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Islamic law

Marriage

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The nature of marriage

Islamic marriage is defined in very formal and essential terms by classical legal scholars (*fuqahā'*): it is the contract that makes sexual intercourse licit, or, to put it in a rather crude way, that makes the woman licit to the man. The very term for marriage, *nikāḥ*, means also sexual intercourse. Thus, *nikāḥ* excludes *zinà*, the illicit sexual intercourse, which amounts to a criminal offense (*ḥadd*) and is punishable with 100 lashes or, in the most serious cases, with stoning. Moreover, licit sexual intercourse is necessary to establish *nasab*, the patrilineal bond linking the child to his father and other agnates, who are the only relatives entitled to provide him with legal protection.

Marriage is dealt with from the moral viewpoint, too. As sexuality is part of human nature, its practice conforms to God's will, provided that it takes place within the legal framework of marriage.[1] Marriage is then considered by many as a *ʿibāda*, an act of obedience to God, a religious obligation enhancing the spiritual and physical wellbeing of individuals, fostering social harmony and ensuring the reproduction of the Islamic community.

Nevertheless, if a man is clearly disinclined towards marriage, or if he is not able to bear its costs, marriage is deemed reprehensible, or outrightly forbidden to him, not to cause prejudice to the wife. In this case, the interests of the women are taken into consideration, even if only indirectly. But, as a rule, the discourse on the nature, obligatory or recommended, of marriage is developed by scholars exclusively from the standpoint of men.

Beyond its strictly legal dimension as a contract (*ʿaqd*), marriage plays a major role in shaping the Islamic social order. After a *Qur'ānic* verse (IV, 21), it is hailed as a solemn pact (*mitāq*). At the conclusion of the contract, Muslims frequently highlight its importance by some rituals, as the reading of *Qur'ānic* verses, in particular the Opening Chapter (the *Fātiḥa*), or by the presence of religiously trained figures. Nonetheless, all these religiously flavoured elements are not necessary for the legal validity of the marriage, which rests on the consent of the contracting parties. They are simply ways to have the union blessed and to invoke the divine protection on it.

The social and moral implications of marriage induce contemporary legal scholars, as well as State legislators, to broaden the traditional scope of marriage. Apart from virtue (*iḥṣān*)[2] and chastity (*ʿafāf*), to be interpreted not as sexual abstention, but as an orderly practice of sexuality,

the aims of the marriage are the foundation of an enduring conjugal life and the creation of a stable family. Alongside this shift in definition, a change in terminology takes place: the classical term *nikāḥ* is normally replaced by *zawāǧ*, which evokes the idea of couple.[3]

The Islamic marriage is not simply the union of a man and a woman; it involves also an alliance between two family groups. This is apparent in the role played by the legal guardian (*walī*), the nearest male relative who represents the spouse at the conclusion of the contract, and at the same time embodies the interests of the family. *Fiqh* deals with a number of cases where the interests of the spouses and the families may come into conflict with each other. For instance, the marriage may be contracted by legal guardians before the puberty of one or both spouses:[4] as prepubescent children cannot consummate the marriage, they have no interest in it, at least temporarily; on the contrary, this kind of marriage may be of interest for their families. At their coming of age, at certain conditions, both spouses have the right of rescission. Moreover, the husband of age has the power to dissolve the marriage bond.

Another possible conflict of interest between the woman and her family arises when an adult woman contracts herself in marriage, doing so without her guardian. As any other woman's act or conduct, such a contract is susceptible to put the honour and the social status of her family at stake. Legal scholars disagree about the validity of this kind of contract. Those who admit it provide the guardian with the right of setting the marriage aside if it is not a suitable match because of the lack of *kafā'a*, that is to say if the husband is not the equal of the wife.

Finally, when the contract is entered into by the *walī* on behalf of the woman of age, her consent is presumed. If the legal guardian refuses to marry the woman to the man she likes, and who is her equal, the dispute is resolved by the judge.

The spouse choice

Equality (*kafā'a*) is a leading factor for the spouse choice; nevertheless, the lack of it does not *per se* entail the nullity of marriage.

Jurists' opinions about the criteria to properly assess *kafā'a* are diverse: descent, tribal affiliation, fortune, profession, or mere piety may be taken into consideration. The husband should be the equal of or superior to the wife, but not the reverse: it would be shameful for the woman, who is subject to the authority of the husband, to obey someone who is less than her. In other contexts, with a penchant for endogamy, husband and wife should be co-equals. By the formidable tool of *kafā'a*, the actual structures and hierarchies of different societies, as well as their changes, are perfectly integrated into the normative discourse, even if they conflict with the fundamental equality of Islam among all believers solemnly proclaimed by Islam.

