CHAPTER 2

With Her Consent

Marriage

QUESTION: A virgin in her legal majority and of sound mind was abducted by her brother and married off to an unsuitable man. Does her father have the right to annul the marriage contract on the basis of the [husband's] unsuitability?
ANSWER: Yes, if the father asks for that, then the judge should separate the spouses whether or not the marriage was consummated, so long as she has not borne children, and is not pregnant, and did not receive the *mahr* [dower] before the marriage. . . . This is the case if her brother has married her off with her consent. But if she was given in marriage without her consent, she can reject [the marriage], and there is no need for the father [to ask for] separation [and raise] opposition, for he is not [in this case] a commissioned agent. [But] if she authorizes him to represent her, then he has the right to request from the judge an annulment [*faskh*] of the marriage and a separation, and the judge should separate them. According to al-Hasan, there is no need for [all] this because the contract is not valid in the first place. And God knows best.[1]

It was, in large part, through such discussions of marriage that the Muslim jurists of seventeenth- and eighteenth-century Syria and Palestine elaborated their vision of the relationship between gender and social

power in their community. In the many fatwas that dealt with marriage arrangements, marriage contracts, and the rights and responsibilities of husbands and wives, the muftis constructed a legal discourse in which the gendered relationship created by marriage occupied pride of place. Their discussions of marriage are illustrative of the complexities of the legal approach to gender in this period, an approach that focused on gender difference and male social power yet proved flexible and responsive to changing social conditions. Indeed, if we look at the records of the Islamic courts, we see a number of ways in which this discourse could prepare the ground for the pursuit of personal strategies, particularly women's strategies, that might improve one's personal situation. The opinions delivered by the muftis defined marital relations in a strongly gendered fashion, one constitutive of gender difference in the society as a whole, and the courts provided a forum in which this construct of gender difference interacted with gender as social relationship. The legal discourse on marriage formed a backdrop against which wives and husbands brought complaints or made claims against one another; in so doing, they in turn contributed to the ongoing elaboration of an Islamic tradition that took account of social reality by commissioning jurisconsults to deliver opinions, buttressed by legal argument, in response to actual situations arising in the courts.

In Islamic law, marriage is a contractual relationship. A woman and a man are united by their agreement to a marriage contract, whether oral or written, in which the names and lineages of the bride and groom are given, an amount of *mahr* (an indirect dowry paid by the groom to the bride) is stated, and witnesses to the couple's freely given consent are named. It was theoretically possible, in Hanafi jurisprudence, to add conditions to the marriage contract specifying that the wife would receive an automatic divorce should her husband commit certain acts, such as taking a second wife or acquiring a concubine. Although Khayr al-Din, for example, clearly recognized the validity of such conditions, they were rarely specified in the written marriage contracts of the period.[2] Some of

these contracts were entered in the records of the Islamic court. This was a common practice in eighteenth-century Jerusalem, but less often the case in Damascus or Nablus, where we find only the occasional marriage contract.[3] A typical contract drawn up for the offspring of two comfortable merchant families in eighteenth-century Nablus contained all the required information and various embellishments as well:

> The groom, the youth of right conduct, Salih al-Din, son of the merchant 'Umar Ya'ish.
>
> The bride, the pride of the guarded women, the *sayyida* Khadija, daughter of the pride of the nobles, the *sayyid* Hashim al-Hanbali, the virgin, in her majority, whose dower is 100 *dhahab bunduqi*, a kaftan, a silk cloth, a rug, a belt, 20 *ratl*s of wool, 20 *ratl*s of cotton, 10 dresses, and a black female slave to serve her. She receives now 60 *dhahab bunduqi*, the above-mentioned items, and the slave by the acknowledgment of her agent for the contract, and the rest is deferred until one of them dies.
>
> Her brother, the *sayyid* Hasan, son of the *sayyid* Hashim, is her agent, and his agency is witnessed by her cousin, the *sayyid* Muhammad, son of Muhi-al-Din al-Hanbali, and by her brother the *sayyid* Salih, legal witnesses.
>
> And the agent of the groom is the merchant Muhi-al-Din Ya'ish, whose agency was witnessed by the pride of the nobles, the *sayyid* Sa'ad al-Din al-Hanbali, and the aforementioned *sayyid* Muhammad.
>
> End of Rabi' I 1138 H. (1725 A.D.)[4]

Such contracts appeared to be standard and widely understood: the muftis addressed the form of the contract only when it contained apparent irregularities (as, for example, the absence of a *mahr*) or when the issue of coercion arose. Most of the court cases and fatwas dealing with marriage focus instead on various aspects of the relationship implicit in the contract.

The muftis tended to ground their discussion of marriage on their understanding of the purpose of this union in the context of their local

Muslim society. That this was a strongly gendered society in which the male and the female were neatly differentiated, not only biologically but also socially, politically, and economically, was an unquestioned assumption embedded in much of their reasoning. Their view of marriage rested, in fundamental ways, on gender difference, on gender in binary opposition: marriage was not a symmetrical relationship. One has little sense, however, that this differentiation was easily reducible in their eyes to male dominance and female submission. As the jurists struggled to define and regulate the institution of marriage, they always reflected a deep concern for the ways in which marriage could not only elaborate and organize gender difference but also strengthen and unify their gendered society: marriage was a highly gendered institution, yet one in which the perceived tensions bred by gender difference might be softened and rendered less fractious. As *'ulama'*, the muftis were charged with the protection of the moral standards of their community, but also, at least in theory, with the physical safety and unity of the group as a whole. Their discussions of marriage must be read in the light of some unspoken yet fundamental assumptions about the social purposes of marriage.

THE PURPOSES OF MARRIAGE

Marriage was a key to social harmony. All three of the muftis whose fatwas we study here focused on the institution of marriage as a basic social building block, a bulwark against social discord and disorganization. Many of the issues they chose to focus on underscored a view of marriage as a social necessity, as the desirable state of being for all members of the community, almost without exception. It is in this context that we can understand the stress they placed on the special responsibility the *wali* (guardian) of a minor bore for arranging a marriage. Every minor had a *wali*, usually his or her father or grandfather. If the father and grandfather were both absent or deceased, other paternal relatives might assume the *wilaya* (guardianship). The guardian of an orphan had, according to al-'Imadi, a responsibility to arrange a marriage for his charge

even before the child reached puberty.[5] Not only minors, but other legal incompetents, including the insane, could be married off by their guardians.[6] Indeed, al-'Imadi took the position that should a *wali* balk at what appeared to be a sound offer of marriage made to his minor charge, the qadi (judge) should step in to oversee the marriage arrangements.[7]

A stand-in *wali* was entrusted with furthering the well-being of his or her charge and protecting the child's interests in the absence of the natural protector, the father or grandfather. That these interests should include the arrangement of an early marriage is a position clearly adopted by al-'Imadi, who was even willing, if necessary, to override the rights of the official *wali* in order not to miss the opportunity to make a good match. The interest of the community in making sure all its members were married extended even to the mentally or physically ill, because all adults, regardless of their situation, benefit from being in the married state.

This strongly promarital position did not mean that any and every marriage was acceptable in the eyes of the muftis. On the contrary, these men were very conscious of the rules of *kafa'a*, the legal concept of the suitability of the match in terms of lineage, legal status, social class, and moral standards, and they chose to enforce them. If a marriage were to reinforce social harmony, it was important to avoid the instability attendant upon mesalliance. All three of our muftis applied the rules of *kafa'a* in fairly predictable ways. A *sharifa* (a member of the status group of descendants of the Prophet) should marry only within her lineage.[8] A woman of free origins should not be permitted to marry a slave.[9] Compatibility of class was somewhat less tangible, but a girl from "people of learning and religious piety" should not be married to an "illiterate profligate,"[10] and a girl of good background should not be married to a man who is "sinful, poor, or employed in a vile profession."[11] Clearly, the interests of the community would not be served by marriages that appeared to be inherently unstable because of the disparate backgrounds of the bride and groom.

Indeed, the absence of compatibility was enough to render a marriage invalid if that marriage were contracted by a woman or her *wakil*

(authorized agent) without her father's or grandfather's approval. The muftis did agree that the law allowed the father of a minor girl to marry her off to whomever he pleased, and thus override the demands of *kafa'a*, but on this matter even the father's judgment might be questioned. Khayr al-Din argued that if a father known for his "poor judgment and his inability to see the consequences [of his actions]" married his daughter to an unsuitable person, the qadi might step in and proclaim the marriage legally defective.[12]

A firm promarital position, based on the understanding that marriage was the natural and desirable state for all Muslim adults, was thus tempered in juristic reasoning by the demands of social harmony. A marriage was central to social relations, and it must reinforce social ties within the community and promote harmony and stability. Problematic unions that united ill-suited couples were to be avoided. Indeed, the community interest in good marriage arrangements, as perceived and protected by the Muslim judge, could take precedence over the right of the father to marry off his minor daughter. A father could not, in the jurists' view, exercise his power over his daughter in a wholly arbitrary and despotic fashion.

