

## Contextualizing Muḥammad ‘Abduh’s Views on the Family, Marriage, and Divorce

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The aim of this essay<sup>1</sup> is to place Muḥammad ‘Abduh’s proposals for the reform of Egyptian Muslim family law in the social, legal, and intellectual context of late nineteenth- and early twentieth-century Egypt. ‘Abduh (1849–1905), it is well known, studied and later collaborated with the Iranian scholar al-Sayyid Jamāl al-Dīn, known as al-Afghānī, and was influenced by the latter’s openness to the study of philosophy and the natural and social sciences. During 1880–2 ‘Abduh edited the official journal *al-Waqā’i‘ al-Miṣriyya*, contributing essays on diverse topics including family and marriage. A supporter of the ‘Urābī Revolution, he was obliged to spend the years 1882–8 in exile in France and Lebanon. Upon returning he was appointed a judge in the National (Ahlī, or Native) Court system. He expressed his mature ideas on the family and the reform of Muslim family law in a report on the reform of the Sharī’a Courts (1900); a Quran exegesis serialized in the journal *al-Manār*, known as *Tafsīr al-Manār* (1900–); and reports and *fatwās* issued while serving as the Grand Mufti of Egypt (1899–1905). ‘Abduh’s posthumous influence on family law reform was due not only to his writings but also to the circle of younger intellectuals he mentored during his last two decades, known as “the Imam’s party.”<sup>2</sup>

An older tradition of scholarship portrayed ‘Abduh and other modernist thinkers as responding defensively to the “challenge of the West,” and juxtaposed his ideas with a supposedly conservative or even stagnant “Islam,” in no small part due to the polemic he, and even more so his followers, engaged in against the religious establishment.<sup>3</sup> Studies of the reformist agenda of ‘Abduh have tended, moreover, to focus on his texts, paying little attention to the specific social and legal context in which he advanced his reforms. This

1 An early version of this essay was presented at the workshop “Reforming Islamic Legal Thought” at the Institute of Arab and Islamic Studies of the University of Exeter, November 2014. I thank the participants for their comments. For a more extensive discussion of some of the issues treated here, see Cuno, *Modernizing marriage*.

2 Hourani, *Arabic thought* 170.

3 See Indira Gesink, *Islamic reform and conservatism*.

essay emphasizes two aspects of that context. The first was the development of a modernist family discourse, in which ‘Abduh participated and which he advanced. The second was a process of legal modernization—the creation of “modern” legal institutions on the French model—that affected the application of family law.

In the second half of the nineteenth century a modernist discourse on the family arose in Arabic and Ottoman Turkish that was not a defensive response to Western influence, but rather affirmative, in the sense that it was concerned with social improvement and optimistic that family reform and social advancement were achievable.<sup>4</sup> ‘Abduh participated in this discourse, articulating a vision of sound family life and promoting legal reforms in order to realize it. This discourse produced a family ideology that posited the conjugal family as the basic unit in society, with the important role of childrearing. ‘Abduh, along with other Ottoman and Arab intellectuals, understood a healthy family life to be the basis of social improvement, and he sought to discourage practices that threatened family harmony and stability, such as polygyny and the abuse by men of the privilege of unilateral divorce. To that end he produced an innovative interpretation of the quranic verses on polygyny, arguing that it could be prohibited in most cases.

Once the conjugal family was imagined as the basis of the social order, the promotion of sound family life was a social good. The principal threat to the family in ‘Abduh’s view was the irresponsibility of men who failed to fulfil their marital duties by not supporting their wives, deserting them, or abusing them. Men also went missing, leaving their wives without support, a problem exacerbated by soldiers who went missing in the Crimean and Ethiopian wars. Married women in any of these circumstances were offered little relief in the Shari‘a Courts, which applied Ḥanafī jurisprudence exclusively. The exclusive use of Ḥanafī law in the courts was a feature of judicial modernization, imposed in the second third of the nineteenth century. ‘Abduh was an adherent of the Mālikī school, which might explain his suggestion that the Shari‘a Courts should apply the Mālikī rules to permit women to obtain a judicial divorce, and to declare a man who went missing without a trace for four years to be deceased. It is also likely that he drew on the still-recent memory of an earlier plural legal system in which litigants “forum shopped” among judges of the different schools of law in order to get the result they desired. One aim of legal modernization was to establish a uniform law, and so a return to legal pluralism was not feasible. Instead, ‘Abduh suggested using the method of *takhayyur*, or selection among the rules of the different schools

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4 See Cuno, *Modernizing marriage* ch. 3.

of law, to achieve the desired result. *Takhayyur* would allow some of the flexibility of the defunct plural system to be incorporated in a uniform family law.

