

**Monogamy in Islam:
The Case of a Tunisian Marriage Contract**

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The Occasional Papers of the School of Social Science are versions of talks given at the School's weekly Thursday Seminar. At these seminars, Members present work-in-progress and then take questions. There is often lively conversation and debate, some of which will be included with the papers. We have chosen papers we thought would be of interest to a broad audience. Our aim is to capture some part of the cross-disciplinary conversations that are the mark of the School's programs. While Members are drawn from specific disciplines of the social sciences—anthropology, economics, sociology and political science—as well as history, philosophy, literature and law, the School encourages new approaches that arise from exposure to different forms of interpretation. The papers in this series differ widely in their topics, methods, and disciplines. Yet they concur in a broadly humanistic attempt to understand how, and under what conditions, the concepts that order experience in different cultures and societies are produced, and how they change.

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Monogamy in Islam: The case of a Tunisian Marriage Contract

At the beginning of 1462, under the rule of the Emir hafside Abû 'Amru 'Uthmân (1435-1478), a judicial case involving a wife and her husband became so serious in the city of Kairouan, the first Islamic city in Ifriqiya, the medieval name for Tunisia, that it troubled public opinion. Moh'ammad ibn 'Abd al-Ghâlib al-Masrâti, the husband, had contracted a marriage with Amatu al-H'aqq, the daughter of an aristocratic Arab family in Kairouan, following the rule of monogamy, well attested to in the contract by the following text: "the husband voluntarily promises his wife not to take another wife; if he did it, his wife was empowered to repudiate the woman he would take". Years later, the husband broke his commitment and contracted a marriage with a second wife. The first wife, consequently, responded by repudiating the new wife. Her husband, however, refused to accept the fact. Supported by her father, she left her conjugal home and brought the matter to the court. The husband claimed that his commitment was attached to his marriage contract only as a voluntary concession and not as contractual condition. For this reason the court ruled in favor of the husband. The case was troubling because the custom in Kairouan city regarding the condition in the marriage contract was considered only contractual and binding. The wife and her father refused the verdict and took the affair to the high judicial authority in Tunis, the capital.

This story, related by a Kairouanian jurist of the fifteenth century¹, was the basis on which he wrote an epistle, a long juridical text, defending the custom and the woman's right afforded by the binding stipulation inserted in the marriage contract: "this clause, according to the custom of Kairouan, well-known by all, is a binding condition, unless it is explicitly written as a husband's voluntary promise"².

This affair is a very interesting case relating to Islamic marriage, but it is rarely studied, despite the fact that the condition of Muslim women is the object of intense research.

The matrimonial reality, illustrated by this case and, as we will see, by many others, is one in which marriage could be conditioned by the principle of monogamy. It offers evidence to counter, or at least to qualify, the idea, that polygamy and women's subjugation in marriage are always required by Islamic law and custom. The assumptions of religion's primacy in social dynamics, and of the total subjection of women and their passivity, still structure certain representations of Islam, even if more and more research in the last decades, inside and outside the Muslim world have introduced new approaches to the debate about gender and Islam.³

Abstract discussion of legal norms in Islamic culture hide specific real life experiences and these provide very interesting testimony for the historicity and

flexibility of Islamic law. My historical investigation enables us to defend the idea that Islamic law and Islamic jurisprudence are not fixed, but are products of history as people interpret and adapt them to particular circumstances. Islamic law is a human product, the product of Muslim jurists and their rational arguments within their doctrine⁴. In consequence, Islamic law is far from being absolute, unique or static; historical and social contexts are at the core of its fabric. Of course, Islamic law derives its bases from the Koran and *Sunna* (the Prophet's praxis), but through its historical trajectory it becomes infused with prevailing customs and local practices. If questions of marriage, divorce and succession are to be linked to scriptural sources and normative texts, their treatment by the four Sunni Schools⁵ nevertheless shows differences (called *ikhtilâf*) from one to the other. Their practices also show different managements of contingency and of the adaptation of legal norms to lived social and political practices⁶.

Even if the patriarchal logic of Islamic normative legal texts is clear, one cannot conceive the idea that real life is a strict application of this theological discourse. Quoting Baber Johansen we can say that: "The societies in which fuqahâ controlled the normative dimension of social life were highly differentiated and complex and needed a system of norms which corresponded to this degree of differentiation and complexity"⁷. Contingency was very present in the fabric of Islamic law. Through its material traces the jurisprudential field allows us to observe how women's status and the rules of gender could be variable and the product of lived fact. In the Maghreb, a space of various cultural and social mixtures, customary law played a central role in modeling the law and judicial practice.

