

COVENANT MARRIAGE
in
COMPARATIVE PERSPECTIVE

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7 The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual?

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The nature of the Islamic marriage contract (*kitab*) has been largely misunderstood by Muslims and non-Muslims alike. On the Muslim side, the problem has been one of over-secularization of the law of contract, a trend that led to a trivialization of the marriage contract, and hence of the commitment of some marriage partners to it. On the non-Muslim side, the problem has been one of trying to explain the Islamic marriage contract from world perspectives that are at times incongruent with it. This has led to unintended distortions in characterizing its nature.

For example, Muslims and non-Muslims often assert the purely contractual nature of the Muslim marriage contract in order to draw a distinction between it and the nature of marriage in other traditions. Unlike Catholic marriages, for example, it is pointed out that a Muslim man can dissolve the marriage bond at will and pay his wife a set amount (called the *mahr* or *sadaq*) agreed upon in advance in the marriage contract. The marriage ceremony may take place at home, and thus, it is argued, is not "before God" as in a church, but rather "temporal."

I was one of those propagating this point of view until I started researching Islamic law, especially in the areas of marriage and divorce, more seriously. As it turns out, Islamic law is a seamless web, and it is quite difficult to understand

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one part of it without having some knowledge of the other parts. I can safely assert now that almost every claim in the preceding paragraph is false.¹

In this chapter, I shall remove some of the confusion and misunderstanding about the Islamic marriage contract by taking the reader with me on a brief tour of the fundamentals of Islamic law as they pertain to our subject. I shall start with an introductory discussion of the Islamic worldview in general, and the Islamic view of gender relations in particular. It will be followed by a discussion of the nature of contract in Islam. I shall then turn to the Islamic marriage contract and its special status in Islamic law and religion, and, finally, examine the nature of marriage among Muslims in the United States.

The Islamic Worldview

The Islamic worldview is based on the fundamental concept of *tawhid* (the unicity of God).² There is only one Creator and one Supreme Will. Any view which associates partners with this Supreme Will, whether directly or indirectly, results in *shirk* (the opposite of *tawhid*), which is a sin that God tells us in the Qur'an he will not forgive (4:48). Iblis (Satan) missed this important point and disobeyed God when God ordered him to bow to Adam (15:31). By refusing to obey a divine command, Iblis made his own will supersede that of God. For that unforgivable sin he was cursed (15:35). But the critical question in this Qur'anic story is this: What prompted Iblis to disobey God? The answer is his vanity. The Qur'an tells us that in justifying his disobedience, Iblis told God, "I am better than he [Adam] is" (7:12). This Iblisi worldview, which is based on vanity intertwined with hierarchy, is directly opposed to divine logic, which celebrates diversity and the fundamental equality of all human beings as signs of God's miracles on earth.

The Qur'an tells us,

1. The full extent of this error will be made clear in my forthcoming book on marriage contracts.

2. This is most clearly stated in Chapter 112 of the Qur'an itself. It states in its entirety, "Say: He is God the One and Only. God the Eternal, Absolute; He begetteth not, Nor is He begotten; And there is none Like unto Him."

In this chapter, I use *The Meaning of the Holy Qur'an*, trans. A. Yusuf Ali, 11th ed. (Maryland: Amana Corp., 2004). However, where critical for our discussion, I have revised some of the translations that are inaccurate linguistically or legally, or are unjustifiably patriarchal. I have also consistently replaced the word "Allah" with "God" since that is the proper translation of the word into English. Leaving it in its Arabic form will cause confusion as to the identity of the God in which Muslims believe. He is the same God of the other Abrahamic religions. All the translations of the Arabic sources, other than the Qur'an, are mine.

O people! We created you from a single [pair] of a male and a female, and made you into nations and tribes, that ye may know each other. . . . Verily, the most honored of you in the sight of [God] is [the one who is] most righteous [*atqakum*] of you. . . . (49:13)

It also states, "And among His Signs [miracles] is the creation of the heavens and the earth, and the variations in your languages and your colors; verily in that are Signs for those who know" (30:22). The Prophet also asserted the same worldview in *Khutbat al-Wadaa'* (Farewell Address) when he reminded his audience, "O kin of Quraysh, God has removed from you the arrogance of *Jahiliyyah* and its patriarchal dynastic pride [*ta'ath.thumaha bi al-abaa'*]. People are of Adam and Adam is of dust."³

Jurists saw in such Qur'anic verses and Hadiths (statements of the Prophet) a conclusive proof of the equality of all humans before God. They also saw in the stories of the fall of Iblis, and of Adam and Eve, the pitfalls of vanity and the pursuit of power.⁴ These realizations prompted jurists to be modest in asserting their views and in disputing the views of others. It also led them to eschew hierarchies and opt for an egalitarian system of relationships.

In the case of gender relations within and outside the family, both the Qur'an and the Prophet were quite clear. Men and women were created of the same *nafs* (soul) (Qur'an 4:1; 7:189), and as a previous verse indicates, they are measured not by their gender but by their individual righteousness (49:13). Further, the Qur'an assures both genders that as to this world, "Never will I suffer to be lost the work of any of you, be [it] male or female; ye are from one another" (3:195). The last part of the passage refers to the fact that not only are the two genders interdependent in reproductive life, they are also constituted of the same basic elements, a sign of true equality. In matters of faith, "Whoever works righteousness, man or woman, and has faith, verily to him will We give a new life, a life that is good and pure, and we will bestow on such their reward according to the best of their actions" (16:97). As for family relations, the Qur'an tells us, "And among His signs is this: that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your [hearts]: Verily in that are signs for those who reflect" (30:21). Finally, the guiding principle in family relations was articulated by the Qur'an with striking simplicity: "[It is either holding together] on equitable terms, or [separating] with kindness" (2:229).

3. Zayd Ibn Ali al-Wazir, *Al-Fardiyyah: Bahth fi Azmat al-Fiqh al-Fardi al-Siyasi 'inda al-Muslimin* (Virginia: Yemen Heritage and Research Center, 2000), p. 62.

4. See, e.g., Muhammad Ibn Ali al-Shawkani, *Fath al-Qadir* (Beirut: Dar al-Khayr, 1992), vol. 3, pp. 438-39.

Clearly, all these verses articulate an egalitarian view of relationships between the sexes. Yet, many traditional jurists living in highly patriarchal societies managed to provide a patriarchal jurisprudence for spousal relationships. They seized on a couple of verses in the Qur'an and interpreted them so as to introduce a full-fledged hierarchy between husband and wife. Extreme statements about this hierarchy were then made that relegated the wife to a subservient status.⁵ Yet the Qur'an clearly states that male and female believers are each other's *walis* (protectors, guardians, advisors). Since Muslims believe that the Qur'an is internally consistent, the hierarchical interpretations of the spousal relationship must be reexamined to uncover the underlying patriarchal cultural influences.⁶

The deeply rooted egalitarian view of gender relations in the Qur'an and the life-affirming view of family relations discussed above are critical to understanding the fact that the Islamic marriage contract is a contract based on the consent of two equal parties. But before we turn to this discussion, we need also to understand the theory of contract in Islam.

The Islamic Contract

The Islamic marriage contract is a variant of Islamic contracts. Therefore, it is important to understand the underlying Islamic theory of contracts before embarking on the more specialized discussion of the jurisprudence of the Islamic marriage contract. Unfortunately, little attention has been given to the study of Islamic contract theory, which arose originally in the commercial context. Further, when this body of law is studied, it is usually examined within the commercial contexts of the modern Western capital markets. While this is an important endeavor, it is unhelpful for understanding the basics of Islamic contract law and the logic behind its various rules. Indeed, it has led many writers to misunderstand and mischaracterize the nature of the Islamic marriage contract. Yet this fact is not fully comprehended even by some Muslims today who unwittingly tend to think of Islamic contract theory as essentially secular, as is exemplified by the popular belief that the Islamic marriage contract is simply a civil contract.

This distorted understanding of Islamic law is not surprising given that many Muslim countries abandoned that law decades ago as a result of modernization, the collapse of the Ottoman Empire, and the ensuing colonialism, to

5. See, e.g., Abu Ja'far al-Tabari, *Jami' al-Bayan fi Tafsir al-Qur'an*, 23 vols, repr. of ninth c. ed. (Beirut: Dar al-Ma'rifah, 1978) vol. 2, p. 275; vol. 5, pp. 37-39. See also Abu Bakr Muhammad Ibn al-'Arabi, *Ahkaam al-Qur'an* (Beirut: Dar al-Ma'rifah, 1987), vol. 1, pp. 188-89, 415-16.

6. See, e.g., Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights," *American Journal of International Law and Policy* 12 (1997): 1, 20.

list a few factors. They replaced it in most areas, but notably not in the area of family relations, with positive law modeled after Western secular law. The replacement severed the conceptual connection between contract law, which became secularized, and family law, which remained Islamic.⁷ As a result, many modern Muslim jurists studied the second without reference to the first, in either its secular or religious manifestations. Important principles of Islamic contract law and its connections to family law were thus missed, leading to an important loss of insight in later generations. In the next few sections, we shall try to regain some of these insights in order to develop a deeper understanding of the Islamic marriage contract.

Traditional Islamic contract theory is based on reasonably well developed medieval jurisprudence. This jurisprudence, while quite suitable for the demands of its time, was not challenged by the complicated structures of our industrial and information-based societies. The jurisprudence of Islamic contract law is now in dire need of updating in order to be able to respond to these more recent developments. The task, however, is quite daunting. For the purposes of this chapter, we shall simply attempt to understand the basic principles of contract law as they relate to the issue at hand. We leave a more fundamental assessment and contribution to the field for another day, and we turn now to the basic principles of Islamic contract theory.

What Is an 'Aqd?

The word *'aqd*, which has been translated into English as *contract*, means "to bind, tie, fasten or secure," as in the case of tying two ends of a rope.⁸ It was later used figuratively to refer to firm commitments, whether in spiritual or legal contexts and whether unilateral or not. An *'adq* is also referred to also as an *'ahd* (pl. *'uhud*), although an *'ahd*, as we shall see later, may refer to commitment of a higher order, such as a treaty or a covenant.⁹ An *'aqd* has a general meaning as well as a specialized meaning. The general meaning in the literature subsumes under *'aqd* any binding undertaking or commitment by a unilateral

7. Some countries like Saudi Arabia retained Islamic law in all its branches, including contract law.

8. Abd al-Hamid Mahmoud al-Ba'li, *Dhawabit al-'Uqud* (Cairo: Maktabat Wihbah, 1989), pp. 39-40; Abd a-Razzaq al-Sanhuri, *Massadir al-Haqq fi al-Fiqh al-Islami* (Beirut: Dar Ihya' al-Turath al-Islami, 1953-54), vol. 1, p. 75 (quoting al-Alousi in his *Tafsir*).

