A STUDY OF THE WIFE'S RIGHTS IN ISLAMIC FIQH

By

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ABSTRACT

The aim of this thesis is to study the various fundamental rights that the wife enjoys in accordance with the teachings of Islam. In particular, the thesis focuses on those rights that affect the husband, including the right to choose a husband, the right to get a dower, the right to have *nafaqah*, the right to be treated equitably, and the right to have *al-khulᶜ*. The thesis falls into nine chapters including the introduction (Chapter One) and the conclusion (Chapter Nine). It contains 70000 words, approximately.

Chapters Two and Three are introductory chapters, as each one of them introduces a key aspect of the research. Chapter Two introduces the concept and significance of the Prophet's *sunnah*, the framework within which the research is conducted, while Chapter Three investigates the significance of marriage in Islam.

Chapter Four centres on one of the most fundamental rights the woman, regardless whether she is a *bikr* or *thayyib*, should have. It is the right to choose a husband. This right is guaranteed by *sharīᶜa* through the different *ḥadīths* the prophet had said in this respect. The chapter also considers the vital role played by the guardian in guiding the woman under his guardianship into the right way so she can make a wise decision while making her choice.

Chapter Five looks at another significant right the wife enjoys which is the right to get a dower. This right is the wife's own and no one else, whether the father or the guardian, should interfere or take anything of it without her permission to do so.

Chapter Six explores another right the wife is entitled to have which is the right to have a maintenance or *nafaqah*. Different types of maintenance are identified such as food, clothing, housing, servant, medical, perfume, adornment *nafaqahs*. In addition, the *nafaqah* in the case of the working wife is also dealt with in this chapter. The calculation of *nafaqah* is estimated in accordance with the husband's income.

Chapter Seven considers the wife's right to get fair treatment known in Arabic as *al-ᶜishra bilmaᶜrūf*. According to this right, the wife is entitled to be treated by her husband with respect and trust. Therefore, he should refrain from ignoring, humiliating or ridiculing her or her opinions. Furthermore, he should teach her useful things about life and religion so that she will be a good companion to him.

Finally Chapter Eight looks at *al-khul'* as one of the wife's important rights in Islam, according to which she has to return the dower she had from her husband, or give him something of the same value, for the sake of ending the marriage without the need to provide any reasons for the desire to do so.

These five rights that the wife exercises play a significant role in stabilising the family and bringing about happiness. It has been stated in the *Qur'an* that marriage is a way of "dwelling in tranquillity". In fact, this ultimate goal of the legitimisation of marriage can be achieved nowadays only through adhering to the rights that Islam has granted to the Muslim wife.

DEDICATION

This work is dedicated to my parents and to my husband.

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TRANSLITERATION TABLE

Arabic has some sounds that do not actually exist in English. Thus, in order to enable the non-Arabic speaker produce the Arabic word in a way that is closest to the Arabic origin, we have to provide a transliteration table that shows the sounds in Arabic. Here is a list of both Arabic consonants and vowels.

A. The Consonants and glides:

q	ق	**z**	ز	‘	ء
k	ك	**s**	س	**b**	ب
l	ل	**sh**	ش	**t**	ت
m	م	**ṣ**	ص	**th**	ث
n	ن	**ḍ**	ض	**j**	ج
h	ه	**ṭ**	ط	**ħ**	ح
w	و	**ż**	ظ	**kh**	خ
y	ي	**ᶜ**	ع	**d**	د
ah	ة	**gh**	غ	**dh**	ذ
		f	ف	**r**	ر

B. The Vowels:

Arabic has three long vowels and three short ones.

a	ـَ	**ā**	ا
u	ـُ	**ū**	و
i	ـِ	**ī**	ي

Note of Clarification:

Due to typing difficulties, the capital letters of /ħ/, /ṣ/, /ṭ/, / Ż / are /Ħ/, /Ṡ/, /Ŧ/, / Ż/, respectively.

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CHAPTER ONE
INTRODUCTION

1. The Reasons for Choosing the Subject

Although we are now in the twenty first century, the Arab nation is still under developed.[1] The problem becomes really more serious when one knows that this nation is a rich one as it has both natural and human resources that are usually required for development. In addition to this, Muslims believe that Allah has blessed them with divine religion that guides them in all aspects of life through the rules and principles it offers to regulate their daily life. In fact, there are many factors that can be blamed for keeping Arabs lagging behind away from the development witnessed in many developed countries. The discussion of these factors falls beyond the scope of this thesis; therefore, they will be ignored. However, there is one factor that has a vital role in contributing, directly and indirectly, to the non-development of the Arab nation. This is the break-up in the family ties that this nation faces. This break-up in the family relationships is primarily due to a misunderstanding between husbands and their wives which, in turn, can be traced back to the lack of respect of the mutual rights and duties that the Islamic law adopted. Thus, it is quite common that the husband treats his wife unjustly by not fulfilling and ignoring the duties he has toward her. Moreover, it is not uncommon these days that the wife is not fully performing her role as a housewife which also leads to the instability and collapse of the family as an institute, which is the cornerstone of the society. As a result, the family loses its leading role in building and developing the society, as members of the family, particularly the husband and the wife, are busy pursuing endless family disputes and conflicts. Of course, the children are the worst hit by this, and it is very likely that their education will be badly affected. It is natural

that children raised in this way will not be qualified enough to face any future challenges and be in charge of their own affairs or the affairs of the society in which they grow up. This is in line with what Jāsim Al-Mutawa[c] argues for. He says

> The social reality we live nowadays is quite bitter. We hear about lots of family problems and we see the disintegration and collapse of families. As a lawyer in a personal affairs court, I have to deal with more than thirty cases everyday. These cases are mostly about family problems such as paying *nafaqah* to the wife, nursing children, and carelessness in educating the children, in addition to cases that have to do with divorce, family disintegration, and children deviation and loss.[2]

From that we understand why the Islamic *shari[c]a* tried to maintain the status of each of the husband and the wife through legitimising certain rights and duties that have to be observed. In fact the Islamic *shari[c]a* considered the fulfilment of these duties and rights, part of one's religious duties, the observation of which will count as a form of worshipping Allah and following the *sunnah* of Allah's Messenger.

If one wants to fully investigate the rights and duties that a husband and his wife have to respect when dealing with each other, one needs more than one dissertation; therefore, I believe it will be plausible to restrict the subject of this Ph. D. dissertation to one aspect of this subject, namely, the wife's rights as should be observed by the husband. I decided to tackle this topic because the wife has a vital and very effective role to play in bringing about stability and happiness to the family, and by doing this, she contributes to the stability and happiness of the society in general. The wife differs from other members of the family in that she is the most fundamental and essential member in this institute. As such, she has to be well taken care of through respecting her and

granting her legitimate rights in accordance with the rulings of the Islamic law.

The significance of the role that the wife plays within the family has been highlighted by Nasīma Ḥasan, who says

> Family is the basis of Islamic society. A wife deprived of her proper rights can't play her proper role to form an ideal family. The society will lose its balance if the foundation of the family is weak and not rightly constructed. An Islamic family, more precisely an Islamic wife, provides prosperity, balance and care for coming generations. So if we can ensure the status of the wife and free her from all forms of persecution, we can hope for a better future of a sound and well-disciplined generation.[3]

Similarly, Muḥammad ᶜAbduh, who was a great Islamic thinker, stressed the importance of the role played by the family in the development of the society. He argues that

> The nation, any nation, consists of the total of families that make it up. Thus the nation will be a good one if the families it consists of are good. And if one has no family, he/she has no nation.[4]

The concept of the family and that of nation are almost identical according to this view, as shown by the bilateral relationship between the two. As for the righteousness of the family, it can be guaranteed only through the fair treatment of the wife by her husband, and through giving her all her rights. ᶜAbduh also says that

> It has to be known that those men who try to show that they are masters at home through the maltreatment of their wives they lead their children to become slaves to others.[5]

This is a clear indication that husbands have to respect their wives and observe their rights at home. However, if they don't, their children will be affected by this, as they will grow up with no integrity or autonomy.

The wife is an effective member of the family, as she is the mother who raises the children who will make the future generations. Therefore, if she is deprived of her marital rights either morally or physically, then how could she adequately perform her duties toward her husband or children? Obviously, she would not have the time to care for them, as she will be busy seeking her rights. If she does not get these rights, she will have either to accept things as they are without doing anything for her family or to seek divorce from her husband who has no regard or respect for her. In fact, this is what many studies about the causes of divorce have indicated. These studies conclude that the husband's ill-treatment of his wife and his ignoring of her legitimate rights are some of the most important causes of divorce.

In a field study about the causes of divorce in the Kuwaiti society, Fahd Al-Thāqib[6] lists about one hundred and forty five reasons for this phenomenon. These reasons fall into eight main groups, seven of which relate divorce to the husband not observing his wife's rights as well as mistreating her, which constitute a violation of the rules of the Islamic *sharīʿa*, and these seven groups are:

1. Mistreatment
2. Non-existence of a separate residence
3. Sexual problems
4. Lack of interaction between the husband and the wife
5. Financial problems (i.e. either the husband has no money to provide *nafaqah* for his wife or he is not willing to do so)

6. Lack of love, as in cases where the wife gets married to a man who she does not love.
7. Psychological problems such as scepticism, jealousy, and witchcraft.

These are the problems that have been listed by Al-Thāqib as the most important causes of divorce. In fact, these items represent the wife's rights as stated in the Islamic *shari^{c}a* whether in the *Qur'ān*, in which husbands are ordered to "treat them (i.e. wives) with equitable treatment" in Sūrat Al-Nisā': 19, or in the Prophet's *sunnah*, according to which husbands are repeatedly asked to respect their wives, treat them fairly and patiently, and provide all her material as well as other needs. The Prophet knows the status of the wife in the society and the significance of her role in the development of her society. The Prophet stresses the status of the woman, whether a wife or not, being equal to that of the man in the saying "women are sisters to men".[7] The aim of this is to show how important it is for the woman to interact positively with her husband, protect her family, and devote herself to serve her family by all means she has. Thus, divorce and carelessness in observing the wife's rights are the same; therefore, I believe it is more important for me to account for the rights that the Muslim wife has, as the husband's commitment to these rights contributes significantly to the psychological stability and happiness of the wife as well as to the provision of a better quality of life for her. Although these problems, whether divorce or family disintegration, occur between husbands and their wives, the damage extends beyond the couple to the children, in the case where there are children, who will be deprived of the much needed care, love, and guidance. In fact this is what Abdulrazzāq Al-Māliki refers to when he states that

Separation between the husband and his wife will negatively affect the general environment of the family including the children. The negative effects are:

- The children will be deprived of the love of both, or one, of their parents.
- They will lack the required control and supervision.
- They will lag behind at school due to negative psychological effects inflicted upon them such as loneliness, as well as absent-mindedness in the classroom.
- They will also be deprived of the medical care and will be more vulnerable to psychological shocks and disturbances.

These effects have a great impact on the child to the extent that he/she may become a delinquent youth who has the potential to become a criminal, a thief or even a drug addict. The child will be a passive person who can be easily led into wrongdoing. Children may experience feelings of inferiority and this makes them absent-minded and distracted. [8]

With this kind of assessment it is difficult to expect positive progress and development from a nation that suffers from all these problems and psychological disturbances.

The importance of the family in bringing about the feeling of happiness to the society has been emphasised by Amīnah Al-Jābir, who argues that

> Societies that witness family disintegration are more vulnerable to problems that stand as a stumbling block in the way of any progress or happiness that can be achieved, whereas societies where the family ties are strong and stable are more peaceful and more harmonious and as a result they become more productive. [9]

Of course, the family will not disintegrate unless the wife's rights have been ignored and she, herself, has been treated unfairly. This is indeed the problem that the Arab nation is experiencing nowadays and the reason for this nation's

underdevelopment is that its people are busy, as stated above, with social and family conflicts and disputes. In this regard, Al-Tībī states that

> The reason why peoples and nations are suffering from loss and disintegration is because the family which is the main constituent of these nations has been very weak and helpless. The family is in ruins because the woman, who is the key member of the family, is not enjoying the status she deserves. [10]

In order to contribute to the progress of the nation, we have to face this problem and deal with this key member of the family and society (i.e. the wife) fairly, through giving her legitimate rights. Because the wife and the children constitute more than half of our society, it is vital that this slice of the society be made happy in order for this nation to prosper and have a promising future. This is a great challenge for the man in the Arab world, as he is supposed to take care of his entire family. This is what can be understood from the *ḥadīth* by Allah's Messenger in which he says that

> Everyone of you is a guardian and is responsible for his charge; the ruler is a guardian and is responsible for his subjects; the man is a guardian in his family and is responsible for his charges; a woman is a guardian for her husband's house and is responsible for her charges; and the servant is a guardian for his master's property and is responsible for his charge. [11]

If every member of the family performs his/her duties in the proper way, the family will restore its leading role in building a coherent and unified society and this certainly will bring about success and prosperity to the whole nation.

2. The Objectives of the Thesis

The thesis aims at exploring the following issues that relate to the Muslim wife and her rights as stated in Islamic law. First, this thesis presents a study

of the most important marital rights of the woman, as proposed by the Islamic *shari^{c}a* for the purpose of improving the status of the Muslim wife in general. The thesis attempts to raise awareness in Muslim women, particularly the wives, about their rights that were granted to them by Islamic *shari^{c}a* since the dawn of Islam. A critical look at the issues at stake could make one argue that the deterioration in the current status of the woman is actually the result of her ignorance of her rights. Thus, due to a lack of knowledge of the teachings of the Islamic *shari^{c}a*, the woman's rights are being ignored by the man. Evidence to support this view comes from a study carried out by specialists at the United Nations. According to this study, the Arab woman still doesn't know about many of her rights. The study concludes that

> The woman's awareness of her rights is still in its minimal limits in most Arab countries. However, there are some modest efforts being made in the form of holding symposiums as well as seminars and conducting legal studies.[13]

If this is the situation of the woman in general, what about her situation in cases where she is a wife? To answer this question, I will say that the woman's rights as a wife are not very different. In fact, the same study carried out by the United Nations, as mentioned above, points out that the Arab woman lacks the knowledge of some of the most basic rights that were granted to her by Islam. Many Arab wives do not know the rights they are entitled to enjoy in the marriage as specified by the marriage contract. The study states that:

> The Arab woman most often does not know the terms and conditions stated in her marriage contract which aim at guaranteeing her a stable life and fair treatment by the husband. Even in cases where the woman knows these terms and rights stated in the marriage contract, the traditions and customs of the country will usually prevent her from exercising the rights she is entitled to. Here are some examples that

show what conditions a wife may state in her marriage contract. She may make it a condition, for instance, that the husband may not get married to another wife, he may not take her out of the country to settle elsewhere, the furniture should be her own, and he should not object if she wants to get a job. She may also maintain the right to divorce him despite the fact that she has the right to seek divorce in cases where he leaves her, or he is sent to jail, for a long period of time. She can always ask for divorce if the husband either cannot, or is not willing, to pay for her *nafaqah*. The same is also true when he gets an incurable disease or if he suffers from some sexual deformities or problems. [14]

As is clear from the UN report, the wife is facing a serious problem, because either she is ignorant of her rights, or she knows them but cannot exercise them.

Another objective of this research is to increase awareness in Muslim husbands, in order to make them give up their unfair traditional practices of dealing with their wives, as most of these ways, which are based on oppression and abusiveness, are actually deeply affected by the burdens of inherited bad traditions that have nothing to do with Islam.

This work also seeks to focus on the virtue of treating the wife in a positive way and giving her all her rights as a part of one's religious practice. Thus, if a person does not observe these obligations, he will be penalised for that, because Islam drew a balance between the wife's rights and her duties as expressed by this verse from Sūrat Al-Baqarah: 228: "And women shall have rights similar to the rights against them, according to what is equitable." The Prophet was also reported to have said that "women are sisters to men."

3. The Methodology of the Research

For a long time, the study of the status and the rights of the wife in Islam has been appealing to me. This desire inside me drove me to go to the holy *Qur'ān* and the *sunnah* of the Prophet seeking more information about this topic. After some time of research, I have found out that the origin of many of the rights that wives enjoy can actually be traced back to the *Qur'ān*. However, it was clear that some of these rights were explicitly demonstrated in the Prophet's *sunnah* and the Prophet made them laws, while others first appeared in the *Qur'ān* and the Prophet demonstrated them also. Therefore I realised that it is worthwhile to study these rights in the light of the *sunnah*, given that these rights that originated in the *Qur'ān* are highlighted and detailed in the *sunnah*, which is taken to refer to all the sayings of the Messenger of God which fall outside what is stated in the *Qur'ān*, as well as all the deeds and views that he expressed and can be used, in practice, as the bases for legal rules.

In recent years many writers have attempted to do this by revising the *sharīᶜa* not only in its rulings but also, and often in quite radical fashion, by adopting new methods of Qur'ānic interpretation and the approach to *ħadīth* [12]. It is not the intention of the present study to enter into this debate, nor to adopt some of the solutions suggested by such writers. But this study seeks to identify and discuss the principles and rules already established within the *sharīᶜa* tradition and to show the contribution they can make to the improvement of the position of wife, even before exploring the more radical methods favoured by modernists

Because a wife has many rights upon her husband, I thought it would be appropriate to investigate five of these rights that I consider to be highly important and fundamental for the establishment and continuation of any marriage. These rights are: the right to choose a husband, the right to get a

dower, the right to have maintenance, the right to equitable treatment and the right to *al-khulᶜ*.

This thesis starts with an introduction in which I justify the choice of the topic of the research. Then, I dedicate a chapter to explore the linguistic or lexical, as well as the technical meanings of the term "*sunnah*". Here I also present evidence to demonstrate the legitimacy of the *sunnah* in Islamic legislation. Since this work is concerned with the wife and her marital rights, I also devote a whole chapter to discuss the meaning of marriage as well as its legitimacy according to *sharīᶜa*. This chapter also looks at the purposes and rules that govern marriage such as, under what certain circumstances a husband may, or may not, get married, so that the wife could not be treated unjustly by a husband who cannot afford marriage either financially or psychologically. The chapter ends with putting forward a set of legitimate conditions that a wife can make for her husband to meet for the purpose of protecting her and guaranteeing her a good life with her husband.

Next, I move to study each of the wife's marriage rights in some detail. This includes doing the following:

1. Demonstrating the meaning of each one of these rights when necessary.
2. Presenting evidence from *sharīᶜa* (i.e. *Qur'an, sunnah, or ijmāᶜ* where possible) in support of these rights.
3. Providing details that relate to each of these rights and explaining these rights in a way that is more adequate for a contemporary wife by showing her the legitimate rights and avoiding the details that are of no relevance to the thesis.
4. Reviewing the various views expressed by the classical jurists from *Hanafiyyah, Mālikiyyah, Shāfiᶜiyyah,* and *Hanbaliyyah* regarding these

rights, and presenting the most plausible view in cases where jurists disagreed.

5. Showing keenness on reporting views held by Ibn Taimiyah and Ibn Al-Qayyim with respect to the wife's rights in *shariᶜa*, as I found whatever views they express, to be supportive of women.
6. Seeking and presenting views held by contemporary specialists, like Yūsuf Al-Qaraḍāwī, and ᶜAbdulḥalīm Abū Shaqqah, who one could turn to for the interpretation of these rights.
7. In translating the meaning of the Qur'ānic verses in this study, I relied on ᶜAbdullah Yusuf ᶜAli's *The Holy Qur'ān: Text and Translation*.

4. The Organisation of the Thesis

This thesis comprises seven chapters. Five of these chapters, namely chapters 4, 5, 6, 7, and 8, deal with different aspects of women's right such as the right to choose a husband, get a dower, have *nafaqah*, have equitable treatment, and have *al-khulᶜ*.

The first chapter is the introduction. It sets the context of the research as it introduces the reason for choosing the wife's rights in Islam, as should be observed by the husband, as the topic for this research. The introduction also presents the objectives of this thesis as well as the research methodology that is followed in the work. Finally, it gives an idea about the organisation of the thesis.

As for the second chapter, it focuses on the importance of the *sunnah* of the Prophet as a main source of legislation in Islam. In particular, it gives an account of the term "*sunnah*" and its legitimacy as a second source of legislation after the *Qur'ān*, presenting evidence for this from *the Qur'ān*, the Prophet's sayings and *ijmāᶜ al-'ummah*.

The third chapter focuses on marriage and its significance in Islam. Among other things, I discuss the legitimacy of marriage and present evidence in support of this legitimacy. The evidence comes from the *Qur'ān* and the Prophet's *sunnah*. After that, I discuss the benefits and wisdom of legitimising marriage in terms of bringing about affinity, intimacy, and tranquillity, preserving the human kind, protecting the manners and health from corruption, and establishing the family. Finally, I consider the various legal rules that are of great advantage to the wife in different circumstances of marriage.

In chapter four, I discuss the woman's right to choose her husband. I deal with a number of issues pertaining to the basic right that any woman should have: it is the right to choose her husband and life partner. First, I explain the meaning of guardianship in the marriage contract, then I present the woman's right to choose a husband through discussing if she is adult *biker* or adult *thayyib* and present the most favourable opinion. After that, I move to deal with the issue of the woman being a guardian of herself or of other women and the implications of this and give my own point of view in this regard. Then I study some of the required qualities that a proposing husband should have so that he may be given the woman in marriage by the guardian. These qualifications are manifested in a number of factors that include: strong faith, good manners, acceptable physical appearance, and age. Then I move to discuss the different advantages that result from giving the woman the right to choose a husband. Then I conclude this chapter by discussing if the woman has the right to present herself to a righteous man or not.

Chapter five studies the concept of dower according to the Islamic *sharīʿa*. In particular, it focuses on the way Islam promoted the issue of the dower and made it a right for the woman so a marriage contract would not be valid

without a dower. I also consider how the different Islamic schools deal with it. Then I discuss the importance and legitimacy of dower in marriage. Another point that will be discussed is the (maximum and minimum) amount of dower according to different Islamic schools. Finally, I discuss the contexts in which a dower should be prepaid or delayed.

In chapter six, I discuss a number of issues that relate to *nafaqah* or maintenance. First, I introduce the meaning of maintenance or *nafaqah* and show how important it is. After that, I present evidence that legitimises the concept of maintenance in Islam. The evidence comes from different sources: the Noble Qur'ān, the Prophet's *sunnah*, the *ijmāᶜ* (or consensus) among Muslim jurists, as well as logic and reasonability. Then I discuss the conditions according to what maintenance is provided and how it can be calculated. I also explore different types of maintenance, focusing on the wife's maintenance of food, clothing, and housing. Other sorts of maintenance will also be discussed, such as the additional maintenance that is payable to the wife in case she has a servant, or in case she needs medication. In addition to these, I discuss maintenance for detergents, perfume, and adornment, as well as maintenance in the case of working wives.

Chapter seven focuses on the type of relationship that should be held between the husband and his wife according to the teachings of Islam. In this chapter, I discuss the meaning and implications of the term 'equitable treatment' as well as the legitimacy of equitable treatment, with evidence from both the *Qur'ān* and the Prophet's *sunnah*. Then I explore the ruling (i.e. obligatoriness) of equitable treatment between husbands and wives. Later, I move to discuss the various manifestations that equitable treatment may take in the form of trust and confidence, appropriate form of address, respect, tolerance and cooperation, secret keeping, no beating, and being charitable to the wives if

married to more than one. Finally, the chapter closes by emphasising the significance of the relationship between husbands and their wives that should be built on pillars of fairness, justice, intimacy and understanding. It particularly focuses on the impact of equitable treatment between a husband and his wife both on the level of the couple themselves and on the level of the family including the children.

Chapter eight, which is the final chapter, will be dedicated to *al-khulᶜ*. The chapter discusses the legitimacy of *al-khulᶜ* and offers evidence for legislating this right for women from the *Qur'ān*, from the Prophet's *sunnah*, from deeds performed by the Prophet's Companions, and from *ijmāᶜ al-'ummah*. It also focuses on the wisdom and advantages of the legislation of *al-khulᶜ* in Islam. Then I discuss the amount of money that the husband has to take in compensation for his wife's *al-khulᶜ*. Other cases of *al-khulᶜ* will be dealt with in addition to the compensation the husband may get for *al-khulᶜ*. The question of whether *al-khulᶜ* should be treated as a case of *ṭalāq* or as an instance of *faskh* will be addressed. Then, we move to discuss some of the reasons that stimulate the wife to ask for *al-khulᶜ*. In particular, we will focus on one example which is the recently modified article of the *al-khulᶜ* law in Egypt. We discuss the crucial differences between the two versions of the law: the original version, which was used for more than a century and the newly modified version of 2000. I conclude this chapter by stressing the importance of modifying *al-khulᶜ* laws in Arab countries, so that the wife will be more fairly treated. I also emphasise that husbands need to be more considerate towards their wives and their needs.

Notes to Chapter One

1. For further information on the under development of the Arab nation. See ARAB HUMAN DEVELOPMENT REPORT 2002 By the United Nations Development Programme, Regional Bureau for the Arab States, Second Print 2002, NewYork.U.S.A
2. Al-Mutawaᶜ, Jāsim, "Al-Wiqāyah min beuyūt al-ᶜankabūt", a research paper presented at the conference on al-'usrah fī al-tashrīᶜāt al-kuwaitiyyah at al-dīwān al-amīri, (Kuwait: 1995).
3. http://www.witness-pioneer.org/magazinearticle.

   Hasan, Nasīma, "Wife: Her Status and Rights in Islam", p. 3.
4. ᶜAmārah, Muḥammad, *Al-Islām wa al-mar'ah fī ra'y Muḥammad ᶜAbduh*, (Cairo: Al-Qāhirah li-thaqāfah Al-ᶜarabiyyah,1975), p. 7.
5. ᶜAmārah, Muḥammad, *Al-Islām wa al-mar'ah fī ra'y Muḥammad Abduh*, p. 69.
6. Al-Thāqib, Fahd, "Asbāb al-ṭalāq fi al-mujtamaᶜ al-kuwaytī: dirāsah maydāniyyah", in *Majalat al-ᶜulūm al-ijtimāᶜiyyah,*, vol. 24, no. 3, (Kuwait: the Academic Publication Council, 1996), pp. 56-58.

   See also Al-Anṣārī, ᶜAbdulḥamīd, "Ta'ākhr al-zawāj wa irtifāᶜ muᶜadalāt al- ṭalāq fī al-mujtamaᶜ al-khalījī: al-asbāb wa al-ḥulūl, qirā'ah fiqhiyyah muᶜāṣirah" in *Majalat dirasāt al-khalīj,* issue no. 97, (Kuwait: Kuwait University, 2000), p. 168.
7. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 1, edited by ᶜIzzat ᶜUbaid Al-Daᶜās, and Adil Al-Sayyid, (Beirut: Dār Al-Ḥadīth, 1974), p. 161.
8. Al-Mālikī, ᶜAbdulrazzāq, "Żāhirat al- ṭalāq fi dawlat al-imarāt al-ᶜarabiyyah", in *Majalat dirasāt istrātijiyyah,* issue no. 50, (UAE: Markaz Al-Imarāt li-dirasāt wa al-buḥūth al-istratijiyyah, 2001), p. 26.

   See also Philips, Abu Ameenah Bilal and Jameelah, *Polygamy in Islam*, 3rd edt. ,Riyad, Tawheed publication , 1990, p 11.

9. Al-Jābir, Aminah, "Żāhiratu al- ṭalāq fī al-mujtamaᶜ al-qaṭarī wa ᶜilājihā fī ḍaw' al-tashrīᶜ Al-Islāmī", *Majallat al-khalīj wa al-jazīrah al-ᶜarbiyyah*, issue no. 72, (Kuwait: Kuwait University, 1994).

See also Muħammad, Ṣalāħ, *Wasā'l al-Islam fī al-muħāfażah ᶜala al-ħayat al-zawjiyyah*, (Egypt: Maktabat Al-Dār Al- ᶜarabiyyah li-al-kitāb, 1998).

10. Al-Ŧībī, ᶜUkāshah, *Al-ṣifāt al-maṭlūbah fi al-bint wa al-zawjah*, (Egypt: Dār Al-Faḍīlah, 1990), p. 14.

11. Al-ᶜAsqalānī, Ahamed, *Fath al-bārī bi-sharh sahih Al- Bukhārī,* vol 2 p441.

12. Shaħrur, Muħammad, *Al-kitāb wa al- Qur'ān, qirā'ah muᶜāṣirah,* (Beirut: sharikat al-maṭbūᶜāt li tawzīᶜ wa al-nashir,1994).

13. "Istᶜrāḍ wa taqyīm mā tamma tanfīdhahu li-anuhūḍ bil-mar'ah al-ᶜarabiyyah fī ḍaw' ahdāf istratijyyāt Nairubī al-taṭluᶜiyyah" in *Silsilat dirāsāt ᶜan al-mar'ah al-ᶜArabiyyah fi al-tanmiah*, issue no. 24, (New York: United Nations, 1996), p. 62.

14. "Istᶜrāḍ wa taqyīm mā tamma tanfīdhahu li-anuhūḍ bil-mar'ah al-ᶜarabiyyah fī ḍaw' ahdāf istratijyyāt Nairubī al-taṭluᶜiyyah" in *Silsilat dirāsāt ᶜan al-mar'ah al-ᶜArabiyyah fi al-tanmiah*, p. 61.

See also Kauser, Zeenath, *Women in feminism and politics: new direcrions towards isiamization*, malisia, women's affairs a scretariat (WAFA), 1995, P92.

CHAPTER TWO

AL-SUNNAH AND ITS SIGNIFICANCE IN ISLAMIC LAW

1. The Definition of the *Sunnah*

It is well known that the *sunnah* of the Prophet is counted by Muslims as the second source of Islamic legislation after the *Qur'ān*. From it they derive the judgments and laws which affect their lives and regulate their affairs and behaviour. Before I discuss about the importance of the *sunnah* in Islam, I will explain the meaning of the word '*sunnah*'.

The word '*sunnah*' has a number of meanings in Arabic. Sometimes it means 'conduct' or 'way'. Sometimes, it means 'image' or 'that which appears'. Sometimes it means 'nature' and 'character'. It also has other meaning as it comes in *Lisān Al-ᶜArab.*[1] *sunnah* is good or bad conduct and it is said that it means way.[2] Its plural is '*sunan*'. So *sunnah* means way or conduct, whether acceptable or unacceptable, as the Prophet said:

> Whoever conducts himself well (*sanna sunnah*) in Islam, books will be written about him afterwards like a wage for those who act so and their wages will not be lacking. And whoever conducts himself badly, books will be written about him afterwards like a burden for those who act so and their burdens will not be lacking.[3]

This *ħadīth* means that the good way of behaving and the bad are established ways and the one who follows the good way will be rewarded while the one who follows the bad will be punished.[4] And as the Prophet said: "whoever wants a *sunnah* other than mine is not of me".[5] That is to say, "whoever leaves my way and takes the way of another is not of me."[6]

As for the legal definition of the *sunnah*, there has been no consensus among scholars regarding what exactly it refers to in accordance with the different purposes. For example, specialists in the study of *ħadīth* (i.e., *ᶜulamā' al-ħadīth*) showed much interest in everything that was taken from the Prophet, including what he said or did. They were also keen on looking for the Prophet's qualities, moral or physical, and biography before he became Allah's Messenger, such as his worship of Allah in the cave, or after that even if it leads to a legal rule or not. The term *sunnah* was used to refer to all these things according to these scholars.[7]

As for scholars studying *'uṣūl al-fiqh*, they were more interested in the evidence from *sharīa*. Therefore, they defined *sunnah* as all the sayings (which is not *Qur'ān*), deeds and judgements performed by the Prophet in which he asserts a particular *hukm sharīa* or legal rules.[8] *Al-Shāfiᶜī* is considered to be the first jurist to use *sunnah* in this specific sense. Thus, according to *Al-Shāfiᶜī* what the Prophet's Companions and other followers (i.e., *al-tabᶜin*) said and did is excluded and does not count as *sunnah*, contrary to what was believed at that time. Kamalī comments on this opinion of *Al-Shāfiᶜī* by saying:

> Initially the use of the word *sunnah* was not restricted to the *sunnah* of the Prophet but was used to imply the practice of the community and the precedent of the Companions. This usage of *sunnah* seems to have continued till late second century when *Al-Shāfiᶜī* tried to restrict it to the *sunnah* of the Prophet alone.[9]

On the other hand, *ᶜulamā' al-fiqh* defined *sunnah* as the method or way that the Prophet followed in practising Islam without *iftirāḍ* or *wujūb*.[10] *Sunnah* in this sense is *a hukm sharī taklifī* equivalent to *wajib, farḍ, ħaram, makruh*, and *mubaħ*, as illustrated by Kamalī, who argues

> But to *ᶜulamā' al-fiqh*, '*Sunnah*' primarily refers to a shari value which falls under the general category of *mandūb*. Although in this sense,

Sunnah is used almost synonymously with *mandūb*, it does not necessarily mean that *Sunnah* is confined to the *mandūb*. For in its other usage namely as a source of *sharīa*, *Sunnah* may authorise and create not only *mandūb* but also any of the following: *wajib, farḍ, ħaram, makruh*, and *mubaħ*.[11]

For the purposes of this research, I use *sunnah* in the same way it was used by *ᶜulamā'uṣūl al-fiqh'*. In this sense, *sunnah* is one of the sources that are adopted for legislation in Islam. In fact, this was the case because jurists derived from it many of *al-aħkām 'al-sharᶜiyyah* to govern and deal with different aspects of people's affairs in the past. However, one has to point out that not all that the Prophet said, did, or judged as is part of *sunnah,* and may count as evidence for the legitimacy of certain things, particularly those things that relate to the aspect of human nature in him; but rather we mean all the sayings, deeds and judgements that he produced to enhance or confirm a legal rule. In this respect, Abdulkarīm Zaydān says

> The Prophet's sayings become a source of Islamic legislation when they enhance or refer to *aħkam shariyyah*. However, if these sayings are about matters that are purely mundane and have no relevance to *tashrᶜī* and revelation, they do not qualify as a source of legislation in Islam, and, therefore, do not have to be followed by Muslims.[12]

The Prophet's *sunnah* can be of three categories. The first category of *sunnah* is *al-sunnah al-qawliyyah*, which is concerned with the Prophet's sayings that he said on various occasions and they are synonymous to the ħadīths. One example of this is his saying "Deeds are judged according to intentions.[13]"

The second category of *sunnah* is *al-fiᶜliyyah*, which deals with the Prophet's conduct in matters like performing prayers, showing *ħajj* rituals, among other things. The term *al-afᶜāl*, from which the word *al-fiᶜliyyah* is derived, here refers to the deeds that he performed to demonstrate a legal rule rather than the deeds that he did due to his human nature such as drinking and eating, etc.

Finally, there is al- *sunnah al-taqrīriyyah*, which refers to all things and actions performed in the presence of the Prophet and were approved and endorsed by him. He confirmed these things in various ways such as keeping silent, showing acceptance and *istiħsān*, or expressing denial. An example is found in what Abū Saᶜīd Al-Khidrī reported, as narrated by Abū Da'ūd

> Two men went on a journey and had no water with them and the time for prayer arrived and they prayed together in good faith, and then in time they found water and one of them repeated the prayer with the ablution and the other did not. They went to the Prophet and told him this and he said to the one who had not repeated the prayer: 'You have kept the *sunnah* correctly.' And he said to the one who had repeated the prayer: 'You will be rewarded twice.' [14]

2. The Legitimacy of the *Sunnah*

In this section, I want to explore the legal status of the *sunnah* as a source of legislation. For this purpose, I will present evidence from different sources to show the legitimacy of the *sunnah*. In particular, I consider evidence from the *Qur'ān*, from the Prophet's *ħadīths* and sayings and from *Ijmāᶜ* (or consensus) among Muslim scholars.

2.1. Evidence from the *Qur'ān* for the Legitimacy of the *Sunnah*

Now that I have explained the meaning of *sunnah*, I want to move on to show the importance of the *sunnah* in the Islamic world and how it acquired this

importance so that it has become the second source of Islamic legislation, so that none of the leaders of the Islamic law schools disagree about the obligation to follow it and be bound by it.

In the *Qur'ān*, there are more than forty verses in which God commands obedience to Him and to the Messenger and forbids disobedience to Him and to the Messenger. Indeed, He states in one of the verses that all what Muhammad says is by inspiration: "Nor does he say (aught) of (his own) desire. It is no less than inspiration sent down to him" Sūrat Al-Najm: 3-4. That is to say, the Prophet does not speak or legislate of his own accord, but commands come to him from God thṙough Gabriel. Al-Suyūṭi said explaining verse 3, above that "it means that he did not speak from his own desire"; and verse 4 that "it means that God inspired Gabriel and Gabriel inspired the Prophet." [15] This is regarded as clear evidence for the legality of the *sunnah* and that it comes from God.

There is also the verse in Sūrat Al ᶜImrān: 164

> God did confer a great favour on the believers when He sent among them an apostle from among themselves, rehearsing unto them the signs of God, sanctifying them, and instructtng them in scripture and wisdom, while before that they had been in manifest error.

What is meant here by "wisdom" is the *sunnah* and *Al-Shāfiᶜī* gives evidence for this in his *Al-Risāla*, where he says:

> God referred to scripture, which is the *Qur'ān*, and referred to wisdom. Now, I have heard a scholar of the *Qur'ān* whom I respect saying: Wisdom is the *sunnah* of the Messenger of God. The *Qur'ān* was mentioned and wisdom followed it and God referred to his graciousness towards his creation by teaching them the scripture and wisdom. It cannot be said – and God knows best – that wisdom here

can be anything but the *sunnah* of God's Messenger and this is connected with the scripture. [16]

The Holy Qur'ān states in the following two verses from Sūrat Al ᶜImrān:

> Say: "If ye do love God, follow me: God will love you and forgive you your sins: for God is Oft-Forgiving, Most Merciful" * Say: "Obey God and His Apostle": But if they turn back, God loveth not those who reject Faith. Sūrat Al ᶜImrān: 31-32:

These verses are also clear about the necessity of following the Prophet because they provide a link between love for God and love for the Messenger, which are inseparable and no one can divide them.

The Imām Ibn Kathīr says in explanation of these two verses:

> This noble verse stands in judgment over everyone who claims to love God while not following the way of Muḥammad. Such a person is making a false claim until he follows the law of Muḥammad and the religion of the Prophet in all his sayings and doings and conditions.
>
> And God said: "Say: Obey God and the Messenger and if they turn away '*tawallū*', they turn away". '*Tawallū*' means disobeyed his command. "And God loveth not those who reject faith" is evidence that disobeying him on the way is to reject faith, and God does not love those who are so described. [17]

Among the verses that indicate the necessity of following the Prophet is what the *Qur'ān* stresses in Sūrat Al-Ḥashr: 7: "So take what the Apostle assigns to you، and deny yourselves that which he withholds from you". Commenting on this verse, Ibn Kathīr said in his commentary: "That is, do whatever he commands you and avoid whatever he forbids you, for he either commands what is good or forbids what is evil." Then Ibn Kathīr refers to a story about

Ibn Masᶜūd which teaches the obligation to obey the Messenger and keep his commandments. He said that

> A woman came to Ibn Masᶜūd and said: 'I have heard that you forbid tattooing, and wearing wigs. Is this something you have found in the book of God or is it from the Messenger of God?' He said: 'It is something I have found in the book of God and from the Messenger of God.' She said: 'By God, I have been through all the pages between the covers of the *Qur'ān* and have not found what you say.' He said: 'Have you not found 'So take what the Apostle assigns to you and deny yourselves that which he withholds from you?' She said: 'Yes indeed.' He said: 'I heard the Messenger of God forbid wearing wigs, tattooing and plucking eyebrows.' She said: 'Perhaps it is found among some of your family. That is, perhaps some of your family do it.' He said: 'Go in and look.' So she went in and looked and then came out. She said: 'I did not see anything wrong.' He said to her: 'I have kept the commandment of the good servant as God says: "I wish not, in opposition to you, to do that which I forbid you to do."' [18]

These verses and others[19] came to announce clearly the obligation to follow the Messenger since God showed in the first verse that the *sunnah* is equal to the *Qur'ān.* This is due to the fact that it is inspired, although it is of course not recited inspiration and does not form an act of worship, but it is still inspiration from God.

The second verse came to require equality between love of God and love of his Prophet, because he is counted the first teacher of the *Qur'ān* and the commentator and explainer of it, for whoever loves God loves his Prophet because he is counted the first teacher of the *Qur'an.*

The third verse is a clear and frank command to accept what the Messenger brought without hesitation or resistance. This is all in order that no chance should be given to anyone who wants to challenge the *sunnah* or detract from its authenticity and, therefore, it shows us that the *sunnah* is counted as the second source for Islamic legislation after the *Qur'ān*, on the evidence of the above mentioned verses.

2. 2. Evidence from the *Hadīth* for the Legality of the *Sunnah*

The indication of the legality of the *sunnah* compared with the *sunnah* of the Prophet is that traditions came about the Messenger commanding the obligation to follow and keep his *sunnah* and forbidding the denial of the *sunnah*. Abū Rāfi' says:

> The Prophet said, "We are not familiar with one of you lying on his couch and anyone of my commands comes to him something that I have ordered or forbidden - and he says we do not know. We follow what we have found in the book of God". [20]

ᶜAbdulmahdī Ibn ᶜAbdulhādī said [21] "*lā alfaynna*" meaning we do not find, and this is the negative of that state by way of exaggeration and "*arīkatihī*" meaning his couch decorated with different kinds of decoration. This is an indication that the rejection of the *ħadīth* only comes from lovers of luxury and those concerned with fulfilling their desires and paying no attention to the judgments of the law. They are not concerned with knowledge, for the Prophet forbids this state firmly and clearly and is angry with whoever behaves in such a way.

And he (i.e., Muħammad) also said "according to my *sunnah* and that of the rightly-guided caliphs, you should hold fast to it, biting into it with your

incisor teeth، "*ʿuḍū ʿalaihā bi-al-nawājidh*" [22] That is, follow my way and the way of the rightly-guided caliphs after me and hold fast to it and he expressed this by saying "*ʿuḍū ʿalaihā bi-al-nawājidh*" for emphasis.

There is another *ħadīth* in which the Messenger shows the importance of obedience and that it is a way of gaining entry into Paradise. He said: "All my people will enter Paradise except those who refuse." They said to him: "O Messenger of God, who will refuse?" That is, who will reject? He said: "Whoever obeys me will enter Paradise and whoever disobeys me has refused." [23]

The *ħadīth* shows that whoever refuses to obey the Messenger will not enter Paradise. There is another indication from a *ħadīth* of the Messenger in which he shows the importance of his *sunnah* and the obligation to follow it and not go against it in anything at all in life.

Anas Ibn Mālik said:

> Three groups of men came to the houses of the wives of the Prophet asking about the ways in which the Prophet worshipped and when they were told, they considered it little so they said: 'how can we compare with the Prophet? God has forgiven him what he has done and what he has not done.' One of them said: 'as for me, I pray all night'. And another said: 'I fast till sunset and do not break the fast'. And another said: 'I have nothing to do with women and have never married'. And the Messenger came and said: 'are you the people who said such and such? By God, I am more pious than you, but I fast and break the fast and pray and lie down and marry women and whoever desires other than my *sunnah* is not of me.'[24]

These *ħadīths* show how important the *sunnah* is, and in the Muslim world, Muslims have faith in this and believe it and they have recourse to the *sunnah* whenever a matter they come across that is not clear in the *Qur'ān* since the *sunnah* gives judgments for both what is found in the *Qur'ān* and what is not.

Al-Shāfiᶜī said that [25] "whatever the Messenger passed which is not included in the *Qur'ān* is *sunnah*, because Allah considers it as *sunnah*. The evidence for this comes from a verse from the *Qur'ān* in which it is stated that 'and verily thou dost guide (men) to the straight Way.'" Surat Al-Shura : 52

2. 3. Evidence from *Ijmāᶜ* for the Legality of the *Sunnah*

The Companions agreed to go to the *sunnah* for authority and on the obligation to act in accordance with it. None of them disagreed with acting in accordance with it. If any issue or question was presented to them, they looked for it in the book of God and if nothing appeared to them they looked for a judgment on the matter in the *sunnah* of the Messenger. If this failed, they applied reason to the prescriptions of the *Qur'ān* and *sunnah*, relying in this on a *ħadīth* of Muᶜādh Ibn Jabal when the Prophet sent him to the Yemen and said to him: "By what will you make a judgment if a case comes before you?" He said: "By the book of God." He said: "And if you do not find?" He said: "By the *sunnah* of the Messenger." He said: And if you do not find?" He said: "I will venture my own opinion and do my best." And the Messenger of God struck Muᶜādh on his chest and said: "Praise God who brought the messenger of the Messenger of God into agreement with what is pleasing to God and His Messenger." [26]

There is also what Maymūn Ibn Mahrān related. He said

> Abū Bakr, if two complainants came to him, used to look in the book of God, and if he found there something by which to make a judgement between them, he made the judgment by it. If there was nothing in the book but he knew a *sunnah* of the Messenger of God about the matter, then he judged by that. If his efforts failed, he would go out and ask the Muslims and say: such and such has come before me. Do you know whether the Messenger of God passed a judgment on such a matter? Sometimes they would all come to him and recall that the Messenger of God had made such a judgement and Abū Bakr would say: Praise God who has put among us those who remember about the Prophet. But if he failed to find a *sunnah* of the Messenger of God, he gathered the leaders of the people and the best of them and asked their advice, and if they agreed on an opinion, he judged by it. [27]

These incidents and events show that the *sunnah* comes in second place after the *Qur'ān* and that it is a source of legislation to be relied upon as coming from God through his Prophet and his followers.

Al-Shāfiᶜī said: "If ever I know a *ħadīth* of the Messenger and do not act in accordance with it, I testify to you that I will have lost my mind". [28]

We conclude by what Al-Shawkānī said in this regard

> The establishment of the authority of the pure *sunnah* and its role in the legality of judgements is a religious necessity not to be contravened except by those who have no part in the religion of Islam. [29]

3. Conclusion

In this chapter I have discussed the importance of the *sunnah* as a second source of legislation in Islam. First, I explained the meaning and definition of the term *sunnah* as referring to whatever comes from the Prophet. Then, I moved to give an account of the legitimacy of the *sunnah*. Here I presented evidence from the *Qur'ān*, from the Prophet's *ħadīths* and sayings, and from *ijmā*^{c} referring to support from the Prophet's Companions as well as Muslim scholars to the authority of the *sunnah* as a reliable source of legislation for Muslims.

Notes to Chapter Two

1. Ibn Manżūr, Jamāl, *Lisān al-ᶜarab,* vol. 13, (Beirut: Dār Sādr, 1300 A.H.), p. 225.

2. Anīs, Ibrahīm, et al., Al-*Muᶜjam al-wasīṭ,* 2nd edn., vol. 1, (Cairo: 1972), p. 456.

3. Part of a long ħadīth recounted in: Kitāb Al-ᶜlim, in Al-Nawawī, Yaħyā, *Saħīħ Muslim bi-sharħ Al-Nawawī,* vol. 16, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1987), p. 226. as reported by Al-Tirmidhī and Ibn Mājah.

4. Shalabī, Ra'ūf, *Al-Sunnah al-nabawiyyah bayna ithbāt al-fāhimīn wa-rafḍ al-jāhilīn,* 4th edn., (Kuwait: Dār Al-Fikr, 1982), p. 2.

5. Part of a long ħadīth recounted in *Kitāb al-nikāħ*: Al-ᶜAsqalānī, Aħmad, *Fatħ al-bārī bi-sharħ ṣaħīħ Al-Bukhārī,* vol. 6, (Cairo: Dār Al-Rayyān, 1987), p. 9. ħadīth no. 5063.

6. Saᶜdī, Abū Jayb, *Al-Qāmūs al-fiqhī lughatan wa-iṣtilāħan,* 2nd edn., (Damascus: Dār Al-Fikr, 1988), p. 184.

7. Abū Zahw, Muħammad, *Al-Ħadīth wa al-muħadithūn,* (Beirut: Dār Al-Kitāb Al-ᶜarabī, 1984), p. 10.
   See also Al-Khaṭīb, Muħammad, *Al-Sunnah qabl al-tadwīn,* 5th edn., (Beirut: Dār Al-Fikr, 1981), p. 16.
   See also Kamali, Moħammad, *Principles of Islamic Jurisprudence,* (Cambridge: Islamic Text Society, 1991), pp. 45-46.
   See also Al-Siba'ī, Muṣṭafa, "From Sunnah and its Position in Islamic Legislation", *The Straight Path,* vol. 15, no. 2, (1996), p. 13.

8. Abū Zahw, Muħammad, *Al-Ħadīth wa al-muħadithūn,* (Beirut: Dār Al-Kitāb Al-ᶜarabī, 1984), p. 9.

See also Al-Khaṭīb, Muḥammad, *Al-Sunnah qabl al-tadwīn*, 5th edn., (Beirut: Dār Al-Fikr, 1981), p. 16.

See also Ḥasan, Aḥmad, "The Sunnah as a source of fiqh", *Islamic Studies*, vol. 39, issue: Spring, (2000), p. 6.

9. Kamali, Moḥammad, *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Text Society, 1991), pp. 45-46.
10. Abū Zahw, Muḥammad, *Al-Ḥadīth wa al-muḥadithūn*, (Beirut: Dār Al-Kitāb Al-ᶜarabī, 1984), p. 9.

See also Al-Khaṭīb, Muḥammad, *Al-Sunnah qabl al-tadwīn*, 5th edn., (Beirut: Dār Al-Fikr, 1981), p. 18.

See also Ḥasan, Aḥmad, "The Sunnah as a source of fiqh", *Islamic Studies*, vol. 39, issue: Spring, (2000), p. 6.

See also Al-Siba'ī, Muṣṭafa, "From Sunnah and its Position in Islamic Legislation", *The Straight Path*, vol. 15, no. 2, (1996), pp. 13-15.

11. Kamali, Moḥammad, *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Text Society, 1991), p. 46.
12. Zaydān, ᶜAbdulkarīm, *Al-Wajīz fi 'uṣūl al-fiqh*, (Beirut: Mu'assassat al-Risālah, 1985), p. 164.
13. Al- ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 1, p. 15. ḥadīth no. 1.
14. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 1, edited by ᶜIzzat ᶜUbaid Al-Daᶜās, and ᶜAdil Al-Sayyid, (Beirut: Dār Al-Ḥadīth, 1974), p. 241. ḥadīth no. 338.
15. Al-Suyūṭī, Ja1āl Al-Dīn, *Al-Durr al-manthūr fi al-tafsīr bi-al-ma'thūr*, vol. 7, (Beirut: Dār Al-Fikr , 1993), p. 642.
16. Al-Shāfiᶜī, Muḥammad, *Al-Risālah*, Aḥmad Shākir (ed.), (Beirut: Al-Maktabah Al-ᶜIlmiyyah, 1939), p. 78.
17. Ibn Kathīr, Ismāᶜīl, *Tafsīr Al-Qur'ān al-ᶜaẓīm*, vol. 1, 5th edn., (Beirut: Mu'assasat Al-Rayyān, 1999), p. 467.

18. Ibn Kathīr, Ismā^{c}īl, *Tafsīr Al-Qur'ān al-^{c}aẓīm*, vol. 4, p. 429. We note that Ibn Kathīr quotes from Sūrat Hūd: 88 to explain the position.
19. See also Al-Nisā^{c}: 59,65, Al-Aḥzāb: 36 and Al- Ḥashir: 7.
20. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 5, (Beirut: Dār Al-Ħadīth, 1974), p. 12. ħadīth no: 4605. Also this ħadīth was related by Al-Tirmidhī and Ibn Mājah.
21. ^{c}Abdulhādī, ^{c}Abdulmahdī, *Al-Madkhal 'ila al-sunnah al-nabawiyyah* (Cairo: Dār Al-I^{c}tiṣām, 1998)، p. 365.
22. Related by Al-Tirmidhī in the *Sunan*, vol. 5, p. 43, ħadīth no. 2676. Also Abū Da'ūd and Ibn Mājah relate that 'al-nawājidh' in "^{c}uḍhū ^{c}alaihā bi-al-nawājidh" means the back molars, the emergence of which refers to wisdom. The metaphor here means that one has to bite it with all one's teeth including these at the very back of the mouth to indicate the one has to grip it or have hold it firmly. See:
Ibn Al-^{c}arabī Al-Mālikī, *^{c}āriḍah al-'ħwūdhi bi-sharħ jāmi^{c} al-tirmidhī*, vol. 5, (Beirut: Dār Al-Fikr, 1995), p. 108.
23. Al-^{c}Asqalānī, Aħmad, *Fatħ al-bārī bi-sharħ ṣaħīħ Al-Bukhārī*, vol. 13, p. 263. ħadīth 7285.
24. Al-^{c}Asqalānī, Aħmad, *Fatħ al-bārī bi-sharħ ṣaħīħ Al-Bukhārī*, vol. 9, p. 5. ħadīth no. 5063.
25. Al-Shāfi^{c}ī, Muħammad, *Al-Risālah*, p. 88.
26. Al-Dārimī, ^{c}Abdullah, *Sunan Al-Dārimī*, vol. 1, (Beirut: Dār Al-Fikr, 1994), p. 46. ħadīth no: 170.
27. Al-Dārimī, ^{c}Abdullah, *Sunan Al-Dārimī, al-muqaddimah*, vol. 1, p. 45. ħadīth no: 164.
28. Al-Baltājī, Muhammad, *Dirāsāt Islāmiyyah*, (Cairo: Maktabat Al-Shabāb, 1980), p. 82.
29. Al-Shawkānī, Muħammad, *Irshād al-fuħūl*, vol. 1, (Cairo: Dār Al-Kutubī, 1992), p. 158.

