

**FORCED MARRIAGE IN THE BRITISH SUNNĪ MUSLIM
COMMUNITY FROM AN ISLAMIC LAW PERSPECTIVE: A
CRITICAL STUDY**

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Declaration

The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

Forced marriage affects a number of communities within the UK, including British Muslims. In some cases, Islam is used to justify this practice and the media has highlighted cases where young Muslims have been coerced into marriage. This thesis attempts to address this issue from a normative perspective, using Islamic legal sources to assess whether Islamic law (*sharīʿa*) allows forced marriage and will determine what can be done about it from within this context. It provides a much needed comparative and contrastive account of key discussions and debates of Muslim jurists (*fuqahāʾ*) from the four Sunni schools of law regarding elements of the marriage contract which are pertinent to this discussion, specifically: *wilāya* (guardianship), *ikrāh* (coercion) and *maqāṣid al-sharīʿa* (the aims and objectives of Islamic law).

The Introduction sets out the main themes and structure of the thesis determining the motivation for the research, the research problems, its rationale, its significance and contribution to academic literature, the research questions, the methodology and the overall structure of the thesis. The issue will be approached from three perspectives: the nature of Marriage in Islamic jurisprudence, the role of guardianship in concluding marriage contract, and the ruling of marriages contracted under the effect of coercion. Chapter 2 defines forced marriage whilst looking at the distinction between it and arranged marriage, contextualising the issue in terms of UK and human rights law. It also introduces the problem of forced marriage within the Muslim community, and asks whether or not it is sanctioned by Islamic law. Chapter 3 looks in depth at the meaning and significance of marriage in Islam, and some elements of marriage; *khiṭba* (engagement/betrothal), the *maqāṣid* (legal objectives), the *arkān* (cornerstones), the *ṣīgha* (marriage formula), the *shuhūd* (witnesses), *kafāʾa* (suitability or social equity of the spouses) and the *mahr/ṣadaq* (dowry). *Wilāya* (guardianship) *ahliyya* (legal capacity), and *wilāyat al-ijbār* (compelling guardianship) will be discussed in detail in Chapter 4. Chapter 5 focuses on the pivotal issues of *ikrāh* (coercion) and *riḍā* (consent). The Conclusion will gather together all the pertinent information and arrive at a definitive judgement with regard to forced marriage in Islamic law: forced marriage is not compatible with the objectives of the Sharīʿah and has no reliable basis in its sources; the function of the *walī* (guardian) is to protect the interests of the ward and not to exercise his authority over her; the woman with legal capacity has the right to choose her spouse; the marriage contract conducted under coercion is invalid. This chapter will also include suggestions for further research and recommendations for addressing the issue of forced marriage.

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List of Abbreviations and Arabic Transliteration System

<i>EI²</i>	<i>Encyclopaedia of Islam, 2nd Edition</i>
<i>MFK</i>	<i>Al-Mausuū^ca al-Fiqhiyya al-Kuwait</i>
<i>Q</i>	<i>Qur'an</i>

Arabic	Transliteration	Arabic	Transliteration
أ	a	ط	ṭ
ء	'	ظ	ẓ
ب	b	ع	ʿ
ت	t	غ	gh
ث	th	ف	f
ج	j	ق	q
ح	h	ك	k
خ	kh	ل	l
د	d	م	m
ذ	dh	ن	n
ر	r	هـ	h
ز	z	و	w
س	s	ي	y
ش	sh		
ص	ṣ		
ض	ḍ		

Arabic short - long vowels and case endings:

Arabic	Transliteration	Arabic	Transliteration
ا	Ā	ـَ	-an
و	Ū	ـُ	-un
ي	Ī	ـِ	-in
اَ	a		
اُ	u		
اِ	i		

Chapter 1

Introduction

1.1 Introduction

In its article *TV drive targets forced marriage problem*, the Yorkshire Post discussed the problem of forced marriage which it claims is happening throughout the UK with areas such as West Yorkshire having a high number of cases. The article argues that advertisement can be used to highlight this problem and persuade families not to tolerate this practice. According to the report by Maggie Stratton, the Forced Marriage Unit of the Home Office and Foreign Office deals with 300 reported cases of forced marriage annually. Although the government was still consulting on a proposal over whether to make forcing someone into marriage a criminal offence, the government launched a national television advertising campaign to tackle the problem on the 16th March 2006. The high-profile information campaign included adverts that were screened across Asian satellite channels were backed with a newspaper and magazine campaign. Campaigners believe forced marriage issues lie behind the high rate of young Asian women who go missing from home – four times the national average – and who commit suicide – three times the national average between the ages of 16 and 24 and double for women of 25 to 35.¹

This issue, I believe, is not restricted to the Asian community within the UK context. It has been observed by scholars in Muslim communities throughout the world and, therefore, Islamic law has dealt with it as a social problem. The aforementioned Yorkshire Post article has been the driving force behind the current work through which I hope to provide some solutions to this problem through a series of recommendations and advice.

1.2 Interest and Motivation behind the Research

Over the past decade and a half I have met several young women and men who have been common victims of forced marriage for counselling. Throughout the period of my work as

¹ See Maggie Stratton, 'TV drive targets forced marriage problem', the *Yorkshire Post*, 16 March 2006, p.10.

an Imam of Leeds Grand Mosque in the United Kingdom, and because of being close to many young people, I became aware of several stories and facts that are relevant to the issue of forced marriage. Despondently, these stories are full of horrific and distressful events which have had a profound impact on me. All of this sad reality became the motive behind this study to provide an appropriate understanding of marriage in Islam and to uncover whether or not forced marriage has a place in Islamic teachings, in the light of the wisdom of the Qur'an and standard practice of the Prophet Muhammad (*Sunna*). Thus, all of this observation and experience suggested to the researcher that the issue of Forced Marriage should be studied and examined from an angle which seems not to have been approached by most writers, academic researchers, social workers and legal professionals in British society. It is an important angle which is directly related to the problem of Forced Marriage and has not been dealt with carefully by a specialist in Islamic studies, namely: the ruling of Islamic law on forced marriage through a study of jurispārudence with regard to marriage in the Sunni schools of jurisprudence which are adhered to by the majority of the Muslim world.

1.3 Problem of the Research

The pivotal research problem that will be investigated in this work is forced marriage in the Sunni Muslim community of the United Kingdom. This will be examined according to the Qur'an and *ḥadīth*, along with objectives of Islamic law (*maqāṣid al-sharī'ah*) and Islamic jurisprudence. Since 1999, there has been great interest in forced marriage from the media. Media reports and research commissioned by policy-makers. This phenomenon turned out to be a growing problem among ethnic and religious minorities in British society, and awareness of it was created through newspaper headlines. Public awareness concerning forced marriage has risen since 1999, even though reports from the Forced Marriage Unit mention that there were 1,300 cases.²

² H M Government, *The Right to choose*, Multi-agency guidance for dealing with forced marriage, (2014), p.1.

1.4 Rationale of the Research

Forced marriage is a highly controversial and sensitive problem that has significant psychological, social and financial implications on a large number of young European Muslims in general and British Muslims in particular. This research aims to provide a solution to this contentious problem through recommendations given at the end of this work which may assist governmental and non-governmental organisations, families and individuals. These recommendations will also aim to raise social and educational awareness about this problem and its devastating impact on the individuals involved.

