The Islamic Marriage Contract

Case Studies in Islamic Family Law

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INTERPRETING TEARS: A MARRIAGE CASE FROM IMAMIC YEMEN

Brinkley Messick

At her request, a young woman named Arwā appeared before a group of men and declared that she had reached her legal majority. The resulting document, prepared by one of the men, begins by stating that she first was legally identified by some individuals present, including two men and a woman who knew her by her voice. "She appeared behind a barrier wall (*ḥijāb*)," that is, outside the door to the room, "and bore witness to us [the document writer] and to the aforementioned [individuals named earlier] that physical maturity had occurred to her, and this by menstruation."[1] The fact of her legal majority established, Arwā then took further action on her own behalf in a legal struggle that by then had persisted for some months. It was March of 1958.

Fifteen years earlier, a contract purportedly had been written at the behest of two brothers named Muḥammad and Aḥmad, the sons of Nājī ʿAlī Muṣṭafā, from a highland village to the west of the provincial capital of Ibb, in Lower Yemen.[2] The brothers had agreed to marry their children—Muḥammad's daughter, Arwā, and Aḥmad's son, ʿAzīz—in what anthropologists technically call a parallel-cousin marriage. Both the son and the daughter were children, legal minors, and the contract was made on their behalf by their fathers. Years later, in litigation, one of the contending parties described this document as the "first contract." It was quoted in the court record as follows:

> A valid Shariʿa [Islamic law] contract was entered into by Muḥammad Nājī ʿAlī Muṣṭafā for his minor daughter, the free woman Arwā, with his brother's minor son, ʿAzīz, son of Aḥmad Nājī ʿAlī Muṣṭafā, and the contract was accepted for him [the minor son] by his father, the mentioned Aḥmad Nājī, [and this] according to the principles of the Book of God and the Sunna [prophetic traditions] of His Prophet, with a dower of those equivalent to her (*mahr mithlihā*), as a virgin. This was written on its date, July [no day specified], 1943. [Three named individuals] and others witnessed, and God is sufficient witness.

Some years passed and Arwā's father, Muḥammad, died, leaving her affairs and those of her minor brother in the hands of his brother, the children's

paternal uncle, Aḥmad Nājī, who was made the legal administrator (*waṣī*) of the property they inherited from their deceased father. As Arwā and her cousin and husband-by-contract, ʿAzīz, were still minors, their marriage remained unconsummated.

Fourteen years passed before, finally, in 1957, Aḥmad Nājī (the uncle and father, respectively, of Arwā and ʿAzīz) began to take steps to complete the marriage purportedly contracted in 1943. As he later explained, he intended to "renew" the first contract, perhaps because the first contract, as will later appear, was liable to contest as to its authenticity. The death of his brother, however, necessitated an additional legal step. Under Zaydi law, in her first marriage as a virgin a woman must have a legal guardian, a *walī*, who enters into the marriage contract on her behalf. Typically, this guardian is the woman's father, or in his absence, her adult brother or other close male-line relative. As Arwā's paternal uncle, Aḥmad Nājī might have acted in this capacity himself, except for the fact that in this instance he already would be acting on the other side of the contract, representing his minor son. The additional legal step necessary would be to obtain from Arwā legal agency for someone to represent her in the marriage contract.

Aḥmad Nājī also wished to establish two other facts to fortify the "renewed" contract, and these would prove more complicated and contentious. One was that Arwā had reached the age of physical maturity (known legally as *bulūgh*). The second was that, as an adult, she had given her consent, her *riḍāʾ*, to the marriage. A several-part document establishing these various requirements was prepared in July 1957, and a copy of it was entered into the instrument register of the Ibb Province Shariʿa Court. It reads:

> There appeared before me the Head of the Village of [place name] with [name] and [name] and they together bore witness to the fact that the free woman Arwā, daughter of Muḥammad Nājī granted agency to and permitted her paternal uncle, Ḥājj Aḥmad Nājī, to marry her and to give her to his son ʿAzīz, the son of Aḥmad Nājī ʿAlī Muṣṭafā, for a dower of those equivalent to her among her paternal aunts, together with the complete silver. And they bore witness, together with others, that the aforementioned girl is legally mature.

The text continues, attending to the potential legal obstacle represented by the prior right of Arwā's brother, if mature, to represent her in the contract:

> And together with this there appeared the adolescent (*murāhiq*, i.e., not quite legally mature) brother of the mentioned girl, ʿAlī (son of) Muḥammad Nājī ʿAlī Muṣṭafā and, as a precaution against uncertainty as to his legal maturity, he granted legal agency to his paternal uncle

> Aḥmad Nājī ʿAlī Muṣṭafā, following the permission from his sister, to give her to his son ʿAzīz, son of Aḥmad Nājī.

Arwā's uncle Aḥmad Nājī thus acquired the right by agency to represent her in the marriage contract. But, because he could not act simultaneously for both his niece and son in the same contract, a second agency was required. The document therefore continues:

> And since the aforementioned son of Ḥājj Aḥmad is a minor, an adolescent, legally immature, and since the one who will accept the contract for him is his aforementioned father, a granting of agency occurred from him [the father, Aḥmad] to "the father" [an honorific] al-Sharafī [a nickname for Ḥusayn] the learned Ḥusayn b. Muḥammad al-Shāmī to enter into the contract of marriage with his son [on Arwā's behalf], and he [the father] would accept for his son on his behalf. Written on its date, 9 Dhū l-Qaʿda 1376 [1957].

Incorporating these previous steps, there follows the text of the marriage contract itself, which represented the "second contract" concerning these cousins:

> Then there occurred the Shariʿa contract of marriage, from "the father" al-Sharafī [al-Shāmī], in accord with an agency granted to him by Aḥmad Nājī ʿAlī Muṣṭafā, in accord with an agency and permission to him from the free woman Arwā, daughter of Muḥammad Nājī and by her brother ʿAlī Muḥammad Nājī, to the son of Aḥmad Nājī, who is ʿAzīz, son of Aḥmad Nājī. The contract of marriage was accepted for him by his father Aḥmad Nājī ʿAlī Muṣṭafā, and this with the free woman Arwā, daughter of Muḥammad Nājī, with the presence of witnesses at the session who are [three named individuals] and others, and God is the best of witnesses. And this with a dower of those equivalent to her among her paternal aunts, and the stipulated silver, and [hope for] good conjugal relations, and God grants success, on its date, 9 Dhū l-Qaʿda 1376 [1957].

It was at this point that Arwā, her marriage now contractually "renewed" but still unconsummated, took matters into her own hands. She fled Aḥmad Nājī's (her paternal uncle's) household where she had been living, to the household of her maternal uncle (*khāl*), an individual named ʿAlī Muḥammad Qāsim.