Marriage was also defined as a relationship of material support, and the provision of that support was strongly gendered. The marriage contract, provided the marriage had been consummated, initiated certain responsibilities: a husband was responsible for providing for his wife and any children born of the union. A man was solely responsible for his wife's *nafaqa* (support), regardless of the wife's own resources. Once the marriage contract was signed *and* the marriage was consummated, the husband had to begin to provide *nafaqa* in the form of "nourishment, clothing, and shelter"; should a man fail to do so, he could be jailed until he did.[13] The muftis also agreed that the Islamic courts should play an active role in ensuring the delivery of this support. Should a husband go away on a trip or disappear without leaving sufficient support, the qadi was authorized to discover any of the husband's assets that might be attached: if the husband were the beneficiary of any *waqf* revenues or had any outstanding debts owed to him, the qadi could assign these monies to his wife.[14]

Support had also to be provided at a level appropriate to the wife's social background: she had to be maintained in the style to which she was accustomed. The muftis devoted time to defining what was appropriate for members of their communities. Khayr al-Din established a "customary" standard of living for a poor woman of the Ramla vicinity: a diet of barley bread and corn oil, and a clothing allowance of two gowns (one winter and one summer), two shirts, two head scarves, and one cloak.[15] al-'Imadi, operating in a city of more pronounced social nuance, distinguished the diets of three social classes. The rich woman ate wheaten bread and meat for lunch and should have an ample supper. The woman of the "middle" stratum could expect a lunch of bread of unspecified grain and animal fat. The poor woman must make do with bread and cheese. The attention to detail in the discussions of *nafaqa* reinforces the legal position that the husband was not simply being exhorted to support his wife, but was in fact legally required to provide her with the full amount of material support she could expect as a woman of her particular class.

The gravity of this responsibility was further underscored by the precise definition of its scope. All agreed that a husband owed this support from the moment of the consummation of the marriage until such time as the marriage was terminated by divorce or death. In the case of divorce, the former husband must continue to support his wife until the end of her waiting period, when she would be legally free to remarry. In the case of a wife's death, the responsibilities of the husband might actually extend into the grave. Khayr al-Din drew a clear parallel between *nafaqa* and burial costs: just as the clothing and housing of a wife is his responsibility during her lifetime, so is her shroud and her grave his responsibility after her death.[16] Marriage, then, stood at the center of a gendered system of nurture. The man was clearly assigned the responsibility of providing food, shelter, and other necessities of life for his wife and children (the wife's responsibilities, as we shall see, lay elsewhere). The muftis took these gendered arrangements for family provision very seriously, for marriage was the institution that undergirded the most

basic social tie of the community, and they took considerable pains to define and standardize the material responsibilities it entailed.[17]

In addition to its importance in achieving social harmony and the arrangement of material provision, marriage was also critical, in the legal discourse, for the control and satisfaction of sexual drives. Marriage was a sexual relationship, and the consummation of the marriage was essential to establishing the groom's responsibilities for *nafaqa:* the full legal consequences of a marriage could not be realized until sexual intercourse had taken place. Legal discourse distinguished between the signing of the marriage contract, at which time the groom must pay the *mahr,* and the moment of first sexual intercourse, which activated the full obligations of marital support. A marriage could be contracted before either party was ready for sexual intercourse, but a marriage could of course not be consummated until both bride and groom were physically mature. The muftis did not equate such maturity with puberty (the marker of legal majority), however: a girl might be mature enough for sexual intercourse before she began to menstruate. Her readiness for intimacy was signaled in large part by her appearance, by whether or not she had become an "object of desire," "fleshy" (*samina*), or "buxom" (*dakhma*), physical attributes that signified that she could now "endure intercourse."[18] Until such time, the marriage, although legally contracted, clearly lacked an essential element.

The muftis all agreed that marriage existed to channel and fulfill the sexual drives of both men and women, and the refusal or inability of one of the partners to have sexual intercourse could invalidate a marriage. A woman could refuse to have intercourse with her husband if he had failed to pay the stipulated *mahr,* but once the accounts were settled, she had to be available as a sexual partner.[19] If she persisted in refusing him, he would be absolved of any responsibility for *nafaqa* or, according to what appears to be a minority opinion of al-Tamimi (neither of the other two muftis mention it as permissible), he could rape her.[20] The woman who through physical or mental disability was incapable of intercourse but did not consciously refuse her husband was to be treated differently. If,

according to al-'Imadi, a woman became mentally or physically ill, or so obese as to make intercourse impossible, she should still receive *nafaqa*.[21] A man was entitled to the sexual companionship of his wife, and his obligations were directly tied to her availability for sexual intercourse, but should she be disabled, she should not be punished for her disability; *nafaqa* should continue.

Just as a man could expect and require sexual activity from a marriage partner, so could a woman. Once a wife had moved to her husband's domicile, was considered ready for sexual intercourse, and did not refuse any of her husband's advances, she should receive *nafaqa*, and if her husband was still a minor, was ill, or was otherwise incapable of intercourse, he had still to pay her the full *nafaqa*.[22] If he were to prove incapable of intercourse over the long term, then she could seek legal remedies. al-Tamimi responded to a woman whose marriage had been "consummated" and yet she had not been deflowered ("did not flow"). After she had waited for a period of one year for the matter to resolve itself, she could raise the problem with a qadi and request a divorce.[23] al-'Imadi agreed that in order to have her marriage annulled for impotence, a woman must testify to the judge that she was still a virgin after a full year of living with her husband (not counting days of sickness or separation).[24] The sexual rights of husband and wife were not exactly symmetrical: whereas a man's marital obligations could be relaxed in light of his wife's refusal to sleep with him, the jurists did not entertain the notion that a woman could forthwith modify her marital behavior in response to her husband's nonperformance. Still, after a year had passed, she could seek to have her marriage terminated on the grounds of her husband's sexual failings.

The muftis' discussions of sex and marriage are remarkably free of references to procreation. If the siring and bearing of children figured prominently in the jurists' sense of the purpose of marriage, they were curiously silent about it. The discussion of sexuality takes place entirely within the context of sexual desire, and of the need to satisfy this desire within the institution of marriage. Indeed, in all their discussions the jurists limit themselves to marriage as a contractual relationship between

two people who, as we shall see, acquire both rights and responsibilities as a result. Marriage institutes arrangements of shared nurture and rights of sexual companionship; no larger purpose is made explicit. But the consistent valuing of marriage for all members of the community, the emphasis on matches that respect social barriers, the close attention to the material details of the arrangement, and the recognition that marriage channels powerful sexual drives all point to an institution that serves the needs not just of two individuals but of a community. The achievement of social harmony and stability rested on the achievement of successful matrimonial unions through careful attention to gender difference.

It is small wonder, then, that the muftis and the courts spent so much time and energy considering marriage arrangements and the behavior required of husbands and wives. As an elaborate and detailed legal discourse on these arrangements and behaviors continued to develop, marriage came to hold the key to a vision of a distinctly gendered society.

ARRANGING A MARRIAGE

How should a marriage begin? In addressing the question of what the law prescribed and permitted in marriage arrangements, the muftis seemed to draw on two potentially contradictory principles. First, a family enjoyed rights and responsibilities in the arrangement of its children's marriages. Second, an individual, whether male or female, once he or she reached legal majority, had the right to choose his or her spouse.

For children in their minority, the matter was rather straightforward. The muftis all agreed that the marriage guardian (*wali*) could arrange a marriage for the girl or boy under his guardianship. The consent of the child was not required, logically enough, because the minor was not yet legally competent. As long as the *wali* was the father or paternal grandfather, he could arrange whatever marriage he wished without regard for the suitability of the match, although, as we have seen in some extreme cases, the judge might intervene to protect the interests of the minor.[25] In general, however, the rights of the patriarch appeared to hold sway.