The modernist family discourse in which 'Abduh and others participated is sometimes misidentified as feminist or proto-feminist, but that is an anachronistic reading of it. Modernist family discourse construed women normatively as the dependents of men and as under the supervision of men. Marital relations were understood in the frame of what Nadia Sonneveld has called "the maintenance-obedience relationship," in which a husband owed his wife maintenance (*nafaqa*) and, provided he fulfilled that responsibility, his wife owed him obedience (*tā'ā*).<sup>5</sup> Women in that relationship were thus the dependents of male providers and under the supervision of male guardians, as daughters and wives. Many of 'Abduh's contemporaries, and to some extent 'Abduh himself, opposed polygyny and easy divorce not only because it damaged family life but out of fear of the moral consequences of leaving divorcées unsupported and unsupervised.

### Family Ideology

In the second half of the nineteenth century, modernist intellectuals in Egypt and other Ottoman provinces articulated a hybrid family ideology influenced by post-Enlightenment social thought in Europe but also in dialog with pre-colonial Islamic writings on marriage and marital relations. Historic Muslim jurisprudence did not contain a family ideology, despite the assertions of some latter-day scholars of "the centrality of the family in Islam."<sup>6</sup> The jurists privileged the extended patrilineal family over the conjugal family unit (the couple and their children) in the marital property regime and in inheritance. They also permitted polygyny and easy divorce by men, which were sources of conjugal family instability.<sup>7</sup> They described marriage as necessary for licit sexual relations and procreation, but they did not especially emphasize companionate spousal relations or parent-child relations.<sup>8</sup> This was also true of the pre-colonial handbooks on marriage that circulated in Ottoman Egypt and into the early twentieth century, which emphasized the maintenance-obedience relationship. Wifely obedience included staying in the marital home and not

5 Sonneveld, *Khul' divorce in Egypt* 17–34.

6 Esposito and Delong Bas, *Women in Muslim family law* xiv. Messick identifies this view as a colonial artifact in *The calligraphic state* 61–2.

7 Charrad, *States and women's rights* 28–50.

8 Ali, *Marriage and Slavery* 6.

leaving it without the husband's permission, submitting to him sexually, guarding his home and possessions in his absence, and guarding her chastity.<sup>9</sup> The jurists illustrated the authority of the husband over his wife by comparing the state of the wife to one of slavery<sup>10</sup> or captivity.<sup>11</sup>

The idea that the conjugal family is the basis of society and that marriage should be companionate and lasting, with the aim of forming a family and raising children, was not historically Islamic but originated in Enlightenment thought.<sup>12</sup> A corollary of that was domestic ideology, or domesticity, the notion that women's vocation is to manage the family household and raise children. Arab and Ottoman modernists joined those ideas with the maintenance-obedience relationship in producing their own, hybrid family ideology, and advocated reform of the family for the sake of social improvement. The implications for women were important. The modernists held that women should be educated to be able to fulfill their domestic roles properly, and to be good companions for their husbands. Together with prenuptial meetings to allow prospective spouses to get to know each other, an educated bride increased the likelihood of marital compatibility, and hence the harmony and stability of the family. The modernists also discouraged polygyny and easy divorce in the interest of family harmony and stability.

The Lebanese Buṭrus al-Buṣṭānī (1819–83) and the Ottoman Namık Kemal (1840–88) were early advocates of the education of women, which they saw not as good in itself but a means of improving conjugal life and childrearing.<sup>13</sup> In Egypt Rifāʿa Rāfiʿ al-Ṭaḥṭāwī (1801–73) and ʿAlī Mubārak (1823–93) made

9 Al-Nawāwī, *ʿUqūd al-lujayn* 9–11; ʿAlī, *Maṭlaʿ al-badrayn* 5–6, 11–12. See also Qadrī, *al-Aḥkām al-sharʿiyya*, Art. 212.

10 Rapoport, *Marriage, money and divorce* 52; Ali, *Marriage and slavery* 164; Ibn ʿĀbidīn, *Radd al-muḥtār* ii, 325; al-Ghāzalī, *Proper conduct* 89. This comparison derived from a *ḥadīth* attributed variously to Asmaʿ bint Abī Bakr or ʿĀisha bint Abī Bakr or both of them: “Marriage is slavery and so let each of you consider where he places his daughter [in marriage]” or “Marriage is slavery and so let each of you consider where he consigns to slavery his freewoman” (author’s translation). From al-Bayhaqī’s *al-Sunan al-kubrā*, al-ʿIrāqī’s *Takhrīj aḥādīth al-ihyāʾ*, Ibn Abī al-Dunyā’s *al-Nafaqa ʿalā al-ʾiyāl*, and Saʿīd ibn Manṣūr’s *al-Taḥṣūr: Sunan Saʿīd ibn Manṣūr* accessed via the *Complete reference of Islamic Hadeeth*.

11 Ibn ʿĀbidīn, *Radd al-muḥtār* ii, 663. The comparison originated in the Prophet’s farewell sermon: “Treat women well, for they are prisoners with you.” Author’s translation, using the version of the farewell sermon in *Sunan al-Tirmidhī* iv, 256, no. 1159, accessed via the *Complete Reference of Islamic Hadeeth*.

