THE IMPLICIT ROLE OF CUSTOM (*‘URF*) IN THE ISLAMIC JURISPRUDENCE OF SAUDI ARABIA AND IRAN

A Comparative Legal Study of *Mu‘āmalāt* (Marriage and Divorce Rules)

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ABSTRACT

This research is an analysis of the connection between Islamic law (*sharīʻa*) and custom (*ʻurf*); it proposes to identify how personal and social issues are treated within contemporary Saudi and Iranian legal approaches. The primary objective is to emphasise the interaction between custom and textual authority, and to develop an analytical framework of *sharʻī* rules: namely, those that pertain to social relations in general and marital issues in particular.

The study compares approaches adopted by Saudi-Ḥanbalī and Iranian-Jaʻfarī scholars towards the *sharʻī* status of *ʻurf* in three particular categories; the methodological perspective (classic and contemporary), the *sharʻī* opinions of scholars (*fatwā*) and the court verdicts of judges (*aḥkām*). The research illustrates the ways in which scholars achieve different implementations in their *sharīʻa* systems through the application of direct or indirect *ʻurf*. This research also examines the extent to which the *sharʻī* regulations have been altered or sustained through the prioritisation of the legal concept of *ʻurf*. The attitude of *ʻulamāʼ* (religious scholars) towards the application of *ʻurf* demonstrates that both the classical Ḥanbalī and Jaʻfarī schools have approved the validity of *ʻurf* in the *sharʻī* area. This applies both to direct usage of *ʻurf* and manipulations of its utility by rational explanations or secondary legal principles.

This research compares the diversity of legal opinions and court verdicts between the two countries. It places a particular emphasis upon the usage of *ʻurf*, whether in the form of a *sharʻī* principle with semi-independent status or the form of a subsidiary source that is dependent upon various *sharʻī* principles. The last two sections link the diversity of legal implementations with the indigenous customs of both Saudi Arabia and Iran – this in turn justifies the complexity and discrepancy of *fatwā*s and *aḥkām* in cases pertaining to personal issues.

Considering *ʻurf* as a legal device alongside various legal principles allows the two states to frame their political strategies in religiously acceptable terminology. It specifically provides insight into the creation of national religious identities through the exercise of state authority. The ambiguity which arises from the transformation of theory into practice plausibly helps to explain discrepancies in the legal systems of the two states and this lends further evidence with which to answer the question of whether or not there is an absence of legal methodology in Saudi Arabia and Iran. However, this thesis attempts to demonstrate that the legal use of *ʻurf* in the two contexts avoids the simple explanation that divergence between the two systems is due to a lack of methodology.

It is hoped that the analysis of the legal concept of *'urf* within the contemporary Saudi and Iranian legal systems will stimulate further research on the role of *'urf*. The current study points towards the need for further research which should deepen our understanding of the ways in which judges, authorised within particular legal systems, have sought to utilise local customs within their *sharī'a*-based courts.

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INTRODUCTION

The development of legal methodology is strongly affected by historical distance from the age in which the texts were promulgated since contextual circumstances disappear and terminologies change. The time and environment in which people live inevitably influence their distinct orientation and evaluation of new circumstances. The *'ulamā'* (legal scholars) do not apply the *uṣūl al-fiqh* (science of jurisprudence) in order to innovate in their religion, but instead seek to increase the adaptability and functionality of religious rules in accordance with time and place. The *fatwā,* as known legal rulings of the scholars, generally reflect their environment and form a substantial collection of local rulings.

This dissertation proposes to examine the usage of *'urf* in the *shar'ī* rules for the sphere of *mu*'*āmalāt* (social relations) with reference to various implementations in Saudi Arabia and Iran. These nations are particularly instructive reference points because a substantial part of their identity is constructed upon the foundation of *sharī'a*, which they use to bolster and support their belief that they are more Islamic than other nations. *Sharī'a* plays a crucial role and establishes the parameters of what is permissible; considerable insight can be obtained through a close comparison of the rulings issued in both countries.

This research suggests that classical *shar'ī* sources can be flexibly interpreted within culturally and socially diverse atmospheres. These sources must be studied with reference to customary context along with circumstances that fall within the permitted limits of *sharī'a*. In a general sense, the reference to *'urf* in harmony with context is relevant to the sphere of social relations (*mu'āmalāt*), as opposed to the area of rituals (*'ibādāt*). The privileged consideration of easiness and best interest for the believers as an objective of the *sharī'a* enables legal authorities to make relative alterations and reforms in the scope of *mu'āmalāt*. Although the terms *'urf*, *'āda* and *ma'rūf* are interchangeably used to refer to custom, habit or good deeds, there is a tendency among the *'ulamā'* to address the term *'urf* with reference to the cases mentioned in the *shar'ī* sources. It is typically held that the absence of rejective and affirmative statements against the prevalent *'urf* in the *shar'ī* sources entitles the customary act to be valid and permissible. The recognition of a recurrent action that is in harmony with the main principles and objectives of *sharī'a* is normally considered permissible from the *shar'ī* perspective.

Islamic law forms the backbone of state legislation within both countries. Saudi Arabia has long asserted itself as the representer and defender of Islam and the Islamic legal system. This is established by the first and seventh Articles of its Basic Law of Governance, the first Article of which states:

> "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunna of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital."[1]

While, the seventh Article reiterates:

> "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet which are the ultimate sources of reference for this law and the other laws of the state."[2]

Likewise, when the Ja'farī scholars obtained state power through the Iranian Islamic Revolution in 1979, they also sought to present themselves as the representers and guardians of Islam worldwide. This is clearly and unequivocally specified in the first and fourth Articles of the Iranian Constitution. The first Article states:

> "The government of Iran is an Islamic Republic, which the nation of Iran based on its long-held belief in the rule of the truth and the justice of the Qur'an, and after its victorious Islamic revolution, under the leadership of *marja'-e taqlīd* the exalted Grand Ayatollah Imam Khomeini, has established…"[3]

The fourth article explicitly confirms that the Iranian constitutional system and judiciary are grounded within Islamic law. It states:

> "All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *fuqahā* of the Guardian Council are judges in this matter."[4]

As stated in the constitutions of both countries, *sharī'a* constitutes the main foundation and basis of their legal systems. It may be asserted that the application of *sharī'a* within the legal systems implicitly refers to these countries Muslim identity and character.

The objective of creating the virtuous Muslim society which would be paralleled by an authentic Muslim state became the principal religious agenda within both countries. Religious organisations in both countries sought to propagate their practices and tenets outside their own countries with the aim of achieving universal religious expansion. This was achieved by publishing religious literature or establishing and supporting international organisations. Success could be evaluated with reference to the spread of these publications and the international religious foundations which placed particular emphasis upon the establishment of operational *shar'ī* legal systems.

The politico-religious agendas of the two states assert Islamic civilization as a role model for the *umma*. Their religious institutions and organisations, in operating at both the individual and collective level, have promoted their own customary practices, ideological movements, and moral attitudes. The proximate goal (the representer and protector of true Islam) has come to predominate over the end objective, to the extent that it has become

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[1] "Basic Law of Governance," Article 1., *Royal Embassy of Saudi Arabia,* March 1, 1992, accessed September 20, 2015, https://www.saudiembassy.net/basic-law-governance.

[2] "Basic Law of Governance," Article 7.

[3] "Constitution of the Islamic Republic of Iran," Article1., *Foundation for Iranian Studies*, accessed October 10, 2015, http://fis-iran.org/en/resources/legaldoc/constitutionislamic.

[4] "Constitution of the Islamic Republic of Iran," Article 4.

established as an official religious strategy within the politico-religious agenda of the two states. Consolidation of a reputation as the defender of the faith and the faithful to Islam has inevitably impacted the decisions of scholars within the two states and fuelled the competition between alternating interpretations of *sharīʻa*. When Muslim countries impose their national identities and religious interpretations in order to further Islamic unification, some disturbances and struggles inevitably emerge from the multiple identities within the Muslim community. Religious scholars are aware of the fact that neither the Wahhābī nor the Jaʻfarī movements have universally triumphed due to their impartiality towards customary interpretation and diversity. Scholarly slogans place particular emphasis upon ecumenical and transnational religious rhetoric, in apparent defiance of the fact that the discourses have developed in a specific local context and are, therefore, encoded with their own cultural codes and practices.

Obedience to scholars and rulers in the Wahhābī tradition and belief in the ultimate authority of the Jaʻfarī tradition are the key implications which scholars have extracted from the interpretation of the Q. 4:59 ("Obey Allah, and obey the messenger, and those of you who are in authority"). Ḥanbalī-Wahhābī understanding had obtained a prominent position within the Kingdom of Saudi Arabia's establishment by the mid-19th century, in no small part due to the contribution of a conservative religious scholar, Muḥammad ibn ʻAbd al-Wahhāb. The percolation of Wahhābī ideology helped to solidify the alliance between the mundane and transcendent dimensions of state and religion – this in turn shaped the legal system and gave *sharīʻa* new direction. This situation highlights the mutuality of Iranian legislation that operates within the wider context of politico-religious theory.

The political components of the Iranian government and the religious elements of the Jaʻfarī school powerfully intertwined within the concept of *wilāyat al-faqīh* (ultimate authority). This concept was introduced to the Iranian community with the intention of strengthening the Islamic character of the state. The members of the Guardian Council, who are able to exert veto powers over parliamentary laws, were granted privileged status as official interpreters of the constitution and *sharīʻa.* A parallel can conceivably be drawn with the alliance between *ʻulamā'* (religious scholars) and *'umarā'* (official rulers) in Saudi Arabia – the sanctity afforded to both recalls *āyatullāh*s and Jaʻfarī leaders in Iran. It should also be noted that both the Iranian-Jaʻfarī and Saudi-Wahhābī religious establishments have become increasingly dependent upon the patronage of the state. In establishing hierarchical Islamic organisations within their legal systems, both countries demand complete compliance from their citizens and a repression of independent thought, while citing the loyalty, security and well-being of their society as justification. Judges are tasked with conveying the *sharīʻa* and

are recognised as its authoritative interpreters, meanwhile, the political rulers of both Iran and Saudi Arabia are recognised as the implementers of Islamic legal rulings decided by judges. Legislation within both countries also requires complete obedience and submission to the political rulers and scholars, as the implementation and interpretation styles of scholars reflect. Nonetheless, the authority of religious scholars and their interpretations are restricted in the political sphere as political rulers have the power to invoke the prerogative of political stability. However, it can not be denied that the *'ulamā'* have broad discretion to create a properly Islamised community within the public arena or social sphere.

Neither Iranian nor Saudi Arabian scholars stand outside their cultural context, and this sometimes results in a functional and practical application of religious texts. *'Urf* mediates between *shar'ī* theory and practice, and makes the ruling practicable. The issuance of a solution without referring to *'urf* or the rejection of its validity may conceivably exacerbate the tension between theory and practice. In addition, pervasive practices within the communities help to shape legal forms and support the development of *shar'ī* rulings. Ultimately, the legal system of the countries emphasises the importance of the Qur'an and the Sunna in the legal arena, but also preserves a special place for the legal concept of *'urf* by way of judicial custom. The official mystification and sanctification of particular interpretations may produce unjustifiable socio-cultural stratification of communities, owing to their disregard of cultural diversity. Both countries have sought to Islamise their societies by sanctioning their own doctrines and initiating reform movements that are grounded upon their local context and indigenous norms. In drawing upon Ja'farī and Wahhābī discourses, scholars position themselves as authentic guardians of the original message and present themselves within the lineage of earlier generations of scholars.

A closer engagement with the location of *'urf* within the *sharī'a* will provide considerable insight into the practical and progressive character of the *shar'ī* system. Analysis demonstrates how jurisprudence can be adapted to solve social problems by advancing local interests and the entrenched norms of followers. This research identifies how the Iranian and Saudi legal systems succeed in generating an enforceable jurisdiction by accumulating classical Ḥanbalī and Shī'ite works. In addition, the discussion also touchs upon points of divergence between the two countries' legal systems. There is a clear potential for variance among the interpretations of scholars, the literal meaning of a text and the implementation of a ruling. This research also examines the construction of current law and classical rulings with specific reference to the usage of *'urf* in *mu'āmalāt* (social transactions). The study of the connection between the *shar'ī* system and *'urf* has originated three distinct methods that can be applied to the reality of customary dynamics in

jurisprudence. The first approach seeks to legitimise *'urf* as a *shar'ī* principle in addressing customary norms applying to both explicit statements of *'urf* and, to a lesser extent, *'āda* (usage or common habits of people). The second rejects the overt use of *'urf* in adopting a conservative approach to *shar'ī* texts while the final approach positions itself between the two methods and adopts a dependent and indirect style of applying *'urf*. Despite the sectarian divisions that separate Saudi Arabia and Iran, it is possible to draw clear parallels between the *shar'ī* status of *'urf* within both countries. While both systems are confronted by similar problems, they have occasionally reached different solutions. This applies despite the fact that the methodological frameworks and *shar'ī* principles which work towards a solution are virtually identical. Thus, *sharī'a* takes into consideration the local conditions of the region as a *shar'ī* constraint. *'Urf* in *sharī'a* puts in place a broad framework that acknowledges the diversity of the two legal systems and enables them to operate simultaneously at the level of theory and practice.

Widespread actions within a particular society are considered to provide a determining proof for the assessment, compulsion, identification, permission, prohibition or qualification of the practices. The acceptance of these criteria amplifies the scope of justification that the parties can refer to in their explanation, the *shar'ī* scholars can address in their *fatwā*s, and the judges can invoke in their *aḥkām*s. The *niẓāmī* (statutory) and *shar'ī* (religious) concepts of *'urf* within the Saudi context demonstrate that the *niẓāmī* regulations embrace customary nature and can be traced back to the Saudi collective identity and national values. However, the *niẓāmī* (statutory) and *shar'ī* (religious) concepts of *'urf* within the Iranian context demonstrate that the *niẓāmī* system approves the validity of *'urf* as an independent legal tool. In addition, the *niẓāmī* system of Iran mainly accepts *'urf* as an independent legal ground for rulings. Meanwhile, the *shar'ī* regulations are mainly concerned with supplementary usage of *'urf* rather than its application as an independent source. The combination of the material *'urf* with the *shar'ī* principles has authorised religious scholars and judges to emphasise the reciprocal interaction between *sharī'a* and *'urf*. Practices within an individual's daily routine are generally held to be customary orders. These customary orders or behavioural norms have become established as *niẓāmī* obligations, as opposed to attributes of the *shar'ī* regulations, over the course of time.

The validity and value of *'urf*, both as *shar'ī* principle and resource, varies in accordance with codified and uncodified contemporary legal systems along with issues pertaining to *shar'ī* ruling. In non-codified systems such as Saudi Arabia, *'urf* is an essential reference point which makes an important contribution in the absence of explicit *shar'ī* rulings, comparing favourably in many respects with codified systems. *'Urf* stems from both

personal relations and social foundations, and it helps to organise general rules of law by exerting indirect influence within non-codified legal systems in the form of dependent judicial *'urf*. In codified systems such as the Iranian example, *'urf* clears the way for legal accomplishments, interpretations and implementations. In particular circumstances, most notably the absence of *shar'ī* textual solutions, Iranian lawmakers have sought to introduce *'urf* as a law with slight modifications in order to strengthen the functionality and practicality of codified regulations. However, Iran's codified *shar'ī* system does not have a general rule which establishes *'urf* as an independent source and *'urf* is not privileged over written regulations. Contemporary Iranian scholars have sought to minimise the gap between *shar'ī* codified rules and *'urfī* doctrines by ensuring that their *shar'ī* rulings are, whenever possible, closely aligned with Iranian *'urf*.

The two countries have developed legal principles which are ideally suited to their social contexts, backgrounds, perspectives, and interests. The main solutions pertaining to *mu'āmalāt* are designed with reference to educational opportunities, intellectual environment, financial situation, social life and practices – in each of these respects, there is a clear divergence between Iran and Saudi Arabia. This is substantially necessary for both countries to protect their dominant structures and create religious nationalities. There is considerable evidence which suggests that the status of *'urf* and its credibility as a source of law in the legal sphere has created extensive controversy among judges and jurists from both countries. Libson renders the consensus opinion among scholars. He states:

> "That is to say, Muslim jurists granted de facto recognition to certain customs by resorting to other, "legitimate," sources of law. A particularly important principle in this context is *istiḥsān*, that is, juridical or personal preference, which became a common means for assimilating custom and usage, although some scholars introduced innovations into the legal system by direct appeal to *istiḥsān*, with no reference whatsoever to custom or usage. Another principle used for the same purpose was *ḍarūra* or necessity. These principles were frequently invoked by the jurists in their discussions of commercial law."[5]

In broad terms, the implementation of *shar'ī* rules pertaining to social transactions can be said to have given credence to *'urf* being applied directly as a legal principle or being applied indirectly as a subsidiary factor. The later relates to the interpretation of various legal principles which include *istiḥsān* (juristic preference), *istiṣlāḥ* (common good), *istiṣḥāb* (presumption of continuity), *sadd al-dharā'i'* (blocking of the means), *ḍarūra* (necessity), and *siyāsa shar'iyya* (politic in accordance with the Islamic law). This research is mainly concerned with evaluating the extent to which these different interpretations can be linked to the secondary sources of *sharī'a*. Variations in *sharī'a* in the implementations of Saudi Arabia and Iran will be examined with reference to the relationship between the sacred and

[5] Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge, London: Harvard University Press, 2003), 70.

the mundane. The compliance mechanism between religious texts and *shar'ī* rulings necessitates a long process of methodological justification. Therefore, customary values, national identity, religious interpretation and the status of women have all become a central locus of confrontations and debates among the scholars and judges who function in these countries official legal posts.

The primary focus of the present analysis is upon the influence of *'urf* within the legal understanding of Saudi and Iranian scholars and judges. This study expands beyond the methodological justification of customary figures within the contents of *fatwā*s and *aḥkām* rather than the procedural implementation of the solutions. Customary consideration operates as the primary mechanism and promotes the adaptability and functionality at a social level. The methodological logic of solutions with reference to *shar'ī* principles provides insight into the socio-cultural components of *fatwā*s along with their implications for *sharī'a*. The link between *'urf* and *shar'ī* principles establishes the basis for a comparison of Iranian and Saudi legal approaches. The examination of the parallel *fatwā*s ascertains the main underlying linkage which conjoins conservative religious scholars, namely, the effects of modernisation, the interpretation of religious rules by means of *'urf* and the use of *'urf* as a *shar'ī* principle. The scholars indigenise a more constructive and flexible approach towards the direct application of *'urf* as a *shar'ī* principle in the examined *fatwā*s in contrast to *aḥkām*. This is because the *fatwā*s possess a non-binding character and are issued with the purpose of bringing religious ordinances into people's lives and of promoting applicable rulings. Common social practices are occasionally regarded as legitimate and valid norms, precedents, and yardsticks. This is why religious leaders have encouraged the community to participate in the common activities and historical events which they justify as customary practice. *'Urf* therefore has a singular importance in helping to determine the significance of the textual sources, interpreting their meaning and promoting their implementation in communal life.

In addition to analysing *shar'ī* opinions and rulings of scholars, this study also compares similar court cases from Iran and Saudi Arabia. The comparison helps to gain further insight into a judge's strategy when applying *shar'ī* sources, along with the interpretation and invocation of *shar'ī* principles. The restricted discretion that is granted to judges by legislators and state authorities enables them to draw upon local and social circumstances when inferring from the legal materials. The examined *aḥkām*s of Saudi Arabia and Iran within this study can be broken down into three parts: the first contains information such as the court case number, the date of the decision, names (of the court clerk, defendant, plaintiff, and judge) and the legal representatives (if there are legal representatives, whose credentials

will also be referenced). The second part summarises the dispute, and also refers to any court discussions. The claims of the parties, the defence of the opposing side, the evidence, any intermediate decisions, the inquiries of the judge and reconciliation judgements are all referenced in this component. The third part includes the final decision of the judge – this brings to light a clear difference between the Saudi and Iranian systems. Saudi judges extensively address the original *shar'ī* sources and invoke their legal reasoning; in contrast, Iranian judges refer to the codified laws when seeking to justify their finalised judgement. This final part of the document pertains to the judge's attempt to handle disputes by employing customary, legal and statutory materials, each of which this thesis will analyse in more depth. The judge's incorporation of local customs into the decision-making process (whether directly or through judicial interpretation) becomes clear during the final part of the judgement. In both societies, there is a widespread tendency for legal activity pertaining to *khul'* and *ṭalāq* divorces to take place outside of the official court. However, this is only possible if the respective parties reach a deal. Cases are submitted to the courts only if the disputes between the parties have not been resolved through arbitration.

Academic Literature

The limited English literature on the division of customary and religious norms in *sharī'a* presents a problem for non Arabic and Persian speaking scholars. Equally, there is a paucity of literature on the approaches that Iranian and Saudi Arabian scholars have adopted when applying *'urf* as a *shar'ī* principle. Most of the scholarly literature on the two countries has tended to focus upon economic activities, political relations, radical movements, sectarian divides or the oil industry. There is, as a result, a clear academic lacuna on the relationship between the interpretation of *shar'ī* texts, socio-legal developments and the judicial implementation process in Iran and Saudi Arabia. However, interdisciplinary social studies have undertaken academic research exploring the relationship between *'urf* and *sharī'a*. This conceptual framework draws upon main bodies of literature which examine classical methodologies of Ḥanbalī and Ja'farī schools of law, the *shar'ī* interpretations of contemporary Saudi and Iranian scholars, and the legal anthropology of Saudi Arabia and Iran.

The main traditional references for the *shar'ī* opinion of Ḥanbalī scholars are chosen from the *fatwā* compilation of Ibn Taymiyya which is known as *Majmū' al-Fatāwā*.[6] The works of Ibn Qudāma, *Al-Mugnī* and *Al-Kāfī fī Fiqh Aḥmad Ibn Ḥanbal* are held to provide

[6] Aḥmad Ibn 'Abd al-Ḥalīm Ibn Taymiyya, *Majmū' al-Fatāwā* (Dār al-Wafā', 2005).

the dominant opinions and methodology of the authoritative sources.[7] The General Presidency of Scholarly Research and Iftā', which is known as Dār al-Iftā', was chosen as a primary source of Wahhābī-Ḥanbalī *shar'ī* interpretation for contemporary Saudi Arabia.[8] This religious institution issues *fatwā*s under the leadership of the prominent Grand Muftī and it has been established as the highest religious authority in the Kingdom since 1953.[9] Because the institution is responsible for conducting religious research and solving problematic matters, it exerts sanctioning power over Saudi citizens. Therefore, the institution performs an essential role in helping to formulate cultural and social norms. In attempting to bridge the gap between the traditional comprehension of *shar'ī* orders and the modernised life standards of believers, the institution strengthens the juristic understanding of religious precepts and modern developments. It also promotes political stability by weakening the ability of radicalised Islamist factions aiming to challenge the government and its institutions.

Qūtad explores the influence of *'urf* upon the financial affairs of the Ḥanbalī school and also sets out its *shar'ī* influence and validity.[10] The main academic studies of Saudi Arabia's legal system and rulings have been written by Muhammad Al-Atawneh, Khaled Abou El Fadl and Frank Vogel. Vogel's *Islamic Law and Legal System*, in particular, is frequently celebrated as a pioneering Western study of the legal process that operates within Saudi Arabia's *shar'ī* court system.[11] The edited study of *The Islamic Marriage Contract* compares the religious marriage procedures of different countries from a legal perspective. The book also broadens the reader's comprehension of minor divergences in the marriage institution, along with the personal rights that *sharī'a* provides to women within marriage.[12] Al-Atawneh's *Wahhābī Islam Facing the Challenges of Modernity* provides considerable insight into the Dār al-Iftā', and sets out the methodology and framing context of practical *fatwā*s that are addressed to the many administrative and socioeconomic challenges of modern life.[13] His study does not engage with the religious worship (*'ibādāt*) of *sharī'a* and he focuses upon personal and social issues within contemporary Saudi society. In his concluding chapters, he reflects upon the fact that scholars tend to differentiate between

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[7] 'Abdullah ibn Aḥmad ibn Muḥammad ibn Qudāma al-Maqdisī, *Al-Mugnī* (Riyadh: Dār 'Ālem al-Kutūb, 1997), and *Al-Kāfī fī Fiqh Aḥmad Ibn Ḥanbal* (Dār al-Kutub al-'Ilmiyya: 1994).

[8] Kingdom of Saudi Arabia The General Presidency of Scholarly Research and Ifta, *Royal Embassy of Saudi Arabia,* accessed September 20, 2015, http://www.alifta.net/default.aspx?languagename=en#1.

[9] Muhammad Al-Atawneh, *Wahhābī Islam Facing the Challenges of Modernity: Dār al-Iftā in the Modern Saudi State* (Leiden: Brill, 2010), 8.

[10] 'Ādil ibn 'Abd al-Qādir ibn Muḥammad Walī Qūtad, *Al-'Urf Ḥujjiyyatuhū wa Āthāaruhū fī Fiqh al-Mu'āmalāt al-Māliyyati 'inda al-Ḥanābalite* (Mecca: al-Maktaba al-Makkiyya, 1994), vol. 1.

[11] Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000).

[12] *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Massachusetts: Harvard University Press, 2008).

[13] Muhammad Al-Atawneh, *Wahhābī Islam Facing the Challenges of Modernity: Dār al-Iftā in the Modern Saudi State* (Leiden: Brill, 2010), xix, and "Wahhābī Legal Theory as Reflected in Modern Official Saudi *Fatwās*: *Ijtihād*, *Taqlīd*, Sources, and Methodology," *Islamic Law and Society* 18, no. 3/4 (2011).

legitimate and illegitimate practices of society when engaging with the unclear and vague criteria that govern customary divisions. In *Speaking in God's Name*, Khaled Abou El Fadl strongly criticises the fact that *sharīʿa*, within the contemporary Saudi state, is largely confined to the areas of family and ritual law; in contrast, it is not obeyed or followed in the administrative, commercial, contractual, criminal or financial spheres.[14] The status of women and gender-related issues are considered inside the *sharʿī* authority.

Al-Rasheed's *A Most Masculine State* provides an analysis of belief systems, economic realities, gender issues, historical events, marriage institutions, political relations and religious rituals in Saudi Arabia. The main innovation of her account derives from the way in which she brings out the conflict between the values of past and present Saudi Arabia.[15] She argues that the role of women within public life can be attributed to the history of the country and the ideology of religious nationalism, rather than Islamic rules. The relationship between the state authorities and religious institutions, along with the influence of political agendas upon the legal system, are explained with reference to religious nationalism. *Contesting the Saudi State*, a separate book by the same author, explains how the state has used the Wahhābī approach to establish nationalistic ideologies. The book explains the connection between *jihādī* movements and prevailing Wahhābī tradition, and also provides insight into how younger generations of Saudis are engaging with Islamic traditions.[16] Yamani's *Polygamy and Law in Contemporary Saudi Arabia* seeks to link the increase of polygamous marriages to the Saudi state structure.[17] She provides a map that clearly distinguishes rulings drawn from the Qur'an and the Sunna and from other sources (mostly *fatwās,* administrative, judicial, ministerial and royal decrees). She asserts that in addition to external and internal factors, polygamous marriage can be traced back to the character and custom of the ruling class, along with the manner in which they understand the religious orders. The imposition of Najdī cultural values as a political strategy is also argued to create an imbalance and social dilemma within the monogamous nuclear family structure. Yamani makes an important contribution by sketching an encompassing portrait of Saudi socio-legal environment and social values, thus providing considerable insight into the custom-based interpretations of scholars.

[14] Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law Authority and Women* (Oxford: Oneworld, 2001).
[15] Madawi Al-Rasheed, *A Most Masculine State: Gender, Politics, and Religion in Saudi Arabia* (New York: Cambridge University Press, 2013).
[16] Madawi Al-Rasheed, *Contesting the Saudi State: Islamic Voices from a New Generation* (New York: Cambridge University Press, 2007).
[17] Maha A. Z. Yamani, *Polygamy and Law in Contemporary Saudi Arabia* (Reading: Ithaca Press, 2008), 2.

The jurisprudential sources (*Al-Lum'a al-Dimashqiyya fī Fiqh al-Imāmiyya*) which was written by Al-Shahīd al-Awwal,[18] along with its commentary (*Al-Sharḥ al-Lum'a al-Dimashqiyya fī Fiqh al-Imāmiyya*) which was written by Al-Shahīd al-Thānī,[19] are both recognised as authoritative legal compilations. These two sources help to clarify the classical Jā'farī rulings when they are applied to the disputed cases. The *fatwā*s of Iranian-Jā'farī scholars are mainly taken from the official websites of *marji' taqlīd*s (sources of imitation or grand religious scholars with authority) who include Ruhollah Khomeini, Ali Khamenei, Hossein Ali Montazeri and Ali Saanei. The *Risāla*s and *Tawḍīḥ al-Masā'il* books along with other contributions from these authoritative Jā'farī scholars are extensively quoted in order to provide insight into their relationship with the customary implementations in Jā'farī school of law.[20] The *fatwā*s reflect the *shar'ī* standpoint of the religious scholars and set out their stance in relation to problematic and novel issues. In addition, they also reveal the tension between *shar'ī* orders (as prescribed in religious texts) and customary values. Thus, they seek to minimise the divergence of the modern and traditional components of Iranian society.

Modarressi's *Introduction to Shi'i Law* provides a general outline of Jā'farī *shar'ī* literature, methodology, and tradition, and lists the most effective jurists and judges.[21] He argues that the reliance on *imām*s on *shar'ī* issues along with the intellectual conflict between rationalists and traditionalists delayed the development of systematic Jā'farī jurisprudence until the fifth century. Modarressi demonstrates that rationalist scholars, in particular Ḥasan al-Ṭūsī, succeeded in integrating *shar'ī* views and rational analysis into Jā'farī jurisprudence by rejecting the authority of single tradition (*āḥād*) as a *shar'ī* source. Calder[22] and Newman[23] demonstrate the divergence of rationalist and traditionalist approaches when they stress the authority of the jurist. Hamid Algar's *Religion and State in Iran* examines the role of jurists in chronological and geographical contexts in Qajar Iran. The book also advances the argument that the separation of political and religious authority resulted in the Jā'farī school being transformed from a sect into to a national religion.[24] Gleave's *Scripturalist Islam* provides a comprehensive account of the chronological development of *shar'ī*

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[18] Muhammad ibn Jamāl al-Dīn Makkī al-'Āmilī (Al-Shahīd al-Awwal), *Al-Lum'a al-Dimashqiyya* (Qom: Dār al-Fikr, 1994).

[19] Zayn al-Dīn 'Ali ibn Aḥmad al-'Āmilī (Al-Shahīd al-Thānī), *Al-Rawḍa al-Bahiyya Sharḥ al-Lum'a al-Dimashqiyya* (Qom: Al-Mu'esse al-Ismā'iliyya, 1999), vol. 1-3.

[20] Mousavi Khomeini, *A Clarification of Questions: An Unabridged Translation of Resaleh Towzih al-Masael*, trans. J. Borujedi (Colorado: Westview Press, 1984).

[21] Hossein Modarressi Ṭabāṭabā'ī, *An Introduction to Shi'i Law: A bibliographical Study* (London: Ithaca Press, 1984).

[22] Norman Calder, "The Structure of Authority in Imāmī Shi'ī Jurisprudence" (PhD. Diss., School of Oriental and African Studies, University of London, 1980).

[23] Andrew Newman, "The Development and Political Significance of the Rationalist (Usūlī) and Traditionalist (Akhbārī) Schools in Imāmī Shi'ī History from the Third/Ninth to the Tenth/Sixteenth Century" (PhD. diss., University of California, 1986).

[24] Hamid Algar, *Religion and State in Iran 1785-1906: The Role of the Ulama in the Qajar Period* (Berkeley: University of California Press, 1969).

methodologies and also offers bibliographical insight into various Jā'farī scholars.[25] *Inevitable Doubt: Two Theories of Shi'ī Jurisprudence* brings out differences between the Akhbārī and the Uṣūlī *shar'ī* theories by comparing the two eighteenth–century Jā'farī scholars. The book clarifies the distinct epistemological attributes, *shar'ī* methodologies and doctrines of the two thinkers, Yusuf al-Baḥrānī and Muhammad Baqir al-Bihbahānī.[26] Ahmad Kazemi Moussavi's *Religious Authority in Shi'ite Islam* explores the juridical hierarchy, the ability to attain a *shar'ī* opinion upon the basis of independent reasoning, and Al-Ḥillī's basis for accepting *ijtihād* within the *shar'ī* system..[27] These books provide a considerable amount of knowledge related to the classical Jā'farī school, its methodology, intellectual and *shar'ī* development.

As for the modern legal systems of Saudi Arabia and Iran, there are considerable academic studies, works and research. Fandy Mamoun's *Saudi Arabia and the Politics of Dissent* and Chibli Mallat's *The Renewal of Islamic Law*[28] observe that official institutions maintain a conservative approach in the sphere of social regulation. These two books suggest that a considerably greater flexibility is evidenced within other areas such as finance and politics; both contributions assert that religious doctrines, organisations and tools are used to create socio-cultural dynamics that derive from the slogans of religious nationalities. Masud et al's edited book, *Islamic Legal Interpretation,* engages with particular *fatwā*s and highlights the operational link between theory and practice.[29] It makes a unique contribution by clarifying Islamic legal thought and emphasising the practical role of *fatwā*s for the followers. Frank Vogel's contribution explores the link between legal structures and state authority, and demonstrates how this feature is amenable to the flexibility and performability of *sharī'a*.[30] Within her chapter, Shahla Haeri analyses Rajsanjani's *fatwā* that relates to a father's permission for temporary marriage.[31] These researchers tend to focus more closely upon practice as opposed to theory when attempting to show the ability of *muftī*s to undertake independent legal reasoning.

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[25] Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbārī Shi'ī School* (Leiden: Brill, 2007).
[26] Robert Gleave, *Inevitable Doubt: Two Theories of Shi'ī Jurisprudence* (Leiden: Brill, 2000).
[27] Ahmad Kazemi Moussavi, *Religious Authority in Shi'ite Islam* (Kuala Lumpur: Istac, 1996).
[28] Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (Cambridge: Cambridge University Press, 1993).
[29] *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. M. K. Masud, B. Messick, and D. S. Powers (Cambridge: Harvard University Press, 1996).
[30] Frank Vogel, "The Complementarity of Iftā' and Qaḍā': Three Saudi Fatwas on Divorce," in *Islamic Legal Interpretation Muftis and Their Fatwas*, ed. M. K. Masud, B. Messick, and D. S. Powers (Cambridge: Harvard University Press, 1996), 262-269.
[31] Shahla Haeri, "Mut'a: Regulating Sexuality and Gender Relations in Postrevolutionary Iran," in *Islamic Legal Interpretation Muftis and Their Fatwas*, ed. M. K. Masud, B. Messick, and D. S. Powers (Cambridge: Harvard University Press, 1996), 251-261.

A number of additional field researchers explore the connection between culture and religion in the two countries. *Culture and Customs of Saudi Arabia*[32] and *Culture and Customs of Iran*[33] are both anthropological studies that attempt to focus upon the closed, conservative and kin-based attributes of the two countries. The intention of the books is to demonstrate how each of these attributes impacts upon religious and *shar'ī* understanding. Lawrence Rosen, in extending an analogy between anthropology and law, seeks to demonstrate that judicial decision-making is linked to the cultural characteristics of society.[34] The clear analysis of the relation between legal and customary aspects will contribute to an enhanced understanding of the implementation process. However, Rosen fails to acknowledge that his approach is flawed because it neglects the religious dimension of Islamic jurisprudence. Delong-Bas's *Wahhabi Islam* extends beyond the main doctrines of the Wahhabī movement in jurisprudence, gender, or women rights, and engages with the militant extremism that is intrinsic to the Wahhābī vision.[35] Ziba Mir-Hosseini in developing her analysis within the theoretical anthropology of law, evaluates legal issues by assuming a uniformity of jurisprudence across cultural distinctions and social boundaries.[36] Her fieldwork provides considerable insight into customs within Iranian society and interactions between formal law and actual legal practices. In illustrating the legal conflict between theory and practice in Iranian society, she demonstrates how jurisprudence is rooted within specific aspects of society and how it interacts with established socio-cultural dynamics.

Libson's comparative work, which examines the status of *'urf* within the foundational process of Islamic and Jewish law, maintains that *'urf* was integrated into Islamic law during its formative period. This integration is respectively attributable to the *ḥadīth*, *ijmā'*, *istiḥsān*, and *maṣlaḥa.*[37] Closer consideration of the *shar'ī* principle of *istiḥsān,* with specific attention to the meaning of public interest, clarifies that legitimate customary practices were more prevalent during the formative era of the legal schools. While Libson identifies that *ḍarūra* (necessity) is mainly referenced in order to incorporate *'urf* into *sharī'a* during the post-classical period, he does not provide a formula which helps to explain the alteration process of using *'urf* within the borders of *sharī'a*.

[32] David E. Long, *Culture and Customs of Saudi Arabia* (Connecticut: Greenwood Press, 2005).
[33] Elton L. Daniel and Ali Akbar Mahdi, *Culture and Customs of Iran* (Connecticut: Greenwood Press, 2006).
[34] Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), 3-4, and *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (New York: Oxford University Press, 2000).
[35] Natana J. Delong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (New York: I.B. Tauris, 2004).
[36] Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Law* (London: I.B. Tauris, 1993), and *Islam and Gender: The Religious Debate in Contemporary Iran* (: Princeton: Princeton University Press, 1999).
[37] Libson, *Jewish and Islamic Law*, 76-77.

Shabana's *Custom in Islamic Law and Legal Theory* explores the chronological development of the concepts of *'āda* and *'urf*.[38] His research stresses the various permutations in the status of *'urf* through the premodern *shar'ī* tradition. At various stages, *'urf* has taken on the appearance of a general *'urf*, a linguistic convention, a *shar'ī* convention, a specific *'urf* and a major theoretical construction. He claims that *'urf* was incorporated into *shar'ī* theory as one of the inductive secondary sources during the early era and he rejects Libson's arguments because of his negative stance towards the *ḥadīth* literature. *'Urf* is treated within the genre of *shar'ī* principles through legal developments, and it finally became established as a legal principle with the consequence that scholars were able to reinvigorate *shar'ī* theory. In addition to explaining the diachronic development, Shabana demonstrates that *'urf* has taken on the form of a built-in mechanism thus enabling it to contribute to the various hermeneutical and linguistic discussions within the pre-modern *shar'ī* tradition. This mechanism resulted in the emergence of diverse subgenres which include *shar'ī* principles and objectives along with substantive law in legal application.

Ibrahim's *Customary Practices as Exigencies in Islamic Law Between a Source of Law and a Legal Maxim*[39] divides *'urf* into three categories: linguistic *'urf* (linguistic convention), *'urf* of premodern judges (judicial custom) and *'urf* of the people (customary laws and social custom enacted outside of a court). He argues that judicial *'urf* can be distinguished from social custom on the grounds that the incorporation of social customs into law through the authorised judges ascribes clear value to the concept of *'urf* (as it contributes to legal pluralism). In referring to judicial and social custom, Ibrahim claims that *'urf* both complies with *sharī'a* and is only referred to fill a legalistic gap or to prioritise one view over another in instances of juristic disagreement. The form of *'urf* which contradicts the *shar'ī* sources presents a clear challenge to the legal theory that Ibrahim attempts to expound. He aims to elaborate a theoretical formula by exploring how the intervention of classical intellectuals have contributed to the development of *shar'ī* principles with the ultimate intention of demonstrating how the status of *'urf* changed in the post-classical period. In outlining his methodology, he argues that advanced standards for the use of *ḍarūra* (necessity) in relation to the principle of *maṣlaḥa* (public interest or public welfare) emerged during the classical formulation period. However, it was rearticulated by post-classical

[38] Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concept of 'Urf and 'Ādah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010), 12, and "Custom, as a Source of Law," *Encyclopaedia of Islam,* 3rd ed. Brill Online, accessed October 02, 2015, http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/custom-as-a-source-of-law-COM_24632.

[39] Ahmed Fekry Ibrahim, "Customary Practices as Exigencies in Islamic Law Between a Source of Law and a Legal Maxim," *Oriens* 46 (2018), forthcoming.

scholars and *ḍarūra* was replaced with *ḥāja* (need) whose prevalent roots enabled scholars to connect *'urf* with the textual sources.

Studies of *sharī'a* do not generally focus upon the question of how *'urf* has been applied as a *shar'ī* methodological principle. The main exception is research that assesses the legal practices of the Ḥanafī school of law during the Ottoman period (contributions from Gerber, Libson and Masud are relevant examples in this respect).[40] The current research thesis is the first comparative study that has systematically sought to engage with the examples of *fatwās* and *aḥkām*s from Iran and Saudi Arabia. In contributing to the literature, this study will, in applying a legal anthropological method, consider the position of *'urf* within the Wahhābī and Ja'farī jurisprudence as a *shar'ī* source. The focus upon *'urf* clearly distinguishes this study from previous contributions that have engaged with Ja'farī and Wahhābī implementation processes, legal structures, and methodological sources.

Legal studies of court decisions have focussed upon the *qānūnī* implementation of divorce and marriage by considering individual countries, as contributions from Afary, Haeri, Mir-Hosseini and Yamani[41] illustrate in more detail. A limited number of studies have engaged with the legal methodologies of marriage and divorce as applied in both countries. The expansive scope of this type of research did not centre around the *'urf* of the local society that was either directly or indirectly expressed within *fatwās* issued by scholars and *aḥkām* issued by judges. This study will therefore focus upon the customary dynamics of *fatwā*s and *aḥkām* that relate to personal transactions, particularly marital issues, in Saudi Arabia and Iran. Centering around *'urf* upon its own terms, this study proposes to engage with the use of *'urf* in the judicial process of decision-making from both a personal and social perspective and from within the parameters of *shar'ī* principles. A comparative perspective will also enable an in-depth understanding of legal approaches within both countries. The comparison establishes the distinctive contribution of this research as no previous academic study has proposed to use *'urf* to analyse the contextual and methodological dimensions of *sharī'a* across two countries. The detailed examination of *'urf* across Iranian and Saudi jurisprudences highlights a synthesis between theory and practice, and modifies the usage of rational justifications and secondary *shar'ī* principles during the legal decision-making process. Here, it is essential to distinguish between the direct semi-independent usage of *'urf*

[40] Haim Gerber, *Islamic Law and Culture: 1600-1840* (Leiden: Brill, 1999), and Muhammad Khalid Masud, *Muslim Jurists' Quest for the Normative Basis of Shari'a* (Leiden: Isim, 2001), and Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law," *Islamic Law and Society* 4, no. 2 (1997).

[41] Yamani, *Polygamy and Law*, Mir-Hosseini, *Marriage on Trial,* Shahla Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran* (New York: Syracuse University Press, 1989), and Janet Afary, *Sexual Politics in Modern Iran* (Cambridge: Cambridge University Press, 2009).

and the indirect dependent usage of *'urf* (with its interpretation relying on various legal principles).

Methodology and Research Hypothesis

Sharīʻa is naturally intertwined with other elements of religion that include Islamic culture and society, and this provides an additional justification for an inter-disciplinary approach. This thesis hypothesises that *'urf* manifests as an important element during the decision-making process and that it should be considered alongside the meanings which underpin religious texts and principles that are used to apply *sharīʻa* in Iran and Saudi Arabia. Irrespective of whether there is a direct reference to *'urf*, the interpretation of textual sources and use of *sharʻī* principles have a relatively close connection to the surrounding contextual environment. The extensive use of customary norms in the absence of *sharʻī* sources or in the interpretation of *sharʻī* texts might be in excess of the permitted legal limits.

The research will strive to provide a comprehensive answer to the following question: in what ways do Saudi Arabia and Iran create various legal interpretations by using different types of *'urf*? Judges and scholars engage with *'urf* by explicitly or implicitly referencing it and divergent customs may conceivably explain variations in the implementation of *sharīʻa* within these countries. The credibility of *'urf* in contemporary legal systems sheds light upon the diversities and similarities between countries and epitomises the transformation of theory into practice.

This research largely works within the framework of legal anthropology because this discipline offers considerable insight into the changing dynamics of customary expressions and collective identity in legal systems. However, the legal component of the research ultimately supersedes its anthropological counterpart, as the overriding concern of this study is to understand the *sharʻī* function of *'urf*. The differences between personal and social rules are explored in depth because the main purpose is to explain differences by establishing connections to the principles of *sharīʻa* in general and the concept of *'urf* in particular. The study focuses upon Saudi Arabia and Iran because these are the foremost centres of Wahhābī and Jaʻfarī learning, in which compounds of *'urfī* and *sharʻī* elements have been formed through extraordinary interpretations. The main focus will be upon *sharʻī* practices and the extent of customary influence over the two countries' contemporary legal systems.

The research method takes a comparative approach which combines descriptive and qualitative materials. Three lines of comparison are pursued throughout the study; the comparison of classical texts belonging to the Ḥanbalī and Jaʻfarī schools (theoretically); the comparison of approaches adopted by contemporary Iranian and Saudi scholars relating to

the legitimacy of *'urf* (theoretically); and the comparison of contemporary *fatwā*s and *aḥkām*s (practically) in both countries. The inductive analytical method is used to survey a representative sample of *fatwā*s that were issued by contemporary Saudi and Iranian scholars (*'ulamā'*). These selections in turn provide considerable insight into the approaches that these scholars use when engaging with *'urf*. The comparison of *fatwā*s will bring out key differences within the implementation and interpretation of *shar'ī* sources. The comparative descriptive method that is set out in the second chapter engages with the issue from a methodological perspective to reveal the different approaches that scholars and states have deployed.

The method of the last two chapters broadly undertakes a qualitative comparison of court materials in order to explore trends among contemporary judges. In the first instance, the current research may be characterised as the first attempt to outline a systematic comparative legal study of Iran and Saudi Arabia within the contemporary period. The study places particular emphasis upon the question of permanency and attempts to identify how scholars ensure, through the deployment of *'urf*, that their opinions and methods are practicable. This research is extensively benefitted from *fatwā*s issued by the Dār al-Iftā' along with the *masā'il* books and *fatwā*s in the official websites of prominent Iranian clerics. The descriptive and analytical methods of texts on *shar'ī* theory and practice divide into two levels. Firstly, the textual approach engages with *fatwā*s issued by scholars, and extracts the *shar'ī* principles and rationality that underpin the rulings. Secondly, through the application of a contextual approach, the rulings are then classified with reference to their natural link with *'urf*. The study also draws on consequentialist theory in order to explain cultural underpinnings in the development of jurisprudence and clarify the role of *'urf* in the process of decision-making.

Field research, in the form of interviews, was conducted with several Iranian scholars (who have been involved in either the official juristic system or educational activities relating to *sharī'a*) and Saudi Arabian judges and scholars. A partial observation method (see Chapter Three) was used to collect data relating to court materials, judges and the legal process in Saudi Arabia. Researchers from Saudi Arabia's King Faisal Center for Research and Islamic Studies assisted the researcher by helping to organise meetings with several *muftis* who function in the Dār al-Iftā', some academicians who are experts in the area of *sharī'a* and a few lawyers and judges. The research institution enabled the researcher to participate in civil, criminal and personal court trials as an external observer. The interviews with judges (*qāḍī*s) and scholars (*'ulamā*) enabled the researcher to gain a broad understanding of respondents' attitudes towards personal and social transactions. Discussions with judges tasked with

examining decisions provided the researcher with considerable insight into the extent to which contemporary judges import classical *sharʿī* sources and principles into their cases. A lack of fieldwork in Iran due to unexpected obstacles limited the scope of this study. In the face of these unexpected developments, the only sustainable solution was to rely upon Iranian scholars who live in Britain, official websites, and online court materials. This was often the only way to gain a fuller grasp of the jurisprudential system and legal institutions in Iran.

Court cases from Saudi Arabia are categorised in accordance with their customary elements and topics; parallel cases from Iranian courts, which have been obtained through an online database, are then selected to make a comparison. A few criteria have been used to choose and prioritise these cases. These include: the availability of identical cases from both countries; the connection of decisions with *sharʿī* principles, the involvement of *ʿurf*; and the presence of classical *sharʿī* materials on the disputed issue. Limited access to Saudi court cases setting apart from those obtained during the area research provides an additional reason to focus only upon these specific examples. Therefore, lack of access to Saudi court cases restricted the scope of examined cases and necessitated the use of selection criteria for the Iranian court materials. The collection of available court materials, and this is particularly true of Saudi Arabia, does not meet the requirement of being statistically representative. However, this is not problematic as the research is qualitative in character focussing upon defining social trends and gaining an insight into different legal rulings and modes of legal thought. However, even in these terms, this study has clear limitations and needs to be complemented by further sociological fieldwork that will provide further insight into how *ʿurf* has been utilised within the *sharīʿa*-based courts. This is a particularly pressing imperative in the case of Iran.

The research extends from the establishment of the Saudi Kingdom (1932) up until 2017. Therefore, it encompasses the first years of King Salman bin Abdulaziz al-Saud, along with a range of contemporary materials. More recent *fatwā*s and theoretical explanations that have been issued close to the current period will be prioritised in instances where there is dispute among the opinion of scholars. The reform initiatives of the Crown Prince Muhammad bin Salman were not consulted. In the case of Iran, the time-period extends from the establishment of the Iranian Islamic Republic (1979) until 2017. Just as in the Saudi case, particular priority will be given to the most recent materials in instance of dispute. Reference will also be made to the opinions of *ʿulamāʾ* in order to adequately focus on the evaluation of *sharʿī* rules. Khomeini's opinion is prioritised as the main baseline for the codification. Its importance is acknowledged and conceived in isolation from the complexity of *sharʿī* opinions. Taking the establishment of the country and regime as the starting points of

analysis was a conscious decision that was guided mainly by substantial legal differences and confrontations with the previous periods. This is true not just at the level of state politics, but also at the level of Wahhābī and Ja‘farī doctrines.

This research divides into four chapters. The first chapter, which introduces key concepts and outlines general themes, brings out the connection between culture, custom and jurisprudence within the Saudi-Wahhābī and Iranian-Ja‘farī interpretations of the *sharī‘a*. The linguistic and terminological differences and connexions between key terms such as *ma‘rūf* (the notion of the good), *‘āda* (usage), *thaqāfa* (culture), and *‘urf* (custom) are discussed in order to clarify the *shar‘ī* status of *‘urf*, and to remove ambiguity from its terminological reference. The chapter explores the concept of *‘urf* within the genre of *shar‘ī* principles and the rejection of invalid *‘urf* in accordance with the methodology of *shar‘ī* schools. A substantial part of the chapter is reserved to define the application which ensures its maximum utility and the criteria which governs its legitimacy. It seeks to demonstrate that even though Ja‘farī and Wahhābī scholars do not theoretically accept the usage of *‘urf* in the *sharī‘a*, it nonetheless functions as an invisible principle which anchors the *shar‘ī* practice of scholars. The reactions of Saudi and Iranian scholars to customary practices were discussed with reference to the *fatwā*s that were issued in relation to the Nowrūz celebrations, women driving, and exchange marriages. The analysis of *fatwā*s highlights the need for more attention to be given to both explicit and implicit references to *‘urf* in textual sources. The consideration of customary interpretations and the extension of the influence of the socio-cultural environment over the *fatwā*s are central issues. The integration of *sharī‘a* into a national state law system makes a change in the way that *sharī‘a* is practised – despite this, the legal systems of both countries still contribute to the independent *ijtihād* of scholars in the implementation process of *shar‘ī* rules.

The second chapter examines the relationship between the *shar‘ī* methodologies of the Ḥanbalī and Ja‘farī schools of law and discusses the contemporary approaches that Saudi and Iranian scholars have adopted towards *‘urf*. In identifying an existing shortcoming within the literature, it illustrates key similarities and differences between the two *shar‘ī* schools. The chapter limits itself to a concise discussion of the *shar‘ī* methodology and statements that have been issued by *‘ulamā’* from the classical to the contemporary period. The diachronic development of the *‘urf* is therefore brought out in more detail. The direct statements of authorised scholars and the solutions that they have derived through *‘urf* are acknowledged to be the textual *shar‘ī* foundations of the concept of *‘urf*, along with the Qur’an and the Sunna, the two founding texts of the *sharī‘a*. After analysing the natural connection between Islamic law and state law (*shar‘ī* and *qānūnī*), the discussion proceeds to ask how Saudi and Iranian

scholars have approached *'urf* from within the parameters of this connection. In addition, the *fatwā*s that relate to the permissibility of eating food are examined in order to highlight the organic and reciprocal link between the concept of *'urf* as a *shar'ī* principle and *shar'ī* limit. The authenticity and reliability of rulings provided by customary practices are evaluated and criticised from the viewpoint of indigenous *'ulamā'* with the intention of demonstrating their stance towards *'urf* in the *sharī'a*.

The third chapter seeks to reveal the inevitable moderation that occurred when the theory of divorce regulations in Saudi Arabia was translated into practice. It commits a specific section to the methodological problems that were encountered when an attempt was made to interpret the *shar'ī* status of *'urf* from the perspective of scholars and state authorities in contemporary Saudi Arabia. The chapter demonstrates the predominant orientation of scholars towards the sources of the Ḥanbalī school and jurisprudential materials. This chapter clearly explains how original *shar'ī* sources (including quotations from the Qur'an and the Sunna, secondary *shar'ī* materials and statements from well-known scholars, albeit non-Ḥanbalī, scholars) are used by judges to produce a functional and reliable decision. Over the course of the chapter, the divorce types and their practicability in Ḥanbalī classical sources are compared to contemporary divorce types and their functionality in Saudi jurisprudence. After outlining a theoretical map, the research analyses two court decisions that relate to the return of marital gifts after divorce and the child visitation rights of the non-custodial parent. The critical approach to the jurisprudence is not solely a legal method, but is also intended to provide insight into cultural and social dimensions in each examined court case.

The fourth chapter, like the third, focuses upon the *shar'ī* implementation procedure and establishes a link between classical *shar'ī* regulations and contemporary rulings related to marital issues, most notably divorce. Subsequent to the establishment of the Islamic Republic, Iran proceeded towards an application of the *sharī'a* providing both an ideal and practical opportunity to assess how codified *shar'ī* rules in accordance with the Ja'farī legal tradition translated into practice. The methodological and systematic comparison between the traditionally approved Ja'farī divorce types and contemporarily accepted divorces is explained. The types are categorised into four (*ṭalāq*, *khul'*, *ṭalīq*, and *tafrīq*) with the intention of providing a nuanced historical analysis. Specific attention is committed to these types of divorces and their associated *shar'ī* processes and procedures. The analysis makes specific reference to the classical Ja'farī texts, codified *shar'ī* regulations and the opinions of authoritative contemporary scholars. Online research identified two court cases which related to the return of marital gifts after a *khul'* divorce and child visitation arrangements for the

non-custodial parents were examined from a *shar'ī* perspective. These cases were closely aligned with the one that was applied to the Saudi cases. The discussion focuses upon the extent to which the judges' decisions and methodology, as evidenced during the trials, were linked to *shar'ī* (religious), *siyāsī* (political), and *'urfī* (customary) elements. In addition, it also asks if customary assumptions were justified with reference to secondary sources of *sharī'a*, with this justification taking the form of judicial *'urf*.

CHAPTER 1: THE SAUDI ARABIAN AND IRANIAN LEGAL POSITIONS ON CUSTOM

Introduction

The construction of bridges between religious studies and the interdisciplinary study of culture enables scholars to further expand the cultural parameters of religion and overcome difficulties related to categorization. This chapter seeks to explore key points by reflecting upon correlations between *ʻurf* and *sharīʻa* rather than just focusing upon the broad understanding of culture. However, the study of *ʻurf* in the field of *sharīʻa* is complicated by the fact that there is a lack of agreement among scholars about how to judge issues in accordance with *ʻurf* and what the status of *ʻurf* as a *sharʻī* principle in the decision making process. The legal aspects of *ʻurf* and its actual role within Islamic jurisprudence are the main questions that this chapter will address.

One difficult question pertains to the issue of what should be defined as ‘positive *ʻurf*’ and what should in turn be defined as ‘religious *ʻurf*’. In addition, it is also important to clarify, with reference to the Saudi Arabian and Iranian understanding, what kind of activities can be legitimately designated as ‘semi-religious customary practices’. In the following account, I initially review the evidence that relates to the objective approach to the usage of *ʻurf* in the *sharīʻa* before then proceeding to identify how legal scholars have reflected upon this application. The analysis focuses upon the adaptation of *ʻurf* to *sharīʻa* and does not therefore attempt to evaluate whether customary practices of *sharīʻa* are more conductive to the interests of the given society. Tracing the position of *ʻurf* and its role within the two *sharʻī* schools (Ḥanbalī-Jaʻfarī) is invaluable because it simultaneously deepens the understanding of *ʻurfī* (customary) and *sharʻī* (legal) dynamics and brings out overlaps and divergences between Wahhābī and Jaʻfarī interpretations of *sharʻī* sources.

1. The Relationship between Religion, Culture and Custom

Culture refers to the completely unified pattern of human behaviour, and it can therefore be said to provide the basis of social stability and values. The philosophical approach suggests that culture epitomises what makes it possible for human beings to live in communities and compensate for their natural weakness.[1] All essential human actions, beliefs, expectations, knowledge, languages, morality, skills or symbols can be said to be fundamental components of culture that exert direct influence over the legal systems. Cultural

[1] Birgit Recki, “Culture,” *Religion, Past, Present: Encyclopedia of Theology and Religion*, 4th ed., (Leiden: Brill, 2007), vol. 3, 619.

anthropological approaches suggest that culture, as a product of human agency, corresponds to bilateral control or the recognition of a reciprocity in which humans are simultaneously creators and creations of culture.[2] When a culture reaches a certain stage of maturation within the society, it dominates each and every aspect of social life, extending from family life to gender relations onto birth/marriage proceedings. Albanase's umbrella category suggests that if culture becomes a subset of religion, religion relativizes culture and comes to serve as a principle that grounds culture or moves beyond cultural limitations.[3] In acknowledging the comprehensive character of culture, Muslim scholars mainly argue that Islam encourages the creation of Islamic culture, and therefore draw extensively upon religious parameters and sources in order to align culture with Islamic doctrines. To put it slightly differently, scholars can instrumentalise culture and use it as a tool to accomplish their goals or Islamise a society. The law is, by its very nature, one of the main components of what has been referred to as the moral constitution of society or the core values of culture. This explains why Muslim scholars try to take control of culture in order to make the legal system Islamic. It should be noted that the elaboration of the incipient law is structured over ethical norms based on the Islamic sources; religious scholars have therefore adopted a combination of customary practices, independent reasoning and various factors. These factors are extracted from the legal system that operates within a specific geographical environment.

Muslim scholars observed that Islam evidences a selective tendency to embrace the positive and beneficial aspects of different cultures and ethnicities. It does not repudiate various cultures in their entirety as long as the culture does not refuse the revealed law or act contrary to the Islamic faith. Most scholars concur that Islam establishes an inclusive legal system by representing and affirming the customary needs of Muslims as long as they do not contradict Islamic tenets. The understanding that anticipates this approach is that the cultural item is deemed to be permissible until it is proven otherwise, a position which clearly echoes the legal principle of 'innocent until proven guilty'. Rosen argues that Islamic law creates the parameters of what is permissible – within this general outline, a broad range of individually unique and customarily specific relationships can be identified.[4] It can therefore be said that *'urf* closely resembles secondary precepts of the law (*shar'ī* principles) under necessity.[5] With regard to the mutual interaction between culture and religion, *sharī'a* from the perspective of religious scholars, should function at the local level by enabling Muslim

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[2] Hubert Meisinger, "Cultural Anthropology; Social Anthropology," *Religion, Past, Present: Encyclopedia of Theology and Religion*, 4th ed., (Leiden: Brill, 2007) vol. 3, 610.
[3] Mark Hulsether, "Religion and Culture", in *The Routledge Companions to the Study of Religion*, ed. John R. Hinnells (London: Routledge, 2005), 500.
[4] Rosen, *The Antropology*, 79.
[5] Umar Faruq Abd-Allah, "Islam and the Cultural Imperative," *CrossCurrents* 56, no. 3 (2006), 363-364.

communities to contribute to and establish effective Islamic roots. Religious scholars perform a crucial role in shaping customary practices and intellectual domains, engaging as educators and reformers, and mediating between formal religious institutions and the wider public.[6] Despite varying ethnic and social backgrounds, the creation of an Islamic culture which functions in accordance with universal values is mainly assured through *khuṭba*s (hymn of praise or religious sermon), *qiṣṣa*s (pious story) and *wa'z*s or *tadhkīr*s (admonition) – each plays an essential role in promoting cross-cultural communication and mutual understanding amongst Muslim communities.

'Urf is constructed in the minds of people by logic and is integrated into the collective dynamics of society on this basis. The term *'urf* derives from the root of *'arafa*, which terminologically stands for what is commendable, good or praiseworthy. Shabana offers a common definition of the term:

> "*'Urf* stands for what has been rooted in (people's hearts and) spirits by the testimony of intellects and that is deemed compatible with good nature...This definition emphasises the rootedness of custom in history and tradition and its compatibility with accepted and approved standards."[7]

In the Islamic normative approach, *'urf* is required to be aligned with the Islamic doctrines; however, the term *'āda* (usage) refers to an individual habit or characteristic feature. It translates as a practice that is repeated without rational justification. While being applied as a *shar'ī* instrument, *'urf* has significantly contributed to the development of jurisprudence primarily in being used as a legitimate basis for interpreting *shar'ī* sources through the exercise of *ijtihād*.[8] It ordinarily influences almost every legal system and encourages the enhancement of legal practice while bridging theory and practice. It is clear that it would not generally be possible for the legal system to operate within the community if its rules contradicted widespread norms or customary practices (generally known as *'urf).*

Sharī'a, when engaged at a theoretical level by scholars, does not accept that *'urf* functions as an independent source for the creation of new *shar'ī* rules; when implemented practically, it frequently resorts to *'urf* as a secondary source for proper implementation of the law. Even if *'urf* is never recognized as a fifth source of *shar'ī* methodology, its influence can be discerned in the justification for introducing changes into the law or principal arguments and decisions. The main advocates of the rejectionist approach to *'urf* claim that the dependence upon human reason rather than divine justification increases the fallibility of practice in terms of *shar'ī* evaluation -upon this basis, it is argued that customary practices

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6 Merlin Swartz, "Arabic Rhetoric and the Art of the Homily in Medieval Islam," in *Religion and Culture in Medieval Islam*, ed. Richard G. Hovannisian and Georges Sabagh (Cambridge: Cambridge University Press, 1999), 50.
7 Shabana, "Custom."
8 Michael Mumīsa, *Islamic Law: Theory and Interpretation* (Maryland: Amana Publication, 2002), 137.

cannot be accepted as *shar'ī* sources. The rejection of *'urf* as an independent source can be attributed to its human origin.

Although the *fiqh* literature rejects the proposition that *'urf* can function as a formal source of law, its widespread application by scholars of different *madhhab*s (legal schools) affirms the power that it possesses when applied within the wider context of a multi-cultural community. The *'urf* has sustained its invisible position and achieved semi-formal recognition in jurisprudence as legal practices have gradually changed. Shabana maintains that the influence of *'urf* can be clearly discerned within the entire legal process: it functions as a criterion (that ensures continued validity or authorizes revision and reconstruction of preceding custom-based decisions), a measure (that ensures feasibility and applicability) and as a source (which operates under the absence of other textual sources).[9] The existence of *'urf* within daily practices forces the normative system to acknowledge it, whether by incorporating customary practices into the legal framework or deeming them to be unworthy of integration.[10] Ali observes that although classical texts provide the main *shar'ī* principles and mechanisms that enable judges to issue rulings, judicial practice continues to be influenced by local customs and considerations of public interest, both of which function as supplementary sources of law in the contemporary juridical systems.[11] As a result, *'urf* may come to assume a more central role in contemporary Iranian and Saudi legal systems because of its general usage during the interpretation of legal texts.

Muslim scholars have observed that *sharī'a* requires flexibility to adapt to new situations on the ground of social realities. It has the potential to function as a *shar'ī* mechanism that engages with the local demands of a Muslim community. At this point, it is important to acknowledge that *sharī'a* is not only based on collective customary practices. Similarly, political orientation, social unity, pure reason or rationality does not provide a sufficient grounding in themselves; however, a combination of each of these factors may conceivably create a legal system that relies on the revealed text and the Sunna.

The Islamic religion originated within the customary context of Saudi Arabia, and in particular the cities of Mecca and Medina, both of which were rarely influenced by different cultures. Whereas the influence of *sharī'a* on *'urf* is clearly noticeable in Saudi Arabia, the influence of *'urf* on *sharī'a* can be observed in Iran.[12] The influence of *sharī'a* upon *'urf* is clearly indicated by the fact that marriage was a customary affair within pre-Islamic societies,

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[9] Shabana, "Custom."
[10] Libson, "On the Development," 132.
[11] Kecia Ali, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," in *The Islamic Marriage Contract Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Massachusetts: Harvard University Press, 2008), 27.
[12] George Makdisi, "Religion and Culture in Classical Islam and the Christian West," in *Religion and Culture in Medieval Islam*, ed. Richard G. Hovannisian and Georges Sabagh (Cambridge: Cambridge University Press, 1999), 5.

where it operated in accordance with different rules. However, Islamic rules altered these arrangements by placing particular conditions on marriage and divorce institutions. This inaugurated significant changes such as restricting the number of wives a man was permitted to have and the number of times a husband could divorce the same woman. Scholars are mainly of the view that Islam reorganized pre-existing family structures and therefore did not alter the existing arrangements wholesale. Although certain rights retain the status of a general principle, the particular conditions of marriage (e.g. the dowry amount) were left to be defined by the people of each period and community.[13] The framework of protection and the manner of its application vary in accordance with local conditions, places and times. The alteration of specific laws within the broad parameters of *shar'ī* criteria are permitted with these individual innovations serving to further reiterate the influence of *'urf* over *shar'ī* principles.

The influence of *sharī'a* upon *'urf* and vice-versa occurred mainly through a natural, silent and spontaneous process. The transference of the knowledge of the revealed law into the practice of obeying religious creeds may conceivably include both negative and positive correlations between *'urf* and*sharī'a*. Most scholars view *sharī'a* as being responsible for protecting the essentials of religion in the development process. In Saudi Arabia, culture is the situational interpretation of reality and the task of*'urf* conceived as an element of religion, is to establish a synthesis between people's world-view and its members' practical rituals. Scholars claim that the *shar'ī* system should provide motivation that guides action and reconfigures social reality. When the customary aspects of Saudi society are evaluated within the conceptual framework of religion, it becomes clear that the widespread authoritarian hermeneutic in Saudi Arabia applies irrespective of the customary and intellectual pluralism that is evidenced in different regions. The intellectual environment in which Saudi jurists operate exposes the limits of interpretation and the dynamics of determination -this applies because each culture has its own subjectivities. The issue is not only the authenticity of any particular source, but also whether the conditions for social associations, the local environment, and the nature of civilization have a determining impact upon the production of a particular rule.

The interaction between religious texts, the readers of texts and the scholars of religion is affected by a number of separate factors. The question of whether cultural sensibilities and subjective values play a determining role in constructing the meaning of texts is open to question -this applies because the readers focus upon the intent of the author

[13] Ziba Mir-Hosseini, "A Women's Right to Terminate the Marriage Contract: The Case of Iran," in *The Islamic Marriage Contract Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Massachusetts: Harvard University Press, 2008), 226.

and consider the interpretation of scholars when attending to comprehend the real meaning of the texts. It is important to emphasize that the exegeses of scholars are commonly shaped by customary realities or local features -these are in turn influenced by a hermeneutic methodology and level of understanding in the process of explanation. The relationship between *'urf* and *sharī'a* is essentially the question of whether the *'urf* is in harmony or conflict with the religion that provides its surrounding environment: religion can either complement or contradict its customary environment.[14] The institutional and everyday structures of religion along with the means through which religion is integrated into adherents' lives are embedded in an encompassing customary context. Abou El Fadl observes that although the purpose of *sharī'a* is to discover the divine will, no single jurist or juristic group can claim authority for exclusive criteria that represents customary variety within *shar'ī* systems, doctrinal diversity and social consciousness.[15] There is a relevant verse (Q. 49:13) which states:

> "O mankind, indeed we created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you, and Allah is knowing and acquired."

The verse emphasises the expectation of differences, individual responsibility, the importance of justice, the multi-layered character of community and the legitimacy as well as neutrality of various tribes or societies. The personal efforts of jurists to obtain correct answers frequently lead the practice of juristic diversity and juristic disputations, as individual understanding has a strong bond with customary dynamics.

In addition, the general acceptance of *shar'ī* methodology makes it possible to change rules in accordance with changing circumstances. With regard to the rationale that underpins the principle, the *uṣūl* (science of jurisprudence or source of jurisprudence) is viewed as immutable and unchangeable while the *furū'* (the understanding and implementation of the *uṣūl* or substantive law) is held to be continually shifting. If the diversity of rules within the *shar'ī* system is evaluated with reference to the concept of *furū'* (as opposed to *uṣūl*), the distinctions might conceivably be approved as falling within the scope of acceptable jurisprudence. Scholars generally agree that *shar'ī* doctrine established that when the reason of the law is changed, the change of law becomes permissible and is required. Upon this basis, it is possible to advance towards the conclusion that the development of interpretation around legal sources and the understanding of communities will be insufficient if it does not take *'urf* into account.

[14] Volkhard Krech, "Culture; Art and Religion," *Religion, Past, Present: Encyclopedia of Theology and Religion*, 4th ed. (Leiden: Brill, 2007) vol. 3, 623.
[15] Abou El Fadl, *Speaking*, 9-10.

2. The Reaction of *Sharīʻa* towards Culture and Custom

In reacting to the customary elements of early societies, *sharīʻa* emphasized various aspects of religion and put in place certain parameters that would enable *ʻulamāʼ* to evaluate customs of later communities. This research divides the customary practices of communities into two basic categories: the first category includes customs that are completely rejected by revealed texts upon the basis of clear explanations. The second category involves customs that are not explicitly engaged by the revealed sources. Upon encountering a new *ʻurf, sharīʻa* presents itself with the intention of providing legal decisions that are underpinned through *sharʻī* methodologies and principles. The rational mechanisms of *sharīʻa* which include *istiḥsān*, *ḍarūra*, *maṣlaḥa*, *sadd al-dharāʼiʻ*, *istiṣḥāb,* or *sīra ʻuqalāʼiyya* help to promote the integration or rejection of new material, flexibility and the relaxation of legal rules that relate to the practice of customary norms.[16] When the *ʻulamāʼ* apply these *sharʻī* principles to a new *ʻurf*, it will either be accepted or rejected upon the basis of personal interpretations that derive from legal methodologies. It might be presumed that, in the works of jurists, *ʻurf* is applied to rationally justify substantive *sharʻī* principles or to provide a foundation for *sharʻī* principles.[17] There are a number of different and sometimes conflicting reasons why a *mujtahid* (legal scholar) may respond negatively or positively to a specific issue. However an exclusionary inducement that operates in accordance with a situation will provide a clear justification for preferring one reason and excluding others.[18] Taking into account public interest or public welfare, *ʻurf* has played an important role in developing jurisprudence with a legitimate grounding in the exercise of *ijtihād* (independent reasoning).

As Abou El Fadl claims, during the first centuries of Islam, custom, practice and unsystematic reasoning became increasingly pre-eminent and the juristic schools of Medina and Kūfa embraced the established practice of local Muslims to be one of the indispensable secondary sources of *sharīʻa*. During later centuries, legal scholars established methodological parameters that emphasised the centrality of textual proof (*dalīl naṣṣī*) and restricted rational principles (*dalīl ʻaqlī*) such as public interests or reason.[19] The tendency to interpret *ʻurf* under the protection of other *sharʻī* sources including *istiṣḥāb* provided a justification for assimilating *ʻurf* along into an acceptable framework in legal decisions. While a judge would be permitted to use *sharʻī* principles that operate under the heading of the *ʻurf*, he is not obligated to do this in any particular case. Prior to settling a rule, it is advisable for a scholar to investigate the socio-cultural environment with the intention of

[16] Gerber, *Islamic Law*, 9.
[17] Shabana, "Custom."
[18] Abou El Fadl, *Speaking*, 22.
[19] Ibid, 35.

accommodating law to real life or vice-versa. Taking into account Iranian and Saudi legal systems, the principle of *istiṣḥāb* opens the doors of jurisprudence to customary implementations as *'urf* is rooted within society's historical experiences.

The principle of *maṣlaḥa* (public interest) may also contribute to the implementation of *'urf* in jurisprudence. The justification for the avoidance of social conflict can probably be found in the concept of *maṣlaḥa*. In other words, the concept of *maṣlaḥa* may conceivably make it possible for the judges to favour *'urf*. Vogel, quoting Shaykh al-Ghusūn, observes that it was common for Saudi *qāḍī*s (judges) to choose the view of one scholar over another while citing *maṣlaḥa* as a justification.[20] Ongoing changes within *shar'ī* decisions that rely on the recognition of public interest can be interpreted as indicating that the *'urf* does not contradict the benefit of society. Gerber reiterates:

> "[I]f despite social developments the laws remained unchanged, the people would suffer hardship, whereas the sharī'a is built on the premise of making the life of the believer easier and as far as possible free form hurt."[21]

In helping to advance the benefit of community, the allowance of applying to customary elements in the process of decision-making that do not contradict the main tenets of Islam could conceivably provide believers with more peace-of mind. *Lā ḍarar wa-lā ḍirār* is another essential principle that symbolises no harm and the causing of no harm and which guides judges when they attempt to choose among possible views in closed cases. The absence of codification in the Saudi legal system does not suggest a negligence of the doctrinal corpus; rather it opens up a positive space between the concept of *'urf*, the decisions of judges and wider social relations. The interpretative authority of Wahhābī scholars is considerably enhanced by the encouragement of reinterpretation of the original sources of *sharī'a* (the Qur'an and the Sunna), so it omits the interpretations of past jurists, insists upon a return to the original sources of *sharī'a* (the Qur'an and the Sunna), suspects towards the classical tradition, rejects blind obedience and imitation (*taqlīd*).[22]

Under the uncodified Saudi legal system, the judges theoretically have more freedom to apply changing customs within the limits of Islamic tenets. The solution of a case could be attributed to *'urf* which the judge has personally experienced. From the perspective of a judge preparing applicable rules, there is probably no escape from the recognition of different customs. While *'urf* has a particular place of importance within the judgement, the freedom of jurists is restricted by the limits of the *sharī'a* and the principles of the Ḥanbalī school.[23] The approach of Saudi-Wahhābī scholars toward the concept of innovation (*bid'a*) is another

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[20] Vogel, *Islamic Law,* 134.
[21] Gerber, *Islamic Law*, 111.
[22] Abou El Fadl, *Speaking*, 174.
[23] Vogel, *Islamic Law,* 110.

core aspect of jurisprudence that restricts the autonomy of judges in the issuance of *fatwā*s.[24] Conversely, although Iran's legal system acknowledges the principle of *lā ḍarar wa-lā ḍirār* in the codification process, codified law provides no theoretical grounds for consideration that this principle can be easily applied in the jurisprudential area – adherence to the written or codified regulations could clearly militate against this. However, it is important to remember that this principle is obtained with the assistance of *fatwā*s issued by Iran's religious leaders. The intervention of Iran's *āyatullāh*s and the community's spiritual leaders may solve customary problems by applying this principle with the aim of extracting appropriate, practicable and flexible *shar'ī* rulings.

The two countries advocate a religious agenda that is based upon a general order for the Muslim community to form special groups in which they pursue good and forbid evil. This is an imperative which is justified in relation to Q. 3:104 ("Let there arise out of you a group of people inviting to all that is good, enjoining *al-ma'rūf*, and forbidding *al-munkār*."). The fulfilment of the duty, which can be conceptualised as *'amr bi al-ma'rūf nahy 'an al-munkar*, is compulsory for every ruler in Saudi Arabia and Iran. Every Muslim citizen is compelled to pursue it without neglect or deviation from the basic principles of *sharī'a*.[25] While the commanding of right appears as a straightforward imperative in both countries, the forbidding wrong also has an important contribution to control and change both countries' legislative systems. The principle and its transformation as a consequence of the control of states have profoundly shaped the chronological development of *shar'ī* methodologies and interpretations of *shar'ī* sources.

The social environment of a community is another element that allows *'urf* to exert influence over *sharī'a*. It may be said that the incumbency of religious rituals results in *'urf* being recognised as a source of law – this applies because the law cannot be isolated from the context in which it operates. In the *fiqh* literature, the *'ulamā'* do not define what people are permitted to do in their lives and this in turn gives the *sharī'a* considerable flexibility. Therefore, it is necessary to develop a perspective that engages with *'urf* and its interaction with formal legalised religious tenets in order to produce an applicable juridical system – this is necessary because the *sharī'a* leaves considerable scope for the insertion of *'urf*.[26] However, these blank areas are not completely left to the discretion of the jurists, but are instead interpreted in accordance with mutual methodologies or basic presuppositions. Abou El Fadl observes that although the various communities may diverge to an extent that they

[24] Al-Atawneh, *Wahhābī*, 88.
[25] Vogel, *Islamic Law,* 170.
[26] Lisa Wynn, "Marriage Contracts and Women's Rights in Saudi Arabia: Mahr, Shurūt, and Knowledge Distribution," in *The Islamic Marriage Contract Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Massachusetts: Harvard University Press, 2008), 201.

may justify identifying themselves as separate communities, sufficient commonality may enable the establishment of a larger overriding community.[27] Jurists and judges in addressing real-life problems in accordance with consideration of individual expediency have emphasised *'urf* both directly and indirectly.

It is important to recognise that the legal authorities are judges both in Saudi Arabia and Iran and that their judgements will reveal a close congruence with the social environment around them. Their decisions may indirectly refer to *'urf* as a source of law in attempting to maintain an internal harmony between community and *shar'ī* rules – this applies because the law allows the denial of a legal difficulty in order to enhance juridical effectiveness. On unknown issues, the judge considers *'urf* to be an applicable source that can be integrated with the *'ulamā'*s established doctrines. However, it should be remembered that decisions attained by particular Muslim community in various times and places may only remain binding if they continue to serve the same purpose for which they were initially intended. The production of solutions for specific problems connected with particular periods and conditions are mostly based on special customs (*'urf khāṣṣ*) which are esoterically known to that community. It might therefore be argued that distinct solutions for common issues that apply across countries originate within the customary practices of the local area – this applies because decisions based on particular *'urf* does not always need to be binding upon other Muslim societies that live under different conditions. This rule is put in place in order to serve the society's best interest and to prevent a situation in which harm outweigh benefit.