9. Muhammad Abu Zahrah, *Al-Milkiyah wa Nathariyat al-'Aqd* (Cairo: Dar al-Fikr al-'Arabi, 1996), pp. 173-75; Ali M. A. al-Qurra Daghi, *Mabda' al-Ridha fi al-'Uqud* (Beirut: Dar al-Basha'ir al-Islamiyah, 1985), vol. 1, p. 106.

individual will, whether it was made in return for an undertaking by another or not.¹⁰ Thus, there need not be two parties to an 'aqd. Examples of a unilateral 'aqd are oaths and vows.¹¹ Also, under this definition, every stipulation in a contract is an 'aqd because of the undertaking to fulfill the condition it specifies.¹²

The specialized meaning of 'aqd, however, is that which refers to the agreement of two wills resulting in a firm commitment. This has become the more prevalent meaning of 'aqd. Many medieval jurists used the word 'aqd in its specialized meaning.¹³ Nevertheless, all Qur'anic interpreters agreed that the verse, "Fulfill all 'uqud" (5:1), refers to the general meaning of 'aqd, and, hence, covers both types of commitments, unilateral and otherwise.¹⁴

Given this broad Qur'anic interpretation, it follows that reneging on one's commitment, whether in exchange for another or not, is wrong.¹⁵ This follows regardless of the presence or absence of formalities when the commitment was made, because the need to fulfill it does not derive from legal formalities but from divine orders and religious morality.¹⁶ This point is made emphatically in *Taj al-Arus*, the classical Arabic lexicon, even in its discussion of mere promises (as opposed to contractual commitments). Under the entry *wa'd* (promise), it notes that "if a person promises [to do] something good and does not deliver it, they [the Arabs] would say: 'the person *akhlaf*' [breached his promise], and that is a grave vice [*al-'ayb al-fahish*]."¹⁷ It also quotes the 'ulama, who emphasized the importance of fulfilling promises and prohibited breaching them.¹⁸ *Taj al-Arus* then continues,

and the Arabs found it [breaching a promise] an ugly vice and they said: "breaching a promise is of the morals of scoundrels"; and it is said that ful-

10. Malakah Yusuf Zitar, *Mawsu'at al-Zawaj wa Al-'Alāqah al-Zawjīyah* (Cairo: Dar al-Fath, 2000), vol. 1, pp. 134-35 (margins). Zitar admits only of the unilateral meaning of 'aqd, however, while providing a different definition for the bilateral ones; see also p. 139.

11. Zitar, *Mawsu'at al-Zawaj*, vol. 1, p. 139.

12. Abu Zahrah, *Al-Milkiyah*, pp. 173-74.

13. Al-Qurrah Daghi, *Mabda' al-Ridha*, vol. 1, pp. 114-15 (quoting Ibn Nuja'im, al-Babirī, ibn Hammam, al-Kasani, al-Dardir, al-Dusuqi, and many others).

14. Al-Qurrah Daghi, *Mabda' al-Ridha*, vol. 1, p. 115 (citing al-Tabari, Ibn 'Arabi, al-Jassas, Ibn Kathir, and others).

15. Muhammad Fakhr al-Din al-Razi, *Tafsir al-Fakhr al-Razi* (Beirut: Dar al-Fikr, 1985), vol. 5, pp. 47-48, vol. 11, pp. 125-26. See also al-Qurrah Daghi, *Mabda' al-Ridha*, vol. 1, p. 115.

16. Al-Qurrah Daghi, *Mabda' al-Ridha*, vol. 1, p. 116.

17. Muhammad Murtadha al-Zabidi, *Taj al-Arus* (Beirut: Manshurat Dar Maktabat al-Hayat, eighteenth-century reprint, n.d.), vol. 2, p. 537.

18. al-Zabidi, *Taj al-Arus*, vol. 2, p. 537.

filling promises is a *Sunnah* [the example of the Prophet]. . . . Qadi [judge] Abu Bakr bin al-'Arabi said: ". . . breaching a promise is lying and hypocrisy, and if it is rare it [still] is disobedience to God."¹⁹

To understand better the interaction between the legal and spiritual world in Islam, I offer a brief overview of Islamic law. It is divided into two general categories: *'ibadat*, or matters of worship (between a person and God), and *mu'amalat*, or transactions (among people). The first category includes matters of faith, such as prayer, fasting, and tithing. The second category includes such matters as contract law, property law, and constitutional law. Both categories are proper subjects of Islamic jurisprudence and are governed by the Qur'an and Sunnah.²⁰ For example, as we shall see, the Qur'anic prohibition of usury (*riba*) resonates throughout the Islamic financial markets, affecting contract law, banking law, and even securities regulation.²¹ This fact alone renders Islamic contract law essentially different from Western secular law. It is very important to keep these differences in mind, if we plan to understand Islamic law properly and not empty it, through facile translation or interpretation, from its very *raison d'être*.

The Islamic Worldview and Its Impact on Contracts

The Qur'an enjoins Muslims to fulfill their contracts. It says, "O ye who believe, fulfill all '*uqud*'" (5:1). This verse is the opening verse of a long passage which lists for Muslims those things permitted unto them, and those things forbidden. According to al-Tabari, whose exegesis of the Qur'an is among the most famous, the verse urges Muslims to fulfill *all* their '*uqud*', because there is no rational basis for differentiating among them.²² So a Muslim should not breach a contract after affirming it. In fact, fulfilling one's '*ahd*' is placed in the Qur'an alongside prayer, charity, chastity, and truthful testimony — qualities used to describe a pious and fair person (70:22-35).

The Prophet himself was no less emphatic about the importance of fulfilling one's contracts. He said, "Fulfill your '*uqud*', and the '*aqd*' most worthy of

19. Al-Zabidi, *Taj al-'Arus*, vol. 2, p. 537.

20. The Sunnah is the Hadiths (sayings), deeds, and example of the Prophet. It is used by Muslim jurists as a source secondary only to the Qur'an for further clarification and guidance.

21. Abd a-Razzaq al-Sanhuri, *Massadir al-Haqq*, vol. 3, p. 14 (noting that *riba*, *gharar*, and the rule against multiple transactions in one contract have deep influence on various specific rulings and matters of Islamic jurisprudence).

22. Al-Tabari, *Jami' al-Bayan fi Tafsir al-Qur'an*, vol. 6, p. 33; al-Ba'li, *Dhawabit al-'Uqud*, pp. 34-36.

fulfillment is that of marriage."²³ This prophetic Hadith makes it very clear that, among all Islamic contracts, the marriage contract is the most worthy of fulfillment; yet by Qur'anic injunction even the least important contract in Islam must be fulfilled.

This fact also shows that an Islamic contract is not the same as a secular contract under American law. While the worldly repercussions for entering, fulfilling, or breaching an Islamic contract may overlap significantly with those under American contract law, these repercussions represent only *haqq al-'abd* (the right of the human being). But an Islamic contract also gives rise to *haqq Allah* (the right of God), which has been clearly distinguished and articulated in the Qur'an. That right arises when a Muslim violates the clear injunctions of the Qur'an to fulfill all her *'uqud*.

The Islamic view that all contracts are subject to Qur'anic injunctions is conceptually different from some Christian views. Christian theologians like John Calvin distinguished between two kingdoms — the temporal and the spiritual — with the former pertaining to the concerns of our daily life, and the latter pertaining to the life of the soul.²⁴ Calvin argued that marriage is an institution of the earthly kingdom, "just like farming, building, cobbling, and barbering."²⁵ It has no bearing on one's salvation or eternal standing, but it is a divine remedy for human lust. Muslims, on the other hand, believe that "farming, building, cobbling, and barbering" all have a bearing on our eternal standing, because, like marriage, they fall into the category of *mu'amalat*, which is an important part of the religion.

The overlap between the spiritual and the temporal realms in Islam explains why contracts that deal with everyday matters are also subject to God's law. Given this religious dimension of the Islamic contract, it is misleading to translate the Arabic word *'uqd* as *contract*. This distortion is most noticeable in the case of the Islamic marriage contract. To call the Islamic marriage contract "a civil contract," as many do, and analogize it to a modern secular contract, strips the marriage contract of its momentous religious status as the contract most worthy of fulfillment.

Recognizing the special importance and station of the marriage contract in Islam, jurists refused to apply to it *mutatis mutandis* the same rules as those that govern sales and other commercial contracts.²⁶ In each case the distinction was

23. Muhammad Ibn Isma'il al-Bukhari, *Sahih al-Bukhari* (Beirut: Dar al-Ma'rifah, n.d.), vol. 3, p. 252.

24. John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville: Westminster John Knox, 1997), p. 79.

25. Witte, *From Sacrament to Contract*, p. 94.

26. For more on the distinction between the marriage contract and the commercial one,

based on the gravity of the marriage contract and the fact that, unlike a sale, it is not an exchange transaction (that is, one made for consideration).²⁷ While the marriage contract (like all other contracts) contains worldly terms negotiated by the parties, these terms address only the worldly aspect of the marriage. To assume that there is no more to the contract than these aspects is to commit a grievous error. Many Muslims primarily conduct marriage negotiations with a view to pleasing God. In fact, some women and their *walis* (guardians or advisors) pay so little attention to the worldly aspect of the marriage contract that they end up suffering worldly consequences.

Exceptions to the Rule

The fact that even the least important contract in Islam must be fulfilled was not fully appreciated by some writers because they misconstrued a reported incident involving the Prophet.²⁸ The incident involves 'A'ishah, the wife of the Prophet, who agreed to purchase Barirah, a slave woman, upon the latter's request, in order to free her. Under Islamic law, the freeing of Barirah created between the two women a special relationship of *wala'* akin to that of a blood relationship.²⁹ Such relationships are very narrowly and carefully defined. They include the usual blood relationship, as well as others articulated by the Qur'an and Sunnah such as the milk relationship (based on nursing), the womb relationship (*silat al-rahm*), and the *wala'* relationship (based on freeing a slave). None of these relationships is transferable.³⁰

see al-Ba'li, *Dhawabit al-'Uqud*, pp. 106-7. See also Zirar, *Mawsu'at al-Zawaj*, vol. 1, pp. 134-44, and al-Sanhuri, *Massadir al-Haqq*, vol. 3, p. 130.

27. See, e.g., Zirar, *Mawsu'at al-Zawaj*, vol. 1, pp. 134-44.

28. Frank E. Vogel, *Islamic Law and Finance: Religion, Risk, and Return* (The Hague, 1998), pp. 67-68. Based on this precedent and practice in Saudi Arabia, the author states that "[t]his *Hadith* is highly troubling for freedom of contract. It suggests that the very terms of contracts, not to mention contracts themselves, must be prescribed by God's writ" (pp. 67-68). But Vogel's statement is based on a narrow interpretation that has been rejected by various important jurists. This chapter adopts the better interpretation that contract terms (and contracts) may not violate God's law (i.e., Islamic public policy). This is the interpretation adopted by al-Sanhuri, *Massadir al-Haqq*, vol. 3, pp. 170-72, and al-Qurah Daghi, *Mabda' al-Ridha*, vol. 2, pp. 1193-96, among others.

29. Al-Bukhari, *Sahih al-Bukhari*, vol. 4, p. 169 (margin).

30. See, e.g., Taqi al-Din Ahmad Ibn Taymiyyah, *Nathariyat al-'Uqud* (Cairo: Markaz al-Kitab li al-Nashr, n.d.), p. 23. This nontransferability requirement is quite important, as is obvious from the jurisprudence regarding adoption. A person may become the *kafeel* (guardian) of an orphaned child, but may not take away from the child the name of his or her own biological

The *wala'* relationship included, among other things, a commitment to mutual defense and protection.³¹ This commitment was critical to the freed slave, who had no tribe of her own to defend or protect her. The owners of Barirah, however, stipulated that they would sell her only if the *wala'* relationship remained theirs.³² Their aim in this case was not to defend Barirah's liberty or protect her. Rather, they wanted to inherit Barirah's property after her death, thus adding insult to injury by re-appropriating the property she had accumulated through her hard work.

