

# **On the relationship between Shariah and Western Family Law**

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## **Summary**

This article proposes responses to questions and solutions for issues that Muslims in Western societies are dealing with in the area of family law due to the confusion between those who call for abiding by human-made law which may contradict the Islamic Shariah in some judgments, and those who call for seeking resolutions from Islamic institutions which don't have any executive or judicial authorities according to the Western judiciary system. The solution offered here is represented by three principles which consider the reality of Western Muslims, and out of those principles we come to a number of applicable results which achieve the objectives of the Islamic canon in this area and relieve the difficulties on Western Muslims. These principles are:

- 1) The rulings of western family courts are legitimate and effective upon Western Muslims, be it for marriage or divorce, as well as their outcomes of obligations and rights for each party, and the children, as long as they do not contradict the fundamentals of Islamic Shariah, and regardless of the judge's religion or that of the government representative enforcing the law.
- 2) Divorce is a legitimate right for a woman that she must not be denied. Therefore, it is legitimate for her to seek divorce through Western courts, and to seek support through Islamic institutions in the West to rule for the divorce in a matter of four months.
- 3) Islamic institutions in the West fulfill the role of the Islamic judge, and as a result their decree for divorce to an Islamic marriage that is not officially registered by the state has complete legitimacy. Their decisions are effective in the same manner as those of Islamic Shariah-based judiciary systems in Muslim majority countries.

This paper also discusses how to approach the details where there are differences between Western law rulings and both Islamic fundamentals as well as principles adopted through Ijtihad.

## **Introduction**

There is a growing number of grievances pertaining to family law for Muslims who reside in Western societies, where the secular law system presents a major obstacle for Muslim minorities. While these laws are not built upon the Islamic fundamentals of family, they are effective and protected by the authority of the state, and even though these laws are established theoretically in order to bring about balance in the society and protect the weaker parties, their rulings may violate Islamic law in a number of fundamental Islamic areas and in a way that permits that which is prohibited in Islam, and prohibits the permissible.

Muslims are caught between two contradictions when it comes to dealing with family law in Western societies: on one hand, some Muslims resort to Western laws exclusively without considering whether these laws conform with or violate Islamic law, leading to violations of fundamental areas of Islamic law pertaining to worship. On the other hand, there are those who hold the belief that these laws are invalid according to the Islamic law because they represent "an authority of a non-Muslim over a Muslim." In these instances, Muslims seek

judgement from mosques or Islamic Shariah councils in their disagreements on issues pertaining to marriage and divorce. However, because Islamic institutions neither hold official authority nor do they claim any executive powers by Islamic Shariah, seeking their judgment has unfortunately caused many issues and a failure in handling many actual violations of Islamic law, as these violations require authority and power for the execution and enforcement of verdicts.

Mosque Imams and Islamic council members may apply the judgements of one Islamic school of thought or another, but their judgments, often on important matters, lack the ability or the courage to offer a contemporary deduction suited to the realities of Muslims living in the West. Most importantly, those decrees also lack the executive state authority to guarantee the fulfillment of the rights to whom they are due, especially women and children, and to help avoid oppression and harm many men cause their wives or ex-wives. This lack of morally conscious individuals and state authority causes the transgression of fundamental limits set by the Shariah in domestic law.

In contemporary times, Muslim women in the West are witnessing a strange irony where they may find a deal of fairness and decisiveness in secular courts, or slowness and unfairness within Islamic institutions. It is hoped that this council will compile the various fatwas issued in this area into a comprehensive, moderate vision which combines both the real authority of the state upon its citizens and the authority of Islamic Shariah upon moral consciousnesses, in addition to a new and necessary deduction for some pertinent questions. This modest paper is a first step in the direction to formulate this vision.

### **Primary domestic issues for Muslims in the West**

The primary issue in dealing with mosque imams and Islamic councils, when it comes to family law in the West, is that the state does not recognize the contracts and the verbal or oral rulings they produce, and in the fact that they themselves do not recognize marriage and divorce decrees by the Western legal system.

It is true that concerned parties could sign a civil agreement alongside the unofficial marriage or divorce contract stating rights and obligations, however, there is no obligation from any official entity for these parties to come to any agreement. Additionally, this agreement, if reached, does not have the executive power of the state in the areas of domestic law and its financial and administrative affairs, since the secular state in the west does not recognize marriages or divorces which take place in mosques or Shariah councils as official legal procedures, and considers them “Marriage de facto” or “common law relationship.” Thus, in the legal sense, in most countries and states, these agreements do not affect the financial affairs and children resulting from these relationships, as they lack all powers of enforcement and accountability.

There is a growing public opinion these days in Western countries that sees establishing Islamic law to judge between people as an attack on the authority of these countries and their official court systems, as well as assuming authorities which don't belong to citizens in a modern state system. This has lead legislators in a number of Western states and countries to issue laws criminalizing what they call, “Seeking Shariah courts,” and these laws have resulted in practical complications for Muslims in courts even when they seek judgements of the regular judiciary system. <sup>1</sup>

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<sup>1</sup> Anti-Shariah Law Bills in the US. Southern Poverty Law Center. <https://www.splcenter.org>

This mutual lack of recognition has resulted in a great deal of injustice with both Islamic and practical implications, some of which we share here based on personal anecdotes witnessed among Muslim communities in the West, as well as the questions for Islamic verdicts (Fatwas) asked by Muslims and addressed to the European Council, the Fiqh Council of North America, and other councils and entities in Western countries.

### **First: Making Divorce or khula unavailable to women:**

This is one of the most problematic issues in the West: when an official marriage exists but the woman is told that divorce rulings of a court are not “divorce according to Shariah” and therefore needs the husband’s agreement; or an unofficial marriage where a woman is told it cannot be “dissolved” if established unless the man decides to. In both cases a woman is put under a man’s absolute power, and absolute power is absolute corruption. How many marriages in the West have oppressed the woman by not granting her the rights she deserves as a wife, whether financial or otherwise? Or when a woman realizes that she was a victim to a temporary marriage because her husband didn’t disclose to her his intention for merely wanting a temporary marriage to fulfill his lusts, or, “marriage with the intention of divorce,” or “marriage for citizenship,” or any of these false purposes <sup>2</sup>, or if the woman was shocked by the indecent treatment of the husband who may have humiliated her or severely physically assaulted her which falls under what is called in the contemporary terminology “domestic violence,” or disconnecting her from her family. The trials get even more complicated when the woman returns to the same places and the same people who established this Islamic “Shariah-based” marriage contract to ask them to dissolve it, only to find the shocking response that is: “We don’t have the authority to grant you divorce because divorce in Islam is the husband’s right only.” Then the husband makes things very difficult or disappears to another country or city or runs into a new marriage adventure leaving his wife hanging with this “Islamic Shariah-Based” contract, whether it was registered officially or not. There are thousands upon thousands of these cases in every single Western country, and I personally witnessed cases in countries where Muslims are minorities where the woman remained “Hanging” in limbo - according to Islamic terminology - for ten years or more without any solution!

I have also witnessed many different kinds of oppression and injustice in the area of Muslim minorities in the West due to the weakness of religious motivation of these husbands, and the lack of effective pressure from society or the state to make fairness and balance a reality. I have seen someone asking a fortune of his wife to the point of requesting hundreds of thousands of dollars as a “compensation” only so that he divorces her “based upon Islamic

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<sup>2</sup> See some examples of these deviant Fatwas which unfortunately permit some of these invalid types of marriages on <http://www.binbaz.org.sa> Fatwa No. 3849 and also <http://fatwa.islamweb.net> Fatwa No. 11173 and others. Shaykh Mohammed Rashid Reda has a definite response to such Fatwas reported by Shaykh Syed Sabiq in his *Fiqul Sunnah* 2/39 where he said: “The scholars of the early precedents as well as contemporary scholars have all been firm on their position against temporary Mutaa’ marriage and that leads to prohibiting marriage with the intention of divorce, even while jurists would say that the marriage contract itself is legitimate if the husband intended the timeframe but did not add it as a condition to the contract. His concealing to this intention, however, is considered deception and falsification. It is more appropriate to invalidate such a contract than to permit a temporary contract that is based upon the agreement of all parties including the husband, wife, and her guardian. Its harm lies in distorting such a great bond that is one of the greatest human bonds, and instead favoring a constant wandering after lusts, and the evil consequences of such a practice. In case of contracts where the intention of temporary marriage is concealed, it involves deception which results in other evils such as hatred, enmity, and loss of trust even for those who may be honest about their willingness in truthful marriage.” I have a personal response to those who permit temporary Mutaa’ marriage despite it being an abrogation stage between marriages of pre-Islamic times into marriage according to Islam. I detailed this response in my book: “*Fiqh of Maqasid: Authorizing Islamic legal rulings according to their objective*,” IIIT, 2007.

Shariah,” relying on the fact that the majority of scholars did not define a limit to this compensation. I have seen another case of a man who put a condition for divorce that he take his children to another country where she would never be able to see them again, and he even forced her to give up on all her rights as a mother in writing before he divorced her. And another case I witnessed was someone who refused to divorce his American wife, and moved to live in an Arab country and did not respond to or care about any of the calls and efforts to communicate with him for over three years. This led to his wife marrying another man without getting a divorce from the first, and when Muslims told her that this is prohibited in Islam, she abandoned the religion altogether so that she can be married and live.

The truth of the matter is that all of this is a violation of the commands of Allah SWT in the Quran: “O you who have faith! It is not lawful for you to inherit women forcibly, and do not press them to take away part of what you have given them, unless they commit a gross indecency.” An Nisa (4 : 19), and where He SWT says: “And do not harass them to put them in straits” Attalaq (65 : 6), and: “ Yet do not turn away from one altogether, leaving her as if in a suspense” An Nisa (4:129) and there is much more within the Islamic canon prohibiting injustice and harm, and granting women rights just like men are granted rights: “the rights of the wives [with regard to their husbands] are equal to the [husbands'] rights with regard to them, although men have precedence over them [in this respect].” Al Baqarah (2:228), and this precedence is for responsibility and leadership rather than tyranny and oppression. But this constrained woman who's left in suspense goes through severe hardship which may continue for years and decades, leading to severe mental and psychological distress if her religious reason is strong, or if it's not, she may, God forbid, fall into sins or get married again without a divorce, and we have witnessed firsthand all of these cases among Muslims in the West as well as from the questions received by the European Council.

## **Second: The lack of protection for the safety and security of women:**

Many women approach mosques and Shariah councils in the West complaining about their husbands' mistreatment, especially what is known in the contemporary terminology as “domestic violence.” Regardless of the dispute over the interpretation of the meaning of “beating” in the verse in Surah An Nisa: “admonish them [first]; then leave them alone in bed; then beat them” (4:34),<sup>3</sup> all the early predecessors and those of later times from all schools of thoughts agreed upon the prohibition that is mentioned in the saying of the Prophet PBUH: “he should not strike her on the face nor disfigure her, and he should not abandon her except in the house (as a form of discipline).”<sup>4</sup> They also agreed that “severe” beating is both prohibited and impermissible in Islamic Shariah,<sup>5</sup> and what is taking place, which is categorized as “domestic Violence,” greatly surpasses the limits of severe beating, and therefore it is clearly prohibited according to the Shariah, and is categorized as severe harm in Islamic law. No one among early or later scholars in any given school of thought has given any legitimacy or support of the domestic violence that is happening these days.

