

# **The Application of Family Law in the Bahraini Courts and the Need for Codification**

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## ABSTRACT

There has been increasing interest in the media regarding the Islamic legal system in Bahrain. Recently many shortcomings in the process of Family Law have been identified and brought to the attention of the public; not only via the general media, but also through summit conferences and academic seminars. At present, I teach Islamic Studies over a broad spectrum, however, my main interest lies in the sociological issues pertaining to the functions of the family. The purpose of this research is to broaden understanding of the flaws inherent within Bahraini Family law and the injustices and 'knock-on' effects that these produce. Primarily, I am concerned with women's rights and how these can be upheld in a system that clearly fails to consider the financial and custodial implications of divorce.

I feel that establishment of cohesion in the current legal system is crucial to the correct application of Islamic law. I have observed numerous contradictions in the procedures related to Family law and believe that the current problems will remain insurmountable unless some form of consistent Codification is set in place.

## THE SYSTEM OF TRANSLITERATION

The following system has been followed in transliterating the Arabic words and names used in the text.

ء	'	ر	r	ق	q
ء	A, i, u (con.) <sup>1</sup>	ز	z	ك	K
ا	ā (l.v.) <sup>2</sup>	س	s	ل	l
ب	b	ش	<u>sh</u>	م	m
ت	T	ص	ṣ	ن	n
ث	<u>th</u>	ض	ḍ	هـ / ة	h
ج	J	ط	ṭ	و	w
ح	ḥ	ظ	ẓ	و	ū (l. v.)
خ	<u>kh</u>	ع	'	و	aw (d.t.) <sup>3</sup>
د	d	غ	<u>gh</u>	ي	y (con.)
ذ	<u>dh</u>	ف	f	ي	ī (l.v.)
				ي	ay (d.t.)

Note: the Arabic names have generally been transliterated except in case of those names which have already been used untransliterated in English literature.

The *hamzah* was ignored when it occurs prior to a long vowel in the beginning of a word like Asmā' and Ummayyah.

The definite article "al-" ignored except when it occurs in governed words such as *mahr al-mithl*, or when it is used as a proof for a certain opinion.

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<sup>1</sup> Consonant.  
<sup>2</sup> Long vowel.  
<sup>3</sup> Diphthong.



## PREFACE

- i. Research justification
- ii. Literature Review and Research Justification
- iii. Research Methodology
- iv. Research Plan

### i. Research Justification:

The last twenty years or so have witnessed heated debates regarding Bahraini Family law (Personal Status). A variety of shortcomings in this area of the law have been raised in summit conferences and academic seminars; the media also giving wide coverage to this issue. This thesis aims to examine the following current criticisms:-

- The lengthy delays of judgements regarding family claims, in particular, the ones pertaining to a divorce requested by the wife.
- Limitations resulting from sole dependence of judges on definite, fixed opinions of the Mālikī school (for the *Sunnī*<sup>1</sup> Islamic<sup>2</sup> Courts) and the *Ja'farī*<sup>3</sup> school (for the *Ja'farī* Islamic Courts). It is important that the legal opinions (*ijtihādāt*) are not based on certain schools which follow definitive texts from the Qur'ān or the

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<sup>1</sup> The follower of Sunna, a follower of mainstream Islam. Sunnī or Sunite an orthodox Muslim, who recognises the first four Caliphs as the rightful successors.

<sup>2</sup> Every time the term 'legal courts' is used; it refers to the Islamic Judicial system (*Sharī'a*).

<sup>3</sup> That branch of Muslims who recognise 'Alī b. Abī Tālib, the Prophet's cousin and son-in-law, as the rightful successor. See, Wehr, Hans. A Dictionary of Modern Written Arabic, 498, Edited by Cowan J. Milton, Macdonald & Evans Ltd. London 3<sup>rd</sup> Printing 1980.

Sunna. Moreover, there are other different opinions that are not considered, despite their having more preponderance.

- The lack of cohesive mechanisms to control the judicial application, which is currently based on the individual judge. There is potential for contradiction within judgements that relate to the same type of case.
- Most judges in the Islamic Courts lack both the necessary Islamic legal knowledge and a thorough comprehension of legal pleading procedures and operations.
- The judges may not understand changing needs and circumstances; especially regarding the realistic assessment of child maintenance subsequent to divorce.

In order to resolve the preceding flaws in the system, a cohesive codification of Family law is perceived as crucial.

## **ii. Literature Review and Research Justification:**

There are numerous works on Islamic Family law and its codification. El-Alami and Hinchcliffe (1996) highlight the ‘undisputed benefits’ of such codification that can result not only in the unification of judges, but also general awareness of public rights and duties. Conversely they state that attempts to codify law were unsuccessful at the time of the Abassid Caliphates, due to the perception that the inherent flexibility of Islamic law might be impeded by any structure that might prove constricting. It has been mooted that Malik compiled the Muwatta in response to Al-Mansur’s repeated requests for legislative codification, but Malik denied that his work was intended to represent a law for all Muslims. Although the Ottomans initiated Western practices in the areas of Civil,



Commercial and Criminal law, the actual codification of Personal Status law was a slow process. El-Alami and Hinchcliffe detail the codification of Personal Status in a number of Islamic countries, including Algeria, Egypt, Iraq, Syria, Jordan, Kuwait, Lebanon, Morocco, and Yemen<sup>4</sup>.

Ziba Mir-Hosseini (1993) cites a variety of cases pertaining to the interactions between Islamic law and the social constructions of marriage and divorce. Her work highlights the struggle between traditionalism and modernism within the context of the Iranian and Moroccan Courts and examines the issues of marriage, marital disputes, custody, maintenance and so on<sup>5</sup>.

Jamal Nasir (1986) outlines the notion of Personal Status and examines the current state of legislation in some Arab states, including Egypt, Lebanon, Algeria, Jordan, Morocco, Tunisia, Syria, Sudan, Libya, Yemen and U.A.E. He raises the controversial issue of codifying a universal Personal Status law and cites the conflict of laws in personal status matters (apart from Tunisia) as being dealt with in the Civil codes of Arab States that have modern Personal Status laws. This work is aimed primarily at legal practitioners<sup>6</sup>.

The following works have also been examined with a view to further investigation of the dynamics and evolution of Islamic law and the exigencies attending the need for its codification:

The Theory of Contracts in Islamic Law. Rayner S.E.

Islamic Law. Theory and Practice. R.Cleave and E. Kermeli

Islamic Law. Concept and Codification. Amin Ahsan Islahi

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<sup>4</sup> Islamic Marriage and Divorce Laws of Arab World. El Alami, Dawoud Sudqi and Doreen Hinchcliffe. CIMEL and Kluwer Law International, London 1996.

<sup>5</sup> Marriage on Trial: a Study of Islamic Family Law in Iran and Morocco Mir-Hosseini, Ziba. I.B. Tauris Publishers Revised Edition, London. New York 2000.

<sup>6</sup> The Islamic Law of Personal Status. Nasir, Jamal. J. Graham and Trotman, 1<sup>st</sup> Edition, London 1986.

Purdah and the Status of Women in Islam. Sayyid Abul A'la Maududi

The Status of Women under Islamic Law. Jamal J. Nasir

The Laws of Marriage and Divorce in Islam. Maulana Abul A'ala Maudoodi

The Islamic Law and Constitution. Sayyid Abul A'la Maududi

Islamic Family Law. Chibli Mallat and Jane Connors

Islamic Law. Social and Historical Contexts. Aziz Al-Azmeh

Law of Desire. Temporary Marriage in Shi'I Iran. Shahla Haeri

Other than the MA thesis by: 'Abd al-Raḥmān al-Shā'ir entitled "*al-Taṭbīq al-Shar'ī fī al-Aḥwāl al-Shakḥsiyya fī Dawlat al-Baḥrayn fī al-'aṣr al-Ḥādīr*"), I have been unable to find any literature that specifically examines the nature of Family law in Bahrain. This study aims to make a start on elucidating some relevant matters and also to offer some primary evidence of the need for codification in this Islamic Kingdom. The research is characterised by the following:

1. It coincides with increasing criticism of the Islamic courts and the call to codify family law and compel the Islamic judges to abide by this. Thus, the study attempts to offer a scientific and objective analysis of the nature of the Islamic courts.
2. The study focuses on the most important issues and controversies; omitting the general issues that are agreed upon.
3. The research is based on field study, the details of which are as follows:
  - Distribution of questionnaires to the following Samples<sup>7</sup>:
    - a. The President of the Judicial Supreme Council
    - b. Judges from both the *Sunnī* and *Ja'farī* courts

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<sup>7</sup> See appendix for translations of these questionnaires



c. Lawyers.

d. Claimants (in the referred claims in the Islamic Courts).

Prior to finalising the design of the questionnaires, I consulted both lawyers and members of the Islamic Studies department at the Arts Faculty and the Law College of the University of Bahrain, in order to gauge their opinions of the format.

- Interviews were undertaken with some Islamic judges and defence lawyers in the Islamic cases.
- Data was extracted from the claims files whether concluded or pending in the Islamic Courts.
- Sessions at the Islamic Courts were also attended for a period of one year, in order to evaluate the magnitude of referred claims, their quality, pleading and the claims hearing.

Each of these steps was taken in order to compile as much reliable data as possible.

In order to investigate the need for codification, the following methodology was employed:

- Comparison between proposed draft laws and analysis of their contents related to the thesis.
- Study of the Draft of Bahraini Family Laws Project<sup>8</sup>, the Draft of the Conjunct Masqat<sup>9</sup> Document<sup>10</sup> in the Personal Status Law at the Council of Gulf Countries Co-operation G.C.C., and the Kuwaiti Personal Status Law<sup>11</sup>. This discussion

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<sup>8</sup> From this point, will be referred to as B.P. throughout the thesis.

<sup>9</sup> The Capital of Omān.

<sup>10</sup> From this point, will be referred to as M.D. throughout the thesis.

<sup>11</sup> From this point, will be referred to as K.L. throughout the thesis.

intends to make a comparative study in order to evaluate the level of the application and achievement of the purposes of Islamic law (*maqāṣid al-sharī'a*).

- In addition, two visits to the administration of the Islamic courts in Kuwait and the United Arab Emirates were made, with the aim of appraising the nature of practical trials in the system of arbitration (*taḥkīm*) between a dysfunctional couple (*shīqāq bayn al-zawjayn*).

### **iii. Research Methodology:**

This study is divided into two sections: these being practical field study and theory. I commenced with the former in order to shed some light on the reality of the processes within the Islamic Courts that constitute the aforementioned issues of controversy.

Based on the above, I was able to collect some different juristic opinions in order to address the debate with reference to the referred claims in the Islamic courts. Therefore, it can be submitted that the research is designed to be both analytical and comparative in order to assess actual implementation and how far this corresponds with the Islamic texts themselves. Effort has been exerted to access the preponderant opinion on the basis of its strength, proof and the extent of its agreement with the purposes of Islamic law; rather than limited adherence to a single doctrine. It was my intention to collate as many relevant opinions as possible, but unfortunately I was met with some un-cooperative response and the extent of the field study had to be narrowed.

Despite the great co-operation that I had from the officials in the Ministry of Justice, especially the Undersecretary, and the fact that I was given permission to attend all the sessions in all the Islamic Courts, notification on the claims files and the Judges



meetings; I was not allowed to distribute the questionnaires pertinent to claimants during their appearance at the Courts Rest Room. I was refused permission on the grounds that this may affect the mentality of claimants while waiting for their cases to be heard. However and arguably, that was the only viable method I could have used. Instead I had to distribute those questionnaires to the lawyers of the claimants for them to give to their clients. This method was not that helpful because they may not have grasped the correct way to fill out those questionnaires. Out of 200 prepared forms, I was only able to distribute thirty and these were returned containing many errors; rendering the data invalid and thus unusable. I also distributed those questionnaires to the President of the Supreme Judicial Council and various lawyers. The former refused to answer the questions and the latter were too busy to take it seriously and produced only brief answers that were unhelpful. At this point, I decided to abandon this form of primary research. A further difficulty arose due to the *Ja'farī* judges refusing to either answer questions or give me permission to attend the sessions. This resulted in incomplete information as far as the application of family law is concerned regarding marriage and divorce.

A major obstacle to my accessing of certain relevant data was the desire of non- *Ja'farī* Courts to add the confirmed documents to the marital bond in the claims file. These two problems in particular posed by the *Ja'farī* Islamic Courts, compelled me to depend, in many cases, on the ruling stated by 'Abd al-Rahmān al-Shā'ir wherein he did not mention the numbers of the claims. This lack of detail made it impossible to refer to the real files and know the circumstances surrounding them, unlike the majority of cases in the *Sunnī* Islamic Courts. A further problem is related to the absence of figures and statistics in the previously mentioned claims in Shā'ir's MA thesis, which is one of the important

references in this study. The system in the Dar al-'Ulūm College in the University of Cairo is such that names and numbers of cases are protected data.

#### **iv. Research Plan:**

The study is composed of a preface, an introduction, nine chapters and a conclusion. In the preface, the research justification, features and characteristics, methodology, obstacles and plan are discussed.

The introduction deals with the Islamic Courts in the Kingdom of Bahrain: its geographical and historical situation, Schools of Jurisprudence, the inception of Courts and the applied Schools in Islamic Courts.

The first four chapters deal with the applications of Family Law regarding Marriage. Chapter I explores the categories of guardianship (*wilāya*) within the marriage contract. This chapter is divided into the following topics; obligatory guardianship (*wilāyat al-ijbār*), prevention (*'aḍl*) of marriage by a *walī* and a woman's right to initiate marriage without reference to her guardian (*walī*) Chapter II examines the conditions related to the marriage contract which are presented as follows; conditions required for initiating a contract, conditions contravening the requirements of the contract, conditions neither requisite nor denied by the contract. Chapter III deals with equality in marriage. Chapter IV discusses the history and implications of "enjoyment marriage" (*nikāḥ al-mut'a*). Chapter V examines the concept and practicalities of arbitration (*taḥkīm*); for the resolution of disputes between the spouses (*mu'ālaḥat al-shiqāq bayn al-zawjayn*) and contains. Chapter VI explains the three types of divorce and their application in law. The sections are presented as follows; Innovated divorce (*ṭalāq bid'ī*), Divorcing 'thrice' in



one session and divorce made under the influence of alcohol or during rage. Chapter VII reviews a woman's right to apply for annulment, both in proven cases of abuse and unproven ones that require the application of "negotiated divorce" (*khul'*). Chapter VIII focuses on the practical implications of divorce; indemnity, custody and child maintenance. Chapter IX examines the Codification of Family Law in Islamic Courts in Bahrain. It deals with the definition of codification, its elements, lawfulness, theoretical justification, objectives, mechanisms, and analogy.

Finally, the conclusion presents a summary of the findings and recommendations of this study.

## INTRODUCTION

### The Bahraini Islamic Courts

- i. A Geographical and Historical Summary of Bahrain
- ii. The Islamic Schools of Thought (*madhāhib*) in Bahrain
  - a. The *Sunnī* Schools
  - b. The *Shī'ī* Schools
- iii. The Inception of Bahraini Islamic Courts
- iv. The Applied Schools in Islamic Courts

#### i. A Geographical and historical summary of Bahrain:

Bahrain, officially the Kingdom of Bahrain, occupies an archipelago consisting of Bahrain Island and about 36 smaller islands, lying along the Arabian Peninsula in the Arabian Gulf off the eastern shore of Saudi Arabia. Frequently called the 'Pearl of the Arabian Gulf' (*lu'lu'at al-khalīj al-'arabi*), Bahrain has a history of more than 5,000 years of civilization, from the mists of time to a vibrant present under a stable and prosperous government.<sup>12</sup>

Bahrain is the site of immortal Dilmun; religious centres to Sumerians, Babylonians and Assyrians, as dramatic excavations have proved. Subsequent visitors included Greeks

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<sup>12</sup> The Bahraini Statistics Catalog 10-11, Bahrain 2000; the New Encyclopedia Britannica I 802, 15<sup>th</sup> Edition 1991; G. Rentz and W. E. Mulligan. The Encyclopedia of Islam I 941, New Edition, Edited by B. Lewis, Ch. Pellat and J. Schacht, Leiden E. J. Brill 1965.

from the time of Alexander the Great, Portuguese, Omani and the English. Old sites and buildings are juxtaposed with modern office buildings and colourful traditional markets.

While relatively small in population, land area and resources, Bahrain has achieved a high level of social and economic development in a short period. The road network, international airport, telecommunications, public services, medical facilities and universities are all recognized as being among the best in the world. Although great emphasis is naturally placed on the development of its own citizens, due to its large expatriate population; Bahrain has a multi-national community, living harmoniously in a completely unique mix of cultures. English is widely spoken, but traditional Arab courtesy and hospitality are still the hallmark of a friendly and peaceful Bahrain.

Based on the information in the year 2000, the Kingdom of Bahrain is an archipelago with a total area of 711.85 square kilometers and a total population of 637,582 in its 12 regions, which include the capital Manama. The results of the 2001 Census listed a total population of 650,604.<sup>13</sup>

#### Location:

The State of Bahrain is an island group located off the central southern shores of the Arabian Gulf between latitude 25° 32" and 26° 20" North and longitude 050° 20" and 050° 50" East. The state comprises some 36 islands, with a total land area of about 706 square kilometers. The largest of these is Bahrain Island where the capital city, Manama, is situated. Bahrain Island is 48 km long from north to south and up to 16 km wide at its maximum point east to west. This island accounts for nearly 85% of the total area of the State. The next largest elements are the southern archipelago called "Ḥuwār" (50 square

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<sup>13</sup> The Bahraini Statistics Catalogue 10-11; the New Encyclopedia Britannica I 802; the Encyclopedia of Islam I 941.



kilometers), not far from the coast of Qatar, followed by the desert island of Umm Na'sān (19 square kilometers), the populous Muḥarraḡ Island (18 square kilometers) connected by causeways to Bahrain, and finally Sitra (10 square kilometers), a mainly industrial island also connected to Bahrain by causeways. The remaining small islands, islets and coral reefs combine to make up the rest of the land mass.<sup>14</sup>

### Geography:

Bahrain is low lying. Typically the limestone bedrock slopes very gently towards the roughly central peak of Jabal Dukhkhān 'Mountain of Smoke', so named because on hot humid days it becomes surrounded by a misty haze. Its top is only 137 meters above sea level, but seems higher due to the flatness of the surrounding plain. Land use varies greatly, from extensive urban development and cultivated areas in the north, to sandy wastes spreading south, east and west from Jabal Dukhkhān. Here true desert conditions exist, with only sparse tough desert plants growing among the barren limestone rim rock and varying depths of sand. Horticulture and agriculture flourish in the north, limited only by the amount of fresh water supplies from artesian wells or desalination plants. Gardens grow dates, almonds, pomegranates, figs, citrus fruit and a wide range of vegetables. Another noticeable feature of the Bahrain landscape is the preponderance of man-made stony tumuli or burial mounds.<sup>15</sup>

### History:

Burial mounds in the north appear to date back to the 3<sup>rd</sup> millennium BC. The island has been identified with the ancient Dilmun (Telmun) of about 2000 BC, a lively and

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<sup>14</sup> The Bahraini Statistics Catalogue 12.

<sup>15</sup> The Bahraini Statistics Catalogue 13; the New Encyclopedia Britannica I 802.



prosperous trading center linking Sumeria with the Indus Valley. Written records of the archipelago exist in Assyrian, Persian, Greek, and Roman sources.

Bahrain may have been under mainland Arab domination when Shāpūr II annexed it, together with eastern Arabia, into the Persian Sāsānian Empire in the 4<sup>th</sup> century AD. By the time of the Muslim conquest, in the 7<sup>th</sup> century, Bahrain was being governed for Persia by Christian Arabs; Syrian Christian records suggest Bahrain had its own Nestorian bishop. The ‘Abbāsids took Bahrain in the 8<sup>th</sup> century, and it remained under Arab control until 1521, when Portugal seized it. In 1602, after 80 years of unrest, the Persians took Bahrain and held it against assaults by the Portuguese and the Omanis. In 1783 Aḥmad b. al-Khalīfa ousted the Persians, and his family has ruled Bahrain ever since.

During the 9<sup>th</sup> century, Bahrain intervened several times to suppress piracy by the Bahrainis and to defeat attempts by neighbouring Arabs to assert dominion over the islands. In a series of treaties dating from 1820, Britain gained extensive control over Bahrain. After Bahrain’s decision in 1968 to withdraw all forces from the Persian Gulf, Shaykh ‘Isā b. Salmān al-Khalīfa proclaimed Bahrain independent in August 1971. After independence, tensions between the Shī’a<sup>16</sup> and Sunnī<sup>17</sup> communities increased, and Shī’a Muslims, emboldened by Iran’s revolution in 1979, continued to press for greater participation in government.<sup>18</sup>

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<sup>16</sup> A branch of Islam comprising approximately 10% of the total Muslim population, which has doctrines significantly different from those of the orthodox *Sunnī* majority. *Shī’is* themselves are divided into three principle groups. Twelve Imām *Shī’ism* (*Ithnā ‘Ashariyya*) or “Twelver”, the Zaydīs “five-Imām *Shī’ism*” or “fiver” and Ismā‘īlīs. Smith, Huston 364. The Concise Encyclopedia of Islam, Stacey International, London, 1<sup>st</sup> Published 1989.

<sup>17</sup> The largest group of Muslims, often known as orthodox, who recognize the legitimacy of the first four Caliphs. Smith 250.

<sup>18</sup> The New Encyclopedia Britannica I 802; and see: The Bahraini Statistics Catalogue 14; the Encyclopedia of Islam I 941.

## ii. The Islamic Schools of Thought (*madhāhib*) in Bahrain:

### a. The *Sunnī* Schools:

Currently the most renowned and predominant of the *Sunnī*'s four schools of *fiqh* in Bahrain are: Mālikī<sup>19</sup> and Shāfi'ī<sup>20</sup>, and it is a comparative minority who follow either the Ḥanafī<sup>21</sup> or Ḥanbalī<sup>22</sup> schools. According to Luwaimar's table<sup>23</sup> relating to the "respectable families" in Bahrain and Kuwait, the Mālikīs represent more than 80%, Shāfi'īs about 17%, while the Ḥanafīs and the Ḥanbalīs represent the minority of Sunnīs, who amount to 60% of Bahrain's population,<sup>24</sup> yet, there is no official statistic to determine the precise percentage of the followers of each school.

The Mālikī school: The wide spread nature of the Mālikī school is mainly due to the succession of rulers adhering to its theology, for instance the reign of 'Uṣfuriyyūn<sup>25</sup> in the middle of the 7<sup>th</sup> century A.H/13<sup>th</sup> century A.D. They seized the Bahrain region and the surrounding areas for about a century; āl Jabur<sup>26</sup>, and their Mālikī-oriented legislation continuing to reign over Bahrain for about two centuries up to the end of the 10<sup>th</sup> century

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<sup>19</sup> The School of Mālik b. Anas (94-179/716-795). He was born and died in al-Medina al-Munawwara and received traditions from Ṣāliḥ b. Sa'd, one of the last surviving Companions. He studied with Ja'far al-Ṣādiq. Smith 250.

<sup>20</sup> The School of Muḥammad b. Idrīs (150-205/767-820). The architect of systematic Islamic law, he was born in Palestine and raised in Mecca. He studied law in Medina with Mālik b. Anas, and also pursued studies in Baghdād to which he returned several times, thus becoming intimately acquainted with Ḥanafī law. Smith 359.

<sup>21</sup> The School of Abū Ḥanīfa al-Nu'mān b. Thābit (81-150/700-767). He was born in Kufa in Irāq and died in Baghdād. he was one of the great jurists of Islam and like Mālik he studied with Ja'far al-Ṣādiq. Smith 19.

<sup>22</sup> The School of Aḥmad b. Ḥanbal (164-241/780-855). He studied in Baghdād and received instruction from the great legal theoretician Shāfi'ī. He is the compiler of a large collection of *ḥadīth*, the Musnad. Smith 171.

<sup>23</sup> *Dalīl al-Khalīj 301*. as cited by Shā'ir, 'Abd al-Raḥmān. *Al-Taṭbīq al-Shar'ī fī al-Aḥwāl al-Shakhṣiyya fī Dawlat al-Bahrīn fī al-'Aṣr al-Ḥāḍir* 15, University of Cairo, Egypt 2000.

<sup>24</sup> That is at the end of the 19<sup>th</sup> century.

<sup>25</sup> See: Ibn Khaldūn, 'Abd al-Raḥmān. *Tārīkh Ibn khuldūn* 4/118, Dār al-Fikr, Beirut, 1<sup>st</sup> Edition 1981; Musllam, Muḥammad. *Sāḥil al-Dhahab al-Aswad* 168, Dār Maktabat al-Ḥayāt, Beirut; Anṣārī, Muḥammad 'Abdullāh. *Tuḥfat al-Mustafid bi-Tārīkh al-lḥsā' fī al-Qadīm wa al-Jadīd* 119, al-Maktab al-Islāmī, Damascus, 1<sup>st</sup> Edition 1963.

<sup>26</sup> Musllam 168.



A.H./16<sup>th</sup> century A.D.<sup>27</sup> The Banū Khālīd reign which continued for 125 years and ended in the late 12<sup>th</sup> century A.H/18<sup>th</sup> century A.D.<sup>28</sup> Finally the al-Khalīfa family's<sup>29</sup> dynasty rule has been in place since 1197/1782.

The Bahraini historian, Mubārak al-Khāṭir<sup>30</sup> stated that, "The Mālikī school was followed by Shaykh 'Isā b. 'Alī's government (1872-1932) and his preceding rulers of Bahrain. The Mālikī school prevailed due to the fact that most of the immigrants from Zubāra of Qatar, were mainly Arab tribes settled in Bahrain who were following the Mālikī school, thus this has been the predominant school since the late 18<sup>th</sup> century, after the al-Khalīfa rule began in Bahrain."<sup>31</sup>

Luwaimar stated that "al-'Utūb, a major *Sunnī* Muslim tribe which follows the Mālikī school, is the strongest tribe in Bahrain. The ruling families in Bahrain and Kuwait belong to this tribe."<sup>32</sup>

**The Shāfi'ī school:** The Shāfi'ī school of jurisprudence spread widely in Bahrain due to the early immigrants from Persia and Khawārizm region, subsequent to the Mongolian attacks in the 13<sup>th</sup> century. It then extended throughout the Arabian Gulf coastal countries, because those areas were more secure than others. Along with the arrival of immigrants, the Shāfi'ī school spread in Bahrain and other Arabian Gulf countries. Furthermore, during the 9th century A.H. a further exodus there occurred of *Sunnīs* from Persia towards the Gulf States, in a bid to escape the cleansing of *Ṣafavids* State<sup>33</sup>. Thus

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<sup>27</sup> Nabhānī, Muḥammad b. Khlifa. *Al-Tuḥfa al-Nabhāniyya fī Tārīkh al-Jazīra al-'Arabiyya* 74, Dār Iḥyā' al-'Ulūm, Beirut 1995.

<sup>28</sup> Shā'ir 16.

<sup>29</sup> See: Qadūra, Zāhiya, *Shubh al-Jazīra al-'Arabiyya* 427, Dār al-Nahḍa al-'Arabiyya, Beirut.

<sup>30</sup> He died on the 29<sup>th</sup> March, 2001.

<sup>31</sup> *Al-Qādhī al-Ra'īs Qāsim b. Mihza* '50, the Governmental Printing, Bahrain, 2<sup>nd</sup> Edition 1986.

<sup>32</sup> Shā'ir 16.

<sup>33</sup> A dynasty which ruled Persia (907-1145/ 1501-1732). The first *Ṣafavid* ruler, Ismā'il, used Shi'ism as a power base to rally support and deny the legitimacy of those he was suppressing. The *Ṣafavids* made



the Shāfi'ī School was well established in main cities of the Gulf and the Eastern coast of the Arabian Peninsula (also by virtue of āl Madhkūr in 1150/1790. An Arab Persian Shāfi'ī, who was appointed as ruler of Bahrain by Sultan Nādir Shāh, the ruler of Persia. Āl Madhkūr's reign lasted only half a century.

**The Ḥanafī school:** The existence of the Ḥanafī school of thought dates back to the occupation of the Bahrain region by the Ottomans, who had little intellectual influence other than the introduction of the Ḥanafī school. Nabhānī<sup>34</sup> stated: "The original Arabs from Iḥssā's people follow the Mālikī school, and among them are some Ḥanafī, who originally descended from Baghdād, Muṣil or from the Ottoman Empire. Those of the Shāfi'ī school are originally Kurdish or Persian, and those who follow Ḥanbalī are originally from Najd."<sup>35</sup>

**The Ḥanbalī school:** From the previous citation of Nabhānī we quote the following: "and those who follow Ḥanbalī are originally from Najd". This fact is confirmed by Aḥmad Taymūr Bāshā who states: "The majority of Bahraini follow the Mālikī school and there are Ḥanbalī who migrated from Najd."<sup>36</sup>

#### b. The Shī'ī Schools:

The most predominant of the Shī'ī schools in Bahrain are the Twelver Shī'a (*Imāmiyya* *Ithnā 'Ashariyya*)<sup>37</sup> or *Ja'fari*.<sup>38</sup> Their existence is rooted in the *Qarāmiṭa*'s control over

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Shī'ism ( the twelve Imam sect ) the state religion, thereby establishing the basis for internal unity, but tending also to isolate Persia from its *Sunnī* neighbors, as well as laying it open to the tensions inherent in Shī'ism. Smith 341.

<sup>34</sup> (d. 1369/1946), who is a historian of Bahrain in 14<sup>th</sup>/2000<sup>th</sup> century. Ziriklī, *Khayr al-Dīn. Al-A 'lām* 7/8, Dār al-'Ilm lil-Malāyyīn, Beirut, 4<sup>th</sup> Edition 1999.

<sup>35</sup> *Al-Tuhfa al-Nabhāniyya* 196.

<sup>36</sup> Abū Zahra, Muḥammad, *Nazra Tārikhiyya fī Hudūth al-Madhāhib al-Fiqhiyya al-Arba'a* 98, Dār al-Kitāb al-'Arabī, Cairo 1969.

<sup>37</sup> They believe in the authority of the twelve Imāms who are: 1) 'Alī b. Abī Ṭālib (d. 41/661); 2) Ḥasan b. 'Alī (d. 49/669); 3) Ḥusayn b. 'Alī (d. 61/680); 4) 'Alī Zayn al-'Ābidīn (d. 94/712); 5) Muḥammad al-Bāqir (d. 113/731); 6) Ja'far al-Ṣādiq (d. 148/765); 7) Musā al-Kāẓim (d. 203/818); 8) 'Alī al-Riḍā (d. 203 818);

the land of Bahrain and the surrounding areas in the middle of the 3<sup>rd</sup>/9<sup>th</sup> century till 470/1095. Then succeeded by the reign of Banī Jarwān an extravagant sect of *Shī'ism* based in Qatīf, an eastern region of Saudi Arabia— who took control of Bahrain in the 9<sup>th</sup>/14<sup>th</sup> century. In spite of little evidence of any effect of the Jarwāns on the *Sunnī's* beliefs, they left no significant existence of the *Shī'a* there. Ibn Baṭūṭa<sup>39</sup> the traveller visited the region in 732/1356 and toured Bahrain island, al-Iḥsā', Qatīf and Yamāma. Nevertheless he cited *Shī'a* belief only in Qatīf, which he stated “inhabited by Arabs cults of *Shī'ism Rāfiḍīs*<sup>40</sup> Dissenters hardliner' who declare their beliefs boldly.”<sup>41</sup> In 1039/1680 Bahrain was annexed under the sovereignty of the Persian Ṣafavids State upon the request of the *Shī'a* of Bahrain.<sup>42</sup>

The *Shī'a* of Bahrain were described by Luwaimar as an effective minority<sup>43</sup> estimated by Maḥmūd Shākīr to make up one third of the population of the eastern region of the Arab Peninsula, mainly in Qatīf<sup>44</sup>, and estimated as about half the population by F. Sh. Fidal,<sup>45</sup> Thus such estimation dealt only with the *Shī'a* throughout the general eastern region, however as yet there are no definite official statistics available in Bahrain.

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9) Muḥammad al-Taḳī (d. 220/835); 10) 'Alī al-Naḳī (d. 254/868); 11) Ḥasan al-'Askāī (d. 260/873); 12) Muḥammad call “*al-Mahdī al-Muntaẓar*”. Smith 202, 366-337.

<sup>38</sup> An adjective derived from Ja'far al-Ṣādiq to qualify the body of religious law of Twelve-Imām *Shī'ites*, whence the expression “*Ja'farī Shī'ites*”. Smith 204.

<sup>39</sup> Abū 'Abdallāh Muḥammad (704-780/1304-1378). An explorer and traveler similar to “Marco Polo”. He was born in Tangiers and began traveling at the age of twenty-one when he went across North Africa to Cairo, and then to Mecca to perform the pilgrimage. Thereafter he traveled in Syria to Sumatra. At the end of his life he dictated a description of his travels (*Tuḥfāt al-Nuẓẓār fī Ḡharīb al-Amṣār wa 'Ajīb al-Asfār* “*Reḥlat Ibn Baṭūṭa*”). Smith 170.

<sup>40</sup> (lit. “Repudiators”; in Arabic generally *al-Rāfiḍa* or *al-Rawāfiḍ*). A general name, abusive in tone, given by the *Sunnīs* or the *Shī'īs* because they repudiate the validity of the Caliphs who preceded 'Alī. These Caliphs, Abū Bakr, 'Umar, and 'Uthmān, along with 'Alī, are considered to be “the rightly guided” Caliphs by *Sunnīs*. *Shī'īs* believe that only 'Alī and his descendants had the right to the Caliphate, and so consider the first three to be usurpers. Smith 328.

<sup>41</sup> Shā'ir 17.

<sup>42</sup> Nabḥānī 73.

<sup>43</sup> Shā'ir 17.

<sup>44</sup> *Al-'Ālam al-Islamī* 58.

<sup>45</sup> *Wāḥat al-Iḥsā'* 58, as sited by Shā'ir 17.



### iii. The Inception of Bahraini Islamic Courts:

The judiciary in Bahrain followed Islamic law, whereas the al-Khalīfa used to appoint the Islamic jurists as judges to adjudicate and solve all the cases and disputes raised therein. The said judges performed their duties without being paid by the governor, in other words it was considered as a religious duty and not an official job. Shaykh ‘Isā b. ‘Alī the governor of Bahrain (1869-1932) appointed in 1875 both Shaykh Qāsim al-Mihza’ (1847-1941) as a judge for the *Sunnī* school and Shaykh Khalaf al-‘Uṣfūr as a judge for the *Shī’a* school. Both of them were simultaneously responsible for the properties of endowment (*waqf*) and minors.<sup>46</sup>

After the 1<sup>st</sup> World War, Bahrain became the British mandate. In 1926 Sr. Charles Belgrave (1894-1969) was appointed as an advisor to Shaykh Ḥamad b. ‘Isā al-Khalīfa, the chairman of the municipality at that time, and later (1932-1942) succeeded his father Shaykh ‘Isā b. ‘Alī. The advisor, Belgrave, was entrusted with the official matters of Bahrain and among other procedures; he changed the judicial system creating three courts, the high court, the mixed court and the minor court. The former two courts were connected and dependent on the British Approval Court (*Maḥkamat Dār al-I’timād*), which was established after introduction of the British Colonies Law in Bahrain. British judges headed the High Court and the deliberations before these courts were conducted in English. The Mixed Court was headed by both Shaykh Ḥamad and the British Commissioner (governor) Major Bert and it was considered as the court of government of Bahrain. Its judgments were raised in front of the governor of Bahrain at that time. British lawyers came from England specially to appear before the first court as well as the British

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<sup>46</sup> Khalīfa, May, *Charles Belgraf: al-Sīra wa al-Mudḥakarāt* (1926-1957) 91-93 & 114, al-Mu’assasa al-‘Arabiyya: Studies & Distributors, Beirut, 1<sup>st</sup> Edition 2000.



lawyers already residing in Bahrain. There were only four Bahraini lawyers at that time.<sup>47</sup>

Finally, the Low Court (the Islamic Court), for which the aforementioned two judges were appointed. Later on three assistant judges were appointed to assist Shaykh Qāsim b. Mihza'. They were named: "Abādila" in reference to their initial name "Abdul". Two of them followed the Mālikī school, Shaykh 'Abd al-laṭīf b. Muḥammad al-Sa'ad and Shaykh 'Abd al-laṭīf b. 'Alī al-Jawdar; the third one Shaykh 'Abd al-laṭīf al-Mahmūd followed the Shāfi'ī school. Moreover Shaykh Salmān b. Aḥmad b. Hīrz was appointed to assist Shaykh Khalaf al-'Uṣfūr. The jurisdiction of the said Islamic Court was limited to the Personal Status, or Family law (*al-aḥwāl al-shakḥsiyya*) cases, the observation of endowment and minor properties.<sup>48</sup>

In 1962 another Islamic Court was created called the High Court, and the first Islamic Court was renamed as the Islamic High Court of Appeal.

In 1971 Bahrain became an independent State after the end of the British mandate period. One of the first *Amirī* Decrees issued was the Law (13) of 1971 relating to organization of the judiciary and courts, the second section of the said decree relating to the judiciary and its jurisdiction stated in Article (8) that: the judiciary is divided into two sections:

1. The Civil Courts.
2. The Islamic Courts.

The Islamic Courts are divided into two sections: *Sunnī* courts and *Ja'farī* Courts.

It is stated in the third section of the same law relating to the hierarchy of the courts, Article (12) that the civil courts are graded as follows:

1. The Civil High Court of Appeal.

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<sup>47</sup> Charles Belgraf: *al-Sīra wa al-Mudḥakarāt* 92 & 114.

<sup>48</sup> Jawdar, Ṣalāḥ b. Yūsuf. *Ibn Jawder Qaḍī al-Muḥarraḡ* 65, Bahrain, 1<sup>st</sup> Edition 1999; Charles Belgraf: *al-Sīra wa al-Mudḥakarāt* 92 & 114.

2. The High Civil Court.

3. The Low Civil Court.<sup>49</sup>

Regarding the hierarchy of the Islamic Courts, Article (17) of the same law stated that:  
the Islamic courts are divided into two courts:

1. The Islamic High Court of Appeal.

2. The Islamic Low Court.

The Islamic High Court of Appeal is divided into:

- The *Sunnī* Islamic directorate.
- The *Ja'farī* Islamic directorate.

The Islamic High Court is divided into:

- The *Sunni* Islamic directorate.
- The *Ja'farī* Islamic directorate.

Each division deals with the personal status cases based on the religious school of the plaintiff at the time of filing, whether *Sunnī* or *Ja'farī*, as stated in Article (17): Each section of jurisdiction on Muslim family cases is based on the religious school of the plaintiff at the time of filing. The Islamic Courts also deal with cases of inheritance (*mirāth*), donation (*hiba*), testament (*waṣiya*) and endowment (*waqf*), in accordance with the religious school of the inheritor (*muwarriṭh*), donator (*wāhib*), testator (*muwaṣṣi*) or the donor (*wāqif*).<sup>50</sup>

In the 1999, *Amirī* Decree (4) for the year 1991 was issued to amend Decree (13) for the year 1971 relating to the judiciary. Article (1) of the amendment Law stated:

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<sup>49</sup> Official Journal 29 Issue 2354 January 1999.

<sup>50</sup> Official Journal 29 Issue 2354 January 1999.

Articles (17, 18, and 20) of *Amirī* Decree (13) for the year 1971 shall be amended as follows:

1. The Islamic High Court of Appeal.
2. The Islamic High Court.
3. The Islamic Low Court.

Each court shall have jurisdiction on the cases filed in front of it.

Each court shall have two divisions:

- The *Sunnī* division.
- The *Ja'farī* division.

Each division shall have jurisdiction over the Family Law cases of Muslims according to the religious school of the plaintiff<sup>51</sup> at the time of filing.

As an exception to the provisions of the proceeding paragraph, the jurisdiction of cases relating to contracts of marriage shall be based on the religious school wherein the contract of marriage was made. This shall be specified by the religious division or by the authorized officer (*ma'dhūn*)<sup>52</sup> who attested the contract of the marriage. The jurisdiction shall be according to the religious school of the husband at the time of contract if the marriage was unattested, or if there was a contract of marriage attested out of Bahrain but unattested by either division.<sup>53</sup>

The Islamic Courts shall have jurisdiction over cases of inheritance, donation, bequest and endowment in accordance with the religious school of the inheritor, donator, testator or the bequeathed.

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<sup>51</sup> Meaning: *Sunnī* or *Ja'farī*.

<sup>52</sup> The official authorized by the Judge to perform civil marriage. There are 20 *ma'dhūn* of *Sunnī* included the 10 judges and 40 *ma'dhūn* of *Ja'farī* included the 12 judges.

<sup>53</sup> Official Journal 30 Issue 2354 January 1999.



Article (18): The Islamic Low Court shall have jurisdiction in the first instance (to pass appeal able judgment) in the following cases:

- All responsibilities of maintenance of the wife and minor, maintenance between relatives, and requests for its increase, decrease or abandonment.
- The right of nursing, caring for and moving of a minor to another country.
- The proof of inheritance, legacies, wills and gifts and the attestation of inheritance declarations (*al-farīda al-Shar'īyya*) including the names of the heirs of the deceased.
- The verification of legal evidences, titles or deeds, and all types of affidavits. Also attestation of documents relating to personal status and the title of endowment and any amendment thereto provided that the provisions of the law of attestation are observed.<sup>54</sup>

The Islamic High Court shall have jurisdiction to pass appealable judgments in the following cases:

- Suits relating to matrimony, for example: proof of marriage, right of recourse, divorce, negotiated divorce (*khul'*) and dissolution (*mubāra'a*), and separation of the spouses for various legal or religious reasons.
- Cases relating to proof or disproof of kinship.
- Cases relating to interdiction for insanity or incapacity and inaptitude due to incapacity or mental disability etc.
- Cases related to the proof of absence of missing persons and their return or the proof of their death.

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<sup>54</sup> Official Journal 30 Issue 2354 January 1999.

- Cases related to endowment.
- All Personal Status cases over which the Islamic Low Court lacks jurisdiction.

Also it shall have jurisdiction to pass final judgments on cases appealed to it against judgments passed by the Islamic Low Court.<sup>55</sup>

The Islamic High Court of Appeal shall have jurisdiction on the appeal cases raised against the judgments passed by the Islamic High Court at the first instance.

Article (20): judgments issued by the *Sunnī* division shall be appealed before the *Sunnī* religious division of the competent court and the same shall be applied regarding the judgments passed by the *Ja'farī* division, notwithstanding the school of thought of the defendant or plaintiff.

Article (2): Another paragraph shall be added to the provisions of the Article (21) of Decree (13) for the year 1971 relating to the organization of judiciary to read as follows: (the Islamic Low Court shall have one single judge).

Article (3):

a. A paragraph shall be added after the first paragraph of Article (27) of Decree (13) of 1971 relating to the organization of judiciary to read as follows: (It is a precondition for a Islamic Low Court Judge to practice for– at least– two years in legal or Islamic position after obtaining the license or B.A of Legislation or Islamic law or it equivalent).

b. The phrase 'or Islamic' after the word 'legal', which comes at, the end of paragraphs 2 and 4 of Article (27) referred to.

Article (4): Article (19) of Decree (13) of 1971 relating to the organization of judiciary shall be repealed.

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<sup>55</sup> Official Journal 30 Issue 2354 January 1999.

Article (5): Every *Sunnī* or *Ja'farī* Court shall transfer all cases before it which come under the jurisdiction of another court as per the provision of this Law, at its current stage, and shall ratify the parties to appear in front of the competent court to which the case was transferred.

The said provision of the previous paragraph shall not be applied regarding the appealed cases, which are subject to the means and the dates of appeal valid at the time of filing the same.

Article (6): The Minister of Justice and Islamic Affairs shall execute this Law, which shall be valid after one month from the date of its publication in the official Gazette.<sup>56</sup>

The Bahraini law has respected the rights of other religions by allowing and confirming the marriage of Christians in Bahrain, Decree (9) of 1971 states:

Article (1): Any marriage between Christian spouses taking place in Bahrain and made before specialized religious persons according to the ritual and procedural means applied by the Church to which the spouse adheres, shall be formally deemed effective and valid, whether it took place before or after the validity of this law.

Article (2): The religious rites and ordinance after marriage of Christians shall take place in the following churches or other churches authorized to perform worship in Bahrain by the order of the State Council:

St. Christopher Cathedral Church.

Sacred Heart Church.

American Mission Church.

Article (3): every certificate of marriage issued by an authorized religious person as per this law shall be a valid document for the validity of marriage.

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<sup>56</sup> Official Journal 30 Issue 2354 January 1999.



#### **iv. The Applied Schools in Islamic Courts:**

- *Sunnī* Courts: based on the Mālikī school.
- *Ja'farī* Courts: based on the *Ja'farī* school.

After having observed the reality of the mechanisms in the Islamic Courts of Bahrain, I have been able to collate several juristic issues concerning marriage and divorce and legal verdicts related to these. Currently, there is increasing controversy and criticism leveled at judges who are involved in such cases in the Islamic Courts.

In the first four Chapters I will discuss the issues pertaining to marriage, as I perceive that the related laws can be instrumental in augmenting marital breakdown and thus impeding the mutual love and compassion that is prescribed by the Divine: *“And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your (heart): Verily, in that are signs for those who reflect.”*<sup>57</sup>

This view will be highlighted as follows:

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<sup>57</sup> Al-Rûm, XXX: 21.

## CHAPTER I

### The Notion of ‘Guardianship’ (*Wilāyat*) in Marriage

#### 1.1 Definition of *wilāya*

#### 1.2 The concept of *wilāya al-ijbār*

- The cause (‘*illa*’) of the *wilāya al-ijbār* and on whom it is applied

#### 1.3 Prevention of Marriage (‘*adl*’)

#### 1.4 The woman’s right to initiate her marriage without reference to her *walī*

- The legal position of *walī* regarding the marriage contract

Prior to any discussion of Family law, it is important to understand the Islamic notion of “guardianship” (*wilāya*). This area continues to create controversy among scholars and currently a major point of debate within media circles. Historically, Muslim women stayed in the family home and were expected to rely on the advice of parents regarding potential marriage partners. Thus her lawful ‘guardian’ (*walī*) was responsible for all aspects of the matrimonial process. Today, these women are independent; managing their careers and finances without the support of men. Consequently, the concept of *wilāya* is perceived as antiquated by certain sectors of society. This Chapter intends to examine, ‘obligatory guardianship’ (*wilāyat al-ijbār*), the mechanisms inherent in the prevention



(*‘aql*) of marriage by a *walī* and also a woman’s right to initiate marriage without referral to a *walī*.

## 1.1 Definition of *Wilāya*:

*Wilāya*, a noun from the root *w-l-y* “to be near, adjacent, contiguous to” [someone or something], and it may be defined as the process of loving and supporting; stated in the Qur’ānic verse: “*As to those who turn (for friendship) to Allāh, His Messenger, and the believers, it is the party of Allāh must certainly triumph.*”<sup>58</sup> It is a term with a range of meaning in political, religious and legal spheres. In Islamic law, here, it indicates representation, which signifies the power of an individual to initiate an action personally. It is seen as a legal authority (*sulṭa shar‘iyya*) by which an individual can initiate contracts (*‘uqūd*) and actions (*taṣarufāt*) and actuate their effects (*āthār*). When a person acts on behalf of others, *wilāya* is more often termed *niyāba*.<sup>59</sup>

*Wilāya* and *niyāba* are the two main requirements for any proper contract, *‘aqd ṣaḥīḥ*. *Ahliyya* represent the individual qualification to undertake an action. This requires soundness of mind (*‘aql*), adulthood (*bulūgh*) and, often, in family-related matters, profession of Islam. *Wilāya*, on the contrary, is the “authorised” ability to perform an action. A contract in which one of its contractors is not able (*ghayr walī*) or unqualified (*ghayr ahl*) is considered null (*bāṭil* or *fāsid*). A qualified person who performs a legal contract without authority is considered as intrusive (*fuḍūlī*) and the contract will only become valid if approved by the persons concerned.<sup>60</sup>

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<sup>58</sup> Al-Mā’ida, V: 56.

<sup>59</sup> Ibn ‘Abdīn, Muḥammad Amīn. *Rad al-Muḥtār ‘alā al-Dur al-Mukhtār (Ḥāshiyat Ibn ‘Abdīn)* 3/54, al-‘Uthmāniyya Printing, Quṣṭanṭīniyya 1903; Izz al-Dīn, Mawil, Y. The Encyclopedia of Islam XI 208.

<sup>60</sup> Izzī Dien, Mawil. The Encyclopedia of Islam XI 208.

*Wilāya* has been legislated by the text to safeguard the rights of those who are incompetent and incapable of disposing their affairs due to loss of, or reduced capacity, and to take care of their interests lest they should be undermined. Islam considers society as one whole and whoever is incapable of managing his interests, then Islamic law appoints someone else to secure his benefits and keep him safe from harm.<sup>61</sup>

*Wilāya* is divided into: restricted (*qāṣira*) and transitive (*muta'adiyya*). The restricted class is the *wilāya* of a person on himself and his property, and it is only confirmed for those who meet the conditions of full capacity (*ahliyya*) e.g. freedom, soundness of mind (*'aql*) and adulthood (*bulūgh*). The transitive one is *wilāya* of a person towards others, and is not confirmed except to those who enjoy the restricted *wilāya* on himself.

There are three forms of *wilāya*, whether personal (*'alā al-nafs*), financial (*'alā al-māl*) or personal and financial (*'alā al-nafs wa al-māl*), but I will focus on (*wilāya 'alā al-nafs*), which provides the person who has proved his capability with the right to initiate the marriage contract of the person under his *wilāya*, without need of permission from any other party.<sup>62</sup> Technically, this *wilāya* can be either optional (*ikhtiyāriyya*), when entered into by personal choice, such as *wakāla* [q.v.], or compulsory (*ijbāriyya*). However, in practice *wilāya* is a term used only to describe the latter, namely, *ijbāriyya*, which is determined by legal rule or judicial order. This can be divided into the following categories: the custody of infants (*ḥaḍāna al-ṣaghār*) and the *wilāya* over the person (*wilāyat al-nafs*) requiring care for a child who has passed the age of infancy or for an

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<sup>61</sup> Subā'ī, Muṣṭafā. *Sharḥ Qānūn al-Aḥwāl al-Shakhṣiyya* 1/136, al-Maktab al-Islāmī, Beirut, 8<sup>th</sup> Edition 2000.

<sup>62</sup> Sh'bān, Zakī al-Dīn. *Al-Aḥkām al-Shar'iyya lil-Aḥwāl al-Shakhṣiyya* 196, Libya, 2<sup>nd</sup> Edition 1973.



insane person. It also includes the father's duty to marry off his child when the latter comes of age (*wilāyat al-tazwīj*).<sup>63</sup>

Ibn Nujaym<sup>64</sup> states, “*wilāya* of marriage is twofold: preferred (*nadb*) *wilāya*, which is over the sound mind and the woman who has come of age, whether a virgin or previously married and *wilāyat al-ijbār*, which is over the minor, whether a virgin or previously married, and also the mature and mentally unsound woman.”<sup>65</sup>

I interviewed a group of authorized officials (*ma'dhūn*) and judges, (one of them being an agent at the Supreme Islamic Court of Appeal), regarding the kind of testimony given by the witnesses during the initiation of a marriage contract. I enquired as to whether it is a testimony on the contract for the purpose of notarization only or a testimony on the consent of the wife, (who does not attend the council of contract), to marry the person mentioned in the contract? All concurred that it is for notarization only, since the consent of the wife, particularly if she be a virgin, is not a condition in either the Mālikī or Shāfi'ī schools, the laws of which are currently applied in the Islamic Courts of Bahrain. In accordance with the method of *wilāyat al-ijbār*, the father is the owner of the *wilāya* and it is he who has the right to approve the marriage of his virgin daughter, whether the latter is a minor or an adult of sound mind, without the condition of her consent.

I discovered that this opinion, particularly regarding the rights of a mature woman, clearly contradicts what has been stated in Islamic law and responsibility lies within the relevant state of mind. 'Āysha<sup>66</sup> narrated that the Prophet stated: “*the responsibility is not*

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<sup>63</sup> Ibn Nujaym, Zayn al-'Abidīn b. Ebrāhīm. *Al-Baḥr al-Ra'iq Sharḥ Kanz al-Daqa'iq* 3/117, al-'Ilmīyya Printing, Cairo 1910; Izzi Dien, Mawil. The Encyclopedia of Islam XI 208.

<sup>64</sup> Zayn al-'Ābidīn b. Ibrāhīm al-Maṣrī, Ḥanafī scholar (d. 870/1563). *Al-A'lam* 3/64.

<sup>65</sup> *Al-Baḥr al-Ra'iq* 3/117.

<sup>66</sup> Bint Abī Bakr al-Ṣiddīq (9 B.H-58/613-678). She is a Mother of believers (*umm al-mu'minīn*), the third and favorite wife of the Prophet. She was born in Mecca. She is recognized as the most knowledgeable



*applicable in three cases: the sleeper until he awakes, the person who has not yet come of age and the mentally impaired until he attains understanding.*<sup>67</sup>

Islamic law maintains that each sane person has the principle of choice in all his living affairs, and one of the most important of these is the right to choose a partner with whom to fulfill a harmonious co-existence. The Qur'ān states: "*And among His signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect.*"<sup>68</sup> Based on this premise, I will examine the concept of *wilāya al-ijbār* in marriage, its cause (*'illa*) and upon whom it falls, as follows:

## 1.2 The Concept of *Wilāyat al-Ijbār*.

This is the type of *wilāya* where the *walī* has the sole right to initiate the marriage contract of the person under his *wilāya*.

The two grounds for its confirmation are:

- The kindness that incites the care of the interests and benefits of the minor and of his future life.
- Wise counseling and the providing of support to secure, manage and preserve his interests or property. If these two elements were to be fulfilled without flaw, then

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Muslim woman in law and literature of her time. She transmitted 2210 *ḥadīth* from the Prophet, but barely 300 of these were retained by Bukhārī and Muslim. *Al-A 'lām* 3/240.

<sup>67</sup> Nasā'ī, Aḥmad b. *Shu'ayb. Sunan al-Nasā'ī (al-Mujtabā)*. 3432, Maktab al-Maṭbu'āt, Ḥalab, 2<sup>nd</sup> Edition 1986; Ibn Mājih, Muḥammad b. Yazīd. *Sunan Ibn Mājih*. 2041, Dār al-Fikr, Beirut, N.D.

<sup>68</sup> Al-Rūm, XXX: 21.

the *walī* shall be complete, and the contract becomes obligatory to the person under the *walī*.<sup>69</sup>

### The cause (*'illa*) of the *wilāyat al-ijbār* and on whom it is applied:

There is a divergence of opinion amongst the scholars concerning the reasoning of this *wilāya* and on whom it should be applied:

The majority of scholars attributed the cause of its application to human need for marriage, combined with inability to choose a suitable spouse, whether a male or female.

They concurred on the reasoning in the case of the male: being a minor, but if the minor came of age or the irrational or mentally impaired person recovered his senses, then there should be no *wilāya* for anyone upon him.

Ibn Shubruma<sup>70</sup> agreed with them on the cause of its application and confirmed that it is applicable on the adult and the mentally impaired of both sexes who need to marry. However, they took a different stance regarding the minor, whether a boy or a girl, because need of marriage is not applicable since it usually occurs after puberty and if youngsters were made to marry prior to that point, it may be harmful to them.

With regard to the female, there was disagreement about the application of *wilāya*, as follows:

The Ḥanafis stated that the causes of its application were immature age and mental problems/disabilities<sup>71</sup>. Also, the *walī* is not allowed to force the adult virgin to marry because she is considered competent. The minor on the other hand may not be addressed

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<sup>69</sup> Muḥammad Abū Zahra. *Al-Aḥwāl al-Shakhsiyya* 118, Dār al-Fikr al-‘Arabī, Egypt, N.D.

<sup>70</sup> ‘Abdullāh b. Shubruma al-Zabbī (92-144/711-861). He was a Ḥanafī scholar and judge of Kufa. Shīrāzī, Abū Ishāq Ebrāhīm b. ‘Alī b. Yūsuf. *Ṭabaqāt al-fuqahā* 1/85, Dār al-Qalam, Beirut, N.D.

<sup>71</sup> See; *al-Baḥr al-Rā’iq* 3/117.



directly until she has come of age. The *wilāya* is applied on adolescents of both genders<sup>72</sup>, the man or woman born with a mental disorder and those of either gender who have developed mental problems, whether virgin or previously married. The *wilāya* is not applied on the adult and the sound of mind, either virgin or previously married.