Among the recommendations of this study, a statement is given of Islamic rulings (*ḥukm al-sharīʿah*) on the issue of forced marriage and related practices in the light of the objectives of the Islamic law (*maqāṣid al-sharīʿah*) and the authentic *Sunna* of the prophet, in the hope that this will contribute in providing an appropriate understanding of the nature of marriage in Islam and whether or not forced marriage as practiced today is something supported by Islamic law.

This problem has also been of tremendous interest to critics of Islam, politicians and the media. Evidence from the legal texts, i.e. the Qurʿan and *ḥadīth* (*Sunna*), along with *maqāṣid al-sharīʿah* has demonstrated that a rational solution can be found for this social problem.

1.5 Aims and Significance of the Research

This research aims to examine the problem of forced marriage from a number of perspectives. First of all, it will look at the context, that is, forced marriage in the UK. It will outline debates surrounding defining forced marriage and it will look at current legislation. It will also look at some responses to the issue by contemporary Muslim bodies and critics of the practice. It will then look at the institution of marriage in the Sharīʿah in the light of the legal textual evidence (Qurʿan and *ḥadīths*) through the lens of the four Sunni legal schools. In doing so, it will focus on the objectives of marriage in Islamic thought and the role of *wilāya* (guardianship), explaining certain legal rulings and scholarly debates surrounding it.

It will then look at the issue of *ikrāh* (coercion) and its legal effect on the marriage contract from the four aforementioned perspectives.

The main contribution of this thesis is that, after a thorough survey of the issue in both the UK context and the Islamic law, it will find solutions to this problem and provide awareness to the academic and Muslim community about the Islamic legal perspective of this practice. It is believed that only in that light, can real and effective solutions to this problem be found. In other words, for any solution to gain the acceptance of the Muslim community, it must be found through the foundational sources of Islamic law; the Qur'an and the *Sunna*.

1.6 Research Questions

The following questions will be addressed in this work:

- (i) What is the nature of marriage in Islamic law?
- (ii) What is the role of guardianship (*wilāya*) in concluding a marriage?
- (iii) Does Islamic jurisprudence allow coercion with regard to concluding marriage contract?
- (iv) Do the objectives of Islamic law (*maqāṣid al-sharī'ah*) agree with the idea of forced marriages and is it a breach of human rights according to Islamic jurisprudence?
- (v) What is the effect of coercion on marriage contract and how does someone get out of a forced marriage according to Islamic jurisprudence?

1.7 Methodology

The main body of this research is based on a comparative-contrastive analysis of marriage in the four *Sunni* schools of jurisprudence (the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī *madhahb*). It will compare between the schools' various positions regarding forced marriage, focussing on their respective stances on the pivotal issues of guardianship (*wilāya*) and coercion (*ikrāh*), including the evidence and juristic principles invoked by each. This work will

further mention the discussions made by each group of scholars regarding the other schools' evidence and methods. This work will then choose the most relevant from among these opinions, based on which opinion meets the requirements of the purposes of marriage in Islamic law (*maqāṣid al-sharī'ah*) and the benefits of the Muslim community in the UK.

In order to provide an informative discussion on this topic, my comparative and contrastive account will be based on specific aspects of marriage, including components of the marriage contract such as the pillars (*arkān*) and the conditions (*shurūṭ*) of validity. As previously mentioned, it will investigate guardianship in marriage specifically (*al-wilāya fī 'aqd al-zawāj*) and its other general aspects in the respective schools of jurisprudence in order to set the scene for the reader regarding what the role of guardianship in marriage is.

As the major focus of my research is 'forced marriage in the UK Muslim community', I have adopted a methodological investigation of this problem through looking into how writers and scholars have approached it and how they judged this practice from different points of view, using that as a source of evidence to show the impact and effect of forced marriages. In order to achieve this, I have relied on major sources such as recent articles, books and encyclopaedias to provide the data for the comparative-contrastive analysis. However, since the focus of my research is 'from an Islamic law perspective', the majority of the thesis (i.e., chapters 3, 4 and 5) will be concerned with Islamic jurisprudence in order to specify what constitutes a forced marriage, the reasons behind it and to find solutions to this problem from within Islamic law itself. Therefore, the Qur'an, *ḥadīth*, *tafsīr* (exegesis of the Qur'an) and classical and modern jurisprudence text books will also be consulted and invoked. Due to the fact that the majority of the British Muslim community are *Sunni*, I have not included other perspectives in my jurisprudential discussion.

1.8 Structure of the Thesis

The thesis falls into five chapters:

Chapter One: Introduction.

Chapter Two: Literature Review

This chapter will deal with forced marriage as practised by a minority of Muslims in the United Kingdom. It will also investigate the reasons behind forced marriages, some statistics related to this problem, the position of British law towards forced marriage, and how the UK Government has responded to this problem. The chapter will also deal with authentic cases of forced marriages.

Chapter Three: Marriage in Islam

This chapter details theological and anthropological definitions of marriage. It provides an informative account of the constituents of Marriage contract in Islamic Law. This chapter will thoroughly investigate the legal cornerstones and stipulations of the marriage contract (*arkān wa shurūṭ fī 'aqd al-zawāj*). This chapter will also examine the matters which cause the marriage contract to be invalid (*bāṭil*) and irregular (*fāsid*). The chapter also provides a comparative-contrastive analysis of jurists of the four major Sunni schools' views with regard to the legal principles, the conditions and matters that make marriage contract invalid.

Chapter Four: Guardianship (*wilāya*) in the Marriage contract

The chapter will focus on the issue of guardianship (*al-wilāya*) and its impact on the marriage contract. It will specifically discuss the significance and definition of *wilāya*, as well as the purposes and reasons for it. The chapter will further look at who has the right of guardianship as well as what the rights and responsibilities of the guardian (*walī*) are as well as the various types of guardian. This chapter will also account for the problem of whether a person has the legal capacity (*al-ahliyya*) to make a contract. Furthermore, it will look at the legal evidence for it and the jurists' discussions surrounding the issue and how the various juristic methodologies led to different rulings. It will also introduce and discuss the issue of *wilāyat al-ijbār* (compelling guardianship) from the perspectives of the four legal schools respectively.

Chapter Five: The effect of coercion (*ikrāh*) on marriage contract.

This chapter will examine whether or not Islamic law gives liberty to the individual to make contracts in general and whether a contract concluded under coercion is legally valid. This chapter will also examine the effect of coercion on consent (*riḍā*) which causes marriage contract to be either invalid (*bāṭil*) or irregular (*fāsid*). The chapter also provides a comparative-contrastive analysis of jurists' views of the four major Sunni schools of law with regard to the legal effect of coercion, whether or not the contract can be terminated and the conditions and other matters that make the marriage contract invalid.

Chapter Six: Conclusion and recommendations

This will be a critical assessment of the problem of forced marriage among some British Muslims. It will also provide recommendations that aim to raise social awareness about this problem and its devastating impact on the individuals involved. The solutions in the form of recommendations can be established on the basis of Islamic law; in the light of Qur'an, the standard practice of the Prophet Muḥammad and the objectives of Islamic law (*maqāṣid al-Sharī'ah*).

