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Family law in Syria: a plurality of laws, norms, and legal practices

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PART II

UNITY IN MULTIPLICITY: MUSLIM AND CHRISTIAN LAWS AND LEGAL PRACTICES

4 Patriarchy, religion, and legal rules

Introduction

Laws do not operate in a vacuum and have to be understood in context, not only its historical and socio-political context (see previous chapters) but also its cultural context. In this chapter I will focus on the intersection of law and culture. More precisely, I will describe the cultural context in which Syrian family law operates. The chapter consists of two parts: the first part analyses some key concepts in relation to family relations in the Middle East (including Syria), namely (in order of analysis): patriarchal family, morality and propriety, family honour and women's sexuality, and marriage ideals. It is important to introduce these cultural concepts in order to understand how they relate to and interact with the contents of and discourse around the various personal status laws.

The second part of this chapter will focus on legal regulation of marriage and divorce. I will discuss the provisions related to marriage and divorce in the SLPS and Christian laws of personal status. Because the SLPS is the dominant and default law in the field of family law, I will, in the first section of this second part, provide an extensive analysis of the substantial contents of this law. Moreover, since studies on the contents of the SLPS are scant, I consider a detailed discussion of this law appropriate. Secondly, I will make some general observations about legal regulation of Christian marriage and the dissolution of a Christian marriage, with reference to the various Christian laws of personal status. This latter section, however, will not be as elaborate as the first. After all, as described in chapter 1 (§ 1.7), the SLPS is considered the general law; the Druze, Jewish, and various Christian personal status laws, on the other hand, are considered special laws.

Besides, the chapter will function as a conceptual framework for chapters 5 and 6, which deal with legal practices within a *shar'iyya* court and a Catholic court, respectively. In these chapters I will demonstrate that shared norms and views on social propriety, marriage and gender relations are emphasised and reinforced by all the participants in the family law arena.

During my time in the *shar'iyya*, Catholic, and Greek-Orthodox courts, I noticed that the same themes were constantly addressed: the ideal of marriage, the proper role of women, wives in particular, the husband as the provider and head of the household, and so on. Regardless of their legal and religious differences, the personal status courts were united in their shared cultural understandings of gender, family relations, social norms and behaviour. I contend that in the Syrian family context, the patriarchal family model is preserved and reinforced by the various personal status laws and by the various actors which operate in the field of family law. It is this family model which determines the gender roles in society; it is more powerful than legal or religious norms, specific to the different ethnic and religious communities.

Finally, the main sources of this chapter are: material collected during my fieldwork in Damascus, including: court observations in various personal status courts in Damascus, interviews, recurrent informal interactions with (legal) experts, particularly lawyers, interactions with 'informants', as well as Syrian friends and 'family members'. In addition, primary and secondary literature was reviewed, most importantly law codes and commentaries on the law, in particular the commentary of the legal scholar and lawyer, Muhammad Fihri Shafqa (1934-2010). I will combine the different sources to explore which (legal, social, and religious) norms about family, gender roles, marriage and divorce prevail in Syrian society, and in particular how these norms are embedded in the various personal status laws.

4.1 Patriarchal family: family as the nucleus of society

Syria's Constitution of 2012, similar to most Middle Eastern constitutions (Joseph 1996: 16), defines 'the family' as 'the nucleus of society' and guarantees that 'the law protects its existence and strengthens its ties' (Art. 20).¹⁶⁶ The fact that 'the family' and not the individual is considered the mainstay of society is not surprising; researchers from different disciplines regard family as the basic unit in

¹⁶⁶ The wording of article 44 of the 1973 Constitution was nearly the same, it read: 'The family is the fundamental nucleus of society and is protected by the state.'

Middle Eastern societies.¹⁶⁷ The concept of 'family' in the Middle East has been an object of study for many researchers from different disciplines, including anthropology, gender studies, history, law, religion, and economics. Studies on family in the Middle East focused on its many different aspects and manifestations, including kinship and marriage, family law, patriarchy, nuclear families, rural or urban family relations, family as an ideological project of the state or as an economic unit.¹⁶⁸

In Syria, as elsewhere in the Middle East, families¹⁶⁹ are commonly patriarchal, meaning that (senior) men are the head of the family and with women and younger family members in a more subordinate role (Wedeen 1999: 51). In a common Arab nuclear family, the father traditionally has the authority and is the breadwinner or provider, the mother on the other hand usually takes up the role of housewife and takes care of the children (Barakat 1993: 101). This male dominance within the family manifests itself on several levels. In this regard, I would like to refer to the definition of the term 'patriarchal family model' given by Léon Buskens, who describes it as follows:

'[a] model for family life in which senior men are entitled to a dominant position over subordinate women and children. This male dominance, grounded in their position as husbands and fathers, is expressed in norms about gender, descent, obedience, sexuality, the use of space and freedom of movement, as well as the economy of the household.' (2003: 75 n. 5)

Kinship or descent through the father's lineage is a key feature of patriarchal Arab families; in Syria too, 'kinship remains a central organizing institution.' (Wedeen 1999: 51) One's patrilineal descent group is decisive for one's economic security, religious affiliation, citizenship, social life, and identity (Joseph 1996: 15-16). Kinship determines one's religion and with that also one's status in family law. In

¹⁶⁷ For example, Barakat 1985, 1983; Doumani et al. 2003; Joseph 1999; Fernea et al. 1985.

¹⁶⁸ For example, Cuno et al. 2009; Doumani 2003; Eickelman 1998; Joseph 2000; Moors 1995; Tucker 2008; Welchman 2007, and many more. I will not discuss the various analyses and discussions about the concept of 'family' as it would be beyond the scope of these introductory paragraphs to discuss the ample literature available.

¹⁶⁹ In Syria different words are used to refer to 'family', i.e., most importantly, *'ā'ila*, *ahl* or *usra*, depending on the context.

other words, a son or daughter does not only inherit his or her father's religion, but it also determines his or her future family relations. Hence, when a man or woman wants to marry and start a family, it is not Syrian citizenship that is the determining factor but one's religious denomination and gender.¹⁷⁰

Syria's personal status laws, as many other Arab family laws, in varying degrees, reflect the patriarchal family model (Moghadam 2003b: 69). The laws privilege men, in particular men from the patrilineal line, in numerous ways, i.e. in child custody, inheritance, divorce, choice of marriage partner, passing on religious identity to children (and with that, citizenship), household division of labour, and authority and obedience in marriage. It should be noted, however, that as of late, several of these 'patriarchal' notions, such as the maintenance-obedience equation, have been successfully challenged by women activists in several Arab states, such as Morocco and Algeria (see below). In Syria, however, the patriarchal family model is, by and large, enshrined in all laws of personal status, Muslim and Christian. Certain matters are typically associated with Muslim family law or, on the contrary, Christian family law, but the underlying structures are generally the same. All laws oblige the husband to provide for his wife and children, the wife, in return, is obliged to take care of the household and the children and obey her husband. Hence, in Syria, the 'patriarchal gender contract' (Moghadam 1998) or 'patriarchal bargain' (Kandiyoti 1988) is realised within the family and laid down in the laws of personal status (Moghadam 2004: 145; Tucker 2008: 73-74; Welchman 2011: 10-11, 2007: 93-99).¹⁷¹

Family patriarchy can also not be separated from 'religious patriarchy'¹⁷² in the field of family law (cf. Joseph 1996). As we saw in chapter 2, the various personal status laws are written and are applied by men, often religious men. Regardless whether they are 'official' religious men (i.e. appointed by a religious or state authority) or not, the drafters of the laws and the ones who apply them (i.e. judges)

¹⁷⁰ In chapter 2 (§ 2.5.3), we saw that when a non-Muslim woman converts to Islam, the 'laws of patriarchy' are superseded by 'the laws of religious affiliation' (Tadros 2009: 130-32).

¹⁷¹ For detailed discussions on the historical and state ideological analyses of the patriarchal nature of the Arab family laws, see Charrad 2001, Kandiyoti 1991, Sharabi 1992.

¹⁷² Joseph distinguishes 'patriarchy' into various kinds, including 'social patriarchy', 'economic patriarchy', 'political patriarchy', and 'religious patriarchy' (1996: 14-18).

are selected on their religious merits and knowledge of the religious sources. Besides, Syria's personal status laws not only embrace and solidify the patriarchal family model, but they also bear a religious imprint: the SLPS carries an Islamic legal imprint; the various Christian family laws carry, obviously, a Christian imprint. The religious imprint, i.e. its symbolic (most importantly Islamic) value, of personal status law also holds great political weight in the government's delicate relationship with the various religious communities, as demonstrated in the previous chapter.