12 See, e.g., Fairchild, *Women and the family* 97–110.

13 Al-Buṣṭānī, speech on “The Education of Women” (1849) 97; and Kemal, essay “On the Education of Women: A Draft” (1867), as discussed by Sönmez, *Turkish women* 8–11.

similar arguments in favor of educating women for a domestic vocation, as did 'Abduh's teacher al-Afghānī.<sup>14</sup> Children, it was argued, were in the care of their mothers during the crucial first years of life in which their character was formed. Children, the future of the society, will acquire the proper character and virtues from educated mothers but not ignorant ones. The emphasis on companionate marriage and the importance of the conjugal family to childrearing in the new family ideology also led intellectuals like al-Ṭaḥṭāwī and Mubārak to discourage divorce and polygyny.<sup>15</sup> Women writers usually identified as early feminists, like 'Ā'isha al-Taymūr, Zaynab Fawwāz, and Malak Ḥifnī Nāṣif, also cited women's domestic role as a justification for their education. Fawwāz wrote that "women are the basis of civilization, as the first school for every one of the human race," and that individuals acquired their good or bad characters from their mothers as children. She also agreed that educated women made better helpmates for their husbands and were more able to share in family life with them.<sup>16</sup>

The association of monogamous marriage with civilization was a theme that the modernists encountered in nineteenth-century European social science. Al-Ṭaḥṭāwī translated Conrad Malte-Brun's universal geography and D.-B. Depping's comparative study of the mores and customs of diverse societies into Arabic in the 1830s. Both authors asserted that the status of women indicated the level of civilization of a society. Depping condemned early marriage, polygyny, and easy divorce, as practiced by "Turks," and Malte-Brun held that polygyny and divorce suppressed population growth.<sup>17</sup> Al-Afghānī and 'Abduh were also influenced by François Guizot's *History of Civilization in Europe*, which appeared in translation in 1877. In Guizot's progressive historical scheme the conjugal family emerged out of more primitive forms of social organization, along with the emergence of social differentiation based on property, in the feudal era. Guizot argued that the high status of European women was a consequence of the emergence of the conjugal family and women taking up their role in the domestic sphere as wives and mothers.<sup>18</sup> His projection of the conjugal family and domesticity into the past as a foundational element of modern civilization was consistent with the theses of Malte-Brun and especially Depping.

14 Al-Ṭaḥṭāwī, *al-Murshid* 66–8; Mubārak, *Tarīq al-ḥijā'* ii, 81–2; Keddie, *Sayyid Jamal ad-Din "al-Afghani"* 110–11.

15 Al-Ṭaḥṭāwī, *al-Murshid* 138; Mubārak, *Tarīq al-ḥijā'* ii, 110–11.

16 Fawwāz, Essay No. 69 in *al-Ras'ail* 214–16.

17 Malte-Brun, *Universal geography* i, 261–2, 281–2. Depping, *Aperçu historique* 54–5, 57–67.

18 Hourani, *Arabic thought* 114, 132; Guizot, *History of civilization* 72–4.

‘Abduh’s early contributions to Egyptian family ideology in *al-Waqā’i al-Miṣriyya* showed the imprint of these ideas. In an essay on the necessity of marriage he approached the subject using a developmental scheme, starting with the assertion that women by nature were unable to provide all the necessities of life for themselves and their children, hence they needed to form an exclusive relationship with a man who would protect them and provide for them. But men would not do that without the assurance of kinship that marriage provides. Thus the various holy laws established rules for marriage, so that a couple were able to maintain a good home life (*ḥusn al-mu‘āshara*) and preserve the system of domestic society (*niẓām al-ijtimā‘ al-manzili*). The needs of individual members of the family (*al-‘āila*) would be fulfilled through it, and their only interest would be to promote its happiness and wellbeing.<sup>19</sup> The term “good home life” referred to one of the principal duties of the husband in pre-colonial jurisprudence, but ‘Abduh borrowed the term “system of domestic society” from European social science. Nearly twenty years later, in his report on the reform of the Shari‘a Courts, he more clearly articulated a concept of the family as the elemental unit of society. He wrote, “it is clear that the populace (*al-sha‘b*) is composed of houses (or households, *buyūt*) that are called families (*‘āilāt*), and the basis of every nation (*umma*) is necessarily its families because the whole consists of its parts.”<sup>20</sup> It followed that the ills that afflicted Egyptian family life threatened the greater social order, and one of those ills was the abuse by men of their privilege of polygyny.

‘Abduh opposed polygyny in his early writings on grounds similar to those advanced earlier by al-Ṭaḥṭāwī and Mubārak, namely that men rarely treated plural wives equitably as stipulated in the Quran, and that the jealousy between co-wives and enmity between their children disrupted family life. Men often divorced one wife to placate another, breaking up the family. The divorcées and their children suffered poverty and degradation when the ex-husband neglected their maintenance. Upper class men may have divorced less often, but they neglected older wives and their children to appease their younger wives, depriving the former of companionship.<sup>21</sup> The conventional exegesis of that era explained the quranic verse Q Nisā’ 4:3 (“If you fear that you will not act justly then one”) as requiring equity in maintenance and companionship, including equal numbers of nights spent with each wife. Thus, according to ‘Abduh, polygynous men incurred an obligation of equitable treatment, but

19 ‘Abduh, *Hājat al-insān ilā al-zawāj*, in *al-A‘māl al-kāmila* ii, 68–71. See also Malte-Brun, *Universal geography* i, 273.