Chapter 2

Literature Review

2.1 Background

There are many reasons why people marry. These motivations can be legal, social, emotional, economical and religious in nature. They might include inter alia family obligations, the desire to establish a family unit, legal protection of children, public declaration of commitment, and to obtain citizenship. However, marriage is a relationship between two individuals before anything else; therefore, the emotional aspect is the most important of these reasons. Thus, marriage should not be entered into without the desire, free will and choice.³ Therefore, distinguishing between forced marriages and arranged marriages is on the basis of the distinction between free consent and the other that come under the influence of coercion.

The following discussion is to define forced marriage and examine whether it is distinguished from so-called arranged marriage or not. This section will also emphasise that forced marriage is a crime against human rights, as it involves physical and emotional abuses. Furthermore, we will clarify that the problem of forced marriage was the reason for governments and states to issue laws and legislation in order to tackle and reduce the negative effects of it on the individuals who are subjected to it.

2.2 The problematic of Forced Marriage

Forced Marriage has been considered in the national and international literature from an ethnic perspective and constructed as a cultural pathology,⁵ and is a social problem, because of its impact on individuals and societies. It can include a range of intimidating behaviour such as domestic violence, physical and emotional pressure and coercion. It has been suggested that forced marriage is an extension of the practice of endogamy (the custom of marrying only within the limits of a local community, clan, or tribe), and cultural notions of

³ See Abu Sadik Maruf, *Forced Marriage, A Study on British Bangladeshi Community*, (Bloomington, USA: AuthorHouse, 2012), p. 5.

⁵ Samad, Yunas, 'Forced marriage among men: An unrecognized problem', *Critical Social Policy* 30.2 (2010), p.190.

honour and shame. As this study will be dealing with the problem of forced marriage as it is practiced within the Muslim communities in the UK, it is worth saying that the majority of Muslims in the UK originate from Pakistan, India and Bangladesh. There are also other Muslim communities from various Arab and Muslim countries. According to the report issued by the Office for National Statistics in December 2012, Indian is one of the largest ethnic group with 1.4 million people (2.5 per cent) followed by Pakistani (2.0 per cent). Arab accounted for 240,000 permanent residents (0.4 per cent of the population).⁶

Since the largest population in Muslim communities originated from South Asia, it is useful to know that marriage in the Asian sub-continent and the rest of Muslim world, as in most societies, is based on custom and tradition which has been inherited from one generation to another.⁷ Gill and Anitha believe that forced marriage is a significant cultural tradition in numerous countries worldwide and within certain communities in the UK.⁸

Generally, forced marriage has been seen as a religious practice, associated largely with Islam. However according to Strickland all major religions including Islam reject this practice; and others suggest that forced marriage is a harmful *cultural* practice which is considered a form of violence against women and a serious abuse of human rights.⁹

2.3 Defining Forced Marriage

Marnia Lazreg states that there is no agreement on the definition of forced marriage. For example The Council of Europe defines the term as: ‘covering slavery, arranged marriages, marriage custom law, child marriage and marriage of shame; unlike arranged marriage in which the couple give their consent’.¹⁰ In the case of forced marriage, one or both of the people involved are forced into a marriage against their will and without their permission.

⁶ See *Ethnicity and National Identity in England and Wales 2011*, Office for National Statistics, (11 December 2012), pp. 4-10.

⁷ See *Liberation from Forced Marriages*, report, Muslim Arbitration Tribunal, (2008), p.5.

⁸ See Aisha, Gill, and Anitha, Sundari ‘The illusion of protection? An analysis of forced marriage legislation and policy in the UK’, *Journal of social welfare & family law* 31.3 (2009), p.258.

⁹ Pat Strickland, *Forced Marriage*, House of Common’s Library; Home Affairs Section, (23 March 2012), p.1; Samad, *Forced marriage among men*, p.190.

¹⁰ See Marnia, Lazreg, ‘Forced Marriage: Introducing a Social Justice and Human Rights Perspective’, *Contemporary Sociology: A Journal of Reviews* 42.5 (2013), p.744.

Therefore, in forced marriage, at least one party does not consent to the marriage and several elements of coercion are involved.¹¹

The officially recognised definition of forced marriage in the UK is:

A marriage in which one or both spouses do not (or, in the case of some adults with learning disabilities, cannot) consent to the marriage and duress is involved. Duress can include physical, psychological, financial, sexual and emotional pressure.¹²

It is generally believed that this definition underlines the influence of coercion insofar recognises it as a main factor in defining forced marriage. Therefore, the issue of consent became central. According to Gangoli et al., the definition of forced marriage in the UK acknowledges the role of duress and the ways in which it serves to curtail consent, and this should help to underline that forced marriage is a form of violence against women.¹³ However, others argue that current definitions of forced marriage focus exclusively on the point of entry into marriage. The Home Office defines forced marriage as occurring: ‘Where one or both parties are coerced into a marriage against their consent or duress at point of entry into marriage’. Gangoli, et al., argue that even though this is a useful definition, it also creates questions surrounding exit options, particularly where consent has not been given or where pressure was put upon women and men to stay in forced marriages. Pressure here includes any emotional, physical, financial and cultural state, as well as immigration status.¹⁴

Strickland claims that forced marriage must be distinguished from arranged marriage, where both parties fully and freely consent to the marriage, although their families take a leading

¹¹ See Lazreg, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, p. 743.

¹² See Ministry of Justice, ‘One year on: initial impact of the Forced Marriage Act 2007’, *A report reviewing the impact of the Act in its first year of operation* (2009), p. 9.

¹³ See Gangoli, Geetanjali, and others. ‘Understanding forced marriage: definitions and realities’, in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), p. 26

¹⁴ See *Ibid*, p. 40.

role in the choice of partner.¹⁵ However, some people conflate the concept of forced marriage with arranged marriage. Therefore, it would be relevant to shed some light on this issue.

2.4 Drawing a line between Forced Marriage and Arranged Marriage

Forced marriage is where one or both parties are coerced into a marriage against their will and under duress. This was based on the Home Office report on forced marriage, published in 2000, which focused on consent as the discriminating factor. The report defined arranged marriage as a marriage facilitated by family, but with the consent of both partners, and a forced marriage as that which either or both parties fail to give consent to, or do so only under duress.¹⁷ The tradition of arranged marriages has operated successfully within a variety of communities and in many countries for a very long time.¹⁸

As for Quek, the consultation paper from the UK government sought a straightforward distinction between forced and arranged marriages. In *A Choice by Right Report*, the UK government was seeking to make clear to relevant groups that its concern was only with forced and not arranged marriage, which was described as a ‘tradition’ which has operated successfully within many communities.¹⁹ Therefore, the Home Office report attempted to accept minority cultural practices, through adopting a twofold distinction between arranged and forced marriage. According to Thiara et al., in forced marriage an individual has been coerced against their will and under duress, while in an arranged marriage the family assists in the marriage in order to help their children to choose by introducing them to marriage partners. Therefore, this sets forced marriage apart from other forms of marriages.²⁰

¹⁵ Strickland, *Forced Marriage*, p.1.

¹⁷ Gill and Anitha, *The illusion of protection*, p. 258.

¹⁸ HM Government, *The Right to Choose*; Multi-agency statutory guidance for dealing with forced marriage, (2014).

¹⁹ Quek, Kaye, ‘A Civil Rather than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK’, *The British Journal of Politics & International Relations* 15.4 (London: Political Studies Association, 2012), p.11.