Before analysing the different aspects of the patriarchal family model, as laid down in the various family laws, I will first discuss some key issues that are important to Syrian gender relations in general. As explained earlier, the Syrian laws of personal laws cannot be analysed solely from a formalistic legal angle, they need to be understood in their cultural context. The normative order developed and imposed by the state, i.e. through state laws and courts, aims to organise and regulate family relations, but it is only able to do so to a certain degree, as there are other, i.e. not necessarily legal, norms at work. The interaction between various social, legal, and religious norms (codified and uncoded) in the field of family law cannot be underestimated, as was also demonstrated by other studies on Middle Eastern family law (see for example, Buskens 1999; Carlisle 2008, 2007a, b, c; Rosen 1989; Shehada 2009a, b, c; Sonneveld 2012a). It is therefore important to understand against which cultural and moral setting these norms are expressed, endorsed and enforced.

In this light I will analyse the following concepts: 'morality and propriety' (in particular gender behaviour), 'family honour and women's sexuality' and 'marriage ideals', for they shape and influence legal discourses and practices. Ideas about proper gender comportment, family and marriage are continuously expressed by individuals in the court rooms and play a role in, most importantly, the assessment of spousal or parental behaviour of the parties involved. The narratives presented to the court by the litigants, their lawyers and witnesses influence the outcome of a case, as judges take social (and not necessarily legal) norms and values into account (cf. Carlisle 2007c).

4.2 Morality and propriety

Dahlgren maintains in her book *Contesting Realities*, which discusses the versatile and changing gender and family relations in contemporary Adeni society (Southern Yemen), that cultural understandings of family and family relations are continuously communicated in the field of personal status law (2010: 88-89). Men and women ‘as gendered subjects’, i.e. as husbands, wives, fathers, mothers, sons, and daughters are confronted with and subjected to ‘dominant familial ideologies’; Dahlgren defines ‘familial ideology’ as ‘a set of norms, values, and assumptions about the way in which the family life is expected to be organised in a normative way.’ (2010: 89) In the context of a marriage we should think of the rights and obligations of the husband and the wife. A wife ought to obey her husband and fulfil her marital duties, a husband, for his part, is expected to provide for his family. Dahlgren states that a wife’s ‘moral value is constructed in her fulfilling her marital duties, and thus it is only as a dutiful wife that she safeguards her moral dignity and legal rights.’ (2010: 127) This latter aspect of the ‘familial ideology’ (the dutiful wife) made its way into the different personal status laws, as we shall see below and in the following chapters.

Dahlgren describes in her study how morality and propriety or proper comportment (*adab*) affect gender and family relations in Adeni society. She emphasises that propriety in every day life ‘is not a fixed entity but instead has a variety of manifestations.’ (2010: 10) With that in mind, I use the term ‘morality’ in a broad sense.¹⁷³ I will not link ‘morality’ directly to Islam or Christianity, i.e. denoting norms as ‘typically’ Muslim or Christian, unless people themselves denoted it as such (see for example the personal anecdote below). My argument aims to demonstrate that many familial norms and values were shared amongst the diverse (in this case primarily Muslim and Christian) Syrian communities.

Morality and propriety are also gendered concepts, with different expectations for men and women (Dahlgren 2010: 13). The proper comportment for wives and husbands differs, each is expected to take on a different role. In the event of a

¹⁷³ I am aware that my use of the general concept ‘morality’ does not do justice to the broad range of literature available on the topic, see for example Dahlgren 2010 for a discussion of some of the principal anthropological studies of Islam in relation to ‘morality’.

family dispute, and particularly those disputes that make it to court, these expectations are clearly articulated and publicly assessed by, first of all, the spouses themselves and others involved in the dispute, most importantly judges, lawyers, witnesses. During divorce proceedings, participants in the process express whether or not a spouse (or both) lived up or fell short of expectations as a wife or husband. A negative assessment can be made based on seemingly simple acts as serving coffee for guests, cooking or idling about at home (see in particular chapter 6).

Similar to Dahlgren, I observed that when people talked about others, be it in court or elsewhere, they often made moral comments on the behaviour and character of others. A person of high moral character (*akhlāq*) is generally highly appreciated by people from all walks of life, across the various Syrian communities. The assessment of a person's character and/or behaviour is usually based on daily interactions. Syrian families commonly live in tightly knit communities, many of which may have lived in the same village, town or quarter for generations. People usually keep a close eye on each other's lives, families and social relations. Living close together and being a part of each other's life also means that people talk, either good or bad. Gossip, positive or negative, is a way to communicate and reinforce dominant social norms and/or denounce behaviour that contravenes familial or gender ideals.

The reputation of an individual or a family can be damaged, improved or reinforced through gossip of neighbours, family or other community members (cf. Meneley 1996). Gossip about, in particular, women's behaviour, marital or other family disputes, can make or break a marriage and affect a family's reputation. Through gossip, social codes or norms are communicated, upheld, and used to exert social control on, particularly, the female and younger members of the community. Rumours about improper behaviour of a girl can ruin her chances for a good marriage, for example. Or worse, it may put her at risk to become a victim

of an honour killing, a practice which does occur in Syria, in Muslim, Christian, and Druze communities alike.¹⁷⁴

Women are in a more vulnerable position than men when it comes to harmful gossip, that is why ‘most women maintain consciousness about how any dress, behavior, interaction or location can result in people talking and lead to serious harm to their social position and well-being.’ (Hegland 2005: 211). To give an example, non-related men and women are not expected to interact unsupervised in public. For that reason, family members often control and restrict, especially unmarried, women’s behaviour and mobility. Gender segregation is oftentimes regarded as something typical for Muslim communities, but my informants told me, and I also observed it myself, that the same conventions apply to Christian youth (see below). Fear of gossip can be a powerful tool to ensure that men and women adhere to their expected gender roles. Under the watchful eye of family and community, individuals are expected to keep in line with social decorum, ‘both men and women should behave with constraint and modesty.’ (Rabo 2005a: 82)

4.2.1 Preserving the honour of the family – control of women’s sexuality

Upholding the family’s reputation or good name is of great importance in the various Syrian communities, similar to most Arab societies. The honour of a family is usually centred around the sexuality of the female family members (Rabo 1986: 81). The reputation of a wife, daughter, or other female family member, particularly a girl’s virginity, is important and should be protected. Compromising her reputation or sexual honour would not only reflect upon and endanger her reputation but also that of her family as a whole (Barakat 1993: 98; Sato 2001: 120). The male family members have the responsibility to control and protect the family honour, by monitoring a woman’s behaviour and, possibly, disciplining the transgressors.¹⁷⁵ In this light, I would like to share a personal anecdote.

¹⁷⁴ In 2009, it was estimated that almost 200 people, mainly women, are killed every year by a family member because the family honour was considered to be tarnished (<http://www.hrw.org/news/2009/07/28/syria-no-exceptions-honor-killings>, accessed 22 February 2012).

¹⁷⁵ Joseph (1994) emphasises that the brother/sister relationship takes up a central role in the reproduction of Arab patriarchy, in particular in relation to the honour/shame complex.

During my fieldwork (2008-2009) a (Christian) Syrian family had generously taken me into their care and helped me in countless ways, including assisting me in finding an apartment. I lived with this Syrian family for some time and visited them regularly; once I had moved into my own place, the daughters of the family stayed in my house on a regular basis. When I was looking for a place to live, the father of the house was visiting relatives abroad and therefore one of his daughters did the honours. She negotiated the rent, arranged all the necessary paper work with the real estate agent, the authorities, and, at the insistence of the mother, made sure the lock of the front door was replaced. The family had a family friend, George, who was a locksmith. But as George did not have time to replace the lock himself, he sent a colleague to my house to change the lock. The man came to my house (I was alone), he replaced the lock and asked me to try to see if it worked, which I did. Whilst testing the key he rubbed my knee and told me how beautiful he thought I was. It was all rather harmless, nevertheless I was shocked and insulted; I started yelling at him and told him to leave my house. He was surprised by my reaction and started pleading with me not to tell anyone. In the evening I went to the family's house and told the daughter what had happened. She was shocked and called George immediately. George rushed over and apologised numerous times for what had happened; interestingly enough he also exclaimed 'but he is a Christian!', as if it was unthinkable that a Christian could do something like that. George conferred with the daughter and one of her brothers what would be proper course of action. George suggested he, with help of others, would teach the man a lesson, i.e. deliver a few blows. I was invited to come and watch, if I wanted. I told George that I thought beating the man up was not really necessary and that I preferred if he would refrain from doing so. A week later I was told some blows were delivered, but since the man cried and pleaded not to be touched, George had dropped the matter. I asked the daughter why George had taken up the matter so seriously. She explained that because her father was not at home to take care of things, George had felt responsible to defend her father's name. The father, however, when

hearing what had happened, disapproved with George's chosen course of action because he denounced all forms of violence. As the family had taken me into their care, I was also considered part of the (extended) family, and therefore my encounter with the transgressor had to be avenged.