By scrutinizing the deep and hidden history, by examining its variations and its change, over time and within societies, one can observe that the status of women in Muslim societies across history is neither uniform nor invariable. This kind of historical reading of cultural heritage is the only way to show that gender relations are never fixed, absolute, or unique. On the contrary, they are cultural, social, and legal constructions, subject to continuous negotiation and change.

Based on my examination of Tunisian Islamic marriage contracts of "marriage kairouanais"—a local custom widely practiced across a long history, from the medieval age to the contemporary period in the first Islamic city of the Maghreb—I will show how the *shari'a*'s norm of marriage could be shaped, and even circumvented to respond to a social demand.

This marriage contract was singular and very specific. According to its stipulation polygamy was forbidden and its control was held by the wife, which means that, in case the husband failed to honor his commitment and took a second wife, his wife had the right to divorce the second wife. The terms of matrimonial equation were thus reversed by granting ultimate nuptial power (marriage bond), which is masculine according to scriptural norms, to the wife. The insertion of stipulations in the marriage contract, assuring women more security and autonomy,

was not unknown in Islamic law, but in Kairouan it was a custom widely practiced, backed by a legal rule.

Here was the deep significance of this customary legal practice: more than a singular contract of Islamic marriage, a simple matter of law, it was a social fact, which revealed the character and the state of mind in that city. Islamic law, like other law, when viewed from the angle of anthropology, as notes Lawrence Rosen, “constitutes a realm within which it is possible to see people acting in accordance with their deepest assumption and beliefs”⁸.

Through a historical examination of “marriage Kairouanais,” supported by a juridico-anthropological approach, I aim to show how real history could be lived very differently from the ideals transmitted by doctrines, discourses and images. Finally, I also want to challenge the generalization that women’s status and gender relations in Islamic societies were to be unique, fixed and unchanging, due to their strict definition by scriptural dogmas.

This reflection is constructed in three stages:

First, I will start by locating the traces of stipulations in the marriage contracts, upon which the Kairouanian marriage was based, these are in juridical *responsa*, from the tenth to the fifteenth century. My aim is to put the particular case of Kairouan into a broader Islamic legal framework.

Secondly, I will try to understand how, and in which contexts and circumstances, this marriage contract instituting monogamy under the woman’s control, became widely used, a custom with its own form and legal rule, in the city of Kairouan.

Finally, moving towards the end of the nineteenth and the beginning of the twentieth century, when notary records become available, I will try to see how this local norm “worked on the ground”, in everyday life. In this way I can evaluate its real weight in the social landscape of the city.

Stipulations in Islamic marriage contract

The question of Muslim marriage, its terms and juridical constituents have been much observed and analyzed. However, the conditions or stipulations, which women and their families could negotiate or even impose on husbands at the time of the conclusion of the contract to expand their rights in marriage, are rarely taken into account by the many studies concerned with the matter of Muslim marriage⁹. Certainly, the option of conditions or stipulations was not regularly used; however it had a juridical existence that Muslim jurists did not fail to discuss and Muslim judges considered it in their judicial practice. Even if these conditions, which varied, did not change the essence of gender relations, which were based on male supremacy, they succeeded in introducing a definite change in the wife’s position in the matrimonial relationship.

The case of the Maghreb during the process of its islamisation, which started with the arrival of Muslim troops guided by 'Uqba Ibn Nâfa' and his followers in 670 in the framework of the Islamic conquests, is very interesting at this level. The socio-cultural diversity of the communities was successfully managed by the *fiqh* malikite, the Sunnit School rooted in the Hidjaz, well established in Ifriqiya and the whole Maghreb. It was reinforced thanks to Kairouan's School of Islamic law (*fiqh*), with its famous Jurists, (such as Assad Ibn al-Furât (d.213H/828), Suhnûn (d.240/854), Ibn Zayd al-Qayrawânî (d.386/996), and others). The very rich interactions between the legal norms of Islamic law and local customs, were significant. The phenomenon of specific local jurisprudence or "cases of law", called '*amal*', such as '*amal Fâs* (Fez), '*amal Qurtuba* (Cordoba) or '*amal al-Qayrawân* (Kairouan)¹⁰', is evidence of this rich legal reality. The example of stipulations in marriage and above all, the case of the custom of Kairouan, is exemplary.