CHAPTER THREE

MARRIAGE AND ITS SIGNIFICANCE IN ISLAM

1. Introduction

In this chapter I will discuss some concepts and terms that relates to marriage. I am going to explain the definition of marriage. Then I will illustrate the legitimacy of marriage in Islam through *Qur'an, Sunnah, Ijmāᶜ* as well as logic and reason. Next I will discuss the benefits and wisdoms of legislating marriage. More over, illustration of legal terms and rules governing marriage in Islam will be highlighted. Finally, I will provide some conditions that aim at protecting the wife.

2. The definition of marriage

'*Zawāj*' (i.e. marriage) is an Arabic word that is derived from '*zawj*', which may refer to any species or kind of anything. It may have an opposite or antonym, as in the case of colours, or it may have a counterpart or match, as in the case of 'dry' and 'wet' or 'male' and 'female', where the two elements complement each other. Each item or thing has another item or counterpart of the same kind. [1]

Thus, '*zawāj*' is used to convey that there is some kind of relationship based on partnership and formation of couples.

'*Zawāj*' has been defined as relationship or bond between a man and a woman where the woman becomes the wife and the man becomes her husband. It is possible in Arabic to say that a man someone is '*mizwāj*' if he gets married lots of times to many women, and it is said that a woman becomes '*mizwājah*' if she gets married to many men. One has to point out, however,

that the word '*zawj*' may have other meanings that are of no relevance to our work in this chapter. [2]

As for the word '*nikāħ*', it has a similar meaning to that of '*zawāj*' in the sense that they both refer to the same concept of getting married. The difference between the two words barely exceeds that of pronunciation, as they are synonymous. The Arabic word '*nikāħ*' is a noun derived from the root '*nakaħa'*, which is a verb in the past form and it means to mix, join and take as a partner. [3]

As for the meaning of '*nikāħ*' in *shari*^{c}*a,* or the Islamic Law, Muslim scholars could not agree on a specific explicit definition of this word. As Dāwoūd expresses:

> The classical jurists define the marriage contract in terms of physical gratification. For Hanaffis the marriage contract refers to the husband's exclusive right to sexual enjoyment of his wife. The Shafi' is consider it to include the exclusive right to sexual intercourse, whatever the term used, so long as the joining of two people is implied. An alternate opinion of the Shafi' is views marriage as a from of "*aqdibaħaħ*"; a contract of "passive consent". The Malikis consider marriage a contract of legitimate sexual gratification from a woman. [4]

However, I conclude this section by presenting one final definition of the term. It is based on Abū Zahrah's simple and clear concept of '*nikāħ*'. Abū Zahrah had put forward a simple and clear definition that takes into account the previous definitions of '*nikāħ*'. He said that '*nikāħ*', according to Islamic Law, [5] is a contract that grants the two contracting parties (i.e. the two spouses) the right to lawfully enjoy each other. Abū Zahrah defined '*nikāħ*' as a contract between two people: a male and a female who comply with the terms that qualify them for marriage. This contract enables them to enjoy each other in accordance with the rulings of the legislator, which is the Islamic

Law. However, this contract is different from other contracts, such as those in the fields of business, sales, rent, etc. Even though the vocabulary used in both sale and marriage contract are similar they are being used in different contracts and therefore they are different. This is due to the fact that the emotional and psychological bond between the man and the woman unites them. This contract is looked on as a 'solemn covenant' that the woman has obtained from the man, as stated in the *Qur'ān* in Sūrat Al-Nisā': 21: "and they (i.e., the wives) have taken from you (i.e., the husbands) a solemn covenant." Farhat explain thus:

> The most unique characteristic of marriage in Islam is its contractual nature quite contradictory to marriage as a religious sacrament. Since marriage is contractual, the terms and conditions of marriage have to be settled when marriage is arranged, and these can be altered within legitimate period of the bond. The socio-legal and contractual element should not obscure the religious aspects, as marriage is also a covenant. This should not be confused with marriage as a sacrament in which case it is religious binding. In Islam the distinction between secular and sacred is not explicit. All actions and transactions have religious implications but they are not religious binding. [6]

3. The Legitimacy of Marriage In Islam

Marriage is legal according to the Islamic Law and was also legal according to earlier prophets and messengers and there is no disagreement in this regard. Abū Ayūb, for example, was reported to have said

> Getting circumcised, using perfumes and tooth cleansers, and getting married are four of the practices that were carried out by messengers of God. [7]

In fact, Al-Balqinī commented on this saying

> *Nikāḥ* had been legalised since the days of Adam and has been so ever since. Moreover, it will continue to be so in Heaven. There is nothing like it particularly in the contracts that constitute a form of worship and comes second to faith. [8]

There is plenty of evidence in support of the legitimacy of marriage in Islam, and this evidence comes from various sources. In this section, I will be discussing evidence taken from both the *Qur'ān* and the prophet's *sunnah*, as these are the most significant sources of legislation in Islam.

3. 1. Evidence from the Holy Qur'ān

There is evidence in the *Qur'ān* that clearly states that marriage is legal. Consider the following verse from Sūrat Al-Rūm: 21:

> Among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.

This verse clearly states that God created for man a mate from himself in order for man to feel at ease and be happy. Al-Shawkānī comments on God's words in "Among His Signs is this, that He created for you mates" by saying

> That one of God's signs of ability to resurrect is creating mates from you for you. This means that God created human beings and it is argued that this is a reference to the creation of Eve, as she is, according to Islam, created by God from one of Adam's ribs. As for "ye may dwell in tranquillity with them", this means that the man may feel inclined to, and familiar with, the woman. If the two do not belong to the same species, they would not love each other and they would not be able to dwell in tranquillity together. And "He has put love and mercy between your hearts" means that God wanted you to show

affection and love towards each other due to the marriage bond that holds you (both of the husband and wife) together. They treat each other in a merciful way even though they did not know each other before marriage, nor did they have any kind of love or mercy.

Mujāhid said that in the *ħadīth* above 'love' means "having sexual intercourse" and mercy" means "having children". Al-Suddī also commented on this and said that "love" here is the same as "love" and "mercy" means "pity". It had also been said that "love is the man's love of his wife, and mercy is the mercy a man shows towards his wife, so that she is not harmed."[9]

This demonstrates that marriage is legitimate and that the husband and his wife love, and have mercy on, each other.

The Holy Qur'ān provides further evidence to demonstrate the legitimacy of marriage. In Sūrat Al-Aᶜrāf: 189, it is stated that

> It is He Who created you from a single person, and made his mate of like nature, in order that he might dwell with her (in love).

God created humanity from "you" which refers to Adam and from Adam; He created his mate, which refers to Eve. It is quite clear from the verse above that when God created humanity, He did not create them of one sex. On the contrary, He created the male and the female (i.e., Adam and Eve) so that there will be love, intimacy, familiarity and tranquillity among themselves.

Al-Ŧabarī pointed out, [10] in his explanation and commentary on this verse, that "of like nature" refers to Adam. As for what is meant by "He made out of his mate of like nature", it refers to Eve, who as Al-Ŧabarī narrates, was made out of from one of Adam's ribs "in order to dwell with her in love". "Dwell with her in..." means, as interpreted by Al-Ŧabarī, that the man comes to her (i.e., his wife) whenever he needs her particularly for love and sexual intercourse.

Had Eve belonged to a different species, Adam would not have loved her or felt at ease with her.

The same point had been emphasised by Ibn Al-Qayyim,[11] as he said that: "God made the cause of dwelling in tranquillity in that the woman is created from the man" who is the same kind. If the wife belongs to a kind of being other than that of the man, he would not be able to dwell with her in love or feel at ease with her.

3. 2. Evidence from the Prophet's *Sunnah*

There are many sayings or hadiths by the Messenger of God urging people to get married in an attempt to achieve what is in the interest of humanity. Hopefully, marriage will reduce the chances that people may establish unlawful sexual relationships, leading to fornication and other sins punishable by God. For example, it is narrated that the Prophet had said that

> O young men, if anyone of you could afford the marriage costs, he should get married, and if he could not, he should fast, as this will protect him. [12]

Ibn Ħajar Al-ᶜAsqalānī[13] comments on this *ħadīth* saying that it is directed to the young men, because they are quite active and lively and they have a stronger desire to have sex than old men. Thus, if anyone of the young men can afford the marriage expenses, he should get married. The Arabic word for "the financial affordability of marriage cost" is '*al-bā'ah*'. However, some scholars argued that '*al-bā'ah*' is used in the *ħadīth* above to refer to "the physical ability of the man to have a sexual intercourse". Thus, according to this last interpretation of '*al-bā'ah*', if a young man is unable to make love, he should go fasting, as this will repress the desire in him to have sex. Similar

accounts were also presented by many other scholars like Al-ᶜAdawī, [14] and Al-Ubbi which say:

> One should fast because fasting reduces the desire to have sex. This is due to the correlation between the desire to make love and the desire to eat. Thus, if the desire to eat is suppressed, then the desire to have sex will also be suppressed but if the food desire is further agitated, then the sex desire will also be kindled.[15]

Accordingly, if a young man cannot afford marriage expenses, he should fast, as this will protect him from the temptations of fornication. Al-Hāshimī provides further support for this by arguing that

> Getting married at an early age protects the youths from sexually straying from the right path which might be caused by the abundance of leisure time in the absence of marriage. Thus, marriage can be considered a protective measure that helps in remedying the problems of sexual perversion and the way out of this is through facilitating marriage for young men with no delay. [16]

It had also been reported by ᶜAisha that the Prophet said addressing men "Get married to women as they bring you wealth."[17] This means that marriage could be a cause enabling men to make more money. Because when a man gets married, he will bear the responsibility of running a family and providing all the needs for his family. This will make him eager to look for a job from which he can earn his living and improve the living of his family.

Another *ħadīth* that urges people to get married is "The best thing that lovers can do is get married."[18] What this last *ħadīth* means is that the only legitimate way to bring lovers together is by having them get married in a lawful way. It was stated in a book entitled *Sharħ Sunan Ibn Mājah* that

> The word 'lovers' may refer either to two or to more than two people who are in love. The intended meaning here is that if two people loved each other nothing else but marriage can make this relationship between the two stronger and more durable. [19]

Thus, if there is marriage in addition to the already existing love, this love will become stronger day by day.

Moreover, one may argue that there has been consensus on the legitimacy of marriage since the early days of Islam up till now, and never has anybody argued against this issue[20].

Further evidence for the legitimacy of marriage comes from logic and reason:[21]

> Any wise human being would like to leave behind, after his death, something that reminds others of him. This may take place only through getting married and having children.

Even if one thinks about marriage, he/she will come to the conclusion that it should be legislated. Thus, the evidence is overwhelming and comes from different sources.

4. The Benefits and Wisdom of Legislating Marriage

I have already shown that marriage has been practised for a long time and that it is a legal relationship that brings the man and the woman together for a variety of purposes and benefits. In the following sections, I will discuss the benefits and goals of marriage.

4. 1. Bringing About Affinity, Intimacy, and Tranquillity

One of the benefits and purposes of marriage is that it brings about the feeling of intimacy, tranquillity, and stability. This is due to the idea that when God

created Adam, He left him first to live alone for sometime. But, God wanted Adam to become happier and more joyous, so He created Eve for him from one of his ribs to make him feel more at ease. This will drive away boredom from his life and make it more interesting. Love, intimacy and the feeling of ease are considered to be of prime importance as advantages of marriage. Al-Ghazālī supported the above mentioned view in his book *Iḥyā' ᶜulūm al-dīn* and he said

> Another benefit of marriage is the entertainment and amusement the couple get through being together, and looking as well as playing with each other.[22]

This is supposed to make the married couple more relaxed and more dedicated in their worship of God. It is part of human nature that humans get bored easily and they might also be inclined to refrain from what is right; therefore, it is argued that having relaxing time with women makes men happier and sometimes men of faith need to have such relaxation in so far as this complies with the rules and regulations of Islam. This is what the phrase "to dwell in tranquillity with them" from Sūrat Al-Rūm means. Abū Al-Aᶜla Al-Mawdūdī commented on that by saying:

> It is quite essential for married couples to have psychological stability and tranquillity because this will provide them with the power and energy to achieve the society's most precious purposes.[23]

This advantage of marriage in providing intimacy and love is not restricted to wives only because others such as relatives and neighbours of the couple may benefit from the marriage. Khālid Bin Yazīd Bin Muᶜāwiyah was reported to have said

> I hated most the Al-Zubair family; however, after I got married to Ramlah, who is a member of this family, I loved them (Al-Zubair family) more than all other people.[24]

This change in feelings is the result of marriage.

ᶜAli Khalīl argues that there are many social benefits one gets from marriage such as affinity and intimacy. He said that

> Intimacy brings about social togetherness and stability. And it concerns each of the individual and the community as it provides the right social atmosphere and security that are required for the development of the society. It is not surprising, therefore, that the Prophet called people to have social bonds based on affinity and intimacy, as these bonds, as expressed by Al-Māwardī, make people stick together against any potential threats or dangers so that they may not be humiliated.[25]

Thus, it is evident that the first major benefit of marriage is affinity, intimacy, closeness and friendliness not only on the level of the wife and her husband, but also on the level of relatives and the community. Of course, this will be reflected positively on the community at large. However, some scholars believe that preserving mankind that will be discussed in the next section is the main purpose of the marriage and is of most priority than others.

4. 2. Preserving Human Kind

Another benefit of marriage is that it becomes possible to preserve human kind through procreation and posterity. This is a very significant benefit, as it would be impossible for the human race to continue living on this planet without marriage and this would have led to confusion or chaos in the structure of society. The structure of society will be seriously disturbed or affected.[24] Procreation and posterity are the most important benefits of marriage for various reasons, as I argue below.

First, procreation and giving birth is considered to be a continuation of man's name and reputation and it does not stop at the death of the man, because the offspring will carry the man's name, reminding other people of the father.

Second, procreation and offspring's may constitute a means of providing the man with help he may need, as the children will be able to support their father when they become adults. In fact one may look at the possibility of having children as a blessing from God, as the following verse from the *Qur'ān* states:

> And God has made for you mates (and companions) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best: will they then believe in vain things, and be ungrateful for God's favours? [Al-Naħl: 72].

In his commentary on this verse, Ibn Kathīr said, "God states that He made out of the husband and wife children and grandchildren." Ibn Abbas said in this context that "your children are there to make grandchildren for you and to help and serve you."[27]

4. 3. Protecting the Manners and Health from Corruption

Marriage is also considered to be a legal means of protecting the manners of both the man and the woman alike from corruption and immorality. Through marriage they can fulfil their sexual desires in each other in a lawful way away from disease and other health problems. If the man and the woman had the freedom to have sex with anybody he or she wants, with no restrictions or regulations what so ever, this would lead to serious sexual chaos where things become messy and this will pose a serious threat and risk for humanity as it goes against the human nature which God made. One may refer to the following verse taken from Sūrat Al-Anᶜām: 151 from the Holy Qur'ān to support this point: "Come not nigh to shameful deeds. Whether open or secret".

Abū Al-Ȧᶜla Al-Mawdūdī [28] demonstrated the significance of the benefit of marriage in terms of protecting the manners of the people from corruption and decay. He argued that "this protection of manners is the primary goal of marriage, because Islam prohibits fornication and at the same time obliges the human beings, both men and women, to constrain their natural instincts by the law through marriage, hoping that this measure will help in saving the society from moral decay. In fact, this is the reason as to why the *Qur'ān* uses the word '*al-iḥṣān*', which is an Arabic word meaning protecting, as a synonym to the word '*zawāj*' meaning marriage. From the same root for '*al-iḥṣān*', one can derive '*al-ḥiṣn*', which is the word for the castle. Thus, a man who is getting married is likened to a man who is building a castle around himself.

Moreover, marriage protects not only the good manners of the man or the woman from corruption but also the man's health. Marriage has some advantages on the level of the human health. For example, it helps the man to get rid of the semen that he produces, and this makes the man feel comfortable and stable. In this context, Ibn Al-Jawzī said that

> If the man does not get rid of the semen that he has, he may be harmed, as this may cause diseases and may lead to the obsession with lust and evil sexual desire. [29]

Further evidence in support of this comes from Al-Sharbīnī, who stressed that

> There are three main goals that the marriage fulfils: preservation of the human kind, release of liquid (i.e. semen) the retention of which is harmful, and enjoyment. It is this last goal that one finds in Paradise because the other two (i.e. begetting, and no retention of semen) do not exist there. [30]

4. 4. Establishing and Structuring the Family

It is well known that the family is the nucleus of society, and society will never be coherent or strong enough if the nucleus is not. For this reason, Islam urged people to get married in numerous verses and *ħadīths*. According to Islam, marriage provides the best method of teaching the man and the woman to bear responsibility, so each one of them tries to improve the circumstances of his/her family through hard work. So, the father would toil and go out looking for a job to provide sustenance for the family to live in honour and dignity, whereas the mother would perform her role doing her utmost to provide all that her husband as well as children need in order to to make them feel happy, and so on and so forth. The Prophet is reported to have said, as narrated by ᶜAbdullah Bin ᶜUmar, that

> Everyone of you is a guardian and is responsible for his charge; the ruler is a guardian and is responsible for his subjects; the man is a guardian in his family and responsible for his charges; a woman is a guardian of her husband's house and responsible for her charges; and the servant is a guardian of his master's property and is responsible for his charge. [31]

In fact, the same point had also been argued for by Al-Mawdūdī, who said that

> The first and most important, and even most crucial, establishment in the human society is the house. This is the factor that contributes in raising the walls of the building the family and this can be guaranteed through marriage between men and women, which hopefully leads to the birth of a good new generation with bonds of kinship and tribal relations. This new generation is hoped to prevail and be in charge of all aspects of the society. It is in the house that members of the young generation acquire their manners and get ready to bear the

responsibility in facing a new kind of modern challenges with a lot of love, equality, and intimacy.[32]

I have also to mention other benefits of marriage not only at the level of the family, as we have just seen, but also at the level of the woman herself. Marriage protects the woman from loss because through marriage the woman will not have to worry about how to obtain her maintenance, as there will be a husband to take care of this matter.

Aħmad ᶜUthman lists a number of social and psychological advantages of marriage.[33] First; it protects the woman and provides maintenance for her. It ensures her security, as the husband is obliged to provide good means of life for her whether in food, clothing, housing, maid/servant, medicine, perfume, adornment, or detergents, as we will discuss in Chapter Six. This point is supported by a *ħadīth* by the Prophet, who says, as reported by Imām Mālik and narrated by ᶜAisha, that "the woman should be dutiful to her husband." This shows how grateful a woman should be to her husband and this may be attributable to the lots of services as well as the maintenance that he provides for her.

What has been stated above presents evidence that demonstrate the various benefits of marriage. Despite all these advantages that the marriage has, yet marriage is by "*nadb*", which means that it is not an obligation for every man and woman. In fact, Islam left this issue to the individual and his or her own circumstances. In other words, Islam rules in different ways in so far as the need to get married is concerned, so some people might be obliged to get married whereas others are exempt from this. It all depends crucially on the individual's situation, as we will see in the following section.

5. Legal Terms and Rules Governing Marriage in Islam.

Before I embark on exploring the different legal rules *(al-aḥkām al-shar^{c}iyyah)* that govern marriage, I want to demonstrate what the term means and refers to. In fact, legal rules are of two categories: *taklīfī* rules and *waḍ^{c}ī*[34] rules. However, the term *al-aḥkām al-shar^{c}iyyah* is used in this chapter to refer to the *taklīfī* kind of rules, rather than *waḍ^{c}ī* rules. These rules are concerned with what the legislator requires Muslims to do whether through the *iqtiḍa* (i.e., ordering and obliging them), or through the *takhiyīr* (i.e., giving them the chance to choose). As for the term *iqtiḍa*, it means ordering, Muslims may be ordered not only to do certain things but also to avoid doing others. First, in the case of ordering and obliging Muslims to do things, this may take the form of *farḍ*. This is also referred to as *wājib* by *Al-Jumhūr*. However, unlike *Al-Jumhūr* scholars, who looked at *al-farḍ* and *Al-wājib* as referring to the same thing, *Hanafiyyah* scholars discriminated between the two terms. The second case of ordering is that which is non-obliging. This is what is called *Al-mandūb*. Second, the order to avoiding doing a certain thing can also be either obliging, known as *ḥarām*, or non-obliging, which is called *Al-makrūh*. As for *takhiyīr*, the legislator gives Muslims the freedom to choose whether to do a certain thing or not, and this is known as *mubāḥ*[35].

In fact these rules have been explained in some details by Al- Al-Zuhaylī, who stated that:

> *Al-mandūb* is what the Islamic Lawmaker (legislator) would like you to do, but it is not obligatory. It is something good to do and gets you praise, but if you do not do it you won't be penalized for that.
>
> *Al-farḍ*: is what the *shari^{c}a* explicitly orders you to do based on firm evidence and it is compulsory. An example of this will be the five pillars of Islam as stated in the *Qur'ān*. It also includes other things that

are confirmed by the *sunnah* such as reciting the *Qur'ān* while praying. It also includes what had been confirmed by unanimity, such as prohibiting the sale of these four types of food: wheat, oats, dates and salt. If something is a *farḍ*, you have to do it. If you do, you will be rewarded, and if not you will be punished. In the last case you count as kafir.

Al-wājib: This is what the *sharīᶜa* orders you to do based on shaky evidence, as in the case of *ṣadaqat al-fiṭr, ṣalat al-watr* and the two *Eids* (festivals)". The obligation of this could be due to something narrated about the Prophet. It becomes similar to *al-farḍ*, but if you deny it or fail to comply with it, you will not become kafir.

Al-ħarām: This is what is prohibited by the legislator. Thus, it is compulsory. *Al-Ħanifiyyah* said about this that it is something the avoidance of which had been confirmed with explicit evidence. An example will be the prohibition of killing, drinking wine, adultery, etc. You have to avoid it and if you don't, you will be punished. If something is labelled as '*ħarām*', then it is a sin and an example of disobeying God.

Al-makrūh: This refers to what the *sharīᶜa* asks you not to do, but it is not an obligation. If you do something '*makrūh*', you will not be punished, but if you avoid something '*makrūh*', you may be rewarded.

Al-mubāħ: (allowed): It is something you may either do or avoid, as in eating, and drinking. Everything is '*mubāħ*' unless there is a statement that prohibits it. There is no punishment or reward for doing or avoiding it, unless avoiding it may cause certain problems. For example, you should eat to stay in good health, because you cannot survive without eating[36].

Because people are in different in financial states and social circumstances. I would like to mention legal terms that govern marriage in order to enable the

husbands to be aware of the rules of marriage to know their position from marriage and avoid unjust practices with their wives.

5. 1. Marriage as a *Mandūb*

Marriage, according to the Islamic Law, is '*mandūb*' in the sense that Islam wants us to get married, but it is not obligatory. It would be good for one to get married, but if he/she does not, they won't be punished. Thus, marriage is different from worship as in praying, and paying '*zakāt*' (or charity), This is demonstrated by the following saying by the Prophet that "being shy, using perfume, using tooth cleansers, and getting married" are some of the characteristics and activities that God's Messengers had and did. And the Prophet was also reported to have said that "anyone who loves my nature follows my method of life (i.e. *sunnah*), part of which is getting married." He also called 'love' a way of life (or *sunnah*) and once something becomes a way of life for the Prophet, it also becomes a good example to be followed by Muslims who can follow. Thus, it becomes a '*mandūb*' not an obligation.

It was also reported that a woman came once to the Prophet and said to him

> O, Messenger of God, 'what rights does the husband have upon his wife?' After he had explained these rights to her, she said 'I swear to God that I'll never get married'.[37]

Had marriage been an obligation, God's Messenger would have told her so and explained it to her. But since the Messenger did not comment on what she said or reply to her rejection of the idea of marriage, then marriage cannot be a compulsory religious duty. Further evidence that shows that marriage is a '*mandūb*', rather than obligatory comes from the fact that some of the Prophet's companions died without ever getting

married and they were not blamed for this (as this was not looked on as an example of wrong doing).

Marriage becomes optional (or *mandūb*) in cases where the man is moderate in his desire for women, but he still refrains from getting married, although he can afford the financial and psychological cost of marriage. This is a case of a man who has control over his sexual desires, so the danger of getting involved in an unlawful sexual relationship does not arise. Marriage in such a case is more important than and prior to the '*nawāfil*', which is the Arabic word for the optional practices in Islam.

Ibn Qudāmah, who is a scholar following the *Ħanbaliyyah* School of Islam, argues for the desirability and priority of marriage in cases where the man may risk fornication. He said

> It is preferable in the case of a man whose sex desire is quite strong that he gets married to save him from committing unlawful deeds. Marriage in this situation is more urgent than, and prior to, performing optional worship.[38]

In saying this, Ibn Qudāmah is following what the companions of the Prophet had said.

The reasons that necessitate giving priority to marriage over '*nawāfil*' worship had been discussed by Al-Kāsānī, who is a follower of the *Ħanafiyyah* School of Islam.[39] Al-Kāsānī says that there are various reasons for placing more emphasis on marriage in certain occasions.

First, marriage is a '*sunnah*' or a way of life, in accordance with the practices of the Prophet himself as well as his own way of life. The Prophet said, "Marriage in of may '*sunnah*'". It is well known that there is unanimity regarding the *sunnah* practices being more preferable than optional worships,

in cases where one has to choose. This is stated in a more explicit way in a saying by the prophet when he says "He who refrains from my '*sunnah*' is not from me." On the other hand, there is no punishment, according to Islamic teachings, awaiting those who may not perform the optional religious practices (i.e. *nawāfil*).

Second, another reason as to why '*sunnah*' practices are more important than '*nawāfil*' practices is that the '*sunnah*' practices were conducted by the Prophet himself and he continued to practise them. If something, like marriage for instance, was good for the Prophet to perform, it is also good for the people, and in its interest, to follow suit.

Third, marriage is unlike '*nawāfil*' in that it aims at something that is of great and immediate benefit like giving birth to children and keeping oneself away from wrong doing, such as getting involved in unlawful sexual relationships. This view had also been adopted by a number of Muslim scholars like Al-Murtadha, who wrote *Al-Baħr al-zakhar*, [40] Al-ᶜAdawī, [41] Al-Azharī, [42] and Al-Sharbīnī. [43]

However, *Al-Shāfiᶜī* has an opposing point of view, as he argues that it is better to give up everything and dedicate himself to worshiping God. [44] The evidence he uses in favour of this view is that God, as he says, praises Yaħya, by using the Arabic word '*ħaṣūrah*', which refers to the man who has no interest in women. His conclusion from this is that had marriage been more urgent or preferrable than other optional worship practices, God would not have praised the Messenger Yaħya for not getting married, although Ibn Hazm had argued for the necessity of marriage in such cases. [45]

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5. 2. Marriage as a *Farḍ*

There are cases where the rules of marriage may change according to the person himself or according to the circumstances he is going through. For example, sometimes marriage becomes '*farḍ*' (or an obligation) on the man, and it is sin not to get married. This is the case when the man is in a situation where he is almost sure that he will commit fornication, if he does not get married and if he does not control himself and his sex desires through fasting, although he can afford the lawful costs of marriage whether social or moral. This kind of man is obliged to get married according to all Muslim imams, [46] as he should do something to protect himself from evil things and the only way in this case is through marriage.

Aḥmad Ibn Ḥanbal says that such a man should get married although he may not be able to pay for a provision for the wife. What is important here is that the man should be protected from resorting to wrongdoing, before he seeks a job from which he earns his living. Marriage is a preventive measure as it protects the man morally, as there may come a day when he may lose patience and fail to restrain or hold his emotions and desires.

Similarly, the woman is obliged to get married on certain occasions. For example, if she fails to get a job and earn her own living and she has nobody to provide maintenance for her, or if she is vulnerable to temptations of some corrupt people and it is difficult for her to keep herself away from this kind of conduct. As such, she is obliged to get married. [47]

5. 3. Marriage as a *Wājib*

Occasionally, marriage becomes obligatory upon the man to a degree (or *wājib*) less than that of a prescribed or an enjoined duty (i.e. *farḍ*), in case he believes, or is scared, that he may commit fornication, if he did not get

married. Marriage becomes a duty, which is a lesser degree of obligation, particularly if he can afford the financial and moral obligations needed for marriage.

As for the *Ħanafiyyah* scholars, represented by Al-Zaylaʿī, they believe that

> Marriage is a '*sunnah*' and if the desire for marriage is very strong it becomes a '*wājib*' (a duty), so that it saves the man from being trapped into illegal sexual affairs. Avoiding fornication is an obligation, and if something makes one avoid fornication this something becomes an obligation as well. [48]

Thus, marriage in this case is a *farḍ*, because of the fear of committing something that is '*ħarām*' (or prohibited).

5. 4. Marriage as a *Makrūh*

It is also possible that marriage might be "*makrūh*" or detested for the man, as is the case when the man is confident that he can control his desires and he can manage with no women (i. e. he does not desire women), and he believes that he may not be fair with his potential wife, as he does not like marriage. In such a case, marriage is not advisable. [49]

One has to point out, however, that Ibn Qudāmah, who is a *Ħanbali*, [50] mentioned that there are two points of view regarding the case where the man detests marriage. The first opinion states that it is better for him to get married for the various reasons that marriage has. The second opinion requires the man not to get married, because he, probably, will not appreciate the advantages of marriage and at the same time the woman will be deprived of the chance of getting married to someone else. It is also not advisable for the man to get married in this situation, because the woman will be married to

him while he may not be able to fulfil the marriage responsibilities. As for the man, marriage will take him away from worship and religious knowledge.

5. 5. Marriage as a *Harām*

Marriage becomes '*ħarām*' (or forbidden) if the man is certain that he won't be fair to his wife in the sense that he may not be able to meet her material and moral demands. It is seems that marriage in this case becomes prohibited and illegal, since the goals of marriage are not satisfied.

It is stated in *Al-Baħr al-zakhar* that .

> Marriage is forbidden for those who can't bear sexual intercourse and for those who find it difficult not to have it although they know that they will not be able to give their wives all that they need as wives. [51]

This is in compliance with what is stated in the *Qur'ān* in Sūrat Al-Ŧalāq: 6: "annoy them not, so as to restrict them".

6. Marriage in case of clash in Rulings

The final case of ruling that we are going to discuss is where there seems to be a clash in the rulings of marriage. This is the case where for some reasons marriage is an obligation (i.e. *farḍ*) but for other reasons it is prohibited (i.e. *ħarām*). A typical example of this is a man who knows for sure that he is going to commit fornication unless he gets married, but at the same time he is also certain that he will not be fair to his would-be wife, as he is not going to fulfil all her needs. In this case, Muslim scholars argue that the man should not get married to avoid doing injustice to his wife. This is consistent with the verse from the *Qur'ān* in Sūrat Al-Nūr: 33:

> Let those who find not the wherewithal for marriage keep themselves chaste, until God gives them means out of His grace.

The man here has to be patient and should wait, so that he avoids fornication. He has to take care of himself and his behaviour until things improve and he gets married.

On the other hand, Muṣṭafa Al-Sibāʿī has a different view from the one presented above. He contends that waiting till later on, before one gets married, is not a solution to the problem. On the contrary, he argues, marriage is not only a necessity but also a duty, as it saves the man a potentially unlawful sexual relationship. He says that

> No doubt being unjust to the woman affects only the woman herself; thus the problem here is limited. The man usually becomes more well natured and more morally obliged after marriage, than he was before marriage. After marriage, he feels more responsible as a husband and as a father. These feelings he has toward his wife and his children prevent him from causing them any harm or at least minimise the chances of doing them any injustice. As for fornication, it is a common corrupt social behaviour, and if anyone does commit fornication once it becomes quite difficult for him to give it up unless one gets married. Thus, there is wisdom in legislating marriage as it preserves people's social interests through staying away from all forms of socially and sexually illegal relationships. All this shows that it is more appropriate for the man to get married and this point of view seems to be closer, than the first view discussed earlier, to the essence of the Islamic Law.[52]

I feel more compelled to favour the Al-Sibāʿi's point of view for different reasons. One the these reasons is that marriage, in all cases, refines the individual and protects him. It also makes the married person feel responsible toward his family which in a way motivates him to seek a better life and family. However, if this man is deprived of the right to get married, due to the

fear of treating his wife unfairly, this might frustrate him and lead him to other types of sins that he would not have otherwise committed.

7. Some Conditions that Aim at Protecting the Wife

In Islamic Law the wife has the right to make her husband agree on a number of conditions, particularly those that guarantee her the right to divorce, instead of leaving this matter to the husband. This will save her a lot of trouble both psychological and physically as this problem may occur again in the future. She will be legally permitted to do that and she cannot be blamed for it. For example, the wife may require her husband, before they get married, to grant her the right to divorce herself from him whenever she wants (i.e. she may have this as a pre-condition to marriage). This should be the case particularly if she has some doubts about him or his conduct. In fact this kind of pre-conditioning is familiar according to *Al-Hanafiyyah* School of Islam.

Other things that a potential wife may require the husband to agree on even before marriage include the right to work (or to stay in her job if she has got a job), and the requirement that he does not get married to another woman. If the husband violates any of these conditions, she will have the right to dissolve the marriage whenever she wants in accordance with the *Hanbaliyyah* School of Islam.

If the woman adheres to these conditions she will be guaranteed a much safer and more peaceful life with her future husband, as this saves her a lot of potential problems with a man who she is very likely to know only after marrying him and experiencing life with him.

8. Conclusion

In this chapter, I have discussed a number of issues including the linguistic as well as the technical meanings of the word '*zawāj*'. I also investigated the legitimacy of marriage in Islamic shari^{c}a (*Qur'an, Sunnah, Ijmā^{c}*). After that I discussed the wisdom and purposes of legitimising marriage in terms of protecting the society through bringing about stability, and balance. Next, I considered the various legal rules that govern marriage and the way these rules differ from one person to another according to both the person's ability to get married and his need for marriage. Furthermore, I explained the disputes of rulings in cases where marriage could be both obligatory (i.e. *farḍ*) and prohibited (i.e. *ħarām*) for the same person at the same time. Finally, I dealt with the terms that aim at protecting the wife and preserving her marriage rights even before the completion of the marriage contract.

Since the marriage contract, like other types of contracts, obliges the parties in terms of duties and rights. In the next chapter, I will be explaining in some detail the woman's rights in marriage and the way these rights have been accounted for in Islam.

Endnotes to Chapter Three

1. Abū Al-Baqā' Ayūb, *Al-Kulliyāt*, 2nd edn., (Cairo: Dār Al-Kitāb Al-Islami, 1992), p 486.

   See also Al-Mutrazi, Nāssir, *Al-Mugharrab fi tartīb Al-Muᶜarrab* (Beirut: Maktabat Lubnān, 1999), p. 123.

   See also Al-Jazri, Majd Al-Dīn, *Al-Nihāyah fi gharīb al-ħadīth wa al-athar*, edited by T. Aħmad and M. Al-Tanāħi, Egypt: Dār Al-Fikr. vol. 2, p. 317.

   See also Al-Maqrī, Aħmad, *Al-Miṣbāħ al-munīr* (Beirut: Al-Maktabah Al-ᶜIlmiyyah), p. 395.

   See also Al-Rāzī, Muħammad, *Mukhtār al-ṣaħāħ* (Kuwait: Dār Al-Kitāb Al-Ħadīth, 1987), p. 278.

   See also Ibrahīm, Anīs, et. al., *Al-Muᶜjam al-waṣīṭ*, vol. 1, 2nd edn., (Cairo. n. d.), vol. 1, p. 405.

   See also Al-Karmī, Ħasan, *Al-Hādī 'ilā lughat Al-ᶜArab*, vol. 2, (Beirut: Dār Lubnān, 1991), p. 289.

2. *'Al-zawj'* means according to mathmeticians a number by which other numbers may be evenly divided. Thus, it cannot be an odd numeral.

   Al-Jurjānī, ᶜAlī, *Kitāb al-taᶜrīfāt* (Beirut: Maktabat Lubnān, 1990) p. 130.

   See also Fāris, Aħmad, *Mujmal al-lughah*, vol. 3, edited by H. H. Ħammūdi (Egypt: Manshūrāt Maᶜhad Al-Maħfūżāt Al-ᶜArabiyyah, 1984), p. 9.

3. Anīs, et. al., *Al-Muᶜjam al-wasīṭ*, vol. 2, p. 951.

4. E l-Alamī, Dawoūd, *The Marriage Contract in Islamic Law*, (USA: Kluwer Academic Publishers, 1992), p.10.

   See also Nāsir, Jamāl J., *The Status of Women under Islamic Law*, (London: Graham and Trotman, 1990), p.1.

See also Hossini, Zibamir, *Marriage on Trail: a study of Islamic family law: Iran and Morocco compared,* (London, 1993), p.32.

5. Abū Zahrah, Muḥammad, *Al-Aḥwāl- al-shakhṣiyyah* (Egypt: Dār Al-Fikr Al-ᶜArabi, 1957). p.18.
6. Farhat, Yasmeen and Ahmed, 'A sociological study of marriage and divorce in Islamic Law', *Islam and Modern Age* vol. xx no.4, (Nov. 1989), p.343.
7. Al-Tirmidhī, Muḥammad, *Sunan Al-Tirmidhī*, vol. 3, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 391. ḥadīth no: 1080. Al-Tirmidhī said that this ḥadīth is '*ḥasan gharīb*'.
8. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, (Egypt: Maṭbaᶜat Muṣṭafa Al-Bābi, 1958), p. 124.
9. Al-Shawkānī, Muḥammad, *Fatḥ al-qadīr*, vol. 4, edited by Y. Al-Ghoush, (Beirut: Dār Al-Maᶜrifah, 1995), p. 274.
10. Al-Ṭabarī, Muḥammad, *Jāmiᶜ al-bayān fi tā'wīl al-Qur'ān*, vol. 6, 2nd edn., (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1997), pp. 142-143.
11. Ibn Al-Qayyim, Shams Al-Dīn, *Al-Tafsīr Al-Qayyim*, edited by M. H. Al-Faqi, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1978), p. 28.

    Al-Shanqīṭī, M. *Aḍwā' al-bayān*, vol. 2, (Beirut: ᶜAlam Al-Kutub, n. d.), p. 340.
12. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī,* vol. 9, p. 8. ḥadīth no: 5065.
13. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī,* vol. 9, p. 8.
14. Al-ᶜAdawī, ᶜAlī, *Ḥāshiat Al-ᶜAdawī*, vol. 2, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1997), p. 34.
15. Al-Ubbi, Abū ᶜAbdullah, *Ikmāl ikmāl al-muᶜalim sharḥ ṣaḥīḥ Muslim*, vol. 4, (Riyadh: Maktabat Ṭabarayeh, n. d.), p. 4.

16. Al-Hāshimi, Abdulḥamīd, *Al-Murshid fi ᶜilm al-nafs al-ijtimāᶜī*, 2nd edn., (Jedda: Dār Al-Shurūq, 1989), pp. 314-315.
17. Al- Ḥākim, Muḥammad, *Al-Mustadrak ᶜalā al-ṣaḥīḥain*, vol. 2, edited by M. A. ᶜAta, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1990). p. 174. ḥadīth No.2/2679. He said that this ḥadīth is hasan ᶜalā sharṭ Al-Shaykhayn.
18. Al-Qazwīnī, Muḥammad, *Sunan Ibn Mājah*, vol. 1, edited by M. F. Abdulbāqī, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 593. ḥadīth no: 1847. It was mentioned in *zawā'id* (i. e., appendix) that this ḥadīth is *ṣaḥīḥ* and those who narrate it are trustworthy.
19. Al-Sindī, Abū Al-Ḥassan, *Sharḥ sunan Ibn Mājah*, vol. 1, (Beirut: Dār Al-Maᶜrifeh, 1996), p. 407.
20. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol.6, Beirut: Dār Al-Kitāb Al-ᶜArabī, 1972, p 446.
21. Ismāᶜīl, Muḥammad, *Aḥkām al-zawāj fī al-Islam* (Cairo: Dār Al-Taḍāmun li-al-ṭibāᶜa wa al-nashr, 1983), p. 27.
22. Al-Ghazālī, Muḥammad, *Iḥya' ᶜulūm al-dīn,* vol. 2, 2nd edn.by Sayyid Ibrahīm, (Cairo: Dār Al-ḥadith, 1992), p. 49.
23. Al-Mawdūdī, Abū Al-Aᶜla, *Ḥuqūq al-zawjain,* translated into Arabic by Ahmad Idrīs, (Cairo: Maktabat Al-Qur'ān, n. d.), p. 19.
24. Bin Ḥumayd, Ṣāliḥ. et.al. *Mawsūᶜat niḍrat al-naᶜīm*. vol. 2, (Jeddah: Dār Al-Wasīlah, 1998), p. 497.
25. Bin Ḥumayd, Ṣāliḥ. et.al. *Mawsūᶜat niḍrat al-naᶜīm*. vol. 5, p. 496.
26. This means that the structure of society will not be balanced, as the old will outnumber the young. This may weaken society.
Ḥussain, Aḥmad, *Aḥkām al-zawāj fi al-sharīᶜah al-Islamiyyah*, (Beirut: Al-Dār Al-Jāmīᶜah, n. d.), p. 17.
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CHAPTER FOUR

THE WOMAN'S RIGHT TO CHOOSE A HUSBAND

1. Introduction

A woman's right to choose a husband is one of the most fundamental rights on which a healthy marriage may rely. This is why the Islamic Law was keen on granting woman this right. A marriage contract is different from all other contracts, because it is looked on as a sacred bond that should be adhered to because it brings together a man and a woman to become husband and wife in marriage, as well as partners in the sense that they share all different aspects of life. Marriage is essentially based on love, harmony and mutual understanding. This explains why it is crucial to get the woman's consent to the person proposing to her and leave the matter as to her whether to agree or not, to the potential husband. Before I discuss the details regarding the woman's right to choose a husband, I find it appropriate to explain the meaning of guardianship (or *wilāyah*) in marriage and what it means to be a guardian as these two concepts are quite relevant to the subject.

2. Guardianship in Marriage

Linguistically, the word *wilāyah*, which is the Arabic equivalent for guardianship, means (family) relationship, and it comes from the Arabic root *wali*.[1] As for the meaning of this term according to *shari*^{c}*a*, it refers to "the ability to make a contract and put it into effect".[2] Therefore, the *wali*, or guardian, is the person who has the capacity to put into effect someone else's marriage contract whether this someone is a young woman or man.[3] In fact, Abdal 'Ati has demonstrated the meaning of *wali* in some detail. He says

> Marriage guardianship is the legal authority invested in a person who is fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently. It is the authority

of a father or nearest male relative over minors, insane, or inexperienced persons who need protection and guardianship.[4]

As for *wilāyah* in marriage, it can be of two types: *wilāyat al-ijbār* (i.e., guardianship that is based on compulsion, and *wilāyat al-sharākah* (i.e., guardianship that is based on partnership). The second type of guardianship is frequently referred to by *Ħanafiyyah* scholars as *wilāyat al-istiħbāb*. Jamal Nasir explains this by saying

> Guardianship in marriage falls under two categories in respect of the ward according to the classical *shariᶜa* tenets:
>
> a. Guardianship with the right of compulsion (*wilāyat al-ijbār*) is exercised over a person of no or limited legal capacity wherein the guardian may conclude a marriage contract which is valid and takes effect without the consent or acceptance of the ward.
> b. Guardianship without the right of compulsion (*wilāyat un-nadb*) is exercised where the woman, whether a virgin or previously married, possesses full legal capacity, but in deference to social customs and traditions, delegates the conclusion of her marriage to a guardian. Some Islamic jurists call it "joint guardianship" when the woman has been previously married.[5]

3. The Woman's Right to Choose a Husband

The ruling regarding the woman's right to choose a husband varies in accordance with the status that she has. Muslim jurists from all Islamic schools (i.e., *Ħanafiyyah*, *Mālikiyyah*, *Shāfiᶜiyyah*, and *Ħanbaliyyah*) demonstrated disagreement among themselves in whether or not to give an adult sane virgin (or *bikr*) woman the right to choose, whereas they all agreed that an adult *thayyib* may not be forced to get married to someone against her desire and will. In the following sections I would like to explore this in detail, as to how this issue was dealt with by jurists.

3.1 The Right of the Adult Sane *Bikr* to Choose

There is no agreement among jurists from various schools of Islam with regard to the ruling of the father being the guardian in marriage matters of an adult sane virgin woman. They cannot agree on whether the *wilāyat* in this case is *wilāyat al-ijbār* or *wilāyat al-ikhtiyār* (*wilāyat al- al-istiḥbāb* according to *Ħanafiyyah* scholars).

Mālikiyyah, *Shāfiᶜiyyah*, and *Ħanbaliyyah* scholars argue that the father has *wilāyat al-ijbār* over his adult sane virgin daughter. Thus, according to these schools, the father has the authority to contract her marriage without her prior permission or consent. However, this is not the case for *Mālikiyyah* scholars, who argue that an adult virgin daughter, who has been declared by her father as having the legal competence, is exempt from this authority the father may exercise over her, as he does not have *wilāyat al-ijbār* over her. Al-Śāwī States:

> A rational father may have the authority to make his adult sane *bikr* daughter get married to the man whom he chooses without seeking her permission or consent. The exception of this is the case of an adult *bikr* woman who has been declared by her father as having the legal competence and is no longer under her father's guidance. In this case, a father does not have the authority to contract her unless he has already sought her explicit agreement regarding her marriage. As for an adult sane virgin daughter who is still under her father's guardianship, the father can make her get married to any man he chooses regardless of whether this man is a good match for her or not or whether she will get *mahr al-mithl* or not. However, the father may not make her get married to a leper, an impotent, or a slave. And if he does, then his *wilāyat al-ijbār* over her will be void in this case. [6]

As for *Shāfiᶜiyyah* scholars, they believe that the father has *wilāyat al-ijbār* over his adult sane *bikr* daughter, so he can drive her to get married without her consent. They argue that this is in accordance with a *ħadīth*, in which the Prophet is quoted as to have said that, "a matron has more right to her person than her guardian. As for the virgin, she gets married through her father." [7] They argue that this *ħadīth* specifies that the *wali* or guardian does not have *wilāyat al-ijbār* over the *thayyib*, and this implies that such a *wilāyah* does exist in the case of the *bikr*.

In another *ħadīth*, the Prophet was reported to have said that "a matron has more right to her person than her guardian. And a virgin should also be consulted by her father." [8] Consulting the virgin woman, the Arabic word for which is *isti'mār*, here is taken to be a form of *nadb* or *istiħsān* rather than an obligation. However, *Shāfiᶜiyyah* scholars put forward some conditions that should be met, so that the father's *wilāyat al-ijbār* over his adult sane virgin daughter can be applied. These requirements are:

1. There is no apparent enmity between the father and his daughter,
2. He marries her to a competent man,
3. He guarantee her *mahr al-mithl* in the local currency,
4. The dower does not pose a problem for the marriage
5. He does not drive her to marry a man who makes her life miserable due to a problem in this man such as being blind or is a leper,
6. She has performed *ħajj*

Shāfiᶜiyyah scholars believe that if these requirements are satisfied, then it is possible for the father to oblige his adult sane virgin daughter to get married even without her permission or consent. For these scholars, *wilāyat al-ijbār* is possible only in cases where the guardian or *wali* is either the father or the grandfather[9].

As for *Ħanbaliyyah* scholars, they have two views in the issue of obliging the daughter in marriage. According to the first opinion, it is possible for the father to force his daughter to get married without getting her agreement or even consulting her in this matter. *Wilāyat al-ijbār*, in this case, can be used only by the father[10].

There is another opinion held by some scholars from *Ħanafiyyah*[11], and *Ħanbaliyyah*[12] Schools regarding the woman's right to choose a husband. These scholars believe that a father may not oblige his adult sane *bikr* daughter to get married to someone she does not want. In fact, *Ħanafis* contend that the father's guardianship is *wilāyat al-istiħbāb* rather than *wilāyat al-ijbār*. Thus, a guardian, whether the father or somebody else, is not allowed to oblige an adult sane virgin woman to get married to someone she doesn't want. To them, the justification behind forcing the girl to get married, also known as *wilāyat al-ijbār*, is young age. Thus, if the woman is mature enough and is mentally qualified to exercise her legal rights, then forcing her to get married becomes unjustified. To support this viewpoint, *Ħanafiyyah* scholars holding this opinion, use evidence from various sources. First, they refer to what Abu Bakr and Abu Musa Al-Ashᶜari narrated about the Prophet making void the marriage of a *bikr* whose father forced her to get married but she did not like it.

Second, they also use evidence from Khansā', who once came to the Prophet and complained to him that her father made her marry his nephew and she told the Prophet that she did not like this marriage. The Prophet advised her to accept what her father did, but she replied that she did not like it. Then, the Prophet asked her to leave and get married to whoever she wanted. She said after this, that she would accept what her father decided for her and added that she did this because she wanted other women to know that fathers do not have the right to force their daughters in to marriage. *Ħanafiyyah* scholars

commented on this *ħadith* saying that the Prophet did not deny or disagree with what she said about fathers, nor did he ask her whether she was *bikr* or *thayyib*.

Third, *Hanafiyyah* scholars sought support for their view from the argument that since an adult woman has the right to do whatever she wants with her money, why is she not given this freedom when it comes to choosing a husband? It is worth pointing out that there is no discrimination between a *bikr* and a *thayyib*[13].

The evidence above has been used by *Hanafiyyah* scholars and clearly shows that an adult sane *bikr* should be given the right to choose her appropriate husband, as the Prophet himself helped the *bikr* wife in the first *ħadith*, by Abu Bakr and Abu Musa Al-Ashᶜari, to get rid of a marriage that she hated, and he gave the other wife Khansā', the freedom to choose after he had listened to her complaint.

However, because a virgin woman is usually shy and refrains from expressing her desire for marriage, *Hanafiyyah* scholars believe that there is no need for a woman's explicit consent in this case, as it is enough for her to indicate in some way that she accepts the marriage, such as staying silent, smiling, or laughing. But if she indicates in some way that she is not content with the marriage such as slapping herself in the face, then this does not count as consent according to *Hanafiyyah*.[14]

Ibn Taimiyah [15] held the same view held by *Hanafiyyah* scholars, as presented above, in giving the adult sane *bikr* woman the right to choose her partner (husband) in marriage and not forcing her. In fact, the same opinion was also advocated by Ibn Al-Qayyim Al-Jawzī, who argued that

The father of a rational mature *bikr* woman may not interfere in what she owns unless she permits him to do so. Nor can he force her to give anything of what she has without her approval. Given this, how is it possible for him to make her get married to someone of his own choice without her consent? How could he force her to marry the man whom she hates most? This marriage, which is against her will, turns her life into a prison. [16]

3.2 The Most Favourable Opinion

After having presented different views relating to the woman's right to choose a husband according to different Islamic schools, I find the opinion that is held by *Hanafiyyah* School and scholars like Ibn Taimiyah and Ibn Al-Qayyim Al-Jawzī the most favourable, due to the straightforwardness of the evidence they come up with to support their position. The guardian, whether a father or someone else, may not, under any circumstances, oblige an adult sane *bikr* woman to get married to someone she does not want. The guardian has to know the opinion of the woman under his guardianship either directly, through asking her about her opinion, or indirectly, through asking the mother to approach her daughter and consult her. In fact, this is what the Messenger of God used to do when dealing with his daughters in marriage. He used to take their opinions regarding the prospective husband.[17]

Moreover, although jurists from *Mālikiyyah*, *Shāfiᶜiyyah*, and *Ħanbaliyyah* supported *wilāyat al-ijbār* in the case of adult sane *bikr* women, this support was not absolute. Evidence for this comes from what *Mālikiyyah* said regarding the unacceptability of *wilāyat al-ijbār* if the *bikr* woman has been declared as legally competent by her father. The father of such a woman may not contract her marriage without her prior consent. Similarly, *Shāfiᶜiyyah* scholars have introduced some conditions that have to be fulfilled before the father can resort to *wilāyat al-ijbār*. Even if *wilāyat al-ijbār* is applicable, its

use is restricted to the father and grandfather. Furthermore, there is nothing in these Islamic schools that forbids fathers from consulting their daughters before the marriage contract is finalised. In other words, scholars from these schools never did anything to discourage fathers from seeking permission, for the marriage to proceed, from the daughters and their mothers. This is in accordance with what the Prophet was reported to have said: "Consult women about their daughters." [18]

Al-Sarkhasī, who is a *Ħanafiyyah* scholar, commented on the wisdom of granting the woman the right to choose by saying

> Because it is the woman who will live and associate with the husband, she will lead a good life with the husband that she chooses rather than the one who her father chooses for her. [19]

One may conclude that Islamic jurists have given the woman the right to choose her husband either directly as *Ħanafiyyah* did, or indirectly as done by *Mālikiyyah*, and *Shāfiᶜiyyah*.

