Beyond the Code

Muslim Family Law and the Shari`a Judiciary in the Palestinian West Bank

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by

Lynn Welchman

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To my Nain, Jane Winter,
and to Elsie and Geoff Knights

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Preface

This book started as my Ph.D. thesis at the School of Oriental and African Studies at London University, based on research in the records of the West Bank *shari`a* courts of Bethlehem, Hebron and Ramallah, and funded by a grant from the British Academy. It has since undergone substantial updating and has also had the benefit of subsequent research carried out by a Palestinian women's rights organisation, the Women's Centre for Legal Aid and Counselling, in the records of the courts in Nablus, Dura, Gaza City and Rafah.

Many acknowledgments are due to friends, family and colleagues who, over the course of my Ph.D. research and in subsequent years, have helped my work in many different ways. Amongst the *shar`i* judiciary, I am indebted to then Acting *Qadi al-Quda*, the late Shaykh Sa`ad ad-Din el-`Alami, for his permission to work for an extended period in the *shari`a* court records, and to the judges and staff of three courts who were extremely generous in giving time and space while I was researching. In particular, Shaykh Taysir al-Tamimi, at the time judge at Bethlehem and later the Hebron court, and currently Deputy *Qadi al-Quda* in Palestine, and Shaykh Hiyan Hilmi al-Idrisi, then judge at Ramallah court and currently in Jerusalem, were unfailingly welcoming and helpful, contributing greatly to my education in matters *shar`i*, and providing me with texts, documents and on occasion figures which were enormously helpful in my study. Shaykh Taysir Tamimi also made time to meet me to discuss developments in the *shar`i* system after the arrival of the Palestinian Authority. In Jordan, the *Qadi al-Quda*, Shaykh Muhammad Mheilan, also made time to meet with me and similarly provided me with documents as well as giving me the benefit of his insights. I was also helped enormously by a number of lawyers working in the *shar`i* system, and would like in this regard to thank Saadi al-Qishta and Ragheb al-Qasem in Jordan, and Fouzi al-`Amleh and especially Ala al-Bakri and Hanan Rayan in Palestine.

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Thanks also go to the Gaza branch of the Model Parliament: Women and Legislation, in particular Marwa Qasim and Karam Nashwan and other members of the Legal Committee. The WCLAC research which is cited in this study is based on research in court records by lawyers Hiyam Karkur, Rim Jaber, Fatima Mukhallalati and Ghada Shadid, and I would thank them for that work and WCLAC for allowing me to cite the study here and to reproduce the table of their material. Part of the second chapter appeared in an article in Islamic Family Law (eds. Mallat and Connors) in 1990; I am grateful to Dr. Mark Hoyle, General Editor of the Arab and Islamic Law Series, for permission to include this material in this book. Many thanks also go to John Tordai for the photograph on the cover of this book.

Elsewhere, Abdullahi An-Na'im, Emma Playfair, and Sara Hossain have been as encouraging as possible while I was finishing this book; Leila Othman Asser and Randa Alami provided enormous support all the way through, and Randa's technical assistance was invaluable and Urmi Shah's insistence on priorities was unerring and unfailing: for all of which, my particular thanks. Of my other friends, Martin Asser and Anne Fitzgerald edited chapters for me, and Ian Edge, also as my former Ph.D. supervisor, has been an encouraging colleague. Other chapters were read by my family: Elsie and Geoffrey Knights, Sian and Michael Smith. To them, and my nieces Rhiannon, Eluned, Lowri and Bethan, my love and thanks.

A Note on Case Material and Language

The material collected in my work in the *shari`a* courts is not, in this publication, referenced to the particular court records; these records are not 'public', the cases are not published, and it is only fair to make every effort to ensure that identification of the parties is not possible. A full table of the case material is included in the Appendices, and published decisions from the Appeal Courts are of course fully referenced. A glossary of Arabic terms appears at the end of the book; the character "`" is used to denote the Arabic letter *`ayn*.

CHAPTER 1

Introduction: Courts, Codes and Cases

1.1 Legal Context and Contemporary Scholarship

This study provides an examination of the rules governing Muslim personal status law for Palestinians in the West Bank, with comparative reference to Gaza. It focusses on the derivation of these rules, how they are applied by the *shar`i* judiciary, and what criticisms are directed at the law and practice by civil society groupings (particularly the women's movement) as the Palestinians build towards statehood and, sooner or later, the first ever Palestinian law of personal status.

The elections of 1996 afforded that part of the Palestinian people then resident in the West Bank and Gaza Strip their first opportunity to elect a Palestinian legislature. During the course of the century, the West Bank area had been ruled by the Ottoman Turks as part of Palestine, originally within the 'Greater Syria' administrative area; by British military occupation and then the British Mandate authorities, as part of Palestine; by Jordanian military and then civilian rule as part of the Hashemite Kingdom of Jordan; then under Israeli military occupation. The Gaza Strip was administered by Egypt from 1948–1967, and came under Palestinian Authority jurisdiction rather earlier than most of the West Bank in May 1994. The West Bank Palestinian population of over a mil-

lion[1] comprises urban and rural sectors as well as refugees in the camps created to house some of the hundreds of thousands displaced by the creation of Israel in 1948 and their descendants.[2] Since 1994 significant numbers of Diaspora Palestinians have come back as 'returnees'. The population is overwhelmingly young, with some 47% under the age of fifteen, and a sex ratio of 103.2 males to 100 females. It is 92% Sunni Muslim.[3]

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[1]Takkenberg, 1998, 21, gives an 'indication' of 1,250,000 Palestinians in the West Bank (including East Jerusalem) in 1995, and 880,000 in the Gaza Strip. The PCBS survey of 1997 put the West Bank Palestinian population at 1,873,476 with 210,209 resident in annexed parts of East Jerusalem. It put the Palestinian population of the Gaza Strip at 1,022,207. On the numbers of refugees displaced in 1948, see Chapter Two, note 59. By way of comparison, Abu Lughod, 1971, 162, put the June 1967 (pre-war) population of the West Bank including East Jerusalem at 975,000 and the Gaza Strip at 400,000 according to UNRWA estimates. In a later article (1984, 255), she further estimates that in 1967 the population of the West Bank and Gaza Strip represented about 50% of the total Palestinian nation; in 1983 she estimated at 1.3 million the Palestinian population of the West Bank and Gaza Strip, constituting only 29% of all Palestinians.

[2]Takkenberg, 1998, 21, includes in his estimates for the Palestinian population in 1995 cited above in note 1 a total of 517,400 UNRWA-registered refugees in the West Bank and 683,600 in the Gaza Strip. The FAFO survey of 2500 households in the early 1990s found 40% of all the households surveyed (in the West Bank including East Jerusalem, and the Gaza Strip) to be registered as UNRWA refugees, and while Gaza had the majority of camp-dwelling refugees, 60% of UNRWA-registered refugees were by then living outside the camps. Heiberg, 1993 ('Household'), 160. Graham-Brown, 1984, 62, gives a 1982 figure of refugees constituting 40% of the population of the West Bank.

[3]PCBS, 1998, 5. The same source indicates a very low proportion of elderly people, with only 3.4% aged 65 or over. See further Abu Libdeh, Ovensen and Brunberg, 1993. Hammami and Johnson, 1999, 323, give a figure of 80,000 PLO cadre members and their families who have been given the right to residence under the terms of the Oslo Accords. Bisharat, 1989, 11, writing in the 1980s, estimates a Christian minority of about 8%, concentrated in the areas of Ramallah, Bethlehem and Jerusalem; it is widely believed to have decreased since then, although figures are hard to come by. The FAFO survey of the early 1990s found 96% of the Palestinian population in the Gaza Strip and West Bank, including East Jerusalem, to be Muslim. In the Gaza Strip the proportion was 99.8%, 'making Gaza one of the most compact Muslim areas in all of the Middle East' while even in Jerusalem, Bethlehem and Ramallah, where 90% of Christians live, Christians were only 15% of the population in Arab Jerusalem and 11% of the population in Bethlehem and Ramallah. The issue of Christian-Muslim relations has become one of some sensitivity since the arrival of the Palestinian Authority; for an examination and refutation of the charges by Israeli officials in the light of reported incidents and PA policies, see *The Myth of Christian Persecution by the Palestinian Authority*, LAW, 1998.

The Palestinian population world-wide is estimated at some seven million.[4]

Various aspects of the legal history of Palestine and the political struggle of the Palestinian people for self-determination during the course of the twentieth century (and particularly since the 1960s) have been treated in a large number of studies and publications. After the Israeli occupation of the West Bank and Gaza Strip in 1967, the literature focussed not only on the socio-economic situation of Palestinians in the Occupied Palestinian Territories, but also on their status under international law, violations of international humanitarian and human rights law by successive Israeli governments, and the use of law, or quasi-legal instruments, by the occupying authorities. There has also been detailed consideration of the changes made to the legal system by the Israeli authorities, and of the court structures, in particular the military court system.[5] The legal situation changed again after the Declaration of Principles on Interim Self-Government Arrangements signed in 1993 by the head of the Palestine Liberation Organisation (PLO) Yasser Arafat and the Israeli prime minister, the late Yitzhak Rabin. The Declaration of Principles and subsequent negotiations resulted in a series of agreements transferring specified power to the Palestinian Authority set up initially in Gaza and Jericho in 1994. The original timetable envisaged a five-year interim period after which 'final status' negotiations would settle remaining questions on borders, refugees, water, Israeli settlements in the occupied Palestinian territory, and the question of Jerusalem. By the summer of 2000, this timetable was already a year behind schedule. The Oslo framework, with its numerous and rather serious flaws — especially in regard to the protections of international law — and the performance of the Palestinian Authority have since been the subject of a developing body of literature.[6]

This study aims to fill a particular gap in the existing legal literature on Palestine by examining the body of law that governs the personal status of

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[4]Hammami and Johnson, 1999, 319, citing Arzt, D., *Refugees into Citizens: Palestinians and the End of the Arab-Israeli Conflict*, New York: US Council on Foreign Relations, 1996.

[5]See for example work by Shehadeh, Mazzawi, Playfair, and the Palestinian human rights organisation al-Haq cited in the Bibliography.

[6]Notably, on the first subject, Shehadeh 1997, and Cotran and Mallat, 1996; and publications by Palestinian human rights organisations on the second.

Muslim Palestinians in the West Bank, and the courts that apply it. For historical and practical reasons, family law and the *shari`a* law courts were less directly affected by the various regimes controlling the area over the last century than other areas of the law. Issues of marriage, divorce and the relationship between the spouses were not considered matters of the most immediate import when considering an area that for over thirty years was under direct military occupation, (which continues in some areas), and a people that has been historically denied the right of self-determination. Nevertheless, the texts on personal status considered in this study affect nearly all the Muslim majority of the Palestinian population of the West Bank (as well as Palestinians in Jordan) at some point in their lives. The comparative reference to family law in Gaza extends the scope of the study, albeit case material is not included.

On another level, this study contributes to the existing literature on Muslim family law in the Middle East, by providing the opportunity to trace the development of the family law issued by one Arab state (Jordan) from its first codification in 1951 to the promulgation of a revised law in 1976, along with the discussions of new legislative proposals in the 1980s and 1990s. Until recently, there was little in-depth law-focussed study in English of the practical implementation of contemporary family law codes of the Middle East, so the way in which the reforms noted by earlier scholars have worked out in practice were not generally known in any detail to those outside the legal communities in those countries. Aharon Layish's 1975 work *Women and Islamic Law in a Non-Muslim State* was something of an exception, based as it is on extensive study of the records of the *shari`a* courts in Israel in the 1960s. However, the law that was and is the basis of the rules applied in those courts is the Ottoman Law of Family Rights 1917, supplemented in Israel by amendments introduced through 'secular' legislation by a non-Muslim authority and applied to the Muslim Palestinian population of the Israeli state. Elsewhere in the Middle East, codifications of family law implemented by the national legislatures of countries with Muslim majorities have long since replaced the Ottoman law. In this sense, of course, the current study also considers an area that constitutes the exception rather than the rule: the national personal status code of a Muslim Arab state (Jordan) as applied in an area that does not legally form part of that state (the West Bank) nor itself constitute a state, at least during the period studied. In Gaza, by way of comparison, we are dealing with a codification of Islamic family law drawn up by a Muslim Arab state (Egypt)

specifically for use in territory over which it was not sovereign (the Gaza Strip) and which it never applied in its own courts.

More recent times have seen the publication of a number of works in English based on court records or court observation, and examining either the workings of law or the social processes involved in negotiating litigation procedures. Particular mention might be made here of Ziba Mir-Hosseini's legal anthropological work comparing the application of Muslim family law by courts in Morocco and Iran,[7] and of Ron Shaham's consideration of the extent to which Egyptian *qadis* implemented the family law reforms of the 1920s, based on *shari`a* court decisions published by the Bar Association.[8] In Palestine, Annalies Moors' work based on her research in the Nablus *shari`a* court records provides essential context for any discussion of marriage-related property matters (notably dower) considered in the current study,[9] and Judith Tucker's study of family law-related *fatwa*s of a number of Hanafi *mufti*s working in Ottoman Syria and Palestine gives historical perspective to current-day application.[10]

Important background and contextual material regarding the regulation of the family in general and gender relations in particular is to be found in the published results of a number of major social science projects undertaken in the West Bank and Gaza Strip during the 1990s, notably the results and analysis of an extensive social survey published in 1993 with contributions from a range of social scientists from Palestine and elsewhere.[11] There is an extensive literature on the Palestinian women's movement and on the role and status of Palestinian women which has been published in English by Palestinian and non-Palestinian scholars in a variety of disciplines — including work by Rema Hammami, Joost Hiltermann, Eileen Kuttab, Islah Jad, Penny Johnson, and Julie Peteet. Their work helps to set the consideration of family law in a social and political context in particular in the concluding examination of developments towards a Palestinian family law.

That said, the limits of this study are clear: it is based on law and law-focussed research. This includes a detailed examination of texts (the texts of

[7]Mir-Hosseini, 1993.

[8]Shaham, 1997.

[9]Moors, 1994.

[10]Tucker, 1998.

[11]Heiberg and Ovensen, 1993.

the law and associated regulations and directives), and the writings of their interpreters (contemporary commentators, lawyers and judges) and of *shari`a* court records to determine recourse had to courts and positions on implementation and interpretation taken by the judiciary. It does not include case studies of the background to and progress of individual petitions, except in so far as these can be drawn from the court records, nor involve other forms of social science research using instruments such as questionnaires or structured interviews.[12] It is written within the framework of studies in Muslim family law. Where possible it draws on sources from other disciplines in assessing patterns and phenomena documented in the court records, the potential effect of various proposed reforms to the existing law, and the difficulties presented by current legislation particularly in regard to realisation of its protections by women.

In a sense, the limits of this study coincide with the limits of law in the particular area of personal status.[13] Customary rules frequently constitute a stronger controlling force than 'law', particularly over matters involving women and the family. An illustration is the role of the marriage guardian: while in law previously married women aged over eighteen are explicitly entitled to marry on their own authority and have no need to register the consent of a male guardian, the court records show that this is almost entirely ignored in practice, with the courts recording a guardian's consent in cases where there is unequivocally no legal requirement to do so. Palestine may be seen to fit at least one pattern here, in that it can be argued that the impact of 'deep legal pluralism' disproportionately affects the rules that govern the lives of women.[14] Wing's articles evaluating custom, religion, women's legal status and the operation of parallel rule systems in the West Bank during the *intifada* go some way to describing this in a limited context.[15] On another level, writing in the 1980s, Bisharat briefly outlines 'the complex of institutions and customs grouped roughly under the rubric of

[12]Shaham, 1997, 19, describes as 'disappointing to some extent' the limitations of the Egyptian *shari`a* court records in regard to social and background data. Compare Gerber's description of the limitations of the summaries he studied in the Ottoman court records of the seventeenth and eighteenth century: Gerber, 1994, 15.

[13]The immediate reference here is to Allott, 1980.

[14]Stewart, 1997, 28, writing about the public/private divide in the law under colonial regimes in Africa, notes that 'women's activities are regulated through customary law because of their position within the family and clan but also through work in the subsistence and informal economies'.

[15]Wing, 1993 and 1994.

al-qada' al-`asha'iri' ('tribal adjudication') as a number of distinct practices or levels including 'blood judges' and the '*manshad*' who has customary jurisdiction over cases involving 'the chastity of women.'[16] On the whole, however, little systematic study has been made of the interplay of law and custom in contemporary Palestine, although the extensive observations of the anthropologist Granqvist published in the 1930s retain some resonance when examining the data from certain rural communities.[17] Peteet's in-depth considerations of dispute processing and gender relations in the Palestinian refugee camps in Lebanon provide considerable insight into the systems at work in those communities.[18]

Writings on legal pluralism which might shed further light on such facts and processes within society have tended to avoid the Arab world, as noted in a collection of essays produced in an effort to start remedying this gap.[19] Botiveau's contribution to this collection emphasises that 'Palestinian law is described first and foremost in terms of diversity' and indeed that 'pluralism is one of the organizing principles of state law in the Arab world.'[20] Examining the implications of 'internal pluralism' for the emerging Palestinian state (including the territorial division between the West Bank and Gaza Strip) he seeks to explain the dynamics behind the 'quest for legal homogenization' discernible in different sectors of society as well as at the level of the governing authorities, as a process involving shared central values expressed as 'the quest for the formulation of a Palestinian identity.'[21] In this process, as discussed further in the Conclusion, the *shari`a* court system and the implementation of personal laws are asserted as having an historical and national legitimacy at the same time as being premised on the distinctive identity of separate religious communities within the Palestin-

[16]Bisharat, 1989, 39–43.

[17]Granqvist, 1931, 1934 and 1935.

[18]Peteet, 1987 and 1991.

[19]Dupret et al. (eds.), 1999. Bisharat, 1989, 171–177, gives a short evaluation of the workings in society of various formal jurisdictions and informal processes of dispute resolution in the West Bank in the 1980s. Of the formal system (civil courts, Israeli military courts, and *shari`a* courts (along with other religious courts), he notes (at 176) that 'only the Islamic courts have any true moral legitimacy to complement de facto recognition of their power'. In the third chapter of his book, 'The Social and Cultural Context', he seeks to examine the community response to lawyers as reflective of the relationship between society and law.

[20]Botiveau,1999, 77 and 82.

[21]Botiveau, 1999, 84.

ian people. At the same time, the years since Oslo have seen moves towards the re-institutionalisation of customary processes of dispute resolution,[22] but existing studies on particular aspects of this development do not yet reveal to what extent recourse to and indeed litigation in the *shari`a* courts may be affected.[23]

The Palestinians are not a people well served, historically, by 'state' law. Beginning with the British Mandate authorities in 1917, those in control of designing, passing and implementing legislation have had at the very best an ambiguous attitude towards the rights and interests of the Palestinian population; at the worst they have pursued, through law, a predatory and annexationist agenda aimed explicitly or implicitly at their dispossession and exile. In addition, over the decades of Israeli military occupation of the West Bank (including East Jerusalem) and the Gaza Strip, the regular court system was stripped of much of its jurisdiction (which was transferred to the Israeli military courts) and systematically under-resourced and underdeveloped.[24] During the *intifada* — the Palestinian uprising in the West Bank and Gaza Strip that erupted in December 1987 — the popular boycott of goods and services from or administered by the Israeli occupation authorities was accompanied by a wider popular transfer of authority over social regulation and dispute settlement to 'neighbourhood committees' and politically-constituted conciliation committees whose processes had strong resonance with customary law.[25] In other aspects, certain individuals and groups took on roles as judge, jury and executioner of persons accused of collaboration with the occupation authorities.[26] The severe undermining domestically of the 'law' as expression of the state, as process and as protec-

[22]Frisch, 1997, 349, notes that Arafat established the Office of the President for Tribal Affairs in 1995.

[23]See for example Frisch, 1997, and Zilbermann, 1996. Brand, 1998, 95, notes the critical role of kinship groups to power relations and political alliances in Jordan.

[24]Bisharat, 1989, notes that the strike by lawyers announced at the start of the occupation was maintained by many in the profession throughout the occupation and contributed in some degree to the weakening and fragmenting of the legal profession in the long run. See Chapter 9, 'Disintegration of the Profession', 145–161. The motives for the strike and the effect of its continuation are also discussed in Shehadeh, 1980, 45–50.

[25]Wing, 1993 ('Legal Decision-Making'), 123–127.

[26]See B'Tselem (the Israeli Information Centre for Human Rights in the Occupied Territories), *Collaborators in the Occupied Territories: Human Rights Abuses and Violations*, Jerusalem: B'Tselem, 1994, 103–180.

tion could not but be reinforced by the sustained failure of the international community to ensure that the protections of international law were afforded to the Palestinian population.[27] In the national framework, since the establishment of the Palestinian Authority in 1994, its head, Yasser Arafat, has frustrated attempts by the Palestinian Legislative Council (elected in January 1996 under the framework of the PLO-Israel 'Interim Agreement')[28] to have the draft Basic Law (a sort of interim constitution) ratified and implemented by the executive authority in the areas under its control. The executive as a whole has been criticised for failing to implement legislation.[29]

Nevertheless, the substantive content of state-generated law has been a major focus of advocacy activities by all sectors of civil society in Palestine during the transitional (or 'interim') period preceding statehood. This applies to the non-governmental movement in general as well as the women's movement in particular and, where personal status law is the subject, the hierarchy of the *shar`i* establishment as well as members of political parties that may be generally termed 'Islamist'. The directions these debates have taken are examined more closely in the final chapter of this study.

The study begins with an outline of the history of *shari`a* courts in the West Bank, particularly their operation under direct Israeli occupation and in the period since the establishment of the Palestinian Authority. It then considers the text of the laws applied by the West Bank *shari`a* courts to the conclusion and regulation of the marriage contract; claims arising within marriage; divorce; and claims arising after the end of marriage. Each chapter includes an examination of the derivation of the relevant rules and a consideration of the application of this law by the courts in the light of material from the *shari`a* court records examined for the purpose of this study, with further consideration of Appeal Court rulings where appropriate. The concluding chapter seeks to assess the prospects for a future Palestinian

[27]See al-Haq reports in the Bibliography.

[28]Also known as Oslo II. See Chapter Two note 144 for the titles and dates of PLO-Israel agreements in the 'Oslo' process.

[29] For example, the Palestinian Independent Commission for Citizens' Rights has severely criticised the executive for impeding the activities of the Legislative Council, including 'failing to implement legislation or fully acceding to the PLC's recommendations in connection with PLC oversight of the Executive Board'. *Third Annual Report of the PICCR*, for the year 1997, 55.

family law in light of developments in the debate on family law during the course of the transitional period since 1994.

1.2 SOURCES OF LAW IN THE WEST BANK *SHARI`A* COURTS

Along with most Arab states of the Middle East, the Jordanian legislature has largely replaced the use of the texts of the classical jurists with state-legislated codifications of law covering most matters of personal status. The text and application of the Jordanian Law of Personal Status (JLPS) 1976 is considered in this study by comparison with its predecessor, the Jordanian Law of Family Rights 1951 (JLFR).[30] The study and comparison of texts in this work is done in the framework of a recognition of the significance of the relationship of state with law, and of the state as a critical actor in this regard, a significance clearly vested in the matter of text and law-making by civil society actors in today's Palestine. The development of the law-making process in Palestine and the likely significance of a prospective text are discussed further in the Conclusion.

For students of Islamic law the matter of 'text' also retains an independent significance, demonstrating the movements of a legislature largely within the *fiqh* (Islamic jurisprudential) tradition in response to a changing socio-economic context. Where relevant, therefore, this study also considers commentaries on the legal texts, including those contained in the Explanatory Memoranda to the laws, and the text-book commentaries produced by scholars seeking to trace the origins of specific provisions of the Jordanian law in the positions of the classical schools of law. The opinions of the two contemporary commentators on the JLPS (Mahmud Sirtawi and Muhammad Samara) are clearly indicative of ongoing debates in *shar`i* circles, and while they do not work from case material, their interpretations of how the law should be applied are enlightening.

Reference is also made to the Ottoman Law of Family Rights of 1917 — the first state-promulgated codification of Muslim family law — and by way of comparison to the Egyptian-issued Law of Family Rights applied in

[30]For a summary consideration of the changes introduced by the JLPS, see Welchman, 1988.

the *shari`a* courts in the Gaza Strip. There is also a consideration of certain articles of proposed revisions to the JLPS produced by various (and successive) drafting committees in the latter half of the 1980s in the process of the Jordanian Parliament's review of temporary legislation issued in its absence over the period 1974–1984, including the JLPS.[31] In particular, reference is made in this study to the revisions proposed in 1985 and 1987, showing reflection on the operation of the JLPS over the previous ten years or so. In addition, a full draft of a proposed text was drawn up in 1996 by the Jordanian National Committee for Women which gives an interesting perspective on the aspirations of the 'establishment' women's movement in Jordan with regard to personal status law.[32] In the West Bank, the Conclusion considers in more detail the efforts of various actors apparently engaged in drafting a Palestinian personal status law, but during the study particular reference is made to the proposals generated through two non-governmental rights-based processes: the 1994 al-Haq conference on Women,

[31]In 1974, the Rabat Conference of Arab heads of state declared the Palestine Liberation Organization (PLO) to be the sole legitimate representative of the Palestinian people. The Jordanian Parliament, finding it impossible to alter the 1952 Constitution to exclude representation of the Palestinian population of the West Bank (which Jordan had annexed in 1951) accordingly suspended itself. Article 94 of the Jordanian Constitution (as amended 1958) provides for temporary legislation to be issued in the absence of the National Assembly; that is, when it is not sitting or dissolved, should the Council of Ministers be dealing with 'necessary measures which admit of no delay or which necessitate expenditure incapable of postponement'. A large amount of such temporary legislation was issued 1974–1984, much of it on matters criticised in opposition circles as not of such urgency as to merit emergency temporary legislation. Such legislation must be placed before the National Assembly for approval or amendments when Parliament next convenes. In 1984, faced with a constitutional crisis internally, due to the death of several Members of the Assembly and the possibility of Parliament becoming inquorate, and following certain political developments externally, King Hussein reconvened the National Assembly, which duly began the process of reviewing the temporary legislation. It is within the context of this review that the various draft amendments to the JLPS were considered in different committees of the Parliament in the second half of the 1980s and 1990s. Brand, 1998, 149–150, traces a number of these drafting efforts, reporting on the reasons for the secrecy in which the debates appear to be conducted.

[32]I am indebted to advocate Reem Abu Hassan for the text, together with a memorandum from the Jordanian National Committee for Women (JNCW). On the JNCW, see Brand, 1998, 158–164.

Justice and the Law, and the 1998 Palestinian Model Parliament: Women and Legislation. Finally in terms of texts, there is interesting comparative material in the work of a committee of jurists charged by the Council of Arab Justice Ministers with drawing up a Draft Unified Arab Code of Personal Status, and from a different perspective the One Hundred Measures text of egalitarian personal status provisions drafted by the Maghreb-Egalité collective in the early 1990s.[33]

The JLPS builds on the JLFR in adopting some Egyptian-inspired innovations which had not been previously taken up by the Jordanian legislature. Notable examples of these are significant modifications to the law of succession which introduce the 'obligatory bequest' (*al-wasiyya al-wajiba*) for orphaned grandchildren previously excluded from succession by the death of their parent;[34] the right of the spouse to share in the return (*radd*) of the remainder of the estate where no other heirs remain;[35] and a solution to the ancient problem of the possible exclusion of full brothers (or full brothers and sisters), who inherit as agnates the remainder of the estate, by

[33]Respectively Jum`a et al, 1987; and Majmu`at 95, n.d.. The latter project began in 1991 and involved researchers and women's groups from Algeria, Morocco and Tunisia.

[34]Article 182 of the JLPS combines the Egyptian and Syrian versions of this provision. The Egyptians entitled orphaned grandchildren to take from the estate the amount their dead parent would have inherited had he/she been alive, provided this did not exceed one third of the estate; this was first introduced by the Egyptian Law of Testamentary Bequests — see Coulson, 1971, 143–150, and Anderson, 1952 ('Intestate Succession'), 133. The Syrians restricted *al-wasiya al-wajiba* to grandchildren through a dead son, and allowed them to inherit only their own share of what would have been their dead father's portion; see Anderson, 1955, 46. The JLPS combines elements of these two provisions to allow grandchildren through the dead son only to take the full amount of their father's share. In the 1987 draft version of the amended JLPS, a provision is included which would make the JLPS identical to the Egyptian one in also entitling grandchildren through a predeceased daughter to receive the obligatory bequest. In Gaza, the terms of the Egyptian law were applied by order in 1962: Law no.13 1962 of 2 December 1962.

[35]Article 181 of the JLPS. Classical law in the Hanafi and Hanbali schools allowed Quranic heirs to share the residue of the estate after the fixed shares were distributed, should there be no agnate or uterine heir to take the residue; the only exception was the spouse relict, who was not included in the *radd* ('return'). In the Law of Testamentary Bequests 1946 the Egyptians allowed the spouse relict to share in the *radd* where there are 'no *`asaba* by blood, no quota-sharer who is a blood relative, and no uterine heir' and the Syrians followed in 1953. See Coulson, 1971, 139–140 and Anderson, 1952 ('Intestate Succession'), 133, and 1955, 48.

their uterine collaterals who are allotted fixed shares which exhaust the estate so that there is no remainder.[36]

Syrian approaches to *mukhala`a* (divorce with renunciation), the maximum *`idda* ('waiting') period after divorce and the related issue of filiation/legitimate paternity (*nasab*) are also adopted in the JLPS, and the innovative Syrian introduction of compensation (*ta`wid*) for injurious unilateral divorce *talaq* by the husband is modified into a wider Jordanian text. While thus owing a substantial amount to the 1953 Syrian code, and through it to the Egyptian legislation of the 1940s, the JLPS introduced rules on custody that appear to be of indigenous inspiration, as well as maintaining those locally-inspired rules that first appeared in the JLFR.

The diverse sources from which the JLPS is drawn means that, like its predecessors and parallels, it includes provisions from all four major Sunni schools as well as a certain amount of material from less obvious sources, as noted by the Jordanian *Qadi al-Quda* (Chief Islamic Justice).[37] However, although the JLPS is considerably more comprehensive than the JLFR, Article 183 maintains the same text as the JLFR and the Ottoman law before it, requiring recourse to the majority opinion of the Hanafi school in any matter not explicitly covered by the code.[38] When it is necessary to consult majority Hanafi opinion, the text used in the West Bank and also the Gaza Strip is the 647–article compilation of selected Hanafi rules on personal status matters drawn up last century by the Egyptian Minister of Justice Muhammad Qadri Pasha.[39] An examination of the records of rulings (*sijillat al-*

[36]Article 180 JLPS. This type of case (germane and uterine relatives in competition) was an early problem discussed by the jurists and was resolved by the Shafi`i and Maliki schools by allowing the germane relatives to share the Qur'anic portion of their uterine relatives. The *mushtaraka* (shared) solution was introduced in Egypt in 1943 and in Syria in 1953. The Jordanian text parallels these predecessors. See Coulson, 1971, 73–77 and Anderson, 1952 ('Intestate Succession'), 134 and 1955, 48.

[37]Mheilan, 1986, 76. He refers to the Zhahiri school and the opinions of Ibn Hazm as having been drawn on for the provisions of the JLPS.

[38]Article 22 of the Law Establishing the *Shari`a* Courts 1972 turns this text around as follows: '[t]his jurisdiction shall be [exercised] in accordance with the predominant opinion of the school of Abu Hanifa, with the exception of that which is provided for in the special laws.'

[39]Qadri Pasha's compilation, *kitab al-ahkam al-ahwal al-shakhsiyya `ala madhhab al-imam abi hanifa*, was first published by the Egyptian government in 1875 although never formally implemented as 'law'. See Shaham, 1997, 14. It is reproduced in Dahduh

ahkam) in the *shari`a* courts of the West Bank reveals that reference is had to *Kitab al-Ahkam* most frequently in the areas of the breastfeeding of children, custody, the accommodation and clothing of the wife, occasional clarification on *mukhala`a*, and the marriage guardian.

Another text frequently referred to in the rulings of the West Bank *qadis*[40] is the 'Book of Maintenance', *Kitab an-Nafaqat*, a 1937 Arabic translation of an original Turkish text setting out detailed Hanafi rules on maintenance.[41] This text is referred to frequently in maintenance and *ta`a* rulings. The specific provisions referred to mostly concern the cutting of maintenance awards; the time when maintenance becomes due to a wife and the circumstances when her right lapses; reassessment of maintenance levels; what exactly is required to be covered by maintenance; the fee that in some circumstances a woman can claim for breastfeeding babies and taking custody of minors; maintenance for minors; and the requisite characteristics and contents of the marital home in which a husband may legitimately call his wife to obedience (*ta`a*).

In the matters examined in this study, these three texts — the codified law (the JLFR and subsequently the JLPS) the *Kitab al-Ahkam*, and the Book of Maintenance — were the sources of substantive law.[42] In addition, occasional references were made in cases of interdiction to the Majalla, the compilation of Hanafi rules on civil law matters promulgated by the Ottomans at the end of the nineteenth century.[43] *Qadis* might also refer to *Shari`a* Appeal Court decisions to support a ruling owing more to local

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et al, 1997, 2–107. By contrast to the situation in the West Bank, Shaham 1997, 230, found 'hardly any evidence' of Egyptian *qadis* using the compilation in the published material he considered for his study.

[40]Article 103 of the Jordanian Law of *Shar`i* Procedure requires the *qadi* to include in the written judgement (*hukm*) the texts on which his ruling is based.

[41]The book is out of print, and when I was doing my research in the West Bank, each court had only one photocopy. I am grateful to lawyers Ala al-Din Bakri and Hanan Rayan Bakri for providing me with a copy.

[42]In cases dealing with orphans and proof of majority, the references were to the Orphans Law of 1953 and various additional Regulations.

[43]See Chapter 2.2. The Majalla is translated into English and introduced in its legal and historical context in the two-volume work by Hooper, 1933 and 1936. All citations of articles from the Majalla in this study are taken from Hooper's translation, except that the word 'defendant' in his translation has been replaced here with 'respondent' and 'plaintiff' with 'claimant'.

practice and interpretation than to classical positions. The Egyptian principles contained in al-Jundi's *Fifty Years' Principles of Shar`i Justice* were also occasionally referred to, as were the opinions of the eighteenth/nineteenth century *mufti* Ibn Abidin.[44]

1.3 COURTS AND CASE MATERIAL

At the end of the 1990s there were thirteen first instance *shari`a* courts in the West Bank, including the East Jerusalem court.[45] Each court session is presided over by a single *qadi* (judge); the larger courts have more than one *qadi* attached.[46] Each court keeps its own records (*sijillat*), which in the case of the older courts demonstrate the extent to which *shari`a* jurisdiction has been restricted since the earlier Ottoman times. Records dating from the sixteenth, seventeenth and eighteenth centuries are described by Doumani, who conducted extensive research into the Nablus *shari`a* court records, as showing the *shari`a* court to be a 'primary instrument of social control', forming the major link between the Ottoman rulers and the local population.[47] Information is to be found on weights and measures and the supervision of foodstuffs and transport costs; on coins; on *jizya* (poll tax) payments for non-Muslims, on building ventures and the adjudication of criminal and civil cases. Mandaville notes that most entries are in Arabic, although a few types of entry (such as financial reports) may be in Turkish.[48]

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[44]The reference is to Ibn Abdin's *radd al-muhtar `ala al-durr al-mukhtar*, recently republished in eight volumes by Dar al-Fikr in Beirut, 1995. By comparison, Shaham reports that this text was the most frequently cited source in the case material examined for his study: 1997, 230 note 10.

[45]But excluding the *Shari`a* Court of Appeal. The courts are in: East Jerusalem, Hebron, Dura, Bethlehem, Ramallah, Bir Zeit, Nablus, Toubas, Qalqilyia, Tulkarim, Jenin, Jericho, and Salfit. In March 2000, another first instance court was established at Yatta in the Hebron District. Bakri, 2000, 18.

[46]In 1987 there were seventeen *qadis* in the West Bank *shari`a* courts, including those in the Jerusalem Court of Appeal; at the same time in Jordan there were 45 first instance *shari`a* courts with 63 *qadis*, as reported by the Jordanian newspaper *ar-Ra'y*, 20 January 1988. For increase in the *shari`a* court personnel under the first PA *Qadi al-Quda*, see Chapter Two.

[47]Doumani, 1985, 156.

[48]Mandaville, 1966, 313. At 313–314, he details the types of information contained in these records.

Of all the West Bank *shari`a* courts, Jerusalem has the richest collection of *sijillat*, stretching back to the first half of the sixteenth century with only one small gap.[49] The records of Nablus court are second to Jerusalem in age and continuity, going back to 1656, but with substantial gaps. Doumani notes the diversity of subject and indeed of litigants shown in the records as continuing until the last quarter of the nineteenth century, when the restriction of jurisdiction of the *shari`a* courts began, leading to a specialisation of the courts' functions and coinciding with the use of separate records, rather than one general log-book.[50] The more recent records of the West Bank courts show an increasing specialisation and formalisation, due to tighter specification of jurisdiction and to the increasing centralisation of power and ease of communication and document reproduction. Over the period covered by this study — that is, the twenty years 1965–1985 — increasing standardisation can be noticed in the later *sijillat*. One cause of this has been the introduction of standardised forms for all the various deeds (*hujaj*) that can be registered at court. According to Muhammad Mheilan, then *Qadi al-Quda* in Amman, these forms were introduced in 1979 to aid efficiency in the courts.[51] The increasing recourse had by all strata of West Bank Muslim society to lawyers in dealings with the *shari`a*

[49]The Jerusalem records have a gap of 28 months, from April 1574 to August 1576: Doumani, 1985, 161. Researchers have long been aware of the potential of these collections and a project was begun in the 1980s to index the contents of the Jerusalem records: Doumani, 159. The Jerusalem court is by far the best equipped of the *shari`a* courts in the West Bank. At the time the research for this study was carried out, the Bethlehem, Ramallah and Hebron courts had no photocopying facilities; all entries in all the records were kept in longhand and copies of individual judgements were made either longhand or typed on carbons on a manual typewriter. Records of proceeding were taken down in longhand by a court clerk sitting next to the *qadi* during the session. Word processors are currently being introduced: Bakri, 2000, 18.

[50]Doumani, 1985, 159.

[51]Mheilan, 1986, p.95. Mheilan reproduces these standard forms in the second half of his book. As an example of increasing centralisation and standardisation of procedure, Mheilan describes a 1978 circular (*ta`mim*) from the *Qadi al-Quda* in Amman informing the courts of a simplification in the procedures for the identification of persons before the *qadi* — henceforth, either the personal acquaintance of the *qadi* or official state documentation was to be sufficient, obviating the need for identification by for example village elders. In the West Bank, it was many years before the *shari`a* courts would accept identity cards issued by the Israeli military authorities in the West Bank as proof of identity.

courts may also have contributed to a certain amount of standardisation in presentation and progress of claims. The content of the entry in the *sijill* is ultimately a matter for the *qadi*; however, in general, there is a noticeable increase in the length of the entries in the later records — those of 1985, for example, compared to those of 1965. The extra length is usually accounted for by a more detailed and formalised phrasing of the substance of the claim, and of the *qadi's* ruling. Selections of the standardised documents used in the West Bank *shari`a* courts under Jordanian rule, along with information on the *shar`i* judiciary during that time, are contained in the book produced by Shaykh Muhammad Mheilan. The Palestinian *Qadi al-Quda*, Shaykh Muhammad Abu Sardane, has produced a similar compilation detailing the situation of the *shar`i* judiciary and courts under Palestinian Authority rule.

The jurisdiction of the *shari`a* courts in the West Bank is regulated in accordance with the 1952 Jordanian Constitution by the Law of the Principles of *Shar`i* Procedure 1959. Article 105 of the Jordanian Constitution grants the *shari`a* courts exclusive jurisdiction in matters of personal status concerning Muslims, Islamic *waqfs* (pious endowments), and *diya* ('blood wit') where either both parties are Muslims or where a non-Muslim party agrees to *shar`i* jurisdiction. In the *Shar`i* Procedure Law, this general statement was expounded into a detailed description of matters coming under the exclusive jurisdiction of the *shari`a* courts. In particular, the following 'personal status matters' are listed:

> Article 2(8): marriage; divorce; dower, trousseau (*jihaz*), and all payment by way of dower; maintenance; filiation/legitimate paternity; custody;
> Article 2(9): all that occurs between the spouses, the origin of which is the contract of marriage;
> Article 2(16); everything related to personal status between Muslims;
> Article 2(17): every contract of marriage registered with the *shari`a* courts or by a *ma'dhun* (marriage registrar) and all matters arising from any such contract.

Article 2 also includes matters relating to the guardian (*wali*),[52] the property of orphans and the establishment of legal majority, interdictions due to

[52]As well as the *wasi* (trustee) and the *qayyim* (custodian/curator).

legal incompetence, wills and rights in succession, death-bed gifts and missing persons.[53]

Within this jurisdiction, the vast majority of tasks dealt with by the *shari`a* courts are of the type requiring the final act to be registered as a deed (*hujja*) in the relevant record, rather than claims (*da`awa*) which are the subject of litigation and are recorded in the 'record of rulings' (*sijill al-ahkam*).[54] This applies, for example, to the majority of the work on succession; the *shari`a* court does not in general deal with the specific details of estates and inheritances, but simply draws up a list of the heirs together with the respective portions of the estate, and forwards it to the Land Registry Offices.[55] Only when there is a need to correct a previous determination of rights to succession will a claim be raised, for example by an heir missed out from the list submitted to the court.[56]

For the purposes of this study, the *sijillat* for the years 1965, 1975 and 1985 were examined in the *shari`a* courts of Bethlehem, Ramallah and Hebron. In 1965, the *shari`a* courts in the West Bank were applying the JLFR 1951 and were under the direct administration of the Jordanian authorities. In 1975, the West Bank courts were applying the JLFR but in practical isolation from Jordan, the Israeli occupation of 1967 having severed the direct links between the east and west banks of the River Jordan. In 1985, under Israeli occupation, the West Bank courts were applying the JLPS 1976. Of the three courts, that of Hebron is the oldest, with *sijillat* dating from 1867 when it was first separated from the jurisdiction of Jerusalem. The records in Ramallah and Bethlehem courts date from their establishment in 1949 and the mid-1950s respectively.[57]

The choice of the courts of Hebron, Ramallah and Bethlehem was made both because of the lack of prior attention to them by contemporary

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[53]As well as *waqf*, *diya*, and other matters not related to personal status.

[54]Mheilan, 1986, 54–55, reproduces the 1985 annual report on the *shari`a* courts that he as *Qadi al-Quda* forwarded to the Prime Minister in Amman. The report gives the total number of claims resolved by litigation in 1985 in both the West Bank and Jordan as 20,915; the total number of deeds and documents registered was 185,401. The table for the West Bank is in places incomplete.

[55]Succession orders are executed by the Land Registry Offices, not the Execution Offices. Meron, 1982, 363.

[56]By way of example, in one case in the 1985 material, one of the deceased's two wives raised a claim against the other in order to secure the inclusion in the list of heirs of her own minor daughter by the deceased.

[57]Doumani, 1985, 161.

scholars publishing in English, who have concentrated on Nablus and Jerusalem; and on the assumption that they would reflect many of the diverse sectors of population and the various influences at work in the Muslim communities of the southern West Bank at the time. Bethlehem is the second smallest of the courts existing in 1985, the last year of the survey, a year before the creation of three new, relatively small courts in sub-districts of the West Bank. The court had one *qadi* and its catchment area included three refugee camps and the Ta`amira Bedouin settlement that has been the subject of papers by Aharon Layish,[58] as well as the rural area surrounding the town. Bethlehem town traditionally had a sizeable concentration of Christian inhabitants, as was also the case with Ramallah.[59] Ramallah is a medium-sized court, and usually had two *qadis* attached, serving also Ramallah's twin town of al-Bireh. The court has jurisdiction over a number of refugee camps and villages and a large urban population with a high rate of emigration. The court of Hebron, in the south of the West Bank, has a large catchment area and had two *qadis* attached; Hebron District is the largest in the West Bank.[60] Hebron (both town and rural districts) has a reputation for 'traditionalism', with strong clan ties and an active system of 'tribal law' (*al- qada' al-`asha`iri*). It also traditionally provides many of the staffers of the *shar`i* judiciary. Bedouin settlements, notably in the villages of Zhahiriyya and Bani Na`im, and the relative proximity of the area to the Bir as-Sab`a (Beersheva) area inside Israel and dealings with Bedouin tribes there, are also factors reflected in the *sijillat.*[61] All three courts at that time had a Palestinian university within their catchment area.[62] In each court, material was drawn from the following types of records:

sijillat al-ahkam — the records of the *qadi*'s rulings on claims (that is, involving litigation);

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[58]Layish, 1979 and 1980–82.

[59]Graham-Brown, 1984, 242. See above, note 4: in the early 1990s the FAFO survey found 11% of the population in Bethlehem and Ramallah to be Christian.

[60]Masudi, 1987, p.225, gives 1985 population figures for Hebron District as 195,000; Ramallah District as 126,000 and Bethlehem District as 84,000.

[61]Another factor that distinguishes Hebron from other towns in the West Bank is that it has sizeable Israeli settlements in the middle of the town; this is not however a factor reflected in the records of the *shari`a* courts. Also see Frisch, 1997, 344–346, on the impact of 'Hebronite customary law'.

[62]Since 1986, Bir Zeit University in the village of Bir Zeit in Ramallah district has come under the jurisdiction of the Bir Zeit *shari`a* court established that year.

sijillat at-talaq — these registers comprise deeds (*hujaj*) of *talaq* (unilateral divorce) pronounced by the husband either unilaterally or in exchange for the wife waiving certain or all of her financial claims on him, as part of a *mukhala`a* agreement (that is, divorce by mutual consent or divorce for renunciation);

Marriage contracts — these are bound separately in books of 150/200 contracts in chronological order and according to the *ma'dhun* (marriage registrar) who recorded them.[63]

In addition, occasional recourse was had to the *sijillat al-mutanawwa`a* — registers of miscellaneous deeds which consist largely of procedural and administrative petitions and authorisations, including for example the registration of conversions to Islam, increase in dower, *waqf*, confirmation of marriage,[64] wills, revocation of *talaq*[65] and correction of previous deeds.

This study is based in the first instance on the 8535 marriage contracts, 992 deeds of *talaq/mukhala`a* and 1679 rulings by the judges registered in the three courts in the years selected, which I studied over the course of years 1986–87 at the court premises, and which formed the basis of my Ph.D. thesis. It should be noted that the material does not represent all claims presented to the courts in each year, but only those that were resolved — that is, claims that reached the stage of a ruling from the judge at the end of litigation. In addition, it is possible that a few marriage contracts registered in 1985 remained with individual marriage registrars in the books of contracts they were continuing to use through 1986 and 1987. The table in Annex I shows the breakdown of material by year and court. For the purposes of Chapters Three and Four, a detailed record of a random sample of just over 10% of the contracts in each court was made, totalling 857

[63]This has been the case since British Mandate times. Doumani, 1985, 159.

[64]*Tasaduq al-zawaj*. This is a deed registered by the two spouses who have lost their papers or who failed from the beginning to register their marriage in court. It is not the same as the claim of proof of marriage (*ithbat zawaj*) where one party is absent (or perhaps dead) or denies the claim. The *sijillat mutanawwa'a* in Bethlehem, for example, contain many examples of elderly couples applying for documentation confirming their marriage, having lost their papers during their flight from other parts of Palestine during the 1940s, and being either unable or unwilling to go in person to the *shari`a* court now inside Israel. The same problem may arise if, for whatever reason, the marriage notary (*ma'dhun*) neglects to render to the court the third copy of the contract.

[65]Previously, revocation of *talaq* was registered in the *sijillat at-talaq*.

contracts. The deeds of *talaq* and *mukhala`a* form the basis of Chapter Six. For Chapters Five, Seven and Eight, the litigation rulings form the basis for the consideration of the application of the text of the law. The table in Annex II shows, in a rough breakdown, the subject matter of the litigation dealt with in the courts of Bethlehem, Ramallah and Hebron in the relevant years.[66]

A second source of primary material from the court records comes from a research project carried out under the auspices of the Women's Centre for Legal Aid and Counselling (WCLAC), a Palestinian women's organisation based in Jerusalem, for which I acted as research director and principal writer for the project. Lawyers working with WCLAC conducted research in the records of six *shari`a* courts: Hebron and Dura, Ramallah and Nablus in the West Bank, and Gaza City and Rafah in the Gaza Strip.[67] The years chosen for study were 1989, 1992, 1993 and 1994, to reflect any differences between the material during the *intifada* and after the arrival of the Palestinian Authority in Gaza (and Jericho) in 1994. The table in Annex III sets out the content of this material, which included a review of 2189 court rulings following litigation on cases related to maintenance, obedience, judicial divorce, compensation for arbitrary divorce, dower, and custody and related claims (such as the fee for custody); it also included a review of 4418 deeds of *talaq* registered in the court records in those years. In addition, a total of 954 contracts of marriage were used as an randomly-selected sample for the research on age of marriage from the courts of Ramallah, Gaza and Rafah. The review of the court material did not exactly parallel the design of the earlier research, and did not include individual case details: hence the two sets of data are mostly kept separate in this study.[68] This later material is used to supplement the original research by

[66]The subject breakdown is only rough because some of the claims, especially in 1965, involve compound claims, in the majority of cases combining maintenance and some other element. In such cases, the non-maintenance element of the compound element is shown, while those claims shown as 'maintenance' represent claims that were solely for maintenance award; see Chapter Five. In 1985, the court actions shown in the table constituted nearly 40% of all actions ruled on in the West Bank *shari`a* courts; Mheilan, 1986, 55, gives the total court actions resolved in the West Bank in 1985 as 1632.

[67]The court records research was carried out by Hiyam Qa'akur, Reem Jaber, Ghada Shahid, and Fatima Mukhallalati.

[68]A study detailing and analysing the results of the WCLAC research has been pub-

providing a comparative indication of the application of the Egyptian-issued Law of Family Rights and recourse had to the courts in the Gaza Strip; similarly to provide a comparative indication of application of the JLPS in Nablus, a large court with a wide catchment area in the biggest town in the northern West Bank; and to provide a general update on any developments that can be discerned from the 1990s material.

Additional material on the interpretation and application of personal status law is to be found in a number of published collections of selected principles and decisions from the *Shari`a Court* of Appeal in Amman. All three such works cited in this study (by `Amr, al-`Arabi, and Dawud) are invaluable for the researcher as well as for the practitioner.[69] Dawud's collection reproduces the selected decisions in the most detail, providing the opportunity for an examination of the *ijtihad* (interpretation) of the Appeal Court on substantive matters of personal status. Finally, two Palestinian scholars have published short studies based on West Bank court records. `Ayyush published his findings and analysis of marriage and divorce in the West Bank *shari`a* courts over the years 1978–1983 in the bulletin of Bethlehem University, and Shalabi's studies of marriage and divorce at the Ramallah court over the years 1985–1989 were published by Bir Zeit University.[70] These studies are used to compare and extend the findings of the current work.

1.4 PROCESS AND PROCEDURE IN THE *SHARI`A* COURTS

On procedural matters, the primary reference in the West Bank courts is the Law of *Shar`i* Procedure of 1959, as amended in 1980,[71] but there is also frequent reference to various procedural parts of the Majalla,[72] indicating the

lished in the West Bank: Welchman, 1999. Preliminary papers were prepared by Ghada Shadid, Hiyam Qa'akur and Reem Jaber.

[69]Al-`Arabi, 1973 and 1984; `Amr, 1990; Dawud, 1999.

[70]`Ayyush, 1985; Shalabi, 1992.

[71]The 1980 amendments (Laws 10/1980, *Official Gazette* 2928, 3 May 1980; and 30/1980, *Official Gazette* 2972, 1 December 1980) introduced changes to notification procedures and to the rules on urgent execution; the 1990 law (Law 9/1990, *Official Gazette* 3704, 1 August 1990) added rulings on *diya* to the list of first instance decisions subject to automatic review (failing an appeal by a litigant) by the *Shari`a* Appeal Court.

[72]Particularly Book 16 entitled the Administration of Justice by the court; but in-

less than comprehensive nature of the Jordanian procedural law. The 1959 law is still based on the Ottoman Law of Procedure for *Shari`a* Courts of 1917, although it is considerably more comprehensive.[73] It substantially extends the classical rules on procedure and evidence, establishing court structures allowing for appeal and for a plurality of judges in higher levels, and procedural rules regulating such matters as costs, decisions *in absentia* and written evidence. However, the basic evidential rule remains that given as a General Principle in Article 76 of the Majalla: 'Evidence is for the one who affirms; the oath for the one who denies'.[74] In the system summarised by this principle, the person 'affirming' is the claimant (*mudda`i*) while the person denying is the person 'claimed against' or the respondent (*mudda`i `alayhi*). In *shar`i* procedure, the claimant is the person whose statement runs counter to the presumption (operating in favour of the norm, *al-'asl*), and the respondent is the person whose assertion is supported by this presumption.[75] Thus Article 77 of the General Principles of the Majalla states:

> The object of evidence is to prove what is contrary to appearance; the object of the oath is to ensure the continuance of the original state.

Since conflicting claims are often raised in one case, the claimant/respondent roles may change accordingly in so far as the burden of proof is concerned. In a maintenance claim, for example, the wife will begin by claiming something against the normal state of affairs, that is, that despite his legal obligation, her husband is not paying her maintenance. If the hus-

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cluding also the Books on Actions (Book 14), Evidence (15), Admissions (13) and Agency (11).

[73]The Jordanian Law of *Shar`i* Procedure 1959 contains 160 articles in 23 chapters, as compared to the Ottoman law of 65 articles in six chapters. The Jordanian law includes, *inter alia*, chapters on jurisdiction and competence notification, litigation, evidence (with a special section on written evidence), third persons, guarantee of court costs and expenses, emergency execution, decisions *in absentia* and objections to such decisions, appeal, retrial and the precautionary attachment of goods.

[74]Hooper, 1936, 10–11, traces this principle to a *hadith* attributed to the Prophet. The same formulation appears in the letter traditionally attributed to the second caliph, `Umr Ibn al-Khattab, as addressed to Abu Musa al-Ashari and dealing with the basics of procedure. The letter is partially reproduced in Doi, A.R., *Shari`ah: The Islamic Law*, London: Ta Ha Publishers, 1994, 14–15.

[75]See Anderson, 1949.

band denies this, she will have to prove her claim. However, if the husband admits to not paying maintenance but states that he has a *shar`i* reason for not doing so, then he carries the burden of proof in proving this defence because he is now claiming that, contrary to the legal norm, his wife is not entitled to maintenance (i.e. that she is *nashiz*, disobedient).[76]

Although in litigation the descriptions of 'claimant' and 'respondent' will not alter formally during the progress of the claim, still the assignment at each stage of the roles of *mudda`i* and *mudda`i `alayhi* is highly significant because of the burden of proof placed on the person whose assertion runs counter to the legal presumption. Hooper's translation of the following articles from Book 16 of the Majalla, frequently referred to in the *sijillat al-ahkam* on the West Bank, provide a useful summary of litigation procedure and demonstrate the importance of the correct assignment of the burden of proof:

> Article 1817: If the respondent admits the claim, the judge shall give judgement on the admission. If he denies, the judge shall call upon the claimant for his evidence.
>
> Article 1818: If the claimant proves his case by evidence, the judge shall give judgement accordingly. If he cannot prove it, he has a right to the oath, and if he asks to exercise such right, the judge shall accordingly tender the oath to the respondent.
>
> Article 1819: If the respondent swears the oath, or if the claimant does not ask for the oath to be administered, the judge shall order the claimant to give up his claim upon the respondent.
>
> Article 1820: If the respondent refuses to take the oath, the judge shall deliver judgement based upon such refusal. If the respondent states that he is prepared to swear an oath after judgement has been so delivered, the judgement shall remain undisturbed.[77]

Litigants' respect for the oath is shown not just in refusal to take it on the part of the respondent, but also in the waiving of the right to have it administered to the respondent on the part of a claimant who has failed to

[76]Schacht, 1964, 191, gives further examples of the presumption in operation and the consequent assignment of the burden of proof; as does Anderson, 1949, 6.

[77]Hooper, 1933, 499–500. These articles come from Book 16 (The Administration of Justice), Section 4 (The Hearing of a Court Action).

prove his or her claim.[78] Recourse to the oath is a frequent occurrence in the West Bank as elsewhere, since the nature of the disputes, being largely domestic and personal, often precludes the presence of witnesses other than the parties to the claim. In addition, in the West Bank, in the many cases where a spouse, usually the husband, is absent and of unknown whereabouts, the claimant must take the oath to support his/her claim due to the impossibility of the oath of denial being administered to the absent respondent.[79]

With regard to witnesses, the classical rules are altered in the Jordanian law along the lines of the Egyptian Codes of *Shar`i* Procedure of 1910 and 1931, allowing for example for the calling and questioning of witnesses by either party; no explicit text however has replaced the general rule requiring the testimony of two women for every one man, which therefore

[78]In one claim in the 1985 case material, a woman claimed her trousseau (*jihaz*) to the value of 1400 Jordanian dinars (at the time, worth about 2500 sterling) from her husband who she claimed was refusing to hand the property over to her. The husband denied the claim, and the case spent several months in the courts. In the end of the woman was unable to prove her claim and asked for the oath of denial to be administered to her husband. The man declined to take the oath, and thus caused his wife's claim to be established and himself to be held liable for the full amount. In another case in the same year, a woman raised a maintenance claim against her husband, to which he offered the *shar`i* defence of her 'disobedience' (*nushuz*). He was unable to prove her disobedience, and on his request, the woman was offered the oath of denial to his defence. She refused to take it, so he was given the opportunity of taking the oath to establish his defence, and upon his taking it, her claim for maintenance was rejected by the court. Coulson, 1964, 124–125, held reliance on the oath to display 'an altruistic reliance upon the force of religious belief' which he clearly considered a contributing factor in the development and maintenance of other 'non-*shar`i*' jurisdictions, especially in criminal matters. He did nevertheless acknowledge (1964, 65) that 'the swearing of the oath is not a matter lightly regarded in traditional Muslim society'. On this, see Gerber, 1994, 48–50; after providing examples of the efficacy of the oath in cases from Ottoman material and referring to David Power's compelling example from Morocco, he concludes that '[t]he case of the oath suggests that we may be influenced by our hidden ethnocentric blinders concerning this system of law, and that it is time we tried to view this legal system on its own terms.' The numerous examples in the West Bank court material of the apparent efficacy of the oath in establishing the truth would give support to this statement.

[79]Thus the wife must take the oath supporting her claim to maintenance from an absent husband, or to separation from an absent husband on grounds of his refusal to maintain her. See further Chapter Two for the impact of the Israeli occupation in rendering the status of anyone outside the West Bank as of 'unknown whereabouts'.

stands, with the standard exceptions that the jurists traditionally made for matters on which women alone are expected to have expert knowledge.[80] The classical rules of procedure have also been modified to accommodate an increasing primacy given to written evidence, particularly such official documents as birth and marriage certificates.[81] All the judges in the *shar`i* courts are men.

It remains to consider the position of appeal in the *shar`i* structure.[82] Jordanian law allows for only one stage of appeal within the *shar`i* system,

[80]These rules make the examination of the witness' character (the process of *tazkiyya*) less critical, by allowing both parties to question the witnesses on the content of their testimony. However, in a 1996 ruling the Amman *Shari`a* Appeal Court criticised the first instance court for not having investigated properly the respondent's challenge made against the witnesses, to the effect that they did not pray or fast and were 'known liars': 41627/1996, Dawud, 1999, I, 295–296. Either party can call witnesses and although the latter must swear the oath before giving their testimony, there is no requirement for them to make the initial formal declaration 'I give testimony', which was still a requirement in the Majalla (Articles 1684 and 1689, compare Article 65 of the Jordanian law). The court can also question and recall the witnesses if this is considered necessary and appropriate. On the provisions in Egypt and in the Majalla, as well as comparative law in Syria, see Anderson, 1951 ('Competence and Procedure'), 43–44. For an examination of the discussions of jurists on the one man / two women rule, see Fadl, 1997. A suggestion by lawyer Asma Khadr in 1998 that the gender specific rules on witnesses be dropped proved controversial for leading members of the *shar`i* judiciary, as noted in the Conclusion.

[81]The written report of a doctor is now required in support of testimony before a court to establish insanity, imbecility and diseases that provide grounds for the dissolution of marriage (Article 90 of the Law of *Shar`i* Procedure). Official state documents, including birth and marriage certificates, and documents written by the Clerk of the Justice, are considered decisive proof for the matter for which they are drawn up, and can be challenged only for forgery (Article 75). Financial claims based on such a document cannot be refuted by personal testimony, with the sole exception of the defence presented in such financial claims by one spouse against the other, which enables the wife to claim her dower despite written acknowledgement of receipt by her father (Article 89, see further Chapter Five).

[82]It is frequently noted that a formal system of appeal was not strictly recognised in the 'pure' *shar`i* system (for example Schacht, 1984, 189; Anderson, 1949, 15; and most expansively perhaps Shapiro). On a practical level, however, Eisenman, 1978, 48, notes that an appeal system was well-established practice in the Ottoman Empire and indeed before. More recent scholarship such as that by David Powers, 1992, disputes the strictly hierarchical vision of appeal, arguing for the practice of judicial review, well-established in the *shar`i* system, to be considered in this light.

from the first instance court to the *Shari`a* Appeal Court. The period within which appeal is allowed is 30 days from the date of the judgement, or from the defendant's notification thereof if the *hukm* was issued *in absentia*. There are certain types of rulings which, if no appeal is raised by a litigant within the 30 days, are automatically submitted to the Appeal Court by the first instance court for the ruling to be checked and verified; the first instance court's decision is not implemented until that verification is made. The types of rulings to which this procedure of automatic review applies are those involving *haqq allah* (literally 'the right of God') and are listed by Article 138 of the Law of *Shar`i* Procedure as including *inter alia*:

> rulings on minors, incompetents, *waqf* and Treasury matters, and decisions on dissolution of marriage (*faskh*), judicial divorce (*tafriq*) and unilateral divorce (*talaq*), breastfeeding entailing a prohibition on marriage, respites granted for disease and madness, and other matters related to *haqq allah* . . . [83]

In considering a case brought before it, then, the Appeal Court, which is convened by a President and two members, considers issues of both substantive and procedural law. It may abrogate a decision in full, modify it, or return it to the first instance court with recommendations on how to proceed. If the Appeal Court returns a ruling, with recommendations, to the first instance court, and the *qadi* there insists on his former ruling, the decision is raised again to the Appeal Court; if the Appeal Court in turn again disagrees, then it may either hear the case itself or return it for another first instance court to consider.[84]

The *Shari`a* Court of Appeal, under Jordanian law, also has a carefully defined role to play in exercising collective *ijtihad* to come to authoritative or new rulings. Article 150 of the Law of *Shar`i* Procedure provides that where there are contrasting Appeal Court rulings on the matters in question, or where it sees it appropriate to issue a ruling contrary to all previous rulings, the court considering the case shall be a panel of five rather than the usual three judges.[85] The judicial exercise of *ijtihad* in Jordan is thus care-

[83]Note that the reference to *talaq* means *talaq bi-da`wa*, i.e. *talaq* occurring as a result of litigation, not a *talaq* registered by the husband at court. When a first instance decision on dissolution or judicial divorce is verified by the Appeal Court, the woman's *`idda* ('waiting period') is calculated as of the date of the first instance ruling; if it is abrogated, the divorce is considered never to have happened.

[84]Law of *Shar`i* Procedure 1959, Articles 146 and 149.

[85]The *Qadi al-Quda* deputises the two extra *qadis* for this panel.

fully regulated; firstly, it is the task of the legislature, in drawing up the codes of family law on which all but the rarest rulings will be based. Secondly, the Appeal Court exists to deal with points arising in practice, and to confirm or reject the *ijtihad* exercised of necessity by the individual *qadi* in the first instance court in those cases in which he is faced with a novel situation not covered by the texts and without previous Appeal Court decisions to guide him or when he considers it might be time to challenge an established practice or interpretation. Such occasions are rare. In practice, the majority of appeals submitted by West Bank litigants to the *Shari`a* Court of Appeal in the case material of this study were based on procedural arguments, and procedural irregularities were also the cause of most of the instances where a ruling subject to mandatory review was abrogated by the Appeal Court.[86]

From 1967 to 1994, the *shari`a* courts of the West Bank had recourse to a *Shari`a* Court of Appeal in Jerusalem rather than the Court in Amman, a fact recognised in Jordanian law after some ten years of its *de facto* existence. From 1995 to the time of writing, while the Jerusalem *Shari`a* Court of Appeal continued to serve the *shari`a* court of first instance in the city, both still administered by Jordan, a Palestinian Authority *Shari`a* Court of Appeal established by decree of Yasser Arafat convened in Nablus to hear appeals from the remainder of the West Bank. These developments are considered in the following chapter, against the background of the history of the *shari`a* court system in the area.

[86]In one case in the 1985 material, in appealing a maintenance award made against his client, the husband's lawyer won his appeal when the Jerusalem *Shari`a* Appeal Court observed that the notification sent by the first instance court required the husband's presence in court on '12/13/1985'. In another case, a series of decisions involving the establishment of an out-of-court *talaq* were sent back four times by the Appeal Court in Jerusalem who each time found fault with the text of the oath or the person to whom it was administered.

CHAPTER 2

The *Shari`a* Courts: A Constant in a Changing World?

2.1 INTRODUCTION

In many ways, Islamic family law and the *shari`a* court system in Palestine have constituted the most constant feature of the formal Palestinian legal system since the mediaeval period; to this day, both law and courts display features of their direct inheritance from the Ottoman tradition. This is not to suggest that either law or courts have been monolithic and unchanging; indeed Beshara Doumani is of the opinion that 'the *shari`a* courts as social institutions have changed radically over the past 450 years.'[1] In terms of jurisdiction, and the role the courts were able to play in society at large through the exercise and representation of that jurisdiction, this is certainly the case. Nevertheless, those involved in what is now left of the *shari`a* court system are wont to emphasise the centuries of unbroken legal tradition embodied by the *shar`i* judiciary in Palestine.[2] George Bisharat notes the 'greater moral legitimacy of the Islamic courts within the community and the greater familiarity and intelligibility of their laws and procedure'—that is, compared to the civil court system and the Israeli military tribunals in

[1]Doumani, 1985, 155.

[2]The '*Shar`i* Statement' issued in 1968 in protest at the Israeli government's moves to take over the East Jerusalem *shari`a* court is a good example; see section 2.5.2.

operation in the West Bank during the occupation.[3] Late Ottoman and post-Ottoman British Mandate changes to law and courts are what led Bentwich, writing in 1948, to describe the legal system in Palestine as a mosaic.[4] Half a century later, Botiveau notes that 'jurists make no bones about the fact that acculturation to models imposed from outside is part of the Palestinian legal experience.'[5] In this framework of importation, acculturation, transplants and pluralism, the *shari`a* courts remain something of a cultural as well as legal constant. Circumstances led the *shar`i* system in the West Bank to positively assert this standing in the years of direct Israeli occupation, and the association of the *shar`i* system with a national Palestinian identity and cultural heritage articulated in the twentieth century has been a feature of the claims for its place in the Palestinian state.[6] This chapter traces the history of the *shari`a* courts and the development of Islamic family law in the area, from Ottoman times until the arrival of the Palestinian National Authority and the establishment within it of the Department of the *Qadi al-Quda* (Chief Islamic Justice) in the 1990s.

2.2 OTTOMAN RULE

The *sanjaks* (administrative districts) of Palestine were conquered as part of the Syrian provinces from the Mamluks by Selim I in 1516 as the Ottoman Empire was rising to the peak of its power. Apart from a brief spell under Egyptian rule in the nineteenth century, Palestine remained under the Ottomans until the dismantling of the empire at the end of the first world war.

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[3]Bisharat, 1989, 43. He further observes (at 121) that the relatively more 'familial' ambiance of the *shari`a* court and the formal religious attire of the *qadi* 'associates the latter with an indigenous rather than an alien tradition.'

[4]Bentwich, 1948, 33; his point was that the law was 'not Mosaic but *a* mosaic.' Noting the impact of Ottoman rule and British military and civilian administration, together with a rapidly developing social structure, he concluded that 'the result is, indeed, a curious pattern made up of many pebbles.' On the enduring impact of the Ottoman tradition in the eyes of Palestinian jurists, see Botiveau, 1999, 78.

[5]Botiveau, 1999, 77.

[6]A good example is the arguments which the Palestinian *Qadi al-Quda*, Shaykh Muhammad Abu Sardane, reports himself as having put to Yasser Arafat at a June 1994 meeting in Tunis in regard to the absence in the draft Basic Law—intended to serve as a constitutional regime for the transitional period—of any mention of the *shar`i* judicial system: Abu Sardane, n.d., 43–47. See further in the Conclusion.

The Ottomans based their rule on the *shari`a*, and orders (*firmans*) issued by the ruling authorities from their early days in Palestine required the observance of its provisions, particularly in places sacred to Islam such as Jerusalem and Hebron.[7] *Qanun* (state-issued law) dealing with matters ostensibly outside the jurisdiction of the *shari`a* and equally binding on Ottoman subjects was issued by the central authorities and the two were frequently accommodated through the *fatwas* of the *Muftis*, in particular those of the highest Islamic dignitary of the Empire, the Grand *Mufti* and Shaykh of Islam in Istanbul. Colin Imber's study of Ebu's-su'ud, sixteenth century jurist and Grand *Mufti* to Sulayman 'The Law-Giver', explains with a wealth of examples how and to what purpose this was done, and how the bodies of law worked together.[8]

The Hanafi school of law enjoyed the official patronage of the Ottoman rulers, and a Hanafi *Qadi al-Quda* was appointed in Damascus and was always an Ottoman, with final jurisdiction over the province; by the 18th century, it seems that Jerusalem had its own Chief *qadi*, who Bisharat states was rotated annually by the central authorities.[9] Hanafi *qadi*s were appointed to the districts of Jerusalem and Nablus, and although as in the past people might still take their cases to the judge of their preferred school

[7]For example, in 1565 a *firman* to the governor and the *qadi* of Jerusalem orders them to ensure that wine is not brought to Jerusalem, and that Muslims are not drinking it; the same year, similarly, another decree required the closure of coffee houses as places of iniquity and bad influence that disturbed the pious and kept people from their prayers. This last *firman* was addressed to the *qadi* of Jerusalem alone. Heyd, 1960, 160–161, documents 106 and 107. On the debate over the prohibition of coffeehouses in the Arab world generally, see Hattox, 1985, 29–45. See also Imber, 1997, 94: 'Wine and coffee-drinking in public came, for the Ottoman authorities, to symbolise defiance of the ordinances of the *shari`a* and therefore by extension, a defiance of the will of the Sultan and a threat to public safety.'

[8]See Imber, 1997, x, on the epithet 'Law Giver' and on the nostalgia of the Ottomans for the 'legal order of his reign' as a part of a 'lost golden age.' One of Ebu's-su`ud's *fatwas* is cited by Heyd, 1967, 9, as 'there can be no decree of the Sultan ordering something that is illegal in the view of the *shari`a*.'

[9]Bisharat, 1989, 18. Gibb and Bowen, 1957, 121. Anderson saw the extent of official Ottoman sponsorship of the Hanafi school in the promulgation in 1839 of procedural regulations requiring jurisdiction to be exercised on the basis of certain specified and exclusively Hanafi texts; Anderson, 1951 ('Matters of Competence, Organization and Procedure'), 36 and note 2. Gerber, 1994, 50, argues that this 'effectively achieved impartial arbitration between the parties—a concept tantamount, of course, to judicial ignorance.'

of law for rulings in accordance with that school, at times the non-Hanafi judges had to seek approval for their decisions from the Hanafi appointee. Judith Tucker's examination of *fatwa* collections from Ottoman Palestine includes a recommendation that, in the given circumstances, the Hanafi *qadi* should himself appoint a Shafi`i deputy in order to divorce a woman in accordance with Shafi`i doctrine.[10]

Under the Ottomans, *qadi*s had jurisdiction beyond the administration of the *shari`a*. Sixteenth century *firman*s required the *qadi* to apply both *shari`a* and *qanun* law, and, with variations in time and place, many matters of civil administration as well as criminal law were directed to them as second in authority only to the administrative governors.[11] In family law matters, as in other areas of the *shari`a*, the *qadi* would make his ruling in accordance with and citing from the authoritative texts of the school to which he adhered, whether these were from the 'classical age' (that is, before the thirteenth century CE) or subsequent texts acquiring a later authority.[12]

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[10]Tucker, 1997, 78. This seems to have been a longstanding practice, in particular in the case of wives deserted by their husbands with no maintenance provision made for them. Imber, 1997, 187, notes that a sixteenth century decree prohibited this practice, although Ebu's-su`ud himself had unequivocally approved to the extent that his handbook for *qadi*s had a standard model confirmation of permission granted from a Hanafi *qadi* for this procedure. It is not clear how long the prohibition on 'Hanafis acting as Shafi`is' lasted.

[11]Heyd, 1967, 8. See also Gibb and Bowen, 1957, II, 125–133. This pattern did of course vary according to time and place. Gerber, 1994, 58–78, qualifies the assumption that *shari`a* criminal law had little place in practical administration of Ottoman and other Muslim polities; he also qualifies Heyd's argument on the decline of *qanun* law after the sixteenth century. He finds (77) for 'the paramountcy of the *kadi* in the Ottoman legal system' compared to other elements of the administrative system. Doumani, 1985, 157, lists the wide jurisdiction of the Palestinian *qadi*s on the basis of matters recorded in the *sijillat*. The *qadi* represented the sultan's judicial authority, while the *vali* (governor) represented his executive powers. The *qadi* could not execute his own judgments, while the administrative ruler was not supposed to execute any punishment without trial by and written judgment of the *qadi*. This was designed to safeguard against the potentially oppressive results of the discretionary powers wielded by the Ottoman officials, in whose hands lay the implementation of penal law which applied all over the empire. It appears, however, that with the decline in power of the central government by the end of the 16th century, this reciprocal link of authority was largely bypassed by the Ottoman governors. Heyd, 1957, 3.

[12]See Imber, 1997, 25–30, for an analysis of the different types of Hanafi texts.

Recent scholarship has extended understanding of the way in which the doctrine was applied; in particular, the *fatwas* of the Ramla *mufti* Khayr al-Din al-Ramli provide much material on the way in which this scholar sought to resolve legal questions of his time.[13]

In accordance with the *millet* system of rule followed by the Ottomans in Palestine, recognized non-Muslim communities had their own system of religious laws and courts, the latter largely based in Jerusalem.[14] Each *millet* court in theory had jurisdiction over marriage and divorce, wills and related personal status matters of their members, as well as over religious affairs.[15] Goadby states that in Palestine, the jurisdiction of the non-Muslim *millet* courts was limited to marriage and filiation, and that 'in practice all questions of successions were brought before the Moslem Courts' which ruled according to the *shari`a* law on succession:

> Christians became, therefore, accustomed to the application of Moslem law in cases of inheritance, and the old Byzantine law which was the traditional law of the principal Palestinian Christian Community, that of the Orthodox Church, became obsolete.[16]

Together with the Greek Orthodox, the Rabbinical courts were the most significant courts of recognized *millets* in Palestine, and Chigier states that the Rabbinical courts did in fact exercise jurisdiction over intestate succession as well as over wills.[17] The primacy of the *shari`a* system, as the religion of the state, was expressed in the residual *shari`a* court jurisdiction

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[13]Notably Tucker, 1998; and see also Gerber, 1998. Motzki, 1996, examines the issue of child marriage in Palestine in *fatwas* by the same *mufti*. Tucker also examines *fatwas* by Abd al-Fattah al-Tamimi, an eighteenth century *mufti* in Jerusalem. Gerber's 1994 work in the Ottoman court records of Bursa and Istanbul in the sixteenth and seventeenth centuries makes a considerable contribution in this regard.

[14]Abu Jaber, 1967, 213, defines millet as denoting 'a religious community or nation whose internal affairs were administered by the members of that community and its chosen, appointed or hereditary head.'

[15]Rubenstein, 1967, 384; Chigier, 1967, 149; Abu Jaber, 1967, 215. Abu Jaber further notes that 'the several millets had criminal jurisdiction until the Law of 1862, under which such power was taken away by the Government.'

[16]Goadby, 1926, 114. In cases of wills, however, Bertram, 1909, 43, states that the 118th Novel of Justinian was the law regulating the wills of the Eastern Orthodox Christians.

[17]Chigier, 1967, 149. Goadby, 1926, 134–136, notes with regard to this same issue

over any 'mixed' case involving a Muslim and a non-Muslim and also any case involving members of a non-recognised community.[18]

In addition, from the sixteenth century onwards, the Consular courts of European nations also had a part to play in the law of the Ottoman empire, including family law, through the system of Capitulatory privileges, granting them jurisdiction over cases involving their nationals and also Ottoman nationals belonging to the religious communities taken under the 'protection' of these foreign states. This system developed into a powerful political structure that, combined with direct military and economic pressure from European imperial powers (including loss of territory) was one of the motivating factors behind the 'Tanzimat' reforms to the law and the legal system carried out by the Ottomans in the second half of the nineteenth century.[19] Initially this consisted of formally removing from *shar`i*

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of succession law under the British mandate that unlike in the smaller Christian communities, there were no comparable problems regarding the application of Jewish law.

[18]Goadby, 1926, 113. Abu Jaber, 1967, 214, states that until 1831 only three *millets* were recognized: the Jewish, Greek Orthodox and Armenian Gregorian communities. He adds that in 1831 the Catholic Armenians were recognized, followed by a series of others, so that 'by 1914 there were 17 separate *millets*, each enjoying the protection of a foreign power.' He observes (217) that the Protestants were recognized in 1850 in Constantinople as a result of British support of that community. Levonian, 1952, 91, lists ten *millets* recognized by the Ottomans by the early 19th century and adds the Protestants in 1850. The list of communities both authors cite as recognised comprises: Greek Orthodox, Jewish, Armenian Gregorian, Maronite, Greek Melkite, Protestant, Armenian Catholic, Chaldean (Uniate) Catholic, Syrian Jacobite. Levonian adds Orthodox Chaldean and Orthodox Coptic; Abu Jaber lists Bulgarian Catholics and Nestorians. Needless to say, not every *millet* was established in all areas over which the Ottomans ruled. For a brief history of various Christian communities in Palestine and the Ottoman Empire, see also Goadby, 1926, 93–99.

[19]The first major Capitulation of this kind was in 1569 to the French, although the Venetians had had certain concessions before this. See Inalcik in the Encyclopedia of Islam, 1183. Goadby, 1926, 60–61, examines the 1536 French treaty with the Ottomans as the first example of later Capitulations; Inalcik however holds this to have been no more than a draft document. In civil matters, a foreign national, or increasingly any Ottoman subject (mainly non-Muslims) who had the protection of a particular state possessing a Capitulation could only be sued before his/her Consular court (under that national law). In personal status matters the Consular courts had exclusive jurisdiction. The system was much abused according to Goadby (1926, 66): 'a regular trade in certificates of protection grew up.' See also Liebesny, 1955. See Tibawi, 1969, 94–95, for discussion of the motivation for reform, and Abu Jaber, 1967, 219, for a list of the measures to which non-Muslims were subjected, including extra taxes.

jurisdiction whole areas of law that had in practice been covered by a mostly *shari`a*-infused mix of customary and *qanun* law for centuries. This process began after the Egyptian occupation of Palestine and Syria (1831–40), during which time criminal and administrative matters had been transferred to local councils set up in the districts, leaving the *shari`a* courts to deal with personal status and property matters only.[20]

The Ottomans sought to reconcile their reforms with the demands of the *shari`a;* the *Hatti-i Sherif* of Gulhane, the initial and innovatory imperial proclamation from the Sultan, justified the introduction of new laws on the basis of strengthening the state and preserving Islam.[21] The *Hatt-i Sherif* was followed in 1856 by a second imperial edict, the *Hatt-i Humayun*, which was dominated by the theme of ensuring equality among Ottoman subjects[22] and provided for a major reconstruction of the legal system with regard to the rights of non-Muslim subjects. It provided for secular mixed courts composed of Muslims and non-Muslims to hear commercial and criminal cases between people of all religions, and stated that non-Muslims of recognised communities might take succession issues to their own religious court, rather than to the *shari`a* courts as had been the practice. The text of a memorandum addressed to the European powers outlined this policy:

> Suits which relate to religious law or which by their nature can only interest Moslems among themselves, or Christians among themselves, will be brought as heretofore before the Moslem Religious Courts for Moslems and the Ecclesiastical Courts for Christians.[23]

This was rather more than reaffirmation of the *millet* policy of communal religious jurisdiction in matters of personal status, for in practice the *shari`a* courts had exercised a far wider jurisdiction, including residual jurisdiction, and heard all mixed cases. Non-Muslim testimony was validated

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[20]See for example Doumani, 1985, 159, on the period of Egyptian rule.

[21]The *Hatt-i Sherif* guaranteed to ensure the life, honour and property of all Ottoman subjects, stating explicitly 'This royal favour is to embrace all subjects of our Sultanate, Muslims and those of other religions without any exception.' Ma`oz, 1968, 22; Tibawi, 1969, 95.

[22]Abu Jaber, 1967, 220, cites the sultan's *Hatt-i Humayun* as forbidding any and 'every distinction or designation tending to make any class whatsoever of the subjects of my Empire inferior to another class on account of their religion, language or race . . .'

[23]Goadby, 1926, 104.

and through the 1860s and 1870s *nizamiyya* (regular, statute) courts were established throughout Palestine applying codes of law based on European (mostly French) models that excluded *shar`i* jurisdiction.[24] In Doumani's words, 'the *shari`a* courts found themselves at the losing end of a process of centralization of power.'[25] Just as significant as the removal of these areas from *shari`a* jurisdiction, both for the substance of Islamic law and for the way it came to be applied in the *shari`a* courts, were the Ottoman codification of Hanafi rules on civil law issues in the Majalla, and on family law in the Ottoman Law of Family Rights.

The Majalla covered certain areas of civil and commercial law ruled traditionally by the *shari`a* and outside the scope of the imported codes, but constituting integral parts of many of the issues arising in the new *nizamiyya* courts. The apparent ignorance of many of the judges in the new courts of how to 'find' the law in the authoritative texts of the schools prompted the drafting of guidelines.[26] A committee of Ottoman jurists sit-

[24]The final system, leaving aside the religious courts and the mixed courts, was set out in the 1864 Law of Vilayets, and consisted of a three tier structure on the French model, of a local magistrate's court in the sub-district with appeal to a first instance court in the *sanjak*, where more serious cases were also dealt with, from which appeal lay to the major *vilayet* (regional) court. In 1869 the new Judicial Council became the Court of Cassation in Istanbul. The French-based codes — for example, the 1850 Commercial Code, to be applied in the special commercial courts—and their parallel Codes of Procedure were extremely significant, but were arguably not of the same lasting significance to the Palestinian *sanjaks* as that which attached to the Ottoman codifications of custom-based regulations in the Land Law and Islamic law in the Majalla (on rules of civil law) and the Ottoman Law of Family Rights. British reluctance to interfere drastically with these laws, which they saw as linked inherently to the customs and culture of the lands they occupied, appeared to contrast with their willingness to overturn such codes as they saw to have been imported from France or other European countries, and thus it was the distinctively Ottoman laws that were to survive the Mandate intact. See Eisenman, 1978, 108; and see Messick, 1993, 61, on the colonial period identification of 'the uniquely close fit of *shari`a* theory and practice' in ritual and family law, 'and that they alone were relatively immune from Western legal "penetrability"'.

[25]Doumani, 1985, 159. He notes (at 160) that the *shari`a* courts were re-organised in 1866, and by 1877 were no longer allowed to hear criminal cases or rule on many types of civil petitions.

[26]Friedman, 1975, 196; Liebesney, 1983, 203; Hooper, 1936, 17. For an examination of the Majalla see Onar, 1955. Messick, 1993, 55–66, gives a fine introduction to the Majalla contextualised against colonial-period assessments of 'rationalism' and 'modernism' and the 'newly perceived obscurity' of the *shari`a* provoking the impetus for the Majalla.

ting in Istanbul drew up the Majalla, promulgated in various parts over the years 1867–1877, and it was approved by the Sultan for use in the *nizamiyya* courts in civil suits; thus traditional Islamic law, in this semi-codified state, became a law of territorial application in secular courts in the Ottoman lands. The Majalla was intended by its drafters to serve as a guide to those who had difficulties in having recourse to the traditional body of doctrine in the classical texts. Its application as a veritable Civil Code came after the collapse of the Ottoman empire.[27]

The form of the Majalla is extremely significant in the history of the *shari`a*: as Brinkley Messick puts it, initiating 'the transformation of the *shari`a* into law.'[28] As for substance, the drafting committee in places selected minority Hanafi opinions where these were seen as more appropriate than the established majority view, referring in justification of this approach to the sultan's established power to order the application of a particular variant Hanafi view.[29] One article provided specifically for the sultan's right to order the application of a certain jurist if this were in the public interest.[30] Change might also be effected by silent omission; in line with policy and promises to the European powers, the word 'Muslim' was simply left out of the otherwise traditional qualifications required for a valid witness.[31] The ordering of the application of a particular view from within the Hanafi school was to be widened in the twentieth century to include the views of other schools, and even the individual views of certain prominent early jurists not adopted by any of the four schools, in a codification-based methodology known as *takhayyur* (selection).[32]

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[27]Under the British in Palestine, the Majalla became part of the law through Article 46 of the Palestine Order-in-Council 1922; in Transjordan it became law by virtue of Article 58 of the Organic Law of 16/4/28. Hooper, 1933, (i).

[28]Messick, 1993, 57.

[29]'In questions which have been the subject of legal interpretation it has been found necessary to act in accordance with whatever order has been issued by the Sultan.' Hooper, 1933, 11.

[30]Example 4 in Article 1801: Hooper, 1936, 19, gives this as a case where the examples illustrating each general principle in the Majalla occasionally also contained substantive law.

[31]Meron, 1970, 204.

[32]See Coulson, 1964, 185–205, and for a detailed examination of the process and results in a number of states in the Muslim world in the twentieth century, see Anderson, 1976: see Hallaq, 1997, 210–211, for a critique of reliance upon this method of law reform.

Meanwhile the *shari`a* courts continued to apply classical Hanafi law in its traditional form, drawing for their rulings from the authoritative texts of the school. A circular of 1887 attempted to remove the remaining confusion of jurisdictions between the various sets of courts: the *nizamiyya* courts were to hear penal, commercial and civil suits, while the *shari`a* courts had jurisdiction over the Muslim community in personal status, succession, and the customary *diya* and *qisas* (compensation and retaliation).[33]

In the 1870s, with the accession of Abdul Hamid II and his decision to rule by decree and subsequent dismissal of the newly established Legislative Assembly, the 'Tanzimat' reform period as such came to an end. At the very end of the Ottoman empire, following the restoration of the constitution in 1908, came the first codification of Islamic law on marriage, divorce and related matters in the Ottoman Law of Family Rights (OLFR), for application as law (that is, not for use as guidelines) in the *shari`a* courts. The OLFR was promulgated on 7/11/1917, just one month before the British military conquest of the southern West Bank area including Jerusalem and Hebron,[34] and was not therefore put into real effect in this area by the Ottomans themselves. The original law included provisions on the family law of non-Muslims as well, but in Palestine the British were to restrict its application to Muslim subjects.[35]

2.3 BRITISH RULE

The end of the first world war found Palestine under British military occupation. During the war years, different promises had been made to various parties by the British regarding the future of the Arab lands that were to be freed from Ottoman rule through the Arab revolt encouraged by the allies. The Hussein-Macmohen correspondence of 1915–1916, the Sykes-Picot or Tripartite Agreement of 1916 and the Balfour Declaration of 1917 all had

[33]Bertram, 1909, 41–42.

[34]See Eisenman, 1978, 32 note 1, and 33, for confusion over dates. The Nablus area may have had some exposure to the law before its conquest the following year.

[35]In Turkey itself, the Majalla was replaced in 1926 by a secular Civil Code, based on the Swiss model, which also covered family law matters, a wholesale repeal contrasting with the piecemeal repeal and replacement typical of the Arab successor states to the Ottoman empire.

bearing on the proposed status of Palestine after the war was over.[36] In the end, it was the Balfour Declaration of 1917 which, incorporated into the preamble to the Mandate for Palestine awarded to Britain at San Remo in 1920, was by far the most significant to the practical running of the country and to the lives of the population.

The Mandate for Palestine vested in Britain legislative and executive powers. The Capitulatory privileges were abrogated and the judicial system was required to guarantee the rights of foreigners and local inhabitants, and implied that the separate competences for religious communities would be retained. The Palestine Mandate, unlike for example the Iraq Mandate also held by Britain, was a 'Class B' mandate, not requiring the Mandatory power to facilitate development towards an independent state. It specifically required the Mandatory Power to facilitate immigration and settlement on the land by Jews. A census carried out by Britain in 1922 showed Muslim Arabs to make up 78% of the population, Jews 11% and Christian Arabs just over 9%.[37]

The neighbouring area of Transjordan was excepted from all the clauses turning on the facilitation of a Jewish national home in a memorandum to the Legislative Council approved on 16/9/22, pursuant to Article 25 of the Mandate. A separate administration for Transjordan was set up under the general supervision of the Mandatory power. The Palestine Order-in-Council of 1922, in effect a constitutional document for Palestine, was not applicable to Jordan,[38] but set out in full the legislative, judicial and executive powers for Palestine.[39]

In Palestine, the British retained the basis of the *nizamiyya* court system of the Ottoman Tanzimat period and the separate jurisdictions in per-

[36]For a full discussion of the terms of the Balfour Declaration, see Mallison, 1971. For a discussion of all three undertakings, see Tibawi, 1969, 241–282.

[37]John and Hadawi, 1970, 189.

[38]Article 86 of the Palestine Order-in-Council, published in the Official Gazette of 1/9/22.

[39]The Palestine Order-in-Council was an enactment of the King in the Privy Council. Although the High Commissioner for Palestine was head of government and held legislative power, the King also retained power of legislation through Orders-in-Council. Bentwich, 1948, 38, notes that during the Mandate 'while normally the law is enacted by Ordinance of the Government of Palestine issued by the High Commissioner, in matters of great moment and touching international relations the other form has been used on several occasions.'

sonal status for different religious communities.[40] Slight modification was made to the jurisdiction of religious courts that may be read as reflecting that Palestine was no longer being ruled by an Islamic authority. The residuary jurisdiction of the *shari`a* courts was given over largely to the civil courts.[41] Articles 51–55 of the Palestine Order-in-Council define personal status and the respective jurisdiction of the *shari`a*, rabbinical and Christian courts. The *shari`a* courts were to have exclusive jurisdiction in Islamic *waqf* (pious endowments) and in personal status as defined in Article 51:

> suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

Article 52 of the Order-in-Council made reference for the purpose of defining jurisdiction to the Ottoman Law of *Shar`i* Procedure; appeal from the

[40]Magistrates' courts were established by order of the British High Commissioner in districts and sub-districts as under the Ottoman Magistrates' Law of 1913. The Ottoman Courts of First Instance became District Courts, superior to and appellate courts for the Magistrates' Courts in civil and criminal matters. A Court of Criminal Assizes was to deal with offences punishable by death, for which penalty confirmation of sentence was required from the High Commissioner. Special Land Courts were to be set up 'as may be required from time to time' to hear issues on title. Appeal from the District, Criminal Assize and Land Courts lay to the Supreme Court acting as Court of Appeal. As in other British colonial territories, final appeal from the Supreme Court lay to the Privy Council in London. Thus, the Ottoman structure was maintained, recourse to the Supreme Court in Jerusalem and to the Privy Council in London replacing the Court of Cassation of late Ottoman times. The separate commercial courts no longer existed, and nor did consular courts. See Bentwich, 1948, 34.

[41]Goadby, 1926, 114–115, comments on this change as follows:

The substitution of a British for an Ottoman authority in Palestine did not in general affect the jurisdiction of the religious courts of personal status. But a change almost inevitably took place as regards the position of the Moslem Courts. The Government being no longer distinctively Moslem by religion, it resulted that the Moslem inhabitants of Palestine came to be conceived as a religious community, the Courts of which had jurisdiction over Moslems only. Doumani, 1985, 160, on the other hand, states that by the 1930s,'the British-installed state apparatus had reduced [the *shari`a* courts] to a shadow of their former selves, limiting them strictly to matters of personal status such as marriage, divorce and inheritance.'

qadi's court lay to the *Shari`a* Court of Appeal in Jerusalem whose decision was final. That the *shari`a* courts had exclusive jurisdiction even in the case of foreign Muslims was clear by contrast with the terms of Articles 53 and 54, regarding rabbinical and ecclesiastical courts, where the jurisdiction was constrained to 'members of their communities other than foreigners'.[42] Article 64 explained that personal status matters concerning non-Muslim foreigners were to be heard in the District Courts where their own personal law would be applied. The rabbinical and ecclesiastical courts were to exercise a somewhat narrower jurisdiction than the *shari`a* courts, having exclusive jurisdiction only with regard to marriage and divorce, alimony and confirmation of wills,[43] and in pious endowments constituted according to their own law. Jurisdiction in other matters of personal status for the Jewish and Christian communities was concurrent with the civil courts and might only be dealt with in their religious courts with the consent of all parties to an action.[44] The Order did not specify the courts of which communities exactly were to be allotted such authority, but Goadby, writing in 1926, states that in practice it was those religious courts established under the 1923 Succession Ordinance.[45] The judgements of the religious courts

[42]Previously, as Goadby, 1926, 118–119, notes, foreign Muslims holding the nationality of a state with Capitulatory privileges were subject to their respective Consular courts.

[43]With regard to the exclusive jurisdiction of non-Muslim religious courts in the confirmation of wills, Goadby (1926, 119) states that 'it was doubtful whether this was so under the old system.'

[44]Chigier, 1967, 152, opines in regard to Articles 51–54 of the Order-in-Council and the wider jurisdiction of the *shari`a* courts, that 'this discrimination in favour of the Moslem Religious Courts based apparently on political grounds was a part of the appeasement policy towards the Arabs for the Balfour Declaration and its partial implementation . . .' In response, Rubenstein, 1967, 386, puts it down to 'the general aim of leaving the Ottoman order in its integrity.' With regard to certain of the non-Muslim communities, Goadby, 1926, 119, drew attention to practical difficulties faced in applying their original communal laws of succession:

> the smaller communities either do not possess any traditional law of succession or guardianship, or if such law did exist, it has fallen into oblivion in Palestine where these matters have long been in the jurisdiction of the Moslem courts.

[45] Vitta, 1947, 112–113, notes the Schedule attached to the 1939 Palestine (Amendment) Order-In-Council, which listed one Jewish and nine Christian communities as having jurisdictional competence. Vitta notes that the Muslim community was not included 'as their courts were, and in part still continue to be, state courts, different

were to be executed by the civil authorities.[46] Where conflicts of jurisdiction arose between different religious communities, the Chief Justice was to decide which court had jurisdiction, and where the conflict was between civil and religious jurisdiction, provision was made for a special tribunal to decide. Palestinians not belonging to a recognised religious community came under the civil courts.[47]

The complicated structure of an interlocking religious and secular courts system was thus defined by the British Mandate authorities. To summarise, the *shari`a* courts retained exclusive jurisdiction in personal status and *waqf* of all Muslims, including foreigners, but had no jurisdiction over non-Muslims.[48] The rabbinical and ecclesiastical courts were assured a wider jurisdiction than they had formerly held in practice, although this was narrower than that of the *shari`a* courts. The jurisdiction of the civil courts included that formerly held by the commercial and consular courts, as well as the residual jurisdiction previously held by the *shari`a* courts.

The High Commissioner was now the legislative power in Palestine. In the Palestine Order-In-Council of 1922, four classes or sources of legislation were identified: Ottoman law in force on 1/11/14, and 'such later Ottoman laws as have been or may be declared to be in force by Public Notice;'[49] Palestine Orders-in-Council, Ordinances and Regulations; 'the substance of the common law, and the doctrines of equity in force in England'; and 'the powers, procedure and practice' of courts in England.[50] Specifically English legal

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from those of the other religious communities.' See also Goadby, 1926, 116. Besides the Jewish community, the recognised communities included: Eastern Orthodox, Latin Catholic, Armenian Gregorian, Armenian Catholic, Syrian Catholic, Chaldean Uniate; followed later by the Greek Melkite and the Maronite communities. According to Goadby, the Coptic, Nestorian and Protestant communities were not recognized for jurisdictional purposes in Palestine. Meron, 1982, 354, adds the Syrian Orthodox community and points out that this list was repeated in the Second Schedule of the 1939 Palestine Order-in-Council.

[46]Article 56, Palestine Order-in-Council.

[47]Bentwich, 1948, 37; Rubenstein, 1967, 386–387.

[48]Bentwich, 1948, 36; Goadby, 1926, 118–119.

[49]Hooper, 1936, 57, notes that Article 46 of the Order-in-Council does not stipulate a post 1 November 1914 cut-off date for 'such later Ottoman Laws as have been or may be declared to be in force by Public Notice,' but that Article 59 of the Transjordanian Organic Law mentioned the date 23 November 1918.

[50]Article 46 Palestine Order-in-Council; Hooper, 1936, 28–29.

principles, as well as British legislation, entered in this way into the body of law applied in Mandatory Palestine and the effect continues to be felt in certain areas of the law to this day.[51] However, in the area of law and administration considered by the British colonial power to be directly and exclusively the business of the majority Muslim community, much of the Ottoman heritage was preserved. On 1/1/22 the Supreme Muslim Council (SMC) was created under a special order issued the previous year; it was headed by the *Mufti* of Jerusalem and was established in order, according to Bentwich, 'to meet Moslem objection to the appointment and dismissal of religious judges by non-believers.'[52] The SMC administered *waqf* and general Muslim affairs, as well as the *shari`a* court system, including the appointment and dismissal of *qadi*s and all other *shari`a* and *waqf* officials.

The OLFR of 1917 and its accompanying Law of *Shar`i* Procedure were given specific legal effect in Palestine in the Muslim Family Law (Application) Ordinance 1919.[53] The British repealed the sections in the OLFR relating to Christians and Jews, while retaining in full the majority of the law which applied to Muslims. The Ottomans had justified their codification of *shari`a* rules on marriage and divorce in an accompanying Explanatory Memorandum, relying on both juristic and social grounds with reference to *istislah* (consideration of the public interest).[54] As compared to the Majalla, which had drawn on variant and minority opinions within the Hanafi tradition, views from the other Sunni schools of law were included

[51]See Mogannam, 1952, 195, regarding some of the Ordinances which constituted almost exact copies of the corresponding English law. For the continuing effects of the introduction of English legal principles in Israel, see for example Friedmann, 1967. With specific regard to the Occupied Palestinian Territories, see Moffett, 1989, for the discussion on the controversial revival, as part of 'local law' by the Israeli occupation authorities, of the Defence (Emergency) Regulations 1945, issued by the British and providing for such measures as deportation, administrative detention and house demolition, used extensively by successive Israeli governments against the civilian Palestinian population in the West Bank and Gaza Strip.