Whether it was truly about the family's honour or possibly George's own honour (or a combination of both), I do not know. What ever the case may be, I want to pay some attention to George his comment 'but he is a Christian!'. His comment is an illustrative example of the (mis)conceptions Christians often have of Muslims and vice versa, especially with regard to gender relations and sexuality.¹⁷⁶ It is often claimed by Christians that Christian women have more freedom than Muslim women, and that they can interact more freely with the opposite sex, because Christians are not as obsessed with sexuality as Muslims are (see also Rabo 2012b: 89-90). Christian or Muslim, a woman's sexual virtue is closely connected to a man's masculinity, but there is a difference. Rabo sums it up as follows:

'To generalize, the ideal for Christian men is to be able to protect their womenfolk and enable them to mix and mingle in public space. The ideal for Muslim men is to be able to protect their womenfolk from mixing and mingling in public space. The ability to both protect and control one's own womenfolk is a crucial aspect of Syrian masculinity.' (2012b: 90).

Even though Christian men generally allow and enable 'their women' to mix and mingle in public, some Christian female friends informed me that, in all honesty, they could not really mingle freely with unrelated men, even if they were Christian, for the eyes of the community were always watching (i.e. they feared it may lead to gossip).

As stated earlier, a woman's sexual conduct is connected to her reputation and honour, and that of her family, this accounts for most Syrians, regardless of their

¹⁷⁶ See also chapter 1, which described the socio-political background of the religious majority-minority relations, and chapter 2, which includes a description of the effect this relationship has on the legal system, in particular family law.

ethnicity or religion. For example, it is important for a woman to enter her marriage as a virgin. Sato, who conducted fieldwork among Syriac Orthodox Christians in Aleppo and the Al-Jazira region (northeast Syria) in the late 1990s, writes that in the past a Christian bride was expected 'to show the sign of her purity', i.e. virginal blood on a cloth, to her mother-in-law and other female in-laws on the morning after the wedding night. The blood-stained cloth was a public proof for the wife's purity and 'also demonstrated the groom's masculinity'; it proved the bride's modesty, good character, obedience to her parents, and also corroborated her family's successful upbringing and preservation of the family honour (Sato 2001: 118-119). My Christian friends told me, just as Sato observed, that this practice of public display of the bride's virginity was no longer common amongst Christians, as it was generally believed that a couple's sexual intimacy was a private matter (2001: 118-120).

That being said, the importance that is attached to a wife's sexual virtue and a husband's masculinity has not changed (Sato 2001: 119), especially when a husband's masculinity is challenged. On one occasion I witnessed a divorce case where this subject was raised.

A young couple seeking divorce appeared in the Greek Orthodox court in Damascus for a cross-examination session. Before the court started the interrogation, the judge spoke to the couple in a serious tone, reminding them of the importance of a good marriage and telling them to continue to strive for reconciliation.

The wife (the plaintiff) told the judge that they got married when she was seventeen years old and they had now been married for two years, whilst living with the husband's family. She claimed that her husband and his family beat her and that her husband did not support her in any way. She also claimed that the marriage had not been consummated. The claims made by the wife made the husband very nervous and he denied all allegations. The wife was a strong-willed woman, making the husband taste defeat on several accounts during the interrogation by the court.

The judge concluded the session by announcing that in a next session the claims would be discussed in the presence of their lawyers. Yet,

the wife remained agitated and kept on repeating that she was still a virgin because her husband was not 'manly' enough. She claimed that she and her lawyer went to see a doctor who confirmed that she had not yet lost her virginity. The husband was clearly annoyed and embarrassed. Before leaving the court, he turned to the judge and his clerk to assure them that the marriage was consummated; he said that he could prove it. He presented a little plastic bag which he said contained the proof that she had lost her virginity, i.e. the blood-stained cloth of the wedding night.¹⁷⁷

4.3 Marriage ideals: marriage as a 'safety-valve'

To control and prevent any improper behaviour of, in particular, young individuals, it is generally believed that it is better when people get married, preferably young. For that same reason, long-engagements are not preferable (Sato 2001: 120); Sato's observation corresponds with what I observed in the different personal status courts, namely that couples generally married quickly, after an engagement period of a few months. Rabo mentions that her informants talked of early marriages 'as a 'safety-valve' for young people's sexuality' (2005a: 88). It should be noted though that the average age of marriage, reportedly, has gone up the last decades. One of the reasons for this is that the costs for a wedding feast and furnishing a house or apartment have increased considerably, making it difficult for, particularly, men to marry young (2005a: 86-87).

Tucker asserts that in 17th-18th Ottoman Syria 'marriage was central to social relations'; it reinforced social ties within the community and promoted harmony and stability (1998: 42). I would argue that marriage in Syria today is still central to social and familial life, as it is in most Middle Eastern societies. Marriage is not just a union between a man and a woman but it is considered a family affair. More than that, a good marriage is favourable, not only to the parties and families involved but to the community as whole (Barakat 1993: 107; Bennet 1999: 159; Rabo 2005a: 89 ff.). But what makes a good marriage?

¹⁷⁷ Case A, Damascus Greek Orthodox court, 9 April 2009.

This will depend on the families' background and position in their community. Factors that are considered important in the choice of a potential marriage candidate are: religion, denomination or sect, wealth, moral character, level of education, age difference, 'the family name' (cf. Drieskens 2008; Rabo 2005a). These qualifications are not only valued when assessing the candidate as an individual, but they also apply to the candidate's family members. As Rabo writes: 'The more that is known about the family of the groom or the bride, the more one is able to vouch for the character of the individual' (2005a: 90).

Troublesome unions, on the other hand, may become a source for social conflicts and should therefore be avoided. For this reason, the role of the marriage guardian, as protector of the bride's and the family's interest, is crucial. In most cases, the bride's legal guardian, usually her father or grandfather, will be consulted before a marriage contract is signed (see § 4.5.1). For who is better to serve and preserve the interests of the family and the wider community than the senior male family members? Besides, a marriage union without the approval of the families of both sides will be extremely difficult to sustain, especially for women, because where will she go if the marriage fails. Since there is no national social security system available in Syria, most individuals rely completely on their family's support for socio-economic security and protection. Hence, if an 'objectionable' marriage fails, who will support the divorcée? In her article 'Mother Love', Carlisle describes a striking example of couple that was forced to divorce under the pressure of the wife's family. The mother of the wife, who insisted she would agree to a divorce, stressed exactly this point, i.e. that if the marriage failed, she (the bride) would have no-one to fall back on, because her family assured to ostracise her if she did not listen to them (2007b).

4.3.1 Unsuitable marriages

Another complicating factor is when one falls in love with someone who belongs to a different religious community. According to my sources, interreligious marriages were rare in Syria, for various reasons.¹⁷⁸ Since civil marriage does not exist in Syria, a wife has to follow her husband's religion in marriage. A Muslim

¹⁷⁸ Weber maintains that interreligious marriages are also rare in Lebanon (2008: 15).

man can marry a Christian or Jewish woman, but a non-Muslim man cannot marry a Muslim woman, unless he converts to Islam. In chapter 2 (§ 2.5), we saw that mixed marriages and conversions can lead to complicated and sad legal realities, due to conflicting jurisdictions of the different personal status laws and courts. Even so, interfaith unions do exist, but they are usually contracted in secret or are not officially registered¹⁷⁹ because of social condemnation. During my fieldwork I heard of examples of engagements and marriages between Sunni-‘Alawi, Druze-Sunni,¹⁸⁰ and Shi‘i-Sunni. Christian interdenominational marriages, however, were usually not considered problematic. In fact, according to the minister (*qassīs*) and judge of the Protestant court of Damascus, Boutrus Za‘our, such marriages were concluded on a regular basis.¹⁸¹

Under the SLPS, a Christian woman can marry a Muslim man, but whether these unions are socially acceptable is another matter. I was told that such unions are strongly condemned within the Christian communities. Christians in Syria are a minority and that fact alone can be enough reason to encourage endogamy, i.e. to marry within one’s own group.¹⁸² One of my Christian informants told me that when a Christian woman marries a Muslim man she will be considered a prostitute, for she brings shame on the entire town/village/community, not just her own family.