Domestic issues become further complicated when the assaulted woman cannot divorce her husband due to some of the opinions we mentioned earlier, and when she complains she fails to find any sincere helper in the mosque or Islamic councils to help her to find relief through

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<sup>3</sup> See research done by Dr. Khalid Hanafi and the discussion around it in the 25th session of the European Council for Fatwa and Research in 2015.

<sup>4</sup> “Al Mustadrak Ala Al Sahihin” 2818. Al Hafiz said: This is a Hadith with authentic Isnad but they did not extract it. Abu Dawoud and Ibn Maja narrated along its lines.

<sup>5</sup> See Jabir's long Hadith during the farewell pilgrimage of Prophet Mohammed PBUH in Sahih Muslim.

divorce. Oftentimes she is advised to be patient and pray, but nobody forbids or outlaws such egregious assault or actively helps her to escape from a horrible marriage. Additionally, Muslim women are advised not to seek the police for protection in order to protect the reputation of the Muslims and to not give the Islamophobic media another excuse to attack Muslims, and as a result the woman is gravely oppressed, especially if she does not have extended family or male relatives in the same country whom she can ask for protection.<sup>6</sup>

The excuse for some of the brothers who are mosque imams or members of Shariah councils may be that they do not possess the state authority which enforces the law by having a monopoly over means of violence. As political scientists say, this is the state which is obligated by law to protect this female citizen from being assaulted and penalizes the assaulter - even if he was her husband - and puts him under a legal obligation to deal with the consequences of this physical and psychological damage.

It is also fair to mention - based upon what we have experienced in different Western countries - that some of the mosque imams and callers to Islam do not understand Fiqh to the degree that enables them to distinguish between small transgressions of the husband that may be forgiven for the sake of peace and reconciliation in the family, and cases of severe assault which one mustn't be quiet about, which require a serious response whereby a believer establishes the truth, forbids evil and wrongdoing, and works to bring about justice for this woman who has been assaulted (or man in some rare cases), and even if that response required state authority even if that state was secular, or the involvement of police personnel even if they were non-Muslims.

Additionally, some of the brothers who are mosque imams or muftis have a misconception about the nature of marriage in Islam, whereby they think that as long as a woman agreed to a marriage contract, she has become a prisoner to this man eternally no matter what he does, and that she doesn't have any right according to Islamic law to leave him based on her own free will decision. This is a misunderstanding that complies neither with the Islamic canon in the area of family law, nor with the general lenient spirit of the Islamic Shariah, nor with what is known and established in the schools of Fiqh, as per what will follow.

### **Third: The lack of guarantee for women's financial rights in cases of divorce:**

Another serious problem arises in instances when the divorce is officially registered in Western courts, but then the woman is advised not to sanction the authorities to receive her official rights based on the claim that those rights are different from what is stated in some schools of Islamic fiqh. In other instances, when the marriage and divorce are not officially registered, then the woman does not have any guarantees that the man would pay what is due to the woman based upon Islamic law. This all takes place in contradiction to the command of Allah SWT in the Quran: "And the divorced women, too, shall have [a right to] maintenance in a goodly manner: this is a duty for all who are conscious of God. In this way God makes clear unto you His messages, so that you might [learn to] use your reason." (Quran 2: 241-242), and in Surah At Talaq: "[Hence,] let the women [who are undergoing a waiting-period] live in the same manner as you live yourselves, In accordance with your means; and do not harass them with a view to making their lives a misery. And if they happen to be with child, spend freely on them until they deliver their burden; and if they nurse your offspring [after the divorce has

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<sup>6</sup> For example, see this BBC report on the discussion of The Home Affairs Committee in the British Parliament on violence against Muslim women in Britain, and the testimonies which show how some of those involved in the leadership of mosques have ignored complaints of domestic violence and abuse and advised women to be patient and remain quiet. <http://www.bbc.com/news/uk-37838496>

become final], give them their [due] recompense; and take counsel with one another in a fair manner [about the child's future]. And if both of you find it difficult [that the mother should nurse the child], let another woman nurse it on behalf of him [who has begotten it]. [In all these respects,] let him who has ample means spend in accordance with his amplitude; and let him whose means of subsistence are scanty spend in accordance with what God has given him: God does not burden any human being with more than He has given him” (Quran 65: 6-7), and in Surah An Nisaa: “But if you desire to give up a wife and to take another in her stead, do not take away anything of what you have given the first one, however much it may have been.” (Quran 4:20).

It's very rare to find men among Muslims in the West willing to pay women their dues as per these glorious verses and others without external pressure from society or the state.

Such pressure from society in Western countries is extremely rare especially if the husband disappears after the divorce and if the woman does not have extended family in the West or is a convert to Islam who was abandoned by her family and disowned by her people. As far as pressure from the state, a woman is often advised not to resort to it and it's not even available in the case that the marriage or divorce is unofficial and not recognized by the law.

#### **Fourth: the lack of guarantee for the rights of the children in the case of divorce:**

There hasn't been - in my knowledge - a single one case among Muslims in the West where the father has taken care of the financial responsibility of his own children as he is obligated to after divorcing their mother from an unofficial marriage. The law doesn't require the father to take financial responsibility of his children in instances of unregistered marriages to begin with, unless the father himself confirms his fatherhood to each one of the children through a special certificate attached to the child's birth certificate, which rarely is done. Even if the father ended up covering some of these expenses irregularly - which does actually happen - then the disputes over details, the quantity of money, and related decencies never end between the parents, since there isn't a fixed point of reference for such rights they can resort to in case of disagreement such as those laws which are defined in great detail in official family laws in every “Islamic” or “un-Islamic” nation. As for the case of divorce in unregistered marriages, the woman has no recourse to official authorities as per her custody rights over her children.

The rights of children differ according to different circumstances and customs, but upholding the rights of children is the responsibility of the father according to the Islamic Shariah and sound human instinct. Allah SWT says in the Holy Quran: “And the [divorced] mothers may nurse their children for two whole years, if they wish to complete the period of nursing; and it is incumbent upon him who has begotten the child to provide in a fair manner for their sustenance and clothing. No human being shall be burdened with more than he is well able to bear: neither shall a mother be made to suffer because of her child, nor, because of his child, he who has begotten it. And the same duty rests upon the [father's] heir. And if both [parents] decide, by mutual consent and counsel, upon separation [of mother and child], they will incur no sin [thereby]; and if you decide to entrust your children to foster-mothers, you will incur no sin provided you ensure, in a fair manner, the safety of the child which you are handing over. But remain conscious of God, and know that God sees all that you do.” (Quran: 2-233).

There are many other evidences for the responsibility of the father to spend on his children whether the marriage is still established or after divorce. There is no need to mention that the concepts of “sustenance” and “clothing” mentioned in these glorious verses include all essential expenses for children, be it foundational education, health care, transportation, or any of the necessities of modern-day living which fall under the umbrella of goodness which

prevents harm and is within the capacity and ability of the father. Allah SWT says: “[In all these respects,] let him who has ample means spend in accordance with his amplitude; and let him whose means of subsistence are scanty spend in accordance with what God has given him: God does not burden any human being with more than He has given him”. (Quran: 65:7).

#### **Fifth: The issues of establishing official paternity for children resulting from unregistered marriages:**

The Western legal terminology for a child of spouses joined by an unregistered marriage is a “non-marital child,” or a child who is illegitimate by law. A father can register his paternity of such a child through a special certificate after birth, but there is no obligation on him to do so; and he may deny that the child is his own, in which case the law establishes the parenthood of the child solely to the mother even though the man is her husband according to Islamic Shariah. Generally, in the laws of Western countries, a mother can also deny the father’s parenthood in the case of an unregistered marriage, which deprives him from his Islamic legal rights, unless he seeks a complicated legal procedure through DNA testing.

It is also worth mentioning that if parenthood is registered to the father and the mother in an unregistered marriage that the law in most Western countries and states requires the father to be financially responsible for his child regardless of the legality of his marriage to the mother. Despite this, the establishment of paternity in an unregistered marriage is not equal to that of a registered marriage in all aspects. The case in most Western countries is that even after establishing paternity, the father doesn’t have legal rights to the guardianship of the child or even in being able to see him or her if the mother at any point declines offering this right, unless the father goes to court to seek these rights on a limited basis and in special cases. Moreover, this child does not have the right to inherit from the father according to these laws unless there was a written will. This child would also be treated legally as a stranger and not as a legal child who may represent their father legally in official aspects related to medical treatment and senior care.

#### **General principles for a potential Fiqhi solution**

There is no doubt to the reader that these problems constitute serious violations of the Islamic canon and the objectives of Shariah. They have serious consequences, firstly by causing injustice and animosity among Muslims living in the West; and secondly by distorting the image of Islam and the honorable Shariah presented to non-Muslims. We therefore recommend in the following some general principles for approaching Family Law for Muslims residing in the West in a manner which would hopefully - God-willing - help to achieve a constructive vision that balances the requirements of Islamic law with the requirements of our contemporary lives, thus fulfilling the objectives of the Shariah in the area of Family Law, particularly the objective of worshipping through obligatory fundamentals, the objectives of justice, mercy, removing harm, and preserving the self, offspring, and honor.

#### **First principle: The rulings of family courts in the West are legitimate and effective upon Muslims in the West**

The argument for those who do not recognize the rule of law on Muslim dealings in matters of marriage and divorce is based on the question of legal jurisdiction, meaning that they consider judiciary a form of power, and since the judge or their deputy who registers the marriage or divorce in official records is a non-Muslim most of the time, so for those people it is as if legal rulings in the West are not effective. They reference what Allah says in the Quran: “and never

will God allow those who deny the truth to harm the believers.” (Quran: 4-141), <sup>7</sup>although the context of the verse is in regards to the status of the hypocrites on the Day of Judgment: “who but wait to see what betides you: thus, if triumph comes to you from God, they say, ‘Were we not on your side?’ - whereas if those who deny the truth are in luck, they say [to them], ‘Have we not earned your affection by defending you against those believers?’ But God will judge between you all on the Day of Resurrection; and never will God allow those who deny the truth to harm the believers.” And even if we go past the context, the expression here is general and so it does not suggest the renunciation of all means or powers from the non-believers upon the Muslim in every instance, especially if that authority serves to organize a society of peoples of diverse backgrounds and to guarantee their civil rights and obligations, and is not an authority solely over a matter of worship such as leading prayers.

The following was stated in the religious verdict of the “Permanent Committee” in regards to this matter: “It is not permissible for a Muslim to seek secular courts except when necessary when Islamic legal courts are unavailable.”<sup>8</sup> It was mentioned in a statement by the “Islamic jurists of America”: “Permission is given to seek a secular judiciary when it is a path to obtain a right or remove an injustice in a country that is not governed by Islamic Shariah, on the condition that one seeks out individuals knowledgeable of the Shariah in order to determine the Islamic legal rulings.”<sup>9</sup> However, the rulings of Shariah courts individuals knowledgeable of the Shariah lack the executive power of the state, which leads to an imbalance in the desired fairness and interests. Although seeking those Islamic Shariah-based entities or individuals is the most suitable solution in the cases of unregistered marriages, as per what follows, dissolving an official marriage cannot be handled except through official entities.

If we return to the religious canon, we do not find any texts specifying the religion of the judge - or even the witness - when it comes to family law dealings or any other types of legal cases. In fact, the manifestation of what Allah says in the Quran: “O YOU who have attained to faith! Let there be witnesses to what you do when death approaches you and you are about to make bequests: two persons of probity from among your own people, or two other persons from [among people] other than your own.” (Quran 5:106), as well as in the different prophetic sayings where equity is attributed to witnesses such as the hadith narrated by Ahmed and Darqatni: “There is no marriage without a guardian and two trustworthy witnesses,” suggest that the Islamic Shariah is not so much concerned with the religion of the witness but rather with the attribute of equity in order to establish the accuracy of the testimony itself. The Quranic expression “persons of probity” in (Quran 5: 95 and 106) only means affirming that the Muslim witness is fair and it is not reasonable to believe that a non-Muslim cannot be fair or just when they testify.