If, however, the *wilaya* or guardianship had devolved to another relative, in the absence of the father or grandfather, the *wali*'s rights were more restricted. This stand-in *wali* could marry his or her charge only to a person who was suitable, in the legal sense of *kafa'a*, and the marriage contract would have to specify a "fair" *mahr.* In a case where a fatherless girl in her minority was married by her paternal uncle to his own son without a proper *mahr* in a "criminally fraudulent manner," al-'Imadi declared the marriage illegal and therefore annulled.[26]

Further, if a minor girl were married off by someone other than her father or grandfather, she had the option, upon reaching her legal majority, of refusing the marriage. Such a refusal, which had to be given at the time she first reached puberty, immediately ended the marriage.[27] Despite the clarity of the muftis on this issue, the girl's ability to exercise this right could be thwarted in various ways, as the following opinion from Khayr al-Din suggests:

> QUESTION: There is a minor girl whose brother married her off, and she came of age and chose *faskh* [annulment] in her "coming-of-age" choice. Her husband claimed that her brother had acted as the *wakil* [agent] of her father and she does not have a choice. She then claimed that [her brother] married her off during [her father's] brief absence on a journey. If the husband provides evidence for his claim, is her choice canceled or not? If he does not have evidence, and wants her oath on that, must she swear an oath?
> ANSWER: Yes, if the husband proves his claim, then her choice is canceled. . . . Only the father's and grandfather's marriage arrangements cannot be canceled . . . [and] if the marriage was arranged by way of a *niyaba* [proxy] for her father, then she has no choice. If the marriage was arranged as a result of [the brother's] *wilaya* [guardianship], then she has a choice.[28]

Still, all muftis reiterated the same general principles: only arrangements made by the father or paternal grandfather were inviolate; arrangements made by other individuals were subject to review by the qadi; and a minor girl (or boy for that matter) could not exercise any choice of partner

until she reached her majority, but she could then choose to reject arrangements made by any other *wali* even if that meant annulling a marriage that had already been consummated.

The family's right to manage the affairs of minors in its own household was thus tempered, in theory and practice, by the right of the individual to exercise free choice once she or he reached the age of reason. It was also modified by the position of the muftis that only the family's patriarch, in the person of the father or grandfather, could operate with a free hand. All other members of the community were constrained by standards imposed and enforced by the jurists to serve the interests of the individual minor, especially in the absence of a father. The jurists took their charge to protect the fatherless child seriously, and their defense of the rights of orphans figured among the most impassioned of their opinions. Khayr al-Din made no attempt to conceal his wrath when asked about a village head who had intervened in a marriage arrangement made for a girl from his village by her mother, who had legally assumed the position of *wali* (a possibility I shall address in chapter 4). The shaykh had wrested the girl away from her mother, forestalled the arranged marriage, and then arranged a marriage for the girl himself and pocketed the *mahr*. Khayr al-Din soundly reprimanded the shaykh, who had no business interfering with a valid arrangement made by the mother of a fatherless girl. Nor did the shaykh have any right to act as marriage *wali* himself, and the marriage he arranged was therefore not legal. And, thundered Khayr al-Din, "his eating of the *mahr* is like filling his belly with fire and blazing flame."[29]

Once a child reached his or her legal majority (at the time of puberty), that child's right to choose a marriage partner took clear precedence over the family's right to arrange a marriage. The muftis all agreed on the basic principle that men and women in their legal majority could choose their own mates. Such a woman could exercise this choice in two ways. First, she enjoyed a right of refusal: were she informed of a marriage arrangement made by her *wali* or anyone else for her, she could refuse the match, regardless of who arranged it. Second, she was entitled to take

a more active role in her own fate, by appointing an agent to arrange a marriage for her, thus bypassing her *wali*.

A woman who wanted to refuse a marriage had to do so as soon as the news of the arrangement reached her. As long as she stated her opposition to the marriage when she learned of it, the marriage was canceled. And if some question arose concerning whether or not she had refused in a timely fashion, her own testimony under oath to her immediate refusal carried the day. This right of refusal clearly extended even to marriage arrangements made by her father, or by other relatives.[30] al-'Imadi contrasted this position with non-Muslim (*dhimmi*) marriage practices when he was asked about the legality of a marriage arranged by a *dhimmi* woman for her daughter without her daughter's consent. We do not intervene, he stressed, in "the disreputable marriages of *dhimmi*s," for we have no jurisdiction over such *dhimmi* affairs; if, however, a *dhimmi* came to an Islamic court and wanted a judgment on this issue, we would rule according to Islamic law and invalidate this marriage, which was made without the woman's consent.[31] The jurists seemed intent on guarding against hidden coercion in marriage arrangements. A man pressed a claim against a woman on the basis that her father had married her to him when she was a minor, and now she refused to honor the arrangement. She replied that she had been in her majority at the time of the arrangement, and that she had not been informed of it. Her testimony, according to al-'Imadi, should be accepted, and she, not her putative husband, can testify to the fact that she had already reached her majority (puberty) at the time of the marriage.[32]

Consent was signified by the absence of refusal. If a woman learned of a marriage arrangement made for her and kept silent, she thus signaled her consent. The muftis agreed that this consent, however silent, must be informed consent. al-'Imadi weighed in on the issue of informed silence:

> QUESTION: A virgin in her majority was married by her *wali* legally, but without her permission, to a man who was suitable and paid a fair *mahr* [dower]. Then the *wali* informed her of the marriage and of the groom and of the *mahr*, and she was silent

> concerning her choice and she did not reject the marriage. Is her silence acceptance of him?
> ANSWER: Yes. But if the *wali* marries her off without consultation and then informs her after the marriage and she remains silent, and he does not mention the [name of the] groom and the [amount of the] *mahr*, then it is different and not [legally] sound. And likewise if he consults her before the marriage but fails to mention the [name of the] groom and the [amount of the] *mahr*, and she is silent, this too is not a legal marriage.[33]

A woman thus needed to enter a marriage willingly; coercion invalidated marriage arrangements. Such a position did not, however, preclude a firm family hand in marriage arrangements. Families were free to marry off their women as long as their consent, even if of a passive nature, had been obtained.[34] Women in their legal majority still had marriage *wali*s, those people who were legally entitled to arrange their marriages for them, but the *wali* had to communicate fully all details of a proposed arrangement and honor a woman's refusal of a marriage. The special interest of the family in the marriages of its members was thus affirmed and buttressed in legal opinion, while at the same time the practice of coercion was strictly prohibited.

A woman in her legal majority also had the right, so far as the Hanafi jurists were concerned, to arrange her own marriage. Again and again the muftis affirmed that a woman of sound mind in her legal majority could directly, or through an agent of her choosing, select her own husband and make her own marriage arrangements. Such a marriage might take the form of an oral agreement made directly between two people to marry with a stipulated *mahr:* as long as the *mahr* was fair and the agreement was properly witnessed, the marriage was legal. Sometimes such a woman would appoint her own agent (*wakil*) to arrange a marriage for her, a perfectly valid approach that might neatly bypass the plans of her male relatives. A woman in her legal majority need not rely on, or even consult with, her marriage *wali;* it was her prerogative to arrange her own marriage.[35] Her "patriarch," in the person of her father, paternal

grandfather, or paternal uncle, had no power of intervention in such arrangements, and their objections would be overruled.[36] All the jurists were careful to point out, however, that the legal *wali* (the father or grandfather, or other paternal relative in the absence of both) could raise objections to a marriage if the groom were not suitable, or if the *mahr* were not fair. If the *wali* were to raise such valid objections, the qadi would have to annul the marriage.[37]

Legal discourse on marriage arrangement, then, displayed a certain duality. On the one hand, marriage was a family affair: every female had a legal marriage *wali* and, in the case of a girl in her minority, the *wali* enjoyed broad powers of discretion in making arrangements. Once a woman attained her majority, however, legal discourse emphasized her freedom to refuse a match and even to arrange her own marriage.[38] The muftis often elaborated these views in response to situations manifesting palpable tension between the family's interest in controlling marriage choice and the individual's right to choose a partner, within limits. Many of the opinions on marriage arrangements pitted the jurists against irregular social practices, especially those whereby a family attempted to arrange a marriage without taking proper account of legal procedure and a young woman's rights. There seems to have been no question in the minds of the muftis about their proper role: as the upholders of Islamic legal norms, they took a firm position on a woman's right to participate in choosing a mate. This right was a feature of life, at least theoretically, in the Muslim community, and could not be put aside for the convenience of the family.

The idea that social harmony would be served and gender difference softened by choice of marriage partner lurks between the lines of many of these opinions. In choice of partner, at least, the differences between the male and female were minimized, though still present. Minors, whether girls or boys, were under the same form of family control. Once in their legal majority, however, young women, unlike young men, still remained under the aegis of a marriage *wali* who could arrange a marriage for them. On the one hand, the muftis maintained the position that

a woman could be married off with minimal (silent) consent; on the other hand, they also repeatedly elaborated the Hanafi position that women enjoyed the right to choose their mates just as men did. Gender difference was surely a significant factor in marriage arrangement, but the difference was tempered by clear acknowledgment of a woman's right to choose.