If the post-revolutionary era in which I first lived in Yemen (1974–1976) provides any retrospective evidence, the strategy Arwā followed was a venerable one. The departure of the wife from the marital residence, typically to her father's house, is a characteristic step taken by women to attain some

sort of redress or resolution to a marital problem. Departure by the wife engaged a mechanism of dispute resolution in which the woman's interests typically were represented by her father, or some other male-line relative. In difficult cases, the "return" of the wife could be the outcome of either a customary settlement[3] or the subject of a court ruling for "return of the wife" (*irjāʿ al-zawja*).[4] Arwā's situation was more complicated, however, since, as noted, her father had died, her brother was an adolescent, and she was living in the extended family household of her paternal uncle (her *ʿamm*). She therefore fled to the home of her maternal uncle. According to Anna Wurth,[5] who has studied Yemeni litigation in connection with marital conflicts in the 1990s, however, such recourse to the resources of the father or the extended family was only infrequently used by litigants now using the capital city courts. Most of these modern-day litigants were originally from distant locales in Lower Yemen and they now mainly lived in nuclear families.

In response to Arwā's flight, a court case was brought by her paternal uncle (*ʿamm*), Aḥmad Nājī, from whose house and from whose son she fled. In the Ibb Province Shariʿa Court, presided over by Judge Ismāʿīl ʿAbd al-Raḥmān al-Manṣūr, a claim was entered by Aḥmad Nājī, saying that the defendant, ʿAlī Muḥammad Qāsim and his accomplices "stole [*nahabū*] the wife of his son ʿAzīz." Aḥmad Nājī demanded that the judge enforce the "return of the wife of his son ʿAzīz to the residence of her husband." The two contract documents cited above were presented by Aḥmad Nājī as evidence and entered into the judgment record. The ensuing litigation ultimately led to Arwā's March 1958 appearance before a group of men to declare her legal majority (described above) in an attempt to claim control over her own marital affairs.

"The Writer Writes"

Before turning to further discussion of this case, which I will examine in terms of its gendered evidence, disputants' motivations, legal arguments, and the judge's final ruling, I want to pause to examine how the practice of making a Muslim marriage contract is understood in a local, late nineteenth-century manual for notaries. In terms of distinct levels of legal writings, thus far I have mentioned the standard mechanisms for the application of law, namely, a contract and a court judgment. In what follows I also refer to several distinct dimensions of doctrinal legal texts: first, the notarial manual, an in-between legal genre, known as the *shurūṭ* (stipulations) literature, which encapsulates doctrine for the specific purpose of guiding contract writing; then, doctrine (*fiqh*) per se, including both the basic law book text (*matn*) and the commentary literature (*sharḥ*); and, finally, a further specialized level of practice-oriented doctrine, the rule-like "choices" (*ikhtiyārāt*) issued by reigning imams on specific points of law

to guide judges in their Shariʿa court judgments. As the events of Arwā's case took place in the period before the Revolution of 1962, Shariʿa law in highland Yemen remained uncodified and unlegislated. These were the last decades of Shariʿa law application under an indigenous Islamic state.[6]

The brief chapter from the manual for notaries,[7] which I translate in full below, makes explicit a set of issues that a document writer ought to consider before actually writing a marriage contract. Many complex legal matters that are fully treated in the law books are mentioned here only in passing, with a pragmatic view to practice. These include: the waiting period (*ʿidda*) imposed upon a woman after the termination of her marriage; repudiation (*ṭalāq*) by the husband; dissolution (*faskh*) of marriage; the woman's marriage contract guardian (*walī*) and his guardianship (*wilāya*); the dower (*mahr*); the woman's consent (*riḍāʾ*); and, finally, such key features of the contract itself as the "offer" and "acceptance," derived from the sale contract model, and the bilateral consent (*tarāḍī*) of the contracting parties.

The part of the manual relevant for our purposes here reads as follows:

> It is required of whomever makes a contract for marriage, whether a judge or his deputy or an arbitrator (*muḥakkam*) from among the Muslims, that he knows the husband and his name and his descent (*nasab*), and the woman and her name and her descent. And if he does not know them, it is necessary that they are made known by two just witnesses. And it is necessary that he ascertains that she is free from any husband, or of a waiting period [after] any husband; whether she is a virgin or a non-virgin; whether her husband has died and she has completed her waiting period after him or has repudiated her and she has completed her waiting period after him; or whether her [marriage] has been dissolved [contractually] by a judge. And the repudiation or dissolution must be established for the notary (*al-ʿaqīd*, literally, "contractor") in Shariʿa terms or else he should not engage in the [new] contract, because the basic principle (*al-aṣl*) is the continuity of the marriage relation. And if the woman said, "I was married and he died, or he repudiated me, or my marriage was dissolved contractually," then evidence is necessary for this claim. And it is [also] necessary for the contractor to know the *walī* of the woman by his name and to verify the establishment of his *wilāya* by a Shariʿa method, not simply by the statement of the woman that "he is my *walī*." If it is found that the woman is legally eligible for marriage, and a [verbal] contract occurred between the *walī* and the husband, offering and accepting, and the woman having consented, as is required in Shariʿa terms, after ascertaining the above from the *walī*s and [in] the presence of two just witnesses, then the writer writes:[8]

"There appeared So-and-so, son of So-and-so, *walī* of the free woman So-and-so, daughter of So-and-so, for himself," or, "by representation according to an agency document from So-and-so, and So-and-so, a daughter of So-and-so was married to So-and-so, son of So-and-so, by a contract that is legal and complete in its considered Shariʿa stipulations, with the presence of two just witnesses, So-and-so and So-and-so, with the mutual consent (*tarāḍī*), for a dower of (those) equivalent, whose amount is thus and so, surrendered by the husband," if he has surrendered it, or, if it remains the husband's financial obligation, he writes, "it remains (to be paid) as the financial obligation of the husband." And if her father has received this he would say, "Her father has received this for her benefit, by right of his Shariʿa *wilāya*." "[This] after the establishment of her status as a virgin of verified interdiction."

He should write all that we have mentioned in three copies, two documents for the spouses, and a [third] document should remain with him to serve as a reference for him in case of need. Caution [is warranted] against negligence in mentioning the amount of the dower since disputes are many that are caused by greed, even if mention is made of the dower of those equivalent, due to the differences of the equivalent women among the relatives.[9]

In terms of its genre, this brief chapter on the marriage contract from the notarial manual is poised between the large and detailed literature of the chapters on "Marriage" and "Repudiation" in the Zaydi *fiqh*,[10] on the one hand, and the actual documents of local marriage agreements on the other. Largely implicit references invoke the pre-existing doctrinal corpus while its explicit designs attempt to properly constitute forthcoming written texts.

