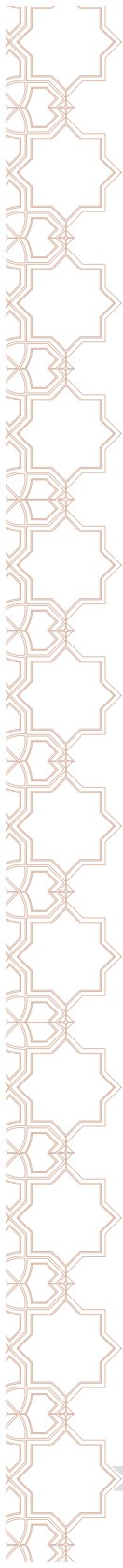


Women's Rights in the Kuwaiti Personal
Status Law and Bahraini Shari'a
Judicial Rulings
(Theory Part)

Authors:

Dr. Badria Al Awadi
Sheikh Hameed Al Mubarak
Dr. Ahmed Al Attawi





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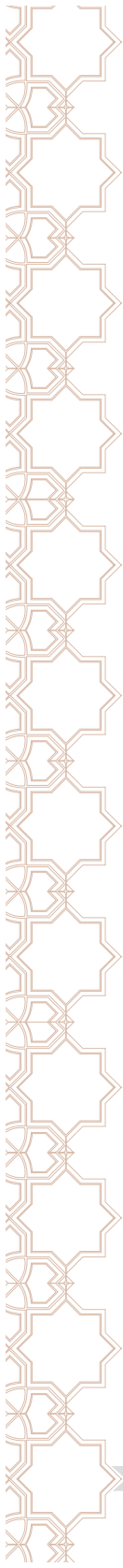
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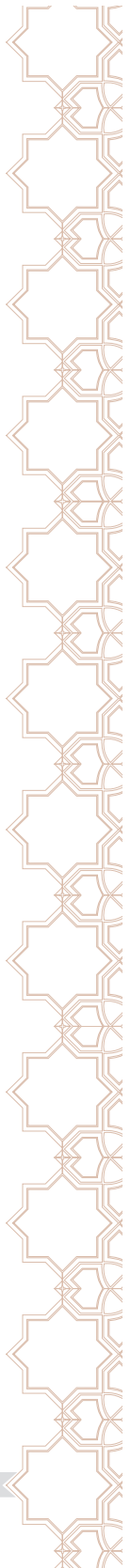


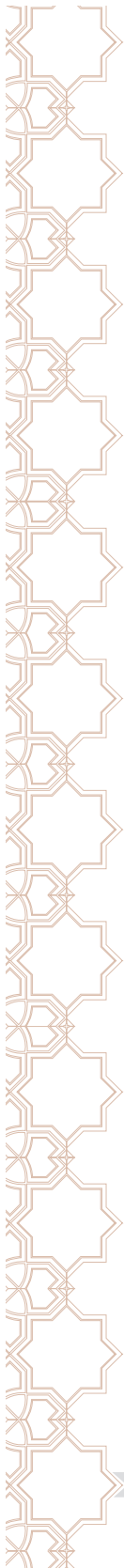
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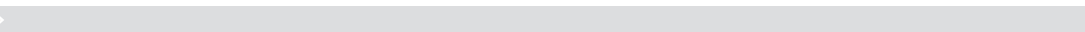
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Acknowledgments

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The Family Law Program also gratefully acknowledges our program partners, the Women's Cultural and Social Society and the Bahrain Women's Union, as well as the support of the Middle East Partnership Initiative (MEPI) and the United Nations Development Fund for Women (UNIFEM).



Preface

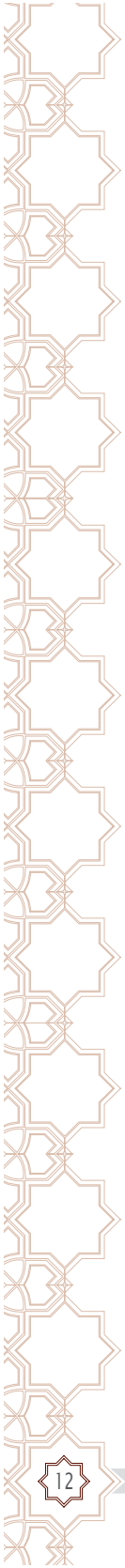
The Freedom House survey entitled *Women's Rights in Middle East and North Africa: Citizenship and Justice*¹ (2005) revealed that women in the Arab Gulf states have the lowest legal status in the region. In these countries, family and personal status laws — governing topics including marriage, divorce, inheritance, and child custody — are derived from Shari'a, which is often interpreted and applied in a manner that discriminates against women and prevents them from fully participating in many aspects of society. While women's rights in the Gulf states have lagged behind those in the rest of the region, activists in these countries have created a vibrant movement for reform in recent years that has already begun to bear fruit.

As women in the Gulf have gained the right to participate in legislative elections as voters, and in some cases as candidates, their political voice and leverage on personal status and women's rights issues have also increased, creating an opening for further reform efforts. Nevertheless, some governments are still reluctant to implement these reforms in law and in practice, and activists have struggled to effectively bridge the divide between various religious and secular legal interpretations.

To help meet these challenges, Freedom House's Family Law Program works with women's groups, activists, Sunni and Shiite Islamic scholars, and legal experts in Kuwait, Bahrain, and other countries in the Gulf region to review existing family laws, compare them with international standards, and conduct legal analyses of current practices based on both civil and Islamic jurisprudence. The present publication, *Women's Rights in the Kuwaiti Personal Status Law and Bahraini Shari'a Family Court Rulings*, is a result of these efforts.

Participating scholars, while representing diverse schools of thought and opinion, used a unified approach and methodology to produce a

¹ Freedom House Survey: Women's Rights in Middle East and North Africa: Citizenship and Justice, located at <http://www.freedomhouse.org/template.cfm?page=148>



thorough theoretical analysis of the status of women's rights under family law and Shari'a rulings in Kuwait and Bahrain, respectively. Freedom House, along with the authors and partners involved, present this resource as a tool for understanding and reforming women's rights within a legal framework, and with the aim of fostering collaboration among the various reform efforts in the region.

Introduction

Dima Malhas
Project Director 2006-2008
Family Law Program
Freedom House



Introduction

Background

This **Women’s Rights in the Kuwaiti Personal Status Law and Bahraini Shari’a Family Court Rulings** is the result of an ongoing project in the Arabian Gulf States on Women’s Rights and Family Law, entitled “*Family Law Program*,”¹ pioneered by Freedom House,² with the support of the U.S. Department of State, Bureau of Near Eastern Affairs, Office of the Middle East Partnership Initiative (MEPI) and in partnership with the United Nations Development Fund for Women (UNIFEM).³

The project aims to assist reformers in their struggle for women’s rights. Two countries were selected: Kuwait and Bahrain.⁴ These countries provide distinct case studies in the Gulf region, as one adheres to a codified family law and the other to an un-codified family law. The Kuwaiti Family Law (“Kuwaiti Personal Status Law”) was codified in 1984,⁵ and the Bahraini Family Law remains un-codified, resulting in adjudication through judicial rulings.

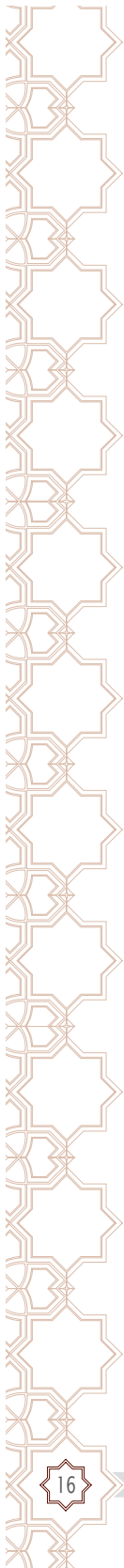
¹ The Family Law Program was built on findings released by Freedom House in the first survey on women’s rights in Middle East and North Africa. See Freedom House Survey (2004), “*Women’s Rights in the Middle East and North Africa: Citizenship and Justice*”, www.freedomhouse.org/template.cfm?Page=148. An updated edition, *Women’s Rights in Arabian Gulf and MENA* is scheduled for release in 2009.

² Freedom House is a non-profit, nonpartisan organization mandated to support the expansion of freedom around the world. It was founded in 1941 by Eleanor Roosevelt, Wendell Willkie, and other human rights leaders to promote peace and freedom. Freedom House has held a Special Consultative Status before the United Nations Economic and Social Council (ECOSOC) since 1995. See www.freedomhouse.org.

³ The United Nations Development Fund for Women (UNIFEM) Arab States Regional Office, established in Amman in 1994, is one of 15 regional offices of UNIFEM worldwide. It covers 17 Arab countries and is mandated to promote women’s human rights, to eliminate all forms of violence against women, and to transform development into a more peaceful, equitable, and sustainable process. See www.unifem.org/jo/

⁴ For further background information on selected countries, See the Freedom House annual report (2008), “*Freedom in the World*.” Freedom House annual reports has provided a comparative assessment of global civil liberties and human rights worldwide since 1972. For the Kingdom of Bahrain country report, see www.freedomhouse.org/template.cfm?Page=22&year=2008&country=7348, and for the State of Kuwait country report, see www.freedomhouse.org/template.cfm?Page=363&year=2008&country=7426.

⁵ See Kuwaiti Personal Status Law No. 51 (1984), Appendix 1, pp.193. See also “Arab Family Laws” in Gender and Citizenship Initiative in the Arab Region (Beirut: The United Nations Development Program) www.pogar.org/publications/other/laws/family/kuwait-personalstatus1984-a.pdf



The Guide is in two-parts: I Theory, written by three legal and religious scholars, highlights women’s rights under the Kuwaiti Personal Status Law and the Bahraini Shari’a Court rulings in both the Sunni and Shiite circuits and Islamic jurisprudence; and II Practice, documents two national campaigns on women’s rights and family law launched by civil society in the State of Kuwait and the Kingdom of Bahrain.

This Theory portion (part I of the guide) marks a historic joint publication produced by three renowned legal and religious scholars on women’s rights and family law under Sunni and Shiite jurisprudence in the Arabian Gulf region, with a particular emphasis on Kuwait and Bahrain.

Rationale⁶

Family law is embedded in the cultural, political, and economic fabric of every society. Family law in the Arabian Gulf States, like that of other Islamic countries, is governed by or otherwise enacted in conformity with Islamic Law (Shari’a) and safeguarded by the exclusive jurisdiction of special family courts, namely, the “Shari’a courts.” For a clearer understanding of the material to come, it is helpful to explore the genesis of Shari’a and its impact on women’s rights.

Shari’a and Legal Theory

Although it is one of the most widely used bodies of religious law, Shari’a differs significantly from other religious laws. Shari’a is an autonomous legal system, which derives many of its laws from juristic precedent parallel to the doctrine of “stare decisis”⁷ and reasoning by analogy,⁸

⁶ The Rationale section of the Introduction contains a brief overview of doctrines and legal theories of Shari’a and jurisprudence under Sunni and Shiite schools of law and should be read with the caveat that it necessarily contains broad generalizations. It is meant merely to orient the reader to the subject.

⁷ “Stare decisis. Lat. To abide by, or adhere to, decided cases.” *Black’s Law Dictionary*, 6th Ed.

⁸ Sunni Jurists adopt Qiyas analogical reasoning, whereas Shiite scholars adopt logical reasoning *Aql* or *Mantiq*. John A. Makdisi “Formal Rationality in Islamic Law and the Common Law,” *Cleveland State Law Review* 34 (June 1985): 97-112.

similar to common law.⁹ Thus, Shari'a and jurisprudence constitute an early application of the legal concept of the "rule of law,"¹⁰ thereby vesting Shari'a in the reasoning of secular and religious jurists.

Shari'a positive law encompasses two general categories: the ibadat (acts of ritual worship), which regulates divine interactions such as purification, prayer, and almsgiving; and the mu'amalat (social interactions), which regulates interactions within institutions and issues such as marriage, divorce, inheritance, economic exchange, and injurious actions.¹¹

Shari'a and the Role of Jurists

Over time, the legal methods and conclusions of the most influential jurists¹² evolved into distinct schools of thought. The jurists' corpus of opinions and accompanying legal methodology became known as a school of law ("madhhab"). Each school of law separated its works into genres of writing, adopting particular legal methodologies on the usage of text, tradition, and reason in articulating Shari'a.¹³ Sunni jurists developed four main classical schools of law – Hanafi, Hanbali, Maliki, and Shafii – while Shiite jurists developed three main schools of law – Ja'afari (Twelvers), Ismaili and Zaidi.

In short, Islamic jurisprudence ("fiqh") is the body of rules and legal principles resulting from the conclusions crafted by jurists of different

⁹ Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice*, Cambridge University Press, (2006) 16-7. John A. Makdisi, "The Islamic Origins of the Common Law," *North Carolina Law Review* 77 5 (June 1999): 1635-1739. See also Justice Gamal Moursi Badr, "Islamic Law: Its Relation to other Legal Systems," *The American Journal of Comparative Law* 26 2 (Spring 1978).

¹⁰ Judge Christopher G. Weeramantry, *Justice Without Frontiers: Furthering Human Rights* (1997) 132-5.

¹¹ Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihabal Din al Oraifi* (Leidan: Brill, 1996) 201-2.

¹² Evidence demonstrates that there were women jurists in Islamic history. See Wiebke Walther, *Women in Islam: From Medieval to Modern Times* (Princeton, NJ: Markuswiener publisher, 1995) 109-10.

¹³ Asifa Quraishi, "Interpreting the Qur'an and the Constitution: Similarities in the use of Text, Tradition, and Reason in Islamic and American Jurisprudence," 28 *Cardozo Law Review* 67 (2006).

schools of law seeking to articulate Shari'a for society.¹⁴ Hence, the Islamic jurisprudential realm is undertaken by private jurists analyzing the divine texts to provide doctrinal legal answers for society.¹⁵

Shari'a and Family Law, or "Personal Status Law"

Jurisprudence in Shari'a contributed to the development of several modern legal theories regarding family laws, such as the doctrine of "intent in Personal Status Law." In Shari'a, marriage and divorce hinge on performative speech acts and matters of intent. The doctrine of "intent" is also a critical and complex aspect of divorce law and inheritance. For example, unambiguous speech is generally held binding regardless of sincerity, while less explicit speech may depend on intent. This is attributed to reasoning in complex cases in matters related to the number of declaratory statements by the husband that determine irrevocable divorce.¹⁶ In inheritance, Shari'a also contains elaborate and binding provisions for property entitlement upon death.¹⁷

Shari'a and Women's Rights

To evaluate the effect of Shari'a on women's rights, many writers have researched the status of women in pre-Islamic Arabia (the advent of Islam dates from the early seventh century). Shari'a instituted new opportunities for women in property ownership, inheritance, education, and divorce.¹⁸ Some scholars argue that women generally had fewer legal restrictions under Shari'a than they did under certain Western legal systems until the 20th century. For example, restrictions on the

¹⁴ Khaled Abou El Fadel, *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford One World Publications, 2001) 39.

¹⁵ Frank E. Vogel, "King's Law as Complement and Competitor to *Fiqh*" *Islamic Law and Legal System: Studies of Saudi Arabia* (2000) Chapter 5.

¹⁶ Irrevocable divorce is determined based on three declaratory statements by husband ratifying Intent.

¹⁷ Paul R. Powers, "Intent in Islamic Law: Motive and Meaning in Medieval Sunni *Fiqh*," *Studies in Islamic Law and Society*, (2005) 123-158.

¹⁸ Yvonne Yazbeck Haddad, and John L. Esposito, *Islam, Gender, and Social Change*, (Oxford and NY: Oxford University Press, (2004) 163.

legal capacity of married women under French law were not removed until 1965.¹⁹ Other scholars studied the epistemology of different legal theories derived from Shari'a and jurisprudential schools of law, such as the theory of the marriage contract which derived from the theory of contracts under Shari'a.²⁰

Shari'a and International Law

The Cases of Kuwait and Bahrain

The Universal Declaration of Human Rights adopted in 1948 asserts "the equal rights of men and women," and addresses both equality and equity issues. In 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), known as the international bill of women's rights, which came into force in 1981.

Kuwait ratified CEDAW in 1994, with reservations²¹ on Article 16 pertaining to "Marriage and Family Life."²² Despite the constitutional guarantee of elimination of all forms of discrimination, the reservation remains. Article 29 (1) of the Kuwaiti constitution,²³ states "All people are equal in human dignity and in public rights and duties before the law, without distinction to race, origin, language, or religion."

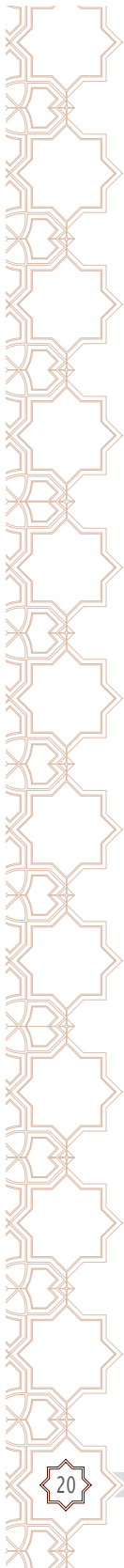
¹⁹ Gamal M. Badr, "Islamic Criminal Justice," *The American Journal of Comparative Law* 32(1) (Winter 1984) 167-9 .

²⁰ Azizah, Al-Hibri, "The Nature of the Islamic Marriage: Sacramental, Covenental, or Contractual," in John Witte, John Witte, Jr., and Eliza Ellison eds. *Covenant Marriage in Comparative Perspective*, 182-216 (2005).

²¹ See "States Parties" (New York): United Nations Division for the Advancement of Women [DAW], Department of Economic and Social Affairs [ECOSOC], Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], www.un.org/womenwatch/daw/cedaw/states.htm.

²² In its reservation, the State of Kuwait "declares that it does not consider itself bound by the provision contained in article 16, paragraph 1 (f), inasmuch as it conflicts with the provisions of the Islamic Sharia, Islam being the official religion of the State." See also "The State of Kuwait, combined initial and second periodic reports, 30th Session" (New York: United Nations DAW/ECOSOC/CEDAW supra at Country Reports www.un.org/womenwatch/daw/cedaw/reports.htm#b).

²³ See The United Nations Development Programme (UNDP): Programme on Governance in the Arab Region, Rule of Law, Arab Constitutions, The State of Kuwait Constitution (1962) <http://www.pogar.org/publications/other/constitutions/kw-constitution-62-e.pdf>.



Similarly, Bahrain ratified CEDAW in 2002, with reservations²⁴ on Article 16 pertaining to “Marriage and Family Life.”²⁵ Although the Bahraini constitution²⁶ prohibits gender discrimination, the reservation remains. Article 18 of the constitution states, “People are equal in human dignity, and citizens are equal before the law in public rights and duties. There shall be no discrimination among them on the basis of sex, origin, language, religion or creed.”

The Women’s Rights Advocacy Guide – The Theory Part

This theoretical portion of the Guide, Part I, summaries family law with regard to women’s rights in selected countries in the Arabian Gulf States. The first chapter contains an annotated listing of the Personal Status Law in Kuwait, including a comparative regional analysis underlining women’s rights from a legal and juristic perspective. The second and third chapters comprise annotated Shari’a court rulings pursuant to the Sunni and Shiite schools of law, as applicable in Bahrain, including a comparative juristic analysis regarding women’s rights.

Chapters Summaries

The first chapter is authored by Dr. Badria Al Awadi, international law professor and legal scholar, former Dean of the University of Kuwait School of Law, lecturer and author of numerous publications and articles on law and comparative legislation, and advisor on regional legislative policy and international law. **The second chapter** is by

²⁴ See The United Nations DAW/ECOSOC/CEDAW/State Parties at <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

²⁵ In its reservation, the Kingdom of Bahrain “makes reservations with respect to Article 16, insofar as it is incompatible with the provisions of the Islamic Shari’a; and Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Shari’a.” See also The United Nations DAW/ECOSOC/CEDAW supra at Country Reports located at <http://www.un.org/womenwatch/daw/cedaw/reports.htm#b>. The Kingdom of Bahrain, combined initial and second periodic reports (November 2007), supplemental report (June 2008).

²⁶ The Kingdom of Bahrain promulgated two constitutions in its modern history: the first in 1973 and the second in 2002. See UNDP: Programme on Governance in the Arab Region supra at The Kingdom of Bahrain Constitution (2002) at <http://www.pogar.org/publications/other/constitutions/bahrain-02e.pdf>

Sheikh Hameed Al Mubarak, Chief Justice of the Bahraini Upper Shari'a Appellate Court (Highest Court) for the Ja'afari Circuit, member of the Upper Judicial Council and the drafters' committee of the Bahraini draft family law in 2005, and author of a number of publications and articles on the Shiite schools of thought and jurisprudence. **The third chapter** is by Dr. Ahmed Al Atawi, family law professor at Bahrain University's Arabic Literature and Islamic Studies Department, appointed religious advisor to the Bahraini Ministry of Islamic Affairs, Imam and preacher, lecturer on family law and history of the Bahraini judicial system, and weekly columnist on family law.²⁷

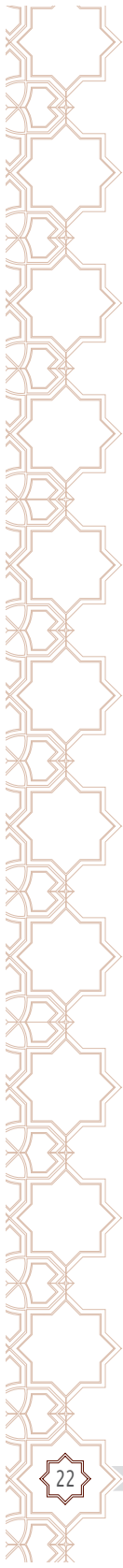
This collaboration on women's rights and family law separates a unified study into distinct chapters of comparative regional laws: Sunni jurisprudence under the four traditional schools of thought (Hanafi, Hanbali, Maliki, and Shafii); and Shiite jurisprudence under the Ja'afari school of thought (Twelvers). Each chapter is based on case studies from Kuwait and Bahrain.

The authors' presentation and treatment of the issues takes an informative, academic approach, supported by a wealth of references and citations of Qur'anic verses, Hadith, statute, draft law, judicial and juristic opinions, surveys, and legal and religious precedents. These diverse references clarify women's rights under different legal and religious theories.

The three chapters were originally written in the Modern Standard Arabic language, which is derived from the Classical Arabic.²⁸ The terminology and etymology of legal and religious terms and concepts employed by the authors are defined in the text of each chapter making this guide useful as a reference and advocacy tool for women, civil society, academic institutions, and lawmakers both within the region and beyond.

²⁷ See Biographies of Authors in back cover.

²⁸ Classical Arabic has been the literary and liturgical language of Qur'an and Islamic legal theories since the 7th century.



The authors present a unified, systematic exposition of basic and complex family law problems under the various Sunni and Shiite schools of thought. The methodology applied within each chapter involves a comprehensive approach that addresses women's rights under family law topics and related sub-topics. The topics outlined by the authors cover all subjects of family law under legal and religious theories in accordance with Shari'a. Shari'a addresses women's rights in every stage of a woman's life, from childhood through provision of her heirs. This comprises a circle of rights: pre-marriage, during, and post-marital rights. The authors, basing their analysis on these rights, classify topics within each chapter as follows:

First, women's rights during the marital relationship, including: Engagement; marital capacity; ineligibility of legal guardian; husband's eligibility; marital financial rights; polygamy; marital obedience; and other matters.

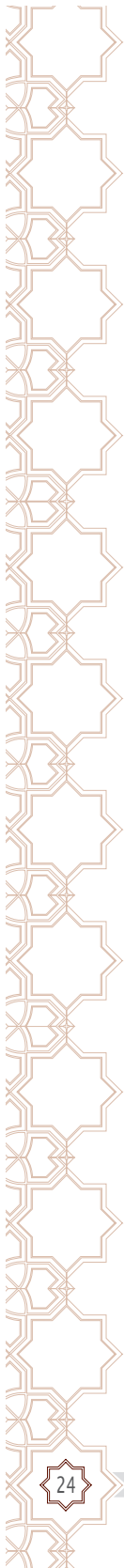
Second, women's entitlement to dissolve the marital relationship: Legal grounds for divorce; irrevocable divorce; legal consequences on number of divorces uttered; void marriage based on breach and alienation of affection; divorce based on lack of financial support, separation based on physical and psychological abuse; divorce based on spousal absence or imprisonment; divorce based on loss of spouse; and women's petition for dissolution "Khula."

Third, women's rights upon dissolution of the marital relationship: Waiting period; maintenance/alimony; custody rights; visitation rights; and guardianship rights.

Chapter 1 examines women's rights under the Kuwaiti Personal Status Law. Dr. Badria Al Awadi conducts an in-depth comparative legislative analysis of women's rights and family laws in the Gulf and Arab regions. From its inception in 1984, the Kuwaiti Personal Status Law has had a significant impact on the regional family laws that followed. Dr. Al Awadi explores the most recently enacted progressive family

laws in the region, including the Omani Family Law codified in 1997, the United Arab Emirates Family Law codified in 2005, and the latest codification of the Qatari Family Law in 2006. In introducing her analysis of women's rights and legal reform, Dr. Al Awadi emphasizes the importance of the legislative branch's autonomy in maintaining legitimacy within an Islamic landscape, the judiciary's role in enforcing Shari'a law, and the significance of public awareness of Shari'a law within a codified system. In part, this chapter of the Guide provides an exploratory dissertation on Shari'a doctrine and endorses unification of family laws in the Gulf region pursuant to Shari'a, citing the Gulf Cooperation Council (GCC) initiative for unified family law, which encompasses Kuwait, Oman, United Arab Emirates, and Qatar, in addition to the Muscat Document for Unified Personal Status Law for the GCC countries. Dr. Al Awadi asserts that justice and equality in family relations under the canons of Shari'a law and a codified legal system require women's active participation in the legislative process, a concerted effort to establish public awareness of family law rights for women, and a unified family law system that is straight forward, comprehensible, and flexible. She affirms women's rights throughout the chapter, citing authoritative references to both legal and religious schools of law.

Chapter 2 examines women's rights under the Bahraini Shari'a Court Rulings for the Shiite Circuit. Chief Justice Sheikh Hameed Al Mubarak explores the normative and legislative nexus, as prevalent norms shape the codification of legislation while legislation affects the process of normative reform. Justice Sheikh Al Mubarak defines Shari'a, regardless of its roots in particular schools of thought and jurisprudence, as a body of legal principles aiming to regulate the dynamic social interaction of human beings, including political, historical, and economic development. Justice Sheikh Al Mubarak further explains that the purpose of Shari'a is justice and progress for human beings, and, therefore, is a legal framework inseparable from society to be endorsed, respected and obeyed. He describes legal philosophy as law born through culture." While many scholars confine



themselves to elucidating different interpretations of Shari'a, Justice Sheikh Al Mubarak argues that the adaptation of Shari'a to prevailing social conditions is imperative for legal reform in the pursuit of justice and equality. He explains that an effective law is one that is timeless and practical, reflecting social evolution. Justice Sheikh Al Mubarak highlights women's rights under the topics of the incorporated methodology by referencing existing judicial practices and citing other progressive schools of Ja'afari law in support of women's rights.

Chapter 3 examines women's rights under the Bahraini Shari'a court rulings for the Sunni Circuit. Dr. Ahmed Al Atawi explores protection of women's rights under Shari'a since the inception of Islam. Dr. Al Atawi explains how Shari'a ensures women's rights by affording rights under various legal classifications such as mother, wife, daughter, sister, and relative. Dr. Al Atawi provides citation of legal and religious references affording women protection under different statuses with Qura'nic and Hadith verses. He further explores the legal system of family law in Bahrain under un-codified law presenting the judicial legal procedure of family law in the Sunni and Shiite circuits,²⁹ and outlining the jurisdiction and procedure of family law courts. He also introduces family law and procedure for non-Muslims in Bahrain. Dr. Al Atawi introduces the legal theory and the methodology of its application under an un-codified law. He presents a brief historical background of the family law codification initiative in the Kingdom of Bahrain since 1982, and highlights women's rights under various topics of the incorporated methodology by referring to existing judicial practices and citing other progressive schools of Sunni law in support of women's rights.

Conclusions and Recommendations

The international community has made great strides towards reaching a consensus on women's rights and legal reform. Universal reform comes from the global meeting of various thoughts and ideologies

²⁹ Kingdom of Bahrain Family Law Court Jurisdiction and Procedure Decree No. 13 of 1971, as amended in Decree No.4 of 1999.

shaped over centuries. It is this paradox that creates the wealth of nations, which leads to the ideal implementation of reform. As part of this universal pursuit of women's rights, the authors undertake the challenging task of examining women's rights in different legal and religious schools of thought in the Arabian Gulf to bring awareness and better understanding for women regionally and internationally.

The overarching legal argument and conclusion in this theoretical section of the Guide is that "women's rights" are inherent under Shari'a, in spite of its diverse legislative and jurisprudential guises. This premise necessitates a concerted legal and religious scholarly effort, in addition to bringing together eminent religious and secular jurists, to take women's rights to the forefront, resulting in *bona fide* legal awareness and reform. The following chapters embody a positive scholarly effort toward achieving a unitary view of women's rights regionally and internationally, utilizing a wealth of perspectives from these different schools of law.

This integrated study provides a definitive treatise from diverse schools of law and an invaluable advocacy guide on women's rights. It identifies four intrinsic components necessary for achieving women's rights and legislative reform, notably: Societal awareness (legal and Shari'a); unambiguous legislative drafting (flexibility, simplicity, and clarity in conjunction with the adoption of juristic opinions that promote women's rights); international participation (civil society's active participation in the application of international conventions); and finally, judicial enforcement (proper application of Shari'a and jurisprudence in support of women's rights).

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Women's Rights
In the Kuwaiti Personal Status Law
A Comparative Study of Arab Legislation

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Introduction

Kuwait was one of the first Gulf countries to enact a comprehensive law governing personal status, which it did in 1984. The idea for this law originated in 1977, when a preparatory committee of legal experts and judges undertook a seven-year study to analyze a draft law. The committee's work ended in early 1984, and the law was enacted after it was published in the Official Gazette on October 1, 1984.

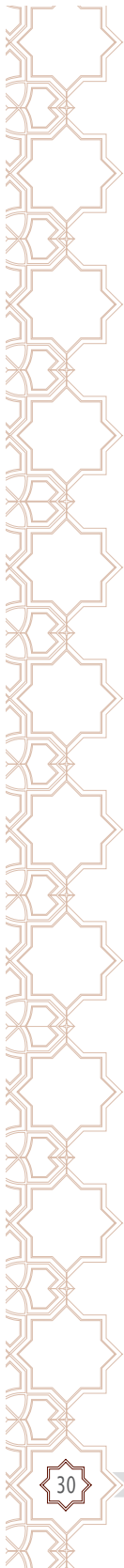
The law is composed of 347 articles. It includes provisions on wills, testaments, and inheritance, and establishes the general legal framework for family relations in the State of Kuwait within Islamic Shari'a law for the purpose of enhancing and protecting women's rights and their application by the national judiciary. In addition, the law regulates issues related to the rights of children during and after their parents' marriage, and aims to eliminate family disputes.¹

The passage of Kuwait's Personal Status Law was followed by personal status laws in Oman in 1997, the United Arab Emirates (UAE) in 2005, and Qatar in 2006. All of these family laws documented and developed legislative provisions in a simplified format accessible to the entire public. The laws also raised the level of legal and legislative awareness throughout Gulf societies, consolidated the state's legal system, and established its sovereignty.

The most important element of these laws' passage is that they standardized principles and provisions related to legal capacity, guardianship, and competence in marriage, divorce, inheritance, wills and testaments, and other family issues. The laws placed these crucial issues on solid legal footing, away from conflicting jurisprudential opinions that might not favor married or divorced women.

This particularly applies to the Sultanate of Oman's 1997 Personal Status Law, which is considered more advanced in empowering women than

¹ Law No. 51 for the year 1984, regarding Kuwaiti Personal Status, became effective as of October 1, 1984, after it was published in the Official Gazette *Al Kuwait Al Yawm* No. 276. For a full text of the Kuwaiti Law, refer to Appendix No. 1.



the Kuwaiti Personal Status Law or other Arab laws that were enacted after Oman's Law.²

In their eighth meeting in Muscat, in October 1996, the ministers of justice of the Gulf Cooperation Council (GCC), representing the Arab States in the Gulf region, approved a unified legal guideline for personal status issues entitled "The Muscat Document." It was designed to exist for a period of four years; the document was later endorsed by the Supreme Council, and in 2000 it was extended for an additional four years. This was designed to enable GCC member countries to coordinate their legal policies in order to achieve the goals stipulated in the GCC's charter. The standardized Personal Status Law gives a general legal framework for the official position of these countries regarding both controversial and agreed-upon issues in personal status laws in the Arab Gulf states.³

In addition to the Muscat Document on the standardized personal status law for GCC countries, the individual personal status laws of GCC members (Kuwait, Oman, United Arab Emirates, and Qatar) include many legislative and legal principles that may alleviate injustice and inequity for women, and assist them in taking positive steps toward equality with men in family relations. Qatar's 2006 Personal Status Law, or Family Law, as it is also called, is considered the most influential national law on women's rights and duties, whether the woman is a wife or a mother, divorced or widowed.

This study largely addresses the rights of women in Kuwait's Personal Status Law, comparing them, whenever possible, with the provisions of personal status laws in other GCC countries and with modern laws in other Arab countries. These laws include additional legal rights for women, and aim to increase equality in family relations within the

² Sultan's Decree No. 33/97 enacting the Personal Status Law.

³ The Muscat Document, or the Unified Personal Status Law for the Gulf Cooperation Council of the Arab Gulf States for the year 2001, is considered one of the projects for the codification of the rules of Islamic Shari'a, within the GCC Secretariat. It contains of 282 articles.

framework of a flexible, fair and humanitarian interpretation of the Islamic Shari'a principles in the four Islamic schools of thought and Islamic jurisprudence.⁴

The explanatory memorandum in Kuwait's Personal Status Law indicates that the general objective behind the law is the regulation of personal status in a standardized, legal manner based on the general principles of family relations as stipulated in the Holy Qur'an. In the Qur'an, God Almighty says, "*And among His wonders is that He creates for you mates out of your own kind so that you might incline towards them, and He engenders love and tenderness between you. In this, there are messages for people who think.*"⁵

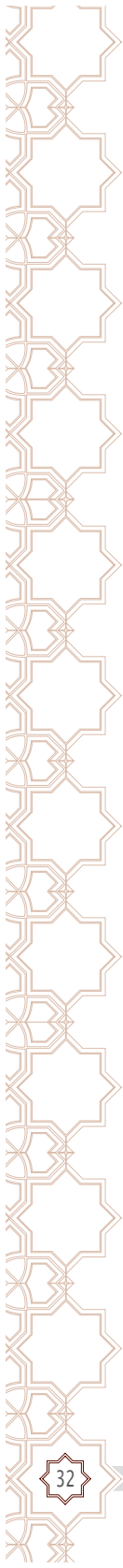
In addition, Kuwaiti legislators relied upon the Prophetic Sunnah, and on Islamic jurisprudence (*fiqh*), which assert that "marriage is the route to noble intentions in building a good society and establishing a life based on tranquility, sincerity and compassion..."⁶

The Kuwaiti Law composes 347 articles divided into 7 sections. The first section is dedicated to the various aspects of marriage: establishment of marriage, marriage fundamentals, conditions of the marriage contract, eligibility and guardianship in marriage, conditions-based contracts, types and provisions of marriage, alimony in marriage, separation of married couples, divorce, Khula' divorce, 'Iddah and its general provisions, and compensation for separation.⁷

⁴ Article 2 of the UAE Personal Status Law stipulates that: 1. References to the understanding, explanation and interpretation of the legislative texts of this law, should be made in accordance with the principles and rules of Islamic Jurisprudence (*fiqh*). 2. The texts of this law shall apply to all matters addressed therein, in pronunciation and meaning, and the interpretation and application of their provisions should be in accordance with the Islamic school of jurisprudence from which they were taken. 3. In the absence of any relevant text available in this law, judgment should be based on what is salient in the Maliki School of Thought, then the Hanbali, the Shafi'i, and finally in the Abu Hanifah School of Thought.

⁵ Surat Al Rum, Verse: 21.

⁶ This rule was stressed by Article 2 of the Personal Status Law of the United Arab Emirates for the year 2005, which compels the legislator to refer, in understanding legislative texts of this law, their interpretation and explanation to the principles and rules of Islamic Jurisprudence (*fiqh*).



It is well known that the law plays a fundamental role in advancing the rights of Kuwaiti women in society through their participation in public life and in providing family security by emphasizing women's legal rights. The most important of these are women's rights under the Personal Status Law. Nevertheless, there are disparities among personal status laws in Arab countries as a result of the political, social, and economic conditions prevailing in each country and their influence on the legal status of women, which still falls short of real equality in family relations.

The sections that follow focus on the most significant family and women's rights in Kuwait's Personal Status Law and the extent of their effect on the legal status of women in Kuwaiti society.⁸

Part I: Women's Rights during Married Life

Legal Competence for Marriage

Article 24/A of the Kuwaiti Law requires that, as a general rule, a person must be judged sane and have reached puberty in order to marry. Nevertheless, Article 26 of the law stipulates that "the marriage contract may not be registered unless the female has completed fifteen years of age and the male seventeen years at the time of registration." Islamic law courts are legally bound by this article to observe this general age rule when registering the marriage contract. This rule is also observed by the 2005 Qatari Family Law, which specifies women's marriage age: "A man's marriage contract may not be registered if he is below eighteen years of age, and a woman's marriage contract may not be registered if she has not completed

⁷ The Kuwaiti Law included other issues relevant to civil status, such as, the general provisions for proving lineage, acknowledgement of lineage, custody, wills, definition, basis and conditions of wills, nullity and cancellation of wills, provision of wills, inheritance, reasons for and types of inheritance, inheritance of kinship, various provisions, pregnancy, bisexuality, child of adultery, child of incest, disassociation.

⁸ This study uses the term "Kuwaiti Law" instead of repeating the term Kuwaiti Personal Status Law.

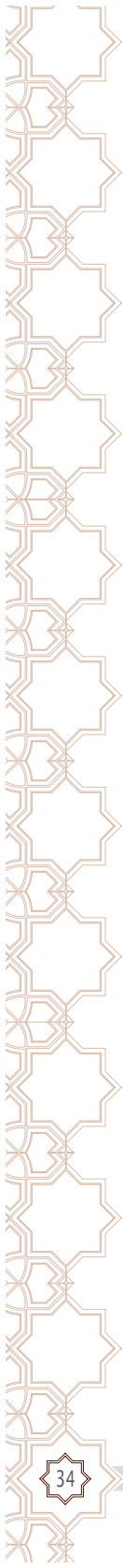
sixteen years of age, except with the approval of the guardian, verification of the approval of both parties, and the permission of the judge in charge.”⁹

The Kuwaiti Law’s provision specifying the age of marriage at fifteen years may lead to continued marriage incompatibilities, in light of the stipulation of Article 29 of the law, which gives the guardian absolute guardianship, consenting to the marriage of a virgin, until she is 25 years of age. Article 36 gives the woman, alone, the right to decide age compatibility, as a right that belongs exclusively to her.

Oman’s 1997 Personal Status Law aims to avoid a situation in which a competent, adult woman can be prevented from selecting her husband according to her own will. In Article 7 of the law, Omani legislators prevent “the completion of a marriage contract between a man and a woman before finishing eighteen years of age.” According to this article, “Competency for marriage is completed through sanity and attaining the age of eighteen.” In order to validate this rule, Article 10/C of the law authorizes judges to refrain from transacting a marriage contract for couples who have not reached the age of 18 years, “except with their permission and after verifying the benefits involved.”

Article 30 of the 2005 UAE Personal Status Law adopts a similar principle, which stipulates that “the legal competence for marriage becomes complete with sanity and puberty, whereby the age of puberty is exactly eighteen years of age for those who have not legally reached puberty prior to this age. Those who reach puberty before completing eighteen years of age shall not be allowed to marry, except with a special permission of the judge, after verifying the benefits.” Article 21/2 of the UAE law stipulates, “If the engaged

⁹ Articles 1–7 of the Kuwaiti Law specify what are known as marriage premises, such as explaining the concept of marriage as a contract between a man and a woman, approved by Shari’a law, aimed at cohabitation, impregnability, and the strength of the nation, showing the conditions for engagement, and the rights of each party to the engagement for its duration or if it is terminated. Articles 8–11 of the law address conditions that should be present in the marriage contract, the most important of which are the offer and the acceptance, explicitly or implicitly. Two adult, Muslim, sane, male witnesses shall be present, for the validity of a marriage. If a Muslim man is marrying a Kitabi woman (Christian or Jew), two Kitabi witnesses are accepted.



couples are not age-compatible, in that the age of the male is twice that of the female or more, the marriage shall not be completed except with the approval and knowledge of both and permission from the judge. The judge may withhold approval if there is no interest in this marriage.”¹⁰

Women’s Right to Marriage

In line with the current conservative trend in organizing marital relations in Gulf society, the Kuwaiti Law, as well as most personal status laws in Arab countries (including Oman, the United Arab Emirates, Qatar, Jordan, Morocco, Syria, Sudan, and Iraq), restricts a woman’s choice in selecting a husband by imposing a condition requiring the complete approval of her guardian, or his participation with her, in concluding the contract. The guardian may be a father, son, direct brother, direct uncle from the father’s side, or other close kin, and any of these has the right to annul the marriage contract if he deems the partners to be incompatible.

This is emphasized in Articles 29 and 30 of the Kuwaiti Law. Article 31 of the Kuwaiti Law, however, emphasizes the girl’s right to marriage if the guardian refuses to conclude the marriage contract; the law permits her to refer the issue to the judge in order to conclude the marriage or decline. This rule has helped to reduce the number of cases of marriage against a girl’s consent, particularly by resorting to the judiciary to conclude the marriage contract if the girl is over 25 years of age and her father or brother has refused. This was also adopted in the Qatari Family Law and Oman’s 1997 Personal Status Law, in Articles 19 and 20.¹¹

¹⁰ The Yemeni Family Law of 1974 and the Jordanian Personal Status Law of 1976 set a general basis for the age of marriage, in order to avoiding a wide difference in age between the husband and the wife. Concluding a marriage certificate is prohibited if the age difference between the husband and the wife exceeds twenty years. According to Article 9 of the Yemeni Family Law, “It is not permissible to conclude a marriage contract with an age difference exceeding 20 years, unless the woman has reached the age of thirty-five.”

¹¹ This trend is adopted in the Qatari Family Law of 2005 guardianship in marriage in Articles 26–29 and compatibility in marriage in Articles 32 and 34 which show the rights of the guardian and the woman in requesting the annulment of marriage for non-compatibility.

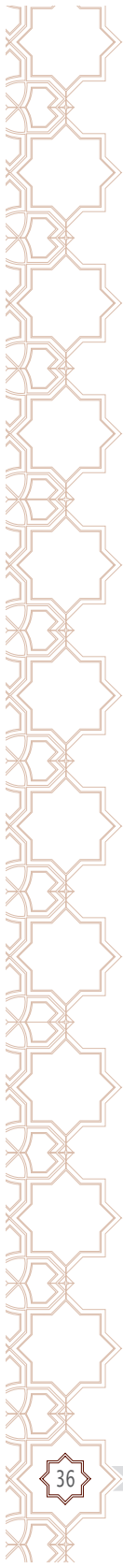
On the other hand, general provisions in the 2005 UAE Personal Status Law agree with the Kuwaiti Law in restricting a woman's right to choose a husband, in addition to some amendments that dilute the absolute power of the guardian at the time the marriage contract is drawn. Articles 21 and 23 of the UAE Law, as in articles 34 and 38 in the Kuwaiti Law, stipulate that the man is required to be competent for marriage only at the time of drawing up the contract. Both the woman and her guardian have the right to demand the annulment of the marriage if compatibility is no longer applicable. The contract is not affected by the loss of compatibility after the completion of the contract.

Article 24 of the UAE Law permits the guardian to terminate the marriage contract if the man has untruthfully claimed competence, or if competence was stipulated as a condition in the contract but was proven otherwise at a later date. Both the wife and the guardian have the right, in this case, to terminate the marriage.¹²

Consistent with modern trends in some Arab personal status laws, and in conformity with the provisions of Islamic Shari'a laws, it is reasonable to approve and ratify a sane and rational woman's right to represent herself, once she has reached the age of 21, in the presence of her guardian. This is reflected in God's words in Surat Al Baqarah, verse 234, "*When they have reached the end of their waiting-term there is no sin in whatever they may do with themselves in a lawful manner.*" This verse asserts that the woman is her own guardian when the marriage contract is concluded, while the guardian's role is to clarify his opinion of the incumbent husband, because the guardian has more experience and knowledge than she does.¹³

¹² Article 23/2 of the UAE Law stipulates that: "The more distant of the guardians does not have the right to object to non-compatibility except when the closer guardian is absent or is ineligible." Articles 25 and 35 of the UAE and Qatari laws are similar to Article 39 of the Kuwaiti Law, which stipulates the following: "The right to request separation for non-competence is abated if the wife became pregnant or a year elapses after knowledge of the marriage, or with prior acceptance on behalf of the party applying for separation."

¹³ Islam stipulates that the woman's approval of marriage is a pre-condition to marriage. The approval of her guardian alone is not sufficient in this matter. The Prophet Mohammad said: "Do not wed the widow until she requests, and the virgin until you have permission." See Mahmoud Abdulhamid Mohammad "*Women's Rights between Islam and other Religions*" (1985) 223.



This just and objective trend in the interpretation of the provisions of Shari'a laws is stipulated in Chapter 12/1 of the amended Moroccan Personal Status Code of 2004, as follows: "Guardianship is the right of the woman, and the guardian may not conclude her marriage contract unless delegated to do so by the woman herself." Article 11 of the amended Algerian Family Law of 2005 also emphasizes this, as follows: "A rational woman shall conclude her marriage in the presence of her guardian, who is her father, a relative of hers or any person she may select."

Polygamy

The Kuwaiti Law gives the woman the right to establish a condition in her marriage contract that her husband will not concurrently marry another woman. Article 21 of the Kuwaiti Law, however, permits polygamy without any of the legal checks stipulated in Islamic Shari'a law or in personal status laws in Arab and Muslim countries when it says, "No man shall marry a fifth wife unless his marriage contract with one of his other wives is terminated and she completes her 'Iddah period." While most personal status laws in Arab countries succeed in setting a legal regulation according to Islamic Shari'a to curb the abuse of the polygamy permission, not all have. Article 30, for example, of the amended 2005 Moroccan Personal Status Code stipulates, "The first wife shall be notified that her husband wishes to take another wife, and the second that he is married to another. The wife shall have the right to set a condition that her husband shall not take another wife, and in the event that he does, she shall have her own freedom."

The Moroccan Personal Status Law asserts, through this text, the general Shari'a rule in the context of polygamy: namely, that of equitable treatment among wives. In all cases, if unequal treatment of wives is suspected, the judge does not permit polygamy.

Article 111 of Egypt's 1985 Personal Status Law represents a legal and just assertion for women in regulating the issue of polygamy. It permits a wife whose husband takes another wife to request a divorce if she

sustains material or moral damage to the degree that it is impossible to continue cohabitation, even if she had not included a conditional clause in her marriage contract preventing him from taking another wife. Paragraph 3 of this article stipulates that, a year after the husband marries another woman; a wife loses her right to demand a divorce, if she had accepted it in a clear or implied manner. Her right to demand divorce, however, is renewed every time he takes a new wife.¹⁴

Furthermore, in Article 8 of Algeria's amended 2005 Family Law, Algerian legislators succeeded in establishing legal controls to protect the rights of the first wife and children, in order to systematize the treatment of polygamy. It states, "Marriage to more than one wife is permitted within the confines of Islamic Shari'a laws, if the legal justification is present and the conditions and intention for equal treatment are satisfied. The husband shall inform the previous wife and the prospective wife, and must submit an application for marriage certification to the head of the court near the marital residence."

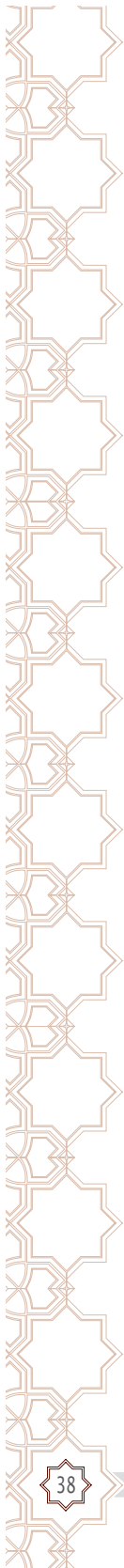
The amended Algerian law permits the head of the court to issue certification of the new marriage when he is satisfied with the wives' approval and the husband has proved the legal justification along with his ability to provide fairness and the necessary conditions for marital life. In case of deception, each wife has the right to press legal charges against the husband, demanding divorce.¹⁵

A Wife's Adequate Financial Support

Articles 74 to 83 of the Kuwaiti Law set the provisions and controls related to marital financial support, the methods for estimating it by

¹⁴ The Tunisian Personal Status Code amended in 1985 prohibits polygamy by law. Article 18 of the code stipulates that "Polygamy is prohibited. Anyone who marries while still in another marriage and without ending it shall be punished by imprisonment for one year, and a fine amounting to two hundred and forty thousand Francs, or with one of the two, even if the new marriage was not concluded in accordance with the provisions of the law."

¹⁵ Article 18 of the Algerian Law, Repeat 1, amended in 2005, stipulates that: "A new marriage shall be annulled prior to consummation if the man failed to obtain a certificate from the judge in accordance with conditions stipulated in Article 8."



the special judge, its due date, and its priority vis-à-vis the husband's wealth. Article 74 of the law indicates the general rule in this context, which is that the wife has a right to financial support from her husband, even if she is wealthy or of a different religion from him, if she had submitted to him according to the law. The amount of support is estimated based on the husband's financial status, regardless of the wife's financial status, provided it is not less than the wife's minimum requirement. The financial support may be increased or decreased according to the husband's financial status or the cost of living in the country. Cases requesting an increase or decrease in the amount of support may not be addressed less than one year after the amount of support, has been set, other than in exceptionally urgent cases. The increase or decrease shall be from the date of judgment, as emphasized by the Kuwaiti Court of Cassation.¹⁶

Article 79 of the Kuwaiti Law permits the judge, when addressing financial support cases, to order the husband to pay a temporary support if the wife requests it. This shall be repeated monthly until final judgment is passed and is applicable immediately.

