Concubinage, in Islamic law — Brill

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While in English usage the word "***concubine***" is generally used to refer to a mistress or illegitimate sexual partner, in the context of **Islamic law** it is used to refer to a slave woman who is a man's legal sexual partner as a result of his ownership of her (see Marmon, 527). The Qurʾān makes several allusions to the sexual availability of female slaves, a practice that appears to have been widely accepted in the Arabian Peninsula before the rise of Islam as well as in the pre-existing cultures of the wider region (Schacht; Brockopp, 137, n78). Jonathan Brockopp has argued that there is a chronological progression from Meccan verses acknowledging slaves as well as wives as legitimate sexual partners (Q 23:6 and 70:29–30) to Medinan verses (2:221, 4:25, 24:30, 24:32) promulgating "a new ethic… where sexual intercourse was to be entirely within marriage bonds" (Brockopp, 133); if so, however, this trajectory is not reflected in the rules subsequently articulated by Muslim jurists.

The prophet Muḥammad is reported to have had concubines, including the war captives Ṣafiyya and Juwayriyya (both of whom he manumitted and married) and Māriya al-Qibṭiyya, who bore his son Ibrāhīm. The legitimacy of sexual relations with female slaves is also assumed by a *ḥadīth* reporting that when distributing female war captives to participants in the raid of Awṭās, the Prophet instructed that the recipients should not have sexual relations with a pregnant woman until after she gave birth, or with one who was ostensibly not pregnant until she had completed one menstrual period (Abū Dāwūd, *Sunan*, Kitāb al-nikāḥ, Bāb fī waṭʾ al-sabāyā).

In principle, any female slave who is wholly possessed by a male owner is sexually at his disposal; scholars derive this rule from Q 23:6, which praises believers "who preserve their chastity except from their wives and that which their right hands

possess” (*mā malakat aymānuhum*; see also verses 4:3 and 4:24). Although

grammatically masculine, a generic statement of this kind would ordinarily be taken to include female as well as male believers (who would then be entitled to sexual access to their male slaves); scholars were at pains to refute this inference, although at least one anecdote from the early period suggests that it may have been drawn by some people (see al-Qurṭubī, 12:71, 72; Ali, 12–5, 176–83). The assumption that any female slave might be intended for sexual use is reflected in some jurists’ assertion that a female (but not a male) slave could be returned to the seller on grounds of offensive odor or bad sexual morals (Marmon, 27).

The legitimate sexual availability of female slaves to their owners was limited by certain factors. Broadly speaking, the same categories of kinswomen that were prohibited to a man as wives were barred to him as concubines, even if he happened to acquire them as slaves. The incest taboos resulting from milk kinship similarly applied to concubinage. A man could not simultaneously hold as concubines two women who could not legally be co-wives (for instance, two sisters), or have sexual relations with a slave whose mother or daughter had previously been his sexual partner. Religious bars also applied; a man could take a Muslim, Christian, or Jewish slave as a *concubine*, but not a Zoroastrian or a pagan. Furthermore, a man had sexual rights (sometimes referred to as *milk al-istimtāʿ*, “ownership of the right to enjoyment”) only over a slave whom he wholly possessed. A slave who was partially free (for instance, one who was buying her freedom in installments through a *mukātaba* contract, or who had been freed by some but not all of her multiple owners) was not a legitimate sexual partner, nor was a slave whose ownership was divided among two or more masters. If no owner enjoyed exclusive possession, then none was entitled to sexual access to the slave. A slave woman could be validly married, either because she was purchased after marriage or because she married as a slave; a slave woman could marry with her owner’s permission or be compelled by him to marry *(ikrāh)*. In such a case, the husband had the exclusive right of sexual access, while the owner retained the right to her labour.

The underlying principle, as pointed out by Ibn Qudāma (d. 620/1223), is that "a woman is never licit to two men" (*al-Mughnī*, 7:459).

It is worth noting that the sexual needs and desires of the female slave were not completely disregarded: an owner had the obligation to provide a sexual outlet to ensure the chastity *(iʿfāf)* of his slave of either sex, usually by arranging a marriage, although in the case of a female slave it sufficed for the owner to have intercourse with her himself. However, unlike wives, slave women had no right to an equal allocation of nights *(qasm)*—although wives also had no right to limit the time their husband spent with a *concubine*, as long as co-wives themselves were treated equally in this respect.