When informed that the owners of Barirah were ready to sell her on the condition that her *wala'* remained theirs, 'A'ishah became reluctant to enter this untenable transaction.³³ In effect, the transaction would have required Barirah to dedicate her loyalty and *wala'* to her previous owners, even as she lived with 'A'ishah and was actually being protected by 'A'ishah's tribe. In other words, the stipulation created a classic case of divided loyalties in a tribal society where loyalty and *wala'* were critical for the well-being of its members.

'A'ishah's reluctance would have kept Barirah locked into slavery as a result of the unconscionable stipulation by her owners. The Prophet was understandably displeased with the attempt of Barirah's owners to overreach. He told 'A'ishah, "Free her, for the *wala'* relationship belongs to the one who frees."³⁴ Then he went to the mosque that evening and publicly chastised the owners, saying, "How is it that some people are demanding *shurut* [stipulations] not in God's book? Any *shart* [stipulation] not in God's book is null and void, even if it were a hundred *shurut*."³⁵ In another report, he said, "God's book is more worthy [of being followed] and God's *shart* is more binding."³⁶

Some jurists were puzzled by this incident, which according to other ac-

father and mother. The Qur'an is clear on this point. Similarly, the child cannot inherit as a blood relative, but may inherit from the discretionary portion of the estate in accordance with a will by the *kafeel*. Thus inheritance in Islam, as well as naming, is one of the indicia of the closeness of a relationship. From this perspective, a *wala'* relationship is closer than that of a *kafeel*. This makes sense, given the fundamental importance of liberty to human beings, and the wish to encourage Muslims to liberate slaves.

31. Ibn Taymiyyah, *Nathariyat al-'Uqud*, p. 23.

32. Al-Bukhari, *Sahih al-Bukhari*, vol. 4, pp. 168-69; vol. 2, p. 116.

33. Al-Bukhari, *Sahih al-Bukhari*, vol. 4, pp. 168-69; vol. 2, p. 116.

34. Al-Bukhari, *Sahih al-Bukhari*, vol. 4, pp. 168-69; vol. 2, p. 116. The report is unclear as to whether 'A'ishah purchased Barirah under this condition or was contemplating purchasing her under the condition. The reports in the latter case state that the Prophet told 'A'ishah to go ahead and buy Barirah under the condition "because the *wala'* always belongs to the one who frees."

35. Al-Bukhari, *Sahih al-Bukhari*, vol. 4, pp. 168-69; vol. 2, p. 116.

36. Al-Bukhari, *Sahih al-Bukhari*, vol. 4, pp. 168-69; vol. 2, p. 116.

counts appeared to encourage 'A'ishah to agree to a contract that contained a stipulation she knew she would not keep.³⁷ Even if the latter accounts were true, the situation described is no different from one in which a person executes a contract containing a term that is inconsistent with public policy. Under our laws, such a term is null and void. It is also null and void under Islamic law.³⁸ Under Islamic law, once a slave is freed, all oppressive ties to the earlier status are severed. The freed slave acquires all the indicia of freedom others have. To drive this point home, the Prophet encouraged a woman from his own noble tribe of Quraish to marry a freed slave.³⁹

Therefore, those who insist on including oppressive, overreaching, or unconscionable provisions in their contract have only themselves to blame. In the early days of Islam, this incident was an occasion for the Prophet to reiterate the fact that freedom of contract does not supersede Islamic public policy as articulated by the Qur'an and the Sunnah. His emphatic position regarding public policy does not detract from the fundamental Islamic position that even the most modest contract in an Islamic society must be fulfilled because of its religious nature. To argue otherwise would result in a *reductio ad absurdum*, since the opposite argument in favor of unlimited freedom of contract would oblige us to honor a contract even if it involved a criminal act.

This is in fact the view of the Andalusí scholar Ibn Hazm. In his notable work *al-Muhalla*, he states that a Muslim is not obligated to fulfill all his promises.⁴⁰ He argues that it is in fact a good thing for a Muslim to renege on a promise to commit adultery, drink alcohol, or commit other forbidden acts.⁴¹ He was responding to other jurists who argued that a person who reneges on his promise must be forced to fulfill it, or that at least it would be preferred that he do so.⁴² The arguments of those in favor of fulfilling a promise were also based on another Qur'anic verse that states, "O ye who believe! Why say ye that

37. See Taqí al-Din Ahmad Ibn Taymiyyah, *Majmou'at al-Fatawi* (al-Mansoura, Egypt: Dar al-Wafa', 1998), vol. 15, pp. 185-89 (stating among other things that the bond of *wala'* is like a familial bond).

38. Al-Sanhuri, *Massadir al-Haqq*, vol. 3, pp. 171-72; Wihbah al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuhu* (Beirut: Dar al-Fikr al-Mu'asser, 1997), vol. 9, pp. 6540-47; Ibn Taymiyyah, *Nathariyat al-'Uqud*, p. 23; Abu Zahrah, *Al-Milkiyah*, pp. 235-37.

39. Ibn Hisham, *Al-Sirah al-Nabawiyah* (Beirut: al-Maktabah al-'Ilmiyah, n.d.), vol. 1, pp. 247-48; Omar Rida Kahalah, *A'lam al-Nisa' fi 'Alamay al-Arab wa al-Islam*, 5 vols. (Beirut: Mu'assasat al-Risalah, 1977), vol. 2, p. 59.

40. Abu Muhammad Ali Ibn Sa'ed Ibn Hazm, *Al-Muhalla bi al-Athar* (Beirut: Dar al-Kutub al-'Ilmiyah, 1988), vol. 6, pp. 278-79.

41. Ibn Hazm, *Al-Muhalla bi al-Athar*, vol. 6, pp. 278-79.

42. Ibn Hazm, *Al-Muhalla bi al-Athar*, vol. 6, p. 278 (discussing Ibn Shabramah and those who followed him).

which you do not do? Grievously odious it is in the sight of [God] that ye say that which ye do not do" (61:2-3).

Ibn Hazm is quite right, but he could have widened the scope of his examples; for, while a Muslim is enjoined to keep her promises, it cannot possibly be argued that a Muslim must keep that promise regardless of the nature of the promise or its circumstances. Under the well-known principles of "choosing the lesser of two evils" and "avoiding harm" (*la darar wa a dirar*), a person would be allowed to breach his promise if fulfilling it would result in harm or greater evil.⁴³ For example, a promise to give the baby milk is enforceable, unless it is discovered that the baby is allergic to milk. To insist on fulfilling the original promise in light of the changing circumstances would cause the child harm and hence is against Islamic public policy and moral principles.

For this reason, in discussing the importance of fulfilling promises, *Taj al-Arus* (the classical Arabic lexicon mentioned earlier) distinguished between two types of promises: *wa'd*, which involves doing something good, and *wa'eed*, which involves visiting harm upon someone or doing something bad. In the former case, the lexicon argues that a person who gives a *wa'd* must fulfill it; in the second case, it argues that it is better for a person who issues a *wa'eed* not to fulfill it. It adds that such failure to follow up on the threat would not constitute a breach. Rather, it would constitute an act of forgiveness and generosity. It then notes that it is the quality of God, the Almighty, that if he makes a *wa'd* he fulfills it, and if he issues a *wa'eed*, he forgives.⁴⁴

The famous jurist Abu Hanifah disagrees with this analysis based on the clear and emphatic injunction in the Qur'an which states flatly, "Fulfill all [*'uqud*]" (5:1). He argues that if a person vows to fast on the day of *'Eid* (the day after the end of fasting, which is prohibited), or to sacrifice (slaughter) his son, then he must fulfill his *'aqd*.⁴⁵ So, once the *'aqd* is made, it is such a grave and strict obligation that no considerations would permit its nonfulfillment. In my opinion, this view ignores the prophetic precedent that permitted a public policy exception in the case of Barirah. The Barirah precedent is critical for shed-

43. For further discussion of this principle, see Azizah al-Hibri, "Islamic Constitutionalism and the Concept of Democracy," *Case Western Reserve Journal of International Law* 24 (1992): 1, 8-9.

44. Al-Zabidi, *Taj al-Arus*, vol. 2, p. 537.

45. Al-Razi, *Tafsir al-Fakhr al-Razi*, vol. 6, p. 126. Abu Hanifah argues that such a vow contains two parts. The first is the act of slaughtering and the second is the object of the act of slaughter, namely, one's own son. The first part of the vow — that is, the act of slaughtering itself — is binding. Only the second part of the vow, which involves the object of the act, is not binding. The person must therefore slaughter an animal to fulfill his vow and ask God for forgiveness for not fulfilling the rest of his vow.

ding light on the flat Qur'anic injunction to fulfill *'uqud*. Another famous jurist, al-Shafi'i, understood this fact and disagreed vehemently with Abu Hanifah. He argued that a vow to fast on the day of *Eid* or to sacrifice one's son is null and void, because fulfilling such a vow would result in an act of disobedience toward God. He then quoted the Prophet: "There is no [valid] vow that disobeys God."⁴⁶

Thus, to adopt the distinction introduced by *Taj al-Arus*, the Qur'an and Sunnah enjoined that a *wa'd* (but not a *wa'eed*) be fulfilled. Alternatively, if we drop this linguistic distinction, we could simply say that the Qur'an and Sunnah enjoin the fulfillment of *'uqud* generally, but that the duty to fulfill such *'uqud* is implicitly contingent (as the rest of the Qur'an and Sunnah indicate) on public policy, morality, and similar concerns. This is not an unusual feature for a body of law. As noted earlier, secular law has many such exceptions. Clearly, however, the question of damages (where appropriate) and other possible remedies can be raised in Islamic law as it can be raised in other legal systems.

In general, Muslim jurists agree that one who promises with intention to fulfill that promise but becomes unable to do so because of legitimate intervening circumstances is neither legally nor morally (religiously) liable.⁴⁷ They also agree on the moral culpability of a person who makes a promise he does not intend to keep, but they disagree on the legal enforceability of such a promise.⁴⁸ They all recognize such behavior as a sign of hypocrisy, a trait soundly condemned in the Qur'an and Sunnah. The Qur'an admonishes hypocrites who do not keep their promises. The Prophet does, too. In a famous Hadith, he says, "The sign of a hypocrite is three-pronged: if he speaks, he lies; if he promises, he breaches; and if he is trusted, he betrays."⁴⁹

Clearly, people lie, breach, and betray. The majority of Muslim jurists reasoned that most of this behavior remains outside the reach of the courts but is within the realm of (religious) ethics.⁵⁰ Thus, while breaching a promise may not always be legally actionable, barring intervening circumstances, it is still ethically wrong. From an Islamic perspective, where the realms of ethics and law run into each other in a seamless web, this is not much of a break for a pious person who must live by the dictates of both. The Muslim will have to answer to a higher authority for an unjustified breach of promise, but the courts

46. Al-Razi, *Tafsir al-Fakhr al-Razi*, vol. 6, p. 126.

47. Al-Ba'li, *Dhawabit al-'Uqud*, p. 65.

48. Al-Ba'li, *Dhawabit al-'Uqud*, p. 65. See also al-Zuhayli, *Al-Fiqh al-Islami*, vol. 4, pp. 2928-29.

49. Al-Bukhari, *Sahih al-Bukhari, Kitab al-Iman*, vol. 1, p. 15.

50. See, e.g., al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6512.

cannot be responsible to enforce every single promise. This brings out clearly the difference between a promise and an *'aqd* under Islamic law from the majority perspective: the former is a personal undertaking that usually does not rise, like the second, to the level of a firm contractual commitment.