²⁰ *Violence against Women in South Asian Communities: issues for policy and practice* ed. by Thiara, Ravi K., and Aisha K. Gill, (London, England: Jessica Kingsley Publishers, 2010), pp.130-31.

Quek claims that it is important not to confuse forced and arranged marriages, as feminist research recently indicated that, in practice, the distinction between customs may not always be clear. Moreover, there is evidence within feminist literature which indicates that, in some cases, the so-called "arranged marriage" can be described as a "forced marriage" and that, when practiced, forms of non-physical pressure is applied on young women.²¹ Meanwhile, Phillips and Dustin believe the distinction between arranged marriage and forced marriage may make it easier to bring community leaders on board any government initiatives to deal with problem of forced marriage if they can be assured that government action is not directed against the practise of arranged marriage. However, because they see that the distinction between forced marriage and arranged marriage revolves around the notion of consent, if the parties consent to the marriage it cannot be described as forced in their view.²²

An-An'im claims that the most dramatic cases of forced marriage involve abduction and physical violence. He also states that forced marriage is a union which lies on the continuum of arranged marriage, which is defined by degrees of coercion and consent.²³ According to Maruf, traditionally in arranged marriage, parents arrange for a spouse for their son or daughter, if their children do not agree, the parents start looking for another partner. In this type of situation, an all-out attempt to convince their children about the value of the arrangement is used by the parents to make it happen, but without utilising force.²⁴ For Chantler, et al., forced marriage is also included within the domestic violence definition used by the government.²⁵ On the other hand, in an arranged marriage, families choose marriage partners on the basis of their socio-economic status, sometimes on the basis of their religious sect, but the decision lies with the potential couple as to whether to go ahead with the

²¹ Kaye, *A Civil Rather than Criminal Offence?* p. 4.

²² Anne, Phillips, and Moira Dustin, 'UK initiatives on forced marriage: regulation, dialogue and exit', *Political studies* 52.3 (2004), p. 537.

²³ See An-Na'im, Abdullahi, and C. H. Candler, 'Forced marriage', *Emory University, Atlanta* (2000), p.1.

²⁴ See Maruf, *Forced Marriage*, pp. 6-7.

²⁵ Chantler, Khatidja, Geetanjali Gangoli, and Marianne Hester, 'Forced marriage in the UK: Religious, cultural, economic or state violence?', *Critical social policy* 29.4 (2009), p. 596. Domestic violence is defined as 'any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality' and include 'issues of concern to black and minority ethnic communities'.

marriage or not. Therefore, in arranged marriages the will of the potential bride and bridegroom is established without any pressure.²⁶

Chantler et al. question the forced marriage definition given by the Foreign and Commonwealth Office which also considers that there is a clear distinction between forced and arranged marriages based on whether consent has been given or not. In many cases, the young person has been rushed to accept the arrangements and gives her/his consent without understanding what they are doing because they have been given insufficient information.²⁷ An-An'im believes that this distinction that researchers often make it's only an effort to protect the culture of arranged marriage, characterising the arranged marriage as legitimate and forced marriage as objectionable. He further states that a closer examination of individual cases indicates a sharp distinction between the two can be misleading.²⁸

2.5 The Issue of Consent and Duress

The issue of consent was problematic for a number of researchers, as forced marriage was defined as a marriage conducted without the full and free consent of the couple involved. Gangoli argues that the Home Office definition assumes the distinction between arranged and forced marriage is based on '*full and free consent*'. However, she sees this definition does not specifically address the issue of age, while much of the official literature surrounding forced marriage indicates that the primary victims are young girls under the age of 18, with the implication that women and men of any age can be forced into marriage.²⁹ Quek believes the vital issue with forced marriage is the issue of choice, so she sees the main problem with forced marriage is the denial of choice of one's spouse. She refers this to

²⁶ See Muslim Arbitration Tribunal, *Liberation from Forced Marriages*, report, p. 7.

²⁷ See Chantler Khatidja, Geetanjali Gangoli, and Marianne Hester, *Forced Marriage in the UK: Religious, cultural, economic or state violence?* p.587.

²⁸ See An-Na'im, and Candler, *Forced marriage*, pp. 2-3.

²⁹ Geetanjali, Gangoli, McCarry, Melanie and Amina Razak, 'Child marriage or forced marriage? South Asian communities in north east England', *Children & Society* 23.6 (2009), p. 420.

results from a working group which states that the denial of choice is the distinction between forced and arranged marriage; in forced marriage there is no choice.³⁰

Again, Gangoli et al., state that one of the important issues within the consent debate is that the existing definitions of forced marriage focus on whether one or both spouses had the right or the ability to choose the marriage at the time of entry into marriage.³¹ However, for Sundari et al. the crucial question still remains whether threats, blackmailing, pressure, or whatever pressure is applied, is such as to destroy the reality of consent and overbears the will of the individual.³²

For Gangoli et al., the notion of consent is further complicated by the definition of forced marriage which counterpoises arranged marriages with forced marriage.³³ An-Na'im believes there is no difference between arranged and forced marriages, but that they fall on a continuum between consent and coercion. He claims that this classification allows for the cultural and contextual nature of consent and considers its difference from coercion as the matter of degree and perception, with persuasion playing a key role in the grey area of the continuum.³⁴ Gangoli et al. adds that the separation of arranged and forced marriages is obviously an attempt to accept diverse cultural practices.³⁵ In the same context, Anitha and Gill also believe that there are grey areas between coercion and consent and, therefore, the notion of free will remains central to the legal discourse surrounding forced marriage in the UK.³⁶

Furthermore, Gangoli and Chantler et al. state that this separation between arranged and forced marriages serves to cover up some of the indirect forms of coercion that can sometimes result in 'slippage' between arranged and forced marriages. Also, they note that

³⁰ See Quek, *A Civil Rather than Criminal Offence?*, p 10.

³¹ See Gangoli, and others. *Understanding forced marriage*, p. 27.

³² Sundari, Anitha, and Aisha K Gill, 'Reconceptualising consent and coercion within an intersectional understanding of Forced Marriage' in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 48.

³³ See Gangoli, and others. *Understanding forced marriage*, p. 27.

³⁴ See An-Na'im, *Forced Marriage*, p. 3

³⁵ See Gangoli, and others. *Understanding forced marriage*, p. 27

³⁶ See Anitha and Gill, *Reconceptualising consent and coercion*, pp. 53-54.

the vocabulary of forced marriage is rather recent, but it is important to note that degrees of coercion have been accepted as the norm within some scholarship on arranged marriages, particularly in the Indian subcontinent.³⁷ Again, Anitha and Gill, claim that consent might be given under the influence of power imbalances and gendered norms in the absence of explicit threats.³⁹ It is also supported by Bredal who focuses on understanding coercion in terms of degrees and both direct and indirect constraints.⁴⁰

2.6 Forced Marriage as a Human Rights issue

The Foreign and Commonwealth Office report, *Forced Marriage – Human Rights and Democracy*, states:

‘Forced marriage is an appalling and indefensible practice and is recognised in the UK as a form of violence against women and men. It is a serious abuse of human rights and, where children are involved, child abuse. Victims of forced marriage can suffer physical, psychological, emotional, financial and sexual abuse, including being held captive unlawfully, assaulted and repeatedly raped’.⁴¹

Therefore, many consider the issue of violence against women to be a human rights issue and because forced marriages are among those issues which violate human rights, it should be taken seriously at an international level.⁴²

Quek confirms this by saying: ‘At the level of the international human rights community, forced marriage has been identified as a harmful cultural practice, and is increasingly

³⁷ See Gangoli, and others. *Understanding forced marriage*, p. 27.