20 ‘Abduh, *Taqrīr* 3.

21 ‘Abduh, *Ḥukm al-shari‘a fī ta‘addud al-zawjāt*, in *al-A‘māl al-kāmila* ii, 76–81.

few were able to meet that standard, and so it was better for them to limit themselves to a single wife.<sup>22</sup> The standard interpretation of a later verse, Q Nisā' 4:129 ("You will not be able to be equitable between your wives, be you ever so eager; yet do not be altogether partial so that you leave her as it were suspended"), was that men were not expected to have equal affection or passion for their wives, nor to treat them equally in sexual intercourse.<sup>23</sup>

Nearly twenty years later, in *Tafsīr al-Manār*, 'Abduh advanced a radically different reading of Q Nisā' 4:3 and 4:129, arguing that they implied the abolition of polygyny. Now he understood that the latter verse "may refer to equal treatment (*al-'adl*) in the inclination of the heart." Moreover, he understood the phrase ("yet do not be altogether partial so that you leave her as it were suspended") to refer to men who left one wife without companionship and/or support in favor of another.<sup>24</sup> Since polygyny harmed women and children, it was harmful to families and society as a whole, and so 'Abduh concluded that it could be forbidden in the public interest (*maṣlaḥa*).<sup>25</sup> The only allowable exception would be the barrenness of a first wife, and that should be established before a judge.<sup>26</sup> 'Abduh's hardened attitude toward polygyny reflected the progressive strengthening of family ideology, at the center of which stood the conjugal family ideal, along with a concern with the issues of maintenance and divorce that was very likely informed by what he observed in numerous cases as a judge in the National Court system.<sup>27</sup>

### Family Law Reform and *Takhayyur*

Contextualizing 'Abduh's advocacy of *takhayyur* requires an understanding of the transformation of Muslim family law in Egypt during the nineteenth

22 'Abduh, *Ḥukm al-sharī'a* 71, 77, 78, 80, 83.

23 Translation of Q Nisā' 4:129 by A.J. Arberry, *The Koran interpreted*. Ḥanafī jurists required a man to perform at least one act of sexual intercourse with his wife but no more than that. See Ibn 'Ābidīn, *Radd al-muḥtār* ii, 608–9.

24 Here and in his earlier essay the word *al-'adl*, which I interpret contextually as "equal treatment," also means "balance" and "justice." 'Abduh, *al-A'māl al-kāmila* v, 169.

25 'Abduh, *al-A'māl al-kāmila* v, 170. *Maṣlaḥa*, the public interest, is a principle that can override a normative legal rule or even a scriptural text. See Khadduri, *Maṣlaḥa*.

26 'Abduh, *al-A'māl al-kāmila* ii, 88–92.

27 Most family issues were heard in the Sharī'a Courts, but judges in the National Courts heard suits involving the enforcement of family law in such areas as maintenance and child custody. Moreover, 'Abduh conducted a study of the Sharī'a Court system in 1899, and as mufti he regularly dealt with Muslim family law.

century and its effect on marital life. Legal “modernization” in the nineteenth century was not limited to the sphere of secular law. It also entailed the reorganization of the Shari‘a Court system and the issuing of new procedural rules that affected the application of family law and hence marital life in two important ways. First, in a step toward creating a uniform law, judges were restricted to ruling in accord with the predominant view in Ḥanafī jurisprudence. Second, increasing emphasis was placed on the use of documentary evidence, so that by the end of the century, the courts were instructed not to hear posthumous claims regarding marriage and divorce except those supported by proper documents. Although decreed by the Egyptian khedives, these changes in Shari‘a Court procedures were similar to and roughly contemporaneous with measures taken by the Ottoman imperial center and effected in the provinces directly ruled from Istanbul.<sup>28</sup> Like the reorganization of the Ottoman Shari‘a Courts, also, the changes introduced in the Egyptian Shari‘a Courts went unnoticed by historians until recently, because they were “introduced as . . . administrative instructions” or procedural rules, and not as substantive changes in or codifications of the Shari‘a.<sup>29</sup>

The Shari‘a Courts themselves were the main venue for issuing notarized documents concerning family affairs. Thus the requirement of documentation expanded the social role of the Shari‘a Court system and led in 1880 to the creation of a cadre of marriage registrars, or *ma’dhūns*, who issued documents to brides and grooms and inscribed their nuptials (and divorces) in special registers. There was, it seems, a corresponding diminution of informal (i.e., out-of-court) marriages and divorces. The growing importance of the Shari‘a Courts in social life upends an older narrative of legal modernization, in which the Shari‘a Courts were supposed to have declined in importance due to the limitation of their jurisdiction to family and religious law. The enhanced role of the Shari‘a Courts also meant that the imposition of Ḥanafī law in family affairs had broad effects. Toward the end of the century, and in concert with those changes, officials became convinced of the need to codify family law, although disagreements delayed codification until after the First World War.