Our research in the collections of jurists' *responsa* from the tenth to the fifteenth century led us to some conclusions in regard to stipulations attached to marriage contracts:

- First, the practice of the stipulation was well used over the centuries, and thus confirms the idea of its permanence, notably for what concerns the ban on a second wife. The practice was widely used in the Maghreb and Al-Andalous, specifically in the large cities, such as Kairouan, Tunis, Fes, Cordoba and Grenada. The concept of the '*amal*', very efficient in the Maghrebian Malikisme was, as Toledano noticed (in his work on the Book of '*Amal d'Al-Sijilmâsi*, a Moroccan jurist of the 18th century) is: "*an instrument for modifying and adapting the Shari'ah to meet the practical needs of societies*"¹¹. It was the basis for the wide spread practice of stipulations in marriage in urban society.

- Second, normally, a stipulation was a binding condition forming an integral part of the contract: the husband empowered his wife to repudiate herself in the event of his non-respect for his commitment to not undertake a specific action. Jurists are not, however, unanimous concerning the character of the clause. Nevertheless, judicial practice in the Maghreb seems to have a clear position by considering it as stipulatory, a juridical obligation, when the contract does not specify otherwise. And also, even when the written contract specified that the husband's promise was voluntary; the custom considered it as stipulatory¹².

Clauses inserted in the marriage contract could be various: a ban against the husband's taking another wife or a concubine; the right for the wife not to leave her family's city or country; the acceptance by the husband to live with his wife in her parent's house; the right of the wife to continue her occupation; and other stipulations allowing women more autonomy in the marriage.

- Third, the cases of litigation about a husband's non-respect of his commitment, especially concerning the taking of a second wife, point to men's ignoring the rule, but also to women's attachment to their right. Judges generally

ruled in favor of the woman if she had a contract which required rigorous adherence to the stipulation's rule.

It seems clear that the monogamy clause inserted in the marriage contract had juridical value in the framework of Islamic law, but to my surprise, the fact was also practiced by Jewish communities living in Muslim countries. Unlike Ashkenazi communities, these groups remained attached to polygamy sanctioned by the Talmudic law. As the Cairo Geniza Ketubba from the twelfth-thirteenth centuries reveals, the stipulation was regularly written into Jewish marriage contracts. S.D. Goitein and Mordechai Friedman pointed out this matrimonial Jewish practice and its fixed legal form appearing in numerous documents involving Egyptian, Spanish and Maghrebian Jewish groups. They also point out the interplay of Jewish and Muslim law revealed by the Geniza documents. This similarity in Muslim and Jewish matrimonial practice, added to other items as the *môhar* (equivalent of the Muslim *sadâq* paid by the husband to his wife), or divorce initiated by the spouse brings us to a ground of Judeo-Islamic correlations and interconnections. A cultural syncretism existed in which Jews and Muslims had common usages, even in a domain which seems reserved for the world of religion. Such evidence invites us to more consideration of the cross-influences between Jewish and Muslim culture in medieval and modern Arab-Mediterranean space.

All the cases of stipulations, we collected from our juridical sources, happened similarly everywhere, in Kairouan, in Tunis, in Fes and in Cordoba. Nowhere, were we confronted with a case isolated of local usage. However, we know from later juridical sources that the city of Kairouan was distinguished by its specific stipulation whose use became a custom known as *the Kairouanian marriage contract*, in Tunisia as well as in Algeria, and in some other Arab-Muslim countries.

Here is the singularity of the Kairouanian case: even if it took roots in a general Islamic rule, it nevertheless ended, by producing its own model, a local reformulation with regard to the specific context.

The singularity of Kairouanian case

This singularity is revealed by the formulation of the stipulation which is: "*the husband (named) promises voluntarily to his wife (named) the prohibition, according to the custom ('âda) of Kairouan*": a very condensed sentence which we found in all the marriage contracts in the notary records we consulted. That form of enunciation is very specific in comparison to the general form of stipulation pointed out in earlier juridical sources, notably, the reference to local custom.

The prohibition of the second wife, which is the evident meaning of the Kairouan contract, is clearly pronounced by its indicating word, *ban* (*tah'rîm*). Even if the condition inserted in the contract was written in terms of a voluntary act of the

husband, nevertheless, it was considered as binding. This is the current customary practice of Kairouan.