ENTERING A MARRIAGE

The muftis' view of marriage as a means for promoting harmony between the sexes provided the context for their elaboration of the ways men and women should enter marriage. They devoted considerable effort to detailed discussion of the rights and obligations of husband and wife, aiming all the while at gender harmony through close attention to the precise requirements of both parties. What was owed and what could be expected structured much of this discussion as the material aspects of the marriage arrangement were implemented.

An initial obligation on the part of the husband was the provision of a proper *mahr*. The *mahr* (dower) was a necessary component of any marriage contract, whether or not it had been specified in the contract itself. The *mahr*, usually stated in the contract in this period as a specified amount of money, or money in addition to certain goods, had to be delivered to the bride herself. None of her family members, or her husband, had any right to the *mahr*. In the marriage contracts recorded in Damascus, Jerusalem, and Nablus in the eighteenth century, the Hanafi practice was always to divide the *mahr* into two portions, a *muqaddam* (prompt dower, consisting usually of about one-half to two-thirds of the total) to be paid at the time of the signing of the contract and a *mu'akhkhar* (deferred dower, making up the balance) to be paid at the time of termination of the marriage, whether by death or divorce. The amount of *mahr*, although it varied enormously by social class, was usually a substantial sum.[39] The prompt receipt of the *muqaddam* was a right

of the bride and, as we have seen, she could refuse to consummate the marriage until it was in her hands.

The muftis agreed that the *mahr* must be stated and must be paid. It might happen that a woman married and had the marriage consummated without a *mahr* having been paid. In such a case, the groom owed her a fair *mahr*, to be paid immediately. Once any marriage contract was concluded, the husband was obligated for the *mahr* as a debt to his wife. Should he have died before he had delivered the *muqaddam* of the *mahr*, his wife could take this amount from his estate or, in the case of an impecunious or minor husband, she could demand that amount of the *mahr* from her husband's father, if the father had served as *wali* or *wakil* for his son.[40] Upon the termination of the marriage through death or divorce, a woman could also lay claim to the *mu'akhkhar*. And in the case of a deceased husband, this claim would be made against his estate and had to be honored despite the disclaimers of his other relatives, unless they could produce legal proof that the debt had already been paid. Even if the woman were to have died shortly after her husband, her heirs could bring a claim against the husband's estate in the amount of the *mu'akhkhar*.[41]

The *mahr* had to be paid to the bride herself, not to any of her relatives. In the case of a girl in her minority, her *wali* was authorized to receive the *mahr* on her behalf, and she would be permitted to take possession of it when she came of age. Once a woman was in her majority, however, she was entitled to receive and control her own *mahr*: the muftis agreed that her father had no right to receive or keep the *mahr* over his daughter's objection.[42] Khayr al-Din, who handled many cases from the rural hinterland, where a free and easy attitude toward the *mahr* seemed to prevail, repeatedly took families to task for such lax *mahr* practices. To pay the *mahr* to a woman's mother or uncle, whether or not they subsequently spent it on the bride, was as good as not paying it at all: it was like paying the *mahr* to a "stranger." The husband in such a case still owed his wife a *mahr*, and he had to pay it, even if he were not successful in recovering the money he had given to his wife's mother or uncle.[43]

Nor could the prompt payment of the *mahr* be held hostage to bargains a family might strike over the marriage of their daughter. A man who married a woman and paid 85 (*ghurush?*) to her father, 5 to her paternal uncle, and 20 *ghurush* worth of clothing to the bride was informed that the entire amount had nonetheless to be paid to the bride as her legal *mahr*.[44] Khayr al-Din also actively discouraged the practice of exchanging brides for token *mahr*s:

> QUESTION: A man said to his brother: "Arrange a marriage for my minor daughter and you can marry using her *mahr*," and [the uncle] married her off to a man with [the father's] permission and a *mahr* was named. And then [the uncle] married [the groom's] sister and a *mahr* was named for her. But the two marriages were consummated before the *mahr*s were received. Then the minor came of age and her father died. Can she authorize her brother or someone else to demand her *mahr* from her husband, and is the husband required to pay it? Likewise, can the husband's sister appoint an agent to collect her *mahr* from her husband, and is he obliged to pay it?
> ANSWER: Each of them can appoint someone to receive the *mahr*, and it is not legal for the father to give the minor's *mahr* to her uncle or anyone else . . . for it is not his property, it is her property . . . and the groom must pay his debt, the *mahr*.[45]

Khayr al-Din also insisted that the *mahr* stated in a marriage agreement could not be reduced on a whim. A man who married his wife with legal witnesses and then decided to go to court with the bride's father to redo the marriage with a discounted *mahr*, "out of fear of the size of the first *mahr*," was informed that the first *mahr* could not be changed once it had been agreed upon.[46]

Through these opinions the jurists, especially Khayr al-Din, waged a campaign of sorts against the manifold ways in which family interests worked to erode a woman's right to her *mahr*. They were acutely aware that illegal practices existed, and they were consistent in upholding the principles that the *mahr* must be proper, must be paid, and must become the enduring property of the bride. Although none of the three muftis

was willing to countenance social practices that interfered with the proper disposition of the *mahr*, they all demonstrated a greater willingness to accept local community practice when it came to other property transfers that took place at the time of marriage.

It seems to have been customary, although not required by law, for the groom to send the bride and her family a number of presents after signing the marriage contract and before the marriage was consummated. These presents, which could include clothing, jewelry, and money with which to purchase food for wedding-related entertaining, did not form part of the *mahr*, but rather were voluntary and customary gifts. The groom was under no legal compunction to send these gifts, though we can imagine that social pressure to do so must have been considerable. The muftis turned their attention to this custom of engagement presents when conflicts arose over the ownership of this property, usually in the context of the cancellation of the marriage before consummation. al-'Imadi noted that whereas a groom could expect the return of the *mahr* if the bride's family withdrew from a marriage arrangement, the presents he might have made to her of money, food, and clothing were not part of the *mahr* and therefore did not need to be returned to him.[47] Khayr al-Din took a similar position, at least on money that was spent on providing food for guests. As long as the groom had given this money in the knowledge that the family of the bride was going to use it to feed guests, then it was as if he had entertained the guests himself, and the money would not need to be returned.[48] Both jurists noted that such presents were made in accord with local custom and did not fall under the rules governing the *mahr:* in this instance, at least, the expectations arising out of standing customary practice loomed large in the reasoning of the jurists.

They took a like approach to questions concerning the bride's trousseau (*jihaz*). Brides were often fitted out with house furnishings and clothing by their families of birth when they first embarked on married life. But families were not legally required to provide a *jihaz:* if the mother of the bride or the groom himself complained that the bride's

father had not given a sufficient *jihaz*, they were told that the father could not be compelled to do so.[49] Once such items were given, however, they normally became the property of the bride herself. A father or mother or both often furnished a daughter with a trousseau, which the daughter took with her to her marital domicile. If the giver of the trousseau subsequently died and his or her heirs tried to claim that trousseau items formed part of the estate of the deceased, they were told that the *jihaz* was the personal property of the bride and no longer that of her parents—it formed no part of the parents' estates.[50]

The muftis were sensitive, however, to local customs that might modify the bride's claim to this property. al-'Imadi worked from the notion that a bride could expect to receive a proper *jihaz*. If a mother fitted out her daughter with clothes and such clearly in excess of what could be expected, in one case double the value of her *mahr*, then the mother's claim that some of these things were given only on loan should be credited.[51] He was also willing to accept legal evidence that weakened the bride's claim to this property, such as a legal agreement between a father and his daughter stating that certain materials she took with her upon marriage were not *jihaz* but a loan. al-'Imadi in particular also bowed to the "custom in the community," where it was present, of making the *jihaz* a loan, a form of property shared by the bride with her family. When a family could demonstrate that such was local custom, the items of the *jihaz* were regarded as being on loan from the bride's family and would therefore revert to that family upon her death.[52]

The muftis, then, upheld the right of a woman to enter her marriage with certain endowments. Legal discourse held that the *mahr* was an absolute requirement of every marriage, and that a bride's family had no right, once a woman reached legal majority, to receive or control the *mahr*. Juristic discussion of the *jihaz*, however, was more nuanced. Discussion of the *jihaz* was permeated by the tension between, on the one hand, a woman's right and need to enter a marriage with independent means and, on the other hand, the family's desire to minimize the loss of family property occasioned by the marriage of their daughter. Al-

though the muftis usually affirmed the bride's right to the *jihaz* as her private property, they also proved willing to bow to social practices that retained effective family control of this property.