On another note, Article 87 of the Kuwaiti Law indicates situations in which the woman's right to financial support is forfeited by a court judgment. The following cases are examples of this:

1. If the wife refuses to move to the matrimonial house without justification or prevents the husband from cohabiting with her in her house, her right to financial support is lost for the period of refusal, if it is legally proved.
2. A wife's insubordination can only be proved by her refusal to willingly implement final judgment.
3. A wife's refusal to willingly implement final judgment is considered justified if her husband does not protect her,

¹⁶ A marriage is concluded and calculated based on the husband's right, so her alimony should come from his financial resources, even if she is well-off or from a different religion. He shall not be exempted from alimony unless he pays it or is exempted from it. (Appeal 201/99 Status, Session 24/6/2000), The Judiciary and Law Journal 28, 2, July 2003 (329).

did not make the first dowry payment, did not prepare the legal residence, or refused to support her, and she could not implement her financial support judgment due to the lack of any virtual wealth on his behalf.¹⁷

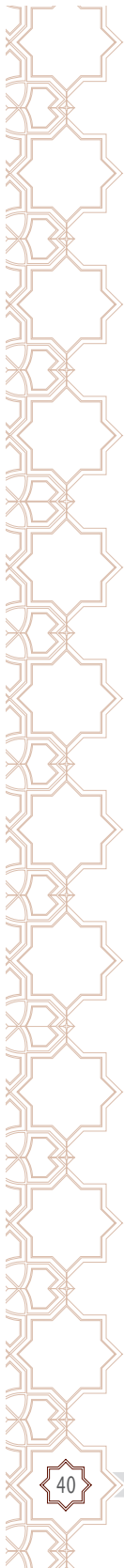
As a result of legislators' keenness to ensure that the husband does not abuse his marital rights and restrict the wife's freedom, Article 89 of the Kuwaiti Law stipulates, "A wife leaving her home for a legitimate reason shall not be considered insubordinate if she does so for a logically permitted purpose, provided it is not detrimental to the welfare of the family."

Maintaining the marriage contract, which is a legal and Shari'a document, is a matter of utmost importance, especially for women in societies with a high rate of illiteracy concerning women's legal and Shari'a rights. This requires instituting legal controls to protect the legal document from tampering and misuse, such as false claims that a marriage exists, or a false document passed off as authentic. The husband may also deny a legal marriage, and there is no official proof in the absence of the document.

The prevalence of these conditions in the region prompted Kuwaiti legislators to highlight the importance of the marriage contract's being a legal document, as is outlined in Article 92 of the Kuwaiti Law. A statement declaring a fully settled marriage represents an official document. Paragraph A of the article stipulates that the judiciary shall not accommodate a marriage case presented to it unless it is substantiated by an official document.

An exemption to this is a marital case aimed at proving lineage, whether it is an independent lineage issue or one intended to prove another right, such as financial support or inheritance. If judgment is passed in a newborn's lineage case that the marriage of the

¹⁷ Article 88 of the Kuwaiti Law stipulates that "Compliance judgments may not be imposed on the wife."



parents is a legitimate one, the judgment will represent a judgment of the marriage, which bears all the responsibilities and effects of a legitimate marriage.¹⁸

Countries of the GCC have utilized articles similar to those of the Kuwaiti Law to address a wife's financial support. An example is Article 51 of the Omani Law, which stipulates, "The judge may decide, upon the wife's request, a temporary amount of support in her favor. His decision shall indicate an immediate implementation by force of law."

Articles 61 to 73 of the 2006 Qatari Family Law address a wife's financial support and methods to estimate it, as well as its duration, in the event that a woman raises a court case against her husband. According to Article 61 of the Qatari Law, "Financial support shall be granted to the wife from her husband in a legitimate contract, if she does not object to yielding to his care. Financial support includes food, clothing, shelter, medication, and all that maintains human life according to the law. The wife is not granted support for more than three years prior to the date of recording the court case, unless the parties agree otherwise. An increase or decrease in the support amount is calculated from the date of filing the court case."¹⁹

UAE legislators allocated Articles 66 to 73 of the law to explain provisions related to financial support and methods of estimating it

¹⁸ "Explanatory memorandum in interpreting Article 92 of the Kuwaiti Personal Status Law," page 198 and after.

¹⁹ Qatari legislators delegated to the relevant judge in Articles 62 and 63 of the family law the power to estimate financial support and decide a temporary amount in favor of the wife as follows: "In estimating the financial support, the husband's financial status and the wife's need are taken into consideration, as well as economic conditions in time and place." The judge was also permitted to "decide on the basis of the wife's request, when evaluating the court case, on a temporary amount of support in her favor. His decision shall be accompanied by rapid implementation."

²⁰ Article 71 of the UAE Law indicates cases in which the wife is deprived of the financial support as follows: 1. If she did not avail herself to the husband or refused to move to the legal marital home without a legitimate reason. 2. If she leaves the marital home without a legitimate excuse. 3. If she denied the husband entry to the marital house without a legitimate excuse. 4. If she refused to travel with her husband without a legitimate excuse. 5. If a judgment or decision has been issued by the court that restricts her freedom against the husband's right, and it is being implemented. This principle was adopted by Article 51 of the Muscat Document for a unified Personal Status Law for in the member countries of the Cooperation Council for the Arabian Gulf States in 2001.

by the judge in a manner that corresponds to the Qatari Family Law. In addition, Articles 71/1–5 of the UAE law specifies cases in which the wife’s right to alimony is dropped.²⁰

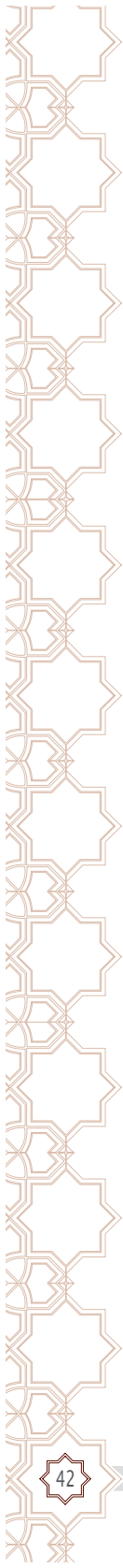
In accordance with the provisions of Islamic Shari’a, most personal status laws in the Arab Gulf countries as well as other Arab countries stipulate that financial support takes priority over all other debts of the husband, in case there are many debtors seeking the husband’s wealth. This highlights Islam’s keenness to protect women’s rights. As an example, Article 82 of the Kuwaiti Law stipulates that a wife’s financial support takes priority where the husband’s money is concerned, even if that money can only accommodate her support. Article 67 of the Omani Law also adopts this rule in a clear manner, whereby financial support and child support are given priority, followed by parents’ support and relatives’ support.²¹

This same is true in the 2005 UAE Personal Status Law, as is evident in Article 65, which says, “Continuous financial support takes priority over all other debts.”

Part II: Women’s Right to End the Marriage

Women’s rights and legal protections in family relations include the regulation or cancellation of some elements, including the issue of divorce. Hence, Article 102 of the Kuwaiti Law stipulates that divorce cannot be undertaken by someone who is insane, mentally deranged, compulsion-driven, mistaken, intoxicated, shocked or furious, if his actions and talk are dominated by flaws. By spelling this out, legislators have avoided some controversial divorce cases, in which the husband might be in one of the aforementioned states, to protect the family from a divorce that is solely the individual will of the husband.

²¹ The Muscat Document for a unified Personal Status law in the member countries of the Cooperation Council for the Arabian Gulf States in 2001 includes this principle in Article 67 as follows: “If a number of alimony recipients existed, and the alimony payer is incapable of providing for all of them, the wife’s alimony is paid first, followed by child support, then parents and finally, relatives.”



The Qatari Family Law incorporated this principle in Article 110, which stipulates that “a person applying for divorce should be sane, and have freedom of choice. Divorce is not approved for anyone who is insane, mentally deranged, compulsion-driven, or not fully conscious as a result of intoxication, fury, or any other cause.”²²

This also applies to Jordan’s amended 1976 Personal Status Law, in accordance with Article 88 of the law. The article says that: 1) divorce is not granted to anyone intoxicated, shocked, compulsion-driven, mentally deranged, unconscious or asleep; 2) a person is ‘amazed’ if he has lost the discretion due to anger, fascination, or infatuation, to the extent that he is unaware of what he says.

Annulment of the Marriage Contract Because of Defects

Articles 139 to 142 of the Kuwaiti Law address cases in which marriage contracts may be annulled because of defects. Article 139 of the law sets the general basis of annulment, with both husband and wife having the right to request annulment if they find an aggravated defect that is repulsive or harmful or that prevents either from achieving pleasure, regardless of whether the defect was present before the contract was concluded. Each party loses the right to a divorce if he or she had known about the defect before marriage or accepted it openly after marriage.²³

Longstanding cultural and social traditions in the Gulf assumed that women surrendered their rights when they accepted at the outset their

²² Article 90 of the Moroccan Family Code amended in 2004: “Permission to divorce a habitually intoxicated person, the compelled and also the resentful shall be denied.”

²³ Article 112 of the UAE Law and Articles 123 — 125 of the Qatari Family Law, stipulates the following:

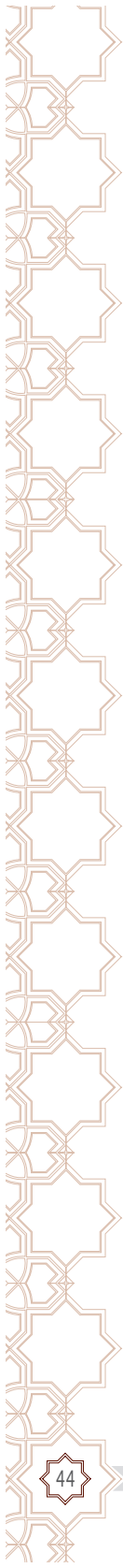
1. If one of the married couple discovers a chronic defect in the other, of the repulsive or damaging defects, such as insanity or leprosy, or others that prevent sexual pleasure, he/she has the right to request divorce, even if this defect was present before marriage or was developed afterwards.
2. The right to divorce is abated if the party requesting it had known of the defect, and accepted it openly or by indication.
3. The right of the wife to request separation as a result of the prohibitive defect that prevents enjoyment shall not abate under any circumstance.

husband's sexual inadequacy. In an effort to address this and protect a wife's legal rights, Article 140 of the law asserts that a wife does not lose her right to demand a divorce as a result of inadequacies on the part of her husband, such as impotence, that prevent the attainment of pleasure, whether it is chronic or accidental. This is the case even if she accepted it openly, the article says, "because the wife's acceptance may have been, as mentioned in the explanatory note, in the hope that it could be rectified, or in the hope that she would be able to persevere, but was later disappointed." Judgments by the Kuwaiti Court of Cassation approved this basis in a number of divorce cases resulting from endemic inadequacies of one of the married partners.²⁴

Article 141 of the Kuwaiti Law sets the conditions and basis to be followed by the judiciary in dealing with endemic or curable inadequacies. It stipulates that if the inadequacies are incurable, the court shall immediately revoke the marriage contract. If they are curable, the case shall be postponed for an appropriate period of time, after which, if the problem persists and the party requesting that the marriage be revoked persists, the court shall revoke the marriage, separating the couple. In order to make things easier for the party that suffers from the decision, the article says that the separation resulting from the inadequacy shall be a pure revocation and not a divorce (based on the number of times the husband utters the word "divorce"), and does not entail financial ramifications, except for the revocation expenses.

Despite the similarities between general provisions about revocation due to inadequacy or illness in the 2006 Qatari Family Law and the Kuwaiti Law, the Qatari legislature did not adopt the principle of

²⁴ A decision passed by the Kuwaiti Court of Cassation indicates the judiciary's position vis-à-vis this issue; namely that "the right of both parties to a marriage to revoke the marriage contract is abated if the other party proved that the party requesting revocation had been aware of the defect prior to marriage, yet he/she went ahead with it, or that he/she found out about it after marriage but accepted it. The right of the wife to request separation as a result of the man's defects (impotence, castration), that prevent enjoyment does not abate even if she accepted them openly."



revoking the marriage contract but rather recommended a separation requested from the relevant judge. In Article 125, it supports a wife's right to request separation as a result of certain inadequacies of the man, such as impotence or castration, whether chronic or accidental, even if she had openly accepted it in the past.

On the other hand, Articles 112 to 115 of the 2005 UAE Personal Status Law address cases of separation between married couples resulting from inadequacies in some detail, and consider, as does the Kuwaiti Law, that this is a separation and not a divorce. This is emphasized in the second paragraph of Article 115 of the law, which says, "Separation in this judgment is a revocation."

Paragraph 112/3 of the UAE law emphasizes, "The wife's right to request revocation based on an inadequacy that prevents sexual pleasure does not abate. The court examines a marriage revocation case resulting from inadequacy in a private session." Article 114 of the 1976 Jordanian Personal Status Law is similar, stating, "A wife who knew, prior to marriage, of her husband's inadequacy that prevents copulation, or who accepts her husband, after marriage, with his inadequacy, loses her right of choice, with the exception of impotence, the knowledge of which, prior to marriage, does not abate the right of choice."

According to Article 113 of the UAE law, "If the inadequacies mentioned in Article 112 of this law are incurable, the court shall revoke the marriage immediately and without delay. If cure is possible, the court shall postpone the case for an appropriate period not to exceed one year. If the inadequacy persists during this year, and the party requesting divorce maintains his or her position, the court shall revoke the marriage."

Paragraphs 1 and 4 of Article 114 of the UAE Law add new cases of inadequacies and diseases that the Kuwaiti Law does not address, whereby each of the married partners has the right to request separation. The most important of these are:

1. If a medical report proves the barrenness of the other party after 5 years of marriage, and after medical treatment, provided that the party requesting revocation does not have any children, and that he or she has not completed 40 years of age.
4. If it is proven that the other party has contracted an infectious, potentially fatal disease, such as HIV/AIDS or a similar disease. If a danger exists that the disease may be transmitted to the other party or to their offspring, the judge shall separate the couple.²⁵

Divorce for Lack of Financial Support

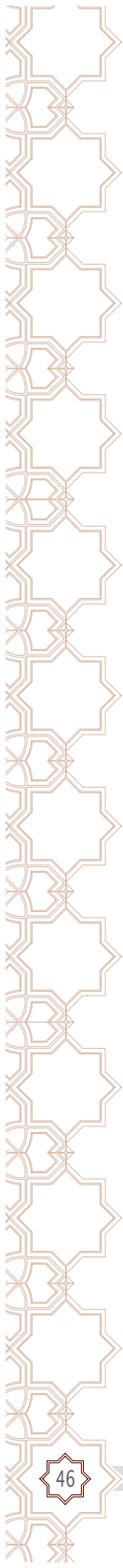
The Kuwaiti Law allocates Articles 120 to 122 to explain the cases and conditions for separation through litigation, and stipulates that a woman has the right to resort to the judiciary to obtain a divorce from her husband for a host of reasons, including lack of financial support, damage, and prolonged absence or imprisonment. The general rule is that divorce due to a lack of financial support is retroactive. Article 122 of the law states, however, that “If a court case is initiated for lack of financial support more than twice, and the wife requests divorce, the judge shall grant the divorce on this basis.”²⁶

²⁵ Article 98 of the Moroccan Family Code amended in 2004 approved divorce because of a defect as a reason. Article 108, however, stipulates that “in order to accept the request of one of the parties in marriage to end the marital relationship because of a defect:

1. that the party requesting separation should not have known of the defect at the time of marriage.
2. that the party requesting separation should not have indicated acceptance of the defect after knowing of its incurability.”

²⁶ Article 120 of the Kuwaiti Law states:

“If the present husband refrained from providing financial support to his wife and has no virtual financial resources, and his poverty was not proved, his wife shall have the right to ask for divorce. The judge shall rule for the divorce immediately. The husband may avoid divorce by paying the financial support due to her from the date of the litigation. If the husband proved his inability to pay, or was absent in a known place or in prison, and has no virtual financial resources, the judge shall grant him a grace period of between one and three months, in addition to dates allocated for distance, to meet his financial obligation to his wife. If he declines to pay, the judge shall effect the divorce. If the husband is absent in an unknown location, or missing, and has no financial resources, the judge shall rule for the divorce without delay.”



The Kuwaiti Law distinguishes between the case of a husband who is not poor and that of one who is absent or missing. The judge has been afforded total responsibility to grant a divorce immediately in the first and third situations. He does not have to adhere to the grace period stipulated in Article 120/B of the law, which permits him to give the husband a grace period of between one and three months to provide alimony, unless the husband proves his financial inability, or is absent in an unknown location, or is missing and has no known financial resources.

Most Arab personal status laws apply the same principles. Examples include the 2005 UAE Personal Status Law, which stipulates in Article 124 that:

1. If a husband refuses to support his wife financially and has no known wealth that can be used to provide due financial support within a short period, his wife has the right to request a divorce.
2. If he claims to be financially incapable but is proved otherwise, he shall be divorced immediately. If he refrains from stating his financial status, or otherwise insists on refraining from providing support, or if his financial inability is proved, the judge shall give him a grace period not to exceed one month. If he refrains again from providing financial support, the judge shall rule in favor of divorce.²⁷

As part of UAE legislators' keenness to protect a wife's rights to alimony and maintain the marital bond, Article 125 of the UAE law sets a flexible mechanism to avoid divorce for lack of financial support. Article 126 of the law stipulates, "The husband may avoid divorce by submitting proof of his ability to support his wife financially. In this

²⁷ Article 125 of the UAE law states: "If the husband is absent in a known location, and has known financial resources, he shall be judged to provide from his money. If he has no known financial resource, the judge shall excuse him and grant him a grace period of a maximum of one month, in addition to the distance dates as decided. If he declined to pay the financial support, the judge shall approve the divorce after the allocated grace period."

case, the judge will grant him the grace period stipulated in Article 126 of this law.”

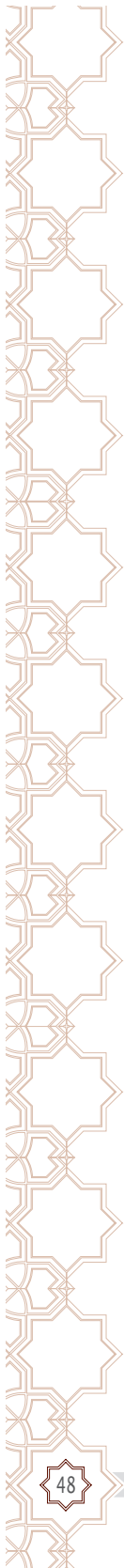
Article 128 of the UAE Law is equivalent to Article 122 of the Kuwaiti Law in responding to repeated requests for divorce. Article 128 stipulates the following: “If litigation is repeated more than twice for the lack of financial support, and it is proved to the court in each case that support was not provided, and the wife requests a divorce for non-support, the judge shall grant her an irrevocable divorce.”²⁸

Jordan’s amended 1976 Personal Status Law regulates a wife’s right to a divorce as a result of the husband’s inability to provide financial support in more detail. Articles 127 to 129 of the law apply to this, and they are equivalent to the Kuwaiti Law in its general provisions. They address cases that the Kuwaiti Law does not allude to, however, enhancing women’s rights to financial support in the process. As an example, Article 127 of the law stipulates, “In the event that the husband refuses to provide financial support to his wife after she is granted judgment for financial support, and it is proved that he has enough financial resources to permit implementation of the judgment, judgment is implemented based on his financial resources. If he has no financial resources and he does not state whether he is wealthy or poor, or states that he is wealthy but refuses to provide, the judge shall rule to divorce him immediately. If he claims inability but fails to prove it, he shall be divorced immediately. If he proves inability to provide, he shall be granted a grace period of between one and three months. If he still does not provide, he shall then be divorced.”²⁹

Article 102 of Morocco’s amended 2004 Personal Status Code addresses cases of divorce for lack of financial provision, reducing the grace

²⁸ The Qatari Family Law of 2006 did not include in Articles 61 – 73 the legal regulation of the wife’s financial support stipulated in the Kuwaiti and the UAE laws in Articles 122 and 128 respectively.

²⁹ Article 78 of the Jordanian Law regarding the wife’s financial support takes the following into consideration: “Fees charged by the midwife and the doctor, as well as the cost of treatment are to be paid by the husband. Fees charged by the midwife and the doctor summoned for delivery, when needed, as well as the cost of treatment and other cost related to delivery shall be borne by the husband as is customary, based on his financial status, regardless whether marriage is valid or not.”



period granted to the husband to a maximum of 30 days, according to this article: “A wife may request a divorce because her husband has failed to provide the financial support imposed on him by a court ruling, according to the following cases and provisions:

1. If the husband has wealth from which alimony may be obtained, the court shall decide the manner in which alimony shall be obtained in favor of his wife and shall turn down the request for divorce.
2. If inability is proved, the court shall specify a grace period, based on the circumstances, not to exceed 30 days, during which the husband must make payment or divorce will be imposed, except in cases of *force majeure* or an exceptional situation.
3. The court shall divorce the wife immediately if the husband refrains from making payment and inability to pay is not proved.”

Article 103 of the Moroccan code stipulates that provisions laid out in the previous article shall apply to a husband who is absent in a known location, has been served the court’s decision but declines to implement it, or whose location is unknown and his wife’s claims have been verified by the court.

Article 53 of the Algerian Family Code as amended in 2005 permits the wife to file for divorce on the grounds of lack of financial support after a court judgment has been passed to do so, unless she was aware of his inability prior to the marriage. Article 79 of the code stipulates that

³⁰ Article 110 of the Syrian Status Law for 1953, 1. stipulates that “the wife has the right to separation if the present husband declined to provide financial support to his wife, had no virtual financial resources, and was unable to prove his inability to provide support.” 2. In case he proved his inability, or was absent, the judge shall grant him a grace period, not to exceed three months. If he still did not provide, the judge shall separate the couple. According to Article 111 of the Syrian Law, “Separation ordered by the judge shall be a revocable divorce, and the husband may take back his wife for the ‘Iddah provided he proves ability and willingness to pay.”

the judge shall take into consideration the status of both parties and the circumstances they live in before estimating the financial support. His estimate shall not be revised less than one year after the first judgment.³⁰

Separation as a Result of Damage

Kuwaiti legislators approved a wife's right to request a separation if she suffers from material or moral damage. Separation of the married couple has the purpose of protecting the couple from damage inflicted on one another, whether in words or in action, resulting in the impossibility of cohabitation. According to Article 126 of the Kuwaiti Law, "Both the husband and wife may, before or after consummating the marriage, request separation as a result of damage inflicted by the other party, in words or in action, in such a way that cohabitation cannot be sustained between them." It can be said that in most cases of judicial divorce in Kuwaiti society, a wife bases her claim on physical and moral abuse by her husband, as a result of beatings, the husband's addiction to alcohol or drugs, or because of improper verbal abuse of her person or her family.

Judgments passed by the Kuwaiti Court of Cassation show the importance of assuming a flexible and objective attitude toward the concept of material and moral damage when it decided that separation as a result of damage "takes place when one party is negatively affected as a result of staying in the marriage, whether that pertains to a material causes proving abuse of the other party in words or action, or for other reasons of difference such as repugnance or severe resentment. This is the case even if damage by the other party is not proven when the wife is the one requesting separation,

³¹ Appeal 64/2000 Status, Session 2/12/2000, *Judiciary and Law Journal*, 28, 2, July 2003, 453. In another judgment, the Court of Cassation decided that: "What is attached to divorce as a result of damage is verifying that it happened. The cessation of damage or the attempt to delete it, after it was proven, does not prevent implementing the divorce."

(Appeal 36/85 session 27/1/86, 269).

as long as, in all cases, cohabitation cannot continue between the two parties, as dissension makes the potential for success in intimacy and good cohabitation less likely.”³¹

According to Article 134 of the Kuwaiti Law, in order to prove damage it is sufficient if events regarding the couple’s life are talked about in the community. This testimony is not sufficient to negate damage.³²

This method of alleviating injustice or damage from the wife lies in the fact that it is fairly difficult to prove damage in many instances of married life because of the specific nature of the relationship. Hence, Article 135 of the Kuwaiti Law permits a relative’s testimony, or that of anyone related to the defendant, when available. Based on that, the level of relationship or connection between the witness and the defendant does not by itself preclude testimony for the purpose of proving damage to one of the married partners.

To provide further legal protection to the woman regarding the husband’s evasion in many cases, Article 130/E of the law stipulates that “separation for damage is an irrevocable divorce.”

In the Kuwaiti Law, a wife’s right to end the marriage through divorce by resorting to the judicial system requires presenting the conflict to two arbitrators from the couple’s families, who are tasked with looking into the reasons behind the conflict and learning which party is at fault. This is in accordance with the provisions of the Islamic Shari’a law regarding judicial separation between a husband and wife through arbitration. As the Almighty said in the Qur’an, *“If you have reason to fear that a breach might occur between a (married) couple, appoint an arbitrator, from among his people and another from among her people; if they both want to set things right, God may*

³² Article 122 of the UAE Law stipulates that, “In a court case of divorce for inflicting damage, the damage is proved through legitimate methods and through judicial judgment issued against one of the married couple. Testimony is accepted verbally if the witness explained, or implied the presence of damage in the couple’s life circle, as decided by the court. Testimony negating damage is not accepted verbally.” Article 129 of the Qatari Family Law for 2006 is similar.

³³ Surat Al Nisa’ (Women), Verse: 35.

*bring about their reconciliation. Behold God is indeed all- knowing, and aware.*³³

Articles 129 and 130 of the Kuwaiti Law outline the mission of arbitrators in resolving family conflicts. The law compels arbitrators from the families of the two parties to work at reconciling the couple in any way possible and explains what should be done when reconciliation fails, such as separation and its financial repercussions, or the possibility of dropping litigation, depending on the abuse and its source, by the party requesting separation.

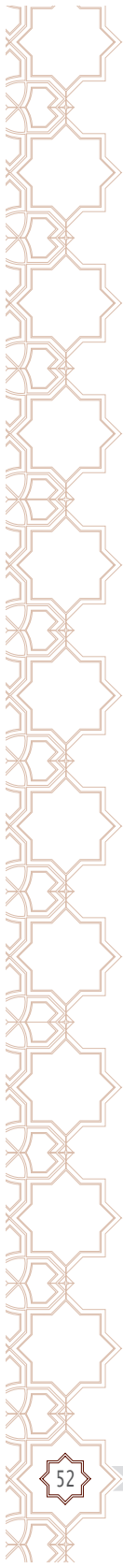
Article 131/B of the Kuwaiti Law stipulates, “If the two arbitrators are in disagreement, the court shall add a third arbitrator from neither family to tip the balance, normally a lawyer who is well-known for fairness, objectivity and experience in personal status issues to attempt reconciliation between the husband and wife.” Article 132 of the Kuwaiti Law specifies the mission of the three arbitrators: “The three arbitrators shall submit their report in agreement, or by majority, to the court, to decide the case according to Article 130. If their opinions are too dispersed, or if no report is submitted, the court shall follow normal procedures in the case.”³⁴

Articles 117 to 123 of the UAE Law address this matter under the premise of separation due to damage and dissention. Article 117 says, as a general principle:

1. Each party in a marriage has the right to request a divorce from damage that does not permit the continuation of married life amicably, and neither shall lose their right, unless reconciliation is proved.

³⁴ Articles 127–132 of the Kuwaiti Law. Most personal status laws in the Arab countries adopt the arbitration method to settle marital conflicts. Examples include the Jordanian Personal Status Law of 1976, the Syrian Personal Status Law for 1953, the Moroccan Personal Status Code amended in 2004, the Algerian Family Law amended in 2005, and Article 56 of the Egyptian Personal Status Law amended in 1985.

³⁵ Refer to Articles 118–122 of the UAE Law regarding arbitration conditions and provisions for divorce as a result of damage and dissention, and Articles 130-136 of the Qatari Family Law, as well as Article (53/8) of the Algerian Family Law amended in 2005. Article 53 permits the judge, in cases of divorce judgment, to pass judgment for compensation for damage caused to the wife.

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2. The Family Moral Guidance Committee, in accordance with Article 16 of this law, shall undertake to effect reconciliation between the husband and the wife. If it fails, the judge shall offer to reconcile them. If he fails and damage is proved, divorce shall be granted.³⁵

On the other hand, Moroccan legislators succeeded in developing the divorce for damage base to include all forms of damage that affect a wife as a result of her husband's misuse of his marital rights. The amended Articles 99 to 101 of the 2004 Moroccan Family Code address these cases, dealing with the issue of divorce for damage in a way that is superior to those of the Kuwaiti Law and other personal status laws of GCC countries and some other Arab countries.

For example, Article 99 of the Family Code holds that any breach of the marriage contract provisions is considered damage inflicted upon the wife, which gives her the right to request a divorce from the husband. The same applies to any action or shameful behavior on behalf of the husband that contradicts proper decorum and causes material or moral damage to the wife, rendering her incapable of continuing the marriage.

Article 100 of the Moroccan Family Code permits a wife to prove damage through any method available to her, stipulating, "Damage can be proved using all available methods, including the testimony of witnesses, to whom the court shall listen in the consultation room." In case the wife is unable to prove damage and insists on divorce, she can resort to legal provisions regarding differences.

To further protect the wife's material rights, Article 101 of the code stipulates, "In case of a divorce for damage judgment, the court may, in the same session, specify the amount of compensation for the damage."

The above three articles in the amended Moroccan Family Code represent an important guarantee that preserves the woman's right to divorce through the judicial system as a result of the damage she

has sustained during married life, as well as enhancing her family rights.

The Khula' Divorce

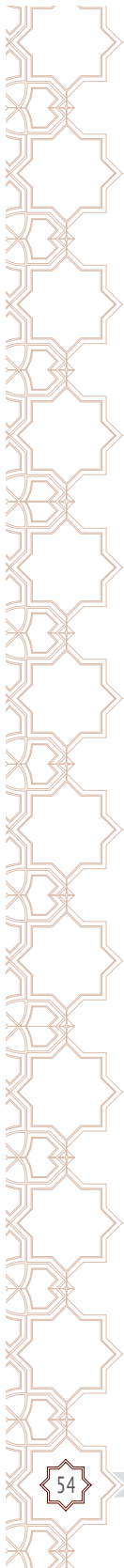
Khula' divorce is considered a Muslim woman's basic right, allowing her to unilaterally manage her way out of a marriage without her husband's acceptance, as long as she is willing to return the dowry paid to her and forfeit the 'Uddah and compensation alimony. This legitimate right is included in the Kuwaiti Law and is allocated nine articles that explain its provisions and conditions of use, in case the husband and wife have each come to believe that the other is not providing the required material and moral commitments of married life. The wife is given the legitimate right to pay her way out of her husband's protection by compensating him; he thus releases her accordingly.³⁶

The Khula' divorce is based on Islamic Shari'a provisions that permit a wife to redeem herself from her husband's protection, even without his approval, as long as she returns the dowry he paid and forfeits her legitimate rights. It is based on the Qur'an: "*And it is not lawful for you (men) to take back anything of what you have ever given to your wives, unless both partners have cause to fear that they may not be able to keep within the bounds set by God. There shall be no sin upon either of them for what the wife may give up (to her husband) in order to free herself.*"³⁷

Although the Qur'anic verse and the Prophetic Sunnah assert a wife's right to resort to a Khula' divorce, Kuwaiti legislators assumed a neutral position on the Khula' divorce and set a flexible, and arguably

³⁶ Articles 111–119 of the Kuwaiti Law regulate Khula' provisions and conditions and the rights and duties of the married couple when resorting to the Khula' divorce to terminate the marriage bond. The explanatory memorandum of the law indicates that Article 119 stipulates that "it is right to permit terminally ill women a divorce through Khula', and in this case, a revocable divorce is effected, but it is only implemented on one third of her wealth when the heirs are not accredited, because it is a donation, and donation in case of terminal illness is a will".

³⁷ Surat Al Baqara, verse: 229.



unfair, regulation on a wife's use of this right. They did not set a deadline for the husband to accept financial compensation offered by the wife, as did Qatari legislators in Article 122 of that country's 2006 Family Law, and Egyptian legislators in Law No. 1 for the year 2000, which regulates the conditions and provisions of the Khula' divorce. In that law, Article 20 stipulates that "the husband and wife may come to an agreement between them over Khula'. If they fail to do so, and the wife initiates litigation, redeems herself and divorces her husband by forfeiting all her financial and legitimate rights, and returns to him the dowry he paid her, the court shall decide to divorce her from him."³⁸

From a different perspective, UAE legislators recognize a wife's right to resort to a Khula' divorce to protect herself from financial and moral exploitation by her husband. Article 110/5 of the UAE law stipulates, "With the exception of the provisions in Item 1 of this article, 'if refusal on behalf of the husband is pure obstinacy, and if there is a possibility that the parameters set by God are not observed, the judge shall decide on Khula' against a reasonable compensation."

In Article 54 of the 2005 Algerian Family Law, Algerian legislators established a more advanced foundation that is commensurate with the principles of justice and fairness, reduces the husband's financial exploitation of his wife, emulates the Prophetic Sunnah, and respects the woman's human dignity. It declares that "the wife may, without the husband's approval, divorce herself using Khula', against a sum of money. If the husband and wife do not agree on the amount of money for Khula', the judge shall decide on an amount not to exceed the value of the dowry when the judgment is passed."³⁹

³⁸ Paragraph 2 of Article 18 of the Egyptian Khula' law stipulates the following: "The court shall not pass judgment on Khula' divorce until after attempting to reconcile between the husband and wife, and delegating two arbitrators to continue reconciliation attempts between them for a maximum period of three months. The judgment issued for divorce by Khula' is to divorce the wife from her husband one time which is (revocable) if the three times (of uttering the divorce statement) has not been completed."

³⁹ Article 57 of the Algerian Family Law amended by order number 2/5 dated February 27, 2005, stipulates the following: "Judgments passed in divorce and Khula' cases cannot be appealed, except for its financial issues."

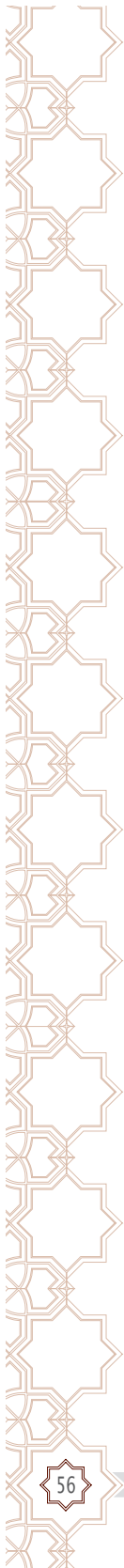
Articles 111 to 119 of the Kuwaiti Law indicate the provisions and conditions of the Khula' divorce. The most important of these protects the rights of a divorced woman who has custody of her children. Article 118 of the law stipulates that it is inadmissible for the husband to insist on custody of the male child as a condition for Khula'. If the father resorts to this, Khula' divorce shall take place, the condition shall be nullified, the mother can keep the child, and the father is compelled to pay alimony and child support. The Kuwaiti Court of Cassation emphasized this principle and decided, "Khula' is deemed correct and the condition is nullified if the mother divorces her husband by Khula' against dropping her right and giving up custody of her son from him, in favor of the child's right, which takes [precedence] over both the mother's and father's rights. Divorce by Khula' is a revocable divorce."⁴⁰

The Kuwaiti Law's explanatory memorandum discusses the concept of holding the child. "Holding the child, as mentioned in Article 188, is simply intended to mean the right to keep the child, but not to support him financially. The decision to support the child financially is something that is mutually approved between the divorced parents. It is a purely financial matter, and there is no objection to implementing their agreement over it, because it does not affect the child's rights or benefits."

This principle has been applied in most Arab personal status laws. For example, Article 111 of the 1976 Jordanian Personal Status Law stipulates, "If the man in a Khula' divorce case sets the condition of keeping the child in his custody during the custody period, Khula' is approved and the condition is nullified, and the legitimate custodian has the right to take the child from him, and the father is compelled to support him financially if the child is poor."

Similar is Article 119 of the 2004 amended Moroccan Family Code, which stipulates, "Khula' is not permitted based on a condition

⁴⁰ Appeal No. 9/1989, session No. 26/6/1989, *Judiciary and Law Journal* (State of Kuwait), Ministry of Justice, Appeals Court, Technical Office, 358.



regarding children's rights or their support, if the mother is financially poor. If the mother is too poor to support her children, their father is under the obligation to support them, without jeopardizing his right to take her back."

Article 120 of the 2006 Qatari Family Law adopts this principle, stipulating that "giving up children's custody or any of their rights may not be in return for Khula' divorce."⁴¹ Article 110/2 of the 2005 UAE Personal Status Law is similar, stipulating, "What applies to setting the dowry applies to setting the compensation for Khula' divorce, but no compromise may be reached regarding the children's support or custody."⁴²

From another perspective, the Kuwaiti Law does not include any controls to curb a husband's possible exploitation of his wife's legitimate and financial rights when she resorts to the Khula' divorce, or to guarantee that she is not compelled or abused simply because she is resorting to this type of divorce. The only exception is Article 116 of the law, which outlines that the wife's divorce should be by her own choice, without any obligation or damage, according to the Shari'a principle.⁴³

Although the explanatory memorandum of the Kuwaiti law specifies how a Khula' divorced wife should prove damage as per Article 116 of the law, it states, "In order to facilitate proving damage that prevents

⁴¹ Article 95 adopted this principle from the Muscat Document for the Unified Personal Status Law for the countries of the Cooperation Council of the Gulf Countries for 2001. "It is not permissible that giving up custody of children, or any of the children's rights be allowed in return for Khula'. If this happens, Khula' is instated and the condition is voided."

⁴² This principle was emphasized by Articles 96 - 99 of the Draft Unified Arab Personal Status Law, approved by the Council of Justice Ministers in its sixth session on 4/4/1988, when setting the provisions and conditions of Khula' divorce according to Article 98 of the Arab Draft Law. "It is not permissible that giving up custody of children, or any of the children's rights be allowed in return for Khula'. If this happens, Khula' is instated and the condition is voided."

⁴³ Article 122 of the Family Law in the State of Qatar of 2006 stipulates that if the husband and wife have not reconciled their differences over Khula', the court shall attempt a reconciliation, and shall delegate two arbitrators to start reconciliation attempts within a maximum period of six months. If the arbitrators do not arrive at a reconciliation, and the wife requests Khula' against surrendering all her rights, and pays her husband back all dowry money he paid her, the court shall decide to separate them.

the husband from deserving Khula' divorce, [the court] shall hear the testimony of reliable people or others whose testimony is unacceptable, such as servants. In this case, one witness and her oath are sufficient, or the testimony of two women and her oath, and her evidence shall be accepted even if the husband claims she divorced him by Khula' without the presence of damage, and she dropped the witness who testified to her damage, yet she does not need this testimony or dropping of witness, for she can present her evidence.”

But the law does not establish a mechanism by which the wife can recover what she paid for the Khula' divorce, as does Morocco's Family Code. Article 117 of that document provides an important legal guarantee to the woman in this case, through the text that “the wife has the right to recover what she paid to obtain Khula', if it is proved that her Khula' is a result of coercion or damage inflicted by her husband. Divorce is granted in all cases.”

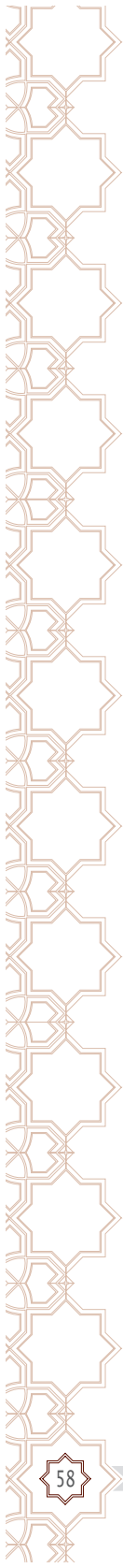
Official statistics issued by the Ministry of Justice in the State of Kuwait indicate that in most judgments issued in Khula' divorce cases, the agreement for Khula' between the married partners is carried out against a specific amount of money agreed upon, or by the wife giving up her legal rights or her alimony in its various forms, or relinquishing her divorce payment, or even giving up her right to child custody, as is the case in the Ja'fari school.⁴⁴

Part III: Women's Rights in Terminating a Marriage

The Right to Compensation Alimony

Islamic legislators established common rights for both husband and wife in the marriage contract, and committed them to observe these rights so that married life commences on the basis of affection and

⁴⁴ Refer to Appendix No. 3 of this study for documented Khula' cases in Kuwait for the years 2000, 2001, and 2002.



compassion. This is reflected in the Qur'anic verse in Surat Al Baqarah (228), *“In accordance with justice, the rights of wives (with regard to their husbands) are equal to the husband’s rights.”*

As the marriage contract in Islam is not supposed to be eternal, however, it is important to know the rights of both husband and wife after the marriage contract is terminated, and particularly women’s rights after divorce, which are identified clearly in Islamic Shari’a law. In spite of this, Arab personal status laws differ on these rights. This is especially evident with respect to the right of a divorced woman to compensation (compensation alimony), which is considered to be among the most basic of women’s rights, particularly if the marriage is terminated arbitrarily and through the unilateral will of the man.

A woman’s right to compensation alimony is based on Islamic Shari’a law, according to the Qur’anic verse, *“The divorced women, shall have a (right) to maintenance in a goodly manner. This is a duty for all who are conscious of God.”* And another verse says, *“And make provisions for them, the affluent according to his means, and the strained according to his means.”*⁴⁵

The Kuwaiti Law acknowledges a divorced woman’s basic right to compensation alimony or financial compensation in the case of a divorce caused by the husband’s unilateral wish. This right is a tool that can be used in divorce cases that occur without justification, as is the case in many divorce cases in Kuwaiti society today, the result of the country’s sudden material boom and its effects on family relations.

⁴⁵ Surat Al Baqarah, Verses 241 and 236.

⁴⁶ Article 117 of the Syrian Personal Status Law amended in 1975 stipulates that the divorced woman has the right to compensation alimony in case of a coercive divorce, and the judge is given the authority to estimate coercion, provided the compensation does not exceed three years’ alimony in addition to the ‘iddah alimony. Article 115 of the Qatari Family Law for 2006 is similar. It stipulates the following: “Every divorced woman deserves compensation alimony if the divorce is from the husband’s side. An exception to the provisions of the previous Article is divorce for the lack of financial support due to the husband’s inability to provide. Alimony is estimated according to the financial status of the husband and the wife, provided it does not exceed three years’ alimony.

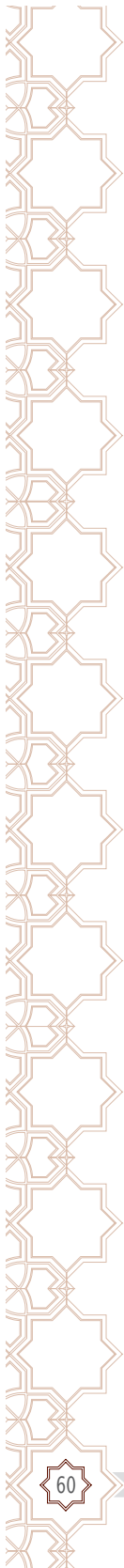
Article 165 of the Kuwaiti Law sets the conditions and provisions for compensating an arbitrarily divorced wife: “If a healthy and sane husband dissociates himself from the marriage after the marriage has been consummated, the wife shall deserve the right alimony of the ‘Iddah, an amount that does not exceed one year’s alimony, depending on the husband’s financial situation, to be paid to her in monthly installments, after the end of her ‘Iddah period, unless the two parties agree otherwise in amount and performance.”⁴⁶

The explanatory memorandum of the Kuwaiti Law emphasizes the importance of compensation alimony to a divorced woman when pointing out the justification for listing it in the law: “In these times, chivalry has deteriorated, and the divorced woman is in need of assistance exceeding the alimony, to help alleviate the effects of divorce financially. Compensation alimony achieves this assistance, and, at the same time, prevents many cases of hasty divorce.”

Although the law highlights the importance of compensation alimony, Kuwaiti legislators imposed a number of restrictions on it that prevent a divorced woman from enjoying her legitimate right, as stipulated in paragraph B of Article 165. The law reduces the period of payment to a maximum of one year; additionally, it deprives her of compensation alimony if the divorce results from a lack of financial support due to the husband’s poverty, if the divorce was sanctioned by the wife, if the marriage’s annulment was requested by her, or if one of the partners dies. Nonetheless, it is simultaneously acknowledged that compensation alimony contributes to a divorced woman’s human and social security.⁴⁷

According to Article 165 of the Kuwaiti Law, a divorced woman has the right, as a general rule, to obtain compensation alimony that does not exceed one year’s compensation, as soon as divorce takes place by her husband’s unilateral decision, and as long as the divorce is

⁴⁷ Kuwaiti legislators deprived divorced women, in paragraph A of Article 199 of the law, of custody fees during compensation judged for in favor of the custodian against the child’s father.



not a result of her husband's coercion. This is outlined by the Kuwait Court of Appeals: "A wife's right to receive compensation alimony is contingent upon divorce taking place without the wife's approval and without her being the cause. Imposing divorce by the husband's unilateral will, without the consent of the wife, indicates that she shall receive compensation alimony, even if she was the reason behind the divorce. Estimating the amount of the compensation alimony and the manner in which it is presented and calculated is based on the monthly alimony that the husband's financial situation permits at the time it is due, not to exceed one year's alimony."⁴⁸

Most Arab personal status laws have adopted this Shari'a principle. Differences lie in the amount and length of the compensation alimony. Some Arab personal status laws give the judge the authority to estimate the value of compensation alimony according to the financial status of the divorcing man. An example is Article 84 of the Moroccan Family Code of 2004, which states that "payments due to the wife include the late dowry, if applicable, the 'Iddah alimony, and the compensation alimony, in which the period of marriage and the husband's financial status are taken into consideration when estimating it, as well as the reasons for divorce and the level of the husband's arbitrariness when committing it."

Article 117 of the Syrian Personal Status Law specifies the amount of compensation on the basis of three years' compensation, as does Article 18 of the Egyptian Personal Status Law of 1985, which outlines the wife's right to compensation over and above her 'Iddah alimony, which may be estimated at a minimum of two years' compensation, taking into account whether the husband is poor or wealthy. Article 134 of the Jordanian Personal Status Law, amended in 2001, also adopts this trend. In a situation where "a man divorces his wife arbitrarily, and the divorce is unreasonable, and she requests compensation, the judge shall decide that the husband pay alimony of between one and three years, taking into account the husband's financial status.

⁴⁸ Appeal 86/96, Status, Session 8/6/96, *Judiciary and Law Journal*, 24, 2, March 2000.

The husband shall make one payment if he is wealthy and monthly installments otherwise. This shall not affect the wife's other rights under marriage."

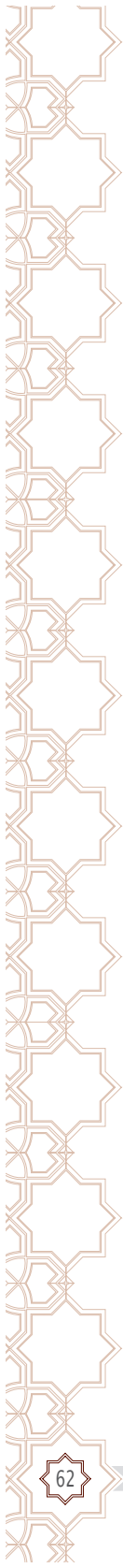
This also applies to the Qatari Family Law and the UAE Personal Status Law; like the Kuwaiti Law, they set a time ceiling for the compensation alimony that ranges between one and three years, without taking into account when regulating this issue opinions that may be more in the interest of the divorced woman.⁴⁹

On the other hand, personal status laws in other Arab countries give the judge the freedom to estimate the period during which a divorced woman deserves compensation alimony, without restricting it to a specific period of time or requiring the presence of certain conditions on behalf of the husband. Examples include Article 91 of Oman's Personal Status Law, which does not specify a period for compensation alimony and does not stipulate that the divorce should be arbitrary, but outlines that the divorced woman whose marriage has been consummated deserves compensation alimony according to the husband's financial status. With this wording, the law emphasizes that the payment of compensation alimony is compulsory for any man divorcing his wife, according to the provisions of Islamic Shari'a laws: *"The divorced women, shall have a (right) to maintenance in a goodly manner; this is a duty for all who are conscious of God."* Similarly, *"And make provisions for them, the affluent according to his means, and the strained according to his means."*⁵⁰

Article 84 of the Moroccan Family Code, amended in 2004, is similar to Article 91 of the Omani Law, with a stipulation focused on the husband's level of arbitrariness in divorcing his wife, which gives

⁴⁹ Article 53 of the Algerian Family Law amended in 2005 stipulates, "The judge may, in passing judgment in divorce cases, decide on a compensation for damage sustained by her."

⁵⁰ For the positions of scholars in the four Sunni schools of Islamic jurisprudence (*fiqh*) regarding the compulsory compensation to the divorced woman as in Qur'anic verses (Surat al Baqarah: 241, 236), see Abalnabi Mico, Part I, Marriage and Divorce, *Al Wasit fi Sharh Mudawwanat Al Ahwal Al Shakhsiyah* [The Median in Interpreting the Personal Status Code], 1971.



the judge authority to investigate the reasons for the divorce and estimate its ease of application, the husband's financial status, and the marriage period. According to Article 51 of the 1984 Libyan law regarding provisions for marriage and divorce and their effects, the wife is to be given compensation alimony commensurate with the wealth or poverty of the husband, if he initiated the divorce. Article 51 refers to Article 39: if the party causing the damage is the husband, the compensation and the late dowry should be decided in favor of the divorced wife.

The Tunisian Personal Status Journal of 1956, amended in 1981, does not specify the duration of the compensation alimony allocated to the divorced wife, as is also the case in the Kuwaiti Personal Status Law and most Arab family laws. Tunisian legislators established a system to provide actual guarantees to a divorced woman, until she can make do without the compensation assigned to her, whether by marriage or the creation of another source of income.⁵¹

Based on the above, it is clear that most Arab countries' personal status laws tend to contradict to the provisions of Islamic Shari'a, with respect to a divorced woman's right to financial compensation. Although the laws enhance a woman's rights when the marriage contract is terminated based on the husband's unilateral will, legal regulation of compensation alimony does not result in limiting the divorce, and the semi-vague articulation of the legal provisions does not provide the necessary family and human security to the divorced wife and may even constrain her with subjective and unfair conditions.

⁵¹ Paragraph 3 of Article 31 of the Tunisian Personal Status Journal amended in 1980 stipulates that the woman has the right to compensation for material damage she sustained, in monthly payments made after the end of the 'iddah, openly and according to what she normally was used to during married life, including the residence. This payment (compensation alimony) is subject to review upwards or downwards as a result of changes and remains until her death or when her social status changes with a new marriage, or if she acquires what negates her need for the payments, and becomes a debt to the inheritance in case the payer dies, in which case it is reconciled in agreement with the heirs or through litigation through one payment, taking into account her age at the time. All this, and she can be given the option of compensation for the material damage in the form of capital, to be given to her in one payment (amendment on 18 February, 1981, published in the Official Gazette of the Tunisian Government No. 11, dated 20 February, 1981, 358).