Another important aspect of the Kairouan stipulation concerns the empowering of the wife by her husband to repudiate a new wife. It is a novel stage in comparison to the general stipulation that gave the wife only the right to repudiate herself. In the case of Kairouan marriage, the principle of monogamy was strengthened by the fact that the repudiation of the eventual new wife fell under the first wife's control. And even if stipulation's text did not spell out this women's right of repudiation explicitly, the fact is part of the stipulation, acknowledged by all as having juridical value; it is a binding legal principle. This codification, favorable to women, was deeply inscribed in the collective memory, by the very specificity of the case of Kairouan. Following J.P. Charny in his reflection on the pluralism of Islamic law, we could qualify this Kairouan's rule as a "*norme inversée*"¹³. The initial matrimonial relationship announced by the *shari'a* law, is reversed by denying the male power of repudiation. Here we can see the inventive aspect of the Malikite school of Kairouan, its flexibility and its capacity to take into account social demands and practices. The ethnic, social and cultural diversity which marked that Islamic city during its first four centuries would have influenced this flexibility. With time and repeated use, the custom was adopted and it became part of juridical practice. This structuring power of custom and its juridical value have functioned over the entire Maghreb across centuries.

Without doubt, the custom was not instantly taken up. By definition custom is the product of the time; its legitimation is linked to its use and frequency. However, custom could not arise without a link to a social need, because it is definitely this need which created social consent for the incorporation of usage in the juridical conscience of the society: "custom is the translation of what a community considered to be its interests"¹⁴.

The stipulation of monogamy and its adoption as a custom can be read as a symptom of the specific social and cultural climate in the city of Kairouan. According to Lawrence Rosen: "Law is a part of the larger culture, a system which for all its distinctive institutional history and forms, partakes of concepts that extend across many domains of social life."¹⁵ From that angle, juridical rule becomes a cultural phenomenon, an integral part of a society's common sense.

It is definitely by using the notion of usefulness that Jurists, Malikites and also Hanafites, have formulated their reasoning about the necessity for custom as a source for the law. Custom, in its essence and in its logic does not exist without a social base. By the fact that it is an emanation of a particular context, it translates its reality by its language and its facts. Its juridical form is an adaptation to a social and historical situation.

This is one of the most important premises for my research.

The new matrimonial principle instituted by local custom in Kairouan, in comparison to *shari'a's* law of marriage, was neither insignificant nor without consequences for women's lives. Giving the right to women to bind their husbands to monogamy was a great challenge for Muslim society living within a culture of masculine domination. The fact is of a remarkable importance. Men's right to polygamy, which *chari'a* allows, was here contradicted by habit and social custom. It presents a great case of a strategy that some Muslim societies elaborated to answer its needs, and that Jurists integrated into judicial practice.

But how was this custom formed? By what historical process and what practical and symbolic process did this matrimonial norm achieve the status of legal rule?

First of all, it is important to note that in the literature I have consulted, two stories of marriage with stipulation were contracted by famous personalities in the eighth century. The first is the story of Abû Ja'far Al-Mansûr's (who will be the second Abbaside Calife)¹⁶ marriage with Arwa, the daughter of Mansûr AL-H'imiyari, one of the Arab *Achrâfs*, notables settled in Kairouan, around 726, after the success of 'Uqba Ibn Nâfar's campaign, in North Africa¹⁷. Al-Mansûr, hunted by the Omeyyades (the first dynastic Islamic state established after the stage of the Khulafâ': companions of the Prophet), found refuge in Kairouan where he contracted his marriage with Arwa, "the very lovely and distinguished woman", as described by chroniclers. She imposed on him the stipulation of the ban of another wife or even a concubine. Chroniclers tell us also, that : « *Abû Ga'afar en souffrit dix ans de son règne* »¹⁸.

The second story concerns the marriage of the governor of Ifriqiyya (Yazîd ibn H'âtim al-Muhallabî, who ruled from 770 to 787 (154h to 171h)¹⁹. Like his caliph, his marriage with a daughter of a prestigious Arab family from the Hidjaz who had settled in Kairouan was contracted with the clause of monogamy. Years after his marriage, he decided to take a concubine, and his wife replied by taking her case to the judge and demanding a divorce. It is said that the judge, well known for his righteousness, approved the wife's position. So the governor had to choose between his wife and the concubine.

Reality or a mixture of reality and fiction, these stories matter to us because they are memory's traces. This symbolism may influence reality more than the facts themselves, especially because they concern famous historical figures.

If these facts about famous people are remembered by history, others concerning less remarkable people, surely existed. Following the example of upper-class families, less privileged Arab families had taken up this practice especially when their daughters married outside of their circles.