The principle that a man could have relations with only his own, exclusively owned slave was viewed with some degree of leniency even in the normative texts. While it was prohibited to have intercourse with a slave one owned only fractionally, to do so, according to most scholars, did not constitute *zinā* (illegitimate intercourse, punished by the *ḥadd* penalties of lashes or death); partial ownership was regarded as an element of ambiguity *(shubha)* sufficient to avert the *ḥadd*, although it was subject to lesser, discretionary punishment. The same applied, according to many scholars, to a man who had intercourse with his married slave woman. Similarly, while it was forbidden to have sex with the slave girl of one's son, or with one's wife's slave girl even with her permission, to do so did not incur the *ḥadd* (Ibn Qudāma, *al-Mughnī*, 7:459, 10:156–8). The large number of *fatwā*s addressing these scenarios suggests that in some times and places such occurrences were far from rare, and that they probably went largely unpunished. According to some scholars, a man who impregnated his wife's slave woman was able to claim paternity only if the wife affirmed that she had given her permission for the sexual use of the slave (Imber, 143–7).

Because any female slave is in principle (and in the absence of other impediments) at the sexual disposal of her owner, any one of a range of legal terms for "slave" (for instance, *jāriya, ama, mamlūka*) could be used to refer to a *concubine*; however, the legal term *surriyya* specifically refers to a female slave who is acquired to be used as a sexual partner, rather than as a source of labour. Muslim scholars proposed multiple etymologies for this term, all suggesting various aspects of the institution of concubinage as they understood it. For instance, it might be derived from *surūr* (enjoyment), because a man acquired her for sexual pleasure; from *sarāt* (eminence), because a *concubine* enjoyed higher rank than other female slaves; or *sirr* (secrecy), because her owner secluded her from public view and enjoyed intercourse with her in private (see, e.g., al-Māwardī, 15:408–9).

Indeed, despite the theoretical sexual availability of all female slaves to their male owners, Muslim scholars frequently understood concubines *(al-sarārī)* as a distinct subcategory of slave women. The precise definition of a *concubine* was debated particularly in the context of the law of oaths; it appears that an oath not to take any concubines was sometimes extracted by a wife and accordingly the precise boundaries of the category were of interest to husbands. (Indeed, the husband's obligation not to acquire additional concubines was among the conditions most commonly added to premodern marriage contracts; see, for instance, Hanna, 149–52.) Abū Ḥanīfa (d. 150/767) and Muḥammad al-Shaybānī (d. 189/805) are said to have held that the defining factor in concubinage was that the owner establish the female slave in a home, protect her chastity, and have sex with her, while Abū Yūsuf (d. 182/798) argued that a woman was a *concubine* only if her owner sought to have offspring with her. The fifth/eleventh century Ḥanafī jurist al-Sarakhsī, who reports these opinions, himself equates "taking a *concubine*" with "protecting [the woman's] chastity *(al-taḥṣīn)* and preventing her from going out" (al-Sarakhsī, 7:106). The Shafiʿī jurist al-Māwardī (d. 450/1058) specifies that according to al-Shāfiʿī (d. 204/820)—as with Abu Yūsuf—the woman becomes a *concubine* only if there is intercourse including ejaculation (that is, if the man does not practise withdrawal); otherwise, she

is not a *concubine* even if he has intercourse with her (15:409). Ibn Rushd the Elder (d. 520/1126) records a similar debate among the Mālikīs, with some holding that the key factor was sexual intercourse and others arguing that concubinage required the seeking of offspring through ejaculation (*al-Bayān wa-l-taḥṣīl*, 6:152–3).