3.3 The Adult *Thayyib*

There has been consensus among the four jurists [20] with respect to the *wilāyah* used in the case where the married woman is an adult *thayyib*. This *wilāyah* is know as *wilāyat istiħbāb* and not *wilayah ijbār* regardless of whether the guardian is the father or anyone else. The only exception to this was Hasan Al-Başri, who disagreed with the four jurists saying that the father may have *wilāyat ijbār* over his mature *thayyib* daughter. This is shown by Ibn Qudāmah, who argues

> If a matron is an adult she has to be consulted and she has to say that she is convinced, and there seems to be a consensus among jurists in this regard. They all agree that the father can't force his *thayyib* adult daughter to get married to someone without her agreeing to this in accordance with a *ħadīth* narrated by Nasā'i and Abu Da'ūd in which

the Prophet said "A guardian has no concern with a woman previously married and has no husband". In fact Hasan Al-Baṣri is the only jurist who had a different view, as he was the only jurist who argued that the father may force his adult *thayyib* daughter to get married. In this regard, Ismāᶜīl Ibn Isħāq states that he had never heard anybody say something like what Hasan Al-Baṣri said. Thus, Al-Baṣri's statement about permitting the father to behave in this way is a deviation from the mainstream as well as a violation of the *Ijmāᶜ* and general consensus among the followers of the Prophet's *sunnah*.[21]

These jurists used evidence from the traditions of the Messenger of Allah, as demonstrated by the following *ħadīths*:

> An *aiyim* (i.e., this is another word for *thayyib* and it means a woman who has no husband at the present due to his death or divorce) has more right to her person than her guardian. And a virgin should also be consulted, and her silence implies her consent.[22]

In another *ħadīth*, the Messenger was reported to have said

> The *thayyib* has more right to her person than her guardian. As for the virgin, her father can force her to marry.[23]

It was also argued by these jurists that because the *thayyib* knows what *nikāħ* is, as she had been married before, then she cannot be forced into it. This is not the case with the virgin woman.[24]

Jurists explained that the *thayyib* should be consulted and she has to show explicit acceptance in words and deeds. She has to mention the name of the person who is going to marry her as well as specify the dower. *Ħanafiyyah* scholars argued

> If the woman is a *thayyib*, then her consent on the marriage could be expressed verbally sometimes or in deeds at other times. Her consent is verbal if she states in some way that she agrees to marry and so on. As for her consent to the marriage in deed, and not in words, this could be

case when she gives him access to herself and then asks for *mahr* and *nafaqah*. This shows that she agrees on the marriage in practice rather than in words. [25]

Similarly, *Mālikiyyah* scholars called for giving the *thayyib* the right to be consulted and for taking her opinion into consideration. They argued that

> The *thayyib* woman may not be forced in to marriage by her father or by anybody else. She has to be consulted and she should give her permission in saying. [26]

Along the same lines, *Shāfi*ᶜ*iyyah* scholars, too, argued that there should be an explicit permission by the *thayyib* in order for the marriage to proceed. The reason they insisted on her permission is that she is no longer shy, as she had been married before. [27]

In the case of the father of *thayyib* forcing his daughter in to marriage, there are two different views about the marriage contract. According to *Ħanafiyyah Mālikiyyah* and *Ahmad* in one of his views: - If the *thayyib* agree on marriage after the contract is done, the marriage contract will be valid, but if she does not agree on the contract, the marriage contract will be void.

In the other view: the contract marriage which done without her permission will be void even thought she agrees later or doesn't agree. [28] This view means agreement of *thayyib* must be taken upon the contract not after being done.

Ibn Taimiyah had agreed with the *Jumhur* (i. e., scholars from *Ħanafiyyah, Mālikiyyah, Shāfi*ᶜ*iyya*, and *Ħanbaliyyah* Schools) in that

> An Adult *thayyib* cannot be forced in marriage by her father or by anybody else without her permission, and there is an *ijmā*ᶜ (i. e., consensus) among Muslims on this matter. [29]

Having considered the *ħadīths* presented above and the opinions expressed by different jurists on the issue of the woman's right to choose her husband, I can conclude that, generally speaking, they all agreed that the woman, whether a *thayyib* or a *bikr*, needs to consulted for her permission in marriage matters but does not have the right to contract marriage. In other words, the guardian, whether the father or someone else, does not have the right to force the woman, under his guardianship, to get married without going back to her and consulting her. At the same time, the guardian may have the role of the guide or advisor to the woman and advise her, so that they exchange opinions and advice with respect to the man who is proposing to her, as this consultation may help them reach an appropriate decision and this may minimise any differences and clashes that may arise in the future between the guardian and the woman. This is demonstrated by Nadvi, who says:

> Exactly like that is the affair of woman and her guardian. She is being instructed that her guardian has a say in the matter of her marriage contract, so much so that without his blessings her *nikah* becomes ineffective. And the guardian is told that the woman has a greater right over her own affairs, as if to say, he had no right of intervention in her marriage. But in view of all the traditions on this theme, it can be said that both of them have been held responsible that there should be no marriage without mutual consultation. Neither should the guardian be so high-handed that the girl may be deprived of her legitimate right, nor the girl should go to such lengths of freedom that she may become a disgrace to her guardian and her family.
>
> Strictly speaking, the guardian has no power of compulsion over an adult girl in the matter of her marriage. He may, however, give her advice in this connection. In the case of a minor, he may do what he deems proper. When there is a conflict of opinions between the guardian and the woman to be married, the leanings of adult girl will

have precedence over that of the guardian, which of course is supported by the *Qur'ān* and the traditions. [30]

4. Guardianship of Women in Marriage

In fact, Muslim scholars and jurists have two different arguments regarding the issue of the woman marrying herself or another woman to a proposing man. Here, I will be presenting two main views: one adopted by *Al-Jumhūr* (the majority) and another one held by *Al-Ħanafiyyah* scholars. Then, I will present the view that I believe to be most favourable.

4. 1. The Opinion of *Al-Jumhūr*

The first opinion I discuss here is the opinion of *Al-Jumhūr*, which subsumes *Mālikiyyah*, *Shāfi'iyyah*, and *Ħanbilyyah*. They argue that it is not permissible in any case for a woman to marry herself or marry another woman (i.e., she can nor be a guardian), because they believe that the male guardian is the main party among those who should be involved in the marriage contract. Without a male guardian the marriage contract is incomplete, according to *Al-Jumhūr*.

In what follows I want to provide some views that relate to this main opinion of *Al-Jumhūr*. I start with Ibn Jazzī Al-Mālikī, who said,

> A woman may not contract her own marriage nor can she contract the marriage of another woman, be she *bikr*, *thayyib*, despicable, rational, shameless, free, or slave whether with permission or not. If she does, then, the marriage should be void and annulled before the consummation of the marriage or after it. Annulment of the marriage in this case may take place even after the woman got married and had children. [31]

Thus, according to this school of thought, it is not possible at all for the woman to exercise the role of the guardian in any way.

As for *Ħanbaliyyah*, they argue that marriage will not be valid unless it is blessed by a guardian and that the woman has no right to marry herself or another woman to a proposing husband. Nor has she the possibility of having as a legal representative anyone other than her guardian for the purpose of agreeing the marriage contract. However, if she does, marriage will become void.[32]

Similarly, the *Shāfiᶜiyyah* School prohibited the woman from

> Marrying herself or initiating this process of marriage with or without permission from the guardian, and regardless of whether the guardian agreed to the marriage or did not.[33]

4. 1 .1. Evidence from the *Qur'ān*

Scholars from all three schools agree that a woman may not become a guardian and give herself in marriage to a potential husband, nor may she initiate a marriage contract, be it her own contract or a contract of another woman. They agree that it is necessary to have a guardian when marriage is contracted. However, if there is no guardian, she may authorise a judge from the court of law to witness and agree to the marriage contract. Their evidence for this argument comes from the *Qur'ān* in Sūrat Al-Nūr: 32 "Marry those among you who are single." In this verse, Allah is addressing men and not women, because He used the Arabic verb "*ankiħu*", whose inflection shows that the subject is the second person, masculine, and plural pronoun (i.e. you: is used for males in the verse). This means that women are excluded, because the word form that refers to the female subject of the same verb is "*ankuħna*". Thus, there is linguistic evidence that the guardian has to be a male.[34]

In another context Allah says

> When you divorce women, and they fulfil the term of their *ᶜiddah*, do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms. [Sūrat Al-Baqarah: 232].

In fact, this verse was revealed upon the Prophet concerning Maᶜqal Ibn Yāsir, because he prevented his sister from returning to her husband who divorced her. It is argued that had Ibn Yāsir not had the right to stop his sister from getting married to her husband again, he would not have tried to do so. This story was reported by Al-Bukhārī. Who states that Ibn Yāsir said to the man (i.e. his sister's husband) that

> I gave you my sister in marriage and you divorced her. After that you came seeking marriage again. You should know that she will never return to you.

But the husband was a good man and his wife, who is Ibn Yāsir's sister, wanted to go back to him. Therefore Allah revealed the verse (232) in Sūrat Al-Baqarah upon the Prophet. It is for this reason that the Prophet asked Ibn Yasar "to agree to the marriage." What matters to us from this story is that it can be used as evidence in support of the guardianship of the man; otherwise, probably the Prophet would not have asked Ibn Yasar to agree to the return of his sister to her husband.[35]

Al-Shafi consider this verse the most evident proof that the guardian must be one of the parties in marriage contract.[36]

4. 1. 2. Evidence from the *Sunnah*

There is evidence in favour of the guardianship of the man in marriage. In one *ħadīth* narrated by Abū Mūsã in *Sunan Abī Da'ūd*, the Prophet says, "there is no marriage without the permission of a guardian." This means that a marriage contract may not be finalised without the permission and witnessing of the woman's guardian. This *ħadīth* was related by a number of Companions of the Prophet including Umar Ibn Al-Khaṭṭāb, ᶜAbdullah Ibn Masᶜūd, ᶜAlī Ibn Abī Ŧālib, and others. It is worth noting that this *ħadīth* is not recognised by *Al- Ħanafiyyah* scholars because when its narrator, who is Al-Zahri, was asked about it, he could not remember it, so they dropped it as

an invalid *ħadīth*. However, through their way of '*isnād*' or tracing this *ħadīth*, *Al-Jumhūr* concluded that it is a correct *ħadīth* and they used it to support their argument for the guardianship of the man. Imām Muħammad Qurṭubi said on this matter that

> It is enough to rely on what Ibn ᶜUliyyah reported about Ibn Juraij that he asked Al-Zahrī about this *ħadīth* and he did not know it. Nobody else said this about Ibn Juraij except Ibn ᶜUliyyah. On the other hand, many other narrators reported that Al-Zahrī narrated this *ħadīth*. Even if it is true that Al-Zahrī did not know or remember the *ħadīth*, this is not necessarily an argument against the *isnād* of the *ħadīth*, because many other trustworthy people including Sulaiman Ibn Mūsã and Jaᶜfar Ibn Rabiᶜa stated that they had this *ħadīth* from Al-Zahrī. If Al-Zahrī forgot the *ħadīth*, that would be something very natural because he is only a human being and humans are not immune to forgetting.[37]

For these reasons, *Al-Jumhūr* considered the *ħadīth* to be valid so that it can be used as an argument for the need to have a guardian witnessing and agreeing to the marriage contract. In fact, this further enhances the role of the guardian as an important party of the marriage contract.

The wisdom of making the guardian's approval a requirement for the marriage contract to be legal is that the guardian plays a significant role in guiding and directing the woman's opinion toward the best decision, because he is more experienced in life and knows men better than she does, as she may be easily deceived. However, the availability of a guardian, who is usually either the father or the grandfather, beside the woman proposed to for marriage, will be of great help in reaching the decision that best serves her interests. Moreover, the presence of the guardian at the time of contracting the marriage is something positive as it helps in making more people know that the couple are getting married. People used to publicise such social events in the past.

Muḥammad Abū Zahrah says in pointing out the wisdom of making it a requirement to have a guardian when contracting a marriage that

> The marriage contract is very important and could be very serious, because it is difficult for women to know men very well, as they are usually confined to their houses and children. This makes it necessary for the woman to have a guardian to help her decide on a potential husband. This guardian will be very sympathetic, merciful and caring for her and her own benefit. He would be reliable and advisable and he would not be carried away by appearances and temporal or casual things. Moreover, the guardian is usually directly affected by the contract, as it may bring him either shame or pride, because according to Islamic tradition and practices, marriage is a bond not only between two individuals but also between two families one of which is headed by him. Therefore, marriage will be a disaster for the whole family if, for instance, the husband turns to be a bad person. On the other hand, the family will be very proud of the husband if he turns to be a respectable, honourable man. The marriage contract is different from other contracts such as business or financial contracts, because it is more serious. Thus, if a marriage fails to work, it will be usually very difficult to get rid of its negative consequences, because this relates to feelings and emotions between men and women and not money or business.[38]

4. 2. The Opinion of *Al- Hanafiyyah* School

Abū Hanifah argued against what *Al-Jumhūr* adopted. He gave the adult rational woman the right to marry herself or other women to proposing men with no need to go back to the guardian or asking for his permission. He believed that the guardian's role in the marriage contract is desirable but not compulsory.

Abū Ḥanifah said that "it is permissible for an adult mature woman to initiate her own marriage contract or that of other women but this is not desirable."[39] He argued that an adult mature woman has the right to be in charge of her marriage contract regardless of her marital status (i.e. whether she is a *bikr*, or a *thayyib*). If the marriage contract she obtains is an appropriate one (i.e., the dower they agree on is "*mahr al-mithl*" or even more), the marriage will be valid and obliging. However, *Al-Ḥanafiah* followers argue that it is better that she gets married through her guardian.

In fact, *Al-Ḥanafiyyah* scholars made it clear that not any man can be a husband. They said there are certain requirements that should be satisfied by the husband. For example, he has to be competent and qualified. He should at least offer *mahr al- mithl* if not more, so that the social status of the guardian will not be negatively affected in public if the dower was not good enough. As for the cases when the woman marries herself to a husband who is not a good match for her, or she accepts a dower that is less than dowers usually taken by women in her situation, without her guardian's permission, the guardian has the right to reject the marriage and seek *faskh ᶜaqd al-zawāj* (i.e., bring the marriage contract to an immediate end) in any of these cases because, by agreeing to the marriage without the guardian's permission, she went beyond what she is allowed to[40]. Thus, *Al-Ḥanafiyyah* scholars interpret the saying that "there is no marriage without the permission of a guardian" as meaning it is a detestable thing for the woman to get married without the prior consent of her guardian, because there is always the risk that she may not show high performance while contracting for marriage, or she may behave rudely. Apart from this, whenever these two requirements are fulfilled, the woman will be given the absolute freedom to marry herself to any husband who proposes to her, without the need, help, or permission of the guardian.[41]

To support their view in entitling the woman to contract her own marriage as well as marriage of other women, *Hanafiyyah* scholars use evidence from various sources, such as the *Qur'ān* and the Prophet's *sunnah*.

4. 2. 1. Evidence from the *Qur'ān*

Al-Hanafiyyah scholars used evidence from the *Qur'ān* to demonstrate that it is legitimate for a woman to give in herself in marriage to a proposing man. In other words, the woman here will behave as a self-guardian. Consider this verse from Sūrat Al-Aḥzāb, in which Allah addresses the Prophet saying that

He made lawful for him to get married to

> Any believing woman who dedicates her soul to the Prophet if the Prophet wishes to wed her.
>
> Sūrat Al-Aḥzāb: 50

In this verse, the Arabic expression for "dedicates her soul" is "*wahabat nafsaha*", which means literally that "she gave herself" freely as a gift and this is interpreted as a form of contracting marriage by the woman. Marriage is contracted once the woman says to the man "*wahabtuka nafsi*: I gave you myself." This shows that a woman may give herself in marriage without a guardian. [42] Moreover, *Al-Hanafiyyah* scholars also use evidence from the *Qur'ān* as in one of the verses of Sūrat Al-Baqarah which states

> So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they reunite, provided they feel that they can keep the limits ordained by God. [Sūrat Al-Baqarah: 230]

According to *Hanafiyyah* scholars they consider this verse as a proof of their opinion that the guardian is not requirement in marriage contract. [43]

4. 2. 2. Evidence from the *Sunnah*

Supporters of the argument that a woman may be in charge of herself and may decide for herself with no male guardian use evidence from the Prophet's *sunnah* to support their argument. Allah's Messenger says in one *ħadīth* that "An *aiyym* has more right to her person than her guardian." According to *Al-Ħanafiyyah* scholars, the word *aiym* in this *ħadīth* refers to a woman who has no husband at the present time, so she could be either a virgin or a *thayyib* (i.e. previously married but now a widow or a divorcee). According to this *ħadīth*, the woman, regardless of her marital status, has more right to herself than her guardian. This means that she has the right to decide on matters of her marriage independently of her guardian. [44]

More evidence for women being guardians of themselves comes from another *ħadīth*. It was reported that Al-Khansā' came to Allah's Messenger and said to him "I want women to know that their fathers have nothing to do with matters that relate to their daughters." This was said by a woman in front of the Prophet, who did not show any objection to it. Therefore, according to the *Hanafiyyah* School, this constitutes a clear indication that a woman may be the guardian of herself or of another woman with no interference from men what ever so. [45]

4. 2. 3. Evidence Based on *Al-Maᶜqūl* (Reasonability)

This kind of evidence for the woman's right to decide on matters of her marriage relies on logical and plausible argumentation. Proponents of this view believe that an adult mature woman can use her mind properly and choose for herself. In this case, she will be exercising her own right in matters pertaining to her marriage, money, or anything else.

Ibn Al-Qayyim supports *Al-Ħanafiyyah* school in giving the woman the freedom to choose her own husband away from the guardian's interference. In this regard, he said

> The father of an adult, mature, and virgin woman is not permitted to act on her behalf in any matter of her possessions regardless of how trivial this matter could be. [46]

They argue that this includes marriage matters. So an adult, rational woman should be given the chance to decide for herself. This opinion is also argued for by Maħmūd Shaltūt, who says

> It is neither reasonable, nor conventional that one may not be allowed to initiate a contract by himself/herself, although his/her agreement to the contract is required. What guarantees the correctness of what one does is his/her qualification. Thus, if the virgin woman is mature and rational just like any matron, it is difficult to understand why she may be forced to get married to a man she does not want, or why a marriage contract which she initiates should be void. [47]

4. 3. The Most Favourable Opinion

In sections 4.1 and 4.2 above, we have considered evidence supporting both views regarding the issue of giving the woman the right to independently decide in matters pertaining to her marriage contract without a male guardian. We have seen that *Al-Jumhūr* scholars are against this issue whereas the *Al-Ħanafiyyah* are for it. I want to argue that the most favourable opinion is that of *Al-Jumhūr*. This opinion is based on a number of arguments. For example, scholars from *Al-Jumhūr* insist on the role of the male guardian as an important party in the marriage contract, without which marriage will be void, because there are certain considerations which should be taken into account by both the guardian and the woman. In what follows I present evidence in support of the opinion of *Al-Jumhūr* and discuss the reasons for which I contend that this opinion is the better one.

First, the guardian is usually either the woman's father or her grandfather and they both are normally prepared do their utmost to best serve their daughter and do only what is in her best interest. Thus, they will do anything to ask about the proposing man and know as much as possible about him, so that the woman will not suddenly wake up and realise that she is married to the wrong person. Of course, this will save her and her future family a lot of trouble. For this reason, I believe that it is inappropriate to deprive the father of this much needed role in the marriage contract, provided that he consults her in the marriage and does not drive her into it.

Next, the *ħadīths* presented in sections 2 and 4. 1, above, demonstrated that the woman has the right to choose and they also showed that a guardian is required for the marriage contract. This in fact, has been the convention since the early days of Islam, and the Prophet did not say anything that undermines the role of the guardian. What the Prophet prohibited however, is that guardians decide on their own without asking women their opinions on marriage.

Moreover, contracting marriage in the presence of a guardian is an advantage for the woman, because once there is a mutual understanding and agreement between the guardian and the woman on accepting a potential husband, the guardian will be pleased with the marriage and he will do whatever needed to find solutions to any problems that may arise between the wife and her husband in this marriage. Some people believe that undermining the guardian's role in this way might not be to the woman's benefit.

Finally, even Imām Abū Ħanifah himself did not speak against the idea of having a guardian in general. What *Ħanafiyyah* scholars argued for was giving the woman the right to marry herself and maybe other women without the need for a guardian or even permission from him. However, according to

Abū Ḥanifeh, it is not forbidden for a guardian to witness the contraction of a marriage at all. He said, "it is preferable for the woman to have a guardian for the marriage contract." And he wanted the guardianship to be based on acceptance, respect, representation, rather than on obligation. That is, he would not accept a guardianship that is imposed forcibly on the woman.

For the reasons presented above, I believe that it is more convenient for the woman and her guardian to agree on whoever they find appropriate as a future husband for her. Such an agreement guarantees that both parties (i.e. the wife and her guardian) should be happy as they both have exercised their rights in the sense that the guardian fulfilled his right in contracting the marriage on behalf of the woman under his guardianship and at the same time the woman maintained her right in choosing her husband. Thus, there will be no clash between the two.

However, it may be the case that the guardian of the woman, regardless of whether he is the father or someone else, is not understanding or just, and the woman has been sought in marriage by a good man who she finds as an appropriate husband for herself, but the guardian prevents her from marrying him. The woman in this case has the right to go to a court of law and complain to the judge, asking him to marry her, so that she will not miss the opportunity of getting married and establishing a happy family. It may also happen in some Muslim countries that the guardian becomes abusive and obstinate and he does not allow the girl under his guardianship to marry for any genuine reasons. He may do this only out of being unfair or extorting. Again in such a case, the woman has no choice but to go to court to ask for her right in choosing a husband.

Bin Bāz had something to say about such guardians. He said that

> Although Islam has urged people to get married, yet at the same time it warned guardians against treating women under their guardianship unfairly by preventing them from marriage or by confining them to their bedrooms in accordance with Allah's statement in Sūrat Al-Baqarah: 232
>
> When ye divorce women, and they fulfil the term of their (*ʿiddah*), do not prevent them from marrying their (former) husbands.

Preventing a woman from marriage may cause her a lot of harm and may lead her to the path of corruption, and this in turn will negatively affect the Muslim society at large. It is also unjust for the guardian to deprive the woman of something that Allah has permitted her to do and made it a source of happiness, chastity, and offspring's. Such misbehaviour, on the part of the guardian, will lead the woman into a lot of sadness as well as distress.[48]

This clearly shows that it is not acceptable, according to the *Sharīʿa* as represented by the verse from Sūrat Al-Baqarah above, for the guardian to be abusive in the way he uses his right in being a guardian of a woman in the marriage contract.

5. Factors Sought in the Proposing Husband

There are certain requirements that the proposing husband should have so that the guardian may grant his agreement to the marriage. For example, the husband should have strong faith, good manners, acceptable physical appearance, among others, as the following sections show.

5. 1. Strong Faith and Good Manners

Before the guardian decides whether to accept or reject the proposing husband, he should do his best to find out more about the man especially his

faith and manners, so that the subject is not dealt with unfairly. In fact, this is one of the most fundamental requirements that should be satisfied before the marriage can proceed. Thus, if the proposing man is ill-mannered and pays no regard to religion and Allah, the guardian is prohibited from agreeing to such a person, as this will put the wife in a very vulnerable position. This may cause the wife and her future children too much damage. This is in fact the wisdom of the Prophet's emphasis on the need to accept, as a husband, any man whose faith and manners are good. The Prophet said

> If a man of good faith and manners proposes to get married to a woman under your guardianship, you should agree to his marriage. If you do not give her in marriage to him, that will be seditious and immoral.[49]

In this *ħadīth*, Allah's Messenger urges the fathers, and guardians in general, to facilitate marriage for young people. So they should not ask for too much in dower. It is enough for the husband to be a good person with good knowledge of the *Qur'ān*. In fact, there are many stories from the Islamic tradition that support this point. For example, it was narrated by Mālik that a woman came to the Messenger of Allah and said, "Messenger of Allah! I have given myself to you." She stood for a long time, and then a man got up and said, "Messenger of Allah, marry her to me if you have no need of her." The Messenger of Allah said, "Do you have anything to give her as a bride-price?" He said, "I possess only this lower garment of mine." The Messenger of Allah, said, "If you give it to her you will not have a garment to wear so look for something else." He said, "I have nothing else." He said, "Look for something else, even if it is only an iron ring." He looked, and found that he had nothing. The Messenger of Allah, said, "Do you know anything from the *Qur'an*?" He said, "Yes. I know such-and-such a *sūra* and such-and-such a *sūra,"* which he named. The Messenger of Allah, said to him, "I have married her to you for what you know of the *Qur'an*." This story emphasises the importance of the requirement of good faith and good manners on the part of

the potential husband. Thus, if the man is well behaved and is of good faith, there is no reason as to why the guardian should not agree to the marriage.

The requirement of strong faith and good manners is also emphasised by Imām Ḥasan Bin ᶜAli when, as it was reported, a man came to him and said, "O Imām! I have a daughter and there are many men proposing to her. Who should I make her marry?" Imām Ḥasan replied

> Let her marry someone who is fearful of Allah, because if he loves her he will be nice to her, and if he hated her he would not be harsh and unfair with her.[50]

Al-Qaraḍāwī stressed the importance of the guardian being cautious in agreeing to the marriage of the woman under his guardianship. He said

> As for getting married to a careless and transgressing man under the pretext of trying to guide him to the right path, it is a good intention, but it is a great risk the outcome of which no one can predict. However, what is more common in such marriages is that the careless man tries to negatively influence his wife and if he fails to do so, he will start to turn her life to a misery in various ways. Obviously, this kind of behaviour is rejected and jurists warned us of such things, because they believed that "if one gives his daughter in marriage to a transgressor, he will be severing the bond on kinship.[51]

5. 2. Physical Appearance

Another important requirement that the proposing husband should have, is good physical appearance. This is a sensitive matter that many guardians actually ignore, although it has a great impact on the woman. In fact, according to *Shariᶜa*, it is not permissible for the guardian to oblige the woman under his guardianship to get married to an ugly man, because this will not be conducive to love and intimacy between the woman and her future

husband. It is quite natural that the woman in this case will hate her husband and she cannot help it. It is very difficult for a woman to marry someone who she does not want. Such behaviour constitutes a violation of, and interference in, the woman's right to choose her husband, leading to discordance between the two parties and a rapid collapse of marriage. In this regard, Umar Ibn Al-Khaṭṭāb says

> Do not (i.e., addressing the guardians) make women get married to ugly men, because they (i.e., women) like for themselves what you like for yourselves.[52]

According to Umar, a woman cannot be forced to be given in marriage to an ugly man. Similary, Ibn Al-Jawzi argued that the proposing man should be attractive to the woman. He said "it is preferable for the father to find his daughter an attractive man, because the woman likes what the man likes."[53] This means men like beautiful women, and women like handsome men. Islam also urges fathers, and guardians as well, to take this point into consideration when deciding on a potential husband for their daughters.

One may ask what about ugly people? Is it not possible that they will get married? The obvious answer to this question is yes, because what may be ugly for you may be beautiful for someone else. Beauty and attraction are relative matters. Furthermore, the element of beauty is only one out of many factors that are usually accommodated before the final decision regarding the potential bride or bridegroom is made. It may be the case that somebody is ugly but he/she has a very attractive personality or a good faith and this may make people show interest in getting married to this person.

5. 3. Age

Another issue that the guardian has to consider is the age of the proposing man. His age should be close to that of the woman. Thus, he should not give her in marriage to an old man who cannot fulfil his marital duties. Forcing a

woman to get married to someone who is so many years older than the woman may leave her unsatisfied and psychologically unhappy, and this may lead her to shameful deeds. A good guardian should take this point into account before he agrees to the marriage in order not to be unfair to the woman. Ibn Al-Jawzi said in this regard that

> You (i.e. the guardian) are not allowed to force the woman to marry someone who is old or hateful to her, as this may lead her to do forbidden deeds.[54]

However, this sort of thing is quite common these days. There are in fact some guardians who force women to get married to men who are much older and these guardians show no respect at all toward the women's opinions of these old men. The guardian in these cases is not interested in whether the woman will accept the man as a husband, because of his misconception of the right he is given by *Shari^{c}a*. He wrongly believes that because he is the guardian of the woman, *Shari^{c}a* entitled him to marry her to anyone of his own choice. There are many stories I personally know but I want to tell about this one where a girl was made to get married to a man who she was never consulted about or even given the chance to see before marriage. On the wedding day, she realised that she was getting married to an old man who lost one of his eyes. The girl was shocked and ran away from this man who tried to get her back by all means. But she was determined to leave him and refused to come back to him, so he had to leave her and he divorced her. This of course cost him a lot of effort, time and money in courts and elsewhere in an attempt to get her back. This sad story demonstrates clearly that the guardian has transgressed his authority and interfered in the woman's choice of husband. Thus the poor girl was not only not consulted but also not given the chance to see the man or even to know anything about him. She was pushed to get married to the first man who proposed to her. In such a case, the guardian or the

father is sinful as he has infringed upon the rights of his daughter or the woman under his guardianship and caused her a lot of trouble and misery for some time.

6. Advantages of Giving the Woman the Right to Choose a Husband

Granting the woman the right to choose a husband has various positive effects on many levels. In this section, I want to consider some of the advantages of giving the woman the right to choose her husband.

First, one of the most important advantages of giving the woman the right to choose a husband is that it constitutes an acknowledgement of (and a sign of respect for) the human aspect in the woman, as it shows that she is equal to the man not only in rights and duties but also in reward and punishment. This point is stressed in Sūrat Al-Nisā': 1:

> O mankind! Reverence your Guardian-Lord, Who created you from a single person.

Similarly it is stated in Sūrat Al ᶜImrān: 195 that the Lord treats men and women equally.

> And their Lord hath accepted of them, and answered them: "Never will I suffer to be lost the work of any of you, be he male or female: Ye are members, one of another."

Both verses from the *Qur'ān* show that men and women are equal. The first verse demonstrates that both the man and the woman are created from a single person, whereas the second one shows that the good work neither of the man nor of the woman will be lost or wasted. So they are treated equally.

It was also reported that Allah's Messenger had said that "Women are full sisters to men."[55] This presents straightforward evidence that *sharīᶜa* takes care of both men and women when it comes to marriage. In other words, they are both treated equally fairly and justly according to Islamic Law. For

example, the man always wants to get married to a virtuous woman that suits him and that will make a good mother for his future children. Similarly, the woman wants the same thing because she, too, always wants to settle down and get married to a good man who will be a good father of her future children. In fact, these wants and tendencies are part of human nature regardless of the sex of the person. For example, according to *shari^{c}a* (in fact there is a sort of *ijmā^{c}* among all scholars that) the man has the right to look and see the woman he wants to get married to before he proposes to her. This is consistent with what Jābir Ibn ^{c}Abdullah narrated about the Prophet, who is quoted to have said

> When one of you asked a woman in marriage, if he is able to look at what will induce him to marry her, he should do so. He (Jābir) said: I asked a girl in marriage, I used to look at her secretly, until I looked at what induced me to marry her. I, therefore, married her. [56]

Moreover, Abū Huraira reported that he was in the company of Allah's Messenger when a man came in and informed him that he had contracted to marry a woman from the *Anṣār*. Thereupon Allah's Messenger asked the man: "Did you cast a glance at her?" He said: "No." Allah's Messenger said to him: "Go and cast a glance at her." [57] The permission the man has to have a glance at the woman he proposes to is very significant because it plays a great role in making the man decide whether to go forward with the marriage procedures or forget it, because he may find something in her that he does not like. This is why jurists argue that "if a man intends to get married to a woman, he is permitted to cast a glance at her face and palms." Therefore, it was permissible to cast a glance at the woman whom one intends to marry particularly the face and the palms in accordance with *shari^{c}a*.[58] Thus men and women are both equal in this respect as each one of them is given the chance to see the other before marriage.

In fact, *shariᶜa* does not only give the man the right to see the woman he intends to get married to before he actually decides whether to marry her or not, but also gives the woman the right to express her opinion regarding the man who may become her husband. The woman's opinion is very important, as we have seen earlier, and this is the wisdom of requiring the guardian to ask her about her opinion of the proposing man before marriage. This clearly shows that Islam treats men and women on a par in marriage. Like the man, the woman wants to know the person who is proposing to her. For example, it is important for her to know his social status, age, job, and maybe other things that relate to the way he looks, etc. These details will help her decide and give her opinion in a straightforward way. It seems that Muslim scholars agree on the need for the woman to know these things about the man who intends to get married to her. For example, Al- Śanᶜāni says

> She is treated similarly. So she is allowed to glance at him and she may like something in him just as he may like something in her.[59]

It is also said by others that

> The woman is like the man in that she is allowed to see the face and palms of the man proposing to her.[60]

From what has been said above, one concludes that it is significant and necessary for both the man and the woman to see and know each other before the marriage, so that they may proceed with the marriage preparations. This is consistent with the teachings of the Islamic Law for both men and women alike.

Second, it is also plausible to say that granting the woman her freedom to decide on who to get married to has other positive implications. One may conclude from this that it is not enough to obtain the consent of the husband and the guardian, as the consent of the wife is as vital as that of each of the husband and the guardian in order for the marriage to be valid. In this regard, Maḥmūd Shaltūt says

Shari^{c}*a* had always discredited any marriage that is based only on the consent of the guardian, even if he is the father, as long as the two parties (i.e. the man and the woman), or even one of them, are not content deep in his/her heart although they may not spell it out. Likewise, *Shari*^{c}*a* did not embrace a marriage based on the mere consent of the woman. *Shari*^{c}*a* wants the matter to be through discussion and consultation among all of them. [61]

The woman can always express her consent either through saying it verbally if she is a *thayyib* or *bikr* or by remaining silent if she is a virgin. The silence here is taken to be a degree of smiling and laughing; therefore, it is considered to be consent. Al-Kāsānī pointed out the reasons for interpreting a woman's silence as an indication of consent so there will be no need to articulate the opinion and he said

> The evidence is based on the plausibility of silence being an indicator of consent in the case where the woman is virgin. A virgin woman is shy and this shyness holds her from explicitly pronouncing her agreement to marriage, because such a deed will exhibit her desire in men. Thus, if she had to articulate her agreement in words, but she could not due to her shyness, she may not get married although she wants to. This is not encouraged in Islam because she is not blamed for being shy. On the contrary, she has the right to show some shyness.[62]

Therefore, it suffices for the woman to keep silent, a thing that is considered a sort of exercising her right to choose a husband. Rajā' Ghūli argues that

> The woman should be more entitled to the right to choose a husband than the man, because the man has the authority to end the marriage through divorce, whereas the woman is not allowed to do so.[63]

This further stresses the importance of the woman's right to choose her husband although this may be manifested by showing agreement through keeping silent.

Third, one may also infer from the requirement that the woman's consent in marriage should be sought, that the woman's rejection of a marriage offer which has been blessed by her father, is not considered a kind of disobedience or rebellion against her father's decision, because the right to choose a husband is her own, and nobody else may interfere in the exercise of this right. Thus she is not blamed by Islamic Law for not obeying her father in this particular matter. There are many examples where women did not agree with their fathers' choices during the days of the Prophet, who was the legislator at the time. None of those women were rebuked by the Prophet for not obeying their fathers or for complaining against them to the Prophet. On the contrary, the Prophet supported them and gave them the authority to decide for themselves in matters pertaining to marriage.

Fourth, we also learn from the *ħadīths* presented in section (2) of this chapter that the guardian has to take into consideration a number of important issues, so that his opinion regarding the marriage of the woman under his guardianship does not clash with that of hers. In case there is a difference in opinion between the guardian and the woman under his guardianship, he should do his best to inquire about the potential husband and find out more about him if he does not know him, because marriage is a permanent partnership. This is exactly what the Messenger meant when he said in a *ħadīth* that "marriage is a form of slavery, so one has to know where his daughter ends up in marriage." The Messenger likened marriage to captivity and said the woman becomes a captive or a prisoner of her husband as soon as the marriage is contracted. Al-Kāsāni commented on this by saying that "calling marriage 'slavery' is only for the sake of a metaphor, because there is no slavery any longer."[64]

7. May a Woman Present Herself to a Righteous Man for Marriage?

The Islamic Law gave the woman the right not only to choose a husband, but also to present herself to a righteous man as he will be a more qualified husband. There are different *ħadīths* that tell about cases where women presented themselves to men during the days of the Prophet, and he did not speak negatively about them. For example, we were told that Khadījah saw some signs of piety, sincerity and honesty in the Prophet, and she liked these qualities in him, so she sent her maid to him asking him if they (i. e., the Prophet and Khadījah) could get married. The Prophet agreed to this; therefore, he took Abū Ŧālib, his uncle, with him and together went asking for her hand in marriage. In fact, this took place before the revelation upon the Prophet and before Muħammad's mission as the Messenger of Allah. However, even after that, the possibility of the woman presenting herself in marriage to a righteous man was confirmed and was never prohibited in Islam. Evidence that it is acceptable in Islam for the woman to present herself to the man is found in *Śaħīħ Al-Bukhāri*, as this book dedicates a chapter to this issue entitled "A Woman Can Present Herself to a Righteous Man (for marriage)." In this chapter, there is a story about a woman who came to the Prophet offering herself to him. The Prophet looked at her carefully and fixed his glance on her and then lowered his head, which indicated a polite rejection. Then, one of the Prophet's Companions asked him to marry her to him if he (i.e. the Prophet) is not interested in such a marriage.

Al-Bukhāri cited another *ħadīth* which confirms this one. In this second *ħadīth*, Al-Bukhāri reported that Thābit Al-Bunāni said that[65]

> I was with Anas and his daughter, when he said that a woman came to Allah's Messenger presenting herself to him. She said to him: 'O Messenger of Allah! Do you want anything from me?' Then, Anas's daughter said: 'What a rude woman she is!' Anas replied, 'she is better than you. She desired the Prophet so she approached him.'

Clearly, this *ħadīth* demonstrates that it is possible for a woman to approach a man she likes for marriage. This is what happened to the Prophet, and he did not prevent people from doing this. This means that this kind of conduct is acceptable, and no one else should be able to prohibit it.

Ibn Ħajar Al-ᶜAsqalāni commented on these two *ħadīths* by saying,

> They have evidence that it is possible for the woman to present herself to the man for marriage and indicate that she desires him. There is nothing wrong in this. As for the man to whom she gives herself, he is free to accept or reject. However, if he rejects he should not say that verbally. He should just keep silent.[66]

In an addition to what Ibn Ħajar Al-ᶜAsqalāni commented on concerning the woman presenting herself to the man for marriage as we saw above, Al-Qasṭalānī[67] and Al-ᶜAynī [68] said that

> If the woman offers herself for marriage to a man for religious or noble purposes, as is the case when the man is righteous, and knowledgeable, there is no sin doing that. On the contrary, such a woman is a virtuous one, as implied by Anas when he said to his daughter "she is better than you". This is not the same if the woman presents herself for marriage to a man for materialistic or mundane purposes, as is the case when she does it for money, or authority. This is bad and cannot be acceptable.

I want to add that even the guardian may present his daughter or the woman under his guardianship to a righteous man. There is no wrong doing in that, because Umar Ibn Al-Khattāb, after the death of the husband of Ħafsah, his daughter, went to Uthmān Ibn ᶜAffān and offered him Ħafsah. But Uthmān asked for more time to think about the matter and did not give a reply at all. So he offered her to Abū Bakr, who kept silent and did not give an answer. Later on, she got married to Allah's Messenger. Presenting the woman to the man in this case was done by the guardian.

Thus, according to *shari'a*, the woman is given the right to choose the man who she believes to be appropriate for her, regardless of whether he proposes to her or she presents herself to him for marriage, given that she knows him, appreciates his faith, righteousness, and desires to get married to him. In case he proposes to her, she has the right to either accept or reject, but in case she gives herself to him in marriage, it is the man who has this right.

8. Conclusion

In this chapter, I have discussed a number of issues pertaining to the basic right that any woman should have: it is the right to choose her husband and life partner. In the first section of the chapter, I introduced the woman's right in choosing a husband in Muslim countries, particularly nowadays, because women are denied this right on a large scale. In section two, I presented different types of evidence to support the idea that Islam gave the Muslim woman the right to choose a husband. Evidence used came from the *Qur'ān*, tradition and *ħadīths*. After that, I discussed the different advantages of giving the woman her right to choose her potential husband in section three. Section four is concerned with some of the required qualities that a proposing husband should have so that he may be given the woman in marriage by the guardian. These qualifications are manifested in a number of factors that include: strong faith, good manners, acceptable physical appearance, age and other things. Next, I moved to deal with the issue of the woman being a guardian of herself or of other women and the implications of this. *Al-Jumhūr* argue that it is not permissible for the woman to marry either herself or another woman to a man, whereas *Ħanafi* scholars argue for the possibility of the woman to contract marriage for herself with no male guardian witnessing the contraction. Of course each party had its own evidence from the *Qur'ān* and *ħadīths* to support its point of view. Then, I introduced my viewpoint which is, to a large extent, based on the opinion of *Al-Jumhūr*. Thus, I favour *Al-Jumhūr*'s opinion because of the clear and overwhelming evidence they presented. The

chapter ends with section six, in which I argue that a woman may present herself to a man for marriage. Furthermore, I show in this section that even a guardian may present the woman under his guardianship to a man, provided this man is righteous, and virtuous.

I believe that Islam has strengthened the position of woman in society and in marriage in particular, as it gives her the right to accept or reject any man proposing to her in marriage without any interference from the guardian or anyone else. In fact, woman in Islam have gone a step further than that when, under certain circumstances, it has became possible for her not only to accept and reject men as potential husbands, but also to propose to the man.

Notes to Chapter Four

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3. Siddiqi, Muhammad Iqbal, *The Family Laws of Islam*, (Delhi: International Islamic Publishers, 1988), p. 71.
4. Abdal ʻAti, Hummudah, *The Family Structure in Islam*, (Indiana: American Trust Publications, 1977), p. 70.
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   See also, Al-Dasūqī, Muhammad, *Ḥāshiat Al-Dasūqī*, vol. 2, (Beirut: Dār Al-Fikr, n. d.), p. 223.

   See also Al-Azharī, Ṣāliḥ, *Jawāhr al-iklīl sharḥ al-ᶜallamah Khalīl min madhab al-imām Mālik*, vol. 1, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1997), p. 390.

   See also Al-Kashnāwi, Abu Bakr, *Ashal al-Madārek Sharḥ Irshād al-Sālek*, vol. 2, (Beirut, Dār Al-Fikr, 1988), p. 71.
7. Al-Nawawī, Yaḥya, *Ṣaḥīḥ Muslim bi-sharḥ Al-Nawawī*, vol 9, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1987), p 205.
8. Al-Nawawī, Yaḥya, *Ṣaḥīḥ Muslim bi-sharḥ Al-Nawawī*, vol 9, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1987), p 205.
9. Al-Shāfiᶜī, Muḥammad, *Al-ʻUmm*, vol. 5, (Beirut: Dār Al-Maᶜrifah, 1987), p. 17-18.

   See also Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol.3, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1958), p 149.

See also Al-Nawawī, Muḥydīn, *Al-Majmūᶜ sharḥ al-muhadhab*, vol. 6, (Beirut: Dār Al-Fikr, n. d.), p. 165.

10. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1972), p. 380.

See also Ibn Mufliḥ, Shams Al-Dīn, *Kitāb al-furūᶜ*, 4th edn., vol.5, (Beirut: ᶜAlim Al-Kutub, 1985), p 172.

11. Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol. 5, (Beirut: Dār Al-Maᶜrifah, 1987), p. 2.

See also Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 2, edited by M. K. T. Ḥalabī, (Beirut: Dār Al-Maᶜrifah, 2000), p. 383.

12. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 380.

13. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol.2, p 283.

See also Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol.5, p 2.

See also Damādā, ᶜAbdullah, *Majmaᶜ al-anhur fi sharḥ multaqa al-abḥur*, vol.1, (Beirut: Dār Iḥyā' Al-Turāth Al-ᶜArabī, 1389. A. H.), p 333.

See also Al-ᶜAynī, Maḥmūd, *Al-Bināiah sharḥ al-hidāyah*, 2nd edn., vol.4, (Beirut: Dār Al-Fikr, 1990), p 584.

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15. Ibn Taimiyah, Aḥmad, *Majmūᶜ al-fatāwī*, vol. 32, (Riyāḍ: Dār ᶜAlim Al-Kutub, 1991), p. 30.

16. Ibn Al-Qayyim Al-Jawzī, Shams Al-Dīn, *Zād al-maᶜād*, vol. 4, (Cairo: Dār Al-Taqwā li-al-turāth, 2000), p. 43.

17. Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol. 5, p. 4.

18. Abū Da'ūd, *Sunan Abī Da'ūd*, edited by ᶜIzzat ᶜUbeid Al-Daᶜas, and ᶜAdil Al-Sayyid, Beirut: Dār Al-Ḥadīth, 1974.

19. Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol. 5, p. 10.

20. Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol 5, (Beirut: Dār Al-Maᶜrifah, 1987), p. 9.

See also Al-ᶜAdawī, ᶜAlī, *Ħāshiat Al-ᶜAdawī*, vol. 2, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1997), p. 56.

See also A-Shāfiᶜī, Muħammad, *Al-'Umm*, vol. 5, (Beirut: Dār Al-Maᶜrifah, 1987), p. 18.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 7, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1972), p. 385.

21. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 7, p. 385.
22. Al-Nawawī, Yaħya, *Ṣaħīħ Muslim bi-sharħ Al-Nawawī*, vol 9, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1987); p. 204.
23. Al-Nawawī, Yaħya, *Ṣaħīħ Muslim bi-sharħ Al-Nawawī*, vol 9, p. 203.
24. Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfāż al-munhāj*, vol. 3, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1958), p. 150.
25. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, p. 385.
26. Al-ᶜAdawī, ᶜAlī, *Ħāshiat Al-ᶜAdawī*, vol. 2, p. 56.
27. Al-Nawawī, Muħydīn, *Al-Majmūᶜ sharħ al-muhadhab*, vol. 16, (Beirut: Dār Al-Fikr, n. d.), p. 165.
28. Ibn Taimiyah, Aħmad, *Majmūᶜ al-fatāwī*, vol. 32, (Riyāḍ: Dār ᶜAlim Al-Kutub, 1991), p 29.
29. Ibn Taimiyah, Aħmad, *Majmūᶜ al-fatāwī*, vol. 32, (Riyāḍ: Dār ᶜAlim Al-Kutub, 1991), p. 39.
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31. Ibn Jazzi Al-Māliki, *Qawānīn al-aħkām al-sharᶜiyyah*, edited by ᶜAbdulraħman Ħasan Maħmūd, (Cairo: ᶜAlem Al-Fikr, 1985), p. 197.
32. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh ash-sharħ al-kabīr*, vol. 7, p. 337.
33. Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfāż al-muħtāj*, vol. 3, (Egypt: Maṭbaᶜat Muṣṭafa Al-Bābi, 1985), p. 147.

34. Al-Qurṭubi, Muḥammad, *Jāmiᶜ al-aḥkām al-fiqhiyyah*, vol. 2, edited by F. A. Al-Jundi, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1994), p. 185.

35. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 9, (Cairo: Dār Al-Rayyān, 1987), p 89, hadith no. 5130.

36. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, p. 147.

37. Al-Qurṭubi, Muḥammad, *Jāmiᶜ al-aḥkām al-fiqhiyyah*, vol. 2, edited by F. A. Al-Jundi, p. 185.

38. Abū Zahrah, Muḥammad, *Al-Aḥwāl al-shakhsieh*, (Beirut: Dār Al-Kitāb Al-ᶜArabi, 1984), p. 129:

See also Siddīq, Ḥasan Khan, *Al-Rawḍah al-nadīeh sharḥ al-durar al-bahīyyah*, vol. 2, (Cairo: Maktabat Dār Al-Turāth, n. d.), p. 13.

39. Al-Ḥanafi, Ibn Al-Humām, *Sharḥ fatḥu al-qadīr*, vol. 2, (Egypt: Maṭbaᶜat Muṣṭafa Al-Bābi, 1970), p. 2.

40. See: Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 2, 241.

41. See: Al-Tamurtāshi, Shams Al-Dīn, *Radd al-muḥtār ᶜalā al-durr al-mukhtār: ḥāshiet Ibn ᶜAbdīn*, edited by A. ᶜAbdulmajīd Taᶜmah Ḥalabi, (Beirut: Dār Al-Maᶜrifah, 2000).

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42. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, p 1366.

41. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, p 1367.

See also Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol. 5, p. 11.

42. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, p 1367.

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43. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. , p .

See also Al-Sarkhasī, Shams Al-Dīn, *Al-Mabsūṭ*, vol. , p. .

43.44. Ibn Qayyim, Shams Al-Dīn, *Zād al-maᶜād*, vol. 4, (Cairo: Dār Al-Taqwa li-Al-Turāth, 2000), p. 43.

45. Shaltūt, Maḥmūd, *Al-Islām ᶜaqīdah wa shariᶜa*, p. 233.

44.46.Bin Bāz, ᶜAbdullah, *Majallat al-buĥūth Al-Islāmieh*, issue 9, (Riyadh: n. d.), p. 8.

47.Al-Tirmidhī, *Sunan Al-Tirmidhī*, vol. 3, p. 394. ĥadīth: 1084.

48.Al-Sharqāwī, Aĥmad, *Al-Mar'ah fī al-qaṣaṣ Al-Qur'ānī*, vol. 1, (Cairo: Dār Al-Salām, 2001), p. 450.

49.Al-Qaraḍāwī, Yusif, *Qaḍāya Islāmiah muᶜāṣirah*, (Jordan:, Dār Al-Ḍiyā', 1987), p. 69.

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51.Ibn Al-Jawzī, *Aĥkām al-nisā'*, p. 305.

52.Ibn Al-Jawzi, *Aĥkām al-nisā'*, p. 305.

53.Al-Tirmidhī, Muĥammad, *Sunan Al-Tirmidhī*, vol. 1, edited by M. F. Abdulbāqi, (Beirut: Dār Al-Kutub Al-ᶜIlmieh), p. 195. ĥadīth no: 113.

54.Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 2, p. 565. ĥadīth no: 2082.

55.Al-Tirmidhī, Muĥammad, *Sunan Al-Tirmidhī*, vol. 3, p. 397. ĥadīth: 1087.

56.Al-ᶜUthmani, Muĥammad, *Raĥmat al-'ummah fī ikhtilāf al-ā'immah*, 2nd edn., (Egypt: Maṭbaᶜat Muṣṭafa Al-Bābi, 1967), p. 262.

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60.Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 2, p. 387.

61.Ghūli, Rajā', "Al-Zawāj wa Ẓahirat al-ṭalāq", a research paper presented at the fourth regional conference on al-mar'ah fī al-khalīj wa al-jazīrah al-ᶜArabiyyah, Musqaṭ: 15-18 December, 1986.

62.Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 2, 394.

63. Al- ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 9, p. 80. ḥadīth no: 5120.

64. Al- ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 9, p. 80.

65. Al-Qasṭalāni, Shihāb Al-Dīn, *Irshād al-sāri li-sharḥ ṣaḥīḥ Al-Bukhāri*, vol. 8, (Beirut: Dār Iḥyā' Al-Turāth Al-ᶜArabi, n. d.), p. 44.

66. Al-ᶜAynī, Badr Al-Dīn, *ᶜImdat al-qāri sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 20, (Beirut: Dār Iḥyā' Al-Turāth Al-ᶜArabi, n. d.), p. 113.

CHAPTER FIVE

THE WOMAN'S RIGHT TO DOWER

1. Introduction

This chapter studies the concept of dower as one of the woman's rights according to the Islamic Law. It focuses on the way Islam promoted the issue of the dower and made it a right for the woman, so a marriage contract will not be valid without a dower. I also consider how the different Islamic schools dealt with it. Then, I discuss the importance and legitimacy of dower in marriage. Another point that will be discussed is the (maximum and minimum) amount of dower according to different Islamic schools. Finally, I embark on discussing the contexts in which a dower should be prepaid or delayed.