The gendered transfers of property that accompanied a marriage were strictly regulated. The bride, but not the groom, was to be endowed by her husband's family through the *mahr*, and by her own family through the *jihaz*. In supporting her right to these endowments, and to full control of them, the muftis endorsed the idea that a woman should enter marriage as an empowered individual. At the same time, however, the jurists recognized and accepted the fact that local communities might adjust these transfers. The bride as propertied individual must be weighed against the need and desire of the bride's family to retain some control over their property: the custom of "lending" or "sharing" bridal trousseaus was accepted by the jurists as a legitimate community practice. Still, the bride was always to be launched into marriage with some clearly defined property of her own: the strongly gendered notion that the husband was to be the head of the marital household was thus tempered at a practical and significant level by some required provisioning of the new wife.

The importance of the dower, however, should be kept in perspective. The courts provide ample testimony to the fact that women acquired property in a variety of other ways, as well: they had legal rights to shares in family estates, for example, and were frequently named as beneficiaries of *waqf* (religious endowment) properties. For many women, then, the marital rights to property were supplemented by other forms of wealth. Indeed, estate records for women in eighteenth- and early nineteenth-century Nablus demonstrate that the amount of the dower named in a marriage contract represented roughly 15 to 25 percent of a woman's estate at the time of her death, and tended, not surprisingly, to be a more significant part of a poor woman's estate, since the middle and upper classes had far more access to other forms of family wealth.[53] Still, the *mahr* and *jihaz* could lend a new bride, especially one in a modest household, crucial control over money and goods central to the well-being of the new family.

LIVING A MARRIAGE

Once the marriage contract was agreed to and the marriage had been consummated, the bride and groom each acquired a set of rights and obligations, all of which were strongly gendered and therefore asymmetrical. The muftis took pains to delineate the legal expectations and requirements of husbandly and wifely behavior, which strongly differentiated male and female roles in the household. In such precise regulation of gender difference lay the key to gender harmony: men and women must understand their responsibilities to each other, responsibilities based on innate differences. Legal discourse did not view such difference, however, as justification for gender-based oppression since marital rights and obligations seemed to be aimed at achieving social harmony between two gendered individuals by assigning them distinct roles, while ensuring that the potential for abuse of these roles was limited.

The husband's role, first and foremost, was that of provider. Legal discourse held the husband responsible for the material support (*nafaqa*) of his wife. Once the marriage had been consummated, and for as long as he was married to her, a man was required to support his wife. Moreover, a wife was entitled to receive *nafaqa* before consummation of the marriage if she was refusing consummation because of nonpayment of *mahr*. Should the husband divorce her, he was also required to support her for the following three months of her waiting period (*'idda*), a period that was extended for a pregnant woman until after the birth of her child. If the husband should die, the responsibility for *nafaqa* was terminated, except for a pregnant wife who could claim *nafaqa*, through to delivery of her child, from her husband's estate. Such support must be provided only if requested during the period of the marriage or the *'idda;* no retroactive requests could be made.[54]

All the muftis agreed on the principle of *nafaqa* for a wife. The matter of how she was to claim this support was rather more complicated, however, and occasioned considerable discussion. We may assume that in the usual course of events the food, shelter, and clothing that com-

prised *nafaqa* were provided routinely, as a normal part of the life of a marital household in which husband and wife lived together, sharing food and shelter. A man might have taken it upon himself to name an amount of *nafaqa* to be paid to his wife as part of an agreement he had made with her at the time of the marriage or later. Although such an agreement was not legally required, once made it could be enforced by the court.[55] The muftis and courts would take up the issue of *nafaqa* only when something had gone wrong, as when a husband for one reason or another was not fulfilling his obligations, or when some unusual arrangement had been made and was not honored. The absence of a husband, or his failure to provide adequately for his wife, could throw the question of support into the laps of the jurists.

If a man were to leave the vicinity without leaving his wife the proper means of support or naming a substitute provider for her, she could choose to approach the court and ask for an assignment of *nafaqa*. The judge would then require that she swear that her husband had neither left her support nor named a provider, that she was not a "disobedient" wife (a category we will explore below), and that she had not been divorced. She might also be asked to produce, if the judge had no personal knowledge of her marriage, evidence that she was indeed married to the man from whom she claimed *nafaqa*. In response to her request for *nafaqa*, the judge was then authorized to fix an appropriate amount of support, expressed in money to be paid on a daily basis.[56] According to Khayr al-Din, certain procedures and standards of evidence had to be met before *nafaqa* could be assigned. He offered one terribly flawed case as an example of how it should not be done:

> QUESTION: There is a man in Egypt who has a wife in Ramla, and she has a brother in Jerusalem who came to the qadi and asked that he assign *nafaqa* for his sister in Ramla from her husband in Egypt. The man did not present evidence of the marriage or of his agency [for his sister], nor did he have legal guardianship [of his sister]. She was not present, and she did not swear that he had not left her *nafaqa*. He [the judge] did not ask if they were poor or

> rich or if one of them was rich and the other poor. . . . But he imposed on the absent man a sum of *dirhams* without first determining the man's situation, and he wrote a document that contained an assignment of a sum of *nafaqa* to so-and-so and her children for the costs of meat, bread, oil, bath entrance, soap, laundry, and all their needs, and the sum was, each day, 8 *qita' misriyya* [Egyptian coins] imposed on the absent husband, and the judge gave her permission to provide for herself and her children, and the husband will owe the money, and this permission was given to her brother, her agent, "so-and-so." And it is the case that the children are in no need of their mother and the daughter is weaned. . . . Is this assignment legal?[57]

Khayr al-Din pointed out, in a lengthy response, that this case lacked almost all the legal conditions for assignment of *nafaqa:* there was no evidence that the wife had made this request herself; she had not sworn that her husband had not left her *nafaqa* and that she was not legally "disobedient"; and the judge had not investigated the material circumstances of the couple and their children in order to assign a proper level of support. Elsewhere, Khayr al-Din reminded a judge that unless the husband were away from his "hometown" (*balad*), he had to be present in court when the judge assigned *nafaqa.*[58]

Once such conditions were met, however, and a judge had made an award of *nafaqa,* a husband was legally required to make the payments, and could be imprisoned until he did so.[59] If the husband could not be found or reached, the woman who had been assigned *nafaqa* by the court was authorized to borrow money in the amount of the assigned *nafaqa,* and the debt devolved on her absent husband. The muftis were firm in their position that any debts incurred by a woman for her awarded *nafaqa* were the sole responsibility of her husband, once he became available.[60] In this manner, the right of a wife to material support from her husband could be activated and enforced by the legal system. The jurists underscored the central role of the qadi and court in the regulation of this support should problems arise: it was essential that a woman obtain a legal

assignment of *nafaqa* if she wanted to force her husband to meet his obligations, or if she needed to borrow money in his absence.

The muftis did not limit their discussion to legal procedure; they were also ready to give detailed instructions concerning what a wife could expect and require as appropriate *nafaqa* in terms of food, clothing, and shelter. A woman could not demand more than what was considered necessary to the customary standard of living of her social group, as we saw above in the question of food consumption. Thus the jurists were careful to guard a wife's right to *nafaqa*, but they were equally firm in limiting this support to a reasonable level. *Nafaqa* for clothing for the wife of a poor man of the Ramla vicinity, according to Khayr al-Din, should be sufficient for two gowns, a veil, and a cloak, the customary clothing of the poor. These clothes, along with a diet of barley bread, corn, and oil, were all that a poor woman might demand.[61]

al-'Imadi's opinions, by contrast, dealt with questions of a rather more exalted lifestyle, in keeping with the Damascus milieu. A woman from a comfortable background might refuse the hard work of making her own bread and processing other food at home; if such a woman did not have a household servant, her husband had to provide her with prepared food bought in the market as part of her *nafaqa*. A woman of respected status, such as a *sharifa*, whose husband was affluent, could demand a servant to help with household tasks. The *nafaqa* owed to a woman could also extend to her personal slave, if her husband was of sufficient wealth to maintain a household with slaves.[62] *Nafaqa* was not conceived of, then, as simply provision for subsistence: wives had to be supported in the manner to which their social group was accustomed, and the legal system was mandated to divine the standards of any social group in a given community.