On another level, these stories tell us about the socio-ethnic singularity of the city of Kairouan. Indeed, since its foundation in 670, by 'Uqbab Ibn Nâfa' and his numerous followers, Kairouan had received successive groups of migrants from

Hidjaz: soldiers, scholars, merchants and others. The aristocratic Arab families coming from various famous Arab tribes had settled in this new Islamic city over the years since the imposition of Islamic power in the Maghreb. The favorable environment created by the continuous reception of men and sciences prepared the city, already in the second half of the eighth century, to become a great center of Muslim culture²⁰. These aristocratic Arab families, who settled in Kairouan did not hesitate to exchange their oriental tribal ways for new membership in the local notability. There was a kind of a “*trait-d’union*” between Muslim Western, the Maghreb and Andalusia, and Muslim Eastern, the Hijaz, Shâm and Iraq. While continuing their links with the society of the big metropolises of Iraq, Basra or Kûfa, notably through matrimonial alliances, they also formed new alliances with the Muslim society of *Ifriqiya*, mostly Berbers.

This position “in between” would have pushed these families to impose the clause of monogamy on their daughters marriage contracts. Two logics, in opposite senses, could explain their matrimonial strategy: toward the Oriental metropolitan society, it was the fear that their daughters, married to oriental men were going to be abandoned for another wife in one of the great far-off cities of Iraq, Shâm or Hijaz. Toward the newly islamicized local society, the Berber particularly, it was reversed: a feeling of superiority in their social and religious difference was probably behind the strategy to marry their daughters under the rule of the prohibitory clause. From their powerful position, these Arab families, founders of the first Muslim society in Kairouan and in the Maghreb, were generally proud of their roots, their privileges and their difference in comparison with the new-comers to Islam, notably the Berbers, imposed the matrimonial rule of the prohibitory clause, as a sign of power and social differentiation in a Muslim environment where cultural and social mixtures were the most intense. Thus, they established the first bases for what was later to become a custom. We may see a mark of a will there to preserve a distinctive local and social identity at the same time. With use and time, the practice became a mark of the distinctive identity of a distinguished city.

The ethnic and social mosaic of the city, its emergence as a center of Islamic culture in the Occidental Islamic region, notably under the regional dynasty of the Aghlabides in the ninth century (from 800 to 909), the prominence of its educated elite and its famous juridical school, the role played by many women of the elite in the city’s life²¹, all these factors supported a dynamic legal judicial practice which resulted from a rich negotiation with the lived reality of the city and its society. This mingling of multiple factors made for the particularity of Kairouan: its own reading of the stipulation in Islamic marriage, the permanent fabric of its matrimonial custom and juridical norm.

Monogamy's practice in Kairouan's nineteenth century

Moving into the contemporary period, it is the presence of marriage contracts in Kairouan's notary records, from the later nineteenth century on, that allowed me to evaluate the weight of this custom for general matrimonial practice, and to observe how the matrimonial local custom operated "on the ground." Beyond the inner logic of the custom and the effect of this habit and its normative power, can we detect any other logic, social or cultural, which would be behind women's use of the monogamy stipulation in their marriage contracts?

These are the questions that I take up as I analyze my data.

First, it is important to note that the city from the second half of the nineteenth to the twentieth centuries had enormously changed since earlier times. It was no longer the capital; neither was it a great city or a cultural center. The successive destructions and the demographic change even if they dispossessed the city of many its advantages, nonetheless did not affect its religious and symbolic image. Wars' traumas and other crises could not erase easily what history inscribed as marks of the election and differentiation of the city. Effectively, in the context of social and political decline, sacral order resists and supports the image-symbol of the city. In this context, the attachment to the usage of the custom of monogamy would have its deep and enduring signification for the townspeople, as well as for the rural newcomers; for the former as a mark of their differentiation, for the later as sign of their integration into the city's culture, for membership in the city.

This context, in my view, has reinforced the practice of the custom. This hypothesis is based on the fact that the usage of the kairouanian marriage contract continued until the promulgation of the Tunisian Personal Status Code, in 1956 (at the moment of national independence). These hypotheses had to be confirmed by lived reality: it's what drove one to the notary records, particularly to marriage contracts.

The sample on which I conducted my analysis is drawn from five records dated from 1293h/1872 to 1303h/1898. It is important to say that the registers I used not only cover the same period, but are the only ones which can be found today. This means that the number of marriage contracts I gathered from the records must not be taken as the total number of marriages contracted in the city of Kairouan during this period.