The considerations regarding *kafā'a* may influence the selection of the spouses; but much more decisive for this choice are the stringent rules concerning blood relatives, relatives by marriage, and the religious affiliations of the spouses: they might end up in an outright prohibition of certain unions, entailing the nullity of the contract.

Qur'ān (IV, 23), as interpreted by *fuqahā'* defines the scope of incest by barring the man from marrying his mother and all female ascendants, his daughter and all female descendants, and his mother's and father's descendants. All these women are *maḥārim* (prohibited) to him. Cousins are not prohibited; rather, a specific kind of cousin, the patrilateral parallel cousin (the father's brother's daughter), is considered as a particularly appropriate bride. This kind of preferential mating corresponds to an Arab customary rule, and it is not prescribed by *šarī'a*. Nevertheless, it has spread well beyond its original boundaries, with the Islamisation, and even more the Arabisation, of new converts.

Milk is equated to blood as a possible cause for marriage prohibition (*Qur'ān*, IV, 23). Fosterage may generate a relationship similar to the blood relationship, so that a man is prohibited from marrying his foster sister. Some jurists maintain that, more comprehensively, everything is prohibited by reason of fosterage which is so for reason of kindred. Fosterage is then a means to create a kind of artificial kinship.

Certain relatives by marriage, or affinity, are prohibited as well (*Qur'ān*, IV, 22–23). The man is barred from marrying any ascendant or descendant of his former wife, as well as any former wife of his ascendants and descendants.

Another crucial criterion for the choice of the spouses are their religious affiliations. Religion may be grounds for a marriage impediment. But, while impediments on grounds of consanguinity, fosterage, and affinity are permanent, so that they cannot be removed and the woman is prohibited to the man once and for all, the impediment on grounds of religion is temporary and can be overcome by an appropriate conversion.

A Muslim woman cannot marry but a Muslim man (*Qur'ān*, II, 221; LX, 10): she is prohibited to all non-Muslim males. On the contrary, a Muslim man may marry non-Muslim women, provided that they are *kitābiyyāt*, i.e. believers in a Sacred Book (*Qur'ān*, V, 5). This is indisputably the status of Jews and Christians, but also, according to some legal opinions, of Zoroastrians and Sabeans. All idolatrous women (*muškirāt*), instead, are prohibited to Muslim men (*Qur'ān*, III, 221).

This set of limitations on mixed marriages affects Muslim women and men differently: the admissible marriage partners are more numerous for men than for women. Given the hierarchical structure of the marriage, this gendered articulation of the ban on religiously mixed marriages ensures that a Muslim woman is never under the authority of a non-Muslim husband, whereas nothing shall prevent a Muslim man from exercising his authority on his Jewish or Christian wife. Moreover, as the child born of a Muslim father is Muslim, the allowed mixed marriages invariably give birth to Muslim offspring, at least from the point of view of the Islamic community.

As the prohibition to marry non-Muslims affects only women, it is a blatant violation of the principle of gender equality enshrined in the constitutions of many Muslim countries. At the same time, it resonates with deep feelings of aversion for this kind of union common in many societies. Thus, it may happen that statutes are accurately purged of this impediment, which nevertheless flourishes in circulars and regulations, and other minor sources are scrupulously applied.[5]

A way to overcome gender discrimination while maintaining the ban on interreligious marriages, is to extend the impediment to men: all Muslims, men and women, should be prohibited from marrying non-Muslims. The solution, put forward by some isolated *Sunni* scholar, corresponds to the mainstream opinion in *Shi'i* Islam.

Marriages between *Sunnis* and *Shi'as* are not prohibited on grounds of religion. Nevertheless, societies may show different degrees of aversion to this kind of union, and States' laws sometimes make them impossible, as in the case of Lebanon.

A last category deserves attention, as far as marriage impediments are concerned: that of apostates (*murtadd*). Persons having abandoned Islam are barred from marriage. So, if a Christian or Jewish woman is in fact a convert to her present faith from Islam, she is prohibited to all Muslim men.

Furthermore, apostasy (*irtidād*) after the conclusion of the contracts results in the automatic dissolution of the marriage, and a conviction for apostasy forces the condemned to separate from his wife/her husband.

The formation of marriage

The contract of marriage consists of the proposal and the acceptance, uttered by the two parties, in the presence of witnesses. The parties may be represented by duly appointed *wakīls* (proxies).

The statements may be made orally or in writing. What does matter is that they are definite and clear as to their meaning, since the marital status of two persons depends on them. Legal scholars deal at length with the expressions and formulas that may be used, either metaphorically or literally meaning marriage, and derived from the same roots as *nikāḥ* and *zawāǧ*. Scholars show their preference for the use of verbs in the past tense ('I offered you', 'I accepted'), as this unambiguously expresses the determination and commitment of the party. Acceptance may be replaced by silence, only when the context clearly indicates its meaning.