Right to Custody

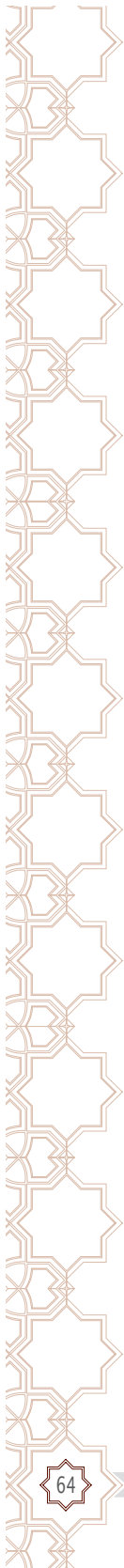
Most Arab personal status laws actively guarantee women's rights during married life and after divorce in allowing them to keep custody of their children, depending on the child's gender. This applies to the Kuwaiti Personal Status Law, which allocates 11 articles to the issue of custody and conditions for entitlement, developing legitimate principles that benefit a woman custodian as well as the child in her custody. This has been emphasized by a number of judgments passed by the Kuwaiti Court of Appeals. In one instance, the court rejected custody by an older woman because she had been convicted of a crime similar to an "honor misdemeanor." The decision of custody is based on consideration of both the rights of the custodian and the child in custody, not simply one of them, but the child's rights should dominate.⁵²

Article 191 of the Kuwaiti Law highlights cases in which the right to custody is dropped. In one of them, a custodian woman loses her rights when she marries a man who is a Mahram, "someone who is prohibited from marrying her." Paragraph B of the above article stipulates that if the husband knows about this marriage for a period of one year without complaining, he loses his right to custody; allowing a year to pass after the mother's marriage without demanding custody demonstrates evidence of his negligence and

⁵² Articles 189 – 100 of the Kuwaiti Law. See Appeal No. 348/2004, Personal Status, Appeals Court, Personal Status Department, session No. 31/3/2005, *Judiciary and Law Journal*, 33, 1 (Ministry of Justice, Court of Cassation, Technical Bureau), 296.

⁵³ Other conditions that the custodian woman should satisfy: Attainment of puberty, wisdom, integrity, and ability to rear the child in custody in health and manners. According to the Ja'fari school, the mothers custody continues, for the male, for two years, and for seven years for the female, reverting to the father until she is nine years old, when she is given the choice to be with either of the parents. It is also decided in Shari'a Law that when the child, male or female, reaches puberty and becomes wise, custody is lifted, and he/she is left to fend for him/herself. Puberty is measured either through physical signs or by the attainment of the age of 15, at which point the child has his own legal entity to undertake litigation against others or be litigated against. Appeal No. 238/2004, Court of Cassation, Personal Status Department, session 10/4/2005, *Judiciary and Law Journal*, (Ministry of Justice, Court of Cassation, Technical Bureau), 33, 2, August 2007, 224.

⁵⁴ Article 198 of the Kuwaiti Law: "The party assigned the expenses of the child in custody shall pay the rent for the shelter of custody, unless the custodian owns the place of shelter, or has one assigned to her."



shows an implied acceptance of the divorced wife's continued custody, despite her marriage to a prohibited man.⁵³

Article 197 of the Kuwaiti Law stipulates the right of the custodian to custody alimony, regardless of whether she is the mother. This alimony includes clothing, food, and shelter; rent is a compulsory part of custody alimony unless the custodian owns a house, or has one allocated to her, in which case she does not require rent to cover the child in her custody.⁵⁴

It is well known that the Holy Qur'an and the Sunnah do not specify in detail the period when children's custody by the mother ends; hence, schools of jurisprudence disagree about this. The Kuwaiti Law, in Article 194, adopts the opinion of the Maliki school, which stipulates, "A woman's custody of her male child ends at his puberty, and the female's with her marriage and copulation with her husband." The Kuwaiti Law does not specify an age for the end of puberty; however, the explanatory memorandum of the Kuwaiti Law indicates that if the boy completes the time of his custody, he can go wherever he wishes, and cannot be compelled to join one of his parents or whoever replaces them. Article 194 of the Kuwaiti Law does not mandate that the relevant Kuwaiti court give the boy the choice to reside with either one of his parents. This has been asserted by the Court of Cassation (Personal Status Department, 1999) in its interpretation of the above article.⁵⁵

According to Article 156 of the 2005 UAE Personal Status Law, 1. a mother's custody terminates when the male child reaches 11 years of age and the female child reaches 13, unless the court sees fit to extend this period until the male reaches puberty and the female marries,

⁵⁵ Appeal No. 93/89 Personal Status. Court of Cassation, Personal Status Department, session 9/1m/1999. *Judiciary and Law Journal*, 23, 1. (Ministry of Justice, Court of Cassation, Technical Bureau), April 2002, 280.

⁵⁶ Article 146 of the Egyptian Personal Status Law amended in 1985: "The custody period ends when the boy completes nine years of age and the girl eleven years of her age."

simply for the benefit of the child in custody; 2. a mother's custody continues if the child in custody is insane, sick, or an invalid, unless the child's interest is otherwise.⁵⁶

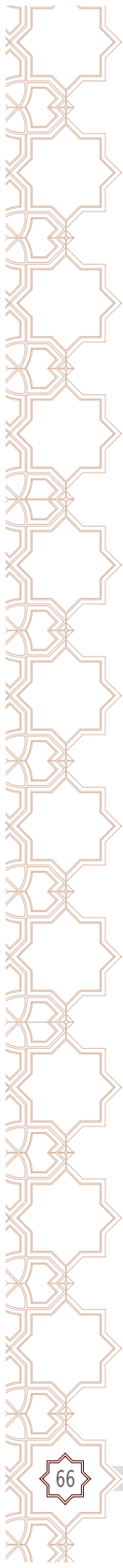
On the other hand, Article 166 of the 2006 Qatari Family Law addresses the general provisions regarding custody: "Custody is the duty of both parents, as long as marriage keeps them together. If they separate, even without divorce, the mother has a greater right to the child's custody, unless the judge decides otherwise for the benefit of the child. The judge shall attempt to reconcile the two parents, provided reconciliation does not conflict with the child's interests. Custody is a continuously renewed right. If it fails for any reason, or is judged to end, and the reason for failure or termination ends, the right reverts to the custodian. Custody is also a common right between the custodian and the child, and the child's right is more powerful."⁵⁷

Article 173 of the Qatari Family Law indicates that custody, and all of its obligations, end as follows: "Custody by the mother ends when the male completes thirteen years of age and the female completes fifteen, unless the court sees otherwise after investigating the rights of the child in custody, and then authorizes the continuation of the male's custody until he completes fifteen years of age, and until the female child gets married and marriage is consummated. The court may also give the child in custody the choice, after investigating the eligibility of the parents, but in all cases the reasons on which the court decision is based must be mentioned."

In an exception to the provision in the above article, a mother's custody may continue if a child is mentally ill or suffers from a complicated

⁵⁷ The Qatari legislator allocated articles for the issue of custody.

⁵⁸ Article 168 of the Qatari Family Law stipulates the following: "Observing conditions stipulated in Article 167 regarding eligibility for custody, the custodian should: 1. If the custodian is a woman, she should not be married to a foreigner to the child in custody, with the marriage being consummated, unless the court sees otherwise for the interest of the child. 2. If the custodian is a man, he should be of the same religion as the child in custody, and should have with him a woman from his kin, who is fit to carry out the duties of custody."



disease. The custodian or the other parent may not take the child back when the woman's custody period is finished unless the transfer is mutually agreed upon or decided judicially.

In the absence of a judgment for custody, if one of the parents takes by coercion the child who is at the age when he should be in his mother's custody, the judge may return the child to her, temporarily, with or without a personal guarantee, and direct the contenders to resort to the relevant court for custody.⁵⁸

Article 183 of the Qatari Family Law indicates that custody can be withdrawn from the custodian for the following reasons:

1. If the custodian fails one of the conditions stipulated in Articles 167 and 168 of the law, which address the concept of custody and its requirements, such as puberty, wisdom, honesty, safety from infectious diseases, and the ability to raise a child in a manner that realizes his or her interests.
2. If the new custodian resides with one who lost custody as a result of bad manners and behavior, heresy, or the contraction of a dangerous infectious disease.
3. If the father or other custodian of the child is unable to carry out his duties, including supervision, rearing, and education, because the woman custodian resides with the child without legal permission in a distant, inaccessible country.

Although the above cases clearly require ending custody, Article 148 of the law stipulates, "If the legal custodian does not demand custody for one year without an excuse, his or her right to custody abates, unless the court decides otherwise for the benefit of the child in custody."

On the other hand, Articles 65 and 186 of the Algerian Family Law, amended in 2005, stipulate that "the custody period of the male

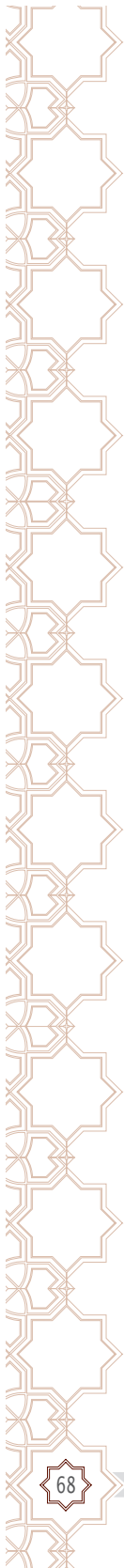
child ends when he becomes ten years of age, and that of the female child when she reaches the age of marriage. The judge may extend the male child's custody period to 16 years if the custodian is an unmarried mother, keeping in mind the child's interest in deciding to end custody." Article 67 of the law also stipulates, "Custody is dropped if any of the conditions mentioned in Article 62 of the law, specifying the concept of custody as nurturing the child, educating him, raising him according to his father's religion, protecting him, and keeping him healthy and well mannered, are violated. The custodian is required to be capable of doing those things."

Article 67 of the Algerian law addresses the relationship between the custodian's work and her right to custody. Paragraph 2 of the article emphasizes, "The mother's work can never be a reason for ending her right to custody of the child."

Moroccan legislators, through the Moroccan Family Code, amended in 2004, allocated 23 articles addressing all matters related to custody, including the age of ending custody and which parent deserves to be a custodian after the marriage has ended. According to Article 166, "Custody continues until reaching the legal age of puberty for the male and female alike, after the end of the marital relationship. The child in custody, who has completed fifteen years of age, has the right to choose between the father and mother. In case they do not exist, he or she can choose one of their relatives, as stipulated in Article 171, provided this does not conflict with the child's interest, and that his or her legal representative approves. In case he does not approve, the matter is referred to the judge to examine, according to the interests of the minor."

Article 173 of the Family Code indicates necessary conditions for the custodian, as follows:

1. legal adulthood, for those other than the parents;
2. honesty and integrity;

- 
3. the ability to raise the child in custody, protect him, nurture him religiously and in manners, and watch his schooling;
 4. women requesting custody cannot marry, except in cases stipulated in Articles 174 and 175. If there is a change in the status of the custodian that may jeopardize the welfare of the child in custody, custody is dropped and transferred to the next custodian.

Article 175 of the Moroccan Family Code is more comprehensive than Arab legislation in general, and particularly compared to the Kuwaiti Law, when dealing with cases that focus on ending the mother's custody. As a rule, it stipulates that the mother's remarriage does not terminate her custody in the following cases:

1. If the child in custody is less than seven years old, and may be hurt by leaving her.
2. If the child in custody has a defect or a disease, making his custody by anyone but his mother impossible.
3. If her husband is a close relative prohibited (*mahram*) or is a legal representative of the child.
4. If she is also the legal representative of the child in custody.

The above article also stipulates that the mother's remarriage relieves her husband of the costs of the child's shelter and custody expenses. The support of the child in custody remains the father's obligation.

Right to Visitation

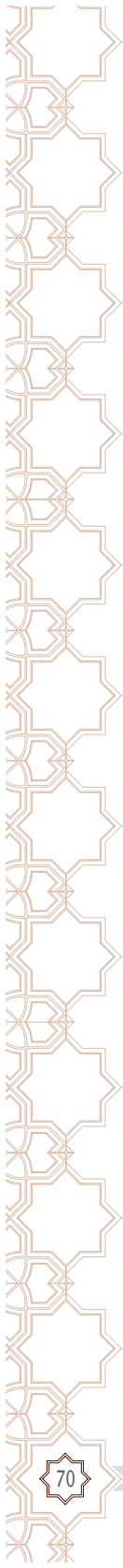
The Kuwaiti Law addresses the issue of visitation in only one article, and rather briefly, although the question of visitation rights of the child in custody after the end of a marriage is considered a complicated issue that may create family controversy in Kuwaiti society. According to Article 196/A of the law, only parents and grandparents have visitation

rights, and the custodian may not prevent any of these from visiting the child, provided that the venue and the period of the visit are observed. Kuwaiti legislators gave the judge discretionary authority to regulate this issue in the absence of clear legal guidance, in order to reduce family conflicts. If one custodian prevents the other party from visiting the child, the law delegates the relevant judge to allocate a specific periodic date and an appropriate venue that allows the rest of the child's family to visit him.⁵⁹

One example in the area of advanced legislation is Qatar's 2006 Family Law, in which Articles 186 to 188 regulate all matters related to the right of the custodian in visiting the child in custody. According to Article 186 of the law, "The parents may arrive at a reconciliation regarding exchanging visits with the child in any way and at any time, unless the visit turns into a 'prohibited seclusion after they become separated.' If the parents do not agree on visitation dates and times, the judge may assign them, taking into consideration the gradual change in the visits' duration as the child in custody advances in age and his needs change."

The above article adds that the visit venue should be the child's place of residence. In case of a disagreement, the judge may assign an adequate venue for the visit. The judge may warn the custodian or the guardian if he or she does not abide by the time or place of the visit and may even prohibit visitation for a period of time. If problems are repeated, the court may cancel visitation rights altogether. If the problem originates with the custodian, the court, after warning her, may end her custody. The party with visitation rights may host the

⁵⁹ Article 137 of the Omani Personal Status Law of 1979 gives the right to the relatives of the child in custody to visit him as decided by the judge, if one of the child's parents is dead or absent. This is similar to Article 180 of the Moroccan Family Code amended in 2004: "The parent who is not custodian, has the right to visit and invite the child in custody for visitation." Article 148/5 of the Syrian Personal Status Law of 1957 stipulates that: "Each of the two parents has the right to visit his/her children residing with the other parent, periodically, in the venue where the children reside." In case there is an objection to this, the judge may order that this right be fulfilled, assigning a method for its immediate implementation without the need for judgment from the basic courts. Anyone who objects in opinion or in the method of implementation should refer to the court. The provisions of Article 482 of the penal code.



child during religious holidays (the *eids*) and special occasions. The judge may decide on this if there is disagreement.

This article also addresses special provisions for relatives' rights to visitation with the child in custody, stipulating, "If one or both of the parents is dead or absent, visitation is permitted for the child's mahram, or 'prohibited,' relatives, as the court sees fit. If judgment is passed granting visitation rights, the parties may resort to the judge to request the amendment of the visitation judgment. The final decision regarding visitation of the child shall be covered by immediate implementation."

As part of Qatari legislators' desire to expedite ending conflicts related to child visitation rights, Article 187 of the Qatari Law stipulates, "The initial and appeal stages of matters related to visitation rights or accompanied travel of the child in custody, or returning him to the legal custodian, shall be addressed urgently, pending final judgment of the custody case."⁶⁰

Article 154 of the 2005 UAE Personal Status Law regulates visitation rights as follows:

1. If the child is in the custody of one of the parents, the other parent has the right to visit him, invite him for visits, and accompany him according to the judge's decision, provided the place, time, and person bringing the child have all been outlined.
2. If one of the parents of the child in custody is deceased or absent, the child's prohibited (mahram) relatives have the right to visitation as the judge sees fit.

⁶⁰ Article 163 of the Jordanian Personal Status Law amended in 2001 regulates the visitation rights issue of the child in custody as follows: "A. The rights of the mother and the guardian in visiting the child in custody, when he/she is in the custody of others, are equal. B. When there is a conflict in visitation rights of the child; visitation is assigned for the mother and the guardian as once every week, and once every month for grandparents, and once a year for those who have rights to custody. C. The judge may assign the time and place for visitation, in the interest of the child, if the parties did not agree over it."

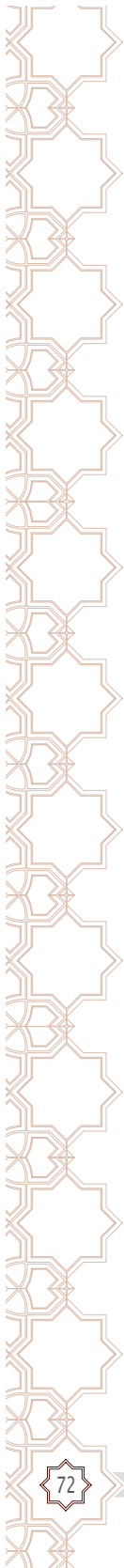
3. If the child is with parties other than his parents, the judge shall appoint those relatives who have visitation rights.
4. This decision is to be implemented by force of law, if the party with whom the child resides refuses visitation.
5. The Minister of Labor, Islamic Affairs and Religious Sites (*awqaf*) shall issue a code specifying procedures for visiting and delivering children in custody, provided such venues are not police stations or correctional facilities.

The amended Moroccan Family Code is considered to be among the most advanced bodies of legislation in this respect. Articles 108 to 186 address the issue of child visitation; if one of the parents does not agree to the other parent's visitation rights, Article 182 of the code stipulates, "In case the parents do not agree, the court shall decide on custody and visitation periods, and control the time and place in such a way that prevents, as much as possible, deceit in implementation. The court shall take into account the circumstances of the various parties and the special conditions of each case. The court's decisions are subject to appeal."

Article 183 indicates, "If circumstances change, making the planned visit with the agreement of the parents or by court decision detrimental to one of the parties or to the child in custody, it is possible to request a review and amendment to accommodate the change in conditions."

Article 184 of the code outlines the measures that should exist so that the custodian does not violate provisions of the law, allowing the specialized court to "carry out what it sees fit by way of measures, including amending the visitation system, and dropping custody rights in cases of misrepresentation or deceit in implementing the agreement or the regulation of visitation."⁶¹

⁶¹ Article 185 of the Moroccan Family Code stipulates the following: "If one of the parents of the child in custody passed away, he/she is replaced by his/her parents in organized visitation rights as per the previous provisions."



Article 186 compels the court to “take into account the child’s interests when applying the special articles related to visitation of the child, which gives those articles enough flexibility when taking any measures contrary to those stipulated in the law, when they are in the interest of the child in custody.”

Conclusion

This study addresses, in particular, women’s rights in the Kuwaiti Personal Status Law, compared with personal status laws in other GCC member states (the Omani Personal Status Law of 1997, the UAE Personal Status Law of 2005, and the Qatari Family Law of 2006), in addition to personal status laws and amendments in other Arab countries, in order to develop and amend those laws to accommodate new developments in the status of women in Arab society. Specifically noted are the Algerian Family Law, which was amended in 2005, and the Moroccan Family Code, amended in 2004, dealing with women’s rights in the Personal Status Law that was issued in 1993, as well as recent amendments to the Egyptian Personal Status Law of 2000.

In most areas that focus on a wife’s rights during married life and afterward, the 1984 Kuwaiti Personal Status Law is traditional in nature, whether addressing unilateral divorce, judicial separation, or the rights of her children. This is the result of a conservative cultural environment that opposes women’s equality in family relations, which Kuwaiti legislators reflected when they drafted this law in 1984. The time has come to review and amend some provisions of the law for the purpose of providing greater security for women and enhancing their family rights, in harmony with the increasing role of Kuwaiti women in public life and ultimately helping to develop Kuwaiti society.

Islamic Shari’a law is flexible and humanistic, and may be interpreted and applied in a manner that accommodates prevailing conditions, for the purpose of renewing Islamic interpretation (ijtihad) and jurisprudential comparison, to deal with the social and economic

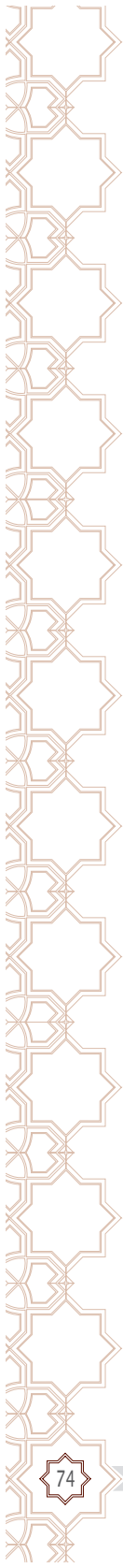
changes of these times. It is not in the public interest to cling to a specific school of thought and ignore the opinions of scholars of other Islamic schools of thought, which may be more pertinent and fair to women and their rights within the framework of the law, as some Arab countries' personal status laws have done, without deviating from Qur'anic texts that address issues relevant to women's rights in family relations. Islam honors human beings; women are human beings, and should be viewed and dealt with in this law on equal footing with men, without discrimination on the basis of gender.

Part IV: The Impact of Kuwaiti Family Law Court Rulings on the Promotion of Women's Rights

*By Attorney Wasmi Khalid Al Wasmi
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The mentality of Kuwaiti judges has not been inconsistent with the rights that the Kuwaiti personal status law guaranteed for women. Since the adoption of the law, judges have been attentive to the needs of Kuwaiti women, who are the most vulnerable parties in the marital relationship. Courts at various levels of the judiciary have managed to develop a number of legal norms that could provide even more guarantees than are explicitly stated in the current personal status law. It can be said that the judiciary has played a successful and crucial role in establishing women rights in practice, and that without such a judiciary, the written legal provisions could be subject to personal interpretation.

The system of family law courts in Kuwait started with Shari'a courts in the 1930s. In these courts, judges applied the principles of Shari'a according to their own religious interpretations. Initially, the courts were staffed by Islamic scholars who were assigned to serve as judges. Kuwaiti lawmakers were mindful of this arrangement as they developed the current personal status law, recognizing that the relevant rules of Shari'a should be explicitly stated in the legislation. Today's judges are not required to be religious scholars, but they



must be qualified in both law and Shari'a. This change is clearly reflected in the quality of the new judges' verdicts and their ability to interpret legal texts. They are better able to search for the intent behind the codified legislation that governs personal status, and to produce rulings that are consistent with the provisions and perhaps even the spirit and essence of the law.

Protection of Women's Rights

Family courts have played a crucial role in securing a sustainable living for the Kuwaiti family. Divorce is no longer the end of life for Kuwaiti women. It does not lead to the denial of their rights to child custody, housing, or alimony. Kuwaiti legislators and the Kuwaiti judiciary were keen to offer divorced women a free hand in life. They ensured that divorced women receive financial compensation after divorce occurs, as reflected in rulings that women have a right to compensation for the period of waiting after divorce and for the marriage period itself.

If a divorced woman has children, she is entitled, along with the rights above, to custody and a stipend for her role as a caretaker. She must also be offered a house for herself and her children, money to furnish it, wages for a housemaid, and compensation for the expenses of hiring one. A divorced woman is similarly entitled to have a car, a driver, and compensation for the expenses of hiring him. For example, a Ja'afari (Shiite) appeals court upheld a lower court's ruling, in case number 168 of 2006, that obliged the husband to pay 100 Kuwaiti dinars as a food and clothing stipend for his two daughters, and 150 Kuwaiti dinars every month to rent a house for them, starting from the date of the ruling that made this sum permanent. He also had to pay 1,500 Kuwaiti dinars, divided into monthly installments of up to 100 Kuwaiti dinars, for housing costs, and 20 Kuwaiti dinars every month to hire a housemaid to care for the two daughters. Because they were young and unable to earn money, the expenses for their care were an obligation of their father so long as they remained

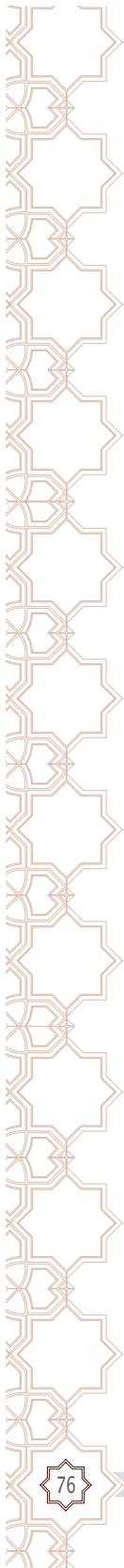
in the mother's custody. This care included a furnished house, a housemaid, and a car with a driver.

Family courts are not restricted to the stated rights that have been offered to women by the personal status law. They have also offered women payment for the costs of private education for their children, and the size of these payments are determined by the assets of the husbands, which are often substantial in Kuwait. A family court ruled in case 1079 of 2007 that the father was obliged to send his daughter, who was in the custody of his former wife, to private school. The court stated in its ruling, which has been upheld by an appeals court, that “the claimant is entitled to claim supplementary expenses to educate the daughter, and the father is obliged to pay 3,456 Kuwaiti dinars, which were the school expenses for the year 2006–2007, in accordance with reality and law.”

Evidence and Equity

Lack of evidence supporting women's financial claims does not prevent Kuwaiti judges from ensuring equity for aggrieved women. Instead, they have regarded any official or conventional documents proving that the husband has income, property, or assets—and indicating that he is solvent—as a warrant to ensure justice for the wife and restore her financial respect. Family court judges are examining cases with an approach that mixes what is apparent in the documents with their own convictions and discretion. In contrast, criminal court judges must convict defendants based on the law and the evidence, and civil court judges must rule according to what is apparent in the documents before them. Judges in most personal status cases refer the cases to be investigated, hear testimony from the witnesses, and question the two parties about their claims.

Recent rulings of the Kuwaiti judiciary, in confirming the rights for women stated in the personal status law, were built on many precedents. These include rulings citing any source of information that indicates the husband's wealth, including his frequent travel to



a commercial country, documentation of his exits from and entries to the country, ownership of shares in a given company, or ownership of a shop or any other piece of property. Consequently, the courts applying the personal status law have expanded the types of evidence available to ensure equity and protect women. Attempts by some men to renounce their obligation to provide women with their financial rights do not prevent them from paying these debts as required by the law, and originally by Shari'a. In case number 28 of 2006, a family court invoked these precedents in considering documents that were submitted by the defense lawyers, and decided that 210 Kuwaiti dinars should be paid as a monthly stipend for three children, 120 Kuwaiti dinars monthly for the claimant herself, and 40 Kuwaiti dinars as a monthly wage for a housemaid. The ruling was upheld by an appeals court.

Choice of Marriage Partner

The role that Kuwaiti family courts have played in maintaining Kuwaiti women's rights as stated in the personal status law cannot be ignored. The law first offers women the right to choose their own marriage partners, then gives them the right to seek divorce when they decide that the continuation of the marital relationship is impossible.

Confirming women's right to choose their marriage partners, a family court in case number 1651 of 2004 revoked the marriage contracts of two girls, signed by their father, who served as marriage guardian. In a separate ruling, the court approved the demands of the two girls to terminate the guardianship of their father, on the basis that he was not qualified to be a marriage guardian. An appeals court stated in case number 2131 of 2006 that the "defendant of the appealed case violated the rights of his daughter, the first claimant in the appealed case, as stated by Article 29 (b) of the Law of Personal Status (No. 51 of 1984), which gives a woman the right to have a say in her marriage. It was evident from the documents that the guardian singlehandedly signed the contract of his daughter's marriage without her knowledge or approval. This was evident in the final legal decision in case number

1651 of 2004, which revoked the marriage contract and ordered that it should be erased from the records and rendered invalid, a decision that has been upheld in the case number 1105 of 2006.”

The court added in its reasoning that “offending the first claimant in the appealed case resulted in damage because she was married and then divorced, contrary to the law and reality, forcing her to resort to the court to prove that her marriage contract was null and void. Based on that, the court decided, under its right to public guardianship and to supervise the acts of private guardians, that it cannot be satisfied with the continuation of his guardianship in terms of the marriage of his two daughters.”

Kuwaiti family courts should be further developed to shorten the periods of litigation in personal status cases, while considering the rights of defendants. Long delays in these cases should be decreased. Furthermore, judges of these courts should be better qualified and trained to address the submitted evidence, to have a positive effect on the cases they are hearing.



Women's Rights in Family Provisions
and Their Application in Shari'a Courts
in the Kingdom of Bahrain
(The Ja'fari Department)

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Introduction

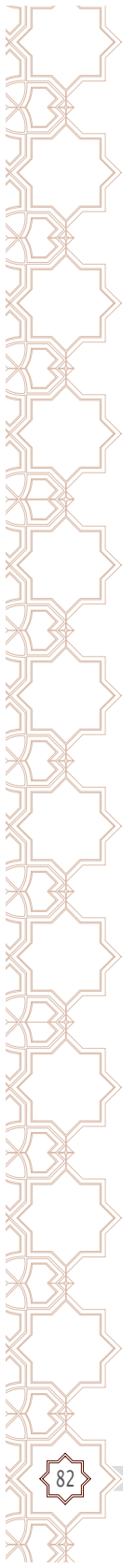
Legislation and Prevalent Norms: A Reciprocal Relationship

The relationship between legislation and social norms is always a reciprocal one. A society's prevailing norms reflect on legislation, just as legislation plays an important role in shaping social norms. This is evident in examining Shari'a law and its purpose. Shari'a (whatever its source of legislation) is a set of principles that seeks to regulate a person's social life. It correlates with the environment and its political, historical, and economic factors.

If the purpose of legislation is to achieve justice and human advancement, it cannot be separate from the social reality, particularly if the public is to accept it and submit to it in an effort to achieve a better reality.

It has been said that "law is born from the womb of culture." This means that a body of laws is often the product of culture, something absolutely impossible to bypass. For the law to be practical and applicable, it must take into consideration the time and place in which it exists, and abide by them.

For this reason, Islamic legislation evolved gradually. Islamic Shari'a directives developed in the midst of traditions and norms and sought to apply them gradually, rather than contradict them. It therefore limited the number of wives a man could take to four — something that had formerly been without limits — and made equality and fairness among wives a condition for sanctioning multiple marriages. In divorce, Islamic Shari'a awarded a woman the right to separate from her husband if he was abusive or if she resented living with him, a right she had formerly been denied. Shari'a also banned a husband from retrieving money or gifts given as dowry to the wife if the separation was initiated by him.



Islam also gave women the right to inheritance, in contrast to the prevalent norm at the time. This is provided by Al Tabari's commentary on the inheritance verse, "To the male the equivalent of the portion of two females" (Surat Al Nisa', Verse 11). The change was resented by the people, who consequently visited the Prophet and asked him how he could give the woman a quarter and an eighth and give the daughter and sister a half, when the woman does not ride a horse or fight the enemy or acquire plunder. This example illustrates the difference between purely religious rulings and those norms that regulate the management of society.

Social legislation, whether manmade or divine, must be based on objective foundations that take into account the status quo of the society and aim to improve it. The objectives of these principles are not symbols or vague codes but must be understood by anyone who examines the relationship between them and the reality on the ground. As such, one can differentiate between permanent human norms and laws that shift as circumstances change. This is one of the major responsibilities shouldered by specialists in Shari'a study, especially at the present time, when the status quo is changing rapidly in all aspects in terms of the family, a woman's role in the family and society, and the relationship between men and women.

Part I: Women's Rights During Married Life

Women's Rights during the Engagement Period

1. A woman has the right to refuse a man's engagement proposal, regardless of his characteristics and attributes. It is not incumbent on the woman to marry; rather, she has the option to do so, no matter how old she is or what the attributes of the proposing man are.

In this regard, the Hadith, related by the Prophet, states, "If someone comes to you of whose commitment to his faith

and morals you approve, then accept him for marriage, and if you do not, then there shall be dissention on earth and great corruption.”¹ At that time, these words were for the benefit of the guardians of the woman’s marriage, warning them against refusing a competent man and leaving the woman unmarried. The woman at that time did not undertake the marriage contract herself, and so the Hadith is not addressed to her.

2. Prior to agreeing to the marriage contract, a woman has the right to see the man who is proposing to her. This is meant to directly introduce the two parties to one another, and to enable them to investigate the level of agreement between them. If the woman is satisfied with the agreement, she can then confirm her acceptance of the man. This helps to avoid a divorce due to disagreements that might result from differences of opinion or diverse personal approaches, in the case of a hastily conducted marriage ceremony.
3. A woman has the right to change her mind about her promise of marriage. A marriage is legally established through the marriage contract, which is a solemn covenant. As stated in God’s words, “*They have taken from you a solemn covenant.*”² The promise without the contract has no legal value.
4. If it is the man who changed his mind about the marriage without providing appropriate reasons, the woman has the right to keep the gifts she received from him during the engagement period.

A Woman’s Right to Determine her Eligibility for Marriage

1. An adult woman has the right to undertake a marriage contract herself or assign another person, even a foreigner,

¹ *Muqadimat Al Nikah*, Ch. 28, Hadith 2.

² Surat Al Nisa’, Verse 21.

to do so. This is the requirement of the contract to which she is party.

2. No relative of a woman — even her father — may force her to marry. This is supported by the tale about Al Imam Ja'far Al Sadiq, who said, "The virgin daughter may be requested, but she may not be married without her permission."³
3. At the time that this research was conducted, it was prevalent in the Ja'fari Shari'a court for a daughter to give herself in marriage only with her father's permission. However, there is a strong argument among many Shiite Imams that an adult woman should be able to give herself in marriage without having to seek her father's permission. This is indicated in some statements found in *Wasa'il Al Shi'ah*, by Al Sheikh Al Hurr Al 'Amili, particularly the chapter about the guardians of the contract. They relate the following about Al Imam Ja'far Al Sadiq: "There is no problem for the adult woman to give herself in marriage, if she accepts such without her father's permission."

The late scholar Al Sheikh Muhammad Jawad Mughniyah (d. 1979) said, "The majority of *Al Imamiyah* said that when a woman reaches maturity, she has control over all her actions, including contracts and others, and even marriage, whether she is a virgin or not. So she may contract for herself and others directly or by proxy, upon positive acceptance, whether she has a father or grandfather or other male relatives or not, and whether the father accepts or not, and whether she is of high social stature or not, marrying a man of high social rank or not, and no person may object, for she is just like the man without any difference."

Guidance on this matter could be taken from the Qur'an, which states, "*Place not difficulties in the way of their marrying their husbands,*"

³ *Muqaddimat Al Nikah*, Ch. 7.

and from a Hadith narrated by Ibn Abbas that quotes the Prophet as saying, “The single person is better unto herself from her guardian,” and the single person is one who has no spouse, a man or a woman, a virgin or not.

Guidance can also be taken from reason, which indicates that every person is fully free to do what he or she wants, and no other person, near or far, has any authority over him or her.⁴ The contemporary scholar Al Sheikh Muhammad Sadiq Al Ruhani (b. 1345 AH) said in *Fiqh of Al Imam Al Sadiq*, “An adult woman may give herself in marriage without her father’s permission; and you may say that no one has authority over her marriage contract, whether she has a father or not.”

Based on these opinions, the texts that noted the father’s permission did so out of courtesy to him and out of consideration for the prevalent norms at the time.⁵

A Woman’s Right in the Case of Her Father’s Objection

1. The objection occurs when the father unfairly forbids his daughter from marrying a competent man. This is banned by Shari’a because of its injustice toward the daughter. In this case, the woman may raise the issue with the judge in order to give herself in marriage. The ban on such an objection comes in the Qur’anic verse, “*Place not difficulties in the way of their marrying their husbands,*” and was also related by the Prophet when he said, “There shall be no harm and no infliction of harm in Islam,” as well as the report from Al Sadiq, who said, “The grandfather is worthy of that unless otherwise harmful.”⁶ Thus, neither the father nor the grandfather — or any others — are allowed to forbid the woman to marry a

⁴ Book on Marriage and Divorce of the five schools — Maghniyah.

⁵ *Al Wasa’il*, Ch. 9, Hadith 4–6.

⁶ *Al Wasa’il*, Ch.11, Hadith 2.

competent man, unless there is a legal or customary reason determined by the judge.

2. If an adult virgin daughter claims that her father objects to her marriage, she may file a suit with the judge to prove her case.

Judicial Example: Sentence Issued by the Ja'fari Shari'a Court in the Kingdom of Bahrain on December 1, 2004

According to Ja'fari fiqh provisions, if a guardian objects to his daughter's marriage, forbids her from marrying for irrational reasons, and deviates from Shari'a objectives by forcing her to marry an incompetent man or banning her from marrying a competent man, the guardian's permission's is hereby rendered null and void upon the agreement of jurists. God said, *"Place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness."*⁷

This is the case: the father, the defendant, objects to the marriage of his daughter, the plaintiff, to the man who proposed to her in marriage and whom she accepted to marry. The father showed no signs of facilitating his daughter's marriage by attempting to resolve the standing problem. The plaintiff is in her mid-thirties, an age at which people refrain from marrying, which entails damage to her from delaying her marriage in the case of family disputes that may remain unresolved. The father did not object to the proposing man and does not have any legal pretext or reason for refusing this marriage, whether religious, moral, or education-based. The court finds no legal or Shari'a justification that would prohibit the independence of the plaintiff in giving herself in marriage to the proposing man following the defendant's objection and his refusal to facilitate the marriage. Therefore, the court sees no objection to deciding that the plaintiff is free to give herself in marriage to the person who came forward

⁷ Surat Al Baqarah, 232.

to engage her, even after the guardian's objection and refusal to facilitate the marriage, according to the text of the decision.

Women's Right Regarding Marriage Competence

1. Competence is required as a condition for the validity of the marriage contract, as is a simple similarity in religion. The husband of a Muslim woman should be Muslim, but union in Fiqh School is not required.⁸
2. Compatibility in financial or social standards is not required if the husband and wife are each knowledgeable of and content with the other's status. It is said that the Prophet approved the marriage of Al Miqdad Ibn Al Aswad to Daba'a Bint Al Zubair Ibn Abdul Muttalib, so that people should know that "the most noble among them in the eyes of God is the one who is the most pious."⁹
3. If the wife sets a condition of a description or status for the husband, or if the situation required such a condition, but it later turned out that the required condition was not met, the wife may demand that the contract be dissolved. This goes under the category of "covering up," in the sense that the truth was obscured or a defect was covered up, to the ignorance of the other party. If there was a cover-up by the husband — whether by showing a good side that was not genuine, or covering a defect — the wife has the right to request a divorce.
4. The right to annulment disappears if the wife knew about the cover-up and accepted it.
5. If the wife annulled the contract because of the husband's cover-up, her right to the dowry does not disappear.

⁸ Al Sheikh Muhammad Jawad Maghniyah, "Introductions to Cohabitation and its Manners," Section 26, in *Al Ahwal Al Shaksiyah*.

⁹ Section 26 of the *Introductions to Cohabitation and its Manners*.

A Wife's Rights during Marriage

1. A wife has the right to refrain from fulfilling her husband's rights until he fulfills hers. This is referred to as the Principle of Reciprocal Rights, according to God's words, "*And women shall have rights similar to those against them according to what is equitable.*"¹⁰ This indicates reciprocity of rights in marriage. It is further supported by the story related by Al Sharif Al Radi, in *Nahj Al Balagha*, related by Imam Ali, which says "Right is the widest in agreement and thinnest in division. What one does, one receives and vice versa. Otherwise, this is solely to God. He has made some of his rights as rights to some people, making them equal and supporting to each other, but no one is superior to another; all are complementary."¹¹ In summary, the wife has the right to refrain from providing the rights of the husband until he provides her rights.
2. A wife has a right to receive from her husband not only material things, but also moral elements such as protection, care, and freedom from abuse in word or deed. Among material rights:

Dowry. This may include all legal and known wealth, such as silver and gold, real estate and other investments, as well as benefits such as education. According to the Prophet's words, "We accept you for marriage with what you have from the Qur'an, or carrying out a certain work" according to principles:

- The dowry has no set value. Its major value was mentioned in God's words, "And if you gave one of them a bundle, you shall not take from her anything." Also, in the Prophet's words according to "*al miqdar*

¹⁰ Surat Al Baqarah Verse 228.

¹¹ *Nahj Al Balagha*, Speech 216.

al basit,” the small amounts are relevant: “Give them even an iron ring.” In a story related by Al Sadiq, it is said, “You shall name the dowry you have agreed upon, whether large or small.”¹² These statements demonstrate that the dowry is a symbol of respect, like a present – which is significant no matter how small it is, because it is not the material value that counts.

- The amount of the dowry due varies between two conditions: as a valid contract whereby she deserves half if the marriage is not consummated, as is referred to in the phrase, “And if you divorce them before consummation, but after the fixation of a dowry [is due to them], unless you remit it, or the man’s half is remitted,”¹³ or full consummation, in which case a wife deserves the full dowry.
- A wife may refuse intercourse with her husband until she receives her full dowry.
- The dowry is a wife’s full right, and she is not obligated to share it with anyone. She may use it as she wishes and as she uses her own wealth, as long as she is mentally capable of doing so. She may also give it to her husband, partially or fully.
- A wife has the right to request a delayed dowry that is due at death, divorce or when demanded, so that she can obtain a guarantee if she is divorced or her husband dies.
- If the husband included a condition in the contract that he would not pay dowry, saying, “I marry you

¹² *Wasa'il Al Shi'a*, Section 18, Al Hadith.

¹³ Surat Al Baqarah Verse 237.

but no dowry is due to you,” and she said, “I accept,” the condition set by the husband and the acceptance by the wife are null and void, and the contract is valid, and the wife shall receive a dowry equal to what is paid to those women similar to her beauty and to her social and educational status.

- If both parties neglected to mention the dowry—for instance, if the man said, “Take me as your husband,” and she agreed, without mentioning the dowry, and if there is clear evidence that the wife delegated the husband to estimate the dowry, he shall have what she delegated. But If there is no evidence to this, she shall have an agreeable standard dowry.

Judicial Example: Sentence Passed on April 15, 2005

The defendant requested that she be given the balance of her dowry. The rules of the Ja’fari school stipulate that a wife deserves her full dowry immediately after legal consummation and after a valid contract that cannot be abated except by the husband’s performance or the wife’s releasing the husband from his responsibilities. It is proved that the defendant married the plaintiff according to the marriage certificate number and her advance dowry was 500 Bahraini dinars. Legal consummation took place between them, as proved by their children and their judicial testimony. The defendant testified that he owes her 200 dinars that were due to her from her dowry, and she did not acquit him, as evident from the fact of the litigation. Hence, it is decided that the defendant shall pay the balance of 200 dinars of the dowry according to the text of the sentence.

A Wife’s Right to Alimony, according to the principles:

1. Alimony includes food, clothing, shelter, services, medication and other benefits as per social norms. Alimony also includes recurring needs, according to life’s requirements

and advancements. Islamic Shari'a has imposed alimony on the husband, according to God's words, "*Live with them on the footing of kindness and equality.*"¹⁴ This refers to those elements entailed by modern life, as situations change.¹⁵ Al Sheikh Al Tabarsi (d. 548 AH) explained God's words by saying, "*Retain them on equitable basis,*"¹⁶ in his book *Mujamma' Al Bayan fi Tafsir Al Qur'an*: "It is retaining them in a good acceptable way by Shari'a." This verse supersedes all anecdotal reports, including whatever statements contradict it and specify financial support in certain areas should be ignored. The principle of followers of the Ahl Al Bait School is to relate all Hadith to the Qur'an, and what agrees with it shall be taken and what contradicts it is rejected.

2. A wife's alimony is estimated according to her status and her husband's abilities. If he is poorer than her, the minimum is set according to his abilities, according to God's words, "*Let the man of means spend according to his means and the one whose resources are restricted, let him spend according to what God gave him.*"¹⁷ God also said, "*No soul shall be burdened with more than it can afford.*"¹⁸
3. Forms of alimony:
 - Food, drink, clothing, medicine, and medical services.
 - Beauty products and cosmetics.
 - Provision of household help. A wife who is used to being served in her family home has the right to request service from her husband if he can afford it.

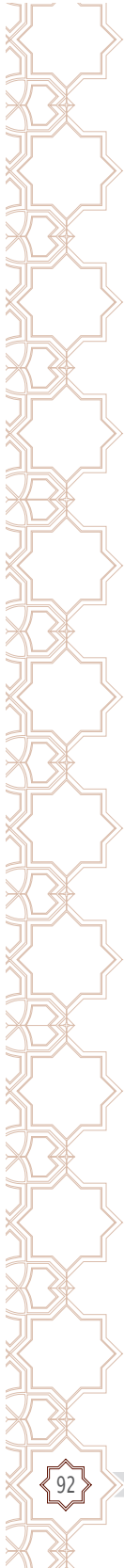
¹⁴ Surat Al Nisa', Verse 19.

¹⁵ Shamsuddin: Critical Issues in Women's Jurisprudence.

¹⁶ Surat Al Baqarah, Verse 229.

¹⁷ Surat Al Talaq, Verse 7.

¹⁸ Surat Al Baqarah, Verse 233.

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- The right to residence. A wife's residence should be for her and her children only, unless her husband otherwise included a condition in the contract or agrees with his wife on it beforehand. She has the right to refuse to cohabit with the husband in a residence with his family, with another wife, or with his children from another wife, in such a way that she loses her independence in the residence. The scholar Al Hilli (b. 648 AH) said in his book *Irshad Al Ad han*, "She has the right to be in a separate house from other company, with her husband."
 - A wife has the right to a separate residence with separate entrances and exits, unless she accepts what is less, because the residence stipulated by Shari'a is the one that provides security and safety to the wife, and this is not fulfilled, normally, in a shared residence, especially if the second wife resides in it. God said: *"Let the woman live (in 'Iddah) in the same style as you live, according to your means. Annoy them not so as to restrict them."*¹⁹
 - The residence should include all necessary services and utilities, including lavatory, bathroom, kitchen, bedroom, closet, and sufficient furniture and equipment for respectable living. That includes bedding, covers, kitchen utensils, cleaning and disinfecting agents, aromatics and soft drinks in summer, and other similar things required for living in ease.²⁰
 - The level of a wife's status, as well as that of her husband, is taken into consideration when considering

¹⁹ *Masa'il Harijah fi Fiqh Al Mar'ah*, p.147.

²⁰ Al Sheikh Fadil Al Saffar, *Fiqh Al Usrah*.

their residence, as a requirement of living in kindness. Taking into consideration the husband's status is in accordance with God's words, "*House them where you live, by your own volition.*" Though the verse is related to the divorced woman, it includes the priority of the actual wife, because the right of a divorced woman branches off from her marriage before the divorce.²¹

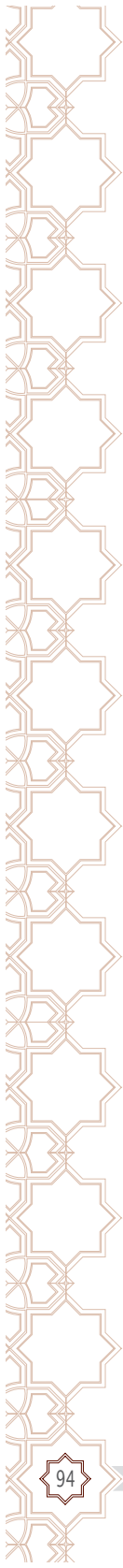
Judicial Example: Sentence Issued on February 25, 2007

In this case, the court listened to the verbal defense, examined documents, and heard legal deliberations according to jurisprudence and the *Imami* school of fiqh. These outlined that the basis of understanding about the residence provided by the husband is that the husband should house his wife in a separate residence from others, one that is appropriate for her and provides safety and security, according to his financial status. It should also be free of his family and relatives unless she approves, and harm should not be inflicted on her through pressure at her place of residence. Relevant quotes included, "House them where you live, and according to your means, and do not hurt them," and "God does not burden a soul more than it can accommodate." If any of these conditions are absent from the marital residence, it is the right of the wife to refrain from cohabiting with her husband, and she will not be considered disobedient.

The evaluation of whether the marriage home is in accordance with Shari'a requirements includes the basic requirements of life and sufficient utilities and is in accordance with the husband's status and circumstances is a matter to be decided by the relevant judge, according to what he sees in the case's conditions and evidence.

The plaintiff in this case requested that judgment be passed in his favor to force his wife to return to the marriage home. Arguments failed to prove, however, that the residence he prepared for them is

²¹ Sahih Al Bukhari, Hadith 5364.



according to Shari'a. It was legally determined that the residence is not a separate home, as it is shared with his family on a permanent basis and the stairs leading to her apartment are shared by them, requiring her to pass through their residence. The defendant is not on good terms with them, as is evidenced by her reporting them to the police. Additionally, the residence is not appropriate for her because it does not have sufficient utilities and services; namely, the kitchen is shared by his family and the plaintiff refused to change it. A wife is not required by Shari'a law to live with her husband's family in one house unless there is a legal provision in the marriage contract to this effect. And even if such a condition exists, she is not required to bear the harm resulting from living with them, according to the principle, "No harm and no causing of harm," included in the subject of the case.

As the plaintiff has failed to prepare the appropriate residence for the defendant and has no acceptable excuse, despite the fact that he is financially capable of doing so, judgment against the defendant to oblige her to return to the married home prepared by the plaintiff is henceforth withheld, unless the basic conditions for a Shari'a accepted residence mentioned above are met. Hence, the defendant is not considered insubordinate as long as she refuses to return to the married home for a legitimate reason.

4. If a husband who refuses to support his wife financially is capable and has the resources to do so, such as a bank account, rent from property, or returns from a trade, from which the alimony may be taken, the judge will enable the wife to take her alimony through legal measures. A proof of this is an anecdote: Hind, the wife of Abu Sufian, came to the Prophet and said that her husband was a stingy man and did not give her enough money to support her and her children, unless she took from him in secret. She asked if she had done something wrong. He answered: "Take what is sufficient for you and your children in good faith and kindness."²²

²² *Sahih Al Bukhari*, Hadith 5364.

Al Imam Ja'far was once asked, "Who should I support?" He answered, "The parent, the child and the wife."²³

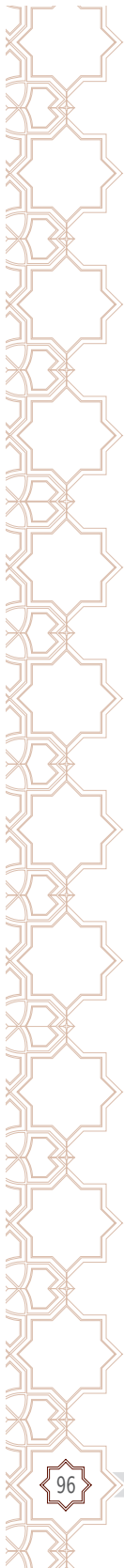
If the husband is poor, and incapable of paying alimony, and the wife is financially capable, she has the right to obtain a court decision to have the money she spends considered a debt against the husband, which he must repay when he makes more money. Hence, the husband is not required to spend his money because he has the excuse of poverty. God said, "*Grant him time till it is easy to repay.*"²⁴ The wife is not required to pay alimony or participate in it unless she volunteers to do so. With this judgment, the rights of the husband and wife are satisfied.

5. If a husband declines to provide one or more of his wife's rights, she shall have one of three choices:
 - Refrain from fulfilling his rights until he fulfils hers.
 - Obtain the right on her own, if she is capable of doing so, provided no graver harm is inflicted or caused, according to the prophet's words, "Take what is sufficient for you in kindness."
 - Refer her case to the judge, who will obtain the right for her. If he cannot, she has the right to request a divorce, and the judge shall respond to her request even if alimony is not possible because of the husband's poverty and inability to support her financially. This principle was adopted by the modernizing scholar Al Sheikh Shamsuddin in his book, *The Shari'a Judge Divorce*.

6. What is meant by the disobedience of a wife who loses her rights is that she violates what God has established as laws

²³ *Wasa'il Al Shi'a*, Section 26 under Alimony.

²⁴ Surat Al Baqarah, Verse 280.



for a wife, in the interest of her husband. Total and complete obedience is not required from a wife toward her husband; there is no evidence of this in the Qur'an or the Sunnah. Hence, what is known and definite is that a wife's alimony abates in specific cases in Shari'a texts, such as if she does not make herself available to her husband, or refuses to move to the marriage home without a legitimate or Shari'a reason.