[52]The Order Establishing a Supreme Moslem Council (SMC) for Moslem Religious Affairs was issued on 20/12/21 and was referred to in the Order-In-Council, Article 52. Bentwich, 1926, 36. The SMC was originally four members elected by adult male Muslims, but later on (from 1935) the members were nominated by the Government. Rubenstein, 1967, 389. See also Eisenman, 1978, 77–78; and for an in-depth study of the SMC, see Kupferschmidt, 1987.

[53]Hooper, 1936, 59.

[54]Anderson, 1951 ('The Contract of Marriage'), 114.

where this was considered necessary, although the basis of the law remained recognisably Hanafi. The irony was that the application of this law to Palestine and Transjordan was effected not by the Sultan of a Muslim state but by the non-Muslim British administrator. The British also carried over the amendments to the Ottoman Criminal Code, backing up registration requirements of marriage and divorce for all communities (in the Registration Ordinance of 1919) with a six-month prison sentence in the Palestine Criminal Code of 1936. The existence of the OLFR was presumably the reason why the British felt no need to introduce legislation into the area of family law as they had in India, for example. In the Criminal Code of 1936, the British did introduce changes in the ages of capacity for marriage and legal majority, but it seems that no attempt was made to ensure enforcement of these rules in the *shari`a* courts.[55] Muslims were exempted from the felony of 'bigamy' in the Criminal Code by virtue of their personal law permitting polygyny.[56] While 'principles of English law' did enter the Pales-

[55]In the OLFR, as in the Majalla, marriage was not allowed below the minimum age of puberty (twelve for boys and nine for girls in accordance with standard Hanafi doctrine). The age of full capacity for marriage was eighteen for males and seventeen for females, and between this age and the minimum age of marriage, the *qadi* might allow the marriage if convinced the party was sexually mature. The British made the age of full competence eighteen for both sexes and required a medical certificate for marriage under fifteen. See Eisenman, 1978, 103–105.

[56]The simple repeal of this exemption clause in 1951 made polygyny a crime for Palestinian Muslims in Israel. See below, Chapter 4. Another piece of Ottoman legislation specifically applied by the British in Palestine and Transjordan was the 1913 Law of Inheritance, promulgated before the cut-off date for Ottoman laws specified in the Order-In-Council. In applying the Ottoman law in their 1923 Succession Ordinance, the British legislator not only confirmed its validity but attempted in some measure to extend its use. The Succession Ordinance required that the Ottoman law (giving equal shares to male and female in inheritance to *miri* property i.e. where the title was held by the ruler) be the law applied by all religious and civil courts for all *miri* holdings. For *mulk* property (absolute private property) the religious courts were expected to apply their own personal law, but while for Muslims *mulk* property could only be distributed according to traditional Islamic law, in the other communal courts the consent of all the concerned parties was required for the application of the personal law on intestacy, while on the request of one of the parties the issue would be regulated under the terms of the Ottoman law for *miri*. The Ottoman law thus became the only law applicable to *miri* land, and the residual law for *mulk* land of non-Muslims. In practice, Goadby noted that he was 'informed that in fact daughters having a right to share under the Ottoman law frequently renounce.' Goadby, 1926, 121–124. Compare the situation in Israel: Layish, 1975, 280. On circumstances in which it is 'socially condoned' for a daughter to take

tinian legal system, their influence on the substance and application of the law applied in the *shari`a* courts was less than in other spheres.[57]

In short, when, in the spring of 1947, the British Mandate authorities turned the question of Palestine over to the United Nations, the *shari`a* courts had a well established jurisdiction adapted from the later Ottoman model and were applying Ottoman codifications of Islamic law drawn mainly from the Hanafi tradition, with supplementary recourse to the authoritative opinions of the school, and the addition of certain procedural and administrative requirements.

2.4 JORDANIAN RULE

The United Nations Partition Plan of 1947 provided for the withdrawal of the British Mandatory forces and the establishment of separate Arab and Jewish states in Palestine, with Jerusalem to be administered as a *corpus separandum*, an international zone administered by a Trusteeship Council on behalf of the United Nations.[58] On 14/5/48, British troops withdrew from Palestine and at midnight the mandate came to an end. In the fighting that ensued between Jewish and Arab forces, the intended Jewish state made gains in territory beyond that assigned to it in the Partition Plan, while the projected Palestinian Arab state was never established. Those areas not conquered by the Jewish forces came under the control of Jordan (the West Bank) and Egypt (the Gaza Strip). Jerusalem was split under Israeli and Jordanian control. A huge proportion of the Palestinian Arab population of the area of central Palestine that became Israel was displaced and left as refugees, south to Gaza, east to the West Bank and Jordan, and north into Lebanon.[59] The newly-established United Nations found itself obliged to

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her share, see Moors, 1996, 77. Succession to *miri* property was returned to regulation by the traditional *shari`a* rules (which generally give the male twice the share of the female) in both the West Bank and Gaza Strip by legislation issued respectively by Jordan in 1991 and Egypt in 1965.

[57]By comparison, see Pearl and Menski, 1998, 33–38 on the development of 'Anglo-Mohammadan law' as a case-law system under British colonial rule of India.

[58]For a discussion of the Partition Resolution (United Nations General Assembly 181 of 29 November 1947) and in particular the proposed internationalisation of the city of Jerusalem, see Cattan, 1981, 7–9; Mazzawi, 1997, 239–247.

[59]Various sources estimate that upwards of 700,000 Palestinians of a population of 900,000 were displaced over the borders of what is now Israel in or following 1948.

create a special organ, the United Nations Relief and Works Agency, specifically to assist the displaced Palestinian population, most of whom were housed in makeshift refugee camps under UNRWA auspices, the majority in the West Bank and Gaza Strip.

The area of Transjordan had gradually acquired administrative autonomy through the Mandate period in Palestine. In 1946, Britain concluded a Treaty of Alliance with the Kingdom of Transjordan, and in 1948 a new treaty was signed, two months before the end of the Mandate. The Hashemite Kingdom of Jordan thus entered the 1948 conflict as a fully independent sovereign state.[60]

In July 1948, a ceasefire was agreed upon and the armistice concluded in April of the following year between Israel and Jordan left Israel in control of West Jerusalem and the larger part of Mandatory Palestine and Jordan holding East Jerusalem (the Old City) and the area of Palestine closest to Jordan not conquered by the Israelis—the West Bank of the River Jordan.[61] From this time, the West Bank was used as a territorial description, as distinct from the East Bank (of the Jordan) which constituted Jordan proper. The remainder of Palestine, the Gaza Strip, came under Egyptian control during the war and was administered by the Egyptians until the 1967 war.[62]

The courts had stopped functioning during the war and the first steps taken in the administration of law in the West Bank by the Jordanians came in the form of military orders and proclamations. As early as May 1948, a proclamation extended the 1935 Defence Law of Jordan to the West Bank, and all laws and regulations in force in Palestine up to that date were de-

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Among these refugees were the members of the Supreme Muslim Council and many *waqf* officials and workers. Rubenstein, 1967, 389; Dumper, 1994, 25–26. See Takkenberg, 1998, 18–21 on the difficulties in ascertaining numbers. He cites Israeli historian Benny Morris as concurring with the 'loose, but probably not inaccurate, contemporary British formula' of 'between 600,000 and 760,000 refugees.' Takkenberg, 1998, 20, note 62, records 914,221 Palestinian refugees registered with UNRWA on 31 June 1950 (outside Israel, where a further 45,800 were receiving UNRWA relief); of these, the Gaza Strip held 198,227 and Jordan including the West Bank 506,2000.

[60]Wright, 1951, 441.

[61]Wright, 1951, 449.

[62]In September 1948, the short-lived All-Palestine Government was established in Gaza under the Egyptians. For details on this, and on King Abdullah of Jordan's annexation of the West Bank, see Shlaim, 1990, and al-Qasem, 1994, 190–191.

cleared as continuing in force unless they contradicted that Defence Law.[63] In December 1948, notables from the West Bank, proclaiming a representative capacity, met in Nablus and Jericho to invite King Abdullah of Jordan to annex the West Bank to his rule.[64] Elections were held to send West Bank delegates to the Jordanian Assembly, which on 24/4/50 passed a resolution declaring the two banks as one state, the Hashemite Kingdom of Jordan, and guaranteeing the equality and rights of all citizens. This integration of the two banks of the Jordan did not receive international recognition,[65] but nevertheless was given internal constitutional effect by an enactment of August the same year, subjecting the West Bank including East Jerusalem to Jordanian law.

After the August enactment, laws in force before the union were declared as remaining in force until repealed or amended, thus preserving Mandate laws and the military and temporary regulations issued during the two preceding years of military rule.[66] In addition, a committee of lawyers and judges was set up to work towards unifying the laws of the two banks of the Jordan. Jordan, having had more autonomy in its internal affairs and having been more separated from the Mandate authority, was still governed largely by Ottoman legal tradition, with less British (or English) influence and legislation than was the case in Palestine. The committee was responsible for the promulgation of various laws to cover both banks. Jordanian legislation came to cover most areas of penal, commercial and procedural law, with Ottoman law remaining in force in certain traditional areas. Isolated pieces of Mandatory legislation also remained; they were something of an anomaly in the Kingdom, sometimes in force on the West Bank but not valid on the East Bank.[67]

Jordan ruled the West Bank until the war of 1967, much of the time under a state of emergency declared in 1956.[68] The Jordanian Constitution

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[63]Mogannam, 1952, 195–196.

[64]Al-Khalil, 1981, 15–16; Wright, 1951, 445–446.

[65]Only Britain and Pakistan recognised the union; Britain subjected this recognition to a proviso concerning sovereignty over the city of Jerusalem (given the provisions of UNGA resolution 181). Wright, 1951, 456–457.

[66]Law no.28 of 1950.

[67]See Mogannam, 1952, 195–196.

[68]The state of emergency, reinforced at the time of the 1967 war, was finally lifted in 1989. See the report by Amnesty International, *Jordan: The Protection of Human Rights after the Lifting of the State of Emergency,* London 1990.

of 1952 repealed the 1922 Palestine Order-in-Council and its amendments, although retaining laws enacted in accordance with it.[69] Legislative power was vested in the National Assembly and the King. Executive power was vested in the King, who exercised it through his ministers. Judicial power was to be exercised by the various courts and all judgements were to be pronounced in the name of the King.[70]

Section VI of the Constitution, entitled 'The Judiciary', provides for three types of courts to be set up—statute or regular courts (the Ottoman *nizamiyya*), religious courts (*diniyya*) and special tribunals.[71] In accordance with these provisions, the Law on the Establishment of Regular Courts was promulgated in 1952, granting the regular courts jurisdiction over all persons in all civil and criminal matters except those under the jurisdiction of the religious courts or special tribunals.[72] The *shari`a* courts retained their customary jurisdiction over Muslims but did not regain any of the former residuary jurisdiction of Ottoman times. The Jordanian Constitution specifies *shari`a* court jurisdiction as exclusive over questions of personal status where the parties are Muslims, issues of *diya* where the parties are Muslim, or one is a non-Muslim but both agree to *shari`a* court jurisdiction, and matters relating to Islamic *waqf*.[73] The personal status of foreigners was to be dealt with in the regular courts under their own national law where such

[69]Article 129(ii) and (iii) of the Jordanian Constitution.

[70]Articles 25–27 of the Constitution.

[71]Articles 98–99 of the Constitution. On the special tribunals in Jordan, see Kilani, 1966.

[72]Under this law, a four-tier system on the Ottoman model was set up with magistrates' courts presided over by a single judge in districts and sub-districts, courts of first instance in every district with a president and a plurality of judges to hear civil and criminal issues outside the jurisdiction of the magistrates' courts and to act as appellate courts from them. Two Courts of Appeal were established, in Amman and Jerusalem, and finally a Court of Cassation was set up in Amman to act as Supreme Court of Appeal in civil and criminal matters from the Courts of Appeal, and as a High Court of Justice, in which role it might hear administrative suits. The Court of Cassation replaced the recourse to the Privy Council of Mandate times. Two members of the Court of Cassation sat on the special tribunals convened to decide cases of conflicts of jurisdiction between courts, a function that had formerly gone to the Senior Judicial Officer or to similar tribunals. See Mogannam, 1952, 202–203.

[73]Articles 103(2) and 105 of the Constitution; the term used is *wahadha*. For details of the current jurisdiction of the *shari`a* courts, see above Chapter 1.3.

was customary.[74] The *qadis* in the *shari`a* courts were to be appointed by the Jordanian *Qadi al-Quda,* whose status was that of a government minister, with the approval of the king.

The Law of Establishment of *Shari`a* Courts 1951 had made basically the same points as were reiterated in the Constitution, unifying the *shari`a* court system in the West Bank and Jordan, and establishing 24 *shari`a* courts of first instance (with a single *qadi*) of which eight were in the West Bank. Occasional legislation in following years established additional courts in, for example, Bethlehem (1955) and Qalqiliya (1965). *Shari`a* Courts of Appeal, consisting of a president and two members passing final decisions by a majority of votes, were convened at first in both Jerusalem and Amman, but in 1951 a law was passed providing for a single *Shari`a* Court of Appeal, based in Amman, although it might be convened in Jerusalem if the need arose.[75] Jerusalem thus lost the permanent *Shari`a* Court of Appeal situated there since the beginning of the Mandate.

The Jordanian Constitution also dealt with non-Muslim religious courts (*majalis al-tawa'if*) which were to proceed according to laws specially laid down for them. The Constitution, and a later law of 1958 extending the 1938 Religious Councils Law of Transjordan to the West Bank, gave the ecclesiastical courts jurisdiction (not defined explicitly as exclusive or otherwise) in all matters of personal status, succession and *waqf* for their community. Personal status was to include the same issues in non-Muslim religious courts as in the *shari`a* courts; this represented a considerable widening of jurisdiction for the non-Muslim courts compared to Mandate times, although the word 'exclusive' does not appear.[76] The Jordanians initially recognised five Christian denominations as having this jurisdictional competence.[77] Jordan did not recognise rabbinical courts.

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[74]Article 103(1) of the Constitution.

[75]Article 2, Law no.3 on the Regulation of the *Shari`a* Court of Appeal, 1951. See further below.

[76]Article 109 of the Constitution. Meron, 1982, 353 note 2, and 355, considers this expanded jurisdiction a 'major innovation' of the 1952 law. The 1938 Transjordanian Law of Religious Councils (no.2 of 1938) was extended to the West Bank by Law no.9 of 1958 (*Official Gazette* no.1366 of 1 February 1958).

[77]Layish, 1984, 4; Shehadeh, 1980, 21; and al-Qasem, 1992–1994, 201, all note five Christian communities recognised by Jordan. However, Meron, 1982, 355–357 and note 21, adds four other Christian communities who he say sought and obtained recognition

The Jordanian legislators stayed faithful to the Ottoman tradition by retaining Hanafi *fiqh* as the residual jurisprudence of the *shari`a* courts, although the population is generally held to be predominantly Shafi`i.[78] The Law on the Establishment of *Shari`a* Courts instructs the *shari`a* courts to make their decisions in accordance with the most approved opinion of the Hanafi school, unless there exists a contrary provision of statutory law on the subject.[79]

The Jordanian legislators were prompt in their promulgation of an independent national code on marriage, divorce and associated matters, preceding a series of similar national codes by Arab states in the 1950s. The Jordanian Law of Family Rights (JLFR) was promulgated in 1951 for application in the *shari`a* courts. The JLFR was modelled fairly closely on the OLFR, but incorporated some of the Egyptian reforms of the intervening years, and added certain provisions of indigenous inspiration. In procedural matters too, the 1959 Law of *Shar`i* Procedure[80] kept quite close to the Ottoman law of procedure that had been preserved in Palestine by the British. The Jordanians also issued a Criminal Code in 1951, replaced by a new law in 1960;[81] both codes included the by now standard penalties for offences against family law.

By the end of Jordanian rule, then, the *shari`a* courts in the West Bank were applying Jordanian codes of family law and procedure, and had seen

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after 1958 when the Transjordanian law on Religious Councils was extended to the West Bank. The recognised communities elected their own judges. The First Schedule of the Transjordanian Religious Councils Law 1938 listed the following recognised Christian communities: Greek Orthodox, Greek Catholic, Armenian, Latin, Arab Episcopal, Maronite, Lutheran, Syrian Orthodox, Seventh Day Adventists. Meron, (1982, 356,) lists three communities (Armenian Catholics, Syrian Catholics and Chaldeans) as recognized by the British but not by Jordan.

[78]Goadby and Doukhan, 1935, 11; Layish, 1975, 3. Al-Shafi`i was born in either Gaza City or Askelan.

[79]Article 22 of the Law on the Establishment of *Shari`a* Courts, 1951. The same text comes in Article 130 of the JLFR.

[80]Law no.31/1959, replacing Proclamation no.10/1953. Meron, 1982, 354, note 7, notes three successive Laws of *Shar`i* Procedure; Laws nos. 95/1951, 10/1952, and 31/1959, 'but apart from minor modifications the Ottoman provisions still prevail there.'

[81]See Mogannam, 1952, 197, for some of the differences between the Palestine Criminal Code of 1936 and the Jordanian Criminal Code 1951.

the removal of the permanent *Shari`a* Court of Appeal that under the British had been situated in Jerusalem. This court was to be re-established in Jerusalem under the unlikely circumstances of Israeli occupation.

2.5 THE *SHARI`A* COURT SYSTEM UNDER ISRAELI OCCUPATION

2.5.1 The 1967 occupation

The Arab-Israeli war of June 1967 (the 'Six Day War') ended with the Israeli army holding the West Bank, the Gaza Strip, the Egyptian Sinai and the Syrian Golan Heights. Immediately the formal hostilities ceased, the Israeli Military Commander in the West Bank issued Proclamation Number 2, assuming all powers of government, legislation, appointment and administration with respect to the region and its inhabitants, henceforth to be exercised by him or his delegates, military officials appointed for the purpose. Previous requirements of consultation or approval in any legislative matters were repealed. [82]

In Jerusalem, the Israeli authorities took immediate steps towards integrating the Arab East of the city occupied in the 1967 war with the west side that had been under Israeli control since 1948. The controversial decision to annex East Jerusalem and a number of surrounding areas — was taken on 14 June 1967.[83] On 27 June, the Knesset heard and approved the modification of the Law and Administration Ordinance 1948 by the addition of a clause empowering the Israeli government to apply Israeli law and regulations over any part of former Mandatory Palestine. The same day, the Interior Minister was empowered to enlarge the area of any municipality to include lands over which Israeli laws and regulations could apply according to the terms of the amended Law and Administration Ordinance; this enlargement could be effected by the issuing of an ordinance at the discretion of the Interior Minister without need for consultation with the residents of the area proposed for inclusion in the enlarged municipality. The next day, the Israeli Interior Minster issued an ordinance extending the former

[82]Shehadeh, 1980, 18.

[83]Brecher, 1978, 13.

municipal boundaries of West Jerusalem up to and beyond the former municipal boundaries of occupied East Jerusalem, an area of approximately 70,000 *dunums* with a Palestian population of around 70,000.[84] Israeli law was extended to cover the annexed area, Jordanian government and public departments were taken over, and the existing court structure was integrated into the Israeli system.[85] The purported annexation was condemned by the international community which maintains to date that East Jerusalem is occupied territories and continues to demand an end to measures by Israel aimed at changing the demographic make-up of the city.[86] The legal system in the rest of the West Bank was subjected to Israeli military administration. The afore-mentioned Proclamation 2 provided that:

> All laws which were in force in the area on June 7th 1967 shall continue to be in force as far as they do not contradict this or any other proclamation or order made by me (the West Bank Military Commander) or conflict with the changes arising by virtue of the occupation of the Israel Defence Forces of the area.[87]

Chapter Four of Shehadeh's *Occupier's Law* examines in detail some of the 'changes arising' in the legal system due to the Israeli occupation in the regular (*nizamiyya*) court system.[88] These have included the abolition of the Court of Cassation, the highest court in the four-tier Jordanian system, together with the additional functions carried out by its members, and the transfer of the Jerusalem Court of Appeal in the regular system to Ramallah. An Israeli Officer in charge of the Judiciary was appointed to whom were transferred all powers of the Jordanian Minister of Justice, and the Military Governor appointed a committee to whom passed the powers of the Judicial Council in appointing judges and public prosecutors; all court processes were required to take place and all decisions to be issued 'in the name of law

[84]Israeli Ordinance no.5727/1967: Bakri, 1986, 8; Brecher, 1978, 25–26; Hirst, 1974, 18. A *dunum* is roughly equal to 900 square metres. Schmelz, 1981, 65, gives the figure of 71,000 Palestinians within the expanded municipal borders of Jerusalem in September 1967; Layish, 1975, 4–5, gives a figure of 69,000.

[85]Hirst, 1974, 18; Bakri, 1986, 8.

[86]On UN Security Council resolutions regarding Israel's 1967 annexation of Jerusalem, see Mazzawi, 197, 248–257.

[87]Shehadeh, 1980, 18.

[88]Shehadeh, 1988, 76–101.

and justice'. The Execution Departments attached to the local regular courts were put under the administration of the Israeli military authorities.[89]

Soon after the occupation, on 24/7/67, some twenty notable Muslim personalities in Jerusalem established a body called *al-hay'a al-islamiyya* (the Islamic Board) to administer Muslim affairs in the West Bank, in particular in East Jerusalem, in the absence of a Muslim sovereign. The body developed into *al-hay'a al-islamiyya al-`uliya*, the Supreme Islamic Board. Kupferschmidt observes that this body was established as 'an outspoken act of protest against the Israeli annexation of East Jerusalem' and that the Israeli government 'has therefore withheld any formal recognition.'[90]

The Acting Chief Islamic Justice, the *Qadi al-Quda*, became head of the Supreme Islamic Board and directly supervised the work of the *shari`a* courts still functioning under the indirect administration of Jordan, providing the link between the *shar`i* systems in Jordan and the West Bank. From the start, the *shari`a* court system was placed in a situation of some confrontation with the Israeli occupation authorities. Although the Israeli authorities assumed all supervisory functions for the regular court system, the *shar`i* judiciary refused to accept confirmation of appointment or payment from the military authorities or to attach Israeli stamps to court documents. In East Jerusalem, the judges of the *shari`a* first instance court refused to countenance integration into the Israeli state system, which would involve their own appointment under the Israeli Qadis Law 1961 and the swearing of an oath of loyalty to the state of Israel.[91]

As it became clear that the occupation was not going to be removed in a matter of weeks or even months, the *shar`i* judiciary maintained their stand and the Israeli authorities extended the jurisdiction of the Israeli *shari`a* court of Jaffa to include East Jerusalem, in an attempt to preclude recourse to the Jerusalem court by the Muslim Palestinians resident in the annexed part of the city, and so to force compliance by the judges. In August

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[89]Military Orders 310/1969 and 412/1970; see Shehadeh, 1980, 18–20.

[90]Kupferschmidt, 1987, 260. The Arabic title of the Supreme Muslim Council of Mandatory times, the subject of Kupferschmidt's book, uses the word *majlis* rather than *hay'a*. See also Dumper, 1994, 78–79.

[91]The *shar`i* judiciary's reasons for resisting were set before the public in press articles, for example Ahmed Ahmed, '*al-mahkama al-shar`iyya fi'l-quds wa'l-ihtilal*,' in *al-Quds*, 26 April 1974.

of 1969, instructions were issued to the Execution Offices of the West Bank not to execute decisions issued by the *shari`a* courts.[92] This move aroused protests from the Palestinian judiciary as a whole. Just after the order was issued, a local Arabic newspaper reported that the magistrate, public prosecutor and head of Execution in Jericho, Zuhayr al-Bushtawi, had sent a memorandum to the Israeli Justice Affairs Officer, in which he stated his objection to the non-execution of *shari`a* court decisions.[93] A few weeks later, the Magistrate of Hebron, Hussein ash-Shuyukhi, was reported by the same paper to have resigned in protest at:

> the interference in the powers of the courts by the Israeli Officer in charge of the Judiciary, and his insistence on preventing the Execution Departments of the regular courts from executing the decisions of the *shari`a* courts.[94]

Two articles published in the local newspaper *al-Quds* in April of 1970, one by a *shar`i* lawyer and one by a *qadi* in the *shari`a* courts, stressed that the principle behind the stand being taken by the *shar`i* judiciary was its need for independence and for inviolability from the effects of transient political change. The first noted that even the British had not attempted to interfere politically in the *shar`i* judiciary; the second stressed that:

> The political order must have no influence upon the work of the *shari`a* courts, whatever the source be of such political motive: for temporal politics has no fixed constants . . .[95]

By the time the above articles were published, the newspapers had reported that some Execution Departments in the West Bank were in fact executing *shari`a* court decisions despite instructions to the contrary.[96] Although in practice decisions of the *shari`a* courts in the West Bank, excluding Jerusalem, were in fact executed through the Execution Offices during

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[92]There is some confusion regarding this order; some say it referred to all *shari`a* courts, some say only to East Jerusalem; local press coverage at the time clearly stated that it applied to all the *shari`a* courts.

[93]*Al-Quds*, 25 August 1969; also cited in Shehadeh, 1980, 22.

[94]*Al-Quds*, 16 October 1969; his reasons were included in a memorandum sent to the West Bank Military Commander. Also noted by Shehadeh, 1980, 51 note 16.

[95]Jilani in *al-Quds*, 24 April 1970, and al-Husseini in *al-Quds*, 27 April 1970.

[96]See *al-Quds*, 23 April 1970.

the direct Israeli occupation, it is not clear whether there were any written instructions countermanding the original orders for non-execution. Meron is thus at least partly right when stating that:

> The judgements rendered by these Qadis could certainly not be executed by the official Execution Offices, were it not for the Military Governor's decision to honour these judgements . . .[97]

The authorities' decision indicated a reluctance to force further confrontation with the *shar`i* judiciary and the Muslim community on this specific point, and there is no doubt some merit in Meron's point made in partial explanation, that the Israeli authorities were used to the vestiges of the Ottoman *millet* system in Israel itself, rendering them more ready to take an 'abdicatory' attitude towards the jurisdiction of the religious courts.[98] However, it is also the case that for the Israeli authorities there was little strategic economic or political advantage in directly controlling the courts dealing with personal status issues in the West Bank (apart of course from East Jerusalem) particularly as they had no independent means of execution. In administrative terms, therefore, the position of the *shari`a* courts in the West Bank as described by al-Husseini in 1970 held good until the autumn of 1994:

> [the *shari`a* courts] continue to be linked to His Excellency the *Qadi al-Quda* and to the *shar`i* Judicial Council in Amman. . . . they are all subject to the terms of . . . the laws constituting the *shari`a* courts, and to the authority of the *Qadi al-Quda* in their administration.[99]

After 1967, then, the West Bank *qadis* continued to be tested and appointed in Amman after recommendation by the Acting *Qadi al-Quda* in Jerusalem to the Jordanian *shar`i* Judicial Council. In contrast to the Gaza Strip *qadis*, where the *shari`a* courts were under Israeli administration like the regular courts, the *qadis* in the West Bank were paid by the Jordanian authorities; court fees were sent to Amman via the Acting *Qadi al-Quda* in

[97]Meron, 1982, 365.

[98]Meron, 1982, 356.

[99]Al-Husseini, 1970. An article by the *qadi* of Nablus published in *al-Quds* on 4 February 1974 similarly emphasised the fact that 'the Jordanian Government has not relinquished responsibility for the *shari`a* courts . . .'

Jerusalem and were taken into account in the Amman financial reports of the Department of the *Qadi al-Quda.*[100] Court fees were levied and collected in Jordanian currency only; Israeli shekels were not accepted. Judgements were issued in the name of the Jordanian king, in accordance with Article 27 of the Jordanian Constitution, and each separate ruling, or *hukm*, was entered under this formula in the court records. Should the ruling be of a nature to need the services of an Execution Office, it was written out again under the heading 'In the name of God, the Merciful, the Beneficent', rather than the 'law and justice' formula used in the regular courts under the terms of Military Order 412. Further, the Jordanian authorities established four new *shari`a* courts in the West Bank in the 1970s and 1980s.[101] Within this picture of determined non-recognition of the occupation by the West Bank *shari`a* court system, and the apparent accommodation of this by the Israeli occupation authorities, there were both minor and more far-reaching effects on the system as a result of the occupation. These effects are most obvious in the *shari`a* court in East Jerusalem.

2.5.2 The *Shari`a* Court of East Jerusalem

Having refused integration into the Israeli state system, the judges of the East Jerusalem *shari`a* court saw their documents and rulings refused recognition by Israel courts, official offices and agencies—what Yitzhak Reiter has described as policies based on 'passive non-recognition of the *Shari`a* Court system in Jerusalem'[102] and a concerted effort to have Palestinian Muslims of East Jerusalem repair to the Israeli *shari`a* court of Jaffa as much as possible. In the spring of 1968, the Jaffa *shari`a* court dealt directly

[100]See Mheilan, 1986, 54–55. The tables for the West Bank accounts are incomplete.

[101]In Salfit in 1976, and in Tubas, Birzeit and Dura in 1986. The Israeli occupation authorities in the Gaza Strip validated the opening of two new *shari`a* courts by Military Order, bringing the total number of *shari`a* courts there to five: Meron, 1982, 361. On the position taken by the Gaza *qadi*s, see Dumper, 1994, 92.

[102]Reiter, 1997, 13. Meron, 1982, 363, presents the issue of Palestinian Muslims in East Jerusalem from the perspective of the occupation authorities:

> These Muslims, having been deprived of the services of the Moslem Court of Jerusalem which refused to accept nomination under Israeli law, address themselves to the Moslem Court at Jaffa, which is the only court competent to issue judgments in family matters, executable at the Execution Offices.

with the conflicting jurisdictions in a claim raised by an East Jerusalem Muslim applying for the lifting of an order for attachment (*hajz*) placed upon his person by the East Jerusalem court in 1949 at the application of the defendants.[103] The plaintiff's lawyer argued his claim on the basis of the Israeli Law of Legal Competence and Guardianship of 1962, which he noted had repealed all provisions relating to the attachment of property on the grounds of a person's 'profligacy' or 'squandering'. The original attachment order had been given on these grounds under Jordanian law.[104]

The defendant's lawyer argued for dismissal of the claim or its transfer to the East Jerusalem *shari`a* court, on the grounds of non-competence. He claimed that the case should be heard by the same court that had placed the attachment order on the plaintiff, and challenged the administrative measures that had extended the Jaffa court's jurisdiction to East Jerusalem.

As to the question of competence, the plaintiff's lawyer submitted that the East Jerusalem *qadi*s were not properly appointed judges under Israeli law. He referred to the Israeli Law of *Shari`a* Courts 1953 and the Israeli *Qadi*s Law 1961, which detailed the methods of appointment of *qadi*s, including the oath of allegiance to the state (Article 7 of the 1961 Law) and the publishing of appointments in the Israeli Official Gazette. Since the East Jerusalem *qadi*s had gone through none of these procedures, he submitted that they could not be considered judges under the law.[105] The Jaffa *qadi* agreed with this argument, while also accepting the plaintiff's submission regarding the extension of the Jaffa court's jurisdiction:

> Since its establishment on 19 November 1950, the Jaffa *shari`a* court has exercised jurisdiction in personal status matters for Jaffa and the Southern Re-

[103]Case no. 39/1968 in the Jaffa court. I am grateful to Ala and Hanan Bakri for providing me with an Arabic transcript of the proceedings and decision.

[104]The property of a 'profligate' (*safih*) or 'squanderer' (*mubadhdhar*) may be made the subject of an attachment order under Jordanian law in the West Bank courts, including East Jerusalem. The case material from 1985 included an example of an application for attachment on these grounds raised by a man against his paternal cousin.

[105]Another side to this controversy was raised by the claim made in the court by the defendant's lawyer, that the plaintiff had himself first gone to the East Jerusalem court to get the attachment raised, but his pleading was not recognised, as by the law applied in the East Jerusalem court he was not qualified to act. The plaintiff's lawyer denied this and stated that even if it had been the case, and he could therefore have been said to have implicitly recognised the East Jerusalem court, such recognition by a lawyer had no bearing on whether a court was competent under the law.

gion including Jerusalem; adding a part to the whole does not require the granting of new authority.

Only the person legally appointed by the Israeli authorities to fulfill the function of judge could decide such claims, and hence, the court stated,

> No person or court in the eastern part of Jerusalem has the right to hear personal status claims according to the laws of the land: the Jaffa *shari`a* court is the court holding jurisdiction over such claims arising in East Jerusalem.

This decision was given in July 1968, a little over a year after the annexation of East Jerusalem. On 26 September, a '*Shar`i* Statement' was issued in East Jerusalem in response to the Jaffa decision under the signatures of the Acting *Qadi al-Quda*, eight West Bank *qadi*s and three West Bank *muftis*, 'proclaiming the will of the Muslims in the protection of their rights, the independence of their judges and the administration of their religious affairs . . .' The statement quoted from the Jaffa decision, stating that it relied on laws imposed by the Israeli authorities in violation of the terms of the *shari`a*. It drew attention to the threat being posed to the rights of the Muslim community in East Jerusalem, noting that they would be subject to legislative provisions that were binding on them neither in statutory nor *shar`i* terms. The condemnation of the Jaffa decision and of the Israeli policies behind it was supported by references to international law, including the Hague Regulations, and to UN resolutions from the previous year refusing to recognise the Israeli annexation of East Jerusalem. Tracing the history of the Jerusalem *shari`a* court back to ancient times, the Statement stressed the continuity of authority from which it derived its competence, and noted:

> At no time in our history, even under the British Mandate, has any ruler interfered with the independence of the *shar`i* judiciary in our land, or given themselves the right to appoint Muslim *qadis*: all have left that to the Muslims, and acknowledged their rights to independence in their jurisdiction and in the administration of Islamic *waqf* and Muslim holy places . . .[106]

[106]See Bakri, 1987, 9–10. Jilani, 1970, notes: 'Everyone is aware of the real reasons behind the actions of the Israeli authorities—eliminating the *shar`i* judiciary and gaining control of the Islamic *waqf*s.' Kupferschmidt, 1986, 260, notes that Jordan still closely supervises the administration of the *waqf*s in the West Bank, including the very impor-

This statement did not elicit the desired response from the Israeli authorities, and two months later a local Arabic newspaper reported the failure of contacts between various Israeli governmental departments and Islamic groupings in Jerusalem aimed at finding a solution to the problem.[107] That those attempts had also failed to find an answer to the human problems involved is illustrated by the following extract from an 'Open Letter' published in a local newspaper in 1970. The letter was signed by 'A Citizen of Arab Jerusalem' and was addressed to the Israeli Minister of Religious Affairs; it described the difficulties faced by some East Jerusalem bridegrooms:

> When a son of Arab Jerusalem wants to get married, he goes to the departments of the *shari`a* court in the city for the *shar`i qadi* to process the marriage. When this is over, he heads for the (Israeli) Interior Ministry to get himself registered as married. The Interior Ministry, however, refuses to acknowledge this contract because it has been issued by the *shari`a* court in Arab Jerusalem, and they tell him to go to the *shar`i* judge in Jaffa or some other *qadi* in Israel . . . So off he goes to one of these judges to ask for a new contract to be written out. The *qadi* starts things off by asking for *shar`i* proof in order to complete the contract. The bridegroom presents the evidence to the *qadi*, who then refuses the Quranic contract when he learns that the bride is under 17 years of age, saying that the law in Israel does not permit the *ma'dhun* (marriage notary) to marry a girl under 17. . . . and this is where the problems really start! What is to be done? The groom is married and a child is on the way, but he can't register the child in his Identity Card, and he can't get a birth certificate for it . . .[108]

Several of the aspects of the situation under discussion are raised by this letter. Firstly, there is the introduction of state-issued territorial (not communal) legal provisions into the law applied by the *shari`a* courts in Israel; secondly, there is the non-recognition of any document issued by the Jerusalem *shari`a* court on the part of the Israeli authorities; and thirdly there is the burden of double recourse. These last two points are referred to in the following paragraph taken from the Reply to the above Open Letter

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tant ones in East Jerusalem. This remains the case during the 'transitional period', as discussed below.

[107] *Al-Quds*, 27 November 1968.

[108] *Al-Quds*, 5 March 1970.

from a Spokesman for the Ministry of Religion, published a week later in the same paper:

> It is natural that the Israeli Ministry of the Interior should not recognise marriage certificates still bearing the name of the Hashemite King of Jordan and verified by a *shari`a* court that will not cooperate with government institutions, despite the fact that nearly three years have passed since the city of Jerusalem was unified. Instead, they carry on as if nothing has changed, caring nothing for the alterations in the affairs of Muslims and doing nothing to help them avoid difficulties . . .[109]

This reply purported to correct the Open Letter in stating that for an East Jerusalem marriage to be recognised by the Interior Ministry it was not necessary for the whole marriage to be done again, only for the marriage to be proved before the Jaffa court. This might be misleading, as a claim to prove an existing marriage would in any case necessitate the presence of both parties, or of one partner and witnesses, in the Jaffa court, as opposed to a simple ratification of the Jerusalem contract which could be secured by the efforts of the groom alone. The claim in any case would be subject to fees in the Israeli court, just as the contract was subject to fees in the Jerusalem court, in addition to the costs involved in the transport of spouses and/or witnesses to Jaffa. The Israeli government's answer to this problem was to encourage the Muslims involved to avoid the Jerusalem court altogether, as shown by the Spokesman's reply:

> These difficulties can be avoided if those wishing to marry go to one of the two marriage notaries appointed by the Jaffa court in unified Jerusalem . . .

Later on, the Israeli authorities considered establishing a permanent branch of the Jaffa *shari`a* court in Jerusalem: in 1973 it was reported that the Jaffa *qadi* was to head the branch.[110] Less than two months later, however, the same paper reported that the Israeli government had revoked that decision and was considering, as an alternative, the possibility of having the decisions of the East Jerusalem court recognised by the Execution Offices.[111] It also reported the Israeli Justice Ministry to be considering recognising the Supreme Islamic Board as the sole body responsible for appointments

[109] *Al-Quds*, 13 March 1970.
[110] *Al-Quds*, 26 January 1973.
[111] *Al-Quds*, 12 March 1973.

and promotions of *shar`i* judges in Jerusalem and the West Bank. However, as with other attempts to find solutions to the situation, these suggestions came to nothing.

In the 1980s, moves by the Israeli authorities concentrated again on setting up a *shari`a* court in Jerusalem, although this time the Minister of Religious Affairs decided to set up a new Israeli *shari`a* court in the city, rather than just a branch of the Jaffa court. A statement issued in response to this proposal by the late Shaykh Sa`ad ad-Din al-`Alami, then Acting *Qadi al-Quda* and head of the Supreme Islamic Board, was published on 11 February 1985 in *al-Sha`ab* newspaper, calling on the Israeli minister to revoke his decision and instead to recognise and execute the decisions issued by the *shari`a* court in East Jerusalem. Shaykh Sa`ad ad-Din went on to deplore the burden of double recourse and duplicate fees borne by East Jerusalem Muslims, which could be removed by recognition of the East Jerusalem court. Perhaps the clearest proof that little had changed since 1967 lay in the reference Shaykh Sa`ad ad-Din made to the '*Shar`i* Statement' of 1968, of which large parts were quoted in the 1985 article, showing that for the *shar`i* judiciary, the arguments therein stood unchanged. Nevertheless, in April 1988, Radio Israel announced that a *shari`a* court had been established in West Jerusalem; Reiter refers to this as the Jaffa court which moved to a West Jerusalem location.[112]

Besides being subject to conflicting jurisdiction and duplicate court fees, the East Jerusalem Muslim Palestinians are also subject to conflicting legislation. In his Reply to the Open Letter quoted above, the Israeli Spokesman for the Ministry of Religious Affairs had exhorted the *ma'dhuns* appointed by the Jerusalem *shari`a* court to:

> remember, when they are going about their tasks in Jerusalem, which is in Israel, that Israeli law does not allow girls under 17 to marry, and that every action in contravention of (that law) is going to create problems for those who use their services.

The difference in the age of capacity for marriage is only one of the ways in which personal status law as applied in the *shari`a* courts in Israel differs from that applied in the Jerusalem court and the rest of the West Bank. In 1970, when the Open Letter was published, the Jerusalem court was applying the provisions of the Jordanian Law of Family Rights of 1951,

[112] *Al-Quds*, 6 April 1988, quoting Radio Israel of the previous day. Reiter, 1997, 11.

which gave the ages of full capacity for marriage as eighteen and seventeen for males and female respectively, but allowed females aged fifteen to seventeen and males aged fifteen to eighteen to marry with the permission of the *qadi*, on proof of sufficient maturity and physical development. The Israeli Age of Marriage Law 1950, on the other hand, imposed a criminal penalty on persons involved in the marriage of a girl under the age of seventeen.[113] While the Israeli law did not actually invalidate the marriage if it was recognised by the parties' personal law, it could be made the grounds for dissolution on application by the girl, her parents or guardians or a Social Affairs employee, although such dissolution did not cause the penalty to lapse.[114]

The Open Letter thus describes the situation facing East Jerusalem Muslim Palestinians: a marriage that would be both *shar`i* and legal in the East Jerusalem court might expose the male parties involved to a criminal penalty if referred to the Jaffa court. Problems would obviously arise if the relationship proved problematic: the young wife, for example, unable to have recourse to the Jaffa court, would have her case (for example for dower) heard in Jerusalem and would be unable to get it executed through formal channels. While the possibility of claiming 'special circumstances' to effect an under-age marriage does exist under Israeli law, Layish found 'no indication that Muslims availed themselves of this opportunity'. He continues that 'Muslims preferred in such circumstances to obtain a marriage confirmation, or at any rate not to have recourse to a civil court.'[115] Layish here is talking about Muslims inside Israel, but the statement would also apply to East Jerusalem Muslims. The proof of marriage would be carried out at Jaffa when the bride was of legal age according to Israeli law. In this regard, Layish notes for the three years up to 1970:

> About a third of the approximately 100 marriage confirmations issued by the Qadi of Jaffa to residents of East Jerusalem (the city and the villages in its area

[113]Article 2 of the Israeli Age of Marriage Law, 1950. Arabic text in Natur, 1981, 138–139.

[114]Layish, 1975, 15. Layish notes that if a girl were pregnant or had given birth, the District Court (rather than the *shari`a* court) was empowered to permit her marriage to the father of the child. In 1960, an amendment to this Law extended the District Court's power to permit the marriage of a girl of sixteen even where there was no pregnancy, provided that 'special circumstances' existed convincing the judge of the need for the marriage.

[115]Layish, 1975, 20.

of jurisdiction) were clear cases of offences against the Age of Marriage Law or of reasonable suspicion in such offences.[116]

Another and rather sharper distinction between the laws applied in the *shari`a* court of East Jerusalem and that of Jaffa is on the subject of polygyny. Neither the 1951 Jordanian law nor its replacement in 1976 placed any legally enforceable restrictions on polygyny, while in Israel it is a criminal offence.[117] A polygynous union would be valid under the law applied in the East Jerusalem court but could not be registered in the Jaffa court and might lead to prosecution should it be discovered. Reiter noted forty polygynous marriages registered in the East Jerusalem *shari`a* court in 1975; Ayyush found a total of 475 over the period 1973–1983.[118] This gives rise to the same potential problems regarding recourse to legal remedy and execution that apply to marriages to girls underage by Israeli law. In his discussion of polygyny, Layish notes that in one case the Jaffa *qadi* registered the proof of a polygynous union between Palestinians from East Jerusalem, taking care to indicate that the marriage had been concluded before 1967 and therefore before Israeli law was applied to the area. He notes nine convictions on the charge of polygyny for the year 1969, but gives no details on where those nine were resident, so it is not clear whether East Jerusalem Palestinians were involved.[119] It is however possible that while the Israeli authorities refuse to afford any recognition to documents issued by the East Jerusalem *shari`a* court, a marriage contract issued there for a polygynous union might be used as a basis for a criminal prosecution in the Israeli courts, although Reiter notes that it is rare that a formal complaint is registered.[120]

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[116]Layish, 1975, 28.

[117]This was achieved in 1951 by the repeal of the 'good defence' to the charge of bigamy in the Criminal Code taken over from the Mandate period. With a further amendment in 1959, the only good defences for polygyny now in Israel are continuous absence of the spouse for seven years or mental illness making consent to divorce by the affected spouse impossible.

[118]Reiter, 1997, 17, found a total of 1031 contracts that year. `Ayyush, 1985, 82–83, found an average annual rate of polygamy in Jerusalem of 3.9%, the second lowest rate he recorded in all the West Bank courts over that period—the lowest being in Jenin.

[119]Layish, 1975, 83 and 73–75.

[120]Reiter, 1997, 17; he gives no numbers, but states the law is enforced only in the event of such a complaint being lodged by the first wife or one of her relatives. In 1970,

These and other differences in the law applied in Israel and imposed by the Israeli authorities on the Muslim Palestinians of East Jerusalem are not accepted by the Palestinian *shar`i* judiciary in East Jerusalem and the rest of the West Bank. They are challenged on the grounds of being non-*shar`i* both in content and by dint of being issued by a legislature not empowered to issue rules for *shari`a* courts, besides the issue of illegal annexation.[121]

The original instructions for the non-execution of decisions from *shari`a* courts appear to have applied, as noted above, to all the *shari`a* courts in the West Bank, including the East Jerusalem first instance court and the *shari`a* Court of Appeal. While the Execution Offices did however go back to executing decisions from the rest of the *shari`a* courts of first instance, there was no official execution through the normal channels of rulings from the Jerusalem *shari`a* court following the order issued in 1969. This can be seen from the statistics used by Meron in his article on the religious courts in the West Bank; the statistics are drawn from the Execution Offices in the West Bank and list the number of decisions issued by each one and the *shari`a* court where the decision originated. The list of courts does not include Jerusalem, although Jaffa is listed.[122]

However, there were times when decisions issued by the Jerusalem court did obtain execution by some informal means or other, shown *inter alia* by the circulation in 1985 of a memorandum to the West Bank Execution Offices reminding them of the instructions on the non-execution of rulings from the East Jerusalem *shari`a* court. Following this, the Jerusalem court was unable to obtain execution of its decisions other than through voluntary compliance.

The problems in obtaining execution also affected some Palestinians living in some areas outside the municipal boundaries of Jerusalem as spec-

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in Criminal Appeal Case no.135, the Israeli Appeal Court held that an Israeli Palestinian man who had married a second wife in the West Bank could be tried for polygyny in Israel. The first instance court had ruled itself not competent to hear the case, brought by the state, as the offence had occurred outside the borders of Israel. The case is referred to by Layish, 1975, 88 note 35. I am grateful to advocates Ala and Hanan al-Bakri for the Arabic text of the decision.

[121]See Bakri, 1986, 12–13.

[122]Meron, 1982, 367.

ified by the Israeli authorities in 1967. However, whereas Palestinian Muslims resident inside those boundaries had the option of recourse to the Jaffa court where decisions can obtain execution, Palestinians carrying West Bank identity cards could not raise claims in Jaffa. These Palestinians were at the same time subject to the Ramallah or Bethlehem military and *nizamiyya* jurisdictions in other areas of litigation. This situation arose because certain outlying areas of the Jerusalem District, as it was under Jordan, were not included in the area of Jerusalem annexed by the Israeli authorities in 1967, but were administratively transferred to the Ramallah or Bethlehem districts for regular court and military court jurisdiction.[123] However, since the (Jordanian-specified) jurisdiction of the *shari`a* courts did not recognise any change, they remained subject to the Jerusalem *shari`a* court. This would result in non-execution of rulings if the claim had to be raised in a particular court, as specified in the Jordanian Law of *Shar`i* Procedure, and if that court happened to be Jerusalem.

The reverse, of course, also applied: decisions from a West Bank *shari`a* court could not be executed in Jerusalem; a resident of the West Bank would not be able to execute an award made in a West Bank court against a spouse resident in East Jerusalem or in Israel. Those entitled and willing to go to the Jaffa court could however have their decisions executed through the Israeli-administered West Bank Execution Offices against a spouse resident there. The only place that decisions of East Jerusalem could be executed was on the East Bank of the Jordan. Yet another quirk in this complicated state of affairs lay in the fact that decisions issued in the Israeli-

[123]A 1985 paper by Advocate Ala ad-Din Bakri summarised the situation as follows: By virtue of Military Order 39/1967 and later amendments, the regular court jurisdiction of Bethlehem would include all areas formerly under the Jerusalem jurisdiction, with the exception of those areas to which Israeli law had been extended (i.e. the annexed areas). Twenty of these villages were later transferred to Ramallah jurisdiction by Military Order 567/1974. Thus, the villages of Abu Dis, Anata, Izariyya, and al-Khan al-Ahmar were under Bethlehem for military and regular jurisdiction and remained under Jerusalem in the *shar`i* system, and in the Ramallah District the same applied to all or part of the villages of Biddu, Beit Ijza, Beit Iksa, Beit Hanina, Beit Duqqu, Beit Surik, Bir Nabala, Jaba', al-Judeira, al-Jib, Hizma, Rafat, Ram, Qatanna, Qalandiya, Kufr Aqab, Mukhmas, an-Nabi Samwil and al-Qubeiba. The status of some of these villages remained under contentious discussions at the end of the 'interim' phase of the Oslo Accords.

administered *shari`a* courts of the occupied Gaza Strip had to be be verified in the East Jerusalem court if they were to obtain recognition and/or execution in Jordan.

Obviously, not all documents or decisions of the *shari`a* courts actually need execution procedures. Till the time of writing, East Jerusalem Muslim Palestinians entitled to go to the Jaffa court may well do so where there is a need for execution in Jerusalem for example, or where they need a document acceptable to the Israeli authorities; otherwise, they continue to have recourse to the East Jerusalem court if they do not need execution, or if for example they require recognition of the document in Jordan. Reiter found that an examination of the records of the East Jerusalem and Jaffa courts in 1987 'illustrates that there are very few Muslims who approach only one of the two *shari`a* courts.'[124] This is probably still the case and

[124]Reiter, 1997, 15. One indication of the way in which the Jaffa and East Jerusalem *shari`a* courts work can be gleaned from an examination of local Arabic newspapers published in East Jerusalem, in which the courts publish notices for persons to attend court hearings or notify them of decisions taken in absentia, where the person to be notified is 'of unknown whereabouts' (see below). During the three months September—November 1986, the three local newspapers *Al-Quds*, *Al-Sha`ab* and *Al-Fajr*, published 153 such notifications issued by the West Bank courts, of which 22 came from the Jerusalem court. 23 notices were published by the Jaffa court. The largest single group of notifications made by the Jaffa court concerned succession, listing heirs who stood to inherit from the estate of a deceased and providing a time period for objections or additions thereto. It is to be assumed that the property involved lay within the Jerusalem area so that for any heir to obtain distribution of the estate, the documentation would have to be processed through the Jaffa court. The one notice from the Jerusalem court on succession was the result of a claim made by the widow of a deceased resident for 500 Jordanian dinars from the estate for her deferred dower; notice was given in this case to the other heirs, resident in Amman and Kuwait. An award of this sort could only be executed on property in Jordan. On the other hand, the largest single group of Jerusalem court notices concerned petitions for separation on the wife's initiative on the grounds of absence and injury, notifying absent husbands from East Jerusalem listed as of unknown whereabouts and living abroad, mostly in the Americas. Wives married in Jerusalem under Jordanian law would have to petition the Jerusalem court for their divorce. Reiter, 1997, 16, table 1, presents a more detailed breakdown of the claims made by East Jerusalem Muslims in the Jaffa (and West Jerusalem) and East Jerusalem courts in 1987. However, his findings (that the East Jerusalem court is used more for actions on marriage, divorce and child-related claims, while Palestinians from East Jerusalem turn more often for cases of inheritance or *waqf* to the Jaffa court) do not immediately appear to be supported by the figures he gives.

likely to remain so until determination of the fate of city and its Palestinian population in the final status negotiations between Israel and the Palestine Liberation Organisation.

2.5.3 The *Shari`a* Court of Appeal in East Jerusalem

In 1951, Jerusalem lost the permanent appeal court that operated there throughout the Mandate period when the Jordanian Regulation of the *Shari`a* Court of Appeal provided that:

> There shall be one Appeal Court in the Kingdom for all the *shari`a* courts, with its headquarters in Amman: it may convene in Jerusalem when necessary.[125]

After the 1967 war, the *shar`i* judiciary in the West Bank was cut off from the *Shari`a* Appeal Court in Amman, and the same Muslim notables who formed themselves into the Supreme Islamic Board also organised a *Shari`a* Court of Appeal in Jerusalem along the lines laid down in Jordanian law but made up of West Bank *qadis* under the presidency of the Acting *Qadi al-Quda.*[126] The measures taken against the *shari`a* court of first instance in Jerusalem, and to a lesser extent in the rest of the West Bank, also included this Court of Appeal. Meron, writing in 1982, notes 'some hesitation' as to the authority of the *Shari`a* Court of Appeal as a result of the administrative order of August 1969 ordering the Execution Offices in the West Bank not to execute rulings from the *shari`a* courts, and continues:

> This measure was probably the result of the refusal of the Qadis in Jerusalem to accept nomination under the Israeli Qadis Law of 1961, thus denying validity to proceedings held and decisions given by them . . . Later, however, the administrative order was amended so as not to apply to the Moslem Court of Appeal in Jerusalem.[127]

In practice, in the years following 1967, an Appeal Court decision would be returned to the first instance *shari`a* court where the appealed de-

[125]Regulation no.3/1951, *Official Gazette* no.1982, 1 September 1951.

[126]See Shehadeh, 1980, 19–20 on the transfer of the regular Court of Appeal from Jerusalem to Ramallah.

[127]Meron, 1982, 360.

cision originated, where it was written out and submitted to the Execution Office in the relevant West Bank town as 'having reached the stage of a final decision' without reference to the *Shari`a* Court of Appeal in East Jerusalem.[128]

In statutory terms, the Jerusalem *Shari`a* Appeal Court had no basis in Jordanian law for some ten years, although the Jordanian authorities were appointing its members for some years before they made the Jerusalem Appeal Court a fact in law as well as in practice. The delay was probably due to political reservations on the implications of this, but finally in 1977 the Jordanian authorities issued the *Shari`a* Courts of Appeal Regulation (no.20/1977) which repealed the 1951 Regulation stipulating Amman as the permanent seat and provided that 'A *Shari`a* Court of Appeal shall be constituted in both Amman and Jerusalem.'[129] Article 3 of the Regulation provided that the Amman Appeal Court would deal with decisions issued by the *shari`a* courts in the East Bank and the one in Jerusalem with those from the West Bank. The Regulation thus provided a statutory basis for a situation that had prevailed in practice since the 1967 occupation.

The existence of two *Shari`a* Courts of Appeal brought about the possibility of conflicting appeal judgements for the two areas; the Regulation made no provision as to whether the rulings of one court should prevail in such circumstances, and it is to be assumed that each area would follow the rulings of the local appeal court. In practice, the collected Amman decisions were freely quoted in West Bank courts, together with decisions from the Jerusalem court.

One area where the two Appeal Courts can be seen to have taken contradictory stands and where the Jerusalem decision might be seen in light of the circumstances of occupation (despite denial of such influence by the Jerusalem judges) is that of compensation for arbitrary *talaq*. The provision for such compensation came post-occupation, introduced in the Jordanian Law of Personal Status of 1976 and thus in effect only for a matter of months before the separate jurisdictions of the two Appeal Courts were formalised in law. The key ruling issued by the Jerusalem Appeal Court in this matter originated in a 1984 case in the Ramallah first instance *shari`a* court when a woman submitted a claim for compensation for a *talaq* pronounced by her husband in 1983. The divorce, a second revocable *talaq*, became final

[128]This is also in accordance with Jordanian procedural law.

[129]Regulation no.20/1977, *Official Gazette* no.2695, 16 April 1977.

on the termination of her *`idda* without revocation of the *talaq*. Both the claimant and her ex-husband were residents of Beit `Anan, a village which had been within the jurisdiction of Jerusalem before 1967 but was transferred by the Israelis outside the annexed area to the jurisdiction of Ramallah. Thus, the residents of the village came under the Ramallah military and regular courts, and carried West Bank identity cards, but were subject to the Jerusalem *shari`a* court for personal status matters.

The ex-husband's lawyer sought dismissal of the woman's claim on the grounds that the man was resident within the *shar`i* jurisdiction of Jerusalem. He quoted Article 3(5) of the Jordanian Law of *Shar`i* Procedure to detail those claims that might be heard in any court without regard for the residence of the defendant: 'All courts have the right to assess maintenance [. . .] and to hear applications for custody, fees for suckling and accommodation.' These claims constitute an exception from the general rule laid down in the same article, that claims are to be heard in the *shari`a* court with jurisdiction over the area where the respondent lives; the exceptions do not include compensation. The *qadi* of Ramallah agreed that, technically, his court was not competent to hear the claim, which belonged in Jerusalem, but pointed out that if the claim were heard in Jerusalem, formal execution of any award that might be given would be impossible. He therefore held that the Ramallah court was able to hear the claim in order to avoid injury to the woman, 'in view of the circumstances of occupation and the impossibility of executing decisions of the Jerusalem *shari`a* court.' The Ramallah *qadi* went on to award the woman compensation and the ex-husband appealed. The *Shari`a* Court of Appeal in Jerusalem held that the Ramallah court was indeed competent to hear the compensation claim, but had taken the correct decision for the wrong reasoning: claims for compensation, said the Appeal Court, had the characteristics of maintenance awards and thus fell within the terms of the above-quoted article of the Law of *Shar`i* Procedure and, like maintenance claims, could be heard in any court.[130]

Besides the implications of treating compensation like maintenance, the Jerusalem Appeal Court with this decision established a principle entirely contrary to the one previously established by at least four appeal decisions in Amman on the same subject and dating back to 1978. These state:

[130]Text in Ra.App.1984:77–177–25.

> The *shari`a* court has no competence to consider a claim for compensation for arbitrary *talaq* if the respondent is not resident in its area of jurisdiction and the claim is defended on that basis.[131]

Obviously, had this principle by the Amman court been acted upon in Jerusalem, the Ramallah court would have been held not competent and the case transferred to the court of the husband's residence—Jerusalem, leaving execution of whatever award was made to the goodwill of the husband. The three Amman decisions establishing the Jordanian principle are published in the collected decisions of the Appeal Court; the contrary Jerusalem judgement can be seen as an example of consideration being made of the practical circumstances occasioned by the Israeli occupation in laying down principles for the West Bank. However, the text of the decision itself explicitly denies any such consideration. Whatever the Appeal Court's motivation, its reasoning amounts to a novel procedural interpretation of a question of substantive law.

The insistence of the Jerusalem court that its decision in the compensation case was not prompted by consideration of the circumstances of occupation was upheld shortly after the above case in another claim raised in Ramallah which ended up in the Appeal Court.[132] The residential circumstances of the parties involved led to a similar situation as that described above: while the woman was a resident of a refugee camp in the district of Bethlehem, the man was resident in an area in the *shar`i* jurisdiction of Jerusalem but according to the Israelis under Ramallah military and regular jurisdiction.

The woman was claiming her deferred dower after the termination of her *`idda* from a *talaq* in 1983. The ex-husband's lawyer defended the claim on the grounds that the Ramallah court was not competent to hear the claim, as dower was in the exclusive jurisdiction of the area of the respondent's residence—that is, in the *shar`i* system, Jerusalem. The woman's lawyer quoted two Appeal Court decisions to argue for consideration of the claim in Ramallah: the above Jerusalem precedent on compensation, and another case from the Amman Appeal Court which had established the principle that the first instance *shari`a* court in Amman could hear a claim

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[131]Al-`Arabi, 1984, 168, 20368/1978, 20404/1978 and 21669/1981. Dawud, 1999, I, 213, 22386/1981. The Amman rule was reaffirmed in 39465/1995—Dawud, 217.

[132]Ra.App.1985:101–9–8.

for *ta`a* (obedience) even though the defendant (the wife) was resident in Jerusalem 'because of the circumstances of occupation and the capture of the (West) Bank' which meant that the husband, not allowed by the Israelis to cross the bridge into the West Bank, was unable to present his claim in Jerusalem where the wife was resident.[133]

In the claim for deferred dower, the Ramallah *qadi* agreed with the arguments and precedents submitted by the woman's lawyer, rejected the man's defence, and held that the Ramallah court was competent to hear the claim,

> given that the present occupation has prevented the execution of the decisions of the Jerusalem *shari`a* court, which would cause injury to the claimant . . . and that the *shari`a* does not accept injury (to be caused by law) and that there are precedents for this decision . . .

Following the award of deferred dower to the woman, the husband's lawyer appealed in Jerusalem on his original grounds and this time the Jerusalem *Shari`a* Appeal Court agreed with the arguments of lack of competence. The court stated that the principle of the compensation decision could not be applied to the present case, as deferred dower was not comparable with maintenance and had none of its characteristics: unlike compensation, it was not calculated in terms of maintenance, nor was it paid in installments. The court also declared that the Amman principle in the *ta`a* case was not applicable to the circumstances of the present case as there was no physical obstacle preventing the wife from submitting her claim in Jerusalem, where the husband was resident. The decision did not discuss the obstacles posed by the occupation, which would prevent the wife obtaining formal execution of her award from the *shari`a* court of first instance in Jerusalem.

The two cases in the Jerusalem Court of Appeal discussed above thus involved the same arguments by both sets of lawyers, with the Court accepting the appeal in the dower case and rejecting it in the case of compen-

[133]Amman *Shari`a* Appeal Court decision no.17578/1973; the decision is not published, but two decisions stating the rule to which it constitutes the exception are published in al-`Arabi, 1973, 161, 13035/1963 and 13331/1964: 'The *shari`a* court is not competent to hear a claim of *ta`a* if the wife is not resident within the area of its jurisdiction and the claim is defended on this basis . . .'

sation by virtue of an original interpretation of the nature of compensation. As noted above, the compensation case is something of an exception in that it constitutes a contrary position to that taken in Amman: but a proper assessment of all the ways in which the Jerusalem Appeal Court did or did not adapt its rulings to take account of the occupation would require a systematic study of all the rulings made there after 1967.

2.5.4 *Shari`a* Courts Outside East Jerusalem

In terms of the laws applied, the *shari`a* system in the West Bank stood as an exception to the regular courts, where all Jordanian laws in force were frozen in their pre-occupation state, and where the only post-1967 legislation applicable was the huge body of Israeli military orders. The residents of the West Bank were thus deprived of the benefits of modifications to Jordanian legislation and of new legislation introduced after the occupation, including the 1976 Jordanian Civil Code, which repealed large parts of the nineteenth century Ottoman Majalla. However, the same year, 1976, saw the promulgation in Amman of the Jordanian Law of Personal Status, replacing the Jordanian Law of Family Rights of 1951. The JLPS was applied in the West Bank *shari`a* courts as a matter of course. The same applied to other laws, modifications and regulations in the *shar`i* system promulgated in Jordan after 1967, including the Law of Establishment of *Shari`a* Courts of 1972 (replacing the original 1950 version) and its more recent amendments; two Laws of 1980 amending the Law of *Shar`i* Procedure 1959; a 1979 modification to the 1952 *Shar`i* Advocates' Law; and of course the 1977 *Shari`a* Appeal Courts Regulation.

However, the *shari`a* courts in the West Bank were obviously faced with challenges arising from the social and economic effects of the occupation on those under their jurisdiction. One example is the number of persons who are classed, for purposes of a *shari`a* court hearing, as 'of unknown whereabouts'. Under the Law of *Shar`i* Procedure, in the normal process of notification for a court session, the relevant papers would be sent to the *shari`a* court with jurisdiction in the area where the respondent to be notified is resident;[134] if the person is believed to be in the locality, the no-

[134]Article 18, Law of *Shar`i* Procedure 1959.

tice may be displayed in the court building and in the last known place of residence or work. Other lawful methods include sending the notification to the governmental department or company where the person is employed, or to the prison governor if the person is in prison. After 1967, however, in the West Bank, direct liaison and therefore formal communications with Jordan were obstructed by the fact of the occupation: anybody physically outside the West Bank was for notification purposes 'of unknown whereabouts'. This included anybody living in Jordan; in Israel, since there was no liaison with the *shari`a* courts in Israel; in the Gaza Strip, unless the *qadi* there responded to a personal letter from a West Bank *qadi* (thus avoiding any liaison with the Israeli authorities administering the *shari`a* courts in the Strip); and, it seems, anybody held in an Israeli prison in the West Bank on a 'security' charge, since this would involve going through the military authorities. In 1980, a modification to the Law of *Shar`i* Procedure added the following clause:

> if the person [to be notified] is resident outside the Kingdom and the court is satisfied that notification is not possible through the appropriate official parties, then the court may carry out notification by publication in a local newspaper.[135]

Finally, another effect of the occupation lay in the fact that the West Bank *shari`a* courts no longer transferred the files of those in violation of provisions of family law to the criminal courts for prosecution. The Jordanian Penal Code of 1960 sets penalties for certain offences arising from family law, such as non-registration of a *talaq* pronounced out of court, or involvement in the marriage of an under-age woman. Before the occupation, if such an offence came to light during proceedings in the *shari`a* court, the court would transfer the papers of the case to the regular court system in order for a criminal prosecution to take place if appropriate. However, while the regular courts were under the administration of the Israeli military authorities, the non-liaison policy maintained by the *shari`a* courts meant that this official process was suspended. It is not clear how far this may have affected the intended deterrent effect of the penal legislation.[136]

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[135]Law no.10/1980, *Official Gazette* no.2928, 3 May 1980, Article 23(3).

[136]Thus, for example, in Article 101 of the JLPS, it is provided that a husband who

2.5.4 Beyond the Code

December 1987 saw the beginning of the *intifada*, the uprising in the Occupied Palestinian Territories, which had a profound effect on the community. Amongst other direct effects, women were widely mobilised into political and practical action by, *inter alia*, the detention of massive numbers of the male population and the need to create workable socio-economic and political structures in the face of the reprisals, repression and widescale collective penalties imposed by the military authorities.[137] Some of these effects were felt in areas directly related to Islamic family law: Warnock reports that dower was 'increasingly being seen as a burdensome custom and incompatible with belief in the equality of women', so that a reduction in levels of dower could be seen as a political act as well as a response to the severely straitened economic situation in the territories.[138] The extent to which such patterns actually affected gender relations within Palestinian society and might be sustained post-*intifada*, and indeed post-independence, is a matter of quite immediate significance, as will be considered at the end of this study. The work of the *shari`a* courts was also directly affected by the uprising: in particular, the first few years saw a sharp drop in the number of

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divorces his wife out of court must register the *talaq* in the *shari`a* court within fifteen days, or be liable to the penalty stipulated in the Criminal Code for this offence. This is not only for administrative reasons, but also to ensure that the wife is informed of the incidence of the *talaq* within a reasonable amount of time. The Jordanian Criminal Code of 1960 lays down in Article 281 a prison sentence of up to one month or a fine for failure to register a *talaq* within the specified time limit. Under normal circumstances, a husband coming to acknowledge an out-of-court *talaq* after the specified fifteen days would be informed of his offence and the papers would be transferred to the regular courts in contemplation of prosecution, while the *talaq* would be duly registered and would be valid. However, during the direct Israeli occupation of the West Bank, the *shari`a* courts would not transfer the papers to the regular system.

[137]See in general Warnock, 1990; Hiltermann, 1991; Giacaman and Johnson, 1990; Abdo, 1991 and 1994; Kuttab, 1993.

[138]Warnock, 1990, 63. Reduction in dower levels was also reported in *al-Quds*, 12 December 1988. The article also noted a tendency towards earlier marriage and a smaller age difference between the spouses—presumably at least partly because the reduced financial commitments involved meant that men could marry younger but also, as suggested in the article, encouraged by the fact that so many of the youth were obliged to stay home due to the closure of all schools and institutions of education in the first year of the uprising and for several months thereafter. The Palestinian universities remained closed for several years.

claims filed at court, perhaps prompted partly by a reluctance to initiate litigation under such circumstances (a sense of 'priorities') and partly by the fact that the execution of rulings from the courts was subjected to severe disruption,[139] as indeed was the work of the courts and society at large.

In July 1988, not yet a year into the uprising, King Hussein of Jordan announced the formal severance of administrative ties between Jordan and the West Bank.[140] Enabling legislation followed: on 7 August 1988, Regulation no.28 dissolved all Jordanian governmental departments and institutions in the West Bank, with the explicit exception of the Ministry of *Awqaf* and Islamic Affairs and the Department of the *Qadi al-Quda*, the latter being the department administering the *shari`a* courts.[141] The Executive Committee of the Palestine National Council subsequently issued a decision declaring the Palestine National Council to be the Palestinian legislative authority; all laws and orders in force until the date of Jordan's severance of ties were to remain in force until repealed or amended by that legislative authority.[142] In November, the nineteenth session of the Palestine National Council, meeting in Algiers, issued the Declaration of Independence of the State of Palestine.[143]

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[139]The *qadi* of Ramallah very kindly provided the following figures of all claims filed in Ramallah court during the years 1985–1989, together with the figures for Nablus and Tulkarim courts:

year	Ramallah	Nablus	Tulkarim
1985	460	642	283
1986	451	645	264
1987	466	558	305
1988	288	320	185
1989	263	337	207

[140]The text of King Hussein's statement is reproduced in *IV Palestine Yearbook of International Law*, 1987/1988, 297–300.

[141]Regulation no.28/1988 Repealing the Governmental Apparatus in the West Bank, *Official Gazette* no.3565, 16 August 1988. Text of decision reproduced in al-`Abadi, 1998, 38–39. According to al-`Abadi, 1998, 37 (at the time of writing the Minister of *Awqaf* and Islamic Affairs and holy places in Jordan), the decision was taken in order to give the opportunity to the PLO to realise its national rights (a reference to the Rabat summit of 1974) while retaining supervision over al-Aqsa and other *waqf* sites and the *shari`a* courts in the West Bank due to their significance to the Muslim world.

[142]Decision of 22 August 1988. Reproduced in *Al-Ittihad*, 24 August 1988.

[143]This was on 15 November 1988. A previous Declaration of Independence for the State of Palestine had been issued on 1 October 1948 by the National Council in

On the ground, these developments were an important part of the lead-up to the bilateral peace negotiations that began in Madrid in 1991 and resulted in September 1993 with the White House Lawn handshake between Yasser Arafat and Yitzhak Rabin formally launching the 'interim' or 'transitional' phase of the Oslo peace process. In May 1994, the signing of the Israel-PLO Gaza-Jericho Agreement and entry of PLO forces paved the way for Yasser Arafat's triumphal return to Gaza to head the Palestinian National Authority (PNA), and for the incremental transfer from the Israeli occupation authorities to the PNA a range of civil functions and responsibilities including administration of the regular (*nizamiyya*) and *shari`a* court system and the Execution Offices in the territorial areas submitted to their jurisdiction by this and the subsequent Interim Agreement.[144]

2.6 THE *SHARI`A* COURT SYSTEM AND THE PALESTINIAN AUTHORITY

On 20 May 1994, Yasser Arafat issued a decree from Tunis (where the PLO had been headquartered since its exit from Beirut in the summer of 1982) ordering that 'all regular, *shari`a* and sectarian courts, at their respective levels, shall continue their functions in accordance with the laws and regulations that are in force' and confirming existing judges in their positions.[145] Also from Tunis, Arafat appointed Shaykh Muhammad Abu Sardane as

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Gaza. Text of the 1988 Declaration in IV *Palestine Yearbook of International Law*, 1987/1988, 1294–1296; and see Shlaim, 1990.

[144]The PLO-Israel Agreement on the Gaza Strip and the Jericho Area was signed in Cairo on 4 May 1994, superseded the following year by the Interim Agreement on the West Bank and Gaza Strip signed on 28 September 1995. The Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 is sometimes referred to as the Oslo I Agreement, while the Interim Agreement is Oslo II. For a rigorous and critical examination of the legal terms and implications of these agreements, see Shehadeh, 1997.

[145]It also ordered that 'all laws, regulations and orders that were in force prior to June 5, 1967 in the Palestinian territories (the West Bank and Gaza) shall remain valid until they are unified.' Published in *Al-Quds* 24 May 1994, reproduced in *Palestine Yearbook of International Law* 1992/1994. Shehadeh, 1997, 149, notes that the decision 'was widely publicised in the local press and served the political purpose of deflecting criticism that the Declaration of Principles had confirmed all the military legislation Israel had passed during its 27 years of occupation'. See also al-Qasem, 1992–1994, 192.

Wakil (junior minister, or under-secretary of state) to the Minister of Justice within the Palestinian Authority for the affairs of the *shar`i* judiciary and *ifta*.[146] Arriving in the Gaza Strip in August to take up his position, Shaykh Muhammad Abu Sardane set about upgrading the *shar`i* system both quantitatively—according to his own claims doubling the number of employees in the *shar`i* system in the first ten months—and qualitatively, with requirements for training and promotion involving academic and professional qualifications.[147] He cancelled the stamps used during the Israeli occupation in the *shari`a* courts of Gaza and replaced them with stamps bearing the standard of the PNA.[148] He directed the design and production of over two dozen standard document forms for use in the *shari`a* courts of both the West Bank and Gaza, including those on which are registered deeds (*hujaj*) of *talaq*, increase or decrease in dower, *khul`* divorce, revocation of *talaq*, freedom from impediments (to marry) and others.[149] He supported a petition from the people of Bani Suhaila in the Gaza Strip to open a *shari`a* court there, a petition which was granted by Arafat and the court duly opened.[150]

In the West Bank, however, the affairs of the Palestinian *shar`i* judiciary did not progress so smoothly. Relations between the PNA and Jordan were increasingly strained. Less than 24 hours after the 1993 Israel-Palestinian Declaration of Principles was signed at the White House, Jordan and Israel had signed a Common Agenda, followed in July 1994 by the Washington Declaration signed between King Hussein and Israeli Prime Minister Yitzhak Rabin, declaring an end to the state of war that had existed between

[146]Decision no.17 of 6 May 1994 appointing Abu Sardane as *Wakil* to the Ministry of Justice for *Shari`a* courts: Abu Sardane, n.d., 93 and 42. Abu Sardane noted that when he arrived in the Occupied Palestinian Territories there was no 'Council of *Ifta*' and so he sought to 'gather together qualified persons to sit on such a Council in order to deliver *fatwas* on matters affecting the Muslim population.' Abu Sardane, n.d. 248; *Al-Hayat al-Jadida*, 26 January 1996.

[147]Abu Sardane, n.d., 247; *al-Nahar*, 11 July 1995.

[148]Decision no.2 of *Wakil* Muhammad Abu Sardane, reproduced in Abu Sardane, n.d., 57.

[149]Abu Sardane, n.d., 248 and 83.

[150]Decision (un-numbered) of 1995 by Yasser Arafat as President of the Palestinian Authority and chairman of the PLO, and the Bani Suhaila petition for the court, opened on 16 April 1995, reproduced in Abu Sardane, n.d., 164 and 162–163 respectively.

their two countries for 46 years. The Washington Declaration included a paragraph emphasising that:

> Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim Holy Shrines in Jerusalem. When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines . . .[151]

Palestinian sensitivities over the status of Jerusalem were inflamed by the implication that Jordan might be involved at Israel's insistence in the 'final status negotiations' in regard to the future status of the city, the east side of which the Palestinian side had always insisted was to be the capital of the future Palestinian state. Jordanian officials protested in defence of their 'traditional role' in safeguarding Muslim religious sites in the city; King Hussein was quoted as saying that 'Palestine is for its people. However, the holy sites are for the Islamic nation as a whole' and as being embittered at the attitude taken towards Jordan's historic role.[152] Figures were cited indicating the extent of the financial investment that Jordan had made in this special role since 1948.[153] The Council of the Arab League insisted that Jerusalem should be under Palestinian sovereignty,[154] presaging the disrup-

[151]Reproduced in VIII *Palestine Yearbook of International Law* 1994–1995, 277–279. The Common Agenda is reproduced at 275–276. The Treaty of Peace between Jordan and Israel, signed in Wadi Araba in the south of Jordan in the presence of a wide array of world dignitaries on 26 October 1994, included the identical paragraph regarding Jordan's special role (Article 9, see 290).

[152]*Palestine Report*, 7 August 1994; see also *al-Nahar* 22 July 1994, quoting King Hussein as saying that 'sovereignty over Jerusalem should be for God alone,' and *al-Nahar* 24 September 1994.

[153]For example, *Palestine Report*, 25 September 1994 quotes the *Waqf* Department's Director of al-Aqsa mosque as stating that over the period 1953–1993, Jordan spent $485 million in social and religious services in the West Bank, that over half the *Waqf*'s budget goes to the West Bank, that it employs 2500 persons in the West Bank and in East Jerusalem runs 35 mosques and 300 dunums of Muslim graveyards. Al-`Abadi, 1998, 42, similarly claims that in 1994 of a fifteen million dinar budget, 7,632,000 dinars were spent by the *Waqf* on the departments working in Jerusalem and the rest of the West Bank.

[154]Final statement of the Cairo meeting of the Council of the Arab League at foreign minister level. *Al-Quds*, 16 September 1994.

tion of the Organisation of Islamic Conference summit in Casablanca at the end of the year, which failed to agree to Jordan's request to include in a Jerusalem resolution a recognition of Jordan's role in administering the Islamic holy sites.[155] Jordan's position was that it would continue to administer the sites until the final status talks were over, when it would be able to hand them over to Palestinian control.[156]

In the meantime, in September, as rumours began to circulate of the content of the Israel-Jordan peace treaty including the identical reference to Jordan's 'special role' in the Islamic holy places in Jerusalem, Jordan announced that it would be cutting administrative ties with the *shari`a* courts and the *Waqf* Department agencies in the West Bank as of 1 October, with the exception of those in East Jerusalem.[157] For its part the PNA's Council of Ministers announced its decision that the PNA would take over responsibility for the employees of the *waqf* and the *shari`a* courts in the West Bank as of that date.[158] On the due date, the Jordanian-appointed Acting *Qadi al-Quda* in Jerusalem asked the *qadis* of the *shari`a* courts elsewhere in the West Bank to return to his care their Jordanian-issued seals, since their link with the Jordanian *Qadi al-Quda*'s Department had now been severed. Shaykh Abu Sardane instructed all the *qadis* to continue work as normal, although clarifying that the signature of the *qadi* on the document would render it valid during the period the court system was awaiting delivery of new seals and stamps ordered by the PNA.[159]

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[155]Seventh summit of the OIC; *al-Quds*, 14 December 1994. The final statement of the summit, taken after King Hussein had left apparently in protest at the rejection of Jordan's proposed amendment, affirmed support for the PLO in having all authorities transferred to it in the Occupied Territories including Jerusalem. However, it remained the first time in the 25–year history of the Organisation of Islamic Conference that the resolution on Jerusalem was taken without consensus due to Jordan's reservations. *Al-Quds*, 16 December 1994.

[156]See for example al-`Abadi, 1998, 42; and interview with Jordanian Prime Minister `Abdel Salam Majali in *al-Nahar*, 10 November 1994.

[157]This decision appears to have been taken on 27 September 1994, although some newspaper reports refer to it as originally undated.

[158]Reproduced in Abu Sardane, n.d., 69.

[159]*Al-Quds*, 3 October 1994; Abu Sardane, n.d., 234–235. Earlier reports (*al-Quds*, 2 October 1994) stated that Abu Sardane had ordered the *shari`a* courts not to surrender the seals.

On the morning of 2nd October Abu Sardane went to Jerusalem to meet with the acting *Qadi al-Quda* and head of the *Shari`a* Appeal Court, Shaykh Abdin, to discuss arrangements concerning the *Shari`a* Appeal Court and in particular the possibilities of this court continuing, even under Jordanian supervision, to hear appeals from the *shari`a* courts in the rest of the West Bank. It was clear that a political decision would be needed to resolve this issue and, in memoranda that followed from Shaykh Abu Sardane to Yasser Arafat and to the Jordanian Government, the Palestinians formally proposed that the existing connection be maintained.[160] More precisely, the suggestion was that the Jordanian government mandate the head of the *Shari`a* Appeal Court and its members to work in the *shar`i* system of the PNA in the West Bank until the political future of Jerusalem was determined, to hear appeals from the West Bank *shari`a* courts. Although this was not to be agreed, one step forward was the agreement by the Jordanian Foreign Ministry to verify all documents referred to it after verification by the embassy of the state of Palestine in Amman, avoiding the need for verification of the West Bank and Gaza Strip documents by the Jordanian appointees in Jerusalem, as had been proposed in the memorandum.[161]

At the same time, a meeting of the *shar`i* judges produced a petition to Yasser Arafat requesting the establishment of the post of *Qadi al-Quda* in the PNA for the West Bank and Gaza Strip along with the continuation of the connection with the *Shari`a* Appeal Court in Jerusalem.[162] Abu Sardane's position was quickly upgraded to *Qadi al-Quda* of the *shari`a* courts, with the rank of Minister, independent from the Ministry of Justice and directly answering to the President.[163] As discussions on the future arrange-

[160]The memoranda pointed out that the Israeli occupation authorities would not allow the PNA to establish its own *Shari`a* Appeal Court in Jerusalem and that in any case this would constitute duplication, while to establish a court outside Jerusalem would constitute a concession of a Palestinian political right. Abu Sardane, n.d., 68, reports his memorandum to Arafat on 8 October 1994 and to Jordan on 18 October 1994.

[161]This proposal had been made in the cover letter, reproduced in Abu Sardane, n.d., 70.

[162]Meeting on 3 October 1994 in Nablus; the judges also sought the confirmation of the appointments of all *shari`a* court employees, with maintenance of all years of pensionable service and regard for the independence of the *shar`i* judiciary. *Al-Quds*, 4 October 1994. Petition reproduced in Abu Sardane, n.d., 91.

[163]Decision no.16 of 1994, Gaza 18 October 1994; reproduced in Abu Sardane, n.d., 92. In Jordan, the Department of the *Qadi al-Quda* is governed by Regulation no.18

ments for the *shari`a* courts continued, the Jordanian-appointed *Mufti* of Jerusalem died.[164] Within a week, Yasser Arafat had appointed Shaykh Ekrameh Sabri as *Mufti* of Jerusalem and the Palestinian lands, while Jordan extended the mandate of Shaykh Abdin, Acting *Qadi al-Quda*, to be *Mufti* as well.[165] For a while the city had two *Muftis* ostensibly doing the same job; but by the spring of 1995, the Jordanian appointee had retired and was replaced by a Jordanian-appointed 'deputy secretary general for Jerusalem affairs.'[166]

A compromise had also been forced on the issue of the *Shari`a* Court of Appeal; with the Jordanians continuing to decline to accept the arrangement proposed by the Palestinians, and cases building up in the West Bank first instance *shari`a* courts, Yasser Arafat issued a decision on 2nd January 1995 establishing a *Shari`a* Court of Appeal in the *shar`i* judicial system of the PNA. The court was to have its permanent seat in Jerusalem, while provision was made for it to convene elsewhere.[167] In practice, as of the summer of 2000, the Palestinian court sat in Nablus to hear appeals from all the West Bank first instance *shari`a* courts except Jerusalem. In Jerusalem, the first instance court heard cases and registered deeds from East Jerusalem's

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of 1993, Article 3 of which provides that 'the *Qadi al-Quda* heads the Department and exercises the functions of a Minister in the administrative affairs of the Department, and is linked to the Prime Minister.'

[164]Shaykh Sulaiman `Ali al-Ja`abari, who had been appointed on 20 February 1993, died on 10 January 1994. *Al-Quds*, 12 October 1994.

[165]*Al-Quds*, 17 October 1994.

[166]One report, quoting an article in the Israeli newspaper *Ha'aretz*, stated that Shaykh Abdin was evicted from his office by agents of the Palestinian Preventative Security force (not permitted under the Interim Agreement to operate in Jerusalem which fell outside PA jurisdiction) in favour of the Palestinian-appointed *Mufti: al-Quds al-Dauli*, 28 June 1999. At the end of January 1995, Abu Sardane announced the start of Ramadan on the sighting of the new moon being reported to the office of the *Mufti* of Jerusalem (Shaykh Ekrameh Sabri)—Palestinians therefore began the fast the next day, as did Saudi Arabia, while Palestine's more immediate neighbours (Syria, Jordan, Egypt and Lebanon) started the day after, the moon not having been sighted there. In previous years, the West Bank had waited for Jordan to announce the sighting, and Gazans had followed Egypt's timing. Abu Sardane, n.d., 142; *Palestine Report* 5 February 1995.

[167]Decision no.6, 2 January 1995; Abu Sardane, n.d., 118, reproduces his own letter to President Arafat seeking the creation of this court in view of the need to protect the interests of the population and the fact that Jordan had not yet replied to the Palestinian proposal.

Muslims, as before, while the *Shari`a* Court of Appeal still situated there heard appeals only from that one court, both still being administered by the Jordanian *Qadi al-Quda*.

The arrangements for execution of judgements reveal the continuing Palestinian claims over the *shari`a* court of first instance in Jerusalem. Appeal decisions from the PNA regular Court of Appeal (sitting in Ramallah) have held rulings from *shari`a* courts in Jordan and from the Israeli *shari`a* court of first instance in Jerusalem to be 'foreign judgements' coming under the terms of Law on the Execution of Foreign Judgements 1952, issued by the Jordanians and applied in the West Bank, which requires such rulings to be processed for implementation through the regular court system.[168] In the case of the Israeli-administered Jerusalem court, the Court of Appeal has held that such rulings 'at the current stage fall outside the competence of the [PNA] Execution Department.'[169] Similarly, in regard to Jordanian courts, the Court has held that a decision issued by a *shari`a* court in Amman 'has been issued by a court outside the territorial jurisdiction of Palestinian land, and is consequently considered a foreign judgement' which was therefore outside the competence of the PNA Execution Department 'before the measures set out in the said law [of Foreign Judgements] have been followed'.[170] This implies that decisions from Jordan may be properly processed and implemented as foreign judgements, but those issued from the Israeli *shari`a* court in Jerusalem may not. By contrast, rulings of the Jordanian-administered *shari`a* court in Jerusalem are routinely executed by the PNA execution offices in the same manner as they execute rulings from the PNA-administered *shari`a* courts.[171]

[168]Law no.8 of 1952, Articles 3 and 4; Bakri, 2000, 37.

[169]Appeal Decision 521/1996; Bakri, 2000, 37, annexing this decision.

[170]Appeal Decisions 451/1996 and 620/1996; Bakri, 2000, 37–38, annexing these decisions.

[171]Bakri, 2000, 37.

CHAPTER 3

Getting Married: The Who and How of the Contract

3.1 THE CONTRACT

Getting married is something nearly all Muslims in the West Bank do at least once in their lives. Those who never marry are a tiny proportion of the population, and some 10.5% of men and 4% of women marry more than once.[1] The severe dislocation and disruptions to Palestinian society over the course of the twentieth century, and the substantial changes in the socio-economic determinants affecting 'who marries whom and why', as Rema Hammami puts it in the FAFO report,[2] appear to have impacted the social rules for organizing marriage rather than forcing change in the legal rules, which have accommodated these changes more or less within the existing *shari`a*-based framework.[3] In society, developments in educational levels for women and

[1]PCBS, 1998, 23. The figures for marrying more than once differ between the West Bank (men 9% and women 3%) and the Gaza Strip (men 13% and women 5%).

[2]Hammami, 1993, 285.

[3]The commentaries on the law spend considerable time discussing matters reviewed in the traditional *fiqh* works but arguably of rather less immediate relevance these days, such as what parts of his fiancée a man might legitimately look at before concluding the contract of marriage, and whether she has to be aware that he is looking. Samara, 1987, 25; Sirtawi, 1981, 24–26.

increased social mobility, along with the existence of fora such as the Palestinian universities and student movements are identified as providing the context for the development of individually-negotiated relationships, while elsewhere in Palestinian society 'the family continues to play an important role in organizing marital relations, and the exigencies of the entire family unit play a determinant role in the logic of marriage relationships.'[4]

The one real exception to the general conservatism of Jordanian law as applied in the West Bank courts in this area is the increasing of the legal age of capacity for marriage over the course of the twentieth century. While the provisions of the Jordanian Law of Personal Status (JLPS) governing the process of getting married are thus fairly standard, the selection, in some cases implicitly, of Shafi`i rules in some areas is interesting as it may indicate a recognition of the rules of that school coinciding more closely in some cases with existing practice among the population. The law also sometimes selects minority Hanafi opinions, and introduces the kind of administrative extensions necessary to regulate the affairs of the territorial state complete with overseas consular officials and so on.

This chapter deals with the process and persons involved in concluding the marriage contract under the terms of the JLPS and as reflected in the marriage contracts registered in the courts. The issue of the age of capacity for marriage is examined in light of changes both by Jordan and more recently by the Palestinian *Qadi al-Quda* in the Gaza Strip aimed at bringing law there into conformity with the law applying in the West Bank. In the area of guardianship in marriage, clear patterns emerge of custom dictating the use made of available legal rules; women as a rule do not act for themselves in the actual conclusion of the contract, although they may sign alongside their male representative (*wakil*) and they (or the court) almost invariably register the consent of the *wali* (marriage guardian) to their marriage even in cases where it is explicitly not required by law.

In the occupied West Bank, as elsewhere in the Middle East, a Muslim marriage is created by the conclusion of a contract between the spouses, either directly or by their duly appointed representatives. As defined in the JLPS, marriage is 'a contract between a man and a woman whom the *shari`a* permits him (to marry), in order to establish a family and to create

[4]Hammami, 1993, 286.

progeny between them.'[5] Although the contract is required to be recorded by court officials these days, the basis remains an oral offer and acceptance of marriage made in contractual terms. As soon as the contractual agreement is made, those rights and obligations that arise from the existence of the contract, regardless of consummation of the marriage, take effect, and a formal dissolution of some kind is needed if the union is to be ended. Similarly, before the formal contract is so concluded, no rights are conferred or obligations incurred.

This means that there is no effect in law of the state of pre-marital engagement, *khutba*, which is a normal part of the process leading up to marriage.[6] The JLPS states in Article 3 that:

> Marriage is not contracted by *khutba*, nor by the promise [of marriage], nor by the reading of the *fatiha*, nor by the receipt of anything by way of dower, nor by the acceptance of gifts.

Two claims in the case material from 1965 showed the courts putting this principle into practice under the equivalent terms of the JLFR; both claims were raised by women seeking the *qadi*'s intervention with men claiming to be engaged to them and seeking to prevent their marriage to another individual.[7] Mahmud Sirtawi and Muhammad Samara, authors of two commentaries published on the JLPS, devote substantial space to the process leading up to and the conditions involved in concluding the contract of marriage in Islamic law. Samara defines *khutba* as a man asking a woman in marriage; Sirtawi as the request by a man of a woman in marriage, or by a woman of a man, observing however that while jurists say that the latter

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[5]Ma`ruf, 1985, 4–5, observes a similarity between the definition of marriage in the Jordanian, Iraqi, Syrian and Algerian codes; she prefers the use of the term *mithaq* (usually translated as 'covenant') in the codes of Morocco and Libya.

[6]The 1987 draft text of the modified JLPS (Article 3 (a)) included a description of engagement as 'the request and promise of marriage as a preliminary step towards the contract.' The draft Explanatory Memorandum notes that the definition of *khutba* is intended to distinguish this pre-contractual agreement from the contract of marriage, 'in order to enable the *qadi* to deal with the facts before him'.

[7]JLFR Article 2: 'Marriage is not concluded by *khutba*.' Both claims were titled in the court records 'objection to marriage.' The only 'objection to marriage' specifically dealt with in the law is that of the *wali*, dealt with below.

procedure is permitted, it is not explicitly recommended. While the engagement of a couple does not create a contract, it is agreed that a man should not engage in marriage the fiancée of another man, due to the social friction that may arise.[8]

In addition, since the *khutba* is essentially a preparation for an expected marriage, jurists take a detailed interest in what may and may not occur during the engagement period, in terms of social conduct. Part of the reason for the *khutba*, assuming the couple have not had open social contact before, is for each to assess the other as a potential spouse, and both Sirtawi and Samara agree that the engaged couple can meet together provided this be in the presence of a *mahram*, a person within degrees of relationship to the woman that prohibit their marriage to her.[9] Most of this discussion, however, assumes extremely restricted social contact, rather than reflecting the broader range of social practice that can be seen in different areas and social classes in the West Bank today.[10]

The engagement not being binding, either party to it may withdraw at any time.[11] No legal liability is incurred, apart from the return of items given by the man to the woman towards the dower; the fiancé may recover the items he gave if they are still extant, for example jewellery, or their cash value if not, and amounts of cash must also be returned.[12] Neither the man nor the woman, however, can sue for breach of promise if the other party breaks off the engagement. Samara and Sirtawi consider the argument that

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[8]Samara, 1987, 24 and 27; Sirtawi, 1981, 21 and 23. As Samara says, this rule arises 'more out of politeness than from a legal prohibition.'

[9] Sirtawi, 1981, 21; Samara, 1987, 29.

[10]Samara acknowledges this variety when he laments the impact of 'Western influences and thoughts' that have led to engaged couples going out together without a *mahram*.

[11]JLPS Article 4.

[12]JLPS Article 65. The classical jurists agreed on the return of money paid by way of dower, and differed slightly as to the rules on the return of cash value or items not specifically given as dower; the JLPS takes Abu Hanifa's view on the rules of gift applying. Sirtawi, 1981, 29–30. Samara, 1987, 28–29, observes in this regard that local custom dictates that if the man breaks off the engagement the woman must return any goods she has bought as *jihaz* from the money he has advanced by way of dower, while if it is she who withdraws she may be required to return their value in cash. See el-`Alami, 1992, 18–19 on the Egyptian and Moroccan law on the return of gifts exchanged between the fiancés.

the woman should be able to seek compensation if she suffers distress by the man's withdrawal from the engagement, but both agree with the position taken by the Jordanian legislators in omitting any mention of compensation. Hanafi law does not grant compensation; Sirtawi notes that the classical jurists did not even discuss this question and Samara reminds his readers that changing social circumstances and attitudes, which might suggest the appropriateness of compensation, are not grounds on which to base a change in the law.[13]

Yet if no obligations arise in law before conclusion of the contract, custom does not sanction their establishment until after the wedding (*`urs*), the public celebration that traditionally involves large numbers of people and includes the *zifaf*, or wedding procession, when the bride is escorted to her husband's house.[14] Cohabitation is not sanctioned before the wedding. The conclusion of the contract is customarily termed *katab al-kitab* (the writing of the document) and those who have done this may be described as *katibin al-kitab* or as *khatibin* (engaged) as distinct from married. In *shar`i* terms, however, the couple are fully and legally married once the contract is concluded; rights and duties arise, and sexual intercourse is legal. One assumes that in the case of many of the substantial numbers of couples divorced before consummation of the contract, the *zifaf* never took place and the couple were viewed as engaged rather than married. Nevertheless, since the contract had been written, a divorce is necessary to separate them.[15]

The contract of marriage is carried out in the West Bank by a *ma'dhun*, a marriage registrar, on behalf of the *qadi*, often at the home of one of the parties (usually the bride) while a substantial number are concluded at the *shari`a* court.[16] The administrative regulations for the conclusion of the contract are supported by penal sanctions in the event of non-compliance; however, not registering the marriage in accordance with these regulations does not render the marriage void in *shar`i* terms. Registration seems to

[13] Sirtawi, 1981, 30–32; Samara, 1987, 30–31.

[14] According to Granqvist, 1934, 49, 'a wedding in Palestine is the ceremonial conveying of the bride from her father's house to her husband's house.'

[15] The records of the Nablus *shari`a* court in the early 1990s showed a total of 39% of all non-litigious divorces to have taken place before consummation, nearly all of them by *khul`* (*talaq muqbil ibra' `amm*): see Chapter Six, and Welchman, 1999, 150, chart 7.5.

[16] Ma`ruf, 1985, 9, notes that Iraqi and Libyan legislation require that the contract be concluded in court. Some support this as a means of reducing the potential for the bride to be pressured into giving consent: see below.

have first been made compulsory by the central Ottoman authorities as early as the sixteenth century, although the extent of compliance would be another question.[17] Tucker notes that in seventeenth and eighteenth century Syria and Palestine, 'the courts acted as a marriage registry' with people from a variety of social backgrounds entering their contracts into the records, placing 'marriage and its consequent rights and obligations squarely under the jurisdiction of the Islamic court.'[18] Jordanian law has not used the procedure of registration to deny legal remedy to unregistered marriages; provided the *shar`i* conditions are met in full, the marriage contract is valid and can be established in court even if criminal penalties are imposed for non-registration.

The *shar`i* conditions attached to the contract of marriage address every aspect of the process, divided traditionally into the 'pillars' of the contract and the conditions proper, which in Hanafi texts are classified as including conditions of conclusion (*al-in`iqad*), of validity (*al-sahha*), of implementation (*al-nafadh*) and of 'bindingness' (*al-luzum*).

3.1.1 Pillars of the Contract

For the Hanafis, the pillars of the contract are the *ijab* and the *qubul*, the formal declaration of marriage by the two spouses or their legal representatives which constitute the contract, as provided in the JLPS.[19] Samara defines the *ijab* as 'the words uttered by one of the two contractors first, indicating his or her desire to conclude a contract of marriage,' and the *qubul* as 'the words uttered second by the other contractor indicating agreement to the desire of the first in concluding the contract' — either party can begin the process, whether in person or through his or her *wakil*

[17]Imber, 1997, 165–166.

[18]Tucker, 1998, 71; she notes that in Damascus and Nablus, 'only a minority of the population appears to have bothered' to register their contracts, while the practice was more broadly established in Jerusalem. Compare Shaham, 1997, 63–67 on the Egyptian *qadis* supporting registration requirements issued in the 1920s. In Algeria, French law required Muslim judges to register all marriages in an effort to centralise administration and make its rule over colonial territories more efficient: see Lazreg, 1994, 88, and 104 on unregistered marriages during the colonial period.

[19]Article 14.

(representative).[20] There are strict rules as to the phrasing of the *ijab* and *qubul* and the way in which they are uttered. Article 15 of the JLPS provides that:

> The *ijab* and *qubul* shall be by explicit words such as *inkah* and *tazwij*, and for the persons incapable of [speech] by known sign.

It is usual to use the past tense in both parts of the contract, although it is permissible for one to be in the future or present tense and the other in the past.[21] The two root verbs stipulated for indicating marriage in the JLPS article were generally agreed upon among the classical jurists, but there were long discussions about the use of other words, including the Hanafi position that it was legitimate to use any words that indicate possession, and the debate over words such as 'sale' and 'deliver.' Samara prefers the Shafi`i and Hanbali views, which held that only the words *nikah* and *tazwij* can conclude a contract of marriage, and attributes Article 15 of the JLPS to this position. Both he and Sirtawi however would allow the colloquial verb *jawwaza* in the place of *zawwaja* so long as it gives the meaning of the *ijab* and *qubul*.[22]

The other major issue is that referred to directly in the JLPS, where one or both of the parties is unable to speak. The basis of the contract is still oral; if the parties can speak, the contract is concluded by the utterance of the *ijab* and *qubul*. The majority view held that if one party could not speak, the contract is concluded by a sign recognisable to and understood by all those attending the contract session; only some of the Hanafis allowed for the alternative of writing .[23]

Finally, if the *ijab* and *qubul* are constructed in such a way as to suspend the marriage on an unrealised condition (for example, I'll marry you if my business prospers) or defers it to a future date (for example, after three

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[20]Samara, 1987, 33. Compare el-`Alami, 1992, 20

[21]Sirtawi, 1981, 44; Samara, 1987, 34. Samara observes that the Hanafis allow the *ijab* to be an interrogative.