The evolution of jurisprudence has strong connections with customary, linguistic and methodological elements because the commemorative function of symbolic communication skills revives the collective conscience and renews the community's sense of identity. The practical performance of *'urf* gives insight into the degree of language and literacy in return for the language reflecting and preserving the customs of society.[28] With regard to the meaning (*mafhūm*), the difference between the relationships of culturally-based meaning and possible linguistic meaning may help scholars to better understand the ways that jurists construct rulings and the role of reference, association, signs, and symbols in the formulation of such rulings. It must be noted that while the relativistic subjectivity of interpretation impacts upon rulings, scholars, as Abou El Fadl states, share a common language, common linguistic practices, epistemological assumptions and particular methodologies of jurisprudence.[29] Linguistic engagement is noticeable as a complex, dialectical, dynamic and interactive process of *shar'ī* interpretations. The acquiescence and awareness of this factor

[27] Abou El Fadl, *Speaking*, 123.
[28] Delong-Bas, *Wahhabi Islam*, 82, 93.
[29] Abou El Fadl, *Speaking*, 122.

provide an advantage to judges involved in jurisprudence because individuals use their local language to demonstrate their decisions or reactions to daily events. The judges must acknowledge the local meaning of words along with terminological understanding when in the process of interpreting statements. Scholars generally accept that there are both negative and positive local words that can be used to indicate consent or rejection of marriage – each of these specific expressions have to be accepted in accordance with their local meaning by the legal authorities. In evaluating the ability to understand dynamics within the society, the qualified judges evaluate under what conditions and in what respects the local context have meaning.

3. The Distinction between *Thaqāfa* (Culture), *'Urf* (Custom) and *'Āda* (Usage)

Culture (*thaqāfa*) covers all of human production and therefore presents itself as an umbrella category; however, custom as sub-branch of culture is more interested in actions and practices rather than beliefs, ideas or thoughts. The chronological enhancement of the *shar'ī* context of *'urf* provides useful insight into legal methodologies that perpetually dealt with accommodating agreeable customs to *sharī'a* while neutralising disagreeable ones.[30] Close examination of the treatment of culture and its subcategories (*'urf* and *'āda*) that perceives it from a *shar'ī* viewpoint reveals that *'urf* is a part of culture that could be used to mediate between legal theory and practice in jurisprudence. Ibrahim claims that the majority of premodern jurists tend to use the two terms (*'urf* and *'āda*) interchangeably, but there is a slight distinction, albeit not recognised by most jurists, in emphasising the collective nature of *'urf* and the individual aura of *'āda*.[31]

When translated from the Arabic verb *'arafa* (to know), *'urf* literally means that 'which is known' and 'which is granted to be acceptable and familiar to the community' as a social value.[32] A group of exegetes read the words of *'urf*[33] and *ma'rūf*[34] in the Qur'an and took this to establish faith in God and his Prophet along with adherence to God's injunctions. Ziadeh and Othman observe:

> "When God ordered that good be done and that evil be shunned, He could not have meant by *'urf* and *ma'rūf* the good which reason or custom decrees to be such, but what he enjoins. This explains why *'urf* in the sense of 'custom' or 'usage' could not be included among the sources of law in the classical theory which limits these to the Qur'an, traditions (*ḥadīth*), consensus (*ijmā'*), and analogy (*qiyās*)."[35]

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[30] Shabana, *Custom*, 3.
[31] Ibrahim, "Customary Practices", 225.
[32] Farhat J. Ziadeh, "*'Urf* and Law in Islam," in *The World of Islam: Studies in Honour of Philip K. Hitti,* ed. James Kritzeck and R. Bayly Winder (New York: Macmillan Co, 1959), 60.
[33] Q. 7:199 reads: "Take what is given freely, enjoin what is good (*ma'rūf*), and turn away from the ignorant."
[34] Q. 3:110 reads: "You are the best nation produced [as an example] for mankind. you enjoin what is right (*ma'rūf*) and forbid what is wrong and believe in Allah. if only the People of the Scripture had believed, it would have been better for them. among them are believers, but most of them are defiantly disobedient."
[35] Ziadeh, "*'Urf*," 62, and Mohammad Zain ibn Haji Othman and Muhammad Bakhit al-Muti'i, "*'Urf* as a Source of Islamic Law," *Islamic Studies* 20, no. 4 (1981), 345.

Although scholars are compelled to determine criteria for *'urf*, they generally conceptualise it as a good within the*sharī'a.* Reference can also be made to *'āda* (usage or habit) which is another sub-term of 'culture' and generally refers to individual experiences that are not common as *'urf*, but which can sometimes signal collective activities along with *'urf*. The two terms may appear to be inseparable but, in fact, their interconnectedness may account for the confusion that the terms often evoke. The differences between the two can be traced back to the divergence between collectivism and individualism along with generality and speciality. Scholars generally assume that *sharī'a* does not produce rules that function in accordance with the habits of a few or even a substantial minority within a group – this is the reason why *'āda* is not held to provide a valid basis for *shar'ī* decisions.[36] However, when it is used to refer to the collective act of a substantial number of people, *'āda* is treated in the same way as *'urf* . If the culture becomes the subject matter or material of jurisprudence, it is referred to as *'urf* that terminologically obtains validity in the *sharī'a* as a built-in mechanism. However, if it is not examined by the *shar'ī* system or is not the subject of the *sharī'a*, it is generally called *'āda* and cannot therefore be treated as a valid source in jurisprudence. Shabana observes:

> "From the religious perspective, custom is perceived as a negative construct that corrupts the original and pure essence of religion. From the legal perspective (as a legal tool), on the other hand, custom is perceived positively as a means that enables the legal systems to adapt and adjust to different contexts."[37]

The terminology is fluid in defining specific legal terms because the *'ulamā'* do not use the same criteria to identify various legal terminology. An established tendency puts in place an arrangement in which *'āda* is used to refer to objects and issues which fall outside of the Qur'an and the Sunna while *'urf* is used to refer to objects, issues, and common practices which fall within both reference points. Although the definitions of *'āda* (usage), *'urf* (custom) and *thaqāfa* (culture) are multifaceted, it is possible to draw upon a legal perspective to provide clear examples for each category – this will in turn make the overall division of categories more understandable. First of all, *thaqāfa* should, in general terms, be understood to encapsulate both *'āda* and *'urf* with each component of the two categories being understood to be a constituent element of culture. Henna night is an example of *'āda* while the identification of the level and type of *mahr* (dowry) as a religious ritual is an example of marriage *'urf* in Saudi Arabia and Iran; meanwhile, variations which distinguish the two cultures can be traced back to local conditions, environment and understanding.

In the first instance, the bride's henna night before marriage can be said to be an important ritual accompanied by symbolical and recognized meaning that is embedded within

[36] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), 283.
[37] Shabana, *Custom,* 3.

Saudi and Iranian societies.[38] Because the root of the ritual maintains cultural thought patterns, the social cohesion of communities and traditional values, it does not have any connection with religious doctrines or rulings. Each region has its own *ʿāda* for henna nights which include covering the palms of the bride's hand, both hands and feet or decorating the hands with traditional motifs by using henna – the nature of the occasion therefore varies in accordance with social doctrines, values and practices. The ceremony's concept falls inside the category of *ʿāda* (usage), and this excludes the cultural event from being examined by*sharīʿa.* The event is not an issue for *sharʿī* rulings because there is no religious requirement or obligation in the main two sources (the Qur'an and the Sunna) that orders the organisation of the henna night before marriage. Conversely, the payment of dowry is one of the main principles that is required for the marriage to be approved as valid under *sharīʿa*. However, the qualification of the compulsory payment and specification of its time are generally decided in accordance with the cultural dynamics of communities.[39] When the cultural elements are applied to complete religious rituals or cultural practices are examined from a *sharʿī* perspective, these cultural factors are considered to fall within the *ʿurf* category. The *ʿurf* of local people when defined as a characteristic attribute becomes a determining factor that can be used to identify the amount of dowry – relevant examples include educational level, family structure, kinship traditions, legal capacity or tribal values. Because there is no specific explanation about the amount of dowry in the main sources, *ʿurf* is used as a *sharʿī* source to determine the actual amount of dowry.

There are different kinds of categorisations that are applied to *ʿurf* , but this study will examine *ʿurf* as an abstract tool of *sharʿī* theory which is applied to justify various practices or produce solutions in *sharīʿa.* It may be observed that *ʿurf* is an expression of cultural and social norms whose legitimacy requires additional validation by either legal or religious authorities. Because the application of *ʿurf* seeks the endowment or support of legal methodologies or principles, the dependent nature of *ʿurf* clearly distinguishes it from other *sharʿī* sources which include *ijmāʿ*, *istiḥsān*, or *istiṣḥāb.* The archive of the Ottoman legal system represents the most detailed examples where *ʿurf* supplanted *sharīʿa* by incorporating regularized *ʿurf* into *qānūn*s (the Sultan's acts and orders), which was the jurisprudential system that operated in the Saudi region prior to the Kingdom's establishment.[40] In a similar manner, Iran applied bilateral cooperation between *ʿurfī* and *sharʿī* jurisdictions; the first was resisted by state authorities who retained the power of sanction while the second was resisted

[38] Long, *Culture and Custom*, 69.
[39] Long, *Culture and Custom*, 66-67, and Daniel and Mahdi, *Culture and Custom*, 165.
[40] Farhat J. Ziadeh, "Permanence and Change in Arab Legal Systems," *Arab Studies Quarterly* 9, no.1 (1987), 23.

by religious scholars who possessed limited enforcement power.[41] Ibn ʻĀbidīn, a famous Ottoman jurist upon taking the enhancement of the validity of *ʻurf* into account sought to divide *ʻurf* into two categories in accordance with its comprehensiveness: *ʻurf khāṣṣ* (special custom) and *ʻurf ʻāmm* (general custom).[42] If the latter conflicts with the text, it is not permissible for it to be followed; however, it can instead be accepted as a limiting criterion of the text upon the condition that it only contradicts certain elements of the text. Because special custom is delimited to a specific area, it is not used for general provisions of the texts – this applies whether it conflicts with the texts or not. Another type divides custom into *ʻurf qawlī* (verbal custom) and *ʻurf fiʻlī* (actual custom).[43] Verbal custom focuses upon the usage and meaning of words in a literal sense, but the actual custom is understood to be the recurrent practices of people and is accepted as valid on this basis.

The main sources of *sharīʻa* include two primary sources (the Qur'an and the Sunna), two procedural sources (*ijmāʻ* and *qiyās* -Wahhābī school-, *ijmāʻ* and *ʻaql* -Jaʻfarī school), and a number of inductive sources (*istiḥsān*, *istiṣḥāb*, *istiṣlāḥ*, *maṣlaḥa*, *sadd al-dharāʼiʻ,* or *sīra ʻuqalāʼiyya*). Libson summarises the gradual development of *ʻurf* in Islamic law: incorporation of *ʻurf* into the Sunna, identification of *ʻurf* with *ijmāʼ*, disagreements arose in relation to the methodological collections upon the status of *ʻurf*, interpretations of *ʻurf* using other *sharʻī* sources, the equivalence of *ʻurf* with the written text, and the compilation of rulings involving customary practices.[44] During the chronological development of the *sharʻī* principles and methodological system, *ʻurf* has been treated inside of these sources up until the point where inductive sources obtain their final shapes and contexts.

In the first instance, *ʻurf* and its influences are assessed within the primary and procedural sources put in place by Saudi-Wahhābī scholars – this is deemed to be appropriate because Saudi Arabia is the country from which the Islamic religion emanated. The effect of prevalent *ʻurf* during the time of the Prophet could potentially be located in the foundational process that corresponds to a school's methodology. In the second instance, the application of *ʻurf* within the inductive and procedural sources may be achieved through the Iranian-Jaʻfarī methodological hierarchy. This may be required in later instances as the *sharʻī* system needs to adapt to local dynamics if it is to be successfully applied in the new territories. Al-Ṭūsī, the eleventh century Jaʻfarī scholar, uses the principle of *ijmāʻ* to substantiate and legalize the customary practices and equalises its status with *ijmāʻ* whenever there is no definite textual

[41] A. K. S. Lambton, "Maḥkama," *Encyclopedia of Islam*, 2nd ed., Brill online, accessed May 12, 2015, http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/mahkama-COM_0625.
[42] Othman and Al-Mutiʻi, "*ʻUrf*," 346, and Ziadeh, "ʻ*Urf*," 63.
[43] Kamali, *Principles*, 291.
[44] Libson, "On the Development," 141-142.

ruling.[45] However, the most common method that was used to develop customs peculiar to the society in later centuries was to connect or combine it with other *shar'ī* principles (in particular *istiḥsān* and *sīra 'uqalā'iyya*) without directly recognizing it as a formal *shar'ī* source. In addition to these methodological implementations, the concept of *'urf* is sometimes used to provide rational and non-textual grounds for the jurisprudence when *shar'ī* sources are absent.

4. Conditions for the Application of *'Urf* in the Jurisprudence

Legal scholars specify certain criteria that must be in place if *'urf* is to be considered as a legal factor – these include compatibility with the Islamic faiths, conformity with *shar'ī* texts and the production of harmless results that can be rationally applied, and which can be aligned with the general application. There is a deeply ingrained tendency to accept common practices within Muslim society as the basis of permissible action in large part due to the fact that the Prophet had once stated "my community will not agree on an error".[46] This *ḥadīth* establishes that if a Muslim society adheres to a certain practice, the common agreement states that it cannot be conceived as wrongdoing unless it rationally conflicts with main tenets. The cultural elements of the pre-Islamic Arabs which ingrained virtues such as faithfulness, honour, generosity, and patience were accepted as useful basis upon which to strengthen the collective Muslim identity and establish relationships between communities.

It is not an obligation for all Muslims to obey these *'ādā*s of Arab society, but they are advisable social behaviours that will benefit the entire community. The chronological scope of *'urf* presents a question which arises in the formulation process whether the *'urf* of later and new territories should be treated as equivalent to the *'urf* that was prevalent at the time of the Prophet. Accepted opinion maintains that the *'urf* of the new community should not conflict with Islamic principles or tenets if it is to be recognised by the *shar'ī* authorities. The conceptual framework of jurisprudence allows for legitimate disagreements between the branches (*furū'*) – this, however, does not extend to the fundamentals (*uṣūl*) or basics of *sharī'a* which are ascertained by differentiating between the *uṣūl* and the *furū'*.[47] The customary practices of communities remain valid as long as there is no provision on a given matter in the main sources of *sharī'a* (the Qur'an or the Sunna). At this point, the presence of different *ḥadīth* sources that are regarded as authentic by Wahhābī and Ja'farī movements has drawn the attention of legal scholars to the question of diversity in the jurisprudence. It must be emphasised with reference to the main *ḥadīth* sources and the contextual doctrines of

[45] Libson, "On the Development," 149-150.
[46] Muhammad Ibn Yazīd ibn Mājah, *Sunan Ibn-i Mājah*, trans. Muhammad Tufail Ansari, no. 3950 (Lahore: Kazi Publications, 1996), vol. 5, 282.
[47] Abou El Fadl, *Speaking*, 65.

societies that what is considered to be religious in Saudi Arabia may instead be viewed as customary in Iran.

The position of *ʻurf* can be rejected on two grounds: the first pertains to revealed texts and the second relates to temporary rejection with rational methodologies or secondary sources of *sharīʻa*. The first category of *ʻurf* which is rejected completely by clear texts is not debatable and it has not therefore given rise to substantial differences in the jurisprudence. The ruling derived from explicit sources cannot be altered permanently by *ʻurf* because *ʻurf* cannot prevail over the *sharʻī* ruling extracted from the authoritative *sharʻī* text (*naṣṣ*)– this applies even if the origin of the textual rule pertains to local practices or values. Because the pre-Islamic Arab *ʻurf* was generally corrected and approved by the Qur'an or the Prophet, these early customs do not give rise to debates amongst scholars.[48] For example, during the pre-Islamic time, marriage with the divorced wife of adopted sons was prohibited and against the *ʻurf* of the Arabian Peninsula. However, this *ʻurf* was abolished by the practice of the Prophet with the explicit command of God. The Prophet then married to Zaynab bint Jahsh who was divorced by Zayd bint Ḥāritha. Zayd bint Ḥāritha was adopted by the Prophet after his manumission and the dissolution of his marriage with Zaynab bint Jahsh. The verse is also accepted as conclusive evidence that determines the boundary of marriageable women by *ʻulamā*'.[49] It is conceivable that the customary practice of pre-Islamic community was repealed and permission to marry the divorced wife of an adopted son was generalized and permitted by the Qur'anic verse, implemented and actualised by the Prophet's Sunna. If the *ʻurf* contradicts a clear *naṣṣ*, the Qur'an and the Sunna, it is forbidden.

The second category of *ʻurf* that is rejected by *sharʻī* interpretation contributes to variation within the legal area because personal interpretation is affected by the social dynamics of a region. It should be noted that the recognition of *ʻurf* in concordance with the Islamic parameters or positive cultural identifications does not presents a clear difficulty to the implementation process. The customary norms enjoy presumptive validity unless they pertain to a matter explicitly prohibited by a revealed text. Analysis of the results of *ʻurf* that is conducted in accordance with its negative and positive outcomes from socio-religious perspective is another aspect of the decisions that helps to determine the rejection of customary practices. If the *ʻurf* involves no tangible evil such as abuse or harm, but raises minor doctrinal questions, the *ʻulamā'* generally permit it to go into use and then wait to see

[48] Othman and Al-Mutiʻi, "*ʻUrf*," 345.
[49] Q. 33:37 reads: "...So, that there are no questions for the believers (regarding the) marriage with the wives of their adopted sons, after they have dissolved the marriage with the necessary (steps) with them (their ex-wives). And Allah's (divine) order must be completed and fulfilled."

if problems arise whether in marital adjustments or litigation.[50] Upon encountering various circumstances, human needs automatically produce new customs and social changes that go beyond the provisions of the *shar'ī* rules. However, although the *'urf* itself may contribute to useful consequences such as unifying society, its position might, as a result of heightening symbolic interaction with the non-Islamic religious elements, create complexity in the legislation.

5. Methodological Sources of Scholars for Custom

Contemporary Saudi *'ulamā'* primarily remain faithful to the tenets of Ibn Ḥanbal and Ibn Taymiyya and therefore stress adherence to the *naṣṣ* and to the transmitted tradition (*naql*) which is prioritised over reason ('*aql*). In contrast, Iranian scholars are mainly loyal to the *imām*s' teachings and therefore avail themselves with *'aql*. When qualified scholars subsequently encountered an issue requiring *ijtihād*, they overcame the deficiency as independent *mujtahids* by adopting legal constructions and methodologies. These jurists must possess a sound understanding of law, legal theory, linguistic analysis, logical deduction of the law from its sources, and methods of legal reasoning. These are prerequisites because they are accountable for determining the law in unprecedented cases in accordance with the principles of a school. The resulting opinions are added to the repertoire of the school's doctrine and then discussed by following generations of jurists. However, if the *mujtahid* finds that a ruling in a particular case has already been derived and elaborated by the authorities of *madhhab*, he will generally adopt it and will not call it into question by seeking textual evidence.[51] For Wahhābī scholars, Ibn Ḥanbal and Ibn Taymiyya's decisions are binding while Ja'farī scholars act in accordance with the rulings of *imām*s – both ensure the protection of *uṣūl* and *furū'* for later generations.

The *'ulamā'* divide the main sources referenced by Wahhābī scholars when issuing legal judgements into separate categories: the Qur'an and the Sunna, *ijmā'*, the *fatwās* of the companions, *qiyās*, *istiṣḥāb*, *maṣālīḥ mursala*, and *sadd al-dharā'ī'*.[52] Wahhābīs, in the same vein with Ja'farī scholars, accept *istiṣḥāb* (presumption of continuity) as a *shar'ī* principle and deploy it in order to expand legal rulings – this, however, is contingent upon the assumption that in the absence of any definite evidence, rulings will continue unchanged. If the scholars consider *'urf* to be part of the evidence, the exercise of *istiṣḥāb* increases in *shar'ī* rulings.[53] The underlying intention of the legal judgements establishes that the scholars

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[50] Vogel, *Islamic Law,* 125.
[51] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 11.
[52] Muhammad Abu Zahra, *The Four Imams: The Lives, and Teaching of Their Founders,* trans. Aisha Bewley (London: Dar Al-Taqwa, 2001), 475.
[53] Abul Hakim I. Al-Matroudi, *The Hanbali School of Law and Ibn Taymiyyah Conflict or Conciliation* (London: Routledge, 2006), 37.

issue *fatwās* based on *maṣlaḥa* (public interest) in order to avoid moral and social corruption.[54] Wahhābī scholars also admit the principle of *sadd al-dharā'i'* (blocking of illegitimate means) which helps to achieve the desired prohibition of unlawful actions. This principle expands, strengthens, and enriches the scope of jurisprudence while enabling it to respond to changing circumstances by removing harm.

Al-Atawneh notes that, in addition to these principles, the scholars now go beyond Ḥanbalism and draw inspiration not only from their Ḥanbalī intellectual predecessors, but also from a wide array of non-Ḥanbalī traditions and scholars – in doing so, they cross the borders of Ḥanbalī legal epistemology.[55] The limitation of the practice of *ijtihād* to qualified *'ulamā'* promotes *taqlīd* (imitation) for those who are unqualified to investigate the sacred sources, while characterising *maṣlaḥa* (public interest) in conformity with the five objectives of the *sharī'a* (*maqāṣid al-sharī'a*). This in turn justifies the tendency among contemporary scholars to renew *sharī'a* in the contemporary period. Upon encountering the challenges of modernity, religious scholars also encouraged to draw upon the selection of *fatwās* from other schools (including the Mālikī, Ḥanafī, and Shāfi'ī), doing so upon the grounds that the Ḥanbalī school cannot provide solutions to all the problems of contemporary life. Layish and Vogel claim that this selective inclination and tolerance towards the other schools symbolises the pragmatic approach rather than theoretical investigation and refers to the scholars' endeavours to make *sharī'a* compatible with modern issues.[56] The contemporary assignment of other *madhhab*s' scholars within the Board Council of Ulama is excused upon the basis of this tendency. Although the Saudi *'ulamā'* apply the methods, opinions, and rulings of different schools, contemporary Wahhābīs generally favour the Ḥanbalī school as a method of argumentation, especially in cases pertaining to legal disagreements.[57] It might therefore be observed that contemporary Saudi scholars are committed followers of the Ḥanbalī methodology, but support the amalgamation of the *furū'* of schools when it is deemed to be necessary. In reality, specific rulings may sometimes to be prioritised in cases where the interests of society are served better by the application of a particular law – this applies even if it has not been decided by Ibn Ḥanbal or Ibn Taymiyya. Because practice in certain areas of the law may differ from one region to another, the authority that a particular practice bestows upon a certain issue may also diverge.[58] A particular point of law applied for a specific case cannot be said to be a universal statement because practice and prevalent

[54] Abu Zahra, *The Four Imams,* 496-498.
[55] Al-Atawneh, "Wahhābī Legal," 329.
[56]Aharon Layish, "Saudi Arabian Legal Reform as a Mechanism to Moderate Wahhābī Doctrine," *Journal of the American Oriental Society* 107, no. 2 (1987), 283, and Vogel, *Islamic Law,* 79.
[57] Al-Atawneh, "Wahhābī Legal," 341, 342, and Vogel, *Islamic Law,* 79.
[58] Hallaq, *Authority, Continuity,* 111.

customs determine which doctrine is to be applied. It might, however, be argued that what the *‘ulamā’* refers to as legal rules in Saudi Arabia is influenced by local customs and regional interpretations as opposed to radical drivers of change.

The Ja‘farī jurisprudence is frequently labelled as the Imāmī, the Shī‘ite, or the Imāmī Shī‘ite school of law. However, the term ‘Ja‘farī *madhhab*’ has been increasingly deployed over the past few centuries. Within the field of *shar‘ī* studies, Ṭabāṭabā’ī divides Ja‘farī *uṣūl al-fiqh* into two categories: the first section is the method of deduction of legal verdicts from the four original sources; the Qur’an, Sunna, *ijmā‘* and *‘aql*, each of which corresponds to the established Ḥanbalī *uṣūlī* order.[59] In comparison with Ḥanbalī sources, Ja‘farī scholars integrate a new principle (*dalīl ‘aqlī* known as ‘the evidence of reason’) which replaces analogy. The main approach which derives from this principle is that whatever is ordered by reason is also ordered by religion, and this enables adherents to simultaneously take advantage of practical and pure reason. Rational materials and doctrines in the methodology of Ja‘farī law are inferred from the sole verdict of reason which emerges from juridical efforts to discover *shar‘ī* rules.[60]

The second section relates to the manner of reasoning with procedural principles when the *shar‘ī* norms are not deduced from those four basic sources. In these instances, special general principles known as *uṣūl ‘amaliyya* (procedural principles) are resorted by scholars. Although the validity of the procedural principles is examined by the *‘ulamā’*, the principles of *aṣl al-barā’a* (exemption), *iḥtiyāṭ* (prudence), *ikhtiyār* (option), and *istiṣḥāb* (continuance) make an essential contribution to modern Ja‘farī jurisprudence and help to elaborate *shar‘ī* opinions, rulings, and the provisions.[61] The concept of *aṣl al-barā’a* which is known as the absence of any legal obligation does not oblige individuals to follow a certain and particular rule. *Iḥtiyāṭ* is understood as caution; if there is a certain obligation with alternative choices, all options are required to be followed. The principle of *ikhtiyār* means the freedom to include the viewpoints of other currents. When it is not possible to use different options to pursue a single issue, one option should be selected in order to secure the justice and promote the continuance of *sharī‘a*. *Istiṣḥāb* is another principle that is used by both Ja‘farī and Ḥanbalī scholars in jurisprudence. Scholars have sought to set out the principles in more detail along with the conditions of their implementation. These principles relate to cases in which the true ordinance of God is not clear or known. These *shar‘ī* maxims broadly enable contemporary Ja‘farī scholars to achieve considerable adaptability and

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[59] Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Utah: University of Utah Press, 1998), 15.
[60] Ṭabāṭabā’ī, *An Introduction*, 4.
[61] Ibid*,* 9-10.

flexibility of law when encountering changes and new issues. When no provision exists in the constitution or the law for a case under consideration, the court has to, by implementing the principles of the Jaʻfarī *madhhab* and operating within the limitations established by its constitution, render a verdict that secures justice in a practical way. The Council of Guardians which consists of six jurists responsible for scrutinising whether rules, regulations and laws comply with *sharʻī* criteria.

In 1984, the Supreme Leader Khomeini approved a *fatwā* that authorised parliament to create legislation based on the *sharʻī* principles of social necessity (*ḍarūra*) and public interest (*maṣlaḥa*), and the measure (as proposed law or bill) passed with a two-thirds majority of the paeliament.[62] The attributes of this constitutional model derive from the Jaʻfarī structure that was inherited after Uṣūlism's triumph, and which was refined in the school of law's educational system.[63] The Persian national character is another crucial factor which has to be taken into account when considering the development of the new Iranian legal system. This is particularly important because, in recent decades, patriarchal interpretations of *sharīʻa* have increasingly derived from local norms.

In taking into account these *sharʻī* sources, the discussion will now engage the *fatwā*s of Saudi and Iranian scholars on a range of topics (including the Nowrūz festival, women driving and cultural exchange marriage) which will be analysed in order to ascertain how *ʻurf* influences the legislative process. The case studies are not particularly interested in the precise conclusions that the jurists attained; rather, they are interested more in the process through which scholars are preoccupied while reaching these conclusions. This in turn suggests a series of questions: which sources and methodologies did the scholars use to achieve the determination during the *sharʻī* interpretation? Does the rule derive exactly from the original texts or is it constructed with reference to customary norms and individual orientations that operate within the communities? To what extent does *ʻurf* exert a (negative or positive) influence upon the decision of scholars? Which logical and rational principles assist scholars as they endeavour to achieve or reach a determination? The discussion will now turn to each of these questions and their reasonable answers within the customary context of societies.

A. The Nowrūz Festivals

The customary events of societies are rejected upon the grounds that they include symbols of old religious doctrines in new territories. Even if the customary event does not

[62] Ziba Mir-Hosseini, "Sharia and National Law in Iran," in *Sharia Incorporated A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present,* ed. Jan Michiel Otto (Leiden: Leiden University Press, 2010), 335.
[63] Mallat, *The Renewal*, 72.

cause substantial damage, it will be forbidden upon the grounds that this will protect Islamic tenets and avoid interference with the old religions. The case of Nowrūz festival (*Chahârshanbeh Sūrī*) is a clear case-in-point. Nowrūz when translated from the Persian language means 'new day'. It marks the worldwide vernal equinox as the beginning of the New Year for Iranians.[64] The festival embodies the sense of rebirth, renewal and revival that coincides with the arrival of Spring. It originates within pre-Islamic Zoroastrian traditions that were dominant in ancient Persia, which preceded the spread of Islam within the country. The relationship between Nowrūz and Zoroastrianism is clearly depicted in the bonfire ritual that is held on *Chahârshanbeh Sūrī* (Red Wednesday). This event is held on the eve of the last Wednesday which precedes Spring which is considered to be the unluckiest night of the year. During the ancient style fire celebration, the people jump over the flames.[65] Fire is used to keep the sun alive until the early hours of the morning.

The customary event is divided into normative, prescribed, repeatable, prohibited or obligatory categories according to its symbolical relation with the old religions. It should be noted that the celebration of Nowrūz is symbolically connected with the pre-Islamic religion because every Zoroastrian ceremony is performed in the presence of fire. Wahhābī and Ja'farī scholars from Saudi Arabia and Iran have issued *fatwās* that address the Nowrūz festival. The discussion will now evaluate how customary and denominational influences impacted four separate *fatwā*s.

a. The *Fatwā*s of Saudi Scholars

"*Fatwā* No. 3825, 3829, 3841, 3847, 3962, 4028 (Saudi Arabia)
Query: Does doing any of these or similar things (referring to the rituals of the Nowrūz festival) or approving them have any effect on a Muslim's *'aqīda* (belief)?
Response: [T]he Qur'an, Sunna, and authentic Athar (narrations from the Companions) give detailed evidence on the prohibiting of imitating the disbelievers in what is particular to them. This includes imitating them in their 'Eids or celebrating them. 'Eid (festival) is a generic term which (in the context of these reports) includes every day or occasion which is repeated and is venerated by the Kafirs (disbelievers), or any place in which the Kafirs hold religious gatherings, or any action which they do in these places or at these times –all of that is part of their 'Eids or festivals. The prohibition applies not only to their festivals, but to any times or places which they venerate that have no basis in the Din of Islam; and all the invented acts that they do at them are prohibited also. The days preceding and following their festivals are also covered by this prohibition, as pointed out by Shaykh al-Islam, Ibn Taymiyya... It is also reported that 'Abdullah ibn 'Amr ibn al-'As said, "Anyone who settles in the land of the non-Muslims and celebrates their Nayruz (New Year's Day) and their Mahrajaan (two non-Islamic Persian festivals) and keeps imitating them until they die in that state, will be gathered with them on the Day of Resurrection....Muslims are prohibited from observing the festivals of the Kāfirs for many reasons, some of which are: 1. Imitating them in some of their festivals will give them delight and complacency in their falsehoods. 2. Imitation and similarity in external matters will inevitably leads one to imitating them and behaving like them in internal matters such as their corrupt beliefs and being slowly and subtly won over to their way of thinking. 3.

[64] Daniel and Mahdi, *Culture,* 186.
[65] Ibid, 185-188.

> One of the gravest ensuing corruptions is that imitating the Kafirs in external matters generates a kind of love, friendship and loyalties that are incompatible with Iman (Faith)."[66]

> "*Fatwā* No. 119796: *Nowrūz Festivals*
> Query: I need a brief explanation about Nowrūz festival and what is its legal status in Islam?
> Response: According to grammatical analysis, Nowrūz comes from the root of '*fay'ūl*' with the pronunciation of 'fa' or it is also said that Nowrūz comes from the root of '*faw'ūl*'. The first one is more famous because the root of '*faw'ūl*' cannot be traced in the Arab's spoken language. It is an Arabicised term and means the beginning of the year. But according to Persians, it is associated with the descent of the sun to the zodiac sign of Aries, whereas for the Copts it signifies the beginning of the month of Tūt. These explanations were taken from the book of *Al-Miṣbāḥ al-Munīr fī Gharīb al-Sharḥ al-Kabīr* with some editions.
> In the book of *Mawāhib al-Jalīl* (*Talents of Galilee*): According to Copt, Assyrian, Roman and Persian, Nowrūz is the first day of year and means new day. It lasts six days for Persians and the first one of them is the first day that is the first month of their year, and regarding this, the first month is named private Nowrūz and the sixth is general Nowrūz and the big Nowrūz.
> In the book of *Ṣubḥ al-A'shā* (*Morning of the Night*): The Copts probably adopted the festival through the way of Persians (God knows). They borrowed its name from them and the first day of the year is also named Nowrūz and they announced this day as an *'eid*.
> As for the legal rule, the celebration or participation of Nowrūz is not permissible for Muslim believers. We issued *fatwā* on the rule of participation to the celebration of infidels with the number 4586."[67]

The structure of the first *fatwā* touches upon three important components of *sharī'a* and establishes that the rejection of the customary practice can be explained with reference to the Qur'anic verses, *ḥadīth*s and personal interpretations. In the first instance, the jurists use the verses and narrations that derive from the Sunnī *ḥadīth*s sources. In drawing upon verses and *ḥadīth*s, the scholars have reached a consensus that rejects participation in these celebrations. The last section of *fatwā* applies the secondary sources of *sharī'a* (which include *istiḥsān*, *maṣlaḥa*, and *sadd al-dharā'i'*) to explain that participation within these customary festivals brings about a degradation of faith. The *'ulamā'* also emphasised that the Islamic traditions would only be fully respected and that the Arabian Peninsula was kept free of infidels and other religious traditions by prioritising Islamic culture.

The second *fatwā* which was published on Islamweb, the famous Saudi-based Islamic website, also rejects the celebrations depending on the identical concerns with the first one. However, rather than providing a jurisprudential explanation, it instead provides a linguistic exploration of the word "*nowrūz*" that works towards the event's diachronic origin. The discussion engages ancient beliefs, social context and terminological connection with the Persian language. The history of Nowrūz and the diffusion of the ancient cultural pattern across neighbouring countries are also set out more detail.

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[66] *Fatwā* No. 3825, 3829, 3841, 3847, 3962, 4028 in *Fatwās of the Permanent Committee,* vol. 26, 402-411, accessed August 25, 2015, http://www.alifta.net/Search/ResultDetails.aspx?languagename=en&lang=en&view=result&fatwaNum=&FatwaNumID=&ID=10440&searchScope=7&SearchScopeLevels1=&SearchScopeLevels2=&highLight=1&SearchType=exact&SearchMoesar=false&bookID=&LeftVal=0&RightVal=0&simple=&SearchCriteria=allwords&PagePath=&siteSection=1&searchkeyword=110097121114117122#firstKeyWordFound.

[67] *Fatwā* No. 119796 in *Islamweb*, accessed August 30, 2015, http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=119796.

These two *fatwā*s establish that participation in the religious occasions of disbelievers is not permissible and underline the fact that the act is categorized under the concept of falsehood. A Muslim should refrain from participating in these occasions in order to retain his/her religious purity. In setting out their explanation in more detail, the scholars introduce the socio-practical principle of *al-walā' wa al-barā'a* (association with Muslims and dissociation from infidels) which arranges and controls personal relations between believers and non-believers in the *shar'ī* sphere.[68]

The rejection of the celebration might also originate within the Wahhābī advocacy of puritan programs of religious reform in public and private life. The *'ulamā'* expressed particular concern that *bid'a* known as a heretical innovation may have crept into the religion, largely as a consequence of the legal interpretations of scholars displacing the core belief of *tawḥīd* that had been revealed in the Qur'an and the Sunna.[69] The Saudi-Wahhābī scholars have come to advocate prohibition in order to protect the main Islamic tenets and preserve religious community, both of which have been asserted at the expense of customary celebrations.

b. The *Fawā*s of Iranian Scholars

"*Fatwā* No. 380, 381: Social and Cultural Issues*, Nowrūz* (Khamenei)
Query: What is your opinion on the Nowrūz festival? Is it legally fixed like the *'Eid al-Fitr* and *'Eid al-Aḍḥā* or is it only a blessed day like Fridays and an occasion other than else?
Response: Although there is no reliable tradition to the effect that Nowrūz is considered among religious festivals or holy days with particular legitimacy, there is no harm in celebrating or visiting one's relatives on this day. (Rather it reinforces ties among relatives that is recommendable).
Query: Are the reports for Nowrūz day, the virtue of it and the actions of it correct? Is it permissible to come up with those acts (such as Qunūt praying or invocation) with the purpose of intention?
Response: The purpose of intention in these acts is an issue which is controversial and needs contemplation. Yes, there is nothing wrong to come up with these desired petitions."[70]

"*Fatwā* No. Fa5132, Archive code No: 14149
Query: What legal reference do we have for 'Eid Nowrūz?
Response: This *'eid* is an ancient Persian holiday that was marked and celebrated before the emergence of Islam. There is a *ḥadīth* from Imam Sadeq in *ḥadīth* sources regarding Nowrūz which the popular vote has verified to be reliable and therefore they have given the *fatwā* to the *faḍīla* (recommendation) of *ghusl* (ritual washing) on the day of Nowrūz, however some have objected and seen it to be unreliable. Consequently, we cannot assure that this '*eid* is religious one, nevertheless we must note that there has been no objection presented against it in the *ḥadīths*. As a result, this event is categorized under the *mubāhāt* (things which are permissible) especially since this '*eid* coincides with times that remind us of the greatness of the lord, the creator of nature and, moreover, people perform rituals that are recommended in Islam, such as: cleaning the house, visiting relatives and family, celebration by the believers, removing enmity and hatred between each other, freeing prisoners, etc. Furthermore, we know that Imam Ali says that: every day in which we do not disobey Allah, is an '*eid*. Yes, there are a few traditions like jumping over fire and... that not only do we not have any Islamic proof

[68] Al-Rasheed, *Contesting*, 36-39.
[69] Long, *Culture*, 23.
[70] *Fatwā* No. 380, 381in *The Office of the Supreme Leader Sayyid Ali Khamenei,* accessed September 10, 2015, http://www.leader.ir/tree/index.php?catid=12.

> for their legitimacy, we must actually try our best to put an end to them, for they are no more than superstition, rather than being a part of religion."[71]

Khamanei's response does not prohibit the Nowrūz celebrations and on the contrary encourages participation in the festivals upon the basis that this will reinforce and promote national identity. In emphasising the principle of public interest and national unity, his decision endorses the Nowrūz celebration and elevates its potential benefits over anticipated harmful effects. The Iran's Ja'farī scholars had observed that this kind of celebration could be performed in accordance with the principle of dominant public interest or presumption of continuity. However, the detailed version of the second *fatwā* offers more descriptive explanations that draw upon Ja'farī *ḥadīth* sources. While the response supports activities such as visiting relatives and participating in the celebration, it suggests that the fire performance should be abolished.

The *fatwā*s general positive appraisal is further underlined by the fact that it establishes chronological links between Nowrūz day and the acts of Prophets and Imāms – these include the day of allegiance in Ghadīr, the victory of Nahrawān, or the existence of Dajjāl. Khamenei and contemporary Ja'farī jurists have systematically sought to maintain a rejective attitude towards the fire events while stressing their non-Islamic origins by explicitly referring to the link between Persia's ancient religion and Red Wednesday. In *Masā'il*, Khomeini states:

> "When a heresy occurs in Islam such as those unlawful perpetrated by governments in the name of the true religion of Islam, it is obligatory, particularly for the religious authorities of Islam (*'ulamā'*) to state the right and to denounce the void."[72]

In operating in accordance with this principle, the scholars reject the fire as a symbolical element of Zoroastrianism, but still permit the festivals to be celebrated. The conclusions and recommendations outlined in the *fatwās* reflect the contemporary Ja'farī attitude toward socio-cultural celebrations. In engaging with traditional celebrations, jurists have permitted community participation, albeit with State supervision and upon the condition that the event falls within the parameters of the *sharī'a*. The *fatwā*s seek to preserve traditional norms by accommodating *'urf* to the *sharī'a* in a manner that preserves the balance between religious and customary sections of society. The expectation that underpins the rule is that it will be possible to bridge the gap between theory and practice in a manner that mirrors *'urf* and *sharī'a* within contemporary Iran.

The different *fatwā*s that have been issued by scholars do not only highlight the multidimensional sides of legal thought, but also provide considerable insight into ongoing tensions between efforts to implement *sharī'a* while simultaneously engaging with *'urf*. The

[71] *Fatwā* No. 5132 in *Islam Quest,* accessed September 11, 2015, http://www.islamquest.net/en/archive/question/fa5132.
[72] Khomeini, *A Clarification,* 374.

Saudi *fatwā* presents a more conservative attitude because the case is discussed with reference to imitating the religious events of infidels. Although Ja'farī *fatwās* acknowledge that the event is not Islamic, they evidence a greater flexibility by permitting celebrations without bonfires and interpreting the event as a reassertion of traditional identity. The resistance to innovations or initiatives that are inimical with Islam's core tenets can be clarified with reference to the impact of Wahhābī understanding of *sharī'a.* As Al-Atawneh claims, the most practices of celebration and social norms have been criticised and banned by Saudi *mutfī*s upon the grounds that they are not consistent with Wahhābī doctrine.[73] The Basic Law of Governance of Saudi Arabia (Article 12) establishes the State's responsibility to consolidate the national unity and to forbid all activities that may instil disorder, division and partition.[74] In operating under the protection of this verdict, the religious scholars have encouraged the production of Islamic customs rather than adoption of the practices of non-Islamic societies. However, they have not yet clarified which criteria or parameters should be implemented during the decision process.[75] Article 23 establishes:

> "The State shall protect the Islamic creed, apply the *sharī'a*, encourage good and discourage evil, and undertake its duty regarding the propagation of Islam (*da'wa*)."[76]

When the article is examined in closer depth, it becomes apparent that Nowrūz celebrations are prohibited upon the grounds of suspicion towards novel customary events and the protection of Muslim communities from the exposure to foreign customs. For Ja'farī scholars, even though Nowrūz is a national ceremony, the *'urf* combines with the religious rituals which include remembrance of God and submission to the almighty.[77] Articles 3 and 4 of the Iranian Constitution strongly emphasises the creation of moral virtues grounded within the Islamic faith and inculcation of a piety that will resist all forms of corruption.[78] The Article potentially enables scholars to establish a connection between the Nowrūz festival and the Islamic rituals, and therefore permits *'urf* to be shaped in accordance with religious criteria.

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[73] Al-Atawneh, *Wahhābī*, 94.

[74] "The Basic Law of Governance", Article 12 reads: "Consolidation of the national unity is a duty. The State shall forbid all activities that may lead to division, disorder and partition."

[75] Al-Atawneh, *Wahhābī*, 99.

[76] "The Basic Law of Governance", Article 23.

[77] "Norouz, an Opportunity for Eastern Culture," *The Office of the Supreme Leader Sayyid Ali Khamenei*, March 27, 2010, accessed October 2, 2015, http://www.leader.ir/langs/en/index.php?p=contentShow&id=6609.

[78] "Constitution of the Islamic Republic of Iran,", Article 3 reads: "In order to attain the objectivities specified in Article 2, the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals:1. The creation of a favourable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption; 2. Raising the level of public awareness in all areas, through the proper use of the press, mass media, and other means; 3. free education and physical training for everyone at all levels, and the facilitation and expansion of higher education; 4. Strengthening the spirit of inquiry, investigation, and innovation in all areas of science, technology, and culture, as well as Islamic studies, by establishing research centers and encouraging researchers; 5. The complete elimination of imperialism and the prevention of foreign influence; 6. The elimination of all forms of despotism and autocracy and all attemts to monopolise power…," and Article 4 reads: "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *fuqahā'* of the Guardian Council are judges in this matter."

The Nowrūz celebration is placed under the category of a national tradition and Khamenei therefore receives official participants from foreign countries who participate in the international Nowrūz organisation. If Khamenei in his role as a religious leader within the Ja'farī community completely rejects the celebrations, it would be expected that he would not host or participate in the national Nowrūz celebrations. However, Article 20 of Iran's constitution, in functioning in accordance with Islamic doctrines, upholds the social and cultural rights of Iran's.[79] Iran's Constitution advances customary actions and national traditions which are grounded within Islamic principles and norms; similarly, religious scholars root the customary act within Islamic elements in an effort to improve religious consciousness. Consequently, it might be assumed that Saudi-Wahhābī scholars are more protective and restrictive on the issue of customary celebrations than their Iranian-Ja'farī counterparts. As has already been noted, the influence of *sharī'a* upon *'urf* can be clearly identified in Saudi *fatwās* while the converse is discernible in Iranian *fatwās*.

The presence of varied references to different *ḥadīth* sources increases the likelihood that two distinct opinions will be produced on the same issue – this applies because the Wahhābī *fatwā*s do not approve the Nowrūz festival while the Ja'farī *fatwā*s consider it permissible upon the condition that it does not include the fire events by virtue of its connection to the Persia's ancient religion. If there is no record that indicates the Prophet, his companions or followers performed the action then the practice is within the Saudi-Wahhābī approach considered to be without legal basis in *sharī'a*. This rejection is clearly consolidated and supported by way of direct reference to Abū Dāwud's *ḥadīth* ("Whoever shall imitate a particular nation will be considered as part of them.")[80] Conversely, Iranian Ja'farī scholars will approve the occasions and celebrations under the category of recommendable acts upon the condition that they do not include practices, acts, and rituals that resemble and remind of religious rituals other than Islam.

If there is no authoritative textual source that addresses whether the act is permissible or forbidden, despite mentioning the occurrence of celebrations in the presence of the *imām*s, the Ja'farī scholars will categorize the event under the permissible acts. This is clearly established by Imam Ṣādiq's *ḥadīth* from the book of Al-Ṭūsī:

> "On the day of Nowrūz do *ghusl* (ablution) and put on your cleanest and purest clothing, use perfume and fast for the day."[81]

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[79] "Constitution of the Islamic Republic of Iran," Article 20 reads: "All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria."

[80] Abū Dāwud Sulaymān ibn al-Ash'ath al-Azdī al-Sijistānī, *Sunan Abū Dāwud,* no. 4031 (Cairo: Dār Ihyā' al-Sunnah al-Nabawīyah, 1950), 44.

[81] *Fatwā* No. 5132 in *Islam Quest,* accessed January 19, 2015, http://www.islamquest.net/en/archive/question/fa5132.

Because the bonfire tradition is understood to derive from the Zoroastrian religion and superstition, the community is advised to act in accordance with the principle of *iḥtiyāṭ* (prudence) and bring the practice to an end. The symbolic importance of the *Chahārshanbeh Sūrī* (Red Wednesday) ritual has not been neglected completely. It can consequently be assumed that even if the *madhhab* and sources of legal jurisprudence impact upon judges' decisions, the nation-oriented customary dynamics might affect the *fatwā*s. Because the sources were built up within the communities, they might include customary elements that allow the operation of social norms.

B. Women Driving

Technological developments have made car-driving one of the necessities in the modern world. As this activity has expanded across different countries, it has raised controversies as Islamic scholars have sought to determine whether Islamic law permits the driving of a car for women. Saudi Arabian scholars have provided a highly conservative *fatwā* by maintaining that women should not be allowed to drive, with this *fatwā* being adopted as a state law. In contrast, an official Iranian *fatwā* allows women to drive by embracing an affirmative stance. Nonetheless, the same Iranian scholars do not permit women to ride a bicycle. It was not maintained that there was an explicit reference to the right of women to drive, but this decision was enabled by *shar'ī* deduction methods and secondary sources are used to decide the rule. It is important to note that this question did not raise in response to public pressures; instead, scholars opted to focus upon it.

a. The *Fatwā*s of Saudi Scholars

> "*Fatwā* of Ibn Bāz, vol. 3, Page 351. *Ruling on Female Driving a Car*
> Query: What is the legal decision about women driving?
> Response: There has been a lot of discussion in Al-Jazirah Magazine regarding female driving of cars. Evils and temptations of this measure are well known to everyone including those who call for it. For example, this entails unlawful *khulwah* (being alone with a member of the opposite sex), unveiling the face, careless and free intermixing (of men and women), and committing adultery which is the main reason for the prohibition of these practices. Allah's sacred *sharī'a* (law) forbids all means leading to unlawful actions and makes them *ḥarām* (prohibited) in themselves. Allah commanded the wives of the Prophet and all believing women to remain in their homes and to wear a *hijāb* (veil) if they go out for some need. He also commands women not to display their beauty to anyone other than their *maḥram* (spouse or permanently unmarriageable relatives), as it will inevitably lead to licentiousness that can devastate the entire community... Allowing women to drive contributes to the downfall of the society. This is well known; however, ignorance of legal rulings and the disastrous consequences of vice results in feeling no pricking of conscience at committing sins, as do the sick-hearted libertines who enjoy looking at *ajnabiyyāt* (a woman other than a wife or permanently unmarriageable female relatives). This leads to scandals and indifference to impelling evils..."[82]

[82] *Fatwās of the Permanent Committee,* 3: 351-353, accessed October 5, 2015, http://www.alifta.net/Search/ResultDetails.aspx?languagename=en&lang=en&view=result&fatwaNum=&FatwaNumID=&ID=218&searchScope=14&SearchScopeLevels1=&SearchScopeLevels2=&highLight=1&SearchType=exact&SearchMoesar=false&bookID=&LeftVal=0&RightVal=0&simple=&SearchCriteria=allwords&PagePath=&siteSection=1&searchkeyword=119111109101110032100114105118105110103#firstKeyWordFound.

"*Fatwā* No. 45880, *Customs and Traditions,* (Shaykh Muhammad Ṣāliḥ al-Munajjīd)
Query: Does the ruling on driving a car vary from one country to another?... To what extent is there flexibility in ruling? Is what is happening correct, I mean is it right that something may be obligatory in one country and *mustaḥabb* in another?
Response: The rulings of *sharī'a* are of two types: (1) Those where the evidence of *sharī'a* points to the ruling, regardless of various customs or what good or bad consequences may result. In this case, the ruling is fixed and does not vary from one place to another or from one person to another, unless a person is forced to do something, is sick or is excused, in which case the ruling is waived as much as required by his situation according to what it says in *sharī'a*. An example of such a fixed rule is the obligation to offer the five daily prayers, to fast at Ramadhan, to enjoin what is good and forbid what is evil, to seek knowledge, etc. Another example is the obligation for the Muslim woman to cover her entire body, including the face and hands. This ruling is obligatory and does not vary from one place to another... (2) Rulings which are based on specific reasons, or where the ruling as to whether a thing is forbidden, allowed, or obligatory depends upon whatever good or bad consequences will result from that, and where there is no *shar'ī* evidence to suggest a fixed ruling that does not vary. The issue of women driving cars may come under this heading. The scholars have issued *fatwā*s stating that it is *ḥarām* because of the negative consequences that may result from it. This applies completely to the land of the two holy sanctuaries. With regard to other countries, the matter should be referred to trustworthy scholars for they know their countries' situation best."[83]

Ibn Bāz's *fatwā* derives from quotations within the Qur'an and the Sunna that legitimise women being protected from possible dangerous conditions that they may encounter when alone. Driving is placed under the category of actions that lead to immorality and evil, and which arise as a consequence of carelessness.[84] Al-Atawneh clarifies that rational reasons for prohibition are addressed by the probability limits as potentially damaging the veil and guardianship policies, entrenching moral corruption and increasing women's exposure.[85] Al-Munajjīd's *fatwā* emphasises the influence of cultural diversity within the jurisprudence and also asserts different solutions for the same issue that diverge in accordance with local circumstances. Classification of the rules is made with reference to direct or indirect sources, and the driving case is largely assessed with reference to the latter. The responsible scholar agrees with the flexibility of non-straightforward rules that vary in accordance with *'urf*. However, he also emphasises that the teachings and jurisprudence of Ibn Ḥanbal and Ibn Taymiyya entrench a specific Wahhābī approach towards key issues.

In general, the logical explanations or rational justifications of *fatwā*s that ban women from driving are constructed with reference to mutual principles that include moral collapse (*fitna*), veiling (*ḥijāb*), and guardianship (*walī*). In seeking to avoid *fitna* (social disorder), Saudi scholars implement a range of preventive measures that apply to female members of society. The principle of *'amr bi al-ma'rūf wa nahy 'an al-munkar* (enjoin good and forbid evil), establishes that women driving should be categorized under the concept of an evil act

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[83] *Fatwā* No. 45880 in *Islam Question and Answer,* December 17, 2003, accessed October 8, 2015, http://islamqa.info/en/45880.
[84] The Interior Ministry in 1991 issued a decree banning women from driving depending on the mentioned *fatwā*s. For more information Christoph Wilcke, "Saudi Women's Struggle," in *Unfinished Revolution: Voices from the Global Fight for Women Rights*, edited by Minky Worden (2012: Bristol University Press), 93-106, 97.
[85] Al-Atawneh, *Wahhābī*, 104.

and prohibited in order to offset the danger of possible turmoil. The *shar'ī* principle of *sadd al-dharā'i'* may be the basis for this decision because it is established that Islam forbids the things that lead to anything *ḥarām* (forbidden) which it also regards as *ḥarām*. The assessment of the issue with reference to its anticipated negative and positive consequences draws attention to the *fatwā*s. In expounding the principle of necessity, Ibn Taymiyya states:

> "If injuries or benefits are in conflict, then we should incline toward the best for us. So, if a command or a prohibition that is to secure benefit and to prevent injury respectively was opposed by a similar injury, then the one which secures more benefits must be upheld as well as the one which has lesser injuries. Nevertheless, the criterion of deciding the type and the degree of benefit and injury is the *sharī'a* itself."[86]

This establishes that for the Wahhābī approach if the negative results of a practice are equal to or exceed any anticipated benefits, then prohibition must take precedence over permission. The comparison of harm and interests that derive from the implementation of women driving is a determinative factor because the interpretation clearly establishes that harm should not be replaced by a harm that resembles or exceeds it.[87] The protection of society from the spread of the causes of immorality comes to function as a sound basis for the prohibition of women driving – this applies because permitting women to drive would undermine the basic assumption that the most appropriate place for the woman is the home. Al-Rasheed argues that the ban on women driving derives from concerns relating to the nation's moral integrity, as the act is considered to be source of corruption and as it entails the imitation of non-Muslim societies.[88] It might therefore be argued that the *fatwā*s are cited in the context of customary determinations that aim to prevent the mixing of sexes (*ikhtilāṭ*) by applying protectionist approaches and seek to uphold the symbolical role of women within the Saudi society.

Another logical reason derives from the fact that every woman must have a *walī* (male guardian) who is frequently a relative or a husband. In addition to *sharī'a*, safety is also an important consideration as women are frequently characterized as a highly sensitive and vulnerable section of the community. The guardian accompanies women in public and traditionally provides her with permission to perform certain activities. Permitting women to drive may threaten the legal system as it could potentially undermine the position of the guardian. Because the code of personal and collective honour (*sharaf*) is recognised as an important aspect of Saudi *'urf*, it is widely considered that providing women with permission to drive may damage the honour of male members.[89] The patriarchal structure of Saudi society should be taken into account here, as it has caused the role of the guardian to be

[86] Mansour Z. Al-Mutairi, "Necessity in Islamic Law" (PhD diss., University of Edinburgh, 1997), 65, and Ibn Taymiyya, *Majmū' al-Fatāwā,* vol. 28, 129.
[87] Al-Mutairi, "Necessity," 130.
[88] Al-Rasheed, *A most Masculine,* 130.
[89] Long, *Culture,* 64.

interpreted literally. In addition, reference should also be made to the *fatwā* of contemporary Saudi scholar, Shaykh ibn 'Uthaymīn, which states:

> "When women drive it leads to overcrowding in the streets or it deprives some young men of the opportunity to drive cars when they are more deserving of that."[90]

In offering this contribution, the scholar accepts that men are superior to women and that women should be excluded from public life – both propositions are, it should be noted, rooted within Saudi *'urf* rather than *shar'ī* texts.[91] In comparing the rights of men and women, *'ulamā'* consistently evidence a preference for women to bear the burden that arises from the loss of their rights. It might be asserted that the *'ulamā'* have interpreted *shar'ī* texts in a conservative and customary manner without taking multi-dimensional meanings into account. Although Wahhābī scholars sometimes evidence considerable flexibility when engaging with problems such as finance or banking, a greater conservatism is evidenced when gender issues are the focus of attention.[92] These customary values conform to normative and fundamental assumptions that affect the process through which the law is determined. Both the male-dominated community and tradition superimpose themselves upon *sharī'a*.

The logical correlation is established by the prohibition of driving and explicit rules that pertain to veiling or adultery. Rules which derive directly from the Qur'an and the Sunna have established as the justification of the secondary sources – this applies because the nature of the driving issue is open to multiple interpretative strategies. This does not suggest that *shar'ī* sources are open to any interpretation; rather it instead demonstrates that they are capable of supporting a dynamic interpretive movement, such as the conservative and traditional one which prevails in Saudi Arabia. The use of *'urf* for non-textual problems provides a valuable solution because Ibn Taymiyya maintains that any item which has no limitation in the Arabic language or the *sharī'a* can be defined with reference to *'urf*. It can plausibly be argued that Saudi-Wahhābī scholars have, in drawing upon cultural values in the legal gaps, sought to reformulate the *sharī'* along patriarchal lines. In actual fact, the issue of women driving should be considered as a political *fatwā* rather than a *shar'ī* rule – this applies because the preservation of Saudi society and its cultural structures are highlighted as ongoing imperatives, and the original pact between Saudi *'umarā'* and *'ulamā'* is alluded to. In referring to this consolidated allegiance, Saudi-Wahhābī scholars have mainly stressed the family and its associated religio-moral values while also referring to the unifying role of religious ritual and law. Both elements help to put in place the foundations of an imagined

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[90] *Fatwā* No. 45880 in *Islam Question and Answer,* December 17, 2003, accessed October 8, 2015, http://islamqa.info/en/45880.

[91] The concept of permissible interactions or appropriate communication has been shaped according to social realities. For further information look, Wilcke, "Saudi Women's Struggle,"99-101.

[92] Delong-Bas, *Wahhabi*, 123.

religious nation in which control over the women has a central significance. Al-Rasheed emphasises the image of women which is depicted by religious nationality. She states:

> "The contemporary status of women in Saudi Arabia is shaped by the historical legacy of Wahhabiyya and its transformation into a religious nationalist movement under the banner of the Saudi state. This transformation had an important impact on gender after the movement became not only state religion but also state nationalism."[93]

Some scholars therefore observe that, over time, the exclusion of women established the core tenets of a religious nationalism which was defined by piety and unity. Scholars that operate within this framework generally provide religiously sanctioned opinions that fix women in a particular role, the intention of which is to guard the symbolism of gender religiosity in the kingdom. It is important to note that after 2017, the Crown Prince of Saudi Arabia, Muhammad bin Salman, openly announced his attempt to make moderations in the Islamic understanding and rescinded a dozen of rulings including the prohibition of women driving. Although the reason of his reform policies seems to be political rather than *shar'ī*, the social desires with the changing dynamics imposed burden for the legal change. Since the change of regulation is quite recent development, the effects of initiations or their practical outcomes are not enough to analyse here.

b. The *Fatwā*s of Iranian Scholars

> "*Fatwā* No. 535, *Ruling on Female Driving a Car*, Khomeini,
> Query: According to Islam, is it permissible for women to drive? Are women allowed to drive in Islam, and if so then why in a Muslim country like Saudi Arabia cannot they?
> Response: The ruling for women driving must be derived from other laws and principles; meaning that we do not have a direct ruling on women driving in the Qur'an and Sunna because it is a new issue (*mustaḥdatha*). Arabian scholars, who ruled that it is unlawful for women to drive, have declared very disputable and irrational arguments. However, all of the Shī'ite scholars, by using the Qur'an and Sunna, and having not found any basis for its prohibition, have ruled that it is permissible, so long as proper *ḥijāb* and Islamic values are observed. Just as some of the Sunni scholars of other Arabic countries have ruled that it is permissible for women to drive."[94]

> "*Fatwā* No. 26659, *Ruling on Female Riding a Motor*, Khomeini,
> Query: What is the legal ruling for women to ride a motor in Islam?
> Response: 1. This practice is not unlawful in itself, but in some situations concerning time and place, motorcycling of girls and women in public, would attract men and this is incompatible with the chastity of women. A woman must avoid circumstances and actions which require her to be self-conscious of her appearance in front of non-*maḥram*. Riding a bicycle or motor bike in a public place, by a pedestrian walkway, or in view of others leads to corruption and thus, is not permissible. 2. The narration states that it is not appropriate for women to walk in the middle of the street, but it is recommended to move (or walk) on the side of the wall and streets. In one *ḥadīth*, the Prophet says: "Women should not walk in the middle of the road, but they can walk near the walls, the edge of the road and streets."
> It is obvious that the Prophet, in his statement, does not want to prohibit for women to walk in the middle of the way. However, these traditions represent the importance of respectful and honourable character of women in Islam, and peaceful privacy of women to attend public spaces in which the ruling of narration will be more beneficial to women and the Muslim."[95]

Iranian scholars permit women to drive, but upon the condition that they observe *ḥijāb* and respect Islamic values and modesty. However, they do not permit women to ride cycling or

[93] Al-Rasheed, *A most Masculine,* 43-58.
[94] *Fatwā* No. 535 in *Islam Quest,* accessed October 10, 2015, http://www.islamquest.net/fa/archive/question/fa535.
[95] *Fatwā* No. 26659 in *Islam Quest,* accessed October 12, 2015, http://www.islamquest.net/fa/archive/question/fa26659.

bicycles. In contrast to Saudis, Iranians do not believe that women driving is a cause of disobedience or social corruption. Khomeini's *Masā'il* states:

> "There are steps in conducting ordering the right and barring the wrong and it is not acceptable to practice what is called for at a higher level when there is likelihood of achieving the goal at a lower level."[96]

This establishes that scholars understand driving a car to be a normal part of modern life. This explains why they do not seek to generalize the negative consequences and apply them to all women. To take one example, the scholars emphasise women driving in Iran, but do not refer to any of the indecent outcomes taking place. This has been used to support the proposition that a woman might drive while maintaining her modesty and self-respect without causing any moral corruption.

In addition, scholars strongly emphasise that there must be a creditable Islamic basis in order for Ja'farī school to designate an item or action as permissible or forbidden. In instances where there is no *shar'ī* text that demonstrates if the act is permissible or prohibited, the most common response is to consider the act in the framework of permissible things, although here reference must be made to the concept of *aṣl al-barā'a*. In a similar manner to the categorical approach demonstrated by Al-Munajjīd, the scholar alludes to the absence of rules in the Qur'an and the Sunna that indicates the division of decisions in accordance with their sources. Ja'farī scholars generally require the support of an explicit *shar'ī* text or evidence if an action is to be labelled as *ḥarām*. However, the same flexibility is not evidenced with regard to the riding of bicycles, and this further reiterates the conservative attitude toward gender that is ingrained within *'urf*. Ayatollah 'Ilm Al-Hudā, a contemporary and conservative Ja'farī scholar, states:

> "It is not a sin for a woman to sit on a bicycle saddle, provided she does so indoors or in her backyard. But if she cycles in public... her movements and posture will lead to corruption and prostitution."[97]

In this opinion, Al-Hudā invokes two religious rules; the first reiterates the obligation to obey proper veiling, and the second leads into the proposition that a failure to do so will result in moral corruption or seduction.[98] Cycling in public is assumed to be dubious and avoidable act according to *sharī'a*. The rational reasons that underpin the cycling ban closely resemble the prohibition on Saudi women driving cars. The avoidance of moral corruption and removal of a particular form of veil are both key preoccupations of the two *fatwā*s which can both be traced back to a customary and traditional understanding of women's role in societies. In common with the Saudi example, it is assumed that the home is the most appropriate place

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[96] Khomeini, *A Clarification,* 376.

[97] "Women Should Only Ride Bicycles in Their Backyards," *Iran Press News*, July 24, 2012, accessed October 13, 2015, http://www.iranpressnews.com/english/source/128729.html.

[98] Azadeh Kian-Thiébaut, "From Islamization to the Individualization of Women in Post-Revolutionary Iran," in *Women, Religion and Culture in Iran,* ed. Sarah Ansari and Vanessa Martin (Surrey: Curzon Press, 2002), 137.

for women. The reference is made to *imām* Ali's *ḥadīth* which states: "If possible, do not give (women) permission to leave the house."[99] In a manner which clearly recalls the Saudi rationale, Iranians employ the fulfilment of the *'amr bi al-ma'rūf wa nahy 'an al-munkar* and present it as a compulsory duty that is necessary to prevent possible moral corruption. Khomeini's *Masā'il* clarifies that:

> "The mere stating of the religious problem is not enough in ordering the right and barring the wrong. Thus, the religiously accountable person must command and prohibit."[100]

In providing permission for women to drive for public good and prohibiting women from cycling for preventing harm, Ja'farī scholars' draw upon two separate approaches that lead to achievable goals for custom-based rules. Inconsistencies in the *shar'ī* methodology and decisions demonstrate the authority of scholars and accentuate the influence of *'urf* an area in which scholars are experienced.

The responses of Wahhābī and Ja'farī scholars derive from two separate attitudes towards women driving. In the first instance, driving is prohibited whereas in the second instance, women are enabled to drive, and men are encouraged to turn their gaze away from the physical attributes of women. The Wahhābī approach has taken advantage of the recognition of blocking means (*sadd al-dharā'i'*), doing so in clear acknowledgement of the fact that the prevention of injuries before they materialise is actually the doctrine's main purpose. The Saudi *'ulamā'* have generally banned any act which might conceivably result in harm, doing so upon the basis that the repelling of an evil is preferable to the securing of a benefit. It is therefore the case that the Wahhābīs have become advocates of prohibition by emphasizing the protection of guardianship, veil, and seduction, and reinforcing each element with customary assumptions. Conversely, Iranian scholars have evidenced sympathy for the permissibility of an act when it does not give rise to harm or bad results. Taking into account the absence of clear proof that designates the act as an unlawful, Ja'farī scholars give precedence to positive consequences over negative results and allow women to drive. This reflects a more flexible and liberal interpretation. However, in later judgements, these same scholars did not extend a comparable flexibility to the riding of bicycles or motors.

The Saudi and Iranian scholars underpin the consideration of public interest, and they choose the most beneficial results that are aligned with their interpretations and which complement cultural dynamics and local contexts. It is clear that the rules derived from the same texts with *shar'ī* methodologies reflect two different solutions that are directed to the same issue. The rejection of the influence of *'urf* and intellectual environment results in the contrary view being labelled as a non-religious opinion. If the prohibition or permission is

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[99] Ziba Mir-Hosseini, "Islam, Women and Civil Rights: The Religious Debate in the Iran of the 1990" in *Women, Religion and Culture in Iran,* ed., Sarah Ansari and Vanessa Martin (Surrey: Curzon Press, 2002), 177.
[100] Khomeini, *A Clarification*, 373.

evaluated within the framework of *'urf*, it obtains, by virtue of diversity, recognition and respect from other believers. However, if the rule is dictated as representing the only Islamic solution, Muslims resident in other countries have an opportunity to criticise and reject the rule of others. It should be noted that the discrepancy between decisions does not relate a situation in which *'urf* is preferred to revelation; rather, it is instead a means of insuring that the investigation of sources is in fact consistent with what purports to be with cultural compatibility. If there is a dynamic and vigorous process of determination in which the *shar'ī* methodology and rationality play a central role, it is possible to find a continuing state of indeterminacy or variety, and this in turn reflects the influence of customary and intellectual understanding.

The influence of customary assumptions as an external factor becomes most obvious when the focus is upon the interpretation of scholars rather than their *shar'ī* methodologies. At this point, it can be argued that both Saudi and Iranian scholars have sought to dictate their personal interpretations with the intention of creating religious nationalities. Both Saudi Arabia and Iran have unified their doctrines with their national identities and have gone to great lengths to present themselves as the embodiment of piety.

In Saudi Arabia and Iran, the moral symbolism of women has become a key preoccupation for religious nationalism with the consequence that scholars have continually stressed the importance of limiting threats, preserving public modesty, and purifying the community. The persistence of customary interpretations can be traced back to the exhibition of the national Islamic identity rather than conservatism. For these scholars, religious nationalism has become synonymous with purity while tradition has become inseparable from the ongoing attempt to construct imaginary boundaries around the national identity.[101] It is conceivable that the *'ulamā'* have applied to *'urf* by justifying them with *shar'ī* texts; this extends to the proposition that the authoritative textual sources (*naṣṣ*) has been used in order to establish national religious identity.

C. The Case of Cultural Exchange Marriage

A guardian-representative (*walī*) is often responsible for contracting a marriage – this is usually done on behalf of a daughter, but sometimes on behalf of a minor son. The classical tradition which prevails in both countries establishes that a guardian of a female must be a member of her agnatic kin and a responsible adult Muslim. There are certain requirements for guardianship and the *walī* qualifications evidence considerable variation across both countries. A shared religion, freedom, maleness, maturity, probity (*'adāla*), agnatic kinship,

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[101] Al-Rasheed, *A most Masculine,* 172.

reason and the status of the closest male relative are the main requirements put in place by the Saudi court system. Article 1064 of the Iranian Civil Code states that the person who performs the act must be capable of mind, of legal age and sane.[102] Immorality (*fisq*), insanity, and slavery meanwhile, are held to disqualify individuals from being guardians in the Iranian system. This section will further explore the *shar'ī* responsibilities of a guardian and will further stress the legal consequences that derive from the specific customary marriage example (*badal*). The comparison of the customary marriage practices in Saudi Arabia and Iran will be instructive as it will provide considerable insight into how *'urf* and school traditions influence legal decisions.

Wahhābī interpretation establishes that a woman can conclude every kind of agreement with the exception of the marriage contract – this is why it is required for a woman to be married off by a legal guardian. The rejection of a suitable groom who has been chosen by the bride sometimes creates problems because the intervention of a *walī* is required in Saudi Arabia. There are two ways to deal with this issue: a lower-ranked male relative who has been designated as a *walī* can arrange her marriage or a judge can do this on her behalf. The predominant Ja'farī interpretation in Iran established that a guardian must arrange the marriage of a minor female; however, it is merely recommended to conclude a marriage contract for mature females or responsible adults. If this kind of marriage is arranged by a woman without her *walī*'s acceptance, it is categorized as void or suspended until it is ratified by a guardian. The proposition that guardianship can be undertaken by female members of a family is completely rejected by both Iranian and Saudi *'ulamā'*.[103] When a mother gives away her daughter, the question of whether the marriage valid or void is ultimately dependent upon the offspring's approval. Article 1181 of the Iranian code explicitly clarifies this point by making it clear that the bride must submit to the authority of her paternal grandfather.[104] Upon attaining maturity, a female, the question of whether she is a virgin is irrelevant, is not required to obtain her guardian's consent in order to conclude her own marriage.

In both Saudi Arabia and Iran, there is a type of customary marriage that is known as *ṣighār* or *zawāj al-badal* (marriage by exchange). This type of marriage is arranged between two couples and proceeds upon the basis that individual 'a' marries his daughter or sister to individual 'b' in return for individual 'b' allowing 'a' to marry his daughter or sister. There is no requirement for a dowry, as the mutual agreement is understood to provide sufficient

[102] "Civil Code of the Islamic Republic of Iran," Article 1064 reads: "The person who performs the act must be sane in mind, of legal age, and capable of forming a decision," accessed November 20, 2015, http://www.alaviandassociates.com/documents/civilcode.pdf.
[103] Ali, "Marriage," 14.
[104] "Civil Code of the Islamic Republic of Iran," Article 1181 reads: "Either the father or the paternal grandfather has the right of guardianship over his children."

insurance in this respect.[105] The type of marriage is practised in particular regions of both Saudi Arabia and Iran. The *shar'ī* rules classify such marriages as invalid upon the grounds that the dowry is absent, and by virtue of the fact that consent is suspended. In responding to a personal question, Saudi scholars issued a *fatwā* that condemns this type of marriage practice. It states:

> "That a man marries a woman in return of giving his daughter in marriage as an exchange deal between him and another is prohibited, and it is known as *shighar* marriage, which the Prophet forbade. It was narrated by Nafi' on the authority of Ibn 'Umar that 'The messenger of Allah forbade *shighar* marriage.' A *shighar* marriage is one in which two men exchange their daughters in marriage with no *mahr*...whether it was better for him to marry a woman whose *walī* wants to marry his daughter and for them to give money or to marry another woman and give her money, it is preferable and safer for him to step away from blame to marry another woman. This is because, if he marries the woman whose *walī* wants to marry his daughter, he might be lenient over his daughter's *mahr* in return for the *walī* being lenient with him in the *mahr* he asks for his daughter."[106]

In rejecting the validity of this type of marriage, the Saudi *'ulamā'* refer to the *ḥadīth*, along with the principles of *istiḥsān*, *maṣlaḥa*, and *sadd al-dharā'i'*. Because the determination of the dowry amount will be negatively impacted by exchange, the *'ulamā'* use rational tools to rule out the practice while citing the interest of women as justification. The responsible guardian exerts control over the consent of minor brides and grooms, and this authority is derived from the tradition of the respective schools. That is why the approval of guardians legalises these pre-maturation marriages in both Saudi Arabia and Iran. However, it should be noted that Ibn Taymiyya and Al-Ḥillī, respectively the renowned Ḥanbalī and Ja'farī scholars, both prohibited a man from consummating a marriage with his wife until she reaches the age of nine.[107] However, it should be recognised that the specific conditions and punishments that pertain to child marriages are frequently complicated by the vagueness or wholesale absence, of consent. If the consent of a bride was obtained through oppression, then the marriage may be categorised under forced marriages. The classical Ḥanbalī interpretation establishes that if a legal guardian with the power of compulsion (*walī mujbīr*) concludes a marriage contract for a minor, then the female virgin does not have the opportunity to dissolve the marriage upon reaching maturity.[108] However, some Ḥanbalī and Ja'farī *'ulamā'* argue that a virgin female who has attained maturity may not be given away without her permission, even if her father deems this to be appropriate.[109]

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[105] Yamani, *Polygamy*, 112.

[106] *Fatwā* No. 354 in *Fatwās of the Permanent Committee,* 18: 426, accessed November 30, 2015, http://www.alifta.net/Search/ResultDetails.aspx?languagename=en&lang=en&view=result&fatwaNum=&FatwaNumID=&ID=7096&searchScope=7&SearchScopeLevels1=&SearchScopeLevels2=&highLight=1&SearchType=exact&SearchMoesar=false&bookID=&LeftVal=0&RightVal=0&simple=&SearchCriteria=allwords&PagePath=&siteSection=1&searchkeyword=101120099104097110103101032109097114114105097103101#firstKeyWordFound.

[107] Al-Hasan ibn Yūsuf Ibn al-Mutakhhar al-Ḥillī, *Taḥrīr al-Aḥkām al-Shar'iyya 'alā Madhhab al-Imāmīyah: Mawsū'ah Fiqhīyah Kāmilah Mashhūnah bi-al-Takhrīj wa-al-Tafrī'* (Qum: Maktab al-Tawhīd, 1999), vol. 3, 467-468, and Ahmad ibn 'Abd al-Ḥalīm ibn Taymiyya, *Fatāwa al-Kubrā* (Cairo: Dār al-Jihād, 1965), vol. 4, 70.

[108] Ali, "Marriage, 37.

[109] Ibid, 19.

In 2005, the Grand *muftī* of Saudi Arabia, ʻAbdulaziz Āl al-Shaykh, announced that forced marriages contradict *shar'ī* rules before asserting that those who are found guilty of this offence must be punished with imprisonment.[110] If this type of marriage is prohibited, women will not be forced into marriage and they will not be dominated by their guardians. Al-Ṭūsī, a Jaʻfarī scholar whose opinions have strongly influenced the Iranian legal system, maintains that the customary practice of *badal* marriage is null and void unless the dowry is specified and the girl's acceptance is obtained.[111]Article 1210 of the Iranian code explains that when a person reaches the age of maturity, he/she has full legal capacity and nobody is entitled to treat him/her like a disabled person.[112] The clear statement of consent by brides and grooms and the specification of a fair dowry (*mahr al-mithl*) which may take the form of *mahr al-mu'akhkhar* (deferred dowry) clearly situate this type of marriage implementation under the protection of *sharīʻa*. The determination of the amount of a fair dowry is generally connected with the individual qualities of the bride (such as beauty, education, intelligence, refinement, religiosity, virginity and wealth are all important consideration) and local factors (such as peculiar attributes that set the bride apart from equals who live within the same area). This latter factor helps to explain why the reasonable amount for a dowry differs widely in accordance with the individual context.

The approaches that the two countries adopt to *badal* marriage clearly indicate that even if the action originates in *'urf*, it may conceivably become Islamicised and assume a specific significance for the Muslim community who practice it. It is therefore noticeable that although, there is a wide variation in *ḥadīth* sources, legal methodologies, results and stipulated conditions with regard to marriage practices, it is nonetheless possible to identify clear similarities that traverse individual countries. It could conceivably be argued that loyalty to the traditions of different schools is not the sole explanation of observed differences in *shar'ī* areas. The scholars affirm the socially embraced acts unless the practice has a detrimental impact upon Islam. When the customary practice partially contradicts *shar'ī* rules, the *'ulamā'* consider ways in which the action can be Islamicised usually by setting out certain additions or conditions that will help to align the implementation with *shar'ī* rules. The existence of different *shar'ī* decisions within broad areas of human life across countries may be explained by customary interpretation or local understandings; in many instances, this will provide a preferable alternative to variations within different legal methodologies and

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[110] Esther Van Eijk, "Sharia and National Law in Saudi Arabia," in *Sharia Incorporated*, ed., Jan Michiel Otto (Leiden: Leiden University Press, 2010), 164.
[111] Mohammad ibn Hasan ibn Ali Abu Jaʻfar al-Ṭūsī, *A Concise Description of Islamic Law and Legal Opinions*, trans. A. Ezzati (London: Icas Press, 2008), 345.
[112] "Civil Code of the Islamic Republic of Iran," Article 1210 reads: "No one, when reaching the age of majority, can be treated as under disability in respect of insanity or immaturity unless his immaturity or insanity is proved."

tools. To put it differently, the use of Saudi-Wahhābī or Iranian-Ja'farī sources does not in itself explain the production of different rules; in contrast, belongingness to particular *'urf*, the integration of the *'urf* into *shar'ī* principles and the contextual background may instead provide more fruitful avenues of exploration.