During my fieldwork period in Damascus, I got to know a couple who wanted to get married, but her family strongly opposed the match. It concerned a Christian woman who wanted to marry a ‘Alawi man; they had been together for years and considered a civil marriage abroad. The family was against the marriage, irrespective of where it would be contracted, i.e. in Syria or abroad. The family was not against the marriage because of religious reasons, as her family was not religious in any way, but because it was socially unacceptable in their [Christian] community.

¹⁷⁹ See chapter 5 and 6 on customary and/or unregistered marriage practices.

¹⁸⁰ A case study of a Druze woman married to a Sunni man is described in the next chapter.

¹⁸¹ Interview 26 March 2009, Damascus.

¹⁸² Especially since the number of Christians declined significantly in the 1920s-1930s and again in the late 1960s, due to immigration following land reform and nationalisation projects (Moussalli 1998: 287; Rabo 2012b: 88).

The father of the girl was a respected man in the town, where the family had lived for many generations. The fact that the family had close connections with the family of the husband-to-be, due to a shared political past, did not make a difference. The girl's father was known for his secular, liberal-egalitarian convictions, yet, he vehemently opposed the intended marriage, as did the rest of her family. The girl repeatedly expressed her disappointment about her father's attitude to me; she could not understand how her father (whom she adored and admired) could act against his own convictions, the same convictions he raised her with. The father's explanation for his objection was that he did not want to bring shame on the family. If she would marry this man, their whole family would be looked down upon and it would make life difficult for them.

This case illustrates the importance of the social implications that come with marriage. It chimes with Tucker's finding that marriage functions to reinforce social ties within the community (see above). With that in mind, the consequences of a good or, on the contrary, socially unacceptable marriage for the family of both spouses will be thoroughly considered before an intended engagement of marriage can be materialised. In the case described above, the marriage between the Christian woman and the 'Alawi man would have such a negative impact on her family, that all her nuclear family members vehemently opposed it (also those who lived abroad). The girl pleaded with her family, she promised that they would live in a neighbourhood in Damascus where their interfaith background would not stand out.¹⁸³ But it made no difference to their kin, they put the interest of the family first.¹⁸⁴

This brings us to the end of the first part of this chapter. Now that I have sketched the contours of the cultural context in which Syrian family laws operate, I will move on to the contents of the various laws. First of all, Syria's most important personal status law, the SLPS, will be discussed; I will particularly analyse the

¹⁸³ In their case, most importantly a neighbourhood that was not predominantly Christian.

¹⁸⁴ See Weber's article on Muslim-Christian couples in Lebanon who concludes that objections of families to a mixed union are usually socially motivated instead of religiously motivated (2008: 27).

(Muslim) notions of marriage and divorce as set out in the SLPS.¹⁸⁵ Secondly, as explained in chapter 2, the SLPS stipulates that the Druze, Christian and Jewish communities are exempted from several of its provisions and, instead, entitles these communities to apply their own religious laws in these specified areas of law, most notably marriage and divorce. In the latter sections of this chapter I will briefly discuss some key aspects of Christian marriage and divorce, as set out in the most important Christian laws of personal status.

4.4 Muslim marriage: A contractual relationship

The purpose of marriage in Muslim societies is commonly designated as being legalisation of sexual relations and preservation of paternal lineage.¹⁸⁶ According to Tucker, Islamic jurists of the past agreed that the first and foremost purpose of the marriage contract is ‘the establishment of licit sexual relations between a man and a woman’ (2008: 42). The confinement of sexual relations within the realm of a marriage also served the larger society, for with the institution of marriage, the primary cause of social discord, i.e. illicit sexual behaviour (*zinā*), could be eradicated (Hallaq 2009: 271-272). That is why the vast majority of classical jurists deemed it commendable (*mandūb*, *mustaḥabb*) for a Muslim to marry (Linant de Bellefonds 1965: 26-28). In this regard a famous *ḥadīth* narrated by Malik ibn Anas is often quoted, the prophet Muhammad reportedly said that ‘when a man marries he has fulfilled half of the religion; so let him fear God regarding the remaining half.’

A Muslim marriage is generally depicted along the lines of the maintenance-obedience divide:¹⁸⁷ a husband has to obligation to support (maintain) his wife and children and in exchange she will be obliged to co-habit and obey him. Earlier we saw that this divide has been described as the ‘patriarchal gender contract’ (Moghadam 1998) and the ‘patriarchal bargain’ (Kandiyoti 1988), and that this

¹⁸⁵ For a detailed analysis of the central legal elements pertaining to marriage and divorce, as defined and regulated by the SLPS, please refer to the Appendix.

¹⁸⁶ See, for example, Hallaq 2009: 129; Linant de Bellefonds 1965: 23; Mir-Hosseini 2009: 28; Tucker 2008: 41.

¹⁸⁷ See, for example, Buskens 1999: 185-90; Mir-Hosseini 2009: 31; Shehada 2009a: 28 ff.; Sonneveld 2012a: 17 ff.; Tucker 2008: 50-56; Welchman 2011, 2007: 93-99.

maintenance-obedience divide continued to exist in the contemporary family law codes, despite attempts by many Arab states to reform family law (from the early twentieth century onwards). Abu-Odeh maintains that with the reforms the Arab states tried to 'chip away at the most cruel aspects of gendered reciprocity by first, limiting the scope of the wife's obedience; second, expanding the scope of the husband's financial duties' (2005: 460). It should be noted that indeed some states, as of late, have left out the wife's duty of obedience to her husband, including Algeria (2005), Libya (1984), Morocco (2004), Tunisia (1993), and (South) Yemen (1974); but, at the same time, maintained the husband's obligation to provide maintenance for the wife (Welchman 2007: 94-97; 2011: 3).¹⁸⁸ Syria, however, always retained the maintenance-obedience divide; in the following paragraphs I will describe how it is translated into the provisions of the SLPS.

As mentioned earlier, the SLPS is predominately based on Islamic legal sources, particularly on the Hanafi *fiqh*. For that reason, the provisions of the SLPS pertaining to marriage and divorce, discussed in the following paragraphs, strongly relate to classical Hanafi *fiqh* rules and interpretations. On some (generally minor) points, however, the authors of the SLPS diverted from the classical Hanafi *fiqh* and incorporated interpretations from other schools of law or minority opinions (cf. Anderson 1955). Besides, the 'residual' article 305, stating '[i]n every matter in regard to which there is no relevant provision in this Law reference shall be made to the most authoritative doctrine in Ḥanafī school',¹⁸⁹ opens the door wide to the rich collection of jurisprudence of the Hanafi school of law. This is a welcome option for legal practitioners as the substantive text of the SLPS is rather brief in many areas. For the practical application of article 305 judges and lawyers today still consult and refer to the personal status code compiled by the Egyptian jurist Qadri Pasha in 1875 (see chapter 2), which is much more detailed than the SLPS. For that reason I will occasionally refer to the 'Qadri Pasha Code' in my analysis of the provisions of the SLPS, especially where the text of the SLPS is ambiguous or insufficiently detailed.

¹⁸⁸ The People's Democratic Republic of Yemen was the first Arab state to drop the wife's duty of obedience from its statutory law in 1974 (Welchman 2011: 11-12).

¹⁸⁹ Translation taken from Anderson (1955: 49).

4.5 Marriage according to the Syrian Law of Personal Status

The SLPS starts with the definition of marriage. Article 1 reads as follows:

‘Marriage is a contract between a man and a woman, who is lawfully permitted to him, with the aim to establish a bond for a joint life and procreation.’¹⁹⁰

The marriage contract is an essential element in a Muslim marriage, for only a valid (*ṣaḥīḥ*) marriage can generate legal effects, most importantly rights and duties for the two contracting parties.¹⁹¹ For a marriage to produce legal effects, it has to meet certain requirements. These requirements include, amongst others, legal capacity, a marriage contract, a dower, and social parity between the spouses.

A detailed analysis of these central legal elements pertaining to marriage (and divorce), as defined and regulated by the SLPS, is given in the Appendix. In the following sections I will focus on those aspects that are relevant to the subjects under study in this chapter and the next, i.e. the marriage guardian, dower, marital rights and duties, dissolution of the marriage, and its consequences.