158 is the total number of marriage contracts that I have drawn from the records; among this number 70.8%, (112) were contracted with the monogamy prohibitive stipulation. With these results, our first of hypotheses is well reinforced. From that, we can deduce that the custom was widely practiced in the city by the diverse elements of kairouanais society. Even for new groups in the city it would become a tool of assimilation. These groups, in need of recognition in a strange environment, chose to follow the city's practices, even more when it was a matter of

alliances contracted with families settled in the city. So, far from ignoring monogamy's rule, those of rural origins made the city's rule their own.

The observation of the rule by a large majority of women is a confirmation of its permanence and its rooting in the social space of the holy city. It's also, a confirmation of the idea that the clause of monogamy was definitely a kairouanaise reality. This fact confirms our initial hypothesis. The usage would have survived all crises; better, it would have been additionally reinforced with the arrival of newcomers to Kairouan.

A crucial question that drives my analysis of the data is: did these women who had conditioned their marriage by monogamy's clause have more advantages than the others? Women's advantages were determined at that time by social rank, beauty, age and personal status. Our sources do not provide us with all that we need, but they may enable some persuasive answers.

64% of the total number of women were virgins (*bikr*) (70 of 112), the fact is quite normal for the time. But, the percentage of divorced and widowed, which equals 36%, is in no way negligible. Divorce did not constitute a disadvantage for women to remarry with the same stipulation; this fact is another element which confirms the wide social use of the custom.

About the social status of these women, our data reveal that 36% of women belonged to elite families, 64% belonged to the common social categories. Such a distribution reflects the general social distribution of the city's population at large.

In regard to the behavior of older inhabitants and new arrivals, we concluded from our data that 40% of marriages with stipulation were contracted between couples from Kairouan when both husband and wife were natives of the city. 42% of marriages were of newly settled families, both husband and wife. What is visible and remarkable in this data is that both groups followed the custom. Social class certainly had a significant impact on some matrimonial strategies. But on the level of the use of the stipulation, the classes were mixed.

This conjunction of data appears to point to a wide use of the matrimonial stipulation by all social categories of the city's population. The custom was far from a practice reserved for a select group of women; even former slaves seem to have conditioned their marriages with monogamy's stipulation. Every woman of Kairouan, even the socially disadvantaged, could use it, and impose the observation of monogamy on the husband. We know, however, that every law or rule can be transgressed. Even if the custom was largely used and could be seen as a social phenomenon in the city, there might some husbands who would try to get free of the bind of the stipulation by taking another wife.

Four such cases were collected in the archives. They testify to the fact of a husband's transgressions of his contract, but also, to the rarity of that behavior. Complaints of wives are the best testimony of women's reaction to defend their rights inscribed in their contracts. All cases, confirmed the power of wives to bind

their husbands to the rule of monogamy: they definitely pronounced the divorce of the second wife²². Supported by their families or on their own, these women carried their cases to notaries and judges. Every time that they had to use justice, their position was approved. Proof, that the custom was definitely a juridical rule.

Until promulgation of the Code of Personal Status in 1956, Kairouanaises continued living according to customary usage. The marriage contracts of Kairouanaises—the memory of the city—testify to it. The clause of the prohibition of polygamy was certainly circumscribed within the limits of the city of Kairouan. But, it was also well-known by all, Ulemas and jurists particularly. It constituted a positive tradition for women within the large framework of Islamic Law, and in Kairouanaise jurisprudence, in particular. None of its traces, however, appeared in texts of the reform of personal status, nor in intellectual reformists' texts of the first half of the twentieth century. Its neglect in this later period was complete.

The rupture with the tradition on multiple levels—ideological, political, social, cultural and even architectural—was the core of Habib Bourguiba's project for modern Tunisia. So the Personal Status Code, the first major social reform promulgated only a few months after independence, made no reference to the Tunisian historical prohibitive clause, which forbade polygamy. With the Personal Status Code, Bourguiba's idea was to subject family law to modern reason. His desire to ignore any reference to Shari'a is obvious in the text, even if some of the dispositions of the articles of the code drew inspiration from Islamic Law.

Interestingly, attention has returned to this history in the twenty-first century. The Kairouanian marriage contract is once again remembered today. The circumstances of the celebration of the event of "Kairouan capital of the Islamic culture" in Tunisia during the year 2009, was at the core of this re-memorization. Could we read this development as a "re-invention" of the tradition in response to a context of rising of Islamic fundamentalism?