6. Cultural Presumptions within the *Fatwā*s

Various types of assumptions which relate to culture, methodology, politics, reason and values establish a foundation for *shar'ī* analyses while, at other times, functioning as the outer limits for the legal determinations of scholars. Rules grounded within culture may provide the lines of demarcation which divide Saudi Arabia and Iran's juristic communities. When scholars issue *fatwā*s that depend on secondary *shar'ī* sources by only discussing these principles in general terms, they may conceivably refer to cultural presumptions which include concepts of guardianship, the veil, or seduction. It is important to accept the cultural assumptions of text-based rules in order to agree with the validity of second-hand rulings without drawing the decision into question. Cultural assumptions do not transfer easily from one culture to another because they rely on shared knowledge within societies. The rule that characterizes a particular juristic group could conceivably be materially distinguished from laws that adhere within another community. Hursh argues:

> "...while the Qur'an is the infallible word of God and the *Sunna* is the legitimate collection of the Prophet's example, the transmission of these words into law was a cultural enterprise. This mediating position allows for liberal reform inside the Islamic tradition without questioning the legitimacy of the divine sources of Islamic law."[113]

The decisions that are extracted from the clear texts could be explicitly proven, but laws derived from rational or deductive methodologies are open to re-determination and mainly reflect the intellectual capacity and *'urf* of scholars. It can be argued that customary contexts will not only influence the understanding of interpreters through the sources, but will also orient the understanding of valid reason in a variety of ways. Upon the basis of the logical explanations, it could be summarised that Saudi-Wahhābī and Iranian-Ja'farī scholars employ the *shar'ī* methodologies or principles in conformity with certain typologies of the function of women which are in accordance with the customary perceptions of both countries. This contributes to the construction of the patriarchal interpretations and rules that are evidenced within the *sharī'a* system.

'Urf and *sharī'a* cannot be conceived in diametric opposition; rather, it is instead essential to understand the two concepts in their mutual relation, with specific attention to the points at which they reinforce and refute each other.[114] This complexity is clearly evidenced in countries where notions of *'urf* and piety intermingle with the proposition that *'urf* is

[113] John Hursh, "The Role of Culture in the Creation of Islamic Law," *Indiana Law Journal* 84, no. 4 (2009), 1423.
[114] Al-Rasheed, *A most Masculine,* 229.

purely *shar'ī*. When individuals seek to 'break the taboo' (or explore what is permitted by Islam but prohibited by society), the situation creates a social discrepancy that is mainly justified by religious precepts. The customary concept of *'ayb* (shame) and the religious rule of *ḥaram* (prohibited) appear to be intertwined within rulings issued by religious scholars, and this contributes to considerable *shar'ī* confusion and methodological problems. Traditional and conservative interpretations offered by scholars have invoked symbols and meanings that resonate within society. It might be argued that customary assumptions that relate to femininity, masculinity and violations of honour are core elements of the interpretations because rules in gender issues are mainly expressions of customary codes of modesty and nationalism in the two countries. The sanctioning power of individual interpretations sometimes results in questions being asked about the limitations of *sharī'a* and society. The Committee for the Promotion of Virtue in Saudi Arabia and Iran's Prevention of Vice and the Iranian Revolutionary Guards are used to attain the uniquely purified society. The religious *'ulamā'* have generally assumed that evil or vice is everywhere and have sought to eradicate it; in response, Saudi and Iranian women have sought to undermine a number of automatic assumptions that have been ascribed to them.[115]

The concept of family life in Saudi Arabia and Iran draws strongly upon endogamous, patriarchal, patrilineal, patrilocal and occasionally polygamous ideas although it is important to recognise that the influence of these elements has decreased over the course of time. Long clarifies:

> "Patriarchal refers to family authority being concentrated among the elders, male and female; patrilineal refers to tracing descent through the male line; patrilocal refers to family members living in close proximity; endogamous refers to choosing spouses from within the same tribe, extended family, or social group; and polygamous refers to having multiple wives."[116]

The distribution of responsibilities among family members is determined in accordance with this patriarchal structure; men are primarily protectors and providers of the family who work outside the home; women are managers whose primary duties are focused upon the home. In a society in which parental authority –in particular the authority of fathers – is foremost, women struggle to increase their freedom or decrease the power of guardianship. Mir-Hosseini argues that the seclusion of women within the home can generally be traced back to virtues of modesty and religious piety.[117] In both countries, the *'ulamā'* incorporate the patriarchal and social sensitivities of society into their religious interpretations when engaging with particular gender issues. Al-Rasheed claims that most of these interventions generally confirm exclusionary social habits and insufficiently establish a dividing line

[115] Kian-Thiébaut, "From Islamization," 127.
[116] Long, *Culture,* 35.
[117] Mir-Hosseini, "Islam, Women," 183-184.

between custom and religion – this in turn results in conservatism and different religious nationalities.[118] It is difficult for religious scholars to manipulate or reject the patriarchal aspects and structures that linger behind the specificity of rules. The interpretative strategies of both scholars therefore neglect the reality of an Islamic *umma* which encompasses different nationalities, multicultural groups and various cultures. The orientation of scholar veers between the poles of conservative and radical, and frequently overshoots the centre-ground which is considerably more flexible and moderate. The scholars are therefore exposed to the accusation that they seek to impose their understandings and render them as the only interpretations that can be legitimately envisaged.This is particularly important because *sharīʻa* is distinguished by the fact that its divine and infallible sources produce a rich diversity when applied as law at the local level.[119]

The political and social impact of the religious rules makes them potentially enforceable, but the enforcement of decisions needs to be consistent with socially defined doctrinal, legal, or moral elements. This will in turn enable *ʻurf* to operate within the *sharʻī* system. The legal reasoning that underpins the rule is influenced by the socio-cultural context along with the intellectual environment in which legal scholars operate. In both countries, the weaknesses (*ḍaʻīf*) of female members are unfavourably juxtaposed with their male counterparts.[120] Although Wahhābī and Jaʻfarī scholars have sought to root this interpretation within the Qur'anic verses,[121] Rahman argues that the intention of the verses is not to make women dependent on their guardians; rather, it is instead to strengthen the position of the weaker segments of society.[122] While the *sharʻī* concept of *qawāma* (protection and maintenance) is used to structure an Islamic model of gender relations and marriage, the overuse of the term contributes to misinterpretations of male authority. Women within societies are used to symbolise the authenticity of rules and the religiosity of countries. This is to be achieved by consulting a male religious scholar and enacting strict rules for women's dress. Mir-Hosseini observes:

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[118] Al-Rasheed, *A most Masculine,* 158-159.
[119] Hursh, "The Role of Culture," 1415-1418.
[120] Al-Rasheed, *Contesting,* 130.
[121] Q. 4:34 reads: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance –[first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is eve Exalted and Grand." and Q. 30:21 reads: "And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought."
[122] Fazlur Rahman, "A Survey of Modernization of Muslim Family Law," *International Journey of Middle East Studies* 11, no.4 (1980), 452-456.

> "Where patriarchal and authoritarian/discriminatory laws and practices have prevailed with regard to gender issues and family structures, they are justified in religious terms, notably with reference to concepts derived from the much-debated verse 4:34."[123]

The regulations that relate to women's appearance in both countries is intended to ensure restraint in this life and salvation in the afterlife.[124] Although gender issues have become established as a core preoccupation for scholars, the topics tend to be approached from different viewpoints. At one-point, moral corruption provides the point of entry whereas at other times it is moral superiority or religious piety that performs this function. Although the rules are supported by strong religious interpretations, customary decisions that are indigenous to specific countries have an important impact upon these controversial decisions.

The textual proofs that Al-Razi lists clarify that men are considered to be superior to women in each of these respects.[125] Prophets, leaders and scholars undertake various religious duties including *adhān*, *jihād* and the *khuṭba*. The men bear witness while also being charged with blood money and financial maintenance; they also enjoy guardianship in marriage, greater inheritance shares, lineage, permission to possess up to four wives and a unilateral right of divorce. The precedence that men are granted by *sharīʻa* is frequently further enhanced by customary dynamics and local assumptions – this is shown, for example, in the way that customary tools are used to impede the construction of concepts. Mir-Hosseini observes:

> "The problem is not with the text but with context and the ways in which the text is used to sustain patriarchal and authoritarian structures."[126]

Although there is no restriction that impede female scholars in religious education, with the exception of being an *imām* who leads daily prayers, the most prestigious titles are reserved for men – these include *āyatullāh* (sign of God), *hujjat al-Islām* (proof of Islam), *kabīr al-muftī* (grand scholar), *marjiʻ taqlīd* (source of emulation) or *mujtahid* (authority in jurisprudence).[127] The cultural assumption of male superiority can be traced back to the combination of female attributes and *sharʻī* rules. In assisting legal scholars in their main responsibility to extract the solution from *sharʻī* sources, *ʻurf* can sometimes be deployed as a pragmatic solution that confirms or justifies the rules.

The conservative approach believes that women seek to seduce (*fitna*) men and that they should be controlled in order to protect men's chastity. By virtue of the strong

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[123] Ziba Mir-Hosseini, "Muslim Legal Tradition and the Challenge of Gender Equality," in *Men in Charge Rethinking Authority in Muslim Legal Tradition*, ed. Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (London: Oneworld, 2015), 36.
[124] Al-Rasheed, *Contesting,* 130, and Kian-Thiébaut, "From Islamization," 128.
[125] Omaima Abou-Bakr, "The Interpretive Legacy of Qiwamah as an Exegetical Construct," in *Men in Charge Rethinking Authority in Muslim Legal Tradition*, ed., Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (London: Oneworld, 2015), 50.
[126] Mir-Hosseini, "Muslim Legal," 38.
[127] Azam Torab, "The Politicization of Women's Religious Circles in Post-Revolutionary Iran," in *Women, Religion and Culture in Iran,* ed. Sarah Ansari and Vanessa Martin (Surrey: Curzon Press, 2002), 150.

connection between religion and state, men, in their designated role as guardians, are believed to mirror the state. The general consensus upon the respective roles of men and women affirms that men protect women against the violence of other men while women raise and support the second generation of men. While the mixing of the genders is viewed as opening the way to moral corruption and the violation of *sharʿī* rules, it is important to recognise that more profound customary and sociological reasoning underpins the insistence upon segregation in Saudi Arabia and Iran. Al-Rasheed observes:

> "[T]he state has in many ways marginalised men by becoming not only a provider for women but also the guardian of their honour –at least, this is how the state is presented in its own official narratives."[128]

This assertion suggests that the field of gender relations is predetermined and divinely prescribed by an authoritarian state that operates under the idea of a religious nation focused upon authenticity and piety. It is important to note that *ʿurf* is sanctified within Saudi Arabia's national identity to a greater extent. Long observes:

> "Arabia is not only the cradle of Islam but also of the Arabs, the latter identified in the tribal and extended family-based society with linage, as much if not more than language and politics. Personal status is conferred more by bloodlines than money or achievement, and nearly all Saudis claim a proud Arabian ancestry."[129]

Custom combines with familial control mechanisms, powerful tribal influences and religious interpretations – each element implies complete obedience to males in positions of authority and condemns individual ideas that are believed to threaten unity. As a consequence, the ancient code of personal and collective honour (*sharaf*) has become established as an important attribute of interpersonal relations in Saudi customary heritage. Casual relations between men and women are believed to one cause of social corruption as Lewis Atiyat Allah (a Wahhābī Islamist activist) argues.[130] It might be observed that the Islamic rule of guardianship combines with the masculine and tribal conception of honour to contribute to an overestimation of the role of men and a violation of women's religious rights.

The impact of *siyāsa sharʿiyya* (politics in accordance with the Islamic law) or the alliance between official rulers and scholars also requires closer attention. Scholars have sometimes, at the request of a ruler, issued a particular *fatwā*, in the expectation that this would enable them to legalize their own conservative rules. The establishment of a law that consolidates the control of *fiqh* over political power changes the rational logic that underpins the rule. The identification of the exact character of second-hand rules enables scholars to identify and explore the shifting patterns, the formation of particular interpretive communities, and influence of political power. In both countries, the theory of religious nationalism which is closely linked into guardianship responsibilities is practiced under the

[128] Al-Rasheed, *A most Masculine,* 279.
[129] Long, *Culture*, 26.
[130] Al-Rasheed, *Contesting,* 180.

patronage of the state.[131] The states are active agents in the implementation and enforcement of particular gender-related codes – this is particularly important as it is directly linked into their attempt to boost their Islamic profile and standing within the wider Muslim world. Setting aside customary and social contexts, Saudi Arabia's indigenous rules are strongly connected with the long-standing historical association between religion and the state. This applies because the propagation of local Saudi religious interpretation mainly derives from the towns of central Arabia, in particular the Najd region. It attests to the intellectual contribution and influence of scholars who retain genealogical links to their region or geography. This situation also reiterates the failure of scholars who failed to develop intellectual ideas or a methodology that extended beyond their locality. The solutions could therefore be considered to be mutable and temporarily valid, despite the fact that the moral principles or religiously oriented forces that underpin the rules are immutable and eternally valid.

In drawing upon chronological support, the official Saudi *'ulamā'* have invoked the sacred texts in order to sanction the words and practices of the ruler or approve erroneous acts. It was not merely the case that 'Abd al-Wahhāb followed the radical interpretations of the Ḥanbalī school in order to retain stability and safety in the specific social context; the next generation of Wahhābī '*ulamā'* followed him in this respect. This situation increased the autonomous position of customary legislations and the monopoly of rulers. Just as, in Saudi Arabia, political power is closely tied into religious knowledge, the similar and this power assemblage in turn exerts considerable influence over gender-related issues in Iran.[132] The concept of *wilāyat al-faqīh* (the mandate of the jurist) is understood to conflate political and religious leadership and to provide considerable managerial authority to religious clergies who function as the representative of the hidden *imām* during the occultation.[133] For instance, compulsory veiling or the chador in Iran should be understood to channel religious principle into political strategy – this is shown by the fact that secular women view it as a symbol of national unity while religious women believe that it symbolises their Ja'farī religious identity.[134] Strong comments on the issue should be understood in the wider context of the *'ulamā'*s desire to control an Islamised public sphere which is taken as an indicator of the purity of society and state. The official Wahhābī interpretation compels society, in a moral, symbolic and physical sense, to work towards the Islamisation of the country – this reminds individuals that their primary duty or obligation is to purify religious practice and protect it

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[131] Al-Rasheed, *A most Masculine,* 240, and Torab, "The Politicization," 152.
[132] Mir-Hosseini, "Muslim Legal," 38-39.
[133] Torab, "The Politicization," 152-153.
[134] Kian-Thiébaut, "From Islamization," 128.

from *shirk* (blasphemy). However, these Ja'farī and Wahhābī scholars should be careful not to convey the sense that their individual interpretations are binding upon all Muslims, even in those instances where the *sharī'a* would appear to provide grounds for such presumption.

Wahhābī and Ja'farī ideologies seek to put in place cultural stability and enable local dynamics with a view to protecting the local context against the penetration of Western culture and modernization. The imperative to purify Islamic space and preserve it from unlawful *ikhtilāṭ* (intermingling of men and women) is in turn reflected within the government policies of Saudi Arabia.[135] When Saudi Arabia and Iran were founded upon the basis of religious nationalist ideology, gender was identified as a key area of representation, and it accordingly became invested with considerable cultural, political and religious powers. The prohibition upon driving cars in Saudi Arabia and bicycles in Iran were consciously undertaken with the intention of limiting Western intrusion into the two societies – to this extent, the two initiatives could be argued to be consistent with the principle of *tadarrīj* (gradual evolution).[136] The intellectual reaction to Westernisation, as embodied in the defensive attitudes of scholars, ultimately served to reinforce customary influence over the status of women and traditional family relations.

In addition to patriarchal and state influences, media productions have also encouraged individuals to assimilate a specific style of interpretation and world-view that is consistent with authentic *'urf*. Scholarly efforts to portray women as the symbolisation of the nation's piety have benefitted from the accompanying contribution of an educational literature and various media sources.[137] Media or modern communication networks are frequently used to promote customary assumptions and align public religious consciousness with state ideologies.

Conclusion

Patterns of difference or varieties of customary practices among human society will not simply disappear. The appropriate implementation of the *shar'ī* rules necessitates the broad accommodation of local norms, which should be changed when necessary, most notably when they contradict the main principles of *sharī'a*. Any scholar who blindly implements the standard *shar'ī* rules of his school without acknowledging changing times and circumstances along with customary variations will ultimately damage the flexibility that is built into *sharī'a* and legal consensus. However, it is important to note that the acceptance of customary practice in the *shar'ī* area basically relaxes the observance of Islamic values

[135] Al-Rasheed, *A most Masculine,* 164.
[136] Ibid, 166.
[137] Al-Rasheed, *Contesting,* 163, and Kian-Thiébaut, "From Islamization," 129.

such as public good and interest. In particular and extreme circumstances, the deployment of *'urf* under the appearance of separate *shar'ī* principles might be interpreted as an effort to conceal the need for innovation. The application of *'urf* might be interpreted as an affirmation of the position which holds that primary issues of faith should be determined with reference to the central and original values of classical sources. However, it should be remembered that scholars frequently advocate flexible and pragmatic approaches in the sphere of *mu'āmalāt* (social relations) or less important issues. It is quite conceivable that *'urf* will result in changes to the basic legal methodologies that had previously constituted the grounds of *sharī'a*– this applies when scholars obtain authorisation not to blindly follow the authoritative books and decisions of the *madhhab*s. It is in fact the case that they are required to acknowledge the needs and habits of contemporary time during the jurisdiction process, with this being achieved by preserving the formal framework of sanctity. It could be argued that *'urf* is a positive internal principle which helps to establish a legal mechanism – from this perspective, it no longer appears as a negative external force that attacks Islamic principles. If differences in implementation may originate in *'urf*, this assertion makes an important contribution by enabling the advocates of distinct schools to evaluate legal differences with reference to the concept of customary diverstiy.

The legal rulings of scholars appear as a synthesis of quotations from the Qur'an and the Sunna which attempt to rationalize the motivation for either acceptance or rejection with reference to the principle of public interest. Because the Sunna sources are strongly linked into *'urf*, the rational analysis of sources identifies distinctions. This is encapsulated within the concept of *ḥadīth* – the acts, consents and words of *Imām*s who lived inside Iranian *'urf* provides legal grounding for the extension of customary influences over religious rituals. It should be acknowledged that the acceptance of the *Imām*s's words within the *ḥadīth* sources sometimes opens the way to customary reflections. Within the Nowrūz example, the Ja'farī Iranian scholars used the *ḥadīth* of *imām*s while the Wahhābī Saudi scholars applied the sunnī *ḥadīth* sources in the expectation that this would permit different solutions. In the case of driving, scholars within both countries applied rational methodologies, but with different results. None of the scholars accepted that exchange marriage was compatible with Islamic rituals. While the scholars engaged different sources, the results demonstrated clear similarities. Upon this basis, it can be ascertained that approaching the question from within different legal schools (Wahhābī-Ja'farī) does not provide the only explanation for the emergence of different solutions to the same issues. Conversely, peculiar customs along with the existence of different legal *madhhab*s (schools) provided a more sustainable explanation.

CHAPTER 2: THE LEGAL POSITION OF ḤANBALĪ AND JA‘FARĪ SCHOOLS ON *‘URF*

Introduction

Legal scholars and reformists, within the branches of jurisprudence, generally acknowledge the difficulty of identifying legal validity of regulations which rely on customary values. In the absence of solutions that can be achieved through the application of *shar‘ī* principles, *‘urf* emerges as a valid source in response to the impossibility of restricting legal issues. Al-Qarāfī, the thirteenth century established Mālikī scholar, observes:

> "Recognition of *‘urf* (as an Islamic legal tool) is [a] common inclination among all schools of jurisprudence and upon reaching a person settling (the dispute) with *‘urf*, they certify (the solution) with it."[1]

At this point, the resort to *‘urf* which is applied as a *shar‘ī* tool in urgent circumstances may become an indispensable part of jurisprudential procedure which helps to validate the solution within the Ḥanbalī and Ja‘farī jurisprudence. Legal scholars generally analyse the complex relationship between *‘urf* (custom) and *‘āda* (usage) with reference to three categories.[2] The followers of the first opinion who include Ḥanafī scholars such as Ibn Abidīn and Al-Nasafī maintain that there is no distinction between the definition of *‘urf* and *‘āda* – this applies because these two terms are taken to be synonymous with one particular meaning. This approach establishes that what people know and use in abandonment, actions and speeches can be considered to be *‘urf* and referred to as *‘āda*. The science of jurisprudence does not, however, recognise a clear distinction of the two terms.[3] Advocates of the second approach instead insist that the definition of *‘urf* and *‘āda* can be distinguished. They proceed to assert that customary acts can be conceptualized as ‘*āda*, and speeches or verbal customs can be viewed as *‘urf*. Those aligned with the third opinion who include Ibn Taymiyya, most Ḥanbalī and Ja‘farī scholars suggest that the distinction pertains to the general or particular meaning. They suggest that *‘āda* can be considered a greater extent than *‘urf*[4]and engaged in general terms.

Prior to initiating the discussion, it should first be observed that the chapter identify the main approaches that scholars have adopted to *‘urf*. It compares the opinions of classical Ḥanbalī scholars and contemporary Saudi scholars to their Ja‘farī counterparts. The sketching of a theoretic outline that runs from past to present period provides considerable insight into

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[1] Qūtad, *Al-Urf Hujjiyyatuhu*, vol. 1, 204.

[2] Su‘ud ibn ‘Abdullah al-Waraqī, *Al-‘Urf wa Taṭbīqātihi al-Mu‘āsaratī,* 8-10, accessed December 28, 2017, http://elibrary.mediu.edu.my/books/MAL03775.pdf.

[3] ‘Abd al-Wahhāb Khalāf, *‘Ilm Uṣūl al-Fiqh* (Qairo: Dār al-Qalem, 1942), 89-90, and ‘Abdullah bin ‘Abd al-Muḥsīn al-Turkī, *Usūl Madhhabī Imām Aḥmad* (Mu'assese al-Risāla, 3rd Edition, 1990), 583.

[4] Ṣāliḥ ibn ‘Abd al-‘Azīz Al-Manṣūr, *Usūl al-Fiqh wa Ibn Taymiyya*, (Egypt: Dār al-Naṣr, 1985), 512.

legal attitudes towards the shifting status of *'urf* within the *sharī'a* over time. Both the transformation of the *shar'ī* status and validity of *'urf* in the methodology of Ḥanbalī and Ja'farī jurisprudence will be considered along with the interplay between *shar'ī* rules and emerging Islamic customs which will be discussed with reference to exemplary *fatwā*s on the issue of eating fallen fruits.

A. The Concept of *'Urf* in Ḥanbalī Jurisprudence

Within the Ḥanbalī school of law, *'urf* is not considered to be an independent source of *sharī'a*; rather it is instead discussed with reference to the *shar'ī* principles of need, public interest, necessity, defence of hardship and embarrassment, or ease in achieving compliance with the demands of *sharī'a*. Within the field of practice, it is acknowledged to be appropriate to use the customary context to identify the intended purpose of the action. The customary context enables scholars to identify if the performance of an act is legal or illegal, prohibited or advisable, or valid or invalid. Customary proofs can therefore provide accurate insight into the explanation of practices during the evaluation phase.

Scholars within the school such as Ibn Taymiyya consider terminological uncertainty or confusion to be responsible for disputes.[5] With the intention of resolving the confusion, he creates his own three-dimensional criterion for the definition of terms – in his view, this will enable him to understand the meaning of the jurisprudential terminology that derives from the Qur'an and the Sunna. He suggests that in the first instance, the terms (praying or alms) are defined by the Lawgiver. In the second instance, the terms are defined with reference to language and words such as earth or sun. In the third instance, the meaning of terms is determined with reference to *'urf* (marriage) and practice (possession). Because the definition of terms in the third category is not specified, whether by the Lawgiver or linguistic scholars, they may substantially differ across individual context, and evidence considerable variation in accordance with society or time.[6] When the meaning of term is defined with reference to the language and *'urf* during the relevant time, all rulings are considered valid and practical in accordance with that time and environment.

1. The Distinction between *Ijmā'* (Consensus), *'Āda* (Usage), and *'Urf*

Ḥanbalī scholars, in considering the connection between *'āda* and *'urf*, generally argue that *'āda* is a general term which encompasses individual and collective activities; *'urf*, meanwhile, only extends to collective activities. Qūtad suggests that *'āda* encompasses both individual and collective meanings while collective *'āda* is grounded within *'urf* rather than

[5] Al-Mansūr, *Uṣūl al-Fiqh*, 520, and Ibn Taymiyya, *Majmu' al-Fatāwā*, vol. 19, 127.
[6] Al-Matroudi, *The Hanbalī School*, 115.

individual reference points.[7] For the Ḥanbalī scholars every *'urf* can be considered to be *'āda*; however, the converse does not apply.

In addition to the *shar'ī* definition and the division of *'āda* and *'urf*, the references that *qānūnī-niẓāmī* (statutory) system makes to previous customary decisions help to clarify both the material (*māddī*) and spiritual (*mānawī*) aspects of *'urf*. For the Ḥanbalī scholars, the material form of *'urf* is generally considered to be *'āda* – this is the recitation of the actions in the absence of any official reason; in contrast, the spiritual aspect of *'urf* is understood to be nonmaterial *'urf*. Its connotation is brought out with reference to the *shar'ī* concept that is created by the community on the basis of necessity and respect (e.g. verbal acceptances).[8] When the material component combines with the religious doctrine or *shar'ī* requirements, the pursuit of the behaviour becomes binding and obligatory. In this circumstance, the regulation is considered to be, in contrast to classical Islamic theory, customary. In the view of a majority of scholars, this circumstance represents a partial correlation between '*urf* and *'āda*.

The distinctive criteria that set apart *ijmā'* and *'urf* have also been assessed by Ḥanbalī scholars from a *shar'ī* perspective. They separate the two terms in accordance with the opinion of laymen (*'urf*) and opinion of scholars (*ijmā'*).[9] While *'urf* encompasses the practices of general or specific, literate or illiterate and scholar or laypersons, *ijmā'* requires consensus among scholars on a particular issue. *'Urf* requires continual reiteration if it is to be recognized by the community – this, however, is not a requirement for the *shar'ī* concept of *ijmā'*. Malleability is another feature that differentiates the two terms: while *'urf* adapts in accordance with new context and times, *ijmā'* does not, once its *shar'ī* validity in time is achieved, change in accordance with new circumstances. While it is possible for *'urf* to be null and void, this situation is not conceivable for *ijmā'* which is tasked with demonstrating the *shar'ī* correct path to believers.

2. Types of *'Urf* in the Religious (*Shar'ī*) and Statutory (*Qānūnī*) Systems

The *shar'ī* perspective divides *'urf* into valid (*ṣaḥīḥ*) and invalid (*fāsid*) categories. The former is acknowledged among the local population and it does not include elements that contradict the main authoritative texts or the *shar'ī* principles. It is considered to be an applicable *shar'ī* source that a jurist or judge has a right to resort to in order to produce regulations that relate to blood money, custody of children or maintenance. Because the

[7] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 111.
[8] Fahd ibn Maḥmūd bin Aḥmad al-Sīsī, *Makānat al-'Urf fī al-Sharī'ati al-Islāmiyyet wa Athāruhū fī Sinni al-Inẓimati fī Mamlakat al-Arabiyya al-Su'ūdiyya,* Master diss. (Medina: Kulliyya al-Shar'iyya fī al-Jāmi'a al-Islāmiyya, 2009), 87.
[9] Al-Turkī, *Uṣūl Madhhabī*, 584, and 'Abd Al-Waḥḥāb Khalāf, *Maṣādir al-Tashrī' al-Islāmī fīmā-lā Naṣṣ fīh* (Dār al-Qalem, 1993), 145-146.

authority for the usage of valid *'urf* is provided by the classical *shar'ī* sources, a direct reference will provide permission without *shar'ī* obstacle. Invalid *'urf* is rejected upon precisely the same basis – that is, the inclusion of elements that contravene the main purpose of the *sharī'a* by allowing prohibited acts or vitiating legal acts.[10] However, it is important to recognise that this kind of *'urf* is not approved as a *shar'ī* source and nor is it applied during *shar'ī* procedures.

The approach that statutory scholars adopt to *'urf* within the jurisprudence is distinguished from the opinions of religious scholars in a number of important ways. *'Urf* within the *qānūnī* system is categorised into two types which are constituted by customary order and customary explanation (including policymaking). In the first instance, the rational customary order is the source for *qānūnī* or *niẓāmī* regulations and it is not permitted for a person to object to the decision and prove a counter argument. Within daily practices or routines, *'urf* is generally regarded as customary orders and these behavioural norms obtain statutory obligation over the course of time. Conversely, customary explanation, which is also known as policymaking, is used within the jurisprudence to produce a legal solution. This occurs in instances where there is no a legal consensus upon the dissenting opinion. It is also used to expound contractors' intention in instances where there are no indicators (whether in the form of approval with custom or the judgement of custom in order to ascertain validity as with the usual convention).[11] While a few legal scholars disagree with the first variation upon the grounds that *'urf* lacks the ability to establish interpretations or prescriptions without the assistance of constitutional permission, the majority of scholars agree with the application of both variations within the contemporary jurisprudence. As long as scholars recognise *'urf* as an official source of the law, there is no justification for limiting its impact on the creation of various types of regulation. '*Urf* might, in accordance with its acceptance, applicability and conditions, be presented in the form of interpretation, order or policymaking.

The comparison between *shar'ī* and *qānūnī* classifications of *'urf* demonstrates that the evaluation criteria of *sharī'a* focuses more on general considerations while *qānūnī* evaluation tends to derive from a single direction or style. Because individuals' daily routines have developed gradually, the acts obtain sanctioning power over time and do not require determinations and explanations. Although the *shar'ī* categorisation focuses upon the generality of custom (*'urf 'āmm)*, the *qānūnī* system sometimes refers to specific customs (*'urf khāṣṣ)* for particular issues or instances of necessity in which legal validity is acquired

[10] Al-Waraqī, *Al-'Urf wa,* 12-13.
[11] Al-Sīsī, *Makānat al-'Urf,* 111.

for a certain rule. This circumstance may lead to multiple systems within the country, and this may result in the achievement of the best solution to the problem, the declaration of progress or the furtherance of unity. However, when the *qānūnī* system is, whether generally or specifically, addressed to *ʻurf* in attempting to establish *qānūnī* regulation, these customary regulations become compulsory for all members. Nonetheless, this situation may create difficulty for the community, many of whose members may conceivably be unfamiliar with the enacted *ʻurf*.[12]

3. Legal Proof (*Adilla*) of *ʻUrf* and Its Estimation (*Iʻtibār*)

While the texts do not provide additional elaboration, the term *maʻrūf*, when it is deployed within the *sharʻī* textual sources, is generally interpreted in the same manner as *ʻurf* in large part because they share the same linguistical roots (*ʻarafa*). Qūtad observes:

> "The word comprises knowledge not only what is known from legal dimension, but also what people get accustomed to do in their life. When the legal order is recognised by society, it is defined as known (*maʻrūf*) opposing to indeterminate, it also must be considered as being beneficial acts opposing to evil."[13]

Although the Qur'an does not provide a clear authority for *ʻurf*, scholars nonetheless sought to validate it and have accordingly quoted several Qur'anic passages, *ḥadīth*s (of the Prophet) and *ijmāʻ* (of the scholars) in support of their views. Direct reference is made to Q. 5:89 which reads:

> "He will punish you for your deliberate oaths; for its expiation feed ten needy people, on a scale of average (*awsaṭ*) of that with which you feed your own families or clothe them or manumit a slave."

In this verse the Lawgiver does not provide a specific amount for the penance, but the solution is rendered in basic formats. The scholars refer to the *ʻurf* in order to adjust the penance of oath which takes the form of feeding in accordance with the standard set by society. The concept of *ʻurf* sets out when Ibn Taymiyya in engaging with the unqualified commands refers to Ibn Ḥanbal. He states:

> "We expanded the effects of *ʻurf* in other topics, and we explained that this statement is correct as evidenced by the Qur'an, the Sunna, and consideration. This is the analogy of Aḥmad's school, since its origin is not derived from the command of the Lawgiver, it returns to *ʻurf*."[14]

In applying *qiyās* to contemporary issues, Ibn Ḥanbal and Ḥanbalī scholars set out the criteria through which Ibn Taymiyya's further extend their statements to conceive of the customary norm as a subcategory of analogy.[15] The specification of the average amount, in acting in accordance with circumstances, demonstrates variety because each region has its own characteristics. At this point, the context of *ʻurf* obtains applicability by making it necessary to determine the *sharʻī* limits for unqualified compulsory rules.

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[12] Al-Sīsī, *Makānat al-ʻUrf,* 112-113.
[13] Qūtad, *Al-ʻUrf Ḥujjiyyatuhū*, 183,184.
[14] Ibn Taymiyya, *Majmūʻ al-Fatāwā*, vol. 35, 205.
[15] Qūtad, *Al-ʻUrf Ḥujjiyyatuhū*, 147.

One particular *ḥadīth* ("Whatever the Muslims deem to be good is good in the eyes of God, whatever the Muslims deem to be bad is bad in the eyes of God.)"[16] is frequently quoted in support of *'urf*. Even though it does not provide decisive proof, scholars generally refer to this *ḥadīth* to demonstrate the appropriateness of *ijmā'*, *istiḥsān,* and *'urf*. Ibn Qudāma in explaining *shar'ī* examples and proofs of *istiḥsān* addresses this *ḥadīth* while relating the approval of Muslim society.[17] Because *'urf* represents collective trends within the society, the point is further illustrated by another *ḥadīth* emphasises that the community abstains from a collective agreement on an error. Scholars also invoke this *ḥadīth* as a textual authority when they use *'urf* to set out general and detailed rules.

Ibn Najjār refers to another *ḥadīth* ("Take what is sufficient for you and your children in conformity with known (*ma'rūf*).")[18] in order to set out the standard maintenance of children and women in accordance with *'urf*. The narration indicates that what is deemed to be sufficient is defined in accordance with *'urf*. The narration presents *ma'rūf* in similar terms to *'urf*. The consideration of *'urf* with reference to specific places, situations, subjects and times is permitted with reference to the particularization of absolute rules that need external additional support in the absence of *shar'ī* texts.[19] When Ibn Qudāma addresses the issue of maintenance, he states:

> "It is correct that we did not specify the limit of absolute maintenance in the jurisprudence because the maintenance is related to *'urf* among people (and it) shows changeable character according to financial situation of rich, poor, or middle people."[20]

The identification of accommodation, cohabitation, consent, custody, maintenance and the rights of spouses along with a number of other issues relating to marital life are mainly defined in accordance with customary values according to scholarly consensus.[21] This also extends to the *ḥadīth* which establishes that "Whoever buys a foodstuff should not sell it until he possesses it." The definition of possession (*yaqbiḍuhū*) is attributed to *'urf* because the classical texts do not provide a fixed explanation of it. Therefore, the concepts of ownership and possession is further elaborated by the different practices of dealers or the diversity of custom.[22]

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[16] Muhammad ibn Aḥmad ibn 'Abd al-'Azīz al-Futūḥī al-Ḥanbalī Ibn Najjār, *Sharḥ al-Kawkab al-Munīr* (Wizārāt al-Awqāf al-Su'ūdiyya, 1993), vol. 4, 448.
[17] 'Abdullah ibn Aḥmad ibn Muhammad ibn Qudāma al-Maqdisī, *Rawḍa al-Nāẓir wa Jannat al-Manāẓir*, (Damascus: Resalah Publishers, 2009) 201,202.
[18] Ibn Najjār, *Sharḥ al-Kawkab*, vol. 4, 450, and Al-Manṣūr, *Uṣūl al-Fiqh*, 514.
[19] Al-Waraqī, *Al-'Urf wa,* 19.
[20] Walīd ibn 'Alī al-Ḥusayn, *Majālāt I'māl al-'Urf*, 28, accessed December 28, 2016, http://csi.qu.edu.sa/files/shares/مركز%20البحوث/مجالات%20إعمال%20العرف%20بعد%20التعديل.pdf.
[21] Ibn Najjār, *Sharḥ al-Kawkab*, vol. 4, 452-453, Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 161-165, and Ibn Taymiyya, *Majmu' al-Fatāwā*, vol. 34, 55.
[22] Al-Manṣūr, *Usūl al-Fiqh*, 513.

4. The Legal Position of *'Urf* and the Opinions of *'Ulamā*

The *shar'ī* validity of *'urf* within Ḥanbalī jurisprudence can be analysed with reference to three categorical divisions: textual sources of Ibn Ḥanbal that relate to *'urf*, textual sources of famous Ḥanbalī scholars that relate to *'urf* and the value of customary consideration (this is one of the main reasons that helps to explain the growth of the sect and its continued survival). The first division contains Ibn Ḥanbal's explanations and textual sentences which engage, *inter alia*, with custom's *shar'ī* estimation and the issues that is resolved by way of *'urf*. In addressing himself to the sale of clothes and slaves, he states: "What is beautiful, it is for the seller, and what is habitual cloth, it is for the buyer."[23] The determining factor of the commodity, both for the purchasing party and the seller, is deemed to be the question of whether it is compatible with regional *'urf*. In responding to a question on the verbal practice of bazaar merchants, Ibn Qudāma quotes a narration:

> "Is it acceptable for the tradesmen of bazaar to abbreviate the word *dīnār* (contemporary currency) as *dānaqa* despite the dissimilarity? Abū 'Abdullah begins by observing that when people agree to shorten the word, it makes matters easier for the community. This is not held to be invalid according to *sharī'a* upon the grounds that this has not changed anything."[24]

Both Ibn Ḥanbal's answer and this narration further reiterate that locally known expressions or verbal custom (*'urf qawlī*), along with their *shar'ī* validity, are recognised as being the most useable type of *'urf* within Ibn Ḥanbal's method.

The second type of proof is provided by the customary approvals or statements of famous Ḥanbalī scholars. These reference points, it should be noted, have both a theoretical and practical value (in demonstrating how *'urf* can be addressed during the implementation procedure). Ibn Qudāma observes:

> "The Lawgiver makes the sale lawful, but He does not explain the conditions that allow the application of customary principles. [If] a thing is proven to be a scale, what is understood to be within the scale of *'urf* can be said to be the scale. If its concept is not proven within the *sharī'a* except in the general statements of the texts, its response is known by people's *'urf*. Because there is no way to determine it other than *'urf*, it is attributed to *'urf* in a similar way with the possession, the parties in sale or likewise."[25]

Al-Ṭūfī, (fourteenth century Ḥanbalī scholar who paid attention to the principle of *maṣlaḥa*) by considering *'urf* to be the tenth source of *sharī'a* claims that when the problem is not solved or settled by *shar'ī* text within the jurisprudential compilations, people's common knowledge becomes established as the *shar'ī* border.[26] By emphasising on the intimate link between *'urf* and *maṣlaḥa*, he employs the concept of *'urf* to determine the best interest of a given community.[27] Ibn Taymiyya provides further clarification:

> "An absolute (unqualified) contract returns to *'urf* in obligatory circumstances – the same applies to the obligation of the absolute contract for commonly known monetary sale which

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[23] Ibn Qudāma, *Mughnī* (Riyadh: Dār 'Ālem al-Kutūb), vol. 6, 259.
[24] Ibid, 108.
[25] Ibn Qudāma, *Mughnī'*, vol. 12, 427.
[26] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 217.
[27] Ibrahim, "Customary Practices," 248.

> requires not making unlawful lawful or lawful unlawful for the owner of stipulation. Conditions of contract are sometimes receivable by word (*lafẓ*) or else *'urf*, but both of these two tools are qualified with the intention of not prohibiting the order of Lawgiver and the Prophet."[28]

In referring to the treatment of economic contracts, Ibn Qayyim observes that the purpose of the contract is considerable because customary conditions are treated in the same way as verbal conditions.[29] Furthermore, contractors specify *'urf* and *'āda* of absolute contracts for the general considerations. These explanations establish that if the contract does not mention discrete stipulations, the conditions will be approved or understood by relying on the customary dynamics which accompany the conclusion of the agreement.

It is commonly presumed that if the contract includes elements or stipulations that are contrary to customary assumptions, they must be registered or communicated in writing prior to the approval. Eighteenth century Najdī based Ḥanbalī scholar Aḥmad ibn Muḥammad al-Manqūr in his collection *Al-Majmū' al-Manqūr* provides further clarification by establishing that *'urf* is an existing presumption that enables the judge to define a decision before. 'Abd al-Raḥman ibn Nāṣir al-Sa'dī, the prominent twentieth century Ḥanbalī scholar, clarifies that the influence of *'urf* can be attributed to the fact that the conditions and rights of the contract are not specified, whether in *shar'ī* or linguistic sense.[30] Furthermore, *'urf* can be referred to in every *fatwā* or *aḥkām* and the jurist or judge is therefore free to rely upon it without restriction.[31] The first Grand muftī of Saudi Arabia Muhammad bin Ibrāhim 'Āl al-Shaykh further clarifies that *'urf* performs an essential role within jurisprudence unless it encounters legal obstacles.[32] Twentieth century Najdī based Ḥanbalī scholar Ibn Qāsim in *Ḥāshiya 'alā al-Rawḍ* explains the gradual obtainment of validity of both terms and notes that both *'urf* and *'āda* are addressed in different instances until the solution becomes original. For him, *'āda* is the lawmaking precept (*muḥakkimetūn*) and its outcomes can be said to be valid from *shar'ī* perspective.[33] The present member of the Majlis al-Shūrā al-Su'ūdī Ibrāhīm al-Balīhī, meanwhile, clarifies the categorisation of *shar'ī* sources by placing *'urf* inside them ("[c]ustom is inside the framework of Islamic law").[34] Abū Zahra, the renowned scholar, further explains the Ḥanbalī approach towards *'urf* in the *sharī'a.* He states:

> "[T]he *fatwā*s of Ḥanbalī scholars are subject for *'urf* in non-textual and non-traditional issues likewise Mālikī and Ḥanafī schools. Common knowledge of people might be a plausible explanation for a *muftī* when there is no detrimental effect or eradication of public interests. The definition of word related to faith, bequest, or financial contracts is determined in compliance with *'urf* of people that creates stable and constant provisions in itself and produces valid verdicts for people being familiar to them since these definitions are derived

[28] Ibn Taymiyya, *Majmū' al-Fatāwā*, vol. 34, 59.
[29] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 218-219.
[30] Ibid, 219.
[31] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 219.
[32] Ibid, 220.
[33] Ibid.
[34] Ibid.

from the knowledge of the people. When *ʻurf* becomes an arbitrator in the Ḥanbalī jurisprudence (or the issue concerns with the *ʻurf*), Ibn Ḥanbal avoids giving a *fatwā* in all the facts because of this reality, the school has become very productive. It is possible to find a considerable number of contracts that are decided depending on it, especially derived from contemporary *ʻurf* rather than previous or alien *ʻurf* ...”[35]

Abu Zahra’s contribution further clarifies that Ḥanbalī scholars avoid issuing permanent or binding *fatwā*s on topics that relate to customary values or practices. It seems that this reality enhances the adaptability, flexibility and productivity of the *sharʻī* system while helping to set the school apart from others. Ibn Taymiyya provides further clarification for the legalisation of the use of *ʻurf* in legal exercises by referring to Q. 2:236.[36] It is noticeable that the verse uses the word *maʻrūf* in a manner which suggests that it closely resembles *ʻurf*. Ibn Taymiyya explains:

“God says that the compromise will be with virtue (*maʻrūf*), sobriety (*imsak*) will be with *maʻrūf*, demobilization (*tasrīh*) will be with *maʻrūf*, cohabitation will be with *maʻrūf*, it is obvious that (rights) for women and on women will be with *maʻrūf*. The mentioned topic in the Qur’an is the duty of justice in all issues concerning with the marriage, its process and the rights of spouses. As referred, what is necessary for woman as a livelihood and custody is identified with *maʻrūf*. It is *ʻurf* that allow people to know the identification of conditions in variety, amount and description...As well, it is an obligation over man to pay livelihood expenses and alimony for woman in order to stay night with her. Having intercourse with her will be with *maʻrūf* and situations demonstrates variety according to the conditions of woman and man.”[37]

In his discussion of *mahr,* Ibn Taymiyya addresses *ʻurf* with the intention of clarifying its form and amount.[38] The payment time of dowry, whether with reference to *muqaddam* (before) or *mu’akhkhar* (later) may be specified in accordance with an established *ʻurf*. If the *ʻurf* of society requires paying some portion before the marriage and paying a remaining portion later, it is considered to be a valid condition from *sharʻī* dimension.[39] In his opinion, the application of contemporary *ʻurf* is valid in the area of social issues which include agriculture, blood money, contract, divorce, endowment, irrigation, marriage, oaths, productions, proportions, rent, sale and venture. Ibn Taymiyya claims that all statements involving *ʻurf* in the above mentioned social issues are absolute and valid from *sharʻī* perspective if there is no authoritative *sharʻī* source.[40] As there is no definitive regulation of these parts in the *sharīʻa*, solutions are generally derived from customarily valid practices.

The status of rules on *sharʻī* obligations which include cancellation or conditions take place in accordance with the interpretation of customary pronunciation.[41] Ibn Taymiyya emphasises:

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[35] Qūtad, *Al-ʻUrf Ḥujjiyyatuhū*, 220-221.
[36] Q. 2:236 reads: “If you divorce women while you have not touched them yet, nor appointed to them their *mahr*. But bestow on them, the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good.”
[37] Ibn Taymiyya, *Majmūʻ al-Fatāwā*, vol. 34, 55.
[38] Ibid, 170.
[39] Al-Ḥusayn, *Majālāt*, 46.
[40] Ibn Taymiyya, *Majmūʻ al-Fatāwā*, vol. 24, 28.
[41] Al-Ḥusayn, *Majālāt*, 52.

> "The position of speaker and listener has to be considered according to all speech. If the listener knows the speaker, the meaning of his speech is understood, when he does not know the local terms, the speech is not understood because the listener does not know *'urf* of the person in his speech."[42]

Because the speaking of (spoken) language reflects norms and values, it becomes essential for jurists and judges to learn local expressions. Ibn Taymiyya claims that the absence of certain definitions or forms of verbal practices which include acceptance, buying or selling ultimately paves the way for the implementation of *'urf* and *'āda* in the *sharī'a*.[43] In offering his support, Ibn Qayyim argues that a judge is obliged to know the customary meaning of terms such as a bequest that derives its definition from customary understanding. The lack of this knowledge invalidates the judge's decision because it violates the jurisprudential capability. Ibn Qayyim further states:

> "It is not permissible for a judge to issue a *fatwā* on the topics of approval, faith, commandment, and other issues regarding only literal meaning without consideration of verbal meanings. The judge might understand linguistic meaning from words without knowing *'urf* of people, but the speakers transfer their message by means of *'urf* what they accustomed and know. If there is contradiction against the original roots of jurisprudence (origin of reality), it is abandoned in order to avoid astray of himself and followers of him."[44]

Buhūtī, another seventeenth century Ḥanbalī scholar, draws attention to the same point by noting that when the linguistic meaning contradicts with customary meaning, the latter attains a relative pre-eminence within the jurisprudence.[45] The judge must, in order to interpret the questioner's explanation correctly, be possessed of the capacity to engage with customary terms in social use. If a person attains a deal irrespective of the deal's customary, intentional or purposive meaning, he is obliged to know the meaning of the word (*lafẓ*) within the context in order to to attain *shar'ī* validity.[46] Although the contract includes actual or verbal customary expression that prevails within the society, it is accepted as a valid agreement by the *sharī'a.* These expressions represent the linguistic and practical variety of *'urf* that function in accordance with place and time.

5. Condition to Apply *'Urf*

'Urf should not contradict the *shar'ī* texts or the decisive roots of the *sharī'a* as conceptualised in the framework of *'urf saḥīḥ*. Upon this ground, *'urf* obtains *shar'ī* approval as a beneficial and valid source for the consideration of public interest.[47] This is an important consideration if the treatment of *'urf* disrupts a jurist or judge and makes the unlawful lawful or lawful unlawful (on matters such as bribery, finery, lamentation or usury), the abandonment of it becomes from a *shar'ī* perspective obligatory.

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[42] Ibn Taymiyya, *Majmū' al-Fatāwā*, vol. 7, 77.
[43] Ibid, vol. 20, 189.
[44] Al-Manṣūr, *Uṣūl al-Fiqh*, 517.
[45] Manṣūr ibn Yūnus ibn Ṣalāḥ al-Dīn ibn Ḥasan ibn Idrīs al-Buhūtī, *Kashshāf al-Qanā' 'an Matn al-Iqnā'*, (Beirut: 'Ālem al-Kutub, 1983), vol. 6, 304.
[46] Al-Manṣūr, *Uṣūl al-Fiqh*, 518.
[47] Al-Waraqī, *Al-'Urf wa,* 20, 21.

'Urf must be consistent, frequent, and general if it is to be applied in the *sharī'a*. Although customary practice is not applied to issues that involve specific circumstances, this condition does not devalue the approval of the aforementioned *'urf* in general conditions. It is essential for *'urf* to be applied in all parts of the region (rather than specific parts) if it is to obtain validity in *shar'ī* decisions. *'Urf* could be simultaneously general and inconsistent – this would be the case if a local practice becomes non-applicable for all issues.[48] In this circumstance, *'urf* is categorized as a specific custom that is the possession of a location, time or tribe, and it is accordingly abandoned by *sharī'a*. Because the law is regularised with reference to local practice rather than doctrine, contemporary opinions only make sense when refracted through the local understanding. Islamic legislation is not a body of artificial reason or professionalized discipline and is, to a substantially greater extent, the articulation of the accepted – as such, *sharī'a* only makes sense when understood in its wider cultural and social context.

Customary statements might be valid for actions, but its application is conditional upon it being persistent and present when the *fatwā* or *aḥkam* is established. The practical or verbal reiteration of a previous *'urf* cannot supplant the *'urf* that is predominant at the time of the *shar'ī* decision.[49] Ibn Qayyim claims that it is acceptable to implement change in the *fatwā*s and *ahkam*s (with regard to condition, place, purpose and time) in order to benefit followers and protect them from detriment.[50] Compatibility with regional *'urf* is a precondition for the implementation of *'urf* in *shar'ī* decisions. When the contemporary *'urf* is opposed to a previously established *'urf*, it is the former that becomes applicable. Ibn Qayyim, the renowned Ḥanbalī scholar, states:

> "Although something becomes a defect in the process of sales according to *'urf*, the laws can make change in the habitual practice through time so that it is not considered in the concept of defect despite not mentioning it in the sales."[51]

Scholars have argued that what is granted to be a defect in the previous *'urf* may not be viewed as a defect in the subsequent *'urf* or vice-versa. The principle establishes that the validity of *'urf* determines the validity of the action from *shar'ī* dimension. If there is no disputed source that contradicts the customary practice, *'urf* becomes permissible in the *shar'ī* arena. If the sources do not provide a statement that constitutes an approval or rejection, the existing *'urf* obtains validity from *shar'ī* authorities. Upon satisfying these conditions, the *'urf* becomes binding provision in the *sharī'a*.

As a consequence, the *shar'ī* position of *'urf* obtains considerable value when direct rulings are absent. In this context, as both Ibn Taymiyya and Ibn Qayyim argue, it provides

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[48] Al-Waraqī, *Al-'Urf wa*, 24, 25, and Al-Turkī, *Uṣūl Madhhabī*, 588.
[49] Al-Waraqī, *Al-'Urf wa,* 25.
[50] Al-Turkī, *Uṣūl Madhhabī*, 598.
[51] Al-Ḥusayn, *Majālāt*, 21.

an authoritative reference point which helps to clarify the meaning of words. Verbal custom has become established as a prominent reference point within the discussion of customary factors, particularly of financial issues within the Ḥanbalī school. It is important to acknowledge that the majority of scholars escape the confines of literalism to validate customary expressions by referring to the *sharīʿa*'s general objectives. The aforementioned Ibn Taymiyya's quotation provides further credence to *ʿurf* in the application of *qiyās*, whether in the form of *aṣl* (original case) or *ḥukm* (regulation). The attempt to link *ʿurf* with analogy involves characteristic reasoning which conceivably offers a method of identifying a more equitable solution to existing problems which extend beyond the confines of the texts.

The reference which some of the Qur'anic passages make to the words *maʿrūf* or *ʿurf,* along with their logical extension, is both tolerated as a measure of diversity and variation in the practical rules of *sharīʿa,* and considered to be a sign of continuity and the essence of flexibility. The distinction between the literal and technical meanings of *ʿurf* and *maʿrūf* creates a measure of confusion for scholars. However, juristic sense has established and offered a plausible solution in a particular case, irrespective of whether it can be described as an exception to another source. When encountering a tendency to follow popular desires and whims, *ʿurf* can be considered in the realm of *qānūnī* system, as opposed to mandatory *sharʿī* rules that create contradictive approaches between *sharʿī* and *qānūnī* scholars. In relating to this variation of *ʿurf*, *sharʿī* system forbids the action by criticising it as corruption – this leaves no doubt that what is viewed as correct in *sharʿī* system is considered to be acceptable from the perspective of *qānūnī* system.[52] To put it differently, Ḥanbalī methodology supports that if the relationship between *ʿurf* and *sharʿī* decisions are unclear or contradictory, then the Islamic regulation must be selected by the official judges.

6. The Opinions of Contemporary Saudi Scholars

In being confronted by a novel issue that was not directly addressed by the Qur'anic injunction or textual sources, the religious authorities instructed the pursuit of a dominant opinion (the approach taken by most jurists) or a preferred opinion (the approach based on what is customarily performed or what is socially desirable). It is maintained that both could be employed in accordance with circumstance, but they do not set specific techniques that are recommended for identifying when each approach can be applied. It could be assumed that the overall orientation is itself closely intertwined with concepts of *ʿurf* and *maṣlaḥa* that the decisions are grounded within a wider set of cultural assumptions. However, although it resembles the approach adopted by traditional Ḥanbalī scholars, ʿ*urf* is not, in comparison

[52] Al-Sīsī, *Makānat al-ʿUrf,* 44.

with other sources of *sharī'a*, accepted as an independent source of contemporary Saudi jurisprudence.

Contemporary Saudi jurists and judges have focused upon defining the concept of *'urf* in the *qānūnī* system. Its establishment as the most credible component in comparison to other elements has been a clear benefit that has emerged from their engagement. A contemporary Saudi Ḥanbalī scholar Maḥmūd 'Abd al-Raḥman Muḥammad in his book *Al-Madkhul li al-'Ulūm al-Qānūniyya* addresses *'urf* from a *qānūnī* viewpoint:

> "It is the collection of statutory regulations in which reveals from what people get accustomed to follow clearly in their issues for a long period."[53]

'Abd al-Karīm Sayi', a contemporary Saudi scholar, also provides important insight into the definition of *qānūnī 'urf* and important distinctions among scholars. He states:

> "There are numerous definitions for it –*'urf*- depending on the branches of private or public law in the form of applications imposed by the legal centre. Therefore, this diversity hides a profound unity behind reflections and accumulates various forms of customary phenomenon."[54]

Another contemporary Saudi scholar Mubārakī defines it by observing that what the majority of individuals are accustomed to or what is followed all over the country or in particular parts of it at particular times can be conceptualized as *'urf*.[55] Mubārakī demonstrates how *'urf* can be considered in the majority of circumstances, but he does not seek to refract it through a specific community with the intention of extending it to the general population. Mubāraki also defines *'āda* with reference to *qānūnī* system:

> "*'Āda* is the material aspects of *'urf* and it is common behaviour of people in some of their relations in a certain way during a particular time."[56]

In engaging with the jurisprudential dimension, the scholars have sought to limit *'urf* as a source or basis of *qānūnī* law. However, the majority of definitions have no application, whether in conceptual or practical terms, to the jurisprudential system's customary regulations. Because the consideration of *'urf* does not extend influence, the regulation in itself can be said to be the result.

The restriction of customary implementation to the period when the *'urf* is prevalent is the feature that serves to most clearly distinguish *shar'ī* and *qānūnī* systems. The *qānūnī* system accepts the proposition that customary knowledge and its associated nature embody features that adjust to a specific condition, place or time. It might be observed that the *qānūnī* law is frequently restricted to particular issues and that this feature functions to destabilise custom-based regulations. Within the *qānūnī* law, the concept of *'urf* includes social practices and behaviours, and applies irrespective of its strength in *sharī'a*. This is why the scholars of

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[53] Al-Sīsī, *Makānat al-'Urf,* 44.
[54] Ibid, 42.
[55] Aḥmad ibn 'Ali Sīr Mubārakī, *Al-'Urf wa Atharuhū fī al-Sharī'ati wa al-Qānūn* (Riyadh: 1993), 35.
[56] Ibid, 35-36.

the *qānūnī* system focus upon material and spiritual elements which are the two main pillars of *'urf*. Because customary values build community or collective identity, it is necessary for the *qānūnī* approach which is the adoptive method deployed within the contemporary Saudi legal system, to acknowledge their importance. A comparison of the *qānūnī* and *shar'ī* concept of *'urf* reveals that the *qānūnī* regulations which possess customary character can be traced back to the consolidative character of community and the establishment of punishments; in contrast, the power of *sharī'a* derives from respect for community and a stable society that is grounded within a clear vision of *maṣlaḥa*.[57] When the state creates its *qānūnī* legislation, the components of the statutory law that embody the knowledge of collective identity and nation can be used as evolutionary criteria to interpret *shar'ī* sources. National or popular values are considered to be the main components of *qānūnī* system that enable an official judge to address the problem in his decision.

7. The Power of *'Urf* in the Legal System

The *shar'ī* status or binding power of *'urf* has given rise to extensive debates which engage the question of its independence both within *shar'ī* and *qānūnī* systems. To put it differently, the question of whether *'urf* can be conceived and applied as a *shar'ī* principle (in the same way as the authoritative *shar'ī* texts, or consensus) has provoked an extensive discussion within the contemporary system. When *'urf* establishes new provisions for accepted fields and sketches the limits of its extension, it obtains legal prestige and is therefore considered within the framework of amnesty and righteousness. Qūtad maintains that the judge is entitled to use *'urf* to fill the deficiency of jurisprudence in various practices which include conditions, contracts, documentations or records.[58] It could be argued that *'urf* is the origin of the legal verdict, but not the legal verdict itself. This applies because decisions change as a result of the alteration of customary origins.

'Urf is differentiated from other *shar'ī* sources such as texts or *ijmā'*, but it can function as an explanatory criteria, a legal grounding, or a supporting instrument that reveals *qānūnī* codes.[59] As a consequence, conditions are determined and evaluated in accordance with customary values whereas the regulation is somehow reliance on these circumstances and uses *shar'ī* sources such as *ijmā'*. There is a consensus among scholars that *'urf* is not a legal source; rather, it is instead engaged as an assistive element or supplementary component that is categorised as the dependent type of judicial *'urf*.

[57] Al-Sīsī, *Makānat al-'Urf,* 46.
[58] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 226.
[59] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 225-226, and Khalāf, *Maṣādir*, 149.

In reflecting upon the evidentiary validity of customary regulations, Ibn Najjār maintains that the solution which derives from the customary norm is legitimate because people's knowledge is legitimised by the authorities. The approach closely resembles the one forward by Ḥanafī scholars because it elaborates the concept of the *shar'ī* validity for *'urf*.[60] He also claims that, while *'urf* resembles evidence in many respects, it is not a *shar'ī* proof – rather, the content of the issue is specified in accordance with *'urf* so that it functions as a complementary or subsidiary principle alongside the *shar'ī* proofs.[61] Once the approaches of Ḥanbalī scholars are taken into account, it will be noted that the followers of the school issue a considerable number of *fatwā*s and *aḥkām*s that are derived from *'urf*. This is particularly clear with regard to social transactions, the consideration of the meanings of words, and the purposes of acts as opposed to their direct implication or linguistic meaning.[62] It could be claimed that the consideration of verbal expressions and their contextual meanings are the most important feature in the *shar'ī* area because scholars emphasise local understanding by providing credence to *'urf qawlī*. The scholarly consensus upon verbal custom should be conceptualised as a principle that establishes the consideration of customary condition should, from *shar'ī* viewpoint, be regarded as verbal confirmation.[63] Although classical Islamic compilations do not ascribe a specific significance to *'urf* as a source of decision-making, the existence and shape of the opinions that have been collected in the school's tradition clearly demonstrate that the collections have themselves served to legitimise local *urf*.

In addition to the aforementioned *shar'ī* examples, proofs and statements, *qānūnī* scholars have frequently sought to approve the influence of *'urf* over the contemporary jurisprudence. In contrast, the power of *'urf*, whether in the form of original source or substantive element, has remained more open to debate. The *qānūnī* reality of *'urf*, which has enabled it to attain a pre-eminent status within the jurisprudence and to be considered as an official source in distinction from other *qānūnī* sources, is an important question. The basis upon which *'urf* becomes binding and leads to ongoing disputes between scholars of the jurisprudential system needs to be acknowledged in order to ascertain custom's influence upon Saudi jurisprudence. The engagement of *qānūnī* scholars with the exigent power of *'urf* has originated two distinct approaches. While some scholars disallow the exigent power of *'urf* and seek to replace it with the will of public authority, other scholars instead aim to

[60] Ibn Najjār, *Sharḥ al-Kawkab*, vol. 4. 448-453.
[61] Ibid, 439.
[62] Al-Turkī, *Uṣūl Madhhabī*, 593.
[63] Khalāf, *Maṣādir*, 147.

insert it into judicial provisions.[64] The supporters of the second approach claim that the Lawgiver's implicit will towards human actions and practices is positive as long as they do not contradict divine principles and this can function as the basis of *shar'ī* power for *'urf.* In the absence of implicit disapprovals or regulations, *'urf* functions as a practical mechanism or a legal yardstick during the decision-making process of judges and jurists. Vogel reflects upon the status of *'urf* in Saudi jurisprudence. He states:

> "…The Caliphs in their *ijtihād* did encounter cases where they found scant guidance from text, and to claim that they resorted to one or the other of the macrocosmically-rooted proofs (such as *maṣāliḥ mursala*, or non-textually-revealed utility) dealt with in *uṣūl al-fiqh*. Many '*ulamā'* admit such proofs as lower-order principles of justification, exercisable only after texts had exerted their maximum influence on a question. This position again understood an imam's legislative activities as those of a *mujtahid*, not of a head of state. The broad, pragmatic, adaptive legislation of the early caliphs thus left its mark and survives in highly attenuated form in the controversial *uṣūl al-fiqh* sources of custom (*'urf*), utility (*maṣāliḥ mursala*), and individual preference (*istiḥsān*)."[65]

This promotes the proposition that the indispensable power of *'urf* stems from the conscience of community and collective behaviours. The consensus of jurists and judges upon the respectful position of *'urf* within the *qānūnī* system is usually obtained after the stabilization of the courts and is reflected within repeated customary practices. Contemporary jurisprudence frequently refers to *'āda* as a materialistic principle of *'urf* that enables *'urf* to repeat itself on a definite practice. The intertwining of tangible form and the religious doctrine makes it necessary to follow the regulations and also establishes the provisions as customary. Thus, the situation establishes a clear contrast to the Islamic imitative approach which brings *'urf* and *'āda* together. Reference has already been made to the *shar'ī* basis of *'urf* that contributes material and spiritual components of the jurisprudence. The spiritual elements of *'urf* are mainly generated by collective conscience with the imperative of establishing the need to abide by social doctrines and norms. These components are respected as *qanūnī* regulations that establish dissent or assent for the integration of the material or physical penalties that create material *'urf.* It could be claimed that these customary regulations derive from the consensus of previous generations or the opinions of earlier jurists establish the binding power of *'urf* as a secondary *shar'ī* source.

The positions that a majority of scholars have adopted upon the *shar'ī* validity of *'urf* can be ascertained with reference to diachronic developments and cumulative opinions related to *'urf.* In the initial stages, the judge's authority is restricted to the application of the law's provisions. Setting aside its origin or ultimate destiny, the practice of the legal system obviously presupposes the existence of rules that applied in the past and which have a potential future application. When the judge performs his duty while drawing upon custom-

[64] Al-Sīsī, *Makānat al-'Urf,* 87.
[65] Vogel, *Islamic Law*, 197.

based practices, *'urf* is not understood to be the origin of the jurisprudence but is instead engaged as an auxiliary source of law. It is a requirement for the application of *'urf* to obtain verification from its existence, but it is not possible that this verification by itself will function as the constructive status for regulations. The assumption of conformity between the knowledge of the judge and laws requires the system to be constructed after the verification of the existence of the *shar'ī* principle. As with customary regulations, the existence of knowledge arises from the internal components of society and from communal productions, as opposed to interference from external factors. The nature of the customary norms embody cohesion even though they are not a key preoccupation for judges during legal revision.[66]

There are considerable number of customary rules that lack the opportunity to be applied in the court; however, this situation does not affect their existence as is the case for legal regulations. The same situation can be observed within the regulations of customary constitutions that govern the relationship between various social authorities. It should be noted that it is also difficult for customary norms to be the subject of *shar'ī* application among provisions. It is not possible to clarify if the judiciary is the origin of *'urf* or if it is the source of power for jurisprudential systems. The role or authority of the judge within the determinative process is complemented by mundane practices or the ordinary content of certain practices that enable *'urf* to intermingle with the jurisprudence. It might consequently be claimed that *'urf* constitutes unwritten rules within the Saudi legal system. However, the controversial or problematic opinions of the system generally contain customary content in eliciting responses that create dissidence among jurists as has already been noted with reference to the driving case. Scholars have resorted to *'urf* in one form or another, and the essential validity of *'urf* is therefore undeniable. It enables a departure from the apparent conditions to a variant ruling which offers explanatory criteria. For the majority, it is neither an alternative source nor a technique of escape from regulations; rather, it is instead a substantial and supplementary source. From the perspective of contemporary Saudi jurists and judges, *'urf* can be construed as a method of jurisprudence to explore the situation, but it cannot therefore be conceptualised as one of the fundamental sources of *sharī'a* on account of itsmutable, changeable and variable character. Nonetheless, in reality, plays a prominent role by bridging the gap between law and social realities, thus enabling scholars to engage with specific conditions and the peculiarities of particular regions.

[66] Al-Sīsī, *Makānat al-'Urf,* 91.

8. The Application of *‘Urf* in the *Fatwā*s

The implementation of *‘urf* in the contemporary *fatwā*s can be analysed with reference to four categories, each of which evidences a clear variation. The first type of *‘urf* provides clear evidence of legitimacy within the judgement. Sunna, consensus, public good, permissibility (*ibāḥa*), and other legal principles have addressed the consideration of *‘urf.* It has become identified as an article of proof that can be applied to contracts (*muḍāraba* or *salam*), production methods and social interactions. The second type relates to *‘urf* that is addressed during the implementation of absolute judgements for certain matters. The consideration of *‘urf* during the implementation of general judgements enables scholars to address the issue from different aspects of events and to particularize the solution with the guidance of textual sources. Examples provided by previous generations are mainly used to establish analogies or comparisons during the *shar‘ī* process. Every kind of absolute rule that lacks a procedural explanation, whether in the form of action or speech, directs *‘urf* to resolve the issue. Relevant examples might include debt, gift, invitation, land use, permissions, reason, social intercourse, *ta‘zīr* (punishments awarded at the discretion of the ruler or judge) and the value of commodities. Issues relating to marriage and divorce, including accommodation, custody, divorce conditions, dowry, gift, maintenance and marriage conditions also fall within this category.

In addition to the approved validity of customary practices, the third type of *‘urf* is referenced at the level of pronunciation for accepted or known orders.[67] Customary declarations or statements are given credence, as opposed to linguistic understanding of the words. Usage and common knowledge of verbal communication are considered to be determinative proof that considers compulsion, explains quality/quantity and permits or prohibits an action. The acceptance of the type extends to a judge in his verdict and to a witness in his justification. For instance, a guest can drink a glass of water without the permission of the house owner; however, he can be, in accordance with *‘urf*, required to ask permission to drink juices. When an individual drops his personal objects (penny, stick or whip), the retrieval of the fallen items may be conditional on *‘urf*. The concept which governs this *‘urf* encompasses collecting fallen crops after the land has been harvested by the owner, and this practice is conceptualized or referred to as a *liqā‘at*. To the same extent, the silence or smile of the virgin girl may be interpreted as consent although this will ultimately be dependent upon mutual customary norms.[68] The renting of a shop in the bazaar with the intention of opening a store can only be achieved if there is no additional condition on the

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[67] Qūtad, *Al-‘Urf Ḥujjiyyatuhū*, 273.
[68] Ibid, 275.

rental agreement. In this circumstance, if a person rents a shop but uses it for different activities or purposes, the owner has the right to cancel the tenancy contract. The last category of *'urf* includes the verbal custom of community, which represents the character of the particular region and which depends on the school tradition.[69] The Ḥanbalī tradition establishes that what is conditioned or stipulated within its written sources can be approved as a customary proof and considered as a valid piece of evidence from *shar'ī* viewpoint.

a) The *Fatwā* for the Implementation of *Liqā'at*

A contemporary Saudi *fatwā* on eating fallen fruits from a tree has been published by Islamweb, the renowned website. It states:

> "Question: What is your opinion on the issue of taking the roses or fruits or something like that from a tree standing on the road or a tree locating on the house of a person, but its fruits are on a branch out of the fence that surrounds the garden? Whether is it evaluated under the category of stealing (*ḥarām*) or not?
>
> Response: It is not *ḥarām* (prohibited) to cut the roses and to pick the fruit from the tree located on the way that does not belong to a person benefitting from it because it is permissible for a person to take advantage of what the Lawgiver created on the land from fruits, cereal, or such like unless it is under the hands of a private owner. In the verse [Q.2:29] the Lawgiver says that: "It is He who created for you all of that which is on the earth." However, what is the legal decision about eating fruits or taking cereals from the land that has an owner creates dissidence among scholars. Mālikī scholar Dewānī states: "There is disagreement between the scholars on the issue of eating beans or fruits on the passing way of a person. The conclusion is that it is permissible for a needy person to take the fruits without discussion, but the situation for wealthy is both permissible and prohibited." We consider that it seems permissible eating fruits outside of the garden and drinking milk from cattle after asking around the owner of the things at least three times and obtaining no response. This is the solution for non-needy people because the *ḥadīth* narrated from Aḥmad and Ibn Māja states: "If anyone of you passes by a wall surrounding a garden and he wants to eat from its fruits, then he has to call the owner three times. If there is no answer, then he can eat from it." … Our opinion on the issue is that there is no harm on a person who eats from a palm tree or a tree that its branches extend over the fence on the road that does not have an owner. However, there are two conditions for permissibility: firstly, the fruits must be ownerless, and the person should call the owner of the tree at three times and he does not get any response. Secondly, it is restricted to eat without carrying anything with him depending on the mentioned narration. Because when it is permissible to eat from the fruits inside the wall or garden, it is more acceptable to eat the fruits that are outside of the fence."[70]

This contribution should be considered alongside a separate *ḥadīth* (transmitted narration) that relates to this issue ("If anyone of you passes by a wall surrounding a garden and he wants to eat from its fruits, he can do so but he should not take anything with him.") Although the scholars differ in opinion as to whether it acceptable for a person to, in the absence of the owner's consent, eat from a tree whose fruits extend outside a garden or beyond a fence, the solution is stipulated considering the conditions.[71]

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[69] Qūtad, *Al-'Urf Ḥujjiyyatuhū*, 269-277.
[70] *Fatwā* No. 17384 in *Islamweb,* accessed September 11, 2015, http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&lang=A&Id=17384, and *Fatwā* No. 51744 in *Islamweb,* accessed September 11, 2015, http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=51744
[71] *Fatwā* No. 90231 in *Islamweb,* accessed September 11, 2015, http://fatwa.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=90231

The narrations establish a few crucial details within the opinions of Ibn Ḥanbal and the scholars. Firstly, it is permissible to eat from a garden which does not have a wall or guard around it, even without necessity. However, the crucial question is whether the mentioned permissibility applies to the fruits remain on the trees or the fruits have fallen on the ground. If there is no owner present or a sign indicating ownership, the action will be evaluated under communal property or public ownership, and the action will be permitted upon the grounds of public good. The owner of the property is responsible for protecting his goods or leaving a sign demonstrating that he does not intend to permit people to consume the fruits of the garden or tree. The person is required to seek the owner of the garden at least three times before eating the fruits. If the garden or tree has an owner, he is expected to provide the enquiring party with a positive or negative response. If the owner hears the enquiry but does not respond, this is understood to provide permission upon the grounds that silence indicates consent.

The *fatwā* states that a person is not allowed to take anything with him outside of the garden, and permission is not understood to extend to agricultural areas or gardens that have been built for financial benefit. In order for the action to meet the threshold of theft and demand *ḥadd* (punishment), it must occur via stealth (e.g. not by force or snatching), and it must involve property that exceeds a specified value. Furthermore, it must not be property to which the accused has any putative claim (even an attenuated claim such as the claim of a citizen in public property). The item should also be stolen from a place of safekeeping.[72] The burden of famine does occasion alterations in the prescribed theft punishment because the priority of life or protection of life takes precedence over other regulations. Taking into account the conditions of theft, the taking of a fruit from an ownerless place should not categorized within the legal framework which governs this crime. The person's actions are deemed to be permissible as long as they do not exceed the established consummation limits. The *fatwā* both assists the production of local culture within the location where the decision is practiced and establishes a customary scope that can be used to demonstrate possession of personal items.

B. The Concept of *'Urf* in Ja'farī Jurisprudence

In the Ja'farī understanding, jurisprudence is not conceived as a civil act but is instead held to be a religious practice that ultimately orientates towards eschatology and theology. The scholarly focus has converged upon the proposition that human society would not travel the true path unless limitations on the actions and appetites of each individual were first put

[72] Vogel, *Islamic Law*, 243.

in place by *shar'ī* ideology. From the Ja'farī perspective, God has sought to impose boundaries upon human activity by putting in place five categories which encompass positive law in its entirety: actions absolutely forbidden (*ḥarām*), actions deemed to be indispensable or expressly commanded (*wājib* or *farḍ*), actions held to be admissible or permitted (*mubāḥ*), recommended or desired (*mustaḥabb* or *mandūb*) and actions deemed to be reprehensible (*makrūh*).[73]

The Ja'farīs, in common with the Ḥanbalīs, also sought to identify and categorise the definition of terminological words. Al-Shahīd al-Awwal clarifies the predominant opinion of Twelver *'ulamā'* by explaining that the origin of the meaning of the word (*lafẓ*) itself is always connected to its real (*ḥaqīqī*) meaning. The common (*mushtarak*) or metaphorical (*majāzī)* meaning is only referred to when external evidence of its usage is provided. The real meaning is comprised of three different categories; linguistic (*lughawī*), customary (*'urfī*), and legal (*shar'ī*) – the same applies to the metaphorical meaning, with the exception of the case of letters (*ḥurūf*). The letter does not have a metaphorical meaning because its meaning always relates to its original usage (*aṣl al-wa'd*). With regard to names, it is sometimes the case that the essence of the name is strongly connected with the *shar'ī* reality– relevant examples include the five religious rituals whose name derives from prior religious understandings. In some instances, the essence of the name is connected to the *lughawī* reality or contiguous roots of the verb - relevant examples include *bā'a* (to sell, seller, selling items), *fā'il* (subject), *maṣdar* (infinitive), *mef'ūl* (object) and *ṭalāq* (to divorce, divorce, divorced).[74] In instances that require the analysis of two individual meanings, customary and legal meanings need to be addressed separately. This division enables scholars to use *'urf* as a legal tool by means of reason (*'aql*) and also provides *'urf* with heightened legitimacy within jurisprudential interpretation (in particular its verbal variation).