In the matter of housing in the legal marital domicile, the muftis followed what they held to be very distinct guidelines. A wife had to be lodged in a house "separate" from the dwellings of other people, defined as one with a door that could be locked and that was fully equipped with its own conveniences, including a private toilet and kitchen. The house

had to have its own water supply—a well or cistern—or the husband had to be prepared by other means to supply all the water his wife needed. The house had also to be located among "decent" neighbors where the wife's person and money would be secure.[63] The human need for same-sex companionship also figured into housing requirements: a woman had to have *mu'anasa*, companionship or conviviality, which could be provided, we may infer, only by female relatives, friends, or servants. A man might need to lodge a female companion with his wife if she lived without servants, but trustworthy neighbors would usually suffice.[64]

One form of companionship a woman might legally refuse was that of a co-wife. The muftis agreed that co-wives were entitled to separate dwellings, that is, dwellings that fit the definition of a legal marital residence, complete with locks and private bathroom and kitchen facilities. Such a dwelling could be located right next door to that of a co-wife—off the same courtyard, for example—so long as it fulfilled the requirements of separate locks and facilities.[65] A woman could not refuse, however, to live in the same house with other members of her husband's family, including his concubine, his mother, or his children by another mate as long as they were not yet old enough to "understand sexual intercourse."[66] She was not obliged, however, to suffer undue noise or annoyance as a result of living with her husband's family.[67] Although a wife could be expected to live with her husband's family members, the reverse was not at all the case. A man had no obligation to house his wife's children by a former marriage. Nor was he required to lodge his mother-in-law in the same house with her daughter; on the contrary, he could forbid her the house altogether with the exception of a weekly visit.[68]

The muftis, then, not only held the husband responsible for the *nafaqa* of his wife, but also elaborated in some detail on the form this support should take. The obligation of the husband to support his wife entailed a provision of food and clothing of a quality appropriate to her social background, an issue particularly prominent in the more urbanized and stratified locales. Much of the discussion of shelter, by contrast, focused on the strict legal requirements of the marital domicile. The gen-

dering of space, and particularly of marital space, emphasized the married woman's need for privacy and relative autonomy, needs shared by all women regardless of social class. Spatial arrangements that allowed a woman to lock herself away from her husband's kin in order to perform her toilet and to prepare her food in private were an absolute minimum standard for a marital household, and were enforced by the jurists.

The muftis, in attending so earnestly to the details of *nafaqa* arrangements, signaled a serious commitment to the husband's obligation to support his wife and the wife's right to demand support commensurate with her status as a married woman of a given social class. A strongly gendered vision of male as provider and female as recipient of support, indeed one with well-defined rights to a certain level of comfort and privacy, underlay this discourse. There was a bill to be paid, not surprisingly, for this support: husband as provider for the marital family was also husband as ruler of the marital family. Upon marrying, a man acquired certain rights vis-à-vis his wife, rights that the jurists worked to clarify for their time and place.

The muftis agreed that a wife owed her husband obedience. The woman who did not obey her husband, the *nashiza* (disobedient) wife, forfeited her right to *nafaqa*. Such forfeiture was, indeed, the only penalty mentioned by the muftis, the sole disciplinary action they appeared to sanction. On a practical level, a husband could, of course, choose to divorce a disobedient wife, or to take a second wife as a form of discipline, but neither of these acts was suggested as sanction by the law. What exactly constituted disobedience (*nushuz*), and thus justified cancellation of *nafaqa*, involved the jurists' understanding of what a man could and could not demand of his wife.

The basic purposes of marriage—social harmony and sexual satisfaction—could not be fulfilled unless husband and wife lived together. The muftis agreed that a wife must inhabit the marital domicile. At the same time, however, there was room for some difference of opinion on the extent to which a woman must accommodate her husband if, for example, he decided to travel or move. As a general principle, a wife had to move

with her husband, but the jurists found that the distance involved as well as the location of the woman's hometown and her place of marriage were factors to be considered. A wife could be required to move with her husband if the distance was not considerable. al-'Imadi, in giving the nod to husbands who wanted to move their wives from one-fourth to one-half a day's journey away, cited the positions of two different fatwas for guidance. The first stated that a man could move his wife as far as he liked so long as it did not constitute "exile." The second defined the maximum distance as that which one could travel in a day before nightfall.[69] Khayr al-Din also noted that the fatwa literature varied on this problem, especially when there was a considerable distance involved: past muftis had differed over whether a woman could be declared *nashiza* if she refused to move a "distance of travel" with her husband.[70] When a "distant place" was involved, however, the question was clear as far as al-Tamimi was concerned: the husband was absolutely forbidden from insisting that his wife move.[71]

Legal discourse recognized a certain level of ambiguity in the rule that a wife must live in her husband's house, an ambiguity that arose from the idea that a woman should not be asked to make a move that entailed undue hardship. The woman's hometown, defined as the place where she was married, was a factor to be considered in assessing the hardships of a move. Although a woman did not enjoy the unconditional right to remain in her hometown, she could refuse to move too far abroad.

A wife had far less latitude, however, in her ability to leave her husband's house against his wishes. All the muftis agreed that a woman who defied her husband by leaving his house was *nashiza* and had therefore forfeited her *nafaqa*.[72] A man might grant his wife permission to leave on an extended visit, but she should return in the time agreed. One woman left her husband in Lidd to attend her sister's wedding in Nablus with the understanding that she would return in a month. When, after a year had passed, she still remained in Nablus, Khayr al-Din found that she had clearly disobeyed her husband and had lost her rights to *nafaqa*.[73] Nor was illness a valid excuse for absence from the marital domicile. In

the case of an ill woman who had moved to her parents' house and remained there despite her husband's demand that she return, al-'Imadi ruled that she should return to her husband "if it is possible for her to move to her husband's house on a litter or similar thing." If she refused, she would lose her *nafaqa*.[74] And in the most extreme yet permissible of behaviors, a husband was within his rights to forbid his wife to leave the house or to receive visitors, with the exception of her parents.[75]

There is little question that the marital domicile was the husband's house, that he was the proprietor, and that he set the rules and the tone. His comings and goings were not to be scrutinized so long as he fulfilled his obligation of providing for the household. It fell to the wife, on the other hand, to make such moves and other accommodations to life in her husband's house that might be necessary to realize the marital purposes of sexual companionship and social harmony. There was no hesitation on the part of the jurists in requiring wifely obedience as the key to this harmony, but a husband's demands were also subject to some constraints. His wife must live in his house, but the house must be equipped and located in such a way as to ensure her comfort, both material and emotional.

The muftis were mostly silent, however, on the question of the rules governing a husband's physical abuse of his wife. Only Khayr al-Din addressed this question directly:

> QUESTION: There is an evil man who harms his wife, hits her without right and rebukes her without cause. He swore many times to divorce her until she proved that a thrice divorce [a final and irrevocable divorce] had taken effect.
> ANSWER: He is forbidden to do that, and he is rebuked and enjoined from her. If she has proved that a thrice divorce has taken place, it is permissible for her to kill him, according to many of the *'ulama'* [jurists] if he is not prevented [from approaching her] except by killing.[76]

Elsewhere Khayr al-Din included decent treatment of a wife among a man's marital obligations: in addition to the expected requirements of a

separate and secure domicile with conveniences, respectable neighbors, and so on, Khayr al-Din expressly forbade any "intentional ill treatment" of a wife.[77] He further noted that any battery of a wife that resulted in injury could be a matter for legal compensation: the man who knocked out three of his wife's teeth had to pay her the legal indemnity prescribed for such an injury.[78] Although there are no such explicit statements in al-'Imadi's or al-Tamimi's work, all the muftis did agree that such advantages as a husband may have secured from his wife by using force or threats of force were ill-gotten gains with no legal standing in court. A husband had no right, automatic or otherwise, to his wife's property. Men who coerced their wives to give them legal agency, to pledge their property as security for a husband's borrowing, to hand over their *mahr*s, or to forgo the balance of a *mahr*, were reminded that coercion invalidates such transactions.[79] The jurists were certainly conscious of the fact that the assignment of strongly gendered roles in marriage risked just this kind of abuse, but they relied on moral exhortation, as well as sanctions against gaining legal advantage through abuse, to lend protection of a sort.

The rights and obligations of a married couple heightened and ordered gender difference. A man was to provide; a woman was to consume. A man was to decide; a woman was to obey. The idea that such net differentiation ran the risk of fostering hostilities, of producing social rifts if not outright conflicts along gender lines, lurked between the lines of the legal discourse. The task of a legal thinker thus was not only to distinguish the male from the female, but also to elaborate on distinctly gendered rights, many of which privileged men but some of which worked to temper male dominance. The legal discourse on marriage was being constructed, of course, by men who themselves had a vested interest in male dominance. Marriage, however, was more than an individual male-female affair: it was a relationship with broad social resonance. As part of their responsibility for the welfare of the community, the muftis were pledged to harmonizing gender interests as much as possible and reducing what they termed abuses. It was in this spirit that they attacked the thorny problem of entrenched social practices that violated

the letter and the spirit of the law, many of which tended to disregard female rights in marriage.