The minority view rejects the distinction between a simple promise (*wa'd*) and a firm undertaking (*'aqd*). It relies on Qur'anic verses, such as that which states, "Fulfill every *'ahd*, for every *'ahd* will be inquired into [on the Day of Reckoning]" (17:34). It also relies on prophetic Hadiths, such as the one which states, "There is no faith in one who is not trustworthy and no religion in one who does not keep his promise."⁵¹ Based on these foundations, these jurists require that every promise be kept and be legally enforceable. They generally recognize, however, that certain intervening circumstances could operate as a legitimate excuse for breach.⁵² Thus the difference between the majority view and the minority view is not really about ethical values and the importance of the fulfillment of promises. It is, rather, about the extent to which the state may use its judicial arm to enforce promises made among its citizens. The majority view upholds a less intrusive view of government, while the minority view advocates greater governmental intrusion. Our American system has undergone similar discussions. In the area of marriage promises, we have come out in favor of the majority view, namely, generally keeping government out of such matters.

Engagement and Marriage

Before a marriage takes place in Islamic law, there usually is an engagement period during which the man and the woman determine their suitability to each other. The rules associated with this period reflect the importance of honoring one's commitments and preparing for a successful marriage. So we turn to the engagement process first.

The Engagement Promise

An engagement involves a promise to marry. Hence it is a very significant promise. The engagement promise allows the man several privileges; foremost

51. Al-Ba'li, *Dhawabit al-'Uqd*, p. 68; there are also other Hadiths that have the same meaning, see Al-Bukhari, *Sahih al-Bukhari*, *Kitab al-Iman*, vol. 1, p. 15.

52. Al-Ba'li, *Dhawabit al-'Uqd*, pp. 66-71.

among them is the ability to have greater interaction with the woman he wishes to marry. Usually, all such interaction is chaperoned. Furthermore, a man who is seriously considering engagement to a veiled woman has the right to see her if his offer is likely to be taken seriously by her and her family. This is part of the Prophet's Sunnah. Jurists disagreed as to how much of the woman her prospective fiancé may legitimately see.⁵³ But, in any case, it is agreed that not only must he see her, but she must also see him to decide upon his suitability.⁵⁴ In other words, the feelings and preferences of the woman during engagement and marriage are equally important to those of the man. This state of affairs may be puzzling in a society like ours where everyone is seen by everybody else, but in a community of veiled women, extending to the man the right to see his prospective fiancée is quite significant. It makes clear that the engagement promise is a serious and important one which overcomes certain prohibitions. Consequently, it must be honored barring a legitimate intervening circumstance.

It is worth noting, however, that the reasoning behind permitting a man to see his prospective fiancée is not based on the importance of the "looks" of the woman or the man. The Prophet made that clear when he recommended to a man that he see his intended wife because seeing her could help them develop affection for each other.⁵⁵ On another occasion, the Prophet cautioned Muslim men against choosing a woman for her looks or riches. Instead, he recommended that they choose a woman for her piety.⁵⁶

Nevertheless, despite the seriousness of the engagement promise, jurists have generally allowed parties to an engagement to change their minds about their proposed life-long commitment.⁵⁷ The major reason underlying this attitude is that the Islamic marriage contract requires *ridha* (psychological contentment), and not mere acceptance from the parties.⁵⁸ So, if the parties appear not to find such *ridha* with each other, then it would be better to break the engagement than embark on a life-long journey of misery. Furthermore, if the promise is treated as enforceable, then it would have the force of a contract,

53. See, e.g., Ibn Hajar al-'Asqalani, *Fath al-Bari Sharh Sahih al-Bukhari* (Beirut: Dar al-Kutub al-'Ilmiyah, 1989), vol. 9, pp. 225-27; Muwaffaq al-Din Ibn Qudamah, *Al-Mughni* (Beirut: Dar al-Kitab al-'Arabi, n.d.), vol. 7, pp. 453-54. See also Muhammad Abu Zahrah, *Al-Ahwal al-Shakhsyah* (Cairo: Dar al-Fikr al-'Arabi, 1957), pp. 28-30; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6501-6508.

54. Zirar, *Mawsu'at al-Zawaj*, vol. 1, pp. 150-51.

55. Zirar, *Mawsu'at al-Zawaj*, vol. 1, p. 147.

56. See, e.g., al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 167-69.

57. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 36-37.

58. Al-Qurrah Daghi, *Mabda' al-Ridha*, vol. 2, p. 835. See also al-Ba'li, *Dhawabit al-'Uqud*, pp. 19-28.

which it is not;⁵⁹ it would also mean that the judiciary can force one person to marry another, which it cannot under Islamic law.⁶⁰

On the other hand, if the "jilted" party sustains damages as a result of the break-up, such as those incurred by a woman who left her job upon the request of her fiancé, reparations must be made.⁶¹ Note that under American common law, an action for breach of promise to marry existed for several centuries, entitling the plaintiff to recover for injury to his or her feelings, health, and reputation. Recently, however, most states abolished this cause of action through "anti-heart balm statutes."⁶²

As mentioned above, the period of engagement is very important for helping the couple determine their compatibility. Therefore, this becomes an active period where families invite the couple to dinners and surround them with opportunities to be together. The man usually showers his intended with gifts (in addition to the required marital gift called *mahr*) in the spirit of the Qur'an that requires the man to give gifts to the woman upon marriage and recommends (some say requires) him to give additional gifts (*mut'at al-talaq*) in case of divorce.⁶³ While these gifts are not religiously required, they are viewed as signs of affection and commitment.

The reason the family surrounds the couple is that the two may not be left totally alone in private with each other. This is a significant requirement with legal ramifications, which I shall presently explain. In Islamic law, the interaction between male and female is circumscribed by the Qur'an to avoid sin. Thus only certain blood relatives of the prospective bride may have unfettered access to her.⁶⁴ The fiancé remains outside this circle until the marriage contract (*kitab*) is concluded. Thus, any intimate interaction between the two prior to the *kitab* is religiously unacceptable. For that reason, many families avoid having their children fall into sin by executing the *kitab* at the time of engagement, but not announcing it until the wedding.

The benefit of this approach is that the couple may now hold hands, even kiss, as they spend time together, without fear of breaking God's law regarding chastity. But there are also problems with this approach. First, if the engage-

59. Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 36.

60. Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 37.

61. Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6511.

62. John De Witt Gregory et al., *Understanding Family Law* § 4.02 (New York: Matthew Bender, 1993).

63. Qur'an 2:241. See also al-Razi, *Tafsir al-Fakhr al-Razi*, vol. 6, p. 173; Abu al-Walid Muhammad Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (Beirut: Dar Ibn Hazm, 1995), vol. 3, pp. 1108-1109; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6829-35.

64. Qur'an 24:31. See also Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 454-57.

ment does not work out, a divorce will be needed to end it. Second, if the couple spends even a short period of time (a few minutes) alone in private, most jurists would presume the marriage consummated, whether a wedding had taken place or not. Thus, if the engagement is broken in such a situation, not only will it require a divorce, but the divorce will have to follow the rules pertaining to a consummated marriage (with full payment of *mahr* by the husband). This situation also affects the status of the woman, who will now be regarded as a divorcée. In some countries, this status could make her less marriageable.

In the United States, where males and females freely interact with one another, there is usually no need for an early *kitab*. Couples join their friends in public places and have a good time getting to know each other. As a result, the engagement period in the United States tends to achieve its intended purpose by allowing a couple to determine compatibility before it moves into the final stage of commitment, the *kitab*.

The Islamic Marriage Contract

The Qur'an does not refer to the marriage contract as a contract based on offer and acceptance. Rather, it describes it as *mithaqan ghalithan* (a solemn covenant), which is carefully regulated by a body of laws. It admonishes men who are about to leave their wives, "But if ye decide to take one wife in place of another, even if ye have given the latter a whole treasure for dower, take not the least bit of it back; would ye take it by slander and a manifest wrong? And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant?" (4:20-21).⁶⁵

The word *mithaq*, which means "covenant," appears in a number of places in the Qur'an. In each place it refers to a momentous context, such as the covenant between God and the children of Israel, or those with whom Muslims have concluded a treaty. Furthermore, Egyptian jurist Malakah Zitar notes that God has placed marriage within the category of *'ibadat*, which relate to God's worship, and not within *mu'amalat*, where contracts are usually placed.⁶⁶ This makes the marriage contract radically different from and superior to all other contracts.

65. These verses refer in particular to the *mahr*. The husband has no right to reclaim it if he initiates divorce, because it is the wife's pure right. Incidentally, despite this admonition, some Muslim men today do exactly what the Qur'an forbade upon divorce. They treat their wives miserably to force them to give up their financial rights in the marriage, or they make false allegations against them during divorce proceedings. I shall discuss these situations in my forthcoming book.

66. Zitar, *Mawsu'at al-Zawaj*, vol. 1, pp. 134-44 (also citing similar views by Shaykh Imam Shaltut, in *al-Islam 'Aqidah wa Shari'ah*).

The Sunnah of the Prophet is no less emphatic. The Prophet said that the marriage contract is the contract most worthy of fulfillment.⁶⁷ In other words, he viewed the marriage contract as superior to all other contracts. He is also reported as saying that "marriage is my *Sunnah*, so the one who turns away from my *Sunnah*, turns away from me."⁶⁸ After all, marriage concerns human happiness and progeny. Ideally, it brings into being a relationship of affection, tranquility, and mercy,⁶⁹ and usually results in offspring, who are not only very dear to the parents' hearts but also very critical to the future of the community.

Yet, despite the importance of marriage, jurists disagreed as to whether it was a duty for a Muslim to marry, or whether it was simply a desirable or just permissible act.⁷⁰ Some argued that marriage in Islam was not obligatory except to avoid sin.⁷¹ Nevertheless, even jurists who viewed marriage as a duty prohibited a prospective husband from getting married in the presence of evidence that he was abusive.⁷² The prohibition is based on the fact that abusive marriages do not fulfill the Qur'anic ideal of spousal relationships (see, for example, Qur'an 2:187 and 30:21).

In an Islamic marriage, the parties maintain their identity as well as independence. The woman, for example, keeps her (maiden) name, and financial independence.⁷³ The wife remains an independent entity under the law, capable of transacting her own business and other affairs.⁷⁴ Husbands and wives are expected to consult with each other in the upbringing of their children.⁷⁵ Further, the wife has no obligation to perform housework, and is entitled to main-

67. Al-Bukhari, *Sahih al-Bukhari*, vol. 2, p. 117; vol. 3, p. 252.

68. Abu Hamid al-Ghazali, *Ihya' 'Ulum al-Deen*, eleventh century, repr. (Egypt: Mustafa Babi al-Halabi Press, 1939), vol. 2, p. 22.

69. See, e.g., Qur'an 30:21.

70. Zirar, *Mawsu'at al-Zawaj*, vol. 1, p. 156.

71. Zirar, *Mawsu'at al-Zawaj*, vol. 1, p. 159.

72. Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6516; Muhammad Baltaji, *Fi Ahkam al-Ushrah* (Cairo: Maktabat al-Shabab, 1987), pp. 147-48 (describing the Hanafi view); Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 24.