Shariʿa subjects must be either known or made known, their identities formally established, initially by means of full names, including, as mentioned in the manual, links of descent. This is a precondition for the principled intervention of the third-party writer, an individual whose authority and integrity are at stake when he prepares a written legal document following an oral transaction. If he does not know the prospective parties to a marriage contract, their identities may be verified by witnesses in an identification process that may be seen as a discrete opening step in the later witnessing of the contract itself. In preparing to write, the notary places a distinct emphasis on the woman's identity. This emphasis reflects the fourth of four conditions for a legal marriage set forth in Zaydi *fiqh*: after (1) a valid contract made by a legal *walī*, (2) the witnessing of two just witnesses, and (3) consent by the woman, then (4) "her identification" (*taʿyīnhā*) must occur.[11] Commentator al-ʿAnsī elaborates on this basic formulation by adding that it refers to:

> [T]he identification of the woman at the time of the contract and also the identification of the husband. "I accepted for one of my sons" [for example] is not sufficient. Identification of [the woman] can be obtained by a sign indicating her, such as if he [the *walī*] says, "I married you to this indicated individual [feminine], or the one [feminine] you know," even if she is absent. Or by a description such as "I married you to my oldest daughter, or youngest, or [my] white [daughter], or black," or such like among the designating descriptions for the woman, so that he [the other party, the husband, or his agent] will not confuse her with another. Or she can be identified by name, as Fāṭima or Zaynab, or such, or *laqab*, such as "I married you to my daughter, 'the Pious,'" or "the Pilgrim," or by a *kunya* for her, like Umm Kalthūm or Umm al-Faḍl, or such.[12]

In the notarial manuals, the critical issue prior to the writing of the document is the woman's current legal status and the potential for any impediment to her marriage (e.g., an existing marriage or required waiting period following a previous marriage). A woman's statement that she is married or divorced, or that a particular individual is her *walī*, must not be taken at face value but must be backed by formal evidence that satisfies the notary. As for the *walī*, he too must be known, both by name and by the legal terms, the *wilāya*, on the basis of which he acts in the woman's behalf, the typical case, again, being that the right pertains to a father with respect to his daughter. As the model contract notes and as we have seen in Arwā's case, the *walī* also may be represented in the contract by an agent whose agency should be verified by a document to this effect. In all such matters, it is the notarial writer's role and responsibility to demand accurate information before writing. His primary sources are his own knowledge and that of the two just witnesses. Potentially also, although it is not mentioned, he may refer to other documents, such as agency documents, divorce papers or court rulings.

In Arwā's case, it was at this key node of information-gathering by one of the contract-writing notaries prior to writing that a breakdown occurred. The overview provided in the manual chapter makes clear reference to the initial occurrence of the witnessed verbal contract between the *walī* and the husband, with the notary ideally attending. This spoken contract comes into existence with the use of the standard language of the "offer" and "acceptance," modeled on the general form of bilateral contracts in the *fiqh*. In the model document, however, this contractual language is not mentioned and the guiding rubric instead references the more fundamental issue of intent.[13] Thus the notarial writer states that the bilateral contract occurred "with the mutual consent" of the two parties, the *walī* and the husband.[14]

Interpreting Tears

The third of four formal conditions of a marriage contract in Zaydi fiqh treatises, as mentioned above, is that the initial verbal marriage contract be predicated on the individual consent, or *riḍāʾ*, of the woman. Since this is a unilateral form of consent, spoken statements may be taken as relatively secure evidence of inner intentions. But in the absence of explicit spoken words, difficult interpretive issues may be raised. The issue of tacit consent is gender-specific and represents a crucial substantive issue in such contracts, as will be demonstrated later with respect to the developments in Arwā's case.

In doctrinal terms, between the two major Yemeni schools of fiqh, the Shafiʿi and the Zaydi, we find a distinctive difference. In the view of the Shafiʿi *madhhab*, the subordinated indigenous school of Ibb and Lower Yemen, consent on the part of the betrothed woman is not always required.[15] Specifically, the Shafiʿis hold that in the case of a virgin, where the other marriage conditions are met, her father (or grandfather), acting as her *walī*, has the right to impose a marriage upon her. The conditions of this imposition (*ijbār*) include the absence of any manifest animosity (*ʿadāwa*) between the future couple, the existence of the appropriate social or moral equivalence (*kafāʾa*) in the spouse, and the woman's contentment with the dower.[16] In the case of a contract for a non-virgin, however, the Shafiʿi position is that it is illegal to make a marriage contract for her unless she has reached her majority and given her permission.

By contrast, the doctrine referenced implicitly in the notarial manual (and, as we shall see, explicitly in Arwā's case), is that of the official Zaydi school of the ruling imam, which, as noted, requires the consent of any free woman who is in her majority.[17] Generally, the woman's consent must be legally operative (*nāfidh*), and this is characterized by the twentieth-century commentator al-ʿAnsī as the case where, using his past tense examples, "she says 'I consented,' or 'I authorized,' or 'I gave permission,' or such like, which indicate that she has asserted her consent."[18] After this basic rule is set forth, the Zaydis also discuss the different circumstances of virgin and non-virgin women. The non-virgin is expected to make her consent known by an explicit statement. In place of a statement, only strong pieces of contextual evidence (*qarāʾin qawiyya*), such as, in the sample list provided by the commentator, "receipt of the dower or requesting it, active preparation for the husband and her going to the house of the husband, or her extending her hand to be hennaed,"[19] may be adequate to demonstrate her consent, and only then if such evidence is not undermined by indications of the woman's shyness towards, or fear of, her *walī*.

In the case of the virgin, however, while an explicit statement of consent is preferable, the jurists also anticipate instances of shyness, intimidation, and silence. Silence alone can constitute consent for a virgin woman, so

long as she understands that she can refuse. Difficult interpretive circumstances may surround the actual ascertaining of such consent, however. Consent may be thought to occur "if the news of the marriage reaches her and to a witness to her condition no contextual evidence (*qarīna*) is apparent from which he understands her aversion to it, [and] instead, she was silent, or she laughed, or she fled from room to room in the house, or she cried to an extent not indicating sadness or dissatisfaction—since crying can be from happiness and it can be from distress."[20] But, the commentator continues, "if [the situation] is ambiguous, the reference is to the basic circumstance (*al-aṣl*), which is silence."[21]

Then, for the opposite situation, the doctrinal jurist offers some potential indicators of non-consent, typical nonverbal manifestations that constitute contextual evidence on the basis of which there is a probability that she opposes the marriage. Al-ʿAnsī's examples of such indications are her striking her face with her hand in despair, or "tearing at her breast, pleading woe, and fleeing from house to house, etc."[22] In these suggested legal readings of the nonverbal signs of the female inner state, fleeing "from room to room" indicates consent while the more extreme fleeing "from house to house" is taken as non-consent.

Gendered Evidence

The details of Arwā's case illustrate not only the relationship of women to marriage contracts and litigation, but also the assumption of separate spaces and knowledge of men and women. At two points in the trial process Judge al-Manṣūr took steps to obtain crucial evidence about Arwā, evidence that could only be collected and evaluated by other women.[23] In some historical jurisdictions this has entailed reliance on women "experts." Near the beginning of the judgment record, immediately following the assertion by the claimant Aḥmad Nājī that Arwā had reached her legal majority, the text states, "there was an order from us," that is, from Judge al-Manṣūr, "to two just women [unnamed] to research and investigate the [matter of] the aforementioned having reached the age of mature discernment (*rushd*)." The concise findings are reported as follows: "The two just women stated that the aforementioned remains a minor at this time, not of full legal capacity, but [that] she is verging on physical maturity (*murāhiqa li l-bulūgh*)."[24] Defendant ʿAlī Muḥammad Qāsim seized on this finding and offered estimations of the ages of Arwā (not more than fourteen years) and of ʿAzīz (at this time not more than ten years); both, it is noted, had appeared in court. Then he pointedly observed that the purported "first" contract for their marriage was dated fourteen years and seven months ago.