³⁹ Anitha and Gill, *Reconceptualising consent and coercion*, pp. 53-54.

⁴⁰ Anja, ‘Bredal, Border control to prevent forced marriage: choosing between protecting women and protecting the nation’, in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), p. 102.

⁴¹ *Forced Marriage – Human Rights and Democracy 2012*, The 2012 Foreign & Commonwealth Office Report, p.1.

⁴² See Shazia, Choudhry, ‘Forced marriage: the European Convention on Human Rights and the Human Rights Act 1998’, in *Forced Marriage: Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), p. 70.

discussed by feminist scholars as a violation of women's human rights'.⁴³ For Maclean and Eekelaar, forced marriage clearly falls within the category of human rights issue under UK state law.⁴⁴ Moreover, Gill and Anitha stated that forced marriage violates the fundamental right to freely consent to marriage that is protected in numerous international human rights instruments.⁴⁵

In a 2006 study of all forms of violence against women, the former UN Secretary-General Kofi Annan stated that:

A forced marriage is one that lacks the free and valid consent of at least one of the parties. In its most extreme form, forced marriage can involve threatening behaviour, abduction, imprisonment, physical violence, rape, and, in some cases, murder.⁴⁶

Chantler et al., believe that, from a human rights perspective, forced Marriage breaches a number of international Human Rights standards, specifically, the issue of consent. Therefore, there are many of the international Human rights instruments and standards in which forced marriage falls under its provisions, including the Universal Declaration of Human Rights 1948 (UDHR), the convention on the Elimination of all forms of Discrimination against Woman (CEDAW), and the UN Convention on the Rights of the Child 1989 (CRC). The UDHR confirms the acceptance of 30 rights and was adopted by UN member states in 1948. Furthermore, the UK is party to the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR) as well as CEDAW and CRC.⁴⁷ Moreover, The United Kingdom is a signatory to The European Convention on Human Rights. The

⁴³ See Quek, *A Civil Rather than Criminal Offence?*, p. 4.

⁴⁴ *Managing Family Justice in Diverse Societies*, ed. by Mavis Maclean and John Eekelaar, (Oxford, England: Hart Publishing, 2013), p. 7.

⁴⁵ Aisha K. Gill and Sundari Anitha, 'Framing Forced Marriage As A Form Of Violence Against Women', in *Forced Marriage, Introduction a Social Justice and Human Rights Perspective*" ed. by Aisha K.Gill & Sundari Anitha. (London, England: Zed Books Ltd, 2011), p. 6.

⁴⁶ Choudhry, *Forced marriage: the European Convention on Human Rights*, p.70.

⁴⁷ See Chantler Khatidja, Geetanjali Gangoli, and Marianne Hester, *Forced Marriage in the UK: Religious, cultural, economic or state violence?* p.588.

United Kingdom is therefore under a legal obligation to adhere to and secure individual's rights under the Articles of the Convention. Here are a number of examples:

1. Forced marriage violates Article 12 of the convention, which declared that 'Men and women of marriageable age have the right to marry and found a family according to national laws governing the exercise of that right'. The article demands that there is free and full consent to marriage by intending spouses.
2. The practice of forced marriage would contravene Article 3 of the Convention prohibiting torture and inhumane or degrading treatment.
3. Also, forced marriage may also involve the deprivation of personal liberty, namely, the arbitrary detention of victims by family members, which is again a violation of human rights.
4. Finally, some cases of forced marriage can result in the violation of the individual's right to life, where those who refuse to enter into marriage are killed.⁴⁸

International bodies or emanations of the state can be used to hold to account forced marriage as an abuse of Human Rights. Moreover, forced marriage has been seen as a form of child abuse, because sometimes it is young girls who experience the negative consequences of such marriages. Harmful outcomes include sexual assault and health risks associated with early pregnancy.⁴⁹ Therefore, The UN Human Rights Office highlighted that although forced marriage is common in the developing world, particularly in Africa and Asia, it is in fact a global problem, across many countries, cultures, religions and ethnicities.⁵⁰

Quek believes that it is important to note that the discourse on human rights has been criticised by both feminist and non-feminist scholars. However, as several scholars argue,

⁴⁸ See Thiara and Gill, *Violence against Women in South Asian Communities*, p. 151.

⁴⁹ See Gangoli, McCarry, and Razak, *Child marriage or forced marriage?*, p. 418.

⁵⁰ *Ending Forced Marriage Worldwide*, The United Nation Human Rights Office, (21 November 2013).

the language of rights can also be a useful as a tool with which to battle harmful practices that have been left to grow.⁵¹ For Choudhry, the main emphasis of the prohibition of forced marriage by international legal instruments was based on progress made by the State in respect of its obligations in this area and by focusing on the need for free consent and the full approval of each party to the marriage.⁵² Therefore, human rights laws which are designed to enable individual self-determination are lost on the female victims of patriarchal cultures.⁵³

In the UK, the official policy on domestic violence is aligned with the Human Rights Act of 1988 and the European Convention on Human Rights. Article (3) of the European Convention of Human Rights states: ‘No one shall be subject to torture or to inhuman or degrading treatment’. Based on the meaning of this Article, Choudhry questions whether forced marriage is inhuman and degrading treatment for the purposes of Article 3.⁵⁴ Furthermore, she states that, under the UK’s Human Rights Act 1998 (HRA), public authorities are required to protect victims of violence. This means that the government, police, prosecution authorities and courts are required to take positive steps to protect victims of violence⁵⁵ Finally, Choudhry claims that applying a human rights framework can bring about real protection for the victims of domestic violence and forced marriage. She then gave an example of the case of *Opuz v Turkey* where the European Court of Human Rights accepted for the first time that victims of domestic violence could fall within the group of ‘vulnerable individuals’ entitled to state protection under Article (3).⁵⁶

Thus, the existence of the problem of forced marriage continues in many communities, especially those which maintain cultural heritage, customs and traditions which affect women and violate their rights. Therefore, it was imperative that the international community takes practical steps to reduce, control and prevent these unjust practices.

⁵¹ See Quek, *A Civil Rather than Criminal Offence?*, p. 4.

⁵² See Choudhry, *Forced marriage: the European Convention on Human Rights*, p. 71.

⁵³ See Thiara and Gill, *Violence against Women in South Asian Communities*, p. 150.

⁵⁴ See Choudhry, *Forced marriage: the European Convention on Human Rights*, p.73.

⁵⁵ See *Ibid*, p. 67.

⁵⁶ See Choudhry, *Forced marriage: the European Convention on Human Rights*, p. 84.

2.7 The ‘Forced Marriage Civil Protection’ Act 2007 and its impacts

As mentioned above forced marriage involves coercion and duress. The legal response from the UK government toward this problem was ‘the Forced Marriage (Civil Protection) Act 2007’, which was issued in November 2008. The UK government wanted for this law to introduce civil remedies in order to protect individuals at risk of being forced into marriage, or to help remove them from a situation of forced marriage in the form of Forced Marriage Protection Orders. They asserted that this sends out a strong message that forced marriage is unacceptable practice and will not be tolerated.