It is notable that a man was allowed to practise withdrawal *(ʿazl)* as a form of birth control with a slave woman without her permission, while he could do so with a wife only if she agreed. In this respect, concubinage (as understood by some scholars) occupied an intermediate space between ordinary slavery and marriage. Men were assumed to have a legitimate interest in avoiding the pregnancy of their ordinary slave women (see Schacht), and legal and historical sources suggest that they sometimes sought to terminate slave pregnancies when they occurred (see Katz, 36; Toledano). This tendency is unsurprising, given the diminished property rights an owner exercised over a slave woman who had borne his child (see the discussion of the *umm al-walad*, below). Al-Ghazālī (d. 505/1111) cites the desire to avoid the automatic (if delayed) emancipation of the mother of her master's child as a legitimate motivation for the use of birth control with slaves (see Katz, 43). In contrast, many scholars understood concubinage—like marriage—to imply a desire for offspring. The imposition of modesty practices was also regarded as constitutive of a more marriage-like relationship. As noted above, Abū Ḥanīfa is said to have regarded the establishment of a (presumably separate) domicile and the protection of the woman's chastity as constitutive of concubinage. Al-Māwardī also notes that scholars differ on the question whether seclusion *(al-takhdīr)* is integral to the status of *concubine*; he states that concubines are concealed from public view according to social and linguistic custom *(al-ʿurf)*, while no explicit legal provisions require it (15:409).

Other distinctions as well served to separate the *concubine* from the broader category of female slaves. Owners were obligated to provide for the maintenance *(nafaqa)* of slaves of both sexes. As in the case of the allocation of time, slaves (unlike wives) had no binding entitlement to equal treatment in this respect; nevertheless,

some scholars noted that it was desirable for the owner to be equitable in the

providing for them. However, as Ibn Qudāma notes, “If his female slaves include one that he intends to make his *concubine*, there is no harm in his giving her more clothing, because that is the custom” (Ibn Qudāma, *al-Kāfī*, 3:249).

Legal texts postulate that the private parts *(ʿawra)* of a slave woman were equivalent to those of a man rather than those of a free woman. However, without citing textual authority, the Ḥanbalī scholar Ibn Qayyim al-Jawziyya (d. 750/1350) argued that there was a sharp difference between concubines and other female slaves in this respect. He asserted that, while a slave woman used for labour could expose her face to men not related to her, this was not true of “concubines, who according to custom are protected and secluded” (*jarat al-ʿāda bi-ṣawnihinna wa-ḥajbihinna*; Ibn Qayyim al-Jawziyya, 2:47). Some later scholars, such as the Shāfiʿī jurist Ibn Ḥajar al-Haytamī (d. 974/1567), even recommended that the inauguration of a relationship of concubinage should be celebrated with a banquet *(walīma)*, like a wedding (al-Shirwānī, 7:426). Despite the fact that concubinage customarily shared some of the material and social consequences of marriage, the two relationships remained legally distinct and incompatible; although a man could be married to another man’s slave, he could not be legally married to his own slave. The many men who married their own concubines were thus required to manumit them first.

A slave woman who bore her owner’s child *(umm al-walad)* enjoyed a privileged status, although one whose precise parameters were disputed among jurists. The Prophet is reported to have freed his *concubine* Māriya after she gave birth to his son Ibrāhīm, and a report claims that he declared, “Her son has freed her” *(aʿtaqahā waladuhā)*. Later legal doctrine held that such a woman was freed, not on the birth of her child, but on the death of her master; another *ḥadīth* reports that the Prophet stated, “Any woman who has a child by her master *(sayyidihā)* is free when he dies” (both reports in Ibn Māja, *Sunan*, Kitāb al-ʿitq, Bāb ummahāt al-awlād). However, neither *ḥadīth* was unanimously accepted by scholars. According to Sunnī scholars, an *umm walad* became free immediately upon the death of her owner, and therefore

was not treated as part of the estate; thus, she was freed without regard to the

principle that a man could dispose of only one-third of his estate through bequests, and regardless of any debts that he might owe. For the same reason, an *umm walad* was a legitimate recipient of bequests by her owner. In contrast, Imāmī scholars held that the woman did not automatically receive her freedom on the death of her owner, but was inherited by her child (who was then obligated to free her) as part of his share of the estate. If the child's share did not cover her value, she was obligated to make up the difference to secure her freedom (see al-Shahīd al-Thānī, 3:519–20).

Reports claim that *umm walad*s continued to be sold like ordinary slaves in the lifetime of the Prophet and the caliphate of Abū Bakr (r. 11–3/632–4), but that ʿUmar (r. 13–23/634–44) and ʿUthmān (r. 23–35/644–56) forbade the practice (Ibn Rushd, *Bidāyat*, 2:767). Scholars also debated the limitations on the owner's use of the *umm al-walad* during his lifetime; al-Shāfiʿī and Abū Ḥanīfa held that he could continue to avail himself of her labour (as did Ḥanbalīs and Imāmīs), while Mālik argued that he was entitled only to sexual enjoyment (or perhaps, according to some later Mālikīs, to very light work).