The second instance of evidence privy only to women occurs near the end of the trial record regarding two documents Arwā is reported

to have presented to the court. The first document (referenced at the beginning of this paper) records Arwā's appearance behind a barrier and the identification of her by her voice. This text comprises her formal announcement to the assembled document witnesses, including the writer, of her legal maturity (*bulūgh*) by reason of the abrupt onset of menstruation. The second document she presented directly supports the first. Here the final judgment record (the *ḥukm* document) reads: "[T]here was an inquiry (*istifhām*) of two just women from the house of his honor the Judge of the Province about what the aforementioned had reported concerning the occurrence of menstruation in her, and they testified to the occurrence to her of that, and that the aforementioned reached maturity by her period."

A very different type of evidence is provided about women from the perspective of male witnesses. Examples are the defense efforts to fix the children's ages so as to demonstrate the impossibility of the date of the "first" contract. Two pieces of testimony for the defendant concerned al-Ḥurra (the "free woman") Bilqīs, the mother of Arwā, and the free woman ʿĀʾisha, the mother of ʿAzīz and wife of the claimant Aḥmad Nājī. In the first testimony text we learn in passing from the specifying of Arwā's descent that her mother was also her father's patrilineal cousin, indicating that Arwā's parents were related in the same way as was envisioned for Arwā and ʿAzīz. The text reads in pertinent part:

> Aḥmad Ḥusayn Qāsim from the village of [X] bore witness to God that the free woman Bilqīs, daughter of ʿAzīz ʿAlī Muṣṭafā, mother of the free woman Arwā, daughter of the aforementioned Muḥammad Nājī, went to visit her maternal uncle ʿAlī Muḥammad Qāsim [the defendant] in the month of Jumādā II, the year 1362 [1943], and she was pregnant with the free woman Arwā, daughter of Muḥammad Nājī. And she stayed with him for two months and then she gave birth to the child she was carrying at the end of Shaʿbān 1362 [1943]. Then she stayed until the end of Ramaḍān when she returned to the house of her husband.

It also becomes clear from this that the defendant, ʿAlī Muḥammad Qāsim, is Arwā's maternal uncle only in the broader classificatory sense, since he actually stands in that specific relation to her mother. The first testimony thus provides some family history, both with respect to the purported marriage and to Arwā's fleeing to this same man's house some fourteen years later.

The next piece of testimony provides some background for the family of ʿAzīz, the prospective husband, revealing (again in passing) what may be the trace of still another patrilateral cousin marriage in the generation of ʿAzīz's maternal grandparents:

> Aḥmad ʿAbduh Qāsim from the village of [X] bore witness to God that Aḥmad Nājī repudiated his wife, the free woman ʿĀ'isha, daughter of Muḥammad Bayḥān, in the year 1368 [1948–49], and [that] the aforementioned [ʿĀ'isha] went to the house of her paternal uncle to be with her mother in the village of [X], and with her was her son ʿAzīz Nājī [sic], a nursing infant not more than two years of age.

It should be noted that there were counter-efforts on the part of the claimant to present evidence that the two children were living at the time of the contract, including one witness who said that on a date before the contract he was in attendance at ʿAzīz's circumcision (his *khitān*).

Motivations

In the last process-recording segment in the judgment record, there is an entry of testimony which is relevant to understanding the parties' motivations in the conflict. The text reads:

> ʿAbd Allāh Nājī al-Muḥammad from the village of [X] bore witness to God that al-Ḥājj Aḥmad Nājī called to him from the window, since the house of the witness is next to the house of Aḥmad Nājī. He went in and found Sayyid Ḥusayn al-Shāmī and his son Aḥmad [who eventually wrote the "renewed" contract, countersigned by his father], and they ordered him to hear the agency grant by the free woman Arwā to her paternal uncle to contract for her with his son ʿAzīz. He said that he went out [of the room where the men were sitting] to go to her, and she was in a room next to the kitchen. He asked her about the agency by her, and she pleaded with him, by God and by the Shariʿa, to leave her alone and [she said] that she was not granting agency to anyone and that she was a minor. He returned to the room and informed them of this. And Aḥmad Nājī went out and in his hand there was a [...] stick and he beat her with this stick three [times], with the witness behind him watching. Then Aḥmad Nājī jumped on top of the aforementioned, stepping on her stomach with his foot, he [the witness] said, "until we saw her urine on her clothes and on the floor covering." Then the witness went with Aḥmad Nājī in to the room where Sayyid Ḥusayn and his son were. They said, "What did she say?" And the witness told them that she did not consent. And Sayyid Ḥusayn said, "If she does not consent, leave her alone, rushing is not good in this matter."

We know that, despite this, the "renewed" contract eventually was written. As this witness' testimony continues it reveals what may be the crux of the matter for the claimant Aḥmad Nājī, Arwā's paternal uncle:

> Aḥmad Nājī requested of Sayyid Aḥmad [al-Shāmī] that he write the contract document for the aforementioned [Arwā] with his son ʿAzīz, connecting her [to the family], because under his [Aḥmad Nājī's] control [as the appointed legal administrator, *waṣī*] was an inheritance pertaining to the free woman Arwā from her mother and from her father, and he feared that she would marry another man who would cause them trouble and 'Shariʿa' [that is, litigation].

This text indicates that Arwā's inheritance may have played a central role in the motivations of the several parties involved. Arwā's case is now seen not just as one of a forced marriage of a minor, but also one that turns on the fate of a woman's inherited wealth at the key juncture of her marriage, a significant issue in the context of a society based on patrilineal property relations.

For Arwā, the events described above may also have represented a turning point, the beating and the forced agency and contract of marriage turning her irrevocably against her uncle and causing her to flee his house. Her motivations, beyond whatever she may have felt towards her contracted-for cousin-husband, which is unknown, may be learned directly from her reported statements and also (but much less securely), through assertions made by the defendant, her maternal uncle ʿAlī Muḥammad Qāsim, and others. For example, basic information about Arwā appears in the first recorded responses by the defendant early in the litigation:

> ʿAlī Muḥammad Qāsim responded that the mentioned girl, the free woman Arwā, daughter of Muḥammad Nājī, was with him, and that her paternal uncle, Aḥmad Nājī, the claimant, wanted to marry her to his son ʿAzīz, and she is a minor. He contracted for her with his mentioned minor son, employing duress (*karhan*), and without her consent. [...] She fled to him [ʿAlī Muḥammad Qāsim] after her paternal uncle had inflicted injurious suffering upon her and beat her severely. [...]
>
> ʿAlī Muḥammad Qāsim stated that the aforementioned remains a minor until this time and that she does not consent to the contract, even if she did consent to the contract when she was beaten. When she arrived [at his household], ʿAlī Muḥammad Qāsim decided to have the aforementioned brought to him to know the truth. And he had her brought and she stated that she does not consent to the contract, and would never consent to it, and that her paternal uncle beat her severely as a result of her non-consent.