1. The Distinction between *Ijmā'* (Consensus), *Sīra 'Uqalā'iyya* (Rational Practice), *'Āda* (Usage), and *'Urf*

As has already been noted, the connection between *'āda* and *'urf* has been broken into three types, traditional Ja'farī scholars mainly follow the third variation and therefore emphasise the practice's generality or particularity. The renowned Imāmi scholar Ṭabāṭabā'ī asserts that *'urf*, as the practice of the entire society, is formally recognized and appears as the combination of traditions, desirable activities and useful methods that pervade society. His concept of *'urf* clearly contrasts with the exceptional and rare actions that both the

[73] Majid Mohammadi, *Judicial Reform and Reorganization in 20th Century Iran: State-Building, Modernization and Islamicization* (New York: Routhledge, 2014), 121.
[74] Al-Shahīd al-Awwal, *Al-Qawā'id wa al-Fawā'id* (Qom: Maktaba al-Mufīd), 152, 153.

community and social consciousness have designated as evil acts.[75] Al-Iṣfahānī, a twelfth century Ja‘farī scholar, further clarifies that *‘āda* renders acts or reactions that are repeated until they become consistent, easily achievable and natural deeds. It is for this reason that it has previously been suggested that usage (*‘āda*) might be interpreted as forming and carving out the second nature to humans.[76] The terminological understanding advanced by the majority of traditional scholars refers to the commonality or generality of *‘urf* that is required if it to be recognized as a *shar‘ī* source. The main underpinning doctrine maintains that *ma‘rūf* and *‘urf* relate to acceptable, good and positive deeds. This applies because good conduct can be designated as the most common character-trait of human beings. A fourteenth century linguistic scholar, Ibn Manẓūr refers to the reliability of general *‘urf* and notes that it might be conceived as an advantage upon the grounds that it will assist individuals to find a confidential and peaceful path.[77] Saljooghi, an independet scholar, further clarifies the *‘āda* and its position within contemporary Iranian jurisprudence. He states:

> "*‘Āda* is certain consuetudinary behaviour in which the effect and repetition of certain practice becomes (habitually) achievable for a person. And then, following the same style for the performance of act makes it *‘āda* (habitual). It does not need any explicit intentional practices because each time upon satisfying the conditions *‘āda* has been automatically performed as in the past."[78]

In addition to these opinions, a number of contemporary scholars align themselves with the first opinion which maintains that there is no legal distinction between *‘urf* and *‘āda.* Iran's Civil Code considers the two terms to be synonymous, to the point where they are interchangeable.[79] Mahdi, an Imāmi scholar, provides further clarification by observing that whenever *‘āda* and *‘urf* are used together, the former addresses the legal relationship between two or more people whose are not part of a class or group. The latter, meanwhile, addresses the familiarity which is inherent within a particular class, community or group.[80] Although the Iranian Civil Code maintains that the two words are interchangeable, the science of jurisprudence generally adopts the view that traditional scholars generally refer to *‘urf* and sometimes invoke *‘āda*; it is rare, however, for both words to be used simultaneously. In seeking to explain the division between the two words, scholars have highlighted the fact that *‘urf* has three main conditions: firstly, it is a particular or definitive act; secondly, it is reiterated by a majority of individuals; and finally, it is grounded within voluntary, rather than obligatory, conduct. However, it is important to acknowledge that *‘āda* mainly possesses

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[75] Akram Muḥammad Arani, *Naqsh ‘Urf Der Tafsīr Qawānīn Khānda* (Tehran: Nashr Mīzān, 2014) 20, and Muḥammad Ḥusayin al-Ṭabāṭabā’ī, *Al-Mīzān fī Tafsīr al-Qur’an* (Beirut: Mu’assasat al-A‘lamī, 1997), vol. 8, 380.

[76] Abū al-Qāsim al-Ḥusayn ibn Muḥammad al-Rāghib al-Iṣfahānī, *Al-Mufradāt fi Gharīb al-Qur’an* (Maktabatu Nizār Musṭafā al-Bāz, 2009), 457.

[77] Saljooghi, *Naqsh ‘Urf,* 19.

[78] Mahmud Saljooghi, *Naqsh ‘Urf Der Ḥuqūqi Madanī Iran* (Tehran: Mizan Legal Foundation, 2014), 54.

[79] "Civil Code of the Islamic Republic of Iran," Articles 54, 220, 280, 356, 357,456, 667, 1131.

[80] Arani, *Naqsh ‘Urf*, 29.

an individual character and is performed by a limited number of individuals. From a *shar'ī* perspective, this is significant because it prevents scholars from considering it as a *shar'ī* source. While *'āda* originates within natural conditions, personal desires or a special event, general custom (*'urf 'āmm*) could conceivably originate within reason or the wise individual whose ideas and practices are followed by laymen. It could be argued that the distinction between the two terms originates within the compulsory, hidden and mandatory character of *'urf*.

It should be recognized that customary practices have not been closely scrutinised by *'ulamā'* because the majority of Imāmī scholars view *'urf* as being an element of *maṣlaḥa*.[81] Shibli clarifies that although the main proof is linked to *maṣlaḥa*, livinwithin a certain *'urfī* environment impacts the understanding and application of this *shar'ī* principle as s the case with the acknowledgement of the role of 'urf in abolishing tribute (*kharāj*).[82] The principle of *maṣlaḥa,* which upholds what is appropriate and forbids what is wrong, plays an important role by preserving the safety of the region and encouraging scholars to permit the infusion of customary norms into religious forms.

Ja'farī scholars have avoided invoking *'urf* and *'āda* in their later works; however, they have more frequently engaged with *sīra 'uqalā'iyya* (rational practice or *'urf* of a reasonable and sagacious person), a new concept of customary understanding. While Imāmī *'ulamā'* use *urf* and *'āda* during the foundation process, they instead use the *sīra 'uqalā'iyya* method over a longer period of time.[83] This is why the majority of Ja'farī literature does not devote an independent section to *'urf,* but instead prefer to focus upon *sīra 'uqalā'iyya*. Al-Ṣadr, a renowned Imāmī scholar, explains the hierarchy of proofs and places *sīra 'uqalā'iyya* as one of *shar'ī* proofs that can be employed during the decision-making process of jurists at the lowest level. He observes:

> "The confirmation of texts that was narrated from the Prophet and infallible *imam* with *tawātur* creates legal decisions and this is categorized in the framework of *lafẓī* proofs. With the same approach, the *lafẓī* type of indirect inductive methods includes various categories such as *ijmā'* (consensus), *shohrat* (famous), *khabar* (news, information), and *sīra* (biography or practice)… On the one hand, legislative practice (*sīra mutasharri'a*) is the behavior of the religious public [generally alluding to Muslim scholars] in the time of legislation such as the agreement of previous scholars to perform the noon prayer on Friday in the place of Friday prayer or the annulment of *khums* payment from inheritance. On the other hand, the *sīra 'uqalā'iyya* with its unique style differs from the *sīra mutasharri'a*. The concept of *sīra mutasharri'a* is the outcome of *shar'ī* statement (of Muslim scholars], so that it is considered as an exploratory factor. However, the *sīra 'uqalā'iyya* is attributed to the general tendency that is found in the particular practices of reasonable people [who may include Muslim jurists and judges or not]."[84]

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[81]Arani, *Naqsh 'Urf*, 33.
[82] Ibid, 34.
[83] Ibid, 41.
[84] Muḥammad Bāqir al-Ṣadr, *Al-Mu'ālim al-Jadīda li-Uṣūl* (Tehran: Maktaba al-Najāḥ, 1975), 149, 165, 166, 169.

The principle of *sīra mutasharri'a* is therefore the behaviour (*sulūk*) of religious individuals which generally includes Muslim scholars during the time of legislation. The religious identity of the individual and the fact that it is followed by the majority of the community are considered to sufficiently prove the adequacy of the *shar'ī* statements. The given decision for the particular behavior or practice is tolerated upon the basis of a legitimate statement.[85] The reliability of proof increases or even attains a high level when the practice is generally implemented by the entire religious community during the legislation process. It is maintained that when the practice is pursued by the majority of the religiously devout, it is not possible for it to include error and negligence.

At this point, the distinction between the principles of *ijmā'* and *'urf* needs to be acknowledged. The main discrepancy pertains to their origins because *'urf* relies on collective acts and identity while *ijmā'* derives its authority from the religio-rational deduction of scholars.[86] However, a practical consensus begins to emerge in situations in which the inhabitants of an era and knowledgeable individuals are familiar with an act and practice it regularly. This initially takes the form of *'urf*, which is later followed by a large number of people, so it can be argued that *'urf* itself take on the appearance of practical consensus. Although the appearance of *'urf* in the form of practical consensus, on obtaining religious prestige, leads to *'urf* being considered within the framework of *ijmā'*, *shar'ī* approval and being produced by the scholars are still required for *shar'ī_'urf*. Indeed, while changes within *'urf* are acceptable, comparable adjustments of *ijmā'* do not meet with similar approval, with the only exception being the alteration of social benefit.[87] In advancing the accepted assumption of collective righteousness, the division between *ijmā'* and *'urf* clearly resembles the Saudi contribution; in contrast, the opinion upon the relationship between *'āda* and *'urf* appears to be distinctive to a certain extent, and this is embodied within the allusion to *sīra 'uqalā'iyya.*

2. Types of *'Urf* in the Religious (*Shar'ī*) and Statutory (*Qānūnī*) Systems

'Urf, in closely resembling the Ḥanbalī approach, divides into six categories which vary in accordance with character, compatibility, validity or comprehensibility and which are comprised of *'urf ṣaḥīḥ*, *'urf fāsid*, *'urf 'āmm*, *'urf khaṣṣ*, *'urf 'amalī* and *'urf qawlī*.[88] When the nature of *'urf* establishes compatibility with the *shar'ī* doctrines and orders, it is considered to be acceptable and is referred to as valid custom (*'urf ṣaḥīḥ*). Some scholars

[85] Al-Ṣadr, *Al-Mu'ālim al-Jadīda,* 167, 168.
[86] Muḥammad Muṣṭafā Shiblī, *Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār Al-Nahḍa al-Arabiyya, 1986), 328.
[87] Ibid, 329.
[88] As'ad Kāshif al-Ghaṭā'ī, *Al-'Urf Ḥaqīqatahu wa Ḥujjiyyatahu*, 7, accessed January 15, 2016, http://shiabooks.net/library.php?id=4718

treat *'urf ṣaḥīḥ* in a similar manner to the concept of *maṣlaḥa* because their foundation rely on the rationally provable doctrine upholding public interest and protecting against corruption.[89] However, *'urf fāsid* (invalid custom) has never been accepted by the *shar'ī* dimension because it includes harmful practices (like usury) or non-religious elements. While it is a widely observed practice, it might cause harmful consequences, legitimises prohibited actions, opposes the divine law and rejects *shar'ī* obligations.[90] The issue of whether the item complements or contradicts Islamic values is the key question which precedes the creation of these two categories.[91]

General custom (*'urf 'āmm*) is a practice that is followed by the majority of individuals within a wide number of areas. In the view of experts in jurisprudence, this feature establishes it as being very valuable. In the absence of available legal sources, general custom (comprising only *'urf ṣaḥīḥ*) is referred to as being the main guidance for the solution – this applies because the general practices are mainly rooted in rational inferences or reason. Consideration of the strongest or most common *'urf* becomes the determining criterion that relates to the extensive number of acts that are concerned with the identification of praying times, measurement, numeration, payment of dowry and weighing.[92] Al-Ghaṭā'ī, the nineteenth century Imāmī scholar, divides general *'urf* into two categories by addressing *sīra 'uqalā'iyya* and *sīra mutasharri'a* within a single category. The *sīra 'uqalā'iyya* involves the renowned deeds, explanations and practices of both knowledgeable Muslims and their counterparts within other religions, while *sīra mutasharri'a* means the behaviour and actions of Muslim jurists and judges in the time of legislation – both fall within the framework of general *'urf*. Because rationality is the main contributor to the creation of common practice, the practices might be resorted in order to obtain *shar'ī* solutions.[93]

The *sīra 'uqalā'iyya*, in being established as a general tendency amongst people, does not derive from legislative statements nor religious motivations, but rather from justifications or methods taken from rational statements of people– it is this that leads to its formation and implementation.[94] However, the consideration of *sīra mutasharri'a*, to the same extent as *ijmā'* and *shohrat* originates within the validity of inductive methods of Muslim jurists and judges, and this frequently leads to *shar'ī* statements being asserted within the regulations. Al-Ghaṭā'ī, in addition, claims that *sīra mutasharri'a* which includes the general *'urf* and

[89] Arani, *Naqsh 'Urf*, 34.
[90] 'Abd al-Karīm Zaydān, *Al-Wajīz fī 'Uṣūl al-Fiqh* (Beirut: Mu'assasat Qurṭuba, 1987), 253.
[91] Saljooghi, *Naqsh 'Urf*, 30.
[92] Al-Shahīd al-Awwal, *Al-Qawā'id*, 147.
[93] Al-Ghaṭā'ī, *Al-'Urf*, 9, 15, 16.
[94] Al-Ṣadr, *Al-Mu'ālim*, 169.

ʿāda does not create any defective point in the *sharʿī* elements of the practice.[95] When the *sīra ʿuqalāʾiyya* actualizes the conditions, it is recognized as evidence; however, if it does not satisfy the requirements, it is not considered during the legislation process.[96] In explaining *sīra mutasharriʿa*, Al-Ṣadr notes:

> "[W]e sustain the possibility of error, negligence and even tolerance. If we know that the two individuals are following the same behavior or opinion in the time of the legislation and performing the noon prayer in a similar vein on the day of Friday, this increases the reliability or validity of the proof."[97]

The performing of noon prayer on Friday relays on the *sīra mutasharriʿa* in accordance with *sharʿī* statements. It is therefore clear that the approach that scholars adopt towards the deduction (*istidlāl*) method of *sīra ʿuqalāʾiyya* (having no connection with *sharʿī* sources) clearly differs from the concept of *sīra mutasharriʿa* (having limited connection with *sharʿī* sources).[98] The acceptance of gifts, the arrangement of different receptions for female and male messengers, the congregation spaces, the drinking from owned rivers and streams, the donation amount, the designation of scores, the farewell courtesies, the height of the *imām* during prayers, the opening of doors, the picking of fruit upon noticing the appearance of ripeness, the praying in the desert, the preservation of foods for severe conditions and the taming of animals – in each of these areas, *sīra ʿuqalāʾiyya* has an important customary role. The compensation contracts, the concept of possession, the division of property in the aftermath of *khulʿ* (divorce), the downloading of authorized materials from the internet, the equality of marriage, the observance of dowry, title and a wife's permission for her husband to work at night are the areas that are most frequently referenced by *sīra mutasharriʿa*. There is a distinction between renting animals, objects and substances, and it is frequently necessary to refer to customary practices in order to identify the conditions, prices and requirements that correspond to each of these items. *ʿUrf* can be recognised in the words of 'bequest' and 'endowment' because upon a person's authorisation to use an endowment to construct a mosque, the will is conceptualized with reference to customary conjecture whose only purpose is to construct a mosque. The same situation applies to guests when the owner brings foods, the guests are not required to ask for permission before consuming them is peculiar to local *ʿurf*.[99] However, the consideration of a specific custom (*ʿurf khāṣṣ*) that is commonly practiced by specific groups within a location creates clear disagreement among Imāmi scholars in a manner which clearly recalls their Ḥanbalī counterparts. When it clashes with the revealed law, it is required to be rejected. However, it may obtain *sharʿī* validity after the

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[95] Al-Ghaṭāʾī, *Al-ʿUrf,* 10.
[96] Al-Ṣadr, *Al-Muʿālim*, 168.
[97] Ibid, 167, 168.
[98] Ibid, 169.
[99] Al-Shahīd al-Awwal, *Al-Qawāʾid*, 148.

rational evaluation. If the reason enables it to possess *shar'ī* weight, it cannot be included among the unlawful acts.[100] Announcing Eid al-Fitr in the middle of the Sha'bān month, picking fruits before the ripening season, protecting crops during the day and securing bazaar areas with guards are all prominent examples of acceptable *'urf* according to *shar'ī* viewpoint.[101]

The *'urf 'amalī* (practical custom) is an actual practice in which individuals become familiarised with a certain way of life and habitual conditions (in addition, it also refers to identical activities and mutual rights). When individuals become familiar with an act, no knowledgeable person denies it and it is practiced regularly, *'urf 'amalī* becomes *shar'ī* valid source.[102] The *'urf qawlī* (verbal custom) refers to phrases, terms and words that are used in a society and whose meanings are grasped by the community and linked to context and reason. This *'urf* is definitive, specific and renowned among the masses – as such, it does not require extensive examination nor literal analysis – this applies because it is not possible for a single word to simultaneously possess both literal and metaphorical meaning.[103] The consideration of customary rather than literal meaning becomes necessary if there is no clear way of abandoning the customary mean.[104] With regard to mutual meaning including customary or literal understanding, if the literal meaning of the verbal act has a distinguishable character for the decision (e.g. different subjects, as in what I ate or what he ate) or conveys information about their quantity, the all meanings are given equal importance. The meaning of the word intrinsically carries or includes the concept of custom.[105] However, if there is a conflict between the customary and literal meaning of the word, it is possible to abandon the latter by considering people's *'urf* and *'āda*. The analysis of verbal custom does not therefore require extensive literal scrutiny to obtain the customary intention which can be obtained through superficial or surface analysis. As Al-Shahīd al-Awwal claims, there is no difference between the *shar'ī* validity of verbal (*qawlī*) and actual (*'amalī*) customs in Ja'farī jurisprudence – this is why the use of *dabbe* for a horse as a verbal *'urf* is held to be equivalent and treated equally with the will of a person requiring serving charity food consisting only regional dishes as an actual *'urf*.[106]

[100] Al-Ghaṭā'ī, *Al-'Urf,* 11.
[101] Al-Shahīd al-Awwal, *Al-Qawā'id*, 149.
[102] Al-Ghaṭā'ī, *Al-'Urf,* 8.
[103] Ibid.
[104] Shiblī, *Uṣūl al-Fiqh*, 326.
[105] Al-Shahīd al-Awwal, *Al-Qawā'id*, 158, and Zaydān, *Al-Wajīz*, 253.
[106] Al-Shahīd al-Awwal, *Al-Qawā'id*, 150.

3. Legal Proof (*Adilla*) of *'Urf* and Its Estimation (*I'tibār*)

In a comparable manner to their Saudi counterparts, Iranian *'ulamā'* place particular emphasis upon the Qur'anic words *ma'rūf* and *'urf,* and divide the terminological usage of *'urf* into two categories. The intention is to demonstrate that customary practices are acceptable from the perspective of *sharī'a* while also stressing the interchangeability of the two terms. The first type, which directly invokes *'urf*, refers to acceptable and correct deeds, avoidances, practices, speeches and thoughts. It recommends activities and its validity relies on Q. 7:199. ("Take what is given freely, enjoin what is good (*'urf*), and turn away from the ignorant.") The second type focuses upon society's standard and usual practices as opposed to recommended deeds, and is therefore addressed to the word *ma'rūf*. However, the analysis of the relevant verses demonstrates that the Qur'anic concept of *'urf* accentuates more ethical, reformative and valuable activities (first type) as opposed to the need to align with widespread tendencies within society (second type).[107] *Ma'rūf* is more prominent than *'urf* within the verses (Q. 2:180, 229, 232, 233, 3:104, 4:25, 31:15 and 60:12)[108] and it is generally used to provide advise upon socially accepted common trends concerned with communal life, economy, family, individual and social activities.[109] The main assumption that underpins its acceptability is that the Lawgiver does not force believers to endure arduous and stressful orders – this applies because religion is intended to enhance ease and

[107] Al-Shahīd al-Awwal, *Al-Qawā'id*, 20.

[108] Q. 2:180 reads: "Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents nd near relatives ccording to what is acceptable (*ma'rūf*) – a duty upon the righteous", 2:229 reads: "Divorce is twice. Then, either keep [her] in an acceptable manner (*ma'rūf*) or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransom herself. These are the limits of Allah, so do not transgress them. And whoever transgress the limits of Allah -it is those who are the wrongdoers", 2: 232-233 respectively reads: "When you divorce women and they reach the end of their waiting period, do not prevent them from marrying other men, if they have come to an honourable (*ma'rūf*) agreement. This is enjoined on every one of you who believes in God and the Last Day; it is more wholesome and purer for you. God knows, but you do not know. And the [divorced] mothers should nurse their children for two whole years, if they wish to complete the period of nursing; and during that period the father of the child shall be responsible for the maintenance of the mother in a reasonable (*ma'rūf*) manner. No soul is charged with more than it can bear. No matter should be made to suffer on account of her child, and no father should be made to suffer on account of his child. The same duties devolve upon the father's heir [in the case of the death of the father]. But if, after consultation, they choose by mutual agreement to wean the child, there shall be no blame on them. Nor shall it be any offence for your children, provided that you hand over what you have agreed to pay, in a reasonable (*ma'rūf*) manner. Have fear of God and know that God is observant of all your actions." In Q. 3: 104, it is stated: "Let there be a group among you who call others to good, and enjoin what is right, and forbid what is wrong: those who do this shall be successful." Q. 4: 25 reads: "If any of you cannot afford to marry a free believing woman let him marry one of believing maids whom he possesses. God best knows your faith. You are one of another. So marry them with their owner's permission, and give them their dower according to what is fair (*ma'rūf*), neither committing fornication nor taking secret paramours. And if, after they are married, they commit adultery they shall have half punishment prescribed for a free woman. This is for those of you who fear lest he should fall into sin. But that it is better for you to practise self-restraint. God is most forgiving and merciful. Q. 31: 15 says: "But if they press you to associate something with Me about which you have no knowledge (*ma'rūf*), do not obey them in this world and follow the path of those who turn to Me. You will all return to Me at the end, and I will tell you everything that you have done." In the Q. 60: 12, it is stated: "O Prophet! When believing women come to you and pledge themselves no to associate in worship any other thing with God, not to steal or commit adultery or kill their children or indulge in slander, intentionally inventing falsehoods, and not to disobey you in that which is right (*ma'rūf*),, then accept their pledge of allegiance and pray to God to forgive them their sins, for God is forgiving and merciful.

[109] Arani, *Naqsh 'Urf,* 21.

not difficulties. Taking into account the verses whether in the form of *ma'rūf* or *'urf* (which are both integrated at a conceptual and practical level), Ja'farī scholars have sought to maintain a flexible attitude and acquiescent response towards the customary act of community.

Ja'farī scholars also align themselves with their Ḥanbalī contemporaries by referring to the same *ḥadīth* ("Whatever Muslims regard as good, it is good in the sight of God").[110] Taqī Al-Ḥakīm addresses the same *ḥadīth* when considering *ijmā'* and *istiḥsān* in Ja'farī jurisprudence – this is embodied in the claim that the *ḥadīth* emphasises the logical connection between rational and *shar'ī* regulations by arguing that rationally approvable good deeds are also good in the sight of God.[111] *'Urf* must benefit the society from *shar'ī* viewpoint as its acceptance is indicated within the community's practice.

The opinion of Ja'farī scholars upon the validity and recognition of *'urf* and *sīra 'uqalā'iyya* can be classified in two types. The first one is an independent practical *shar'ī* source and the second one is a dependent *shar'ī* source (*'urf* obtains power through *shar'ī* tools or methods).[112] The vast body of texts which refer to *'urf* as a direct or indirect source of law reiterate the need to acknowledge the proposition that the permissible and positive *'urf* embody a truth that can be attained through rationality. In explaining the *shar'ī* link between *maṣlaḥa* and *'urf*, Shibli observes that the Prophet establishes the limits of valid *'urf* during the time of revelation, and this is embodied in the approval or rejection of a particular Arabic practice.[113] If the community's agreement upon a particular practice produces social benefit or reduces harm, it becomes a valid source that functions in accordance with the rational limits put in place by the Prophet. In being considered under the *maṣlaḥa, 'urf* may become recognisable as it will enable the community to perform their usual activities with a greater degree of ease. In addition, the approvals of the *imāms* and *ma'ṣūm* (innocent) are understood to be valid proofs which even encompasses customary norms – this applies because the *imām*s, in providing their decision, do not only consider the *'urf,* but also take into account the benefits that accrue to the Muslim community.

4. Legal Position of *'Urf* and Opinion of *'Ulamā'*s

The validity of *'urf* and its *shar'ī* status in Ja'farī jurisprudence mainly originates within three points: firstly, those which address the direct statements of *imām*s that relate to *'urf*; secondly, those that reflect the notion of classical and famous scholars (including *marjī' taqlīd*s); and finally, those that represent *'urf* through *fatwā*s. The *shar'ī* opinions or *fatwā*s of

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[110] Arani, *Naqsh 'Urf*, 43, 50, and Al-Ghaṭā'ī, *Al-'Urf,* 21.
[111] Muḥammad Taqī al-Ḥakīm, *Al-Uṣūl al-'Āmmati li-Fiqh al-Muqārin* (Mu'assasa Āl al-Bayt, 1979), 375.
[112] Arani, *Naqsh 'Urf*, 38.
[113] Shiblī, *Uṣūl al-Fiqh*, 335, 336.

*imām*s are the primary provenances to which are referred to legalise the use of *'urf* in the solutions. As the previous chapter observed, the permissibility of the Nowrūz celebration is established with reference to *imām* Ja'far's opinion.

The second category of *shar'ī* proof includes the theoretical statements of famous Ja'farī scholars and their practical verdicts that enable the solution to be obtained through *'urf*. Al-Ḥillī reflects further upon the ways and *shar'ī* limits regarding the usage of *'urf* during the decision-making process. He states:

> "The consideration of *'urf* is done one of the two ways (the prominence of metaphorical usage with customary consideration and the appropriation of names for particular thing with customary consideration), it is not permissible to prove a third method (for the usage of *'urf* in the linguistic explanation). If the truth is reached by means of *'urf*, the original proofs exist with it."[114]

In lending further support to the use of *'urf* for the linguistic definition of *shar'ī* terms, Al-Ḥillī approves the use of customary words (such as referring to a pregnant camel as '*maẓada*') as they indicate an established tendency within the community. In explaining edible food, Al-Ṭūsī states:

> "The criteria of knowing (*ma'rifa*) what is lawful to eat from animals or what is not relies on jurisprudence (*sharī'a*). Whatever *sharī'a* permits is deemed permissible, and whatever it prohibits is deemed forbidden. In case of lacking evidence in the *sharī'a* regarding permissibility or prohibition of eating the meat of certain animals, the reference is made to the Arabs' *'urf* and *'āda*. In other words, what the Arabs consider as good food is lawful, and when the food is unpleasant, it is forbidden. When there is no evidence mentioned in the *'urf* or *shari'a*, the scholars resort to analogy where they compare the item with its closest possible similarity and thus deduct the ruling of either permissibility or prohibition."[115]

He considers the concept of *'urf* as being the first applicable reference which lies beyond the *shar'ī* principles and sources; however, he then situates reason (*'aql*) in second place and presents it as a *shar'ī* principle that enables comparison of the two most similar cases depending on *'urf*. Ṭabāṭabā'ī provides further clarification by adding that "[c]ustom is the prevalent beautiful traditions and practices among the wise men of community, unlike the rare and unacceptable things that society and conventional wisdom reject."[116] In referring to the practice of knowledgeable person, he clarifies how *sīra 'uqalā'iyya* comes to present itself as an indirect consideration. 'Irāqī, a twentieth century scholar and writer of *Maqālāt al-Uṣūl*, claims:

> "Imitation reflects the act of human being for the situations in which people do not have enough information about it. It is a natural and subjective tendency that exists in the behaviour of all human beings. *Sīra, 'urf* and *'uqalā* also cover the same meaning from *shar'ī* approach."[117]

The comparison of *'urf* and *taqlīd* highlights the natural roots of *'urf* that are derived from people's imitative and repetitive acts. Al-Ṣadr clarifies:

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[114] Al-Ḥasan ibn Yūsuf Ibn al-Mutahhār (al-Ḥillī), *Nihāyat al-Wuṣūl ilā 'Ilm al-Uṣūl* (Qom: Maktaba Al-Tawhīd, 2004), vol. 1, 244-245.
[115] Abī Ja'far Muḥammad ibn al-Ḥasan ibn 'Ali al-Ṭūsī, *Al-Mabsūṭ fī Fiqh al-Imāmiyya* (Beirut: Dār al-Kitāb al-Islāmī, 1992), vol. 6, 278.
[116] Al-Ṭabāṭabā'ī, *Al-Mīzān*, vol. 8, 384.
[117] Saljooghi, *Naqsh 'Urf,* 24.

> "*Sīra ʻuqalāʼiyya* is a specific term that explains the general approach of reasonable religious people and others towards a certain behaviour. Having no legal proof plays a positive role in the formation of this tendency, for example, the knowledgeable religious people would take the words of the speaker at its face value without digging deep into it… It is not the result of *sharʻī* statement, but the result of various factors and other influences that are embraced according to the penchant and activities of reasonable people. Therefore, the general trend which is presented by *sīra ʻuqalāʼiyya* is not confined only to the realm of religious people, because religion was not one of the factors which led to the establishment of this tendency."[118]

It should be noted that Al-Ṣadr evaluates the principle of *ʻurf* within the framework of *sīra ʻuqalāʼiyya*. He emphasizes that practices must be compatible with religious ordinances and underlines that the permissibility of *ʻurf* should be considered with reference to society's benefits and interests. If it is discovered that the practice is hostile to the public interest, it either has to be corrected by other practices or replaced entirely by new customs.

Al-Anṣārī encourages scholars to rule on cases by applying *ʻaql* (reason) to uncertainties arising from the absence of *sharʻī* indicator in the classical sources.[119] The principles of *aṣl al-barāʼa* and *istiṣḥāb al-ḥāl* are addressed positively by scholars who attend to the disputes – this is shown by the fact that there is no statement that permits or prohibits the disputed issue. The presumption of continuity for repetitive *ʻurf* and the presumption of permission for indefinite *sharʻī* concepts both further the impression that *ʻurf* has been accepted.[120] Aranī observes:

> "*ʻUrf* is an expression of consuetudinary behaviour or public method among community members on performing or avoiding a particular practice whether in the form of speech or deed."[121]

Madani, a twentieth century Jaʻfarī scholar and the writer of *Mabānī wa Kulliyyāt ʻIlm Ḥuqūq*, provides further clarification:

> "In the terminology of jurisprudence, *ʻurf* is an expression that covers the particular speech or behaviour of the whole community or majority of people within the community. In other words, when a particular norm becomes habitual practice among people, the act should be qualified within the range of mandatory (norms) that certifies the recognizable authority of *ʻurf*."[122]

Finally, Saljooghi, a contemporary Jaʻfarī scholar, clarifies:

> "*ʻUrf* is an element and method of jurisprudence on the social ground because it only becomes referable source for *sharʻī* rights and laws in the case of focusing this (social) point."[123]

The theoretical grounding for the reference to *ʻurf* is set out clearly in the linguistic sphere, where it is justified as the interpretation and understanding of the peoples' responses and behaviours toward religious ordinances. To take one example, the acceptance of locally accepted sounds that refer to expected or desired meanings can be attributed to the inability to pronounce required formulas or approval of locally prevalent behaviour (by virtue of being deaf or dumb). Both deficits that arise from people's disability or disease are obvitated

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[118] Al-Ṣadr, *Al-Muʻālim*, 168, 169.
[119] Zackery Mirza Heern, "Thou Shalt Emulate the Most Knowledgeable Living Cleric: Redefinition of Islamic Law and Authority in Usuli Shiʻism," *Journal of Shiʼa Islamic Studies* 7, no. 3 (2014), 321-344, 327.
[120] Murtaḍā al-Anṣārī, *Farāʼid al-Uṣūl* (Qom: Bāqirī, 1998), 343.
[121] Saljooghi, *Naqsh ʻUrf*, 25.
[122] Ibid, 26.
[123] Ibid, 53.

through the application of *'urf* as a *shar'ī* tool. The allusion to the connection between *'urf* and *'aql* and the assertion of *'urf* under the protection of logical validation epitomize the general approach that scholars have adopted.

5. Conditions to Apply *'Urf*

The types of *'urf* that the Ja'farī scholars refers to as a *shar'ī* principle establish the limits of permissibility and individuals resort to these *'urf* in the absence of evidence by avoiding personal desires and wrongdoings. In a manner which closely resembles Ḥanbalīs, Ja'farī scholars have set out conditions and criteria for *'urf* with a view to being recognized as an applicable and valid source during the formation of *shar'ī* decisions. The mutually agreed basic condition for the approval of *'urf* is that it must not contradict *shar'ī* sources that have been conceptualised inside the valid custom (*'urf ṣaḥīḥ*). The avoidance of translating lawful into unlawful or vice-versa is the most crucial point that impinges upon the validity of *'urf*. The absence of *shar'ī* sources or regulations makes it possible to refer to *'urf*.[124] It is important to note that, upon identifying a *shar'ī* source that offers a text-based solution, *shar'ī* sources must be considered in the first instance – *'urf* loses its basis and direct reference to it becomes problematic and questionable.

The majority of scholars strongly emphasise that valid *'urf* must be a widely accepted (*'urf 'āmm*) practice – relevant examples include generally accepted and recognised deeds and speeches within a particular society because these acts are mainly recognised by every member of society. The specific act must be frequently reiterated by groups, whether at the level of nationality or the local, among small groups of people.[125] However, it is essential for the act to be performed upon the basis of rational consideration rather than instinctive behaviours. In the absence of the aforementioned conditions, *'urf* is not considered to be a valid source or principles from *shar'ī* viewpoint.

Al-Ṭūsī's approach to edible food sets out specific criteria that relates to customary practices and his direct reference to *'urf* clarifies a number of important conditions.[126] He places objects including customary reference points inside the principle of *ibāḥa* by noting the original matter of things is grounded within the idea of permissibility – this applies as long as there is no opposite opinion. In addressing the explanation of objects that are deemed to be lawfully good, he asserts that lawful food is deemed to be with reference to people's own customary values good and not disgusting. Although the objects present themselves as attractive at the level of *'urf*, it is required not to render any punishment in this world or the

[124] Shiblī, *Uṣūl al-Fiqh*, 330.
[125] Arani, *Naqsh 'Urf*, 43, and Saljooghi, *Naqsh 'Urf,* 68, 69.
[126] Al-Ṭūsī, *Al-Mabsūṭ,* vol. 6, 279.

hereafter. However, if this is to apply, it is first necessary for the permissibility to be known through *sharʻī* or intellectual means. In addition, the *ʻurf* must be prominent and familiar to the people of the towns and villages where people live in accordance with their own will. In highlighting this, Al-Ṭūsī demonstrates that there must be an option to select from among the practices; by logical extension, unequivocally compulsory or obligatory acts are not sufficient to infer from customary practice as a *sharʻī* principle.

It is also important for actual custom (*ʻurf ʻamalī)* to align with the linguistic norms – all Jaʻfarī scholars with the exception of Al-Shahīd al-Awwal[127] agree that this is essential to obtain *sharʻī* accountability. It is permitted to change the ruling when the *ʻurf* and *ʻāda* changes – this is because particular *ʻurf* and *ʻāda* (e.g. the exchange of money, the maintenance of wife or relatives and the measurement systems) are all connected with the specific time period of the country.[128]

Most contemporary Jaʻfarī scholars also maintain that valid *ʻurf* is comprised of *māddī* (material) and *maʻnawī* (spiritual) components. The former refers to the process of development and evolution (this includes the moral values and usages of society); the latter, in contrast, addresses to the collective image of society with *sharʻī* considerations.[129] *Māddī* elements gather around generality, publicity, stability and universality; *maʻnawī* elements of *ʻurf*, in contrast, relate to officially dependent and simple acts – this serves to distinguish it from other current practices within society.[130]

Imāmī opinion upon the reliability and validity of *ʻurf* converges upon three main points: the doctrine of approval, the doctrine of reason and the validity of *ʻurf* upon its own terms (*dhātī*). The consideration of reasonable *ʻurf* which is defined with reference to its own nature and which operates in the absence of the Lawgiver's approval requires to benefit society. In operating through this mechanism, it avoids conflict, benefits society and protects social order. The authority of reason, which is embodied within the point of destination, its decided conclusion and position of mediation sets out the rational foundations of *sharʻī ʻurf.*

The capability of reason to differentiate between positive and negative objects has been used as a proof to argue that there is no contradiction between *ʻaql* and *ʻurf*. *ʻUrf* and *ʻaql* must have authority, credibility and reliability if they are to function as a *sharʻī* grounding that can be approved by a jurist or judge. Although a specific *ʻurf* originates within social practices rather than *sharīʻa*, the absence of *sharʻī* proof or the silence of *sharʻī* sources are used as proofs to justify the approval of *ʻurf* while determining a ruling for

127 Al-Shahīd al-Awwal, *Al-Qawāʻid*, 150.
128 Ibid, 152.
129 Arani, *Naqsh ʻUrf*, 69-71, and Saljooghi, *Naqsh ʻUrf,* 44.
130 Arani, *Naqsh ʻUrf,* 72.

certain practices, actions, and issues.[131] The scholarly position upon *'urf* can be summarised as entailing that a customary case becomes credible and valid if it obtains the approval of legislators, jurists, and judges. In the *sharīʿa,* the valid *'urf* is used and extended under different categories that include *sunna taqrīrī* (tacit consent), *islāmī* (Islamic practice), *sīra mutasharriʿa* (legal practice) and *sīra 'uqalā'iyya* (rational practice).[132]

6. The Opinions of Contemporary Iranian Scholars

'Urf is not considered to be an independent *sharʿī* principle of Jaʿfarī jurisprudence, but the traditional decisions clarify that it is mentioned within the various methods as being a dependent and supplementary reference that can help to obtain the solution.[133] The main body of Jaʿfarī scholars believe that, in addition to the Qur'an, Sunna and other sources, *'urf 'amalī* functions as an independent and revealing proof of *sharʿī* decisions. The scholars also limit the thematic interpretation and willed expression of *'urf* to two approaches – it is therefore recognised as a direct and independent object by itself or as an indirect and dependent element mixed with *sharʿī* principles that include *sīra 'uqalā'iyya.*

Subsequent to the Islamic revolution, the Iranian legal system has experienced a discordance between the Islamic law and the reality of actual practice, a duality of legal subject matter and *sharʿī* norms, tensions between theory and practice and a variation of ethical, legal and ritual rules.[134] This turbulent atmosphere has affected the law-making process and has also adversely impacted the approval of customary values in the jurisprudence. Within the Iranian judiciary, there has been a considerable deviation between law and *'urf*, ethics and practice. In order to identify the position of *'urf*, it is therefore necessary to determine the borders, establish the independence of judicial performances, improve the utilization of jurisprudential methods and overcome tensions between accountability, evaluation criteria and quantity. Mohammadi examines the reform periods of judicial system over the last century and emphasises how the changing character and positioning of *'urf* have been misunderstood. He observes:

> "[The] modern judicial system replaced the Islamic law or *shariʿah* in Pahlavi era and Islamic judicial system replaced the modern one after the revolution of 1979 and showed that modern formal judicial system replaced not the *shariʿah* courts but the dual "*'orfi* or state and *shariʿah*" court system."[135]

It could be argued that the words *'urf* or *'urfī* convey negative connotations for the contemporary legal diaspora because they are connected with the secular legal system that operated during the Pahlavi period. Although the rule of the scholars has severed the

[131] Saljooghi, *Naqsh 'Urf*, 46, 47.
[132] Ibid, 47.
[133] Ibid, 39.
[134] Mohammadi, *Judicial Reform*, 117.
[135] Ibid, 257.

distinction between *sharī'a* and some sections of the *'urf*, the legal system has not completely disengaged from its connection with the valid customary applications. The line between these two domains was recognized by the Imāmī *'ulamā'* in Iranian society subsequent to the revolution. In the aftermath of February 6, 1988, as Mohammadi notes, the religious establishment has sought to replace the concept of *'urf* with *maṣlaḥāt al-niẓām* (the well-being of the system).[136] *Maṣlaḥāt al-niẓām*, in attempting to mediate between *'urf* and the necessities of governing, substitutes the dynamic *'urf* and advances criteria in order to identify what is permitted to limit a text. In addition, it also highlights the priority of the survival of the regime in instances where it conflicts with customary values. In most cases, the ruling clergy do not sufficiently acknowledge changing local conjecture that has been embodied in the *shar'ī* tradition for centuries and in some instances advance their interpretation of *sharī'a* as the pure truth. In this context, a general or specific *'urf* cannot annul a general or specific *shar'ī* rule that has been presented by classical jurists and judges. However, the power of the governmentally supported Expediency Council can supersede the regulations and this replacement seeks to resolve the crises of efficiency and legitimacy. Meanwhile, *'urf*, in functioning as a *shar'ī* source, is accepted upon the basis that it aligns with the law and the changing necessities of social order. It should be noted that both the centralization of authority and religious domination in addition to their artificial and symbolic interaction have created a new style of *'urfī* interpretation within the jurisprudence. It should also be recognised that this has been led to the secularisation of interpretations and *shar'ī* rules.

The explanations for references to customary reforms of law which rely on *sharī'a* have not been the main priority for Imāmi scholars and intellectual movements. The emphasis usually tends to be upon external and internal power relations along with the administrative manipulations which pertain to relations between civil society, individual practices and the Islamic state. However, scholars within Baghdad's traditional circles are often more attached to *'urf* than scholars educated in different Ja'farī education centres.

As with Saudi jurisprudence, it is not acceptable for a contemporary Iranian jurist or judge to ignore the *'urf* of his region or time when issuing a solution for a problem. A closer compatibility with local practices and understandings provides *shar'ī* solutions with an enhanced applicability, practicality and reliability. However, it is important to acknowledge that when the *sharī'a* embeds customary practices that exceed normal limits, the legal system will remain open to the accusation of secularization.[137] The proposition of different solutions

[136] Mohammadi, *Judicial Reform*, 257.
[137] Saljooghi, *Naqsh 'Urf*, 34.

that distinguish countries' legal systems may originate in the belief that the particular methods of jurisprudence are mere instruments and tools. They are mainly adopted from external elements with the specific intention of helping to produce better solutions. It can be argued that *'urf* derives its influence from the *shar'ī* methodologies; furthermore, this lends credence to the conclusion that if circumstances change, the regulations must also change. Because the science of jurisprudence has been developed and supplemented by the experimental, natural and social factors (which include *'urf*), it is incumbent upon scholars to make use of those developments and additions by exercising *ijtihād*.

7. The Power of *'Urf* in the Legal System

The founders of Islamic regime are somewhat reluctant to include *'urf* among the sources of law because the classical theory of *fiqh* limits these sources to the Qur'an, Sunna (including the explicit and tacit approvals of Ja'farī *imām*s), consensus (if it embraces the occulted *imām*'s opinion that is almost impossible to obtain) and reason (*'aql*, harnessed by faith). In extending from the Islamisation agenda of Iranian scholars, *sharī'a* obtained, at a theoretical level, a prestige that denies the wide scope of *'urf* in the jurisprudence. *'Urf* is considered to be the arbitrary decisions of governments or people's opinions that might be deemed to be entirely contrary to Islamic tenets – this applies because *sharī'a*, when applied as a legal system, could easily challenge those arbitrary decisions. Within the practice of the courts, judges examine the cases with a mixture of arbitration and local *'urf* while pursuing equity - this interpretative effort may be excused by the principle of *maṣlaḥa* or necessities of time (*muqtaẓi'āt al-zamān*).[138] Both the independent *'urf* and the dependent *'urf* in the form of judicial style become noticeable in the Iranian jurisprudence albeit to codified rulings.

In Iranian legal system, the methodological instruments do not extend to encompass the *'urf* of the time, so ignorance of its role and influence are frequently evidenced within legislation and the policy-making process that are followed by '*ulamā*s who are supported by the government. The *shar'ī* area has been characterised by ongoing debates that relate to the question of whether a new *'urf*, for purposes of social expediency, should be preferred to a textual ruling based on an old *'urf* or if it is instead preferable for the system to proceed with the textually established practice. In attending to this question, observers could claim that even particular *'urf* that is frequently reiterated and applied and which is not opposed to the sources of *sharī'a* tend to be approved by the judiciary. In these customary cases, the government most frequently aligns itself with the traditional role that *hesbeh* (police of the guilds), judges of the old *maẓālīm* (extraordinary jurisdiction) and administrators of *shurta*

[138] Mohammadi, *Judicial Reform*, 129.

(police) assumed during the Islamic era which they attempted to mediate between law, religion and society.[139]

Because the executives used *'urf* as an instrument to make inroads into jurisprudence during the Pahlavi era, contemporary scholars are often reluctant to refer to it, lest they be accused of harbouring secular sentiments. The concept of *maṣlaḥa*, in common with the rational concept of *sīra 'uqalā'iyya* as opposed to *'urf*, is considered to be an instrument that has enabled Islamic administrations to make inroads into exceptional fields. In this respect, it clearly contrasts with *sharī'a*, which closely protects its practical and theoretical autonomy. Although scholars are sometimes reluctant to resort to *maṣlaḥa* because of its high status within the hierarchy of *shar'ī* principles, it is preferred upon the basis that it justifies the use of *'urf*. However, neither classical Imāmī jurisprudence nor the Constitution of 1979 accepted *'urf* upon the same basis as *maṣlaḥa* by highlighting its validity as a default category within the hierarchy of *shar'ī* sources.

The codified law of Iran permits *fatwā*s to be used as the source of judgement because Article 167[140] of the constitution makes it clear. In instances where the codified law is absent, the judge's ruling must be rendered with reference to authoritative *shar'ī* sources and authentic *fatwā*s. The judge is obliged to deliver a judgement even if there is a deficiency of law (e.g. if it is too brief or contradictory) or a pretext of silence – under these circumstances, addressing of the *fatwā* collections including customary norms for uncodified regulations may provide practical solutions. Legal gaps within the constitution open the way to customary interpretations in instances where evidence is lacking. However, the same constitution does not provide methodological systems or logical borders that complete the jurisdiction process. Although scholars, in engaging at a theoretical level, have offered different views on *'urf*'s credibility, they have accepted its validity at the level of principle (*uṣūl*) and its reliability within the *shar'ī* system.[141]

8. The Application of *'Urf* in the *Fatwā*s

Ja'farī school places particular emphasis upon the principles of *'urf* and *'āda* that are compatible with the objectives of Islam and the real interests of people (*maṣlaḥa*) -this applies in order to maintain social stability. The aim of protecting social stability and producing practicable solutions encourages the scholar to understand how *shar'ī* systems relate to the wider political and social environment. In contemporary Ja'farī school, business,

[139] Mohammadi, *Judicial Reform*, 148.
[140] "Constitution of the Islamic Republic of Iran,", Article 167 reads: "The judge must try to base the verdict of each dispute on the codified laws. If his attempt fails, he should issue the verdict on the case by referring to reputable Islamic sources or religious rulings (*fatwā*s). He cannot refrain from issuing a verdict under the pretext of silence, deficiency, brevity, or inconsistency in the laws."
[141] Saljooghi, *Naqsh 'Urf*, 42.

contracts, partnership and renting are the most noticeable areas of economic transactions that relate to *'urf*.[142] Mohammadi clarifies that courts and laws are firmly embedded in political practices and structures; this feature is specific to Iran and seeks to address issues of identity in the era of the nation-state.[143]

When *'urf* is analysed as a *shar'ī* principle, it can be understood as a common tool within presented decisions or as an explanatory criteria in the determination process according to the opinion of Al-Shahīd al-Awwal.[144] The opinion of using *'urf* as a common tool highlights the rational capacity of people and logical inference methods rather than *shar'ī* sources. Under particular circumstances, communication styles, consideration of citations (the opinions of third parties), eye witnessing, and scale can be considered as important reference points for *'urf*. To the same extent, the recognition of each condition, prevention and reason has strong link with their customary meaning and exemplifies the usage of *'urf* as a common tool. Conversely, *'urf* guides scholars to confine the regulations in the version of explanatory criteria. The examples set out limits for continuation of the possessions, conditional bequests, invalid or corporal oaths, judicial procedures, condition for the testimony of two men or four women or the young (*ṣibyan*) who have been wounded. The *shar'ī* rules entitle the wife to sufficient maintenance, but the sum will be determined in accordance with local conventions along with *shar'ī* precedents.

Al-Ṣadr's aforementioned categorization of *shar'ī* sources establishes that indirect inductive evidences do not enable the *shar'ī* decision to be directly engaged; scholars instead depend on verbal proof and this results in *shar'ī* decisions being extroverted.[145] In applying the direct inductive method, scholars directly engage the verbal proof, and this in turn enables them to reach the *shar'ī* decision. The placing of *'urf* within the verbal (*lafẓī*) type of indirect inductive methods enables it to gain *shar'ī* validity. In the absence of preventive regulation, the appearance of the speaker is given importance alongside his words depending on *'urf*. The scholars recognize this method for understanding speech of the speaker and agree to consider appearance as a *shar'ī* proof. This is one illustration of how *'urf* is used as a preventive measure to guide and inspire the scholars and deter them from impracticable decisions.[146] Therefore, the directive character of *'urf* enables authorities to apply it as an influential material and supplementary mechanism that can be used to create Islamized communities and societies.

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[142] Arani, *Naqsh 'Urf,* 30.
[143] Mohammadi, *Judicial Reform*, 22.
[144] Al-Shahīd al-Awwal, *Al-Qawā'id*, 151.
[145] Al-Ṣadr, *Al-Mu'ālim*, 149, 165, 166.
[146] Ibid, 169, 170.

a) The *Fatwā* Pertaining to Permission and Consumption

The *fatwā* that Ja'farī scholars have issued upon consuming the house owner's foods during invitation is frequently cited to indicate the borders that *'urf*, in acting in the absence of texts, has established within the *sharī'a*. It reads:

> "*Fatwā* No: Fa1209, Archive Code No: 1069
> Query: Is it necessary to get permission before eating something from its owner?
> Response: In Islamic jurisprudence, it is a condition for the eatable food not only being *ḥalāl* (religiously edible) and pure (not *najīs*), but also needs to be *mubāḥ*, meaning that its owner must be happy and content with your eating it and that you should know that he is happy about it. Eating things without the permission of owner that belong to someone else is *ḥarām*. Nevertheless, in cases that the one invites us to his/her house to have a meal there or the owner of an orchard or garden invites us to eat some fruit or vegetables, there is no longer any need to get permission for eating. In response to the question: "It is enough for us to be sure that the owner of a certain food is content about us eating it, for it, to be okay for us to eat?" Ayatullah Khamenei says: "It is enough." Ayatullah Makarem Shirazi's response: "If different clues tell us that he/she is content, for instance if he/she invites us to their house, then it is okay."[147]

The *fatwā* establishes clear conditions for the consumption of food which derive from both the *shar'ī* dimension and worldly assessment in which the owner's approval is required. In addition to the regulations for *ḥalāl* objects that are prescribed by the Lawgiver for the hereafter, there are a number of external requirements that concern worldly matters and affect the permissibility of things. The evaluation criteria for the worldly assessments is given in accordance with the customary practice or presumptions – this comes to function as the origin of the decision because it does not produce harm or detrimental results.

The permissibility of consuming foods in the guest's house ultimately relies on the customary understanding of consent and invitation. If the owner of the house or foods is not happy to share with his guests, he is required to clearly indicate this. If no signs of reluctance are forthcoming, the individual is entitled to, in citing customary presumptions, eat the owner's foods. It should be noted that invitation is customarily conceptualized as permission to enter the house and eat the foods. Scholars have, in examining customary assumptions by employing the principle of reason, found no basis for the prohibition – this has resulted in the practice becoming permissible and valid from *shar'ī* perspective.

There is a common scholarly tendency which holds that particular behaviours and exercises can be considered as a driving force. There are specific actions in which the owner's purpose is not clarified clearly, but the type of act indicates the main intention which includes providing food to the guest. *'Urf* allows the guests to consume the food without verbal permission and the practice is categorized within the framework of permissible act from *shar'ī* viewpoint.[148] As a result, the *shar'ī* permission is given to the act by referring to the *'urf* as an explanatory criteria.

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[147] *Fatwā* No. 1069 in *Islam Quest,* accessed October 15, 2015, http://www.islamquest.net/en/archive/question/fa1209.
[148] Ibid, 49.

Conclusion

The compilation of *sharʿī* sources and contextualization naturally include some kind of customary translation with this being particularly pronounced in the case of the verbal *ʻurf*. Traditional *furūʻ* sources are written versions of oral testimonies which embrace verbal *ʻurf*. These sources have the power to define not what is merely correct, but also what can be construed as coherent, logical, mentionable or sensible. The power to define the elements of narrative that will emphasized and the type of method that is deemed to be appropriate for a case are decided with reference to the customary norms that adhere within specific areas in the countries.

The study of the process of customary integration clearly demonstrates how traditional scholars diverge in their understanding of the essential *sharʿī* mechanisms that pertain to the disputes. Furthermore, it also indicates how legal actors incorporate their interpretation of *sharʿī* sources and the local context into the process through which conflicts are handed. In engaging with practice, it is also possible to identify actions that are occasionally permitted, but which, setting their direct relevance to customary contexts aside, are believed to be technically unlawful. Classical *sharʿī* rules of procedure have also been modified in acknowledgement of the increasing primacy of customary norms with this feature being particularly pronounced in cases pertaining to marriage or divorce. In acknowledging the practical distinction, several anthropologic studies have sought to explore the relationship between *ʻurf*, social norms and understanding of *sharīʻa* – in engaging at these points, the scholars aim to identify how culturally construed notions of equity and fairness are assimilated into legal reasoning in diverse cultural contexts both *sharʿī* and *qānūnī* systems. These decisions are clearly linked to the jurists' and judges' concern to uphold the public interest; however, they should also be theorized as a response to local notions of continuity and equity. The theoretical approaches provide, to this extent, considerable insight into how scholars incorporate *ʻurf* into their *sharʿī* reasoning without directly referring to *ʻurf*. Justifications of religiously moderated rules sometimes claim that jurists' and judges' interpretations and norms attempt to align *sharīʻa* with local values by relaxing regulations and producing a law-like norm, which subsequently attains *sharʿī* reasoning and acceptability

At a theoretical level, the comparison between the Saudi's deliberately open traditional legal system and the Iran's codified legal system which is particularly instructive in this respect reveals that the latter one does not leave discretion for judges to apply *sharīʻa* in family law. This feature is mainly attributable to the fact that the implementation of codified rules derived from amendments has considerably constricted the Iranian legal

system’s open character. Codification, in advancing the cause of universalized regulations which apply across the country, therefore restricts the consideration of customary values. The Ja‘farī school’s reliance on reason has an important contribution to make any attempt to identify how *‘urf* has been advanced within the *sharī‘a*. This feature notwithstanding, the Iranian legal system also deploys *‘urf* in order to maintain social order and stability within the framework of *qānūnī* system as opposed to *shar‘ī* system. The Iranian scholars consider its observance as being necessary to the point where its violation is interpreted as a disruption of public order. While *qānūnī* system establishes the state as the immediate source of legal authority, its ultimate source is understood to be *sharī’a*. Meanwhile, functional authority accrues to the judge that has been given priority by *shar‘ī* principles and sources.

CHAPTER 3: MARRIAGE AND DIVORCE REGULATIONS IN SAUDI ARABIA

Introduction

In functioning to further advance acculturation, monopolism and transplantation, Saudi Arabia's *sharīʻa* courts have become established as key cultural or contextual actors whose influence has shaped the legal system from its point of establishment until the contemporary period. The association of the legal system with a national Saudi identity and cultural heritage regarding to nationalistic movements during the twentieth century become established as defining attributes of the country's legal structure. The legal system is built upon religiously approved regulations derived from *sharʻī* sources and state-issued laws that engage with matters that ostensibly fall beyond the jurisdiction of the *sharīʻa* (*malik al-marsūms* or Royal Decree). These two elements are equally binding on Saudi residents and have become closely associated with the highest religious authority (the Grand Muftī) and the highest governmental authority of the Kingdom (the King). Article 45 of the Basic Law and Governance establishes:

> "The source for *fatwā* (religious legal opinion) in the Kingdom of Saudi Arabia shall be the Book of God and the *Sunnah* of his messenger. The Law shall set forth the hierarchy and jurisdiction of the Board of Senior ʻUlamā and the Department of Religious Research and Fatwā."[1]

The legal system exerts a balancing power that stabilises the interactions between the key religious and state institutions. The Administrative Committee with juridical power has emerged over a considerable period of time and it is tasked with exerting jurisdiction over administrative, civil, commercial and criminal matters along with disputes that arise from a lack of implementation. On April 2, 2005, a Royal Decree was passed which sought to organise the country's judiciary in the commercial, criminal, domestic and labour spheres. These innovations also extended to the establishment of specialised courts for the first time.

On October 1, 2007, a novel Royal Decree approved a new version of laws that regulate the Board of Grievances and the judiciary. These amendments aimed to improve the judicial standard and provide better facilities for Saudi society. Under the renewed judiciary law, Saudi Arabia's court system is composed of: (1) High Court; (2) Courts of Appeals; and (3) First-Degree Courts, which are in turn composed of Criminal Courts, General Courts, Personal Status Courts and Labour Courts.[2] Marital disputes that relate to marriage, divorce, maintenance, and custody of children come under the jurisdiction of Personal Status Courts.

[1] "The Basic Law of Governance", Article 45.

[2] Gabriel Sawma, "Saudi Arabian Child Custody Cases in U.S. Courts," *Islamic Divorce in USA*, accessed 11.11.2017, http://islamicdivorceinusa.com/saudi-arabian-child-custody-cases-u-s-courts/.

This chapter engages with the history of customary interpretation, and specifically engages with its implementation in family law, along with the establishment of custom-based *shar'ī* methodologies within the Ḥanbalī-based Wahhābī interpretation. This chapter provides a synopsis of the formation of woman's legal status in personal courts of Saudi jurisprudence and focuses upon a number of factors that judges have drawn upon when analysing disputes and decision-making processes. The link between customary norms, the intervention of state doctrines and the treatment of woman within the courts is discussed with reference to exemplary court cases that were obtained during the research engagement.

1. The Connection of Contemporary Saudi Legal System with the Ḥanbalī School

The Ḥanbalī school of law has enjoyed the official patronage of the Saudi rulers, and Ḥanbalī-Wahhābī educated judges have, from the establishment of the Kingdom, exerted final jurisdiction over the provinces. The main sources of Saudi jurisprudence converge upon the largely Ḥanbalī *fiqh* literature that is set out in a number of specified classical treatises written by authoritative jurists and less renowned Ḥanbalī sources. Additional reference points drawn upon by scholars include other schools of law, state regulations, royal decrees, *'urf* and *'āda*.[3] As Vogel observes, royal decrees have been used to make the court's judgements congruent with the authoritative classical compilations of Ḥanbalī jurists who include *al-Mughnī* of Ibn Qudāma. Alternatively, they are used to supplement issues in instances where modern arrangements demand new legal provisions.[4] Particular Ḥanbalī sources provide the main guidelines in the civil matters of the contemporary legal system; however, if no suitable provisions are forthcoming, general Ḥanbalī treatises are referred to as secondary sources. *Shar'ī* sources of other schools are also referenced, but this is an option of last resort. If no applicable solution emerges from the aforementioned sources, *ijtihād* and general *fatwā*s from the religious institution of Saudi Arabia (Dār al-Iftā'), invariably on issues pertaining to family disputes and religious observance, provide potential solutions.[5] Traditional areas of law largely continue to be governed by *sharī'a* while more recent legal fields, including corporation, immigration, tax and trade law have tended to be regulated by royal decrees that possess a semi-codified status.

Individuals might, in referring their cases to the judge, ask for rulings to be made in accordance with their preferred school of law and this feature was particularly practiced in the Harem region during earlier stages. The situation, however, has changed over time and in

[3] Abdullahi A. An-Na'im, *Islamic Family Law in a Changing World* (New York: Zed Books Ltd, 2002), 136.
[4] Frank E. Vogel, "The Complementarity of *Iftā'* and *Qaḍā'*: Three Saudi Fatwas on Divorce," in *Islamic Legal Interpretation Muftis and Their Fatwas*, ed. Muhammad Khalid and Brinkley Messick (Cambridge, Massachusetts: Harvard University Press, 1996), 262.
[5] Ibid, 267.

the contemporary period, judges have evidenced a pronounced reliance upon Ḥanbalī school of law. Hurvitz maintains that the Ḥanbalī school is favoured over the other *sunnī* schools because Ibn Ḥanbal is regarded as a traditionalist who seeks to return to the original sources that influenced the Wahhābī doctrine.[6] The state, in addressing personal issues, acted in accordance with the Ja'farī school of law in the Ja'farī dominated regions of Saudi Arabia and approved the validity of judgements. Under the Kingdom's current system, judges have jurisdiction that extends beyond the administration of both the *sharī'a* and also state law. The hierarchy for the application of a particular view within the Ḥanbalī school has been widened in the contemporary period by including the views of other scholars. The methodology is known as *takhayyur* (selection) and this even applies to the individual opinions of prominent early jurists that were not adopted by any of the school. As Al-Atawneh observes, the Kingdom's legal system has supported inter-school interpretation and rejected the notion of complete obedience to a specific school – in doing so, it has argued that there is no reason for a society to be constrained by a particular set of determinations.[7]

In civil matters that cover criminal and family cases, the judge mainly makes his ruling in accordance with the authoritative Ḥanbalī texts to which the majority of Saudis adhered, with this applying both to the classical Ḥanbalī sources and subsequent texts that acquired a later authority. The six recognized and authoritative Ḥanbalī sources can be listed in accordance with their priority as follows: Ibn Qudāma, *Al-Sharḥ al-Kabīr* and *Al-Mughnī,* Ibn Najjār, *Muntahā al-Irādāt fī Jam'i al-Mughnī ma'a al-Tanqīḥ wa al-Ziyādāt,* Al-Buḥūtī, *Kashshāf al-Iqnā' 'an Matn al-'Iqna'* and *Sharḥ Muntahā al-Irādāt*, Al-Ḥujāwī Abū al-Najā, *Al-Iqnā' fī Fiqh al-Imām Aḥmad ibn Ḥanbal*. As Al-Atawneh, Al-Turki, and Vogel observe, in exceeding the authority of these six primary sources, the modern jurisprudence expanded its usage to other Ḥanbalī sources which mainly included the works of Ibn Taymiyya and his student Ibn Qayyim.[8] In the Saudi legal system, the judge is not permitted to execute his own judgements and the ruler is not supposed to execute any punishment without the judge's formal ruling. When the deliverance is related to the criminal court (this includes retaliation), the implementation of the judgement requires the approval of the ruling authorities. Vogel observes that, in the case of Saudi Arabia, legislative power in criminal matters largely remains in the hands of the ruler and his authority usually predominates in legislation and adjudication of criminal issues.[9] This design safeguards against the possibility that discretionary powers of Saudi judges who are responsible for the implementation of penal

[6] Nimrod Hurvitz, *The Formation of Hanbalism: Piety into Power* (New York: Routledge Curzon, 2002), 105.
[7] Al-Atawneh, *Wahhabi Islam*, 74-75.
[8] Al-Atawneh, *Wahhabi Islam*, 76, and Al-Turki, *Uṣūl Madhhabī*, 707-711.
[9] Vogel, *Islamic Law*, 223.

law across the Kingdom, would prove to be oppressive. The Saudi legal system operates in harmony with the *shar'i* and administrative authorities by exerting a balancing power with the *muftī*s and *qāḍī*s largely performing a complementary role within the governmental system.[10] Judges, in formulating their decisions, have applied classical *fiqh* sources in the court procedure – in doing so, they have added a further dynamic to the judicial divorce practice in the region. The observer will gain a clear understanding of the Kingdom's jurisprudential system if they seek to understand the ways in which legal doctrine, judicial rulings and Wahhābī theory have become intertwined. Although *aḥkām* of the judge is strongly rooted within the Ḥanbalī tradition, supplementary recourse to the school's authoritative opinions and the addition of certain administrative and procedural elements distinguish the current system from classical *shar'ī* practice. Article 32 of Saudi Arabia's procedural law states:

> "[W]ithout prejudice to the provisions of the Grievance Board Law, General Courts shall have jurisdiction over all cases outside the jurisdiction of Summary Courts. Specifically, they may consider the following: …(b) Issuing title deeds, registration of endowment and hearing the declaration thereof, and recording marriages, probate, divorce, *khul'* divorce at the insistence of the wife, paternity, death and determination of heirs. (c) Designating trustees, guardians, and administrators and permitting them to perform actions that require the judge's permission and dismissing them if required…(e) Marrying off women who have no guardians."[11]

Taking the Article into account, the requirement for the notification of divorce to the official authorities provides legal validity for divorce within the regulations and makes both sides independent. Divorce actualises subsequent to the expiration of *'idda* period or the day on which notice (as indicated within the relevant sub-section) is delivered to the chairman for previously divorced couples. A divorce without official notification or registration does not impose legal barriers or remove the responsibility of guardianship for the parties before the law; despite this, it is still accepted as being a *shar'ī* valid termination that brings the marital relationship between spouses to an end. Upon deciding divorce, the respective parties are advised to register with the purpose of avoiding future legal burdens. With regard to legal theory, contemporary judges have sought to maintain a flexible stance towards the other schools and have therefore gravitated beyond Ibn Ḥanbal's basic methodological approach. Al-Atawneh observes:

> "It is significant that the Wahhābī approach to the *qiyās* is based not only on *'illa* as an effective cause, but also on necessity (*ḍarūra*) and public interest (*maṣlaḥa*) as legal sources. This approach enables extensive use of reasoning and accommodating legal norms when dealing with the challenges of modern life."[12]

Saudi Arabia's civil courts handle a range of personal problems that relate to child custody, divorce, inheritance and marriage. Judges have mainly justified their interpretation and

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[10] Vogel, "The Complementarity," 262-269.
[11] "The Law of Procedure Before Shari'ah Courts," Article 32.
[12] Al-Atawneh, *Wahhābī Islam*, 80.

implementation of *shar'ī* sources on divorce and marriage by referring to public interest and drawing upon a mixture of juristic and social factors.

2. The Ḥanbalī School's Classical Divorce Regulations and the Role of *'Urf*

In handling divorce applications, judges should ensure that the procedure complies with *shar'ī* requirements set out in the Qur'an and Sunna and that the process does not reflect the pleasure of the husband. Although each type of divorce is permitted in the *shar'ī* system, it is not considered recommended by Ḥanbalī scholars who frequently cite a *ḥadīth* in justification ("The most detestable of all permitted matters to Allāh the exalted is divorce").[13] A Qur'anic verse (Q. 4:35) provides further clarification:

> "If you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, God will cause it between them."

In circumstances in which only one side sues for divorce or the court finds reasonable grounds for reconciliation between the parties, judges prefer to, in seeking to uphold the interests of the marriage, refer the case to the *Qism al-Ṣulḥ* (Conciliatory Committee). If the Committee manages to reconcile the spouses, the marriage continues; however, if the Committee is reluctant to sanction reconciliation, the authorities confirm the divorce. Classical Ḥanbalī sources establish that the judge should approve divorce in instances where problems are obvious and there is a clear danger that *shar'ī* limitations upon the continuation of the marriage will be exceeded.

Ibn Qudāma, whose contributions have strongly structured the discussion of this issue in the Ḥanbalī school, divides divorce into five *shar'ī* categories which take the following forms: obligatory (*wājib*), recommended (*mustaḥābb*), permissible (*mubāḥ*), disapproved (*makrūh*) and objectionable (*maḥẓūr*).[14] *Wājib* refers to divorce that occurs because of a lack of permission from a guardian or dissention among arbitrators. *Makrūh* (which is dependent upon "*lā ḍarar wa-lā ḍirār*") refers to divorces that occur without any plausible reason. *Mubāḥ* is divorce that is undertaken to prevent damage from being inflicted upon one of the parties. Conversely, divorces are divided into four main types which extend from implementation and procedural methods. These include: *ṭalāq* (husband's unilateral divorce right), *khul'* (woman-initiated divorce), *ṭāliq* (conditional divorce) and *tafrīq* (judicial termination). The practice of these types and their regulations during both classical and contemporary periods will now be examined in order to engage the question of how jurisprudence changes in accordance to the *'urf* within a society. Divorce can be sanctioned if one of the parties is careless in their performance of religious rituals, meeting of religious

[13] Abū Dāwud Sulayman ibn Ash'ath, *Sunan Abu Dawud*, translated by Nasiruddin al-Khattab (Riyadh: Darussalam, 2008), vol. 3, 20.
[14] Ibn Qudāma, *Al-Kāfī*, vol. 3, 106-107.

obligations or general religious conduct. Divorce that occurs during the menstruation period is considered to be undesirable, but *khul'* divorce during the menstruation period does not arouse comparable objections.

a. *Ṭalāq*

In classical *shar'ī* practice, *ṭalāq* corresponds to three unilateral divorce rights or repudiations that the husband can pronounce against the wife regardless of context or time and in the absence of legal proceedings. Scholars commonly accept a *ṭalāq* pronunciation during one session as being one use of divorce right with Ibn Ḥanbal's narrations often being cited as justification. That states:

> "Abū Dāwud said: I heard Ahmad asked about a man who divorces his wife triply in one statement, and he did not consider that appropriate" [;] "I heard Ahmad asked about a man who says to his wife, 'you are divorced,' meaning triply. Ahmad said, 'it counts as a single divorce."[15]

Although there continues to be considerable disagreement among Ḥanbalī scholars on the issue of triple *ṭalāq* pronouncement and the husband's intention, the majority of scholars align themselves with Ibn Taymiyya's opinion. He maintains that one *ṭalāq* pronouncement should, in the interest of the parties, be conceived as a single divorce right.[16] The physical and mental capability of the husband upon uttering the divorce formula is taken into account by the classical Ḥanbalī scholars. Particular modifications of the divorce formula or restorations of the marriage are then undertaken in accordance with the husband's condition. Ibn Qudāma claims that the pronouncement of *ṭalāq* when being in a state of immaturity, intoxification, lunacy, madness, sickness or sleep ultimately nullifies it.[17] This regulation is attained through the *qiyās* to the narration that states:

> "The pen has been lifted from three: from the sleeping person until he awakens, from the minor until he grows up, and from the insane until he comes back to his senses."[18]

The word for the divorce formula may be explicit (*ṣarīḥ*) or implicit (*kināya*) for *ṭalāq* as well as *khul'*. An explicit pronouncement of termination is considered to be a proper divorce and it becomes effective regardless of the intention from Ḥanbalī viewpoint. In contrast, the implicit utterance of repudiation (such as go away, God rewards you, swallow and taste) is conceptualized and authorized with reference to the code of conduct, customary barriers and intention that apply within a given region.[19] Ibn Qudāma insists that only the intention of *ṭalāq* (which operates in the absence of action) does not provide a *shar'ī* ground

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[15] Susan A. Spectorsky, *Chapters on Marriage and Divorce Responses of Ibn Hanbal and Ibn Rahwayh* (Austin: University of Texas Press, 1993), 69.

[16] Al-Manṣūr, *Uṣūl al-Fiqh*, 520, and Ibn Taymiyya, *Majmu' al-Fatāwā,* vol. 33, 46-47.

[17] Ibn Qudāma, *Al-Kāfī*, 110.

[18] Muhammad ibn Yazeed ibn Māja al-Qazwinī, *Sunan Ibn Mājah*, trans. Nasiruddin al-Khattab (Riyadh: Darussalam, 2007), vol. 3, 168.

[19] Ibn Qudāma, *Al-Kāfī*, vol. 3, 97-98, 113-116, and 'Amr ibn al-Husayn al-Khiraqī Abū al-Qāsim, *Matn al-Khiraqī 'alā Madhhab Abū 'Abd Allāh Aḥmad ibn Ḥanbal Al-Shaybānī* (Medina: Dār al-Ṣaḥāba li-Turāth, 1993), 111.

for divorce; however the explicit pronouncement of *ṭalāq* even in the absence of intention is considered within the school's established tradition to be valid.[20] The categorisation of the formula, whether in explicit or implicit form, is identified in conformity with *sharʿī ʿurf*.[21] Although the divorce occurs with an implicit declaration, it could be conducted upon equitable terms (*maʿrūf*) and in accordance with the *sharʿī* prescriptions. When the implicit divorce formula is uttered in a situation of extreme anger and anxiety, it is not regarded as a valid divorce as there is a clear lack of explicit pronunciation and intent. It could be observed that when the word is applied in customary usage for something other than the *ṭalāq*, it is not referred to as a divorce that is similar with the validity of consent (*riḍā*),[22] If the metaphorical pronunciation of the formula conveys a real intention of divorce, it is credited as an acceptable and implicit divorce.[23] It is also conceivable that the validity of metaphorical expressions for the pronouncement of divorce could be made dependent upon the explicit utterance and intention of the word – however, this applies on the precondition that the word is customarily known and sufficient for the termination.

The unilateral *ṭalāq* right of husband does not require him to find a reasonable excuse for his pronouncement of divorce; however, if one was required, then misbehaviour on the part of the wife would suffice as the traditional scale of values establishes that this is disgraceful. In these cases, deviation from accepted norms, chastity, and female honour are foregrounded as important preoccupations. The husband's claim that his wife has caused him humiliation or brought him into contempt is considered plausible grounds for the justification of *ṭalāq*.

b. *Khulʿ*

The *khulʿ* divorce is initiated by the woman and is obtained with the man's consent by her renunciation of any remaining economic rights. Woman who participates in this type of divorce is known as *mukhṭaliʿa*. The couple agrees upon a *ṭalāq* settlement by the wife's request. The immediate irrevocable divorce occurs when the husband utters a single pronouncement of the formula and in turn receives compensation from the wife. As a result, the husband obtains a right to dissolve the marriage at will without the payment of dowry – it is this feature that distinguishes this type of divorce from *ṭalāq* divorce. It is important to recognise that Ibn Ḥanbal clarifies that the wife, as the initiator of the divorce, should harbour dislike towards her husband and not vice-versa - Ḥabība bint Sahl's dislike of Thābit ibn

[20] Ibn Qudāma, *Al-Kāfī*, vol. 3, 113.
[21] Ibid, 114.
[22] Ibid, 115.
[23] Ibid, 116.

Qays being relevant in this respect.[24] Ibn Qudāma divides *khul'* into three categories with each one being distinguished upon the basis of its anticipating reasons and financial results: in the first type, the wife's dislike or abstinence from her husband results in the relinquishing of her financial rights and the return of the dowry. In the second type, continuous discord between spouses results in separation being valid but not recommendable with the wife renouncing her financial rights. In the third type, an appeal is issued to the court to terminate the marriage upon the grounds that the husband has badly treated. However, the financial rights of the wife are preserved and she is not obligated to return the *mahr*.[25] This type closely resembles judicial divorce in the modern Saudi legal system as the husband's consent for divorce is absent. The pronunciation of the *khul'* divorce outside the court or during menstruation (this would be deemed to be unacceptable for the *ṭalāq* divorce) is not understood to undermine the *shar'ī* validity of the dissolution, as the wife has forsaken her financial rights.[26]

Classical Ḥanbalī sources allow the court to adjudicate *khul'* for an appropriate exchange in the event that the husband is arbitrary or obstinate in his refusal. The fear that the spouses will not live together in the *shar'ī* permitted limits provides an additional justification. Scholars trace the origin of *khul'* divorce back to the Qur'an and specifically to the following Qur'anic verse (Q. 2:229), which states:

> "…And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep (within) the limits of Allah. But if you fear that they will not keep (within) the limits of Allah then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them."

Ibn Qudāma observes that in the classical Ḥanbalī school, it is considered more appropriate for arbitrators to have family bond; however, there is no requirement for arbitrators to possess lineal consanguinity as decision-making skills and a knowledge of the special circumstances are deemed to be sufficient.[27] Because the arbitrators reach the decision through their own will and without the direct intervention of the respective parties, the fact that they are male and just does not significantly restrict their power of arbitration. However, the arbitrators only possess the role of proxy and do not therefore have the right to authorise separation. They should not overrule the individual rights without the special permission of the clients – this is because *ṭalāq* is a preserved right that only belongs to the husband or the wife.[28]

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[24] Spectorsky, *Chapters*, 109.
[25] Ibn Qudāma, *Al-Kāfī*, vol. 3, 95-96.
[26] Ibid, 97.
[27] Ibid, 94.
[28] Ibid.

In classical practice, the majority of scholars do not approve the repayment of compensation that exceeds the dowry amount – this is justified with reference to the narration of the Prophet ("The Prophet ordered Thābit ibn Qays to take from his wife the garden (given as a *mahr*) without addition.")[29] Additional justification is provided by Ibn Ḥanbal's response ("No, I do not like him to do that (*lā u'jibunī*)")[30] to the husband who wished, after a *khul'* divorce, to take more back from his wife than he had originally given. Although there is no specified amount of compensation for *khul'* divorce, it is considered to be disgraceful and unrecommendable for the husband to ask for an amount that exceeds the dowry. In addition, three *dirhams*[31] is established as the smallest price of her freedom. Ibn Qudāma observes that if the wife wishes to make a *khul'* divorce upon the basis of problems deriving from the husband, the husband should disclaim the half of the *mahr* in return for the benefit that he obtained during the marriage.[32]

c. *Ṭalīq*

During the marriage, the parties might set conditions that relate to possible and undesired events. In the time that these anticipated events occur, the wife will be able to easily invoke the right of divorce. Stipulations in marriage contracts can be broken down into three categories: those which invalidate the whole contract, those which are valid and enforceable and those which are void but which do not invalidate the contract.[33] Ibn Ḥanbal states:

> "The marriage contract is valid, but the condition is invalid. The contract is legitimate even with obscure conditions because it is not nullified with void conditions in the same vein with *'atīq*…If there is a stipulation stating that the dowry is performed at such a time and there will be no marriage between them until the parties satisfy the condition, the condition is accepted valid because it preserves benefits of the parties. This term resembles in many aspects the condition of not moving the wife from her residential area."[34]

The consensus opinion among scholars holds that the marriage remains in force even if invalid conditions (e.g. marrying without dowry or relinquishing maintenance) are present – in these instances, it is instead the stipulations that are considered to be invalid and in need of revision.