Both proposal and acceptance must be made in the same contractual session (*mağlis*), that is to say before the parties separate, so as to exclude any uncertainty about the legal condition of the prospective spouses. Proposal and acceptance must be heard by the witnesses, two Muslim males or one male and two females. If the marriage is religiously mixed, one of the two witnesses may be Christian or Jewish.

The presence of the witnesses is required for the contract to be valid and at the same time ensures the publicity of the marriage. However, this kind of publicity is not adequate to meet the needs of contemporary complex and mobile societies: this is the reason why mandatory registration for marriages has been gradually introduced by legislatures, even if with different degrees of success. In certain countries, the lack of registration may involve criminal penalties. However, an unregistered marriage, even if difficult to prove, is considered as valid and may produce only in part the effects normally attached to marriage.

In Muslim countries, the conclusion of the marriage contract does not take place at the mosque, nor in a public office, but in a home. It represents a stage that is clearly distinct and separate from the wedding festivities and rituals, and is regulated by local customs which accompany the first sexual intercourse between the spouses (consummation) and involve as many people as possible. The marriage may be consummated years after its conclusion, and some of its effects are conditional on consummation.

The parties enjoy a wide scope of freedom in defining the content of the marriage contract; they may agree on various stipulations, normally aiming to improve the status of the woman, by curbing the husband's rights and reducing the wife's duties. The wife may stipulate that the husband will not take an additional wife (monogamy stipulation); the husband may delegate the wife the power to unilaterally dissolve the marriage by *ṭalāq* (delegated *ṭalāq*), so that the woman is on an equal footing with him as to marriage termination. Stipulations may concern the place of the conjugal dwelling and the spouses' rights to it, or fix in detail what the husband must pay as maintenance (*nafaqa*) to the wife. The husband may undertake to allow the wife to go out to work, or, conversely, not to force her to do so; he may promise not to prevent the wife from leaving the town or the country they're living in; the wife may promise to accompany the husband in his travels. Stipulations may be added to the contract at any moment as long as the marriage lasts.

The freedom of will of the parties is not without limits, though. Stipulations that are incompatible with the nature of marriage are void, but there is not a complete agreement on the implications of such a principle. For instance, Sunni *fuqahā'* unanimously reject the stipulation under which the marriage will last until the deadline agreed upon by the parties, while Shi'is allow temporary marriage (*nikāḥ al-mutʿa*). Stipulations effectly derogating the rigid separation of property regime between the spouses are considered void by all the *fuqahā'*, without exception.

Furthermore, the propensity of contracting parties to resort to stipulations varies widely between social environments, from country to country, and over time. The most frequent stipulations concern dower (*mahr* or *ṣadāq*): they quantify the sum to be paid by the husband to the wife and determine the schedule of payments. If the marriage contract includes no stipulation regarding the dower, the husband is liable to pay a fair or proper dower (*mahr al-mitl*), equal to the dower usually paid for a woman similar in social status to the bride. The stipulation which excludes the obligation to pay the dower is void and, according to certain scholars, renders the whole contract void.

Mahr belongs to the wife, who cannot be forced to spend it on household management, or the like. It is a sign of the husband's serious intentions and of the lawfulness of the union. It gives a measure of the bride's social status and, at the same time, of the groom's wealth. But fundamentally, it generates the asymmetry between husband and wife that characterises the entire structure of the marriage relationship from beginning to end. In fact, the right of the wife to *mahr* and the power of the husband to terminate the marriage by *ṭalāq* are interdependent (see later).

Mahr greatly varies in value, according to the country, the region, the social group. It may have a symbolic rather than actual value, or, at the other extreme, consist in a very substantial amount of money. In the latter case, *mahr* can effectively secure the financial interests of the woman in the event of widowhood or divorce; but, at the same time, it may represent a formidable obstacle to the marriage conclusion. To facilitate the conclusion of marriages, which is considered a socially and religiously desirable objective, some governments fix a ceiling for *mahr*.

Stipulations may specify the mode of payment of the *mahr*: the dower may be payable either immediately at the time of the contract (prompt dower, *mahr muʿağğal*), or, in whole or in part, on the dissolution of the marriage, for divorce or death (deferred dower, *mahr mu'ağğal*), when the woman is particularly vulnerable. If the contract does not specify whether the *mahr* is prompt or deferred, the presumption is normally in favour of prompt dower. The wife can refuse to consume the marriage, as long as the prompt dower has not been paid.

