The Emergence of “Divorce Before Consummation” as a Legal Category in Jordanian Sharia Courts fictions

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Today’s inquiry into the nature of legal fictions takes us to Jordan’s government-run Sharia courts, where the concept of “divorce before consummation” (*ṭalāq qabl al-dakhūl*) has become something of a “living fiction.” Nowadays, “divorce

before consummation" is dutifully tracked through the Sharia Courts' *Annual Statistical Report* in its section on divorces. Those figures are (somewhat ironically) further disseminated by dissident Islamic intellectuals in their critiques of the state, its courts, and the broader society. A representative sample of over 800 marriage contracts dating from 1926 to 2011 that I constructed shows that the category of "divorce before consummation" appeared relatively suddenly in marriage contracts in the late nineties, after which point a small but consistent number of contracts in the sample invoked the category. Interviews with Court officials and experts in customary law reveal that secular officials in governors' offices have been obviating Sharia Court authority for decades in extreme cases of "divorce before consummation" in the name of public order. Yet despite solving an immediate problem by filling a gap in the courts' system of terminology for personal [marital] status, the concept has simultaneously become a sort of platform from which people can voice critiques of not only the broader society but also the state and the courts themselves.

As I have argued elsewhere (Hughes 2015), Jordan is home to a number of overlapping codes of family law. The most prominent are Islamic "Sharia law" (largely embodied in Jordan by its government-run Sharia Courts) and *'adāt wa taqalīd* (customs and traditions: largely embodied in Jordan by large agnatic kin groups). "Divorce before consummation" emerges as a legal fiction due to a contradiction between these two parallel systems of family law: that one can be "married" in the Islamic sense that one has signed a marriage contract without being "married" in the traditional sense of having consummated the marriage.

> *In practice, most people attempt to studiously abide by both 'customs and traditions' and 'Islam' when legitimating their marriages.*

So the typical set of rituals involved in getting married comes to look something like this: After whatever discrete matchmaking among senior women and/or courtship between the couple and their families has taken place, an elaborate ritual known as the *jaha* occurs in which a delegation of the groom's male kin

announces their wish to 'get closer to' (*qaruba*) the family of the prospective bride. After performing their agreement (with or without serious negotiations over the exchange of bridewealth), the oral contract is ratified through rituals of shared commensality involving the two groups of [male] agnates and the senior males who serve as their respective representatives. As far as the agnatic kin group has traditionally been concerned, the next step is the wedding, ending with its consummation and the creation of a legitimate social bond between the husband of the bride and any children she might give birth to. These wedding rites ensure that these children will have the agnates that are so central to all legal proceedings within so-called "traditional" law.

Yet for hundreds and, in some places, *thousands* of years, more urban people have been inserting written contracts into the midst of this process. These, by their nature, have a largely individuating effect, foregrounding the individuals most immediately concerned with the marriage and deemphasizing their extended kin groups. In many cases, these written contracts have accorded all manner of rights to women—in some cases rights that women in Europe would not enjoy until the nineteenth and twentieth century (Sonbol 2008). As far as mainstream Islamic law is concerned, it is these contracts that effectively embody the marriage and obviate the rest of this ritual pageantry surrounding the oral contract. The contract is an agreement that obligates the husband to support and care for his wife. Once it is signed then the husband can only be freed of his obligations by divorcing her and paying her the *mahr* (the bridewealth or alimony payment) to which they had agreed in the marriage contract. Those who identify strongly as Muslims in Jordan today tend to abhor families who "eat" the bridewealth of their daughters. They mock overly-gaudy wedding and engagement parties, and they express horror at the idea that their ancestors ever partook in the widespread Old World practice of displaying the bloody sheets after the wedding as visible proof of the bride's virginity [1]. Yet while reform-minded Muslims tend to be more vocal, the continuance of these other practices and rituals in the face of hundreds of years of campaigning by urban religious practitioners [2] forces us to contend with the fact that on some level, for many

Jordanians, the Islamic ritual of the written contract is simply sterile and unsatisfying.

Mufid Sarhan and Faruq Badran's Spinsterhood: The Reality, The Causes, The Solutions combines the government Sharia Courts' own data with social criticism to argue for the existence of a 'crisis of marriage.' Its authors believe that declining marriage rates represent a betrayal of the aspirations of many Jordanian women and a threat to social cohesion more generally

So the two systems amble along, side by side, and it is hard to over-emphasize how often they work in relative harmony. Usually, they are complementary. The interactive context of the courthouse foregrounds individual consent and minute matters of personal status. Meanwhile, it is easy for guests to leave an engagement party, a wedding, or a delegation unsure of who precisely is marrying whom—even as such rituals nonetheless clearly materialize the broad-based communal support for the match. People can claim whatever bridewealth they want in public, but it is much harder to get out of whatever has been agreed to in writing. People talk openly about contracts signed long before the couple can wed—the better to "encourage" them: that is, to keep the youths delaying gratification and contributing to these larger multi-generational kinship projects.