According to Mavis Maclean, before the Forced Marriage Protection Act there had been ongoing argument about whether legislation was a suitable way to respond to the situation and how far the reform should go towards the criminalisation of forced marriage.⁵⁷ In 1999, Mike O’Brien, the Minister for Community Relations, set up a working group to investigate the extent of forced marriage in England and Wales and presented proposals for tackling it effectively. Its report, *A choice By Right* (2000), clarified the key issues regarding forced marriage. Following the publication of the report, the Foreign and Commonwealth Office (FCO) established a Community Liaison Unit (CLU) to take forward the working group’s recommendations. The CLU was absorbed into a joint FCO-Home Office Forced Marriage Unit (FMU) in 2005.⁵⁸

Mavis Maclean states that in 2005, the Forced Marriage Unit (FMU) was set up which later in the year issued a consultation entitled *Forced Marriage -A Wrong Not a Right*. This sought views on whether the creation of a specific legal offence would help to combat forced marriage. By June 2006, the government had decided against introducing legislation.⁵⁹ Later, the Liberal Democrat peer, Lord Lester, sought to extend the range of protection available by introducing the forced marriage (Civil Protection) Bill as a Private

⁵⁷ See Maclean and Eekelaar, *Managing Family Justice in Diverse Societies*, p. 128.

⁵⁸ See Khanum, Nazia, *Forced Marriage, family cohesion and community engagement*, (Luton: Equality in Diversity, 2008), p.4.

⁵⁹ See Maclean and Eekelaar, *Managing Family Justice in Diverse Societies*, p. 128.

Member's Bill in November 2006. The bill was supported by the government and has now been passed as the Forced marriage (Civil Protection) Act 2007.

According to Gill and Anitha, the main arguments against the proposed legislation were that

- (i) A criminal offence would not represent an effective prevention, nor would it provide adequate protection for victims.
- (ii) It would be difficult to obtain sufficient evidence in individual cases to satisfy the criminal burden of proof require under the proposed law.
- (iv) The new law will eventually prevent victims of forced marriage from seeking help of authorities for fear that family members would be prosecuted.⁶⁰

And, as a result of consultations, in June 2006 the UK government decided not to introduce a forced marriage criminal law. However, despite overwhelming support for this decision, a number of those who were consulted believed that this would stop the practice or send a clear message to potential perpetrators.⁶¹ However, from her review of the implementation of Forced Marriage (Civil Protection) Act 2007, Mavis Maclean argued that it seems the impact of legislation as a response to this issue is limited, referring to a report by Gill in 2011 on an independent survey of 74 respondents, conducted by Roehampton University on the question of the criminalisation of forced marriage, which showed little desire for further legislation. Therefore, Mavis stated that change will come from working together in the light of current ideas of individual rights and liberties, rather than by redefining old practices as new crimes.⁶²

Many non-governmental organisations argued, critically, that there are no adequate resources provided to meet victims' needs, both during and after legal proceedings. As a result, these services often have a limited understanding of forced marriage victims' specific

⁶⁰ See Gill and Anitha, *Reconceptualising consent and coercion*, p. 140.

⁶¹ See *Ibid*, p. 141.

⁶² Maclean and Eekelaar, *Managing Family Justice in Diverse Societies*, p. 136.

needs.⁶³ However, others believe that since 25 November 2008, family courts have been successful in making Forced Marriage Protection Orders to protect individuals from being forced into marriage. Furthermore, the Act makes it possible for potential victims to make applications prior to a forced marriage in favour of dealing with cases after the fact.⁶⁴ Yet, the report of The Home Affairs Committee states that it is not at all clear that the Act is wholly effective as a tool in protecting individuals from forced marriage. Nevertheless, 293 Forced Marriage Protection Orders have been made during the two years and four months following its enactment.⁶⁵

2.8 Recent Legislation on Forced Marriage

A new law came into effect in England and Wales in June 2014 making forced marriage a criminal offence. Courts have been able to issue civil orders to prevent forced marriage since 2008, but offenders will now be punishable by up to seven years imprisonment. (This is subject to criteria that will be outlined later).⁶⁶ This was the result of a public consultation and, as an outcome of that, the Prime Minister announced on the 8th of June 2012 that his government intended to make forcing someone to marry a criminal offence in England and Wales; suggesting that in order to strengthen the civil law in England and Wales it is vital to make the breach of a Forced Marriage Protection Order a criminal offence. These proposals were part of the Anti-social Behaviour, Crime and Policing Act, which received royal assent on 13 March 2014 (the 2014 Act).⁶⁷

The Home Secretary Theresa May said: ‘The practice was “A tragedy for each and every victim”. Furthermore, she added: ‘the criminalisation - under the Anti-social Behaviour,

⁶³ See Aisha, K. Gill, and Anicée Van Engeland, ‘Criminalization or ‘multiculturalism without culture’? Comparing British and French approaches to tackling forced marriage’, *Journal of Social Welfare and Family Law* 36.3 (2014), p. 245.

⁶⁴ See Anitha, Sundari, and Gill, Aisha K. ‘Forced Marriage Legislation in the UK: a critique’, in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 142.

⁶⁵ See *Forced marriage* - The Home Affairs Committee, <http://www.parliament.uk>.

⁶⁶ ‘*Criminalising Forced Marriage Presents New Challenges*’.

⁶⁷ Circular 10/2014: new forced marriage offences, <https://www.gov.uk>.

Crime and Policing Act 2014 - was "a further move by the government to ensure victims are protected by the law and that they have the confidence, safety and the freedom to choose".⁶⁸

The new law come into force on 16 June 2014, and *Section 121 of the 2014 Act* proclaims that:

1. A person commits an offence in England and Wales if he or she:
 - (a) Uses violence, threats or any other form of coercion for the purpose of causing another person to enter into the marriage, and
 - (b) Believes, or ought to reasonably believe, that the conduct may cause the other person to enter into the marriage without free and full consent.
2. In relation to a victim who lacks capacity to consent to marriage, the offence under subs.(1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form of coercion).
3. A person commits an offence under the law of England and Wales if he or she practices any form of deception with the intention of causing another person to leave the United Kingdom, and intends the other person to be subjected to conduct outside the UK that is an offence under subs. (1) or would be an offence under that subsection if the victim were in England and Wales.

The maximum penalty for the forced marriage offences is 7 years' imprisonment in a criminal court.⁶⁹

Gill and Anitha, argue that the civil remedies available under the Forced Marriage (Civil Protection) Act primarily focus on protection and prevention, rather than on prosecution and

⁶⁸ 'Forced marriage law sends 'powerful message'', <http://www.bbc.co.uk>.