Polygamy

Polygamy, or, more precisely, polygyny, is allowed by *fuqahā'*, based on the *Qur'ān* (IV, 3). This principle is expressed as a temporary impediment, limiting an otherwise absolute faculty of the man: he may have up to four wives at the same time, but a fifth woman is prohibited to him.[6]

The *Qur'ānic* verse regulating polygyny requires the husband to treat all his wives fairly. The wife is entitled to a right to maintenance (*nafaqa*) *vis-à-vis* her husband. In case of polygyny, every wife is entitled to equal maintenance and a separate living accommodation: co-wives do not live together, unless they all agree to, renouncing their rights. The husband has to care for all his wives and spends his nights with each of them in turn.

While the relationship between the husband and his wives is regulated in every detail, the same cannot be said of the relations between the wives. Even if in some social contexts they are rather important, these relations are not legally relevant. There is no hierarchy among the wives, who are not entitled to reciprocal rights and obligations.

The exercise of polygyny has never been evenly spread throughout the Muslim world: it varies according to the period, the place, and the social background of the parties. Equally varied is the condition of the wives of a polygynist.

Polygyny became a contentious issue during the second half of the 19th century, within the framework of Western criticism of women's condition in Muslim societies.

Reformist scholars[7] put forward a new interpretation for the *Qur'ānic* verse (IV, 3) that requires the man to fairly treat his wives; they connected it with another verse (IV, 129), which states that men are not able to deal in fairness and justice between women, however much they wish. On this basis, they argue that the practice of polygyny is allowed subject to a condition that God himself declares out of reach for men, and conclude that it is virtually banned.

On the wave of this new interpretation of the *Qur'ānic* verses, new statutory measures were introduced in many States to the effect of limiting and controlling the exercise of polygyny. A married man has to apply for a special judicial authorisation if he wants to marry another woman. The court shall grant authorisation only in exceptional cases. The first wife must be notified of the new marriage, and the new wife of the existence of previous marriages. Moreover, the woman may include the monogamy stipulation in her marriage contract, so that, if her husband takes an additional wife, she can seek divorce and/or demand the payment of compensation. According to some statutes, even in the absence of a specific stipulation in the contract, polygyny constitutes a valid ground for divorce.

Rare are the countries, such as Turkey and Tunisia, where polygyny is prohibited outright and qualifies as a crime. Nevertheless, a gap may exist between black-letter law and practice, to the extent that authorities turn a blind eye to the phenomenon of non-registered marriages, concluded in a purely religious form.

The marriage relationship

The conjugal life is to be inspired by the love and mercy God has placed between the spouses (*Qur'ān*, XXX, 21). Husband and wife are urged to treat each other with respect, affection, patience, forgiveness, and mutual caring. But, apart from these general moral exhortations, the matrimonial relationship is regulated by a set of rather rigid rules, which, for the main part, concern the institution of *nafaqa*.

Nafaqa is the right of the wife, who is entitled to receive from her husband food, clothing, lodging, and, according to statute law, medical treatment. The obligation to pay *nafaqa* starts as soon as the wife moves into the conjugal dwelling, and lasts till the end of the *ʿidda*, the waiting period after the termination of marriage, during which the woman cannot marry another man. The *ʿidda* lasts three months, or three menstrual cycles; if the woman is pregnant, it lasts until childbirth. After the *ʿidda*, no alimony is due.

Nafaqa is due irrespective of the wife's needs. An affluent woman is entitled to maintenance, and the level of her maintenance must be in accordance with the standard of living to which she is accustomed. How to determine the *nafaqa* to be paid by a poor man to a rich woman is then a challenging question, thoroughly dissected by scholars, who reach different solutions. Normally, the level of the *nafaqa* is left to the parties who are free to define it by agreement. The important point is that *nafaqa* is a sign of respect towards the wife. It is her property and she manages it as she prefers.

If the husband fails to pay, many are the remedies available to the wife. She can sue for maintenance and have the judgement executed; she may be authorised by the court to borrow money in the husband's name or to collect *nafaqa* out of the husband's property, during his absence. She can bargain with her husband over divorce, or even seek it in court.

The wife is not required to contribute with *nafaqa* or any other property of hers to the costs of the household, nor to the support of her own children, even if her husband is unable to do so. The property of the spouses is strictly separate, and all the costs of the family are borne by the man.

In the discourse about women's rights in Islam, which is currently developed out of a polemical comparison with the UN documents, women's financial independence and *nafaqa* represent

two particularly important issues. Unquestionably, Muslim women had their independence recognised long before European women. *Nafaqa*, on the other hand, is a more nuanced question. Ideally, the wife is not required to spend her money on household and family costs, nor to do housework, nor to care for the children. The husband will pay someone to do those services. But, if the man is unable to do so, or, if domestic help is not part of the *nafaqa*, because of the social status of the woman, the wife will do all the housework that is needed. This work will actually be an important contribution to alleviate the family burden that is placed on the man. Moreover, women working outside the home often contribute by their income to family expenses, deeming it necessary for the wellbeing of their beloved. The least that can be said, is that the rules regulating *nafaqa* are difficult to implement in their entirety.