A slave woman became an *umm walad* by virtue of being impregnated by her owner while in his possession. Pregnancy by the owner resulted in the status of *umm walad* even if it ended in miscarriage or stillbirth, as long as the fetus displayed some features of the human form. Scholars disagreed about the legal implications of miscarriage occurring before the fetus's human form was discernible, if midwives testified that the matter expelled was a fetus (Ibn Qudāma, 12:504–5). Imāmīs, in contrast, held that the prerogatives of the *umm walad* expired with the death of the child; even if the baby was born alive, if it later died the woman could be sold. Ḥanafīs held that it was the prerogative of the owner to deny paternity of the child (a claim that also denied the status of *umm walad* to the woman); the Shāfiʿīs, Mālikīs, and Ḥanbalīs, in contrast, held that the child was ascribed to the master as long as it was born at least six months after his acquisition of the *concubine*, even if he claimed to have practised withdrawal *(ʿazl).*

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Bibliography

Kecia Ali, *Marriage and slavery in early Islam*, Cambridge MA 2010

Jonathan Brockopp, *Early Mālikī law. Ibn ʿAbd al-Ḥakam and his major compendium of jurisprudence*, Leiden 2000

Nelly Hanna, Marriage among merchant families in seventeenth-century Cairo, in Amira El Azhary Sonbol (ed.), *Women, the family, and divorce laws in Islamic history* (Syracuse NY 1996), 143–54

Sean Marmon, Concubinage, Islamic, in Joseph R. Strayer (ed.), *Dictionary of the Middle Ages*, (New York 1982–8), vol. 3: 527–29

ʿAlī b. Muḥammad al-Māwardī, *al-Ḥāwī l-kabīr*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd, 18 vols. in 19, Beirut 1994

al-Muḥaqqiq al-Ḥillī, *Sharāʾiʿ al-Islām fī masāʾil al-ḥalāl wa-l-ḥarām*, 4 vols. in 2, Qum 1419/1998

Ibn Qayyim al-Jawziyya, *Iʿlām al-muwaqqiʿīn*, 4 vols., Beirut 1417/1996

Ibn Qudāma, *al-Kāfī fī fiqh al-Imām Aḥmad b. Ḥanbal*, 4 vols., ed. Muḥammad Fāris and Musʿad al-Saʿdānī, Beirut 1994

Ibn Qudāma, *al-Mughnī*, 14 vols., Beirut n.d.

Ibn Rushd [the Elder], *al-Bayān wa-l-taḥṣīl*, ed. Muḥammad Ḥajjī, 20 vols., Beirut 1984–7

Ibn Rushd [Averroes], *Bidāyat al-mujtahid*, 2 vols., Beirut 1424/2003

Colin Imber, Eleven fetvas of the Ottoman Sheikh ul-Islam ʿAbdurrahim, in Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, *Islamic legal interpretation. Muftis and their fatwas* (Cambridge MA 1996), 141–9

Marion Katz, The problem of abortion in classical Sunnī fiqh, in Jonathan E. Brockopp (ed.), *Islamic ethics of life* (Columbia SC 2003), 25–50

Muḥammad b. Aḥmad al-Qurṭubī, *Tafsīr al-Qurṭubī*, 21 vols. in 11, Beirut 1424/2004

Joseph Schacht, Umm al-walad, *EI2*

al-Shahīd al-Thānī, *al-Rawḍa al-bahiyya fī sharḥ al-Lumʿa al-Dimashqiyya*, 4 vols., Qum 1429 A.H.

ʿAbd al-Ḥamīd al-Shirwānī and Aḥmad b. Qāsim al-ʿAbbādī, *Ḥawāshī al-Shirwānī wa-Ibn Qāsim al-ʿAbbādī ʿalā Tuḥfat al-muḥtāj*, 10 vols., Beirut 1972

Ehud R. Toledano, Shemsigul. A Circassian slave in mid-nineteenth-century Cairo, in Edmund Burke III and David Yaghoubian (eds.), *Struggle and survival in the modern Middle East* (Berkeley 2006^2), 48–63.

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