⁶⁹ Circular 10/2014: new forced marriage offences, <https://www.gov.uk>.

punishing of the perpetrators. Therefore, they see that point as the main difference between the Forced Marriage (Civil Protection) Act and the criminal statute that was originally proposed. In other words, “the principal remedy under the Forced Marriage (Civil Protection) Act is the injunction: an order made by the court prohibiting certain acts that may lead to forced marriage.”⁷⁰ They further suggested that attempting to prevent forced marriage through injunctions or criminal proceeding is only part of the solution.⁷¹

However, Mavis Maclean states that there are limits to what courts and the law can achieve. She then raised the question of whether further legislation could provide more protection for those in need without taking into account the improvement of education and welfare authorities in order to increase awareness of the practice and its impact. Moreover, she suggested considering the needs of those who still need long-term support to live apart from their family and culture after the legal protection is in place.⁷² According to Hanisha Patel, many have argued that under the new law victims may choose not to disclose information about what happened because of their fear to see their own family members sent to prison. However, the law allows for victims to go for civil action through a forced marriage protection orders through the family courts rather than criminal action.⁷³

One of the latest observations of the new legislation is in where they suggest that victims could determine whether or not to pursue remedies under civil or criminal law; thus, the new challenge would arise the following:

- 1- Ensuring that victims are able to make informed choices.
- 2- Qualified professionals would be required to advise victims, as well as assess their ability to make an informed decision.

Meanwhile, the effectiveness of criminalisation is contingent upon the development of legislation that distinguishes effectively between forced and arranged marriages; however,

⁷⁰ Anitha, Sundari, and Gill, Aisha K, *Forced Marriage Legislation in the UK: a critique*, p. 142.

⁷¹ Ibid, p.152.

⁷² See Maclean and Eekelaar, *Managing Family Justice in Diverse Societies*, p. 126.

⁷³ Patel, Hanisha, *Criminalising Forced Marriage Presents New Challenges*, <http://www.7br.co.uk>.

this is not an easy task, even for trained professionals. A number of European countries have already criminalised forced marriage, although, to date no research on the success of such legislation has been published in English. Meanwhile, the Scottish Government, having investigated these European examples, opted in 2009 to forgo criminalisation and, instead, created civil legislation based closely on FMCPA. Finally, they conclude their article by this statement ‘Thus, while the issue of forced marriage has received significant attention from the British Government as a result of NGOs’ work, their arguments against criminalisation seem to have fallen on deaf ears’.⁷⁴ Some believe that legislation is not the only choice in tackling the forced marriage problem and they assert that the key issue is how countries may balance social integration and multiculturalism.⁷⁵

2.9 Forced Marriage as a problem among Muslim communities in the United Kingdom

It has been suggested that forced marriage is a product of immigration rather than a ‘tradition’ which is exported from countries of origin.⁷⁶ It is true that South Asian communities are the largest ethnic minorities in the UK, therefore, scholars have pointed out the public debates on forced marriage are mostly addressed in terms of immigration.⁷⁷ In the UK, forced marriage has also been seen as harmful culturally within some communities, specifically South Asian and/or Muslim communities.⁷⁸

According to An-Na’im, in the Indian sub-continent arranged marriage is central to the social systems of the community, and in particular to the system of honour. Marriages are often negotiated by community elders who view the union as bringing together two families, rather than two individuals. Conformity to the union brings honour to both families. Therefore, migrants to Britain maintain their links to the sub-continent and cultural

⁷⁴ See Aisha, K. Gill, and Anicée Van Engeland, *Criminalization or ‘multiculturalism without culture?’* p. 245.

⁷⁵ See Ibid, p. 256.

⁷⁶ Phillips and Dustin, Anne, *UK initiatives on forced marriage: regulation, dialogue and exit*, p. 543.

⁷⁷ Chantler, Gangoli, and Hester, *Forced Marriage in the UK: Religious, cultural, economic or state violence?* p. 589.

⁷⁸ Ibid, p. 589.

traditions through marriages.⁷⁹ According to Samad, forced marriage is seen as part of endogamy practices (the custom of marrying only within the limits of a local community, clan, or tribe) where cultural notions of *izzat* (honour) and *sharam* (shame) play a role.⁸⁰

For Mavis Maclean, forced marriage is not just a practice; it is a strategy of survival, both cultural and economic. Moreover, there are a number of reasons why members of a community might pressurise a couple to marry. In the majority of cases involving young girls, there may be family honour and family connections to maintain, or an economic aspect comprising either reward for offering a marriage as way to facilitate economic migration.⁸¹ Some research suggested that parents who force young people into marriage believe that they are upholding the cultural practices of their country of origin.⁸³ However, Chantler et al. state that there has been much focus on Indian, Bangladeshi and Pakistani communities with regard to forced marriage, and it is important to recognise that a wider range of ethnic minorities are engaged in the practice, including African, Middle Eastern and Latin American immigrants. Also, mentioned to a lesser extent were Eastern Europeans, Albanian, Chinese, Jewish and some Christian groups, including Mormon, Jehovah's Witnesses and Greek Orthodox.⁸⁴ Finally, based on the evidence collated by the Home Office and Foreign and Commonwealth there is a much wider range of ethnic communities and religions where forced marriage is practiced. This involved Europeans, Africans, Chinese and increasing numbers from Middle Eastern communities, who are mainly Kurds, as well as South Asians.⁸⁵

2.10 Perspectives on Forced Marriage

To understand forced marriage from a religious perspective is the central objective of this research. In this case, it will be the religion of Islam, as the problem is closely related to

⁷⁹ See An-Na'im, Abdullahi, and C. H. Candler, *Forced marriage*, p. 5.

⁸⁰ See Samad, *Forced marriage among men*, p. 190.

⁸¹ See Maclean and Eekelaar, *Managing Family Justice in Diverse Societies*, p. 127.

⁸³ See Gangoli, McCarry, and Razak, *Child marriage or forced marriage?*, p. 419.

⁸⁴ See Chantler, Gangoli, and Hester, *Forced Marriage in the UK: Religious, cultural, economic or state violence?* p. 599.

⁸⁵ See Samad, *Forced marriage among men*, p. 194.

Muslim communities in the UK. Chantler et al., claim that many people from Bangladeshi and Pakistani communities believe that forced marriage is a problem which was projected specifically through their religion; that is, Islam. Furthermore, forced marriage has been considered a South Asian - and in particular a Muslim problem - in the public's eye.⁸⁶ Furthermore, according to Mavis Maclean and John Eekelaar, forced marriage is a practice based not on religious belief, but on local customs in certain areas where immigrant families who have come to the UK are from.⁸⁷

Historically, forced marriage was common among all communities. Over the course of the twentieth century, the use of force in marriage has become less common within the white British community as a result of changes in the nature of the relationship between parents and children, and between men and women.⁸⁸ In the UK, forced marriage currently has a deep involvement with some cultures, specifically South Asian and Muslim communities.⁸⁹ It has been said that forced marriage has no foundation in Islamic teaching, as explicitly stated by the Muslim Arbitration Tribunal in their report in 2008: "Forced or coerced marriages have no foundations in Islamic Law and shall be nullified under the edicts of Islamic tenets".⁹⁰ Nevertheless, studies on forced marriage suggest that it is being practised in Muslim communities far more than others, even though many are claiming that Islam does not allow forced marriage and that it is a misinterpretation of Islam. However, cultural traditions of particular communities have made it quite common in various Muslim communities.⁹¹

Therefore, to answer the question of whether Islam allows Forced Marriage, it is important to know that the issue of forced marriage can be approached from a number of theoretical perspectives. Our concern here is that forced marriage is multidimensional. Thus, we have to engage with one of the most important factors related to forced marriage which is the impact

⁸⁶ See Chantler, Gangoli, and Hester, *Forced Marriage in the UK: Religious, cultural, economic or state violence?* p. 600.