Furthermore, the woman's right to *nafaqa* is not absolute, but it corresponds to her duty to obey her husband. This is the conclusion that, despite some terminological difficulties, interpreters unanimously draw from the *Qur'ān* (IV, 34): men have authority over women because they spend their property to support them.

As a consequence, the wife loses her right to *nafaqa* in case of disobedience or rebellion (*nušūz*). On the other hand, the most usual defence for a man summoned to appear in court on the grounds that he failed to pay *nafaqa*, is to accuse his wife of disobedience. To be considered obedient, the wife has to move to the conjugal dwelling, and not to leave it without the husband's consent or a legitimate reason. She has to fulfil her conjugal duties, and in particular not refuse sexual intercourse.[8] In general, she has to obey her husband, save where he orders her to perform an act which is religiously illicit.

In case of disobedience, the *Qur'ān* (IV, 34) allows the husband to warn his wife, then to refuse to sleep with her. As a measure of last resort, the man is permitted to use force against the wife and beat her. This *jus corrigendi* of the husband is a very contentious issue: the meaning traditionally attached to the *Qur'ānic* verse is refuted either on the basis of some subtle lexical arguments, or by reference to the general duty not to cause harm, or to the duty, specific to the spouses, to treat each other with affection and mercy (*Qur'ān*, XXX, 21).

In certain States, such as Egypt and Sudan, statutory law allowed the enforcement of obedience decrees through the assistance of the police. The wife was forced to return to the conjugal dwelling, to what was called *bayt al-ṭāᶜa* (the house of obedience). This institution, not regulated by *fiqh*, was abolished in Egypt in 1967.

The relationship between husband and wife, shaped by the couple *nafaqa*/obedience, is deeply asymmetric and hierarchical, and characterised by the clear pre-eminence of the man over the woman.

Marriage dissolution

In Sunni Islam, marriage is contracted to last indefinitely, but it is not indissoluble.[9] The decision about its termination essentially lays in the hands of the husband. The wife is given a rather limited role: she may either persuade her husband to dissolve the marriage on the conditions they agree upon, or seek a judicial divorce against her husband's will.

According to *fiqh*, the husband puts an end to the marriage by *ṭalāq*, a unilateral act that takes place outside court. The presence of the wife is not necessary, neither is an express reason for the breakdown of the marriage required. *Ṭalāq* is valid even in the absence of witnesses. *Ṭalāq* is regulated in detail by the *Qur'ān* (II, 228.232), in a number of verses that restrain and limit a pre-Islamic form of marriage dissolution.

The husband has the power to pronounce *ṭalāq* three times. The first and the second *ṭalāqs* are revocable: the husband may take back his wife during the period of *ᶜidda*, the three months,

or more precisely the three menstrual cycles, following the *ṭalāq*. The revocation of *talāq* does not require the woman's consent. After the *ʿidda* period has expired, the husband may marry the woman again, by a new marriage contract and with a new *mahr*.

The third *ṭalāq* is instead irrevocable, and the husband is barred from remarrying the woman unless she undergoes an intermediate marriage: after the dissolution of this new marriage, the woman is permitted again to the first man.

The *Qur'ānic* verses plainly aim to make men aware of the serious effects of *ṭalāq* and discourage them from lightly pronouncing it, with the result of indirectly protecting women's interests. However, this form of protection for women is weakened by legal scholars, who allow the husband to pronounce all three *ṭalāq* at once, with the result that an irrevocable dissolution of the marriage is immediately operative, together with all its personal and financial effects. The triple *talāq* is considered a reprehensible innovation (*ṭalāq al-bidʿa*), but it is perfectly effective according to *fiqh*.

Ṭalāq may consist in explicit or metaphorical expressions: only in the latter case does the husband's intention to dissolve the marriage have to be proven. Otherwise, the marriage is terminated by the mere utterance of the expression containing the word *ṭalāq*, or other terms derived from the same root *ṭ-l-q*, as well as some archaic locutions as *īlā'* or *ẓihār*,[10] irrespective of the real capacity of the husband to make a sound judgement. An explicit *ṭalāq*, even if uttered by someone who is drunk, out of his senses, asleep, mentally deranged, under duress or overwhelmed, is perfectly valid and effective.

According to *fiqh*, the husband may also pronounce suspended *ṭalāqs*, in order to ensure the wife's compliance with his orders. For instance, he may swear that the marriage is to be considered dissolved by *ṭalāq* if the woman leaves the house. But such a weapon, intended to keep pressure on the woman, may easily backfire against the man if the woman leaves the house, taking advantage of the opportunity of securing her freedom from the marriage.