[22]Discussion in Samara, 1987, 33–35, and Sirtawi, 1981, 40–42. The classical jurists also discussed the conclusion of a contract of marriage by non-Arabic speakers, with the Shafi`is and Hanbalis holding that where possible, Arabic should be used, but that in all cases both parties to the contract and the witnesses must understand the words being spoken. Samara, 35–36; Sirtawi, 42–43.

[23] Samara, 1987, 42.

months), no contract is concluded. The presumption in the contract of marriage is that the effects arise immediately by the mere fact of its conclusion. Such phrases may constitute a promise to marry, or a form of *khutba* with no legal effect, but do not conclude marriage.[24]

3.1.2 Conditions of Conclusion

The conditions of conclusion are essentially related to the *ijab* and *qubul*. Firstly, they must agree in every respect; thus, any conditions stipulated in either the *ijab* or the *qubul* must be either repeated or explicitly accepted by the other party. The exception is where the husband includes a figure for the dower higher than that specified by the wife, with the woman stating for example 'I have married you for a dower of 1000 dinars' and the man responding 'I have married you for 2000 dinars'. The man is bound by the sum accepted in both *ijab* and *qubul*, that is, 1000 dinars. However, if the man were to specify a sum lower — thus for example, responding in this example with 'I have married you for 500 dinars' — then the *qubul* would be held not to agree with the *ijab*.[25]

The second 'condition of conclusion' is that the *ijab* and *qubul* must take place in one single 'session', without distraction from the matter at hand or interruption of the business of the contract.[26] Connected to this is the condition that nothing occurs that suggests withdrawal of the *ijab* before the utterance of the *qubul* — if withdrawal in any form occurs, no contract is concluded. Finally, each of the contracting parties must hear and understand the words of the other.[27]

3.1.3 Conditions of Validity

Three issues are included in the conditions of validity: the witnesses to the contract, the absence of temporary or permanent impediments to the mar-

[24]JLPS Article 18. Samara, 1987, 36. Compare the suspension of *talaq* on an unrealised condition, below Chapter Six.

[25]Samara, 1987, 51.

[26]See below, Chapter Six, with regard to 'sessions' of *talaq*.

[27] Subject of course to the rules regarding persons who cannot hear or speak.

riage of the partners; and the intention of permanence in the terms of the contract.

On the matter of witnesses, the JLPS takes the majority view in requiring the presence of witnesses[28] and tends to the Hanafi view on the characteristics required of those persons:

> Art.16: A requirement for the validity of the contract is the presence of two male witnesses or one male and two female witnesses, who are Muslims if the spouses are Muslims, and are sane and major, hearing the *ijab* and *qubul* and understanding the meaning thereof. The ascendants and descendants of the fiancé and fiancée may witness the contract.

While the classical schools agreed on the requirements of sanity and majority, allowing two women to witness along with a man was the Hanafi and majority Hanbali position.[29] There was also a discussion among the jurists as to the testimony of non-Muslim witnesses. Abu Hanifa and Abu Yusef held that if the woman is a non-Muslim, then the witnesses could be two non-Muslims; others disagreed. Samara, while supporting the view that marriage is concluded only by the testimony of Muslim witnesses, observes that implicitly the law appears to have taken the position of Abu Hanifa in allowing the testimony of non-Muslims if the wife is not herself a Muslim.[30]

The question of impediments to the marriage concerns whether the partners can legitimately be married to each other. The categories of prohi-

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[28]Samara, 1987, 53–55; Sirtawi, 1981, 96. Samara notes that the Malikis required witnesses as a condition to legalise consummation, but not for the creation of the contract. For the Malikis, the point is making the marriage public; if the witnesses see the marriage and then keep silent about it, the contract is voided.

[29]A contract cannot be concluded on the testimony of women alone. The Shafi`is held that the testimony of women, even when accompanied by that of men, did not conclude marriage. Sirtawi, 1981, 97; Samara, 1987, 56. Samara notes that while it might be appropriate to have a man and a woman, the texts hold a woman to be half a witness, so two are needed with one man in order to fulfill the *shar`i* conditions. On the specific issue of women's testimony, see Fadel, 1997.

[30]Samara, 1987, 57 and 59; Sirtawi, 1981, 99. The JLPS article does not deal with blind witnesses, whom the majority including the Hanafis permit to testify to a contract of marriage since the oral process can be heard and the voices distinguished by a blind person.

bitions are divided into permanent and temporary. If the woman is under a permanent prohibition of marriage to a certain man, she can never be married to him. If the prohibition is temporary, she may at some time become a lawful party to marriage with him, whether by reason of time (for example, the end of the *`idda* from her marriage to another man) or by her own personal status (for example being married to another man) or that of another woman (for example, her sister).

The permanent prohibitions arise from specified degrees of blood kinship (*qaraba* or *nasab*), relationship by marriage or 'affinity' (*musahira*), and foster-relationship created by suckling (or breastfeeding, *rada`*). The JLPS sets these out in Articles 24–26 in normal Hanafi fashion, although in some cases adopting the Hanafi position through omission rather than by positive ruling.[31] With regard to the permanent impediment caused by a relationship through suckling, the JLPS explicitly adopts Abu Hanifa's position which reduces the number of persons affected by the prohibition.[32]

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[31]For example, Article 25 on affinity does not deal with the question of whether a permanent prohibition is raised by the incidence of illegal intercourse, such as where a woman engages in illegal intercourse (*zina*) with an ascendant or descendant of the man, or a woman born as a result of such intercourse. While the majority, including the Hanafis, held that the impediment of affinity (*musahira*) was raised by the mere fact of intercourse, the Shafi`is held that only legal sexual relations could raise the legal impediment. Samara agrees with this position, finding the Shafi`i arguments the strongest, but notes that since the JLPS does not deal with it, the Hanafi position holds: Samara, 1987, 63; Sirtawi, 1981, 75. Sirtawi goes on to consider the various positions on whether the impediment is raised by a lustful touch of the woman by the man, or looking upon her with lust. Schacht, 1979, 268, considers the origins of the discussion. Article 24 of the *Kitab al-Ahkam* states that:

> A man is prohibited from marrying the descendants and ascendants of a woman with whom he engages in *zina*, and she may not marry his ascendants or descendants, but the latter are not prohibited from marrying her ascendants or descendants.

[32]The majority of the classical jurists prohibited women in exactly the same degrees of relationship created by breastfeeding as those in blood relationship. The exceptions made by the Hanafis arose from their ruling that the impediment is raised only for the child suckled rather than extending also to his/her siblings. Samara, 1987, 63–65; Sirtawi, 1981, 83. Article 377 of *Kitab al-Ahkam* sets out the exceptions. The previous Jordanian article on this subject, JLFR Article 15, was less detailed, stating simply that 'There is a permanent prohibition on the marriage of a woman and a man between whom there is a relationship of *rada`*'.

The classical jurists considered in detail the degree and nature of suckling that would raise the prohibition. Aspects considered in the discussions include during what period of the child's life the suckling had to occur; whether the milk had to be taken from the breast or also if it were taken from a bottle; whether the milk had to be produced as a result of pregnancy; and what amount of suckling gave rise to the impediment. The Hanafis held that if within the first two years of its life, the baby imbibed any quantity of milk, the impediment was raised;[33] since the JLPS does not deal with this question, this is the current position.[34]

Temporary prohibitions include the wife or *mu`tadda* (woman during the *`idda*, the mandatory waiting period following termination of marriage) of another man and various forms of unlawful conjunction. Article 31 of the JLPS provides that a man may not be married at one time to two women 'between whom there is an impediment of kinship or suckling such that if one of them were a man, she could not marry the other'. This impediment applies until after the end of the *`idda* of the man's current wife.[35] This means, for example, that a man cannot be married to two sisters at the same time, nor to a mother and daughter.[36] The other rule related to unlawful conjunction concerns numbers; a man is under a temporary prohibition from contracting any other woman in marriage so long as he has four wives or *mu`taddas*.[37] The final temporary impediment listed in the JLPS is that which applies to a man who has divorced his wife three separate times in three separate sessions and so has ended the marriage by the 'greater finality'; he is under a temporary prohibition from remarrying her

[33]*Kitab al-Ahkam* Article 375.

[34]The 1987 version of the draft amended JLPS proposed adding a clause adopting the position that the suckling had to take place on five or more separate occasions in order to raise the bar. The Explanatory Memorandum (point 6) argued for this Shafi`i and strongest Hanbali view because 'the reason for the prohibition of *rada`* is because the milk builds flesh and bones, and *rada`* can only have this effect if done at least for one whole day, that is not less than five times.'

[35]JLPS Article 30.

[36]Sirtawi and Samara differ on the extent of the implications of Article 31. Samara, 1987, 69, states that it is legal to conjoin in marriage a woman and her father's former wife, while Sirtawi 1981, 91, argues for the minority opinion, raising the impediment for a woman and the wife of her father or her son.

[37]JLPS Article 28.

until she has completed her *`idda* period from a subsequent consummated marriage to another man.[38]

As for the impediment caused by religion, a Muslim woman cannot marry any non-Muslim man, and a Muslim man cannot marry a non-Muslim woman who is not a *kitabiyya* — that is, a believer in one of the recognised monotheistic scripture-based religions. The term 'People of the Book' (*ahl al-kitab* or *kitabiyya*) is generally taken to include the Jewish and Christian communities and to exclude polytheists and idolaters; for the jurists, those of the Zoroastrian and Hindu faiths gave rise to discussion but were usually excluded. Sirtawi includes Buddhists and adds communists to the list of those women whom a Muslim man may not marry.[39] The prohibition so imposed is temporary because conversion to Islam for the man, or to Islam or another revealed religion for the woman, would remove the impediment. A proposal in 1998 by advocate Asma Khadr that the Palestinian legislature should simply omit any reference to the religion of the spouses seems, for the moment, to be an unlikely candidate for adoption in any imminent texts of a Palestinian personal status law.[40]

The third condition of validity, the intention of permanence of the contract, requires that the presumption of permanence not be in any way contradicted, for example by a time limit being stipulated for the marriage. In line with Hanafi law, the JLPS holds both *mut`a* marriage and temporary marriage to be irregular.[41]

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[38]JLPS Article 30.

[39]Sirtawi, 1981, 93–94, and Samara, 1987, 70.

[40]Khadr, 1998, 138. Her argument is that the text forbidding such marriages (primarily, Muslim women to non-Muslim men) does not impact on the incidence of such relationships, and while the law should not encourage such matches, omitting the requirement would be in line with human rights instruments especially on child rights.

[41]In Article 34(b). On the Twelver Shi`a institution of *mut`a* marriage, see Haeri, 1989. In regard to temporary marriage, the classical jurists made a difference between a man stating in the *ijab* or *qubul* that he has married the woman for one month, and a woman stipulating in the contract that the man shall divorce her after one month. The Hanbalis held no contract to be concluded in either case; Abu Hanifa and the more prominent of two views attributed to Shafi`i considered a condition that a divorce occur at a specified time to be a void condition which would be held of no effect, leaving the contract valid. Discussions on the legal points in Samara, 1987, 37–41; Sirtawi, 1981, 46–49; and Schacht, 1950, 266–267.

3.1.4 Conditions of Implementation

The conditions of implementation, or execution (*nafadh*), comprise the competence of the parties to act in and of themselves — that is, that they are sane and major — and their capacity to undertake an executable contract, in that neither is a *faduli* (uncommissioned agent).[42] The conditions of implementation require that the contract be concluded by the husband or his *wakil* on one side, and, on the other, either the wife's marriage guardian (*wali*) or his *wakil*, or according to the Hanafis, the wife herself.[43]

The rules on the competence of the parties undertaking the contract differ according to the views of the schools on, *inter alia*, the age of marriage and the role of the marriage guardian (*wali*). The *wakil* is the duly appointed representative of one of the parties with the capacity to undertake the contract, charged with undertaking the contract on that party's behalf. Thus, for the Shafi`is, the *wakil* for the wife's side of the contract would be representing the *wali* and would be appointed by him, since the woman cannot undertake the contract herself.[44] A view of the Hanafis, however, allows a woman to marry herself on her own authority, and to represent herself in the contract session; therefore for them, the *wakil* is appointed by the woman to represent her in the contract — or indeed, she may pronounce her side of the contract herself. The JLPS clearly took this Hanafi view in Article 14, stating that marriage is concluded by the *ijab* and the *qubul* of the two fiancés or their representatives.[45]

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[42]Sirtawi, 1981, 111; Samara, 1987, 92.

[43]See below on the *wali* in marriage. A *faduli* on the other hand undertakes the contract as an uncommissioned agent, leaving any contract undertaken non-executable until the consent of the spouse-to-be, or the guardian, has been given. The institution of *faduli* is absent in the JLPS, notably in Article 14, and it can probably be assumed to have lapsed: see Samara, 1987, 94 and Sirtawi, 1981, 57–58 and 111.

[44]Samara, 1987, 45.

[45]The Hanafis divide *wakala* in marriage into two types: restricted and absolute. If the mandate of the *wakil* is restricted, the original party is not bound to the contract concluded on his or her behalf if the *wakil* has exceeded this mandate. An absolute *wakala* would simply charge the *wakil* with concluding a marriage on behalf of the original party without specifying the identity of the party to the contract, or any particular attributes or dower; a minority of jurists did not permit this type of *wakala*. Sirtawi, 1981, 55; Samara, 1987, 46.

The majority of the classical jurists allowed one person to represent both parties and therefore to pronounce both the *ijab* and *qubul* to conclude the contract, for example where the *wakil* was either guardian of both parties or the appointed *wakil* of both. The JLPS, in Article 14, by using the dual form of *wakil* to indicate two representatives, appears to adopt the Shafi`i view that one person cannot undertake both *ijab* and *qubul*;[46] it also implicitly requires the *wali* to be appointed *wakil* to act on behalf of his female ward, rather than acting per se as *wali*.

Under the JLPS, then, two persons must directly undertake the contract; they can be the engaged couple in person, or either or both of them can be represented in the procedures of the contract session by a duly appointed *wakil*. The marriage contracts registered in the courts of the West Bank examined for this study illustrate the implementation of these rules: of the 857 contracts taken as a 10% sample, 840 showed the groom to have represented himself, while in 843 the bride was represented by her *wakil*, usually also identified as her guardian. At the same time, in most of the contracts in the case material, the woman herself appoints her *wakil* at the beginning of proceedings, sometimes signing the contract together with her *wakil* at the end.[47]

The few exceptions to the rule of women being represented by a *wakil* included foreign (mostly North American) women marrying on their own authority, and previously married Palestinian women, in some cases entering polygamous unions, who also did not always register the consent of a marriage guardian; in one even more unusual case a sixteen year old bride marrying for the first time represented herself in the contract session in the presence of her father, who attended to give his consent as her *wali*. Others included a woman whose *wali* was absent but had informed the court of his consent, and a woman whose guardian, her father, was charged as *wakil* for

[46]See discussion in Samara, 1987, 48–49, and Sirtawi, 1981, 56–58. Samara prefers the majority Hanafi view. Sirtawi cites Zufar of the Hanafis in support of the Shafi`i view.

[47]Exceptions in the 1985 case material included a bride of sixteen who was married in her absence to a man of 25 by her father, whose *wakala* to conclude the contract was established by witnesses. In the 1975 material, the woman, resident in Amman, sent to the court a document appointing a friend as her *wakil* (on a limited *wakala*) and her father sent a document affirming his consent to the marriage. Contrast Ali, 1995, 165 on current practice in Pakistan.

the groom. As for the men, their representation by a *wakil* usually occurred only when the groom was not able to be present at the contract session. These included several resident in Jordan, and some further afield. The contract document in these cases usually registered the receipt by the court of a document conferring a restricted *wakala* on the man's *wakil* drawn up by the *shari`a* court in the area of his residence. The one contract in the sample that differed from this pattern was concluded by a *wakil* for the woman, who was present, and by the husband on his own behalf accompanied by a named *wakil*, with the contract document adding an explanatory note that the presence of the *wakil* was due to the fact that the husband concluded the contract by signs rather than by speech.

In sum, the West Bank case material shows a pattern of behaviour that fits with the Shafi`i legal rules — and, it appears, local custom — not endorsing a woman to herself conclude the contract of marriage. In practice, the woman, whether previously married or not, appoints a *wakil* (usually her *wali*) to represent her in the *ijab* and *qubul*, while the man does it in person unless physically unable to do so. It may also be that women perceive and exploit the involvement of their guardian as *wakil* in the process in this manner as representing not the bride alone for the single performace of the act, but rather the support and strength of the woman's natal family vis-à-vis that of the husband's family, which custom perceives them as entering on marriage, emphasising and reinforcing the woman's weight and position in her new family.[48]

3.1.5 Conditions of Bindingness

Samara defines the conditions of bindingness (*luzum*) as:

> the conditions on which depend the continuation of the contract; neither spouse nor anyone else can prevent the contract taking effect, once all the conditions of conclusion, validity and implementation have been met, unless one of them has the right to do so because the contract is not binding.[49]

[48]I am indebted to students on the Gender Law and Development course at Birzeit University for enlightening discussions of this and other areas of law in April 1999.

[49]Samara, 1987, 112.

3.1.5 Beyond the Code

Three issues are usually discussed under this category: the 'equality' or 'suitability/adequacy' (*kafa'a*) of the bridegroom, the proper dower (*mahr al-mithl*) and the 'option of puberty' (*khiyar al-bulugh*). Under classical Hanafi law, the exercise of a veto or right of objection by the appropriate party based on any of these three principles could dissolve the marriage, so that the contract, if subject to those rules due to the circumstances in which it was concluded, remained non-binding until the right of objection or withdrawal either lapsed, was exercised or was waived.

The rules on the option of puberty are peculiar to the Hanafi school and arise directly from their distinct position on the mandate of the *wali* to marry off minor wards. The jurists from the other schools allowed only the father or grandfather to conclude a marriage for minor wards; the Hanafis allowed a *wali* in a further degree of relationship to do so, but made the contract non-binding. When the ward married as a minor by a *wali* other than his/her father or grandfather reached puberty, they had the 'option of puberty' — that is, the choice of withdrawing from the marriage.[50] However, since the marriage of minors is no longer permitted under the law, the option of puberty also does not arise as far as the law is concerned, and the JLPS does not deal with this part of Hanafi law.[51]

This is almost, but not quite, the case with the other two conditions of bindingness. The Hanafis built up an extensive doctrine on *kafa'a*.[52] The doctrine of *kafa'a* applies to the bridegroom only, on the explicit assumption that a man's status is not lowered by that of his wife, while a woman's position in society is gauged by that of her husband.[53] With marriage being seen as a social and familial rather than a purely individual arrangement, the doctrine of *kafa'a* was presented as a way for the bride's family to conserve the standing of their daughters and thereby the family itself. The quality of *kafa'a* was described as the right of the bride, and of the *wali*; if the bridegroom misrepresented his status to the bride and she later discovered

[50]See Sirtawi, 1981, 110 and Samara, 1987, 113.

[51]A person married below the legal age of marriage is able to seek dissolution on that basis — see below; and compare also Layish, 1975, 171.

[52]The Hanafi doctrine was taken up by Shafi`i and some Hanbali jurists. Ziadeh, 1957, 503–504, and Coulson 1964, 49, trace the history of the doctrine of *kafa'a* to origins in Kufan society.

[53]Samara, 1987, 120; Sirtawi, 1981, 102. Ziadeh, 1957, 509, cites such phrases as 'the lowliness of [a man's] bed does not annoy him.'

him not to have been her equal at the time of the contract, she held the right to seek dissolution of the marriage. Furthermore, if the woman married herself under certain circumstances to a man not her equal without the consent of her *wali*, the guardian had the right to seek dissolution, acting on behalf of the interests of the family as a whole.

According to the classical Hanafi doctrine, the factors on which the bridegroom's *kafa'a* was assessed included lineage (*nasab*), confession of Islam, freedom, piety, occupation and financial means.[54] The Ottoman Law of Family Rights maintained the classical rules to a large extent, requiring that the groom be 'equal to the woman in financial means, occupation and suchlike.'[55] In Egyptian cases from that time, Shaham finds that the consideration of occupation would only operate in cases where the gap was considerable.[56] The Jordanian legislators, first in the JLFR and then in the JLPS, kept a special chapter in the law entitled *kafa'a*, but substantially reduced the scope and effect of the doctrine, which is now constrained to financial terms. Article 20 of the JLPS provides that:

> It is a requirement of marriage that the man be the equal of the woman in means (*mal*); that is, that the husband be capable of [producing] the prompt dower and of [paying] the wife's maintenance . . .

Thus, in law at least, *kafa'a* now consists simply of the groom's ability to pay the prompt dower and the wife's maintenance.[57] Furthermore, Arti-

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[54]Here, confession to Islam refers to at what point the man or his family became Muslims, up to three generations. Thus, a man whose parents converted to Islam would not be the equal of a woman whose grandparents were Muslims. The same generation assessment applies to freedom from slavery. Full discussion of all the categories, and the variations between different jurists on the categories, occur in Samara, 1987, 114; Sirtawi, 1981,104–107; Ziadeh, 1957, 510–514; and the majority Hanafi view is given in *Kitab al-Ahkam* Articles 63–68. See also Siddiqui, 1996.

[55]OLFR Article 45. Compare al-Jundi, 1978, Vol.2, 872, principle no.9 from the Egyptian courts in 1929; lack of equality in profession and means, and a contract for less than a proper dower are reasons for dissolution of the contract.

[56]Shaham, 1997, 44; and see 48–49, and al-'Alami, 1992, 70–72 on the famous Egyptian case at the turn of the century when the marriage between Safiyya and Ali Yusef was dissolved by a Cairo judge on the basis of a petition by the bride's father on the grounds of Ali Yusef's lack of *kafa'a*.

[57] Samara, 1987, 117–118, is critical of consideration of such factors as lineage and profession, advocating evaluation only of religious piety. Similarly, an article in *al-Quds*

cle 20 stipulates that the *kafa'a* of the bridegroom is assessed at the time of the contract, so if it ceases thereafter, this cannot affect the marriage.[58] Thus, under the JLPS, provided that the groom is able at the time of the contract to provide adequate maintenance for his wife and to pay the prompt dower, the doctrine of *kafa'a* cannot affect the continuation of the contract.

However, should the groom in fact not be her equal under these restricted terms, the JLPS retains the option of dissolution in Article 23:

> On application, the *qadi* may dissolve the marriage by reason of lack of *kafa'a*, provided the wife has not conceived from the man. If she has become pregnant, the marriage may not be dissolved.

Here, the law has maintained the classical Hanafi remedy of dissolution, but constrained it with the minority Hanafi view that the option of dissolution on these grounds lapses after childbirth or pregnancy.[59] The option of dissolution may be exercised by the woman and her *wali*, or by the *wali* alone, if she married without his consent. The JLPS gives them both the right to seek dissolution in a case where the man misrepresented his status, or where they explicitly stipulated *kafa'a* as a condition, but not otherwise, and the possibility of dissolution is again constrained by the provision that it may not be sought if at the time of litigation the man is indeed the equal of the woman.[60]

In the letter of the law, then, the doctrine of *kafa'a* has been stripped of its class and social implications and technically is maintained to further protect the wife's financial rights against her husband (and the aspect of

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newspaper on 9 January 1987, by Imad Mustafa Sawalma, insisted that only piety and religion were to be considered in assessing the equality of the groom; the article criticised the custom of the *wali* in seeking grooms with good jobs, certain levels of accommodation and so on. Mheilan, 1986, 77, notes matter-of-factly that such considerations as *nasab* and profession no longer apply. Sirtawi, 1981, 107. Imber, 1997, 173, notes that in practice in the sixteenth century, the most important factor must have been a man's ability to pay the prompt dower and maintenance; the relatively few *fatwas* on this subject 'mostly look at balancing claims of Muslim piety and claims of wealth.'

[58]Compare *Kitab al-Ahkam*, Article 62.

[59]Sirtawi, 1981, 108.

[60]JLPS Article 21. This last constraint was not included in JLFR Article 25.

family standing involved in this).[61] *Kafa'a* is to be assessed at the time of the contract, and a subsequent decline in means has no effect; however, the wife can obtain deliverance of her dower and maintenance through the courts, or seek dissolution in the event of non-payment.[62] If, on the other hand, unbeknownst to the wife and her *wali*, the man was not capable of paying the dower and maintenance at the time of the contract, simply that fact in time does not give the wife an additional right to seek dissolution if his means increase rather than decrease, so if when she gets to court he is able to provide her with maintenance and pay the dower, she will have no remedy against him.

For the other schools, the doctrine of *kafa'a* only had effect in the case of misrepresentation of the groom's status, since they did not endorse a woman marrying without the consent of a guardian. The JLPS is not entirely clear on the requirement of the *wali*'s consent in a contract of marriage, as is discussed below. The last article in the Chapter of *Kafa'a*, however, indicates that there can be cases where a woman concludes a valid marriage without the consent of her *wali*. Such a marriage could theoretically become the subject of a subsequent plea for dissolution by the *wali*, on the grounds of the non-equality of the groom, as provided in Article 22:

> If the *bikr* (virgin) or *thayyib* (previously married woman) who has reached her eighteenth year denies having a *wali* and marries herself [to a man], and then a *wali* presents himself, then if she married herself to an equal, the contract stands, even if the dower is below the proper dower; but if she married herself to a non-equal, then the *wali* may petition the *qadi* for dissolution of the marriage.

In his article on the doctrine of *kafa'a*, written in the late 1950s, Ziadeh observes that it is not entirely a theoretical matter, citing some instances in

[61] Ziadeh, 1957, 571, notes in this regard:

> In general, it would s\t the doctrine of *kafa'a* has ceased to be of major importance in determining or reflecting social stratification in Muslim society. This does not mean, of course, that social stratification is non-existent or that it is on its way out. All it means is that a field once regulated by legal rules — because of the all-inclusive character of the law at the time — has gradually come to be governed by social rules and considerations.

[62] See below Chapter Seven on separation for non-payment of maintenance.

various countries where *kafa'a* has been invoked.[63] However, neither the case material examined in the West Bank nor the published collections of rulings from the *Shari`a* Court of Appeal in Amman give any mention of a case involving *kafa'a* either under the JLFR or the JLPS.

The 'proper dower' (*mahr al-mithl*) referred to in Article 22 brings in a third disputed condition of bindingness. The proper dower is defined in the JLPS in classical Hanafi fashion as the dower 'which is the dower of the wife and her peers from among her paternal relations' as opposed to the specified dower settled upon by the parties in the contract session.[64] The proper dower is in some ways a 'fall-back' dower: it falls due when a valid contract of marriage has no dower specified in it, or where the specification is irregular, or in the event of an irregular but consummated contract of marriage, if the proper dower is lower than the specified dower. The proper dower is assessed according to varying characteristics of the woman and her peers. While the JLPS has kept it for these cases, it is rarely needed, since irregular specification or lack of specification of dower is uncommon in an age when contracts of marriage are registered by court officials. The JLPS has furthermore explicitly adopted (in Article 22) the opposite opinion of the majority, rendering the proper dower not a condition for the bindingness of the contract.[65]

3.1.6 Types of Contract

The Hanafi jurists divide marriage contracts into four categories, according to the effects to which they give rise: valid (*sahih*), void (*batil*), irregular (*fasid*) and suspended (*mauquf*).[66] The effects of a valid contract, one which fulfills the requirements of the pillars and the conditions, include the rais-

[63]Ziadeh, 1957, 515.

[64]Article 44 JLPS.

[65]The jurists differed as to whether the *wali* had the right to object if the woman married herself for less than the proper dower. Abu Hanifa held that the *wali* could prevent the continuation of the marriage in these circumstances, since it affected not only that particular woman but all the women of the family; Sirtawi, 1981, 109. Samara, 1987, 113, does not discuss the position of the current law but merely includes it among the conditions of bindingness.

[66]Samara, 1987, 139.

ing of the prohibition of *musahira* (affinity) between those who become related by the marriage; the falling due of the dower and the payment of maintenance to the wife; the legalisation of sexual relations, the establishment of paternity and mutual inheritance entitlements.

The jurists of the different schools varied in their categorisation of non-valid contracts, both as to reason and as to effect.[67] Samara summarises the Hanafi distinction as being that a void contract is one that is lacking a condition of conclusion, while an irregular contract lacks a condition of validity.[68] The JLPS takes the approach of listing the conditions that cause a contract to fall into each category, and defines the distinction by effect only.

Thus, the JLPS lists contracts of marriage as void in the case of the marriage of a Muslim woman to a non-Muslim man; of a Muslim man to a non-Kitabiyya woman; and of a man to a woman who is under a permanent prohibition by reason of relationship by blood, affinity or *rada`*.[69] This is a more detailed list than that which had appeared in the parallel article of the JLFR which had *inter alia* omitted to classify contracts involving a couple under permanent prohibition by *rada`* or affinity. Sirtawi, while not referring to this omission in the JLFR, criticises the categorisation in Article 33(3) of the JLPS of a contract involving parties under a prohibition created by *rada`* as void and therefore giving rise to no effects at all even if consummation occurs. He notes that the classical jurists held such a contract to be irregular,[70] due to the many different opinions among the jurists as to the rules on *rada`*.[71] He further points out a grammatical slip; the clause

[67]Sirtawi, 1981, 119, notes that the Hanafi distinction between void and irregular contracts 'has often led students into confusion with regard to contracts of marriage and other transactions.' Anderson, 1951 ('JLFR', 195) refers to 'that most vexed of questions, among Hanafis, of irregular and void marriages.'

[68]Samara, 1987, 139–40. For a full treatment of the Hanafi position, see Anderson, 1950 ('Invalid and Void Marriages in Hanafi Law').

[69]Article 33 JLPS.

[70]Sirtawi, 1981, 124, prefers the term *batil mushtabah* (quasi-void) to *fasid* (irregular).

[71] In a case in the 1985 case material from Hebron, the court dissolved a marriage on the grounds of *rada`*, declaring the contract *fasid* rather than *batil*. The Appeal Court confirmed the ruling. The JLPS articles cited in the case record were Articles 26 (on the impediment of *rada`*), 42 (on the effects of a *fasid* marriage) and 43 (on the *qadi* sepa-

renders void contracts between a man and a woman in a prohibited relationship to him as set out in Articles 24, 25 and 26. Sirtawi points out that the Arabic phrase used here to indicate relationship, *dhat rahim mahram*, can refer only to blood kinship and therefore cannot properly be used to refer to the prohibitions created by relationships arising from *rada`* or affinity.[72] Although he does not refer to it, the *Shari`a* Appeal Court in Amman made a similar point in two decisions of 1980, when, despite a clarification in the Official Gazette, it held marriages concluded in contravention of the impediment of *rada`* to be irregular rather than void, as in the *Kitab al-Ahkam* and the OLFR; in both cases, the ruling was on claims made for dower after the dissolution of the marriage, and the ruling of the contract as irregular gave the woman the right to dower, which would not have fallen due in a void contract.[73] With regard to the effects of a void contract, Article 41 states:

> A void marriage, whether consummated or not, has no effect and therefore no rulings of a valid contract are established between the spouses, such as maintenance, paternity, *`idda*, the impediment of affinity and inheritance.

Here, there is no explicit reference to *mahr* as not arising in a void contract. The questions that arise here relate to the imposition of the penalty (*hadd*) for *zina* (illegal sexual relations), which most jurists held as falling due if consummation occurs in a contract the couple knew to be void. According to Abu Hanifa, however, while if consummation occurs it is indeed *zina*, the 'semblance of a contract' (*shibh al-`aqd*) causes the *hadd* penalty to lapse and the woman is due dower, the general principle being that every sexual relationship gives rise either to *mahr* or to the *hadd* for *zina*.

The *hadd* penalties are in any case not part of state law in either Jordan or the West Bank, and Samara wonders therefore whether the omission of *mahr* from the list of effects not arising in a consummated void marriage is intended to indicate an adoption of the position of Abu Hanifa, or whether

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rating parties to an irregular contract). Article 33, including such a contract in the list of void marriages, was not cited. On the other hand, in an appeal case from Ramallah court, the court used the term *batlan* to refer to the 'voiding' of a contract due to *rada`*. See further Chapter Seven below.

[72]Sirtawi, 1981,104.

[73]Al-`Arabi, 1984, 273–274, 21566 and 21598/1980.

the phrasing of Article 41, listing those effects as examples ('such as maintenance') is, as is probably the case, intended to be non-exhaustive and *mahr* can therefore also be understood as not falling due in any circumstance in a void marriage.[74]

In the case of an irregular contract, no effects arise if the parties are separated before the union is consummated, but certain specified effects arise in the event of consummation before separation. Article 34 of the JLPS lists irregular contracts as those where one or both of the parties were not competent according to the conditions of capacity at the time of the contract; the contract was concluded without witnesses; the contract was concluded under coercion; the witnesses to the contract were not competent to act under the stated requirements; the contract is concluded with a woman subject to the rules of unlawful conjunction due to *rada`* or kinship; or it is a *mut`a* marriage or temporary marriage.[75] In the event of such a marriage being consummated, Article 42 of the JLPS provides that:

> dower and *`idda* are due, paternity is established and the impediment of affinity raised, while the remaining effects [of marriage] such as inheritance and maintenance before or after separation are not due.

In a later article, the JLPS takes Abu Hanifa's view that the dower due in these circumstances is the lower of the specified or the proper dower.[76]

Couples are prohibited from remaining in a void or irregular marriage, and if they do not separate themselves, the *qadi* is charged with separating them.[77] The public interest involved in the separation of couples involved in such marriages was emphasised by the proposed inclusion in an

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[74]Samara, 1987, 139–140 and 144–145. Articles 131 and 132 of the *Kitab al-Ahkam* deal with the issue of sexual relations in certain types of 'non-valid' marriages, and make a clear distinction in terms of penalty between those with prior knowledge of the invalidity of their contract, and those who were unaware.

[75]Sirtawi, 1981, 121, notes omissions from this list: contracts between a man and a fifth wife, and a man and woman whom he has divorced three times and who has not yet completed the *`idda* from a consummated marriage to another man. The JLPS does state in the section on prohibitions that these contracts may not be concluded.

[76]JLPS Article 56.

[77]In the name of *al-haqq al-`amm al-shar`i*, JLPS Article 43; see further Chapter Seven.

early draft revision of the JLPS of a clause giving any *shari`a* court the jurisdiction to consider claims for the dissolution of marriages due to their being void or irregular, without regard for the residency of the spouses, in order 'to speed up consideration of these claims since they involve *haqq allah*,' the right of God.[78]

The JLPS does not explicitly include the category of 'suspended' contracts, which were concluded according to classical Hanafi law when the person actually undertaking the contract did not have the *shar`i* capacity to do so — for example, a discriminating minor, where the effect of the contract is suspended on the consent of the *wali*. The majority of non-Hanafi jurists held such contracts not to be valid and the current Jordanian law applied in the West Bank does not allow them to be concluded.[79]

This is indeed the case with many of the concerns addressed by the classical jurists writing on the contract of marriage. The nature of the rules adopted by the JLPS, and the mandatory supervision and registration of the contract by an official of the *shari`a* court has removed questions connected to for example the marriage of minors, at least in law. The case material does however show examples, albeit rare, of applications for dissolution of marriage on the grounds of the invalidity of the contract, usually for reasons connected with the capacity or status of one of the parties, involving one of the permanent or temporary impediments to marriage.

3.2 CAPACITY OF BRIDE AND GROOM

There are two basic requirements that potential parties to a marriage contract must fulfill in order to be competent to conclude the contract: sanity and a minimum age. These requirements, however, are not absolute — parties not fulfilling them may still become a partner in a valid marriage — but they constitute the standard rules to which there may be controlled and specified exceptions. Article 5 of the JLPS sets out the two requirements as follows:

[78]Draft Amended JLPS version of 1987 Article 38(b); Explanatory Memorandum point 8.

[79]Samara, 1987, 141–143, and 145. See also Sirtawi, 1981, 126.

Capacity for marriage requires that the fiancés be sane and that the fiancé has completed his sixteenth and the fiancée her fifteenth year.

3.2.1 Sanity

The rule on sanity of parties to the contract needs no legal explanation, soundness of mind being a normal requirement for validity of contracts. The exception to this rule is set out in Article 8 of the JLPS:

> The *qadi* may permit the marriage of a person who is afflicted by insanity or 'imbecility' (*`uth*) provided that it is established by medical report that marriage is in that person's interest.

This provision is interesting from a theoretical point of view (no case material having been found on the subject), in its positive phrasing, as opposed to the negative terminology of its predecessor in the JLFR, where the following text was included at the end of a longer article dealing with permanent prohibitions on marriage:

> No insane man or woman may be married unless there is a necessity; if the necessity is there, then they may be married by their guardian with the consent of the *qadi*. (Article 16).

The above JLFR text was taken from the OLFR (Article 9), which removed from the hands of the *wali* the absolute discretion in the marriage of an insane ward that lay with him under classical Hanafi law. The JLPS, in its turn, makes no reference at all to the role of the *wali* and places the matter entirely in the hands of the *qadi*, with a beneficial interest having to be established by recourse to medical opinion, rather than the *wali* deciding that necessity requires such a marriage. It has been, in short, an interesting progression towards judicial rather than familial determination of the interest of an adult person not competent to contract a marriage in his or her own right.

Samara notes that to some extent, the JLPS text conforms to the Shafi`i position, which included permission for the *wali* to marry an insane minor

if there was a need (which could be established for instance by the testimony of two doctors) or if there was an interest for the ward in such a marriage. The Shafi`i rule, however, differs according to which *wali* was involved and according to whether the ward was male or female, as well as between degrees of insanity.[80]

3.2.2 Age

The introduction of minimum ages for a Muslim marriage in the Middle East began in 1917 with the OLFR. The majority position of all classical schools of law held that minors could be contracted in marriage by their guardians, although consummation was not permitted until the minor was physically ready to enter a sexual relationship.[81] The differences between the schools centre on the role of the *wali*, marriage guardian, which again depended upon the degree of relationship to the ward, the sex of the ward and the status of the female ward (single or divorced/widowed).[82]

Furthermore, the schools distinguished a 'minor' from a 'major' through physical phenomena, rather than by a set age, with the onset of puberty signalling the end of legal minority.[83] Certain ages were, however, for

[80]Samara, 102–103; see also Sirtawi 65–66. Note that while Article 44 of *Kitab al-Ahkam* refers to the 'imbecile' and the insane, Article 9 of the OLFR and Article 16 of the JLFR omit the first and deal only with the insane. Hooper, 1936, 23, cites the following definition of an imbecile (*ma`tuh*) from Article 945 of the Majalla: 'An imbecile is a person of slight comprehension, confused speech, and uncertain action, although he does not strike or insult persons as a lunatic does.'

[81]Motzki, 1996, 130. The Prophet's marriage to `Aisha is often given as an example; he is understood to have contracted her in marriage as a minor aged about six, with consummation occurring a few years later. Samara, 1987, 105 and 148; Rodinson, 1977, 151. See Ahmed, 1992, 51–52 on the social context and political implications of such arrangements by the Prophet. Lazreg, 1994, 103, cites a study of court documents from the first half of the twentieth century in French-occupied Algeria, showing fathers frequently opposing the consummation of the marriage of their daughters who had not reached the age of puberty (citing Jean Paul Charnay, *La Vie Musulmane en Algérie, d'après la jurisprudence du XXiéme siécle*, Paris 1965).

[82]Details in Samara, 1987, 95–99, Sirtawi, 1981, 62–64, and *Kitab al-Ahkam* Article 44.

[83]Sirtawi, 1981, 65, describes the signs of the onset of puberty in detail. Motzki, 1996, 129–130 sets out the classical rules on the beginnings of sexual maturity, and re-

the purposes of the law, identified as the minimum and maximum ages at which puberty was presumed to have been reached. The majority held the minimum age to be twelve for a boy and nine for a girl, with the maximum at fifteen years for both; Abu Hanifa held the maximum to be eighteen for males and seventeen for females.[84] These three sets of ages were to have a bearing on the development of the law on the relation of age to marriage competence.

It seems likely that the marrying of minor wards was an established practice in Palestine, as elsewhere, before the twentieth century, although it is not possible to tell how broadly. Motzki, in his consideration of child marriage in seventeenth century Palestine based on the work of the Ramla *mufti* Khayr al-Din, concludes that marriages involving one or two minor parties were probably not uncommon, but similarly discerns, albeit tentatively, a comparatively high rate of breakdown of such marriages, and notes that the option of puberty was 'commonly invoked'.[85] He sees financial factors as involved in the practice, as does Shaham, who includes as factors encouraging the marriage of minor girls the motivation to preserve the integrity of family property and to relieve the natal family of the support of girls.[86] Even as the momentum for change took hold, Badran notes that in early twentieth century Egypt, the establishment of a minimum age of marriage stood to benefit most immediately middle and upper class women, who had access to educational opportunities: this circumstance doubtless contributed to the problems she notes in enforcement of the Egyptian rules.[87]

It was upon the individual views of a few jurists, and citing various socio-economic factors, that the Ottomans relied in making the ages of twelve for the boy and nine for the girl, already recognised as the minimum

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marks that 'the end of childhood in Islamic law is sealed by the beginning of puberty' as compared to adulthood being established at the end of puberty.

[84]Sirtawi, 1981, 65; Anderson, 1952 ('Testamentary Bequests'), 38. For legal purposes, the Hanafis also distinguished between 'discriminating' and 'non-discriminating' minors, the latter being under the age of seven and the former aged from seven to puberty. Samara, 1987, 104, distinguishes the discriminating minor as 'having rational views in so far as he can distinguish between beautiful and ugly, good and evil, benefit and detriment, while not having deep insight.'

[85]Motzki, 1996, 139; and see Tucker, 1998, 46–47.

[86]Shaham, 1997, 45.

[87]Badran, 1995, 126.

age of puberty, the minimum age of marriage in the OLFR.[88] Article 7 of the OLFR states that:

> No-one may marry a boy who has not completed his 12th year or a girl who has not completed her 9th.

As well as the minimum age, an age of full competence for marriage was introduced: eighteen years completed by the male and seventeen by the female.[89] The setting of these ages drew upon the maximum ages of puberty according to Abu Hanifa and at these ages the parties attained full legal majority (*rushd*) (i.e. beyond puberty, *bulugh*) and were fully competent to marry. For an adolescent between the minimum ages of twelve or nine and legal majority (eighteen and seventeen) marriage could be authorised by the *qadi* provided the party concerned had reached puberty and the *qadi* held them to be able to sustain such an undertaking; the female also had to have her guardian's consent.[90] This discretion of the *qadi* age-zone between the minimum age of marriage and full legal majority was taken over into the personal status codes of several Arab states that emerged later in the century.

The introduction of provisions of substantive law laying down minimum ages of marriage was thus an Ottoman innovation, and the original OLFR text was also quite absolute. Article 52 of the OLFR declared as irregular (*fasid*) a marriage where one of the parties did not fulfill the conditions of competence at the time of the contract; and Article 77 stated that it was 'absolutely forbidden' for parties to remain in an irregular (or void) marriage. Later provisions modelled on the OLFR modified this rather absolutist position.

It has already been noted that when the British took over the administration of Palestine, they left in place the OLFR and its accompanying procedural legislation. In the Palestine Criminal Code of 1936, when carrying over from the Ottoman Penal Code the penalties stipulated for non-compliance with registration requirements, the British introduced changes in the age of marriage and of legal majority. The latter was set at eighteen for both sexes, while officially there was a criminal sanction for anyone involved in the

[88]Samara, 1987, 105; Sirtawi, 1981, 64.

[89]OLFR Article 4.

[90]OLFR Articles 5 (male) and 6 (female).

marriage of a girl under fifteen, the age of full legal majority according to the Majalla. However, a 'good defence' to this text was provided to accommodate the existing rules of the OLFR as the personal status law of Muslims, and no attempt was made to introduce such legislation in the *shari`a* courts or, it appears, to enforce it in general.[91] During the same period, in Egypt, a different approach was being taken towards preventing the marriage of minors. One of the first demands of the Egyptian Feminists' Union in 1923 was the establishment in law of a minimum age for marriage, at sixteen for females and eighteen for males; this was achieved the same year with a decree forbidding the registration of marriage where the parties were below these ages. By all accounts, this legislation was not particularly effective — in Margot Badran's words, it 'demonstrated the limits of legal reform,'[92] even when followed by subsequent legislation denying judicial remedy in the case of unregistered marriages. A major weakness appears to have been the lack of reliable means of establishing ages.[93] Some decades after the Egyptian legislation, the Jordanians followed the Ottoman precedent of setting a substantive minimum age, but used the procedural approach to add some flexibility into the provision.

The four articles in the OLFR on the competence of parties to the contract of marriage were condensed in the JLFR into a single one, Article 4:

> It is a condition in competence for marriage that the fiancé has completed his eighteenth year and the fiancée her seventeenth.
> a) If an adolescent male who has not completed his eighteenth year wishes to marry and has recourse to the *qadi*, the *qadi* may permit his marriage if he is satisfied that he has completed his fifteenth year and is capable of taking on marriage.
> b) Similarly, if an adolescent female who has reached (root: *balagha*) her fifteenth year but has not completed her eighteenth has recourse to the *qadi* and requests him to permit a marriage with the consent of her *wali*, then if the *qadi* considers her to be capable of taking on marriage he may permit it.

[91]Eisenman, 1978, 103–105; Layish, 1975, 15. Hooper, 1936, 99, on legal capacity in the Majalla (Article 986).

[92]Badran, 1995, 128.

[93]Badran, 1995, 128, notes that Egyptian feminists complained that doctors falsified ages. See also Shaham, 1997, 58, and 1995, 269. In 1997, 57 note 13, he cites a figure of over 40% of rural women questioned in a survey in the 1970s reporting having been married under the minimum age of 16. The early legislation in Egypt was Laws no.56/1922 and 78/1931: Abu Zahra, 1957, 140.

The above article contained the same ages of full legal majority as the OLFR, set a new minimum age of marriage and provided for the discretion of the *qadi* in the age-zone in between. There are two points of confusion in the article, the first noticeable in the use of the verb 'reach' (*balagha*) in 'the female who has reached her fifteenth year'. Elsewhere in the article, as indeed in the OLFR, the verb is either *tamma* or *akmala*, both meaning to complete or to finish. The literal translation indicates that it was originally legal to marry females aged fourteen years and one day; given that according to Article 127 of the JLFR any mention of 'year' indicated the lunar or *hijri* calendar, this in fact sanctioned marriage for a girl of under fourteen years of age according to the solar or Gregorian calendar. An amendment was swiftly introduced changing 'fifteenth' to 'sixteenth.'[94]

The second point of confusion in the JLFR, again regarding the female, was whether she attained full competence, or legal majority, at the age of seventeen or eighteen.[95] The first paragraph of Article 4 states the age of competence for the female as seventeen years completed (i.e. aged seventeen) while in 4(b) the discretion of the *qadi* age-zone for the female is identified as between fifteen (as amended) and the completion of her eighteenth year — that is, aged eighteen. Seventeen was of course the age set by Abu Hanifa as the maximum age of puberty for the female.[96] On the other hand, Article 279 of the Jordanian Penal Code takes the upper limit, providing for a prison sentence of one to six months for anyone marrying or being involved in the marriage of a girl aged under eighteen without ascertaining that her *wali* agrees to the marriage.

At the bottom end of the discretion-of-the-*qadi* age-zone there is again a certain amount of variation. In the majority of contracts in the survey where court consent was registered for the marriage of the bride, the age of the female is registered as sixteen, although there are some fifteen-

[94]Amendment to the JLFR, *Official Gazette* no.1083/1951, 1308. The amendment changed the word 'fifteenth' to 'sixteenth' while keeping the same verb. Anderson, 1951 ('JLFR'), 191, noted that the JLFR had raised the age of marriage for a girl to fifteen — this observation was presumably made after the publication of the amendment.

[95]Anderson, 1951 ('JLFR'), 191, notes this confusion.

[96]In the 524 contracts registered in the three courts under the JLFR (1965 and 1975) included in the sample examined for this study, 44 women registered their ages as seventeen; of these, the consent of the court was registered in thirteen cases and not registered in 31. This is as likely to have been the result of solar/lunar calculations as difference on textual interpretation.

year-olds and even brides of fourteen, who were presumably fifteen by the lunar calendar. There was the occasional registration of the *qadi*'s consent for the marriage of a male below the age of legal majority — boys aged sixteen to seventeen.

In some cases, although the bride was clearly within the discretion-of-the-*qadi* age zone, no court consent was registered in the contract, despite having been in some cases included in the documentation upon which the contract was based; the practice of particular *ma'dhuns* serving certain outlying villages is clearly implicated in some repeat examples. The timing of the consent given by the *qadi* to the marriage of sixteen-year-old girls was ruled by the Amman *Shari`a* Appeal Court as constituting a case to answer on the grounds of lack of competence of a bride claiming the consent, registered in the contract, was given after the marriage.[97]

Very occasionally, the contracts revealed examples of registration of the approval of the *qadi* in implementation of Article 6 of the JLFR:

> Neither the *qadi* nor his deputy shall allow a marriage where there is a 20 year difference in age [between the spouses] before ascertaining the consent of the youngest party and the fact that they consent to [the marriage] without force or coercion, and that their interest is served thereby.

Anderson described this article as 'the most interesting innovation' peculiar to the JLFR.[98] It appears to address the social phenomenon of older men taking sometimes very young women in marriage, often in a polygamous union. Issues of fully voluntary consent may be complicated in many cases, but particularly so by such circumstances, combining the authority represented by the prospective bridegroom, the youth of the woman, and the financial benefits of such a marriage in the event of enthusiasm of the bride's parents for the match. The introduction of this provision in the JLFR, which has no basis in classical law, provided for the consent of the woman to be given more than the usual scrutiny, and gave room for the discretion of the *qadi* to be withheld. However, by 1957, cases in the Amman Appeal Court had established that Article 6 was to be interpreted as constrained by Article 4, and that the *qadi*'s permission for the age difference was only needed where one of the spouses (clearly most usually the woman) were

[97]Al-`Arabi, 1984, 68, 17967/1974, and 1973, 74, 5748/51, 13081/63, and 13098/64.
[98]Anderson, 1951 ('JLFR'), 192.

under the age of full competence (*rushd*)[99] and so in any case needed the *qadi*'s permission to marry. Thus, in the majority of contracts in the sample contracts involving an age difference of twenty years or more, the approval of the court for the age difference was not explicitly registered.[100] Variations on the theme of the Jordanian position were included in some subsequent Arab codifications of family law.[101] In the meantime, in the 1976 JLPS, the equivalent provision confirmed the Appeal Court's interpretation of the original article in the JLFR:

> The contract [of marriage] may not be concluded for a woman who has not completed her 18th year if her fiancé is more than 20 years older than her, unless the *qadi* has ascertained her consent and choice and made sure that this marriage is in her interest. (Article 7)

There are three modifications made by this article to its predecessor in the JLFR. Firstly, the provision refers to the woman only, rather than to the 'youngest party'. The party concerned will probably always be the bride, so the JLPS is in this sense more realistic, particularly since a man in this position could always end the marriage by *talaq*. However, it is in one way the exception, since elsewhere the JLPS adopts the approach of making provisions previously applicable only to the woman explicitly applicable to both spouses. The second change is the use of the positive approach in instructing the *qadi* to ascertain the free consent and choice of the bride to such a marriage, rather than ensuring that she has accepted it 'without force or co-

[99]Al-`Arabi, 1973, 77, 9661 and 9647/57.

[100]The sample contracts included several demonstrating the application of the Appeal decision — that is, that no consent was needed for an age difference of over twenty years where both spouses were over the age of full legal majority.

[101]The Syrian Law of Personal Status 1953, Article 19 of which allowed the *Qadi* to withhold his permission for a marriage if the parties were 'not suited to each other in regard to their ages and there [was] no benefit in the proposed marriage' — Anderson 1955 ('SLPS') 36; and the People's Democratic Republic of the Yemen in its Family Law 1974, Article 9 of which disallowed a contract of marriage in the event of an age difference of over twenty years, unless the woman was 35 or more. More recently, the Kuwaiti Personal Status Law 1984 (Article 36) states that 'compatibility of age between the couple is considered as a right of the wife alone'. See el-`Alami, 1992, 85 on the 1976 introduction in Egypt of requiring special provisions in the event of a 25 year age difference between an Egyptian woman and non-Egyptian man proposing to get married.

ercion', as under the JLFR. Finally, and most significantly, the JLPS text restricts these instructions to the *qadi* to those cases where the woman is under eighteen. The Explanatory Memorandum to the JLPS states explicitly that it was never intended that all marriages involving a twenty-year age difference should be prevented, as might have been deduced from the terms of the JLFR, but that protection in this matter should be given to the woman under the age of legal majority (*rushd*)[102] Under the JLPS, once the woman has completed her eighteenth year, the *qadi* has no role to play in ascertaining whether in fact the marriage is in her interest and is being concluded by her own free will. This clarification did not meet with unqualified approval. In a memorandum to members of the Jordanian Parliament, the Amman-based Business and Professional Women's Federation recommended that Article 7 should be amended to provide that no marriage involving an age difference of twenty years or more should be allowed to take place at all, except in cases of 'serious emergency and clear benefit.' A working paper by an Amman lawyer observes that the current provision appears to have forgotten that consent can be forced, and that 'this is what happens in fact'; the law should therefore be stricter and return to the lines of the JLFR, making such marriages conditional upon a clear necessity, benefit to both spouses, and no coercion.[103] As to the views of the commentators, Sirtawi approves of it as a legitimate exercise of *siyasa shar`iyya*, while Samara appears more hesitant.[104]

It remains to consider the provisions of the JLFR on breaches of the conditions of capacity. The law reproduced the OLFR article to the effect that a marriage was irregular if the parties did not fulfill the conditions of competence at the time of the contract[105] and backed it up with Article 279 of the Penal Code which laid down a penalty of a prison sentence of up to six months for any person involved formally in a marriage that conflicts with the provisions of the relevant family law and for any person involved

[102]Explanatory Memorandum to the JLPS, 2. It continues: 'There is no authority in personal matters over a woman who is past the age of legal majority (*rushd*)'.

[103]Raghib al-Qasim, 1986, 3. Ma`ruf, 1985, 7–8, is of the opinion that the extent of permissible difference in age should be halved to ten years and the rule made applicable to all women, except widows and divorcées and those over 35. Only one contract in the 1985 sample required consent under Article 7 to be registered; it involved a marriage between a sixteen-year-old girl and a 38–year-old man.

[104]Sirtawi, 1981, 117; Samara, 1987, 148.

[105]JLFR Article 28(1).

in the marriage of a girl who has not completed her fifteenth year. On the other hand, the JLFR provided for such marriages in certain circumstances to be recognised, in effect, as valid, by setting claims for their dissolution outside the jurisdiction of the court:

> Claims of a marriage falling irregular due to the young age [of the spouses] shall not be heard if the wife has given birth or pregnancy is apparent, or if the two parties at the time of the claim being brought are competent according to the requirements of Article 4 [of this law]. (Article 30)

This carried over into the current law, so that once again the conditions for competence set out in the JLPS are not in fact absolute.[106] The only change made to the wording of the pre-existing texts in Article 43 of the JLPS is to deny the hearing of claims for irregularity of marriage where the woman is 'pregnant' as opposed to 'where pregnancy is apparent', which may have conceivably caused problems under the 1951 law, although there is no case material to suggest that this was in fact the case. Decisions from the Amman Appeal Court on the JLPS maintain the established position: that pregnancy of the wife means a claim for dissolution on the grounds of being underage cannot be heard, since 'by pregnancy [it is clear that] the woman is capable of/ready for (*ahlan li*) marriage'.[107]

Thus, an action raised by the court or on behalf of the bride (usually the underage party) has to be instituted before the girl has completed her fifteenth year if the marriage is to be declared irregular and dissolved by the court. In 1980 the Amman Appeal Court heard a claim raised by a woman for the dissolution of her marriage on the grounds that she had been 'in her fifteenth year' at the time of the contract, rather than having completed it. The decision noted that previous to this she had also submitted in person a claim for maintenance against her husband; the court examined the papers and found her now to have completed her fifteenth year, and dismissed her petition. The problematic implications of this include that the person who

[106]Article 43 of the JLPS adds wording to the same effect after the more general prohibition on parties to an irregular or void marriage staying married.

[107]40092/1996, Dawud, 1999, I, 417; and see also 20769/1979, at 414. The only case material under the JLFR that al-`Arabi cites on this particular issue is a decision from 1974, ruling in similar circumstances that miscarriage by the wife is proof of a pregnancy and therefore entails the dismissal of a claim for the irregularity of a marriage due to young age. Al-`Arabi, 1984, 68, no.17994/74.

acted as *wali* for an underage bride is obviously unlikely to raise a claim on her behalf — not least because he would be implicating himself in a criminal office. A 1977 Amman Appeal Court decision showed the bride's mother recognised by the Court as the girl's *wasi* (authorised agent) and claiming that her brother (the girl's uncle) had married her twelve-year-old daughter off 'in the Bedouin manner' without her knowledge or consent. The 1996 JNCW-drafted suggestions for amendments to the JLPS propose to add a phrase to the effect that the court shall not hear these claims if the spouses fulfil the criteria of capacity at the time 'and are content for marital life to continue' — which would seem a useful recourse, at least in law, for girls illegally married before their fifteenth birthdays and unwilling to stay in the union.[108]

With the introduction of the JLPS in 1976, the rules on the minimum age of spouses were changed in two ways. Article 5 of the JLPS, quoted in full at the beginning of this section, requires the fiancé to have completed his sixteenth year and the fiancée her fifteenth; the age of capacity for the girl thus remains fifteen, while the minimum age for males is raised a year to sixteen.[109] These ages, according to Article 185 of the JLPS, are to be calculated by the lunar calendar. Secondly, the JLPS effectively abolished the 'discretion-of-the-*qadi*' age zone, leaving assessment of the wisdom of a girl's marriage before the age of full legal majority to her guardian, and only bringing in the *qadi* to give special consent if the *wali* is refusing,[110] while no special scrutiny is required by law of the marriage of a boy under the age of *rushd* but over sixteen.

On the face of it, the contract sample does not suggest that there was a tendency for the age of marriage to drop as a result of the ending of the need for the *qadi*'s consent until the ages of seventeen/eighteen. The mean age of the bride in the three years included in the sample contracts was the same, at eighteen, while that of the husband was twenty in 1965, 21 in 1975

[108]Respectively, 21185/80, al-`Arabi, 1984, 69, and 19541/1977, Dawud, 1999, I, 414. JNCW text Article 39.

[109]The verb *tamma* (to complete) is used. The Explanatory Memorandum to the JLPS, 2, notes that the ages of capacity have been changed 'according to the needs of the family,' observing that making it fifteen in the JLPS 'means the end of the year of [maximum] puberty'.

[110]The remaining confusion in the texts between the age of seventeen/eighteen for the female, in connection with the role of the *wali*, is discussed in the following section.

and twenty in 1985. The age group within which the largest number of women married in the sample contracts remained the same for all three years: seventeen-nineteen. However, the contracts did show an increase in the percentage of females registered as marrying below the age of seventeen from 14.5% of the sample in 1965 to 23.3% in 1975 and 24.3% in 1985. For males, the age group within which the majority married rose from the 20–22 range in 1965 and 1975 to the 23–25 age group in 1985.

The apparent rise in the percentage of females of sixteen or under being married, if borne out by a wider sample, might be at least partly attributable to the greater likelihood of the correct ages of the brides being registered. The registration of births under the Jordanians was increasing in standardisation during the 1960s[111] and in the West Bank was probably hastened also by the large population of refugees, for whom UNRWA provided shelter and relief supplies, requiring registration of family members. After the Israeli occupation, birth certificates were also increasingly registered by non-refugees, such documentation providing the basis for the issuing, at the age of sixteen, of an ID card by the military authorities.[112] It is increasingly unlikely that the age of an adolescent female will be testified to by her *wali* and/or elders of her village, a process which must be assumed to have led to many women being registered officially in the marriage contract as some months or years older (or, conceivably, younger) than they actually were, for the purposes of marriage.

Earlier work by Ibrahim Ata (based on questionnaires) found that most females interviewed had married in the sixteen-twenty age group; the mean age of marriage for males included in his survey was 23.6 and for women 19.6.[113] With specific regard to Ramallah, Fahoum Shalabi of Birzeit University reported similar findings, to the effect that over the years 1986–1989, the age group within which the largest number of women married was fifteen-nineteen, and for men it was 20–24; the average ages of

[111]The 1985 case material shows for example a contract showing the age of the bride as 23 and of the groom as 38. The man was born in 1948 and obtained a birth certificate in 1962; the woman was born in 1962 and was registered in 1966.

[112]The Israeli military authorities regularly used confiscation of the *hawiyya* as a form of harassment and/or control. See for example, al-Haq, 1990, 324–327, and also Whittome, 1990. More recently, measures depriving large numbers of Palestinians of their Jerusalem ID during the 'transitional period' following the Interim Agreement have been widely criticised.

[113]Ata, 1986, 50–54.

marriage he found to be twenty for women and 25.5 for men.[114] A wide-ranging demographic survey by the Palestinian Central Bureau of Statistics published in 1996 found the average age of marriage for men to be 23 and for women eighteen.[115] An extensive study into early marriage carried out by the Women's Affairs Centre in Gaza found that 41.8% of females in their survey married between the ages of twelve-seventeen, with 13.3% marrying under the age of fifteen.[116] The PCBS reports a rise in marriage age for both sexes between 1991 and 1995.[117]

In general, such figures support both the general impression that during the 1970s and 1980s age at first marriage rose, and probably continues to do so, a phenomenon connected to higher and wider levels of education and increasing urbanisation, and a temporary rise in early marriage in the early years of the *intifada*.[118] At the same time, they give justification for the concern currently being articulated in Palestinian society at the extent of early marriage, particularly of girls. Following the election of the Palestinian Legislative Council in January 1996, the Women's Affairs Technical Committee, an umbrella group representing various political women's organisations, issued a statement identifying a number of issues that it suggested should be included in Palestinian laws and regulations to be promulgated by the Legislative Council. These included a minimum age of marriage for women of eighteen, as a 'priority for lobbying.'[119] The final session of the Palestinian Model Parliament: Women and Legislation held in Gaza in 1998 proposed an age of eighteen solar years for males and females, with circumstances in which exceptional cases would be allowed to marry below that age to be specified exhaustively; lawyer and rights activist Asma Khadr writes that there is a 'quasi-consensus' that the age of marriage needs

[114]Shalabi, 1992, 28–29. His findings are based on a survey of all contracts of marriage registered in the Ramallah *shari`a* court records over the years 1986–1989, a total of 6038 contracts.

[115]Reported in *Palestine Report*, 16 February 1996.

[116]Imad and Radwan, 1998.

[117]PCBS, 1998, 12.

[118]Hammami, 1993, 288. In the FAFO survey, the West Bank sample of 457 married women of all ages reported their age at first marriage as follows: 11% aged ten to fourteen; 26% aged fifteen to sixteen; 26% aged seventeen to eighteen; 22% aged nineteen to 21; 9% aged 22–24; and 7% aged 25 plus. See also Welchman, 1999, 34–37 on the results of the WCLAC court work in Gaza, Rafah and Ramallah courts in the early 1990s.

[119]*Palestine Report*, 8 March 1996.

to be raised, and proposes similar limits of eighteen years (solar) with permission for sixteen year olds to marry to be given by the *qadi* 'where necessity requires it.'[120]

Final note might be made of developments in the Gaza Strip under the Palestinian Authority. In Gaza, the Egyptians had not introduced their own rules of the age of marriage but had left in place the rules from the OLFR, giving capacity to marry to males at eighteen and females at seventeen (lunar calendar) with no marriage allowed for a boy aged under twelve or a girl under nine, and the *qadi*'s permission needed for marriage of adolescents who had reached puberty but not the age of capacity.[121] Research for the WCLAC study showed that in a sample of 259 contracts registered at the Rafah court in the years 1989, 1992–94, 21% of brides were registered as aged sixteen or under, while in the sample of 472 contracts registered at the Gaza City court the figure was 34%.[122] In his first decision on substantive issues, the first Palestinian-appointed *Qadi al-Quda*, Shaykh Muhammad Abu Sardane, brought this part of Gazan law largely into conformity with that applying in the West Bank, setting the ages of competence at fifteen *hijri* for females and sixteen *hijri* for males. The text of the *Qadi al-Quda*'s decision, issued in December 1995 and in force as of January 1996, is worth citing in some detail:

> Having regard to the social, medical and humanitarian injury that results from the marriage of youngsters below the age of puberty as occurs in the *shari`a* courts of the Gaza Strip; and given that the prevention of injury is in the public interest; and given that in matters of *shar`i* interpretation (*ijtihad*) the most appropriate of the views of the jurists is taken to realise the interest of the Muslims —
> 1) the fiancée shall be competent for marriage if she has completed her fifteenth year, and the fiancé his sixteenth; the *qadi* shall not permit the marriage of persons below this age;
> 2) if the fiancée has completed her fifteenth year (that is, fourteen years and seven months by the solar calendar) the *qadi* permits her marriage until she completes her seventeenth year, at which time she may marry without the *qadi*'s permission, having regard for existing requirements and after the court

[120]Khadr, 1998, 131.

[121]Article 5–8 of the Law of Family Rights 1954.

[122]Welchman, 1999, 30–37.

> has completed the [necessary] procedures; and if the fiancé has completed his sixteenth year (that is, fifteen years six months by the solar calendar) the *qadi* permits his marriage until he completes his eighteenth year, at which time he may marry without the *qadi*'s permission, having regard for existing requirements and after the court has completed the [necessary] procedures; 3) the *hijri* year shall be the basis for calculating age, and official birth certificates and other official documents shall be relied upon in ascertaining age. In the event that an official document gives only the year [of birth] and not the day or month, the fiancée or fiancé shall be held to have been born on the last day of the twelfth month of that year . . .[123]

Of particular interest in this decision is the re-institution of the 'discretion-of-the-*qadi*' age-zone, which had already disappeared from the Jordanian law applied in the West Bank. Also instructive is the approach to official documents lacking full dates of birth — to instruct the Gaza courts to assume the youngest possible age for the party involved, so that there may be no possibility (in law) of marriage below the age specified as the minimum. The alacrity with which this decision was issued, and the interest in this area of law and practice among various sectors of civil society, might suggest it could be an early target for legislation by a Palestinian state. On the other hand, it is reported that the decision irritated some parts of the Gaza population, and as noted in the conclusion, leading members of the *shar`i* judiciary have yet to lend unequivocal support to a further rise in the minimum age of marriage. [124]

3.2.3 The Role of the Marriage Guardian

The legal requirement that remains in the *shari`a*-based codes of many Arab states that women must have their guardian's consent for their first marriage is a target for legal reform and activism on the part of various sec-

[123]Decision of the *Qadi al-Quda* no.78/1995 of 25 December 1995, valid as of 10 January 1996; text reproduced in Abu Sardane, n.d., 185.

[124]In Jordan too, much effort by women's groups has centred on raising the legal minimum age of marriage to eighteen through amendment of Article 6; Advocate Noor el-Emam describes the awareness-raising and lobbying campaign — Emam, 2000, 9–11. The 1987 draft amended text of the JLPS had proposed that all references to 'year' should be taken as solar calculations. Welchman, 1988, 885.

tors of civil society in Palestine and elsewhere who see in the institution the continuation in law of patriarchal authority over women.[125] The identity of the *wali* is defined in Article 9 of the JLPS:

> The *wali* in marriage is the paternal relative (*`asaba*) so qualified in the order set out in the soundest opinion (*ar-rajih*) of the school of Abu Hanifa.

This, then, is one matter in which the JLPS makes no changes whatsoever to classical Hanafi law.[126] The Hanafi rules set at the head of the hierarchy the male descendants starting with the son, followed by male ascendants through the father and then continuing through full and agnatic brothers, nephews, uncles and cousins until the male agnates are exhausted.[127] If there are no male agnates to act as *wali* for the female, one Hanafi view held that *walaya* (guardianship) passes to the ruler or to his delegate (the *qadi*). Abu Hanifa himself held that in such circumstances *walaya* passes to the mother, then the paternal grandmother, and so on, before passing to the ruler; this position is reflected in the *Kitab al-Ahkam*.[128]

No other school of law gave *walaya* in marriage to women guardians, and in support of the majority opinion Samara cites several *hadiths*.[129] The JLPS does not address explicitly what happens if there is no surviving male agnate: Article 12 merely states that if the nearest *wali* is not available, guardianship passes to the next, and if the next closest is unavailable, in certain circumstances it passes to the *qadi*. The compiler of the collection of Jordanian *shar`i* legislation, Zhahir, refers the reader to Article 35 of *Kitab al-Ahkam*, which deals with the *`asaba*; al-`Arabi, on the other hand, refers to Articles 35–37 of the same compilation, which include the provision for *walaya* to be transferred to female relatives.[130] The law does not refer to gender when stipulating the requisite characteristics of the *wali*:

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[125]For example, Algeria's report to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/DZA/1, of 1 September 1998, 9, describes this as among the provisions of its Family Code 'most hotly contested by human rights associations'.

[126]See JLFR Article 7, OLFR Article 10.

[127]Article 35 of *Kitab al-Ahkam* sets out the list of male agnates in detail. See also Sirtawi, 1981, 66; Samara, 1987, 81.

[128]*Kitab al-Ahkam* Articles 36 and 37; Sirtawi, 1981, 67.

[129]Samara, 1987, 81.

[130]Zhahir, 1983; al-`Arabi, 1984, 351.

> The *wali* must be sane, past puberty (*baligh*), and a Muslim if the fiancée is Muslim.(Article 10)

In the list of qualifications that Samara sets out in his commentary to this article, he cites sanity, puberty, liberty, being a Muslim, being just, and being male, 'because a woman can marry neither herself nor another.' He considers that Article 9 has required the *wali* to be male, through its reference to the *`asaba*, so that it is not significant that Article 10 omits this quality. Sirtawi, on the other hand, addressing the same point, does not include being male in his list of qualifications, making his required characteristics up to six with the inclusion of the Shafi`i condition of judgement unimpaired by illness or confusion. Both jurists note that the qualification of 'being just' was disputed among the classical scholars.[131] The case material examined for this study shed no light on whether or not a woman might assume guardianship functions under the terms of the JLPS. Historically, Tucker finds that in seventeenth and eighteenth century Palestine, 'the *muftis* dealt with the mother-guardian as a normal phenomenon, and held her to the same standards as they would any male guardian', although this appears to have been more commonly through having been appointed *wasi* by the deceased father than in the line of *walaya*.[132]

Having established his identity, the role of the *wali* is connected in law with issues of consent — particularly the consent of young women to their marriage — and, on the other side, of the fully autonomous legal capacity of adult women. The issue of consent recalls the pre-codification rules of all the classical schools allowing certain guardians to contract in marriage their minor wards who, by dint of being minor, were not in a position to give legally recognised consent. This form of 'coercive guardianship' extended to adult *bikrs* for the non-Hanafi schools, although it could be exercised only by the father or in some cases the grandfather, and having the adult woman's informed consent was recommended.[133] Nowadays, since

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[131]Samara, 1987, 89–90. Sirtawi, 1981, 67–68. *Kitab al-Ahkam* Article 33: 'The *wali* must be free, sane, past puberty and Muslim in the case of the male and female Muslim [ward], even if he be corrupt (*fasiq*)' (that is, justice is not a condition in the *wali*).

[132]Tucker, 1998, 142–143. The gendered division of parenting into — broadly — guardianship to the father (and males) and custody — physical care and nurturing — to the mother (and females) is challenged in the 1993 amendments to the Tunisian Law of Personal Status: see Welchman, 1999, 204.

[133]Samara, 1987, 77–78; Ibn Rushd, n.d., vol.1, 8–17; Siddiqui, 1998–1999.

generally the law prohibits (and indeed criminalises) the marriage of minors, and states that coercion renders a marriage irregular, the issue addressed in *shari`a*-based codifications of family law is consensual guardianship over adult females: whether a woman past puberty (*bulugh*) or legal majority (*rushd*) has to have her *wali*'s consent for her marriage.

Of the four Sunni schools, the majority opinion held that a woman always required the consent of her *wali* to her marriage: 'there is no marriage without a *wali*.'[134] El-`Alami notes in explanation that

> men are generally believed to be relatively more experienced than women; thus the basic reason for a guardian acting on behalf of a woman is to protect her interests and her honour and that of her family, it being improper for a woman to mix in male society outside her immediate family.[135]

For his part, Samara insists that the fact that the *wali*'s consent is a prerequisite for marriage is not due to some 'inadequacy of reason' of the woman, but because 'the consequences of her marriage are not confined to the woman alone but [involve] her relatives in order to prevent dishonour.'[136]

The Hanafi jurists were divided on this issue. While some agreed with the majority position, Abu Hanifa himself differed and held that once past puberty a woman could choose her own husband and undertake the contract herself, without the consent of her *wali*.[137] *Walaya* exists over the minor, according to this view, because of the inadequacy of the reason or judgement of the minor, which applies to both male and female wards in the Hanafi view, and which is overcome with the reaching of puberty; thus, just as a woman may dispose of her property once she is of age, so may she dispose of her person in marriage.[138] Both of these views have a history in the area, certainly in law and, at least on occasion, in practice. Imber points

[134]For Schacht's opinion on the origins of this *hadith*, see Schacht, 1950, 182–3.

[135]El-`Alami, 1992, 51.

[136]Samara, 1987, 76.

[137]Samara, 1987, 75, who does not appear to support this view, cites Abu Yusef as holding the opposite and making the *wali*'s consent a condition. Sirtawi, 1981, 51, who favours Abu Hanifa's opinion, put Abu Yusef alongside Abu Hanifa as the source of this position. Abu Zahra, 1957, 146, states that Abu Hanifa 'and one view from Abu Yusef' take this position.

[138]Samara, 1987, 75.

out that this was one of the very few areas of family law in which the sixteenth century Ottoman sultan Sulayman intervened, forbidding the marriage of women without the permission of their guardians. *Fatwas* from Ebu's-su`ud insisting that judges in the Empire did not have the licence to act on alternative Hanafi opinions indicate that some were minded to do so, giving effect to Abu Hanifa's view.[139] In succeeding centuries, Tucker's reading of *fatwa* collections establishes that the *muftis* consistently affirmed Abu Hanifa's view, to the effect that a sane, adult woman could choose her own husband and make her own marriage arrangements, without having to establish the consent of her *wali*, and conversely, that she could not be married off without her freely given consent. The *wali*'s rights were protected through his ability to have his ward's marriage dissolved in the event of his subsequent objection (on grounds of lack of *kafa'a* or dower) being established to be well founded. Tucker notes, however, that many of these *fatwas*

> pitted the jurists against irregular social practices, especially those whereby a family attempted to arrange a marriage without taking proper account of legal procedure and a young woman's rights.[140]

At the end of the nineteenth century, Qadri Pasha selected Abu Hanifa's view for inclusion in the *Kitab al-Ahkam*:

> Art. 34: The *wali* is a condition for the validity of the marriage of the minor boy and girl and those major persons who are not mentally competent. The *wali* is not a condition for the validity of the marriage of free, sane, major (past puberty) men and women — rather, their marriage is executed without a *wali*.

On the *shar`i* sources adduced for each of the two positions, the Egyptian jurist Abu Zahra concedes that Quranic citations validate the conclusion of her marriage contract by a woman without her *wali*, but he observes that 'it is preferable that her *wali* do the contract for her, or that he consent to it.'[141] The combination of strong custom and prevailing attitudes on this issue, and the differences among the classical jurists, is reflected in a relative ob-

[139]Imber, 1997, 167–169.

[140]Tucker, 1998, 50–51.

[141]Abu Zahra, 1957, 146.

scurity in the legal texts governing it in current Jordanian law, as illustrated by the differing views of the commentators. On the *shar`i* sources, Samara comes to the conclusion that:

> the proofs adduced by the majority for the condition of the *wali* in the contract of marriage, and that the woman does not possess it, are stronger and clearer and this [position] should be the one on which to proceed.[142]

He goes on to observe that the JLPS has taken the view of the majority in making the *wali* a condition in the contract of marriage, while the hierarchy of *walis* is in accordance with the Hanafi school. Sirtawi, on the other hand, cites the evidence for the various views and concludes that the strongest (*ar-rajih*) is that of Abu Hanifa, which is the position taken up by the JLPS. Samara supports his position initially with reference to Article 9 of the JLPS, and subsequently also to Articles 10 and 13 as well; Sirtawi cites Articles 13 and 22 for his premise.[143]

Articles 9 and 10, as noted above, define the identity and qualifications of the *wali;* Article 13 provides that:

> The consent of the *wali* is not a condition in the marriage of the sane *thayyib* who has completed her eighteenth year.

Samara claims that although all are in accordance with or citing Hanafi law, these three articles indicate that in the case of the *bikr*, the JLPS has taken the Shafi`i view and requires the consent of the *wali*. He concedes that the law does not explicitly state the requirement of the *wali* in the contract of marriage, but argues that since the *wali* is explicitly not required in the marriage of a major *thayyib*, it is to be deduced that the *wali* is required for the *bikr*, and that a *bikr* may not conclude her own contract without her *wali*.[144]

The above Article 13 is indeed the strongest indication in the JLPS that the *wali* is a requirement in the marriage of a major *bikr*. It is a rephrasing of Article 34 of *Kitab al-Ahkam*, cited above, omitting the first sentence and changing 'major man or woman' to '*thayyib*' in the second. However, given

[142]Samara, 1987, 76.

[143]Samara, 1987, 76 and 108; Sirtawi, 1981, 52 and 54.

[144]Samara, 1987, 108.

that there is no explicit text with regard to the major *bikr*, an argument can be made for the recourse provided for in such circumstances to classical Hanafi position.[145] Indeed, it is also arguable that the conclusion from Article 13 is simply that a *thayyib* under eighteen does need her *wali*'s consent — which certainly is the case under the JLPS, and which conforms with the classical Hanafi position apart from the substitution of the age of eighteen for actual puberty. This is Sirtawi's conclusion; he observes that Abu Hanifa's view is taken with regard to the major *thayyib* in Article 13, and with regard to the major *bikr* in Article 22,[146] which contains the rules on *kafa'a* and provides:

> If the *bikr* or *thayyib* who has reached her 18th year denies having a *wali* and marries herself [to a man], and a *wali* subsequently presents himself, then if she married herself to an equal the contract stands. . . .

This article assumes that both the major *thayyib* and the major *bikr* can contract a marriage on their own behalf and without a *wali*. However, it is nowhere near an explicit adoption of Abu Hanifa's position on this. With regard to women under eighteen but above puberty, the JLPS is slightly clearer: the consent of the *wali* is a requirement, whether this be her actual *wali* or the court exercising its *walaya* on his behalf. Article 6 provides:

a) the *qadi* has the right, upon petition, to marry the *bikr* who has completed her fifteenth year to an equal in the event of the *wali* who is neither her father nor her grandfather prohibiting it [root: *`adala*] without legitimate reason;
b) however, if the prohibition [on her marriage] comes from her father or grandfather, then her petition shall be considered only if she has completed her eighteenth year and the prohibition is without legitimate reason.

Combined with Article 22, which states explicitly that a *thayyib* over eighteen does not need the consent of her *wali* to her marriage, it is clear that although the JLPS sets full competence for marriage at fifteen years completed for the female, it requires her to have the consent of a marriage guardian until she reaches the age of full legal majority (*rushd*).

[145]In accordance with Article 183 of the JLPS.

[146]Sirtawi, 1981, 54.

3.2.3 Beyond the Code

Article 6 of the JLPS is interesting for several reasons. It is, as noted above, clearly based on the classical Hanafi rules on the veto or prohibition of the *wali* to a reasonable marriage by his ward — however, the *Kitab al-Ahkam* article on this subject deals with the *wali*'s veto on the marriage to an equal of a minor female ward, since major females according to the classical rules had no need of a *wali* in their marriage.[147] In addition, the classical rule as set out by Qadri Pasha made no exception for the prohibition by the father or grandfather, since the identity of the *wali* was relevant only in defining the right of a woman married as a minor to the 'option of puberty.'

In 1951, the JLFR kept closer to the Hanafi position in that respect, by not distinguishing between the identity of the *wali* blocking the marriage, but implied even more strongly an adoption of the Shafi`i rules by stating in the parallel provision, Article 5, that:

> The *qadi* has the right, upon petition, to marry the *bikr* and the *thayyib* who has completed her seventeenth year to an equal, in the event of prohibition by the *wali* and his refusal to marry her.

This text strongly implied that both *bikr* and *thayyib* still needed the consent of a *wali*, either her family guardian or the *qadi* in his place, after reaching the age of full legal majority. The JLPS text on the prohibition of the *wali* does not go this far; but in Article 6(b), it states that the *qadi* cannot over-ride the veto of the father or grandfather until the *bikr* has completed her eighteenth year, and then only if the veto is 'without legitimate reason.' The first implication is that in this case, *walaya* is transferred to the *qadi*, although this is not explicitly stated. The second implication is that this does not apply to the *thayyib*, and no explicit reference is made to the *thayyib* between completing her fifteenth year (when, according to classical Hanafi law, if she has reached puberty she no longer needs the consent of her *wali*) and the age of eighteen, after which according to Article 13 she clearly does not need the consent of a guardian to her marriage.

Summing up his interpretation of the prevailing rules on *walaya*, Samara states that:

> Our law of personal status stipulates that there be a *wali*, and in that it has deviated from the Hanafi school to the view of the majority . . . but there may

[147] *Kitab al-Ahkam* Article 41.

> be cases when a woman marries herself, claiming she has no *wali* [according to Article 22] . . . and a contract concluded without a *wali* is not listed as irregular or void, unlike one involving parties who are under the age of competence.[148]

Samara's phrase 'that there be a *wali*' uses the term *wujud*, existence or presence; in this case, it must be understood as meaning that there must be a *wali* to give permission, rather than that the *wali* must conclude the contract for the woman or indeed be physically present at the session in which the contract is concluded. The latter position cannot be substantiated under the terms of the JLPS, where the issue is whether or not the *wali*'s consent is required.[149] Even under the JLFR, the Amman Appeal Court stressed that the law:

> does not stipulate the presence of the *wali* in the session during which the *qadi* gives his consent for the fiancee to marry [i.e. in the discretion-of-the-*qadi* age zone before full legal majority] but the *wali*'s consent to the contract is required . . . If his consent is given before the contract . . . then the contract is valid.[150]

The only reference to a marriage contract concluded without the consent of a *wali* being held irregular in the published case material involved a girl of sixteen whose spouse was fifty. The girl in any case had not reached the age of legal majority and today, in accordance with Article 6 of the JLPS, would need the consent of the *wali*.[151]

In the marriage contracts examined for this study, the practice of the West Bank courts was to register the consent of the bride's *wali* even where it is clearly not required by law. Nevertheless, the odd exception bears out the conclusion that the adult *bikr* can in some circumstances marry without the consent of a *wali*. In the 10% sample of contracts, total 857, only eleven failed to record the consent of the *wali*: three in 1965, two in 1975, and six in 1985. Often the exceptions coincided with those where the women were

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[148]Samara, 1987, 119.

[149]Contrast, for example, the Algerian family law, which defines marriage as 'a contract between a man and a woman undertaken with their consent and in the presence of the woman's legal guardian.' See further Hijab, 1988, 29.

[150]Al-`Arabi, 1973, 357, 14037/65.

[151]Al-`Arabi, 1973, 355, 13081/63.

not represented by a *wakil*, since these two functions are most commonly combined. Thus, the only contract in the 1965 sample from Ramallah that registered the consent of neither *wali* nor court involved an eighteen year old *bikr* marrying a man who although being from the same village was resident abroad. The groom was represented in the contract session by his *wakil*, who was the bride's father. The contract showed 'the consent of the husband's *wakil*, and of the wife for herself.' Thus, even under the JLFR, it was technically possible for an adult *bikr* to give herself in marriage on her own authority; however, given the particular circumstances of that contract, the theoretical possibility was probably made practical use of because of the presence of the woman's father, who would normally be her *wali* as well as acting as her *wakil*, but who in this case represented the absent groom. In the 1985 sample, one *bikr* was married without registering the consent of her *wali* or the court, but she was from the United States and was registered in the contract as a Christian. This was not a consistent position as regards marriage to foreign women.[152]

A number of the other cases that are the exception rather than the rule shed no light on what the law does actually permit, but do indicate what some court officials think it either does or should not allow. Thus, for example, the other contracts in the 1985 sample that registered the consent of neither court nor *wali* were all *thayyib*s, ranging in age from their early twenties to their early forties. In one, in the section assigned to register the details of consent to the marriage, the *ma'dhun* has written 'the consent of the wife for herself as she is a *thayyib* who is over eighteen years old in accordance with Article 13 of the JLPS.' Another added the same in rather less detail: 'the consent of the wife herself as she is a *thayyib*'.

In the JLFR texts, as noted above, there was an ambiguity as to the ability of the *thayyib* to marry on her own authority, and while the sample in 1965 did show two divorcées marrying on their own authority, other contracts showed examples of the court's consent being substituted for that of the family *wali* in such cases. One was the contract of a North American *thayyib* which included 'the consent of the *qadi* by his general *walaya*'; in

[152]In an article on the subject of marriage to foreign women, in *al-`Awdah* English Weekly, 28 September 1987, 'Marriage — For Better or Worse?', no mention is made of having to obtain consent from the woman's equivalent of a *wali*, although other problematic aspects are discussed. In some cases, however, the women converts to Islam and the *qadi* then becomes her *wali*.

another, a divorcée in her forties entered a polygamous union in a contract that registered 'her own consent and the permission of the *qadi* by virtue of his general *walaya*.' These extra phrases added by the marriage registrars attached to the court suggest that they are following an established practice, or are adding them in the belief that really the woman, even if an adult *thayyib*, should have the consent of her *wali* to her marriage. The majority of women, as shown by the table, also conform to this practice. Apart from these very few exceptions, all the divorcées and widows in the sample, let alone adult *bikrs*, registered the consent of a family *wali* to their marriage, no matter what their age. Thus, the sample included the contract of a divorcée of 75 who registered the consent of her paternal cousin to her new marriage; and, in perhaps the clearest example of the triumph of custom that appeared in the sample contracts, a sixty-year-old widow entering into a polygamous union, who brought in a man described as her neighbour and landlord to act as her *wakil* and whose consent to her marriage was registered in the contract.

The only court action in the case material seeking the over-riding of the veto of a *wali* also involved circumstances where arguably the woman did not need her *wali*'s consent in any case, and therefore was not subject to his veto. The case was raised in 1975 by a woman whose paternal grandfather as her *wali* was opposing her marriage to her fiancé. The woman was a widow of 32; the court heard that the dower agreed between the couple was a proper dower and granted the woman a ruling of 'prevention of objection to her marriage' against her grandfather. In giving the ruling, the court cited Article 5 of the JLFR and Article 34 of Qadri Pasha's compilation, the latter of which states that the *wali* is not a condition in the marriage of sane, major women.[153] Whether or not in 1975 this woman could have in theory gone ahead with her marriage on her own authority, without going to court, under the JLPS she certainly could have done by law but might have still raised a claim to obtain *shar`i* support for over-riding custom.

This case also involved the final aspect of *walaya* in marriage that should be outlined here. The woman's father had emigrated and in his absence the paternal grandfather became the *wali*. The records of the *shari`a* courts usually record in detail when *walaya* is transferred to a more dis-

[153]The two other claims listed in the case material as 'objection to marriage' involved men claiming rights of objection as fiancés of the claimant, rather than as her *wali*: see above.

tantly related *wali* in the absence of her nearest male agnate; for example in Hebron in 1985, one contract formally registered the *qadi*'s approval of transfer of *walaya* to the woman's paternal cousin. Where it is possible to contact the first *wali* however, usually his consent is sent by written document certified in a *shari`a* court, and the woman is represented by another male member of her family acting as *wakil*; this is the usual practice where the *wali* lives in another Middle Eastern state with a *shar`i* system permitting such facilities.[154]

In the vast majority of contracts included in the sample, *walaya* over the woman was exercised by her father — in 270 out of the 327 contracts in the sample which registered the *wali's* consent in 1985, 244 out of 281 in 1975, and 193 out of 238 in 1965. Second in frequency was the woman's brother,[155] with the remaining marriages in the sample being conducted with the consent of paternal grandfathers, paternal uncles and great-uncles, paternal cousins, half-brothers on the father's side, father's cousins and in one case a second cousin on the father's side.

From the sample, one could conclude that the practice of the courts follows standard Islamic legal principles in sanctioning local custom where it does not conflict with the law — that is, in regularly registering the consent of male members of the family to the marriage of female members, whatever their age and personal status. At the same time, the distinct lack of clarity in the law recalls Dawoud el-`Alami's observation in regard to the similar obscurity of Moroccan law (prior to the 1993 amendments) on the consent of the *wali*:

> The impression given is that the law is in this way vague enough to be applied in different ways according to the parties and the circumstances and is therefore adaptable to the needs of both liberal and the more conservative elements of Moroccan society.[156]

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[154]In one claim in the 1985 case material, for example, the bride's father sent his written consent verified in the Amman *shari`a* court and she was represented in the session by her maternal grandfather. Article 11 of the JLPS provides that if there is more than one *wali* equal in degree of kinship to the woman then the consent of one of them overrides the objection of the other. Samara, 1987, 86, notes that this is a majority position among the Sunni schools. See also Sirtawi, 1981, 69–70.

[155]47 in the 1985 sample, 22 in 1975 and 32 in 1965.

[156]El-`Alami, 1992, 156.

In this manner, it might be argued, the legislature has sought to maintain some of the flexibility and discretion available to the *qadi* in the administration of *shari`a* personal status law pre-codification.

In both the West Bank and in Gaza, a vigorous debate followed suggestions by, *inter alia*, the Women's Model Parliament that the need for the *wali*'s consent to the marriage of an adult woman be dispensed with in law and left to the realm of social custom and family negotiation. Based on the finding of the FAFO survey, Rema Hammami discusses the finding that 80% of men and 76% of women surveyed felt that the choice of a girl's husband should be 'mainly the daughter's choice'[157] — weighting the daughter's opinion and choice while maintaining the deference to that of the family. In this sense the current position in Jordanian law could be seen as an attempt to provide for that balance in legislation. At the same time, while there appears to be consensus supporting the prohibition of forced marriage, this does not necessarily betoken an agreement on the meaning of 'consent' — or, conversely, of 'coercion'. This issue is complicated by the apparent inadequacy of redress in the event of the marriage being registered, when the contract documents are taken as absolute proof of consent, as discussed below in Chapter Seven. The *shar`i* establishment in the West Bank seems for the moment to be holding fast to the position that requires the guardian's consent, as discussed further in the Conclusion.

[157]Hammami, 1993, 293, table 10.6.

CHAPTER 4

Variations on the Theme: Dower, Stipulations and Polygynous Unions

The subjects dealt with in this chapter are covered in different ways in the contract of marriage. The dower is, according to the majority of the schools and the JLPS, an inalienable effect of the contract, and the standard contract forms issued by the Jordanian and now the Palestinian authorities set aside special sections designated for the detailing of its various component parts. Another section is allocated to special stipulations inserted by either party which attach to the contract to modify or clarify various of the otherwise prevailing rules that govern the marriage in law. These stipulations were rarely used in the contracts examined for this study, so in contrast to the section on dower, which is invariably filled out, this section was most commonly left blank. Finally, the same contract document is used in the event of a man marrying another wife in a polygynous union, but existing requirements for insertion of the parties' personal status (single, married, divorced, widowed) make it possible to identify polygynous contracts. In case of both stipulations and polygyny, the particular format of the contract document can make a substantial difference in the protection of certain rights of the wife; the new contract document issued in 1995 under the Palestinian National Authority, however, makes no change in regard to the first, and in regard to the second appears to undermine the prospects of ac-

cess to information provided by the pre-existing Jordanian document in use in the West Bank.

4.1 DOWER AND *TAWABI`*

The institution of dower is governed in law and in the courts by clear and unequivocal rules which may, at the same time, stand in contradiction to the rules of local custom which direct practice in the majority of cases; this is most likely to be the case regarding the wife's sole and absolute entitlement to the dower. In other aspects, however, the law explicitly accommodates the rule of custom. A common illustration of the legal maxim 'custom ranks as a stipulation' is the standard (pre-codification) Hanafi position that in the event of the relative proportions of prompt and deferred dower not being specified, the court would rule according to local custom on this issue. Looking at how the *shari`a* court in a Jordanian subdistrict dealt with dower in the 1960s and 1970s, Richard Antoun finds *mahr* 'an excellent example of the varying modes of reception, acceptance and accommodation of local custom.'[1]

While it is always the case that the picture of what is going on in marriage trends gleaned from the court material is a very narrow, incomplete one, this is particularly the case with the dower. Behind the facts and figures registered in the marriage contract lie a host of complex socio-economic expectations and transactions, inter-family perceptions and gender interactions that affect the level of dower, the nature of the dower (what is given), what happens to the dower, who actually gets it, and what the dower actually means. The clearest example is the value of the dower, which is, apparently, rarely accurately represented in the figures registered in the marriage contracts. Dutch anthropologist Annalies Moors, in her study on women and property in twentieth century Nablus, notes that the registration of an ordinary prompt dower bears 'at least some resemblance to what is given', while the more recent pattern of registering a 'token' prompt dower — a symbolic single dinar, for example — creates 'a complete break between the amount stated in the contracts and the gifts received.'[2] Fahoum Shalabi, in

[1]Antoun, 1980, 456.
[2]Moors, 1995, 92.

his study of marriage contracts registered in the Ramallah court, does not analyse the registered prompt dower because 'for social and religious reasons the real value is not shown.'[3] Furthermore, any consideration of the registered sums of deferred dower must be set in perspective of the fact that in the event of divorce, most women renounce their rights to these sums in a *khul`* settlement, as described in Chapter Six below. That said, what the contracts can be taken as showing is what, in particular socio-economic contexts, the parties agree to have registered as the dower; and to what — in most cases — the wife would be entitled by law, should she have recourse to the courts.

4.1.1 Basic Rules

The JLPS deals in standard manner with *mahr*. Sirtawi's definition reflects the dual basis of the wife's entitlement to dower as held by the classical jurists:

> The property required from the man to the woman by reason of the contract of marriage or by reason of his sexual intercourse with her.[4]

The fact that the right of dower arises in part from the mere existence of the contract is seen in the rules that provide that the wife is due *mahr* in a valid marriage even where none has been specified in the contract. The other source of the right, consummation of the marriage, is reflected for example in the rules that give a dower entitlement to a woman who has consummated an irregular marriage, since the irregular contract itself has no value, and no dower is due unless consummation has occurred; and in the fact that if divorce occurs in a valid marriage before consummation, the woman is due only half the dower specified in the contract.[5]

The JLPS also stresses classical principles when it states in Article 61 that the *mahr* is the property of the wife alone and follows up with Article 62:

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[3]Shalabi, 1992 (*al-zawaj*), 32.

[4]Sirtawi, 1981, 134.

[5]These days, identifying the source of the wife's right to dower as anything beyond the contract itself is not always found acceptable: for example Khadr, 1998, 139. On dower as gift, see Siddiqui, 1995.

> Neither the wife's father nor any of her relatives may take money or anything else in return for marrying or delivering her to the husband, and the latter may claim back anything taken from him [in this manner] in goods if extant or in value if perishables.

This, as noted already, is where the law insists on a position rather less than wholeheartedly upheld in practice. Writing on the 'unwritten laws' affecting women in Palestine in 1931, Canaan observed that although the *shari`a* gave women the right to take the whole *mahr*, 'custom deprives her of the greater part of it.'[6] There are indications that this custom continues in some areas of the West Bank: the author of a 1979 article on marriage expenses in the West Bank identified as a factor in the inflation of dower in the West Bank the fact that in certain poverty-stricken sectors of the rural population, families with few income-earners would use the opportunity of the dower due a daughter on her marriage to get some extra funds for the family.[7] In Hebron in 1987, when local religious and tribal leaders convened a meeting to draw up a document setting out aspects of marriage that they wished to see upheld in the local community, one of the points they included was 'the fact that *mahr* is the sole right of the woman, and neither her father nor her husband may use or spend it unless she gives permission for that.'[8] In 1994, advocate and WCLAC legal adviser Hanan Rayan reminded participants in a Tulkarim workshop that custom and tradition frequently pose obstacles to the implementation of laws aimed at protecting

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[6]Canaan, 1931, 194. Granqvist, 1935, 128, notes that 'part of the bride-price can be given to her, sometimes she even receives the whole of the bride price.' In the seventeenth century, Motzki, 1996, 138, reviews *fatwas* discussing the guardians of minor girls using their dower to provide the dower needed for a brother to marry or to pay off a debt incurred by the ward's father, as well as for legitimate spending on the girl herself. By contrast, Gerber, 1994, 31, deduces from his examination of court records in central Ottoman areas (Burqa and Istanbul) in the seventeenth and eighteenth centuries that local custom there was more closely in harmony with the *shari`a* rule stipulating the wife's absolute entitlement.

[7]Fakhida, 1979, 66.

[8]'Hebron Document on Marriage' point 3; reported in *al-Quds* 20/10/87. `Ata, 1986, 58, talks of the 'bride price' paid to the parents of the bride. Layish, 1975, 48–49, cites evidence for some women not getting their dower, it being kept by their father or brothers.

the position of women, citing specifically the fact that the bride's *wali* frequently 'gets hold of his ward's dower one way or the other'.[9]

However, the hold of this customary practice seems to be loosening. In Nablus, while Moors notes the long established custom of the father taking a proportion (a third, for example) of the dower of his daughter, she concludes that in general these days the bride is receiving either all of her dower or an increasingly large share of it.[10] Antoun's consideration of dower in Jordanian peasant society emphasises 'the local belief that the *mahr* is the father's right (or in his absence the eldest brother's) to dispose of as he pleases.' He too notes, however, that with the loosening of economic dependency on their families of many of the young men heading for cash wages in the Gulf from the late 1970s, changes in these expectations could be anticipated.[11]

Whether or not the woman gets all, most or some of her dower may give rise to claims, mostly against her husband and far less frequently against her father, as will be considered in the next chapter. The first article on dower in the JLPS provides that:

> The *mahr* is [of] two [types]: the specified dower which the two parties specify at the time of the contract, be it small or large, and the proper dower which is the dower of the wife and her peers from among her paternal relatives, and if there are none then her peers from among the people of her village. (Article 44)

The differentiation of specified dower and 'proper dower' (*mahr al-mithl*) is standard Hanafi law, reproduced in the JLPS in rather less detail than in the texts of the classical scholars. The dower that is specified (i.e. in terms of amount) at the time of the marriage is these days documented under the signatures of the spouses or their *wakils* in the contract and is the norm. Proper dower falls due in cases where the specification of the dower is irregular, or where no dower has been specified at all.[12] This arises from the fact that dower is due in every valid marriage, but for the majority of the

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[9]Al-Haq, 1995, 50–51.