But what caused Arwā to be unwilling to accept the proposed marriage in the first place, before she was beaten? Leaving aside her feelings toward ʿAzīz, a possibility is raised in the course of the litigation. In the recorded

response by the defendant immediately following the entry on the "first" contract, he describes Arwā as a girl, "whose father had died and [also] her mother, by poisoning, by he [that is, Aḥmad Nājī] who undertook the reckless falsification of this document [the "first" contract] [...]." This accusation, that the claimant Aḥmad Nājī had committed a double murder by poisoning (a fratricide and murder of his sister-in-law), is repeated later, but still without much development, when defendant ʿAlī Muḥammad Qāsim responds to the claimant's written statement. At this juncture, he states that Arwā, "does not want marriage with the aforementioned [ʿAzīz] because she is afraid of her paternal uncle Aḥmad Nājī for her life and her property, that he will extinguish her life (*rūḥ*) after having extinguished the lives of her father and mother by poison, as is known by the elite and the commoners [...], and the accounting will come on the Day of Accounting [Judgment Day]." For his refutation, claimant Aḥmad Nājī states in the written statement entered in the judgment record:

> As for what [the defendant] [...] says, that Muḥammad Nājī died by poisoning by his brother, this statement is a lie, and no consideration should be given [to] it. The aforementioned [the brother, Muḥammad] was sick and he was in jail on order of the Judge to Sayf al-Islām al-Ḥasan [the son of Imam Yaḥyā, governor of Ibb in the early 1940s], who jailed him. And when he became sick he was released from jail and he entrusted his will (*waṣiya*) to the responsibility (*dhimma*) of his brother Aḥmad Nājī. And if there had been any animosity between them, he would not have made the administration of his will his [brother's] responsibility.

In his ruling, Judge al-Manṣūr took no notice of either the murder accusation or the matter of the young woman's property.

According to the rationale attributed to Aḥmad Nājī, in his words as quoted by a witness to the "renewed" contract, his pursuit of the case may have been motivated by an attempt to keep patrilineal property within the extended family. On the other side, it is not clear the extent to which Arwā herself may have been "afraid," not only for her life but also for "her property," as the defendant, her maternal uncle, stated. We have no indications of the precise nature of the property Arwā inherited, but in late agrarian-age Yemen such wealth mainly involved immovables such as cultivated land or buildings.

Typically, an estate was allocated on paper (in shares) as a consequence of inheritance. This meant that the ownership of groups of adjoining terraces, and even single terraces, would be divided among the heirs. If a young heiress marries "in," that is, within the patriline, to an individual who is to her a male-line "cousin," her property will remain within the family in the following generation. But if she marries "out," to a man

from another patriline, her property eventually will be passed to children who identify with this "stranger" family. What all this is thought to mean for family property-holding, as Aḥmad Nājī succinctly put it, is that this "stranger" line "would cause them trouble and Shariʿa [litigation]." A group of patrilineally-related property owners whose lands are concentrated in a place will, as a consequence of the transmission of property rights in the generation following an exogamous marriage, have to deal with "stranger" owners on adjoining terraces, or even, fractionally, within individual terraces. This outcome was thought to be undesirable, although this situation could also arise through a simple property sale. Against such transfers, however, "family" pressure could be applied to not sell to outsiders and there also was a formal legal mechanism of sale pre-emption (*shufʿa*), whereby certain sales of this type could be blocked and ownership recovered by an adjoining member of the family.

As this case and others demonstrate, however, "trouble and Shariʿa" are not necessarily avoided by marrying within the patrilineal group. Also, the passage of property to other patrilines through inheritance from "stranger grandmothers" was possible. Virtually all elite families, including those in the rural districts around Ibb, engaged in at least some strategic marriages with other families to create or cement alliances. Against such patterns of conflict within patrilines and of intermarriages between them, what sustains the patrilineal ideology of keeping control of patrimonial property through a preference for "in" marriages?

A potential explanation for the continuing vigor of such ideas, at least at mid-century in Yemen, lies in the convergence of "family" with "tribe," and specifically with the dictates of armed force in rural districts. Later in the case, the defendant comments that the claimant's case is supported by his underlings, "his subjects (*raʿiyyatihi*) who are under his domination *(sayṭara)*." Claimant Aḥmad Nājī appears in this court record, in short, as a man of property and the "retainers" mentioned presumably are the sharecropping tenants on his own land and on that of his deceased brother, whose estate he controls as administrator.

In Lower Yemen, a *shaykh*, or rural leader, was primarily an individual of great wealth, specifically wealth in cultivated land. In times of trouble, the property relations between *shaykh*-landlords and their tenants could translate, in the weak local version of the formidable tribes of Upper Yemen, into relations of armed support. Mobilizing his family networks, such an individual might call on an entire village, or villages, of sharecroppers to come to his support. If this sort of family-specific concentration of related holding is broken up into scattered properties and involves in-mixtures of individuals from other families, the local armed potential of the associated tenants similarly would be fractured and weakened. One of the important transformations of rural property-holding since the 1962 revolution, in fact, has been the dissolution of some of the old concentrated holdings, as

former tenants broke tenancies that were in some cases generations-old, migrated to the Persian Gulf and elsewhere for wage employment, and returned to purchase land and otherwise assert their independence.

In Arwā's patrilineage, the property of her grandfather presumably had been divided between her father and her uncle (and other siblings, if any), and that which had passed to her father (leaving aside property sold or acquired) was divided between Arwā and her brother (one part to her and two parts to him). Since Bilqīs (Arwā's deceased mother) had herself married "in," Arwā and her brother could also have inherited patrilineal property (from their great-grandfather) through this channel as well. As has been noted, however, Arwā's immediate situation in resisting the proposed marriage was further complicated by the fact that Aḥmad Nājī also was the appointed legal administrator (*waṣī*) of her property during her minority. According to blunt assertions made by the defense, Aḥmad Nājī's motives were not to preserve the unified integrity of family property, but simply to grab it. In one of his early responses, for example, defendant ʿAlī Muḥammad Qāsim refers to "the irresponsibility and greed of Aḥmad Nājī in the coercion and consumption of the wealth of the minor daughter of his brother Muḥammad." This is reiterated by the defendant later in the case, where he says that Aḥmad Nājī attempted to "unlawfully appropriate (*istiḥlāl*) her wealth," and more specifically, that he "wanted the coerced marriage of the girl to unlawfully appropriate her wealth." No evidence is offered, however, of any irregularities, such as allegations of inappropriate sales or transfers.

On the side of the claimant, in witnesses' testimonies, there are traces of what may have been efforts by Aḥmad Nājī to financially induce or satisfy Arwā. Specifically, one of the witnesses to the agency from Arwā commented, on the basis of information provided by Arwā's grandmother and in the context of what is otherwise found to be false testimony, that Arwā's paternal uncle had promised her that he would provide for her. Another stated more concretely that the uncle had given two elaborate and valuable pieces of silver jewelry (known as *lawāzim*) to Arwā's grandmother for Arwā. Later in the case, however, in his lengthy written statement, Aḥmad Nājī states that when Arwā was taken by the defendant, she left his house with "all of what she took in the way of his jewelry, valued at four hundred riyals."