In fact, even in a legal environment that is, overall, unfavourable to them, women may find interstices to exercise their agency, possibly with the support of their families of origin. For instance, it is a good bargain for the woman if the husband confers his power of *ṭalāq* on her (*tafwīḍ*). The scope of the delegation may vary: an absolute delegation is normally inserted into the marriage contract and allows the wife to dissolve the marriage whenever she wants. On the other hand, a conditional delegation will take effect only under certain circumstances, normally if the husband does not keep to what he has promised. Such a delegation usually puts an end to a dispute between the spouses which arises in the course of the marriage. In any case, the delegated *ṭalāq* is irrevocable.

In fact, the delegated *ṭalāq*, if absolute, places the wife on an equal footing with the man as to the freedom to terminate the marriage; however, the unilateral power of *ṭalāq* still formally remains the privilege of the man, and the wife dissolves the marriage in his name. If the husband has not delegated his power to her, the wife who wishes to be freed from marriage may try to persuade the man to pronounce *ṭalāq* himself. The *ṭalāq* given by the husband for compensation paid by the wife is called *hulʿ*. *Fiqh* distinguishes two main cases: the wife either pays compensation (*ʿiwaḍ*), or renounces her rights (*ibrā'*). If the agreement involves the mutual waiving of any financial obligations between the spouses, it is called *mubāra'a*. Obviously, the waiver and the compensation may be combined together. The woman normally renounces the rights strictly connected with the marriage and its dissolution: the dower, or the part of it not yet paid; the maintenance for the *ʿidda*, the waiting period following the dissolution of the marriage; and the arrears payments for maintenance during the marriage. Quite often, the waiver concerns the children: the woman renounces her rights of custody (*ḥaḍāna*), or the wage she is entitled to as their *ḥāḍina*; more importantly, she may waive the children's right to be maintained (*nafaqa*) by

their father. In general, any right claimed by the woman or her family against the man may be waived in exchange for *ṭalāq*. As to the compensation, it may consist of any asset; according to a prophetic tradition, it is the return of the sum paid as dower.[11]

However, the terms of the agreement are not always the successful outcome of the wife's initiative and agency; on the contrary, they may be the result of her extremely weak position, shamelessly exploited by the husband. The man enjoys an extraordinary bargaining power *vis-à-vis* his wife in negotiating the marriage dissolution by mutual consent. *Ṭalāq*, the key to the solution to the marriage breakdown, is his exclusive prerogative; moreover, he is never in desperate need to be free of a specific marriage in order to enter another one: polygyny allows him to indefinitely prolong the negotiations, while making the life unbearable for the wife. Eventually, she will be ready to pay a ransom for her freedom.

The woman's position is less miserable when a possibility exists for her to terminate the marriage irrespective of the husband's consent. Legal scholars, with the exception of the Hanafis, allow the wife to sue for divorce (*taṭlīq* or *tafrīq*) in the courts on a number of grounds: if the husband fails to pay maintenance (*ʿadam al-infāq*); if he is absent (*ġiyāba*); and if he causes harm (*ḍarar*) to her, i.e. if he treats her unjustly. A defect (*ʿayb*) or mental or physical disease are considered grounds for divorce for either spouse by all the scholars, including the Hanafis.

Divorce proceedings are long, they are held in public, and their result is uncertain. Nevertheless, they are a better option for women than other ways out of marriage: as mentioned earlier, during the 1930s Muslim women in India would renounce their faith to be rid of their undesirable marriages. Hanafi law, which was applied in the country, did not contemplate any form of judicial divorce, but, as with the other schools, it provided for the immediate termination of marriage in case of apostasy (*irtidād*) of one of the spouses. This practice created great turmoil in Muslim public opinion, and the *ʿulamā'* convinced the British government to pass an act, The Dissolution of Muslim Marriages Act (1939), allowing Muslim women to seek divorce.

This Act perfectly fits with the general trend that, at that time, started emerging in statutory interventions concerning family law across the Muslim world. To promote a more equitable balance between husband and wife in matters relating to marriage dissolution, legislatures tried to strengthen the wife's position and to limit the husband's powers. On the one hand, they generalised the judicial divorce and widened the grounds on which the woman can seek it. On the other, they transformed *ṭalāq* into a judicial procedure and made it more onerous to the man. Only in Tunisia were women and men granted perfect equality in their access to divorce proceedings.[12]

Current family codes expand the traditional list of grounds for divorce, so as to reduce the discretion of the court in assessing what constitutes harm and justifies the application for divorce lodged by the wife. Obviously, the breach of any clause inserted in the marriage contract is a valid ground for divorce. Polygamy, even in the absence of a specific clause to that effect, constitutes a ground for divorce according to certain statutes; the same happens in the case of extramarital relationships and same-sex activities. Other new grounds for divorce are gambling, drug addiction, and wine consumption, or behaviours that are contrary to the interests of the State (desertion or treason). However, the case-by-case evaluation by the court of the circumstances cannot be avoided, and it may prove particularly tricky when referring to episodes of ill-treatment of the wife.