4.5.1 The role of the marriage guardian

In the first section of this chapter I described that a marriage is a family affair, the approval of the family for a union is therefore imperative. As marriages are socially considered to be the mainstay of society and communal harmony, contracting a ‘good’ marriage is of vital importance for the bride and groom and their respective families. In a patriarchal society like Syria, who is better to serve and preserve the interests of the family than the senior male family members, as it

¹⁹⁰ The Jordanian (1951) and Iraqi (1959) personal status law give a definition of marriage that is practically the same as the Syrian one (Nasir 2002: 44).

¹⁹¹ In chapter 2 (§ 2.5.3), we saw that invalid (*bāṭil*) marriages cannot produce legal effects, such as the establishment of paternity.

is often argued. That is why, in most marriages, the father or the grandfather will act as the legal guardian of the bride (*wali*).¹⁹²

Various legal professionals told me that the commonly held view in contemporary Syria is that when it is a woman's first marriage (i.e. she is considered to be a virgin (*bikr*)), her legal guardian needs to give his consent to the marriage, regardless of her age. The presence of a guardian may thus not be conditional for the validity of the contract (under the law), seeing that he is not a contracting party,¹⁹³ but his presence and approval will generally (socially) be preferred to ensure that the interests of the girl and family are protected, especially her financial rights (i.e. the dower). That is why the legal guardian, generally the bride's father, will be present during the negotiations regarding the marriage contract and at the time the contract is officially concluded in the presence of a marriage official or judge.¹⁹⁴

This social preference or practice tallies with what I discussed in the first section of this chapter, namely the (senior) male family members take a prominent position in the protection of the bride's and the family's interests. The marriage guardian as the representative and protector of the interests of the family is a fine example of the hegemonic patriarchal family model.

The provisions of the SLPS pertaining to the marriage guardian, however, do not give a decisive answer as to whether a mature (i.e. older than 17) bride always needs a legal guardian to marry, as the wording of these provisions comes across as rather ambiguous.¹⁹⁵ Articles 20-25 seem to imply that the guardian's consent is needed, regardless of the bride's age.

¹⁹² It is important to note that the SLPS distinguishes between different types of guardianship (*wilāya*), namely guardianship in marriage (*wilāyat al-zawāj*); guardianship of property (*wilāyat 'alā al-māl*); guardianship over a person, such as minors and insane persons (*wilāyat 'alā al-nafs*). In chapter 2 (§ 2.5.2), guardianship over minors was already explained; we saw that guardianship over the person includes guardianship in marriage, just as it includes authority over education and medical treatment.

¹⁹³ Court of Cassation, *shar'īyya* chamber, decision dated 19 November 1956 ('Atari 2006: 120-121).

¹⁹⁴ Email correspondence with lawyer Yusuf, 10 February 2012.

¹⁹⁵ The same goes for the 1976 Jordanian personal status law, see the elaborate analysis of Welchman on the subject in her study *Beyond the Code* (2000: 121-133).

Article 16 SLPS stipulates that the age of capacity for marriage is 18 years for a man and 17 years for a woman. If the betrothed parties are younger than the required age, they need to apply to the judge for permission to marry, and, in addition, if the legal guardian is the father or grandfather, his consent to the marriage is also needed (Art. 18). Accordingly, when a woman is younger than 17, she needs the consent of her legal guardian. But what if she is older?

If the bride is 17 or older, the guardian's consent is not an absolute prerequisite under the law. Article 20 stipulates that a mature woman (i.e. older than 17) can contract her own marriage but the judge will still ask her guardian for his opinion. If the guardian does not object to the marriage or if his objections are ill-considered, the judge shall give permission for the couple to get married, provided the betrothed parties are of equal social status (*kafā'a*).¹⁹⁶ A court is thus empowered to marry a woman (over 17) against her guardian's will. Still, a woman (over 17) does not have the legal authority to act independently because some form of consent to marry is needed, either from her legal guardian or the judge.

If, however, a mature woman has given herself in marriage, i.e. without her guardian's approval, to a husband who appears to be beneath her social standing, her legal guardian may ask the court to nullify the marriage (Art. 27). The SLPS does not, however, define what 'equality of status' (*kafā'a*) entails, whether it refers to the groom's financial situation, his occupation or religious piety, for example.¹⁹⁷ The only direction the law gives is 'the custom of the country' ('*urf al-balad*') (Art. 28), which is an exceptionally 'open norm'. In 1956, the Court of Cassation already decided to leave the exact interpretation of the concept *kafā'a* to the discretion of the judge.¹⁹⁸ Upon inquiry with some lawyers, I was told that the key elements of *kafā'a* in marriage today are parity in faith (*īmān*) and financial means or wealth

¹⁹⁶ The role of the marriage guardian needs to be understood in conjunction with the doctrine on concept of equal social status (*kafā'a*), which was particularly developed by the Hanafi school of law (Linant de Bellefonds 1965: 171 ff.) According to Linant de Bellefonds, Hanafi scholars attributed great importance to *kafā'a* because this school allows an adult woman to conclude her own marriage (without her guardian), it is for that reason that *kafā'a* serves to secure the interests of the bride and her family (1978: 404).

¹⁹⁷ Unlike the 1976 Jordanian Law of Personal Status, which limited it to 'the groom's ability to pay the prompt dower and the wife's maintenance.' (Welchman 2000: 99)

¹⁹⁸ Court of Cassation, *shar'īyya* chamber, decision number 325, 19 November 1956.

(*yasār* or *infāq*) between the two prospective parties. A groom's descent (*nasab*), his occupation or difference in social class is no longer relevant to the court. When, for example, a groom is religious, honourable, pious, and has sufficient financial means, the court cannot reject him as a potential husband.¹⁹⁹

The requirement that the groom ought to have sufficient financial means is important in consideration of his ability to pay the mandatory dower and spousal maintenance. A husband's financial obligations are essential for the validity and success of a marriage, as will become evident below.

4.5.2 Dower

A marriage contract (*'uqd al-zawāj*) has to include certain specifications, such as the personal particulars and signatures of the betrothed parties and the witnesses, and the mention of a dower (*mahr*). The dower is a wife's prerogative and a husband's obligation (Arts. 53 and 60).

A dower is generally divided into two parts, namely a prompt (*mahr mu'ajjal* or *mahr muqaddam*) and a deferred dower (*mahr mu'ajjal* or *mahr mu'akhkhar*). The prompt dower has to be paid upon conclusion of the marriage contract, whereas the deferred part has to be paid when the marriage is terminated due to an irrevocable divorce or death (Arts. 55 and 56). Divorce disputes often revolve around the question exactly which dower amount (either prompt or deferred) was stipulated, whether or not it was actually paid, or whether the wife is entitled to half or the full dower, and so on. In the next chapter the subject of the dower will be discussed in more detail.

4.6 The effects of marriage: marital rights and duties

As explained earlier, many studies on Muslim personal status law emphasise the reciprocal nature of the marital bond, in that the husband's main legal obligation is his liability to pay maintenance to his wife and that her main legal obligation, on the other hand, is to be sexually available to her husband. Marriage is a

¹⁹⁹ Email correspondence with lawyer Yusuf, 10 February 2012.

relationship based on exchange of rights and duties: the husband will take care of the wife, in exchange for her cohabitation and obedience.

4.6.1 Financial obligations of the husband

As explained in the previous section, the husband is obliged to pay his wife a (prompt) dower. Once the wife received the prompt dower, she is obliged to live together with her husband (Art. 66). She may, however, refuse to move in with him if he has not yet paid the prompt dower or if he did not prepare a suitable house for her, meaning that he has not provided a house that meets the legal requirements (a *maskan shar'i*) (Art. 72.2). Providing adequate housing for the wife is one of the obligations falling upon the husband; the SLPS determines the basic rules pertaining to housing in articles 65-70 (see Appendix).

Providing a marital home to the wife is only one form of maintenance (*nafaqa*) that needs to be supplied by the husband, there are more. The husband's maintenance obligations include, moreover, the following: clothing, food, medical care, and domestic help; the latter only if this is appropriate to her social standing (Art. 71.1). The level of maintenance to be provided by the husband depends on his financial situation, although a minimal level (*ḥadd al-kifāya*) has to be met (Art. 76) (see chapter 5).

If a husband fails to provide maintenance to his wife, she can go to court and file a *nafaqa*-claim against him, forcing him to fulfil his obligations (Art. 71.2). When the claim is brought before the court and the husband denies the allegations, the burden of proof rests upon the wife. If the court decides in her favour and the husband, thereupon, fails to comply with a court-ordered maintenance payment, he can be sentenced to a fine or imprisonment (article 488 Penal Code). Another option for the wife is to file a judicial divorce claim on the ground of failure to provide maintenance (Art. 110) (see below).