The Mālikīs stated that the causes of its application are youth, virginity or both, as these attributes suggest incompetence and inability to choose a proper and suitable match. In their view, *wilāya* is applicable to:

- The minor, whether a virgin or previously married.
- The virgin and the young adult, even if a spinster.<sup>73</sup> Ibn Wahb<sup>74</sup> disagreed saying: “the father can oblige the virgin, unless she is a spinster because if she remains unmarried for a long time, she assumes the status of the previously married.” The source of this disagreement in defining the cause of the obligation is questionable: is it virginity, or merely ignorance of the interests of women?<sup>75</sup> This concurs with what was stated in *Mukhtaṣar Khalīl* thus: “the widely known application is that when the father declares that his daughter is of sound mind, then his obligation on her is invalid, and he shall not conduct her marriage without her consent.”<sup>76</sup> From the book of *al-Sharḥ al-Ṣaghīr* comes: “he shall not oblige a virgin who is come of age”, meaning that her father declared her to be of age, and he confirmed that by his confession; otherwise taking an oath is incumbent upon him if he denies, since

<sup>72</sup> Marghinānī, ‘Alī b. Abī Bakr. *Al-Hidāya Sharḥ al-Bidāya* 1/196, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1<sup>st</sup> Edition 1995.

<sup>73</sup> See: Asbahī, Mālik b. Anas. *Al-Mudawwana al-Kubrā bi-Rwāyat Siḥnūn* 2/152, Dār al-Fikr, Beirut, 1<sup>st</sup> Edition 1998; Dardīr, Aḥmad. *Al-Sharḥ al-Ṣaghīr ‘alā Aqrab al-Masālik* 2/217, Muṣṭafā al-Bābī al-Ḥalabī Printing, Cairo, N.D.

<sup>74</sup> ‘Abdullāh b. Wahb, Mālikī scholar (d. 197/ 802). *Al-A‘lām* 8/125.

<sup>75</sup> *Al-Sharḥ al-Ṣaghīr* 2/219.

<sup>76</sup> ‘Abdarī, Muḥammad b. Yūsuf. *Al-Tāj wa al-Iklīl li-Mukhtaṣar Khalīl* 1/634, Dār al-Fikr, Beirut, 2<sup>nd</sup> Edition 1978.



she was not obliged, then her utterance and permission are imperative.<sup>77</sup>

Muḥammad al-Shaqfa stated: “if her father declared her to be capable, then his interdict on her shall be lifted in all transactions, and he shall have no power to compel her, since her permission and verbal consent are imperative- due to the fact that his declaration would include all aspects of her capacities (mental state, age etc.) However, his *wilāya* remains valid after her coming of age because it will be deemed to have moved from *wilāyat al-ijbār* to that of permission and choice. She shall apply her opinion in all her affairs, and the *walī* who is her father shall represent her in the marriage contract only.”<sup>78</sup>

A disagreement arose regarding the commencement of the age of spinsterhood; some identifying it as thirty, whilst others have mentioned varying figures.

- Regarding the adult virgin, Ibn Abī Zayd al-Qayrawānī<sup>79</sup> states: “the father is entitled to initiate the marriage of his daughter without her consent even if she was of age, but if he wished, he could consult her.”<sup>80</sup> Ābī states: “the choice without any preponderance as apparent.”<sup>81</sup>
- The previously married (or non-virgin) and of age, if she lost her virginity accidentally or by adultery (according to valid opinion).
- The previously married and of age, if her fornication became apparent, and her *walī* failed to preserve her.

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<sup>77</sup> 2/219.

<sup>78</sup> Shaqfa, Muḥammad Bashīr. *Al-Fiqh al-Mālikī fī Thawbihi al-Jadīd* 3/278, Dār al-Qalam, Damascus, 1<sup>st</sup> Edition 2000.

<sup>79</sup> ‘Abdullāh b. ‘Abd al-Raḥmān, Mālikī scholar (d. 386/ 912). *Al-A ‘lām* 5/205.

<sup>80</sup> ‘Abdullāh b. Abī Zayd. *Risālat al-Qayrawānī* 1/368, Dār al-Fikr, Beirut, N.D.

<sup>81</sup> Ābī, Ṣāliḥ ‘Abd al-Samī‘ al-Azharī. *Al-Thamar al-Dānī fī Taqrīb al-Ma‘ānī: Sharḥ Risālat Abī Zayd al-Qayrawānī* 1/438, al-Bābī al-Ḥalabī, 2<sup>nd</sup> Edition, Egypt 1973.

- The insane woman, even if she has given birth to children; except for the person who eventually recovers her mental capacity. Ibn Wahb<sup>82</sup> disagreed: “the father can oblige the virgin, unless she is a mature woman, because women of ‘a certain age’ are regarded in the same light as those who have been previously married”.<sup>83</sup>

They said also: that seeking permission of the virgin by the *walī* is recommended and preferable (*mustahabb* or *mandūb*) but not obligatory (*wājib*). Accordingly ‘Āysha narrated: “I said: O Messenger of Allāh! Would women be consulted about whom they choose to give themselves in marriage?”<sup>84</sup> He replied: “yes”. I said: “then the virgin may be embarrassed and remain silent!?” He said: “*Her silence is indicative of her consent.*”<sup>85</sup> The Prophet stated: “*Consult the women themselves.*” This is because asking for permission comforts the father and there is no detriment either to the woman or her *walī*.<sup>86</sup>

The Shāfi’is discern the reasons for the application of this *wilāya* as virginity and innocence regarding marital issues, due to lack of experience. Such naivety can result in an inability to choose an appropriate husband. Shāfi’i maintained: “if any *walī* of a woman, initiates her marriage without her consent, then the marriage shall be deemed void; an exception being in the case of virgins”<sup>87</sup> Nawawī<sup>88</sup> stated: “The father and grandfather are not entitled to initiate the marriage of the virgin without her consent,

<sup>82</sup> ‘Abdullāh b. Wahb, Mālikī scholar (d. 197/ 802). *Al-A ‘lām* 8/125.

<sup>83</sup> See: *al-Sharḥ al-Ṣaghīr* 2/217; *al-Tāj wa al-Iklīl* 1/634.

<sup>84</sup> Meaning: their marriage.

<sup>85</sup> Bukhārī, Muḥammad b. Ismā‘īl. *Ṣaḥīḥ al-Jāmi’* (*Ṣaḥīḥ al-Bukhārī*), narrative: 6537, al-‘Ubaykān Bookstore, Riyadh, 2<sup>nd</sup> Edition 1997.

<sup>86</sup> Manūfī, ‘Alī b. Khalaf. *Kifāyat al-Ṭālib al-Rabbānī ‘alā Risālat Abī Zayd al-Qayrawānī* 2/52, al-Madanī Printing, Cairo, 1<sup>st</sup> Edition 1987.

<sup>87</sup> Shāfi’i, Muḥammad b. Idrīs. *Al-Umm* 5/3, Dār al-M‘rifa, Beirut 1973.

<sup>88</sup> Yahyā b. Sharaf. Shāfi’i scholar (d. 676/). *Al-A ‘lām* 8/55



whether she be a minor or of age. Ibn ‘Abbās<sup>89</sup> narrated; that the Prophet said: “*A woman who was previously married has more claim to herself than her walī. And a virgin’s permission is to be sought. Her silence is indicative of her consent.*”<sup>90</sup> This indicates that the *walī* has the right over the virgin, but if she is of age, it is recommended to take her permission by informing her, and her consent may be inferred by her silence.”<sup>91</sup>

The Shafi’is specify similar conditions to the Mālikīs regarding the mentally impaired and also the older woman who has been married previously. In the case of the latter, the obtaining of her consent is insisted upon.

Nevertheless the following conditions are specified to fulfill this *wilāya*:

- There should be no clear enmity between the father and his daughter, such as may be caused by his divorcing her mother etc.
- He should marry her to a proper and suitable match.
- He should initiate the marriage with the same dowry as her siblings (*mahr al-mithl*).<sup>92</sup>
- The husband should not be insolvent to pay the dowry.

<sup>89</sup> ‘Abdullāh b. ‘Abbās b. ‘Abd al-Muṭṭalib (3 B.H-68/619-6871). He was a prominent companion and very knowledgeable. He was born in Mecca. He accompanied the Prophet and transmitted from him many traditions. Bukhārī and Muslim recorded 1660 *ḥadīth* from him. He died in Ṭā’if. *Al-A‘lām* 5/95.

<sup>90</sup> Naysāburī, Muslim b. al-Ḥajjāj Abū al-Ḥasan al-Qushayrī, *al-Jāmi‘ al-Ṣaḥīḥ (Ṣaḥīḥ Muslim)*: narrative: 1421, Dār Iḥyā’ al-Turāth, Beirut, N.D.

<sup>91</sup> Nawawī, Yahyā b. Sharaf. *Al-Majmū‘ Sharḥ al-Muḥadḍḥab* 2/37, Maktab al-Irshād, Saudi Arabia, N.D.

<sup>92</sup> Two kinds of *mahr* are distinguished:

a. *al-musamma*, “specified *mahr*”, the amount of which is exactly laid down in the wedding contract.

b. *mahr al-mithl*, “*mahr* of the like”, i.e. unspecified dower, in which the amount is not exactly laid down, but the bridegroom gives a bridal gift befitting the wealth, family and qualities of bride. This *al-mithl* is also applied in all cases in which nothing definite about the *mahr* was agreed upon in the contract. The *mahr* becomes the property of the wife and she has full right to dispose of it as she likes. In the case of any dispute afterwards as to whether certain things belong to the *mahr* or not, the man is put upon oath. The Islamic law lays down no maximum. There is also no upper limit to the *mahr*: whatever is agreed upon in the contract must be paid. The *mahr* generally is adjusted to what other women of equal status (sister, daughter, aunt) have received. As regards the minimum for the amount of the *mahr*, limitations were introduced by the various law-schools. The difference in the amount fixed depends on the economic conditions in the different countries. (O. Spies. The New Encyclopedia of Islam VI 78).



- He should not initiate her marriage to one whose partnership would be harmful e.g. a blind or aged man.

Shāfi'ī stated: "The father may impose marriage on his daughter if this is financially fortuitous for her and free from negative implications, but it is not permissible if it may include any shortcomings or harm."<sup>93</sup> Mālik held the same opinion when once a woman asked him, "I have a wealthy daughter, she is desirable and is offered a high dowry, but her father wants to give her in marriage to his nephew who is insolvent, should I interfere? He answered: "yes". Ibn al-Qāsim<sup>94</sup> maintained: "I see that the initiation of a daughter's marriage by her father is permissible unless his action is potentially harmful, then it should be stopped."<sup>95</sup>

Awzā'ī<sup>96</sup> agreed: "the *walī* of the virgin has more right over her than she herself has, because if we describe something precisely it may indicate that anything other than that is considerably to the contrary. Hence the expression in the *ḥadīth* regarding the previously married woman, "*she has more claim to herself*", is a combination of indication and text and also an indication. The application by the indication is much similar to that of the text, and it is a duty to apply both the indication and the text. Thus, seeking her permission is a mandatory duty upon the *walī* in order to appease and please her, based on taking her silence as indicative of her permission. Although silence is not permission, it is deemed as such because she may feel too shy to express it."<sup>97</sup>

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<sup>93</sup> *Al-'Umm* 5/3.

<sup>94</sup> Muḥammad b. al-Qāsim b. Khālīd, one of the narrators of *al-Mudawana al-Kubrā* from Imām Mālik. Mizzī, Yūsuf b. al-Zakī 'Abd al-Raḥmān. *Tahdhīb al-Kamāl* 17/344, Mu'assast al-Risāla, Beirut, 1<sup>st</sup> Edition 1980.

<sup>95</sup> *Al-Mudawana al-Kubrā* 2/152.

<sup>96</sup> 'Abd al-Raḥmān b. 'Amr b. Yuhmid (88-157/707-774). He is a famous jurisprudence scholar. *Al-A'lām* 3/320.

<sup>97</sup> Zarqānī, 'Abd al-Bāqī b. Yūsuf. *Sharḥ al-Zarqānī 'alā Mukhtaṣar Khalīl* 3/165, Dār al-Kutub al-'Ilmiyya, Beirut, 1<sup>st</sup> Edition 1991.

The Ḥanbalīs: There are two narrations of Imām Aḥmad regarding the obligation of an adult of sound mind. The first is that a woman's father has the right to oblige her on marriage without her permission as minor. This opinion is also adopted by the Mālikīs, and Shāfi'īs. The second is that he has no such right; this opinion being shared with the Ḥanafīs, who perceive it as a preferable (*rājih*) opinion in their school. Both narrations initiate that the father has no right to marry her to an unfit or improper person.<sup>98</sup>

Ibn Taymiyya<sup>99</sup> concurs with the Ḥanafī's opinion in his answer to the following question: Is it permissible for the father to oblige marriage on his virgin and adult daughter or not? He answered: regarding the obligation of the father to his virgin and adult daughter in marriage, there are two well-known opinions narrated by Aḥmad:

- He may oblige the virgin and adult according to Mālik and Shāfi'ī, and preferred by Kharqī<sup>100</sup>, Qādī<sup>101</sup> and his companions.
- He has no right to oblige her, according to Abū Ḥanīfa and others, and it is the option preferred by Abū Bakr Abd al-'Azīz b. Ja'far<sup>102</sup>. And that is the sound opinion.<sup>103</sup>

There is controversy regarding the point of obligation. Is it virginity or minor age or a combination of the two? According to the four *Sunnī* schools of thought, the sound opinion is that the reason of obligation relates to the minor, while the adult virgin may not

<sup>98</sup> Maqdisī, 'Abdullāh Aḥmad b. Qudāma. *Al-Mughnī and al-Sharḥ al-Kabīr* for Shams al-Dīn 'Abd al-Raḥmān b. 'Umar b. Qudāma 7/31, Dār al-Fikr, Beirut, 1<sup>st</sup> Edition 1984.

<sup>99</sup> Aḥmad b. 'Abd al-Ḥalīm b. 'Abd al-Salām b. 'Abdullāh b. 'bī al-Qāsim al-Ḥarrānī al-Dimashqī (661-728/1263-1328). He was the most famous scholar at his time and *mujāhid*. He was imprisoned many times in Cairo, Alexandria and Damascus. He died in Damascus while in prison. All the members of his town came to his funeral. He wrote more than three hundred volumes. *Al-A 'lām* 1/144.

<sup>100</sup> Abū al-Qāsim 'Umar b. Ḥusīn b. 'Abdullāh, Ḥanbalī scholar (d. 334/945). *Al-A 'lām* 5/33.

<sup>101</sup> Abū al-Faḍl 'Īyād b. Musā b. 'Īyād b. 'Amrūn al-Yaḥsubī al-Sibtī (376-544/1083-1149). He is a leader of *ḥadīth*'s scholar in Morocco. *Al-A 'lām* 5/99.

<sup>102</sup> Ḥanbalī scholar from Baghdād (285-363/898-974).

<sup>103</sup> *Majmū' al-Fatāwā* 32/22., Dār al-Ma'ārif, Morocco, N.D.



be obliged on marriage. This evidence is based on the *ḥadīth* narrated by ‘Āysha that the Prophet stated: “*A virgin should not be given in marriage except after her permission; and a deflowered female should not be given in marriage unless she has been consulted.*” The people asked, “O Allāh’s Messenger! How can we know her permission?” He said, “*Her silence (indicates her permission).*”<sup>104</sup> And others narrated that he said: “*A virgin should be consulted by her father.*”<sup>105</sup> This is an explicit order from the Prophet to the father and other *walīs* to seek the permission of a virgin prior to proceeding with marriage plans. Also, minor age is the reason of interdiction (*ḥajr*) as stated by the text and consensus of opinion (*ijmāʿ*). Asserting virginity to be the cause of *ḥajr* contradicts with the principles of Islam, since the legislator did not make it a cause for restriction in any of the unanimously agreed points. Such reasoning is descriptive and has no effect in Islamic law.”<sup>106</sup>

Ibn Taymiyya added: “and they did not view the asking of her permission as a necessity, but stated it to be recommended. Some added to their detailed analogy and opined that since it was recommended, this was sufficient indication.”<sup>107</sup> They claimed that where the virgin’s permission must be sought, she must express it verbally. This clearly contradicts both the consensus of Islamic scholars and the Prophetic *ḥadīths*. The previous *ḥadīth* confirmed that the difference between the virgin and the matron lies in the manner of obtaining their consent. The *ḥadīth* mentioned the “permission” for the virgin and used the word ‘consulting’ for the matron, making silence the permission of the former and utterance the permission of the latter. The Prophet did not differentiate between them in

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<sup>104</sup> Bukhārī: 1456.

<sup>105</sup> Muslim: 1421.

<sup>106</sup> *Majmūʿ al-Fatāwā* 32/22.

<sup>107</sup> See: *Al-ʿUmm* 5/3; *Sharḥ al-Zarqānī* 3/165.



obligation or non-obligation, since the virgin may feel shy, whilst the matron has the maturity to discuss her marriage. Hence the *walī* is instructing the matron and asking permission of the virgin; this is the exact sense of the aforementioned *ḥadīths*. It is against the principles of Islamic law and logic to initiate marriage against her wish. Allāh does not permit the *walī* to sell or rent for her unless she allows him, and she is not to be obliged to him for food, drink or garments that she dislikes, so how can he force her to share her life and bed with someone she cannot bear to live with, while Allāh has put love and mercy between husband and wife?.”<sup>108</sup>

The same opinion was adopted by Ibn Taymiyya’s disciple Ibn al-Qaiyyim<sup>109</sup> who stated: “according to the purpose of this ruling, an adult virgin should not be obliged on marriage and it can only be initiated upon her consent. This was the opinion of the majority of scholars, Abū Ḥanīfa and Ibn Hanbal in one of his narratives. It is the opinion we accept as it is based on Prophetic sayings and the Qur’ān; the text being the basis of his Law.”<sup>110</sup>

Shawkānī<sup>111</sup> stated: “apparently it is narrated that if the adult virgin is obliged to marry without her permission then the contract shall not be valid. This was agreed on by Awzā’ī, Thawrī<sup>112</sup>, the Ḥanafīs and other knowledgeable scholars cited by Turmudhī.”<sup>113</sup>

Perhaps this opinion is more closely linked with rationalization and narration than with the text itself:

<sup>108</sup> *Majmū‘ al-Fatāwā* 32/22.

<sup>109</sup> Abū ‘Abdullāh Shams al-Dīn Muḥammad b. Abī Bakr al-Dimashqī (671-751/1292-1350). A famous scholar and disciple of Ibn Taymiyya. *Al-A‘lām* 6/57.

<sup>110</sup> Ibn al-Qaiyyim. *Zād al-Ma‘ād fī Ḥadīy Khayr al-‘Ibād* 5/99, Mu’assasat al-Risāla, Beirut, 3<sup>rd</sup> Edition 1998.

<sup>111</sup> Muḥammad b. ‘Alī b. Muḥammad b. ‘Abdullāh (1173-1250/1760-1834). A jurist and *mujtahid*. One of the prominent scholars in Yemen from Ṣan‘ā’. He wrote 114 books. *Al-A‘lām* 6/80.

<sup>112</sup> Abū ‘Abdullāh Sufyān b. Sa‘īd b. Masrūq (97-161/716-778). A leading scholar in *ḥadīth*. He was pious and knowledgeable. He was born and raised in Kūfa. He lived in Mecca and Medīna. *Al-A‘lām* 3/104.

<sup>113</sup> Shawkānī, Muḥammad b. ‘Alī. *Nayl al-Awṭār Sharḥ Muntaqa al-Akḥbār* 6/126, al-‘Uṭḥmanīyya al-Meṣrīyya Printing 1954.

It was narrated that the Prophet initiated the marriage of his paternal uncle Ḥamza's daughter 'Omāma' to Salama b. Abī Salama<sup>114</sup> when she was young,<sup>115</sup> Abū Bakar initiated the marriage of 'Āysha to the Prophet when she was young, and she said: "The Prophet married me when I was six years old, and he cohabited with me when I was nine."<sup>116</sup>

'Āysha narrated: "that a girl entered her house and said, 'My father married me to his nephew and I hate this arrangement'. I said, 'sit until the Messenger of Allāh comes', then I told him. He sent for her father so that he could hear what the daughter had to say about her situation. Then she said, 'O Prophet I have obeyed my father, but I want people to know that is not right for fathers to force their daughters with no consultation about such a matter'."<sup>117</sup>

In this case it is clear that the daughter wished to enlighten women about their rights to take decisions regarding their own affairs, as prescribed by Islamic law. This *ḥadīth* clarifies that fathers have no rights to impose an inappropriate marriage without the consent of their daughters.

The Prophetic *ḥadīths* clearly stated that the virgin's permission should be sought. With regard to rationalization, it has been agreed amongst scholars that the *walī* has no right of disposal in the property of the adult virgin unless she permits this. Nevertheless the loss of her property is less serious than imposing marriage against her will. Therefore, as

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<sup>114</sup> Al-Juramī. He was *Umm al-Mu'minīn* Umm Salama's son. 'Asqalānī, Aḥmad b. 'Alī b. Ḥajar. *Al-Iṣāba fī Tamyīz al-Ṣaḥāba* 3/294, Dār al-Jīl, Beirut, 1<sup>st</sup> Edition 1982.

<sup>115</sup> *Al-Iṣāba* 7/500.

<sup>116</sup> Bukḥarī: 3681; Muslim: 1422.

<sup>117</sup> Ibn Ḥanbal, Aḥmad, *Musnad al-Imām Aḥmad*. 23892, al-Maktab al-Islāmī, Beirut 1978; Nisā'ī: 3217; Ibn Mājih: 1864.



maintained by Ibn Taymiyya, preventing the *walī* from having control over her life without her permission has the greatest priority.

The following points demonstrate the opinion of the Mālikīs and Shāfi'īs:

- The real cause for this *wilāya* is the inability of the girl under the *wilāya* to choose a suitable husband with whom the marital interests may be fulfilled. The Malikis, as previously mentioned, deem this to be applicable in the case of the young girl having no experience with men and also being of sound mind. This notion is contrary to the actual applications in the Islamic Courts in Bahrain, who adopt the first opinion as clarified at the beginning of this question.
- Conditions specified by the Shāfi'īs to carry out this *wilāya* may mitigate the negative impacts of *wilāyat al-ijbār* but will not provide an optimal solution to the problem. They continue to include explicit examples from unambiguous texts of the Prophet's traditions, which compel the *walī* to seek her order or permission when initiating her marriage.
- Adherence of the *Sunnī* Islamic Courts by adopting the first opinion, which imposes the *wilāyat al-ijbār* on the virgin who is a minor or adult of sound mind. Rejecting the other opinion that excludes the adult from this *wilāya* is inappropriate fanaticism (*ta'aṣṣub*) to a single opinion without any justification. In fact it outweighs (*tarjīḥ*) the other opinion, which is non-preferable and contradictory to the aims of Islamic law (*maqāṣid al-Sharī'a*) and its principles.

It is useful to include here the opinion of one contemporary jurist, Yūsuf al-Qaraḍāwī, who commented thus on the Shāfi'ī school: "it is reasonable to put the independent opinions of the scholars in their historic context, since any scholar having an independent



opinion is a product of his time and his environment. The individual element of the scholar should not be neglected. Shāfi'ī had lived in an era when a girl was rarely acquainted with the one who proposed to marry her, except what her family knew of him. For this reason her father was given a special right to initiate her marriage even without her consent. Probably if Shāfi'ī lived today, he would perceive how the status of women has changed, both culturally and academically. This increase in experience and knowledge renders a young woman much more capable of making her own appropriate choices. If she were forced to marry against her will, there exists the potential for a life of matrimonial discord and bitter unhappiness. Perhaps if Shāfi'ī could have witnessed this, he would have changed his opinion, as he did regarding many other issues. It is well known that he would follow one school of thought then shift to another. One was the old school before he traveled to Egypt and the second was the new after he settled there and became acquainted with a different style of life and a new set of experiences. From that time it became a well known tradition in Shāfi'īs's books to distinguish between the periods of narration; for instance Shāfi'ī said in the 'old' and Shāfi'ī said in the 'new'.<sup>118</sup>

The following Articles all specify the consent of the prospective wife in the conditions required for initiation of the marriage contract:

The B.P. in Article (16) states: the consent of both the *walī* and the woman shall be imperative in the marriage contract.

The M.D. in Article (18) states: the *walī* of the woman initiates her marriage contract upon her consent.

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<sup>118</sup> Qaraḍāwī, Yūsuf 'Abdullāh. *'Awāmil al-Sa'a wa al-Murūna fī al-Sharī'a al-Islāmiyya* 50, Maktabat Wahba, Cairo 1998.

The K.L., paragraph (b) of Article (29): the opinions of both the *walī* and the one under his *wilāya* shall coincide. In Article (30): the previously married or a 25 year old woman may have the decision on her marriage providing that she shall not initiate the marriage contract herself, since that is left to her *walī*.

The K.L. requires reviewing regarding the specifying of the age of 25 years, because the main point is that the woman is of sound mind, which is a relative matter and may be attained prior to this age. It may be more accurate to say (the matron and the virgin of sound mind).

Perhaps some of the indications of having ‘come of age’ may be recognized by the *walī* as follows:

- Allowing her to continue her university studies and to select a suitable specialization that coincides with her ambition.
- Allowing her to earn a living and be self-supporting. Also the father may be himself financially dependent on her to fulfill the needs of the family.

The following section deals with the second Issue mentioned at beginning of this chapter:

### **1.3 Prevention of Marriage ( ‘*adl*’).**

In the previous question, I mentioned that Islamic law has guaranteed for the woman her right to choose her husband, and prohibited forcing her to marry someone whom she did not like. Conversely, the woman can be prevented from marrying someone she likes, this is called ‘ ‘*adl*’ and indicates that the *walī* unjustly prevents the woman from marrying as has been stated in the Qur’ānic verse (II: 232) and ‘Āysha narrated that the Prophet said:



*“then if disagreement occurs between the walī and his ward and the latter feels that she is being unjustly oppressed; she may approach the judge for his opinion. If the judge finds that her claim is true, he may then take the position of walī himself.”*<sup>119</sup>

The following two judgments are among the rules issued by the Islamic Courts:

- 1- A *Sunnī* Islamic lawsuit of appeal: (because the *walī* refused to initiate the marriage of his daughter who has come of age without a legal justification for this refusal, such action is deemed unjust and prevents the girl from achieving her desire to marry. Based on this premise, the *wilāya* of initiating marriage shall be transferred to the judge.)<sup>120</sup>
- 2- The court did not agree to initiate the marriage of the plaintiff to the person who proposed to her and she was obliged to obey her *walī* (the defendant) because her suitor was a foreign resident in the State and did not hold a Bahraini passport. The potential consequence of this marriage could manifest itself as a future problem for any children, who would be deprived of the right to Bahraini nationality. This scenario would contradict the interest of initiating a family.<sup>121</sup>

The following two suits, the sessions of which I attended personally, indicate the potentially contradictory nature of issues between *walī* and ward. The judgment of the first<sup>122</sup> stated that: (whereas the father is obliged (*mujbūr*) according to Mālikī scholars, they did not grant obligation to the *walī* if he deemed her to be sufficiently rational and mature, and offered her freedom to continue her studies or work etc. This has been stated

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<sup>119</sup> Abū Dāwūd: 2083.

<sup>120</sup> *Shā'ir* 186.

<sup>121</sup> *Shā'ir* 191.

<sup>122</sup> Case No: 833/2001.



in the *Sharḥ al-Ṣaghīr*<sup>123</sup>: “but they did not grant obligation to the *walī* if he deemed her to be rational and mature enough, and offered her freedom to continue her studies, work or suchlike.” In this case the defendant judged the plaintiff to be sound of mind; allowing her to study at the university, to obtain a driving license and to own a car. The second plaintiff desired to marry Mr. ‘...’ with whom she was in love. Their feelings were mutual and abandonment of their wedding plans would create emotional turmoil and may lead to an illicit and covert continuation of the relationship. Ibn ‘Abbās narrated that the Prophet maintained: “*There is only one path for lovers and that is through marriage.*”<sup>124</sup> The refusal of the defendant to initiate the marriage of the plaintiff has no legal pretext. The most important conditions of equality (*kafā’a*) set by the Mālikīs pertain to religion, status, piety and manner, in accordance with Abū Hurayra’s narration that the Prophet said: “*if you are approached by someone who is devout and fulfills the necessary conditions, then you as walī must accept the marriage because failure to do so would be very wrong.*”<sup>125</sup> Accordingly the court judged that the defendant was obliged to initiate the marriage of the second plaintiff (the defendant’s daughter) and if he refused, then the *wilāya* would be transferred to the official authority of the defendant’s city.

In my opinion, what has taken place in this lawsuit regarding the girl’s powers of rationalization (*tarshīd*) by allowing her to obtain a driving license (considering that her age did not exceed nineteen as stated in the particulars), clearly contradicts with the consideration of the obligatory *wilāya* by the judges in the previous suit, who affirm the right of *walī* to initiate the marriage of his ward without conditioning her consent by the

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<sup>123</sup> 3/107.

<sup>124</sup> Ibn Mājih: 1847; Ḥākim, Muḥammad b. ‘Abdullāh al-Nīsābūrī. *Al-Mustadrak ‘alā al-Saḥīḥayn*. 2677, Dār al-Kutub al-‘Ilmiyya, Beirut, 1<sup>st</sup> Edition 1990.

<sup>125</sup> Turmudhī: 1085; *al-Sunan al-Kubrā*: 13259

obligatory jurisdiction, nor taking account of her rational ability whilst these factors are considered in the cases of *'adl*. This contradiction is something of an enigma.

As for the second case<sup>126</sup> the verdict stated: (while reviewing the case, the two plaintiffs (mother and daughter) appeared before the court in the presence of the defendant (the *walī*), who approved of his daughter's marriage but wished to postpone proceedings until he had checked on the man's suitability. The defendant appeared again and gave no evidence regarding the unfitness of the second plaintiff, the two plaintiffs brought a letter signed by the Imam of a mosque and this included a list of twenty names of those who prayed there, along with their signatories recommending the prospective suitor. This was in addition to a copy of a recommendation issued by his employer. The two plaintiffs insisted that the marriage should be initiated and they presented documents indicating the good conduct of the proposed husband. The *walī* produced no evidence of the unsuitability of the man and the court decreed that the marriage should proceed.

I have reservations about the mechanism employed by the judges to prove the *'adl* by the *walī*, and the fitness of the proposed person. No concrete evidence was produced to endorse the man's character and a list of signatures could have been contrived by anyone. No addresses or C.P.R. numbers were included to validate the signatories and I feel that this did not constitute a thorough examination of the *walī*'s concerns. The character of the prospective husband was reviewed just the once; indicating that there was no repeated practice of *'adl* by that *walī* to ensure the safety of the woman under his *wilāya*. These are strange shortcomings and contradictions, as in this case the *walī* did not hold the right to reject the proposed bridegroom from the outset. Scholars maintain that *'adl* has two aspects:

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<sup>126</sup> Case No: 821/2001.



- The *'aḍl* should be based on an Islamic principle, such as unfitness of the proposed person, as was stated in the second suit. In this case the *wilāya* shall remain valid for the *walī* and shall not be transferred to other remote kindred, as was stated in the court judgment.
- The *'aḍl* has no Islamic basis, especially if this *'aḍl* is repeated, in which case the *walī* shall be deemed as unjust to his ward and unworthy of preserving his *wilāya* over her. Thus the *wilāya* shall be transferred to the judge directly and not to any of her remote kindred, as has been stated in the aforementioned suits. No one can object to such a marriage or demand its nullification.<sup>127</sup>

Despite its importance the B.P., the M.D. and K.L. have ignored this and there is no reference except in part of the B.P. Article (12) states: the *walī* must be male, of sound mind, major of age and if the ward is Muslim, then her legal guardian must also be Muslim. If the *walī* attempts to prevent the marriage of his ward, then the *wilāya* shall be transferred to the judge. Article (14) of the M.D.: in the absence of the *walī* for an extended period or if his whereabouts are unknown, or he practiced *'aḍl* on his ward, then *wilāya* extends to his successor by permission of the judge. Article (31) in the K.L.: if the *walī* imposes marriage on the woman under his *wilāya* she may file a law suit to the court and the judge shall decide on the matter. The same shall be applicable in case of numerous *walīs* of the same level whether all agree or differ in practicing *'aḍl*.

Nevertheless the means of proofing the *'aḍl* are not clear. This apparent shortcoming is common to all three legislative bodies.

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<sup>127</sup> See: Dusūqī, Muḥammad 'Arafa. *Hāshiyat al-Dusūqī 'alā al-Sharḥ al-Kabīr* 2/232, Dār al-Fikr, Beirut N.D.; *Hāshiyat Ibn 'Abdīn* 3/82; *al-Umm* 4/12; *al-Mughnī* 7/23.



The following section deals with the third Issue mentioned at beginning of this chapter:

#### 1.4 The woman's right to initiate her marriage without reference to her *walī*.

The legal position of *walī* regarding the marriage contract:

There are three opinions:

Abū Ḥanifa and Zufar<sup>128</sup> stated: the woman is permitted to take sole charge of her marriage, she may initiate the contract by her utterance without her *walī* participation. However, they preferred that the *walī* should conduct the marriage and he should be satisfied provided that she initiates her marriage to a suitable (*kuf*) man and her dowry (*mahr*) equates with that of her female contemporaries. If both conditions are fulfilled, then they consider the marriage to be sound, and it becomes binding, whether or not the *walī* is satisfied with that.<sup>129</sup>

The *Shī'a* initiate that the adult woman who is of sound mind owns the right of disposal in her affairs regarding contracts of marriage upon reaching the age of puberty. Whether she is a virgin or previously married, she may initiate marriage for herself and for others, directly or by proxy, with acceptance and consent, whether she has a father, grandfather or other paternal kinsmen who are termed 'remote kindred'. Whether or not the father is satisfied, no one whosoever has the right to object and she must be perceived as having the same status as a man.

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<sup>128</sup> Zufar b. al-Ḥārith b. 'Abd 'Amr b. Mu'ādh (d. 75/690). *Al-A'lam* 3/45.

<sup>129</sup> Kāsānī, 'Alā' al-Dīn. *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* 2/391, Dār al-Ma'rifa, Beirut, 1<sup>st</sup> Edition 2000.

Their proofs are:

1. The Qur'ān stated: *"when you divorce women, and they fulfil the term of their ('idda)<sup>130</sup>, do not prevent them<sup>131</sup> from marrying their (former) husbands, if they mutually agree on equitable terms."*<sup>132</sup> The Qur'ān has attributed and associated marriage to the woman, which clearly denotes an evidence that marriage is her concern and issued by her, so legally she has the right to initiate her marriage. Alūsī stated: "there is no evidence in the verse- by all interpretations- indicating that the woman cannot initiate her marriage as it was thought. The *walīs* are prohibited to practice *'aḍl* against the wish of the woman, not because the soundness of marriage depends on their satisfaction, but only to prevent harm. They are legally capable of initiating their marriage but they are kept from that for fear of blame (*lawm*) and alienation (*qaṭi'a*), or fear of mistreatment. Referring marriage to the woman indicates that she may proceed, otherwise the figurative may become binding which is contrary to what is apparent."<sup>133</sup>
2. 'Abdullāh b. 'Abbās narrated that the Prophet said: *"a woman who was previously married (ayyim) has more claim to herself than her walī"*: the *ḥadīth* confirmed a right for both the woman and the *walī* a right which is indicated by *"has more claim"* it is known that the *walī* has no right other than the initiation of the

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<sup>130</sup> Meaning: Prescribed period.

<sup>131</sup> The termination of the marriage bond is a most serious matter for family and social life and every lawful device is approved that can equitably reunite a couple, provided only that there is mutual love and they can live on honorable terms with each other. If these conditions are fulfilled, it is not right for outsiders to prevent or hinder re-union. They may be swayed by property or other considerations. This verse was occasioned by an actual case that was referred to the holy Prophet in his life time. 'Alī 94-95.

<sup>132</sup> Al-Baqara, II: 232.

<sup>133</sup> Ḥasanī al-Ḥusaynī. *Rūḥ al-Ma'ānī fī Tafsīr al-Qur'ān al-'Aẓīm wa al-Sab' al-Mathānī* 2/145, al-Amīriyya Printing, Egypt, 1<sup>st</sup> Edition 1900.



contract if she accepts, accordingly she has more right than him in initiation of a marriage.<sup>134</sup>

3. Abū Musā<sup>135</sup> narrated that the Prophet said, “*There is no marriage without the permission of a walī.*”<sup>136</sup> ‘Āysha narrated, “*the marriage of a woman who marries without the consent of her walīs is void.* (He said these words three times).”<sup>137</sup>

Both aspects of generalization with some particularization, and relating to the marriage of the minor and virgin or to the denying of the perfection so that she may not be accused of impudence if she initiated the marriage herself.

4. Abū Hurayra<sup>138</sup> reported that the Prophet said, “*The woman does not marry the woman, and the woman does not marry herself, then the adulterer is in the one that married herself.*”<sup>139</sup> Relates to the fact that the presence of women is frowned upon in the council of contract marriage because declaration of marriage is required; this is why people are gathered together. Thus the presence of the woman in such a gathering is reprehensible, as she should preserve her self-respect and dignity.<sup>140</sup>

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<sup>134</sup> *Badā’i’ al-Ṣanā’i* 2/393.

<sup>135</sup> ‘Abdullāh b. Qays b. Salīm b. Ḥaḍār b. Ḥarb Abū Musā (21 BH-44/602-665). An one of the Prophet's companions. He narrated 355 *ḥadīth*. *Al-A ‘lām* 4/114.

<sup>136</sup> Sajistānī, Sulaymān b. al-Ash‘ath Abū Dāwūd al- Azdī. *Sunan Abī Dāwūd*: 2085, Dār al-Fikr, Beirut; Turmudhī, Muḥammad b. Eysā. *Sunan al-Turmudhī*: 1101, Dār Iḥyā’ al-Turāth, Beirut, Ibn Mājih: 1881.

<sup>137</sup> Aḥmad: 24417, Abū Dāwūd: 2083; Turmudhī: 1102.

<sup>138</sup> ‘Abd al-Raḥmān b. Ṣakhr al-Dawsī (21 BH-59/602-679). A companion. He memorized more *ḥadīths* than any of the Companions. From him was recorded 5374 *ḥadīth*. He died in Madīna. *Al-A ‘lām* 3/308.

<sup>139</sup> Ibn Mājih: 1882; *al-Sunan al-Kubrā*: 13410; Dāraqutnī, ‘Alī b. ‘Umar. *Sunan al-Darqutnī*: 25, Dār al-Ma‘rifa, Beirut 1966.

<sup>140</sup> *Badā’i’ al-Ṣanā’i* 2/393; see: Zuḥaylī, Wahba. *Al-Fiqh al-Islāmī wa Adillatuh* 9/6698, Dār al-Fikr, Damascus, 4<sup>th</sup> Edition 1997.

5. When an adult woman of sound mind initiates her marriage, she is practicing her own clear right as a legal competent, thus her action is correct, as in the case where she disposes her own property.<sup>141</sup>

Mālik<sup>142</sup>, Shāfi‘ī<sup>143</sup>, Ibn Hanbal<sup>144</sup> and the majority of scholars maintained: the *walī* is a prerequisite condition to the soundness of the marriage contract. No woman is allowed to initiate the marriage herself or take charge of initiating the marriage for others in any way, whether being a virgin or previously married, of whatever social status, of sound mind or otherwise, permitted by her father or not, if initiated, the marriage shall be nullified before or after the consummation of marriage, even if it took a long time and she had given birth to children.<sup>145</sup>

Ibn Qudāma<sup>146</sup> stated: “the reasoning for preventing her is to protect her from behaving in an improper fashion towards men, which is against the basic principles of Islam.”<sup>147</sup>

Their Proofs are:

1. The Qur’ān stated: “*Wed them with the leave of their owners*”<sup>148</sup> and: “*Marry those among you who are single*”<sup>149</sup> <sup>150</sup> Ibn Rushd<sup>151</sup> maintained that the Qur’ān only

<sup>141</sup> *Badā’i’ al-Ṣanā’i* 2/393-294.

<sup>142</sup> *Al-Mudawana al-Kubrā* 4/165.

<sup>143</sup> *Al-Umm* 5/12.

<sup>144</sup> Maqdesī, ‘Abdullāh Aḥmad b. Qudāma. *Al-Kāfi fī Fiqh al-Imām Aḥmad b. Hanbal* 3/10, al-Maktab al-Islāmī, Beirut, 2<sup>nd</sup> Edition 1979.

<sup>145</sup> See: Ghandūr, Aḥmad. *Al-Aḥwāl al-Shakhṣiyya fī al-Tashrī‘ al-Islāmī* 152, Maktabat al-Falāḥ, Kuwait, 4<sup>th</sup> Edition 2001; *Shaqfa* 3/229.

<sup>146</sup> Abū Muḥammad ‘Abdullāh b. Muhammad b. Qudāma al-Jamā‘ilī al-Maqdsī al-Dimashqī al-Hanbalī, Muwaffaq al-Dīn (541-620/1146-1223). Born in village Jamā‘il near Nābul in Palestine. A prominent Hanbalī scholar. *Al-A‘lām* 4/76.

<sup>147</sup> *Al-Mughnī* 7/6.

<sup>148</sup> *Al-Nisā’*, IV: 25

<sup>149</sup> The subject of sex ethics and manners brings us to the subject of marriage. “Single” (*ayāmā*, plural of *Aiyim*) here means any one not in the bond of wedlock, whether unmarried or lawfully divorced, or widowed. ‘Alī 874.

<sup>150</sup> *Al-Nūr*, XXIV: XXXII.

<sup>151</sup> Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad al-Qurṭubī (520-595/1126-1198). He was born in Cordova. A Mālikī scholar and philosopher. Smith 174.



addressed men in concluding the marriage and if it was a concern of women he would have mentioned them.<sup>152</sup>

2. The previous Qur'ānic verse. This means 'adl of (female) unjustly from getting married, this verse was revealed on Ma'gil b. Yasār,<sup>153</sup> who prevented his sister from returning to her husband. Unless he had the right to initiate the marriage, he would not be prohibited from preventing her because the holder of the right to initiate the marriage can only issue 'adl.<sup>154</sup>
3. The previous *ḥadīths* of Abū Musā, Āyshā and Abū Hurayra.
4. The marriage contract, as opposed to other types of contract, requires the fulfillment of certain criteria and interests which are not existing in every husband, so it requires care, precision and a thorough study of the status of men to decide who is suitable and qualified and who is not. Such qualifications are not available for women due to their lack of experience and emotionally driven natures; being easily subject to deception or praise, so the purposes of marriage will not be attained if the woman takes charge of initiating her own marriage contract.

The *Sunnī* Court applies the following two decrees<sup>155</sup>:

- “The court judged that the *walī* must attend the contract council to initiate the marriage of his daughter or the ward under his *wilāya* and that any contract by official authorization without the presence of the *walī* and two competent

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<sup>152</sup> Ibn Rushd, Muḥammad b. Aḥmad. *Al-Bayān wa al-Taḥṣīl* 4/260, Dār al-Gharb al-Islāmī, Beirut, 1<sup>st</sup> Edition 1987.

<sup>153</sup> Muzanī Abū 'Alī. He converted to Islam before *Ḥudaybiyya* (6/ 623). He died in the end of Mu'āwiya rule. *Al-Iṣāba* 6/183.

<sup>154</sup> See: *Shaqfa* 3/231.

<sup>155</sup> *Shā'ir* 185.

witnesses is null and void, unless there are no *walīs*, hence it rests upon the Judge or official authorized to appoint a *walī* for those who have none”.

- “The court decreed that the *walī* has the right to dissolve the marriage of his daughter who initiated her marriage behind his back; claiming his death at the writing of the marriage contract”.

Shāfi‘ī replied precisely to the Ḥanafīs: “this verse (II: 232) is the clearest one in the Qur’ān which indicates that no marriage shall be initiated without a *walī* because the *walī* is prohibited from *‘aḍl* and this *‘aḍl* can be achieved only when the prevented (matter) is in his hands.”<sup>156</sup>

As part of the observation process, I attended many sessions at the High Islamic Court among others. Two cases were brought in front of the court, the first one<sup>157</sup> was initiated by the *walī* who was a wealthy man, a subject of one of the Gulf States, and a follower of the *Sunnī* school. He filed a lawsuit against his daughter’s husband, a Bahraini who follows the *Shī‘ī* school. He demanded the annulment of his daughter’s marriage, because it was initiated in an illegal manner because the husband seduced his daughter and convinced her to run away with him to the Islamic republic of Iran where he initiated a customary contract marriage with her. The contract was unapproved by the official authorities and they consummated the marriage like spouses and she became pregnant. The court issued the following judgment: (the marriage contract initiated in Iran is deemed void and the parties shall be separated immediately as an obligatory decree for both sides to comply with and act accordingly). After one month of this decree, the defendant went to one of the judges of the High *Ja‘farī* Islamic Court and claimed that he

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<sup>156</sup> *Al-Umm* 5/11.

<sup>157</sup> Case No: 14/2001 at High Court and 484/2002 at Court of Appeal.



was married to the defendant according to a customary contract and he brought two witnesses and demanded the issuance of a document proving his marriage. He failed to inform the judge about the *Sunnī* Court decree of their separation. When the judge asked him to bring his wife to sign up, he claimed again that she was sick and unable to come and pledged before the judge to have her signature on the paper in front of the witnesses. In this way he was able actually to obtain that document though his wife was not in Bahrain at that time because but she had traveled abroad with her father after the decree of separation was issued. The husband filed an appeal, against the previous decree, to the High Islamic Court of Appeal, and at the time the deception made before the judge of the *Ja'farī* Court was discovered, the document was canceled and the Court of Appeal issued its decree confirming that of the High Court.

This case has raised the following issues:

- Despite technological advancement in global communication, courts administration is still utilizing primitive methods. For instance relying on an un-automated system and writing by hand even the most important issues that will not support exchanging decrees issued by the two courts (the *Sunnī* and *Ja'farī*). This made it easier for the defendant to deceive the judge despite the fact that the two courts are only a few yards from each other. There should have been an electronic link between the offices of these courts.
- The indifferent attitude of some judges in issuing such documents through their content with the presence of only two witnesses. Furthermore the judge was very lax in this case to the extent of issuing the document in the absence of the wife who was the second party of the contract and ignoring the potential consequences

of such leniency; such as the husband using this document to harm the woman or gain some privileges that were only offered by the State to a lawfully married couple?!

The second lawsuit<sup>158</sup> was also filed by the *walī* against his daughter's husband. He demanded the dissolution of her marriage, which was initiated in another Arab country without his knowledge or consent. It is also important to note that the defendant had previously asked for the hand of his daughter in marriage and was rejected due to unsuitability. The defendant seduced the man's daughter and they traveled to that state and conducted the marriage. The court agreed to his demand in accordance with the school applied in that country.

Reviewing the opinions of the scholars and their proofs in this matter and their sayings it is clear that agreement is almost unanimous that both the woman and her *walī* have a right in the marriage contract. The consensus of scholars see that the woman may not observe the contract formula herself but that is left to her *walī*, but neither can he initiate it alone without her consent (as previously mentioned), nor can she without his. There must be mutual participation in the observing of the marriage contract formula.

Perhaps the Shāfi'ī scholar, Abū Thawr<sup>159</sup> cited an even more apt opinion: "In the marriage contract the satisfaction of the woman and her *walī* is a must, and when the satisfaction of both is realized, then either of them can initiate the marriage contract and the marriage shall be sound, and neither has to impose marriage without the satisfaction of the other, because Islamic law does not state that gender is a prerequisite for the initiation of contracts, rather it deems male and female to have equal status regarding the

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<sup>158</sup> Case No: 123/2001.

<sup>159</sup> Ibrāhīm b. Khālīd b. Abī al-Yamān al-Kalbī al-Baghdādī (d. 240/854). He is a Jurisprudence scholar and companion of Shāfi'ī. *Al-A'lam* 1/37.



conducting of personal affairs.”<sup>160</sup> Abū Yūsuf<sup>161</sup> and Ibn Sīrīn<sup>162</sup> maintained: She may not have that without the permission of the *walī* and if she did, then it shall depend upon his approval. They narrated: “*The marriage of a woman who marries without the consent of her walīs is void.*” (He said these words) three times. The following: the concept in this *ḥadīth* denotes the soundness of the contract upon his permission and because the woman was prevented from solely initiating marriage due to her mental shortcomings and the fact that she may be vulnerable to manipulation. Thus she may be secured if it is permitted and accepted by her *walī*.<sup>163</sup>

It is apparent that collectively, the religious texts indicate the principles related to all factors inherent in the marriage process. Islamic law aims to procure stable relationships and offers remedial actions in the case of disputes. The texts outline procedures guarantee both the right of the woman and the right of her *walī*, the latter being a representative of the woman’s family, which may suffer the shame of a bad choice and its financial and/or psychological consequences. This husband will join the family immediately when the contract is initiated and his new family shall have some rights on them, the most important of these being that the new member should behave as a blood-relation and take on appropriate responsibility. Numerous are the family problems that have occurred because the wife initiated her own marriage. In the aforementioned case, the woman was duped by the words and appearance of a man, as a result she rushed to marry him without the approval of her *walī* and her family, and moreover without the presence of her *walī*.

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<sup>160</sup> *Nayl al-Awṭār* 6/106.

<sup>161</sup> Ya‘qūb b. Ibrāhīm b. Ḥabīb al-Anṣārī al-Kūfī al-Baghdādī (113-182/731-798). A famous student of Abū Ḥanīfa and a great scholar of *fiqh*. For some time he was a judge in Baghdād where he died. *Al-A‘lām* 8/193.

<sup>162</sup> Muḥammad b. Sīrīn al-Baṣrī al-Anṣārī, Abū Bakr (33-110/653-729). A follower and *Imām* in *fiqh*, *ḥadīth* and oneiromancy (*tafsīr al-ḥlām*). *Al-A‘lām* 6/154.

<sup>163</sup> *Al-Mughnī* 7/5.

Later on his dishonesty and corruption are revealed, and she may know about his character before her approval, this situation may cause humiliation to her *walī* and family among other people raise many problems caused by that bad husband and the expected reaction against such behaviors— as in many cases- the *walī* and the family may break off the relation with their daughter and leave her alone to face her problems with her husband. In contrast so many marriages broke down due to a one-sided decision made by the *walī* to initiate the marriage contract without her consent?!

This opinion adopted by the B.P. in Article (16) states the following:

- The consent of the *walī* and the woman is a must in marriage contracts.
- The woman may initiate her marriage herself providing that the *walī*'s consent is confirmed.

The Law defines no mechanism to enable the initiator to verify the consent of the *walī*. Perhaps it is better to stipulate that she present a letter or an official proxy attested by the *walī* confirming his agreement.

As for the M.D., it confirmed that the initiation of the contract may only be to the *walī* in case he is present providing the woman's consent for her marriage, Article (18): the *walī* of the woman shall initiate her marriage contract upon her approval. Also the K.L. In Article (30): the previously married or the 25 year old woman shall have opinion in her marriage but she may not initiate the marriage herself since that is for her *walī*.

In conclusion, it is evident that current controversy regarding the issue of *wilāya* is based on clear flaws that exist within the Bahraini legal system. There is potential for the *walī* to impose his decision unjustly on his ward and the system appears open to abuse by unscrupulous *walīs*, who fail to fulfill their role as protectors.



## CHAPTER II

### Conditions (*Shurūṭ*) Related to the Marriage Contract

2.1 Conditions required for initiating a contract

2.2 Conditions that contravene with the requirements of the contract

2.3 Conditions neither requisite nor denied by the contract

The contract of marriage involves stated conditions, just as in any other contract between independent parties. Because the state of matrimony is intended to endure for the lifetime of the spouses and thus represents one of the most important steps in life, it is crucial that any relevant conditions should be specified in writing. Many cases come to court that highlight the problems caused by the omission of particular conditions. An example of this may be a problem that arises from the wife not having specified her desire to continue her studies; her husband subsequently disputing her right to do this.

At the outset, I deemed it necessary to discuss the details of rights and conditions within marriage before embarking on the examination of other areas. However, after due deliberation I decided that the topic of guardianship was a more pertinent precursor as the contract of marriage, in many cases, would not be undertaken without the *walī* as mediator/advisor. In reality, the guardian does not always stay within this capacity of mentor and often he denies the woman her right to choose whether or not to marry a particular person. Thus, this section focuses on *wilāya* with a view to establishing how much importance is placed on marriage conditions by both *walī* and prospective husband.

“Conditions” (*shurūṭ*) in this context means any condition/s that is/are added to the marriage contract by one or both spouses to attain a certain interest or right. Referring to the marriage contract formula adopted in Bahrain’s Islamic Courts (both *Sunnī* and *Jaʿfarī* directorates), I found that the principle of stipulating conditions is recognized in a particular clause of the contract. Nevertheless reviewing a sample of 500 *Sunnī* and 500 *Jaʿfarī* contracts, I found the aforementioned clause is almost neglected, specifically in the *Sunnī* contracts, as shown in the table below.

Types of contract	figure	Percentage %
<i>Sunnī</i>	43	8.6
<i>Jaʿfarī</i>	192	38.4

*Sunnī* contracts that include 53 stipulations representing 13 types are as follows:

Types of condition	figure	Percentage %
Husband’s abidance by maintenance	1	1.8
Wife to remain in her home/country	5	9.4
Wife to recommence her education	3	3
Wife to resume work	7	13.2
Private housing	15	28.3
Good matrimony	3	5.6
Fostering the wife’s children from her ex-husband	7	13.2
Wife to visit her family	3	5.6



Wife shall not leave the matrimonial house without the husband's permission.	2	3.7
Wife to reside with the husband's family	4	7.4
A Bahraini passport shall be issued to the wife	1	1.8
The wife observes clothing as prescribed by religion.	1	1.8
To allow the wife to drive a car.	1	1.8

According to the above table I found that most of these conditions need not be mentioned in the contract since they are mainly related to mandatory conditions in any matrimonial relationship, such as husband's abidance by maintenance, good matrimonial companionship, providing a private house for the wife and the wife shall not leave the matrimonial house without the husband's permission. Of these types, there are about 31 conditions, representing 58.4% of the total.

*Ja'farī* contracts, which include 288 stipulations that represent 11 types, are as follows:

Types of conditions	Figure	Percentage %
Wife to recommence her education	٨٤	٢٩,١66
Wife to resume work	٣٦	١٢,٥
To allow the wife to work outdoors	١	٠,٣٤
Private housing	١٤٧	٥١.041
Good matrimony	٢	٠,٦٩
Fostering the wife's children from her ex-husband	٢	٠,٦٩
Wife to visit her family	٥	١,٧٣6

To allow the wife to drive a car.	£	1,388
Wife is not allowed to drive a car	1	0,34
To specify engagement period	0	1,726
The husband shall bear the expenses of the marriage.	1	0,34
Total	288	

Also according to the above table, I found that most of these conditions need not be mentioned in the contract since they are mainly related to mandatory conditions in a matrimonial relationship, such as providing a separate shelter for the wife, good matrimonial companionship and the husband's responsibility to undertake the marriage expenses. There are about 150 of this type of conditions, representing 52% of the total.

As I believe, all parties involved share the responsibility of such default- not stating conditions- in marriage contracts. On the one hand, less awareness by both the couple and the guardian of the importance of such conditions in guaranteeing the future stability of matrimony, and the official authority on the other hand- carelessly unaware to alert the other parties- mainly the absent wife, to the importance of writing them. Hence I asked the Chairman of the *Sunnī* High Islamic Court about the judicial procedures regarding the breaching of a stated condition in the contract, e.g. preventing a female spouse from recommencing her education after marriage, and whether she has the right to demand a divorce? He answered that the court does not decide divorce at once, but at first it issues a compulsory verdict to be executed by the judge against the husband to fulfill the said condition.



Generally, a marriage contract is considered as any transaction between two contracting parties to achieve a common interest but with certain privacy in marriage, this point shall be elucidated later. Such interest could be “qualitative” in contracts of the same type, for example the vendor’s ownership of a property in a sale contract and the enjoyment of possession of the lessee, or it could be a “private interest”, i.e. required to secure an individual interest of a contractor. Thus, stipulating conditions is permitted to achieve such interests and welfare. However, the limitation of conditions in a contract is a controversial issue among Islamic schools of jurisprudence. According to the view of the majority of scholars, except the Ḥanbalīs: valid conditions in a contract– with no restriction- are those adhering to the contract system and principles of Islamic law. As ‘Āysha narrated: The Prophet said, *“What about the people who stipulate conditions which are not present in Allāh’s Laws? Whoever imposes conditions, which are not present in Allāh’s Laws, then those conditions will be invalid, even if he imposes those conditions a hundred times. Allāh’s conditions are more solid.”*<sup>164</sup>

Ḥanbalīs and some Mālikīs see that: the contracting parties have boundless right to include any number of conditions that could achieve each party’s interest as long as they comply with Islamic law. The Prophet is reported to have said: *“The Muslims at their conditions, except condition allows a prohibition or prohibited a lawfulness.”*<sup>165</sup> Such differences in opinion reflect a conflicting scope of freedom for both parties. Even though the consensus of scholars has tightened boundaries of freedom, the Ḥanbalīs see no limitation for the contractors to put in conditions within the frame of Islamic law.<sup>166</sup>

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<sup>164</sup> Bukhārī: 7292; Muslim: 2792.

<sup>165</sup> Turmudhī: 1352.