Moreover, it wasn’t reported that the Prophet PBUH explicitly specified for only Muslims to act as witnesses; in fact the opposite was reported in that he accepted the testimony of non-Muslims on Muslims such as what was narrated with a credible chain of narrations by Ibn Abbas when he said: ““A man from Banu Sahm went out with Tamim Ad-Dari and ‘Adi bin Badda. The Sahmi man died in a land in which there were no Muslims. When they arrived with

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<sup>7</sup> For example, see the Fatwas of Shaykh Dr. Salah Al Sawy [fatawaalsawy.com](http://fatawaalsawy.com) and Dr. Shaykh Abullah Bin Bayyah [binbayyah.net](http://binbayyah.net) as well as Fatwas of different Islamic legislative bodies in the Arab world such as the Egyptian Dar Al Iftaa in: 2272 for year 2006 and 544 for year 2007 [www.dar-alifta.org](http://www.dar-alifta.org) as well as the Jordanian Dar Al INTA in: 708 for year 2010 [www.aliftaa.jo](http://www.aliftaa.jo) and others.

<sup>8</sup> See the fatwa in: <https://islamqa.info> – the permanent committee 23/5.2

<sup>9</sup> See the final statement of the second conference for the Fiqh Council of North America held in Copenhagen, Denmark with the Muslim World League in 4-7 of Jumada Al Awwal 1425 Hijri, 22-25 of June, 2004.



what he left behind, they searched for a bowl made of silver which was inlaid with gold. The Messenger of Allah SAWS had the two of them take an oath.”<sup>10</sup>  
Thus, this hadith apparently suggests that the religion of the witness is a secondary consideration and not a major one regarding witnesses.

Regardless of the fiqhi argument on the religion of the judge, the inaccuracy in understanding this issue today is in the perception of the role of the judge, since a judge does not have an authority nor jurisdiction as a person but it's merely the authority of written law which they enforce. The contemporary judicial system considers the judge a professional executive whose job is only to enforce the law, and not create it nor even explain it. The judge is only tasked with matching the law to the case in which they are judging, and applying the law within the limits of the spirit of the law, judicial precedent, and the texts codified by the legislature. And in the case that a judge makes a mistake in applying the written law, his decision is subject to the judicial appeals process and higher courts may nullify his decision.

Hence authority or jurisdiction - if we may - is the jurisdiction of the law, not the judge, and consequently the idea here is not about the judge's religion and whether they were Muslim or non-Muslim, but about whether this law is in agreement with the Islamic legal rulings or in disagreement with them. Regardless of whether this law was in a Muslim-majority country or not, there is not a law in any country - including Muslim countries - which does not include some titles and areas which violate the Shariah of Allah SWT in different areas.<sup>11</sup>

Some objections to this principle of legal jurisdiction will be mentioned here with brief responses as the space here allows:

### **First objection: The consensus over the invalidity of seeking legal decisions by anything other than Islamic legal courts**

This objection may be responded to by stating that a number of major scholars of the ummah throughout its history have decided that if a judiciary based upon Islamic law is absent, then it is obligatory upon the Muslims to seek legal decisions from the extant judiciary in order to attain benefits and prevent corruption as would result from the lack of any effective judiciary. Sultan al-'Ulama Al Izz Bin Abdul Salam says: “If the non-believers were to take over a region and appoint a judge to take care of the general affairs of Muslims, then this seems acceptable in order to bring about public benefits and prevent corruption. Deterring what is in the public interest and allowing corruption due to the lack of perfection in the judiciary is far from the mercy of Shariah and its consideration for the affairs of the people”<sup>12</sup>, and both Imam Ibn Tayimiya and Al Shatibi have said something along similar lines.<sup>13</sup>

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<sup>10</sup> See the Hadith in Al Baihaqi 20011, Tirmidhi 3060, Abu Dawoud 3606, and Al Darqatni 4209.

<sup>11</sup> For example, see the discussion around how a contemporary judge approaches what is against the Shariah of Allah the Almighty in Penal Law in the modern state, where there are opinions that obligate the Muslim judge to rule according to the Shariah even if that violates the law and if the higher ranking courts would rule his decree invalid, and those who see that the judge is obligated to apply the law regardless, in an absolutely professional manner in order not to destabilize the judiciary system. See: The Contemporary Encyclopedia of Penal Islamic Fiqh, a book by Abuld Qadir Auda, with commentary and opinions of Tawfiq Al Shawy, Mohamed Selim Al Awwa, and Ismail Al Sadr, and his first book: Crime, its types, and pillars.

<sup>12</sup> Bin Abdul Salam, Al Izz, “Qawaed Al Ahkam”. Page 66. Alrayyan Foundation- Beirut.

<sup>13</sup> See the research paper by Shaykh Faysal Moulawy and the decision of the European Council for Fatwa and Research No. 15 3/5 for the 5th session in 2000, in Dublin.

A number of contemporaries - though few - have issued Islamic legal verdicts on enforcing a divorce issued by a non-Muslim judge in Muslim-minority countries, such as our passed teacher Sheikh Judge Faisal Moulawy - May Allah's mercy be upon him - in research he proposed to the European Council for Fatwa and Research in its fifth session<sup>14</sup>, as well as our teacher Allama Sheikh Dr. Yusuf Al Qaradawi, the head of the council.<sup>15</sup>

Contemporary Islamic legal verdicts which recognize a divorce issued by non-Muslims are built upon the idea that by registering a marriage through official institutions, a husband thus accepts the addition of a condition to the contract whereby he gives a mandate to the judge allowing for divorce. However, there is a question in adapting the issue through a mandate - with all due respect to our teachers - because a mandate requires an intention and willingness to offer the right for a mandate to another person. A mandate also requires, according to the Islamic Shariah, an explicit permission and thus by its nature a mandate is a decision that may be reconsidered by the initiator.

From what I surmise, it is more appropriate to recognize a woman's right to divorce from the beginning, as will follow in the coming principle, and that an institution in authority - from among the Muslims or non-Muslims - accepts that her wish for divorce is legitimate and thus guarantees the protection of the rights due to her in the divorce.

The consideration of what is in the best interests mentioned by our teachers is not only regarding the legitimacy of the divorce taking place by the judge as the decision mentions. It transcends this to the legitimacy of what the judiciary rules in terms of financial and moral rights and obligations which affect all of the members of the family after the divorce, such as divorce alimony (which will be explained further later), expenditures for the mother and minor children, arrangements for custody, and other legal dues and obligations.

### **Second objection: Western laws not abiding by Islamic legal conditions and impediments**

Allah SWT says in the Quran: "Forbidden to you are your mothers, and your daughters, and your sisters, and your aunts paternal and maternal, and a brother's daughters, and a sister's daughters; and your milk-mothers, and your milk-sisters; and the mothers of your wives; and your step-daughters - who are your foster children - born of your wives with whom you have consummated your marriage; but if you have not consummated your marriage, you will incur no sin [by marrying their daughters]; and [forbidden to you are] the spouses of the sons who have sprung from your loins; and [you are forbidden] to have two sisters [as your wives] at one and the same time - but what is past is past: for, behold, God is indeed much-forgiving, a dispenser of grace". Quran 4:23

And Allah SWT says, "And if he divorces her [finally], she shall thereafter not be lawful unto him unless she first takes another man for husband; then, if the latter divorces her, there shall be no sin upon either of the two if they return to one another - provided that both of them think that they will be able to keep within the bounds set by God." (Quran 2:230)

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<sup>14</sup> [www.e-cfr.org](http://www.e-cfr.org) European Council for Fatwa and Research: What is the ruling on a non-Muslim judge ruling for divorce? By Shaykh Faisal Moulawy, 2000.

<sup>15</sup> [www.aljazeera.net](http://www.aljazeera.net), an episode of the show "Shariah and Life" on Fiqh of Muslim communities in the west dated May 16th, 1999.

And Allah SWT says, “And the divorced women shall undergo, without remarrying, a waiting-period of three monthly courses: for it is not lawful for them to conceal what God may have created in their wombs, if they believe in God and the Last Day. And during this period their husbands are fully entitled to take them back, if they desire reconciliation.” (Quran 2:228)

(The Messenger of Allah SAWS said: 'What becomes unlawful (for marriage) through breastfeeding is that which becomes unlawful through birth.'")<sup>16</sup>, as well as other texts of the Islamic canon that are absolutely confirmed and evident which detail the reasons, conditions, and impediments of marriage and divorce.

Western laws do not consider these Islamic legal rulings - except for prohibiting incest among immediate (first and second degree) family members - and consequently, they permit types of marriages that are prohibited by Allah and his messenger, and prohibit other types of marriages that are permitted by Allah and his messenger. Some of these permitted marriages that are prohibited by Allah and his messenger are same-sex marriages in some countries, marrying those who are deemed “Mahram” by nursing from the same mother in childhood, allowing women to remarry after the divorce has been granted by a judge before the end of the Islamic legal waiting period, and so forth.

It is important to understand that when the law makes permissible what Allah has made prohibited that this law does not impose what is prohibited in Islam upon Muslims, but it merely legalizes it, and the Islamic legal rulings remain the same in any case. According to the Islamic Shariah, there is no legal effect on the Islamic rulings based off of this legal permissibility. For example, if a marriage which differs from the conditions and limitations of the Islamic Shariah were to be established, it is still considered invalid according to the Shariah as though it has not been established, even if it is legally valid. Thus, it has no Islamic legal consequences but it must be nullified and one should repent from committing such an act. However, these violations do not negate the initial authority of Western law in arranging matters pertaining to marriage and divorce, nor do they negate the fact that establishing a marriage or dissolving it by divorce is a shared human experience common to Muslims and non-Muslims, despite the differences in the conditions and impediments in each of their legal systems.

### **Third objection: Permanent legal banning of permissible acts**

The issue of human-made laws prohibiting what Allah has made permissible is a much more complicated matter, for whatever Allah has made permissible no one can make impermissible or permanently outlaw. Essentially, it is up to the Imam (or law in our time) to limit what is permissible for attaining what is in the best interests such as what was reported about Omar - may Allah be satisfied with him - in some of the well-known restrictions he ordered regarding triple divorce, the marriage of a Muslim man to a woman from the people of the book, and prohibiting slaughtering on some days, as our teacher Alama Shaykh Qaradawi mentioned in some of his well-known legal verdicts in which he clarified that the authority of the leader (imam) here is limited only to: “The right to limit some permissible acts for a common interest in some times and some circumstances, or for some people, but not to prevent it as a general absolute and permanent prevention, because absolute and permanent prevention is similar to prohibition which is only for Allah SWT”.<sup>17</sup>

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<sup>16</sup> Bukhari 4941

<sup>17</sup> See the text of the Fatwa on the website Islam online <https://fatwa.islamonline.net/11502>

In order to resolve this issue - which goes beyond Muslim-minority countries to Muslim-majority countries as well - there must be room for flexibility and legal ways out for such cases from within the law itself. The three most important examples in this area are: prohibiting polygamy, and marrying cousins (as almost half of American states consider cousins Mahrams and some countries such as the UK and the Netherlands are discussing banning marriage of cousins), as well as the marriage of those who are not of official marriage age which is between 16 and 18 years of age by Western and Eastern laws.