A husband, for his part, is entitled to cease maintenance payments if his wife fails to live up to her end of the bargain, namely obedience to her husband or, to be

precise, co-habitation. The financial obligations of the husband are inextricably bound up with her legal obligation to co-habit and obey him.

4.6.2 Obedience of the wife

The issue of co-habitation is closely connected to the concept of disobedience (*nushūz*), for co-habitation implies sexual availability of the wife to her husband, which is an obligation upon her side (Arts. 66 SLPS, 212 Qadri Pasha). Consummation (*dukhūl*) of the marriage plays an essential part in establishing the validity or nullity of a marriage, and in the dissolution thereof (see Appendix and chapter 5 § 5.5), for only after sexual intercourse the judicial and financial consequences of the marriage become effective.

Whether or not sexual relations did in fact occur is occasionally disputed by spouses in the court. In that event the judge will try to establish whether the couple has had the opportunity to consummate the marriage, i.e. ‘valid seclusion’²⁰⁰ (*al-khalwa al-ṣaḥīḥa*) took place. When the court establishes that the couple spent a reasonable amount of time alone together, it is assumed that they had sexual relations. I will elaborate more on this subject in the next chapter, when I discuss legal practices in a *shar‘iyya* court.

A wife may forfeit her right to maintenance if she works outside the house without her husband’s consent (Art. 73) or if she is considered disobedient (*nāshiza*) to her husband. A wife can be considered disobedient if she leaves the conjugal home without a lawful reason or if she prevents her husband from entering the house (Art. 75). Accordingly, if it is established that a wife is disobedient, she loses her right to maintenance, for as long as she is disobedient (Art. 74).

If the husband, however, did not live up to his part of the ‘patriarchal bargain’ because he did not yet pay the prompt dower or if he did not prepare a suitable marital home for her, she may refuse to co-habit with him (Art. 72.2). In such an event she is not considered disobedient and she will not lose her right to maintenance. In short, a wife can be qualified as being disobedient if the following

²⁰⁰ Translation taken from Welchman (2007: 184).

conditions are fulfilled: (a) there is a suitable house provided by the husband, and (b) the husband has given his wife the full prompt dower. If these conditions are met and the wife has left the 'suitable house' without justification, on her own accord and through no fault of the husband, she will be considered disobedient (Shaqfa 1998: 314-15).

A husband can go to court and claim his wife is disobedient when she refuses to return to the conjugal home. In other words, he can file a so-called *mutāba'a* claim, which (in this context) I translate with the phrase 'marital obedience'.²⁰¹ The court may recognise a claim for marital obedience, i.e. his claim to be discharged from performance to pay, when the wife persistently refuses to 'follow' her husband and return to the marital home (Shaqfa 1998: 314-15).

It is important to note here that the issue of *mutāba'a* is mentioned in article 308 SLPS as one of the specified matters falling under the jurisdiction of the Christian and Jewish judges. In the following chapters on legal practices in the *shar'īyya* and Catholic courts, I will elaborate more on the issue of marital obedience.

4.7 Dissolution of marriage

The SLPS recognises three types of divorce: (1) unilateral divorce or repudiation by the husband (*ṭalāq*), (2) *mukhāla'a* divorce, and (3) judicial divorce (*tafrīq*).²⁰²

4.7.1 Repudiation (*ṭalāq*) by the husband

Ṭalāq is a unilateral repudiation of the wife by the husband and is the standard form of divorce. A husband can simply pronounce the formula 'I divorce you' either verbally or in writing (Art. 87.1), this does not mean that the marriage is immediately dissolved. During a period of (more or less) three months, the so-called waiting period (*'idda*), the husband can revoke the divorce and take his wife back. This revocation right is, however, not unlimited. A husband can only

²⁰¹ Although more literally it would come closer to the meaning of 'to follow', meaning that a wife has to 'follow' her husband.

²⁰² For a more detailed analysis, see the Appendix.

repudiate his wife three times (Art. 91); the third *ṭalāq* is irrevocable and thus final (*bā'in*) (Art. 94).

There is another distinction that needs to be made, namely a *ṭalāq* pronounced by or in front of a judge and out-of-court *ṭalāq*, i.e. divorce pronounced outside the court, which is then registered afterwards at the court. This type of divorce, commonly referred to as 'administrative' *ṭalāq* (*ṭalāq idārī*) is quite popular among men, however it often leaves many wives in a state of limbo. In the next chapter I will describe a few case studies that deal with these so-called out-of-court *ṭalāqs*.

4.7.2 Divorce by mutual consent (*mukhāla'a*)

Mukhāla'a divorce is often referred to as a wife-initiated divorce, because it is generally initiated by the wife. Like most Muslim family laws, the SLPS stipulates that, nevertheless, the consent of both spouses is required, in contrast to repudiation (*ṭalāq*), which is the sole prerogative of the husband. Contrary to Egypt and Pakistan, for example, where a woman has the right to initiate a *mukhāla'a* divorce without her husband's consent (Sonneveld 2012a; Kruiniger 2012, respectively).

In a *mukhāla'a* divorce, the spouses sign a contract in which the husband agrees to divorce his wife, in exchange for which the wife agrees to renounce some or all of her financial rights. The wife renounces, at least, her right to any (unpaid) prompt and/or outstanding deferred dower amount, and her right to maintenance (*nafaqa*). In addition, she may agree to return her trousseau (*jihāz*), her gold or household goods, which usually means that some financial compensation would have to be paid (see chapter 5).

A *mukhāla'a* contract can either be drawn up in court or outside the court and then registered *ex post facto*. However, in all events the wife has to be present in court to declare that she is willing to give up her financial rights before the contract can be registered and the divorce can take effect. For the registration of out-of-court *mukhāla'a* contracts, it is important that it is evident from the contract that offer and

acceptance took place in one session. In addition, it has to be clear that both parties verbally agreed to the agreement, a written agreement or a signature will not be sufficient for the validity of the contract.²⁰³ In the next chapter I will examine several aspects of the *mukhāla'a* divorce in further detail.

4.7.3 Judicial divorce (*tafrīq*)

The SLPS recognises various grounds for judicial divorce (*tafrīq*), divided into four types:

- I. *tafrīq* on the grounds of disease or defect (*'ilal*), which include insanity and impotence of the husband (Arts. 105-108);
- II. *tafrīq* on the grounds of absence or disappearance (*ghayba*), for example due to imprisonment (Art. 109);
- III. *tafrīq* on the grounds of non-payment of maintenance (*'adam al-infāq*) (Arts. 110-111);
- IV. *tafrīq* on the grounds of discord between the spouses (*shiqāq bayna al-zawjayn*) (Arts. 112)

While a woman can seek a divorce on the first three divorce grounds, both spouses can bring a judicial divorce petition to court on the grounds of discord. Either one or both can claim that the other is causing so much harm (*ḍarar*) that it is impossible to continue their marriage.

4.7.4 Reconciliation and divorce

All the different types of divorce have to go through a reconciliation process. The SLPS stipulates that when a *ṭalāq* or a *mukhāla'a* action is taken to court, the judge will have to defer acting upon the case for a month in the hope of reconciliation, in accordance with article 88. If, after that month, the husband persists in his action for divorce (*ṭalāq*) or the couple persists in their *mukhāla'a* request, they will be summoned to court. The judge shall try and resolve their differences with help of

²⁰³ Court of Cassation, *shar'īyya* chamber, decision number 388/385, 21 April 1976 ('Atari 2006: 123).

their family members or other individuals who might be of assistance. If, despite these attempts, reconciliation cannot be brought about, the judge can register the *ṭalāq* or the *mukhāla'a* contract (Art. 88). Whether these prescribed reconciliation procedures are actually followed by the court, is different issue. The issue of reconciliation will be discussed in more detail in the next chapter.

When one of the spouses or both file for a judicial divorce (*tafrīq*) on the grounds of discord, the judge should also attempt to reconcile the spouses. If reconciliation cannot be achieved and the plaintiff persists in his/her claim, the judge will appoint two arbiters from the family of the spouses or persons who the judge considers capable of bringing about reconciliation (Art. 112.3). If the arbiters fail to reach reconciliation, they will determine the reason for the disagreement and advise the court how to dissolve the marriage. They will establish the level of culpability ascribed to either the husband or the wife or both, in order to determine if and how much of the remaining dower and (possibly) post-divorce maintenance has to be paid (Arts. 114-115). In the next chapter I will pursue the issue of divorce on the ground of discord, including the court-ordered arbitration procedures, in greater dept.