[10]Moors, 1995, 97–99; and see 82–83 and 96 on past patterns in Palestine.

[11]Antoun, 1980, 456; and 466 note 3.

[12]The rules on what renders specification irregular are set out in Sirtawi, 1981, 143–144. The routine registration of marriages by officials of the *shari`a* court makes ir-

schools is an effect of the marriage contract rather than being a condition for its validity.[13] The JLPS thus reflects the position of the majority of classical jurists in holding that if the contract includes a stipulation to the effect that there is to be no dower, then the stipulation falls void, the contract remains valid, and the wife is due the proper dower.[14]

The Hanafis detailed the bases on which proper dower, when due, was to be assessed, summarised in the above Article 44.[15] Classical Hanafi law identified a number of factors for the assessment of the individual woman and her peers, including age, beauty, intellect, virtue, virginity, wealth, learning and nobility of birth, with local customary levels and expectations probably playing the decisive role.[16] The JLPS has a whole section of 22 articles devoted to *mahr* and still does not cover the entire range of circumstances in which, for example, specification may be irregular, or proper dower may be due.[17] However, although other claims do arise from the manner of specification of dower in the contract, as described in the next chapter, irregular specification by the *ma'dhun* did not feature in the case material examined for this study. In addition, although there were cases of dissolution of irregular marriages, in none of them was there an application for payment of a proper dower. That is, the case material provided no examples of the assessment of a proper dower under the current or the previous Jordanian law and in the cultural contexts of the West Bank. Nonetheless,

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regular specification an unlikely event these days; no claims were found in the case material considering this issue.

[13]Samara, 1987, 150.

[14]See JLPS Article 54. Samara, 1987, 152; the Malikis would hold the contract irregular in such circumstances. Compare Layish, 1975, 59–60.

[15]The Hanafis went into more detail than this and Sirtawi 1981, 148, notes in this regard that Article 44 is not as precise as it could be. See also Samara, 1987, 157–158; *Kitab al-Ahkam* Article 77.

[16]Sirtawi, 1981, 147. See also Samara, 1987, 17. Fakhida, 1979, 71, lists beauty, education and family background as factors that affect the level of dower for a woman in rural West Bank Palestinian society today. See also Granqvist, 1931, 132, noting the close connection between the 'bride price' and the 'value ascribed to the woman'. 'Atayat, 1984, 3, notes that if dower is not defined, the proper dower is due 'according to social status'.

[17]Section 8, Articles 44–65. Samara, 1987, 159, excuses the law for not covering all the possible circumstances, since the necessity of registering marriages reduces the likelihood of such circumstances arising.

both commentators on the JLPS are somewhat critical of the law's less than exhaustive treatment of this institution.[18]

4.1.2 Prompt and Deferred Dower

Apart from those articles already cited in this section, the only one really relevant to the dower at the contract stage is Article 45:

> The specified dower may be paid promptly, or all or some or it may be deferred, provided that this is supported by written document; if deferral is not explicitly stated, then the dower shall be held to be [payable as] prompt.

The presumption of specified dower is that it is payable before or on the conclusion of the contract of marriage, or before the wife moves to live with her husband in the marital home; this is 'prompt' payment. In practice, however, many communities have customarily divided the dower into part payable prompt and part deferred for payment at a later date, and the custom is sanctioned by law. The rules concerning valid deferral of all or part of the dower include the condition that the deferral date should not be an imaginary or absurd deadline — one example given in Article 46 of the JLPS is the deferral of the dower 'until wealth'. Where the deferral is held to be invalid, the whole of the dower is payable as prompt. The prevailing custom, however, is for the deferred dower to be payable when the marriage is ended by divorce or the death of one of the parties.[19] The standard contract form for the West Bank (and Jordan) thus allows space for the specification of the amount of prompt (*mu`ajjal*) and deferred (*mu'ajjal*) dower, the assumption being that the deferred portion is due on termination of the marriage by death or divorce.[20]

The variations of time and place affect not only the levels of dower but also the relative proportions of the registered cash value of prompt and deferred. As well as the reservations set out above regarding the extent to

[18]Sirtawi, 1981, 147–148; Samara, 1987, 159.

[19]See Samara, 1987, 174. See below on the implications Article 46 on payment of the dower.

[20]Colloquially, the prompt is *muqaddam* and the deferred *mu'akhkhar*.

which these values reflect reality, the values are further complicated by the addition of the *tawabi`* (or 'effects') of the prompt dower — goods with a specified cash value rather than a money payment — and the recent emergence of the 'token' prompt dower. These are considered below. The isolation of the 'cash' prompt dower is thus reflective only of that, not of how much the full prompt dower actually costs the groom and his family, or in many cases (given the registration of *tawabi`*) what value of 'other' goods is registered as part of the prompt dower in the contract. It is, however, interesting to compare even at this level the 'how' of the dower payment, with a decreasing emphasis on a cash prompt dower in proportion to the deferred dower.

The table in Appendix IV shows the result of the contract sample in this regard. The trend that emerges most immediately from the material is a sharp reversal of the older pattern of having the registered value of the cash prompt dower greater than the value of the deferred dower. In 1965, the prompt dower was higher than the deferred dower in 85% of the sample contracts from the three courts. In the 1975 sample, this fell to 58%, and by 1985 the deferred dower was greater than the prompt in 70% of all the contracts in the sample. The regional differences are also interesting. Of the three courts, Hebron was the slowest to show the trend and compared to the other two, still had in 1985 a fairly large percentage of contracts (nearly 25% of the sample) where the prompt dower was greater. The sharpest shift in the sample came in Bethlehem from 1975 when 15.6% of the sample contracts registered a deferred dower greater than the registered prompt, to 1985 when 85.4% of the sample contracts did so. Ramallah, on the other hand, shows the most steady trend of the three courts, moving firmly from weighting the prompt to the deferred over the two decades.

This trend is supported by other researchers. In the Jordanian village of Kufr al-Ma' over the period 1960–1979 Antoun notes the same shift, from very rare registration of deferred dower in the early years to the registration of a deferred dower of equal or greater value than the prompt in all but one of the 34 contracts registered by the *ma'dhun* in the village in 1979. Antoun attributes the change at least in part to the *ma'dhun* who 'was advising the fathers of all brides to stipulate such a payment in order to provide against divorce.'[21] From her study of contracts in Nablus up to 1990, Moors concludes that 'the most striking and immediately visible change is

[21] Antoun 1980, 459.

the increased prominence of the deferred dower.'[22] Finally, the results of research conducted for the WCLAC study in the *shari`a* courts of Nablus and Ramallah confirm this pattern in the West Bank. In the Gaza Strip, the pattern appears to be basically the same but emerging more slowly, retaining generally a greater emphasis on the prompt dower than is the case in the West Bank, and more of a tendency to register equal levels of prompt and deferred dower.[23]

The increasing preference for having a higher deferred than prompt dower can be ascribed to a number of socio-economic factors. In a study of the proportions of prompt to deferred dower in Muslim Palestinian society in Israel in relation to the level of education of the women involved, Layish found the higher the educational level, the more likely the deferred dower was to be greater than the prompt.[24] This would accord with the increasing level of education among women over the period 1965–1985 in the West Bank and more generally in Palestine in the 1980s and 1990s as compared to earlier decades. However, this may have an impact more on an attitude towards the cash part of the prompt dower in and of itself, and the 'material' side of marriage more generally, than on the level of deferred dower, as can be seen also by the increasing prominence of the token prompt dower.

The standard explanation for the registration of a high deferred dower is to deter the husband from unilaterally divorcing his wife in view of the costs he would thereby incur. Shalabi, however, concludes from his work in Ramallah *shari`a* court that there is no particular relation between the number of *talaqs* and the amount of deferred dower registered in the contracts.[25] Moors agrees that it is hard to say whether or not a high deferred dower does in fact work as a deterrent to *talaq*, but argues that at least in Mandatory times, it was the prospect of having the raise a new prompt dower for a new wife that served to restrain men from divorcing.[26] She also

[22]Moors, 1995, 147; and see 127–130 for a summary history of proportions of prompt and deferred dower in Nablus contracts from Mandate times.

[23]Welchman, 1999, 47–50, tables 2.1 and 2.2.

[24]Layish, 1975, 54–55 and Table V. Layish found that in 1969, 60% of the Muslim marriages he surveyed had been concluded without deferred dower (1975, 51 and table 3, 52).

[25]Shalabi ,1992 (*al-zawaj*), 28.

[26]Moors, 1995, 139.

concludes, from her conversations with women in the Nablus area, that women themselves do not generally regard deferred dower as a deterrent to *talaq*, but rather as a potential financial security in the event of divorce. Moors places the decrease in the proportion of prompt to deferred dower in the context of a growing emphasis on the husband-wife relationship over and above kinship ties, and a shift in the perception of women in Palestinian society from production-based to consumption-based; women thus need property in the event of having to return to their father's house after a divorce or as a widow, rather than when they get married.[27]

Once again, it must be stressed that in the majority of divorces in both the West Bank and Gaza Strip, women in fact renounce their legal right to deferred dower in *khul`* settlements. Such a settlement may involve the woman receiving a certain sum from her divorcer, but her waiving of her legal right means firstly that she cannot hold him to that commitment, and secondly that certainly she does not receive the whole registered sum. The implications of the increasing prominence of the deferred dower can be further examined with reference to the recent emergence of the token prompt dower, which illustrates most clearly the apparently growing reluctance to register a large cash dower.

4.1.3 The Token Prompt Dower

In the contracts in the sample, the token prompt dower usually consists of one Jordanian dinar, although less frequently it may be five or ten dinars, and sometimes 'one gold lira,' which, although still clearly symbolic, is worth rather more than a dinar, while not reaching the value of a normal prompt dower. Moors identifies the mid-1960s as the beginning of a trend towards registering a token prompt dower in Nablus, with the lead being taken by 'highly educated professionals' and spreading from the urban centre to village and camps, although its incidence remains highest in the city.[28] In the sample contracts from the courts included in the present study, the emergence of the token prompt dower can be compared with the discarding of the token deferred. Thus, while there was one token prompt dower in the 1965 sample contracts from Bethlehem court, there were none in either the Ramallah or the Hebron samples, but either no deferred dower

[27]Moors, 1995, 147–148.

[28]Moors, 1995, 106–107.

at all or a token deferred dower of up to five dinars was registered in 43% of the sample contracts in Hebron and in 13% of those in Ramallah. A number of these involved marriage between paternal relatives and registered a notably low prompt dower as well.[29] In 1975, 8% of the Hebron sample had either a token or no deferred dower, and in 1985 this had fallen again to 6% of the sample. The rise in registration of the token prompt dower seems to have begun in these courts over the period 1975–1985, as shown by the table below:[30]

Table 4.1 — Percentages of contracts in the sample registering a token prompt dower

year	Bethlehem	Ramallah	Hebron
1965	2%	0	0
1975	2%	5%	0
1985	75%	40%	40%

The WCLAC research found that 53% of the contracts from their 1994 sample in Ramallah court registered a token prompt dower.[31] The Nablus sample showed a steady one third of contracts registering a token prompt dower, while the Gazan courts showed a much lower rate: under 4% in Gaza City, and 8% in Rafah, although 1994 was the first year the Rafah sample showed any token prompt dowers being registered.

From its origins as the 'invention of the modernising elite', Moors tracks the increasing registration of token dowers through other social classes, as 'an expression of modernity'. She points out that where a token dower is registered, the bride's family might actually expect to receive more gifts than a regular prompt dower would have brought — that is, the token dower would actually be more costly for the groom than a regular prompt dower; and she gives examples of cases where this expectation was not ful-

[29]Compare Shaham, 1997, 45, on the low dowers (or no dower) in cousin marriages.

[30]For the purposes of this table, the 'token' was taken to include dowers of one to five dinars in the two earlier years, and one to ten dinars in 1985, as well as the symbolic gold lira.

[31]Welchman, 1999, 51 table 2.3. The year 1989 was an exception in the rise of the token prompt dower, with only 30% registering it in the Ramallah sample; this could have been symptomatic of a trend early in the uprising.

filled.[32] Other reasons cited by Moors for the emergence of the token prompt dower include a woman's personal commitment to the groom, leading to a desire to de-emphasise the prompt dower.

Whatever the motivation, and whether or not the token dower actually results in the groom spending more or less than would be involved in a regular dower, Moors points out that the result is reduced control by the bride and her family over the dower. This is the case both because the groom and his family control the value and the nature of the dower gifts, and because the wife cannot use any unpaid (and in the case of a token dower unregistered) dower to strengthen her position in the relationship. For Moors, in summary, 'registering a token dower means taking a risk'.[33]

4.1.4 *Tawabi`*

The only mention of the *tawabi`* of the *mahr* in the JLPS is made in passing in Article 47, which provides for the wife's right to withhold 'obedience' until the prompt dower and its *tawabi`* are delivered into her keeping. In an unpublished part of an article partly serialised in a local newspaper, the then *qadi* of Ramallah noted the customary origins of the separate identification of the *tawabi`*, a custom now reflected in the marriage contract form in the West Bank.[34] Section 5 of the form is headed 'Dower and Type [of Dower]' and divided into three sections subtitled Prompt, Deferred and *Tawabi`*. The word *tawabi`* is derived from the verb *taba`a*, to follow or to attach to, and thus indicates addenda or supplements to the prompt dower. The *tawabi`* consist of items making up a specified cash value normatively additional to the prompt dower; the cash is either delivered to the wife for her to buy items of the kind specified or is used by the husband to purchase the items which are then delivered to the wife.

The registration of *tawabi`* appears to arise at least partly from an awareness on the part of the bride's family — perhaps prompted by the local *ma'dhun* — of the potential in protecting her right to items of property that might otherwise be disputed or 'held hostage' by the husband. This may happen, for example, in the wife's claim to *jihaz*, her 'trousseau'. Custom dictates that the bride is provided with gold jewellery, items of clothing

[32]Moors, 1995, 108–110.

[33]Moors, 1995, 113.

[34]Idrisi, 1987 (Marriage Expenses, Part III).

and of household furniture to take with her to her new home when she goes to live with her husband. Classical Hanafi law holds the *jihaz* of the wife to be the responsibility of the husband, along with her maintenance and the preparation of a proper dwelling.[35] Thus, although the woman may often use at least a part of her dower to buy items for her *jihaz*, there is no obligation upon her to do so, as emphasised by Article 61 of the JLPS:

> The dower is the property of the wife and she may not be obliged to use it for her *jihaz*.

Samara's comments on this issue serve to illuminate the connection between *mahr*, *tawabi`* and *jihaz*. He discusses 'money paid by the husband over and above the dower, for the *jihaz* of the woman's person and house'; he agrees that Article 61 represents classical Hanafi law, but notes that it does not distinguish between the circumstance where the man pays money separate from the *mahr* for the purposes of *jihaz*, and where the *mahr* is paid without any sum being distinguished from it for use as *jihaz*. In the latter circumstance, Article 61 clearly applies, but Samara would argue that if a certain amount of money was provided by the husband separately from the prompt dower for the purchase of articles for her *jihaz* by the wife, then she must use it for that purpose. Noting that the JLPS does not address the question of ownership of the *jihaz* and household items, he observes that it appears the Jordanian legislators felt it was sufficient for the wife to be able to register in the contract items of furniture and other items that are her property, and continues that 'this is what people in the current age do, registering particular items of furniture in the name of the wife.'[36]

The *tawabi`* of the prompt dower, where registered, are usually the same as the items customarily included in the wife's *jihaz* (apart from clothes), but it is likely that the wife also takes other items as her *jihaz* not included in or indeed bought from the *tawabi`* of the prompt dower. Furthermore, it is obviously erroneous to assume that where no *tawabi`* are registered, no *jihaz* was provided for the wife by the husband; the gift of gold jewellery, at the engagement and perhaps at the contract as well as at the wedding, and of clothes for the wife is an established custom. The legal

[35]See Samara, 1987, 199. *Jihaz* also means 'equipment'; the root, *jihaza*, gives the meaning of getting ready or preparing for. Compare Shaham, 1997, 28, 37, on Egyptian customs on *jihaz*, reflected in the material he studied.

[36] Samara, 1987, 199–200; and 203.

point of interest is the increasing tendency to register these items in the contract document, paralleling the decrease in the proportion of prompt dower compared to deferred dower shown in the sample contracts, as shown in the table below.

Table 4.2 — Number of contracts registering *tawabi`* of the prompt dower, by court and year

court	total contracts	no. with *tawabi`*	% with *tawabi`*
1965			
Bethlehem	448	18	4%
Ramallah	708	63	9%
Hebron	1248	182	15%
total	2404	263	11%
1975			
Bethlehem	441	27	6%
Ramallah	1040	102	10%
Hebron	1331	571	43%
total	2812	700	25%
1985			
Bethlehem	475	88	18.5%
Ramallah	1038	181	17.5%
Hebron	1806	1416	78.5%
total	3319	1685	51%

The table shows a steady increase in the proportion of contracts registering *tawabi`* in Ramallah and Bethlehem, and a sharp increase in Hebron which considerably affects the overall totals. Other research confirms both the increasing tendency to register *tawabi`* in the contract, and the strong influence of local custom (or perhaps the preferences of the local court officials) on this institution. The WCLAC study shows a wide variation in local patterns, with the 1994 contract sample showing 62% registering *tawabi`* in Nablus, 26% in Ramallah (a slow climb from the 1985 figure), 22% in Rafah and a startling 97% in the Gaza City sample.[37] It is probably

[37]Welchman, 1999, 53, table 2.4.

also the case that the value of the *tawabi`* is becoming increasingly significant in the value of the prompt dower as a whole, given the emergence of the token prompt dower.[38] The WCLAC research showed that in Gaza, both the average and the mode registered values of cash prompt dower plus *tawabi`* were higher than the deferred dower, while in the West Bank courts of Nablus and Ramallah the average remained lower than the deferred. In Ramallah, in the 27% of contracts that had *tawabi`* registered in 1989, the mode value was equal (1000 dinars prompt dower, 1000 dinars the value of the *tawabi`* and 2000 dinars deferred); in 1994 the emergence of the token prompt dower as the mode in the Ramallah sample adjusted this balance, even though the mode *tawabi`* value had doubled to 2000 dinars and the mode value of deferred dower had risen to 3000 dinars.[39]

In Nablus, Moors' work revealed that the lead in registering *tawabi`* was taken by the urban lower middle classes, and moved up the social hierarchy. Combined with the emergence of the token prompt dower among the urban elite, this made a common combination in the 'middle social categories' of the token prompt dower with registration of *tawabi`*.[40] She concludes however that despite the clarity of the emerging pattern, her interviews showed that 'in practice the implications of this trend have remained rather limited.' She adds that women may strengthen their position within the marriage by allowing the husband not to bring everything at once: 'the importance of registering addenda then may well be that it makes it visible that the bride has refrained from claiming her rights.'[41] This of course is just what the bride cannot do if she registers a token prompt dower and no *tawabi`*: the latest available figures for Ramallah — those from the WCLAC study — show 53% in the sample registering a token prompt dower, but only 35% registering the *tawabi`* of the dower in the contract document.

In the contracts registering *tawabi`* examined for the purposes of this study, the level of standardisation within particular communities was notable — both in terms of whether or not *tawabi`* tended to be registered, and if so, what items were involved. The main items registered as *tawabi`*

[38]Fakhida, 1979, 75; and Idrisi, 1987 (Marriage Expenses). Both observe that it is often the *tajhiz* of the bride that poses the greatest financial burden on the groom and his family these days.

[39]Welchman, 1999, 57 table 2.5 and 2.7.

[40]Moors, 1995, 114.

[41]Moors, 1995, 116.

were gold jewellery (*masagh, haly*) and house furnishings (*athath bayt*), as shown by the table in Appendix V. In 1965, when only 10.9% of the contracts in the three courts had *tawabi`* registered, items of furniture were the items most commonly listed (76%). This was often done in great detail, listing for example beds, mattresses, cupboards, bedlinen, pillows, sometimes a table and chairs, and occasionally a sewing machine, with a maximum value of 250 dinars. In Hebron, several contracts included the registration of a 'complete bedroom';[42] another, more unusually, listed a piece of land valued at 60 dinars. In 1975, items of furniture were still most commonly listed as *tawabi`* (73%) but an increasing number of contracts included also items of gold jewellery along with furniture (20%). Occasionally the contracts registered fridges, washing machines or televisions, as well as the more common bedroom and living room furniture. Two contracts included items of *kiswa*, the outfits of clothing traditionally bought for the bride as part of her *jihaz*. By the year 1985, the most frequent entry of *tawabi`* comprised both items of furniture and gold jewellery (53%) — although this really reflects the Hebron figures, since registering only gold was more common in Bethlehem and furniture in Ramallah. Some of the amounts being registered were very high. By way of example, in Hebron, one contract registered items of furniture worth 1500 dinars, together with gold jewellery to the same value; in Bethlehem there was a contract with a token prompt dower of one dinar, a deferred dower of 5000 dinars and *tawabi`* consisting of 2000 dinars' worth of gold jewellery and 3000 dinars in furnishings; and in Ramallah one contract showed a prompt dower of one dinar and 5000 dinars' worth of furnishings as *tawabi`* of the prompt dower. In several contracts from the village of Halhul in the Hebron district, items of furniture were registered as the *tawabi`* and the prompt dower was given as gold jewellery rather than as a cash sum; others registered the gold in weight rather than by value.

In most cases, the *tawabi`* are clearly intended as additional to the cash prompt dower. However, in Hebron in 1965 and particularly 1975, it was

[42]In 1975, about half the *tawabi* registered in Hebron included a 'complete bedroom'; there were under 20 in the two other courts. Heiberg 1993, 90, notes this more generally as a custom, with the bedroom furnishings detailed in the contract and provided by the groom's family. The obligation to furnish the bedroom remains where the couples move in to the man's family house, but she notes that in independent dwellings of the middle classes these days, the groom is expected to furnish the whole house.

specifically stated in some contracts that the items registered as the *tawabi`* of the dower had been bought by the wife or her *wakil* from the prompt dower that had been received from the husband. Thus, for example, one contract gave the dower as 1000 dinars prompt and 500 dinars deferred, and the *tawabi`* as 500 dinars' worth of gold and 400 dinars of furnishings 'from the prompt dower'.

Less clear are those contracts where the *tawabi`* are registered as having been 'bought from wife's own money'; for example, a dower of 450 dinars prompt and 300 dinars deferred dower registered in Hebron with *tawabi`* of 250 dinars gold and 200 dinars furnishings, 'bought from the wife's own money.' The prompt dower is, of course, the wife's own money, and in this example the cash values tally, but it cannot be conclusively deduced that she used her prompt dower to buy the items registered. Phraseology of this kind also appeared in Hebron contracts of 1975 under the section set aside for stipulations, rather than in the section reserved for dower and *tawabi`*. A high total of 69 stipulations was registered in the contracts of Hebron that year, 54 of them being accounted for by *ma'dhuns* in three particular areas using the stipulations section to identify *tawabi`* of the prompt dower. The largest grouping of stipulations all came from the same village, and simply registered that the husband 'acknowledged that the wife owns' a certain amount of gold or furnishings 'as her property and as a right'; none of them registered anything under *tawabi`* of the dower. Other stipulations identified items of gold, and sometimes clothes, as having been bought from the wife's prompt dower or as having been bought for her by the husband. A smaller group of contracts had stipulations to the effect that the husband should bring his wife items of furniture to a certain value, with gold jewellery registered as *tawabi`*, or *vice versa*. This last type of stipulation is likely to be of little legal effect in realising the aim of ensuring the wife's right to property. An Appeal decision from 1951 cited by al-`Arabi states that:

> A stipulation made by the wife's *wakil* in the contract session to the effect that the husband bring his wife a suite [of furniture] to the value of 40 dinars, to be hers on *talaq* or death, and this being stated in the section of stipulations, has no value so long as it is not stated in the section set aside for Dower and Type [of dower].[43]

[43]Al-`Arabi, 1973, 29, 5709/51. In 31677/1990, the Amman Appeal Court held sim-

As far as the other stipulations are concerned, while the inclusion of the stipulation acknowledging the wife's ownership of certain items of property may assist in establishing ownership in the event of a dispute, their non-registration as *tawabi`* means that they cannot be claimed as a defence to an action for obedience by the husband, and if they are not acknowledged by the husband as being *jihaz*, then claims regarding the items will be heard in the regular rather than the *shari`a* courts.

4.1.5 Receipt of the Dower

The bases of potential complications in the event of future disputes can also be seen in the fact that the vast majority of contracts note that the wife's *wakil* 'acknowledges receipt' of the prompt dower during the session in which the contract is concluded. There are two points here that may arise in later disputes. Firstly, customarily it is not the wife but her *wakil* who receives the dower, and indeed by law the dower of the *bikr* must be received by her *wali*.[44] As noted above, in the past at least it was not uncommon for the father or brother of the bride to hold on to all or part of the sum, although legally bound to deliver it all to the wife. Secondly, the wife's *wakil* will often acknowledge receipt of dower that has not actually been paid, more as a formality and a show of good faith than as a legal acknowledgment of receipt.[45] If the dower is never actually paid and a dispute arises, the *wakil* will have to deny his written acknowledgment of receipt in support of an action by the wife for payment of dower by her husband, as is described in the next chapter. The *wakil*'s acknowledgment of receipt is however very much the rule, whether the prompt dower is a token dower or a sum in the thousands. There are some exceptions; in Hebron in 1975 and 1985 it was not uncommon for the wife's *wakil* to acknowledge receipt of one portion of the prompt dower and to state that the rest was in the keeping (*dhimma*) of the groom; examples of this also occur in the 1985 sample of contracts

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ilarly, stating that a stipulation clarifying the wife's ownership of a piece of land did not serve to implement this statement, since a stipulation was of legal value only in seeking dissolution in the event of it being violated: Dawud, 1991, I, 376.

[44]JLPS Article 64.

[45]Compare Shaham, 1997, 31, on similar practice in the Egyptian material he examined, although the informal promissory note for the remainder that features in his material did not appear in the West Bank material examined for this study.

taken in Ramallah. Occasionally, all or part of the prompt dower is actually paid over in the contract session. In Hebron in 1985, an interesting feature in several contracts appeared to combine the token prompt dower with the traditionally higher prompt dower, involving a dower of for example 1001 dinars prompt, 1000 dinars deferred and 1000 dinars *tawabi'*; the wife's *wakil* would acknowledge receipt of one dinar.

4.1.6 Dower, Law and Society

Of the many complex issues related to *mahr*, it has generally been the burden of the dower and the costs of marriage in general as perceived by the groom and his family that has received the most public attention — at least in the press. Depending upon the general economic situation, this has been a common cause of complaint throughout the region, but is not generally regarded as a matter for regulation by law — only South Yemen set an upper limit on the amount of dower, and this was removed in the unified Yemeni personal status law.[46] Enforcement of such a rule would be extremely difficult, and classical position that held a maximum could not be imposed in law has been little challenged.[47] The tone of much of the discussion and writing on this issue is therefore not so much advocacy of a change in the law but one of exhortation to society, particularly the families of the brides, to take a different attitude, in recognition of the fact that it is custom that dictates conduct in this area of the law.

It is hard to identify a standard dower for a whole area, and on top of the dower one has to calculate the costs of non-registered gifts and other items of *jihaz*, and the associated expenses of the wedding celebration, to estimate what it would cost to get married in the West Bank. In 1965, the contract samples showed a typical prompt dower to be from 100–200 dinars, with some well below this amount.[48] By 1975, the contract samples showed most prompt dowers ranging from 300–600 dinars, with several

[46]Article 18 of the 1975 South Yemeni law stated that the total of prompt and deferred dower may not exceed a hundred dinars. In the new Personal Status Law (no.20 of 1992) this provision disappeared.

[47]See Sirtawi, 1981, 138–139, and al-Kurdi, 1981, 20. See Layish, 1975, 63, for the views of the *qadis* in Israel 'that the problem would find its solution with the passage of time', and 56–57 for the failure of a Bill aimed at setting a limit.

[48]The lowest dower in the Bethlehem sample in 1965 was five dinars prompt, none

over 1000 and sometimes having *tawabi`* of several hundred dinars also registered. In 1985, apart from those contracts with a token prompt dower, few contracts in the Bethlehem or Ramallah sample had prompt dowers of under 1000 dinars, and although prompt dowers in the 500–1000 dinar range were more common in Hebron, the large proportion of contracts registering *tawabi`* there gives a clear picture of registered costs of over 1000 dinars for the total prompt in most cases. The highest prompt dower in the 1985 sample in Hebron was 5000 dinars, with *tawabi`* of gold to the value of 2000 dinars, followed by a prompt cash dower of 2000 with bedroom furnishings to the value of 2000 more as *tawabi`*.

When the expenses of the wedding celebrations are added, the total amounts form the context to the concern articulated in various quarters in the 1970s and 1980s at the rising costs of marriage. The problem of inflated dowers was not peculiar to the West Bank; Hijab notes the impact on dowers in the Gulf of that region's rapid material development, and the inflation there undoubtedly also had an indirect effect in the West Bank due to number of ex-patriate Palestinians living and working in the Gulf and coming home to marry. Layish discusses the problem in Israel, al-Kurdi in Syria, and articles in the Jordanian press voiced similar positions.[49] In the West Bank, newspaper articles blamed society at large for allowing ostentation and competition to dominate the institution of marriage.[50] The document drawn up by the Hebron elders' meeting on marriage in 1987 also addressed this issue.[51] The then *qadi* of Ramallah, in a newspaper article, pointed out that excessive demands in dower not only cause delay in the marriage of young men, but might encourage them to marry foreigners since little dower, gold or *jihaz* is required by such women on their mar-

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deferred and no *tawabi`*, followed by twenty dinars prompt, ten deferred and ten *tawabi`*; in Hebron it was 20:10:10, followed by 50:10:0.

[49]Hijab, 1988, 127; Layish, 1975, 56–7; Al-Kurdi, 1981, 17–19; and articles by Ahmad Hussein Abu Ghosh in *al-Ra'y*, 3 March 1988 and 25 March 1988. Nor are these complaints unique to modern times; Shaham 1997, 29, notes the *qadis* of Egypt in the material he examined as generally being 'irritated by the gradual increase in the rates of dower.'

[50]For example, articles by Nabil Yahya, 'The Inflation of Dowers and its Psychological Effect on the Youth', *Al-Quds*, 6 September 1986; and by Ali Abu Zaid, 'Women is a Pearl in Islam', *Al-Quds*, 26 December 1986.

[51]Reported in *Al-Quds*, 20 October 1987.

riage.[52] In a sequel to this article, he observes that society has moved far away from the practice of the Prophet and his Companions, and that demands for excessive dower are made for the wrong motives.[53]

The uprising that began in the Occupied Palestinian Territories in December 1987 added to these general social and religious exhortations the expectations and the exigencies of the national struggle. The economic situation deteriorated severely, and in deference to the families of the martyrs and the prisoners, a period of 'silent weddings' marked the early years, substantially reducing the costs of the actual celebration. A relative reduction in dower expectations was reported during these *intifada* years, attributed in part by some writers to efforts by women's groups 'to decrease or eliminate the *mahr*' as a 'burdensome custom'.[54] By way of comparison, Badran notes Egyptian feminists campaigning to lower the *mahr* in the 1930s, (including leading by example) against the background of depression and economic crisis.[55] In Algeria, Marnia Lazreg records attempts by the nationalist FLN to limit the maximum level of dower during the war of liberation against the French; despite feminists holding it 'an antiquated custom that objectifies women' she notes its persistence as a major feature of marriage, and the inexorable increase in its value over the years.[56]

Similarly, in Palestine, it does not appear that the decrease reported in the *intifada* years has been sustained, and weddings are once again big events, making marriage more immediately expensive. Nevertheless, the increase documented in the WCLAC sample of West Bank contracts does not support the perception of an insupportable inflation in dowers as was the case in the 1970s, and Moors points out that the devaluation of the dinar in January 1989 was often not fully compensated for by a proportional rise in the dower. She finds that for the groom and his family, the greatest financial burden of marriage these days may not be the dower but the cost of accom-

[52]Idrisi, *Al-Nahar*, 30 January 1987.

[53]Idrisi, *Al-Nahar*, 6 February 1987.

[54]Wing, 1994, 188–189. See also Chapter Two note 132.

[55]Badran, 1995, 139–140.

[56]Lazreg, 1994, 181–182. See her discussion, 183–184, on the intentions of the Algerian legislator in maintaining dower as a condition of marriage (in line with Maliki law) and of the perceptions of dower motivating women to demand it even in circumstances where they clearly do not stand in need of it.

modation. The costs of housing have risen much more steeply than the relative value of the dower, and women's expectations have also increased, with an emphasis on accommodation independent from the groom's family house, as is illustrated also in the subjects addressed by women in special stipulations in their marriage contracts.[57] In real terms, Moors finds that women may have a decreasing access to and control over property through dower than previously, with a less central role being given to the prompt dower and women more economically dependent upon their husbands in a societal structure that is increasingly emphasising the conjugal tie over kinship relations.[58] The fact that under the terms of the current law, a husband can — in theory — prevent his wife from working and that the gender-specific proportions of inheritance still apply (with the basic rule that women take half the man's portion) keeps dower as a potentially critical element in the balance of rights and duties between the spouses. Beyond the law, as Hammami notes, dower 'continues as an important social practice, although it may no longer provide a sustainable source of economic support for women.'[59]

4.2 SPECIAL STIPULATIONS IN THE CONTRACT OF MARRIAGE

4.2.1 Stipulations in Law

The wife's rights of dower and maintenance established by the contract are balanced in the classical rules by her duty of obedience to her husband. As explained further in the next chapter, this duty meant *inter alia* that the classical jurists gave her no absolute right to go out to work and required that she must move to live with her husband if he relocates to a different town or country. The classical rules also grant the husband the

[57]Moors, 1995, 121–123.

[58]Moors, 1995, 124–125.

[59]The FAFO survey showed 55% of women interviewed in the West Bank claimed to own jewellery which they could sell — that is, the gold they receive at engagement and marriage, as well as sometimes at the birth of a child, remains a key, and frequently sole, form of independent capital. Hammami, 1993, 295–297, and table 10.11.

licence to contract marriage with up to three other women at the same time, and to dissolve the contract — that is, end any marriage in which he is engaged — with a simple unilateral repudiation (*talaq*) of the woman involved, a power which does not accrue to the wife by the simple fact of the contract.

However, these standard terms can be altered somewhat through attachment to the contract of special conditions. Leila Ahmed suggests that 'spelling out the terms' of marriage contracts was perhaps 'not unusual' — at least so far as women of the elite were concerned — in the early decades of Islam, possibly reflecting pre-Islamic practice and expectations.[60] It is clear that practice has varied from place to place down the centuries, although the absence of written contracts complicates the exploration of the extent to which such stipulations were used, by whom, under what circumstances and to what purpose. What is clearer, however, is the fact that whatever the expectations of the parties, and whatever function these stipulations played in the negotiation of their marriage contract and indeed their marital relationship, most of the jurists accorded a large proportion of such stipulations no enforceable legal value, unless phrased as a delegated divorce.

The classical jurists were of one mind in considering valid any stipulations that reinforced something already required by dint of the marriage contract — for example, a stipulation to the effect that the husband should treat the wife well, or that he should not take over her property.[61] On the validity of stipulations that did not fall into this category, however, they differed. The Shafi'is and Malikis classified stipulations into three categories: broadly, stipulations upholding the regular terms of the contract, which they held to be valid; irregular stipulations which were cancelled, leaving the contract valid; and void stipulations which caused the voiding of the contract.[62] The Hanafis recognise as valid only those stipulations that reinforced something already required by the contract and by marriage, or those that were expressly permitted; these were 'enforceable' only if reme-

[60]Ahmed, 1992, 77; she notes that Muhammad's great-granddaughter Sukaina is reported to have stipulated *inter alia* that her husband take no other wife and let her live near her best friend.

[61]See Samara, 1987, 123, and Sirtawi, 1981, 112.

[62]Samara, 1987, 123–5, 112–3.

dies existed in the classical rules for the violation of the existing rule that was being reinforced.[63] Any other stipulations were regarded by the Hanafis as having no legal value. They distinguished between stipulations that it was forbidden to fulfill, since they contradict the basic presumptions of marriage (such as that the wife should have no dower) and those that might be legitimately and voluntarily fulfilled — for example, not to take another wife for the duration of the marriage. In the latter type, the Hanafis held that while it would be lawful and indeed good of the husband to keep his word, there was no legal obligation for them to be fulfilled, and no remedy if they were broken.[64]

The Hanbalis were alone among the Sunni schools to give legal value to stipulations other than those reinforcing the standard rules arising from the contract of marriage.[65] The Hanbalis divided stipulations into valid and invalid and then subdivided according to nature and effect. Valid stipulations were those reinforcing the normal requirements of the contract and also anything that was not against the requirements of the contract or the fundamental intentions of marriage. This category included for example a stipulation that the man should not take another wife, or should not make his wife leave her home town. The Hanbalis held these stipulations to be binding, in the sense that breach thereof constituted breach of the contract, and the injured party could seek dissolution of the marriage.[66]

Invalid stipulations were divided by the Hanbalis into those causing the voiding of the contract — principally, those that turn the contract into a temporary or *mut`a* marriage;[67] and those stipulations which are them-

[63]Thus in the Hanafi school not many stipulations would have been enforceable. A stipulation reinforcing the man's duty of maintenance, for example, could not have been used before a Hanafi judge as grounds for divorce in the event of failure by the man to comply.

[64]Samara, 1987, 125–126. See also Musa, 1955, 253–256.

[65]Samara, 1987, 128, cites a *hadith* on which schools based their non-recognition of all other stipulations. See Musa, 1955, 79, for the Quranic basis of the Hanbali position, including 'O ye who believe, fulfill your undertakings' (The Table Spread, verse 1: translated by Pickthall, 1976, 133.)

[66]Samara, 1987, 126; Sirtawi, 1981, 113–114; Musa 1955, 257– 263 on the Hanbali position.

[67]Or a *muhallil* marriage, where a woman is married to a man with the express condition that she is to be divorced by him promptly and that the intention is purely to make her lawful again to her former husband. See below and Samara, 1987, 127.

selves void but leave the contract intact. The latter are stipulations contradicting the requirements of the contract, such as that the woman should have no dower.

In 1917, the OLFR used the Hanbali position to justify a provision that allowed the woman to stipulate that she would be divorced if her husband married another wife while still married to her.[68] This was as much an extension of the Hanafi rules on delegated or suspended *talaq* as an adoption of the Hanbali position on conditions, particularly as it was so limited, but the emphasis on the form, as a stipulation, was backed up by Article 61 of the OLFR, which stated that if stipulations inserted at the time of the contract for the benefit of one of the parties were not respected, the marriage was irregular. There was no clarification of what kind of stipulations would be allowed, nor of what the procedure would be in the event of one being broken; nor indeed if this was in fact meant to be constrained by the earlier article. Nevertheless, it pointed the way for the selection (*takhayyur*) of the wider Hanbali position on this subject in many of the Arab codes of personal status law later in the century.

In 1951, the Jordanian legislators included in the JLFR the following Article 21:

> If in a contract of marriage a stipulation is made that is to the benefit of one of the parties — for example, if it is stipulated that the bond of marriage is in the hand of the wife, or that the husband will not take her out of the town in which they have agreed to live, or that he shall not take another wife during their marriage — then it must be observed, provided that in the event of a denial, the condition is registered in the marriage document; if the stipulation is violated, then the marriage shall be dissolved (*faskh*) at the petition of the wife.

This provision sets out part of the Hanbali position in curtailed form: for example, it does not state explicitly that the stipulation must not violate the fundamentals of marriage or that the benefit must be lawful. Furthermore, although it does not identify the party who may make the stipulation, the provision ends by giving the recourse of an application for *faskh* in the case of violation to the wife only. The promulgation of the JLPS in 1976 gave the legislators the opportunity of expanding considerably upon the

[68]OLFR Article 38.

JLFR text, drawing in more of the original Hanbali distinctions and giving further examples. The JLPS also makes the use of stipulations explicitly open to both spouses and details the effects on each spouse should the other violate a stipulation. Article 19 provides:

> If a condition is stipulated in the contract that is of benefit to one of the parties, is not inconsistent with the intentions of marriage, does not impose something unlawful and is registered in the contract document, it shall be observed in accordance with the following:
>
> i) if the wife stipulates something to the husband that brings her a benefit that is lawful and does not infringe upon the right of the other, such as if she stipulates that he shall not remove her from her town, or that he shall not take another wife during their marriage, or that he shall delegate to her the power to divorce herself, or that he shall settle her in a certain area, this shall be a valid and binding condition, and if the husband does not fulfill it, the contract shall be dissolved at the application of the wife and she may claim from him all her matrimonial rights;
> ii) if the husband stipulates to the wife a condition that brings him a lawful benefit and does not infringe upon the rights of the other, such as if he stipulates that she shall not go out to work, or that she shall live with him in the area in which he works, this shall be a valid and binding stipulation, and if the wife does not fulfill it, the marriage shall be dissolved at the application of the husband and he shall be exempted from paying her deferred dower and maintenance during the *`idda* period;
> iii) if the contract is constrained by a condition that contradicts the intentions of marriage or imposes something unlawful, such as if one of the spouses stipulates that the other shall not live with him/her, or that they shall not share marital intimacy, or that one of them shall drink alcohol, or shall break off relations with their parents, then the condition is void while the contract remains valid.

The Explanatory Memorandum to the JLPS states that the Hanbali position has been adopted in the public interest (*maslaha*) and the stipulations provided for made binding (*mulzim*).[69] Samara points out that the one omission from the Hanbali position in the JLPS article is the type of

[69]Explanatory Memorandum, 2. The JLFR had not used the word 'binding' (*mulzim*).

stipulation that the Hanbalis categorised as causing the voiding of the contract, since the type of contract to which they give rise are voided under other sections of the JLPS.[70] The detailing of the type of stipulation that is void while leaving the contract valid in Article 19(iii) is a tightening of the provision on stipulations in line with Hanbali rules.

With regard to stipulations that are held to be valid, there are two standard Hanbali constraints: that the benefit obtained by the party inserting the stipulation is not something expressly forbidden by the *shari`a*, and that it does not affect the right of others.[71] The examples of stipulations that a woman may legitimately make all imply a change in existing legal presumptions on what the wife shall and shall not do or be subject to; the stipulations that a husband may make, on the other hand, are illustrated by examples that reinforce the weight of presumptions that still exist to a large extent in law, but which are being challenged in practice as a result of more recent socio-economic developments — it is no longer to be automatically assumed that the wife will be wholly engaged in non-waged domestic labour, or indeed that this is necessarily preferable to her participation in the wage-earning labour force, nor is it to be assumed that she will be willing to move wherever her husband goes.

The other advantage for the man in inserting such a stipulation, besides clarifying the terms of his marriage, is his ability in the event of the wife's non-fulfillment to have the marriage dissolved without being liable to pay his wife's remaining financial claims upon him — her deferred dower and maintenance for the *`idda* period. This is one of the areas where the JLPS has taken the approach of 'balancing' between the rights of the spouses, an approach which appears usually to benefit the husband rather than the wife since it gives him additional rights and recourses to those he already has. In the case of the wife's 'disobedience', for example by refusing a legitimate request that she come to live with him, the husband has always had the option of exercising his power of unilateral repudiation. However, while a wife divorced for reasons constituting 'disobedience' is not due maintenance for the *`idda* period, the only times she loses her right to de-

[70]Samara, 1987, 129; see also Sirtawi, 1981, 115.

[71]Literally, 'the other's right', but this can be taken to mean the rights of the other spouse and of third parties such as the spouses' parents or another wife.

ferred dower in classical law are when she explicitly agrees to waive it in return for a divorce in a *mukhala`a* arrangement, or where she loses all or some of it as a result of the apportioning of blame by the arbiters in a claim for separation on the grounds of 'discord and strife'.

Under the present law, if the husband were to insert a stipulation and divorce his wife by *talaq* upon her non-fulfilment thereof, he might in some circumstances be able to defend her claim for maintenance during the *`idda* period by establishing that her action constituted 'disobedience' under the terms of classical law and the terms agreed in their contract. In addition, a wife would probably be unable to claim compensation for arbitrary *talaq* if the husband could establish the grounds of his wife's violation of a written stipulation. However, were a man to choose to apply for *faskh* of the contract on these grounds, there would be no question of compensation for arbitrary *talaq*, and his wife would face the prospect not only of the end of the marriage and loss of maintenance, but also of her remaining right to deferred dower.

For the woman, the insertion of written stipulations in the contract of marriage offers the opportunity of protecting a certain degree of freedom of choice: choice of where she lives, or of participating in the waged labour force for example, without being penalised in financial terms for exercise of this choice. However, in the case of the husband's violation of the stipulation, the choice ultimately is acceptance of what she has stipulated against (i.e. an unacceptable situation) or the ending of her marriage. Stipulations in the marriage contract are binding but not enforceable; they do not prevent the establishment in fact or in law of the situation stipulated against, but give the wife a way out if her apprehensions are realised. Thus, if a woman wishes not to become involved in a polygynous marriage, for example, she may stipulate that her husband shall not take another wife while still married to her; this stipulation is not enforceable in the sense that any subsequent marriage he may conclude is voided on the basis of the stipulation, but it is binding in that such an action constitutes breach of contract and she at least has the choice of not remaining in the polygynous union, through applying for dissolution of the contract. The final point to be made about the contents of Article 19 of the JLPS is that it clearly states that to be of legal value, the stipulation has to be in writing in the contract of marriage. While the JLPS has provided that documented changes to the terms of the contract in regard to dower (increase or decrease) attach to the contract itself, jurisprudence from the Amman Appeal Court has held that a stipulation agreed upon subsequent to the contract (a year later in the spe-

cific case examined) and duly registered at court in a 'deed of acknowledgement' (*hujjat iqrar*) was not covered by the terms of Article 19.[72]

4.2.2 Incidence

The effect of the expanded text of Article 19 appears to have been minimal in terms at least of use made of stipulations in the West Bank. Writing just after the promulgation of the JLFR in 1951, Anderson noted that he had been informed that the insertion of stipulations 'is today the rule rather than the exception among upper class families in Jordan, and increasingly common among all classes'.[73] There is no evidence of this in the contracts examined in the West Bank; the following table shows that of the 8535 marriage contracts seen in the three courts, only 1.5% contained special stipulations:

Table 4.3 — Number of stipulations registered in marriage contracts, by year and court

court	contracts	number with stipulations	% with stipulations
1965			
Bethlehem	448	8	1.8
Ramallah	708	5	0.7
Hebron	1248	18	1.4
total	2404	31	1.3

[72]28363/1987, Dawud, 1999, I, 374–375. The first instance court had granted a judicial dissolution on the basis of a delegated *talaq* recorded in the 'deed of acknowledgment'; the Appeal Court overturned the ruling. On increase or decrease in dower, Article 63 JLPS.

[73]Anderson, 1951 ('JLFR'), 192, note 14. Layish, 1975, 31–32, noted that in 1968 about 10% of contracts from the Muslim Palestinians in Israel contained stipulations; many of these are likely to refer to property, while the marriage contracts in Jordan and the West Bank have a special section for property in *tawabi`* of the prompt dower. See Layish, 1975, 34 and 36 regarding the attitude of *qadi*s to stipulations inserted in contracts by Muslim Palestinians inside Israel. See Ali and Sulaiman, 1969, 17, for attitudes to stipulations in Saudi Arabia, where Hanbali rules are applied.

1975			
Bethlehem	441	3	0.7
Ramallah	1040	5	0.5
Hebron	1331	69	5.2
total	2812	77	2.7
1985			
Bethlehem	475	1	0.2
Ramallah	1038	3	0.3
Hebron	1806	17	0.9
total	3319	21	0.6
overall totals	8535	129	1.5

There is one major disruption in the figures in the table — the registration in Hebron in 1975 of stipulations in 69 contracts of marriage, constituting 5.2% of the contracts there for that year. The large majority of these stipulations were of the type described in the previous section of this Chapter — that is, the use by *ma'dhun*s in certain areas of the Hebron district of the 'stipulations' section of the contract to register property, instead of the section set aside for *tawabi`* of the prompt dower. Thus, over 50 of these contracts would more properly have had nothing written in the stipulations section but would have shown entries in the *tawabi`* section. An adjustment of the figures to eliminate this idiosyncrasy, which as noted earlier may in some cases have affected the woman's right to that property in an adverse rather than a positive way, would take the proportion of contracts with stipulations in Hebron in 1975 to 1.1%, the overall proportion for the year to 0.8% and the proportion of contracts containing stipulations out of the total seen in the three courts over the three years to 0.9%. The WCLAC research covering the years 1989, 1992, 1993 and 1994 found only two stipulations registered in Ramallah in a total of 4643 contracts, although 2% of the contracts in Nablus over those years had stipulations.[74]

Nearly all stipulations in the case material were made by women. The extremely small number reflects the rather negative opinion of stipulations

[74]Welchman, 1999, 69, table 3.1. A total of 11,351 contracts were examined and had an overall percentage of 1.2% with stipulations. The examination of contracts registered in the Gaza and Rafah courts revealed none; the Law of Family Rights reproduces the OLFR provision in its Article 24.

held by commentators. The insertion of stipulations may arise from specific apprehension on the part of the bride's family vis-à-vis the groom — for example, if he is much older than the bride, or if they fear he is likely to emigrate, or if they do not know his family. Even so, many families are likely to shy away from making written stipulations in the contract session, and rather to obtain oral assurances.[75] The disruption of such a traditional process as the conclusion of marriage by introducing demands for written conditions could be perceived as bad faith; insisting on unusual rights for a woman might be perceived as presaging trouble ahead. Marriage notaries may display aversion and be loath to register stipulations in the contract; *qadi*s themselves may consider them inopportune and not necessary, and be discouraging about their use.[76] Ziba Mir-Hossaini reports being told by some marriage notaries in Morocco that they would 'never agree' to draft in such stipulations as it 'sets a shaky foundation for the union.'[77] For all sorts of reasons, stipulations are not generally looked upon with favour. The woman herself is therefore under pressure not to insist on something out of the ordinary being incorporated in a stipulation, and her negotiating position is likely to be weak.[78] Two points are voiced in answer to queries on this matter: firstly, the *shar`i* position that the rights of women are fully protected by the *shari`a* and adequate remedies already exist for such grievances as she may develop later in her marriage; and secondly that it is preferable for spouses to be able to have mutual understandings on such matters (without it having to be in writing) and to talk about any problems as they arise.

Where the wife and her family do decide to take advantage of the opportunity offered by the possibility of setting special conditions for the marriage, they sometimes make two or three stipulations rather than just one: Article 19 of the JLPS sets no official limit to the number that can be made. The number of stipulations made in the case material thus exceeds

[75]Moors, 1995, 111 recounts the case of a Nablus woman stipulating orally to her fiancé that she was to complete her MA, go out to work if she wished, and dress as she pleased.

[76]See Khadr, 1998, 137.

[77]Mir-Hosseini, 1993, 86.

[78]See Sa'adawi, 1980, 191: 'The traditions a pressures of society and the family are usually too heavy for [the wife] to insist on including such a clause in her marriage contract.'

the number of contracts containing them, as shown in the following table which shows the subject matter of stipulations made by women and indicates the number made by men:

Table 4.4 — Subject matter of stipulations in the contracts

Subject matter	1965	1975	1985	total
place of wife's residence	7	5	3	15
domestic accommodation of wife	3	2	9	14
another wife	6	3	2	11
general power of divorce (*`usma*)	3	2	1	6
husband travelling abroad	3	1	0	4
wife to do non-domestic work	0	2	6	8
wife not to do non-domestic work	2	0	0	2
disposal of wife's earned income	2	2	0	4
property of the wife	3	56	0	59
guarantors for dower	0	3	0	3
wife's education	0	1	2	3
children	3	0	0	3
disease in man	0	1	0	1
stipulations by men	1	0	2	3
totals	33	78	25	136

In 1965 and 1975, the subject about which women made most stipulations was the geographical location of residence — where she was going to live; by 1985, this had shifted to domestic accommodation — what kind of dwelling she was going to live in. The WCLAC work shows a similar concern in the material from Nablus in the 1990s, with 'independent dwelling' at the top of the list. It is followed, however, by a stipulation to the effect that the wife was to continue her studies, and then the geographical location.[79]

Stipulations made by women addressing the subjects indicated in the table above fall into two categories: those that provide a remedy, and those that do not. Both these categories can be subdivided. The type of stipulation that provides no remedy either appears as a clarification on a certain aspect of the marriage, strengthening the woman's defence against standard

[79]Welchman, 1999, 72 table 3.3: seventy out of the total 133 stipulations were on an independent dwelling, twenty on continuing education and nine on geographical location of the marital home.

claims by the man, largely for 'obedience'; or as straight statements that the husband may not take a certain action. The latter type may serve a function similar to the 'clarification' type, but in some cases the legal value may be disputed. Decisions from the Amman Appeal Court have held that the value of such stipulations is limited to seeking dissolution in the event of breach, and does not serve to enforce implementation of the content, which may in some cases be sought through other means. Thus, for example, in a 1993 case, the Court upheld a first instance decision that had rejected a woman's claim for 990 dinars based on a stipulation in the marriage contract that her husband would pay her 30 dinars a month. The stipulation had not been honoured 'which gives rise to [her right] to seek judicial dissolution (*faskh*)' but not to a case for claiming the said sum, according to the Appeal Court.[80] Further examples of this position are used to illustrate the potential value of the types of stipulations found in the case material below.

In the other type, the remedies reserved by the woman consist either of the power to divorce herself, or of a large cash sum to be paid her by the husband. Both these are clearly intended to deter the occurrence of the specified action by the man, but the second can act only as a deterrence rather than providing also a way out of the situation — except perhaps in that the husband might himself divorce the wife before taking the specified action in order to avoid having to pay the sum of money in addition to her financial rights on the end of the marriage by *talaq*.

The exception to these two types of stipulations, which both identify specific circumstances, is the assumption by the wife of the power of *talaq*, not linked to a particular action by the husband. In the contracts, as in the text of the JLPS, the phrasing of this condition is that 'her power/affairs/protection be in her hand' (*`usmatuha bi-yadiha* or *`amruha bi-yadiha*) to divorce herself from her husband. The phrasing is indicative of the fact that this is the standard Hanafi process of the delegation of *talaq* (*tafwid at-talaq*) to the wife by the husband; as such, the Hanafis always recognized this stipulation as valid, not regarding it however as a stipulation but as a delegation of *talaq*.[81] Thus, the husband delegates his power of divorcing his wife to the woman, so that she divorces herself from him (rather than divorcing him). The process of delegation, and the precise phrasing in which such a stipulation must be couched in order to ensure that the in-

[80] 35261/1993, Dawud, 1991, I, 376–377.

[81] Samara, 1987, 126; Sirtawi, 1981, 112.

tended objective is actually realisable, are discussed in further detail in Chapter Six. It should be noted here, however, that of the six stipulations in the material examined giving the wife the general right to divorce herself, at least two could in theory be denied legal value by the court, and three would be liable to revocation by the husband if the wife did try to register a *talaq*, leaving only one that would assuredly have the effect intended.

Problems connected to the precise text of a stipulation arise less where the wife's right to divorce herself is tied as a remedy to the realisation of certain circumstances that she wishes to avoid; that is, when the stipulation suspends or gives rise to her power of *talaq* only upon the occurrence of a specific event, such as the husband taking a second wife. Furthermore, this more specific approach poses less of a challenge to the assumptions underlying the basic structure of the marriage as presented in the classical rules than the assumption by the woman of the general power in unilaterally ending her marriage, as her husband can, without having to provide or prove a reason. In the Egyptian project discussed at the end of this section, the proposed stipulation that found least favour among the university students questioned was the general unrestrained delegation of *talaq* to the wife.[82]

4.2.3 Stipulations Against Polygyny

In the contracts examined, the stipulations against polygyny included examples of those with and without remedies. Specific delegation of the power of *talaq* was stipulated in two of the contracts: in each case, the woman was marrying a man divorced from his current wife by a revocable *talaq*, and the new wife stipulated that should her husband exercise his right to revoke the *talaq* then she would have the power to divorce herself from him. One of them also reserved the right to *talaq* if her husband subsequently entered into a new contract of marriage with his ex-wife.

However, it was more common in the contracts reviewed for the woman to stipulate payment of a substantial sum of money in the eventuality of her acquiring a co-wife.[83] Three contracts contained stipulations by women providing for a cash sum if the husband revoked the *talaq* of his di-

[82]Zulfiqar and al-Sadda, 1996, 257.

[83]Compare Layish, 1975, 32.

vorced wife, while others required payments if the husband took another wife while married to the woman making the stipulation.[84] The Amman Appeal Court has dealt with two points in consideration of this particular type of stipulation. The first is that the cash sum will not be payable until the women has clarified whether or not it is intended as an increase in her dower; if so, the *shari`a* court could proceed, but if it was not intended as dower then it would transfer to the civil courts.[85] Only one of the stipulations in the contracts examined specified explicitly that the sum (of a hundred dinars in 1965) would be paid as an increase in her prompt dower. The other point is one that would have applied to all six of these stipulations: that the sum is payable even if the husband establishes that the wife consented to his taking a second wife, since the stipulation did not condition payment upon her consent to his action, but only upon the fact of his action.[86]

Of the remaining two stipulations in the case material dealing with the possibility of the wife having a co-wife, one is less clear in the potential effect that it could have. It stated that:

> The wife's *wakil* stipulated to the husband that he was not permitted (*la yajuza lahu*) to take another wife without her consent.

The problem with this stipulation is the use of the verb 'permit'. The phrase used in the JLPS, and before that in the JLFR and OLFR, is literally that the wife may stipulate that her husband 'shall not marry on top of her' (*la yuzawwaja `alayha*). This was valid according to Hanbali law, which provided the remedy of dissolution if the husband proceeded to break the stipulation, while the Hanafis held it to have no value at all, although the husband was at liberty to keep to it if he so wished. Similarly, the Malikis placed such a stipulation in their category of 'disapproved' (*makruh*) stipulations which were not contradictory to the contract but which the husband did not have to fulfill; it was disapproved because it limited the husband's right.[87] Stating that her husband 'was not allowed' to take another wife might have been construed by a literal-minded *qadi* as seeking to constrain his established right to do so. It is certainly the case that a dissolution would

[84]The sums involved were 600 dinars in 1975 and 5000 in 1985.

[85]Al-`Arabi, 1984, 207 and 173, 24042/83.

[86]Al-`Arabi, 1973, 184, 17125/1972.

[87]Samara, 1987, 124–126.

be easier to obtain if the stipulation had given her the right to divorce if the husband took another wife; this is interpreted as not affecting his right to do so, yet giving her a remedy in response to his exercise of that right.

The other stipulation found in the contracts dealing with polygyny was recorded under the JLFR in 1965 and stated that:

> The wife stipulated to the husband that he divorce his [current] wife within one year of the date of the [present] contract and if he did not divorce her within that period then the prompt dower would increase by a hundred dinars.

For the Hanbalis, a stipulation by the wife that her husband divorce another wife was held void, while leaving the contract valid.[88] The Hanafis held it to have no value while the man was free to fulfill it if he wished.[89] The OLFR of 1917, purporting to take up the Hanbali position on stipulations in the specific area of polygynous unions, included this kind of stipulation as valid in relation at least to a future wife:

> If a man marries a woman and she stipulates to him that he shall not marry another wife and if he does then she or the second wife shall be divorced, then the contract is valid and the condition is to be observed. (Art. 38 OLFR).

The JLFR did not reproduce the OLFR example but included nothing to clarify the validity or otherwise of such a stipulation. Given the Hanbali and the Hanafi positions, it is doubtful that a West Bank court would have given this stipulation legal value, whether under the JLFR or the JLPS.[90] Dawud publishes extracts from a number of rulings by the Amman Appeal Court confirming the dissolution of a marriage on the basis of stipulations that the husband would not take another wife, or would not revoke the *talaq* of his current wife revocably divorced by him.[91] In a longer extract, he reproduces text from a ruling turning down a woman's application for *faskh* based on a stipulation that her husband should not take another wife. The

[88] Samara, 1987, 126, cites a *hadith* attributed to the prophet which the Hanbalis quoted in support of this position: *la yuhill an tinkah imra'a bi-talaq ukhra*, 'a woman may not marry by the *talaq* of another [woman]'.

[89] Samara, 1987, 126.

[90] See Samara, 1987, 129. This is particularly so after the inclusion in the JLPS of the Hanbali constraint that the stipulation not affect the right of the other.

[91] 26884/1986, 26920/1986, 31798/1990, Dawud, 1999, I, 371 and 376.

man had divorced his then wife but had revoked his *talaq* ('in word and deed') the same day; he had then married the woman petitioner in Kuwait, and three weeks later registered his revocation of the divorce against his first wife in the *shari`a* court in Amman. The petitioner sought a dissolution based on her stipulation, but the Appeal Court set out the sources to the effect that marriage is established by the *ijab* and *qubul* and that the revocation of a *talaq* does not constitute a new marriage; accordingly, the woman petitioner had the right to seek *faskh* if he married another woman but not in the current circumstances. The extract published by Dawud gives no indication of whether the marriage contract in Kuwait showed that the man was 'married' or was described as 'divorced'. The woman's attempt to protect herself against ending up in a polygynous union (a desire clearly shown by her attempt to use the stipulation upon becoming aware of the circumstances) was in this case frustrated by the actions of the husband and the wording of her stipulation.[92]

4.2.4 Stipulations on Place of Residence

The other two examples of stipulations that the wife might make given in Article 19(i) of the JLPS both concern the place of residence of the wife — that her husband not make her leave her home town or village, or that he settle her in a certain place. The subject matter here is related to the husband's right to the 'obedience' of his wife, which includes his right to call her to live with him wherever he chooses, so long as he is to be trusted with her; the JLPS adds in this regard 'and so long as there is no stipulation to the contrary in the contract document'. With the greater mobility of modern society, and in particular in areas of the West Bank with a high rate of emigration or at least of work abroad, there is an increased likelihood that the woman may find herself expected to move far away from her home area and therefore her own support network.[93]

Provision for the woman to stipulate where she wishes to live was first made explicitly in the JLFR and repeated with added detail in the JLPS. The

[92]27886/1987, Dawud, 1999, I, 372–373.

[93]In Tunisia in the 1930s, Berque notes that the increased mobility of the labour force prompted urban women to end their practice of including in their contracts stipulations against being moved to live away from their family. Berque, J., *Le Maghreb entre Deux Guerres*, Paris 1962, cited in Lazreg, 1994, 100–101.

Hanbalis considered it a valid stipulation, with the option of dissolution available to the woman if it were broken; the Hanafis and Malikis gave it no legal value.[94] The Jordanian legislators followed the Hanbalis in stating that if such a stipulation were agreed to and broken by the husband, the marriage could be dissolved on the petition of the wife.

Leaving aside the stipulations concerning property — vastly inflated in number by the approach in Hebron in 1975 — the place of residence of the wife was the subject on which most stipulations were made in the contracts reviewed. All except one of the fifteen stipulations on this subject specified the woman's home town or village as the place where she desired to spend her married life; the one exception simply stated the woman's right to choose the place ('to live in the place that she wishes to live in with her husband, by consent and agreement'), and in this sense may have been too general to be of much effect. However, this exception was the same as the others in that no remedy was specified in the case of the husband breaking the agreement, and the nature of the stipulations thus appears to be that of clarifying the ground-rules for the forthcoming marriage for the sake of the parties. Several of the stipulations employ phrasing such as 'he shall not make her live anywhere apart from 'X' without her consent.' An Appeal Court decision of 1963 established that if she did move to live elsewhere than the place she had stipulated, she retained the right to withdraw her consent at any time and to 'exercise her right in realising the condition'.[95]

However, quite what 'realising the condition' means in this context is not clear. When awards of *ta`a* (obedience) were enforceable, such a stipulation could presumably have been of effect in preventing the forcible implementation of such rulings by officers of the court. However, since 1976 there has been no forcible execution of a ruling for 'obedience' against the wife in any case, and it would seem that the stipulation would more likely be used as a pretext for not accompanying the husband rather than as grounds for dissolution after she has accompanied him. A decision from the Amman *Shari`a* Court of Appeal ruled rather anomalously in this regard in 1974 that in a claim for separation on the grounds of absence and injury, a stipulation to the effect that the wife would only move out of her home area by her consent would not serve to rebut a man's defence that he had asked her to come and live with him and she had refused. The Court argued that the provisions on judicial divorce on the grounds of absence and

[94]Samara, 1987, 124 and 126.

[95]Al-`Arabi, 1973, 185, 11382/1963.

injury were absolute and unconstrained, and that the wife retained the right to raise other claims to implement the stipulation — presumably by seeking maintenance to enable her to keep living away from him, since the Court agreed the stipulation could be of value in a defence to the husband's claim for *ta`a*.[96] Two years later, the JLPS specifically constrained the requirement for the wife to move to live with her husband in the event of there being a stipulation to the contrary.

In practice, under the current law, it seems that a woman would use the stipulation to refuse to go with her husband; he might then refuse to pay her maintenance on the grounds that she is 'disobedient' or else call her to the 'house of obedience' in his new place of residence. She could use the stipulation to establish a good defence to the 'obedience' claim, continue to claim maintenance from him, and if he did not return to live with her, could either obtain separation for non-payment of maintenance if he defaulted, or arguably for desertion (*hajr*) or absence and injury if he did not, although given the previous Appeal Court rulings this might be disputed. On the other hand, the woman might specify place of residence in order to ensure that her husband take her to live with him, espeically if he is living abroad, rather than leaving her at home alone. In such circumstances it would be easier to establish a claim for dissolution, since the stipulation accords with the existing presumption in the law — that the woman will move to live with the man — and the choice would be either he moves her to live with him or she is entitled to dissolution. Two rulings in the published Amman Appeal Court decisions show women (one living in the U.S. and the other in Kuwait) being granted dissolution on the grounds of this type of stipulation.[97]

The JLPS also included place of residence as an example of stipulations that the husband might make, but no examples were found in the contracts examined for this study of a man stipulating that his wife live in a certain place with him. The WCLAC research found one example of a man stipulating that his wife should live where he does.[98]

4.2.5 Stipulations on Work

The other subject area given as an example in the JLPS of stipulations that a husband might make was the employment of the woman in work

[96]Al-`Arabi, 1984, 207, 18004/1974.

[97]42562/1997 and 45262/1998, Dawud, 1991, I, 247 and 380.

[98]Welchman, 1999, 71, table 3.2.

outside the marital home. This matter was also addressed more by women than by men in the case material. The sense of the example in Article 19(ii), 'that [the wife] shall not work outside the home' is that the woman should not go out to work in waged, non-domestic employment. However, two stipulations made by women exempted the brides from being required by their husbands to work outside the house, one explaining this by the phrase 'work of the village'. Both women were marrying farmers, and it may be that the stipulation was intended to exempt them from agricultural work rather than from waged employment.[99]

Other stipulations made in the case material by women on the subject of work were positive, protecting their right to engage in non-domestic employment. Six teachers and one lawyer made such stipulations, and one woman whose profession was not recorded; all these examples came from the court at Hebron. Once again, most of the stipulations are of the 'declaratory' type, without a remedy being stipulated, so that to realise the general remedy of dissolution for violation by the man, the woman would have to have been forcibly stopped from continuing her employment. Short of this, however, the issue is again that of 'obedience'; denying the husband the opportunity of establishing that his wife is being disobedient or is deserving of being divorced if she continues to go out to work, since the existence of this stipulation is evidence of his explicit consent to her doing so. In one case only, the woman gave herself an explicit remedy, stipulating that the husband 'will not prevent her from working, and that if he does, she will have the right to seek separation in the *shari`a* court'.[100]

In two other contracts both husband and wife addressed the issue of the woman's waged employment. The contracts were concluded at the same time by two brothers marrying two sisters; the women, both teachers, stipulated that they should work in the area of their expertise and the men, accepting that condition, rejoined that their wives should undertake the bringing up of their children, a condition accepted by the women. The implication of the brothers' condition was that although they had no objec-

[99]Compare Layish, 1975, 98, who notes that in certain villages in Israel women stipulated that they should stay indoors and not have to work away from the home; Layish observes that not having to do agricultural labour was a matter of prestige.

[100]This came from the 1975 material, and the woman made the same stipulation with regard to her right to the income she earned thereby, and to the fact that she should live in a home alone.

tion to their wives continuing to teach, when the couples had children, the women should stay with them rather than placing them with relatives or in daycare facilities in order to pursue full-time employment.[101]

A number of stipulations on the subject of the woman's right to work either added a clause concerning her income or assumed her continued work and focussed on her right to dispose of her income. Hanafi law makes no provision for shared property rights, and gives the husband no claim to his wife's property, except in inheritance. How the woman disposes of independently owned or earned property is thus legally a matter for her discretion alone, but the number of stipulations reaffirming this right both over income and other property belonging to the wife is indicative of customary practices that may infringe upon this position. Stipulations relating to the wife's income are clearly of the 'clarifying' variety, stating the wife's right to dispose of her income as she pleases. In some cases, an indication is made of the way she chooses to spend it; for example, the wife's father, acting as *wakil* in a 1965 contract, stipulated to the husband that if his daughter continued to work, he (her father) would receive ten dinars a month from her income. Two other contracts gave half the wife's salary to one or the other of her parents. The value that attaches to such stipulations arises purely from the wife's right to dispose of her property. If the husband tries to prevent his wife giving all or some of her salary to her parent(s), he can be ordered to stop; but if the wife chooses to withhold the money, her parents cannot use the stipulation made to the husband in the contract of marriage as a basis for a claim upon her salary, although it is likely that she would be exhorted to adhere to her undertaking.

4.2.6 Stipulations on Independent Accommodation

Of the stipulations examples of which are not given in Article 19 of the JLPS, the most common constituted reinforcement of a right that already exists in Hanafi law — for the wife to live in 'separate' accommodation. The rules on what constitutes a *shar`i* dwelling include that the wife is to have

[101]Lazreg, 1994, 164–165, notes the insertion of clauses by men forbidding women in a particular province in post-independence Algeria to continue to work at a manufacturing plant; she sees this as symptomatic of association in the colonial era of industrial work with loss of status and identified with the French working class.

accommodation separate from either relatives (primarily her in-laws) or co-wives. Custom is moving from this being a separate room or set of rooms for the married couple in the man's family home to a separate dwelling, whether a flat built on top of the man's family home or an entirely different house, depending upon class, region and income levels. Although long established as a legal right, the fact that women are frequently dissatisfied with or apprehensive about the independence of their dwelling quarters is indicated both by claims raised in the courts and by the relative frequency of stipulations on the subject in marriage contracts. The larger number of women insisting on separate accommodation in 1985 as compared to earlier years seems to indicate increased expectations in this regard. The majority of stipulations in the case material on this subject simply state that the wife is to live 'by herself' or 'in an independent dwelling not shared with any other person'. Some, however, identify a specific concern, stipulating for example that the husband may not make his wife live in the same house as her co-wife, or next door to where his own mother lives. The WCLAC research in the Nablus court, as noted above, also puts this subject at the top of the list in contracts in the early 1990s, and it also illustrates efforts made by men to establish ground-rules contradicting this trend, with five stipulations made by grooms to the effect that the wife should live with him in his parents family house, or with a co-wife.[102]

In three of the stipulations included in the contracts examined for the current study, the women stipulated payment of a sum of money in the event of her husband breaking the stipulation and making her live with her co-wife. In the rest, no specific remedy was stated. The published Amman Appeal rulings include decisions that trace the progress of a claim made in 1981 by a woman for dissolution due to her husband's violation of her stipulation that she live by herself. The first instance court had turned down the woman's petition for dissolution, on the grounds that the stipulation was not one which had to be observed — the classical Hanafi position. The Appeal Court clarified that the stipulation in the contract required the man to accommodate her in a home on her own and that he had violated this by bringing a co-wife to live with her. The husband acknowledged the stipulation but claimed that the plaintiff had waived it and consented to her co-wife living with her. The case was referred back to the first instance court to take evidence on the husband's defence. The first instance court promptly

[102]Welchman, 1999, 71, table 3.2 and note 12.

dismissed the claim again on the grounds that the documented text of the contract did not include the fact that the stipulation was made by the wife, nor the husband's acceptance of it. The woman returned to the Appeal Court, which held that the man had acknowledged the existence and validity of the stipulation and his acceptance of it during the course of the claim, and referred the case back for the first instance court to proceed with consideration of his defence again. The man was unable to prove his defence and the marriage was eventually dissolved.[103]

An independent dwelling is already the woman's right under Hanafi law, and the remedy there is for her to refuse to live in the house on the grounds that it is not a *shar`i* dwelling; he will in this case have to continue paying her maintenance, but there is no way of actually obliging him to provide another dwelling. It would take a year of living apart from him, and establishing that the separation was legally his responsibility, for the wife to be entitled to seek separation on the grounds of desertion — grounds which of course were not recognised by the Hanafis.

4.2.7 Other Stipulations

In a contract in the 1965 sample, the wife attempted to shorten the maximum period of isolation from her husband to which she could be subjected by stipulating that if he stayed outside Jordan (understood by the courts as including the West Bank at that time) without a legitimate pretext (*`udhr shar`i*) for ten months, then she would have the right to divorce herself. This stipulation, if admitted by the *shari`a* court, would cut two months from the time the woman would otherwise have to wait before suing for separation on the grounds of absence and injury, or desertion, and could avoid the lengthy procedure of a separation claim. However, the inclusion of the words 'without a *shar`i* reason' might mean that the court would wish to notify the husband and elicit his reason from him, as in a separation claim, before proceeding to divorce the woman from him by *talaq* in accordance with the stipulation.

Three other stipulations included in the contracts from Ramallah dealt with travel abroad by the husband. One woman stipulated that the

[103]Al-`Arabi, 1984, 206, 21910/1981 and 61, 22404/1981; see also Dawud, 1999, I, 370–371.

husband take her with him if he went abroad, while another simply stated that the husband should not travel to the United States, thus giving herself the right to refuse to accompany him; the third stated that if her husband travelled to the States, she would have the power to divorce herself.

Another precaution on a subject nominally covered by existing rules came in a stipulation to the effect that were it to transpire that the husband was afflicted with 'a sexual disease' then the wife would have the right to seek separation in the *shari`a* court ten months after the date of the contract. The classical rules expounded in the JLPS give the wife the right to seek separation if the husband has a contagious and dangerous disease such as syphilis, but with the proviso that if the disease is curable, the wife has to wait for at least a year to see if her husband responds to treatment;[104] if there is no cure, the marriage can be ended immediately. This would for example cover conditions such as HIV, but other, unspecified 'sexual diseases' might not be included.

Other extensions to existing rules contained in the contracts examined included three stipulations by women concerning their formal education — a subject holding second place in the more recent work from Nablus contracts in the WCLAC study. Two of the contracts in the material examined for this study stipulated that the wife would complete a university degree, and one added that her university education in North America would be financed by her husband. These stipulations would probably be held to be binding in the sense that the husband could not with impunity demand that his wife cease her studies or accuse her of 'disobedience', and cease paying maintenance if she did not, and if he divorced her, she could claim compensation for arbitrary *talaq*. As far as being liable for her expenses at university, the *shari`a* court might wish to ascertain that the woman was a successful student and not prolonging her studies unnecessarily, by analogy with the constraints upon the father's obligation to fund the further education of his male offspring.[105]

The rules on the maintenance of children would probably cause to be dismissed any claim brought on the basis of two stipulations made in 1985. The stipulations purported to oblige the husband to maintain children from the wife's previous marriage, in one case for a total period of fifteen

[104]JLPS Articles 115 and 116. See below Chapter Seven.

[105]JLPS Article 169. Article 168(b) provides for maintenance of daughters to end at their marriage, and of sons at adolescence (*ghulam*), unless the son is a student.

years, and if he stopped maintaining them at any point during that period to be liable to pay a lump sum of money to the wife. The JLPS follows standard Hanafi rules on this subject: the maintenance of children comes first out of their own property, if they have any, and thereafter is the responsibility of their father, their mother and their father's ascendants in the relevant order.[106] Thus, while the new husband could choose to pay for the maintenance of his wife's children from another man, it is unlikely that the *shari`a* court would oblige him to do so. The Malikis placed this kind of stipulation in the category of void conditions that contradicted the requirements of the contract and caused dissolution of the contract if the marriage was unconsummated.[107]

Another stipulation dealing with children from a former marriage required the husband to guarantee custody of the woman's child for the period of suckling. The intention would appear to be that her new husband was not to refuse to let the woman keep the child with her until it was weaned; the realisation of this stipulation could be frustrated by third parties, since the rules on custody still provide for the child to be removed to the family of the father in the event of the mother marrying a man outside certain degrees of kinship to the child.[108]

A more standard guarantee was sought by a woman in 1975 through a stipulation that the husband's father act as guarantor for payment of her prompt dower and *tawabi`*. Two other stipulations in the same year required the groom's father to act as guarantor for payment of the deferred dower when it fell due; in both cases, the deferred dower was unusually high by prevailing levels.[109] The acceptance by the groom's father of the role of guarantor would bind him to pay the dower in the event of default by the husband.

Two of the three stipulations made by men in the contracts reviewed were registered, as noted earlier, in response to stipulations by the wife. In

[106]Article 168(a) JLPS. Article 171 explains that in the event of the father being unable to maintain them the children's maintenance must be paid by 'the person who would have to maintain them in the absence of the father'. See *Kitab al-Ahkam* Articles 399 and 400.

[107]Samara, 1987, 125.

[108]Article 155 JLPS.

[109]Deferred dowers respectively of 3000 and 5000 dinars were rare in 1975. Compare Shaham, 1997, 30.

the other, the husband undertook to treat his wife well and to increase her deferred dower by two hundred dinars if he mistreated her. The husband is required by the existing rules to treat his wife well, and all schools recognised a stipulation requiring him to do so as valid — although not in the sense of giving grounds for dissolution if he failed, since only in the Maliki school was ill-treatment or cruelty grounds for separation at the petition of the wife. The stipulation probably served the more immediate purpose of reassuring the bride's family through acknowledging their concern: she was sixteen and the second wife of the groom.[110]

4.2.8 Stipulations, Law and Society

Despite the possibilities for protection of rights or clarification of 'ground rules' for a marriage that the insertion of stipulations offers under the law currently applied in the West Bank, it is clear that it represents no more than an *ad hoc*, individual remedy that places the burden of initiative on the woman and is likely to arouse considerable adverse pressure. During discussions on a future Palestinian law of personal status, it has also been pointed out that for the legislature and for society as a whole, there is a question of national policy and social responsibility in leaving the protection — or clarification — of rights such as education and waged employment for women out of the law *per se* and subject to the knowledge, ability and initiative of the individual woman not only to insist on the insertion of a stipulation but to phrase it in a manner that gives it legal value. In the face of inadequate training or experience and possible personal (and/or institutional) antipathy on the part of *ma'dhuns*, the latter obstacle can be considerable.

On the other hand, the legal provisions allowing for the insertion of valid stipulations give a clear indication of the acceptability of the changing of the more traditional parameters of the marriage relationship. In the course of debates elsewhere, it has been suggested that one expeditious, if interim, way of giving added protection to certain rights for women within the family would be for certain stipulations to be included in the text of the marriage contract itself: that is, for the standard, government department-issued form for the contract of marriage to list certain stipulations that will

[110]Compare Layish, 1975, 31, for the range of stipulations made by Palestinian men inside Israel.

rule the contract. In this way, the woman's right to work, education and so on could be clarified at the beginning of the marriage in an appropriate manner that would be applicable to all those concluding the contract.

In Egypt, research and debate on this approach have been going on for many years and have included the NGO sector, lawyers, jurists, and government departments. The idea of developing the contract document began as a project in 1985 and was taken up by the national committee of NGOs constituted to prepare for the International Conference on Population and Development convened in Cairo in the summer of 1994.[111] These efforts found a certain resonance at the Ministry of Justice, where a project was underway with a view to expediting litigation procedure in personal status matters. The idea was that the form should include a list of stipulations that would be assumed to be part of the terms of the contract, and that in the event of their not wishing to include any particular stipulation in the contract document, the parties should strike them out. The effect here would be to reverse the burden during the negotiating process, away from the party (usually the wife and her family) seeking to have stipulations included and to the party (usually the husband) seeking to have them struck out. The proposed agreements to which the parties would be invited to sign up included the wife's right to education, to go out to work, to leave the country, and against her husband concluding a polygynous marriage.[112]

In a commentary on the developments proposed in the contract of marriage, Zulfiqar and Sadda stress the legitimacy of the proposed agreements under Islamic law, while setting the thrust of the project clearly in the effort to 'encourage frankness, mutual understanding and dialogue' between the spouses, reduce the need to have recourse to the courts in difficult and bitter litigation procedures, and 'raise awareness of legal and *shar`i* rights and encourage people to exercise them.' They point out that the list is neither exhaustive nor obligatory, and that even if adopted, it would not obviate the need for a review of both procedural law and substantive personal law. They also report on a survey in response to the project among Egyptian university students: 77.7% of those questioned said that they would agree to be bound by some of the conditions, 16.8% by all of them and 5.5% did not agree with the idea of the project at all. The least favoured

[111]Zulfiqar and al-Sadda, 1996, 251.

[112]On the Egyptian project from the perspective of women involved in it, see Zulfiqar and al-Sadda, 1996. See also Welchman, 1999, 77–80.

stipulation, according to the survey, was the right of the wife to divorce herself, with only 34.8% agreeing. The stipulation on the wife's right to education was agreed to by 83.1%, while agreement on her right to work met with the approval of only 51%.[113]

Despite the efforts and longevity of the project, Ron Shaham deduces that it was 'doomed to oblivion' — albeit temporarily — following opposition from al-Azhar and a lack of coverage of the issue after the Beijing World Conference on Women in 1995.[114] In Palestine, pending legislative amendments to the substantive law on personal status, it was pointed out that this form of interim action was more or less immediately available, since it is more a matter of administration (the issue of administrative regulations altering the routine contract forms) than of legislation. The implementation by the national authorities of such routine protections would be substantially more indicative of an intention to strengthen women's position in the socio-economic sphere, as well as in personal life, than simply leaving the burden of initiative on individual women. Thus, when a new contract document was drawn up, it would have been possible to include a standardised delegation of *talaq* to the wife.[115]

In the event, the new contract document issued by the *Qadi al-Quda* for use in West Bank and Gaza Strip *shari`a* courts under the PNA did not exploit this opportunity, but rather followed the existing form by simply providing a section for registration of stipulations at the initiative of one or both parties. The problems here, as noted above, include the obstacles of non-awareness and societal antipathy; in addition, a disregard for intention and a literalistic approach on the part of at least some members of the *shar`i* judiciary, combined with inadequate phrasing at the time of registration, mean that many stipulations may serve an extra-judicial function but fail to provide the anticipated protection if called upon in court.

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[113]Zulfiqar and al-Sadda, 1996, 255–259.

[114]Shaham, 1999, 462.

[115]This recommendation was voiced at the 1994 conference on Women, Justice and the Law in Jerusalem, reported in al-Haq, 1995, 226. Khadr, 1998, 137, although concerned at the anti-equality implications (or assumptions) of the rules of stipulations, nevertheless proposes the inclusion of the delegation of *talaq* and a stipulation on the equitable division of property after divorce, in the event that a Palestinian law does not provide for equality in these two areas of family law.

4.3 POLYGYNY

4.3.1 Polygyny and the Law

Classical Islamic law permits a man to be married to up to four women at any one time, subject to the constraints that he is able to fulfill his standard duty of maintenance with regard to each woman he marries, and that he treats them equally. The institution of polygyny, *tu`addad al-zawjat*, was regarded by the jurists as having been explicitly provided for in the Qur'an[116] and endorsed by the Prophet. The two classical constraints mentioned above were regarded as binding upon the conscience of the individual man rather than as 'legally' enforceable.[117]

Over the course of the last hundred years or so, thinkers and jurists and women's movements in the Arab world have articulated a different view of the institution of polygyny. The debate has covered all aspects of the need for reform, both from a *shar`i* and socio-economic perspective. In Egypt, Fauzi Najjar notes that Muhammad `Abduh argued for the restriction of polygyny as well as unilateral *talaq*, followed in later years *inter alia* by Jamal `Utayfi and others; Margot Badran described the campaign by Egyptian feminists in the 1940s against polygyny as 'a struggle against a dying institution'.[118] In Tunisia in the 1930s, the abolition of polygyny was one of main arguments of the famous work by Tahir Haddad. In her presentation at the 1994 conference in Jerusalem on Women, Justice and the Law, Tunisian lawyer Hafidha Chekir described how the subsequent debate in Tunisian society fed into what is still one of the most radical developments in Islamic personal status laws in the Arab states, the abolition of polygyny in Tunisia.[119]

In other Arab states, more limited efforts have been made in two basic directions in personal status legislation to constrain the institution of polygyny. The first is requirements and limitations that are to be enforced by the

[116]Notably, 4:3.

[117]Sirtawi, 1981, 92. For the classical rules, see Hinchcliffe 1970.

[118]Najjar, 1998, 321; Badran, 1995, 130; and see al-`Alami, 1992, 129 on the history of legislative drafts in Egypt from the early twentieth century, none of which were passed.

[119]Chekir, 1995, 130–131.

courts before the conclusion of a polygynous union. The second is the introduction of legislation reflecting the changing view of society towards the institution, effectively allowing that a woman may be injured by the simple fact of her husband's taking another wife, and that she may have cause to seek dissolution of her marriage accordingly.

With regard to prior requirements, the legislatures of various Arab states have basically expanded the two classical constraints upon polygyny and rendered their enforcement the business of the courts, rather than a matter for the man's conscience. Under classical Islamic law, the husband's duty of maintenance applies to each wife individually, and its components were analysed in great detail by the jurists. The second constraint, the requirement of treating wives equally, is classically interpreted as equality in material things — 'visible justice' — which would include maintenance, accommodation, gifts, nights spent with each woman and so on, but exclude 'things of the heart' or equality in the love and affection felt by the husband towards each wife.[120] These two constraints were not interpreted as constituting enforceable conditions in the sense that a polygynous marriage wherein these conditions were not met was open to dissolution.[121] A man could be exhorted to consider them before contracting a woman in a polygynous union, but could not be prevented from concluding a marriage where the conditions were not met, and the marriage would still be valid.[122]

The history of the efforts of the legislatures of Arab states to reform the classical law on polygyny makes for extremely interesting reading. It reflects the approaches of modern nation-state governments to a very traditional feature of classical Islamic law. The reforming regimes were often impelled by the adoption of a 'modernist' or 'revolutionary' agenda that included recognition of the role of women in the struggle for national independence, and of the role of women in building the new state, of which they were reminded by the women's movements becoming increasingly vocal on these issues. At the same time, they have justified their reforms on legal ar-

[120]Sayings attributed to the Prophet are quoted in support of the position that no man is capable of controlling his feelings in order to love each woman equally. See Sirtawi, 1981, 91–92 and Abu Zahra, 1957, 226. See also Qur'an 4:129.

[121]Alone among the classical schools, the Malikis provided for separation at the petition of the wife in the event of non-payment of maintenance, not just in the event of polygynous unions, but in every marriage. See below, Chapter 7.

[122]Sirtawi, 1981, 92.

guments and interpretations reconciling the changes in the law with the *shari`a.*

The legislation currently in force in the West Bank reflects none of the developments in neighbouring countries. When the Ottomans issued the OLFR in 1917, they left intact the classical rules on polygyny. The only innovation the OLFR made in this regard was to adopt the Hanbali position on stipulations to allow the individual woman to protect herself against her husband taking another wife; it made no attempt to institute legal (i.e. state-regulated) constraints on the conclusion of polygynous unions *per se.* The only other article on polygyny in the OLFR restates the classical position, that a husband with more than one wife must ensure justice and equality between them.[123] The OLFR was quickly abandoned by those who promulgated it, with Turkey's adoption of a secular civil code that prohibited marriage by a person already contracted in a valid marriage, and furthermore provided for the court to declare invalid a second marriage concluded in violation of that prohibition.[124] In Palestine, however, as elsewhere in the Middle East, the OLFR remained for many decades the basis of family law. The British Mandate authorities issued a Criminal Code imposing a prison sentence for those contracting polygynous marriages, but the Code incorporated a 'good defence' to the charge for 'non-Jews' for whom polygyny was valid according to their personal law. The exception clause covered most men in Palestine, the majority of whom were Palestinian Muslims.[125]

In 1951, the Jordanians added only one phrase in the JLFR to the pre-existing OLFR references to polygyny: the law required a man who had more than one wife to be just and treat them equally, and not to make them live together without their consent — the standard Hanafi rules.[126] In their

[123]Article 74 OLFR.

[124]Turkish Civil Code 1926 Articles 93 and 112 (1). See Ansari, 1982, 229. The Turkish law has not had the effect of 'secularizing' family life, and nor has it eliminated polygyny; see Cosar, 1982, 127, and Ilkkaracan, 1999, 100.

[125]Criminal Ordinance 1936, section 181.

[126]On the other hand, the JLFR made a curious omission, as noted by Anderson, in not explicitly providing that a marriage by a man who had already had four wives or divorcées in *`idda* is irregular. This is classical Hanafi law and therefore would have been applied by the court in the absence of an explicit text in the JLFR, but it constituted an oversight on the part of the legislators the stranger for the fact that the irregularity of such contracts was in fact included in the text of the OLFR. JLFR Article 36. OLFR Arti-

Criminal Code, the Jordanians maintained the same terms as the British, making the clause of exception the law that effectively applies to the vast majority of the male population in both Jordan and the West Bank:

> Every person, male or female, who marries while their spouse is still alive, whether or not the subsequent marriage is void or may be dissolved, shall be punished by imprisonment for a period of from six months to three years unless it is established
> a) that the previous marriage has been dissolved by the competent court or religious authority; or
> b) that the law of marriage applicable to the spouse at the date of the previous or the subsequent marriage permits the husband to marry more than one wife. (Article 280)

The regulation of polygyny in the West Bank thus remained in its classical state, unconstrained by enforceable limits. Elsewhere in the Middle East, constraints on the institution of polygyny were introduced in the legislation of Syria, Iraq, Morocco and the Yemen,[127] before the JLPS of 1976 confined itself to reproducing the terms of the JLFR on polygyny:[128]

> Article 28: Any person who has four wives or *mu`taddas* may not contract another woman in marriage until he has divorced one of them and she has completed her *`idda*.
> Article 40: The man who has more than one wife shall be just and equitable between them and may not settle them in one house without their consent.

In these provisions, the Quranic requirement of equal treatment is presented in classical form, with the requirement of separate accommodation indicating the level of maintenance recognised these days as customary in the West Bank — that is, that co-wives are entitled to separate houses, rather than simply separate rooms in a house. There is no suggestion that either constraint could be used to subject a polygynous union to the

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cle 54; JLFR Article 28 omitting it. Anderson, 1951 ('JLFR'), 195. *Kitab al-Ahkam* Article 134 classifies such a marriage as invalid (*ghayr sahiha*) . See `Abd al-Hamid, 1984, 59, on irregularity.

[127]See Welchman, 1999, 85–92 for a consideration of these legislative provisions and the later Egyptian and Algerian laws.

[128]Articles 28 and 40 of the JLPS. The only change to the latter article is to use the word *dar* for house instead of *bayt* in the JLFR article: see below for implications.

scrutiny of a court before its conclusion. This is despite the fact that already in 1951, the JLFR had introduced this method of pre-emptive scrutiny of motivation and appropriateness for certain types of marriages, through requiring the consent of the *qadi* to a marriage involving parties with an age difference of over twenty years. It remains the case that the only available protection for a woman against polygyny under the terms of the JLPS is the insertion of a stipulation in the contract of marriage. The same situation, coincidentally, applies in the Gaza Strip, under the Egyptian-drafted Family Rights Law of 1954.[129]

The absence of judicially-enforceable constraints prior to the conclusion of a polygynous marriage is matched by an absence of attention to remedies available to a woman whose husband takes another wife and as a result no longer wishes to remain in her marriage. The JLPS keeps to the classical Hanafi position of not making 'injury' in and of itself grounds for separation at the petition of the wife. An interesting point in this regard was made by the then *qadi* of Ramallah, who pointed out that the word for co-wife, *durra*, comes from the root *darara* (to injure, the same root as the word used for injury), indicative that the fact of marriage to a second wife by a woman's husband always causes injury to the first wife, not only because he is likely to give more attention to the new wife but also in that he will be spending money on the second wife and that his property (at inheritance for example) will be further divided.[130] However, under the current legislation, the question of whether the marriage of a woman's husband to another woman constitutes injury will only be considered in the context of a claim for separation on grounds of 'discord and strife'. In such a claim, the woman must establish the incidence of injury in order to institute the process of arbitration. The arbiters appointed by the court in such a claim may find, for example, evidence of injury caused to the wife or unequal treatment resulting in arguments and 'strife', and accordingly find the woman relatively blameless. On the other hand, since there is no presumption in the law that polygyny causes injury, they may in theory draw the conclusion that the wife was treated equally and received her full rights according to the law, and has herself created a problem out of an entirely le-

[129]Articles 14 and 33 of the Family Rights Law make marriage to a fifth wife irregular; Article 42 requires a man with more than one wife to 'treat them equally and be just'.

[130]Idrisi, 1986 (Marriage and Divorce Part VI).

gitimate second marriage by her husband; such a finding would cost her a large proportion of her remaining financial rights against her husband if the separation were effected.

So long as there is no legal presumption of injury by the fact of a second marriage by the husband, a woman who has inserted a stipulation against her husband marrying again in her marriage contract would do better to seek dissolution (*faskh*) of her marriage on grounds of breach of the condition, thereby safeguarding her financial rights, rather than seeking to use the stipulation in a claim for separation on the grounds of 'discord and strife'. If no stipulation has been inserted, however, the separation claim may ultimately constitute a woman's only remedy to leave the marriage, and this is particularly serious given that for the duration of the polygynous unions, there appears to be no direct way of enforcing the requirements of equal treatment or even separate accommodation, beyond the objecting wife withdrawing from the marital home and claiming maintenance. Although the claims and defences from that point on may have a number of variations, they involve two fundamental premises: firstly, that neither a woman nor a court may prevent a man from marrying another wife, and secondly that this second marriage gives no direct right of divorce to the first wife, unless she has ensured such right by means of a stipulation at the time of the contract.

In the West Bank, in terms of procedure, the official forms for the contract of marriage issued by the Jordanian authorities provide two ways in which the conclusion of a polygynous marriage could be distinguished from a monogamous one by the courts. The first is in the registration, in the section of the marriage contract reserved for this information, of the man's status — i.e. single, widowed, divorced, [already] married. The second is in the levying of a higher registration fee for the marriage contract. The original terms of the Jordanian Regulation on *Shari`a* Court Fees of 1951 levied a fee of one dinar for monogamous contracts of marriage, and ten dinars for a contract concluded 'by a person who is still married to a living wife, without there being justification (*mubarrir*) for another marriage'; a 1983 amendment raised these to ten and fifty dinars respectively, and in Jordan a 1997 amendment raised them again to fifteen and sixty dinars respectively.[131]

[131]Jordanian Regulation of Court Fees, no.2/1951 (Official Gazette 1179 17/4/53); as amended by Regulations no.55/1983 (Official Gazette 3194 5/12/83) and no.52/1997 (Official Gazette 4230 1/10/97).

This procedural regulation is particularly interesting given the failure of the Jordanian legislature to introduce judicial scrutiny of the 'justification' for polygynous unions in substantive personal status law. The original Regulation cited above — which preceded the JLFR, although issued in the same year — clearly envisages that the court has a role to play in deciding whether there is a 'justification' for a polygynous union, and imposing the higher fee where they find none. Nevertheless, the Regulation remained unsupported by parallel references to a 'justification' or a 'legitimate benefit' in the texts of either the JLFR or the later JLPS, or any indication as to by whom, when and how this should be assessed.

In practice, the higher fees appear to be routinely applied to any polygynous marriage without any formal decision as to the legitimacy of the justification for it. The only exception found in the contract sample is a demonstration of just how the Regulation has not been used: in a contract from 1965, the groom was described as 'married to one wife' but in the space reserved for showing the fee paid, the sum of one dinar was registered with an accompanying note in explanation that the man paid the lower fee 'because of special circumstances, being very poor'. Bearing in mind the requirement that the man be financially capable of maintaining both wives, the fact that the court facilitated his marriage by lowering the fee may indicate additional circumstances not mentioned in the explanatory note.

4.3.2 Incidence

The proportion of polygynous marriages in the West Bank appears to be well within the estimate of 10% or under for the Middle East in general. Muheilan's statistics from the *shari`a* courts in Jordan for 1985 indicate a proportion of 7.7% of contracts there as polygynous.[132] That rate is higher than the proportion of polygynous marriages in the contracts examined for this study, as set out in the table in Appendix VI, showing an overall rate of 5.6% in 1965 and 1975 and 4.9% in 1985. Of the three courts, the rate in Hebron was the highest of the three, with the highest rate of all the figures

[132]Mheilan, 1986, 55, gives a table showing the total number of contracts registered in Jordan (i.e. not including the West Bank) in 1985 as 22620, with polygynous contracts accounting for 1746 of these. He cites (56) the West Bank total for 1985 as 8778 but does not break it down into polygynous/monogamous contracts.

of 7.2% in 1975. Ramallah saw a particular decrease in the polygyny rate over the ten years 1965 (5.6%) to 1975 (3.8%), followed by 3.6% in 1985.

These figures compare with the results of a survey of contracts analysed by Professor `Ayyush of Bethlehem University for the years 1973–84.[133] Over the twelve years, Professor `Ayyush found the average rates to be 6.6% in Hebron, 3.2% in Ramallah and 5.3% in Bethlehem. The highest average rates in the West Bank he found to be in Jericho (10.3%), followed by Hebron and then Bethlehem, with Ramallah as the lowest. His conclusion overall was that there was no particularly striking pattern or change, although the rates were slightly higher in the later years of his survey.[134] In the 1990s, the WCLAC research found a rate of 4.5% for the West Bank contracts it included,[135] with a rate of 3.8% in Ramallah.[136] Since the contract forms used in the Gaza Strip for those years did not have the West Bank distinctions between monogamous and subsequent polygynous unions described above, the WCLAC study could not provide statistics on polygyny in the Gazan courts. However, the PBCS reports a rate of polygyny in the Gaza Strip of 4.4%, while it found the West Bank rate to be 3%, giving an overall rate of 3.5%.[137]

The proportion of polygynous marriages is thus quite low. Layish, among others, attributes the general decline of polygyny in the Middle East *inter alia* to greater educational opportunities, increases in dower and in economic expectations of the spouses, and the 'transformation of traditional society' particularly with regard the role of women.[138] The figures from the Gaza Strip can be compared with an overall rate of 4% in Egypt at

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[133] `Ayyush, 1985, 80–81, 84–85 and 88–89. Further tables of figures, for the Nablus and Tulkarim courts of the years 1975–84, are given by Nasru, 1986, 3.