In a general sense, the Ḥanbalī school allows a wife to dissolve the marriage if the husband agrees to grant her this right at the time of marriage or subsequently. It should be noted that the Ḥanbalī school advocates or allows the widest range of stipulations and that

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[29] Ibn Qudāma, *Al-Kāfī*, vol. 3, 101-103.
[30] Spectorsky, *Chapters*, 80.
[31] *Dirham*: The Islamic *dirham* is a specific weight of pure silver equivalent to 3.0 grammes or 2.975 grammes. See M. Zarra Nezhad, "A Brief of History of Money in Islam and Estimating the Value of Dirham and Dīnār," *International Association for Islamic Economics* 8, no, 2 (2014), 52-56.
[32] Ibn Qudāma, *Al-Kāfī*, vol. 3, 66.
[33] Dawoud Sudqi El-Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: CIMEL, 1996), 8.
[34] Ibn Qudāma, *Al-Kāfī*, vol. 3, 42.

these extend to cover polygamy or the wife's relocation.[35] This is shown by Ibn Ḥanbal's response to a question relating to the bride's residence ("Then he can never expel her from her house.")[36] Upon attaining the agreement and consent of the parties, the stipulations obtain validity and sanction power in disputed circumstances. Ibn Qudāma provides a clear explanation about the generality of stipulations. He states:

> "The conditions give benefit to the wife such as an increase on the specified *mahr* price, certain amount of money, not marrying with another woman, hesitating from it, not travelling with him, not moving from the residential location or country. All of them are valid and require obedience to terms. The narration of the Prophet states that: 'The best conditions are the ones that obtains agreement in the marriage time.'[37] There was a man who married a woman with the condition of not leaving from her city. After that the man wanted to move and their case referred to Omar for decision. He stated that if there was such a condition, the husband was required to obey it. The man wanted to divorce, and Omar adjudicated that the divorce was valid because of the stipulation and the circumstance was not in conformity with the intended purpose of the marriage."[38]

This quotation clearly highlights the main approaches that classical Ḥanbalī scholars have adopted towards marriage conditions while also reiterating the scope of the implementation. The main attribute that differentiates this type of divorce from others is that although the wife is the initiator of the divorce, her financial right whether *mahr*, *nafaqa* (maintenance) or *ḥaḍāna* (custody) is preserved by the contract.

d. *Tafrīq or Faskh*

Ṭafrīq or *faskh* refers to the annulment of a marriage that is obtained through a court decree when either the husband or wife file for divorce by petitioning the authorities to annul the marriage. Classical sources, as the opinions of Ibn Ḥanbal, Ibn Qayyim and Ibn Qudāma attest, agree that divorce upon the grounds of a defect (*'ayb*) within either spouse has a sufficiently strong *shar'ī* grounding. Ibn Ḥanbal states that if the wife consents to the marriage without knowing the defects of her husband, she is entitled to petition for divorce; however, this does not apply if she consented to the marriage in full knowledge of the defect.[39] Ibn Qudāma observes that if health problems (*'ayb*), whether upon the part of the husband or wife, prevent the full enjoyment of marriage, there is an option to dissolve the marriage contract. He lists seven health problems that can be categorised as 'defect'depending on *shar'ī* sources. These are: impotence, removal of the male sex organ (male partner), vaginal and hernia problems (female partner), leprosy, madness and vitiligo (both parties). However, if the parties are aware of the problem before concluding the contract, the termination of marriage upon the grounds of *'ayb* is not held to provide sufficient grounds for the divorce – under these circumstances, the wife loses her dowry

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[35] Ali, "Marriage," 21.
[36] Spectorsky, *Chapters*, 69.
[37] Al-Bukhārī, vol. 7, 67.
[38] Ibn Qudāma, *Al-Kāfī*, vol. 3, 39-40.
[39] Ibid, 44.

right. The judge is then tasked with deciding whether the reason for divorce is justifiable and the divorce is considered to be revocable one.[40] However, Ibn Qayyim broadens the concept by alleging that every defect, whether on the part of the husband or the wife, entitles the other party to petition for a divorce – this applies because the marriage contract is performed upon the basis of the assumption that it is flawless. In referring to customary norms for justifying the defection of spouses, Ibn Qayyim enlarges the scope of the defect by providing the widest definition of what causes aversion to the other spouse without listing them definitively.

In Ḥanbalī school, the husband's failure to make maintenance payments and lack of property, both of which demonstrate his inability to provide financial support, are deemed to provide *shar'ī* grounds upon which the wife can request the termination of the marriage. Ibn Qudāma observes that each of the parties are required to complete their duties or responsibilities during the marriage with maintenance being the obligation of the husband. The Qur'anic verse (Q. 2:228) clearly demonstrates:

> "And due to the wives is similar to what is expected of them, according to what is reasonable. But the men have a degree over them (in responsibility and authority)."

The amount of maintenance is not only defined with reference to local factors but also the social status of the wife and her living conditions. In addition to referring to the failure of the maintenance, Ibn Ḥanbal also approves the wife's divorce petition upon the grounds that her husband has been imprisoned for a single year or longer without leaving financial support – he achieves this by categorising the case within the framework of the marriage's annulment.[41]

The concept of *nushūz* (disobedience) in the classical *shar'ī* sources is explained with reference to one spouse's disobedience to the other upon lawful matters which would entail the lapsing of marital rights along with responsibilities which include cohabitation or maintenance. Ibn Qudāma divides *nushūz* into two types: the first is the disobedience of the wife – in behaving against the will of her husband and exceeding the *shar'ī* borders of the marriage contract, she creates a valid ground for divorce. The consensus within the school establishes that the wife, retaining in the status of *nushūz*, does not only forfeit cohabitation and maintenance – rather the situation also entitles her to educative measurement or particular treatments that will enable her to correct her misconduct.[42] This is indicated in the following verse (Q. 4:34):

> "…But those (wives) from whom you fear arrogance (first) advise them (then if they persist), forsake them in bed, and (finally) strike them. But if they obey you (once more), seek no means against them."

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[40] Ibn Qudāma, *Al-Kāfī*, vol. 3, 42-44, 66.
[41] Jamal J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation* (London: Graham Trotman, 1990), 93.
[42] Ibn Qudāma, *Al-Kāfī*, vol. 3, 92.

Ibn Qudāma interprets the concept of punishment (*ḍarab*) that is outlined within the verse to refer to the rectification of misbehaviour through training rather than direct violence.[43] If the wife disobeys or rejects a court verdict that orders her to return to the marital home, the classical implementation applies *nushūz* and cuts her maintenance payments.

The second type of disobedience is related to the husband's misbehaviour and does not therefore negatively impact the wife's entitlement to maintenance. If the husband abstains from his wife because of her age, illness or related reasons, this is considered to fall within the scope of the husband's *nushūz* – this applies even if his wife retains her desires. The justification of divorce upon the grounds of disobedience in Ḥanbalī school is also referred to by a relevant verse:

> "And if a woman fears from her husbands' contempt or evasion, there is no sin upon them if they make terms of settlement between them, and settlement is best."[44]

Khiraqī states that if there is the possibility that the spouses will reconcile, it is recommended for them to achieve peaceful cohabitation by working through their problems under an arbitrator's guidance.[45] However, if it is not possible to achieve a settlement, the husband is entitled to obtain divorce through a unilateral pronunciation of *ṭalāq* or the wife is entitled to apply to a court for a judicial divorce that preserves her entitlement to dowry and maintenance.

3. Divorce Regulations of Contemporary Saudi Arabia and The Role of *'Urf*

The reserved rights of the husband within the marriage and divorce process provide the Islamic marriage contract with a different character and further reiterates the husband's role within the family union. *Shar'ī* injunctions establish that when the marriage has irretrievably broken down, divorce should be settled on fair and equitable terms and in a spirit of kindness rather than ill-feeling or rancour. The classical *shar'ī* schools set out the main conditions that govern the validity of divorce, and the modern Saudi jurisprudence largely grants approval upon the same terms. Although the Muslim community's divorce regulations share some mutual elements and implementations, each school possesses its own criteria and conditions for acceptability. In the first instance, the contemporary Saudi *shar'ī* system inserts various modifications that are generally derived from Ḥanbalī-Wahhābī interpretative methodologies and customary practices of community – these are significant because they impact strongly upon various forms of marriage dissolution.

The predominance of patriarchal structure and the associated subordination of women within the Saudi region have sometimes resulted in the reaffirmation of regulations that

[43] Ibn Qudāma, *Al-Kāfī*, vol. 3, 93.
[44] Q. 4:128.
[45] Al-Khiraqī Abū al-Qāsim, *Matn al-Khiraqī*, 111.

favour male members, and which operate in the absence of clear rulings. Al-Atawneh observes that although scholars recognise the role of women within society, albeit in terms that are limited and restricted, it is generally held that the place of the woman is within the home where she is expected to commit herself to educating and raising the next generation.[46] However, it should also be acknowledged that these same scholars have also clearly indicated that the pre-Islamic *ʻurf* which preceded Islam is both impermissible and invalid. A *fatwā* from the Dār al-Iftā' for the practice of customary divorce clarifies this point. It states:

> "Question: In our neighbourhood there is a tradition that when a wife dies, her husband should not marry another wife for six months or more. If asked why, they reply that this shows respect to the deceased wife. It happened that a person married a week after the death of his wife, and no one attended his marriage or even offered him *salām* (Islamic greeting of peace). Is marriage, even one day after the death of one's wife, permissible in the *sharīʻa* perspective?
> Answer: This is a pre-Islamic tradition that is baseless as far as the purified *sharīʻa* is concerned. Therefore, it should be abandoned and ignored. It is not permissible to forsake anyone who marries immediately after his wife's death; it is even wrong to do so."[47]

When *ʻurf* is clearly inconsistent with Islamic doctrines or the main principles of *sharīʻa* fail to acknowledge the practice (which presumably falls beyond the border of *sharīʻa*), scholars have openly rejected its implementation upon the grounds of Islamic purification and protecting religion from deterioration. In acknowledging the fact that the *fatwā* denies the practice by addressing remarks to the pre-Islamic *ʻurf*, the Dār al-Iftā' has maintained that the justification is invalid. Therefore, the rationale of the *fatwā* depending on the interpretation of *sharʻī* sources exemplifies the annulment or rejection of false beliefs and groundless practices including customary segments.

The types of divorce are categorized in accordance with who initiates the act (the husband or wife), the level of consensus and the judge's final decision. It should be noted that when only one party desires a divorce, the transformation of theoretical knowledge into practice becomes complicated. This transformation comes to reflect cultural norms embedded within society in the form of dependent judicial *ʻurf*. Upon obtaining a divorce request, the judges have mainly considered the reasons for incompatibility – the most common grounds include desertion, disobedience (wife) and lack of maintenance.

The acts of marriage and divorce that the Saudi system legitimises are strongly dependent upon the *sharīʻa* and are therefore closely aligned with sociocultural currents that run throughout Saudi society. Wives that seek to establish grounds for divorce under the various divorce types are required to provide reliable proofs that demonstrate – beyond reasonable doubt – why they are eligible to access various divorce types. Because the deferred dowry becomes payable to the wife upon the termination of the marriage, specific

[46] Al-Atawneh, *Wahhābī Islam*, 99-100.
[47] *Fatwā* No. 20193 in *Fatwas of the Permanent Committee*, vol. 19, 156, accessed June 9, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=7254&PageNo=1&BookID=7

conditions may prevent the husband from divorcing his wife – these include the requirement to pay the whole dowry or coercive conditions that are contained within the marriage contract. If the dowry is set to an extremely high amount in order to restrain the husband from divorce, it functions to impede the husband's ability to exercise *ṭalāq*.[48] Under this circumstance, the husband might refuse to divorce his wife through the unilateral right of *ṭalāq* and may instead suggest negotiations, with the intention of establishing mutual consent for a divorce (*khul'*). However, mutual agreement among spouses on divorce generally results in the wife relinquishing the right to achieve dowry or the acceptance of a symbolical payment that is less than the specified amount. If the divorce is petitioned by the wife in response to the breach of marriage contract (*ṭalīq*) or if either side undertakes judicial initiation in order to achieve divorce (*tafrīq*), then legal procedure and acceptable grounds will be required to reach a solution. To summarise, there are four main types of valid divorce within contemporary Saudi *shar'ī* implementation that might be evidenced within the *fatwā*s and *aḥkām*s. Whereas unilateral *ṭalāq* and *khul'* (mutually agreed divorce) might occur without litigation,[49] *tafrīq* (judicial divorce or separation) and *ṭalīq* (breaking of the marriage contract) are only actualised in the presence of the judge.

a. *Ṭalāq*

Most marriages are terminated through the husband's pronouncement of the formula at once which occurs without litigation. Under the present law, the practice can take place outside the court and be registered subsequently.[50] Although there is a provision that necessitates the registration of divorce issued by Royal Decree, the contemporary *shar'ī* system approves the divorce of the husband outside of the court unless there is no opposing evidence.[51] The validity of a divorce that has occurred outside the court might be challenged by either spouse upon the grounds that the husband was not in a competent state when he pronounced it.

In relating to the husband, the formula should satisfy certain conditions which emphasise the importance of conscious awareness (of his own utterance), free will, good judgement (maturity), legal capacity and sanity. If *ṭalāq* is uttered in a state of extreme anger, intoxication, jesting or mental deficiency, it will be subject to strict measures by the contemporary *shar'ī* system. In comparison with classical Ḥanbalī approaches, the contemporary legal system adopts a more tolerant view of the acceptability of divorce – even

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[48] Wynn, "Marriage Contracts," 206.
[49] Ibn Qudāma, *Al-Kāfī*, vol. 3, 97, and 'Alī Ibn Yaḥyā Bābakī, *Qaḍāyā al-Ṭalāq wa al-Ḥaḍānat wa al-Nafaqat wa al-Ziyārat* (Riyadh: Maktaba Dīwān al-Muḥāmīn, 2015), 41.
[50] Bābakī, *Qaḍāyā al-Ṭalāq*, 51.
[51] Ibid, 41.

so, divorce is still only nullified if the speaker is so angry as to have virtually lost consciousness.[52] Although the husband has a right to divorce his wife by merely pronouncing the *ṭalāq* formula, he is fully aware that the exercise of this right will result in him forfeiting all the money that he has invested in the marriage ceremony and duration.[53] The judges most frequently approve divorce through a single revocable pronunciation which is followed by the ‘*idda* (waiting period) and usually lasts for three months and ten days – during this period, the marriage continues and the divorce might be unilaterally revoked by the husband without the approval of the wife. In addition, the husband is required to pay maintenance during this period; if he revokes his decision, the marriage continues without a new marriage contract. If the ‘*idda* period expires without a reversal, the divorce becomes final and the marriage is brought to an end. If the couple decide to continue their relationship after divorce, they are then required to renew the marriage contract and the husband must pay a new dowry to his wife.

In the circumstance that the husband remarries his previous wife, he is obliged to attend court to register his initial divorce and obtain a marriage certificate for his new marriage.[54] This procedure (*ṭalāq ṣughrā*) only applies after the first and second termination between the spouses. In certain circumstances, a single pronunciation of the *ṭalāq* formula results in divorce immediately and is known as irrevocable divorce and referred to as *ṭalāq kubrā* (greater finality). When the marriage is terminated by the third of three *ṭalāq*, the couple cannot remarry until the wife has concluded and consummated a marriage with another man. At this point, the judges are required to consider whether a *ṭalāq* (accompanied in word or sign by a number or by any other expression of finality) can be approved as a single revocable *ṭalāq* or an immediate and irrevocable triple *ṭalāq*. At certain points, judges will refer to the testimony of witnesses in order to decide upon questions of revocability or irrevocability. Shaykh Ibn Bāz, the renowned Saudi scholar, maintains that one pronouncement (uttering three *ṭalāq* formula at once) can be conceived as a single revocable divorce, a viewpoint which has been largely upheld within the country’s courts.[55] In aligning with Ibn Bāz’s view, judges have generally, during the course of the court procedure, tended to approve the unilateral three *ṭalāq* of a husband as a single revocable divorce – however, this is conditional upon non-existence of contradictory proof.

When the divorce case is taken to the court by the wife, the judges should consider all the available evidences in order to solve the disputes. The major issues that the judges are

[52] Vogel, “The Complementarity,” 264.
[53] Wynn, “Marriage Contracts”, 206.
[54] Bābakī, *Qaḍāyā al-Ṭalāq*, 52.
[55] Vogel, *Islamic Law*, 7-8.

required to address during the trial are payment of the dowry, determination of pregnancy, reasons for divorce petition, presence of children, child custody, maintenance of custodial parent and menstruation (the acknowledged tradition disapproves of *ṭalāq* being announced during menstruation).[56] The judge then scrutinises the case closely before adjudicating upon the custody and maintenance of children (including place of residence), the division of the matrimonial property and the payment of compensation. While *ṭalāq* provides the husband with the unilateral right to dissolve the marriage contract, there might be particular restrictions that prevent him submitting this right to the court. In this instance, the court may either accept *ṭalāq's* validity or call, subsequent to an inquiry, for the marriage to be dissolved. The court also might order divorce subject to an investigation in the same manner as a judicial case. It should be noted that the financial burden on the husband, subsequent to the *ṭalāq* divorce (in particular maintenance for the custody of children which is mostly given to the mother of the child) functions to constrict the facility of *ṭalāq* by the husband. It should be recognised that the practice of deferred dowry is presumed to be a matter of *'urf* which is recognized by both the Saudi community and jurisprudence. The practice intents to deter the husband from arbitrary divorce while also providing a certain measure of economic security to the wife after divorce. The Dār al-Iftā' has previously addressed this subject in the following answer:

> "Question: Is it *wājib* (obligatory) on a husband to pay the deferred *mahr*? It is worth mentioning that according to the *'urf* (custom) of the society, a deferred *mahr* is not considered a real part of the *mahr*. Rather, it is regarded a financial punishment for the husband in case he proceeds with the divorce and as help to be given to the wife in such a case. Moreover, is it permissible for the *walī* of the bride to insist on recording the deferred *mahr* in the marriage contract and agree with the husband that the latter does not pay it after the consummation of marriage? Does the husband have to pay the *mahr* even though this was not his intention at the time of conclusion of the marriage contract?
> Answer: It is *wājib* to pay the deferred part of the *mahr* upon the wife's request. However, if a definite date was assigned for its payment; the deferred *mahr* has to be paid for the wife on that specific date if she requests it. Otherwise, it is to be paid to her in case of divorce or to her heirs when she dies."[57]

Because marriage *shurūt*s (the conditions) explicitly force the husband to pay the deferred portion of the *mahr* as a substantial sum, it is undoubtedly the case that some husbands are deterred from fully exercising the right of unilateral divorce. Marriage *shurūt*s provide wives with the right to demand a deferred portion of the dowry on a date that is specified in advance. This semi-modified *'urf* provides wives with the right to demand their deferred amount of the *mahr* – it functions as a penalty that can be imposed on the husband in case of unilateral divorce. When wives initiate a termination of the marriage, they presumably forfeit this right.

[56] Bābakī, *Qaḍāyā al-Ṭalāq*, 51.
[57] *Fatwā* No. 6045 in *Fatwas of the Permanent Committee*, vol. 19, 59-60, accessed June 8, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=7163&PageNo=1&BookID=7

b. *Khul‘*

A *khul‘* divorce relates to instances in which the formula of divorce is pronounced as part of a mutual agreement and payment of compensation is extracted from the wife in exchange for divorce. The key features are the payment of a sum to the husband and the wife's renunciation of outstanding rights in return for conceding a divorce. In the absence of the husband's consent to the divorce, relinquishment and compensation are meaningless because it is the convinced husband who performs the divorce in accordance with his own free will. Resort to the court is merely undertaken to confirm the terms of the divorce, along with attendant effects on legal and property relations.

In acknowledgement of the centrality of the wife's role and relinquishment of her rights, this is known as a wife-initiated divorce. The judges accept the wife's divorce petition on specific grounds which include the husband's addiction (to alcohol or narcotics), desertion (for a specified period), disappearance, sentencing to a custodial term (in excess of a specified period), or unjustified absence. When a wife files a lawsuit that abandons her financial rights, a judge is required to take these reasons into account and either attempts to achieve reconciliation or, in building upon the mutual consent of the spouses, rules in favour of divorce. The mutual consent of the spouses serves to distinguish this type of divorce from other variations – in the absence of agreement, the divorce is considered in the framework of either *tafrīq* or *ṭalīq*.

The specific grounds for divorce vary in accordance with circumstances; however, the concept of harm evidences a more mutable character and this entitles both the husband and wife to seek divorce. If the wife is unable to demonstrate that her husband has inflicted harm or that the marriage is incompatible, the judge is then required to address the case to the Conciliatory Committee where it will become subject to an arbitration process. Two appointed arbitrators from each of the spouses' families are then authorised to identify the party with greatest responsibility or to initiate reconciliation – their contributions then feed into a discussion that examines the continuation of marriage and approval of divorce as plausible propositions. If the wife is, subject to the reconciliation process, found to be largely responsible for the marital dispute, the court will rule in favour of divorce and she will lose all or most of her rights to dowry and maintenance. Although this provides the wife with easy access to divorce, the precise specification of circumstances that are viewed as being conducive to harm or injury within the established customary context become subject to extensive scrutiny during the legal procedure. The assessment of the level of harm or injury inflicted upon individuals demonstrably varies in accordance with social contexts.

The judge's attitude towards domestic violence or other forms of abuse may conceivably obstruct a wife's attempt to achieve a divorce on these grounds. Although a hospital assault report may provide clear evidence of physical abuse, it will still necessary for her to provide a witness in order to convince the court. By virtue of the fact that such incidents tend to occur within the family, it can often be difficult to find a witness who is willing to testify – despite this, the judge insists upon such testimony in order to approve the *shar'ī* validity of the report. It should also be recognised that judges, when confronted by cases involving domestic violence, frequently prefer to save the marriage rather than approve divorce. In addition to financial burdens, both the vagueness of the procedural period and the length of time that must be spent in court both appear as further legal restraints. However, it is essential to recognise that the authority of the decision on domestic violence is mainly retained by the judges within the court rather than the spouses – it is this feature that changes the *khul'* divorce to a judicial divorce. However, when a wife convinces her husband to agree to divorce by promising to revoke some – if not all – of her remaining rights, the case can be resolved without the intervention of a long court process, through the procedure is known as *khul'*.

Shar'ī recognition of the the *khul'* procedure means that it can be used as a last resort by wives who seek to leave an undesirable marriage. However, financial considerations (women who cannot afford to repay the dowry), legal duration and variation within judicial decisions all militate against the selection of this type of divorce. While the *khul'* agreement restricts the right of the judge by obliging him to terminate the marriage in accordance with the wife's petition, the determination of the amount of compensation (including additional payments and *mahr*) is ultimately left to the judge's discretion. In particular cases, financial negotiations between the couple are referred to as a solution that does not require the intervention of the judges, even in instances requiring extra payments. The court is also, in attempting to maintain the unity of the family institution, required at the first step to reconcile the spouses – this is a precondition for granting the wife's petition for a judicial *khul'*.

c. *Ṭalīq*

The *ṭalīq* divorce is the wife's delegated repudiation and is issued when the husband breaches a stipulation within the marriage contract. If the appropriate stipulations are in place, the wife has the power to terminate the marriage expeditiously and extra-judicially – however, this power can only be exercised when the conditions specified in the agreement are violated by her husband. If there is no such violation, the wife is not entitled to obtain the right of *ṭalāq* and the marriage persists.

The enforcement of stipulations may create problems when punitive sanctions that apply in the event of a breach are not set out. At the beginning of the marriage, male relatives from the two families are mainly involved in negotiating marriage contracts; however, there is also a considerable scope for the bride and mothers to intervene and exert influence over the negotiations and stipulations.[58] A *fatwā* of the Dār al-Iftā' has observed that the authenticity and stipulations of the contract that are concluded on behalf of the bride by her legal guardians are acceptable even if the amount of *mahr* is not specified. It states:

> "[T]he contract is valid. It is not a condition of the contract that an amount of money has to be recorded in it…"[59]

The *fatwā* not only demonstrates the acceptability of the contract agreed by the guardians; it also preserves its validity despite the fact that there is no inserted stipulation. This also clarifies that kin marriages are least practical for inserting stipulations into the marriage contract. Ibn Ḥanbal's response to a bride who was given in marriage by her guardian for less than a fair dowry states ("If she consents, then it is a valid marriage").[60] Take into consideration his opinion, it might be said that the validity of the stipulations is dependent upon the consent of bride in the case of arranged marriages.

Most of the early *fiqh* authorities maintained that a divorce operated automatically when the conditions were fulfilled – as Vogel notes, this view has been broadly applied within the Saudi courts.[61] The prescribed stipulations within the classical sources provide sufficient grounds for *faskh* divorce (judicial divorce); therefore, the purpose of additional conditions is to provide a logical framework for a *ṭalīq* divorce. The question of whether a marriage is concluded through *ṭalīq* or *faskh* is ultimately resolved with reference to the financial consequences of divorce and the applicability of stipulations. The protection of financial rights including dowry and marital investments after the divorce is the feature that clearly differentiates this type from *faskh* and *khul'*.[62] *Ṭalīq* preserves the wife's right to compensation whereas under *faskh,* it is possible to both lose or obtain the compensation.

The wife may sue for a divorce relying on non-payment of her deferred dowry upon the ground that the *shurūt* of marriage entitles her to dissolve the marriage. The scope of valid conditions for the marriage contracts also establishes that extra payments, which are

[58] *Women Living Under Muslim Law* (London: The Russell Press, 2006), 167.
[59] *Fatwā* No. 3582 in *Fatwās of the Permanent Committee*, vol. 19, 52-53, accessed June 8, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=7155&PageNo=1&BookID=7 ("Question: I witnessed the contracting of a marriage by a *ma'dhun* (marriage registrant). When he asked the bride's *waliy* (a legally accountable person acting for a woman regarding marriage) about the *mahr* to record it in the marriage contract document, the *walī* said that they were relatives and there were no conditions between them and asked him to contract the marriage based on what they had mutually agreed on. The contract was concluded based on what they had agreed on. What is the religious opinion on the lawfulness of this contract?").
[60] Spectorsky, *Chapters*, 64.
[61] Vogel, "The Complementarity," 263.
[62] Yamani, *Polygamy*, 97.

additional to the sum of the *mahr*, should be paid by the husband in the event of divorce. A *fatwā* from the Dār al-Iftā' states:

> "Question:…When a man gives his daughter or sister in marriage, he fixes an advance amount of *mahr* and another deferred amount payable by the husband in case of divorce, which is called a debt. Is it permissible to stipulate this amount? If it is permissible, in the instance when the husband dies without divorcing his wife, does it remain a debt or not?
> Answer: The entire *mahr* or part of it can be paid in advance or deferred. The deferred amount should be paid when it becomes due. If no time is set for paying the *mahr*, it must be paid when the husband divorces his wife. If he dies before paying it, it is to be paid from the deceased's inheritance…"[63]

The *fatwā* approves the *shar'ī* validity of extra payment as an additional portion of the dowry and it explains that the deferment of the payment until death or divorce does not invalidate the marriage contract. The stipulation of extra compulsory payment that is made in the case of divorce can plausibly be considered as a precautionary measure that is used to discourage the husband from using his reserved right of divorce. In issuing the *fatwā*, the official scholars do not only attempt to secure the rights of wives; the permission of the practice also aims to minimize the practice of unilateral *ṭalāq* divorces. Indeed, the legal permissibility of the judge's reference to the *fatwā*s during the court procedure clearly reiterate the overlap between the Kingdom's legal and religious institutions.

Ṭalīq divorce frequently takes the form of interventions which authorise or empower the wife with the right of divorce at the outset of marriage. The stipulation establishes that the husband delegates his divorce right to his wife or appoints his wife or another person as a deputy possessed of the power to provide release from the marriage. Delegation does not deprive the husband of his inalienable right to pronounce *ṭalāq* and the husband's pronunciation of the *ṭalāq* formula has an immediate impact. However, it does institute an arrangement under which both spouses become possessed of the power to dissolve the marriage by verbal formula. The wife's pronouncement through delegated authority dissolves the marriage and it is generally categorized within irrevocable divorces. The practice frees the wife from the requirement to establish a plausible ground because she only needs to demonstrate the non-fulfilment of the condition stipulated in her marriage contract (this in turn reiterates that the delegated divorce right is conditional). Spouses may, in appearing before a civil court, agree upon divorce conditions and then subsequently resort to the court in order to implement the agreement.

Under optional circumstances, the respective predispositions of the parties will be recognised; however, it is important to recognize that stipulations relating to the maintenance

[63] *Fatwā* No. 4907 in *Fatwās of the Permanent Committee*, vol. 19, accessed June 6, 2017, http://www.alifta.net/Search/ResultDetails.aspx?languagename=en&lang=en&view=result&fatwaNum=&FatwaNumID=&ID=7157&searchScope=7&SearchScopeLevels1=&SearchScopeLevels2=&highLight=1&SearchType=exact&SearchMoesar=false&bookID=&LeftVal=0&RightVal=0&simple=&SearchCriteria=allwords&PagePath=&siteSection=1&searchkeyword=109097114114105097103101032103105102116032105110032116104101032099097115101032111102032100105118111114099101#firstKeyWordFound

and control of polygamy are important constituents of the contracts. The insertion of the condition that relates to sufficient maintenance and the husband's failure to make the payment over a long period of time enables the wife to pursue a *ṭalīq* divorce. If the court upholds this version of events, the divorce will reflect the interest and priorities of the wife. However, if the marriage contract contains a clear stipulation establishing that the husband should not marry a second wife or restricts the husband's freedom to take another wife, the condition is considered to be invalid; despite this, the validity of the marriage is still approved. The rationale behind the rejection of the condition has been explained by the scholars that the permission to possess up to four wives is a given right by the Lawgiver. A stipulation cannot block this *shar'ī* right, and the nature of the stipulation is not consistent with the precepts of marriage. However, the stipulation requires readjustment and revision; subsequent to change, the conditions establish that upon marrying a second wife without the consent of the first wife, the husband will renounce his divorce right to his first wife. Alternatively, he would have to pay her a certain amount of money or provide a separate house for her and any dependants to live in.[64] Although these revised conditions seem acceptable and plausible from the perspective of *sharī'a,* the impracticality of them results in a clause being not inserted into the marriage contract. Ultimately, when a husband breaches a monogamy clause, the will of the wife to terminate the marriage should provide justifiable grounds for divorce.

Even though the wife has an option to obtain the right of divorce, this right largely operates at a theoretical rather than practical level. There are a number of factors that help to explain this feature: firstly, the interrelationship of cultural assumptions, legal approaches, substantive law and practical application of decisions reflects and reproduces a diversity of implementation. The comparison between the transformation of theory into practice for marriage and divorce rulings in the classical Ḥanbalī and contemporary Saudi system reveals changes in the *shar'ī* regulations. The situation reflects the the fact that the definition and regulation of the Ḥanbalī sources do not exactly correspond to their application and translation into legal practice in Saudi society. The multi-dimensional character of *sharī'a* is often modified or neglected when they are interpreted and applied in the Saudi courts. The social construction of marriage and women's role within Saudi society present Saudi way of understanding *shar'ī* sources and regulations. Each step exerts its own influence over the outcome because a clear gap seperates *the shar'*ī theory and its translation into practice; a comparable gap also distinguishes classic and contemporary practices. It will inevitably be

[64] Wynn, "Marriage Contracts," 208.

claimed that women's understanding of marriage and their *shar'ī* rights within it are shaped by *'urf* that enjoys a clear pre-eminence over its judicial and legal counterparts.

In addition, *shar'ī* regulations are imbued with a patriarchal ethos that accentuates local *'urf* and aligns legal implementation with the customary context in favour of judicial *'urf*. The main expectation that derives from an Islamic marriage bond between two people is to live together within a peaceful atmosphere and in accordance with *shar'ī* rules. Even if a Muslim woman has an opportunity to insert her personal terms into the marriage contract, it seems inappropriate to consider the breakdown of the marriage at its onset. This insertion appears to be inimical to the very proposition of a lasting union. Here, it is also important to take the patriarchal system into account – it is notably plausible that the reputation of warning stipulations would have strong implications for the honour of the bride's clan or lineage. Therefore, the legal guardians act reluctant for this kind of stipulations to protect the honor of the family. In addition, the divorce-related legal instruments and the court procedure in the type of *ṭalīq* divorce remain insufficiently developed. The cultural and social environment is also not conducive to either this course of action or divorce more generally, as divorced women within the country require male guardianship for all official acts. The reflection of *'urf* in a society in which the strong patriarchal norms are quite prevalent and dominant results in restricting the practice of *ṭalīq* divorce.

d. *Tafrīq* or *Faskh*

Judicial authorities have assumed responsibility for resolving legal issues that arise between spouses when the respective parties are unable to agree upon the conditions of divorce. *Tafrīq* or *fash* is known as judicial dissolution and both the husband and the wife are entitled to apply to the court in order to terminate their marriage through *tafrīq*. Bābakī observes with reference to contemporary practices that the right of divorce can be obtained under particular circumstances both with or without witness testimony. This action can be legitimately pursued if the husband has a drug addiction, is negligent upon religious matters, possesses specific defects (behavioural, physical, mental) or if he is unable to provide sufficient maintenance.[65] In cases where the wife could not obtain her husband's consent for a mutual divorce agreement, she is permitted to ask the court for divorce upon the grounds that it is impossible for the marriage to continue. In doing so, she accepts the consequences that relate to the payment of compensation and also agrees to waive remaining financial rights. In general terms, the court procedure seeks to secure religiously established rights for both spouses. It sometimes allows damages to be awarded to whichever spouse is blameless

[65] Bābakī, *Qaḍāyā al-Ṭalāq*, 9,10.

in the divorce whereas in other instances it invokes the principle of compensation when confronted by an abuse of rights.

Questions pertaining to *tafrīq* divorces may conceivably appear before the courts in the wider context of various allegations which include absence, cruelty, desertion, failure in maintenance, hardship, illness or imprisonment. The reasoning that underpins a court-ordered dissolution of marriage has traditionally derived from the doctrines of the dominant Ḥanbalī school. Its attendants focus upon the man's inability to fulfil marital obligations (as a result of financial or medical problems) and the general security and stability of the marriage.[66] As in the example of the traditional Ḥanbalī school, the marriage can be justifiably dissolved if neither party was aware of its counterpart's defect/s prior to the marriage. The court judge retains the authority to nullify an irregular marriage and his limited scope of discretion extends to a number of points. These include: categorization within the framework of reasonable cause (abuse of rights, avoidance of financial responsibilities, health problems), maximum or minimum amounts of compensation (including payment method and instances in which the judge is convinced that one party is entirely at fault) and sufficiency of proofs (whether the court can terminate the marriage with or without compensation). In attending to specific disputes, judges inspect the duration of marriage in order to identify lineage and to exert control over *shar'ī* time prescriptions that govern the validity of legal acts.

In instances where a wife resorts to *tafrīq* upon the grounds of injury, the inflicted harm is assumed to be a reasonable factor that authorises her to seek divorce upon the basis that divorce will remove the damage. Under this circumstance, the divorce can be conceived against the will of her husband. Although the theory of general application entitles the wife with divorce right, the judge asks for the wife to bring proofs showing physical and psychological cruelty. The wife must demonstrate more than one of the recognized grounds that are cited in her divorce petition; in addition, she has to initiate litigation which might result in the repayment of half of the dowry (and in some instances even more). Upon presenting the reliable and trustable proofs, the judge will not oblige the wife to pay the compensation. Upon concluding that the dispute originates within the wife's wrongful behaviour, the judge will annul the marriage and compensation by the wife to the husband will be paid.

The wife should possess strong *shar'ī* grounding for her divorce petition because she might face with the accusation of disobedience. In defending himself, the husband will frequently make disobedience accusation of his wife – this is the reason why the court, in applying what is essentially a precondition for *tafrīq*, seeks a proof which verifies that the

[66] Ibn Qudāma, *Al-Kāfī*, vol. 3, 42.

wife is not guilty of disobedience. A number of acts can be cited in support of the accusation by the husband: these include, disruption of marital harmony, leaving the husband's home against his expressed wish, refusing to move with the husband to another location without justifiable reason (marriage stipulations can sometimes provide an exception in this respect) and an unreasonable refusal to obey her husband's lawful will. Layish alleges that the reference to the concept of disobedient wife is often a strategy that is initiated by the wife when there is no *shar'ī* basis for annulment or the husband refuses to consent to divorce.[67] If the wife openly expresses her wish for divorce, she exposes herself to the accusation of *nushūz*. If the court rules that the wife should return to the marital home and the wife fails to obey the order, the husband is immediately divested of his financial responsibilities to his wife until her return. The divorce ruling on *nushūz* results in her forfeiting the deferred dowry or half of the full dowry and she is sometimes required to make a compensation payment to her husband.

Classical *shar'ī* sources establish that the marriage regulations do not permit any individual to abstain from the maintenance payment. In addition, any contemporary judge is authorised to order a divorce in instances where a husband fails to maintain his wife and family. If the wife reasons this failing for *tafrīq* divorce, she is required to demonstrate that she is not in a condition of *nushūz*. In instances where the wife cannot prove her husband's faults and defienciencies, the relinquishment of her financial right provides her only course of action.

Compensation extended to the wife receives more discussion in the *tafrīq* divorces because this decision upholds the social status of the husband and the authority of male members of the family. Entrenched norms within Saudi society conceivably demonstrate that gender roles operate in accordance with complementary functions rather than Westernised notions of gender equality. In male-dominated Saudi society, this feature can also possibly be traced back to *qiwāma* ('authoritative supervision'). The male dominance appears to derive, in large part, from the classical interpretation of *sharī'a* within a patriarchal society where divorce is regarded as a unilateral right of the husband. The practice of personal law in Saudi Arabia brings out its connection with *'urf* and also reiterates its significance as both a *shar'ī* principle and a facilitator of *shar'ī* interpretation in instances where there are no explicit regulations. The status of customary regulations, relatively contra the textual tradition of *fiqh*, results in men attaining a privileged position within society.

[67] Aharon Layish, *Women and Islamic Law in a Non-Muslim State, A Study Based on Decisions of the Shari'a Courts in Israel* (Tel Aviv: Tel Aviv University, 1975), 158.

Within the contemporary *shar'ī* system, the absence of the husband for more than six months or his imprisonment for a period of more than one year provides the wife with sufficient grounds to apply for a *tafrīq* divorce.[68] This feature can most likely be traced back to the influence of the classical sources, which establish that the disappearance of the husband for more than six months provides a *shar'ī* reason for the termination of the marriage. In recognising that the absence or imprisonment of husband may significantly increase the wife's mental, psychological and social insecurity, the *shar'ī* system aims to extend protections that mitigate this vulnerability.

Critics of the *tafrīq* divorce generally converge upon the argument that *qiwāma* and *ṭalāq* are the right of the husband while financial security and maintenance are the right of the wife. The granting of a divorce right to a wife whose husband performs his duties significantly enhances the wife's power. It could also be argued that the removal of the husband's consent to a divorce directly violates the *shar'ī* regulations which are derived from authoritative *shar'ī* sources. Because the courts' authority and power are maintained by state-issued regulations, the court's decisions have a sanctioning power and individuals are obliged to follow decisions. State control is exerted over the jurisprudential system in order to uphold social order, but this influence is intended to assure that implementation closely corresponds to the *shar'ī* orders. It is also conceivable that licensing the court with the power to terminate a marriage in the absence of a husband's consent may significantly impair the husband's authority (*qiwāma*) within the marriage. This may have a devastating impact upon Saudi society and its underpinning foundation of patriarchal norms.

4. Case Studies of Saudi Jurisprudence

a. Case Report (The Lawsuit for Returning Marital Gifts after Dissolution)[69]

Hanan, the plaintiff and Saudi wife, claimed that the registered marriage was supported by a dowry of 50.000 Saudi Riyal (SR) (equal to around 10.000 British Pounds). Once the dowry was paid, the husband and wife obtained their marriage certificate from Diriyya's general court and then consummated the marriage. The plaintiff claimed that the marriage soon unravelled when it became clear that her husband (the defendant) was a bully and prone to the use of verbal violence. In addition, the plaintiff also insisted that the husband had expelled her from the home more than one occasion. His neglect extended to his religious rituals and his failure to perform his daily prayers. After observing these deficiencies, Hanan decided to bring the marriage to an end.

[68] Nasir, *The Status*, 93.
[69] See Appendix A: Case Number One (The Lawsuit for Returning Marital Gifts after Dissolution), 226-227.

Ubaid, the defendant and Saudi husband, confirmed that the marriage had been validated by the payment of the aforementioned dowry and the consummation of the marriage. However, he denied the plaintiff's various accusations of ill treatment. In rejecting his wife's claim that he had physically expelled her from the house, he claimed that this was actually a sign of *nushūz* as she had left the house without his permission. He called for the lawsuit to be cancelled and for the marriage to continue.

After verifying the marriage certificate, the judge referred the case to the Peace Court, reasoning that as the couple had only recently married, there was still hope for reconciliation. The Peace Court reported that continued disagreement, a lack of intimacy and a lack of will meant that it was not sustainable to ask Hanan to return to her husband's home and continue matrimonial cohabitation. After citing quotations from Ibn 'Abd al-Barr (978-1071), Ibn 'Arabī (1076-1148) and Ibn Bāz (1910-1999), the court judge announced that the divorce and the distribution of compensation would be more appropriate than cohabitation. Scholars generally accept that compensation should be half of the dowry that was put in place when the marriage was inaugurated. When bad treatment or injustice occur, then divorce and the payment of half a dowry frequently ensue.

Outcome

The judge referred to a Qur'anic verse and a narration from Ibn 'Abbas.[70] He held that in instances where there was disagreement between the spouses, the wife would be permitted to obtain her divorce through the payment of compensation (e.g. half of the dowry). The judge proceeded to state that Hanan was obliged to repay half of the *mahr* (around 25.000 SR), in addition to 2.000 SR.[71] In referring to the *shar'ī* basis for making this payment obligatory, the judge referred to gifts that had been given both at the beginning and during the marriage. The plaintiff would only be allowed to marry after three menstrual cycles (or three months ten days) had passed.

The case is categorized within the framework that governs *tafrīq* divorce. Other frameworks such as *khul'* (which requires mutual agreement), *ṭalāq* (which needs to be initiated by the husband) and *ṭalīq* (which requires stipulation in the marriage contract) were disregarded upon the basis that they were clearly not applicable to the given situation. The court procedure seeks to secure religiously established rights for both spouses and sometimes allows damages to be awarded to whichever spouse is deemed to be blameless in the divorce. In some instances, the court will invoke the principle of compensation for the abuse of a

[70] Q. 4:35 reads: "And if you fear dissension between the two, send them an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, God will cause it between them. Indeed, God is ever knowing and acquainted (with all things)."
[71] 1 Pound is equal to 5 Saudi Riyal (SR).

right. It is important to note that neither domestic violence nor physical abuse was referred to and that non-respectful attitudes and verbal injury were instead the cited grievances.

Within Saudi Arabia, divorce is only put into effect when it is absolutely necessary and afflicted by intractable, irresolvable and irreconcilable difficulties, tensions and problems. The marriage must therefore be, beyond the reasonable doubt, dysfunctional, devoid of love and compassion for the approval of divorce. For the judge, the main ambiguity arises from the absence of maintenance payments once the wife left the home and the gifts that were given to Hanan during the marriage. The Ḥanbalī textual tradition does not uphold strict laws on marriage gifts; however, the *shar'ī* system does acknowledge *'urf* by ordering the wife to return jewellery and money that the husband had given to her at the beginning and during the marriage. This extra payment might be regarded as a penalty that is imposed upon the wife or as an attempt to deter violations of informal elements of the marital arrangement.

1. *Shar'ī* (Legal) Elements of the Decision

In recognising the importance of harmony between the spouses, the judge directly quoted Ibn 'Arabī, a twelfth century Mālikī scholar. He said:

> "The contracts amongst people should be conducted upon the basis of agreement, harmony and mutual kindness. In the absence of these elements, the contract becomes meaningless and the interest (*maṣlaḥa*) of both parties then requires separation with an agreement. This establishes the basis of a fair and equitable distribution of items between the husband and/or wife."[72]

This quote reflects the judge's opinion upon the importance of peaceful and stable cohabitation and provides a rational basis for separation upon grounds of ill-treatment. It also demonstrates that the *shar'ī* status of items owned during the marriage, whether they are held or returned, should be decided upon the basis of mutual consent between the parties. In presenting oppression as a reasonable and valid basis for the termination of marriage, the judge invokes the most appropriate reference points, albeit in not belong to Ḥanbalī sources; this is shown by the second quote from the Peace Court, which is provided by Ibn 'Abd al-Barr, another eleventh century Mālikī scholar. He said:

> "If there is oppression of the husband, separation presents itself as the optimal solution. It is not appropriate for the spouse to take things from his wife as compensation for divorce. When there is oppression among them, take what you consider to be appropriate – this is what known as *khul'* between spouses."[73]

The judge presumably agrees that there will be no matrimonial problem when the husband and wife live as ordained – that is, in a spirit of harmony and mutual love. The preceding two quotations clearly affirm that contemporary judges tend to adopt a flexible approach that incorporates other schools of law, with this approach being privileged over strict alignment with classical Ḥanbalī sources. Vogel further reiterates that Saudi judges are given discretion

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[72] See Appendix A: Case Number One (The Lawsuit for Returning Marital Gifts after Dissolution), 226.
[73] Ibid, 227.

to practice broad *ijtihād* and are not therefore restricted to the Ḥanbalī or any other schools of law.[74] The judge proceeded to invoke Ibn Bāz, the prominent Saudi scholar, who was in turn referring to Ibn Taymiyya's reported opinion (upon whether it is permissible to nullify the marriage when there is dispute, either with or without compensation obtained from the wife). Ibn Bāz said:

> "The judges can separate the wife and the husband if they see divorce as an appropriate solution whether without compensation or with compensation from the wife's side and this is the opinion of 'Ali and Ibn 'Abbas transmitted from Othman and was chosen by Shaykh Taqī al-Din Ibn Taymiyya as the closest in terms of evidence (*dalīl*)."[75]

In referring to this source, the Peace Court invokes the general interpretative tendency of the jurisprudence that is grounded within the Wahhābī mixed Ḥanbalī school. The wife alleged that her husband had sent her away from home, but the husband rejected this accusation and maintained that his wife had left the house without his permission. A *fatwā* from Ibn Qudāma is particularly instructive upon this point. It states:

> "If the wife travels without the permission of her husband, her right of maintenance and cohabitation have fallen because her cohabitation right is blocked by her absence and her maintenance right is cancelled by disobedience (*nushūz*). If the husband sends or orders his wife to move from her hometown, she forfeits neither her maintenance right nor her cohabitation right because of physical inaccessibility. Since it is done intentionally (actively), her rights are protected in a similar vein with as if the defect of the sale product that is done by the buyer does not affect its price. If the wife travels with her husbands' permission because of her exigency, there are two options: 1. Since she travels with the permission of her husband, it resembles to travel with him and does not cause to loss her maintenance right. 2. Al-Khiraqī also agrees with this opinion that the wife losses her maintenance right because cohabitation is for people and the expense is for the access of enjoyment. Relying on this excuse the right of maintenance is fallen likewise the price of the product changes upon having defect before the delivery."[76]

The approach advanced by Ibn Qudāma suggests that it is not important if the husband provides permission. Traveling to a particular destination or spending the night outside of the home negatively impacts the right of maintenance and to perform such actions in the absence of permission can be interpreted as disobedience. Additionally, a *fatwā* from the Dār al-Iftā' accepts leaving from the husband's house either obtaining his permission or providing a religious excuse that forces her to go out.[77] Although the *fatwā* seeks to align with the classical Ḥanbalī interpretation, this *fatwā* adopts a more flexible stance by allowing visits to be undertaken with the permission of the husband.

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[74] Vogel, *Islamic Law*, 107.

[75] See Appendix A: Case Number One (The Lawsuit for Returning Marital Gifts after Dissolution), 227.

[76] Ibn Qudāma, *Al-Kāfī*, vol. 3, 86.

[77] *Fatwā* No. 18280 in *Fatwās of the Permanent Committee*, vol. 19, 165, accessed June 6, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=7260&PageNo=1&BookID=7. (Question: What is the ruling on a woman leaving her husband's house and staying at her father's house without the husband's permission? What is the ruling on her giving priority to the obedience of her father over that of the husband? It should be mentioned that the husband is a practicing Muslim. Answer us, may Allah reward you good. Answer: It is impermissible for a woman to leave her husband's house except after taking permission, whether she is going to visit her parents or others, for this is one of his rights over her, unless there is a *shar'ī* (Islamically lawful) reason that forces her to go out. May Allah grant us success. May peace and blessings be upon our Prophet Muhammad, his family, and Companions.)

It should also be recognised that there is a clear distinction between dowry and matrimonial or bridal gifts that are given during the marriage ceremony. *Mahr* is an integral element of Muslim matrimonial law while marital gifts are not a part of Muslim *sharʿī* tradition and are instead part of *ʿurf*. The *sharʿī* requirement of *mahr* is a preserved right of the bride that is subject to the control of her disposal. The latter are sums of money and presents that are provided by either the bride or groom's family with the intention of showing respect to the other side. In instances of divorce, the *sharʿī* status of the gift is not clearly expressed, with this feature being attributable to the influence of *ʿurf*. However, a *fatwā* issued by the Dār al-Iftāʾ maintains that these presents have a clear status. It observes:

> "Question: A man here in Kashmir has to spend huge sums of money on his daughter's wedding; he has to give gifts, home appliances, and a car or a refrigerator, for example, to the groom, based on what they ask for. These have become almost custom. The father also has to willingly give him jewellery and expensive clothes sometimes… The question is: Can the money spent on a daughter's wedding be deducted from her share in the inheritance, and is it lawful for a woman's share in inheritance to be relinquished?
> Answer: In marriage contract, it is obligatory for the *mahr* (mandatory gift to a bride from her groom) to be paid by the husband, as Allah addresses husbands saying: 'And give to the women (whom you marry) their *mahr* with a good heart; but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).' Allah also says: '…so with those of whom you have enjoyed sexual relations, give them their *mahr* as prescribed.' Anything paid by the bride's family to their daughter's groom comes under the heading of gifts to incline his heart to her, and it is not an obligation. It is not permissible to calculate this expenditure as part of her inheritance from the testator who paid for these gifts when he dies, unless she willingly agrees to it, according to the saying of the Prophet, 'The property of a Muslim is not *ḥalāl* (lawful), unless they give it willingly.'"[78]

The scholar's decision upon the possession of the bridal gifts confirms that the present is subject to the authority of the person who receives it as a gift. The *fatwā* establishes that when a person presents jewellery or valuable items to another person in the form of a gift, it is not viewed, in the circumstance of death, as being in the possession of the giver and nor can it be bequeathed as part of an inheritance. To the same extent, if a husband presents jewellery to his wife, she assumes full responsibility for the gifts and the authority for disposing of the gifts automatically transfers to the new owner or the wife. The scholars of the Dār al-Iftāʾ have also issued a separate *fatwā* that relates to the possession of the gift given by the groom to the father-in-law. It states:

> "It is permissible for you to take the car from your son-in-law. If he gave it to you as a *mahr*, it should go to your daughter. However, if he gave it to you as a gift; you may take it for yourself but your son-in-law has to pay a proper *mahr* to your daughter if he did not do so at the time of the conclusion of the marriage contract."[79]

[78] *Fatwā* No. 21003 in *Fatwās of the Permanent Committee*, vol. 19, 34-35, accessed June 7, 2017, http://www.alifta.net/Search/ResultDetails.aspx?languagename=en&lang=en&view=result&fatwaNum=&FatwaNumID=&ID=7137&searchScope=7&SearchScopeLevels1=&SearchScopeLevels2=&highLight=1&SearchType=exact&SearchMoesar=false&bookID=&LeftVal=0&RightVal=0&simple=&SearchCriteria=allwords&PagePath=&siteSection=1&searchkeyword=098114105100097108032103105102116115#firstKeyWordFound

[79] *Fatwā* No. 12354 in *Fatwās of the Permanent Committee*, vol. 19, 43, accessed June 7, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=7145&PageNo=1&BookID=7.

The *fatwā* clearly establishes that a full disclosure of the assets is considered to belong to the party who receives the gift. The items that the parties contributed at the start of the marriage mainly return to the initial owner, with the main exception applying if the marriage conditions do not mention particular enforcement. The division of the property that was acquired during the marriage is somewhat vague. Ibn Ḥanbal, in engaging the question of who owns household furniture in the aftermath of divorce, observes:

> "When the husband and wife differ in the household, (what is the solution)? The clothes of the women belong to woman likewise the clothes of the men belong to man. Then each takes an oath about what he or she owns of the rest of their household goods. Abū Dāwūd said: 'What if there is doubt about the truthfulness of their oaths?' Aḥmad said: 'Then the rest of their household goods are divided up into equal halves.' The situation of a slavery husband was asked to him and he said that the same procedure is followed, whether free or slave does not matter."[80]

In taking the *maṣlaḥa* of both sides into account, Ibn Ḥanbal observes that the equal division of the property among spouses after divorce does not extend to apparels. The division of clothes in accordance with gender indicates that gender-specific or personal items belongs to the actual user. However, a clear note of ambiguity is struck by the fact that the pragmatic usage of jewellery as an investment tool or saving method simultaneously excludes it from gender-specific clothes. This feature categorises it amongst property that should be divided equally. Although the answer directly relates to the *shar'ī* ruling of property division in divorce, it is influential both because it reiterates that equality entails more than favouring one side over other and also highlights the right of possession of personal items.

2. *Qānūnī* (Statutory) Elements of the Decision

The judges' straightforward reference to the Q. 4:35 both validates the decision to send parties to the Peace Court and also explains the legal procedure within the Saudi jurisdiction. The judges, in citing Article 9 of the Basic Law of Governance, reluctantly approve the divorce. It states:

> "The family is the kernel of Saudi society, and its members shall be brought up on the basis the Islamic faith, and loyalty and obedience to God, Prophet and to guardians…"[81]

When there is a hope that the marriage can be continued or the reason for divorce is not held to be sufficiently serious, judges are generally predisposed to refer the case to the Peace Court, in the hope that this will prevent the marriage from being nullified. Vogel observes that if the parties reconcile before a judgement is issued, the court will approve their agreement, record the reconciliation and issue a judgement in order to achieve its implementation. If the parties express a preference for privacy, the reconciliation will remain

(Question: I married one of my daughters to a man whom I did not ask to pay a Mahr (mandatory goft to a bride from her groom). One year after their marriage my son-in-law gave me a Toyota (car) though I did not ask him to do so. What is the ruling on this?)

[80] Sulaymān ibn al-Ash'ath Abū Dāwud, *Masā'il al-Imām Aḥmad Riwāyat Abū Dāwud Sulaymān ibn al-Ash'ath al-Sijistānī* (Beirut: Dar al-Ma'rifah, 1980), 181.

[81] "The Basic Law of Governance," Article 9.

private and the plaintiff will discontinue the lawsuit.[82] The implementation of the arbitration process clearly exemplifies how practices of regulation are directly derived from the texts and supported by state regulations. In addition, the references to *hadīths* are made with the intention of confirming the Peace Court's decisive authority. Irrespective of whether he accepts the ruling, the judge does not have absolute discretion to reject the Peace Court's main solution; however, he is possessed of limited discretion that enables him to make small revisions that bring out the legal hierarchy within the Saudi jurisdiction.

The Peace Court asserted that reconciliation was not an option as the wife was determined to dissolve the marriage. Judges, in issuing a decision, generally demand that the side with the greater level of guilt should pay compensation in greater proportion. However, in this case, the Peace Court maintained that both sides were equally responsible for failure:

> "[I]t is clearly apparent to us that injustice and recklessness emanated from both parties to an equal extent during the reconciliation session (*jalsa al-ṣulḥ*)."[83]

In referring to the wife's unwillingness to reconcile, the judge indirectly implies that she bears a greater degree of responsibility than the husband – this was in turn reflected in a demand that she pays compensation. The accusation (the husband's failure to perform his daily prayers) was made by the wife during the first phase of the proceedings in the hope that she could obtain a divorce without renouncing her dowry payment. However, the Court rejected her allegations and stated that none of her claims had been proven. This resulted in her ultimately being viewed as the main source of conflict within the marriage. As a consequence, the direction of the case changed with the result that she was denied the right to claim a dowry. Legal procedure establishes that a particular judgement can only be reversed if it conflicts with an indisputable proof obtained from the *shar'ī* sources; conceivably, this judgement will not alter if a judge, in acting in accordance with *ijtihād*, offers a separate opinion.[84] Because the judgement of the Peace Court was based on individual *ijtihād* of the judge, a judge of family court is not entitled to overrule the first decision. The degree of power which the Saudi legal system allocates to judges in order to enable them to review and even reverse decisions taken by others can be simultaneously understood as a confirmation of judicial freedom of *ijtihād*.

3. *'Urfī* (Customary) Elements of the Decision

Although compliance in religious obligations would appear to give the wife a *shar'ī* basis for requesting a divorce, the judge did not take this factor into consideration when issuing his decision. Instead, he dismissed this complaint as mere accusations. When classical

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[82] Vogel, *Islamic Law*, 154.
[83] See Appendix A: Case Number One (The Lawsuit for Returning Marital Gifts after Dissolution), 227.
[84] Vogel, *Islamic Law*, 86.

shar'ī sources are the objects of reference, this complaint can conceivably be accepted as a justifiable reason for divorce; however, the judge shifted away from classical methods and therefore gave this complaint little credence. Vogel refers to a divorce trial that was initiated by a wife in order to divorce her drunkard husband who was also abusive to her. During this case, the judge sought to establish whether the facts corresponded to significant harm or if the accusation of drunkenness was merely being used to excuse divorce.[85] In addressing themselves to *ḥadd* (prescribed punishment), the judges focused upon worldly rather than religious accusations. The interpretative approach clearly demonstrates how the method of the proof-evaluation, even by a judge who uniformly applies accepted Ḥanbalī rules, could leads diversities by virtue of judicial *'urf*. The question of whether the change is connected with the *'urf* or not requires further research; however, the fact that religious factors were not engaged in great length during the decision process lends further strength to the proposition that judges are increasingly orientating towards contemporary or customary influences.

The question of what constitutes disobedience is subject to interpretation and is largely dependent upon the social circumstances of the respective parties. In this case, the wife was found guilty because she left her husband's home without his permission. In categorising the case under disobedience, the judge sought to take the husband's *nushūz* defence into account – if this was upheld, the wife would automatically forfeit her right to gifts. The husband's denial of his wife's accusations impacted negatively upon the Court's perception of the wife by clearing the way for the charge of disobedience, along with the forfeiture of the value of the gifts that had been given to her during marriage.

In issuing his decision, the judge ordered the wife to pay the amount of 2000 SR along with half of the dowry. The legal grounding for making this amount obligatory can be traced back to gifts provided at the beginning and duration of the marriage. Taking into account the *fatwā*s of the Dār al-Iftā' in the court case, the judge clearly applied his own method or a further innovation – this was clearly indicated in the fact that the wife was not given ownership of the gifts. The judge's decision somehow surmounted the limitations of the *shar'ī* sphere and rooted itself within the Saudi social context. Wynn suggests that within contemporary Saudi Arabia, it is widely expected that the woman in the aftermath of divorce will return to her family – whether a brother, father or even sister.[86] The expectation that she will leave her home is further reiterated by the fact that the majority of people believe that the contents of the home and household expenses are the responsibility of the groom. The house is the husband's property and his contributions during the marriage will revert to him in the

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[85] Vogel, *Islamic Law*, 140-142.
[86] Wynn, "Marriage," 205.

instance of divorce.[87] Oman has reflected upon the implausibility of bargaining away the wife's claim on her husband's future assets or income in the marriage contract. He states:

> "To be sure, a man who gets married under *sharīʿa* law in Saudi Arabia may well expect that upon divorce his wife has no claim on the wealth he has acquired during the course of the marriage. This expectation, however, does not arise as a matter of contract. Rather, it arises because of the background rules of Islamic property law."[88]

Oman argues that while this type of presumption relates to the divorced women, it is not connected with the *sharʿī* provisions; rather, the original roots of the idea can be traced back to an alternative source such as a property law originating within a peculiar *ʿurf*. However, the items that are brought by the wife and recorded in the marriage contract are returned to her in the event of separation. A *fatwā* of the Dār al-Iftā' states:

> "If the matter is exactly as what is mentioned in the question, there is no impediment to include such a *qa'ymah* with the document of the contract of marriage. Both the bride and the groom may sign it to define for sure what the husband has bought in case that a dispute between the two sides arises as a *khulʿ* (divorce at the request of the wife in return for compensation to the husband) is to take place."[89]

When household goods are registered on behalf of the spouses, they are treated as personal properties with this privilege clearly distinguishing them from both bridal gifts and dowry. If disputes arise, it is accepted in *sharīʿa* that the respective owners are entitled to retrieve their personal belongings. Although this is appropriate for personal items, this does not extend to gifts and dowry.

The outline appears to relate a social *ʿurf* that is not anticipated or sustained in the classical *sharʿī* sources for the status of marital gifts; in this instance, it appears that the judge unintentionally used his customary background in order to resolve the dispute. It should be recognised that both the *ḥadīth* literature and early *sharīʿa* sources are, with the exception of the *ṣadāq* (the half of the dowry that is deferred until the event of death or divorce), almost completely silent upon marriage gifts. Rapoport's article that compares the legal situation of matrimonial gifts in Egypt, observes that *sharīʿa* transformed the gifts of the groom into the essential element of the marriage contract known as *mahr*. However, its implementations occurred within a wider context strongly influenced by marriage traditions of local settlements.[90] In excluding the *sharʿī* position of *ṣadāq* and considering it as part of dowry, the writer claims that the *sharʿī* status of the matrimonial gift as opposed to dowry is decided in accordance with the prevalent *ʿurf* established by the Ḥanafī school of law. When these two factors do not function in harmony, a tension between local practices and the

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[87] Wynn, "Marriage," 205.

[88] Nathan B. Oman, "Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization," in *Wake Forest Law Review* no. 9-46 (2010), 21.

[89] *Fatwā* No. 8875 in *Fatwās of the Permanent Committee*, vol. 19, 39, accessed June 7, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=7141&PageNo=1&BookID=7 (Question: What is ruling on the so called *Qa'ymah* (list) of all house items, whether bought by the groom or anyone else that is attached to the marriage contract? It is noteworthy that such a *qa'ymah* is claimed to be among the public interests especially in this age with the spread of fraud, and that it is a similar document to the marriage contract itself.)

[90] Yossef Rapoport, "Matrimonial Gifts in Early Islamic Egypt," *Islamic Law and Society* 7, no. 1 (2000), 22-24.

requirements of *sharīʿa* (not only of the Ḥanafī school but also other schools) will result. Egypt resembles Saudi Arabia in this respect – in both contexts, the extension of property rights over endowments and gifts is left as an open question and operates largely within the unofficial sphere while being closely aligned with *ʿurf*. This development is also, it should be noted, mirrored by the development of the relationship between law and society. In operating under changing social conditions, the criteria governing the status of marriage gifts within instances of divorce has remained flexible, with the consequence that it is continually contested within both the judicial (most notably in the interpretative approach depending on judicial *ʿurf*) and public arenas. The legal regulation of matrimonial gifts should therefore be understood as an interaction between *ʿurf* and the *sharīʿa* in which the respective elements have interacted and shifted over time.

It could conceivably be claimed that if a solution derives from the classical *sharʿī* sources, the judge could refer directly to them in an attempt to justify his decision. In attending to the dowry, the judge did refer to Ḥanbalī and other schools of law, but there was no particular reference for the status of gift. The absence of explicit regulation within the *sharʿī* sources that related to gifts apparently forced the judge to take the initiative and depend upon Saudi Arabia's *ʿurf*. Because no maximum or minimum limits were assigned to the value of gifts provided to divorcees in lieu of compensation or damage, the amount referred to by the husband was understood to indicate the real value of the jewellery given as a gift.

The presence of *ʿurf* within the decision-making process is indicated by the fact that the rule is not encountered within the *fiqh* literature nor the *marsūm al-malik*s. The judge issued this decision because he was fully aware that *ʿurf* requires the gifts and jewellery to be returned. At this point, the emphasis should focus on the dependent usage of *ʿurf* in the form of judicial *ʿurf*. Because the authoritative *sharʿī* sources do not straightforwardly resolve the status of the gift, the judge indirectly invokes *ʿurf* by placing it under the *maṣlaḥa* principle. This allusion to the principle provides considerable insight into the judge's ruling because the *sharʿī* principles permit a judge to refer to *maṣlaḥa* in the *sharʿī* schema with the intention of excluding fixed ordinances and ritual law. Its use is particularly suited to deciding upon new cases for which no attestation can be found within the main sources of *sharīʿa*. In elaborating the concept of religious commandments, Al-Ṭūfī distinguishes between *sharʿī* affairs that concern *ʿibādāt* which relate to the relationship between God and his servants and *muʿāmalāt* that regulate non-religious matters including the relationship among people. For him, *maṣlaḥa* is only preponderant in the law-finding process, finding expression in civil transactions, customs and similar subjects because the *sharīʿa* is primarily preoccupied with

safeguarding the public interest.[91] The ruling relying on *maṣlaḥa* obtains validity in relation to non-religious matters that cover social transactions, but the concept does not have unrestricted priority over textual rulings. The judge's reference to the principles of *istiḥsān* or *maṣlaḥa* endows the legal decision with validity and demonstrates how jurisprudence is compatible with the classical way of thinking even in the implementation of *'urf*.

b. Case Report (The Lawsuit for Arranging Visiting Place and Time for the non-Custodial Parent)[92]

Hussam, a Saudi father and plaintiff, claimed that he had married Dalia, the defendant, and their marriage had been consummated. Their marriage produced a baby daughter called Sanan. The couple divorced and the mother obtained physical custody of Sanan who lived with the defendant's mother in Riyadh. Hussam claimed that he was not permitted to visit his daughter in this location and he therefore asked the court to establish a separate meeting-place and time.

Dalia confirmed the validity and consummation of the marriage and the fact that a baby was produced during the course of the marriage. Subsequent to the divorce, she began to live in her family house with her family. After verifying her former husband's initial version of events, she insisted that there was nothing to prevent him from visiting his daughter in her family home whenever he wanted. She added that it was not possible to arrange a visit in a separate location as she lacked transportation facilities. Upon this basis, she requested the cancellation of the lawsuit and the continuation of current procedure. After their statements were ascertained, the judge assigned the case to the Peace Court with the intention of establishing an appropriate location and time for the plaintiff's visits.

Outcome

The judge at the Peace Court established Friday as the visiting day with visiting hours extending from four to seven; however, he was unable to reach a compromise upon the meeting-place. The Civil Court judge ordered that the visit location should be decided in the presence of both parties and should be selected with reference to the benefit of Sanan (*maṣlaḥa al-ṭifl*). He referred to Article 76, which provides the judge with the authority of selection and clarifies the procedural action within the hierarchy.[93] The judge's final decision

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[91] Muhammad Yasarī, *Al-Maṣlaḥa fī al-Tashrī' al-Islāmī* (Cairo: Dār al-Yasr, 1954), 84, and Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010), 217.

[92] See Appendix A: Case Number Two (The Lawsuit for Arranging Visiting Place and Time for the non-Custodial Parent), 227-228.

[93] "Law of Procedure Before Shari'ah Courts," Article 76 reads: "The court on its own may order the joinder of whoever it feels should be joined in the following circumstances: A person who is linked to an adversary by the bonds of partnership, right, or indivisible obligation; An heir of the plaintiff or defendant or an owner in common with either of them if the case involves an estate in the first instance or a common ownership in the second; A person who may be harmed by the case or by a judgement thereon if the court finds serious evidence of collusion, fraud, or failure on the part of the litigants. The court shall set a time for the appearance of whoever it orders joined, and the normal summons procedure shall be followed." Accessed by February 27, 2018, https://www.saudiembassy.net/law-procedure-shariah-courts.

favoured the defendant and the meeting-place was, in accordance with the previous implementation, determined to be the defendant's family house. Dalia's travel restriction was accepted as a valid ground for the rejection of Hussam's request. The judge's final decision was binding upon both sides.

Various *shar'ī, qānūnī,* and *'urfī* components of the judge's decision can be directly or indirectly observed. Closer scrutiny of these various factors demonstrates how the *'urf* of society is applied during the implementation procedure. The *shar'ī* elements that are invoked during rulings on custody and visitation rights, along with their interpretation by the Saudi judges, are important because they establish a basis for an enhanced understanding of the case. Particular attention will be given to the question of which *shar'ī* sources and principles inform the provisions on divorce and custody; additional reference will be made to the statutory aspects of the decision and the identifiable customary assumptions. It is important to find the solution for the question of whether the introduction of the *maṣlaḥa* and its associated customary elements change the ruling.

1. *Shar'ī* (Legal) Elements of the Decision

This category asserts that *shar'ī* components have a determining impact upon the decision and it encompasses the opinions of classical and modern Ḥanbalī *'ulamā'*. The *shar'ī* sources establish the right of every father to visit and support his child, even if he/she is under the custody of an individual other than the mother.

The *ḥaḍāna* (physical custody) of children under particular ages (mostly seven for both genders) is mainly awarded to the mother, and the father maintains legal custody upon condition that he provides financial support and legal guardianship.[94] Ibn Qayyim, in referring to the *shar'ī* understanding, observes that the father is responsible for financial matters and the mother attains responsibility for nourishing and upbringing. It should be noted that this clear division of labour is compatible with contemporary Saudi interpretation and *'urf*.[95] While mothers retain physical custody of children up until to the age of seven (this is, it should be noted, subject to conditions which include adulthood, capability and sanity), the father retains the right to determine where the children live and travel. In addition, the father is also entitled to, in disputed circumstances, assume legal custody of children against the wishes of the mother.

When the child has passed the age threshold and has acquired the ability to distinguish between right and wrong, he will be given an option to choose between both parents; alternatively, the judges will decide upon the minors' welfare. Ibn Qudāma observes

[94] Ibn Qudāma, *Al-Mughnī*, vol. 11, 413-415.
[95] Muhammad ibn Abī Bakr ibn Ayyūb ibn Qayyim Al-Jawziyya, *Zād al-Ma'ād fī Hadī Khayr al-'Ibād* (Beirut: Mu'assasa al-Rasāla, 1998), vol 4, 268, 289.

that in the absence of the mother, the custody of the child is followed by her mother, then her mother's mother. In the absence of these maternal relatives, the father assumes the right of custody, followed by his mother, then the grandmother followed by his mother. In the absence of these relatives, custody will be respectively provided to the full sister, the uterine sister, the paternal sister, the full maternal aunt, the uterine maternal aunt and so on.[96] The Dār al-Iftā' has issued a *fatwā* which addresses age limits, custodial conditions, custodial order, mother's precedence etc. It states:

> "The person who has more right to be given the custody of the child is its mother in case the couple separated. If the mother gets married to another man, the custody of the child is given to the mother's mother. In case the mother's mother is not alive, the custody is given to the father's mother as custody is better given to women. The child's mother is more merciful to the child than others. It is related by Abū Dāwud that the Prophet (peace be upon him) said to one mother: 'You have more right to him as long as you do not marry.' When a male child reaches the age of seven, he will be given the option either to live with his mother or to live with his father. He lives with the part he chooses. If the child is a female and reaches the age of seven, her father has more right to her, as she needs protection and care. The mother herself needs a person who can protect her. However, the custody of a child should not be given to any party that cannot protect or reform it."[97]

This contemporary *fatwā* establishes that modern standards for age-limit or custodial line are determined in accordance with classical *shar'ī* sources. Ibn Ḥanbal clarifies this point and he observes:

> "A boy is given the choice [of deciding who should have the right to his custody] when he is six or seven years old. I said, 'And a girl?' He said, 'A father has the right to custody of his daughter because he gives in marriage girls of this age (*mithlaha*)."[98]

The child normally spends the night at the custodian's house unless a judge decides that this is not conducive to the child's personal and psychological development. The court record demonstrates that the father did not attempt to take custody of the child because classical practice assigns this to the mother in order to protect the interests of the child. The contemporary *shar'ī* system preserves and perpetuates the traditional privilege of the mother in this respect.

Both classical and contemporary *shar'ī* interpretations outline mutually agreed preclusions (mother's health problems, observance of a different religion and remarriage) that enhance the likelihood that custody of the minor will be assigned to the father. Upon demonstrating one of these preclusions, the father does not only change the visiting place; rather, he instead obtains custody of the child, even in the case of minors. The wife's

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[96] Ibn Qudāma, *Al-Mughnī*, vol. 11, 417.

[97] *Fatwā* No. 14806 in *Fatwās of the Permanent Committee*, vol. 21, 193-195, accessed July 16, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=8067&PageNo=1&BookID=7. (Question: …Dar al-Ifta' asks for a clear *fatwā* showing the period of custody as for both male and female children. Is it legal for the mother to raise the children instead of their father who has not asked about them, seen them or participated in meeting their needs such as costs of living, clothes, medical treatment and education for more than a year and a half? Dar al-Ifta' would like the *fatwā* to be in accordance with the Madhab (School of Jurisprudence) set by Imam Ahmad ibn Hanbal (may Allah be Merciful to him) to be a fixed *fatwā* by which Dar al-Ifta' can be guided in the present time and in the future...)

[98] Spectorsky, *Chapters*, 89.

remarriage results in custody being granted to the father because contemporary jurisprudence, in common with Ḥanbalī school of law, states that the custody of a minor child will be removed from the mother in the event of her remarriage.[99] If the new husband of the wife is inside the *maḥram* (the prohibited degree of relationship) or is custodial relative of the child, the mother retains her custodial right for the reason that they also exude compassion and kindness towards the child.[100] When there is an irrevocable divorce with the second husband, the right of custody returns to the mother because her priorities, in contrast to the orders of the husband, enable her to privilege the child's responsibilities.[101] The privileging of the best interest and rights of the child is the main factor which determine this prescription.

Although the mother's remarriage is considered to provide a plausible basis for the loss of custody, it is the interest of the baby that is prioritised in the disputed circumstances. Subject to conditions, children may, in order to protect their interests, remain in the custody of their mother even if she remarries. It might be presumed that court's main concern is to provide the children with a compassionate and natural environment that will enable them to develop and fully participate within society. Because the former husband lacks claims or proofs that would enable him to contest this provision, he is not able to apply for custody of the daughter or a change of the visitation place. In a clear divergence from traditional implementation, the withholding of custody from non-Saudi mothers is not justified upon a *shar'ī* but rather a nationalistic basis. This is a reflection of the belief that Saudi *'urf* is considered to provide a beneficial cultivating environment for the child.

Once a child attains maturity, three factors should be taken into account by the court procedure – these are, the choice of the child, the religion of the parents and the welfare of the child. It should be remembered that the wish of the ward is investigated with reference to two dimensions: welfare of the child and disqualifying reasons that restrict further custody. The Ḥanbalī school of law establishes that children who attain the age of maturity will be granted the right to choose their place of residence.[102] However, the minor's selection of his/her custody has always been subject to the principle of the child's welfare. If the court notices detrimental factors within the minor's decision, it may conceivably counsel an opposed course of action in order to protect the child's benefits. The judge's decision within the court is also strongly guided by the environment which will prove to be most conducive to the child's development. It should be recognised that this selective discretion is restricted

[99] Ibn Qudāma, *Al-Mughnī*, vol. 11, 420.
[100] Ibid, 421.
[101] Ibid, 427.
[102] Ibid, 416.

to children over the age of seven and that it does not therefore apply to the aforementioned case.

While the custody of the child is given to the mother, the alimony as an inevitable right of the child is incumbent upon the father; in the absence of the father, the alimony transfers to the paternal relatives (Ibn Qudāma relates a Qur'anic verse).[103] In the case of infant babies, if the mother wishes to breastfeed her child, the payment of lactation belongs to the father and the mother, in comparison with other maternal and paternal relatives, assumes priority in the feeding of the baby.[104] In the current case, the mother's attainment of the custody of the child means that she has the right to ask for the breast-feeding payment. However, neither the defendant, judge or plaintiff mentions the alimony payment. Because the trial was initiated upon the ground of visiting place and time rather than the amount of financial support, the issue of alimony did not arise during any part of the process. Alhabdan observes that if the plaintiff does not request the solution of disputes relating to the amount of alimony or child custody within the application form of trial, the judge is not required to consider upon these issues.[105] However, because child support is incumbent upon the father, the mother has no right to exempt him from this obligation and it is probable that the payment amount was specified at the divorce trial.

The custody or financial right of the child cannot be revoked by the parent even in instances where the mother was divorced through *khul'* (during the course of this process, she sometimes would have been required to indicate a willingness to waive her custodial and financial rights). In these cases, the court approves the validity of the divorce but rejects the relinquishment of these rights of the children. In return, the father is required to pay reasonable alimony that covers their accommodation, clothing, education, medical services, nourishment and transportation. Setting aside the specific necessities of the child, the amount of alimony is defined with reference to the father's financial capacity and income – in a different case, a judge determined the monthly amount of child maintenance to be 700 SR (approximately £140).[106] In the aforementioned case, incapacity and the absence of transportation facilities were the main reasons that the defendant cited in rejecting the father's claim. It might be assumed that the plaintiff's acceptance or insistence in his claim would produce an increase in the amount of maintenance and prevent him from advancing his allegation.

[103] Q. 2:233 reads: "Mothers may breastfeed their children two compete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers' provision and their clothing according to what is acceptable."
[104] Ibn Qudāma, *Al-Mughnī*, vol. 11, 430.
[105] Sahar Alhabdan, "Domestic Violence in Saudi Arabia," PhD diss., Maurer School of Law, Indiana University (2015), 130-132.
[106] See Appendix A: Case Number Three (The Lawsuit for the Amount of Child Maintenance), 228-229.

Each parent has equal rights with regard to *mushāhada* (visiting rights) of the child and the *shar'ī* rule establishes that individuals possessed of the right to accompany, visit and see the child should not be prevented from doing so. Both classical *shar'ī* sources and contemporary *fatwā*s affirm that neither party could be denied their irrefutable right to see and visit the child. Ibn Qudāma observes that when the distance between the father's and mother's accommodation is small (thus enabling the father to visit on a daily basis), custody will be given to the mother.[107] Within the sources, close distance or the suitability of daily visitation is specified as a *shar'ī* parameter for the characteristic feature of accommodation. If the child lives with the mother, she should not be allowed to travel to a faraway town without the consent of the father – this is because this would probably impede the father from visiting his child or vice-versa.

The restriction of the mother's travel is rooted within the *shar'ī* sources and it is instructive to consider Ibn Qudāma's opinion of the aforementioned case. The mother retains her custody over the daughter as the (small) distance between the two accommodations provides the father with an opportunity to see the daughter whenever he wishes. Because the short distance makes daily visitations possible, there is no expectation that the *shar'ī* dimension will change the visitation place. If the child were older than 7 years old, the request of the father could be accepted upon the grounds of his status as the custodial parent or the interest of the respective parties. However, because the baby is deeply bound up with her mother, the judge is required to consider the benefit of both the child and mother.

The *'ulamā* differ in their assessment of the appropriate timeframe for visitation. The most frequent conclusion resolve the issue by referring to *'urf* and therefore maintains that the father should arrange to visit the child once a week. The main consideration is that visitation time should harmonise with the individual's customary day of visitation during the week. A *shar'ī* rule establishes that, in the aftermath of divorce, the husband becomes a stranger or non-*maḥram* to his ex-wife – due acknowledgement must be forthcoming in this respect. If he visits the child in his ex-wife's home, he should not stay for too long, and it is essential that he should not be alone with his ex-wife. While she may prevent him from entering her house, she should also bring the child out to see him. Scholars have placed particularly strong emphasis upon the permissibility of visitation within the *shar'ī* barriers and *maḥram* regulation. Shaykh Ṣāliḥ al-Munajjīd has issued a *fatwā* that addresses a father's visit to his children in the custody of his ex-wife. It states:

> "The point is that it is not permissible for you to deprive the father of seeing his son and vice versa, rather you must allow him to see and visit him, either in your house, if you have a

[107] Ibn Qudāma, *Al-Mughnī*, vol.11, 419-420.