When it comes to the issue of polygamy in Western contexts, we deal with a thorny problem and an issue which requires further dedicated research since it has become such a common phenomenon among Western Muslims in many different countries.<sup>18</sup> What takes place in the vast majority of cases is a secret marriage which causes great injustice upon both the first and second wives. For the first wife, she is denied her right - in the name of Islam - to object to her husband marrying a second wife; and she is denied her right to a divorce if she has been harmed because of his second marriage, which is common in most cases when the husband starts to favor the new wife, and the first wife is compelled to comply and advised to be patient and endure. However, a woman's right to divorce - with moral and financial fairness - if she has suffered as a result of her husband marrying another woman is legitimate, and has clear evidence from the Prophetic tradition - regardless of the interpretations of some interpreters - as it was narrated in Bukhari and Muslim that al-Miswar bin Makhramah said: "Ali demanded the hand of the daughter of Abu Jahl. Fatimah heard of this and went to Allah's Messenger saying, 'Your people think that you do not become angry for the sake of your daughters as 'Ali is now going to marry the daughter of Abu Jahl.' On that Allah's Messenger got up and after his recitation of the tashahhud. I heard him saying, 'Then after! I married one of my daughters to Abu Al-'As bin ar-Rabi' (the husband of Zaynab, the daughter of the Prophet) before Islam and whenever he spoke to me, he spoke the truth. No doubt, Fatimah is a part of me, and I hate to see her being troubled. By Allah, the daughter of Allah's Messenger and the daughter of Allah's enemy cannot be the wives of one man.' So 'Ali gave up that engagement." And in the narration of Bukhari, it says, "Fatima is part of me, so whoever angers her, angers me."<sup>19</sup>

On the other hand, among Muslims in the West, the second wife ends up being treated unfairly firstly by how short the marriage period ends up being in most cases, as the majority of Muslim men who are interested in polygamy in the West lack the intention to continue the marriage after fulfilling a passing desire. Secondly, she is also treated unjustly when the marriage is not officially registered, and thus the husband may not fulfil the duties upon which they both agreed due to the absence of the authority of law, as mentioned earlier. Then the children who result from such a marriage are also wronged within this unregistered marriage.

Therefore, in short, it is more appropriate if polygamy is not practiced in Muslim-minority countries, not as a prohibition but so as to prevent oppression and protect the Muslim family. However, if there is a need for it, as it is permissible in any case, it has to take place outside of the state in another country where it is legalized, and be officially registered. This helps protect the rights and allows for the second wife the ability to go to family court in the other country to demand her rights and the rights of her children, as the marriage must be established according to the known conditions of the Islamic Shariah.

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<sup>18</sup> There are no scientific statistics regarding what we are reporting here on the reality except for the personal anecdotal experiences of those who are working in the public affairs of Muslims in the West as well as some media reports that have been recently published. See for example: Rachel Stewart. The Men with Many Wives: the British Muslims who practice polygamy. <http://www.telegraph.co.uk>

<sup>19</sup> Bukhari 3523 and 3556, and Muslim 2449.

When it comes to marrying cousins, it may be done if there was a need for it outside of the American state or the country where it is not legal, then the couple may return to the state or the country and register it officially, which is legal according to all Western laws.<sup>20</sup>

As for restricting the age of marriage in the West, it is valid based upon the benefits derived therefrom, considering that maturity and readiness for marriage in this era for female and male minors alike come at a much later time than in the past when it was reasonable for people to get married at a young age, and nowadays marriage happens at a later age due to multiple financial, educational, and social factors. The minimum age for marriage in most European countries and the states of the United States and Canada is 18 years old. Most laws, however, allow marriage at the age of 16 (sometimes even before) with permission from the court and the consent of the parents through the legislations that allow minors to take action (emancipation), which aim towards confirming the degree of the minor's maturity and their eligibility for marriage,<sup>21</sup> which is a valid precaution Muslims should welcome in any case.<sup>22</sup>

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<sup>20</sup> See <https://www.cousincouples.com>

<sup>21</sup> See the Council of Europe Family Policy Database [www.coe.int/familypolicy/database](http://www.coe.int/familypolicy/database)

<sup>22</sup> As for what was narrated in authentic books of Hadith regarding the age of Aisha the mother of the believers and how she was married to the messenger of Allah at the age of 9, it contradicts a number of other authentic narrations which imply a different age that I estimate to be between 16 and 19 years. The following are these narrations which contradict the 9 years old narrations which I think all go back to Hisham Ibn Urwah, and there's a known debate on his "Tadlees" lying. 1) Ibn Ishaq's narration on the story of Aisha's acceptance to Islam: "She became a Muslim after 18 persons (i.e. in the first year of the Message), and she was young" - Sirah Ibn Hisham Part 1 page 271, and An-Nawawi mentioned it in the book "Tahzib Al Asmaa' Wa Allughat" part 2 page 351 and 329 reported by Ibn Abu Khaithma in his history from Ibn Ishaq, and Ibn Ishaq was around at a very early time (He died in 151 Hijri), and thus it is inappropriate to reject his narrations merely because they were narrated before the Science of Hadith itself had been developed as we know it, especially with the narrations of those who authenticated Ibn Ishaq such as Ali Bin Almadini who said about him: "The Hadith of the messenger of Allah PBUH is found among six people -and he mentioned them- and then the knowledge of those six was shared with twelve, one of them is Mohammed Ibn Ishaq." And Al Zuhri said: "There remains to be abundant knowledge with the people of Madinah as long as Ibn Ishaq is among them," and Shu'ba Bin Al Hajjaj said about him: "He is the leader of the believers when it comes to the science of Hadith," and Abu Mu'awiya Aldareer said about him: "Ibn Ishaq was one of those who memorized the most among the people," and Soufian Althwoury said: "I sat with Ibn Ishaq over seventy and a few years and no-one in Madinah accused him of anything." 2) Bukhari narrated in: Women battling and fighting with men (No. 2724): Reported by Abu Ma'mar, 'Abdul Warith, Abdul Aziz: narrated Anas: "On the day (of the battle) of Uhud when (some) people retreated and left the Prophet, I saw `Aisha bint Abu Bakr and Um Sulaim, with their robes tucked up so that the bangles around their ankles were visible hurrying with their water skins" (in another narration it is said, "carrying the water skins on their backs"). "Then they would pour the water in the mouths of the soldiers, and return to fill the water skins again and came back again to pour water in the mouths of the soldiers," - which is impossible to imagine at the age of 10. The Prophet (s) never allowed children to the battlefields anyway. 3) Bukhari's narration that Aisha "remembers" her parents at the time of the early migration to Abyssinia in the 4th year of the Message. Hadith No. 2176 In "Jiwar" Abu Bakr during the time of the messenger of Allah PBUH reported by Urwah Ibn Al Zubair. Narrated 'Aisha (the wife of the Prophet): "I never remember my parents believing in any religion other than the true religion, and I don't remember a single day passing without us being visited by Allah's Messenger in the morning and in the evening. When the Muslims were put to test (i.e. by the pagans), Abu Bakr set out migrating to the land of Ethiopia". And what is known is that this was migration in the 4th year after the Message (i.e. almost a decade before Aisha married the Prophet in Medina). 4) Another hadith by Bukhari himself where he narrates (No. 4595) that Aisha witnessed the revelation of Surat Al-Qamar (Chapter 54) while she was a "jariyah" (an Arabic term for a girl between 6 and 13) "playing in Mecca." Yusuf Bin Mahik reported: "I was at the house of Aisha the mother of the believers and she said: It was revealed to the Messenger of Allah in Mecca while I was a girl playing: (But the Hour is their appointment [for due punishment], and the Hour is more disastrous and more bitter)." There is no disagreement that Chapter 54 was revealed before the 6th year of the Message (i.e. 8 years before Aisha married the Prophet in Medina allegedly at the age of 9!). 5) What Ibn Said reported on Asmaa Bint Abu Bakr: "She died a few nights after her son, and his death occurred on the 17th of Jumada Al Awwal 73 Hijri." Siyar A'lam al-Nubala, p. 296. Considering that Asmaa died at the age of 100 and that Aisha was indisputably 10 years younger than her, according to all other narrations, then Asmaa was 27 in Year 1 Hijri and Aisha was 17 when she migrated to Medina. She married the Prophet (s) afterwards. And there are many other evidences.

#### **The fourth objection: The lengthy nature of the ordained separation period before asking for divorce**

Most human-made laws do not allow a married couple to get a divorce before a certain period passes, referred to legally as “separation reconsideration.” This period is usually a year to two years, as is the case in American, Canadian and French laws, and five years in the English law. If the divorce is a matter of a legal battle in court by one spouse, some laws do not require that period and grant the divorce if it is a result of a mutual agreement between the two and they do not have children under the age of 16. If that is the case, the Swedish law requires the passing of 6 months to reconsider the separation.

The closest Islamic legal concept to this secular concept of separation is “Ilaa”, a divinely ordained buffer of four months as a period of separation after which they can decide on whether they wish to separate or stay together. Allah SWT says, "Those who take an oath that they will not approach their wives shall have four months of grace; and if they go back [on their oath]- behold, God is much-forgiving, a dispenser of grace.; But if they are resolved on divorce - behold, God is all-hearing, all-knowing." Quran (2: 227-228).

Although this four month period is the one to be considered according to Shariah for separation between the married couple (as we will explain soon), there is no escape from having to wait for the time period required for the divorce case and waiting on re-marriage again up until the final closure of the judge's signature on the formal divorce. It is more appropriate logically and according to the Islamic Shariah that the couple agree on the details civically and in a manner that is satisfying to Allah the Almighty, so the proceedings of the case do not linger and unnecessarily cost more than they should.

#### **The Fifth Objection: The differences regarding rights and obligations between secular law and what is stated in the various schools of jurisprudence**

This is a point that needs elaboration based on the following question: what are the rights and obligations pertaining to issues such as the alimony of the divorce, the woman who sought Khula returning her dowry, the details of custody, or the amount of alimony? Are these issues indisputable pillars of faith and acts of worship, or are they variables subject to change according to what serves the attainment of justice according to changing circumstances?

The same question could be posed from a different angle: in regards to what was reported on the Prophet PBUH in areas of obligations and rights after divorce, is it a matter of legal and legislative Ijtihad that is malleable according to circumstances, or are such teachings and judgments a core non-questionable ordinance like religious worship rites?

Imam and scholar Qarafi has some known sayings wherein he differentiated between the legislative acts of the Prophet PBUH, saying: “There is a difference between the Prophet's actions regarding judgment, issuing legal verdicts (fatwa) - which is delivering the divine message - and in leadership. His actions in these different forms have a different effect on the Shariah, for everything he has said or done as part of delivering the message was to be considered as a general ruling. However, sending out armies, spending the wealth of the Muslim treasury, appointing judges and rulers, distributing the spoils of war, and establishing

covenants are all circumstances in which he acted as a leader and nothing more.”<sup>23</sup>

These issues pertaining to the rights and obligations in family law do not appear to me as rigid ordinances of worship or matters of delivering the divine message, in fact they actually seem as part of an area of variable benefits, which the Prophet himself PBUH managed as a leader and a judge.