[134] `Ayyush, 1985, 76–77.

[135] A total of 12,968 contracts registered in the courts of Dura, Ramallah and Nablus over the years 1989, 1992, 1993 and 1994, with 581 of them polygynous. Welchman, 1999, 95.

[136] A total of 4643 contracts were registered, of which 178 were polygynous: Welchman, 1999, 96. This coincides with Shalabi's finding from the marriage contracts registered in the Ramallah *shari`a* court 1986–1989 (total 6038 contracts) of which he found 3.9% to be polygynous unions. Shalabi, 1992 (*al-zawaj*), 25.

[137] PCBS, 1998, 23; see 24 table 1–8 for a breakdown of the ages of the men involved in polygynous unions.

[138] Layish, 1975, 79. He notes (74) that there are no official statistics of polygyny in Israel.

the time of the National Assembly's discussion of the 1979 personal status legislation. During the debate, one of the points raised by opponents of the constraints on polygyny proposed in the legislation was whether it was actually necessary, given the low rate of polygyny according to official statistics.[139] The perception of polygyny as relatively rare and therefore not constituting a 'pressing problem' might also be part of the reason for the failure of the Jordanian legislators to address the issue.

4.3.3 Polygyny, Law and Society

The defence of the institution of polygyny is set by some writers within the framework of a limited comparative evaluation of the 'morality' of societies under Islam and 'in the west.'[140] For the jurists, other points raised range from the assertion of its legitimacy under the *shari`a* through a discussion of various particular circumstances seen to provide particular justification. Sirtawi gives a four-point analysis of the justification for polygyny, based on the principle that the *shari`a* is complete, for all people and all times. He refers to situations in which the wife is infertile, or unable to engage in sexual intercourse due to chronic or contagious disease, arguing that in such circumstances, the husband needs another wife, while the woman is unlikely to be able to marry again; and that it is better for her to have a co-wife than to be divorced. In his view, polygyny also remedies a lack of men in the community, perhaps arising from wars, and helps in these circumstances to compensate the community for the numbers it has lost through allowing for a greater number of children.[141] The jurist `Abd al-Hamid makes the same points, but stresses in particular the 'danger' presented to society by a 'surplus' of women (the familiar idea of '*fitna*').[142]

By contrast to these authors, both Ma`ruf in Iraq and Shqeir in the Maghreb support the restriction of polygyny. Shqeir observes that the

[139]Najjar, 1988, 329.

[140]An example comes from the 'Compiler's note' appended to a collection of statutory provisions on polygyny in a journal on Islamic affairs (Ansari, 1982, 230):

> [the] controlled and disciplined polygamy of Islamic law can be compared by the honest observers with the practice of non-marital cohabitation and extra-marital sex relationships that have eclipsed the institution of marriage in Western countries.

[141]Sirtawi, 1981, 92–3.

[142]`Abd al-Hamid, 1984, 60.

Tunisian legislation abolishing polygyny sets the spouses on a relatively equal footing; Ma`ruf makes a general case for the implementation of legislation that will 'move towards a new conception of marriage as involving obligations and duties that cannot be fulfilled unless it is based on equality, stability and security', and that will therefore involve the stringent control of polygyny.[143] Lazreg notes that although polygyny is under 2% in Algeria, the fact that the institution remains in law is a 'monument to the failure of the Algerian state to build a just and egalitarian society.'[144]

During the 1980s in Jordan, a number of recommendations were made in regard to ways in which polygyny could and should be constrained. In her pamphlet published in 1984, Jordanian lawyer `Atayat recommended that polygyny be subjected to judicial supervision, making the consent of the *qadi* a prerequisite for conclusion of a polygynous contract and conditioning this consent on the following:

> a) that a 'legitimate benefit' be realised by the polygynous union;
> b) that the husband provides a guarantee for his ability to support two wives, either in the form of a financial guarantee or a person to act as guarantor;
> c) that the intended bride be notified of the presence of an existing wife before the contract of marriage;
> d) that the existing wife be notified of the consent given to her husband to take another woman in marriage;
> e) that there be an investigation of the reasons given by the husband for his intended marriage to a second wife and that requirements be imposed [as to the evidence of the legitimate benefit he is claiming] such as a medical report if the husband claims the illness of his wife, her inability to engage in sexual intercourse or infertility.[145]

`Atayat's recommendations are worth quoting in full to demonstrate the way in which she selected her proposals from among those measures already adopted in other Arab states which, by dint of espousal by the legislators and practice in the courts, must be assumed to have acquired a certain amount of consensus and legitimacy. Her examples of what might constitute a 'legitimate benefit' for a court to approve an intended polygynous

[143]Ma`ruf, 1985, 11; Shuqayr, 1982, 18.
[144]Lazreg, 1994, 186–187.
[145]`Atayat, 1984, 6.

union are interesting not only for their addition of evidence requirements (notably, a medical report), but for their resonance with some of the particular justifying circumstances put forward by Sirtawi in his defence of the institution of polygyny, as summarised above. The infertility of the wife or her inability to engage in sexual relations — both to be established by medical report — were cited as the two circumstances in which the husband might gain permission to take a second wife in the South Yemeni law of the family in 1974.[146] Earlier in the century it was these two circumstances that Egyptian feminists had demanded be recognised as the only ones permitting a man to marry polygynously.[147] However, despite representations and studies by Jordanian women's groups,[148] no legally enforceable restraints are proposed in the various draft proposals to amend the JLPS.

In Palestine, meanwhile, the report of a discussion among Palestinian women on the reform of polygyny at the 1994 conference in Jerusalem on Women, Justice and the Law reflects differences between those participants who aspired to an absolute prohibition on polygyny, as in Tunisia, and others who sought reform and restriction of the institution. In the course of the discussion, the report notes that all agreed that the 'right of polygyny' must be restricted 'lest it be abused.' The particular restrictions that were cited combined notification requirements with judicial scrutiny (and, by implication, control) before the conclusion of a polygynous union, and the establishment of a woman's right to divorce as a remedy.[149] In 1998, the discussions at the Model Parliament in Gaza amended a proposed text that allowed for limited exceptions to the general assumption of monogamy, voting for a text that prohibited polygyny.[150]

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[146]PDRY Law of the Family, no.11/1974, Official Gazette no.9 of 28/2/74, Article 30.

[147]Badran, 1995, 128.

[148]For example, the Jordanian National Committee for Women (JNCW) in its 1996 memorandum, and an earlier memorandum from the Business and Professional Women's Association of Amman in 1986. Emam, 200, 5, recalls a memorandum from the Jordanian Women's Union to parliamentarians in 1977 and later attempts to have polygyny prohibited, noting that 'polygyny had become a tangible social phenomenon in Jordanian society'.

[149]Al-Haq, 1995, 52. The participants also discussed other matters of personal status directly related to the consequences of polygyny, such as the woman's right to retain the marital home in the event of divorce, and the need for an increase in the amount of compensation that may be awarded in the event of arbitrary *talaq*.

[150]The exceptions were for the infertility of the wife, her contagious and incurable

However, by the time of the Model Parliament meetings, the new PNA form for the registration of the contract of marriage had been issued by the *Qadi al-Quda* in 1995 for use in the *shari`a* courts of the West Bank and Gaza. The new form appears to give no formal space for the registration of the husband's current social status: that is, whereas the Jordanian forms previously in use in the West Bank had at least required the husband to reveal whether or not he was already married to another woman, the new Palestinian form appears to reproduce the existing situation in the Gaza Strip: while the form provides for the woman to be identified as either *bikr* or *thayyib*, there appears to be no equivalent requirement for registration of the husband's status. In illustration, a newspaper article in 1998 reported the story of a Gazan woman who had no idea she was the third wife of her husband.[151] In effect, the contract form issued by the PNA stands to actually reduce the information available to both the bride and the courts under the previous Jordanian procedures. Given developments elsewhere, this requirement of disclosure and notification is the minimum that might have been expected from the PNA.

disease, or her loss of capacity: Nashwan, 1998, 22. Khadr, 1998, 149, made recommendations in similar vein.

[151]Shahin, H., 'Marrying More than One' in *Palestine Report* 11/12/98. It was claimed that the man had 22 children from four wives.

CHAPTER 5

Married Life and the Law: Rights and Responsibilities that the Spouses Bring to Court

5.1 INTRODUCTION AND NON-PETITIONABLE RIGHTS

The conclusion of a valid contract of marriage gives rise to a range of effects that reflect the balance of rights and obligations on which the jurists constructed their vision of the family in Islamic law. One of the most obvious of these is the balance between the husband's financial obligations towards his wife, and her obligation of obedience to him, and it is around this basic concept that the claims arising within marriage and discussed in this chapter are built. The rights and duties discussed here are gender-specific: the wife's duty of obedience is matched by the husband's right of 'correction', or 'chastisement', (*ta'dib*), in the case of her disobedience (*nushuz*). The husband's obligation of maintenance (*nafaqa*) complements his other financial obligation of dower, while the wife has the right to good treatment (*hasan al-ma`ashira*) and, should she be in a polygynous union, to equal treatment (*`adl*). There are other mutual rights and duties arising from the contract, including lawful intercourse, the establishment of the impediment of affinity, mutual inheritance and paternity.[1]

[1]Sirtawi, 1981, 128, includes 'good treatment' in his list of rights shared by the two

In law, these rights arise directly from the contract, rather than from consummation of the marriage, but the obligations of the wife tend to be consequent upon the prior completion of the husband's obligations. Thus, the husband cannot require the obedience of his wife until he has paid her prompt dower and has prepared a suitable dwelling for her that fulfils the *shar`i* requirements. The wife, meanwhile, can claim maintenance from the husband until his obligations towards her are met, provided she is ready to move to live with him.

The JLPS has made few changes to the classical Hanafi rules on this area of law, summarising the structure of marriage in Articles 35 and 39:

> Article 35: If the contract is valid then the wife is due maintenance and dower from her husband, and mutual inheritance is established.
> Article 39: The husband shall treat his wife well and deal with her favourably; the wife shall obey her husband in permitted matters.

The basic approach of the law is in general supported by commentators on grounds of biological determinism, with reference to the 'natural' and distinct functions of men and women to which each is physically suited — men for wage-earning in the public sphere, and women for childbirth, childcare, and domestic labour — and to an assertion of the 'predominantly emotional nature' of women.[2] In the absence of significant developments in the letter of certain areas of the law, it has therefore been the role of the *shari`a* courts, headed by the Appeal Courts, to adapt the application of the rules, where they see it as necessary, to the circumstances of modern-day life.

The claims arising within marriage and made in court by one spouse against the other fall into three categories: the wife's claims for maintenance; the wife's claims for prompt dower, the *tawabi`* of the dower and/or *jihaz;* and the husband's action for obedience against his wife. The other rights between the spouses are not actionable in the sense of having means

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spouses, while Samara, 1987, 247, categorises good treatment as a right of the wife against the husband, and is supported in this by Article 39 of the JLPS.

[2]Samara, 1987, 251; Sirtawi, 1981, 130. The view of women's emotional nature is also cited as an argument against giving the wife the power to divorce herself. See also Abu Zahra, 1957, 221.

of positive enforcement. The wife's right to be treated well by her husband, for example, is defined by Samara as the husband's duty not to harm her in word or deed, to prevent injury of her by others, and to 'give her what she is due from him without delay'.[3] Samara goes on to criticise the JLPS for not stipulating a penalty in the case of the husband mistreating his wife, unless the mistreatment should reach the point where 'discord and strife' (*niza` wa shiqaq*) is established, on which grounds the wife can seek separation. Samara notes that the Hanafi response to such ill-treatment is the rebuke of the husband, and asks if this is a suitable ruling for a court to make.[4] In practice, the wife usually claims ill-treatment by the husband after she has left the marital home and in defence to an action for *ta`a* raised by the husband. If she proves the ill-treatment, she will be due maintenance and the action for *ta`a* will be dismissed; in some cases in the material examined for this study, the court did explicitly tell the husband to 'improve his behaviour' or 'make things up' with his wife. The *qadi*, when making such a ruling, will be aware that the only legal recourse available in the *shari`a* courts has been made, unless the wife later chooses to sue for divorce, and that the matter is thereafter entirely in the hands of the couple and their respective families.

The right of co-wives to equal treatment appears also not to be positively enforceable. The classical Hanafi rules on this subject are repeated in Article 40 of the JLPS:

> The man who has more than one wife shall be just and equitable between them in his treatment, and may not settle them in one house without their consent.

The issue of the separate accommodation of co-wives is often raised in defence against an action for *ta`a*. None of the cases studied however raised the issue of what constitutes unequal treatment, so the only definitions come from the jurists writing on the subject, in line with the classical positions. They agree that this equal treatment includes spending an equal number of nights with each wife, except where the man is accompanied by one wife on a journey.[5] It is agreed that each wife must have adequate main-

[3]Samara, 1987, 247.

[4]Samara, 1987, 250.

[5]Abu Zahra, 1957, 226. Samara, 1987, 248 (who details the exceptional rules that apply when a virgin is first married.)

tenance for her needs, but there is dispute over whether one may be given more than the other.[6] In general, 'equality' appears usually to be taken as meaning precisely equal treatment in all material matters.[7]

The husband's prerogative of decision-making as the head of the family and his right to the obedience of his wife in marital affairs in the home are also not enforceable through the courts. It is only when the wife has physically left the marital home for no legitimate reason that he may have recourse to the *shari`a* courts to have her ordered to return to the 'house of obedience' (*bayt al-ta`a*).[8] This is because within the marital home, the husband is presumed to be able to assert his will over that of the wife through his right of chastisement, which Schacht describes as a 'limited right of correction'[9] and is sometimes translated as 'discipline.' The jurists expounded the rules of 'obedience' and 'discipline' as providing for three stages: verbal rebuke, withdrawal of physical intimacy[10] and use of physical force. In the differing climate of the late twentieth century, some modern scholars of law appear to continue to endorse the use of 'moderate' force by husbands against their wives, while insisting that this is only allowed in certain circumstances, and emphasising the constraints placed upon it by the early jurists in their authoritative works — thus, that the blow must be 'non-severe', in that there must be no wounding, no breaking of bones and no marks left on the flesh, and the husband may not use anything to strike his wife that would cause her dishonour, such as a shoe.[11] Whatever these theoretical constraints, the sanctioning of any degree or form of physical force by men against women is one of the most controversial of the features of traditional Islamic jurisprudence maintained in modern times, and allows for a relativist approach to the use of physical as well as other violence; in 1961, the *Shari`a* Appeal Court in Amman stated that 'in evaluating injury and harm to the wife, custom and the classes of the spouses must be taken into consideration.'[12]

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[6]See Samara, 1987, 248.

[7]The classical Hanafi rules on equality are set out in *Kitab al-Ahkam* Articles 152, 153, 154, 157.

[8]*Kitab an-Nafaqat*, Article 174.

[9]Schacht, 1979, 166.

[10]*Hajr*, defined as 'not spending the night with her on the same mattress.' Abdel Hamid, 1984, 118; Sirtawi, 1981, 131. See Qur'an 4.34.

[11]Sirtawi, 1981, 130–131; Samara, 1987, 253–254; see also Abu Zahra, 1971, 221.

[12]`Amr 1990, 250, 11667/1961. Compare Shaham, 1997, 92–93 and 131–132, on a similar approach by Egyptian judges in the material he studied.

Samara notes that if the husband exceeds these limits, or abuses in any other way his right of chastisement, the wife may petition for separation.[13] It should be noted in passing here, however, that divorce could only occur in such a situation through the filing of a petition for separation on the grounds of *niza` wa shiqaq*, as the JLPS does not provide for divorce for ill-treatment without the necessary process of arbitration and the apportioning of blame between the two spouses. Where physical abuse is established, the wife has a good defence to an action for *ta`a*; only rarely is verbal abuse without accompanying physical violence raised in court by wives defending *ta`a* actions.

Given the careful scheme of the rights and duties of the two spouses according to Islamic law, nearly every claim arising during marriage and discussed in this chapter will involve one of the others at some point. In petitioning for *ta`a*, for example, the husband may have to prove that he treats his wife properly, that he has paid her prompt dower and that he has prepared a suitable marital home for her; the wife filing for maintenance, on the other hand, may have to prove that she has not been disobedient in leaving the marital home. The exception to this is the wife's right to her prompt dower, which can be claimed during marriage by a valid contract without reference to any corresponding rights and duties.

5.2 *MAHR, TAWABI`* AND *JIHAZ*

The significant shift in relative proportions of prompt and deferred dower apparent from the contracts of marriage was noted in the previous chapter as corresponding with the rising registration of *tawabi`* and amounting to substantial financial obligations in the contract of marriage. These trends do not however appear to have led to a proportionate increase in claims for dower or *tawabi`* over the years studied; such claims by the wife constituted 4.1% of all claims in the three courts in 1965, 5.5% in 1975 and 7% in 1985.

5.2.1 Classification as Prompt or Deferred

The type of dower-related claims submitted during marriage in the case material mostly revolved around the wife seeking to ensure payment of

[13]Samara, 1987, 253.

her prompt dower, but there are a number of other issues that also arise. One such is the distinction between prompt and deferred dower. The second article in the Chapter on Dower in the JLPS, Article 45, provides that:

> The specified dower may be paid promptly, or some or all of it may be deferred, provided that this is supported by written document. If the deferral is not explicitly stated, then the dower shall be held to be prompt.[14]

The signature of the wife's *wakil* and/or the wife herself establishes her agreement to the deferral. The significance of the distinction between prompt and deferred dower during the continuance of marriage lies in the fact that non-payment of prompt dower and/or the *tawabi`* is a good defence to a husband's claim for *ta`a*: the wife may thus leave the marital home and claim maintenance from her husband at any point during the marriage without being held disobedient (*nashiz*) if any part of the prompt dower remains unpaid (Articles 37 and 47). Non-payment of deferred dower does not give her the right to refuse or withdraw obedience, and the sum may not be claimed until the arrival of the deferral date or the death of either spouse. Thus, Article 47 provides:

> If the wife receives her prompt dower and the *tawabi`* thereof, or consents to the total or partial deferral of the dower or *tawabi`* to a specified time (*ajal*) then she shall not have the right to refuse obedience, although this shall not prevent her from seeking that which is her right.

It is customary in the West Bank for deferred dower to be held to fall due when the marriage ends, whether by death or divorce.[15] This is supported by Article 46 of the law:

> If the date of the deferred dower (falling due) is specified, then the wife may not claim it before the set time has come, even if *talaq* occurs, while if the husband dies, then the delay lapses. If the set time is absurd, such as 'till wealth' or 'until demand' (*li-hayn al-talab*) or 'until the wedding procession' (*zifaf*) then the set time is irregular and the dower shall be prompt. If the set time is not specified, the dower shall be considered deferred until *talaq* or the death of one of the spouses.

[14]This article reproduces its parallel in the JLFR Article 41, apart from the last sentence, which is presumably introduced for purposes of clarification.

[15]Samara, 1987, 173. See also Abu Zahra, 1971, 233.

The parallel article in the JLFR (Article 42) did not contain the middle sentence of the above article, regarding 'absurd' deadlines, and it is probable that this was included in the new law due to the experience of the courts. In many contracts in Hebron, for example, the *ma'dhun*s added extra phrases to the formal statements of the contract; in 1965, many contracts bore the words '[deferred] to one of the two deadlines' (*li-ahad al-ajalayn*) after the amount of deferred dower. This is unnecessary clarification, since the above Article 46, and its predecessor in the JLFR, makes it clear that the standard deferral is indeed to one of the two deadlines of either death or divorce.

More significant, however, were several examples of *ma'dhun*s including extra wording in the space for prompt dower. Several 1975 contracts add that the prompt dower, or that part of it not yet received, was 'deferred until demand' (*li-hayn al-talab*). If the result of this was that what had been intended as prompt dower was changed into deferred dower, it would have removed the wife's right to claim her prompt dower at any time. A decision from the Amman Appeal Court in 1952 decided that Article 42 of the JLFR on deferral of dower (the forerunner of the JLPS article) did not apply to prompt dower 'deferred until demand' because this deferral was not specific. Hence, the wife in such a case did not lose her right to defend a *ta`a* claim on the ground of non-payment of prompt dower.[16] The change in wording in the JLPS supports this principle. In 1975, in Hebron, two actions (one for *ta`a* and one an accusation of *nushuz* made during the course of a maintenance claim) were rejected on the grounds of non-payment of prompt dower which had been 'deferred until demand.'[17]

5.2.2 Consummation and Establishment of the Right to Full Dower

Another issue that continues to arise in the courts is connected to the complications relating to the source of the requirement of dower, discussed in the last chapter: in Jordanian law, following Hanafi rules, dower is an effect of the contract, but there are also rules that make some connection

[16]Al-`Arabi, 1973, 293, 7495/1952.

[17]In one, the husband claimed that the phrase 'until demand' had been inserted by deceit and that what had been intended was *li ahad al-ajalayn*, to one of the two deadlines, making it a deferred dower. He brought no proof to support his defence, and the court noted duly that he had not claimed forgery of the document, which would have required transferral to the regular court system, and rejected his action for *ta`a*.

with consummation.[18] The complications in identifying the source of requirement of dower has led to apparently contradictory decisions on the part of the Amman and the Jerusalem *Shari`a* Courts of Appeal. In 1983, the Amman court dealt with a case where the wife in a consummated valid marriage was claiming the *tawabi`* of her prompt dower, consisting of house furnishings to the value of a thousand dinars. The first instance *shari`a* court had held her claim to be established by the contract of marriage in which the *tawabi`* were registered. The Appeal Court stated that the contract established matrimony and the *tawabi`*, but in order for the wife to be due all the specified dower, and for the first instance court's ruling to be correct, consummation of the marriage also had to be established.[19]

This position of the Amman court was relied on in a 1985 decision in the court of Ramallah, in a case concerning a claim for *tawabi`* made by a wife in an unconsummated valid marriage. The couple had been married for a dower of 1000 dinars prompt, 1000 dinars *tawabi`* and 1000 dinars deferred, all registered in the contract. The wife's *wakil* had acknowledged receipt of the 1000 dinars prompt dower in the contract document; the husband failed to prove his defence that his wife had received the *tawabi`*, and did not ask for her to be sworn the oath of denial to this defence. Finding the wife's claim to be established, the Ramallah *qadi* awarded the wife 500 dinars, half the sum due, as there had been no consummation. The decision quoted the Amman precedent in support.

The wife appealed this decision to the Jerusalem *Shari`a* Court of Appeal, which held that the Ramallah court had awarded her half the total dower due — that is, half of the total of 3000 dinars, given that she had already received 1000 dinars. The Appeal Court noted that if *talaq* occurs before consummation or valid seclusion, then the wife is due half the total specified dower and *tawabi`*. The court went on to observe that there was no mention of *talaq* in the claim, that the parties were still married, and that therefore the Ramallah court should have awarded the wife the full 1000 dinars *tawabi`*, with the husband to choose between paying the value or delivering the items of furniture to that value.

The Jerusalem decision corresponds to the classical position, that the wife is due all her prompt dower whenever she claims it, and should *talaq* occur before the marriage has been consummated, the husband can claim

[18]See for example Sirtawi, 1981, 134; Samara, 1987, 173, and above, Chapter Four.
[19]Al-`Arabi, 1984, 276, 24027/1983.

back anything he has paid over half the total dower. This is consistent with Articles 52 and 53 of the JLPS, for example, which provide that where divorce occurs on the initiative of or by reason of the wife, the dower lapses in its entirety and the husband can claim back anything he has already paid. The Amman decision may have relied solely on the lack of evidence for consummation, but it was nevertheless a decision that indicated the occasional difficulties that arise from the dual source of the requirement of dower.

5.2.3 Amount of Dower

Given that it seems the norm now for marriages to be registered, and that the dower is included in the contract, disputes on the amount of dower for which the contract was concluded are rare, and no examples were found in the case material. Article 59 of the JLPS addresses the possibility of such disputes:

> If the spouses dispute as to the dower for which the contract was concluded, the claim shall not be heard if it contradicts the contract document, unless there is written evidence showing agreement at the time of marriage to a dower other than that stated in the contract.

This article also addresses the problem of 'secret' and 'public' dowers discussed by jurists with regard to those people who, usually for reasons of social prestige, agree on one dower in secret and announce another one to the public.[20] The JLPS article would appear to require the 'declared' dower, since the one registered in the contract is agreed upon publicly to be paid. It is, however, qualified by Article 63, which provides:

> The husband may increase the dower after the contract, and the wife may decrease it, provided they are fully competent to act. This attaches to the contract if accepted by the other party in the session of increase or decrease.[21]

[20]Discussed by Hodkinson, 1984, 137; and Shaham, 1997, 29–30. Sirtawi, 1981, 163–164; Samara, 1987, 182–184.

[21]This article was not included in the JLFR and follows the opinion of Abu Yusef and the Hanbalis in making the increase attach to the contract itself. Thus if *talaq* occurs before consummation, the wife will be due half the dower as amended. Abu Hanifa and Muhammad Shaybani held that such an increase lapsed altogether if *talaq* occurred before consummation, while the Shafi`is would give half the dower in the contract plus the increase as a gift. Samara, 1987, 205; Sirtawi, 1981, 163.

In practice, the only official documents (*hujuj*) on a change in the amount of dower found during fieldwork at the *shari`a* courts were those filed by the husband increasing dower. The reasons behind some such increases may be surmised from the stipulations inserted in certain marriage contracts, whereby the husband undertakes to increase the dower if he marries another wife, or if he makes his second wife live with his first. At other times, the increase may be a measure of conciliation and reassurance.[22] Samara suggests that a man might raise his wife's dower when revoking his *talaq* of her, in order to compensate for his treatment of her;[23] it may also be a means of increasing his wife's share of his estate beyond the proportion she stands to inherit under the law of succession. The increase in dower is registered in the miscellaneous records of the courts, and none of the studied case material involved any such documentation in later litigation.

5.2.4 Non-Receipt of Prompt Dower

Just as it is not possible to discern from the miscellaneous registers the reasons behind an increase in dower, so the reasons behind the wife submitting a claim for dower are not set out in the records of rulings. Obviously, the factor common to most such claims is disagreement or breakdown in communication between the wife and her husband and their respective families, to the extent that out-of-court negotiations and conciliation procedures have failed. In some cases, it may be that the wife, probably with the encouragement of her family, is using the claim for dower as a form of pressure on her husband and his family; thus the wife in an unconsummated marriage, for example, may submit a claim for dower to pressurise the husband into calling her to live with him, entailing the preparation of a suitable marital home and so on.

Most claims for dower in the case material, however, were made by wives in consummated marriages, and concerned either all or the remainder of the prompt dower, some having been paid before the *zifaf*; these claims are presumably prompted by on-going problems between the spouses. In some cases, the husband acknowledges his wife's claim without

[22]It may be, for example, that dower may be increased voluntarily by the husband in order to help reconcile a first wife to his taking a second. Increase in dower may be seen as a form of insurance for the future of the first wife.

[23]Samara, 1987, 105.

offering any defence. In others, however, the cases become quite complicated through disputes over how much the wife has already received. These disputes and the procedures that apply to them are the same whether it is cash dower or the *tawabi`* that is being sought, and may therefore be considered jointly. Claims for *jihaz* are liable to produce rather different defences on the part of the husband.

In *mahr* claims, where there is no acknowledgement of receipt of the prompt dower in the marriage contract, the burden of proof is on the husband if the wife claims that some or all of her dower remains in his keeping (*dhimma*, literally 'protection'). If the husband is unable to prove that he has delivered the *mahr* to his wife, he has the right to ask that she be sworn the oath of denial to his defence. If she takes this oath, she will be awarded the sum she is claiming.[24]

The claim may become more complicated where the marriage contract includes an acknowledgement of receipt of the prompt dower and/or the *tawabi`*. Mostly — as seen in the previous chapter — this acknowledgement is made by the wife's guardian acting as her *wakil* in the contract. Indeed, the JLPS requires this to be so in most marriages:

> The virgin (*bikr*), even if fully competent to act, has her dower received by her *wali* if this is her father or grandfather.(Article 64)[25]

Thus, a *bikr* of any age must by law have her dower received on her behalf by her guardian; if she is under the age of legal majority (*rushd*), although she can get a ruling against him for her dower, he cannot be obliged to actually hand it over until she is fully competent under the law.[26]

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[24]For example, in one 1985 case, the wife claimed 500 dinars as the remainder of her prompt dower. She stated that she had asked her husband for the sum and he had refused. The husband claimed he had paid her 220 dinars, and acknowledged the remaining 280 dinars to be in his keeping. When he could not prove this defence, he asked for his wife to be sworn the oath, and upon taking it the wife was awarded the full 500 dinars.

[25]Contrast Article 95 of *Kitab al-Ahkam*, which restricts application of this rule to minors.

[26]The consent of the *bikr* to her *wali*'s receipt of the dower is considered to be given by her silence as well as by her explicit agreement — that is, she must explicitly forbid him if she does not want him to receive the dower. The consent of the *thayyib* must be explicit: Samara, 1987, 207. He notes that the woman does not have to be present when her dower is received, 'as the custom has prevailed that fathers receive the dowers of their

Where such an acknowledgement is made, there are two circumstances that may mean that the wife has not in fact received her dower. The first is that her *wakil*, usually her father, did receive the amount from the bridegroom, but did not pass it on to his daughter, whether in cash or in kind. Where this happens, the wife has the right to claim the amount from her father in court, but this is a right rarely exercised.[27] In the court records studied, only one case was found (in the 1965 material) where a woman claimed her dower from her father who had received it as her *wali* and *wakil*. The father had passed on to his daughter less than half the dower he had received from the groom, and she went to court to claim the remainder. The case ended with an out-of-court settlement between the parties whereby the woman received just under half the amount outstanding — a recognition, at least implicitly, of lingering customary rights of the *wali*.

The other explanation for the wife seeking dower already acknowledged as received by her *wakil* is that the husband never actually paid it to her father; that is, that the *wali/wakil* made a false acknowledgement of receipt. This is by all accounts a frequent occurrence, even where large sums are involved, as the good faith involved in the contract of marriage, and the circumstances in which it is signed, militate against the bride's father denying that the groom has fulfilled his obligations and that he has received the dower. It is only a specific exception in the Law of *Shar`i* Procedure of 1959 that allows the wife to seek her dower despite a signed testimony of receipt on an official document. Article 89 of this law states:

> Where financial claims are based on documentation, then personal testimony shall not be accepted to defend such claims; excepted from this is the defence offered by one spouse against the other.

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daughters in order to purchase their *jihaz*'. He criticises the JLPS for not tackling such questions as what happens if the dower gets lost, or from whom she can seek it if she does not receive it. An Amman Appeal decision from 1981 points out that so long as the woman has not reached the age of *rushd*, her father remains her *wali* and is obliged to receive the dower, and cannot be ordered to pay it over to her until she achieves majority, unless she shows cause why he should deliver it to her immediately; al-`Arabi, 1984, 351–352, 22167/1981.

[27]Granqvist, 1934, 50, notes that '[i]t is . . . a vital necessity for a married woman that her connection with her father's house is never completely severed. [A] woman in her husband's house is wholly dependent on the esteem she enjoys and the support she can still count upon in her father's house.'

In such claims, the father may be brought in as a third party. If the wife fails to prove her father's non-receipt of her dower, the outcome of the case will depend upon the husband's willingness to take the oath. Two brief examples can illustrate the process of such claims. In one, from the 1965 material, the woman was claiming 75 dinars of a total of 100 dinars prompt dower, along with various articles of her *jihaz*. The husband produced the marriage contract in which the wife's father had acknowledged receipt of the full prompt dower of 100 dinars. The wife claimed that this acknowledgement was false and that her father had received only 25 dinars, but she was unable to prove her claim. The husband took the oath to the effect that her father had not been lying when he made the acknowledgement of receipt, and the claim for dower was dismissed.

The second case, from 1975, concerned a claim for deferred dower from a marriage that had been ended by *talaq* before consummation. The marriage contract showed that the prompt dower was 500 dinars and the deferred 100 dinars, and that the wife's father had acknowledged receipt of 500 dinars. The wife claimed that her father had not received the money and that his acknowledgement had been false. The husband was not present at the hearings and the court decided to bring the father in as a third party. He stated that his acknowledgement had indeed been false. As the husband was of unknown whereabouts, he could not be sworn the oath, and so the wife and her father were both sworn the oath in support of their statements, and the wife was awarded the dower she was due. The receipt or non-receipt of the dower was significant in this case since the wife was due only half the dower (the marriage having ended before consummation). Had she received the 500 dinar prompt dower, she would actually have owed the husband 200 dinars; as it was, she was due a further 200 dinars from him.

In an unpublished paper written in 1987, the then *qadi* of Ramallah takes note of this problem and suggests that if the husband were asked first whether he had paid the dower, rather than the *wali/wakil* whether it had been received, then the burden would shift to the husband, who might be expected to feel embarrassed in his turn to claim payment if in fact he has not paid it. This slight modification in procedure during the contract session could do much to prevent the problems currently arising from false acknowledgement of receipt.[28]

[28]Idrisi, 1987 ('Dower and Marriage Expenses', Part 3).

5.2.5 Claims for *Tawabi`* and *Jihaz*

The issue of non-receipt also arises in claims on items of property as opposed to the cash value of the dower. There are however additional questions to be dealt with, including the identification of the articles, and whether or not they legally constitute *tawabi`*, or *jihaz*, or neither of the two. Some of the problems connected with claims made for these articles can be traced directly to the way in which the *ma'dhun* fills in the contract of marriage. It has already been noted, in the last chapter, that the inclusion of property in the 'stipulations' space instead of the 'dower and *tawabi`*' section of the contract may cause legal protection of the woman's right to that property to lapse. In addition, it appears that the contracting parties are not always clear on the meaning of *tawabi`*. One case from the 1975 material shows that the husband at least held the *tawabi`* to be what would legally be held to be the *jihaz*. The wife claimed that the *tawabi`* of her dower were in his keeping, with an estimated value of 600 dinars, including a cupboard, bed, mattresses, bedclothes and gold bracelets, all registered in the marriage contract of the previous year. The husband claimed that these items were a part of the prompt dower of 700 dinars, not in addition to it, and that she had in fact bought the items from her dower. He stated that local custom in his village supported his defence, but could not prove his statement, and the court held that the wife was still due the *tawabi`*.[29]

Another common problem in claims of *tawabi`* results from the non-specification of the *tawabi`* in the contract: for example, the phrase 'house furnishings to the value of 250 dinars known to the two parties / agreed between the parties'. In the event of a later claim, a detailed breakdown of the items will have to be produced; the onus of proof here will be on the husband to establish that his wife had accepted these items as the *tawabi`* of her dower.[30] In addition, there is a problem of what is to be awarded. The Amman *Shari`a* Court of Appeal held in 1981 that in such a case the husband can choose between giving his wife the value or the items, while in

[29]The original claim was an action for maintenance raised by the wife, which the court combined with a *ta`a* action raised by the husband. The wife's claim to *tawabi`* came as defence to the husband's charge of *nushuz*. The *ta`a* claim was dismissed and the wife awarded maintenance.

[30]See al-`Arabi, 1973, 284, 12840/1963 and 1984, 281, 18084/1974. The use of expressions such as '1000 dinars' *tawabi`* consisting of furnishings agreed upon between the spouses' may indicate that the specifics were yet to be agreed.

1983 it said he should give the items.[31] In the West Bank, the husband seems usually to be given the choice where the goods have been specified. Idrisi points out that in the event of such a dispute, a man may find his house emptied of furniture if his wife demands her *tawabi`*.[32]

With regard to *jihaz*, claims are raised about the competence of the *shari`a* courts that do not arise with regard to *mahr* or *tawabi`*. Article 61 of the JLPS brought no change to the JLFR nor to Hanafi law when it stated:

> The dower is the property of the wife, and she may not be obliged to provide her *jihaz* from it.

While this is the view of the majority of classical jurists,[33] Anderson is right in noting that its equivalent in the OLFR and JLFR threw some light on local custom.[34] The Hanafis held that the *mahr* is the sole property of the wife, while her *jihaz* is the responsibility of the husband, as in maintenance; thus, if she arrives at his house with little or no *jihaz*, even though he has paid her a large dower, he cannot ask her to buy anything extra. She can of course choose to buy herself items as *jihaz* from her dower if she so wishes; in the West Bank, the custom has been that the husband is responsible for furnishing the house, although some of the items may be registered in the wife's name as *tawabi`* of the prompt dower.[35] Moreover, if her father buys her goods, whether from her dower with her consent, or as a gift from him, it remains her property and counts as *jihaz* if such was the intention.

One of the complications that arise in claims for *jihaz* is that of competence. Article 2(8) of the Law of *Shar`i* Procedure 1959 provides clearly that *jihaz* is in the competence of the *shari`a* court, but similar goods — clothes, jewellery, furniture — that are bought by the wife later on, or by the husband for the wife but not as *jihaz*, are under the jurisdiction of the reg-

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[31]Al-`Arabi, 1984, 282, 22067/81 and 23823/1983.

[32]Idrisi, 1987 ('Dower and Marriage Expenses', Part 4); he seems to consider that practice in current times is not in accordance with the original intention of registering *tawabi`*.

[33]The only differing view was held by the Malikis, who say that the *jihaz* is bought by the wife from her dower to the extent that is customary among her peers. See Abu Zahra, 1971, 289, and Samara, 1987, 200.

[34]Anderson, 1951 ('Further Points'), 188.

[35]See Samara, 1987, 198; Idrisi, 1987 ('Dower and Marriage Expenses', Part 4). In the West Bank, the wife or her father often buys items from her dower such as gold and clothes, some of which is indicated by the earlier marriage contracts.

ular courts in civil law property claims. The burden of proof is often therefore upon the wife to prove that specific items were indeed bought as *jihaz*.[36] In his examination of the Jordanian legislature, al-Fakhani gives rules set down by the Jordanian Court of Cassation on this subject:

> 1. If the wife buys something from her dower and brings it to the marital home to be her *jihaz*, then if a dispute arises between the spouses concerning the goods, the dispute is over *jihaz* and shall be considered by the *shari`a* court.
> 2. The wife is not legally obliged to provide her *jihaz* from her dower, but that does not mean that goods bought from her dower with her consent to be her *jihaz* shall not be considered as *jihaz*.[37]

This rule was formulated in 1967 after a case in which the Court of Appeal had reversed a first instance decision and declared that jurisdiction lay with the regular courts. The Court of Cassation upheld the original first instance decision which had given jurisdiction to the *shari`a* court. The rule is that where the wife is explicitly claiming goods as her *jihaz*, competence will be awarded to the *shari`a* court if the husband bases his defence on the non-competence of the court to hear the claim. Where the wife fails to prove the goods she is claiming are part of her *jihaz*, the outcome of the case will rest upon the husband's willingness to take the oath. Thus, in a 1985 case, the wife was claiming *jihaz* which she had bought from her own money and taken with her to the marital home in the *zifaf*, consisting of a cupboard, bed, dressing table and sofa. The husband acknowledged her claim to the sofa and denied the rest. The wife failed to prove her claim, and was awarded the value of the sofa alone when the husband swore the oath of denial to the remainder of her claim.[38]

Claims for *jihaz* are often interesting for factors other than the legal procedures that accompany them in that it is possible, in some cases at least,

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[36]See Appeal decisions in al-`Arabi, 1984, 171, 20113/1978 and 172, 18323/1975, and 1973, 286, 15927/1969.

[37]Court of Cassation decision 475/1967, in al-Fakhani, 1975/6 (IV) 58.

[38]Similarly, in a 1975 case, the wife claimed furnishings, kitchen utensils and *jihaz* to the value of 180 dinars — 50 dinars for bedding bought by her from her dower, plus 'her *jihaz* worth 130 dinars'. The bedroom items were registered as *tawabi`* in the contract and the husband could not prove he had handed them over to her, so she took the oath to her claim and won the award. She could not prove that the other items were in fact *jihaz*, so he took the oath and she lost that claim.

to discover what the wife actually did with her prompt dower.[39] In some cases, the individual items are detailed at great length, reaching 23 lines in one case from the 1985 material, which included gold jewellery worth over a thousand dinars, clothing worth over 400 dinars and listing everything else down to a kohl pencil costing one dinar.[40] Another example from the same year, where the wife claimed *jihaz* of nearly 1500 dinars bought from her prompt dower and taken to the marital home on the *zifaf*, lists six complete 'outfits' of different colours, woollen shawls, blouses, skirts, dresses, nightclothes, handbags, headscarves, slippers, shoes, housecoats; various kitchen utensils, blankets, sheets, pillow cases, cosmetics and perfume. The wife was unable to prove her claim to the goods, but her husband declined to take the oath of denial and she was awarded the items listed. Earlier claims listing items of *jihaz* include such items as rugs and a sewing machine for the wife.

In raising a claim for *jihaz*, the wife usually states that the husband has 'taken over' these goods (literally, 'put his hand upon them') and is refusing to give them to her. This seems often to reflect an attempt by the husband to pressurise his wife, sometimes in the context of wider family disputes, frequently by taking her jewellery. If the gold is bought as *jihaz* rather than registered as *tawabi`* in the contract, the burden of proof falls on the wife. The difference between the *tawabi`* of the prompt dower and the wife's *jihaz*, which she may or may not have bought from her prompt dower, is further shown by the different legal effects of the two. In the event of an action for *ta`a* made by the husband, the *tawabi`* have the same force as the prompt dower proper in serving as a good defence to *ta`a* if they have not been paid. The *jihaz*, however, cannot be used in this way, but if the wife can prove that the husband has indeed taken over her *jihaz* and is refusing to give her the items, she will still have a good defence to the *ta`a* action if he is found to be untrustworthy with her property.

[39]Compare Layish, 1975, 51.

[40]The wife could not prove her claim, but her husband declined the oath and when she was offered the oath in affirmation she took it, and was awarded the items. On the evaulation of the descriptions of articles being claimed as *jihaz*, see al-`Arabi, 1984, 37, 18481/1975.

5.3 MAINTENANCE

5.3.1 Basic Rules

Article 167 of the JLPS lays down a basic principle of the Islamic law of the family:

> The maintenance of every person comes out of their own property, except for the wife, whose maintenance is the responsibility of her husband.

There are exceptions to this basic rule, for example in the case of poor and incapacitated parents, but the principle is clear. The husband is solely responsible for his wife's upkeep and she has no financial obligation in law towards him or the upkeep of her person or the household. This theoretical position is followed quite strictly in the rules of *fiqh* and the writings of the jurists, however unlikely it is in practice. If a married woman goes out to work, she is not obliged to spend on herself or her family, and the law does not recognise her productive and reproductive labour in the house as contributing economically to the family. A consequence of this in law is that the classical rules recognise an extremely limited division of property on divorce, as will be discussed below in Chapter Eight. Another related part of family law is that females generally inherit half the share inherited by males under the traditional law of succession: a frequently cited argument in support of this classical position, still holding in the law applied in the West Bank (and Gaza) is that women have fewer financial responsibilities in law than men. Starting from the other perspective, some feminists argue that the law should not reduce the rights of women to maintenance and dower until it evens up inheritance, property during marriage and the man's ability to prohibit his wife from going out to work.[41] The many debates and positions on these issues are indicative of a lack of consensus marking this area of law, which in the West Bank and Gaza poses a real challenge to the PNA in its drafting of a law.[42] In the meantime, a married woman forfeits her right to maintenance only when she is proved to be 'disobedient' (*nashiz*). No maintenance is due the wife in an irregular or void marriage, which makes the relation of maintenance to the existence of a valid contract

[41]Compare Badran, 1995, 134 on the lack of feminist consensus in the Egyptian debates in the early twentieth century.

[42]See Khadr, 1998, 185; Nashwan, 1998, 18.

clear and more consistent than that of dower, particularly as consummation or lack thereof has no effect on the requirement of maintenance. Nevertheless, there is still a debate as to whether maintenance is due the wife by the mere fact of the contract, or whether it is also connected to her seclusion in her husband's house under his 'dominion' (*ihtibas*). The JLPS, as the JLFR before it, has taken the majority view of the requirement of maintenance from the combination of a valid contract and the possibility of *ihtibas* — that is, that the wife is willing and able to go to her husband's house, whether or not she has actually moved there.[43] Thus, Article 67 reads:

> Even where there is a difference of religion, the wife's maintenance shall be due from the husband from the time of the valid contract, even if she is living in her family's house, unless he has asked her to move and she has refused without *shar`i* right. She has the right to refuse if the husband has not paid her the prompt dower, or has not prepared a *shar`i* dwelling for her.

This article has no predecessor in the JLFR, and was presumably included to settle questions that had arisen during application of the former law. The classical jurists went into many supplementary questions on this issue, mainly concerning *ihtibas*, which was taken to mean the possibility of the occurrence of legal intercourse between the spouses.[44] The general consensus was that where this possibility was lacking for some reason on the wife's part, then she was not due maintenance, while if the reason was from the husband, then maintenance was payable. Thus, for example, as clarified in the JLPS, when the husband had not fulfilled his primary obligations to his wife (prompt dower and a *shar`i* dwelling) then he had to pay her maintenance. The JLPS does not deal with reasons from the wife's side, and Sirtawi notes that therefore recourse must be had to the majority Hanafi opinion, in which case such circumstances as an illness making it impossible for the wife to be moved will cause her right to maintenance to lapse.[45]

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[43]See Abu Zahra, 1971, 297; Fakhani, 1975/6, III, 20; and Article 136 of the *Kitab an-Nafaqat*.

[44]Sirtawi, 1981, 188.

[45]Sirtawi, 1981, 190. He also discusses the positions of the jurists where the wife is menstruating or is 'otherwise incapable of intercourse', and where she is in prison or kidnapped. See also Abu Zahra, 1971, 297–298 and Samara, 1987, 214–215. Samara himself appears to incline to the minority view of Ibn Hazm, that maintenance is due purely from the existence of matrimony (*qiyam al-zawjiyya*). Articles 136 and 167 of the *Kitab an-Nafaqat* set out the classical Hanafi view.

An Amman Appeal Court decision predating the 1976 JLPS made it clear that barring such obstacles, maintenance was due from the time of the conclusion of the contract.[46]

The other basic question on maintenance, besides what it actually covers, it how it should be assessed. The Hanbalis and the majority Hanafi view held that the wife's maintenance is assessed in the light of the circumstances of both spouses, while the Shafi`is and a minority Hanafi view considered only the circumstances of the husband. The JLPS followed the JLFR in adopting the minority Hanafi and Shafi`i view in Article 70, making the wife's maintenance dependent upon the status of her husband, be he rich or poor, provided that it not fall below a basic minimum of food and clothing.[47]

Article 66(a) of the JLPS sets out the items for which the husband is responsible in his wife's maintenance:

> The wife's maintenance includes food, clothing and accommodation, medical treatment to a reasonable amount, and service for the wife whose peers have servants.

In this article, the last part, referring to the provision of a servant, is a standard Hanafi rule, and as such reflects the majority view of the consideration of the status of both spouses rather than, as in the JLPS in general, the husband alone. No case material was found on this aspect of maintenance, but it must be assumed to be subject to the general standard of the husband's circumstances, so that even if a wife's peers had servants, the husband could not be obliged to provide her with one if he could not afford it.[48]

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[46]Al-`Arabi, 1973, 312, 11550/1961. The decision stated that stipulations that the maintenance of the wife should be delayed to the time of *zifaf* did not form a legal defence to an action for maintenance, 'because maintenance is due the wife whether stipulated or not . . .' This position is similar to that taken on dower, i.e. that the wife is due the proper dower even if she and her husband stipulated in the contract that there be no dower. In both cases, the stipulation would be held invalid and the contract would stand.

[47]Sirtawi; 1981, 113 and 182. Abu Zahra, 1971, 305, notes that the majority Hanafi view was applied in Egypt until Law no.25/1929 established the minority view. On Egypt, see also al-Jundi, 1978, 1086, principle 27. Samara, 1987, 223, on the other hand, states that the majority Hanafi view was for assessment according to the husband's status, while the minority took both spouses into consideration. In *Kitab al-Ahkam*, it is clear in the articles on food, clothing, and accommodation that the wife's maintenance is to be assessed according to the circumstances of both spouses (Articles 173, 181, 184).

[48]Sirtawi, 1981, 186, ascribes the provision of a servant to part of 'good treatment of the wife if she is of the type who does not serve herself'. See also Abu Zahra, 1971, 308.

The requirement of food, clothing and accommodation is also standard; by accommodation is meant the *shar`i* dwelling which the husband must prepare as the marital home. The absence of a *shar`i* dwelling is a good defence to a husband's action for *ta`a* and the wife can continue to live away from him and claim maintenance until he provides one. Whether she can submit a positive claim for a *maskan shar`i*, as she can for *mahr* and for maintenance in general, seems dubious, although it is clear that she cannot seek separate accommodation expenses from him unless the marriage has ended and she is seeking it in order to undertake custody of her children from him in the dwelling.

With regard to food and clothing, the JLPS does not go into details, but one of the texts sometimes referred to in maintenance claims, Article 288 of the *Kitab an-Nafaqat*, gives an idea of the basic minimum:

> The types of maintenance necessary for the wife are those things that are necessary for life according to custom (*`ada*), such as flour or bread, water for drinking, washing oneself and washing clothes, salt, wood, millet, candles, soap, a comb, clothes and a dwelling, and if the husband is wealthy, a type of fruit. As for such things as coffee and tobacco, the husband is not obliged to provide them.

It is however accepted that such items vary according to time, place and local custom.[49] Article 229 of the Book of Maintenance states this explicitly with regard to the wife's clothing expenses, noting however that in all cases the husband is obliged to provide different clothes for summer and winter.[50] Necessary furnishings are also included in this category, including mats, rugs, mattresses, seats and curtains, blankets and so on.[51] Sirtawi and Samara both also consider various cosmetic items as due, such as kohl, oil, henna and perfume if the husband likes his wife to make use of such items.[52]

Sirtawi, 1981, 187, supports the Maliki view that if a wife is not of such a type then the housework in the marital home is her duty i.e. baking bread, cleaning and making the beds and such like. Samara, 1987, 211–212, ascribes to the Hanafis the view that a wife who does not have servants must perform the 'service' herself — that is, baking bread, cooking, sweeping and washing, but not activities that constitute a trade, such as milling, weaving, or spinning.

[49]Samara, 1987, 224; Sirtawi, 1981, 184.

[50]See also Samara, 1987, 223.

[51]Article 237, *Kitab an-Nafaqat*; Sirtawi, 1981, 184.

[52]Sirtawi, 1981, 184–5; Samara, 1987, 212.

The obligation of the husband in Article 66(a) to pay the cost of his wife's medical expenses was not included in classical Hanafi rules, and its inclusion in the JLFR was approved by Anderson as a timely expansion of the concept of maintenance.[53] Both Samara and Sirtawi approve of this provision in their commentaries on the JLPS, pointing out that the husband may be obliged to bring a servant for the wife who is used to such treatment, and that provision of a doctor or medicines to preserve life is obviously of greater priority. Sirtawi adds that the cost of doctors and medicine is far more expensive now than in the past, and that had the classical jurists lived in modern times, they too would have included these in the husband's obligations. The majority of classical jurists held that the wife had to pay her own medical costs, although those related to childbirth could be claimed from the husband.[54] Samara points out that usually the wife is preoccupied with domestic work and childcare rather than with waged labour, often has no property of her own, and is not supposed to leave the house without her husband's permission, all of which may mean that she cannot pay medical expenses herself. The Amman Appeal Court has however clarified that it is the husband's prerogative to determine the choice of treatment (which doctor, which hospital). The example cited by Dawud concerned a man objecting to the level of expenses awarded to his wife, who had given birth in a private hospital which was considerably more expensive than the one he had chosen. The Appeal Court held that the first instance court was to assess the expenses according to the 'birth expenses of the peer (*mithl*)'.[55] In addition, Article 82 of the JLPS obliges

[53]Anderson, 1951 ('JLFR'), 200; he notes it had 'no parallel in either the Ottoman or Egyptian legislation' but observes (at note 43) that in practice the Egyptian courts would make a husband pay for essential medical treatment for his wife. It was formally introduced in the 1985 legislation in line with Maliki law — see el-'Alami, 1996, 122.

[54]Sirtawi, 1981, 185. Layish, 1975, 92, states that inside Israel the classical concept of maintenance has been widened to include medical treatment. Samara, 1987, 212, states that the Shafi'is, Hanbalis, and Malikis held medical expenses not to be the responsibility of the husband, while the Hanafis did not discuss the matter. The Explanatory Memorandum to the 1979 Egyptian legislation, on the other hand, stated that medical expenses were required by the Zaydi school and by some Maliki jurists: text in Badran, 1981, 220.

[55]Samara, 1987, 213. 27895/1987, Dawud, 1999, I, 56. Dawud (at 55) is clear that this principle (based in his exposition on the traditional interpretation of *qawama*, males having authority over females) extends to the choice of doctor in general.

the husband to pay the expenses of the shrouding and burial of his wife's corpse after her death should she predecease him. This is a new provision, and Samara makes an analogy with the duty of clothing the wife during her lifetime in order to show why this obligation would fall within maintenance.[56]

In practice, most of the claims for maintenance submitted during marriage are for the one sum that covers all the wife's *shar`i* requirements. The exceptions to this in the records studied are those claims submitted for expenses to do with childbirth and children. One claim was found in the 1965 material where medical expenses were sought for something other than childbirth; the wife was awarded the sum she was claiming for treatment she had undergone in the husband's absence.

5.3.2 Claims

Maintenance claims, including those by the wife, ascendants and descendants, comprised well over half the caseload of the *shari`a* courts examined for this study. In the earlier years, 1965 and 1975, claims for maintenance were often combined with other claims, for example for dower, or for fees to do with childbirth, or combined with a simultaneous action for *ta`a* raised by the husband. In 1985, compound claims were much less frequent, with a tendency to submit separate claim sheets for separate claims. This tendency probably stems from greater centralisation and standardisation in the *shari`a* courts with regard to the form of claims and general bureaucratic procedures. There appears to have been a decrease in the proportion of cases including maintenance claims in the total caseload of the courts studied, from 75% in 1965 to 65% in 1975 to 59.5% in 1985. A factor in this of course is the introduction of new claims, such as compensation for arbitrary *talaq*, but also for example the possibility of claims being made by men that were previously restricted to women. However, the same material shows the numbers of these new claims submitted to be rather low as a proportion of the total caseload. With the circumstances of occupation since 1967, the frustration of claims at the Execution Offices,

[56]Samara, 1987, 242; compare the 1943 Egyptian Law of Inheritance — Anderson, 1952 ('Intestate Succession'), 140.

and the number of husbands inaccessible due to absence abroad or imprisonment is likely to have had some part in this decrease.

Once a maintenance award has been made by a court, it can only be altered by a new court order, even when the reason for its imposition has disappeared — for example, if the wife has come home to her husband. In some cases a period of several months or even years may go by before the spouses reconcile their differences to the extent that the wife returns to the marital home. In others, the parties may actually become reconciled during the progress of the claim through the court, or immediately after the award has been made, with no time at all between the wife appearing as claimant in her own action and then as respondent to acknowledge her husband's subsequent action to rescind the award.[57] The following table shows the distribution of claims according to the beneficiaries, and as to whether the maintenance is being sought or increased, or rescinded or decreased:

Table 5.1 — Claims in the case material including claims for maintenance, by year and beneficiaries

year	wife	wife and children	ascendants	descendants	collaterals	total
1. Awards and increase: beneficiaries						
1965	88	74	59	40	2	263
1975	86	66	35	49	1	237
1985	114	99	40	62	3	318
2. Rescission and decrease: beneficiaries						
1965	72	19	9	22	-	122
1975	45	29	4	22	-	100
1985	32	22	1	12	-	67

The table shows that the vast majority of claims for maintenance are made by the wife, whether for herself alone, or including claims for the

[57]Two cases from the 1965 material serve as examples, the first on 29/3/65 for the maintenance of wife and child, the second on 1/4/65 for the rescission of this same award. In another example in the 1965 material, an award made in the first case for the wife's maintenance was rescinded in a second case the next day.

maintenance of her children. The majority of maintenance claims are won; if the husband acknowledges that the wife is not living in his house and that he is not paying her maintenance, the only *shar`i* defence he can offer to her maintenance action is to establish that she is *nashiz* and has therefore lost her right to maintenance. If he cannot prove this, or if he acknowledges her claim, the parties are asked to agree upon an appropriate sum. If they cannot agree, 'expert witnesses' (*khubara'*) are appointed by the court from among people put forward by the parties, on condition that they are familiar with the financial circumstances of the husband. The *khubara'* decide upon a sum, and the *qadi* will be guided by their advice; if the husband feels it is too high, he must prove the basis of his objection. The maintenance award is executed through the Execution Office attached to the regular courts, and the final threat of imprisonment can be held against a husband persistently refusing to pay.[58]

The JLPS has taken the Hanafi view in the second part of Article 70 regarding the period for which past maintenance can be claimed:

> Maintenance is imposed either by agreement between the two spouses upon a certain amount, or by a ruling by the *qadi*. Maintenance for the period preceding the agreement or application to the judge lapses.[59]

This position can cause injustice to the claimant, notably when the wife's claim is dismissed due to a technicality such as a mistake in the filing of her claim, or in the notification of the respondent; since she has to submit the claim again, the wife will lose the maintenance she is due for the previous period. In addition, it is clear that many women delay going to court until the last possible moment: a court case, it is often felt, would only exacerbate the problems that already exist. These women again lose the maintenance for the period before they eventually find themselves having to have recourse to the court. On the other hand, Article 72 of the JLPS

[58] Jordanian Law of Execution no.31 of 1952. *Kitab al-Ahkam* Article 176; Law of *Shar`i* Procedure, Articles 84 and 85. See also Abu Zahra, 1971, 310. Meron, 1982, 362, states that the data provided by the Execution Offices for 1977 showed that nearly 75% of all judgements executed for the *shari'a* courts were maintenance claims.

[59] The Shafi`is and Malikis held that it could be claimed from the date it stopped being paid, regardless of whether or not there had been an agreement or a ruling. Sirtawi, 1981, 195. Compare Layish, 1975, 107. Egypt allows arrears of up to one year to be claimed: Shaham, 1997, 70.

takes the view of Abu Hanifa and Abu Yusef in making the husband unable to claim back from his wife maintenance that has been paid in advance, should the grounds for its requirement lapse.[60]

Once a maintenance award has been made, it cannot be increased or reduced until six months have passed, 'unless there are exceptional emergency circumstances such as a rise in prices' (Article 71). In the case material, the wife's actions for increase are frequently made well over six months after the original award, sometimes years later, and usually plead inflation, a rise in the cost of living and the consequent inadequacy of the original award. The husband usually acknowledges her claim, although where he can prove that he cannot afford the increase, the wife's action will be dismissed.[61] The case material showed examples of the husband obtaining a reduction in maintenance levels by reason of a change in his circumstances after imposition of the award.

Maintenance in the case material of 1985 was invariably assessed in monthly instalments, although the law does not provide explicitly for this. In 1965 and to a lesser extent in 1975, many awards were made on a daily assessment. The levels generally awarded to women are not only indicative of socio-economic circumstances but support the assumption that a woman who has left her marital home for a legal reason is usually expected to return to her own family rather than live alone. The exceptions to the generally low level of awards tend to be those made against absentee husbands. In such cases, the wife has to establish the existence of matrimony and swear the oath to the effect that her absent husband has not left her any maintenance, that she is not *nashiz* and that she is not a divorced woman whose *`idda* is over.[62] The level is set by *khubara'* and the wife has recourse to the Execution Department for execution of the award if her husband has money somewhere in the area, or from a debtor if he has one; if not, she may borrow from other persons, who then have the right to claim back what they have

[60]For example if she dies, or she returns to his house, or she becomes disobedient and is therefore no longer due maintenance. The Shafi`is, Malikis and Hanbalis said the husband could claim back sums paid in advance in such circumstances. Samara, 1987, 226; Sirtawi, 1981, 196.

[61]For example, in a claim in the 1985 material the wife sought to increase the level of the award made originally in 1983, pleading a rise in the cost of living. However, she acknowledged that her husband could not afford the increase and the court dismissed her claim.

[62]Article 76 JLPS. See also al-`Arabi, 1984, 311, 18645/1975.

paid from the husband when he returns.[63] In practice, the wife usually either finds work to support herself, or is supported by her family or perhaps his.[64] The difficulty of executing maintenance orders against absentee husbands can cause real hardship, and was addressed in Jordan during consultations on draft modifications to the JLPS. Suggestions included the improvement of liaison between the Jordanian Ministry of the Exterior and the courts, in order to facilitate execution of maintenance awards against ex-patriate citizens, and the establishment of a special fund for the temporary relief of needy wives, to be funded from the *zakat* contributions and an extra fee levied on contracts of marriage and deeds of divorce.[65]

During the *intifada*, there was discussion in the West Bank *shari`a* courts of the idea of establishing a special *zakat* fund for the advancing of cash to needy women based on maintenance awards in the courts that for whatever reason could not be enforced. Now that the Palestinian Authority is in place a similar initiative might be expected from the legislature, and Palestinian women have already turned their attention to the wider issue of social security funds.[66]

However, in some claims made against the absentee husband, it appears that the aim is not so much maintenance, but separation, which will be applied for once the wife has proved that she is unable to gain execution of the award. It is here that the higher levels of maintenance are significant, justified on the higher financial capabilities of the husband who lives and works abroad, for example in the USA. Thus in 1985, for example, an exceptional award of 150 dinars per month was made against a husband of unknown whereabouts; others had rates of 45, 50 and 60 dinars imposed on them, all well above the average level for the time. In at least some of these cases, it may be expected that the wife would allow the maintenance to accumulate for a few months before raising an action for separation for the non-payment of maintenance, so that the accumulated amount would be

[63]Article 77. Samara, 1987, 232–233, observes that the JLPS does not discuss the problem of whether real estate belonging to an absentee husband can be sold for the support of the wife, and notes that the Hanafi view is that it cannot be sold.

[64]Compare Layish, 1975, 92.

[65]Memorandum (*'tawsi'at `ala qanun al-ahwal al-shakhsiyya'* — recommendations on the Law of Personal Status) prepared in 1986 by the Federation of Business and Professional Women in Amman.

[66]See al-Haq, 1995, 64–71 for the report of the workshop on Women, Work and Social Security.

too much for family or friends of the husband living locally to pay, preventing them from frustrating her claim for separation.

5.3.3 Disobedience and Disqualification from Maintenance Entitlement

The oath that must be taken by the wife claiming maintenance from an absentee husband is designed to establish that she is actually due maintenance — that is, that the marriage is still in existence (established by the contract of marriage and the oath that she is not a divorcée whose *`idda* has expired) and that she is not *nashiz*, disobedient. The disobedience of the wife disqualifies her from the right to maintenance for so long as her disobedience continues. Moreover, the wife who is divorced by her husband while she is disobedient is not due maintenance during her *`idda* period (Article 81). A *talaq* in such circumstances would probably be considered justified and thus any claim by the wife for compensation for arbitrary *talaq* could be dismissed. In addition, if the wife raises a claim for divorce for *niza` wa shiqaq*, disobedience on her part will be taken into account by the arbitrators in their assessment of the proportions of blame of each spouse, and may well cause her to lose most, if not all, of her remaining financial rights if divorce follows.

The establishment of the wife's *nushuz* thus has effects beyond the lapse of the right to maintenance, and the jurists discussed in detail the situations in which the wife was held to be *nashiz*. The Hanafis held the wife to be disobedient in three situations:

> if she refuses to move to his house without right; if she refuses to travel with him wherever he wishes; or if she leaves his house or is absent from it without his consent and without *shar`i* justification.[67]

The Jordanian legislator kept very much to this view in defining *nushuz* in Article 69 of the JLPS:

> If the wife becomes *nashiz* then she is not due maintenance. The disobedient wife is she who leaves the marital home without a *shar`i* excuse, or prevents

[67]Samara, 1987, 218–20: he discusses the positions of the other schools. See also Abu Zahra, 1971, 301.

> the husband from entering her house if she has not requested him to move her to another. Among the legitimate reasons for her leaving the house are the husband's injury of her by beating or ill-treatment.

The jurists agreed that the husband's injury and ill-treatment of his wife provided a good defence to the charge of *nushuz*. Other acceptable reasons for leaving the marital home, or not moving to it in the first place, include the house failing to fulfil *shar`i* requirements. The jurists also agreed that she might leave the house without his consent to visit her parents once a week, and other relatives once a month or once a year.[68] The wife may refuse to travel with her husband, but if he moves to live elsewhere, she must move with him; this is provided, as stipulated earlier in the law, that the husband can be trusted to treat her properly, and that there is no stipulation in the marriage contract to the contrary.[69]

5.3.4 Maintenance, Disobedience, and the Wife Who Goes Out to Work

A similar reference to a contrary stipulation might have been expected in the provision regarding the paid employment of the wife. Here, however, the text of the JLPS is staunchly classical in its content. Article 68 reads:

> No maintenance is due the wife who works outside the house without the consent of her husband.

This article had no predecessor in the JLFR, but without further explanation of 'consent', for example, represents the classical doctrine of the majority of jurists, who held that the husband could forbid his wife to go out to work at any point in the marriage, even if he had previously con-

[68]Article 207 of *Kitab al-Ahkam* sets out the Hanafi opinion as once a year for other relatives. See also Sirtawi, 1981,193; Abu Zahra, 1971, 222/3; Badran, 1981, 220. Different rules apply if the wife's parents are aged and ailing, and have nobody besides her who can see to their needs. No cases were found debating this point in the material studied. See also *Kitab al-Ahkam* Article 216.

[69]Article 208, *Kitab al-Ahkam*; Article 181, *Kitab an-Nafaqat*; Article 37, JLPS. Samara, 1987, 245.

sented to her paid employment outside the home.[70] Article 156 of the *Kitab an-Nafaqat* puts the classical view:

> If the wife has delivered herself (i.e. to the *ihtibas* of her husband) by night and refuses by day, or delivers herself by day and refuses by night, then she is *nashiz.* For example, if the wife is a professional woman who works by day in her own interests and comes back to the husband by night, she is not due maintenance.[71]

The logic behind this principle lies in the connection between maintenance and the *ihtibas* of the woman in her husband's house. If she leaves the house without his permission, she is no longer in his *ihtibas* and has therefore forfeited her right to maintenance. If on the other hand she leaves with his consent, he has willingly waived his right to *ihtibas* for the time she remains outside; and if she leaves for a *shar`i* reason although without his consent, then the possibility of *ihtibas* has been frustrated by failure on the husband's part to fulfill some or all of his legal obligations towards her.

The reason why the woman's work under the classical rules is not held to be a legitimate reason to leave the house is that the husband alone is responsible for his wife's maintenance; she has in theory no legal obligation to spend anything on herself or the house, since everything she actually needs is supposed to be provided by the husband. At the same time and in the same logic, the law gives the husband no say in the manner in which the wife disposes of her income if he agrees to her going out to work. The husband's absolute responsibility for her financial maintenance, however, means that the wife does not have an unqualified right to work within the logical equation of rights and obligations established in the *shari`a:* there is no absolute right nor absolute prohibition on women's work outside the home.

In their commentaries on the JLPS, Samara and Sirtawi do not discuss the practical application of this article of the JLPS in light of the socio-economic changes that have affected the area since the 1960s. Community interest in these phenomena is however high, and articles on the changing

[70]Sirtawi, 1981, 193; Samara, 1987, 219; Abu Zahra, 1971, 302.

[71]Compare Article 169, *Kitab al-Ahkam:* '[As for] the working wife who is out of the house by day and with the husband by night, if he forbids her to go out and she disobeys and goes out, she is not due maintenance for so long as she is outside.'

role of women, especially with regard to their entry into the wage-earning labour force, frequently appeared in popular magazines and daily newspapers, as well as in scholarly studies and articles in the 1980s when the fieldwork for this study was being carried out.[72] In the West Bank and Gaza, a variety of civil society-based efforts were undertaken — notably by the Women's Committees in the 1980s — to facilitate the participation by women in income generating projects.[73] At a 'government' level, the PLO preceded most Arab governments in ratifying the 1976 Arab Convention on Working Women, reaffirming the right of women to engage in all areas of economic activity.[74] It is a fact, nevertheless, that even bearing in mind all the difficulties associated with defining and documenting 'work' for statistical purposes,[75] women's participation in the labour force is low both in Jordan[76] and in the West Bank and Gaza Strip. In 1998, the Palestinian Central Bureau of Statistics published a report on gender and the labour force, noting that 'Palestinian women's labour force participation ranks amongst the lowest in the world.'[77] The FAFO study found that support for women's

[72]For example in Jordan: article on 'The Role of Jordanian Women' by Dr. Aida al-Mutlaq, *Ar-Ray* daily newspaper, 9/4/88; 'Education and Work for Women', Nur al-Huda ad-Dauliyya, *Ar-Ray*, 10/4/88; 'Supervision of Working Women', Mihka'il Jam'an, *Ad-Dastur* newspaper, 24/4/87; and 'Attitudes of University Students towards Working Women: the Case of Jordan', Barhoum, 1983, 369–376. In the West Bank, see for example the work by Maysun Wahidi, Fathiyya Nasru and Mona Rishmawi cited in the bibliography.

[73]See Wahidi 1986, 185–187; Nasru 1985 and 1986, Hijab, 1988, 158–160.

[74]Hijab, 1988, 83; by the end of 1986, the Convention had been ratified only by Iraq and the PLO.

[75]See Ovensen, 1993, 207, on the definition of 'work' and its application to women's work in Palestinian society

[76]Jordan's 1997 report to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW/C/JOR/1 10 November 1997, 14–15) gives the percentage of economically active women out of the total female population of working age (defined as 15–64) at 6.4% in 1979 and 12.7% in 1990. For earlier figures, see Barhoum, 1983, 369; Zaghlal, 1984, 57. Brand, 1998, 131, puts Jordanian women as 15% of the formal workforce in Jordan in 1995 and notes a rise in female unemployment.

[77]Palestine Central Bureau of Statistics, data sheet on 'Women and Men in the Palestinian Labour Force,' June 1998; it noted a UNDP survey that found an average of 25% of women in the Middle East participating in the labour force, compared to an average 39% in developing countries, while in the West Bank and Gaza Strip, female par-

right to work outside the home varied according to the type of work (with business and the professions most approved) as well as according to the gender and age of the interviewee.[78]

As for the judiciary, where called upon to rule on the question of *nushuz* and women's work, the *shari`a* courts have developed the original principles beyond the apparent meaning of the text in Article 68 of the JLPS. Even before the JLPS was promulgated, development of the idea of the husband's consent was occurring in the courts, as shown by published decisions from the *Shari`a* Court of Appeal in Amman. The second volume of al-`Arabi's collection of decisions, covering the years 1973–1983, contains a number of apparently contradictory principles which nevertheless can be shown to represent a consistent development in the treatment of the issue.

The first principle on the matter published by al-`Arabi quotes the afore-mentioned Article 156 of the *Kitab an-Nafaqat*, and supports this by a reference to Syrian principles on personal status, that a woman who works by day is not due maintenance.[79] No Amman decision is quoted in support. The second decision published, however, also a Syrian one, shows an emphasis on the positive prohibition by the husband:

> The wife's work outside the house by day does not cause her maintenance to lapse so long as it is not preceded by a prohibition from the husband and the establishment of this prohibition.[80]

The requirement that the husband positively prohibit his wife from working, and establish this in court, is taken up in the first Amman decision quoted:

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ticipation rates were 11–12% of the working age female population in the years 1995–1997 (compared to the male rate of 67–70%). Women were 13–14% of the total Palestinian labour force, and unemployment rates were high, as were those of men, at 18–22%. See also PCBS 1999, 120–121.

[78]Ovensen 1993, 209–210, who notes also a very high labour force participation rate among divorced and separated women 'who are usually accorded low social status.' See also Hammami, 1993, 305, who notes that 86% of women interviewed for the survey stated that they would like their daughters to hold professional positions: and Heiberg, 1993, 134, on the lower support levels among men in the FAFO survey aged fifteen to nineteen and over 60 for the principle of women going out to work.

[79]Al-`Arabi, 1984, 307.

[80]Loc. cit..

> The work of the wife does not entail *nushuz* unless the husband establishes that he has a *shar`i* dwelling and has called her to *ta`a* therein, and that she has failed to respond.[81]

The second Amman decision quoted in al-`Arabi tackles the problem from a moral and social point of view, noting that some jurists had held that the wife engaged in a professional occupation, such as teaching or clerical work, was due maintenance whether or not she had her husband's consent to her work, and observed that this view

> suits the developments of the age in which we live, where women share with men the burdens of life; we would be injuring her if we took the first (contrary) view and deprived her of gaining the fruits of her study and of her right to work, which she has won in practice . . . this is in addition to the current shortage of workers and (the fact that we would be) taking away from the husband an income that may help him, especially in these days in which inflation and economic depression are rife . . . [82]

In 1979, a further Appeal Court decision focussed on the issue of stipulations in the marriage contract with regard to work:

> If the wife claims that she stipulated to her husband that she would go out to work and he accepted this condition, that is a legitimate defence to a claim for [cutting] her maintenance, even if [the stipulation] is not registered in the text of the contract [of marriage]. This is because while Article 68 of the JLPS is general, Article 19 stipulates that such matters be registered [in writing] [only] for [purposes of] claims for dissolution of the contract of marriage on the basis of [breach of] the said stipulation.[83]

A decision in the Hebron court as early as 1975 had put the burden of stipulations regarding the wife's work squarely on the husband. The wife had applied for maintenance, and her husband's defence was that she was *nashiz*, as she was working as a teacher without his consent. The court

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[81] Al-`Arabi, 1984, 308, no.18664/1975.

[82] Al-`Arabi, 1984, 306, 18900/1976, and `Amr, 1990, 256. The decision refers to an earlier Amman decision, no.11667 of 1961, as supporting this view; the earlier decision is not published in either collection.

[83] `Amr, 259, 20876/1979. Compare al-Jundi, 1978, 150–151.

rejected this defence and awarded the wife maintenance 'because the claimant was a teacher before her marriage, and her husband knew that and did not stipulate in the marriage contract that his wife should not go out to work'. In other words, it would seem to be the case, in court practice if not in the text of the applicable laws, that if the husband knows of the wife's work before her marriage and accepts it, then the wife can challenge his objection if he later tries to prevent her working, even if she has not inserted a stipulation in the marriage contract ensuring her continuance in her job.[84] In practice, the burden of proof appears to be falling on the husband rather than the wife; in the event of a dispute, the husband will be required to demonstrate the validity of his lack of consent to his wife's paid employment outside the home, and when and why his prohibition was voiced, if he did not actually insert a stipulation in the contract of marriage stating that his wife was not to go out to work. This is of course particularly the case if at the time of the marriage the wife was employed in such an occupation. In such circumstances, the default position (or the 'norm') would appear to be that in the absence of a registered stipulation to the contrary, a woman will be considered to have gained her husband's implicit consent to her going out to work.[85]

With regard to the nature of the employment in which the woman is engaged, court decisions stating that women working in the professions are due maintenance from their husbands are no doubt rendered less problematic by the fact that they deal, for the most part, with the 'professions'. Teachers and clerical workers are the examples given, both being positions of some prestige and respect in society. Shalabi reports that over half the women registering a waged occupation in their contract of marriage in Ramallah court 1986–89 were teachers.[86] For his part, the then *qadi* of Ramallah Shaykh Hiyan Hilmi al-Idrisi states that if a woman's occupation is

[84]See `Atayat, 1984, 3–4.

[85]An amendment proposed in 1987 to Article 68 of the JLPS suggested that the text be changed to read: 'No maintenance is due the wife who goes out to work without her husband's consent, be this implicit or explicit, even if this consent is not registered in the marriage contract; however, if the agreement is given after the contract, then it has to be in writing, whether it be given on a permanent or temporary basis.'

[86]Shalabi, 1992 ('Marriage') 24. Only 1.5% of women registered an occupation; 93.7% described themselves as housewives and 4.8% as students.

honourable (*sharif*), involving no damage to her reputation or emotional or physical harm, nor causing her to neglect her husband or her children, then she has the right to engage in this occupation and since no reasonable objection could be raised by the husband, he may not forbid her to work; Idrisi's premise is that a man must be able to establish a 'good reason' if he wishes to forbid his wife going out to work.[87] The issue that becomes more at stake is then the professional (and socio-economic) hierarchy in the establishment and protection of the woman's right to go out to work. That is, while a woman teacher, lawyer and doctor may find their right to work defended, the same may not apply less prestigious jobs, since the courts are likely to find similarly to society in 'preferring' the professions.

In summary, the courts in both Jordan and the West Bank have developed the applicable texts relating to maintenance, 'disobedience' and a woman's right to go out to work beyond the more restricted position suggested in the law in force. It is also a fact that, at least in the West Bank, very few husbands seem to bring to court their objections to their wife's work.[88] Indeed, many maintenance claims are extremely straightforward, with the husband offering no defence but rather acknowledging his wife's claim. In other cases, however, the husband will defend the claim on the grounds of *nushuz*, in which case he will be charged by the court to prove this defence, which must include his establishing that he has a *shari`i* dwelling, and that he has asked his wife to return and she will not come. In many cases, the husband claims that his wife is *nashiz* because she 'left the marital home without legitimate reason and without his permission', fails to prove this defence and then demands that his wife swear the oath of denial. If the wife declines to take the oath, he can then take the oath in support of his defence and her maintenance claim will be dismissed. In some cases the wife simply acknowledges his defence of *nushuz* and thus loses her claim. If, on the other hand, the wife takes the oath of denial or the husband fails to prove his defence and does not ask for her to be sworn the oath, the maintenance

[87]Idrisi, 1986 ('Marital Disputes' part I). Shaykh Taysir al-Tamimi, then *qadi* of Hebron court and by 1999 acting Chief Islamic Justice, also referred to an unpublished Amman Appeal Court decision to a similar effect; the text was unavailable and I am grateful to him for the information.

[88]The Hebron case mentioned above was the only one of its kind found in the case material.

claim will be found to be established. In challenging allegations of *nushuz*, the women in the case material used defences based on the non-fulfilment by the husband's *maskan* of the *shar`i* requirements, the husband's non-payment of prompt dower and/or *tawabi`*, the husband's physical ill-treatment of her, and the fact that the husband did actually give his consent to her leaving the house.[89]

The defences the wife may make to her husband's charge of disobedience in response to her maintenance claim are naturally similar to those she makes against a petition by the husband for a ruling of *ta`a* against her. A dismissal by the court of her maintenance claim on the grounds that she is *nashiz* does not however automatically give rise to a *ta`a* ruling, which has to be applied for separately by the husband. Nor, conversely, does a *ta`a* ruling automatically mean that the wife loses her right to maintenance; this only arises after the wife has refused to comply with the *ta`a* ruling despite the efforts of the husband to implement it.

5.4 THE 'HOUSE OF OBEDIENCE'

5.4.1 Basic Rules

Ta`a* claims consist of the husband calling his wife to *bayt at-ta`a, 'the house of obedience'; a husband can have recourse to this action only when his wife has physically left the marital home and is therefore no longer under his *ihtibas*. The general duty of obedience is placed upon the wife in Article 39 of the JLPS:

> The husband shall treat his wife well and deal with her favourably; the wife shall obey her husband in permitted matters.

[89]In this last regard, Article 178 of the *Kitab an-Nafaqat* is of some interest: 'If the wife is in her family's house by permission of her husband, then he must pay her maintenance. For example, if she asks permission to go to her family's house and he says to her 'if you come back before a year is over then you're divorced' and she goes, then he has given her permission to live there for a year, and must pay her maintenance.' Regarding *nushuz* and maintenance claims, compare Layish, 1975, 101.

The words 'permitted matters' indicates that the classical jurists imposed strict conditions on the husband's right of *ta`a*, and these conditions are stressed by modern writers, who may be sensitive to criticisms made of the principle of *ta`a*.[90] The conditions are threefold according to Abdul Hamid: i) that the orders made by the husband concern marital affairs (not, for example, the wife's personal financial affairs); ii) that they accord with the *shari`a*; and iii) that the husband has himself fulfilled his *shar`i* obligations towards his wife.[91] Within these limits, obedience is due, and 'the obvious manifestation of this obedience is that the wife lives in the marital home which the husband has prepared for her'.[92] Article 37 of the JLPS sets out in more detail the conditions for obedience:

> After receiving her prompt dower, the wife shall obey her husband and live in his *shar`i* dwelling, and shall move with him wherever he wishes, even outside the Kingdom, provided that he can be trusted with her (*amin `alayha*) and that there is no stipulation to the contrary in the marriage document. If she refuses obedience, then her right to maintenance lapses.

This article contains more than may be immediately apparent from the translated text. Firstly, the change of one word in the JLPS from the parallel article in the JLFR has effectively ended forcible implementation by the Execution Departments of a ruling for *ta`a*. Under the terms of the JLFR, a *hukm* for *ta`a* could be executed against the will of the wife by officials from the Execution Office — that is, she could be escorted back to the marital home, theoretically with the help of police officers if necessary; awards for *ta`a* included the word *jabran*, meaning by force or forcibly. This was provided for in JLFR Article 33, the equivalent of JLPS Article 37, which stated that after receiving her prompt dower, the wife 'shall be obliged (*tujbira*) to

[90]For example Idrisi, 1986 ('The House of Obedience'): 'Some people think that *ta`a* means the monopoly of power by the husband, but this in itself is contrary to the aims of marriage. *Ta`a* is the right of the husband, but he may not abuse this right or be arbitrary in his use thereof . . . *Ta`a* is not meant to be used to humiliate women . . . It is a right in return for the wife's right of maintenance . . .' See also Samara, 1987, 252, who describes the limits on *ta`a*.

[91]`Abdel Hamid, 1984, 116.

[92]In the Explanatory Memorandum to the 1979 Egyptian legislation: Badran, 1981, 214.

live in her husband's house'. The JLPS article simply states that the wife shall live there. The ending of the possibility of executing *ta`a* awards in this manner followed the Egyptian precedent of 1967.[93]

Thus, when a *ta`a* claim is granted to a husband in the West Bank now, the husband takes a delegation of relatives with him to his wife's family's house to seek her return.[94] If she refuses, he may take the award to the Execution Department and the officials there will notify the wife officially of the decision that she must return.[95] If she again refuses to comply, at this point the husband can have recourse to the court to cut any maintenance award the wife may have gained against him previously, and if she applies in the future, no award will be made so long as the *ta`a* ruling stands. No further measures of legal enforcement of a *ta`a* award are possible, and progress will depend in all probability upon family conciliation.[96]

The second point of significance about Article 37 is that it mentions three major rights of the wife, the absence of any of which will cause a *ta`a*

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[93]Najjar, 1988, 319–344 notes a feeling in Egypt that forcible execution of rulings for obedience had become increasingly inappropriate with the changing times. Compare the article by Dr. Jamal Utayfi in *al-Ahram* 6/3/67 (reproduced in Collected Writings, 355–359) quoting *shar'i* scholars in Egypt voicing similar sentiments. Utayfi claims that forcible execution contradicts the general principles of the Egyptian Constitution regarding personal freedom and respect for the family. See also on Egypt, Sa'adawi, 1980, 198; Shaham, 1997, 83, who notes women hiding from police who came to execute the rulings; and Badran, 1995, 131–132 on early protests against the institution. The forcible execution of *ta'a* orders in Egypt was cancelled by ministerial order on 13/2/67. With regard to Israel, Layish (1975,101–102) notes that there is similarly no forcible execution of orders there; nevertheless, claims for *ta`a* continue, and Layish observes that 'it seems that more than in the past, the husband in recent times has resorted to legal action to get his wife to obey him'. In Algeria, compare Lazreg, 1994, 103, on women forced back to the marital home under the colonial regime. In Jordan, Dawud, 1999, I, 710, quotes from one Appeal Court ruling in 1977, correcting a first instance ruling for *ta`a* by removing the phrase 'forcibly' (*bi'l-jabr*) in accordance with the then recently issued JLPS: 19348/1977.

[94]Antoun, 1980, 458, notes the convergence of legal procedure and custom here.

[95]See Idrisi, 1986 ('The House of Obedience') and al-`Arabi, 1984, 226, 21257/1980.

[96]Granqvist, 1935, 218, refers to the wife who becomes '*hardane*' (literally, offended or angry) and goes away to her father's house. This word is still used in the West Bank with reference to wives in this situation, usually without a *ta`a* action following, if family conciliation (a *sulha* process) as described by Granqvist is successful in reconciling the parties.

claim to be dismissed: the payment of her prompt dower and/or *tawabi`*, the provision of a *shar`i* dwelling by the husband, and the perceived trustworthiness of the husband with the person and property of his wife.

5.4.2 Defence Based on Dower

The classical jurists were all agreed that the wife has the right to refuse to move to her husband's house before she has received her prompt dower. Opinions differed, however, if the wife agreed to consummation of the marriage and to live in her husband's house before she had received her dower. Within the Hanafi school, Abu Yusef and Muhammad Shaybani held that the wife had thereby waived her right to withhold obedience, and could no longer use non-payment of dower as a good defence to *ta`a* should she subsequently leave the house. Abu Hanifa himself held that the wife's right to refuse obedience continued as long as her prompt dower remained unpaid, whether before or after consummation, and this is the view taken in the Jordanian law.[97]

In the case material from the West Bank, the non-payment of prompt dower or *tawabi`* was commonly used by the wife as a defence to an action for *ta`a*.[98] In some cases the husband acknowledged this defence, while in others the establishment of either dower or *tawabi`* being in his keeping involved the same complications that have been described with regard to claims for these goods by the wife. Particular rules apply when the *tawabi`* registered in the marriage contract include furnishings, since the wife in theory may remove them from the marital home and if he seeks *ta`a* when the furnishings are still in his house, he will not be considered to have delivered the *tawabi`* to her and so will not be awarded *ta`a*.[99] An examina-

[97]The former view was also held by the Malikis, Shafi`is and some of the Hanbalis and thus constituted the majority view. Sirtawi, 1981, 142–143; Samara, 1987, 176–178. Note that Samara identifies Article 47 as having adopted the majority view, and is presumably here referring to the other point in Article 47, that if the wife agrees to deferral of dower she cannot then refuse obedience. Both the *Kitab an-Nafaqat* and *Kitab al-Ahkam* take the view of Abu Hanifa in this. (See Articles 213 and 214 *Kitab al-Ahkam* and Article 175 of *Kitab an-Nafaqat*).

[98]Compare Layish, 1975, 49 and 93.

[99]Idrisi, 1987 ('Dower and Marriage Expenses' part 4). In addition, the husband is responsible for furnishing the house, and if he cannot prove that the wife consented to

tion of the reasons for the dismissal of *ta`a* claims in the case material showed that defence on the grounds of non-payment of dower and/or *tawabi`* accounted for 16–18% of dismissals, with no significant rise over the three years. In the later WCLAC material, the figure was 20%.[100]

Items bought by the wife from her dower or elsewhere as *jihaz*, on the other hand, cannot be used to defend a *ta`a* claim in the same way as *tawabi`* and prompt dower. In a claim for *ta`a* in 1965, the wife began her defence by claiming that the remainder of her prompt dower was in the *dhimma* of the husband; she then acknowledged his response, to the effect that he had paid it in full, and claimed instead that her *tawabi`* were in his *dhimma*, consisting of a cupboard, a bed and six chairs. The husband once again replied that she had received these items and she acknowledged his statement. The court therefore decided *bara'at dhimmat az-zawj* — that is, that the husband had fulfilled all his obligations with regard to the prompt dower and *tawabi`*, and that nothing remained in his keeping. The wife then went on to claim that the husband had in his *dhimma* gold bracelets shown by the marriage contract to have been bought by the wife from her prompt dower. The court declared that 'the wife may not refuse (obedience) because of these (bracelets) because they are not part of the *tawabi`* of the prompt dower, but were bought by the wife from her dower . . .' An examination of the dwelling found it to be *shar`i*, so the husband won his action for *ta`a*. An Appeal Court ruling from Amman in 1982 is cited by Dawud supporting the position that the husband being in possession of his wife's *jihaz* does not serve as dower and *tawabi`* in rebutting his claim for *ta`a*.[101]

5.4.3 Defence Based on Untrustworthiness of Husband

In the last case described above, the wife's final defence was not valid because she made no suggestion that the husband had taken over her property, or that he was refusing to give it to her. Had this been the case, she could have had a valid defence in claiming that he was not trustworthy with her property. This defence can apply to all items of *jihaz* and all other prop-

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the use of her property in the marital home, the *maskan* may be liable to be held *non-shar`i*. See for example al-`Arabi, 1973, 215, 11473/1961 and 16147/1969.

[100]Welchman, 1999, 129, table 6.3.

[101]23112/1982, Dawud, 1991, I, 718.

erty belonging to the wife, for example if he takes from her without her consent the wages she earns by going out to work. In another case, the wife defended her husband's action for *ta`a* by stating that he had taken away her gold bracelets and was therefore not trustworthy with her property. The wife's defence was established by the husband's acknowledging that the Magistrate's Court in the town was at the same time hearing a case against him on these same grounds, and the *ta`a* claim was dismissed.[102]

The defence of the untrustworthiness of the husband, also referred to in Article 37 of the JLPS, includes both the person and property of the wife. Article 69 of the law explicitly provides that 'legitimate reasons for the wife leaving the house include the husband's injury of her by beating or ill-treatment'. One 1974 Amman decision held that a first instance court had been wrong in dismissing a *ta`a* action on the grounds that the husband had acknowledged that he hit his wife because she had left his house without his permission; the Appeal Court held that the court should have looked into the husband's claim that the blow 'did not injure the wife.' Later published decisions hold similarly that a simple acknowledgement of an isolated instance of physical violence does not serve in and of itself to rebut a claim for *ta`a*, without further investigation by the first instance court.[103] Clearly the 'relative' assessment of injury and the acceptance in the traditional interpretation of some degree of physical force as the final stage of domestic 'discipline' may add to the complications of establishing the incidence of domestic violence against the wife. However, where physical injury is established, the *ta`a* claim will not be awarded, and there were claims in the case material where the wife proved her defence by the fact that the husband had previously been sentenced by the local Magistrate's Court on criminal charges for actual or threatened physical assault against her.[104] The defence of ill-treatment was also proven by the testimony of witnesses where they could testify to specific incidents. Where the wife failed to prove her defence, the court usually tried to establish the husband's treatment of her. Thus, in a claim in the case material from 1965, the wife failed to prove that her husband beat her, and the husband was awarded *ta`a*. The wife ap-

[102]An Appeal Court decision on precisely this situation is in al-`Arabi, 1973, 206, 14370/1966.

[103]Al-`Arabi, 1984, 228, 18092/1974; and Dawud, 1999, I, 717 and 738, 22823/1982 and 38123/1994.

[104]Compare Layish, 1975, 97–98 and 116 note 57.

pealed the award, and in examining the case file the Appeal Court found that the wife had also stated that her husband regularly drank alcohol and gambled and generally was of a bad moral character, and that his house was frequented by people of the same type. The Appeal Court noted that the first instance court should have checked with the neighbours with regard to the husband's behaviour, but these claims by the wife did not in the end have to be investigated since the dwelling on which the first instance court carried out its investigation was found to be not in fact where he lived, so the ruling was overturned.

Other forms of ill-treatment less commonly found to be established in published *shar`i* decisions include illegal forms of sexual intercourse, which can be proved by a doctor's report and testimony[105] and false accusations on criminal matters made against the wife by the husband.[106] In addition, an award for *ta`a* will not be made if the court is satisfied that the wife will suffer injury if it were given. One claim in the 1965 case material was dismissed because the court found that the husband had absented himself from his wife for seven years, and now was calling her to *ta`a* elsewhere in the Middle East, far away from her own family; the court held that the husband intended injury of his wife given the attendant circumstances.[107]

This was the least relied upon of the three defences to a *ta`a* action, accounting for only 10% of dismissals in the case material, and only 2% in the later WCLAC material.

5.4.4 Defence Based on the Matrimonial Home

The place in which the house is located must also be discussed in the context of the third and most common defence to an action for *ta`a* — the lack of *shar`i* legitimacy of the dwelling in which the husband is calling his wife to obedience. Article 38 of the JLPS provides that:

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[105]Al-`Arabi, 1973, 207, 13861 and 14236 of 1965.

[106]Al-`Arabi, 1984, 309, 21330/1980.

[107]In another claim, noted above, the husband lived near Amman but had prepared a dwelling for his wife in the West Bank, far away from his place of residence. The claim was rejected and included among the reasons was that 'good intentions are lacking on the part of the husband as this would cause the wife injury'.

> The husband shall prepare the dwelling (*maskan*) containing the *shar`i* requirements, according to his status, and in the place of his residence and work.

The *maskan* is part of the wife's maintenance, and the JLPS is therefore consistent in requiring it to be appropriate to the financial circumstances of the husband.[108] The jurists agree that the required characteristics of the *maskan* change according to time, place, the dictates of local custom and the social status of the husband. Three social classes are recognised — rich, middle class and poor — and differences are made according to whether the dwelling is in a town, a village or a Bedouin encampment. To these classical differentiations, necessity has added refugee camps in the West Bank.[109] These requirements refer to the physical characteristics and content of the dwelling, which are determined by an investigation (*kashf*) carried out by the *qadi* or the Chief Clerk to the *shari`a* court[110] accompanied by another clerk of the court to record the proceedings of the investigations. This team, together with the wife or her lawyer if they wish to be present, go to the *maskan* in which the husband is calling his wife to obedience. The physical characteristics and contents of the dwelling are recorded, and three local people are chosen as *khubara'*, to give expert testimony as to the husband's status in the area and whether this particular *maskan* is considered appropriate by local customary standards. Details that are recorded may include the exact location of the dwelling, the names of the neighbours and where their houses are, the floor space of the various rooms, windows, doors, locks, outside yard, all items of furniture, fittings (including whether or not the house is provided with running water and electricity), domestic utensils, crockery and cutlery, foodstuffs, bedding and clothes. When the court deputy has completed his examination, the woman's lawyer may ask questions of the husband or the experts, and can ask to have the answers recorded. The details are written up as a report and placed in the case file. In a subsequent session at court, the report is read out by the *qadi* and the litigants may use its contents to try to establish the legitimacy, or lack thereof, of the *maskan*. The final decision on the dwelling belongs to the *qadi*.

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[108]Article 279 of the *Kitab an-Nafaqat* and Article 184 of *Kitab al-Ahkam* require the *maskan* to be appropriate to the status of both spouses.

[109]Idrisi, 1986 ('House of Obedience').

[110]According to Article 73 of the Law of *Shar`i* Procedure, 1959.

The *kashf* of the *maskan* does not depend upon the wife requesting that it be undertaken, or explicitly denying the legitimacy of the dwelling. Where no other defence is offered, the *kashf* must be carried out unless the wife has explicitly acknowledged the legitimacy of the *maskan*.[111] This is because the *maskan shar`i* is the right of the wife in law, and the *qadi* cannot award a ruling for her to go to a 'house of obedience' if that house itself does not fulfil the *shar`i* requirements. In other words, the legitimacy of the *maskan* is a condition in any award of *ta`a*.

The *kashf* is carried out by the *shari`a* court with jurisdiction over the area in which the *maskan* is located, while the *ta`a* action must be raised in the court of the wife's area of residence. Thus, the court in Hebron, for example, considering an action for *ta`a* against a wife resident there, may ask the court in Tulkarim in the northern West Bank, to carry out a *kashf* on the husband's *maskan* in that area. After the 1967 occupation, the courts on the West Bank were unable to arrange for a *kashf* to be carried out under the auspices of a *shari`a* court anywhere outside the West Bank. Hence, a 1975 *ta`a* action presented in Ramallah was dismissed because the wife challenged the legitimacy of the *maskan*, which was in Amman, and because of the circumstances of occupation prevailing in the West Bank 'the husband was therefore unable to prove that the *maskan* was *shar`i*'.[112]

While the characteristics of a *maskan shar`i* may vary enormously according to place, time, local custom and the class of the husband, there are some basic rules that apply to all; for example, the wife cannot be obliged to live in a house that is on the point of collapse, or built on land illegally obtained,[113] and there must be 'good neighbours, able to assist the wife in her

[111]In one 1975 claim, the wife acknowledged her husband's claim to *ta`a* and declared herself ready to return to his *maskan*. The court ruled accordingly. The Appeal Court abrogated the decision and returned the case to the first instance court for a *kashf* to be carried out, as the wife had not explicitly acknowledged the legitimacy of the *maskan*. The *kashf* showed that the *maskan* was not *shar`i* and the *ta`a* ruling was therefore overturned. In another case, by contrast, the wife explicitly acknowledged that the *maskan* was *shar`i*, and agreed to comply with her husband's action for *ta`a* and no *kashf* was therefore undertaken. See also al-`Arabi 1984, 225, 21149/1980.

[112]By comparison, ten years previously, a *ta`a* action was made against a wife living in Hebron, obliging her to go to her husband's *maskan* in Amman, which had been shown by a *kashf* to be *shar`i*.

[113]*Kitab an-Nafaqat* Articles 177 and 179 respectively.

religious and material interests, and to prevent the husband oppressing his wife if such is his intention . . .'[114] A *maskan* located in an isolated area with no nearby neighbours is not likely to be held to be *shar`i*, and the Amman Appeal Court has also ruled that the wife will not be ordered to *ta`a* in a non-Muslim country with non-Muslim neighbours.[115]

In classical law, the *maskan* does not necessarily denote a 'house', as can be seen from the following Article 280 of the *Kitab al-Nafaqat*, a text still occasionally referred to in *ta`a* actions:

> [T]he noble wealthy wife must have an independent house; the middle class wife must have a room with an independent lock and facilities (*marafi`*), that is, toilet and kitchen; but the *maskan shar`i* for the poor wife is a room with a lock and a shared toilet and kitchen.[116]

In practice, the 'facilities' of the *maskan* were often the reason given in the case material for the dwelling being found to be non-*shar`i*; the toilet being outside and lacking a proper lock, for example, or having only a woollen curtain for a door.[117] The other 'facility' besides the kitchen that can cause a dwelling to be held non-*shar`i* is the yard in which it is customarily expected that the wife will hang out the washing, beat the mattresses and so on. If the yard is unacceptably open and exposed, so that she can be seen performing her household chores by all and sundry, or if for example it is used by other people as a passageway, the house is likely to fail to meet *shar`i* requirements in many parts of the West Bank.

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[114]Article 281 of *Kitab an-Nafaqat*. See also Article 207 of *Kitab al-Ahkam*. Sirtawi, 1981, 203 and Samara, 1987, 243; al-`Arabi 1973, 212, 8663/1955, 9723/1957 and 12185/1962.

[115]Al-`Arabi, 1973, 212, 11689/1961 and 11824/1961. In the 1985 case material, one petition for *ta`a* was dismissed when the husband admitted the *maskan* had no neighbours. The non-Muslim state in issue in the example was Germany; presumably this had the effect of entitling the woman to remain in Jordan claiming maintenance. 21440/1980, Dawud, 1999, I, 715–716.

[116]The article adheres to the majority Hanafi view of assessing maintenance according to the status of both spouses.