CAMPAIGNING AGAINST CUSTOM

On occasion, the jurists could find themselves locked in combat with social custom when custom threatened to undermine the harmony in gender relations they sought to achieve. The three muftis were unanimous, for instance, in their condemnation of the practice of testing a bride's virginity on her wedding night and then returning her to her family should she fail. The fact that all three jurists addressed this issue suggests that at least some communities in all three locales did integrate tests of a woman's virginity into the ceremonies surrounding the consummation of the marriage. But virginity or the lack thereof on the part of the bride was irrelevant, according to the muftis, to the constituting of a marriage. Men who found that their brides had been previously "deflowered" were informed that they could not cancel the marriage, send the bride back home, or demand the return of the *mahr*.[80] Khayr al-Din offered the most thorough critique of this practice when confronted with the situation addressed in the fatwa opening chapter 1 (a man who found his bride deflowered on their wedding night sent her back to her family, and then abducted her sister). In a sizzling response to this drama of honor, shame, and violence, Khayr al-Din made two distinct arguments against the practice of testing virginity. First, he averred that the condition of a woman's hymen had nothing to do with the legal contracting and consummating of a marriage. Indeed, once a marriage was legally contracted and consummated, the only way to dissolve it was by legal divorce with all the concomitant obligations of payments both for the balance of the *mahr* and for support during the wife's waiting period. A man cannot simply return a woman as damaged goods. Second, Khayr al-Din questioned exactly how a man would know that his bride was not a virgin. In a sophisticated and compelling discussion of female anatomy, he added that a hymen can be damaged or destroyed in a number of ways,

including by accident or illness. A groom is not an expert on such matters, and is in no position to make such judgments. It is the woman's testimony that takes precedence.[81]

The virginity test, and the consequent rejection of the deflowered bride, thus had no place, according to the muftis, in Muslim marriage practices. It was a social practice that not only lay outside the pale of the laws governing marriage, but could also result in the active violation of Islamic law: a woman returned to her family after her wedding night was not, in these circumstances, properly divorced, and was, by the letter of the law, still married. If she were nonetheless treated as a divorced woman, that status would mean that her rights to *mahr* payment and support had in turn been summarily abrogated, an entirely unacceptable and illegal outcome.

The practice of marriage by capture incurred equal opprobrium. In the following instance, Khayr al-Din was consciously addressing the practice of abducting a bride as a not uncommon rural phenomenon:

> QUESTION: A man approached a woman, a virgin in her legal majority who was married to someone else, abducted her in the month of Ramadan, and took her to a village near her own village. He brought her to the shaykh of the village, who welcomed him and gave him hospitality and protection. There the man consummated the "marriage," saying "between us there are relations." Such is the way of the peasants. . . . What is the punishment for him and the man who helped him? . . . Should Muslim rulers halt these practices of the peasants . . . even by combat and killing?
> ANSWER: The punishment of the abductor and his accomplice for this grave crime is severe beating and long imprisonment, and even worse punishment until they show remorse. It is conceivable that the punishment could be execution because of the severity of this act of disobedience to God. This practice—and one fears for the people of the region if it spreads and they do not halt it—will be punished by God. The one who commits this act, and those who remain silent about it, are like one who punches a hole in a ship,

> [an act] that will drown all the passengers. . . . It is the obligation of Muslim rulers to commit themselves to putting an end to this revolting practice . . . even if it means punishment [of the offenders] by combat and killing.[82]

Here and elsewhere the jurists acknowledged the existence of a marriage practice that not only negated almost all the Islamic rules governing marriage arrangements, but also circumvented both family participation and female choice, a practice that nonetheless was accepted not only by the general population of a given area but even by those in authority, the village shaykhs.[83] In his use of the dire analogy of the sinking ship, Khayr al-Din assailed such a practice as hostile not just to the interests of a bride and her family, but also to the moral fiber of the community as a whole. The alarm in his response undoubtedly reflected a very real fear that parts of the Muslim community for which he felt responsible could slip out of his control, that is, out of the orbit of Islamic law and legally sanctioned Muslim practice. The importance of marriage as a central Islamic institution, lying at the heart of the social life of the community, was abundantly clear to Khayr al-Din.

Another local practice addressed with disapproval by the muftis was that of bartering brides between families, or of bartering a bride for other favors, from another family. Such arrangements usually involved the waiving of a *mahr:* the fathers or guardians of two girls would agree to exchange them as brides between the two families without incurring any expense. Alternatively, a girl might be given to another family as a "gift," for purposes of goodwill or material gain. According to the muftis, this bartering of brides could not be squared with Islamic law. Every marriage had to meet the basic requirements of the marriage contract, including a *mahr,* proper guardianship or consent, and witnesses. Every marriage arrangement had to be able to stand on its own: it could not be made contingent upon the arrangement of another marriage or the delivery of goods or favors, and it could not be such as to deprive a bride—or, worse, two brides—of proper *mahr.*

The muftis were consistent in their opposition to any such external, contingent conditions.[84]

Although legal discourse on marriage evolved in response to concrete social conditions, it did not accommodate all existing social practices. On the contrary, certain persistent customs, including the testing, abducting, and bartering of brides, were consistently and heatedly denounced by the jurists, but not thereby eradicated. In an institution constructed to recognize, and yet harmonize, gender difference, practices that reduced women to chattel, whose sole worth lay in their usefulness to immediate family honor or gain, could not but be viewed as destructive. Men and women came to marriage as distinct people with asymmetrical rights and obligations reflecting innate biological difference. On such difference lay the foundation for a stable and harmonious relationship, one that was central to the overall good of the Muslim community. The jurists, in their recognition and elaboration of gender difference, did not, however, countenance practices that translated this difference into unbridled male domination. The legal discourse existed, in large part, to regulate gender relations, to ensure that both males and females understood the proper parameters of their social roles, and to prevent abuses in gender relations, most of which occurred at the woman's expense. The presence of this discourse, and its accessibility in the form of a local mufti or other *'ulama'* who was learned in the fatwa literature of the past, provided a firm basis for claims to gender-based rights, as well as protests and appeals of gender-related abuses.

MARRIAGE IN THE COURTS

The fatwa literature was, at least in theory, a literature reflecting legal practice: the muftis were usually responding to concrete problems either raised by members of their own communities or referred to them from other Muslim communities by judges in the Islamic court system. All problems pondered were supposed to refer to actual situations: jurists were not to invent interesting questions in order to solve them. We can-

not be sure, however, that such was the case. Probably many, or most, or even almost all of the questions the muftis answered did originate in real life, but we cannot rule out the possibility of embroidery or invention. The fatwa literature, then, cannot be read as a straightforward record of events in the life of a given community, so much as a reflection of the concerns of its learned hierarchy as they constructed a social discourse within and for that community.

The Islamic courts provided a forum for the multiplicity of voices in the community. Qadis listened to the plaintiffs who came to the court, weighed the evidence of witnesses and documents, and ruled on the issues. They did not indulge in juristic discussion and, indeed, rarely justified or explained their rulings. The minutes of the court proceedings are much more a record of the uses the population made of the Islamic court. The problem is often presented by a plaintiff in some detail, complete with explanations, evidence, and narrative, but the judge's reply is sparse and unadorned, usually a simple thumbs up or down, perhaps with brief instructions on the implementation of the decision. The fatwa literature captures the contours of an intellectualized legal discourse, and the court records demonstrate, in part, how that discourse was understood and mobilized by members of the community in the pursuit of their own ends.

In part, too, the courts acted as a marriage registry. In Jerusalem, and to a lesser extent in Nablus and Damascus, marriage contracts were entered into the court records. In each case, the titles and lineages of the bride and groom, their agents or guardians, the type and amount of *mahr,* and the witnesses to the agreement were included in the written form of the contract.[85] People of various social backgrounds registered their marriages in the courts, but in Damascus and Nablus only a minority of the population appears to have bothered to do so. The advantages of such registration included the establishment of a permanent written record of the marriage agreement. To register your marriage in court was to place marriage and its consequent rights and obligations squarely under the jurisdiction of the Islamic court, in anticipation of the court's playing a role

in any later disputes concerning marriage arrangements or *mahr* payment. Such registration was not essential for subsequent claims or complaints concerning a marriage, but could no doubt lend strength and substance to testimony on amounts of *mahr* and other matters. A written record of the marriage agreement might also have served to obviate the need for court action: if the facts of the marriage were readily available to all, many potential disputes simply would not arise.