Was Arwā herself part of the claimant's patrimonial domain? One of Aḥmad Nājī's allegations against the defendant is that the latter had engaged in the "instruction" (*taʿlīm*) of the girl Arwā, that he "wanted the instruction and the turning of the woman against her husband." This trope of improperly influencing the minor girl necessitates little explication. We learn that the alleged influencing occurred early on, before Arwā fled to the home of the defendant: "There was from them," claimant Aḥmad Nājī states, "the instruction of the free woman Arwā, daughter of Muḥammad

Nājī, wife of ʿAzīz b. Aḥmad Nājī ʿAlī Muṣṭafā, and the causing of her departure from the house of her husband and from her paternal uncle." Aḥmad Nājī also refers to the defendant "and those with him as instructors (*muʿallimīn*)" and then glosses this as those individuals "covetous of the forbidden [women] of others."

Aḥmad Nājī also makes a legal point which concerns the position of the *ʿamm*, the father's brother, versus that of the *khāl*, the mother's brother. As noted earlier, those who have the right to be the woman's *walī*, or guardian, in marriage, are the male-line relatives (*ʿaṣaba*), in order of closeness of relationship. By contrast, the matrilineal uncle and others classed as *dhū l-arḥām* (uterine/female-line relatives) do not have the right to be the *walī*. "No *wilāya* to the relative who is not among the *ʿaṣaba*, such as the *khāl* [...] because they are among the *dhū l-arham*," states the law book.[25]

Such notions figure in Aḥmad Nājī's claim at the beginning as he demands that the judge enforce the return of the "stolen" wife, since the defendant is neither in the position (in relation to the girl) of close and non-marriageable relative (*maḥram*) with whom it is permissible for her to reside, nor that of possible *walī*. The marrying-off of a woman for whom one is the closest male-line relative is itself a right. As the law book says, "marriage is a right (*ḥaqq*) of the *walī*."[26] As for conjugal rights per se, that is, those rights established in Arwā as "wife," the key general term of individual property ownership (*milk*) has a specific and restricted application here. In one of the quoted pre-contractual passages prior to the second or "renewed" contract of marriage, the phrase translated above as "to marry her and to give her to his son ʿAzīz," actually employs a verb from the "m-l-k" root of "*milk*." Thus the permission Arwā is said to grant to her paternal uncle is to marry her "and give ownership in her to his son ʿAzīz" (*wa-yumliku bihā li-ibnihi ʿAzīz*). In this formulation she becomes a *milk* right of ʿAzīz in his status as her husband. This means, as specified in the law books, the *milk* of intercourse (*waṭʾ*), not that of the woman's substance (*raqaba*).[27] That is, it is a domain-specific type of use-right.

Arguments

The legal crux of Arwā's case, the eventual basis for both the judge's ruling and the later finding of the Court of Appeals, is the law of marriage contract dissolution, or *faskh*. Dissolution of a marriage contract is one of three legal mechanisms (other than death) whereby a marriage can be terminated. The other two are the well-known *ṭalāq*, or "repudiation," an exclusive right of the husband; and *khulʿ*, a lesser-known type of agreement in which the wife compensates the husband and gives up her rights to such things as the postponed dower (*mahr*) and support (*nafaqa*) in order to gain her release from the marriage. *Faskh* is one of the specific areas of the law in which both of the twentieth-century ruling Zaydi imams, Imam Yaḥyā

(d. 1948) and his son Imam Aḥmad (d. 1962), issued guidelines for their appointed judges to follow. These guidelines are in the form of personal interpretive "choices," or *ikhtiyārāt* (also known as *ijtihādāt*), and represent a subset of their doctrinal positions on other aspects of marriage and the status of women. In his guidelines, Imam Aḥmad addressed: (1) the rules of repudiation, according to whether the husband is educated or not, and in terms of its illegal forms; (2) child custody; (3) the disobedient wife; and (4) marriage termination through *khulʿ*. Among the two imams' "choices" on *faskh*, the best-known concern the phenomenon of the absent husband. The hypothetical is an absent husband who has had no communication with the wife nor provided any support for her maintenance and that of his children, if any. (This hypothetical also assumes that he owns no local property that could be sold to support the wife.)

The two imams' "choices" on *faskh* based on the husband's lengthy absence provide an instance of simple legal change from father to son. Imam Yaḥyā's only *faskh* "choice" concerned the absent husband, however his son's "choices" comprised a set of possible conditions for marriage dissolutions, including the insanity of the husband, the husband's absolute poverty, the denial of intercourse to the wife, and, the doctrine argued for by the defense in Arwā's case, intense hatred, or what some American courts euphemistically refer to as "incompatibility." Among the appended materials to Imam Aḥmad's original set of thirteen numbered and rule-like "choices", originally issued in 1949, is a summary concerning a court case from 1951. Like another such case fragment (regarding dissolution due to the husband's insanity) which also appears in the appended materials, the case on dissolution due to hatred is related to three of Imam Aḥmad's thirteen regular *ikhtiyārāt*, which deal with marriage dissolution on other grounds (for example, the husband's absence, the husband's poverty, or the wife is denied her right to have intercourse). In the 1951 case, the analysis is complicated by the added issues of "timidity" (*nafūr*) on the part of the wife and the claim of the husband's impotency. An applicable rule, the "choice" or *ikhtiyār* itself is meant to be extracted from the following case summary:

> In a matter which occurred, the wife Laṭīfa, daughter of Muḥammad ʿAlī, and her opponent, her husband, Aḥmad Ismāʿīl Ḥasan, from ___, the court process is before me. The woman claimed, at first, that the marriage contractor for her was not her guardian (*walī*), and a judgment was given by the judge for dissolution of the marriage. Then, the appeal claim was entered and it was ruled on review that the contractor for her was from among her male-line relatives, [specifically] the paternal uncle's son, after testimony on descent and following a review-ruling by His Majesty, Our Master the Martyred Imam [Yaḥyā, who was assassinated in 1948], may God be pleased

with him. Then, in the interval, there became apparent in the woman extreme timidity. And there were numerous intermediacies between them to better the outcome, but the husband did not help. And the woman is young, and she claims that her husband was impotent, and she requested dissolution. I brought the situation to the attention of His Majesty [Imam Aḥmad], the Victorious for the Religion, and the answer (*jawāb*), from the palace, in the honored pen, may God support him, in what are his words:

"Blessings of God Almighty. If there are established to your satisfaction extreme timidity and hatred of the husband, then in the Shariʿa of Muḥammad bin ʿAbd Allāh [the Prophet], prayers of God for him, the clear solution is in the case of the wife of Thābit bin Qays. The woman must return that which she received as dower (*mahr*), and either repudiation by the husband or dissolution by the judge [shall be the final outcome]. Greetings to you. [Dated] 4 Ramaḍān 1371 [1951]."

On this is the signature with the words "Commander of the Faithful," God forgive him.