[117]In 1975, a claim was dismissed because the *maskan* was held not *shar`i* because it had no [indoor] kitchen or toilet, and in the view of the court, the husband was 'a member of the more comfortable class, and people of the same class as he in that village do have kitchens and toilets'.

Whatever the class of the husband, the *maskan* must contain separate mattresses and blankets for each spouse[118] and the other items set down as necessary for basic living as regards foodstuffs, fuel and water. In 1975, two claims for *ta`a* in the case material were dismissed because the *maskan* lacked certain essentials: in one, rice, sugar, soap and needles and thread, and in the other soap, salt, sugar, combs, a lufa, needles and thread, a cupboard or chest for clothes, a separate mattress for the wife, and any form of heating device. Another wife challenged the legitimacy of the *maskan* on the grounds that it lacked an oven (*tabun*), a mirror, and a wardrobe, and had no good lock on the doors.[119]

Other objections that the wife can legitimately make to the *maskan* in order to defend herself against a claim of *ta`a* arise not from the house itself, but from where it is, and who else lives in or around it. Article 38 of the JLPS provides that:

> The husband may not settle his family and relatives or his children of discriminating age with him in the *maskan* he has prepared for his wife unless he has her consent so to do. Excepted from this are his parents if they are poor and incapacitated and he cannot afford to maintain them separately — they can be with him, provided this does not obstruct married life. Similarly, the wife may not have her relatives or her children from another man to live with her, unless she has the husband's consent.

In this article, the JLPS has gone back to the original Ottoman and classical Hanafi rule regarding the husband's children from other wives. The JLFR had stated that such children could not stay with him if they had reached the age of puberty, but the JLPS limits this to the earlier age of discrimination.[120] Sirtawi does not approve of this alteration, arguing that the

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[118]Al-`Arabi, 1973, 214, 11876/1961 and 14147/1965.

[119]From this, it can be understood that the husband had been judged to be 'middle class', since a cupboard or wardrobe at that time was required in a middle class house (al-`Arabi, 1973, 224, 17349/1972) and a private *tabun* (oven) was not a condition in a poor household (al-`Arabi, 1973, 214, 11752/1961).

[120]JLFR Article 34; Anderson, 1951 ('JLFR'), 197; see also Article 185 of *Kitab al-Ahkam*. While puberty is judged to begin not later than age 15, the age of discrimination occurs at seven for both sexes. Hooper, 1936, 100, defines an undiscriminating minor as 'a young person who cannot distinguish major misrepresentation from minor misrepresentation' in accordance with the Majalla Article 943.

principles of love and compassion inherent in the Muslim family require that the husband's children should be accommodated in the *maskan* so long as marital life is not thereby prevented.[121] Samara notes that the article does not deal with the possibility of the wife being injured by the presence of the husband's parents, and that she cannot legitimately refuse to live with them if they do not actually obstruct marital life.[122] It seems that Samara is right in assuming that recourse must be had in this issue to the majority Hanafi opinion, which holds that the wife does have the right to refuse to live with the husband's family if they are hostile to her, or injure her in word or deed.[123] In practice, the wife will not be ordered to *ta`a* in the same house as her in-laws if they cause her harm. This applies not only to a shared house, but also to the separate room (*bayt*) within a family house (*dar*) which the husband of a poor class could otherwise claim as a *maskan shar`i* especially where the custom prevails for married sons to remain in the family house.

The terms of Article 38 of the JLPS reflect the assumption of patrilocal residence of the couple after marriage, as was noted by Layish with regard to the OLFR rules inside Israel.[124] Nevertheless, women are increasingly objecting to having to live with their in-laws, as shown by the number of stipulations in marriage contracts providing that the wife shall live alone. In some *ta`a* actions in the case material, the wife obtained dismissal of the claim by her husband acknowledging that the home was shared with his family, usually his mother or both his parents, but sometimes his sons and once his brother. In other cases, the wife refused to return to an independent *maskan* because it was next door to her in-laws, who 'harmed her by their proximity'.

In two cases in the 1985 material, the *maskan* was found to be not *shar`i* because the husband had both his second wife and his family in the same dwelling. Article 40 of the JLPS provides that the husband may not settle co-wives in one house without their consent. The article changed one word from the parallel provision in the JLFR (Article 36) which used the word *bayt* for 'house', whereas the JLPS uses *dar*. Although both words can

[121]Sirtawi, 1981, 204. The principle on the husband's parents on the other hand, has his approval.

[122]Samara, 1987, 245.

[123]Samara, 1987, 243; Abu Zahra, 1971, 306.

[124]Layish, 1975, 93; compare also 95.

be used to mean 'house', in context they have clearly distinct meanings, as shown for example in Article 184 of *Kitab al-Ahkam*: 'the wife must be settled in a house (*dar*) by herself if she is rich, and if not then by herself in a room (*bayt*) in a house (*dar*)'. Samara refers to this when he criticises the article for not stating whether co-wives can be settled in separate rooms (still called a *bayt* in local usage in this context) in one house, as the Hanafis say, or if every wife is now entitled to an independent house.[125] The exact position is not entirely clear from the records, since the one *ta`a* action dismissed for this reason in 1985 stated that the *maskan* was shared with the co-wife. Nevertheless, even in the material from earlier years, a wife was able to have a *ta`a* claim dismissed because of her refusal to live in the same building as her co-wife, where they had to share facilities although having separate rooms. It would seem that these days a wife could legitimately insist on living in an entirely separate building from her co-wife.

The final consideration in the assessment of the legitimacy of the *maskan* is its geographical location. Article 37 of the JLPS sets out the classical duty of the wife to move with her husband, adding to this 'even though this is outside the Kingdom', and also adding 'provided that there is no stipulation to the contrary in the contract document'. It has already been noted that given the political situation, no award of *ta`a* will be made in a *maskan* outside the West Bank, due to the impossibility of having a *kashf* undertaken to ascertain whether or not the dwelling is *shar`i*. The frequency of stipulations in the marriage contract regarding where the wife is to live has also been noted. In addition, there is the principle that an award for *ta`a* will not be made if the wife will suffer injury from it. These three factors combine to give the wife significant grounds for refusing to move from her own family and support networks in her home area if she does not wish to leave.[126] Furthermore, the *ta`a* action will be dismissed if it is established that the husband himself works and lives at some distance from the dwelling in which he is calling his wife to *ta`a*. This can be illustrated by a 1975 case in Ramallah, where the husband first called the wife to *ta`a* in Amman, where he worked, and she refused to go, so he then submitted a claim for

[125]Samara, 1987, 248.

[126] `Ata, in his study of the West Bank Palestinian family (1986, 114) found that one of the factors seen as problematic by wives at the beginning of their marriage was their removal from their home areas. See also Abu Zahra, 1971, 300, on how the position of the jurists has changed on this point. Samara, 1987, 245.

ta`a* in a *maskan* in the Ramallah area. The wife refused to live alone in this house with the husband absent more often than present, and the court upheld her objections. The same may apply when the husband lives permanently with one wife in one town and calls the other wife to *ta`a in an independent *maskan* in another town; this is held to constitute injury to the wife.[127] In all these cases, the wife is therefore able to continue living with her own family and claim maintenance from her husband.

Challenges to the legitimacy of the husband's *maskan* accounted for the majority of dismissals of *ta`a* claims in the case material; well over 50% of all the *ta`a* claims in the material were successfully defended on grounds of the non-legitimacy of the *maskan*, and in 1985 this proportion had risen to 80%. It accounted for 73% of dismissals in the WCLAC material, and the Gazan judges seemed in that material to find more dwellings acceptable by the standards of local custom — possibly due to particular problems of housing for many of the Strip's refugee camp population.[128]

5.4.5 Procedural Matters

On the procedural level, the wife usually obtained dismissal of the *ta`a* action against her if it was made in a court other than that with jurisdiction over the area in which she resided. However, after the 1967 occupation, the Amman Appeal Court allowed courts in Jordan to hear claims for *ta`a* by husbands resident there against wives resident in the West Bank, because the political situation meant that the husband might not be allowed into the West Bank to present his claim; this was in exception to the procedural rule that claims for *ta`a* must be raised in the jurisdiction of the respondent.[129] The obstacles to a West Bank wife getting a maintenance claim ex-

[127]For example, in a 1975 case, the husband acknowledged that he had sent his wife to live in a *maskan* in his home town (to which she was refusing to return) while he himself lived with his second wife in Bethlehem, where he worked. See also appeal decisions on this in al-`Arabi, 1973, 210, numbers 7539/1952, 9201/1956, 11873/1961 and 13977/1965.

[128]Welchman, 1999, 130.

[129]Decision no.17578/1973 in Amman, unpublished. The normal principle, that a *ta`a* action must be raised in the jurisdiction of the respondent, is published by al-`Arabi, 1973, 161 and 208, 13035 and 13331 of 1964.

ecuted against a husband resident in Jordan may in any case have reduced motivation to seek ways of getting to Jordan to defend such a claim.

A final defence available to the wife in the event of an action for *ta`a* by her husband is to claim the existence of *niza` wa shiqaq* (discord and strife) between herself and her husband. This leads to immediate suspension of consideration of the *ta`a* action while the wife's claim is being investigated by the court: arbitrators are appointed with a view to reconciling or separating the spouses.[130] If that claim fails, the *ta`a* action may be resumed.

5.4.6 Claims in the Case Material

In the table below, procedural reasons for dismissal of actions for *ta`a* are included in the 'other' category, along with such reasons as the change of the *maskan* halfway through the case. The table shows the reasons for the dismissal of the 101 rejected *ta`a* actions in the case material:

Table 5.2 — Successful defences to *ta`a* actions in the case material, by year and defence

year	*maskan* not *shar`i*	non-payment of dower or *tawabi`*	husband not trustworthy	other	total
1965	20	6	3	5	34
1975	26	7	6	3	42
1985	20	4	1	-	25
total	66	17	10	8	101

The above table has a further significance when the 'cases dismissed' are compared to those won or dropped. The range of defences open to the wife means that in each year studied, more claims were dismissed than were won. Many of those that were won were awarded because the wife acknowledged the husband's claim or offered no defence, although some were won by the husband proving that contrary to the woman's defence, the *maskan*

[130]See al-`Arabi, 1984, 227, 18906/1976.

was *shar`i* according to the husband's status.[131] The general picture however shows that in the claims followed through, a husband had only a one-in-three chance of winning a *ta`a* action. In 1985, only 20% of all *ta`a* actions raised in the three courts ended with the husband being awarded *ta`a*.

Table 5.3 — Actions for *ta`a* in the case material by year and result

year	won	dropped	dismissed	total
1965	32	15	34	81
1975	9	4	42	55
1985	7	2	25	34
total	48	21	101	170

The increase in the number of *ta`a* actions that are dismissed is probably partly due to increasingly rigorous standards in the courts, particularly with regard to the *maskan*, and partly due to the increasing recourse had to lawyers. The claims that are dropped by the husband are usually those where the parties have in the meantime become reconciled, either in or out of court; the husband drops the *ta`a* action, the wife drops the maintenance action if she has raised one, and both return to married life in the marital home. In *ta`a* claims, as indeed in most others, the *qadi* will try to reconcile the parties when they come before him, and in some cases the case record includes an exhortation by the judge to the husband to try to reconcile the differences between himself and his wife.[132] Nevertheless, the act of submitting a claim for *ta`a* often indicates the failure of procedures of reconciliation (*sulh*) between the respective families.

It is also clear that by no means all women are aware of their rights in the face of a *ta`a* claim by their husbands, and may not be aware that the award cannot be forcibly executed. In the late 1980s in Jordan the *al-Sha`ab*

[131]For example, in one 1975 case there were two rooms with no facilities, in the other one a single room with no facilities, but the peers of the husbands in their villages all had similar houses, as both were judged to be of poor class. In a 1965 claim, the wife was refusing to return to her husband's tent (*bayt sha`ar)* in a Bedouin encampment, but the *kashf* found it to be *shar`i* by local customary standards and the husband was awarded *ta`a*.

[132]Compare Layish, 1975, 103.

newspaper ran a women's supplement once a week, with a section of legal advice for those writing in with their problems. In one month in 1987, three of these weekly columns included advice dealing with letters concerned with *ta`a*. In two of the three cases, the correspondent claimed she had been physically abused by her husband's family and wanted to know if she had the right to refuse to live with them. In the third, the woman stated that her husband was taking her wages for his own use, and in addition had beaten her so badly that he had cracked her skull.[133] Any and all of these circumstances, once established, would have served as a valid defence against an action of *ta`a*, but the letters suggested a lack of awareness both of these rights and of the non-enforcement by the courts of the awards.

The proportion of *ta`a* claims in the case material as a percentage of the caseload of the courts showed a decrease in 1985, following the removal of enforcement procedures in the 1976 law; societal trends and changing attitudes may also account for some of the decrease. In 1965, *ta`a* actions accounted for 16% of the total caseloads of the three courts; in 1975 they represented 11% and in 1985 5.3%. In 1998, a Palestinian woman whose husband had filed an action for *ta`a* after her claim for divorce had been rejected by the Gaza court, started a national campaign to 'strike the house of obedience off the statute books' in Palestine.[134] Despite the lack of forcible execution, the implications of the institution of *ta`a* go beyond the (now) ultimate sanction of the withdrawal of maintenance for a wife who has left the marital home.

[133] *Al-Sha`ab* newspaper (Amman), 6,13 and 20/4/87. In the last described case, the husband had already obtained a *ta`a* award against his wife which she stated had been heard without her being properly notified, and she was therefore seeking advice on grounds for objection in appealing this award.

[134] See Welchman, 2000.

CHAPTER 6

Getting Divorced: Deeds and Processes of *Talaq* and *Khul`*

6.1 INTRODUCTION

The provisions of the JLPS on divorce maintain the broad patterns of classical *fiqh*, while including various modifications widely introduced across the Arab world. The way in which most marriages are terminated is through the pronouncement by the husband of a *talaq*, which occurs without litigation, and under the current law can take place outside court and be registered subsequently. This chapter deals with both *talaq* and *khul`*. *Talaq* is the unilateral divorce or 'repudiation' of the wife by the husband. A *khul`* divorce is where the *talaq* is pronounced as part of a mutually agreed arrangement which involves a financial consideration from the wife in exchange for the divorce. In the *shari`a* court records of the West Bank, *khul`* is routinely (and more accurately) described as *talaq muqabil ibra'*, a *talaq* [by the husband] in exchange for a renunciation [of her remaining financial rights by the wife]. Other forms of dissolution occur only in court and after litigation. These are judicial divorce or 'separation' (*tafriq/tatliq*), which may be sought on a number of specific grounds primarily but not only by the wife, and judicial dissolution (*faskh*) which in the JLPS terminates an irregular marriage. Litigious divorces are examined in the following chapter.

Since the beginning of this century, the changes that have been taking place in the family laws of Arab states have had a major impact on the char-

acteristics of all forms of dissolution of marriage. There has been a broad tendency to widen the grounds on which the wife may seek dissolution while restricting the unilateral power of *talaq* held by the husband. Jordanian law has generally conformed to this pattern. The vast majority of marriages that are terminated before the death of one of the spouses, however, continue to end through one of the non-litigious forms of divorce; that is, either by unilateral *talaq* by the husband or by *khul`*. In the three courts studied, these forms of divorce accounted for an average of 90% of all terminations, with judicial divorce and dissolution accounting only for 10%.[1] In the later WCLAC material, the overall proportions in the case material studied in six courts in the West Bank and Gaza Strip was 93% *talaq/khul`* to 7% litigious divorces.[2] Socio-legal explanations for this include the technical complexities of the court actions for divorce as compared to a mere registration procedure for *talaq* and *khul`*; the social opprobrium attached to court cases within the family; the shame attached to disclosing the intimacies of a failing marriage in court; and the comparative lack of awareness of the grounds on which separation may be claimed in court, particularly by the wife.

6.2 *TALAQ* AND *KHUL`* COMPARED

The 90% of divorces that are achieved without court litigation are registered in one *sijill*, the *sijill at-talaq*. This register contains deeds of *talaq* performed by the husband in court, usually (in the case material) in the absence of his wife, or an acknowledgment by him of the incidence of a *talaq* outside court (*iqrar bi-talaq*), and of *talaq*s pronounced by the husband as part of a *khul`* divorce, at which the wife — or a person duly delegated to act for her — must be present and indeed be an actively participating party to the divorce.

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[1]These figures do not include actions in court to prove the incidence of an unregistered *talaq (ithbat talaq)* in the absence of the husband or in the event of his denial. In 1965, non-litigious divorce accounted for 88.3% of marriage dissolution in the case material, in 1975 89.2%, and in 1985, 92.7%.

[2]Welchman, 1999, 136: total deeds of *talaq* and *khul`* registered in the *shari`a* courts of Hebron, Dura, Ramallah, Nablus, Gaza and Rafah in the years 1989, 1992, 1993 and 1994: 4417. Claims for *tafriq* registered in the same period in the same courts: 315. Shalabi, 1992 ('*talaq*'), 16, found that the records of Ramallah *shari`a* court for the years 1986–1989 showed a proportion of 89% *talaq/khul`* and 11% litigious divorce (including *ithbat talaq*).

The figures from the West Bank case material show that divorce by mutual consent — by *khul`* — is the most common form of divorce. With one exception (Ramallah 1975) in each court in each year more deeds of *khul`* than of *talaq* were registered, with an overall proportion of 60% *khul`* to 40% *talaq*.[3] In terms of marriages ended by these deeds, the proportion ended by *khul`* is even higher than this, since a *khul`* is immediately final, while it may take up to three unilateral *talaq*s to irrevocably end one marriage within a certain time period, and since the JLPS was promulgated in 1976, each *talaq* has to be registered in a separate deed in the court register. Regional specificities illustrated in the court records show a relatively high proportion of *talaq* in Ramallah in 1975 and 1985 (52% and 45% respectively), which is at least in part attributable to the registration of consecutive *talaq*s terminating marriages to foreign residents in an area of high emigration.[4]

Divorce rates are hard to define from the material available (including a reckoning of multiple deeds of divorce relating to a single marriage; unregistered out of court divorce; and revocation of registered divorce) but in his statistical survey of marriage and divorce in the West Bank courts over the years 1973–83, `Ayyush analysed each district separately and noted a general rise in the divorce rate in most areas.[5] A similar tendency in Jordan in the 1980s was noted by Barhum in a study on *talaq* commissioned by the Federation of Business and Professional Women in Amman.[6] He attributes this rise to a variety of factors, including changing socio-economic circumstances and the increasing participation of women in the workforce,[7] emigration, industrialisation and the spread of education. Both Barhum and `Ayyush draw conclusions on the relationship of *talaq* with the age of the spouse, the number of children in the marriage and the length of marital life. Barhum examines also

[3]Of a total of 992 deeds from the three courts in the three years, 601 were *khul`* and 391 *talaq*. Layish, 1975, 135 and 162, also found *khul`* to be the most common form of divorce of Muslims inside Israel, at a proportion of 75%. Mir-Hosseini, 1993, 87, table 3.,1 by contrast found the deeds of divorce registered in two Moroccan courts in 1987 to show reverse proportions — 36% *khul`* to 64% *talaq*. In Iran on the other hand she found over 50% of divorces registered in Tehran to be *khul`*.

[4]See figures in Appendix VII.

[5]`Ayyush, 1985, 93–94.

[6]Barhum, 1983, 2.

[7]Barhum, 1983, 1; compare Hijab, 1988, 133, on a similar claim made by the Awqaf Ministry in Kuwait and its rebuttal on facts by Kuwaiti lawyer Badriyya al-Awadhi. See also Sa'adawi, 1980, 204, on Egypt and Tunisia.

such factors as the length of the engagement before the marriage, the way the spouses were introduced to each other, their educational levels, professions, and the age difference between them. Barhum concludes that in Jordan at least, the major reason for divorce is interference by in-laws, especially by the husband's family; in Egypt, Shaham notes that studies have stressed the significance of inter-familial disputes as a cause for divorce.[8]

The court registers, however, give no indication of the reasons for the termination of the marriage.[9] One statistic that stood out in the WCLAC material was that 26% of all deeds of *talaq* and *khul`* recorded in the six courts studied over the four years recorded a divorce before the marriage had been consummated.[10] In practice this means the couple never set up home together. In many cases it is likely that with the period between concluding the contract and the *zifaf* functioning as an 'engagement' period (although not in law), the couple discover they are not suited to each other, or differences arise between their families, either exacerbating or causing problems between them. The absence of children from the marriage means fewer complications in such a divorce.[11] That the overwhelming majority of such divorces are agreed between the spouses (and their families) is shown by the fact that of the divorces before consummation in the WCLAC material, 92% were effected by *khul`* and only 8% by unilateral *talaq*.

There remains a strong social stigma attached to divorce in Palestinian society which is compounded by a lack of economic support available to divorced women. The FAFO study, noting this stigma, found only 1% of the female sample in the survey to be divorced.[12] For men, although the social

[8]Barhum, 1983, 19 and 23; Shaham, 1997, 104. For reasons for divorce in Israel, see Layish, 1975, 125–131. In the West Bank, Idrisi also identifies interference by in-laws, particularly where the couple are living with the husband's family, as one of the major causes of marital disputes; 1986 ('Marriage and Divorce in Islam', Part 6).

[9]Compare Shaham, 1997, 104.

[10]Welchman, 1999, 151 and see chart 7.5, 150. The highest proportion was in Nablus, where 40% of *talaq* and *khul`* deeds were before consummation; the lowest was Ramallah at 16%. Moors, 1995, 145, tracks a rise in the proportion of *khul`* deeds that take place before consummation in Nablus from 17% in the Jordanian period to 38% in 1976, and up to 54% in the mid-1980s. She identifies this as a mainly urban trend, at least partly attributable to longer engagement periods and increased contact between the couple in the city areas.

[11]Compare Shaham, 1997, 104, who cites field studies as establishing that almost half Egyptian divorces happen within the first two years of marriage.

[12]Hammami, 1993, 287.

consequences are likely to be lighter, restraining factors include not only the respective families but also the financial costs involved, not only or necessarily the costs of divorce but those involved in a new marriage.[13] In the West Bank *shari`a* courts, although the function of conciliation is not detailed in the law as it is elsewhere,[14] in practice, the *qadis* take seriously the opportunities the court can afford to encourage reconciliation between the spouses.

6.3 *TALAQ*

6.3.1 Basic Rules

In traditional Sunni law, the husband 'possesses' three unilateral *talaq*s which can be pronounced against his wife anywhere and at any time, without need for any legal proceedings. The form of *talaq* most approved by the jurists[15] is a single revocable *talaq* followed by the *`idda* or waiting period, usually of three months,[16] during which the marriage continues and the *talaq* may be unilaterally revoked by the husband without the consent of the wife. If the *talaq* is so revoked, the marriage continues.[17] If the *`idda* period expires without the husband revoking his *talaq*, the *talaq* becomes

[13]Shalabi, 1992 (*'talaq'*), 28, concludes from his examination of the Ramallah court records that there is no particular relation between the number of *talaq*s and the amount of deferred dower registered in the contracts. Moors, 1994, 139, agrees that it is hard to say whether or not a high deferred dower does in fact work as a deterrent to *talaq*, but argues that at least in Mandatory times, it was the prospect of having to raise a new prompt dower for a new bride that served as a restraint on divorce. Compare Lazreg, 1994, 184, and Shaham, 1997, 103.

[14]Contrast the new Law 1/2000 in Egypt, articles 18 and 19; and for example the SLPS 1975 Article 88, and the Algerian Law of the Family 1984 Article 49.

[15]For the difference between *talaq al-sunna*, the 'approved' forms of *talaq*, and *talaq al-bid`a*, the 'disapproved' forms, see el-`Alami and Hinchcliffe, 1996, 22–24, and Nasir, 1990 (The Islamic Law of Personal Status), 118–119. The classification into 'approved' or 'disapproved' depends on whether the husband has had intercourse with the wife during the menstrual cycle, the timing of the *talaq* and of consequent *talaq*s. Both forms are however equally valid in law in the West Bank, as in traditional Sunni (though not Ithna`ashari Shi`i) law, and not all the factors affecting classification can be discerned from the court records. The disapproved form of three *talaq*s in one session or one final one are dealt with below.

[16]See JLPS Articles 135, 137, 139.

[17]See JLPS Article 97.

'final', terminating the marriage, and if the couple wish to renew their relationship, they must conclude a new marriage contract, with a new dower for the wife.[18] The termination of the marriage in this way is known as the 'lesser finality' (*baynuna sughra*), and applies to termination by the first or second *talaq* between the spouses.

A single *talaq* can in some cases give rise immediately to the 'lesser finality' — that is, be final (*ba'in*) upon pronouncement, rather than revocable (*raja`i*), so that the marriage ends immediately, the husband cannot revoke the *talaq* during the *`idda* period, and any renewal of the relationship requires a new contract and dower. This is the case in *talaq* before consummation of the marriage, *talaq* in return for a financial consideration by the wife (*khul`*), and certain other ancient forms of *talaq*.[19] The termination of the marriage by the 'greater finality', the *baynuna kubra*, is occasioned by the third of three *talaqs*; such a *talaq* is immediately final and the couple cannot remarry until the wife has concluded and consummated a marriage with another man. Only when that marriage has been terminated by death or divorce and the completion of her *`idda* period can the woman return, by a new contract, to her former husband.

During the course of the 20th century, efforts in various Arab states to restrict the husband's wide power of unilateral *talaq* resulted in the constraining and in a few isolated cases invalidating of extra-judicial or unmitigated unilateral *talaq*.[20] The current Jordanian law follows more common, less controversial patterns in modifying the classical rules in three ways: by restricting the incidence of *talaq* under certain circumstances related to the husband's physical and mental states and to the formula of *talaq* employed; by imposing procedural and administrative registration requirements backed up by penal sanctions for non-compliance in the criminal law; and by allowing for extra financial obligations to be placed upon the husband in the event of *talaq*.

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[18]See JLPS Article 99.

[19]Primarily, *ila, zhihar* and *li`an*. On these, see el-`Alami and Hinchcliffe, 1996, 25–27. In 20982/1979, the Amman Appeal Court instructed the first instance court to investigate whether the phrase 'you are prohibited to me as my mother' was intended to bring about a *zhihar* (irrevocable) divorce or as second phrase of *talaq* in the text used by the husband; Dawud, 1999, II, 811.

[20]Articles 25 and 29 of the PDRY Law of the Family 1974; Article 30 of the Tunisian Law of Personal Status 1957. See Coulson, 1978, 210–211. See Anderson, 1951 ('The Dissolution of Marriage') for earlier reforms.

6.3.2 The Restriction of *Talaq* in Jordanian Legislation

Article 91 of the JLPS provides that:

> If a man divorces his wife before the *qadi*, voluntarily and of his own choice, while in a state considered *shar`i*, or acknowledges a *talaq* [that occurred] when he was in such a state, no claim made by him against this shall be heard.

The physical and mental condition of the husband when the *talaq* is pronounced was taken into account by the classical jurists, and only slight modifications are made to Hanafi rules in the JLPS, following up those previously included in the JLFR. Article 88 of the JLPS discounts any *talaq* pronounced by a man who is drunk, in a swoon, or asleep, is an imbecile or is under duress.[21] Also discounted is the *talaq* of the *madhush* ('overwhelmed'), defined in Article 88(b) as 'the man who has lost his discrimination through anger or rage or whatever, and does not know what he is saying'.[22] The JLFR had discounted only the *talaq* of a man under duress, drunk or *madhush*.[23] Thus, when a man comes to divorce his wife in front of the *qadi*, or to acknowledge the occurrence of a *talaq* outside the court, he is asked about his state of mind at the time of the divorce, and the stan-

[21]Article 218 the *Kitab al-Ahkam* states that if a man pronounces a *talaq* when he has voluntarily got himself drunk on forbidden substances, the *talaq* is valid. Article 220 discounts the *talaq* of a man asleep, and a man who is insane, an 'imbecile', mentally ill and so on. The OLFR (Articles 104 and 105) discounted *talaq* by a man who is under duress. See Schacht, 1979, 180, on the origins of the rules on *talaq* under duress; Layish, 1975, 158, on intoxication, and Anderson, 1951 ('The Dissolution of Marriage'), 271, on these restrictions as a whole.

[22]The Explanatory Memorandum to the JLPS (3) accredits this rule to the Hanafis. See Anderson, 1951 ('JLFR'), 201, and 1955, 38, on the meaning of *madhush*. In the West Bank *shari`a* courts, *madhush* seems to be used synonomously with *al-ghadban*, indicating excessive anger. In 19637/1977, the Amman Appeal Court set out the procedure required if a man makes such a defence to his wife's claims to establish a *talaq* by letter: 'the court must charge the wife with establishing that [the husband] was [fully] aware/conscious (i.e. not *madhush*) and if she does then the court rules for the *talaq;* if she does not then the court charges the husband with proving his defence, and if he does not but takes the oath, or if he does [in fact] establish it then the claim of *talaq* is rejected, while if he cannot prove it and declines the oath then the *talaq* is established.' Dawud, 1999, II, 804.

[23] JLFR Article 68.

dard phrase 'while in a state considered *shar`i*, not *madhush*, not under duress, and of my own free will . . .' or a variation thereof, is incorporated in the text of the deed of *talaq*.

The validity of a *talaq* that has occurred outside court can be challenged by either spouse on the grounds that the husband was not in a *shar`i* state when he pronounced it. Such claims sometimes occur in the course of cases raised to prove the occurrence of a *talaq* (*ithbat talaq*), a petition brought usually by the wife. Thus in the 1985 case material, a wife's action to prove the incidence of a *talaq* was dismissed when her husband established that extreme anger, rendering him *madhush*, was a personality trait of his, and that he was in this state at the time of the alleged *talaq*. In another case, the *qadi* ruled that a *talaq* was to be cancelled when the wife produced a medical report establishing that her husband was mentally unstable at the time and had in fact been admitted to a psychiatric clinic a few days after recording the *talaq*.

Connected with the rules on the mental state of the husband are those concerned with his intention in pronouncing the divorce. The JLPS provides that explicit formulas of *talaq* cause divorce to occur whether or not this was really intended, while 'obscure' expressions that could bear the meaning of *talaq* or of something else have to be supported by clear intention of divorce.[24] Similarly, oaths including the formula of *talaq* (*`alayya at-talaq/al-haram*) are discounted along the lines provided for in the JLFR, and now give rise to *talaq* only where the phrase explicitly includes an address or allusion to the wife.[25] The colloquial use of these expressions is often closer to a suspended *talaq*, intended to persuade somebody to do or refrain from doing something, or to emphasise the veracity and significance of a point being made or fact being conveyed by the speaker. It was in this latter form that the Syrian law removed the validity of such expressions as a form of *talaq*.[26]

The Jordanian law maintains previous modifications to classical law in discounting a conditional *talaq* that is pronounced in order to make some-

[24]See Layish, 1975, 133 and 173/4 on this in the OLFR. *Kitab al-Ahkam*, Article 227, gives examples of explicit phrases of divorce, and Article 229 of 'concealed' phrases.

[25]JLPS Article 92, JLFR Article 71. See Layish, 1975, 138, on such oaths in Israel, where *talaq* is held to occur as the OLFR provisions are still valid. Compare Article 228 *Kitab al-Ahkam*, where *`alayya at-talaq* is counted as one revocable *talaq*.

[26]SLPS 1975 Article 90. The 1987 draft of proposed amendments to the JLPS proposed to follow this position, with the Explanatory Memorandum noting disagreement among the jurists as to whether they were in fact oaths. Draft Amended JLPS, Article 87. Explanatory Memorandum, point 17.

body do or not do something rather than with the actual intention of *talaq*.[27] Thus, if a man threatens to divorce his wife if her brother does not leave the house immediately, and the brother stays, the *talaq* will be discounted if the intention was really to get rid of the brother.[28] Otherwise, suspended and conditional *talaq*s are still valid under the JLPS, and cannot be revoked once pronounced by the husband.[29]

Another way of restricting *talaq* used in the legislation of Arab states — led by Egypt in the 1920s — is to limit to a single revocable *talaq* the effect of certain forms of *talaq* that under Hanafi law would give rise either to a single final *talaq* or a triple repudiation leading immediately to the 'greater finality'. Article 94 of the JLPS provides that:

> Every *talaq* falls revocable except the third of three, *talaq* before consummation, *talaq* for property, and such *talaq* as is stipulated in this law to be final.

This is backed up by Article 90:

> *Talaq* accompanied by a number in word or sign and *talaq* repeated in one session give rise only to a single *talaq*.

The first modification to classical law contained in Article 90 is a standard one in the personal status legislation of Arab states; classical Hanafi law holds the 'greater finality' to be caused by a man saying, for example, 'you are divorced three times'. The marriage would thus be irrevocably terminated on the spot by the 'greater finality', and the partners unable to remarry until the wife had undergone an intervening marriage.[30] Under

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[27]Article 89 JLPS; Article 70 JLFR. Compare Article 251 *Kitab al-Ahkam*.

[28]Compare Layish, 1975, 128, 137 and 184–185. The OLFR did not discount such a *talaq*. The Explanatory Memorandum to the JLPS (3) attributes this modification to `Ali, Ibn Hazm and Ibn Taymiyya *inter alia*. Samara, 1987, 280, noting this is against the dominant opinion of all four Sunni schools, attributes it to Ibn Hazm.

[29]Article 96 JLPS. The corresponding provisions in the JLFR, Articles 75 and 76, made no reference to the permissibility of revocation of a suspended or conditional *talaq*, but Samara, 1987, 279, notes that this is the standard view of the majority of the classical jurists. Compare also OLFR Articles 106 and 107. See Shaham, 1997, 105 for examples of suspended repudiation in the published Egyptian material.

[30]See *Kitab al-Ahkam* Article 239. Anderson, 1951 ('The Dissolution of Marriage'), 276, details the first introduction of modifications to this traditional rule in an Egyptian law of 1929, followed by Jordan, Syria and Iraq. See also Ma'ruf, 1985, 18. This kind of

Jordanian law, such a divorce is a single revocable *talaq*. The case material in all years showed instances of a man coming to court to register the incidence outside court of a *talaq* by his saying to his wife 'you are thrice divorced' (*anti taliq bi-thalath*) and being informed by the court that he has caused one revocable *talaq* to occur.[31]

The second modification in Article 90 limits to a single revocable *talaq* the effect of '*talaq* repeated in a single session', and represents a change to the previous Jordanian law.[32] The emphasis on one *talaq* in one session (*majlis*) is also to be found in Article 85 of the JLPS:

> The husband possesses against his wife three separate *talaq*s in three sessions.[33]

This means that the action of repeating the *talaq* three times also counts as only one revocable *talaq*. The Explanatory Memorandum to the JLPS condemns the use of such a triple repudiation as leading to the wanton destruction of the family, and attributes the amendment of the law to certain of the Prophet's Companions, and to the fourteenth century jurist Ibn Taymiyya.[34]

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talaq is considered 'disapproved' but valid by the classical Sunni jurists, although it is not recognised by the Ithna`ashari Shi`a.

[31]In a rather different claim from the 1975 material, a woman raised a claim to prove the incidence of an out-of-court *talaq* by her husband saying '*taliqa bi-thalath, ma biddi iyyaha*' (she is thrice divorced, I don't want her). The husband claimed his words had been '*turuhi taliqa bi-saba`a*' (you leave seven times divorced) and claimed he was *madhush* at the time. He was unable to prove his defence and one revocable *talaq* was registered. The phrase 'seven times', or 'by the seven schools', is apparently in colloquial use in certain areas of the West Bank. Since the 1951 JLFR both phrases would give rise only to a single revocable *talaq*.

[32]Compare JLFR Article 72: '*talaq* accompanied by a number in word or sign gives rise to only a single [*talaq*]'. Mheilan (1986, 77) notes this development in the law.

[33]Compare Article 69 JLFR, 'The husband possesses three *talaq*s against his wife.' See also OLFR Article108 with the same text. This JLPS innovation is backed up in Article 30, prohibiting marriage between a woman and a man who has divorced her 'three separate times in three sessions', until an intervening marriage has taken place.

[34]Explanatory Memorandum to the JLPS, 3. See Schacht, 1979, 196–197. The triple repudiation was held by the Hanafis to be disapproved but valid. Rulings from the Amman Appeal Court establish that even if the wife and husband both agree that his repeated *talaq*s happened in one session, rendering the result one revocable *talaq* under the revised terms of Article 90 of the JLPS, the court must hear any witnesses to the

The effect of this particular modification to the law can be seen clearly in the records of *talaq*. In the pre-1976 *sijills*, there are many instances of men coming to court and pronouncing two or three divorces one after the other, immediately effecting the irrevocable termination of the marriage by the *baynuna kubra*, with the *talaqs* being registered together in the record of that one session in the court.[35] In 1985, however, three separate deeds of *talaq*, representing three *talaqs* in three separate sessions, are needed to effect the *baynuna kubra*. Furthermore, the practice by the *qadis* appears to be to allow only two separate *talaqs* to be pronounced on the same day. The ending of one session in court and the beginning of a new one allowing another *talaq* to be pronounced is easily marked by the registration formalities and by the husband leaving the *qadi*'s room and then coming in again for the next one. Outside court, a session is closed by any decisive movement, such as a change of location, as illustrated in the case material — for example, in two different rooms of a house.

Once three *talaqs* are pronounced in three sessions, the marriage is immediately ended and remarriage of the couples forbidden under the rules of temporary prohibition.[36] Article 100 of the JLPS describes how the prohibition occasioned by termination by the 'greater finality' is removed, allowing the couple to remarry if they choose:

> The *baynuna kubra* is removed by the marriage of the woman concerned, the *`idda* of her final divorce from her former husband being over, to another man, without the intention of legitimising (*tahlil*) [her marriage to her former husband], provided that the [second] husband consummates the marriage. After her divorce from the [second] husband and the end of her *`idda*, she may legitimately marry the first man.

This article follows the OLFR and the JLFR in providing that the wife's intervening marriage must be free of any conscious intention of rendering legitimate a later marriage to her former husband.[37] This is the Maliki position; the Hanafis did not hold such intention to affect the legality of the

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event, and if the witnesses testify to a plurality of sessions (rather than a plurality of *talaqs* in a single session) then their word is taken by the court over that of the spouses, in deference to *haqq allah*. 19890/1977 and 21361/1980, Dawud, 1999, II, 806 and 812.

[35]Contrast Layish, 1975, 210 on Israel.

[36]Article 30 JLPS.

[37]OLFR Article 118; JLFR Article 82.

tahlil process, provided that the intervening marriage was consummated.[38] No cases on the question of intention were found in the case material or in the published decisions.[39]

Note should also be taken of an administrative regulation that seeks to limit the incidence of the third of three *talaq*s giving rise to the 'greater finality.' In 1979, an administrative circular was sent out by the *Qadi al-Quda* in Amman to the heads of the *shari`a* Courts of Appeal in Jerusalem and Amman, for distribution to the *qadi*s. The circular instructed the *qadi*s not to register the incidence of the third of three *talaq*s until the relevant papers had been sent to and approved by the *Qadi al-Quda*. A husband being informed of this when coming to court to pronounce the third *talaq* is not only likely to have the gravity of his intended action suitably impressed upon him, but will have rather more time to reflect upon it, while waiting for the papers to return.[40]

6.3.3 Registration and Out-of-Court *Talaq*

The first legislation requiring the registration of *talaq* in the *shari`a* courts in this area took the form of the Marriage and Divorces (Registration) Ordinance which was issued by the British in Palestine on the basis of Ottoman regulations drawn up along with the OLFR but not applied in the area.[41] The JLFR followed in requiring the husband to register his divorce at the *shari`a* court. Furthermore, the JLFR provided that:

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[38]See Article 224, *Kitab al-Ahkam*. See Haq, 1943, 86 note 1, on Ibn Taymiyya's insistence on the absence of such intention, and on the past practice of avoiding the rules on *baynuna kubra* by marrying the wife to a slave and then giving the slave to her the next day, so that the marriage was automatically annulled and the wife free to remarry her former husband. Imber, 1997, 200–201, notes opinions from Ebu's-Su`ud to the effect that penetration must occur but 'seminal emission is not necessary' in support of the Hanafi position allowing the intervening marriage to be to a very elderly man or a twelve year old boy.

[39]In the 1987 draft text of amendments to the law (Article 96), the Jordanian legislature proposed to return to the original Hanafi position by removing the phrase 'without the intention of *tahlil*'. The Explanatory Memorandum to the Draft JLPS, point 18, justifies the proposed change on the grounds of the strength of the Hanafi and corresponding Shafi`i arguments.

[40]Doc. no.31912826 of 23/7/79. See also `Atayat, 1984, 4.

[41]Layish, 1975, 135 and 222 note 96.

> Claims of *talaq* [made] by the husband shall not be heard unless [the *talaq*] was registered before the *qadi*; however, the wife's evidence of a *talaq* occurring other than before the *qadi* shall be admitted.[42]

Thus, under the terms of this provision, while a wife could raise a claim to prove the incidence of an unregistered out-of-court *talaq*, a husband could not for example raise an unregistered out-of-court *talaq* as a defence to his wife's claim for maintenance. The JLFR set no time limit within which the husband had to register his *talaq* through the normal procedures. However, Article 77 was clearly aimed at encouraging the husband to register his *talaq*, and in Coulson's opinion, 'a step had been taken in the direction of making divorce by repudiation [*talaq*] a judicial proceeding'.[43] The above article of the JLFR was not carried over into the JLPS; the Explanatory Memorandum to the JLPS gave no explanation for the omission, but it would appear that there were objections on the basis that the JLFR provision had been seriously flawed in *shar`i* terms, since in certain circumstances it all but denied the validity and effect of an unregistered *talaq* — a direction from which, by 1976, the Jordanian legislators seem to have drawn back. Other Arab legislators have maintained a certain momentum in this direction, including the Egyptian legislation of 1985 which maintained the amendments of 1979 despite objections from parts of the *shar`i* establishment.[44] By con-

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[42]Article 77 JLFR. Anderson, 1951 ('JLFR'), 201–202, called this a 'sound and beneficial' provision.

[43]Coulson, 1964, 173–174.

[44]The aim of the Egyptian legislation in Law no.100/1985, according to the Explanatory Memorandum, was to 'prevent the injury without constraining the husband's right of *talaq*' and the method was to delay the start of the *`idda* period until the time of the husband's acknowledgement of his *talaq*. In the event that the husband has 'concealed' the divorce from his wife, the law (Article 5 bis) provides that 'the effects (inheritance and other financial effects) shall arise only from the date of her being notified thereof.' Text of Explanatory Memorandum and report of the Joint Committee on the draft law reproduced in Hassan and Wahhab, 1987, 39–52. Najjar, 1988, 320–323, summarises the People's Council's debates around this provision. The Iraqi amendment of 1978, the Algerian law of 1984 and the Moroccan amendments of 1993 are other examples. In South Yemen the pre-existing rules of the PDRY Law of the Family were replaced in 1992 by a unified law which restored the validity of extra-judicial *talaq*. In Tunisia, extra-judicial *talaq* has had no validity since 1956. Rendering divorce a strictly judicial matter remains an aspiration for many of those in Jordan and Palestine interested in legal reform. The JNCW memo-

trast, the JLPS keeps to a fairly standard position — that of imposing time-specific registration requirements backed up by penal sanctions in the event of infringement, without suggesting that a non-registered *talaq* is invalid, or at least of no legal value as a defence for the husband. Article 101 of the JLPS requires the husband to register any out-of-court *talaq* within fifteen days of its occurrence, and the Jordanian Penal Code (Article 281) provides for a fine or a maximum of a month's imprisonment to be imposed on any man who does not comply with the registration rules of *talaq*.

As is the case in other areas of the law, these penal sanctions ceased to have practical effect under the direct Israeli occupation after 1967. In the case material, the timing of an acknowledgement of an extra-judicial *talaq* varied from the day after to weeks or months after the event but still within the *'idda* period, to in some cases months or years later. In cases of late registration, there was no mention of transfer of the husband for prosecution in the Israeli-administered regular court system. However, it remained possible for the wife herself to have recourse to the regular court system to raise an action against her husband for the late registration of a *talaq*.

It was noticeable however that the case material showed the majority of registered *talaq*s to have taken place in court. In a more detailed examination of this aspect, the later WCLAC material showed a proportion of 4% of *talaq*s registered by *iqrar* in Ramallah and 26% in Nablus, as compared to the rest undertaken in the court itself. The Nablus figures were shaped by the statistics from 1993, which showed 38% of unilateral *talaq*s registered by *iqrar*, compared to the other years (12%, 20% and 22% in 1989, 1992 and 1994 respectively). In Ramallah, the 4% of registered *talaq*s having taken place out of court must be read with the higher proportion of repeat *talaq*s registered in that court (see below); and in both cases it must be remembered that the figures for extra-judicial *talaq* represent only those that have eventually been registered, and not the total number of *talaq*s that have taken effect; others will have been pronounced and not yet been registered, while some may never be. However, it may well be the case that the situation reflected in the court records is a fair representation of current practice in the areas of the West Bank covered by these courts, in that most *talaq*s are, eventually, regis-

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randum on its 1996 proposed amendments to the JLPS is an example. In Palestine, the text voted on at the Model Parliament in 1998 provided that 'no *talaq* is established except by a court ruling and after attempts at reconciliation.' Nashwan, 1998, 26.

tered, and that it is already the norm for the husband to go to court to pronounce a *talaq* rather than to do so in an extra-judicial procedure.

6.3.4 Points in Practice

The majority of *talaq*s recorded in the *shari`a* courts of the West Bank are registered by the husband in the *sijillat at-talaq*, whether he pronounces it at that time in front of the judge, or acknowledges the incidence of a *talaq* out of court. Some, however, are recorded as a result of an action brought by the wife to prove the incidence of a *talaq* outside court not registered by her husband, or by the husband in the course of his defence of a claim (primarily for maintenance) by the wife.[45]

An action by the wife to prove the incidence of a *talaq* involves proceedings of such complexity that the first instance court's decision, which must be submitted to the Appeal Court in a process of automatic review,[46] is often returned by the latter for correction. The complications involve the exact wording of the formulae used for *talaq*, the testimonies of the witnesses thereto, the investigation of the husband's defence (for example, that he was *madhush*), and the precise wording and content of an oath of denial by the husband and at what point it should be sworn. Thus, the 1965 case material included a claim by a woman seeking to establish the incidence of a triple repudiation, while her husband claimed that there had been two revocable *talaq*s and a revocation in the *`idda*. The case involved three separate rulings on this one action by the court, the first two of which were sent back by the Appeal Court for further steps to be taken by the first instance court.

The wife may also raise an action to establish *talaq* when her husband divorces her by letter. Article 86 of the JLPS allows *talaq* to be by written or spoken word.[47] However, in order to have such a *talaq* recorded, the wife

[45]In illustration of another circumstance, related to succession, the 1965 case material included a case of *ithbat talaq* raised by two men in a case naming 15 respondents; the claimants were seeking to prove the incidence of a *talaq* pronounced against a dead woman by her husband, an agnatic relative of the men bringing the claim. The court dismissed the claim.

[46]Article 138 of the Law of *Shar'i* Procedure; the same applies to rulings for *tafriq* and *faskh*.

[47]Or by a known sign from the person who cannot speak or write.

must establish to the court that the letter is indeed from her husband; if she cannot prove this, and he cannot be contacted for the administration of the oath, she may be asked to take the oath in support of her claim. In one claim in the case material, a woman produced a letter apparently sent by her husband, who was resident abroad and could not be contacted by the court. The letter announced the divorce of his wife and was signed by the husband and two other Muslim men as witnesses, whom the court was also unable to contact. The wife was held unable to prove her claim and an announcement was placed in the local newspaper requiring the husband to take the oath of denial. When he did not come at the appointed time, nor ask for a delay, he was held to have declined the oath, and the court decided to swear the wife the oath in support of her claim. The wife for her part declined to support her claim with the oath, and the case was dismissed.

However, the normal procedure for registration of a *talaq* is for the husband to come before the *qadi*, nearly always in the absence of the wife, to fill in the necessary forms[48] and then to go through the pronouncement of the *talaq* in front of the *qadi*. In the vast majority of cases in the case material, this took place in the absence of the wife. The text of the *talaq* includes the names of the spouses, the fact that the husband is in a suitable state to pronounce the *talaq*, the formula of *talaq* and mention of whether it is first revocable and so on; the *qadi* ends the text by explaining to the husband the effect of the *talaq*, the *`idda* requirement for the wife and, if the *talaq* is revocable, the husband's right of revocation, and the instruction that the *talaq* is to be communicated to the absent wife.[49] Sometimes the husband was himself absent from the session, having officially delegated another man, usually a paternal relative, to perform the *talaq* on his behalf.[50] The *qadi* will usually attempt to dissuade the husband from pronouncing the *talaq*, and the circular sent round by the *Qadi al-Quda* in 1979 reinforced this by instructing the *qadi*s to encourage the husband to delay the registration of the

[48]Since 1979 standard forms have been used in all court documentation under the Jordanian law: Mheilan, 1986, 95. The Palestinian *Qadi al-Quda* Shaykh Muhammad Abu Sardane standardised forms in Gaza and the West Bank for the Palestinian Authority shortly after his appointment in 1994: see above, Chapter Two.

[49]According to Article 101 JLPS, the wife has to be informed within one week of the incidence of a *talaq* in her absence.

[50]In this event, the reference of the document of *wakala* will also be given in the text. In examples in the case material, such deeds were usually issued by the Jordanian Consulate in the husband's country of residence in cases where he was resident abroad.

first and second *talaq*s for a period adequate for the husband, or both spouses, to reconsider. In practice, the *qadi* will often simply tell the husband to fill in the necessary forms and come back in a few days in order to pronounce the *talaq* — which, of course, he may fail to do.[51]

When *talaq* occurs in court, the standard formula is 'I have divorced my wife'. When the husband acknowledges in court a *talaq* pronounced out of court, the most common formulae found in the case material were 'you are divorced' (*anti taliq*), or 'you leave divorced' (*turuhi taliq*). Sometimes this is accompanied by the phrase 'three times', or is repeated three times in one session, in which case these days the *qadi* records one revocable *talaq*, in accordance with the law. In one exception in the 1985 case material, the text recorded that a man came to acknowledge the incidence of a *talaq* that had occurred out of court some weeks before by his directing to his wife a phrase roughly translating as 'you leave thrice divorced, without revocation, whenever you become lawful [to me] you are [again] prohibited [to me as a wife], nor shall any law in the world bring you back.[52] The *qadi* explained to the man that he had caused the termination of his marriage by the *baynuna kubra*, and that he and his ex-wife could never re-marry — that is, even if she underwent an intervening marriage. The reasoning behind this exceptional ruling was that the phrase 'whenever you become lawful [to me] you are [again] prohibited' meant that every time the woman became able to marry him, notably after an intervening marriage, she was instantly divorced again. Discussions with different officials of the *shari`a* court system in the West Bank suggested alternate rulings: it might for example have been argued that *talaq* can only be pronounced by a man against a woman to whom he is validly married according to Article 84 of the JLPS, and that once the marriage is entirely over due to the incidence of the *baynuna kubra*, a prior pronouncement of *talaq* against her no longer had any effect and could not be 'carried over' once she had married another man. Or, again, this phrasing could be held to constitute a *talaq* suspended on the realisation of the *baynuna kubra* (rather than on a condition) which would mean that the *baynuna kubra* was effected but the couple could remarry after an intervening

[51] Compare Layish, 1975, 333.

[52] *'turuhi taliq bi'l-thalath bala raja`a kullma tuhalli tihrami wa la yuruddik la shar` wa la far`'*. `Arif al-`Arif, 1933, 133, notes the first half of this expression as an expression of *talaq* used among the Palestinian Bedouin although not among other communities. For an example of the second half of the formula, see below note 61.

marriage by the wife. Either ruling might more closely reflect the intention of a man using this phrase to divorce. Reference to the same phrase of *talaq* is made in a number of published Amman Appeal Court decisions, although they do not set out a position on the consequences, and it thus appears that although rare, this type of phrasing remains in limited use.[53]

Apart from that case, all the phrases of divorce used in one session in the case material from 1985 were held to cause the incidence of one revocable *talaq*. Together with the types of divorce registered in 1965 and 1975, this gives the breakdown of *talaq* a very different appearance to that observed by Layish in the *shari`a* courts in Israel in the late 1960s, where he found revocable *talaq* to represent only about 3% of all divorces other than judicial ones, and a particular frequency of triple repudiation in one session.[54] The impact of even the earlier JLFR provision in rendering into a single revocable divorce a *talaq* accompanied by a number ('thrice divorced') thus becomes clear. The table below shows the breakdown of the case material of *talaq* according to type; in the table, the *talaq* classed above as 'other' is that discussed above where the ruling was lifetime prohibition between the spouses, the description 'three in one' indicates three separate *talaq*s in one session, the phrase 'two and three in one' indicates the second and third *talaq*s occurring in one session, and 'rev.' indicates revocable.

Table 6.1 — Unilateral *Talaqs* in the case material by type, year and court

type	Bethlehem			Hebron			Ramallah		
	65	75	85	65	75	85	65	75	85
1st rev.	8	6	13	40	50	39	35	25	40
2nd rev.	0	0	2	1	1	6	0	6	23
3rd of 3	0	0	0	0	0	1	1	3	20
1st final	0	0	3	8	4	1	3	1	0
3 in 1	1	1	0	2	0	0	1	36	0
2 & 3 in 1	2	0	0	2	0	0	1	1	0
suspended	1	0	0	2	0	0	0	0	0
other	0	0	0	0	0	1	0	0	0
total	12	7	18	55	55	48	41	72	83

[53]Al-`Arabi, 1973, 243, 10601 and 10309 of 1959 and others — there are eight cases referred to, showing that the phrase may not be that unusual.

[54]Layish, 1975, 174–175.

The first point to note about the table above is the overall predominance of single revocable *talaq*s, even in those years (1965 and 1975) when it was still possible to pronounce more than one in one session. The predominance of single revocable *talaq* is particularly noticeable in Bethlehem and Hebron, where first revocable *talaq*s accounted for an average of 80% of all the unilateral divorces registered in the courts. Similarly in Ramallah in 1965, first revocable *talaq*s accounted for 85% of all the unilateral *talaq*s registered. In 1975 and 1985 in Ramallah, however, the picture is very different and the changes can probably be directly attributed to the comparatively high rate of emigration in that area, particularly as of the 1970s.[55] In 1975, there was a marked rise in the number of triple repudiations registered in one session, coming to half the total number of unilateral *talaq*s registered in the court that year. Of these, 29 were pronounced against non-Palestinian women of foreign nationality resident abroad, primarily in the Americas, and the remaining seven by locally resident men against Palestinian women with foreign nationality. In 1985, when the husband or his *wakil* could no longer register three *talaq*s in one session, seventeen of the twenty terminations by *baynuna kubra* were carried out in quick succession to two preceding *talaq*s, all three usually coming within two or three days. All seventeen of these involved women resident abroad. The special situation in which the court in Ramallah has found itself because of the high emigration rate has been recognised by the Jerusalem office of the *Qadi al-Quda*. Following the 1979 Amman circular noted above, the Ramallah *qadi* sent a memorandum to the Acting *Qadi al-Quda* in Jerusalem seeking clarification on the registration procedures for the *baynuna kubra*. In reply, the Acting *Qadi al-Quda* informed the *qadi* of Ramallah that:

> The matter dealt with in the circular concerns treatment of ordinary registered *talaq*. As for the émigré (literally, the person who has gone West) who wants to divorce his foreign wife who lives abroad, there is no objection to this *talaq* being registered without permission being obtained.[56]

[55] Ayyush, 1985, 81 and 91. Graham-Brown, 1984, 242 quotes the Israeli newspaper *Ma'ariv* (16 May 1978) as estimating that between 1975 and 1977 alone, some 5000 Ramallah residents left for the Americas.

[56] Doc.no.QQ/38/73 of 27 January 1980.

The divorce rate in Ramallah is also pushed up in various indirect ways as a result of the emigration rate. `Ayyush's figures show a rate of 21.9% in 1979, compared to a maximum rate in Bethlehem during the period of his survey of 15.8%, and in Hebron of 9.4%.[57]

The suspended *talaq*s recorded in Hebron and Bethlehem in the case material are an interesting variation to the normal procedures of either unilateral *talaq* or *khul`*, but although registered as 'suspended *talaq*', they are in fact one of the two parts of a *khul`* process, with the *talaq* suspended upon the wife's payment of a certain amount of money within a specified time period, usually a year, in addition to renouncing any remaining financial rights.[58] Otherwise, the JLPS allows the suspension of *talaq* on a condition, or the postponement of *talaq* to an future date,[59] but none of the latter type were discovered in the case material, and suspended *talaq*s also appear to be rare, at least in so far as they are brought to the attention of the court. For a suspended *talaq* to be valid, the intention must be the divorce by *talaq*, rather than the influence of another person's actions, and the condition must be realisable not absurd. In his compilation of Hanafi rules, Muhammad Qadri Pasha gives the example of a man telling his wife to go to her family's house and that if she returns within a year she is divorced; in this case, he has in effect given her permission to live with her family for a year and must pay her maintenance, unless she chooses to return to his house and therefore cause the *talaq* to occur.[60] Examples of suspended *talaq*s in the case material include 'if you go to the house of [*folan*] you are divorced' and 'you are divorced if I eat and drink from you [i.e. anything you give me] again.'[61]

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[57]`Ayyush, 80–81. See also al-`Awdah, no.17, 1983, for rates of marriage and divorce in the Ramallah district 1967–1982.

[58]In one case the husband had registered the suspended *talaq* in Jordan and the court registered its incidence when the wife's father paid the specified sum in the West Bank court.

Compare Layish, 1975, 139.

[59]JLPS Article 96; JLFR Articles 75 and 76; OLFR Articles 106 and 107; *Kitab al-Ahkam* Article 251.

[60]*Kitab al-Ahkam*, Article 178. See Chapter Five note 89.

[61]The text and handwriting were unclear. An example of an invalid suspension is given in al-`Arabi, 1973, 243, 14156/1965. The text of the *talaq* was '*turuhi taliq, la yuhillik shar` wa la far` illa tidhbahi bintik `ala sidrik*,' which would appear to translate as 'you leave divorced and no law in the world shall make you lawful again [to me as a wife], unless you slaughter your daughter upon your breast.'

6.3.5 Revocation of *Talaq*

Just as he may divorce his wife in or out of court, so the husband may revoke a revocable *talaq* either by coming to court and declaring his revocation and asking the court to inform his absent wife; or by approaching the wife directly out of court and revoking the *talaq* 'in word or deed', later notifying the court of this. In earlier years, deeds of revocation were registered in the *sijill at-talaq*, but nowadays they are entered in the miscellaneous register. To give an example of numbers in the case material: in Hebron in 1975 there were 55 unilateral *talaq*s and nine revocations, while in 1985 there were 48 unilateral *talaq*s and fourteen revocations. Some of the revocations take place very quickly after the registration of the *talaq*; others take longer, and this may indicate the protracted nature of negotiations taking place between the spouses and their families, albeit in law the revocation is not dependent upon the wife's consent.

After a revocable *talaq*, the husband remains financially responsible for his wife until the end of the *`idda* period[62] and if they resume marital relations during that period, the *talaq* is revoked 'by deed.' This revocation is facilitated by the *shar`i* assumption, backed up by the terms of the JLPS, that the wife will remain in the marital home during the *`idda* of a revocable *talaq*.[63] However, customarily it is common for a woman to return to her natal family's house when she is divorced, so that the husband may not actually have access to her. A case from the court records illustrates the situations to which this may give rise. The husband had told his wife 'you leave divorced' and she left his house, in the early months of pregnancy, and went back to live with her family. The *talaq* remained unregistered. During the course of her pregnancy, the husband twice sent male relatives to her father's house with a message that he wanted to revoke the *talaq*, but the wife refused to come back to his house. After the birth, however, she returned to the marital home with the child, and the couple resumed marital relations. A few months later they came to court to register the incidence of one revocable *talaq* and its revocation during the *`idda* (which ended with childbirth.) The *qadi*, however, noted that revocation does not occur by the

[62]Unless she has been divorced in a state of *nushuz*.

[63]Samara, 1987, 288. JLPS Article 146. Samara, 1987, 307, notes that one of the differences between revocable *talaq* and *mukhala`a* is that in the latter case, the wife does not spend her *`idda* period in the matrimonial home, while after *talaq* she does.

husband stating his intention or desire to revoke the *talaq*, and none of the witnesses could testify to the text of an actual revocation ('I have taken back my wife'). The court therefore ruled for the incidence of a revocable *talaq* that had become final with the expiry of the *`idda* period by childbirth without revocation of the *talaq*. He ordered the couple to separate, and if they wished to resume relations to conclude a new marriage contract including a new dower for the wife.

6.3.6 Delegation of *talaq* to the wife

Article 87 of the JLPS provides that as well as appointing another person to carry out the divorce of his wife on his behalf (i.e. by *tawkil*, deputising), the husband may also delegate to the wife the power to divorce herself (by *tafwid*, delegation).[64] All the Sunni schools held that such delegation was permissible, and the only addition the JLPS makes to the classical rules is to stipulate that this be in writing.[65] The other reference in the JLPS to *tafwid at-talaq* comes in Article 19 regarding special stipulations in the contract of marriage. The phrase used in Article 19, 'that her affairs be in her own hand', along with the phrase that 'her protection be in her hand', is the standard formula for the delegation of the power of *talaq* from the husband to his wife.[66] Procedurally, however, the wife must raise a claim to establish

[64]See Samara, 1987, 276 on *tafwid* to the wife and *wakala* to others. Ma`ruf, 1985, 18, notes that the Syrian and Iraqi laws, in their definition of *talaq*, state that it can occur from the husband or from the wife, thus reminding the wife of the possibility of being delegated the power of *talaq*.

[65]There was no equivalent provision in the JLFR. However, in Article 21 of the JLFR, on stipulations in the contract, the law provided that the stipulation had to be in writing to stand in the event of a denial.

[66]Respectively, *yuj`ala 'amraha bi-yadiha*, and *takuna `ismatuha bi-yadiha*. Layish, 1975, 153, distinguishes between these two phrases, saying that the first is the more serious in effect, 'since it entails irrevocable or triple repudiation'. There was no indication of such being the case in the West Bank, and Samara, 1987, 273–276, does not mention such a distinction in his consideration of this issue. He gives three possible texts for delegation of *talaq*; *tallaqi nafsaki*, *ikhtari nafsaki*, and *'amruki bi-yadiki*, (in colloquial usage, these would transliterate as: *tallaqi nafsik*, *ikhtari nafsik*, and *'amrik bi-idik*). He cites Ibn Abdin in support of his statement that standard Hanafi rules would hold the first phrase to be explicit and the other two implicit, and that if a woman divorces herself explicitly (i.e. using the first phrase) the *talaq* falls revocable, while if she uses an implicit phrase (one of the other two) it would fall final: Samara, 1987, 275, and note 3.

her *talaq* or have the *qadi* effect a divorce in court by *faskh*. Furthermore, the rather literalistic approach of courts in the West Bank to the text of the delegation means that the woman may find that the delegation has no legal value.

One of the problems that may arise is the question of when the wife may use her power. As a general principle, it is held that if the delegation is absolute and unconstrained, then the wife may exercise this power only in the same session it is delegated to her. That is, if the husband says 'divorce yourself', or 'your affairs are in your hand,' then the wife must respond immediately, since the power ends with the end of the session. This is confirmed by a number of decisions from the Amman Appeal Court. The decisions distinguish, however, between the type of divorce being sought by the woman on the basis of such a stipulation. Thus, in a 1993 case, the Court overturned a decision from a first instance court giving the woman a judicial divorce by a final *talaq* based on a stipulation (*al-`usma bi-yadiha*) in the marriage contract. The Court held that she could have applied for judicial dissolution on this basis in accordance with Article 19 (on stipulations), but that the text of her delegated *talaq* did not give rise to repetition (i.e. of the *talaq*) and could only be exercised in the session of delegation, which had ended with the end of the contract session. If, on the other hand, she had applied for a *faskh*, the first instance court would have been correct to grant the dissolution.[67] If, however, the delegation is suspended upon a condition, such as if her husband takes another wife or goes to live abroad, then the woman may exercise the power if and when the condition is realised, or has the choice of seeking a *faskh* from the court.[68]

The delegation of *talaq* to the wife may also be 'suspended on a generalisation', with the use of such phrases as 'whenever you wish', in which case the delegated power may be used at any time by the wife.[69] Here, the problem also arises as to whether the wife's *talaq* falls revocable, as would the hus-

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Compare *Kitab al-Ahkam* Article 260, which states that with delegation of *talaq*, the wife can 'make her choice' (*ikhtiyarha*) or 'have her affairs in her hand'. Article 261 of *Kitab al-Ahkam* uses the same phrase, stressing it must be exercised in the same session as the delegation.

[67]35304/1993, Dawud, 1999, I, 377–378; see also 16490/1970 and 16701/1971, Dawud, 1999, I, 368–369 and al-`Arabi 1973, 183. An example of a *faskh* granted on the basis of a general stipulation of delegated *talaq* come in 29407/1988, Dawud, 1999, I, 375.

[68]Compare Layish, 1975, 154. See also al-`Arabi 1973, 225, 9583/57.

[69]See *Kitab al-Ahkam* Articles 260 and 261; al-`Arabi 1973, 183, 16490/70; Samara, 1987, 274–275.

band's, leaving open the possibility that her husband could revoke it. Samara, in discussing the suspension of *talaq*, lists the words that may be used in phrases of suspension as comprising 'if' (*in, idha*) 'when' (*matta*) and 'anytime/whenever' (*kullma*), and observes that only the last-mentioned gives rise to the right to repeat the *talaq*.[70] That is, if any of the other words were used, the wife would be able to use her delegated power of *talaq* only once. If this *talaq* were considered revocable, the husband could then revoke it and the wife would not have gained the protection she had envisaged by the original delegation. With the use of 'whenever', however, the wife could, if she chose, repeat her *talaq* until the husband could no longer revoke it (that is, three times) and thus end the marriage by the *baynuna kubra*.

Al-`Arabi reviews a few decisions that appear to support Samara's position. One holds that if the wife stipulates that 'her affairs are in her hand' and then comes to court to establish that she has divorced herself, it will fall revocable. Another case involved a woman stipulating that if her husband drank alcohol, she would have the power to divorce herself from him when she wished (*matta sha'at*). He subsequently did drink, the woman divorced herself from him; he revoked the *talaq* and they resumed marital relations. The court ruled for the incidence of one revocable *talaq* and a revocation. On the other hand, as indicated above, under current jurisprudence it would appear that the court would grant a woman's application for *faskh* on the basis of the range of wording employed in stipulations, leaving the husband unable to revoke it.[71]

The only case in the case material where a woman sought to exercise her power of delegated *talaq* illustrates a rather literalistic approach by the Jerusalem *Shari`a* Court of Appeal. The woman had been married some months previously to a man who had since left the country before the marriage had been consummated. The contract had included the stipulation that the wife had the power to divorce herself when she wished (*matta sha'at*). The wife accordingly raised a claim for *tatliq* (implying the *qadi* would pronounce the *talaq* for her) and the *qadi* registered the incidence of a single *talaq* which fell immediately final because it was before consum-

[70]Samara, 1987, 277.

[71]Respectively, al-`Arabi 1973, 183, 16490/70; and 233 and 206, 19240/77; and 45891/1998, Dawud, 1999, I, 381. The first ruling also noted that if the wife raised a claim for judicial divorce on the basis of the general delegation of *talaq*, the *qadi* should rule for a *faskh*.

mation. Upon review in the Appeal Court, however, this ruling was corrected and the *talaq* not given, because firstly the text of the wife's stipulation in the contract did not include the phrase 'and the husband agreed to this stipulation'; and secondly in the final text as a whole, set out in full above the signatures of the parties, the stipulation was not mentioned in the *ijab* or the *qubul*. In this latter position, the Jerusalem Appeal Court followed earlier rulings to this effect of the Amman Appeal Court published by al-`Arabi. However, a later ruling under the JLPS from the Amman Court (in 1987) held that even though the stipulation had not been included in the text (*sigha*) section of the contract, it had been registered in the stipulations section in accordance with Article 19, and the husband had acknowledged this fact. The Court held that his claim that he had accepted the stipulation 'in order not to disrupt the contract session' had no effect on his acceptance in law, and returned the file to the first instance court (which had turned down the woman petitioner's application) to proceed accordingly.[72]

The rare use of the delegation of *talaq* in the West Bank seems to lead also to inadequacies of phrasing, as has been noted in regard to stipulations in general. It has already been noted (in Chapter Three) that of the six stipulations that were found in the over 8000 contracts examined for the purpose of this study purporting to give a general delegation of *talaq* to the wife, two could in theory have been denied legal value by the court and three would, by some arguments, have been liable to revocation by the husband. It is doubtful that either the *ma'dhun* or the parties concerned were aware of the implications of the phrasing they employed in these cases, or that the woman would have known that in the event of seeking a divorce on the basis of the stipulation it would generally be safer to seek a *faskh* from the court rather than seeking to 'divorce herself' from her husband.

Shaham notes similar discussions among Egyptian *qadis* in the material he examined, although in at least some cases, the Egyptian courts appear to

[72]28095/1987, Dawud, 1999, I, 374. Earlier Amman Appeal Court decisions state that for a stipulation on the delegation of *talaq* to be valid, the wife must begin the formula of marriage including the stipulation in the text, followed by the *qubul* by the husband. If the husband begins the *ijab*, or he makes it a condition on himself, it is not a valid delegation. See al-`Arabi, 1973, 183, 11181/60, 9583/57 and others. The 1987 decision focussed on the phrase 'registered in the contract document' as the legal requirement under the JLPS.

have adopted a less literalistic approach.[73] In a case summarised by al-Jundi, the court held that the expression *tutallaq nafsha matta sha'at* was customarily believed to give the wife the power to end the marriage just as the husband could, so that the intention was clearly that either it should fall final, or she should be able to repeat it.[74] A proposed modification to the JLPS that would have required a woman to establish a delegated *talaq* through a court action and rendered it final was justified in the draft Explanatory Memorandum of 1987 along similar lines of intended benefit, adding that this would give the woman time to think over her action and to reconsider her decision during the court proceedings — just as a man has the *`idda* period of a revocable *talaq* to reflect on and potentially reverse his action.[75]

Although much is made of the potential of 'evening up' the balance of the power of divorce embodied in the institution of the delegation of *talaq* to the wife, the fact that it is so infrequently included in contracts of marriage indicates what appears to remain a societal antipathy, popularly expressed in views on the 'emotional' nature of women as compared to the 'rational' nature of men. In the survey of attitudes among Egyptian university students carried out in the course of the project on the new marriage contract, the least favoured stipulation was that granting the wife the power to divorce herself.[76]

6.4 *KHUL`*

In Jordanian law and West Bank practice, a divorce by *khul`* (or *mukhala`a)* is concluded by a single final *talaq* pronounced by the husband in exchange for (*muqabil*) the wife's renunciation (*ibra'*) of some or all her financial rights against him, primarily the dower and maintenance; if the direct exchange is not explicitly stated, then the *talaq* falls as a single revocable *talaq*

[73]Shaham, 1997, 147–148. At 106–107 he also notes a similar scarcity of cases dealing with delegated divorce in the Egyptian material he studied.

[74]Al-Jundi, 1978, 710 (Tanta 3170/30).

[75]Explanatory Memorandum to the Draft Amended JLPS 1987, point 5, on article 23 of the proposed revised version.

[76]Zulficar and al-Sadda, 1996, 251–259; only 34.8% of the sample said they would agree to be bound by such a stipulation in the contract.

accompanied by a voluntary waiving of rights by the wife; and similarly if it is explicitly stated that there is to be no consideration then the ruling is for a single revocable *talaq*.[77] The pronouncement of the *talaq* and of the renunciation can be performed by the spouses themselves, or by *wakil*s appointed by them for this purpose and, as in *talaq*, can take place in front of the *qadi* or out of court. In the latter case, the spouses come to court to acknowledge the occurrence of the *khul`* out of court. The major difference between the registration of *talaq* and of *mukhala`a* is that the wife or her *wakil* must be present to pronounce the renunciation of her rights in the same session.[78]

Unlike unilateral *talaq*, which depends upon the will of the husband, the process of *mukhala`a* requires the consent of both spouses; under the Jordanian law the husband cannot be obliged to pronounce the *talaq* or have it pronounced for him by the court, nor the wife the renunciation of her rights. It is not therefore a case of the wife having a guaranteed 'right' to obtain a *talaq* from her husband by giving up her financial rights, unlike the rules on 'judicial *khul`*' established by court decision in Pakistan and, more recently, in Egyptian legislation.[79]

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[77]Article 107 JLPS. Article 94 specifies that *talaq* for *mal* is final. The difference between *talaq* and *mukhala`a* is illustrated in a set of divorces in the case material recording *talaq*s registered by paternal relatives acting as the *wakil*s for a group of male cousins all at that point resident abroad. In most cases the *wakil* pronounced a *talaq*, and the wife then declared her renunciation of all her matrimonial rights, but without the key phrase 'in exchange for'. The renunciation was therefore held to be voluntary, not in exchange for the *talaq*, and the *qadi* registered in each case the incidence of a single revocable *talaq*. By contrast, in one related case, the wife pronounced the *ibra'* explicitly in exchange for the *talaq*, and this was therefore registered as a final *talaq* (i.e. in a *khul`* divorce).

[78]Unless the *khul`* is performed as a *talaq* suspended on renunciation within a certain time. See al-`Arabi, 1973, 234,14335/66 and previous examples from the case material in this chapter.

[79]In Pakistan, the courts have established that a 'wife is entitled to a dissolution of her marriage without the consent of her husband if she would otherwise be forced to maintain a hateful union . . . If the wife desires this she must repay what she has received from her husband during the marriage, the final decision as to what she must return lying with the court . . .', *Khurshid Babi vs. Baboo Muhammed Amin*, PLD 1967, S.C.97; see Hodkinson, 1984, 228–230; Hinchcliffe 1968; and Carroll, 1996. In Egypt, Article 20 of Law no.1/2000 Regulating Certain Procedures of Litigation in Personal Status Matters

In procedural terms in the West Bank, a *mukhala`a* agreement starts with the wife announcing that she has renounced her rights in exchange for a single final *talaq* 'by which she possesses herself'; her husband then responds with the *talaq* in return for release from his financial obligations towards her. The word used in the West Bank by the wife is *ibra'*, (absolution, release) and the *mukhala`a* agreement is registered in the *sijill at-talaq* as *talaq muqabil al-ibra'*.[80] The marriage is ended immediately (by the incidence of the *baynuna sughra*) and a new contract is needed for them to resume their relationship. This kind of divorce was recognised by all the schools of law. The JLFR contained no provisions on *khul`*, thus by default leaving the classical rules intact. The JLPS does cover *khul`*, although most of the relevant provisions are declarative of the classical law, with only a few modifications introduced.

The JLPS provisions on this subject appear to have been modelled largely on the 1953 Syrian Law of Personal Status. This is clearly the case in the first modification made to classical law, regarding retraction of the offer of *mukhala`a*. According to Hanafi law, if the husband pronounces the offer (*ijab*) then he cannot retract it until the woman has made her response (*qubul*), while if it is the woman who makes the offer, she may retract before the husband has answered. In the JLPS, the Shafi`i position is adopted when either party is allowed to retract their offer before the response of the other: this provision was an innovation in the Syrian law.[81]

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allows the court to rule for a divorce if the spouses fail to agree on *khul`* and the wife 'ransoms herself and divorces (*khal`at*) her husband by waiving all her *shar`i* financial rights and returns to him the dower that he has given her.' This is provided that the court has tried to effect conciliation through two arbiters for a period of up to three months and that the wife has explicitly stated that she 'loathes life with her husband,' that the marriage cannot continue, and that she is afraid that she will not be able to live 'within the limits of Allah' if forced to remain married to him. Official Gazette no.4 29/1/2000. I am grateful to Aziz Dajani for a copy of the text. A similar provision in Libyan legislation preceded this (Article 14(b) of Law no.176/1972) but was amended slightly in the subsequent legislation (Law no.10/1984, article 49(b)). The Draft Unified Arab Law of Personal Status (Article 116) allowed for this arrangement only for divorce before seclusion or consummation. The Quranic reference is 2:229.

[80]See Samara, 1987, 298, on other words that might be used. Compare Shaham, 1997, 103, who notes the general use of the term *talaq `ala mal* in Egypt; c.f. Article 94 JLPS.

[81]JLPS Article 103; *Kitab al-Ahkam*, Article 279; Samara, 1987, 296 and 298, and Anderson, 1955, 40.

As in *talaq*, to conclude a *mukhala`a* agreement, the husband must fulfill the normal conditions of legal competence and the woman must be contracted to him in a valid marriage. The only difference is that if the woman is under the age of legal majority (*rushd*), then the *khul`* is not valid unless her legal guardian (*wali al-'amr*) gives his consent to her renunciation of her rights.[82]

According to the JLPS, the 'exchange' (*badl*) for the *talaq* can be anything that is binding according to the *shari`a*. Samara explains this as being anything that is *shar`i* and that can be assessed in monetary terms.[83] There was some discussion as to whether or not the wife could renounce more than the husband had actually given her by way of dower and so on — that is, whether it was valid if the 'renunciation' became what Layish calls a 'compensation' divorce, whereby the wife renounces her rights and in addition pays the husband a sum of money on top.[84] All four schools hold that such a divorce is valid, although disapproved.[85] Thus, for example, in exceptions in the 1975 case material, sums ranging from 250–400 dinars were paid by women in addition to renunciation of all their remaining financial rights: this is often likely to represent the return of the received portion of the prompt dower.[86]

Most deeds of *mukhala`a* in the case material, however, show a standard *ibra'* and do not include extra compensation. The JLPS takes Abu Hanifa's view that if the *mukhala`a* is undertaken for something other than the dower, then all other rights (primarily the dower and maintenance) are also automatically renounced,[87] while if no specification at all is made (for

[82]Article 102(b) JLPS. In the Draft JLPS from 1987 (Article 99) this is expounded by the addition of the phrase 'that is, eighteen years' to explain what is meant by the woman reaching the age of legal majority. The Explanatory Memorandum to the Draft Law (point 19) notes that this is to make it agree with Article 189 of the Draft Law which makes the solar year the basis of all calculations.

[83]JLPS Article 104; Samara, 1987, 299. Layish, 1975, 160.

[84]Layish, 1975, 160.

[85]Samara, 1987, 303.

[86]Compare Ghani, 1983, 362. Shaham, 1997, 107, similarly notes that most *khul`* divorces in the Egyptian material he examined were renunciation rather than compensation.

[87]JLPS Article 105. This is noted by Samara, 1987, 303–304, as being the view of Abu Hanifa, as opposed to that of the Shafi`is, Hanbalis and the Two Companions, who held that the other rights were only lost if certain explicit formulas were used.

example, if the *mukhala`a* is on the basis of a 'general absolution', (*ibra' `amm*) then 'both parties are cleared of obligations towards the other as regards dower and maintenance'.[88] However, in contrast to Abu Hanifa's view, the JLPS makes an exception of maintenance for the *`idda* period following the divorce, which it holds to be waived only by explicit renunciation in the *mukhala`a*.[89] On the other hand, any maintenance due the wife from before the *mukhala`a*, whether or not ordered by a ruling from the court, and however much it may amount to, is included in a general renunciation.

Also valid as exchange for a *talaq* in a *mukhala`a* divorce are the fees due from the husband to the divorced wife in connection with her continuing care of a child from their marriage. These consist of the fees for suckling the child and for undertaking custody. In addition, the wife can take upon herself other expenses related to the child that would otherwise be the responsibility of the husband if the child itself had no independent income. These consist of the child's maintenance, and the cost of its accommodation. Article 109 of the JLPS allows all these to be included as exchange in a *mukhala`a* divorce.[90] The article also provides, in accordance with standard Hanafi law, that where the wife does undertake to waive these fees and/or to maintain the child herself for a certain time, then the husband can claim back from her the expenses for the time remaining if the wife remarries a man outside the prohibited degrees of relationship to the child and consequently loses her rights of custody, or if she or leaves the child or dies. However, the article adds, in exception to the dominant Hanafi view, that if the child dies, the father cannot claim anything back from the mother.[91]

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[88]JLPS Article 106.

[89]JLPS Article 108. Samara, 1987, 304. The 1975 case material (under the JLFR) showed an example of a husband winning a claim to cut his wife's maintenance and not to pay the maintenance of her *`idda* period on the basis of a *khul`*, the text of which showed an *ibra' `amm* without specifying the maintenance of the *`idda* period.

[90]On the fees, see Articles 152 and 153 JLPS. These can only be claimed after divorce; see below Chapter Eight. See also JLPS Article 159. The recent Egyptian legislation (Law no.1/2000, Article 20) appears to preclude inclusion of child maintenance as valid exchange for a *talaq* in a *khul`* divorce.

[91]Compare *Kitab al-Ahkam* Article 286. In some earlier *mukhala`a* deeds, and indeed in some registered under the 1976 law, the woman specifically stipulates that she will waive all these fees and expenses provided that if the child died before the end of the period of custody, the father should not have the right to claim anything back from her. See also Samara, 1987, 299.

The JLPS stipulates that these expenses and fees should be renounced for a specific period ('a known time'), an issue not discussed in the case material, although according to the Jordanian *Shari`a* Appeal Court, if the period is not specified, then the *ibra'* is not valid.[92] The principle here is that the *mukhala`a* must be for something the value of which can be assessed in monetary terms; if the period is not defined, no such assessment can be made.[93] In most cases found where these fees and expenses were included in the *mukhala`a*, the specification of the time period would probably not satisfy the rules of 'a known time': for example, the wife waiving the fee of custody for 'so long as I retain custody', or 'until the child reaches the age of puberty'. By contrast, a phrase such as 'until the child reaches the age of fifteen' would be a valid specification of the time period.[94] However, in the deeds of *mukhala`a* in the case material involving a renunciation by the wife of these fees and expenses, the rights to dower and maintenance were also renounced, so that the *mukhala`a* was not dependent upon the validity of the period specification for the suckling and custody fees. The main effect of an invalid time specification would then be to prevent the husband from claiming anything back from the wife should she cease to care for the child.

While no litigation was found regarding the fees of *rada`* (breastfeeding) or custody after a *mukhala`a* divorce, there were cases on the child's maintenance. The JLPS provides that if the mother becomes poor after the divorce and is unable to fulfil her undertaking to maintain their child, then the father is obliged to maintain the child and this will be held a debt against the mother.[95] This is standard Hanafi law, and is illustrated in a claim from the earlier case material resolved under the JLFR. The mother had undertaken in the *mukhala`a* deed to maintain their child and had waived her fee for custody, but her circumstances had changed and finding

[92]Al-`Arabi 1984, 21683/80.

[93]See Samara, 1987, 300.

[94]Under the JLPS, the mother's right to custody lasts 'until puberty' (Article 162). Compare the *fatwa* from Khayr al-Din al-Ramli cited in Tucker, 1997, 127.

[95]JLPS Article 110. In their 1986 Memorandum, the Amman-based Federation of Business and Professional Women recommended that Articles 109 and 110 be changed so that the husband cannot claim back fees and expenses for the period after the wife remarries, or the child's maintenance if she becomes poor; they pointed out that a new marriage is the wife's right, and that it was enough for her to lose the right of custody of her children by such a marriage, without having to pay back money to their father.

herself impoverished she had gone back to court. The court awarded her maintenance for the child against the father, on the condition that the father could claim back what he had paid once the mother became financially able to support the child herself; however, her petition for reinstatement of her fee for custody was dismissed. This is because the fees for *hadana* and suckling are rights of the wife and once renounced cannot be claimed; the child's maintenance, however, is the right of the child, and must be discharged by the father if the mother becomes unable to meet the obligations she took on herself.

The same principle applies to the right of custody over a child from the marriage. Article 111 of the JLPS provides that:

> If the man stipulates in the *mukhala`a* that he shall keep the child with him during the period of custody, then the *mukhala`a* is valid but the condition is void, and the legal custodian may take the child from him.

This is again a restatement of standard Hanafi law, and has been upheld in Appeal Court decisions in Jordan: only the Malikis allowed a *mukhala`a* to stand on the wife's renunciation of her right of custody over children from the marriage.[96] Under the classical interpretations of the sources, while the father is regarded as the natural guardian (*wali*) of his children, the mother is considered the best person to have custody of them until they reach the age where they 'can dispense with the care of women', at which point they return to their father. The schools set the end of the period of custody at various ages; Hanafi law sets it at seven for boys and nine for girls. The JLPS raises this to puberty in both cases, provided that the mother fulfills certain conditions. If the mother fails to fulfill these conditions of competence for custody, then the right of *hadana* passes according to the Hanafi rules to the maternal grandmother and then to various other female relatives.[97] At all times, however, custody, and the correct identification of the custodian, is primarily the right of the child. Thus, while the

[96]Samara, 1987, 300. Al-`Arabi, 1973, 184, 9527/57. Compare *Kitab al-Ahkam* Article 288 and al-`Arabi, 1973, 184, 9527/57; and also Khamlishi, 1994 Volume I, 363–364 on the Maliki rules.

[97]JLPS Article 154; *Kitab al-Ahkam*, Article 384. On custody in the WCLAC material see Welchman 1999, 201–220.

mother may renounce her own rights, she cannot renounce the right of her child to be cared for by the person held by law to be its best custodian.

However, after the promulgation of the JLPS, with this explicit provision repeating the classical Hanafi position, there were still examples in the case material of women agreeing to forego any claim to custody of their children in exchange for the *talaq* from their husband, along with all other rights. Annelies Moors illustrates the circumstances in which this may come about in a case from Nablus; it may be a combination of pressure from the husband and his family, or a reflection on the likely prospects for remarriage for a single woman with young children.[98]

In practice, however, the vast majority of *mukhala`a* deeds registered in the case material involved various combinations of the prompt and deferred dowers, *tawabi`* and maintenance. By way of example, in the 1985 registers, the standard formula in 42% of the deeds was the renunciation of prompt and deferred dower and maintenance for the *`idda* period (98 out of 234 deeds), while a further 16% (38) added *tawabi`* of the prompt dower. Some 22% (51 deeds) reflected the equivalent in a *khul`* before consummation (half the prompt and deferred dowers, with a similar proportion including *tawabi`*). The remaining 20% either omitted maintenance for the *`idda* period or explicitly added in outstanding maintenance due from before the divorce, or fees related to the children (suckling or custody).

In regard to the standard text, it should be noted here that when the wife renounces rights to 'both dowers', this does not usually mean that she has to pay back such prompt dower as she has received from him; it will merely prevent her making subsequent claims for any amount outstanding. Reading from decisions in the Jordanian Court of Cassation, Fakhani points out that the standard formula, 'I release my husband from all that which I am due from him of my prompt and deferred dower . . . etc.' is absolution of rights outstanding, and so does not include goods handed over to her before the date of the absolution.[99] In practice, it seems that the wife

[98]Moors, 1995, 211. Compare Layish, 1975, 159. Mir-Hosseini, 1993, 151, found in Morocco that when negotiating a *khul`* divorce, women felt they had to either forgo their right to keep their children or to assume total responsibility for their maintenance and upkeep; post-divorce arrangements for the children therefore tended to be entirely centred around the divorced woman and her family.

[99]Fakhani, 1975/6 (IV), 60 (from Court of Cassation decisions, no.19169).

only actually pays back such dower as she has received in those cases where a sum of money is stipulated to be paid to her husband on top of the renunciation of financial rights.

Some deeds in the case material indicate the possibility of pressure being exerted on the wife, with the *mukhala`a* divorce being undertaken in the wife's *`idda* from a revocable *talaq* by the husband. In such cases the *talaq* becomes final with the *khul`*, but the *`idda* is calculated from the date of the first unilateral *talaq*. In some of these cases, it may be that the wife has agreed to a *mukhala`a* in response to the husband threatening to revoke his *talaq* and therefore keep her in a marriage that she no longer wants. This type of conduct by the husband was specifically condemned by the then *qadi* of Ramallah, Shaykh Hiyan al-Idrisi, in a newspaper article in 1987.[100]

The more general problem of wives possibly being pressurised into renouncing their rights in order to be released from a marriage is one that has been acknowledged by both classical and modern writers. Barhum suggests that wives may be unaware of their rights and may waive their dower and other rights when they could in fact obtain relief in other ways.[101] Samara notes that the Shafi`is, Hanbalis and Malikis held that if the man obtains the wife's renunciation of her rights through oppressing her and beating her, then the renunciation is not valid as it occurs under duress, and the *mukhala`a* becomes an ordinary *talaq*.[102] This is not however the Hanafi position, but the introduction of various rules from the other Sunni schools, primarily the Maliki, allowing the wife to seek separation (*tafriq*) for absence and injury, desertion (*hajr*), discord and strife and the non-payment of dower, means that she can seek relief from the court in the event of certain kinds of injury. It is, however, clear that in many cases, the prospect of long drawn-out litigation, the outcome of which cannot be guaranteed, encourages the woman to opt instead for the simple registration process required for *mukhala`a* and an immediate, final divorce from her husband, with minimum court exposure. The alternatives — divorce through litigation at court — are considered in the following chapter.

[100]Idrisi in *Al-Quds*, 23 November 1987.

[101]Barhum, 1983, 24. Compare Carroll,1996, on practice in Pakistan.

[102]Samara, 1987, 302.

CHAPTER 7

Litigating Divorce: Claims and Procedures for *Tafriq* and *Faskh*

7.1 INTRODUCTION

The termination of a marriage by judicial divorce (*tafriq*) or by judicial dissolution (*faskh*) is performed by the *qadi* after litigation in the *shari`a* court on the initiative of one of the two spouses, usually the wife, or, in the case of *faskh*, of a third party. Judicial dissolution is mandatory whenever an invalid marriage contract is concluded or when a previously valid marriage becomes invalid through the actions of one of the parties, since the parties to an irregular (*fasid*) or void (*batil*) contract of marriage may not legally remain together.[1] Termination of the marriage by judicial divorce, on the other hand, is an option granted to one or both spouses in certain given circumstances; the spouse may choose to exercise this option and apply for judicial divorce or may opt to continue in the marriage. The one exception to this generalisation is dissolution by the *qadi* of a marriage based on the petition of one spouse due to breach of a legal stipulation by the other which is a choice made by the spouse petitioning (the breach having been the choice of the other spouse) and occurs in a marriage where, although the contract has been broken by one spouse, it has not become irregular or void in legal terms.

[1]Article 43 JLPS.

Judicial divorce by the *qadi* in most cases gives rise to a single final *talaq*[2] which is counted in the number of *talaq*s directed by the husband to the wife should the parties later remarry. Dissolution (*faskh*) by the *qadi* does not enter into the *talaq* calculation. Under Jordanian procedural law, all rulings by the first instance *shari`a* court for judicial dissolution or judicial divorce are subject to mandatory review by the *Shari`a* Appeal Court thirty days after the ruling is issued, unless an appeal has already been submitted by the litigants.[3]

The Hanafi rules on the grounds on which the wife might seek judicial divorce are the most restrictive of the four Sunni schools. These grounds have been substantially expanded by the codified legislation issued this century, but the number of claims for judicial divorce is still very low compared with the number of terminations by unilateral *talaq* and by *mukhala`a*, due at least in part to the practical difficulties and necessary public exposure involved in going through a public court case.[4] The table below shows the number of claims made for judicial divorce and judicial dissolution in the case material, not all of which resulted in the termination of a marriage.

Table 7.1 — Bases of applications for judicial divorce and dissolution in the case material

claim	65	75	85	total
tafriq for absence and injury	27	13	8	48
tafriq for non-payment maintce.	1	7	16	24
tafriq for discord and strife	8	11	4	23
tafriq for a prison sentence	1	2	0	3
faskh	3	4	2	9
total	40	37	30	107

The table shows that overall in the case material, most claims for judicial divorce were made by the wife on the grounds of absence and injury,

[2]Except in the case of *tafriq* for the non-payment of maintenance, where the *talaq* is revocable.

[3]Article 138 of the Law of *Shar`i* Procedure 1959. On non-inclusion of a *faskh* in the calculation of the number of *talaq*s between the spouses, see al-`Arabi, 1984, 72–73, 16490/70.

[4]See Hijab, 1988, 17, and above Chapter Six.

followed by non-payment of maintenance and then discord and strife. There is a distinct change in the pattern, however, in 1985, when most claims were submitted on grounds of non-payment of maintenance. The later WCLAC material from the West Bank courts shows the pattern established in 1985 to be maintained, with non-payment of maintenance the most common ground, followed by absence and injury and then *niza` wa shiqaq*.[5] There is a certain amount of regional variety between the West Bank courts in the distribution of claim types, discussed below in the relevant sections.[6] In the Gaza Strip, the WCLAC material showed a different pattern, with most claims submitted on grounds of absence (or desertion) and injury, followed by non-payment of maintenance and then imprisonment in the claims examined in the Gaza City and Rafah courts.[7] The table above also shows an apparent decrease in the number of applications for *tafriq* overall, another trend borne out in the later WCLAC material.

7.2 JUDICIAL DIVORCE (*TAFRIQ*)

7.2.1 Discord and Strife

The application for judicial divorce on the grounds of 'discord and strife', *niza` wa shiqaq*, represents a limited adoption of Maliki rules on this area of divorce law, and was first made part of the applicable family law in the West Bank area in the OLFR of 1917. The phrase 'discord and strife' refers to severe abuse by either one or both parties to the extent that marital life cannot possibly continue. Once such strife is established to the satisfaction of the *shari`a* court, if the *qadi* himself fails to reconcile the spouses, he transfers the matter to two arbiters, who in their turn exert efforts to effect reconciliation. If this arbitration process fails, the spouses will be separated by the *qadi* on the recommendation of the arbiters, with each spouse

[5]Welchman, 1999, 172, table 8.1. Of 213 claims: 126 for non-payment of maintenance; 59 for absence or desertion (*hajr*) and injury; *niza` wa shiqaq* 17; imprisonment 10; disease one.

[6]Ayyush, 1985, 91, table 18, presents a breakdown of judicial divorce claims showing a degree of regional variation. His overall results show the same pattern regarding the three most common grounds for *tafriq*.

[7]Welchman, 1999, 172, table 8.1: the figures were respectively 59, 40 and 3 in the total of 102 claims in the two Gazan courts.

paying or forfeiting financial dues in proportion to the relative amount of blame attributed to them by the arbiters.

The original text in the OLFR permitted either spouse to apply for judicial divorce on the grounds of *niza` wa shiqaq*, while the JLFR of 1951 restricted it to the wife only.[8] Article 132 of the JLPS returned to the original position by allowing either spouse to make such an application:

> If discord and strife appear between the spouses, each of them may apply for judicial divorce if claiming injury (*idrar*) by the other in word or deed to the extent that marital life cannot continue . . .

Under the JLFR, it was theoretically possible for the wife to deliberately cause problems within the marriage until the husband unilaterally divorced her to save himself and his family from further embarrassment. In this event, the husband would have to pay his wife all her remaining financial rights. Under the terms of the JLPS, however, the husband may have recourse to the court in such a situation, and if he can establish the abuse by his wife, may obtain judicial divorce with the wife forfeiting an amount of her remaining financial rights in proportion to the blame attributed to her by the arbiters. In the case material, of four cases in the three courts under the JLPS in 1985, only one was submitted by a man. The Explanatory Memorandum to the JLPS justified the extension to the husband of the right to seek *tafriq* on the grounds of *niza` wa shiqaq* by reason of the equality it afforded to the spouses as well as referring to the original position in the OLFR.[9]

There is an established connection between the rules on *ta`a* (including the husband's power of 'discipline' over his wife) and processes of arbitration between the spouses that may end in *tafriq*. Samara begins by summarising the three stages of correction for *nushuz*, and notes that if all the means of correction have been employed without result, the husband may seek arbitration in applying for judicial divorce for *niza` wa shiqaq*,

[8]OLFR Article 130; JLFR Article 96. Article 108 of the Draft Unified Arab Law of Personal Status (published 1987) also allows either spouse to seek separation on the grounds of *niza' wa shiqaq*. The 1929 Egyptian legislation allowed only the woman to apply for separation on these grounds; the Explanatory Memorandum that accompanied the legislation justified this departure from Maliki rules on grounds criticised as unsound by Abu Zahra, 1957, 425–426. The Qur'anic reference is 4.34, 35.

[9]Explanatory Memorandum, 5. Mheilan, 1986, 77, comments on this as a beneficial change brought about by the 1976 Jordanian law.

while if the husband exceeds the limits of correction the wife may apply for the same.[10] It has already been noted in Chapter Six that consideration of the husband's action for *ta`a* will be suspended if the wife defends the action by claiming the existence of *niza` wa shiqaq*.[11] In the case material, 26% of the actions for judicial divorce on the grounds of discord and strife involved a *ta`a* action by the husband at some point or other, while 13% were raised by the wife directly in defence to a *ta`a* action.

Although in this and other respects the OLFR followed Maliki *fiqh* in introducing *tafriq* for discord and strife, it did not wholeheartedly embrace the body of Maliki rules on the subject and nor has the subsequent Jordanian legislation. In Maliki law, arbitration and judicial divorce for *niza` wa shiqaq* is closely connected to the wife's right to judicial divorce on the grounds of 'injury' (*idrar*) or cruelty. According to the Malikis, the establishment of injury or cruelty will give the wife the right to judicial divorce from her husband,[12] while if she cannot actually prove specific injury, but the discord continues, arbiters will be appointed and if reconciliation fails the spouses will be separated on the grounds of *niza` wa shiqaq*. These rules apply in the Law of Family Rights applied in Gaza. In the Jordanian law, however, even where severe injury is established, the court can only attempt reconciliation and then transfer the matter to two arbiters, who must similarly attempt reconciliation before finally recommending judicial divorce.[13] The first two clauses of Article 132 of the JLPS provide:

> a) If the application (for judicial divorce) is from the wife, and she establishes the husband's injury of her, the *qadi* shall do his utmost to effect reconciliation between them; if he fails, then he shall warn the husband to improve his behaviour with his wife and shall postpone the claim for a period of not less than one month, and if reconciliation has not occurred, then the matter shall be transferred to two arbiters.

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[10]Samara, 1987, 331. Compare the Egyptian legislation (Law no.25/1929 as amended 1985): Badran, 1981, 201.

[11]Al-`Arabi, 1973, 86, 9339/56 and 1984, 227, 18906/76.

[12]See Samara, 1987, 334.