Effectively, could it be that with the return religion, politicians have an interest in re-inventing that tradition? Reference to the Kairouanian custom in recent political discourses, has less to do with continuity than with symbolism. The discursive use of the ancient usage can be read as a language, "a practice of symbolic communication", meant to apply to a new context. As Eric Hobsbawm wrote about the invention of tradition, "adaptation took place for old uses in new conditions and by using old models for new purpose..., re-inventing tradition is essentially a process of formalization and of ritualization characterized by reference to the past"²³.

Conclusion

Finally, we can conclude that the case of the marriage contract of Kairouan, as a local legal custom is a significant illustration of possible flexibility of Islamic law, even in the realm of family law, a realm where *shari'a* law is supposed to be immutable. The

case is illustrative of the jurisprudential dynamic influenced by social custom and demand. It is a case of change from the inside generated by a new social dynamic. This specific marriage contract introduced a new equation into gender relations that was different from the *shari'a* principle. Like other cases of change in Islamic law that need to be investigated, this case illustrates the openness of the law and its flexibility in specific context²⁴.

My reflection is necessarily a critical reading of the reductionist and fundamentalist vision of law and society which ignores social complexity and which thinks in terms of generalizations and stereotypes produced about Islam and its culture. The growth of fundamentalist ideology, which calls for the reinstatement of laws and practices set forth in orthodox doctrinal discourse on the one hand, and the negative stigmatization of the Islam and its culture in Western societies²⁵, on the other, make urgent and relevant the investigation of Islamic history and the re-reading of specific local experiences.

In so doing I aim to highlight what Abdulaziz Sachedina calls “a crisis of epistemology in traditionalist evaluation of Islamic legal heritage”²⁶, because I believe firmly, that only an historical approach to the Islamic legal system will enable us to understand this heritage²⁷. From my point of view, what is urgent today is not a problem of interpretation of the law and a quest for “a correct interpretation on matters of gender which was captured and preserved in the corpus of Muslim thought and writing and constitutes the heritage of establishment Islam”, as noted Leila Ahmed²⁸, it is rather an historicization of Islamic law in order to make visible the weight of the socio-historical dynamic in the construction of that law, and consequently the very historicity of the law. That historicity of Islamic law will enable us to draw useful lessons for the present and the future.

ENDNOTES

1. Abî ‘Abdallâh Mohammad Ibn Abî al-‘Abbâs Ah’mad Ibn Abî Fandâr al-Murâdî al-Qayrawânî, (Ibn ‘Adhdhûm), *Risâlat al-Tamlîk* (Epître sur la clause conditionnelle), introd. edit. Mohammad al-Tahar al-Rizgui (Riyâdh: Maktabat al-Rushd, 1998).
2. Ibn ‘Adhdhûm, p.70-71.
3. Fatima Mernissi, *Beyond the Veil* (Paris: Albin Michel, 1987); Mernissi, *Male-Female Dynamics in Muslim Society* (London: Al Saqi Books, 1985); Leila Ahmed, *Women and Gender in Islam* (New Haven, CT: Yale University, 1992); Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law, Iran and Morocco Compared* (London: I.B.Tauris, 1993); Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton, NJ: Princeton University Press, 1999); Nilufer Gole, *Musulmanes et Modernes* (Paris: La Découverte, 1993).
4. For further details on the debate about the definition of the fiqh and the Islamic Law, see for example: Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964); G.H. Bousquet, *Le Droit Musulman* (Paris: A.Colin, 1963); Chafik Chehata, *Etudes de Droit Musulman*, 2 Vol. (Paris: Presses Universitaires de France, 1971); Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden, The Netherlands: Koninklijke Brill NV, 1999).
5. The four Schools of fiqh that dominated the theory and the practice of Sunni Islamic Law were formed in different parts of the Abbasside Empire: the Hanafite in Irak and Iran at the second half of the 8th century, the Malikite in the Maghreb, Andalus and Hijaz in the 9th century, the Shafiite in Egypt in the 9th century, and the Hanbalite in Bagdad in the mid-9th century. For further information, see: Joseph Schacht, *Introduction to Islamic Law*, (Oxford: Clarendon Press, 1964); Noel Coulson, *A History of Islamic Law* (Edinburg: Edinburg University Press, 1964); Wael B. Halleg, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009).
6. Baber Johansen, op.cit.; Ron Shaham,(edit.), *Law, Custom and Statute in the Muslim World* (Leiden, The Netherlands: Brill, 2007).
7. Baber Johansen, op.cit., p.62
8. Lawrence Rosen, *The Anthropology of Justice* (Cambridge: Cambridge University Press, 1989) “Introduction”, p. XIII.