In this carefully reported text within a case summary, which exhibits the characteristic concision of such imamic discourse, the matter in question finds its "solution" in a kind of precedent, or textual *aṣl*, located in the early Islamic "case" of the wife of Thābit bin Qays.[28] In this exchange between the imam and the unknown judge, both the textual site of this early historical "case" and its factual details are left unstated. The task was to "find" the law so as to address an open problem posed by a pending judgment. Imams were originally meant to be qualified interpreters of the law (*mujtahid*), and in this authoritative interpretive act, the imam links present and past texts, and in the process renews his understanding of both. His gloss on the present case, that its distinctive features are "extreme timidity and hatred," becomes a gloss as well on the cited source case of the wife of Thābit bin Qays. Once articulated in this manner by the imam, his "choice" subsequently served as a rule to guide judgments in similar cases.

How does this specialized doctrinal category, the "choice" of a ruling Zaydi imam, actually figure in a particular case? Arwā's case illustrates how the specific source text for the "choice" on marriage contract dissolution on the basis of intense hatred can be (and was) referenced by a litigant, here the defendant, in support of her argument. Citations of "choices" occur in the judgment text in Arwā's case, but not in the tutored and highly implicit style of interchange by trained legal scholars, as seen above, and not located, as in many other court cases, in the judge's ruling. Rather, invocations of "choices" take the form here of pragmatic renderings by the parties in their pleadings during the litigation. With these discursive

acts, the parties urge particular legal frames for the conflict. First, there is this passage from defendant ʿAlī Muḥammad Qāsim:

> [A]nd not concealed from the judge is that which is in the clear statement of the honored *ikhtiyār* of [Imam] Aḥmad, the Victorious, concerning the non-necessity [i.e. non-viability] of hatred in marriage. Rather, it is clear that [for] the married woman, if the judge verifies her hatred and her inability to be patient and to remain with her husband, due to hatred of being married, then it is required to make the husband repudiate [the wife] and, if he does not repudiate [her], then dissolution [is to be ordered] for her by the judge.

It seems clear from his use of the appropriate term "hatred" and the relatively close paraphrase of parts of the *ikhtiyār* in this oral pleading that the defendant had good legal counsel, including access to some version of the *ikhtiyār* itself. It also seems that in his reference to "the married woman" the defendant may concede the existence of the contract in order to then seek the application of the *ikhtiyār* on marital hatred. The defendant concludes:

> [T]he judge is a follower of the Shariʿa of God. God help us with [the claimant] Aḥmad Nājī who wants to unlawfully appropriate her by illegal means, which is not consented to by the Shariʿa, or Justice, or the honored *ikhtiyār*.

In contrast to this statement by the defendant, the claimant makes a different argument and cites a countervailing imamic *ikhtiyār*. The central evidentiary struggle in the case concerns the purported "first" and "second" (or "renewed") contracts of marriage, and it is this contractual basis, as opposed to the issue of "hatred," that the claimant would have the judge put into the foreground. To this end, Aḥmad Nājī explicitly references another *ikhtiyār* of Imam Aḥmad, the thirteenth of his free-standing original choices of 1949, which concerns the content (*jawhar*) of a judge's decision (*ḥukm*). This *ikhtiyār* requires the judge to ascertain the soundness of the substantive focus of the judgment. It states specifically that "diversions (*taʿlīlāt*) that are of no benefit except to widen the conflict, and the gulf between the disputants, and the give-and-take, and [serve to] alienate the [possibility] of resolution by a judgment of God, are not to be decided," that is, they are not to be taken into consideration by the judge in his ruling.[29] Evincing his own access to solid legal advice, the claimant appropriates some language from this imamic *ikhtiyār*, stating that the defendant

> spoke at great length in his response and he extended remarks to that which is irrelevant. As is comprised in the claim of the claimant,

> the conflict involves the contract, first and last, in each of two situations. The basic principle (*aṣl*) in the contracts of Muslims concerns the legality of the consensus-based Shariʿa principle (*qāʿida*), and it is obligatory for the judge, may God protect him, that he consider the content (*jawhar*) of the judgment (*ḥukm*), according to the *ikhtiyārāt*, without giving attention to other [issues brought up] in the give-and-take and thus like. He should interpret one matter (*qaḍiyya*), and that is that I have proven with witnesses the occurrence of the contract, and then the contract document.

In the end, the final outcome of the case bypassed both of these imamic "choice"-based legal arguments by the parties and instead engaged a further technical doctrinal dimension of contracts. As was seen in the vignette at the outset of this essay, a new material fact was established by Arwā as she appeared before a group of men to assert the advent of her legal majority due to the onset of her menstruation. This new fact created, in turn, a new legal situation of which Arwā immediately took advantage. Here, again, it is clear that she must have had good legal advice, this time concerning not imamic "choices" but the doctrine of the Zaydi school on the law of marriage.

A foreshadowing of the principle involved first appears in the judgment in the form of a counter-argument towards the end of claimant Aḥmad Nājī's long written statement. He refers to the existence of the "first" contract made for Arwā by her father, stating that such a contract, made for a minor daughter by her ideal *walī*, "is not like the contract [made for her] by other than he, which the woman can dissolve upon her legal majority (*bulūgh*)." He continues, "the contract of the father is, by principle, legally valid [and] not subject to the right of dissolution by her, as is textually stipulated in the legal school of the imam."

Returning to the document that resulted from Arwā's 1958 appearance (physically behind a barrier, but legally before the assembled men), we see that after her assertion of legal majority, there took place an important second part of what was a compound legal event: her dissolution of the contract of marriage. As stated in Arwā's written submission to the court:

> There was a request from the free woman Arwā, daughter of Muḥammad Nājī, to us [the document writer] and to those present with us, and they are [five named men], and this after her identification by those who know her voice [two of the above named men, and a named woman]: she appeared behind a barrier wall and bore witness, to us and to the aforementioned above, that physical maturity (*bulūgh*) had occurred to her, and this by menstruation (*ḥayḍ*), and that, as God Almighty knows best, the contract that was contracted for

> her by her paternal uncle Aḥmad Nājī with his minor son is extant, and [that] she has dissolved that [contract]. This the aforementioned [Arwā] uttered in the presence of the aforementioned witnesses on its date, 15 Shaʿbān 1377 (1958).

Reviewing these texts together, it becomes clear that both sides in the case evidently had read the law books and on this textual basis constructed their arguments and their legal acts. The claimant uncle, in arguing for the binding authority of the "first" contract, had been apprised of the passage (e.g. al-ʿAnsī 1993 [c. 1940] 2:36–37, citing the *matn* of *Kitāb al-Azhār*, the basic doctrinal text of the Zaydi school) which states that the right of choice (*khiyār*) pertaining to the minor at the point of her legal maturity, which allows her to dissolve the contracted marriage, pertains only to women not married by their fathers as their *walī*s.[30] Arwā, in placing emphasis on the "second" contract, was literally on the same page as her paternal uncle, as the above text illustrates. The law book goes on to state that, if the woman in question does not exercise her right to dissolve the contract in the same legal session in which she attests to reaching her legal maturity, she loses her right to do so. While Arwā recognized, in passing, the existence of the "second" contract arranged by her uncle, her acts, as reported in the resulting document, precisely satisfy the necessary technical requirement of the doctrine because they comprise, in the same session, both her bearing witness to her maturity and her *faskh* of this latter marriage contract.