<sup>166</sup> See: Zarqā, Muṣṭafa Aḥmad. *al-Madkhal al-Fiqhī al-‘Ām* 322- 361, Dār al-Fikr, Damascus, 10<sup>th</sup> Edition 1968; Abū Zahra, Muḥammad. *Ibn Ḥanbal* 332- 342, Cairo, N.D.

After the previous description of all transactions contracts in general, including marriage contracts, the subsequent paragraphs will handle the issue in some detail as follows:

Once a condition is valid, then the contract and the condition are deemed to be valid and both spouses should abide by them accordingly, otherwise the contract is deemed valid but the condition is void. The origin of this issue is based on the Prophet's *ḥadīth* narrated by 'Uqba b. 'Āmir, that the Prophet said: *"From among all to fulfill, the conditions which make it legal for you to have sexual relations (i.e. the marriage contract) have the greatest right to be fulfilled"*<sup>167</sup>. Abū Hurayra narrated that: the Prophet is reported to have said, *"It's lawful for a woman (at the time of wedding) to ask for a divorce of her sister (i.e. the other wife of her would-be husband) in order to have everything for herself, for she will take only what (Allāh) has preordained for her."*<sup>168</sup>

Conditions and their judgments can be classified as follows:

## 2.1 Conditions Required for Initiating a Contract:

These include those conditions required by Islamic law, as the man stipulates a good conjugal community, or the woman stipulates that he should not restrict any of her rights, or to be treated on an equal footing with the others and her right not to attend in licentiousness whereabouts, or to stipulate what is based on customs and norms. All the above should be fulfilled and whether stated or not, they have no effect on the contract.<sup>169</sup>

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<sup>167</sup> Bukhārī: 2572; Muslim: 1418.

<sup>168</sup> Bukhārī: 4857.

<sup>169</sup> Nuwawī, Yahya b. Sharaf. *Sharḥ Ṣaḥīḥ al-Imām Muslim* 9/202, Dār Iḥyā' al-Turāth, Beirut, 2<sup>nd</sup> Edition 1972; Nafrāwī, Aḥmad b. Ghānim. *Al-Fawākih al-Dawānī 'alā Risālat Ibī Zayd al-Qayrawānī* 2/14, Muṣṭafā al-Bābī al-Ḥalabī Printing, Cairo, 3<sup>rd</sup> Edition 1955.



## 2.2 Conditions that Contravene the Requirements of the Contract:

For instance, the male spouse may specify the condition not to pay dowry or any maintenance for his prospective wife, or a female spouse may put conditions such as the divorce of a fellow wife, although this does not contravene with the requirements of the contract, it contradicts a clear prohibition stated in the previous *ḥadīth*, “*It’s not lawful for a woman to ask for the divorce of her fellow wife in order to have everything for herself, for she will take only what (Allāh) has foreordained for her.*” Prohibition in this context proves the invalidity of the prohibited. Furthermore, if a female spouse stipulates the condition not to allow her would-be husband his legal right of marital enjoyment, or to use a means of coitus interruptus to prevent reproduction, such conditions are void by themselves because they contravene the requirements of the contract and include exclusion of rights. Nevertheless the contract in itself is sound according to the consensus of scholars, as such conditions are deemed as supplementary context in the contract which may not render it void itself.<sup>170</sup>

## 2.3 Conditions neither Requisite nor Denied by the Contract:

These include conditions that maintain a benefit to one of the spouses, but are neither commanded nor forbidden by a text. For instance if a woman stipulates not to be removed from her parents’ house, or not to travel with her husband, or that he should not remarry after her; the scholars have different views in this regard:

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<sup>170</sup> *Sharḥ Ṣaḥīḥ al-Imām Muslim* 9/202; *al-Fawākih al-Dawānī* 2/14.

Hanafīs<sup>171</sup> and Shāfi‘īs<sup>172</sup> believe that such conditions are not compulsory to fulfil so the contract is valid.

Their proofs:

- a. The Prophet stated: *“the Muslims at their conditions, except a condition allows a prohibition or prohibited lawfulness”*. The above condition prohibits lawful acts, i.e. marriage and traveling which are permitted.
- b. The Prophet stated: *“conditions which are not present in Allāh’s Laws, (then those conditions) will be invalid, even if imposed a hundred times.”*<sup>173</sup> Hence they argued that this was not stated in the Qur’ān because it is not required by Islamic law.

Mālik prohibited a variety of conditions<sup>174</sup>; he prohibited people from marrying through enforcing conditions. He stated: “The custom among us is that when a man marries a woman, and he makes a condition at the time of writing the marriage contract that he will not marry after her, then it means nothing unless there is an oath of divorce or setting free attached to it; making the conditions obligatory.”<sup>175</sup> Therefore Mālik concurs with the aforementioned opinion to abandon conditions that are not required in the contract. The Mālikīs explained the *ḥadīth*, *“The most deserving conditions to be fulfilled are those by means of which sexual intercourse becomes permissible for you”* as only denoting a recommended deed, so they believe that if a condition is not required in the contract and does not contradict its purpose, then the condition is void and the contract is sound; for

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<sup>171</sup> *Hāshiyat Ibn ‘Ābdīn* 3/131.

<sup>172</sup> Sh. Iāzī Ibrāhīm b. ‘Alī al-Fayrūzabādī. *al-Muḥadḍhab* 2/47, al-Bābī al-Ḥalabī Printing, Cairo, 2<sup>nd</sup> Edition. N.D.

<sup>173</sup> Bukhārī: 2023; Muslim: 2762

<sup>174</sup> *al-Fawākih al-Dawānī* 2/14.

<sup>175</sup> *Sharḥ al-Zarqānī* 3/177; *al-Mudawwana al-Kubrā* 2/197.



example conditions such as “not to marry after her” or “not to move her from her family”. Nevertheless Islam recommends a person to fulfill promises because this is correct and proper behaviour.<sup>176</sup>

The Ḥanbalīs state that it is the man’s duty to fulfill the conditions he has made, if he fails to fulfill, then the wife has the right to annul the marriage, The same opinion was reported to have been given by ‘Umar b. al-Khaṭṭāb, Sa‘ad b. Abī Waqqāṣ<sup>177</sup>, Mu‘āwīya<sup>178</sup> and ‘Amru b. Al-‘Āṣ<sup>179</sup>, Also by ‘Umar b. Abd al-‘Aziz<sup>180</sup>, Tāwūs<sup>181</sup>, Awzā‘ī and Ishāq.<sup>182</sup>

Their proofs:

- The Prophet stated: *“the Muslims at their conditions”*.
- The Prophet stated: *“the most deserving conditions to be fulfilled are those by means of which sexual intercourse becomes permissible for you”*
- It was reported that a man married a woman on the basis that she reside at her own family house, but he wanted to move her. Her family complained to ‘Umar b. al-Khaṭṭāb, who said: *“her condition must be fulfilled. Rights are in accordance with conditions.”*

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<sup>176</sup> See: al-Subā‘ī 1/111.

<sup>177</sup> (d. 55/674). One of the most famous Companions and earliest converts to Islam, also a veteran of all the Battles. He is one of the “Ten well betided ones” who were told by the Prophet that they were assured a place in Paradise. Smith 340.

<sup>178</sup> B. Abī Sufyān b. Ḥarb (d. 60/680). He became the sixth Caliph and founder of the Umayyad dynasty, having forced Ḥasan b. ‘Alī b. Abī Ṭālib to abdicate. When Caliph, Mu‘āwīya also compelled the leading sons of the Companions to acknowledge his own son Yazīd as successor to the Caliphate, thereby making this originally elective office hereditary. Smith 278.

<sup>179</sup> (d. 42/633). He acceded to Islam shortly before the conquest of Mecca and went on to become one of the most successful Muslim military leaders. He took part in the campaign in Syria in 14/635 and conquered Egypt in 20/641 during the Caliphate of ‘Umar. Smith 41.

<sup>180</sup> B. Marwān b. al-Ḥakam al-Umawī Abū Ḥaṣṣ (61-101/681-720). He called the Fifth Patriarchal Caliphs (*al-khulafā’ al-rāshidūn*). *Al-A‘lām* 5/50.

<sup>181</sup> B. Kaysān al-Khawlanī al-Hamadhānī Abū ‘Abd al-Raḥmān (33-106/ 653-724). An one famous scholar of followers. *Al-A‘lām* 3/224.

<sup>182</sup> *Al-Kāfi fī Fiqh al-Imām Aḥmad* 3/55; *al-Mughnī* 7/71.

- Because the stipulation encompasses a limited benefit to the wife, and does not contradict with the purpose of the contract, it is binding.

Ibn Qudāma supported this opinion confounding the evidence of the former opinion: “they said: (this prohibits the lawful), we argue that it does not, but it does grant the woman the right to annul the marriage if the man does not adhere to that, they said: “it would not be to the benefit of the contract“ we say: “we do not take it for granted, since it is beneficial to the woman, consequently whatever is beneficial to the contractor, would be to the benefit of the contract.”<sup>183</sup>

Ibn al-Qayyim maintained: “Conditions stipulated in a marriage contract are likely to be fulfilled even prior to those of sale contract, because what is ordained by Allāh and his Prophet is undeniable, and he who has foresight into the objectives of Islamic law in its resources, justice, sagacity and its welfare to mankind will realize the preponderancy of this say-so and how close it is to the basis of Islamic law”<sup>184</sup>

Shī’a view: If a woman stipulates a correct condition such as not to leave her home or to be maintained in a particular house, both the contract and the condition are sound and binding. If the husband fails to meet the condition she has no right to annul the contract, but if she disobeys him she deserves maintenance because she denies his right on legal ground.<sup>185</sup> Ḥasaballah perceives the judgment of a divorce as being a woman’s right if her spouse fails to comply with a specified condition that is related to a particular interest well known to the husband.<sup>186</sup> However, his student Biltājī contradicts him by stating: “we incline not to grant the wife the right of divorce in the contract, whether absolutely or

<sup>183</sup> *al-Mughnī* 7/71.

<sup>184</sup> *Zād al-Ma’ād* 5/183.

<sup>185</sup> Hillī, ‘Abd al-Karīm Riḍā. *Al-Aḥkām al-Ja’fariyya fī al-Aḥwāl al-Shakḥsiyya*, Articles (12-16), Hijāzī Printing, Cairo 1947; al-Subā’ī 1/112.

<sup>186</sup> Biltājī, Muḥammad. *Dirāsāt fī Aḥkām al-Uṣra* 445, al-Shabāb Bookstore, Cairo 1998.



under a condition, for instance, not to marry after her or not to take her from her home ... etc, because we do not want the matrimonial relationship to remain absolutely subject to the wife's will, or upon the fulfillment of her stipulated advantage, as this will make matrimonial life subject to disturbance and frivolity."<sup>187</sup> Though this is a respected point of view, I tend to agree with the opinion that such conditions should be met. I may also add a further two examples of conditions that are very relevant to contemporary women:

- To stipulate completion of her education as being necessary in two ways:  
First: It is often necessary for a mother to continue her education if she wishes to support her children in their studies. A woman should have the right to pursue a degree course for example, if she so desires. In this increasingly technological age, further education should not be denied.  
Second: It is often vital for a household to have two incomes in order to maintain satisfactory living standards. A wife may need to obtain qualifications if she is to contribute to the financial security of her family. Even if the husband is wealthy, the potential for earning can be useful for the wife in case of divorce and it can also guarantee some future for the children.
- To stipulate the retaining of a wife's employment, which should correspond to the principles of Islam regarding its type and circumstances; providing that this has no adverse effect on her matrimonial duties.

However, a wife should consider her family's common interest in exceptional cases, for instance, when a woman stipulates that her husband should not move her from her country. If it transpires, for example, that her husband must live abroad for a long-term scholarship, she ought to accompany him in the interests of the welfare of her

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<sup>187</sup> *Dirāsāt fī Ahkām al-Usra* 445.

husband and family. Also, if a man desires to take a second wife, divorce should not be an immediate first choice, unless there is a real grievance, e.g. inequality of treatment between the two women.

According to the B.P. and M.D., Article (5) state the following:

- a. Spouses are at their conditions, except a condition allows a prohibition, or prohibited lawfulness.
- b. If the contract includes a condition that contradicts with its purpose and objectives, then the condition is void and the contract is sound.
- c. No condition is valid unless it is written clearly in the contract or strongly proven.
- d. If conditions are violated, the aggrieved party has the right to demand nullification of the marriage.

The B.P. is distinguishable from the M.D. by clause (e) which states that: the wife has the right to make a stipulation on her husband not to take her away from her town or not to marry after her. Though views may vary in such specification, a good reason for this could be merely picking the most paramount two examples that do not contravene with the reality and purpose of the contract and which are not forbidden by Islamic law. It is likely to include here more examples as important as the above ones in the detailed handout; For example: her right to recommence education and work if that does not contravene with her responsibilities towards her husband and children, also to exclude the condition not to travel with her husband if he is obliged to do so for the purpose of education. It is against the wife and her family's interest to reject accompanying her spouse. Moreover such rejection may expose her husband to fornication if he were to be absent for several years.



The K.L. adopts the views of the Ḥanbalī school, Articles (40-42) state the following:

Article (40): A marriage contract is deemed void if it includes: -

- a. A condition that contravenes with its origin.
- b. A condition does not contravene its reality but its prerequisite or being prohibited, then the condition is void while the contract is sound.
- c. A condition that does not contravene with its origin or prerequisite and is not prohibited by Islam must be fulfilled; otherwise the other party has the right to nullify the marriage.
- d. The provision of the aforementioned clause is applicable

Article (41): the stipulation should be stated in the marriage document.

Article (42): the right to annul may be dropped upon an implicit or explicit forfeit by the right-holder.

The explanatory handout includes: “this is based on the Divine orders to fulfill promises and contracts and on the clear, precise and correct *Sunna* that calls for the fulfillment of matrimonial stipulations, and as absolutely depicted as having the greatest right to be fulfilled. It is also based on Caliph ‘Umar’s judgment in favor of the woman in accordance with what her husband stipulated on himself (not to take her away from home) and argued them stating that “Rights are in accordance with conditions and yours [the woman] must be fulfilled.”<sup>188</sup>

The Law in its provisions sustains the achievement of common interests and whatever is required by means of social and transient progress.<sup>189</sup>

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<sup>188</sup> Anas, Mālik. *Al-Muwaṭṭaʾ*: 1410, Muʾassasat al-Risāla, Beirut, 1<sup>st</sup> Edition 1992; *al-Sunan al-Kubrā*: 14216.

<sup>189</sup> See: *Ghndūr* 77.

In conclusion, it is evident that the legal system fails to address the appropriate conditions for matrimony that are crucial to the maintaining of the basic Islamic principle of interest.



## CHAPTER III

### Equality (*Kafā'a*) in Marriage

#### 3.1 The Notion of Equality (*Kafā'a*)

#### 3.2 The Time to Appraise *Kafā'a*

#### 3.3 Who has the Right in *Kafā'a*?

At the start of these chapters, I mentioned my intention to discuss the issues pertaining to marriage, as I perceive that the related laws can be instrumental in augmenting marital breakdown and thus impeding mutual love and compassion. Consequently, it is appropriate at this point to examine the notion of equality (*kafā'a*) between couples and its inherent implications.

#### 3.1 The Notion of Equality (*Kafā'a*):

*Kafā'a*, is a term which in common usage signifies equality, parity and aptitude, but in the terminology of *fiqh* designates similarity of social status, wealth and profession (those followed by the husband and by the father-in-law). Also husband and wife should hail from similar backgrounds, otherwise the marriage is considered ill matched and as a consequence potentially liable to break down. In fact, in *fiqh*, *kafā'a* works in a single direction and protects only the wife who must not marry beneath her status; it matters little, on the other hand, if the man marries a woman of socially inferior status, he owns the right of divorce wherever he chooses as per the conditions of annulment that will be

clarified at a later point. As for the woman, she may be deceived by her husband's false claims regarding his social or financial status, however, she has no right of divorce.<sup>190</sup>

*Kafā'a* is considered by both the *Sunnī* and *Ja'farī* courts as crucial to a harmonious relationship as is clear from the following decrees:

- A *Sunnī* Islamic lawsuit: legally, the considered *kafā'a* represents equality in religion and good manners, based on the prophetic words: *"if you are approached by one who shares your faith and proper behaviour, then marry him, as to refuse can create temptation and sin."*<sup>191</sup>
- A *Sunnī* Islamic lawsuit: *kafā'a* in marriage shall be free from constant physical disabilities that may be detrimental to marital life.
- A *Sunnī* Islamic lawsuit: judged that an adult virgin of sound mind should not marry a man who is not her social equal.
- A *Ja'farī* Islamic lawsuit: decreed the soundness of the marriage between a *Ja'farī* woman and a Muslim man of any sect and that all legal conditions and effects shall be applicable to that marriage.
- A *Ja'farī* Islamic lawsuit: judged that one Muslim is equal to any other Muslim and no kinship, race, blood or humble trade shall prevent the soundness of the marriage.
- A *Ja'farī* Islamic lawsuit: decreed that the constant physical disabilities which can have adverse effects on marriage are: madness, impotence (*'anah*), castration (*khīṣā'*) and cut off 'genital deficiency' (*jabb*), these disabilities shall be legally

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<sup>190</sup> Bellefonds, Y. Linant De. The Encyclopedia of Islam IV: 404; see: Subā'ī 1/147, Abū Zahra *al-Aḥwāl al-Shaṣiyya* 135.

<sup>191</sup> Turmudhī: 1085; *al-Sunan al-Kubrā*: 13259.



proven either through the confession of the husband himself or by authenticated medical checks performed by a medical board from the Ministry of Health.<sup>192</sup>

These decrees handle the issue of *kafā'a* in marriage and the question is, what is the concept of fitness in Islamic jurisprudence, and pertaining to which aspects is it applicable?

The consensus of scholars agree that the most crucial *kafā'a* in marriage relates to faith, since no Muslim woman shall be married to a non believer. However, there exist differing opinions regarding the stipulation of other issues, and to what extent these make an impact on the soundness of the contract. The following details highlight this:

Mālik, Karkhī<sup>193</sup>, Ḥassan al-Baṣrī<sup>194</sup>, Ibn Ḥazm<sup>195</sup>, Ibn al-Qaiyyim and the *Shī'ī* consider only the issue of faith; this conclusion being based on the following grounds:

- a. Specifying any requirements other than religion is against the justice of Islam and the notion of *kafā'a* amongst people. The Qur'ān states: *"Verily, the most honorable of you in the sight of Allāh is (he who is) the most righteous of you."*<sup>196</sup>, *"The Believers are but a single Brotherhood"*<sup>197</sup>.<sup>198</sup> Abū Sa'īd al-Khudrī<sup>199</sup> narrated, "The Prophet maintained: *"O people; your God is one truly, and your father is one, no favor to an Arab upon a foreigner truly and no to a*

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<sup>192</sup> *Shā'ir* 198.

<sup>193</sup> Abū al-Ḥasan 'Abdullāh b. al-Ḥusīn al-Karkhī (260-340/874-952). The last famous Ḥanafī jurist in Irāq. He was born in Karkh and died in Baghdād. *al-A 'lām* 4/193.

<sup>194</sup> Abū Sa'īd Ḥasan b. Yasār al-Baṣrī (21-110/642-728). He was a famous follower (*tābi'i*), an Imām in Basra and a prominent scholar of his time. He was born in Medīna. During the reign of Mu'āwiya he travelled to Baṣra where he died. He was brave and honest. *al-A 'lām* 2/226-227.

<sup>195</sup> 'Alī b. Aḥmad b. Sa'īd b. Ḥazm al-Zāhirī, Abū Muḥammad (384-456/994-1064). The famous scholar in Andalusia of his time. One of Islamic leaders. *Al-A 'lām* 4/ 254).

<sup>196</sup> *Al-Hujurāt*, XLIX: 13.

<sup>197</sup> The enforcement of the Muslim Brotherhood is the greatest social ideal of Islam. On it was based the Prophet's Sermon at his last pilgrimage, and Islam cannot be complete until this ideal is achieved. 'Alī 1341.

<sup>198</sup> *Al-Hujurāt*, XLIX: 10.

<sup>199</sup> Samura b. Junāda b. Jundub al-Anṣārī (d. 59/680). An one of the Prophet companions. *Al-Iṣāba* 3/178.

foreigner upon an Arab, and no to a red upon black and no to black upon a red favor except through piety.”<sup>200</sup> Abū Ḥātim al-Muzanī<sup>201</sup> narrated, “The Prophet said; “if you are approached by one who accepts the faith and correct behaviour, then marry him. If you refuse to do this, then temptation and sin may result”. Even when asked if other problems within the prospective spouse should be considered, the Prophet reiterated his initial instruction three times.<sup>202</sup> Abū Hurayra narrated, “The Prophet ordered the Bayāḍa sons that they marry Abā Hind<sup>203</sup>, who is a cupper (*ḥajjam*), then said: “O Bayāḍa sons marry Abā Hind, and marry him.”<sup>204</sup>

Bukhārī supported this opinion by devoting a chapter entitled: [the chapter of equality in religion (*kafā’a fī al-dīn*). The Qur’ān stated: “And it is He who has created man from water”<sup>205</sup>]. He deduced from this verse that *kafā’a* must exist between all human beings and added that ‘Aṣḥa narrated how Abū Ḥudhayfa<sup>206</sup> adopted Sālim<sup>207</sup> and married him to his niece. Sālim was a freed slave (*mawlā*) and the niece was an Anṣārī woman.<sup>208</sup>

Ibn al-Qaiyyim maintained: “what is desired by the Prophet’s judgment is to consider religion as the major qualifying element in marriage. No Muslim woman

<sup>200</sup> Aḥmad: 23536.

<sup>201</sup> Al-Ḥijāzī. The scholars differed in his comradeship (*ṣuḥba*) and he has narrated only this *ḥadīth*. *Al-Isāba* 7/81.

<sup>202</sup> Turmudhī: 1085; *al-Sunan al-Kubrā*: 13259.

<sup>203</sup> Bir or Burayr b. ‘Abdullāh Abū Hind. Known as Abū Hind. An one of the Prophet’s companions. *Al-Isāba* 7/447.

<sup>204</sup> Abū Dāwūd: 2102; *al-Sunan al-Kubrā*: 13556; Ḥākim: 2693; Bastī, Muḥammad b. Ḥibān. *Ṣaḥīḥ Ibn Ḥibān*. 4067, Mu’assasat al-Risāla, Beirut, 2<sup>nd</sup> Edition 1993.

<sup>205</sup> Al-Furqān, XXV: 54.

<sup>206</sup> Abū Ḥudhayfa b. ‘Utba b. Rabī’a (42 A.H-12/578-633). A companion of the Prophet and he emigrated to Ḥabasha (Ethiopia) and Medina. He shared in all conquests and was killed on Yamāma Day. *Al-A’lām* 2/171.

<sup>207</sup> Sālim b. Ma’qil Abū ‘Abdullāh *mawlā* Abū Ḥudhayfa. He was killed with him in Yamāma (12/633). *Al-A’lām* 3/73.

<sup>208</sup> Bukhārī: 4800.



shall be married to an unbeliever (*kāfir*) and no chaste woman to a dissolute. The Qur'ān and the *Sunna* consider no other prerequisites in marriage. It is forbidden for a Muslim woman to marry an adulterer but there is no stipulation regarding lineage, wealth or professional rank. A slave is permitted to marry the wealthy and highborn woman providing that he is a Muslim and chaste. A non-Qurashī is allowed to marry a Qurashī woman, a non-Hāshimī to marry a Hāshimī woman and the poor man may marry a rich woman.”<sup>209</sup>

Ibn Ḥazm al-Dhāherī perceives that all Muslims are brothers, so the son of the Negro woman can not be prohibited from marrying the Hāshimī Caliph's daughter and a dissolute Muslim may be fit for the chaste Muslim woman unless he is an adulterer.<sup>210</sup>

- b. If *kafā'a* had any consideration in *fiqh*, it would have taken priority in the chapter of blood “*bāb al-dimā*”, because this is the most sensitive and required caution. Nevertheless it was not considered, where the noble is killed for the humble and the scholar for the ignorant man. In marriage it is not of high priority.<sup>211</sup>

The majority of scholars consider the matter of *kafā'a* in marriage to have requirements other than religion, because the interests of the spouses can only be attained when there is equality between them. If the husband is not of equal status to his wife, then she may deny him as protector and lose respect for him. There may be far-reaching family implications if in-laws are ashamed of him. Such problems can escalate until the marriage is put in jeopardy.

<sup>209</sup> *Zād al-Ma'ād* 5/159.

<sup>210</sup> Ibn Ḥazm, *al-Muḥllā* 10/24, Dār al-‘Āfāq al-Jadīda, Beirut, N.D.

<sup>211</sup> Badrān, Abū al-‘Aynīn Badrān. *Al-Fiqh al-Muqāran lil-Aḥwāl al-Shakhṣiyya Bayn al-Madhāhib al-Arba'a al-Sunniyya wa al-Madhhab al-Ja'fari wa al-Qānūn* 161, Dār al-Nahḍa al-‘Arabiyya, Beirut, 3<sup>rd</sup> Edition 1973.

The following conclusions have been put in order to refute the first opinion:

- The intended meaning of the previous two verses<sup>212</sup> and narrative: “*O people; your God is one truly, and your father is one*” is the judgment in the afterlife and not the judgment of the life in this world.
- While Dahlawī commented on the narrative: “*if one comes to you who accepts his religion and manner, then marry him*”: “there is nothing in this narrative that indicates that *kafā’a* and fitness in marriage are not considered. How come when this issue relates to the tradition and norm of all societies. Defamation may possibly be worse than slaughter, but people are concerned with status and the divine legislations never pay attention to this fact. ‘Umar<sup>213</sup> stated: (I shall never permit women to marry except from their match), but the Caliph did not mean to trace any degrading characteristics such as shortage of money, poor condition and ugliness .etc, after being satisfied with his religious and moral position. The most important element in stabilizing matrimonial life is good companionship and faith.”<sup>214</sup>
- It is unfair to indicate that: *kafā’a* in marriage goes against the justice of Islam in dealing with all people on an equal footing, because *kafā’a* in Islam is that of *kafā’a* regarding rights and duties and not personal considerations which are based on custom (‘*urf*) and traditions (*taqālīd*) of the people.<sup>215</sup> The Qur’ān does indicate the preference of some people over others: “*Allāh has bestowed His gifts of*

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<sup>212</sup> Al-Hujurāt, XLIX: 10, 13.

<sup>213</sup> B. al-Khaṭṭāb b. Nufayl al-Qurashī Abū Ḥaṣṣ (40 A.H-23/584-644). The second Caliph and the second of the four Patriarchal Caliph, one of the most notable figures in Islam, he was famed for his strong and direct. He is on of the “Ten well betided ones” who were told by the Prophet that they were assured a place in Paradise. *Al-A ‘lām* 5/45; Smith 407.

<sup>214</sup> Dahlawā, Shāh Walī Allāh. *Hujjat Allāh al-Bāligha* 2/217, al-Maktaba al-Salafiyya, Lāhūr, N.D.

<sup>215</sup> Badrān 162; Ghndūr 180.



*sustenance more freely on some of you than on others.*<sup>216</sup> Therefore disparity amongst people in this life is necessary for the sake of stability; the social position of a waste-collector is unequal to that of a judge or a consultant and people still vary in their communal and social positions. This is God's handiwork according to the pattern on which He has created mankind: "*Say: Are those equal, those who know and those who do not know?*"<sup>217</sup> The narrative about the girl who complained to the Prophet, which we include under the topic of obligatory guardianship, states: "my father initiated my marriage to his nephew in order to raise his low position through me." There is an indication in this narrative that the husband was unequal to her, this is why the Prophet gave her the choice either to accept or annul the marriage.

- Regarding analogy (*qiyās*) comparing marriage issues with crimes (*jināyāt*) and chastening (*qīṣaṣ*), they maintained: it is analogy with a difference, because the chastening is legislated for the benefit of life, so if the *kafā'a* is considered here the benefit will not be sustained and life would be anarchy, wherein the powerful shall kill the humble as he desired based on this inequality. This was the case in the pre-Islamic era and Islam eradicated this as revealed in the Qur'ān: "*We ordained therein for them: Life for life...*"<sup>218</sup>

Nevertheless they differed later in defining the issues to be considered in *kafā'a* more or less as follows:

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<sup>216</sup> Al-Nahl, XVI: 71.

<sup>217</sup> Al-Zumar, XXXIX: 9.

<sup>218</sup> Al-Mā'idā, V: 45.

The Ḥanafīs considered it in six issues: Kinship, Islam, freedom, wealth, religion, and trade. Muḥammad b. al-Ḥasan<sup>219</sup> disagreed with the inclusion of religion, maintaining this to be one of the matters of the hereafter which is between the slave and His Lord. Therefore, the rules of this world should not be based on it, except if the person declares his disobedience (such as the drunkard) to a degree where people slander him for it.<sup>220</sup>

The Mālikīs consider three areas: religion, freedom and being free from disabilities.<sup>221</sup>

The Shāfi'īs consider five areas: religion, kinship, freedom, trade and being free from disabilities. Some of the later scholars added 'age match' of the spouses, so that a very old man cannot be suitable for a young woman. Shāfi'ī however stated: (considerable age difference between the spouses is not forbidden, but may bring shortcomings for the woman and her guardian. If both accept the marriage then it is sound, but if one disagrees, then he has the right to dissolve it).<sup>222</sup>

The Ḥanbalīs consider only two issues: religion and trade. Whoever works in a humble trade shall not be qualified to marry a girl whose father works in a more professional capacity.<sup>223</sup>

I have the following comments to make regarding the aforementioned opinions:

- My opinion favors that made by the majority of scholars in considering 'fitness' in marriage in a general sense, since the intention of *kafā'a* is to attain the maximum degree of harmony between the spouses and to sustain the stability of matrimonial life; protecting the woman and her guardians from being subject to

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<sup>219</sup> Shaybānī, Abū 'Abdullāh Muḥammad b. Ḥasan b. Farqad, *mawlā* banī Shaybān (131-189/748-804). He transmitted and spread the *fiqh* of Abū Ḥanīfa. He was born in Wāsiṭ, raised in Kūfa, lived in Baghdād and died in Rayy, *Al-A'lam* 4/80.

<sup>220</sup> *Badā'' al-Ṣanā''* 2/320; *al-fatāwā al-Hindiyya* 1/201, al-Kubrā Printing, Egypt, N.D.

<sup>221</sup> *Al-Sharḥ al-Ṣaghīr* 2/401.

<sup>222</sup> *Al-Umm* 5/12.

<sup>223</sup> *Al-Mughnī* 6/482.



slander and any sedition that may arise accordingly. However, it is necessary to bear in mind that situations may change as time passes and the norms of people alter regarding application of the principle of Islamic jurisprudence principle that reads: “the common traditions are as binding as stipulated conditions”. Providing that there is no contradiction with any explicit text, what I mean here is to grant the woman and her guardians the right to reject the marriage to a person who does not enjoy these qualifications. If the guardian does not observe these matters when initiating the marriage of his ward and attempts to force her, then she should have the right to refuse that marriage. In case she forfeits her right to reject and she wants to marry an ‘unfit’ person, then the guardian can prevent this.

- Suitability and *kafā’a* between the spouses narrows the status gap, but does not mean total *kafā’a*, otherwise marriage would be as scarce a commodity among human beings as the scarcity of complete *kafā’a*.
- The Ḥanafīs have broadened this issue more than have the other schools. Perhaps the reason for this could be attributed to their opinion that a woman may initiate her own marriage without her guardian, provided that she makes a suitable match. If her intended husband does not fulfill this condition, then her guardian is entitled to demand the dissolution of the marriage.
- The condition of *kafā’a* in marriage as viewed by the Islamic scholars is not out of any Arab racial fanaticism, or one group’s pride over another (such as the poor), but it is intends to achieve the maximum level of agreement and stability within a marital relationship. This may be proven by the fact that many of those scholars

were non-Arab (*mawālī*), who occupied a high position amongst the Islamic nations.

- Scholars mentioned ‘freedom’, which is a condition stipulated by most creeds, at a time when slavery was widespread. Nowadays it does not exist and there is no need to discuss it.
- Social traditions and norms generally had a major impact on the opinions of most scholars, particularly those who included ‘trade’ as a condition for *kafā’a*. Ibn ‘Abdīn<sup>224</sup> stated: “the stableman (*sā’is*) and the shepherd (*rā’ī*) are not qualified to marry a tailor’s daughter, and the tailor is not qualified to a merchant’s daughter, and both are neither equal to a daughter of a scientist nor a judge providing that he is honest and accepts no bribes and the scientist should practically be applying his knowledge, and the competent educator is a match for the prince’s daughter...”  
The overview to some of these ‘trades’ has been revised nowadays, and we need not follow the norms that prevailed centuries ago. The aspects of life have changed but no explicit Islamic texts exist to deal with them, therefore these issues should be left to the current customs and norms of the people. The guardians in various environments should seek the help of the experts to identify whatever corresponds to their time and their customs in accordance with the aims of Islamic law.

During my attendance of sessions at the *Sunnī* Courts directorate, mainly the High court, and through my follow up to lawsuits presented in front of them, I discovered that 90% of the filed suits came from wives demanding divorce from their husbands due to bad

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<sup>224</sup> Muḥammad b. Amīn b. ‘Umar b. ‘Abd al-‘Azīz ‘Ābdīn al-Dimashqī (1198- 1252/ 1784- 1836). The greatest scholar of Ḥanafīyya in his time. *Al-A ‘lām* 6/42.



conduct and ill-treatment. For instance, regarding prohibited relations with other women and drinking alcohol; behaviour which created marital dysfunction. Thus Muḥammad b. al-Ḥasan's opinion regarding the condition of faith being a matter for the sake of the hereafter is definitely flawed in view of these 'earthly' problems! The procedures that are currently pursued in the courts prove that lewdness, particularly cases regarding drunken behaviour and prohibited sexual relations, do not consider modern mechanisms and new advancement in technology, but they are only attached to the Islamic scholars' opinions related to the old times where no sophisticated means of technology were available. For example, when a wife files a case demanding divorce from her drunkard husband, the judge refers this accusation to the husband (the defendant) requesting his reply. If he denies that, the judge will ask him to swear the oath accordingly. 'Amru b. Shu'ib<sup>225</sup> narrated that the Prophet maintained: "*The onus of proof rests on the claimant; the taking of an oath is incumbent upon who denies.*"<sup>226</sup> Consequently the defendant performs the oath denying the accusation against him and therefore the suit is canceled. Shall such an oath be accepted from non-chivalrous persons? Who will not hesitate to swear it hundreds of times unaware of the grievance punishment Allāh has prepared for liars in the hereafter, because he is deeply indulgent debauchery. Surprisingly in one of the cases<sup>227</sup>, the judges demanded this oath from a husband who was well known to the court as having a history of alcohol abuse, bad conduct and illicit sexual relationships. It is strange that they asked him to perform an oath when they were aware of his propensity for untruth! It is merely the blind adherence to the outer essence rather than to the

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<sup>225</sup> B. Muḥammad b. 'Abdullāh b. 'Amr b. al-'Aṣ al-Sahmī. He is a weak in narrative. 'Asqānī, Aḥmad b. 'Alī b. Ḥajar. *Tahdhīb al-Tahdhīb* 8/44, Dār al-Fikr, Beirut, 1<sup>st</sup> Edition 1984.

<sup>226</sup> *Al-Sunan al-Kubrā*: 16222; Turmudhī: 20324, and he stated, "this *ḥadīth* is a weak (*ḍa'īf*)."

<sup>227</sup> Case No: 612/2002.

substantial meaning of the texts and the aims of Islamic law that call for complying with scientific developments in confirming the rights. Nowadays there are efficient modes of assessing liquor consumption. Blood and urine samples can be analyzed in the lab to determine the percentage of alcohol in the body. The judges' argument not to apply this procedure was that proof of drunkenness must result in executing the punishment (*hadd*) on him which is lashing (*jald*), whereas punishment is abandoned in doubtful acts as the *ḥadīth*: "avoid punishments if there is only suspicion of a crime"<sup>228</sup> However, these punishments are not applied in the Bahraini courts and the authority of the *ḥadīth* has not been authenticated (*sanad*).<sup>229</sup>

### 3.2 The Time to Appraise *Kafā'a*:

*Kafā'a* is considered at the time of initiating the contract, in other words, if the qualities that define fitness are realized at the time of the contract, then any change afterward may not be harmful, since they are conditions for initiation and do not remain for good as stated by the Ḥanafīs.<sup>230</sup> If the husband was pious (*taqī, ṣāliḥ*) then he later deviated (*fasaqa*), this shall have no effect on the soundness of the contract because people's affairs are subject to change, and if we stipulate to keep certain qualities at the time of initiating the marriage contract, then we are demanding the impossible condition, since nothing is constant with regard to the state of humankind.

<sup>228</sup> Turmudhī: 1424; Ibn Mājih: 2545; Abī Shayba, Abdullāh b. Muḥammad. *Muṣannaf Ibn Abī Shaiba*: 2852, Maktabat al-Rushd, Riyadh, 1<sup>st</sup> Edition 1989.

<sup>229</sup> Albani, Muḥammad Naṣir al-Dīn. *Da'if al-Jāmi' al-Ṣaghīr* 1/117, narrative: 258, al-Maktab al-Islāmī, Beirut, 2<sup>nd</sup> Edition 1979.

<sup>230</sup> *Al-baḥr al-Rā'iq* 3/139.



### 3.3 Who has the Right in *Kafā'a*?

We previously mentioned that according to the Ḥanafī school, if the adult woman of sound mind initiates her own marriage to an 'unfit' husband without prior consent of her kindred guardian, then the marriage is unsound, and her guardian has the right to reject it and demand nullification. If the guardian other than the father who is not commonly known of his ill choice initiated the marriage of his ward to an unfit husband, then the marriage shall be deemed unsound. The conclusion here is that the competence is the right of the woman and her guardians, and both enjoy this right independently so if the woman forfeits her right to competence, then the right of the guardian shall not be dropped and vice converse.

Based on this, if she married a man without investigating his suitability and later found him to be 'unfit', then she may not ask for the dissolution of the marriage, because she forfeited her right by default. But, her guardian retains the right to demand the nullification of the marriage because he did not forfeit that right.

It is stated by the Mālikī school that: if the woman accepted an unsuitable husband and her guardian did not agree, then the marriage may be dissolved before its consummation, but not afterwards.<sup>231</sup>

The Ḥanafis perceive that the right of the guardian to dissolve the marriage remains until the woman is pregnant or she delivers the baby if she is already pregnant. Once she becomes apparently pregnant or gives birth then the right of the guardian is dropped.<sup>232</sup>

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<sup>231</sup> *Dusūqī* 2/249.

<sup>232</sup> *Al-Baḥr al-Rā'q* 3/139.

If her guardian initiated her marriage to a man upon her consent and permission without investigating his status and then his incompetence is disclosed; the guardian and the wife have no right to reject the marriage, because they forfeited this by default.<sup>233</sup>

However if she stipulated the fitness of the husband in the marriage contract and she was misled by deceptive statements that claimed his competence, her right to object and demand to annul the marriage shall not be dropped, because it is not her nonfeasance.<sup>234</sup>

According to *Shr'ā*: if the marriage of the adult woman was initiated to an unfit person by her guardian or by proxy without her knowledge of his status, then she has the option to dissolve the marriage. But if she married herself to an unfit husband, then she has no choice. If the adult woman married through her guardian upon her consent, if her husband had no background of his social status and she knew him to be unfit, then she and her guardian have no choice.<sup>235</sup>

In the case of numerous guardians and different levels of kindred such as father, brother, and uncle etc, the right of nullification and objection shall be that of the nearest lineage if the husband is not a proper and suitable match. If they are of the same level as brothers, it shall be as a single whole guardianship for each of them, so if one accepts, then the others have no right to object or demand a dissolution.<sup>236</sup> This is the opinion of Abū Ḥanīfa and Muḥammad. Abū Yūsuf who opines that: the right is confirmed as a shared one for the brothers, if forfeited by one of them, the right of objection remains with the others. Perhaps the opinion of Abū Ḥanīfa and Muḥammad is the preponderant one.<sup>237</sup>

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<sup>233</sup> *Al-Baḥr al-Rā'iq* 3/137.

<sup>234</sup> *Al-Baḥr al-Rā'iq* 3/137; *al-Dur al-Mukhtār* 3/85

<sup>235</sup> See: Badrān 165.

<sup>236</sup> Ibn al-Humām, Muḥammad b. 'Abd al-Wāḥid al-Siyūsī. *Fath al-Qadīr* 3/294, *al-Tejāriyya al-Kubrā* Bookstore, Egypt, N.D.

<sup>237</sup> *Fath al-Qadīr* 3/294, *al-Baḥr al-Rā'iq* 3/138.



Regarding the B.P. it did not state the issue of 'fitness' except in Article (17), which stated that: competence in marriage is a private right for the woman and the guardian. This fails to mention the analogy for their *kafā'a* and when it should be considered, The same goes for the M.D., Article (14) which states the identical text, This is a clear shortcoming that should be addressed prior to approval of the B.P. for application in the courts. However, the K.L. outlines a number of relevant articles:

Article (34): it is a condition in marriage that the man shall be the proper and suitable match for the woman at the time of writing the contract, otherwise the right to annul the marriage shall be reserved for the woman and her guardian.

Article (35): consideration in marriage shall be given to the righteous in religion. The explanatory memoranda states that: it is sufficient in faith and a sign of justice that no chaste person shall be married to a reckless and dissolute one; and it deals with good manners, particularly those which are required by the nation in its political, social and economic life.

Article (36): the suitability between the couple is considered to be the right of the wife alone.

Article (37): the guardian for competence in marriage is conferred by kinship; to the father, the son, the grandfather of kindred, then the brother, then to the uncle, then to a father.

Article (38): if a man claims competence in marriage and this remains unproven, then the wife and her guardian have the right to dissolve the marriage.

Article (39): the right of nullification is dropped due to the wife's pregnancy or upon her prior consent or the elapse of one year after being informed by marriage, as stated by the Hanafī school.

The aforementioned articles are a definite improvement on those of the B.P. and the M.D.

In conclusion it is evident that equality between spouses is important to the cementing of a stable and secure relationship. Generally, the choosing of a partner who is not suitable due to disparity in faith, behaviour or status etc. can lead to potential problems in the future. Islamic law prescribes equality between the genders and therefore it follows that both *walī* and ward should share decision-making rights related to prospective marital partners.



## Chapter IV

### Enjoyment Marriage (*Nikāḥ al-Mut‘a*)

#### 4.1 The Notion of Enjoyment Marriage (*Nikāḥ al-Mut‘a*)

#### 4.2 The Judgment of *Nikāḥ al-Mut‘a*

This chapter aims to examine a kind of non-permanent marriage recognised in the *Ja‘farī* Courts with a view to establishing whether or not such an arrangement can fulfill the ‘tranquility’, ‘love’ and ‘mercy’ prescribed by God.<sup>238</sup> This partnership is called ‘enjoyment marriage’ (*nikāḥ al-mut‘a*).

#### 4.1 The Notion of Enjoyment Marriage (*Nikāḥ al-Mut‘a*)

Literally, “enjoyment”, used in Islamic law in the sense of temporary marriage (*nikāḥ mu‘aqqat*) (according to the Arab lexicographers “marriage of pleasure”), indicates a marriage that is contracted for a fixed period and entails payment of a fee to the woman. Prior to Islam, temporary marriage was already common among the Arabs in the 4<sup>th</sup> century A.D. This may be referred to as *mut‘a*, whereby it was customary for the woman to bring a lance and tent to the man and then leave if desired after the specified period had elapsed.<sup>239</sup> In such an arrangement the male enters in a marriage contract with the female by vocalizing a formula that specifies a time limit, such as: “I will enjoy relations with you for a ... (period of time); or in the case of an indefinite period: “until the

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<sup>238</sup> Al-Rūm, XXX: 21

<sup>239</sup> Heffening, W. The New Encyclopaedia of Islam VII: 757.

termination of my residence in that country”, against a fixed amount of money. The woman merely has to reply: “I accept”. Once the definite time limit or indefinite residence period is over, they part company; the contract having no repercussions on either party.

This type of relationship is accepted by the *Ja'fārī* Courts; a fact that results in numerous difficulties and family disputes. Some permanently married women have experienced enjoyment Marriage with other men either inside or outside Bahrain and figuratively speaking this has placed them under the matrimonial authority of more than one man; replicating the polyandry prevalent in the pre-Islamic period.

In some cases the contract is convened by the two parties themselves, with referral to neither judge nor any official authority. The man may simply say: “I want to enjoy you for a week or a month” and she replies: “I accept.” After this unofficial verbal statement, they consummate the marriage as spouses and the relationship is subsequently terminated by the end of the prescribed period. Al-Ayām daily newspaper<sup>240</sup>, reported the story of a 19-year old girl who married three husbands at a time by *nikāḥ al-mut'a*, whilst being officially married to a fourth.

This type of contract is most frequently entered into when distant travel is involved and it only requires an oral request on the part of the man and the tacit approval and consent on the part of the woman.

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<sup>240</sup> On May 16<sup>th</sup> 2001, Issue No: 4456.



## 4:2 The Judgment of *Nikāḥ al-Mut'a*.

The Prophet only permitted *nikāḥ al-mut'a* for his companions in certain circumstances while they were away from their wives for a long period. Salama b. al-Akwa'<sup>241</sup> narrated from his father: "The Prophet licensed *nikāḥ al-mut'a* for three days, then he forbade it."<sup>242</sup> This proves conclusively that he prohibited such a procedure; the previous permission being abrogated (*nusikha*)<sup>243</sup>. It has been narrated that this prohibition occurred on six occasions: the first during the Khaybar battle, the second in Tabūk, the third on Mecca Conquest Day (*yawm al-fath*), the fourth later in the same year, the fifth during the "Fulfillment Umarah" (*'umrat al-qadā'*) and the sixth during the welfare pilgrimage (*hajjat al-wadā'*)<sup>244</sup>.

The opinion of scholars varies in their judgment of Enjoyment Marriage. The majority of *Ṣaḥāba* and scholars - except the *Twelver Shī'ī* - deem it to be void and non-binding, citing the following evidence:

1. The Qur'ān states: "*Who guard their modesty*"<sup>245</sup>. *Except with those joined to them in the marriage bond, or (the slaves) whom their right hands possess, - for (in their case) they are free from blame. But those desires exceed those limits are transgressors*"<sup>246</sup> God

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<sup>241</sup> Salama b. 'Amr b. al-Akwa' Abū 'Āmir (d. 74/693) . An one of the Prophet gusty warriors. Bastī, Muḥammad b. Ḥibbān. *Mashāḥir 'Ulamā' al-Amṣār*, Dār 'Ālam al-Kutub, Beirut 1959.

<sup>242</sup> Muslim: 1405.

<sup>243</sup> It is a verb of *naskh*: (lit. "deletion", "abrogation" or "coping", "transcription"). The principle by which certain verses of the Qur'ān abrogate (or modify) others, which are then called *mansūkh* ("revoked"). What is generally at issue is the modification of a universal meaning by a more specific one, a modification caused by an historic change of circumstance. It is also a question of the "style" natural to a Divine revelation, which cannot speak with clauses, exceptions and qualifications in the manner of a legal document, but must be direct and absolute statement may condition another set of direct and absolute statement which are thereby rendered *mansūkh*, or conditional; the original statement is not untrue, but is subordinated to another which is more immediately relevant, in this way, by *naskh*, or self-limitation, the "absoluteness" of Qur'ā accommodates itself to the relativities of the human situation. The Qur'ān itself speak of the principle in II:106 and XVI:101. Smith 298.

<sup>244</sup> Al-Ghandur 160.

<sup>245</sup> The Muslim must guard himself against every kind of sex abuse or sex perversion. 'Alī 844.

<sup>246</sup> Al-Mu'minūn, XXIII: 5-7 and al-Ma'ārij, LXX: 29-31.

has permitted the enjoyment of permanent lawful marriage, or (the slaves) as right hands possessed. Hence a temporarily married woman is neither recognized as a wife nor possessed as slave. She has no legal rights and accordingly she will not inherit and can depart with no official divorce. She is not regarded as a slave and therefore this marriage is textually prohibited.<sup>247</sup>

2. Sabura al-Juhanī<sup>248</sup> narrated that the Prophet stated: “*O people, I had permitted you to contract temporary marriage with women, but Allāh has forbidden it as from now until the Day of Resurrection. So he who has any woman with this type of marriage, should let her go, and should not take back anything which he gave her.*”<sup>249</sup>

3. ‘Alī b. Abī Tālib<sup>250</sup> narrated that on the day of Khaybar, the Prophet prohibited both *nikā al-mut‘a* and the consumption of donkey flesh.<sup>251</sup>

4. Abū Hurayra<sup>252</sup> narrated that the Prophet stated: “*Proper marriage, divorce, specified waiting period (‘idda), and inheritance (mīrāth) are conditions that have cancelled the validity of enjoyment marriage*”<sup>253</sup>

It was reported that ‘Alī stated: “by Allāh, if I know anyone who is ‘enjoying’ outside his permanent marriage, he will be stoned”<sup>254</sup>, and he said to Ibn ‘Abbās<sup>255</sup>: “You are wrong, the Prophet prohibited enjoyment marriage.”<sup>256</sup>

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<sup>247</sup> See: Ghandūr 88.

<sup>248</sup> Sabura b. Ma‘bad b. ‘Awsaja b. Ḥarmala b. Sabura al-Juhanī Abū Thariyya. He participated in Khandaq battle and all the subsequent ones. He died in Mu‘āwiya’s rule. *Al-Iṣāba* 3/31.

<sup>249</sup> Muslim: 1406.

<sup>250</sup> B. ‘Abd al-Muṭṭalib, Abū al-Ḥasan (23 BH-40/599-661). The Fourth of the Patriarchal Caliph. He was born in Mecca and was the second person to accept Islām after Khadīja. He was very eloquent and knowledgeable. In the year 35/656 he became the Caliph. On the 17<sup>th</sup> of Ramaḍām he was assassinated. 586 *ḥadīth* were transmitted by him. *Al-A‘lām* 4/294.

<sup>251</sup> Bukhārī: 3979, Muslim: 1407.

<sup>252</sup> ‘Abd al-Raḥmān al-Dawsī (21 BH-59/602-679). A Companion. He memorised more *ḥadīths* than any of the Companions. From him was recorded 5374 *ḥadīth*. He died in Madīna. *Al-A‘lām* 3/308.

<sup>253</sup> *Al-Sunan al-Kubrā*: 13956, al-Dārquṭnī: 54, Abū Ya‘lā, Aḥmad b. ‘Alī b. al-Muthannā, *Musnad Abī Ya‘lā*: 6625, Dār al-Ma‘mūn lil-Turāth, Damascus, 1<sup>st</sup> Edition 1984.

<sup>254</sup> That ‘Umar b. al-Khaṭṭab saying, Muslim: 2135.



Nawawī stated: “prohibition and permission were made twice, it was permitted before the Khaybar battle, then prohibited at the Khaybar battle and then permitted on Mecca’s Conquest Day when it was a time of war. After three days from then, it was permanently forbidden until the Day of Resurrection.”<sup>257</sup>

Ḥasaballah stated: “The Prophet permitted Enjoyment Marriage by Allāh’s order for a provisional necessity as an exception from the whole Qur’ānic origin- as he suspended the punishment of stealing at war– but then he prohibited *nikāḥ al-mut’a* exclusively after Mecca’s Conquest. Some people understood that the Prophet’s prohibition of *nikāḥ al-mut’a* at a certain time proves his previous permission. This is flawed reasoning; creating misunderstandings that will be examined later. In all sound *ḥadīth* there is no evidence that *nikāḥ al-mut’a* was permissible and the fact that there were repeated prohibitions may indicate that such relationships were still apparent and people needed a reminder to desist. The prohibition of adultery in the Holy Qur’ān does not signify a pre-permission of the same.”<sup>258</sup>

Zufar, a Hanafī scholar, disagreed with the majority and stated: “who conducts an enjoyment marriage, his marriage would be permanent”, he believes that mentioning adjournment in the contract is a defective and void condition but the marriage shall be sound.”<sup>259</sup>

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<sup>255</sup> Abū al-‘Abbās ‘Abdullāh b. ‘Abbās b. ‘Abd al-Muṭṭalib (3 BH-68/619-687). He was a prominent companion and very knowledgeable. He was born in Mecca. He accompanied the Prophet and transmitted from him many *Ḥadīths*. Bukhārī and Muslim recorded 1660 *Ḥadīth* from him. He died in Ṭā’if. *Al-A‘lām* I 4/95.

<sup>256</sup> Nisā’I: 3365.

<sup>257</sup> *Sharḥ Ṣaḥīḥ Muslim* 5/201.

<sup>258</sup> Ghandūr 89.

<sup>259</sup> ‘Asqalānī, Aḥmad b. ‘Alī b. Ḥajar. *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Imām al-Bukhārī* 9/173, Dār al-Manār, Cairo, 1<sup>st</sup> Edition 1999; *Sharḥ Ṣaḥīḥ Muslim* 9/179.

The *Shī'ī's* opinion: they see it as permissible and call it the "discontinued marriage" (*nikāḥ munqaṭi'*) because marriage, to them, is of two types: permanent (*dā'im*) and discontinued (*munqaṭi'*). The permanent marriage has specific prerequisites while the ceased marriage is *nikāḥ al-mut'a*. They define it as: "A marriage contract between two well known parties for a fixed period and a fixed dowry stated in the text of the contract". Once the term is over the bond is untied without need of divorce, the wife shall enter into a waiting period of two menstrual cycles or 45 days if she no longer menstruates.

If her husband dies before the end of the waiting period, her husband's death waiting period, which is estimated as four months and ten days, shall be either added or extended till the delivery of birth— in case of pregnancy, anyway the longest term of either period is applied. A child from a ceased marriage has the same full rights of inheritance and maintenance as that of a permanent marriage. Imām Ja'far al-Ṣādiq once was asked about the offspring from enjoyment marriage, he said: "he is his child". The *Shī'a* see no limit for the number of wives for the enjoyer, the man has the right to enjoy with any number of women, they have other narratives that allow only four in *nikāḥ al-mut'a*, which is exactly the case in permanent marriage. Among these: "Imām Ja'far al-Ṣādiq was once asked about *nikāḥ al-mut'a*? He said: "It is as identified as four".

"They abhor *mut'a* with virgins; once Imām Ja'far al-Ṣādiq was asked about *nikāḥ al-mut'a*? He said: "leave the virgins, it is so hard matter."<sup>260</sup>

Their proof is based on the following:

1. The Qur'ān states: "*Seeing that ye derive benefit from them, give them their dowers (at least) as prescribed.*"<sup>261</sup> In other words, Allāh has obliged the husband to grant the wife

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<sup>260</sup> Maghniyya, Muḥammad Jawād. *Fiqh al-Imām Ja'far al-Sādiq* 5/246, dār Ṣādir, Beirut 1987.

<sup>261</sup> Al-Nisā', IV: 24.



her rights against the sexual enjoyment, they interpreted the word “*ajr*” as “remuneration” which they see as being different from dowry (*mahr*) and thus *nikāḥ al-mut‘a* is different from the permanent, whereas remuneration is against the enjoyment, hence they concluded that the verse denotes the license of *nikāḥ al-mut‘a*. They narrated another version of recitation to this verse by Ibn ‘Abbās, ‘Umrān b. al-Ḥuṣayn<sup>262</sup> and Ibn Mas‘ūd<sup>263</sup> as follows: “*Seeing that ye derive benefit from them (for a fixed period), give them their dowers (at least) as prescribed.*” ‘Umrān b. al-Ḥuṣayn maintained: “The verse of enjoyment was revealed in Allāh’s book, we applied it during the lifetime of the Prophet it was not repealed by another revelation and the Prophet did not prohibit it until he passed away.”<sup>264</sup>

2. It was narrated by Ibn Mas‘ūd: “we were fighting alongside the Prophet; our wives being left behind. We said to him: “*should we castrate ourselves?*” The Prophet forbade us to do so. He then allowed us to marry women against a garment as a dowry for a prescribed period of time<sup>265</sup> and ‘Abdullāh then recited this Verse: “*O ye who believe! Make not unlawful the good things which Allāh hath made lawful for you.*”<sup>266</sup>

3. Jābir b. Abdullāh<sup>267</sup> narrated: “we contracted *nikāḥ al-mut‘a* for some days for a handful of dates or flour as dower during the lifetime of the Prophet and during the time of Abū Bakr<sup>268</sup> until ‘Umar forbade it in the case of ‘Umar b. Ḥurayth.”<sup>269</sup>

<sup>262</sup> (d. 52/672). One of the Prophet’s Companions. Ibn Ḥajar, *Al-Iṣāba* 4/705.

<sup>263</sup> (d. 33/653). A Companion of the Prophet and an early convert. Some remnants of this variant have survived, but it was condemned by Mālik b. Anas, who declared that prayer performed by an Imām who recited Ibn Mas‘ūd version of the Qur’ān was invalid. Smith 173-174.

<sup>264</sup> Ṭabarsī, al-Faḍl b. al-Ḥasan. *Tafsīr al-Tibyān* 3/162, Tahrān University, 3<sup>rd</sup> Edition 1992; Qummī, ‘Alī b. Ibrāhīm. *Tafsīr al-Qummī* 1/135, Dār al-Kutub, Irān, and he said: ‘this saying narrated from Ja‘far al-Ṣādiq’. He said (Ja‘far), “This Verse is prove of *al-Mut‘a*”.