For the sake of equality, access to divorce is sometimes open to the husband. This is not the case for *ṭalāq*, which retains its nature as a male privilege. However, some of its excesses are reined in: triple *ṭalāq* and suspended *ṭalāq* are abolished;[13] the actual intention on the part of the husband to terminate the marriage is required for the *ṭalāq* to be effective. What is more important,

ṭalāq ceases to be a purely private act and is brought under judicial supervision: statutes normally provide that a court decree is needed to establish *ṭalāq*, or at least to authorise its drafting by the notary, and its registration. In some States, failure to register the *ṭalāq* within a set deadline involves criminal sanctions. Despite the efforts of the States to enhance the judicial supervision of *ṭalāq*, out-of-court *ṭalāqs* are still an important social phenomenon in many countries.

A private *ṭalāq* may concern a registered marriage. In this case, it is particularly detrimental to the wife: according to the law of the State, the woman is trapped in the marriage, whereas the man does not consider her as his wife anymore. For this reason, statutes often make the proof of the extra-judicial *ṭalāq* easier for women than for men. However, there are also cases where the out-of-court *ṭalāq* terminates a non-registered marriage. The man giving extra-judicial *ṭalāq* may have chosen informality as the only way of organising his conjugal life: he invariably omits to register the marriages he contracts,[14] because, faced with the cumbersome and bureaucratic procedures required, he cannot see the benefits of the registration. In fact, his preference for informality is normally shared by the social environment in which he lives. Conversely, a man may combine formality and informality, in such a way as to create a hierarchy between different conjugal unions. Alongside the main marriage, approved by the families and duly registered, he enters minor, non-registered marriages (*zawāǧ ʿurfī, zawāǧ al-misyar*): they are less demanding than 'official' marriages, but perfectly suitable to make sexual intercourse licit. Obviously, the position of a woman involved in an unofficial marriage is particularly vulnerable, and her rights are not protected upon dissolution.

As to judicial *ṭalāq*, the court is called upon to play an important role in attempting to reconcile the spouses and dissuade the husband from making use of his power to terminate the marriage. If mediation fails, the court ensures the rights of the woman: the deferred dower and the maintenance due for the waiting-period (*ʿidda*). In addition, current legislations provide for compensation in favour of the wife. The reform was introduced by reference to the 'gift of consolation' (*mutʿa*) that the *fuqahā'* recommended be given to the woman at the time of *ṭalāq*: what was recommended is now mandatory and regulated in different ways from country to country. Some statutory texts provide for *mutʿa* only in the case of arbitrary *ṭalāq*, pronounced without a reasonable cause; for others the arbitrary nature of *ṭalāq* is always presumed, and sometimes *mutʿa* is mandatory in types of judicial divorce other than *ṭalāq*. The wife's condition, the husband's financial situation, and the duration of the marriage are possible criteria to determine the sum to be paid as *mutʿa*. When courts award women substantial sums for *mutʿa* in case of *ṭalāq*, and especially when the husband has to deposit these sums prior to *ṭalāq*, men are encouraged to abandon their traditional prerogatives and to opt for other forms of dissolution, preferably on the basis of an agreement.

Statutes look with favour at *hulʿ*, the agreement on marriage termination: they try to strengthen the position of the wife in the bargaining, so as to protect her from being forced to adhere to unacceptable terms. They identify certain rights she cannot renounce in return for the *ṭalāq*, notably her right to custody (*ḥaḍāna*) and the maintenance of the children. Moreover, if the spouses agree on the principle of ending their conjugal relationship in exchange for compensation, but disagree on its amount, it is up to the court to fix it.

Hulʿ was transformed into a judicial divorce in Egypt (Law n. 1/2000). If the husband refuses the offers made by the wife to reach an agreement, she may apply for divorce, stating she is ready to return the dower and renounce all her outstanding rights. The wife does not need to provide grounds for her demand; neither is her culpability under discussion. The court will grant her divorce against the wishes of the husband. Similar procedures are available to women in other Arab countries.

Morocco introduced another way than *hulʿ* to empower women to terminate their marriage: the divorce for *šiqāq*, or discord. *Šiqāq* is an arbitral procedure regulated by the *Qur'ān* (IV, 35) and provided for by a number of statutory texts, as part of ordinary divorce procedures. But only the Moroccan code shapes it as a rapid, sure, and non-discriminatory way to dissolve the marriage. In case of disagreement making it impossible to continue married life, each of the spouses may petition for divorce. The court appoints two arbitrators to investigate the causes of the dispute between the spouses and attempt to reconcile them. If reconciliation proves impossible, the court grants the divorce and fixes the sums to be paid, taking into account each spouse's responsibility for the marriage breakdown. If the husband is to blame, the wife will be awarded her rights; otherwise, she will renounce the dower or return it.