Indeed, people did not often bring questions about marriage arrangements to the court, although occasionally the issue of whether a marriage had actually occurred came up. A Muhammad b. Kamal explained to the court in Jerusalem that he had married off his minor son to his sister's minor daughter through a legal agreement with the girl's guardian that included a fair *mahr*. He went on to complain that the girl's guardian had subsequently refused to deliver the girl to her husband, claiming that there had been no such marriage. There was no written agreement in the court for anyone to consult, but there were witnesses to the marriage who could testify that it had indeed taken place as claimed, and the guardian was ordered to deliver the bride to her rightful husband.[86] Another Jerusalem bride claimed through her agent that she had never been married to a plaintiff, but both her maternal and paternal uncles testified against her, saying that she had been married off as a minor eight years previously, and she was "delivered" to her husband.[87]

In these cases, men who sought to claim their brides were relying on the court to enforce dictates concerning marriage arrangements. They were careful to bring evidence that demonstrated their adherence to the legal requirements of marriage arrangements, and in the case of the marriage of minors, they were conscious that the proper assignment of guardianship and fair *mahr* payment were mandatory.

Not all court decisions worked against the interests of females. Women relied on the privileging of *mahr* in the legal discourse to collect the balance of the *mahr* after marriage was ended by death or divorce. In theory, a woman was to receive any unpaid *mahr* from her husband's estate as a first claim against his property. In practice, a woman

might have to resort to the court to collect unpaid *mahr* from recalcitrant heirs. In cases where a woman came in person (a not uncommon practice among the less affluent) or sent her agent to court to claim such a debt, the judge was quick to instruct her husband's other heirs that her claim took priority.[88]

A woman might also go to the court after her husband had divorced her in order to collect unpaid *mahr.* A Maryam bt. ʿAbd Allah appeared before the judge in Damascus and complained that her husband had just divorced her but would not pay her either the 15 *ghurush* he still owed her from the *muqaddam* of her *mahr* or the 70 *ghurush* he now owed for the *mu'akhkhar.* The judge then stepped in to regulate the payment of this money as well as other divorce obligations.[89] Such claims, of course, did not always go the woman's way. If a man could produce evidence that he had paid the *mahr,* or if he took a formal oath that he had paid it and the woman could not produce oral or written evidence to the contrary, the court would deny the woman's claim.[90]

The fear that claims for unpaid *mahr* might be made at some point in the future seemed to underlie the practice of registering the payment of *mahr* in the court. Upon occasion, couples would come to court so that the husband could testify that he had divorced his wife and she could testify that she had received the balance of her *mahr* and had no further claim on her husband.[91] There was no ostensible legal reason for testifying, in court, to *talaq* (divorce) and the subsequent payment of *mahr,* save for the avoidance of dispute in the future. That some men chose to protect themselves in this fashion suggests the degree to which *mahr* obligations were taken seriously.

In the care with which the court registered *mahr* amounts, entertained *mahr* claims, and oversaw *mahr* payment, we discern the fine hand of the muftis, whose consistent position on the enforcement of *mahr* obligations resonated in court practice. There were a multitude of ways, no doubt, by which female rights to a fair amount and timely payment of *mahr* were abridged in social practice, but the courts were not ready to countenance deviation from the legal discourse on the sacrosanct

nature of this female right and male obligation. Women did not bring this matter to the courts very often, but the fact that at least a few women continued to do so suggests that they were conscious of the legal position on this issue.

The greatest proportion of court cases that were related to marriage, outside of the contracts themselves, were those concerned with the *nafaqa* (support) that a husband owed his wife. Most *nafaqa* cases consisted of an award of *nafaqa* that was expressed as a certain sum of money each day to provide for the woman's needs. These needs varied but often included the costs of her clothing, rent, meat, oil, bread, drink, soap, henna, and bath admission, valued at anywhere from two to eight *qita' misriyya* in the eighteenth century. The judge awarded a stated amount of *nafaqa*, authorized the woman to spend this amount of money on herself, and made the husband responsible for the payment of this sum and possibly any debts the woman might incur should she have to borrow money to cover awarded but unpaid *nafaqa*. A typical *nafaqa* award read as follows:

> The shari'a judge award *nafaqa* for clothing, house rent, toiletries, soap, bread, oil, and other things, and the rest of her legally prescribed needs, to the *hurma* [lower-class woman] Amna bt. Darwish al-Ghazawi on the date below [in the amount] of two *qita' misriyya*. He permitted her father Darwish to borrow the money, and the debt incurred will be owed by her husband, Ahmad b. Subah, who was away from the city and had left her with neither *nafaqa* nor anything else, nor had he delegated a legal provider for her in the prescribed legal fashion.
>
> Recorded at the beginning of Rabi' I 1138 H. (1725 A.D.).[92]

Women like Amna came to court seeking *nafaqa* awards when their husbands were absent and had failed to leave them with support. Often the woman appeared in person to swear that her husband was indeed gone and that he had not left her with adequate means, although on occasion she might send an agent to present her case. In some instances, provisions had seemingly been exhausted, such as in the case of one Sa'da,

who told the judge that her husband had left her two jars of oil, some fabric, and some greengroceries. He had been gone, however, for a year and a half, and these supplies were manifestly inadequate. In this case, and in virtually all the others that reached the court, the judge accepted the woman's testimony and made an award of *nafaqa*.[93]

Just as many awards of *nafaqa* were made when the husband was not absent at all, but rather appeared in the court with his wife to be assigned his responsibilities. In these cases, the women did not testify to their husbands' absence or lack of support, but did receive an award and the same kind of permission to borrow up to the amount of the award, if necessary, against the husband's repayment. *Nafaqa* was awarded for the same items and in the same amounts as would have been the case with an absent husband.[94] Lacking explicit explanation, we can only speculate on why some couples sought an award of *nafaqa* from the court. In some instances, a woman would ask for a legal award on the eve of her husband's departure on a trip, as a means of protecting herself against his failure to return in the expected time period. Once she had the award of *nafaqa* in hand, she could then borrow the money she needed without incurring personal debts. Women also used the court forum for redress. If a husband was not supporting his wife adequately, she could come to court, have her *nafaqa* awarded, and thus obtain legal backing for a specific level of support. Once *nafaqa* had been awarded, the failure to pay it in the specified amount was punishable by imprisonment, a situation affording her a powerful means of enforcement.

That women came to court, with or without their husbands, to seek awards of *nafaqa*, strongly suggests that the legal discourse on marital *nafaqa* was taken seriously by the court. The Islamic court system acted to buttress a wife's right to material support: there is no record of refusal of such requests. Women came to court in expectation that the court would, in fact, back them up and act effectively in securing them proper support. By repeatedly raising this issue, women also contributed to its centrality in the discourse on marriage. Here as elsewhere it is impossible to draw a neat line between the discourse being fashioned by the

muftis and the activities of the judges, plaintiffs, and defendants in court. We must assume a reciprocity between an intellectualized legal discourse and the more diverse discourses of the court system, as the muftis responded to social concerns and the courts and the people took heed of past juristic responses and anticipated those of the future.

The court system embraced the binary opposition of gender in marriage that was elaborated by the muftis. The judges and the court's clients accepted this gender difference as the foundation of the marital relationship. They also cooperated, however, in the larger project of ensuring that this difference promoted the harmony and stability of the community rather than breeding its disarray. By acting as a marriage registry where the details of marriage agreements could be recorded for future reference, by enforcing legal procedure and rights to *mahr*, by ensuring that *nafaqa* obligations were met, and, above all, by supplying a dependable space in which people could express their grievances and expectations, the courts helped elaborate the legal discourse on gender and served as the arena for the intersection and interaction of different levels of that discourse.

The marital relationship that the muftis and the courts described and defined served as a potent symbol of women's place in society. The distinctness of male and female roles in marriage, the clear denotation of the marital household as the locus of male authority, and the expectation of wifely obedience as fulfillment of a primary marital duty all point to a gendering of the marital relationship in which male was equated with power and command and female was equated with subservience and obedience. Embedded in the muftis' discussions of marriage and the courts' judgments, however, were nuances that suggest the ways in which social relationship softened and transmuted symbol. A woman was expected to come to a marriage endowed with property; she could choose her own spouse; she had well-defined and well-enforced expectations of support; and she enjoyed certain protections from coercion and abuse. She acquired through marriage a number of

important rights—to property, to material and psychic comfort, to sexual satisfaction—that could not help but hedge the gender dichotomies of marriage under law. A woman's ability to call up these rights and privileges was circumscribed to a great extent, however, by the extent to which she could exercise control over the duration of her marriage, that is, by her power or lack of power in the face of the ever-present threat of divorce.