9. Some studies concerned with Islamic Law mentioned it, but the only study which focuses on it is: J. Lapanne-Joinville, "Les conventions annexes au contrat de mariage en droit musulman malékite," *Revue Algérienne, Tunisienne et Marocaine de Législation et de Jurisprudence* (1, 1954) pp. 112-125. Also Henry Toledano, *Judicial Practice and Family Law in Morocco: The chapter on marriage from Sijilmâsi's Al-'Amal Al-Mut'laq*, (New York: Columbia University Press, 1981) presents information and comments on the question.
10. Amor al-Jîdî, *Al-'Urf wa-l-'Amal fi al-Madhab al-Mâlikî wa Mafhûmuhu ladâ 'Ulamâ' al-Maghreb*, Rabat, 1982.
11. H. Toledano, 1981, p.7.
12. Al-Sijilmâsi, *The Chapter on marriage*, H. Toledano, p.128.
13. J.P.Charnay, "Pluralisme normatif et ambiguïté dans le fiqh", *Studia Islamica*, XIX, 1er trim. 1964, pp.65-82.
14. Société Jean Bodin pour l'Histoire comparatives des institutions, *La Coutume/Custom*, 3ème partie, Europe Centrale, Asie et islam, (Bruxelles: De Boeck Université, 1992) p. 40.
15. Rosen Lawrence, *The Anthropology of Justice. Law as Culture in Islamic Society*, Cambridge University Press, 1989, p.5; Clifford Geertz, "Common Sense as Cultural System," *Local Knowledge*, third edit. (New York: Basic Books, 2000) pp. 73-90.
16. Abû Ja'far al-Mansûr ibn Muhammad ibn Ali ibn 'Abd Allah ibn al-Abbâs ibn Abd al-Mut't'alib, est né en 714 d'une 'ummu waled, Salâma la Sanhâjiyya (la berbère), il devint le second calife abbasside en 754, succédant : à son frère Abû-al'Abbâs. Al-Mansûr est mort en 775 : cf. Ibn Hazm Al-Andalusi, *Jamharat Ansâb al-'Arab*, Edit. critique par E.Lévi-Provençal, Le Caire, Edit. Al Maaref, 1948, p.18.
17. Ibna-Abbâr, nous en propose quelques informations biographies, cf. *H'ulla*, (t.2) pp. 338-339.
18. Ibn al-Abbâr, *H'ulla*, op. cit., t.2, p.330 ; l'information est aussi rapportée par Mohammed Talbi, *L'Emirat Aghlabide* (Paris: Adrien-Maisonneuve, 1966) p.42.
19. Ibn al-Abbâr, *H'ulla*., op.cit., t1, pp.72-76, t2, pp. 358-362. A propos de la constitution de la wilâya d'Ifriqiya, voir entre autre : H.Jait, "La Wilâya d'Ifriqiya au IIè/VIIIè siècle," *Studia Islamica* (XXVII, 1967) pp.77-121.

20. M. Talbi, *L'Emirat*, op. cit., p. 41, *Al-Ya'kûbî, Al-Buldân*, cité in M.Talbi, 1982, p. 143.
21. H.H.Abdelwahhab, *Chahirât al-Tûnisiyât*, Tunis 1954.
22. A.N.T., Kairouan notary record n°616, affair dated in 3rabii'2 1293/1872, p. 37-38; affair dated in 16 rabii'2 1293/1872, p.47; record n° 705, affair dated in 17 juamada 1 1302/1884.
23. Eric Hobsbawm, *The Invention of Tradition*, (Cambridge: Cambridge University Press, 1983) p.4.
24. Ronald Jennings, in his study, "Kadi, Court and Legal Procedure in Seventeenth Century Ottoman Kayseri," *Studia Islamica* (48, 1978) pp.133-172, has well shown how the legal culture could be influenced by local customary law.
25. Joan W. Scott, *The Politics of the Veil*, (Princeton, NJ: Princeton University Press, 2007).
26. Sachedina, Abdulaziz, "The Ideal and Real in Islamic Law," in *Perspectives on Islamic Law, Justice and Society*, R.S. Khare, ed. (New York: Rowman and Littlefield, 1999) p. 25.
27. See Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought", *Ha wwa*, where she noted: "At the root of this crisis a non-historical approach to Islamic legal systems and a male-centred religious epistemology", p.3.
28. Leila Ahmed, *Women and Gender in Islam*, (New Haven: Yale University Press, 1992) p. 238.