<sup>265</sup> *al-Sunan al-Kubrā*: 13191.

<sup>266</sup> Al-Mā‘ida, V: 87.

<sup>267</sup> B. ‘Amr b. Ḥarām al-Khazrajī al-Anṣārī (16 A.H.- 78/ 607-797). He narrated 1540 *ḥadīth*.

4. *Nikāḥ al-mut‘a* is proved by a conclusive *ḥadīth*, but narrations about abrogation are merely hypothesis for their contradiction, and what is proved as certainty can not be dismissed for doubts.

5. Prohibition of *nikāḥ al-mut‘a* by some Companions- as ‘Umar did- was a refuted individual legislation because it could be an independent opinion or circulated by narration,<sup>270</sup> thus they see such independent opinion is void due to its contradiction with a text, and if it was by narration they argue that how such matter was concealed from companions at the time of the Prophet, all the period of the Caliphate of Abū Bakr and part of ‘Umar’s? They added: “The prohibition of *nikāḥ mut‘a* was made by ‘Umar and they quoted his words: “Two enjoyments-at the time of the Prophet- were permissible, and I prohibit them and punish the transgressors”.

6. It was narrated that a man asked Ibn ‘Umar about *nikāḥ al-mut‘a*, he said: “It is permissible” then the man said: “But your father prohibited it”, Ibn Umar said: “If my father prohibited it while the Prophet enacted it, should we abandon the *Sunna* and follow my father?”<sup>271</sup>

These evidences are refuted as follows:

- With regard to their conclusion regarding the Qur’ānic verse (IV: 24):
  - a. The sound meaning is: those of you who have married and enjoyed sexual relations according to what Allāh has permitted for you, then your duty is to

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<sup>268</sup> Ṣiddīq, ‘Abdullāh b. Abī Quḥāfa (d.13/634). The First Caliph, who held together the Muslim community after the death of the Prophet and consolidated Islam’s victories in Arabia. He was the second, after Khadīja, to believe in the mission of the Prophet and accompanied him on his *Hijra* from Mecca. Celebrated as being the closest personal friend of the Prophet and as having an unswerving loyalty to him and as unshakeable belief in every aspect of the prophetic mission, he was known as al-Ṣiddīq “the faithful”; he replaced the Prophet as Imām to lead the prayers during the Prophet’s last illness. Smith 19.

<sup>269</sup> Muslim: 2497.

<sup>270</sup> Maghniyya, Muḥammad Jawād. *Tafsīr al-Kāshif* 2/291, Dār al-‘Ilm lil-Malāyyīn, Beirut, 3<sup>rd</sup> Edition, 1981.

<sup>271</sup> Turmudhī: 824 by different pronunciation.



give your wives their full dowry as prescribed. Ṭabarī<sup>272</sup> narrated that Ibn ‘Abbās interpreted the verse thus: “If one of you married a woman and had sexual intercourse only once with her, you must pay her full dower”.<sup>273</sup> Thus the verse assures its fulfillment as per the consummation of the marriage and enjoyment not only convening the contract. Qurṭubī<sup>274</sup> maintained: “remunerations: dowers and he named the dower as remuneration because it is paid in exchange for enjoyment.”<sup>275</sup> Ibn Kathīr<sup>276</sup> stated: “As you enjoy sexual relations, pay them their dowry against that.”<sup>277</sup> Jaṣṣāṣ<sup>278</sup> confirmed: “The dowry is called remuneration because it is a compensation in return for enjoyment and what proof that the very meaning is dowry it is mentioned exclusively to those desiring chastity by marriage in accordance with the Qur’ānic statement: “...*All others are lawful, provided you seek* (them in marriage) *with Mahr* (bridal-money given by the husband to his wife at the time of marriage) *from your property, desiring chastity, not committing illegal sexual intercourse...*”,<sup>279</sup> “*Wed them with the permission of their own folk* (guardians or masters *awliyā*) *and give them their mahr according to what is reasonable;*

<sup>272</sup> Abū Ja‘far Muḥammad b. Jarīr b. Yazīd al-Ṭabarī (224-310/839-923). A prominent historian and *mufasssīr*. He was born in Ṭabaristān. He lived in Baghdād where he died. He refused to be a judge. *Al-A‘lām* 4/69.

<sup>273</sup> Ṭabarī, Muḥammad b. Jarīr. *Jamī‘ al-Bayān ‘an Ta’wīl Āyī al-Qur’ān (Tafsīr al-Ṭabarī)* 5/11, Muṣṭafā al-Bābī al-Ḥalabī Printing, Cairo, 2<sup>nd</sup> Edition 1954.

<sup>274</sup> Muḥammad b. Aḥmad b. Abī Bakr b. Farah al-Qurṭubī Abū ‘Abdullāh (d.671). A Mālikī scholar and *mufasssīr*. *Al-A‘lām* 5/193.

<sup>275</sup> Qurṭubī, Muḥammad b. Aḥmad al-Anṣārī. *Al-Jāmi‘ li-Aḥkām al-Qur’ān al-Karīm (Tafsīr al-Qurṭubī)* 5/129, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 2<sup>nd</sup> Edition 1967.

<sup>276</sup> Ismā‘īl b. ‘Umar b. Kathīr al-Baṣrāwī al-Dimashqī Abū al-Fidā’ ‘Imād al-Dīn (701-774/1302-1373). A prominent historian, *mufasssīr* and Shāfi‘ī scholar. *Al-A‘lām* 1/320.

<sup>277</sup> Ibn Kathīr, Ismā‘īl b. ‘Umar. *Tafsīr al-Qur’ān al-‘Aẓīm (Tafsīr Ibn Kathīr)* 6/475, Dār al-Fayḥā’, Damascus, 1<sup>st</sup> Edition 1992.

<sup>278</sup> Abū Bakr Aḥmad b. ‘Alī al-Rāzī al-Jaṣṣāṣ (305-370/917-980). A honourable man from Rayy, and a prominent Ḥanafī scholar. He lived and died in Baghdād. *Al-A‘lām* 1/171.

<sup>279</sup> *Al-Nisā*, IV: 24.

*they* (the above said captive and slave-girls) *should be chaste, not adulterous, nor taking boy-friends.*<sup>280</sup> Allāh mentioned chastity just subsequent to marriage, and called the *mahr* as recompense.”<sup>281</sup> Zaijjāj<sup>282</sup> stated: “some people greatly misinterpreted this verse due to lack of language knowledge, thus they interpreted the word “*mut‘a*” as enjoyment, a matter which the knowledgeable scholars unanimously agreed on as prohibited, in the verse “... *so with those of whom you have enjoyed...*” while it means: with those of whom you have enjoyed according to the sound marriage contract, give them their remuneration according to what is prescribed i.e. *Mahr*”, once the enjoyment is fulfilled by consummated marriage then full payment of the dowry is due, and half of the dowry is outstanding upon enjoyment of the marriage contract.”<sup>283</sup> In addition, the context of the verse and verses preceding it, deals with legitimate permanent marriage and has nothing to do with enjoyment marriage.

- b. The Qur’ān expressively described the dowry as remuneration to denote its being offered against a benefit for the husband. Such expressions are familiar in the Qur’ān, for instance: “*O Prophet (Muḥammad) Verily, We have made lawful to you your wives, to whom you have paid their dowry.*”<sup>284</sup>
- c. The conclusion with regard to the reading of Ibn ‘Abbās, ‘Umrān b. al-Ḥuṣain and Ibn Mas‘ūd, this is a solo (*āḥād*) irregular (*shādhah*) narration which do not

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<sup>280</sup> Al-Nisā’, IV: 25

<sup>281</sup> Jaṣṣāṣ, Abū Bakr Aḥmad b. ‘Alī. *Aḥkām al-Qur’ān* 3/106, Dār al-Kutub al-‘Ilmiya, Beirut 1995.

<sup>282</sup> Ibrāhīm b. al-Sarīy b. Sahl, Abū Ishāq (241-311/ 855-923). A scholar of Arabic grammar and language. *Al-A‘lām* 1/40.

<sup>283</sup> Ibn Manẓūr, Muḥammad b. Makram. *Lisān al-‘Arab* 8/329, Dār Ṣādir, Beirut, 2<sup>nd</sup> Edition 1997.

<sup>284</sup> Al-Rūm, XXX: 50.



prove the Qur'ān, it can only be proved by tradition and successive (*twātur*) narration.<sup>285</sup>

- d. Their conclusion regarding the saying of 'Umrān Ibn al-Ḥuṣain includes alteration and deletion of some words and expressions that indicate the sound meaning. The correct text is: "the verse on enjoyment marriage in the Qur'an (he means the 'Umrah-pilgrimage combination (*mut'at al-hajj* or *hajj al-tamattu*) was also prescribed by the Prophet. There was no further revealed text to invalidate the 'Umrah-pilgrimage combination and the Prophet never prohibited it to the day he died."<sup>286</sup>
- Jābir's narrative can be interpreted as follows: those who practiced enjoyment during the time of 'Umar and Abū Bakr did not know about the verse being repealed, and the expression: (until 'Umar forbade it) means: till he was informed by the abrogation.<sup>287</sup>
  - Regarding their conclusion that the enjoyment marriage is only proved by conclusive evidence and all narrations, about the verse being repealed, were hypothetical, and that conclusive evidence can only be abrogated by a conclusive one is also rejected, because the very persons who had narrated it as permitted signified the opposite later on. There were a number of traditional narrations by companions about its prohibition and no one denied that. Even Ibn 'Abbās who was believed to deliver a formal legal opinion (*fatwa*) in this regard as permissible was thought to retreat than his opinion later<sup>288</sup>, he clarified his intention as

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<sup>285</sup> *Sharḥ Ṣaḥīḥ Muslim* 9/179.

<sup>286</sup> Muslim: 1226.

<sup>287</sup> *Sharḥ Ṣaḥīḥ Muslim* 9/183.

<sup>288</sup> *Fatḥ al-Bārī* 9/171; Subā'ī 1/83.

follows: It is allowed in compulsory situation as the case of eating dead meat, blood, and the flesh of swine.

- Regarding the contradiction in narrations, this is a mistaken claim. It is likely to prohibit a matter in a given time and to prohibit it once more in a different time for the sake of confirmation or to circulate it so that every one be aware, consequently some narrators were informed in a time different than the others, in this way each group transmitted what they had heard relating that to specific timing.<sup>289</sup>
- It is odd that they mentioned some narratives included in the *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim* to prove its permission, meanwhile they denied all narrations– the biggest in number– which state the prohibition and abrogation of the previous judgment. Moreover they included the same narrations after altering and deleting whatever signifies the repealing and abrogation.<sup>290</sup> For instance to mention some: Salma b. al-Akwa' narrated that the Prophet said, *"whenever a man and woman are consenting, then if they enjoy each other for a period of three nights, it is their decision whether to continue or separate."* Salama said: then I do not know is it thing was to us specially or to all people? Abū 'Abdullāh said: *"Alī clarified it from the Prophet that this is repealed (mansūkh)"*.<sup>291</sup> Saburah al-Juhanī narrated that while he was with the Prophet he said: *"O people, I had permitted you to contract temporary marriage with women, but Allāh has forbidden it as from now until the Day of Resurrection. It is not lawful for you, (men), to take back any of*

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<sup>289</sup> *Sharḥ Ṣaḥīḥ Muslim* 9/179.

<sup>290</sup> See: *Tafsīr al-Kāshif* 2/291.

<sup>291</sup> *Bukhārī*: 4827.



*your gifts (from your wives).<sup>292</sup> And in another narrated: “It is a prohibition from your day this to the Day of Resurrection.”*

- Regarding their claim that ‘Umar had prohibited it according to his own independent opinion is incorrect. It was narrated that ‘Umar stated: The Prophet permitted enjoyment marriage on three occasions, then prohibited it, by Allāh I have no knowledge of any contracted temporary marriage and he married I will stoned him, except that he comes me by four witnesses that the Prophet permitted it after he prohibited it.”<sup>293</sup> ‘Umar did not make an independent opinion in this issue but confirmed its prohibition according to the Prophet’s words. No sound narrations transmitted that enjoyment marriage was permissible during the time of Abū Bakr or ‘Umar.
- Shawkānī stated, “what they mentioned regarding some Companions who practiced enjoyment marriage after the Prophet passed away is not a novelty; the judgment probably was unknown to some of the Prophet’s Companions, therefore ‘Umar declared the prohibition for the same reason and he referred that to the Prophet’s instruction when he realized that some companions were committing enjoyment.”<sup>294</sup>
- The correct text: “about Ibn Shihāb<sup>295</sup> that Sālim b. ‘Abdullāh<sup>296</sup> narrated: “That he heard a man from the al-Shām’s people when he was asking ‘Abdullāh b.

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<sup>292</sup> Muslim: 1406.

<sup>293</sup> Ibn Mājih: 1963.

<sup>294</sup> Shawkānī, Muḥammad b. ‘Alī. *al-Sayl al-Jarrār* 2/268, Dār al-Kutub al-‘Ilmiyya, 1<sup>st</sup> Edition 1985.

<sup>295</sup> Muḥammad b. Muslim b. ‘Abdullāh b. Shihāb al-Zuhrī (58- 124/ 678- 742). A famous follower and one of the memorizers of *Ḥadīth*. *Al-A ‘lām* 1/ 97.

<sup>296</sup> B. ‘Umar b. al-Khaṭṭāb al-Qurashī al-Adawī (d. 106/725). One of seven famous jurists in Medīna. a prominent *Tābi‘ī*. He died in Medīna. *Al-A ‘lām* 3/71.

‘Umar about the combination by the ‘Umra to the pilgrimage, then ‘Abdullāh said: “It is lawfulness...”

- Regarding their opinions regarding the unlimited number of wives for the enjoyer except the opinion of Imām Ja‘far al-Şādiq who limited them to four, divorce is not needed, no inheritance right between the spouses unless stipulated in the contract, the enjoyer is not entitled to pay maintenance and the waiting period is two menstrual cycles; all the above assured that this is not a marriage since it lacks the specifications and effects of permanent marriage.
- It is not the intention of marriage in Islamic law just to satisfy sexual desire, but as previously mentioned, it represents dwelling in tranquility, love and peace with wives and children, and the proper sustaining of the human race through reproduction. This cannot be achieved by a temporary and time-limited marriage but only through a permanent arrangement where both spouses feel stable and secure.

Therefore such marriage, which can lead to family and social disintegration, should be proscribed given that it is likely to resemble adultery or fornication that drives both sexes to satisfy their maximum sexual libido without the burden of financial and moral responsibility. From an Islamic perspective, it is impossible to conceive of a correctly functioning society without the stable family unit as its backbone.

The K.L. confirms the formula of the marriage contract as Article (10) states the following:

- a. They – i.e. acceptance and consent- shall be executable not denoting a time.



The explanatory memoranda states the following: the Law also pursues the opinion of the consensus of scholars in voiding enjoyment and temporary marriage, and regardless of Zufar's view of the Hanafis relating to the soundness of temporary marriage upon the cancellation of the timing, such marriage shall be void, because it is fundamentally similar to enjoyment marriage; both being adjourned marriages despite the utterance of the marriage formula and their being observed by witnesses. The intention of contracts is their purpose not their phraseology.

Also Article (20) of the B.P. and Article (22) of the M.D. both state as follows:

3) The acceptance and consent shall be executable.

However this paragraph requires explanation, as it is explained in the K.L., because execution includes other matters in addition to the enjoyment marriage, or the temporary marriage, for example: to put in the future and a condition is required for execution.

To conclude, it is evident that the notion of enjoyment marriage contravenes the fundamentals of Islamic law. Such an arrangement is detrimental to a stable social structure and cannot fulfill the objective of interest as specified by the text.

## CHAPTER V

### The Resolution of Disputes between the Spouses through Arbitration (*Taḥkīm*)

- 5.1 The Meaning of *Taḥkīm*
- 5.2 The Legitimacy of *Taḥkīm*
- 5.3 The Appointment of the *Ḥakamīn*
- 5.4 Ruling regarding the order of appointing the *Ḥakamīn*
- 5.5 The Conditions of the *Ḥakamīn*
- 5.6 Appropriate Timing for the Instigation of the *Taḥkīm* Process
- 5.7 The Purpose of the *Ḥakamīn*

Disputes between spouses can take on such magnitude that divorce may seem to be the only option. In many cases it is difficult for those involved to look objectively at the situation, but resolution is often possible with the mediation of a third party. Sometimes a subjective viewpoint is all that is needed to enable a couple to make a sensible decision whether to continue their relationship or not. This chapter aims to evaluate the role of *taḥkīm* in the resolution of marital disputes.

During my presence in Islamic courts attending sessions, I found that once the proceedings are initiated in a certain suit of breach between spouses— regardless of how breaches may vary— the court offers them a period of between 1 and 2 months and



adjourns the hearing session date accordingly. They are advised to attempt conciliation during this period, whether directly and mutually or by appointing other intermediaries from among their relatives. Initially it is a good step and upon the start of the second session, the chief judge will ask about the result of the adjourning step, regardless of the approach that has been utilized. Did they receive family-assisted reconciliation or advice from knowledgeable people? How competent were the assistants? It will become apparent if suitable means have been practiced and whether or not the breach between the couple has widened. It is worth-mentioning that in most such suits, the reason for disagreement is very simple and quite easy to address if the right solution is sought and the mediation of knowledgeable and experienced people is provided, especially where negligence of rights and obligation prevails between the spouses.

Currently, the procedures in the Islamic Courts tend to hinder the principle of arbitration between the spouses (*al-tahkīm bayna al-zawjīn*), this fact has the following impacts:

- The spouses are obliged to stand on the court platform and in front of a judge merely if any party files a suit against the other, however simple the case is. Bringing the case to the court may have unnecessary negative impact on both sides, specifically the defendant who could be driven to insist on separation out of rebellion.
- Resorting to courts will leave no room for amicable reconciliation with little opportunity left for that since the judge will allot only a few minutes to review the case. The venue itself, as a very formal and forbidding atmosphere exacerbates the tension. Finally the official style in handling the case is a somewhat unnerving experience.

- Excess pressure on judges due to the bulk of cases being filed, adds to the burden of their task to both investigate the reasons for breach and to attempt the achieving of reconciliation. In other words: they perform two missions: *taḥkīm* and jurisdiction (*qaḍā'*), crating the potential for the following negative impacts:
- Exhausting time and effort unnecessarily in simple suits that can be amicably solved by other approaches.
- Extending suits proceedings and hearing time and subsequently postponing many litigators to attain their rights.
- Adjourning the most crucial petitions, which no party other than the judge may decide on.

The important nature of this issue will be examined in some detail:

### 5.1 The Meaning of *Taḥkīm*.

Arbitrator (*ḥakam*) may be defined as one who settles a dispute (from *ḥakama*: to judge, from whence is derived also *ḥākim*: any holder of general authority, such as a provincial governor and, more precisely, the judicial magistrate). A synonym, also a technical term and in current use, is *muḥakkim* (from *ḥakkama*: to submit to arbitration, whence also *taḥkīm*, the procedure of arbitration or, more precisely, submission to arbitration).

*Taḥkīm* was the sole judicial procedure available to individuals who did not wish to exercise their right of private justice or who were unable to settle their differences by means of direct friendly agreement. This procedure was of a purely private character, depending throughout solely on the goodwill of the parties involved. In principle, they



chose their *ḥakam* freely, and the only binding force of the latter's decision was a moral one. Thus the arbitrator usually requested the parties in the dispute to hand over to him pledges which would ensure that his judgement was carried out.

Nevertheless arbitration requires a certain systematization and institutional character amounting to public justice in the fairs held periodically in various localities, such as 'Ukāz: a *ḥakam* was appointed there, to whom, by force of custom, recourse was made for the settlement of disputes arising from the transaction being carried out there.

This state of affairs survived in Arab society after the coming of Islam, for the Qur'ān maintained, in principle, the system of private justice; all the same, it recommends Muslims to submit their differences to the arbitration of the Prophet.<sup>297</sup>

A term first used in Islam to refer to Abū Musā al-Ash'arī and 'Amr b. al-'Āṣ (*al-ḥakamān*) when they arbitrated in the dispute between 'Alī b. Abī Ṭālib and Mu'āwiya b. Abī Sufyān<sup>298</sup> in 37/657.<sup>299</sup> As a terminology the meaning is similar to that literal context.

Ṭrābulṣī<sup>300</sup> stated: "It is permissible, if two disputing parties are agreed to abide by the arbitration of a third person."<sup>301</sup> Also it is the opinion of Ibn Farḥūn<sup>302</sup>. Shīrāzī<sup>303</sup> stated:

"it's permissible that two men may recourse to a third to act as arbiter and judge between them."<sup>304</sup> This is similar to the definition made by Ibn Qudāma as he stated: "if two

persons agreed to arbitrate a third who is qualified to decree a judgment, so it is

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<sup>297</sup> Tyan, E. The Encyclopedia of Islam III: 72.

<sup>298</sup> (d. 60/680). He became the sixth Caliph and founder of the 'Umayyā dynasty, having forced Ḥasan b. 'Alī, to abdicate. Smith 278.

<sup>299</sup> Ibn Manẓūr. *Lisān al-'Arab* 12/142.

<sup>300</sup> 'Alī b. Muḥammad al-Ṭrābulṣī al-Dimashqī, 'Alā' al-Dīn (950-1032/1544-1623). A Ḥanafī scholar. *Al-A'lam* 5/13.

<sup>301</sup> *Ma'īn al-Hukkām fīmā Taradada bayn al-Khaṣmayn min al-Aḥkām* 24, al-Bābī al-Ḥalabī Printing, Egypt, 2<sup>nd</sup> Edition.

<sup>302</sup> *Tabṣīrat al-Hukkām fī Uṣūl al-Aqḍīya wa Manāḥij al-Aḥkām* 1/55, Dār al-Kutub al-'Ilmiyya, Beirut, 1<sup>st</sup> Edition 1996.

<sup>303</sup> Ibrāhīm b. 'Alī b. Yūsuf al-Fayrīzābādī, Abū Ishāq (393-476/1003-1083). A prominent Ḥanafī scholar. *Al-A'lam* 1/51.

<sup>304</sup> *Al-Muḥadḍhab* 2/ 291.

permissible.<sup>305</sup> The Shāf'īs and Ḥanbalīs added one condition to that of the Ḥanafīs and Mālkīs, they stipulated the arbiter should be trustworthy for the arbitration on jurisdiction, which is applicable because the duty of arbiter is highly important and sensitive for the prevention of injustice. The same will be detailed later in "the conditions of arbiters".

## 5.2 The Legitimacy of *Tahkīm*.

The origin of legalizing the *tahkīm* is based on the Qur'ānic Verse: *"If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers"*<sup>306</sup>; *if they wish for peace, Allāh will cause their reconciliation.*<sup>307</sup> 'Uthmā b. 'Affān<sup>308</sup> has sent 'Abdullāh b. 'Abbās and Mu'āwiya b. Abī Sufyān to arbitrate between 'Aqīl b. Abī Ṭālib<sup>309</sup> and his wife Faṭīma b. 'Utba b. Rabī'a, Ibn 'Abbās said: "me and Mu'āwiyya were sent arbitrators, they said to us: if you see fit to unify the couple do so, and if you see fit to separate them, then do so."<sup>310</sup> It has been narrated: that a man and his wife came to 'Alī b. Abī Ṭālib with all of them a group from the people, then 'Alī said: what is a matter of these? They said: There is disunity

<sup>305</sup> *Al-Mughnī* 9/107.

<sup>306</sup> An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognize this plan in their legal systems. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties, and would be able, with Allāh's help to effect a real reconciliation. 'Alī 196.

<sup>307</sup> *Al-Nisā*, IV: 35.

<sup>308</sup> (d. 35/656). The third of the Four Patriarchal Caliphs (*al-khulafā' al-rāshidūn*), 'Uthmān was elected by a council called the *shūra*, which had been appointed by 'Umar as he was dying of the wounds inflicted by a disaffected slave. He was called "*dhū al-nūrayn*" ("he of the two lights") because he had, at different times, married two daughters of the Prophet, Umm Kulthūm, and Ruqayya. 'Uthmān ordered the compilation of Qur'ān from the memories of the Companions and such written records as existed, after which it was then edited and a definitive recession which bears his name, was copied and sent to the four corners of the Islamic Empire. Smith 412.

<sup>309</sup> The brother of 'Alī b. Abī Ṭālib (d. 60/680). *Al-A'lām* 4/ 242.

<sup>310</sup> *al-Sunan al-Kubra*: 14563; 'Abd al-Razzāq, Abū Bakr. *Muṣannaf 'Abd al-Razzāq* 11885, al-Maktab al-Islāmī, Beirut, 2<sup>nd</sup> Edition 1982.



between them. He read the previous verse, then ‘Alī said: Do you know what upon you? Upon you: if you saw fit to unify so unify, and if you saw fit to separate so separate. So the woman said: I accepted Allāh’s book, then the man said: as for the separation no, then ‘Alī said: you lied, by Allāh you will do not escape me until admit as she admitted.”<sup>311</sup>

### 5.3 The Appointment of the *Hakamīn*:

The Scholars differ in identifying the person who is addressed by the previous Qur’ānic verse, There are three opinions in this regard:

- The scholars of the four schools<sup>312</sup>: the verse is addressing a third person- the guardian or his heirs; they are the judges who only take hold of the power of judgment and execution. As the Qur’ānic verse: “*refuse to share their beds.*” (4:24) is addressing the husband as he is the only person entitled to admonish by refusing, to share her the bed and finally punish her. If these attempts were unsuccessful no other way but to refer the issue to the one who brings justice and executes his judgment on them i.e. the ruler (the judge) who may send two arbiters to bring conciliation.<sup>313</sup> They concluded that: it was narrated that Sa‘īd Ibn Jubayr<sup>314</sup> stated: “the recalcitrant (*nāshiz*) wife shall be admonished if she is not deterred by sleeping alone, if not deterred the matter should be raised to the ruler to appoint two arbiters, one from his family and one from hers”.<sup>315</sup>

<sup>311</sup> *Tafsīr al-Qurṭubī* 8/321.

<sup>312</sup> Khaṭīb, Muḥammad al-Sharbinī. *Mughnī al-Muḥtāj ‘ilā M‘rifat Alfāz al-Minhāj* 3/260, al-Bābī al-Ḥalabī Printing, Cairo 1958; *al-Mughnī* 8/166; *Badā’i’ al-Ṣana’i’* 2/334; *Ḥāshiyat al-Dusūqī* 2/305.

<sup>313</sup> See: Jaṣṣāṣ 2/190; Shawkānī, Muḥammad b. ‘Alī. *Tafsīr Faṭḥ al-Qadīr* 1/463, Dār al-Fikr, Beirut. N.D.; Ṣābunī, Muḥammad ‘Alī. *Rawā’ al-Bayān Tafsīr ‘āyāt al-Aḥkām Mina al-Qur’ān* 1/471, Dār al-Ṣābunī, Egypt, 1<sup>st</sup> Edition 1999.

<sup>314</sup> Asadī Abū ‘Abdullāh (45-94/ 665-714). A famous Follower. *Al-A‘lām* 3/93.

<sup>315</sup> *Tafsīr al-Ṭabarī* 8/319.

- Rāzī stated: the verse addresses every pious person in the nation, because the Qur’ān addresses everyone as he says: “*If you fear*” and does not restrict part of the people, this interpretation should have priority, then He says: “*appoint*” this should be interpreted as an order for individuals from the nation, the evidence here is whether being an *Imām* or not, other pious people may appoint arbiters from the righteous ones as long as it is a task to elevate harm and may be entitled by anyone.<sup>316</sup> They concluded what was narrated about Ibn ‘Abbās, regarding previous verse: “*and if you fear a breach between them*”, he said: “This happens when the relationship between a man and a woman breakdown, Allāh has ordered the appointment of a righteous man from his family and a similar one from hers to decide on the wrongdoer.”<sup>317</sup>
- The verse addresses both the man and the woman. Ṭabarī related this saying that Siddī<sup>318</sup> was reported to have said: “if he beats her and she returns to obedience then he has no right to seek against her means (of annoyance), if she refuses to conform, he shall appoint an arbiter from his family and she shall appoint an arbiter from her family”. However, he did not offer any textual evidence for this.<sup>319</sup>

Since the last opinion has not been proven so it is likely to be excluded, as for the other two opinions they are more acceptable since they are proven by evidence. Probably the first opinion that sees the guardian or his representatives from the judges and which is approved by consensus is preferred, because it more likely to bring justice as backed by

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<sup>316</sup> Rāzī, fakh̄r al-Dīn. *al-Tafsīr al-Kabīr* 5/95, Dār al-Fikr, Beirut, N.D.

<sup>317</sup> Shawkānī. *Tafsīr Fath al-Qadīr* 8/320.

<sup>318</sup> Ismā‘īl b. ‘Abd al-Raḥmān (d.128/745). Follower from Ḥijāz and life in Kūfa. *Al-A‘lām* 1/317.

<sup>319</sup> *Tafsīr al-Ṭabarī* 8/320.



power and authority of the position and the professional nature to decide on disputes, to the contrary, the pious and righteous people lack power to make decisions and judgment and have nothing to do more than advise.<sup>320</sup> It was evident that ‘Uthmān b. ‘Affān and ‘Alī were used to send arbiters and they did not leave that for the spouses or to any one of the Muslim folks. That was an evident that the guardian (ruler) or his agent is assigned to appoint the two arbitrators.<sup>321</sup>

#### 5.4 Ruling Regarding the Order of Appointing the *Hakamīn*:

It is permissible to appoint arbiters in case of dispute. Ibn Rushd claimed the consensus of scholars on that,<sup>322</sup> but it was not realistic as there is another opinion. That it is mandatory and required, which is the opinion of Bayjrumī, who is a *Shāfi‘ī* scholar<sup>323</sup>, and was attributed to Imām *Shāfi‘ī* as it a way of elevating prejudices, and one of the general duties on rulers. Some contemporary scholars such as Muḥammad Abū Zahra<sup>324</sup> and Muḥammad ‘Alī al-Ṣābunī agreed the same.<sup>325</sup> It was also an opinion that was thought to be outweighed based on the principle: “The issue is prescribed in origin unless otherwise is indicated by the context.

#### 5.5 Conditions of the *Hakamīn*:

<sup>320</sup> *Al-Mudawwana al-Kubrā* 2/226.

<sup>321</sup> *Al-Mudawwana al-Kubrā* 2/266.

<sup>322</sup> Ibn Rushd, Muḥammad b. Aḥmad. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* 2/74, Dār al-Fikr, Beirut 2002.

<sup>323</sup> Bayjrumī, Sulaymān b. ‘Umar. *Ḥāshīyat al-Bayjrumī ‘alā Manhāj al-Ṭalāq* 3/442, al-Maktaba al-Islāmiyya, Turkey. N.D.

<sup>324</sup> A famous scholar of Azhar in Egypt (1316-1394/1898-1974). He wrote more than 40 books. *Al-A‘lām* 6/25.

<sup>325</sup> See: *Al-Aḥwal al-Shakḥsiyya* 437; *Rawā‘i‘ al-Bayān* 1/471.

- Islam: the scholars agreed unanimously that a non-Muslim is not entitled to arbitrate between Muslims, whether he be Christian or Jew etc.<sup>326</sup>
- Justice: Shāfi'ī perceives justice and honorability as being prerequisite for arbiters, even if they are considered representatives and not arbiters, because the representative/agent even if appointed by the ruler should be honorable if appointed as a proxy for a child or a bankrupt person, consequently if the arbiter is a dissolute his judgment is deemed void, whether on divorce or return or divorce by remuneration.<sup>327</sup>
- Maturity and puberty: the consensus of scholars stipulated soundness of mind, because insanity and irrationality are not perceived to constitute competence to decide on such matters. Abu Hurayra narrated that the Prophet stated: “By Allāh, beware of the mouths of predators and the boy who has responsibility.”<sup>328</sup> Similarly, a child is not acceptable as a witness; therefore the arbitration of minors is impermissible.
- Knowledge of jurisprudence: knowledge of rulings concerned with marriage and divorce is paramount. Ibn Qudāma stated: “The consideration here is that they should be knowledgeable in marriage and divorce rulings since their rulings and deductions are based on their knowledge”<sup>329</sup>, “Consideration” here means stipulation.

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<sup>326</sup> Ḥaṭṭāb, Muḥammad al-Ṭarābulṣī. *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalī* 4/16, Maktabat al-Najāh, Libya. N.D.; Bahūtī, Maṣṣūr b. Yunis b. Idrīs. *Kashshāf al-Qinā' 'an Matn al-Iqnā'* 5/210, 'Ālam al-Kutub, Beirut 1983; *Hāshīyat al-Bayjrumī* 3/443.

<sup>327</sup> *Hāshīyat al-Dusūqī* 2/305.

<sup>328</sup> Aḥmad: 8302.

<sup>329</sup> *Al-Mughnī* 8/166.



The Shāfi'is differentiate between arbiters and agents; being arbiters they must be scholars, but based on the view of being agents they may be ordinary people. Shīrāzī stated: "If we say they are arbiters they must be knowledgeable people, if we say they are agents they may be ordinary people."<sup>330</sup>

- Being members of the spouses' family: appointing the arbiters from the families of the spouses is commendable as agreed by the unanimity of schools as it is permissible to appoint non-family members, but the former is preferable given that they are well informed about the situation and more interested in the couple's interest and trustworthy to maintain their privacy.

Ibn al-Humām<sup>331</sup> stated: "The priority is to appoint arbiters from their family as ordained by Allah and it is preferable because they are better informed about the hidden issues and more compassionate, and it was the opinion of Shāfi'ī and Aḥmad too."<sup>332</sup>

The Mālikīs did not allow appointing unrelated persons except when no one could be found from the spouses' family, Dusūqī stated: "non-related persons should not appointed be when there is a possibility of relatives, if this happened while it is possible to appoint from family members, then their judgment shall be questionable, and apparently void as it is apparently a prescribed condition according to the verse."<sup>333</sup>

Obviously as in the above, the scholars unanimously agreed that it is permissible to appoint other than the spouses' family members when no arbiters are found from their families, but when they are available, there is a different opinion for the majority of

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<sup>330</sup> *Al-Muḥadḍḥab* 2/90.

<sup>331</sup> Muḥammad b. 'Abd al-Wāḥid b. 'Abd al-Ḥamīd b. Mas'ūd al-Sīwāsī al-Iskandari, Kamāl al-Dīn known as Ibn al-Humām (790-861/1388-1457). One of great Ḥanafī scholar. He was knowledgeable in many Islamic sciences. He died in Cairo. *Al-A'lām* 6/255.

<sup>332</sup> *Fatḥ al-Qadīr* 3/223; *al-Muḥadḍḥab* 2/90; *al-Mughnī* 8/173.

<sup>333</sup> *Ḥāshiyat al-Dusūqī* 2/306; *Mawāhib al-Jalīl* 4/16.

scholars and the Mālikīs. The majority of scholars see it as permissible and meritorious while the Mālikīs see it as obligatory deduced from the apparent order in the verse: “*appoint (two arbiters)*” accordingly it is obligatory in this context unless otherwise indicated as ‘Uthmān deduced by analogy in the previous narration, when he appointed Ibn ‘Abbās as arbiter from Aqīl b. Abī Tālib’s family and Mu‘āwīyya as arbiter from the family of Aqīl’s wife Fātima bint ‘Utba<sup>334</sup>.

- Being the spouses’ neighbors: the Mālikīs solely see neighborhood as recommended as such people are able to address confidential matters and points of differences and subsequently they are most capable to resolve the matter.<sup>335</sup>
- Gender: The Mālikīs and Ḥanābalīs stipulate that arbiters must be male. Ibn Qudāma stated: “should be males because the matter needs reasoning and insight”<sup>336</sup>, based on this if the judge appointed a woman as arbiter her judgment is void.

The Ḥanafīs refuted this opinion and made female arbitration permissible. ‘Alā’ al-Dīn al-Ṭrābulī stated: “anyone whose testimony is accepted in a matter he may possibly be an arbiter on it, otherwise not, and the woman can be appointed as an arbiter.”<sup>337</sup>

As for the Shāfi‘īs, some see masculinity as obligatory,<sup>338</sup> others say it is recommendable<sup>339</sup> *Sunna* and consider appointing a woman for arbitration as permissible. Some contemporary scholars argue in their opinion that: “A woman is not permissible to be appointed as a judge and similarly arbitration, it has to be noted that this position does

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<sup>334</sup> She is a sister of Hind b. ‘Utba, who is Abū Sufyan’s wife and Mu‘āwiya’s mother. *Al-Iṣāba* 8/68.

<sup>335</sup> *Mawāhib al-Jalīl* 4/16.

<sup>336</sup> *Al-Mughnī* 7/244.

<sup>337</sup> *Ma‘īn al-Ḥukkām* 27.

<sup>338</sup> *Al-Muḥadḍhab* 2/90.

<sup>339</sup> *Ḥāshiyat al-Bayjrumī* 3/450.



not fit female physical structure as it needs abnormal fatigue and effort that may extend into days and nights.”<sup>340</sup>

- Number of arbiters: The majority of scholars restrict the number that mentioned in the verse that reads: “*appoint two arbiters, one from his family and the other from hers*”, but the Mālikīs agree on the judge authority to appoint one arbiter if other conditions that are required in the two arbiters are applicable on him. It was stated in *al-Mudawana al-Kubrā*: “I said: if they agreed on a person, will he be in the position of the two arbiters to decide alone in the matter? He said: (i.e. Mālik) yes. These are their own affairs if they wish they could reach an agreement without the arbitration of a third party, and they can mutually assign them to anyone who is qualified for that.”<sup>341</sup> Qurṭubī stated: “given that appointing one arbiter is permissible, so if the two spouses appointed one his appointment is likely to be sound if they agreed on that.”<sup>342</sup>

Subkī<sup>343</sup> relates two opinions of Shāfi‘ī’s school in this regard, the first one is: prohibition for the obvious sense of the verse, the second is: permission. Rāfi‘ī<sup>344</sup> explained this as saying: if we consider it as arbitration the number is not conditioned, or proxy also is not conditioned except in “*khul*” divorce where the heresy remains on whether to appoint one as a representative for both parties of a contract.<sup>345</sup>

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<sup>340</sup> Fakhrū, ‘Abdullāh. *Sulṭat al-Qādī fī al-Tafrīq bayn al-Zawjjayn lil-Ḍarar wa ‘adam al-Infāq* 42, University of al-Imām Muḥammad b. Saū‘ūd al-Islāmiyya, Riyadh 1987.

<sup>341</sup> *Al-Mudawana al-Kubrā* 5/368.

<sup>342</sup> *Al-Jāmi‘ li-Aḥkām al-Qur’ān* 5/177.

<sup>343</sup> Tāj al-Dīn ‘Abd al-Wahhāb b. ‘Alī b. ‘Abd al-Kāfi al-Subkī Abū Naṣr (727-771/1327-1370). A Shāfi‘ī scholar and he is a judge, historian and researcher. He was born in Cairo then transfer to Damascus and died there. *Al-A‘lām* 4/ 184.

<sup>344</sup> ‘Abd al-Karīm b. Muḥammad b. ‘Abd al-Karīm Abū al-Qāsim al-Rāfi‘ī al-Qazwinī (577-623/1162-1226). A Shāfi‘ī scholar. *Al-A‘lām* 4/55.

<sup>345</sup> Suyūṭī, Jalāl al-Dīn, ‘Abd al-Raḥmān. *Al-Ashbāh wa al-Naṣā’ir* 392, Dār al-Kutub al-‘Ilmiyya, Beirut 2001.

These are the main conditions that the scholars agree upon as requirements in the two arbiters; I have the following comments to make:

- Making the arbitration in a dispute between two spouses similar or equal to the jurisdiction and consequently equalizing them in the conditions, as it is apparent in stating masculinity is a questionable issue. This is because each task is totally different from the other, the arbiter is not more than a person having specific characteristics that qualified him to be appointed by the judge to handle and investigate the reason of the dispute and attempt to bring about reconciliation as possible as he could. He then must report his view and the results of his investigation to the judge to take his decision in the matter accordingly, either to maintain matrimonial life or separate the couple.

It is strange that whenever a discussion involves the issue of appointing a woman to any position in the state, people preventing women employment conclude their evidence based on the Prophet's saying: *"such people as ruled by a woman will never be successful"*<sup>346</sup>, such generalization is misplaced because the above text is concerned with inclusive jurisdiction which is the vice-regency or the presidency of a state and not merely attempting to mediate and reconcile two disputing parties according to given experience or knowledge in line with action prompted by the *Shar'ī* urgency all Muslims in regard to cooperation and reconciliation between them, the Qur'ān stated: *"The Believers, men and women, are protectors, one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practice regular charity,"*<sup>347</sup> and *"By*

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<sup>346</sup> Bukhārī: 4163.

<sup>347</sup> Al-Tawba, IX: 71.



*(the token of) time (thought the Ages). Verily man is in loss<sup>348</sup>. Except such as have faith, and do righteous deeds<sup>349</sup>, and (join together) in the mutual teaching of Truth, and of Patience and Constancy.<sup>350</sup>*

Tamīm al-Dārī<sup>351</sup> narrated that the Prophet said: “*The religion is the advice (al-naṣīha).*” We said: to whom? He said: “*To Allāh, his book, his Messenger, the Muslim Imāms, and their public.*”<sup>352</sup> The Qur’ānic addressing to one sex (male) is binding to the other sex (female), except in situations of privacy with particularity denotations,<sup>353</sup> similarly in the Prophet’s *ḥadīths*.

Sayīd Quṭb<sup>354</sup> said: “The Qur’ānic text has divided the distinctions between the entity of Muslim man and woman and their characteristics, and mentioned the Muslim woman side by side as partners which is part of the Islamic nature in raising the worthiness and value of women, to enhance it is position within the society and to grant her the same position as man on an equal footing in their relation with Allāh.”<sup>355</sup>

- Stipulating “Islam” in selecting the arbiter is in place; nevertheless it is not due to the similarity between arbitration and jurisdiction as we explained, but because his mission is focused on reconciliation between spouses in religious rights and obligations. It is inconceivable that defining these rights and obligations can be

<sup>348</sup> If the life be considered under the metaphor of a business bargain, man, by merely attending to his material gains, will loss. When he makes up his day’s account in the afternoon, it will show a loss. It will only show profit if he has faith, leads a good life, and contributes to social welfare by directing and encouraging other people on the Path of Truth and Constancy. ‘Alī 1693.

<sup>349</sup> Faith is his armour, which wards off the wounds of the material world; and his righteous life is other positive contribution to spiritual ascent. ‘Alī 1693.

<sup>350</sup> Al-‘Aṣr, LIII: 1-4

<sup>351</sup> Tamīm b. Aws b. Khārija al-Dārī Abū Ruqayya (d. 40/ 660). A one of Prophet’s companions. Bukhārī and Muslim narrated to him 18 *ḥadīth*. *Al-A ‘lām* 2/87.

<sup>352</sup> Muslim: 55.

<sup>353</sup> See: Khaṭṭābī, Ḥama b. Muḥammad al-Bistī. *Ma‘ālim al-Sunan* 2/162, Maktabat al-Sunna al-Muḥammadiyya, Cairo. N.D.

<sup>354</sup> Sayīd Quṭb Ibrāhīm (1324-1387/1906-1966). An Egyptian Islamic reasonable. *al-A ‘lām* 3/ 147.

<sup>355</sup> *Fī Zilāl al-Qur’ān* 5/1863.

attained by non-Muslim, as transmitted in the proverb “on who lacks something cannot supply the same.”

- Restricting an arbiter on the jurisprudence contains shortcomings, especially in our current time when reasons of dispute are diversified; some are related to psychological and social issues, for instance some are haunted by loneliness and isolation even from husband or some are affected by sadism or abnormality, so how can a jurist treat such cases? And some are related to sentimental mood, i.e. complaint about a lack of affectionate expressions and actions; some are related to financial problems, whether being short of money or middle class or wealthy but unable to control expenses and losing wealth unnecessarily. Thus merely a jurist may not find a solution to this problem, so knowledge should be considered along with other elements related to matrimonial issues.
- Regarding conditioning or recommending the arbiters to be from the family of the spouses in accordance with the apparent sense of the verse. Although reasonable points of view, there are some complications, mainly:
  - a. Most spouses reject such interference of relatives in their private affairs; meanwhile many relatives avoid such interference fearing the dispute gap may widen to incorporate them.
  - b. It is a difficult task on the judge to know the competent person to shoulder the task due to the bulk of cases waiting in queue of proceedings.

## **5.6 Appropriate Timing for the Instigation of the *Tahkīm* Process:**



It is vital to know when to begin the arbitration process, in other words when it could be the right time for a judge to appoint arbiters to investigate the reasons of the dispute: is it coinciding the filing of the suit, or after implementing preliminary steps?

The Ḥanafī perceive that arbitration must be once the case is litigated to the judge, al-Kāsānī stated: “if the punishment fails, the case must be transferred to the judge to appoint two arbiters...”<sup>356</sup>

The Mālikī perceive that the judge starts with scolding the wrongdoer if he identifies him, if the claim is repeated and the plaintiff fails to bring evident of harm, the judge may reside the spouses with righteous people and assign them to investigate the matter and inform the judge to scold the wrongdoer, if the judge did not pick up an evidence and the dispute continues he appoints two arbiters to judge between them.<sup>357</sup>

The Shāfi‘īs and Ḥanbalīs perceive that: upon a suit filing, the judge has to appoint a trustful man to discover the situation and to prevent injustice; if the dispute escalates he may appoint an arbiter for each, (if each party claims breach on the other side he can let them settle close to a trustful man to identify the wrongdoer to prevent him/her, if they came to the point of using expletives and the use of violence, he appoints two arbiters).<sup>358</sup>

Contrasting these opinions we conclude the following:

- Ḥanafīs: appointing the arbiters at the early stage when dispute is feared or once a suit is filed.
- The majority of scholars: they allow the judge to try some amicable solutions before appointing the two arbiters because a conciliation may be reached without the need of that, but they differ in the means. Some support scolding and then to

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<sup>356</sup> *Badā'i' al-Ṣanā'i'* 2/334.

<sup>357</sup> *Mawāhib al-Jalīl* 4/16; *Ḥāshiyat al-Dusūqī* 2/343.

<sup>358</sup> *Al-Muḥadḍḥab* 2/89; and see: *al-Mughnī* 8/168.

settle them with righteous people and others suggested to place the spouses under the supervision of a trusted person to decide ending the dispute amicably.

Actually placing them to reside with pious people may not be workable in this time for two reasons:

- It is difficult for a judge to appoint such people with many issues being filed to only a small number of judges.
- The difficulty for those people to accept strangers in their house, particularly when they know about the dispute, the same is applicable on the couples part, they will find it difficult to live in a home a way sharing with strangers.

It is evident to me that the Ḥanafī opinion is the most preponderant.

## 5.7 The Purpose of the *Ḥakamīn*

The arbiters are assigned to investigate the reasons of the dispute between the spouses in order to identify the wrongdoer; initially they find out the grounds of this dispute, as each arbiter will take a side with one party to inquire the reasons from his own point of view and he believes is needed from the other party to terminate this breach and to bring about reconciliation and regain harmony, also both sides are advised by every pressure of affection and wisdom to avert disputes for the sake of their family and children.

After exerting every effort, regardless of the result (positive or negative), the arbitrators must meet to suggest a suitable solution and report that to the judge to take the necessary procedure.<sup>359</sup> Thus the agreement between the arbiters is the most important point in this

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<sup>359</sup> See: *Ḥāshīyat al-Bayjrumī* 3/442; *Kashāf al-Qinā'* 5/210.



mission. Ibn Rushd stated: "They (the scholars) agreed that no consideration for the arbiters' opinion if they differ."<sup>360</sup>

On the practical side there have been numerous successful experiences implemented in some Gulf Cooperation Council G.C.C. Countries, mainly Kuwait, UAE, particularly the Dubai Emirate. The subsequent data has been collated from personal interviews conducted with the managers of the relevant departments.

In 1996, Kuwait formed the (Family Consultant Section), as a new department in the Religious Documentation Directorate of the Justice Palace, in support of the General Secretary of Endowment "*wagf*" in order to save the family from disintegration and disparity and to find other alternatives to recover stability and security to matrimonial life:

As a result of the success and achievements made by this department and its positive role in affirming the decrease in divorce ratio (compared with previous years), the ministry of justice began to grant more authority to this department and a greater role to expand its activity. This has opened doors of cooperation with other institutions concerned with family issues, for instance the Social Development Bureau of the Ministry of Social Affairs, The General secretary of Endowment and the University of Kuwait. This collaboration will create a broader link based on scientific research and comprehensive social studies with the aim, not only to curb divorce phenomenon but also to keep it within the average level or minimum standard, therefore this department was upgraded to the level of office in 1998. Three years later, in 2001, the office was elevated to a directorate under the direct supervision the deputy under secretary, with a number of sections and provided with highly skilled social researchers in addition to a group of

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<sup>360</sup> *Bidāyat al-Mujtahid* 2/74.

consultants in different scientific specializations, e g: (psychology, social service, Islamic law, legislation, statistics), alongside representatives of civil society groups to make the most of their expertise in this regard, the fact that encouraged the administration to accomplish great achievements in this regard that deserve appreciation and merit .

Meanwhile this directorate is supported by the effort of (*Markaz Iṣlāḥ dhāt al-Bayn*) “The Good Will Center” of the General Secretary of Endowment, which works in the afternoon to provide advice in family and matrimonial issues.

The idea of establishing this directorate is based on the following reasons:

- The last decade of the 2<sup>nd</sup> millennium was distinguished with the emergence of many cultural, economical, and social challenges, which affected the social system in general, and the family in particular.
- Focus has been given to examine effective ways to combine tools of reconciliation, and their appropriateness to the society’s conditions, traditions and values that are derived from Islamic law.
- As the Directorate of Religious Documentation (in the General Court) is concerned with the attestation of documents relating to marriage and divorce, a new section for the social research was established. The mission of this office is focused on investigating divorce cases that are brought to the religious documentation department prior to taking the legal procedures to finalize the divorce process.

The directorate after adopting its general slogan: “To make a solution from divorce not a problem”, then it sets the following objectives:



- The main objective of establishing the family consultant directorate is “to bring about reconciliation.”
- To reduce the rate of divorce by increasing reconciliation rates.
- To achieve self-satisfaction and regain social acceptance among divorcees.
- To configure the familial environment surrounding divorcees and children.
- To create positive dealing between the divorce and divorcers.
- To effectively treat psychological impacts of divorce for particular spouses.
- In cases of revocable divorce, helping the husband to reunite and bring back the awareness of consequences and encourage re-integration.

Regarding the procedures pursued in the directorate, they are as follows:

- When one or both of spouse/s apply demanding divorce based on consultation, special application forms should be filled with particulars of the spouses based on the marriage certificate.
- In case the husband calls on the council solely, he shall be given a second appointment along with a notification to the wife to attend the same date in order to discuss the case and assist them to reach an amicable solution that satisfies both parties and preventing divorce.
- If the wife does not respond to the notification of the case study, the husband shall be given another appointment within a period between 2 and 3 weeks, during which the wife will be notified with the date of divorce according to an official announcement published by the announcement department of the general court. If

the wife is absent the husband may complete the divorce procedures without her presence providing that the notification has been delivered to her, consequently the husband has to decide the continuance (reconciliation) (*şulh*) or divorce.

- Upon the attendance of the two parties or after the wife is summoned, the case shall be investigated.
- If the spouses insist on divorce after the case has been studied, a stamped report by the notary public shall be attached with case study. The file shall be transferred to the notary office, if the religious documentation department issued the contract.
- If the wife is abroad the directorate shall address the concerned authorities at the national terminals to assure her departure. In case of departure the divorce procedure shall be executed.
- If the husband pronounces divorce outside the premises of the directorate, the two parties shall be transferred to the concerned clerk in the documentation directorate in the presence of two witnesses to attest the divorce.
- In case of the wife's absence from the matrimonial house and move to an unknown address, the husband shall supply manifest or report to prove her absence.

As I have mentioned earlier, there is assistance provided by experts and consultants in various walks of scientific specialization from outside the ministry of justice, who are well known for their competence in this field. Their role is focused on studying cases transferred by sociological researchers as follows:



- Psychological counseling for spouses, aiming at diagnosing and treating psychological disorders that accompany social problems, and to reach reconciliation.
- Divorce advisors to help them to understand and face the divorce crisis, subsequent problems and psychological disorders.
- To provide specialized courses aiming at promoting professional efficiency for researches and revisers.
- To present detailed reports of cases being examined.
- To contribute research and studies performed by the directorate via consultation, discussions and control, In addition to contributions in preparing bulletins, enlightening brochures and information programs related to the directorate.

As for the Dubai Emirate, the department of “Counseling and Family Guidance” was established in courts directorate to handle this task. The idea was first launched in September 2000, and it was inaugurated at the beginning of the year 2001, after an inclusive study of previous experiences in and outside the Emirate.

The establishment of this section aims to achieve numerous objectives such as:

- Action to prevent aggravation of familial disputes and bring about reconciliation and solutions by means of simple and swift procedures and without any expenses prior to recourse to court suing.
- Protecting mutually recognized rights by means of drafting minutes and documenting them through religious judges and make them as official and executive documents.

- Action plan to minimize cases of divorce and to exhaust all opportunities of voluntary conciliation between the parties before the utterance of divorce to attain the least level of divorce.
- To work out conciliation within the projected vision to urge the parties to voluntarily abide by and to agree on its places before being executed compulsorily.
- Utilizing symposiums, lectures, printing and distributing bulletins and articles in the newspapers.

With the advent of the year 2001, counseling and family guidance initiated its lofty mission. Since then, counseling check cases of family differences and attempts to find solutions and conciliation between the parties, in accordance with the basis of the Islamic and psychological approaches with preservation of privacy and confidentiality.

By the end of the year the positive outcomes of the Royal Decree were apparent, along with the positive roles, which could be summarized as follows: Divorce and number of suits ratio decreased markedly during the previous year, as is shown in the following table:

Year	1999	2000	2001
Divorce ratio	35.5%	35.2%	29%
Figure of cases	893	923	787

After the experience of a full year in studying results both negative and positive and restraints, suitable solutions were scheduled and action plans for the year 2002 were set to achieve the aspiration and sustain the achievements made so far a leading familial



guidance and conciliation orientation locally and within the gulf Arab states as well as globally.

In order to boost the role of this office, the proceedings law of the religious courts states:

- No case shall be filed unless it is transferred through the office; in other words the court will not consider any matrimonial case or family dispute case unless the office files to solve it. In this way filtration of cases will make only a few cases to be raised in front of judges to minimize the burden of courts.
- All procedures related to divorce shall be revived by the department prior to issuing the verdict of divorce e.g. maintenance, visiting of children and other financial rights such as deferred dowry.
- The opinion of counselor (arbiter) is binding to the Judge in accordance with the Mālikī school, which is applied in the religious courts of UAE.

In addition to all the above, this center is distinguished by:

- a. Attention is paid to the quality of its staff; this is represented in the following required qualifications for applicants nominated for this task:
  - a. Experience in the field of social counseling
  - b. Good communication skills e.g. distinguished spokes person or lecturer.
  - c. Strong personality
  - d. Participated in specialized courses related to the missions.
- a. Organizing training courses for supervisors in any new evolutions in every field.
- b. Using computers in all procedures among these retrieving information related to the claim's parties, bank receipts, loans, financial issues tribunal issues it's likely

to monitor the effort of Dubai government in launching the first electronic government in the area, so all needed data by the supervisors and judges are stored in computers.

- c. Similarly, all data and sessions minutes are stored on computer. The disputing parties can retrieve it and verify their validity at any time.
- d. The mission of the office is not restricted on actual disputes but also perform the role of counseling and education through lectures and courses organized for all groups of the society an advantage lacked by “family consultant directorate” that belongs the Kuwaiti ministry of law.
- e. Finally here is the final result reached by the office late in 2001 as shown in the following table:

Cases	Divorce agreement	Figure of conciliations	figure of files
1100	40%	23%	37%

“Case” in the above means situations unsolved by the office, there by transferred to the jurisdiction and became judicial case, in other word this department has minimized the burden of jurisdiction to about 67% and this is one of the benefits of utilizing arbitration in familial and matrimonial cases.

Regarding the experiences in Bahrain these humble experiences made by civil societies mainly:

*“Lajnat Mashā’il al-Khayr”* Charity flambeaus committee or charity to riches committee established by the “Islamic Society” under the slogan of “towards a stable familial



society” in collaboration with “*Maṣābīḥ al-Hudā*” the Guidance lanterns subject of “*al-Iṣlāḥ* social society” of Kuwait .

The society has set a general objective, that is, to enhance the family relation ships and strengthen ties between the family members.

Regarding the scope of it’s activity, it’s within the field of preventing family disputes (*al-khilāfāt*)-mainly at the early stage of action and not to resolving problems get aggravated and complicated by repeated wrong behaviors which the mission of future. The targeted individuals by the actively of this committee are: the spouses, children, and the spouses’ families.