A dower, the Arabic word for which is *al-mahr*[1] is one of the woman's rights that was imposed by God on the husband towards his wife. The idea of the dower was not first introduced to mankind by the Islamic law, or *al-shari'a*, given that it was a common thing to Arabs and other nations during the pre-Islamic era. However, it was the Islamic law that cultivated and regulated this right and gave it its appropriate form. The woman in the pre-Islamic era was treated as property that could be sold or bought with no regard to her opinion. If a man wanted to get married to a woman, her legal guardian would negotiate for a better dower, which he, and not the woman, would take. This explains why some Arabs in the past would congratulate a husband if his wife gives birth to a female baby. In fact, they would do this believing that the newly born daughter would grow up and get married and he, the father, would get her dower. Therefore, he will be more well off. However, with the birth of Islam in the Arab Peninsula, lots of concepts and practices of that time gave

way to new Islamic concepts and values that were of great advantage for both the individual and the society in general. One of the concepts that Islam had redefined was the dower. According to the then new Islamic law, it became a woman's right and nobody else's, no matter who, may take it or do anything with it without her consent or permission.

2. The Definition of the Dower

The legal definition of the dower according to *Ħanafiyyah* is "... the property which is incumbent on a husband either by reason of its being named in the contract of marriage, or by virtue of the contract it self. As opposed to the usufruct of the wife's person". [2]

This means that the husband is obliged to give dower money or property to his wife even if it is specified or not.

However, this definition and others[3] introduce the importance of dower in the marriage contract. It is not the price of the women to enjoy her body only. But it is an honour for the wife, which expresses the real desire of the husband to become his partner.

According to Abū Al-Nūr, the dower is what a husband willingly offers to his wife in order to accept him as a husband and partner. He states that "the dower honours the woman in different ways, provided that the woman is not only for enjoyment and that marriage is not looked upon as sex.[4]" The dower also enhances the woman's status because she is no longer looked on as a female slave. Imām Muħammad ᶜAbduh argues that

> One should look at the dower as something superior to what Islamic scholars had referred to. The dower, or *ṣadāq*, is not an exchange of, or the price for, the body. [5]

3. Evidence for the Legalisation of Dower

The dower, according to the definition above, is something that is heavenly or divine and it is prescribed by God. Evidence for this interpretation comes from the *Qur'ān*:

> And give the women, on marriage, their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer. Sūrat Al-Nisā': 4.

This verse from Sūrat Al-Nisā' explicitly states that women should be given their dowers, which implicitly constitutes a call to abandon the pre-Islamic practices pertaining to the dower, and this is what the word "give" in the previous verse implies, as it is used in the imperative form. Scholars[6] interpreting this verse expressed the view that those who should "give" are either the husbands or the guardians. In the case of the husbands, they are obliged to give women their dowers '*niħlatan*', which means out of their own good pleasure or willingly. As for the guardians, they have to give the dowers that they receive to women, because it is forbidden for them to keep anything of these dowers unless they are allowed to do so by the women themselves. It is possible that a woman may give some of her dower to her husband or her guardian. However, a husband or a guardian may not resort to trickery or anything of the kind to take the dower, in which case the woman apparently seems to voluntarily give something from her dower.

In the Islamic world, it is a common practice that the man is obliged to pay a dower out of his own will, whereas the woman is not required to pay anything to the man for the marriage to proceed, although marriage enjoyment and partnership is mutual. It is the man only who pays a dower and it is he who proposes to her and this costs him money.

More evidence for the obligation of the dower comes from Sūrat Al-Nisā' where Allah says:

Also (prohibited are) women already married, except those (slaves) whom your right hands possess: Thus hath God ordained (prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property-desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree mutually (to vary it), there is no blame on you, and God is All-knowing, All-wise. Sūrat Al-Nisā': 24

Al-Qurṭubi argues that this verse provides proof for the existence of *ṣadāq*, or dower, in any marriage contract; thus all marriage contracts must include dower.[7] Further support for this also is found in the Prophet's sayings. Ibn ᶜAbbas quotes the Prophet as saying: "Give them their dowers." If a man gets married to a woman and has a sexual relationship with her, he has to pay her a full dower because enjoying the woman means marrying her. [8]

The *sunnah* of the Prophet is used to further support what had been revealed in the *Qur'ān* regarding a woman's right to her dower. Ibn ᶜAbbās narrated that when ᶜAli contracted to marry Fātima, the Prophet said to him: "Give her something as *ṣadāq*." ᶜAli replied: "I have nothing with me." The Prophet asked: "Where is your Ħuṭaimiyyah Shield?"[9] This indicates that he (i.e., ᶜAli) should give her something though it may be of little value. He may give her something that is symbolic, such as a shield. The purpose of doing this is to make her happy.

It had also been reported that Abū Salama Bin ᶜAbdurahman narrated that:

I asked ᶜAisha: 'How much had Allah's Messenger given as *Ṣadāq*?' She replied: 'His *Ṣadāq* to his wives was twelve *'uqiyyah*[10] and *nash*.' She asked, 'Do you know what a *nash* was?' I replied: 'No.' She said,

> 'it was half an *'uqiyyah*; so the total was five hundred *dirhāms* and that was the God's Messenger's *Ṣadāq* to his wives.' [11]

These are only few of the many sayings or *ħadīths* that strongly support and explain what the Holy Qur'ān states about the women's need to take their own dowers. Muħammad, the Messenger of God, set a good example and gave his wives their full dowers. He paid each of his wives five hundred *dirhāms* for their dower.

Furthermore, there was a consensus among Muslim scholars regarding the women's rights to their dowers, as they all agreed that there should be a dower in a marriage contract. In fact, in a step to ensure that this requirement is met, the Islamic scholars promised that those who failed to comply with this requirement by tricking or cheating the woman would be severely punished on the Day of Resurrection. This is clearly demonstrated in a *ħadīth* by the Prophet. According to this *ħadīth*, which was labelled as *ṣaħīħ* by Al-Ṭabrāni, who narrated it, the Prophet was quoted to have said

> He who gets married to a woman and intends not to give her her dower, and then he dies before she gets what she deserves, will face Allah on the Judgement Day as a fornicator. [12]

This is a harsh punishment from Allah to any husband who tries to get married to a woman but evades giving her anything of her dower by means of trickery.

4. The Importance of Dower in Islam

It is argued that the importance of the dower, according to the Islamic Law, arises from the fact that it fulfils a variety of functions that contribute to the success and prosperity of the marriage relationship. First, giving a woman her dower is a sign of respect, she feels more respectable and exercises the right

to own, in the same way men do. Before Islam, a woman was treated as property that was owned. However, in Islam she became a person of dignity, value, decision, and power. She acquired the right to use her money in the way she wants. This has a positive impact on the future of the family as it strengthens the bonds between the wife and her husband.

Second, giving the dower, which is a woman's right, to the woman and not to anyone else, reduces the authority imposed upon her by her guardian. One has to remember that in the pre-Islamic days, a woman's guardian, whether he is her father or somebody else, used to take the whole dower leaving her nothing. Abdal ᶜAti says

> Payment of the dower to the bride herself probably minimises the element of self-interest and power of the guardian in his choice of husband for the ward. He became mainly concerned with what is best for the woman. This change, and many others, made by Islam tended to remove control over their affairs from the women's male relatives and protectors and to vest it in themselves. [13]

Third, the dower also helps in bringing about the feeling of pleasure and happiness in women, so they have more pride and self-confidence. She will be a better wife or marriage partner, given that women in the Islamic world, in general, do not have any relationship with their husbands before marriage. Thus, it is argued that a dower would guarantee that the relationship proceeds smoothly.

Another consequence of the prescription of the dower is that giving a dower provides the husband with the chance to learn to bear responsibility and live up to this responsibility. If the husband is not required to pay a dower, he would look down on the woman and he would probably even try to get rid of her because he did not work hard to get her. Al-Kāsānī says in this regard that

> The dower was legislated and became an integral part of the marriage contract for the sake of marriage stability, because there might be lots of things in any marriage that may drive the husband to seek divorce. Had there not been a dower, it would have been much easier to obtain divorce even if the reason is very trivial or insignificant. [14]

Finally, when a woman gets her dower, she feels more secure because the husband who can afford a dower and is willing to offer it would be prepared to pay for her living expenses as well. ᶜAbdal'Aṭi says

> It may be thought of as a manifest assurance on his part that the bride's economic security and rights will be maintained. [15]

These are some of the reasons that show how significant it is to impose a dower on men who want to get married. Now that I have highlighted the importance of dowers in Islam, let us move to consider the legitimacy of marriage contracts that do not state how much a dower is.

5. The Legitimacy of Marriages with no Fixed Dower

According to the four main Islamic Schools, it is possible that a marriage contract may not state the exact value of the dower. The *Hanafiyyah*[16] followers said that it is possible for a marriage contract not to state the dower. In this case, a woman would have a dower that is equal to dowers of women like her, no more no less, whether he had consummated the marriage with her or not. They would argue that if the dower, according to Islamic Law, is an obligation, how is it possible to get married to a woman without offering her a dower? This question has been answered by Al-ᶜAynī, [17] who said that the dower is an obligation in accordance with the Islamic legislation and it is an obligation not only for the sake of the marriage itself but also for the woman's honour. So there is no need to mention how much it is if it is only for the sake of marriage. Other schools of Islam, namely *Mālikiyyah*, [18] *Shāfiᶜiyyah*, [19] and

Hanbaliyyah[20] agree with the *Hanafiyyah*'s view as presented above. However, they express the view that it is preferable to state the value of the dower in the marriage contract because this may save both the husband and the wife a lot of trouble in the future.

There is evidence that supports the legitimacy of marriage contracts that do not state the value of the dower. The first piece of evidence comes from the *Qur'ān*, where in Sūrat Al-Baqarah which states

> There is no blame on you if ye divorce women before consummation or the fixation of their dower. Sūrat Al-Baqarah: 236

This verse presents evidence that there is no sin or wrong doing in divorcing the woman whose dower had not been specified. This is so because divorce usually occurs if there is proper marriage or consummation. This implies that there had been marriage although a dower was not specified. One concludes from this that marriage contracts that do not specify dowers are legitimate.

It was reported that ᶜAbdullah Ibn Masᶜūd was once asked about a man who got married to a woman without naming a dower for her and he had never had a sexual relationship with her until he died. Ibn Masᶜūd said that she deserved the same dower that women similar to her would usually get, no less and no more. She has to observe the *ᶜiddah*, which is a prescribed period of time during which a widow or a divorcee may not remarry, but she is entitled to inherit. Then, Maᶜqal Bin Sinān said that this ruling is in accordance with what the Messenger of God had already ruled in a similar situation regarding a woman named Barwaᶜ Bint Washiq. This was narrated by Abū Da'ūd [21]and Al-Tirmidhī, [22] who graded it as *ṣaḥīḥ*.

It was also narrated by Uqba Bin ᶜĀmir that the Prophet once said to a man "I declare you get married to so and so". The man said: "I agree". The Prophet then said to the woman: "Do you accept so and so as a husband?" The woman

replied: "Yes, I do". Thus, the two were married and there was no dower. When the man was dying, he said: "the Prophet made me get married to so and so. I did not state a specific dower for her and, in effect, I gave her nothing. But, as a dower I gave her the arrow I used in *Khaibar Battle*. She took it and sold it for one hundred thousand *dirhams*.[23]

The previous verse and sayings, above, all show that it is permitted to have a marriage contract even without specifying the dower. The woman in this case is entitled to ask for her dower. The reason for permitting a marriage contract with no dower is that the man did not deny the woman's right in her dower and did not ask her to drop it and did not agree with her on not paying a dower. On the contrary, they all agree that she deserves a dower but it happens sometimes that specifying the dower is delayed till after marriage. There is no problem in this as long as the two parties, namely the man and his wife, are agreed on this.

However, if the man claims that the woman has no dower, his claim will be discredited and he will be asked to pay a dower agreed upon or a dower that is similar to dowers paid to women like his wife. In fact, followers of *Hanafiyyah*, *Shāfi'iyyah*, and *Hanbaliyyah* went a step further and said that the marriage contract is valid but the condition is not satisfied, so she deserves a dower that is similar to that of other women like her. As for the *Mālikiyyah* followers, they differentiated between whether or not the marriage was consummated. If there had not been a consummated marriage, the marriage contract would be invalid. In the case of a consummated marriage, on the other hand, they argue that the woman was entitled to a dower similar to dowers of other women and she has the right to ask for it and get it. In fact, Islamic scholars have agreed that a woman may, and has the right to, even refrain from having sex with the man, i.e. her husband, unless he had already granted her a dower, and there is no wrong in doing that.

This shows that the dower has a fundamental role in the marriage. Without it, marriage will not be valid. However, it may not be overtly stated in the contract itself. As such, the woman will get a dower that is similar to dowers other women like her will usually get.

6. The Amount of the Dower

Islamic scholars from various denominations or schools, namely *Ħanafiyyah*, *Mālikiyyah*, *Shāfiʿiyyah* and *Ħanbaliyyah*, have all agreed that there are no restrictions on how much a dower could be, given that there is no explicit statement referring to the value of the dower in Islamic Law, whether according to the Noble Qur'ān or according to the *sunnah* of the Prophet. Therefore, if the husband can afford to pay a high dower, he is free to do that. And if he could not afford it, due to poverty or any other reasons, he is not forced to pay or give a high dower. It is left to the individuals to estimate what dowers to grant or get, because this may vary from one person to another according to different factors such as customs, habits, and traditions. Thus, the specification of the amount of the dower is not significant. What is important, according to Islamic Law, is that the dower is of some value, such as money, and property. In some cases, it may have only a symbolic value. But, it should not be something that is forbidden by God. For example, a dower that is agreed by both parties, the husband and the wife, cannot be wine or a dead body, and if it is, then, the dower becomes invalid although the marriage contract itself remains valid. The wife in this case gets a dower that is similar to dowers of other women like her, in accordance with the teachings of the schools of *Ħanafiyyah*, *Shāfiyyah*, and *Ħanbaliyyah*.

6. 1. The Maximum Amount of the Dower

The Islamic scholars representing main schools agreed that there should be no maximum limit to what a dower might be. A man may pay as much as he

desires in so far as he can afford it. Their evidence for this comes from the following verse from the *Qur'ān*, where it is stated:

> And if ye have given one of them (the latter) a *qintār* (as a whole treasure for dower) Sūrat Al-Nisā': 20.

Ibn Kathīr [24] said that those who are concerned with interpreting the *Qur'ān* disagree on how much a *qintār* is. Some of them, like Al-Dhaħāk for example, said that a *qintār* means a lot of money. Others said it could be one thousand *dināars*. A third party believed that a *qintār* is one thousand and two hundred *dināars*. Other estimations were given, such as twelve thousand, forty thousand, sixty thousand, seventy thousand, eighty thousand *dināars*, etc. Abū Hurairah reported that the Prophet had said that a *qintār* is "twelve *uqiyyahs* and each *uqiyyah* is worth more than what is between the sky and the earth."

The Qur'ānic verse above implies that, according to Islamic legislation, there is nothing that stops the man from offering his wife whatever he wants as a dower. There are many examples from the Islamic history to show this. For example, we are told that Umar Bin Al-Khaṭṭāb offered forty thousand *dināars* as a dower for 'Umm Kulthūm, a daughter of ᶜAlī Ibn Abī Ŧālib. Although he was reported to have asked people not to exaggerate in offering dowers, he later refrained from asking people not to have high dowers after he heard the previous verse from the Noble Qur'ān Sūrat Al-Nisā': 20 repeated here: "And ye have given one of them (the latter) a *qintār* (i.e., a whole treasure for dower)". There is only one scholar who had a different view in this respect. He is Imām Fakhr Al-Dīn Al-Rāzī, [25] who interprets God's words "And ye have given one of them a *qintār*" in a different way. He says that this Qur'ānic verse does not necessarily license the offering of one *qintār* for dower. This verse, according to Al-Rāzī, has a similar interpretation as another Qur'ānic verse in which God says:

> If there were, in the heavens and the earth, other gods besides God, there would have been confusion in both! Sūrat Al-Anbiyā': 22

This verse does not indicate that there could be another God. Similarly, Al-Rāzī concludes that the verse "And ye have given one of them a *qintār*" exaggerates the dower for the sake of exemplifying and making people avoid doing the same thing. Thus, this verse, by analogy with the other one, which clearly says that there is only one God, is probably best understood as meaning that it is not legitimate that one has to offer the value of a *qintār* to his wife as a dower. Thus, the meaning of the verse is that the husband is permitted to offer his wife a dower even if the value of this dower could be a *qintār*, or a whole treasure. This interpretation has been adopted by the mass of scholars who share the same opinion.

6. 2. The Minimum Amount of the Dower

However, after the four Islamic scholars had agreed that there should not be a maximal limit as to what the amount of a dower might be, they disagreed on what might be an acceptable minimal limit. There are three different views on this matter.

First, according to the *Ħanafiyyah* School, the dower that the wife receives should not be less than ten *dirhāms*. To support this view, they say that Jābir reported that the Messenger of God said: "No dower for less than ten *dirhāms*" as narrated by Al- Dārquṭnī. There is a similarity here between the amount of money that makes a dower and that which may be counted as a theft, given that a thief's hand might be chopped off if the value of what he had stolen exceeds ten *dirhāms*. They believe that this analogy provides more support for their viewpoint regarding the ten *dirhāms* being a bottom line for a dower. Thus, according to the *Ħanafiyyah* School, a woman's marriage may not be consummated unless she had been granted a dower of at least ten

dirhāms. There is also another *ħadīth* of the Messenger of God in which he says: "Give something as a dower even if it is a ring made from iron". Here the Messenger of God is addressing a man who wanted to get married but had nothing to offer as a dower. One might argue that an iron ring is worth much less than ten *dirhāms*. This seems to contradict what has been said before. But the explanation of this apparent contradiction is that the dower in such a case will be postponed indefinitely and paid later on. Although the *Ħanafiyyah* scholars admit that the Prophet's *ħadīth* narrated by Jābir, on which they rely pertaining to the minimal amount of a dower, is a weak one, they argue that this *ħadīth* had been followed by others that were somehow weak but were ranked as *al-ħasan* (i.e. acceptable) and was reliable.[26]

As for *Mālikiyyah*, they said that the amount of a dower cannot be less than one quarter of a *dinār* worth of gold or three *dirhāms* of pure silver. Mālik says:

> I do not think anyone should get married with a dower of less than quarter of a *dinār*.[27]

Therefore, for them a man cannot get married to a woman with a dower of less than this and if he marries her and has a sexual relationship with her and pays a dower of less than three *dirhāms*, he will be required to pay the rest of the minimal dower. However, if there is marriage but no sexual relationship, he will be asked to complete paying the dower and if he does not the marriage contract will not be valid.

Finally, we will consider the opinion of *Shāfiᶜiyyah* and *Ħanbaliyyah* [28] regarding the minimal amount of a dower. Followers of these two Islamic schools agree that there is no limit as to what the lowest dower might be. They believe that anything of value in terms of money, or that, which can be used to buy things, might be taken as a dower. They follow Ibn Qudāmah's saying that: "There are no restrictions on how much a dower or *śadaq* might

be; anything that is money could be used as a dower." They also refer to saying by the Messenger of God, in which he says: "Do you have anything that you can present to her as a dower?" The man replied: "No." The Prophet said: "Find something for her, even an iron ring will do."

More evidence for this view also comes from what ᶜAmr Ibn Rabīᶜa said about a woman from the Fazārah tribe who got married for a dower of a pair of shoes. The Messenger of God asked her: "Are you fully satisfied with a pair of shoes 'as a dower?'" She replied: "Yes." So the Messenger considered the marriage contract valid. This *ḥadīth* was narrated by Al-Tirmidhī, [29] who graded it as *ṣaḥīḥ*.

Further evidence for the argument that a dower has no bottom line comes from what Jabir narrated about the Messenger of God, who said: "If a man gives his wife only a handful of food as a dower, she would be lawfully his wife". This was narrated by Aḥmad.

Moreover, the *Shāfiᶜiyyah* and *Ḥanbaliyyah* went a step further and labelled as weak what Jābir narrated in an earlier which was adopted by *Ḥanafiyyah* in which the dower was said to have the value of ten *dirhāms* at least. They said that such a *ḥadīth* could not be relied upon because, after Jābir, it was narrated by Maisarah Bin ᶜUbaid and Al-Ḥajjāj Bin Arṭa'ah, who were weak as *ḥadīth* narrators. Some of them argued that this *ḥadīth* could be valid for one specific woman and not for all women. So probably it was a specific case and therefore, it should not apply to all women.

The *Shāfiᶜiyyah* and *Ḥanbaliyyah* also argued that the analogy used by *Ḥanafiyyah* scholars is not accurate. They analogise between the right to have a sexual relationship with the chopping off of the hand of the thief. But there 's a difference between the two because in the case of marriage, the husband

has the right to enjoy the whole body of his wife, whereas in the case of stealing, only one part of the body, which is the hand, is involved. Moreover, chopping off the hand is a punishment whereas marriage is not. For all this, the analogy in this case is rejected.

One has to hasten and say that it is a kind of obligation that people do not exaggerate when asking for dowers. Guardians, whether fathers or not, should not ask potential husbands to pay very high dowers which they cannot afford because this will negatively affect the marriage prospects and perhaps be a stumbling block. Although the Islamic legislation did not specify the value of a dower, as we have discussed above; it is in accordance with the *sunnah* that people adhere to dowers that are convenient to all parties, both husbands and wives. People should give up showing off and exaggerating in dowers because this may lead only to misery and more problems in the future. ᶜAisha narrated that the Prophet said: "The most blessed women are those that take the least dower."[30] It was also reported that once Umar Ibn Al-Khattāb, while preaching, said

> Do not exaggerate in women's dowers, because if high dowers were ever honourable in our worldly life or would lead to piety in the afterlife, the Prophet would have done this himself. He had never offered a dower for any of his wives nor had any of his daughters asked for a dower that exceeds twelve ounces.

This was narrated by Al-Tirmidhī, who confirmed that the *ḥadīth* is graded *ṣaḥīḥ*.

In this regard, Ibn Taimiyah says

> It is disliked but not forbidden for a man to offer a dower that he cannot pay in cash nor can be repaid if it is a debt.[31]

It is also not acceptable that women's guardians pride themselves on their daughter's dowers and originate heresies that go against the teachings of the

Prophet as well as his *sunnah*. In some cases, some guardians' resort to speaking of dowers in front of other people in an exaggerated way, because this gives them a sense of self-satisfaction and pride and this is not correct. This is what the following by Ibn Taimiyah states

> What people of conceit and hypocrisy do by exaggerating dowers through showing too much pride and double-dealing, as they do not intend to take these dowers from the husbands nor do the husbands intend to pay them to the wives, is detestable. This is rejected because it is not in harmony with the *sunnah* of the Prophet nor does it comply with the Islamic legislation.[32]

From all that has been stated above it becomes clear that, although the Islamic legislation did not set limits (i.e. maximum and minimum) for dowers, it has ordered people to be flexible and moderate in estimating them and never to exaggerate their values. This, it is hoped, will facilitate marriage for people who want to get married.

7. Prepaying and Delaying the Dower

Dowers are primarily prepaid as indicated by sayings or *ħadīths* said by the Prophet, and stories about the Prophet's companions. This has been agreed upon by Islamic scholars from different schools with no differences reported about this matter. Ibn Taimiyeh argues that

> It is more appropriate that the dower be paid before the husband consummates with his wife if possible. It is permitted that the husband prepays the dower or he may delay it.

He also added that

> In the past, *al-salaf al-ṣāliħ*, forefathers who set good examples for us, used to prepay the full dower before consummation and they usually would not delay paying anything of it.[33]

However, because people have different circumstances and they differ in their financial ability to pay the dower before marriage, the Islamic legislation allowed them to delay paying the dower for the sake of making the marriage procedure easier and ensuring that those who need to get married do get married. To postpone paying the dower, the husband has to approach the wife or her guardian and ask for the possibility of delaying the dower. But it happens sometimes that the wife herself may want to postpone getting the dower, because she wants to have a small prepaid dower which the husband can afford and she asks for a higher delayed dower which she gets if the husband dies or if he divorces her. This would help the woman in the future after the husband had gone. No matter what the reasons for dower delaying it is still legitimate according to Islamic Law. However, Islamic scholars disagreed on the conditions according to which it is possible to postpone paying the dower.

The *Hanafiyyah* [34] said that it is lawful to delay the dower, provided that it does not refer to or contain any outrageous ignorant remarks, such as saying to the wife "I will marry you for a thousand *dināars* payable when my financial circumstances get better or when the wind blows". Of course, these conditions are imprecise and unclear. Consequently, postponing the dower in such cases is invalid according to *Hanafiyyah*.

As for Mālikiyyah, 35 they decided that the issue of postponing the dower depends on what type of dower we have at hand. If what the dower requires or refers to is available locally, such as residence, clothes, or animals, then it cannot be postponed and the wife is supposed to get it immediately. Delay in paying the dower in this case is prohibited even if the wife accepted the delay. However, if what the dower refers to is not available in the country, it is possible to postpone paying the dower for a definite period of time. Otherwise, the marriage contract will be invalid.

In some cases, the dower may be money, or things that are bought according to their size or weight. Here delaying part, of the dower or all of it, is allowed, provided that the delay is only for a definite period of time. Thus, the *Mālikiyyah* are similar to the *Ħanafiyyah* in this point.

Finally, the *Shāfiᶜiyyah* and *Ħanbaliyyah*[36] permitted the delay in paying the dower, in part or in full, whether it is available in the country or not regardless of whether it is money or otherwise as long as the delay is not indefinitely.

I favour the *Shāfiᶜiyyah* and *Ħanbaliyyah*'s understanding of the issue here, because it makes marriage requirements and procedure much easier for those planning to get married. If one cannot prepay a dower, this dower will be a debt that he has to repay at a specific time.

One final point I would like to explain before I bring this chapter to an end. It is: How does the Islamic Legislation look at a guardian who insists on having something of the dower of the woman to whom he is the guardian? In fact, there are many fathers and guardians these days who insist that the husband should offer them part of the dower. The exact wording of what they say is something like: "I'll marry her to you on the condition that I get one thousand and she gets one thousand", for example. The Islamic scholars looked into this matter and said that in this case, the guardian may be the father or someone else. If the guardian is the father, scholars and the four main Islamic schools expressed different views on whether what the father asks for himself is legitimate or not. The *Hanafiyyah* scholars[37] argued that the father of a woman is not allowed to keep anything for himself, of the dower of his daughter. On the contrary, everything that comes as a dower should go to the woman herself. As for *Al-Mālikiyyah*, [38] they differentiated between two types of women: those that are virgins and those that are not. The guardian is permitted to take a part of the woman's dower if she is a *matron* (i.e., not

virgin) because she has the right to marriage and the guardian in this case may only represent the woman, as her guardian, in the marriage contract to authorise it. They said that the guardian is quite similar to an authorised agent who takes a commission for any ordinary contracts such as sale or business contracts. According to the *Shāfiᶜiyyah* School, [39] the father is not allowed to impose his own terms regarding his daughter's marriage contract. If he does, the woman gets a dower that is similar to dower of other woman similar to her. However, the *Ħanbaliyyah*[40] had an opinion that is different from that of the others like *Ħanafiyyah*, *Mālikiyyah*, as well as *Shāfiᶜiyyah*. They contend that a woman's father can, if he so wants, to keep a part of his daughter's dower for himself. Ibn Qudãmah, Isħãq, Masrūq, and ᶜAlī Ibn Al-Ħussain all argued that it is permissible for the father to take something of his daughter's dower. In fact, it was reported that Masrūq imposed for himself, the amount of ten thousands *dirhams,* which was given to *al-ħājj* (the pilgrims) and the poor, and asked the husband to prepare his wife's (i.e. Masrūq's daughter) trousseau. More evidence to support *Al-Ħanbaliyyah*'s view in allowing the father to take something of his daughter's dower comes from the story of Shuᶜaib and Moses when Shuᶜaib insisted that Moses graze the sheep for marrying him to one of his daughters. This is what the following verse expresses: "I will marry you one of my two daughters, provided that you graze my sheep for eight years." [Sūrat Al-Qaṣṣaṣ: 27]. Moreover, *Al-Ħanbaliyyah* followers use evidence from some sayings by the Prophet, as when he says: "You and your money are for your father." He also says: "Your children are the best of what you have acquired, so eat or take from their money." According to *Al-Ħanbaliyyah*, they are following the teachings of the *Qur'ān* and the Prophet's *sunnah* in allowing the father to keep a part of his daughter's dower for himself, as the previous verse and *ħadīths* show.

What has been said above about the permissibility or legality of the guardian taking some of the dower for himself, according to different Islamic schools, applies when the guardian is the father. But what happens if the guardian is somebody else other than the father. In this case, the guardian could be the brother, the uncle, or someone else like a relative. All Islamic scholars agree that he is not allowed to ask for anything for himself. And if he does, he will have committed a sin and everything he has demanded should go to the woman herself.

I believe that it is more appropriate to prohibit guardians, regardless of whether they are the fathers or not, from taking anything from the women's dowers. This will help in alleviating the woman's status in the society, so that she will not be treated as an object that can be sold and bought like any other commodities or goods that can be bargained. Nowadays, there are lots of people whose faith and belief in God is not that strong, they do not show any respect for religion and manners and they treat woman in a terrible manner. Thus if they are given the chance to keep some of her dower they will be prepared to marry her to the man who pays more in dower. This, of course, will do more harm than good to the woman and will lead her into misery and oppression. It is a well established principle or rule in the Islamic legislative rule that there is "*lā ḍarar wa lā ḍirār*: which means that neither party should be harmed." For this reason, I believe that *Al-Ḥanafiyyah* and *Al-Shāfiʿiyyah* should be followed because they deprive the father of the possibility of keeping a part of their daughter's dower for themselves. Such a measure will hopefully discourage fathers from increasing the dowers of their daughters. If such a step is not taken, and fathers are free to impose whatever they want to keep for themselves, the dowers will be very high because the husband in this case will have to offer the ordinary dower for his wife and at the same time he will have to pay that extra part that his wife's father wants to keep for himself.

And the husband will be worse off and he will be in a financial position that is far more difficult since he cannot afford to pay all this, given that most husbands live of their salaries (which are limited). This may, in the end, make many men refrain from getting married. Obviously, this is not in harmony with the principles and regulations of the Islamic Law and, therefore, should be rejected.

8. Conclusion

In this chapter, I have discussed several key issues that relate to the concept of dower in Islam. First I gave an idea about the dower before Islam and in Islam. Then I focused on the importance of the dower in Islam as it came to honour the women. Next, I moved to discuss the different justifications for making the dower not only an obligation but also something that is compulsory. The statement of the exact amount of a dower in terms of money or anything else was also considered. Here, I explored the maximal and minimal amounts of a dower and how it should be left to the individuals, yet stressed the need that there should be something specified for the dower. I also discussed the circumstances of both prepaying and delaying the dower according to different Islamic schools and scholars.

Notes to Chapter Five

1. Other Arabic words for the dower include: *al-niħla*, *al-farīḍa*, *al-hiba'*, *al-ajr*, *al-uqr*, *al-'alā'iq*, *al-ṣadāq*, *al-tawl*, *al-nikāħ*.
2. Baillie, Neil B.E, *Digest of moohummadan law,* Second part, 2 edition, (Lahore, Primier book house), p 91.
3. Siddiqi, Muhammad Iqbal, *The family laws of Islam,* Delhi, Internatiol Islamic Publishers, 1988, p 79.

   See also Nasir, Jamal J., *The Status of Women Under Islamic Law*, London: Graham and Trotman, 1990.
4. Abū Al-Nūr, Al-Aħmadi, *Manhaj al-sunnah fi al-zawāj*, 4th edn., (Cairo: Dār Al-Salām, 1992), p. 407.
5. Abū Al-Nūr, Al-Aħmadi, *Manhaj al-sunnah fi al-zawāj*, p 407.
6. Ibn Kathīr, Ismā^{c}īl, *Tafsīr al-Qur'ān al-^{c}ażīm,* vol. 2, 5th edn., (Beirut: Mu'assasat Al-Rayyān, 1999), p. 202.

   See also Al-Shawkānī, Muħammad, *Fatħ al-qadīr*, vol. 1, edited by Y. Al-Ghoush, (Beirut: Dār Al-Ma^{c}rifah, 1995), p. 531.
7. Al-Qurṭubi, Muħammad, *Al-Jāmi^{c} li-'aħkām al-Qur'ān*, vo. 1, (Beirut: Dār Al-Kutub Al-^{c}Ilmiyyah, n. d.), p. 497.
8. Al-Shawkānī, Muħammad, *Fatħ al-qadīr*, vol. 1, edited by Y. Al-Ghoush, (Beirut: Dār Al-Ma^{c}rifah, 1995) p. 574.
9. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 2, edited by ^{c}Izzat ^{c}Ubaid Al-Da^{c}as, and ^{c}Adil Al-Sayyid, (Beirut: Dār Al-Ħadīth, 1974), p. 596. ħadīth no. 2125.
10. Al-Khaṭṭābi explains that an "'uqiyyah" is the equivalent of forty dirhams, whereas a "nash" is twenty dirhams. These are units of currency that were used then. Thus, twelve 'uqiyyahs and one nash will make five hundred dirhams. See:

    Al-Khaṭṭābi, *Ma^{c}ālim Al-Sunan*, vol. 3, 2nd edn., (Beirut: Al-Maktabah Al-^{c}Ilmiyyah, 1981), p. 209.

11. Al-Nawawī, Yaħya, *Ṣaħīħ Muslim bi-sharħ Al-Nawawī*, vol. 9, (Beirut Dār Al-Kitāb Al-ᶜArabi, 1987), p. 215.
12. Al-Ŧabarānī, Sulaimān, *Al-Muᶜjam al-kabīr*, vol. 8, (Cairo: Maktabat Ibn Taimiyah, 1983), p. 40. ħadīth no. 7301.
13. ᶜAbdal'Aṭi, Ħammūda, *The Family Structure in Islam*, (1977), p. 65.
14. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, edited by M. K. T. Ħalabi, (Beirut: Dār Al-Maᶜrifah, 2000), p. 485.
15. ᶜAbdal'Aṭi, Ħammūda, *The Family Structure in Islam*, p. 40.
16. Al-Sarakhsī, Shams Al-Dīn, *Al-Mabṣūt*, vol. 5, 3rd edn., (Beirut: Dār Al-Maᶜrifah, 1987), p. 403.
17. Al-ᶜAynī, Maħmūd, *Al-Bināiah fī sharħ al-hidāyah*, vol. 5, 2nd edn., (Beirut: Dar Al-Fikr, 1990), p. 131.
18. Anas, Mālik Bin, *Al-Mudawwanah al-kubrā*, vol. 2, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1994), p. 1164.
19. Al-Shāfiᶜī, Muħammad, *Al-'Umm*, vol. 5, (Beirut: Dār Al-Maᶜrifah, 1987), p. 238.
20. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 8, (Beirut: Dār Al-Kitāb Al-ᶜArabi, 1972), p. 46.
21. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 2, p. 588. ħadīth no. 2114
22. Al-Tirmidhī, Muħammad, *Sunan Al-Tirmidhī*, vol. 3, edited by M. F. ᶜAbdulbāqi, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d), p. 450. ħadīth no. 1145.
23. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 2, p. 590. ħadīth no. 2117.
24. Ibn Kathīr, Ismāᶜīl, *Tafsīr Al-Qur'ān al-ᶜaẓīm*, vol. 1, 5th edn., (Beirut: Mu'assasat Al-Rayyān, 1999), p. 359.
25. Al-Rāzī, Fakhr Al-Dīn, *Al-Tafsīr al-kabīr*, vol. 10, 3rd edn., (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1990), p. 12.
26. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, pp. 489-491.

27. Al-Dardīr, Ahmad, *Al-Sharḥ al-saghīr ᶜalā aqrab al-masālik*, vol. 2, (Cairo: Dār Al-maᶜārif, n. d.), p. 428.

See also Anas, Mālik Bin, *Al-Mudawwanah al-kubrā*, vol. 2, p. 152.

28. Al-Shirāzī, Ibrahīm, *Al-Muhadhab fī fiqh al-imām Al-Shāfiᶜi*, vol. 2, 3rd edn., (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1976), p. 55.

See also Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1985), p. 220.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 8, pp. 4-5.

29. Al-Tirmidhī, Muḥammad, *Sunan Al-Tirmidhī*, vol. 3, p. 420. ḥadīth no. 1113.

30. It is narrated by Al-Hākim, who also said that this ḥadīth is ṣaḥīḥ.

Al-Hākim, Muḥammad, *Al-Mustadrak ᶜalā al-ṣaḥīḥain*, vol.2, edited by M. A. ᶜAta, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1990), p. 195.

31. Ibn Taimiyah, Aḥmad, *Majmūᶜ al-fatāwī*, vol. 32, (Riyadh: Dār ᶜālem Al-Kutub, 1991), p. 192.

32. Ibn Taimiyah, Aḥmad, *Majmūᶜ al-fatāwī*, vol. 32, p. 193.

33. Ibn Taimiyah, Aḥmad, *Majmūᶜ al-fatāwī*, vol. 32, p. 195.

34. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 3, p. 515.

See also Al-Tamartāshi, Shams Al-Dīn, *Radd al-muḥtār ᶜalā al-durr al-mukhtār,* vol. 2, edited by A. ᶜAbdulmajīd Taᶜmah Ḥalabi, Beirut: Dār Al-Maᶜrifah, 2000), p. 493.

35. Al-Dasūqī, Muḥammad, *Ḥāshiet Al-Dasūqī ᶜalā al-sharḥ al-kabīr*, vol. 2, (Beirut: Dār Al-Fikr, n. d.), p. 297.

See also Al-Dardīr, Aḥmad, *Al-Sharḥ al-saghīr ᶜalā aqrab al-masālik*, vol. 2, (Cairo: Dār Al-Maᶜārif, n. d.), pp. 432-3.

36. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, p. 222.

See also Al-Bahwatī, Mansūr, *Sharḥ muntahā al-irādāt*, vol. 3, (Beirut: ᶜālim Al-Kutub, 1991), p. 178.

See also Ibn Qudãmah, Muwafiq Al-Dīn, *al-mughnī wa yalīh al-sharḥ al-kabīr*, vol. 8, p. 21.

37. Al-Shaikh Niẓām, *Al-Fatawī al-hindiyyah*, vol. 1, (Cairo: Dār Al-Fikr li-tibāᶜah wa Al-nashr, n. d.), p. 309.

38. Al-Dardīr, Aḥmad, *Al-Sharḥ al-ṣaghīr ᶜalā aqrab al-masālik*, vol. 2, p. 345.

39. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, p. 226.

40. Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 225.

CHAPTER SIX

THE WIFE'S RIGHT TO MAINTENANCE (*NAFAQAH*)

1. Introduction

The Arabic word for maintenance is *nafaqah*, which means paying for living expenses. There are different types of maintenance in Islam and this variation in meaning is due to the variation in the causes that necessitate *nafaqah*. For example, there is the wife's maintenance according to which the husband has to pay his wife's living expenses. In addition, there is what we call relatives' maintenance according to which rich people have to pay a sort of maintenance to their poor relatives, as a means of keeping bonds or ties of kinship. Another kind of maintenance is the one which a master has to pay for his slave. However, in this chapter we are concerned with the maintenance which a husband is obliged to pay for his wife according to the teachings of Islam.

2. The Meaning and Significance of Maintenance

Muslim scholars defined the term maintenance in different ways but all these definitions state that maintenance means the provision of commodities of marital life for the wife and this includes food, clothing, housing, and other things that relate to marital life which are generally accepted by other people of the place where one lives. The value or amount of this may not be specified as it varies from one husband to another and this has to do with his financial status to a large extent regardless of whether the wife is a rich or poor, Muslim or one of the people of the Book (i.e. Christians or Jews).

The significance of maintenance emerges from the fact that it helps in keeping and maintaining oneself from loss and destruction because it can be looked at

as a kind of social security for the woman, since it saves her the need to look for a job and earn her own living, given that this is usually done by the husband. Furthermore, when the woman gets her maintenance from her husband, she will have the feeling that she has a special importance and status and she means a lot to him and this contributes in strengthening the mutual understanding and love between the wife and her husband. This will make married couples live in peace and tranquillity. In Sūrat Al-Rūm, it is stated that God intended marriage to be a kind of dwelling in tranquillity:

> And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect. [Sūrat Al-Rūm: 21]

It is also argued that a maintenance that is payable by the husband to the wife makes her accept, with content, his guardianship and protection of her. Maintenance is actually compulsory, because it is prescribed by God on the husband as stated in

> Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means.
> [Sūrat Al-Nisā': 34].

Men are more preferable, and are given more, by God because they have to pay dowers and maintenance to women.

The fact that the husband pays his wife's maintenance is not something new, because this was known by man from ancient times, as expressed in Sūrat Ŧāhã, where Adam, who lived a long time before Islam, was asked to pay *nafaqah* for Eve, his wife.

> Then we said: O Adam! Verily, this is an enemy to you and to your wife: so let him not get you both out of the Paradise, so that you will be distressed. [Sūrat Ŧaha: Verses 117]

Al-Qurṭubī[1] commented on these verses and said that Allah used the Arabic verb '*fatashqa*': meaning 'you (male, masculine, second person) would be in misery,' which is in the singular form and this implies Adam alone, and excludes Eve. God would have used the form for the dual '*fatashqaya*': 'you (both) would be in misery,' if the implication was to include Eve as well. God is referring to Adam alone because he is supposed to toil and work to earn their living. So he, and not Eve, would be "landed in misery", which means that the man is responsible for his wife's maintenance. The maintenance that the husband has to bear includes four things: food, drinking, clothing and housing. If the husband does this only, he would have fulfilled his obligation. However, if he gives more, he will be rewarded for that.

3. Evidence for the Legalisation of Maintenance in Islam

According to Islam, maintenance is legitimised by the *Qur'ān*, the *sunnah*, the *ijmāᶜ al-'ummah*, and reason (what is reasonable or logical). In what follows, I will be considering evidence in support of the legalisation of maintenance. The evidence comes from a variety of sources.

3. 1. Evidence from the Holy Qur'ān

Allah says in Sūrat Al-Baqarah: "But he (the father) shall bear the cost of their food and clothing on equitable terms" [Al-Baqarah: 233]. The Arabic phrase for "the father" in this verse is "*al-mawlud lahu*", because the noun is in the singular, and masculine form. As for the expression "food", it is "*rizquhunna*" in Arabic and it refers to maintenance that is unspecified in terms of what and how much it is. This is the case because the word "*rizq*" includes everything. The purpose of this verse is to tell about the right of a

divorcee who suckles her baby to have maintenance from her husband. If a divorcee deserves maintenance, then what about the one who lives with her husband. It is obvious that she deserves maintenance. In commenting on this verse, Ibn Kathīr says: [2] "the father of the child is responsible for the provision of maintenance of mothers and clothing them "on equitable terms". This means that he has to provide them with clothes like those of other women similar to them, no more no less. The amount of the maintenance relies heavily on what the man can afford, but it should not be a burden laid on him greater than what he can bear. Elsewhere in the *Qur'ān*, it is stated that

> And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden". [Sūrat Al-Talāq: 6]

This verse, too, provides evidence that a husband has to provide maintenance for his pregnant divorced wife. It is reasonable that a wife who actually lives with her husband deserves maintenance more than a divorcee.

3. 2. Evidence from the *Sunnah*

According to the *sunnah* of the Prophet, the husband has to pay maintenance for his wife as shown in the following *ħadīth* by the Messenger of God in *Hijjat Al-Wadāᶜ*: "You (i.e. the husbands) are obliged to provide them (i.e. the wives) with food and clothing on equitable terms." This *ħadīth* is narrated by Abū Da'ūd, Ibn Mājah, and Aħmad. Muħammad Abādī explained this by saying:[3] "You (i.e. husbands) have to provide them (i.e. the wives) with food," which also includes drink, and residence, "and clothing on equitable terms" in accordance with the financial circumstances such as being rich or poor. One has to be moderate and nice to them and should treat them fairly.

It was also narrated by Hind Bint ᶜUtba that she once came to the Messenger of God complaining about how mean and stingy her husband, Abū Sufyān,

was. He did not give them enough money in maintenance, so she took from his money, without his knowledge that. She came to the Prophet asking him about whether what she was doing was legitimate or not. She said:

> O Allah's Apostle! Abū Sufyān is a miser and he does not give me what is sufficient for my children and me. Can I take of his property without his knowledge?

The Prophet said

> Take what is sufficient for you and your children, and the amount should be just and reasonable.

This *ḥadīth* had been agreed upon. Had the maintenance not been compulsory on the husband, the Prophet would not have allowed Hind to take money from Abū Sufyān, her husband, without Abū Sufyān permitting this, or even knowing about it.

Furthermore, the Messenger of God did not only show that the man has a maintenance obligation towards his wife, but also urged and stressed, in other *ḥadīths*, the importance of the man bearing the maintenance of all members of the family. He explained the great reward that the man will get in return for giving maintenance, as was narrated by Al-Bukhārī that

> When a man (Muslim) spends something on his family intending to receive Allah's Reward, it is regarded 'as a *ṣadaqah*' (i.e. an act of charity) for him.

It was also narrated that God's Messenger also said in another *ḥadīth* that

> A *dīnār* could be spent in Allah's Cause, in manumitting a slave, on poor people, or on your family. The reward will be greatest when a *dīnār* is spent on your family.

This was narrated by Muslim. However, one may claim since maintenance is compulsory in the sense that men have to pay it for their wives, why is it then regarded as a *ṣadaqah*? Al-ᶜAynī[4] answered this question by saying that

although maintenance is obligatory, there is some kind of reward, so the Prophet, through this, wanted to urge people to provide for, or spend it on, their families.

That the husband is obliged to pay maintenance for his wife is further supported by many *ħadīths* appearing in *Śaħīħ Al-Bukhārī*, in which Al-Bukhārī classified this *ħadīth* as coming under "Chapter on the Obligation of Maintenance for Family and Children." Al-ᶜAsqalānī[5] says in this regard that what is meant by family is his wife and then he added the children as an instance where the general is added to the specific.

3. 3. Evidence from *Ijmāᶜ* (Consensus)

Muslim scholars agreed unanimously that the husband should be obliged to provide maintenance for his wife. For example, Ibn Qudãmah said,

> Muslim scholars had agreed that the husband has to provide maintenance for his wife if they were both of the marriage legal age (i.e. marriageable), and she is not disobedient.[6]

3. 4. Evidence Based on *Al-Maᶜqūl* (Reasonability)

As soon as the woman and the man contract for marriage and she gives herself to him, the woman becomes his own, and she confines herself to him and his benefit and not to anybody else.[7] As a result, she cannot try to earn her own living in her way. Thus, if the husband does not provide for her in a fair way, she would be in deep trouble and she would be ruined. The jurists made an analogy between the status of the wife with that of the guardian or judge, because these two have maintenance from the Financial House of Muslims or state for keeping them working for the benefit of the others. If those people were not given money from the Muslim Finance House or the government, they would become bankrupt and be in deep trouble. The same thing applies

to the wife; she has to be provided for by her husband. [8] Ibn Humām says, in this regard, that

> The wife has the right to get *nafaqah* from her husband even if she were one of the people of the Book or Scriptures, (i.e. a Christian or a Jew). If she gives herself in to him, then he has to provide for her living, clothing and housing. [9]

From what has been said, it becomes clear that according to Islamic Law, a woman has the right to get maintenance from her husband. The reason that this maintenance is given by the husband, as Muslim scholars argue, is that the wife was confined to him all the time and she had already given herself to him in marriage.

4. The Conditions of Getting Maintenance

According to the four Sunni Schools of Islam, the wife deserves maintenance if the following requirements are met. First, the marriage contract has to be a valid one, because if it is not, the wife no longer qualifies for a provision. She is also not entitled to get maintenance if she apostates (i.e. she converts from Islam to something else). Another factor that nullifies the marriage contract, and consequently the women's provision, is the case where a man gets married to a woman and later he realises that she was his foster suckling sister, as they both were breast fed by the same woman. In this case, they are immediately separated from each other and the marriage contract becomes invalid. She cannot get her maintenance nor can she ask for it. As for what the man has already spent on her, he cannot get it back nor can he get compensated for it, according to some Muslim scholars.

Al-Khassāf, [10] *Al-Ħanafiyyah* School follower, said: "The woman who got married in accordance with a marriage contract that is invalid deserves no *nafaqah.*" To explain this, one may argue that maintenance is in exchange for

the right to benefit from the woman. Thus, if benefiting from the woman is unlawful, the maintenance is not an obligation whether the woman is pregnant or not. In fact, *Shāfiʿiyyah* and *Ḥanbaliyyah* scholars[11] shared their *Ḥanafiyyah* counterparts in this opinion.

Second, a woman must give herself to her husband and she should be of the legal age for marriage. Ibn Qudãmah says: [12]

> If the woman gives herself in marriage to her husband in the way she is supposed to, she has the right to get everything that she needs in terms of food, drinking, clothing and housing.

However, if she had not attained puberty (i.e. she is too young for marriage), scholars disagreed on whether she should get the provision or not. The *Mālikiyyah* said that if she could have sexual intercourse, her maintenance is an obligation. But if she could not, the man will not be obliged to pay for her. According to them, maintenance is imposed on the husband after he enjoys his wife and consummates with her. Thus, maintenance is countered by sexual access. Therefore, if the wife is too young to be enjoyed in marriage by her husband or if she cannot bear sexual intercourse, the purpose of maintenance is not achieved. In this regard, Imām Al-Bājī says

> It may be the case that the man may have sexual intercourse with the woman though she might still not be sexually mature. If the husband was also too young for marriage, or the wife was impossible to have an intercourse with, due to her young age, there is no maintenance for her.[13]

This same opinion was also expressed by *Al-Ḥanafiyyah* [14] and *Al-Ḥanbaliyyah* as well.[15]

As for the *Al-Shāfiʿiyyah*, [16] they had a different point of view regarding this matter. They argued that the sexual maturity of either the husband or the wife does not count as a factor that severs maintenance, as long as she had given

herself to her husband in marriage and there had been sexual intercourse even though she might not be sexually mature." This argument by *Shāfi'iyyah* is on a par with what Abū Yūsuf, who is one of *Al-Hanafiyyah* followers, [17] as he, too, said that a very young wife deserves maintenance if she is somebody who one feels at ease with, if she does the wife's work at home, and if she gives in to her husband although he cannot have sexual intercourse with her. Thus, according to the *Shāfi'iyyah* School, maintenance is counted by obedience rather than by sexual access.

Third, the husband is responsible for his wife's maintenance if he was too young and unable to have sexual intercourse with his sexually mature wife, provided that she had given herself to him. Ibn Qudāmah[18] said in this regard that "if the woman was old enough for marriage and able to have sexual intercourse, and she gave herself in marriage to her husband or tried to, and if she did not hold herself from him nor did her guardians hold her from her husband, then the sexually immature husband, who is only a boy, is responsible for her maintenance." Maintenance in this case is an obligation because the condition of the wife giving herself to her husband has been satisfied on her part. The problem is in him (the husband being sexually immature). This same ruling (i.e. obligation of maintenance by the husband) applies in cases where the husband could be either ill, imprisoned for a committed crime or an unpaid debt. It was only Imām Mālik who did not agree with the legitimacy of a very young husband bearing his wife's maintenance. He said

> A sexually immature husband is not obliged to pay a *nafaqah*. The *nafaqah* is due only when both the husband and the wife are mature enough to enjoy a sexual relationship.[19]

A final condition is that her not giving herself to her husband in marriage is attributable to some acceptable legal reasons. For example, if the husband has

not paid her a dower, if she is having her menstrual period, if the husband beats her, or if she knows that he is not trustworthy. In all these cases, the wife deserves to get her provision and she cannot be considered disobedient.[20]

Ibn Taimiyah agreed with the mass of scholars in this opinion and he said:

> If the woman does not allow her husband to touch her or have intercourse with her, or if she leaves his house without his permission, she has no right to ask for *nafaqah*, or clothing because in this case she is taken to be a shrew or disobedient in things she is supposed to obey[21].

It is clear from all what has been stated above, that giving the wife a provision relies crucially on two requirements: first, whether the marriage contract is legitimate or not and second, whether the wife has enabled her husband to have sexual intercourse with her. The first requirement states that the marriage contract should not be invalid or void. The second requirement is fulfilled if the wife enables her husband to marry her and this can be done in one of two ways. According to the first way, the wife is confined in the husband's house, in compliance with *Hanafiyyah* jurists; and the other is through enjoyment in compliance with *Mālikiyyah*, *Shāfiʿiyyah*, and *Hanbaliyyah* jurists. If both requirements are satisfied, the wife gets the provision, as argued by the majority, the Arabic word for which is *al-jumhūr*, (i.e. the four school of *fuqahā'*). However, if either of these requirements or both of them are not observed in the marriage relationship, the wife loses her right to get maintenance.