The transformation of the Shari‘a Court system began with the creation of the position of Grand Mufti of Egypt (Muftī al-Diyār al-Miṣriyya) by the vice-roy Muḥammad ‘Alī Pasha in 1835, and continued with procedural laws governing the operation of the Shari‘a Courts, issued in 1856, 1880, and 1897.<sup>30</sup>

28 See Kenneth M. Cuno, Reorganization of the Sharia courts of Egypt 87, 89.

29 Agmon, *Family and court* 55, 147.

30 These laws were Lā’iḥāt al-quḍāt in 1856, Lā’iḥāt al-maḥākim al-shar’iyya in 1880, and Lā’iḥāt tartīb al-maḥākim al-shar’iyya in 1897. I refer to them as procedural laws, though

A few years after the elevation of a Ḥanafī scholar to the new supreme muftiship, the right of giving *fatwās* on matters of public policy was restricted to officially appointed muftis, all of whom were Ḥanafīs.<sup>31</sup> By mid-century at the latest, Shari'a Court judges were ordered to apply Ḥanafī law exclusively, and subsequently the procedural laws reinforced this new requirement. Previously, deputy judges representing the four Sunni schools of law had presided in the Shari'a Courts of Cairo, something that may have been a legacy of the appointment of judges from the four schools during the Mamlūk Sultanate (1250–1517).<sup>32</sup> However, in other Ottoman provinces where the population included adherents of the other schools of law, deputy judges representing those schools were also appointed to preside in the courts along with a Ḥanafī chief judge.<sup>33</sup> This pluralistic system allowed litigants and the makers of contracts to engage in forum shopping by choosing a judge and hence a school of law that best suited their purpose. The flexibility of Islamic legal pluralism compensated in practice for the rigidity of the individual schools of law in the era of *taqlīd*.<sup>34</sup>

Women understood the uneven advantages and disadvantages offered by each school of law in matters of marriage, and had forum shopped to achieve the result they desired. Those whose husbands failed to support or deserted them could petition for a judicial divorce or annulment (*taṭliq*) before a Ḥanbalī, Shāfi'ī or Mālikī judge, and many did so.<sup>35</sup> The latter two schools also permitted a judge to declare a man who had gone missing without a trace for four years to be deceased, so that his wife could inherit and re-marry. In contrast, only Ḥanafī law permitted an adult woman to marry on her own without involving a guardian in the arrangements. The Palestinian mufti Khayr al-Dīn al-Ramlī (d. 1671) permitted a woman whose marriage had been annulled by a Shāfi'ī judge to re-marry herself without a guardian according to the Ḥanafī doctrine,<sup>36</sup> and this case was by no means unique. Al-Ramlī cited as his

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they dealt with the organization and administration of the Shari'a Court system as well as with court procedures.

31 Cole, *Colonialism and revolution* 37. About seven percent of the Grand Mufti al-'Abbāsī's questions were identified as coming from government offices or the Shari'a Courts. Peters, Muḥammad al-'Abbāsī al-Mahdī 69.

32 Hanna, Administration of courts 45; Rapoport, Legal diversity.

33 Shahar, Legal pluralism 138; Inalcik, The earlier centuries; Hallaq, *Shari'a* 216–17; Vikør, *Between God and the sultan* 209, 217; Christelow, *Muslim law courts* 86.

34 See Shahar, Legal pluralism 112–41; Rapoport, Legal diversity; and Baldwin, Islamic Law, 120–67. I am indebted to James Baldwin for his comments and willingness to share his knowledge of the Ottoman legal system.

35 Tucker, *In the house of the law* 83; Baldwin, Islamic law, 138–9.

36 Al-Ramlī, *al-Fatāwā al-khayriyya* i, 76.

precedent a case decided by the Central Asian jurist al-Marghīnānī (d. 1197), and women customarily forum shopped between the schools to obtain annulments and marry themselves off in Africa and South and Southeast Asia.<sup>37</sup>

The “Ḥanafization” of Egypt’s Shari‘a Courts eliminated the flexibility of this plural system. Ḥanafī law was especially inimical to married women in three respects. First, Ḥanafī law offered no relief to married women who were deserted and left without support by their husbands. Second, it presumed a missing man to be alive into his nineties, and would not declare him deceased before then. Third, arrears of maintenance accumulated automatically as a debt against the husband in the Ḥanbalī, Mālikī, and Shāfi‘ī schools. However, Ḥanafī jurists required that the rate of maintenance be determined formally, either by a judge or in a legal agreement between husband and wife, before unpaid maintenance would be accounted as a debt against the husband.

The emphasis on the use of documentary evidence in legal proceedings magnified the effect of Ḥanafization in peoples’ lives. By the turn of the twentieth century civil registration of marriages and divorces was all but required.<sup>38</sup> Women and men had recourse to the Shari‘a Courts and the *ma’dhūns* to establish an unassailable record of their marital status and rights, and consequently the courts were busier than ever. Thus while Ḥanafization reduced the legal options available to married Muslim women, the new requirement of documentation made it more difficult for them to arrange their affairs informally, out of court.