> *But the very emergence of the legal category of "divorce before consummation" seems to be widely accepted in Jordan as itself evidence that all is not well.*

Accounts differ as to what precisely is going on here and what the nature of the problem might be. Rania Salem (2012) makes a convincing case that longer engagements can serve as a prolonged courtship that allows young people to effectively assert autonomy in the face of gerontocratic power structures. This would mean that young people were using "divorce before consummation" to get out of "bad" matches. Meanwhile, the more conservative and rural people I have interviewed on the topic point to the immense costs of a broken engagement—to say nothing of the cloud that subsequently hangs over the sexual purity of the groom and (especially) the bride. It is for these reasons, especially the economic and reputational costs of divorce before consummation for the vulnerable (women, the poor) that Jordanian Sharia practitioners have begun documenting and debating the phenomenon.

> *Like the divorcee and the spinster, the woman divorced before consummation has emerged as a figure of concern both for court officials and members of the broader Islamic movement. Yet the woman divorced before consummation is, of course, a product of the court's own knowledge practices.*

The category is a somewhat inexorable development of much older evidentiary principles central to the knowledge practices of the courts. As a matter of course, all unmarried applicants to the court who have never signed a marriage contract are defined as virgins and celibates (depending on gender). Famously, to accuse someone of adultery under most interpretations of Sharia requires four eye-witnesses—making it nearly impossible for court officials to challenge any assertion of sexual propriety. Obviously, questioning the virginity of the couple after the signing of the marriage contract would not technically be accusing the couple of adultery from the perspective of Sharia because they are seen as already married. The problem is that this would nonetheless be accusing the couple of grave improprieties from the perspective of customs and traditions–something divorce judges and notaries are in fact loathe to do given the real force that alternative systems of family law still exert and the dependence of the courts on the basic cooperation of applicants.

Yet officials cannot possibly deny the meaning and significance of the signed contract either—despite the awkward resulting position for anyone who falls into the breach between the two parallel systems of marriage law. As divorce judges and the notaries who prepare the marriage contracts begin to legally recognize the rituals of another legal system within their own knowledge practices through the legal fiction of "divorce before consummation," the category comes "alive".

> *As a compromise with customs and traditions, "divorce before consummation" opens those customs and traditions up for critique at the same time that it invites scrutiny and critique of the courts themselves and the state of which they are apart.*

While "divorce before consummation" is primarily mobilized as an indictment of the broader society, it also opens the state and its courts up to new kinds of political demand as well. Perhaps the most interesting aspect of this phenomenon is a study conducted for the Master's Thesis of an Islamic activist named Amal 'Abdeen under the auspices of the Supreme Judge of the Jordanian Sharia Courts

(2010). In it, she mobilizes the category of the woman divorced before consummation, relying on the courts themselves to help her enlist in her study fifty women divorced before consummation and fifty women divorced in the first year of marriage. The confluence of legal category, scientific writing, and anonymous questionnaire in this thesis colludes to produce a new, hybrid voice. It is simultaneously individual and feminine (like the forms of voice articulated and highlighted in the confines of the contract signing) but also public and highly mediated (like the forms of voice articulated in the family delegation). As a document, 'Abdeen's thesis voices these women's collective thoughts on the unraveling of their marriages.

This is how the person—specifically the woman—divorced before consummation can be transformed into a figure of victimhood—an embodiment of the failure of the courts and the state it represents to protect those who fall through the cracks of the (logically prior) system of agnation that the courts are supposed to bolster and correct. To be sure, the main culprits according to 'Abdeen's research are kin themselves. She writes that, "the findings indicate that the most important reason for divorce among the divorced is a bad match, followed by familial interference, then lack of bearing responsibility, followed by subordination of the husband to his mother or another member of his family" (2010: 17). But 'Abdeen also clearly identifies the state's responsibility and complicity as well. She ultimately advocates for "consciousness-raising" *(taw'īya)* through the media and the relevant ministries, including more "guidance for willing individuals" from the courts "before the case gets to the Judge," and, of course, more research (2010:152).

While it is hard to argue that these developments break free of their patriarchal premises, we can see how the emergence of novel legal fictions, while smoothing over some contradictions, also highlight and exacerbate others. As the Jordanian Sharia Courts and the Islamic intellectuals who care about its system of justice have been forced to contend with these sorts of contradictions, they have been key innovators in the production of novel forms of individual and collective "voice"—which have allowed for the articulation of new critiques of kinship

structures, the state, and the courts themselves.

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[1] See Vassos Argryou’s (1996) *Tradition and Modernity in the Mediterranean: The Wedding as Symbolic Struggle* for a description of changing social mores around the display of bloody sheets as a virginity signifier in a Christian context.

[2] Jennifer Tucker's study (1998) of the legal opinions of the seventeenth and eighteenth century Sharia practitioners in Ottoman Palestine reminds us that they railed against virginity tests and the diversion of bridewealth from divorced women then in much the same way that they do now.