73. See, e.g., Muhammad Rashid Rida, *Huquq al-Nisa' Fi al-Islam*, repr. ed. (Beirut: al-Maktab al-Islami, 1975), pp. 19-20. See also Zaidan 'Abd al-Baqi, *Al-Mar'ah Bayna al-Din Wa al-Mujtama'* (Cairo: n.p., 1977), vol. 4, pp. 291-97; vol. 7, pp. 334-43.

74. See Abd al-Rahman al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah* (Beirut: Dar Ihya' al-Turath al-Arabi, 1969), vol. 4, pp. 46-47. See also Muhammad Jawad Maghniyah, *Al-Fiqh 'ala al-Madhahib al-Khamsah*, sixth ed. (Beirut: Dar al-'Ilm li al-Malayin, 1969), p. 321; Ahmad Faraj, *Al-Zawaj wa Ahkamuhu fi Madhahib ahl al-Sunnah* (Mansourah, Egypt: Dar al-Wafa', 1989), pp. 126-34.

75. For a discussion of consultation within the family, see Abd al-Halim Abu Shuqqah, *Tahrir al-Mar'ah fi 'Asr al-Risalah*, 6 vols. (Kuwait: Dar al-Qalam, 1990), vol. 5, pp. 104-9.

tenance by her husband.⁷⁶ These facts are the result of the juristic position, based on the Qur'an, that the marriage contract is not a service contract. Rather, it is viewed as being about *nafsayn* (two souls), male and female, coming together in a relationship of tranquility, mercy, and affection, to enjoy each other, and procreate and raise children who are good Muslims and good members of their society. This relationship is so close that the Qur'an describes each spouse as being the "garment" of the other, that is, one who covers the other's shortcomings and protects his or her privacy (Qur'an 2:187).

Regarding the rights of women within marriage, the Qur'an says, "women shall have rights similar to the rights against them [that is, rights of men] . . ." (2:228). It is reported that a man called Bishr ibn al-Harth, who lived in the early period of Islam, refused to marry for fear of not being able to live up to this verse.⁷⁷ The Qur'an also sets the standard for dealing with marital discord. It describes proper marital relations as "[either holding together] on equitable terms, or [separating] with kindness . . ." (2:229).

These and other verses, as well as the Prophet's Sunnah and the description of marriage as a solemn covenant, have led some jurists (despite their patriarchal tendencies) to recommend gentle behavior in the treatment of women. Al-Ghazali, the preeminent medieval jurist, argued that to be well-mannered with one's wife does not simply mean that the husband should not harm his wife (verbally or physically); rather, it means that the husband must be prepared to endure the harm inflicted upon him by his wife, and be patient when she becomes angry. Al-Ghazali noted that God emphasized the importance of the rights of women when he described the marriage contract as a "solemn covenant"; and that the Prophet repeatedly counseled men to be kind to women, until his tongue became heavy and his voice inaudible.⁷⁸

The Qur'an also cautions a man against taking the easy way out and leaving his wife (4:19).⁷⁹ It tells those who dislike their spouses, "If ye take a dislike to them, it may be that ye dislike a thing, and [God] brings about through it a great deal of good" (4:19). Thus, while Islam provided four ways to divorce, it did not encourage it; for, "ye have gone in unto each other, and they have taken

76. See, e.g., Ibn Qudamah, *Al-Mughni*, vol. 8, pp. 130-31. See also al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 632-33, 640-41; Ibn Rushd, *Bidayat al-Mujtahid*, vol. 3, pp. 1028-29; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6591-92.

77. Al-Ghazali, *Ihya' 'Ulum al-Deen*, vol. 2, pp. 24, 34. Please note that the second part of this passage states, "But men have a degree of advantage over them." This has been interpreted by patriarchal men to refer to a superior status. In fact, it refers to a heightened duty, as discussed in al-Tabari, *Jami' al-Bayan fi Tafsir al-Qur'an*, vol. 2, p. 275.

78. Al-Ghazali, *Ihya' 'Ulum al-Deen*, vol. 2, p. 44.

79. See also al-Ghazali, *Ihya' 'Ulum al-Deen*, vol. 2, pp. 57-58.

from ye a solemn covenant . . ." (4:20-21). Al-Ghazali calls a man who abandons his family a run-away whose prayer and fasting will not be accepted by God until he returns.⁸⁰ After all, the Prophet told Muslims that "Each one of you is a shepherd, and each one of you is responsible for his flock."⁸¹

This discussion shows that, while divorce is permitted in Islam, it is seriously disliked. The Prophet calls it "the most disliked permissible act."⁸² The Qur'an provided ways to reduce the divorce rate by instructing a troubled couple to seek arbiters, one from each side of the family (4:35). These arbiters are bound by the rules of justice in mediating disagreements. If mediation fails, then God will not force an unhappy couple to stay together.

The burden of divorce thus becomes a religious one, between God and the one who seeks it. So, if a spouse decides to divorce, a judge may not ask him or her about private matters, unless the divorce action is based on fault. Otherwise, it is left to the conscience of the spouse, and his or her relationship with God. So, in every divorce there is the right of the spouse (*haqq al-'abd*), and the right of God (*haqq Allah*). The courts deal with the former, God deals with the latter in the afterlife. Even where the courts conclude that a unilateral divorce by the husband is arbitrary and oppressive toward the wife, they are not entitled to prohibit it. Otherwise, courts would be intervening in the Muslims' freedom of contract. Instead, courts have allowed themselves the right to step in and protect the oppressed party by adjusting the final terms of the divorce settlement to reflect the equities of the situation.⁸³

It is worth noting at this point that one of the forms of divorce permitted in Islam is that of *khul'*. This form, which gives the woman the right to initiate divorce, is often misunderstood. Recently, the Egyptian religious scholars of al-Azhar, the oldest Islamic school in the world, attempted to clarify (and correct) it. Historically, the Prophet granted this form of divorce to a woman who sought it because she was afraid that staying with her husband might cause her to violate God's laws (perhaps by looking to another relationship outside the marriage to console her). She informed the Prophet that there was no defect, moral or religious, in her husband, but that she simply could not stand him. The Prophet asked her if she would be willing to return the *mahr* (and only that) to her husband. When she agreed, he instructed the husband to divorce her.⁸⁴

80. Al-Ghazali, *Thiya' Ulum al-Deen*, vol. 2, pp. 34-35.

81. Al-Bukhari, *Sahih al-Bukhari*, bk. 62, *Kitab al-Nikah* (Marriage), vol. 3, p. 257.

82. Abu Dawud Sulayman Ibn al-Ash'ath al-Sijistani, *Sunan Abu Dawud* (Beirut: Dar al-Irshad, 1969), vol. 2, pp. 631-32; bk. *Kitab al-Talaq* (Divorce), nos. 2177, 2178.

83. See, e.g., Syrian family law, Decree No. 59 (1953) regarding Personal Status Law, amended by Law No. 34 (1975), Bk.1, Tit. 3, Ch. 5, Item 117.

84. Al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 493-505, esp. pp. 500-501.

Despite the plain meaning of the story, patriarchal jurists interpreted this form of divorce to require the consent of the husband.⁸⁵ For centuries, Muslim women could not divorce at will. Recently, the situation became far more serious as less religious men began asking for large amounts of money in exchange for their consent, in clear contravention of the Prophetic tradition. The problem became so egregious that al-Azhar jurists decided to review the matter. As a result of this review, the consent requirement by the husband was eliminated.⁸⁶ In doing that, they reached the same conclusion that a Pakistani court reached decades earlier in a brilliant opinion that went largely unnoticed.⁸⁷

The new Azhari interpretation rectifies the current jurisprudential situation by dropping the requirement of the husband's consent. This change prevents the husband from coercing his wife into staying with him (*'adhl*), or forcing her to pay a large amount of money for her divorce. The Qur'an expressly prohibits *'adhl*, whether by a husband or by a father who tries to prevent his daughter from getting married (2:232). The Prophet's Sunnah specifies that the husband may not take from the wife more than the *mahr* he gave her upon marriage. Further, some jurists recommend that it would be better and more charitable if the husband forgives part of the *mahr*.⁸⁸ By doing so, the husband would soothe the wife's feelings as they part, in accordance with the Qur'anic injunction to part ways charitably.

As a result of the new jurisprudence, the Egyptian personal status law (family law) was amended.⁸⁹ Under the new law, a woman has the right to ask for *khul'* from her husband. She need not specify any grounds, except to state that she fears that the continuation of the marriage may cause her to violate God's law.⁹⁰ Once the wife utters these words, the judge is bound to grant her

85. See, e.g., Ahmed al-Khamlishi, *Al-Ta'liq 'Ala Qanun al-Ahwal al-Shakhsyah*, 2 vols. (Rabat: Dar al-Ma'arif al-Jadidah, 1987), vol. 1, pp. 355-63, esp. pp. 361-63.

86. Egyptian Code, Act No. 20 (2000), Decree No. 1, regarding the regulation of certain situations and procedures of judiciary actions in matters of personal status (stating that the consent of the husband is no longer required in cases of *khul'* divorce).

87. See Keith Hodgkinson, *Muslim Family Law: A Sourcebook* (London, 1984), pp. 285-87 (relating criticism by a Pakistani court of the consent requirement).

88. See al-'Asqalani, *Fath al-Bari*, esp. vol. 9, p. 503.

89. See Egyptian Code, note 86 above.

90. According to the Prophetic tradition, there was a woman who developed a great dislike for her husband, through no fault of his own. She went to the Prophet seeking a way out of the marriage. The Prophet instructed her to return to the man his *mahr* (in this case, a garden). She was so pleased by the prospect of ending the marriage that she offered to give the husband other things as well. The Prophet said, "As for the garden, yes. As for more, no." See Ibn Qudamah, *Al-Mughni*, vol. 8, pp. 173-75, 182-83; Muhammad Ibn Ali Muhammad al-Shawkani, *Nayl al-Awtar*, 9 vols. (Beirut: Dar al Jil, 1973), vol. 7, pp. 34-41.

divorce after an attempt to reconcile the parties. If the reconciliation fails, she is granted divorce but must return to the husband his *mahr*.⁹¹ This is based on the rationale that the woman herself rejected her husband through no fault of his own, and hence must not profit by her action.

The fact that divorce is permissible in Islam is an integral part of the Islamic system of *'adalah*. *'Adalah* is another core concept in the Qur'an, and the backbone of *'adalah* is the *mizaan* (balance). Loosely translated, *'adalah* means "justice," but not just human retributive justice. Rather, it refers to a richer concept of justice which encompasses the whole universe as well as higher forms of justice, such as restorative justice and the concept of forgiveness.⁹² It also provides the *mizaan* of the world.⁹³ God tells us in the Qur'an that God created the whole universe in due measure,⁹⁴ so that the sun would not overtake the moon, nor the night overtake the day;⁹⁵ that "the earth we have spread out [like a carpet] set thereon mountains firm and immovable and produced therein all kinds of things in due balance" (15:19). In other words, everything on earth was created according to Divine Balance. So was marriage. This is why the Islamic concept of marriage is based on tranquility and harmony. Discord upsets the balance, and oppressive divorces violate God's all-encompassing principle of *'adalah*. On the other hand, where the divorce is the result of a failed good-faith effort by both parties, then God will simply reward the parties for their attempts and open new doors to the divorcing spouses.