[13]The 1996 JNCW-suggested amendments to the JLPS (Article 112) propose to redress this by introducing a clause closer to the Maliki rules. Entitled '*tatliq* for injury', the draft refers to 'grave injury caused to one [spouse by other] such as attempted murder, murderous beating, and addiction to alcohol and drugs'. Establishment of such injury would under the proposed text allow the *qadi* to rule for divorce without the need to appoint arbiters and go through the process of the apportionment of blame.

b) If the application is from the husband and he establishes the existence of *niza` wa shiqaq*, the *qadi* shall do his utmost to effect reconciliation between them. If he fails, he shall postpone the claim for a period of not less than one month in the hope of improvement, and after that, if the husband insists on his claim and reconciliation has not occurred, then the *qadi* shall transfer the matter to two arbiters.[14]

These clauses show the derivation from the Maliki rules on judicial divorce by requiring an application from the wife for injury (*idrar*), whereas the husband must prove the existence of discord and strife in his relations with his wife, rather than her injury of him. Establishment of injury does not give rise to a right to judicial divorce according to Hanafi opinion; the Hanafis held that the wife could only ask the *qadi* to restrain her husband's actions and to rebuke him for his injury of her.[15] Samara notes that while this part of the JLPS article is in line with the majority of the classical jurists who, unlike the Malikis, held that there was no *tafriq* for injury without arbitration, the JLPS gives no penalty that may be imposed on the husband for inflicting injury on the wife. Such penalties are now in the hands of other judges in the regular jurisdiction.[16]

Once the existence of injury or discord and strife has been established, and the *qadi* himself has failed to reconcile the spouses, the claim is always postponed for at least a month, in accordance with the above clauses, in the hope that the situation will improve.[17] If it does not, at the end of that period, the *qadi* will appoint two arbiters to perform the task of arbitration between the spouses. In the OLFR and the JLFR, this pair were referred to as the 'family council', since if possible they are chosen from the spouses' families. Article 132(c) of the JLPS provides that:

The arbiters shall be men who are just and able to effect conciliation, one of them being from her family and one from his so far as this is possible, and if

[14]Compare Article 108 of the 1987 Draft Arab Unified Law, which provides for the *qadi* to separate the spouses where the injury of either one by the other is established, while if it is not established but the discord continues, two arbiters shall be appointed to follow the set process for arbitration, culminating in separation for *niza` wa shiqaq*. See also Abu Zahra, 1957, 421.

[15]`Abdel Hamid, 1984, 303.

[16]Samara, 1987, 334–335.

[17]This was introduced in the JLPS. Articles 96 and 130 of the OLFR made reference to such a waiting period.

not then the *qadi* shall appoint them from among men of experience, justice and ability to effect conciliation.

The characteristics thus required in the arbiters are fairly standard, although Samara points out that the law should have included that they be Muslims since arbitration is a form of litigation, and `Abdel Hamid notes in general that the Shafi`is required them to be males by dint of established practice rather than law.[18] The arbiters must attempt to reconcile the spouses, but if they fail, they shall recommend to the *qadi* that the spouses be separated with financial responsibilities according to the proportion of blame attributed to each by the arbiters as a result of their investigation of the discord.[19] The ability of the arbiters to recommend judicial divorce, rather than merely to attempt reconciliation, was the Maliki view, which was not accepted by the Hanafis, and which found only scattered support from the Shafi`is and Hanbalis. The JLPS requires the arbiters to set out their investigations and conclusions in a signed report to the court, and makes the following provisions (Article 132 (e) and (f)) in the event of failure to reconcile the spouses:

> e) If the two arbiters fail to effect conciliation, and it appears to them that all the wrong is from the wife, they shall decide on judicial divorce between the spouses for such compensation (*`awd*) as they consider appropriate, provided it be not less than the dower and *tawabi`*. If the wrong is all from the husband, they shall decide on judicial divorce between the spouses by a final *talaq*, provided that the wife may seek from him all her marital rights, just as if he had divorced her himself.
> f) If it appears to the two arbiters that the fault is from both spouses, they shall decide on judicial divorce between them for a portion of the dower in proportion to the fault of each. If the matter is unclear, and they cannot assess the proportion of blame, they shall decide on judicial divorce with such compensation as they see fit to take from the spouses.

The use of the phrase 'judicial divorce for compensation' here, as in the JLFR, replaces the use of the term *mukhala`a* in Article 130 of the OLFR, since it is held by all the classical schools that the divorce process of *mukhala`a* can be effected only by the husband of his own free will. While the

[18]Samara, 1987, 332–333; Abdel Hamid, 1984, 303.
[19]Samara, 1987, 332. Compare Layish, 1975, 206 and 168–169.

result is the same, there is a distinct legal difference between the husband's pronouncement of a final *talaq* in exchange for the wife waiving all or some of her financial rights, and the pronouncement of a final *talaq* between the spouses by the *qadi* acting on the report of the arbiters, for compensation to be paid by the wife in the form of all or part of her dower. Similarly, Article 132(g) of the JLPS refers to the decision (*qarar*) of the arbiters which is acted on by the *qadi*, rather than the arbiters' 'ruling' (*hukm*) as in Article 130 of the OLFR. While the *qadi* has to act on the decision of the arbiters, so long as the process leading up to such decision is in accordance with the law, it is he who makes the formal ruling for judicial divorce (JLPS Article 132(i)).

The remaining clauses of Article 132 of the JLPS add procedural clarifications to the culmination of the arbitration process. Clause (h) provides that where it is the wife seeking *tafriq* and the arbiters award compensation against her to the husband, the wife must guarantee payment of the sum before the formal submission of the decision to the court.[20] Clause (g) deals with the eventuality of the arbiters being unable to agree on their report, providing that the *qadi* may either appoint new arbiters or add a third to their number and permit the decision to be by majority.

Article 132 is the longest article in the JLPS, and its length is indicative of the complexity of the progress of claims made under its terms from initial registration to completion. The complications begin with the necessity of proving the existence of injury or *niza` wa shiqaq* where the other spouse denies it. A breakdown of the case material shows that of a total of 23 claims over the three years, seven failed at this first hurdle.[21]

Niza` wa shiqaq may be established on the basis of word or deed; psychological or emotional cruelty is, in law, equally admissible with physical abuse as grounds for an application for judicial divorce. In the Gaza Strip, where the Maliki rules on divorce for injury (without the court appointment of arbiters) are part of the law, the kind of injury that constitutes grounds for a woman to seek divorce for injury under the terms of the Law of Family Rights has been described as including her husband 'robbing her, beating her, or harming her in any intolerable manner, or forcing her to do something forbidden in word or deed.'[22] Dawoud el-Alami defines injury

[20]This is a procedural clause described as 'good *fiqh*' by Samara, 1987, 335.

[21]Claims: 23; claims established 13; not established 7; dropped by the parties 3. In the later WCLAC material, of 17 claims in the four West Bank courts studied, 10 resulted in divorce.

[22]Hassaniyya, 1994, 59–60.

by a man of his wife in the Maliki view as 'any wrongful action toward her which is considered deviant according to society and about which the wife complains.'[23] The rules of custom (time and place) thus clearly affect the legal definition of injury, and it is also apparently relative, according to the nature and personality of the spouse, so something that may constitute injury to one may not be considered injury to another. In the West Bank, Idrisi gives as general examples of injurious behaviour by the husband physical cruelty and violence, verbal insults, neglecting his responsibilities towards his wife, and bad habits such as drinking alcohol and gambling; any of these characteristics, in his opinion, can cause *niza` wa shiqaq* between the spouses.[24] The main form of non-physical abuse referred to in the claims in the case material was insults by the husband, but this was almost always accompanied by claims of physical abuse as evidence of injury.[25] Other claims included references to *hajr*, (sexual) desertion, considered further below. In the only claim that made no accompanying reference to physical abuse, discord and strife was established by a charge of theft made against the wife by the husband in progress in the regular court system.

Where physical abuse is claimed by the wife, there may be problems in proving it. Hearsay evidence by witnesses is not admitted, and where there are witnesses, they will be asked to testify to specific occasions, dates and times.[26] The wife is often unable to prove the injury and may have to ask for her husband to be sworn the oath of denial.[27] In two claims in the case material, the wife's claim was supported by evidence from the regular courts where the husband had been convicted and sentenced to prison for physical assault on his wife.

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[23]El-`Alami, 1992, 99.

[24]Idrisi, 1986 ('Marriage and Divorce in Islam', Part 6). In a 1984 case, the Amman Appeal Court returned a ruling for judicial divorce to the first instance court for further investigation on the grounds that although three witnesses had established that the husband was addicted to alcohol, they had not explicitly stated that this injured the wife. 25049/1984, Dawud, 1999. I, 268. In another case, the Court accepted that the husband's practice of anal intercourse with his wife was 'forbidden and condemned by the *shari`a*' but held that 'in and of itself it does not entail judicial divorce of the spouses'. 29410/1988, Dawud, 1999, I, 274.

[25]Compare Layish, 1975, 169.

[26]See Al-`Arabi, 1984, 92, 23765/83. Hearsay evidence of physical abuse was explicitly dismissed in 23765/1989, Dawud, 1999, I, 275.

[27]In one of the claims in the case material, the wife failed to ask that the husband be sworn the oath of denial and her claim was accordingly dismissed.

The other situation in which *niza` wa shiqaq* might be established by the wife is in the course of marital disputes arising after her husband has taken a new wife. The JLPS does not take the position that a subsequent marriage by the husband without the consent of his first wife will necessarily be considered an injury to the first wife.[28] The woman would have to establish this in court, and no examples in the case material or in available published decisions indicate how the courts would evaluate such a claim in the current day West Bank. The fact that only one case was found where the husband applied for judicial divorce on these grounds also made it difficult to assess the incidents a man might bring forward to prove the existence of *niza` wa shiqaq*. In the one case where the husband applied, he was unable to expound the details of his claim when asked to do so by the *qadi*, and his claim was therefore dismissed. However, if a man fails to establish the existence of discord and strife, but continued to return to court to repeat the same claim, the *qadi* might eventually hold *niza` wa shiqaq* to be established by the fact of this repetition. While no case material was found on such cases, this is in line with the original Maliki rules on *tafriq* for *niza` wa shiqaq* where injury has not been established. The jurisprudence of the Amman Appeal Court has however established that it is not enough for a woman to repeat her claim; she is bound to establish that she has suffered injury, placing inevitably a greater burden on the female petitioner.[29]

Once injury or discord and strife have been established, the *qadi* must himself try to reconcile the spouses and then postpone consideration of the claim for a month in the hope that reconciliation may occur in the meantime. In previous times, it was possible for the husband to persuade his wife to attempt reconciliation (*sulh*) and thereby cause her claim to lapse, since it was held that the possibility of reconciliation contradicted the initial claim that continued marital life was impossible. An Amman Appeal decision of 1980 dealt with this position, and held that reconciliation had to have actually taken place before the claim was dismissed.[30]

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[28]This is the position, for example, taken by the courts in India; Hodkinson, 1984, 177. In the 1979 Egyptian legislation, this position was adopted, but the 1985 replacement legislation leaves it to the *qadi*'s discretion to decide whether or not a wife has been harmed by her husband's marriage; Hijab, 1988, 35.

[29]27413/1987, Dawud, 1999, I, 271.

[30]Al-`Arabi 1984, 85, 21764/80. Compare the earlier position in al-`Arabi 1973, 86, 10029/58. In an early claim, a wife sought separation on the ground that the husband beat her and that continued life together was not possible. The husband pointed out that he had been awarded *ta`a* against the wife, and she then stated that if the husband gave

If reconciliation does not occur, as was the case in all the claims in the case material, then the *qadi* asks the spouses to nominate persons from their families who would be suitable arbiters.[31] In some cases, the lawyer of each spouse will object to the arbiter nominated by the other, so the court appoints others of its choice; in other cases, the proposed family arbiters may be appointed. However, in none of the claims studied did the arbiters succeed in reconciling the spouses; and it may be that in at least some cases, once informal mechanisms of *sulh* have failed and the court appoints arbiters, their role in assessing relative proportions of blame is of greater immediate significance than their court-endorsed *sulh* function.

When the arbiters come to assessing where the blame lies, it is uncommon for them to find that all the fault lies with one spouse. Of the thirteen claims in the case material where judicial divorce was made on the grounds of *niza` wa shiqaq*, in only two was the wife held to be blameless, and in two other cases the wife had to pay the husband compensation on top of forfeiting her dower, indicating that she had been found entirely to blame. In the remaining nine cases, the wife was held to be more at fault than the husband in four cases, to be equally at fault in two and to be less at fault but still blameworthy in three.[32]

The process of arbitration is lengthy, and added to the difficulties in establishing *niza` wa shiqaq* and then the month's postponement by the *qadi*, means that completion of a claim for judicial divorce on these grounds may take up to six months or more from the time of registration.

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her the gold she was due from him, they would perhaps be able to continue together. The husband denied he owed her any gold, but the court in any case dismissed her claim because of her admission of the possibility of a continued relationship. The later position was upheld in, for example, 35901/1993, Dawud, I, 285.

[31]Al-`Arabi 1973, 88, 11825/61 and others.

[32]Compare Layish 1975, 170, who notes that in Israel where separation occurred under the terms of OLFR Article 130, the arbiters usually found the wife to blame. Two examples from the case material may serve to show how these calculations are made in practice. In one, the arbiters decided on *tafriq* with three fifths of the blame on the wife and two fifths on the husband. The wife had received a prompt dower of a hundred dinars and was due fifty dinars of *tawabi`* not yet received and the deferred dower of one hundred dinars. The *qadi* separated the two by a final *talaq* on the condition that the wife would not seek any of her remaining dower or *tawabi`* from the husband. In the other, the arbiters assessed that two thirds of the blame lay with the husband and one third on the wife. The prompt received dower was eleven hundred dinars and the deferred dower a hundred dinars, so the wife had to pay the husband 300 dinars on divorce, over and above foregoing her deferred dower.

In addition, since the wife usually ends by having to forfeit at least some of her dower, situations that could theoretically be the basis of a claim for judicial divorce on the grounds of *niza` wa shiqaq* may give rise rather to a *mukhala`a* divorce. It seems that an application for judicial divorce on grounds of *niza` wa shiqaq* will usually only be resorted to by a woman where the husband is refusing to agree to a *mukhala`a* agreement at all or to reasonable terms for such an agreement.

The complications of a claim for judicial divorce on the grounds of *niza` wa shiqaq* derive from the fact that these grounds are not 'objective', such as in the case for example of judicial divorce for non-payment of maintenance or for a physical condition or disease. The uncertain outcome, inevitable exposure of the details of the couple's intimate relations, and the length of time needed to process the claim combine to pose potential obstacles to those seeking a divorce from the outcome of the claim. Of the three areas included in the study, applications for this type of judicial divorce were most common in Hebron, where customary tribal arbitration (*al-qada' al-`asha'iri*) is still a common method of dispute settlement.[33] By way of comparison, the WCLAC research in the Gaza Strip courts found no claims submitted on the grounds of *niza` wa shiqaq*, and also none on the grounds of injury.[34]

7.2.2 Absence and Injury

Maliki rules are also drawn on in the JLPS provisions on judicial divorce for absence and injury, although in one respect the Hanbali view is

[33]Layish, 1975, 170, notes that applications for separation on these grounds is also not very common inside Israel, occurring mainly among the Bedouin, where it was familiar due to the bases of arbitration in tribal law, and among more educated urban women. `Ayyush finds that claims for divorce on the grounds of *niza` wa shiqaq* accounted for 16.4% of all petitions for litigious divorce over the years 1973–1983. This accords fairly closely with the findings of this study, for although applications on these grounds accounted for 23 of the total 98 claims for *tafriq* in the case material, this becomes 17.7% when the claims for proof of *talaq* (*ithbat talaq*) and dissolution (*faskh*) for irregularity of the contract are included in the total, as they are in `Ayyush's statistics.

[34]By contrast, Mir-Hosseini, 1993, 102, found claims for divorce on the basis of injury to be second in incidence only to those on the grounds of absence and injury in two Moroccan courts. Shaham, 1994, 25, found 50% of applications for judicial divorce in Egypt 1920–1955 to have been made on the basis of injury, with general injury forming a 'residual ground' for divorce. See `Ayyush, 91, table 18; and also Antoun, 1980, 461.

followed. The specific injury caused by the husband's prolonged absence was first made grounds for judicial divorce in the West Bank area in the OLFR of 1917. The Ottoman provisions were considerably modified in both the JLFR and the JLPS. Closely connected to the concept of judicial divorce for absence and injury are those of *hajr*, desertion, and of the missing person (*mafqud*).[35] The rules governing judicial divorce for absence and injury are set out in Articles 123–125 of the JLPS:

> 123. If the wife proves her husband's absence (*ghayba*) from her or desertion of her (*hajr*) for a year or more without reasonable excuse, and his place of residence is known, the wife may apply to the *qadi* for judicial divorce if she has been injured by his distance from her or abandonment of her, even if he has property from which she may obtain maintenance.
> 124. If it is possible for letters to reach the absentee, the *qadi* shall grant him a respite and warn him that he will divorce his wife from him if he does not come to live with her, or move her to live with him, or divorce her; then if the period passes and he has done none of these things and there is no reasonable excuse, the *qadi* shall separate the spouses by a final *talaq* after swearing the wife the oath.
> 125. If the husband is absent in a known place but letters cannot reach him, or his place of residence is unknown, and the wife proves her claim with evidence and swears the oath in accordance with her claim, the *qadi* shall divorce her from him with no warning being given or respite being granted; if she is unable to prove her claim or declines to take the oath, the claim shall be dismissed.

The absence of the husband for a year or more and the wife's resulting injury have become fairly standard grounds for judicial divorce in the legislation of Arab states. The JLPS provisions make only one substantial modification (adding *hajr*) to the former provisions of the JLFR, where a position wider than the original OLFR provisions had been adopted.[36]

It seems likely that the JLFR provisions were modelled on Egyptian legislation, specifically Law no.25/1929 which contained the same provisions. With regard to the Egyptian rules, Abu Zahra makes an observation that applies equally to the Jordanian texts: that rules are not entirely Maliki, since the Malikis made no distinction between absence for a good reason

[35]Also connected is separation on the grounds of the husband being sentenced to three years or more in prison, discussed below.

[36]JLFR Articles 89 and 90; Article 127 of the OLFR had treated both *tafriq* for absence and injury and the rules regarding the wife of a missing man.

and absence without such reason.[37] It was the Hanbalis who made this distinction; in their opinion, if the absence was for a good reason and therefore free of any intention of injury, it could not be grounds for judicial divorce. Thus, absence necessary in the cause of *jihad,* commerce, education and the like, where it was not possible for the wife to accompany her husband, would not give rise to grounds for judicial divorce. The Malikis did not distinguish between the reason for the absence since the effect on the wife was the same; the West Bank courts (and the Amman Appeal Court) insist on clarification that the absence was with no reasonable excuse.[38] Besides this point, however, once the fact of the absence is established, the injury to the wife is more or less taken for granted by the jurists; references are made to the awkward social situation of the wife left 'suspended', neither really married nor divorced, and the threat that is perceived to be posed to the morality of a woman left alone over a prolonged period.[39] This assumption is also raised in discussions on the reason for granting judicial divorce for *hajr.*

This assumption of injury means that in practice it is not difficult for the wife to prove her claim for judicial divorce. However, in the *shari`a* courts of the West Bank, if in submitting her petition the wife omits to state that she has been injured by her husband's absence, her claim will be dismissed. The text of the claim must state that the absence was for no good reason and without her consent; if it is proved that she agreed to the husband's absence, her claim will be dismissed. Furthermore, the wife must make it clear that her husband left her, and not she him; thus, if the spouses were together abroad, and the wife returned home to the West Bank but the husband did not follow, she could not then petition for judicial divorce for absence and injury, nor yet if she has in fact consented to his absence.[40] The

[37]Abu Zahra, 1957, 429.

[38]Samara, 1987, 320. For 'good reasons' for absence, see al-`Arabi 1973, 69, 9484/57 and 1984, 77, 21492/80; the decisions state that if the man went abroad for reasons of work, this is a legitimate pretext, while if the wife agreed to his absence she may not later seek separation on grounds of his absence. Compare Shaham, 1997, 128–129, on the various positions of Egyptian *qadi*s on a justified excuse.

[39]Samara, 1987, 318–319; Abu Zahra, 1957, 428. Compare Layish, 1975, 166.

[40]Unless, in the first case (possibly), she had inserted a stipulation in her marriage contract to the effect that she should live in the West Bank. Appeal Decisions 8775/1955, 13826/1965, 15952/1969, Dawud, 1999, I, 226–227. More recently, see 43689/1997, Dawud, 1999, I, 249. Dawud, 1999, I, 225, describes the task of dealing with such situations as a 'grave social duty'.

claim must also clarify whether the husband's whereabouts is known or not. If the wife or her lawyer was careful in the wording of the application regarding the above points, and she had competent witnesses to support her statements to the court (necessary in the absence of the husband), the progress of her claim through the court was, in the case material, fairly straightforward. Of a total 48 applications in the case material, 42 were granted, five were dismissed, and one was dropped. Of the five claims where *tafriq* was not granted, two were dismissed because the wife had left the husband rather than he her,[41] one because the requisite year had not yet passed, and two because of inadequacies in the wording of the claim and the testimony of the witnesses.[42]

In most cases, the wife submitted the claim after an absence by the husband of one to four years, but there were exceptions where the wife waited between ten and eighteen years before applying for judicial divorce. In none of the claims was there mention of the husband being contacted and a respite being granted, and the vast majority stated explicitly that the absent husband was 'of unknown whereabouts' somewhere abroad — that is, outside Jordan in the 1965 material, or outside the West Bank after the Israeli occupation. While Article 123 of the JLPS does not state that the 'absence' must be abroad, this appears to be a general assumption.[43] However, the JLPS did introduce into its provisions on absence and injury one major addition to the JLFR articles, which allows the woman to seek judicial divorce if the husband is even in the same town as her — that is, the grounds of *hajr*, when the husband stops physically living with his wife. *Hajr* can be translated as desertion, but it carries a clear sense of sexual desertion. Commenting on the difference between *ghayba* and *hajr*, Abu Zahra notes that in the 1929 Egyptian legislation, *ghayba* means absence abroad, while 'if the husband is in the same area and leaves his wife for this period, then judicial divorce in this case will be for [. . .] injury, since this is *hajr* and involves

[41]See also al-`Arabi 1973, 71, 13970/65.

[42]In one, the application was initially granted by the first instance court but the Appeal Court found that the wife had not stated whether or not the husband had left for 'unknown parts', and that there were irregularities in the testimonies of the witnesses.

[43]See Samara, 1987, 318; Abu Zahra; 1957, 427. Some *qadis* in the West Bank, however, stated that the *ghayba* could be inside the West Bank, although in another district. In Al-`Arabi 1984, 77, 18123/74, a distinction is made between absence (that is, outside the wife's area of residence) and *hajr* (where the husband stops living with his wife).

intentional injury to the wife.' On the other hand, an early decision from the Amman Appeal Court noted that *hajr* could occur in or out of the marital home, suggesting that sexual desertion within the home does indeed count as grounds in this regard.[44] Shaham notes that *hajr al-firash* ('abandoning the [marital] bed') was a 'typical form of injury' included in applications for divorce in the Egyptian material he examined. As with the absence of the husband abroad or in a different area, there is the sense of the risk to a woman's morality (in terms of her social and sexual conduct) in such circumstances, particularly in the case of young women.[45]

A claim for judicial divorce on the grounds of *hajr* in the Jordanian legislation has the same requirement of injury as that for *ghayba*, and the presumption of the injury involved in these circumstances is based on the same premises. Proving physical desertion by a husband who is present in the area may however be more difficult than establishing his physical absence in terms of *ghayba*. Certainly claims for *hajr* are very rare; none were found in the case material studied, and `Ayyush's survey shows that there was only one claim for judicial divorce made on the grounds of *hajr* in each of the three courts in the years covered by his survey after the provision was introduced (i.e. 1976–1983).[46]

Although rare in practice, there are a number of not uncommon situations in which grounds for an application for judicial divorce on the grounds of *hajr wa darar* might arise. Idrisi for example notes that if the husband had sought *ta`a* but been refused because his dwelling was found to be non-*shar`i*, then if he had not prepared a suitable *maskan* for his wife within a year, the wife could raise a claim for judicial divorce on the grounds of *hajr*. Certainly the Amman Appeal Court has established the other side of this principle — that a claim for *tafriq* is suspended if the husband applies for *ta`a*, since if it is established that the man wishes to move her at his expense to live with him, and that the dwelling is *shar`i*, and that there is no *shar`i* obstacle to an award of *ta`a*, then there remains no scope

[44]Abu Zahra, 1957, 427. Dawud, 1999, I, 226, 7559/1955. Ma`ruf, 1985, 25, listed the laws of Algeria, Morocco and Libya as, at that time, allowing for divorce in the event of four months of *hajr*.

[45]Shaham, 1997, 122.

[46]`Ayyush, 91, table 18, puts claims on the grounds of *hajr* as constituting 2.3% of all litigious divorce in all the West Bank courts over 1976–1983, with a total of 18 claims in all, eight of which were heard in Nablus and five in Jerusalem.

to hear the divorce petition and it would therefore be thrown out.[47] Logically, these grounds might also be available to a woman who has stipulated that she should live in a certain area and whose husband subsequently moves out of that area, or to a woman who has stipulated that she is to live in a house separate from her in-laws in the case of her husband not preparing such a house; consideration of this has been made above in Chapter Four.

It remains to note the connection with the concept of the missing person (*mafqud*). This connection is seen clearly in the OLFR provisions of judicial divorce for absence and injury. While Article 126 of the OLFR allowed the wife to seek judicial divorce where her husband was absent or missing and she could not obtain maintenance from him,[48] Article 127 of the OLFR dealt with claims raised by the wife of an absentee where maintenance was available, postponing the application for divorce for four years from the date the *qadi* 'despaired' of getting any news of the absentee, or one year after the return of the armies if the man went missing in time of war.[49] In both cases, on getting the divorce, the wife was to perform the *`idda* of the widow.

The JLFR, while introducing clearer separate provisions on judicial divorce for absence and injury, added to the article regarding judicial divorce from a missing person a requirement that the wife be injured by the situation, and postponed the claim for a period of four years from the date the application was made to the court, rather than from the time the *qadi* despaired of finding news of the missing man.[50] The JLPS separates even more clearly between the 'absentee' (*gha'ib*) and the 'missing person' (*mafqud*), and postpones the claim from the date of the missing person's disappearance, for four years in times of stability, and one year 'in circumstances where the death of the missing person seems probable, such as when he disappeared in battle or after an air raid or earthquake or such-like . . .' (Article 131). Samara calls this 'judicial divorce for *faqd* (loss/disappearance)' and notes that it is normal Maliki law.[51]

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[47]Idrisi, 1986 ('House of Obedience'). 17568/1973, Dawud, 1999, I, 227–228; and in more detail, 18004/1973, at 228–229.

[48]Article 91 of the JLFR parallels this article; the JLPS omits it, resulting in a clearer distinction between separation for absence and injury, and separation for the non-payment of maintenance.

[49]See Schacht, 1979, 211, for his comments on the origins of this principle. Layish, 1975, 165–166, notes the continued use of this provision in Israel.

[50]Article 92 JLFR.

[51]Samara, 1987, 322–323, notes that the majority of Shafi`is and Hanbalis argued

In contrast to the OLFR and the JLFR, the JLPS makes no reference to the *`idda* to be performed by the wife who obtains *tafriq* under the terms of Article 131 — leaving it, by default, the *`idda* of divorce — nor does it discuss the possibility of the missing husband returning after his wife has obtained judicial divorce on the grounds of his disappearance and has remarried. The OLFR and JLFR both explicitly stated that should such an eventuality occur, the wife's subsequent marriage was not to be dissolved.[52] In the final Chapter of the 1976 law, provisions are included regarding a decree of death made upon a missing person, which involve the same terms regarding circumstances of the disappearance and the relative time postponements (Article 177). The following articles (178 and 179) provide that when such a decree is made, the wife shall perform the *`idda* of death, and that if she then remarries and it subsequently turns out that her first husband is in fact still alive, her later marriage shall be dissolved only if it has not been consummated. A strict separation is thus made in the JLPS between the passing of a death decree on a missing man, requiring his wife to perform the *`idda* of death, and the application of the wife of a missing man for judicial divorce on the grounds of his disappearance, followed by the normal *`idda* of *talaq*.

There were no claims for *tafriq* on the grounds of *faqd* in the case material (nor in the later WCLAC material), but there were two claims submitted in 1985 by descendants seeking a decree of death on a missing man according to the terms of Article 177. One concerned a man who had left for Egypt in the 1950s and had never been heard of since, and the other a man who had left for Amman in 1970, the time of the 'Black September' battles in Jordan. Both claims were granted, enabling the estates of the missing men to devolve upon their heirs.

7.2.3 Non-Payment of Maintenance

Judicial divorce on the wife's initiative for the non-payment of maintenance by an absent husband was first made available in the area by a spe-

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that the marriage of a man who disappeared in normal circumstances ended only on proof of death, while his disappearance in abnormal circumstances required a postponement of four years, followed by the *`idda* of death.

[52]OLFR Article 128; JLFR Article 94.

cial decree issued by the Ottoman Sultan in 1915, followed two years later by inclusion in the OLFR.[53] The JLFR and JLPS widened the basic Ottoman rules to provide a recourse also for the wife whose husband is neither absent nor missing but still will not or cannot pay maintenance. In contrast to the Hanafis, the Malikis, Shafi`is and Hanbalis all allowed the wife to seek judicial divorce for the non-payment of maintenance, although with significant differences in the detailed rules between the schools.[54] Although the provisions of the JLPS largely reproduced those in the previous law, the Explanatory Memorandum to the JLPS nevertheless repeated the reasons for their inclusion: the rejection by the Hanafis of judicial divorce in this case led to husbands delaying the payment of maintenance to their wives and thus gave rise to injury, and it was therefore to the benefit of the wife that the opinion of the majority of the classical jurists was adopted in Articles 127 and 128 of the Jordanian law.[55]

The Explanatory Memorandum did not detail which rules were taken from which school and while the general picture is a Maliki one, in some of the details Shafi`i and Hanbali opinions have been adopted. This is seen, for example, in the fact that the law does not discuss a situation where the wife married her husband without knowing of his poverty, or consented to remaining with him in poverty when it occurred later on. In such a situation, the Malikis did not allow judicial divorce, while the Shafi`is and Hanbalis on the contrary held that such knowledge or consent did not remove the

[53]Anderson, 1951 ('The Dissolution of Marriage'), 272; and 1951 ('Competence and Procedure'), 38.

[54]For the various reasoning, see Samara 1987, 324–325, and Abu Zahra, 1957, 407–409. The broad Hanafi argument is that the *qadi* can punish the prosperous husband and oblige him to pay maintenance, and can order the wife to obtain loans against a poverty-stricken husband or oblige him to allow her to work. The dominant opinions of the other schools argued that since the wife is allowed to seek separation if her husband is impotent, she should be able to seek it for the non-payment of maintenance, because firstly, like impotence, it causes injury to the wife, but while the human body can survive without sexual intercourse, it cannot survive without food, and the injury for the non-payment of maintenance is thus potentially greater; and secondly, the injury arising from the husband's impotence is shared by both spouses, since no intercourse can occur between them, while the injury caused by the non-payment of maintenance is shouldered by the wife alone, and if a shared injury gives rise to separation, then so also must an injury borne entirely by the wife.

[55]Explanatory Memorandum to the JLPS, 5.

wife's right to judicial divorce.[56] Various factors that were considered by all the schools include whether the husband is prosperous (*musir*) or poor (*mu`sir*) — that is, able or unable to pay maintenance; whether he has property on which a maintenance order can be executed; and whether or not he can be contacted.

The following article of the JLPS sets out the current position in Jordanian law with regard to the husband who is in the same country as the claimant wife:

> Article 127: If the husband fails to maintain his wife after a ruling has been made against him to do so, then if he has property on which the maintenance order can be executed, such shall be done. If he does not have such property, and did not state whether he is poor or prosperous, or said that he is prosperous but persists in not paying maintenance, then the *qadi* shall divorce her from him immediately. If he claims he is unable to pay it, but does not prove this claim, she shall be immediately divorced from him. If he does prove his inability, he shall be granted a respite of not less than one month and not more than three, and if he has not maintained her, she will be divorced from him after that.

The only major amendment made by the JLPS to the parallel provision in the JLFR was to extend the respite given to the poverty-stricken husband, which in the 1951 legislation was a maximum of one month.[57] With regard to the absentee husband, the law makes the same provision for maintenance to be obtained from property, but where there is no such property, the rules are similar to those governing judicial divorce for absence and injury. Where the husband can be reached by letter, the *qadi* gives him an ultimatum of either sending her maintenance or coming to maintain her in person, and if he does neither then the *qadi* separates him from his wife. If the husband cannot easily be reached by letter, or is of unknown whereabouts, and it is proved that he has no property on which a maintenance order could be executed, the *qadi* separates the spouses without giving the husband the ultimatum.[58]

In setting out these rules, the Jordanian legislator made a difference between the man who cannot pay maintenance, and the man who is able to but refuses to fulfill his obligations to his wife. The Hanbalis and Shafi`is had not provided for judicial divorce in the latter case; Samara notes that

[56]Samara, 1987, 326.

[57]JLFR Article 98.

[58]Article 128 of the JLPS; compare Article 99 JLFR.

the result for the wife is the same, and that in his opinion the option of judicial divorce is even more fitting than in the case of inability since the man's refusal to pay involves intentional injury to the wife.[59] Abu Zahra takes a different position, observing that the prosperous husband can be forced to pay maintenance by the *qadi*, so *tafriq* should not be available; as for inability to pay, he appears critical of women who would seek separation simply because their husbands had fallen upon hard times.[60]

In contrast to other forms of judicial divorce performed by the *qadi*, judicial divorce for the non-payment of maintenance constitutes a revocable *talaq* if it occurs after consummation; if it occurs before consummation, then like a normal *talaq* it falls final. These are the Maliki rules; the Hanbalis and Shafi`is hold that the *qadi*'s ruling for judicial divorce constitutes *faskh*, judicial dissolution.[61] Unlike unilateral *talaq*, however, the revocation of the *talaq* pronounced by the *qadi* for the non-payment of maintenance is conditional upon the husband establishing that the reason for the judicial divorce (i.e. the injury suffered by the wife due to being deprived of her maintenance) has ceased to exist. Article 129 of the JLPS provides that:

> The *talaq* pronounced by the *qadi* for the non-payment of maintenance falls revocable if it occurs after consummation, but final before consummation. If the *talaq* is revocable, the husband may bring his wife back during the *`idda* if he establishes his prosperity by paying three months' worth of the back maintenance that has accumulated, and by being prepared actually to maintain her during the *`idda*. If he does not prove his prosperity by paying the maintenance and is not prepared to maintain her, then any revocation of the *talaq* is invalid.

The JLPS made revocation more difficult than it had been under the terms of the JLFR, which had required the husband only to prove his ability to pay and actually to maintain his wife during the *`idda*.[62]

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[59]Samara, 1987, 327.

[60]Abu Zahra, 1957, 413–414; he appears to disapprove of the inclusion in the 1920 Egyptian legislation of these provisions. He also notes that if the wife did not know of her husband's poverty before her marriage, the Hanafis provide for separation on the grounds of the lack of *kafa'a*.

[61]Compare also Layish, 1975, 211. The *talaq* also falls final where there has been valid seclusion (*khalwa*) between the spouses, but no actual consummation (*dukhul*). In a 1986 case in a West Bank court, the *qadi* awarded a revocable *talaq* to a woman in this situation; the Jerusalem Appeal Court corrected this to a final *talaq*.

[62]JLFR Article 100.

The submission by the wife of a claim for judicial divorce on the grounds of non-payment of maintenance begins with the obtaining of a maintenance award against the husband, since it is a prerequisite in the claim for judicial divorce that she establish that she obtained such a ruling but that the Execution Offices have been unable to execute it.[63] Once the maintenance award is obtained, the wife will usually wait for a number of months to prove non-execution, and to ensure a larger accumulation of back maintenance, before submitting her claim for judicial divorce. The only defence a man may make to the judicial divorce claim is that his wife is not due maintenance — that is, that she is *nashiz*.[64] In none of the claims studied was this defence made.

The majority of applications for judicial divorce on the grounds of non-payment of maintenance in the case material were made against absentee husbands of unknown whereabouts.[65] In such a claim, the wife must produce her marriage certificate and swear the oath to the fact that she is neither *nashiz* nor divorced, to show that she is due maintenance; she must also produce the maintenance award that she has obtained against her husband and has been unable to execute, and state explicitly in her claim, to be proved by witnesses, that the husband has no property from which she could obtain maintenance.[66]

In the case material, of a total of 24 applications, 21 were granted and three dismissed. The reasons for dismissal were various. In one, the husband defended the claim by stating that he was willing to pay the maintenance claimed by his wife, and although he failed to attend later sessions, the claimant declined to state categorically that he did not have property from which she could obtain maintenance. Another claim was dismissed when the husband came to the court session and paid three months of the accumulated maintenance due his wife. The third claim was initially

[63]See al-`Arabi 1984, 70, 21634/80. In the majority of cases, the maintenance award is made under Article 76 of the JLPS providing for the award of maintenance against an absentee husband.

[64]Al-`Arabi 1973, 83, 13839/65.

[65]In 1985, for example, in only one of the sixteen claims did the husband actually attend the court sessions. In eleven, the husband was stated to be of unknown whereabouts in various other continents; in two the husband was in Jordan, and in the maining two cases, although the man was not stated to be of unknown whereabouts, the case was heard in his absence.

[66]See al-`Arabi 1984, 70, 21504 and 21808/80.

granted by the first instance court but returned for further consideration by the Appeal Court due to inconsistencies in the testimony of the witnesses. Procedural irregularities, such as mistakes in the notification process, the *wakala* appointing the woman's lawyer, or the wording of the oath were responsible for dismissals of other claims seen in the court records but not included in the case material.

The increase in the number of applications in the case material for divorce on these grounds, as compared to those on grounds of absence and injury, was due almost entirely to the startling rise in such claims in the Ramallah *shari`a* court, which nearly doubled from 1975–1985 (from seven to thirteen claims). `Ayyush's study shows that this was the most common basis for applications for *tafriq* in the Ramallah court over the period 1973–1983[67] and it appears to be linked to the large numbers of men who left the Ramallah area to seek work abroad over that and the subsequent period. A man might marry in the West Bank before leaving to seek work aboard, or marry on one of his return visits; the case material showed claims from a number of women married in such circumstances, who had either been left by their husband in his family's home and tired of waiting for him to return, or had gone with their husband and returned alone, no longer willing to live abroad with him.[68] In the latter case, the wife could not seek *tafriq* for absence and injury since technically it was she who had left her husband.

For a dissatisfied wife intent on seeking *tafriq*, a major advantage of a claim made on these grounds over one for absence and injury is the shorter amount of time needed to obtain a divorce. Judicial divorce for *ghayba wa darar* requires a continuous absence of at least one year, while *tafriq* for non-payment of maintenance against an absent husband can be obtained

[67] `Ayyush, 91, table 18. Compare Layish, 1975, 166.

[68] In an unpublished article prepared in 1986, the *shar`i qadi* Shaykh Hiyan al-Idrisi was critical of such arrangements, made by the family of the husband, who are keen to maintain strong links between their son and the West Bank. This includes situations where the family persuades him to authorise his marriage to a bride of their choice in his absence (by *wakala*) and send the bride out to live with him. Cainkar, 1990, 56, notes with regard to Palestinian women coming to the United States that: 'the overwhelming majority of Palestinian women arrive here as the wives, daughters or mothers of Palestinian men . . . Many Palestinian women in the United States do not have family here. In traditional Palestinian society, a woman's family provides her with support in both her work and her relations with her husband . . . A Palestinian woman without family loses these sources of support; if she is unhappy with her situation, she has nowhere to turn.'

as soon as the wife can prove non-execution of a maintenance order. The case material for 1985 shows some claims for *tafriq* being granted within three months of the wife first obtaining the maintenance order against her absent husband. The increase in the number of claims must also be put in the context of circumstances arising as a result of the occupation; after 1967, the speedier procedures against an absent husband applied to all men outside the West Bank, including those in Jordan or holding property in Jordan on which previously the court could have ordered a maintenance award to be executed.[69]

7.2.4 Other Grounds for Judicial Divorce

The JLPS identifies four other grounds on which *tafriq* may be sought from the *qadi*: the existence of certain diseases or physical conditions in either husband or wife; the insanity of the husband; the husband's being sentenced to a period of three years or more in prison; and the husband's inability to pay the prompt dower.

Applications for judicial divorce on any of these grounds are relatively rare. `Ayyush lists only the third of the above grounds, the husband's imprisonment, which he found to constitute just 1.4% of all litigious divorces in the West Bank *shari`a* courts 1973–1983. Similarly, the case material examined for the purpose of this study revealed three claims on the grounds of the husband's imprisonment, but none on the other three grounds listed above. Observations on the practical application of the provisions relating to these types of judicial divorce are therefore drawn only from the collected Appeal decisions and from discussions with *shar`i* court personnel in the West Bank.

Certain Diseases and Physical Conditions

Although claims for *tafriq* on these grounds are extremely rare, the rules are extremely detailed and specific, and consequently both the Jordanian legis-

[69]Nevertheless, in such situations, the husband's family, alerted to the maintenance award through its publication in the local newspapers, could pay the back maintenance for the husband, either before the *qadi* pronounces the *talaq* or during the *`idda* period, if they (and he) are unwilling for her to achieve the divorce.

lator and modern-day jurists spend a disproportionate amount of space on clarification of the principles involved.[70] Included among the aspects that are discussed in the commentaries are the various types of diseases and physical conditions that give rise to grounds for *tafriq*, the distinction between curable and non-curable conditions, proof of the disease or condition, and the effects of a dissolution under these circumstances.

Dominant Hanafi opinion provided only for the wife to claim judicial divorce on the grounds of her husband's total inability to consummate the marriage — that is, because of a permanent condition of impotence or castration.[71] In 1915, the Ottoman Sultan extended the Hanafi rules to include diseases in the husband that endangered the wife, and the OLFR expanded it further.[72] The current provisions in the JLPS are basically the same as those in the OLFR and JLFR, except that under the 1976 law the option of judicial divorce is offered also to the husband for physical conditions in the wife preventing consummation or diseases that endanger his health.[73] The Explanatory Memorandum to the JLPS notes that the other Sunni schools allowed either spouse to seek *tafriq* if the other were so affected, and thus justified the inclusion of the articles providing for judicial divorce on the husband's initiative. The conditions by which a claim for *tafriq* on these grounds was constrained by the classical schools are repeated in the JLPS: that the claimant did not know of the other's condition before the contract and has not consented to remaining despite the condition thereafter, that the claimant is free from such a condition, and, in the case of immediate *tafriq*, that there is no cure. Where a cure is possible, the claim will be postponed for one year for the respondent to undergo treatment for the condition.[74]

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[70]Samara, for example, takes ten pages (308–318) in his Commentary on the JLPS to cover separation for disease or physical condition, compared with five pages each for separation on the grounds in most use in the West Bank — absence and injury, non-payment of maintenance, and discord and strife. The JLPS itself has nine articles on the subject, excluding the one on insanity. (Articles 113–119, 121 and 122).

[71]See *Kitab al-Ahkam*, Articles 298–302.

[72]Anderson, 1951 ('Dissolution of Marriage'), 272; OLFR Articles 119–122. Compare Layish, 1975, 199, on Israeli *qadis* preferring the classical Hanafi rules to the OLFR provisions in Israel, and 164–165 on the low incidence of such claims.

[73]JLPS Article 117; no parallel in the JLFR. Illnesses occurring in the wife after consummation cannot be the subject of a *tafriq* claim by the husband (Article 118).

[74]JLPS Article 115.

Samara notes that the Malikis specified thirteen diseases or conditions that could be the grounds for judicial divorce, the Shafi`is and the Hanbalis seven, and the Hanafis only two.[75] The seven conditions agreed on by all but the Hanafis were: castration (*jabb*)[76] and impotence (*`inna*) in the man (with which the Hanafis agreed), *ratq* and *qarn*[77] in the woman; leprosy (*jadham*) and white leprosy (*burs*) and insanity in either spouse.[78] The JLPS mentions all these diseases, adding pulmonary tuberculosis (*sill*), which was included in the OLFR[79] and syphilis (*zahri*) which was not.[80] Moreover, the JLPS provisions list these conditions as examples, rather than an exhaustive list.

In some matters, the current Jordanian law is closer to the Maliki view: thus, while the wife may seek *tafriq* on the grounds of such diseases present before consummation or occuring thereafter, the husband may only apply on the grounds of those existing before consummation. On the other hand, the view of the Shafi`is and Hanbalis was adopted in considering the *qadi*'s ruling for judicial divorce to be a *faskh* rather than the final *talaq* of the Malikis and Hanafis.[81]

All the schools of law, and following them the JLPS, make a certain exception of the condition of impotence, which is regarded as temporary and curable, and as being potentially a result of the particular sexual relationship (i.e. with this wife) rather than a condition inherent in the husband. Thus, Article 115 of the JLPS provides for the postponement of the claim for a year 'in cases that can be cured, such as impotence', and Samara observes that a man cannot obtain dismissal of his wife's claim for judicial divorce on the grounds of his impotence by proving that he has achieved full sexual inter-

[75]Samara, 1987, 310.

[76]El-`Alami, 1992, 75, explains *jabb* as amputation or mutilation of the male sexual organ, and *khisa'* as castration.

[77]Samara glosses *ratq* as 'the physical blockage of the woman so that she cannot be penetrated' (1987, 308 note 10), and *qarn* as 'the growth of horn-like flesh in the vulva, preventing intercourse' (note 11).

[78]Samara, 1987, 314.

[79]OLFR Article 122.

[80]But it was in the JLFR, Article 86.

[81]Samara, 1987, 316. *Kitab al-Ahkam*, Article 300, gives the traditional Hanafi view: 'If the husband does not come to his wife and the specified time period passes, and thereafter the woman comes back to court complaining and seeking *tafriq*, the judge shall rule for separation between them, and this separation is a *talaq* not a *faskh* . . .'

course with a woman other than the claimant.[82] The other exception in the JLPS as regards impotence, set out in Article 114, is also along classical lines:

> If the wife was aware before conclusion of the contract of this condition in the man that prevents consummation, or consented to it thereafter, she loses her right to seek judicial divorce, except in the case of impotence, where, even if she knew of this before the contract was concluded, she does not lose her right to seek judicial divorce.

This principle displays the same underlying premise — that it is fair for the wife to believe that although the husband has been impotent with other women, he may not be so with her. Sexual intercourse with her husband is, however, the wife's right[83] and should the husband prove to be impotent with her, she has the right to seek judicial divorce, which will be granted only after the year's postponement, in which, it is hoped, the husband may yet succeed in consummating the marriage.[84]

Insanity

The classical schools included insanity in the list of diseases permitting an application for *tafriq*, but the OLFR and the Jordanian laws have treated it in a separate provision. Article 120 of the JLPS provides that:

> If the husband becomes insane after the contract of marriage and the wife seeks *tafriq* from the *qadi*, the divorce will be postponed for a period of one

[82]Samara, 1987, 316. See Ghani, 1983, 359, for a claim for separation on the grounds of impotence in nineteenth-century Afghanistan.

[83]The majority Hanafi view held the wife's strictly legal entitlement to be consummation of the marriage. El-`Alami, 1992, 93–94, details a number of differing juristic positions on this.

[84]The principle of no *tafriq* if there was prior knowledge of the disease or subsequent consent meant that the traditional rules made the option of judicial divorce immediate upon learning of the condition, except in the case of impotence; Samara, 1987, 310. The JLPS (Article 121) states, in contrast, that 'in circumstances that give her the right to choose [divorce], the wife may postpone the claim or leave it for a while after raising it'. Samara, 1987, 317, considers that this applies only to those conditions that prevent consummation, but this cannot be confirmed due to the lack of case material.

year, and if the insanity continues during this time and the wife persists in her claim, the *qadi* shall rule for *tafriq*.[85]

Clinical insanity has to be proved by the written report of a qualified doctor, supported by his/her testimony in court.[86] The claim is postponed for one year from the date that the current insanity is first established, and further medical reports and testimony are required after the year's postponement to establish that the insanity has not ceased. Thus, in a 1986 case in a West Bank court, it was stated that the husband had been insane for over ten years, but when the wife finally submitted her claim for judicial divorce, the court still ordered the postponement of the claim for one year from the date the insanity was first established in the *shari`a* court. Similarly, if a ruling for judicial divorce on the grounds of insanity fails to be verified by the *Shari`a* Appeal Court, and is returned to the first instance court for correction and completion, the husband has to be taken for fresh medical examinations in case he has recovered his reason in the time between the abrogation of the ruling and the renewed litigation in the first instance court.[87]

Imprisonment

Judicial divorce on the grounds of the husband's imprisonment for three years or more was first introduced in the area in the JLFR of 1951. The principle came originally from the Hanbalis as an extension of the rules of absence and injury and the *mafqud*, and the close connection between these two grounds is shown by the juxtaposition of provisions on absence and injury and missing persons with those on judicial divorce for imprisonment in the law, and of explanation thereof in the commentaries.[88] Article 130 of the JLPS provides that:

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[85]If the husband was insane before the marriage, he would be held to be incompetent and the wife could therefore seek dissolution for the irregularity of the contract. Compare JLFR Article 87.

[86]Article 90 of the Law of *Shar`i* Procedure, 1959.

[87]Al-`Arabi, 1984, 76, 21787/80.

[88]For example, Articles 118, 119 and 120 of the Arab Unified Law of Personal Status. See also Abu Zahra, 1957, 429–430 and `Abdel Hamid, 1984, 308–309.

> The wife of a man in prison who has received a final sentence of three years or more imprisonment may seek a final *talaq* from the *qadi* after one year has passed from the date of his imprisonment and the restriction of his freedom, even if he has property from which she may obtain maintenance.

The Explanatory Memorandum to the JLPS acknowledged the Hanbali origins of the above article, comparing the situation to an absence of one year after which the wife can seek judicial divorce if she has been injured by the absence.[89] The JLPS article, however, removed a reference to injury in the JLFR article that it replaced.[90] An Amman Appeal Decision of 1960 emphasised the fact that the wife must state that she has suffered injury by her husband's imprisonment when making her claim,[91] but more recent published decisions seem to shed no light on the position under the JLPS. Whether or not the wife therefore has to mention injury in her claim before the court for it to be correct under the terms of the JLPS is a question that cannot be resolved by the case material for this study, since the three claims that were found were made under the JLFR. The rarity of claims made on these grounds is confirmed by the findings of `Ayyush, who located a total of eleven claims in the whole West Bank over the eleven years 1973–1983.[92]

Non-Payment of Dower

The Explanatory Memorandum to the JLPS observes that the non-payment of dower leads to problems between the families and injury to the spouses,

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[89]Explanatory Memorandum to the JLPS, 5. See also `Abdel Hamid, 1984, 309; Abu Zahra, 1957, 421.

[90]JLFR Article 93.

[91]Al-`Arabi, 1973, 68, 10803/1960.

[92]`Ayyush, 1985, 91, table 18. This was despite the large numbers of men imprisoned by the Israeli occupation authorities. Even during the *intifada* years, the WCLAC material found only a total of thirteen applications for divorce on these grounds in the six courts and over the four years included in the study. Community support for the nationalist movement and for 'security' detainees (and their families) meant that the wives of such prisoners would be unlikely to seek divorce; the position of common law prisoners would be different.

with the *zifaf* and consummation of the marriage being delayed along with the dower.[93] Since the Hanafis offered no solution for this problem, the Memorandum continues, for the sake of the public interest, the Shafi`i rules allowing *faskh* of the marriage for failure to pay dower before consummation were adopted in Article 126 of the JLPS:

> If it is established before consummation, by the husband's admission or by evidence, that he is unable to pay all or part of the prompt dower, the wife may seek dissolution from the *qadi*. The *qadi* shall grant him a respite of one month and if he has not paid the dower when the month is over, the marriage shall be dissolved. If the husband is absent and his address is unknown, and he has no property from which the dower can be obtained, the marriage shall be dissolved without respite.

The JLPS did not actually make any significant amendment to the existing terms of the 1951 legislation on this issue.[94] Although the Explanatory Memorandum specifically alludes to the Shafi`i school as the origin of the provision, the Hanbalis and the Malikis also allowed for *tafriq* on these grounds, and Samara's opinion is that the Jordanian legislation inclines to the Maliki rules, since the husband's inability has to be proved and a delay of one month is granted to give him a chance to pay it.[95] The Shafi`i (and Hanbali) rules are however in evidence in that the *qadi*'s ruling is described as a *faskh*, whereas the Malikis held it to be a final *talaq*.

The wife's right to judicial divorce for the non-payment of dower ends on consummation of the marriage.[96] After consummation, the wife may at any time withdraw from the marital home on the grounds of non-payment of her prompt dower, and cannot be obliged to return unless she receives her rights; it should theoretically then be possible for her to claim judicial divorce on the grounds of *hajr* if he has not paid the dower within a year.

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[93]Explanatory Memorandum to the JLPS, 4.

[94]Article 55, JLFR.

[95]Samara, 1987, 196–197. The Hanbalis and Shafi`is as a rule gave no respite, although some Shafi`is did stipulate a respite of three days.

[96]An Appeal Court decision from 1973 states that this means actual consummation, not seclusion. If seclusion has taken place but sexual intercourse involving penetration has not, the woman may still claim *tafriq* under the terms of JLPS article 126. Al-`Arabi, 1984, 74, 17872/73.

7.3 JUDICIAL DISSOLUTION (*FASKH*)

7.3.1 Introduction

Judicial dissolution (*faskh*) of a marriage occurs after a claim is raised in court and a ruling for termination is made by the *qadi*.[97] The dissolution ends the marriage immediately. The court action may be raised by one spouse against the other, or by a third party, usually the Chief Clerk of the *shari`a* court acting in the interest of *al-haqq al-`amm al-shar`i*, the public *shar`i* interest or right. As in the case of *tafriq*, a ruling for *faskh* is subject to automatic review by the *Shari`a* Appeal Court if not appealed by the litigants within 30 days.[98]

A marriage is subject to dissolution when it is either irregular (*fasid*) or void (*batil*), whether it was invalid at its conclusion or has become so since. In practice, most dissolutions seem to arise from irregularities at the time of the contract: these may involve the competence of the spouses and witnesses, infringements of the permanent bans on marriage between spouses within prohibited degrees of relationship through blood (*nasab*), affinity (*musahira*) or breastfeeding (*rada`*), and infringement of the temporary bans. In some cases, however, the irregularity arises during the marriage. This can be through one of the spouses changing religion so that the marriage becomes illegal, or committing some act with a relative of their spouse that raises the bar of affinity.[99] In addition, stipulations inserted in the contract of marriage give grounds for *faskh* if they are violated; the applications for *faskh* in such circumstances have already been considered above in Chapters Three and Six and no further consideration is made in the current section.

The irregularity (*fasad*) of the marriage may be discovered by the court employees during the routine checking of the contract documents submitted by the *ma'dhun*, or it may be revealed by third parties informing the court, or by the bringing of an action by one of the spouses. The incidence of *faskh* in the West Bank is low.[100] In the case material used for this

[97]See for example Al-`Arabi, 1984, 65, 18745/76.

[98]But nowadays a dismissal of a *faskh* action is not subject to such review — Al-`Arabi, 1984, 24, 18903/76.

[99]Sirtawi, 1981, 77–79.

study, a total of nine actions for *faskh* were located in the three courts, which constituted nearly 7% of all the litigious divorces found. Of these, five were related to the age of one or both spouses at the time of the contract, one to the impediment of suckling, one to religion, one to the wife remarrying in her *`idda*, and one to the illegal representation of the bride during conclusion of the contract. The following discussion considers these grounds for dissolution and also has brief reference to applications on the grounds of coercion. No attempt is made to review all the possible grounds for judicial dissolution under the JLPS.

7.3.2 Age of Spouses

Three claims of dissolution due to the age of the parties to the contract were found in the case material of 1975, raised by the Chief Clerk of the court against the spouses within days of having received the contract documents. Two of these concerned the husband, who was under the age of eighteen and had not obtained the *qadi*'s permission for his marriage as required by the JLFR. The third claim concerned a bride of under seventeen by the lunar calendar, whose contract of marriage had been concluded without permission being obtained from the *qadi*. The one dissolution on grounds of age in the case material for 1985 involved a bride who was under fifteen by the lunar calendar at the time of the contract.[101]

The case material also revealed one dissolution, under the JLFR, on the grounds of the failure to obtain the court's permission for an age difference of over twenty years between the spouses. The application for dissolution was made in defence to an action for *ta`a* raised by the husband. The husband claimed that he had called his wife to the *zifaf* in order that the marriage might be consummated, and as she had refused, he came to court to obtain a *ta`a* order. The wife's lawyer stated that at the time of the contract, the wife had been under fifteen, and the husband was just over 35. The wife had obtained permission to marry from the *qadi*, as required by the JLFR, but the husband had not produced his birth certificate and the court had

[100]Compare Layish, 1975, 172. `Ayyush, 1985, 91, table 18, located a total of 42 actions for *faskh*, finding judicial dissolution to constitute just 5.2% of all litigious divorce in the West Bank over the years 1973–1983.

[101]`Ayyush, 1985, 89, notes that the eight cases of *faskh* in Hebron over the years 1973–83 mostly concerned underage spouses.

not investigated the matter of his age. The husband argued that the wife's own acknowledgement of the marriage prevented her subsequently challenging its validity, and pointed to the consent of the *qadi* given for her marriage. The court responded that permission for marriage given to a woman under seventeen did not include permission for the age difference, and that the wife's acknowledgement of the marriage had no bearing on the validity of the contract due to the lack of such permission. The husband's *ta`a* action was dismissed and the marriage dissolved as irregular, in line with Appeal Court decisions from Amman.[102]

7.3.3 The Impediment of *rada`*

The existence of the impediment of *rada`* is proved by the testimony of two men or one man and two women, or by the acknowledgement of the two spouses.[103] In the one dissolution made on these grounds in the case material, the suckling relationship was acknowledged by the wife after her husband raised the claim. The husband stated that his wife's mother had breastfed him with his wife's sister during their infancy; he said that he had known that he could not therefore marry his wife's sister, but had not realised that the prohibition extended also to his wife. The court dissolved the marriage.[104]

7.3.4 Illegal Remarriage by the Wife

The court records showed one example of dissolution (in 1965) on the grounds that the woman involved in the contract was already the wife (or in

[102]Al-`Arabi, 1973, 77, 9647 and 9661/1957. It has already been noted that the claim for *faskh* for being underage will not be heard if the parties are of age at the time of the claim, or if the wife is pregnant: see above, Chapter Three.

[103]*Kitab al-Ahkam* Article 379; Sirtawi, 1981, 87.

[104]The claim was entitled 'dissolution of marriage for irregularity'. Similarly, the end of the summary states that 'the contract was found to be irregular'. By contrast, a claim considered by the Jerusalem Appeals Court in 1985 referred to the 'voiding (*batlan*) of a marriage due to *rada`*'. See above Chapter Three on the impediment of *rada`*. The Amman Appeal Court has on a number of occasions corrected a first instance court ruling holding such a marriage to be void rather than irregular: 29144/1988, 34964/1992, Dawud, 1999, I, 399 and 400.

this case *mu`tadda,* a woman in her *`idda* period) of another man. The claim was raised by the first husband against his wife and her second husband. The claimant stated that he had divorced his wife in a *mukhala`a* agreement when she was in the early stages of pregnancy. A few months later, still pregnant, the woman married her second husband and consummated the marriage. She was still in the *`idda* of pregnancy from her first husband at the time of the court claim. The court dissolved the wife's second marriage and transferred the case to the Public Prosecutor for consideration of criminal proceedings against the woman, her second husband, the wife's father (her *wakil* in the subsequent marriage) and all those who signed the marriage contract.

In a claim involving similar circumstances resolved under the 1976 JLPS, only the *ma'dhun* who drew up the contract was to undergo disciplinary measures (i.e. within the *shar`i* system), since by then the liaison between the regular and the *shari`a* court system had been interrupted. Another claim from the 1980s involved rather different circumstances, but again made no mention of criminal proceedings. The claim was raised by the Chief Clerk of the court against the spouses, who had been married for a number of years but divorced in the 1960s. When her *`idda* ended without revocation, the woman married a second husband. This man subsequently left the country and news of his whereabouts stopped coming: he became, for his wife at least, a missing person. Some years later, therefore, she remarried her original husband, co-respondent with her in the court claim. Clarifying that no decree of death had been formally passed on the second, missing husband, nor had the woman obtained *tafriq* for absence and injury, nor had that marriage been terminated in any other way, the court found her current marriage to have been irregular, dissolved it, and declared her still married to the missing man.

7.3.5 Requirements of Religion

It is unlikely that a Muslim marriage would be contracted in violation of the rules governing the religion of the partners, but it is possible for a marriage to become void by a change in religion of one of the spouses during the marriage. Thus, for example, if a Muslim man converted to Christianity, his marriage to a Muslim wife would become void, as would be the case if the Christian wife of a Muslim man became a polytheist.

In practice, however, it seems that where these cases arise, they mainly involve the same circumstances as those obtaining in the one claim found in the case material — that is, a Christian woman converting to Islam and finding herself consequently in a void marriage with her Christian husband.[105] According to Article 7 of the Law of (non-Muslim) Religious Communities 1938, personal status claims involving non-Muslim and Muslim parties must be heard in the regular court, unless all parties agree to the jurisdiction of the *shari`a* court. The claim for *faskh* from the Bethlehem case material was dismissed because the woman's Christian husband refused to accept *shar`i* jurisdiction.[106]

On another issue, Dawud includes an extended extract from a 1979 Amman Appeal Court ruling on dissolution for apostasy by the wife, which arose when the husband petitioned the first instance court for *tafriq* for discord and strife, including in his grounds that his wife used to 'insult his religion'.[107] This was backed up by witnesses, and the court charged the Chief Clerk to investigate in the name of *al-haqq al-`amm al-shar`i*. Finding the allegations established, the court held that the woman had committed apostasy and dissolved the marriage accordingly by *faskh*. The husband then appealed, insisting that his ex-wife had not intended to insult religion or to commit apostasy. The Appeal Court agreed with the first instance court in that if apostasy occurred the marriage was dissolved,[108] but questioned the manner in which the charge had been established and the contents of what she was supposed to have said: 'Did the wife saying [this] to her husband, in a situation of argument and anger, and in their environment, and their class, — did this really constitute apostasy?' The Court quoted a large number of sources insisting on the benefit of the doubt being

[105]A Christian man converting to Islam would be allowed to continue his marriage to a Christian woman, but may not wish to; the case material on *talaq* included a man recently converted to Islam from Christianity pronouncing three successive *talaq*s against his Christian wife.

[106]See also Al-`Arabi, 1973, 67, 11482/1961; and Dawud, 1999, I, 344–347, 17567/1973, 20536/1979, 37025/1994, 42451/1997, and 45270/1998, all dealing with similar situations.

[107]20767/1979, Dawud, 1999, I, 403–406.

[108]Citing Article 183 of the JLPS and Article 303 of the *Kitab al-Ahkam*. The Jordanian Code has no penalty for apostasy, but Article 272 provides for a prison sentence of one to three years for those who 'publicly insult the prophets' and Article 278 allows for a prison sentence of up to three months for those who offend another's religious sensibilities.

given in such cases and held that she had been ignorant of the implications and not fully in control of what she was saying, even if were indeed established that she had uttered the alleged words. It ended by agreeing with the husband's petition, overturned the finding of her apostasy and returned the file for the first instance court to proceed with the original claim for divorce for *niza` wa shiqaq*. The case is interesting for the insight it gives into the position taken by the Appeal Court judges and the consideration they showed to the probable lack of understanding of the implications of colloquial blasphemies, while upholding the gravity of the allegations.[109]

7.3.6 Technical Irregularities

A marriage will be held to be irregular if the rules surrounding its conclusion are infringed, regardless of the capacity of the two spouses. The example in the case material involved the dissolution of a marriage because the wife was not legally represented at the conclusion of the contract. The wife was a resident in Jordan, and her father had sent another man as his *wakil* in the marriage of his daughter, rather than as the *wakil* of the wife herself. Another example of this kind of dissolution is to be found in the collected Amman Appeal decisions, where a Jordanian couple who were married in Britain had their marriage declared *fasid* and dissolved because the two witnesses, one Muslim man and one Christian woman, did not fulfil the *shar`i* requirements.[110]

7.3.7 Coercion

Article 34(3) of the JLPS lists as irregular a marriage concluded under duress or coercion (*ikrah*). The concern among certain sectors of Palestinian society at the phenomenon of early — and in some cases legally underage — marriage suggests that informed and freely given consent,

[109]In a more recent case, 38322/1995, the Amman Appeal Court held that the first instance court, on hearing the testimony of a witness to the husband's use of such blasphemies, should have interrupted the claim for judicial divorce for discord and strife until it had investigated this claim and issued a ruling as to whether the husband's words constituted apostasy. Dawud, 1999, I, 289; see further 39952/1996 at 292.

[110]Al-`Arabi, 1984, 64, 21303/80.

particularly of young women or girls, may be lacking in a certain proportion of marriage contracts, despite the safeguards of the law intended to prevent any phenomenon of 'forced marriage.'[111] Published rulings from the Amman Appeal Court include a number responding to claims of coercion in marriage which give an indication of the difficulties involved in remedying such a situation under current law and practice. Firstly, it appears that if the petitioner drops the petition for *faskh*, the court is not expected to undertake its independent investigation of the alleged offence, because this 'not a matter that implicates the public right and the petitioner can withdraw [the allegation] and the contract can [stand as] lawful even if [coercion] occurred'.[112] This is in contrast to what the court would do if it was claimed that the spouses were forbidden by a *rada`* prohibition, for example — it would pursue the matter even if the original petitioner sought to drop the case, as the parties are forbidden to remain together. Secondly, the Amman Court has held that the various documents registered by the official *ma'dhun* in the process of documenting the contract of marriage include explicitly the consent of the woman in appointing her father as her *wakil* in her marriage 'without force or coercion'. In accordance with Article 75 of the Law of *Shar`i* Procedure, such documents provide 'absolute evidence' on the matter to which they pertain and can be challenged only for forgery.[113] In effect this makes it possible for claims for dissolution on the grounds of coercion to be made only by those whose marriages have not been registered in accordance with the law, and renders the position of *ma'dhun* of critical importance in investigating the reality of the 'consent' given, for example, by a very young woman in the contract session and in the appointment of her *wakil*.

The case material showed no claims for *faskh* based on coercion, but in the late 1980s a West Bank *shari`a* court was presented with such a claim raised by a man in defence to a maintenance claim by his wife. The couple had been married after the woman was found to be pregnant and had identified the man as the father. Under the Jordanian Penal Code, a man who has seduced a *bikr* by promising marriage and has then abandoned her is li-

[111]See Chapter Three (sections 3.2.2 and 3.2.3). On practice in Pakistan, where similar prohibitions exists in the law, Farida Shaheed notes that 'young women are rarely consulted about the marriages arranged for them by their families'. Shaheed, 1998, 71.

[112]20266/1978, Dawud, 1999, I, 388.

[113]21655/1980, Dawud, 1999, I, 389.

able to a prison sentence of three months to a year. However, the criminal proceedings are halted, or the sentence if already passed suspended, if the man then marries the woman. The Public Prosecutor retains the right to proceed with the case against him or to have the sentence carried out for a period of three years following the crime, should the marriage be terminated by *talaq* 'without a legitimate reason'.[114] In this case, the man acknowledged his seduction of the girl, and they were married, but the relationship was problematic and the girl returned to her father's house and raised a claim for maintenance. The husband's lawyer responded to the maintenance claim by stating that the marriage was irregular due to its having been concluded under coercion. If the marriage were dissolved on these grounds, it would not constitute *talaq* for no legitimate reason, and the prospect of criminal proceedings and a prison sentence would not arise. The husband's lawyer stated that his client had been under duress when offered the choice between marriage and a prison sentence, and was therefore coerced into concluding the contract. The wife's lawyer pointed out that the man had willingly and knowingly committed the act that would have led to the prison sentence, according to his own confession, and that marriage as an alternative to a prison sentence wilfully incurred could not be considered coercion. The *qadi* was spared having to rule on the case when it was settled out of court after extensive *`asha'iri* proceedings; although the straightforward position would have been to affirm consent proven through the documentary processes of the contract, as in the other cases cited above.

[114]This offence is called *fadd bakara bi-wa`ad az-zawaj* (defloration by promise of marriage). Jordanian Criminal Code, Articles 304(1) and 308.

CHAPTER 8

When It's Over: Claims by Divorcées and Widows

8.1 INTRODUCTION

The basis of the claims described in this chapter once again invokes the 'balance' of rights and duties of the spouses prescribed by the law. In this case, the balance is presented as involving most immediately the husband's right of unilateral dissolution of the marriage through *talaq* and his financial duties during marriage and towards his wife in the event of his exercising this power. Important in the idea of the balance is that the financial implications of divorce act as a restraint on the husband's use of *talaq*. Writing in 1934 on the subject of 'Marriage in Palestine', the anthropologist Granqvist noted that 'it has not been sufficiently noticed that there is a great difference between the formal facility of divorce and the practical results accompanying, which are for the husband of such a serious economic nature that he avoids expressing the decisive words.'[1] The 'formal facility' is of course also balanced, in society, by strong family and community interest usually directed at preserving marital relations and discouraging divorce.

The financial results of divorce do however vary considerably according to the individual case and in fact may not, under certain circumstances, be particularly onerous. Of the financial claims that the wife can make dis-

[1]Granqvist, 1934, 51.

cussed in this chapter, the only ones imposed as obligatory by the classical schools are the payment of maintenance during the *`idda* period and fees for the wife's suckling and/or custody of children from the marriage. The fees are not generally intended to enable a woman to live independently with her children, and as to maintenance, the *`idda* period in most cases lasts only three months. However, the increasing tendency in all sectors of society to register a large deferred dower, documented earlier in this study, raises the potential level of financial obligations of the man in the event of death or divorce. In addition, the JLPS has followed Syria in allowing the court to award a woman financial compensation against her ex-husband in the event of an 'arbitrary' divorce, as an additional penalty for abuse of his right. Deferred dower as registered in the marriage contract is due every woman in the event of divorce, unless she has specifically waived it in a *khul`* settlement or she has been held to have forfeited it as a result of blame attributed to her in a separation for *niza` wa shiqaq*, or the marriage has been dissolved before consummation due to a disease or sexually disabling physical condition in the wife. Compensation, on the other hand, may be claimed only under specific provisions in the law and under the JLPS is due only where an arbitrary *talaq* is involved.

Claims that may arise after the marriage has been terminated depend for their timing upon whether or not the *`idda* period has ended. Thus, for example, the wife's maintenance for the *`idda* period is the responsibility of the husband (unless she was divorced in 'disobedience') and in order to claim it in court, the wife has to establish that she has not completed her *`idda* period. Conversely, the husband raising a claim to have a previous maintenance order rescinded must establish that the *`idda* period is over so that the wife is no longer due any maintenance. A claim for deferred dower or compensation must be made by the wife after the marriage has finally ended — that is, it may be made in the *`idda* period of a final *talaq*, but not until the end of the *`idda* following a revocable *talaq*. This chapter will first consider the *`idda* period and then the claims that arise after dissolution of the marriage.

8.2 THE *`IDDA* PERIOD

The *`idda* is a waiting period after the end of marriage by death or divorce, during which the ex-wife or widow may not remarry. During the *`idda* of a

revocable *talaq*, the husband may revoke the *talaq*, in which case the couple's marriage continues. A woman in the *`idda* of a final divorce (including the *`idda* following judicial separation or dissolution) may not marry either her former husband or any other man until the *`idda* is over. Two reasons are usually given as demonstrating the 'wisdom' (*hikma*) of the *`idda* period; firstly to establish whether or not the divorced woman is pregnant by the man from whom she has been divorced, so that the paternity of the child may be correctly attributed, and secondly, in the case of the *`idda* following a revocable *talaq*, to give the husband adequate opportunity to reconsider his decision and to choose to continue the marriage through revocation of the *talaq*.[2]

Since the requirement of the *`idda* period is set out in some detail in the Qur'an,[3] there are only minor differences between the various schools of law on its implementation in practice. The rules of *`idda* that apply to the individual woman depend on whether her marriage has ended due to the divorce or death of her husband; whether the marriage was valid, irregular or void; and whether it was consummated or not. The issue of consummation is further divided into 'actual' and 'presumed' consummation, the latter being taken to occur if 'valid seclusion' (*khalwa sahiha*) takes place between the couple.[4] In the case of the husband's death, the widow must perform the *`idda* whether the marriage was consummated or not. In the case of divorce, a wife contracted in a valid marriage must perform the *`idda* if consummation took place or if there was valid seclusion.

Where the *`idda* period is required, the majority of jurists, including the Hanafis, hold that it begins from the time of the death or divorce, even where these occur without the knowledge of the wife.[5] The Jordanian law

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[2]Samara, 1987, 340–341, adds that the *`idda* period serves as a period of mourning for the end of the marriage (although only for the woman); similarly `Abd al-Hamid, 1984, 336, states that the *`idda* for a widow is a mourning period for a dead husband, in addition to a period for reconsideration of a hasty *talaq* and to verify pregnancy.

[3]See Qur'an 2.228 and 234 and 65.4.

[4]'Seclusion' is 'the meeting of the man and woman in a safe place after the contract of marriage, safe from the gaze of other people.' (Samara, 1987, 161–162). Samara goes on to detail the impediments that may render seclusion other than valid, for example the presence of a third person, even if blind or asleep, or 'obstacles of nature' — such as the wife menstruating — or *shar`i* obstacles such as the Ramadan fast.

[5]`Abd al-Hamid, 1984, 346.

has taken this majority position in Article 141 of the JLPS. Thus where a man acknowledges the incidence of a *talaq* out of court at some past date (*iqrar bi-talaq*) by registering it in the *sijillat at-talaq*, the deed of *talaq* expressly records that the wife's *`idda* is to be calculated from the day of the *talaq*.[6] In an example in the 1965 case material, a woman seeking to establish the incidence of an out-of-court *talaq* told the court that her former husband had divorced her in 1940 and that they had not had marital relations since that day. The ex-husband, also in court, acknowledged her claim. The court ruled that the single revocable *talaq* had become final upon the termination of the *`idda* period a quarter of a century before.

Once begun, the duration of the *`idda* period depends on how the marriage was terminated (i.e. by death or divorce) and on whether the wife is pregnant, menopausal or neither of these two, in which case its duration may depend upon the pattern of her menstrual cycles. The jurists divide the calculation of the *`idda* period according to whether the duration is assessed 'by months, by birth or by blood' — that is, in calendar months, by the end of a pregnancy, or by menstrual cycles. The standard *`idda* period for a divorcée who is not pregnant and is of an age between puberty and the menopause is three menstrual cycles. In Jordanian legislation, the calculation 'by blood' is combined with a monthly assessment. Article 135 states that the *`idda* is three full menstrual cycles, and the court shall not accept any claim that the *`idda* period has been completed before the passing of three months.[7] The minimum *`idda* thus becomes three calendar months.

For pregnant women, whether widows or divorcées, the *`idda* lasts until the pregnancy ends by childbirth. If the woman miscarries, the JLPS takes the classical view that the *`idda* is over if the foetus is sufficiently formed to the extent that it is 'recognisably a human being'.[8] If not, the

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[6]In a 1987 case in the West Bank, the Jerusalem *Shari`a* Appeal Court corrected a decision from the first instance court which had found a woman's claim as to the incidence of a *talaq* in July the previous year to be established and had stated that the *`idda* was to start from the date of the court's ruling the following March. The Appeal Court agreed with the ruling but corrected the *`idda* to commence from the date of the *talaq*.

[7]The Jordanian article replicates Article 139 of the OLFR. The standard phrase used in the court records to note the end of such an *`idda* is that' 'the *`idda* has been completed by the seeing of blood three times in three months'. Samara, 1987, 344–346, details the classical discussion on whether the calculation of the three menstrual cycles should start from the period of menstruation or that of '(ritual) purity', *tuhr*.

[8]Article 140. Samara, 1987, 349, states that the *`idda* is ended if the foetus shows an eye, head, hand or other such features.

`idda* will be calculated in months from the end of the marriage, according to whether the woman is a widow or a divorcée. Although the case material contained a number of examples of the termination of an *`idda period by childbirth, there were no cases regarding the issue of miscarriage and the extent of formation of the foetus.

The classical jurists set two calculations for the *`idda* by months; the first, four months and ten days, applies to all widows except those who are pregnant. If the husband divorces his wife by a revocable *talaq* and then dies, then the time that has been spent in the *`idda* of *talaq* is cancelled and the widow begins the longer *`idda* of four months and ten days from the date of her husband's death. If, on the other hand, the *talaq* was final, or the marriage was ended by judicial separation (with the exception of *tafriq* for the non-payment of maintenance) then the widow has only to complete the *`idda* of divorce, since the marriage is already over.[9]

The second period calculated by months is three months, in cases where the woman is neither a widow nor pregnant, but for some reason does not menstruate and cannot therefore calculate the *`idda* period by cycles. This applies for example to women in the menopause. If the woman begins the *`idda* period by calculating according to menstruation and then enters the menopause, then she must perform the three-month *`idda* as of the day she became menopausal, without regard for the period spent in *`idda* before this.[10] Other women to whom the three-month *`idda* period would apply are girls under the age of puberty — who, according to the current law, may not lawfully be married — and to women from a consummated irregular (*fasid*) marriage.[11]

The major area where the JLPS differs from classical Hanafi rules on the subject of *`idda* is in the setting of a maximum period by calendar calculation. Under classical Hanafi law, if a woman was divorced by her husband, being neither pregnant nor menopausal, then the *`idda* of three menstrual cycles was the period she had to wait, however long this might take. That is, if for any reason her periods stopped after she had menstruated once or twice, then she continued in the *`idda* period until either she completed

[9]JLPS Article 143. Samara, 1987, 347, notes that the Hanafis and one Hanbali view hold that if the final *talaq* is pronounced in death sickness, the wife is to complete the longest out of the *`idda* of *talaq* and of death, and that Article 143 does not address this question.

[10]JLPS Article 133. Samara, 1987, 347.

[11]Article 138 JLPS.

three full cycles or reached the menopause.[12] The Malikis, however, set a maximum limit of one year to the *`idda* period in such circumstances.

The need to set a limit to the maximum duration of the *`idda* period, addressed by the Ottomans in 1917, is usually attributed in major part to the fact that so long as the wife continues in the *`idda*, she is due maintenance from her husband; and it was acknowledged that it was possible for a woman who was prepared to perjure herself to continue for years denying she had 'seen blood three times' and so to claim financial support long beyond that envisaged by the classical rules agreed upon by the jurists.[13] The same rules bound a woman to an *`idda* of uncertain duration due to circumstances beyond her control, and unable in the meantime to remarry. In Egypt, the 1929 law provided that claims for maintenance for the *`idda* period were not to be heard for a period exceeding one year; `Abd el-Hamid explicitly attributes this to the legislators' intention to reduce 'excessive' maintenance claims, while Badran describes the adverse reaction to this 'shrinking *`idda*' of some Egyptian feminists at the time.[14]

Approaching the same issue, the OLFR adopted the Maliki rules regarding the maximum *`idda* period in these circumstances, but an apparent mistake in the wording of the article meant that in fact it provided for a maximum *`idda* of nine months.[15] This mistake was carried over into the JLFR of 1951 but the erroneous text was corrected by the Amman *Shari`a* Appeal Court, which consistently held that 'the divorcée who sees only one period (and then stops menstruating) must wait nine months to ensure her womb is clear and then three months, completing the year'.[16] The position was not as clear in some of the cases in the first instance courts. In a West Bank case in 1975, the record reads that the woman was neither menopausal nor pregnant and usually menstruated, but had not had a period since the divorce, and that therefore she had to continue in *`idda* for

[12]See Article 314 *Kitab al-Ahkam*. The onset of menopause is legally presumed to be at 55.

[13] See `Abd al-Hamid, 1984, 342, and Coulson, 1964, 192–193.

[14]`Abd el-Hamid, 1984, 343, and see Shaham, 1997, 142; Badran, 1995, 133.

[15]Article 40 OLFR. Coulson, 1964, 176. The Maliki position was for a woman in these circumstances to wait for nine months and then to complete the three-month *`idda* of the menopausal woman; Samara, 1987, 240. According to Article 356 of the *Kitab an-Nafaqat*, a nine-month *`idda* is the period applicable for a woman who has abnormally long menstrual cycles (*mumtaddat at-tuhr*).

[16]Article 102 JLFR. Anderson, 1955, ('JLFR'), 204. Al-`Arabi, 1973, 261, including rulings 9373/1957, 12011/1962, 16658/1971, 16388/1970.

nine months from the date of the *talaq*. The legislative slip was corrected in Article 136 of the JLPS, the Explanatory Memorandum to which notes that the maximum limit follows normal Maliki law and that such a provision is in the interest both of the woman and of the husband who must maintain her.[17]

The practical application of the rules on *`idda* came into play in the case material in claims for maintenance, compensation, and deferred dower. The most common claim involving the *`idda* is a claim by the wife for maintenance during the *`idda* period, or by the husband to have a maintenance award rescinded on the grounds that her *`idda* period is over. Thus, in the Ramallah material, a woman raised a claim for maintenance against her husband, changing it to maintenance for the *`idda* period when she added the claim that he had pronounced a *talaq* after she had raised her original claim. During the court's consideration of the claims, it was established that the husband had pronounced one revocable *talaq* at the end of April, and subsequently registered a *talaq* in Jerusalem at the end of July. In October he registered a revocation in Jerusalem. The court characterised the registration of *talaq* as a second *talaq* that had occurred during the *`idda* of the first (unregistered April) one and that the *`idda* following the unregistered *talaq* had been completed before the man registered his revocation in October. The Ramallah court therefore postponed its consideration of the maintenance claim, submitting the question of the validity of the out-of-court *talaq* to the Jerusalem Appeal Court for verification, so that the date when maintenance for the *`idda* fell due could be correctly specified. The Appeal Court verified the ruling, the revocation was held void and the Jerusalem court amended the registration of the July *talaq* from a first to a second revocable *talaq*.

If the *talaq* is revocable, the husband may revoke it at any point during the *`idda* period. If the *talaq* is final, or the marriage terminated by separation or judicial dissolution, then the woman cannot marry anyone, including her former husband, until her *`idda* is over. Marriage by the wife during her *`idda* renders the marriage irregular.[18] No such restrictions apply to the husband, who may remarry immediately after the divorce, provided that he does not already have three other wives or *mu`taddas*; in this case, he must wait until the *`idda* of one wife is completed until he can marry again.[19] The court records in the West Bank show a number of examples of women con-

[17]Explanatory Memorandum to the JLPS, 6.

[18]See Article 27 JLPS; *`idda* is a temporary impediment.

[19]Article 28 JLPS.

tracting irregular marriages during their *`idda* period. In one example, the *Shari`a* Appeal Court in Jerusalem heard an appeal made by a husband against a maintenance order granted to his wife by a first instance court. The basis of the man's appeal was that his marriage was irregular, since the couple had married in the woman's *`idda* period following termination of her marriage to a former husband, and no maintenance is due in an irregular marriage. The court called in the former husband as a third party and established that the woman's first husband had divorced her by a final *talaq* for *ibra'* (*khul`*) in 1978, when she was pregnant. She married her second husband early the next year, while still pregnant. A child was born some months later and a birth certificate issued under the name of her second husband. The court held that the child's father was actually the first husband and that the woman's marriage to the second man was irregular. The Appeal Court therefore cancelled the maintenance award issued to the woman by the first instance court against her second husband, dissolved their marriage, and instructed that the child's birth certificate be changed to show the name of the woman's previous husband.[20]

Besides having consequences for paternity in such cases as described above, the *`idda* is closely associated with the maximum period of gestation, the rules on which determine the legitimacy or otherwise of a child born after the separation of its parents. The classical jurists agreed on a minimum period of gestation of six months, but differed *inter alia* as to its maximum length, with limits ranging from two years according to the Hanafis up to four according to the majority view of the other three Sunni schools. The view of one Maliki jurist was that the maximum gestation period was one lunar year.[21] The Egyptians were the first to introduce this last view, using the same approach as they employed to set a maximum limit to maintenance for the *`idda* period: in 1929, they provided that courts were not to hear claims of disputed paternity where the child was born a year or more after the last physical contact between the couple.[22] In 1953, the Syri-

[20]Al-`Arabi 1984, 66, 18687/1975, describes a case where a marriage was claimed to be *fasid* due to an action by the man, who had married his former wife's sister before the end of the wife's *`idda*, giving rise to illegal conjunction between the sisters.

[21]This was the view of Muhammad Ibn al-Hakam; the Twelver Shi`a also hold it to be one year. Anderson, 1952 ('Intestate Succession'), 127; Samara, 1987, 356.

[22]Law no.25/1929; Coulson, 1978, 177. Badran, 1995, 133, reports 'startled reactions' to the feminist objections to this new law 'ending what feminists saw as the one advantage to women of a personal status code based on premodernist interpretation.'

ans set a maximum gestation period of one solar year as a matter of substantive law[23] and in 1976 the JLPS took this up, although the calculation in the Jordanian legislation is by lunar years.[24] Thus, paternity is not established under Jordanian law where the wife gives birth a year or more after the death of her husband or their legal or physical separation.[25] The JLPS thus corrected something of an anomaly in the JLFR, whereby the maximum *`idda* for non-pregnant women was one year, while the maximum gestation period remained the classical Hanafi period of two years.

The final point to be made here is that the woman in the *`idda* of death or of a revocable *talaq* is required by law to spend the *`idda* period in the matrimonial home. The widow may leave the house to attend to whatever legitimate business she might have, while the divorcée is supposed to leave it only 'in case of necessity'. Neither is supposed to spend the night outside the marital home. Other divorcées (for example, by a final *talaq*, by separation) are not subject to this rule, in exception to the classical Hanafi position.[26] In the case of a revocable *talaq*, the presence of the wife in the marital home is intended to facilitate the revocation of the *talaq* by word or deed by

[23]Coulson, 1964, 194. SLPS Article 127.

[24]Articles 147 and 148, JLPS. Another major difference between the schools turned on whether or not it was necessary for the spouses to have had access to each other. Classical Hanafi law holds that paternity is attributed where intercourse is legal, i.e. by the fact of the contract, the husband becomes father to the wife's children. The other Sunni schools hold that the spouses must have had the opportunity to procreate. Article 124 of the JLFR adopted this majority view by providing that in case of denial of paternity, *nasab* would not be established to the husband of the mother where there had been no access between the spouses since the time of the contract of marriage. For the Hanafi rules on legitimacy, see *Kitab al-Ahkam* Articles 332–343.

[25]The Explanatory Memorandum to the JLPS (6) uses the Maliki view to justify adoption of this position and notes that the maximum gestation period of a year is acknowledged by *'shar`i* medicine' and has been taken up in personal status legislation in Egypt, Syria, Morocco and Tunisia.

[26]Article 146 JLPS. The article uses almost precisely the same vocabulary and phrasing of *Kitab al-Ahkam* Article 322, except that it adds in 'revocable' to constrain the text on the *`idda* of *talaq*. The Amman Appeal Court has held that for the divorcée to be required to perform the *`idda* in the marital home, there must be a state of matrimony (that is, not in the *`idda* of a final *talaq*) and the marital home must be a *maskan shar`i*: al-`Arabi 1973, 261, 12029. Samara, 1987, 351, suggests that the exception of the *mu`tadda* from a final *talaq* from the duty of spending the *`idda* in the marital home might have been taken from the Hanbali opinion that holds that the husband does not have to provide accommodation in this case.

the husband. In practice, the woman is just as likely to return to her natal family once divorced, placing her family as intermediaries if he seeks access to her.[27]

8.3 CLAIMS

8.3.1 Maintenance for the *`idda* Period

The classical rules difer as to which *mu`tadda* may claim maintenance during her *`idda*. The Malikis end the right to maintenance with the end of the marriage, except where the *mu`tadda* is pregnant; that is, a woman in the *`idda* of a revocable *talaq* could continue to claim maintenance from her husband, while a final divorce or the death of the husband gives no rights of maintenance, but a pregnant woman, whether a widow or a divorcée, could continue to claim. The Hanafis, on the other hand, give divorcées, whether from a final or revocable *talaq*, the right to claim maintenance, but hold that a widow has no rights of maintenance whether pregnant or not.[28] The Shafi`is and Hanbalis hold variations on these two positions involving limited rights to accommodation.[29]

The Jordanian legislation has maintained the Hanafi view on maintenance for the *`idda*; the JLPS added two new articles to the JLFR, but they serve an explanatory purpose only.[30] Article 144 provides that no widow is due maintenance[31] while Article 79 states that 'the man must pay the maintenance of his *mu`tadda* by *talaq*, *tafriq* or *faskh*'. On this point, Samara

[27]Ma'ruf, 1985, 13, notes the considerable tension and stress likely to be experienced by a woman obliged to stay in a house with a man who has divorced her.

[28]Samara, 1987, 248 and 331. See for illustration *Kitab al-Ahkam* Articles 324 and 331.

[29]See Hawting, 1989.

[30]Articles 144 and 146 were added. Explanatory Memorandum to the JLPS, 6.

[31]That this was the position before the 1976 law is shown by a ruling in the case material from 1975. The widow of a deceased man applied to the court for a maintenance award for herself and her children against her father-in-law. The court found that there was already a maintenance order for the children and that she was not due maintenance because since her husband was dead, there was no longer a state of matrimony between them.

notes that the JLPS does not make the classical Hanafi distinction regarding the reason for the *tafriq* or *faskh*; the classical view holds that where the reason arises from the wife (for example by her apostasy) then she is not due maintenance.[32] No maintenance is due after a void marriage, nor after an unconsummated irregular marriage, since in neither case is *`idda* required. The JLPS also provides that no maintenance is due for the *`idda* which follows consummation in an irregular marriage.[33] In other ways, maintenance for the *`idda* period follows the same rules as those governing the wife's maintenance during marriage. Thus, the amount of maintenance is assessed according to the circumstances of the divorcing man[34] and the only woman who is not due maintenance for the *`idda* of divorce in a regular marriage is the one divorced in 'disobedience'.[35] If the man is absent when the divorced wife submits a claim for maintenance for the *`idda* period, she must swear the oath to the fact that she is not *nashiz*, in order to qualify for maintenance.[36] The similarity between marital and *`idda* maintenance is shown by the fact that the court may change marital maintenance into *`idda* maintenance during the hearing of a claim due to the intervention of a *talaq*, or rescind an award made for marital maintenance at the end of the *`idda* following a divorce.

One difference between marital maintenance and maintenance for the *`idda* period is that whereas a ruling for marital maintenance can be made by the court from the date of the wife's application for it, maintenance for the *`idda* period is awardable by the court from the date of the dissolution of the marriage. The wife may therefore be some way into the *`idda* period before she submits a claim for maintenance. On the other hand, the JLPS provides that if the wife is notified of the *talaq* at least one month before the end of the *`idda* period and does not claim maintenance until the *`idda* is over, she loses her right to claim.[37]

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[32]Samara, 1987, 239 and 241. The Hanafis excepted the *mu`tadda* by judicial divorce due to her apostasy from Islam after consummation or seclusion; or due to an action by her with a relative of her husband that raises the bar of affinity (*Kitab al-Ahkam*, Article 326).

[33]Article 42 JLPS.

[34]Al-`Arabi 1973, 314, no.8659/1955.

[35]Article 81 JLPS; the JLFR did not contain a parallel provision, although this is standard Hanafi law.

[36]Al-`Arabi 1973, 311, 12819/1963; and 1984, 316, 18645/1975.

[37]Article 80 JLPS. There was no equivalent to this in the JLFR and the Explanatory

In the case material, claims by the wife for maintenance for the *`idda* period tended to be disputed less than those for marital maintenance; once it is established that the woman is in an *`idda* where maintenance is due, the only defence the husband may make to a claim for this maintenance is that his wife has been divorced in 'disobedience', and this was rarely raised. When the husband raises an action to terminate the *`idda* maintenance award, the only defence the wife can make is that her *`idda* has not expired. In one case in the 1975 material, the wife established in defence to her husband's action that she was in her eighth month of pregnancy from him and therefore still in her *`idda*. In another case, a husband raised an action to have a maintenance award rescinded exactly three calendar months after he had divorced his wife, claiming that his wife, who was in her twenties, did not menstruate and in fact had never had a period throughout their ten-year marriage. The wife however stated that she did menstruate and had had one period since the date of the *talaq*. She took the oath to this defence when the husband could not prove his claim, and the man's application was dismissed. These exceptions aside, in the vast majority of cases, the wife comes to court to acknowledge the end of her *`idda* and the maintenance award is accordingly terminated.

A woman may of course waive her right to maintenance during the *`idda* period if her marriage ended by a *khul`* settlement. As noted in Chapter Six, under the provisions of the 1951 law, it appears that practice in the courts was to prevent a woman from claiming maintenance for the *`idda* period if she had made a 'general renunciation' (*ibra' `amm*) of her rights in the *khul`*, but the JLPS stipulates that maintenance for the *`idda* period lapses only if it is explicitly waived in the *khul`* settlement.[38] Many women do explicitly waive the maintenance for the *`idda* period but it is possible that other women do not claim it subsequently because they are not aware that they lose this right only by an explicit renunciation. This misunderstanding of the rules is one of the reasons put forward by Barhum for the low number of women who claim maintenance for the *`idda* period in Jordan.[39] Barhum notes that in his field survey of 237 divorcées in Amman, over half were entitled to maintenance during the *`idda* period, but very

Memorandum gives no reason for its inclusion here. See al-`Arabi 1984, 311, 17743/1973. Contrast, in Egypt, Shaham, 1997, 151–152.

[38]JLPS Article 108.

[39]Barhum, 1983, 24.

few received it and even fewer submitted claims to court. Layish similarly notes that very few claims were submitted to the *shari`a* courts inside Israel for maintenance in the *`idda* period. He suggests that this is because 75% of divorces are by mutual consent and the maintenance is either informally given up or is waived in the *khul`* settlement, and because the maintenance itself lapses if not claimed in time.[40]

These observations of a low number of claims for maintenance for the *`idda* period held true also in the West Bank case material. In 1975, for example, the case material showed only sixteen claims for maintenance for the *`idda* period.[41] Claims for maintenance specifically for the *`idda* period are most likely to be made by women who have left the marital home where before the divorce the husband provided for them without the need for a court order, and often as part of a strategy in ongoing negotiations between the spouses and their families. There are many claims where, as noted above, the original award is made for marital maintenance but by the time the award is rescinded by the court, a divorce has occurred and it has served as maintenance for the *`idda* period without a separate claim being made.

8.3.2 Fees for the Care of Children

In the event of there being children from a marriage that has been dissolved, a number of financial claims may be submitted by the ex-wife against the children's father — or, in the event of her being a widow, against the person charged with their maintenance. If the marriage has been terminated by the death of the wife, these claims may be presented by the person who is awarded custody (*hadana*) in her stead.[42] Financial claims that may be made by the wife connected with children fall into two categories: those made on behalf of the children and those made on her own behalf. In the first category, the wife may claim maintenance for her children from the father, who is responsible for their maintenance if they do not have independent capital or means of support.[43] She may also claim separate expenses

[40]Layish, 1975, 177.

[41]There were 128 claims for the wife's maintenance during marriage and 134 unilateral divorces in the case material for 1975.

[42]Except of course for the fee for breastfeeding, which is payable to the woman who undertakes that role.

[43]Article 168 JLPS

for the children's accommodation, if the father is no longer housing the family. These expenses can be claimed at any time during the marriage or after its dissolution, whenever the husband has ceased providing for his children. They are therefore not dependent upon the termination of the marriage or the *`idda* period. The same applies to claims for the 'fee of childbirth' (*ujrat wilada*) which is more accurately described as 'expenses of childbirth' (*masarif wilada*) since the woman may not claim a fee for the function of childbirth, but can only claim back from the father any outlays she has made from her own money on the birth, for example to a midwife or to a doctor (as she can during the continuation of her marriage).[44]

The second category of financial claims related to children consists of fees which may be claimed by the ex-wife in return for her performing certain functions in respect to the children: that is, the fee for breastfeeding the children (*ujrat al-rada`*) and the fee for undertaking their custody (*ujrat al-hadana*). Both these fees are based on standard Hanafi law, and the absence of any reference to them in the JLFR 1951 had left them in place by default. Both breastfeeding and custody are regarded as the duties of the mother within marriage and therefore neither can be claimed until the end of matrimony; that is, they can be claimed during the *`idda* of a final *talaq*, but not during that of a revocable *talaq*.[45] Since it will in most cases be the mother performing both functions, it will also usually be her claiming the fees. If, for some reason, she is unable to breastfeed her children, or is not awarded custody, the woman who performs these functions in her stead can claim the fees at any point, since she is not married to the father of the children.

The fee for suckling is assessed according to similar fees granted to the wife's peers (*ujrat al-mithl*) and in accordance with the circumstances of the maintainer of the children (usually the ex-husband). The JLPS adds that if the wife seeks a fee higher than that usually granted her peers, the amount granted shall not in any case cause harm to the man who must pay it.[46] The fee for suckling is due from the date breastfeeding begins until the child is weaned, with the maximum age at which weaning is presumed to have oc-

[44]Article 78 JLPS.

[45]On breastfeeding, Article 152 JLPS, and see *Kitab al-Ahkam* Articles 368 and 369. On *hadana*, Article 159 JLPS.

[46]Article 153 JLPS. See also *Kitab al-Ahkam* Article 370.

curred set at the classical limit of two years.[47] For the first two years of the child's life, then, the divorced and nursing mother may claim both the fee for breastfeeding and the fee for custody. The fee for custody, again, is assessed according to the peers of the women, provided it is not beyond the means of the maintainer, and it may be claimed until the end of the period of *hadana*, which according to the JLPS occurs at puberty (*bulugh*) where the custodian is the mother.[48]

In the case material, both the fee for *rada`* and for *hadana* were sometimes included in the rights that the wife waives when her marriage ends with a *khul`* settlement. Where claims for the fees were made, it was often in conjunction with a claim for maintenance for the children; and a claim for *ujrat rada`* was nearly always accompanied by a claim for *ujrat hadana*. The reverse is not however true, due to the greater length of time during which the fee for *hadana* is due. The case material showed twelve claims made for one or both fees in 1965, sixteen in 1975 and twelve in 1985. The number of claims is about equivalent to those made for maintenance for the *`idda* period. Given that more women are likely to be due maintenance for the *`idda* than due these fees, it may be that women are more likely to claim those fees connected with their children than those they are due in their own right.

The payment of a wage to a divorced or widowed wife for her performance of certain parenting functions may be intended to compensate — at least in part — for the fact that the traditional rules give no rights of maintenance to the wife after the *`idda* is over: in the Gaza Strip, Islah Hassaniyya points out that they fall due the woman when she is no longer entitled to maintenance from her ex-husband.[49] Instead, the law considers

[47]Article 153 JLPS.

[48]Respectively, articles 159 and Article 162 JLPS. Where the custodian is not the mother, custody ends at nine for a boy and eleven for a girl (Article 161). Standard Hanafi law holds *hadana* to end at seven for the boy and nine for the girl, at which age the children return to their father as the natural guardian — *Kitab al-Ahkam* Article 391. The JLFR allowed the *qadi* to extend the period by two years if this was in the child's interest (Article 123 JLFR). The JLPS thus set nine and eleven as the absolute minimum when the custodian is not the mother, while the mother keeps the children until puberty. For a discussion on modification to the rules on *hadana*, see Welchman, 1988, 877–878, and see 1999, 201–224, on the application of the current laws in the West Bank and in Gaza.