These tools were of vital role in the consciousness of many couples at the beginning of its establishment through courses, lectures but recently such a activities are reduced noticeably.

“*Maktab al-Istishārāt wa al-‘Ilāqāt al-Usariyya*” Family Relations and Consultations Office belongs to “Nahḍat Fatāt al-Bahrain Society”<sup>361</sup> which was established in 21<sup>st</sup> March 1998.

This office has been assigned to shoulder the following tasks:

f. Receiving cases of problems suffered by the family, provide social, legal and psychological consultants by the working team that belongs to the office which composed of the followings positions:

- Family counseling specialist.
- Social researcher.
- Legal advisor.

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<sup>361</sup> It is the first womanly society in the Arabian Gulf, established in 1955.

- g. Convening collective counseling and guidance for various society groups concerned with the social and psychical problems.
- h. Providing public social psychological and legal awareness programs for the family members and society in general.
- i. To prepare researches and studies in relation with family and woman issues.
- j. To set plans for purposeful training programs to develop the self capabilities development of the female members of the association in social, psychological and legal fields.

*“Makatb al-Istishārāt al-Qānuniyya”* The Legal Consultants Office belong to Awāl Society, but it is only concerned with providing legal services for wives in general as per their desire to file a suit against their husbands in front of religious courts.

All the above are humble experiences- as I mentioned– due to their mean financial potentials, therefore I plea to the Supreme Jurisdiction Council to pursue the example of Kuwaiti Ministry of Justice and Courts directorate of Dubai Emirate to establish Family recompilation directorate to shoulder this task. This is a demand also made by other official bodies as the appeal made by the Council of representatives in its session convened on 14<sup>th</sup> April 2003, the Council was convened its first opening session in 14<sup>th</sup> Dec 2002, and by other civil associations in general and of women in particular. During my constant presence in the Islamic Courts it came to my knowledge that such office is underway to be established shortly with a suggested name as “the Family Reconciliation and Duties (*al-Iṣlāh al-Usarī wa al-farā’id*) Office.”

I have interviewed the nominated person to be in charge of this proposed office to know the level of readiness to establishing this section and whether other experiences from



inside and outside Bahrain will be inspired? I have concluded certain remarks from this interview to be detailed as follow:

- My guest mentioned that he had paid some visits locally and abroad to concerned organizations having experience in this regard to benefit from previous experience, but the fact was to the contrary as it was clear from the outcome of the dialogue that he had little information regarding these experiences not exceeding the information stated in the introductory profiles issued by these directorates and sections, even he lacks much information related to similar local bodies working in this field in order to arrange the cooperation process with these organizations so as to build on experience and development and to avoid negative experience if any in this regard and not to start from scratch.
- Staff members in this department lack considerable practical and scientific experience in this field because, mainly, they are officer of the Islamic and civil courts, some of them have little experience in matrimonial life and their problems, so how they are supposed to be able to resolve the problems they are exposed to? As we said before: “bereaved of affection cannot be provider of the same”, and this assures the fact being short of benefit from previous experiences that started by installing people of knowledge and expertise form those who have proofed their talents before the establishment of these directorates, whether from administrative staff and consultants that the administration seek their assistance to diagnose and treat chronic cases in addition to qualify social searchers who are holders of university degree in social service, and via specialized courses in various sciences related to the mission.

- For more assurance, when I visited Kuwait and Dubai I asked the administrative staff about the visits claimed by the would-be chairman for the proposed directorate to get acquainted and benefited from experiences in these states, they admitted only a swift visit paid by a delegation from the Ministry of Justice in Kingdom of Bahrain and did not include any private meeting in relation to the activities of these directorates.

Therefore the concerned authority in the Supreme Jurisdiction Council is required to reconsider the cadre's structure to be installed in this directorate before its establishment, otherwise it will contribute little to the good of the Bahraini family and society, yet it may be even worse if it provides the community with misleading information exactly like a physician due to his ill-practice recommends the wrong medicine to his patient that critically escalates the case if it is not the deadliest prescription.

Regarding the legal articles in the B.P. and M.D., there are a great deal of similarity except for some extra items found in the B.P., these are as follows:

Article (94):

- Either party hereto may demand divorce for harm when the matrimonial relationship seems unbearable.
- The judge shall endeavor to bring about reconciliation between the spouses.
- In case the judge fails to bring about reconciliation whilst the harm is evident he may rule the divorce.
- The *Ja'fari* Court may alert the husband by divorce if the objective conditions for that are proven, in accordance with the provisions of this law, if the husband denies divorcing the judge may rule to irrevocably divorce her.



Article (100) of the M.D. states the same as above excluding Item 4.

Article (95) of the B.P. states the following: if harm is not evident and breach continues between the spouses and reconciliation seems unviable, the judge shall, within three months from the date of the sue, appoint two arbiters, one from each spouse family as possible, otherwise he may install two from peace wishers or specialists in accordance with the provisions of Article (97) of this law. Article (101) of the M.D. also states that: if the harm is not evident and the breach continues between the spouses and reconciliation seems unviable, the judge shall, within three months from the date of filing the case, appoint two arbiters from the spouses' family as possible, otherwise he may install other two from peace wishers, and renew the period of arbitration for them.

Article (96) of the B.P. states the following:

- The two arbiters must investigate the reasons of breach and exert efforts to bring about reconciliation.
- The arbiters shall report, within a period not exceeding three months from the date of their appointment, the result of their endeavors to the judge along with their suggestions including the extent of the offense committed by each party
- The judge may extend the period as stated in the paragraph mentioned hereinabove, upon request from the two arbiters jointly”.

While Article (102) of the M.D. mentioned only the two first items without stating the phrase: "within a period not exceeding three months from the date of their appointment."

Article (97) of the B.P. states: the judge may approve the report of the arbiters, or issue a decree to appoint another arbiters specialized in social and psychological affairs to carry

out the arbitration task once again in accordance with the procedures stated in the two aforementioned articles. Article (103) of the M.D. stated the same except the phrase "specialized in social and psychological affairs".

Article (98) of the B.P.: if the two arbiters disagree, the judge may appoint others, or appoint a third one who is trustworthy and specialized.

The M.D. in Article (104) does not mention the phrase: "trustworthy and specialized." There is resemblance in text between Articles (95-97) of the B.P. and Articles (105-107) of the M.D., respectively as follows:

Articles (95) and (105): if reconciliation is unviable and dispute continues between the spouses the judge rules by divorce based on the two arbiters' report.

Articles (96) and (106): when the judge decreed divorcing the woman after marriage was consummated, in accordance with the aforementioned article, he may decide the amount of dowry the husband may retrieve in case the wife is found responsible of all or most of the offense, if the husband is responsible of all or most of the offense the dowry remains as right for the wife.

Articles (97) and (109): if the wife demands divorce before consummation of marriage in valid privacy, she pays back the dower and other expenses of the marriage but the husband refuses to divorce, the judge shall divorce her if reconciliation is unattainable.

The K.L. stated several articles that recognized the principle of arbitration, details are as follows: Article (127): the court shall exert the maximum effort to bring about reconciliation between the spouses, if this fails, two arbiters shall appoint to seek reconciliation or separation.



**Article (128):** the two arbiters shall be from the spouses' family if possible, or otherwise from affectionate outsiders who are capable to bring reconciliation.

**Article (129):** the two arbiters shall scrutinize the breach reasons and exert effort to bring about reconciliation between the spouses with all possible means.

**Article (130):** if the effort of the arbiters fails to achieve reconciliation:

- They shall suggest separation if the offense is committed by the husband as the wife demanded the separation; the husband shall be obliged to pay the rights subsequently resulted in marriage and divorce. If the husband demanded divorce the arbiters may reject his lawsuit.
- They shall suggest separation in return of the dower and all her financial rights that are resulted from marriage and divorce, if the wife commits the offense.
- If both commit the offense jointly, the arbiters may suggest separation with or without remuneration as appropriate to the offense.
- If the wrongdoer is not identified, if the husband demands the divorce the arbiters may reject his lawsuit, if the wife demands the divorce or both demand separation, the arbiters may suggest separation without compensation.
- Separation for harm shall be one irrevocable divorce.

**Article (131):** the arbiters shall hand over a detailed report to the court, the judge may rule accordingly if he agrees with the provisions of the aforementioned article. If the two arbiters disagree, the judge may appoint a third trustworthy arbiter from other than the family of the spouses who is believed to be capable of bringing reconciliation.

Article (132): the three arbiters, whether by consensus or majority, shall bring their report in front of the court to decide in the suit in accordance with Article (130). Failure to reach a single decision or to present a report the court shall pursue the regular procedures.

Perhaps it would be likely to make changes in these articles. The method being applied right now in the totalitarian courts, which renders matrimonial and familial dispute suits is activating the role of family-assisted consultation administration, related to these courts. Hence the roles of reconciliation and arbitration or appointing of arbiters are no longer those of the judge, but the administration; therefore the choosing of two arbiters from the spouses' families is no longer valid.

This chapter indicates the benefit of arbitration between couples whose marriage problems may be resolved with the help of a subjective perspective. It is important that arbitration remains an integral part of the Islamic Courts and Bahrain would benefit from applying similar procedures as Dubai and Kuwait.

The following three chapters attempt to clarify the actualities of the divorce process in the Bahraini Islamic courts. Primarily, the different types of divorce are detailed and this section is followed by an evaluation of women's rights and finally the resulting effects related to custody and maintenance of the children involved.



## CHAPTER VI

### The Types of Divorce

- 6.1 Who Owns the Right of Divorce?
- 6.2 Innovated Divorce (*Ṭalāq Bid'ī*)
- 6.3 Divorcing Thrice in One Session (*al-Ṭalāq bi-Ṭhthalāth fī Majlis Wāḥid*)
- 6.4 The Divorce made during Drunkenness and Anger

When the spouses can no longer live in harmony and all avenues of reconciliation have been exhausted, continuance of an unhappy marriage can be damaging, as it may breed hatred and an atmosphere that is potentially harmful to the emotional well-being of the children as well as the spouses. Therefore when mutual respect is lacking, dissolution of marriage might be desirable. Despite the inherent bitterness within such a move, the eventual outcome may well be preferable to the conflict created by the irreparable breakdown of a relationship. Divorce is disliked according to the Prophet's narrative: "*Of all things licit, the most hateful to Allāh is divorce.*"<sup>362</sup> As it brings about the disintegration of family life and adversely affects the emotional health of the children. Nevertheless it could be the only remedy that protects them from the erosive turmoil of disputes. Ibn Qudāmah stated: "worsening relations between the spouses may lead to deterioration that renders marriage just a harmful experience. The husband bears

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<sup>362</sup> Abū Dāwūd: 2178; Ibn Mājih: 2018; *al-Sunan al-Kubrā*. 14671.

matrimonial expenses and maintenance and may use unreasonable force to retain his unhappy wife within a dysfunctional partnership such a situation necessitates appropriate legislation to dissolve the marriage and bring to an end such deterioration.”<sup>363</sup> This is stated in the Qur’ān, the *Sunna* and according to the unanimity of scholars, moreover one whole Qur’anic chapter is dedicated to the topic of divorce (*Surat al-Talāq*).

However, Islamic law has set the following unique methodology of resolving marital difficulties:

- A single revocable divorce (*talāq raj’ī*), where a divorced women shall wait for a prescribed three courses of time called “*idda*”, i.e. a period of nearly three months during which time she must remain in her matrimonial house. The husband may return to his wife during this period of waiting, whether verbally, by uttering words such as, “I take you back” or practically, by resuming sexual intercourse. Hence she is permissible to him without a renewal of contract or dowry. This is a wise method by which to establish the opportunity to calm the situation and to correct the behaviors that may have led to this disintegration.
- If the prescribed period expires without revocation of repudiation, then the divorce is irrevocable and a husband can not take back his wife as in the case of “*idda*”, but he must re-marry her as any other person upon her consent; providing a new contract and dowry.
- If further troubles arise and divorce is pronounced a second time, the same procedures are followed based on the Qur’ānic injunction: “*A divorce is*

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<sup>363</sup> *Al-Mughnī* 7/96.



*permissible only<sup>364</sup> twice: after that, the husbands should either retain their wives together on equitable terms, or let them go with kindness.*<sup>365</sup>

- If the situation is repeated for a third time, the divorce is irrevocable and the husband is not entitled to take back his wife until she is married and divorced again from another husband or unless the second husband has died. The Qur'an states: "*So if a husband divorced her wife<sup>366</sup> (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they re-unite; provided they feel that they can keep the limits ordained by Allāh. Such are the limits ordained by Allāh, which He makes plain to those who know.*"<sup>367</sup> Providing that the purpose of that second marriage shall be sound seeking permanence and not merely intervening to make the previous marriage lawful. 'Uqba b. 'Āmir narrated that, The Prophet said: "*O people; should I tell you about the borrowed billy-goat?*" They said: "Yes of course, O Messenger of Allāh", he said: "*it is the intervening husband, curse be upon the one who marries a divorced woman with the intention of making her lawful for her former husband and upon the one for whom she is made lawful.*"<sup>368</sup> If this conjugal knot is annulled by divorce or by the death of the

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<sup>364</sup> Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with reconciliation between) are allowed. After that the parties must definitely make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and forbearance-to "hold together on equitable terms," neither party worrying the other nor grumbling nor evading the duties and responsibilities of the marriage. 'Alī 92.

<sup>365</sup> Al-Baqara, II: 229.

<sup>366</sup> At the third time.

<sup>367</sup> Al-Baqara, III: 230.

<sup>368</sup> Ibn Mājih: 1936; Ṭabarānī, Sulaymān b. Aḥmad. *Al-Mu'jam al-Kabīr*. 825, Dār al-'Ulūm wa al-Ḥikam, Iraq, 2<sup>nd</sup> Edition 1983.

husband, then the previous husband is entitled to re-marry her and retain three new repudiations.

## 6.1 Who Owns the Right of Divorce?

Islamic Law decrees the request for divorce to be in the hands of the husband because of the following textual prescription: “*(Husbands) are the protectors and maintainers of their (wives), because Allāh has given the one more (strength) than the other, and because they support them from their means*”. However, this does not give man a free hand to use it arbitrarily, but fences it with unbreakable boundaries in order to fulfill the aforementioned steps and to pronounce a single repudiation in one session. The timing is to be in a purification period without sexual intercourse, this is called “*talāq sunnī*”, in other words it has to be in pursuance of the method that Allāh has prescribed. This is in addition to the condition that the husband must be clear-headed and rational at the time of pronouncement.

Here follows an explanation of the three types of divorce and their application in the Bahraini Islamic Courts. The sections are presented thus; ‘Innovated divorce (*ṭalāq bid’ī*), Divorcing thrice in one session (*ṭalāq bi-ththalāth fī majlis wāhid*) and Divorce made under the influence of alcohol or during rage (*ṭalāq al-sakrān wa al-ghaḍbān*).

## 6.2 Innovated Divorce (*Talāq Bid’ī*):

If the husband divorces his wife during her menstruation period or in a period of purity during which he had sexual intercourse with her or if he pronounces the three repudiations at one and the same time, then it is prohibited and is called “*bid’ī*”. This



means it is against Islamic law.<sup>369</sup> The Qur'ān states: *"O Prophet! When ye do divorce women, divorce them at their idda (prescribed periods)"*<sup>370</sup>, i.e. when they enter in their waiting period and purification with no sexual intercourse practiced. Nāfi<sup>371</sup> reported that Ibn 'Umar divorced his wife during the period of menses. 'Umar asked the Prophet about it, and he commanded his son 'Abdullāh to have her back and then allow her respite until she entered the period of the second menses. After this she should be allowed respite until purified, then divorce may occur before having sexual intercourse with her; for that is the prescribed period which Allāh commanded for divorcing a woman."<sup>372</sup>

Among the wisdoms of this prohibition are the following:

- To ensure that Islamic law aims at minimizing divorce cases and investigates their causes thoroughly. These aims can only be achieved by neutralizing temporary reasons that initiate the desire to divorce and through assessment of the real circumstances that might aid in the maintaining of the relationship; the overall objective being to minimize divorce opportunities. This evidently guarantees that divorce is made upon a proper intention. Menstruation is a temporary period that may lead the husband's disaffection to his wife, in other hand the nervous and disturbed mood of most women during this period may provoke the husband's annoyance in some way so that he makes a hasty and ill-considered decision to divorce her. Islamic law is oriented to prohibit divorce in such exceptional time to assure that such emergent circumstances that associated with menstruation are not intervening. Regarding the purification during which he has had a sexual

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<sup>369</sup> Badrān 342.

<sup>370</sup> Taghābun, LXIV: 1.

<sup>371</sup> B. Jubayr b. Muṭ'im b. 'Adī b. Nawfal (d. 99/ 717). A famous follower narrator of *ḥadīth*. *Al-A'lām* 7/ 352.

<sup>372</sup> Muslim: 1417.

intercourse with her, he might be affected by temporary feeling of absent of attraction towards his wife after a session of intercourse, while in purification without a sexual intercourse normally attract the husband to his wife, hence this will assure that he pronounced divorce unaffected by the temporary feeling of sexual coolness.

- Not to harm the divorcee by divorcing her during menstruation because not including this period in *'idda* will extend the calculation of waiting period, regarding the woman who is divorced in purification during which they have had sexual intercourse she can't determine if she is pregnant to initiate waiting period upon delivery, or not pregnant to enter in *'idda* by menstruation calculation.
- In addition to the previous point, the husband may be exposed to regret when he learns that she is pregnant.<sup>373</sup>

Despite this, the opinions of scholars vary in their judgment on divorce and its effectiveness as follows:

The majority of scholars see it as effective, Their conclusion is based on the previous narrative of Ibn 'Umar, that Nāfi' reported that Ibn 'Umar divorced his wife while she was menstruating. 'Umar asked the Prophet about that, the Prophet commanded 'Abdullāh b. 'Umar to have her back and then allow her respite until she entered the period of the second menses. Actually respite is only asked after divorce, this is also supported by other narrations, Ibn Jubayr<sup>374</sup> narrated that Ibn 'Umar said: "it thought

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<sup>373</sup> See: Beltāji 435.

<sup>374</sup> Yūnus b. Jubayr al-bāhili Abū Ghallāb al-Baṣrī. He is trustworthy (*thiqa*) in narration of *ḥadīth*. *Tahthīb al-Tahthīb* 11/383.



upon me one divorce”<sup>375</sup>, Ibn Sīrīn said that he asked Ibn Jubayr: “was it counted (as one divorce)?” He said: “why not, was he helpless and foolish?”<sup>376</sup> All these narrations prove that divorce fall during menses as well as during purification having sexual intercourse with her. Ibn Qudāma said: “if he divorces by innovation or novelty— during menses or purification he has had intercourse with her— he is sinned and his divorce falls under the description knowledgeable people as Ibn al-Mundhir<sup>377</sup> and Ibn ‘Abd al-Barr<sup>378</sup> said: “only those people of novelty and heretics diverge than that, the same was narrated by Abū Naṣīr<sup>379</sup> by Ibn ‘Uliyya<sup>380</sup> and Hishām b. al-Hakam.”<sup>381</sup> The following decree is applied in the *Sunnī* Courts: (the *Sunnī* Islamic judicial courts judge divorce effectively, whether the husband pronounces it while his wife is in her purification period during which time he has not had sexual intercourse with her, or during her monthly menstrual (*ḥayḍ*)<sup>382</sup> time, or during purification period that he has had sexual intercourse).<sup>383</sup>

Ibn Ḥazm stated: “whoever wants to divorce his wife during menses that he has had a sexual intercourse with her, it is not permissible to do that during menstruation or in purification during which he has had sexual intercourse with her. If he did once or twice the divorce is ineffective, and she is still his wife as before”. His conclusion is based on

<sup>375</sup> Bukhārī: 4851.

<sup>376</sup> Bukhārī: 5258; Muslim: 1417.

<sup>377</sup> Abū Bakr Muḥammad b. Ibrāhīm b. al-Mundhir al-Nīsābūrī (242-319/856-931). A great jurist and *mujtahid*. He was *shaykh* of the mosque of Mecca (*Haram*), where he died. He wrote many books. *Al-A‘lām* 5/294.

<sup>378</sup> Yūsuf b. ‘Abdullāh b. Muḥammad b. ‘Abd al-Barr al-Namrī al-Qurṭubī al-Mālikī Abū ‘Umar (368-463/978-1071). He was one of great memorizers of *Ḥadīth* and historian. *Al-A‘lām* 8/240.

<sup>379</sup> Muḥammad b. Naṣīr Abū Naṣīr. Rāzī, ‘Abd al-Raḥmān b. Abī Ḥātim Muḥammad b. Idrīs Abū Muḥammad. *Al-Jarḥ wa al-Ta’dīl* 8/109, Dār Iḥyā’ al-Turāth, Beirut, 1<sup>st</sup> Edition 1952.

<sup>380</sup> Abū Bishr Ismā‘īl b. Ibrāhīm b. Muqassim al-Asadī al-Baṣrī (110-193/728-809). He was most memorizer of *Ḥadīth* in his time. *Al-A‘lām* 1/307.

<sup>381</sup> *Al-Mughnī* 7/99.

<sup>382</sup> Considered a state of ritual impurity, it excludes a woman from performing *ṣalāh* (ritual prayers, which do not then have to be made up); from touching the Qur’ān; sexual intercourse. At the end of a period of menstruation, a woman performs the great ablution (*ghusl*) to restore ritual purity. Smith 267.

<sup>383</sup> *Shā‘ir* 304.

this verse (LXIV: 1), and Ibn 'Umar's narrative. He added: "these are limits or ordinance (*hudud*) set by Allāh; and any who transgresses it, does verily wrong his own, his work is void because the Prophet said: "*each work is not upon it our matter then it is a refusal.*" Which means it is refused."<sup>384</sup>

Shī'a Imāmī stipulates that the wife should be in her purification period from menses or postpartum (*nifās*), so that the divorce is effective, and should be in a "clean period", during which he has had intercourse with her, if the husband is resident or staying with her and he divorced during menses or confinement then the divorce is void. If he divorced her in purification during which he has had sexual intercourse with her also it is void.<sup>385</sup> The following decree is applied in the *Ja'farī* Courts (the court declined to allow the divorce, because the husband uttered the divorce while his wife was menstruating. This type of divorce is deemed as void innovation "*bid'a*" so it is considered as unrecognized and ineffective).<sup>386</sup>

Ibn Taymīyya<sup>387</sup> and his student Ibn al-Qayyim<sup>388</sup> discussed the preferences of the unanimity of scholars in prolonged detail, a selection of which is as follows:

- In a narration of the previous narrative of Ibn 'Umar, the last part read: "Abdullāh said: He returned her to me and did not count it (the pronouncement) anything"<sup>389</sup>, this explicitly denotes the invalidity of divorce in the state of menses.

<sup>384</sup> *Al-Muḥall* 10/161.

<sup>385</sup> Murtaḍā, Maḥdī li-Dīn Allāh Aḥmad b. Yaḥyā. *Al-Baḥr al-Zakhkhār al-Jāmi' li-Madhāhib 'Ulamā' al-Amṣār* 3/145, Maktabat al-Khānjī, Cairo 1946.

<sup>386</sup> *Shā'ir* 304.

<sup>387</sup> *Majmu' al-Fatāwā* 33/22.

<sup>388</sup> *Zād al-Ma'ād* 5/218.

<sup>389</sup> Aḥmad: 5266; Abū Dāwūd: 1869.



- If divorce was valid during menstruation, requesting respite and then annulment would increase the incidence of divorce; a notion to Allāh.
- The error of divorce during menses, if it occurred, will not be elevated by revocation of divorce then divorce once again, but only a permanent return can reunite the marriage and fix the fracture, while a remarriage that is followed by a divorce will not erase the disadvantage of the first divorce, if that is the fact.
- Those who adopt the effectiveness of divorce and obligate the revocation, seek solution in the very cause. It was stated: “we obligate revocation of marriage as a duty as it is the contrary reaction to the husband’s intention when he committed a prohibited deed with the intention to reject his wife, so he is obliged to return her. The reply to this is: ‘The reason of revocation raised here may be a cause in itself to prevent the occurrence of divorce as a prohibited act committed by the legally capable, no doubt preventing divorce is much easier than preventing it by revocation, if the reason is to prevent the effect of divorce by revocation, basically priority should have been given to preventing it.
- They said: “Nāfi’ is much closer to Ibn ‘Umar than Abū Zubayr<sup>390</sup> so his narration should have priority”, this could be applicable if any contradiction does exist, how does it come if no contradiction at all? The fact is, Abū Zubayr’s narrative explicitly discounted the pronouncement, while Nāfi’s narration did not explicitly reflect that the Prophet counted it. Again he said: “why not” which means: what (after all) prevents him from doing so? , and this does imply that the Prophet did

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<sup>390</sup> Muḥammad b. Muslim b. Tadrus Abū al-Zubīr al-Qurashī al-Asadī (d. 126/743). The scholars differed in his trustworthiness (*tawthīq*) of *Ḥadīth*. *Taḥthīb al-Taḥthīb* 9/391; *Al-A‘lām* 7/ 97.

count it. Once he said: “was he helpless or foolish?” but it was merely a point of view. It means that he had committed a foolish act -divorcing at the wrong time-where divorce is prohibited. It is well known that if Ibn ‘Umar was certain that the Prophet counted it, he would not argue the questioner exclaiming “was he helpless or foolish?”. There is nothing to prove the fall of the divorce in this context, and how doubts rose that Ibn ‘Umar may have concealed some words of the Prophet to claim a divorce. Once he said: “it is made one pronouncement of divorce to his wife”, but that was Nāfi’s narrative and not Ibn ‘Umar’s, also it is clearly mentioned in the Two Authentic Collection of narrative by (Bukhārī & Muslim) that ‘Abdullāh said to Nāfi’ when he asked him: “What about the repudiation? He said: “one to count”, in another narration with a slight variation of words “it is counted (as one pronouncement)”, In Bukhārī, according to Sa’īd b. Jubayr Ibn ‘Umar stated “I thought it was one divorce”, but such wording has been transmitted solely on the authority of Ibn Jubayr , while Nāfi’, Anas b. Sirīn, Yūnis b. Jubayr and the other narrators did not attribute the phrase “counted as one” to Ibn ‘Umar. Ibn Jobber solely narrated this about Ibn ‘Umar as did Abū Zubayr: “and did not count it (the pronouncement) anything.”, if both narrations are neutralized for contradiction, the rest did not imply the effectiveness of divorce, to outweigh one narration over the other then Ibū Zubayr’s prevails while Ibn Jubayr’s narration did not clearly identify the source of calculation, may be his father did based on his own independent reasoning to block a new-fangled tradition of a prohibited kind of divorce and for the sake of the benefit of community, after the death of the Prophet, as he also made the three simultaneous



divorces effective. At the time of the Prophet pronouncing the three repudiations at once and the same time was not counted, but when ‘Umar realized the accelerated occurrence of such divorce he counted it in order to deter divorcers and minimize the occurrence of divorce. In this way all narrated narratives in this chapter may be harmonized and any contradiction is elevated and all interpretations detesting that are put aside to put them in accordance with the basis of Islam.

The majority of scholars refuted these conclusions as follows:

- The narration deduced from Ibn ‘Umar’s narrative was inconsistent with other narrations made by the other memorizers, Ibn ‘Abd al-Barr commented: “it is denied as narrated only by Abū Zubayr and it is not an evidence whereas contradicting with other more authentic narrations, possibly the sentence may be interpreted in two different contexts: the previous one that is “he (the Prophet) did not count it (the pronouncement) anything.” Or the Prophet did not see it (the divorce) preventing the respite, or considered it (the divorce) as permissible in the *Sunna*, nonetheless the narration they concluded is not a solid preference.”
- Regarding the narrative: “*Each work is not upon... refusal.*” Where “refusal” here means unacceptable and unrewarded work, nevertheless non-acceptance of a deed does not denote its incorrectness, similarly prayers on an extorted land or in a stolen cloth is correct although unrewarded.
- Prohibition of divorce during menstruation as inferred, as evidence does not necessarily prevent divorce once pronounced: the reason is that prohibition is neither for the action itself nor to its depictions but refers to a matter beyond the

prohibited: that is such divorce is undesirable and lays negative consequences and harms the wife by extending her waiting period. It is stated from an analogical point of view that if divorce prohibition is connected with an external reason, this will not imply is deemed void when it occurs, in the same context, selling at the time of the call to Friday Prayers is prohibited because it distracts people and occupies the time of prayers, but financial deals occurring at that time are deemed sound with all consequent liabilities, their analogy regarding the representative in divorce is respected with some variation, because the representative in divorce is delegated to express and represent someone else and restricted in his delegation. On the other hand, the husband pronounces divorce on behalf of himself and is not deputizing anyone else, so long as he is competent to pronounce it with no preventing reason the divorce is effective. If the evidences regarding divorce during menses as ineffective- were rejected then the unanimity of scholars' judgment prevails.<sup>391</sup>

Aḥmad Muḥammad Shākir<sup>392</sup> reviewed narrations and sayings of Ibn Umar's previous *ḥadīth*- which represent a controversial focus on the effectiveness of divorce- and he concluded: "there are numerous narrations and wordings of this narrative in the Books of *Sunna*, and opinions are extremely dissimilar, enough to make confusion regarding counting the repudiation pronounced by Ibn 'Umar during menses. The most explicit was Ibn Jurayj<sup>393</sup> about Abū Zubayr's narration: that he heard 'Abd al-Raḥmān b. Ayman<sup>394</sup> asking Ibn 'Umar about it, Ibn 'Umar told him, that the Prophet ordered him to return her,

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<sup>391</sup> Badrān 343.

<sup>392</sup> An Egyptian scholar knowledgeable of *Ḥadīth* and *Tafsīr* (1309-1277/ 1892-1958). *Al-A 'lām* 1/253.

<sup>393</sup> 'Abd al-Mālik b. 'Abd al-'Azīz b. Jurayj, Abū al-Walīd *mawlā* Umawīs. *Tahthīb al-Tahthīb* 6/357.

<sup>394</sup> *Tahthīb al-Tahthīb* 6/129.



and ‘Abdullāh said: “he returned her to me and did not count it (the pronouncement) anything”, and it narrated in *Musnad Aḥmad* and *Sunan Abī Dāwūd*.<sup>395</sup> Shaykh Shākir offered evidences to prove its soundness supported by the narration of Jābir b. ‘Abdullāh who concluded that the Messenger of Allāh commanded ‘Abdullāh b. ‘Umar to have her back. Also it was reported Ibn ‘Umar narrated about a person who divorced his wife during menstruation: “it is not counted”, also narrated by Ibn Ḥazm in “*al-Muḥallā*” and related by Ibn al-Qayyim in “*Zād al-Ma’ād*” based on a complete sound chain of authorities. (Nothing explicit in other narrations of Ibn ‘Umar’s narrative that were supported by those who see the effectiveness of divorce during menses, inconsistent in wordings, contradicting with other sound narrations and also with what is explicitly understood from the Qur’ān and other reasonable bases of contracts and nullifications excluding divorce).<sup>396</sup> Shaykh Shākir after comparing all narrations and sayings concluded that a divorcer during menses has infringed what Allāh has ordained (his entire action is deemed incorrect and ineffective), furthermore he included another narration which supports the previous narration of Abū Zubayr as additional evidence of ineffectiveness of divorce at the state of menses. Amongst his precise and thorough overview in relation to what was put as evidence to make such divorce effective that the Prophet maintained: “once should return her”, this was interpreted as they said: respite can only be after the fall of divorce.<sup>397</sup> But this evidence is not pertinent because the connotation of the word “return” here refers to the lexical meaning of the word and not to respite after divorce<sup>398</sup> (since to respite a revocable divorced woman is a new term lately

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<sup>395</sup> *Nizām al-Ṭalāq fī al-Islām* 30.

<sup>396</sup> *Nizām al-Ṭalāq fī al-Islām* 30.

<sup>397</sup> *Al-Mughnī* 7/100; *Sharḥ Ṣaḥīḥ Muslim* 3/659.

<sup>398</sup> Baltājī 438.

used after the time of Prophet-hood, and it is never used in this context in the Qur'ān but only to return and hold back).<sup>399</sup>

Shaykh Ḥassaballah concluded the same: “may Allāh help the people concerned with family laws to make the decision to void divorce during menses or purification after having sexual intercourse in order families gain the benefit and common good beyond this wise legislation contained by the just of Islamic law”.<sup>400</sup> His student Biltājī agreed with him and added: “this opinion apparently is preponderant to us for two reasons:

- For its concrete evidence and preponderance over other opinions adopting the fall of divorce.
- It achieves a definite common benefit for society, decreases to a great extend conditions leading to divorce and achieves the aims of wise Islamic law by isolating temporary factors that generate emergent tension that encourages hastiness in divorce.

Our current overview to variances between jurisprudence schools should be correlated by the following two factors: soundness of evidence and achieving the common benefit. Consequently great consideration must be paid to the opinion not to certain individual (Imām or independent opinion), as questions are traceable according to methodological differences in understanding or authentication of the primary textual evidence, opinions are bound by conditions and no independent opinion is inclusively divine itself regardless of these two factors. Subsequently, I believe that this preponderant legislation I support shall avert detriment and achieve the common benefits to unite the Islamic Family rather than other calls by casuistry approach under the pretext of reforming the family laws. In

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<sup>399</sup> *Neẓām al-Ṭalāq* 30.

<sup>400</sup> *Al-Furqa bayn al-Zawjayn* 43.



addition, some viewpoints and demands of this approach oppose the boundaries of Islamic law and its lawfulness.”<sup>401</sup>

He also added: “Our demand— in addition to its reliable evidence and capability to achieve the common benefit— this legislation can unite the distinction frequently made by the scholars between “religious faith” and “judicial judgment”, which is itself a demand that we seek to attain as possible so as not to widen the gap between “the religious conscience” and “the realistic behavior” of the Muslim, such a gap is one of the causes of Muslim suffering today and in the past.”<sup>402</sup>

I do believe in the preponderance of this opinion, specifically I seek to minimize divorce cases; nevertheless none of the B.P., the M.D. or The K.L. has addressed this matter, except matter relating to the woman in the waiting period. Article (78) of the B.P., Article (84) of the M.D. and Article (103) of the K.L. stated the following: divorce of the wife shall be invalid except the marriage is sound providing that she is not in her waiting period. The fact that should be considered by persons in concern with setting the family laws in Bahrain prior to its ratification.

The following section deals with the second type of divorce mentioned at beginning of this chapter:

### 6.3 Divorcing Thrice in One Session (*al-Ṭalāq bi-Ththalāth fī Majlis Wāḥid*):

The origin of divorce as has been legislated by God is to be uttered separated one after the other according to the Qur’ānic verse: “*A divorce is permissible only twice: after that,*

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<sup>401</sup> *FT Aḥkām al-Usra* 439.

<sup>402</sup> *FT Aḥkām al-Usra* 439.

*the husbands should either retain their wives together on equitable terms, or let them go with kindness.*<sup>403</sup> The wisdom behind this is to give a chance to the husband to reconsider the matter and the relations could be re-established, the condition of this relationship, which Islamic law is keen to preserve its continuity; after divorce twice, the Qur'ān stated: "*So if a husband divorced her wife*<sup>404</sup> (irrevocably), *he cannot, after that, re-marry her until after she has married another husband.*"<sup>405</sup> And there is nothing in the Qur'ān and *Sunna* about combining the three divorces in one pronouncement, or in one session. But if he went against this, wasted his chance and that of his wife, and hasten the final separation and he combined the three repudiations in one utterance, or in one session, then he would have fallen within the second category of Innovated divorce "*ṭalāq bid'ī*" which is prohibited. At this point the question may be raised as to whether or not this divorce is effective.

'Abdullāh b. 'Abbās narrated: 'the pronouncement of three divorces during the lifetime of the Prophet and that of Abū Bakr and two years of the caliphate of 'Umar was treated as one. But 'Umar said: "verily, people have begun to hasten in the matter in which they are required to observe respite. So let us impose this (i.e., three pronouncements) to be three divorces upon them, then he imposed it upon them."<sup>406</sup>

The scholars held the following three different opinions regarding this question:

Most of the Prophet's Companions; 'Umar b. al-Khaṭṭāb, 'Uthmān b. 'Affān, 'Alī b. Abī Ṭālib and the four 'Abdullāhs (Ibn 'Umar<sup>407</sup>, Ibn 'Amr<sup>408</sup>, Ibn 'Abbās and Ibn Mas'ūd)

<sup>403</sup> Al-Baqara, II: 229.

<sup>404</sup> The third time.

<sup>405</sup> Al-Baqara, II: 230.

<sup>406</sup> Muslim: 1472.

<sup>407</sup> Abū 'Abd al-Raḥmān 'Abdullāh b. 'Umar b. al-Khaṭṭāb (10 BH-73/613-692) A companion. He was strong and frank. With his father he migrated to Medina and attended *fatḥ* Mecca. He was born and died in Mecca. He gave *fatwa* for a period of 60 years. Books of *ḥadīth* recorded his 2630 *ḥadīth*. *Al-A'lām* 4/108.



and Abū Hurayrah, and most of the Followers and the Four Imāms, the majority of scholars headed by Ibn Ḥazm: It is effective as an irrevocable divorce. This is the opinion of those who agreed with them: “it is the divorce of *Sunna*, and whoever says: you are divorced and intended it for two or three times, and then it shall be as he intended it.”<sup>409</sup>

Their proofs:

- Apparently the verses in the Qur’ān revealed on divorce did not differentiate between applying the divorce one time after the other and applying it thrice in one utterance. They did not separate between its effectiveness during, one purification period or many purification periods, thus there is no difference in the effectiveness of divorcing once, twice or thrice.
- From the *Sunna*, the *ḥadīth* of Muḥamūd b. Labīd<sup>410</sup>: That the Prophet once was angry to pronounce the three repudiations in one utterance except in mutual imprecation, and said: “*is this Book of God going to be made a plaything while I am yet among you?*”<sup>411</sup> It shows that the triple divorce in one utterance is effective as three, and the divorcee shall be obliged to abide by it, though he is considered to be disobedient in applying the divorce in this manner with the evidence of the Prophet’s anger.<sup>412</sup>
- Ibn ‘Abbās stated: “Rukāna<sup>413</sup> divorced his wife Suhayma<sup>414</sup> absolutely; so he came to the Prophet. He asked him: What did you intend? He said: A single

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<sup>408</sup> B. al-‘Āṣ (7 BH-65/616-784). He narrated 700 *ḥadīth*. *Al-A ‘lām* 4/111.

<sup>409</sup> *Al-Muḥallā* 10/161.

<sup>410</sup> (d. 99/718). A trustworthy follower. ‘Ajlī, Aḥmad b. ‘Abdullāh b. Ṣāliḥ, Abū al-Ḥasan. *Ma‘rifat al-Thiqāt* 2/266, Maktabat al-Dār, Saudi Arabia, 1<sup>st</sup> Edition 1985; *tahthīb al-Tahthīb* 10/95.

<sup>411</sup> Nisā’ī: 3401.

<sup>412</sup> Badrān 349.

<sup>413</sup> B. ‘Abd yazīd al-Maṭlabī who is lost when he was sparing with the Prophet, then he came Muslim. Ibn Ḥajar. *Al-Iṣāba* 1/540.

utterance of divorce. He said: Do you swear by Allāh? He replied: I swear by Allāh. He said: It stands as you intended<sup>415</sup>. The case of Rukāna affords an illustration. He divorced his wife thrice but this was counted as a single divorce, then Rukāna would not have sworn if it had not been counted thrice, and the Holy Prophet would not have asked him to swear for not intending the thrice.<sup>416</sup>

- ‘Ubāda b. al-Ṣāmit<sup>417</sup> is reported to have said: “My grandfather divorced his wife a thousand time, and he went to see the Prophet and told him about that. The Prophet replied: “*your grandfather did not fear Allāh, the three divorces were for him, but the nine hundred and ninety seven were merely in rancor and injustice, Allāh may Punishes him if he wishes or forgives him if he wishes.*”<sup>418</sup>
- They offered the unanimity of scholars as evidence, and those opinions of: Bājī<sup>419</sup>, Ibn al-‘Arabī<sup>420</sup> and Ibn Rajab<sup>421</sup>.
- They concluded what had been reported about the Prophet’s Companions whom practiced divorcing thrice in one utterance. Mujāhid<sup>422</sup> said: “I was staying with Ibn ‘Abbās and a man came to him and said that he divorced his woman thrice.

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<sup>414</sup> Bint ‘Umayr al-Muzaniyya. *Al-Iṣāba* 4/337.

<sup>415</sup> Narrated it Shāfi‘ī, Aḥmad, Abū Dawūd, Turmudhī, Ibn Mājih, Ibn Hibbān and Ḥākim. And in its chain (*sanad*) Ibn Ishāq who is a weak (*ḍa‘īf*) in a tradition. See: Ibn Ḥajar. *Bulūgh al-Marām min Adillat al-Aḥkām*, narrative: 268, Maktabat al-Riyadh, Saudi. N.D.

<sup>416</sup> Badrān 350.

<sup>417</sup> B. Qays al-Anṣārī al-Khazrajī Abū al-Walīd. An one of Prophet’s companions. He narrated 181 *ḥadīth*. *Al-A‘lām* 3/258.

<sup>418</sup> *Muṣannaf ‘Abd al-Rāziq*. 11339.

<sup>419</sup> Sulaymān b. Khalaf b. Sa‘d al-Tajībī al-Qurṭubī Abū al-Walīd al-Bājī (403-474/1012-1081). A Mālikī scholar and narrator of *Ḥadīth*. *Al-A‘lām* 3/125.

<sup>420</sup> Muḥammad b. ‘Abdullāh b. Muḥammad al-Mu‘ārifi al-Mālikī (468-543/1076-1148). A prominent judge and scholar of *Ḥadīth*. He wrote books in all the main fields of Islamic studies. *Al-A‘lām* 6/230.

<sup>421</sup> ‘Abd al-Raḥmān b. Aḥmad b. Rajab al-Sulāmī al-Baghdādī Abū al-Faraj Zayn al-Dīn (736-795/1335-1393). An one scholar of *Ḥadīth*. He was born in Baghdād and life and died in Damascus. *Al-A‘lām* 3/295.

<sup>422</sup> Abū al-Ḥajjāj Mujāhid b. Jabr, Mawlā Banī Makhzūm (21-104/642-722). Second generation (*Tābi‘ī*). A great *mufasssīr* from Mecca. Ibn ‘Abbās has taught him *Tafsīr*. travelled a lot. At the end he settled in Kūfa. *Al-A‘lām* 5/278.



Ibn ‘Abbās was silent and I thought he would return her to him. Then he said: One of you sets to ride his temper then he says: O Ibn ‘Abbās, O Ibn ‘Abbās, and the Qur’ān stated: “*And for those who fear Allah, He (ever) prepares a way out,*”<sup>423</sup> you did not fear Allāh, I did not find a way out for you. You disobeyed your God and your wife was irrevocably divorced from you.<sup>424</sup> And it was narrated that, a man came to ‘Uthmān b. ‘Affān and said: “I divorced my wife a hundred times”. ‘Uthmān said: “Three makes her unlawful to you and the ninety-seven are transgression.”<sup>425</sup> In other narrative: A man came to ‘Alī b. Abī Ṭālib and said: “I divorced my woman a thousand times” and Ali said: “she was irrevocably divorced by three repudiations.”<sup>426</sup>

- They also utilized analogy as evidence, that marriage is a possession that can be removed separately, so it can be removed as one group similar to the other kinds of property.

Shī‘a: it has no effect at all because it is contrary to the *Sunna*, so it is a rejected innovation, and it is nonsense. That is the opinion of.

Some of the Prophet’s Companions; ‘Abd al-Raḥmān b. ‘Awf<sup>427</sup>, al-Zubayr b. al-‘Awwām<sup>428</sup>, ‘Aṭā’<sup>429</sup>, Ṭāwūs, ‘Amr b. Dinār<sup>430</sup>, Ibn Taymiyya and his disciple Ibn al-

<sup>423</sup> Al-Talāq, LXV: 2.

<sup>424</sup> Abū Dāwūd: 2197; *al-Sunan al-Kubrā*: 14720.

<sup>425</sup> Ibn Abī Shayba: 17805.

<sup>426</sup> Ibn Abī Shayba: 17802.

<sup>427</sup> A companion of the Prophet and one of the ten to whom the Prophet explicitly promised paradise. He led the dawn prayer on the expedition to Tabūk when the Prophet was late in coming to the congregation. When the Prophet arrived, he joined the Prayer behind ‘Abd al-Raḥmān; the Prophet also Prayer behind Abū Bakr in the last days of his mortal illness. Smith 16.

<sup>428</sup> (d. 36-656). A famous Companion. He also one of the ten to whom the Prophet explicitly promised paradise and the fifth convert to Islam, having adopted Islam while still a child. He called *al-ḥawārī* (“disciple”) the ward used by the Qur’ān for the disciples of Jesus, because of his military services and personal services to him. He was married to Asmā’, a daughter of Abū Bakr. Smith 435.

Qayyim: it is applied as one revocable divorce. They agreed with Zaydiyya and some of the Zāhiriyya, signified by the following:

- The Qur'ān states: *"A divorce is permissible only twice"* up to His reference to the third divorce: *"So if a husband divorced her wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband"* meaning that what is legislated is the separation of divorce one time after the other because the Qur'ān stated: "twice". And He did not say two divorces. That it is not legislated for divorce to be all in one time. So if he combines the three divorces in one utterance, it shall be applied as one divorce and the divorcer by the utterance of the three shall be considered as a divorcer by one and not a divorcer by three.
- 'Abdullāh b. 'Abbās narrated: "The pronouncement of three divorce during the lifetime of the Prophet and that of Abū Bakr and two years of the caliphate of 'Umar was treated as one. But 'Umar b. al-Khaṭṭāb said: "Verily, people have begun to hasten in the matter in which they are required to observe respite. So let us impose this (i.e., three pronouncements) to be three divorces upon them."<sup>431</sup> And he imposed it upon them. Thus the *ḥadīth* clearly portrays that a thrice divorce, in one utterance was considered as one divorce; and that was not abrogated as it was continued to be applied during the time of Abū Bakr and two years of the time of 'Umar and because 'Umar imposed it based on the benefit to the community and the legislative policy and not from the view of obligatory legislation that should be followed.

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<sup>429</sup> B. Abī Rabāḥ Aslam b. Ṣafwān (27-114/647-732). The greatest scholar of the followers. *Al-A'lām* 4/235.

<sup>430</sup> Jumaḥī Abū Muḥammad al-Aṭṭar (46-126/666-743). *Al-A'lām* 5/77.

<sup>431</sup> Muslim: 1472.



- The narrative of Ibn ‘Abbās about Rukāna, which was previously stated, indicated that the Prophet considered it to be one revocable divorce. Thus the Prophet returned her to him.

Ibn al-Qayyim stated: “The practice during the lifetime of the Prophet, and that of Abū Bakr and the early years of ‘Umar’s Caliphate, when a divorcer combined the three repudiations in one utterance, was counted as but one as proven in ‘Abdullāh b. ‘Abbās narrative: “The pronouncement of three divorce during the lifetime of the Prophet and that of Abū Bakr and two years of the Caliphate of ‘Umar was treated as one.” But ‘Umar b. al-Khaṭṭāb said: “Verily, people have begun to hasten in the matter in which they are required to observe respite. So let us impose this (i.e., three pronouncements) to be three divorces upon them.” And he imposed it upon them.” Then he mentioned many ascriptions to support his conclusion, then he added: (The intention is that: it was not concealed from ‘Umar that was the *Sunna*, and it was lenient and mercy from Allah to his servants that He makes divorce one after the other, and what is ordained one after the other, the divorcer cannot impose the three times at once.” He then said: (This is the Qur’ān, *Sunna*, language of Arabs and the tradition of communication among them, and that is the practice during the lifetime of the Prophet and during the time of his Caliph Abū Bakr and all the Prophet’s Companions with him and so was the situation during the first three years of the Caliphate of ‘Umar, if we count them one by one in name we will find that they counted the three repudiations as one whether based on a *fatwa* or acknowledgement of the same.” “The intention is evident from the Qur’ān, the *Sunna*, the analogy, and old consensus and it is not abrogated by other consensus. However, the opinion of the commander of the Caliph ‘Umar b. al-Khaṭṭāb that the people

underestimated the matter of divorce wherein they were required to observe respite so he decided to punish them by imposing this, to be aware that if anyone divorces thrice at one and in the same time his wife will be irrevocably divorced and until she has married another husband” “so the any scholar whose intention is to know and follow the truth of Islamic law and the acceptance of the Prophet’s Companions for this license and facilitation at the time of the Prophet”<sup>432</sup>, ‘Umar did not withstand the Qur’ān and he understood that the *Sunna* tends to facilitate the matter to the people in accordance with their conditions, but when people misused this lenient he decided to prohibit this overstatement without contravened with the Qur’ānic texts because the verses on divorce were revealed in inclusive and comprehensive context that may be detailed in accordance with the nation’s common benefit. The Qur’ān mentioned divorce without proclaiming whether it should entail one utterance and a single formula or numerous wordings, as the Qur’ānic text is so comprehensive there is a room for independent reasoning which may be changeable according to the circumstances and conditions. For this reason Ibn al-Qayyim stated: “if you understand how religious opinion (*fatwā*) may change according to the times, you will know that Companions of the Prophet had realized the common interest was in imposing divorce as prior to the evil of thrice divorce prevalence”<sup>433</sup> “accordingly the punishment launched by ‘Umar shall come to a halt nowadays for two reasons: Firstly, the majority of people, particularly religious scholars are unaware of the prohibition of combining the three divorces. Therefore it is inappropriate to punish someone who does not recognize that he has committed a prohibited act. Secondly, their punishment would open the doors of permission that were closed at the time of the

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<sup>432</sup> Ibn al-Qayyim al-Jawziyya, *Shams al-Dīn Ibrāhīm b. Muḥammad b. Abī Bakr. ‘I’lām al-Muwaq’īn ‘an Rabbi al-‘Ālmīn* 41/3, Dār al-Jalīl, Beirut 1973.

<sup>433</sup> *‘I’lām al-Muwaq’īn* 52/3.



Companions. Moreover if the punishment was greater than the mischief itself, the judiciary and the religious verdict provider should absolutely prohibit it.”<sup>434</sup>

Ibn al-Qayyiam made his statement at least 800 years ago, yet today there still remains an unawareness of religious affairs, particularly in relation to family law regarding both marriage and separation.

Replies to the proofs of the consensus of the scholars are as follows<sup>435</sup>:

- The generalization in the stated verses are dedicated, and settings tied down by what had been proved by evidence that signified the prohibition of applying what exceeds one divorce.
- As for the *ḥadīth* of Mahmūd b. Labīd, it is considered to be as incompletely transmitted *ḥadīth* (*mursal*) because Labīd was not proven to have heard from the Prophet.
- Reading the *ḥadīth* of Rukāna, Aḥmad had weakened it due to a break in the chain of narration. Mundhirī maintained that it was weakened by Bukhārī and that the story of Rukāna indicated that he divorced her for good and not thrice. Also the intention should be considered and not the wording or actual utterance.
- The *ḥadīth* of ‘Ubāda is weak because the father of ‘Ubāda was not there during the emergence of Islam, so how could his grandfather have been present?
- The consensus of scholars was unproven. Abū Dāwūd reported of Ibn ‘Abbās that he counted the three as one, that Ṭāwūs and ‘Aṭā’ stated: (if a man divorced his

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<sup>434</sup> *‘I’lām al-Muwaq‘in* 60/3.

<sup>435</sup> *Fī Aḥkām al-Usra* 442.

wife thrice before consummating their marriage, then it shall be considered as one.)

- Regarding analogy, if the divorcee had combined what he was ordered to separate, then he would have transgressed the limits ordained by Allāh and disobeyed what He has legislated.

I can conclude that:

- The *ḥadīth* of Ibn ‘Abbās about Rukāna is invalid for citation, being *ḍa‘īf* in its *sanad* of narrators as Ibn Ḥajar maintained.<sup>436</sup>
- Although the *ḥadīth* of Mahmūd b. Labīd was incompletely transmitted, it can be used for citation because of the break in the chain of narrators (*mursal ṣaḥābī*).
- The narratives which were used for citation by the consensus or the acts of the Prophets’ Companions, all took place after the end of the Caliphate of ‘Umar b. al-Khaṭṭāb who decided to consider this form of divorce irrevocable. This was from the viewpoint of legislative policy and the Prophets’ Companions headed by ‘Uṭhmān and ‘Alī b. Abī Ṭālib approved it. They did not take into account any event that occurred in the era of the Prophet, Abū Bakr al-Ṣiddīq or the first two years of the era of ‘Umar. Therefore I find that it added nothing of confirmation to the weight of their opinion, except with regard to the approval of ‘Uṭhmān and ‘Alī of ‘Umar’s action.
- The consensus claimed by the unanimity of scholars cannot be accepted in the presence of another contrary opinion that has valid proofs.

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<sup>436</sup> *Bulūgh al-Marām*, narrative: 268.



- As per the *ḥadīth* of Ibn ‘Abbās: (the divorce at the time of the Prophet was...) it appears evident that the work was originally aligned with the aims of the Islamic law, to uphold the continuity of marriage. That is why it was set on the previously mentioned stages; any deviance from this procedure perhaps being rare at the time of the Prophet. The situation was still the same at the time of Abū Bakr al-Ṣiddīq, but during the caliphate of ‘Umar b. al-Khaṭṭāb, people tended to be lenient in this regard, a fact that encouraged the insightful Caliph to take the decision to bring it into line with the aim of achieving the interest that comes within the legislative policy and not from desire to alter the rules. This notion of interest changes with time and this concept will be discussed in the final section of this research.

When investigating relevant divorce cases brought before the Islamic Courts, it was found that most of them– if not all– indicated some degree of ignorance regarding the distinction between applying the divorce as one revocable divorce, applying it in a dispersed form, or using it as a threat in order to save the marriage. Regarding application in the *Sunnī* Courts, when a husband utters the three repudiations at one and the same session and says: “you are divorced thrice” or “you are divorced, divorced, divorced”, the court judges this divorce as irrevocable (*bā’in baynūna kubrā*) and the husband is not entitled to take her back until she is married by a sound contract to another husband, and she shall remain unlawful to him unless she is divorced or after the death of her husband. But there is a problem of contradiction that arises during application, where the judgment of the very case differs from one judge to another. I posed a question to the chief of the High *Sunnī* Court about this matter and he answered by saying that: there is a difference between a husband who presents himself before the court and says that he had divorced

his wife three times outside the court and another husband who utters the divorce wording before the court judges. The divorce utterance of the first husband shall be considered as one repudiation. As for the second husband, he shall be decreed as having uttered the divorce three times. I asked the reason for this variation and he replied: whoever utters the wording of divorce outside the court's premises is normally excited and he utters words that he neither wishes to say nor he knows about. But the husband, who utters the words of divorce before the court, he normally would be more calm and thoughtful in what he does or says. This is a worthy point of view if applied in all cases. What I found in the application contradicts with this statement, whereas work in courts is done by differentiating between the two formulae: (you are divorced, divorced, divorced) and the other formula: (you are divorced by thrice). The first utterance of divorce is treated as one revocable divorce; and the second is considered to be triple. *Shaykh* Ṣiddīqī, one of the agents of the *Sunnī* High Court of Appeal who is a follower of the *Shāfi'ī* school differs with this practice and he deems that both formulae should fall as a single revocable repudiation only. This was actually enacted by one of the judges of the Low Court when a husband came to him and said that he had uttered the divorce formula against his wife by saying: (you are divorced by thrice) but he intended one revocable divorce and the judge decreed that it was one revocable divorce as per the husband's intention and not as he uttered the divorce wording.<sup>437</sup> I was astonished at the position of the judges of the High Court when they were reviewing a suit before them when a man uttered the divorce formula without definite intervals before them and said to his wife: (you are divorced by thrice) and the court decreed that this divorce as irrevocable, but when they felt the couple's inclination towards each other and that the husband repented

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<sup>437</sup> *Sunnī* marriage contract No: 4987, in Sep 27<sup>th</sup>, 2000.



uttering the words of divorce in such a manner, the judges themselves, directed the husband to go and present his case before *Shaykh* Ṣiddīqī, if he wanted to return his wife; meaning that they were convinced of the soundness of his opinion but at the same time they were bound to abide by the consensus of scholars and this created a major discrepancy. Another case which is no less astonishing than the previous one, that in such cases the judges request the couple to obtain a *fatwā* i.e. (a formal and religious opinion) from the officials working at the Saudī Da‘wa and Irshād ‘Guidance’ center, who adopt the opinion that such a divorce is one revocable divorce. Are the *fatwā* of the officials in that center more forceful from the opinion of the judges of the court? Noting that those officials are not qualified scholars (*‘ulamā’ mujtahidūn*). These are two of the issued verdicts<sup>438</sup>:

- The *Sunnī* court judged that divorcing thrice is considered to be irrevocable even if pronounced in one session without an interval when a husband says to his wife: “you are divorced, divorced, divorced”.
- An Islamic Suit where the court decreed that the divorce pronounced thrice by a *Sunnī* divorcer against his wife who was a follower of the *Ja‘farī* school as irrevocable effective divorce, because he believed that uttering the divorce formula of three repudiations without interval and at the same time was sound in one session and in one formula, so he is bound by what he believes in.