Ruling

The final ruling in Arwā's case is a conclusive marriage contract analysis by the judge. He holds that: (1) the first contract never existed, despite the recorded written instrument; (2) that the second contract existed, although it was based on false testimony and did not include the required consent; (3) that the dissolution of this second contact occurred; and (4) that as a consequence, and as confirmed by the judgment, Arwā is free to enter into another contract of marriage as she sees fit. This analysis is anchored in determinations of the justness (*ʿadāla*) of key witnesses, the necessary and sufficient basis for a ruling,[31] and on securely-witnessed instances of acknowledgment of fraud on the part of the earlier document writer (an interesting part of the case not a subject for present discussion) and of the advent of Arwā's legal maturity. The final judgment reads:

> That which is legally valid (*ṣaḥḥ*) for me [Judge al-Manṣūr] in this conflict is the existence of the contract from Aḥmad Nājī in the month of Dhū l-Qaʿda 1376 (1957), for the free woman Arwā, daughter of his brother Muḥammad Nājī, to his minor son ʿAzīz b. Aḥmad Nājī. Not legally established for me is that the contract occurred with her

consent, since the contractor [the notary], Sayyid Aḥmad b. Ḥusayn al-Shāmī, is just and trustworthy and he stated that she did not appear before him but that her consent and her permission to her paternal uncle for the contract and her legal majority were sworn to by [three named men], and they are known to me for their non-justness. This together with the fact that some of them were asked how they knew of the majority of the aforementioned [fem.] and they stated that this was from the word of her grandmother, the mother of Aḥmad Nājī. The contract took place but her maturity at the time of the contract was not certain. Whereas, on the date of Shaʿbān 1377 (1958), her maturity was certified with menstruation, and she made clear that she dissolved the marriage contract contracted for her by her paternal uncle with his son. This, and as for what Aḥmad Nājī claimed, that he had contracted for her confirming the [first] contract made for her by her father Muḥammad Nājī to the young man ʿAzīz b. Aḥmad Nājī in Rajab 1362 (1943), its [the "first" contract's] non-occurrence has been proven to me, according to what the writer of the contract document, the jurist Saraf al-Khāṭib stated, that there was fraud in it and that he discovered after writing it that the aforementioned girl and the aforementioned boy had not yet been born on that date, that is, in 1362 (1943), as is related in the document of *al-qāḍī*[32] ʿAbd Allāh al-Jamāʿī, authenticated with the script and signature of the District Officer of Jibla [a town near Ibb]. This is what I have found and [accordingly] I have ruled. There is no waiting period [for divorce] for the aforementioned [Arwā] since the dissolution took place before the consummation. Nothing forbids the aforementioned [Arwā] from marrying whomever she wants. Written on its date, 11 Muharram 1378 (July 1958). Ismāʿīl ʿAbd al-Raḥmān al-Manṣūr, Judge of Ibb Province.

Conclusion

While Arwā was not the sort of young woman who would remain silent such that her tears necessitated legal interpretation, this 1958 Shariʿa judgment does preserve a poignant witnessed account of her crying. Attentiveness to human detail is characteristic of such Yemeni Shariʿa court records, as is richness of legal argument. As in other period cases, issues of intent, specifically here the prior consent of the young woman to the marriage, figure centrally in the final analysis. Central also are technical features of the marriage contract, notably including the specific rules of dissolution associated with a woman's legal majority. While some subtle legal matters are explicitly argued in this case, many others implicitly were in play, as can be demonstrated with reference to chapters of law book doctrine and to the specialized genre of the notarial manual. A distinctive feature of this

Yemeni material is the interpretive role of the Zaydi imam, a qualified jurist at the head of an Islamic state. For its key social backdrop, the case depends on the ties and tensions of kinship, and on the closely related property ties of this late agrarian era. Several women from Arwā's extended family appear as important supporting actors in the case, while others provide crucial female-specific knowledge that forms the basis for some of the key legal findings. Among the many males who figure in the case, there are both scoundrels of various types and motivations and others who would not countenance the abuse of a young woman's rights.

NOTES

[1] Unless otherwise indicated, all citations in this chapter are quotations from an unpublished judgment record of a Shariʿa case heard in the Ibb Province Court of Judge Ismāʿīl ʿAbd al-Raḥmān al-Manṣūr and decided by him on 11 Muḥarram 1378 (28 July 1958). Since the original judgment record I cite from takes the form of a rolled document, it is not possible to give page numbers. Document photocopy available in my records.

[2] I have changed only the personal names of the immediate parties to the case and I have concealed their place name.

[3] See Mundy 1995, 272, for the text of a "return" (*irjāʿ*) agreement.

[4] Cf. Würth 1995, 330.

[5] See Würth 1995.

[6] See Messick 1993.

[7] Al-Iryānī, ms. Jāmiʿ al-gharbiyya, Ṣanaʿāʾ, 64 fiqh, 79–80, Chapter 16, "Marriage."

[8] Here the document uses *fulān* (masc.) and *fulāna* (fem.), meaning "so-and-so" in lieu of names.

[9] Al-Iryānī n.d., 79–80, Chapter 16, "Marriage" (citation omitted).

[10] Al-ʿAnsī 1993, 2:3–117, 118–305.

[11] Idem, 2:22–36.

[12] Idem, 2:35.

[13] See Messick 2001.

[14] Al-Iryānī n.d., 79–80.

[15] Abū Shujāʿ 1894, 457; al-Muftī al-Ḥubayshī 1988, 347. The work by al-Muftī al-Ḥubayshī is a local nineteenth-century commentary on Ibn Raslān.

[16] Al-Muftī al-Ḥubayshī 1988, 347.

[17] Al-ʿAnsī 1993, 2:33; al-Shawkānī 1985, 2:271–272. Cf. al-Muṭahhar 1985, 1:101–102.

[18] Al-ʿAnsī 1993, 2:33.

[19] Idem, 2:33.

[20] Idem, 33–34.

[21] Idem.

[22] Idem.

[23] Cf. Messick 1993, 179–180.

[24] On the distinction between the two types of maturity, *rushd* and *bulūgh*, see Messick 1993, 78–79.

[25] Al-ʿAnsī 1993, 2:17.

[26] Idem, 2:22.
[27] Idem, 2:3.
[28] Al-Bukhārī 1974, 7:150–151.
[29] Imam Aḥmad, *Ikhtiyārāt*. Ms.
[30] This is known technically as *khiyār al-ṣaghīr*, the choice of the minor, and it has some conditions. For the post-Revolutionary legislation on this exercise of *faskh* at majority, see *al-Majalla* 1980, 34–36; for a discussion of cases, see Würth 1995.
[31] For a discussion of Zaydi evidence rules, see Messick 2002.
[32] In Yemen, *al-qāḍī* can mean judge (more often, however, the word used is *ḥākim*), but here it refers to a non-*sayyid* educated person.