However, Ibn Hazm[22] disagrees with what is stated above and argues that the wife's maintenance is obligatory once marriage is contracted with no consideration of whether the husband had touched his wife or not or whether she is disobedient to her husband or not. His evidence for this comes from God's statement in the *Qur'ān*: "You (i.e. the husbands) are obliged to

provide them (i.e. the wives) with food and clothing on equitable terms." Ibn Ħazm argues against what the founders of the four Islamic Schools of thought said, and he says that it is incorrect that the maintenance is due only if the wife can have sexual intercourse and if she gives herself in marriage to her husband. According to this verse of the *Qur'ān*, the maintenance is obligatory once the marriage contract is completed. He says that there is no statement of this in any of the *Qur'ān*, the *sunnah*, the Companions' sayings, or analogy.

If God wanted to deprive the disobedient or sexually immature wife of provision, He would have stated, rather than ignored, it. The requirements mentioned above, he says, were reported by a group of the followers, such as Al-Nakhᶜī, Al-Shaᶜbī, and Hammād Bin Abī Salmān, who had no evidence to support their claims. They only said that maintenance correlates with intercourse; thus, if there is no intercourse, there is no maintenance. One concludes that Ibn Ħazm sees that the wife should get a provision as soon as a marriage contract is finalised with no further constraints. This goes against what the four schools of jurists say.

The conditions according to which a wife gets maintenance were also discussed by ᶜAbdulraħman Al-ᶜUmrānī, [23] who is a contemporary scholar. He discussed the requirements that the wife has to meet before she qualifies for maintenance according to the four Islamic jurists. He says: "The objective of the wife's maintenance is not fulfilled if it is associated and restricted to the confinement of the wife at the husband's house, according to the *Ħanafiyyah* School, and enjoyment, according to *Mālikiyyah*, *Shāfiᶜiyyah*, and *Ħanbaliyyah* Schools. If the provision is restricted to confinement, in compliance with what *Ħanafiyyah* scholars say, the husband will lose the right to enjoy his wife, because the wife may hold herself off her husband in their marriage home without enabling him to enjoy her in marriage. On what

basis shall the husband give maintenance in this case? Similarly, schools of *Mālikiyyah*, *Shāfiᶜiyyah*, and *Ħanbaliyyah* restrict the maintenance to the enjoyment of the wife by her husband. Again this requirement misses the point of legislating maintenance, because the enjoyment is shared by both the husband and the wife. So it is a common right for both. Furthermore, the causal relationship between enjoyment and maintenance, in the opinion of Al-ᶜUmrānī, changes the marriage contract into an exchange contract, given that the wife gets her provision only after she enables her husband of enjoying her; therefore, if she refrains, she loses her right in getting a provision. For these reasons, Al-ᶜUmrānī stipulates that the wife's maintenance is an obligation for the husband, since this is what legislations state. As a result, maintenance is a right according to the law. And being one of the effects of a marriage contract, maintenance starts as soon as marriage is contracted. By contrast, enjoyment is one part of the marriage contract and the same can be said about the wife being obedient to her husband. Al-ᶜUmrānī explained this opinion by saying that maintenance becomes compulsory when the marriage contract is completed, because family ties are affected by the development of, and variation in, time and place of human societies. This leads to the emergence and development of concepts that gradually become patterns of behaviour that are adhered to by all members of the society. If the new concepts are to reflect the continuously renewed needs and desires of human beings, they may significantly depart from the rulings of the Islamic Law. Thus, anyone who wants to be in charge of putting forward regulations regarding family matters should ensure that the relationship between these regulations and the social needs of people is one of harmony and integration, rather than contradiction.

In fact, ᶜAbdurahman Al-ᶜUmrānī wants to say that due to the development of human societies, the increase in knowledge and population growth, and the

variation in the needs and circumstances that people have, the reasons for getting maintenance should not be limited to the two requirements stated above. On the contrary, they should make the wife's maintenance rely on the circumstances and other variables that may take place, though still conforming to the Islamic Law. This is because the previously mentioned conditions (i.e. those of both Al-ᶜUmrānī and Ibn Ħazm) have not been explicitly stated in the *Qur'ān* or the *sunnah*, etc. They are only jurist discretions that can be modified and changed according to people's interests and needs. To me, this seems to be similar to what Ibn Ħazm contends.

However Al-Baltājī disagrees with this opinion by ᶜAbdurahman Al-ᶜUmrānī with regard to what makes a wife worthy of a provision. He says

> Some people find Ibn Ħazm's argumentation as only a point of view, because there is no valid statement in the *Qur'ān*, *sunnah*, or other about the drop ability of the wife's right to get maintenance if she is too small for marriage or she is disobedient.[24]
>
> It is based on the conclusion, by the four Sunni schools of jurists, that marriage has legalised the husband's right to enjoy his wife; thus, if this enjoyment is not achieved due to something from the wife's side only, her right of getting maintenance is dropped. But, as Ibn Ħazm says, if we consider statements, according to which the wife's maintenance is imposed on the husband, we will find explicit reference to the restrictions presented by the four Islamic jurists. Al-Baltājī adds, however, we still draw upon what these jurists say, namely that God's legalisation of marriage is a kind of 'dwelling in tranquillity' for the two spouses. How is this possible for this dwelling, with all its meanings and implications, to take place if the wife has not attained puberty? Besides, it is reported that the Prophet in his '*hajjat al-wadāᶜ*' stressed the need to take care of women and said: "They (i.e. the

women) have an obligation toward you (i.e. the husbands) that they may not have anybody that you dislike in your home" and he adds "You (i.e. husbands) have to bear the cost of their food and clothing on equitable terms". This *ḥadīth* was narrated by Muslim and others. It can be understood from this *ḥadīth* by the Messenger of God, that husbands and wives are on equal terms, as both of them have rights and obligations toward each other. Thus, if a disobedient wife is given maintenance in any case, this would lead to mischief, family disintegration, and lack of justice for men, as they have to pay maintenance although there is no dwelling together in the marriage house and this is not the purpose of marriage. One has to note that each school has its rulings which may nullify the maintenance of the disobedient wife.

From all that has been said above either by the four schools or by the contemporary scholars regarding the conditions that necessitate the wife's right to maintenance, I do not see any contradictions among these jurists and other scholars. The Islamic jurists focus on two things: the obligation that the wife should have maintenance, and the man's right to get peace, tranquillity and stability in marriage. The contemporary scholars thought the conditions of paying maintenance should not be restricted only to these two requirements (i.e. the woman's maintenance and man's feeling of tranquillity) for the good of the Muslim family. They wanted more flexibility, because the family needs vary according to changes in time, place, and social environment.

Therefore, I believe that the wife's right to get maintenance should be an obligation as long as she is married to him and she gives herself to him. In addition, there should be other elements that are required such as love, and spiritual or moral enjoyment which spouses share like tranquillity, confidence, assurance, and intimacy. All these factors play a role in making a wife worthy of maintenance from her husband. It is known that maintenance is in money, and money is a double-edged weapon, as it may either agitate the

disputes and differences in case the husband in not paying maintenance for his wife appropriately, or it may enhance love, intimacy, and mutual understanding in case the husband is fulfilling his obligation toward his wife adequately. Therefore, I believe that it is more convenient for the Muslim husband to take this sensitive point into consideration and make sure that his wife is paid what she deserves as maintenance, of what he can financially afford, in accordance with God's statement

> Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He has given him. [Sūrat Al-Ŧalāq: 7]

This verse clearly shows that God asks the husbands to spend only what is affordable.

5. Calculating the Maintenance

There has not been an explicit statement, according to the Islamic Law or *shari*ᶜ*a*, which accurately specifies how much the husband has to pay for his wife as maintenance. It is unclear whether it depends on the circumstances of the couple or it has to do with the man's financial conditions. The unavailability of such a statement gave way for Muslim scholars to express their views and opinions in an attempt to explain this issue. There are two basic accounts that attempted to address this problem.

First, *Al-Mālikiyyah*, *Al-Ħanbaliyyah*, and some of *Al-Ħanafiyyah* followers, particularly Al-Khassāf, argued that the financial conditions of the couple are of prime concern when deciding how much the woman's maintenance should be. [25] Thus, if they (both the husband and the wife) are rich, they have high maintenance in accordance with the traditions of the time and place where they are. However, if they are both poor and facing some financial difficulties, they have little maintenance, and the husband has to pay only

what he can afford. Sometimes, the woman is poor and the husband is well off. In this case, the maintenance she gets is higher than that obtained when the couple are poor but less than the maintenance that is usually obtained when the couple are both rich. And if the husband is poor, he pays only what he can afford.

Mālik says that

> The financial status of the wife and that of the husband have to be taken into consideration when fixing or calculating maintenance.[26]

Evidence to support this comes from a *ħadīth* by the Prophet in which he says to Hind Bint Abī Sufyān: "Take what is sufficient for you and your children, and the amount should be just and reasonable." Here, the Prophet took into consideration the circumstances of both spouses and he allowed her to take from her husband an amount of money that was reasonably sufficient for her and her children.

Second, the *Shāfiᶜiyyah*, *Ħanbaliyyah*, and some *Ħanafiyyah,* particularly Al-Karkhi[27] contends that it is only the husband's circumstances, and not those of the woman, that really matter in fixing maintenance. If a man is poor, he may only pay the kind of maintenance that is normally paid by people suffering from insolvency, although the wife may be quite rich. But if the man is rich, he may pay the kind of maintenance usually paid by rich people, although the wife may be poor. *Shāfiᶜiyyah* scholars say that this does not apply to the cost of housing. They argue that the estimation of the housing benefit or cost has to do with the woman's status and not with that of the man alone. Because she spends most of her time in the house, due to the requirement that she should be confined to her husband's house, the residence has to be convenient to her. Evidence in support of this argument comes from statement by Allah in Sūrat At-Ŧalāq, in which He says:

> Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He has given him. After a difficulty, God will soon grant relief.
>
> [Sūrat Al-Ŧalāq: 7]

I believe that the second opinion, which was adopted by *Shāfiᶜiyyah* and some *Ħanafiyyah* followers, is more appropriate as it takes into consideration the husband's circumstances only. The explanation of this opinion is actually based on the requirement that the man, on his own, has to provide the wife's maintenance and the wife already has some knowledge of the man's financial situation and his ability to pay for her living. She agreed to marry him after she knew all about this matter. This makes it plausible that the estimation of the woman's maintenance is based only on the man's financial or economical status. This is consistent with God's words in [sūrat Al-Baqarah: 286]

> On no soul doth God place a burden greater than it can bear. It gets every good that it earns, and it suffers every ill that it earns.

The wife's maintenance can be estimated or calculated on a daily, monthly or yearly basis. But, the way it should be paid may take into account the husband's circumstances and the most appropriate way for him to provide the maintenance. If he works and gets a monthly salary, he pays the maintenance monthly, and if he is a worker and gets his wages daily, the payment may be daily or weekly, and so on. It is very common nowadays that maintenance is paid on a monthly basis.

Maintenance, as has already been demonstrated earlier in this chapter, includes food, clothing, and housing. This had been clearly confirmed by the Islamic Law and there seems to be no disagreement among scholars or jurists in this respect. However, there is disagreement among Muslim scholars on some details about the maintenance and its quantity. For example, if we take

food maintenance, we see that scholars disagree on determining how much it should be. In this section, I am going to discuss different types of maintenance and investigate how different Muslim scholars had different points of view regarding certain details about calculating maintenance. After I consider these different views I will present my own point of view and try to justify it.

5. 1. Food Maintenance

One of the most significant types of maintenance that a husband has to provide for his wife is food maintenance. Its significance comes from the fact that it is one of the most basic needs of man. According to Islamic Law, the husband has to provide food maintenance for his wife. In fact, this requirement is explicitly stated in different verses of the Noble Qur'ān. This may explain why there is consensus among all scholars regarding this maintenance. However, scholars disagreed on how to calculate this maintenance. Here there are two main points of view.

5. 1. 1. The First Viewpoint

The *Shāfiʿiyyah* scholars[28] argued that the cost of the food maintenance is clearly fixed, in the sense that is known what exactly the husband has to give, so it has a definite value. The husband has to pay it to his wife in food supply. They meant that the wife deserves food maintenance through being provided by the food supply. If the husband is rich, the daily food maintenance he gives his wife is estimated to be two bushels. But if his financial status is moderate or acceptable, he pays maintenance of one bushel and a half. However, if he is poor, the maintenance becomes only one bushel. The reason why these scholars estimated the food maintenance in terms of bushels is because the expiations are also measured by bushels. The maximum value of such an expiation, which is usually the case when one causes harm to others during

the *ħajj* season, is two bushels, and the minimum expiation, which is the case in '*al-żahār*', is one bushel. To support this, proponents of this view, first, used evidence from God's statement in the following verse from Sūrat Al-Ŧalāq:

> Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what God has given him. [Sūrat Al-Ŧalāq: 7]

They argue that in this verse, God discriminated between the rich and the poor in maintenance, so He obliged each to pay according to what he can afford.

Second, there are those who argue that it is quite difficult to settle the amount of food maintenance that is sufficient for the wife. It is also difficult for a judge to fix it because a woman may claim that what she is asking for is what she really needs, whereas the husband may claim that what the wife is asking for, as food maintenance, is more than what she needs and this kind of thing may lead to a dispute between the two parties. For these reasons, they concluded that estimating the relevant maintenance in this way reduces the chances of dispute between the husband and his wife.

The food that can be estimated as maintenance is wheat, barley, and dates. It may also be food that is usually eaten by people living in the same country as the wife and her husband. As for seasoning[29] and meat, the estimation in this case is left to both the man and his wife if they can agree on something. If they fail to do so, things will be more likely to become worse and develop into a dispute. So the judge has to decide, according to his discretion, and issue a verdict.

5. 1. 2. The Second Viewpoint

Another viewpoint regarding how much maintenance could be is that held by *al-jumhūr* of Muslim scholars (i.e., namely jurists belonging to *Ħanafiyyah, Mālikiyyah*, and *Ħanbaliyyah* jurists).[30] They all agree that the calculation of the food maintenance for the wife should be based on her need. She should get all the food she needs. Their evidence to support their view comes from a variety of sources.

First, the most overwhelming evidence comes from the Holy Qur'ān. God states in Sūrat Al-Baqarah

> But he (i.e., the father) shall bear the cost of their food and clothing on equitable terms. [Sūrat Al Baqarah: 233].

God, in this verse, imposed the maintenance on the husband with no restrictions. Maintenance in this verse is referred to as "food", which is usually, and according to traditions, estimated in terms of being sufficient. Obviously, this is different from what *Shāfiᶜiyyah* would argue for.

Further evidence on how to estimate the wife's food maintenance stems from a *ħadīth*, where Hind Bint ᶜUtbah said to God's Messenger that her husband, Abū Sufyān, is a miser and does not give her what she and her son need. The Messenger said to her:

> Take what is sufficient for you and your children, and the amount should be just and reasonable.

It was said after that the Messenger of God did not state exactly how much the food maintenance should be, because he said take what you need or what is enough without spelling it out. This clearly demonstrates that food maintenance should be based on sufficiency whether it is in food or anything else.

Hanafiyyah, *Mālikiyyah*, and *Hanbaliyyah* scholars argued against what *Shāfiʿiyyah* said about calculating food maintenance in terms of bushels (i.e. fixed amounts of food). They said that this kind of measurement is used in the case of expiations and cannot be used in estimating maintenance. Expiations are a way of worship, and not a charity, so they have to be accurately specified in order for people to know what exactly they should do. Thus, expiations are different from maintenance, but similar to *zakāt* in the sense that they can be accurately measured. However, the wife's maintenance is not a form of worship, so it is estimated in a different way. That is, it is estimated in terms of sufficiency. Thus, the wife's need for food should be fulfilled regardless of whether it is too much or too little. The feeling of having had enough, and nothing else, is the measurement to be used in calculating the food maintenance. Thus, the wife's food maintenance in a way is similar to that of relatives.

More evidence in favour of the view that the wife's food maintenance is based on how much she needs is shown in a *ḥadīth*, where the Prophet says that: "You (i.e. the husbands) are obliged to provide them (i.e. the wives) with food and clothing on equitable terms." They said that providing the wives with food is constrained in terms of equitability and it is not quite clear whether this provision of food is less than being sufficient for the wife or whether it is more than two bushels of food. Is this the maintenance that a rich man has to pay in food maintenance to his wife, according to the *Shāfiʿiyyah* School? The obligation that the man should provide enough food for his wife is understood to be included by the phrase "on equitable terms" in the above. Whether it is less than two bushels or less than one bushel is of no great significance, because what matters is that the wife gets a food maintenance that is enough and this ensures that "provide them (i.e. the wives) with food and clothing on equitable terms" is guaranteed.

5. 1. 3. My Viewpoint

The most probable and maybe plausible view with respect to the calculation of the wife's food maintenance is that of the majority of scholars who argue that the estimation of the maintenance should be based on satisfying the need of the wife, and not on anything else, for a variety of reasons. One reason is that the evidence in favour of this view is overwhelming. Another reason is that the process of fixing the value of the food maintenance is hard and arbitrary which might do more harm, than good, to the woman herself particularly nowadays, as God has given people better means of living. He has blessed them with possessions, wealth and fortune. So things have changed and there are various types of food. Therefore, it is more convenient to leave the food maintenance unspecified, so it is calculated in accordance with the wife's food need. This is consistent with God's statement that men should "live with them (i.e. their wives) on a footing of kindness and equity."

In fact, this opinion of the mass of scholars has also been adopted by some *Shāfiᶜiyyah* followers. For example, Al-Sharbīnī states in *Mughnī al-muḥtāj* that

> It was said that the wife's maintenance is calculated in terms of the provision of enough food, just like other types of maintenance such as maintenance spent on relatives following the Prophet's saying: 'Take what is sufficient for you and your children, and the amount should be just and reasonable.' On commenting on this *ḥadīth*, Imām Al-Nawawī said that this *ḥadīth* is a reply to the *Shāfiᶜiyyah*, and Al-Nawawī himself is one of them, and it is particularly directed towards their way of calculating the food maintenance in terms of bushels. Al-Adhruᶜī was reported to have said 'I did not know of anybody who could have called for calculating the woman's food maintenance in terms of bushels before Muḥammad Bin Idris Al-Shāfiᶜī. If I may be more frank,

I dare say that it is more accurate and correct that the wife's maintenance be calculated equitably by following the example of the Prophet.' [31]

5. 2. Clothing Maintenance

There is consensus among Muslim scholars about the clothing maintenance, which requires the husband to provide everything that relates to clothing for his wife. Most of the evidence used earlier for food maintenance can also be used for clothing. For example, it is stated in the *Qur'ān* that the husband has to provide the clothing for his wife as in

But he (i.e. the husband) should bear the cost of their food and clothing on equitable terms. [Sūrat Al-Baqarah: 233]

In fact, the husband has to provide clothing for his wife twice a year: once in the winter and once in the summer. The clothes he buys for her should be appropriate and should conform to what people usually buy. This does not mean that he may not pay for clothing more than some other people do, if there is a need to do so, provided that this complies with the traditions and there is no exaggeration in doing it.

The *Shāfiᶜiyyah* followers believe that the husband has to provide the clothing maintenance, but not the food maintenance, in a sufficient way. They say that sufficiency in clothing can be easily checked by looking, but in the case of food, things are more difficult to judge whether somebody had enough food or not, so they don't adopt the sufficiency criterion in the case of food maintenance.[32] As for other scholars, they all agreed that the woman is entitled to be maintained appropriately. Ibn Qudãmah says in this context

The husband, according to all scholars, is obliged to provide a clothing maintenance for his wife. And this requirement is fulfilled if what the wife gets is sufficient. [33]

5. 3. Housing Maintenance

This is another thing that the husband has to provide for his wife in the form of maintenance. This maintenance requires the husband to provide the proper house and place where the wife will live after marriage.

5. 3. 1. Evidence for the Housing Maintenance

Evidence in support of this requirement comes from the *Qur'ān*:

> Let the women live (in *ᶜiddah*) in the same style as ye live, according to your means.

Although this verse refers to the divorced woman, interpreters and commentators on the meaning of the *Qur'ān* say that it shows the legality of the woman living with her husband in his house. The importance of housing for people is that they feel more comfortable and they cannot be watched by others and keep their own things for themselves away from the eyes and attention of the others.

5. 3. 2. Conditions and Characteristics of the Wife's Residence

There are some conditions and characteristics that should be taken into consideration when one is deciding on a house. These are some of them. First, the house has to be adequate and convenient for the wife. It should also be big enough, so it meets the purpose of marriage. Moreover it has to conform to what people in the neighbourhood consider appropriate. For example, if people nearby live in flats, the wife should live in a flat, and if they live in villas, and houses, the wife has the right to live in similar conditions. However, the husband's financial circumstances should be taken into account, following God's order to "Let the women live (in *ᶜiddah*) in the same style as ye live, according to your means". Thus, the living accommodation of the wife should reflect the husband's financial status. What is important is that the residence should be inhabitable and have the necessary facilities.

Second, the residence should be in an area where good people live. Thus, if the neighbours are bad or if the husband lives in a lonely or distant area with no people around, the wife has the right to reject it, unless he brings her someone with whom she can socialise, so that she no longer feels lonely.[34]

Third, the house has to be completely furnished by the husband, because it is not the woman's responsibility to do this. All she has to do is to give herself to her husband and he does everything else she needs, such as providing food, drink, and housing (but she will cook the food, and do the washing up and cleaning, etc.). This has been agreed upon by scholars, except Mālikiyyah followers, who believe that the woman should pay from her dower for the marriage preparations.

Finally, the residence which the wife is entitled to have should be a house of her own with no one else, particularly from the husband's side, sharing it with her, even though they could be his children from other wives, his other wives, or his sisters and brothers. Imām Al-Kāsānī says [35]

> If the husband wants her to live with another wife of his, or her in-laws and relatives, but she refuses, then he has to provide a separate house for her.

Ħanbaliyyah[36] agreed with *Ħanafiyyah* on this matter and so did *Mālikiyyah*, [37] but they differentiated between a virtuous (or noble) wife and a humble one. They argued that a virtuous wife should get a separate residence, unless the husband had already made it clear to her, when completing the marriage contract, that she had to stay with his family in the same house, provided that they (i.e. the family) did not do her any harm. As for the humble wife, she has no right to ask for a separate house of her own, so she may live in the same house as the rest of the husband's family, unless she had made a condition of this when completing the marriage contract.

The reasons why a wife has the right to have a separate house have been summed up by Al-Gharawī, [38] who says the wife and the husband can enjoy each other whenever they want to if they live in a separate house. They will also be able to stay away from people's attention and gossip. She can be more comfortable in her house, so she can dress and undress to relax or sleep. She will also be assured that all her possessions and other stuff will be safe. Moreover, a separate house will help in keeping a low profile of any disputes that may take place in the house between the husband and his wife, and this in turn, may help in containing any problems between the two before they are aggravated and before they become of interest to everybody else. Living in a separate house, away from the husband's family, may reduce the jealousy that usually surfaces between the wife and her mother-in-law. It is well known that such jealousy can be destructive because it may lead to problems among different members of the family. Al-Gharawi argues that Sūrat Al-Ŧalāq refers to what amounts to a right for the wife to have a house. It is a right to use and enjoy, but not to own a house, as stated in this verse

> O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: And fear God your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness. [Sūrat Al-Ŧalāq: 1]

This shows that woman has the right to have her house before she is divorced.

6. Calculating Other Types of Maintenance

The three types of maintenance that have been discussed so far, namely food maintenance, clothing maintenance, and housing maintenance, are all obliging for the man. He has to provide them for his wife regardless of whether he is poor or rich.

One may conclude from what I have demonstrated above, that the legal maintenance, which the husband is obliged to provide for his wife, subsumes all of food, clothes, and residence. There is no disagreement among scholars with respect to this matter. However, there is more to marital life than these issues. In fact, there are lots of other things that are also necessary for the wife and, therefore, should be provided in order for the wife to be able to manage her marital affairs in a successful way. This is what the following sections attempt to address.

6. 1. Servant/Maid Maintenance

The wife may need a servant to help her and do some chores inside or outside the house. What does Islam have to say about providing the wife with a servant? Is the husband required to pay for the provision of a servant for his wife? Muslim scholars, with the exception of the *Shāfiʿiyyah*,[39] all agreed that if the husband is poor, he is exempt from this maintenance, but he still has to pay the costs of other kinds of maintenance (i.e. food, clothing, and housing), in accordance with what he can afford. Apart from these, he is not committed to pay anything. However, if the husband is rich and is able to pay for servant provisions, there are two potential measures or points of view.

The first point of view is the one adopted by *Ḥanafiyyah, Mālikiyyah, Shāfiʿiyyah*, and *Ḥanbaliyyah*.[40] According to this opinion, the wife deserves a servant maintenance if she was of a noble rank or family and was not used to work at her father's house, if she was ill, or if she had many children and repeated pregnancies. In these cases, the husband is obliged to pay the costs of servant maintenance. This complies with God's statement that requires the husbands to treat their wives nicely and fairly: "live with them (i.e. their wives) on a footing of kindness and equity." There is nothing stated in the *sharīʿa* that deprives a wife of the right to have a servant. In fact, the

Mālikiyyah had gone further than this and said that if the husband is rich and has a fortune, he should pay for two servants, and not one, particularly if the wife needed that or if she was in a high post. Abū Yūsuf, and Abū Thūr, who are both *Ħanafiyyah* agree with *Mālikiyyah*. For example, Abū Yūsuf says in this regard that

> She is entitled to have two servants, because she needs one of them inside the house and the other outside the house.[41]

The other opinion or point of view, which the *Ħanafiyyah* [42] adopt as well, centres on the idea that the husband is not obliged to pay for servant maintenance in cases where the woman can serve herself, or she is not used to having servants before the marriage. In this case, the man does not have to pay for this kind of provision for his wife. To support their point of view, the *Ħanafiyyah* refer to what the Prophet did when his daughter, Fātima, came to him complaining about the hand mill, which hurt her hand. Despite this, the Messenger of God did not appoint a servant for her. Instead, he divided the workload between Fātima and her husband, ᶜAlī Ibn Abu Ŧālib.[43]

It seems to me that it is acceptable, and maybe more preferable, according to Islamic Law as well as traditions, for the man to get his wife a servant, regardless of whether she assumes a particular social status or not, because nowadays marital life has changed and it is almost impossible for the wife alone to do all the housework. She needs somebody beside her to help her with the cleaning, washing and tidying the house, so that she can turn towards herself, her husband, and her children because she will be teaching the children and caring for them. Thus as long as the husband can afford to provide a servant and as long as the wife needs a servant to help her, it would be unjustifiable if the husband did not get her somebody to help her. This will make his wife happier which in turn makes him happy. This kind of relationship between the husband and the wife quarantees that women are

treated nicely and on equitable terms, the same way God wants us to deal with them.

Ahmad Hamad says that regardless of the opinions that exempt the wife from working in her house, it is in the wife's best interest that she serves her husband, herself, and her house by herself.[44] Or, at least, she should work at home as much as she can. As for the chores that she cannot do at home, she leaves them for servants of her choice or whichever servants she may get.

6. 2. Medical Maintenance

There is no disagreement among Muslim scholars regarding the maintenance which an ill wife should get from her husband and this includes food, clothing and housing, given that the wife has given herself to the husband and that she has not behaved in violation of marital duties. Al-Khassāf says:[45] "I said what do you say if the wife gets sick?" He replied that "the man has to pay the costs of her maintenance." This is due to the fact that the husband is benefiting from his wife through the feeling of intimacy he gets by looking at her. Ibn Al-Qayyim says

> If it becomes difficult for the husband to enjoy his wife or have sexual intercourse with her, due to a prolonged illness, he will not be able to invalidate or nullify the marriage contract and he still has to pay the costs of her maintenance fully.

Scholars also agreed on the non-obligatoriness of paying the costs of the medical treatment an ill wife may need, such as the costs of medicine, doctor, etc. They argued that the husband is not obliged to bear responsibility towards his ill wife because they look at the wife's body in the same way they look at a rented house, which he can use and benefit from, but he will not be obliged to repair the property.

Hanafiyyah scholars[46] believe that

> The husband does not have to pay for the doctor and medicine his ill wife needs. Nor has he to pay the costs of phlebotomy or cupping.[47]

Mālikiyyah[48] believe, according to Shaikh Khalīl ᶜAli, that the husband is obliged to pay the cost of providing food, clothing, and housing for a mature woman who can have sexual intercourse within the normal limits, but there is no mention of medication.[49] Furthermore, Al-Kharshi says in interpreting *Al-Mukhtasar*: "no *kohl* sticks (or eyeliner), no medicine, no cupping, and no clothes for outing", [50] that this means the husband may not pay the cost of eyeliners, medicine, or the doctor if the wife gets sick. They excluded what should be paid for the midwife and fees for delivery which, as they argue, should be paid by the husband.[51] Ibn Qudãmah is quoted to have said that:

> When the wife gets sick, the husband does not have to buy the medicine for her or pay for the doctor who treats her because this is done to remedy the body. This is not necessary just as it is unnecessary for the tenant to repair or rebuild a collapsed part of a house that he is occupying. The same thing applies in the case of cupping and phlebotomy. [52]

Similarly, *Shāfiᶜiyyah* will agree with what has been stated above. They argue "the husband is not obliged to pay the cost of health maintenance, such as medicine, doctor, cupping, etc." [53]

From what has been discussed above, it becomes clear that the four Islamic Schools (namely, *Hanifieh*, *Mālikiyyah*, *Shāfiᶜiyyah*, and *Hanbaliyyah*) are in agreement regarding the non-obligatoriness of a wife's health maintenance (i.e., medicine, and doctor fees) payable by the husband. The purpose of this, as Wahab Al-Zuħailī says, is that

> In the past, the treatment of the ill was not a basic necessity, so people rarely needed medication because they followed the rule of general health and prevention. Thus, the scholars' opinion in not legalising what might be called a medical maintenance was actually based on what was common those days. [54]

However, it was only the Zaydiyyah Sect of Islam [55] that did not agree with the view that a wife has no right to medication maintenance. In fact, they argued that the husband is obliged to pay for the costs of the doctor as well as the medicine. According to them, the money paid for medicine is a part of the maintenance the wife receives from the husband. Al-Shawkānī says

> The obligatoriness of the medical maintenance is due to the fact that medicine is one of the things that help in preserving and keeping one's health. [56]

Moreover, this opinion by the Zaydiyyah followers is further supported by many contemporary scholars. For example, Yūsuf Al-Qaraḍāwī[57] argues in the context of interpreting the story about Hind, Abū Sufyān's wife, to whom the Messenger of God said: "Take what is sufficient for you and your children, and the amount should be just and reasonable." Al-Qaraḍāwī argued that what is meant is not only food and drink. On the contrary, what is meant includes everything that is needed. Therefore, it subsumes accessory items which, after being used on a large scale nowadays, became very familiar and people find it hard to cope without today. This may vary due to change in time, place, and other things, such as medicine itself. And this is what is referred to by the following Qur'ānic verse

> But he (i.e., the husband) shall bear the cost of their food and clothing on equitable terms [Sūrat Al-Baqarah: 233].

It is argued that providing medicine for the wife is a kind of maintenance and, like many other items, it comes under *rizq*, the Arabic word for 'food'. Consequently, buying the medicine for the wife is an obligation for the person who is responsible for paying the costs of food (i.e. it is the husband in the case of the wife).

The most likely opinion in this matter, I believe, is what the Zaydiyyah scholars argued for; namely the husband has to provide the medicine and pay for the doctor who treats the wife when suffering from an illness. He has to pay for everything she needs when she is ill for a variety of reasons.

First, treating a disease the wife is suffering from, helps her in protecting her health from deterioration and collapse. It is well known that a food, clothing and housing maintenance keeps the wife and protects her from loss. Similarly, the provision of medicine is quite essential, just like food, clothing and housing; therefore, the wife's maintenance should include it to guarantee that she leads a good quality life. As we all know, one loses his/her appetite when sick, so there is no point in obliging the husband to pay for food at a time when she cannot eat. This implies that medical treatment of the wife should be a kind of maintenance payable by the husband.

Second, it is also a sign of treating the wife fairly and with equity that the husband pays for his wife's medical needs. It is impossible that the husband eats, drinks, and enjoys life while his wife is ill and suffering from pain. In such circumstances, how could he be so careless to leave her with no help? How could he not get her a doctor? How is it possible for the couple to live in peace and tranquillity, as required by God in this verse from Sūrat Al-Rūm

> And among His signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts). [Sūrat Al-Rūm: 21]

at a time when the husband is quite negative because he does not cooperate with his wife and buy her the required medicine.

Third, it was pointed out earlier that the wife is similar to the residence where one lives in the sense that if something or some damages occur to the residence, in which one is only a tenant, and it needs repair, the tenant is not obliged to repair it. The same thing applies to the wife. If she gets ill, the husband is not obliged to provide medication for her. In fact, this analogy where the wife is likened to a house is unfair because the wife is a human being with feelings, and emotions and she is the husband's marriage partner in good and bad circumstances. If the husband gets sick she will be there to stay up and take care of him. As such, how is it possible that she has no right for maintenance from him when she gets sick? It was reported that God's Messenger praised men who treat their wives nicely and urged people to do the same when he said: "The best among you are those who do good to their families, and I am doing good to my family."

Fourth, what some scholars say about the husband not having to provide medicine for his wife could be right to some extent in some circumstances, as in the case where the wife is rich and can afford to buy medicine for herself and pay for her doctor, particularly when the husband is poor and can afford only basic things for her. However, if she is poor and owns nothing, it is not of prime importance that the husband provides her medicine, given that he is the one who benefits from her most. This is a way of facilitating things and making life easier for her. It is well known that the Islamic *Shari*^{c}*a* always adopts the principle of facilitating things rather than complicating them for people. The Messenger of God says in one *ħadīth* that,

> A *dinār* could be spent in Allah's Cause, in manumitting a slave, on poor people, or on your family. The reward will be greatest when a dinār is spent on your family.

This is an invitation for men to spend from what they have, on treating their wives and buying them the much needed medicine. God's Messenger, as narrated by Al-Bukhāri, says in another *ħadīth*,

> When a man (Muslim) spends something on his family intending to receive Allah's reward, it is regarded as *ṣadaqah* (i.e. an act of charity) for him.

There are no reasons why the husband does not count the medication for his wife as a maintenance spent in the way of Allah.

For these reasons, I conclude that nowadays, with the wide spread of diseases, the husband should be obliged to provide medical maintenance for his wife. He should not be careless and merciless as to leave her alone suffering from diseases and pain. I believe that legalising this kind of maintenance where the husband has to show some responsibility toward his wife's health will fulfil some of the most fundamental objectives of marriage, such as intimacy, love, peace, and tranquillity.

6. 3. Detergents, Perfume, and Adornment Maintenance

There is agreement among scholars that the husband has to provide maintenance for detergents, because the wife uses these things to keep herself clean, which in turn enables the husband to fully enjoy his wife. *Ħanafiyyah* followers argue that

> The wife has the right to have as maintenance all what she needs for cleaning herself, such as combs and ointments, what she needs for cleaning her head, such as (*sidr*), and what she needs to get rid of dirt,

such as soaps and other stuff like (*al-ashnān*) [58] that are usually used by people in her community.[59]

The *Mālikiyyah*, *Shāfiᶜiyyah*, and *Ħanbaliyyah* have a similar opinion. In fact, the *Ħanbaliyyah* added to this another thing which is the fee that has to be paid for the hairdresser (i.e. the woman who takes care of the wife's hair such as cutting it, combing and plaiting it). [60]

As for perfumes and adornments, scholars disagreed on whether they should be included in the wife's maintenance or not. On the one hand, there are the *Ħanafiyyah, Shāfiᶜiyyah*, and *Ħanbaliyyah*, who argue that the husband is not required to pay the costs of adornments, such as *kohl* and dye unless he volunteers to provide them.[61] On the other hand, there are the *Mālikiyyah*, who argue that the husband has to pay for things like *kohl* and *ħenna*[62] in cases where the wife may suffer if she does not take them. As for perfumes, scholars did not oblige husband to pay maintenance for these things in general with the exception of deodorants that women may use to get rid of the sweat.

6. 4. Maintenance for the Working Wife

Here we will be exploring whether a working wife (the wife that holds a profession) should get maintenance, since women in the past rarely had a profession outside their homes. Nowadays, things have changed and most women are looking for jobs and professions. However, Islamic Law offers no definite and decisive texts that explicitly state whether a woman should work or not. Another point that is also not very clear is whether or not the working wife deserves maintenance. In fact, these issues were left to time, traditions, and opinions expressed by different Muslim scholars. But it is clear that there are only two options depending on weather she has permission from her husband. The first case is when the wife gets her husband's permission to get a job. In this case, he has to give maintenance because when he accepts that

she works outside, he implicitly exempts her from the home confinement she is usually required to fulfil. Recall that maintenance is conditioned by confinement, as we discussed in section 3.4 of this chapter. However, a new restriction is imposed on the wife regarding the job that the she wants to do. It has to be lawful rather than suspicious or dubious.

This opinion was held by *Shāfiᶜiyyah*, and *Ħanbaliyyah* scholars. *Shāfiᶜiyyah* scholars argued that

> Had she gone out somewhere in town with his permission for something for herself, still *nafaqah* would not have been dropped because she obtained his permission before leaving and because he still maintains the right to enjoy her whenever he wants her. [63]

As for the *Ħanbaliyyah* scholars, they argued that

If the woman hires herself for suckling with her husband's permission, the hiring contract is legitimate and she deserves *nafaqah* in this case. [64]

This shows that *Ħanbaliyyah* scholars consider the woman's hiring herself to suckle is a legitimate thing for the woman to do and get paid for it. If the husband agrees on what she does (i. e., suckling for money), then she is entitled to *nafaqah* from her husband.

Farħāt agreed with both *Shāfiᶜiyyah*, and *Ħanbaliyyah* in their view about this issue. He said

> If the wife works during the day or the night and she had her husband's permission to do so, then this does not affect her right in getting *nafaqah*, because confining the wife to the house is the husband's right and he can give it up if so he wants. [65]

On the other hand, *Shāfiᶜiyyah*, [66] and *Ħanbaliyyah*, [67] believe that the wife does not deserve *nafaqah*, if she has not given the permission by her husband.

The second case is weather the husband gives his wife permission to work or not give the permission; she does not deserve *nafaqah,* because the conferment is incomplete. This opinion is held by Ibn ᶜAbdīn from *Ħanbaliyyah* School. He states:

> If the woman gave herself to her husband only during the day or only at night, she gets no maintenance because giving herself to her husband is incomplete. This is the case when a man gets married to a woman who works outside during the day and stays with her husband during the night. Such a wife has no maintenance. [68]

However, it is possible in some cases that before marriage the wife may make the possibility of having a job in the future or keeping her present job a pre-marriage condition or promise. In such a situation, the *Ħanbaliyyah* scholars contend that the husband has to stick to the condition made before the marriage and honour his promise and the wife, accordingly, should get maintenance because the husband was aware of her desire to get a job or continue with the job that she had already had before the marriage contract. Other scholars from *Ħanafiyyah*, *Mālikiyyah*, and *Shāfiᶜiyyah* schools argue that the condition, about the permission to get a job after marriage or continuing with the job she already has, which the wife made before marriage does not commit the husband. In spite of this condition, he can, if and when he wants, prevent her from working. Let us consider this example, which is taken from Shaikh ᶜAbdulazīz Bin Bāz, who was asked about a woman, who before marriage, made the condition that the husband should not prevent her from working as a teacher. She agreed to his marriage proposal after he accepted her condition. The question was whether the wife and her children get maintenance, given that she is an employee. Bin Bāz's reply was that

> If the man accepted his wife's condition regarding her work, whether she is a teacher or a student, etc., and got married to her, he is obliged

to observe the condition. Thus, he cannot prevent her from practising her profession or job, particularly after consummation. This is consistent with a *ħadīth* by the Prophet, in which he says: 'From among all the conditions which you have to fulfil, the conditions that make it legal for you to have sexual relations (i.e. the marriage contract) have the greatest right to be fulfilled.' If the husband insists on preventing his wife from working, she has the right to either stay with him or leave through legally nullifying the marriage contract. [69]

In this *fatwā*, Bin Bāz followed the *Ħanbaliyyah* School.

What has been stated about working wives so far poses no problems, because the obligator ness of the maintenance on the part of the husband is quite compelling. The husband either permits his wife to work and pays her maintenance at the same time or prevents her from doing so. In the latter case, if she does not obey, she no longer qualifies for maintenance. The husband and the wife have to opt for one of these two possibilities, and the consequences of each option are quite clear. However, a problem may arise when some husbands permit their wives to get the jobs they want. In fact, it is rather common today that one finds some husbands looking for appropriate jobs for their wives in some government offices. At the same time, these husbands refuse to give maintenance to their wives. In other words, they drop the wife's right in getting the maintenance that each wife deserves to get. What is worse is that they even stop paying the children's maintenance if they have any. Their argument for this behaviour is that the wife has a salary; therefore, she should pay the costs of living for both herself and her children. In effect, this leads to many problems and disputes among husbands and their wives that end up, in most cases, in a divorce or a temporal separation.

Now, let us look at how contemporary scholars dealt with this problem. No doubt, what the husband does to his wife in the way presented above does not conform to the rules and regulations of the Islamic Law. This is because the husband is infringing on his wife's right to her own money and he is at the same time, dropping his right to be her protector and maintainer. Of course, this behaviour contradicts God's statement that

> Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. [Sūrat Al-Nisā': 34].

It is said in commenting and interpreting this verse, that men are more preferable because they pay dowers as well as maintenance. Thus, if the husband refuses to pay maintenance, although he gave her permission to work, he will lose his status as her protector and maintainer which is a serious thing, as it threatens the concept of the family. Moreover, when the husband refrains from giving maintenance to his wife and children, he will be committing some sins because he is fiddling with the lives of those who are supposed to be in his care. The Prophet says something that relates to this particular issue when he says that "it is sinful for one to waste the lives of those who he is supposed to support" Thus, it seems inevitable that the couple have to cooperate in organising maintenance and sharing financial responsibilities, because, particularly nowadays, the husband in most cases cannot bear all the costs of living, so it is natural that he will seek support from his wife to share in maintenance. There is nothing wrong with this kind of sharing. It was reported that some female companions of the Prophet who used to spend on their poor husbands as well as children. What is spent on them counts as a sort of charity for which she will be rewarded especially if her husband and the children need money. If the husband and his wife agree on how to share the cost of living, while the wife is still adhering to her right in getting maintenance, there will be no problem. If the case is one where the

husband has permitted her to work, there will be no problem. Abū Al-Nīl encouraged the working wife to help her husband in maintenance. He says

> Even though the working wife has been permitted by her husband to work, she has to pay for part of the maintenance because her work clashes (i.e. affects negatively) with his own interest. This is the case when the two are on good terms. If he permits her to work and leaves her salary, he will be rewarded for that. However, if the two parties disagree, she gets something for what she had lost and this can be estimated according to tradition, and circumstance. [70]

This argument has also been supported by ᶜAbdulḥalīm Abū Shaqqah, who recommended something toward this issue when he said

> The wife has to give a sum of money in compensation for what the husband faces when bearing some physical and psychological effects.[71]

The estimate may vary according to the financial circumstances of each of the husband and the wife.

I believe that each of the two opinions expressed by Abū Al-Nīl and Abū Shuqqah has some positive aspects about the needs of the wife to help her husband in case he needs help as a gesture of love and intimacy. However, I believe that the wife should not be forced to help her husband in exchange for giving her the permission to work for a variety of reasons. First, the husband has the right and the power to prevent his wife from working. Thus, if he does not want her to work, he can prevent her from doing so or he can drop the maintenance which he would usually have to provide for her if she refuses to obey his order. In this case, she cannot ask for maintenance.

Second, forcing the wife to pay her husband for allowing her to work is a kind of exploitation of the wife, because it will become a precedent for other husbands and wives to follow suit, so they will force their women to work to

get some money from them although they do not need it. This is unjust for the wife, and men should refrain from doing it. Fawzī Fayḍallah[72] states that "some parents and husbands use their women's work to get money that they do not need." This is detested and rejected according to Islamic law (i.e. *shari'a*) because it has lots of disadvantages both on the family level and on the level of the man's dignity and right to be a protector of her.

Third, there are many people who argue that the husband is the only one who suffers from the effects of his wife working outside. This is not quite accurate, because the wife, too, suffers a lot as a result of working, since in this case she bears greater responsibilities as she has to do well on two frontiers: she has to do her work outside the home properly, and at the same time she has to look after the family and the children after she gets back from work. Therefore, it is not accurate to claim that it is only the husband who is affected by the consequences of his wife's work outside the house. Since the man and the woman, both suffer, as the wife is not obliged to pay anything for being allowed to get a job. In fact, what she spends on the children and other family matters should be considered a kind of contribution or help to her husband, rather than a commitment or an obligation that she is required to fulfil.

It could therefore be argued that it is more appropriate for the husband and his wife to agree among themselves on the issue of expenditure and maintenance. No one should be obstinate in this matter and stick to his or her own point of view. They both should be flexible, as the husband has to take into consideration that he is obliged to provide maintenance for his wife even if she is working, given that he does not object to her work. On the other hand, the wife, too, has to show some flexibility and take into account her husband's financial circumstances, so she should give whatever help she may

be able to offer. In this way, the family and the marriage avoid lots of problems that surface as a result of financial differences that arise between the husband and his wife.

7. Conclusion

In this chapter I discussed a number of issues that relate to maintenance. First, I introduced the meaning of maintenance or *nafaqah* and showed how important it is both for the family to live in tranquillity and for the marriage to proceed smoothly and with no problems. After that, I presented evidence that legalised the concept of maintenance in Islam. The evidence came from different sources: The Noble Qur'ān, the Prophet's *sunnah*, the *ijmāiᶜ* (or consensus) among Muslim jurists, logic and reasonability. Then I discussed the conditions according to which maintenance is provided and how it can be calculated. I also explored different types of maintenance, focusing on the wife's maintenance of food, clothing, and housing. Other sorts of maintenance were also discussed, such as the additional maintenance that is payable to the wife in case she has a servant, or in case she needs medication. In addition to these, I discussed maintenance for detergents, perfume, and adornment and ended this part of the chapter with maintenance in the case of working wives. I concluded the chapter by arguing that it is in the best interest of the family and the marriage that the couple show cooperation, understanding, intimacy, love, and flexibility toward each other, because a relationship based on these values will definitely be able to withstand all sorts of problems it encounters in contemporary everyday life.

Notes to Chapter Six

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5. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 9. p. 412.
6. Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 11, pp. 348.
7. The Arabic word for 'confine' in this sentence may denote imprisonment. But here it does not mean that the woman will be sent to jail. It means that if a woman gets married she should be confined to her new house, so she can't leave it or work or do anything outside the house without the husband's permission. Thus, she has to confine herself to her husband so she cannot have any relationship with anybody else, nor can she serve anyone else. She has to dedicate herself and her time to her husband, children, and house, so that she qualifies for maintenance.
8. Al-Tamartāshi, Shams Al-Dīn, *Radd al-muḥtār ᶜalā al-durr al-mukhtār: ḥāshiet Ibn ᶜAbdīn*, vol. 3, edited by A. ᶜAbdulmajīd Taᶜmah Ḥalabi, (Beirut: Dār Al-Maᶜrifah, 2000), p. 572.

   See also Al-Zaylaᶜī, Fakhr Al-Dīn, *Tabiān al-ḥaqā'iq sharḥ kinz al-daqā'iq*, vol. 3, 2nd edn., Cairo: Matābiᶜ Al-Fārūq, 1313 A.H.), p. 51.

   See also Al-Sarakhsī, Shams Al-Dīn, *Al-Mabṣūt*, vol. 5, 3rd edn., (Beirut: Dār Al-Maᶜrifah, 1987), p. 181.

   See also Al-Ḥanafī, Ibn Al-Humām, *Sharḥ fatḥ al-qadīr*, vol. 4, p. 193.

9. Al-Ḥanafī, Ibn Al-Humām, *Sharḥ fatḥ al-qadīr*, vol. 4, p. 193.
10. Al-Khassāf, Aḥmad, *Kitāb al-nafaqāt maᶜ sharḥih*, edited by A. Al-Afghāni, Beirut: Dār Al-Kitāb Al-ᶜarabi, 1984.
    See also Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 4, pp. 17-18.
11. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, p. 441.
    See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, 610.
12. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 664.
13. Al-Bājī, Imām, *Al-Muntaqā*, vol. 4, p. 126.
14. Al-Sarakhsi, Shams Al-Dīn, *Al-Mabsūt*, vol. 5, p. 187.
    See also Al-Ḥanafī, Ibn Al-Humām, *Sharḥ fatḥ al-qadīr*, vol. 5, p. 196.
15. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, 601.
    See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Muqannaᶜ*, vol. 3, (Riyaḍ: Maktabat Al-Riyaḍ Al-Ḥadīthah, 1980), p. 313.
    See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Kāfī*, vol 4, edited by Adil Abdulmawjūd, (Beirut: Dār Al-Kitāb Al-ᶜArabi, 2000), p. 23.
16. Al-Shāfiᶜī, Muḥammad, *Al-'Umm*, vol. 5, (Beirut: Dār Al-Maᶜrifah, 1987), p. 96.
17. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 4, p. 19.
18. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 9, pp. 283-4.
    See also Al-Shawkānī, Muḥammad, *Fatḥ al-qadīr*, vol. 3, p. 378.
    See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Kāfī*, vol 4, p. 24.
19. Al-Bājī, Imām, *Al-Muntaqā*, vol. 4, p. 126.
20. The Arabic word for this is "*nāshiz*" and it means a woman who disobeys her husband and detests him. So she, on purpose, disobeys

him and refuses to have an intercourse with him without an excuse. She may also leave her husband's house without his permission.

21. Ibn Taimiyah, Aḥmad, *Majmūᶜ al-fatāwa*, vol. 34, p. 50.

    See also Doi, Abdurahman, WOMEN IN SHARIAH (ISLAMIC LAW)' 3rd ed., Malisia, NOORDEEN, 1990, p 106.

22. Ibn Ḥazm, ᶜAlī, *Al-Muḥalla*, vol 10, pp. 10-11.

23. Al-Umranī, Abdulraḥman, *"Nafaqat al-zawjah hal tajib ᶜala zawwj min ajl al-istimtāᶜ"*, *Majallat al-waᶜī al-Islāmi*, issue no. 434, (1422 A.H.), pp. 76-79.

24. Al-Baltājī, Muḥammad, *Fi aḥ̈kām al-usrah dirāsah muqāranah*, 2nd edn., Egypt: Maktabat Al-Shabāb, 1983), p. 424.

25. Al-Dardīr, Aḥmad, *Al-Sharḥ al-saghīr ᶜala 'aqrab al-masālik*, vol. 2, (Cairo: Dār Al-Maᶜārif, n. d.), p. 734.

    See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 564.

    See also Al-Shaikh Niẓām, *Al-Fatawī al-hindiyyah*, vol. 10, (Cairo: Dār Al-Fikr li-tibāᶜah wa Al-nashr, n. d.), p. 547.

26. Al-Azharī, Ṣālih, *Jawahr al-iklīl sharḥ al-ᶜallāmah Khalīl min madhab al-imām Mālik*, vol. 1, (Beirut: Dār Al-Kutub al-ᶜIlmiyyah, 1997), p. 570.

27. Al-Nawawī, Muḥyidīn, *Al-Majmūᶜ sharḥ al-muhadhab*, vol. 17, (Beirut: Dār Al-Fikr, n. d.), p. 90.

    See also Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, p. 432.

    See also Al-Shawkānī, Muḥammad, *Fatḥ al-qadīr*, vol. 3, p. 322.

28. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, pp. 426-9.

29. The word for seasoning needs further explanation. In fact, this word refers to what is added to bread so it becomes tastier and more delicious.

30. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 4, p. 23.

See also Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh ash-sharħ al-kabīr*, vol. 7, p. 534.

See also Al-Sanᶜānī, Muħammad, *Subul al-salām*, vol. 3, edited by M. Subħi, (Saudi Arabia: Dār Ibn Al-Jawzi, 1997), pp. 297-298.

31. Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfāż al-muħtāj*, vol. 3, p. 426.

32. Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfāż al-muħtāj*, vol. 3, p. 429.

33. Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughī wa yalīh al-sharħ al-kabīr*, vol. 3, p. 429.