The *Ja‘farī* Court judges such cases by considering the divorce as null and void because it considers it as nonsense, and the following is one of the verdicts issued by the *Ja‘farī* court: An Islamic Suit in which the court decreed that even if the divorcer utters divorce

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<sup>438</sup> *Shā‘ir* 304.

the formula of divorce three times, then it is ineffective and it will be considered as nonsense.<sup>439</sup>

Therefore, I perceive a change in the nature of the interest on which ‘Umar based his opinion to pass this divorce as thrice. Today, the contrary is applicable and the retention of this kind of divorce in its original form is relevant. This means applying it as one revocable divorce according to its clear alignment with the saying of Ibn ‘Abbās and the aims of the Islamic law to preserve the marriage bond and the protection of the interests of the children; particularly if the husband admits that he intended one revocable divorce to be applied or that he wanted simply to threaten his wife.

This has been observed by the legal articles in both the B.P. in section (c) of Article (79) and the M.D. in section (c) of Article (85) which states that: no divorce shall be applied which is connected to the number by utterance, in writing or by a signal, except as one divorce. And the K.L. in Article (109), which states that: the divorce, connected with a number in utterance, a signal or in writing shall not be applied except as one divorce.

The following section deals with the last type of divorce mentioned at beginning of this chapter:

#### 6.4 Divorce made during Drunkenness and Anger:

‘Āysha narrated: I heard the Prophet say: *“No divorce and no manumission (‘itāq) in a closure (ighlāq).”*<sup>440</sup>

As was stated in the text of the first decree, the application of the divorce came as a penalty and reprimand for committing the disobedience. This decree requires revision

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<sup>439</sup> Shā‘ir 304.

<sup>440</sup> Aḥmad: 25156; Ibn Mājih: 2046.



from two sides: That this decree was concerned with penalizing the divorcee husband for drinking prohibited liquor and losing his conscious mind by his own free will. However, it overlooked the other parties who would suffer by the application of this divorce, normally the wife and children. The aim of Islamic law in defining a penalty is connected to the achievement of the legislative aim in reprimanding the committing of disobedience— Here it aims to use this penalty to regulate the affairs of society by punishing the wrongdoer only, and not aiming at applying the penalty itself. Applying this divorce is penalizing the rest of the family, a result that does not comply with the aims of Islamic law.

The scholars had set a condition that the husband, when applying the divorce, should be of age and of sound mind, willing and not compelled. If the drunkenness of the spouse is not prohibited (a rare occurrence, such as when liquor is imbibed out of necessity, taken by mistake or under duress) and he applied the divorce on his woman when he was in a such state, then the scholars unanimously agreed this divorce to be null and void and he was considered to be in a similar state to that of a sleeping person. As for the individual who drinks liquor willingly (this being applicable in most cases), the scholars differed in passing a judgment on his divorce:

From the perspective of the four schools of thought: Abū Ḥanīfa, Mālik, Shāfi'ī and Ibn Ḥanbal in one narration approved its application from the point of view of penalty and reprimand for disobedience. Shāfi'ī stated: “whoever drinks liquor or wine and becomes inebriated and thence divorced, the divorce shall be obligatory on him. All the punishments (*ḥudūd*) and the impositions for disobedience for drinking liquor and getting

drunk by drinking wine, shall not impede any imposition or divorce.”<sup>441</sup> The following decree is applied in the *Sunnī* Courts (a decree of the soundness of the divorce applied by the drunkard as one revocable divorce as a penalty and reprimand for his disobedience and that his drunkenness does not prevent his applying for divorce.)<sup>442</sup>

‘Uthmān, ‘Umar b ‘Abd al-‘Azīz, Zufar, Ṭahāwī<sup>443</sup> and Karkhī from the Ḥanafīs, Aḥmad in other narration, Muzanī<sup>444</sup> from the *Shāfi’īs*<sup>445</sup> and the *Shī’īs Imāmi*<sup>446</sup>: They all maintain that the divorce should not be applicable because it lacked the intention, sobriety and the correct will; so the drunkard is considered to be similar to the irrational or sleeping person and his utterance becomes null and void. They state that there is a further penalty for drunkenness, which is the ordained punishment, so there is no pretext to add another penalty on him. ‘Uthmān: “There is no divorce for an insane person or a drunkard”. Ibn ‘Abbās: “The divorce of the drunk and the compelled is not permissible.” ‘Alī said: “all divorce is permissible except that of the insane”. Sa’īd b. al-Musayyib, ‘Aṭā’ b. Abī Rabāḥ and some of the followers also concurred with this opinion. It is also retold of ‘Alī and Mu‘āwiya.<sup>447</sup> Ibn al-Qayyim stated “Not one man of the Companions had been known to contradict ‘Uthmān and Ibn ‘Abbās in that.”<sup>448</sup> For this reason, Ahmad returned to maintaining that the divorce of the drunk shall not be applicable after he said it was applicable: “The correct thing is that there is no consideration for his utterances whether divorce or manumission...” This is the saying of the *Zāhiriyya* as

<sup>441</sup> *Al-Umm* 5/253.

<sup>442</sup> *Shā’ir* 284.

<sup>443</sup> Aḥmad b. Muḥammad b. Salāma b. Salama al-Azdī al-Ṭahāwī Abū Ja’far (239-321/ 853- 933). A Ḥanafī scholar. *Al-A’lām* 1/ 206.

<sup>444</sup> Ismā’īl b. Yaḥyā b. Ismā’īl Abū Ibrāhīm al-Muzanī (175-264/791-878). A companion of *Shāfi’ī* in Egypt. *Al-A’lām* 1/ 329.

<sup>445</sup> *Al-Mughnī* 7/114.

<sup>446</sup> *Sharā’i’ al-Islām* 3/12.

<sup>447</sup> *Nayl al-Awṭār* 6/240.

<sup>448</sup> *Zād al-Ma’ād* 5/214.



cited by Ibn Ḥazm: “The divorce of the drunk is not obligatory, and also the person who lost his mind by other means than liquor. The Qu’ran endorses: *“O you who believe! approach not prayers in a state of intoxication, until you can understand all that ye say.”*<sup>449</sup> “Who told Allāh the Gracious that he does not know what he says, so it is not permissible that he should be obliged to any of the rulings such as divorce or otherwise, because he was not addressed.”<sup>450</sup> Divorce has been legislated because it is needed and the drunk has no sobriety to appreciate the need for salvation. The least that can be aligned with the correct disposition is the correct aim or what is thought to be a correct aim and nothing else. The following decree is applied in the *Jaʿfarī* Courts (A decree of non application of divorce by the drunk; and he was penalized by one week’s imprisonment for committing the disobedience of having liquor, after he confessed that he committed that disobedience).<sup>451</sup>

As for the issue of anger, Ibn al-Qayyim stated: “It is of three kinds: The first removes the mind and the person does not know what he says. The second is in its initial stages so that it does not prevent the person from comprehending what he says and means, thus divorce shall be applicable. The following decree is applied in the *Sunnī* Courts (A decree of the soundness of divorce of ‘...’ one revocable divorce and that it was not proved before the court the validity of the claim of the husband that he applied the divorce in a state of anger, where he was knowing and his anger did not prevent his consciousness.<sup>452</sup> The third type of anger controls and aggravates but does not remove the entire mind but becomes an obstacle between self and intention, so repentance comes when anger abates.

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<sup>449</sup> Al-Nisā’, IV: 34.

<sup>450</sup> *Al-Muḥallā* 10/209.

<sup>451</sup> *Shā’ir* 285.

<sup>452</sup> *Shā’ir* 284.

Such a case requires revision and the inapplicability of divorce depends on the strength of the emotion.”<sup>453</sup>

In addition, he wrote: '*Ighāthat al-Lahfān fī Ḥukm Ṭalāq al- Ghadḥbān*' (The Relief of the needy in the Ruling Concerning the Divorce of the Angry). Ibn 'Ābdīn stated: "what appears to me is that neither the surprised nor the angry should be obliged, as they are unaware of what they say, but it suffices to consider the overcoming of being delirious and mixing seriousness with jest as in the *fatwa* pertaining to the drunkard.”<sup>454</sup> This is contrary to the opinion of the Mālikīs, Shāfi'īs and the Ḥanbalīs.<sup>455</sup> Zarqānī<sup>456</sup> maintained: "the divorce of most people occurs when they are angry. If it was permissible not to apply the divorce of the angry, then anyone can say 'I was angry' and thus his divorce shall not be applicable, which is false.”<sup>457</sup> Dusūqī<sup>458</sup> stated: "the divorce of the angry is applicable even if it was severe.”<sup>459</sup> In the opinion of the Shāfi'īs, it was said: "they agreed that the divorce of the angry should be applicable even if the spouse claimed that his anger had abated.”<sup>460</sup> This opinion requires some reviewing, as it contains contradictions to legislated texts which lift the responsibility from the person who lost consciousness to distinguish between right and wrong and to feel his whereabouts even for a certain period, like the sleeping person. So how can we punish a person who uttered the divorce while he was in a state of lost consciousness? It was reported that in the previous *ḥadīth* of 'Āysha. Shāfi'ī, Aḥmad and Abū Dāwūd and others explained the

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<sup>453</sup> *Zād al-Ma'ād* 5/215.

<sup>454</sup> *Hāshīyat Ibn 'Abdīn* 3/244.

<sup>455</sup> See: *Al-Mughnī* 7/296; *Mukhtaṣar al-Kharqī* 1/104.

<sup>456</sup> 'Abd al-Bāqī b. Yūsuf b. Aḥmad al-Zarqānī (1020-1099/1611-1688). A Mālikī scholar. He was born and died in Egypt. *Al-A'lam* 3/272.

<sup>457</sup> *Sharḥ al-Zaqānī* 3/280.

<sup>458</sup> Muḥammad b. Aḥmad b. 'Arafa al-Dusūqī al-Mālikī (d. 1230/ 1815). *Al-A'lam* 6/17.

<sup>459</sup> *Hāshīyat al-Dusūqī* 2/366.

<sup>460</sup> *Fath al-Mu'in* 4/5.



“*closure*” by anger, thus if the angry person reaches an intense degree of excitement and fury which makes him lose the power of rationalisation, then he becomes like an insane person whose disposition is not worthy. If he applies the divorce in such a condition, then his divorce shall not be applicable. We should consider the other opinion in order to strike a compromise between the two, by ensuring that the degree of anger and the words of the husband can be depended upon, under oath, that he was really unconscious due to his rage and that he repented his action (specially if his wife concurred with this), then the divorce may be revoked. But, as opined by Ibn al-Qayyim, if the anger was light and perception was retained, then it shall not be included in the meaning of “*closure*”, therefore his divorce shall be applied.

The B.P. chose not to apply the divorce of the person unconscious due to drunkenness or anger in Article (77) and the M.D. Article (83) stated the following:

- a. It is a precondition for a divorcee to be sane and capable of rational choice.
- b. The divorce of the mentally impaired, the irrational, the compelled, and the person who loses consciousness due to drunkenness or anger or other, shall not have his divorce applied.

The K.L. in Article (102) stated the following: the divorce of the sane, mature and capable of rationalisation shall be applicable. The divorce of the mentally impaired the irrational, the compelled, the sinful, the drunk, the surprised and the angry, if the discrepancy between words and actions is evident, shall not be applied.

In the cases studied for this research, none of these preconditions appeared to have been considered. Degree of anger and comprehension were not ascertained; a shortcoming that is in need of some reviewing.

From this chapter, it is evident that Islamic judges lack cohesion in their rulings on divorce. It would be preferable if one consistent opinion were adhered to, that entailed fair treatment for all family members who were likely to suffer adverse effects subsequent to the proceedings. In reality, if one judge decides to punish a husband, this can have unseen detrimental effects on the whole family.



## CHAPTER VII

### The Right of Woman to Divorce

#### 7.1 Request for Divorce on Grounds of Abuse

#### 7.2 Negotiated Divorce (*khul'*)

I have already mentioned some procedures, which the couple ought to perform in case of conflict or dissension (*shiqāq*). However, if a wife acts in a completely unacceptable manner, her husband has the right to divorce her, also in accordance with the aforementioned rules. In principle the right for divorce lies with the husband, but, does this mean that Islamic law neglects the right of the woman to initiate annulment however dysfunctional her relationship might be, even if it has become impossible for her to continue matrimonial life? Does this mean that the right of divorce still remains in the hands of the husband despite his being guilty of physical and psychological abuse?

It is acknowledged in Islamic law that in marriage there are rights shared between husband and wife. Important among these are that of mutual respect and harmony between the spouses; each endeavoring to shield the other from harm, according to the Qur'ānic statement (II: 228): “*And they<sup>461</sup> have rights<sup>462</sup> similar<sup>463</sup> over them<sup>464</sup> to what is reasonable.*” Also, the Prophet maintained in his valedictory speech (*Khutbat al-Wadā'*): “*that you have rights on your women, as they have rights on you. Your rights*

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<sup>461</sup> The women.

<sup>462</sup> Over their husband as regards living expenses.

<sup>463</sup> To those of their husband.

<sup>464</sup> As regards obedience and respect.

*over them are that they should neither befriend nor invite home he whom you dislike. However, their rights over you are that you must treat them well and provide food and clothing”.*<sup>465</sup> That is, if each party fully observes the rights of the other, this will lead to continuity and viability in marital life. In a stable marriage, internal peace and contentment may be achieved through intimacy and compassion, as mentioned in the Holy Qur’ān: *“And among His signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect.”*<sup>466</sup>

By reference to the legal cases raised in Islamic Courts, it becomes evident that divorce cases filed for reasons of abuse constitute the majority. For example, in the period between 3.11.2001- 1.12.2001, a total number of 211 lawsuits had been brought before the High *Sunnī* Court, of which a 100 had been cases of divorce due to different types of abuse. That is approximately 50%; bearing in mind that the period in which this was recorded is considered to be the ‘slack’ period for such cases, as it coincides with Ramadan- the month of fasting. At other times, this percentage reaches no less than 70%. For this reason there are increasing calls for a more consistent legislation of Family Law in Bahrain; one of the main justifications for this being the perceived bigotry (*tashadud* or *ta’aṣub*) of the Islamic judges, who tend to prolong the proceedings and the passing of judgment on such cases. On referring back to the files of such cases and attending many court sessions, it became clear to me that the greater part of them were requests for divorce on the grounds of abuse, yet the verdicts stipulated proceeding with negotiated divorces (*khul’*) since the judges were not convinced by the evidence presented,

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<sup>465</sup> Turmudhī: 1163; Ibn Mājih: 1851.

<sup>466</sup> Al-Rūm, XXX: 21.



especially if psychological damage was claimed. Therefore, this section aims to differentiate between the wife's request for divorce on the grounds of abuse and the realities of negotiated divorce.

## 7.1 Request for Divorce on Grounds of Abuse:

'Abuse' may be defined as, any mistreatment of the woman by her husband, resulting in an unbearable and detrimental situation. This includes abuses such as beating, insulting and name-calling, exerting force to do what Allāh has forbidden and neglect or continued absence.

One of the legal cases I attended at the High *Sunnī* Court was brought by a woman against the man she had been married to for 17 years.<sup>467</sup> During this time she had had four children, two boys and two girls, the eldest a girl of sixteen and the youngest a boy of three. She stated that her husband was prone to mistreat her; being a man given to drinking, and spending many nights away from home. He would be absent from the family for three or four days without telling her of his whereabouts. He would eventually return drunk and beat the members of his family. In addition, he provided no maintenance for their living expenditures and conducted illicit extra marital relationships. For these reasons, she requested the court to issue a divorce, but at the same time she required due financial rights, such as maintenance during her prescribed divorce period (*nafaqat al-'idda*), and accommodation expenses for herself and her four children. On considering the case, the court asked her to present evidence for the charges of abuse mentioned in the claim. However, she was unable to comply since she had not reported any incidents to the

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<sup>467</sup> Case No: 1348- 2001.

police, nor had she admitted herself or the children for medical attention subsequent to the physical beatings. She was careful to conceal her problems from other people, and therefore she had no witnesses from her neighbors or acquaintances; such proof being the principal means accepted in Islamic Courts, according to the fundamental Islamic injunction: *“The onus of proof rests on the claimant; the taking of an oath is incumbent upon him who denies”*<sup>468</sup> and the *ḥadīth* *“The oath is incumbent upon him who denies, and if people were given according to their claims, many would have claimed much money and much blood.”*<sup>469</sup> At the same time her husband denied all the charges she brought against him. She then asked the court that he should swear an oath for denial of the charges, as mentioned in the text, but the husband declined. He gave her the option of a negotiated divorce against her abdication of the right of custody of their two youngest children, despite his having no other person to look after them in his absence. The court then advised both parties to seek reconciliation and agreement, in spite of the fact that the accused husband had in fact been dismissed from his job as a result of bad conduct. In addition, there was a further case<sup>470</sup> brought against him to the same court by his second wife, and on the same charges of abuse; however, there were no children from this relationship. The court in fact had passed its verdict on this case only one week prior to passing its judgment on the other. The judge issued a verdict that negotiated divorce was to be the solution and the wife was obliged to accept the offer since her main concern was to avoid further abuse. The court verdict is detailed as follows: First, the divorce of the claimant from the defendant by separation, in exchange for her relinquishing custody of her two children, the other two remaining with her. Second, the claimant gives a binding

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<sup>468</sup> *Al-Sunan al-Kubrā*: 20996.

<sup>469</sup> Aḥmad: 3292; *al-Sunan al-Kubrā*: 5594; Abū Ya‘lā: 2595.

<sup>470</sup> No: 612/ 2002.



undertaking to look after her other two children. Third, the defendant undertakes to pay a monthly sum of BD 80/- for maintenance of his children, and a further BD 80/- for their clothing twice a year. Fourth, the defendant undertakes to accommodate the claimant and their two children in the eastern section of his house, and pays the monthly bills of electricity, water and municipality charges. Fifth, the claimant undertakes to allow the defendant to visit his children, and he allows her to visit her two other children, as appropriate. This judgment is binding for both parties.

In another legal case<sup>471</sup> in which the plaintiff wife presented her request for divorce due to abuse, the husband confessed to hitting her once or twice on her face and to drinking alcohol, however, he rejected divorcing her except by separation, in exchange for her abdicating all financial dues including housing for her children. She was obliged to accept the dropping of her deferred dowry, but she insisted on her right for accommodation and maintenance for their children. The court verdict was passed as follows: First, the wife accepts divorce by separation in exchange for dropping of her deferred dowry. Second, the defendant undertakes to pay the plaintiff their children's monthly maintenance, in addition to their clothing twice a year. Third, he shall pay her BD 20/- as housing allowance. The third case,<sup>472</sup> was brought by a wife on the same grounds as the previous case. Despite the defendant's admission of physical abuse and drunkenness, the court ruled divorce by separation against the wife's abdication and forfeiture of her financial rights.

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<sup>471</sup> No: 123-1995.

<sup>472</sup> No: 77/ 1995.

A fourth case<sup>473</sup> was brought against a husband who had not yet formally consummated the marriage. His wife demanded a divorce on the grounds of his alcohol consumption. On being confronted by the court, he admitted taking alcohol, but rejected divorce unless she paid him the sum of BD 1500/- of the down payment of the dowry (*mahr*). That is, he accepted a negotiated divorce, endorsed by the court in spite of the damage suffered by the wife and for which she was entitled to have a divorce and retain her full dowry.

From these recurrent cases in the Bahraini Islamic Courts, important questions arise as to what abuses are recognized by Judges that entitle the wife to request divorce and what mechanism of proving such are utilized in the application of Islamic law.

From personal observation during court sessions, it became clear to me that the damage suffered by wives coming to court predominantly involved physical abuse inflicted by husbands. The mechanism which the Islamic Courts follows to prove the charges involves: a report from the police station in which is recorded the charge by the plaintiff against the defendant, and a report from the hospital on transfer from the police to hospital, or the presence of witnesses, excluding close kin of first rank (parents and brothers of the plaintiff). If the plaintiff can produce no such evidences, then it is left to the defendant to swear an oath of denial or otherwise. Many women would either be too afraid of the consequences of reporting their violent husbands or may be too proud to make their problems public, but if the husband does not abide by the laws of Islam, then he may repudiate the charges and his oath will be false. Is the oath to be undertaken by every one, regardless of his integrity? This is what in fact happened in the case of the accused mentioned in the first case, where his second wife was forced to change her request for divorce to one of separation, and to forego her financial rights. It is both odd

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<sup>473</sup> No: 353/ 2002.



and worrying that in the second and third cases, the defendant actually admitted beating his wife and drinking, yet the court approved the compromise whereby he offered the plaintiff the choice of divorce by negotiation for foregoing the financial rights to which she was entitled according to Islamic law. The woman had little option but to accept the arrangement because this was the only way in which she could escape the abusive relationship. The court denied the plaintiff her rights and the husband remained unpunished for his actions. This outcome clearly contradicts the Qur'anic prescription: *"O you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the Mahr (dower) you have given them."*<sup>474</sup> Ibn 'Abbās stated: "this injunction concerns the man, who has a wife whose company he dislikes and she still has dowry due. As a result he mistreats her so that she foregoes her dues as ransom for her divorce and repays what he had paid for her as dowry. Allāh has forbidden that."<sup>475</sup> It is widely accepted by the Mālikīs that: if the wife claims abuse and insulting behaviour from her husband, or any actions that degrade her, such as ignoring her and preferring the company of other women; then the court will rule that she may have a confirmed divorce, even if she can only provide evidence of one incidence of the alleged abuse. She proves the abuse if only once, the judge divorces her from him a confirmed divorce. The Mālikīs also consider that confirmation of the abuse could be obtained by a variety of evidence, and it suffices only to hear circulating rumors that the husband mistreats his wife. Despite there being no concrete evidence as to the extent of the alleged abuse, it is acceptable to heed the verbal corroboration of other

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<sup>474</sup> Al-Nisā', IV: 19.

<sup>475</sup> *Tafsīr al-Ṭabarī* 4/308, *Tafsīr al-Baghawī* 1/408.

women, servants, and neighbors.<sup>476</sup> The Mālikī school states that circumstantial evidence is sufficient to prove abuse that rightfully necessitates divorce. It is not therefore necessary that proof should be confined to the word of two male witnesses, or to the confession of the defendant. ‘Adawī maintains, “The woman has the right of divorce for clear and confirmed abuse, or subsequent to circumstantial evidence.”<sup>477</sup> Of the man, who drinks alcohol, is certainly more serious than that of the man who fails to communicate with his wife.<sup>478</sup>

The B.P. in section (b) of Article (90) states the following: as the harm by the husband on the wife is evidenced in negotiated divorce (*khul'*), the divorce is effective, and the conditions on which the divorce is agreed are deemed invalid. Section (c) of Article (94) reads: If the judge fails to bring reconciliation, and the damage confirmed the judge would decree the divorce. And in similar words the M.D. states the same in section (c) of Article (100). Also in Article (98) of the B.P, and Article (105) of the M.D., both stated as regards the outcome of the mediation— that if reconciliation becomes impossible, and the dispute continues between the couple, the judge will rule for divorce relying on the report of the two mediators. In the K.L., it is stated in section (d) of Article (130) as regards to the outcome of mediation that: if it is not known who of the two is the cause of the offense, and the seeker of the divorce is the husband, the mediators propose rejection of the claim. However, if it was the wife who seeks the divorce, or both of them request to be separated, the two mediators should propose the separation without compensation. And in Article (105) of the B.P: the wife has the right of claiming divorce as a result of the husband’s addiction to alcohol or drugs. However, with regard to non- acceptance of

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<sup>476</sup> Ḥaṭṭāb 4/34.

<sup>477</sup> ‘Alī al-Ṣa‘īdī al-Mālikī. *Ḥāshīyat al-‘Adawī* 2/120, Dār al-Fikr, Beirut 1992.

<sup>478</sup> See: *Ghandūr* 513.



close relatives (the parents, brothers and sisters) as witnesses, on grounds that they have vested interest and bias to their relative, is a misplaced justification, since the conditions of witnesses will be applied to them, such as the vow on oath. There exists contradiction among the judges regarding their acceptance of the vow on oath of denial from the husband whose debauchery is clear, and their dismissal of evidence from close kin, even though they are evidently pious. This is the subject addressed by the B.P. in section 2 of Article (134), which states that: evidence presented by a close relative as witness, and who has kinship with that for whom the testimony has been in favor, would be accepted if the person giving testimony is worthy of such testimony. This accords with the K.L. in Article (135), and it is stated in its memorandum.

It is recognized that the degree of closeness of kin or relationship between the witness and that for whom he gives evidence, what so ever it may be, does not alone prevent acceptance of the evidence wherever its other conditions are met, such as conviction in Islam for the Muslim. This is in order to ward off hardship and offence and to preserve rights, following the guidance of ‘Umar b. al-Khaṭṭāb, the Prophet’s Companions (Ṣaḥāba), Shurayḥ and all those agreeing with them.<sup>479</sup>

## 7.2 Negotiated Divorce (Khul’):

The Khul’ is a special form of divorce by which the wife purchases her freedom. The name comes originally from the symbolical act of “taking off” and throwing away a piece of clothing, but already in the pre-Islamic period it had long become an expression for the

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<sup>479</sup> Ghandūr 785.

dissolution of legal relationships in general.<sup>480</sup> The Islamic term refers to the ‘taking off’ of sound marriage relations with consent and with the utterance of the word “*khul*” or in similar meaning, in return of renunciations given by the wife to the husband, i.e. divorce on recompense<sup>481</sup>, or divorce at the instance of the wife who must pay compensation to the husband.<sup>482</sup>

The Ḥanafīs distinguishes between negotiated divorce and divorce on payment or mutual discharge (*mubara’ah*).<sup>483</sup> It is called (*khul*) because the God has made each of the married couple as a cover for the other, the Qur’ān stated: “*They are Libās* [i.e. body cover, or screen, i.e. enjoy the pleasure of living with them], *for you and you are the same for them*”<sup>484</sup> and in negotiated divorce each party rescinds the bond and loyalty of marriage. Divorce is a right which Islamic law has entitled the woman who does not principally own the right to divorce, however, if she is unwilling to continue the marriage relation, the husband may not want to divorce her or loses the dowry he has paid and other things besides, also he may be worried about the future of his children. Therefore, Islamic law opened the door of negotiated divorce, which allows the wife to free herself, willing to forgo the whole or part of her dowry by compensating the husband financially. This fundamental rule is based on the Qur’ānic verse: “*And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allāh* (i.e. to deal with each

<sup>480</sup> Gibb, H. A. R. and Kramers, J. H. Shorter Encyclopedia of Islam 568, Leiden, E. J. Brill 1974.

<sup>481</sup> *Khurashī*, Muḥammad b. ‘Abdullah b. ‘Alī. *Sharḥ al-Khurashī ‘alā Mukhtaṣar Khalīl* 4/12, al-Kubrā Printing, Egypt, 2<sup>nd</sup> Editon, *al-Mughnī* 7/58.

<sup>482</sup> Wehr, Hans 256.

<sup>483</sup> *Nayl al-Awṭār* 7/41.

<sup>484</sup> Al-Baqara, II: 187.



other on a fair basis). *Then if you fear that they would not be able to keep the limits ordained by Allāh, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Khul' (divorce). These are the limits ordained by Allāh, so do not transgress them. And whoever transgresses the limits ordained by Allāh, then such are the Zalimūn (wrong-doers).*<sup>485</sup> Ibn 'Abbās narrated: The wife of Thābit b. Qays<sup>486</sup> came to the Prophet and said, "O Allāh's Messenger! I do not blame Thābit for defects in his character or his religion, but I being a Muslim, dislike behaving in an un-Islamic manner (if I remain with him)." On that the Prophet said (to her), "*Will you give back the garden which your husband has given you (as mahr)?*" She said, "Yes." Then the Prophet said to Thābit, "*O Thābit accept your garden, and divorce her once.*"<sup>487</sup> Ṭabarī related that: Her husband said: "Oh, Messenger of God, I have given her the best of my property, a garden, and then let her give me back my garden." The Prophet said to her: "*what do you say to that?*" she said, yes I accept, and shall give him more if he so wishes. The Prophet said; "*more payment is not allowed*" and he separated them.<sup>488</sup>

From these narratives it will be clear to us that Islamic law has given this right to the woman with respect to alleviate harm and abuse. Such damage as may be found through lack of harmony between the spouses to such an extent that she may develop a feeling of hatred towards him. Hence the prime objective of the marriage bond will be neglected. However, if she demands divorce for no justifiable reason, she will have committed a sin,

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<sup>485</sup> Al-Baqara, II: 229.

<sup>486</sup> B. Shammās al-Khazrajī al-Anṣārī (d. 12/ 633). He was the speaker of the Prophet and killed in Yamāma. *Al-A 'lām* 2/ 98.

<sup>487</sup> Bukhārī: 4782.

<sup>488</sup> *Tafsīr al-Ṭabarī* 2/461

according to the Thawbān<sup>489</sup> narrative that the Prophet said: *“If any woman asks her husband for divorce without some strong reason, the odour of Paradise will be forbidden to her.”*<sup>490</sup>

On reviewing the aforementioned cases, I find that this form of divorce endorsed by the court, does not follow the set procedure. It appears convenient for the judges to find the shortest route and most readily available solutions to end the dispute between the married couple on the one hand, and on the other, the concern of the abused wives to rid themselves of those abuses, after they have ascertained that the judges will not be fair to them despite clear evidence. However, there is a greater problem represented in the court; that of approving the compensation in such a negotiated divorce whereby the wife relinquishes custody of her children as is presented in the two following decrees:

- The court ruled negotiated divorce as appropriate, for the wife’s foregoing of custody of her two children (aged 6 and 8) and also her previous rights of financial support.<sup>491</sup>
- The court judged the divorce of the defendant from the plaintiff, on separation, a confirmed first divorce, for her abdication her right to custody her two children (aged 4 and 2.5 years) to the husband’s mother, and also forfeits the arrears of her bride price (dowry).<sup>492</sup>

This in addition to the case already mentioned in this chapter in which the wife relinquishes the right of custody of her two children (aged 8 and 3). This ruling came

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<sup>489</sup> B. Bajda, Abū ‘Abdullāh, *muwla* of the Prophet. *Tahthīb al-Tahthīb* 2/28.

<sup>490</sup> Aḥmad: 22433; Abū Dāwūd: 2229; Turmudhī: 1187; Ibn Mājih: 2055.

<sup>491</sup> No: 14/ 2002.

<sup>492</sup> No: 155/ 2002.



in accordance with the view upheld by the Mālikīs who state that: divorce by negotiated divorce by abdication of the right of care to the father is acceptable, and this right remains with him, even if there another person more deserving of this right. However, they mentioned some conditions such that the child under care is not to be disadvantaged, for example, if the child is deeply attached to his mother, which is natural, or if the place of residence of the father is not safe. Otherwise, the right of custody will be foregone on agreement between the two and divorce will take place.<sup>493</sup> This is what ought to have happened in the first case, especially that the age of one of the children whose right of care was given to the father was only 3 years. How, then could the father take care of the child, especially during his work outside the house? In addition, at this age the child is naturally attached to the mother, who has already suffered enough by this point. Indeed, such a ruling is based but on the first part of the text of rule in the Mālikī school, and does not take full consideration of the text in its entirety which specifies the condition which is more important. It is like the one who stops while reading the verse from the Holy Qur'ān this way: *“So woe unto those performers of Salāt (prayer).”*<sup>494</sup>

Most importantly, however, that when religious scholars, spoke of the issue of childcare, they stressed two basic points:

- That the mother is naturally the most rightful person to take care of the child. This is evidenced in what has been related about ‘Abdullah b. ‘Amr b. al-‘Āṣ narrated: that a woman came to the Prophet and said to him: “This my son has my stomach

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<sup>493</sup> Dusūqī 2/394.

<sup>494</sup> Al-Mā‘ūn, CVII: 4.

(womb) been a shelter into him my lab a protection, and my breasts a drinking, and his father has divorced me, and claimed to take it away from me.” The Prophet said to her: “*you are the most rightful person off its care unless you marry.*”<sup>495</sup> It is also related that ‘Umar b. al-Khaṭṭāb divorced his wife, Jamīla, and he had a son from her. Then dispute arose between the two of them on who to take care of their son ‘Āṣim, each of them wanting to take his custody. On brining the dispute before the Caliph Abū Bakr al-Ṣiddīq, he ruled that the child remains with its mother, and said to ‘Umar: “let them alone. Her odour, her touch, her caressing, her spittle are better for him than yours, until he grows up, then he will choose for himself.”<sup>496</sup> In another narrative, he said, “better with her than honey with you.”<sup>497</sup> These are words that sum up eloquently the truth about the bond that binds the child to its mother, which must not be violated or transgressed and as a result deprive both parties of its necessity. In another narrative, it is related that Abū Bakr, said to ‘Umar, after he had ruled that the child should remain with its mother: “no mother dotes on her child.”<sup>498</sup>

- However the subsequent issue, which is no less important than the first, examines whether the right of care is due to the carer, or the cared for? This is a matter on which opinion is divided among the trusts of the different religious schools: the Shāfi‘īs the Ḥanbalīs, and some of the Ḥanafīs consider that: it is the right of the woman carer, taking into account the possibility that the might be unable to

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<sup>495</sup> Aḥmad: 6707; Abū Dāwūd: 2276; al-Ḥākim: 2830; *al-Sunan al-Kubrā*: 15541.

<sup>496</sup> Ibn Abī Shayba: 19123; ‘Abd al-Rāziq: 12601.

<sup>497</sup> Ibn Abī Shayba: 19123; ‘Abdal-Rāziq: 12601.

<sup>497</sup> Zayla‘ī, Muḥammad b. ‘Abdullah b. Yūsuf. *Naṣb al-Rāya li-Aḥādīth al-Hidāya* 3/266, Dār al-Ḥadīth, Cairo 1995.

<sup>498</sup> *Al-Sunan al-Kubrā*: 15545.



undertake the caring, and therefore will not be forced to undertake it. Except, however if she has been appointed for it, such as that there is no other one around, and neither the father, nor the child has the financial means. This is in order to preserve the right of the child some of the Ḥanafī uphold the it is the right if the cared for child, such that the mother is obliged to take care of it, in order that the child retains its rights. This view is held by the Mālikīs, as is the view that it is a right for both the career and cared for, and it is not an absolute right for either of them. They also perceive the right of the child as stronger. From this it is clear to me that the Mālikī view is the most valid, as it accords with the aforementioned *ḥadīth* and words of Abū Bakr. Strangely, however, the Mālikī judges do not normally take this view, which is the established one in all their other rulings. Why, then, have they come to overstep it, even though it is the most appropriate? Consequently, the woman has no right to ablactate the care of the child, as the right is not absolutely hers, such that if she foregoes her right, there remains the right of the child in its need for care, protection, and welfare. In addition, it is not acceptable to negotiate the issue of care in exchange for divorce.

This matter is stressed both by the B.P. in section (a) of Article (90) and the M.D. in Article (95) both of which stipulated that it is not right to compensate for the negotiated divorce (*khul'*) by abdication of right for the care of the children or any of the women dues. It however, this does happen, it is appropriate to effect the divorce and the condition annulled. The B.P. adds the statement: and the female guardian has the right to take the child by force, its father is obliged to support it financially. The K.L. in Article (118) specifies that: if the father makes conditional for negotiated divorce to take the

child with him, for the period of care, the divorce becomes capful and the condition null and void. The woman has the right to take the child, and the father is obliged to pay for its support and the change of care. In addition Article (88) stipulates that: (a) the married couple may agree to terminate the marriage contract by negotiated divorce in cases where the wife will not be disadvantaged, and (b) negotiated divorce would take effect if the wife raised her claim to the judge requesting to be divorced, and (c) negotiated divorce would be by the wife paying a compensation to the husband within limits of the amount he has given her, (d) negotiated divorce is considered an absolute divorce. The M.D. stipulates similar terms in Article (93) except for item (c).

In conclusion, there are obvious flaws in the current legislative system wherein a woman who is suffering horrendous abuse may be refused a divorce due to lack of evidence and on the sometimes-false statement of her husband. Also, Islamic judges should consider the emotional and financial difficulties caused to the woman who is forced into accepting a *khul'* as her only means of escaping the abuse. In the majority of cases, it is completely inappropriate for the husband to be given custody of the children; a practice that is not uncommon in the Islamic Courts. This is further evidence that the system fails to fulfill the Islamic prescription of social interest.



## CHAPTER VIII

### The Effects (*Āthār*) of Divorce

#### 8.1 Divorced Wife Indemnity (*Mut‘at al-Mutallaqa*)

#### 8.2 Custody (*Ḥaḍāna*) of Children

#### 8.3 Child Maintenance (*Nafaqa*)

The preceding chapter dealt with the actual process of divorce and this section goes on to examine the implications on family members once the separation is finalized. In the preface of this study, I mentioned the shortcomings of the Bahraini Islamic Courts, some of which pertain to the resultant effects of divorce. The following three topics address this issue; the divorced wife's indemnity (*mut‘at al-muṭallaqa*), the custody of children after divorce (*ḥaḍāna al-awlād*) and their maintenance costs (*nafaqat al-awlād*).

#### 8.1 Divorced Wife's Indemnity (*Mut‘at al-Muṭallaqa*):

In many cases, divorce would be disadvantageous to the woman as a result of financial problems, especially if she were exclusively dependent on her husband's income and the marital home. In addition there may be damage to her reputation due to the surmise of neighbors etc. as to the reasons behind the divorce. Generally, the applied law in Islamic Courts in Bahrain is that the divorcee whose marriage has been consummated should receive her divorce indemnity for three months in case of revocable divorce (*ṭalāq raj‘ī*), however if she has children, the ruling is that those who reside with her should receive

the monthly allowance and accommodation or housing allowance if she has more than one child. This causes problems for a great many divorced women, especially those with one child, or those who have lost their livelihood and accommodation.

The Qur'an states: *"and for divorcee women maintenance (should be provided) on reasonable (scale). This is a duty on al-Muttaqūn (the pious)."*<sup>499</sup>

*"There is no sin on you, if you divorce women while yet you have not touched (had sexual relations with) them, nor appointed unto them their Mahr. But bestow on them (a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good."*<sup>500</sup>

*"O you who believe! When you marry believing women, and then divorce them before you have sexual intercourse with them, on 'Idda [divorce prescribed period], have you count in respect of them. So give them a present, and set them free (i.e. divorce), in a handsome manner."*<sup>501</sup>

The preceding Qur'ānic verses discuss the issue of indemnity for the divorced woman and refer to what the husband pays in financial compensation at the time of divorce. Although a financial settlement is crucial, it is also important that the husband makes his wife's integrity known in public and he should declare that his reason for divorce is a strictly private matter. A divorce settlement then serves as a palliative for her broken heart on the separation from her husband.<sup>502</sup> Lastly, it is a form of financial compensation to help her in her future life. This is a right that the Islamic judges of Bahrain do not normally decree for the divorcee, except in limited situations, or by the personal efforts of

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<sup>499</sup> Al-Baqara, II: 241.

<sup>500</sup> Al-Baqara, II: 236.

<sup>501</sup> Al-Aḥzāb, XXXIII: 49.

<sup>502</sup> Riḍā, Muḥammad Rashīd. *Tafsīr al-Mānār* 2/430, Dār al-Ma'rifa, Beirut. N.D.



one or two of the judges. It is certainly not an established rule that is legally binding for all. This kind of indemnity varies; sometimes the divorced woman will be decreed to have a house, even if she has no children or some who are resident outside the house. This ruling generally applies to the older divorced woman who has spent many years with her husband, has no one to live with and no money with which to buy or rent another dwelling.

However, the scholars' views on this matter differ. Ibn 'Umar, states: "every divorcee woman has an indemnity, except that who is divorced and some one has been allotted to her, and has not been touched, then she has to get half of what has been allotted to her."<sup>503</sup> It is also related that Ḥasan al-Baṣrī<sup>504</sup>, Ibn Shihāb<sup>505</sup>, Zuhri<sup>506</sup> and Sa'īd b. Jubayr<sup>507</sup> have all maintained: "every divorcee woman has an indemnity". Zuhri is related to have said: "she has two indemnities; one decreed by law, the other, a right incumbent upon the pious. A man, who divorces his wife before settling the price and has not consummated the marriage, has to pay the indemnity, because there is no bride price due on him. The man who divorces his wife after consummation of the marriage and settling the price, the indemnity is a right due on him."<sup>508</sup> This is also the view of Mujāhid.

The juridical schools, however, differ as follows:

The Ḥanafīs<sup>509</sup> and Ḥanbalīs hold the most accepted view, which is similar to that of Zuhri; the indemnity mentioned in the Qur'ānic verses is of two types: an indemnity that is decreed by law, and another not decreed, but that the husband undertakes between

<sup>503</sup> *al-Sunan al-Kubrā*: 14268; 'Abd al-Razzāq: 12224; Ibn Abī Shayba: 18699.

<sup>504</sup> 'Abd al-Razzāq, Abū Bakr. *Muṣannaf 'Abd al-Razzāq* 13149, al-Maktab al-Islāmī, Beirut, 2<sup>nd</sup> Edition 1982.

<sup>505</sup> *Al-Muwatta'*: 1189.

<sup>506</sup> Abd al-Razzāq: 12238.

<sup>507</sup> *Al-Sunan al-Kubrā*: 14271.

<sup>508</sup> 'Abd al-Razzāq: 12243.

<sup>509</sup> Jaṣāṣ 1/508.

himself and God- to donate to the divorced woman. Thus, the indemnity is due to the woman before consummation of marriage, if he has not already earmarked a dowry or bride price: *"There is no sin on you, if you divorce women while yet you have not touched (had sexual relations with) them, nor appointed unto them their Mahr. But bestow on them (a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good."*<sup>510</sup> The injunction is in the words *"But bestow on them (a suitable gift)"* and this prescription renders it imperative, until it is otherwise proven to be merely preferable. The Divine words: *"a gift of reasonable amount is a duty on the doers of good"*, *"This is a duty on al-Muttaqūn (the pious)."* and *"a duty on the doers of good"* all indicate positive affirmation. The words: *"and for divorcee women maintenance (should be provided) on reasonable (scale)"* also make it imperative, since indemnity is allotted to the divorced woman. Therefore, what a person is entitled to becomes his right, that s/he may claim to have/or obtain. However, the woman for whom a bride price has been specified is entitled only to half of the price: *"and if you divorce them before you have touched them, and you have appointed to Mahr, then pay half of that (Mahr)."*<sup>511</sup> Such a divorcee has no lawfully recognized indemnity. However, a desirable indemnity is due to the divorced woman whose marriage has been consummated, whether the bride price has been specified or not. There is another version for the Ḥanbalīs, in agreement with what Ibn 'Umar and others hold, that it is a lawful right for every divorcee.

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<sup>510</sup> Al-Baqara, II: 236.

<sup>511</sup> Al-Baqara, II: 237.



The Mālikīs<sup>512</sup> hold that the indemnity is preferable (*mandūb*) and that there is no obligation on the divorcee husband. He makes a settlement of his own free will, as a gesture to alleviate the problems of his wife. Therefore, the indemnity is due to every woman who undergoes a confirmed divorce. It is not due to the woman irrevocably, only after the prescribed waiting period has elapsed, because during this time she still awaits reconciliation with her husband. Also, it is not due to the woman from whose part the divorce has taken place, or of her own will, such as the divorcee (*khul'*) or that of cursing (*mulā'na*).<sup>513</sup>

The Shāfi'īs hold a similar view to that of Ibn 'Umar: that the indemnity is due to every divorcee woman, except that who was divorced before consummation of the marriage, and a dowry has been named for her, so they said she should receive half of that dowry.

This is also the view of Ibn Taymīyya.<sup>514</sup>

Zāhirīs maintain that it is imperative on the divorcee man in all cases. They mentioned that the Qur'ān stated: "*and if you divorce them before you have touched them...*" If the marriage has not been consummated, and a dowry named for her, she should receive half of it. This does not however imply that the wife has no indemnity, as it is instructed in the text. It is therefore possible to combine the two verses, accordingly.<sup>515</sup>

After this review of the different views of the jurists on the legal status of a woman indemnity after divorce, it appears to me the merit of the view which maintains that it is an imperative, but should be circumscribed by the wisdom for which it has been

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<sup>512</sup> *Al-Mudawwana* 2/330.

<sup>513</sup> Meaning: Oath of condemnation; sworn allegation of adultery committed by either husband or wife. See: Wehr 870.

<sup>514</sup> Ibn al-Qayyim al-Jawzīyya, Shams al-Dīn Ebrāhīm b. Muḥammad b. Abī Bakr, *Ikhṭiyārāt Skaykh al-Islām Ibn Taymīyya* 141, Dār al-Ṣafā, Cairo, 1<sup>st</sup> Edition 1993.

<sup>515</sup> Ibn Ḥazm. *Al-Muḥllā* 1/224.

legalized, that is to nitrate the loneliness that befalls the woman on divorce. It is, therefore, important to differentiate between the wife who has been the cause of divorce (she is exempt from this condition) and the one who deserves the indemnity. Such an exemption includes the wife whose behavior has become unacceptable and she may be recalcitrant (*nāshiz*), thus forcing her husband to divorce her. She is thus perceived as being responsible for her own suffering

Finally, there is the case where the husband divorces his wife for no legitimate reason. In Personal Status Law this is entitled “arbitrary divorce” (*ṭalāq ta‘assufī*), which is rejected by one contemporary writer: “some contemporary jurists have coined what they called ‘arbitrary divorce’ which may have been adopted from western legislation. This is because divorce is of two types: *Sunnī* and Innovated (*bid‘ī*). The *Sunnī* one is either Revocable (*raj‘ī*) or Irrevocable (*bā‘in*).<sup>516</sup> This is true if we confine or scrutiny to the name. However, when we look closely into the subject, it would inevitably come within the scope of our subject under review and it contradicts the appropriate procedure in divorce, and contradicts the goals of the Islamic law in its approval of divorce when necessary, and in accordance with the set stipulations.

In addition, the obligatory status of the indemnity of divorce gives rotation to the women— especially those poor ones among them- against being abused by morally weak men, especially those swell-off among them who think that the objective of marriage is only to satisfy their sexual desire, without consideration to other matters, chief among which is the feeling of both husband and wife of stability and psychological quietude and tranquility. This is expressed in the Holy Qur’ān by the word “repose” (*sakan*) in the

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<sup>516</sup> Qaysī, Marwān. *Al-Mar’a al-Muslima bayna Ijtihādāt al-Fuqahā’ wa Mumārasāt al-Muslimīn*, Dār al-Faḍīla, Riyadh, 2<sup>nd</sup> Edition 2000.



Verse: *“And among His Signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect.”*<sup>517</sup>

Therefore, there must be a legal procedure to stop such men from manipulating this conditional right, such as financial compensation, in addition to other financial dues to which the divorcee woman is entitled in normal circumstances.

The B.P. in Article (85) and M.D. in Article (90) both have restricted the indemnity for the divorce to the woman if the marriage has not been consummated, or if a dowry has not been decided. It is also applicable to those women who are in similar such conditions. Both laws have stipulated that: the divorcee whose marriage has not been consummated or her dowry is undecided or unacceptable, has a right to the divorce indemnity; subject to the financial status of the man and an assessment of her particular situation.

This restriction cannot be achieved by the goal already mentioned, particularly with regard to harm being more likely to have come to the wife from a consummated marriage rather than the wife from an unconsummated one. Therefore, the formulation of a legal article must be re-considered before it can be applied as law. It would be preferable to employ K.L. Article (165) with some modification, since it has confined its validity to the woman whose marriage has been consummated, excepting the wife whose marriage has not. However, it has set aside some exceptional cases and stipulates that:

- a. If a void marriage has been undone after consummation of the marriage, the woman has a right (other than her support during the prescribed period of confinement) to an indemnity estimated not to exceed the support for one year, as the status of the husband may permit. This is to be given to her in monthly

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<sup>517</sup> Al-Rūm, XXX: 21.

installments subsequent to the end of the confinement period, unless the two parties agree otherwise on the amount and the method of settlement.

b. The following are exceptions to this ruling:

- Divorce as a result of lack of support due to the husband's financial hardship.
- Separation due to harm, if it be instigated on the part of the wife.
- Divorce with the wife's approval.
- Annulment of the marriage on the wife's request.
- Death of either one of the married couple.

In the explanatory note to the law, the following statement has appeared: in the present climate, the divorced woman has become increasingly in need of greater support than that prescribed for the period of confinement. This would aid her in mitigating the effects of the divorce financially. The divorce indemnity not only addresses this need, but also goes some way to preventing hastiness in proceeding with annulment. There is also no justification for discrimination between the woman who is harmed within a consummated marriage and she who shares a similar plight in an unconsummated one.

## **8.2 Custody of Children (*Ḥaḍānat al-Awlād*):**

The previous topic '*khul*' has mentioned some of the suits in which the Court approved the mother's relinquishing of her custody of the children, noting that this step was taken in a bid to avoid harm from the husband, and not indicative of her negligence or lack of maternal love. The Court's action in this instance disregarded the interests of the children and their need for the care and security of their mother. The following focuses on cases concerning the relinquishing of *ḥaḍāna* by the mother.



The following decrees are issued by the *Sunnī* Court:

- A High Islamic Court of Appeal suit:<sup>518</sup> (after reviewing the appeal against the court verdict and its reasons, we deem that the verdict was correct. Of what has been mentioned in the deliberations: “whereas the *ḥaḍāna* of the mother was dropped towards her young daughter (...) due to her marriage to a man unrelated to the girl. Also the *ḥaḍāna* of the grandmother, who is the first plaintiff, shall also be dropped due to her marriage to a man unrelated to the girl. Whereas the first plaintiff declared that her husband had taken to drinking alcohol, therefore he was deemed untrustworthy as a custodian to the girl in his house where the grandmother lived. The second plaintiff has children, a girl aged 17 and three boys aged (8, 13 and 15) who are in her care, hence, the girl she is demanding to have in her custody may be exposed to future seduction when she comes of age; the boys being resident in the same house. In a time of a widespread decline in values, there is fear of negative consequences of such an arrangement and the Islamic principle that “the averting of harm is foremost to the achievement of benefit”, is applicable here. Whereas the rights of the child under the custody are to preserve him, looking after him, maintain and not to ignore him, thus any person demanding his custody should be competent. Whereas some of the boys of the second plaintiff had come of age and they are unrelated to the girl, which is the same reasoning for dropping the right of her mother to look after her, since she was married to a man unrelated to the girl. This same reasoning shall drop the *ḥaḍāna* of the second plaintiff. Whereas the defendant had gained the custody by the decree of the suit No. 944/2001, and she insists on keeping the girl in her

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<sup>518</sup> Suit No: 1496/2000.

*ḥaḍāna*, and she does not object to the visits by the two plaintiffs to the girl. For all that, we decided to accept the appeal in form, and concerning the content, we decreed to reject the demands stated in the appeal list and approve the appealed against decree which rejected the suit initiated by the two plaintiffs and maintain the custody of the girl (...) at her grandmother to her father, who is the defendant, and that shall be an obligatory decree for the two parties to comply with.

- That the *ḥaḍāna* is a pure right for the custodian (*ḥāḍin*) and she shall not be obliged for *ḥāḍin*; and she can drop or abdicate it for the nearest *ḥāḍin*.<sup>519</sup>
- The father has no right to take away the child from his *ḥāḍin* mother, without a legal pretext, because that act shall jeopardize the right of the *ḥāḍin*.<sup>520</sup>

The following decrees are issued by the *Ja'fārī* Court<sup>521</sup>:

- The mother is more appropriate for the child in his early days, unless she remarries. If the mother was married to an unrelated person to the child, then the *ḥaḍāna* shall be transferred directly to the father.
- The legal period of *ḥaḍāna* for a girl with her divorced mother shall be seven years unless she gets married before that and either of these cases shall drop the *ḥaḍāna*.
- The *ḥāḍin* and divorced mother can relinquish her right to the custody of her daughter for the benefit of her divorcee, provided that maintenance of the girl and the *ḥaḍāna* fees shall be dropped of him.
- The correctness of the agreement between the divorcee and the divorced regarding his abdication of the custody of his children to her, even if she married a person

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<sup>519</sup> *Shā'ir* 474.

<sup>520</sup> *Shā'ir* 474.

<sup>521</sup> *Shā'ir* 474.



lien to them, provided that she pays their expenses from her own resources even after they come of age and become sound of mind:

Amongst the suits that caught my attention, ascertain case in which the *Sunnī* Court issued the following decree<sup>522</sup>: the Court decreed in presence the following:

- That the *ḥaḍāna* of the two boys (6 and 7) shall be at the mother of their father who is the defendant.
- The right of the plaintiff in custody and its requirements of lodging and expenses were dropped.
- The defendant shall permit the plaintiff to take her two boys for a visit for two days for week.

The decree shall be obligatory to both parties to adhere to and comply with.

Referring to the deliberations of this suit we find the following: whereas it was evident to the Court through listening to the testimonies of the witnesses that the plaintiff *ḥāḍin* was neglecting the teaching and taking proper care of her children, whereas the plaintiff is a teacher in a governmental school and she returns to her house at two o'clock in the afternoon, and the two boys finish school earlier than that time, therefore it shall be difficult for the plaintiff to look after her boys within that period. Also the plaintiff has other daily school duties such as correcting exercise books and preparing the lessons, which make difficult for the plaintiff to give her boys enough time to take care of them and revise their lessons. Whereas it was evident to the Court, the great care on the part of the defendant towards his boys from the different psychological, physical and practical

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<sup>522</sup> Suit No: 952/2001.

aspects, according to the testimonies of the witnesses and the report of the special committee, which visited the school of the boys as, demanded by the Court.

I have some comments as follows:

- The judge based his decree on the preoccupation of the plaintiff by the prerequisites of her profession i.e. teaching, which entailed her returning home at two o'clock in the afternoon and continuing work, such as marking and lesson preparation. Does that mean that all the mothers working as teachers are unfit for the *ḥaḍāna* of their children after divorce, while they are entrusted with educating the younger generation?
- As for the time when they return home, it is the normal time for the majority of governmental occupations in Bahrain. In this case the teaching profession may be preferable, as many other jobs would mean a much later return.
- The boys were at the time of initiating the suit in their elementary stage of education. The first one was in the first elementary class and the other one was in kindergarten, and both of them had no homework or very little. So how was the judge justified in deeming the plaintiff to be neglectful of her maternal duties?
- The judge based his decree on a report by a committee formed by the court, after it visited the school where one of the boys was studying and asking questions to the headmistress and the teachers about the condition of the boy's school performance. The report was not favorable, but the plaintiff produced a simultaneous report signed by the headmistress of the same school stating the boy's performance to be excellent. So how did the judge overlook this contradiction between the report of the committee, which was based on the report



of the headmistress and the teachers of the school and that report which was written by the headmistress?

- The committee was formed of two court employees who were doing the job of a court's clerk or secretary and they had no connection with educational evaluation, so why this case was not referred to the specialists? This issue has been stressed by the Bahraini Project as shall be detailed at the end of this topic.

For what I stated earlier, I think that the decree of the court was incorrect because it was based on uncertain things, noting that the scholars when they spoke about dropping the right of *ḥaḍāna*, they set certain conditions the most important of which are:<sup>523</sup>

- The inability to look after the interest of the charge (*maḥḍūn*) and preserve him due to inability caused by illness, blindness or old age.
- Misconduct, as having sexual relations with men, having liquor, frequenting places of bad reputation and other situations which constitute a hazard to the manners of the charge.
- Preoccupation with other things than looking after the charge such as leaving the house many times a day needlessly when there is nobody else to look after the charge.
- Marriage to an alien man to the charge, as has been stated in the Prophet saying:  
*"you are the most rightful person off its care unless you marry."*<sup>524</sup>

All of that was not present in this case.

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<sup>523</sup> See: Dumyātī, Sayyīd al-Bakrī b. al-Sayyīd Muḥammad *Shatā*, *I'ānat al-Ṭālibīn* 4/101, Dār al-Fikr, Beirut. N.D.; *Hāshiyat al-Bayjromī* 4/124.

<sup>524</sup> Aḥmad: 6707; Abū Dāwūd: 2276; al-Ḥākim: 2830; *al-Sunan al-Kubrā*: 15541.

As for the B.P., M.D. and K.L., all of them emphasized these points. The B.P. allotted 29 articles for this topic, which ranged from Articles (115–133) the most important of which are:

Article (115): *Ḥaḍāna*: keeping the child, his bringing up and looking after him in no manner contradicting with the right of the guardian in the jurisdiction on oneself.

Article (116): The conditions required of the primary carer are that he/she should:

- Be of sound mind
- Have reached the age of reason
- Be honest.
- Have the ability to bring up the charge protect and look after him.
- Be free from serious contagious diseases.

Article (117): Other conditions are: if she was a woman: should not be married to a man unrelated to the charge unless the court deems it otherwise for the benefit of the charge.

Article (120): The judge may solicit the specialists and experts in psychological and social affairs when issuing a decree deciding *ḥaḍāna*, seeking the best interests of the charge.