> *maḥram* with whom you will feel safe if he enters your house, you can agree on a suitable time frame, such as every week, every two weeks, and so on....”[108]

The contemporary *fatwā* establishes that there is no prohibition that restricts the father from visiting the children who are living with the mother and the only requirement is the presence of a male *maḥram*. Because the *shar'ī* regulations do not permit residing at the same location with non-*maḥram* members of the opposite gender, this restriction is linked to the *shar'ī* components. In the aforementioned court case, the father's visitation should, in accordance with the *sharī'a*, take place in the presence of a non-*maḥram* member of the family. The *fatwā* that relates to a father's permission to see his son states:

> “If the women left the marital house or the couple separated through divorce or the like and there was one or more children, it is not permissible in the Islamic *sharī'a* (laws) for any spouse to prevent the other spouse from seeing and visiting the children. If the child is under guardianship of its mother, she is not allowed to prevent the father from seeing and visiting him. This is because Allah (Glorified be He) has ordered us to keep good relationship with our kin by saying: 'Worship Allah and join none with Him (in worship); and do good to parents, kinsfolk.' It is authentically reported that the Prophet (peace be upon him) said: 'Whoever causes a mother to desert her children, Allah will separate him from his beloved people on the day of resurrection.'”[109]

A closer engagement with the visiting rights demonstrates that considering it as a right of the child prioritises the interest of the child but considering it as a right of the parents gives priority to the parental interest. The determination of this right and its *shar'ī* dimensions is important because judges refer to distinctive criteria when addressing disputed situations. Examples which establish custody as the duty or right of any child or parent establish the selected side as the centre of attention for the principle of *maṣlaḥa*. The customary perception that the mother is better suited to care for a minor child potentially further embeds the belief that custody is basically a right of the mother to which the minor must submit. The female prerogative in custody is consistent with the concept of complementarity which applies within pre-modern *sharī'a*. This opinion advances the view that women naturally incline towards caring and nurturing.[110] Contemporary *shar'ī* consensus suggests that custody should be interpreted as a right that is jointly shared by the child and the female custodian with a slight leaning towards the child (by virtue of the fact that he/she is the bearer of the right). The hierarchy establishes that the child's right is stronger than his/her parents and the mother's right is stronger than the father's. In this circumstance, judges are required to prioritise the interests of the mother rather than the father. In the aforementioned case, the *maṣlaḥa* of the minor was considered to be synonymous with the interests of the custodial mother, and the judge therefore prioritised her benefit over the father's.

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[108] *Fatwā* No. 112013 in *Islam Question and Answer*, General Supervisor: Shaykh Muhammad Ṣāliḥ Munajjīd, accessed September 7, 2017, https://islamqa.info/en/112013.

[109] *Fatwā* No. 14806 in *Fatwās of the Permanent Committee*, vol. 21, 193-195, accessed July 16, 2017, http://www.alifta.net/Fatawa/FatawaDetails.aspx?languagename=en&View=Page&PageID=8070&PageNo=1&BookID=7.

[110] Nadjma Yassari, Lena-Maria Moller and Imen Gallala-Arndt, *Parental Care and the Best Interests of the Child in Muslim Countries* (Berlin: Asser Press, 2017), 338.

2. *Qānūnī* (Statutory) Elements of the Decision

The statutory component of decision represents the authority of the government and its hierarchical structures rather than *shar'ī* regulation. Articles 50 and 51 of the Basic Law of Governance, respectively, state:

> "The King or whomever he may deputize shall concern himself with the implementation of judicial rulings." and "The law shall specify the composition of the Supreme Judicial Council and its functions, as well as the hierarchy for the courts and their functions."[111]

Because the official report of the Peace Court symbolises the power of the state, the enforcement of its ruling has a binding power and requires obedience. This feature is exemplified in the intermingling of *qānūnī* and *shar'ī* elements.

The regulations license the judge to act with full discretion in disputed cases with this feature being one of the unique attributes of Saudi legal system. The emphasis is upon the beneficial and rapid solution of the problem, as a judge reiterates:

> "We thought that the determination of the visiting method and place would be adjudicated by the executive judge in accordance with Article 76 of the Law of Procedure Before Sharī'a Courts. When the place is specified in the presence of both parties and one side disagrees with it, the executive judge will choose the appropriate option."

In referring to the authority of the judge, Article 76 announces:

> "The court on its own may order the joinder of whoever it feels should be joined in the following circumstances:
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> - A person who is linked to an adversary by the bonds of partnership, right, or indivisible obligation.
> - An heir of the plaintiff or defendant or an owner in common with either of them if the case involves an estate in the first instance or a common ownership in the second.
> - A person who may be harmed by the case or by a judgment thereon the court finds serious evidence of collusion, fraud, or failure on the part of the litigants.
> - The court shall set a time for the appearance of whoever it orders joined, and the normal summons procedure shall be followed."[112]

The procedural regulation does not only entrust the judge with full authority of judgement; to the same extent, it also promotes and upholds the binding character of his decisions. The selection of a visitation time (Friday) and the arrangement of the environment in a way that enhances the suitability of the *maḥram* to enforce a decision of the Peace Court can be said to represent the governmental elements of decision. However, it should be noted that the implementation of restricted visitation rights was not in place during the classical period. In the event of divorce, the visitation arrangement of the court decision will protect *shar'ī* rights rather than violate privileges. The Saudi *shar'ī* system permits the couple to arrange any provision of the visitation agreement (in the presence of an enforcement judge) or conclude a new agreement (by annulling a previous settlement in front of the Peace Court). The court judge sent the respective parties to the Peace Court in order to enable them to find a reasonable solution suited to the place and time. In the absence of the agreement, the judge

[111] "The Basic Law of Governance," Articles 50 and 51.
[112] "The Law of Procedure Before Shari'ah Courts," Article 76.

determines the duration of visitation and place by providing credence to the best interests of the child.

In operating under the guidance of both the *shar'ī* rulings and contemporary *fatwā*s, the Peace Court carefully scrutinises the disputes of parties by focusing upon the child's welfare. The decision scheduled a meeting time that was Fridays from four to seven. It appears that the decision restricts the father from seeing his daughter whenever he wants, and this could be understood as diverging from the classical *shar'ī* regulations. In attempting to institute stability, order and benefit of both parties, the legal authorities added modifications but did not completely reject the regulations. It is worthwhile to note that although the judge choses the custodial parent in accordance with the best interest standard of the child, there is no requirement for the custodial parent to possess parenting qualifications or a settled home. The judge presumes that the custodial parent already has the capacity to look after the children and he does not question this ability.

The determination of a particular time (3 hours per week) and the placing of restrictions upon visiting days are both outcomes of the trial that attest to the influence of *qānūnī* structures upon the legal procedure. Because the classical *shar'ī* sources do not impose particular restrictions upon the visitation, the outcome reflects the adaptation of classical implementation and its alignment with governmental power. Although the classical *shar'ī* sources establish that the non-custodial parent (mainly fathers) should be able to access their child whenever they wish, there is a constructive notice that these rights should be fulfilled in harmony with prevailing local practices. One example would be that the visitation time is constricted to the day upon the grounds that the child spends her night at the custody house.

3. *'Urfī* (Customary) Elements of the Decision

Custom does not reject neither *shar'ī* sources nor the *qānūnī* structure but instead operates within the decision of the judge upon the basis of indirect assumptions. The contemporary legal system, including classical *shar'ī* practices, authorises *'urf* in order to control the implementation of the rule. While the contemporary legal system is clearly inspired by classical Ḥanbalī sources, the court decisions attest to a clear divergence in the implementation of the law. It is important not to misrepresent the legal process as an exercise which is conducted in non-*shar'ī* form. In addition, it is clearly conceivable that the implementation of permissible *'urf* within religious barriers could directly contribute to the observed differences in the implementation of *shar'ī* rulings. In enshrining the best interest of the child, judges have given the principle a prominent position which, in many instances, allows indigenous *'urf* to be refracted through the interpretation of the sources. The impact of

'urf can be observed at a number of points which include the location of ordinary accommodation for divorced women, the selection of Friday as an appropriate gathering day, the strict regulation of guardianship, the availability of finding non-*maḥram* people, and the use of the *maṣlaḥa* principle. The rules of *ḥaḍāna* have also been framed in accordance with gender roles that prevail within Saudi society – the *sharʿī* regulation extends preference for custody to mothers tasked with giving birth, caring for children and ensuring their general well-being.

In reaching an agreement on child custody, the judge decides the most appropriate visiting hours and place – this is established by considering the party who is claiming visitation rights, the place of residence of the respective parties and the question of whether this residence can safely accommodate children. The custodial parent is entrusted with the exclusive right to control the child's medical care, discipline his character and establish his/her accommodation. However, she has no duty to financially support the child, and it is this feature establishes a harmony between *sharʿī* and '*urfī* practices. Fathers are obliged to provide a suitable residence for their children and this responsibility sometimes impede the custodial mother's ability to change the children's residence.

In Saudi Arabia's prevalent *'urf*, women in the family who are mainly restricted from most aspects of public life do not easily earn their own living as this role tends to be exclusively reserved to males. A woman who lacks independent means of support is extensively protected by the legal maintenance obligations of her guardians, and she is therefore supposed to follow her guardians' order out of respect for the structure that helps to sustain her. After divorcing, the woman returns to her family house and again lives with her father's family, with a male member of the household (usually the father or oldest brother) being appointed as her legal guardian. While *'urf* removes the father's obligation to provide safe accommodation for his ex-wife, this responsibility is transferred to the father of the divorced woman and the financial duty of the child's father remains in place.

Forced residence in the paternal or fraternal household in the aftermath of divorce is a customary practice that incorporates the guardianship requirement into society's patriarchal structures.[113] Every female member, in undertaking official activities, requires permission from a male companion or guardian. Although the institution of guardianship derives its validity from the *sharīʿa*, its implementation creates a synthesis of Saudi Arabia's *'urfī* and *sharʿī* understandings. The custodial mother requires two different permissions: the first from her legal guardian and the second from the legal guardian of the child for actions pertaining to the child (e.g. relocating the child to another location or changing the place of visitation).

[113] Wynn, "Marriage Contracts", 205.

While there is an assumption that male sovereignty over female family members is, by virtue of society's patriarchal structures, widespread, the judicial decision does not support this conclusion. The fact that patriarchy is an established fact within Saudi society did not, for example, result in the judge accepting the request of the father. *'Urf* has also evidenced a clear sensitivity to the divorced wife and her social situation within the family and local environment.

Both parties consented to Friday as the visitation day because it is easy to find a non-*maḥram* relative on this day. While the arrangement of visitation in the presence of non-*maḥram* members can be broadly categorised as the *shar'ī* element, the selection of Friday as an appropriate day for visitation attests to customary influence. The enforcement of a restriction of day and time along with the implementation of a time regulation can be linked back to statutory and customary influences and their precise impacts upon the jurisprudence.

The judge would need to predict the future circumstances that would assess whether relocation would have a positive or negative impact upon the child. While the best-interest principle requires that the primary focus should be upon the interests of the child, it is important to recognise that the child normally does not define these interests him/herself. The representation of the child in the ordinary sense is not an ongoing consideration. Although the 'best interest' of the child are explicitly invoked in contemporary court practice, the classical *shar'ī* regulations only rarely refer to the concept of the *maṣlaḥa* of the child. The set of values that a judge should use to determine a child's best interest are therefore somewhat imprecise and unclear. If the judge is required to ascribe a measure of utility to each possible outcome, this raises the question of how utility is determined.

During the decision process, the judge would therefore wish to compare the respective utility derived from visiting the mother's place and a second location. In order to undertake this assessment, the judge must access values that will enable him to measure utility for the child – local *'urf* will most probably assume an active role in this measurement in the form of dependent judicial *'urf*. Because the scope of discretion relies on the *maṣlaḥa* of the child, it is reasonable to assume that the decision may be made with reference to local values that are widely dispersed within Saudi society and which even extend to the judiciary. The *sharī'a* does not impede judges with prescriptions, and this enhances the likelihood that common predictions and local practices will have a determining impact upon the ruling procedure. Even though there are particular criteria that govern the selection of a visiting place (e.g. distance and safety), contemporary court standards and legal structures permit a judge to import his own personal values into decision-making processes. The situation therefore leave considerable scope for local and customary interventions. It may be assumed that there is no

single substantive standard that governs custody cases and also legal arrangements regarding post-divorce issues such as visitation rights of non-custodial parents. In operating at this point, customary values may provide reliable criteria by indirectly combining individual judicial discretion. In this particular case, the use of *'urf* provides judges with further discretion because it enables them to consider the *maṣlaḥa* of the child when questioning whether to change the visitation place or resist a father's visitation time. Yassari et al observes:

> "The shift of the focus from objective to subjective criteria has created considerable room to incorporate changed concepts of parent- and childhood and challenge existing ideas and stereotypes. The concern of the courts is no longer to balance all interests of the parties, but to serve the interests of the child, even if this means infringing on the right of either parent. This is not to deny that the interpretation of the notion of the best interests of a child remains entrenched in the respective cultural context of each country."[114]

'Urf has not tended to be treated as a paramount consideration or justifiable source; rather it has been engaged as an underlying consideration that influences contemporary court practices within the parameters established by classical *shar'ī* sources. Decisions issued in relation to similar disputes have resulted in an enhanced degree of legal certainty, but this certainty has been determined with the perceived general best interest of the Saudi people rather than the individual considerations that prevail in each case. While the concept of *'urf* is not formally acknowledged to be part of the visitation decision, this principle has been obliquely incorporated into guardianship determinations by being considered in judicial decisions that pertain to custody.

Conclusion

The license of judge to determine unknown cases may conceivably open the way to indirect references to *'urf* – this only applies, however, if no countervailing influences emerge from more applicable and reliable *shar'ī* sources. In explaining Al-Ṭūfī's concept of *maṣlaḥa*, Opwis observes:

> "[B]y being based on *maṣlaḥa*, i.e. the intention of the law, such a new ruling is part of Islamic law; legal change is accepted and incorporated into the system. Hence, all types of situations arising in any social or historical context can readily be ruled upon and incorporated into the divine law."[115]

The notion of *'urf* influences the way in which jurists interpret *shar'ī* principles during the process of law-finding. Upon identifying a classical *shar'ī* statement that offers a solution by means of *'urf*, the usage is categorised as a direct *'urf* that enables judges to make a straightforward reference. However, if the classical sources do give credence to *'urf* in the solution of cases, the usage is categorised as an indirect *'urf*– this in turn forces judges to manipulate its usage through the application of additional *shar'ī* principles such as *maṣlaḥa,*

[114] Yassari et al., *Parental Care*, 337.
[115] Opwis, *Maṣlaḥa*, 243.

istiḥsān, and *sadd al-dharā'i'*. Whether directly referencing the *shar'ī* principles or not, the judges ordinarily abstain from rendering a ruling that was inconsistent with the society's *'urf.*

Classical *shar'ī* approaches clarify that, in applying the legal procedure, a judge may issue a ruling without inserting a specific principle - *istiḥsān* and *maṣlaḥa* are both relevant examples in this respect. Opwis observes that Ibn Ḥanbal is quoted as having decided cases upon the basis of juristic preference and public interest without explicit reference to either principle. In applying *maṣlaḥa,* Al-Ṭūfī establishes the relevant criteria by observing if there is *maṣlaḥa* for the solution of the case, the judge should seek to obtain the maximum achievement that can be extracted from it. Because the purpose of the *sharī'a* is focused on the benefit of the believer, *maṣlaḥa* needs to be safeguarded if it is to obtain prior consideration over other principles. If there is two possible *maṣlaḥa* in any single case, the one that produces the greatest benefit should be selected; if there is an equality of achievement, any one of the *maṣlaḥa*s may be selected by the majority of the scholars.[116] When a ruling involves both *mafsada* (damage) and *maṣlaḥa* (benefit), both of which are preponderant in some respect, the most dominant should be selected; if they are instead equal in terms of *maṣlaḥa* and *mafsada*, the ruling should benefit from the support of the majority.[117] Al-Ṭūfī, in citing the concept of "*lā ḍarar wa-lā ḍirār* (no harm and no causing of harm)", maintains that the ruling helps to set out *shar'ī* parameters which are focused upon the protection of human honour, life and property. He observes that when the authoritative *shar'ī* sources do not provide injunctions, a judge is permitted to accomplish them through the method of analogy. Rulings that focus upon civil and social transactions (rather than fixed ordinances and acts of worship) enable a judge to refer considerations of *maṣlaḥa* that entail recourse to *'urf.*

In the first case –that is pertinent to returning marital gifts – the divorce was initiated by the wife without the husband's consent. A ruling in the wife's favour could conceivably result in the destruction of socially embedded gender roles. In the absence of social considerations, this in turn negatively impacted the general authority of male members and the specific social status of the husband. In grounding his ruling within *maṣlaḥa* that maintains and protects the *'urf*, the judge managed to avoid offending widespread social norms. Even if the system does not provide codified regulation of the marriage gifts, trends within court decisions reveal the influence of *'urf* and their perceived validity within the jurisprudential procedure.

[116] Yasarī *Al-Maṣlaḥa*, 238, 239.
[117] Yasarī *Al-Maṣlaḥa* 238-239, and Opwis, *Maṣlaḥa*, 234.

In the second case – that is pertinent to child visitation place – the classical *shar'ī* allocation of custody in accordance with age and gender has been leniently lifted in contemporary jurisdiction. It is now, in accordance with Saudi Arabia's *'urf*, being regulated with a view to serving the best interest of child. The contemporary *shar'ī* system provides judges with discretion to allocate custody upon the basis of the interests of the child as opposed to the determining factors of classical *shar'ī* interpretation (which depend on strict age and gender regulations). This means that although the father has private accommodation that enables him to spend time with his daughter in a more comfortable place, the judge dissents from this option relating to the *maṣlaḥa* of the child. In addition, the judge considers the minor's need for her mother and the inappropriateness of her staying within the ex-husband's home. This echoes Hallaq's claim that *'urf* functions as corroborative and cumulative evidence that accumulates through recurrent conclusions and obtains *shar'ī* validity via inductive inference.[118] In drawing upon the power of the prevalent and repetitive practice of community, the judge selected Friday as the visiting day and restricted the time that would be spent with the child. The perception that the child is the subject and not the object of custody is beginning to evolve within contemporary court practice; the consequent shift towards *'urf* is in turn gradually beginning to accentuate the influence of the classical approach. In the aforementioned case, the primary concern of the judge appears to be to balance the interest of the respective parties by giving priority to the child and her mother – this in turn provides a far-reaching scope for additional parameters, including *'urf*, environmental factors, local values and presumptions to be considered.

[118] Wael B. Hallaq, "On the Authoritativeness of Sunni Consensus", *International Journal of Middle East Studies,* 18 (1984), 445, 446.

CHAPTER 4: MARRIAGE AND DIVORCE REGULATIONS IN IRAN

Introduction

It is important to comprehend the constitutional and *shar'ī* framework as this makes it possible to distinguish practices and theories. The comparative framework also provides the contemporary boundaries within which judges operate. The question of whether the courts will adjudicate in cases where relief is sought upon the basis of *'urf* that is in harmony with the classical Ja'farī school is the main question that needs to be addressed.

As a result of the complete divergence from the Saudi legal system, the codified character of the Iranian legal system evokes the centralization of state power, demotion of non-positive sources of law (e.g. customary or natural sources), formation of the nation-state, invention of new constitutional and legal institutions and the state monopolization of legislation. Because the codification project originates in Western legal models, it stands apart from the main classical categories which correspond to the *sharī'a*. However, in reality, the strong connection of Iranian legal system with classical *shar'ī* methods help to distinguish it from legal systems that originated in the West.

The question of whether the codified regulation is in harmony with the classical understanding of the Ja'farī school or is instead aligned with custom-influenced approaches to legal interpretations is the main issue that will be engaged over the course of this chapter. This chapter is mainly focused upon personal transactions, in particular the institution of divorce and the importance of *'urf* within its practice. Authorised regulations on marital issues in general and divorce types in particular will be outlined with reference to classical sources and contemporary state-approved regulations in order to demonstrate changing dynamics of theory in practice. Finally, court cases that reflect procedural changes of implementation are analysed by addressing the customary elements of court judgements. Examination of two court cases pertaining to child visitation rights of the non-custodial parent after divorce and the division of marital gifts will enhance understanding and establish the basis for a comparison with Saudi Arabia.

1. The Connection of Iranian Jurisprudence with the Ja'farī School

The Iranian government has left judicial interpretation to religiously-educated independent scholars who possess the ability to transform *sharī'a* into a codified set of norms. Inserting constitutional Islamisation clauses into codified systems is viewed as a

public expression or international declaration of Islamic identity that is peculiar to the Iranian interpretation of *sharīʻa*. Article 4 of the Constitution of the Islamic Republic of Iran states:

> "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all laws and regulations, and the *fuqahā* on the Council of Guardians have the duty of supervising its implementation."[119]

It is inevitably the case that the absence of specific regulations on the majority of issues has provided the scholars with the basis for the establishment of an institutional mechanism that enables them to interpret and implement *sharʻī* principles in accordance with their own understanding. Since the Islamic Republic of Iran was founded, the regime has engaged in extensive legal codification efforts which prioritise the legal territoriality of Jaʻfarī jurisprudence. Although the constitution gives precedence to the Twelver (Jaʻfarī) school, it preserves certain rights for recognised religious groups. Article 12 of the Constitution declares:

> "The official religion of Iran is Islam and the Twelver Jaʻfarī school of religion. This principle shall remain eternally unchangeable. Other Islamic schools of thought, such as the Ḥanafī, Shafiʻī, Malikī, Ḥanbalī, and Zaydī, are deserving of total respect and their followers are free to perform their own religious practices, education, and personal matters. They may practice their religious education and personal status (marriage, divorce, inheritance, and bequest) in accordance with their own jurisprudence…"[120]

The code confirms that the followers of other schools are to be given full freedom and respect when they perform their religious devotions and obtain education. The codified system can be seen as a patient reconstruction of the Jaʻfarī regulations in which the *sharīʻa* is privileged over secular civil law. The innovative method of codification has been embraced by contemporary legal scholars in order to engage with *sharʻī* principles and Jaʻfarī school of law in areas that is not covered by *sharīʻa* (e.g. legislation).

The critics of codification argue that the traditional authority of the judge is undermined by the existence of the articles, in particular when matters of personal status are the object of discussion. The possible danger of adhering to a codified regulation that has been established by the state organs potentially opens the way to its administration by incapable judges who may make unjust decisions. The religio-social structure of the *muqallid* (the imitator)- *mujtahid* (the qualified jurist) paradigm is negatively impacted when the *muqallid* is not able to follow a *mujtahid* whose opinion differs from the codified regulations.[121] The standardized limitation of implementation could be understood as Jaʻfarī interpretative initiations of divinely ordained rulings that seek to demonstrate the consistency with *sharīʻa.* The inevitability of incorporating ethnic or national privileges into the codified law blocks Islamic universalism and undermines communal unity by qualifying the

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[119] "Constitution of the Islamic Republic of Iran," Article 4.
[120] "Constitution of the Islamic Republic of Iran," Article 12.
[121] Chibli Mallat, "Shi'ism and Sunnism in Iraq: Revisiting the Codes," in *Islamic Family Law,* ed. Chibli Mallat and Jane Connors (London: CIMEL, 1990), 80.

implementation with legal territoriality.[122] Because the Articles secure the rights of followers of other schools and particular non-Muslim minorities, the territorial character encourages individuals to perform their own religious rituals and also promotes cultural unity within the community. However, the failure to produce a coherent explanation of why the laws should be considered as authoritative statements of *sharīʿa* increases the vulnerability of codified systems to criticism.

The interpretative power of judges that is invested by the classical *sharʿī* texts – which Ibrahim formulates as judicial *ʿurf*[123] - reserves an extensive role and freedom for the judges in personal matters. This does not only apply to the terms of implementation but also extends to the jurisprudential procedure. As Tamadonfar observes, jurists have applied their communities' *ʿurf* and scholastic preferences when identifying the authoritative statements of the *sharīʿa* that are concerned with the administrative and financial spheres. The personal status laws, meanwhile, tend to be treated in harmony with *sharʿī* rulings and generally remain intact through the usage of *ʿurf* derived from classical *sharʿī* sources.[124] As Mir-Hosseini observes, family law in Iran is largely shaped by an ongoing contestation between religious scholars and the state authorities, a struggle which has, in turn, resulted in the creation of a hybrid law.[125] A chronological analysis of codification attempts which extends from the period before the revolution up until the contemporary period reveals that the shift of family law in Iran can be broken down into three categories. Boe observes:

> "The Iranian Civil Code from 1928 represented the first designated family law codification, and a second initiative was enacted in the Family Protection Law of 1967. In 1979, with the establishment of the Islamic Republic of Iran, the Act was officially denounced. Since then only isolated reforms have been passed in family law, and together with the 1928 Iranian Civil Code they have served as the legal basis for family law rulings since 1979. However, a substitute codification of family law was lacking until 2007, when the so-called Family Protection Bill was introduced. In effect, this bill was the first official draft of an Iranian family law code in 40 years."[126]

Codification does not only maintain the classical and historical thoughts, but also contributes to the chronological changes and redefinitions that are expressed in subjective interpretations of *sharʿī* authority that seek to reform codified rules. It should be acknowledged that even though the doctrine of Jaʿfarī school establishes the foundation of contemporary family law in Iran, the legal system has, in functioning in accordance with necessities of time and place,

[122] Tamadonfar, *Islamic Law*, 31.
[123] Ibrahim, "Customary Practices," 226.
[124] Tamadonfar, *Islamic Law*, 32, 33.
[125] Mir-Hosseini, *Marriage on Trial*, 11.
[126] Marianne Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shariʿa* (London, New York: I.B.Tauris, 2015), 2.

protected its flexibility and functionality (*taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān*).[127]

Iran's contemporary legal system is divided between private and public law. Private law is concerned with interactions between people, whereas public law focuses upon relations between state institutions and people. There are three types of courts within the contemporary Iranian legal system that adjudicate upon political, social and personal issues. The revolutionary courts address cases that pertain to the foundations of the political system and its sustainability, and public law are their main framework of reference. Criminal courts engage with issues that pertain to domestic violence, prescribed (*ḥadd*) punishments and severe penalties. Civil courts attend to personal and social relations: relevant issues include marriage, inheritance, divorce, and custody. Civil courts that function in harmony with the classical Ja'farī understanding are the most active and representative sphere of private law.[128] Civil Courts derive their authority from the *Imam's Masā'il* books and the judges of these courts are *shar'ī* scholars who have been selected in accordance with Islamic codes of action from religious seminaries.[129]

Article 167 of the constitution outlines the main limitations which impede the judge's power within the court procedure. They are therefore required to provide reasons for their verdicts and a document which makes appropriate reference to articles and *shar'ī* principles.[130] Judges are also advised to seek the verdict for each case from *shar'ī* sources and *fatwās* – this applies even when written sources have an indirect relation to the case. The Article provides judges with authorisation to address classical sources for the solution of the disputes – this in turn enables judges to adjudicate in accordance with their individual interpretations and perceptual understandings.

The Constitution identifies a range of priorities. These include the creation of a convenient environment for the establishment of families, safeguarding the continuity, sacredness and unity of the family institutions, strengthening family relations and upholding the compatibility of regulations with *sharī'a*. Article 10 of the constitution states:

> "The family is the foundational unit of the Islamic society. Therefore, all the laws, regulations, and their corresponding politics must be in the direction of facilitating the establishment of the family, the protection of its sanctity, and the maintenance of its relations, based on Islamic law and ethics."[131]

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[127] *Taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān:* Permissibility of change in the ruling according to change in time and place.

[128] Zahra Tizro, *Domestic Violence in Iran: Women, Marriage and Islam* (New York: Routledge, 2012), 90-92.

[129] Akbar Aghajanian and Ali Asghar Moghadas, "Correlates and Consequences of Divorce in an Iranian City," *Journal of Divorce and Remarriage* 28 no. 3-4 (1988), 57.

[130] "Constitution of the Islamic Republic of Iran," Article 167 states: "The judge must try to base the verdict of each dispute on the codified laws. If his attempt fails, he should issue the verdict on the case by referring to reputable Islamic sources or religious rulings (*fatwās*). He cannot refrain from issuing a verdict under the pretext of silence, deficiency, brevity, or inconsistency in the laws."

[131] "Constitution of the Islamic Republic of Iran," Article 10.

This affirms that marriage and divorce do not just fall under the heading of a customary and religious act but are also a concern of the state. These practices are therefore subject to official protection and regulatory power. Recognised scholars such as Khomeini and Khamenei, along with various state-supported organisations have drawn attention to female Muslim figures such as Fāṭima, Khadīja and Zaynab in order to sketch the outlines of a female role model for Iranian society.[132] During the revolutionary period, the Islamic regime of Iran introduced particular modifications in family law with the intention of aligning classical Ja'farī regulation with contemporary jurisprudence. While jurisprudential institutions, religious authorities and classical *shar'ī* sources have sought to discourage Iranian citizens from considering divorce as a solution, it has nonetheless always been taken for granted as a non-recommendable and possible outcome of marriage.[133] The divorce law practiced in Iran's civil courts prioritises the *shar'ī* rulings that focus upon protecting families from instability and divorce; this imperative is privileged over the flexibility that would otherwise result if social assumptions were foregrounded.

The Ja'farī school calculates the amount of maintenance by exclusively referring to the wife's standard of living – this entails that co-wives from different levels of society will, under Iranian jurisprudence, be entitled to varying amounts of maintenance.[134] The approval of effectiveness for divorce requires that it must be pronounced orally in a literally prescribed Arabic formula in the presence of two witnesses who must be adult, faithful, and Muslim. This establishes that the Ja'farī regulations that relate to divorce are, in rejecting the metaphorical usage of the divorce formula, considerably stricter than those put forward by the Ḥanbalīs.[135] The prescription of *'idda* (waiting period) is connected to the intercourse and determination of pregnancy as opposed to the actualization of the marriage contract. In addition to the requirements of the *shar'ī* rules of the Ja'farī school, the acts of personal issues (which include birth, divorce and marriage) should proceed through an official registration process to obtain legitimacy. Article 993 states:

> "The following events must be notified to the Census Office during the proper period and in the way stipulated by special laws and regulations:1. All births and all abortions which may occur after the 6th months from the date of conception, 2. Marriages, whether permanent or temporary, 3. Divorces, whether permanent or revocable or divorce by way of waiving the remainder of the period of a temporary marriage."[136]

The textual analysis of Iranian constitution and classical Ja'farī sources establish that the historical roots of the Ja'farī school of law run deep within Iran's contemporary legal framework. In a comparable manner to the contemporary Saudi legal system's accentuation

[132] Boe, *Family Law*, 191. Mir-Hosseini, *Islam and Gender*, 56-57.
[133] Aghajanian and Moghadas, "Correlates," 56.
[134] El-Alami and Hinchcliffe, *Islamic Marriage*, 18.
[135] Ibid, 23.
[136] "Civil Code of the Islamic Republic of Iran," Article 993.

of the Ḥanbalī school of law, the Iranian legal system prioritises the Ja'farī understanding of *sharī'a.* The contemporary legal system of Iran traces the origins of rulings from the Ja'farī school, incorporates them into its preferred legal forms and embodies these origins within codified regulations. However, the influence of public pressures and social changes are clearly indicated in the slight adjustment from classical Ja'farī understanding to moderate interpretation of rulings with this feature even being evidenced in personal matters.

The *shar'ī* principles of *maṣlaḥa, ḍarūra, sīra 'uqalā'iyya, aṣl al-barā'a,* or *taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān* (as being secondary *shar'ī* principles) authorise and justify the legislative instruments to make adjustments within the limited conditions which include criminal and family rulings.[137] While *shar'ī* scholars, in acting in accordance with legal pragmatism, occasionally marginalize or even abandon some *shar'ī* principles, the codified rulings of the Islamic Republic present the image of the application of classical *shar'ī* rulings to contemporary Iran society. The analysis of classical Ja'farī regulations on the subject of divorce will provide the main *shar'ī* outline and enable a comparison of the relationship between classical and contemporary practices. This will in turn bring out differences that derive from the changing dynamics of the society and persistent customary elements within the contemporary legal system.

2. The Ja'farī School's Classical Divorce Regulations and the Role of *'Urf*

The term *ma'rūf* which is sometimes referred to as *'urf* has been mostly used to refer to lacunae areas in the *sharī'a* where customary practices did not conflict with the textual sources of the classical *shar'ī* period. The concepts of 'known to the laity' (*ma'rūf 'inda al-'āmma*) and 'what people knew' (*mā 'arafa al-nās*) have been utilised in order to refer to broadly known *'urf* that relate to the solution of disputes in the classic *shar'ī* methodology. The connection between *'urf* and *maṣlaḥa* (public interests) has frequently been acknowledged by classical Ja'farī scholars – one example is provided by the fact that the extent of hardship is always decided with reference to social considerations because the abolition of widespread *'urf* is contrary to popular linguistic convention and welfare. The establishment of a link between *'urf* and *sīra 'uqalā'iyya* by later methodological sources was widely approved on grounds of rationality by the *shar'ī* authorities upon the condition that it did not involve elements that directly contradicted the objectives of *sharī'a*. From *shar'ī* perspective, Al-Shahīd al-Awwal and Al-Shahīd al-Thānī split divorce into four main categories: obligatory (*wājib*), forbidden (*ḥarām*), valid (*sunna, mandūb*), and disapproved (*makrūh*).[138] The termination of marriage after the completion of the *'idda* period either

[137] Tamadonfar, *Islamic Law*, 38.
[138] Al-Shahīd al-Awwal, *Al-Lum'a*,180, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 383, 384.

through *īlā'* (vow of not having intercourse with the wife), *ẓihār* (comparison between the back of wife and mother) or the impossibility of reconciliation are all placed within the obligatory category. The divorce of wife without plausible reason either in the presence or absence of her is considered forbidden. If the spouses do not fulfil their obligations toward each other due to inharmonious relationship and existing dissention and there is no hope of reconciliation, the termination of the marriage is considered within the licit and approvable category. To divorce without any reason during harmonious relations is understood to be disapproved. Alternatively, *'idda* divorce (completion of three divorce rights after having intercourse at the end of each courses), the irrevocable (*bā'in*) and the revocable (*rāji'*) divorce types are evaluated under the heading of *sunna* divorces. Conversely, divorces are divided into four main types which extend from implementation and procedural methods. These include: *ṭalāq* (husband's unilateral divorce right), *khul'* (woman-initiated divorce), *ṭāliq* or *tafwīḍ* (conditional divorce) and *tafrīq* (judicial termination). The practice of these types and their regulations, during both classical and contemporary periods, will now be examined in order to engage the question of how jurisprudence changes in accordance to the *'urf* within a society.

a. *Ṭalāq*

The *shar'ī* system entrusts the husband with an authority in marital relations to such an extent that he is entitled to dissolve the marriage by pronouncing the divorce formula (*ṭalāq*) through extra-judicial and unilateral means. The formula of divorce should be pronounced in a special and definite way in the presence of two witnesses during the wife's period of purity. Al-Shahīd al-Awwal states that repudiation does not take effect in the absence of at least two faithful, righteous, and trustworthy witnesses; furthermore, it only has *shar'ī* effect within Arabic.[139] However, in instances where the individual has no capacity of Arabic pronunciation, the use of non-Arabic languages that have the same meanings results in a valid divorce. Arabic language expression is not a required condition of validity in instances of incapable parties as long as there is an intention or sense of withdrawal – in addition, the formula must be completed by explicitly specifying the subject and object either in an Arabic language or the mother tongue.[140] The husband should pronounce the wording of divorce ("the so-and-so [name of the person or my wife] lady is divorced"). Because the allusive pronouncement of *ṭalāq* brings forth vagueness and uncertainty, the metaphorical formulas do not result in acceptable divorces from *shar'ī* viewpoint of Ja'farī scholars.

[139] Al-Shahīd al-Awwal, *Al-Lum'a,* 179, Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 378, and Al-Ḥasan ibn Yūsuf ibn al-Mutahhār (Al-Ḥillī), *Mukhtalaf al-Shī'a fī Aḥkām al-Sharī'a* (Qom: I'timaad, 2000), vol. 4, 60, 64.
[140] Al-Shahīd al-Awwal, *Al-Lum'a*,179, Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 378, 379, and Al-Ḥillī, *Mukhtalaf al-Shī'a*, vol. 4, 60.

In diverging from the classical Ḥanbalī approach, the refusal to permit the metaphorical usage of the divorce formula could be interpreted as a rejection of customary intervention which embody local practice and values along with a reluctance to sanction easy divorce. The explicit character of the formula should be deduced from all *'urfī*, *shar'ī* and *lughawī* (linguistic) dimensions of the pronouncement because the uncertainty of usage in any one of these spheres results in the divorce attempt being invalidated.[141] Al-Ṭūsī observes that the man must clearly indicate an intention to repudiate his wife – for this reason, his subsequent act, interpretation or statement must be consistent with the intention of annulment.[142] The maturity and sanity of the husband are essential requirements to the *shar'ī* validity and Al-Ḥillī establishes an age boundary of ten years by refusing to accept the marriage repudiations of those younger than this age.[143] Al-Ṭūsī states:

> "[A] boy of ten years and over who knows very well how to conduct divorce may divorce his wife and his divorce is valid… If he is under ten and does not know how to conduct a divorce, he is not allowed to divorce, and his guardian is not allowed to divorce his wife for him either."[144]

In setting this age restriction for legitimacy, Ja'farī scholars establish a barrier for *shar'ī* liability that clearly diverges from contemporary Iranian jurisprudence. If divorce is illicit (e.g. conducted at an age below this threshold), the marriage contract or the divorce formula loses its *shar'ī* validity on the ground of liability.

The repudiation of marriage by the guardian of an insane husband is valid, but the guardian does not have the same right with regard to minor or intoxicated conditions.[145] The pronouncement of divorce in a state of anger, coercion or intoxication is considered to be invalid as it indicates a lack of conscience and sense.[146] The formula should be clearly expressed by the tongue because the written form of repudiation, whether intentional or unintentional, is held to be inadequate and insufficient from the *shar'ī* perspective. However, intentional repudiation in various forms, as opposed to explicit statements such as the written form, is considered to be binding and legitimate in specific circumstances which include the absence of a person or speaking problems. In the case of an absent husband, the written divorce request is analysed by experts and is subject to the testimony of at least two witnesses – if approval is forthcoming, the written termination is validated.[147] In the case of a dumb husband or an individual with speech impediments, the man is required to throw a veil over the wife's head and then turn his eyes from her. This gesture is interpreted as an explicit

[141] Abū Ja'far Muḥammad ibn al-Ḥasan al-Ṭūsī, *Kitāb al-Khilāf* (Najaf: Al-Nashr al-Islāmī, 1995), vol. 4, 460-461.
[142] Ibid., 458-462.
[143] Al-Ḥillī, *Mukhtalaf al-Shī'a*, vol. 4, 49.
[144] Al-Ṭūsī, *A Concise*, 367.
[145] Al-Shahīd al-Awwal, *Al-Lum'a*, 179, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 380.
[146] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 480, and Al-Ḥillī, *Mukhtalaf al-Shī'a*, vol. 4, 50, 51.
[147] Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 379.

indication of her responsibility to conceal her face from the man.[148] These examples clearly indicate that in the case of those who have specific disabilities, the classical *shar'ī* sources recognise various methods or unusual forms of annulment. In each instance, the act should be conducted in harmony with local values in order to enhance the credibility of act.

Once the marriage is consummated, any divorce attempt in the category of *rāji'* (revocable) should satisfy particular conditions which include that the wife should not be a minor or menopausal (*yā'īsa*). These requirements do not, however, apply to *khul'* or *mubārāt* (a kind of divorce that arise from the reciprocal aversion between the spouses) divorces.[149] In instances where divorce is irrevocable, the woman is not, presuming that pregnancy is not a consideration, entitled to maintenance or lodging.[150] With regard to the revocable *ṭalāq*, the husband has the power to revoke his wife before the expiration of her *'idda* period without completing new marriage contract. During the *'idda* period, a wife is required to abstain from the application of beautifying materials or forms of adornment. Whatever can be categorised as a decoration of clothes according to local *'urf* is prohibited for the woman until the waiting period elapses.[151]

The majority of Ja'farī scholars concur that the pronunciation of three consecutive *ṭalāq* formula without any interruption voids the divorce in part of number. On this circumstance, only one divorce takes place and the person protects his two *ṭalāq* pronunciation rights. Al-Ṭūsī agrees with this condition by observing that when a man, subject to prescribed conditions, divorces his wife one, two or three times, the divorce will not be counted more than once.[152] However, if the husband divorces his wife and then revokes his decision during the *'idda* period by having intercourse with the wife before then waiting for a period of purity and completing this circulation three times (without intercourse in the final instance), the divorce becomes irrevocable (*'idda* divorce). The first two of the consecutive divorces are considered to be revocable and the final one is maintained to be irrevocable *ṭalāq*.[153] If the husband divorces his wife before consummating the marriage, he owes the wife half of the dowry that was agreed upon at the start of the marriage. Upon the payment of the whole dowry, the husband is entitled to request half of it to be returned.[154] However, if the parties separate before the consummation of the marriage without a specified dowry, the wife may be entitled to a gift payment (*mat'a*) – as Al-Ṭūsī observes, its amount should be determined in accordance with the capacity of the husband and local *'urf*. In this

[148] Al-Shahīd al-Awwal, *Al-Lum'a*,179, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 379.
[149] Al-Ḥillī, *Mukhtalaf al-Shī'a*, vol. 4, 62.
[150] Syed Ali Raza Naqvi, *Shia Divorce Law* (Lahore: The Ahl al-Bait, 2012), 286.
[151] Ibid, 333.
[152] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 450, 451.
[153] Al-Ḥillī, *Mukhtalaf al-Shī'a*, vol. 4, 67.
[154] Al-Ṭūsī, *A Concise*, 344, 345.

instance, a customary norm of society is referred to in order to fill the *shar'ī* lacuna and moderate negative effects of divorce.

b. *Khul'*

This is a repudiation of the wife by the husband in return for obtaining particular amount of payment which is issued upon the basis of the wife's unwilling to persevere with the marriage.[155] Termination of marriage upon the basis of mutual aversion among spouses is known as *mubārāt.* The ransom of *mubārāt* divorce can either be waiving the dowry in part or whole or making a payment to the husband that does not exceed the dowry amount.[156] In categorizing *mubārāt* divorce outside of either *tafrīq* and *ṭalāq*, Al-Ṭūsī suggests that the respective parties do not need to apply to a judge to terminate the marriage unless the dispute relates to custody, maintenance or residence.[157] The Ḥanbalī scholars do not recognise or practice the type of *mubārāt* divorce. However, if the termination derives from the mutual agreement of both parties, it is categorised under *khul'* or *tafrīq* in the Ḥanbalī school.

The person who pronounces *khul'* must satisfy particular conditions – he must therefore be free, mature and possessed of clear intention. The consensus among the majority of classical Ja'farī scholars establishes that a *khul'* divorce takes absolute effect through the use of the divorce formula without there being any need to add the word '*khul'*'. The formula should however be pronounced in the presence of two witnesses and during a period of purification.[158] There should be a complete harmony of disposition and full agreement between the husband and wife over the *khul'* divorce. A particular amount (equal, less or more than her dowry, depending on the circumstance) should also be paid to the husband in order to obtain the wife's release from him.[159] The amount, quality and quantity of ransom should be clearly defined and signed, and the ransom should be paid in the local currency if a preferred currency is not indicated.[160] The husband is not entitled to renounce his decision or return to his 'partner' unless she reclaims her ransom. Once the marriage is terminated by the payment of a ransom, the marriage type is considered to fall within the category of irrevocable divorce. In addition, the wife becomes unlawful to the husband unless there is intermediary *shar'ī* marriage with another man. However, if she reclaims her ransom, the divorce is considered to be revocable one and it is considered to be *ṭalāq* divorce. She is then entitled to maintenance and residence from the point that the husband becomes aware of the

[155] Al-Shahīd al-Awwal, *Al-Lum'a*, 184, 185.
[156] Al-Shahīd al-Awwal, *Al-Lum'a*, 184, 185, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 380.
[157] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 424.
[158] Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 3, 3, and Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 422-424.
[159] Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 3, 4.
[160] Al-Shahīd al-Awwal, *Al-Lum'a*, 184, and Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 434.

wife's demand.[161] The process after the *khul'* divorce may transform it from irrevocable to revocable – this however depends upon the wife's reclamation of the compensation during her waiting period.

There is no *shar'ī* consensus upon whether *khul'* permits the divorced women to retain compensation during *'idda* period. If a man agrees with releasing the wife with *khul'* divorce, Al-Ṭūsī maintains that there would be no *'idda*. Al-Ḥillī, meanwhile, claims that there should be *'idda* as it entails release from a contract.[162] The narration establishes that a woman who has been granted *khul'* divorce is not entitled to maintenance nor residence; however, she is required to observe the *'idda* in the same way as normally divorced woman for the determination of pregnancy.[163] Al-Ḥillī states that if the annulment is caused by the wife's actions as embodied within her apostasy, conversion, demand or mistake the woman will be held responsible for the separation and she will not be entitled in the form of a dowry, divorce gift (*mat'a*) or maintenance payment.[164] However, in establishing that the *khul'* divorce is revocable for the duration of '*idda*, Al-Shahīd al-Thānī notes that maintenance and waiting periods are compulsory procedures. This applies to the accessible wife with the exclusion of menopausal, minor and non-consummated examples.[165] Domestic violence or physical abuse amongst spouses are considered to provide sufficient grounds upon which a *khul'* divorce can be accepted as a lawful *shar'ī* solution. If the husband abuses, beats or compels his wife with the intention of obtaining her consent for a ransom in return for a *khul*' divorce, the repudiation will, from within the perspective of *sharī'a,* be upheld, but the payment of ransom will be unlawful.[166]

c. *Ṭalīq*

The insertion of specific conditions (*shurūt*) into the marriage contract at the beginning of the marriage enables parties, and in particular women, to access divorce without waiving their financial rights. Upon deciding to marry his daughter to someone with or without her consent, the guardian (usually the father of the bride) settles marriage conditions. Other parties that are involved in the marriage arrangement may make some additions to the contract.[167] Issues relating to the dowry which include its payment time or quantity must be specified in the marriage contract in order to remove all doubt and uncertainty from

[161] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 426, 429.
[162] Naqvi, *Shia Divorce*, 262.
[163] Muḥammad ibn Ya'qūb al-Kulaynī, *Furū' al-Kāfī* (Beirut: Manshūrāt al-Fajr, 2007), vol. 6, 92, 93.
[164] Naqvi, *Shia Divorce*, 179.
[165] Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 3, 8.
[166] Al-Shahīd al-Awwal, *Al-Lum'a*, 184, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 3, 7.
[167] "The persons who have the authority to marry a person to another person are: the father, grandfather even when the father is still alive, the brother who has been given permission by her, or whoever is appointed by her to look after her affairs. Whoever of these persons marries her is allowed to give her some part of the dowry in advance but not the whole lot." Al-Ṭūsī, *A Concise*, 341, 343, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 275.

disputable cases. In addressing himself to the minimum limit, Al-Shahīd al-Thānī observes that it can be as little as a grain of wheat, but it must be accompanied by the capacity of appreciation and evaluation. In addressing the maximum limit, he notes that there is a consensus of opinion among Ja'farī scholars that forbids the request of dowry in excess of the *mahr al-sunna* (five hundred *dirham*s or fifty *dinar*s).[168] If the dowry is qualitative or descriptive (e.g. teaching knowledge) rather than quantitative or definite, local norms and customary criteria are used in order to determine its character. The dowry limit that ranges from the lowest level up to fifty *dinar*s is decided in accordance with the interest of the society, place and time. However, an amount in excess of fifty *dinar*s will not be considered to be legitimate and it will not therefore be approved. The determination of the upper limit has nothing to do with customary values as it is restricted by the *shar'ī* regulations.

With regard to *'urfī* and *shar'ī* dimensions, mutual confidence and reliability can be said to be compulsory criteria. These characters weigh upon the parties when they consider whether to accept commercial activities and documents that involve the marriage contracts. In highlighting the essentiality of righteousness, Al-Ḥillī notes that if the man contracts to marry upon the basis of claimed membership of a tribe that later proves to be false, the woman has the right to cancel the marriage upon the basis of the dishonour and shame that has been inflicted upon her status.[169] In variation with the *shar'ī* rulings, the false pretence and inaccurate statement issued during the determination of conditions invalidate the contract.

The existence of a defect that is unknown at the time of marriage contract creates reasonable grounds for the annulment of marriage with the woman being entitled to neither maintenance nor lodging in this circumstance. The dissolution of the marriage as a result of an unmentioned defect ends up different rulings during the consideration of *'idda*; if the marriage is consummated, she, if the pregnancy is in question, should observe *'idda* by the time of delivering her child or in the event that she is not pregnant, she must wait for three months and ten days to complete her *'idda* period. If no consummation has occurred, the woman is not required to observe *'idda*.[170] Annulments upon the grounds of unstated physical defects is protected right of parties rather than a customary presumption – however, the scope of defect does have some connection with *'urf*.

To the same extent, inserting a condition that contradicts the doctrines of *sharī'a* nullifies the validity of the stipulation and does not affect the legitimacy of marriage. If there is a stipulation for the husband which states that he should not be responsible for

[168] Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 333-335.
[169] Naqvi, *Shia Marriage*, 496.
[170] Naqvi, *Shia Divorce*, 278.

maintenance, the term is considered to be void because the *shar'ī* sources establish that this is the main responsibility of the husband.[171] Al-Ṭūsī asserts:

> "If a man marries a woman but includes in the marriage contract something contrary to the Qur'an and the tradition set by the Prophet (saas), the marriage is valid, but the contrary conditions are invalid - e.g., terms such as promising not to take another wife (the condition of promising not to marry another woman at the same time is regarded as valid by most contemporary Muslim lawyers), not to marry at all if she dies and similar terms. All these terms are invalid. They may be ignored."[172]

A husband may delegate his power of repudiation to his wife by either restricting it with an extended period of time or conditioning it upon the occurrence of a specified event. An opinion which is compatible with the general principles of *sharī'a* establishes that the delegation of the power of divorce to the wife is considered to be acceptable when she possesses the necessary qualification of being an agent.[173] Upon encountering the condition which relates to the woman's demand of the ransom for the *khul'* and *mubārāt* divorces during the *'idda* period, the husband becomes eligible to demand her return to marriage, and the stipulation is considered to be lawful and applicable.[174] The definite conditions entitle both parties to access legitimate divorce without losing the *shar'ī* rights granted by the Lawgiver. It should be observed that the comparison of financial and marriage contracts derives their roots from the binding power of the stipulations and their functionality.

d. *Tafrīq*

The absence or existence of particular conditions in a marriage contract provides both parties with the option to pursue an annulment on reasonable grounds. Because *shar'ī* authorities or judges are mainly responsible for the annulment of marriage, it cannot be said to be equivalent to *ṭalāq, khul'* or *ṭalīq*. Upon discovering a defect or physical distortion in one party that was unknown prior to the conclusion of the contract, the other party has the right to immediately endorse the case or refer it to the judge for cancellation. The wife can cite the husband's *junūn* (insanity), *khiṣā'* (eunuch), *jubb* (removal of the male organ), *'inan* (impotence), and *judhdhām* (leprosy); the husband can cite the wife's *junūn* (insanity), *judhdhām* (black leprosy), *baraṣ* (white leprosy), *'amā'* (blindness), *iq'ād* (paralysis), *qarn* (fleshy protuberance), *ifḍā'* (urinary and menstrual passages of the woman becoming one), *'afal* (hernia) and *ratq* (genital disease). Any one of these factors provides the other party, subject to the approval of a judge, sufficient grounds for the cancellation of a marriage.[175] In any case, the controversial nature of dissolution entails that cancellation cannot be put into effect without the presence of the judge. However, if the parties are aware of the problem

[171] Al-Shahīd al-Awwal, *Al-Lum'a*, 167, and Al-Ṭūsī, *A Concise*, 346.
[172] Al-Ṭūsī, *A Concise*, 346.
[173] Naqvi, *Shia Divorce*, 26.
[174] Ibid, 484.
[175] Al-Shahīd al-Awwal, *Al-Lum'a*, 172-173, Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 2, 345-347, and Al-Ṭūsī, *Al-Mabsūṭ,* 249-250.

before the accomplishment of the contract, they no longer provide sufficient grounds for the marriage to be dissolved upon ground of defect.[176] Al-Ṭūsi claims that the repudiation could be ordered by the judge on the ground of husband's physical impotency or financial incapability.[177]

Disobedience or recalcitrance of one spouse towards the other provides a plausible excuse for the *shar'ī* validity of divorce.[178] The *shar'ī* scope of *nushūz* refers to the violation of marital duties and terms by either husband or wife. It provides divorce right to both spouses without renouncing the dowry payment. If the husband annuls the marriage with revocable pronouncement upon the basis of the wife's *nushūz*, a clear ambiguity arises in relation to the wife's maintenance and residence rights unless she is able to prove her pregnancy. The provision of maintenance in accordance with personal circumstances and *'urf* is one of the main responsibilities of the husband within the marriage. The rule even applies in instances of *nushūz*, as disobedience does not entail any change in the wife's *shar'ī* status.[179] The extent of disobedience which includes failing to obtain the husband's permission or similar acts, brings out the connection between *'urf* and *sharī'a*. As Ṭabāṭabā'ī observes that absence of the husband inflicts considerable damage upon the wife's social situation and provides the judge with the opportunity to compel the husband to divorce the wife.[180] In instances where the husband is absent for a particular period and the guardian does not volunteer to provide maintenance to the wife, she can, in indicating her unwillingness to await the return of the absent husband, bring the case to the judge for divorce approval. The judge should ask her to wait for four years from the date when she brought the case to him. If the husband fails to respond for four years, the following solution is initiated:

> "If there is no guardian of the missing husband, the judge shall divorce the woman, and two just witnesses shall testify to the divorce, so that the divorce by the judge shall be treated as the divorce by the husband. The woman shall observe *'idda* for four months and ten days. Thereafter, she may marry if she so desires."[181]

If there is irrevocable termination in the form of *li'ān* (mutual imprecation among spouses), the judge, after taking the accusations of the respective parties into account, orders the dissolution of the marriage. The *shar'ī* judge adjusts later arrangements pertinent to the affiliation of the child, inheritance or the waiting period.[182] The essential condition of the *li'ān* establishes that it is necessary to conduct the hearing in the presence of a judge or his representative. The responsibility ascribed to the judge and his subsequent judgement places

[176] Naqvi, *Shia Divorce*, 481.
[177] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 5, 118.
[178] Al-Ṭūsī, *A Concise*, 375.
[179] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 5, 112-114.
[180] Naqvi, *Shia Divorce*, 386.
[181] Ibid., 342,343,349.
[182] Al-Shahīd al-Awwal, *Al-Lum'a*, 190-192.

this genre under the category of *tafrīq* divorces and it can therefore be said to be a dissolution of the marriage rather than a repudiation.[183] In the case of *īlā'* (the oath of sexual abstinence from the wife), the wife is entitled to bring the case before the judge after four months pass. The judge is then entitled to offer alternatives, whether in the form of repudiation or return.[184] Because the complication is resolved through the guidance of the judge, this type can also be referred to as *tafrīq*. If the parties, during the judgement process, send their deputies for reconciliation, their decision is binding upon the couple – the exception is termination of contract as the representative is required to demonstrate the authority of divorce in order to favour his claim.[185] The permission of deputies for cancellation should be aligned with time limitations in order to provide their decision with enhanced legitimacy and validity. The extent of amenability for the deputy indicates a deep concern with customary expectations because its scope has been drawn in compliance with local norms.

3. Divorce Regulations of Contemporary Iran and the Role of *'Urf*

Subsequent to the Islamic Revolution of 1979, which resulted in an abrupt shift from monarchy to governance by Islamic scholars, the Iranian Civil Code was incrementally promulgated by a committee of Iranian jurists. These jurists with the assistance of Ja'farī scholars have incorporated the general *shar'ī* principles of divorce, inheritance, guardianship, marriage and paternity into the civil code with the details mostly being left to the discretion of courts.

The legal system of contemporary Iran consists of general and specific courts and the general courts extend jurisdiction over all cases with the exception of disputes that fall within the jurisdiction of the special courts. The courts of appeals and preliminary courts are branches of general courts and are divided into civil courts, criminal courts and dispute settlement councils. The civil and criminal courts are largely reorganized under the guidance of Ja'farī school of law. Civil courts adjudicate civil disputes along with familial matters that are not the responsibility of Jurisdiction of Dispute Settlement Councils. Article 4 of the 2013 Family Protection Law establishes the framework within which family courts address the following topics: alimony and payment for wife's services, capacity, custody and parental visitation rights, divorce, dowry, embryo transplant, engagement and related damages, guardianship, guardianship of orphans, management absentee's property, marital property brought by the wife, marriage contract clauses, nullification of marriage, parentage, re-marriage, sex reassignment surgery, temporary marriage, permission to remarry, termination

[183] Al-Shahīd al-Awwal, *Al-Lum'a*, 191, and Al-Shahīd al-Thānī, *Sharḥ al-Lum'a*, vol. 3, 34.
[184] Al-Ṭūsī, *Kitāb al-Khilāf*, vol. 4, 510-511.
[185] Naqvi, *Shia Divorce*, 28.

of temporary marriage, and a wife's refusal to perform the conjugal duty.[186] Article 2 clarifies that at least one female consultant should be present in each family court besides the judge.[187] Any judicial decision should only be issued after consulting the written opinion of the female consultative judge. The female consultant may provide a recommendation to the judge but is not entitled to pass a decision – this is due to the absence of a classical Jā'farī example that invests a female member with sufficient power of judgement. All litigants in divorce cases are addressed to arbitration in order to achieve reconciliation and the judge is permitted to issue a divorce decree after obtaining a certificate from the arbitrator which establishes that cohabitation and reconciliation are not among ongoing possibilities.

The Guardian Council is responsible for determining whether the enacted or moderated laws are compatible with *sharī'a* and an Islamic constitution.[188] During the Islamisation process of family law, the authorities seek to extend protection to women by refusing to provide men with exclusive divorce rights. To some extent, the equalisation, liberalisation and modification of personal transition in marital rights have been gradually incorporated into the legal system over time. The modification of family jurisdiction in 1997 resulted in the approval of a clause that requires family dispute to be heard in Special Family Courts and be presided over by married judges with at least eight years of judicial experience and be conducted in the presence of female advisory judges.[189] The classical *shar'ī* rules lead the believer to a specific understanding of the place, position, worth and value of women within the community, family and wider society.[190] In referring to family law, Mir-Hosseini claims that Islamisation has promoted two parallel developments; firstly, the validation of patriarchal mandates of *fiqh*; and secondly, attempts to compensate and protect women in response.[191] Accordingly, it is not only *shar'ī* regulations that place responsibilities upon the respective parties; *'urfī* values also achieve the *sharī'a*, and specifically the rejection of gender equality by distributing economic, moral, psychological and social responsibilities in

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[186] "Family Protection Law," Article 4 reads: "Matters and claims regarding the following will be investigated in the Family Court: 1.Courtship and damages sustained due to its cancellation; 2.Permanent and temporary marriage and permission in marriage; 3.Conditions set while entering marriage; 4.Marryying again; 5.Dowry; 6.Mihriyyih; 7.Alimony to the wife and payment in kind for the duration of the marriage; 8.Discord and obedience (this article used to specify the discord and obedience between the couple but removing that implies that the aforementioned are for the wife alone); 9.Divorce, revocation, annulling and marriage annulment, amount of time and its expiration; 10.Custody and visiting the child; 11.Parentage; 12.Development and no longer being a minor; 13.Natural guardianship and guardianship and matters regarding the supervisor and trustee of the minors as well as administering between them; 14.Alimony of the blood relations; 15.Matters regarding an absent and missing person; 16.Guardianship of children with no guardian; 17.Offering away the fetus: 18.Sex changing." accessed March 25, 2018, http://www.refworld.org/docid/517fb1814.html.

[187] "Family Protection Law," Article 2 reads: "Family court is formed with the presence of one chief or substitutable prosecutor and two advisors one of whom, if possible, will be a woman holding legal status. The meetings are official and verdicts are issued only if maximum presence is reached."

[188] "Constitution of the Islamic Republic of Iran," Article 94.

[189] Ziba Mir-Hosseini, "When a Woman's Hurt Becomes an Injury: 'Hardship' as Grounds for Divorce in Iran," *Hawwa* 5, no. 1 (2007), 120.

[190] Tizro, *Domestic Violence*, 57.

[191] Mir-Hosseini, "*When a Woman's*," 115.

accordance with *sharʿī* designated gender roles. Tizro's research demonstrates how the belief system and identity of Iranians on marital issues emerges from an interaction between *ʿurf*, *sharīʿa* and social groups.[192] Haeri adds that the mutual obligations and rights of Iranian spouses rest upon three interlocking and predetermined axes, which bring together biological, divine and legal determinism.[193] In rejecting equality and reasserting complementary gender roles, Article 1105 clearly states that the husband has the exclusive right to be the head of the family.[194] It may be legitimately asserted that the theoretical components of patriarchy are mainly rooted in *sharīʿa* whereas the patriarchal structure of practice has been an attribute of Iranian *ʿurf* since ancient times. Moghadam draws upon Walby's theoretical contribution to demonstrate how patriarchy has shifted from the private sphere of the family to the public realm of the state.[195] Socio-demographic changes which include increasing levels of educational participation, incremental increases in marriage age and moderations within extended family structures have helped to qualify this trend to some extent. The patriarchal character of the state and its institutions which is reiterated within the structures and practices of the education system, the judiciary and the legislation help to shape appropriate acts and norms. These official institutions put in place customary role models for the socialisation of boys and girls. Iran's contemporary jurisprudence therefore helps to balance *ʿurfī* gender roles (biological, legal and natural) and hierarchical *sharʿī* regulations.

The sources of law that contemporary Iranian courts can invoke to issue verdicts in disputes are as follows: the constitution; laws approved by referendum or laws passed by the parliament after scrutinization by the Guardian Council, regulations designed by the cabinet and other state branches (upon condition they do not in conflict with the constitution or *sharīʿa);* the Council of Maṣlaḥat-i Niẓām; *ʿurf*; legal precedence; the opinion of *sharʿī* scholars.[196] The scope of women's individual rights and the status of women in general could be interpreted as the product of a synthesis between a dependence on *ʿurf*, codified laws and classical *sharʿī* sources.

The utility of *ʿurf* within the contemporary Iranian legal system has been both directly and indirectly acknowledged. Kheiri observes:

> "A contract not only binds the parties to execute what it explicitly mentions, but both parties are also bound by all consequences which follow from the contract in accordance with customary law and practice, or by virtue of law."[197]

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[192] Tizro, *Domestic Violence*, 187.
[193] Haeri, "Divorce," 55.
[194] "Civil Code of the Islamic Republic of Iran," Article 1105.
[195] Valentine M. Moghadam, "Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action," in *Woodrow Wilson International Center for Scholars Conference*, November 16-17 (2004), 11.
[196] Tizro, *Domestic Violence*, 91.
[197] Cited from Reza Banakar, *Driving Culture in Iran: Law and Society on the Roads of the Islamic Republic* (London: I.B.Tauris, 2015), under title "The Reproduction of Meaning and Women's Autonomy". (R. Kheiri, *Deliberation on the Status of Custom on Law* (2012), accessed March 28, 2016, http://www.mrfi.ir/kol/maghalat/1-t/mabahes/18.htm.)

In other instances, *'urf* may be implicitly adopted as legal criteria.[198] For example, if the parties authorise an agent to resolve their disputes, the scope of the attorney's responsibility must be established by *'urf*. Article 667 of the Civil Code declares:

> "The agent must, in his handlings and performances, act in the interests of his principal, and must not exceed the limits of the authority which the principal has explicitly given him, or the authority which is inferred by custom, usage, and circumstantial evidence."[199]

The delegate's power is therefore limited to what the principal has clearly authorised or what can be extracted from the Iranian *'urf.* In clarifying the obedience of citizens and the situation of expatriates and foreign residents, Articles 5 and 6 of the Civil Code establish that all inhabitants of Iran, whether of Iranian or of foreign nationality should be subject to Iran's laws, except in cases where the law indicates otherwise. Laws relating to personal status, including marriage, divorce, custody, and inheritance should be followed and observed by all Iranian subjects even if the person lives abroad.[200] Iranian and non-Iranian citizens are treated equally by the jurisprudence in order to ensure uniformity in the legal system. The articles can be read as a preventive measure that aims to protect Iranian custom by not allowing external factors to intervene in the legal process. Mir-Hosseini maintains that the institutions of marriage and divorce are products of *'urf* that were reformed by merely placing conditions on the man's rights after revolution in order to Islamise the ruling.[201] While the essential principles and rulings of theory remain stable and immutable due to the link with *sharī'a*, it might be possible to notice and make slight moderations in its *'urf* based forms or ways in which people are practising it.

National citizenship or identity is mainly transferred through the paternal line or duration of residency within the Iranian territory. Upon marrying an Iranian husband, a foreign woman automatically becomes an Iranian national; in contrast, an Iranian woman who marries a foreigner maintains her Iranian nationality as long as the regulation of the husband's country permits.[202] If she changes her nationality after the death, divorce or separation of the husband, she will reacquire her original nationality and its associated privileges and rights.[203] However, she cannot pass her Iranian nationality to the children produced in the course of marriage because the children are required to hold their father's nationality - the *shar'ī* rulings bestow the right of lineage upon paternal relatives.[204] The Civil Code requires that an Iranian woman should obtain official permission in order to marry a

[198] "Civil Code of the Islamic Republic of Iran," Article 220 reads: "A contract not only binds the parties to execute what it explicitly mentions, but both parties are also bound by all consequences which follow from the contract in accordance with customary law and practice, or by virtue of a law."
[199] "Civil Code of the Islamic Republic of Iran," Article 667.
[200] "Civil Code of the Islamic Republic of Iran," Articles 5, and 6.
[201] Mir-Hosseini, "A Woman's," 227.
[202] "Civil Code of the Islamic Republic of Iran," Article 976.
[203] "Civil Code of the Islamic Republic of Iran," Article 987.
[204] Boe, *Family Law*, 167.

non-Iranian citizen – however this restriction does not apply to an Iranian man unless he holds a sensitive position within the government. Article 1060 states:

> "Marriage of an Iranian woman with a foreign national, even in cases where there is no legal impediment, is dependent upon special permission of the government."[205]

Even if the code restricts the marriage of an Iranian woman to a foreign man, it does not provide a plausible *shar'ī* explanation for the regulation. This situation results in the rule being connected with the customary values and national identity of the society upon the basis of political concerns.[206] The Article asserts that an acceptance should be provided close to the proposal; furthermore, it maintains that the formal requirements for the *shar'ī* recognition of a marriage which cover an intentionally pronounced offer and acceptance by a liable, mature and sane person should be in harmony with *'urf*.[207] While *shar'ī* sources clearly state the formal requirement for validity, the manner in which *shar'ī* orders are pursued is left open to the impact of *'urf*. However, *shar'ī* function of *'urf* within this sphere is secured with the codes.

The payment of dowry is among the necessary principles of the *shar'ī* marriage, but its quantity varies in accordance with the degree of kinship between the families, along with their social status and wealth. Article 1035 stresses that a discussion or proposal relating to a marriage arrangement should not be treated as a marriage contract even if all or part of the agreed dowry has been paid.[208] As long as the marriage ceremony has not been solemnised, both of the parties are entitled to withdraw, and the opposing party does not have any right to take action for damages with the exception of returning the advance payment. The *'urfī*, *shar'ī* and *qānūnī* regulations explain that if the engagement is broken before the marriage contract, the parties are required to return any payment, present or their equivalent value that was given prior to the ceremony.

Within rural areas and amongst immigrants, it is customary for a bride price payment (*shirbaha*) to be paid to the bride's family – this somewhat surpasses the *shar'ī* obligation of dowry payment.[209] In these cases, a minimal amount or symbolical payment will be recorded in the marriage contract as a dowry. In addition, as Rokh observes, the customary practice of postponing the dowry payment is widespread and is particularly pronounced within cross-cousin marriages. The customary renunciation of the dowry right sometimes occurs in rural areas – if this arrangement is put in place, the marriage contract should involve a stipulation,

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205 "Civil Code of the Islamic Republic of Iran," Articles 1060, and 1061.

206 Mohammad H. Nayyeri, *Gender Inequality and Discrimination: The Case of Iranian Women* (Connecticut: Iran Human Rights Documentation Center, 2013), 24.

207 "Civil Code of the Islamic Republic of Iran," Article 1065 reads: "It is a necessary condition for the validity of the marriage that acceptance should follow close upon proposal, in accordance with custom."

208 "Civil Code of the Islamic Republic of Iran," Article 1035.

209 Ehsan Zar Rokh, "Marriage and Divorce Under Iranian Family Law," *SSRN Electronic Journal* (July 2011), 23, accessed January 15, 2018, doi: 10.2139/ssrn.1886349. (*Shirbana*: a payment of bride price that is done by the groom's family to the bride's family in order to provide her with household necessities.)

as this will avoid unnecessary complexity.[210] In the absence of a specific dowry, the contract preserves its *sharʿī* validity and the quantity is fixed by agreement or by law and is embodied within a fair dowry (*mahr mithl*). Rokh argues that most jurists reject the customary form of the conditional dowry agreement such as the one which fixes a minimum dowry if the wife is not required to leave her place of residence – however, a maximum dowry is required if she is required to relocate to another city.[211] Article 1083 establishes the customary rights of the parties in the payment of the dowry.[212] With regard to the dowry, the prevailing practice among Iranians is to divide it into a portion to be paid immediately, a portion to be paid over time and a portion to be paid upon the occurrence of death or divorce.

Legal alterations of minimum marriage ages over time provide a clear insight into the changing customary effects and dynamics of the jurisprudential procedure. The Iranian Civil Code establishes that marriage that has been contractually agreed before puberty is illegal unless it has been authorized by a guardian who protects and upholds the ward's best interest. The minimum age for marriage before puberty was previously nine. However, in 2002, a change in the family law increased the minimum age for girls from nine to thirteen and the minimum age for boys from thirteen to fifteen. Although minor girls could still be given in marriage with parental permission, this practice has gradually decreased as a result of education and social awareness campaigns.[213] Iran's legal code has also become aligned with this progressive moderation as it lessens the gap between *ʿurfī* practices and *sharʿī* theories within the jurisprudence.

The balance of legal power within the family largely favours the man because *sharʿī* regulations and changes continue to be prioritised within the spheres of chastisement, custody, polygamy and *ṭalāq*.[214] It is conceivable that the image-making function of *sharīʿa* may disadvantage women in relation to their male counterparts. The vast majority of social assumptions that relate to gender relations stem from legal orders, but the *sharʿī* rights that are provided to women by *sharʿī* sources and theoretical explanations are not delivered to them within the contemporary legal system.

These theoretical privileges frequently serve to remind women who is in charge or to create a social contempt for divorced women. Although Iran is frequently depicted as a conservative and static society, cultural, demographic and social shifts have significantly enhanced women's educational achievements (most noticeably within the area of literacy)

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210 Zar Rokh, "Marriage," 2.
211 Ibid, 24.
212 "Civil Code of the Islamic Republic of Iran," Article 1083 reads: "A duration of time or instalments can be fixed for the payment of the marriage portion, as a whole or in parts."
213 Moghadam, "Women," 5.
214 Tizro, *Domestic Violence*, 98.

and this has impacted family structures within the country.[215] The changing paradigm of gender policies has diminished the impact of patriarchal assumptions and has opened up new cultural, educational, political, and social opportunities. However, difficulties encountered during the court proceeding which include the cost and length of the trials and the damage inflicted upon the women's reputation continue to impede the submission of legal claims. Mir-Hosseini observes that the practice of marital issues in Iran is frequently managed with reference to cultural and social values rather than state-ordered rulings with this appearing as a defiance of the Ja'farī school and its *shar'ī* measures.[216] The majority of divorce problems are resolved outside of the court through the mutual consent of spouses and are then recorded for the sake of state formality. The courts seek to establish a bridge between the legal structure of divorce and social practices by putting in place an official mechanism which possesses a degree of standardization. The following sub-section will analyse contemporary legal divorce types while emphasising their changing implementation and links with Iranian *'urf*.

a. *Ṭalāq*

Contemporary Iranian jurisprudence recognises that the explicit, intentional and unconditional pronouncement of unilateral *ṭalāq* by a mature and sane husband can be considered as an acceptable and valid divorce.[217] If the *ṭalāq* is to be effective, it must be pronounced orally in Arabic and in a prescribed formula that rejects local phrases and metaphorical usages. The rejection of the allusive and non-Arabic utterance of divorce formula not only underestimates the role of intention but also highlights the *shar'ī* character of divorce and marriage contracts.[218] The requirement of a court registration decree for divorce cases that is exercised outside of the court by the unilateral *ṭalāq* pronouncement arises from debates that relate to official validity. While the Ja'farī school of law allows the husband to divorce his wife at any time without providing any reason, the codified regulations are distinguished from the classical *shar'ī* implementation. The contemporary legal system only permits the husband's divorce when the wife's consent is obtained.[219] Up until the point when the husband obtains consent from his wife or a certificate from the Iranian legal authorities that states the impossibility of reconciliation, the marriage is deemed to be officially valid – this is clearly established by the fact that if either spouse dies after only providing oral repudiation, the surviving spouse has a right of inheritance. A failure to

[215] Boe, *Family Law*, 177.
[216] Mir-Hosseini, *Marriage on Trial*, 128, 129.
[217] "Civil Code of the Islamic Republic of Iran," Articles 1135, and 1136.
[218] Zar Rokh, "Marriage," 2.
[219] Tamadonfar, *Islamic Law*, 78.

register does not affect the *sharʿī* validity of marriage or divorce. Nonetheless, it incurs a loss of legal regulation and penalties by creating a dual notion in contemporary Iranian legal system.

The divorce is only permissible if it is issued through the courts – any independent pronouncement of *ṭalāq* upon the part of the husband is considered to be valid in the presence of *sharīʿa,* but immaterial if it is not presented to the court. The law has been interpreted to mean that no court can prevent a man from divorcing his wife; however, all her financial rights (that relate to dowry, maintenance or marital investments) must be settled prior to the annulment if mutual interests are to be protected.[220] The enforcement of wages for housework (*ujrat al-mithl*) provides remuneration for household services that the wife has performed for the family during the marriage. This rule provides the wife with some kind of economic protection during unexpected divorce cases.[221] As Tamadonfar observes, in addition to the women's family condition, place and time, the determination and value of compensation for work conducted at home has a clear analogy within agricultural work or animal husbandry both of which fall within the scope of compensation when the husband dies.[222] The implementation is peculiar to contemporary legal system of Iran. The rule becomes an obstacle in the case of *ṭalāq* divorces as it circumscribes the man's financial independence. The Civil Code secures payment of financial support by a husband to his former wife and also ensures the settlement of any dowry or unpaid bridal gift. Because Article 1206[223] entitles the wife to claim all previous non-payments by certifying her allegation, the payment is prioritised as a primary debt that should be resolved before other settlements have been made – this applies even in the case of the husband's bankruptcy and unpaid support should be completed by third-party creditors. The registrar can only register a divorce after permission has been issued from a court and subsequent to dowry, maintenance or other expenses being paid to the wife.

The reformation of marriage regulations in 1997 requires the dowry price to be re-evaluated in accordance with the inflation rate for *maṣlaḥa* or the protection of wife's rights.[224] The intention of the new arrangement was to guarantee that the *sharʿī* requirement

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[220]Woodrow Wilson International Center for Scholars, *Best Practices Progressive Family Laws in Muslim Countries* (Rand Corporation: 2005), 19, accessed June 14 2017, https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf

[221] Moghadam, "Women," 8.

[222] Tamadonfar, *Islamic Law*, 76.

[223] "Civil Code of the Islamic Republic of Iran," Article 1206: "A wife can always and in any case prefer a claim for her past expenses, and her right to these expenses is preferential. In the event of bankruptcy or insolvency of the husband her dues must be paid before any liquidation payment is arranged. Relatives, however, entitled to provision of maintenance expenses can claim only their expenses for a future period."

[224] Boe, *Family Law*, 93, and "Family Protection Law," Article 25 reads: "Ministry of Economics and Finances is duty bound to tax excessively and uncommonly high *mihriyyih*s at the time of registering them in accordance to the situation of the couple and economic situation of the country and in compliance with the increase of the amount of *mihriyyih* based on

of marraige retained its original value irrespective of its nominal value in the marriage contract. In drawing upon *'urf*, some Iranian families sought to protect their daughters against unilateral divorce right of a husband by including a prenuptial agreement that obliges the husband to pay a specific sum of money to his wife in the event of divorce.[225] The legal grounds for the customary payment is connected to the *shar'ī* principle of dowry. The stipulation of high amounts is preferred as it makes the husband reluctant to initiate divorce. It functions as a safeguarding caution against the unilateral divorce right of men and can be applied in unjustifiable circumstances.

Neither forced divorce nor the jocular pronouncement of the divorce formula results in the marriage being dissolved, as there is a clear lack of intention.[226] To the same extent, the pronouncement of the formula under compulsion or in a state of intoxication is considered to be null and void from *shar'ī* viewpoint. The opinion of contemporary Jā'farī scholars related to the lack of intention clearly contradicts the opinion of contemporary Ḥanbalī scholars. Even the joking pronouncement of the divorce formula is considered to be acceptable by the Saudi legal system. Jā'farī scholars establish that the validity of the divorce expression will be clearly indicated by the husband's full knowledge. The requirement of the perspicuous utterance of the divorce formula affirms the rejection of customary practices, a feature that is consistent with classical Jā'farī sources. Bariklou argues that the denial of imprecise divorce formulas by the scholars mirrors a deeply ingrained social sentiment that seeks to protect the family by preventing separation.[227] In maintaining that the family institution embodies the whole society (a sentiment that is also held by the constitution), judges have frequently evidenced a reluctance to approve divorce cases.