The Shari'a rationale is that everything connected to Shari'a is important, including duties and prohibitions that may compete with the man's rights, such as during the wife's menstrual cycle, or when she is performing Shari'a duties, such as prayer, fasting, pilgrimage, and required family visitation, for disrupting such duties is prohibited.

- A wife is not disobedient if she left the home to work, provided this is stipulated in the contract, or her husband married her when she was working and did not require her to leave work.
 - A wife is not disobedient if there is a rational prohibition, such as if the husband has a contagious disease or is impotent, or if the wife has an illness, and the customary prohibition such as that which entails severe discomfiture from living with him.
7. A wife may refrain from obedience to her husband for those actions that contradict cohabitation in kindness. As God said, *"Live with them in kindness,"* and, *"They are owed what they owe us in kindness."* Whatever actions contradict this principle among related Hadith should not be taken. One example is the report related by Abdullah Ibn Sinan, that a man from the supporters (*Al Ansar*) at the time of the Prophet went out to do some business, and asked his wife not to leave until he came back. Her father fell ill, and she sent to the

Prophet asking permission to visit him. The Prophet said, “Sit in your house and be obedient to your husband.” Then her father became sicker, and she asked the Prophet again, and he said, “Stay in your house and be obedient to your husband.” Then her father died, and she asked permission to go pray in his funeral, and he said, “Stay and be obedient to your husband.” She then sent to the Prophet saying her father was buried, and he told her, “Your father has been absolved and forgiven because you have been obedient to your husband.”²⁵

This story contradicts the spirit of the Qur’an, because prohibiting a woman from visiting her sick father and attending his funeral and burial does not represent cohabitation in kindness, but rather a harm that is proscribed, and a violation of cohabitation and living in kindness. Any related texts that contradict the Qur’an must be dropped.

- A wife does not have to do housework in her husband’s house unless they agree on this when preparing the contract. This was stated by major Shi’a scholars, including the one known as the Second Martyr (d. 966 AH) in his book, *Masalik Al Afham*. But it is more likely that the husband and wife cooperate in serving each other due to the positive effects this has on engendering compassion and love.
- Provisions by the Ja’fari Shari’a courts tend not to use the term “house of obedience,” which was prevalent in some fiqh usages, and replace it with the term “marriage home.” It seems there is no such term in related traditions, but that it developed through the accumulation of interpretations at various stages. This term may give the impression that Islam aims to impose

²⁵ *Al Wasa’il*, Section: 91. Section on Prologues to Copulation, Hadith 1.

a wife's complete subservience to her husband, but that is not true. Both husband and wife have responsibilities and duties that they must observe equitably.

8. A wife may set a condition that her husband not take her out of her country unless she grants him the permission to do so.
9. In a valid contract, alimony must be paid by a husband to his wife, even if she is wealthy.
10. The right to financial support is established for the wife if she does not object to going out with him and being alone with him. The subject of support is the wife's, and it does not abate except in one case; namely, if she refuses to fulfill his rights without reason.
11. Alimony for a divorced woman becomes active retroactively as long as she is in 'Iddah, and the same applies for a first-time divorcee if she is pregnant by the divorcing husband.
12. A wife may demand guarantees for future financial support if her husband decides to travel. The scholar Ahmad Kashif Al Ghita' (1344 AH), in his book *Safinat Al Najat (The Ship of Salvation)*, supports this principle, stating, "The husband should, according to his wife's request, guarantee her support for the future as well as the present and the past."
 - For a wife to receive guarantees for future financial support, she should not be disobedient.

Judicial Example: Sentence Issued on April 27, 2004

It is decided by Shari'a and according to the provisions of Ja'fari jurisprudence that a wife has the right to demand from her husband a guarantee for the future if he plans to travel without taking her with

him. The wife, the plaintiff, asked for guarantees of future financial support because her husband, the defendant, was traveling to India and would be away for more than one year. Her husband appeared before the court and asserted what the plaintiff said, and brought in a guarantor of support, who would support her financially when he traveled to India. The guarantor pledged to support the plaintiff financially, including all fees related to the court case provisions, in case the husband refrained from support. Hence, the court sees no objection against responding positively to the plaintiff's request and making (...) a guarantor of her financial support on behalf of the defendant as soon as he leaves the country for the period mentioned in the case file.

13. A wife has the right to request that her current financial support be increased if it is demanded by a change in social norms regarding the level of basic needs or a change in price levels in the country.
14. If a husband refrains from payment, a wife's financial support is considered a debt for the husband that begins at the date of refraining from payment, and does not abate until payment is made or is excused.
15. As proof that Islamic Shari'a gives priority to the wife, her support takes priority over that of relatives and all other debts.
16. A wife has the right, while her case for financial support is being examined, to request temporary support. This will involve immediate implementation enforceable by law.
17. If a husband has a debt due to him from his wife and wants to clear it against her financial support, and if the wife is capable of paying the debt but refuses to do so, he has the right to perform clearance on a daily basis making part of the debt as part of the financial support each day. If

she is incapable of repaying the debt, he may not perform clearance against support, because repaying the debt is based on what is over and above the financial support.

18. The time for financial support expires in the following cases:
 - Fulfillment or forgiveness.
 - Death of the husband or wife. Previous expenses are considered a debt by the deceased husband to be paid by his heirs.
19. Financial support is proved judicially for the wife starting from the date it is legally due according to her request. If no time is set, it is from the date when the court case was filed.
20. If husband and wife disagree about payment dues, with the husband claiming payment and the wife denying it, or if they agree about support but disagree on the amount deserved by the wife, with the wife claiming that the husband has not paid, the husband shall have the burden of the proof and its sufficiency.²⁶
21. A wife may, after divorce, take over what the husband has paid her if it is something that is not perishable with use, such as clothing. The general principle is that these items belong to the wife, and the husband has no power over them once they are hers. This is supported by the fact that the husband's claim of the right to replace the wife's clothes with others whenever he wishes is considered demeaning to her according to social norms and contradictory to the principle of cohabitation in kindness.²⁷

²⁶ Wives' Alimony in Islamic Shari'a by Al Sheikh Aref Al Basri.

²⁷ Family Jurisprudence (*Fiqh Al 'Usrah*) by Al Sheikh Fadil Al Saffar.

Wife's Right in Polygamy

1. A wife has the right to present a condition in the marriage contract that she will represent herself in her divorce from him if he takes another wife against her approval. The condition is considered binding and cannot be revoked.
2. The judiciary may take measures to protect the woman by setting a condition that ensuing polygamy be supervised by the judiciary, in order to demonstrate that the husband is capable of protecting the family, and to achieve justice among his wives. These measures do not violate the permission in God's words, "*Marry women of your choice*,"²⁸ but rather are developed to satisfy the conditions mentioned there and to indicate that they are observed.

A Woman's Right to Responsibility

A wife has the right to demand those actions from her husband resulting from his responsibility to her, indicated by Surat Al Nisa', which asserts, "Men are responsible for women." Many linguists and Qur'anic interpreters agree that responsibility is a right that require from women, men, it does not indicate men's authority over women.

Ibn Manzur said in his lexicon *Lisan Al Arab*, related by Ibn Berri, "Responsibility may mean preservation and reform, and hence God's words, Men are responsible for women, and His words, "except what you are committed to taking care of," meaning, resilient and committed. Al Khoury said in *Aqrab Al Mawarid*, "Man is responsible for woman, or he maintained her and served her."

A group of scholars and interpreters maintained the same position. Judge Abdulaziz Ibn Al Barraj (400–481 AH) stated in *Al Muhadhdhab*,

²⁸ Surat Al Nisa', Verse 3.

“Men are responsible for the rights of women over their husbands.” This is also evident in comments by Al Zahir Ibn Al Rawandi (d. v573 AH), who said in *Understanding the Qur’an*, “God has said, ‘Men are responsible for women. Anyone responsible for someone is responsible for their matters, including their expenses, clothing... etc.’”

Al Imam Al Razi also mentioned this in his “Grand Interpretation” (*Al Tafsir Al Kabir*). The great speaker Ali Ibn Ibrahim said, in explaining the verse, “It means that God stipulated that men support women financially.” Al Qurtubi interpreted the verse as “Stimulus and response; or they spend on them and defend them.”

In summary, it is the responsibility of a man to support his wife financially and protect her. It does not give him the power of superiority or guardianship. As for God’s words, “*According to what God preferred some over the others and according to what they spend,*” refers to preferring the man for his physical strength, which qualifies him for the role of protecting women, and preferring him in the ability to make income and shoulder difficult responsibilities, which qualifies him for the role of supporting women financially.

Part II: Women’s Rights In the Dissolution of the Marital Relationship

A Wife’s Right to Invoke Divorce

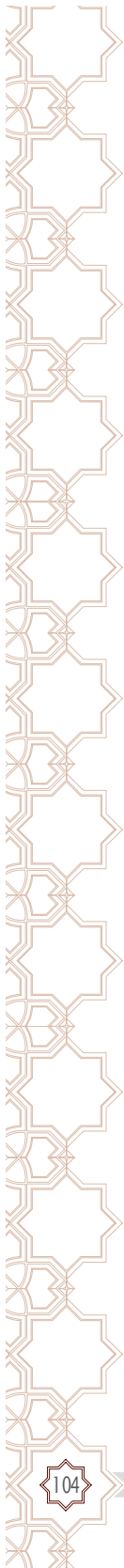
1. A wife has the right to set a condition with her husband that she will represent herself in divorcing him in situations outlined in the contract. The representation is binding and irrevocable.

Judicial Example: Sentence Passed on April 13, 2006

In light of Ja’fari jurisprudence provisions, which apply to this case, a wife has the right to initiate divorce if she was assigned by the

husband to represent herself in a divorce case. According to principle, “Believers follow the conditions as their contracts,” and in this case, the wife, the plaintiff, had set the condition in the marriage contract that she has that right. That condition is evident in the contract presented to the court, showing that the plaintiff may represent herself when she sees it appropriate and in her interest. Her husband, the defendant, did not deny the wording of the condition, and hence the condition is considered valid by Shari’a law. Thus the plaintiff’s right to initiate divorce herself was upheld as part of the Shari’a marriage contract that was established. Based on the above, the court saw it proper to approve the plaintiff’s request and grant her a divorce from the defendant, a one-time revocable divorce as stipulated in the wording of the decision.

2. Imami Shi’ite scholars impose stringent measures on divorce cases and divorced couples, as well as divorce certificates’ wording and witnesses. The idea behind this is that marriage is protection, sincerity and compassion. God said in Surat Al Rum, Verse 21, *“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 hearts.”* In Surat Al Nisa’, Verse 21, He said, *“And how could you take it, after you have given yourselves to one another, and they have received from you a solemn covenant?”* It is important that this covenant not be broken except within minimum limits, and within specific conditions. The Ja’fari jurisprudence has specified these conditions as follows:
 - A person invoking divorce shall be sane, adult, discriminating and aware of what he or she is saying. A divorce of the insane, compelled, or drunk shall not take place.
 - A divorced woman shall be pure and clean and has not been approached by her husband. This is according to



God's words, "*O Prophet, when you do divorce women, divorce them at their prescribed 'Iddah.*"²⁹ 'Iddah here is the period during which the woman knows she is not pregnant. This can only happen through "purity" and abstaining from sexual intercourse. The wisdom in this condition is to make sure that the woman is not pregnant from the first husband, in order to avoid mixed lineages.

- The divorce is conditioned upon conclusiveness, meaning that it is not contingent upon any future event or events that may not take place.
 - The divorce council should include two fair witnesses who are aware of the council's mission, according to God's words, "*And take for witness two persons from among you, endowed with justice.*"³⁰ The presence of the two witnesses leaves the option open that they may convince the married couple to find an amicable outcome other than divorce, which is the most hateful permissible act to God.
 - What is meant by fairness of the divorce witnesses is that they are intent on righteousness and do not insist on committing actions that are prohibited by Shari'a.
3. If a wife is a Shi'ite and her husband is from another school of fiqh, and he divorces her, the divorce may be invalid according to her school but valid according to his. In this case, the judge will have to decide if the divorce is valid. Imams have agreed that every person is responsible for his or her actions as outlined in his or her school. In a story

²⁹ Surat Al Talaq: Verse 1.

³⁰ Surat Al Talaq, Verse 2.

related by Al Sadiq, every follower of a school is to be treated according to that school, and should not be compelled to do otherwise.

This jurisprudential principle shows clearly that Islam respects the rights of other religions and faiths, establishing a profound level of coexistence and plurality.

A Wife's Right to the Number of Divorces

There are three separate divorces, meaning that the second time the husband invokes divorce will not be considered until the first divorce is reconciled, because divorce indicates the husband leaves his wife. As for the actually divorced woman, there is no meaning to her being divorced once again. Hence, the divorce attached to a number does not involve reverting to married life. So if the husband says, "you are divorced" three times, it is considered only one divorce.

If a husband divorces his wife, then returns to her, then divorces her again, then divorces her a third time, he cannot return to her or remarry her with a new contract, until she marries another man, by her own choice and accord, and then separates from him, according to God's words, "*A divorce is permissible only twice. After that, the husbands should either retain their wives together on equitable terms or let them go in kindness.*"³¹ What is meant here is that the divorce where return is permitted can take place only twice. As 'Aisha said, the men in Jahiliyah (the period before the advent of Islam) used to divorce their wives whenever they wanted, and would then return to them during their 'Iddah, and could do this a hundred times. A man among the Ansar (supporters of the Prophet) was angry with his wife, and said to her, "I shall never come to you, and you shall not be permissible to me, and I shall not give you shelter." She said, "How?" He said, "I will divorce you, and when your 'Iddah is almost over, I

³¹ Surat Al Baqarah: Verse 229.

will take you back.” The woman told the Prophet, and hence the verse was established that “*a divorce is permissible only twice.*”³²

A Wife's Right to Khula'

1. Khula' is a divorce that is invoked between a married couple in exchange for compensation paid by the wife to her husband. It was named Khula' because God made the husband and wife suitable for each other like clothes that cover the body, according to Surat Al Baqara verse 187, which says, “*They are your garments and you are their garments.*”
2. The condition for Khula' is that the wife despises her husband and requests to divorce him.
3. A husband has no right to be abusive in demanding compensation, according to the Prophet's words, “God and His messenger are devoid from the one who treats his wife badly until she invokes Khula'.”³³ The husband should not exaggerate his request for compensation, in accordance with the prophetic tradition, “No harm and no causing of harm.” The judge may assign a reasonable and adequate amount of compensation for both parties. The husband may not ask for whatever he desires. Shari'a texts have shown that the husband does not have a right to take from the wife in Khula' more than what he gave her — except in one case, which is if the wife in Khula' admits openly and clearly to adultery (Al Wasa'il, Part IV of Khula' Sections).
4. Ibn Abbas was reported to have said that the wife of Thabit Ibn Qais, who hated her husband because he was ugly, came to the Prophet and said, “O Prophet of God, I have nothing against him regarding his manners or his religion, but I hate

³² “*Nail Al Awtar*” by Al Shawkani.

³³ *Al-Wasa'il*, Section 2 of Khula'

him and hate to be an infidel to Islam.” The Prophet asked, “Would you return what he gave you?” She said, “Yes.” He said to the man, “Accept the money and divorce her.”³⁴

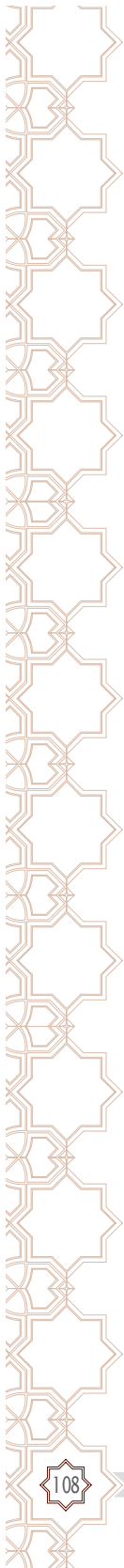
5. A wife may not surrender her right to child custody in exchange for a divorce, unless the judge thinks it is in the interest of the children; custody is not a pure right of the custodian, and the interests of the children in custody must be taken into consideration.
6. If the Khula' took place in the right manner, the compensation agreed upon should be paid. None of the wife's rights that were already due her and not part of the compensation disappear.
7. Both parties may renege on the Khula' before it is completed, because until implemented, it is considered a promise with no legal ramifications, even though it should be kept by Shari'a.
8. If a wife requests a divorce on the grounds of harm having been inflicted, and presents proof to the judge, she has the right to be granted the divorce, and the husband has no right to demand compensation for the divorce. It was reported that Al Imam Al Sadiq said, “Without harm being inflicted, the husband has no right to divorce her by Khula' unless she asked him for it.”³⁵

A Wife's Right to Separation Judgment

1. Shari'a texts indicate that divorce is the right of a husband, but this is not absolute; it assumes a situation in which the wife is not in harm if the normal marital relationship continues. God prohibited the husband from keeping the

³⁴ *Al Bukhari*: “Khula' and Ways of Divorce.”

³⁵ *Al-Wasa'il*, Section One of Khula'



wife and inflicting harm, saying, “Do not retain them to injure them, or to take undue advantage” (Surat Al Baqara: Verse 231). Shari’a law also specified the marital status according to God’s words, “Husbands should either retain their wives together on equitable terms or let them go with kindness” (Surat Al Baqara Verse 229). This comment refers to only two situations: retaining the relationship in righteousness or separating in kindness.

For this, the late Al Sheikh Muhammad Jawad Mughniyah said in his book, *Personal Status*, that a wife has the right to request separation from her husband if she has sustained harm by him. A wife can also request separation if she finds it impossible to be with him. The judge must approve the wife’s request for a separation, if reconciliation is impossible.

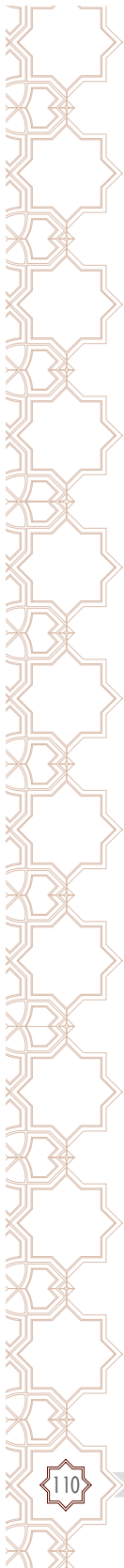
2. Reasons for legal decisions to separate husband and wife:
A **first reason** for divorce is harm resulting from the continuation of married life. This is according to the Prophet’s saying, “No harm and no causing of harm in Islam.”
 - There is no distinction made regarding the type of harm that qualifies the wife for divorce, including whether it is religious or celestial. Furthermore, there should be no distinction made between a bad choice of a husband — such as one who refuses to support his wife financially, has bad manners or is addicted to alcohol or drugs — and other reasons that have nothing to do with the choice — such as being financially incapable to the extent of causing harm to the wife, having an infectious or chronic disease, being jailed for an extended period of time, or being unable to engage in sexual intercourse.
 - Harm that leads to the request for a divorce is placed in the context of social norms; hence, modern

legislators opt to consult norms in such cases by specifying those cases considered to be harm, as related to time and circumstances. Scholars consider physical and psychological diseases as causes for harm, as well as other reasons that may lead the woman to worry about the potential for committing proscribed actions, as stated by Al Sayyid Muhammad Kazim Al Yazdi (b. 1256 AH) in his book, *Mulhaqat Al 'Urwa Al Wuthqa*.

- The common practice in Ja'fari Shi'ite courts is to require evidence, in the form of two witnesses, as a condition for proving harm. Experience, however, has shown that this is not a feasible requirement; frequently, harm that occurs within the family is only witnessed by the husband and wife or those close to them, and the testimony of such people may be prejudiced by a relationship with one of the parties. As a result, some decisions recently passed have opted to accept objective evidence that provides the judge with sufficient evidence of harm. The late Sheikh Muhammad Jawad Mughniyah, in section six of his book, *Fiqh Al Imam Al-Sadiq*, stated that the Shari'a evidence that the judge may rely on concerns not only the two witnesses, but includes all of the information provided to the judge regarding the case.

Judicial Example: Sentence Passed on February 8, 2007

Imami jurisprudence stipulates that according to the law judging the details of the case, if a wife claims harm inflicted by her husband to the degree that cohabitation with kindness cannot continue between them, she may request the Shari'a judge to separate them and grant her a divorce, on the basis of evidence for harm inflicted, if the harm was proved by Shari'a law.



Separation as a result of harm takes place when one party in the married couple is harmed to the point that the married relationship cannot continue, whether from material reasons that can be proved by one party, or physical ones as proved by one of the Shari'a methods. The harm may also be caused by other circumstances typical to married life, such as disaffection, repugnance, or severe hatred. Even if the wife is the one requesting divorce for harm and it cannot be proved by the other party, cohabitation cannot continue amicably.

Estimating the level of harm is an objective matter to be decided by the case judge, who will investigate its circumstances, conditions, and documents, as well as the couple's statements, comparing them with useful evidence derived from documents provided by the parties. If harm is actually proved, and the judge fails to reconcile them, divorce shall be decided.

The decision in the Court of Appeals was that the relevant court has the full power and authority to evaluate evidence submitted in the case and derive from it what is relevant, provided its interpretation is feasible (Appeal No 167 for the year 1999).

The court reviewed this decision, as well as what it derived from reviewing the case documents, including the criminal judgment number (...) issued by the Military Court against the defendant, which was approved by the relevant authorities. The court determined that conflict had existed between the couple for the past 13 years, with supporting photographic evidence showing the level and variety of injuries inflicted on the body of the plaintiff, the wife, and a medical report stipulating that the defendant, the husband, attacked the plaintiff physically, with severe beating that resulted in numerous injuries. Such action violates the Shari'a principle decided by jurisprudence; namely, that the husband shall protect his wife in body and religion and not harm her in any way or form. Furthermore, estrangement is itself considered harm that may surpass the harm caused by beating and verbal abuse. Hence, the court decided that the defendant's behavior towards the plaintiff represented a serious

aggressive harm and abuse that required separating them by Shari'a by severing their marital bond through divorce.

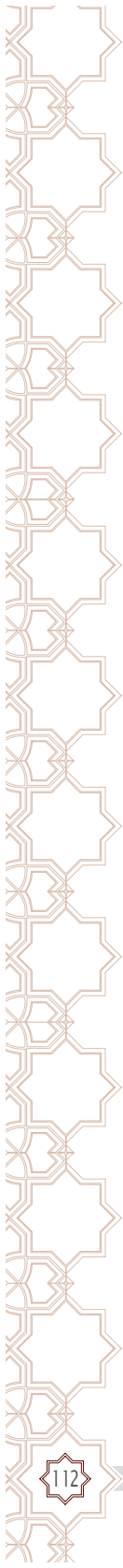
Sheikh Hussain Al Helli (d. 1394 AH) said in his book, *Jurisprudence Research (Buhuth Fiqhiyah)*, "The Shari'a judge may compel the husband to divorce his wife in order to release the wife, or the Shari'a judge himself can do that by imposing divorce, if the husband refuses to dissolve the marriage." The contemporary scholar Al Sheikh Muhammad Shamsuddin said, "If the continuation of the marital relationship is a source of dissention and corruption, because of the husband's insistence on maintaining the marriage bond and refusing to divorce his wife, then the husband's control over divorce disappears in order to end corruption and its causes. If the wife requests divorce from the Shari'a judge, and the husband refuses to divorce her and cannot be compelled, the judge shall have power over her divorce." And if the husband refuses divorce in obstinacy, the court will approve the plaintiff's request and divorce her from her husband in a first divorce with evidence for harm, according to 'iddah stipulated by Shari'a, in accordance with the decision's text.

A **second reason** for divorce is if it is impossible for cohabitation to continue in kindness, even if no harm would affect the wife if the married life continued. The proof of this is God's words, "*Retaining her in kindness, or letting her go in good faith,*" whether this is the choice of the husband or not. The verse indicates that it applies to both parties. If they can cohabit in kindness, he has a right to retain her. Otherwise, he has to let her go if she wants and requests it.

A wife's request for divorce on the grounds that she detests her husband and is repulsed by him in such a way that married life cannot continue falls under this judgment.

Judicial Example: Sentence Passed on June 14, 2006

The plaintiff submitted her case file, which declared her hatred toward the appealed defendant, her repulsion for remaining with him, and



her desire to be separated from him because cohabitation with him in kindness had become unbearable. She added in the case file that she was requesting divorce by Khula' in exchange for a compensation of two 2000 dinars, representing the full amount of her dowry as indicated in the marriage contract. Dissention had become rampant, she said, and her severe hatred for her husband, the defendant, had been proved. However, he refused to divorce her, and insisted on his demands as mentioned in his case file, asking that she return to the matrimonial home. The plaintiff refused to return under any circumstances, believing that she was not able to fulfill God's requirements in the marriage. The court postponed the case more than once to leave an opportunity for reconciliation, but it bore no fruit. As the marriage contract is one built on mutual agreement and a contractual basis of a special kind, according to the Qur'an: *"And they shall receive what they shall give in kindness."* In order to maintain life and honor, the legislator permitted divorce for the man. He permitted it too for the woman, on the grounds that if they remained married, her husband could become estranged from her and not support her financially, or in case she sustained harm in the process, or became resentful towards him, resulting in a corrupt married life that would lose all the characteristics determined by Shari'a.

Severe hatred leads to difficulties and deep embarrassment for the wife in the resumption of married life, and she may worry that she cannot fulfill God's requirements with her husband in married life, and be unable to satisfy him, risking falling in sin. All these are objective issues that the court can sense from the case, and from the surrounding evidence and the husband's and wife's testimony, as well as the documents and memoranda they submitted.

The court decided to impose a Khula' divorce between the husband and wife. The compensation the plaintiff offered is appropriate for the requirements of justice and fairness and does not cause any harm to the defendant and holds no prejudice against him. The husband refused obstinately to allow a divorce, which gave the court the right to impose it. Al Sheikh Yusif Al Sani', the contemporary scholar said,

“If the woman hates the man, she can forfeit her dowry and resort to divorce by Khula‘. Our scholars, as well as a group including Al Sheikh Al Toussi, a prominent scholar of the fifth century, passed a Fatwa that Khula‘ is a solution to be imposed on men, and if a man refused to divorce his wife, the court has the power to enforce the divorce.” For these reasons, the court decided to enforce divorce by Khula‘ for the plaintiff in exchange for compensation of two 2000 dinars, representing the full amount of her dowry.

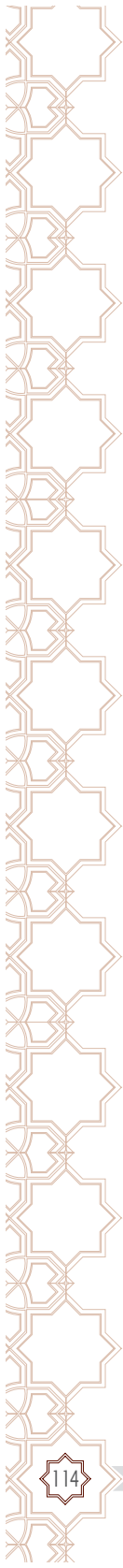
A **third reason** for divorce is the husband’s inability to satisfy his wife’s desires, which can be categorized as creating harm and embarrassment, as well as worry that the wife may commit the unpermitted.

This is because “retaining with kindness,” according to the verse of the Qur’an, includes sexual closeness as well, and the husband’s inability to satisfy the wife’s sexual needs causes embarrassment and the worry of committing scandal, which is contrary to the ideal of “retaining with kindness.” This theory was adopted by a prominent jurisprudence scholar, the late Al Sayyid Muhammad Kazim Al Yazdi, in his book *Appendices to Al ‘Urwa Al Wuthqa*.

A **fourth reason** for divorce is estrangement. If the husband is completely estranged from his wife, and she is suspended without either man or divorce, she has the right to refer her case to a Shari’a judge. The husband will be compelled to apply one of two solutions: either end the period of estrangement or divorce her so she can marry another man. If he does neither, the judge may use all other measures permitted by Shari’a to divorce her, because she requested it and because the judge is her guardian in this case.

Legal Example: Judgment Passed on November 15, 2007

The defendant, the husband, has been estranged from the plaintiff, his wife, since 1995, leaving her without alimony. This is proved by the plaintiff’s evidence, and the court is convinced of the truth



of her testimony, as supported by a letter from the Department of Immigration, Passports and Residence. The testimony of their two daughters also supports the case, testifying that their father left them and their mother for a period of over 10 years without any legitimate justification. And whereas the plaintiff has referred her case to the Shari'a judge to divorce her from her husband for estrangement, this court has decided to uphold the plaintiff's request to divorce her from her husband, a divorce with evidence of estrangement.

A **fifth reason** for divorce is lack of financial support.

- If a husband does not support his wife because he is incapable of doing so, the wife may refer to the Shari'a judge who would order the divorce. If the husband refuses, the judge can divorce her from her husband according to the wife's request, because the Shari'a judge is considered the wife's guardian.
- If a husband is not supporting his wife financially although he is capable of doing so, the wife may refer her case to the Shari'a judge, who will compel the husband to support her or divorce her. If the husband refuses to do either, the judge can divorce them, guided by the Shari'a text quoted in "Al Wasa'il" by Al Sheikh Al Tusi, based on 'Asim Ibn Hamid, related by Abi Basir Al Muradi, who said, "I heard Abu Ja'far say, 'If someone had a wife, and he did not clothe her sufficiently to cover her nakedness, or feed her enough to sustain her, the Imam is obligated to separate them'" (*Al Wasa'il*, section 49, from the book titled *Al Zawaj Al Hadith*, Hadith 6).

A **sixth reason** for divorce is if it is discovered that the husband has been afflicted with a defect since before the contract was negotiated. This judgment is not attached to any specific defects. If the defect recurred after the contract, the wife may request that the judge revoke her contract.

Judicial Example: Case No. 14-2006-1126-9

The defendant and his representative did not respond to the testimony of the plaintiff, although given ample opportunity. As a result, the court shall adopt testimony based on a report from the Psychiatry Hospital: “The patient named above [the defendant] began treatment at the Psychological Medicine Hospital on (...). It was decided, after review of his file, that he suffers from a chronic psychological depression manifest in the following symptoms: sadness, insomnia, lack of appetite, fatigue, seclusion, lack of desire to talk with people around him, neglect of personal hygiene, desperation, lack of energy, lack of interest in mingling with people, and recurring suicidal thoughts. The patient was admitted to hospital for these reasons. He was given a number of medications, but his situation did not improve. He left the hospital the next day, against medical advice, and discontinued treatment. He was contacted by the hospital staff to come back to hospital for treatment but declined to come.” The above indicates that the plaintiff sustained serious harm from the continuation of the marriage, which justifies a divorce judgment for harm, according to the text of the decision.

Part III: A Woman’s Rights After the Dissolution of the Marital Relationship

A Woman’s Right to ‘Iddah

1. ‘Iddah is the time period during which the divorced or widowed woman refrains from marrying another man.
2. For ‘Iddah to be valid, the marriage must have been consummated and the wife cannot be so old that her menstruation has stopped.
3. Types of divorce and Khula’:
 - A woman goes into pregnancy ‘Iddah if she is pregnant, according to God’s words: “*For those who*

*carry (life within their wombs), their period is until they deliver their babies.*³⁶ The maximum period for pregnancy is one lunar year.

- If she is not pregnant, her ‘Iddah is three lunar months, even if she does not see the menstrual blood because of an illness. If she does not see the blood because she is too old, no ‘Iddah is required.
 - A woman can also take ‘Iddah for three pure periods, including the pure period when the divorce took place.
 - If the woman in ‘Iddah reported the three pure periods she shall be accepted, provided she spends a period long enough for the end of ‘Iddah to be possible.
4. Provisions of divorce and Khula’ include the following principles:
- The ‘Iddah period is calculated from the date that the divorce or Khula’ took place.
 - If the divorce is revocable, the wife can stay in the home of her divorcing husband and he may not send her away, according to God’s words, “*And turn them not out of their homes.*”³⁷
 - If the divorce is final and irrevocable, the divorced woman may pass her ‘Iddah any place she desires.
 - The divorced woman shall receive alimony from her divorcing husband as long as she is in ‘Iddah, and she shall inherit from him if he dies while she is in ‘Iddah.

³⁶ Surat Al Talaq: Verse 4.

³⁷ Surat Al Talaq Verse 1.

A Wife's Right to Compensation for Separation

1. A divorced woman is due compensation from her husband, who must give her a sum of money appropriate to her status, and in acceptance of the fair separation invoked in God's words, "*So give them a present and set them free in a becoming manner.*"³⁸ It is narrated that Al Imam Muhammad Ali Al Baqir said, regarding God's words, "Give them a present' indicates 'make them look beautiful as best as you can.'"³⁹
2. In assigning the compensation amount, the two parties should refer to the relevant judiciary, unless they agree amicably on a set amount.
3. The dowry and the compensation are not to be mixed. Often, the compensation judgment is concerned with the case whereby the divorced woman does not receive a dowry, which is the case if the man divorces the woman before the marriage was consummated, and they were not in agreement over the dowry amount. This is indicated in God's words, "*There is no blame on you if you divorce women before consummation or the fixation of their dowry, but bestow on them a suitable gift; the wealthy according to his means and the poor according to his means. A gift of reasonable amount is due from those who wish to do the right thing.*"⁴⁰

A Mother's Right to Custody

1. Custody is the protection and sponsorship of the child for the purpose of rearing and maintaining him or her.
2. There are three principles the Imami Shi'ites follow that

³⁸ Surat Al Ahzab Verse 49.

³⁹ *Al Wasa'il*, Section 49 of the Modern Marriage book (*Al Zawaj Al Hadith*).

⁴⁰ Surat Al-Baqara Verse 236.

outline the period during which the woman deserves custody of the child:

- *Principle One:* Two years only for the boy and seven for the girl, after which period the father has custody.
- *Principle Two:* Seven years for both the boy and girl, after which time custody reverts to the father. This principle is currently being applied in Ja'fari Shari'a courts in the Kingdom of Bahrain.
- *Principle Three:* The mother has custody until the child, male or female, reaches the age of puberty and becomes an adult. After that, he or she is given a choice between the father and the mother. This principle was advocated by prominent Shi'a scholars, such as Al Mufid (d. 413 AH), Silar, and Judge Ibn Al Barraaj,⁴¹ and is the one that should be followed. As stories mentioned in the issue of custody vary and conflicting and cannot be followed in context, and the principle should be applied that upholds the mother's right to custody until an established objection is proved — namely, that the child, male or female, becomes an adult and he or she selects someone other than the mother. This principle is also supported by some Prophetic traditions, which say, "*The mother has the right to custody of the child unless she marries,*"⁴² and another statement by Al Imam Ja'far Ibn Muhammad Al Sadiq, "The woman has more right to the child unless she marries" (Al Wasa'il, Section 81 of the Children's Rights Provisions Hadith no. 4).

⁴¹ *Jawahir Al Kalam fi Sharh Shara'i' Al Islam*, Volume 31.

⁴² *Mustadrak Al Wasa'il*, Section 85 of the Children's Rights Provisions, Hadith 5.

As the scholar Al Sadouq (d. 381 AH) stated in his book, *Al Muqni'* and the scholar Abu Ali stated that "the mother has more right to keep the daughter if she is not married."

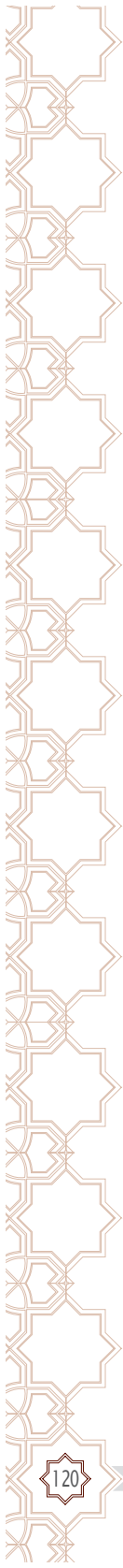
1. The custodian's conditions:

- The custodian should be of the same religion as the child in custody, free of chronic or infectious diseases, trustworthy, and capable of managing the affairs of the child.
- If the man has custody, it is normal in Ja'fari Shi'ite courts in the Kingdom of Bahrain that he should have a housekeeper to take care of the child and his or her affairs.

Judicial Example: Court Decision Dated June 24, 2007

The appeal was launched as a request to cancel the decision granting custody of the two children to their father. The appeal is based on documented evidence that he is incapable of rearing them, and provides neither the security nor the shelter they need. It is decided by Shari'a, and in light of the Ja'fari jurisdiction law that should be applied to the case, that whoever has custody of the children should be sane and guarantee their safety. Custody concerns not only the right of the father or mother, but also the rights of the child, and ends only when the child becomes an adult. The purpose of the child's custody is to rear him, nurture him and guarantee that he receives food, clothing and shelter and that he is clean and all his affairs are cared for, as compared to simple Shari'a custody. Among the first duties of custody is the competence of the custodian to take care of all of the child's needs.

As this is the case, it is clear from the case documents, as well as the appealing father's testimony, that he does not provide a proper residence for the child. He lives in his father's guest room with the



two children; the apartment inspected in the same building is not his, as he had made the court representative believe, but belongs to his father's wife. This was confirmed and stated by the defendant, the father, in the local newspapers. Statements testified that he has "become homeless after he left his father-in-law's house upon his divorce from his wife, and his father's house is dilapidated and has one room where all his sisters sleep. Twelve people live in his father's house in addition to his father and his wife, and his brothers and relatives are incapable of hosting him. He sleeps with his two children in his car, and spends most of his time in shopping malls to use their facilities." In addition, his mother is old and sick and unable to take care of the two children.

Therefore, the defendant cannot provide security for the children, and is not competent to do so. The conditions for custody are present in the plaintiff, the mother, in appeal, and the defendant has not provided any proof to support his claims that the mother is incapable of taking care of the two children. The court sees no evidence in his testimony that proves her incapacity. Therefore, it is clear that it is in the children's best interests to be in their mother's custody, and that transferring them to their father's custody poses a danger to their welfare, especially as the father's competence has not been established. As a result, the court has decided to cancel the decision appealed in this court and will uphold the plaintiff's request, giving her custody of the children according to the decision's wording.

- If the mother marries another man, custody of the child, male or female, is transferred to the father. This occurs, however, only when the mother cohabits with another man. This is established because of the possibility that the child may sustain harm from living with a foreign man, or from losing the mother's care due to her preoccupation with a new man's affairs.
- This opinion was approved by the late scholar Al Sheikh Yusuf Al Bahrani (d. 1186 AH) in his book, *Al Hada'ik Al*

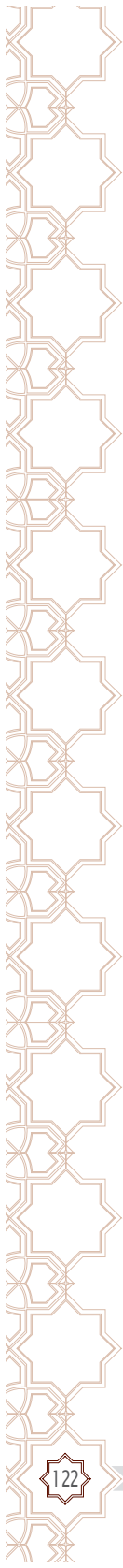
Nadira fi Ahkam Al 'Itrah Al Tahirah, in the Provisions of Pure Custody.

- If the father is absent or has lost eligibility for custody, custody of the child, whether male or female, remains the mother's responsibility, even if she cohabits with another man; custody does not automatically transfer to one of the child's relatives unless the judge deems it otherwise necessary for the child.

Judicial Example: Appealed Case No. 15-2005-75-7

The appellant, the father, based his appeal on the fact that the Ja'fari school, which has jurisdiction in this case, stipulates that the mother's custody disappears if she marries again. The court of first instance, however, based its decision on the fact that custody abates with marriage in the case of the father only; the mother's custody does not abate even if she marries. It is well-known in the Ja'fari school that if one parent is lost, custody transfers to the other. Custody does not transfer to the grandfather if the mother is present, and custody does not transfer to the grandfather if the mother is present. Sheikh Al Najafi (d. 1266 AH), in the book *Jawaher Al Kalam fi Sharh Shara'i' Al Islam*, stated that "the mother has more right to the child even if she were married." The contemporary scholar Al Sayyid Al Sistani also stated in the book *Manhaj Al Salihin*, "If the father dies, the mother has more right to the child's custody until he or she reaches puberty, regardless of whether she married again or not." For these reasons, the court refused the appeal and decided that the child should remain in his mother's custody.

2. A custodian mother has the right to keep all her children, and the judge is required to implement her request if the interests of the children in custody require it, especially if separating children in custody causes them harm.
3. Custody reverts to whoever lost it if the reason for its



abatement is removed. If the mother lost custody because of her marriage and cohabitation with another man, and then she left him, she regains the right to custody. That is, she is still the mother, and the objection to her having custody was removed. This opinion ensures that the rights of the custodian and the child in custody are taken into consideration.

4. A husband should prepare an appropriate place of residence for his children and their custodian.
5. The child in custody can only spend the night at his or her custodian's house, unless the judge decides otherwise for the benefit of the child.
6. A child's right to receive child support from his father does not abate as long as the child is in need, even if he chooses to remain with the mother.
7. If a mother has custody and prevents the father from seeing his children, this is not a reason for the father to stop supporting the children.

Judicial Example: Appealed Case Number 15-205-70-6

Upon reaching puberty, the boy has elected to remain with his mother. Being still of school age, he needs financial support and his father is responsible for him. The appellant, the father, stated that the defendant prevented him from seeing his son, and as a result, he had discontinued the child's support. The court determines that this appeal is invalid: the appellant's inability to see his son is not grounds for the cancellation of the support.

8. A custodian may demand to receive the child support payments. When setting the amount of the support and the manner of paying it, the father's financial status shall

be taken into consideration, as well as the interests of the child.

9. The custodian may demand charges for nursing, to be paid by the provider of the support.
10. Judgment of custody must be followed by the custodian's receipt of the birth certificate and all other documents belonging to the child in custody.
11. The direct parents have priority in taking custody of the child; custody shall not transfer to others if at least one of the parents is present, unless the child's interests require otherwise.
12. If the parents die, or lose eligibility, it is up to the judge to appoint custody to the closest relative, keeping the child's interests in mind.
13. The child, male or female, is given a choice at puberty and adulthood of which parent he or she wants to live with.
14. The father may not travel with the child in custody unless the custodian mother approves.
15. Custody may be delegated if the child's interests permit.

Mother's Right to Visitation

1. If she is not the custodian, a mother may visit or take the child for visitation, provided this does not violate the child's rights or cause harm to the custodian.
2. A custodian mother may request that the place and time of visitation be set according to her conditions and the child's interests.



Judicial Example: Sentence Passed on September 13, 2006

The plaintiff, the father, requested to set the period for visiting his son, who is in the custody of his mother, the defendant, at three times a week and for a period of five hours every time. The court determines that this request cannot be accepted due to the possibility that it exposes the child to hardship, contradicting the intentions of Shari'a law in caring for the child's interests. This is especially the case when the child is still at a nursing age, which requires that the visitation period be restricted to two hours at a maximum, the natural period after which the infant requires nursing, according to an attached medical report. It is also clear to the court that the defendant was right in her claims that for the plaintiff father to see the child at the social center posed hardship to her, due to the distance between her residence and the social center. Hence, the court sees fit to approve her request by ruling that visitation occur at her residence, according to the text of the decision, and that it is in the infant's interest to spare him too much movement. The decision takes into account a combination of the custodian's rights, the child's rights and the father's rights.

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Women's Rights in Family Provisions
and Their Application in Shari'a Courts
in the Kingdom of Bahrain
(The Sunni Department)

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Introduction

Women's Rights in Islamic Shari'a

Islamic Shari'a has sought to maintain women's rights ever since the mission of Prophet Muhammad (may God's prayers and peace be upon him), as summarized by God's words, "*But, in accordance with justice, the rights of the wives [with regard to their husbands] are equal to the [husbands'] rights with regard to them,*"¹ doing away with many societies' formerly oppressive norms that deprived women of their most basic human rights. Prior to that, women were considered either part of a man's belongings, present just to give him pleasure until another woman came along, or an abomination to be avoided or a target when other tribes raided. During the *Jahiliyah* (the age of ignorance that preceded Islam), some Arab tribes even considered it fitting to dispose of women by burying them alive.

In a number of Qur'anic texts and the Prophet's Sunnah, Islamic Shari'a details women's rights according to their relationship, depending on whether the woman is a mother, wife, daughter, sister or other relative. Some of these texts, including Surahs in the Qur'an, are named for women in general (Surat Al Nisa' ["women"]) or for specific women, such as Maryam (Mary, the mother of Jesus).

Among the verses that stipulate women's rights, God's words point out the rights of mothers: "*For your Sustainer has ordained that you shall worship none but Him. And do good unto [your] parents. Should one of them, or both, attain old age in your care, never say 'Ugh' to them or scold them, but [always] speak unto them with reverent speech, and spread over them humbly the wings of your tenderness, and say: 'O my Sustainer! Bestow Thy grace upon them, even as they cherished and reared me when I was a child!'*"² He also said, "We have

¹ Surat Al Baqarah, Verse 228.

² Surat Al Isra', Verses 23-24.

*enjoined upon man goodness towards his parents: his mother bore him by bearing strain upon strain, and his utter dependence on her lasted two years. [Hence, O man,] be grateful towards Me and towards thy parents, [and remember that] with Me is all journeys' end."*³

Abu Hurairah narrated that a man came to the Prophet and said, "O Prophet of God, who of people is best for my companionship?" He said, "Your mother." The man said, "Then who?" And the Prophet said, "Your mother." And the man said, "Then who?" And the Prophet said, "Your mother." The man then asked, "Then who?" And the Prophet answered, "Your father."⁴

Each of the parents is allocated a share in inheritance, according to God's words, "*And as for the parents [of the deceased], each of them shall have one-sixth of what he leaves behind, in the event of his having [left] a child; but if he has left no child and his parents are his [only] heirs, then his mother shall have one-third; and if he has brothers and sisters, then his mother shall have one-sixth after [the deduction of] any bequest he may have made, or any debt [he may have incurred]."*⁵

As for the wife, the Qur'anic texts have outlined the nature of the marriage, according to God's words, "*And among His wonders is this: He creates for you mates from among yourselves so that you might incline towards them, and He engenders love and tenderness between you: in this, behold, there are messages indeed for people who think!"*⁶

He also said, "*And consort with your wives in a goodly manner."*⁷

³ Surat Luqman, Verse 14.

⁴ Related by Bukhari, 5626, and Muslim 2548.

⁵ Surat Al Nisa', Verse 11.

⁶ Surat Al Ruum, Verse 21.

⁷ Surat Al Nisa', Verse 19.

In His farewell address, the Prophet said, *“Beware of God with your women, for you have taken them at God’s trust, and availed their privacy with the word of God.”*⁸

According to ‘Aisha, the Prophet also said, *“The best of you is the one best with his kin, and I am the best of you towards my kin.”*⁹

Similarly, the Almighty outlined women’s rights concerning inheritance, according to His words, *“...And your widows shall have one-quarter of what you leave behind, provided you have left no child; but if you have left a child, then they shall have one-eighth of what you leave behind, after [the deduction of] any bequest you may have made, or any debt [you may have incurred].”*¹⁰

As for girls, God said about their right to inheritance, *“Concerning [the inheritance of] your children, God enjoins [this] upon you: The male shall have the equal of two females’ share; but if there are more than two females, they shall have two-thirds of what [their parents] leave behind; and if there is only one daughter, she shall have one-half thereof.”*¹¹

The Prophet also talked about a woman’s right to a good upbringing, saying, *“He who affords good treatment of girls shall have them as a shield against the fire [of hell].”*¹²

As for sisters, their share of the inheritance is outlined in God’s words, *“They will ask you [O Muhammad] to enlighten them. Say, ‘God enlightens you about the laws concerning [inheritance from] those who leave no heir in the direct line. If a man dies childless and has a sister, she shall inherit one-half of what he has left, just*

⁸ Related by Muslim 1218.

⁹ Related by Al Tirmidhi 3895 and Ibn Majah 1977 and with proper chain of narrators.

¹⁰ Surat Al Nisa’, Verse 12.

¹¹ Surat Al Nisa, Verse 11.

¹² Related by Al Bukhari, 5649, and Muslim 2629.

as he shall inherit from her if she dies childless. But if there are two sisters, both [together] shall have two-thirds of what he has left; and if there are brothers and sisters, then the male shall have the equal of two females' share.' God makes [all this] clear unto you, lest you go astray; and God knows everything."¹³

According to Anas Ibn Malik, the Prophet said, "Whoever supports two or three daughters, or two or three sisters, until they die or he dies before them, I and he shall be like these," and pointed his middle and index fingers to indicate "in heaven."¹⁴

Brief Overview of the Shari'a Judicial System in Bahrain

In January 1999, a decree was issued for Law No. 4 of 1999, amending some provisions of the decree for Law No. 13 of 1971, regarding regulation of the judiciary.

Article 1 of the decree states:

The following stipulations shall replace Articles 17, 18, and 20 of the decree for Law No. 13 of 1971, regarding regulation of the judiciary:

1. The High Shari'a Court of Appeals
2. The Grand Shari'a Court
3. The Shari'a Court of First Instance

Each is specialized in examining cases referred to it according to the law.

Each court shall be composed of two departments:

1. The Sunni Shari'a department
2. The Ja'fari Shari'a department¹⁵

¹³ Surat Al Nisa', Verse 176.

¹⁴ Related by Ahmad, 12520 with proper chain of narrators.

¹⁵ *Official Gazette*, 2354 (January 1999), 29.

Each department is specialized in examining personal status cases for Muslims based on the jurisprudence school of the plaintiff¹⁶ at the time of litigation.

As an exception to the provisions of the previous paragraph, specialization in cases related to Shari'a marriage contracts shall be based on the school of thought in which the marriage contract was concluded, and this shall be specified according to the Shari'a circuit, or the judge who documented the marriage contract.¹⁷

Court specialization is based on the husband's jurisprudence school at the time that the marriage contract was concluded, if there is a documented marriage contract, or if the contract was documented outside the State of Bahrain and not ratified by either of the two departments.

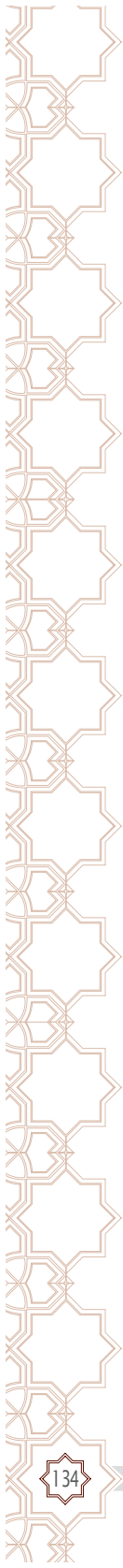
The Shari'a courts specialize in addressing cases dealing with inheritance, gifts, wills, and endowment (*Waqf*) according to the testator's school of thought, or that of the grantor or endowment initiator.