4.8 Legal consequences of divorce: waiting period, unpaid dower, and post-divorce maintenance

In the section on *ṭalāq*, we saw that a revocable divorce does not necessarily mean an immediate end to the marriage. A husband may take his wife back during the waiting period (*'idda*) following such a divorce, but when the waiting period expires and the husband does not take his wife back, the divorce becomes final (Art. 118).

The waiting period is generally three menstrual cycles after the pronouncement of the divorce (Art. 121.1). During the *'idda* period following divorce, annulment of the marriage or death, a woman is not allowed to remarry. For the duration of the waiting period the wife is entitled to post-divorce maintenance (*nafaqat al-'idda*) (Arts. 83-84, 125). In addition to the post-divorce maintenance, the wife is also entitled to all of her unpaid dower. The deferred dower becomes payable once the

divorce becomes final or after death of the spouse (Art. 56). Any unpaid part of the dower is usually registered as a debt owed by the husband on the marriage contract (Art. 54.3 and 5; Carlisle 2007c: 194).

4.8.1 Child custody after divorce

In chapter 2 (§ 2.5.2), the various aspects of child custody were already explained. We saw that, in line with classical *fiqh* works, the SPLS makes a distinction between legal guardianship (*wilāya*) and nursing (*ḥaḍāna*). Legal guardianship is an exclusively male prerogative and therefore commonly belongs to the father (Arts. 170-175), the mother, on the other hand, has the obligation and right to nurse her children (*ḥaḍāna*) (Arts. 137-151). If the mother cannot exercise this nursing right, it can be claimed by the child's maternal grandmother or (subsequently) the paternal grandmother, the maternal aunt, and so on (Art. 139).

In the event of separation of the parents, the mother may ask the court to give her the right to nurse (*ḥaḍāna*) her children until the age of 15 for girls and 13 for boys (Art. 146).²⁰⁴ When the (divorced) mother obtains the *ḥaḍāna*-right over her children, the father remains responsible for the cost of nursing (Art. 142); after all he is the legal guardian and therefore remains responsible for the maintenance of this children.

Whether child maintenance is actually paid by the father is something else. It is therefore important for a mother, who seeks divorce, to know that she can fall back on her family members for financial support, if she intends to take care of the children (Carlisle 2007b: 96). Regardless of who physically takes care of the children, the father (as the legal guardian) will always have the final say in the upbringing of his children, in all matters related to their education, property, etcetera (Art. 170 ff.). When the *ḥaḍāna* period ends, the father can demand that the children are 'returned' to his care.

During this nursing period, the father has the right to see his children (*irā'a*). The SPLS (or any other law) does not regulate the actual implementation of the

²⁰⁴ This article was amended in 2003, see chapter 3 for a more detailed discussion on the amendment.

visitation rights. The precise visitation arrangements are worked out based on custom (*taqlid*), according to senior lawyer ‘Ali.²⁰⁵

Finally, a divorcée can also lose her nursing rights. Article 138 stipulates that a Muslim woman loses her right of nursing of her children when she remarries to someone outside the child’s immediate family (i.e. a non-*maḥram* man).

This brings us to the final sections of this chapter, namely legal regulation of Christian marriage and the dissolution of marriage. Again, the sections on this subject will be brief, especially in comparison with the analysis of the provisions of the SLPS. After all, the SLPS is the default personal status law in Syria and was therefore discussed more extensively.

4.9 Christian marriage and divorce: some general observations

In chapter 2 we saw that about ten per cent of the population belongs to one of the Christian denominations. The various Christian communities of Syria can be divided into three groups, namely the Orthodox Christians, the Catholic churches, and the Protestants or Evangelicals. Nearly every denomination or group has its own family law, which include the following: the Greek Orthodox Personal Status Law (2004), the Syriac Orthodox Personal Status Law (2004), the Armenian Orthodox Personal Status Law (n.d.), the Protestant Law of Personal Status (1949²⁰⁶), and the Catholic Law of Personal Status (2006).²⁰⁷ The latter law will be discussed in more detail in chapter 6, both its contents and its practical application in the Catholic courts of Damascus.

Article 308 of the SLPS allows for the Christian communities to administer their own religious regulations in certain specified matters of personal status, most importantly betrothal, marriage, marital obedience, wife’s and children’s maintenance, annulment and dissolution of marriage, nursing, and inheritance.

²⁰⁵ Personal communication with lawyer ‘Ali Mulhim, 26 January 2009.

²⁰⁶ Promulgated by law in Syria in 1952 and amended in 1962.

²⁰⁷ I understand that the Assyrian Church of the East also has its own personal status law, but unfortunately I have not yet been able to obtain a copy of this law or information on the date of promulgation (if ever officially promulgated), its exact title, and so on.

Similar to the analysis of the SLPS provided above, I will confine myself to a discussion of the Christian notions of marriage and divorce, as laid down in the Christian laws of personal status. However, I will only briefly touch upon the main characteristics of Eastern Christian family law, as an analysis of all the different Christian laws would be beyond the scope of this thesis, let alone this chapter.

4.9.1 Christian marriage: marriage as a sacrament

Marriage in the Eastern Churches has a different status than it has in Islamic law. The Eastern churches consider marriage a sacrament or a mystery²⁰⁸ (in Arabic: *sirr al-zawāj*).²⁰⁹ Tertullian of Carthage, a theologian from the second century, wrote that marriage 'is arranged by the church, confirmed by the oblation (the Eucharist), sealed by the blessing, and inscribed in heaven by the angels'.²¹⁰ The Christian Churches consider marriage an institution established by God, for '[man] is the image of God, God is love, and man, husband and wife, are recreating love in this life in a concrete expression.' (Pospishil 1991:123).

Furthermore, a marriage can only be considered a sacrament when it constitutes a union between a baptised man and a baptised woman, who voluntarily consent to marry before God. If both or just one spouse is not baptised, the marriage is considered a natural marriage. The Church will recognise it as a valid and sacred marriage, also protected by God, but it will not be considered a sacrament (Pospishil 1968: 602).

The theological and canonical position of the Protestant churches on various matters of the faith, including marriage, is different from the traditional Eastern churches, because the former come from a different (i.e. Western) tradition. The

²⁰⁸ Apostle Paul described marriage as 'a great mystery in Christ and in the Church' (Ephesians 5: 32). In Greek the word 'sacrament' and 'mystery' are the same (Meyendorff 1984: 19).

²⁰⁹ Art. 11 Greek Orthodox PS Law; Art. 40 Armenian Orthodox PS Law; Can. 776 CCEO (pertaining to Catholics; see chapter 6, §6.2.1). The Syriac Orthodox PS Law does not define marriage as a sacrament but as a contract, that being said, article 18 stipulates that there can be no valid marriage contract unless it is concluded by a priest of the Syrian Orthodox Church.

²¹⁰ Quotation taken from Meyendorff (1984: 21). He states that an Orthodox marriage has to be understood in the context of the Eucharist, for 'it is the Eucharist which gives to marriage its specifically Christian meaning.' (1984: 21)

Protestant churches were only established from the nineteenth century onwards, following the arrival of Protestant missionaries from Europe and the United States. Article 21 of the Protestant Personal Status Law describes marriage as a contract between a man and woman and not as a sacrament; the Protestant churches, nevertheless, consider marriage an institution ordained by God and therefore holds great religious significance.

A difference between the Latin (i.e. Western) Churches and Eastern (Catholic and non-Catholic) Churches with regard to marriage is that the latter require the blessing of a priest. The grace of the sacrament can only come down upon the spouses through the blessing of the priest 'and without this blessing there can be no sacrament.' (Gallagher 2006: 10) Whereas the Eastern Churches regard the priest as 'the minister of the sacrament of matrimony', the Latin Churches, influenced by Roman law, do not require his intercession because they regard marriage as a 'contract' which is concluded by the husband and the wife themselves (and the priest is only a witness) (Meyendorff 1984: 23). While the Latin Church refers to marriage as a 'matrimonial contract', the Eastern Churches avoid using the term 'contract', instead they speak of 'matrimonial covenant' and 'celebration of marriage' (Faris 2000: 38). Another difference with the Latin Church is that the Eastern Churches do not consider procreation as the primary aim of marriage, but the central consideration is conjugal love (Gallagher 1990: 85).