The nature of divorce (e.g. whether it is irrevocable or revocable) impacts legal outcomes such as maintenance or residence during the *'idda* period. In instances of revocable divorce, the wife has *shar'ī* right to suspend her marital residency and it is incumbent upon the husband to provide maintenance. However, if the divorce is irrevocable (menopausal, minor [younger than nine], thirdly divorced wives or unconsummated), the woman loses maintenance and residential rights with this restriction even applying during the waiting period (with the exception of pregnancy).[228] The Ja'farī regulation pertaining to accommodation of wife (for revocable divorce and during the waiting period on behalf of

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inflation. Acceptable amount of *mihriyyih* and the taxing of it accordingly will be with attention to the economic situation of the country and based on a circular suggested by the Ministry of Economic and finances and approved by the cabinet."

225 Aghajanian and Moghadas, "Correlates," 57.

226 Khomeini, *A Clarification*, 329.

227 Ali Reda Bariklou, "The Wife's Right of Divorce on the Basis of the Delegation Condition under Islamic and Iranian Law," *International Journal of Law, Policy and the Family* 25, no.2 (2011), 194.

228 Khomeini, *A Clarification*, 333.

demised husband) states that the wife has a right to stay in her husband's house. Articles 1005 and 1006 of the Civil Code further affirm this classical ruling. They state:

> "The domicile of a married woman is the same as that of her husband. Nevertheless, where the husband has no known domicile and also when the wife has a separate domicile with the consent of her husband or by sanction of a court, she can have a separate domicile." and "The domicile of a minor child or an incapacitated person is the same as that of the natural guardian or legal representative."[229]

During the waiting period or mourning time of a demised husband, leaving the house for unnecessary activities, wearing colourful clothes and using beautification materials are considered to be unlawful for the woman.[230] The women's beautification strategies, dress code, make-up arrangements and norms of socialising, talking and walking result from a continual interplay between discourses of collective consciousness and *shar'ī* orders.[231] The codes that relate to mourning clothes and the concepts that govern modest acts derive from *'urfī* influences that are in turn shaped by local norms.

b. *Khul'*

The wife's right to apply for the dissolution of a marriage can be qualitatively distinguished from the husband's right. Despite the fact that they both serve the same purpose, a *khul'* divorce might be considered to be a destitute substitute for a man's unilateral right to divorce. The wife's initiative depends on the husband's consent which is normally grounded within some form of compensation that is often tantamount to the value of the dowry. When the harmonious relationship fractures and produces acrimony, the wife has an option to apply for dissolution because Article 1103 establishes that the husband and wife are obliged to establish friendly relations.[232] Because the wife is a major figure in the *khul'* divorce who seeks to obtain consent from her husband for separation, the divorce is initiated by the woman. To the same extent, *mubārāt* divorce in which there is a mutual aversion between the spouses falls under the *khul'* concept and the wife is obliged to make a compensation payment. Khomeini refers to instances in which there is mutual consent for the divorce of the wife through the making of payment. The payment of the dowry or any money that does not exceed the value of the dowry ensures that the agreement is *shar'ī*, and the husband loses his right to revoke her.[233]

The procedure and scope of conditions that entitle the wife to divorce are deeply connected with *'urfī* and *shar'ī* framework. When the wife feels a strong sense of repugnance towards her husband and is no longer willing to stay with him, she can with her husband's

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229 "Civil Code of the Islamic Republic of Iran," Articles 1005, and 1006.
230 Khomeini, *A Clarification*, 332.
231 Tizro, *Domestic Violence*, 164.
232 "Civil Code of the Islamic Republic of Iran," Article 1103 reads: "Husband and wife are bound to establish friendly relations."
233 Khomeini, *A Clarification*, 334.

agreement demand divorce litigation and repayment of dowry. The pronunciation of *khul'* divorce might be treated as a single revocable divorce with the consequence that the word *ṭalāq* would become superfluous. However, once the *khul'* pronunciation is followed by the *ṭalāq* formula, it is considered to be an irrevocable *khul'* divorce.[234] Unless the wife, during the *'idda* period, claims back the compensation that she had paid in return for her husband's consent, the divorce is held to be irrevocable in the perspective of *sharī'a*.

When the divorce formula is stated by a person (authorized by the husband to perform the prescribed divorce on his behalf), the question focuses on whether the repudiation was pronounced in the absence of the husband does affect its *shar'ī* validity or not.[235] During the court judgement on the *khul'* divorce, the lawyer accepts the divorce on behalf of the husband by forgiving half of the dowry payment. When the husband was notified about the divorce decision, he applied to the appeal court in order to revise and nullify the verdict. His claim was that the deputy did not pay attention to his interests and he overused the deputy right by waiving on his behalf. However, the judge rejected his appeal by stating that the act of the lawyer falls within the scope of attorney that was provided by the delegated power.[236] As a result, the authorised proxies have a right to represent the divorce decision to the opposite party without legal obstacles, even it contradicts the interests of the litigants. Therefore, the divorce of deputy on behalf of spouses becomes valid, but the deputy in acting with complete authority is required to issue a formal statement ("On behalf of my client [wife's name], I remit her dowry to my client [husband's name], so that he will divorce her"). The deputy must then immediately respond ("The wife of my client, I make her free, upon her remittance of the dowry.")[237] Khomeini notes that if the woman applies *khul'* divorce by compromising with another man for marriage contract without the knowledge of her husband, both the divorce and marriage obtains *shar'ī* validity, but they are considered to have committed a great sin.[238]

There is neither limitation nor restraint for the ransom payment and it may, depending on the circumstance, be possible for the amount to exceed the actual dowry. The Article states that if the wife initiates divorce because of a dislike of her husband, the ransom amount may exceed the actual value of the dowry; however, if the divorce arises from a mutual dislike between spouses, the payment amount should not exceed the value of dowry.[239] Upon

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[234] Naqvi, *Shia Divorce*, 413.
[235] Khomeini, *A Clarification*, 331.
[236] See Appendix B: Case Number Three (The Lawsuit for the Validity of Lawyers' Divorce with the Right of Attorney), 244-246.
[237] Khomeini, *A Clarification*, 334.
[238] Ibid, 335.
[239] "Civil Code of the Islamic Republic of Iran," Article 1146 reads: "A *khul'a* divorce occurs when the wife obtains a divorce owing to dislike of her husband, against property which she cedes to the husband. The property in question may

initiating divorce whether in the form of *khul'* or *mubārāt* the divorce is categorised as irrevocable and the wife loses any form of economic support along with her dowry and marital property right. The legitimacy of *khul'* divorce, its procedure, financial outcome (repayment of dowry), social status of these women and discretion of judges reveal disputes during the jurisprudential procedure and create complexities within the community.

c. *Ṭalīq* or *Tafwīḍ*

In certain circumstances, a wife can obtain the option of initiating divorce or divorcing herself upon behalf of the husband by referring to stipulations inserted in the marriage contract. The official chief of the marriage registration who reads out the conditions of the contract during the contractual ceremony is requested to obtain the consent of both parties. As a result, the marriage contract and its conditions acquire sanction power. When the parties sign each condition by indicating their acceptance of the terms, the contract and its stipulations – which include enhancing the wife's rights, establishing a degree of equality or pronouncing divorce on behalf of her husband obtain *shar'ī* and *qānūnī* cohesiveness.[240] Article 224 establishes that the words and extent of a contract should be interpreted in accordance with the customary understanding of the parties.[241] The codified system provides the wife with an opportunity to include any kind of stipulation in the written contract – this ranges from studying, travelling and working and extends to obtaining the unilateral right of divorce from her husband. Article 1119 states:

> "The parties can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract: for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or discontinues the payment of maintenance cost, or attempts the life of his wife or treats her so harshly that their life together becomes unbearable, the wife has the power, which she can also transfer to a third party by power of attorney to obtain a divorce for herself after establishing in the court the fact that one of the foregoing alternatives has occurred and after the issue of a final judgement to that effect."[242]

The clause apparently suggests that in the event of the mentioned breach or any similar conditions, the court will be responsible for deciding whether the stipulation has been violated along with initiating a trial by the other party. The stipulations are divided into three categories: those which invalidate the whole contract, those which are valid and viable, and those which are themselves void but do not undermine the validity of the contract. Conditions that include the prohibition of the husband marrying again or the prohibition of his divorce right might impair the essence of the marriage contract. However, while the marriage contract

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consist of the original portion, or the monetary equivalent thereof whether more or less than the marriage portion.", and Article 1147 reads: "A *mubarat* divorce occurs when the dislike is mutual in which case the compensation must not be more than the marriage portion."

[240] Ziba Mir Hosseini, "The Delegated Right to Divorce in Iran and Morocco," in *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce*, ed. Lucy Carrol and Harsh Kapoor (WLUML, 1996), 121-134.

[241] "Civil Code of the Islamic Republic of Iran," Article 224 reads: "The wording of a contract shall be read according to the meaning understood by customary law."

[242] "Civil Code of the Islamic Republic of Iran," Article 1119.

would retain its *shar'ī* validity, the conditions would be considered void. If the conditions are relevant to residency or not leaving a particular city, both the contract and conditions are considered valid from *shar'ī* viewpoint. It should be noted that the validity of terms does not entitle the wife to a right of cancellation unless it is explicitly mentioned.[243] Verbal marriage contracts that are not accompanied by written certificates are technically valid if the consent of both parties has been obtained. However, in instances where the validity of the marriage and its conditions are disputed, the wife will encounter difficulty in both proving the occurrence of marriage and the terms of verbal contract.[244] The validation of verbal contract requires the wife to present at least two male Muslim witnesses who can attest to the existence of the marriage and its conditions.

When the marriage contract is signed by an attorney on behalf of the parties, there should be an agreement and harmony with regard to the stipulations – this is required for its *shar'ī* validity. Article 1073 states:

> "If the attorney does not observe what his principal has laid down in connection with the person or the dowry or other particulars, the authenticity of the marriage will depend upon corroboration from the principal."[245]

The precise delineation of the attorney's conditions prior to the marriage contract can mitigate the impact of external factors, but the scope of rights continued to be connected to customary criteria. Article 1128 states:

> "If a special qualification is mentioned as a condition of the marriage and it is found, subsequent to the marriage, that the party lacks the desired qualification, the other party has the right to cancel the marriage."[246]

In upholding this article, the code does not only encourage and secure the diversity of stipulations (whether explicit or implicit in form) but also reserves a broad array of scope for the impact of *'urf*. The stipulation of delegation to a wife that authorises her to divorce herself on behalf of her husband at the time of the marriage contract and which grants her a cancellation right is known as *ṭalāq al-tafwīḍ*. In reflecting upon the failure of delegated divorce stipulations, Mir-Hosseini states:

> "*[T]alāq al-tafwīd* fails not only to address the inequality inherent in the notion of *talāq* but also to fails to protect those women most in need of protection: those whose husbands abuse their right to *talāq*. This is so because it is premised on the notion that termination of marriage is a right that belongs to the man, who can use it in whatever way he chooses, including delegating it to his wife. So, all depends on the good will of the man."[247]

Bariklou instead argues that the impracticality of the code or delegate stipulation during the preliminary period is reasonable as a wife would not contemplate divorce or separation at the time of contracting the marriage. She would not therefore insist upon inserting the delegation

[243] Chibli Mallat, "Shi'ism and Sunnism in Iraq: Revisiting the Codes," in *Islamic Family Law*, ed. Chibli Mallat and Jane Connors (London: CIMEL, 1993), 84.
[244] *Knowing Our Rights; Women, Family, Laws and Customs in the Muslim World* (Raj Press: New Delhi, 2003), 142.
[245] "Civil Code of the Islamic Republic of Iran," Article 1073.
[246] "Civil Code of the Islamic Republic of Iran," Article 1128.
[247] Mir-Hosseini, "A Woman's," 216.

right.[248] However, the approval of moderations by the Supreme Judicial Council in 1984 have strengthened its effectiveness by adding a text which states that a wife can stipulate a delegated condition in order to divorce herself on behalf of her husband.[249] The state-approved option has made every woman consider her protection and demand the insertion of the delegation condition in the contract – in the aftermath, the term is then inserted in all marriage contracts. The moderation process demonstrates the incremental change of the laws in accordance with *ʿurfī* dynamics and *sharʿī* principles known as t*aghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān* – this functions to minimise the gap between theory and practice. Bariklou connects the right of delegation with national character rather than *sharʿī*. He observes:

> "Thus, the delegation condition of the wife to divorce herself is subject to Iranian national law, in the same way as other conditions that are inserted for the protection of women's rights in the marriage contract - without this, women cannot in many cases be effectively protected. If it were subject to the wife or husband's religious regulations, this could in some circumstances deprive the wife of the necessary protection that the legislature intended…"[250]

Once the contingency occurs, the wife can then choose between exercising her right of repudiation or staying within the marriage. The husband needs to agree with the condition, and she must prove that the power of attorney has not been cancelled or withdrawn by the husband. Because the limitation of time is indispensable to a power of attorney, the condition is not permanently valid and there must be a particularised duration which can extend to forty, fifty or ninety years. With regard to the delegation of power on the basis of difficulties, the interest of the wife takes priority over the husband's interest. This is because the problematic situation of the wife contradicts with what is customarily considered as the essential purpose of the contract. Imprecise conditions or the delegation of unrestricted power to the wife by the marriage contract can limit the freedom of the husband during the divorce procedure and provide the wife with authority to apply for all types of divorce. While issuing a verdict for a divorce case that had been initiated by the lawyer with authorised delegation power on behalf of the wife, the judge set out the scope of authority for the delegated attorney at the court. He states:

> "The delegation right allows both parties to choose an official attorney with authorized terms of conduct. For the case, the husband gave certificated delegation right to his wife without any additional condition that enables her to retain a lawyer on behalf of the husband in order to submit the petition to the Department of Justice for divorce. Relying on the official permission, the lawyer asked for the issuance of certificate about the impossibility of reconciliation between the couple and ruling any forms of divorce either revocable, irrevocable, *khulʿ* or *mubārāt* with all conditions and in any way. Acceptance of receiving the dowry, maintenance, and extra payments, or waiving all the payments, or obtaining the substitutive payment for dowry in order to legalize and registrar the divorce are all considered valid acts of the lawyer. The divorce which has been issued (according to mentioned

[248] Bariklou, "The Wife's," 187
[249] Ibid.
[250] Ibid, 189.

> conditions) is legitimate. The lawyer has been chosen by the wife on behalf of the husband and the husband is supposed to accept every result since the delegation document does not contain any conditional sentence."[251]

Because the husband is neither limited nor constrained the delegated power of the wife, he should abide by all possible outcomes including those that do not possess any benefit or *maṣlaḥa* for him. The husband appealed the case in objection to the decision. However, his claim was considered invalid as it depended upon the absence of clarification over the delegation of right during the onset of marriage contract. The observance of the best interest of the principal is not compulsory for a divorce to be initiated on the ground of the delegation right. If the defendant's side file a suit and claim that the lack of interest results from the delegation of power, the judge does not revalue the case with reference to the terms of the judges' decision or lose benefit. However, the Appeal Court may analyse the case from a procedural perspective – this however depends on the authority set out by the Civil Procedure Law.

The Article 1087 rejects the deferment of whole or part of a dowry with particular duration and associates that this is a customary practice that is taken in default of ambiguity. The Article states that if there is a condition (stating that upon non-payment of the marriage portion within a fixed period, the marriage will be cancelled) in a marriage act, the marriage and marriage portion will protect its *shar'ī* validity, but the condition will be null and void.[252] Both Khomeini and Article 1087 maintain that if the dowry amount is not specified, the marriage will continue to be regarded as valid and the dowry will be established by using customary parameters and the mutual consent of the marrying parties in the form of *mahr mithl*.[253] It should be noted that the contemporary legal authorities do not set a maximum amount for the dowry which diverges from classical *shar'ī* restriction. However, the contemporary scholars instead set a maximum limit for the enforceable payment of dowry beyond which the husband may not be forced to pay unless financial capability is evidenced. On April 2, 2012, the Family Protection Law, in seeking to provide a convention, introduced a legal amendment which legalised the enforceable dowry limit as 110 gold coins.[254] In addition, the amendment attempts to restrict the unbearable amounts of dowry by not permitting individuals to be imprisoned upon the basis that they are unable to make the payment. This moderation highlights the incremental inclusion of customary norms. The

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[251] See Appendix B: Case Number Three (The Lawsuit for the Validity of Lawyers' Divorce with the Right of Attorney), 231-232.

[252] "Civil Code of the Islamic Republic of Iran," Article 1087 reads: "If a condition is laid in the marriage act that if the marriage portion is not paid within a fixed period that marriage will be cancelled, the marriage and the marriage portion will remain binding and authentic but the condition will be null and void."

[253] Khomeini, *A Clarification*, 319, and "Civil Code of the Islamic Republic of Iran," Article 1087 reads: "If a marriage portion is not mentioned, or if the absence of marriage portion is stipulated in a permanent marriage, that marriage will be authentic and the parties to it can fix the marriage portion subsequently by mutual consent. If previous to this mutual consent matrimonial intercourse takes place between them, the wife will be entitled to the marriage portion ordinarily due."

[254] Nayyeri, *Gender Inequality*, 32, 46-48.

impact of *'urf* in the determination of dowry amount and the outcomes of non-payment becomes clear, insofar as the Ja'farī school allows its usage.

If the bride stipulates not being taken out the city by the husband as a condition and the groom indicates his acquiescence, he should avoid removing her from the city.[255] Khomeini observes:

> "If, however, a woman stipulates [in her marriage contract] that in case her husband goes on a journey or fails to maintain her, let us say for period of six months, she may act as the husband's agent in divorcing herself on behalf of the husband."[256]

If this does occur, the wife obtains *shar'ī* ground to terminate the marriage contract without the threat of losing her financial rights. While the scope of customary values makes it possible to add various residential stipulations in the marriage contract, the sanctioning power of the conditions is not only upheld by the authoritative Ja'farī sources, but also by the codified state laws.

The insertion of a stipulation that allows for the renouncement of dowry right in return for the rejection of second marriage will result in the marriage contract being considered valid; however, its condition will remain ambiguous.[257] The written format of the condition should establish that 'if the husband marries a second wife, the wife has a right to divorce herself'. In addition to preventing the husband from taking a second wife with conditions, the laws grant the wife the right to initiate a divorce if her husband marries without her permission. Bariklou claims that, in establishing a connection between the condition and customary standards, *shar'ī* and *qānūnī* rules recognise polygamy as a lawful act – however, within the community, monogamy is more widely accepted as an appropriate model of family structure, especially by women.[258] It is therefore the case that repudiative stipulations for polygamy originate within *'urfī* rather than *qānūnī* instruments. The long-term harm or difficulty that they inflict, even in psychological form, are considered to provide sufficient grounds for the annulment of the marriage.

A condition that contradicts the principles of marriage (accepting the father's failure to provide maintenance or renouncing the maintenance right wholesale) are considered to be null and void from *shar'ī* viewpoint.[259] *Shar'ī* regulations maintain that the earning of maintenance should be in compatible with the living standards of the wife which include clothing, dwelling, food, furniture and sometimes servants – this is a responsibility that the husband performs to the wife in return for her obedience. Any dispute relating to the quantum

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[255] Khomeini, *A Clarification*, 322.
[256] Ibid, 335.
[257] Ibid, 323.
[258] Bariklou, "The Wife's," 192.
[259] "Civil Code of the Islamic Republic of Iran," Articles 1106 reads: "The cost of maintenance of the wife is at the charge of the husband in permanent marriages." and Article 1107 reads: "The cost of maintenance includes dwelling, clothing, food, furniture in proportion to the situation of the wife, on a reasonable basis, and provision of a servant if the wife is accustomed to have servants or if she needs one because of illness or defects of limbs."

of maintenance can be exclusively settled with reference to the wife's living standards rather than the husband's financial capability. Each wife can expect to be entitled to various amounts of maintenance – this should be in harmony with the customary parameters of her social status. In contrast to contemporary Iranian practice, the financial status of the husband has a crucial role to play in determining maintenance within the contemporary Saudi legal system.

In 1992, the High Council of the Cultural Revolution adopted a list of employment policies for women which accentuated the importance of gender division and eliminated certain occupations and professions as inappropriate according to *sharīʿa*. At the same time, the integration of women into the labour force continued to be encouraged, albeit within areas that were deemed to be more suited to their gender roles (gynaecology, laboratory work, midwifery and pharmacy).[260] In citing this regulation, the husband would be able to prevent his wife from working within particular occupations that are deemed to be incompatible with his own dignity or the interest of the family.[261] The criteria governing the appropriateness of work is deeply connected with the ascribed social roles of the genders which have been shaped by customary barriers and norms.

The consideration of divorce, the identification of its possible outcomes, and the stipulation of various conditions highlight the sanctity of the agreement, its *qānūnī* role and *sharʿī* power that has been given by the legal authorities. It is however important to note that while the husband may give his consent for all conditions, when the time of divorce comes, it should be assumed, as Haeri notes, that he will leave them unchallenged.[262] Conceivably, the husband will retain the right to refuse to divorce his wife or he will make her life miserable to the point where she is effectively forced to initiate a divorce procedure. The legal procedure or local difficulties may cause the divorce type to transform from *ṭalīq* to *khulʿ* or *tafrīq*. Mir-Hosseini observes that the question of whether the husband actually agrees to the terms or not has no effect in practice – this is because the presence or absence of his signature under each clause is ignored and the full power to grant the divorce remains with the judge.[263] Tizro observes that the claims of a considerable number of women who normally do not have appropriate access to the legal system go unheard. Women sometimes are left to their own individual resources such as male guardians in attempting to redirect the system to achieve justice or serve their interests.[264] The actual procedure of the legal system which depends

[260] Moghadam, "Women," 3.
[261] "Civil Code of the Islamic Republic of Iran," Article 1117 reads: "The husband can prevent his wife from occupations or technical work which is incompatible with the family interests or the dignity of himself or his wife."
[262] Haeri, "Divorce," 68.
[263] Mir-Hosseini, "A Woman's," 222.
[264] Tizro, *Domestic Violence*, 94.

upon the figure of the powerful man indirectly patronises the extension of male dominance in the jurisprudence rather than enhancing the right of women in divorce. Even the breach of the conditions provides the opposing side with the option of exercising repudiation, the length of procedure and its implementation have been largely determined by the judge.

d. *Tafrīq*

The marriage may be annulled through the absence of certain conditions in either of the parties such as the ascription of fault, the existence of mental or physical incapacities. Both parties have the right to apply to a court for the cancellation of the marriage. The judge, in contrast to other divorce types, is in possession of full authority. Divorce (*ṭalāq*) and annulment (*tafrīq*), as Haeri claims, each other's antithesis because they reflect the *shar'ī* and *qānūnī* scopes of marriage. Whereas *ṭalāq* relates to the exclusive right of the husband and is grounded within *shar'ī* ruling, the judge's annulment of marriage follows particular formats and is dependent upon state-issued regulations.[265] Khomeini and the Civil Code reiterate the classical *shar'ī* defects as reasonable grounds by stating that blindness, genital defects (makes intercourse impossible), insanity, leprosy and obvious lameness are the main considerations that the husband can cite when seeking to annul the marriage contract; in contrast, the wife is liable to cite genital defects and insanity. As Article 1101 establishes, the dissolution of marriage upon the basis of either of these defects prior to matrimonial relations entitles the wife to half of the dowry.[266] In belatedly revealing defects or problems, both parties can dissolve the act and the procedure should be compatible with the *'urf*. Article 1131 observes:

> "The option of cancellation of marriage must be exercised immediately… Determination of the duration of time during which the option can remain valid depends upon custom and usage."[267]

Because the divorce is chosen on grounds of unknown defect rather than unilateral right, it is normally categorised as a *tafrīq* divorce. However, the divorce procedure should be conducted in harmony with customary practices. While the code preserves the right of the husband to repudiate his wife at will in the absence of specific grounds, he should follow strict statutory procedures that have been put in place by the State. This requirement aims to restrict the husband's exclusive right to divorce and to protect the wife's status. Once the marriage is annulled upon the basis of either of the aforementioned reasons, it is not

[265] Haeri, "Divorce," 65, and "Family Protection Law," Article 29 reads: "In all cases requesting divorce other than in case of agreement of both parties on divorce, the court is responsible to, while trying to create peace and reconciliation, refer to the case for arbitration. Taking into account the opinions of the arbiters, the court will issue statement of irreconcilable differences or divorce verdict or if it disagrees with the opinion it will reject it providing reason."

[266] "Civil Code of the Islamic Republic of Iran," Article 1101 reads: "If the marriage is cancelled before matrimonial relations for a reason, the wife is not entitled to any marriage portion. If the reason of cancellation is impotency, the wife will be entitled to half the marriage portion notwithstanding the cancellation of the marriage."

[267] "Civil Code of the Islamic Republic of Iran," Article 1131.

considered within the framework of divorce, but is instead understood as a separation with official authority.[268] Because the list of defects is explicitly indicated and corroborated by the traditional sources, the influence of *'urf* is not held to determine the scope of physical defects. As Aghajanian and Moghadas note, the lower average number of children that are connected with the infertility and childlessness is considered to provide a plausible justification for divorce. This feature can be attributed to Iranian society's pronatalist culture.[269] There is strong social support for granting divorce upon the basis of infertility and it is possible to find court reports that uphold childlessness as an acceptable justification for divorce.

The Civil Code entitles the wife to initiate a cancellation trial if her husband refuses to provide the maintenance and it also authorises the court to fix the maintenance amount by compelling the husband to attend to its payment.[270] However, Mir-Hosseini maintains that in practice, the non-payment of *nafaqa* has proven to be one of the least troublesome grounds upon which a woman can obtain a divorce.[271] Khomeini maintains that the provision of financial support for life expenses, residence and other appliances, each of which is alluded to in the classical *shar'ī* sources, is the obligation of the husband; however, the disobedience of the wife including leaving the house without the husband's permission results in the loss of her maintenance right (with the exception of her dowry).[272] If the judge decides to dissolve the marriage upon the basis of the wife's disobedience, the husband is not responsible for upholding maintenance during the *'idda* period (with the exception of the wife's pregnancy, as Article 1109 establishes).[273]

The broad concept of *tamkīn* (possession), which entails complete obedience to the husband by the wife, secures the wife's rights, status and well-being within the marriage. This *shar'ī* concept functions as the opposite of disobedience. The existence of disobedience as an excuse for dissolution of marriage authorises the court to discipline the wife under a particular procedure rather than allowing the husband to take physical action against her. If preaching her righteousness, depriving her economic rights, and isolating her do not lead the

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[268] Khomeini, *A Clarification*, 314, and "Civil code of the Islamic Republic of Iran," Articles 1122 reads: "The following defects in man will give the woman the right to cancel the marriage. 1. Catration; 2. Impotency, provided he has not even once performed the marital act; 3. Amputation of the sexual organ to the extent that he is unable to perform his marital duty." and Article 1123 reads: "The following defects in a wife bring about the right for a man to cancel the marriage. 1.Protrusion of the womb (*qaran*); 2.Black leprosy (*juzam*); 3.Leprosy (*baras*); 4.Connection of the vaginal and anal passages (*ifza*); 5.Being crippled; 6.Being blind in both eyes."

[269] Aghajanian and Moghadas, "Correlates," 63.

[270] "Civil Code of the Islamic Republic of Iran," Articles 1111, and 1129 reads: "Where the husband refuses to pay maintenance (*nafaqa*) to his wife, and enforcement of a court judgement and inducing him to do so prove impossible, the wife can refer to the judge for divorce (*ṭalāq*) and the judge will compel the husband to divorce the wife. The same applies to a case where the husband is unable to provide maintenance."

[271] Mir-Hosseini, "*When a Woman's*," 117.

[272] Khomeini, *A Clarification*, 318.

[273] "Civil Code of the Islamic Republic of Iran," Article 1109 reads: "Cost of maintenance for a divorced wife during the *'idda* period, is undertaken by the husband unless the divorce has taken place because of disobedience. However, if the *'idda* rises from the cancellation of the marriage or a final divorce, the wife is not entitled to cost of maintenance, unless her pregnancy from the husband is proved in which case she will be entitled the cost of maintenance until her child is born."

woman to change her actions, the court, not the husband, has the right to punish her by annulling the marriage.[274] Khomeini maintains that a permanent wife should not leave the house without her husband's permission and should remain at the disposal of her husband. In the case of disobedience to the husband's will, the wife will be considered to be a sinner, and this will cause her to lose the right of clothing, housing, or sleeping. However, visiting her parents or receiving close female kins is not categorised under the concept of disobedience.[275] The requirement of the husband's permission unless there is a religious justification to leave the home is considered within the framework of disobedience. Tizro claims:

> "Payment of maintenance, regardless of the benefits, provides the context for men's authority over women and for the exercise of this power (even violence). Consequently, this enables them to impose restrictions that can affect women's freedom of movement, their search for employment and their submissiveness."[276]

The extensive concept of disobedience reflects the dynamic perception of society and the judge's ability to use judicial *'urf* that is inserted in classical *shar'ī* sources. The broad consideration of the husband's authority covers approval to leave the home, choosing the place of residence and control her outside activities.

A woman has a right to apply to the court to annul a forced marriage, but her guardian may obstruct the voiding process by demonstrating that he contracted the marriage with her best interest in mind. Taking into account the interest of bride as assessment criteria and leaving the concept of interest open make it possible for external factors and customary norms to assume a legal role during the dissolution.[277] When the guardians do not successfully demonstrate the best interest of an adult woman, the forced marriage loses its legal validity. The Civil Code seeks to protect the right of parties by invalidating forced, minor or non-consensual marriages. Article 1210 states:

> "No one, when reaching the age of majority, can be treated under disability with respect to insanity or immaturity unless his immaturity or insanity is proved. Additionally, the age of majority for boys is fifteen lunar years and for girls nine lunar years."[278]

To the same extent, as Article 1041 establishes, the validity of minor marriage that is undertaken with the permission of the guardian is subject to the demonstrated interest of the ward.[279] If the judge takes the view that the marriage is contrary to the interest of the minor bride, as defined in relation to evaluation criteria and local values, he has an option to annul the contract. If there is an arranged marriage and the minor girl is younger than nine years

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[274] Tizro, *Domestic Violence*, 95.
[275] Haeri, *Law of Desire*, 47.
[276] Tizro, *Domestic Violence*, 44.
[277] "Civil Code of the Islamic Republic of Iran," Article 1074 reads: "The provisions of the preceding Article will also be binding where the power was without any reservation and the attorney did not act according to the best interests of his principal."
[278] "Civil Code of the Islamic Republic of Iran," Article 1210.
[279] "Civil Code of the Islamic Republic of Iran," Article 1041 reads: "Marriage before the age of majority is prohibited. Note: Marriage before puberty by the permission of the guardian and on condition of taking into consideration the ward's interest is proper."

old, Khomeini states that the marriage is acceptable as long as intercourse does not occur (this intents to protect the physical health and development of minors).[280] If intercourse inflicts harm upon the minor wife, the parties will be separated by the judge.

Articles 1129 and 1130 establish that when the continuation of the marriage causes difficult and undesirable grievances, the concept of *ʿusr wa ḥarāj* (hardship and suffering), which is derived from Khomeini's *fatwā*, provides *sharʿī* grounds for separation.[281] Mir-Hosseini, in quoting Khomeini, states:

> "Question:…among these are some articles of the Civil Code, one of which pertains to divorce: if the continuation of marriage causes the wife hardship (*ʿusr wa ḥarāj*), she can demand divorce (*ṭalāq*) by recourse to the religious judge (*hakim-i sharʿ*) who, after ascertaining the matter, will compel the husband to divorce, and if he refuses, the judge himself will conduct the divorce… please state your esteemed opinion on these matters.
> Response: Caution demands that first, the husband be persuaded, or even compelled, to [pronounce] *ṭalāq*; if he does not, [then] with the permission of the judge, *ṭalāq* is effected; [but] there is a simpler way, [and] if I had the courage [I would have said it]."[282]

In removing the dispute from the supposedly peaceful atmosphere, the *fatwā* prioritises the general *sharʿī* principle of alienating hardship by curtailing the husband's right to control divorce. Alternatively, it evokes another general principle of no harm (*lā-ḍarar wa-lā ḍirār*) by authorising the wife to terminate the marriage through the option of *faskh* or *tafrīq*.[283] If the abuse or misconduct of the husband results in hardship and suffering for his wife, the judge can either compel the husband to divorce his wife or adjudicate the separation of marriage. In providing a *sharʿī* and straightforward rationale for women's divorce, the principle has obtained considerable prestige despite the fact that it remains susceptible to subjective interpretation. Mir-Hosseini maintains that in post-revolutionary Iran, the concept of hardship and suffering has been used to expand the limited rights that classical Jaʿfarī school had previously provided to women.[284] The 1982 attempt to identify tolerable situations to clarify the previously broad and vague concept of hardship in marriage. The absence of a definition forces the judge to take the initiative for deciding when and under what circumstances a divorce might be observed.[285] Although the maltreatment is used to provide

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[280] Khomeini, *A Clarification*, 318.
[281] "Civil Code of the Islamic Republic of Iran," Article 1129 reads "Where the husband refuses to pay maintenance (*nafaqa*) to his wife, and enforcement of a court judgement and inducing him to do so prove impossible, the wife can refer to the judge for divorce (*ṭalāq*) and the judge will compel the husband to divorce the wife. The same applies to a case where the husband is unable to provide maintenance." and Article 1130 reads: "The following, if established in the court, are instances of *ʿusr we ḥarāj*: 1. Husband's desertion of the marital home for at least six successive months or nine months in a year without reasonable excuse. 2. Husband's addiction to drugs or the impossibility to force him to quit during a period assessed by a doctor as necessary for him to quit. 3. Husband's final sentencing to imprisonment for five years or more. 4. Husband's beating or any kind of repeated maltreatment that is intolerable to the wife, given custom and her situation. 5. His affliction to an incurable or contagious disease or any other affliction disrupting marital life. The instances cited in this Article do not prevent the court from issuing a divorce on the basis of other instances where a wife's hardship is established in the court."
[282] Mir-Hosseini, "*When A Woman's*," 219.
[283] Ibid, 125-126.
[284] Ibid, 111.
[285] Ibid, 118.

reasonable grounds for divorce (through the application of the legal device of *talfīq*),[286] the scope of contentious provability of abusive acts, hardship and suffering reflect *'urf* whose outlines have been framed by classical *shar'ī* sources.

Current regulations that relate to the termination of marriage on behalf of a missing person are aligned with minor modifications with the classical Ja'farī school. The length of expiration time ranges from three to five years. Article 1019 of the Civil Code states:

> "The judgement of presumed death of a continuously absent person will be issued in a case where such a duration of time has elapsed from the date of the last news received as to his being alive that such a person would not ordinarily remain alive after that time."[287]

The Code authorises the wife to initiate *tafrīq* divorce on behalf of the absent husband. Article 1029 declares:

> "If a man has been absent for consecutive four years with unknown whereabouts, his wife can apply for a divorce. The judge will then grant the divorce subject to the stipulations of Article 1023."[288]

The waiting period for divorce on behalf of absent husband begins on the date when the divorce was certificated and runs parallel to the *'idda* of the demised husband.[289] If the continuously absent husband returns to his wife before the expiry of the *'idda* period, he has right of recourse; however, if the duration expires, he loses his right of revocation.[290] It should be noted that the majority of divorce cases mainly take place outside the court procedure and parties use the courts to register the divorce and obtain a certificate.[291] The courts mainly address themselves to cases in which there is no agreement either over the divorce or the settlement – relevant points of contention include custody, division of properties, maintenance payments, residence and unpaid debts. In cases where the wife petitions for divorce, the courts are mainly concerned with reconciling the couple. This is achieved by addressing the plaintiff to arbitration, strengthening the rights of the wife within the marriage or forcing the husband to make various promises (cease beating his wife, cease taking drugs or delegate the right of *ṭalāq* to his wife). The next sub-section will analyse two

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[286] Mir-Hosseini, "A Woman's," 221.
[287] "Civil Code of the Islamic Republic of Iran," Article 1019.
[288] "Civil Code of the Islamic Republic of Iran," Article 1023 reads: "In cases coming under Articles 1020, 1021, and 1022, the court can only issue the judgement of presumed death of a continuously absent person when a notice has been published for three consecutive times each with an interval of one month from the other in one of the local newspapers and one of highly circulated papers of Tehran inviting the persons who may have news of the man to convey their information to the court and when after the expiry of one year from the date of the first publication of this notice, the fact that the man is alive is not proved."
[289] "Civil Code of the Islamic Republic of Iran," Article 1156 reads: "The wife of a continuously absent husband whose whereabouts are unknown, if divorced by a judge, must observe 'idda for death, starting from the date in which the divorce was granted."
[290] "Civil Code of the Islamic Republic of Iran," Article 1030 reads: "If the continuously absent person returns after the occurrence of the divorce and before the expiry of the period of '*idda* time, he has right to cancel the divorce (*rujū'*) but if the '*idda* period has already expired, his right will be extinguished."
[291] Zar Rokh, "Marriage," 38, 39, and "Family Protection Law," Article 26 reads: "Registering divorce and other methods of annulling a marriage in official offices will only be permitted after the certificate of having irreconcilable differences or the related verdict is issued by court or the certificate of the Family counselling Center regarding stating the couple's agreement on divorce has been issues."

court cases in order to assess how the legal system works while bringing out the full extent of the overlap between classical *shar'ī* theory, *qānūnī* regulations and *'urfī* values.

4. Case Studies of Iranian Jurisprudence

a. Case Report 1 (The Lawsuit for Status of *Jahīziyya* after Divorce)[292]

Hazen, the plaintiff and Iranian wife, claimed that they were divorced approximately one year ago. The division of home appliances was completed in harmony with the recorded list that was written in the presence of the committee at the beginning of the marriage. However, the list did not include gold jewellery and specific home appliances because these items had been obtained during the marriage. The wife filed a suit with the intention of gaining ownership of these nonregistered items. Amir, the defendant and Iranian husband, confirmed the validity of the *jahīziyya* (gift)[293] record and the fact that it had been established with the creation of the marriage contract. However, he was reluctant to return the unregistered gold jewellery and home appliances (including a dishwasher and microwave LG) and did not deliver them to Hazen. Amir claimed that the possession and disposal of the items was ultimately a choice for him as the items had been obtained during the marriage with his investments.

After verifying of the documents and investigating the activities of the parties, the division of the property was completed in accordance with the *jahīziyya* list. Because the gold jewellery and recently acquired home appliances were not included in the list, the very subject was a matter of dispute and doubt. Although the jewellery was not considered within the scope of *jahīziyya* in accordance with prevalent *'urf,* the judge did not use this *'urfī* knowledge in his decision. The dominant idea underscored the fact that even if the items were proven to be on the list, they would not, in accordance with the *'urf* of the society, be considered under *jahīziyya*.

The judge maintained that the parties should receive their contributions in accordance with the recorded *jahīziyya* list. In instances where there was disagreement over the acquisition of properties during the marriage, the division should be determined in accordance with customary practices. Because the dispute of unregistered properties relating to gold jewellery and home appliances was not addressed directly in the lawsuit application, the court judgement does not cover these items. The fact that the plaintiff's lawyer confessed to the delivery of the initial items meant that the case has no standing. As a consequence, the court concluded that the claim for jewellery and home appliances was unfounded. However, if Hazen insists on her demand for gold items and home appliances, she might submit a

[292] See Appendix B: Case Number One (The Lawsuit for Status of *Jahīziyya* (Gift) after Divorce), 229.
[293] *Jahīziyya*: A list of things and gifts that were brought to marriage home by the bride and her relatives.

separate petition to the legal court. Because the duration of the marriage (approximately one year) was quite short, the judge maintained the hope that peaceful agreement between the spouses would enable their reconciliation. Despite this hope, the judge rendered a verdict that *shar'ī, qānūnī,* and *'urfī* components predominate over other elements. An analysis of the extent to which the judge applies classical *shar'ī* sources and the requirement for a particular methodology to connect the decision with classical sources provides a general insight into the structure of the contemporary legal system. A closer examination of the function of codification and the ways of addressing regulations will make it possible to sketch an outline of the court procedure. In addition to these points of engagement, the discussion will also touch upon how the verdict of the judge refers to *'urf* and the question of how he manipulates the decision in order to incorporate *'urf* and its changing significance within contemporary legal practices.

1. *Shar'ī* (Legal) Elements of the Decision

The *shar'ī* status of gift, ownership of gifted items, concept of *jahīziyya* and subsequent acquisitions are, in classical *shar'ī* sources, treated within the scope of '*āriya*, *'aṭiya, hiba* and *wadī'a*. In addressing itself to *hiba*'s reclamation by its previous owner, Al-Shahīd al-Awwal permits the reclamation of gifts after the completion of delivery – however, this is on the precondition that it has been neither changed nor used and the receiver is not among the kinship.[294] Al-Shahīd al-Thānī observes that:

> "[It is permissible to return the gift after delivering it as long as the recipient of the gift did not use it] in a way that damages the item or transfers its ownership or prevents it from returning back due to a birth request or change in the item such as shortening the dress, or carpentering the wood, or milling wheat (the last instance is based on the most predominant opinion). There is another opinion which maintains that any kind of disposal would prevent the gift from being returned. This is the apparent meaning of the text. With respect to the death of the receiver (e.g. whether this should be considered as the disposal of the item or not), there are two opinions: The disposal has not occurred on its own and therefore those proofs suggesting the permissibility of return will entail it. The second opinion maintains that the ownership is transferred from him by death, which is an action of God. This is a strong and preferred opinion compared to the first. The author has chosen that (opinion) in both of his works (namely, *al-Durūs* and *al-Sharḥ*). This is based on their mutual agreement over something equal or equable if the gift is unconditional. [Or the receiver is a blood relative] - the person should be a close blood relative even though they are not from those with whom marriage is not impermissible or the receiver is husband or the wife – this is based on a stronger opinion which derives from the authentic *ḥadīth* of Zurārah."[295]

Khomeini adds:

> "It is not permissible for the giver to take the gift back upon completing transfer of the item to the receiver who is among the relatives such as father, mother, children or other close family members. However, after the delivery of the possession by the giver to the individual who is not among the relatives, the giver may take the gift back as long as it has remained intact. Upon complete or particular damage of the gift with the absence of identical substitution, the item is not retrieved by the giver in accordance with customary practices. The most preponderant opinion states that the husband and wife are treated as non-relatives (*ajnabī*) but

[294] Al-Shahīd al-Awwal, *Al-Lum'a*, 90.
[295] Al-Shahīd al-Thānī, *Sharḥ al-Lum'a,* vol. 1, 611.

> as a precautionary measure, the impermissibility of reclamation of the gift is more appropriate. Likewise, it is impermissible for the giver to take back his gift in case the receiver compensated him for it (even if it was a small compensation)."[296]

The *fatwā*s establish that the decease of either the giver or receiver, the blood kinship, and the damage, loss or usage of the item make the gift irrevocable - gifts that fall outside of these categories are retrievable. In addition to these groups, a gift to the wife by the husband or vice-versa is engaged within the revocable group because the affinity relationship by marriage does not have the same effect as the blood relationship. Taking the opinions of Al-Shahīd al-Awwal, Al-Shahīd al-Thānī, and Khomeini into account, because the husband and wife are not considered to be relatives, it is permissible to take the gift back. The gifts of the husband to his wife are retrievable as long as the wife is neither among the relatives nor dead. However, the reclamation of the presents given by a husband to his wife is not a recommendable act from *shar'ī* viewpoint because of familial bonds between the spouses. Opinions establish that the husband has a right to take back his gift due to certainty of possession, but he cannot claim the jewellery gifted by different relatives because the identity of the gift's previous owner remains vague.

The *fatwā* that relates to the disposal of the wife's inheritance states that the compensation, dowry, *jahīziyya* and presents are all estates of the wife that fall inside her succession. The division of the wife's estate which comprises all mentioned properties was completed among her successors in accordance with the *shar'ī* regulations.[297] The *fatwā* highlights that the ownership of these monetary items belongs to the wife's inheritance and should be engaged in these terms rather than as an asset of the husband. Khamenei, in addressing the ownership of the gift, maintains that if the gift is intended for mutual usage by the spouses, possession belongs to both of them. If usage is particular to one spouse, ownership belongs to the individual who uses the gift.[298] Taking into account the *fatwā*, the wife may have complete ownership over the home appliances, but the status of jewellery arises as a source of dispute because of its multilateral usage. However, in the court case, the judge did not, in spite of the wife's claim, view the jewellery as falling under *jahīziyya* or possession of the wife. In addition, the judge stated that the decision pertaining to the jewellery should be conducted separately by giving credence to *'urfī* values of the people – this applies because there is a lacuna for the treatment of gift in the authoritative Jā'farī sources.

The previous owners of the jewellery (those given to the wife during the marriage ceremony) are uncertain since they were given by the various relatives. The husband and

[296] Abū al-Ḥasan al-Iṣfahānī, *Wasīle al-Najāh* (Qom: Mu'assaset Tanẓīm wa Nashr Āsāri Imām Khamanei, 2001), 524, 525.
[297] *Fatwā* No. 64680 in *Islam Quest,* accessed September 11, 2015, http://www.islamquest.net/fa/archive/question/fa64680.
[298] Ali Hosseini Khamenei, *Ajwabat al-Istiftā'āt* (Tehran: Fiqh Rūz, 2013), 398.

relatives, in operating as givers, delivered the possession by renouncing all dealings with the items and by placing them at the complete discretion of the wife. As a consequence, the husband cannot claim the absolute right of ownership over the jewellery except in relation to his own gifts. In addition, the wife might claim a complete disposal over the property because they were given to her directly during the marriage. It is important to emphasise that the claim that the possession of *jahīziyya* completely belongs to the wife depends on the *shar'ī* approved record; however, the claim that jewellery should be categorised within the concept of *jahīziyya* raises complexity as a result of the vagueness of previous possession of and the diversity of separate contributors.

2. *Qānūnī* (Statutory) Elements of the Decision

The direct references of court decisions to codified regulations reflect the statutory elements and their authority within the contemporary jurisprudence. The Civil Code establishes that item should belong to the giver before it is presented, and the receiver obtains full responsibility and ownership after the gift is delivered. Article 798 states:

> "A gift does not take place except with the acceptance of the receiver and with his taking possession of it, whether the done himself takes over the gift or whether his attorney does so: taking possession of the thing without the permission of the donor is of no effect."[299]

However, during disputes, the code allows the first owner of the item to take the gift back provided it still exists and has not been given to another by way of benefaction.[300] If the parties cancel the marriage before the actual marriage ceremony upon the basis that all or some part of the fixed dowry has been paid after obtaining the marriage promise, there is no compensation for losses upon ground of refusal either the side of man or woman. However, the parties are obliged to return the gifts, payments or equivalent value of gifts in instances where the present does not exist or remains in its original condition.[301] The divorce amendments moderated in 1983 entitle women to claim half of the wealth that her husband acquired during the marriage provided that the divorce is neither initiated by her nor caused

[299] "Civil Code of the Islamic Republic of Iran," Article 798.

[300] "Civil Code of the Islamic Republic of Iran," Article 803 reads: "After possession has been taken, also, the donor may take back his gift, provided it still exists, except in the following circumstances: 1. When the done is the father, the mother, or the children of the donee. 2.When the gift has been reciprocated and the reciprocated gift has been handed over. 3. When the thing given has passed out of the possession of the done or has become the object of the rights of another, whether by way of compulsion, as where the done has become a ward in consequence, or by way of choice, as when the thing given has been given as a pledge. 4.When a change has been made in the thing given."

[301] "Civil Code of the Islamic Republic of Iran," Article 1035 reads: "A promise of marriage does not create the matrimonial relation even though the whole or some of the dowry fixed for payment at the time of marriage between the two parties may have been paid. Either the man or the woman, therefore, can so long as the ceremonial act of marriage has not been pronounced, refuse the marriage and the other party cannot oblige her or him to contract the marriage or claim compensation for losses merely owing to the refusal."Article 1037 reads: "Every one of the betrothed parties can, if the proposed marriage is cancelled, claim the restitution of the presents given to the other party or to the parents for the marriage in question. If the presents do not exists in original, the claimant is entitled to ask for their value of the presents which are ordinarily preserved unless the same presents have been destroyed without any fault of the party who was in their possession." and Article 1038 reads: "The stipulation of the foregoing Article does not apply as far as it concerns the payment of equivalent value in a case where the proposed marriage does not take place in consequence of the death of one of the betrothed persons."

by any fault of hers.[302] Depending on the regulation, the wife may claim half of the jewellery as a mutual acquisition during the marriage, but she did not insist on this option because she was the one who initiated the divorce procedure. At the court paper, the judge did not put any reference from the codified regulations for the status of gift and the practice somewhat spot lights on the independent nature or *ijtihād* of judges during the court procedure.

All cases are subject to appeal within particularised limits upon the request of the parties and court decisions may be altered due to the judge's error or a lack of jurisdiction on the part of the court procedure. Upon encountering these circumstances, the case will be reinvestigated, and the court will issue a revised judgement that calls for justice to be dispensed in accordance with contemporary Iranian jurisprudence. During the appeal session of the court, the judge examines the appeal request of the plaintiff upon the grounds of principle and procedural cohesion – this applies rather than the rational analysis of the decision that derives from the authority provided by Article 358 of the Iran Code of Civil Procedure.[303] In finding no failure in the judgemental procedure, the Appeal Court comprehensibly rejected the reconsideration of the verdict.

3. *'Urfī* (Customary) Elements of the Decision

Because there are no certain rules and measures for the *jahīziyya* restrictions that extend the concept of *hiba*, its implementation has been left to the discretion of law enforcement forces who have been forced to draw upon *'urf*. The definition and status of gifts vary in accordance with local *'urf*, and there is inevitably reciprocal interplay between *'urfī* practices and *qānunī* regulations which in turn creates confusion. In defining 'gift', Hayland observes that gratuitous and voluntary transfers of property by a giver within his lifetime enriches another without compensation, a situation that can clearly be contrasted to the rationality of contractual exchange.[304] The status of gifts and associated practices have a long history in Iran culture. Matthee explains:

> "It is clear, though, that offering gifts was a conspicuous part of traditional, social and political life in Persia, including Safavid Persia, a society that set great store by a reputation of generosity and liberality…"[305]

Although the laws seek to regulate the gifts over time, their customary control results in the initiative being unsuccessful as it involves factors that extend far beyond the law. Endless tension largely derives from presents being enshrined in social *'urf* rather than the law.

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[302] Ziba Mir-Hosseini, "Family Law," *Encyclopedia Iranica*, vol. 9. (1999), accessed September 27, 2017, http://www.iranicaonline.org/articles/family-law.

[303] "Civil Code of the Islamic Republic of Iran," Article 358 reads: "Any person who should or could have been had a party to a suit and whose interests are affected by a judgement in the suit may, if he was not a party to such suit either in person or through a representative, file and opposition to such judgement at any time before such judgement is executed."

[304] Richard Hayland, *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009), 562.

[305] Rudi P. Matthee, "Gift Giving in the Safavid Period," *Encyclopedia Iranica*, vol. 10 (2001), 609, accessed January 17, 2018, http://www.iranicaonline.org/articles/gift-giving-iv.

The exchange of gifts between the families of bride and groom before and during the actual marriage ceremony has been identified as *'urfī* practice of the Iranians. The families and relatives offer their presents to the bride and groom after signing the legal marriage documents. The bride is showered by gifts and usually expensive jewellery. All that she receives is under her disposal and the husband has no right over these gifts after the marriage ceremony has been solemnised. The groom also receives presents from the bride's family – he will normally receive an expensive watch or other distinctively 'male' items such as a gold chain or lounge suite.[306] The payment of *sīrbahā* (price of milk) is transferred by the father of the groom to the father of the bride – this mainly takes the form of gold coins and it enables the bride's family to assemble the daughter's *jahīziyya*.[307] The pre-wedding activity of *jahīziyya* is a preparation by the bride's family which usually includes basic household appliances such as carpets, clothes, fabrics and furniture that are required by the newlywed couple to start their new lives in their new home.

The identification and evaluation of household utensils is known as *ṣūrat haghirī* (nuptial agreement) and it is signed by the elders and important members of both families during the pre-nuptial meeting. The wife's proof for the record of *jahīziyya* list include the accepted *ṣūrat haghirī* documents that refer to the wife's utensils. Because the bride's family prepares the *jahīziyya* component, the bride has complete ownership of the items. In return, the groom's family pays the expenses for the marriage reception and ceremony. Although *jahīziyya* in some cases has become a convenient symbol to convey the social status of the families, there is an initiative to share the expenses for the purchase of the *jahīziyya* between the parties within a rapidly urbanizing contemporary society. The concepts of the *jahīziyya, mahr* and *sīrbahā* along with the multitude of gifts which form the basis of conjugal wealth attest to the originality of Iranian marriage culture. All financial contributions ensure the independence of the married couple for a limited period of time whereas the dowry and bride's own possessions practically and theoretically guarantee the protected status of woman.[308] Both classical *shar'ī* sources and *qānunī* regulations enable the husband, subject to certain conditions, to reclaim his gifts.

The question of whether jewellery is considered within the category of *jahīziyya* or outside of it attests to a cognitive complexity for jurisprudence and results in complete

[306]Massoume Price, "Culture of Iran, Iranian Marriage Ceremony, Its History and Symbolism," *Iran Chamber Society*, December 2001, accessed December 15, 2001, http://www.iranchamber.com/culture/articles/iranian_marriage_ceremony.php.
[307] Christian Bromberger, "Gilān xiii. Kinship and Marriage," *Encyclopedia Iranica*, 2010, accessed February 19, 2017, http://www.iranicaonline.org/articles/gilan-xiii-kinship.
[308] Ibid.

changes at the outcome of the court. During the court decision, the judge underscores the usage of *'urf* as a tacit law for the determination of jewellery's position. He states:

> "The plaintiff is claiming the gold jewellery and home appliances including microwave LG and dishwasher as the rest of *jahīziyya*, putting aside the fact that jewellery customarily falls outside the category of *jahīziyya* and anyway is at the wife's disposal which the parties implicitly confirmed."

This provides a direct acknowledgement of *'urf* as a supplementary legal tool without mentioning to other *shar'ī* or *qānunī* sources. This attests to its *shar'ī* validity and usage in instances in which the classical *shar'ī* sources do not offer definite rulings. In addressing the word *'urf'* openly and without hesitation, the judge does not connect its usage to other secondary legal principles which include *maṣlaḥa* or *sīra 'uqalā'iyya*. He evidences a clear preference for '*urf* granting it a particular authority within the legal system which is privileged over *qānunī* laws. This clarifies that Iranian legal authorities are more flexible and reasonable in the usage of *'urf* during the legislative procedure to the point of accepting it as a legal mean. However, contemporary Saudi judges tenuously avoid making a direct reference to *'urf* and instead encompass customary practices within secondary *shar'ī* tools. It should be reiterated that although the judge addresses the *'urfī* view with the intention of explaining the legal status of gift, this appears to be an informative undertaking rather than the basis of the decision. As Ibrahim notes, one reason for referring to *'urf* within the jurisprudence is to provide preponderance to an opinion that has been supported by *'urf* over another.[309] However, the judge has proven to be reluctant to use *'urf* to protect the wife's right whether by proceeding to the appeal court or filing a new legal application. The judge's placing of jewellery outside of *jahīziyya* depending on *'urfī* knowledge might be seen as a warning to the wife not to proceed further in her claim or to attain a bilateral agreement with her husband outside of the court in order to maintain her expectations. *'Urfī* reference of judge functions as a caution for possible outcomes rather than being the source of the decision.

The decision indicates that judges make direct reference to *'urfī* or commonly accepted practices as a subsidiary source – this however depends upon the authority established by classical *shar'ī* sources. The direct use of *'urf* as an informative *shar'ī* maxim does not only make *'urf* discernible, perceptible and reliable for outsiders; it also serves to indicate the characteristic and partially independent nature of the Iranian legal system within the scope of codified regulations.

In instances of divorce, the reclamation of the gifts given at the outset of the marriage obtain validity from *shar'ī, qānunī,* and *'urfī* authorities. As Haeri notes, women could even

309 Ibrahim, "Customary Practices," 242.

be prevented from taking possession of those gifted items if they neglect to make a list and have it signed by their husbands.[310] Irrespective of the approval of the customary practice, the option of repossessing belongings may cause disputes if there is no definitive registration list or particular condition. Conceivably, the husband may act to prevent his wife from taking her contributions in the absence of record. The codified regulations also entitle the wife to request half the wealth acquired during marriage – however, this will only be forthcoming if she can demonstrate that the divorce was not litigated by her and cannot be attributed to her.[311] With regard to the current case, the wife cannot refer to this regulation – this is because she initiated the trial and offered a signed list of the gifts.

b. Case Report 2 (Visitation Arrangement and Custody of Minor)[312]

The plaintiff Raihana, an Iranian wife, claimed that the marriage had been certificated at Tehran registration office and that 300 golden coins had been established as the postponed dowry. They consummated the marriage and had two children (Sanan and Zahra). Raihana maintained that they were separated for nearly four years ago as a result of the husband's mistreatment which caused hardship and suffering. In addition, he also failed to pay his maintenance payment. She waived half of her dowry right as compensation in order to obtain Masood's consent for *khul'* divorce. Raihana asked for the issuance of a certificate, citing the impossibility of reconciliation, the registration of divorce, and the determination of the dowry amount and payment of its remaining part. She also asked the court to choose Sanan's (minor child) custodial parent and to arrange visitation time for the non-custodial parent.

The defendant Masood, the husband, confirmed the validity of the marriage and the fact that he had separated from his wife nearly four years previously – this empowered the judge to issue a certificate for the impossibility of reconciliation. The arbitrators could not succeed to reconcile between parties during the reconciliation sessions because of prevailing hardship and suffering endured by Raihana. Subsequent to the impossibility of reconciliation, Masood agreed to a *khul'* divorce in return for gaining 150 golden coins – this compensation was half of the dowry. During the court procedure, Masood did not offer any defence in order to prove his payment of either maintenance or the remaining part of the dowry. He requested that the court should provide custody of their child, Sanan, and arrange an appropriate time during which the non-custodial parent could meet with the child.

The continuation of disputes within the marriage would not be in the interest of the couple or provide a basis for reconciliation. The judge validated the initiated divorce by relinquishing 150 golden coins from the whole dowry – this was intended to obtain the

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[310] Haeri, "Divorce," 67.
[311] Mir-Hosseini, "*When a Woman's*," 115.
[312] See Appendix B: Case Number Two (The Lawsuit for Visitation Arrangements and Custody of a Minor), 230-231.

husband's agreement to terminate the marriage in the form of *khul'*. The remaining part of the dowry (150 golden coins) became a debt of Masood that should be paid to Raihana within a particular time. The couple had two daughters, but the eldest (Zahra) was outside of the custody arrangement because of her age (over 14) and marital status. Sanan who was over nine years of age had the freedom to choose in the presence of both parents with whom she wanted to live. The judge provided her financial and physical custody to the father although this depended on her choice. With regard to the meeting arrangement, Raihana obtained the right to spend 24 hours with her daughter each week from Thursday evening until Friday evening. Masood referred the decision to the appeal court in an effort to render the payment of half dowry invalid; however, the court rejected his reclamation of the judgement by stating that there was no objection to change the decision whether in procedural or substantive form. Masood's failure to provide any evidence of infringement or invalidity during the judgment procedure made the reasoning of the court both definite and respectable.

The case concisely demonstrates how the divorce happened outside of the court obtains legitimacy and its registration process along with custodial arrangements. The time for the court initiation overlaps with the conclusion of the mother's custodial period because of Sanan's age. The procedure and outcome of the case show how a wife renounces from her financial rights in order to keep the custody of the child. The hope of obtaining custodial alimony was somehow an obstacle that prevented the wife from advancing a financial claim and asking for an official divorce certificate. The position of '*urf* cannot be quickly categorized without first accounting for the differences between the guidelines of authoritative *shar'ī* sources, the efforts of the formal state and the predilections of the informal customs that pervade society. In a similar manner to the previous case, the analysis of the court focuses on the extent to which the judge's verdict reflects *shar'ī*, *qānunī* and '*urfī* factors.

1. *Shar'ī* (Legal) Elements of the Decision

The case is evaluated under the *khul'* divorce from a *shar'ī* perspective despite the fact that the intervention of the judge in the aftermath of divorce causes it to miscategorise as a *tafrīq* divorce. Because the classical Ja'farī sources authorised the wife to terminate the marriage by redeeming herself in exchange for the husband's consent, she accepted the payment of 150 golden coins which was equal to half of the postponed dowry. The *shar'ī* authorities entitle the wife to pursue divorce upon the grounds of hardship and difficulty caused by marital life. Khamanei's *fatwā* states:

> "If the husband is absent, if there is a dispute between the married couple and the husband does not agree with divorce or if continuing with this life entails difficulties and unbearable hardship for the wife who can no longer bear such a situation, the wife may refer her case to

> one of the representatives/attorneys of a *ḥākīm al-shar'* (*mujtahid*) who will recite the divorce formula after confirming the subject."[313]

Although, the concept of hardship and difficulty as being the main reason for separation was approved by the judge and conciliators, it was not held to be sufficient to protect the wife's financial rights after divorce.

Custody and guardianship are the two institutions in *sharīʻa* that relate to a parent's responsibilities. Custody is a domestic and internal protection of the minor child who is unable to meet his/her own elementary needs because of youth. It consists of financial and physical custody and related responsibilities include accommodation, care of the body, clothing, education, housing, provision of food and supervision. Guardianship is a social protection of the child that covers the totality of duties and rights. The respobsibilities are exercised by the legal representative of the minor with regard to personality and property. The dangerous situation or problematic circumstances in which the child might find him/herself will affect the regulation of custody and guardianship. In harmony with the classical Jaʻfarī school of law, mothers mainly retain physical custody – this includes breastfeeding minors until a particular age and caring for children. Additionally, the custodial mother obtains limited economic support from the father upon grounds of financial custody.[314] In referring to disputes that relate to the custody of the child, Al-Shahīd al-Awwal observes:

> "The mother has a preferable right to the custody of child especially for the son during the suckling period (2 years) provided that she is a free Muslim, willing and not an infidel. The mother also has a better title to the custody of her daughter until the child attains the age of seven. The father has right for the custody of son until his puberty and the daughter after seven years old."[315]

The classical Jaʻfarī ruling establishes that the mother has the right to retain custody of her daughter until she is seven years old; the right of custody then in accordance with her will transfers to the father. In establishing the lowest age-limit of physical custody for fathers, Khomeini states that the father of the daughter cannot separate her from her mother before the child reaches seven years-of-age – this however, is upon the condition that the mother is free, Muslim and sane.[316] The right of custody over the child ceases when they attain discretion and maturity; however, it is preferable for daughters not to leave their mother's custody until marriage. With regard to the best interest policy, the mother forfeits the right of custody upon remarrying a man who is not *maḥram* to the child. Depending on the principle of *maṣlaḥa*, a non-Muslim mother may not have custody of her Muslim children –this is because the prevailing expectation of the custodian is that the child will be raised within the

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[313] Khamanei's *Fatwā*: "Self-Divorce for Separated Women," in *The Office of the Supreme Leader,* accessed November 23, 2017, http://www.leader.ir/en/book/38.
[314] Tamadonfar, *Islamic Law*, 69.
[315] Al-Shahīd al-Awwal, *Al-Lumʻa*, 176-177.
[316] Khomeini, *A Clarification*, 323.

scope of Islamic teachings and values. While the elder daughter does not require any custodial protection because she is married, the youngest daughter needs custodial protection because of her age. As the case clearly illustrates, the consideration of the custodial age limit for girls who are nine-years-old (rather than seven) clearly demonstrates how contextual dynamics affect the general decisions. The contemporary legal arrangements such as the age restriction can exeed beyond limitations imposed by *sharʿī* rulings.

The classical *sharʿī* sources do not impose any restriction on a child meeting with the mother because the limitation disconnects the blood-tie between family members and relatives. However, the gender of the child is taken into account when arranging rules related to the visitation rights of the non-custodial parent – this is considered to be necessary to preserve the right of both parties. While a son has the freedom to see his father or mother whenever he wishes, a daughter cannot be allowed to leave the house for protection or safety reasons. Al-Ṭūsī states that the non-custodial parent of the daughter should, when visiting her, acknowledge prevailing circumstances within the society.[317] When the non-custodial mother visits her daughter in her accommodation, she should avoid prolonging her visit by not staying too long in the house and she should try to make it as brief as possible.[318] If either of them has health problems, the other side is obligated to make frequent visits irrespective of the child's gender. In the court case, there was no mention of medical problems, and the daughter is allowed to make regular weekly visitations to the non-custodial parent by spending one day with her. Although the court's decision is initially considered to contradict the classical *sharʿī* implementation (as it obliges the daughter to visit her mother), the prevailing circumstances and consideration of mother's situation requires to put slight moderations for the implementation of these rights.

2. *Qānūnī* (Statutory) Elements of the Decision

The contemporary regulations oblige the husband to apply to the court for a certificate of non-reconciliation before granting him an official divorce registration. The court is, in turn, required to exert all of the power within its jurisdiction in an effort to bring about a reconciliation between the couples.[319] Although there is a mutual divorce agreement between the couple, they are still advised to pursue the certificate indicating the impossibility of

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[317] Naqvi, *Shia Marriage*, 660.
[318] Ibid, 661.
[319] "Family Protection Law," Article 26 reads: "Registering divorce and other methods of annulling a marriage in official offices will only be permitted after the certificate of having irreconcilable differences or the related verdict issued by court or the certificate of the Family counselling Center regarding stating the couple's agreement on divorce has been issues." and Article 29 reads: "In all the cases requesting divorce other than in case of agreement of both parties on divorce, the court is responsible to, while trying to create peace and reconciliation, refer to the case for arbitration. Taking into account the opinions of the arbiters, the court will issue statement of irreconcilable differences or divorce verdict or if it agrees with the opinion, it will reject it providing reason."

reconciliation. This certificate will give the separation an official recognition. The main purpose of compulsion is to use all possible opportunities of conciliation and to protect the financial right of both parties – this is why the man is only permitted to register the divorce after his wife has been paid due dowry, household works or maintenance costs. It should be acknowledged that the judges sent parties to the reconciliation with hopes of continuing the marriage and also completing legal procedure in accordance with *qānunī* obligations. During the reconciliation session, the wife demonstrated that she was in a situation which threatened her life and safety and was reluctant to continue the marital life. In taking the interests of the parties into account, the judge referred to Article 1130. He states:

> "The wife can refer to the Islamic judge and request divorce upon demonstrating at the court that the continuation of the marriage causes difficult and undesirable conditions. The judge can compel the husband to divorce his wife for the sake of avoiding harm and difficulty. If this cannot be done, then the divorce will be made with the permission of the Islamic judge."[320]

The parties obtained the impossibility of conciliation certificate upon the grounds of the wife's hardship and harm. Arbitrators chosen by each side agreed with the opinion. The wife waived all her financial rights for the obtainment of divorce as compensation with the exception of half of the dowry. With the intent of categorising the case as irrevocable *khul'* divorce and legitimising the renunciation of 150 golden coins, the judge referred to Articles 1145[321] and 1146. He stated:

> "A *khul'* divorce occurs when the wife obtains a divorce owing to dislike of her husband, against property which she cedes to the husband. The property in question may consist of the original marriage portion, or the monetary equivalent thereof whether more or less than the marriage portion."[322]

The court's implementation procedure demonstrates the cooperation between Iranian *shar'ī* authorities and *qānunī* elements of the decision – this applies because the divorce is not recognized without the certificate.[323] The origins of codified rulings relevant to the issues are mainly derived from classical Ja'farī sources which do not leave any considerable ambiguities – this situation demonstrates the harmonious connection between the *qānunī* regulations and *shar'ī* rulings and also somehow wipes out the effect of *'urf*. It should be noted that the failure of registration or the lack of a reconciliation certificate does not affect the *shar'ī* validity of divorce – however they do incur a loss of legal recognition by the *qānunī* authorities and create a dual notion of legality. The jurisprudential registration procedure functioning as a social coordinative mechanism might therefore be viewed as

[320] "Civil Code of the Islamic Republic of Iran," Article 1130.
[321] "Civil Code of the Islamic Republic of Iran," Article 1145 reads: "A divorce is irrevocable in the following instances; 1-A divorce performed before the occurrence of matrimonial relations, 2-Divorce of a wife who is incapable of conception, 3-A divorce which a wife achieves by giving a consideration to her husband (*khul'*) and a divorce by mutual consent (*mubārāt*), as long as the wife does not demand the return of the consideration, 4-A third divorce, performed after three consecutive marriages (of the same parties) whether by mere renouncement of husband's will to divorce his wife or by a new marriage between the two parties."
[322] "Civil Code of the Islamic Republic of Iran," Article 1146.
[323] Ervand Abraham, *Iran Between Two revolutions* (New Jersey: Princeton University Press, 1982), 450-473.

protecting balance between *qānunī* (official) and *shar'ī* (religious) elements of the jurisprudence.

One of the wife's claims was that the husband had failed to pay maintenance and she was entitled to ask for it. Article 1111 refers to issues of maintenance and it says:

> ("The wife can refer to the court if her husband refuses to provide for her maintenance. In such a case, the court will fix the amount and will compel the husband to pay it.)"[324]

However, the judge asked the wife to bring proof that demonstrated his non-payment of maintenance. The practice or the functionality of the maintenance ruling at the court procedure created ambiguity because of its connection with the discretionary power of the judge and the reliability of evidence submitted by the wife. The judge did not therefore engage with the accusation relating to non-payment of maintenance as there was a lack of proofs.

In embracing the classical Ja'farī approach on the issue of *ḥaḍāna* (custody), the Iranian Civil Code has sought to maintain the privileged status of the mother in physical custody of the minors. The legal system has, since the establishment of the Republic, given the mothers physical custody of girls once they reach seven years-of-age and boys once they reach two years-of-age.[325] In 2003, the age of custodial transfer for boys was increased to seven – at this time custody may revert to the father unless the court determines otherwise. Once the age of maturity is reached 15 lunar years (14 years 7 months) for boys and 9 lunar years (8 years and 9 months) for girls, a child cannot be forced to visit the non-custodial parent. Although there is theoretically an age-based arrangement for the custody, the practical implementation of regulations or the outcome of the disputes may move in different directions – this can occur through the influence of judicial *'urf* or the interpretation of the judges.[326]

With regard to the issue of custody, the regulatory department of the Iranian Ministry of Justice has provided a statement which specifies that it is an inherent right of the child and that this declaration prioritises the interests of the child rather than the parents in disputes.[327] Meanwhile, the laws also allow the court to disregard the regulations relating to age-limits and the judge, in particular or necessary circumstances, may issue his decision with reference to the principle of best interest. After compiling the age-limit, a judge may award the mother continued custody of her children. This can be undertaken if it is in their best interest or if it

[324] "Civil Code of the Islamic Republic of Iran," Article 1111.
[325] *Knowing Our Rights*, 338.
[326] Ibid, 339.
[327] "Family Protection Law," Article 39 reads: "If the court decides that the agreement regarding the visitation, custody, up keeping and other matter related to children are contrary to the children's interest and welfare or in the cases where the person responsible for having custody refuses to do the duties prescribed to custody holders or prevents the visitation between the child he/she has custody of with those who have visitation rights, the court can make any decision that has the interest of the child in mind including transferring custody to someone else or appointing a supervisor with the prescribed scope of responsibilities and other such decisions." and Yassari et al., *Parental Care*, 344.

has the approval of the disputing parties according to Article 40 of the Family Protection Law.[328] In cases of custodial death, the current jurisprudence grants the other parent with custodial authority and does not seek to identify a custodian among paternal male relatives. The father or mother are entitled, during the *ḥaḍāna* period, to exclude all maternal and paternal relatives to raise the child. This opinion clearly diverges from the contemporary Saudi jurisprudence which prioritises paternal male relatives.[329] Yassari et al notes that in Iran's court practice, judges attempt to ensure that a female relative of the father will be incorporated into the day-to-care of the child – this however is not a legal requirement.[330] Thus, while there is no requirement for the father to be assisted by a woman, the accessibility of female companionship is considered as an effective criterion.

In addressing the issue of child visitation rights, Article 1174 states:

> "If the parents of the child do not live in the same house owing to divorce or any other reason, either of the parents who is not in charge of custody of the child has the right to visit the child. Determination of the time and place of visit and other particulars will be decided by the court if there is any dispute between the parents about them."[331]

The Civil Code secures the right of visitation by the non-custodial parent. In addition, it highlights that the court should provide the time and place of visitation if there is no parental agreement. Preventing the non-custodial parent from meeting the child and failing to establish the conditions in which they meet are offensive acts that may result in imprisonment until compliance. In addressing calendars and weekly arrangements, Article 17 of the Constitution of the Islamic Republic of Iran states:

> "The official calendar of the country takes its point of departure the migration of the Prophet of Islam. Both the solar and lunar Islamic calendars are recognised, but government offices will function according to the solar calendar. The official weekly holiday is Friday."[332]

The combination of these two articles in order to implement visitation rulings sketches a broader outline and takes the rights of the parties into account. These Articles provide substantial discretion to the judge of the court when determining the specific duration. During the court case, the judge gave his decision upon the visitation period without referring to the aforementioned Articles. However, particular cases were referenced that help to ascertain visitation arrangements for the children. The judges state:

> "…According to Article 1174 of the Civil Code, the plaintiff has the right to see their mutual child every week for a period of 24 hours from 4 o'clock on Thursday until 4 o'clock on Friday. The defendant was also required to provide the place for this meeting."[333]

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[328] "Family Protection Law," Article 40 reads: "A child cannot be taken out of his place of residence that was agreed upon by both parties, or his place of residence before the divorce took place or sent outside the country without the approval of his/her guardian, mother or the person who has custody and is responsible for upkeep of the child unless it is deemed by court to be within the interest and welfare of the child and within the scope of visitation rights by those who have such rights by."

[329] Yassari et al., *Parental Care*, 153.

[330] Ibid, 121, 339.

[331] "Civil Code of the Islamic Republic of Iran," Article 1174.

[332] "The Constitution of the Islamic Republic of Iran," Article 17.

[333] See Appendix B: Case Number Four (The Lawsuit for Visitation Right and Time for the non-Custodial Parent), 233.

It might be claimed that when determining non-custodial visitation times, the judge uses his discretion with the assistance of *qānunī* regulations by choosing 24 hours from Thursday to Friday. The intertwining of *shar'ī* rulings and *qānunī* regulations helps to create a dominant *'urf* for the arrangement of visitation rights. Through implementation and repeated reference, this combination has gained considerable value and utility.

3. *'Urfī* (Customary) Elements of the Decision

The definitive regulations that take their authenticity and implication from classical Ja'farī sources oblige the judge to accept the termination of marriage due to hardship and difficulty that makes the marital life arduous for the parties. The judges have complete freedom to release women from a brutal marriage despite the disapproval of the husband for divorce. In addition, the visitation right of the non-custodial parent to see the children is a *shar'ī* and *qānunī* right of the parents that does not entail any mitigation. The regulations even put forward codified rulings provide a broad outline for the implementation of particular rulings without putting precise or exact prescriptions in place. In implementing *shar'ī* and *qānunī* prescribed obligations, the judge refers to the principles of Jā'farī school and his own reason (*'aql)* in choosing the most appropriate and pragmatic solution that is aligned with the local context. Ibrahim's opinion on legal pluralism notes that while pluralism suggests multiplicity, legal practice is inherently predisposed to narrow in specific conceptions of *maṣlaḥa*. This course of action intends to lessen occasional tensions between judicial practice and rules put in place by author-jurists.[334]

The fragile situation of nonworking women continues to deteriorate after the divorce because the majority of these women, as the case reiterates, forgive their financial rights to obtain consent for divorce. Yassari et al's research notes the court proceeding that demonstrates how mothers would forfeit their dowry to retain custody of their children beyond the legal age or would forgo it in order to exit the marriage.[335] In the case, although the couple had unofficially separated previously, the wife asked, almost exactly four years later, for payment of her financial rights after losing the custody of her daughter. It can be assumed that, during the initial procedure, she was reluctant to go to the court in order to obtain her financial right because she feared losing physical custody of the daughter. However, after forfeiting the right of physical custody because of the daughter's age, there was no impediment that restricted the wife from applying for due payments and obtaining a legal divorce certificate. The hopes that possibility to retain physical custody of the children

[334] Ibrahim, "Customary Practices," 228.
[335] Yassari et al., *Parental Care,* 335.

and obtain the consent of the husband for divorce were strong hindrances that constrained the wife from the full exercise of her financial rights.

The provision of complete personal maintenance for a wife is incumbent on her husband irrespective of her level of personal income.[336] This understanding can be traced back to *shar'ī* doctrine which advances the *'urfī* proposition that male members of society are the breadwinners of the house. The husband's failure to fulfil his financial responsibilities was part of the case that the wife presented to the court. The decision states:

> "Meanwhile, the defendant did not effectively defend himself at the court hearing and no kind of evidence or documents was presented to indicate that the wife did not receive payment of maintenance during this period."

'Urfī norms and *shar'ī* proofs are the two main means through which the maintenance accusation of the wife can be accepted. As the analysis of *qānunī* elements demonstrate the wife could not bring any official evidence in support of her argument such as bank statements or rent payments made by herself. Using social *'urf* to prove the non-performance of financial responsibilities – the prevalent *'urf* of the local area establishes that the claim will be either approvable or dismissible. The judge took customary assumptions into account by supporting them with the *qānunī* regulations – this applied because *'urfī* practices within society do not entitle the woman to advance any kind of claim. Mir-Hosseini maintains that *sharī'a* accepts the principle of unilateral protection among spouses, but ultimately left its form to be shaped by prevalent acts of people – this can be seen in the concept of maintenance payment.[337] It might be claimed that Ibrahim's concept of judicial *'urf* proceeds through jurisprudence with the discretion and interpretation of the judge overseeing the trial procedure.[338] The forms of financial protection along with its application and context are alterable, relative and subjects to demands of time and place – this is the *shar'ī* base which the judge applies. While the judge's verdict highlighted the failure of the husband's defence against this accusation, he ultimately dismissed the claim upon the basis of *'urfī* values as opposed to the *qānunī* rulings.