What supports this point of view is that the Prophet himself PBUH passed different judgments in different circumstances, which led some people of knowledge to wrongfully assume such differences are cases of abrogation by merely assuming that a contradiction exists, or to prefer some hadiths over others despite them all being authentic. It is more appropriate to consider all of the authentic texts, and consider these rulings based on their objectives.<sup>24</sup>

Let's put forward three examples demonstrating the primary rights and obligations wherein Western laws differ when defining those rights and obligations from what is known and established by the schools of Islamic jurisprudence, where different scholars based on the different religious texts and sources deduced their conclusions, and where they also differed between some who are of the opinion that they have to be identified accurately and have to be fixed, and those who believe that they are variable and malleable. Our opinion is that these are matters of ijtiḥād that change in order to derive the ultimate benefit based on the consideration of circumstances, and consequently, it is safe to say that Western laws have rulings that are different from what is familiar in Islamic jurisprudence as each considers the variable status and circumstances of their context.

### **The first example: The custody of the children remaining with the divorced woman after she remarries**

Opinions have differed, and rulings of the schools of jurisprudence have differed regarding the details of custody as a result of the different understandings for combining the narrated contradicting Hadiths in this area. The best summary for opinions which I have read about custody-related questions is what Alamir Alsan'ani has written in his book "Sobol Alsalām". I am quoting here a long excerpt reporting the most important and relevant texts as well as the main differences over the details. This is in order for me to explain later that what I suggest here as a guiding method to deal with conflicts over custody, and a way to better understand and follow the prophetic guidance concerning these issues. Put simply, the prophetic guidance means managing matters of custody based on the best interests of the child and nothing more, and doing so without the need to assume contradiction, abrogation, or preferring some prophetic traditions in this area over others while they are all authentic.

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<sup>23</sup> See: Al Qarafi, Shihab Al Deen “Al Frouq” and its footnotes, edited by Khalil Mansour (Beirut, Dar Alkutoub Alilmeya, 1998) Vol.1, p.357. See also Al Khafif, Ali, “Al Sunnah Al Tashrey'eya” in the book: “Al Sunnah Al Tashrey'eya Wa Ghair Al Tashrey'eya”, edited by Mohammed Imarah. Cairo: Nahdet Misr, 2001.

<sup>24</sup> See a detailed discussion in regards to the issue of conflict and abrogation in: Jasser Auda. Fiqh of Maqasid: نوط الأحكام الشرعية بمقاصدها. IIIT, 2005 and also: Jasser Auda, A Critique of the Theory of Abrogation. Arab Network for Publishing and Research, 2013.

San'aani wrote under the issue of custody saying:<sup>25</sup>

'Amr b. Shu'aib on his father's authority said that his grandfather (Abdullah ibn Amr ibn al-'As) reported: A woman said: "Messenger of Allah, my womb is a vessel to this son of mine, my breasts, a water-skin for him, and my lap a guard for him, yet his father has divorced me, and wants to take him away from me. The Messenger of Allah SAWs said: "You have more right to him as long as you do not marry." (Sunan Ahmed and Abu Dawood, graded sahih by Alhakim)

Abu Hurairah said, "A woman said, 'Oh Messenger of Allah, my husband wants to take my son away, but he helps me, and brings me water from the well of Abu 'Inabah.' Her husband came and said: 'Who is going to take my son from me?' The Messenger of Allah SAWs said: 'O boy, this is your father and this is your mother; take the hand of whichever of them you want.' He took his mother's hand and she left with him." (Sunan Ahmed and the four Sahih, graded sahih by At-Tirmidhi). The ruling which the hadith denotes is agreed upon, and was ruled by Abu Bakr and Omar, Ibn Abbas said: ریحها وفرأشها وحرها are better for him than you, until he grows up and chooses on his own, narrated by Abdul Razzaq in a story. This hadith denotes that if a woman remarries, she loses her right to custody and that is what the majority have chosen. Ibn Al Monthir said: Thus, ruled everyone I remember from among the people of knowledge.

Al Hasan and Ibn Hazm are of the opinion that custody is not given away with remarriage, and they cite evidence based on Anas Ibn Malik who was in the custody of his mother when she was married, likewise Umm Salama married the Prophet PBUH and her son remained in her custody, and likewise the daughter of Hamza whom the Prophet ruled her custody for her aunt from her mother's side while she was married. He said that the hadith of Ibn Omar RA mentioned here has some question, it is "Sahifah", as it was said that: the hadith of Omar Ibn Shoaib by his father by his grandfather is "Sahifa", and it was responded to him that this hadith of Amr Ibn Shoaib is a destination for the scholars and they have acted upon it such as: Al Bukhari, Ahmad, Ibn Al Madini, Al Homaidy, Ishaq Ibn Rahawey, and their likes, so there is no basis for criticizing it. And as for what was argued, evidence cannot be established except for determining to whom the custody shall be passed when a dispute arises. And as for not making such a determination, there is no dispute that the married mother can take care of her child, and it was not reported in any of the narrations mentioned here that there was ever a dispute on this, hence there is no evidence in what he mentioned for what he claimed.

Abu Hurairah said, "A woman said, 'Oh Messenger of Allah, my husband wants to take my son away, but he helps me, and brings me water from the well of Abu 'Inabah.' Her husband came and said: 'Who is going to take my son from me?' The Messenger of Allah SAWs said: 'O boy, this is your father and this is your mother; take the hand of whichever of them you want.' He took his mother's hand and she left with him." (Sunan Ahmed and the four Sahih, graded sahih by At-Tirmidhi).

This hadith is evidence that when a child is old enough to be self-sufficient, they have the option to choose between their mother or father. Scholars have differed on this, where a minority are of the opinion that a child has the choice based on this hadith, and that's what Ishaq Ibn Rahawey says, and the age for choosing can begin at seven years of age.

However, Hadaweys and Hanafis are of the opinion that the child should not be given a choice to begin with, and have said that it is more appropriate for the mother to take the child until he becomes self-sufficient, and when he does, it is better if the father has custody of a male child

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<sup>25</sup> his quote is taken out of the book copy available on Al Maktaba A Shamela's website (<http://shamela.ws>), originally published by Dar Al Hadith in two volumes without a date.



and the mother has custody of a female child. Malik has agreed on this with them regarding not allowing choosing, but said that it is better if the mother takes care of the child regardless of them being male or female, and he said that that should be the case until they reach puberty. There are many details on the subject, but sparse evidence. Those who deny the child the choice use the general meaning of the hadith: "You are more worthy of him (the child) as long as you are not married." They say that if the choice was up to the child, the mother in this case would not have had more right to the child than the father. The response to that is that if that was general and absolute in all instances, then the hadith of choosing limits it or makes it specific, and this position agrees with both pieces of evidence. If the little child had not been given the choice between their parents, it could have been said that the child goes the mother with no other option because custody is her right; however the child may be transferred from her custody because of his choice, and if he does not choose then he remains on the default. And it was also said this is the strongest evidence that a draw is made between the two, since that was reported in the hadith by Abu Huraira in the wording: "The Messenger of Allah SAWS said: 'O boy, this is your father and this is your mother; take the hand of whichever of them you want.' He took his mother's hand and she left with him." Al Baihaqi.

What appears from this hadith is electing a draw over making a choice, however it was decided for choosing because that is what the rightly-guided Khalifahs acted upon, except that he SAWS said in the prophetic guidance that choosing and draw cannot take place unless they ensure the best interests of the child. So, if the mother was to be more protective and vigilant in caring for the child than the father, she would be given custody consideration over him, with no consideration to a draw or a child's choice in such a case. A child's opinion is weak, and children prefer to not do work and just play, so if a child was to choose someone who may make it easy for them to be undisciplined, then their choice cannot be taken seriously, and he is to be in the custody of the one who is more beneficial for him or her. The Shariah does not stand for anything except this. The Messenger of Allah SAWS said, "Command your children to perform (prayer) when they are seven years old, and beat them for (not offering) it when they are ten, and do not let (boys and girls) sleep together", and Allah SWT says in the Quran: "O YOU who have attained to faith! Ward off from yourselves and those who are close to you that fire [of the hereafter]" (Quran 66:6). So in such a case where the mother would leave him with books, or teach him the Quran, and the child prefers playing and being with his peers while his father allows him to do that, then the mother is more worthy of his custody, and there should neither be a draw nor choice making, and vice versa. And that is the best and final word.

It was reported by Rafi Bin Sinan that he became a Muslim while his wife refused to, so the Messenger of Allah SAWS had the mother seated on one side, and the father on another, and had the child sit in between the two. The child leaned towards his mother so the Prophet SAWS said: "O Allah, guide him, so he turned to his father who then took him". Abu Dawood and Nasaai, Sahih by Al Hakim. However, Ibn Al Munthir said that it is not verified by people of "Naql". And there is a question on its transmission because it was a narration of Abdul Hamid Bin Jafaar Bin Rafii and both Thoury and Yahiya Bin Maen, and there is a disagreement on the young child. Some said it was a girl and others said a boy, and the child is not given the choice in the hadith, and it is apparent that they had not yet reached the age of being able to choose for themselves. The Messenger of Allah PBUH had him seated between his parents and prayed that Allah guides him and so the child chose the father due to the prophetic prayer hence that is not an evidence for giving the choice.

The hadith is also evidence that the right of custody may be given to a non-believing mother even if the child is Muslim, for if she did not have this right the Prophet PBUH would not have seated the child between the parents. Thowry and those who have this opinion decided so,

and the majority of scholars are of the opinion that she does not have this right due to her disbelief, saying: The custodian needs to be concerned with raising the child on the religion of the custodian, and because Allah the Almighty disconnected alliances between the believers and non-believers and made the believers allies and supporters of one another, as He said: "And never will God allow those who deny the truth to harm the believers." (Quran 4:141), and custody is a form of authority (Wilayah) in which the best interests of the one under custody must be considered as I have recognized.

Rafi's hadith رَافِعٌ قَدْ عَرَفْتُ عَدَمَ انْتِهَاضِهِ. As for claiming its authenticity, it is abrogated by these Quranic verses, for how can custody be established for a non-believing mother, for instance, while the majority - who are the Hadaweies and Ahmed's companions and Shaf'i - have all put competency as a condition for giving custody to the mother and that a wicked (Fasiqa) mother has no right to custody, while that being a pretty farfetched condition, for if it was truly a condition for the custody of children the world would be lost.

It was narrated by Al Barra' Bin Azib that the Messenger of Allah PBUH ruled for Hamza's daughter to be in the custody of her aunt - her mother's sister - and said: "A mother's sister is in the same rank as a mother". Reported in Bukhari and Ahmed from Ali's hadith when he said: " He said: The female child is to be with her mother's sister, for a mother's sister is like a mother".

This hadith is evidence that custody is granted to the aunt from the mother's side and that she is similar to a mother, implying that she is more deserving of custody than the father and the mother of the mother. However, the consensus gave this a specification, and what appears from it is that the custody of married women is better than men. The story implies that the group of men were present and demanding custody and disputing with Ali, Jafaar, and Zaid Bin Haritha, and that the custody of the female child was ruled to her aunt from her mother's side and the messenger of Allah PBUH said that an aunt may replace the mother. A narration of the story was reported that the messenger of Allah PBUH ruled in favor of Jafaar, and that ruling for Jafar was questioned though it is not prohibited since both Jafaar and Ali had an equal relationship to the child, and the response was that the messenger of Allah granted custody to Jafar's wife, the aunt, who was married to Jafar. But since Jafar was the one who disputed, and he said during the dispute, "She is my cousin and her aunt is my wife." So the Prophet granted custody to Jafar since he was apparently the appealing party, and the messenger of Allah said, "The aunt is like a mother," thus clarifying that the custody was granted to the aunt, saying that he ruled for Jafar here meaning he ruled for Jafar's wife. And the judgment was on him because he was the one who appealed and there is no issue in this though it was questioned again since the aunt was married and thus does not have the right to custody based on the hadith, "You have the right to the child as long as you didn't remarry."