Requirements of the Marriage Contract

The Islamic marriage contract is founded on the mutual consent of both parties.⁹⁶ This requirement again emphasizes the fact that the two parties to the

91. See, e.g., al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 225-27. See also Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 340-41.

92. For a discussion of Islamic criminal law and the concept of forgiveness, see Azizah al-Hibri, "The Muslim Perspective on the Clergy-Penitent Privilege," *Loyola Los Angeles Law Review* 29 (1996): 1723-32.

93. See, e.g., Qur'an 55:7-9: "And the Firmament has He raised high, and He has set up the Balance [of Justice], in order that ye may not transgress [due] balance. So establish weight with justice and fall not short in the balance."

94. Qur'an 25:2: "He to whom belongs the dominion of the heavens and the earth: no son has He begotten, nor has He a partner in His dominion: it is He who created all things, and ordered them in due proportions."

95. Qur'an 36:40: "It is not permitted to the Sun to catch up to the Moon, nor can the Night outstrip the Day: Each [just] swims along in [its own] orbit [according to Law]."

96. Al-Qurra Daghi, *Mabda' al-Ridha fi al-'Uqud*, vol. 2, p. 835. See also al-Ba'li, *Dhawabit al-'Uqud*, pp. 19-22.

marriage contract are equally important. The consent requirement is a *rukʿn* (formal element) of the marriage contract and without it no marriage contract will be properly established.⁹⁷ Where fraud or absence of true consent is discovered, the marriage contract can be annulled.⁹⁸ Further, the terms of the acceptance must coincide with those of the offer, and the language of the offer must be unconditional and clearly indicative of marriage.⁹⁹ According to Islamic tradition, either the woman or the man can make the offer, although in most cultures women have been assigned the more passive role.¹⁰⁰ Finally, the consenting parties must have the legal capacity to do so or the marriage contract will not be properly formed.¹⁰¹

To protect inexperienced, previously unmarried women from entering into unsuitable (and hence potentially unsuccessful) marriages, Islamic jurists have either required or recommended that a woman seek the approval of her *wali* (guardian or advisor) in marriage. So, we now turn briefly to the concept of *wali* and his role in the marriage contract.

The Concept of Wali

This requirement affects the effectiveness of the marriage contract, as well as the possibility of annulling it. Most traditional Muslim jurisprudence requires a *wali* in marriage for a *bikr* (virgin) woman, even if she has reached maturity.¹⁰² The requirement usually means that the young woman's marriage cannot be concluded without the presence (and acceptance) of her *wali*, who is usually her father or, in his absence, someone who truly cares about her interests.¹⁰³ So, what is a *wali* and what is the extent of his authority?

97. See, e.g., al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6567-68; Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 41.

98. Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 60. But not for Abu Hanifah, who did not view marriage contracts as ones that can be annulled. See al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6535, 6567-68, 6582-83; al-Khamlishi, *Al-Ta'liq*, vol. 1, pp. 82-83.

99. See, e.g., al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6522-32. See also Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 41-47.

100. It is well known that Khadija, the first wife of the Prophet, took the initiative of proposing marriage to him; indeed, nothing prevents a woman from proposing to a man. See, e.g., al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 217-18.

101. See, e.g., al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6534. See also Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 41.

102. See al-Jaziri, *Kitab al-Fiqh*, vol. 4, pp. 51-53. See also Muhammad Jawad Maghniyah, *Al-Fiqh 'ala al-Mathahib al-Khamsah*, p. 321; Faraj, *Al-Zawaj*, pp. 126-34.

103. Ahmad al-Ghandur, *Al-Ahwal al-Shakhsyah fi al-Tashri' al-Islami* (Kuwait: Jami'at al-Kuwait Press, 1972), pp. 122, 135-36; Faraj, *Al-Zawaj*, p. 126; al-Jaziri, *Kitab al-Fiqh*, vol. 4, pp. 52-

Generally, a *wali* is a fiduciary who must guard the interests of his or her ward. For this reason, he or she must meet certain conditions to be eligible, such as full capacity (physical maturity, rationality, and liberty), and sameness of faith.¹⁰⁴ In the case of the marriage contract, most jurists required also that the *wali* be male, and he is usually the father of the bride.¹⁰⁵ This requirement was historically defended on several grounds. Most important, jurists instituted this requirement as a protective measure for women who may be swept by their emotions into the most important contract in their lives.¹⁰⁶ They feared that young, innocent women could be deceived by designing men.¹⁰⁷ To eliminate such a possibility, jurists required the consent of the father to the marriage, along with the consent of his daughter.¹⁰⁸ This requirement created a partnership relationship between the daughter and her father in the choice of a husband.¹⁰⁹

The important scholar Abu Hanifah, however, rejected this paternalistic approach by arguing that women should be able to take charge of their own lives.¹¹⁰ He noted that God has given Muslim women full financial independence.¹¹¹ Since life is more valuable than money, he concluded that it was even more important that women be entrusted with their lives.¹¹² Consequently, Hanafi jurisprudence permits a woman to execute her own marriage contract without the need for a *wali*. In other words, under Hanafi law, a marriage contract entered into by a Muslim woman without her *wali* is effective.

Another reason for the requirement of a *wali* was that it protected the fam-

53. See also Muhammad Abu Zahrah, *Muhadarat fi 'Aqd al-Zawaj wa Atharuh* (Cairo, 1958), pp. 135, 139; Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 337, 346.

104. Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 337, 346, 356-57; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6700-6703.

105. See, e.g., Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 346-47. See also al-Ghandur, *Al-Ahwal al-Shakhsyah*, pp. 121-22, 135-36; Faraj, *Al-Zawaj*, p. 126; Al-Jaziri, *Kitab al-Fiqh*, vol. 4, pp. 52-53; Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 110-17, 118-19.

106. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 109, 126-30.

107. Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 128. See also Abu Zahrah, *Al-Milkiyah*, pp. 294-95.

108. Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 128. See also al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6574; Abu-Zahrah, *Al-Milkiyah*, p. 291.

109. Abu-Zahrah, *Al-Milkiyah*, p. 291.

110. Muhammad bin Ahmad al-Sarakhsi, *Kitab al-Mabsut*, 30 vols. (Beirut: Dar al-Ma'rifah, 1968), vol. 5, pp. 10-15. See also al-Ghandur, *Al-Ahwal al-Shakhsyah*, p. 126; Abu-Zahrah, *Al-Milkiyah*, pp. 292-93.

111. See, e.g., al-Shafi'i, *Kitab al-Umm*, first ed. (Cairo: Maktabat al-Kuliyah al-Azhariyah, 1961), vol. 3, pp. 215-16, 219. See also Abu-Zahrah, *Al-Milkiyah*, pp. 291-97.

112. Abu-Zahrah, *Al-Milkiyah*, pp. 292-93; Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6698-99.

ily's honor and social standing, in cases where women may have elected to marry "ineligible" males.¹¹³ This rationale was found so appealing that even Hanafis, who recognized the right of the adult woman to contract her own marriage without a *wali*, expressed their preference for the woman's delegation of that right to a *wali*.¹¹⁴ Furthermore, even Abu Hanifah empowered the father to annul a marriage (where pregnancy had not yet occurred) if the husband was "ineligible."¹¹⁵

Eligibility in this context is a term of art, which has been endowed with a broad range of meanings. The Prophet defined eligibility in terms of faith and piety.¹¹⁶ But the Hanafi School has departed from this basic definition. Hanafis define eligibility in accordance with hierarchical social customs, subsuming under this concept such factors as lineage, financial condition, and skill or profession.¹¹⁷ Consequently, the Hanafi definition, which is currently used in Islamic courts, reflects traditional patriarchal concerns of the jurists' times. These concerns were so strong that they were viewed as sufficient for ignoring the woman's choice after the fact and voiding her marriage.

Note that the traditional patriarchal stereotype of women as irrational, emotional, and dependent plays an important role in justifying the Hanafi view that a *wali* may void an unsuitable marriage. Today, these assumptions are viewed by our society as unwarranted, and hence that part of the jurisprudence of marriage is ripe for review. Nevertheless, the Hanafi idea of an adviser to the woman who is preparing for marriage is an excellent one, although it is not necessary (or desirable) for the woman to delegate to him the power of executing her marriage contract.

In our American society, we have generally recognized the importance of legal advice for a less empowered spouse entering into a prenuptial agreement

113. See, e.g., Al-Jaziri, *Kitab al-Fiqh*, vol. 4, pp. 49-50; Ibn Rushd, *Bidayat al-Mujtahid*, vol. 3, pp. 953-54. See also Abu-Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 294-95; Abu Zahrah, *Muhadarat fi 'Aqd al-Zawaj wa Atharuh*, p. 135; Mohammad al-Dusuqi, *Al-'Usrah fi al-Tashri' al-Islami* (al-Dawha, Qatar: Dar al-Thaqafah, 1995), pp. 84-86.

114. Al-Ghandur, *Al-Ahwal al-Shakhsyah*, pp. 125-26. See Abu-Zahrah, *Al-Milkiyah*, p. 136 and related note 1, p. 154. See also al-Khamlishi, *Al-Ta'liq*, vol. 1, pp. 204-5.

115. See al-Jaziri, *Kitab al-Fiqh*, vol. 4, pp. 51, 56; Muhammad al-Dijwi, *Al-Ahwal al-Shakhsyah li al-Misriyin al-Muslimin* (Cairo: Dar al-Nashr li al-Jami'at al-Misriyah, n.d.), p. 48; Abu-Zahrah, *Al-Milkiyah*, p. 173; Muhammad Zakariya al-Bardisi, *Al-Ahkam al-Islamiyah fi al-Ahwal al-Shakhsyah* (1965), p. 192.

116. Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 374-75; Faraj, *Al-Zawaj*, p. 111. See also al-Dijwi, *Al-Ahwal al-Shakhsyah li al-Misriyin al-Muslimin*, p. 55; al-Shawkani, *Nayl al-Awtar*, vol. 6, p. 262.

117. Al-Sarakhsi, *Kitab al-Mabsut*, vol. 5, pp. 22-30. See also Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 371-79.

(which sets some of the terms usually set in the Islamic marriage contract). While the Uniform Premarital Agreement Act does not expressly require independent legal counsel for the less empowered spouse, the absence of such counsel may well be considered a factor in determining whether the conditions for the unenforceability of the agreement exist.¹¹⁸ This position is not very different from that of Abu Hanifah, who validates the marriage, even without the presence of a *wali*, but nevertheless recommends such a presence. His view, however, about the ability of the *wali* to invalidate the marriage if the husband is ineligible goes beyond both the Sunnah of the Prophet and our American law.

Other Requirements

It is often believed that the *mahr* (the obligatory marital gift that the husband gives his bride) is a *rukun* of the marriage contract or that it is required for the validity of the marriage. In their attempt to protect women and children in marriages where husbands fail to deliver the *mahr*, jurists predominantly have refused to consider the *mahr* a requirement for the validity of the marriage.¹¹⁹ Instead, they have considered it a senior debt against the husband, and have instructed him to pay it.¹²⁰ Where no *mahr* is specified in the marriage contract, the judge simply assigns to the wife a *mahr* that a woman of the bride's qualifications and status would expect.