Women responded to these changes in the legal terrain with certain new strategies. Some women with missing husbands testified that they had received news by word of mouth of the death of their husband, or of his declaration of divorce. The only cases of this sort that appear in the legal record involve women who thereafter remarried, only to have their supposedly dead husband reappear. In some of these cases, at least, women may have claimed fraudulently that their husband died, out of desperation. In Ḥanafī jurisprudence a widow was free to remarry after her waiting period, but the wife of a missing man could not have him declared dead until he would be in his nineties.<sup>39</sup> Women also responded to the Ḥanafī rule requiring the formal setting of their maintenance by suing their husband over its alleged non-payment. Women in intact marriages would resort to this stratagem to get a judicial order setting the amount of maintenance they and their children were due. Doing so

37 Al-Ramlī, *al-Fatāwā al-khayriyya* i, 76; Fyzee, *Outlines*, 75–6; Vesey-Fitzgerald, *Muḥammadan law* 18.

38 *Lā’iḥat tartīb al-maḥākīm*, 163, Art. 31.

39 See Cuno, *Women with missing husbands*.

insured that non-payment would result in the accumulation of a collectible debt against a delinquent husband.<sup>40</sup>

Cases such as these show women making savvy use of the legal system to protect their interests, even if they could not overcome all of the disadvantages they faced. Those disadvantages and the problems they caused were evident to judges like 'Abduh and his younger colleague Qāsim Amīn. In discussions of the codification of Muslim family law, they and others raised particular concern over the failure of men to live up to their responsibilities in the maintenance-obedience relationship by supporting their dependents. A man could be imprisoned for non-payment of arrears of maintenance, or alternatively his wages or property could be garnished, but the failure of the civil authorities to execute Shari'a Court orders was a perennial issue. In 1884 the Ministry of Justice noted the failure of provincial officials and police to act on Shari'a Court decisions,<sup>41</sup> and in his report on the reform of the Shari'a Courts sixteen years later 'Abduh identified the haphazard enforcement of Shari'a Court decisions, including orders to pay maintenance, as a serious flaw in the judicial system. The administrative authorities, he wrote, were neither trained properly nor prepared to execute Shari'a Court rulings, and as a result no more than one percent of them were enforced. To address this shortcoming he proposed giving the Shari'a Courts the ability to enforce their orders directly through bailiffs.<sup>42</sup>

'Abduh had already become involved in official discussions on a codification of Muslim family law. The Ministry of Justice proposed in the 1890s that Muḥammad Qadrī's informal personal status code, published in 1875 as a reference manual for the Mixed Courts, be the starting point of a draft. Qadrī's code was based entirely on Ḥanafī law. A revised version of it was approved by the Grand Mufti, Ḥassūna al-Nawāwī (served 1895–99), though no further action was taken.<sup>43</sup> In his report on the reform of the Shari'a Courts, 'Abduh, who succeeded al-Nawāwī as Grand Mufti, revived the idea of composing a family law, but instead of a revision of Qadrī's code he proposed the inclusion of non-Ḥanafī rules when that was justified by the public interest.<sup>44</sup> The method

40 See Cuno, *Disobedient wives*.

41 Jallād, *Qāmūs al-idāra* iv, 163.

42 'Abduh, *Taqrīr* 67–9.

43 NAE, Majlis al-nuẓẓār wa-l-wuzarā', File no. 0075–016495, *Iqtirāḥāt al-Jam'īyya al-'Umūmiyya*, Feb. 1909. See also Riḍā, *Tārīkh al-ustādh al-imām* i, 626–7, on the public discussion at the time.

44 'Abduh, *Taqrīr*, h-w, 64–5; and Riḍā, *Tārīkh al-ustādh al-imām* i, 628, reproducing passages from an essay in *al-Manār* (June 1904) that made essentially the same points.

of selecting rules from diverse schools of law, or *takhayyur*, would mitigate the effect of the exclusive application of Ḥanafī law.

In July 1900, ‘Abduh, now the Grand Mufti, sent the Ministry of Justice an eleven-point list of reforms that highlighted the need for *takhayyur*. His memorandum was in response to a request for a *fatwā* concerning men who failed to maintain their wives, divorced wives, and children. This was but one of four comparable situations that arose frequently, he wrote. There was, first, the question of men condemned to prison, whose wives were left without maintenance. Second, there was the issue of men who would not or could not support their wives, “as occurs with the majority of individuals of the lower class and many individuals of the middle and upper class.” Third, there were husbands who went missing without a trace, or who were absent for lengthy periods without providing for the maintenance of their wives. Fourth, some men treated their wives so harshly that they could not continue to live together. In such situations a judge should be able to divorce a woman from her husband or to declare a long-missing husband deceased, but that was not permissible in the Ḥanafī doctrine applied in the Sharī‘a Courts at the time. Therefore ‘Abduh proposed that the rules of the Mālīkī school be applied in these cases. Mālīkī jurists permitted women to petition a judge for an annulment on grounds of non-support, desertion, and “harm,” including harsh treatment, and they allowed a judge to declare a man deceased after going missing for four years.<sup>45</sup> ‘Abduh justified his proposal on the principle of necessity (*darūra*), and closed with an appeal to the khedive to implement this reform.<sup>46</sup> The Ministry raised the issue of codifying family law again in 1904, asking ‘Abduh and the Shaykh al-Azhar to consider, among other reforms, convening a group of Ḥanafī shaykhs to agree on a method of composing a family law code, and again recommending Qadrī’s code as the starting point.<sup>47</sup> Nothing came of that initiative either, and in the years following ‘Abduh’s death his circle continued to raise the issue of the need to modify the all-Ḥanafī family law by introducing elements of Shāfi‘ī and Mālīkī law.<sup>48</sup>