As for M.D., it allotted 26 articles (124-139). Finally the K.L. allotted 11 Articles (189-199) and both of them repeated the same articles mentioned above.

### 8.3 Child Maintenance (*Nafaqat al-Awlād*):

It has been previously mentioned that criticism has been aimed at the judges of the Islamic Courts because they appear not to address the changes of living conditions when defining the living expenses of the children in a divorce case. It is legally decided that



maintenance of the children should be the responsibility of the father during and after the marriage. What interests us here is the responsibility of the father after the divorce.

The focus of this topic is that the father should preserve the same standard of living for the children, which they enjoyed before the divorce. It is still preferable to enhance that level after the divorce to compensate the children for the absence of their father and to avoid difficulties for them.

The Prophet warned heavily against this. ‘Abdullāh b. ‘Amr b. al-‘Āṣ stated: “I heard the Prophet saying: *“it is quiet sinful that a man pays no attention to his dependants.”*<sup>525</sup>

During my attendance at the sessions of the Islamic Courts, I could see that when deciding on a divorce case, they do not begin by defining the maintenance of the children, but they leave that to the father unless there is a dispute between the parents in defining them or if the suit was initiated mainly for the purpose of demanding the specification of their expenses or increasing them. At that time, the judge asks the father to produce evidence concerning his monthly income and the debts on him. Based on that, the judge defines the suitable expenses of the children according to the available net income of the father, in accordance with the Qur’ānic verse: *“Let the rich man spend according to his means: and the man whose resources are restricted, let him spend according to what Allāh has given him. Allāh puts no burden on any person beyond what He has given him. Allāh will grant after hardship, ease.”*<sup>526</sup> Provided that these expenses should include food, clothing, lodging, school fees and stationary costs. The payment is made monthly by deduction from his pay through the court of execution.

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<sup>525</sup> Aḥmad: 499; Ḥākin: 8526; *al-Sunan al-Kubrā*: 9167.

<sup>526</sup> Al-Talāq, LIVI: 7.

Regarding with the criticism of the judges that they do not decide on suitable maintenance, I see it is not accurate, because the judges do not decide the amount of living expenses unless they conduct the previous measures to assess the exact net monthly income. It is illogical to define an amount more than the capacity of the father because firstly it contradicts with the previously mentioned words of the Divine and secondly, it encourages the journey into further debt. This can damage the future for both parties if the fathers cannot pay their debts and go to prison, because finally it is the children who suffer, as maintenance will not be paid. Which of the two choices is the best? To pay maintenance of the children, no matter how small a sum or to have nothing at all?. Despite this, there are two points to consider regarding the procedures of the Islamic Court in that matter. The first concerns the mechanism of the court to investigate the debts of the father, which requires him to produce a document from the creditor and based on that, the court defines the net monthly income and the suitable living expenses for the children, without verifying the validity of this document, the purpose of the debt and the date of its inception (except in a few recent cases). This is because the majority of fathers tend not to be honest as to the true extent of their debts, in order to keep maintenance to the minimum. These expenses are for the children and not for the mother, as was previously mentioned in the case of *ḥaḍāna* where the court dropped the right of *ḥaḍāna* from the mother, mainly based on her demand to increase the living expenses for her two sons. The father, who was a bank employee, brought a certificate showing that he was indebted to the bank, in which he was employed, and produced it for the court without being authorized by the bank; and produced another document stating that he was indebted to his brother. Based on these two documents, he demanded the rejection of the



case initiated by his divorced wife to increase maintenance and at the same time he initiated a suit demanding the dropping of the right of the mother's *ḥaḍāna* and the court decreed this in his favour.

The Second remark concerns the decree issued against all initiated suits that demanded an increase in the living expenses if they were initially agreed upon by the parents. The decree was the rejection of all these suits under the pretext that these expenses were concluded through an agreement and that agreement cannot be cancelled except by another agreement. This means that the other party must agree to the increase and the judge has no legal right to cancel the contract. This opinion is flawed because the settlement was based on the prevailing prices at the time and ensuing inflation rendered it insufficient. I discussed this subject with the Chief of the High Court of Appeal and the Chief of the High Court and they both supported my view. Later I learned that the word (temporarily) was added to the phrasing of the agreement, which made it possible for the agreement to be changed if necessary.

The B.P. emphasized this matter when stating that:

Article (43): Maintenance includes all that normally sustains human life according to custom.

Article (44): In defining the amount of maintenance, the financial position of the supporter and the conditions of the supported and the economical situation within the frame of time and place.

Article (45): It should be taken into account when defining maintenance that the involved parties' original social or educational status may be impaired.

Article (46): a. The decreed expenses may be increased or declared according to the changes in circumstances.

b. The increase or decrease in the amount of the defined expenses shall begin from the date of the legal demand.

Also in the M.D. following was stated: Article (46) maintenance includes food, clothing, lodging and medical care and all that sustains Human life according to custom.

Articles (46-48) are similar to these of the B.P. except the addition (b) in Article (47) which states that: no hearing of a suit concerning the increase or the decrease in the amount of maintenance before the elapse of one year on the date of decreeing it, except in exceptional cases. Also the K.L. states the same articles, but they are confined to what is related to maintenance of the wife and do not mention the children, in Articles (75-77).

It is evident from this chapter that the woman does not usually receive her full right to indemnity in divorce cases. This practice creates considerable hardship, particularly for a childless woman who is awarded financial assistance only for the three months subsequent to her divorce. In cases where custody of the children is in dispute, the mechanism employed by the courts has serious flaws. It is possible for a mother to be ruled as 'unfit' for no other reason than she is earning a living for her family and is thus away from home during normal hours. The legal mechanism for ascertaining the amount of maintenance payable by the husband is open to fraud; thorough checks of his financial status being absent from the proceedings. Child maintenance is also assessed solely according to the needs of the children, thus the mother receives no contribution to her living expenses.



## CHAPTER IX

### The Codification of Family Law in Bahrain

#### 9.1 The Definition of Codification

#### 9.2 The Elements of Codification

#### 9.3 The Lawfulness of Codification

#### 9.4 The Justifications for Codification:

i. It is a way for reform (*wasīlat iṣlāḥ*)

ii. Juridical diversity

iii. Realignment of Law according to Prevailing Conditions

#### 9.5 The Conditions that effect Change to the Law:

i. Change in the notion of social Interest (*taghayyur al- maṣlaḥa*)

ii. Closing off the potential for evil (*sadd al-dharā'i'*)

#### 9.6 The Mechanism of Codification

Codification did not occur at the time of the Prophet and early jurists tended to rely on *ijtihad* if they found no clear ruling in the texts. In some Arab states there has been resistance to the notion of codification, however, many contemporary leading scholars have cited numerous reasons for its efficacy. Dr.El-Alami maintains: 'The codification of the law has undisputed benefits both for the community and for the legal system itself,

and the resolution of disputes by judges is facilitated as their efforts are unified....<sup>527</sup>

Having identified some of the shortcomings that exist in the Islamic Courts, my aim in this chapter is present the notion of legal codification as a means of remedying some of the flaws in the current system. In order to address this, the following section will examine the Codification of Family Law in Bahraini Islamic Courts. It will deal with the history of the claim for the need of such codification; its definition, elements, legitimacy, theoretical justification, objectives and mechanisms.

In 1982 a national committee (the Committee of Personal Status) was formed in the State of Bahrain by members of women's organizations, in collaboration with others, who were concerned with issues pertaining to the family subsequent to the spread of arbitrary divorce, default of child maintenance, dispute over custody and other related problems. The task assigned to this committee was to compute the most important issues facing the Bahraini family in general and women in particular and to endeavor to seek help from the authorities to find suitable solutions. In addition, it demanded the issuance of a unified law to be adopted in all Islamic Courts in both directorates: the *Sunnī* and *Ja'farī*. However, in spite of the elapse of more than 20 years, no response has been made to the demands of the committee, in spite of the fact that it is semi-formal.

In 1998 *Shaykh* Muḥsin al-'Uṣfūr, the judge of the *Ja'farī* Islamic High Court, prepared a marriage contract document to be applied in all Islamic Courts, but it was rejected by the *Sunnī* Courts under the pretext that it was written in accordance with the *Ja'farī* school. Yet, the *Ja'farī* Courts rejected it as it was described as a personal effort that included deviation from what was actually being applied by the court. In 1999 he wrote part one of his book '*Qānūn al-Aḥwāl al-Shakhṣiyya 'alā al-Madhhab al-Ja'farī*'. It included 1506

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<sup>527</sup> El-Alami p.35



Articles of rulings pertaining to marriage. In 2003, the translated English version of this law was issued but the judges, for the aforementioned reason, refused to approve it.

Early in 2002, Shaykh Ḥamīd al-Mubārak, the judge of the *Ja'farī* Islamic High Court, presented to the Supreme Council of Judicial a draft law entitled: '*Mashrū' Qānūn Aḥkām al-Usra Ṭibqan lil-Madhhab al-Ja'farī fī Tanzīm al-Zawāj wa al-Ṭalāq wa al-Nafaqa wa al-Ḥaḍāna*'. It included 122 Articles arranged in two chapters: The first, Entitled Marriage, subdivided into seven sections: Engagement (*Khuṭūba*), General Rules, Pillars (*Arkān*) of Marriage, Conditions of the Contract, Rights of Spouses, Types of Marriages and its Effects (maintenance *nafaqa* and offspring *nasab*). Chapter II dealt with Separation Between the Spouses and contained three sections: Divorce, its Types and Effects of Separation (legally prescribed period of waiting '*idda* and custody *ḥaḍāna*).

At the same time, three judges from the *Sunnī* Court; Shaykh 'Isā Abū Bishayt of the Supreme Court of Appeal, Shaykh 'Adnān al-Qaṭṭān and Shaykh Ibrāhīm al-Muraykhī of the High Court presented a draft entitled: '*Mashrū' al- Aḥkām al-Shar'iyya fī al-Aḥwāl al-Shakhṣiyya bī-Tanzīm al-Zawāj wa al-Ṭalāq wa al-Nafaqa wa al-Ḥaḍāna*'.

The draft contained 142 Articles compiled in two sections, the first about Marriage, which in turn was divided into six chapters, *Khuṭūba*, General Rules, *Aarkān* and Conditions (the two spouses, offer ('*ījāb*) and consent (*qabūl*), unmarriageable person (*muḥarramāt*), conditions of the contract and the right of the spouses), Types of Marriage, Dispute over sexual matters and Effects of Marriage (*nafaqa* and *nasab*). The second section includes five chapters: Divorce, *Khul'*, Divorce Pronounced by the judge (for a woman who suffers at the hands of her husband in a verity of ways, annulment and the effect of separation between the spouses ( '*idda* and *ḥaḍāna*). The draft, which is generally

extracted from the aforementioned M.D. and the K.L., was concluded by ultimate rulings. Accordingly, the Ministry of Justice decided to form a committee from the religious judges to draft this Law.

On reading the two drafts I found a great deal of similarity in most of their articles, some of which are only mentioned in one draft, while there is evidence of contradiction between a few. The following table details this:

Types of Articles	Figure		Percentage %	
	<i>Sunnī</i>	<i>Ja‘farī</i>	<i>Sunnī</i>	<i>Ja‘farī</i>
Shared	100	99	70%	81%
Private	35	16	25%	13%
Contradictory	8	8	5%	6%

Following the announcement to form this committee, the Supreme Council of Women submitted an application to incorporate representatives of female lawyers proficient in family issues. This was approved and the committee was re-established to include three judges from the *Sunnī* section, three judges from the *Ja‘farī* section and three women lawyers. After reviewing the two drafts and finding that 70% of the *Sunnī* draft and 81% of the *Ja‘farī* draft were identical, the first mission of the lawyers was an attempt to set up a unified law for both sects, in order to eradicate sectarianism and to enforce national unity; a demand of many civil and political associations. The merging of both drafts was suggested, providing that the privacy of each school would be preserved by allocating certain paragraphs and articles for each sect; adding items neglected by both drafts. As a



result they issued a further draft entitled '*Mashrū' Qānūn Aḥkām al-Usra fī Tanzīm al-Zawāj wa al-Ṭalāq wa Āthārihimā*'. This includes 139 articles divided in the same way as that of the *Sunnī* Courts. The articles are as follows:

Type of items	Figure		Percentage %
	Articles	Paragraphs	
Shared items	87	2	64%
<i>Sunnī</i> only	13	2	9%
<i>Ja'farī</i> only	19	3	14%
Preserving privacy of each sect	-	5	1.5%
Additional items	15	7	12.5%

Only three sessions were held with the participation of all members, the agenda was to discuss the three drafts, with particular attention to the unified draft. In September 2002, *al-Wasat* newspaper circulated that the final draft of the law would be issued within the coming few months.<sup>528</sup> Subsequently there was a cabinet reshuffle that initiated a change within the Ministry of Justice and Islamic affairs. This resulted in the postponement of the work of the committee to a non-appointed term.

I have some comments to make regarding this:

- The B.P. is more distinguished than M.D. and the K.L. by adding further significant articles in relation to conditions related to the marriage contract, these are: section (c) of Article (5): the wife may stipulate that her husband should not move her away from her country, nor to marry after her.

<sup>528</sup> Issue No. 20, in Sep 27<sup>th</sup>, 2002.

Article (7): (a) the husband shall prove his social condition in the marriage certificate, if he is married, he shall declare in his statement the name of his wife or wives under his protection and place of their residence, and he shall notify her/them about the new marriage by a registered letter accompanied with a delivery receipt within a period of 15 days from the date of issuing the document. (b) no marriage certificate of previously married husband shall be attested unless by a judge permission.

Article (45): in estimating the children's maintenance consideration shall be given to provide that their social and educational status before divorce or separation shall not be affected.

Article (46): (a) the decreed maintenance may increase or decrease in accordance to the change of circumstances. (b) Increase or decrease of decreed maintenance shall be calculated from the date of the legal claim.

Article (47): incessant maintenance has a priority distinction over all other debits.

Article (49): a clearance claim of the wife's maintenance or that of her children against her debt shall not be accepted.

Article (51): without prejudice to the provisions of paragraph (d) of Article (41) of this law, the woman has the right of maintenance during her prescribed waiting period after divorce, dissolution (*faskh*), a void (*fāsid*) marriage or in the case of suspicion (*shubha*). If the husband causes the divorce, the divorced wife shall be entitled to enjoy financial support that is estimated to equal at least the cost of maintenance for one year.



Article (90) paragraph (a): Abdication of the right of children's custody shall not in compensation for separation by *khul'*, nor any of their rights. If this occurs the divorce by *khul'* shall be deemed valid but the condition is void. The custodian of the child has the right to retain the child by force of law, and the father is compelled to pay the child's maintenance.

Article (106): The wife has a right of divorce due to the husband's addiction to alcohol or drugs.

Article (134) Paragraph (2): Testimony of the kin and whoever is related to the person benefiting from the testimony is accepted if the person is recommended as trustworthy.

- Since the process is reliant on human integrity etc, it is liable to have shortcomings; so I have had some observations on the texts of some of the items mentioned in the draft of this law. I hope that these observations would be considered after reviewing it and before the law is finally approved for application in Bahraini Islamic Courts. They are as follows:

Article (10): It is not permitted for a man who is over sixty years of age to marry to a foreign woman except by a special permission from the judge, and for a definite advantage.

It seems to me that it is important to define the meaning of the word (not permitted), does it mean prevention? Or will the marriage be unrecognized by the official authorities and consequently unregistered in the official records? How would the mechanism of prevention be implemented when such marriage frequently takes place outside Bahrain? Therefore, if the intention is not to permit

it, then how can this prevention mechanism be applied? In fact seekers of such marriage need only go with the would-be spouse to the authorized registrar or the concerned authority of the particular country. If, however, it means non-approval, then the mechanism is clear, however, this Article needs to be explained to clarify the cause action in this judgment.

Article (12): the Guardian shall be a Muslim, adult male, if that guardianship is over a Muslim. If the guardian prevents marriage, the guardianship over the woman shall transfer to the judge.

It is to be noticed here that (‘*adl*’) means prevention from marriage without a legitimate justification and is mentioned here accidentally but it is more appropriate if stated clearly in a separate item, as is the case in K.L., Article (31), which states that: if the guardian prevents a young lady from marrying, she may file a law suit to the court and the judge shall decide on the matter. The same shall be applicable in case of numerous guardians of the same level whether all agree or differ in practicing prevention.

Article (16): (a) at the time of writing the marriage contract, the consent of the guardian and the woman must be sought. (b) The woman may initiate her marriage contract upon the permission of a guardian.

It is important to specify the mechanism whereby the consent of both parties could be determined. In case the person in charge of the marriage contract is the guardian, there should be witnesses to acknowledge having heard the consent of the woman. This is not the common practice among authorized registrars in that, they seek the testimony to completing the contract only without further



investigating to hear the woman's consent or otherwise. If, however, the woman herself is in charge of her marriage, she should have a letter signed by her guardian, and testimony of the witnesses confirming his approval that she takes responsibility of her own marriage contract by herself.

Article (17): *kafā'a* is a special right for the woman and the guardian.

This Article due to its importance needs further supplementary explanatory items, as is the case with the K.L., which I mentioned it in chapter I: (*kafā'a* in Marriage).

Article (25), item (8): it is not considered the unmarriageable women on a temporary basis to combine as wives between the wife's maternal and paternal aunts, according to the *Ja'afarī* school.

This Article must be canceled even if it is to be applied exclusively on followers of the *Ja'afarī* school since it clearly contradicts with purposes of Islamic law, moreover it contravenes with the *ḥadīth* of Abū Hurayra that the Prophet said: "*it is not permissible to combine in marriage: a woman with her paternal aunt and a woman with her maternal aunt.*"<sup>529</sup> Approving such law breaks down the blood relationship because of the disputes triggered between the fellow wives.

Article (28): the witness must be sane, adult and trustworthy, he shall be present at the hearing offer (*ijāb*) and acceptance and aware that their intention is marriage.

Should he hear the acceptance from the guardian or from the woman herself? In other word, will he be a witness on the contract? Or, only to witness on the woman's consent to marry the approved husband?

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<sup>529</sup> Bukhārī: 5109; Muslim: 1408.

Article (68), item (a): the confirmation of parentage, even on the state of clinical death, shall be a valid confirmation of parentage according to the following conditions:

- The person whose parentage is to be confirmed should be of unknown lineage.
- The person undertaking the confirmation should be an adult and sane.
- The age gap between the confirmer and the beneficial from the confirmation should support the credibility of the confirmation.
- The person whose parentage is to be confirmed, being adult and sane should accept the confirmation as true.
- (b) annexation (*istilhāq*): it is a type of avowal of paternity by a man on the conditions mentioned above dividing this Article in two items: (avowal of paternity and annexation) is not appropriate since annexation, as defined in this item is also an avowal of paternity as well.

Therefore, there is no difference between this and the avowal mentioned in item (a), unless what is meant by the first avowal is a confession of paternity for a person whose parentage is unknown, when asked to do so. Annexation, however, means to claim willingly and by self-motivation, as defined by some scholars such as Ibn al-Qayyim for example. Thus conditions mentioned hereinabove shall be applied with the addition of a preliminary condition, which is: “providing that no avowal that the person of unknown parentage was born out of an illegal sexual intercourse (illegal sexual relationship) is not a legitimate cause for parentage. Another condition is: no other person that claims an avowal of the same.



Article (106): The wife has the right to claim divorce due to the husband's addiction to alcohol or drugs.

Are there any conditions for such a claim in relation to the time of the wife's knowledge of this addiction? That is, if she knows about it before marriage, and she accepted it, does she still have the right of divorce or not? Or this right is related with the occurrence of harm irrespective of the timing of her knowledge of it? This is what is supposed to be the case.

Article (134), Item (2): The testimony of the kin and whoever has a relationship with the person testified for, will be accepted whenever the person giving the testimony is trustworthy to do so.

The word "relative" should be defined. Are the parents, brothers, and sisters included herein, contrary to what is generally practiced in Islamic Courts at present, where their testimony is unacceptable to proof harm done to their relative (the woman), and that is the most essential point.

Critics have called for a unified law for the two sects, but this demand was faced by a tough opposition from the Shī'ī scholars headed by Shaykh 'Isa Qāsim and Shaykh 'Abdullāh al-Ghurayfī, both believe that issuing such a law would contravene with the significant variations between the two schools, it may lead to exclusion of one school, the fact that is rejected by the followers of both sects. Regarding the common denominator between both the *Sunnī* and *Ja'farī* drafts is insignificant to them because the *Ja'farī* draft represents only the opinion of the writer- Shaykh Ḥamīd al-Mubārak- who was not considered as referential Islamic Imām for the Shī'a despite his position as a judge so his opinion is not binding to the respected Shī'ī scholars in the Kingdom of Bahrain.

In 6/5/2003, the MP, Dr. 'Abd al-laṭīf al-Shaykh, member of the Islamic National Platform bloc imposed a question during the Session (19) of the first legislative round to the Minister of justice about the reason of postponing the approval of this law, the Minister answered that the Ministry had numerous drafts and it was still studying the issue which needed a long time, but the Minister did not point out the former committee or whether it had to commence its action or not, but in fact no doubt it was frozen after the elapse of one year. At the same time the MP Jāsim al-Sa'īdī declared that his readiness to participate in drafting the law, though he is specialized in this field and does not hold any Islamic academic qualifications. This move caused the interference of the former *Shī'ī* scholars and denied the involvement of the parliament in this issue for many reasons, first: considering the issue as merely a religious matter, persons unspecialized in religious sciences- as the case of most current parliament members- should not be involved. Secondly: the issue of codification and forcing the judges to pursue it contained exclusion to the right of judges to independent reasoning, this opinion was supported by a handful of *Sunnī* scholars who believed that the idea of codification was a Western one and as such "man-made". They felt that this might nullify Islamic law, that notion was based on the declarations of some secular symbols participated in the Conference of Women and the Law which was convened in Bahrain in October 2000, and finally what was previously mentioned in regard with unified law for both sects.

Further to expressing their opposition through mosque platforms and Islamic memorial service, the *Shī'ī* scholars proceed further to mobilize people to sign a petition demanding the King to reject this law. Regrettably, in order to influence signatories they pursued uncivilized means that were far from methodical persuading that they represented it.



Among these means the accusation made by Shayhk 'Isā Qāsim– a leading figure who disagreed with the new law and a key reference for the Shī'a sect of Bahrain – to non-signatories as treasonable to Islamic law. They alleged that the new law is a move to cancellation of Islamic laws, and allows what is prohibited by Allāh and prohibits the lawfulness.

Contrarily there were supporters for the codification whether as individuals or associations who see such opposition is only meant to exclude the other party's opinion whereas the accusation made by a respected body in Bahrain was inappropriate. The intellectual and political battle enraged between the two camps and attracted the public in Bahrain through symposiums and newspapers' articles.

I have some comments on the outcomes of those symposiums and press articles of both camps:

- Those symposiums generally deviated from the scientific methodical path since each party delivered his own view remotely from the other party whereas this should be organized jointly so that the two groups could have a positive discussion based on concrete evidence.
- Supporters of codifications who participated in those symposiums include persons and representatives of associations without background in Islamic Family Laws and particularly the fact in the Islamic Courts, so spokespersons delivered incorrect rulings and mentioned statements far away from the real situation in the courts, I found no other reason for their participation other than their keenness to socially publicize themselves and to seize this opportunity to achieve political gain.

- Some secular supporters of the law transgressed on the religious scholars who opposed the scheme and depicted them once by ignorant and sometime demanded them just to keep up the preaching in mosques and ceremonial services, rather than intervening in such sensitive issues. In other occasion they demanded to call off the Islamic Courts and to replace them by civil courts and install civil judges, because this is more compatible with the current development of the time. Finally they involved in outweighing between different opinions of the scholars according to their whims and not based on compelling evidence or in compliance with the purposes of Islamic law.

Regarding the position of opposing Shī'ī scholars, the main observation is that they were hesitant to make out one clear stand, initially they described their stance as basically disagreement with the idea of codification being religiously unlawful, but what really surprising was the participation of two of judges: Shayhk Muḥsin al-'Uṣfūr and Shayhk Ḥamīd al-Mubārak in this opposition, who participated in setting and drafting these family rulings, it was strange that they set the laws then oppose them later. Does it mean they have retreated from their previous position? Or is it an attempt to compliment the trend that has had the most influence on the folks and not necessarily the most persuasive?! Then their opposition turned to rejecting the parliament involvement in the issuance of the law and voting on its articles, finally they agreed to study the drafts presented to the Ministry of Justice and to participate in setting the blueprint of the law in a formula of internal regulation for the Islamic Courts, that means the opposition is focused on the mechanism and authority concerned with drafting the law and not on the unlawfulness of codification, I wonder why these changes in mind.



In spite of that it is likely to investigate the definition and the lawfulness of this codification from a religious point of view in the context which I meant and as I indicated in the beginning of this study.

## 9.1 The Definition of Codification:

*Qānūn* (pl. *qawānīn*), Arabic derivative from Greek, *χανων*, which meant firstly “any straight road”, later “a measure or rule”, and finally (in the papyri of the 4<sup>th</sup> and 5<sup>th</sup> centuries A.D.) “assessment for taxation”, “imperial taxes”, “tariff”.<sup>530</sup> The word was adopted into Arabic presumably with the continuation, after the Muslim conquest of Egypt and Syria, of the pre-Islamic tax (*jizyya*)<sup>531</sup> system.<sup>532</sup> Whilst the word preserved in Islamic states in general its special meaning as a financial term belonging to the field of land-taxes, it acquired also the sense of “code of regulations” “state-law” (sc. of non Muslim origin). The two senses must be discussed separately.<sup>533</sup>

In theory, the *Sharī‘a* regulates the whole of the public and private life of the Muslim, but since works of *fiqh* barely deal with the provisions of common law, and also since it became apparent very early on that the greater part of the Muslim penal system was inapplicable guardians of public order (especially the governors) took to issuing regulations (*qawānīn*) in these two fields, although they had no such legislative authority. At the time, these developments did not shock even the strictest of the ‘*ulamā*’, because

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<sup>530</sup> Bellefounds, Y. Linant De. The Encyclopedia of Islam IV 556.

<sup>531</sup> A tax formerly levied on such non Muslim adult males as were able to pay it, provided that they belonged to a religion recognized as Divinely revealed, that is, were “people of the book” (*Ahl al-Kitāb*). Pagans conquered and brought into the Islamic state had, in theory, either to accept Islam or death; however, this provision was rarely, if ever, applied; the Harranians, who were Hellenist Pagans, eventually obtained the status of people with a revelation and were called “Sabians”. The infirm and poor were excluded from paying the tax. Smith 211.

<sup>532</sup> Bellefounds, Y. Linant De. The Encyclopedia of Islam IV 556.

<sup>533</sup> Bellefounds, Y. Linant De. The Encyclopedia of Islam IV 556.

in administrative matters there was no conflict between the *qānūn* and *Sharī'a*, the latter generally being silent on such matters. Similarly with penal law, the *Qānūn* did not appear to infringe on the *Sharī'a*, for the governors had the sense to restrict themselves to substituting the discretionary penalty of the *ta'zīr* [q.v.], fine or flogging, punishments laid down in work of *fiqh*, for the seriously mutilating punishment of the Qur'ān (*ḥudūd*, pl. of *ḥadd*), such as cutting off the hand or stoning.

Under the Ottoman sultans, the term *qānūn* came to be applied mainly to acts in the domain of administrative and financial law and penal law. The first *qānūn-namās* promulgated under Muḥammad II (855-886/1451-1481) were indeed confined to this restricted field, but a century later, through the impetus of Abū al-Su'ūd, grand *muftī* of Istanbul from 952/1545 to 982/1574 [q.v.], *qānūn-namās* began to offer legal solutions to questions which had hitherto been exclusively the province of the *Sharī'a*, particularly property law, Abū al-Su'ūd was a jurist of such great ability that this was done without the *qānūn* and the *Sharī'a* ever coming into opposition with one another.

Nowadays, in the Middle Eastern countries, it denotes not only those codes and laws which are directly inspired by western legislation, such as civil and commercial law, administrative and penal law, but also those laws and codes which are provisions of the Islamic law. To name but a few examples, the Syrian Code (*qānūn*) of Personal Status (1953), the 'Irākī Code (*qānūn*) of Personal Status (1959) and the proposed Egyptian Family Code (also called *qānūn*) fall into this category. The Order in Council is (*qānūn*) of Personal Status designated by the neologism *marṣūm bi-qānūn*.



However, the ward *qānūn*, which, as we have noted, originally signified a ruling of the administrative authority, is not used in this sense today, being replaced by *lā'ihā* (pl. *lawā'ih*) in Egypt and by *nizām* or *trātīb* elsewhere.

Whether it is inspired by western legislation or comprises only provisions adopted from Muslim law, the actual *qānūn* is prepared by a commission, passed by the legislative assemblies if need be, and promulgated by the executive, the same procedure being followed in both cases. In addition, in the case of a *qānūn* concerning personal status or inheritance laws, and therefore one deriving from Muslim law, the discussions in the Assembly are no more phase, the one developed by the commission, which is the most important.

Born in the East, the ward *qānūn* as the designation of the superior from legislation (Law and Code) is current only in the Middle East, or, more precisely, in those countries which came, however partially, under the influence of Istanbul. It was rarely used in Saudi Arabia, which escaped Ottoman domination; there the ward preferred to cover the legislative work of the secular authority was *nizām*.<sup>534</sup>

Regarding the Codification (*taqnīn*) as the legislation of laws, most of the international laws are man-made codes, the human mind and its scope of wisdom and knowledge will continue to play a minor role in accomplishing the perfection of a common benefit for all human. So, when dealing with the Islamic laws in general and the family rulings in particular we do not mean this type of codification, i.e. the Islamic scholars adopt the most preponderant (*arjah*) Islamic rulings as supported by authenticated evidence from the source of Islamic law relevant to each subject of Family Law according to the strength of the evidence and its conformity with Islamic intentions. Subsequently, it is

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<sup>534</sup> Y. Lenant De Belefonds. The New Encyclopedia of Islam IV 556-557.

drafted in concise, numbered, seriated and classified items to be issued in a binding law for all judges.<sup>535</sup>

## 9.2 The Elements of Codification:

It is based on two components: first, the element of enforcement: this is done by making the codified rules binding to the judiciary, the authority should bestow them the official character and a binding force that is imperative on individuals to abide by and execute its injunctions, as the judges are also obligated to enforce these rules rather than others. The second element is the brevity and generality, which is the defining characteristic that distinguishes them from other Islamic researches, based on interpretation, prolonged explanation, and illustration by examples and specific events. In addition to the precision and clarity using serial numbering for each law, so as to enable the judge or researcher to refer to items or articles of such laws by their numbers instead of mentioning their full texts. In this way the rulings covering any subject are concise and numbered by item, each following the other, all contained in one law, or code or regulation, entitled with the subject matter or matters it tackles.<sup>536</sup>

## 9.3 The Lawfulness of Codification:

The idea of restricting judges is an old practice dating back to the era of the four lawful caliphs. In his script that he had sent to Abī Musā al-Ash‘arī, the caliph ‘Umer Ibn al-Khaṭṭāb wrote: “consider the analogous (*ashbāh*) and parallel matters (*naẓā’ir*), then

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<sup>535</sup> Qāsim, ‘Abd al-Raḥmān. *al-Islām wa Taqnīn al-Aḥkām fī al-Bilād al-Su‘ūdiyya* 172, al-Madanī Printing, Saudi, 1<sup>st</sup> Edition 1966.

<sup>536</sup> Qāsim 236.



measure things accordingly.”<sup>537</sup> That is, he restricted any independent reasoning (*ijtihād*) by adopting deduction from analogy (*qiyās*). Hence he restricted him to deducting by analogy only to bind issues with the Qur’ān and the *Sunna*, while caliph ‘Umar was always inclined in his reasoning to judge matters to meet the common benefit when no text exists. Thus ‘Umar had two types of independent reasoning. The first was reasoning by analogy, which he instructed the judges he had installed to abide by, the other: reasoning by the common benefit, where no text is forthcoming, and he handled Muslims’ affairs accordingly.

The idea of restricting judges developed in the reign of the Caliph ‘Umer Ibn ‘Abd al-‘Azīz. He wanted to bring together the views of the Prophet’s Companions and the jurisdiction of Medīna<sup>538</sup> to make one law or fit for the judges to abide by and apply in different regions of the Islamic state.

This method developed even further during the reign of Abū Ja‘far al-Mansūr<sup>539</sup>, when Imām Mālik demanded during the pilgrimage to Mecca (*ḥajj*) season of the year 163/779 to write an inclusive book for the rulings altogether, with considerations of facilitation and simplification, then the Caliph said: calling him by his nickname: “Oh, Abū ‘Abdullāh, write down this knowledge and produce a book out of it, and avoid the hardship (*shadā’id*) of ‘Abdullāh Ibn ‘Umar, and the permissions (*rukhaṣ*) of ‘Abdullāh Ibn ‘Abbās, and Ibn Mas‘ūd’s oddities (*shawādh*), take on the justly balanced matters, and what generally agreed upon by the scholars and the Companions in order to persuade the people to abide by based on your knowledge and books, then we publicize that in all

<sup>537</sup> Ibn al-Qayyim. *I‘lām al-muwaq‘in* 1/63.

<sup>538</sup> al-Medīna al-Munawwara in North west of Saudi Arabia which is the capital of Islamic State (1-35/624-659).

<sup>539</sup> ‘Abdullāh b. Muḥammad b. ‘Alī b. al-‘Abbās (95-158/714-775). The second Caliph of ‘Abbāsids (137-159/754-775). *Al-A‘lām* 4/117.

districts, and we entrust them not to infringe that and not to rule but by them.” Imām Mālik responded, and wrote his famous book (*al-Muwaṭṭa*) However, he did not like to accord to his own opinions a binding force over those of other jurists, so he said to Caliph al-Manṣūr: “May God keeps righteous the Amīr. The people of Iraq do not accept our knowledge, nor do they accept our opinion in their knowledge). That means, he did not deny the idea enforcing the law, but disliked it for himself due to piety and humility.<sup>540</sup>

*Rasā'il al-Ṣaḥāba* (the message of companions) which was written by ‘Abdullāh b. al-Muqaffa<sup>541</sup> to Abī Ja‘far al-Mansūr, which contained some recommendations to redress many issues that he saw as deserving redress. Among these matters were numerous jurisprudence rulings, which he advised the Caliph to put them altogether as one set of law and to make it binding. Prohibiting judges to adjudicate but by these laws was an attempt to restrict the judiciary. The letter stated that, “if the Amīr of the Muslims decides to make these rulings and other deductions binding they should be gathered before him in a single book, and an order letter may be attached to it to justify the reasons for different groups of people derived from the *Sunna* or the analogy. Then the Amīr of the Muslims looks into these matters then passes his own judgment on each case as God inspired him, then he determinedly imposes it and prohibited judgment but according to it, and he then addresses this in an inclusive letter, we would hope that Allāh may make these miscellaneous laws of right and wrong to make a single right law out of them.”<sup>542</sup>

<sup>540</sup> Ibn Qutayba, ‘Abdullāh. *al-Imāma wa al-Siyāsa* 180, al-Bābī al-Ḥalabī Printing, Egypt, 3<sup>rd</sup> Edition 1963.

<sup>541</sup> Abū Muḥammad (d. 140/757). A Persian, originally a Zoroastrian of possibly Manichean convictions, who was converted to Islam. He was secretary in the Caliph administration and renowned for an elegant style and command of Arabic. He translated into Arabic the Indian fables of Bidpai (from Pahlevi), which then became the political allegories called “*Kalīla wa Dimna*”. These stories, in which animals act out situations that arise in matter of state, are perennially popular in Arabic literature. Smith 174.

<sup>542</sup> Kurd ‘Alī, Muḥammad. *Rasā'il al-Bulaghā* 126, al-Bābī al-Ḥalabī Printing, Egypt, 3<sup>rd</sup> Edition 1946.



In addition to that, on the advent of the jurisprudential schools a certain school of thought bound each district. The Ḥanafī School bound Iraq and the outlying Eastern areas. The Mālikī School bound Morocco and the neighborhoods of Andalusia. However, being bound by a certain school was not an absolute binding for the judges, because each school has different views included in the literature of that school, which are uneasy to review or to decide the most appropriate view. Therefore, it was necessary to identify the most preferable opinions and to be collected and inscribed as one law. Thereby a great advantage will be achieved because it facilitates for every intellectual to reach the law governing him, and it will be an easy reference law to the judge. This may save the judge the hardship to study disputes and their distortions to decide the right from the erroneous litigator, and to enable the guardians to distinguish between valid and void rulings and people would be well informed about their affairs, and of the law by which they are being ruled.

However, each school adopts many different views, but the most obvious example in this regard is school of the Imām Aḥmad, narrations about the Imām sometimes vary to reach four dissimilar narrations in the same issue. Moreover, in this rich school of thought no outweighing is made between the opinions of the Companions, but every opinion is counted as a separate view within the school, furthermore no outweighing was made even between the opinions of the late followers- who only met the Prophet- and every opinion of a follower is considered as a separate opinion in the same school.

Given the fact that each school is so rich with such abundance of views then it is essential to restrict judiciary to judge every case according to one of these views. This goal may not be attainable without referring to inscribed and codified law.

There is no harm in this, since the gist is to guide justice, to achieve the public good and maintain the social system. It is obvious, according to the above, that attempt of codification was extant since the advent of Islam.

Apparently Jurists in different schools had attempted to effect such codification. Ibn Juzzī<sup>543</sup> codes, for example in the Mālikī school were drafted in a formula similar to that of articles of law.

In recent times, laws derived from the Islamic jurisprudence have been documented. Two centuries ago the Judiciary Rules Journal "*Mujalat al-Aḥkām al-ʿAdliyya*" commenced the documentation of legal articles. Late in the 19<sup>th</sup> century, Muḥammad Qudarī Bāshā<sup>544</sup> wrote a book entitled: "*al-Aḥkām al-Sharʿiyya fī al-Aḥwāl al-Shakhṣiyya*" (the religious rulings for the Personal Status) mainly comprised of laws quoted from the Ḥanafī school, they include rulings related to marriage and divorce, inheritance, will, gift and interdiction (*ḥajr*) and all other issues related to personal status.<sup>545</sup>

In the mid of 1930s the Personal Status Law was issued in Iran and after the victory of the Islamic revolution in 1979 the law as approved after slight amendment which did not exceed 1%. All Arab counties set laws of personal status, for instance, in 1929, the personal status laws were issued in Egypt. In 1933, the Family law was issued for the Lebanon. In 1953 the family law for Syria was issued, and amended in 1975. And in 1957 the draft law of personal status for the Kingdom of Morocco was issued and amended in 1993. In 1959 the law of Personal status was issued in Iraq, and amended in 1980. In

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<sup>543</sup> Muḥammad b. Aḥmad b. Muḥammad b. ʿAbdullāh al-Kalbī, Abū al-Qāsim (693-741/1294-1340). Scholar from Ghurnāṭa. *Al-Aʿlām* 5/325.

<sup>544</sup> (1237-1306/1821-1888) Egyptian Judge. *Al-Aʿlām* 7/10.

<sup>545</sup> See: Qāsim 244-245.



1967 the Journal of family status was issued in the Republic of Tunisia, and amended in 1988. In 1967 the Family Law for the Kingdom of Jordan was issued, in 1981 the Personal status was issued in the Republic of Algeria; and in Kuwait, the Personal Status was issued in 1984. In the Republic of Libya, the law of rulings relating to marriage and divorce and their effects was issued in 1984 and amended in 1991. The Personal status law of the Republic of Yemen was issued in 1992, and in the Sultanate of Oman Personal status law was issued in 1997.<sup>546</sup>

In 1996, the General Secretariat for the Gulf Cooperation Council Member States commissioned a group of legal experts to prepare a legal charter, which is called “Masqat Document for the unified system (law)” of personal status throughout the member states. Ministers of Justice have endorsed the formula of the law in their eighth meeting in Masqat, the Capital of the Sultanate of Oman on 8-9<sup>th</sup> of October 1996, and were approved by the Supreme Council in its seventeenth round at Doha, the capital of Qatar on 7-9<sup>th</sup> of December 1996. The Document contained 282 Articles dealing with issues of marriage, separation between husband and wife, competence, fitness to marriage and guardianship, bequeath the will, and inheritance. However, only the Sultanate of Oman has adopted it. The rest of the GCC member states i.e. the Kingdom of Saudi Arabia, the United Arab Emirates, Qatar, the Kingdom of Bahrain are still applying the rulings on the traditional way based on the personal independent reasoning of the judges, in some states the law is still underway to codification.<sup>547</sup>

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<sup>546</sup> Balmir, Su'ād. *Tārīkh Taqnīn Aḥkām al-Usra fī al-Duwal al-'Arabīyya*, a Paper submitted to the 1<sup>st</sup> Forum to Arabian Woman Summit Conference in Bahrain 2001.

<sup>547</sup> *Musawwadat Qānūn al-Aḥwāl al-Shakhiyyah al-Muwahḥad li-Duwal al-Khalīj al-'Arabī 1-2*.

## 9.4 The Justifications for Codification:

Codification is not something supplementary legalization; but is one type of legalization which has the characteristic of assembling the principles and rules which comprise each branch of the law or the system in a single unified legal system that is easy to comprehend and circulate around and that suffices from searching into diverse and scattered legal works at a time that swiftness is needed to pass judgment on disputes.<sup>548</sup>

Therefore, we can sum up the justifications for codification in the following points:

i. It is a way for reform ( *wasīla lil- 'iṣlāḥ*):

It is an axiom that that societies' progress or backwardness is judged by the degree of organization and co-ordination of their living affairs, and the extent utilizing their wealth and experiences of citizens, males or females. Organization is the basis for any development, and codification is but a way of organization that must include rulings that cover the state and individual affairs. This is on one hand, and on the jurisdiction is the most important organizational system in the state, it enshrines all necessary guarantees for the society to ensure individuals' mutual respect of rights and freedom. Thus the law needs more concern, organization, and co-ordination of its systems and divisions. It also needs guarantees to preserve and support its position and prestige as well as it needs continuous development to keep up with the global progress and evolution to be efficient enough to solve all types of problems that may arise.<sup>549</sup>

The most certain shortcut to achieve such goals is the codification of Islamic laws by means of bringing alike rules altogether and producing them in classified collections each one dealing with one issue, and the judiciary is bound to apply them on litigations

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<sup>548</sup> Sec: Murquṣ, Sulaymān. *al-Madkhal lil- 'ulūm al-Qānūniyya* 124, 4<sup>th</sup> Edition 1961.

<sup>549</sup> Qāsim 134.



brought in front of the courts providing that no other rules are to be applicable. These laws shall be selected by a group of scholars, who are definitely more able than an individual judge. This, however, would not prevent any judge, scholar, or researcher to express his view according to his knowledge in some of the laws if he sees a defect or shortcoming that is exposed by practical experience. In case of inappropriateness people in concern may therefore direct their view to the officially concerned authority such as the Judicial Council to consider the matter and take the appropriate action.

In this way the authorities will put forward a great contribution and service to the religious rulings and to the nation "*umma*", which will be one of the most successful reformatory methods that stating the rights and obligations, injunctions and prohibitions in a clear easy way that enables every person, even those with average education to refer to such laws easily when enters as a party at dealings as general and that of the matrimonial relation in particular to avoid prohibitions, problems and disputes which flare up between the parties. If, however, the situation needs be brought before the law, he would be more knowledgeable about whether he has a right or not, and consequently, he would proceed forward or recline from his claim. However, if the situation remains, as it is now, access to religious legal sources will not be available except for specialists.<sup>550</sup>

#### ii. Juridical diversity:

During the time of the Prophet there was no need even to write the law since he was nearly among his followers answering their inquiries and solving their problems and disputes directly. After his death some new issues and problems emerged, but there were few in member. Also as regards to conflicts among them, that had been rare, and in most cases, they would reach a consensus after consultation. As such, they had been newly

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<sup>550</sup> Qāsim 134.

acquainted with the legislation, which they had received directly from the Prophet. They had also developed an understanding for religious wisdom and secrets. However, they had found that there was a pressing need to assemble the Qur'ān and unify its versions of recitation when they realized the hazard of losing it by the passing away of those men who learnt it by heart. This is in addition to the fear of disintegration and strife among the Muslims. Also the later followers did the same with the *Sunna* of the Prophet, and so did their followers to arrange the jurisprudence and interpretation and the rest of the religious sciences. As the time passed the jurists and researchers increased in numbers, and each had established their own way in research and inferences. As a result, schools of thought as well as views have multiplied in the same issue. Then following generations preferred to imitate their predecessors. Thus, sects have multiplied; each sect followed one of the independently reasoning scholars. What made things worse, however, the emergence of fanaticism to one sect that led some to believe that their attitude was right, and every thing else was wrong.<sup>551</sup>

The differences between the scholars and the divergence in their views have causes, which were summed up in the words of Ibn al-Qayyim: "the understanding of most people may fall short of comprehending the meanings that embedded in the texts, the nature of evidence and its place. The variation in the degree of understanding among the *Umma* about Allāh and his Prophet, no one can gauge but Allāh."<sup>552</sup> That was during the early periods of Islam, when disagreement was on a limited scale, and restricted to certain reasons. The people who were concerned with studying *fiqh* then were people known for their qualities of independent reasoning. Such that the people who were installed as

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<sup>551</sup> See: Qāsim 135.

<sup>552</sup> *I'lām al-Muwaq'īn* 1/332.



judges were those scholar commanding independent reasoning who would not be content to take the view of a certain jurist, but looks into the Qur'ān and *Sunna*, and the biographies of the Companions as sources to derive his rules. Today, however the judges in Islamic Courts in the Kingdom of Bahrain follow in their judgments the footsteps of the previous judges and who in turn followed the jurists of the Mālikī school in particular. Thus, they constantly repeated the phrase "this is what the venerable sirs of the Mālikī think", without, in fact, verifying the evidence on which the reasoning on the subject is based. Rarely do they overstep the view that was generally accepted by their predecessor's judges, if one of the judges has overstepped this he has to choose between the different opinions on the same subject what he thinks is most appropriate to apply in his judgment. And at the same time another fellow judge would do the same, and as a result there emerge conflicting rules on the same matter in the same country. This may even happen in the same court, if not from the same judge, in spite of the unity of elements of the subject of conflict.

Hence it becomes unreasonable to let the matter of choice and judging the outweighing of rulings to the individual judger alone, considering the diversity of views before the judges in the individual school, or for the individual jurist.<sup>553</sup>

### iii. Realignment of law according to prevailing conditions:

‘Umar Ibn Abd al-‘Azīz had stated: "people will experience legal problems commensurate with what they commit of wrong-doing (or impudence)."<sup>554</sup> Abū Ḥanīfa's views have changed according to the change in time and place.<sup>555</sup> It has also been related

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<sup>553</sup> *I'lām al-Muwaq'īn* 1/332.

<sup>554</sup> Madkūr, Muḥammad Salām. *al-Madkhal lil-Fiqh al-Islāmī* 146, Dār al-Kitāb al-Ḥadīth, Cairo, 2<sup>nd</sup> Edition 1996.

<sup>555</sup> Qāsim 146.

that Mālik stated: “people will experience litigations commensurate as per actions they have committed.” Also, Shāfi‘ī some of his views have changed, such that he had an old school, and a new one, in accordance with the environment and place, and his movement from Iraq to Egypt.

Ibn al-Qayyim dedicates a whole chapter in one of his most important books dealing with this subject, entitled: “the variation in *fatwa* in accordance with change in time and place, conditions, intentions and customs”. He stated in the introduction: “This is a chapter of much benefit, and ignorance of this issue has caused problems for Islamic law; imbuing it with blinkered vision and stipulating compulsion that is not feasible.”<sup>556</sup>

As such, the opinion made by the scholar in his independent reasoning changes, and his *fatwa* changes according to what accompanies him if conditions pertaining to the time, place, environment and custom. Therefore, he must make the object of his independent reasoning the achievement of the wisdom for which the text has been set forth. As such, it is reasonable not to consider the rules of the *fiqh* based on independent reasoning (*ijtihād*) as immutable laws, isolated from its surroundings. But to look to such laws from the perspective of the public good, and the extent to which the wisdom of its stipulation has been achieved. A studious man may arrive at a rule not reached by those before him. That, texts are pregnant, minds different, and conditions may arise that change the face of the general good, such as demands change in the law.<sup>557</sup>

This is what Ibn al-Qayyim had explained in the letter dispatched to ‘Umar b. al-Khaṭṭāb on the Judiciary he addressed to Abī Musā al-Ash‘arī said: (‘Umar’s saying: “be not prevented by a law you decreed today then you reviewed your judgment, then you are

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<sup>556</sup> ‘*I’lām al-Muwaq‘īn* 3/25.

<sup>557</sup> Qāsim 149.



led to the right path, that you should upon it go back to the truth as the truth is old, that nothing can invalidate it, and to go back to the truth is better than continuing to pursue what is invalid.” He means that if you work studiously towards a rule, and that you happen to come across the same situation again, your reasoning in the first case should not prevent you from repeating it. The studiousness may change, and the studiousness in the first does not preclude adopting the result of the second if the latter proves to be the truth. The truth is apt to be favored because it is old and proceeds that is void.)<sup>558</sup> He mentioned another example, which was ‘Umar b. al-Khaṭṭāb’s abrogated the law of punishment of amputation against the thief during the time of famine. He said: ‘Umar abrogated the cut off against thief during the year of famine). Then he mentioned proofs supporting the same because certain compelling circumstances have accompanied the theft that made the wisdom from devising the law untenable, due to there being a situation which is considered preventive of amputation, that is, hunger, out off necessity. This happened when the chaps of Ḥātim b. Abī Balt’a had stolen something and the theft was confirmed on them, that ‘Umar was about to chop off their hands, when he learnt that their master used to starve them.<sup>559</sup>

## 9.5 The Conditions that effect Change to the Law:

### i. Change in the notion of social interest (*taghayyur al-maṣlaḥa*).

The basis and principle of Islamic law in the rulings is the realization of the Interest of the people in their living and worship for the hereafter. It is all justice, all compassion, all good, and all wisdom. That any matter that goes out of justice to injustice, from

<sup>558</sup> ‘I’lām al-Muwaq’īn 1/110.

<sup>559</sup> ‘I’lām al-Muwaq’īn 1/110.

compassion to its contrary, from the interest to the wrong, and from wisdom to chaos, is not part of Islamic law even if analogy is used in it. It is justice of Allāh among his worshippers, his compassion among his creations, and his shade on his earth.)<sup>560</sup>

Social interest is divided into the following:<sup>561</sup>

- Established interest (*maṣlaḥa mu'tabara*): that which has been confirmed by texts, such as an extant deduction (quotation of rule from the meaning of the text, and consensus).
- Void interest (*maṣlaḥa mulghāt*): that which has been mollified by texts, such as imposing a two months fasting on the wealthy as expiatory gift for having sexual intercourse with his wife during the day of Ramaḍān. This is for consideration that setting free a stance is easier for him, such that he would not repent. And the expiatory gift has been stipulated for punishment.<sup>562</sup> However, his explanation, inspired by its obvious merit, misinterprets the meaning of expiatory gift restricting it to punishment, ignoring the other advantage which is the concealment of the sin for the wrong action. This is in addition to its contradiction to the clear religious text. Abū Hurayra narrated that a man came to the Prophet and said: "O Messenger of Allāh, I am destroyed." He said: "*What has caused your destruction?*" He said: "I had an intercourse with my wife during the day in Ramaḍān." The Messenger asked him: "*Can you find a salve to set free?*" He said: "No." He asked him: "*Can you observe fast for two consecutive months?*" He said: "No." He asked him:

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<sup>560</sup> 'I'lām al-Muwaq'īn 3/14.

<sup>561</sup> Maqdisī, 'Abdullāh Aḥmad b. Qudāma. *Rawḍat al-Nāẓir wa Jannat al-Manāẓir* 1/169, Maktabat al-Ruṣhd, Riyadh, 5<sup>th</sup> Edition 1997; Āmidī, 'Alī. b. Abī 'Alī. *al-Iḥkām fī Uṣūl al-Aḥkām* 4/167, Dār al-Kutub al-'Ilmiyyah, 1<sup>st</sup> Edition, Beirut, 1985; Shawkānī, Muḥammad b. 'Alī. *Irshād al-fuḥūl* 1/370, al-Bāz, Mecca, Saudi Arabia. 1972.

<sup>562</sup> Zuḥīlī, Wahba. *Uṣūl al-Fiqh al-Islāmī*. 73, Dār al-Fikr al-Mu'āṣir, Damascus, 2<sup>nd</sup> Edition 1985.



“*Can you provide food to sixty poor people?*” He said: “No,” and he then sat down. Meanwhile, a basket of dates was brought to the Prophet. He said to the man: “*Give these dates in charity.*” He (the man) said: “Is there anyone who is poorer than myself? There is no family between the two sides of Madīna who is in need of this more than mine.” The Prophet laughed so much that his molar teeth became visible, and he said: “*Go and give it to your family to eat.*”<sup>563</sup> Imām Shāṭibī<sup>564</sup> says that (this meaning is appropriate, because the objective for the expiatory gift in Islamic law is punishment, and the powerful and authoritative would not be punished by setting someone free but would be heeded by fasting. This *fatwa* is void, and the scholars are divided into two camps: some maintained preference, others maintained sequential ordering such that freeing a slave comes before fasting upheld). But none has maintained fasting for the wealthy.)<sup>565</sup>

- Unrestricted interest (*maṣlaḥa mursala*): that for which there is no clear text, either for its validity or invalidity. It is a matter that is not spoken about. This is the place for reasoning and some consider it permissible on the basis that the basic principle in things is validity, unless its invalidity is clearly stated in the text. The legislation did not approve it, nor did it cancel it, but kept silent about it out of compassion for us not to forget. Wisdom and the legal politics may require that legalization based on them, as it may sometimes deserve invalidation and inhibition, according to the final objective. That is because the means would have the same rule of the end; therefore, the means would be invalid if the end of it is also invalid. It would

<sup>563</sup> Bukhārī 1936; Muslim 1111.

<sup>564</sup> Ibrāhīm b. Mūsā b. Muḥammad al-Lakhmīy al-Ghumātī (d. 790-1388). The famous scholar in *uṣūl al-fiqh* from Granada, Andalusia. He was a leader in the Mālikī school. *Al-A'lam* 1/75.

<sup>565</sup> Shāṭibī, Abī Ishāq Ibrāhīm b. Mūsā al-Lakhmīy. *Al-I'tisām* 2/113, al-Maktaba al-Tawfiqīyya, Egypt. N.D.

also be advisable if the end is also lawful. This is what is called the principle of allowing and warding off of pretexts.

Social interest that is considered a source of legalization has certain criteria:

- Should not contradict a text from the Qur'ānic text, the Sunna or consensus.
- Should be of general interest for the *Umma* and not confined to an individual or a certain group.
- Should not rest on the expense of another interest that is more important.
- Should be real, not imaginary; and absolute, not hypothetical.

Codification may be based on all that does not contradict the Islamic texts, not only that which the texts actually contain. The Islamic government is bound by Islamic law to rule the Islamic *Umma* by all that does not contradict the rules of Islamic legislation, whether these have been dictated by their rules to be derived directly from the texts, or indirectly, throughout legislative policy. The Prophet prohibited his Commander (*amīr*) from administering the rule of God on a people whom he put under siege, but to administer his rule and that of his own people. Burayda<sup>566</sup> narrated: whenever the Prophet appointed anyone as leader of an army or detachment; he would especially exhort him to fear Allāh and to be good to the Muslims who were with him. He would say: *"Fight with the Name of Allāh, and in the cause of Allāh. Fight against those who do not believe in Allāh. Raid but do not steal from the stores. Do not be treacherous, do not mutilate the dead, and do not kill children."*... *"When you lay siege to a fort and the besieged appeals to you for protection in the Name of Allāh and His Prophet, do not accord to them the guarantee of Allāh and His Prophet, but accord to them your own guarantee of your companions. It is*

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<sup>566</sup> B. al-Ḥuṣayb b. 'Abdullāh b. al-Ḥārith al-Aslamī (d. 63/683). A Companion and narrated 167 *ḥadīth*. *Al-A'lam*. 2/50.



*a lesser sin that the security given by you or your companions be disregarded than the security granted in the Name of Allāh and His Prophet be violated. When you besiege a fort, and the besieged want you to let them out in accordance with Allāh's Command, do not let them come out in accordance with His Command, but do so at your own command; for you do not know whether or not you have reached the judgment of Allāh or not.*<sup>567</sup> Ibn al-Qayyim stated: "observe how he distinguished between the law of God, and the judgment of the studious commander, and prohibited to call the judgment of those diligent jurists the law of God."<sup>568</sup> And in another place he said: "of this kind of rule when the affair writing for 'Umar b. al-Khaṭṭāb put down a judgment, and said: this is what God has revealed to 'Umar, he said ('Umar): "do not say like that, but say: this what 'Umarr b. al-Khaṭṭāb thinks."<sup>569</sup> Social interest is always the first priority in the legislation of laws, because it remains one of the most important principles and aims of relationships in society. There could be no legislation but those to regulate these social relations, such that it prohibits what is harmful, as it also validates what is good for the community, and makes it binding. It also makes it admissible for that which has more good than harm, and makes detestable that which has more harm than good, and so forth.<sup>570</sup> This is applicable to the claim for legalizing the rules on family matters, or family law, since it contains so much benefit for all parties concerned:

- The state monitoring over the proper application for the Islamic laws, and ascertaining of the rightness of such an application– this supervision could pushed through what the state identifies as applicable laws, excluding those that are

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<sup>567</sup> Muslim: 1731.