Hulʿ and *šiqāq* show that a relation exists between the dower and the husband's exclusive power to determine the fate of the marriage by means of *ṭalāq*. As long as the wife is ready to waive her right to the dower, the husband cannot oppose her initiative to terminate the marriage.

Finally, mention must be made of *liʿān*, the oath taken by the husband in order to disavow the paternity of the child born from his wife. Besides this main function, *liʿān* entails marriage dissolution and creates a permanent impediment between the parties. The procedure is held in public, at the mosque, following the rules laid down by the *Qur'ān* (XXIV, 6–9). The husband accuses his wife four times of illicit sexual intercourse (*zinà*); then, in a fifth oath, he invokes the wrath of God upon himself if he is lying. The wife, in turn, swears four times that the husband is falsely accusing her; then in a fifth oath, she invokes the wrath of God if he is telling the truth. *Liʿān* is a very rare occurrence, even if in many countries it remains the sole means of rebutting the presumption of paternity.

The Islamic law of marriage, as summarily outlined, contributes to shaping the life of Muslim women, in interaction with statutes, case law, and customary law. It is the common reference for the supporters of radically different ideas, who animate the ongoing debate about the role of women in family and society throughout the Muslim world. It is sufficiently flexible to accommodate a wide range of solutions, even if not the most radical ones.

Further reading

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Notes

1 In classical law, the sexual intercourse between the master and his female slave is licit, too.
2 *Iḥṣān* is a very tricky legal term. While any person can be *ʿafīf*, the condition of *iḥsān* is acquired only by marriage, or more precisely, by the consummation of the first marriage. Once a person becomes *muḥsan*, it is forever. Marriage protects the *muḥsin* person from illicit and immoral behaviours and at the same time transforms him/her into the guardian of the boundaries between sexes. His/her transgressions are then particularly grave and, in case of *zinà*, a *muḥsin* person deserves the most serious punishment of stoning, be he/she married at the time of the illicit sexual intercourse or not. From this point of view, marriage is like a rite of passage, allowing the definitive entrance of the individual in a new status.
3 *Qur'ān*, LI, 49.
4 At present, all Muslim countries forbid, or at least discourage, child marriage.
5 This was the case of Tunisia, where the circulars providing for the ban of marriages between Muslim women and non-Muslim men were repealed by a new circular in September 2017.
6 Another temporary impediment limits the man's free exercise of polygyny: the prohibition to contract marriage with any woman so related to his present wife that if one of them was a male, they couldn't marry because of their blood relationship.
7 V. in particular Qāsim Amīn, *al-Aʿmāl al-kāmila*, Beirut, 1976, t. 2, p. 93.
8 It is a matter of debate whether a right of the wife to sexual intercourse exists, too. The sexual deprivation of the wife may induce her to engage in an illicit sexual intercourse (*zinà*); that is the reason why some jurists consider the absence of the husband (*ġiyāba*), or his refusal to share the conjugal bed, as grounds for divorce (*hiğr*). The wife has less extensive rights than the husband, though, since she can seek divorce only if she has been deserted for a prolonged period of time (four months, in the case of *hiğr*). Anyway, the majority of the scholars maintain the husband's right to have sex cannot be transformed in the duty for him to be available for the sexual enjoyment of the wife.
9 Alongside the ordinary marriage, Shi'i law admits the temporary marriage (*nikāḥ al-mutʿa*), a contract entered into for the duration specified by the parties. This kind of marriage cannot be dissolved by the will of the spouses, but only by either death or the expiration of the time limit agreed upon. If the duration of the contract is longer than the expected life of the spouses, the *nikāḥ al-mutʿa* amounts to an indissoluble marriage.

10 *Īlā'* is the oath of the husband to abstain from sexual intercourse with the wife for four months; in the *ẓihār*, the husband swears that his wife is like 'the back (*ẓahr*) of my mother' to him. Both procedures are mentioned in the *Qur'ān*, respectively by II, 226–227 and LVIII, 2–4.
11 The tradition tells that the Prophet urged a man to pronounce *talāq* in exchange of the garden he had paid as *mahr*, as his wife was ready to return to him.
12 Equality at marriage dissolution is also ensured in other Muslim countries, such as Turkey, but by means of purely secular statutes, whereas the Tunisian code maintains the link with the legal tradition of Islam.
13 Recently, the practice of triple *ṭalāq* was banned by the Supreme Court of India, who declared it unconstitutional (Shayara Bano v. Union of India and others, 22 August 2017).
14 Women are often not in control of the marriage registration, and sometimes even ignore the administrative procedure and the benefits they could draw from it.