[49]Hassaniyya, 1994, 64.

that she is entitled to a payment in return for providing a 'service' for the father of her children who, ultimately, 'belong' — in law — to his family and bloodline; thus Tucker describes the rules on custody as classing the mother's rights to her child as 'temporary, conditional, and partial.'[50] The rules restrict whom the woman can remarry while retaining custody of her children, and do not assume that she will go out to work,[51] thus a 'wage' could be seen by the jurists as a fair return. However, there remains an assumption that divorced women will return to and be supported by their natal family until they remarry. The level of fees awarded divorced mothers frequently appears to reflect this assumption. The amounts for the two separate functions of *rada`* and *hadana* awarded in the case material studied were always equal, and in 1985 ranged from five dinars to two dinars a month for one child, that is from ten to four pounds sterling at that time; in the later WCLAC material they ranged from three to fifteen dinars per child per month.

The 1976 Jordanian law did not deal explicitly with the divorced mother's accommodation, an issue that has preoccupied legislators and the public elsewhere in the region. In Egypt, the 1979 legislation which was subsequently overturned gave the mother the right to the matrimonial home — including a home owned by the husband — following divorce, for the duration of custody. According to Najjar, this was among the provisions of the 1979 law that produced 'the most abrasive exchange between the proponents and opponents of the law, for the simple reason that Egypt has been suffering from a suffocating housing shortage, as the Egyptian newspapers described it.'[52] This provision was replaced in 1985 requiring the husband to prepare an independent dwelling for his ex-wife and their children, and allowing him to stay in the marital home if he has done so. The Jordanian law does not explicitly deal with these matters, but the published

[50]Tucker, 1998, 135.

[51]Although in both Jordan and the West Bank the courts have upheld the right of the woman to go out to work without losing her right of custody, providing that she leave the child in the care of a suitably diligent and qualified person during her absence from the house. See Appeal Court decisions 23999, 23737, 23746 of 1983 and 21537 of 1980, in al-`Arabi, 1984, 105–106. This would to some degree depend on the nature of the work. See Welchman, 1999, 201–224.

[52]Najjar, 1988, 323 and 335. Proposals drawn from similar provisions were discussed in the West Bank and Gaza in 1998 in the course of the Model Parliament project.

decisions from the *Shari`a* Court of Appeal in Amman establish three main principles with regard to the custodian's accommodation. The first is that the father of the children is obliged to provide accommodation only in the event that the wife does not have any (she has no family able and willing to take her in, for example) and the court must establish this before making an award for the cost of accommodation.[53] The second is that the cost of accommodation is not based on the number of children in the woman's custody but on the general need for accommodation for herself and the wards in her care.[54] Finally, the court has clarified that if the woman submits a claim to the court for the costs of accommodation after having already rented the place for this purpose, she is entitled to the fee for accommodation from the date she submits the claim. If she has not already rented the accommodation then she may claim only from the date of the court's ruling.[55]

8.3.3 Dower

The other standard financial claim that can be made by the wife after the end of matrimony under the traditional rules is for deferred dower. The deferred dower can only be claimed when the marriage is over — that is, when the divorce or separation is immediately final, or when the *`idda* of revocable *talaq* is over. A claim may also be made for prompt dower or *tawabi`* not received during the marriage.

Classical law deals in great detail with the circumstances in which the full dower is due after marriage, or half the dower, or the proper dower (*mahr al-mithl*) or no dower at all. The JLPS reproduces the classical Hanafi rules on this subject.[56] In brief, full dower is due on the death of either party or after *talaq* in a consummated regular contract. Half the dower is due where *talaq* occurs before consummation or valid seclusion, and where the

[53]Al-`Arabi 1984, 115, 21305/1980.

[54]Al-`Arabi, 1984, 117, 17798/1973.

[55]Al-`Arabi, 1984, 116, 18904/1976 and 21143/1980.

[56]JLPS Articles 48–52. Sirtawi, 1981, 122, 152–153. The only change Sirtawi suggests to improve the law is the adoption of the view that no dower is payable if the woman kills herself or her husband; he notes that the Hanafi rules make dower payable in full on the death of either party.

marriage is dissolved (by *faskh*) due to an action by the husband.[57] The whole dower lapses if a *faskh* occurs due to an action by the wife, such as apostasy. In addition, no dower is due if separation occurs before intercourse or seclusion due to a disease or physical condition preventing consummation in one of the partners. A void marriage does not give rise to the right of dower; an irregular marriage does so only if it is consummated.[58]

In the case material, the only frequent variation to the award of the full dower, besides the proportions awarded after separation for *niza` wa shiqaq*, is the half dower due in a regular marriage dissolved by *talaq* before consummation, discussed above in Chapter Five. Where the *talaq* occurs after consummation, the woman may claim for the full amount of deferred dower immediately in the *`idda* of a final divorce, or at the end of an *`idda* following a revocable *talaq*. In the case material, such claims were rarely disputed. Occasionally, the husband defended his ex-wife's claim on the basis that she had already received the amount due from him. This defence was also raised by husbands when the wife was claiming the unpaid remainder of her prompt dower and/or the *tawabi`* along with the deferred dower. The case material also showed claims for *jihaz* made by women after the end of the marriage showing little difference in substance or procedure from claims during marriage.[59] In 1998, in the West Bank and Gaza Strip, during

[57]That is, for example, by him doing something to raise the bar of affinity, or becoming an apostate from Islam: Article 51.

[58]Article 42 JLPS. In decision nos.21566 and 21598 of 1980 (al-`Arabi, 1984, 273–274), the Jordanian *Shari`a* Court of Appeal considered a claim for dower by a woman in a marriage where the spouses were under the prohibition of *rada`*. The court noted that neither the JLPS nor the JLFR explicitly stated whether such a marriage was void or irregular, but that the OLFR and *Kitab al-Ahkam* (Article 379) held it to be *fasid*. The court took note of a 'correction' (*tashih*) issued in the Official Gazette of 10 January 1977 (no.2675) stipulating that in the JLPS, Article 26 was to come under the terms of 33(3) regarding void marriages. The court did not however give this any legal weight since it was not passed as a Parliamentary law with the Royal Decree. In addition, they noted that the *tashih* referred to 'prohibition from the womb', while *rada`* is not from the womb but arises after birth. Thus the marriage was held *fasid* and the woman awarded dower.

[59]Writing in 1957, Abu Zahra commented that where the goods claimed are those 'usually connected with men' (the example he gives is books) then the burden of proof is on the woman, while for items 'associated with women' ('such as cosmetics and things for needlework') the burden of proof is on the man. In the case of such household goods as mats, sheets etc., Abu Hanifa placed the burden of proof on the wife, on the assump-

the course of the Model Parliament project, activists and advocates discussed proposals for the disposal of the marital home and the regulation of the division of property acquired after the couple had married in a manner that would give recognition to the domestic labour of women and their contribution to and rights in the family.[60]

There is however one main difference in the results of claims for deferred dower as compared to prompt dower, with the case material showing examples of the husband being allowed to pay the former in instalments. The substantial amounts that may be registered as deferred dower may not be immediately available to the husband on divorce; and while the requirement of 'equality' (*kafa'a*) means that he must be able immediately to produce the prompt dower, no such proof is needed of his ability to produce the sum he agrees to have registered as deferred dower. Indeed, one frequently cited purpose of having a high deferred dower is that it would not be easily available to the husband and would cause him some difficulty to obtain, thus restraining any speedy and ill-considered recourse to unilateral *talaq*.

Where the woman's marriage is terminated by the death of her husband, she may claim her deferred dower from the husband's estate. This claim takes priority over the distribution of the estate and is in addition to her *shar`i* inheritance as spouse relict. The case material for 1975 showed one widow seeking amendment of the list of heirs and entitlements drawn up after her husband's death to include her entitlement of deferred dower, and another claiming her deferred dower from her dead husband's father who was administering the deceased's estate.

8.3.4 Compensation for Arbitrary *Talaq*

The introduction in the JLPS of compensation (*ta`wid*) for a woman arbitrarily divorced by her husband followed a precedent set in the Syrian law of 1953 (and developed in 1975) which has been taken up in varying forms and to various extents in a number of Arab states in the intervening years. At the heart of these texts is the idea of the man's injury of the woman through his misuse of his power of *talaq*, and the innovative step of em-

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tion that the marital home is usually the husband's and everything in it is under his authority: Abu Zahra, 1957, 293.

[60]Nashwan, 1998, 15; Khadr, 1998, 140.

powering the courts to subject the man's justification for his action to scrutiny. Although men are widely urged to be circumspect, restrained and fair in their use of unilateral *talaq*, the laws in Jordan and most Arab states recognise the same legal value attaching to a *talaq* issued 'arbitrarily' as to one issued 'for good reason.' A court ruling that the *talaq* was unjustified or injurious leaves the validity of the divorce intact, but holds the husband responsible for his action through effectively imposing a financial penalty. The calculation of the amount of compensation is closely connected to marital maintenance, and it is clear that part of the aim of compensation is to ensure some financial provision for the woman beyond the end of her *`idda*.[61]

Modern legal texts requiring the divorcer to pay his ex-wife compensation are usually presented as a development of the Quranic recommendation that a gift of 'consolation' (*mut`a*) be given to divorced women, expanding this concept and empowering the courts to enforce it.[62] Quranic verses on *mut`a* gave rise to different interpretations among the classical schools.[63] The dominant Hanafi opinion, that *mut`a* was obligatory only in the case of a wife who is divorced before consummation in a marriage where no dower has been specified,[64] is reflected in the JLPS, Article 55:

> If *talaq* occurs before the dower has been specified and before consummation of the marriage or valid seclusion, then *mut`a* is due. *Mut`a* shall be assessed according to custom and usage and with regard to the circumstances of the husband, provided that it shall not exceed half the proper dower.

The Shafi`is, on the other hand, hold that *mut`a* is mandatory for every woman divorced or separated without there being a reason for the di-

[61]See the Explanatory Memorandum to the original (abrogated) 1979 Egyptian legislation, and Najjar, 1988, 322.

[62]On the origins of the doctrine and earlier interpretations of *mut`a* as a consideration for the divorced wife, see Schacht, 1950, 101–102; and see Coulson, 1964, 31–32, on early disagreements among *qadis* as to court enforcement of *mut`a*.

[63]The Quranic verses most commonly cited in discussions of *mut`a* are 2.236, 2.241, 33.49, and 33.28.

[64]The Hanafis held *mut`a* to be recommended in all cases of divorce after consummation where the dower has not been specified and where the husband is obliged to pay the proper dower. The Shafi`is hold that *mut`a* is obligatory for all divorcées where the divorce is not occasioned by the woman, with the sole exception of those who are divorced before consummation but after the dower has been specified. The majority of the Hanbalis agreed with the Hanafis, although some took the same view as the Shafi`is. Abu Zahra, 1957, 232 and 335; Kashbur, 1996, 343–343; Khamlishi, 1994, 458–459.

vorce from her side; their exception is for a *talaq* before consummation, when they hold half the dower to be due. In 1953, the Syrian legislators departed from the Hanafi view and used the Quranic institution of *mut`a* to justify the inclusion in the SLPS of an article which provided for compensation for the wife in the event of the husband pronouncing an 'injurious *talaq*' without reasonable cause and giving rise to damage and poverty for the wife. The wife could petition the court for compensation to a maximum amount of the equivalent of one year's maintenance.[65] This was to be paid in addition to the wife's maintenance for the *`idda* period, and in assessing the amount of compensation to be awarded, the court was to take into account the degree to which the husband had wronged his wife and his financial circumstances.

In 1976 the JLPS included a similar but not identical provision:

> Article 134: If the husband divorces his wife arbitrarily (*ta`assufan*), such as if he divorces her for no good reason (*sabab ma`qul*), and she applies to the *qadi*, he shall award her against the man who divorced her such compensation (*ta`wid*) as he considers appropriate, provided that it shall not exceed the amount of her maintenance for one year. This compensation shall be paid in a lump sum or in instalments according to the requirements of the case and the circumstances of the husband, rich or poor, shall be taken into consideration in this. This shall not affect the rest of the matrimonial rights of the divorced woman, including maintenance for the *`idda* period.

In the Explanatory Memorandum to the JLPS, the Jordanian legislature echoed the Syrian arguments for the introduction of the provision on compensation. The Memorandum stated that Article 134 'takes the principle of the compensation of the woman in the event of an arbitrary divorce from the recommendation of *mut`a*'. It also refers to the doctrine of *siyasa shar`iyya,* noting that the ruler can order the commission of the recommended, the permissible or something that brings a *shar`i* benefit, and that according to the Hanafis this order must then be obeyed.[66] Muhammad Mheilan, *Qadi al-Quda* in Jordan, observed with regard to Article 134 that:

> when God gave the husband possession of three *talaq*s against his wife, it was on condition that the man would treat his wife well and use the *talaq* cor-

[65]Article 117 SLPS 1953. See Anderson, 1955 ('SLPS'), 41; and Coulson, 1964, 209.

[66]The specific reference is to Ibn Abidin. Explanatory Memorandum to the JLPS 1976, 6.

> rectly; if the man's *talaq* is not for any legitimate reason, then he is being arbitrary in his use of that right and must pay his ex-wife compensation if she claims it.[67]

Although clearly based on the Syrian provision, the Jordanian text is more radical, since it awards compensation for the mere incidence of an arbitrary *talaq*, with no regard for the material consequences such a *talaq* holds for the wife — that is, there is no requirement that the *qadi* believe that the wife is going to suffer damage and poverty as a result of the *talaq*. This reflects Mheilan's approach, that the man is being punished for his arbitrary use — or abuse — of his right of *talaq*, since this abuse will inevitably cause some hardship to the woman. Another radical aspect of the Jordanian approach to compensation has been established by the courts rather than by legislation. This is the placing of the burden of proof firmly upon the man, through the establishment of the legal presumption that unilateral *talaq* is arbitrary. The text on compensation does not make this clear, but a decision from the Amman *Shari`a* Appeal Court in 1978 held that:

> The woman does not have to prove her claim that the *talaq* was arbitrary, since *talaq* is fundamentally disapproved (*makruh*); it shall be considered arbitrary so long as it was not pronounced for a good reason, and a divorcer who claims that he did have a good reason must prove this defence.[68]

Any *talaq* pronounced without the consent of the wife thus potentially falls into the category of arbitrary *talaq*, even if the wife was present when it was pronounced. Compensation cannot be claimed for a *talaq* pronounced in exchange for the wife's waiving of her rights in a *khul`* agreement, nor for a *talaq* issued by the court in the process of *tafriq* — this last in contrast to the situation in Egypt.[69] The exception to this is possibly the pronouncing of a *talaq* by the court on behalf of a woman when the marriage contract provides for her divorce if a specified condition comes to pass (for example if her husband takes another wife). If the husband has agreed to the stipulation and proceeds to carry out the action therein stipulated against, the wife may be able to claim compensation for the ensuing *talaq*.

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[67]Mheilan, 1986, 78.

[68]Al-`Arabi 1984, 59, 19859/78.

[69]See al-`Alami, 1996, 57, note 7; Najjar, 1988, 332–333.

In practice, when faced with an allegation of 'arbitrary *talaq*', establishing a 'good' reason (or 'reasonable cause') for a *talaq* is extremely difficult for the ex-husband and his lawyer. Of the 26 claims for compensation submitted by women in the 1985 case material, only one was rejected. In this case, the basis for the claim that was rejected was a first revocable *talaq*, and the wife acknowledged that she was still in the *`idda*. Her claim was therefore dismissed, since it was established in the Jordanian *Shari`a* Appeal Court soon after the promulgation of the JLPS that a divorcée can claim compensation only when the state of matrimony has been terminated.[70] Apart from this one case, all the women who applied for compensation in the case material were granted awards of varying amounts. In ten of the cases, the ex-husband explicitly acknowledged the woman's claim; four were heard in the absence of the defendant; in six, the man defended the claim but failed to establish that he had reasonable cause for the divorce, and in the remaining five claims the records did not show whether a defence was made.

In most cases where the claim was defended, the records merely state that the husband denied the *talaq* had been arbitrary but could not prove his defence. In one case, however, the clerk recorded in detail the husband's defence, which rested on his claim that his ex-wife used to use certain blasphemous colloquialisms to curse him. The woman denied this claim and the court asked the man to prove it; he then stopped attending court and eventually the woman took the oath of denial to his defence and was awarded compensation. It may be that the court recorded this particular case in more detail because of the gravity of the contents of the defence presented by the husband, which, if proven, would certainly have been held to constitute a *shar`i* reason for divorcing her. Jordanian Appeal Court decisions have affirmed some of the other obvious positions, such as that no compensation will be due if the ex-husband establishes that his wife was legally in a state of *nushuz* when he divorced her, or that he had in fact divorced her at her request.[71] In one case the man had claimed that his ex-

[70]Al-`Arabi 1984, 19530/77.

[71]`Amr, 1990, 44, 20019/78. In a similar case in 1996, the husband established that the wife had submitted a claim for *niza` wa shiqaq* which had lapsed when he divorced her unilaterally. The first instance court rejected the woman's claim for compensation and she appealed. The Amman Appeal Court pointed out that assuming the judicial divorce had taken place, she would not have got compensation and would have been entitled to [only] a proportion of the dower according to the blame allocated to her. No

wife had had a tattoo done without his consent; on appeal, the Appeal Court directed that he had to prove that this had been done during the course of the marriage, which might imply that if in fact this was the case, it might stand as good reason, or contribute to establishing such a reason.[72] In another, the court stated that the fact that the wife was infertile, slow of speech and generally 'simpleminded' was not in and of itself 'reasonable cause' for a *talaq*; the court continued that in such circumstances, the man should treat his wife 'with affection and mercy, as God commanded', observing that it was unlikely she would be able to find an alternative source of income.[73] One reported case where the Amman Appeal Court held the divorcer's defence of a claim for compensation to be unequivocally established was where he proved that he had 'divorced his wife reluctantly after enduring her harm, neglect and failure to perform her marital duties for over eight years.'[74]

On the whole, the Jordanian and West Bank Palestinian courts appear to seek first and foremost the establishment of a strictly *shar`i* reason for *talaq*, not necessarily including therein reasons which custom and culture would hold to 'justify' a divorce. Thus blasphemy (as in the case above), insulting of or violence against the husband and his family, adultery and apostasy, along with legally established *nushuz*, would serve to overturn the assumption of arbitrariness in a unilateral *talaq*. On the other hand, the fact that the wife is unable to bear children would not necessarily be held to constitute an acceptable reason for a unilateral *talaq*. Having children is not a requirement of the marriage contract between the spouses, and in Jordanian law the man retains the option of taking another wife in a polygamous union.[75] However, in other areas of conduct, the assumption of

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compensation would have been due as the divorce would have been from the court and 'therefore would not be arbitrary'. By the man's divorce of her, the Court continued, the woman got her full dower and 'it is considered to have occurred on her request'; the first instance ruling was upheld. 40170/1996, Dawud, 1999, I, 217. Compare this to the position taken by the Egyptian courts, discussed below.

[72]23414/84, `Amr, 1990, 47, and Dawud, 1999, I, 213.

[73]`Amr, 1990, 46, 22299/81.

[74]Al-`Arabi, 1984, 60, and `Amr, 1990, 46: 23733/83.

[75]Infertility of the first wife is one circumstance widely felt to constitute a 'lawful benefit' for a man in marrying a second wife in a subsequent polygamous union. Infertility of the husband is not a specific cause for divorce at the woman's petition in the classical rules, although infertility of either spouse might be acknowledged as a contributing factor to 'discord and strife' between the couple. In the 1960s, two apparently

arbitrariness may be undermined by the establishment by habitual practices by the ex-wife falling short of the standards of conduct expected customarily by society, whether in public or in their domestic life, as illustrated by the cases cited above.

Besides the general difficulty of proving a *shar`i* defence, the husband may be reluctant to disclose to the court the details of what in fact provoked his *talaq*, or is in any case unwilling to have such details set down in the record. The records in the West Bank courts frequently note that the husband denied the *talaq* had been arbitrary but 'failed to establish his defence', and in some cases at least this means that the husband either refused to elaborate or refused to have the details recorded.

Although this may affect the defence of a compensation claim, it appears also to be the reason why so few women are awarded the maximum amount of compensation available, that is, the equivalent of twelve months maintenance. The *qadi* exercises his discretion when the ex-husband is unable to prove a *shar`i* defence, or is unwilling to have it recorded, and yet the judge feels or has heard in court that the man was not totally and absolutely to blame for his action; or, to put it the other way, maximum compensation is awarded only when the *qadi* is convinced that the ex-wife was totally wronged and blameless in the affair. Thus, the *qadi* will only dismiss a claim for compensation when the husband establishes that there was a *shar`i* reason for the *talaq*; on the other hand, conduct by the wife which would customarily be considered fair cause for *talaq*, without amounting to a *shar`i* reason as such, may serve to reduce the amount of compensation that the *qadi* awards the woman.

Maximum compensation was awarded to the ex-wife in only one of the 25 applications in the case material in which awards were made. In this case, the man had divorced his wife with a first revocable *talaq* while she was pregnant. She obtained a maintenance award and when her *`idda* and the marriage were terminated by childbirth, she applied to the court for compensation. The husband did in this case defend the claim but the court, unconvinced of his stated reasons, awarded the woman the equivalent of twelve months of her existing maintenance award, to be paid in twelve monthly instalments.

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contradictory decisions were issued by the Syrian appellate court regarding whether or not the inability of the wife to have children served to disprove the arbitrariness of a *talaq*: Dahi, 1978, 168–169, 508/511 of 1967 and 491/483 of 1969 — the later one stating that 'the infertility of the wife does not make *talaq* legitimate.'

This award, although unusual, clearly shows maximum compensation being paid as there exists a previous maintenance order with which to compare it. In effect, the court merely extended the maintenance order for a further year. In other cases, it is not clear how the award of compensation compares with maintenance as the monthly instalment for compensation may either exceed or fall below a previous maintenance award. It can thus be deceptive to assume that the compensation is actually equivalent to maintenance for the same number of months over which it is paid. In some rulings in the case material, the monthly instalment of compensation exceeded previous maintenance award levels. In others, it was less: this was often the case where the spouses agreed together on the award to be made. In one such case, the parties chose an expert (*khabir*) to assess the woman's maintenance level in order to take it as a basis for compensation. In yet other cases, the parallel between monthly maintenance and monthly instalments of compensation is clear, as in the one case where maximum compensation was awarded.

Although Article 134 of the JLPS makes payment by instalment optional, in the case material it was rare to find compensation being paid in a lump sum; in only two of the awards in the case material was no mention made of the period over which the amount was to be paid.[76] In the seventeen rulings where it was possible to calculate awards as months of the amount of a previous maintenance award, in only four was it the equivalent of six months or less, in the remainder seven months or above.

The similarities between claims for marital maintenance and for compensation for arbitrary divorce were given as the reason for a ruling by the Jerusalem *Shari`a* Court of Appeal that claims for compensation could be heard in any *shari`a* court, without regard to the place of residence of defendant or plaintiff, as in the case of claims for maintenance.[77] In a claim for marital maintenance, the assumption is that the wife is due maintenance and once she establishes the fact of her marriage, if the husband wishes to

[76]An Amman Appeal Court decision from 1980 held that if the award allows payment in instalments, it must set this out explicitly along with the number of months and the amount due each month: al-`Arabi, 1984, 59, 21581/80.

[77]This was in contrast to earlier rulings by the Amman *Shari`a* Court of Appeal. The Jerusalem decision came in Apps.77–177–25; the Amman principle is to be found in al-`Arabi, 1984, 59 and 168, 20404 and 20368 of 1978, and 21669 of 1981. See more detailed discussion above in Chapter Two.

defend her claim, the burden of proof rests on him to establish that she is *nashiz* and therefore not due maintenance. In the same way, in a claim for compensation for arbitrary *talaq*, the assumption by the court is that the wife is due compensation, once she has established the occurrence of a unilateral *talaq* ending the marriage, and the burden of proof then falls on the husband to establish a *shar`i* reason for the divorce.

The claims for compensation for arbitrary *talaq* in the case material display three major features: that claims are rarely successfully defended; that the amounts awarded are — arguably — relatively low compared with the material and emotional losses sustained by the woman; and that the number of applications for compensation is low compared with the number of unilateral *talaq*s. In Bethlehem, eighteen unilateral *talaq*s were registered in 1985 and only one claim for compensation; in Ramallah, there were 83 unilateral *talaq*s and thirteen compensation claims; and in Hebron, 48 unilateral *talaq*s and twelve compensation claims. It is true that the figures of the Ramallah court for *talaq* are somewhat distorted and that in many other cases there may well be an informal agreement between the spouses to the *talaq*, not amounting to a formal renunciation of rights in a *khul`* settlement. Nevertheless, it seems likely that not all women are aware of their right to compensation in the event of an arbitrary unilateral *talaq* being pronounced against them. The *qadi* does not inform her of this right in the event of a unilateral *talaq* being registered by her husband, and since it is not traditionally part of the family law of the area, she may well not know of her right to *ta`wid* unless she engages a lawyer, which is unlikely unless she has other claims to raise. This has implications for the intended deterrent effect of *ta`wid*, since it may be the case that many men too are ignorant of the fact that a claim for compensation may be made against them in the event of their unilateral divorce of their wife.

The WCLAC study examined claims for *ta`wid* in the West Bank courts of Hebron, Dura, Ramallah and Nablus over the years 1989, 1992, 1993, and 1994, finding a total of 58 claims, with a proportion of 6% *ta`wid* claims to unilateral *talaq*s registered (subject to the above reservations) and a particular concentration of claims in the Nablus court (41 of the 58). Moors found that in Nablus in the mid-1980s, almost a third of women entitled to claim compensation went to court to claim it,[78] and although the WCLAC material suggests a lower rate of claim even in Nablus, it did sug-

[78]Moors, 1995, 140.

gest that claims there are more routine than in the other courts.[79] Attitudes of court personnel are likely to play a part in this along with local knowledge and custom. The levels of compensation awarded in different courts are also interesting and suggestive of the attitudes of the *qadis* working in the different courts. In contrast to the material for the current study, the WCLAC material, weighted by the high proportion of cases in Nablus, showed a maximum of twelve months maintenance in four cases, with seventeen of the 38 cases where the assessment could be made falling in the range of six months or under and 21 in the seven to twelve months range. In the earlier work for this study, eight of the twelve rulings in Hebron were made over ten months and in only eight rulings in all the courts were the instalments to be paid over six months or less.

Compensation for arbitrary *talaq* has been the focus of much attention since 1976 by the *shar`i* judiciary in Amman, with changes to the 1976 provision being prepared in proposed amendments to the law drafted in 1985 and 1987, as well as being the subject of a special three-page memorandum from the Department of the *Qadi al-Quda* in Amman in 1980, justifying the whole issue of compensation within the *shar`i* framework of *mut`a*. The changes suggested in successive versions of the draft amendments proposed the addition of some procedural clarifications drawn from implementation of the current text, and the increase of the maximum levels of compensation, varying from a proposed maximum of the equivalent of three years' maintenance (as is now the case in Syria) to five years, sometimes including also a minimum level of the equivalent of one year's maintenance. For its part the Memorandum, issued just four years after the JLPS itself, and entitled 'Reasons Necessitating Modification of Article 134 of the Personal Status Law 1976,' serves the role of a full 'explanatory memorandum' to the original article on compensation in the 1976 law, which was not dealt with in any great detail in the original Explanatory Memorandum to the JLPS.

The document begins with the reason for the permissibility of *talaq* — that is, to prevent the greater damage involved in hostility of the spouses and the disruption of family life by an unhappy union. It recalls two *hadiths* of the Prophet, the first recorded by Ibn Dawoud that 'the most odious of

[79]Welchman, 1999, 192. Also interesting to note is that in 40 of the 58 claims (69%) the woman claimant was represented by a lawyer.

permitted things to Allah is *talaq*' and the second reported on the authority of Mu'adh Ibn Jabal that 'Allah created nothing more hateful to him than *talaq*'. *Talaq* without a legitimate pretext (*hujja*) is thus arbitrary *talaq* which damages the woman concerned both emotionally and in regard to her reputation; the Islamic *shari`a* therefore established *mut`a* for the divorced woman to console her in her distress. The document cites four Quranic verses as evidence and further notes that the Prophet 'gave *mut`a* to his wife Umayma bint Nu`man [. . .] and used to order his Companions that *mut`a* [should be provided] for the divorcée.'

The document then sets out the Hanafi and majority Hanbali positions on *mut`a* and takes note of the view of Ibn Hanbal selected by Ibn Taymiyya that *mut`a* is obligatory for all divorcées. It also notes one Maliki view to the effect that *mut`a* is obligatory for every divorcée after consummation whether or not the dower has been specified, and sets out the Shafi`i and Zhahiri views. By selecting a variety of these views, it is concluded that it is permissible to hold *mut`a* as obligatory for all divorcées. There is then an argument for the assessment of the amount of *mut`a* to be made by the *qadi*, with or without the assistance of experts, according to the capacity of the husband, on the basis of material in the Qur'an and the practice of the Prophet and it is pointed out that nothing in the *shari`a* forbids payment by instalments.

The final paragraphs of the document recall again that arbitrary *talaq* (i.e. *talaq* without a legitimate pretext) is odious and does not accord with the aims of the *shari`a*. People have exceeded the *shar`i* limits in effecting *talaq*, with a consequent increase in the injury that arises therefrom. There is thus a need to deter its incidence and to lighten its effects where it does in fact occur: 'Therefore legislation is required to reduce the incidence of arbitrary *talaq* which has no justification, and to restrain those who rush into *talaq* to injure the wife and get rid of her in abusive and hostile manner.' The ruling authority is permitted to introduce such legislation in the public interest, by way of *siyasa shar`iyya* and *al-masalih al-mursala*.

In its detail and its invocation of justification in the Qur'an and the *hadith* as well as more immediately social justification, it may be that the memorandum was drafted as much in response to criticism directed at the introduction of the principle of compensation as in justification of the specific proposed amendment to which it was attached. It is noticeable that the word *mut`a* is used more frequently than *ta`wid*, emphasising the *shar`i*

origin of the institution of compensation. In the subsequent and successive draft revisions of the provision (in 1985, and 1987), the word *ta`wid* is used throughout.

Critics of Article 134 can be divided very generally into those for whom it does not go far enough, and those who are hesitant about the principle itself. By 1987, it might have been assumed that the cursory treatment of the issue in the Explanatory Memorandum to the draft law of that year was indicative of the establishment both in law and practice of compensation and its widespread acceptance. This is not necessarily the case. Samara, for example, starts his section on Article 134 by quoting the text of the article without prefacing it with an introduction on the legal background as is his wont elsewhere in the book, because, he points out, he could not find any *shar`i* texts on either arbitrary *talaq* or on compensation.[80] His criticisms stem from the basic position that *talaq* is the right of every married man, and that since neither the Qur'an nor the practice of the Prophet provide that *talaq* must rest on reasons, then a man should not be punished for his exercise of this right. He makes a five-point argument against the principle of *ta`wid*: that there is a 'general permission' (*ibaha `amma*) for *talaq* in the Qur'an and the practice of the Prophet, and that 'a generality can only be constrained by a *shar`i* text, not by rational argument'; that compensation is a penalty, and that a penalty can only be imposed for a crime, which implies that *talaq* for no good reason is a crime; that Islam allows financial penalties only in specified instances (e.g. *diya*), and that the general rule is that punishment is physical, not financial; that the comparison of compensation with *mut`a* is false and there are important distinctions between the two; and that attempts to justify the legislation for compensation on the argument that the temporal ruler can order the obligatory performance of matters that are permitted or recommended in the *shari`a* are misguided, since this principle applies to issues on which the *shari`a* is silent, not where they are specifically classed by the Qur'an into another category of action, such as recommended.[81]

Samara draws support from criticisms similar to his own made by Abu Zahra in Egypt in the 1950s, when some Egyptian courts were already

[80]Samara, 1987, 336.

[81]Samara, 1987, 337. On this last point he is referring specifically to the position of Ibn Abidin.

awarding compensation to divorcées in advance of legislation. One of Abu Zahra's criticisms focused on the fact that by forcing the husband to disclose the reasons for his *talaq*, in order to produce a defence to a claim of arbitrariness in his exercise of *talaq*, the court may be obliging him to reveal in public things that should remain confidential and thus to destroy the respect between the spouses enjoined by the Qur'an. Thus, either the man will reveal things that should remain private, which he is not supposed to do, or else he will risk having the maximum award made against him.[82]

The arguments around compensation for arbitrary *talaq* thus invoke not only the various interpretations of the institution of *mut`a*, but also the principle of the unlawful exercise of rights. This discussion is summarised by Anis al-Qasem in a 1990 article focusing on the civil codes of Arab states and examining the debate on the general Islamic principle, 'permissibility negates liability' conducted between 'the purists who would not admit any liability, and [. . .] the pragmatists who would not allow intentional injury, though arising from the exercise of a recognised right, to escape liability'.[83] Noting that the pragmatists can also base their case on the *shari`a*, al-Qasem goes on to demonstrate the constraints placed upon the general principle by reference to the husband's right to divorce and the entitlement of the wife to claim damages (i.e. in the form of compensation) if he abuses his right.

Despite this ongoing debate, and the criticisms from some jurists, the 'pragmatist' wing of the Jordanian legislators seem to have won the argument on this particular provision, since debates on the article on *ta`wid* since its promulgation have resulted in proposals not for its abolition or reduction but rather for its expansion. In the 1985 draft revision of the provision, the maximum compensation was set at the equivalent of five years maintenance, and a minimum of three years was proposed. In the 1987 version, revised proposals were made of a minimum of one year and a maximum of three years, unless the spouses themselves had agreed on something else. A draft explanatory memorandum to this latter proposal argued that setting levels higher than those therein proposed might encourage husbands to refrain from *talaq* for quite the wrong reasons and proceed to abuse and mistreat their wives to the extent that the wife is

[82]Abu Zahra, 1957, 333–334.

[83]Al-Qasem, 1990, 397–398.

forced to give up her dower and lose her right to compensation (i.e. in a *khul`* divorce).[84] None of these amendments have yet made it into law, and this is clearly an issue that continues to preoccupy the *shar`i* hierarchy, *shar`i* jurists and commentators and various sectors of civil society concerned with women's rights and the family.

Raising the maximum level of compensation to the equivalent of three years' maintenance would bring Jordanian law into line with the provision in Syria, where the new Law of Personal Status introduced this level in 1975.[85] It could be that the idea of a minimum level came from the discussions in Egypt, where the debate on compensation for arbitrary *talaq* was going on for some time before the institution was finally introduced in the ill-fated 1979 legislation. In particular, several articles were written by the late Jamal al-`Utayfi, advocating the financial compensation of the wife after an 'unjust' *talaq*, with the ex-husband providing her with an income for so long as she remained unmarried.[86] The original Egyptian provision was re-issued in 1985 and set a two year minimum and no maximum, and included consideration of the length of the marriage in the factors to be taken into account by the judge setting the award.[87] A proposal following this last element of the Egyptian provision was advocated in Jordan during the period that modifications were being considered to the 1976 article. In a pamphlet written in 1984, advocate `Atayat recommended that there should be a direct relation between the length of the marriage and the calculation of compensation 'so that if the wife is arbitrarily divorced after twenty years of marriage, she can seek compensation for all those years.'[88] In addition, court decisions in Egypt have established that the *mut`a* payment is an entitlement of women divorced without their consent by what-

[84]Draft Explanatory Memorandum to the draft amended JLPS 1987, 4 point 24.

[85]SLPS (no.34/1975) Article 117. In the Draft Unified Arab Law of Personal Status, Article 97(b) proposes similarly a maximum limit of the equivalent of three years' maintenance.

[86]Articles by `Utayfi in *Al-Ahram*, 29 March 1960, 21 April 1967 and 9 February 1971.

[87]See Najjar, 1988, on the debate surrounding this provision in the 1979 legislation. Law no.100/1985, Article 18 *bis*, amending Law no.25 of 1920.

[88]`Atayat, 1984, 4. Al-Qasim, 2000, 16, similarly advocates a five-year minimum level of compensation for arbitrary *talaq*, with the courts empowered to award a monthly pension (presumably for life) in the event of a man divorcing his elderly wife 'who has shared his life for many years'.

ever means. El-`Alami reports an Appeal Court decision setting aside a ruling by a first instance court which had rejected a claim for *mut`a* by a woman judicially divorced from her husband by the court on the grounds of injury. The Appeal Court argued that in cases in which it is possible for a ruling to be given for judicial divorce, the *qadi* is in effect acting in place of the husband in effecting the *talaq*, and for the purposes of *mut`a* it is therefore equivalent to divorce by the husband himself without the wife's consent.[89]

Thus, the existing Jordanian article, as applied in the West Bank courts, lags behind developments in both Syria and Egypt (as well as other Arab states) in its intention and ability to increase the financial rights of divorcées beyond the established entitlement of maintenance during the *`idda* period, deferred dower, and fees related to parenting. The 1994 Jerusalem conference on Women, Justice and the Law recognised this when participants called for the maximum amount of compensation for arbitrary *talaq* available to women to be increased beyond the current maximum in Jordanian law.[90] More specifically, advocate Asma Khadr's 1998 book addressing the issue of a Palestinian personal status law calls for *ta`wid* to be awarded in accordance with estimates provided by experts, provided that this be not less than the equivalent of maintenance for five years for a woman divorced by arbitrary *talaq*, or as alimony until her death if the marriage had lasted over fifteen years.[91] Proposing that experts be involved in setting the levels may be envisaged as opening the way for professionals from outside the *shar`i* system — and from outside the ranks of the more traditional pool of *khubara'* — to be called upon to describe the nature and extent of injury occasioned by the divorce.

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[89]El-`Alami, 1996, 57 and note 7, referring to Court of Appeal decision no.422 of judicial year 106, Ahmad A. v. Soraya A.. Such practice appears to be in line with statements made by the Mufti of the Republic during discussions of the original 1979 legislation: see Najjar, 1988, 332–333. In his commentary on the Moroccan provision, al-Khamlishi, 1994, 462, argues cogently for the application of the *mut`a* obligation to cases of judicial divorce where the husband is established to have been at fault. Contrast the Amman Appeal Court decision reported by Dawud and discussed above in note 71.

[90]Al-Haq, 1995, 52.

[91]Khadr, 1998, 144. Her proposal also allows for compensation for a wronged husband, in a text similar to the Tunisian article.

CHAPTER 9

Conclusion: Towards a Palestinian Law of Personal Status?

9.1 CONTEXT

The 1976 JLPS and the 1954 Egyptian-issued LFR have a number of important differences in substance, as noted in the course of this study, despite their common residual reference to the Hanafi school. Beyond the text, however, they display two important similarities: they both clearly stand in need of revision, if only in view of the amount of time that has passed since their promulgation; and they are not 'Palestinian legislation'. Both of these points, along with the need for territorial unification, have been raised in support of the call for a more appropriate Palestinian law of personal status to be prepared.

Despite the poor level of protection of rights, livelihoods and national identity afforded to the Palestinians during the course of the twentieth century by 'law' in the hands of their various rulers, a remarkable amount of effort and attention has been focussed since the beginning of the transitional period on the drafting and discussion of legal 'texts' presented as the first 'national' Palestinian legislation. In considering the extent to which there is currently a tendency towards centralization in the legal order under the Palestinian Authority, Botiveau highlights the role of non-governmental organisations (NGOs) during the Israeli occupation and their contribution

to 'regulatory activities' in the 'non-state legal field', leading to the formulation of 'a general norm — a national law based on Palestinians' representation of their own identity'.[1] In the two examples of 'texts' (of different status) considered in this Chapter, the draft Basic Law and the various proposals for personal status laws, the idea of representation of national identity — with reference to the immediate history of struggle in the West Bank and Gaza — can be seen to be a strong motivating factor for the drafting process.[2]

Palestinian NGOs have also been deeply involved in both processes. In the case of the draft Basic Law, a broad range of NGOs from diverse sectors participated in the public debate, with human rights organisations getting involved in drafting alternatives. In the case of personal status law, the main NGO actors have been women's rights groups. Historically, and through its different phases, the Palestinian woman's movement had not focused sustained attention on the issue of personal status law or indeed other 'social justice' requirements: as Dajani writes, 'it has become almost axiomatic among national liberation movements that the struggle to end foreign rule takes precedence over other social agendas, including those of women'.[3] After the broader mobilisation of women in the *intifada*, some activist Palestinian women were put in mind of the experience of Algerian women and the failure of the post-revolution independence government to attend to the 'social' (and gender) agenda.[4] Palestinian women sought to raise and address issues of gender discrimination in society and in law, and to strengthen and broaden women's participation in the institution-building processes proceeding with an eye on statehood. Just after Yasser Arafat returned to Gaza to head the Palestinian Authority, at a press conference in August 1994, the Declaration of Women's Rights (or the 'women's charter') was agreed by a range of those involved in the women's movement, on an initiative from the Women's Affairs Technical Committee, and submitted

[1]Botiveau, 1999, 79–86.

[2]See Botiveau, 1999, 83, on the three 'somewhat contradictory approaches' to expressing this identity in the Basic Law.

[3] Dajani, 1994, 34.

[4]See Hammami and Johnson, 1999, 326: 'in Palestinian discourse, 'social issues' have generally been a politic term for questions—and conflicts—over gender issues.' On the references to Algeria, see Dajani, 1994, 34. On what happened in this regard in Algeria, see Lazreg, 1994.

to the Palestinian Authority by the General Union of Palestinian Women. It cited a number of principles on women's rights for incorporation into the constitution and legislation of a future Palestinian state, and included references to the non-discrimination commitments of the 1988 Palestinian Declaration of Independence and to international human rights instruments including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Declaration of Women's Rights emphasised throughout its text the principle of equality between the sexes 'in all aspects of life', although it went into no details on family law.[5]

A number of lobbying targets were achieved by the women's movement as a result of high-profile and energetic issue-specific campaigns, some of them indicated in the Declaration. By way of example, these include a Directive circulated by the Ministry of the Interior in the PNA clarifying that a married woman does not need her husband's approval to apply for a Palestinian passport, nor an adult (over 18) single female her guardian's consent; and the Ministry of Transport's climbdown over requiring unmarried women to be accompanied by a relative for driving lessons.[6] The vulnerability of these achievements lies in the fact that most have been effected by way of regulations or directives issued by PA officials, rather than by way of law passed by the Palestinian Legislative Council (PLC).[7]

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[5]Text in *Palestine Report*, 7 August 1994; see also Hammami and Johnson, 1999, 326, on the demands regarding nationality.

[6]Respectively, PA Ministry of Interior, Passports and Nationality Department, General Directive of 12 March 1996; and Ministry of Transportation, Directive 913 of 18 July 1996. I am indebted to Suheir Azzouni, Director of the WATC, for the texts. Brand, 1998, 136–137, reports the Jordanian parliament in 1994 referring to the relevant committee a draft law allowing women to apply for passports without a guardian's (or husband's) consent, and amendments to the Nationality Law proposing similar changes to those articulated in the Palestinian Women's Charter—that a woman be enabled to pass her citizenship to her children and non-Palestinian (or Jordanian) husband. Brand reports that no action had been taken at her time of writing. See Hammami and Johnson, 1999, 326 on the Palestinian Women's Charter; Khadr, 1998, 92, on the need for legislation on the passport issue in Palestine; and *Palestine Report*, 19 July 1996 on the 'storm of protest from local women's groups' that greeted the transport regulation that was later amended. In Egypt, a draft clause allowing women to travel without their husband's consent was withdrawn from the law later passed in January 2000.

[7]Hammami and Johnson, 1999, 327, report that 'incidents continue to occur in which women are asked for the signature of their male guardian' when applying for a Palestinian passport.

On the specific subject of personal status law, although no 'legislation' marked the transitional period (as compared to administrative directives), a heated public debate that began in 1998 took the discussion beyond the *shar`i* judiciary, where the *Qadi al-Quda* had announced his intention to unify the laws in the West Bank and Gaza, and beyond the women's movement where a series of activities in the NGO sector had led up to the final debating sessions convened by the Model Parliament: Women and Legislation project. Although this project had been preceded by a number of meetings and conferences at which personal status law had been discussed,[8] none had provoked the responses that were directed at the Model Parliament, or had the same impact in focussing public debate on the issues at stake. Questions that were posed in the context of the debate included not only particular positions to be adopted in the text of a future Palestinian law of personal status, but whether the law should not only be unified geographically but should also apply to all citizens (i.e. of whatever religion), and what should be the role of religious courts.

By that time, however, some of the options being discussed within the 'discursive public space' that opened up around the subject[9] may already have been pre-empted by the prompt and sustained attention to 'institution-building' within the putative Palestinian state by the *Qadi al-Quda* and subsequently his Deputy. As described in Chapter Two, these efforts encompassed the level and staffing of senior appointments (including the post of *Qadi al-Quda* itself) and the expansion and upgrading of the *shar`i* judiciary and staff of the *shari`a* courts. They met with a positive response from the Executive (in the person of President Arafat) and clearly presumed the continuation of the separate communal jurisdiction of the *shari`a* courts in a future Palestinian state. Further commitments in this direction were elicited during the transitional period from the executive and from the PLC in the form of draft 'constitutional' texts which, although not passed yet into 'law', must be seen both as indicative of a consensus in the current legislature, with the accord of the executive, and as setting the broad framework for the constitution of the Palestinian State.[10]

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[8]Notably the 1994 conference on Women, Justice and the Law, convened by the Palestinian human rights organisation al-Haq.

[9]Hammami and Johnson, 1999, 320, citing Benhabib, S., 'Models of Public Space: Hannah Arendt, the Liberal Tradition and Jurgen Habermas', in : Landes, (ed.), *Feminism, the Public and the Private*, Oxford: Oxford University Press, 1998, 65–99, at 65.

[10]A draft of a Temporary Constitution for promulgation by the Palestine National

9.2 THE STATUS OF *SHARI`A* AND THE *SHARI`A* COURTS IN DRAFT 'CONSTITUTIONAL' TEXTS

At the same time as building up the *shar`i* judiciary on the ground, the *Qadi al-Quda* also addressed himself very early on to its constitutional recognition in the draft Basic Law for the transitional period, describing as his own 'small part in building these institutions of the Palestinian National Authority' a memorandum he wrote in 1994 regarding the draft text and specifically its omission of any mention of the *shar`i* judiciary.[11] The Basic Law, a sort of draft interim constitution, attracted wide-ranging discussions in Palestinian civil society as of 1994, particularly on the guarantee of human rights and the rule of law, and the structuring of relations between the executive, legislative and judicial authorities. Human rights organisations and the women's movement were among those who engaged in debate, consultation and lobbying efforts around the successive drafts. The Basic Law was widely seen not only as vital for the transitional period but as indicative of things to come in a future Palestinian state, and it proved highly contentious for the executive.[12] Despite having passed its third reading by the PLC in October 1997, by the formal end of the interim period on 4 May 1999, the Basic Law had still not received ratification by President Yasser Arafat. Nevertheless, its wide discussion in civil society and the process of its passage by the Legislative Council remain significant.

Council (as compared to the Basic Law passed by the Palestinian Legislative Council, see below) had been drawn up by the summer of 2000.

[11] Abu Sardane, n.d., 44–46.

[12] The Basic Law was first drafted under the supervision of Anis al-Qasem following the Declaration of Independence by the PLO in 1988. After the Gaza-Jericho Agreement was signed in 1994, the draft was opened to widespread consultation and public debate in Palestine. The original draft text went through a number of different drafts until the elections for the Palestinian Legislative Council in January 1996. In the summer of 1996 the PLC published its own first draft in the local and international Arabic press, and the final version passed its third reading on 2 October 1997. See Oyediran and Gangat, 1996; Chase, 1997; al-Qasem, 1992–1994 ('Commentary on the Draft Basic Law); and for comparison, Wing, 1992–1994. Unofficial English translations of the final (fourth) draft under al-Qasem's supervision and the final text passed by the PLC are published respectively by the Jerusalem Media and Communications Centre (*Draft Basic Law,* February 1996, with an introduction by al-Qasem) and LAW—Palestinian Society for the Protection of Human Rights and the Environment (*Basic Law Draft Resolution*, October 1997).

The main drafter of the original text of the draft Basic Law was Anis al-Qasem, Chair of the Legal Committee of the Palestine National Council. Commenting on the extensive public debates on the draft text that he had originally presented in 1994, he noted that women's organisations had raised questions to do with personal status issues, but that 'it was explained and accepted that a basic law was not the place for such subjects and that that had to be attended to in special legislation.' In similar vein he explained the absence, in his draft texts, of any reference to the place of *shari`a* in the Palestinian legislative process:

> The Draft intentionally avoided the inclusion of issues that may be divisive at this stage within the Palestinian community, such as the religion of the state, the sources of legislation and boundaries. It has been the regular practice in the Arab states to declare that Islam is the religion of the state and *shari`a* the main source or a source of its legislation. Within the Palestinian community, there are various trends on the subject: the secular, the modernist and the fundamentalist. It was thought that such an issue should be decided upon in an atmosphere of freedom when the time comes for the preparation of a permanent constitution.[13]

However, right at the beginning of this process, in June 1994, Abu Sardane attended a meeting with Yasser Arafat and other senior PLO members to discuss his memorandum, where he emphasised the significance of Palestine as a Muslim land since the victory of Umr Ibn al-Khattab and invoked the fifteen-century history of the Palestinian *shar`i* judiciary 'which was applying the principles of Islamic law long before man-made laws were borrowed from the West.' He reports that those at the meeting were convinced by his arguments and that a decision was taken to implement his recommendations.[14]

Predictably, when the PLC published its own draft version in the summer of 1996, and began discussions of it in plenary, the place of *shari`a* gave rise to impassioned interventions.[15] The published discussions did not

[13]Al-Qasem, 1992–1994, 198. By 1996, other drafts had been presented by the PA's Ministry of Justice, the Palestinian School of Law in Jerusalem, and Najah University; the human rights organisation al-Haq and the Birzeit School of Law also worked on a draft. Chase, 1997, 36.

[14]Abu Sardane, n.d.,42–47.

[15]*Al-Quds* (9 June 1996) reported 'heated discussions' on this topic in the PLC during the first reading of the draft Basic Law; see also Chase, 1997, 36, who describes

reach the intensity or depth of the debates in Egypt in preceding decades, but they revolved around similar issues: the role of Islam and whether the *shari`a* — or 'the principles of *shari`a*' — were to be 'a source', 'a principal source' or 'the principal source' of legislation.[16] Al-Qasem's cautious position regarding the timing of legislating on such issues was overturned, and by the time of its third reading the draft Basic Law included the provision that 'the principles of the Islamic *shari`a* are a principal source of legislation' (Article 4/1). At the time of writing, it remains to be seen whether this text will be duplicated in the Palestinian Constitution and whether, if it is, the result will be comparable to the consequences of the similar amendments to the Egyptian Constitution in 1971 and 1980, described by Botiveau as 'having represented an institutionalisation of legal Islamization'.[17]

In addition, Article 92(1) of the draft Basic law provides that 'matters of personal status are to be dealt with by the *shari`a* and religious courts in accordance with the law.' The following year this article was relied up by the *shar`i* judiciary in a further argument over legal drafting. In 1997 Shaykh Abu Sardane had left for Amman, from where he had been summoned out of retirement to take up his post; he is still officially *Qadi al-Quda*, but effectively his functions are carried out by others, notably Shaykh Taysir Tamimi, appointed as Inspector of the *Shari`a* Courts in 1994,[18] who was formally appointed as Deputy *Qadi al-Quda* by presidential decree in

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this as 'the most explosive issue' in the first reading by the full PLC. In a packed meeting in Nablus, one speaker called for the implementation of 'a full Islamic constitution as the source of legislation in Palestine': *al-Quds*, 24 July 1996.

[16]See selections of the debate in the Egyptian press in 1971, particularly the pieces by al-`Utaifi and his critics, translated in O'Kane, 1972.

[17]Botiveau, 1993, 263. The Egyptian Constitution was amended twice, once in 1971 to include that 'the principles of the Islamic *shari`a* are a principal source of legislation' and then in 1980 to make the 'the principal source of legislation.' Botiveau, 1993, 262. The Supreme Constitutional Court in Cairo has asserted its own standing as the ultimate authority in ruling what are and are not 'principles of the *shari`a*' for the purposes of the constitutional references, in response to a series of cases challenging existing legislation (including codified provisions of Muslim personal status law) as unconstitutional. The Court has also held that the constitutional amendment does not entail revision of all existing legislation but is enforceable only subsequent to the incorporation of the amendment. See el-Morr, 1997, 8 (Awad al-Morr is former head of the Supreme Constitutional Court); and Botiveau, 1993, 263–267 on the views of different groups of those involved with the judicial system on the implications of the constitutional amendments.

[18] Abu Sardane, n.d., 127.

March 2000.[19] This has included asserting the role of the *shar`i* system in debates over draft legislation. In June 1998, a memorandum signed by Shaykh Tamimi and a number of other senior officials in the *shar`i* system was presented to the PLC's Legal Committee on the subject of the text of a draft Law Regulating the Judicial Authority. The draft omitted any mention of the *shar`i* judiciary.[20] The memorandum recalled the presence of the *shar`i* judiciary in Palestine since the Islamic conquest, referred to Article 92 of the draft Basic Law, and called on the Legal Committee to draft a law for the *shar`i* judiciary.[21] In an ensuing meeting between members of the *shar`i* judiciary and members of the Legal Committee, the press reported that it was agreed that 'not mentioning the *shar`i* judiciary was an oversight'. For his part, Tamimi reportedly declared that the draft Judicial Authority Law was unconstitutional as a result of the omission, and himself presented to the Committee a draft Law of Establishment of *Shari`a* Courts in Palestine. He described 'the attempt to wipe out the *shari`a* courts' as 'aimed at dealing a blow to our national struggle and our historical battle with those who deny our rights'. He also called on the PLC to 'rely on the Islamic *shari`a* as the sole source of legislation'.[22] Although the PLC had already declined to take that particular wording on the source of legislation in Palestine, the insistent linkage by members of the *shar`i* judiciary of their presence and role in the history of Palestine with the current stage of the national struggle and, consequently, their place in the coming state, clearly has resonance.

9.3 THE MODEL PARLIAMENT AND ASSOCIATED 'TEXTS'

In terms of substantive law, Shaykh Abu Sardane had also moved quickly in announcing in 1995 that he was establishing a committee made up of himself and the heads of the two *Shari`a* Appeal Courts in the West Bank and

[19]Bakri, 2000, 17.

[20]The original draft is published by the Palestinian Independent Commission for Citizens' Rights in *mashru` qanun al-sulta al-qada'iyya — dirasat wa mulahizhat naqdiyya*, Ramallah: PICCR, 1998, 53–74.

[21]*Al-Quds*, 9 June 1998.

[22]*Al-Quds*, 10 June 1998; I am grateful to Shaykh Taysir Tamimi for providing me with a copy of this article.

Gaza to select the 'soundest' of the laws applied in the *shari`a* courts of the two regions in order to unify application of Muslim personal status law under the PA. Abu Sardane recognised that some of the existing provisions were outdated, and that selection could be used in matters open to interpretation: 'rather, we are obliged to take the *ijtihadi* view that realizes the interest of our Muslim people whether this view is from the four well known *fiqh* schools or from other recognised schools'. On the other hand, he declared himself tending more towards the Jordanian model applied in the West Bank, considering it 'better developed' than the Gazan law.[23] In his approach, Abu Sardane was emulating patterns set in neighbouring Arab states in the process of codification: the key was that the law was to be Palestinian, but there was no reason to assume it would be radically different, under his formulation, from those applied in Jordan or in Syria.

However, Abu Sardane's project did not result in a personal status law, and it does not appear that a draft was produced before he left for Jordan. The next publicly-announced effort from within the *shar`i* judiciary to draft a personal status law came in direct response to actions on the issue by the women's movement — specifically, a series of high-profile and wide-ranging activities in the West Bank and Gaza in the spring of 1998 in the framework of the Model Parliament, and texts and publications associated with the project. The Palestinian Model Parliament: Women and Legislation was organised by a non-governmental women's organisation, the Women's Centre for Legal Aid and Counselling (WCLAC), with support and participation from a number of other groups.[24] The project ran for a period of two years in an effort to identify in all areas of existing law those provisions discriminatory to women's rights and to draft, debate and build consensus on proposed amendments to those provisions, to be forwarded for the attention of the Palestinian Legislative Council. In its various stages it involved a large number of workshops and discussion meetings in all areas of the West Bank and Gaza, and built on earlier meetings which had resulted in the 1995 publications cited in the Bibliography. A independent study by lawyer and human

[23]Abu Sardane, n.d., 49–50, 180, 248.

[24]`Uthman, 1998, 61, lists the General Union of Palestinian Women (Gaza), Gaza Mental Health Programme, Birzeit University's Law Centre and Women's Studies Unit, the Women's Affairs Technical Committee, Breij Women's Health Centre, the Palestinian Centre for Human Rights, the Gazan Culture and Thought Forum, and al-Haq, as well as prominent individuals.

rights activist Asma Khadr published by the WCLAC in the lead-up to the final sessions of the Model Parliament in the West Bank and Gaza, and a set of draft proposals for modifications to personal status law drawn up for discussion in the Gaza final session, received particular attention in the press and in meeting halls.[25]

Asma Khadr's study reviewed a range of legislative texts with a view to identifying provisions and positions discriminatory towards women and proposing alternative texts, in some cases giving more than one option for amendment. The areas reviewed included the draft Constitution/Basic Law, legislation on civil and political rights, family law, employment and labour law, economic and social rights (including social security and insurance), and penal legislation. As her optimal system, Khadr argued for reliance on human rights principles, including gender equality, (and the incorporation of these principles in domestic law), with an explicit constitutional text on the plurality of sources of legislation. She then set out the case for a unified civil law system, including the principle of 'the rule of legal and judicial uniformity' apparent in all other spheres of the law, and the need for 'legislative harmony'. She held that the current system of communal jurisdictions 'violates the principle of legitimacy' since, if continued in a Palestinian state, non-elected authorities with no constitutional status would be setting laws for part of the population — i.e. the personal status laws for non-Muslims. Although she acknowledged the Islamic *shari`a* — along with international law — as 'authoritative frameworks/sources' (*marja`iyyat*) for Palestinian legislation, she took on the religious court system directly, by arguing that optimally a unified civil code embodying the principle of gender equality should regulate family affairs for all Palestinians regardless of religion, and that the religious authorities should maintain a guiding and counselling role but no longer have a legislative or judicial role in personal status matters. Her specific proposal was that the civil authorities should be responsible for the registration of marriage contracts and other such transactions, and that disputes on family law should be heard in the regular (statute) court system 'which could annex a specialised family law chamber, which in its turn could hear judges from the religious courts appointed in accordance with the law' — here she gave Egypt as an example. Khadr conceded that this would need time and effort and would necessarily affect the pow-

[25]Khadr, 1998; Nashwan, 1998. Much of the text of the latter is reproduced in `Uthman, 1998.

ers and functions of the religious authorities, but insisted on the principle of gender equality as the basic authoritative principle in reformulating family law, and offered certain suggestions in regard to personal status law until such time as her preferred goal might be realised.[26]

Khadr prefaced her specific proposals on personal status law with the requirement that if the present system were to continue, the legislature must rely on the range of *fiqh* schools and opinions, must 'open the gate of *ijtihad*' and that at least one third of any committees working on drafting family or personal status law should be women.[27] Her proposed amendments — which are not exhaustively listed here — included that the age of marriage be raised to eighteen by the solar calendar for males and females,[28] that both parties to the marriage contract should present a recent medical certificate as part of the contract documents, and that the criminal penalties for breaking the law ruling the conclusion and registration of the contract be increased to a maximum of three years in prison and a fine of 100–500 dinars.[29] More controversially, she proposed that documentation and registration of the contract be a 'condition of conclusion of the marriage' thus suggesting the invalidation of unregistered marriages, and adding that specific requirements as to the religion or the sex of witnesses to the contract should be dropped.[30] On guardianship in marriage, Khadr argued that whatever the past justification was for the institution, 'today it is used to justify the impairment of women's capacity', and proposed the following amendment to the existing law:

1. The approval of the *wali* is not a condition in the marriage of a sane woman who has reached her eighteenth year by the solar calendar;
2. Either or both parents may object to a contract of marriage and the *qadi* shall rule on the objection, which decision may be appealed;
3. The objection shall only be accepted before the contract has been concluded or within one week of the parent's knowledge of it;

[26]Khadr, 1998, 119–124.

[27]Khadr, 1998, 125.

[28]On the basis that this is in accordance with the International Convention on the Rights of the Child as well as with the age of majority in civil law, and given the hazards posed particularly to girls by early marriage; Khadr, 1998, 131.

[29]Khadr, 1998, 201; she proposed the same in regard to registration of *talaq*.

[30]Khadr, 1998, 133.

4. The judge may rule that the contract shall not be completed for a certain period, or may rule for dissolution;
5. The *qadi* shall not prevent a contract of marriage that the two parties insist on concluding two years after a decision [by the court] to uphold an objection [by the parents].[31]

The proposal shows an attempt to deal with the concerns of parents in Palestinian society, seeking to make that 'space' for their view in law that is generally recognised in Palestinian society, but without conceding the principle of legal capacity of the individual or accommodating gender discrimination. On the other hand, she advocated the repeal of Article 165 of the current Jordanian law allowing the *wali* to insist his adult female ward come to live with him, not only on grounds of legal equality and capacity, but in light of the potentially grave social implications for a woman who is driven to refuse to do so.[32]

On maintenance, Khadr proposed that each spouse be responsible for their own upkeep, while a working spouse would be responsible for the maintenance of a non-working spouse.[33] On divorce, she proposed that the husband taking a second wife be added to the existing grounds on which a woman was entitled to seek judicial divorce; and that *talaq* by the husband had to occur in court, with the wife notified of the session in which the *talaq* occurs.[34] In these suggestions she takes on core issues in the 'traditional' *fiqh* rules still reflected in the law applying in the West Bank and in Gaza: the validity of extra-judicial *talaq*, non-recognition of an assumption of injury in the event of a polygynous marriage, and the 'maintenance-obedience' equation regulating the spousal relationship. All these issues have of course been debated elsewhere in the region; with variations, they have been targets of the women's movements in other countries, and in some cases they have been approached in legislation: but neither Egypt nor

[31]Khadr, 1998, 134–135. She also proposed that the law give the mother equal rights to the father or grandfather in guardianship over her children.

[32]Khadr, 1998, 148.

[33]Khadr, 1998, 143. Hammami and Johnson, 1999, note that this was amended in the discussions at the Model Parliament by the addition of the phrase 'whenever possible', in light of the social and economic realities of the lives of most women in the West Bank and Gaza Strip. See their discussion, 330–331.

[34]Khadr, 1998, 141–142.

Jordan currently has legislation in place substantially amending the traditional positions.[35]

In terms both of framework and of specific provisions, Khadr's work found a certain amount of resonance in the document prepared for the final session of the Gaza Model Parliament, which dealt only with personal status law. A similar emphasis was laid on the fact that the personal status laws being criticised are 'inherited laws' — that is, not issued by Palestinians for Palestinians — and that a Palestinian law must conform to the spirit of the 1988 Declaration of Independence and to the guarantee of gender equality made in the draft Basic Law, as well as having regard for international human rights law in general and CEDAW in particular. At the same time, the document proposed development of Muslim family law within its own framework, stating that the *shari`a* is a principal source of personal status law and claiming the space for interpretations of the sources beyond the classical rules to give substance to the principles of equality and justice.[36] The document did not propose a civil law, nor did it question the role of the *shari`a* (or other religious) courts.

On the specifics, the Gaza Model Parliament document proposed the age of eighteen by the solar calendar as the minimum age of marriage for males and females, but in the discussions at the final session a clause was inserted providing that the types of cases in which exceptions would be made (i.e. in permitting marriage under this age) should be exhaustively set out in the law. Participants in the plenary might have had in mind local objections to Abu Sardane's attempt to raise the minimum age of marriage in

[35]As noted during the course of this study, the South Yemen code of 1974 used a text regarding maintenance on which Khadr's would seem to be based, while Tunisia has obliged the wife to contribute to family upkeep 'if she has means' and has dropped any reference to her duty of obedience. Tunisia has also rendered extra judicial *talaq* invalid. Egypt's 1979 provision recognising an assumption of injury to the first wife in a polygynous union was considered highly controversial and was removed in the replacement 1985 law.

[36]Article 9 of the draft passed by the PLC provides that: 'All Palestinians shall be equal before the courts and the law without discrimination on any grounds such as race, sex, colour, religion, political opinion or disability.' There is no equivalent of Article 10 of the earlier draft: 'Women and men shall have equal fundamental rights and freedoms without any discrimination.' Anis al-Qasem, 1992–1994, 201, noted that this latter article (later dropped) had been inserted as a result of interventions by women's organisations. Nashwan, 1998, 4–5.

Gazan law, and the arguments made by some for girls below eighteen being allowed to marry if their 'social circumstances' made it in their interest. On the other hand, the final session approved a proposed text on the guardian based on Abu Hanifa's opinion that an adult sane woman did not need the consent of a *wali* to her marriage, with none of the clarifications on the room for parental objection incorporated in Khadr's suggestion.[37]

The Gaza proposal on maintenance was broadly similar to Khadr's suggestion, placing a joint responsibility of the two spouses 'according to their ability' and providing for arrears of one year preceding the submission of a claim to court; like Khadr, the drafters called for a government fund to cover the payments of maintenance to needy women, to be recoverable by the state against the husband. The arguments here referred to economic realities in modern day life (i.e. the contribution of many women to the finances of the family, and the necessity of giving a value to household labour as a form of work and of expenditure).[38] Although the recommendation was passed, concerns raised at the meeting reflected those raised elsewhere: namely, that placing financial obligations on women in the family should logically be accompanied by equalising the inheritance portions of males and females, since one of the justifications advanced for the double portion of males is precisely that it is males who carry the financial obligations of the family while the woman has only rights against the males. Since the *fiqh* texts base the gender-specific portions on what are considered by the dominant interpretations to be explicit Quranic verses, tackling the issue of inheritance is considered particularly problematic.[39] Indeed, neither Khadr nor the Gaza Model Parliament document proposed amendments to the gender-specific proportions of the basic rule; the focus was rather on the need for administrative regulations to prevent the coercion of women into giving up their portions in favour of their brothers or other relatives, and, in the case of Khadr, the observation that the Palestinian legislator could at

[37] Nashwan, 1998, 7–10. On the age of marriage, the vote was by consensus; on the guardian, it was 54:24 with 4 abstentions.

[38] Nashwan, 1998, 18–19.

[39] Badran, 1995, 134, notes a lack of consensus in the late 1920s and 1930s among Egyptian feminists with regard to the issue of inheritance portions, and describes the reformist Rashid Rida as stating that the denial of traditional teachings on succession would constitute apostasy. Some feminists see in the absolute refusal to countenance a re-interpretation of these verses, or a re-evaluation of their context, a desire to maintain patriarchal control of property.

least equalise inheritance portions in everything but *mulk* property in accordance with pre-existing law and practice.[40]

On divorce, the Gaza document proposed the invalidation of extra-judicial *talaq*, mandatory efforts at reconciliation, and implied a system of judicial *khul`* similar to that adopted in Egyptian law in January 2000, allowing the wife to obtain a divorce even if she could not prove injury, and in such a case forfeiting her deferred dower.[41] On polygyny, the document proposed a clause that stated that 'the presumption in marriage is monogamy; polygamy is the exception' and then proceeded to elaborate on circumstances in which the *qadi* would be allowed to permit a polygynous union: the infertility of the first wife, her being afflicted with a chronic or infectious incurable disease or her loss of capacity. The proposed provision included the notification requirements already legislated in other Arab states and expressly recognised a man's polygynous marriage as a form of injury to the first wife which would entitle her to a judicial divorce should she choose to seek one.[42] In the final session, however, the proposed provision was overturned and the text that was finally voted on stated quite simply that 'polygyny is prohibited'.[43] Rather than a proposed text combining elements already agreed upon by a number of Arab legislatures (with the exception of the assumption of injury), the plenary had chosen one only so far legislated in Tunisia.

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[40]Khadr, 1998, 150. The Ottoman law implemented by the British giving equal rights to *miri* property was replaced in Gaza in 1965 and in Jordan (and the West Bank) in 1991 (respectively, Law no.1/1965 and Law no.4/1991. The issue of women not receiving their inheritance is presented as an area where women have rights in Islamic law which they do not realise in practice. See above, chapter 2, note 56. Moors, 1999, 159–160, explains aspects of this practice in Jabal Nablus within the different contexts of kin and class as well as gender. Hammami, 1993, 295, reports that 'the generalised social compromise that took place on this issue was that peasant women exchanged their rightful share of land inheritance for the guarantee of economic and social support from their brothers.'

[41]If on the other hand a woman proved her husband's injury of her, she was to keep her deferred dower. If the husband proved his wife's injury of him, he was exempted, in the proposed clause, from paying deferred dower, while if his application for divorce was not based on injury then he was to pay it. Nashwan, 1998, 27.

[42]Nashwan, 1998, 22.

[43]Nashwan, 1998, 23. Writing in the Israeli newspaper *Haartez*, 8 May 1998, journalist Amira Hass reported that 'this decision was greeted with huge applause and sparkling eyes by many of the delegates of both sexes.'

The Model Parliament provoked a reaction far beyond that expected by those involved in the activities, ranging from denunciatons of particular proposals to criticisms of the discussions taking place at all.[44] Some of the reactions from individuals and groups identified broadly as 'Islamist' translated into personal attacks on women involved with the project — on their morals, their loyalty to the Palestinian national cause and to their religious beliefs. The exercise was portrayed by some as a 'conspiracy' of hostile forces linking the UN, the EU and Israel, portrayed as actively denying Palestinian rights and seeking to weaken Palestinian resolve and unity through supporting and funding attacks on Palestinian Arab and Muslim values, family structures, and national unity; women leading the debates were portrayed as Westernised and removed from 'authentic' Palestinian society and values.[45] Meetings were organised and statements circulated, including at Friday prayers in mosques in the West Bank,[46] where it was reported that the organisers were denounced as 'spreading ideas of the devil' — or according to some, 'devil worship', being 'agents of Western corruption' and advocating polyandry.[47] Some of the attacks were so potentially damaging that there was talk of libel action.[48]

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[44]As acknowledged for example by Randa Siniora of WCLAC, in her paper for the Conference on Islamic Family Law held in Amman in June 2000 — Siniora, 2000, 10.

[45]Much of the denunciation of Khadr's work for example focussed not so much on her proposals in the area of personal status, but on her suggestions in regard to penal law. In particular, her proposals on the law on rape (notably, that marital rape be criminalised) and that adultery be decriminalised were attacked. Khadr, 1998, 208 and 202. The attack came *inter alia* in the 'al-Huda' pamphlet — see following note.

[46]Notably the statement from 'Youth of the Mosques of Jerusalem' distributed to worshippers at al-Aqsa mosque on 10 April 1998; the statement by '*al-mar'a al-saliha*' of 28 March 1998 distributed to the participants on the first day of the central Model Parliament session in Ramallah; the pamphlet by '*al-Huda*' Women's Association of 8 March 1998 entitled 'Palestinian Women and the Conspiracy of the Secularist Women' — see Hammami and Johnson, 1999, 333, on some of its premises; and the statement attributed to '*al-Zahra*, Fatma Bint Abdullah' circulated to the Model Parliament participants in Gaza in April 1998.

[47]Usher, G., 'A Victory Nevertheless', *Al-Ahram Weekly* (English) 2–8 April 1998; see also Antonelli, A., 'Women's Parliament Sparks Gender War' *Palestine Report* 20 March 1998. The reported charge of advocating polyandry was used in the charge of apostasy taken to court in Jordan against parliamentary candidate Toujan al-Faisal in 1989: Gallagher, 1995.

[48]*Al-Masar*, 25 May 1998; *al-Ayyam*, 30 March 1998.

This response in turn provoked a counter-mobilisation of those defending the legitimacy of holding the debate.[49] Those joining the debate from various perspectives raised issues related to the place of Islam and Islamic law in the cultural heritage of Palestine, the meaning of democracy and pluralism and its history in Palestinian society and in the revolution, the protection of freedom of expression, women's rights and the nationalist struggle. Human rights organisations, the wider women's movement, political parties and members of the PLC lent their support, and the Ramallah final session in the West Bank was opened by the governor of Ramallah with a message from President Arafat.[50]

It was clear to observers that many aspects of this battle in the press and other public fora owed as much to strictly political manoeuvring as to strong reactions on issues of personal status. Hammami and Johnson, for example, in their lucid analysis of the discourses at work in the campaign and counter-campaign around the Model Parliament, note a 'strong sense that the parliament had posed a challenge to the Islamic social vision, which Palestinian nationalist factions had failed to mount', accounting at least in part both for the reaction from 'Islamist' groups and individuals and the counter-reaction from others, including the Palestinian Authority.[51] The complex political dynamics of the transitional period will continue as a backdrop to discussions of a Palestinian personal status law, whether this takes place earlier or later into statehood.

For its part, the *shar`i* judiciary as an institution cannot be identified with the more political attacks on the Model Parliament and its organisers. Hammami and Johnson consider an intervention by the head of the West

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[49]See Hammami and Johnson, 1999, 334–335.

[50]*Al-Quds*, 30 March 1998; Hammami and Johnson, 334.

[51]Hammami and Johnson, 1999, 335. At 333 they also note that the public response to the Model Parliament in Gaza was 'much more muted — reflecting the main division within the Hamas (Islamic Resistance Movement) leadership, as well as the fact that mosques in Gaza are more closely controlled by the Palestinian Authority'. See also Sa`id N.I., 'Violence Against the Women's Movement is Violence Against Women', in *al-Ayyam*, 15 March 1998. Khader Abusway, *Palestine Report*, 3 April 1998, reports that 'analysts had no doubts also that the Palestinian Authority, which placed dozens of its security at the entrance to the Model Parliament to prevent Islamist groups from holding a protest, are siding with the parliament because of the opportunity provided to fight Hamas and other Islamist movements, as much as out of a belief in women's rights and equality.'

Bank *Shari`a* Court of Appeal, Shaykh Hamed Bitawi, in the Parliament's Nablus meeting on personal status, as 'the spark that touched off the larger Islamist attack on the model parliament and the women's movement'.[52] In newspaper interviews he was reported as referring to 'a dangerous conspiracy against our *shari`a* courts and against Islamic and the Muslims', 'incitement against the personal status law that has been applied for 1500 years' and questioning the standing of the leading women involved as being of a 'foreign culture' with no expertise in the Islamic *shari`a* and without proper consultation with those who did in fact have such expertise.[53] A memorandum to the Speaker and Members of the PLC signed by eleven *shari`a* court judges and about seventy others associated with the *shar`i* establishment (*shari`a* college instructors, *imams* etc.) made similar points, objecting to a number of specific proposals under discussion as well as to Khadr's suggestion that the *shari`a* courts — as the memorandum paraphrased it — be abolished.[54] As the political debate heated up, however, leading figures in the *shar`i* judiciary distanced themselves.[55] The *Mufti* of Jerusalem, Ekrameh Sabri, agreeing with the need to amend the existing personal status law, declared that there was 'nothing wrong if the Model Parliament presents its suggestions to the Department of the *Qadi al-Quda*' on the basis that the Department would be drafting a proposed law and sending it to the PLC: the concern of the *shar`i* judiciary, according to the *Mufti*, was that non-specialists (i.e. in the *shari`a*) would pass a 'raw' text to the legislature for approval.[56]

This insistence on the adequate qualification of anyone involved in drafting a personal status law for consideration by the legislature was a constant theme from members of the *shar`i* establishment. An interview with Shaykh Taysir al-Tamimi, described as Acting *Qadi al-Quda*, was headed with the summary: 'Humans may not try to prohibit what Allah has permitted: the scholars of *shari`a* and the PNC members are the only parties

[52]Hammami and Johnson, 1999, 332.

[53]*Al-Risala*, 5 March 1998; *al-Hayat al-Jadida*, 14 March 1998.

[54]Memorandum of 1 March 1998 to the Speaker and Members of the Legislative Council of the Palestinian National Authority, re: Petition for the Rejection of the 'draft law of personal status'.

[55]Including Bitawi: Hammami and Johnson, 1999, 336.

[56]*Al-Ayyam*, 14 March 1998.

empowered to set the law of personal status'.[57] In the interview, Tamimi was reported as criticising a number of particular points in the various proposals being discussed while conceding concerns on certain matters. The *shari`a* courts, he said, frequently found fathers trying to marry their daughters off below the minimum age of marriage, and while this was wrong, marriage after the age of puberty brought 'no injury' to males or females. He gave a standard defence of polygyny in its function of organising sexual relations within a moral and legal framework; denounced 'honour killings' as against the *shari`a*; and agreed with the need for some sort of legal mechanism to ensure that women did in fact receive their *shari`a*-assigned inheritance entitlement, while rejecting any idea of changing the rules on succession. Some suggestions he dismissed as 'not *ijtihadi* matters', meaning that they were not open to amendment, such as allowing equal value to testimony of males and females (as suggested by Khadr in the context of the marriage contract). This was also his position on marriage guardianship for females: he cited a *hadith* purporting to establish the need for the guardian,[58] as well as concern for the vulnerability of women as prey to impious men.[59] At the final West Bank session of the Model Parliament, the issue of guardianship was reported to have provoked an uproar, with Shaykh Tamimi, who attended the session, threatening to withdraw from the session *inter alia* on the grounds that a vote could not be taken on a matter covered by a *hadith*.[60]

Some of the above positions articulated by Shaykh Tamimi have been reflected in actions he has taken as Deputy *Qadi al-Quda*, discussed further below. On others, such as polygyny and the role of the *wali*, he is very much in line with the establishment *shar`i* view in Jordan, Egypt and elsewhere in the region. Nevertheless, for the *shar`i* judiciary, the Model Parliament forced a clarification on the kind of personal status law they would envisage in Palestine, and gave direct impetus to a drafting process confined to the circle of *shar`i* scholars but by no means uninformed of the concerns artic-

[57] *Al-Quds*, 8 March 1998.

[58] *La nikah illa bi-wali* ('no marriage without a guardian'), also cited by others in this debate.

[59] *Al-Quds*, 8 March 1998.

[60] *Al-Ayyam* 30 March 1998; Usher, G., 'A Victory Nonetheless', in *al-Ahram Weekly* (English), 2–8 April 1998.

ulated during this turbulent process. For those who were or became involved in the Model Parliament and/or other sectors of the women's movement, the reaction to the Parliament's activities forced a reflection on strategies and provoked a discussion on, among other things, the appropriate approach to *shari`a* in seeking a more egalitarian personal status law that would conform more closely to the principle of gender equality.

9.4 FALL-OUT AND FOLLOW-UP

In direct response to the discussions at the Model Parliament, Shaykh Tamimi in April 1998 announced the establishment of a preparatory committee to work towards the drafting of a personal status law. The committee was to be made of up 'the elite, men [sic] of law and *ifta*, teachers and deans in religious studies and lawyers in the West Bank and Gaza Strip' and there were to be a number of sub-committees, 'among the most important of which is a woman's committee of those qualified to participate'. Tamimi described the motivation as a need to unify the West Bank/Gaza laws 'as a basic step in establishing the state and the principle of unified and inalienable Palestinian sovereignty'. The draft would be drawn from 'the Qur'an, the Sunna, and the recognised schools of *fiqh*' and all those with suggestions were invited to contact the Office of the *Qadi al-Quda* in Ramallah. It was announced that the committee would study other Arab and Islamic personal status laws, and would in time present a draft to the PLC's Legal Committee for discussions before presenting it to the PLC.[61]

A number of key phrases in the public statements by leading members of the *shar`i* judiciary are repeated in these announcements. First it might be noted that Shaykh Tamimi continues to assert the right (or interest) of the *shar`i* establishment (in the form of his committee) to draft and present a personal status law for the attention of the legislature, retaining in this projection a measure of control over the content of the law. Second is the linkage between matters *shar`i* and the process of state-building and the principle of national unity: here, the appeal is to pre-occupation and pre-

[61]As reported in: *al-Quds*, 2, 5 and 14 April 1998; and *al-Hayat al-Jadida*, 1 May 1998. The announcement from the Office of the *Qadi al-Quda* inviting submissions was in *al-Ayyam*, 4 April 1998.

European colonial history and the sense of continuity represented by the *shari`a* courts — a suggestion of 'authenticity' which is expressed directly in arguments about the nature of personal status law. At the same time, this appeal is based on a system that is premised upon the communal distinctions between Palestinians of different religions. In some ways, therefore, the 'unity' referred to can only really mean unifying family law for Muslim Palestinians in the West Bank and Gaza. Third, there is the insistence that persons working on drafting a personal status law are to be 'qualified'. The clear implication is that they should be qualified in *fiqh* and 'religious studies'. The status of the *shari`a* as the sole source of legislation for personal status issues is not open to discussion, any more than the future of the *shari`a* courts and the whole system built around them. Firm indications in the draft constitutional 'texts' for the Palestinian state, that communal jurisdiction over personal status matters is set to continue for the foreseeable future, put Palestinian personal status law firmly within the pattern of neighbouring Arab states.[62]

It also fits a pattern, however, in having an active and articulate women's movement seeking change and alternatives. In the Palestinian women's movement, differences in evaluation of the events of 1998 and the 'phenomenon' of the Model Parliament[63] have led to a number of different strategies towards family law being proposed and pursued by individuals NGOs, and through an informal coalition established to build consensus on the framework and on particular provisions. These strategies range from in-depth work on reinterpretation of the *fiqh* sources to produce a radically new 'Muslim family law'[64] to proposals for a unified personal status law that would include the *shari`a* as a principal source but would also draw on international human rights principles. The idea is that such a law would apply to all Palestinians under the jurisdiction of the state, with, where necessary and/or appropriate, exceptions for non-Muslim Palestinians: this of course has a precedent in the OLFR, although the sections applying to Christians

[62]Chase, 1997, 47, notes that continuing separate communal jurisdictions 'impel a consideration of a number of issues which stand at the junction of individual human rights, groups rights and Islamic family law.'

[63]Reviewed in Siniora, 2000.

[64]Notably the work of the Gazan NGO Mashraqiyyat, which formed out of the Gaza branch of the Model Parliament after the end of the project.

and Jews were not applied under the British in Palestine, and North African states provide more recent precedents.[65]

A further proposal that has been discussed in this forum is the promulgation of an optional civil code under which those who chose to do so could marry and regulate their family affairs outside the religious court system. The early indications — from before the Model Parliament — are that such a proposal would be vigorously opposed by the *shar`i* establishment. In 1996, it was reported that the PA Justice Minister, Freih Abu Meddein, had responded to petitions 'from human rights groups and private citizens in Israel' by approving the opening of a civil marriage registry office in Jericho for the use of Jewish Israelis who could not or did not want to get married under the rules of Jewish law applied by the Israeli state.[66] The London *Guardian* reported that a small Israeli company was promoting the idea of a 'mini Las Vegas — a marriage centre which will draw couples from all over the world and provide living to the Palestinians'.[67] The idea was vigorously opposed by the *Mufti* of Jerusalem, Shaykh Ekrameh Sabri, who argued that Islam recognises the religious freedom of other faiths, and that it would be an interference in the way in which they chose to regulate their affairs to provide such a service. There was a suggestion that he was concerned that such a mechanism would provide an opportunity for Muslim (and Christian) Palestinians with Israeli nationality (and conceivably Palestinian residents of East Jerusalem) to obtain a civil marriage in Palestine.[68] By way of comparison, el-Cheikh reports that the Sunni *shar`i* establishment was 'the most categorical in its rejection' of the draft civil marriage law presented to the Lebanese cabinet in 1998.[69]

In the meantime, besides working on drafting a Palestinian personal status law in the above committee, Deputy *Qadi al-Quda* Shaykh Tamimi responded to certain practical concerns though a number of administrative directives to the *qadi*s and other officials in the *shari`a* courts. These have included an attempt to tighten up registration procedures of marriage, with

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[65]Tunisia, Morocco and Algeria. Mayer, 1995, 433 note 4.

[66]Currently Cyprus is a likely destination for such couples. *Palestine Report*, 5 July 1996, 'Jericho as Reno.'

[67]*The Guardian*, 29 July 1996. According to the *Palestine Report*, 19 July 1996, PA sources were expecting the project to generate some three million dollars a year.

[68]*Palestine Report*, 19 July 1996.

[69]El-Cheikh, 1998–1999, 149.

strict instructions regarding the functions and conduct of the marriage notaries (*ma'dhuns*),[70] seeking to ensure that only recognised officials (liable to disciplinary procedures) are involved in marriage procedures. Similarly, he addressed the procedure to be followed by the *qadis* in registering a deed of 'acknowledgement of marriage' (*tasaduq bi'l-zawaj*), requiring detailed information from the parties regarding the circumstances and exact procedure (or ritual) of their marriage, and the transfer of the file to the *Qadi al-Quda's* office for verification.[71] Given the concern Tamimi articulated at attempts by some members of the population to marry off their underage daughters, it might be that out-of-court marriages involving underage parties was at least one of the practices being targetted in these instructions.

Two other administrative directives also reflect concerns articulated in the 'texts' associated with the Model Parliament and with the surrounding discussions. The first concerns the division by the *shari`a* courts of inheritance portions between the various heirs to an estate. The preamble puts the contents in the context of representations made to the *Qadi al-Quda's* Department regarding problematic circumstances in which some heirs get others to waive all or some of their portions, including through 'fraud (impersonating), ignorance and threats'.[72] The directive sets out detailed information to be taken from the persons involved, and *inter alia* requires that the final document is to be signed by all parties and the implications of the division to be explained to each heir, including the monetary value of their portion 'especially if it involves real estate, a company, shares or such like'. Again, all the documentation is to sent to the *Qadi al-Quda's* office for verification. The Deputy *Qadi al-Quda's* point here may be to empower the heirs (notably, women) with knowledge of precisely how much their share is worth.

In the final administrative directive to be noted here,[73] the Deputy *Qadi al-Quda* requires every fiancé to undergo a 'CBC' blood test for

[70]Administrative directive no.15/481 of 15 April 2000; annexed to Bakri, 2000. Among other clarifications, the directive states that it is prohibited to force anyone to carry out the contract in the court rather then their house, or conversely not to let them do it at court. This directive also raised the fee for carrying out the marriage contract to 50 dinars.

[71]Such deeds can of course also be used to register a marriage which had been registered elsewhere, but the contract subsequently lost. See Chapter One note 64. Administrative Directive no. 15/1358 of 11 November 2000. Annexed to Bakri, 2000.

[72]Administrative directive 15/1366 of 12 September 1999; annexed to Bakri, 2000.

[73]Administrative directive no.15/711 of 11 May 2000, annexed to Bakri, 2000.

tilisemia before a marriage contract can be concluded.[74] Although restricted to testing for a particular disease, the Deputy *Qadi al-Quda* seems clearly to be responding to concerns articulated *inter alia* during the discussions of the Model Parliament, and reflected in demands elsewhere in the region. A further procedural matter that could be addressed pending the promulgation of a substantive personal status law is the establishment of a public fund from which maintenance payments could be made to needy women on the basis of awards from the religious courts, with the authorities then pursuing recovery of the amount from the errant husband — or father, in the case of maintenance for children. This has been a lobbying target in Palestine, where it will involve the PA as well as the *shari`a* courts, and will need political decisions on how it should be funded.

Although such moves are piecemeal, they do respond — at least on an interim level — to real and practical concerns identified by lawyers working in the *shari`a* court system as well as by sectors of the women's movement. Responding to such concerns poses no perceived risks to the integrity of the *shar`i* system, nor does it implicate the substantive law it applies, in the same way as do discussions on fundamental changes to personal status law; rather, it serves to demonstrate the extent of flexibility beyond the code that the *shar`i* system retains during this transitional period.

Such measures are of course also a prime target for specific and discrete lobbying activities. Siniora notes that one of the lessons learned from the Model Parliament is that it is necessary 'to combine advocacy at the decision-making level with building support through public awareness at the grass-roots level'.[75] The lobbying activities of the women's movement, and on the other hand of the *shar`i* judiciary, as well as of interested political parties (particularly the 'Islamist' tendencies) and the wider public response to further debate on the issues are all likely to have an impact on the conduct of both the executive and the legislature in considering a future Palestinian law

[74]If he is found to carry it, then the fiancée must also be tested, and if it transpires that they are both carriers, then the grave risks for their offspring are to be explained to them; if they insist on the marriage then the *qadi* is to proceed to register the contract, passing the documentation to the office of the *Qadi al-Quda*. The preamble to this directive refers to the spread of genetic diseases in Palestinian society and the need to protect the 'five necessities' of person, property, religion, mind and offspring, as recognised in *fiqh* works.

[75]Siniora, 2000, 10.

of personal status. Elsewhere in the region, the notorious sensitivity of the issue of personal status law has on more than one occasion been blamed for the use of less than democratic means to legislate changes.[76] In Palestine, it was to be expected that personal status law would not be among the priorities for legislation during the transitional period. However, during this period, the ground has been prepared for a wide-ranging, hotly contested and intense debate on the subject once the state is declared and is functional. The first Palestinian law of personal status will be promulgated in quite different times to those prevailing when Egypt, Jordan and other states in the region first legislated on family law. For all the aspects it combines, it stands to be not only an exercise of real and immediate import for that portion of the Palestinian people finally included in the Palestinian state, but also one of potentially considerable moment for the region.

[76]See for example Karam, 1998, 145. In Egypt, commentators note the dilemma of 'Egyptian feminists and progressives' who while desirous of the type of reforms legislated in the 1979 law were sympathetic to the argument that President Sadat's use of presidential decree had bypassed democratic debate and was an abuse of process: Hijab, 1988, 31; Hatem, 1992, 240–241. In Jordan, the JLPS was issued as a temporary law during a ten-year suspension of parliament, and as noted in this study parliament has still not completed a review for a permanent law. In Tunisia, the 1956 law is still hailed by many as the Arab law that goes the furthest towards legislating equality between the spouses in family law. Promulgated right at the dawn of independence, its political significance was clear, but once again, President Bourghiba issued it by decree.

Appendices

APPENDIX I

Breakdown of court material studied, 1965, 1975, 1985

Court and year	Marriage contracts	Deeds of *talaq*/*khul*`	Litigation cases
1965			
Bethlehem	448	47	64
Ramallah	708	147	206
Hebron	1,248	110	238
Total	2,404	304	508
1975			
Bethlehem	441	53	59
Ramallah	1040	138	234
Hebron	1331	114	231
Total	2,812	305	524
1985			
Bethlehem	475	62	97
Ramallah	1038	183	308
Hebron	1806	138	242
Total	3,319	383	647
Grand Total	8,535	992	1,679

APPENDIX II

Breakdown of subject matter of claims in the case material, by court and year

	1965			1975			1985		
Subject matter	**Beth.**	**Ram.**	**Heb.**	**Beth.**	**Ram.**	**Heb.**	**Beth.**	**Ram.**	**Heb.**
Maintenance	32	124	135	38	133	142	67	180	134
Separation	3	24	12	2	21	10	4	20	4
Custody, access and related	4	9	10		11	15	9	23	13
Fees for custody and *rada`*	5	4	15	4	9	18	3	9	11
Proof of divorce or revocation	0	5	4	1	5	0	2	6	0
Succession	0	0	4	0	2	1	0	3	1
Obedience	16	26	34	10	24	21	4	19	11
Proof of majority *(rushd)*	1	3	5	1	9	3	2	10	28
Dower and *jihaz*	1	7	13	3	12	14	4	21	20
Judicial dissolution (*faskh*)	0	0	1	0	3	1	0	0	2
Objection to award made *in absentia*	2	3	4	0	4	3	0	0	2
Compensation for arbitrary *talaq*	0	0	0	0	0	0	1	13	12
Permission to marry	0	1	1	0	1	0	0	0	0
Death decree on missing person	0	0	0	0	0	1	0	2	0
Other	0	0	0	0	0	2	1	2	4
TOTAL	64	206	238	59	234	231	97	308	242

APPENDIX III

Breakdown of court material used in the WCLAC study (years 1989, 1992, 1993, 1994)

Court	*Nafaqa*	*Ta`a*	*Tafriq*	*Ta`wid*	Dower	Custody	*Talaq*
Ramallah	219	17	97	3	25	31	963
Nablus	460	20	63	41	*	65	819
Hebron	168	8	38	11	26	11	753
Dura	58	3	15	3	12	6	121
Sub-total	905	48	213	58	63	113	2,656
Gaza	401	5	80	0	28	35	1333
Rafah	181	24	22	0	2	11	429
Sub-total	582	29	102	0	30	46	1,762
Total	1,487	77	315	58	93	159	4,418

Note: reproduced from Welchman, *Islamic Family Law -Text and Practice* WCLAC 1999, 16.

* Claims for dower in Nablus court not available.

APPENDIX IV

Proportions of prompt to deferred dower in the sample of contracts in the case material, by court and year

Court	Sample	prompt greater		deferred greater		equal prompt and deferred	
1965							
Beth.	45	41	91%	2	4.5%	2	4.5%
Ram.	71	46	64.8%	11	15.5%	14	19.7%
Heb.	125	118	94.4%	1	0.8%	6	4.8%
total	241	205	85.1%	14	5.8%	22	9.1%
1975							
Beth.	45	24	53.3%	7	15.6%	14	31.1%
Ram.	104	34	32.7%	38	36.5%	32	30.8%
Heb.	134	106	79.1%	12	9.0%	16	11.9%
to.tal	283	164	58.0%	57	20.1%	62	21.9%
1985							
Beth.	48	2	4.2%	41	85.4%	5	10.4%
Ram.	104	4	3.8%	80	77.0%	20	19.2%
Heb.	181	45	24.9%	112	61.9%	24	13.2%
total	333	51	15.3%	233	70%	49	14.7%

APPENDIX V

Items registered as *tawabi`* in the case material, by court and year

	Bethlehem		Ramallah		Hebron		total	
Subject matter	no.	%	no.	%	no.	%	no.	%
1965								
gold jewellery	5	27.8%	-	-	12	6.6%	17	6.5%
furniture	10	55.5%	61	96.8%	129	70.9%	200	76.0%
gold and furniture	3	16.7%	2	3.2%	38	20.9%	43	16.3%
other/unknown	-	-	-	-	3	1.6%	3	1.1%
Contracts with *tawabi`*	18	100	63	100	182	100	263	100
1975								
gold jewellery	2	7.4%	3	2.9%	42	7.4%	47	6.7%
furniture	21	77.8%	93	91.2%	397	69.5%	511	73.0%
gold and furniture	4	14.8%	5	4.9%	131	22.9%	140	20.0%
other/unknown	-	-	1	1%	1	0.2%	2	0.3%
Contracts with *tawabi`*	27	100	102	100	571	100	700	100
1985								
gold jewellery	66	75.0%	24	13.3%	441	31.1%	531	31.5%
furniture	10	11.4%	142	78.4%	89	6.3%	241	14.3%
gold and furniture	12	13.6%	15	8.3%	879	62.1%	906	53.8%
other/unknown	-	-	-	-	7	0.5%	7	0.4%
Contracts with *tawabi`*	88	100	181	100	1416	100	168	100

APPENDIX VI

Polygynous contracts in the case material by court and year

Court and year	No. of Contracts	Polygynous Contracts: Number	% of total
1965			
Bethlehem	448	22	4.9
Ramallah	708	40	5.6
Hebron	1248	72	5.8
Total	2404	134	5.6
1975			
Bethlehem	441	23	5.2
Ramallah	1040	39	3.8
Hebron	1331	96	7.2
Total	2812	158	5.6
1985			
Bethlehem	475	23	4.8
Ramallah	1038	37	3.6
Hebron	1806	104	5.8
Total	3319	164	4.9

APPENDIX VII

Proportions of *talaq* to *khul`* in the case material by court and year

Court	entries	*khul`*	*talaq*	% *khul`*	% *talaq*
1965					
Bethlehem	47	35	12	74.5	25.5
Ramallah	147	106	41	72	28
Hebron	110	55	55	50	50
total	304	196	108	64.5	35.5
1975					
Bethlehem	53	46	7	67	13
Ramallah	138	66	72	48	52
Hebron	114	59	55	52	48
total	305	171	134	56	44
1985					
Bethlehem	62	44	18	71	29
Ramallah	183	100	83	55	45
Hebron	138	90	48	65	35
total	383	234	149	61	39
total	992	601	391	60	40

Glossary of Arabic Terms

`aqd	contract
ba'in	final (of a *talaq*)
batil	void (of a contract of marriage)
baynuna kubra	the 'greater finality' occasioned by the third of three *talaqs*
baynuna sughra	the 'lesser finality' occasioned by the first or second *talaq* being or becoming final
bikr	virgin, previously unmarried woman
bulugh	puberty
damm	'annexation', taking into one's protective custody
dukhul	consummation
faskh	judicial dissolution
fasid	irregular (of a contract of marriage)
fiqh	jurisprudence (broadly used for the rules of *shari`a* worked out by the jurists)
ghayba wa darar	absence and injury (as grounds for judicial divorce)
hadana	custody
hajr	desertion
hujja, pl. hujuj	deed (e.g. of *talaq*)
ibra'	renunciation, waiving (of rights)
`idda	waiting period (of the woman after the end of her marriage, during which she may not remarry)
idrar/darar	injury
ijtihad	'interpretation' (broadly, the way sources of law and texts are interpreted for the purposes of deriving rules of implementation)

iqrar bi-talaq	acknowledgement (through deed at court) of (out-of-court) *talaq*
ithbat talaq/zawaj	establishment of *talaq*/marriage (through litigation)
jihaz	'trousseau' of a woman on marriage
kashf	investigation, examination
khalwa	seclusion (of a couple giving rise to presumption of consummation of a marriage)
khul`/mukhala`a	divorce settlement involving a final *talaq* by the husband in return for a consideration (usually the waiving of her financial rights) from the wife
ma'dhun	official marriage notary
madhush	overwhelmed (with anger, as a state of mind)
mahr	dower
maskan	dwelling
mut`a	gift of consolation for divorced wives enjoined by the Qur'an
mu`tadda	woman in the *`idda* period
nafaqa	maintenance
nashiz	disobedient
nushuz	disobedience
niza` wa shiqaq	discord and strife (as grounds for the husband or wife to seek judicial divorce)
qadi	judge
Qadi al-Quda	Chief Islamic Justice
raja`i	revocable (of a *talaq*)
rushd	legal majority
shari`a/shar`i	(inadequately translated as) 'Islamic law'
sijill (pl. *sijillat*)	court record
ta`a/bayt al-ta`a	obedience/the 'house of obedience'
tafriq	judicial divorce
tafwid	delegation (of divorce)
talaq	unilateral divorce
talaq ta`assufi	arbitrary unilateral divorce
tasaduq bi-zawaj	acknowledgement of marriage
tawabi`	'effects' of the prompt dower
ta`wid	compensation
thayyib	previously married woman (widow or divorcée)

`usma	'protection', used to denote general delegation of power of *talaq* from husband to wife
wakil	appointed representative; government post roughly equivalent to 'junior minister'
wali	guardian

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