34. Al-Tamartāshi, Shams Al-Dīn, *Radd al-muħtār ᶜalā al-durr al-mukhtār: ħāshiat Ibn ᶜAbdīn*, vol. 3, p. 602.

35. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 4, p. 23.

See also Al-Khassāf, Aħmad, *Kitāb al-nafaqāt maᶜ sharħih*, edited by A. Al-Afghāni, (Beirut: Dār Al-Kitāb Al-ᶜArabi, 1984), p. 35.

36. Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 7, p. 26.

37. Al-Dasūqī, Muħammad, *Ħāshiet Al-Dasūqī ᶜalā al-sharħ al-kabīr*, vol. 2, (Beirut: Dār Al-Fikr, n. d.), pp. 512-3.

38. Al-Gharawī, Muħammad, *Ħuqūq al-mar'ah fī al-zawāj, (*Cairo: Dār Al-Iᶜtiṣām, 1989), p. 205.

39. They argue that the maintenance payable to the wife for a maid she has should be paid by the husband whether he rich, poor, master or even a slave. This is because the maintenance is required as a sign of treating

wives fairly. This service she gets is an obligation for the husband just like many things he has to provide for the family.

See: Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfāż al-muħtāj*, vol. 3, p. 432.

40. Al-Kāsānī, ᶜAlā' Al-Dīn, *Badāiᶜ al-ṣāniᶜ*, vol. 4, p. 24.

See also Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 7, p. 569.

See also Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfāż al-muħtāj*, vol. 3, p. 432-3.

See also Ibn Jazzī Al-Mālikī, *Qawānīn al-aħkām al-sharᶜiyyah*, edited by ᶜAbdulraħman Ħasan Maħmūd, (Cairo: ᶜAlim Al-Fikr, 1985), p. 245.

41. Al-Mūslī, Majd Al-Dīn, *Al-Ikhtiyār li-taᶜlīl al-mukhtār*, vol. 2, 1st edn., (Amman: Dār Al-Fikr, 1999), p. 321.

42. Al-Shawkānī, Muħammad, *Fatħ al-qadīr*, vol. 4, pp. 388-9.

43. This came in a ħadīth narrated by Al-Bukhāri in:

Al-ᶜAsqalānī, Aħmad, *Fatħ al-bārī bi-sharħ ṣaħīħ Al-Bukhārī*, vol. 9, p. 506.

44. Ħamad, Aħmad, *Al-Usrah: al-takwīn wa al-ħuqūq wa al-wājibāt*, 2nd edn., (Kuwait: Kuwait University, 1986), p. 221.

45. Al-Khassāf, Aħmad, *Kitāb al-nafaqāt maᶜ sharħih*, p. 41.

46. Al-Shaikh Niẓām, *Al-Fatawa al-hindiyyah*, vol 1, (Cairo: Dār Al-Fikr li-tibāᶜah wa Al-nashr, n. d.), p. 549.

47. Cupping is an old Arabic practice of curing certain diseases, through using cups to let blood from the neck.

48. Al-Dardīr, Aħmad, *Al-Sharħ al-ṣaghīr*, vol. 2, p. 732.

49. Al-Kharshī, Muħammad, *Al-Kharshī ᶜalā mukhtasar Sidī Khalīl*, vol. 4, (Beirut: Dār Sāder, n. d.), p. 183.

50. Al-Kharshī, Muḥammad, *Al-Kharshī ᶜalā mukhtasar Sidī Khalīl*, vol. 4, p. 187.
51. Al-Dāsūqī, Muḥammad, *Ḥāshiet Al-Dāsūqī ᶜalā al-sharḥ al-kabīr*, vol. 2, p. 510.
52. Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 568.
53. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, pp. 431.
54. Al-Zuḥaylī, Wahbah, *Al-Fiqh al-Islāmi wa adillatuhu*, vol. 7, 3rd edn., (Damascus, Dār Al-Fikr, 1989). P. 794.
55. This is a group who descend from Imām Zayd Ibn Ali (died 122 A.H.). See:
    Abū Zahrah, Muḥammad, *Tārīkh al-madhāhib al-Islāmiyyah*, (Cairo: Dār Al-Fikr, n. .d.), p. 626.
56. Al-Shawkānī, Muḥammad, *Al-Sayl al-jarrār, vol. 2,* edited by M. Ibrahīm, (Beirut: Dār Al-Kutub Al-ᶜIlmieh, 1985), p. 448.
57. Al-Qaraḍāwī, Yūsuf, *Fatawī muᶜāsirah*, vol. 2, (Amman:, Dār Al-Dhiyā', 1987), p. 172.
58. '*Al-Ashnān'* is an Arabic word in the plural form and it refers a specific container for holding drinking water, and this container keeps water colder then other containers do.
59. Al-Shaikh Niẓām, *Al-Fatawī al-hindiyyah*, vol 1, p. 549.
60. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, pp. 430-1.
    See also Ibn Qudãmah, Muwafiq Al-Dīn, *Al-Mughni wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 259.
    See also Al-Bahwatī, Mansūr, *Kashāf al-qināᶜ ᶜan matn al-aqnāᶜ*, vol. 3, edited by Hilāl Musaylihi, (Beirut: Dār Al-Fikr, 1982), pp. 295-300.

61. Al-Shaikh Niẓām, *Al-Fatawī al-hindiyyah*, vol 1, p. 549.

See also Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, pp. 430-1.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yaīh al-sharḥ al-kabīr*, vol. 7, p. 260, 295.

See also Al-Bahwatī, Mansūr, *Kashāf al-qināᶜ ᶜan matn al-aqnāᶜ*, vol. 3, edited by Hilāl Musaylihi, (Beirut: Dār Al-Fikr, 1982), pp. 295-300.

62. Al-Ḥaṭṭāb, Muḥammad, *Kitāb Mawāhib al-jalīl,* vol. 4, 3rd. edn., (Beirut: Dār Al-Fikr, 1992), p. 184.

63. Al-Ramlī, Shams Al-Dīn, *Nihayat al-muḥtāj*, vol. 7, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1967), p. 222.

64. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, (Beirut: Dār Al-Kitāb Al-ᶜArabī, 1972), p. 626.

65. Farḥāt, Muḥammad, *'Aḥkām al-usrah fī al-fiqh al-islāmi*, (Cairo: Dār Al-Nahḍah Al-ᶜArABīeh, 1992), p. 296.

66. Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-munhāj*, vol. 3, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1958), p. 436.

67. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 7, p. 597.

68. Al-Tamartāshi, Shams Al-Dīn, *Radd al-muḥtār ᶜalā al-durr al-mukhtār: ḥāshiet Ibn ᶜAbdīn*, vol. 3, p. 577.

69. Abdulmaqsūd, Ashraf, *Fatawī al-mar'ah al-Muslimah*, vol. 2, 3rd edn., (Riyaḍ: Maktabat Aḍwā' Al-Salaf, 1996), p. 882.

70. Abū Al-Nīl, Muḥammad, *Al-ᶜAlāqāt al-usarieh fi Al-Islām*, 2nd. edn., (Egypt: Dār Al-Fikr Al-Islāmiyyah Al-Ḥadīth, 1987), p. 171.

71. Abū Shaqqah, Abdulḥalīm, *Taḥrīr al-mar'ah fī ᶜaṣr al-risālah*, vol. 2, 4th edn., (Kuwait: Dār Al-qalam, 1999), p. 366.

72. Fayḍallah, Fawzī, *Al-Zawāj wa mujibātuhu fī al-sharīᶜa wa al-qānūn*, Kuwait: Maktabat Al-Manār Al-Islāmiyyah, 1994), p. 169.

CHAPTER SEVEN

THE WIFE'S RIGHT TO EQUITABLE TREATMENT

(*AL-ᶜISHRAH BIL-MAᶜRŪF*)

1. Introduction

Al-ᶜishrah bil-maᶜrūf, which is the Arabic expression for equitable treatment among husbands and wives, is the backbone of marital life. It is one of the most fundamental rights for the success of marriage. In fact, any marriage that is not based on equitable treatment between the husband and the wife will not be stable nor will it be durable. Although this kind of treatment is a common right for both the husband and the wife, I want to restrict this chapter to the exploration of the equitable treatment as a right and a duty for the husband toward his wife. The evidence that supports this right is quite common in a variety of texts and *ħadīths* in the Islamic *shariᶜa*. In this chapter, I discuss and explain in some detail, the texts and *ħadīths* that illustrate the importance of this duty which a husband should observe when dealing with his wife.

2. The Meaning of *Al-ᶜishrah bil-maᶜrūf*

The concept of *al-ᶜishrah bil-maᶜrūf*, which is equitable treatment among couples, basically requires husbands and their wives to be good companions to each other through not only saying good things to each other, but also through exchanging good deeds. The Arabic word "ᶜ*ishrah*", both lexically and technically,[1] refers to mixing with someone and taking him/her as a good companion. The word "ᶜ*ashīr*", which is derived from the word "ᶜ*ishrah*", means a husband or a wife. This is because they mix and stay together through their life and do not separate. As for the Arabic word "*maᶜrūf*", it

refers to any kind of deed that proves to be a good one.[2] In his explanation of the meaning of this word "*maᶜrūf*", Ibn Al-Athīr Al-Jazrī says

> It is a noun that refers to every deed that has to do with approaching and worshipping Allah as well as being charitable with people. *Al-maᶜrūf* also involves fairness and good company among family members and other people. It is the opposite of '*munkar*', which refers to a bad act.[3]

This term has also been explained by Al-Bahwatī, who states that it

> refers to the intimacy and belonging that binds both spouses to treat each other equitably, so that none of them delays or denies the fulfilment of his or her obligations toward the other.[4]

From these definitions of *al-ᶜishrah bil-maᶜrūf* by different scholars, one may conclude that it is a sort of conduct by a husband and a wife toward each other according to which they fully perform their duties and show good manners and company. This chapter focuses on the husband's duty toward his wife in treating her equitably and not causing her any harm.

3. The Legitimacy of Equitable Treatment

The requirement of equitable treatment among husbands and wives is evident in both the *Qur'ān* and the *ħadīths* by the Prophet. In this section, I want to discuss the woman's right upon her husband to treat her equitably.

3. 1. Evidence from the *Qur'ān*

There is plenty of evidence in the *Qur'ān* that shows that the wife has the right to be treated fairly by her husband. For example, this right has been endorsed by the following Qur'ānic verse in Sūrat Al-Nisā'

> (You men should) live with them (i.e. women) on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing,

> and God brings about through it a great deal of good [Sūrat Al-Nisā': 19].

It seems that interpreters of the *Qur'ān* agree that this verse orders husbands to treat their wives in a fair and kind way and be charitable with them. Men should not oppress or harm their wives. [5]

Ibn Kathīr commented on this verse and said that this verse addresses, in particular, the husbands through urging them to

> Say nice things and conduct good deeds when dealing with their wives. Husbands should treat their wives in the same way they would like their wives to treat them. [6]

However, contrary to Ibn Kathīr, Al-Qurṭubī argued that the previous verse from Sūrat Al-Nisā' addresses all men whether husbands or guardians including parents, brothers and others.[7] They are all required to treat the woman fairly regardless of the relationship between them (i.e. no matter whether she is a daughter, a sister, a mother or a wife.)

I believe that this verse, regardless of whether it addresses husbands in particular or men in general, is an injunction to treat the wife well and be charitable with her in all aspects of marital life, so that marriage may achieve the message it is originally supposed to fulfil.

Mahmūd Shaltūt, a contemporary scholar, also discussed the meaning of verse 19 of Sūrat Al-Nisā'. He argued that in this verse

> There are both '*nahi*' and '*amr*' (i.e., a prohibition and a command, respectively). And they are both in the interest of the wife and the family in general. This verse calls for the prohibition of any kind of harsh treatment of the woman without justifiable reasons, and at the

same time it commands that a woman be treated equitably according to the observed traditions and conventions of human dignity. [8]

More evidence in favour of treating the wife fairly comes from another verse in the *Qur'ān*:

> And women shall have rights similar to the rights against them, according to what is equitable [Sūrat Al-Baqarah: 228].

It is clear from this verse that the rights the woman has toward her husband, are similar to those he has toward her and that one of these rights is the right to get equitable treatment, as it is unjust for the wife to get fair treatment from her husband while he does not get it from her. Thus, equitable treatment, according to this verse, is mutual. In this regard, Ibn Qudāmah says that

> The similarity between the husband and the wife with respect to performing their duties toward each other with no reluctance or hesitation, and without showing any sort of hatred or causing any harm in accordance with Allah's order that husbands treat their wives equitably. [9]

The two verses discussed above (i. e., verses 19 in Sūrat Al-Nisā' and 228 in Sūrat Al-Baqarah) explicitly demonstrate that the *Qur'ān* calls upon husbands to treat their wives equitably.

3. 2. Evidence from the *Sunnah*

Now we move to look at evidence from the Prophet's *sunnah* which shows that men should treat wives with kindness. In fact, there are many *ħadīth* as well as deeds that were performed by the Prophet to urge husbands to deal with their wives in a fair way. It is the wife's right to get fair treatment and this right is part of the husband's religious conduct. In other words, a good Muslim is one who treats his wife equitably. This had been stated in the most reliable collection of books of *ħadīth* as in *Śaħīħ Al-Bukhārī*, and *Śaħīħ*

Muslim, where many sayings by the Prophet ask husbands to show patience and equity when dealing with their wives. For example, in one *ħadīth* in *Śaħīħ Al-Bukhārī*, Abū Huraira narrated that Allah's Messenger had said that

> Whoever believes in Allah and the Last Day should not harm his neighbour. And I command you to take care of the women, for they are created from a rib and the most crooked portion of the rib is its upper part; if you try to straighten it, you will break it and if you leave it, it will remain crooked, so I command you to take care of the women. [10]

This is a *ħadīth* that demonstrates how a husband should treat his wife through being fair to her so that he may benefit from her. This *ħadīth* tells something about the nature and psychology of the woman, particularly that she is created from a crooked rib, which is one of the ribs of Adam. Therefore, Allah's Messenger commanded his companions and followers to take care of women. Al-ᶜAsqalānī comments on this *ħadīth* saying that

> This *ħadīth* indicates that one has to be tender and patient with the 'crookedness' of women and has to seek forgiveness from them. If one tries to straighten their crookedness, it will be for the sake of benefiting from them in some way, because it is impossible for the man to live without a woman to dwell with her in peace and tranquillity, so that they together manage their live smoothly. [11]

This *ħadīth* has another important implication which is that there is no perfection except in Allah. There is no man or woman who is perfect or infallible in the sense that he/she has all the good qualities with no weaknesses and shortcomings. Therefore, the man or the husband should realise this point and should be fair in the way he deals with his wife. This means that he should do all the duties he owes her in accordance with a saying by the Prophet in which he commands Muslims to "take care of women". In fact, by emphasising the importance of taking care of women, the Prophet, and his companions as well as the Islamic nation after him, accepted

to take responsibility in protecting women from any harm or wrong doing. Here the Prophet is commanding his companions and his nation to take care of women to make sure that they are fairly treated, as this will spoil and corrupt the love and intimacy in marital life between the two partners due to certain misbehaviour or ill-treatment that is conducted unintentionally by the wife.

Abdulḥalīm Abū Shaqqah commented on the *ḥadīth* about the Prophet's command to all Muslims to take care of women. He said

> This *ḥadīth* directs the man to be more tolerant with whatever ill-conduct a woman may do, due to some crookedness in her. The Prophet said that it is pointless to straighten this crookedness, because if you try to do so, you may cause a greater damage as if you broke it. The man has to bear in mind that when a woman misbehaves in some way causing the man some embarrassment or trouble, she does not mean to do so. Instead it should be looked at as a conduct that results from her hasty reaction to certain things and she does not have much choice, as she is destined to have such a nature that drives her to behave in one way or another. Therefore, he has to be more understanding and considerate. He should know that it is a common property in women to occasionally misbehave in some way. She may do well in her basic duties such as be pregnant, suckling, and nursing. She needs a lot of emotions, feelings and sensations. [12]

However, this by no means means that the woman is a naive creature who does not fully understand the implications of her conduct or who could not manage her own affairs. On the contrary, the woman is just like the man in almost every thing, particularly when it comes to humanity and dignity. Men and women are created to differ only in some physical and psychological aspects. In this regard, Mahmūd Al-Sharīf says:

Allah's Messenger does not mean by what has been said above that the woman is an evil creature. On the contrary, he wanted to state the facts so one become more realistic without any illusions and focus on things that relate to the man in terms of what is bad and what is good for him. If one finds in the woman something he hates, he should deal with it with patience away from reactions and hatred, as he may also find in her something pleasing. She is a human being with evil as well as virtuous aspects inside her and this is the case with men as well. This is what the Prophet meant by saying 'a true male believer in Allah should not hate a female believer, because if he detests something in her, he may like something else'. [13]

In fact, there are other *ħadīths* which stress the need for the husband to treat his wife equitably and these *hadiths* consider that such treatment of the wife by her husband constitutes an indication of man's faith and piety. In one of these *ħadīths*, the Prophet says

> A believer's faith becomes stronger when he/she is most moral, and the best among you (i.e. believers in Allah) are those who are best to their women.

In this saying, it is clear that the Prophet is stressing the value of morality among believers and calling upon men to be kind and good to their women. In other words, he is asking them to treat women fairly.

In another *ħadīth*, the Prophet says

> The most virtuous among you are those who are most virtuous with their families, and I am the most virtuous with my family.

Here, the Prophet is stating explicitly that good manners is part of faith. Without it one's faith will not be complete. In his commentary on this *ħadīth*, Al-Shawkānī says

By saying that 'the most virtuous among you are those who are most virtuous with their families', the Prophet is drawing the people's attention to the importance of conducting good deeds particularly to their families. One's family members, more than anybody else, deserve to be treated in the most charitable and fair way. One has to support and give the family members and protect them from any potential harm they may be exposed to. If one does show such a treatment toward his/her family, then he/she is a virtuous person. However, if one does not show this equitable treatment, he/she is an evil person. It happens in some cases that a person mistreats his/her family to the extent that this person would not show any kind of generosity or morality, whereas he/she would be very kind, tolerant, and moral when dealing with people other than his/her family members. Undoubtedly, such a person will not be successful in his/her life nor will he/she be following the straight path. [14]

The *ħadīths* that have been presented in this section, taken from the Prophet's *sunnah*, show that men should deal with their wives kindly and equitably. They urge husbands to treat their wives in a fair way. It is clearly stated in all of them that the wife has the right to get fair treatment and this right is part of the husband's religious conduct.

4. The Ruling of Equitable Treatment

A number of scholars discussed the issue of equitable treatment including Al-Shirāzī, [15] Ibn Al-ᶜarabī, [16] who is a *Mālikiyyah* follower, and Ibn Mufleħ, [17] who belongs to the *Ħanbaliyyah* school. They all said that the husband is obliged to treat his wife equitably.

However, I argue that it is the husband's duty to treat his wife equitably. This is due to the fact that such treatment will contribute to strengthening the love,

intimacy and marriage bonds between the couple. This will also make the marriage more durable and will make the couple respect each other. In fact any absence or lack of equitable treatment in the relationship between the husband and the wife will lead to differences between the two which in turn may lead to divorce or a miserable marriage for both of them.

5. Manifestations of Equitable Treatment Between Husbands and Wives

Equitable treatment is considered one of the most significant rights that a husband and a wife may mutually observe. Observing this right by both parties will enable them to fulfil their marital roles properly. Therefore, showing intimacy and mercy toward each other is a crucial factor to the observation of this right and, consequently, the success of the marriage. Commenting on this issue, Yūsuf Al-ᶜĀlim states that

> Showing compassion or mercy is an indispensable thing in marital life, as marriage may collapse once intimacy and affection in the hearts of married people disappear. In fact, compassion is more important than intimacy for the marriage to proceed because it is of relevance in all kinds of context including these of happiness and anger. Thus, compassion is required in cases where the relationship between the man and his wife is tense as well as in cases where the relationship between the two is quite good. The principle that has to be followed in both cases (i.e. depending on whether the relationship between the two is good or bad) is derived from a *ḥadīth* in which Allah's Messenger urges the husband either to keep his wife and treat her equitably or to leave her charitably. On the contrary, intimacy is manifested only in the case where the couple maintain a good marital relationship and live in harmony and peace. Thus, the use of compassion is more comprehensive than that of intimacy. [18]

For this reason Allah's Messenger was keen on treating his wives equitably through the compassion and intimacy he showed toward them to the extent that they were mentioned in the last words that he uttered while he was dying. He said, "take care of women, as they are *ʿawn* in your hands". This means that they should be taken care of as if they were prisoners. This makes it necessary for husbands to treat their wives tenderly and equitably.

The right to equitable treatment is such a great, but also loose right, as it subsumes a number of moral and material rights that a husband should observe when dealing with his wife. For this reason, I want to consider the different manifestations that this right may take relying on examples and evidence taken from the life of the Prophet himself and the way he used to treat his wives. However, I have to point out that a detailed investigation of the different forms of equitable treatment as practised by the Prophet would require another chapter. Therefore, I restrict myself to some of the most important manifestations of this kind of treatment.

5. 1. Enhancing Mutual Trust

For the married couple to continue living in peace and tranquillity they have to demonstrate mutual trust and this drives away jealousy and marriage doubts, which, in turn, leads to dismantling of the marriage and weakening its bonds. This could be one of the reasons as why the Messenger of Allah said that

> There is a certain type of jealousy that is detested by Allah. This is the groundless jealousy a man may show toward his family.

This *ḥadīth* was narrated by Abū Da'ūd. [19] If the man's jealousy toward his wife is within reasonable limits, it will be acceptable. The husband has to demonstrate good intentions to his wife. Thus, he should not spy on her privately, nor should he try to misinterpret her conduct, as this may turn their

marital life into misery and hell. The Prophet was keen on emphasising the significance of mutual trust. In one saying, he was reported to have warned against a husband's sudden entering into his wife's bedroom without her prior knowledge of this. It was reported by Al-Bukhāri and Muslim that Jābir Ibn ᶜAbdullah narrated that

> Allah's Messenger called for the prohibition of anybody entering upon his family at night for the purpose of finding out whether they are betraying him through doing bad things or not.[20]

This *ħadīth* further confirms that mutual trust and confidence between the husband and his wife is a fundamental factor for the stability and continuity of the marriage. Once this confidence vanishes, the couple get into trouble through the desire to put an end to their marriage and get rid of each other. This is precisely what made Kamāl Mursi[21] look at trust among husbands and wives as the first indicator of success and durability of the marriage.

From what has been said above, it becomes clear that the husband has always to make sure that there is trust between him and his wife, as this makes her show more intimacy and affection towards him. Moreover, this will make the marriage more lively and will also foster an increase in the positive interaction between the two. Needless to say, such a step will drive away all causes of accusation and mistrust that may result from the husband's jealousy and suspicion. ᶜAlī Bin Abī Ŧāleb says that

> You should not show too much suspicion toward your family as this may turn groundless and worsen the relationship with someone who loves you.[22]

Despite all that has been said about the requirement that one should not mistrust his wife, we have to acknowledge that some reasonable jealousy is justifiable. According to Islamic law, the husband's jealousy of his wife will

be acceptable if it is within moderate or normal limits. In fact, although Islamic *shari*ᶜ*a* requires both the husband and the wife to trust each other, at the same time it is called for the husband to show some vigilant care and concern for his wife and other family members in a way that will be permitted, rather than detested, by Allah.

Islam, therefore, is not against jealousy in principle, given that it does not exceed the normal limits. In other words, jealousy is rejected only when it turns into an obsession, as this may destroy the marriage and lead to an eventual divorce. For this reason, I find it imperative that bridges of confidence be built between the husband and his wife, because the alternative will threaten the stability as well as the continuity of the marriage. This is in accordance with the teachings of Islam which requires us to trust people in general. If people are asked to trust each other, it will be more compelling that spouses do so.

5. 2. Addressing Each Other Politely

Another manifestation of equitable treatment between the husband and his wife is that they address each other appropriately. The husband should be very nice and kind toward his wife when he talks to her. He should show no arrogance or domination and, therefore, should not just give her orders with no mercy or affection. In fact, the Prophet set a good example in this matter, as he used to be very nice with his wives and he always sought to please them. He never talked to them impolitely, or raised his voice upon them showing any kind of nervousness or dissatisfaction. On the contrary, sometimes a wife of his would desert him for the whole day and he would not be angry with her. He would understand her circumstances and emotional nature. For example, he used to say to ᶜAisha "it is really easy for me to know when you are angry and when you are content and happy with me." She

would reply "How come that you know this?" He would say to her "if you are angry from me, you will swear by saying 'I swear to Ibrahīm's God that so and so', and if you are content or happy, you will swear by saying 'I swear to Muħammad's God' that so and so." And she replies, "yes, you are right. By doing this, I meant to avoid or desert using your name." [23] In fact, for the man to have a good relationship with his wife, he should be flexible with her and address her politely. When calling her, he should use the best name she prefers. He should compliment her on what she does. This means that under no circumstances should he ridicule and humiliate her, through swearing at her, whether at home or outside. This way of talking to her will cause her great psychological damage and this will lead to a feeling of disaffections and alienation between the two. In his remarks on how a man may address his wife in an appropriate way, Aħmad Al-Shāfiʿī explains

> That the man has to say nice words to his wife, so he calls her by using the sweet names or words that she prefers most. He may compliment her on the good food she cooked, the drinks she prepared, or the house she kept tidy. He should pray for her in her presence and absence as well. He may also comfort her by uttering good words when she is in trouble and express his happiness for her when she is happy. However, when she makes mistakes, he may admonish or reproach her but gently. And he is also expected to forgive her little mistakes, and not speak to her harshly. Thus, he has to exploit all the opportunities of bringing about the feelings of joy and happiness and driving away all feelings of grief or trouble for the sake of pleasing her. [24]

It is clear that the focus here is on the way a husband has to deal with his wife particularly when he talks to her.

According to the *Mālikiyyah* scholars, it is possible for the wife to seek divorce from her husband in cases where he intentionally tries to harm her in this way. In *Ħāshiat Al-Dasūqī*, Al-Dasūqī says

> She has the right to ask for divorce from her husband due to harm inflected on her by him, which is against the Islamic law. This is on a par with other factors, such as deserting her needlessly, as well as beating her and swearing at her and her father, as may happen in some circles of vulgar people. [25]

This is a measure that guarantees the wife's right to get a fair treatment from her husband when speaking to her.

5. 3. Respecting the Wives' Opinion

This is another area where the husband is required to treat his wife equitably. A husband should ask his wife her opinion and respect it, particularly in matters that relate to them and their life together. By not ignoring her and her opinion, he strengthens the intimate relations and bonds they have, especially in issues pertaining to managing the house and raising the children. The Prophet urged the husband to deal with his wife kindly in these respects. He once asked Um Salma, one of his wives, her opinion about something and he actually followed her advice in *ḥijjat al-wadāᶜ*. He also ordered men to consult their wives when the matter has to do with the marriage of one of their daughters. In this context, the Prophet was reported to have said, "consult women in their daughters." Of course, this does not contradict the concept of men being protectors and maintainers of women. On the contrary, it stresses the man's right in being the protector and maintainer of his wife and family. Al-Aḥmadī Abū Al-Nūr says

> Another way of treating the wife equitably is through showing respect to her in the same way she respects him. He is also asked to give her the chance to express herself frankly in the way that is appropriate for her. He has also to consult her in matters that relate to the management of the house, as this may make her feel that she has a role to play and responsibilities to bear. An American study has reported in cases where

> the marriage is dominated by the husband, the likelihood of happiness in this marriage is 61 % whereas misery is 24 %. On the other hand, if the marriage is dominated by the wife the percentage of happiness is 47% whereas misery is 31 %. As for cases where marriage is based on cooperation and fair distribution of responsibilities and duties between the husband and the wife, the rate of happiness is 87 % whereas that of misery is only 7 %.[26]

In fact, ʿAbdulhamīd Al-Ansāri pointed out that one of the key causes of divorce is the marginalisation by the husband, of his wife's opinion, in addition to showing no interest in or respect for this opinion. It is not unexpected that if the husband ignores his wife and her opinion, she will refrain from him and refuse to abide by his authority. Al-Ansāri says in this context

> Many marriages lose the warmth of human treatment described by the Holy Qur'ān as intimacy, and affection. This is most probably due to the way the husband understands the issue of being the protector and maintainer of the wife. Due to certain problems in the patriarchal educational system dominant in the Gulf societies, the husband understands his duty to protect his wife as meaning that he should be authoritarian and abusive in the sense that he does not ask her or his children their opinions before taking family decisions. The father in these societies does not teach his children the values of freedom and independence as he raises them. In fact, this is a very serious problem and challenge for us in educating our children.[27]

Clearly, this demonstrates the significance of the opinion of the wife. According to the teachings of Islam, the husband and his wife should exchange views and ideas before settling on a particular decision particularly in matters that have to do with the house or family.

5. 4. Showing Tolerance, Cooperation, and Patience

One of the important characteristics of the Prophet, was showing tolerance, cooperation and patience when dealing with his wives. He was reported to have been understanding and tolerant with them, so they would not have to account for every single mistake or misbehaviour they made particularly if it was made out of ignorance. We may cite as an example of the way the Prophet used to deal with his wives, what happened between the Prophet and ᶜAisha, his wife. While they were arguing a particular matter, Abū Bakr, ᶜAisha's father, came to act as an arbitrator in this dispute between the two (i.e., the Prophet and ᶜAisha). The Prophet asked his wife "Would you go ahead and talk or shall I?" ᶜAisha replied "you talk and say nothing but the truth." At this point Abū Bakr, her father, slapped her in the face and said to her "does he (i.e., the Prophet) say anything but the truth?" indicating that the Prophet always told the truth and that she was rude to say this to him. She appealed to the Prophet seeking forgiveness and sat behind his back. The Prophet said to Abū Bakr "we did not want you here to do this to her", showing discontent with what he (i.e., Abū Bakr) did to his daughter. One concludes from this story, that the Prophet's disapproval of ᶜAisha being slapped by her father shows his tolerance towards her. Although what she said may be interpreted as hinting that the Prophet might not be saying the truth, yet he tolerated this accusation and did not approve of punishing her.

Moreover, the Prophet's tolerance is also manifested in another context in which ᶜAisha angrily said to him "is it you who claims to be a prophet?" He did not show any anger or negative feelings toward what she said to him. He understood that she was very emotional and that what she said is actually due to some psychological factors beyond her capacity and control.

In another story, it is reported that a man came to ᶜUmar Ibn Al-Khaṭṭāb complaining to him about his wife. The man stood at the doorstep of ᶜUmar waiting for him to come out and he heard ᶜUmar's wife talking to ᶜUmar in an impolite way while ᶜUmar kept silent. The man retreated and said

> If this happens to ᶜUmar, who is known to be tough and firm the Prophet in addition to being the amīr of believers, then it is not unnatural that it happens to me.

Then ᶜUmar went out of his house and saw the man at his doorstep, so he asked him "what do you want, man?" The man replied

> O Amīr of believers, I came to you to complain about my wife's misbehaviour, ill manners and insolence. But after I heard how impudent your wife had been to you, I retreated and said to myself if your wife says this to you, why my wife cannot say the same to me?

ᶜUmar said to the man

> Oh brother, I tolerated her because she has rights and I have duties toward her. She cooks my food, bakes my bread, washes my clothes, breastfeeds my children, and makes me dwell with her with tranquillity away from wrongdoing. If she does all this for me, why shouldn't I be patient with her and tolerate what she may say to me?[28]

This shows that not only the Prophet, but also his companions, treated their wives equitably through showing patience and tolerance of her mistakes and insolence. These are some examples on how the Prophet and his companions used to treat their wives. I believe that Muslims should follow the good examples set by the Prophet and his followers regarding the way they should treat their wives, as this may guarantee that women get their deserved rights in a just way, away from humiliation and abusiveness.

The same point has been highlighted by Maḥmūd Al-Sharīf, who argues for the need follow the example of Allah's Messenger in the way he used to deal with his wives

> There are some husbands who treat their wives harshly and unfairly. Those people believe that through doing this they are practising their manhood and noble-mindedness. Those people should realise that they are wrong and should follow what the Prophet said regarding the way a man should treat his wife: 'O, believers in Allah, your faith is not complete unless you are good mannered and kind to your family.' He also said 'the best among you are those who are treating their wives best, and I, for one, am treating my wives in the best way.' [29]

Furthermore, the Prophet was cooperating with his wives through helping them in matters relating to the house without any reservations. Al-Aswad Bin Yazīd, as narrated by Al-Bukhārī, said that he once asked ᶜAisha about what the Prophet used to do at home. She said "he used to do what we were doing. But as soon as he hears the *adhān*, i.e. the call for prayer, he goes for the prayer."

These are only a few of the many examples and situations that show how Allah's Messenger and his companions used to deal with their wives. It is evident that they always treated their wives equitably and were tolerant and patient with them in cases of occasional misbehaviour.

5. 5. Keeping the Wives' Secrets

A further form of treating the wife equitably is by keeping secrets about her. One should not disclose his wife's secrets no matter whether these secrets relate to her or to both of them, as these secrets are most likely to be personal things, or differences and problems between the two. Since the husband

expects his wife to keep his secrets away from people, he too, is expected to do the same. Otherwise, the couple will be arguing with each other most of the time and this gives the pretext to the others to interfere, which in turn may agitate the dispute. Therefore, it is in the interest of the Muslim husband not to disclose any confidential information about his wife, no matter how trivial or private it may be. In fact, as narrated by Abū Saʿīd Al-Khidrī, there is a *ħadīth* by Allah's Messenger in which he said "it is the person who discloses his wife's secrets that Allah grants the most evil status on the Resurrection Day." It was also said that Abī ʿUthman Al-Nisābūrī was asked about "what is the best thing that you may do in order to go to heaven?" He said that

> When I was a young man, my family wanted me to get married, but I refused. One day a woman came to me and expressed her desire in getting married to me and she brought her father with her. He was a poor man. We got married and everyone was happy. But only on the wedding day, just before consummation, I found out that she was blind, lame, and very ugly. Due to the great love she had for me, she wouldn't let me leave her. Therefore, I stayed with her and showed her nothing of the tremendous hatred I had for her. I lived with her for fifteen years before she died. I was quite keen on protecting her and her heart. [30]

This is an example that emphasises the significance of equitable treatment between husbands and their wives. It shows how Al-Nisābūrī cared too much toward the feelings of his wife and did not tell anybody about how ugly he found her and how much he suffered while living with her until she died. On the contrary, he appreciated her love for him and never complained because such a thing would have hurt her feelings.

5. 6. Making Wives Happy and Refraining from Beating Them

In addition to the different forms of equitable treatment that he has to observe, as presented above, the husband also needs to refrain from beating and

humiliating his wife. Although beating could be looked on as a necessary measure in certain occasions, it is advisable that it be used only on a very limited scale particularly in the case of the wife, as this may strip the woman of the feeling of dignity and humanity. The problem gets worse in cases where the wife comes from a family where beating was never practised. However, one may be tempted to claim that the Islamic *shariᶜa* had actually permitted the beating of women particularly when they become disobedient or if they paid no attention to what their husbands wanted them to do. This may seem to legitimise the practice of beating wives in Islam. In an answer to such a claim, I argue that although Islam permitted the beating of wives, it did made it a requirement that this beating be gentle rather than severe so that it does not cause injury, deformity or death. The motivation of this requirement is that beating may be used only for preventing and scaring wives of the consequences of misbehaving, rather than for torturing them. In all cases, wives' beating may be used only on a very limited scale. Al-Bukhārī and Muslim narrated that the Messenger of Allah ordered husbands not to abuse this measure by saying "one should not beat his wife harshly, as if beating a slave because he may come to her late at night to have sexual intercourse with her."

Similarly, Aḥmad, Abū Da'ūd, and Ibn Mājah narrated that Ḥakīm Bin Muᶜāwieh Al-Qushairī reported that his father asked Allah's Messenger "what rights does a wife have on her husband?" Allah's Messenger replied

> You should feed her when you eat, buy her clothes when you buy for yourself, never slap her on the face, do not tell her she is ugly, and do not desert her by leaving the house.

This *ḥadīth* tells about a number of nice things that the husband has to observe and things that he should refrain from doing while dealing with his wife. One of the most important things that he should not do is slap her on the face.

Thus, one concludes from this *ħadīth* that, as a rule, beating is prohibited, although in some exceptional circumstances it may be permissible. In fact, it is not in the interest of either the husband or the family for the wife to be beaten, as this may uproot all feelings of love and respect the wife and the husband have toward each other.

On the other hand, the husband is required to play with his wife and try to do all he can to make her happy as a manifestation of equitable treatment. It is reported that the Messenger of Allah used to do his best to please his wives. For example, he used to permit ᶜAisha to watch the *Aħbāsh* (today's Ethiopians), as they played in the mosque courtyard during the *Eid* days. He also used to run some races with her. Moreover, he used to tell some anecdotes and interesting stories to his wives to amuse them and make them happy.

In this regard, one may refer to what a bedouin woman said while describing her husband after his death saying

> He always smiled when he came back home, kept silent as he went out the house, ate whatever was available of food, and did not ask about what he paid or lost.[31]

This shows the kind of fair and good treatment this bedouin woman used to have from her husband.

It was also reported that ᶜUmar Ibn Al-Khaṭṭāb, who was known to be very harsh and tough, said

> A man has to be like a small child when dealing with his family; thus, as they approach him, they will realise how manly he is. [32]

This also indicates that even a tough man has to be gentle and nice to his wife and family.

5. 7. Teaching Wives Religious and Other Useful Things

Finally, the husband's equitable treatment of his wife is manifested through teaching her things that relate to her religion as well as matters pertaining to her daily life. It is stated in the *Qur'ān* that

> O ye who believe! Save yourselves and your families from a Fire whose fuel is Men and Stones. [Sūrat Al-Taħrīm: 6].

There is more evidence in support of the argument that the husband should bear the responsibility of taking care of his wife, and everybody under his authority. This comes from the following agreed upon *ħadīth*, in which the Messenger of Allah was reported to have said

> Everyone of you is a guardian and is responsible for his charge; the ruler is a guardian and is responsible for his subjects; the man is a guardian in his family and is responsible for his charges; a woman is a guardian for her husband's house and is responsible for her charges; and the servant is a guardian for his master's property and is responsible for his charge.

Being a guardian of his wife, the husband has to take good care of her and this will include teaching her things that relate to her religion and life in general. The husband should do his utmost to make sure that he is performing his role as a guardian appropriately.

A husband will be considered to be treating his wife equitably if he teaches her her religion, because learning is useful and important for the woman both in this world and in the other world. There is a big difference between a learned wife and an ignorant one. An ignorant wife, for example, will not have a lot to offer to her husband and her children. On the contrary, she is a kind of burden that makes their life harder. For this reason, Islam gave the wife the right to learn. In fact, women in the early days of Islam were quite interested in learning, so many of them went to the Messenger of Allah and

asked him to dedicate one day in which he teaches them more about Islam, their religion. Of course, the Messenger welcomed the idea. If the Messenger did this hundreds of years ago, husbands should do the same now. In other words, it is the duty of the Muslim husband toward his wife to teach her insofar as he could. This could be through giving her the chance to continue her education, allowing her to attend lectures, seminars, and symposia, and buying her the necessary books and cassettes which may help her in acquiring religious or non-religious knowledge and learning. ᶜUkāshah Al-Ṯībī says

> Women and men are equal in having the right to have religious learning. Muslims cannot do without religious education, as they would not be able to perform their religious duties and principles or rules properly. As for as worldly branches of knowledge, such as mathematics, health, management, and other fields of knowledge without which life will be very difficult, the woman may learn what she needs for her daily life in order to keep up with the spirit of the age and environment in which she lives.[33]

The need for the woman in general and the wife in particular, to get the learning she needs, is as urgent as it was years ago, regardless of whether it is religious or not.

5.8 Being Charitable to the Wives If Married to more than One

The Islamic Law permitted the man to get married to more than one wife, as stated in the following verse from Sūrat [Al-Nisā': 3]

> If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four.

However, this permission is not absolute as it is restricted by the requirement that the polygamous husband has to be just and fair while dealing with his wives. This condition is in fact what the rest of the same verse from Sūrat [Al-Nisā': 3] demonstrates

> but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.

Ibn Kathīr [34] argues that the phrase "doing injustice" from the Qur'anic verse above refers to all kinds of discrimination that a husband may show in dealing with his wives including unfairness, oppression, despotism, and preference. Therefore, a polygamous husband is required, in accordance with the Laws of Islam, to treat his wives equally fairly. This means that he should not prefer one to the others in bed, nor should he discriminate among them in terms of *nafaqah* [35] in order not to ignite jealousy and selfishness in them. Unless the polygamous husband observes these requirements, his life will be turned into hell. In this regard, Al-Shaᶜrāwi states that

> Allah's permission for men to get married to more than one each is regulated by certain conditions that are clearly stated in the *Qur'an*, so that the life of the Muslim family does not become chaotic or instable.[36]

This is what led Allah's Messenger to threaten any husband who has two wives and does not observe the requirement to treat them equally fairly, that he will face disgrace on the Day of Judgement. In this regard, the Messenger says

> He who has two wives but prefers one to the other will be seen on the Day of Judgement dragging one of his halves. [37]

As for *iḥsān* to wives, it can be achieved through treating them justly and equally in spending the night with them, paying them *nafaqah*, providing them, and their children, with the adequate housing, in addition to entertaining and amusing them and taking care of all their needs. This shows that a polygamous husband is not allowed to practise any kind of discrimination between an old wife and a new one, or between an old wife and a young one, or a fertile wife and a sterile one, or a beautiful wife and an ugly one, or a rich wife and a poor one, or a Muslim wife and one from *'ahl al-kitāb* (i.e.,

Christian or Jew). The husband, in the case of polygamy, is ordered to be just in dealing with his wives in what he has or possesses, but not in things that he does not have such as love, feelings, and sexual intercourse. Thus, according to *shari*ᶜ*a*, the husband does not have to treat his wives equally in matters that are beyond his own control. The Messenger of Allah was quoted by Al-Tirmidhī to have said in this respect

> My Lord, I take an oath to do things I have or in my capacity, but do not hold me responsible for things you have and I do not.[38]

This shows that a polygamous husband has to be just with his wives in all things that he is capable of doing.

In fact, although a polygamous husband may be ill, he has to deal with his wives equally fairly. The Messenger of Allah was reported to have been moving from one of his wives to another even when he was ill and carried by the others. And he kept doing this until it became very difficult for him to continue; therefore, he stayed with ᶜAisha but only after he had sought the permission to do so from his other wives.

Thus, it is an obligation that the husband should show some God fearing while dealing with his wives, though treating them with equity as he was ordered to do so by God. This means that he should respect their legitimate rights and refrain from doing them wrong in compliance with Allah's order to treat wives equitably (*al-*ᶜ*ishrah bil-ma*ᶜ*rūf*) in Sūrat [Al-Nisā': 19]: "(You men should) live with them (i.e., women) on a footing of kindness and equity."

6. The Significance of Equitable Treatment

In this last section of the chapter, I move to focus on the significance of the husband and his wife equitably treating each other. There are two points that highlight this significance of equitable treatment as demonstrated below.

The first point is that it is through this fair treatment that marriage achieves its legitimate objectives in establishing a new life based on intimacy, stability, peace and tranquillity. If the husband and his wife treat each other equitably, they will be balanced psychologically and their marital life will be more lively and interactive. On the other hand, if marriage lacks this kind of just treatment between the two, their life will become tasteless. Therefore, Allah's Messenger, on different occasions, emphasised the role of practising this right by both the husband and the wife, and warned against not abiding by it, as this may undermine the welfare and the very existence of the family, as a result of which the family collapses quickly and this is something very serious. In fact many studies of the causes of divorce and separation between husbands and wives have found out that the main reason for this phenomenon is the lack of equitable treatment between husbands and wives, which is manifested in various forms including mistreatment, unfaithfulness, beating, humiliation, injustice, misunderstanding, and shamelessness. For example, a study of the causes of divorce in Gulf Arab countries by Abdulrazzāq Al-Māliki[39] concluded that the actual causes lie in the fact that husbands mistreat their wives. In other words, husbands do not treat their wives equitably. In another study investigating the reasons for divorce in Kuwait, Fahd Al-Thāqib[40] could trace one hundred forty five reasons that can be classified into eight groups. Six out of these eight classes of reasons centre around the husbands mistreating their wives and the absence of equitable treatment. This shows that equitable treatment, particularly of the wife by the husband, plays a crucial role in strengthening the pillars of marital and family ties. Al-Aḥmadi Abū Al-Nūr argued that equitable treatment between the husband and his wife is a sort of psychological law that organises the relationship between the two. He says:

> The ideal psychological law according to which the husband and the wife should deal with each other is that each one loves for the other

what he/she loves for himself/herself and hates for the other what he/she hates for himself/herself. The implementation of this law is the key to the couple's welfare and ultimate happiness. If each one of them faithfully and voluntarily sticks to this law before he/she behaves, whether the behaviour is in terms of words or deeds, they will refrain from misbehaving and will avoid lots of things that cause hatred and other unpleasant feelings. Thus, if both the husband and the wife abide by the psychological law, they can ensure that behaviour and conduct will be appropriate way and this, in turn, brings about the feeling of satisfaction to the marriage partners. [41]

Again, this shows how equitable treatment between husbands and wives plays a positive role in the stability and continuity of the marriage.

The second point is that equitable treatment between husbands and wives brings about advantages that are not restricted to the couples. In fact, other family members, such as the children, will benefit a great deal from such fair treatment. Therefore, the absence of this method of treatment will badly affect the children, as they will have to lead a life that is full of differences, tension, and pressure if the couple stay together. However, if there is divorce, then the problem that the children will have to face will be even worse.

Therefore, it is very significant that the husband acknowledges and observes his wife's right to fair treatment. He should show some clear understanding and appreciation of this particular right and do his utmost to abide by it in a manner to ensure that the family remains in a good shape, physically as well as psychologically. If the family's affairs are not in a good state, it will lose the ability and impetus to function properly in all aspects of life. One may imagine the size of the damage that may be caused by a man who may mistreat his wife, as expressed by Amīnah Al-Jābir, who reports that

One sociologist said that if the relationship between the parents and their child is not a good one, and if the circumstances the family is experiencing are not good enough to provide the child with his/her needs, then the psychological and moral growth and maturation of the child's character will not be stable, as might be indicated by high rate of delinquent youths. He added that studies which have been conducted on homeless delinquent, alcoholic and drug addicted teenagers confirm that they come from dismantled families members of which are most of the time arguing with each other. As for the parents in these families, they are usually careless and they show no mercy in punishing the children severely and repeatedly.[42]

This shows how serious the non-commitment to the observation of the marriage rights by the husbands and wives toward each other, could be not only to the couple themselves, but also to the whole family as well.

7. Conclusion

This chapter focused on the type of relationship that should hold between the husband and his wife according to the teachings of Islam. This marital bond should be based on what is referred in the *Qur'ān* as equitable treatment. In the first section of the chapter, I stressed the importance of the concept of *ᶜishra bi-almaᶜrūf* in marriage according to the rules and teachings of Islam. The second section looked at the meaning and implications of the term of equitable treatment. Then, I considered the legitimacy of equitable treatment and presented evidence for the existence of this kind of relationship from both the *Qur'ān* and the Prophet's *sunnah*. Here a number of relevant Qur'ānic verses and Prophetic sayings were discussed. The next section dealt with the ruling (i.e. obligatoriness) of equitable treatment between husbands and wives. After that, I moved to discuss the various manifestations that equitable treatment may take. These are positive effects of abiding by the requirement

of this fair treatment, and they include trust and confidence, appropriate form of address, respect, tolerance and cooperation, keeping secrets, no beating, etc. Finally, the chapter closed by emphasising the significance of the relationship between husbands and their wives that should be built on the pillars of fairness, justice, intimacy and understanding. It particularly focused on the impact of equitable treatment between a husband and his wife both on the level of the couple themselves and on the level of the family including the children.

Notes to Chapter Seven

1. Anīs, Ibrahīm, et. al., *Al-Mu^{c}jam al-wasīṭ,* vol. 2, 2nd edn., (Cairo. n. d.), p. 617.

   See also Anīs, Ibrahīm, et. al., *Al-Mu^{c}jam al-wajīz*, (Cairo: Majma^{c} Al-Lughah Al-^{c}Arabiyyah, 1980), p. 419.

   See also Al-Qarmī, Aħmad, *Al-Miṣbāħ al-munīr*, (Beirut: Al-Maktabah Al- ^{c}ilmiyyah, n. d.), p. 628.

2. Anīs, Ibrahīm, et. al., *Al-Mu^{c}jam al-wasīṭ,* vol. 2, p. 617.

   See also Anīs, Ibrahīm, et. al., *Al-Mu^{c}jam al-wajīz,* p. 415.

3. Al-Jazrī, Majd Al-Dīn, *Al-nihāyaḥ fī gharīb al-ħadīth wa al-athar*, vol. 3, edited by T. Aħmad and M. Al-Tanāħi, (Egypt: Dār Al-Fikr), p. 216.

4. Al-Bahwatī, Manṣūr, *Sharħ muntahā al-irādāt*, vol. 3, (Beirut: ^{c}ālim Al-Kutub, 1993), p. 40.

5. Al-Shawkānī, Muħammad, *Fatħ al-qadīr*, vol. 1, edited by Y. Al-Ghoush, (Beirut: Dār Al-Ma^{c}rifah, 1995), p. 561.

   See also Al-Ṭabarī, Muħammad, *Jāmi^{c} al-bayān fī tā'wīl Al-Qur'ān*, vol. 3, 2nd edn., (Beirut: Dār Al-Kutub Al-^{c}Ilmiyyah, 1997), 654.

6. Ibn Kathīr, Ismā^{c}īl, *Tafsīr Al-Qur'ān al-^{c}ażīm,* vol. 1, 5th edn., Beirut: Mu'assasat Al-Rayyān, 1999), p. 608.

7. Al-Qurṭubī, Muħammad, *Al-Jāmi^{c} li-'aħkām Al-Qur'ān,* vol. 5, (Beirut : Dār Al-Kutub ^{c}Al-Ilmiyyah, n. d.), p. 64.

8. Shaltūt, Maħmūd, *Al-Islām ^{c}aqīdah wa shari^{c}ah*, (Cairo: Dār Al-Shurūq, 1988), p. 162.

9. Ibn Qudāmah , Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr,* vol. 8, (Beirut: Dār Al-Kutub Al-^{c}Ilmiyyah, n. d.), p. 18.

10. Al-^{c}Asqalānī, Aħmad, *Fatħ al-bārī bi-sharħ ṣaħīħ Al-Bukhārī*, vol. 9, p. 161.

11. Al-^{c}Asqalānī, Aħmad, *Fatħ al-bārī bi-sharħ ṣaħīħ Al-Bukhārī*, vol. 9, p. 163.

12.Abū Shaqqah, Abdulḥalīm, *Taḥrīr al-mar'ah fī ᶜaṣr al-risālah,* vol. 1, (Kuwait: Dār Al-Qalam, 1999), p. 289.

13.Al-Sharīf, Maḥmūd, *Al-Islām wa al-usrah*, (Cairo: Matbūᶜāt Majmaᶜ Al-buḥūth Al-Islamiyyah: 1972), p. 105.

14.Al-Shawkānī, Muḥammad, *Nayl al-'awṭār,* vol. 6, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1999), p. 218.

15.Al-Shirāzī, Ibrahīm, *Al-Muhadhab*, vol. 4, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1976), p. 233.

16.Ibn Al-ᶜArabī, Muḥammad, *Aḥkām Al-Qur'ān*, vol. 1, (Beirut : Dār Al-Maᶜrifah, n.d.), p. 363.

17.Ibn Mufliḥ, Shams Al-Dīn, *Kitāb al-furūᶜ* , vol. 4, (Beirut: ᶜālem Al-Kutub, 1985), p. 314.

18.Al-ᶜĀlim, Yūsuf, *Al-Maqāsid al-ᶜāmmah li-al-sharīᶜa Al-Islāmiyyah*, (Cairo, Dār Al-ḥadith), p. 414.

19.Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 3, p. 114. ḥadīth no: 2659.

20.Al-Nawawī, Yaḥya, *Śaḥiḥ Muslim bi-sharḥ Al-Nawawī*, vol. 13, (Beirut Dār Al-Kitāb Al-ᶜArabi, 1987), p. 72.

21.Mursī, Kamāl, *Al-ᶜAlāqah al-zawjiyyah wa al-ṣaḥḥah al-nafsiyyah fī al-Islām wa ᶜilm al-nafs*, p. 218.

22.Al-Ghazālī, Muḥammad, *Iḥyā' ᶜulūm al-dīn,* vol. 2, 2nd edn. by Sayyid Ibrahīm, (Cairo: Dār Al-ḥadith, 1992), p. 52.