According to Article 18, the Shari'a court of first instance shall be responsible for judging at the initial level the following cases and matters:

1. A wife's financial support, child support of all types, and financial support and compensation among relatives, including requests for increasing, decreasing or canceling the amount.
2. Rights of custody, safekeeping and traveling with the child to another country.

¹⁶ Any Sunni or Ja'afari.

¹⁷ If the Shari'a marriage official who documented the marriage contract is Sunni, specialization in cases resulting from this contract shall be in Sunni courts, even if the husband and wife, or one of them, is Ja'afari. Specialization in both cases depends on the *fiqh* school of the marriage official (Sunni or Ja'afari) who officiated the contract.

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3. Proof of inheritance, guardianship, wills, grants, and control of lineage information.
 4. Authentication of Shari'a legal documents of all types, testimonials of all types, and documentation of certificates of social status, endowment documents and their amendments, provided documentation laws are not violated.

The Grand Shari'a Court specialize in first instance judgments in the following types of cases:

1. Court cases related to marriage, such as proofs of marriage, returning one's wife and applications, divorce, Khula' (divorce requested by the wife in exchange for compensation to the husband), divorce by mutual consent, and separation between husband and wife for all Shari'a reasons.
2. Cases involving proof or negation of lineage.
3. Cases related to interdiction for insanity, delusion, absent-mindedness, and loss of competence due to a mental disorder.
4. Cases related to proof of absence, missing persons, and their return or proof of death.
5. Cases related to endowments.
6. All cases of personal status that are not the specialization of the Shari'a courts of first instance.

They are also concerned with final judgments in appeal cases referred to them by judgments issued by the Grand Shari'a court in its first instance capacity.¹⁸

¹⁸ The Grand Court and the Higher Court of Appeals are composed of three judges each, a chairman and two members.

Article 20 says that decisions issued by the Sunni Shari'a department shall be appealed at the Sunni Shari'a department of the relevant court. Decisions issued by the Ja'fari Shari'a department shall be appealed at the Ja'fari Shari'a department of the relevant court, regardless of the school of thought followed by the appellant or the party that is appealed against.

According to Article 2 of the decree for Law No. 4 of 1999, an additional paragraph shall be added to the text of Article 21 of the decree for Law No. 13 of 1971, regarding regulation of the judiciary, as follows: The Shari'a Court of First Instance shall be composed of a single judge.

Article 3:

- a. A paragraph shall be added after the first paragraph of Article 27 of the Decree for Law No. 13 of 1971, regarding regulation of the judiciary, as follows: The judge appointed to the Shari'a Court of First Instance shall have acquired his law license, Bachelor's degree in law, or license in Shari'a science at least two years prior, and should have spent that time working in the legal or Shari'a field.
- b. The term "or Shari'a" shall be added after the word "legal" at the end of the second and fourth paragraphs of Article 27.

Article 4: Article 19 of the decree for Law No. 13 of 1971 on regulation of the judiciary shall be deleted.

Article 5: Every Sunni and Ja'fari Shari'a court of law shall refer to Shari'a cases it may have that have become the jurisdiction of another court, according to the provisions of this law, at the stage they have reached, informing the litigants and requiring them to appear before the court of jurisdiction to which the case was referred.

The provisions of the previous paragraph do not apply to cases appealed by objection, and are subject to methods and dates of appeal at the time they were initiated.

Article 6: The Minister of Justice and Islamic Affairs shall implement this law, and it shall be applicable one month after the date of publication in the *Official Gazette*.

The Bahraini law also gives special attention to differences in religious faiths by approving Christian marriages in Bahrain.

The decree for Law No. 9 of 1971 makes a number of stipulations: Article 1: Every marriage concluded in Bahrain by a qualified man of religion, and according to the norms and rituals of the relevant church, shall be considered valid, regardless of whether it was concluded before or after applying the provisions of this law.

Article 2: Religious procedures and rituals for Christian marriages are to be held in the following churches, or any church licensed to perform religious rituals in Bahrain by a decision from the State Council:¹⁹

1. St. Christopher's Church
2. Sacred Heart of Jesus Church
3. American Missionary Church

Article 3: Every marriage document issued by a special man of religion according to the provisions of this law shall be considered a valid document for proving the marriage.

Approved Methodology in Issuing Shari'a Provisions in Bahraini Shari'a Courts

1. In Sunni courts, judges should rely on the valid and current opinions in Imam Malik's school of thought. Judges' interpretations shall also be adopted.

¹⁹ Now called the "Council of Ministers"

2. In Ja'fari courts, the Imam Ja'far Al Sadiq school is adopted, according to the Twelfth Imamate school of jurisprudence.

In 1982, demands began for the development of a family status law like those that existed in other Arab countries, and a Personal Status Committee was formed. It never succeeded, however, in issuing the law. In 2002, another committee composed of a number of judges was formed by the Higher Judiciary Council, for the purpose of formulating a draft law, but it was frozen shortly afterwards. In 2005, the Royal Court formed a new committee to prepare this draft for both the Sunni and Ja'fari schools of thought. The committees completed the formulation and submitted the draft to the Royal Court in November of that year. The Sunni draft committee relied on previous experiences, particularly the Standard Arab Law, issued in the early 1950's, the Muscat Document for the Unified Arab Gulf States, issued in 1996, and the Kuwaiti Law, issued in 1984. The Sunni draft law included 152 articles related to provisions of marriage and separation and their effects.

The Ja'fari draft law included only 109 articles.

The two draft laws were supposed to be referred to the government and then to the parliament for voting. This did not occur, however, due to objections by some religious authorities, especially where the Ja'fari draft law was concerned. This led some relevant parties, such as the Higher Council for Women and the Women's Union, to search for solutions. The groups initiated awareness campaigns and formed committees of specialists to review the two drafts. These efforts are still underway.

Women's Rights in Applications of the Bahraini Sunni Shari'a Courts

This section of the Guide addresses the most important women's rights in jurisprudence covering family provisions, and the extent to which they are observed in Sunni Shari'a applications in the Kingdom

of Bahrain, starting with marriage preparations and ending with the results of separation between the married partners.

The manual's methodology begins with an introduction, followed by a list of the most important rights provided for in the applied school of thought in Bahraini Sunni courts, and closing by presenting provisions gathered from Sunni Shari'a departments, if applicable. The text may explore judges' opinions through direct inquiry when no provisions are available.

Part I: During Married Life

Betrothal (Engagement)

According to Shari'a, engagement is a man's request to a woman or her guardian for cohabitation (*nikah*) with the woman, or his expression of desire to marry a woman whom he can legally marry.

However, it is clearer to say that engagement is the request for marriage and delivery of its promise, whether the person requesting is a man or a woman. In either case, it is not an engagement unless there is a mutual promise for marriage in the future.

Among the women's rights observed in Shari'a and applied by the Sunni Bahraini courts in this aspect are the following:

1. The right of women to choose their appropriate life companions, based on the Prophet's words, "*If someone whose religiousness and manners you accept comes to ask for marriage, you should make sure to get him married, and if you do not, it is considered strife in the land and a major corruption.*"²⁰ If a guardian refuses to allow a woman to marry a competent man whom she has accepted, she shall refer her case to the court.

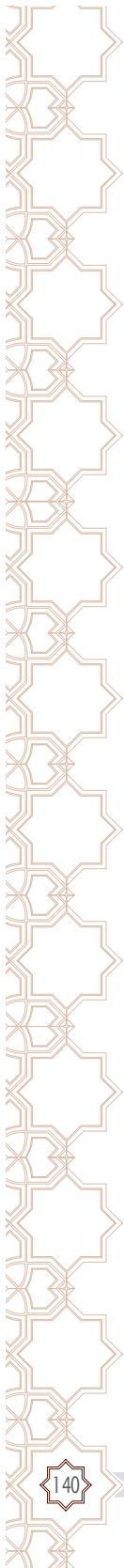
²⁰ Related by Al Tirmidhi, 1085, and Al Bayhaqi in Al Sunan Al Kubra, 13259.

2. A woman has the right to meet with the person who comes forward to ask for her hand according to Shari'a law, as long as she sits with him in the presence of a person who is unlawful to her, so that they can observe each other. According to Al Mughirah Ibn Shu'bah, "I was engaged to a woman once during the time of the Prophet (God's prayers and Peace be upon him), and He said, '*Did you look at her?*' I said no. '*Then look at her, for it is likelier to last between you,*'²¹ meaning it will promote intimacy between the two people." And although it is the man being addressed here, that is simply to maintain the woman's privacy. In reality, both man and woman need to see each other to explore their compatibility in their thinking and inclinations, through dialogue about their future life together, rather than observing only appearances.

3. A woman has the right to understanding and respect for her psychological status, and her grief during her 'Iddah after her husband's death. It is not permissible at the time to declare her engagement, but the subject may be implied, according to God's words: "*There is no blame on you if you make an offer of betrothal or hold it in your hearts. Allah knows that you cherish them in your hearts. But do not make a secret contract with them except that you speak to them in terms honorable.*"²² The same applies in the case of an 'Iddah in evidence, according to what the Prophet said to Fatima Bint Qais when she was in 'Iddah after her husband Abu Hafs Ibn Al Mughirah divorced her thrice: "*Do not surpass me with yourself.*"²³ In another reference, he said, "*If you are no more proscribed, take my permission.*"²⁴ The meaning of this is "do not marry after your 'Iddah is

²¹ This hadith is related by the authors of Al Sunan with proper chain of transmitters, except Abu Dawud. (The meaning is to reconcile between them.)

²² Surat Al Baqarah, Verse 235.



over until you tell me,” indicating that he had the right husband for her. When her ‘Iddah was over, he married her to ‘Usama Ibn Zaid. However, if a woman’s divorce is revocable, her engagement, openly or by implication, is not permitted, because she is still subject to her husband’s protection until her ‘Iddah is over.

4. She has a right to renege on the engagement if she finds out that the person she is engaged to is inappropriate.
5. If the man she is engaged to presents her with gifts and then reneges on the engagement, theoretical jurisprudence stipulates that the Malik school be applied, distinguishing between who decided to renege, as follows:
 - If the man in the engagement is the one who reneged, he shall not get the gifts back. To return the gifts to the man would cause two levels of suffering to the woman: the psychological suffering of losing the marriage, and the material suffering of losing the gifts.
 - If the woman in the engagement is the one who reneged, and there are gifts, she shall return them. If the gifts were consumed, he shall receive their equivalent value, because he presented them for the purpose of a marriage that did not take place, so that he does not suffer twice.²⁵
 - The extent to which Sunni Shari’a departments adhere to this Maliki opinion is unclear, but many judges’ theoretical opinions agree.

²³ Muslim 1480.

²⁴ Abu Dawud 2284.

²⁵ Hashiyat Al Dasuqi, 2/219.

6. A relevant point is that a woman whose engagement is canceled deserves a theoretical compensation from the reneging man if he causes her harm in the process, or causes her material loss. However, that type of judgment is carried out based on civil responsibility principles, which is the jurisdiction of civil rather than Shari'a courts.

Competency for Marriage

Marriage is a contract between a man and a woman that entails rights and duties; whoever initiates it shall be competent, as evidenced by sanity and adulthood, so that he or she is able to select an appropriate lifetime companion, and is fully aware of all that the marriage contract entails in terms of results, such as rights and duties. Through it, he or she shall be required to carry out the duties of marriage, and shall deserve the rights within. This is not valid for the insane or the person who has not reached adulthood.

Hence, a woman's rights in this matter include the following:

1. Maintenance of her rights and the nurturing of her interests if she loses capacity, or if her capacity in choosing an adequate husband is curtailed by her guardian, for the purpose of guaranteeing the decency of men who propose.
2. Guardianship: namely, support and authority to act on behalf of someone else. In Shari'a, it is meant to be a legitimate authority which gives the person in charge, usually the father or grandfather, the authority to set up a marriage contract for the minor, in the context of fostering his or her interests.
3. After the reasons for guardianship abate and her adulthood is evident through proper behavior in public matters, a woman has the right to be consulted about the men who come forward to engage her. The guardian's total domination over

the decision is thus removed, as per the Prophet's words, *"Do not wed the virgin until (the guardian's) permission is obtained and the non-virgin until she approves."*²⁶ It was said to him, "But the virgin is bashful!" He answered, *"Her silence is her permission."*²⁷

4. She also has the right to object to the person selected by her father, if he is unfit for her, as per 'Aisha's words:²⁸ "A girl walked in and said, 'My father made me marry his nephew in order to alleviate his shame, and I am hateful to this.' I said to her, 'Sit down until the Prophet arrives.' I told Him the girl's story, and He summoned her father, and asked her to talk. She said, 'Prophet of God, I have sanctioned what was done to me, but I wanted people to know that fathers have nothing to do with it.'"²⁹ She wanted to draw the attention of women to the rights they have in Islamic Shari'a, so that domineering fathers may not compel them to marry men they dislike against their will.

A Guardian's Objection to Marriage

"Objection to marriage" refers to a father's objection to his daughter's marriage to a man she accepts for herself and who is competent and suitable for her, without a legitimate reason. In this situation, she has the right to submit her case to the court: guardianship in marriage indicates managing the affairs of a minor or an incompetent person in good faith and is not an authoritarian power to be used by the guardian to oppress the person under his guardianship. Hence, he should use the position properly and always consider her interest. But if it is proved that he has abused it, resulting in

²⁶ Related by the two Sheikhs: Al Bukhari 4843, and Muslim 1419.

²⁷ Meaning to relieve him.

²⁸ His vileness.

²⁹ Related by Ahmad, 23892, and corrected by Shu'aib Al Arna'ut. Related by Al Nasa'i, 3217 and Ibn Majah, 1864.

lost opportunity in the form of a potential competent husband, it falls under God's words addressed to the wife's guardian: "*And when you divorce women, and they have come to the end of their waiting-term, hinder them not from marrying other men if they have agreed with each other in a fair manner.*"³⁰

This verse was spoken because one of the Prophet's companions, Ma'akal Ibn Yasar, wanted to prevent his sister from returning to her previous husband though she wanted to go back to him; the verse was revealed to prevent his prohibition. Although this verse concerns the objection to the return of the divorced woman to her previous husband, the jurisprudential principle stipulates the general meaning, not simply the particular interpretation of the events.

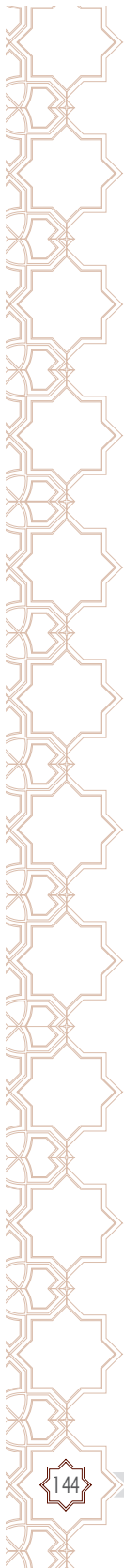
According to Bahraini Sunni Shari'a courts, if the father's objection to his daughter's marriage is proved, she shall compel him to marry her off, and if he refuses to implement the court's decision, she can cancel his guardianship and utilize instead the judge or his representative, such as the religious marriage official in the area. This is according to the Prophet's words, "*And if they quarrel, the government is the guardian of whoever has no guardian, to prevent the oppression of the oppressive, and return the right to whoever deserves it.*"³¹

In a recent judgment passed by the Grand Shari'a Court of the Second District in 2006, the following was stipulated:

The plaintiff demanded that the defendant approve her marriage to the person who came forward to marry her, and presented documents proving his good manners and reputation. She worried for her reputation, being a young woman and suffering from the guardian's objection to the marriage. The defendant had been served

³⁰ Surat Al Baqarah, Verse 232.

³¹ Related by Abu Dawud, 2083.



in person, informing him of the date of a number of court sessions, but failed to attend or delegate a representative to attend on his behalf to defend him against the allegations against him. *“He who declines shall bear the loss,”* and it is not permitted by Shari’a law to object to a girl’s wish, if she wants to be under the protection and chastity of marriage. The Prophet said, *“If you are approached by a man whose religion and manners are acceptable to you, take him in marriage, and if you don’t, you are causing sedition in the land and large corruption.”* Similarly, according to God’s holy words, *“Do not hinder them from marrying other men, if they have agreed with each other in good intention.”*³² Hence, the court decided, in the presence of the parties, that the defendant had to allow the girl to be married to the man in question within two weeks. If he had objected, a judge would have married her to the man as mentioned above.

Competence in Marriage

1. The Shari’a meaning of competence is equality between a husband and his wife. He shall be in a higher position than her in specific areas, and neither she nor her kin shall be disgraced by him, resulting in harm and dissension in marriage.
2. According to Bahraini Sunni courts, competence shall first be in religiousness, according to God’s words, *“And do not give your women in marriage to men who ascribe divinity to aught beside God ere they attain to [true] belief: for any believing bondman [of God] is certainly better than a man who ascribes divinity to aught beside God, even though he pleases you greatly.”*³³

³² Surat Al Baqarah, Verse 221.

In a decision by the Grand Court of Circuit One in 2006

The court noticed that the contract between the two parties was concluded in a church, and the plaintiff woman was a Sunni Muslim. Because it is stipulated by Shari'a that marriage of a Muslim woman to a non-Muslim man is strictly prohibited by the consensus of the jurists, according to the stipulation of Ibn Jizzi in his work *Jurisdictional Principles (Al Qawanin Al Fiqhiyah)* (148), the court decided that the contract should be annulled.

3. Competence is also in manners. The Prophet said, *"If you are approached by a man whose religiousness and manners are acceptable to you, take him in marriage, and if you don't, you are causing sedition in the land and large corruption."*³⁴ "Religiousness" means commitment to faith, which is the basis of the relationship between the subservient human and his God. This includes his performance of Islam's religious obligations, such as praying, paying obligatory financial dues (*zakat*), fasting during the month of Ramadan, and making pilgrimage. "Manners," in turn, means good relations with others and good behavior. This was mentioned in a Hadith by the Prophet and is also included within the concept of religiousness. Good relations, manners, and straight behavior have a great importance in marital relations.
4. Competence is a joint right of both a woman and her guardian. If one of them drops this right, this does not mean that the other's right abates. If the guardian drops his right by neglecting to enquire about a man who wishes to marry the woman under his guardianship, or knows that a man is not competent but tries to marry her off nonetheless, the Sunni court gives his daughter the right to object and stop the marriage procedures if they have not yet been concluded. If

³³ The previous Surah.

³⁴ Related by Al Tirmidhi, 1085, and Al Bayhaqi in Al Sunan Al Kubra, 13259.

they have been concluded, she may annul the marriage. This is according to a Hadith narrated by 'Aisha, regarding the girl who complained about her father's behavior. Similarly, if the negligence and inconsideration were committed by a woman without her guardian's approval, the guardian may object, keeping in mind that the Sunni court does not approve a marriage contract that has been concluded without the presence or agreement of the guardian.

In a decision by the Grand Court in 2001 about an objection case, the court wrote:

The defendant's objection to the plaintiff's marriage to the man mentioned has no legitimate Shari'a justification. The most important competence conditions in the Malik school are competence in religion, status, piety and manners, according to the Prophet's advice, "*If someone whose religiousness and manners you accept, comes to ask for marriage you should make sure to get him married...*" Therefore, the court decides that the defendant should marry the plaintiff to the man. If he refuses to implement his guardianship by doing this, the religious marriage official has the right to marry them.

The Wife's Financial Rights

a) The Dowry (Mahr or Sadaq)

1. The dowry is what a husband presents to his wife as a gift, expressing the honor of the marriage contract for her to use in preparing herself for the marriage. This is according to God's words, "*And give unto women their marriage portions in the spirit of a gift.*"³⁵ It is a present through which the man approaches the heart of the woman he is marrying, and not a fee in exchange for receiving pleasure from her; pleasure should be a mutual feeling between the two of them.

³⁵ Surat Al Nisa', Verse 4.

2. The dowry is a right due to the wife from the husband, according to God's words, "*And unto those with whom you desire to enjoy marriage, you shall give the dowers due to them.*"³⁶ The order here is for obligation, and is one of the principles of the Maliki school, and is the procedure applied in the Sunni court.
3. A woman shall receive her dowry in one of two situations: either a valid contract, or proper consummation of the marriage in an irregular cohabitation.
4. The dowry is a pure right for the wife, not to be shared by anyone. It is for her to use as she wishes, as she uses her money, as long as she is competent to do so. She may accordingly give her husband part or all of it.
5. The dowry has no specific limit. The upper limit is mentioned in God's words, "*...Even if you had given the latter a whole treasure, however much it may have been, do not take away anything of it.*"³⁷ The minimum amount is also mentioned in a Hadith by the Prophet: "*Give, even if a ring made of iron,*"³⁸ referring to the fact that it is ultimately the thought that counts, as with a gift.
6. In evidence of what is suitable as a dowry, it has been agreed that anything permitted by religion is acceptable as a dowry, whether silver or gold, jewelry or gold block, real estate or limited offers, and other items or benefits such as education, according to the Prophet's words, "*We have married you off with what you have of the Qur'an.*"³⁹ Other possibilities include usage of residence, employment

³⁶ Surat Al Nisa', Verse 24.

³⁷ Surat Al Nisa', Verse 20.

³⁸ Related by Al Bukhari, 1096.

or work. That which is not permissible in Islam cannot be used, such as alcohol or a pig, or the unknown, such a piece of real estate that is not specified by boundaries.

7. In receiving the dowry, a wife has the right to ask that some of it be given in advance and the rest be given when the closer of the two ends (divorce or death) arrives, so that she has a financial guarantee in case she is divorced or her husband dies.

The judiciary operates according to this understanding. In a very recent judgment, the Grand Court of Appeals decided in 2007 that:

The appealed defendant should give the appealing plaintiff her delayed dowry of 1,000 dinars and her past financial maintenance of 30 dinars.

8. Once the marriage has been consummated properly in accordance with a valid contract, or goes into a valid seclusion accepted by Shari'a, the whole dowry becomes the woman's right, as stipulated in the marriage contract. Her husband has no right to demand the reimbursement of any part if there is a divorce, according to God's words, *"But if you desire to give up a wife and to take another in her stead, do not take away anything of what you have given the first one, however much it may have been. Would you, perchance, take it away by slandering her and thus committing a manifest sin? And how could you take it away after you have given yourselves to one another, and she has received a most solemn pledge from you?"*⁴⁰ as well as the Prophet's words, *"He who has exposed the face of a woman and looked at her shall pay her dowry, whether he has consummated marriage with her or not."*⁴¹

³⁹ Related by Al Bukhari, 2186.

9. A woman shall receive her full dowry if her husband dies before consummating his marriage to her. The husband's heirs have no right to demand reimbursement from her. Her heirs shall have the right to her dowry in full if she dies, after the contract has been concluded, even if her marriage was not consummated.

10. In the following cases, a wife must be given an amount of the dowry equal to what is paid to women equivalent to her in age, beauty, and social and educational status:
 - a. If the husband has added a condition to the contract that he pays no dowry, and says to her guardian, "I have married your daughter provided she receives no dowry," and the guardian accepts, the contract is null and void, even if the guardian and wife have accepted the proposal.

 - b. If the contract is valid, but mentions nothing about the dowry, it is as if the man says to the guardian, "Marry your daughter to me," and the guardian agrees, without mentioning the dowry. This is called "contract by representation," meaning that the guardian has delegated the husband to estimate the daughter's dowry.

 - c. If the contract stipulates something that is not permissible by Shari'a, such as a pig or alcohol, or something that has no material value.

 - d. If he marries her and the marriage is consummated, and he then discovers that she is unlawful to him —

⁴⁰ Surat Al Nisa', Verses 20-21.

⁴¹ Al Bayhaqi, in Al Sunan Al Kubra, 14264, and Al Darqutni in his Sunan, 232.

such as his sister in nursing, for example — this is referred to as a suspicious consummation.

11. She shall receive half the dowry assigned in the marriage contract if she is divorced before the marriage was consummated, according to God's words: "*And if you divorce them before having touched them, but after having settled a dower upon them, then [give them] half of what you have settled — unless it be that they forgo their claim or he in whose hand is the marriage-tie forgoes his claim [to half of the dower]: and to forgo what is due to you is more in accord with God-consciousness.*"⁴² What is meant by consummation here is proper copulation.

b) The Wife's Alimony

1. A wife has the right to be supported financially by her husband, whether he is rich or poor, and whether she is rich or poor, Muslim or non-Muslim. This is according to God's words, "*And it is incumbent upon him who has begotten the child to provide in a fair manner for their sustenance and clothing.*"⁴³ In other words, the wife's alimony and clothing. Also relevant are these words of God, "*Let him who has ample means spend in accordance with his amplitude; and let him whose means of subsistence are scanty spend in accordance with what God has given him. God does not burden any human being with more than He has given him; [and it may well be that] God will grant, after hardship, ease.*"⁴⁴ The Prophet also said these words in His farewell address, "*They shall have the right of their sustenance and clothing in righteousness.*"⁴⁵ And He said these words to a man who asked Him, "What right does a woman have

⁴² Surat Al Baqarah, Verse 237.

⁴³ Surat Al Baqarah, Verse 233.

from her husband?" The Prophet said, "*To feed her if he eats, and to clothe her if he clothes himself.*"⁴⁶ In another story, Hind Bint 'Utbah, wife of Abu Sufian, complained about her husband's stinginess and unwillingness to support her and her children financially. She asked the Prophet if it was permissible for her to take money from him without his knowledge to spend on herself and her children. He answered, "*Take from his money in righteousness what is sufficient for you and your children.*"⁴⁷

2. What is included in the wife's financial maintenance is all that she needs for sustenance, including food, clothing, housing and its requirements, and service.
3. A husband's obligation to his wife's financial maintenance stems from her affiliation to her husband, her agreement to be subservient to him, and the permission she gives him to obtain Shari'a rights from her.
4. When estimating the amount of her financial maintenance, a wife has the right to take into consideration her husband's financial status, according to God's words, "*Let him who has ample means spend in accordance with his amplitude; and let him whose means of subsistence are scanty spend in accordance with what God has given him,*" as well as His words, "*Feed them of what you eat, and clothe them with what you clothe yourselves.*"⁴⁸
5. Types of financial support due to a wife:
 - a. A wife has the right to an appropriate place of residence and furnishings that provide comfort and

⁴⁴ Surat Al Talaq, Verse 7.

⁴⁵ Related by Muslim, 148.

⁴⁶ Related by Ibn Majah, 1850.

⁴⁷ Related by Muslim, 1714.

security. The residence should be independent, even if she initially agreed to reside with his family. If she realizes the difficulty of this arrangement, she has the right to demand an independent place of residence.

- b. She has the right to ask the husband for someone to help her with the household chores if the husband can afford this, especially if she was used to household service in her father's house.
6. If a husband does not comply and his wife has to resort to the courts, the Sunni court shall estimate her financial support according to the husband's monthly income, based on the official monthly pay slip issued by his employer and including deductions for debts and other compulsory expenses. He will then issue judgment and refer to it for enforcement.

In an urgent decision passed by the Court of First Instance in 2005, the court agreed that:

Married life indicates Shari'a obligations according to God's words, "*And consort with your wives in a goodly manner.*"⁴⁹ Among these obligations is comprehensive financial support estimated by legal jurisprudence, and by examining the husband's abilities and the needs of the recipient(s), taking into consideration any contingencies. The plaintiff requested financial support for her and her children, including housing and its furnishings, and the court decided, in the presence of all parties, first, that the defendant pay the plaintiff and her children a monthly financial support of [...] and pay the same, twice a year, for clothing and a similar amount for education. Second, the defendant shall also pay in lieu of housing, the amount of [...], including furnishings.

⁴⁸ Related by Abu Dawud, 2144 and corrected by Al Albani.

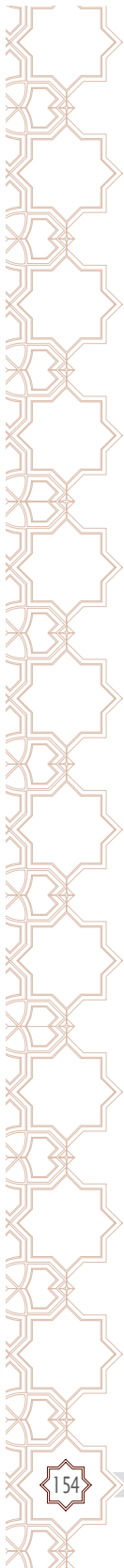
⁴⁹ Surat Al Nisa', Verse 19.

7. If a husband who is refusing to pay is capable and has virtual funds, such as a bank account, rent from property, or income from a trade, from which financial support may be deducted, the enforcement judge shall permit the wife to obtain her support by addressing the bank or the relevant party to deduct the amount of the support and to transfer it to the wife's account directly. This is according to the Prophet's words when Hind Bint 'Utbah complained to Him about the stinginess of her husband, Abu Sufian, and his unwillingness to support her and her children financially. He said, "*Take from his money in righteousness, enough to support you and your children.*"⁵⁰
8. If a husband is in a financial difficulty and unable to pay the financial support and child support, and if the wife is capable of spending from her own money, what she spends is considered a debt that he owes her, to be repaid when his financial situation improves. She is not required to spend and participate in the expenses except voluntarily, and in the interest of relieving the husband's difficulty.

The Right to Equal Treatment, Especially in Cases of Polygamy

Polygamy existed in most Arab societies that preceded Islam, without any controls on the number of wives or any understanding of each party's rights and duties. This was especially a problem for women, who had few rights and were generally oppressed in these societies. When Islamic Shari'a developed, it put an end to the oppression suffered by women. Shari'a set the number of wives at the outset not to exceed four at any time. This was according to the words of God, "*And if you have reason to fear that you might not act equitably towards orphans, then marry from among [other] women such as are lawful to you [even] two, or three, or four: but if you have reason to*

⁵⁰ Related by Muslim, 1714.



*fear that you might not be able to treat them with equal fairness, then [only] one — or [from among] those whom you rightfully possess. This will make it more likely that you will not deviate from the right course.”*⁵¹ Then He set rules for anyone who wanted to marry more than one wife.

1. The Prophet outlined a clear condition for all marriages, whether to one woman or more: *“Young men, whoever among you can support marriage, let him marry, to protect his religion and himself. If one cannot afford to get married he is recommended to control his desire by fasting for in it is his protection.”*⁵² Hence, polygamy is conditional on the ability to support multiple wives. The term “support” indicates all aspects related to married life, whether financial, health-related, or psychological, as well as others, and is not restricted to the financial costs of getting married.
2. Equality among wives is essential, according to God’s words: *“If you be worried not to treat them equally, then one.”* Equality refers to financial support, upkeep, shelter, treatment, and even a smile on the face and a warm word from the mouth, as well as all virtual aspects. This does not include feelings in the heart, which is the realm of God alone. About that, God said: *“And it will not be within your power to treat your wives with equal fairness, however much you may desire it; and so, do not allow yourselves to incline towards one to the exclusion of the other, leaving her in a state, as it were, of having and not having a husband. But if you put things to rights and are conscious of Him, behold, God is indeed much-forgiving, a dispenser of grace.”*⁵³ In a Hadith narrated by ‘Aisha, she said, “The Prophet used to treat his wives equally, saying, ‘O God, this is my division

⁵¹ Surat Al Nisa', Verse 2.

⁵² Related by Al Bukhari, 4788 and Muslim, 1400.

of what I own, so do not blame me with what you own and I don't."⁵⁴ This referred to the heart,⁵⁵ because a human heart's affiliation for one wife and preferring her over the others is out of a man's control, and one cannot change it or get rid of it. God does not hold him accountable for what he cannot control, but will hold him accountable if he prefers one to the other and treats her differently. According to Abu Hurairah, the Prophet said, *"If a man had two wives and preferred one over the other then one of his sides will be limping on Judgment Day."* In another reference, he said, *"If a man had two wives and he preferred one to the other, on Judgment Day he will find himself with one side limp or tilted."*⁵⁶

3. A wife has the right to add a condition to the marriage contract stipulating that her husband not take another wife. If he violates this condition, she has the right to annul the marriage,⁵⁷ according to the Hadith of the Prophet, who said, *"Muslims shall observe the conditions set, except a condition that prohibits a permitted matter, or one that permits a proscribed matter,"*⁵⁸ and also said, *"The most rightful condition is the one that permits you to consummate a marriage."*⁵⁹ This is according to the followers of the Hanbali school of thought and other scholars. Imam Malik said it is preferable and likeable that this condition be observed and held, but it is not compulsory — that is, the judiciary does not adhere to it. This has been adopted in Sunni courts in Bahrain today.

⁵³ Surat Al Nisa', Verse 129.

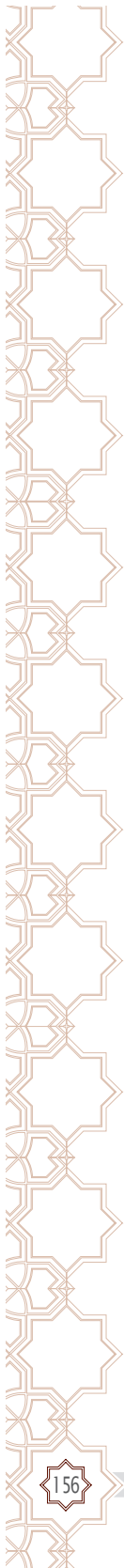
⁵⁴ This is related by Abu Dawud, 2134 with a proper chain of transmitters.

⁵⁵ Tafsir Ibn Kathir, The Qur'an (Interpretation of Ibn Kathir), 1/747.

⁵⁶ Related by Malik in Al Muwatta', 3/427, and Ahmad, 7923, and Abu Dawud, 2133 and Ibn Majah, 1962 with proper chain of transmitters.

⁵⁷ Al Mughni, by Ibn Qudamah, 7/71.

⁵⁸ Related by Al Tirmidhi, 1272 and Abu Dawud, 3120.

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4. In all cases, if a man is married to one woman and comes to another wishing to marry her, she may not insist that he divorce the first one. According to Abu Hurairah, the Prophet said, *“A woman has no right to request the divorce of another woman and deprive her of what she enjoyed with her husband. She shall accept what her fate has dictated.”*⁶⁰
 5. If a wife was one of a number of fellow-wives in polygamy, her rights are clear. If her husband does not fulfill all her rights and treat her equally, by being unequal in financial support or alimony, or if he is estranged from her, she has the right to refer her case to a court requesting that the harm be removed, or that she be divorced for harm.
 6. It is also a wife’s right to not have to share the matrimonial home with any of her fellow-wives, except with her approval. If she approved at one point but then sustained harm later, she has the right to her privacy in a home of her own.

Marital Obedience

1. Islamic Shari’a has specified the concept of guardianship and oversight (*Qiwamah*) and a guardian’s responsibility of general supervision over family matters. This is entrusted to the husband, according to God’s words, *“Men shall take full care of women with the bounties which God has bestowed more abundantly on the former than on the latter, and with what they may spend out of their possessions. And the righteous women are the truly devout ones, who guard the intimacy which God has [ordained to be] guarded.”*⁶¹ It is a legal responsibility and not an honor, and something he will be questioned about on Judgment Day. Hence, a man should maintain it and manage it according to God’s commandments

⁵⁹ Related by Al Bukhari, and Muslim, 1418.

⁶⁰ Related by Al Bukhari, 4857.

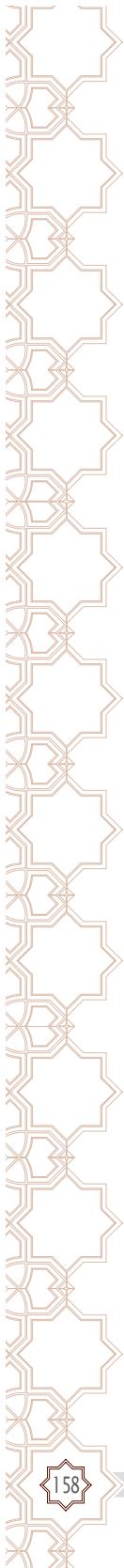
and prohibitions, according to His words, “*O you who have attained to faith! Ward off from yourselves and those who are close to you that fire [of the hereafter] whose fuel is human beings and stones,*”⁶² and the Prophet’s words, “*You are all shepherds, and each of you is responsible for his flock. A man is the shepherd of his family and responsible for them.*”⁶³

2. The concept of this responsibility is oversight and the organization of family matters, and not domination and enslavement of his family, especially of his wife. She is his partner in managing family affairs and is also responsible for the family, and she should be consulted and involved in family decisions, according to the previous Hadith, “*The woman is a shepherd in her husband’s home, and is responsible for her flock.*”
3. The reason the husband is responsible for guardianship and oversight is two-fold:
 - a. What God gave him in terms of his nature and build make him more fit than the woman to carry out this responsibility.
 - b. His commitment to support the family financially.
4. According to Islamic Shari’a, if a husband is entrusted with guardianship and oversight of the family, the wife and other family members must obey his orders regarding family affairs.
5. The concept of a wife’s obedience to her husband is one of a loving person to the one loved, for the purpose of gaining

⁶¹ Surat Al Nisa’, Verse 34.

⁶² Surat Al Ahrim, Verse 6.

⁶³ Related by Al Bukhari, 853, and Muslim, 1829.



his love and attention, by carrying out her responsibilities toward her husband and implementing his orders, provided they do not defy God's will. It is not the obedience of a slave to her master. This is precisely the feat that God praised when He described a good wife: "*And the righteous women are the truly devout ones, who guard the intimacy which God has [ordained to be] guarded.*"⁶⁴ In other words, she guards herself and his belongings⁶⁵ in his absence as well as in his presence. The Prophet himself said to 'Umar Ibn Al Khattab, "*Let me tell about the best thing a man may have: a woman who would make him happy to look at, who would obey him if he requested something from her, and who would safeguard his reputation and belongings in his absence.*"⁶⁶ At the same time, He warned against overdoing this when He said, "*By the one who has Muhammad's life in his hand, a woman does not satisfy God's obligations until she satisfies her husband's obligations.*"⁶⁷

6. This obedience is focused on the following matters:
 - a. Satisfying God's will.
 - b. Within their married life only.
 - c. In a manner that does not harm other people's rights.

So if he orders her to do something reprehensible, she shall not obey him, and if he makes orders about how she should use her personal money, she does not have to obey him, and if his orders harm others, such as one of their children, she shall not obey him. She also should not obey him if he

⁶⁴ Surat Al Nisa', Verse 34.

⁶⁵ Tafsir Al Qurtubi (Qur'an Interpretation), 5/175.

⁶⁶ Related by Abu Dawud, 1664.

⁶⁷ Related by Ahmad, 1853.

intends to cause her harm, verbally or by action, or if he attempts to appropriate her money unrightfully.

7. Among the most important forms of a wife's obedience to her husband is staying at home, and not leaving without his knowledge and permission. This does not mean that the woman is a prisoner at home, but that running the affairs of the matrimonial home is the prime mission that the wife should dedicate herself to. God has spared her the travail of working hard to earn sustenance and expenses, making them the obligations of the man.
8. There are cases in which a husband may not prevent his wife from leaving the home, such as visiting her parents and relatives, and communicating with them, or going to a job that he agreed to at the beginning of their married life, and other similar reasons that do not entail evil or corruption.

The Grand Court passed a relevant judgment in 2007:

The plaintiff demanded that the defendant, his wife, not leave the matrimonial home for work or other purposes, and that she stay at home to carry out the duties stipulated by Shari'a. The defendant responded that when she married him, she had the same job with his approval, and that he did not, until recently, oppose her work. She added that she carries out all her duties towards her husband. The defendant said she had believed the plaintiff regarding his willingness to allow her to work. Currently, the defendant is tied in a number of financial obligations due to which she cannot leave her job. The plaintiff responded that he could not settle the defendant's financial obligations if she left her work. The decision in the Maliki School according to Shaikh Ibn Abdunnur in *Al Hawi* stipulates that a woman may trade, and her husband may not prevent her from going out to do so, and may not lock her in unless she accepts it. It is also decided that if a man marries a working woman with full knowledge

thereof, his right to keep her locked at home abates, because the social norms give way to Shari'a texts. As a result, the court decided, in the presence of the parties, to refuse the plaintiff's case.

9. Among the requirements regarding the home is that the man prepare the matrimonial home for his wife in accordance with Shari'a, where she can be independent with her children, as is appropriate for women equivalent to her in status. He should also provide the necessary items for her. If he does not provide these two requirements, she has the right to leave the house without his permission.⁶⁸
10. Among the requirements regarding a wife's obedience to her husband is that she receives her advance dowry; otherwise, he has no right to demand her obedience, unless she has given it up.
11. The husband shall act toward his wife as he wants her to act toward him, including being genial, providing her with pleasure, participating in household chores, and entertaining whenever he can. If he gives her what she wants, she will not seek others, and if he ignores her she will be subject to corruption, and will search for her requirements outside the household.
12. Finally, it is appropriate to point out here that Maliki jurisprudence — which, in this case, represents the dominant factor in Islamic jurisprudence — sees that the woman is not required by Shari'a to undertake the duty of household service, because household service, according to Imam Ibn Al 'Arabi is "a matter based on norms and habits, which are among the basis of Shari'a Law." He gives an example, saying that the women of Arabian tribes and desert dwellers

⁶⁸ See Kashshaf Al Qina', 5/2588.

serve their husbands by bringing in fresh drinking water and shepherding animals, while urban husbands help their wives in light things. Wealthy people employ household helpers and enjoy high position with their husbands. The Maliki school of thought also stipulates that the husband may not compel his wife to do a virtual service that is aimed at making a profit or realizing an income, such as weaving, spinning, tailoring, and embroidery, because these are income-generating, which is the husband's duty.⁶⁹

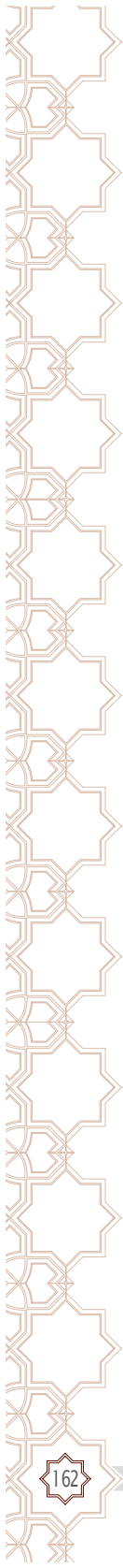
Part II: Women's Rights During Dissolution of the Marriage

Types and Provisions of Divorce

Islamic Shari'a permits divorce as a solution to the problem of incompatibility and dissension between husband and wife to the degree that the marriage cannot continue. This is intended to maintain the right that all family members have to a quiet atmosphere free of disturbances and to provide an opportunity for the husband and wife to try again to find a new partner with whom they may enjoy happiness. At the same time, Shari'a is keen on maintaining the marital relationship and rectifying dissension between the couple to whatever degree possible. For this reason, it has set many conditions for divorce. The terminology used when invoking it, for the purpose of reducing cases of divorce, is as follows:

1. Conditions related to the husband concentrate on his ability to be clear; because divorce inflicts harm on the divorced party, contemplating it requires complete awareness, and this is a problem when a person lacks clarity. Hence, divorce cannot take place in the case of:

⁶⁹ Ahkam Al Qur'an, 3/1150, and Sharh Al Zaqani 'Ala Mukhtasar Khalil (A Brief explanation on Khalil Abridges Work), 4/247.

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- a. A person who is enraged to a degree that he does not comprehend what he is saying. This is according to ‘Aisha’s Hadith, in which she says that she heard the Prophet say, “*No divorce or dissolution is permitted in the case of unawareness.*”⁷⁰
 - b. A person under duress, who is compelled to utter the word of divorce under threats of death or others like it, according to the previous Hadith.
 - c. A drunk who has lost his awareness.

In applications by the Sunni court, a husband’s testimony under oath, in addition to his wife’s attestation of his words, is relied upon.

This is according to the decision passed by the Second Grand Court in 2006, as follows:

The husband invoked divorce in a state of true anger, in violation of the statement by God’s Prophet, “*Divorce does not apply in closure.*” In addition, he was being treated in a mental hospital, and the defendant believed what he said. As a result, the court decided, in the presence of the parties, to cancel the divorce.

In another decision issued by the Second Grand Court in 2006:

The husband had invoked divorce, and indicated to the court that he did so while drunk and unaware of what he was saying. It is up to the husband whether to invoke the divorce or not, and the word is his in explaining the case and the ramifications regarding his full competency. The truth of the matter is that the divorce of the incompetent does not apply, according to the Hanafi school, and the second case for Shafi’e and Hanbali as well as the main one for

⁷⁰ Related by Ahmad, 251 56 and Ibn Majah, 2046.

the Maliki school, stipulated by Muhammad Ibn Al Hakam and by Ibn Rushd. It is also the opinion of Othman and Ibn 'Abbas, and they have Shari'a and rational evidence. Hence, the court decided, in the presence of the parties, that divorce as uttered once by the plaintiff against the defendant was invalid.

2. The most important conditions related to the wife take into consideration her psychological state when the husband invoke divorce against her, such as her demeanor during menstruation. Her psychological pressure may be the reason for her bad mood, causing a misunderstanding between her and her husband. The husband may respond hastily and drop the word "divorce," violating the word of God: "*O prophet! When you intend to divorce women, divorce them with a view to the waiting period appointed for them, and reckon the period [carefully], and be conscious of God, your Sustainer.*"⁷¹ In other words, divorce them in a clean state when there is no copulation. According to Ibn 'Umar, he divorced his wife when she had her period, and 'Umar Ibn Al Khattab asked the Prophet about this. The Prophet said, "*Tell him to take her back, and keep her until she is clean, then menstruates again, and then becomes clean, then after that, he may keep her if he wishes or divorce her if he wishes without touching her.*" This is the 'Iddah that God has ordered women be divorced in accordance with."⁷² In other words, among the cases where divorce is prohibited in clean periods without copulation, a pregnancy may occur that may only be discovered after the divorce, and the husband would be remorseful for his deed. A case like this is referred to as *bid'i* divorce, an unlawful innovation, which is not valid in Shari'a. Some scholars believe it is not valid by virtue of the Prophet's words, "*Whoever commits an act that is not*

⁷¹ Surat Al Talaq, Verse 1.

⁷² Related by Muslim, 1471.

*according to our principles, it is considered invalid.*⁷³ The other opinion is that of the majority of the jurists, who consider that the person who invokes divorce in this case is a violator, but his divorce is valid. This opinion is adopted by the Sunni courts, although some may disagree on the grounds that they violate the Qur'an and the Sunnah, as well as the Shari'a objectives in reducing cases of divorce.

3. For the purpose of protecting the family bond, a wife has the right to a single revocable divorce, in which she goes into an 'Iddah period for three clean periods after menstruation, to assert non-pregnancy. If she is pregnant, the 'Iddah will be until the time of her delivery, whether longer or shorter than the previous date. She should spend the whole period of her pregnancy in the matrimonial home, and not leave it unnecessarily, and her husband may not drive her away, according to God's words, *"Do not expel them from their homes; and neither shall they [be made to] leave unless they become openly guilty of immoral conduct. These, then, are the bounds set by God - and he who transgresses the bounds set by God does indeed sin against himself. [For, O man, although] you do not know it, after that [first breach], God may well cause something new to come about."*⁷⁴ From this, Shari'a intends to give the husband the opportunity to reconsider his decision and think about the possibilities of resuming the marriage as it was previously, simply by informing his wife that he wants to return her. He has the right to do so, according to God's words, *"In case of pregnancy, the husband's wishes shall supersede the wife's wishes, if he wants to remarry her,"*⁷⁵ because she is still his wife by Shari'a, and he will take her back on the first contract and dowry.

⁷³ Related by Al Bukhari, 225, and Muslim, 1718.

⁷⁴ Previous Verse.

This is the Shari'a stipulation, but it is applied differently by different people. In most cases, it is noticed that as soon as the husband mentions the word "divorce," the wife leaves her home and goes to her family's house, which increases friction between them and ends hopes for their reconciliation. Unfortunately, the Sunni court's implementation of this type of divorce reinforces this concept. The court issues a revocable divorce certificate that annuls the marriage, and the couple thinks that their relationship has ended. A better way to do it is to postpone delivering the divorce certificate until the 'Iddah period is over and the divorce is in effect, in which case the marriage actually ends.

Among the cases in which a wife's return was stipulated by her husband without conditions of her approval is a decision issued in 2006.

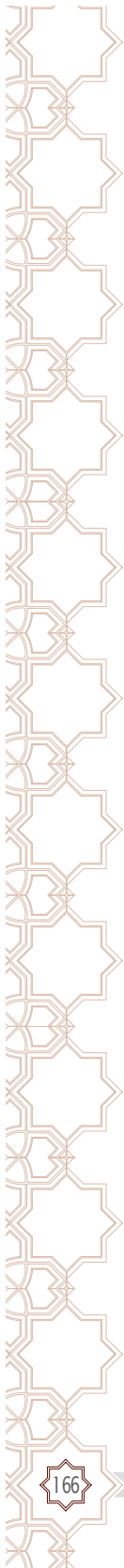
The details of the conflict were such that the plaintiff submitted his case with a petition to the court registry, after paying the court fees, at the end of which the court decided in his favor, as follows:

- Confirming revocability and issuing a certificate accordingly.
- The defendant was compelled to return to the matrimonial home and to cohabit amicably with her husband and to conduct herself well.

This was based on the fact that the defendant was his wife and that he had divorced her, and they had seven children together. The plaintiff returned the defendant to his guardianship and protection, and hence brought litigation for the abovementioned demands.

The plaintiff based his case on a copy of his marriage contract to the defendant, and a copy of the divorce certificate, and an affidavit stipulating that he returned her to his protection, signed by two witnesses.

⁷⁵ Surat Al Baqarah, Verse 228.



When the court evaluated the case, both parties appeared in person before the court. The plaintiff pointed out that he had returned his divorced wife, the defendant, to his protection after one month and 18 days after her divorce, in front of his two brothers, according to the documents signed by the two witnesses, and by him, during her 'Iddah period. His two brothers informed the defendant of this return by telephone. The defendant responded by saying that she had received the case documents, with the proof of return attached, three weeks before that day, and was aware of the contents. The plaintiff's brothers informed her, however, that he would return her, and not that he had already done so. She later called them again, and admonished them for signing the return document after her 'Iddah was over, and said that she totally refused to return to the plaintiff. It is decided by Shari'a that if a husband sues his revocably divorced wife, indicating that he has returned her the day before or a month earlier, he shall be believed if she is in 'Iddah, because he had reported what he could have appealed, and he supplied the evidence, which was his brothers' testimony in this case, proving the right way of returning her.

For these reasons the court passed decision as follows.

First: The fact that the plaintiff returned the defendant during her revocable divorce 'Iddah had been proved, and there was a document prepared to this effect.

Second: The defendant was compelled to return to the matrimonial home and to improve her demeanor and the way she treated her husband. The decision was final and binding to the parties and commanded to be observed and implemented.

4. It is the right of a divorced wife, when her 'Iddah is over and her divorce is proved in a minor irrevocable repudiation, to not return to her husband unless she wants and agrees to, and with a new contract and a new dowry.