The response to this is that the duty of the married woman is to her husband, and she foregoes the right to custody because she becomes preoccupied with taking care of his affairs and serving him. However, if the husband agrees that she may take custody of whomever she has the right of custody to, and would like to have the child in his household, the woman does not lose her right to custody. This story is evidence of this verdict, and that is the opinion of Al Hassan, Imam Yahya, Ibn Hazm, and Ibn Jarir, and this is because a woman foregoes her right to custody upon marriage only if she was a mother and when the disputer is the father. However, other women do not lose their right to custody upon getting remarried, or the mother and the one who is disputing her besides the father is supported by what is known in that the divorced woman reaches an intense degree of hatred towards the divorced husband and his relatives. She could reach the point of neglecting the child she had with him on purpose to

enrage him, and on the other hand exaggerates in showing affection to the second husband by  
... بِتَوْفِيرِ حَقِّهِ

This is a quick overview of some of the most major problematic issues which result from jurists not considering rulings derived from these hadiths as malleable ijtiḥad rulings, and not unchangeable limits, and not connecting these ijtiḥad rulings with the benefits and interests that are considered in each case. They do this despite this being the only solution for resolving supposed contradictions between the texts in order to best follow the tradition of prophet Muhammad PBUH.

First: Claiming consensus without evidence:

As we saw, consensus was claimed that the father is given preference over the aunt (from the side of the mother) if the custody of the mother is not valid, and I do not understand how “consensus” is claimed upon something when it contradicts well-authenticated hadiths such as the one stating, “An aunt is just like a mother,” and “The female child is under the custody of her aunt from her mother’s side,” and when it differs from the opinion of some of the companions and their successors. How did they define this claimed “consensus” without evidence?

Second: Assuming abrogation without evidence:

For example, there is no evidence that the verse - “and never will God allow those who deny the truth to harm the believers.” (Quran: 4-141) - contradicts, let alone abrogates the hadith where the prophet PBUH gave the child the option to choose between his believing father and disbelieving mother.

Third: Preferring some authentic Hadiths over others without evidence:

It is inappropriate to reject authentic Hadiths such as the hadith of Bukhari narrated by Amr Ibn Shoaib - “You have more right to him as long as you do not marry” - nor other authentic narrations where a child remained with their mother even after her new marriage. There is actually no contradiction between these rulings because the differences in these hadiths was according to their different circumstances and how these circumstances influenced the rulings. Thus, it is unnecessary to reject well-authenticated hadith based on merely doubting, and it is more appropriate to authenticate a text rather than neglecting it.

Forth: Assuming a single paradigm considering all of these details has no support

This assumption originates from considering some parameters as being essential for the ruling while they are *علل مدعاة بالتحكم* that have no evidence. For example, the child’s gender being a male or a female, or their age being seven or ten or any other age, or whether the female custodian gets remarried and therefore she becomes ineligible for being a custodian because, “She becomes preoccupied with serving her husband and her duties to him” as they say, or in some cases the religion of the parents such as in the hadith, or the method of choosing a guardian through draw or choice, or who is more worthy of a child after the mother, or the condition of the mother’s competency. All of these are just as what San’ani said himself when he stated: “There are many details with no support.” I add to what he said that even if the evidence was verified based on transmission as in the hadiths mentioned here, there is still no evidence that the most influential consideration in ruling for custody is any of these considerations the jurists previously put forth and then read in texts. I also liked Sana’ni’s

response - based on consideration of reality - to Shaf'i making a condition for the mother's competency in order for her to gain custody by saying about "The competency of the mother custodian": "If that was a condition required from the mother custodian then all the children of the world would be lost".

I also admire San'ani's statement when he said: "A child has to be with whomever is more beneficial to them, and the Shariah would never ordain anything except this." Based on this saying I conclude that in the context of our research that Shariah in the context of Western Muslims cannot but support the realistic considerations that are considered by Western custody laws in different countries since Western courts - based on the examination of family laws there - pay attention to the consideration of what is in the best interest of the child including religious and moral consideration. It appears to me that their judgment is not outside of the limits of what the Prophet PBUH set as a standard in his rulings, which is: the child's best interests, regardless of whether the court gives custody to the mother - which is normal - or denies her custody due to incompetency.

### **The second example: Spendings (Finances) for a divorcee, divorced, and children**

The Almighty says, "but [even in such a case] make provision for them - the affluent according to his means, and the straitened according to his means - a provision in an equitable manner: this is a duty upon all who would do good." (Quran 2:236) and He says, "And the divorced women, too, shall have [a right to] maintenance in a goodly manner." (Quran 2:241) which is evident to Shariah's consideration to the woman's financial loss when she loses her breadwinner after divorce and her need for a compensation to that. Different jurists have estimated different values for alimony however these estimates also are not mandatory in every instance, and they are not acts of worship specifically pertaining to worship, such as what Al Sarkhasi had reported on the Hanafis that: "The least value for alimony payments is three pieces of garments, a shift, a head covering, and a wrap"<sup>26</sup>, and others said a different estimate than that.

Contemporary legislations concerned with this matter have differed. The Egyptian law for instance rules for alimony payments for two years and leaves the estimation to the judge considering the length of marriage and the circumstances of divorce.<sup>27</sup> Syrian law decrees that the ruling of a compensation is to be based off the status of the divorcing husband and the degree of his resentfulness where that compensation is no more than 3 years of alimony payments in addition to an alimony for the waiting period, and it is up to the judge to make this compensation paid once or on a monthly basis, as appropriate.<sup>28</sup> Moroccan Family Code grants the court the authority to estimate the value of payments based on the length of the marriage, the husband's financial ability, and the reasons for divorce.<sup>29</sup>

The status of western legislations is not very different from the concept of "compensation" or "satisfaction" which Muslim jurists whether traditional or contemporary legislators have established in Islamic laws regarding family law. However, customs in western societies regarding "spendings" are different from those in eastern countries since family in the west is

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<sup>26</sup> Al Sarkhasy, Al Mabsout Vol.6 P.62 Dar Al Ma'rifa edition. Beirut, 1989.

<sup>27</sup> See for example: Egyptian Dar Al-Iftaa. What is meant by: Alimony after divorce in the Noble Qur'an and its estimate. Fatwa No. 2810, year 2012.

<sup>28</sup> See: Alimony in Family code. <http://www.startimes.com/?t=25152332>

<sup>29</sup> Ibid

treated as a single financial body by the state when it comes to matters of taxation, pensions, and different types of insurance, where all members of the family considered together, and not on an individual basis. Additionally, if we were to take into consideration the nature of capitalist societies when it comes to housing, work, and so forth, we will come to a conclusion that the objective of the desired “compensation” wouldn’t be attained through offering three pieces of garment, or even ten, and that a servant’s wage or an alimony of two or three years are all not sufficient for it.

If we consider, for example, a common case of divorce among Muslims in the West, which is a divorce that takes place after 15 years or more of marriage after the husband and wife may have started their lives as university graduates and the man worked hard to pay for the house and build wealth whereas the woman has dedicated her life to child-bearing, house chores, taking care of the children, and worked irregular or partial jobs. There are also a large number of cases where a Western Muslim woman works and spends on the household from her money just as her husband works and spends on the house, and in some cases, she even supports the man financially. In all these cases the man cannot by any means take away the house, the car, and the bank account - for instance - even if it was under his name - and leave her with an alimony that is enough for a couple months or the cost of a few pieces of clothing, because in the West that means she would become homeless with nowhere to go but public parks and homeless shelters, and she would rely on charity and support from other people, which we have witnessed unfortunately in some divorces, especially those resulting from unregistered marriages in the West, and unfortunately this is what some men threaten their wives with in the West.

As for in the framework of law in the West - despite differences in some details among states and countries - a court first decrees a divorce distinct from financial issues in case it was disputed, and there is a clear benefit in doing so, and then the court decrees between the two parties in regards to finances and separates their individual private wealth they have gained through inheritance, gifts, or things of similar nature from the wealth which is referred to as common or marital, whether it is under the name of the man or the woman legally. Then the court divides this shared wealth according to what would achieve fairness or compensation, which are considered to be the spirit of the law which is to be applied in their countries.<sup>30</sup> The court also obligates the wealthier party - whether man or woman - to take care of essential expenses that are necessary for life in the West for the other party such as medical insurance, heat, and education in some cases for a certain period of time relative to the length of their marriage - most of the time it can be up to half of the period of marriage after divorce.<sup>31</sup> All of this may be considered as a decent application towards the objectives of this field, and it is not right to consider it a violation of the Islamic Shariah and its rulings merely because it has been decreed by a non-Muslim judge or a court in a Western nation.

Malikis have a deduction that is the closest known concept in Islamic jurisprudence to the laws of shared assets among the spouses in the Western contexts, that is what’s known as: Fatwa in regards to “Hard work, striving” Se’aya or Kadd or Shaqa or Jeraya. The most well-known Islamic legal verdict in this area is Ibn Ardoun’s verdict for when a wife helps her husband in the desert that he gives her a share of his harvest as a partner in case of death or divorce. Shaykh Abdurrahman Al Fasi reported this opinion on him in poetry describing the acts of the people of Fez, Morocco and said:

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<sup>30</sup> See for example: Marital Property. Legal Information Institute [www.law.cornell.edu/wex/marital\\_property](http://www.law.cornell.edu/wex/marital_property)

<sup>31</sup> Ibid

“As for the service of women in the deserts,  
through cultivating, threshing grains, and harvesting  
Ibn Ardoun has said that they have a share,  
equal to that of what they have worked,  
But the people of Fez have a different practice,  
they said that they have a known tradition in this”<sup>32</sup>

The strongest partial evidence on which Maliki's build their position from this fatwa is the incident of Umar Bin Al Khattab when Amr Ibn Al Harith, the husband of Habiba Bint Rozaig died, and she was a weaver and embroiderer and her husband used to trade in what she was producing or mending and they made a wealth out of this. When the husband passed away, his allies came and received the keys to his saves but the wife disputed with them over this and brought her affair to Umar who ruled for her the right to half of his wealth as well as a share of inheritance in the second half. Some Maliki jurists have used this incident to measure based on this incident such as Shaykh Yahya Al Sarrad according to what Shaykh Mahdy Al Wazany has reported in “Al Nawazil Al Soghra”, and Shaykh Mohammed Al Warzizy in his answers. Al Abbasi mentioned in his Nawazil “Momentous/contemporary events”: “A woman who's married to a man who had cattle and stayed with him for four years then he divorced her would take a share of the cattle as a result of her labor and the increase resulted in the cattle, according to the opinion of the people of knowledge, Ibn Al attar said: “ Imam Malik and his companions are of the opinion that if a woman was working in weaving and textiles and such she is a partner of her husband in what he has benefited from her, divided by half to each one of them”.<sup>33</sup>

### **Third example: Not differentiating between custody and guardianship in caring for the child**

This is another issue which is taken as an indisputable fact in contemporary Islamic jurisprudence, whereas there are variables that can change based upon the benefits derived. The issue is that of differentiating between guardianship over the child - which remains for the father after divorce - based upon which he may decide major life decisions for the child when dealing with education, health care, and travel, and custody - if it was given to the mother - based upon which she may only care for the child but not decide on any major life decisions.