23.. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥīḥ Al-Bukhārī*, vol. 9, p. 237, ḥadīth no. 5228.

24.Al-Shāfiᶜī, Aḥmad, *Al-Zawāj fī al-sharīᶜa al-Islāmiyyah*, (Alexandria: Dār Al-Huda li-al-maṭbūᶜāt, 1997), p. 282.

25.Al-Dasūqī, Muḥammad, *Ḥāshiet Al-Dasūqī ᶜalā al-sharḥ al-kabīr*, vol. 2, (Beirut: Dār Al-Fikr, n. d.), p. 345.

26.Abū Al-Nūr, Al-Aḥmadi, *Manhaj al-sunnah fī al-zawāj,* 4th edn., (Cairo: Dār Al-Salām, 1992), p. 415.

27. Al-Anṣārī, Abdulḥamīd, *"Tā'akhkhur al-zawāj wa irtifāᶜ muᶜadalāt al-ṭalāq fī al-mujtamaᶜ al-khalījī: al-asbāb wa al-ḥulūl,"* in Majallat dirasāt al-khalīj wa al-jazīrah al-ᶜarabiyyah, issue no. 97, (2000), p. 173.

28. Al-Ḥuṣīn, Aḥmad, *Al-Zawāj fī Al-Islām*, (Ṭaif: Maktabat Al-Ṭarfein, 1411 A. H.) p. 40.

29. Al-Sharīf, Maḥmūd, *Al-Islām wa al-usrah*, (Cairo: Maṭbuᶜāt Mjamaᶜ Al-Buḥūth Al-Islāmiyyah, 1972), p. 106.

30. Ibn Al-Jawzī, Abdulraḥman, *Ṣaid al-khāṭir*, 7th edn., (Beirut: Dār Al-Kitāb Al-ᶜArabi, 1998), p. 394.

See also Maqsood, Ruqqyyah waris, *The Muslims Marriage Guide*, maryland U.S.A, Amana publication, 2000, p 64.

31. Al-Ghazālī, Muḥammad, *Iḥyā' ᶜulūm al-dīn*, p. 50.

32. Al-Ghazālī, Muḥammad, *Iḥyā' ᶜulūm al-dīn*,p. 50.

33. Al-Ṭībī, ᶜUkāshah, *Al-ṣifāt al-maṭlūbah fī al-bint wa al-zawjah*, (Cairo: Dār Al-Fadhīlah, 1990), p. 23.

34. Ibn Kathīr, ᶜImādudīn, *Tafsīr Al-Qur'an Al-ᶜAZīm*, vol. 1, 5th edn., (Beirut: Mu'assasat Al-Rayyan, 1999), 589.

35. As for matters like love, feelings and emotions, and copulation, the husband is not required to be as fair according to the Islamic Law.

36. Al-Shaᶜrāwi, Muḥammad, *Aḥkām al-zawāj wa al-ṭalāq wa al-khulᶜ*, (Cairo: Maktabat Al-Turāth Al-Islami, 2000), p. 120.

37. Al-Tirmidhī, Muḥammad, *Sunan Al-Tirmidhī*, vol. 3, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 447. ḥadīth no: 1141.

38. Al-Tirmidhī, Muḥammad, *Sunan Al-Tirmidhī*, ḥadīth no: 1140.

39. Al-Mālikī, Abdulrazzāq, *"Żāhirat al-ṭalāq fī dawlat al-imarāt Al-ᶜArabiyyah al-muttaḥidah: asbābuhu wa itijāhātuh makhāṭiruhu wa ḥulūlah,"* in Dirasāt istrātijiyyah, issue no. 50, (UAE: Markaz Al-Imarāt li-dirāsāt wa al-buḥūth al-istrātijyyah, 2001), p. 44.

40.Al-Thāqib, Fahd, *"Asbāb al-ṭalāq fī al-mujtamaᶜ al-kuwaitī,"* in Majallat al-ᶜulūm al-ijtimāᶜiyyah, vol. 24, no. 3, (Kuwait: Kuwait University, 1996), p. 56.

41.Abū Al-Nūr, Al-Aḥmadī, *Manhaj al-sunnah fī al-zawāj,* p. 420.

42.Al-Jābir , Amīnah, *"Żāhirat al-ṭalāq fī al-mujtamaᶜ al-qaṭari,"* in Majallat dirāsāt al-khalīj wa al-jazīrah Al-ᶜArabiyyah, issue no. 72, (Kuwait: Kuwait University, 1994), p. 194.

CHAPTER EIGHT

THE WIFE'S RIGHT TO GET *AL-KHUL^{c}*

1. Introduction

Al-khul^{c} is one of the Arabic terms that refer to the occurrence of a separation between the husband and his wife. In particular, it refers to *ṭalāq* or divorce in return for a monetary compensation to be paid by the wife to the husband. However, *al-khul^{c}* differs from divorce, the Arabic word for which is '*ṭalāq*' and other related terms[1] in the sense that it has its own causes, effects and consequences. The occurrence of *al-khul^{c}* indicates that the wife is disobeying and rebelling against her husband as she refuses to continue living with him as his wife. As such, she is ready to offer her husband a sort of compensation which could be money, or something else, in exchange for granting her her freedom and divorce. This is, in fact, what the Islamic law or *shari^{c}a* legislates as a right for the wife which can be used against the husband whenever she feels the need to do so, particularly if she feels that such a measure will protect her and her faith, from loss. This is usually the case when the wife fails to comply with the marital duties she has to fulfil toward her husband. For this reason, Islam adopted the concept of *al-khul^{c}*, which is consistent with the other principles of Islam, all of which demonstrate and guarantee fair treatment among people. The principle of *al-khul^{c}*, like other similar principles of Islam, aims at eliminating any kind of harm either the wife or the husband may suffer. This is obviously consistent with the legal rule that states that when ruling among people "there should be no harm done to either party".

2. The Definition of *Al-khulʿ*

Before I discuss the technical meaning of the term of *al-khulʿ*, I want to shed light on the linguistic/lexical meaning of the term, so that it becomes possible for us to see the connection between the two meanings. According to language dictionaries, [2] al-*khulʿ* *means*: "to remove or put off something you have on you or to get rid of it". This meaning of the word *al-khulʿ* is the same as that of "put off thy shoes" occurring in the following verse from Sūrat Ŧaha, according to which Moses is required to take off his shoes

> Verily I am thy Lord! Therefore (in My presence) put off they shoes: thou art in the sacred valley of Ŧuwa. [Sūrat Ŧaĥa: 12]

Similarly, if the wife wants to get *al-khulʿ* from her husband, she in some way wants to get rid of him, as a husband of course, and get out of the marriage bond, so that she can restore her freedom. One may point out that the use of the word *khulʿ* in this context actually demonstrates how strong the marriage bond between the spouses is. This strong relationship between the married couple that marriage fosters is also emphasised by the use of the word '*libās*' meaning 'garment'. It is stated in Sūrat Al-Baqarah in the *Qur'ān* that

> They (i.e. wives) are your garments and ye (i.e. the husbands) are their garments. [Sūrat Al-Baqarah: 187].

This is understood to mean that when a wife seeks *al-khulʿ* from her husband, she in some way is getting rid, or out of, the marriage garment. Clearly, *al-khulʿ* in this sense has a symbolic, rather than a concrete or tangible, interpretation. The concrete meaning of the word is captured by the use of another word: '*al-khalʿ*'. Note the change in the vowel quality. A good example of *khalʿa* is when one takes off his clothes.

As for the technical meaning of the term of *al-khulʿ*, there has been no consensus among the four Muslim jurists, because they defined it in different ways in accordance with the basic issue of whether *al-khulʿ* should be looked

at as a form of *faskh* or *ṭalāq* (or divorce). The difference between the two terms of *faskh* and divorce is very crucial because *al-faskh*, but not divorce, brings the marriage contract to an immediate end with neither the husband nor the wife benefiting from this as they both lose all their marriage rights. Another difference between the two is that *Al-faskh*, but not *ṭalāq*, takes place for immediate or sudden reasons, such as the couple suddenly realising that they are sister and brother via suckling. This difference in the way the four jurists looked at *al-khulᶜ* may explain the different formulations and views that different scholars expressed regarding the concept of *al-khulᶜ*.[3] However, I believe that it is more appropriate to stick to the definition of *al-khulᶜ* as proposed by the *Ħanafiyyah* scholars, because I find this definition more comprehensive, clearer and closer to the above mentioned lexical meaning of the word '*al-khulᶜ*', than the other definitions that were presented by various Muslim scholars.

Ibn ᶜAbdīn had defined *al-khulᶜ* as

> Eliminating the right to '*nikāħ*' or marriage that is conditioned by the wife's consent after she pronounces the word *al-khulᶜ* or anything of the same meaning.[4]

Now let us look at this definition in some detail. In this definition, the expression 'the right to *nikāħ* or marriage' means that *al-khulᶜ* may happen only in cases where marriage had been contracted in the right way. Thus, if marriage or *nikāħ* was not right (i.e. it did not conform to the proper requirements of Islam) or if it came after "*ṭalāq bā'in*" (i.e. irrevocable divorce), or after the wife had apostated from Islam, it would be void and unacceptable. As for the expression 'that is conditioned by the wife's consent', it means that the wife's approval is a pre-requisite before *al-khulᶜ* takes place. This is because *al-khulᶜ* is taken to be a compensatory thing payable by the wife, so her agreement is crucial. In case she rejects the *al-*

mukhālaᶜah, which is another noun form of the word *al-khulᶜ*, or if she is forced to accept it against her will, *al-khulᶜ* becomes void and any separation between the husband and his wife is considered to be a divorce. According to Ibn Abdīn's definition above, the phrase "she pronounces the word *al-khulᶜ*" is understood to mean the articulation by the wife of a word or phrase that means divorce, but with the retention of due financial rights any, because the pronouncement of a divorce phrase does not drop the financial rights of the wife such as the dower, for example. Therefore, according to the School of *Ħanafiyyah*, divorce is different from *al-khulᶜ* in this respect, as it nullifies the financial rights that the wife has. As for the last part of Ibn ᶜAbdīn's definition of *al-khulᶜ* expressed by the phrase "anything of the same meaning", it means that *al-mukhālaᶜah* or *al-khulᶜ* may take place if the wife pronounces other words of phrases that have almost the same meaning. These expressions are seven according to the *Ħanafiyyah*. Five of them are quite common. Other Muslim scholars may have longer or even shorter lists of such words. These expressions include: *al-mubāra'ah*, *al-talāq*, *al-mufāraqah*, *al-bīᶜ wa al-shirā'*, in addition to *al-khulᶜ* itself. In other words, if the wife pronounces any of these expressions to refer to her marriage bond with her husband, then the marriage ends and *al-khulᶜ* takes place.

After what has been seen above, it becomes clear that *al-khulᶜ*, both linguistically and technically, refers to the elimination of the marriage ties between the two spouses in exchange for a monetary compensation or other payable by the wife or somebody else such as her guardian, in fulfilment with her desire to end the marriage. Thus, *al-khulᶜ* is a contract between the wife and her husband. It is similar to a postponed oath that is fulfilled when the husband divorces his wife for money. This is how the man looks at it, whereas the wife considers compensation similar to a donation that she gives. It is also

the case that *al-khulᶜ* is legal only if sought by a mature wife who is rational, non-foolish and not legally declared incompetent.

3. The Legitimacy of *Al-khulᶜ*

The legislation of *al-khulᶜ* originally comes from the Holy Qur'ān, as expressed by the following verse from Sūrat Al-Baqarah:

> If ye (i.e. the judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by God; so do not transgress them. [Al-Baqarah: 229]

Those working on the interpretation[5] of the *Qur'ān* mentioned that this verse, also known as the verse of *al-khulᶜ*, was revealed to the Prophet regarding Jamīlah Bint ᶜAbdullah Bin Ubai and her husband Thābit Bin Qais, who was one of the Prophet's companions, and he was one of the Ansār (i.e. companions of the Prophet from the inhabitants of Medina who embraced and supported Islam and who entertained the Muslim emigrants coming from Mecca). It was said that Jamīlah went to the Messenger of God complaining to him about how much she hated her husband, Thābit, and about the lack of love she had for him. She wanted God's Messenger to find her a solution to this, so that she may adhere to her faith and fulfil all her religious duties. The Prophet sent for the husband and asked him to leave her in exchange for a garden she had already got from him as a dower.

In his interpretation of the above verse, Ibn Kathīr states that

> If the couple could not live together in harmony and unity, and if the wife did not perform her duties toward her husband or if she detested him and could not live with him any longer, she has the right to get rid of him by giving him back what she had already received from him.

She is not blamed in paying him back this nor is he blamed for accepting it. [6]

3. 1. The Legitimacy of *Al-khulᶜ* in the *Sunnah*

As for the legitimacy of *al-khulᶜ*, according to the Prophet's *sunnah*, there are many *ħadiths* in which the Prophet ruled that the wife gets *al-khulᶜ* from her husband. One of these *ħadīths*, for example, is reported by Al-Bukhārī[7] according to which Ibn Abbās narrated, that the wife of Thābit Bin Qais came to the Prophet and said,

> O Allah's Messenger! I do not blame Thābit for defects in his character or his religion, but I, being a Muslim, dislike to behave in an un-Islamic manner (if I remain with him).

On that Allah's Messenger said (to her), "Will you give back the garden which your husband has given you (as dower or *mahr*)?" She said, "Yes." Then the Prophet said to Thābit, "O Thābit! Accept your garden, and divorce her once."

In fact, the story of Jamīlah and her husband, Thābit Bin Qais, constitutes the basis upon which the Islamic legitimisation of *al-khulᶜ* is founded, as it was the first case of this type in Islam in those days. Al-ᶜAsqalānī[8] reported that what Ibn ᶜAbbās had said about this story was "the first *khulᶜ* case in Islam". The fact that Jamīlah approached Allah's Messenger provides evidence that the Messenger was the judge and legislator among people those days. Thus she went to him seeking a lawful solution to her problem, and she made it clear that she detested her husband and at the same time she was worried about her loss of faith, indicating that she might not behave as a good Muslim as she may disobey her husband and she may also not do enough in performing her duties toward him. For these reasons, the Messenger of God ordered her husband to leave her in accordance with *al-khulᶜ* rules.

There are also various hadiths in the *sunnah* books that stress the legitimacy of *al-khulᶜ* and demonstrate the genuine reason why Jamīlah actually asked for it.[9]

3. 2. Evidence from the Companions of the Prophet

Evidence for the legitimacy of *al-khulᶜ* comes from the Prophet's companions and the way they ruled after him. For example, it was related that a disobedient woman came to ᶜUmar Bin Al-Khattāb, and he imprisoned her for three days in a very dirty place. Then, he sent for her and asked, "How did you find the place where you were imprisoned?" She replied "Since I came to him (i.e. since she got married to her husband), I have never had a good time like this I had in these last three days in this prison." ᶜUmar said to her husband, "*ikhlaᶜha*", meaning redeem her, "even if it is in exchange for her *qirt* (earring) only."[10] Here, the husband had to leave her even though what he might get could be very little.

What ᶜUmar asked the husband to do presents clear evidence that *al-khulᶜ* is permissible and legitimate. ᶜUmar realised how much the woman hated her husband which made her life with him impossible, contradicting the main purpose of marriage in bringing about the feelings of tranquillity and peace. In such a case, there was no point in imprisoning and disciplining her. One concludes from what ᶜUmar did that the guardian of the woman or judge has first to check how serious she is in seeking redemption from her husband. Sometimes it may happen that the wife wants to get *al-khulᶜ* for some temporary desire she may have, or her decision to get *al-khulᶜ* is taken on the spur of the moment. It is quite possible that in such cases she may retreat from getting *al-khulᶜ* once she is talked to and advised on the matter.

3. 3. Evidence from Consensus of Opinions

There is consensus among Muslim scholars regarding the permissibility and legitimacy of *al-khulᶜ* with the exception of Bakr Bin ᶜAbdullah Al-Muzni, who argued that *al-khulᶜ* is illegitimate and that the Qur'ānic verse that allows it is *mansūkhah* (i.e., abrogated), in consistency with the following verse from the *Qur'ān*: Sūrat Al-Nisā':

> If ye decide to take one wife in place of another, even if you have given the latter a whole treasure for dower, take not the least bit of it back. [Sūrat Al-Nisā': 20]

Al-Muzni argues that once the wife is given a dower, the husband may not take anything back from it in accordance with the verse [20] of Al-Nisā'. Similarly, Abū Qilābah and Ibn Sirīn argue that *al-khulᶜ* is not allowed except in one case. This is the case where the husband finds his wife in the middle of fornication. It is only then that *al-khulᶜ* is permitted and he may oblige her to pay redemption in accordance with the following verse from the *Qur'ān*:

> Nor should ye (i.e. husbands) treat them (i.e. women) with harshness, that ye may take away part of the dower ye have given them, except where they have been guilty of open lewdness. [Sūrat Al-Nisā': 19]

This means that the husband cannot take anything from the wife's dower unless she has been caught committing adultery.

A number of scholars rejected and discredited these claims regarding the illegality of *al-khulᶜ* adopted by Ibn Sirīn and Al-Muznī. For Al-Jassās, [11] among others argued that Al-Muznī's claim is weak and lacks reliable evidence, particularly when contrasted with what the nation had agreed on in the form of consensus among almost all Muslim scholars. Al-Jassās argues against the reference that Al-Muzni makes to Allah's statement in Verse 20 of Sūrat Al-Nisā', stated above.

We stated earlier that Al-Muznī argued that this verse is *mansūkh* by another Qur'ānic verse, in which Allah states that

> If ye (i.e. the judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by God; so do not transgress them. If any do transgress the limits ordained by God, such persons wrong (themselves as well as others).
>
> [Sūrat Al-Baqarah: 229]

This is not the right conclusion that one may draw by comparing the content of both verses. In fact, there is no contradiction between the two, so it is implausible that one claims that one verse abrogates the other. This is due to each verse having its own context and ruling which is different from that of the other. Thus the claim of one verse abrogating the other is invalidated, because the comparison is usually between two things of the same type, nature or context. Thus, it becomes possible if the two verses deal with the same issue and context, and this requirement is not met in the case of the two verses mentioned above, as the first one, which is also known as the verse of *al-khulʿ* (since it deals with this particular issue), deals with cases where the wife hates her husband and seeks separation from him. Thus, hatred and disobedience here come from the wife rather than from the husband. As for the second verse, to which Al-Muznī also refers, it deals with another context. It is concerned with the context where the husband hates his wife. Thus, hatred in this case comes from the man, rather than from the woman. In this last case, the husband is prohibited from taking back the dower from his wife no matter what it may be. It is clear then that the two verses to which Al-Muzni refers above do not contradict each other at all. This explains why it is quite illogical to do the same as Al-Muznī did when he claimed that one verse constitutes a *naskh* or abrogation of the other and that *al-khulʿ* is not legitimate.

Another scholar who argued against what Al-Muznī claimed is Ibn Qudāmah, who belongs to the *Ħanbaliyyah* School of Islam. He said,

> 'all jurists in both *Ħijāz* (Saudi Arabia now) and *Shām* (Syria now) agree that *al-khulᶜ* is permissible.' Ibn ᶜAbdulbrr said, 'We know nobody who was against *al-khulᶜ* except Al-Muzni.' One may add that ᶜUmar, ᶜUthman, ᶜAli, and other Companions of the Prophet all agreed on the legitimacy of *al-khulᶜ*. We are unaware of anyone in their time who was against it, so *al-khulᶜ* was adopted unanimously. [12]

As for Ibn Sirīn and Abū Qilābah, who claim that *al-khulᶜ* is permissible only in the case where the husband finds his wife in the act of fornication, it is also rejected, because the husband has the right to divorce his wife in this case and he can do so instead of driving her to seek *al-khulᶜ*. Abū ᶜUmar says in this regard

> The husband may divorce his wife or he may swear thrice (that he is telling the truth) in the absence of evidence or witnesses of adultery, but it is not right for him to start troubling her in order to take her money. [13]

What has been said above demonstrates that *al-khulᶜ* is a legitimate act in Islam, and it can be resorted to by the wife whenever she has feelings of hatred and detest toward her husband to the extent that she no longer can bear living with him or fulfil the marital commitments she, as a wife, has toward him. In other words, disobedience and rebellion in the case of a lawful *khulᶜ* comes from the wife's, rather than the husband's, side.

However, it may be the case that disobedience and hatred come from the husband and is directed toward the wife. In this case, the man starts misbehaving with her in order to drive her to opt for *al-khulᶜ*. This has been

prohibited by all Muslim jurists. A true Muslim husband cannot treat his wife in this way, simply because he has the right to divorce her. In fact, he should divorce her when he feels that he hates her. Thus, if he, in one way or another, forces her to seek *al-khulʿ*, he is behaving in a sinful way. Obviously, this constitutes a violation of the principles and teachings of Islamic law, as clearly expressed in the above Qur'ānic verse from [Sūrat Al-Nisā': 20], repeated here for convenience:

> If ye decide to take one wife in place of another, even if you have given the latter a whole treasure for dower, take not the least bit of it back.

Thus, according to this verse, a husband is asked not to take anything from his wife's dower. In fact, the Prophet was reported to have said: "One may not take money from a Muslim without the latter willingly giving it." This means that the husband will be illegally taking his wife's money when he pushes her to seek *al-khulʿ*. However, this is quite common nowadays among some husbands who show no fear of God as they resort to this option (i.e. the option of intentionally making their wives seek divorce or *al-khulʿ*). In a way, they are forcing their wives to get divorced from them (i.e. the husbands) but at the same time they (i.e. the husbands) will get unlawfully paid by their wives for divorcing them. Thus, instead of divorcing their wives and paying them money, husbands, on purpose, make life for their wives very difficult, so that these wives will seek *al-khulʿ* and will have to pay their husbands compensation for accepting *al-khulʿ*. In other words, husbands want the divorce but make their wives ask for it and therefore pay. That is, instead of paying their wives when divorcing them, husbands get paid by their wives as a result of agreeing on *al-khulʿ*. Imām Mālik says in such cases that if he knew that

> The husband mistreated his wife and harmed her, or if he knew that the husband was not fair or just with her, he would permit the divorce to take place but would give her back her money. [14]

Similarly, Ibn Qudāmah said that

> If the man harms or hurts his wife by beating her up and making her life more miserable or by unjustly depriving her of her rights such as maintenance and distribution of estate, for example, hoping that she will *takhlaᶜ* (i.e., redeem) herself from him, *al-khulᶜ* in this case is void and any compensation paid by the wife to her husband should be returned to her. [15]

All these pieces of evidence confirm that *al-khulᶜ* is not legal if it does not come as a kind of fulfilment of the wife's wish or desire.

4. The Wisdom of Legitimising *Al-khulᶜ*

There are two benefits that are the outcome of *al-khulᶜ*. The first one is to rid the wife of some harm that she may suffer from in case she keeps living with a husband she detests and no longer loves. The Islamic law or *sharicᶜa* permitted the husband to divorce his wife so he could exercise this right whenever he found it necessary and with no need to explain the reasons. Along the same lines, the *sharicᶜa* also gave the wife the right to seek *al-khulᶜ* from her husband whenever she felt it is necessary to do so. The legal rule used here is that "*lā darar wa lā dirār*: meaning there should be no harm done to either party" in the sense that the wife and the husband are treated on equal terms in Islam.

Ibn Rushd comments on this saying

> *Al-khulᶜ* makes the wife on a par with the husband who can divorce. It is true that Islamic jurisprudence gave the husband the right to divorce his wife if there is no harmony and love between the two and if he does not like her, but it also gave the wife the right to ask for *al-khulᶜ* if she, in turn, hates the husband and can no longer bear living with him. [16]

However, there is a difference between the terms: divorce or *ṭalāq* and al-khulᶜ. The difference lies in the fact that divorce takes place upon the will of the husband only, whereas *al-khulᶜ* requires the agreement of both the husband and the wife or through two arbitrators. Abdulnāsir Al-ᶜAṭṭār says the fact that

> *Al-ṭalāq* comes in response to the husband's mere wish while *al-khulᶜ* needs the consent of both parties or through two arbitrators is due to the wife being emotional. Therefore, it is in her own interest and in the interest of the children that she is not granted the right to automatically get *al-khulᶜ*.[17]

The second benefit of *al-khulᶜ* is that it brings to an end a marriage that does not work. One of the basic objectives of marriage is that the husband and his wife live in love, peace, and tranquillity. It is through these requirements that marriage may bear fruit. Thus, if these objectives cannot be fulfilled, there will be no point for the marriage to go on. *Al-khulᶜ* here proceeds if the wife is suffering in the marriage and she cannot love and tolerate her husband. Thus, love, tranquillity, and settlement are missing in the marital relationship between the two, and the wife, being unhappy in the marriage, will also make the husband unhappy (maybe through not obeying him or not performing her marital duties toward him). This is what the following Qur'ānic verse from Sūrat Al-Baqarah states

> If ye (i.e. judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by God; so do not transgress them. [Al-Baqarah: 229]

In his commentary on this verse, Al-Ṭabari[18] said that what the word "fear" in this verse means is the fear that the wife may not observe the limits prescribed by Allah to obey her husband and treat him nicely, as she may hurt him

through what she says, or she may neglect him, and mistreat him. As such, *al-khulᶜ* would be acceptable. Had the option of *al-khulᶜ* not been available in this case, both parties will be negatively affected and the lives of both the wife and the husband will turn into unbearable hell, due to the disobedience and rebellion of the wife against her husband.

One may ask that since the wisdom of legitimising *al-khulᶜ* is to keep away any harm that may be inflicted upon the wife, why does she not, then, seek a *ṭalāq li-al-ḍarar* or harm divorce, which is a divorce due to harm caused by the man, instead of seeking *al-khulᶜ*. The question becomes more obvious once one knows that in *al-khulᶜ* the wife has not only to give up all her financial rights but also to pay some appropriate compensation for her husband. This does not arise in the case of *ṭalāq li-al-ḍarar*, where the harm is caused by the husband. My answer to this question is that although the wife has to compensate her husband and give up her financial rights in the case of *al-khulᶜ*, it is better for her to get *al-khulᶜ*, rather than divorce, because there are some advantages she may get from *al-khulᶜ* that do not exist in the case of the *ṭalāq li-al-ḍarar*. For example in *al-khulᶜ* the wife is not required to give the genuine reason for seeking *al-khulᶜ*. It is enough for her to state that she detests living with her husband and that she is worried that she may fail to comply with "the limits ordained by God" while she is with him. This measure is a kind of protection for families, as it avoids them many problems. For example, the wife may not like to hurt the feelings of her husband. It is particularly so if he has not caused her any harm; on the contrary, he loves her and he wants to remain with her as her husband. She wants to leave him for her own reasons. Of course, *al-khulᶜ* in this case is much better than getting a divorce, according to which she has to specify the harm inflicted upon her and she has to find witnesses and whatever evidence required to prove the harm which is supposed to have been caused by the husband. This, obviously, drags

her and her family (husband and children) into an awkward position or situation whether in court or in front of people. Therefore, *al-khulᶜ* can be looked on as a legal solution for both the wife and the husband. The wife who becomes trapped in a marriage she does not like, finds a way out of this, and the husband maintains his right to get compensation without being humiliated or embarrassed in public.

In fact, *al-khulᶜ* has another benefit for the husband himself, as he retains the right to get back the dower he paid when he first got married. He gets compensated for freeing his wife from the marriage bond and all financial rights a wife usually has are dropped. Thus he will not be harmed or hurt twice: once for losing his wife and once for losing his money. This in fact shows that the Islamic law is fair for both wives and husbands.

5. The Ruling of the Husband's Consent to His Wife's *Al-Khulᶜ*

According to the teachings of the Islamic *sharicᶜa*, it is usually the case that, before the start of the procedure of *al-khulᶜ* or divorce, the husband and the wife are urged to reconcile and restore harmony among themselves, regardless of whether the problem lies with the husband, with the wife, or with both of them. This is usually done through offering advice and appointing two arbitrators in an attempt to drive away the differences and problems among the couple and bring them back into marriage. In fact, according to Islamic *sharicᶜa*, the couple have to exhaust all possible solutions and mediations, and it is only after it becomes clear that there are no chances for them to stay together in marriage that they are allowed to resort to divorce or *al-khulᶜ*. Let us take as an example the case where the wife is the disobedient one (i.e. this is a potential *al-khulᶜ* case), the husband here has to have the initiative and deal with the problem of his wife's disobedience or rebellion in one of three ways in accordance with what is stated in the *Qur'ān*

> As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance). [Sūrat Al-Nisā': 34]

Scholars concerned with interpreting this verse, including Ibn Kathīr, said that

> When the husband notices that his wife starts to show some signs of disloyalty and hatred, he has to advise her and remind her of the punishment she may get from God in disobeying her husband. If this means of persuading her does not work, he should desert her in bed by turning his back to her when they are in bed together, and he should not make love to her, as this may be a severe punishment to her. If she still did not positively respond, he may beat her lightly, but when he beats her, he should make sure that she is not seriously hurt, so he should not cause fractures or serious injuries. [19]

Al-Ṭabarī, commenting on the verse above, reports that Sa^{c}id Ibn Jubair had said about a wife who was seeking *al-khul^{c}* that

> Her husband should advise and warn her, if she did not accept, he should desert her, if she did not accept again, he should beat her, yet if she did not accept, he should leave it to the judge who will send one arbitrator from the husband's side and another one from the wife's side. The arbitrator representing her counts the bad things that the husband did to his wife, and the arbitrator representing the husband, on the other hand, counts the bad things that the wife did to her husband. In other words, each arbitrator tries to make a point. Then, the judge will stop the husband if he finds him unjust with his wife and make him retreat from his wrong doing, and if the judge finds the wife to be quilty of disobeying her husband, he will ask him to grant her *al-khul^{c}*. [20]

Now if all means of reconciliation do not work, and if the husband becomes hopeless of convincing his wife to stay with him as his wife, there remain

only two choices left. The first is to divorce her, in accordance with the view of Mālik, who believes that the husband may leave his wife and has the right to divorce her, given that all previous remedial attempts have been explored but they did not work with her. The second option that the husband may opt for is to accept an *iftidā'* (i.e., a sort of redemption) from her if she offers to pay it or if he has been advised to accept it by the judge. In the case where the wife offers to pay a redemption to her husband for *al-khulᶜ*, there has been a disagreement among Muslim scholars as to whether the husband may accept the compensation or not. Should he accept the offer and agree to *al-khulᶜ*, and if not, should he be forced to agree to this?

We may sum up the different opinions that various scholars expressed regarding this issue, in two main points of view. The first is held by the majority of jurists and it states that the husband may not be obliged to accept the wife's offer in compensation for *al-khulᶜ*, but it is preferable that he does. Proponents of this viewpoint argued that the order of the Messenger of God to Thābit Bin Qais to "accept it (i.e. the garden in the form of a compensation) and divorce her (Qais's wife) once" is only for the sake of advice and guidance, rather than an obligation. Furthermore, Ibn Muflih also said that *al-khulᶜ* is permissible if the couple can no longer live together, and it is preferrable that the husband accepts it." [21] This same opinion is also held by Al-ᶜAsqalānī and Al-Ṭabarī. [22]

As for the second point of view, it was expressed by Ibn Taimiyah and Al-Shawkānī[23] who believe that the husband should be obliged to accept the compensation offered by his *al-khulᶜ* seeking wife. They base their view on what the Prophet said to Thābīt Bin Qais when he asked him to "accept it (i.e. the garden as a form of compensation) and divorce her (Qais's wife) once." They argued that what the Prophet said amounts to an order and this makes it

compulsory for the husband to accept the compensation; thus, it is unconditional.

Having reviewed these different accounts pertaining to whether or not the husband should accept his wife's offer of compensation for *al-khulᶜ*, I argue in favour of the second point of view as expressed by Ibn Taimiyah and Al-Shawkāni. The husband has to agree to his wife's desire to get *al-khulᶜ*, because her right to get it is guaranteed in the *sharicᶜa*. He should not be obstinate to deprive her of this right, given that he gives up his right only after he gets compensated for this by the wife. The husband should be prevented from not complying with the rules of Allah and *sharicᶜa*.

It is also a violation of the verses of the *Qur'ān* and the principles of Islam for the husband to hold his wife from *al-khulᶜ*, as in the statement that

> The parties should either hold together on equitable terms, or separate with kindness. [Sūrat Al-Baqarah: 229].

If the husband sticks to his wife and prevents her from getting *al-khulᶜ*, the requirement of this verse will be met. In other words, there will be separation with kindness, and this constitutes a clear violation of the rules of the *Qur'ān*.

As for what might happen in the case where the husband refuses to give his wife *al-khulᶜ*, the wife has the choice of filing a case in the court of law against him in which she asks for *al-khulᶜ* from him. Therefore, after efforts to settle an *al-khulᶜ* agreement between the two sides fail, the court, as a last resort, will decide what should be done. In other words, the verdict will be in her favour. This is exactly what courts of law do in the sense that they rule that the husband is obliged to *yakhlaᶜ* or redeem his wife, in accordance with the Islamic law.

Explaining this issue, ᶜAbdullah Ibn Mabrūk Al-Najjār said

> This is in consistency with the *sharīᶜa* and the law to settle disputes and put an end to bad deeds that may result if the problems and differences between the two spouses are not settled, particularly after vainly exploring all channels of reconciliation. [24]

The contention that it is necessary to have the husband's approval for *al-khulᶜ* to proceed does not clash with the role that the court of law may play in this matter, as the latter controls and observes how each side enjoys his/her own rights by mutual consent, so that the husband does not turn into an abusive person and misuses it for the sake of deceiving and expressing his malignant feelings towards his wife. In such circumstances, there will be too much doubt and scepticism in the intentions to humiliate and harm each other coming from both sides. When one side misuses his or her right and causes any damage to the other, it is the judge, according to the law, who should consider the situation, and not the husband. For it is implausible that the husband is prohibited from harming his wife, as in "but do not take them back to injure them, (or) to take undue advantage" in [Sūrat Al-Baqarah: 231] and at the same time he is installed as a judge in a case where he has to try himself for what he does to his wife. In other words, here he is required to be both the suspect and the judge at the same time. This is rejected by law and by *sharīᶜa*. It is also inconsistent that the *sharīᶜa* legitimises *al-khulᶜ* for the wife if its requirements are met and at the same time it makes its implementation subject to the husband's wish or consent. This, in fact, goes against the wisdom of legitimising *al-khulᶜ*. Needless to say that what is legislated by God is beyond any doubt or inclination.[25] This conclusion is further supported by Muḥammad Kamāl Al-Dīn Imām, who argues that

> Leaving the matter to the judge is in accordance with Islamic *sharīᶜa*. As for obliging the husband to accept the *al-khulᶜ* of his wife, it is based on evidence coming from the *Qur'ān* and the sayings of the

> Messenger as well as the principles of Islamic jurisprudence in general.[26]

6. The Amount of Money Taken for *Al-khulᶜ*

In this section I want to discuss how much money the husband has the right to take from his wife as compensation for *al-khulᶜ* or redemption. As we all know by now, paying compensation to the husband is a pre-requirement for *al-khulᶜ*. However, the amount of money due to be paid has not been stated in any legislative source and, therefore, is unclear. This led jurists to differ in their estimation of the compensation.'In fact there are two main points of view in this respect. First, jurists belonging to the schools of *Ħanafiyyah*, *Mālikiyyah*, and *Shāfiᶜiyyah* and the most well known among the *Ħanbaliyyah* scholars (also known as *jumhūr al-fuqahā'*)[27] argued that the compensation the husband gets from his wife for agreeing to *al-klulᶜ* should be left unspecified. This means that it is left to the husband to take less, more or even the same amount of money as he had already given her in dower when they first got married. However, it is preferable that the husband should not take more than stated in the dower.

This point of view had been supported by Imām Mālik, who said

> I had never known any of those who we follow, as good examples, prevent a compensation that is higher than the dower, but I believe that doing this (i.e. taking a compensation higher than the dower) is not of gracious manners. [28]

According to *Al-Shafiᶜiyyah*, there are no restrictions regarding this particular point; therefore, it could be higher or lower than what is actually specified in the dower. [29]

Evidence that holders of this view[30] present in support of their opinion comes from the Qur'ānic statement in the following verse from Sūrat Al-Baqarah:

> There is no blame on either of them if she gives something for her freedom. [Sūrat Al-Baqarah: 229]

They argued that this something, she may give for her freedom in the verse could be too little or too much. And the husband is not blamed for taking what the wife pays in compensation for freeing herself from him.

Further evidence to support that view that the compensation could be high or low comes from what Al-Baihaqī reported about Abū Saᶜid Al-Khudrī, who said

> My sister was married to one of the Ansār and he gave her a garden as a dower. They could not continue with the marriage. They raised the matter to the Allah's Messenger, who said to my sister "Give him back his garden and he will divorce you". She replied, "Yes I will, and I will give him more."

In another narration of the story, she replied: "his garden and more."

The second opinion is one adopted by some scholars and knowledgeable people, including ᶜAlī Bin Abī Ŧālib, and others like Aḥmad, ᶜAṭa, and Tāwūs. It relies on the point that the husband is not permitted to take in compensation, if his wife wants to leave him, more than he had paid in dower when he got married to her. They went a step further and said that if he had already done so, he should return the extra money to her. Similarly, Abū Bakr[31] said in *Al-Insāf*, "taking extra money is not permissible and this extra money is returnable to the wife." In other words, the husband cannot take from her more than he had paid her as dower, and if he does he should return it back to her.

The evidence that proponents of this view present comes from the *Qur'ān*, [32]

> It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by God. [Sūrat Al-Baqarah: 229].

This verse demonstrates clearly that it is illegitimate to take back what one had already given to his wife except in the case of *al-khulᶜ*. If there is al-khulᶜ, it is possible to take only some (in the verse above, it is translated as **any**) of what you had given them (i.e. 'your gifts' in the verse) and not all of it. If it is not permissible for the husband to take all of what he gave, how could it be possible for him, then, to take more than he actually had paid in the dower.

In a narration by Al-Dārquṭnī, with '*isnād ṣaḥīḥ*' (the ascription of which is correct), Abū Al-Zubair said that Thabit had given a garden to his wife as a dower; thus, when she complained to the Prophet asking for *al-khulᶜ*, he asked her, "Would you give him back the garden he had given you?" She replied, "Yes, and more." The Prophet said, "no, don't give him more. Just his garden." Al-Shawkāni also was reported to have said that the separation here took place after the wife had paid for her husband. Had she not been granted the right to pay compensation, her *al-khulᶜ* would have become impossible and meaningless. We have clearly shown that the husband is prohibited from taking more than what he paid to her in dower.

It was also reported by ᶜAtā' that the Prophet hated to take from a wife seeking *al-khulᶜ* more than what she was given. [33]

In this context, the second opinion, is more plausible. According to this opinion, the husband is not allowed to take from his wife in compensation for *al-khulᶜ* more than he had given her in dower for a variety of reasons that are stated below:

First, the evidence that holders of this point of view have presented is overwhelming, compared to the evidence presented by scholars of *al-jumhūr*, who said it is up to the husband whether or not to take in compensation, for accepting the *al-khulᶜ* of his wife, more than what he had offered in dower. The evidence used by *al-jumhūr* is weak, because the *ħadīth* of Abū Saᶜīd Al-Khidrī has a problem, as Al-Shawkānī confirmed when he said "there is a weakness in the ascription of this *ħadīth*, because the Prophet did not ask her to pay more."[34]

Second, although *al-jumhūr* scholars (i.e. jurists belonging to *Hanafiyyah*, *Mālikiyyah*, and *Shafiᶜiyyah* schools of Islam) permitted the payment of extra money, they qualified this by saying it is preferable for the husband not to take more than the value of the dower he paid. One may infer the same thing in Imām Mālik's words when he permitted the husband to take more but added that this is not of 'gracious manners'.

Furthermore, in the Holy Qur'ān, it is stated that "the parties should either hold together on equitable terms, or separate with kindness". It is argued that the phrase "separate with kindness" in this verse may imply that the husband should not take anything from his wife in case they separate, because the dower he gave her was for entitling him to enjoy his wife, which he did. Thus, if he is keen on taking something from her for *al-khulᶜ*, he should not take more than he paid in dower. He commits no sins in doing just that, because this has been legitimised by God in *shariᶜa*.

One may add another reason as to why the husband should not be allowed to take money from his wife that exceeds the value of the dower. This is based on the assumption that if the husband is permitted to get extra money, this

will pave the way for husbands of weak faith, particularly in this materialistic age we live in nowadays, to blackmail their wives and ask them for higher compensations. This obviously may be something some wives cannot afford. This is not consistent with the wisdom of legislating *al-khulᶜ*, because instead of protecting the wife from any potential harm, the wife in this case finds herself falling into another trap. Again this goes against the legal rule of "*lā ḍarar wa lā ḍirār*", which means that "there should be no harm done to either party".

More recent support for the view of prohibiting the husband from taking extra money from his wife comes from ᶜAblah Al-Kaħlawī, who argues that,

> It is detested for the man to take in compensation from his wife more than what he had given her in dower, as this may cause her much harm and it contradicts the requirements of "separating with kindness" and "gracious manners."[35]

7. *Al-khulᶜ* of an Ill Wife

Al-jumhūr of jurists (*Ħanafiyyah, Mālikiyyah, Shāfiᶜiyyah*, and *Ħanbaliyyah*) [36] all agreed that it is allowed to have *al-khulᶜ* in the case of ill wives, because she can bear legal and financial responsibilities. Illness is not a reason for detaining her. However, they contended that for *al-khulᶜ* to proceed in the case of an ill wife, one condition should be met. This condition is that no harm should be inflicted on the heirs, because there is the danger that the ill wife may favour her husband at the expense of her heirs and give him an amount of money that is greater than his deserved share of inheritance.

Jurists differed on fixing how much money should be paid in compensation for *al-khulᶜ* in the case of an ill wife. For example, *Al-Mālikiyyah* followers argued that *al-khulᶜ* compensation should be equal to what the husband gets in

inheritance from his wife. So if he gets more than his share, then, *al-khulᶜ* becomes illegal and he has to return the extra money he took. *Al-Shāficiyyah*, on the other hand, argued that *al-khulᶜ* compensation should not exceed the value of "*mahr al-mithl*". If he gets greater than that, the extra money is rejected. As for *Al-Ħanafiyyah*, they believe that the husband of an ill wife deserves the least of these three things: one third of the inheritance, *al-khulᶜ* compensation, or his share of inheritance. He considers all three options and estimates them and then he has to accept the least amount of these three as compensation for *al-khulᶜ*. Finally, *Al-Ħanbaliyyah* argues that the husband deserves the least of the two portions: *al-khulᶜ* compensation or share of inheritance. If the compensation for *al-khulᶜ* is equal in amount to the husband's deserved share of inheritance, he takes *al-khulᶜ* compensation. ᶜAblah Al-Kaħlawī is of the same opinion as the *Mālikiyyah* scholars on this matter. [37]

I find it compelling that the amount of compensation payable in the case of an ill wife seeking *al-khulᶜ* has to be clearly fixed and the issue be settled by imposing certain restrictions on the ill wife, so that she may not treat her potential inheritors in an unjust manner, by, for example, spending all her money in an unjustifiable way and leaving them nothing or too little.

8. Is *Al-khulᶜ* a Case of Divorce or *Faskh*?

One problem that scholars face in cases where the marriage comes to an end in *al-khulᶜ* is to decide the legal status of *al-khulᶜ*: Is it a case of divorce or an example of *faskh*. The two terms are different as the following sections demonstrate. However, there seems to be no consensus among jurists on this matter. But one can discriminate between two main views. [38]

8. 1. *Al-khulᶜ* as a Case of Divorce

The first view is held by *Al-Ḥanafiyyah* (although they have other opinions, yet they are famous for this one), *Al-Mālikiyyah* and *Al-Shāfiᶜiyyah* (the new opinions of *Shafiᶜiyyah* after Al-Shāfiᶜī moved to Egypt), and *Al-Ḥanbaliyyah* in one of the two narrations. The essence of this view is that *al-khulᶜ* is considered to be an example of "*ṭalāq bā'in bainūnah ṣughrā*" (irrevocable divorce). It counts as one of the three sentences that the husband pronounces when he wants to divorce his wife. Thus, being on a par with one divorce, *al-khulᶜ* dictates that the husband has to stay away from his wife during the *ᶜiddah*, which is an Arabic word referring to a prescribed period of waiting the woman has to observe after divorce or death of the husband, and he has to have a new marriage contract and a new dower if he wants to get back to her. The reason they consider *al-khulᶜ* a case of divorce is that the wife is ready to pay *al-khulᶜ* compensation, whether in money or otherwise, to the husband in order to free herself from the marriage bond and from the husband's authority. However, this freedom from the marriage bond is not achieved for the wife if divorce is *ṭalāq al-rujᶜah* or revocable, rather than *ṭalāq bā'in bainūnah ṣughrā* (irrevocable)". According to *ṭalāq al-rujᶜah*, the husband may come back to his wife whenever he wants even without her approval or consent.

While arguing in favour of considering *al-khulᶜ* an example of irrevocable divorce, Ibn Rushd asked

> What is the point of the wife paying *al-khulᶜ* compensation to her husband if he has the right to come back to her even if she is in her *iddah*? [39]

Ibn Rushd is right in this because it will be meaningless and contradictory to legitimise *al-khulᶜ* and at the same time consider it a kind of revocable divorce.

In fact there is plenty of evidence that proponents of this view present.[40] For example, there is a *ḥadīth* that was narrated by Al-Bukhārī and Al-Nasā'ī reporting that Ibn ᶜAbbās quoted the Prophet saying to Thābit Ibn Qais "accept it (i.e. the garden as a form of compensation) and divorce her (Qais's wife) once." This happened when the Prophet asked Thābit to accept his wife's *al-khulᶜ*'. More evidence comes from that reported by ᶜUmar, ᶜAlī, and Ibn Masᶜūd, who narrated that the Prophet had said that *al-khulᶜ* is one irrevocable divorce (*tatlīqah bā'inah*). A third piece of evidence comes from the claim that some people make regarding the *al-khulᶜ*. They say that the *al-khulᶜ* word can be pronounced only by the husband; thus, it becomes divorce when he says this expression to his wife as in '*khalaᶜtuki ᶜalā kadhā*' meaning that I redeem you for so and so. Finally, if *al-khulᶜ* is a case of '*faskh*', it would proceed without the husband's approval and this is not the case. *al-khulᶜ* takes place only after the husband gives his permission, so it is done by mutual consent of both parties. However, if the husband refuses to agree on *al-khulᶜ*, the wife will get divorce though the court. This proves that *al-khulᶜ* is a form of *ṭalāq* and not *faskh*.

8. 2. *Al-khulᶜ* as a Case of *Faskh*

Now we come to the second view that deals with *al-khulᶜ* as a case of *faskh*. This view is adopted by Ibn ᶜAbbās and *Al-Shāficiyyah* (in his old opinions before going to Egypt) and Aḥmad Ibn Hanbal (in what he is famous for) and it is based on the idea that *al-khulᶜ* is not a form of divorce. Rather, it is a case of *faskh*, and therefore, it should have nothing to do with any of the three divorces or sentences that are implemented in courts.

The evidence that holders of this view present comes from the Holy Qur'ān,

> A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. It is not

lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by God. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by God; so do not transgress them if any do transgress the limits ordained by God, such persons wrong (themselves as well as others). So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until she has married another husband and he has divorced her. In that case there.is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by God, which He makes plain to those who understand.

[Sūrat Al-Baqarah: 229, 230].[41]

In his commentary on these two verses from Sūrat Al-Baqarah, Ibn ᶜAbbās said that Allah mentioned the word *ṭalāq* at the beginning of the verse [229] and said that divorce is permissible only twice. After that, He mentioned the redemption of the wife and this may be referred to as *al-khulᶜ* when He said in the same verse that "there is no blame on either of them if she gives something for her freedom". Then, He said in the next verse [230] that once he divorced her, he cannot re-marry till she gets married to and divorced by another husband. He said: "So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until she has married another husband and that husband has divorced her." This provides evidence that *al-khulᶜ* is different from divorce. Had *al-khulᶜ* been treated as a divorce case, the husband would have been allowed four divorces, rather than three as prescribed by *sharīᶜa*. This kind of evidence caused Ibn Abbās to look at *al-khulᶜ* as a *faskh* and not as a divorce, as is clear from his commentary on the two verses above.

This argument is further supported by a narration by Al-Baihaqī and others about Tāwūs, who said that he asked Ibrahīm Bin Sa^{c}d Ibn Abbās about a woman who was divorced by her husband twice before she got *al-khul^{c}* to get married to him. Ibn ^{c}Abbās said that Allah mentioned the word *ṭalāq* at the beginning and at the end of the verse and *al-khul^{c}* in between; therefore, he concludes that *al-khul^{c}* does not count as a divorce. This entails that the husband may get married to her again.

More evidence for dealing with *al-khul^{c}* as a *faskh*, and not a divorce, comes from that *ħadīth* about Jamīlah, the wife of Thābit Bin Qais. They said that the Prophet ordered that woman to take as *iddah* only one menses after *al-khul^{c}*. One concludes from this that if *al-khul^{c}* is a divorce, the ^{c}*iddah* for both of them should be the same (i.e. three consecutive menses). Again, to believers in the view, this presents evidence not only on the distinction between divorce and *al-khul^{c}*, but also on the claim that *al-khul^{c}* is a *faskh*, rather than a divorce.

Ibn Al-Qayyim presented more evidence for this opinion (i.e. *al-khul^{c}* being a *faskh* and not a *ṭalāq* or divorce). He said

> It is stated in the *Qur'ān* that *ṭalāq*, taking place after marriage had been consummated, has three different rules, provided it is not triple divorce yet. None of these rules is met in the case of *al-khul^{c}*. First, in the case of divorce, the husband has the right to come back to his wife. Second, it is taken to be one of the three divorces, so when these divorces become three, he cannot re-marry her before she gets married to another husband (with marriage consummation) and gets divorced from him. Finally, ^{c}*iddah* in *ṭalāq* is three menses.[42]

Ibn Al-Qayyim added that it had been confirmed, according to Islamic texts, and according to unanimity among Muslim scholars as well, that the husband cannot come back to his wife after *al-khulᶜ*, so it is irrevocable. It has also been confirmed by the Prophet's sunnah as well as the sayings of the Companions of the Prophet that the ᶜ*iddah* in *al-khulᶜ* is only one menses. It is also possible that *al-khulᶜ* may come after two divorces and it may be followed by a third one. This can be explained only if we deal with the two (i.e. divorce and *al-khulᶜ*) as two distinct issues.

Having surveyed the arguments for and against *al-khulᶜ* being considered a case of divorce, I believe that it is not a divorce. Rather, it is *faskh*. My conclusion is based on the strength of the evidence presented by proponents of this view, such as Al-Baihaqī and Ibn Al-Qayyim, in addition to evidence from the *Qur'ān*. Although both concepts refer to the breakdown of marriage and separation between the husband and the wife (so they are similar in form), yet divorce and *al-khulᶜ* differ in content. In fact, there are several differences that make me side with the opinion treating *al-khulᶜ* as an instance of *faskh*, rather than a divorce.

First, one of the differences between *ṭalāq* and *al-khulᶜ* is that the wife has to pay money or some other thing to her husband to agree to free her from marriage in the case of *al-khulᶜ*; however, this usually does not take place in divorce, except in one case of divorce known as *ṭalāq al-māl* (i.e., divorce for money). I will be discussing the differences between this kind of divorce and *al-khulᶜ* in a later section of this chapter.

Second, in *al-khulᶜ*, the wife maintains the right not to tell the reasons for seeking *al-khulᶜ*. This contradicts with what happens in the case of divorce. For example, in the case of *al- ṭalāq li-al-ḍarār* (divorce for harm done to the

wife), she has to mention in what ways she has been harmed and the causes of this harm, so that the judge can divorce her.

Third, in *al-khulᶜ* the wife gives up all her legal and financial rights, such as maintenance and deferred dower, etc. This kind of thing is also not found in divorce. On the contrary, the husband is committed to fulfill all the wife's rights when he divorces her.

Finally, Ibn ᶜAbbās's commentary on the two Qur'ānic verses divorce verse of Al-Baqarah: 229, and *al-khulᶜ* verse of Al-Baqarah: 230, as presented earlier in this section, does not present firm evidence for treating *al-khulᶜ* as a *faskh* or a *ṭalāq*. For example, even if the husband and the wife use *al-khulᶜ* one hundred times, yet they still can come back to each other and re-marry. This clearly demonstrates that *al-khulᶜ* does not count as a *ṭalāq* according to Ibn Abbās's interpretation. Recall that in the case of divorce, if a husband divorces his wife thrice, he cannot re-marry, unless the wife marries someone else and gets divorced. For all these reasons, I conclude this section by saying that *al-khulᶜ* is a case of *faskh*, rather than a divorce.