45 ‘Abduh, *al-A‘māl al-kāmila* ii, 654–8.

46 ‘Abduh, *al-A‘māl al-kāmila* ii, 655–6. On necessity in jurisprudence, see Linant de Bellefonds, *Ḍarūra*, in *ET*<sup>2</sup>.

47 NAE, Majlis al-nuẓẓār wa-l-wuzarā’, File no. 075–04039, mukātabāt al-Ḥaqqāniyya bi-shā’n iṣlāḥ al-maḥākīm al-shar‘iyya. Ṣūrat mā tuqarrir niẓārat al-Ḥaqqāniyya li-faḍīlat Shaykh Jāmī‘ al-Azhar bi-tārīkh 4 yūnyu 1904 wa li-faḍīlat Muftī al-Diyār al-Miṣriyya fī al-tārīkh al-madhkūr.

48 NAE, Majlis al-nuẓẓār wa-l-wuzarā’, File no. 0075-016495, *Iqtirāḥāt al-Jam‘iyya l-‘Umūmiyya*, Feb. 1909.

The laws of the 1920s represented a partial victory for this group. The first of these, Law No. 25 of 1920 Concerning the Legal Rules of Maintenance and Some Questions of Personal Status, embodied the recommendations of a committee of senior ulema convened in 1915 to draft a family law. It addressed long-standing concerns over the enforcement of maintenance payments, drawing on Mālikī jurisprudence in providing for unpaid maintenance to accumulate automatically as a debt against the husband. This could result in the garnishment of his property or wages, as before, but if he was unable to pay or absent the judge was authorized to annul the marriage. The judge could also declare a man who went missing for four years to be deceased. In either case the woman was free to re-marry after her waiting period.<sup>49</sup>

Law No. 25 of 1929 Concerning Certain Rules of Personal Status incorporated the recommendations of another committee that reflected the ideas of 'Abduh. It invalidated conditional and whimsical repudiations and accorded a triple repudiation the effect of a single, revocable divorce. It also drew on Mālikī jurisprudence in expanding women's access to divorce by permitting them to petition a judge for an annulment on the ground of marital discord (*al-shiqāq*) and that they suffered harm or injury (*al-darar*) in the marriage. If the wife established that she suffered harm to an extent that reconciliation was impossible the judge was to annul the marriage. If she could not convince the judge of that but brought repeated complaints, the judge was to appoint arbiters, and if they could not reconcile the couple, they were to recommend an annulment. In addition, the wives of absent and imprisoned husbands now could request an annulment on the ground that they suffered harm due to the absence of their husband even if he had assets that could be used to pay their maintenance.<sup>50</sup>

Legal historians have stressed the innovativeness of the legislators' use of *takhayyur*, the method advocated by 'Abduh. *Takhayyur* recovered some of the flexibility of pluralism and venue shopping at a time in which politicians sought to impose a uniform law on all citizens and left unquestioned the assumption that family law should be derived from religious law. The memory of the old plural system may have inspired 'Abduh's recommendation, and there was the example of the contemporary Ottoman system, which incorporated Shāfi'ī and Mālikī jurisprudence to permit women to seek an annulment for non-support

49 The text of the law and its explanatory memorandum are in 'Abdallāh, *Majmū'a* 166–79. On the drafting committee see Abū Zahra, *al-Aḥwāl al-shakhṣiyya* 9.

50 The text of the law and its explanatory memorandum appears in Muḥammad, *Majmū'a* 18–36.

and desertion.<sup>51</sup> Legal experts declared the use of *takhayyur* to be in keeping with “the spirit of the age,”<sup>52</sup> but the law it produced was socially conservative. The legislators’ intent was to preserve what they had come to regard as the normative conjugal family, and along with it, the maintenance-obedience relationship.