Since marriages are an important part of the constitution of the community, Islamic law requires Muslims to "publish" the marriage through wedding celebrations and announcements.¹²¹ This requirement not only protects the marrying parties if any question arises in the future about their relationship, but also helps create a healthy social climate that celebrates relations sanctioned by marriage. For similar reasons, Islamic law requires two qualified witnesses at the execution of the marriage contract. It also requires the absence of any temporary or permanent impediment to the marriage.¹²² These last two require-

118. Gregory, *Understanding Family Law* §4.02[B].

119. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 168-73. See also al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6521.

120. Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6570-71.

121. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 52-56. See also al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6559-62, 6571, 6618-19; Zirar, *Mawsu'at al-Zawaj*, pp. 290-93; Muhammad Fu'ad Shakir, *Zawaj Batil — al-Misyar, al-'Urfi, al-Sirri, al-Mut'ah* (Egypt: Maktabat Awlad al-Sheikh li al-Turath, 1997), pp. 27-29.

122. Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 52, 57, 63-105. See also al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6550-51.

ments are discussed by jurists in great detail because they affect the validity of the marriage.¹²³

Both Sunni and Shi'i jurists are unanimous in asserting the permanent duration of marriage.¹²⁴ Shi'i jurists, however, carved out an exception to the rule, namely, that of *mut'ah* (temporary) marriages. In these marriages, a premarital agreement specifies the duration of the marriage; after that period of time, the marriage expires without need for divorce. Temporary marriages are not common,¹²⁵ and Sunni jurists do not recognize the validity of such marriages. Permanent marriages are the entrenched rule even in Shi'i communities, and most Shi'i families refuse to give their daughters away in a temporary marriage.

Temporary marriages were devised to guard warriors from adultery while away from home; thus, they were creatures of necessity. The question is simply one of the legitimacy of carving out this exception to deal with very special circumstances. Temporary marriages were practiced at the time of the Prophet;¹²⁶ however, Sunni sources hold that the Prophet flatly prohibited this form of marriage before his death.¹²⁷ Shi'i sources disagree.¹²⁸ This disagreement constitutes one of the more sensitive areas of difference between the two sects, and is fraught with emotions.

It is important to note that temporary marriages have a measure of protection. They must be based on consent, and the husband must give the wife a *mahr*. If a woman becomes pregnant under this form of marriage, the children are entitled to all the rights and privileges of the children of a permanent marriage. The "temporary" wife is not entitled to maintenance or inheritance, but she does have some rights.¹²⁹

The plight of young Muslim men in the West, where sexual temptations and encounters are overwhelming, has made this issue a modern one. Concerned about the temptations faced by Muslim youth in the United States and Europe, some Sunni jurists in Saudi Arabia and Yemen recently tried to introduce into Sunni jurisprudence and societies some unconventional forms of permanent

123. Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6525-81.

124. Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6551. See also Group of scholars and intellectuals, *al-Mut'ah wa Mashru'iyatuha fi al-Ilam* (Beirut: Dar al-Zahra', n.d.), pp. 22-23.

125. Zitar, *Mawsu'at al-Zawaj*, pp. 169-74. See also al-Dusuqi, *Al-'Usrah*, pp. 51-55.

126. Al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 207-17. See also Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 571-73; Ibn Rushd, *Bidayat al-Mujtahid*, pp. 1036-37.

127. Al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 207-17. See also al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6555-58; Zitar, *Mawsu'at al-Zawaj*, pp. 169-76.

128. 'Izz al-Din Bahr al-Ulum, *Al-Zawaj fi al-Qur'an wa al-Sunnah* (Beirut: Dar al-Zahra', 1978), pp. 269-81. See also *al-Mut'ah wa Mashru'iyatuha fi al-Ilam*, pp. 27-100.

129. Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6555; *al-Mut'ah wa Mashru'iyatuha fi al-Ilam*, pp. 32-33. See also Bahr al-Ulum, *Al-Zawaj fi al-Qur'an wa al-Sunnah*, pp. 268-69.

marriage that closely resemble *mut'ah* marriages.¹³⁰ One proposal, which is based on the generally correct assumption that young Muslims live with their parents until they marry, suggested waiving the requirement that a newly-wed couple share a residence. The proposal was defended as necessary to facilitate marriages in situations where there are housing shortages.¹³¹ But in fact, there are no housing shortages in most Western countries. Consequently, Muslim communities around the world became suspicious of this proposal. The form of marriage it advocated was quickly dubbed "zawaj (marriage)-friend." The intention was to draw a derogatory analogy between it and Western "boyfriend/girlfriend" relationships. In other words, the community concluded that what was being proposed was a temporary relationship, disguised as a marriage.¹³²

Malakah Zirar, a leading Islamic female scholar, has spoken forcefully against such unconventional marriages.¹³³ She points out that God has given Muslim women specific rights and protections in their marriages, and no scholar should attempt to upset that divine balance.¹³⁴ Zirar regards "intention" as a very important requirement in the marriage contract. She argues that if a man enters a marriage with the *intention* of ending it after a specific period of time, then the marriage is invalid.¹³⁵ Other Sunni jurists argue that so long as the period is not specified in the marriage contract, the marriage will be deemed valid.

In her opposition to unconventional marriages, Zirar is waging an attack on rich Muslim men who visit economically depressed Muslim countries, marry women there, and, at the end of their visit, leave these women without divorcing them. Although the marriages are not specified as temporary arrangements, they operate in the end as such, but without the protections of a *mut'ah* marriage. In a *mut'ah* marriage, the intention of the man is disclosed from the outset, thus giving the woman a clear choice. Further, the temporary marriage expires at the end of the specified period, and at least the woman will not be left hanging, wondering whether her husband will return or not.

In sum, while there are exceptions both under Shi'i and recent Sunni jurisprudence to facilitate temporary or unconventional marital relations, the basic, common, and entrenched model of marriage for both remains that of a permanent marriage formed through a solemn covenant based on mutual consent.

130. Zirar, *Mawsu'at al-Zawaj*, pp. 215-40; Shakir, *Zawaj Batil*, p. 146.

131. This proposal was made a couple of years ago by the Yemeni leader al-Zandani, and it stirred a storm of objections.

132. The issue was the subject of a panel discussion on al-Jazeera television, summer 2003, in which I participated.

133. Zirar, *Mawsu'at al-Zawaj*, pp. 169-76, esp. 171.

134. Zirar made this statement on the above-referenced television program (see note 132).

135. Zirar, *Mawsu'at al-Zawaj*, esp. pp. 171-74.

The Kitab Ceremony

The *Kitab* ceremony usually precedes the wedding by a period of time ranging from minutes to years. The ceremony tends to be a private and solemn affair. In addition to the bride, groom, cleric, parents and immediate family, and close friends, no one else need be present. Other attendees have no specific legal significance, unless they are the two witnesses necessary for the validity of the contract. The father (or someone in his position) is the *wali* whose agreement to the marriage contract is required in most schools of thought (except the Hanafi).¹³⁶ In some countries, the father is authorized to sign on behalf of his daughter, with her consent, to shield her from attending a ceremony regarded by some as primarily a "male" event!

The cleric will begin with verses from the Qur'an and then explain the marriage contract to the couple. A well-informed cleric will discuss briefly at this point the covenantal nature of the marriage contract and the Islamic view of marital relations. Then, the cleric will ask the couple about the amount of *mahr* (or other type of *mahr*) they have agreed upon. The *mahr* will be recorded in the marriage contract, unless the couple decides not to divulge it publicly, in which case the contract will refer to the "agreed upon *mahr*." The cleric will then inquire about any additional stipulated terms, agreed upon by the couple. If there are some, they will be inserted in the marriage contract, so long as they do not contravene its intent.¹³⁷ The cleric will then ask each party to express consent to the marriage. Traditionally, a virgin's silence is taken as a sign of acceptance.¹³⁸ This is based on a precedent in which the wife of the Prophet, 'A'ishah, pointed out to the Prophet that a virgin in Arabia would be too bashful to express her consent to a marriage offer. The Prophet then said, "Her silence is her acceptance."¹³⁹ Jurists, however, made clear that (sad) tears or other signs of distress by a virgin must also be viewed as rejection.¹⁴⁰ It is my view that this rule should not apply to virgins today, especially in the United States, because of the changed nature of our society, and the abuses perpetrated under the cover of this rule.

Ideally (though often not in the United States), the marriage contract will specify the jurisprudential school of thought governing the contract. The par-

136. Al-Ghandur, *Al-Ahwal al-Shakhsyah*, p. 126; Abu-Zahrah, *Al-Milkiyah*, p. 138; Faraj, *Al-Zawaj*, pp. 134, 136; al-Bardisi, *Al-ahkam al-Islamiyah fi al-Ahwal al-Shakhsyah*, p. 199.

137. Al-'Asqalani, *Fath al-Bari*, pp. 271-75; Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 156-61; Abu-Zahrah, *Al-Milkiyah*, pp. 235-44.

138. Al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 239-43; Ibn Qudamah, *Al-Mughni*, vol. 7, pp. 384-85; Ibn Rushd, *Bidayat al-Mujtahid*, pp. 942-44.

139. Ibn Rushd, *Bidayat al-Mujtahid*, pp. 942-44.

140. Al-Sarakhsi, *Kitab al-Mabsut*, vol. 5, p. 4.

ties then sign, and the *kitab* comes immediately into effect. Everyone present reads *al-Fatihah* (the first chapter of the Qur'an) and congratulates each other, then departs after some refreshments are served. The *kitab* is a much more somber occasion than the wedding, because it is a religious event.

The Wedding

The wedding is simply a social affair intended to publicize the marriage in the community and to celebrate it. It is part of the Sunnah of the Prophet, who instructed a groom to celebrate his marriage, even by serving a lamb to his guests.¹⁴¹ Muslim families, however, have also used this occasion to reflect their social status, as indicated by the size of the party, the guests invited, and the fashions and jewelry exhibited. In some countries, there may be two simultaneous parts to the wedding celebrations, one for men and another for women. The women's celebration tends to be the most exciting, often with singing and dancing that ushers the arrival of the groom, to be joined later by his circum-spect bride. The husband would be the only male in this gathering, usually a very uncomfortable position. The partition of the parties by gender is designed to afford the women the opportunity to abandon the formal outer dress and decorum required in public, and celebrate freely. These are also opportunities for mothers to look around for potential spouses for their children.

Marriage Contracts in the United States

In the United States, Muslims must follow all state law requirements in preparation for marriage. The cleric who oversees the execution of the marriage contract is usually authorized by the state to conduct marriage ceremonies. He would usually have a simple one-page marriage contract specifying the name of the Islamic center he is associated with, the names of the parties and witnesses, as well as the amount of *mahr* involved and any stipulations. He would follow the same procedure described earlier. The *kitab* ceremony is basically the same all over the world because of its religious nature.

Once the parties execute the contract, the marriage springs into existence. After the signing, the cleric files the necessary forms with the state and an official state marriage certificate is then issued. Thus under both Islamic law and state law, it is the date of the execution of the marriage contract, and not the

141. Al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 288-89.

wedding, which determines the marital status of the parties. Weddings therefore are viewed, even in the United States, as purely social events.