<sup>568</sup> *Al-I'tisām* 2/39.

<sup>569</sup> *Al-I'tisām* 2/39.

<sup>570</sup> Qāsim 155.

invalid. The formulation of such codification will be derived from the Islamic sources and its principles by an elite of scholars and jurists, which will guarantee the best choice of laws, and the most acceptable and the most suitable for the age and for meeting the needs of the *Umma*.

- Helping the judiciary in carrying out its duty to arrive at the accumulation of cases will be avoided, and passing judgment will not be delayed, except for that which the general advantage calls for its delay.
- To protect the judges from personal influences which may affect them if it is left for their discretion to choose and determine the judgment for the case before them.
- To protect the good name of the judiciary, and preserve its respect and clear it from doubts, since it applies specific texts that it has no discretionary authority to choose from such texts. And these texts are available for people to refer to easily and quickly to know about the judgment that has been passed, and which the litigants may expect before bringing the case before the law.
- To regulate the relationship between the *fatwā* and the judiciary in family law, such that the judge passing the *fatwa* when consulted by the people would be able to issue one concurring with the view that is applied in the Bahraini law. This would make the plaintiff more at ease, and assured of the course of justice.
- To enable: opponents, lawyers, and those concerned to look into and comprehend these laws with ease, and to understand such rules in a way that would not be simple had they to reference them in the various and weighty volumes of *fiqh*. Even if they referred to such volumes, they could not expect to obtain a judgment



that would be passed readily. This is due to the many different views on the same issue such as makes the laws on the same issue differ from one judge to another.

- To set at ease those who have the claims and litigations and assure them of the rightness of the rules passed by judges. This is because the law that has been applied is stipulated from the Government and is based on comprehensive studies, and is applicable to all cases that are similar in their basic elements, regardless of the social status of the people who hold them. Therefore, reservations concerning the laws will decrease, and so discontent about them will also grow less.<sup>571</sup>

ii. Closing off the potential for evil ( *sadd al-dharā'i'* ):

*Sadd al-dharā'i'*, a term of Islamic law, literally, closing off the means that can lead to evil. The concept is based on the Islamic law's tendency to prevent evil (*dar' al-mafāsid*) and legal maxim states that it has preference over achieving good (*jalb al-maṣāliḥ*). *Sadd al-dharā'i'* is viewed as a continuation of *maṣlaḥa mursala* rather than an independent source. Despite this, *sadd al-dharā'i'* is often included in the books of law as an alternative legal source. Said to be based on the Qur'ān and *Sunna*, it represents a mechanism devised by Mālikī jurists to resolve loopholes in the law. The practical function of *sadd al-dharā'i'* is to prevent improper usage of a legal means to achieve an illegal end. However, unlike *maṣlaḥa* and *'urf*, *sadd al-dharā'i'* is probably the only source of Islamic law to be presented in a negative form. Some scholars, including Muḥammad Abū Zahra, have attempted to study it from a positive angle by focusing on *dharā'i'* alone. This, however, would appear to deprive the source of an essential dimension in favour of a preconceived proviso to prevent a prohibited action.<sup>572</sup> As Ibn

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<sup>571</sup> See: Qāsim 284; Skaykh, *Sa'at al-Sharī'a* 6.

<sup>572</sup> Izzi Dien, Mawil. The Encyclopedia of Islam VIII 718.

al-Qayyim stated: “when objectives cannot be reached without certain means these means become a part of these objectives and are treated as the objectives themselves. The means for the forbidden things, and disobedience in their detestability and probability as they lead to their destinations and associated with them, and the means for obedience and worship God in their desirability and permissibility as they lead to their destinations. The means for the destination is associated with the destinations and both are intended but it is intended as a destination, and the means is intended as a means.”<sup>573</sup> These may be differentiated as follows:

1. The utterance or action leading to a vice, which is laid down, such as drinking alcohol that leads to the vice of drunkenness.
2. The utterance and action leading to a vice, though it is originally formulated to lead to a permissible deed, but is taken as a means leading to a prohibited deed, either intentionally such as the marriage of an irrevocably divorced woman to make her lawful to her ex-husband or cursing the gods of the unbelievers. Here, interest may outweigh vice, or inversely vice may outweigh interest as follows:

- A means laid down leading to a vice.
- A means formulated for permissive action intended to lead to a vice.
- A means formulated for permissible action not intended to lead to a vice, but is most likely leading to it and its harm outweighs its interest.
- A means formulated for permissible action, but may lead to a vice, and its interest outweighs its harm, such as looking to a betrothed lady.<sup>574</sup>

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<sup>573</sup> *I'lām al-Muwaqī'in* 3/147.

<sup>574</sup> *I'lām al-Muwaqī'in* 3/147



Ibn al-Qayyim stated: “the Islamic law has sanctioned permission for this part, or its desirability, or its compulsion as a duty according to the degree of the Interest. It has unplaced for bidding in the first part, thus remains looking into the two intermediate sections. Are they of the type that Islamic law has sanctioned as permissible or forbidden?”<sup>575</sup> That is, there are some of the interests that are valid and describable, and consequently its pretexts would also be valid, and same fall in-between the two according to concomitant conditions that are left to the discretion of the student to evaluate in each historic period. The means may be valid, but even though it has been legislated according to the original text the accompanying factors may divert it to cause vice. Therefore, it should be forbidden or made detestable in accordance with the degree of interest born by it. This is why the Prophet refrained from killing the hypocrites (*munāfiqūn*) though essentially the action carried interest, but would lead to vice, which the Prophet expressed in his words addressed to ‘Umar- as related in the *ḥadīth* of Jābir, “shouldn’t we kill this vicious man- meaning Abdullāh b. Abī Salūl<sup>576</sup>, head of the hypocrites? The Prophet said: “No, people will say that he used to kill his fellows”,<sup>577</sup> and that would oppose the principles of Islam.”<sup>578</sup>

Further evidence can be seen from what Ibn al-Qayyim has stated observing Caliph ‘Umar b. al-Khaṭṭāb’s sanctioning of irrevocable divorce for the man who uttered ‘divorce’ three times in one session, as has been previously mentioned.

Muḥammad Abū Zahra stated: “Extracting a law from the Islamic religion prescribes it as not only desirable, but as a confirmed duty. Any deficiency in this field, which is the last

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<sup>575</sup> *I’lām al-Muwaqī’in* 3/148.

<sup>576</sup> A boss of the hypocrites in Medīna.

<sup>577</sup> *Bukhārī*: 3330; *Muslim*: 2584.

<sup>578</sup> *Qāsim* 129.

fortress of religious legislation, might eventually result in enforcing man-made law that is irrelevant to the religious sources and objective, as has occurred with other laws. When Egyptian legislators failed to extract a law from the four schools, in 1875 its governor, Khidiw Ismā'il<sup>579</sup>, gave Munury, a French lawyer, the task of legislating for multi-courts that were similar to those in France. He initiated civilian law, continental trade law, marine trade law, defending proceedings law, and the law of homicide investigation. In 1883, an Italian lawyer named Murondo created the national civilian law, which was preceded by some special laws, such as the peasantry law that was issued in 1830 to deal with rural life and agricultural affairs. This was followed by the manifesto law, which was specially devised for employees. In Tunisia, the system of Islamic legislation was dominant up until 1901 when a committee of European legislators was formed to implement a preliminary project of a modern legislation of obligations and contracts. The committee attempted to reconcile the prevailing Islamic prescripts with the variable laws of the European civil legislations to avoid any contradiction between legislation and the habits of Europeans and Tunisians. These laws were issued in 1906 and in 1913 and the Moroccan laws emerged.<sup>580</sup>

The new Tunisian and Moroccan laws replaced the Islamic legislation in both countries. The Islamic laws, which were documented in the *al-Mujalla al-'Adliyya* (Journal of Judicial Legislations) prepared by a legislative body formed by the Ottoman government in 1293/1876, remained prevalent in most of the Arab countries dominated by the

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<sup>579</sup> Ismā'il Bāshā b. Ebrāhīm b. Muḥammad 'Alī al-Kabīr (1245-1312/1830-1895). He was a ruling of Egypt (1279-1296/1865-1879) and the first who called khedive. khedive the title of rules of Egypt in the later 19<sup>th</sup> and early 20<sup>th</sup> centuries. In a way, it was a unique title among the vassals of the Ottoman sultan, which the ambitious viceroy of Egypt sought precisely in order to set himself apart and above so many other governors and viceroys of Ottoman dominions. *Al-A 'lām* 1/308; the New Encyclopedia of Islam V4.

<sup>580</sup> In Preface of Qāsim's book (*al-Islām wa Taqnīn al-Aḥkām*).



Ottoman Empire. These laws included 1851 articles governing the questions of Commercial law and remained dominant until the end of the First World War. After the collapse of the Ottoman Empire, new laws were issued and in 1934 the law of obligations and contracts emerged. In 1949, the Syrian civil law was issued, the Iraqi civil law in 1951 and the Libyan civil law in 1953. Thus, the laws of the West invaded the Islamic Arab world and replaced Islamic Law; family law being the exception. These man-made Western laws dominate all Muslim Arab countries; Saudi Arabia excluded. Recently, some Muslim Arab countries such as Tunisia have substituted the Islamic Family legislations with these laws; hence it is the responsibility of authorities to guard against crime by initiating legislation based on Islamic sources.”<sup>581</sup>

## 9.6 The Mechanism of Codification:

Ultimately the issue of parliamentary involvement in drafting and sanctioning the codification remains at the core of debate and controversy as well as being largely opposed by *Shī‘a*. Meanwhile supporters of such parliamentary involvement argued that: *Shī‘ī* references in The Islamic Republic of Iran have approved such codification with a similar mechanism, then why is a different line being adopted, particularly in this issue? The *Shī‘ī* scholars, in turn, argue that the situation in Iran is completely dissimilar from that of Bahrain, as the religious authority there protects all issued codes. In addition most of the Parliamentary members are Muslim academics, a fact that guarantees the protection of Islamic laws from being subject to future change. To the contrary, no such religious authority exists in Bahrain and most of the Parliamentary members are not specialized in Islamic law, a fact that may lead to the replacement of these codes with

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<sup>581</sup> In Preface of Qāsim’s book (*al-Islām wa Taqnīn al-Aḥkām*).

man-made ones, as has happened in some Arab countries like Tunisia and Morocco. Nevertheless it may possibly be a reasonable point of view given that this law may go through a ratification process, whereby the parliamentary members must vote on the law and the majority decides whether these articles of law are accepted or rejected. However there is an alternative mechanism that may help to maintain the law and to overcome this problematic issue. This alternative is to activate and mandate the previously mentioned committee that was formed of Islamic judges and lawyers, and to extend its membership to include a group of competent scholars and others from related fields. After drafting the articles, an internal regulatory list could be issued by The Supreme Council of Jurisdiction as a binding tool for all judges in the Islamic courts. The same proposal was suggested by some of those opposed to parliamentary interference, for instance Shaykh Hussīn al-Najāṭī and Shaykh ‘Abdullāh al-Ghurayfī.

The argument maintained by many critics on the principle of codification, is that the issuance of such a law and compelling the judges to follow it is apt to close the door on attempts of rationalisation and further study among judges. It appears to me that this view is rather short – sighted, especially with respect to the actual situation in Bahrain. Realistically, the judges in Islamic Courts, despite our great respect for them, cannot be described as being independent, reasoning (*mujtahidīn*) and they themselves do not purport to fit this description. In most cases, they emulate the views of the religious school that is prevailing in the Islamic Courts, i.e. the Mālikī sect in the *Sunnī* school, and the *Ja‘farī* sect in the *Ja‘farī* school. Furthermore, the judges, who will be the front line in the selection of the most accepted laws and their inclusion in codification, will implement



the codification whose mechanism has been previously explained. This notion accords with the results of their studies. In conclusion these laws may change after a few years, if they prove unfit for practical application. These remain in line with the aforementioned basic Islamic principle and change will not take place without the consent of the judges. Then, where is the closure of the door of reasoning that is claimed to exist? It is doubtless nothing more than a lack of understanding.



## **CONCLUSION**

- i. Research Conclusions**
- ii. Research Recommendations**

This final section of the study attempts to underline the main conclusions and recommendations. However, as the main conclusions have been presented at the end of each chapter or section of the study, the following will constitute general conclusions and recommendations throughout the research.

### **i. Research Conclusions:**

- From the field study of the nature of Islamic Courts in the Kingdom of Bahrain, a number of factors were identified that hinder the expediency of the cases being heard, the most prominent factors being:
  - a) The small number of courts as compared to the number of cases, in particular the High Court, which is divided into ‘preliminary’ and ‘appeal’ (for the cases already heard by the low court). Moreover, there is only one court for each constituency (*Sunnī* and *Ja‘farī*). Thus, the interval between the sessions of lawsuits is lengthy, an average of 18-20 cases per day. The shortest possible interval between the sessions may be as much as 30-45 days.
  - b) Inaccuracy in registering the addresses on the prosecution list. This delays the process of the lawsuits reaching the prosecutor. Indeed, the whole process of the lawsuit may be repeated by informing the concerned parties again and this may



necessitate a further session that may take at least 45 days. If the address is unknown of someone who is residing outside Bahrain, then it will be announced in the official gazette twice, each time taking 45 days.

- c) Inaccuracy encountered by the prosecutor in recording the details or his non-committal to the details therein provided on the prosecution list. This necessitates a new legal procedure and the changing of some elements at the complaints office. This may be caused by the ignorance of the prosecutor regarding what to write on the prosecution list, particularly if the defendant has no legal representative. It may be due to the negligence of the officials of the complaints office in the court to follow directives.
- d) Absence of some lawyers from attending the sessions, which entails the adjournment of cases to a further hearing.

The factors mentioned above are administrative in nature and fall within the responsibility of the organisation and management of the courts and not that of the judges. Hence even if family laws are legislated in the Islamic Courts and these problems remain unresolved, the negative aspects will continue.

- The qualification of the judges is deemed the second important factor that calls for criticism and review. It was clear during the study that all the judges in the *Sunnī* Courts are graduates of the most outstanding universities, namely, al-Azhar University in Egypt, the Imām Muhammad bin Sa'ūd Islamic University and Umm al-Qurā University in Saudi Arabia. Two of them hold a PH.D, two, an MA and the remaining eight hold a BA degree. At this juncture, it is relevant to point out that the *Sunnī* judges tend only to refer to the Mālihī school of thought, to the

exclusion of all other opinion. More importantly, they will also take the least preferable Mālikī opinion, thus engendering some weakness in their rulings. However, the *Saudī* graduates have not studied law and court procedures. Thus, the Supreme Council of Judges embarked on an initiative to qualify the judges in their professional practice and efficiency by making them attend court cases without participating in making judgements. In April, 2003, some of the junior judges were sent to Kuwait at its specialised Institute in legal practice in order to enable them to understand the mechanics of court procedure. This was fruitful and it was promised that such would be mooted in the Kingdom of Bahrain. It is not possible to comment on the *Ja'farī* judges due to their reluctance to respond to the questionnaire, as previously stated in the Preface.

- The Supreme Council of Judges is criticised for its obsessive adherence to bureaucracy. For example, it failed to answer my questions on the pretext that they were beyond their jurisdiction. All the questions asked were in fact within their responsibilities.
- The *Sunnī* Islamic Courts are different from the *Ja'farī* ones in that the former cover all the lawsuits and evidences; cases relating to marriage and divorce being among these. The *Ja'farī* Courts tend to be disorganised with their system of documentation.
- Non-clarity of procedure that is adopted by the judges of the Islamic Court regarding the confirmation of the guardian of the woman and inaccuracy of the judges as to the depravity (*fisq*) of the husband regarding the consumption of



alcohol or drugs. The system reflects a reticence to accept modern methods of technology.

- Neglecting of the conditions set during marriage, regardless of their significance.
- *nikāh al-mut'a* within the *Shī'a* school is a clear contradiction of the religious texts and does not achieve any of the purposes of Islamic law.
- Most of the lawsuits taken to the Islamic Courts are due to simple disagreements among the couples and could easily be resolved through the family reform (*iṣlāḥ*) offices in light of two arbiters from the two parties. A good example of the benefits of family arbitration is evident in the experimental procedure in the United Arab Emirates, Dubai.
- Lack of acceptance of the evidence given by close relatives: parents, brothers and sisters causes great problems in affirming any harm inflicted upon the woman, who may have refused to involve the police due to her not wishing to be subject to intimate examination. Also, her hesitation to implicate her husband if he holds a respected social position.
- A negotiated divorce (*khul'*) initiated by the woman when she feels that she can no longer tolerate married life. Some women may adopt this procedure if they have no material evidence to prove that they have been abused by their husbands.
- The Islamic Courts have neglected the woman's absolute right to care indemnity maintenance (*nafaqat al-mut'a*) because of the harm that is inflicted on her and to make constraints on the man who, despoils the sanctity of marriage.
- Child maintenance that the Islamic Courts specify after divorce is generally very small and rarely commensurate with the daily needs of the children. However, the

courts argue that the specified maintenance is commensurate with the financial situation of the husband. This cannot be confirmed, as there are no clear parameters and procedures to evaluate this.

- The implementation of a comparative jurisprudence (*fiqh muqāran*) would enable the codification of the family law. Jurists would be compelled to select laws derived from all Islamic sources and reframe them into workable ‘articles’. From these would stem a legislative framework by which all judges must abide and all similar cases would thus be unified in all the courts.
- The method used by both the opponents of codification among the scholars of *Shī‘a* and its defendants is not a civilised method of discourse, because all Seminars except two, have included only one group; a biased and invalid approach.
- Some of the arguments of the opponents of codification are justifiable and should be taken on board, particularly the lack of safeguards to protect the laws from alteration and their replacement with others that are outside the parameters of the Islamic Law. However, some opponents have inconsistent methods and often change the goal posts as it suits them. For example, at first they are against the basic principle of codification and then proceed to stand against the actual mechanism of codification. This results in self contradiction made by the opponents, in that their premise does not concur with the results in the symposia and academic fora.



- Most of the proponents of codification lack the knowledge of the Islamic Courts. They assume that codification will be the radical overhaul of all the negative aspects of these courts.

## **ii. Research Recommendations:**

- The Supreme Council of Judges in Bahrain should seek to attain the following:
  - a) Upgrade the prospective judges through specialised training courses relevant to Islamic judiciary. Nominees should accompany experienced judges to the courts for at least three months so that they can learn the conduct and practices of courts: lawsuits and parties to them.
  - b) Increase the number of Islamic Courts in order to absorb the number of cases.
  - c) Confirmation that judges and secretaries conform to the procedures of preparing the prosecution list and that it covers all details as demanded by the parties.
  - d) Enhance the competence of officials at the complaints offices.
  - e) Improve the standards of the transcripts of the sessions and develop the means of communication and exchange of information among the different branches of the courts, the varying courts, ministries and other relevant parties.
  - f) Institution of a family reform/rehabilitation department after having made sure that its staff will be fully qualified and capable.
  - g) Cooperation with and facilitating the task of researchers in studying the affairs of Islamic Courts in general and “family” in particular.
- All judges should make every effort to consider the consent of the woman, either by direct approach of the witnesses or the woman in question.

- The judges should remind the couple of the absolute importance of the conditions they make upon themselves.
- It is equally important to know before hand that the prospective husband is of good character. This can be achieved by checking the validity of all official references.
- The judges of the Islamic Courts should make use of the new techniques in obtaining information related to lawsuits.
- The need to reactivate the Family Law Review Committee after involving reliable members and trustworthy scholars, in order to safeguard it from alteration.



## GLOSSARY

### -A-

**abū.** father.

**‘aḍl.** means prevention of marriage by the guardian.

**āḥād** (s. *aḥad*) or *ḵabar al-wāḥid*: it is a *ḥadīth* which falls short of the predicate *mutawātir* (or, as certain scholars assert, *mashhūr* in that it has only one or a few (from two to five) transmitters in every *ṭabaqāt* of its *isnād*).

**aḥkām** (s. *ḥukm*): judgment, decisions. In the Qur’ān, the word occurs only in the singular, and is used (as is the corresponding verb) of Allāh, the Prophets, and the other men. Used of Allāh, it denotes both individual ordinances and the whole of His dispensation. *al-aḥkām al-ḵamsa* the ‘five qualifications’ (*farḍ* or *wājib* obligation/religious duty, *mustaḥab* recommended, *mubāḥ* indifferent/ permitted, *makrūh* reprehensible/ disapproved, *muḥarram* forbidden), by one or the other of which every act of man is qualified. (Schacht, J. Encyclopedia of Islam I 257).

**ahl:** qualified, *ahliyya* full capacity, *ghayr ahl*: unqualified.

**ākhirā:** the life to come, the condition of bliss or misery in the hereafter.

**āḥ.** a clan, genealogical group between the family and the tribe. Later, it came to mean the dynasty of a ruler.

**‘anah:** impotence, incapable of sexual intercourse.

**ayyim** (pl. *ayāmā*): is a person with no spouse, either a man or a woman, virgin or otherwise.

**amīr** (pl. *umarā*): commander, in the past it was usually a military title, now used to denote a prince or a title for various rulers or chiefs.

**amīr al-Mu'minīn** or "Prince of the believers", is a title of the Muslim Caliph.

**'aqd** ( *'uqūd*): the legal act, especially that which involves a bi-lateral declaration, the offer and the acceptance. In the science of diplomacy it is used for contract ( *'ahd*, *mithāq*), in particular a civil contract, often more clearly defined by an additional genitive, such as *'aqd al-nihāḥ*, *'aqd al-ṣulḥ*, etc. (Juynboll, Th. W. Encyclopedia of Islam I 318).

**'ār**: shame opprobrium, dishonour.

**aṣlah**: adjective of person who is most suitable or fitting.

**athar** (pl. *āthār*): effect.

**āya** (pl. *āyāt*) a verse of the Qur'ān.

-B-

**bā'in**: an irrevocable divorce.

**bāligh**: major, come of age.

**banū**: sons.

**bayyina** (pl. *bayyināt*): clear, evident. In Qur'ān, appears as substantive, meaning: 'manifest proof'. In law, denotes the proof pre excellentiam-that established by oral testimony (*shahāda*), although from the classical era the term came to be applied not only to the face of giving testimony at law the witnesses themselves. (Miranda, A. Huici. Encyclopedia of Islam I 1150)

**bid'a**: innovation, a belief or practice which was not present in Islam at it was revealed in the Qur'ān, and established by the *Sunna* on the basis of the Prophetic *ḥadīths*; It is



opposite of *Sunna* and is a synonym of *muḥdath* or *ḥadath*. While some Muslim felt that every innovation must necessarily be wrong, some allowance obviously had to be made for changing circumstances. Thus a distinction came to be made between a *bid'ā* which was 'good' (*ḥasana*) or praiseworthy (*muḥmūda*), and one which was 'bad' (*sayyi'a*) or blameworthy (*mdhmūma*). *Shāfi'* laid down the principle that any innovation which runs contrary to the Qur'ān, the *Sunna*, *ijmā'*, or *athar* (a tradition traced only to Companion or Follower) is an erring innovation, whereas any good thing introduced which does not run counter to any of these sources is praiseworthy. (Robson, J. Encyclopedia of Islam I 1199).

*bikr*: a virgin girl.

*burhān*: decisive proof, clear demonstration; a Qur'ānic term signifying a brilliant manifestation, a shining light from Allāh. in correlation, is also the decisive proof which the infidels are called upon to furnish as justification of their false beliefs. In law, refers the quality of certitude (based upon an argument of authority, which can be either a scriptural text or the eye-witnessing of an obvious fact) which is proper to reasoning 'in two terms', in order to prove the radical distinction between or the identity of two comparable 'things', it is found especially in al-*Shāfi'*, Ibn Ḥanbal and Dāwūd al-*Zāhiri*. (Gardet, L. Encyclopedia of Islam I 1326).

#### -D-

*da'if*: weak, in the science of *ḥadīth*, the term for a weak *ḥadīth*, a long with *saqīm*, infirm, *ḥadīth* without any claim to reliability.

*da'wā*: action at law, case, lawsuit.

*dayn* (pl. *duyūn*): debt; claim.

*ḍharā'ī* (sing. *ḍharī'a*): a method of reasoning to the effect that, when a command or prohibition has been decreed by God, everything that is indispensable to the execution of that order or leads to infringement of that prohibition must also, as a consequence, be commanded or prohibited.

*dīn* (pl. *adyān*): religion, the obligations which Allāh imposes on man; the domain of divine prescription concerning acts of worship and everything involved in it.

-F-

*farḍ* or *farīḍa* (pl. *farā'ī*): religious duty or obligation, the omission which will be punished and the performance of which will be rewarded. It is one of the so-called the five qualifications (*al-aḥkām al-khamsa*), by which every act of man is qualified.

*fāsid* or *bāṭil*: in law, a legal act which does not observe the conditions of validity required for its perfection; vitiated and therefore null. Only in Ḥanafī school of law is distinct from *bāṭil*, where it denotes a legal act which lacks one of the elements essential for the existence of any legal activity. (bellefonds, Y. Linant De. Encyclopedia of Islam II 829).

*fāsiq*: in theology, one who has committed one or several 'great sins'. In law, is opposite of a person of good morals (*'adl*).

*faskh*: in law, dissolution of any contractual bond whatever, effected, as a rule, by means of a declaration of intention pronounced in the presence of the other contracting party, or by judicial process.

*fatwā*: a published opinion or decision regarding religious doctrine or law made by a recognized authority, often called a *muftī*



***fiqh***: Jurisprudence, the science which deals with the observance of rituals, the principles of the five Pillars, and social legislation. There are four schools of *fiqh*, known as the four *Sunnī* schools of law (sing. *Madhhab*, pl. *madhāhib*). In addition, the *Shī'is* and the *Khārijīs* have their own schools. Each school has its fundamental written treatises. Someone who is versed in *fiqh* is called a *faqīh* pl. *fuqahā'*. Smith 126.

***fitna***: temptation, trail, attractiveness, enchantment; whatever distracts and disturbs; misguidance, dissuasion from the path laid by Allāh.

***fuḍūlī***. an unauthorized agent.

-G-

***ghulāt*** (s. *ghālī*): 'extremists', those individuals accused of exaggeration, *ghulūw*, in religion.

-H-

***ḥaḍāna* or *ḥiḍāna***: the right to custody of the child, bringing up, nursing.

***ḥadd*** (pl. *ḥudūd*): hindrance, impediment, limit boundary, frontier. In the Qur'ān, it is used (always in the pl.) to denote the restrictive ordinances or statutes of Allāh.

In law, *ḥadd* has become the technical term for the punishments of certain acts which have been forbidden or sanctioned by punishments in the Qur'ān and have thereby become crimes against religion. The punishments are the death penalty, either by stoning or by crucifixion or with the sword; the cutting off of the hand and/or the foot; and flogging with various numbers of lashes (*ḡalḡ*), their intensity depending on the severity of the crime.

In theology, *ḥadd* in the meaning of limit, limitation, is an indication of finiteness, a necessary attribute of all created beings but incompatible with Allāh. (Vaux, B. Carra De [J. Schacht]. Encyclopedia III 20-21).

*ḥadīth* (pl. *aḥādīth*): narrative, talk. It used for Tradition, being an account of what the Prophet said or did, or of his tacit approval of something said or done in his presence.

*Khabar* (news, information) is sometimes used of traditions from the Prophet, sometimes from Companions or Successors. *Athar*, pl. *āthār* (trace, vestige), usually refers to tradition from Companions or Successors, but is sometimes used of traditions from the Prophet. *Sunna* (custom) refers to a normative custom of the Prophet or of the early community. (Robson, J. Encyclopedia of Islam III 23).

*ḥāfiḍ* (pl. *ḥuffāḍ*): a designation for one who knows thousands of *ḥadīths* by heart.

*ḥajj*: the pilgrimage to Mecca, ‘Arafāt and Minā, one of the five pillars of Islam. It is also called the Great Pilgrimage in contrast to the ‘*Umra*, or Little Pilgrimage. One who has performed the pilgrimage is called *ḥājj* or *ḥajjī*.

*ḥajjam*: a cupper (indicating the old medical tradition of ‘bleeding’ the patient).

*ḥajjat al-wadāʿ*: the last pilgrimage of the Prophet, in the year 10/633.

*ḥajr*: the restriction of the capacity to dispose; it expresses both the act of imposing this restriction and the resulting status. A person in this status is called *maḥjūr ‘alayh*.

*ḥakam*: an arbitrator who settles a dispute (synonym: *muḥakkim*).

*ḥāl*: state, condition.

*ḥalāl*: everything that is not forbidden.



**ḥarām:** a term representing everything that is forbidden to the profane and separated from the rest of the world. The cause of this prohibition could be either impurity (temporary or intrinsic) or holiness, which is a permanent state of sublime purity.

**ḥayḍ:** menstruation.

**hiba** (pl. *hibāt*): donation.

**hijra:** the emigration of the Prophet Muhammad from Mecca to Medīna in September 622; distinguished by the initials A.H., beginning on the first day of the lunar year in which that event took place, which is reckoned to coincide with 16th July of 622. It implies not only change of residence but also the ending of ties of kinship and the replacement of these by new relationships. (Watt, W. Montygomery. Encyclopedia of Islam III 366).

**ḥikma:** wisdom, science and philosophy.

**ḥukm** (pl. *aḥkām*): decision, judgement.

**ḥurriyya:** freedom as opposed to slavery.

-I-

**‘ibāda** (pl. *‘ibādāt*): submissive obedience to a master, and therefore religious practice, corresponding, in law, approximately to the ritual of Muslim law.

**‘ibāḥa:** originally, ‘making a thing apparent or manifest’, hence ‘making a thing allowable or free to him who desires it’. In law, was first used with regard to those things that every one is permitted to use or appropriate. And also it is called *mubāḥ*.

**ibn:** son.

***‘idda***: the legal period of abstention from sexual relations imposed on widows or divorced women, or women whose marriage have been annulled, providing the marriage was consummated, before remarriage.

***idhn***: the authorisation necessary to enable certain types of incapable person to conclude isolated transactions, and the general authorisation to carry out commercial in a normal way.

***idtirār***: compulsion, coercion. Human actions carried out under compulsion were distinguished from those carried out of free choice. The opposite is ***ikhṭiyār***.

***ijmā‘***: one of *uṣūl al-fiqh*, or principles of Islamic law (*Sharī‘a*). Its basis is the ***ḥadīth***: “*my community shall never be agreement in error*”. *ijmā‘* is a consensus, expressed or tacit, on a question of law. Along with the Qur’ān, ***Ḥadīth***, and *Sunna*, it is a basis which legitimizes law. Smith 182.

***ijtihād*** (pl. *ijtihādāt*): literally “exerting oneself”, is the technical term in Islamic law, first, for the use of individual reasoning in general and later, in a restricted meaning, for the use of the method of reasoning by analogy (*qīyās* [q.v.]). The lawyer who is qualified to use it called *mujtahid*. Systematically disciplined form, was freely used by the ancient schools of law, and it is often simply called *ra’y* [q.v.], “opinion, considered opinion”. An older, narrower technical meaning *ijtihād*, which has survived in the terminology of the school of Medina, is “technical estimate, discretion of the expert”. It was left to Shāfi‘ī [q.v.] to reject the use of discretionary reasoning in religious law on principle, and to identify the legitimate function of *ijtihād* with the use of *qiyas*, the drawing of conclusion by the method of analogy, or systematic reasoning, from the Qur’ān and the *Sunn* of the



Prophet. This important innovation prevailed in the theory of Islamic law. (Schacht, J. Encyclopedia of Islam III 1026).

**ikhtilāf**: the differences of opinion among the authorities of law, both between schools and within each of them.

**ikrāh**: duress, of which there are two kind: unlawful (*ikrāh ghayr mashrūʿ*) and lawful (*ikrāh bi-ḥaqq*). Only the former is recognised by the Qurʾān and has legal effects.

**iqrār**: affirmation, acknowledgement; recognition of right. The declarant is called *al-muqirr*, the beneficiary *al-muqarr lahu*, and the object of the recognition *al-muqqr bihi*.

**ʾilāʾ**: an 'oath of continence', the husband swearing in the name of Allāh not to have sexual relations with his wife for at least four months. When this time had passed without a resumption of conjugal relations, the marriage was not automatically broken up except in the Ḥanafī school; the other schools allowing the wife to judge the occasion for the severance, which would take place by a repudiation that the husband would pronounce, or that the judge (*qāḍī*) would formulate in his place. (Pedersen, J.-[Bellefonds, Y. Linant]. Encyclopedia of Islam IV 689.

**ʾilal** (s. *ʾilla* 'cause'): the designations given by the law maker for an injunction. (*ḥukm*). This may not be the actual cause but merely serves as a mark (*ʾalāma*) to indicate that a certain *ḥukm* should apply. It is also referred to as *sabab* (pl. *asbāb*).

**imām**: leader of the official prayer rituals (*ṣalāt*). From the earliest days of Islam, the ruler was as leader in war, head of the government and leader of the common *ṣalāt*.

**inkār**: denial, as when a person who is summoned by law to acknowledge a debt denies that he owes it. The transaction which puts an end to the legal conflict is called *ṣulḥ ʾalā inkār*.

*iṣlāḥ*: reform, reformism.

*isnād*: in the science of the tradition, the chain of authorities (*sanad*) going back to the source of the tradition, an essential part of the transmission of a tradition.

*istibrā'*: confirmation of emptiness: a) the temporary abstention from sexual relations with an unmarried female slave, in order to verify that she is not pregnant, on the occasion of her transfer to a new master or a change in her circumstances; and b) an action the left hand designed to empty completely the urethra, before the cleaning of the orifices which must follow satisfaction of the natural needs. (encyclopedia of Islam I 1027; IV 252)

*istidlāl*: proof by circumstantial evidence, reasoning, argument.

*istiḥsān*: arbitrary personal opinion, a method of finding the law which for any reason is contradictory to the usual *qiyās*, reasoning by analogy.

*iṣṭilāḥ* (pl. *iṣṭilāḥāt*): in the works of early grammarians, in the discussion on language, was used in the sense of a social institution tacitly accepted by its users; when opposed to *aṣl al-luġha* 'language'.

*istilhāq*: annexation; avowal of paternity.

*ithbāt*: to witness, to show, to point to, to prove.

*'iwaḍ*: exchange value, compensation, that which is given in exchange for something. In law, is used in a very broad sense to denote the counterpart of the obligation of each of the contacting parties in onerous contracts which are called 'commutative', that is, contracts which necessarily give rise to obligations incumbent on both parties. (Bellefonds, Y. Linant De. Encyclopedia of Islam IV 286).



-J-

*jā'iz*: permissible. In law, the term preferred by Ḥanafī authors to specify that the juridical act was legitimate or licit, in point of law, apart from its being valid or not.

*jināyāt* (s. *jināya*): criminal.

*jizya*: a tax formerly levied on such non Muslim adult males as were able to pay it.

-K-

*kafā'a*: equality, parity and aptitude. Denotes equality of social status, fortune and profession (those followed by the husband and by the father-in-law), as well as parity of birth, which should exist between husband and wife, in default of which the marriage is considered ill-matched and, in consequence, liable to break up. (Bellefonds, Y. Linant De. Encyclopedia of Islam IV 404; 1116).

*kāfir*: unbeliever.

*khālifa*: Caliph ("successor", "substitute", "lieutenant", "viceroy"), as a title, after the first four Caliphs, Abū Bakr al-Ṣidīq, 'Umar b. al-Khaṭāb, 'Uthmān b. 'Affān and 'Alī b. Abī Ṭālib, they are called *al-khulafā' al-rāshidūn*, the "rightly guided" or the "patriarchal Caliphs", passed to the Umayyads, then the 'Abbāsids.

*khālwa*: privacy, seclusion. The theory is that consummation between husband and wife is presumed to have occurred if they have been alone together in a place where it would have been possible for them to have sexual intercourse.

*khaṣī* (pl. *khiṣyān*): the man who has undergone castration; the complete eunuch (*jabb*), deprived of all his sexual organs, is a *majbūb*.

*khidīw*: khedive, the title of rulers of Egypt in the later 19<sup>th</sup> and early 20<sup>th</sup> centuries.

***khiṭba***: 'demand marriage', betrothal. It does not involve any legal obligation and is not a legal act, but certain effects nevertheless follow from it, although the law schools differ: regarding the rights of the woman. Generally, once a woman is betrothed to a man, another cannot seek that woman in marriage. (Delcambre, A. M. Encyclopedia of Islam V 22).

***khiyār***: the opinion or right of withdrawal, i.e. the right for the parties involved to terminate the legal act unilaterally.

***khul'***: a negotiated divorce, a divorce at the instigation of the wife, who must pay compensation to the husband.

***kuf***: equality.

-L-

***li'ān***: the oath which gives a husband the possibility of accusing his wife of adultery without his becoming liable to the punishment prescribed for this, and the possibility also of denying the paternity of a child borne by the wife. It frees the husband and wife from the legal punishment for respective *qadhf* and infidelity. (Encyclopedia of Islam I 1150; IV 689; V 703).

***lu'lu'*** (pl. *la'ālī'*, *la'ālī*) and *durr*: pearl.

***lawm***: blame.

-M-

***madhāhib*** (s. *madhhab*): a system of thought, an intellectual approach; the four schools of law in orthodox Islam, viz. the Ḥanafī, Mālikī, Shafī'ī and Ḥanbalī. and some other later schools, such as the Zāhiriyya founded by Dāwūd b. Khalaf al-Zāhirī..

***ma'dhūn***: the official authorized by the Judge to perform civil marriage.



*mafhum* or *ma'nā*: meaning.

*mahr* (*ṣadaq*): the dower; gift which the bridegroom has to give the bride when the contract of marriage is made and which becomes the property of the wife. Two kinds of *mahr* are distinguished: specified dower (*mahr al-musmma*), the amount of which is exactly laid down in the wedding contract. And dower of the like (*mahr al-mithl*), unspecified dower in which the amount is not exactly laid down, but the bridegroom gives a bridal gift befitting the wealth, family and qualities of the bride. (Spies O. Encyclopedia of Islam VI 78).

*maḥram* (pl. *maḥārim*): the male relation of a woman who is forbidden to marry her. These male kinfolk include; fathers, brothers, uncles etc.

*makrūh*: a reprehensible action, an action disapproved of one of the five juridical qualifications of human actions according to Islam law.

*mandūb*: a meritorious (*faḍila*), recommended action and desirable indefinitely at the age of discretion. The performer is praised and the non-performer is dispraised.

*maqāṣid al-sharī'a* (s. *maqṣad*): the purposes of Islamic law.

*marjūh*: weak, least common or non-preferable, referring to an opinion.

*mas'ala* (pl. *masā'il*): question, problem.

*maṣlaḥa* (pl. *maṣāliḥ*): the concept in Islam of public interest or welfare. It is the abstract of the verb *ṣalaḥa* (or *ṣaluḥa*), "to repair or improve". Strictly speaking, *maṣlaḥa*, like *manfa'a*, means "utility" and its antonyms are *maḍarra* and *mafsada* ("injury"); but generally speaking, *maṣlaḥa* denotes "welfare" and is used by jurists to mean "general good" or "public interest". Anything which helps to avert *mafsada* or *ḍarar* and furthers human welfare is equated with *maṣlaḥa*. As a legal concept, *maṣlaḥa* must be

distinguished from *istiṣlāḥ*, a method of legal reasoning through which *maṣlaḥa* is considered a basis for legal decisions. (Khadduri, Madjid. Encyclopedia of Islam VI 738).

*masjid*: mosque.

*mawlā* (pl. *mawālī*): who entered its service and become an adoptive member.

*mirāth* or *irth*: inheritance.

*mu'āmalāt*: transaction concerning credit granted by a donor to a beneficiary; also, the bilateral contracts, as opposed to the *'ibādāt* which constitute the 'ritual of Islamic law'.

*mubāḥ*: licit, authorized; one of the five juridical qualifications of human acts, indifferent, neither obligatory or recommended, nor forbidden or reprehensible.

*mubāra'ā*: a form of divorce by mutual agreement by which husband and wife free themselves by a reciprocal renunciation of all rights.

*mudd'ī*: the plaintiff in a lawsuit.

*mudd'ā 'alayh*: the defendant in a lawsuit.

*muḍṭarib*: incongruous, in the science of the tradition, it is used when two or more people of similar standing have differing versions of a tradition. The difference may affect *isnād* or *matn*.

*muftī*: the person who gives an opinion on a point of law (*fātwa*), or is engaged in that profession.

*muḥarraf*: altered, in the science of tradition, it is used to signify a change occurring in the letters of a word.

*muḥarram*: obligatory, which is required to abandon definitely or the performer is dispraised.

*muḥṣan*: married.



***mukallaf***: who is obliged to fulfill the religious duties.

***munkar*** (pl. *munkrāt*, *manākīr*): unknown, objectionable, in the science of tradition, a tradition whose transmitter is alone in transmitting it and differs from one who is reliable, or is one who has not the standing to be accepted. When one says of a transmitter 'he transmits unknown traditions' *yarwī al-manākīr*, this does not involve the rejection of all his traditions; but if he is called *munkar al-ḥadīth*, they are all to be rejected. (Junboll G. H. A. Encyclopedia of Islam VII 576).

***mursal***: a tradition in which a Successor quotes the Prophet directly, that is, if the name of the Companion is omitted in the *isnād*. there is *mursal al-ṣaḥābī*, wherein a Companion describes some event (involving the Prophet) at which he/she could not possibly have been present. (Robson J. Encyclopedia of Islam III 26).

***musnad***: indicates a work in which the traditions of each Companion are collated; an arrangement that was not very convenient since the traditions were not arranged by subject.

***mustaftī***: the person who asks for an opinion on a point of law, *fatwā*.

***mustaḥab***: a recommendable action, corresponding largely to *mandūb*.

***mut'a***: enjoyment, temporary marriage, also called *nikāḥ al-mut'a*, a marriage which is contracted for a fixed period. It was authorised at the beginning of Islam but forbidden later by the Sunna, Shī'is tolerates it however. Also, the indemnity payable to a divorced wife when no dowry has been stipulated.

***mutawātir***: a tradition with so many transmitters that there could be no collusion, all being known to be reliable and not being under any compulsion to lie.

\* *mutawātir bi al-lafẓ*: a narration in which the texts appended to the various chains are identical in wording.

\* *mutawātir bi al-ma'nā*: a narration in which the texts are identical in meaning only, as opposed to *mutawātir bi al-lafẓ*. (Robson, J. and Wnsinck, J. A. Encyclopedia of Islam III 23, VII 781).

-N-

*nafaqa* (pl. *nafaqāt*): maintenance for a divorced woman.

*nafs*: soul, self, person.

*nasab*: kinship, the relationship, the list of ancestors is introduced either by son of *ibn* or by daughter of *bint*.

*naskh*: (lit. "deletion", "abrogation" or "copying", "transcription").

*nikāḥ* or *zwāj*: marriage.

*niyāba*: agency, proxy.

*nushūz*: recalcitrance of a wife.

-Q-

*qāḍī*: judge.

*qānūn* (pl. *qawānīn*): a law.

*qarāba*: kinship; the closest relatives, those who have a claim to inherit from a man.

*qasam* and *yamīn*, *ḥalf*: an oath.

*qāṣira*: restricted, the object of and transitive (*muta'adiyya*)

*qawāma*: guardianship, taking care of women, or treating them well.



*qirān al-ḥajj*: in the context of the pilgrimage, it denotes one of three methods of performing pilgrimage, viz. when the 'Umra 'Little Pilgrimage' and the Ḥajj 'Great Pilgrimage' are performed together. The other two methods are *Ifrād* and *Tamattu'*.

*qiṣāṣ*: the principle, of retaliation (*qawad*) for harm inflicted introduced by the Qur'ān.

Where a life is lost and the victim and perpetrator are of equal status, the death of the perpetrator is expiation for the death of the victim (*qiṣāṣ fī al-nafs*). In the case of inflicted harm that stops short of murder, the punishment entails the inflicting of a similar harm on the perpetrator (*qiṣāṣ fī-mā dūn al-nafs*). Smith 325.

*qīyās*: judicial reasoning by analogy, the fourth source of Islamic law. It is the method adopted by the jurisconsults to define a rule that has not been the object of an explicit formulation.

*qur'* (pl. *qurū'*): a Qur'ānic term which is defined by commentators both as the inter-menstrual period and as synonymous with menstrual indisposition (*ḥayḍ*):

#### -R-

*raḍā'*, *riḍā'* or *riḍā'a*: 'suckling', 'breast-feeding', which constitutes the legal impediment to marriage between those having foster-kinship.

*rā'ī*: a shepherd.

*rājiḥ*: outweighing, preponderant, or preferable. Used to denote a variant juristic opinion that is deemed to be the more correct.

*rukḥṣa* (pl. *rukḥaṣ*): permission, dispensation. It is a legal ruling relaxing or suspending by way of exception under certain circumstances an injunction of a primary and general nature. Its counterpart is *'azīma*.

*rushd*: discretion or responsibility in acting, mental maturity.

*ṣabr*: patience.

*sadd al-dharā'i'*: closing off the means that can lead to evil, a mechanism devised by Mālikī jurists to resolve loopholes in the law, probably the only source of Islamic law to be presented in a negative form.

*ṣadīq*: 'truthful'; in the science of *ḥadīth*, a quality of a reliable transmitter of *ḥadīth*, although not as authoritative as *thiqa* or *mutqin*.

*ṣaḥāba* or *aṣḥāb* (s. *ṣaḥābi*): strictly speaking, this term indicates the Companions of the Prophet who were closest to him in his lifetime, kept frequent company with him and strove to assimilate his teaching.

*sā'is*: a stableman

*salaf*: the pious ancients, the main witnesses of early Islam.

*ṣāliḥ*: good, righteous person.

*shādh* (pl. *shawadh*): irregular rule. In the science of tradition, a tradition from a single authority which differs from what others report. If it differs from what people of greater authority transmit, or if its transmitter is not of sufficient reliability to have his unsupported tradition accepted, then it is rejected. (Robson, J. Encyclopedia of Islam III 25).

*shahāda*: testimony.

*sharḥ*: the commentary on a text.

*sharī'a*: Islamic law.

*sharṭ*: condition.



***shaykh***: literally an elder, i.e. a distinguished person usually of an advanced age. A title borne by the head of the clan, (pl. *Shuyūkh*); the general designation for a master in the scholastic community (pl. *mashāyikh*). Also the term is employed to denote all members of a 'royal' family (in all Gulf countries except Saudi Arabia).

***shīqāq***: dysfunction.

***shurūṭ*** (s. *sharṭ*): condition.

***ṣīgha***: form.

***sīra***: the biography of the Prophet.

***sulṭa*** (*suluṭāt*): authority, power.

***sunna***: habit, custom. A normative custom of the Prophet or the early community.

***sūnnī***: The largest group of Muslims are the Sunnīs, often known as the orthodox, who recognize the first four Caliphs. .

***sūra***: a section of the Qur'ān.

-T-

***ta'aṣṣub***: fanaticism.

***tafsīr***: exegetic interpretation, commentary on the Qur'ān.

***ṭahāra***: ritual purity, a necessary condition for the valid performance of prayer.

***taḥkīm***: arbitration.

***taklīf***: the doctrine of individual responsibility.

***ṭalāq***: divorce, repudiation of the wife by the husband, by way of a simple unilateral declaration. Definite divorce or irrevocable *ṭalāq bā'in* or *bithalāth*, revocable *raj'ī*, innovated *bid'ī*: a divorce on menstruating wife, or in a purification period he has had a sexual intercourse with her.

*tamattu'*: enjoyment, one of three methods of performing pilgrimage by accomplishing the 'Umra at the same time.

*tamyīz*: the faculty of discernment.

*taqālīd* (s. *taqlīd*): a tradition.

*taqī*: pious, devout.

*taqlīd*: the unquestioning acceptance of the doctrines of established schools and authorities. A person bound to practice *muqallid*.

*taqnīn*: codification.

*tarjīḥ*: weighing the stronger of differing opinions or proofs.

*taṣarufāt* (s. *taṣaruf*): an action.

*ta'zīr*: discretionary punishment by the judge *qāḍī* in the form of corporal chastisement, generally lashing.

*ṭhayyib*: a girl over the age of puberty who is no longer a virgin, being either widowed or divorced.

*ṭhiqa*: 'trustworthy'; the highest quality of a reliable transmitter of *ḥadīth*.

-U-

*umm*: mother.

*'umra*: the "lesser pilgrimage", or visit to Mecca, which can be performed at any time; its ceremonies take place entirely within the precincts of the Grand Mosque of Mecca and requires a little over an hour to accomplish. The 'umra is also a part of the "great pilgrimage" (*al-ḥajj*) a rite that requires several days to accomplish and can only be performed on a fixed date of the Islamic year. (Smith 410).



*ʿurf* (pl. *aʿrāf*): custom, customary law (also *ʿāda*, [q.v.]). The status of custom in Islamic law. Custom was not one of the formal sources of law (*uṣūl*, sing. *aṣl*) in classical Islamic law. In practice, however, custom was frequently drawn on as a material source of law.

*uṣūl al-fiqh*: (lit. “roots of jurisprudence”), the bases of Islamic law. Among the Sunnīs these are: the Qurʾān, the *Sunna* (acts and statements of the Prophet), *qiyās* (“analogy”), and *ijmāʿ* (popular consensus or agreement). *Ijtihād* (“effort”) is the extrapolation from these principles to specific cases.

-W-

*waqf* (pl. *awqāf*) or *ḥubūs*: in law, a domain constituted into a pious endowment.

*wālī*: a guardian for matrimonial purposes.

*wālī mujbir*: a guardian with the power of coercion; the father or grandfather who has the right to marry off his daughter or granddaughter against her will, so long as she is a virgin.

*waṣīya* (pl. *waṣāyā*): a testament, legacy.

*wilāya*: the power of a *wālī* to represent his ward; guardianship over a child, involving guardianship over property (*wilāyat al-māl*) and over the person (*wilāyat al-nafs*). To these should be added the father’s duty to marry off his child when the latter comes of age (*wilāyat al-tazwīj*). (Encyclopedia of Islam III 50b; VIII 742a, 824a).

*waṭa*: coitus.

-Y-

*yamīn*: oath.

*yamīn al-ghamūs*: an oath to perform a deed that is known to have been already performed. Expiation is not required, except in the Shafi'ī school.

-Z-

*ḡihār*: a term denoting that a husband perceives his wife as behaving like his mother, therefore he wants no physical contact with her: 'you are to me like my mother's back'

*antī 'alayya ka-ḡahri ummī*.



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## **APPEMDIX**

- i. Questions designed for members of the Supreme Judicial Council:**
- ii. Questionnaire designed for Islamic Judges**
- iii. Questionnaire designed for Islamic lawyers**
- iv. Questionnaire designed for claimants**



**i. Questions designed for members of the Supreme Judicial Council:**

1. Can you outline the reasons for the establishment of this Council?
2. What actual authority does it carry?
3. What criteria are used regarding the appointment of judges?
4. Does the Council provide any training courses for judges?
5. Is there any data available pertaining to the history of the Islamic Courts?
6. Which department is responsible for the nomination of judges?
7. Do you perceive there to be any pressures on the Islamic Courts?
8. If so; do you perceive a need to increase the actual number of courts and how many would you recommend as adequate?
9. Are there any reasons that might impede this development?
10. Why have two chairpersons been appointed for the High Islamic Courts?
11. Does this create any problems regarding the passing of judgements?

12. Has any need for the codification of Family law been raised?

13. Do you perceive any particular problems in the courts that might be resolved by codification?

14. Which sources could be utilised if such codification were to be instigated? By whom and when might this be undertaken?

15. Why, at present, is there no utilisation of Information Technology in the Islamic legislative system? Do you feel that bringing the system up to date would benefit areas such as prosecution and the handling of contracts?



## **ii. Questionnaire designed for Islamic Judges:**

1. Qualifications?

2. Years in practice?

3. Type of Court

Low Court / High Court/ Supreme Appeal Court

4. Did your qualification include a practical programme for Court procedure?

Yes / No

5. If 'No', have you attended any practical training courses?

Yes / No

6. If 'Yes', how many and for what period of time?

7. If 'No', how did you learn these procedures?

8. Do you agree with the critics who maintain that the length of judgements is too great?

Yes

To some extent

No

If your answer is amongst the first two, please give your reasons.

9. What do you perceive to be the role/s of the Supreme Council?

10. Have you found that the Council has fulfilled these adequately?

Yes / No

11. How do you feel about the call for the codification of Family law?

Agree / Agree to some extent / Disagree

12. Have you read the Musqat Document?

Yes / No

13. If 'Yes', can you outline your opinion of it?

14. If you are in agreement with the establishment of codified law, can you foresee any of the following as being beneficial?

A unified law for both Sunni and Jafari Courts

A separate codified system for each sect



### **iii. Questionnaire designed for Islamic lawyers:**

1. Gender?

2. Qualifications?

3. Years of experience?

4. Are you involved in Family law cases?

Yes

No

In the past

5. If you answer 'no' or 'in the past', could you explain why?

6. If the answer is 'yes', how many cases have you been involved with?

7. Have you found any problems regarding the Islamic Courts?

Yes

No

8. If 'yes', could you describe these?

9. Have you experienced any delays in court procedures?

Yes / No

If 'yes', can you outline the reasons for these delays?

10. Do you perceive any complications in the general court procedures?

Yes

No

11. Would you describe clients' levels of awareness of procedures as;

Good

Average

Poor

12. How do you feel about the implementation of codification for Islamic Family law?

Agree

Strongly agree

Agree, but with reservations

Disagree

13. If 'agree', do you see codification as having potential for solving problems in the Islamic Courts?

Definitely

Perhaps

Unlikely

14. Do you perceive that the shortcomings in the system are fairly equally distributed between the Sunni and the Jafari Courts? If not, which manifests the majority of problems?



15. Are there any problems caused by the division between the Sunni and Jafari Courts?

Yes

No

16. If 'yes', how can these be resolved?

17. If Family law were to become unified for both sects, which school of thought do you see as being utilised?

18. What mechanisms could be used to achieve codification?

Application being obligatory

Establishment of Civil Courts (the abandonment of Islamic law)

Establishment of both Civil and Islamic Courts.

19. Do you feel that the number of courts is adequate for the number of cases that are processed?

Yes

No

20. If 'no', how many would be appropriate?

21. Do you perceive that any of the shortcomings in the legal system are related to:

The standard of qualifications of officials

The actual procedures

A combination of these factors

23. Are there any further comments that you would care to add?

#### **iv. Questionnaire designed for claimants:**

1. Gender

2. Age group: under 20, 20 –30, 31-40, 41-50, other

3. Level of schooling:

Primary School

Secondary School

College

University - BA, MA. PhD, other

4. How long have you been married?

5. Are you the defendant or plaintiff in this case?

6. Which section is dealing with your case? Sunni / Jafari

7. Which court is hearing you're your case?

a. Low Court

b. Preliminary High Court

c. High Appeal Court

d. Supreme Appeal Court

8. If your answer is c. or d., what was the preliminary judgement issued?

9. Why do you want to appeal?

a. Unfair hearing at the preliminary stage

b. An important issue has been ignored



- c. Some new evidence has been established
- d. Other

10. When did your marital problems begin?

11. What type of case is currently being addressed?

- a. Divorce
- b. Dowry
- c. Child maintenance
- d. Child Custody
- e. Access
- f. Personal relationship problems
- g. Other

12. If you have answered a., then which type of divorce has been issued?

Divorce re. Unconsummated marriage

Revocable Divorce

Irrevocable Divorce

Negotiated Divorce

13. What reason/s for the divorce?

Desertion

Lack of sexual intercourse

Physical abuse

Verbal abuse

Withholding of finances

Alcohol abuse

Drug abuse

Infidelity

Other

14. If the divorce is on the grounds of desertion, how long has the spouse been absent?

15. If the divorce is on the grounds of physical abuse, is the said abuse:

Regularly Severe / Moderate

16. What actual evidence is being produced to support this claim:

Medical Reports

Police Reports

Witness Statements

Other

17. If the reason for the divorce claim is based on the withholding of finances by the husband, please indicate the appropriate reasons:

His debts

Unemployment

Responsibility for more than one wife

Squandering of finances on leisure pursuits

Other

18. If the claim is regarding child maintenance:



How much are you claiming?

How much are you actually receiving?

19. How long has your case taken to date?

20. So far, have you found the court proceedings to have been:

Adequate

Fairly lengthy

Too lengthy

21 If you have found procedures to take too long, whom do you perceive as responsible for the delays?

Myself

Another party

The judges

Court Procedure

Other

22. Do you feel that the judgement issued has been:

Fair

Reasonably fair

Unfair

23. Did the Judges attempt to arbitrate in your case?

Yes / No

24. Would you have preferred to discuss your problems with a professional person in an environment specifically designed for marriage arbitration?

Yes / No