9. The Differences Between *Al-Khulᶜ* and *Ṭalāq Al-Māl*

The terms of *al-khulᶜ* and *ṭalāq al-māl* both refer to dissolving the marriage that brings to an end the marital relationship for a compensation paid willingly by the wife for the sake of getting *al-khulᶜ* or *ṭalāq*. According to both terms the wife has to pay compensation. If she does not pay, then either someone else should pay for her or the compensation will turn into a debt that she has to pay later on. However, despite the similarity in this particular point between *al-khulᶜ* and *ṭalāq al-māl* (i. e., both necessitate the payment of a compensation for the dissolving of the marriage), there are some significant differences between the two.[43]

First, for *al-khulᶜ* to take place, the pronouncement of either the word *al-khulᶜ* or one of its synonyms, such as "*al-mubāra'ah*", is required. As for *ṭalāq* for money, it occurs only after the pronouncement of the expression of *al- ṭalāq* by the husband. An example of this will be a husband saying to his wife "*ṭallaqtukī*", i. e. I divorced you, for the sum of two thousand Kuwaitī *Dinars* or American Dollars. In cases where *ṭalāq* is for money, then it becomes *ṭalāq bā'in*, which counts as one of the three possible divorces (i.e. *ṭalqāt*) a husband may have. *Al-khulᶜ* is different from *ṭalāq* in this respect, as there is no consensus among Muslim jurists regarding the legal ruling of *al-khulᶜ*. Should it be considered *faskh* or *ṭalāq*? Some argued that *al-khulᶜ* is *faskh* so it does not affect the number of divorces or *ṭalqāt* that the husband is allowed; others, on the other hand, argued that *al-khulᶜ* is a form of *ṭalāq*, and therefore, counts as one of the three divorces or *ṭalqāt*. Thus according to this last view, if *al-khulᶜ* takes place, the husband will be left with only two *ṭalaqāt*.

Another difference between *al-khulᶜ* and *ṭalāq* is that in *al-khulᶜ* either the wife or the husband has to give up her or his rights such as the right to get *nafaqah* or compensation, the right to keep the children, the right to have the ᶜ*iddah*, etc., whereas in *al- ṭalāq* both parties maintain their rights.

One final difference between the two terms has to do with the compensation that one gets from the spouse who is seeking *al-khulᶜ* or *al- ṭalāq* for money. If the compensation for *al-khulᶜ* is something that is prohibited by the Islamic law such as wine, pigs or other, then *al-khulᶜ* in this case becomes *ṭalāq bā'in*, according to the *Ħanafiyyah* School of Islam. However, if the compensation in the case of the divorce for money is prohibited by *sharīᶜa*, then divorce is considered to be *ṭalāq rajᶜi* rather than *ṭalāq bā'in*.

10. The Reasons Why the Wife May Seek *Al-khulᶜ*

The Islamic *sharicᶜa* does not state the reasons that may drive the wife to seek *al-khulᶜ*. In fact, there is only one general reason that the wife may present. According to this reason, it is enough for her to say that she detests her husband and she does not feel comfortable living with him and it worries her that she may not be able to observe the limits ordained by God, because she may disobey her husband and not fulfil her marital obligations towards him, if she keeps living with him. She has the right to seek *al-khulᶜ* if she presents this as a reason, although the husband did not harm her or neglect his duties toward her. Ibn Qudāmah says that

> If the wife hates her husband and also hates to prevent him from enjoying her, because she will be disobedient to him, she may get *al-khulᶜ* from him.[44]

This is exactly what happened to Jamīlah Bint ᶜAbdullah when she wanted to get *al-khulᶜ*. Her reason to leave him had nothing to do with his manners or religion, but rather with his appearance and looks. He was dark, short and ugly, and she herself said this in different narrations of the story. For instance, Ibn Al-Jazrī mentioned that Jamīlah was married to Thābit Bin Qais and she became disobedient and revellious against him. The Prophet sent for her and asked her, "What do you hate about him?"[45] She replied that she hated nothing of his manners or faith, but she hated his ugliness. In another narration it was reported that Habībah Bint Sahl, who was another wife of Thābit, said, "I swear by God that I would have spat on his face, had I not been fearful of God."[46] These stories and others show that the reason for legitimising *al-khulᶜ* is the detestation or hatred a wife may have toward her husband to the extent that married life with him becomes unbearable and impossible. In fact, this further supports my argument in the third chapter of this thesis regarding the caution that the woman should show when choosing a husband. She has to be consulted and asked her opinion of the potential

husband. She should also have the chance to see the man proposing to her, so she won't be shocked after marriage, because she realises that the person she got married to, is not the husband she wants. As such, she has to end the marriage in a regrettable way. Therefore, the parents or guardians of women at the age of marriage have a very crucial role to play and responsibility to bear in helping future wives in choosing their husbands in order to ensure that marital life proceeds smoothly and with no problems.

However, one finds it hard to confirm that the reason for the legitimisation of *al-khulᶜ* is the wife's detestation of her husband, as there could be various reasons that drive the wife to seek *al-khulᶜ*. Sometimes, the reason could be psychological or covert, whereas in other circumstances it could be very clear such as a despicable, contagious disease that the wife becomes fearful of contracting the disease. Another such reason could be the infertility of the husband, particularly if the wife is keen on having children. The lack of intimacy or bad company of the husband in any field of life may count as a reason for *al-khulᶜ*. Nāhid Al-ᶜAjūzah pointed out another reason that is becoming more common in our modern life. This is the sexual abuse that may take place between the husband and his wife. She states that

> *Al-khulᶜ* may be due to sexual abuse between the husband and his wife, as the two parties may not be clear or honest in their sexual relationship. This gradually leads to accumulation of feelings of unease and discomfort in this relationship, due to the nature of oriental societies where couples do not discuss such issues either out of fear or out of shyness. [47]

In fact this problem is very important because it could be more common than others in our society.

Another reason as to why a wife may ask for *al-khulᶜ* is the ill-treatment she gets from her husband, because he keeps beating and humiliating her, and he does not respect her at all. It is natural that in such cases that she will seek *al-khulᶜ* to get rid of this unjust husband and restore her freedom and dignity. She cannot manage to be controlled by an abusive husband who shows no respect for good manners and religion. Although she can resort to the court to get a divorce for being beaten or harmed in this case, yet many wives refrain from doing this, due to the long duration of time the proceedings of the court could take in addition to the need to offer evidence and proof to confirm that the husband has caused her some harm. Instead, she tries to get *al-khulᶜ* despite her knowledge that in the case of *al-khulᶜ* she has to not only give up her financial rights but also pay compensation to the husband for *al-khulᶜ*. In fact, she is forced to opt for this measure, because *al-khulᶜ* is like a bitter medicine; although it is bitter she has to take it to get healthy again. This hopefully will put an end to her ordeal and misery with this sick husband.

In all the examples above, *al-khulᶜ* is attributed to some problems in the husband that drive the wife to disobey and rebel against her husband, yet in all these cases *al-khulᶜ* is correct and conforms to the Islamic law, because the wife herself demanded this and wanted it. As for the husband, he is a sinner according to the *sharicᶜa* because he has transgressed the limits and violated the duties he has toward his wife and because he made her behave in this way (resorting to *al-khulᶜ*).

A number of other reasons for which the woman cannot be blamed for seeking *al-khulᶜ* were mentioned by Muḥammad Saᶜd Abū Shatta. He says

> The husband may be someone who slanders and backbites and may say to her 'well, who do you think you are? I was at a party tonight with lots of women on board a boat.' [48]

Abū Shatta reports that this is what actually was said by a decent wife in a courtroom and he could not help her because there were no witnesses, and the husband was shameless. What the husband said above is an invitation to dishonourable or shameful conduct. He is proud of the shameful deeds he committed. However, Abū Shatta ends by saying

> The solution in this case is to offer him what he had already given her to free herself, because there is no way she can live with a husband of this sort.

Apart from this reason, Abū Shatta mentions other reasons that make the wife ask for *al-khulᶜ*. In fact, he makes a whole list of such reasons including: speaking to fallen women on purpose, humiliating his wife because of her family, threatening her in front of her children who may not testify against him in court, inviting her to taking part in rituals performed by satan worshipers, exchanging wives with friends, forcing her to drink wine and take drugs, stopping her from working although she was working when they got married, making fun of her and ridiculing her mind and work in public even for the sake of a joke, and, finally, sleeping on a bed that is different from their usual one for the sake of humiliating and ignoring her or showing no interest in her. It is quite hard for the wife to stay with her husband in any of these situations and it is only her who can decide whether she should stay with him or try to get *al-khulᶜ* from him. However, it is quite clear how difficult it is for the wife to ask for divorce due to the difficulty in providing the required evidence or witness. In all the cases listed above by Abū Shatta, it is usually difficult to get divorce because of the lack of evidence, as most of these things take place in private places. In the absence of divorce, she has to resort to *al-khulᶜ*.

Nowadays, it is possible for the wife to get *al-khulᶜ* in accordance with the law for something wrong not in her but in her husband, such as bad manners, and ill-conduct with her. As a result, the ill practices of the husband cause

much harm to the wife and she seeks *al-khulᶜ*. This is probably what made Naṣir Farīd Wāṣil, who is the Mufti of the Arab Republic of Egypt, say that

> In effect *al-khulᶜ* in its present form and the way it is used is the similar or the same as *al- ṭalāq li-al-ḍarār* (i.e., divorce for harm done to the wife by the husband), and that *al-khulᶜ* is no longer the same as it was meant to be.[49]

To him, the legislator in Egypt treats cases where one expects to get *al-khulᶜ* as divorce, although the two concepts are clearly distinct (recall that a divorce is initiated by the husband who is usually required to pay for his wife, whereas *al-khulᶜ* is initiated by the wife and she has to pay her husband in compensation for this). In fact, the rate of *al-khulᶜ* is increasing remarkably in Egypt and this is traced back to the difficulty for wives to obtain a divorce for harm caused by the husband; therefore, they opt for *al-khulᶜ*, which has become quite easy for many wives to get.

11. *Al-khulᶜ* and the Modern Law in Arab Countries

Although the law for *al-khulᶜ* has been enacted in many Arab countries as a legal right for the wife, it is noticed that many wives refrain from using this right in its current form even if they need and wish to get rid of their husbands. Probably, this may be attributed either to a lack of information and details about such laws, or to the lengthy procedures and the hardships that accompany the implementation of these laws. The difficulty may lie in the need to get the husband's permission to *al-khulᶜ*, which causes too much psychological and material damage to the wife, being the party who is harmed most. Therefore, women in the Arab world, prefer in most cases, not to use this lawful right.

Let us take the State of Kuwait, as an example. Article (111) of the Personal Status Law of Kuwait states that:

1. *Al-khulᶜ* may be looked at as a form of the man's *ṭalāq* of his wife but for a settled or agreed on compensation that he gets from her. This *khulᶜ* is manifested, in effect, by the pronouncement of one of these words: "*al-khulᶜ*, *at- ṭalāq*, or *al-mubāra'ah* (i.e. divorce by mutual consent), or by any other word of the same meaning."
2. Only the husband, the wife, or their representatives may exercise this right. [54]

An explanatory memorandum the purpose of which is to interpret this article, states that "Allah referred to *al-khulᶜ* by using the word '*iftidā'* (i.e. to ransom), which requires that both sides agree on it. Thus, *al-khulᶜ* is based on mutual consent just like other contracts. The meaning of article (111) has also been explained in a more detailed way by Ashraf Kamāl, who said

> Because *al-khulᶜ* is a divorce based on a contract that cannot proceed without the consent of both parties (i.e. the husband and the wife), the wife cannot file a case in court of law asking for divorce for either giving up one of her rights or offering a compensation.

Although this may explain the article, he disagreed with the Kuwaiti legislator in his opinion when he said that

> We believe that one of the justifications of the principle of *al-khulᶜ* is the possibility of obliging the husband, by the force of law, to divorce his wife if she pays him a compensation for redemption. Otherwise, the wife's right to offer a compensation will become meaningless, if eventually the husband is the one who decides in this matter, given that divorce may not proceed without his consent. As such, the wife will have to continue to have a marital life that she cannot bear.

Recall that according to Kuwaiti law, it is only the husband, the wife or their representatives, but not the judge, that may exercise *al-khulᶜ*.

In fact, one can see that the same thing is true of both the Syrian law, [55] the Egyptian law[56] before it was recently amended as well as the Jordanian law

before being amended. Thus, the wife's right to *al-khulᶜ*, according to the Islamic Law, became conditioned by the husband's approval. This constitutes a grave injustice, because it is generally looked at *al-khulᶜ* as the saviour that will enable the wife to escape from her husband whenever she feels she needs to do so. This saviour is expected to put an end to any harm or ordeal caused by the husband; therefore, it is difficult to understand how it is left to the husband to approve of the wife's desire in *al-khulᶜ*.

The laws pertaining to *al-khulᶜ* are so unclear and in-decisive in giving the wife the right to use *al-khulᶜ* in the sense of the Islamic *sharicᶜa*, because they depend on one opinion, namely, that of the *Hanafiyyah* School of Islam. This made the Egyptian legislator modify the *al-khulᶜ* law that had been in effect for more than one hundred years. However, members of the Council for Islamic Research in Al-Azhar relied on more sources and opinions in the process of modifying this law. They took something from the *Mālikiyyah* School, which is more flexible than the other ones in issues that relate to the separation between the husband and the wife and the rules of *al-khulᶜ* that do more justice to the wife. In fact, it grants the wife the right to have *al-khulᶜ* directly even without the need to get the husband's consent. This is in harmony with the Islamic law, and it provides the chance for the wives who have been treated unfairly by their abusive husbands to get rid of these husbands in an officially legal manner with no wrong doing what so ever.

11. 1. The Statement of the *Al-Khulᶜ* Article

I find it appropriate that I discuss and analyse this particular modified article of the law and explore the different points of view that were expressed in this context whether they were with or against it. I believe that this subject is vital for many Muslim women everywhere, particularly in the Arab world.

This is what the article states:

Article (20) of the Law No. (1) of the year 2000, which was ratified by the People's Council of Egypt, states:

> The husband and the wife may try agree on (or settle) *al-khulʿ*, but if they fail to do so, and if the wife files a case in court, offers a *fidiyah* or redemption for *al-khulʿ*, gives up all her financial and legal rights, and gives him back the dower he had given her when they got married, then the court will rule that she be divorced from her husband. The court will not grant divorce to a wife seeking *al-khulʿ* unless the two parties have already tried to get together again or have appointed two arbitrators to pursue the reconciliation efforts within three months, or as stated in the second paragraph of article (18), and the first and second paragraphs of article (19) of this law. The wife would have made it clear that: she detests life with her husband, she cannot at all continue marital life with him, and she is fearful that she may not be able to observe "the limits ordained by God" because of the hatred she has toward him. It is prohibited that a deal be made according to which the wife gets *al-khulʿ* in exchange for abandoning her right to the custody of her infant children, or get a maintenance for them, or drop any of their rights. Whenever *al-khulʿ* happens, it should be dealt with as a case of "*talāq bā'in*" (irrevocable divorce). The sentence in all cases is final and is not challengeable in any way.

11. 2. The Reason for Modifying *Al-khulʿ* Article

There are many reasons that led to the need for modifying the law that deals with *al-khulʿ* in Egypt.[57] One reason is the old version of the *al-khulʿ* law itself, as it had created lots of problems, and *al-khulʿ* cases piled up in courts. Moreover, there was no clear understanding of the previous law, so it was not used appropriately, which in turn led to an escalation of problems among

wives and husbands and obviously this is not in the interest of the family and society. In fact Amīr Muḥammad Mutāwiᶜ discusses these problems and says

> The social and economical changes as well as the development in the legal system in Egypt in the last few years revealed that the rules that were followed by the judiciary in the past are no longer consistent with the development we are witnessing nowadays, and do not reflect the interest of the society and its needs for progress and growth. Furthermore, these laws are scattered because they come from different sources and jurists and they do not form one coherent system. Besides, the rules of some of these laws are dull, and the court procedures are complicated. Thus, these rules and laws do more harm and damage to the family interests at a time when these interests constitute one of the key social issues that have to be protected by the law and the constitution.[58]

Another reason that motivated the need to modify the *al-khulᶜ* law in Egypt was treating *al-khulᶜ* on a par with divorce, as reported by Muḥammad Sāmeḥ, who says that

> The wives who wanted to get separated from their husbands did not ask for *al-khulᶜ* before passing the newly modified law (referred to as Law No. 1 of year 2000) because their cases had to go through the same phases that divorce cases usually go through. In other words, there is no point for them to pay compensation or give up their legal and financial rights to free themselves from their husbands. Therefore, there is no need to ask for *al-khulᶜ* in their cases.[59]

This article of the law led to a great controversy in the public opinion of all sections of the Egyptian society, so there were those who welcomed the modification and those who were against it. The reason for this split in public opinion is that *al-khulᶜ*, according to the new modified version, does not

require, as a pre-condition of *al-khulᶜ*, the husband's consent. This is contrary to what used to be the case in the previous one. Thus, this new law permits the judge to divorce the wife even without the husband's approval if he (i.e. the judge) finds the evidence presented by the wife compelling. In addition to that, the newly modified article is not subject to challenge or contestation and it does not affect the right of the mother to the custody of her infant children.

The proponents of the new law look at this article as the real saviour of the maltreated wife whose dignity has been tarnished by her inequitable husband, who shows no fear of Allah. This new article is a legal right for the wife according to Islamic Law and now she can use it whenever she needs to without being questioned or litigated. It also facilitates the divorce procedures, so in principle it should not take too long before *al-khulᶜ* is finalised. As ᶜAbdulazīz Shāhīn argues, there is no point in holding a wife who hates you. He says that "it is against the Islamic law for a man to hold to a wife who hates him."[60]

Another argument in favour of the new article about *al-khulᶜ* comes from ᶜAbdurāħman Al-ᶜAdawī, who argues that

> The implementation of this article of *al-khulᶜ* is actually in the interest not only of the wife but also of the husband himself, because the wife wants to protect her husband's reputation, as she does not blame him for something in his manners or anything else. She only wants *al-khulᶜ* instead of *ṭalāq li-al-ḍarār* because in the case of the latter (divorce for harm done) there will be more damage done to the husband, as she will have to disclose the harm he caused her and the reasons for that.[61]

Of course this may cause some damage to the reputation of the husband, and the wife does not like this. Therefore, *al-khulᶜ* is much better, even for the husband, than divorce.

Opponents of the new law of *al-khulᶜ* expressed some doubts about it by claiming that it undermines the man's legal right to willingly divorce his wife, it obliges the husband to leave his wife, and it is in no one's interest. In his reply to them, Amīr Muḥammad Mutawaᶜ says

> The new law of *al-khulᶜ* does not undermine the husband's legal right to divorce his wife out of his own will, because if this had been the case, then delegated divorce, according to which the husband authorises his wife to divorce herself from him if so she wants, would also undermine the husband's right to divorce his wife. This is because the delegated divorce does not preclude the possibility of the husband divorcing his wife out of his own will when he wants. Thus, the wife may be divorced either by her husband, or by herself (if she is delegated). Thus the husband's right to divorce is maintained. Moreover, *al-khulᶜ* does not oblige the husband to leave his wife only for stating that she detests living with him; rather, *al-khulᶜ* in fact means that the wife *taftadī nafsahā* (i.e. she frees herself from her husband for some money she pays him) by abandoning all her financial rights stated in the marriage contract. [62]

As for claiming that *al-khulᶜ* is not in the interest of the husband or the wife, Mutawaᶜ wonders "Is it immoral if the husband and his wife implement the Islamic *sharicᶜa*? On the contrary, it is immoral of the couple not to resort to *sharicᶜa*." Of course, everything in the *sharicᶜa* is in the interest of the couple as well as the family. Mutāwiᶜ also refutes the claim that *al-khulᶜ* happens only if there is mutual consent (i.e. between the husband and the wife) by reminding them of what the Prophet ruled in the case of Thābit Ibn Qais and his wife.

As for the opponents of the new modification of *al-khulᶜ* law, they argue that there is no legal or moral restriction that prevents the wife from abusing this

right. Some wives, who have no fear of God at all, may abuse this new law and behave in an unjust way with their husbands, causing them a lot of materialistic and psychological damage. Therefore, the opponents of the new law demand that the wife should pay a financial compensation for *al-khulᶜ* if *al-khulᶜ* is done through a judge. This is further supported by Nāhid Al-ᶜAjūzah, who argues that it is necessary to give the husband a financial compensation if the wife seeks *al-khulᶜ* in an abusive way. She argues that there is discrimination between husbands and wives, because wives are compensated in the case of divorce by men, whereas men are not. Therefore, she asks for the reason as to

> Why the principle/rule of placate or solace in divorce is used with no reason in the case of women, but not in the case of men. So the wife is compensated for a divorce she does not want. Is this not done for the sake of the woman? Why should not the man be compensated for a divorce he does not cause or ask for, given that legally men and women are equal in rights and duties.[63]

According to the rule Al-ᶜAjūzah refers to, the husband may divorce his wife for no reason, but he has to pay her in compensation for the psychological damage as well as for the enjoyment (i.e., *mutᶜah*) she provided him as a wife. One may point out that obliging the wife to pay compensation to her husband may limit or minimise the abuse of this law, by the wife, as argued by Al-ᶜAjūzah when she says

> Imposing a compensation payable to a husband will help in making the wife who is seeking *al-khulᶜ* through divorce more reflective and thoughtful, so she will not ask for it in the case of trivial reasons or casual temptations, so that the family structure will not dismantle and the children will not suffer. In fact, such breakdown in the family will negatively affect the whole society.[64]

A similar argument was proposed by Aḥmad Al-Najjār, who argues for the need to compensate the maltreated husband and give him the chance to challenge the judge's verdict and prove that the wife has been abusive in asking for *al-khulᶜ*. He says

> It is essential that the maltreated husband be compensated through giving him the opportunity to provide evidence about his wife's abusiveness in resorting to *al-khulᶜ*. This may give him the chance to show that she has not been behaving in the normal way other wives do, and that he did not treat her badly in any way as to drive her to seek *al-khulᶜ*. This may also enable him of proving that she followed this path for selfish purposes and idiosyncratic motivations and that he and his family have been harmed by this *al-khulᶜ*.[65]

Regardless of whether most of the opinions were for or against the issue of *al-khulᶜ*, I contend that the newly modified article is fair and acceptable, as it acknowledges the wife's right, as stated in the *sharīᶜa*, to *al-khulᶜ* which Allah's Messenger applied in the case of Thābit and his wife. The *khulᶜ* laws as used nowadays in different Arab countries, do not serve the wife in any way at all, particularly if the husband rejects al-*khulᶜ* and the compensation. Of course, this will lead to more serious and chronic problems between the couple, which will be not accepted by the Islamic *sharīᶜa* under no circumstances. I prefer that other Arab countries follow the steps of Egypt in this regard and modify the article that refers to *al-khulᶜ*. In particular, the modification should deal with the requirement to have the husband's consent. The new version of the article should drop this requirement in order for *al-khulᶜ* to proceed. However, I hasten to whisper in the ear of the Muslim wife and ask her not to abuse this right given to her by God. However, if she does, she will be disobeying God and this may deprive her of Paradise. As we argued in an earlier section (i. e. section 4), the fundamental wisdom of

legitimising *al-khulᶜ* is to prevent any harm or damage from afflicting the wife. Therefore, if there is no harm or damage incurred, she should not resort to this right, because in this case she will be hurting the husband and the children, who are the closest to her. Thus, although *al-khulᶜ* is a right that the wife has, she cannot use this right if she hurts and causes harm to the others. In other words, this right is conditioned by not harming the others. In so far as the *al-khulᶜ* law currently implemented in Egypt does not cause harm or problems to others, it will be protected from attacks and doubts of the opponents of the newly modified law.[66] This may guarantee that justice is done to both parties. In fact this modified version of the *al-khulᶜ* law will make husband more considerate and treat their wives in a more appropriate way, so that they will try to avoid hurting and harming them, or ignoring their rights. Of course, this is one of the ultimate goals of the Islamic law anytime anywhere.

12. Conclusion

This chapter was dedicated to *al-khulᶜ*, which is a very important and controversial issue in the Arab world nowadays. The chapter discussed a number of issues pertaining to *al-khulᶜ*. In the first section, I introduced the concept of *al-khulᶜ*. In section two, I presented the definition of *al-khulᶜ* both lexically and technically. The definition I adopted for the purposes of this work is that of the *Ḥanafiyya*h School of Islam because it is clearer and more comprehensive than the others. Section three focused on the legitimacy of *al-khulᶜ*. I considered evidence for legislating this right for women from the *Qur'ān*, from the Prophet's *sunnah*, from deeds performed by the Prophet's Companions, and from *ijmāᶜ* (i.e. consensus). Section four focused on the wisdom and advantages of the legislation of *al-khulᶜ* in Islam. I particularly argued that *al-khulᶜ* may have many benefits not only for the wife but also for the husband. In section five, I focused on the husband's agreement to his

wife's wish in obtaining *al-khulᶜ*. Here, we explored different possibilities regarding whether the husband should agree out of his own free will, or whether he should be forced to do so by the judge. As for section six, the focus was on the amount of money that the husband may take in compensation for his wife's *al-khulᶜ*. Again there were different views that were discussed in detail. Some scholars permitted the husband to take more money than what he paid in dower, while others were against this. Section seven was basically concerned with *al-khulᶜ* in the case of ill wives and the compensation the husband may take for *al-khulᶜ*. The question of whether *al-khulᶜ* should be treated as a case of divorce or an an instance of *faskh* was raised in section eight, where I showed that there is no consensus on this matter, as some scholars looked at it as a divorce whereas others looked at it as a *faskh*. Then, I moved to discuss some of the reasons that stimulate the wife to ask for *al-khulᶜ*. Section nine focuses on the main differences between *al-khulᶜ* and divorce. In section ten, I highlighted the restrictions and general rules that regulate the *al-khulᶜ* law. I emphasised two basic types of restrictions: the religious restriction and the moral one. Section eleven considers *al-khulᶜ* in view of modern law in the Arab countries. In particular, I focused on one example which is the recently modified article of the *al-khulᶜ* law in Egypt. I highlighted the crucial differences between the two versions of the law: the original version which was used for more than a century and the newly modified version of 2000. I concluded this chapter by stressing the importance of modifying *al-khulᶜ* laws in Arab countries, so that the wife will be more fairly treated. I also emphasised that the husbands need to be more considerate of the their wives and their needs. At the same time the wife should not abuse her right in getting *al-khulᶜ*, as this may hurt her husband and her children as well.

Notes to Chapter Eight

1. Things like al-żihār, al-īlā', al-mutārakah, etc.
2. See the entry for *"khalaᶜa"*, in

   Ibn Manżūr, *Lisān al-ᶜarab*, vol. 4, (Beirut: Dār Ṣādr, 1300 A. H.), p. 179.

   See also Al-Fayrūz Abādī, Majd Al-Dīn, *Al-Qāmūs al-muħīṭ*, vol. 3, (Beirut: Dār Al-Maᶜrifah, 1978), p. 24.

   See also Anīs, Ibrahīm, et. al., *Al-Muᶜjam al-wasīṭ*, vol. 1, 2nd edn., (Cairo. n. d.), p. 250.
3. Al-Mālikiyyah had defined *Ạl-Khulᶜ* as a case of "divorce for compensation".

   See: Dardīr, *Al-Sharħ al-ṣaghir*, vol. 2, p 518.

   Al-Shāfiᶜiyyah said that al-khulᶜ is "a separation between the husband and the wife for a definite compensation, according to this the husband has to pronounce the word ṭalāq or khulᶜ. He may say that I divorce you or *khalaᶜtuki* for so and so, and she may accept it.

   See: Al-Sharbīnī, Muħammad, *Mughnī al-muħtāj ilā maᶜrifat maᶜānī alfā al-muħtāj*, vol. 3, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1985), p. 262.

   See also Al-Ramlī, Shams Ad-Dīn, *Nihayat al-muħtāj*, vol. 6, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1967), p. 393.

   As for Ħanbaliyyah, they defined *al-khulᶜ* as a "the man's leaving of his wife for a compensation that he takes from her or from someone else by pronouncing certain words. See:

   Al-Bahwatī, Mansūr, *Kashshāf al-qināᶜ ᶜan matn al-aqnāᶜ*, vol. 3, edited by Ħilāl Musaylihi, (Beirut: Dār Al-Fikr, 1982), p. 126.

   See also Al-Bahwatī, Manṣūr, *Sharħ muntahā al-irādāt*, vol. 4, (Beirut: ᶜAlam Al-Kutub, 1991), p. 197.
4. Al-Tamartāshi, Shams Al-Dīn, *Radd al-muħtār ᶜalā al-durr al-mukhtār: ħāshiyyat Ibn ᶜAbdīn*, vol. 5, pp. 86-88.

5. Al-Rāzī, Fakhr Al-Dīn, *Al-Tafsīr al-kabīr*, vol. 6, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1990), p. 86.

   See also Al-Ṭabarī, Muḥammad, *Jāmiᶜ al-bayān fī tā'wīl al-Qur'ān*, 2nd edn., vol. 2, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1997), p. 475.

   See also Ibn Al-ᶜArabī, Muḥammad, *Al-Jāmiᶜ li-aḥkām Al-Qur'ān,* edited by A. M. Al-Bijawi, vol. 3, (Beirut: Dār Al-Maᶜrifah, n. d.), p. 92.

   See also Al-Shawkānī, Muḥammad, *Fatḥ al-qadīr*, edited by Y. Al-Ghoush, vol.1, (Beirut: Dār Al-Maᶜrifah, 1995), p. 304 onwards.

6. Ibn Kathīr, Ismāᶜīl, *Tafsīr Al-Qur'ān al-ᶜaẓīm,* 5th edn., vol. 1, (Beirut: Mu'assasat Al-Rayyān, 1999), 367.

7. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥiḥ Al-Bukhārī*, vol. 9, (Cairo: Dār Al-Rayyān, 1987), p. 306.

   See also Al-Nasāī', *Sunan Al-Nasā'ī*, vol. 6, 3rd ed., (Aleppo: Maktabat Al-Maṭbūᶜāt Al-Islāmiyyah, 1994), p. 168.

   See also Al-Qazwīnī, Muḥammad, *Sunan Ibn Mājah*, vol. 1, edited by M. F. Abdulbāqi, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 663.

8. Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥiḥ Al-Bukhārī*, vol. 9, p. 311.

9. Anas, Mālik Bin, *Al-Mūwatta'*, edited by Muḥammad Fu'ād Abdulbāqi, (Cairo: Dār Al-Ḥadīth, 1993), p. 442

   Here Imām Mālik narrates that Ḥabībah Bint Sahl Al-Ansāri was married to Thābit Bin Qais Bin Shammās. The Messenger went out in the morning and found her at his door step at the break of dawn. The Messenger asked "Who is this?" She replied, "O, Messenger of God, I'm Ḥabībah Bint Sahl." He asked, "What do you want?" Ḥabībah answered, "it is either I or Thābit (i. e., her husband)," meaning it is impossible for the two to be together. She's asking for separation. Later on, when her husband arrived the Messenger told him that: "Ḥabībah

said everything she could remember." Ħabībah said, "O Messenger of God, I still have all what he gave me." The Messenger, then, asked Thābit to "take from her", and he did. And, Ħabībah stayed in her house.

The same story was narrated by:

Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 2, p. 667.

Al-Nasā'ī, *Sunan Al-Nasā'ī*, vol. 6, p. 168.

Al-Qazwīnī, Muħammad, *Sunan Ibn Mājah*, vol. 1, p. 663.

10. Al-Bayhaqī, Aħmad, *Al-Sunan al-kubra*, edited by M. A. ᶜAta, vol. 7, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1994), p. 316.

    See also Ibn Kathīr, Ismāᶜīl, *Tafsīr Al-Qur'ān al-ᶜażīm*, vol. 1, p. 359.

    '*Al-qirt*' is whatever the woman hangs in her ears (earrings). They could be gold or silver or any other metal. qirt is singular and the plural form is a *qirat*, *Qirrat* and *qirūt*. See entry for '*qarata*' in:

    See also Ibn Manżūr, *Lisān al-ᶜarab*, vol 5, p. 3591.

    See also Al-Qarmi, Aħmad, *Al-Misbāħ al-munīr*, vol. 2, (Beirut: Al-Maktabah Al-ᶜIlmieh), p. 683.

11. Al-Jassās, Aħmad, *Aħkām Al-Qur'ān*, vol. 2, (Beirut: Dār Iħiā' Al-Turāth Al-ᶜArabi, 1985), pp. 90-91.

12. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh ashsharħ al-kabīr*, vol. 8, (Beirut: Dār Al-Kitāb Al-ᶜArabi, 1972), p. 173f.

13. Al-ᶜAynī, Badr Al-Dīn, *ᶜImdat al-qārī sharħ ṣaħiħ Al-Bukhārī*, vol. 20, (Beirut: Dār Iħyā' Al-Turāth Al-ᶜArabi, n. d.), p. 260.

14. Anas, Mālik Bin, *Al-Mūwatta'*, p. 343.

15. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh ash-sharħ al-kabīr*, vol. 8, p. 178.

16. Ibn Rushd, Muħammad, *Bidāyat al-mujtahd*, vol. 4, (Beirut: Dār Ibn Ħazm, 1995), p. 360.

17.Al-ᶜAṭṭar, ᶜAbdulnāsir. *Al-Usrah wa qānūn al-aḥwāl al-shakhsaiyyah no.100 for the year 1985*, (Cairo: Al-Mu'assasah Al-ᶜArabiyyah Al-Ḥadīthah, 1985), p. 199.

18.Al-Ṭabarī, Muhammad, *Jāmiᶜ al-bayān fī tā'wīl Al-Qur'ān*, vol. 2, p. 479.

19.Ibn Kathīr, Ismāᶜīl, *Tafsīr Al-Qur'ān al-ᶜaẓīm*, vol. 1, p. 643.

20.Al-Ṭabarī, Muḥammad, *Jāmiᶜ al-bayān fī tā'wīl al-Qur'ān*, vol. 8, p. 319.

See also Ibn Al-ᶜArabī, Muḥammad, *Al-Jāmiᶜ li-aḥkām Al-Qur'ān*, vol. 1, pp. 175-176.

21.Ibn Mufliḥ, Shams Al-Dīn, *Kitāb al-furūᶜ*, vol. 5, p. 343.

22.Al-ᶜAsqalānī, Aḥmad, *Fatḥ al-bārī bi-sharḥ ṣaḥiḥ Al-Bukhārī*, vol. 9, p. 312.

See also Al-Ṭabarī, Muḥammad, *Jāmiᶜ al-bayān fī tā'wīl al-Qur'ān*, vol. 4, p. 580.

23.Al-Shawkānī, Muḥammad, *Nayl al-'awṭār*, vol. 6, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1999), p. 261.

24.Al-Najjār, ᶜAbdullah M., *"Ḥatta la tataḥawwal munāqashatu al-qānūn ilā ghairi masāriha"* in Al-Ahram Newspaper, (Cairo: 27/ 1/ 2000), p. 10.

25.Mutawaᶜ, Amīr, *Al-Khulᶜ bayna al-sharīᶜa wa al-qānūn*, edited by A. Hāshim and A. Muḥammad, (Alexandria: Dār Al-īmān, n. d.), p. 80.

26.Imām, Muḥammad, *Aḥkām al-aḥwal al-shakhsaiyyah lilmuslimīn.* vol. 2, (Alexandria: Munsha'at Al-Maᶜārif, 2001), p. 178.

27.Al-Zaylaᶜī, Fakhr Al-Dīn, *Tabiān al-ḥaqā'iq sharḥ kinz al-daqā'iq*, vol.2, 2nd edn., (Cairo: Maṭābiᶜ Al-Fārūq, 1313 A.H.), p. 269.

See also Al-Hanafi, Ibn Al-Humām, *Sharḥ fatḥ al-qadīr*, vol. 4, (Egypt: Matbaᶜat Mustafa Al-Bābi, 1970), 217.

See also Al-Shirāzī, Ibrahīm, *Al-Muhadhab fī fiqh al-imām Al-Shāfiᶜi*, vol.4. 3rd edn., (Egypt: Maṭbaᶜat Muṣṭafa Al-Bābi, 1976), p. 261.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharh al-kabīr*, vol. 8, p. 175.

28. Al-Śanᶜānī, Muḥammad, *Subul al-salām*, edited by M. Subḥi, vol. 6, (Saudi Arabia: Dār Ibn Al-Jawzi, 1997), p. 194.

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30. Al-Śanᶜānī, Sharaf Al-Dīn, *Al-Rawḍ al-naḍīr sharh majmūᶜ al-fiqh al-kabīr,* vol. 4, (Beirut: Dār Al-Jīl, n. d.), p. 169.

31. Al-Mirdāwī, ᶜAlā' Al-Dīn, *Al-Inṣāf fī maᶜrifat al-rājiḥ min al-khilāf ᶜalā madhab Al-Imām Aḥmad Ibn Hanbal*, vol. 8, edited by M. H. Al-Shāfiᶜi, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1997), 398.

32. Al-Śanᶜānī, Sharaf Al-Dīn, *Al-Rawḍ al-naḍīr sharh majmūᶜ al-fiqh al-kabīr,* vol. 4, p. 169.

See also Al-Shawkānī, Muḥammad, *Al-Darāri al-muḍi'ah*, vol. 1, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 228.

See also Al-Nawawī, Yaḥiā, *Rawḍat al-tālibīn*, vol. 7, edited by A. Aḥmad and A. M. Muᶜawwaḍ, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 374.

33. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharh al-kabīr*, vol. 8, p. 176.

34. Al-Shawkānī, Muḥammad, *Al-Darāri al-muḍi'ah*, vol. 1, p. 228.

35. Al-Kaḥlāwi, ᶜAblah, *Al-Khulᶜ dawā' mā lā dawā' lahu*, (Cairo: Dār Al-Rashād, 2000), p. 145.

36. Anas, Mālik Bin, *Al-Mudawwanah al-kubrā*, vol. 22, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1994), p. 351.

See also Al-Sharbīnī, Muḥammad, *Mughnī al-muḥtāj ilā maᶜrifat maᶜānī alfāż al-muḥtāj*, vol. 3, p. 265.

See also Al-Ħanafi, Ibn Al-Humām, *Sharħ fatħ al-qadīr*, Vol. 4, (Cairo: Maṭbaᶜat Muṣṭafa Al-Bābi, 1970), p. 237.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 8, p. 222.

37. Al-Kaħlāwi, ᶜAblah, *Al-Khulᶜ dawā' mā lā dawā' lahu*, p. 183.

38. Ibn Ħazm says that *al-khulᶜ* is a revocable divorce if the husband does not triply divorce his wife. The husband may go back to his wife even during the ᶜ*iddah* period, regardless of whether the wife likes it or not. In this case, he has to return what he had taken from her. However, this opinion is not widely spread. Fqr further details, see:

Ibn Ħazm, ᶜAli, *Al-Muħalla*, vol. 10, (Beirut: Dār Al-Jīl Al-Jadīd, n. d.), p. 235.

39. Ibn Rushd, Muħammad, *Bidāyat al-mujtahid*, vol. 4, p. 362.

40. Al-Sarakhsī, Shams Al-Dīn, *Al-Mabsūṭ*, vol. 6, 3rd edn., (Beirut: Dār Al-Maᶜrifah, 1987), pp. 171-172.

See also Al-Zaylaᶜī, Fakhr Al-Dīn, *Tabiān al-ħaqā'iq sharħ kinz al-daqā'iq*, vol. 2, p. 468.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 8, p. 180.

41. Al-Zaylaᶜī, Fakhr Al-Dīn, *Tabiān al-ħaqā'iq sharħ kinz al-daqāiq*, vol.2, p. 268.

See also Al-Qurṭubī, Muħammad, *Al-Jāmiᶜ li-aħkām Al-Qur'ān*, vol. 3, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, n. d.), p. 143.

See also Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharħ al-kabīr*, vol. 8, p. 180

See also Al-Shawkānī, Muħammad, *Nayl al-'awṭār,* vol. 7, p. 135.

42. Ibn Qayyim, Shams Al-Dīn, *Zād al-maᶜād*, vol. 4, (Cairo: Dār Al-Taqwā li-al-turāth, 2000), p. 94.

See also Al-Shawkānī, Muħammad, *Nayl al-'awṭār,* vol. 6, p. 263.

43. Al-Sarakhsī, Shams Al-Dīn, *Al-mabsūṭ*, vol. 6, p. 179.

See also Ibn Nujaym, Zayn Al-Dīn, *Al-Baḥr al-ra'iq sharḥ kinz al-daqā'iq*, vol. 4, 2nd edn., (Dār Al-Kitāb Al-Islāmi, n. d.), pp. 94-95.

See also Al-Ḥanafi, Ibn Al-Humām, *Sharḥ fatḥ al-qadīr*, vol. 4, p. 64.

44. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 8, p. 180.

45. Al-Jazrī, ᶜIzzuddīn, *Usdu al-ghābah fī maᶜrifat al-saḥābah*, vol. 7, edited by Ali Muᶜawwaḍ, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1994), p. 53.

See also Ibn Kathīr, Ismāᶜīl, *Tafsīr Al-Qur'ān al-ᶜaẓīm*, vol. 1, p. 358.

46. Al-Qazwinī, Muḥammad, *Sunan Ibn Mājah*, vol. 1, p. 663.

47. Al-ᶜAjūzah, Nāhid, *Daᶜwa al-ṭatlīq wa al-khulᶜ*, (Alexandria: Tawzīᶜ Munsha'at Al-Maᶜāif, 2001), p. 209.

48. Shatta, Muḥammad, *"Al-ḥaqā'iq al-ghā'ibah fī niẓām al-khulᶜ"*, Al-Ahrām Newspaper, Cairo: 20. 1. 2000.

49. Wāṣel, Naṣer Farīd, an interview in the *Al-Akhbār Newspaper*, Cairo 17. 11. 2000.

50. Abū Da'ūd, *Sunan Abī Da'ūd*, vol. 2, p. 667.

See also Al-Hākim, Muḥammad, *Al-Mustadrak ᶜalā al-ṣaḥīḥain*, vol. 2, edited by M. A. ᶜAta, (Beirut: Dār Al-Kutub Al-ᶜIlmiyyah, 1990), p. 218.

51. Ibn Ḥanbal, Aḥmad, *Musnad Aḥmad*, vol. 2, (Beirut: Dār Sādr, 1969), p. 414.

See also Al-Nasā'i, *Sunan al-Nasā'i*, vol. 6, p. 168.

52. Ibn Qudāmah, Muwafiq Al-Dīn, *Al-Mughnī wa yalīh al-sharḥ al-kabīr*, vol. 8, p. 176.

53. Al-Zibārī, ᶜAmir, *Aḥkām al-khulᶜ fī al-sharīᶜa Al-Islāmiyyah*, (Beirut: Dār Ibn Ḥazm, 1997), p. 83.

54. Kamāl, Ashraf, *Sharḥ qānūn al-aḥwāl al-shakhsiyyah al-kuwaiti*, 8th edn., (Kuwait: Mu'assasat Dār Al-Kutub li-al-ṭibāᶜah wa al-nashr, 2000), pp. 93-96.

55. Article 96 states that "either side (i.e. the husband or the wife) may retreat from agreeing on *al-khulᶜ* before the other party approves." Muṣṭafa Al-Sibāᶜi explained the meaning of this phrase by saying that "*al-khulᶜ* becomes obliging for both parties only after both of them agree to *al-khulᶜ*. If the *al-khulᶜ* is not completed, either party may withdraw from an earlier consent if the other party has not given his/her consent."

Al-Sibāᶜī, Muṣṭafa, *Sharḥ qānūn al-aḥwāl al-shakhsiyyah*, vol. 1, (Beirut: Dār Al-Warrāq, 2000), p. 225.

56. It was law No. 25 of 1929. After the amendment, it became law No. 10, 1985. Article 6 of this law states that "If the wife claims in front of the judge that her husband had caused her some harm or damage to the extent that they can no longer live together like other normal couples, she has the right to ask the judge for separation. In this case, the judge will divorce her one *bā'inah* divorce if the harm or damage have been proven to be true and no reconciliation could be reached. If the judge did not divorce her, and she still complained and there was no harm noticed, the judge will appoint two arbitrators, etc."

It is worthy to note that the previous law used in Egypt made it a condition for the wife to present evidence of harm or damage caused to her. This requirement could be quite difficult for the wife to satisfy. Further, this will take too long, and in a way it delays arriving at a solution. In addition to this, the previous law was not well organised nor was it explicit enough. These are some of the reasons why many women would not ask for *al-khulᶜ* in its past formulation.

Mutawa^{c}, Amīr, *Al-Khul^{c} bayna al-shari^{c}a wa al-qānūn*, (Alexandria: Dār Al-Imān), p. 236.

57. The woman used to get her right through the Court of Appeal, and then get married. After that her previous husband went to the Supreme Court, and refuses to divorce her. This led to a state of confusion. Therefore, the new law put an end to such problems.

58. Mutawa^{c}, Amīr, *Al-Khul^{c} bayna al-shari^{c}a wa al-qānūn*, (Alexandria: Dār Al-Imān), p. 245.

59. Sāmiħ, Sayyid, *Al-Khul^{c} bayna al-madhāhib al-fiqhiyyah*, (Cairo: Dār Al-Kutub ^{c}Al-Miṣriyyah, 2002), 243.

60. Shāhīn, ^{c}Abdulazīz, "Taħqiqāt," in *Al-Akhbar Newspaper*, issue no. 550, Cairo: 27, 1, 2000.

61. Al-^{c}Adawī, ^{c}Abdulraħman, an interview on *Al-khul^{c}* in *Al-Ahram Newspaper*, Cairo: 27. 1. 2000, p. 13.

62. Mutawa^{c}, Amīr, *Al-Khul^{c} bayna al-shari^{c}a wa al-qānūn*, (Alexandria: Dār Al-Imān), pp. 248-9.

63. Al-^{c}Ajūzah, Nāhid, *Da^{c}wa al-tatlīq wa al-khul^{c}*, (Alexandria: Munsha'at Al-Ma^{c}ārif, 2001), p. 386.

64. Al-^{c}Ajūzah, Nāhid, *Da^{c}wa al-tatlīq wa al-khul^{c}*, p. 386.

65. Al-Najjār, Aħmad, *Al-Khul^{c} wa al-mushkilātuhu al-^{c}amalieh wa al-munāza^{c}āt*, (Egypt: Dār Al-Kutub Al-Qānūnieh, 2003), p. 62-63.

66. One such doubt or problem they refer to, is that it (the new law) may indirectlty encourage wives to think well before they choose their husbands. They may get married to whoever, because she has the right to *al-khul^{c}* whenever she wants. It also gives some weak and flirtatious women to keep changing husbands whenever they want.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

Having investigated the different rights that the wife has according to the teachings of Islam, including the right to choose a husband, the right to have a dower, the right to have *nafaqah*, the right to be treated fairly and equitably, and the right to get *al-khul*^{c}, we realise that the Muslim wife had, and still has, since the dawn of Islam, many rights that guarantee her a decent sort of life. However, Muslim wives in Arab countries in general, are suffering and cannot have many of their rights fulfilled due to being underestimated by Muslim men whether as guardians, or husbands. In fact, this is explicable in terms of a lack of awareness and education in religion as well as other matters of life. Thus, the lack of education contributes to the view held by many Muslim men, according to which, the wife is looked at only as an inferior person and she should be dealt with accordingly. For example, she is not given the freedom to express herself, so she cannot make complaints about her missing rights. It is quite common that a woman is not allowed to have her own conditions included in the marriage contract. This is blamed on the customs and inherited traditions of the community of the woman. According to such practices, it is not acceptable for the wife to exercise her legitimate rights as a wife. In fact, as I mentioned in the previous chapters, this ill-treatment of the wife has a very negative impact on the status and balance of the family.

One has to be aware that these bad practices directed toward the wife in the form of depriving her of her marriage rights, has nothing to do with the Islamic *shari*^{c}*a* at all, because Islam granted the wife lots of rights that she did not have

in the *Jāhiliyyah* (i. e. pre-Islamic era). Rather, they are blamed on Muslims as individuals who ignore these rights. In fact, according to the Islamic Law, women should be treated on a par with men in terms of rights. Through this, Islam seeks harmony and concordance between wives and husbands and this can be achieved only if the two are treated equally. Therefore, men have certain obligations towards their wives in the same way that women have obligations towards their husbands. Neither husbands nor wives are exempt from adhering to these obligations. If either partner abuses his or her rights, then he or she will have sinned and violated the teachings of Islam and its Prophet.

This study has stressed that the wife has the right to choose her husband and that any marriage contract that does not observe this right, as in cases where women are given in marriage without even being asked their opinion in the matter, will be void regardless of whether the wife is a *thayyib* or a *bikr*. Thus, what some guardians do nowadays in terms of imposing certain husbands on their daughters or on women under their guardianship, is an explicit violation of the rules of Islamic *shari'a*.

Furthermore, this study has also provided evidence that the dower is the wife's own, and the husband or the guardian has nothing to do with it. In other words, the guardian may not take anything of the dower, and the same thing applies to the husband, unless she willingly gives something of the dower. This is so because Islam looks at the dower as a gesture or a means of honouring and dignifying the wife on the one hand. On the other hand, the dower is considered to be a symbolic, but sincere, expression of the desire of a man to get married to a woman. These two reasons make it clear as to why neither husbands nor guardians are allowed to take anything from the dower.

Moreover, this thesis has explained how *nafaqah* is the wife's right and that the husband is obliged to pay *nafaqah* for his wife, through presenting evidence taken from the Prophet's sayings and deeds. Thus, the wife does not have to pay for herself from her own money insofar as her husband can afford to pay *nafaqah* for her. If he refrains from doing so, then she may disobey him.

This thesis also argued in favour of another right that the wife has. This is the wife's right to get an equitable treatment by her husband. In fact, we have seen that this right obliges both partners in the marriage to treat each other fairly. However, it is a common practice in Muslim countries nowadays that the wife is not equitably treated; therefore, the significance of this right to women is so great. It seems that it is the wife, rather than the husband, in Muslim communities, who needs to be well treated, looked after, and forgiven when necessary, in order to encourage her to be more cooperative and appreciative. This shows why equitable treatment between wives and husbands is a crucial basis for a happy and stable married life. What some husbands do nowadays through not fulfilling this commitment towards their wives and through humiliating and beating them in addition to staying away from them and not tolerating them, amount to a violation of the Prophet's code of conduct particularly when he was dealing with his wives.

Finally, another right that the woman has, as explored in this research, is *al-khul*^{c}, according to which the wife may leave (i.e., divorce) her husband, if she can no longer bear living with him, for some kind of compensation usually in the form of money. Again this right shows that Islamic law considers husbands and wives equal because at the same time that Islam made it legitimate for the husband to divorce his wife whenever the need to do so arises, it also made it

possible for the wife to use *al-khulʿ* as a measure that is equivalent to the husband's right to divorce. As the husband may divorce his wife whenever he wants, the wife, too, may use *al-khulʿ* whenever she wants without being obliged to provide the genuine reasons for seeking *al-khulʿ*. It suffices for her to say that she detests living with him and has no desire to continue living with him at all. In fact, this right had first been introduced by the Prophet himself when he legitimised the use of *al-khulʿ* by Thābit Bin Qais's wife.

Having explored some fundamental rights that Islam granted to the wife, I want to end this thesis with some recommendations which, I hope, will have an important contribution in making husbands more aware of the role they have to play with their wives, so that the balance and the peace in the family will be secured and this, in turn, will play a crucial role in the stability and development of the society.

The first recommendation I want to make is that education courses be offered to people intending to get married in order to introduce them to the way the Prophet used to deal with his wives.

Second, there should be offices for consultation, specialised in the provision of services and directions, that help people find solutions to marriage problems they encounter in conformity with the rules of Islam. Such offices will help in reducing the rate of divorce and separation cases that may occur due to lack of knowledge and religious awareness.

Another recommendation is to have certain courses introduced in the schools that aim at explaining the different rights that the wife has in accordance with the

teachings of Islamic *shari'a*. This will make students, both males and females, not only develop a better understanding of these basic issues but also be prepared to face the future from now as they represent the future generation of the society or the country, which is supposed to be better. In addition to this, I suggest that new laws have to be enacted to firmly stop and punish husbands and guardians who abuse the wife's rights and do not treat her in a just way as required by Islamic *shari'a*.

Finally, it is advisable to educate women themselves about their marital rights as well as the conditions that they, according to some Muslim scholars (*fuqahā'*), are allowed to make before marriage, in order to ensure a happy and stable marital life. This can be achieved through the appropriate use of the media, such as radio, television, newspapers, as well as other audio-visual materials.

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