However, custody in Western laws encompasses the management of most of the child's affairs by either parent, except for some exceptional decisions that have a major impact on the child's life, such as moving to live in another state or another country, and in such case the court regularly obliges the two parties to come to an agreement. While this division of responsibilities differs from what is known according to Islamic Fiqh, it is more suitable to the circumstances in the West and the role of the parent with custody in it.

### **Second principle: Departure is the right of a woman just like it is that of a man**

A statement has become widespread after being repeated by some people of knowledge from various Islamic schools of thoughts suggesting that: “Divorce in Islam is only the right of men,” and that is a statement which we can respond to from several angles:

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<sup>32</sup> See for example: Al Alamy, Issa “Al Nawazil”. Authenticated by the Scientific Council of Fez. Published by Dar Al Awqaf and Islamic affairs in Morocco. Fadala Publishers 1983.

<sup>33</sup> Ibid

First: Referring to men when discussing divorce in the Quran and the Prophetic tradition does not mean that divorce - meaning separation - is not a right to women, as in what Allah says in the Quran: "But if they are resolved on divorce - behold, God is all-hearing, all-knowing." (Quran 2:227), and: "And so, when you divorce women and they are about to reach the end of their waiting-term, then either retain them in a fair manner or let them go in a fair manner." (2:231), and: "O YOU who have attained to faith! If you marry believing women and then divorce them before you have touched them, you have no reason to expect, and to calculate, any waiting-period on their part hence, make [at once] provision for them, and release them in a decent manner." Quran (33:49), and: "O PROPHET! When you [intend to divorce women, divorce them with a view to the waiting period appointed for them" Quran (65:1), and many other verses. There is nothing in the texts mentioned here which implies that women do not have the right to divorce, as this opinion is deducted based on the logically inconsistent concept of "Mukhalafah," in any case.<sup>34</sup>

Secondly, the Quran clearly shows that a woman has the right to ask for separation from her husband, and the Quran did not name this separation specifically as "faskh" or "khula" or any of these terminologies which have been used as decided in different schools of Fiqh, but it is clear in the speech of Allah the Almighty. The Almighty says: "Hence, if you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself. These are the bounds set by God; do not, then, transgress them: for they who transgress the bounds set by God - it is they, they who are evildoers! Quran 2:229"). A woman cannot give up on her rights unless she initially had the right to ask for separation- regardless of what the terminology is- until she gives the compensation mentioned.

Despite this, it is inappropriate according to the Islamic Shariah that the compensation opens the door towards extortion in the name of "Khula," consequently taking away her right for divorce. The Almighty says, "O YOU who have attained to faith! It is not lawful for you to [try to] become heirs to your wives [by holding onto them] against their will; and neither shall you keep them under constraint with a view to taking away anything of what you may have given them, unless it be that they have become guilty, in an obvious manner, of immoral conduct." (Quran 4:19). Many traditional and contemporary scholars connected the meaning of "Some of what you may have given them" with what a woman may pay in order to be separated from her husband, an example is what was narrated by Ibn Abbas in his commentary on this verse where he says: "Don't oppress them in order to take away some of what you have given them; meaning that a man may have a wife whom he dislikes to be with, and he owes her a dowry so he harms her in order for her to resort to paying a compensation for separation."<sup>35</sup>

Shaykh Muhammad Abdou also commented on this verse saying: "Constraining here does not mean what the interpreter said -Al Jalal- in that it is preventing women from remarrying. It means do not oppress them and constrain them so that they hate you and feel compelled to seek compensation from you. They may even ask her - the woman - for a higher sum of money if they were aware of her ability to pay, and that is the prohibited constraint here."<sup>36</sup> Hence asking for an unjustifiable increase to the original amount of the dowry for a woman to pay in compensation for a khula is exactly what is taking place today, and it is exactly what the

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<sup>34</sup> I discussed the fallacy of the concept of "Mukhalafa" in detail in my book "Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach", IIIT. Arabic edition (2012). Chapter 4.

<sup>35</sup> Ibn Kathir mentioned it in his interpretation for the verse.

<sup>36</sup> Shaykh Mohammed Rashid Reda reported it on him in his interpretation of the verse in Tafsir Al Manar.

prohibited constraint is. This is a natural consequence of the deprivation and denial of a woman's right to divorce - or let's call it separation - while arguing that it is solely the man's right.

Third: It was never reported during the time of the revelation nor the ruling of the four rightly-guided successors of the Prophet PBUH that a woman's demand for divorce was denied by her husband, allowing for months and years to pass while the woman is still hanging and cannot find a way out. This oppressive example is absent in the religious canon, and the other oppressive example that also has no precedent in the canon is that a woman is compelled to live with her husband such as what happens - unfortunately in the name of law - in almost all Arab countries under what they refer to as: "the house of obedience" or "the obedience claim,"<sup>37</sup> which is a false legislation that is undoubtedly not sanctioned by the Quran or the Sunnah.

Fourth: It was never reported in the prophetic tradition that he PBUH denied the right of a woman to be separated from her husband. For example, reflect on what Al Shaykhan reported about Aisha on Habiba Bint Sahl, who was the wife of Thabit bin Qais. "She came to the Prophet PBUH and said: 'O Messenger of Allah, I do not find any fault with Thabit bin Qais regarding his attitude or religious commitment, but I hate Kufr after becoming Muslim.' and in another narration, she said: 'I dislike him,' so The Messenger of Allah called on him and said: 'Take some of her money and leave her,' so he said: 'Is it alright O Messenger of Allah?' The Messenger of Allah replied: 'Yes,' so he said: 'I have given her two gardens and they are in her hand,' so the Messenger of Allah said: 'Will you give him back his garden?' She said: 'Yes.' The Messenger of Allah said to Thabit: 'Take back the gardens and divorce her.'"

And in another narration: "Accept the garden and divorce her once," and in another narration: "the Messenger of Allah PBUH said to take his garden only and nothing more, so he did, then the messenger of Allah ordered her to wait with one menstrual cycle for her waiting period and she stayed in her family's house." Notice the narration which mentioned: "The Messenger of Allah PBUH asked him to take back his garden and nothing more than that."<sup>38</sup>

Ahmad reported (2230) that Nafi Ibn Omar said: "The waiting period of a woman who has sought Khula is one menstrual cycle", and Bukhari said: "Omar permitted Khulaa without a Sultan (meaning without the interference of the authority), and Othman permitted Khulaa with less than a hair braid (meaning even if the ransom was less than a hair braid), and Tawous said: "The verse is: "unless both fear that they will not be able to keep [within] the limits of Allah.", فيما افترض لكل واحد منهما على صاحبه في العشرة والصحية,

Thouban, the servant of the Messenger of Allah SAWS reported that he SAWS said: "If a woman asks her husband for divorce with no (precedence of) harm, the fragrance of Paradise is prohibited from her".<sup>39</sup>

It is apparent that the hadiths mentioned here - and others on the same topic - clearly suggest that asking for divorce and getting it is a right for the woman generally. The term "Khulaa," however, has been used in Islamic jurisprudence since the word was mentioned in the speech of the Messenger of Allah SAWS, as the Hadiths mentioned here, and for its specific condition in which it only has one irrevocable divorce and a waiting period of one menstrual cycle (based

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<sup>37</sup> See for example: Fadia Aboud, The Notice of Obedience: A dagger to the throat of the Arab woman. <http://lahona.com>

<sup>38</sup> Bukhari 4971, Muslim 3463, Ibn Maja 2056, Abu Dawoud 2228, and others.

<sup>39</sup> Ibn Maja 2055



on what appears in the different Hadiths and considering the known difference of opinion in regards to the length of the waiting period, whether it is one or three menstrual cycles). The prohibition here is on separating from the husband without the precedence of harm, and the injustice resulting from that on the man. This is not something particular only for women, but the same thing goes equally also for when men wish to separate from their wives without any harm caused, and how that may result in injustice on the woman.

A consequence of stating a woman's right to divorce is accepting the legitimacy of her seeking Western courts to get a divorce, the validity of this divorce decree by court as an irrevocable divorce - from the minute the judge announces it - as well as all of its Islamic legal and legal consequences upon the man and woman as the judges rules, and in addition to the details pertaining to worship which the Islamic Shariah requires such as the waiting period and its rulings. It is better if the court decree after divorce is also registered at financial regulatory agencies in order to protect the rights of the two parties, to especially protect the rights of children, and to prevent the recurrence of dispute.

As for in the case of an unregistered marriage, a woman still also has the right to separation - by divorce or Khulaa - and the concerned Islamic entity does not hold the right to deny her this right, especially after exhausting attempts towards reconciliation during the four month period which we have mentioned based off the period of Illaa' in the Book of Allah: "Those who take an oath that they will not approach their wives shall have four months of grace; and if they go back [on their oath]<sup>1</sup> - behold, God is much-forgiving, a dispenser of grace. But if they are resolved on divorce - behold, God is all-hearing, all-knowing. " Quran (2: 226-227). It is not appropriate that a woman waits for more than this period of time if she has decided to get a divorce in the name of attempting reconciliation or trying to convince the husband to accept the divorce, and we have actually seen, as mentioned earlier, how some of these waiting periods have reached years and even more than ten years in some cases I personally witnessed.

### **Third Principle: Islamic entities in the West act in place of an Islamic Shariah Judge**

In the area of family law, procedures cannot be regulated, desired interests cannot be attained, nor can prohibited abuses be avoided unless the entity which established the marriage is endowed with the authority to also dissolve it if necessary. Such an entity may be an Islamic institution or a committee within the mosque or Islamic center, even if it lacks the official legal state authority as previously mentioned.

In the case of officially registered marriage contracts, seeking Western courts is necessary in order to secure rights and duties as mentioned. The Islamic center, however, plays an important role towards achieving agreement on the details between the two parties in a decent, civil manner according to the honorable Shariah before going to court. This agreement is highly important as it helps prevent disputes in front of court which lead to extending the period of litigation up to years during which wealth and resources are wasted and concerned parties are afflicted with distress and tribunals, as we have witnessed first-hand. If the spouses differ over the details of the divorce and if the efforts of friendly intermediators fail in reaching a civic agreement, then there is no escape from contesting in family courts and eventually accepting their decree.

When it comes to marriage contracts that are unofficially registered but are registered by an Islamic institution, the only way forward for the wife is returning to the institution that initially issued the unofficial marriage document - or any other available known Islamic institutions - for her to seek divorce or Khula, and this is the role of Islamic institutions if judiciary is absent.

Such institutions must not neglect such a role in order to prevent oppression against women in the name of Shariah, as oppression has no place in the Shariah.

Shaykh Dr. Abdullah Bin Bayyah has research in which he has granted Islamic centers the authority to judge in claims of disputes especially in damages claims as well as decreeing divorce and Khulaa. He mentioned many details in his research from which I cite the following as evidence of the legitimacy of this Islamic legal authority for Islamic centers when they act in the role of "Muslim Jamaa" - Muslim community - or "The competent who act in the place of a judge".

Shaykh Bin Bayyah wrote under the title: "Muslim Jama'a acting as the Judge" saying, <sup>40</sup>"Since there are no judges of the Islamic Shariah in the diaspora, hence Islamic centers can be granted a legal Islamic characteristic in order to settle disputes and decide on disagreements between Muslims in what Muslim jurists referred to at times as "Jamaa of Muslims," and at other times as "Competents who act in the place of a judge." This is because an imam (leader) is essentially a deputy of the Jamaa, hence it is not excluded that the Jamaa could act instead of the leader if his presence is not possible. This is based on what was reported on Ibn Masoud, as he said, "Whatever Muslims see as good is considered good by Allah." Additionally, scholars have stated that the Muslim community acts in the place of the judge when not present, and even when present in rare cases as we will discuss.