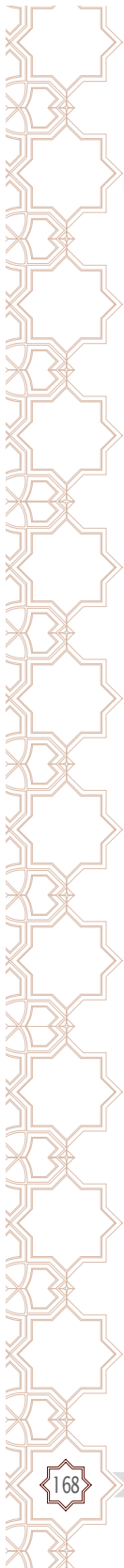
5. These two types of divorce (the revocable and the minor irrevocable repudiation) may recur twice in married life, because Islamic Shari'a is keen on maintaining the marriage bond.
6. It is a woman's right in divorce that it be clearly stated, and not contingent on a specific action, such as her husband saying to her, "If you do this, or you don't, you are divorced." This is a matter of controversy among scholars, but the Sunni court has recently become more inclined to the predominant opinion of not imposing divorce in this manner.

This is according to the decision passed by the Second Grand Court in 2006, as follows:

The husband actually invoked divorce and stated that he suspended the single divorce with the entry of the defendant's daughter to his residence, which she did, according to her admission. As the suspended divorce is a matter of controversy among scholars, the court decided, in the presence of the parties, that the divorce not be upheld in the suspended divorce. according to the decision issued by the Second Grand Court in 2006, as follows:

Number of Divorces

1. The number approved by Shari'a in divorce is three times at different points in time, one time after the other. This is according to God's words, "*A divorce may be [revoked] twice, whereupon the marriage must either be resumed in fairness or dissolved in a goodly manner.*" He also said, "*And if he divorces her [finally], she shall thereafter not be lawful unto him unless she first takes another man for a husband; then, if the latter divorces her, there shall be no sin upon either of the two if they return to one another, provided that both of them think that they will be able to keep within the*



*bounds set by God: for these are the bounds of God which He makes clear unto people of [innate] knowledge.*⁷⁶ After the third divorce, the husband will have exhausted all his chances of return and the divorce is a major irrevocable one; he cannot return to her directly or after her 'Iddah. Nevertheless, and as part of its keenness to reinstate this bond, Shari'a has made it possible for them to remarry after the divorced woman marries another man, a valid marriage that is properly consummated, without the intention to cheat on the first husband, and the marriage relationship between them ends with either divorce or death.

2. There are many husbands who are oblivious of the wisdom behind the spacing between the words of divorce they utter, and are in a hurry to say the words consecutively and rapidly to their wives, "You are divorced, divorced, divorced," or group them in one statement, "You are divorced three times." This is referred to as the final and ultimate divorce. Scholars have disagreed over this concept. Does divorce take place as mentioned as a major irrevocable divorce? If that is the case, the husband may not return her except under the condition mentioned above, which is the opinion of the four Sunni schools. Or is this one a revocable divorce, especially if the husband's intention behind the repetition is to emphasize his point, and not to use the legitimate facility? This is the opinion of Ibn Taymiyah and his disciple, Ibn Al-Qayyim, referring to the origin according to Ibn Abbas, "During the days of the Prophet, and Abu Bakr, and two years of the Caliphate of 'Umar, the three-word divorce was one." 'Umar Ibn Al Khattab said, "*People have taken haste in an issue in which they would be hesitant if we imposed it on them,*"⁷⁷ as part of the Shari'a policy to restrain the violator for the purpose of proper implementation.

⁷⁶ Surat Al Baqarah, Verses 229 and 230.

3. The opinion adopted by the Sunni Shari'a Court in Bahrain is the opinion of the majority of jurists, which stipulates that divorce is invoked three times as mentioned.

This is according to the decision passed by the First Grand Court in 2005, as follows:

The plaintiff divorced the defendant by saying, "You are divorced three times irrevocably," and since divorce by mentioning it three times is invoked according to the majority of scholars, and is implemented as a major irrevocable divorce, the court decided, in the presence of the parties, that the plaintiff's divorce from the defendant was a major irrevocable one, and she became unlawful to him until after having a consummated marriage with another man.

However, there was some confusion in the application. Some judges decide that the three assertions of divorces represent a major irrevocability, as mentioned above, while others distinguish it from a hasty divorce, which occurs when a husband says, "You are divorced, divorced, divorced." In this case, the husband is asked about his intention behind the repetition. If he intended to use the three words to invoke divorce, then divorce is invoked with major irrevocability. If he meant simply to invoke divorce with one word, then divorce takes place as a revocable one if the marriage was consummated or with minor irrevocable repudiation if the marriage was not consummated.

This is according to the decision passed by the First Grand Court in 2006:

The defendant is married to the plaintiff in a valid and proper marriage. The marriage has not been consummated, and the plaintiff has invoked divorce by uttering, "You are divorced, divorced, divorced," intending

⁷⁷ Related by Muslim, 1472.

to emphasize rather than finalize. Hence, the court decided, in the presence of the parties, that the divorce is a true and proper one with minor irrevocable repudiation. She can only be his wife again through a new contract and dowry.

4. The other opinion, perceiving the divorce as a revocable one, is the more powerful one, according to a Hadith narrated by Ibn ‘Abbas. The Hadith is clearly evident, making a divorce that is declared three times in one statement equivalent to a single divorce. It was valid during Abu Bakr’s caliphate and two years into ‘Umar’s caliphate, and ‘Umar changed it as part of Shari’a interest and politics, not as a legislation that should be adhered to at all times.

Dissolution of Marriage for Defect and Difference of Religion

1. A wife has the right to dissolve her marriage if she discovers a congenital defect in her husband that deprives her of her Shari’a right to enjoy sexual pleasure, or a contagious disease that place her life in danger and cannot be treated, provided she had not known of and accepted it prior to the contract.

A relevant decision was passed by the Grand Court in 2006.

It is approved by Shari’a for a wife to request divorce from her husband if she finds a chronic defect in him that cannot be treated, or may be treated only after a very long period, and if her life with him would entail a harm to her in the form of dangerous infectious diseases. This is the case whether the husband’s defect or disease occurred before the contract and she was unaware of it or happened after the contract and she did not accept it. God has said, “*The marriage must either be resumed in fairness or dissolved in a goodly manner.*” A wife’s repulsion for her husband, or her deprivation of pleasure from him, is not considered “staying together in a goodly manner.” It is also stipulated that if the wife discovers this defect and

does not resort to the legal system and stays with her husband for some time, her right to request a divorce from him because of this defect or disease does not abate. Hence, the court decided, in the presence of the parties, to divorce the plaintiff from the defendant in a one-time divorce with minor irrevocability.

2. If the dissolution takes place prior to the marriage consummation, the dowry must be returned. If the marriage has been consummated and the dowry assigned, she shall keep it. If the dowry has not been assigned, she shall receive the equivalent dowry.⁷⁸
3. As for different religions, the opinion followed by the Sunni court is the consensus opinion among Islamic schools, which is conditioned upon compatibility in religion between the husband and wife. A Muslim woman may not marry a non-Muslim man, according to God's words, "*And do not marry women who ascribe divinity to aught beside God unless they attain to [true] belief: for any believing bondwoman [of God] is certainly better than a woman who ascribes divinity to aught beside God, even though she please you greatly.*"⁷⁹ If the husband declares apostasy, or if she was a non-Muslim married to a non-Muslim who then converted to Islam, she may not stay in the man's protection, according to God's words, "*And if you have thus ascertained that they are believers, do not send them back to the deniers of the truth, [since] they are [no longer] lawful to their erstwhile husbands, and these are [no longer] lawful to them.*"⁸⁰ Hence, she has the right to request that her contract be dissolved; she should not be allowed to stay under his protection, even if she agrees to it.

⁷⁸ To be explained in detail later.

⁷⁹ Surat Al Baqarah, Verse 221.

Divorce for Lack of Financial Support

A wife has the right to financial maintenance from her husband, regardless of how well off he is, and this document has explained how she should collect the support if her husband refuses to pay it, depending on the circumstances. If the husband continues to refuse to pay the financial support although he is able to do so, and it cannot be collected from him except through official channels, she has the right to ask for divorce because of harm inflicted upon her. If the reason is that he is too poor to pay, however, a new fund has been established by the responsible authorities for such situations, although it has not yet been activated. It is expected that this new fund will take care of cases such as those mentioned above, considering whatever is paid as a debt owed by the husband. In those cases, the wife does not have the right to seek divorce on the grounds of harm caused by not receiving financial support.

Separation as a Result of Damage

1. Among the most important rights a wife can expect from her husband is good cohabitation with him, according to God's words, "*And consort with your wives in a goodly manner.*"⁸⁰ If he violates this duty by abusing her and causing her harm, the Sunni court adopts the Maliki opinion in this context. This opinion stipulates that if the husband's abuse is evident or is admitted by him, and the harm is such that cohabitation is impossible, and the judge fails to reform the husband, and the wife has requested divorce but the husband has declined, the judge has the right to divorce her from her husband in one divorce by an irrevocable repudiation. This is according to God's words, "*And so, when you divorce women and they are about to reach the end of their waiting-term,*

⁸⁰ Surat Al Mumtahinah, Verse 10.

⁸¹ Surat Al Nisa', Verse 19.

then either retain them in a fair manner or let them go in a fair manner. But do not retain them against their will in order to hurt [them]: for he who does so sins indeed against himself.”⁸²

2. The Maliki school allows the broadest types of harm that can lead a wife to demand that her husband divorce her. Al Tasuli mentions in ‘*Al Bahja*’, “By beating or verbal abuse without the right, or starving, or by not talking to her, or turning his face away in bed...” Malik said, “We do not have any specific listing of little or excessive harm.”⁸³

A relevant court case was submitted to the Grand Court in 2006.

The plaintiff demanded that she be divorced from her husband, the defendant, because of the harm he inflicted upon her through beatings, his lack of financial support, and his addiction to alcohol and drugs. She explained that he divorced her once in a revocable divorce, and they then concluded an agreement stipulating that the defendant should refrain from alcohol and drugs, and that the plaintiff should have the right to divorce for harm inflicted, and to pursue legal litigation upon her oath and without evidence. After the plaintiff took the oath, the court’s decision was as follows: The parties’ agreement ended their conflict by Shari’a and civil law; they had agreed that he would not take alcohol or drugs, and that she had the right to sue him without evidence but simply based on her oath. She gave her testimony under oath, and whereas the plaintiff requested divorce for harm, the court decided, in the presence of the parties, to divorce the plaintiff from the defendant, one revocable divorce for harm, preceded by one divorce, and an adequate divorce certificate was to be issued for them, to be handed to the parties after the decision became final.

⁸² Surat Al Baqarah, Verse 231.

⁸³ Al Bahja fi Tafsir Al Tuhfa, 2/260.

Another decision in 2005 dealt with bodily harm inflicted in the form of severe beating, as evident from the court file and the medical report.

The harm inflicted on the plaintiff was evident and admitted by the defendant. It is the court's duty to remove the harm once it is proved, responding positively to the plaintiff's request for divorce from the defendant, and it is stipulated by Shari'a that married life is based on good cohabitation, according to God's words, "*And consort with your wives in a goodly manner.*" Beating contradicts this, as well as the Shari'a principle that stipulates, "No harm and no causing of harm." Hence, the court decided, in the presence of all parties, that the plaintiff be divorced from the defendant, one time with minor irrevocable repudiation.

A relevant decision related to psychological harm and represented in slander was passed in 2007:

It is stipulated by Shari'a according to the Maliki school of thought that the "harm" that allows a wife to request a divorce is defined as anything the husband is not supposed to do to her under Shari'a law.⁸⁴ This includes curses and insults that harm the wife's honor; for this, the husband shall be divorced from his wife. And as harm was proved to the court, the judges decided, in the presence of the parties, to divorce the defendant from the plaintiff one time for harm with minor irrevocable repudiation.

3. There is a problem however, with the Sunni court's implementation of this ruling. Evidence of harmful situations causing the divorce is often represented by witnesses. In many cases, however, these situations only occur when the husband and wife are alone, and hence lack witnesses. Some of them include beating or insults, which may only

⁸⁴ Al Dasuqi with al Dardir, 2/345.

be witnessed by those sharing the residence or visiting frequently, such as children, parents, brothers and sisters. These people are all unacceptable as witnesses by the Sunni courts: children testifying against their parents plant the seeds of hatred in their parents against them, while the wife's relatives, for example, would be inclined to promote her interests.

As for other evidence, the court allows a medical report to serve as evidence, as well as a complaint filed in a police station testifying to the husband's assault against his wife. Most wives, however, especially those in good social standing, avoid going to hospitals, exposing themselves to doctors when assaulted, undergoing a medical examination, or entering police stations. Thus, there is a need to improve the procedures of proving harm through evidence.

Divorce Due to Absence or Imprisonment

a) Divorce due to the Husband's Absence

A husband's absence from his wife takes many forms, as does the resulting harm to the wife. His absence may be acknowledged, or he may be in an unknown place, with or without a legitimate reason. As for the type of harm, it may be material, because he has left her with no financial resources to spend on herself or her children, or it may be a psychological harm, resulting from feelings of loneliness that render her vulnerable to seduction.

In the Maliki school, if a husband is away for one year or more (and some say three years), and it is known that she has sustained harm from his absence, and he refuses to return to her or to relocate her to his place of residence, separation between them is permissible. This is true whether his absence is substantiated or otherwise, even if he left her financial sustenance. The separation shall take the form of a revocable divorce.⁸⁵

An interesting decision was passed by the Grand Sunni Court in 2006:

The plaintiff requested to be divorced from the defendant because of harm sustained as a result of estrangement and lack of financial support. The plaintiff provided evidence that necessitated divorce for estrangement and lack of financial support. The evidence she provided was represented by two witnesses who testified emphatically that they had not seen the defendant for 14 years, and that he did not support the plaintiff financially, did not delegate anyone to support her, did not leave her anything to sell in order to support herself, and that she was not disobedient. The plaintiff took a legal oath on the witnesses' testimony. The Prophet said, "*No harm and no causing of harm,*" and the defendant left the plaintiff during this entire period without support or compensation to the plaintiff. Once this harm is proved, divorce is necessitated, according to the decrees of God; as a result, the court decided, in the presence of the parties, to divorce the plaintiff from the defendant one time with minor irrevocable divorce for harm.

In a decision passed by the Second Grand Court in 2006, the following was stipulated:

The Shari'a principle is that harm shall be removed, according to God's words, "*And neither shall you keep them under constraint with a view to taking away anything of what you may have given them,*" as well as the Prophet's words, "*No harm and no causing of harm,*" with harm encompassing physical and moral abuse. The plaintiff clarified the harm she encountered by testifying that the defendant left her estranged for over a year without support, underscored by the testimony of witnesses. Estrangement is considered harm, and in this case the lack of financial support is added to it. The plaintiff requested divorce for the above-mentioned harm, and the court decided, in the presence of the parties, to divorce the plaintiff from the defendant in one irrevocable divorce for harm.

⁸⁵ Al Dardir, Al Sharh Al Kabir (The Major Interpretation), 2/382, and Bidayat Al Mujtahid, 2/61.

b) Divorce Because of the Husband's Imprisonment

It is the wife's right, in the Maliki school (which is used in Sunni courts), to consider a husband's imprisonment a harm that permits his wife to request a divorce from him,⁸⁶ due to its similarity to absence. Added to that is the ensuing bad reputation, if imprisonment is the result of a crime committed against others, such as theft or an assault against honor.

A related decision was issued by the Second Grand Court in 2006:

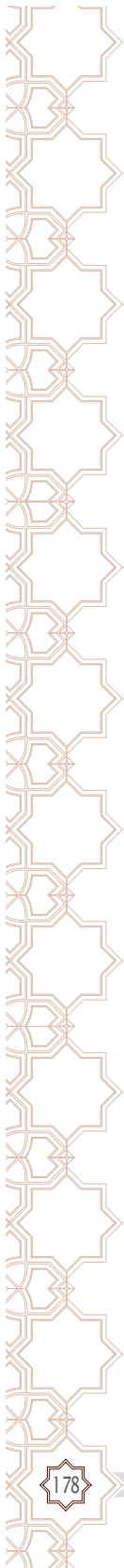
A wife was harmed by her husband's 10-year imprisonment, and the Maliki school decided that this was a case of harm that permits divorce. The plaintiff requested divorce for the harm inflicted, and the court decided, in the presence of the parties, that the plaintiff should be divorced from the defendant in one minor irrevocable divorce for harm inflicted.

Divorce Because of a Missing Husband (whose Condition is Unknown)

The wife of a man who is absent — whose whereabouts are unknown and who may not even be alive, including prisoners of war — has the right to request a divorce from her husband for lack of financial support. This is the case if he has no money that she can use and he sends her none, according to witnesses' testimony, and he has not delegated anyone to do this on his behalf. She may also request divorce from him on the grounds of his absence, implementing absence conditions. In case he has a good excuse, however, she shall not receive judgment against him until four years have passed from the date of the start of his absence.

A missing man's wife may ask the court to look into whether he is alive or dead. After conducting an investigation using all possible

⁸⁶ Al Sharh Al Kabir, 2/159.



methods, the court may declare him dead when the required period has elapsed. If this happens, his wife is required to perform the 'Iddah of the dead as of the date of the court decision. If the missing husband shows up after that, or is proved alive, his wife is his, unless she has married another man who was unaware of the husband being alive and the marriage was consummated. If he knew that the husband was alive, or did not and the marriage was not consummated, she belongs to the man whose death had been presumed.

Khula'

1. Khula' ends the relationship between husband and wife when the word or any of its synonyms are mentioned, in exchange for a compensation paid by the wife to her husband. In other words, it is a divorce in exchange for compensation, and is termed Khula' because God made the husband and wife a cover, like clothing, to each other, when He said, "*They are as a garment for you, and you are as a garment for them.*"⁸⁷
2. Khula' is the right of a woman, who otherwise does not have the right to divorce, to be used when she despises her husband to the extent that she cannot continue married life with him. It is used if he refuses to divorce her lest he should lose the dowry and other gifts he has given her. It is also for the woman who has sustained harm from her husband but cannot prove it. In this case, the husband may set a condition that if she wants to end the relationship, she has to give him a financial compensation or relinquish her financial rights, including a belated dowry he may owe her. According to God's words, "*And it is not lawful for you to take back anything of what you have ever given to your wives unless both [partners] have cause to fear that they may not be able to keep within the bounds set by God.*"

⁸⁷ Surat Al Baqarah, Verse 187.

Hence, if you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself.”⁸⁸ The words of Ibn ‘Abbas are also useful, when Thabit Ibn Qais’s wife came to the Prophet and said, “I have nothing against Thabit in terms of religiousness or manners, but I do not like him.” The Prophet asked her, “Would you return to him what he gave you?” She said, “Yes.”⁸⁹ In another reference to the story, she said, “And I shall give him more if he so wishes.” The Prophet said, “No for the additional gift,” and he separated them.

Among the decisions before the Sunni courts is one that was passed in 2006:

After many sessions, the parties arrived at an agreement that would settle the conflict between them, stipulating that the plaintiff divorce the defendant a second time after she admitted to the Khula’ after consummation, in exchange for surrendering previous financial obligations and compensations. The plaintiff uttered this divorce saying: “I have divorced my wife by Khula’ after consummating our marriage, in exchange for her surrendering past financial obligations and compensations.” Then the parties agreed to the following:

First: The custody of the child would be with his mother, the defendant, according to conditions stipulated by jurists.

Second: The plaintiff would pay the defendant a monthly child support for their child.

Third: The defendant would allow the plaintiff two days of visitation every week with the father, at the rate of two hours a day, provided

⁸⁸ Surat Al Baqarah, Verse 229.

⁸⁹ Related by Al Bukhari, 4872.

they are at an appropriate time. The father would take the child from the social center in their area.

The two parties agreed on divorce by Khula', in exchange for the defendant's surrender of her past financial obligations to the plaintiff. The plaintiff invoked Khula' divorce against the defendant before the court, in their presence. This divorce is the second for the plaintiff according to their submission, and it is accepted by Shari'a that Khula' divorce is approved, according to God's words, "*If you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself.*" Based on the agreement concluded between the parties, the court approved it because it did not contradict the provisions of Islamic Shari'a, and because Shari'a stipulates that Muslims are to observe the conditions they set for themselves, with the exception of those who permit the prohibited and forbid the permitted, for these reasons, the court decided, in the presence of the parties, as follows:

First: That the divorce of the plaintiff against the defendant was valid through a second divorce by Khula' after consummation, with a minor irrevocable repudiation. She would only become available to him with a new contract and a new dowry.

Second: The plaintiff was free from any previous financial obligations or compensations due to the defendant.

Third: The agreement as written between the parties was true and valid, and they were committed to implement it, and carry the power of an executable bond.

3. The compensation in Khula' cannot exceed what a husband has presented to his wife; according to the Hadith, "*Any addition is not permitted.*"
4. The compensation may not include the wife's surrender of the right to child custody, especially with very young

children, because she is more capable and appropriate to care for them, according to a Hadith by Abdullah Ibn 'Amr Ibn Al 'Aas, who said that a woman came to the Prophet and said, "My womb contained this son of mine, and my lap his shelter, and my breast his nourishment. His father divorced me, and wants to take him from me." The Prophet said, "*You have the first right to him among all people, unless you re-marry.*"⁹⁰

5. Another opinion permits an increase in the compensation over what the husband presents, because the verse that is cited does not specify the amount. The Hadith means that whoever accepts the increase has negated the more appropriate amount. This is the popular opinion, especially among Maliki followers.
6. As for the wife's surrendering her right to child custody to their father, and although the Maliki opinion is that custody is a joint right between the custodian and the child in custody, and not the exclusive right of any of them, the right of the child in custody is the strongest.⁹¹ Hence, she may not surrender this right, because although she may have rights, her child's rights are stronger and she cannot surrender them. This is an unusual concept because it violates the Maliki opinion implemented in their stipulations.

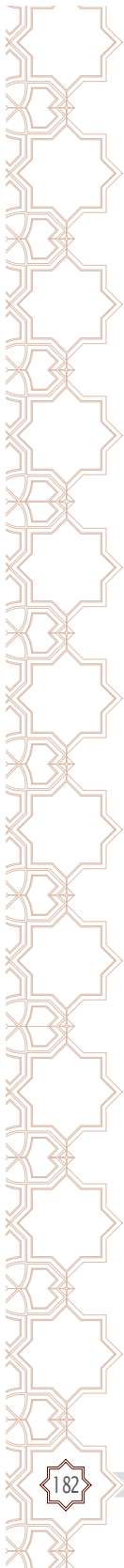
Part III: Women's Rights After Dissolution of the Marriage

'Iddah

1. 'Iddah is the name of the period during which the woman abstains from marriage after her husband dies or after she separates from him, either by giving birth, by *iqra'* (menses),

⁹⁰ Related by Ahmad, 6707, and Abu Dawud, 2276, and others with good chain of transmitters.

⁹¹ Al Hattab, Mawahib Al Jalil, 4/216.



or by a specific number of months.⁹² It is also said that ‘Iddah is the period during which a woman may not become engaged or marry, in order to ensure that she is not pregnant after a divorce that follows a consummated marriage, or the death of her husband. This is according to God’s words, *“And the divorced women shall undergo, without remarrying, a waiting-period of three monthly courses.”*⁹³ He also said, *“Now as for such of your women as are beyond, the age of monthly courses, as well as for such as do not have any courses, their waiting-period — if you have any doubt [about] it — shall be three [calendar] months; and as for those who are with child, the end of their waiting-term shall come when they deliver their burden. And for everyone who is conscious of God, He makes it easy to obey His commandment.”*⁹⁴ and He said, *“And if any of you die and leave wives behind, they shall undergo, without remarrying, a waiting period of four months and ten days; whereupon, when they have reached the end of their waiting-term, there shall be no sin in whatever they may do with their persons in a lawful manner. And God is aware of all that you do.”*⁹⁵

2. ‘Iddah is among the established rights of separation that the Sunni court emphasizes in respect for a woman’s feelings of sorrow after a divorce or her husband’s death.

Compensation for Separation

A divorced woman’s compensation is a material compensation paid by the husband to his wife upon divorce, according to God’s words, *“And the divorced women, too, shall have [a right to] maintenance in a goodly manner: this is a duty for all who are conscious of God.”*⁹⁶ He

⁹² Subul Al Salam, 1/168.

⁹³ Surat Al Baqarah, Verse 228.

⁹⁴ Surat Al Talaq, Verse 4.

⁹⁵ Surat Al Baqarah, Verse 234.

⁹⁶ Surat Al Baqarah, Verse 241.

also said, “You will incur no sin if you divorce women while you have not yet touched them nor settled a dower upon them; but [even in such a case] make provision for them — the affluent according to his means, and the straitened according to his means. A provision in an equitable manner: this is a duty upon all who would do good.”⁹⁷ According to Sahl Ibn Sa’ad and Abu ’Usaid, the Prophet married ’Umaimah Bint Sharahil, and when she entered his presence, he extended his hand to her, but it seemed that she did not like that, so he asked Abu ’Usaid to prepare her marriage requirement and give her two blue dresses.⁹⁸

Malik and his companions said that compensation is delegated for every divorced woman, even if her marriage has been consummated. And when it is not, she shall be satisfied with what she receives, and she shall receive no compensation, according to God’s words, “If you divorce them before touching them, but after you had set the dowry for them, the compensation shall be half the dowry, unless they voluntarily forfeit their rights, or the party responsible for causing the divorce chooses to forfeit the dowry. To forfeit is closer to righteousness. You shall maintain the amicable relations among you. God is seer of everything you do.”⁹⁹

As for the amount of the compensation, Imam Malik said, “Compensation in our opinion has no specific amount, as a minimum or a maximum.”¹⁰⁰

Although the school of Islamic jurisprudence applicable to Sunni Bahraini courts is the Imam Malik school, they take into account the majority of the jurists’ opinions. In this matter, the opinion is that compensation is not required except for a woman who is divorced before her marriage is consummated and before a dowry is specified for her.

⁹⁷ Surat Al Baqarah, Verse 236.

⁹⁸ Related by Al Bukhari, 4957.

⁹⁹ Surat Al Baqarah, Verse 237.

¹⁰⁰ Al Muwatta’, 1189 – 2/573, and Al Istidhkar, 6/120.

This is according to the court decision issued by the Sunni Lowest Court in 2005:

It was decided by jurists that no divorce compensation or alimony be paid to the divorced woman, unless it was done by selection or compassion, according to God's words, "*Divorced women deserve compensation by righteousness, from those who are pious.*" Compensation is the right of a woman whose marriage has not been consummated if no dowry was assigned for her. Hence, the courts refused to oblige.

The Grand Court of Appeal approved this judgment when it was appealed in 2006.

The Right to Custody

1. A mother has the right to custody of her child. Abdullah 'Amr Ibn al 'Aas referred to this when he said that a woman came to the Prophet and said, "*My womb contained this son of mine, and my lap was his shelter, and my breast his nourishment. His father divorced me, and wants to take him from me.*" The Prophet said, "*You have the right to him among all people, unless you re-marry.*"¹⁰¹ It is also related that 'Umar Ibn Al Khattab divorced his wife and there was a quarrel between them over custody of their son, with each wanting to take custody of him. When this conflict was raised to the Caliph Abu Bakr Al Siddiq, he decided that the boy should stay with his mother, and said to 'Umar, "Let it be between him and her. Her scent, her touch, her feeling and her way are better for him than yours, until the boy grows up and chooses for himself."¹⁰² And in another story, "*Better than honey with you.*"¹⁰³ These words summarize the reality

¹⁰¹ Related by Ahmad in his Musnad, 6707. Shu'aib Al Arna'ut said, Hadith Hassan, related by Abu Dawud, 2276.

¹⁰² Related by Ibn Abi Shibah, 19123, and Abdul Razzaq, 12601.

¹⁰³ Nasb Al Rayah, 3/226.

of the relationship between the mother and her child, which should not be changed, as it would deprive both parties of its sweetness. Hence, Abu Bakr said to Omar after he decided the boy should go to the mother, “I heard the Prophet say, ‘Do not make a mother long¹⁰⁴ for her child.’”¹⁰⁵

2. In Bahraini Sunni courts’ applications, custody of the child with the mother remains until the boy reaches puberty, between the ages of 13 and 15, and until the girl is married, according to the opinion of Imam Malik.
3. The mother’s right to custody does not abate unless she marries another man, provided the father requests this abatement within one year of his knowledge of the marriage. Custody then transfers to the next person who has the right, who is the wife’s mother, and then her female relatives. This is the case unless there is an agreement between them to the contrary, which could allow custody to transfer directly to the father, if he makes the request within the time limit. If he declines to make the request, or does so after the time limit, the court will decline his request and the mother will keep custody.

Among the relevant cases is a judgment passed in 2006:

The plaintiff filed a Shari’a case against the defendant, who was legally served, and requested judgment for custody of his two daughters.

The plaintiff stated, “The defendant is my divorced wife, and we have two daughters. She had custody of the girls, but she remarried, and according to Article 4 of the agreement between the two parties, ‘In case the defendant remarries, the girls shall spend every night at the

¹⁰⁴ Indicating sadness over separation or love to the child. Ibn Manzur, Lisan Al Arab, Article (*Waliha*), 13/561.

¹⁰⁵ Related by Al Baihaqi in Al Sunan Al Kubra, 15545.

plaintiff's house.' This condition was satisfied in the decision passed by the Grand Shari'a Court, and I decided to file this case."

The defendant offered to keep the daughters with her during most of the day and undertook to accompany them to the plaintiff's house and pick them up again, and the plaintiff agreed to this. As a result, the court responded to the plaintiff's request to transfer custody from the mother to the father, and as the two parties agreed on times for the daughters' visits to the mother, the court approved the agreement, upon the defendant's promise to receive them and return them to the custodian father.

4. An evaluation of court cases addressed by Bahraini Sunni departments illustrates that the court approves of compensation in Khula' including the wife's surrender of custody of her children. This is according to a Maliki opinion which stipulates that Khula' based on surrendering custody in favor of the father is permissible, and the right shall transfer to him even if there are others who have priority to custody. However, the courts outlined as a condition that the children in custody not be exposed to danger, including the loss of their closeness with their mother, which is a natural emotion, or a lack of safety in their father's residence. If this is the case, custody does not abate and the divorce is implemented.¹⁰⁶ Item one of the Khula' divorce decision issued by the Grand Court in 2002 stipulates that the plaintiff shall be divorced from the defendant by Khula' in exchange for her surrender of custody rights to her two children.

The situation is currently different, because the court does not approve this surrender of custody. This is according to a decision passed in 2007, in which the court refused to allow a wife's divorce

¹⁰⁶ Al Dasuqi, Hashiyat Al Dasuqi, 2/349.

by Khula' to be dependent on her surrender of her custody rights to her children.

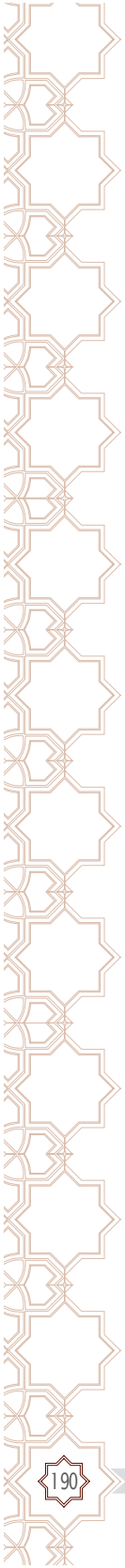
Visitation Rights

If a mother's right to custody abates as a result of her marriage or anything else, she still has the right to visit with her children at appropriate times. This is according to a decision passed by the Grand Court of Appeals: The appellant shall permit the mother to take her children for visitation on Thursday of each week, from 10 AM to 6 PM.

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Conclusion

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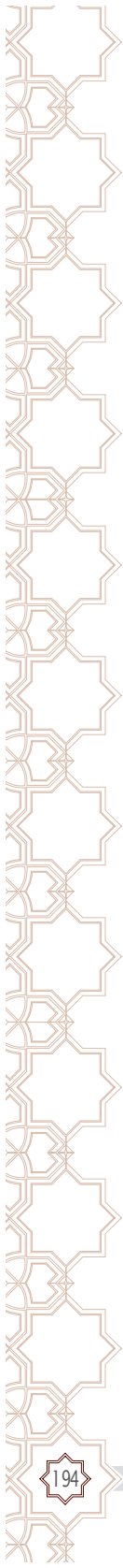
Conclusion

Officially issuing a Personal Status Law in accordance with the state's constitutional procedures, as occurred in Kuwait in 1984, or invoking the interpretation and implementation of Shari'a provisions agreed upon in one of the five jurisprudence schools of thought (Shafi'i, Hanafi, Maliki, Hanbali and the Ja'fari) regarding personal status issues, as was the case in the Kingdom of Bahrain, has contributed to the creation of a legal and Shari'a framework for the regulation of family relations in these two states.

From those actions rose the idea of publishing a standardized guide, titled *Women's Rights in the Kuwaiti Personal Status Law and the Bahraini Shari'a Judicial Rulings*. The creation of the guide is a pioneering step that will enhance the Shari'a principles relating to the rights and obligations of women, whether they are wives and mothers, divorced or widowed. It is hoped that this guide will help to clarify legal and Shari'a principles and raise awareness among women of their basic rights in family relations. The guide was also designed to enhance current efforts, both formal and informal, to achieve equality between men and women for the purpose of increasing social justice, advancing the position of Arab Muslim women, and developing society in these two states.

Within this context, legal and Shari'a research efforts by specialized experts in these fields focused on the current laws, provisions and opinions in the State of Kuwait and the Kingdom of Bahrain. These experts highlighted the legal systems' role in enhancing women's rights in family relations by objectively explaining and analyzing Shari'a provisions, outlining shortcomings, and investigating how they might be implemented in ways that could prevent women from enjoying their legal and Shari'a rights on equal footing with men.

Kuwait's Personal Status Law is the oldest legislation in the Arabian Gulf countries. It was contemplated and prepared in the early 1970's and officially enacted in October 1984. The law comprises 347 articles that



address all issues related to the establishment of marriage, provisions of the marriage contract, effects of marriage, matrimonial alimony, dissolution of marriage, unilateral separation, divorce, Khula' (divorce initiated by the woman in exchange for a compensation paid to the man), separation through litigation, compensation for separation, 'Iddah and its general provisions, and other issues involving family relations.

Social, economic, and educational conditions in the State of Kuwait and the Arabian Gulf countries have improved considerably over the past few decades and have been accompanied by advances in women's educational and social status. Women's rights in family relations have been addressed by personal status laws in three Arab Gulf countries (the 1979 Omani Personal Status Law, the 2005 United Arab Emirates Personal Status Law, and the 2006 Qatari Family Law). This study uses legal analysis to address in considerable detail the status of women's rights as laid out by the Kuwaiti Personal Status Law compared with legislation in other Arab and Gulf countries, which are more equitable, and enhance women's rights in family relations. These laws also reflect Arab women's development and aspirations, without violating the provisions of Islamic Shari'a, in which God honored the human being, without discrimination on the basis of gender.

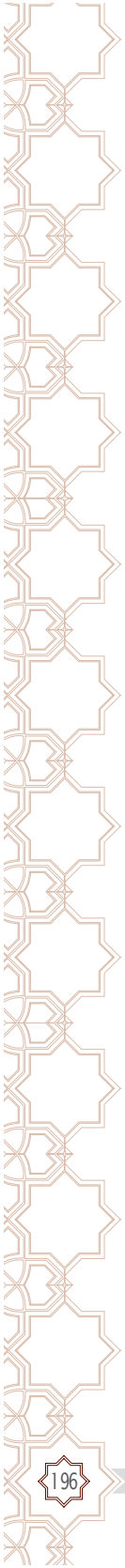
From another perspective, this guide highlights the position of the Shari'a judiciary in Sunni schools of thought and the Shi'ite school of thought regarding women's rights in family relations in the Kingdom of Bahrain. Due to continued disparities between the opinions of jurists from the two schools over some procedural and legal issues, the enactment of a comprehensive personal status law was prevented until now, despite the agreement of government agencies and civil society organizations on the importance of issuing a law that would enhance women's rights and disseminate legal and Shari'a positions on women's rights in Bahraini society.

Due to the absence of a special family law according to the Shi'a school, a paper by a Shari'a judge in the Shi'a circuit, Al Sheikh

Hameed Al Mubarak, titled “*Women’s Rights in Family Provisions and Their Applications in Bahraini Shari’a Courts,*” is presented in this guide. The paper addresses a number of issues by presenting judicial models that assert women’s rights according to the Shi’a school of thought, including women’s rights prior to marriage (rights during the engagement period, eligibility for marriage, cases of the father’s refusal, and competence in marriage) and during marriage, the wife’s right to invoke divorce from her husband, and her right to judgment of separation, in addition to women’s rights after the matrimonial relationship is terminated (her right to compensation, and to custody and visitation of her children).

Dr. Ahmad Al Atawi’s paper in this guide highlights the jurisprudence related to women’s rights in the Sunni school of thought as applied in Bahraini Sunni Shari’a courts of law. His paper points out that the Sunni courts rely, at present, on the salient opinions of Imam Malik’s school of thought as well as on judicial interpretations, due to the absence, until now, of a special family law according to the Sunni school of thought. (In 2008, a draft law covering family provisions according to the Sunni school of thought was completed by a committee of Shari’a scholars, formed in cooperation with the Bahraini Women’s Union and comprising 155 articles). The draft family provisions include a number of articles that enhance Bahraini women’s rights in family relations. Article 145 of the draft law permits the Shari’a judge to consult other schools of thought if this draft law does not include a solution to a specific problem. This leaves the door open to developing the law to accommodate social and economic changes in Bahraini society in general and regarding women’s rights in particular.

Based on the above, this guide to *Women’s Rights in the Kuwaiti Personal Status Law and the Bahraini Shari’a Judicial Rulings* is a crucial project. The guide will enhance women’s rights in the State of Kuwait and the Kingdom of Bahrain, where, as in other Arab countries, most women suffer from legal and Shari’a illiteracy, which facilitates further violation of their basic rights by both the legislative and the executive powers as well as by society at large. Publishing



the guide in both Arabic and English may eliminate suspicion and misunderstanding of the nature of Arab women's Shari'a rights in family relations not only in this part of the world, but also among women in the West and particularly in the United States. This guide may correct erroneous concepts about the Shari'a rights of Muslim women, and contribute to bridging cultural and legal gaps between Arab women and women in the United States, in order to find a common and comprehensible language based on understanding and mutual respect for each other's culture, civilization and laws.

Dr. Badria Al Awadi

Arab Regional Center for Environmental Law

State of Kuwait

Attachments and Appendices





Appendix No. 1

Kuwaiti Personal Status Law of 1984 and Amendments

Article (1)

Marriage is a contract between a man and a woman who is legally available to him, for the purpose of cohabitation, matrimony and strengthening the power of the nation.

Article (2)

Engagement does not compel marriage. The same is true for a promise to wed, receipt of a dowry and the acceptance or exchange of gifts.

Article (3)

- A. Each of the two parties in an engagement may desist from the engagement.
- B. If neither party desists, nor the woman has married another man, the marriage shall not be dissolved.

Article (4)

- A. If either party desists from the engagement, the man may retrieve the dowry presented, or its value the day it was presented if it is not possible to return it in its original form.
- B. Part of the dowry is items that are deemed to be gifts by social norms.
- C. If the engaged woman uses part or all of her dowry to purchase materials in preparation for the marriage, and

the man then reneges, she shall have a choice of whether to return the dowry or to deliver an equivalent or partial quantity.

Article (5)

If one of the parties desists from the engagement, and no conditions or rules had been established:

- A. If his or her change of mind is without justification, none of the gifts offered to the other party must be returned.
- B. If the desistance is justified, he or she shall retrieve the gifts that were presented to the other party, if available; or, if the gifts were perishable or consumable, an equal value from the day they were presented.

Article (6)

- A. If the engagement ends with both parties' desistance, and one of them was the cause, the other party's desistance is considered justified, and paragraph B of the previous article shall be applied. Otherwise, each party shall retrieve what he or she presented, if possible.
- B. If the engagement is terminated by death or a *force majeure*, none of the gifts shall be retrieved.

Article (7)

In all cases, perishable gifts shall not be returned.

Article (8)

Marriage shall be completed upon the offer to the guardian of the wife-to-be, and the acceptance of the woman or whoever represents her.

Article (9)

- A. Offer and acceptance in marriage are verbal, using terms to indicate approval as per social norms, in any language.
- B. Approval among absent people may be in writing or through messengers.
- C. In case speech is not possible, it may be replaced by writing. If writing is not possible, then signals that are clearly understood are acceptable.

Article (10)

- A. Offer and acceptance shall be achievable and not time-specific.
- B. Approval of acceptance shall be expressed openly and candidly or by implication.
- C. The contract council shall convene when members are present. Those who are absent from the council convene by informing the person requesting the engagement of their approval of the contents of the letter, or after listening to a messenger. The council in this case is considered convened continuously for three days, during which time acceptance is legitimate, unless an additional period is requested for approval, or the receiver of the message indicates refusal of the request.
- D. The offer is considered valid until acceptance is issued.
- E. Each of the contractors present shall be able to hear the speech of the other, and with full understanding that marriage is the intention of the contract.

Article (11)

- A. In order for the marriage to be legitimate, two Muslim, adult, and sane male witnesses shall be present to hear and understand what the two sides are discussing.
- B. Two *Kitabi* [people of the book (Christians or Jews)] witnesses are acceptable in the marriage of a Muslim man to a *Kitabi* woman.

Article (12)

For the marriage to be valid, the woman shall not be *Muharram* (unlawful) to the man, temporarily or eternally.

Article (13)

The following are unlawful to a person by virtue of lineage:

- A. Ancestors
- B. Descendents
- C. Father's descendants
- D. First level of grandparents' descendants

Article (14)

The following are unlawful to a man as a result of relationship by marriage:

- A. A woman married to a man from his lineage
- B. A woman married to one of his descendants
- C. Lineage of his wife's ancestors
- D. Descendants of his wife in a marriage that was truly consummated.

Article (15)

A person's marriage to his descendant from adultery is unlawful. No other person is unlawful to these descendants from adultery.

Article (16)

- A. Children who were breast-fed together are unlawful to each other.
- B. In-law prohibitions are confirmed if the parties are proved to have been breast-fed.

Article (17)

Prohibition of marriage between children who were breast-fed together is conditioned upon it occurring during the children's first two years, and must include at least five nursing sessions.

Article (18)

The following marriages shall not be completed:

- A. A Muslim woman to a non-Muslim man.
- B. A Muslim man to a non-*Kitabi* [Kitabi is a person of the book (Christian or Jew)]
- C. The marriage of an unbelieving man or woman, even if the other party is a non-Muslim.

Article (19)

A man shall not marry another man's wife, or another man's wife under 'Iddah.

Article (20)

It is prohibited to have two women, even in 'Iddah. If one of them is obliged to him, the other is prohibited.

Article (21)

A man may not marry a fifth woman before his marriage to one of the other four wives is dissolved and her 'Iddah is over.

Article (22)

A man shall not marry a woman he has divorced three times before, unless she has wed another man and consummated that marriage, then divorced him and completed her 'Iddah.

Article (23)

A man may not marry a woman whom he has turned against her husband, unless she went back to her first husband, and he then divorced her or died.

Article (24)

- A. To be eligible for marriage, both parties must be sane and past puberty.
- B. The judge may permit marriage of the insane or mentally retarded, male or female, if a medical report proves that marriage would contribute to his or her cure, and the other party has clearly accepted the other's condition.

Article (25)

Marriage of a person under coercion or under the influence of alcohol is not permitted.

Article (26)

A marriage contract may not be documented or approved if the girl has not completed fifteen years of age and the boy seventeen years of age, at the time of the documentation.

Article (27)

- A. Delegation in the marriage contract is permitted.
- B. The representative may not marry off the person granting representation unless this is stipulated in the representation document.

Article (28)

- A. If the marriage of an obtrusive person takes place, based on the authorization of the person concerned, it is considered proper.
- B. If the representative exceeds the limits of his representation in a marriage, he is considered obtrusive.

Article (29)

- A. A guardian in the marriage of a virgin who is between the ages of puberty and 25 years is the first in charge according to the hierarchy of inheritance. If this association is lacking, the judge is the guardian. This rule also applies for the insane and the mentally retarded, male or female.
- B. The opinions of the guardian and the woman he represents should be in accordance.

Article (30)

A non-virgin, or a woman who has reached 25 years of age, shall make her own decision in marriage. She may not, however, conclude her own contract, which is the domain of her guardian.

Article (31)

If the guardian prevents the woman from marrying, she may refer the issue to a judge who shall either order marriage or declare that it not to occur. The same applies if a number of guardians exist and they all oppose the marriage or disagree about it.

Article (32)

A guardian who is not unlawful to a woman may marry her, with her approval.

Article (33)

- A. Any person who reaches puberty while stupid, or becomes stupid and foolish afterwards, may marry by himself.
- B. If his marriage takes place after quarantine for treatment, the guardian of his property may object to anything that exceeds a dowry of equivalence.

Article (34)

A condition of marriage is that the man be compatible to the woman at the time of drawing the contract. The woman and her guardian have the right to dissolve the marriage if compatibility is not present.

Article (35)

The basis of compatibility is religious piety.

Article (36)

Compatibility in age between the husband and wife is considered the right of the wife alone.

Article (37)

The guardian of lineage incompatibility is the father, followed by the son, the grandfather, the paternal step-brother, the uncle, and the paternal step-uncle.

Article (38)

If a man claims competence, and he is later proven incompetent, both the wife and her guardian have the right to separation.

Article (39)

The right to separation abates if the wife is pregnant, or has previously given approval, or if a year of marriage elapses after the wife learns of the husband's incompetence.

Article (40)

- A. If the marriage contract is based on a condition that negates its pillars, the contract shall be null and void.
- B. If it is premised on a condition that does not negate its origin, but negates its requirements, or is prohibited by Shari'a law, the condition shall abate and the contract is legal.
- C. If it is premised on a condition that does not negate its origin or requirement, and is not prohibited by Shari'a law, the condition is right and shall be fulfilled. If it is not fulfilled, the party benefiting from the condition shall have the right to request separation.
- D. The provision of the previous paragraph applies after the specific description of the condition required from one of the parties has elapsed.

Article (41)

The condition must be recorded in the marriage contract.

Article (42)

The right to separation abates if the party that has it drops it openly or by implication.

Article (43)

- A. Marriage is two types: valid, or proper, and invalid, or improper
- B. A proper marriage is one whose pillars are present, and all conditions thereon are present according to the provisions of this law. Anything else is null and void.

Article (44)

A proper marriage is valid and requisite, or valid but not requisite, or not valid to begin with.

Article (45)

- A. A valid and requisite marriage is one that is not conditioned on anyone's permission, and is not subject to separation according to the provisions of this law.
- B. A valid but not requisite marriage is one which is subject to separation for a reason stipulated in this law.
- C. An invalid marriage is one that has been concluded based on the permission of someone who has the authority to give permission.

Article (46)

A proper, valid and requisite marriage carries with it from its beginning a number of legal and Shari'a responsibilities.

Article (47)

- A. A proper but invalid marriage does not carry any of the responsibilities incurred before it was licensed or consummated.
- B. If it was licensed, it is considered valid as of the contract date.
- C. If it was concluded, it is considered invalid after consummation.

Article (48)

A null and void marriage does not carry any of the responsibilities of marriage.

Article (49)

A marriage is considered null and void in the following cases:

- A. If there is a flaw in the wording of the contract, or in the eligibility of the parties, that prevents it from happening.
- B. If the wife is unlawful to the husband due to a blood relationship, nursing, an in-law relationship, if she is someone else's wife under 'Iddah, has been divorced three times by her husband, cannot be added to those in his bond of marriage, or does not follow a heavenly religion.
- C. If the husband or wife is an unbeliever, or if the husband is non-Muslim and the wife is Muslim.

A condition for the paragraphs B and C above is knowledge of the prohibition and its reason. Ignorance is not considered an excuse if it is clear that the person claiming ignorance would otherwise know better.

Article (50)

With the exception of marriages mentioned in the above article, every improper marriage is considered invalid, and entering into one entails the following:

- A. The lower of the agreed dowry, and the dowry of the equivalent at the declaration of the dowry, and the dowry of the equivalent when no dowry is set.
- B. Children's shares are set as conditions and results, as stipulated by this law.
- C. The need for 'Iddah upon separation, by consent or because of a ruling of death.
- D. In-law prohibition.

Article (51)

An invalid marriage carries no effects prior to consummation.

Article (52)

Dowry for the wife is an obligation upon concluding a valid contract.

Article (53)

There is no upper or lower limit for the dowry.

Article (54)

Anything accepted for commitment by Shari'a can be considered a dowry, whether it is money, work, or a benefit, as long as it does not negate the husband's guardianship.

Article (55)

The dowry must be properly represented in the contract. If it is not clearly represented, or if the representation is not proper, or if the dowry is not mentioned at all, the equivalent dowry shall apply.

Article (56)

- A. Part of the dowry may be postponed. When there is no clear wording to this effect, the social norms shall apply.
- B. The time period specified in the contract shall abate when the dowry is due as a result of irrevocable divorce, or death.

Article (57)

Releasing the dowry postponement applies to the closer of the two: irrevocable divorce or death.

Article (58)

The husband may increase the dowry after marriage, and the wife may reduce it, if they are both fully competent to do so. This shall be appended in the contract, provided the other party approves.

Article (59)

The father, and after him the grandfather, may receive a virgin's dowry until she is 25 years of age, unless she refuses.

Article (60)

If both husband and wife disagree about receipt of the dowry, the wife shall have the final say prior to consummation and the husband after it, unless there is evidence or a custom to the contrary.

Article (61)

The full dowry is due with true consummation, or proper seclusion, or with the death of one of the two spouses.

Article (62)

If the wife kills her husband prior to consummation, which prevents inheritance, she shall return what she received in terms of dowry, and the balance shall abate. If the killing takes place after consummation, she shall not receive the balance of the dowry.

Article (63)

- A. The wife has the right to half the assigned dowry in the case of divorce prior to consummation or proper seclusion.
- B. If she received more than half, she shall return the extra amount.
- C. If she granted half of her dowry or more to her husband, nothing is reimbursed to her after a divorce prior to consummation or proper seclusion. If what she had offered is less than half the dowry, he shall return the balance of the half.

Article (64)

If separation takes place prior to consummation or proper seclusion in cases stipulated in paragraph B of Article 55, the woman shall receive a compensation to be estimated by the judge, not to exceed half the equivalent dowry.

Article (65)

All of the dowry or compensation shall abate if separation takes place for reasons related to the wife prior to consummation or proper seclusion.

Article (66)

If a man marries during a terminal illness and offers a dowry exceeding the equivalent dowry, the judgment of the will shall apply to the additional amount.

Article (67)

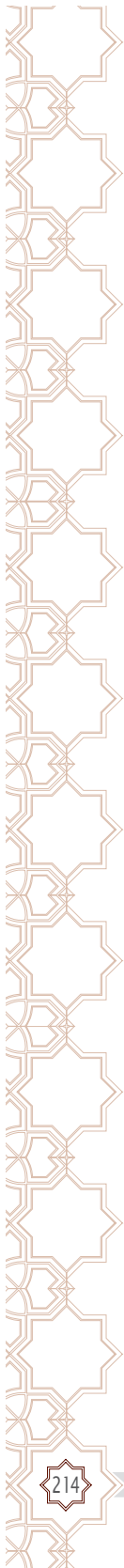
- A. In case of denial, litigation that is contrary to what is stipulated in the marriage contract regarding origin or amount of dowry shall not be accepted.
- B. If the document does not mention dowry details, the following two articles shall apply.