### Family Breakdown, the Irresponsibility of Men, and the Immorality of Women

A reading of ‘Abduh’s proposals for family law reform in the context of modernist discourse on the family reveals him not only to have participated in the construction of the modern family ideology but to have shared with other modernists an anxiety over the breakdown of the family. This anxiety seems to have been twofold. On one hand, once the conjugal family was identified as the elemental unit in society and the fate of the nation was tied to it, discussion of the family was no longer just about the family. Modernist family discourse aimed at social improvement, which required a sound family life. Family breakdown was the result of men failing to fulfill their responsibilities in the maintenance-obedience relationship. Al-Taymūr’s treatise on family and domestic affairs, *Mir’āt al-ta’ammul*, posited a crisis of the family caused by irresponsible men unwilling to support their wives,<sup>53</sup> and Fawwāz and Nāṣif denounced the capricious abandonment of wives and children by polygynous men.<sup>54</sup> ‘Abduh often wrote of the irresponsibility of men who married polygynously and divorced on a whim. The wreckage they made of family life was detrimental to the nation.<sup>55</sup> Qāsim Amīn also argued that divorce was abused by men too frequently and destructive of family life.<sup>56</sup>

Male writers often construed the family crisis as fundamentally a moral one. A key component of the maintenance-obedience relationship was the notion that women could not support themselves; that was the responsibility of men.

51 Anderson, Recent developments 37.

52 The phrase used by Egyptian authors, *rūḥ al-zamān*, may be a translation of *Zeitgeist*: See ‘Abdallāh, *Maḥmū’a* 4; Abū Zahra, *al-Aḥwāl al-shakhṣiyya* 8–9; and Sarkīs, *al-Zawāj* 153. The Ottoman Law of Family Rights employed similar language, e.g. Qarār ḥuqūq al-’āila, in al-Jabī, *al-Majalla* 515.

53 Al-Taymūr, *Mir’āt al-ta’ammul* 29–34.

54 Fawwāz, Yā Allāh lil-mar’a min al-rijāl, in *al-Rasā’il* 202; Bāḥithat al-Bādiya, Ta’addud al-zawjāt, aw al-qarā’ir, in *al-Nisa’iyyāt* 27–31.

55 ‘Abduh, *al-A’māl al-kāmila* v, 170.

56 *Taḥrīr al-mar’a* in *al-A’māl al-kāmila* 394–5.

Men who shirked that responsibility left their wives, children, and other dependents to fend for themselves. Families were broken up and women and children reduced to poverty. Moreover, women left unsupported and unsupervised threatened the moral order. As ‘Abduh put it, the failure of men to support their wives and children resulted in “corruption,” “the destruction of morals,” and “evil doings” that affected the entire nation.<sup>57</sup> This was a persistent theme in discussions of the reform of Muslim family law. An essay in the newspaper *al-Ādāb* in 1889 pleaded with the Khedive to allow Shāfi‘ī and Mālikī judges to apply the doctrines of their schools in cases of missing husbands. Otherwise, the wives of missing husbands would be reduced to poverty. Invoking the commonplace idea that women are deficient in intellect and faith, the writer went on to say that they might be driven by necessity to dispose of “the cloak of honor and chastity.”<sup>58</sup> One of ‘Abduh’s followers, Shaykh ‘Abd al-Raḥīm al-Damurdāsh, made a similar point about women whose husbands left them without support: they were “left in a condition which may compel them—God forbid!—to that which does not please Him.”<sup>59</sup> Qāsim Amīn also drew a stark picture of the uneducated woman left without male support, having “to sacrifice [herself] in the dark of night to the first one who asks—and how great an abasement this is for a woman!”<sup>60</sup>

## Conclusion

‘Abduh wrote at a time in which the periodical press was beginning to popularize certain aspects of the new family ideology, in particular domesticity. He reprised the themes of earlier modernists, identifying the conjugal family as the basic unit in society, the site where children are nurtured, and advocated women’s education and domesticity, and companionate monogamous marriage. Unlike an earlier generation of modernists, who were educators, ‘Abduh as a judge and especially as Grand Mufti advocated legal reforms to promote family stability and to alleviate some of the problems faced by women in Muslim family law. In that context his advocacy of the use of *takhayyur*, including the adoption of Mālikī rules in an overall Ḥanafī system, may have been inspired by the memory of the plural legal system that was abolished in the

57 ‘Abduh, *al-A’māl al-kāmila* ii, 654.

58 *Zawjāt al-mafqūd* 202.

59 NAE, Majlis al-Nuẓẓār wa-l-Wuzarā’, File no. 0075–016495, *Iqtirāḥāt al-Jam‘iyya al-‘Umūmiyya*, Feb. 1909.

60 *Taḥrīr al-mar’a in al-A’māl al-kāmila* 331.

1830s or 1840s. The advocacy of 'Abduh influenced the codification of Muslim family law in the 1920s, which improved the situation of married women. However, his ideas and the consequent reform legislation were premised on the maintenance-obedience relationship, upholding a norm in which the husband provided maintenance in return for the obedience of the wife.

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# Arabic Humanities, Islamic Thought

*Essays in Honor of Everett K. Rowson*

*Edited by*

Joseph E. Lowry  
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Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: [brill.com/brill-typeface](http://brill.com/brill-typeface).

ISSN 0929-2403

ISBN 978-90-04-34324-5 (hardback)

ISBN 978-90-04-34329-0 (e-book)

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