Malikis have stated in regards to the question of the wife of the missing person that the Muslim community has to act in the place of the judge. Khalil said in his abridged book: "A wife of a missing person has to seek the judge, the ruler, "the ruler of water," or else the Muslim community". And in the explanation of Mouwaq: "Al Qabesy and other Qarawis said that if the woman was in a place where there is no ruler (Sultan) she would bring her affair to the righteous among her neighbors." In the notes of Al Hattab on Khalil's saying in the area of alimony (Then he divorced while he was absent): "If she does not have a ruler, she seeks competent individuals." And Ibn Moghith had a similar position regarding a woman whose husband is absent, that she may testify to competent individuals what she would testify before a judge and attain the divorce herself, and Al Mishzali said: "That is when unable to attain the ruler".

Ibn Yunus mentioned in the book of Himala that: "The community of competents acts in place of the ruler." Al Barzali said in regards to districts issues "Aqdeya": "Siyury was asked about someone who went away to another country and has a wife to whom he did not leave an alimony except for a sum that does not account for her dowry, while there is no judge in this town... Is it possible that the Muslim community acts as the judge in this momentous event and other events, or لا؟ يجب على أمينه أن يحث نفسه ويحكم أم لا؟ The answer is: If there was difficulty on the people for the lack of judges or for their incompetence, their Jamaa (community) is sufficient for passing judgement in all of what I have described and in all affairs, hence the people of knowledge in the religion and people of merit may act in the place of a judge for setting timelines and decreeing divorce and such.

Ibn Farhoun says in his book Attabserah: "The authority (wilayah) of judiciary is established upon the consensus of those who have opinions, and the people of knowledge and justice on a man among themselves who has fulfilled the conditions of the judiciary, and that is when they cannot approach the ruler for that."

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<sup>40</sup> Bin Bayyah, Abdullah. "Muslim Jama'a acting as the Judge". <http://binbayyah.net/arabic/archives/144> Reader can also refer to the resources which Shaykh Bin Bayyah included in his research.

In Al Meyar by Al Wanshrisy he states the following: "If there was not a judge in a town, the righteous people in this town should unite in marriage those who wish to get married. Abu Jafaar Ahmed Bin Nasr Al Daoudy was asked about a woman who was previously married and wanted to get married again while there was no ruler in the town. He responded: If there was no judge in the town, then the righteous people of the town should gather and order her marriage to be established. In every state with no ruler, the competent and the people of knowledge in such a town take his place in establishing rulings."

Abu Omran Al Farsi said: "The rulings of the community to whom the affairs are assigned in the absence of a ruler are legitimate rulings in the case that they are based on their soundness and appropriateness, and that applies to all matters in which a ruler's judgment is permissible."

In the book Al Dorr Al Natheer by Ibn Hilal in the topic of Compulsion he mentioned that the group of competent Muslims in countries that are *سائبة* act like deputies to the ruler as it becomes difficult to resort to him for every single ruling, and the same applies in the case of an unjust ruler or a ruler who does not maintain the limits of Shariah.

When speaking on the conditions of marrying off a female orphan in his book of "Shukr Al Nimaa by Spreading Rahma", Allama Muhammad Mouloud Bin Ahmad Fal Al Yaqoubi says: "Note: If the judge was absent, the Muslim community (Jamaa) replaces him in all matters concerned."

The principle of the Muslim community taking the place of the ruler and the judge is known in the Maliki school of thought despite the difference in its application on some momentous events or questions.

Additionally, there are references to this in other schools of Islamic jurisprudence and we will point out some of them. For instance, Allama Abu Yaly Al Faraa Al Hanbali said in "Rulings related to Rulers": "If it happens that a town does not have a judge and they come to a consensus to appoint a judge themselves, I see that if the ruler was present then the appointment is invalid, and if he was absent then it is valid and its rulings are valid as well." And Ibn Abdeen says in "Al Hasheyah": "And in countries where the rulers are non-believers it is permissible for Muslims to hold Friday prayers and Eids and the judge becomes such with the consent of Muslims."

That being said, the circumstances of Muslims in non-Muslim majority countries, where establishing Islamic courts they may appeal to is not permitted, and where all their legal disputes are completely under the umbrella of the laws of the judges in the countries where they reside, put their case under what is deemed as a necessity, a status which has its own rulings and considers what is in the best interests to be the standard of ruling and considers possibility and ability to be the principle of the obligation for what Allah says: "So be conscious of Allah as much as you are able" (Quran 64:16). As we previously mentioned, the opinion that such a divorce is valid is not excluded and that is by accepting the wife's divorce of the husband, and the Muslim community (Jamaa) has to grant such a divorce so that the wife does not remain in a status of disobedience as we presented from Malikis' standpoint regarding a disobedient wife (Nashiz) in order to ward off evil.

Finally: We have taken a cursory look at the reality of Muslims in non-Muslim lands where it has appeared that their circumstances are considered "circumstances of necessity" in the general sense of the term which requires to be approached by one of three types of ijtihad, a type of that utilizes the texts, objectives, branches, and principles. We have recommended a number of principles through which a jurist can approach the different cases of minorities fiqh.

The fundamental of these principles is facilitating affairs and removing difficulty while sticking to conditions and regulations of removing difficulty. We focused on the closest rule to the momentous issue which is: The Muslim Jamaa replacing the judge, and considering this as a vesting of authority to the Islamic centers to settle dispute lawsuits between spouses especially with damages claims, decreeing divorce, and Khulaa.

Thus, the verdicts of whomever the Muslim community has granted this authority, be it Islamic legal committees or the leadership of Islamic centers, are effective and legally valid in the Shariah, and the affairs of family law for Muslims in the West will not be fixed except with this, especially in the cases where marriage has not been officially registered and the woman requests divorce while the man refuses to negotiate.

## **Summary**

It is hoped for this paper to be a first step towards a comprehensive vision for solving problems of family law among Muslims in the West. We can summarize my conclusions as follows:

The mutual lack of recognition of both official Western courts and Islamic Shariah-based institutions of one another has led to many injustices and problems to both practicality and the divine Shariah.

The main issues in family law in the West are: not allowing women to obtain a divorce or khula despite it being her foundational religious right; not protecting the safety and dignity of women especially those under unofficial marriage contracts; a lack of guarantee for the financial rights of women and children in the case of divorce; and the legal difficulties regarding in regards to officially establishing the father's paternity for children born into an unregistered marriage.

There is a common misconception on the nature of marriage in Islam that if a woman agrees to establishing the marriage contract, she has become a prisoner to the man forever, regardless of what he does, and that she does not have a right by Islamic law to leave him by her free will, and this is a misunderstanding that disagrees with both the Islamic legal canon in this area as well as the general spirit of Islamic Shariah.

## **General principles for a potential Fiqhi solution**

First principle: The rulings of family courts in the West are legitimate and effective upon Muslims in the West

Second Principle: Separation is a right for the woman just as it is a right for a man.

Third Principle: Islamic entities in the West take the place of the Islamic legal judge.

There has not been any Islamic legal text specifying the religion of either the judge or the witness in family law dealings, or in any other types of legal cases. In fact, it seems apparent from the Quran and Prophetic tradition to accept the testimony of non-Muslims against Muslims.

A contemporary judge does not have an authority nor jurisdiction as an individual, but instead he serves to enforce the authority of a written law. Thus what matters here is not the judge's religion - whether they were Muslim or not - but rather the alignment or lack of alignment of this written law with the rulings of Shariah.

The call for consensus on the invalidity of seeking legal judgment from any institution except for Islamic Shariah-based courts is responded to in that a number of major scholars of this Ummah throughout its history have stated that if an Islamic legal judiciary does not exist, it is obligatory for Muslims to seek rulings through the extant judiciary as necessary regardless of its nature order to attain benefits and prevent evils.

There is a question in regards to contemporary Islamic legal verdicts which recognize the non-Muslim judge's divorce based on the assumption of a mandate made by the husband to the judge for divorce because a mandate requires an intention, a will, and an explicit permission.

The law in the West does not impose that which is haram upon Muslims, it only permits it legally, and the Islamic legal prohibition remains as it is in any case.

There is no means to permit legally through a contract that which is forbidden in Islam. If a marriage which differs from the conditions and limitations of the Islamic Shariah is established, it is still considered invalid according to the Shariah as though it has not been established, even if it is legally valid. Thus it has no Islamic legal consequences but it must be nullified and one should repent from committing such an act.

Whatever Allah has made permissible, no one can make impermissible or illegal for all time because absolute eternal prevention is similar to prohibition, which is only for Allah SWT. However, there is room for flexibility and legal recognition for the cases in which the lawful is limited through the law itself.

It is more appropriate if polygamy is not practiced in Muslim-minority countries, not as to prohibit it but in order to prevent oppression and to protect the Muslim family. If there is a need for it, it must be done in a manner which allows for the guarantee of the rights of the second wife and her children, and for it to be established according to its known Islamic legal conditions.

Restricting the age of marriage in the West is valid based upon the benefits derived therefrom, considering that maturity and readiness for marriage in this era for female and male minors alike come at a much later time than in the past.

The closest Islamic legal concept to what is referred to as "separation" in Western law is what is known as "Ilaa'," and is limited to 4 months.

Prophet Muhammad PBUH has ruled with various rulings regarding divorce depending upon the particular details and circumstances. There is no need to favor abrogation of one hadith over another without evidence based on the false assumption of a contradiction, or to give varying weight to different Hadiths that are all Sahih and well-authenticated. It is more appropriate that such rulings are based upon realizing the larger objectives of the Islamic Shariah.

Islamic Shariah for Muslims in the West cannot but support the contemporary considerations of custody law in different countries, and the revelation accords to their rulings.

It is not suitable in the West that a man pays to his ex-wife the expenses that are not legislated in Islamic jurisprudence. More so, the division of shared wealth at the court's discretion is the closest way of attaining the objectives of fairness and compensation in this area. Moreover, Islamic fiqh has introduced the legal verdicts of الكد , فتوى السعاية in order to accomplish the same objective.

Custody in Western laws includes taking care of most of a child's needs and affairs by the male or female guardian, and while this distribution of responsibilities may differ from what is legislated in Islamic jurisprudence, it is more suitable to the circumstances in the West and the role of the guardian in this context.

The statement that divorce in Islam is only the right of men is inaccurate. Women have the right to seek separation from their husbands as per Islamic legal conditions, or to pay a compensation close to what she was given as a dowry for marriage in order to be separated by khula from her husband. It was never mentioned in the sunnah of the Prophet SAW that he denied a woman's right to wish to be separated from her husband.

It is inappropriate, according to Shariah, that the compensation for separation by khula become a door to the extortion of women, consequently taking away her right for a divorce, as that is the prohibited act of constraint.

It is forbidden for both men and women to seek divorce without the occurrence of harm or damage.

Divorce verdicts by court are considered an irrevocable divorce from the moment the judge issues them, and they have Islamic legal and legal consequences on both men and women.

Islamic centers play a critical role which is to reach an agreement between the two parties over the details in a civil manner according to the honored Shariah and finding what is best before going to court so that they do not dispute in front of the court, which may elongate and complicate the process.

Verdicts issued by Islamic legal committees or the leadership of Islamic centers are legally valid according to the Shariah, and family law for Muslims in the West will not be rectified except by this, especially in the cases where the marriage was not officially registered and the woman requests a divorce.