Article (68)

- A. If the husband and wife disagree on the original value of the dowry after formerly agreeing on it, and the complainant fails to provide proof, the amount specified at abstention shall be applied, and the equivalent dowry at replacement, provided it does not exceed what was claimed by the wife, and is not what the husband claimed.
- B. This rule will be applied when there is a disagreement between one of the spouses and the heirs of the other.
- C. If the difference is between the heirs of both spouses, the judge should rule with the mentioned amount if it is confirmed; the wife has to bring her proofs, and if she is unable to do so, her husband has the right.

Article (69)

If husband and wife disagree about the amount of the specified dowry, the burden of proof is on the wife. If she fails to prove it,



the husband's word is taken under oath, unless he claims what is equivalent to someone who is her equal by social norms, in which case the equivalent dowry is required, provided it does not exceed the wife's claim. This shall apply upon disagreement between the husband and the wife or the heirs of the other, or between both their heirs.

Article (70)

- A. A guarantee of the dowry is acceptable from someone who is capable of giving, provided the council accepts it, even if it is by implication.
- B. The wife has the right to demand from the husband, his guarantor, or both of them that the guarantor can return to the husband if he bails him with his permission.
- C. A guarantee given during the terminal illness of the guarantor is considered equivalent to a will.

Article (71)

The pledge may be suspended on an adequate condition, and does not expire except with the death of the guarantor, the guaranteed or the party on whose behalf the guarantee was issued.

Article (72)

- A. The wife shall not be required to provide any household items for the matrimonial home. If she does provide any, they are considered her property.
- B. The husband may make use of whatever the wife brings to the household as long as the marriage is valid, and is not considered responsible for her items except in case of transgression.

Article (73)

- A. If the husband and wife disagree over household effects and no proof is available, the final word is the wife's, under oath, for feminine effects, and the man's, under oath, for all other effects.
- B. This judgment shall apply upon disagreement between husband and wife or the heirs of the other, or among both their heirs.

Article (74)

Financial support is due to the wife from her husband in a proper marriage contract, even if she is wealthy, of a different religion, or surrenders to him by the court's judgment.

Article (75)

Financial support includes food, clothing, shelter and other related expenses such as medication, services, and other items according to social norms.

Article (76)

Financial support is estimated according to the husband's financial status, regardless of the wife's financial status, provided it is not less than the minimum requirement of the wife.

Article (77)

- A. The amount of financial support may be increased or decreased according to the husband's financial status or changes in the price levels in the country.
- B. Litigation to increase or decrease the amount of financial support shall not be accepted until one year after setting

the financial support, except in exceptional and urgent situations.

- C. The increase or decrease of financial support shall commence on the date of judgment.

Article (78)

- A. Financial support provided by the wife starts on the date of abstention of financial support, and is considered a debt owed by the husband that is not subject to litigation or settlement. It does not abate, except with fulfillment or acquittal, taking into consideration the following paragraph.
- B. Litigation on financial support is not accepted for a previous period of over two years ending with the litigation date, unless it is by mutual consent to settlement.
- C. If the husband does not approve the settlement, this can only be proved in writing.

Article (79)

- A. In examining the financial support case in court, the judge may order the husband to provide temporary support if the wife so requires, to be renewed monthly, until final judgment is passed. This judgment shall be implemented immediately.
- B. The husband may reduce or retrieve what he has paid, according to the final judgment.

Article (80)

If the wife requests settlement of the account covering her financial support and a debt her husband owes her, her request shall be approved, even if he does not accept.

Article (81)

If the husband requests settlement of his wife's financial support and a debt she owes him, he shall not be granted his request, unless she is wealthy and capable of repaying the debt from her own wealth.

Article (82)

The wife's financial support is the first priority for her husband, even if his wealth is only sufficient for her financial support.

Article (83)

- A. Surety is accepted for the wife's financial support, whether it is past, present or future, and whether it was imposed by law or agreement, or was never imposed.
- B. The provisions of Articles 70 and 71 shall apply to the surety for financial support.

Article (84)

- A. The husband shall house his wife in a residence of his social level.
- B. The wife shall reside with him after receiving her advance dowry.

Article (85)

The husband may not house another wife in his wife's residence without her approval.

Article (86)

The husband may not house anyone with his wife, except his minor children and, if necessary, his other children and his parents, provided no harm is caused to the wife by them.

Article (87)

- A. If the wife refuses to move into the matrimonial home without justification, or prevents the husband from cohabitating with her in her home, and he does not refuse to move, she shall lose her right to financial support for the period that her refusal is proved.
- B. The wife's insubordination is not proved until she refuses to implement the final court decision to be subordinate.
- C. The wife has to prove that her husband is not protective of her, or did not pay her advance dowry, or did not prepare the legal matrimonial residence, or refuses to support her financially and makes her unable to implement her financial support judgment because he has no proven financial resources.

Article (88)

A subordination judgment may not be enforced by coercion on the wife.

Article (89)

It is not considered insubordination if a wife leaves the matrimonial home for a legitimate reason, or for permitted work, unless it causes harm to the family.

Article (90)

The wife shall move to stay with her husband, unless the court sees it in her interest not to move.

Article (91)

The wife may travel with an unlawful relative to perform Hajj (pilgrimage), even without the husband's permission, and her financial support shall apply during her travel.

Article (92)

For incidents that have taken place since this law became effective:

- A. Marital disputes, upon denial, will not be addressed unless documented by an official marriage certificate, unless that denial was preceded by an admittance of marriage in legal papers.
- B. An exception to this is if the aim of the litigation is to determine lineage. In this case, judgment of lineage shall also be a judgment of marriage by induction. Marriage litigation is not addressed if the wife is less than fifteen years of age, or the husband's age is less than seventeen at the time of litigation.

Article (93)

Any sane person who has reached the age stipulated in the previous article is competent to stand for marriage-related litigation and all relevant elements.

Article (94)

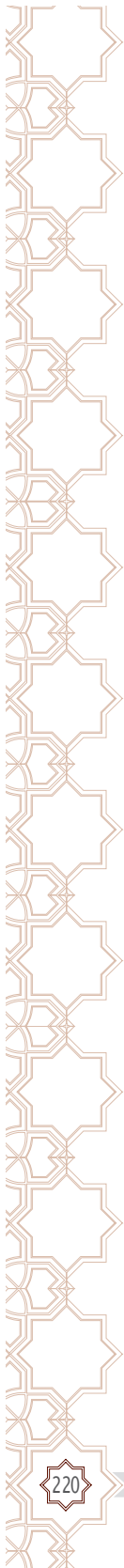
Court cases are filed against the wife alone, but if husband and wife are agreed on a marriage in which the approval of the guardian is a condition, the guardian shall be taken to court as well.

Article (95)

If marriage is claimed against the husband, he shall be litigated as well.

Article (96)

- A. Marriage litigation is not applicable if the plaintiff has previously exhibited proven actions that contradict it.

- 
- B. If a man has admitted that a woman is unlawful to him because they were breast-fed together, and then claims marriage, the contradiction shall be pardoned if the claim is withdrawn prior to the court case.

Article (97)

Divorce is the dissolution of a proper marriage bond by the will of the husband or his representative, through a specific verbal statement, according to Article 104.

Article (98)

There are two types of divorce: revocable and irrevocable:

- A. A revocable divorce does not end marriage until the 'Iddah is over
- B. An irrevocable marriage ends marriage immediately.

Article (99)

Revoking a marriage is the act of repealing its contract, if it is not required any more or if it can no longer continue according to Shari'a, and does not reduce the number of divorce utterances.

Article (100)

- A. In all cases, dissolution depends on the judge's decision, and no judgment is accepted before the legal procedure.
- B. But if the cause of dissolution makes the woman unlawful to the man, the couple must be separated from the time there is a reason for revocation until the judge's decision.

Article (101)

- A. Revocation of a marriage after consummation or proper seclusion requires that the woman receive the assigned

dowry, or an equivalent amount if it was not assigned, an appropriate amount depending on whether she was a virgin or not and on the period she spent with the husband prior to the revocation.

- B. If the revocation takes place after consummation or proper seclusion as a result of the husband's apostasy from Islam, the wife shall receive all her dowry.

Article (102)

Divorce can occur if the husband is sane, adult, willing, and aware of what he says. Divorce cannot occur if the husband is insane, mentally deranged, compulsion-driven, mistaken, drunk, stunned or angry, and if his words and actions are flawed.

Article (103)

Divorce shall not apply to the wife unless she is in a proper marriage and not in a state of 'iddah.

Article (104)

- A. Divorce occurs as a result of a clear verbal expression as per social norms; if expressed in writing, it is considered as an implication.
- B. It shall take place in writing if verbal expression is not possible.
- C. It shall take place by clear and understood signal if verbal or written expression is not possible.

Article (105)

Divorce shall be absolute.

Article (106)

The husband may delegate someone else to stand for divorce in his place. The delegated person may not delegate a third person, except with the husband's approval. Delegation ends with the dismissal of the delegated party, provided he is notified.

Article (107)

The husband has the right to make three declarations of divorce to his wife.

Article (108)

If the divorced woman marries another man, her previous husband's divorce declarations shall abate upon consummation of the new marriage, even if they were less than three. If she returns to him, he is allowed to make three new declarations to her.

Article (109)

A divorce conveyed verbally, by writing, with an indication associating it with a number of divorces can only be considered as a onetime divorce.

Article (110)

All types of divorce are revocable, except one that precedes the marriage's consummation, occurs in exchange for compensation, or completes the three declarations, as well as that which is stipulated as irrevocable in this law.

Article (111)

- A. Khula' is the divorce of a husband from his wife in exchange for a compensation they agree upon, using the verbal expression of Khula' divorce, mutual consent, or the implication.

- B. Only the husband and wife, or whomever they delegate, has the right to make Khula'.

Article (112)

For the Khula' to be proper, both husband and wife are required to be competent to stand for divorce, in accordance with this law.

Article (113)

Each of the parties may withdraw his or her request for Khula' before the other party has approved it.

Article (114)

Anything acceptable by Shari'a is acceptable as compensation in Khula'.

Article (115)

Compensation agreed upon in Khula' shall apply, and nothing abates unless compensated for.

Article (116)

For the husband to receive the agreed-upon compensation, the wife's Khula' must be her choice, without compulsion or damage.

Article (117)

- A. If a condition of Khula' is that the wife nurses the infant child or is his or her custodian without compensation, or supports the child for a certain period of time, and she abstains from doing so, the father has the right to ask for a return of the equivalent of the child's support, or the wages of a nursing woman or a custodian.
- B. If the mother is poor, the father is compelled to support the child, and the cost is considered a debt she owes.

Article (118)

If the father in a Khula' case stipulates that the child should be kept in his custody, the Khula' process continues but the condition is void, and the custodian can have the child, while the father shall provide support and custodian wages.

Article (119)

A women with a terminal illness may be divorced by Khula', and the compensation is taken from one third of her wealth, if her heirs do not approve it. In case she dies during 'Iddah, the Khula' husband has claim to the lower ratio of her wealth and compensation and one third of her money. If she dies after 'Iddah, or prior to marriage consummation, he has claim to the lower portion of the compensation and one third of her wealth.

Article (120)

- A. If the husband refrains from supporting his wife financially and he has no evident wealth but his poverty has not been proved, his wife has the right to divorce him, and the judge shall immediately divorce her from him. He can avoid divorce by paying her due financial support as of the litigation date.
- B. If the husband proves his poverty, or has been absent in a known place or in jail and has no evident money, the judge shall offer him a grace period of three months, in addition to appointments for distance, in order to pay the due support. If he does not pay it, the judge shall divorce her from him.
- C. If the husband is absent in an unknown location, or missing, and has no evident money, the judge shall divorce her from him without delay.

Article (121)

The judge's divorce for lack of financial support takes place retroactively. The husband may return to his wife during her 'Iddah if his good financial status is proved to the court in such a way that he can continue to pay her financial support and he expresses his willingness to do so.

Article (122)

If litigation for the lack of financial support occurs more than twice, and the wife requests divorce for damage, the judge shall affect the divorce irrevocably.

Article (123)

If the husband testifies under oath that he has not touched his wife in four months, or does not specify the time and continues under oath for four months, the judge shall divorce her from him one revocable time according to her request.

Article (124)

If the husband expresses willingness to return before divorce, the judge shall grant him an adequate grace period. If he declines, the judge shall execute the divorce.

Article (125)

For revocability in divorce by oath to be valid, it is conditioned that it be in actual return during 'Iddah, unless there is a valid excuse, in which case a statement is sufficient.

Article (126)

Both the husband and wife may, prior to consummation or after, request separation as a result of damage inflicted by the other party,

verbally or physically, in such a way that cohabitation cannot continue between them.

Article (127)

The court shall try its best to reconcile the couple. If reconciliation is not possible, two arbitrators shall be appointed to reconcile or separate the couple.

Article (128)

The arbitrators shall be two fair members from the husband and wife's families if possible, or else from outside the families, who are understanding and capable of reconciling the couple.

Article (129)

The arbitrators should identify the reasons behind the dissention and make strong efforts to rectify the situation between the couple in every possible way.

Article (130)

If the arbitrators fail to reconcile the husband and wife:

- A. If it is evident that the abuse is the husband's fault in whole, and the wife is the party requesting separation, the arbitrators shall propose separation, and impose all rights commensurate with marriage and divorce. If the husband is the one requesting separation, the arbitrators shall propose rejecting his request.
- B. If the abuse is totally the wife's fault, they shall propose separation in exchange for the return of all dowry she has received, as well as giving up all her financial rights resulting from marriage and divorce.
- C. If abuse is jointly committed, the arbitrators shall propose separation without compensation, or with compensation commensurate with the abuse.

- D. If it is not known which party committed the abuse, and the husband requests separation, they shall propose to reject his request. If the wife is the party requesting separation, or if both are requesting it, the arbitrators shall propose separation without compensation.
- E. Separation for harm and damage is considered a revocable divorce

Article (131)

- A. The arbitrators shall submit a detailed report to the court; if it is according to the provisions of the previous article, the judge shall decide based on it,.
- B. If the arbitrators are in disagreement, the court shall add a third arbitrator from outside the two families who is capable of reconciliation.

Article (132)

- A. The three arbitrators shall submit their report in agreement or by majority to the court, to decide in the case as per Article 130.
- B. If their opinions are not in agreement, or they fail to submit a report, the court shall follow the normal procedures in the case.

Article (133)

Harm is proved through the testimony of two men, or a man and two women.

Article (134)

In proving harm, verbal testimony on those topics which are common knowledge about the couple's married life shall be sufficient. Such testimony is not acceptable for negating harm.



Article (135)

Testimony by a relative, or someone related to the person in whose favor the testimony is made, is acceptable as long as the relative is competent to testify.

Article (136)

If the husband has been absent for one year or more without an acceptable excuse, the wife may request divorce if she has sustained damage and harm from his absence. If the husband has financial resources, the wife has the right to financial support.

Article (137)

- A. If it is possible to inform the absent husband, the judge shall specify a grace period for him, and inform him that his wife will be divorced from him if he declines to return and live with her, or move her to live with him, or divorce her. If the grace period passes and the husband declines, or does not provide an acceptable excuse, the judge shall rule for a revocable divorce
- B. If it is not possible to notify the absent husband, the judge shall divorce them without justification or grace period.

Article (138)

If the husband is imprisoned in a final judgment that restricts his freedom, for a period of three years or more, his wife may request divorce in evidence one year after his imprisonment, and may receive support if he has financial resources.

Article (139)

Each of the married partners may request the dissolution of the marriage if he or she discovers in the other a chronic defect that is

considered repulsive or harmful, or a defect that prevents enjoyment, whether the defect was present prior to the contract or contracted afterwards. The right of each in dissolution abates if he or she had known of the defect before the contract and had openly accepted it thereof.

Article (140)

As an exception to the previous article, the wife's right to request divorce shall not abate in the case of defects on the part of the husband that prevent pleasure, such as impotence, chronic or accidental, even if she had formerly openly accepted them.

Article (141)

If the aforementioned defects cannot be removed, the court shall dissolve the marriage immediately. If they can be dissolved, the case shall be postponed for an appropriate period of time. If the defect cannot be removed during this period, and the party demanding separation persists, the court shall pass judgment in his or her favor.

Article (142)

Experienced Muslim physicians shall be consulted to specify the appropriate period and identify the defects leading to the request for divorce.

Article (143)

- A. If the husband and wife are not Muslims, and they convert to Islam together, their marriage is valid.
- B. If the husband converted to Islam alone, and his wife is a *Kitabi*, the marriage shall remain valid. If she is not a follower of a heavenly religion, he shall ask her to convert. If she converts to Islam or to another heavenly religion, the

marriage shall remain valid. If she refuses, the marriage shall be dissolved.

- C. If the wife converted to Islam alone, the husband shall be asked to convert, if he is competent to do so. If he converts to Islam, the marriage remains valid; if he refuses, the marriage shall be dissolved. If the wife's conversion occurred before the marriage was consummated, or after the 'Iddah if she converted after consummation, and he is not competent for the offer, the marriage shall be immediately dissolved.

Article (144)

- A. For married life to continue in the previous cases, it is conditioned that no reasons for prohibitions, as stipulated in this law, exist between the husband and wife.
- B. For all practical purposes, it is not permissible to investigate the sincerity of someone who converts to Islam, or the motive behind it.

Article (145)

- A. If the husband becomes an unbeliever, the marriage shall be dissolved, but if he does so after the marriage has been consummated, and he returns to Islam during 'Iddah, the dissolution shall be cancelled and marital life shall return.
- B. If the wife becomes an unbeliever, the marriage shall not be dissolved.

Article (146)

If the husband is missing for four years with a high probability of being dead, he shall be judged dead. In all other cases, the period shall be decided by the judge after investigating whether he is alive or dead.

Article (147)

After passing the decision that a missing person is dead, the wife shall perform the death 'Iddah starting at the date of the judgment.

Article (148)

If the missing person reappears, or is found alive, his wife shall remain his unless her marriage to another man has been consummated without knowledge of the status of the first husband. Otherwise, she belongs to the second husband, unless that marriage contract was made during the death 'Iddah of the first husband.

Article (149)

The husband may return to his revocably divorced wife as long as she is in 'Iddah, verbally or actually. This right shall not abate unless intentionally therein.

Article (150)

Verbal revocability is conditioned on:

- A. Being completed and achieved.
- B. Occurring in the presence of two witnesses: two men, or a man and two women, or through an official proclamation.
- C. The wife's knowledge of it.
- D. If it is written, it is considered like a verbal proclamation.

Article (151)

If the divorced man claims that he has the right to return his wife during 'Iddah by menstruation, and the wife denies this, her claim shall be accepted under oath, if the period of time supports the end of 'Iddah.

Article (152)

The divorce of the divorced woman is confirmed with the end of 'Iddah, if her husband has not decided to take her back.

Article (153)

A divorced man may remarry the woman he divorced through a minor revocable divorce during or after 'Iddah, with a new contract and a new dowry.

Article (154)

Remarriage is not allowed following a major irrevocable divorce, unless conditions stipulated in Article 22 are present.

Article (155)

'Iddah is required from a woman:

- A. Following separation after consummation or seclusion, whether valid or invalid for a legitimate reason in a proper marriage, and after consummation in an invalid marriage.
- B. Following the death of the husband in a proper marriage.
- C. Following suspicious consummation.

Article (156)

'Iddah starts:

- A. In a proper marriage, from the date of divorce or the death of the husband.
- B. In an invalid marriage, from the date of separation or the man's death.
- C. In a suspicious consummation, from the date of the last copulation.

- D. In judicial separation, from the date of the court's final judgment.

Article (157)

- A. A woman whose husband dies shall remain in 'Iddah for a period of four months and ten days after his death, unless she is pregnant.
- B. A pregnant woman's 'Iddah ends with her delivery or an aborted delivery with the fetus showing parts of its limbs.
- C. The 'Iddah of a woman who is not pregnant, in cases other than death, includes:
- a. Three full menstrual cycles in a period of not less than sixty days for those who menstruate.
 - b. Ninety days for a woman who never menstruated to begin with, or has reached menopause and does not menstruate any more. If she menstruated before ending 'Iddah, she shall resume her 'Iddah after three cycles.
 - c. Ninety days for a woman who has continuous menstruation, if no regular menstruation is recorded. If she has a menstrual period she records, she shall follow it in recording 'Iddah.
 - d. The least period of three cycles, or one year for a woman whose cycles stopped before menopause.
 - e. The longer period in the divorce 'Iddah, or the death 'Iddah for a woman who was divorced to avoid inheritance, if her divorced husband died before the completion of her 'Iddah.

Article (158)

- A. If a revocably divorced woman's husband dies during her 'Iddah, she shall continue the death 'Iddah for four months and ten days after his death.
- B. In of the case of a minor divorce or separation, if the man dies during 'Iddah, the woman shall complete her 'Iddah and shall not move to the death 'Iddah.
- C. In marriages where consummation is suspicious, the contract is invalid, or no contract exists, if the husband dies, the woman's 'Iddah is a separation and not a death 'Iddah.

Article (159)

If a woman is separated from her husband after consummation, and then remarries him during 'Iddah, and then he divorces her before a new consummation, she shall complete her first 'Iddah.

Article (160)

In all cases, 'Iddah shall not exceed one year.

Article (161)

- A. A woman in 'Iddah from a revocable marriage shall spend her 'Iddah in the matrimonial home, except in specific situations, whereby she moves to a house specified by the judge.
- B. She is considered insubordinate if she leaves the house without justification.

Article (162)

Alimony shall be paid to a woman in 'Iddah from a divorce or a separation or by reason of entering an invalid marriage or in suspicion.

Article (163)

The 'Iddah alimony is considered a debt owed by the husband as of the date it becomes applicable, and shall not abate except with performance or absolution. When imposing it, his financial status is taken into consideration.

Article (164)

A woman in 'Iddah from a death shall receive no alimony, even if she is pregnant.

Article (165)

- A. If a proper marriage is dissolved after consummation, the wife shall receive, in addition to her 'Iddah alimony, a compensation estimated at a maximum of one year's financial support, according to the husband's financial status, to be paid to her in monthly installments upon the end of her 'Iddah, unless the parties agree otherwise in value and performance.
- B. The following are exceptions to previous paragraph's provisions:
 - a. Divorce due to a lack of financial support because of the husband's poverty.
 - b. Separation for harm and damage, if caused by the wife.
 - c. Divorce with the wife's acceptance.
 - d. Dissolution of the marriage through the wife's request.
 - e. Death of one of the spouses.

Article (166)

The minimum pregnancy period is six lunar months, and the maximum is 365 days.

Article (167)

Lineage is not proved by adoption, even if the adopted child's lineage is unknown.

Article (168)

Lineage cannot be proved from a man if it is shown that he is barren, or if the child cannot be his because of a congenital or medical reason. The judge, if there is a dispute, may consult Muslim experts in this field.

Article (169)

- A. The child of each wife in a proper marriage follows the bloodline of the father, based on two conditions:
 - a. That the minimum period of pregnancy elapsed since the marriage.
 - b. That there is no proof of an obstacle that prevented the husband and wife from physically meeting between the date of the contract and the delivery, or happened after the marriage and continued for 365 days.
- B. If the obstacle was removed, the minimum pregnancy period has passed since the date that the obstacle was removed.
- C. If one of these conditions is absent, lineage cannot be proved except with the husband's admission.

Article (170)

- A. If a woman in 'Iddah gives birth during her 'Iddah, the lineage of the child is proved to be of the divorced husband.
- B. If she gives birth after her revocable 'Iddah is over, and after she acknowledges that it is over, lineage is not proved unless she gives birth before the end of six lunar months from the date that her 'Iddah was considered over. In this case, birth is considered proof of revocability and the continuation of marriage.

Article (171)

- A. If the woman in 'Iddah from a present or dead husband does not acknowledge the end of her 'Iddah, the lineage of her child shall be proved if she gives birth within 365 days of the date of proof of death.
- B. Observing the provisions of admission of lineage, if delivery is after this period, lineage is not proved.
- C. If she admits that her 'Iddah was over during pregnancy, lineage is proved if she gives birth less than six lunar months from admission, and less than 365 from proof of death.

Article (172)

- A. A child's lineage must be confirmed; from a man in an invalid marriage, or from a suspicious sexual relation that occurred within six lunar months or more from the actual penetration date.
- B. If the child is born after estrangement or separation, the child's lineage is not proved except if birth is within 365 days of estrangement or separation.

Article (173)

- A. A man's admission to fathering a child, whose lineage is unknown, even during the man's terminal illness, proves lineage, unless negated by reason or social norms or if the father states that it is an adultery child. The person to whom admission is made does not have to be trusted unless he has been commissioned.
- B. If a person whose lineage is unknown admits to a father's lineage, this lineage is considered proved, as long as the conditions stipulated in the above article are fulfilled.

Article (174)

- A. A child's lineage to the mother is proved through her acknowledgment of birthing the child, after the man's conditions of admission are fulfilled, as long as she was not married or in 'Iddah at the time of birth.
- B. The child's lineage from the mother is proved by his or her admission, provided the conditions stipulated in the previous paragraph are fulfilled.

Article (175)

Admission to elements associated with lineage does not prove lineage.

Article (176)

In cases where a child's lineage is proved through admission in a current or dissolved proper marriage, or through the consummation of an invalid marriage or a suspicious consummation, a man may deny lineage of a child within seven days of birth or knowledge thereof, provided that he had not already admitted lineage, openly or implicitly.

Article (177)

Litigation for oath of damnation shall be taken within fifteen days of the birth date, or knowledge thereof.

Article (178)

If an oath of damnation takes place between a man and a woman, the judge shall deny a child's lineage to the man, and the child shall not receive support from the man or inherit from him, and the child is affiliated solely with the mother.

Article (179)

If a man admits to have lied in the accusation and denial of lineage, the child's lineage shall be assigned to him, though after judgment of denial, and he may marry the woman.

Article (180)

Separation by oath of damnation is dissolution.

Article (181)

As of the date of enactment of this law, litigation covering admission of lineage after denial shall not be accepted unless admission is documented officially or according to social norms in writing, in the handwriting of the person admitting lineage and with his signature, or was ratified by witnesses at the time of signing.

Article (182)

For lineage litigation to be legal, the litigation should include the reason it has occurred.

Article (183)

The person whose right depends on proving lineage is the rightful party in a lineage case.

Article (184)

- A. Contradiction in fatherhood and lineage litigation may be forgiven, but nothing else may be.
- B. Actual reconciliation, or acknowledging or refuting the disputed child as a result of the judge's decision, removes the contradiction.

Article (185)

Judgment passed in lineage litigation is not a pretext except for those parties to the litigation involved.

Article (186)

A mother shall nurse her child if there is no other source for its nourishment.

Article (187)

Fees for nursing are due at the time of feeding, and may not abate by performance or absolution.

Article (188)

- A. The mother does not qualify for fees for nursing after marriage is set up, or if she is in 'Iddah for the father of the child, when she deserves compensation.
- B. No nursing fees are due after two years following the delivery.

Article (189)

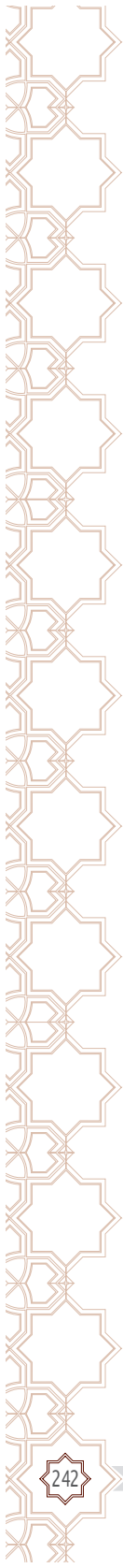
- A. The mother has the right to custody, and after that her mother, then the maternal aunt (mother's side), the mother's maternal aunt, the mother's paternal aunt (father's side), the father's mother, the father, the sister, the paternal aunt (father's side), the father's paternal aunt (father's side), the father's maternal aunt (mother's side), the niece (brother's daughter), the sister's daughter, giving priority to full biological brother, the half brother (mother's side) and the half brother (father's side).
- B. If none of these is worthy of custody, the right to custody transfers to the selected custodian, then to the brother, the father by blood relationship, the brother's son, the paternal uncle (father's side), his son, giving priority to the direct biological brother, then to a mother, then to a father, whenever possible.
- C. If those who qualify are equal in qualification, the judge shall select the better custodian for the child.

Article (190)

- A. The person who qualifies for custody shall be a sane adult of integrity with the ability to raise the child in custody, and to maintain him or her in good health and morals.
- B. The custodian shall be a mahram "prohibited to marry" to the female, and has women fit for performing custody requirements.

Article (191)

- A. If the custodian woman marries a man who is forbidden (*Muharram*) to the child in custody, and the marriage is consummated, custody shall abate.

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- B. If a person with right to custody does not claim it for one year after knowledge of the custodian's marriage consummation without justification, he loses the right to custody. Claiming ignorance of this provision is not considered an excuse.

Article (192)

- A. A non-Muslim custodian has the right to a child's custody, until the child is old enough to comprehend religion, or if there is reason to believe that he or she may get used to religions other than Islam, even though he or she may be too young to comprehend religion.
- B. In all cases, the child in custody may not remain with the custodian after the age of seven.

Article (193)

The right to custody does not abate if it is given up, but is prohibited in the presence of prohibitions, and is regained when they are gone.

Article (194)

A woman's custody of a male child terminates with puberty, and of a female child with her marriage and the consummation of the marriage.

Article (195)

- A. The custodian woman may not travel with the child in her custody to another country to reside there, except with the permission of the child's guardian.
- B. The guardian, whether he is the father or another, may not travel with the child in custody to another country to reside there, except with the permission of the custodian.

Article (196)

- A. The right to visitation is for the parents and grandparents only.
- B. The custodian may not prevent any of those from visiting the child in custody.
- C. In case of prevention, and if the custodian does not wish to take the child for visitation, the judge shall appoint a periodic date and an appropriate place for visitation where the family members can see him or her.

Article (197)

The custodian may receive child support funds, including payment for rent of the residence.

Article (198)

The party responsible for child support shall pay the residential rent for the child in custody, unless the custodian woman owns the house of residence, or has a residence assigned to her.

Article (199)

- A. The custodian shall not receive custody fees if she is a wife to the father, or is in 'Iddah and receives alimony from him, or during compensation by judgment from the child's father.
- B. The custodian shall have a custody fee until the boy is seven years of age and the girl is nine.

Article (200)

No financial support is paid to relatives, except for ancestors or descendents.



Article (201)

- A. A rich child, male or female, shall pay his parents'; grandfathers' and poor grandmothers' financial support, even if they are of a different religion, or are capable of earning their livelihood.
- B. If there are many children, each shall pay financial support in accordance with their financial status.

Article (202)

A rich father is required to support his poor son, who is incapable of earning his livelihood, until he is better off.

Article (203)

- A. If the father is not well-off financially, and the mother is well off, she shall support her son, and that will be a debt the father owes her, to be repaid when his financial situation improves. The same applies if the father is absent and cannot pay child support.
- B. If both the father and mother are in financial difficulty, child support is the duty of the next in line, and is a debt owed by the father, to be claimed by the person who undertakes financial support.

Article (204)

If a number of children deserve support, and the party responsible is incapable of supporting them all, the wife's financial support is payable first, then the children's support, then the mother, then the father.

Article (205)

Alimony is due as of the date of litigation or settlement, and is considered a debt owed by the party who should normally pay it, and does not abate except with performance or absolution.

Article (206)

Settlement of accounts may not take place between the children's support, payable by the father, and the father's debt due to the custodian.

Article (207)

Relatives' financial support is subject to the provisions of Article 79 of this law.

Article (208)

Observing the provisions of Article 29-33, minor children shall be subject to custody until they come of age by Shari'a, or complete fifteen years of age and become adults. An insane or mentally deranged adult, male or female, is also subject to custody.

Article (209)

- A. Custody of a child belongs to the father, and then the grandfather by blood, then blood relatives according to inheritance rights, provided the custodian is proscribed.
- B. When many individuals have a right to custody, and they all have equal rights, the court shall select the most appropriate.
- C. If none of them is eligible, the court shall assign an appropriate person from outside.

Article (210)

Observing the provisions of custody, the guardian is responsible for the affairs of the child in custody regarding correct rearing, education and sponsorship.

Article (211)

- A. The guardian shall be protective of the minor, capable of managing his affairs, and of the same religion.
- B. If the guardian loses any of these conditions, his guardianship shall abate.

Article (212)

In case no guardian is appointed to the minor, or his guardianship is lost, the court shall assign to the minor a reliable person or a charity organization, until guardianship is settled.

Article (213)

The will is implemented when inheritance is being settled, after death.

Article (214)

A will is concluded by a verbal statement or in writing. If the testator is incapable of both, then it is concluded by the legible signature. It shall not be applicable for denial in incidents taking place after this law became effective in will-related cases, or in cases where it is verbally retracted after the person dies. This is contradicted if official documents are found, or handwritten statements according to social norms are present, with his seal, signature or thumb-print indicating what was mentioned, or if the will document or retraction thereof has an authenticated signature. If necessary, a verbal will may be proved by two witnesses who attended the statement.

Article (215)

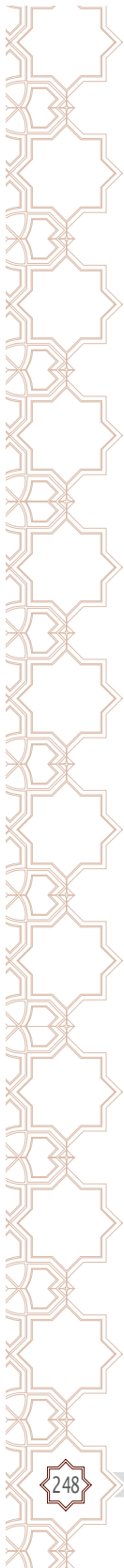
- A. For the will to be authentic, it should not be used for an illegal or immoral purpose, and the motive behind it should not be contradictory to the testator's intentions.
- B. If the testator is a non-Muslim, the will is true unless it contradicts the provisions of Islamic Shari'a.

Article (216)

- A. It is permissible to connect the will to the future, or restrict it to a condition, provided the condition is valid.
- B. A valid condition is one that holds a legitimate interest for the testator or its beneficiary person, or for others, which is not prohibited and does not contradict the provisions of Islamic Shari'a laws. It should be taken into consideration and nurtured as long as the interest it pursues is valid or prevalent.
- C. If the will is conditioned on a false premise, it is null and void.
- D. If the will is constrained by an invalid condition, the will is right and the condition shall be removed.

Article (217)

- A. The testator should be capable of delivering on the promise by law.
- B. If the testator is detained for a banal act or an oversight, or has reached the age of eighteen, his will is accepted with the court's permission or approval.

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- C. A will issued by a detained person for a banal act or an oversight does not need the court's permission and his will is considered valid.
 - D. The will of an unbeliever is valid if he returns to Islam.

Article (218)

The beneficiary in a will should be:

- A. Known.
- B. Present at the time that the will is prepared if he is assigned.
- C. If the beneficiary is not assigned, he does not have to be present when the will is prepared or its testator dies, observing the stipulation of Article 279.

Article (219)

- A. A will is valid for God and for charity, without assigning the party or beneficiary in the charity.
- B. It is permissible that a will name mosques, charitable organizations, scientific institutions and public utilities as beneficiaries. The funds shall be spent on their administration, buildings, interests, poor people and other affairs related to them, unless spending is stipulated by a social rule or directive.

Article (220)

A will may benefit a charitable organization that will be established in future. If it does not materialize, the benefits will go to the nearest similar organization.

Article (221)

A will may benefit someone whose religion and belief may be different, and lives in a different country, unless the will testator is from a Muslim country and the beneficiary is a non-Muslim from a non-Muslim country, and whose religion prevents him from being a beneficiary.

Article (222)

The subject of the bequest should be:

- A. Part of the inheritance, or something valid to be concluded in contracts during the testator's life.
- B. Evaluated by the testator and the beneficiary, if it is money.
- C. Present when the will is prepared as part of the property of the testator, if it is specifically mentioned, taking into consideration paragraph A of Article 216.

Article (223)

The will is valid with khula' and it applies in cases of rights that transfer with inheritance, including the right to benefit from a rented entity after the death of the renter.

Article (224)

The will can be used to lend the beneficiary a specific amount of money, but shall not be implemented for more than that amount over one-third of the inheritance, except with the permission of the heirs.

Article (225)

- A. The will shall be valid by dividing the major part of the inheritance over the heirs, whereby each heir, or some of the

heirs, are assigned by the testator part of the inheritance, equal to his share in the inheritance.

- B. If there is an excess from the share in inheritance, the remaining part is considered part of the will.

Article (226)

A will is cancelled:

- A. If the beneficiary dies before the testator dies.
- B. If the assigned bequest perishes before the beneficiary approves it.

Article (227)

The intentional killing of the testator negates the right to an optional or compulsory will, whether the killer was the main perpetrator, an accomplice, or a false witness whose testimony led to the execution of the testator, if the killing was without right or excuse, and the killer is criminally responsible. Among the excuses is bypassing the legal right of defense.

Article (228)

The testator may cancel the will in part or in whole, openly or by implication. Any act supported by evidence or social norms that indicates so is considered a revision of the will. Among revision by implications is the testator's acting in a manner that cancels his bequest of property to the beneficiary.

Article (229)

Denying the will, removing the name of the beneficiary or changing his description, or requiring an addition that cannot be met is not considered a cancellation of the will, unless there is clear evidence that the testator intends to cancel the will.

Article (230)

The will becomes effective by acceptance, openly or by implication, on behalf of the beneficiary after the death of the testator. If the beneficiary is a fetus, a minor, or in custody, the acceptance or refusal of the will shall be by the custodian of his or her property, who has the right to refuse it with permission from the judge.

Article (231)

If the beneficiary dies before accepting or rejecting the will, his heirs shall act on his behalf.

Article (232)

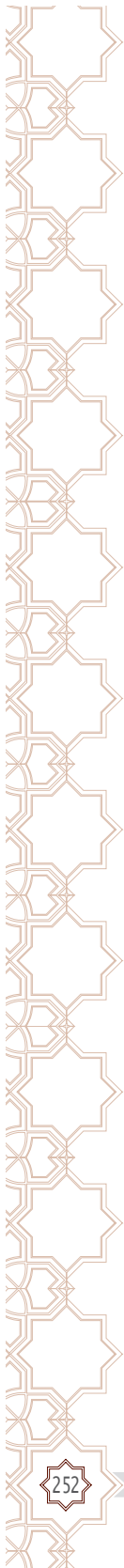
Acceptance or rejection is not required immediately after the death. Nevertheless, the will shall be considered null and void if the caretaker of the will officially informs the beneficiary, with a statement of implementation, and requires him to accept or reject it within thirty days, with the exception of legal distance requirement, and the beneficiary does not respond in writing with acceptance or rejection and has no acceptable excuse.

Article (233)

- A. If the beneficiary accepts parts of the will and rejects other parts, the will shall apply only to what was accepted; the rest is cancelled.
- B. If there are a number of beneficiaries, and some accept it while others reject it, the will shall apply to what was accepted and shall be cancelled for what was rejected.

Article (234)

- A. A will does not become invalid by rejection before the death of the testator.

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- B. If the beneficiary rejects the will in part or in whole after death and before acceptance, what was rejected becomes valid.
 - C. If the beneficiary rejects the will partially or in full while one of the heirs accepts it, the will shall be nullified. If nobody accepts it from him, his rejection is cancelled.

Article (235)

- A. If the beneficiary is present when the testator dies, the beneficiary shall receive the property in the will as of the death of the testator, unless the text of the will indicates that the property is bequeathed after a certain date from the death.
- B. The beneficiary may also inherit additions to the property during the time period between division of the inheritance and acceptance of the will's terms, if acceptance comes after division is begun. The beneficiary shall settle expenses to the property in the interim.

Article (236)

A will involving property which includes a nonexistent yield at the time is valid. If none of the beneficiaries are present at the time of the testator's death, the yield shall go to his heirs. If there is no hope of finding one of the beneficiaries, the property outlined in the will shall go to the testator's heirs.

If one of the beneficiaries is found at or after the testator's death, he shall receive the yield, until another is found, in which case they will share it with whoever is available when the yield materializes, until no more beneficiaries are found, in which case the property and its yield belongs to all beneficiaries, and the share of whoever has died among them is considered his inheritance.

Article (237)

If the will involves benefits only for those mentioned in the previous article, and none of them is present when the testator died, the benefits shall go to the heirs of the testator.

If a beneficiary is found when or after the testator dies, the benefit shall be his, and to those after him among the beneficiaries until they cease to exist, in which case the benefits revert to the testator's heirs. If there is no hope of finding other beneficiaries, the property shall revert to the testator's heirs.

Article (238)

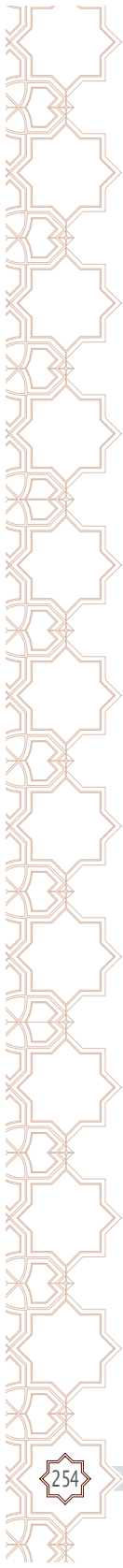
If only one of the beneficiaries is found, he shall receive all the yield of the property bequeathed, unless the testator's statement shows, or evidence proves, that he had intended plurality, in which case the beneficiary receives his share of the yield, and the rest is given to the heirs of the testator. The property is then divided between the beneficiary and the heirs of the testator, if there is no hope of the presence of another beneficiary.

Article (239)

If the will involves numerous benefits with different layers, the lower level shall be entitled if there is no hope of finding anyone from the upper level, or if they no longer exist, taking into consideration the provisions of the previous articles. If no more levels exist, the property is considered an inheritance, unless the testator willed it, or parts of it, to others.

Article (240)

- A. A will can apply to non-specific parties, particularly the neediest among them. The distribution of benefits is left to the interpretation of those commissioned to distribute them, without adhering to generalities or equality.

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- B. Execution of the will is the function of the testator's executor, and if he does not exist, the will is executed by whoever the court assigns.

Article (241)

If the will favors a group assigned by a title or name pertaining to them, and the beneficiaries are not assigned individually and some of them are not deserving of the benefits at the time of the testator's death, the rest shall deserve the whole of the benefits, observing the provisions of Articles 236, 237 and 238.

Article (242)

If the will is jointly shared by a number of people or a group, or is shared between a group and a party, or shared among all of them, each specific person or member of the specific or unspecified group shall have a share of the property in the will, unless the testator indicated otherwise.

Article (243)

If the will is devised for specific persons, the heirs of the testator shall receive the share of those who do not deserve it at the time of the testator's death.

Article (244)

- A. If the will becomes null and void for a specific individual or group, the property willed shall revert to the heirs.
- B. If part of the property willed becomes in excess, and the will is not made null for a third, it shall be distributed to the beneficiaries and the heirs, at the rate of the excesses and what was made null in the will.

Article (245)

A will is applicable in cases of pregnancy in the following situations:

- A. If the testator admitted the presence of pregnancy at the time of the will, and the fetus was born alive 365 days or less from the date of the will.
- B. If the testator did not admit the pregnancy and the fetus was born 270 days or more from the date of the will, unless the pregnant woman was in death or proved separation 'Iddah at the date of the will, in which case the will is legal if the fetus was born alive in 365 days or less from the date of death or proved separation. If the will is targeted to the pregnancy of a specific person, a share to that specific person shall apply.
- C. The yield due to a beneficiary shall be suspended until the pregnancy ends with a live birth, and the yield is assigned accordingly.

Article (246)

- A. If a pregnant woman gives birth to two live babies or more in one delivery, or has two births in less than six months, the estate shall be divided between them equally, unless the will stipulates otherwise.
- B. If one of the births is a stillborn, the live one shall receive the whole amount.
- C. If one of the children dies after birth, his share in property shall go to his heirs, and his share in benefits until death shall go to his heirs, and shall revert to the heirs of the testator after the child's death.



Article (247)

- A. The will shall be implemented for non-heirs for up to one-third of the balance of the inheritance, after debts are settled using sources other than the heirs' share.
- B. The non-heir shall not receive anything unless the heirs permit it after the death of the testator, and the party giving permission is fully competent.
- C. If some of the heirs permit the will to benefit an heir or a non-heir in excess of one-third, and others do not, it shall be implemented in favor of those who permit it.
- D. The will of someone who owed no debts or had no heirs shall apply to all his wealth, or part thereof, without the permission from the public treasury.

Article (248)

- A. The will of a person whose wealth is tied up in debts is considered true and proper, but benefits shall not be distributed until all debts are cleared.
- B. If some of the debts are paid, or the debt is not due, the will shall be implemented for one-third of the balance after the debt abates or is paid.

Article (249)

If the debt is not due, or is paid in full or in part from the willed property, the beneficiary may retrieve around one-third of the balance of the debt of the inheritance after paying the debt.

Article (250)

If the will is equal to the share of one specific heir of the testator, the beneficiary deserves an amount equal to the share of this individual in addition to the statutory portion.

Article (251)

If the will is equal to the share of an unspecified heir of the testator, the beneficiary shall receive the share of one of them in addition to the statutory portion if the shares are equal, and the share of the least of them in addition to the statutory portion if the shares are not equal.

Article (252)

- A. If the will assigns to someone a common share of the inheritance, and assigns to another an equal share as a specific or unspecified heir, he shall first receive an estimated share equal to the heir's share, considering that there is no other will. The third of the willed inheritance is divided between the two wills by shares, if the third is insufficient.
- B. If the will is for a specific amount of money, or a property of the inheritance, rather than the common share, the money, or the value of the property, is estimated as a value of the inheritance shares.

Article (253)

If the will represents a specific amount of money, or a piece of property, and the estate involves an absentee debt, if the bequeathed amount is out of the third present in the will, the beneficiary shall get it, or else an amount equal to the third, and the balance goes to the heirs. Whenever more funds become available, the beneficiary has the right to third of it until he receives the full amount.

Article (254)

If the will is based on a common share of the inheritance, and there is an absentee debt, the beneficiary shall receive his share of what is available, and as more becomes available, he shall receive the amount that is his right.

Article (255)

If the will is based on common shares in the inheritance, and involves an absentee debt, the beneficiary shall take his share from what is available, if this share is to be deducted from the present third of the inheritance. Otherwise, the beneficiary shall receive from his share an equal amount to the third. The balance goes to the heirs. As more becomes available, the beneficiary shall receive his third, provided this does not harm the heirs. If it does, the beneficiary shall receive the balance value of his share in the type outlined out of one third of what is available, until he receives his full right.

Article (256)

- A. In all cases presented in previous articles, if the estate includes a debt due by one of the heirs, and this debt is of the type of property in the estate, fully or partially, clearance is applied to it for the share of the heir in this type, and is thereon considered available funds.
- B. If the debt due by the heir is of a different type than what is in the estate, clearance does not take place and the debt is considered available money if it is equal to the heir's share or less. If it is more, this share equivalent is considered available money. In this case, the heir does not take his share of the available money unless he settles his debt. If he does not, the judge shall sell it and pay the debt from the proceeds.
- C. Banknotes and different currencies are considered one type.

Article (258)

- A. If the will is for a common share in a property, and it perishes or becomes due, the beneficiary shall receive nothing.

- B. If it partially perishes or becomes due, the beneficiary shall receive his share from the balance, if sufficient, from one-third of the inheritance.
- C. If the balance is not sufficient to cover the will, and it comes from the third, the beneficiary shall take all the balance, even if it is enough for the will. If it is more than the third, he shall take the equivalent of one third of the will.

Article (259)

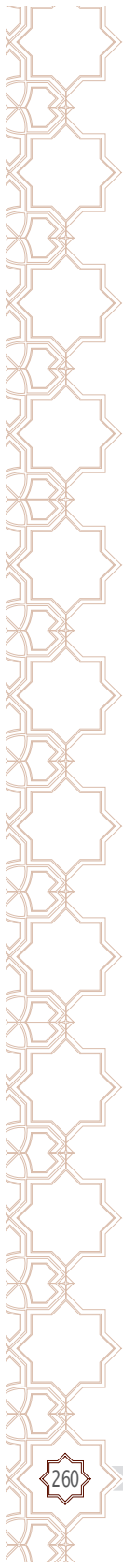
- A. If the will is a common share in one type of the testator's money, and it perishes or becomes due, the beneficiary shall receive nothing.
- B. If part of it perishes or becomes due, the beneficiary shall only have his share in the balance, even if it comes from one-third of the money, or else he receives one-third of it.

Article (260)

- A. If the estate includes the benefit of a property with a specified beginning and end, the beneficiary shall receive the benefit during this period.
- B. If the period passed before the death of the testator, the will becomes null and void. And if part of the period elapsed, the beneficiary shall receive the benefit of the balance.
- C. If the period is specified in duration but not in starting point, it shall begin at the date of the testator's death.

Article (261)

- A. If one or all of the heirs prevent the beneficiary from benefiting from the property during all or part of the period, whoever objects shall guarantee to him the benefit's



equivalent, unless the beneficiary and all the heirs agree that he should be compensated with benefits some other period.

- B. If efforts to prevent the beneficiary from benefiting came from the testator, the beneficiary shall receive another period after the cause of the objection is removed.

Article (262)

Regarding the provisions in the last two articles:

- A. If the estate is to benefit a charitable party or unspecified people whose disappearance is improbable, and the will is eternal or absolute, the beneficiaries shall receive the benefit by corroboration.
- B. If the will is eternal or benefiting unspecified people who are expected to discontinue, the beneficiaries shall deserve the benefit until they perish.

Article (263)

The will may outline benefits for a specific period of time and for specific people, as well as for those after them who are not expected to discontinue, or for a charitable party. If none of those specified is available for a period of 33 lunar years after the testator's death, or during the specified period, or they disappear before this period is over, the benefit throughout the whole period or part thereof shall go to charity.

Article (264)

If one of the benefits outlined in the will is property which may be better utilized in a different manner from that stipulated in the will, the beneficiary may utilize it or benefit from it according to how he sees fit, provided he does not cause damage to the property from which the benefit is derived.

Article (265)

If the will outlines a yield or harvest, the beneficiary shall have the yield or harvest at the time of the testator's death, and future benefits thereof, unless there is evidence otherwise.

Article (266)

- A. If the will commands that property be sold for the beneficiary for a specific price, or leased for him for a specific period of time and a specified fee, and the price or lease fee is drastically less than that of the equivalent, it should be subtracted from one third of the estate.
- B. If the drastic difference is not subtracted from a third of the estate, and the increase does not satisfy the heirs' claim, the will shall not be implemented unless the beneficiary accepts to pay the difference.

Article (267)

In a will, each share of the benefits is established by dividing the yield or harvest between the beneficiaries and the heirs of the testator according to each one's share, or by accommodation in time or place, or by dividing the property if it is divisible without harm. In case of disagreement, the court shall choose one of these methods.