The woman who exercises custody must not marry someone who would fall outside the required scope of her children's kinship network. The legal system does not allow a judge to make an exception to this condition even if doing so supports the interests of the child. The loss of custody for a remarried custodial mother depends on particular assumptions which include; the consideration of *maḥram* rules for the welfare of the minor child, the incapacity

[336] "Family Protection Law," Article 32 reads: "When issuing a divorce order or a note stating irreconcilable differences, the court will make decisions for the fate of the dowry, mihriyyih, alimony for the wife, children and carrying and manner of upkeep of the child and its cost and method of payment. Furthermore, the court will decide the time, manner and place of visitation with father, mother and other relatives, having in the mind the emotional dependency and interest of the child. Registering divorce is dependent upon achieving the aforementioned rights, other than when the wife agrees, or a definite order of insolvency or payment arrangement has been issued. In any case, if the wife agrees to be divorce without ensuring the aforementioned rights, she can request these rights through said court proceedings after the divorce is registered."

[337] Mir-Hosseini, *Islam and Gender*, 270.

[338] Ibrahim, "Customary Practices," 226, 257.

of the stepfather to extend care or tolerance, and the priority of the wife's duties towards her new husband. The court case demonstrates the judge's perspective and the manner in which he used his creation to favour the husband – this was shown by the fact that he did not extend the physical custody of the mother even though she remained unmarried. Thus, the implementation procedure invites interpretation, flexibility, and responsiveness to local conditions and renders judges as active participants.

Selection of 24 four hours from Thursday until Friday for meeting the child exemplifies the procedural change at the court implementation and illustrates the coordination between the *shar'ī* protected rights, *qānunī* prescribed rulings and collectively constructed *'urf* –that the day carries. In a significant number of cases, the judges mainly intend to select the mentioned time period for the visitation of the child. This applies unless the non-custodial parent lives in a different city that is a significant distance from the child's location with the consequence that daily visits are impeded. In attending to the implementation of *shar'ī* regulation in general and selecting days and times in particular, the judge used *'urf* without explicitly acknowledging it. This was necessary because there was no provision related to time and date in the classical Jā'farī sources. The judge ultimately applied *'urf* in an allusive manner but managed to refer implicitly by invoking officially recognised *shar'ī* principles such as *maṣlaḥa*.[339]

The overlap of *'urf,* gender and social justice within the legal construction of the family and their use to sustain this patrilineal structure enable the judge to produce a framework that guides his decision. A customarily supported patriarchal structure might be viewed as a general outline of constituted rules because there was no obstacle which impeded the judge from providing custody to the mother. The policies of contemporary Iranian jurisprudence that relate to the marriage, divorce, gender issues and roles restrict the work options for the divorcees. The *shar'ī* principle of *lā ḍarar wa-lā ḍirār* and its protectionist interpretation by the judges (that aims to avoid from moral corruption) somehow help to create a unique form of legal implementation. The living arrangements, in particular the residence of the ex-wife after divorce, clearly vary in accordance with the economic dependence and social status of the women.[340] If a child is a factor within the equation, the husband's financial support for the wife continues. This is due to the mother's prioritisation in the physical custody of minor children and the fact that the majority of divorced women prefer to live in their homes with maintenance being provided by the ex-husband until the

[339] Mumisa, *Islamic Law*, 137-143.
[340] Aghajanian and Moghadas, "Correlates," 66.

children reach prescribed ages.[341] Younger women in particular those with no children either return to their parental households or live with their relatives when they do not have any source of income. Older divorced women who have mature and working children live as members of household in their children's home. With regard to the case, the wife retained the custody of the daughter for four years and received financial assistance during this period, she lost alimony soon after losing custody of the child. It might be said that the judges enter into *'urfī* practices through the principles of *aṣl al-barā'a*, *maṣlaḥa* and *sīra 'uqalā'iyya.* This context enables judges to achieve a synthesis between rational considerations and classical methodologies with this feature even being evidenced in codified systems. While it is important to acknowledge the centrality of codification and its specific derivation from the classical Jā'farī understanding, lacunas within the codified law authorise the judges and legal theorists to work towards an alternative mechanism. These alternative options will enable *'urfī* practices to pave the way towards additional or secondary *shar'ī* principles.

Conclusion

The Iranian jurisprudence does not only attempt to raise awareness of lawfulness and the potential utility of regulations; it also aims to facilitate the official understanding of legal procedure. The demands for the state to intervene within the jurisprudential system may result in the state advancing requirements to the parties and then seeking to minimize the influence of customary gaps. The detailed listing of women's marriage duties and divorce rights are very much a construction of the codes and the family concept constitutes elements structured by the modern patriarchal state. This circumstance, rather than a re-articulation of classical approaches, is the preponderant theme.

It will be noted that the assertion that the codified Iranian legal system purely derives from *sharī'a* is a misrepresentation that insufficiently acknowledges the infusion of external customary and modern values. Although occasional legislative attempts have been made to set upper limits on the dowry, the enforcement of the regulation has been complicated by the influence of established *'urf* – this applies even in instances where the issue of dowry and associated marriage costs continue to be perceived by the authorities as a social challenge. In instances where a codified *qānunī* law and classical *shar'ī* sources permit the application of local '*urf,* the invisible role of *'urf* presents itself in full perspective – this applies because social behaviour tends to follow customary limits rather than regulated laws. In a general sense, the codified *qānunī* system or the textual construction have little impact upon marriage

[341] "Family Protection Law," Article 42 reads: "If the woman or other individuals who must be provided with alimony request, the court will decide on the amount and manner of paying for alimony going forward." and Article 43 reads: "Payment of wife's alimony and making payment for the upkeep expenses and alimony of the child takes precedence over all other expenses."

practices which are much more clearly indebted to internal customary assistance. The indirect usage of *'urf* authorizes judges to issue their verdict by interpreting *shar'ī* principles by virtue of their *'urfī* knowledge.

The critics of the government's legal system focus upon its failure to counter the cultural onslaught and frequently emphasise its dependence on extra-legal means or interpretations. The interpretative deviation aims to secure the public's compliance with what the judges perceive to be appropriate *shar'ī* rulings. Legislation pertaining to personal status in general and family law in particular often remains, in keeping with the principles of *sharī'a*, the sole area controlled by the *'ulamā'*. The area is comprised of both commutable rulings and immutable principles that might be subject to reform and transformation in harmony with contemporary conditions. Culturally, religiously and socially shaped gender relations and roles have been promoted through regulations on children, custody, divorce and marriage which seek to preserve the authenticity of national identity.[342] An ideal model of a woman is asserted within the form of the daughter, mother or wife with each role being privileged over an active position in social life.

The modified regulations put in place during Iran's codification process concerned itself with outlining borders in accordance with *shar'ī* principles. In focusing on personal matters pertaining to marriage, divorce, custody, and division of properties, the code seeks to sketch a guideline that is compatible with the general principles of *sharī'a*. The rationale that underpins this approach is that the judge broadly addresses codified regulations in an effort to find what he needs. Upon outlining a basic framework that underscores the main principles of jurisprudence, he refers to means of deduction through sources of reason taking care not to violate the foundations of *sharī'a.* Encountering the use of *'urf* in classical *shar'ī* sources, the judge attempts to adjudicate in harmony with *'urf.* He does not hesitate to directly refer to *'urf*, a course of action which is clearly justified by the fact that the first court case acknowledges the legal status of jewellery and its link with gift. It should be noted that although the judge informed court participants on the existence of different solution rooted within *'urf,* he somehow neglected to resolve the dispute by referring to *'urf.* He, instead, advised them to submit another legal application which did not give credence to the *'urf.* However, in the absence of applicable classical ruling, the utility of *'urf* becomes more implicit and latent, and assumes a different role in relation to other *shar'ī* tools. Although the second court case refers to customary parameters as a legal basis for the determination of *'usr wa ḥarāj* (difficulty and hardship), the concept of harm is justified with reference to the *maṣlaḥa* of the parties rather than a specific *'urf.* Prevalent assumptions or repetitive

[342] Boe, *Family Law*, 184.

practices are also used to arrange the visitation time and method - but *'urf* is not explicitly acknowledged at any point as a *shar'ī* principle.

The interpretation of classical rulings or implementation of the judgement frequently changes in place and time and gives rise to divergent opinions within the *shar'ī* schools. The insertion of explicit or implicit *'urf* into the legal system along with the consideration of public interest both put in place essential commutative parameters in the enforcement procedure; furthermore, they anticipate a situation in which deduction and interpretation are aligned with ideological currents within the society. The judgement must not only be *shar'ī*, but should also be culturally acceptable – this is particularly important because cultural norms may present themselves as additional and non-judicial obstacles to the implementation of the decision. The analysis of the point at which the *'urf* came to function as a supplementary principle along with its more general influence upon the judgement procedure promises to provide considerable insight into the more flexible and practical components of the *shar'ī* system. In order to establish a clear distinction between *'urf* and *sharī'a*, it is first necessary to ask how the judge directly or indirectly implemented customary elements when interpreting *qānunī* regulations.

CONCLUSION

The relatively conservative and protectionist approach that Saudi authorities have adopted towards non-Islamic customs can be clearly identified with reference to the *sharʻī* concept of *bidʻa* (innovation). The transformation of the principle from theory into practice through state control has contributed to maintain a rejective stance against various customs. The broad interpretation of the term has encouraged *ʻulamā'* (religious scholars) and *'umarā'* (rulers) to adopt a firm stance in opposition to novel innovations or recent developments along with imported non-Arab and non-Saudi practices. The strategy of Saudi scholars has encompassed the prohibition of greater harm, the protection of religious purity, the establishment of distinctive dress codes, and social life. This approach has encouraged contemporary legal scholars to act reluctantly when embracing legal alterations, irrespective of the *sharʻī* principle of changing time and place. The conservative *sharʻī* strategy has also led them to reject celebrations and practices considered to be 'non-Islamic'. In attempting to respect Islamic tradition, Saudi scholars have internalised a strong belief and have emphasised the need to keep the Arabian Peninsula free from non-Muslims and other religious traditions – the rejection of the Nowrūz celebrations (refer to Chapter One) being one case in point.

The regime's insistence upon retaining a rigid Islamic cultural identity through monopolism and dismissal of an established nationalistic consciousness has not produced the expected results in Iran. Khatami's political agenda and reformist strategies actively sought to minimise government interference in public life and also attempted to initiate a liberalisation of social relations. In acknowledging the dangers of unilateral cultural and political tendencies, the regime shifted its strict policy. In operating within the confines of the *sharʻī* worldview, Iranian scholars adopted a moderate, respectful and tolerant stance towards non-Islamic Iranian cultures, historical heritage and nationalistic sentiments. The strategy has authorised Iranian scholars to embrace peculiar customary parameters in situations of complexity – one example was provided by the *fatwā*s of Nowrūz celebration. The customary and non-Islamic celebration of Nowrūz was justified with reference to the *ḥadīth* of *imām* Jaʻfar and *sharʻī* principles, along with the bridge between classical Islamic events and Nowrūz celebrations. It should be noted that the *fatwā*s of Iranian scholars do not provide absolute permission to the un-Islamic elements of the celebration such as fire circles. Therefore, the scholars partially reject un-Islamic aspects of the activities upon the basis of national unity. In contrast, the *fatwā*s of Saudi scholars adopt a more conservative and protectionist stance in relation to the un-Islamic celebrations by applying the concept of

bid'a. While Saudi scholars are generally insensitive to other historical and cultural experiences, Iranian scholars evidence a greater receptiveness to a diverse range of cultural and historical backgrounds.

The *sharʻī* principle of *sadd al-dharā'iʻ* has been construed with reference to a preservationist attitude towards gender issues that derives from deeper patriarchal hierarchies embedded within Saudi Arabia. To the same extent, if the negative results of a practice are equivalent or greater than the benefits during the evaluation procedure, prohibition takes precedence over permission within the Wahhābī legal approach. The transfer of opinion into practice has resulted in foreclosing modern innovations such as women driving by labelling them unlawful. In contrast to the contemporary Saudi *'ulamā'*, Iranian *'ulamā'* prioritise positive consequences over negative results. The flexible and non-conservative interpretation which was set out in Chapter One enables women to drive, but this flexibility does not extend to the riding of bicycles or motor cycles. Pragmatic eclecticism or the selection of less stringent juristic views in order to reflect variations of place and time enables scholars of both countries to invoke widespread *'urf*. The pragmatic eclecticism method explains the clear difference between Iran (which is more moderate and tolerant in relation to cultural and gender-related issues) and Saudi Arabia (which is more protective with regard to such issues).

The chronological alteration of *'urf* within the *sharʻī* systems brings out the organic link between theory and practice. The *sharʻī* foundations of the concept of *'urf* along with the transformation of its *sharʻī* status (from a semi-independent to dependent style) in the Ḥanbalī and Jaʻfarī schools can be categorised with reference to the three diachronic analyses set out in Chapter Two (Table 1). The first genre contains the *fatwā*s of Ibn Ḥanbal that were intended to guide the followers of the Ḥanbalī school; in contrast, the *fatwā*s of *imām*s within the Jaʻfarī school that were intended to guide the followers of the Jaʻfarī school. The distinctive nature of these *fatwā*s is that they were issued with reference to direct *'urf* and using *'urf* as a *sharʻī* principle. With regard to the f*atwā*s, locally known expressions were formalised as verbal custom (*'urf qawlī*) and their legitimacy was recognised by Ibn Ḥanbal to be the most useable *sharʻī* type. The *sharʻī* concept of actual custom (*'urf fiʻlī*) is understood to relate to recurrent practices undertaken by the general public and its acceptability tended to be more dominant during the initial era of the Jaʻfarī school. In this respect, it can be compared with the usage of *'urf qawlī* within the Ḥanbalī school during the foundational period of *madhhab*s.

The second type of proof relates to *sharʻī* statements that are pertinent to the approval of *'urf* as a *sharʻī* principle along with the *fatwā*s that renowned Ḥanbalī and Jaʻfarī scholars

have provided by invoking explicit reference to *‘urf*. The type both offers a theoretical explanation and also demonstrates how *‘urf* can be applied during the implementation procedure. The *shar‘ī* validity of these two types are mainly accepted by scholars and they generally take on the appearance of a semi-independent form within the *shar‘ī* theory and practice. Amongst the contemporary Saudis, there is a widespread tendency to use the indirect dependent style for *aḥkām*s of judges and direct semi-independent style for the *fatwā*s of scholars. In contrast, Iranian scholars remain receptive to all styles of *‘urf* when there is an absence of classical *shar‘ī* sources.

<table>
<tr><th rowspan="2">Usage Style</th><th rowspan="2">Prevalence</th><th colspan="2">Validity or Proofs</th></tr>
<tr><th>Ḥanbalī School</th><th>Ja‘farī School</th></tr>
<tr><td rowspan="2">Legal ‘Urf
Valid,
Lawful,
Direct,
Explicit,
Definite,
Semi-Independent</td><td rowspan="2">Saudi Arabia
Iran</td><td>Fatwās of Ibn Ḥanbal with ‘urf</td><td>Fatwās of imāms with ‘urf</td></tr>
<tr><td>Direct statements and fatwās of famous scholars</td><td>Direct statements and fatwās of famous scholars</td></tr>
<tr><td>Judicial ‘Urf
Indirect,
Implicit,
Indefinite,
Dependent</td><td>Saudi Arabia
Iran</td><td>Consideration of ‘urf with legal maxim
• Maṣlaḥa
• Istiḥsān
• Istiṣḥāb
• Sadd al-dharā’ī‘
• Ḍarūra
• Lā ḍarar wa-lā ḍirār
• Taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān
• ’Amr bi al-ma‘rūf wa nahy ‘an al-munkar</td><td>Consideration of ‘urf with legal maxim
• ‘Aql
• Maṣlaḥa
• Istiḥsān
• Aṣl al-barā’a
• Sīra ‘uqalā’iyya
• Sīra mutasharri‘a
• Iḥtiyaṭ
• Ḍarūra
• Takhyīr
• Lā ḍarar wa-lā ḍirār
• Taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān
• ’Amr bi al-ma‘rūf wa nahy ‘an al-munkar</td></tr>
</table>

Table 1

The third source of validity relates to the extent of customary consideration during the application of various *shar‘ī* principles – this is one of the reasons which helps to explain the growth of sects and the diversity of rulings. The third type has a clear dependency upon secondary *shar‘ī* principles and is not addressed as a source of decision. *‘Urf* obliquely affects the outcome of the court and the interpretation of the judge through judicial *‘urf*. This

is a widely dispersed form of customary usage within the *aḥkām*s that were issued by the contemporary judges in both countries.

There are two main styles that relate to the application of *'urf* within the *shar'ī* sphere – these are the direct and explicit reference (with a semi-independent nature) and the indirect and implicit reference (with a dependent nature). The direct reference is not entirely independent because the *'urf* is closely scrutinised in order to ensure its compatibility with *sharī'a*. Although some scholars claim that early generations of Muslims did not distinguish between the terms *'amal* and *mar'ūf* when addressing *'urf*, there is an obvious gap between the textual and interpretative usage of *'urf* in the contemporary *shar'ī* methodologies. The scholars do not avoid directly referring to *'urf* when identifying a classical *shar'ī* solution that has been provided by customary references. Saudi scholars tend to use this type more frequently in their *fatwā*s which is attributable to the *'ulamā*'s strict adherence to classical *shar'ī* texts. Iranian scholars and judges also address this type of usage in their *fatwā*s and *aḥkām*s, an application which can be clearly distinguished from the Saudi example, where it is the only approved form of referring to *'urf* in the *fatwā*s.

Upon failing to find a customary solution in the classical *shar'ī* sources, the judges do not exoterically address *'urf* in their statements and this is the second style of applying *'urf* or judicial custom. The *shar'ī* principles of Ḥanbalī school inclduding public interest (*istiḥsān*), blocking the means (*sadd al-dharā'i'*), presumption of continuity (*istiṣḥāb*), necessity (*ḍarūra*), prevention of harm (*lā ḍarar wa-lā ḍirār*), enjoin good and forbid evil (*'amr bi al-ma'rūf wa nahy 'an al-munkar*), and changing rulings upon the change in time and place (*taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān*) establish the basis upon which *'urf* can be indirectly applied by the contemporary Saudi scholars and judges. This type is also widely used by the contemporary Iranian scholars and judges along with concepts of public interest (*istiḥsān*), rational practice (*sīra 'uqalā'iyya*), accepted purity or exemption (*aṣl al-barā'a*), prudence (*iḥtiyaṭ*), option (*takhyīr*), continuance (*istiṣḥāb*), necessity (*ḍarūra*), varying time and place (*taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān*), and enjoin good and forbid evil (*'amr bi al-ma'rūf wa nahy 'an al-munkar*). The application of these principles within the classical Ḥanbalī and Ja'farī sources enables *'urf* to be indirectly infused into the jurisprudence. In addition, the methodology of the Ja'farī school privileges reason (*'aql*) as a *shar'ī* principle and this authorises the scholars to refer to indirect and dependent *'urf* when there is no textual source. The freedom to use indirect *'urf* in non-textual disputes and the *shar'ī* validity of these decisions help to explain the legal diversity between the countries.

The implicit use of *'urf* under the guidance of secondary *shar'ī* principles empowers the decision of the judge and increases the authenticity and reliability of his *ḥukm* at the

court. This indirect style has maintained its strength within the codified system of Iran and the non-codified system of Saudi Arabia. While the legal system is not codified in Saudi Arabia, the jurisprudential provisions enable parties to protect their rights and to use their customary values in the jurisprudence. The usage of *shar'ī* principles rather than direct *'urf* is becoming more predominant in contemporary Saudi jurisprudence.

The government's commitment to an Islamic cultural monopoly and its intolerance of non-Islamic cultural heritage appear to derive from a general objection to customary dynamics. Although the non-codified system of Saudi Arabia seems to be more flexible, the principle of *'urf* is attenuated in due proportion. The contemporary scholars of Saudi Arabia have tenuously sought to restrict the application of semi-independent *'urf* by encouraging the usage of other *shar'ī* principles. Conversely, Iran, where the codified law is implemented, restricts jurisprudential independence by forcing judges to follow the standardised and official regulations rather than the classical method. The priviledged status of *'aql* and *'urf* in relation to non-textual matters exposes Ja'farī jurisprudence to customary influence, but the codified character of the Iranian legal system is not amenable to the excessive penetration of customary values. The accentuation of state interests reduces the reliance upon the modern *shar'ī* implementations in Iran; however, it also increases the power of customary doctrines to a certain degree. The religious agenda of the Iran government maintains local customs under Islamic tradition and supports the slogan 'cultural Islamisation'. As a consequence, the strategy is applied during the Islamisation of society and provides credence and impetus to *'urf* that are not held to be inimical to the principles of *sharī'a*.

The utility of *'urf* as a substantial source in law-making further underlines its importance within the legal methodology that is applied by contemporary Iranian and Saudi judges. The main intention behind this approach is to produce practicable rulings and to modify regulations in accordance with place and time. The propositions that both countries are open to *'urf* do not logically imply that jurisprudence has to be understood as a customary practice and interpretative process rather than a divine body of rules. Courts, in interpreting law, draw upon the perceptions and values of judges. However, the legal systems do not authorise judges to produce independent rules that contradict *sharī'a*. The evaluation should therefore focus upon the question of how cultural assumptions may shape judicial decision-making. During the jurisprudential procedure, the attention of judges focuses on the appropriate interpretation of the meaning and use of *shar'ī* principles, which are understood in relation to the local *'urf*. The *ḥukm* of a judge is required to fulfil particular conditions before providing a verdict. The credibility of the evidence, assessment of the case and functionality of proofs require information that cannot be drawn from only *sharī'a*; instead,

'urf is more likely to provide the framework of reference. The evaluation procedure of these factors within jurisprudence helps to establish distinctions between the legal rulings of the countries in personal transactions.

The Hanbalī-Wahhābī spirit of the Saudi courts does not formalise the trial's religious aspect, and use the principle of the *maṣlaḥa* to work towards collective interpretations of *sharī'a*. It seems that the coordination between the *shar'ī* ethical norms and the *'urfī* values operates long before the dispute comes to trial. In theory, the contemporary Saudi judges advance *shar'ī* ideals, however the operational law mechanisms make it conceivable that judges arrive at a shared legal consensus and systematised collection of rules. In contrast to the independent style of the Saudi legal system, the Iranian codification establishes external borders that will frame the decisions of judges. In instances where classical Ja'farī sources refer to *'urf* directly or the judge's reasoning is embedded within cultural modes of thought, a number of important factors come into play – these include the interrelation of cultural assumptions, the legal approach and substantive law. The judges mainly decide depending on the collective interpretations or systematised collection of rules for the cases related to marriage and divorce. The amount of dowry, the approvability of consent, the status of marital gifts, the divorce rights of women, the visitation time of the non-custodial parents, or the value of maintenance, are the main areas where either direct or indirect reference to *'urf* colours the decision of the judge. The operative function of *'urf* in both countries has been broadly adopted; however, it should be noted that adoption has not taken the form of principle from the perspective of *sharī'a*. It has been manifested in improvised concessions in particular cases or increased respect for the views of senior scholars. The practice obtains *shar'ī* validity after the identification of mutual reiteration and subsequent references to it. This was evidenced in the marital cases relating to the accommodation of divorcees and the selection of visitation days.

It may be assumed that in the majority of court decisions, the concept of *'urf* is neither an alternative source nor a main principle; rather it is a substantial and supplementary source that can be used to explore the situation. Iran therefore contrasts with the Saudi system where *'urf* operates as a main principle in the *qānūnī* system. Iran's *qānūnī* system, as the *aḥkām*s of judges demonstrate, applies both the indirect dependent *'urf* and direct semi-independent *'urf* in non-textual cases. As Chapter Four illustrates, the Iranian judge sought to inform the parties about the customary criteria for the dispute and the *shar'ī* status of gifts. The privileged status of reason as a *shar'ī* tool in the Ja'farī scholastic methodology and the link of contemporary codification with the classical method entitled the Iranian judges to explicitly refer to *'urf* upon the basis of *shar'ī* reasoning. The Wahhābī influenced Ḥanbalī

methodology, which is mainly based on a literal understanding of classical Ḥanbalī sources, restricts the application of explicit *'urf* to non-textual examples. The semi-independent *'urf* is not used in the *aḥkām*s of Saudi judges due to the country's strong adherence to classical textual sources. The system of Saudi Arabia privileges classical *shar'ī* sources over analogical reasoning whereas the *shar'ī* system system of Iran prioritises analogical deduction over *shar'ī* sources. The hierarchy of *shar'ī* sources between the two schools justifies the reason for distinctive opinions.

Contemporary Saudi scholars aim to contribute to the enforcement of classical *shar'ī* methods within the current legal system. In issuing the *ḥukm*, the judge initially quote from the main *shar'ī* sources. These include Qur'anic verses, *ḥadīth*s of Prophet, and statements from authoritative Ḥanbalī and non-Hanbalī scholars. Once the expository section is set out in accordance with the classical *shar'ī* method, the judge finalises his decision and aims to increase its feasibility and reliability. The approach of scholars highlights that the contemporary Saudi legal system, in referring to original *shar'ī* sources, closely resembles the classical *shar'ī* practice. The Saudi system contrasts with the contemporary Iranian legal system where the codified articles are used during trials. Law-making is no longer the responsibility of judges, but the duty is undertaken by state legislative bodies. The legal authorities of state aim to enact a strategy of unified and standardised legislation. In addition, the *qānūnī* regulations of Iran approve the authenticity and legitimacy of *'urf* as a legal source that is deployed within the court procedure. Although judges are theoretically advised to connect their ruling with classical Ja'farī sources during trials, the practice of the legal system does not always allow judges to address the classical *shar'ī* sources. It is possible to identify references from codified articles at the *aḥkām*s of judges; however, it is extremely rare to find quotations from original *shar'ī* sources. The nature of codification serves to dissociate the contemporary Iranian legal system from a classical methodology of ruling.

The *'urf* obtains *shar'ī* validity once the recurrent practice has been widely accepted and has become pervasive amongst scholars. In the absence of no countervailing evidence, inductive reasoning methods authorise scholars to refer to *'urf* either directly or under *shar'ī* principles. The indirect style of customary usage is widely used in both countries by religious scholars (in *fatwā*s) and judges (in *aḥkām*s). Judges are the sole experts possessed of the exclusive authority to give decisions during trials and they shape the essential nature of interpretation. Their interpretation of *shar'ī* sources and evaluation of the cases inevitably employ *'urf* of their environment within the binding framework of *sharī'a*. The harmonious relationship between widely practiced *'urf* and contemporary *shar'ī* systems reinforces the sense that they

are interchangeable. This collaboration inevitably establishes the basis for the reconstruction and reform of rulings.

APPENDIXES

Appendix A: Court Cases of Saudi Arabia

1) Case Number One (The Lawsuit for Returning Marital Gifts after Dissolution)

Date: 16.11.2016 (First Trial); 09.01.2017 (Second Trial)
Record: 111
Judge: Salman
Plaintiff: Hanan (Wife; Saudi National)
Hamīd (Father – Joined During Second Trial)
Defendant: Ubaid (Husband; Saudi National)

Transcript

Praise be to the God alone and after. I am Salman who is a judge in the civil court of Riyadh. This case was referred to us by the president of the civil court in Riyadh with the number 1 and date 27.09.2016. In the court it was registered under the number 11 and date 27.09.2016. I opened the court hearing on Thursday 16.11.2016, which is the appointed day.

Hanan who holds Saudi citizenship (Identity Number 91) attended the court. In her presence, Ubaid, who holds Saudi citizenship (Identity Number 81), participated in the trial. The Plaintiff addressed the court and explained her situation. She said:

> "The defendant is my husband. I married him with a valid marriage contract that was issued by the general court in Diri'iyya with the registration number 22 at 03.04.2016. My dowry was 50000 Riyal and we consummated the marriage. However, dissension and undesirable behaviours have arisen between us and he has uttered bad words, not prayed daily and sent me away from the home more than once. Thus, I want to divorce from him. This is the problem I present at this trial."

After the case was presented to the Defendant, he said:

> "As is stated in the lawsuit, the plaintiff is my wife with official certificate and mentioned dowry. We consummated our marriage - this is correct. However, the allegations of bad treatment and use of slang words are not correct. She left my home without my permission. As a result, I request to cancel the trial of the plaintiff. This is my answer."

The aforementioned marriage contract was investigated, and I found that it closely resembled their claims, to the point of being identical. I then addressed the case to the Peace Court (*qism al-ṣulh*) along with a written paper that requested the respective to listen to both parties with the intention of finding a common and peaceful ground with the intention of inaugurating a newly peaceful period in the marriage. I closed the session and awaited the response of the Peace Court.

I am Thānī who is an apprentice judge within Riyadh's Civil Court. I am responsible for upholding the virtue of Salman, the Shaykh of the tenth department who was established as head of the Court by the letter numbered 333 upon the date of 26.12.2016.

In the presence of the registered parties I opened the session on Monday 09.01.2017 and their statements closely resembled previous ones that had been made. Upon this occasion, Hamīd (a Saudi citizen possessing identity number 92), the father of Hanan, attended the court. During this session, we reviewed documents from the head of the peace department which were numbered 1111 and dated 19.12.2016. Particular emphasis was placed upon Resolution Two, which states:

> "I completed the arbitration session with the both parties personally and listened to their problems while attempting to establish a basis for reconciliation between the respective parties. I was unsuccessful in this respect as the wife insisted upon a divorce. In doing so, she again claimed that he was generally offensive towards her and utters insulting words during their verbal interactions. She maintains that she cannot continue to live with him.
> When these accusations were presented to the husband, he maintained she spoke offensive words to him and failed to respect him. From our perspective, it is clear that there is a lack of willingness from either party to work towards a situation in which they can reside together; furthermore, it is clear that ongoing dispute makes it difficult to envisage circumstances under which the wife can return to the husband's home. The wife has ceased her affiliation and

> compassion, both of which are necessary preconditions for marriage. It is clearly apparent to us that injustice and recklessness emanated from both parties to an equal extent during the reconciliation session (*jalsa al-ṣulḥ*)."

Ibn 'Arabī established an important set of reference points when he insists:

> "The contracts amongst people should be conducted upon the basis of agreement, harmony and mutual kindness. In the absence of these elements, the contract becomes meaningless and the interest (*maṣlaḥa*) of both parties then requires separation with an agreement. This establishes the basis of a fair and equitable distribution of items between the husband and/or wife."

In addressing the issue of judgement, Ibn 'Abd al-Barr observes:

> "If there is oppression of the husband, separation presents itself as the optimal solution. It is not appropriate for the spouse to take things from his wife as compensation for divorce. When there is oppression among them, take what you consider to be appropriate – this is what known as *khul'* between spouses."

Ibn Bāz further clarifies:

> "The judges can separate the wife and the husband if they see divorce as an appropriate solution whether without compensation or with compensation from the wife's side and this is the opinion of 'Ali and Ibn 'Abbas transmitted from Othman and was chosen by Shaykh Taqī al-Din Ibn Taymiyya as the closest in terms of evidence (*dalīl*)."

The opinion of the two judges establishes that divorce with the distribution of compensation between the spouses is more appropriate than cohabitation. There is a consensus among scholars that the compensation is the half of the dowry that was specified between the parties at the time of the marriage. When there is injustice or mistreatment by one or both spouses, the solution is divorce and the payment of half of the dowry. After taking into account the statements and responses of the parties, the Peace Court approved divorce between the spouses and the repayment of half of the dowry that was paid at the start of the marriage which was equal to 25,000 Riyal. In addressing the issue, God states:

> "And if you fear dissension between the two, send them an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, God will cause it between them. Indeed, God is ever-knowing and acquainted (with all things)." (Q. 4:35)

In addressing the case of women, Ibn 'Abbas states that myself and Mu'āwiya have been sent for judgement. Ma'mar said that I was informed that Othman sent those two for a judgement and he said; "If you see fit reconcile them; if you see fit, separate them."

I therefore cancelled the marriage contract of Hanan, the Plaintiff which conjoined her to Ubaid, the Defendant, and ordered that compensation of 25,000 Riyal be paid. She will return the jewellery that was provided as a gift for marriage, which the Defendant has noted is worth 2,000 Riyals. I decided and announced that the plaintiff should wait three menstrual cycles or three months from the date of today. She should not marry until the end of this period. I pronounced my judgement to the parties and I closed the session at 11:00 am on 09.01.2017.

2) Case Number Two (The Lawsuit for Arranging Visiting Place and Time for the Non-Custodial Parent)

Date: 07.08.2016; 06.09.2016
Record: 222
Judge: Salman
Plaintiff: Tariq (Husband; Saudi National)
Defendant: Dalia (Wife; Saudi National)
Hussam (Father and Attorney of Wife; Saudi National)

Transcript

Praise be to God alone and after that I am Salman, a judge within Riyadh's Civil Court. The case has been referred to us by the President of the Civil Court in Riyadh with the number 2 and date 07.08.2016; it was previously recorded under the number 222 and date 07.08.2016 at the court. I opened the court session upon 06.09.2016, which was the appointed day. The representative of the Defendant Hussam (a Saudi citizenship with identity number 82) presented to the court. As the legal representative for Dalia he was invested with the responsibility of deputation by the second justice book of Riyadh (numbered 22 and dated 24.08.2016) which set out his rights of acknowledgement, argumentation, conciliation and denial. The plaintiff Tariq (a Saudi citizenship with identity number

91) then presented to the court. Before proceeding with the session, I asked the representative of the defendant to participate in the court with the defendant upon a personal basis. I therefore took the decision to postpone the session to Monday 21.11.2016.

I then opened the session in the presence of Dalia, the defendant (who holds Saudi citizenship with the identity number 81) and Tariq, the plaintiff (who holds Saudi citizenship with the identity number 91). The plaintiff responded to my inquiries with the following clarifications.

> "The defendant is my wife and this arrangement is embodied within a valid marriage contract. Our marriage has been consummated and the defendant gave birth to Sanan, our daughter, on 23.10.2015. Our daughter lives with the defendant in the family house of the defendant in the city of Riyadh. I petition to specify the time for visiting my daughter and seek to arrange a meeting place other than the defendant's family home."

When the defendant was informed about the request and explanations, she confirmed the information that had been presented during the trial. She maintained:

> "There was nothing to prevent the plaintiff from visiting his daughter within her family home whenever he requests. The lack of transportation facilities made it impossible for her to transfer her daughter to another location."

Subsequent to obtaining both the responses of the defendant and the plaintiff, I wrote to the Peace Court to arrange a meeting with both parties and to specify an appropriate place and time that would enable the plaintiff to visit his daughter. I closed the session in order to hear the conclusions of the Peace Court and the next trial will be held on 16.12.2016.

I opened the trial and the parties were prepared with their previously recorded explanations. We obtained the written response of the head of the Peace Court and arbitration which was numbered 2222 and dated 06.12.2016. In functioning in accordance with Article 4160, it states:

> "We inform your eminence that we completed the sitting session with the parties, hearing from them and attempting to achieve reconciliation between them. We could not achieve this on any points. We decided that the visiting time for the daughter Sanan (1-year 2 moths baby) is on Friday from four o'clock until seven o'clock every week. We thought that the determination of the visiting method and place would be adjudicated by the executive judge in accordance with Article 76 of the Law of Procedure before Sharīʻa Courts. When the place is specified in the presence of both parties and one side disagrees with it, the executive judge will choose the appropriate option. We suggest that the specification of the visiting place should be consistent with the interests of the daughter and should not harm either of the two parties."

Upon the basis of what was presented during the case and the answers that were provided, in addition to the decisions of the experts, I established that the Plaintiff should visit Sanan, his daughter, on every Friday during 4-7pm. The method and place of this visit will be consistent with the decisions of previous executive judges that were made in accordance with Article 76 of the executive system. The decision of the judge is legally binding upon both parties. The two parties were notified that the verdict is disputable, and the parties were provided with the right to apply to an appeal court in 30 days henceforth. If the period concludes without an appeal being made, the judgement will be conclusive. Allah grand us success and peace be upon our Prophet Muhammad, his family and his companions. Record date: 16.12.2016.

3) Case Number Three (The Lawsuit for the Amount of Child Maintenance)

Date: 15.01.2017
Record: 333
Judge: Salman
Plaintiff: Shirin (Wife; Egyptian National)
Shahin (Father; Egyptian National Who Joined Second Trial)
Defendant: Karem (Husband; Egyptian National)

Transcript

Praise be to the God alone and after that I am Khalid, a judge apprentice in Riyadh's Civil Court who is responsible for preserving the virtue of Salman, the Shaykh of the Twelfth Department. The case has been referred to us by the President of Riyadh's Civil Court under the number 333 and with the date 26.12.2016. I opened the court hearing on the at 09:32 on Sunday 15.01.2017.

The plaintiff personally attended the court. Shirin is an Egyptian (residence number 91) and her father Shahin (also an Egyptian, residence number 92), upon the character of knowing his daughter, joined the trial. Neither the defendant nor his representative attended the court. We obtained

a letter of response from the Peace and Arbitration Court (which was numbered 33 and dated 21.11.2016). It states:

> "Regarding your eminence, we completed the sessions with the parties, and attempted to achieve reconciliation between the spouses but was ultimately unsuccessful in this respect. The defendant stated that he is working for a company which pays him 6000 Riyal per month. He is living in a flat in Demam which costs 12000 per year. He has not remarried and Saira is his only child. We consider the appropriate maintenance (*nafaqa*) for Saira to be 700 Riyal per month. This is our opinion."

My opinion is based upon the aforementioned explanations and the decision of the Peace and Arbitration Court; reference was also made to two verses: 1) "Upon the father is the mothers' provision and their clothing according to what is acceptable." (Q. 2:233); 2) "Let a man of wealth spend from his wealth, and he whose provision is restricted-let him spend from what Allah has given him." (Q. 65:7)

I obliged Karem, the Egyptian defendant (residence number 81), to pay 700 Riyal as monthly maintenance for Saira. It has to be transferred upon the first day of each month of the Gregorian Calendar. The judgement will be implemented with an explanation in his presence and an appeal can be registered with an appeal court up to 30 days in the aftermath of the current day. When this period expires, and no appeal has been issued, the judgement will be conclusive. Allah grand us success and peace be upon our Prophet Muhammad, his family and his companions. Record date: 15.01.2017.

Appendix B: Court Cases of Iran

1) Case Number One (The Lawsuit for the Status of *Jahīziyya* (Gift) after Divorce)[1]

Date: 13.01.2013 (Final Trial)
Record No: 111
Source of Issue: Appeal Court of Tehran, Branch 47
Plaintiff: Hazen (Wife; Iranian National)
Hassan (Lawyer; Iranian National)
Defendant: Amir (Husband; Iranian National)

Summary

The jewellery is customarily considered outside the category of *jahīziyya* and the claim for the reclamation of *jahīziyya* has been rejected. However, the inventory of gifted jewellery was listed under the title of *jahīziyya*.

The Summary of Court Procedure

The petition is initiated by the wife Ms Hazen (daughter of Majid) with the lawyer Mr Hassan against the husband Mr Amir (son of Halem) with the request of refunding *jahīziyya*. In the light of the hearing session of the parties, the investigation of activities and the representation of documents, which show the recorded *jahīziyya* of the parties in the presence of the committee at 16.09.2011, the plaintiff claims the gold jewellery and home appliances including microwave LG and dishwasher as the rest of *jahīziyya* – this puts aside the fact that jewellery customarily falls outside the category of *jahīziyya* and is in any case at the wife's disposal, which the parties implicitly confirmed. Furthermore, while the two aforementioned home appliances were not written in the *jahīziyya* list, the very subject was a matter of dispute and doubt. Even if it were proven that these items could not be considered under *jahīziyya*, they would still be claimable upon an independent basis.

As a consequence, the court held that the claim for jewellery and home appliances was unfounded and rejected the claim in this regard. With regard to the initial items, the fact that the plaintiff's lawyer has confessed to the delivery of the items means that the case has no standing. The issued judgement is presented, and it can be either reviewed or appealed up to 20 days after the parties have been notified of the decision.

The Judgement of the Court

The appeal of Ms Hazen that was advanced through the lawyer Mr Hassan on the issue of the court's verdict (numbered 001111 and dated 14.11.2012 at branch 260 of the General Family Court) which sought to reclaim the aforementioned *jahīziyya* was rejected and held to be inapplicable. This applies because the judgement (of rejection) for appeal demand is in accordance with legal regulations

[1] Court Number: 9109970224001667, Court Date: 24.10.1391, Iranian Jurisprudence, accessed 10.01.2018, http://judgements.ijri.ir/SubSystems/Jpri2/Showjudgement.aspx?id=c0syZkQvOVFIcjA9.

and it is issued with reference to the principles and procedures of trial – for this reason, there is no fundamental objection. Article 358 of the Law of Civil Procedure establishes that the appeal request of the judgement is completed by stating that the objection is not the preferred option. However, if there is a demand in cases pertaining to gold items and home appliances, she might submit the petition to the legal courts separately.

2) Case Number Two (The Lawsuit for Visitation Arrangements and Custody of a Minor)[2]

Date: 29.12.2012 (Final trial)
Record No: 222
Source of Issue: Appeal Court of Tehran, Branch 45
Plaintiff: Raihana (Wife; Iranian National)
Halil (Lawyer; Iranian National)
Defendant: Masood (Husband; Iranian National)

Summary

The couple have been separated during last four years on the ground of the wife's hardship and suffering. The relinquishment of some part of the dowry before the divorce was narrated and the claim of hardship and suffering was investigated.

Court Procedure

The petition has been initiated by the wife Ms Raihana (daughter of Gamor) who was born in 1975. It has been issued with the support of the lawyer Mr Halil (son of Rostam) against the husband Mr Masood (son of Masum), who was born in 1972. It requests the issuance of a certificate that acknowledges the impossibility of reconciliation and which files for divorce upon the grounds that the couple have been separated for nearly four years. In addition, it also maintained that there was no just reason showing the defendant's failure to uphold maintenance payments.

Taking into account the documents and contents of the petition and supporting documents (including the marriage contract numbered 101, dated 12.05.1994 and certificated at marriage department no 461 at Tehran registration office) and acknowledging the fact that the marital relationship between the parties has been established (attached injunctions, existing evidences, photocopies of judgement and other proofs), it became possible to ascertain that the hardship and suffering of the plaintiff was the cause of the four-year separation. In addition, the defendant did not effectively defend himself at the court hearing and no documents or evidences were provided to indicate that the wife did not receive payment of maintenance during this period. In addition, the plaintiff's waiving of 150 gold coins from the dowry suggests the rectitude of her claim and her hardship and suffering. The continuation of disputes would not be in the interests of the couple, and the selected arbitrators could not expect to reconcile the relationship between the parties. The demand is therefore considered legitimate and valid by the court. A certificate (which referenced Articles 1130, 1145, 1146, and 1284 of the Civil Code and Article 1370 of the Uniform Code of Amendment Regulations concerning divorce approval) which confirmed the impossibility of reconciliation and the necessity of divorce was then issued. During a period of three months from the date of notification and certainty of the judgement the plaintiff can, subject to the husband's acceptance of the waiver and indication of his willingness to delegate to the lawyer, waive the 150 golden coins from the whole dowry of 300 golden coins and thus establish the basis for a *khul'* divorce. Subsequent to the registration of the act, she should observe *'idda* for three pure periods after the divorce has been legalised.

The couple has two daughters. Zahra, the oldest, was born on 23.05.1998 and is not subject to custodial proceedings. Sanan, who was born on 17.08.2003 and was placed in the custody of her father. The Defendant (mother) was provided with the right to spend time with her child for 24 hours each week for a period which extended from Thursday evening until Friday evening. When Sanan becomes nine-years-of-age (lunar calendar), she will have the right to select which parent she wishes to live with. No pregnancy claim was made. The issued judgement was presented and can be reviewed or appealed within 20 days within Tehran's provincial courts of appeal; if no application is made during this period, the case can be closed.

Judgement of the Court

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[2] Court Number: 9109970224501765, Court Date: 09.10.1391, Iranian Jurisprudence, accessed 10.01.2018, http://judgements.ijri.ir/SubSystems/Jpri2/Showjudgement.aspx?id=SEVjM3FJY1Vncm89.

The appeal of the appellant Mr Masood against Ms Raihana which sought to revise the decision (numbered 2022 and dated 19.11.2012 at the branch 233 of the Family Court of Tehran) which ordered the separation of the couples from each other (see numbered file 20221) was found to be invalid. Because the opinion was issued upon the basis of legal and regulatory provisions, there was no objection to change decision, whether in procedural or substantive form. The reasoning of the court was held to be respectable because the documentation is valid. The appellant showed no evidence that the judgement had been infringed or invalidated.

Taking into account the documented court case, the rejection of the plaintiff's reclamation of the judgement is exactly confirmed in accordance with the last section of Article 358 of Regulations of the General and Revolutionary Court Procedure of Civil Code, which was approved on 09.04.2010. Although the Court's judgement is subject to appeal by the Supreme Court of the Country, in accordance with Articles 368 and 397 of the aforementioned law, the decision is definite.

3) Case Number Three (The Lawsuit for the Validity of Lawyer's Divorce with the Right of Attorney)[3]

Date: 24.12.2012 (Final trial)
Record No: 333
Source of Issue: Supreme Court of Tehran, Branch 8
Plaintiff: Shirin (Wife; Iranian National)
Araz (Lawyer; Iranian National)
Defendant: Halem (Husband; Iranian National)

Summary

The delegation right allows both parties to choose an official attorney with authorized terms of conduct. This entails that the husband provides a certificated delegation right to his wife – this operates without any additional condition that enables her to retain a lawyer (including herself) on behalf of her husband when petitioning the Department of Justice for divorce. In relying on the official permission, the lawyer asks for the issuance of certificate that rules upon the impossibility of reconciliation between the couple. This makes it possible to rule any kind of divorces – revocable, irrevocable, *khul'* or *mubārāt* – with all conditions and in anyway. The acceptance of receipt of the dowry, extra payments and maintenance along with the obtaining of substantive payments for dowry and the waiving of all payments are all considered to be valid acts of the lawyer. The divorce which is issued in accordance with the aforementioned conditions is legitimate. The lawyer has been chosen by the wife on behalf of the husband and the husband is supposed to accept every result because the delegation document does not contain any conditional sentence.

Court Procedure

Mr Araz, in being possessed with the authority of attorney from both side (the husband Halem and the wife Shirin) pleaded a suit and requested the issuance of a certificate which demonstrated the impossibility of reconciliation on 22.05.2012. They presented their agreement for the implementation of divorce to branch 268 of the Family Court. The hearing session of the trial was completed in the presence of husband's and wife's mutual lawyer on 16.06.2012. The lawyer asked the court to issue a certificate attesting to the impossibility of reconciliation for the reason that the continuation of matrimonial cohabitation had become impossible due to the absence of harmony.

The wife stated that the whole dowry amount was 114 gold coins, from which she waived four gold coins in order to obtain divorce. The remainder of the dowry (110 gold coins) could be requested from the husband whenever she asks for it. The waiving and remaining amount were both accepted by the husband's lawyer who was appointed by the wife on his behalf. The wife also inserted a stipulation which established that she did not extend a claim upon the basis of other rights such as delayed maintenance and gifts (*jahīziyya*). While the wife was not pregnant during these legal proceedings, children nonetheless needed to be taken into account by the Court. The Court referred the case to the arbitration department for judgement, with the arbitrators of the couple submitting a written statement that contained the signature of the husband's and wife's lawyer. This statement contended that there was lack of compromise between the parties. The court eventually issued a decision (numbered 303) and dated 16.06.2012) in which it acknowledged the impossibility of reconciliation, and thus established the basis for divorce in the form of *khul'*. Subsequent to the

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[3] Court Number: 9109970906801440, Court Date: 04.10.1391, Iranian Jurisprudence, accessed 10.01.2018, http://judgements.ijri.ir/SubSystems/Jpri2/Showjudgement.aspx?id=QmVwWkwwZE9PeDA9.

agreement of both sides, the decision was issued and presented to the wife and the lawyer of the husband on 16.06.2012. The husband then asked for the judgement to be revised on 07.07.2012, while citing his contention that the lawyer did not have right to accept the waiver on his behalf. In this instance, the lawyer did not refer to his interest. After the legal procedural dispute, Branch 47 of the Appeals Court recognized that the appeal was unjust and rejected the appeal request while confirming the original judgement (application number: 313; dated: 07.08.2012)

Halem, the Husband, was notified of this ruling on 26.08.2012 and he filed an appeal suit on 11.09.2012. After bills were exchanged and the country's Supreme Court was notified, the case was referred to this branch. The judgements and responses of the parties were read out during the consultation session.

The Court's Judgement

The appeal request of Mr Halem confirms the impossibility of reconciliation between spouses to provide sufficient grounds for the implementation of the divorce which was issued in accordance with the preliminary ruling at Branch 47 of the Appeal Court of the province (application number: 313; dated 07.08.2012). The decision is enforceable because the couple appeals by virtue of the official attorney power (numbered 323; dated 27.02.2010 at the notary office 789) without inserting any condition that causes the wife to desist from using the attorney right that entitles her with rights ranging from the selection of stipulated *talāq tafwīḍ* (conditional divorce) to the use of an attorney on behalf of someone (even the choice of a lawyer at the court who represents the clients' husband).

Meanwhile, applying to the court, filing a suit, observing legal procedures or the obtaining of a certificate that attests to the impossibility of conciliation legalises all forms of divorce (whether revocable, irrevocable, *khul'* or *mubārāt*) – this applies with any condition and in any way, irrespective of whether this entails receiving additional payment, dowry, maintenance or the relinquishment of the same amount of dowry for divorce. While the client has the right to dismiss the lawyer and other lawyers before finalising the case, the deprivation of lawyer Araz does not abolish the trial. The wife subsequently began to act as a lawyer on behalf of her husband with the option of *tafwīḍ* – to put it differently, the Husband concurred with filing a certificate stating the impossibility of reconciliation in order to enforce the divorce decision.

Divorce is a unilateral legal act that is subject to a man's will; whenever a man wishes to divorce his wife in accordance with the regulations, he can legally authorise someone to operate as his attorney and complete the divorce on his behalf. Because the authenticity of the attorney is documented, the wife is protected from the offensive pending of the husband by legal regulations. The official divorce document is applicable with the power of attorney. The utility of the attorney's power and the enforcement of the lawyer's rights by the wife does not arouse objection. The dismissal of the wife's power of delegation (*tafwīḍ*) cannot be understood from the interpretation of the agreement because the agreement entitled her to a right of attorney.

The husband claimed that the lawyer's action in accepting the annulment falls beyond the scope of delegated authority because, during the explanation of the trial on 16.06.2012, the wife did not choose to waive part of her dowry in order to implement the form of divorce known as *khul'*. The letter of attorney suggested that the husband had insisted upon this as he did not provide the right to choose between the *khul'* and *tafwīḍ* divorce to the wife – this curtails her options and the acceptance of divorce in return for the wife's financial relinquishment is the prerogative of the husband. The legal principle ("[p]ermission is an object so using it in necessary conditions is permissible") establishes that the husband's claims are inoperative and unjustifiable. The acceptance of waiving particular things falls within the limits of authority and the delegation of termination right (*tafwīḍ* divorce) that pertain to the wife. In addition, she can select herself as a lawyer for termination and the husband has no right to reject this arrangement.

As a consequence, the action of the wife falls within the scope of attorney that was provided by delegated power (*tafwīḍ*) and the employment of this practice does not create any harm for her. This establishes that the initial judgements and appeals based on the contents of the case and actions are legitimate. Legal procedures and decision are carried out in accordance with the objectives of justice, the requirements of legal regulations and substantive principles. The required conditions for the intervention did not present themselves within the written judgement and procedure. The appeal subject of the husband (claiming that the reasons and principles include harm and damage) is not taken into consideration for the re-examination and explanation of the final decision. As a consequence, the rejection of the appeal is confirmed, and Article 370 of the Civil Code of Procedure Law is cited in justification.

4) Case Number Four (The Lawsuit for Visitation Right and Time for the non-Custodial Parent)[4]

Date: 23.01.2013 (Final trial)
Record No: 444
Source of Issue: Appeal Court of Tehran, Branch 45
Plaintiff: Mahlika (Wife; Iranian National);
Madum and Mahzar (Lawyer; Iranian National)
Defendant: Wasim (Husband; Iranian National)

Summary

If the parent of the child does not share the same house, one of the parents holds custody of the child and the other one has a right to visit the child.

Court Procedure

The plaintiff Miss Mahlika (daughter of Kamar) with lawyers Mr Madum and Mahzar, and the defendant Mr Wasim (son of Khalid) requested to see their mutual child named Mahpaikar. Representation of the petition to the court describes the entire contents of the case. If the parent of child does not share the same house, one of the parents legally takes the custody of the child and the other has right to visit his/her child. Given the fact that the defendant has not acknowledged the suit. Thus, the court paid attention to the claim of plaintiff. According to the Article 1174 of the Civil Code, the plaintiff has right to see their mutual child every week for a period of 24 hours from 4 o'clock on Thursday until 4 o'clock on Friday. The defendant was also required to provide meeting place for this meeting.

The issued judgement was presented and can be reviewed or appealed within 20 days after the notification of the parties about the decision; if no application is made during this period, the case can be closed.

Judgement of the Court

The appeal of the appellant Mr Wasim against Ms Mahlika which sought to revise the decision (numbered 404 and dated 27.10.2012 at the branch 278 of the Family Court of Tehran) asked to change the ultimate decision by determining the visitation time for the mutual child whose name is Mahpaikar who was born at 22.11.2012. The judgement requests from the mother of the child as being defendant to give permission for visitation during one day from 4 o'clock after *ḍuhr* on Thursday every week. As described in the previous statement from the Court of First Instance, the adjudication is not justifiable.

Since the opinion was issued on the basis of legal and regulatory provisions, there was no objection to change the decision either in substantive or procedural forms. The reasoning of the court is respectable as well as the documentation is valid. The appeal of proof or reasons such as infringement of ruling or lack of esteem for judgement is neither collected nor presented. The reason of lack of eligibility against the mother especially for her minor child did not alleged. Therefore, regarding the documented court case, rejection of the plaintiff's reclamation of the judgement is exactly confirmed according to the last section of Article 358 of Regulations of the General and Revolutionary Court Procedure of Civil Code, approved 09.04.2010. The judgement of the court is definitive based on Article 365 of the aforementioned law.

[4] Court Number: 9109970224501995, Court Date: 04.11.1391, Iranian Jurisprudence, accessed October 01, 2017, http://judgements.ijri.ir/SubSystems/Jpri2/Showjudgement.aspx?id=WDhZbXFnck1Uc1E9.

GLOSSARY

ʻāda (usage or habit): The term refers to an individual habit or characteristic feature. It translates as a practice that it repeated without rational justification.

āḥād (single tradition): It is known a solitary *ḥadīth* transmitted through fewer channels than *mutawātir* or by odd individuals, as such he knowledge of their contents is probable.

aḥkām (verdicts of judges): The decisions and rulings of judges at official courts are known *aḥkām.* The judges reach their solution throughout the way of *sharʻī* sources and principles.

al-walā' wa al-barā'a (association with Muslims and dissociation from infidels): It literally means loyalty and disavowal, which signifies loving and hating for the sake of God. It is generally used to refer to *sharʻī* principle which arranges and controls personal relations between believers and non-believers in the legal sphere within the framework of *sharīʻa*.

'amr bi al-maʻrūf nahy ʻan al-munkar (pursue good and forbid evil, or enjoin good and forbid evil): The principle is used to refer to the collective duty of the Muslim community to encourage righteous behaviour and discourage immorality, as recognised by reason and the Islamic moral and legal system. It aims to remove oppression from society and instead establish justice. It is applied moral, social, political, and economic facets of Muslim life. It is, ideally, the distinguishing trait of the Muslim nation.

ʻaqīda (belief): faith, dogma, credo, creed.

ʻaql (reason): human reason, human rationality, intellect. In Jaʻfarī jurisprudence, the term is terminologically used to refer to one of the fundamental sources of Islamic law.

aṣl al-barā'a (exemption and presumption of purity) presumption of original freedom from liability, which means freedom from obligations until the contrary is proved. In the event where no rule can be found in any of the legal sources regarding a case, its legality is determined with reference to a general maxim of purity.

āyatullāh (literally "miraculous sign from God"): Honorary title used to address a high-ranking *mujtahid* in Jaʻfarī school of law.

ʻayb (shame or health problems, or defect either physical or mental): In *sharʻī* terminology, it is used to attribute a defo that negatively affects the rulings and condition within the contract. In addition, it both customarily and jurisprudentially means "disgrace," "defect," or "shame" resulting from dishonourable behaviour.

bā'in ṭalāq (irrevocable divorce): greater irrevocable divorce. It is generally known as triple and an irrevocable form of divorce in classical Islamic law. It can be put into practice through the mere pronunciation of *ṭalāq* formula three times in one occasion.

bidʻa (heretical innovation): literally innovation, often referring to illegal innovation in the religion.

Chahârshanbeh Sūrī (Red Wednesday): This event is held on the eve of the last Wednesday which precedes spring, and the day is considered to be the unluckiest night of the year. The celebration has a strong connection with the old Zoroastrian religion. Fire is used to keep the sun alive until the early hours of the morning and the people jump over the flames during the ancient style fire celebration.

dalīl ʻaqlī (evidence of reason): guide, indicator or legal proof inferred, reached and attained by the reason.

ḍarab (concept of punishment): the term *ḍarab* can be traced back to the Arabic *ḍaraba*, which means to strike, to beat, to hit, to cut off, to pitch (a tent) to coin, to quote, make use of (a proverb, smile), to play an instrument, to impose (tribute, etc.), to be long (of the night) and to inflict. The derivative form (*ḍarab*) conveys the meaning of disciplining someone because of his/her immoral, unethical and abnormal behaviours and conducts.

ḍarūra (necessity): literally indispensable, essential and compelled. In the area of Islamic law, it refers to an Islamic legal principle used to denote what may be called the technical state of necessity in a narrow meaning. In a wider sense, it used to describe the necessities or demands of social and economic life, which the jurists take into account in their elaboration of the law which was otherwise independent of these factors.

dirham (specific unit currency): a silver coin that is equivalent to 3.0 grams or 2.975 grams.

farḍ (obligatory): obligation, obligatory duties and responsibilities.

fatwā (legal opinion): elucidation, guidance, opinion and interpretation. Terminologically, it refers to a non-binding *sharʻī* interpretations and opinions that are issued by qualified and authoritative Muslim jurists and scholars. Judges have freedom to adhere to *fatwās* routinely despite the non-binding character of them.

fiqh (understanding or perceptiveness): the divine law, the law itself, the sum of man's knowledge of the *sharīʻa*, Islamic law or jurisprudence. The law is considered as a product of juristic interpretation or extrapolation from the foundational text. It is concerned with the knowledge of the detailed rules of Islamic law in its various branches. It is the knowledge of the practical rules of *sharīʻa* acquired from the detailed evidence in the sources.

fitna (seduction): temptation, trial, and civil strife. The term itself has various meanings, but mostly refers to a feeling of disorder or unrest. It can be used to describe the difficulties faced during personal trials. The term can be also used to denote the oppression of the powerful against the weak, or to designate the "whispers" of devil (satan or demon). The word also means attractiveness or captivation.

furū' (branches or subsidiaries): it refers to the branches of *fiqh* as opposed to its roots and sources *uṣūl al-fiqh*, that is, the understanding and implementation of the *uṣūl* or substantive law.

ḥaḍāna (physical custody): the physical protection of children under particular ages (mostly seven for both genders) is awarded to the trustable person mainly the mother of the child. The father maintains legal custody upon condition that he provides financial support and legal guardianship. The term is used to denote a domestic or internal protection of the minor child who is unable to meet his/her own elementary needs because of youth.

ḥadd (prescribed punishment): crimes defined in the Qur'an and Sunna and assigned fixed penalties. In the most general sense, the divinely decreed penalties for certain offences including adultery, theft, intoxication and false accusation of adultery. *Ḥadd* is the right of God, so it is the rightful punishment for an offence against God.

ḥadīth (Prophetic narration): a report of what the Prophet said, done or acquiesced.

ḥarām (forbidden): prohibited, illicit.

hiba (gift): present, donation or grant.

'ibādāt (ritual worship): acts of worship, duties owed God opposed to *mu'āmalāt*.

ibāḥa (permissibility): it is used to refer to the acceptability, lawfulness and legality of any act or anything in Islamic jurisprudence.

'*idda* (waiting period): the waiting period following the dissolution of marriage by death or divorce. The period differs for widows (3 menstruation and 3 clean periods) and divorcees (4 months 10 days). During this period, the women are not permitted to remarry.

iḥtiyāṭ (prudence): caution. If there is a certain obligation with alternative choices, all options are required to be followed. Where doubt remains between potential obligations, all must be observed, if possible.

ijtihād (independent reasoning): a process of legal reasoning and hermeneutics through which the jurist mujtahid derives and rationalises law on the basis of fundamental sources of Islamic law, mainly the Qur'an and Sunna.

ikhtiyār (option): option on the basis of suitability. It means the freedom to include the viewpoints of other currents. When it is not possible to use different options to pursue a single issue, one option should be selected in order to secure the justice and promote the continuance of *sharī'a*.

īlā' (the vow of not having intercourse with the wife): An oath on the part of the husband that he will abstain from sexual intercourse with his wife. If a period of four months passes and this oath is kept and then the bonds of matrimony between the couple are irrevocably resolved.

imām (leader): leader of prayer, caliph, founder of a *madhhab*. The Twelve *imām*s are the spiritual and political successors to the Prophet Muhammad in the Ja'faī school of law.

istiḥsān (juristic preference): juristic preference upon practical consideration or the preference for one analogy-based rule over another.

istiṣlāḥ (consideration of public interest): legal reasoning by considerations of public interest that are, in turn, grounded in universal legal principles.

istiṣḥāb or *istiṣḥāb al-ḥāl* (presumption of continuity): it is one of Islamic legal principles and takes three related but distinctive iterations. In one understanding, it refers to the notion that past legal determinations are deemed valid until evidence of change can be produced regarding the circumstances that gave them rise in the first place. In second instance, *istiṣḥāb* is alternatively known as *al-barā'a al-aṣliyya* and that is based on the argument that if an act is required or prohibited, then God would have revealed that to us. Therefore, an act always licit unless evidence to the contrary, from a recognised source, can be produced. Its last iteration is restated in procedural law as *barā'at al-dhimma* or "original freedom of liability" and is similar to the Western legal concept of presumption legal, which enables the law to presume, for example, that good are the property of the possessor or that people are innocent until proven guilty.

jahīziyya (gift): A list of things and gifts that were brought to marriage home by the bride and her relatives. The pre-wedding activity of *jahīziyya* is a preparation by the bride's family which usually includes basic household appliances such as carpets, clothes, fabrics and furniture that are required by the newlywed couple to start their new lives in their new home.

kināya (implicit): implied or metaphorical meaning, a type of expressions denotes that saying one thing and meaning another.

khul' (woman-initiated divorce): Divorce at the instigation of the wife in which she pays a set sum of money in return for being released from the marriage contract.

khulwah (being alone with a member of the opposite sex): the state of being alone together (of a husband and wife), which carries the same consequences as actual consummation, whether or not this taken place.

khuṭba (hymn of praise): sermon that serves as the primary formal occasion for public preaching in the Islamic tradition. It is specifically used to refer to the oral speech that takes formally at the afternoon (*dhur*) congregational prayer on Friday.

lā ḍarar wa-lā ḍirār (no harm and the causing of no harm): no harm no foul or no harm and reciprocated harm. It is an Islamic legal maxim which is derived directly from the Prophet's *ḥadīth* and which is widely applicable to any matter related to the occurrence, avoidance, and elimination of harm during the decision making process. The maxim emphasises the objectives of the Islamic law (*maqāṣid al-sharī'a*) and their actualisation and realisation by way of deterrents or preventive measure, or minimisation of their occurrence, to it refers to the legal maxim that helps to avail harm (*ḍarar*) and to remove it if *ḍarar* occurs for one reason or another.

li'ān (mutual imprecation among spouses): Testimony between husband and wife in the form of customary phrases comprising the accusation of adultery made by the husband, and angry denial by the wife, both repeated four times. The term is taken from the fifth and final expression in which the accuser states that his accusation is true and invokes God's wrath upon himself if he is lying. The accused then denies the accusation and invokes God's wrath on herself if she says lie. The marriage is then irrevocably dissolved. This is used in a case where adultery cannot be proved, as it is necessary to produce four witnesses. Where the *li'ān* is used there is no punishment incurred for adultery as it is not proved and none for slander of a virtuous women as would otherwise be the case.

lughawī (linguistic): it is a term used to refer to linguistic and literal meanings of words.

madhhab (school of law): legal opinion or legal doctrine espoused by a jurist; after the third/ninth century it is also referred to a doctrinal school.

mafhūm (meaning): implicit meaning, concept or implied meaning. The term refers to texts that convey meaning beyond what is linguistically determined, so it is generally the product of interpretation by language user.

mahr (dowry): gift, a sum of money paid obligatorily to the bride by the groom, without which marriage is not valid according to Islamic law. In some marriages, the dowry can be divided into prompts: determined (*muqaddam*) and deferred (*mu'akhkhar*) portions. If its amount is specified before the marriage contract, it is known as (*mahr al-muqaddam*). If its amount is not specified and it is adjourned later to be paid, it is known as deferred dowry (*mahr al-mu'akhkhar*).

mahr al-mithl (a fair dowry): exemplary dowry. In the case of undetermined dowry, it is estimated to be appropriate for a particular woman taking her age, social, status, family education, and customary values into consideration.

maḥẓūr (objectionable): the things that include suspect, vain or inefficacious.

makrūh (disapproved): actions deemed to be reprehensible and disapproved.

ma'nawī (immaterial): spiritual, moral, unearthly, inner or incorporeal.

mandūb (valid): a desirable cause or commendable.

marji' taqlīd (sources of imitation): source of emulation, authority to be followed, grand religious scholars with authority. The highest ranking authorities of Ja'farī community, who execute *sharī'a.* the term is usually applied between four and high ranking jurists (*āyatullāh*) locally and nationally; on the world scale, it is applied to only one or two jurists. The position is informally acquired and depends on patterns of loyalty and allegiance and the perceived conduct of the jurist.

ma'rūf (notion of the good): recognised and known, morally accepted, the good, commonly and ethically known good and beneficial things. The term is sometimes used within the contexts of known to the laity (*ma'rūf 'inda al-'āmma*) and what people knew (*mā 'arafa al-nās*).

maṣāliḥ mursala (utility): interest, public interest, and legal reasoning dictated by considerations of public interest that are, in turn, grounded upon the objectives of Islamic law known as *maqāṣid al-sharī'a*. In Islamic jurisprudence it generally refers to "unrestricted" utilities, that is, utilities not enjoined or excluded by revelation.

maṣlaḥa (public interest): utility, interest, public welfare.

maṣlaḥāt al-niẓām (well-being of the system): in attempting to mediate between *'urf* and the necessities of governing. This concept advances criteria in order to identify what is reconcilable between the authoritative text and the dynamic custom; in addition, it also highlights the priority of the survival of the regime in instances where it conflicts with customary values.

mubāḥ (permissible): indifferent, licit. It is neither obligatory, recommended, reprehensible, nor forbidden.

mubārāt (mutual aversion divorce) a form of divorce based on the mutual aversion among spouses in which the compensation does not exceed the actual value of dowry.

mujtahid (qualified jurist) one who is component to reason from the revealed texts, fashion new rules or justify and rationalise pre-existent law.

muqallid (imitator): a jurist or lay man who follows a *mujtahid*. A person who is incapable of deducing rule from the original sources of law.

muqtaẓi'āt al-zamān (necessities of time): the term refers generally to things that are in need of change with the change of time.

mushāhada (visiting right): the right assigned to non- custodial parents to visit and spend time with his/her children after divorce.
mustaḥabb (recommended): meritorious, commendable, in reference to acts the performance of which, while not required, are awardee by God.
naḟaqa (maintenance, alimony): legally required marital maintenance and financial support based on bonds kindship. A husband is required to make this payment to his wife according to Islamic law.
nāshiza (disobedient wife): recalcitrant or disobedient, used to characterise such behaviour on the part of wife.
nushūz (disobedience): the state of disobedience, unlawful acts of the spouse. If the wife becomes disobedient to her husband, following which the husband is not bound to maintain her.
naṣṣ (revealed text): a clear injunction an explicit textual ruling, definitive texts of the Qur'an; or language capable of yielding only one meaning.
niẓām (system): regulation, decree-law of a Muslim ruler.
qānūn (legal code): code, statute, law, standard, principle.
qānūnī (statutory): decided or controlled by law. Within the area of law in Muslim countries, it is generally used as an adjective to denote a system that is regulated, decided and controlled by decree-law of Muslim rulers or governments. In Saudi Arabia, it refers to a legal system that were mainly regulated and controlled by the Royal Decrees of Kingdom. In Iran, it is used to refer to the system that is decided and controlled by status, regulations and bills that were passed by Islamic Consultative Assembly (parliamentary chamber) and then submitted to the Guardian Council of the Consultation (a reviewing power) in order to enact.
qawwāma (matrimonial guardianship): to maintain, take care of, guardianship or protection by men over women. The person who undertakes the responsibility for maintaining the interests of others, administering their affairs, and disciplining them. It has three different type; the guardianship over a minor, the guardianship over endovments, the guardianship over the wife.
qism al-Ṣulḥ (Court of Peace, The Peace Courts): a Conciliatory Committee-Department within the scope of personal courts in Islamic judiciary that decides whether the spouses can reconcile. The procedure intents to minimise divorces in the society before verifying the divorce certificate.
qiṣṣa (pious story): a generic term is used to describe different varieties of narrative and story but, in the area of Islamic science, it is used to refer specifically to the past stories based upon real occurrences and events in the Qur'an.
qiyas (analogy): one of the four *uṣūl al-fiqh*, analogical deduction, an analogy between cases considered as a justification for the formulation of a novel rule.
rājiʻ (revocable divorce): retrievable, reversible divorce. After divorcing his wife with first or second divorce right, a husband can revoke his decision and return to the marriage.
ṣadāq (deferred part of the dowry): additional and extra payment of the dowry that is deferred until the event of death or divorce.
sadd al-dharāʼiʻ (blocking the means): the obstruction of formally legitimate means to illegitimate means. An Islamic legal principle means preventing the act and means which lead to harm and evil. It implies blocking the means to an expected end which is likely to materialise if the means towards it is not obstructed. In its juridical application, the concept also extends to 'opening the means to beneficence'.
ṣarīḥ (explicit): clear, unambiguous, precise, definite, and exact.
sharaf (code of personal and collective honour): a quality that combines respect, being proud, and honesty.
sharʻī (religiously legitimate and legal): an adjective used to describe the appropriateness of rulings, determinations, acts, actions in terms of Islamic law or an adjective that qualifies rulings and regulation derived from Islamic legal sources as legitimate, licit and lawful.
shart (p. *shurūt*) (condition): a term, condition or stipulation: the imposition of something as obligatory in contractual agreements including marriage contract.
shirbaha (bride price payment): literally 'price of milk', a kind of marriage payment in addition to *mahr* in Iran. The payment is transferred from the family of the groom to the family of the bride for the preparation of *jahīziyya.*
ṣighār or *zawāj al-badal* (marriage by exchange): form of marriage involving an arranged and reciprocal exchange. This type of marriage is arranged between two couples and proceeds upon the basis that individual 'a' marries his daughter or sister to individual 'b' in return for individual 'b' allowing 'a' to marry his daughter or sister. There is no requirement for a dowry, as the mutual agreement is understood to provide sufficient insurance in this respect
sīra ʻuqalāʼiyya (rational practice or *ʻurf* of reasoned people): the conduct of reasonable people. Within the Jaʻfarī school, it is one of *sharʻī* proofs that can be employed during the decision-making process of jurists at the lowest level. The term refers to which is customarily perceived as reasonable or which is agreed upon by those possessed of reason. The practice of reasonable people is considered sufficient for a jurist to rule that the Lawgiver approbated the practice. However, *sīra ʻuqalāʼiyya* is subject to change with the change in time and place.
sīra mutasharriʻa (legislative practice): normative practice of committed pious Muslim jurists. It is the behaviour of religious individuals which generally includes Muslim scholars during the time of

legislation. The religious identity of the individual and the fact that it is followed by the majority of the community are considered to sufficiently prove the adequacy of the *shar'ī* statements. It depends on the assumption that the reliability of proof increases when the practice is generally implemented by the entire religious community during the legislation process.

siyāsa shar'iyya (politics in accordance with the Islamic law): policy, governance and administration within the limits that are demarcated and determined by the *sharī'a*. In a narrower sense than this, it refers to law legislated and administered by the ruler.

ṣūrat haghirī (nuptial agreement): an arrangement or agreement entered into by a couple before they get married. This agreement commonly practiced in Iran and designed to regulate what should happen if a marriage dissolves and ends. Generally, this agreement includes heavy conditions stipulated by the wife to prevent dissolution of marriage or divorce by the husband easily.

taghyīr al-ḥukm bi taqhayyīr al-zamān wa al-makān (permissibility of change in the ruling according to change in time and place): an Islamic legal maxim that provides Muslim jurists with an essential tool in considering the change in time place when they derive legal rulings.

ṭalāq al-tafrīq or *faskh* (judicial dissolution): annulment or dissolution of marriage by a judge. A kind of divorce that judicial authorities have assumed responsibility for resolving legal issues that arise between spouses when the respective parties are unable to agree upon the conditions of divorce. Both the husband and the wife are entitled to apply to the court in order to terminate their marriage through *tafrīq*.

takhayyur (selection): "choosing," an eclectic method of legal reform whereby rules are chosen from different legal schools in the formulation of *shar'ī* legal codes and regulations.

ṭalāq (divorce): to divorce a wife, unilateral divorce right of the husband. The pronunciation of a formula by a husband results in a binding dissolution of a marriage contract. It can be either revocable or revocable according to circumstances.

ṭalāq al-tafwīḍ (delegated divorce): delegation of the power of divorce by a husband to his wife, delegated right of divorce given to the wife in the marriage contract.

ṭalāq kubrā (greater finality): greater irrevocable divorce. When the marriage is terminated by the third of three *ṭalāq* pronunciation, the couple cannot remarry until the wife has concluded and consummated a marriage with another man.

ṭalāq ṣughrā (smaller finality): revocable divorce. After the dissolution of marriage with first or second divorce right, the husband can revoke his decision during the *'idda* period. Or the couple can remarry with a new marriage contract after the expiry of the *'idda* period and the husband is required to make a new dowry payment.

ṭalīq (conditional divorce): conditional repudiation, conditional pronunciation of divorce. It is the breaking of the marriage contract by virtue of not obeying the conditions of marriage contract. This type entitles a wife to access divorce without losing her rights.

tamkīn (possession) obedience, submission. The term is used to refer to complete obedience to the husband by the wife, in return for it, the wife's rights, status and well-being are secured within the marriage.

taqlīd (blind obedience and imitation): emulation, imitation; denotes the following of the dictates and decrees of a *mujtahid*.

thaqāfa (culture): the way of life, especially, the general customs and beliefs, a particular group of people at a particular time.

ujrat al-mithl (wages for housework): in the case of divorce, the request of payment by the wife in return for her housework and time spending for growing and educating children. The payment and its concept is peculiar to contemporary Iranian jurisprudence.

'ulamā' (scholars): in the thesis, the author specifically uses the term in a way that includes both jurists and judges who obtained religious education in official centres.

'umarā' (ruler): commanders, rulers, governors and administrators.

'urf (custom): common practice. The term is used to denote "what is unknown", "what is good, wholesome, or commendable" as opposed to "what is unknown". Linguistically, it refers to any common practice, whether good or bad. Juristically, it refers exclusively to the common practice that has been established as good by the testimony of reason and has become acceptable to people's deposition. Over time, it became recognised as one of the secondary sources of Islamic law primarily in being used as a legitimate basis for interpreting Islamic law through the exercise of *ijtihad.*

'urfī (customary): an adjective that refers to customary aspect or components of legal rulings or things.

'urf 'amalī / *'urf fi'lī* (actual custom): a long standing practical custom that has been subjected to careful examinations by jurists. Some practical customs are approved in the light of Islamic law while others are rejected in the light of general Islamic legal principles.

'urf 'āmm (general custom): general convention that is followed by the majority of people who live in the same region.

'urf khāṣṣ (special custom): a delimited custom that is commonly practiced by specific groups within a specific location.

‘urf saḥīḥ (valid custom): legitimate convention that is compatible with Islamic law. It is a custom that is acknowledged and approved by the main sources of Islamic law and it does not deny the interest of people. It is supposed not bring corruption and harm into a society.

‘urf qawlī (verbal custom): linguistic convention used to refer to the usage and meaning of words. In Islamic jurisprudence, the verbal custom is a principle employed by jurists to denote the technical sense that is terminologically different from its literal meaning.

uṣūl fiqh (science of jurisprudence): source of jurisprudence, roots or sources of *fiqh*, science of legal reasoning, derivation methods and legitimation of *ijtihād* .

uṣūl ‘amaliyya (procedural principles): principles outlining the practical duty in the absence of a religious proof.

walī (male guardian): the legal guardian of a female member or minor particularly for the purposes of marriage arrangement.

wājib (obligatory): often synonymous with *farḍ*, actions deemed to be indispensable or expressly commanded.

wa‘z (admonition): a piece of advice that is also a warning to someone about their behaviour.

wilāyat al-faqīh (mandate of the jurist): principle according to which political authority belongs to the *‘ulamā’* and foremost amongst them, the religious jurist (*faqīh*) according to the Ja‘farī school of law. This principle became the keystone of the constitution of the Islamic Republic of 1979, revised in 1989.

wilāya (guardianship): authority, father’s right to custody.

ẓihār (the comparison between the back of wife and mother): the word *ẓihār* is derived from the “*ẓahr*” (back) and means “to oppose back to back”. It is explained that when there is discord between the husband and wife, they instead of remaining face to face towards each other turn their backs against each other. In the language of law, it denotes a man comparing his wife to any of his female relatives with whom there is prohibited degrees of relationship, whether by blood, fosterage or by marriage. This comparison renders marriage with the wife invariably unlawful.

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