Marriages in the Muslim world have tended to be highly stable, despite the legal ability of both parties to initiate divorce. This stability is rooted in the centrality of the family in Muslim societies. For this reason, marriages tend to be between whole families and not just two individuals. Thus, at the very first sign of trouble, the extended families step in to resolve potential conflicts. In fact, the Qur'an itself advocates mediation and conflict resolution through the use of one arbitrator or mediator from each of the two families. With the advent of modernity, however, some of these traditions have been broken, and marriages have become increasingly strained.

The situation of American Muslims is a case in point, especially with respect to immigrant Muslims. Most of the immigrants left their extended families behind and have no support system. Furthermore, American society places many pressures on the family unit, including economic and moral ones. As a result of these and other factors, divorces have been rising in the Muslim community, and divorce actions have multiplied in courts.

It is disturbing that in some divorce actions, Muslim husbands have claimed that they did not fully understand the marriage contract, especially with respect to the *mahr* term. Other actions have revealed that the life of the couple, from the beginning, was anything but a reflection of the Qur'anic ideal of "tranquility, affection, and mercy." The picture emerging from these court cases is that marriage at times is not being viewed as seriously as it is supposed to be. This is not unique to American Muslims. It is part of a larger trend which seems to secularize and trivialize marriage by emptying it of its covenantal content (*mithaqan ghalithan*) and by regarding it as a "mere" contract that can be terminated at will. To reverse this trend, the community needs to inform prospective spouses of their rights and obligations and to protect Muslim women and families through education and counseling.

Muslim women have begun audibly expressing their complaints of abuse of authority by both well-intentioned and untrustworthy *walis* who pressure their daughters or other relatives (including sons) into marriage. There have been cases where a prospective spouse did not properly disclose all relevant information about his health, financial situation, or other matters. In other cases the husband claimed he was drawn by fraud into the marriage, and did not understand the document he was signing. In such instances, in the absence of true *ridha*, the marriage is generally voidable by the party whose *ridha* was either lacking or improperly obtained. Realistically, however, once a person is married it is very difficult for him or her to void that marriage. If they were able to do so, most likely they would have avoided the marriage initially. Therefore, it is im-

perative for Imams executing marriage contracts to ensure the full, informed *ridha* of the prospective spouses.

Such *ridha* can only be based on full disclosure by both parties, adequate opportunity for forming a judgment, and a truly free choice. In the United States, this can be achieved by providing marriage counseling sessions in Islamic centers by Imams and other qualified staff for the prospective spouses. The counseling would provide spouses with the opportunity to disclose information and assess responsibilities of married life, given the circumstances and abilities of each spouse and the common goals they may share. It will also help determine whether *ridha* is likely to develop. This arrangement will help reduce the rising rate of divorce among Muslims in the United States and, just as important, ensure that marriages are based on well-informed *ridha* that is not vitiated by pressure, fraud, deceit, or defect.

Another benefit of premarital counseling is that it could be an effective venue for informing Muslim women of their vast rights within the marriage under Islamic law, and to educate their husbands about these rights as well. As mentioned earlier, Islamic law does not require the woman to perform housework. It also gives the woman the right to keep her finances separate from those of her husband. If the woman plans to benefit from these rights, and the husband plans on a traditional division of labor and a financial union, then the sooner these facts become clear, the better. The counseling period would reveal these differences and help the couple work them out or part ways before any damage is done.

During the counseling process, both parties will develop a better idea about the type of relationship they would like to have in their own marriage. Islamic law provides significant latitude to the parties by allowing them to define their relationship through the use of stipulations in the marriage contract. A primary limitation, however, is that these stipulations do not contradict the intent of the marriage.¹⁴² For example, a prospective wife could insert a stipulation that her husband will be responsible for financing her higher education, or that he will not interfere in her career, but she cannot stipulate that he will not consummate the marriage.¹⁴³ A traditional husband who may balk at such permissible stipulations will discover quickly whether his prospective bride shares his view of a married life. Young American Muslim professionals have repeatedly contacted me about the inclusion of various stipulations. Increasingly, it appears, they are agreeing on more egalitarian marriages than those of their parents. Others who prefer traditional marriages are also free to negotiate such marriages. This is part of the freedom of contract in Islam. It is designed to

142. Al-'Asqalani, *Fath al-Bari*, vol. 9, pp. 271-75.

143. See, e.g., al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6540-47, esp. pp. 6544-45.

make a marriage strong by ensuring the *ridha* of the parties. The effort at fashioning one's particular life relationship with another can only deepen the commitment to the "solemn covenant" between them.

Covenant Marriage Laws

It is worthwhile at this juncture to compare Islamic marriage laws with ones more recently proposed in this country to protect marriages from hasty dissolution. Foremost among these laws is Louisiana's Covenant Marriage Law.¹⁴⁴ Under this law, covenant marriage is entered into by heterosexual couples who view marriage as a lifelong relationship and are willing to undergo premarital counseling to help them understand the nature, purposes, and responsibilities of marriage. Counseling would also inform them about the various aspects of the covenant marriage they elect to come under, including the exit conditions. For example, divorce may be obtained by one of the parties only when the other party has totally breached the marriage covenant commitment. Otherwise, a two-year separation period is required. A total breach occurs upon proof of adultery, abuse, certain types of separation, and abandonment of domicile by, or imprisonment of, the other spouse.

Louisiana's Covenant Marriage Law is consistent with Islamic marriage laws insofar as it is a marriage by a heterosexual couple entering a lifelong relationship. Yet, while Islamic marriage is usually intended to be forever (except in *mut'ah* marriages), however, God has permitted Muslims the right to divorce both at will and for cause. Divorce for cause is quite similar to that articulated by the covenant marriage law.¹⁴⁵ It is usually sought by a wronged wife looking to the judge for vindication and reparation.

Divorce at will may seem to contradict the rationale underlying covenant marriage, namely that of preserving marriages by making divorce contingent on good cause. But major Muslim jurists are clear that divorce at will may be exercised only for very good cause (including psychological and emotional cause). Otherwise the divorcing party is rejecting God's blessings for a happy familial life and is accountable to God on the Day of Judgment.¹⁴⁶

144. La. Rev. Stat. Ann. § 9:272 (2003). Information in this paragraph also comes from § 9:307 of the statute.

145. Compare Ira Mark Ellman, "The Place of Fault in a Modern Divorce Law," *Arizona State Law Journal* 28 (1996): 773 (addressing the relevance of fault in divorce proceedings) with Katherine Shaw Spaht's chapter herein.

146. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 286; Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 4, p. 296.

In divorce at will, the divorcing party need not divulge the ground for divorce. In this way, the privacy interests of both parties, and sometimes their reputations, are protected. In these circumstances, and where no harm is alleged, the courts usually set up a mediation process to save the marriage from dissolution. The courts leave the final decision to the conscience of the party seeking the divorce. Where the divorce action oppresses one of the parties, the courts attempt to rectify the situation through divorce settlement.

In an attempt to limit the improper use of divorce at will, jurists have attached additional requirements for its validity. For example, the husband may not be angry, drunk, or coerced into his action.¹⁴⁷ It is also strongly preferred that the wife not be in a state of menstruation or recovery from delivery (period of *nafaas*). These preferences are based on a desire to protect the woman from a lengthy waiting period, called *'iddah*, before the divorce becomes final.¹⁴⁸ Further, even if the divorce is proper, the husband has the opportunity for the duration of the waiting period to retract his divorce by simply returning to bed and board.¹⁴⁹ No judicial action is necessary. If, at the end of the waiting period, it turns out that the wife is pregnant, it is preferred that there be no divorce until delivery.¹⁵⁰

The waiting period in Islamic divorce is much shorter than that of the Louisiana Covenant Marriage Law. Nevertheless, it affords the families an opportunity to intensify their efforts during that period to effect reconciliation. This is one additional indication that the marriage contract is momentous.¹⁵¹ To the extent that the waiting periods differ between the two systems, the covenant marriage law may be unacceptable because it seems to deny the husband the right to divorce after the passage of the Islamic waiting period. The denial would thus prohibit what God has made permissible, a clear violation of Islamic law (Qur'an 5:87; 66:1). Since, however, the law applies only to those who elect to be covered by it, it could be argued that the husband contractually elected to be bound by a longer period. Since this contractual extension does not violate God's law, then it should be permissible. An analogous example would be that of the husband delegating his right of divorce to

147. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, p. 15; Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6882-84; al-Dusuqi, *Al-'Usrah*, pp. 233-37.

148. See, e.g., Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 286-87; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6922-26, 6950-55.

149. Qur'an 2:228; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 6987-88 and 6991; Abu Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 312-13; al-Dusuqi, *Al-'Usrah*, pp. 288-89.

150. See, e.g., Muhammad Fakhr al-Din al-Razi, *Tafsir al-Fakhr al-Razi* (1149-1209) (Beirut: Dar al-Fikr, 1985), vol. 30, p. 31.

151. Al-Dusuqi, *Al-'Usrah*, p. 377.

the wife.¹⁵² Many Muslim jurists accept the delegation as valid; others do not. So, the difference in the waiting period will raise an interesting discussion among Muslim jurists.

It is important to recognize the reason behind the shorter waiting period. It is a balancing between two factors: (1) giving time for the spouses to reconcile; and (2) ensuring that no spouse would suffer sexual deprivation through a long waiting period, and hence run the risk of an adulterous relationship. Islamic law provides a great deal of attention to the sexual needs of Muslims, both male and female, as a way of keeping them chaste.¹⁵³ It is a well-known fact in Islamic law that a separation of six months is grounds for divorce.¹⁵⁴

So, while Islamic law limits judicial divorce (as opposed to divorce at will) to cases very similar to those of the Louisiana statute, it is not generally willing to tighten the bond of marriage to an extent that would create unhappiness and oppression for a long period of time. Thus, not only do the waiting periods for divorce differ significantly between the two approaches, but even the forms of divorce are more accommodating under Islamic law. The final decision as to whether a person observed his or her covenant faithfully remains a matter between that person and God. God has informed us about the importance of marriage in Islam, and the gravity of the marriage commitment. But balancing that with the right to privacy and the sexual rights of individuals within a marriage results in both men and women being given a faster divorce than is available under the covenant marriage law. To agree to a law that imposes, except under certain circumstances, greater waiting hardship on an alienated couple is to expose Muslim men and women to unnecessary temptation and loneliness that may indeed affect their chastity. This is as grave a consideration for any Muslim as that of the importance of the marriage contract, and must be balanced with it.

In summary, the Islamic marriage contract is a solemn covenant before God, between a freely consenting man and a freely consenting woman, which is of grave importance. Hence it is most worthy of fulfillment. Consequently, society should assist couples, through counseling, workplace restructuring, and other helpful methods to preserve their families. Islamic law, however, does not force Muslim couples to continue within a marriage that has proven to be irredeemably broken, for God is all-merciful. Counseling informs couples of their duties, but divorce remains in the hands of the couple. The propriety of exercising of this power, however, is primarily a matter between the individual and his or her God.

152. Al-Khamlishi, *Al-Ta'liq*, vol. 1, pp. 348-53; al-Ghandur, *Al-Ahwal al-Shakhsyah*, p. 349.

153. See, e.g., al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, p. 6923; al-Dusuqi, *Al-'Ushrah*, pp. 377-78.

154. Ibn Qudamah, *Al-Mughni*, vol. 8, pp. 143-44; Abu-Zahrah, *Al-Ahwal al-Shakhsyah*, pp. 366-67; al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, pp. 7066-67.