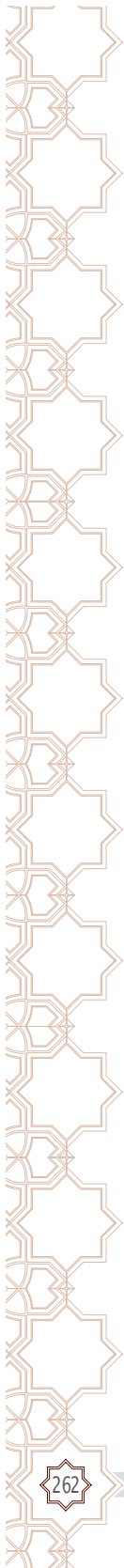
Article (268)

The beneficiary is responsible for property obligations and whatever else is needed to receive its benefits, even if someone else is the beneficiary of the property.

Article (269)

Benefits from the will abate in the following cases:

- A. If the beneficiary dies before receiving the benefit outlined in the will, totally or partially.

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- B. If the beneficiary buys the property he is willed to derive benefit from.
 - C. If the beneficiary relinquishes his right in favor of the testator's heirs, against a return or none thereof.
 - D. If the property whose benefit is willed matures.

Article (270)

The testator's heirs may sell their share in the property willed for benefit without requiring permission from the beneficiary.

Article (271)

If the will outlines a benefit to a specific person of eternal nature, or during the person's life, the beneficiary shall receive the benefit throughout his life, provided his right to benefit appears within 33 lunar years from the testator's death.

Article (272)

One-third of benefits and rights should be deducted from the inheritance as follows:

- A. If the will's benefits are eternal, or absolute, or for the period of the beneficiary, or for a period longer than ten years. In a will whose benefits include property, the benefits are considered equal to the value of the property itself. If the will outlines a relative share of the benefits, it is considered equal to the respective share of the property.
- B. If the will's benefits do not exceed ten years, they are estimated as the value of the benefits willed during this period.
- C. If the will outlines the right to a piece of property, it is estimated as the difference between the value of the property when the willed right is added, and its value without it.

Article (273)

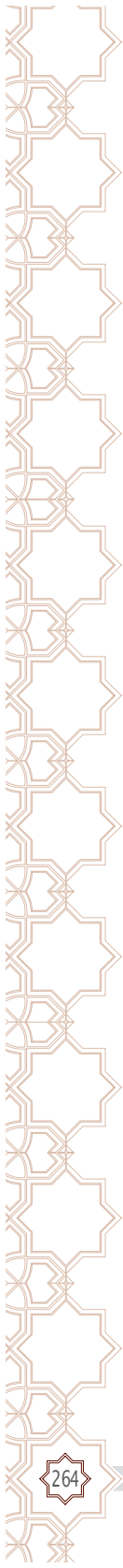
- A. Payments from capital for a specific period are acceptable, and an amount from the testator's wealth is allocated to guarantee that the will is executed in a manner that does not cause harm to the heirs.
- B. If the surplus of the amount allocated to guarantee the execution of the will exceeds one-third of the inheritance and the heirs do not permit the increase, a third is allocated and the will is executed according to it, until the beneficiary receives the equivalent of one third of the inheritance from the payments at death, or until the period elapses, or the beneficiary dies.

Article (274)

If the will outlines payments from the estate, or yield from a property for a specific period of time, the estate or property applies, burdened with the payments outlined in the will. If this applies to one-third of the wealth, the will shall be implemented. If it exceeds it, and the heirs do not permit the increase, the equivalent of one-third is executed, and the excess from the payment and its equivalent from the inheritance or the property shall go to the heirs of the testator.

Article (275)

- A. If the will includes property with payment from capital, or a yield that is permanent or absolute, or lasts for the lifetime of the beneficiary, his lifetime is considered 70 years, for the purpose of making calculations if the beneficiary surrenders one-third of the inheritance. A sufficient amount is allocated from the testator's wealth to guarantee that the will is executed as stipulated in Article 273, if the will includes payment from capital. An amount equivalent to the payment is allocated from the yield outlined in the will, as stipulated in Article 276.

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- B. If the beneficiary dies before the period stipulated in the previous paragraph, the balance shall go to the heir or heirs who deserve it, or to the next beneficiary. If the money allocated for executing the will is exhausted, or the beneficiary lives for longer than the period mentioned, he may ask the heirs for a maximum of one-third of the share.
 - C. In all cases, it is not permissible to estimate that the balance of the beneficiary's lifespan is less than ten years when the payment is due.

Article (276)

- A. In a will that includes payment from capital, the beneficiary shall receive his payment from the property yield allocated in the will. If the yield is not sufficient for payment, the heirs may complete it, or else an amount from the property should be sold to complete the payment. If the yield exceeds the payment, the balance shall be returned to the testator's heirs.
- B. In a will that includes payment against the yield, the payment shall be deducted from the yield allocated in the will. If the yield is higher in some years than the payment, it is not returned to the testator's heirs, but is kept to cover the shortfall in the yield in other years.
- C. If the will stipulates that payment is deducted year by year, or if there is an evidence to this effect, the annual surplus is returned to the testator's heirs.

Article (277)

- A. If an absolute will is made for a party that has a continuous or eternal nature, an amount from the testator's money is allocated whose yield guarantees that the will is executed.

No more than one third is allocated, unless permission is given from the heirs.

- B. If the yield from the amount allocated in the will is more than the payment willed, the beneficiary party shall receive it. If the yield is less than the payment, the beneficiary may not refer to the testator's heirs.

Article (278)

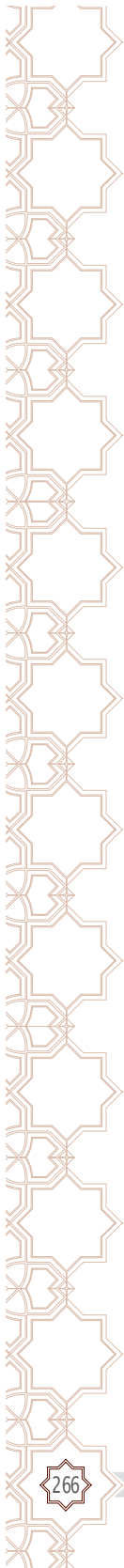
- A. In cases stipulated in Articles 273 – 276, the heirs of the testator may utilize the allocation to execute the will by payment, provided they deposit all payments in cash at a location approved by the beneficiary or appointed by the judge. The amount deposited is allocated for executing the will.
- B. If the beneficiary dies before exhausting the amount deposited, the balance is returned to the testator's heirs.
- C. All of the beneficiary's rights to the inheritance shall abate by deposit or allocation.

Article (279)

A will outlining payments from capital or from the yield applies only to the beneficiary at the time of the testator's death. The beneficiary's life is estimated according to Article 275, and the will is executed according to the provisions stipulated for appointed beneficiaries.

Article (280)

- A. If the testator changed a feature of the property in the will, or added to its construction something that does not stand alone, such as maintenance, the whole property is in the will.

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- B. If the addition is something that can stand alone, such as trees or structures, the heirs and the beneficiary share in the property for the value of the addition.

Article (281)

- A. If the testator demolished a building on the property in the will and returned it to its original status, it is the property in its new status referred to in the will, though its features have changed.
- B. If the building was rebuilt differently, the property is shared, with the building's value going to the heirs, and the land's value to the beneficiary.

Article (282)

If the testator demolished the property in the will, and added the land to another piece of land owned by him, and built on them, the beneficiary shall share all of the value of the land and the building with the testator's heirs.

Article (283)

In an exception to the provisions of Articles 280, paragraph 2, Article 281, paragraph 2, and Article 282, if what the testator spent on or added to the property is what he/she normally would allow, these additions are then added to the will, and the addition exceeds what the testator normally, it too can be added to the will if instructed to do so.

Article (284)

If the testator added a building on a piece of property in the will to a building on another piece of property owned by him, and made them one unit in such a way that it is not possible to deliver to the beneficiary alone, the beneficiary shall share with the heirs the equivalent amount indicated in the will.

Article (285)

- A. If the wills exceed one third of the inheritance, and the heirs did not permit the increase, the third is then divided among the wills by percentages.
- B. If the heirs approve the increase, but it is insufficient for the total amount due of the wills, the inheritance shall be divided among the wills by percentages.

Article (286)

If the will is for a number of relatives, and does not contain enough benefits to implement it fully:

- A. If the levels of relationship are equal, the inheritance is distributed equally.
- B. If the levels are different, obligations are given priority over duties and duties over supererogatory (*nawafil*), as per the previous method.

Article (287)

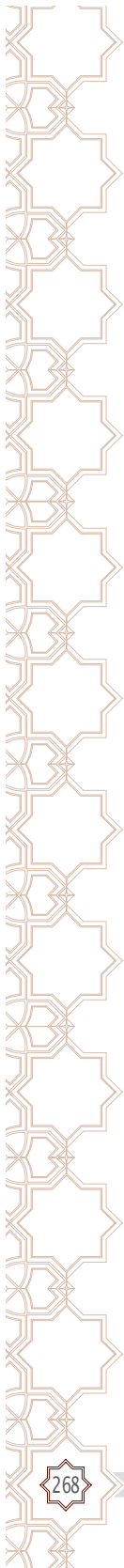
If a will includes periodic payments and some of the beneficiaries die or become disconnected, the share of those who died or became disconnected shall go to the heirs of the testator.

Article (288)

The inheritance becomes valid with the death of the testator, actually or by judgment.

Article (289)

- A. For the inheritance to become available, the beneficiaries must be proved alive at the time of the testator's death, actually or by judgment.

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- B. A child still in the womb is eligible for inheritance if the provisions stipulated in Article 330 of this law are present.

Article (290)

If two or more people die, and some are heirs to the others, and it is not known who died first, none of them shall have a claim to the other's inheritance.

Article (291)

Inheritance is drawn according to the following sequence:

- A. Enough to prepare the deceased and whoever died before him who requires financial help from his estate, according to legitimate limits.
- B. The deceased man's debts.
- C. The compulsory will.
- D. The voluntary will, to the extent of executing it.
- E. Heirs according to their sequence in this law.
- F. If there are no heirs, the inheritance is distributed as follows:
 - a. The person for whom the deceased stipulated additional shares over others.
 - b. According to the will, regarding the excess over the limit to execute the will.
 - c. If none of these exists, the inheritance, or what is left of it, goes to the public treasury.

Article (292)

Among the inheritance prohibitions include the intentional killing of the testator, whether the killer is the perpetrator, an accomplice, or a

false witness whose testimony led to the unlawful execution of the testator, if the killer has no excuse and was sane, adult and criminally responsible. Among the excuses includes bypassing the right to legal defense.

Article (293)

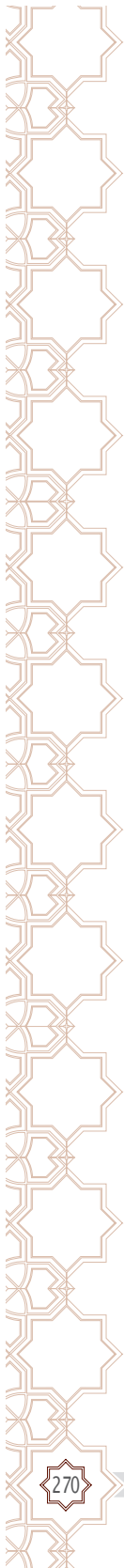
- A. There is no inheritance between a Muslim and a non-Muslim.
- B. Non-Muslims can inherit from each other.
- C. Differences in sects do not prevent inheritance among Muslims.
- D. Differences in countries of residence among non-Muslims do not prevent inheritance, unless the law of the foreign country prohibits it.

Article (294)

- A. Unbelievers do not inherit from anyone.
- B. The wealth of the unbeliever goes to his Muslim heirs when he dies. If he has no Muslim heirs, his wealth goes to the public treasury.
- C. If the unbeliever acquires citizenship in another country, he is considered dead and his wealth goes to his Muslim heirs.
- D. If the unbeliever converts back to Islam after acquiring citizenship in a non-Muslim country, he shall have whatever remains of his wealth in his heirs' possession or at the public treasury.

Article (295)

- A. Among the reasons for inheritance: marriage and relationship.
- B. Inheritance by marriage is by way of obligation.

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- C. Inheritance by relationship is by obligation, or kinship, or both, or by blood relationship (*rahm*).
 - D. If a beneficiary has two sides of inheritance, he shall inherit both, observing the provisions of Articles 302 and 306.

Article (296)

Obligation (*fard*) is a share estimated for the beneficiary of the will. Inheritance starts with those under obligation. These are: father, paternal grandfather, mother's brother, the mother's sister, husband, wife, daughters, daughters of the son, sisters of the father and mother, father's sisters, mother's sisters, true grandmother.

Article (297)

- A. With the observation of the provisions of Article 309, the father may oblige one-sixth of the inheritance if the deceased has a son, or a son's son.
- B. When there is no father, the blood grandfather shall have one-sixth, according to the previous paragraph. The blood grandfather is the one whose relation to the deceased does not involve a female.

Article (298)

- A. The mother's children shall receive by obligation one-sixth each, and one third for two children. Males and females are equal in division.
- B. If the mother's children are two or more, and obligations deplete the inheritance, the mother's children shall share with the blood brother or brothers, individually, or with a blood sister or more, and the third shall be divided among them all as mentioned previously.

Article (299)

- A. The husband has the share of one-half if there is no son or son's son, and a quarter if there is a son or a son's son.
- B. For the wife, or wives, even in a revocable divorce, if the husband dies while she is in 'Iddah, she has the share of one fourth if there is no son or son's son, and an eighth if there is a son or a son's son.
- C. A revocably divorced woman with a terminal illness is considered a wife if she has not accepted divorce, and the husband dies from illness while she is still in his 'Iddah, provided her competence for inheritance remains from divorce to death.

Article (300)

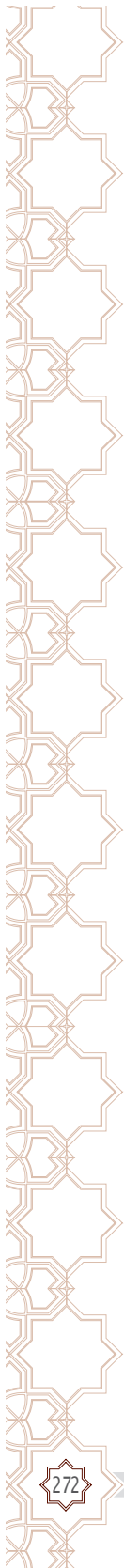
Regarding the provisions in Article 307:

- A. Each of the daughters shall receive half by obligation, and two-thirds for two daughters or more.
- B. The daughters of the son receive priority shares if there is no daughter, or no son's daughter with a higher rank. They receive one share or more than a sixth with the daughter, or a son's daughter.

Article (301)

Regarding the provisions in Articles 307 and 308:

- A. Each of the blood sisters shall have one-half as her share by obligation and two-thirds for two or more sisters.
- B. The father's sisters shall have an advanced priority share, if no blood sister exists.

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- C. They shall receive one or more of a sixth if there is a blood sister.

Article (302)

- A. The mother shall receive one-sixth as her share by obligation with the son, or a son's father, or with two or more of the brothers and sisters.
- B. She shall have one-third in other cases, but if she is with one of the two in the marriage and the father only, she shall have one-third of the balance after the shares of one of the married couple.
- C. The fixed grandmother is the mother of one of the parents, or is the blood grandmother, and she and other grandmothers shall receive one-third, to be divided among them equally, with no difference regarding the nature of kinship.

Article (303)

If the shares of obligations are more than the inheritance, it is divided among them in proportion to their shares of the inheritance.

Article (304)

- A. If none of the obligatory parties is present, or they are present but the obligatory shares do not deplete the inheritance, the inheritance, or what remains of it, shall devise to in-law kin.
- B. In-law kinship is of three types:
 - a) Kinship by self
 - b) Kinship by others
 - c) Kinship with others

Article (305)

Kinship by self has four levels, some of which take priority over others in inheritance, as follows:

- A. Offspring, including sons and son's sons.
- B. Brothers, including brothers from the same parents, brothers from the same father, and their children.
- C. Uncles, including the deceased uncles from both parents, or from the father's side, and the deceased father's uncles, the uncles of his blood grandfather, and sons from males.

Article (306)

- A. If kinship by self is from the same side, the person with the greatest claim to inheritance is the closest to the deceased.
- B. If they are equal in side and rank, priority goes to strength of relation. The person whose relation is through the parents takes priority over the person whose relation is from the father alone.
- C. If they are equal in side, rank and power, the inheritance is divided among them equally.

Article (307)

Kinship by others is:

- A. Daughters along with sons.
- B. Daughters of the son, with the sons of the son, if they are absolute in their rank or lower, if they do not inherit otherwise.
- C. Sisters of parents with sons of parents. Sisters of father with brothers of father.

- D. Inheritance among them, in this case, is for the male twice the share of the female.

Article (308)

Kinship with others is:

- A. Sisters of the parents or of the father with girls, or the sons' daughters. They shall have the balance of the inheritance after obligations.
- B. In this case, they are considered, compared to other kin, like brothers of parents or of a father, and they shall take their shares by priority in side, rank and power.

Article (309)

If the father or grandfather is together with the daughter or the son's daughter, the sixth shall apply by obligation, and the balance through kinship.

Article (310)

- A. If the grandfather is with the brothers and the sisters of both parents or of the father, two cases shall apply:
 - a. Share with them as brothers if they are males only, or males and females, or females by blood with the inheriting branch of the females.
 - b. He receives the balance after obligation shares by kinship, if it is with sisters who are not in kinship with males, or with the inheriting branch of females.
- B. If division or inheritance by kinship is applied, the grandfather shall be denied inheritance or his share shall be reduced to sixth, and is considered an obligation share by sixth.

- C. The father's brothers and sisters who are obscure shall not receive inheritance.

Article (311)

- A. Exclusion is if a person qualifies for inheritance, but does not inherit because another inheritor exists.
- B. The excluded shall exclude others.

Article (312)

A person denied inheritance does not immediately exclude any of the other inheritors.

Article (313)

- A. The fixed grandmother shall be excluded by the mother.
- B. A distant grandmother shall be excluded by a close grandmother.
- C. A father's grandmother is excluded by the father.
- D. A grandmother is excluded by the grandfather by blood if he is of her lineage.

Article (314)

The mother's children are obscured by the father, the blood grandfather, and the son and the son's son.

Article (315)

- A. The son's daughter is obscured by the son, and the son's son, if she is of a lower rank.
- B. The son's daughter is also obscured by two daughters, or the son's two daughters, if they are of a higher rank than

her, unless she has close kinship on her side, according to Article 307.

Article (316)

A sister of the parents is obscured by the father and the son, and the son's son.

Article (317)

- A. The father's sister shall be obscured by the father and the son, and the son's son.
- B. She is also obscured by a brother of the parents and a sister of the parents if of a different kinship, according to the provisions of Article 308, and by sisters of the parents if there is no brother to the father.

Article (318)

- A. If the obligations do not deplete the inheritance, and there is no in-law kinship, the balance shall transfer to obligation owners other than the husband and wife, according to their share of obligations.
- B. The balance of the inheritance shall revert to the husband or the wife if there is no in-law kinship, or any in-law obligation, or close kinship.

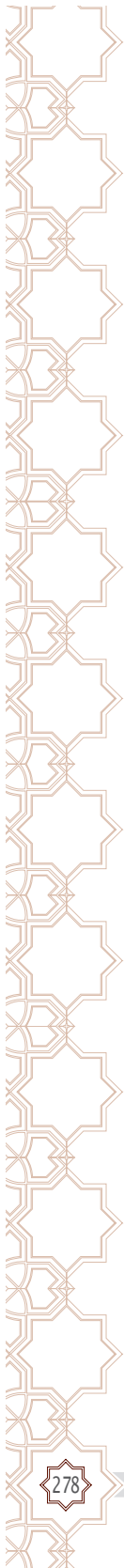
Article (319)

- A. If there is no share by obligation or share by kinship inheritor, the inheritance or its balance shall go to other kin.
- B. Kin are relatives without obligation, or kin by share.

Article (320)

Kinship is of four types, some with higher priority in inheritance, according to the following ranking:

- A. Rank One: daughters' sons, and sons of the sons' daughters.
- B. Rank Two: grandfather, and the non-permanent grandmother.
- C. Rank Three: sons of brothers from the mother and their sons. Sons of sisters from both parents, or from one parent. Daughters of brothers from both or one parent, and their sons. Daughters of brothers' sons from both or one parent, and their sons.
- D. Rank Four: includes six groups, some having priority over others in inheritance, as follows:
 - a. Group One: maternal uncles of the deceased, and aunts of the deceased, uncles and aunts from both or one parent.
 - b. Group Two: sons of those mentioned in the previous paragraph, female cousins of the deceased from both parents or from the father, daughters of their sons, and the sons of those mentioned.
 - c. Group Three: maternal uncles and aunts of the deceased from both or one parent, and uncles and aunts of the deceased mother from both or one parent.
 - d. Group Four: sons of those mentioned in the previous paragraph, cousins of the deceased father from both parents or father only, daughters of his sons, and sons of those mentioned.

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- e. Group Five: uncles of the deceased grandfather, uncles of the deceased mother's father, her aunts, their uncles and their aunts, from both or one parent, uncles of the deceased mother's mother, her aunts from both or one parent.
 - f. Group Six: sons of those mentioned in the previous paragraph, cousins of the deceased grandfather from both or one parent, daughters of their sons, and the sons of those mentioned, and so on.

Article (321)

- A. The first group of kin takes priority in inheritance, especially those closest to the deceased.
- B. If they are all equal in rank, the son by obligation takes priority over the son by kinship only. If they are all sons by obligation, or if none of them is under obligation, they shall share the inheritance.

Article (322)

- A. In the second group of kin, the one closest to the deceased takes priority. If they are equal, priority is given to the one closest in obligation.
- B. If they are equal in rank, and none of them takes priority by being closest to an obligation, and they are all from the father's or mother's side, they shall share the inheritance, though their sides may differ. Two-thirds go to the father's side, and one-third to the mother's.

Article (323)

- A. In the third group of kin, the closest to the deceased takes priority for inheritance.

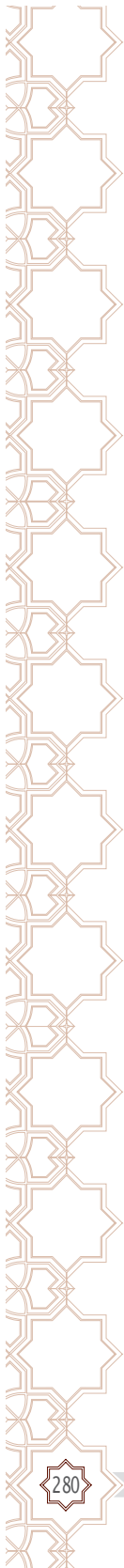
- B. If they are equal in rank, and some of them are sons by blood, and others by kinship, the first shall take priority over the second, or otherwise those closest to the deceased shall take priority. The one whose lineage traces to the two parents takes priority over the one whose origin is from the father. He whose origin goes to the father has priority over one with ties to the mother. If they are equal in rank and strength of relation, they shall share the inheritance.

Article (324)

- A. In group one of the fourth rank in Article 320, in the father's team, namely the deceased uncles and aunts, or the mother's team, namely uncles and aunts, the one with the strongest relationship is given priority. The one who belongs to both parents takes priority over the one from the father, and the one from the father takes priority over the one from the mother. If they are equal in relationship, they shall share the inheritance.
- B. When the two teams are together, two-thirds go to the father's relatives and one-third to the mother's. The share of each team shall be divided as mentioned above.
- C. The provisions of the two paragraphs above shall apply to groups three and five.

Article (325)

- A. In group two, the person whose rank is closer takes priority over the farther, though not from his side. When equal and from the same side, the closer in relationship, even if children of a blood relation or blood kin, shall be given priority.
- B. If they are different, the child of a blood relation is given priority over the child of kin.

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- C. When the side is different, two-thirds go to the father's side and one-third to the mother's. What each team receives is divided among its members as per the above system.
 - D. The provisions of the above articles shall be applied on the fourth and sixth groups.

Article (326)

There is no consideration for multiple aspects of kinship for the inheritor among kin, unless the side is different.

Article (327)

In the inheritance of kin, the male shall receive twice the share of the female.

Article (328)

- A. If the deceased approved the lineage himself, this approval does not transfer to the heirs, unless the conditions for its truth are met.
- B. If he approved lineage to others, the person approved shall receive the inheritance if his lineage was unknown or not proved, and the person who approved does not renege on his approval. This is conditioned on the person approved being alive when the person who approved died, or when death judgment was passed, and that none of the inheritance objections applies.
- C. If the inheritors approved an inheritor and the kinship is not proved, the person approved shall have his share if it is not obscured, and shall receive nothing if obscured.

Article (329)

Part of the deceased's inheritance shall be allocated to the child still in the womb, with estimations made whether it is male or female.

Article (330)

If a man died and left a wife or a woman in 'iddah, the child she is pregnant with shall not inherit until born alive within a maximum of 365 days from the date of death or separation.

A child in the womb inherits from his father only, except in the following cases:

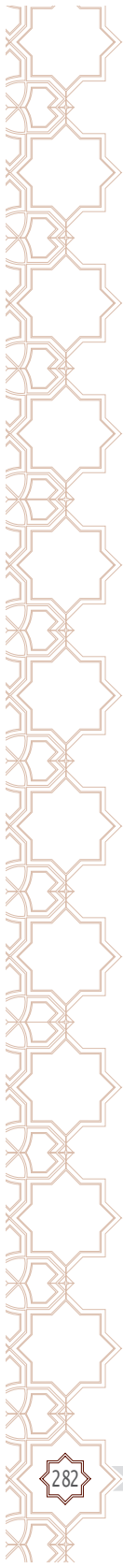
- A. If born alive within a maximum of 365 days of the death or separation date, if his mother is in a death or separation 'iddah and the inheritor died during 'iddah.
- B. If the child is born alive within a maximum of 270 days from the date of the inheritor's death, if the child is from a current marriage at the time of the death.

Article (331)

- A. If there is a shortfall in the amount allocated for the child, compared to what he deserves, the balance is obtained from the share of the heir who received a surplus.
- B. If the amount allocated for the child is more than deserved, the balance is returned to the deserving heir.

Article (332)

- A. The share of inheritance for a missing person shall be set aside. If he shows up alive, he shall take it. If he is judged dead, his share shall be allocated to deserving heirs at the time of the inheritor's death.

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- B. If he shows up alive after being judged dead, he shall receive what remains from his share from the heirs.

Article (333)

If a missing person is judged dead, and his heirs qualify for his inheritance, and then the missing person appears or is found to be alive, he shall receive what remains of his inheritance from heirs, and shall not demand what they had expended.

Article (334)

A bisexual person shall receive the lower of the limits. The balance shall revert to the heirs.

Article (335)

Observing the period stipulated in the last paragraph of Article 330, the adultery child, a child of a damnation oath from the mother and her kin, shall inherit, and shall be inherited by his or her mother and her kin.

Article (336)

- A. Settlement is when the heirs meet and agree to exclude some of them from the inheritance.
- B. If an heir settles with another, he shall assume the other heir's share and replace him in the inheritance.
- C. If one of the heirs settles with the rest of the heirs, and what is paid to him is from the inheritance, his share shall be divided among them according to their shares in the inheritance. If they are paying him from their own money, and the settlement agreement does not stipulate the method of sharing the outcome, it shall be divided among them according to the ratio of what each paid.

Article (337)

The Public Prosecution Office shall initiate litigation, or shall interfere if no one else has interfered, in every issue that affects public order.

Article (338)

Public order in the previous article includes Islamic Shari'a provisions in the following cases:

- A. Marriage to eternally or temporarily prohibited persons.
- B. Proof of irrevocable divorce.
- C. Dissolution of marriage.
- D. Endowment and charitable wills
- E. Lineage and name correction litigation.
- F. Litigation concerning persons lacking competence, and absent and missing persons.

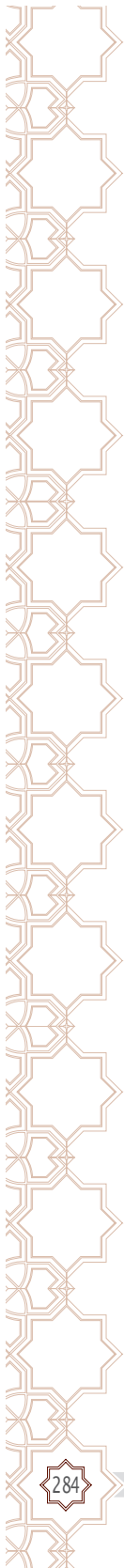
The public prosecutor shall have equal rights as the opposition in these cases.

Article (339)

- A. The public prosecutor is considered party to the court case when it submits a memorandum of opinion, and is not required to attend unless the court sees otherwise.
- B. In all cases, the public prosecutor is not required to attend when judgment is passed.

Article (340)

In all cases stipulated by law regarding the public prosecutor's interference, the court's registration office shall inform the public



prosecutor in writing upon the initiation of litigation. When addressing the case, if a matter is presented requiring interference on behalf of the public prosecutor, informing the public prosecutor is carried out by order of the court.

Article (341)

The public prosecutor's office is granted, upon its request, a minimum period of fifteen days to present a memorandum of opinion, from the date that the case file is delivered. The prosecutor's office may appeal a decision even if it did not interfere.

Article (342)

Years and months in this law are calculated based on the lunar calendar.

Article (343)

Anything not stipulated in this law shall be ruled based on what is well known in the Maliki school of thought. If nothing well known is available, other judgment is applied. If there is no judgment to begin with, the general principles of the Maliki school of thought shall be applied.

Article (344)

Final judgments issued by personal status departments shall be accepted as legal documents for all departments.

Article (345)

The implementation of the provisions of this law is the responsibility of the personal status department at the district courts and courts of appeal and cassation.

Article (346)

- A. This law shall apply to those to whom the Maliki school of thought is applied. All others are subject to their own provisions.
- B. If parties in a conflict are non-Muslims and of different religions and schools, the provisions of this law shall apply to them.

Article (347)

This law shall be published in the Official Gazette and shall be applied as of the beginning of October 1984.

Appendix No. 2

General Principles in the Provisions of the Kuwait Court of Cassation

1. Alimony

- A. *Alimony*: the marriage contract in which the wife is considered part of the husband's right, and therefore should be supported by alimony from his wealth, even if she is wealthy or of a different religion. Alimony must be either completed or exempted (See Appeal case no. 201/99 Personal Status, Session 24/6/2003. Judiciary and Law Journal, Year 28, Volume 2, July 2003, p.329).
- B. Alimony includes food, clothing, shelter, maid's wages and other needs. (Appeal 113/95 Status Session 1996, Judiciary and Law Journal, Volume 2 March 2000).
- C. Estimating alimony in its three forms (food, clothing, shelter), and its adequacy compared to the financial status of the party compelled to provide it, and the date when support was withheld. This is part of the authority of the relevant court (Appeal 40/2000 Status Session 18/11200, Judiciary and Law Journal, Year 28, Volume 2, July 2003, p.433).
- D. Abatement of alimony. Proof of insubordination through refusal to implement final judgment for subordination after being served (Appeal No. 77/96 Status Session) Judiciary and Law Journal, Year 25, Volume 1, July 2000, p. 455).

2. Compensation Alimony

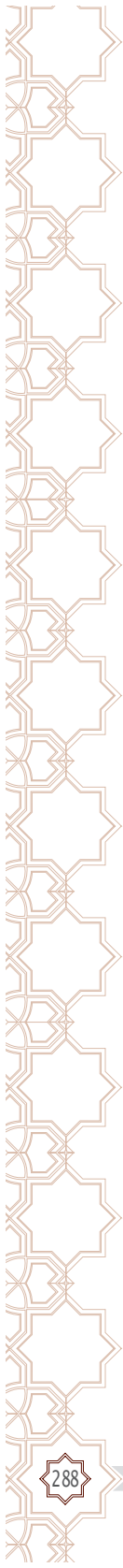
The problem with legitimizing alimony is that it makes the wife miss her husband and his financial support, the type of chivalry

required by Islam. Hence, the wife deserves alimony in addition to her 'Iddah (period of waiting after divorce) alimony. This is compensation estimated at no more than one year's alimony, except in the following cases: divorce due to non-support as a result of the husband's inability to provide financially; or separation if the cause is the wife; and finally, the husband's death. These are exceptional cases in which alimony is not expected.

- The wife is deserving of compensation alimony if the divorce is taking place without her approval, or because of reasons unrelated to her.
- Implementing divorce by the husband's unilateral decision, without the wife's approval, requires that she receive compensation alimony, even if she was the cause of the divorce.
- Estimation and implementation of the compensation alimony: the standard is to calculate it on the basis of the amount of the monthly alimony that the husband's financial status permits at the time it is due, provided it does not exceed one year's alimony (Appeal 86/96 Status Session 8/6/96. Judiciary and Law Journal, Year 24, Volume 2, March 2000).
- Evaluation of the wife's approval or lack thereof of the divorce is the authority of the relevant court (Appeal 48/93 Status Session 5/3/94 and 4/94 Status Session 14/5/94, Judiciary and Law Journal, Year 22, Volume One February 1999, pp. 441 and 505).

3. Obedience and Insubordination

Subordination litigation: Based on estrangement, the wife's violation of the cohabitation duty in the matrimonial home. Insubordination litigation is based on the wife refraining from implementing the final



judgment to return to her husband's authority. Hence, obedience and insubordination court cases are different from cases of divorce on the grounds of damage, which are based on the wife's claim that her husband caused her damage in such a manner that prevents the continuation of cohabitation between them. Hence, issuing a ruling requiring the wife to return to her husband's authority, or a judgment deeming her insubordinate, does not prevent the courts from looking into her request for divorce for damage, and has no bearing on the abatement of separation reason.

(Appeal 58/97 Status Session 3/1/98, Judiciary and Law Journal, Year 26, Volume One, May 2001).

- Evaluation of the husband's integrity in order for the wife to return to his authority is objective (Appeal No. 50/96 Status Session 15/1997).
- Evaluation of whether the matrimonial residence has the legally required conditions is up to the judge, if the issue is palpable (Appeal 55/93 Status Session 4/6/94), Judiciary and Law Journal, Year 23, Volume Two July 1999).
- Wife's insubordination is tied to abatement of the alimony. The husband must require her to submit to him, to implement the decisive judgment issued for her to return to his authority as a base (Appeal 134/97 Status Session 3/1/98), Judiciary and Law Journal, Year 26, Volume 1, May 2000).
- Abatement of the wife's alimony takes place only after she refuses to implement the final judgment issued, requiring her subordination to her husband, and after being served accordingly (Appeal 11 and 62/96 Status Session 16/11 and 23/11 1996), Judiciary and Law Journal, Year 24 Volume 2 March 2000).
- The wife's alimony abatement for insubordination: its condition is proof that she refused to implement final

judgment issued for subordination and after being served (Appeal 107/97 Status Session 7/3/98), Judiciary and Law Journal, Year 26 Volume One May 2001).

4. Khula' Divorce

Khula' divorce takes place when a husband divorces his wife in exchange for a compensation they agree upon by orally separating, divorcing, or the like. Islamic Shari'a has defined it as a divorce in exchange for money, which the wife pays to redeem herself, presenting it to the husband in exchange for divorcing her (Appeal 61/89 Session 16/12/1998).

- For Khula' to be valid, both parties must be deemed competent at the time of the procedure, and the wife should be actively married to him at the time. Khula' cannot take place when the wife is in 'Iddah.
- Whatever is accepted by Shari'a applies as a compensation in Khula' without specification. Hence, the compensation under Khula' cannot be what is prohibited, such as alcoholic drink or the like (Appeal 30/85 Session 23/12/85).
- Khula' is legitimate and conditions abatement if the wife/mother agreed to Khula' with her husband in exchange for relinquishing her rights to custody of her children. The priority is given to the children's interests over those of the father and the custodian.
- Khula' divorce is an irrevocable divorce (Appeal No. 9/1989, session 26/6/1989. p.358).

5. Divorce due to Lack of Financial Support

A wife whose husband illegitimately refuses to support her financially has the right to request the judge to grant her a divorce from him,

provided he is present and does not have any virtual wealth, but his poverty has not been proved as yet. In this case, the judge shall divorce her from him immediately. In case the husband is absent, or at a known location, or was proved poor, the judge shall give him a grace period of a maximum of three months. If he still refrains from providing support, the judge shall approve the divorce.

A divorce imposed by the judge for non-support is reversible, and the husband may revert to his wife within the 'Iddah if he proved the availability of funds and his ability to support her financially (Appeal 57/95 session 112/1994).

Divorce due to Lack of Financial Support in the Ja'fari Sect

Abstention of the husband from supporting his wife financially gives her the right to refer to the judge, who will either require him to support her financially or divorce her. If he refuses to perform either, the judge has the right to divorce her from him (Appeal 110/96 session 14/1997 and Appeal 63/93 session 27/1193).

6. Divorce Resulting from Infliction of Damage

Separation for damage inflicted takes place when one of the parties in marriage would sustain damage if he or she remained in the marriage, whether for a physical reason, showing that one party hurt the other, or for other reasons of dissention, such as disinclination or severe resentment. Even if abuse on behalf of the husband cannot be proved, for example, when the wife is the one requesting divorce, the marriage cannot continue, as dissention is considered a flaw in the potential for the success of a good marital relationship (Appeal 64/2000 Status Session 2/12/2000) Judiciary and Law Journal, Year 28, Column 2, July 2003 p. 453).

Divorce based on damage is not restricted to the wife. The husband may request it although he has the power to divorce. The justification is such that the contentious wife does not use her quarrelsome

behavior as an excuse to get divorced without compensation, incurring losses on behalf of the husband. The courts relieve the husband from these ramifications and from paying compensation imposed on him in a normal divorce. If the husband imposes the divorce by his free will, and without the wife's approval, she would still receive compensation alimony, even if she is the cause for the divorce (Appeal 172/97 Status Session 3/6/2000), Judiciary and Law Journal, Year 28, Volume 2 July 2003, p.235).

- Damage Divorce Litigation: The court should interfere to end the conflict amicably. This is part of the general regulation. If it is impossible to reconcile them, the court follows arbitration procedures stipulated in Articles 118–123 of the Personal Status Law No. 51/84.
- The judge commits to the arbitrators' decision in the damage divorce case provided they, or a majority, agree on one opinion, according to the text of Article 130 of Law No. 51/84 of the Kuwaiti Personal Status Law (Appeal 3/97 Status Session 11/10/1997) Judiciary and Law Journal, Year 25 Volume 2 November 2000).
- Evaluation of proof or negation of damage requiring divorce is the sole duty of the relevant judge, as long as he bases his deliberations on palpable reasons presented in the court case (Appeal 63/95, Judiciary and Law Journal, Year 25 Volume 2 November 2000, p.194).
- The standard of damage as a result of which married life cannot continue is a personal and not a material standard (Appeal 2/58 Session 15/4/85 p. 155).
- Divorce for damage is contingent upon evidence to verify that the allegations actually occurred. The disappearance of the damage or the attempt to eradicate it does not cancel

the divorce, as long as damage was proved to have actually happened (Appeal 36/85 session 27/2/86 p. 269).

- Divorce concluded by a judge is a divorce in evidence and cannot be revoked (Appeal 12/1973 session 31/3/1975, p. 36).

Divorce for Damage in the Ja'fari School of Thought

Neither of the partners in a marriage, according to the Ja'fari school of thought, has the right to request a divorce based on damage, represented by beating, profanity, estrangement, confiscation of wealth, or other examples of damage. The victimized party should resort to the judge to deter and restrain the aggressor or augment what he or she believes is a deterrent. If the conflict escalates and dissension is to be avoided, the judge shall send two arbitrators to rectify the situation (*Minhaj Al Salihin* (Method of the Righteous) by Al Khu'i, p.122).

If her husband refuses to support her financially, the wife may, in the Ja'fari school of thought, refer him to the judge to impose one of two solutions: compliance or divorce. If the husband refuses to do either, the judge may divorce her from him (Appeal 110/96 Status Session 14/6/97, Judiciary and Law Journal, Year 25 Volume 2, November 2000).

7. Divorce as a Result of a Defect

A partner in marriage has the right to request annulment upon evidence of a defect in the other party, whether before the contract or after, provided one of the partners discovers such physical or mental defect, previously existing or new, in the other party. The defect should be chronic and incurable, or curable only after a long period of time. In addition, the party raising litigation should have been affected by it, and he or she should not have known of the defect and accepted it initially. Each of the partners' right in requesting

marriage annulment as a result of the defect abates if the other party proves that the party raising litigation had known about the defect yet accepted it, or found out about it after the contract was concluded or when it happened, and accepted it. The exception is the wife's right to annulment as a result of the man's sexual defects (impotence, castration) which prevent her from attaining pleasure. Her right does not abate even if she had previously accepted the defect openly (Appeal 12/75 session 21/3/77 and 4/75 session 76).

8. Custody and Visitation

Custody is the matter of rearing a child and protecting him or her during the early stages of life by the mother. However, guardianship over the child's behavior and belongings is the father's right.

- Custody is a right of the custodian and the child under custody. The right of the latter is more powerful than that of the former.
- The mother's right to custody is the basis, provided she satisfies the conditions of a custodian.
- The mother should be an adult, have wisdom, integrity and the capability to raise the child in her custody, in health and manners, unless otherwise proven (Appeal 48/2000 Status Session 22/10/2000, Judiciary and Law Journal, Year 28 Volume 2, July 2003, p.393).
- Evaluating the presence of custody conditions is the duty of the relevant court (Appeal No. 92/ Personal Status, Session 3/5/1997, Judiciary and Law Journal, Year 25 Volume 1 July 2000, p. 505).
- The custodian may travel, accompanying the child in custody, to any country without permission from the guardian, as long as the trip is temporary and not intended for residence

and settling down (Appeal 12/94 Status Session 18/6/94, Judiciary and Law Journal, Year 25 Volume 2, July 1991).

- The custodian deserves a wage, unless she is married to the child's father, in 'Iddah, or is acting voluntarily (Appeal 6/94 Status Session 19/11/94, Judiciary and Law Journal, Year 22 Volume 2 July 1999).

9. Child Support

- Support for the child, who is incapable of providing for him or herself, includes rent, education expenses, medical treatment and maid's wages if required. The duty falls upon the father if he is able to provide, according to the child's requirements and the father's ability (Appeal 72/98 Status Session 3/6/2000), Judiciary and Law Journal, Year 25 Volume 1, July 2000, p. 240).
- The custodian's right to receive child support, including rent, is hers because the child's responsibility is in her hand. The earner bears the responsibility of financial support. Guardianship does not abate when the earner cannot provide. (Appeal No. 45/93 Status Session 26/3/1994), Judiciary and Law Journal, Year 23 Volume One February 1999 p. 454).
- The custodian of the female child may receive the child support money and has a right to demand it. Violating this judgment will undermine it.
- Rent for the child's residence is a required support component that the custodian shall take no responsibility for, unless she owns a residence where she resides or that is allocated for her (Appeal 47/95 Status Session 1/6/96, Judiciary and Law Journal, Year 24 Volume 2, 2000).

10. End of Custody and its Ramifications

- Women's custody in Imam Malik's school of thought ends in puberty, whether the child shows physical signs or reaches the age of fifteen without showing signs. Verifying evidence is evaluated by the relevant judge (Appeal No. 40/200 Status Session 18/11/2000), Judiciary and Law Journal, Year 28 Volume 2 July 2003, p. 433).
- Custody of a female by a woman does not end when the child reaches a specific age, but rather when she is married and the marriage is consummated.
- A male child's custody by a woman ends with the normal signs of puberty or the child's completion of fifteen years of age without showing signs. The result is that custody abates and he becomes financially responsible for himself.
- Upon reaching the age of fifteen, the child alone has the right to litigate demanding residence support. Litigation by his mother requesting support is no longer acceptable. (Appeal 114/95 Status Session 3/5/1997). Judiciary and Law Journal, Year 25 Volume 1, July 2000 p. 497)

Custody in the Ja'fari School of Thought

In the Ja'fari school of thought, custody of a female child belongs to the mother until the child reaches the age of seven, and then to the father until she is nine years old. After that, the child is given a choice in the matter of custody.

Custody of a normal male child in the Ja'fari school belongs to the mother until the child reaches seven, eight and above, until puberty. The father's right is stronger and he has more right than that of the grandmother (Appeal 240/99 Status Session 17/6/2000), Judiciary and Law Journal, Year 28 Volume 2 July 2003, p. 293).

Custody in the Ja'fari school ends when the child, whether male or female, reaches the age of puberty, after that he/she has the right to choose which parent or other relative to stay with (Appeal 19/2000 Status Session 10/602000), Judiciary and Law Journal, Year 28 Volume 2 July 2003 p. 273).

11. Child Visitation

The right to visitation belongs to the parents and the grandparents only, and the custodian may not prevent anyone from seeing the child in custody (Appeal 19/88 Status Session 27/9/89). The mother's right to see her children is not affected by the father's accusation of bad behavior, nor by proof that she had previously divorced the father through Khula' conditional on non-visitation (Judgment by Court of Appeals No. 158/96-Session 3/6/1996).

Visitation is based on the premise that it is up to the custodian of the child. When there is a dispute over time and place of visitation, the judge decides on a compromise that preserves the rights of the child and the considerations of the legislator regarding visitation. (Appeal 113/2000 Status Session 12/11/2000), Judiciary and Law Journal, Year 28, Volume 2, July 2003. p. 410).

12. Validity of Judgments in Personal Status Issues

- The validity of judgments on personal status issues which may be changed or amended as a result of changing conditions, among these are judgments passed in confirming or rejecting alimony; its validity is temporary, and this validity remains as long as the reasons and conditions for the judgment do not change.
- Changing the conditions in personal status issues or maintaining them is the prerogative of the relevant judge alone, with no supervision from the Court of Cassation. (Appeal 56/99 Status Session 3/6/2000), Judiciary and Law Journal, Year 28, Volume July 2003 p. 253).

Appendix No. 3

Tables Showing the Total Number of Khula' Divorces as Documented in the State of Kuwait for the years 2000 – 2002

Source: Ministry of Justice, Information System Center, Statistics and Research Department

TABLE 1
**Documented Cases of Divorce in 2000
According to Husband's Nationality and Type of Divorce**

Type of Divorce	Kuwaiti	Non-Kuwaiti		Total
		Nationality Specified	Nationality Not Specified	
Witnessed Divorces	1,537	364	23	1,924
Khula'	666	271	6	943
Based on Judge's Ruling	534	219	29	782
Total	2,737	864	58	3,649

- Statistical Data
- Ministry of Justice, Information System Center, Statistics and Research Department
- Percentage of Khula' divorce cases relative to total number of divorce cases: 25.8%

TABLE 2
Documented Cases of Divorce in 2001
According to Husband's Nationality and Type of Divorce

Type of Divorce	Kuwaiti	Non-Kuwaiti		Total
		Nationality Specified	Nationality Not Specified	
Witnessed Divorces	1,624	377	13	2,014
Khula'	709	298	8	1,015
Based on Judge's Ruling	552	254	16	822
Total	2,885	929	37	3,851

- Statistical Data
- Ministry of Justice, Information System Center, Statistics and Research Department
- Percentage of Khula' divorce cases relative to total number of divorce cases: 26.4%

TABLE 3
Documented Cases of Divorce in 2002
According to Husband's Nationality and Type of Divorce

Type of Divorce	Kuwaiti	Non-Kuwaitis		Total
		Nationality Specified	Nationality Not Specified	
Witnessed Divorces	1,674	339	10	2,023
Khula'	756	316	10	1,082
Based on Judge's Ruling	566	236	17	819
Total	2,996	891	37	3,924

- Statistical Data
- Ministry of Justice, Information System Center, Statistics and Research Department
- Percentage of Khula' divorce cases relative to total number of divorce cases: 27.6%

TABLE 4
Reservations and Declarations of the Arab Countries Party to the Convention on the Elimination of All Forms of Discrimination against Women on Articles 2 and 16 (as of the end of April 2006)

	Name of Arab Countries Party to the Convention	History, Ratifications, Reservations and Declarations of Arab Countries	Arab Countries' Reservations and Declarations
1.	Algeria	May 22, 1996	Declared readiness to adopt Articles 2 and 16 provided it does not conflict with the Algerian Family Law
2.	Bahrain	June 18, 2002	No reservations
3.	Djibouti	December 2, 1998	Expressed reservations about Articles 2 and 16 to guarantee that they are implemented within the framework of Islamic Shari'a provisions
4.	Egypt	September 18, 1981	Reservations about Articles 2 and 16; namely that they should not conflict with the provisions of Islamic Shari'a
5.	Iraq	August 13, 1986	Article 2 (two sub-paragraphs F and G) and Article 16, provided they do not conflict with the provisions of Islamic Shari'a
6.	Jordan	July 1992	Article 16 (Paragraphs A,C,D,G)
7.	Kuwait	September 2, 1994	Declared, when expressing reservations, that Article 16 (Paragraph 1F) will not be adapted because it conflicts with the provisions of Islamic Shari'a

TABLE 4 (contd...)

8.	Lebanon	April 21, 1997	Reservations about Article 16 (Paragraphs A,C, D,G and Q)
9.	Libya	May 16, 1989	Reservations about Article 2 (Paragraphs 1C, D) to assure they do not conflict with women's rights in Islamic Shari'a
10.	Mauritania	May 10, 2001	The Government of Mauritania, after studying the Convention on Eliminating all Forms of Discrimination against Women, 1979, agreed to it and all its articles that conflict with the provisions of Islamic Shari'a and the country's Constitution
11.	Morocco	June 21, 1993	Declared: The implementation of Article 2 is contingent upon their compliance with provisions of Islamic Shari'a. Expressed reservation to Article 16 because the provisions concerning equality do not agree with the provisions of Islamic Shari'a
12.	Oman	February 7, 2006	Reservations about all the Convention's provisions that contradict the provisions of Islamic Shari'a and the legislations applicable in the Sultanate of Oman. Reservations on Article 16 (Paragraphs 1A, C, Q) regarding equality between men and women.

TABLE 4 (contd...)

13.	Saudi Arabia	September 7, 2000	In case of differences between the provisions of the Convention and the Islamic Shari'a principles, the Kingdom is under no obligation to observe the contradicting provisions of the Convention
14.	Syria	March 2, 2003	Reservations against Article 2 and 16, (paragraphs 1S,D,F,G) and paragraph 2 of this Article because they do not agree with the provisions of Islamic Shari'a
15.	Tunisia	September 20, 1985	Declaration: The Tunisian Government declares that it will not take any regulatory decision or legislation according to the requirements of the Convention, when this decision may contradict the provisions of Chapter One of the Tunisian Constitution. Reservations about Article 16 (1/CDFGH)
16.	United Arab Emirates	October 6, 2004	Reservations against Article 2 (paragraph/Q) and Article 16 in case they contradict the teachings and principles of Islamic Shari'a.
17.	Yemen	May 30, 2004	No reservations on Articles 2 and 16



General Notes:

- 185 countries are signatories to CEDAW, representing 90 percent of the United Nations member countries.
- 17 Arab countries ratified the Convention.
- 16 Arab countries expressed reservations or issued declarations regarding the articles of the Convention.
- Five Arab countries had not ratified the Convention as of the end of 2006 (Sudan, Somalia, Comoro Islands, Qatar and Palestine).