This is precisely the argument Christians in Syria invoke, according to Rabo, when they compare themselves to Muslims with regard to marriage. Christians often claim that because Muslim men can divorce their wives or take another wife without any difficulty, their wives are forced into obedience. Rabo quotes a comment she heard from many Syrian clergy who said: 'Muslim men marry not for the companionship between men and women, but only for their own pleasure. Their marriage is not sacred but simply a sexual union' (2012b: 89). Furthermore, 'ordinary' Christians also stress the difference in perception of marriage, for Rabo quotes a typical Christian comment from Christian men: 'We look for companionship with our wives. A Christian husband and wife spend more time together and the relationship cannot only be based on sex' (2012b: 89).

Since marriage is considered an expression of faith, it is concluded or (to use the proper terminology) celebrated in church, commonly in the church of the husband. In Syria, a marriage is usually celebrated on a Sunday and will be conducted by the local priest in a Eucharistic celebration, i.e. mass. A marriage concluded in a church is recognised by the state as a valid marriage, no additional procedure has to be undertaken by the church's court for example. After the marriage ceremony the church sends the 'marriage papers' (*mu'āmalāt al-zawāj*) to the Civil Registry Office.²¹¹

4.9.2 Christian marital rights and duties

The patriarchal family model is also visible in the various Christian personal status law; for example, the Armenian Orthodox law and the Protestant law state that the husband is the head of the family (Article 46 and 33, respectively). Similar to the rights and duties pertaining marriage laid down in the SLPS, the Christian personal status laws also require the husband to provide maintenance for his wife and children.²¹² In return, a Christian wife has to be obedient to her husband, which generally means that she is required to live with him and follow him wherever he chooses to live.²¹³ When, however, the wife is financially well-off (and the husband is not), the duty is on her to support her husband and their children.²¹⁴ In a Christian marriage, incidentally, it is common for the family of the bride to pay a dowry (*dūtṭa* or *bā'ina*) to the husband and/or to equip the couple with a trousseau (*jihāz*).²¹⁵ The husband does not pay his wife a dower, but he will commonly give his bride gifts, such as gold and other jewellery.

Similar to the SLPS, most Christian laws of personal status stipulate that a Christian husband can be excused from paying maintenance to his wife when the

²¹¹ Interview with judge of the first instance and appeal Catholic court Fr. Antoun, 26 March 2009, Damascus.

²¹² Arts. 33-35 Greek Orthodox PS Law; Art. 34 Syriac Orthodox PS Law; Art. 121 Catholic PS Law; Art. 31 Protestant PS Law.

²¹³ Art. 22 Greek Orthodox PS Law; Arts. 47-48 Armenian Orthodox PS Law; Art. 33 Syriac Orthodox PS Law; Art. 125 Catholic PS Law; Art. 32 Protestant PS Law.

²¹⁴ Art. 32 Greek Orthodox PS Law; Art. 35 Syriac Orthodox PS Law; Art. 123 Catholic PS Law.

²¹⁵ Arts. 42 ff. Greek Orthodox PS Law; Arts. 79, 90, 92-93 Armenian Orthodox PS Law; Arts. 42 ff. Syriac Orthodox PS Law; Art. 40 Catholic PS Law.

court considers her disobedient.²¹⁶ A wife will be considered disobedient if she leaves the marital home without his consent or without informing him and she refuses to return. It is therefore important for the court to determine if the wife left the house voluntarily or if she was kicked out by her husband. Based on (witness) statements of the litigants, family members, and neighbours, the court will try to establish a credible narrative so as to determine whether the wife left of her own or her husband's accord, as will be demonstrated in the chapter on Catholic court practices.

4.10 Divorce, separation or annulment of marriage?

A Christian marriage bond is deemed exclusive and permanent, after all Christ himself has reportedly said: 'So then, they are no longer two but one flesh. Therefore what God has joined together, let not man separate.' (Matthew 19:6; *New King James Version*, 1982)

In principle, all (Eastern) Churches condemn divorce. Because marriage is regarded as a union before God, dissolving such a union is considered problematic. In addition, the problem of divorce is related to the issue of remarriage, since a marriage is an eternal union in Christ which is not broken by death and continues in the afterlife (Meyendorff 1984: 54). Broadly speaking, the Orthodox Churches take a more lenient stand on divorce and remarriage when compared to the Catholic Church. The Catholic Church does not recognise divorce; it even renounces the very word 'divorce' (*ṭalāq*). A Catholic marriage can, however, be terminated, but only through nullification of a marriage (*buṭlān al-zawāj*), i.e. meaning that the spouses have to prove that the marriage was never valid in the first place, which will only be accepted in exceptional cases (see chapter 6).

Generally, the various Christian sufficient laws differentiate between legal separation (*hajr*), annulment (*buṭlān*), and dissolution (*faskh*). The grounds for

²¹⁶ Art. 37 Greek Orthodox PS Law; Arts. 49-51 Syriac Orthodox PS Law; Art. 127 Catholic PS Law.

divorce or separation for each denomination vary. A spouse can, for example, ask for judicial dissolution or annulment of marriage in case:

- the other spouse converted to another religion (Art. 67 sub a Greek Orthodox Law; Art. 62 sub d Armenian Orthodox Law; Art. 40 sub c Protestant Law);
- the other spouse committed adultery (*zinā*) (Art. 68 Greek Orthodox Law; Art. 50.3 Syriac Orthodox Law; Art. 62 sub a Armenian Orthodox Law; Can. 863 CCEO);
- impotence or sexual dysfunction has been established (Art. 69 sub e, 70 sub d Greek Orthodox Law; Art. 51 Armenian Orthodox Law);
- lack of sufficient use reason or the inability to understand the essential obligations of marriage (Cann. 1095, 1096 CCEO).

A husband can file an annulment or divorce petition to the court when he discovers that his wife was not a virgin when he married her (Art. 69 sub a Greek Orthodox Law; Art. 54.1 Syriac Orthodox Law) or when the wife has left the marital home and refuses to return (Art. 69 sub c and d Greek Orthodox Law; Art. 50.5 Syriac Orthodox Law). The wife can seek divorce or annulment when her husband forces her to unnatural sexual acts or adultery (Art. 70 sub a Greek Orthodox Law; art. 50.6 Syriac Orthodox Law).

As stated earlier, the Catholic Church takes a strict stand on divorce and only accepts annulment of marriages in exceptional cases. I was told that the other churches generally have a more liberal approach towards divorce. In my observation, the Greek Orthodox court, when compared to the Catholic court, indeed proceeded more pragmatically in its treatment of divorce cases. The Catholic court took on a much more weighty and formal stand in its handling of annulment petitions. It is my hypothesis that the Catholic judges' were also more conservative due to their canonical training in Rome. In chapter 6, I will expound on this hypothesis in relation to my discussion of the annulment proceedings in a Catholic court of Damascus.

4.11 Conclusion

In the first part of this chapter I have described the cultural context in which Syrian law operates. Cultural understandings of family relations and gender roles in the context of personal status law have formed the point of departure. This included an analysis of some key cultural concepts, namely patriarchal family, morality and propriety, family honour and women's sexuality and marriage ideals. These concepts lie at the foundation of Syrian family life and are at the core of the different laws of personal status.

An analysis of the legal rules pertaining to marriage and divorce, as set down in the various personal status laws, demonstrated that the patriarchal supremacy of men over women is securely embodied in these laws. The SLPS and the most important Eastern Christian personal status laws have espoused the patriarchal family model and with that contribute to the preservation and confirmation of that model in the Syrian legal context. The gendered personal status laws prescribe different roles, rights and obligations for men and women, as becomes apparent from the provisions of the different laws.

A man in his gendered role as husband and father is obliged and expected to provide for his wife, children and other family members. A woman in her gendered role as wife and mother is obliged and expected to be obedient to her husband and satisfy the wishes of her husband, their children and her family-in-law. In addition, as a daughter and sibling, she is expected to uphold her family's reputation and honour by living up to the expectations of a dutiful wife and mother. The success or failure of a woman's marriage also reflects on the name and reputation of her own family. Hence, women in particular are faced with legal and social expectations to adhere to the patriarchal family model.

My main argument of the second part of this thesis is that shared norms and views on proper or improper gender comportment, marriage and marital roles are emphasised and reinforced time and again in the different personal status courts, both Muslim and Christian. Not just by the judges, litigants, lawyers but by all the participants in the legal arena, thus including witnesses and other 'visitors' to the

court. During my time in several personal status courts of Damascus, I observed that despite their legal and religious differences, the courts were united in their shared cultural understandings of gender, family relations, and social norms and behaviour, as will become evident in the next two chapters. Hence, the courts can be regarded as sites where norms and expectations are expressed, emphasised and reinforced, not just by the judges but by all those who work on or visit these sites.