⁸⁷ See Maclean and Eekelaar, *Managing Family Justice in Diverse Societies*, p. 7.

⁸⁸ See Maruf, *Forced Marriage*, p. 8.

⁸⁹ See Samad, *Forced marriage among men*, p. 194.

⁹⁰ Muslim Arbitration Tribunal, *Liberation from Forced Marriages*, p. 4.

⁹¹ Maruf, *Forced Marriage*, p. 9.

of Islamic jurisprudence on the problem of forced marriages and its teaching regarding marriage in general. Therefore, we will approach this problem from three different perspectives:

- a) The nature of Marriage in Islamic jurisprudence.
- b) The role of guardianship in concluding marriage contract.
- c) The ruling of marriage contract under the effect of coercion.

Most researchers and writers working on forced marriages, with reference to the practice of Muslim communities in the UK, have claimed that this practice is not permitted by Islam; yet, none of them have gone to the length of proving this through an academic study of Islamic jurisprudence.⁹² Therefore, this study will undertake the task of exploring the issue to ascertain whether or not it is permitted in Islamic Jurisprudence. However, there are many research papers and articles that have dealt with the problem of forced marriages in the UK from different angles, which will be sources and references in the following sections and chapters of this thesis.

2.11 Statistics on Forced marriage in United Kingdom

According to Pat Strickland the number of cases that were registered with the Forced Marriage Unit (FMU) in 2011 amounted to 1,468 while according to a report released by 'The National Centre for Social Research' issued in July 2009, the number of forced marriage cases in the United Kingdom can be estimated to be 5,000 to 8,000 in 2008. In 78% of the total number of cases registered with the FMU the victims were female, while 22% were male.⁹³ Another report issued by the Home Office of the United Kingdom in 2013

⁹² *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011); Abu Sadik Maruf, *Forced Marriage, A Study on British Bangladeshi Community*, (Bloomington, USA: AuthorHouse, 2012); Chantler, Khatidja, Geetanjali Gangoli, and Marianne Hester, 'Forced marriage in the UK: Religious, cultural, economic or state violence?', *Critical social policy* 29.4 (2009); Tribunal, Muslim Arbitration, 'Liberation from Forced Marriages', (2008); Gill, Aisha K., and Anicée Van Engeland, 'Criminalization or 'multiculturalism without culture'? Comparing British and French approaches to tackling forced marriage', *Journal of Social Welfare and Family Law* 36.3 (2014).

⁹³ See Strickland, *Forced Marriage*, p.3.

stated that the number of cases relevant to forced marriage reached more than 1,300 cases.⁹⁴ This was after the issuance of ‘The Forced Marriage (Civil Protection) Act’ on 26th July 2007 which came into effect from 25th November 2008. The aim of the Act is to provide civil remedies for those faced with forced marriage, and victims of forced marriage. A person is considered to be forced into marriage if they are forced by another person to enter into that marriage without having given their free and full consent. “Force” is defined as including threats or other psychological means and may be directed against someone other than the victim. The Act applies to England and Wales and Northern Ireland.⁹⁵

However, studies and research on the subject of forced marriage in United Kingdom have shown that coercion is still sometimes practiced by the guardians over their wards. For example, Gill and Anitha stated that the most common claims of duress which have come before courts have involved duress imposed either by one of the parties to the marriage or by the family of one of the parties.⁹⁶ Moreover, they believe that the notion of free will remains central to the legal discourse on forced marriage in the United Kingdom. For them, this preoccupation with free will ignores the fact that consent is constructed under threats, power imbalances and gendered norms.⁹⁷ They conclude by stating that the current definition of arranged and forced marriage is based on a defective distinction between consent and coercion. Although, consent and coercion are clearly distinct, they are connected through degrees of social expectations, control, pressure, threat and the variety of force, which operate in the context of gender inequalities.⁹⁸

Through records of the British authorities such as Foreign Affairs Office, Home Office and the police authorities, we find that in most forced marriage cases threat and coercion were exercised. For example, in the report of Foreign & Commonwealth Office, it is stated that:

⁹⁴ H M Government, *The Right to choose*, Multi-agency guidance for dealing with forced marriage, (2014), p.1.

⁹⁵ See Strickland, *Forced Marriage*, pp. 4-5

⁹⁶ Gill and Anitha, *Reconceptualising consent and coercion*, p. 50.

⁹⁷ *Ibid*, p 54.

⁹⁸ *Ibid*, pp. 58-59.

Forced marriage is an appalling and indefensible practice and is recognised in the UK as a form of violence against women and men. It is a serious abuse of human rights and, where children are involved, child abuse. Victims of forced marriage can suffer physical, psychological, emotional, financial and sexual abuse, including being held captive unlawfully, assaulted and repeatedly raped.⁹⁹

In the case of British Muslims, this practice is not because guardians are enacting the right of guardianship which is granted to them by Islamic Law, because forced marriage is a compulsion to marry, which is against the objectives of *wilāya* (guardianship) as we will see in chapters three and four of this thesis. Even if we were to hypothetically accept the validity of exercising compelling guardianship, the jurists stipulated conditions to validate the exercising of that type of guardianship. We will discuss this in depth later in this work. Coercion (*ikrāh*) is closely related to the subject of this thesis and deserves to be highlighted to clarify that all types of pressure, death threats and coercion practiced by the guardians over their wards in order to pressure them into accepting the marriage is coercion as can be seen in the evidence of cases presented in British courts, and here we can mention some examples:

- The murder of Rukhsana Naz by her family, after she left her arranged marriage;
- The plight of Jack and Zena Briggs, who were forced into hiding to escape bounty hunters employed by Zena's family, after she had refused to marry one of her cousins in Pakistan;
- The case of 32 –year-old doctor Humayra Abedin, who was rescued from forced marriage in December 2008, where she was held captive by her parents since arriving in Bangladesh to visit them in August 2008;¹⁰⁰
- 'Noreen' who at the age of 14 was forced to travel to Bangladesh to attend a family wedding, only to find out that it was her own. Noreen suffered from physical and

⁹⁹ Foreign & Commonwealth Office Report, *Forced Marriage – Human Rights and Democracy*.

¹⁰⁰ Gill, Anitha, *The illusion of protection*, p. 258.

emotional pressure from her grandmother. Three months after the wedding, pregnant, and with her education disrupted, Noreen was allowed to return home on the understanding that she agree to sponsor her husband's application for entry into the UK as a spouse. Upon returning to Britain and refusing to sponsor his application, she was disowned by her family, deprived of all contact with her brothers and sisters, and lives in fear of retribution from the family.¹⁰¹

There are many incidents and events relevant to forced marriage where coercion and compulsion are practiced by deception, lying and the threat of kidnapping or murder, alongside all other means of physical and psychological pressure. This is in addition to the murder cases which took place in UK and beyond its borders. Therefore, it can be concluded that forced marriage can involve physical, psychological, emotional, financial and sexual abuse including being held unlawfully captive, assaulted and raped.¹⁰²

Many young people in forced marriage concluded a marriage contract because of repeated threats to be harmed or killed. Therefore, this threat and pressure, without any doubt, destroys the reality of consent and the will of the individual.¹⁰³ However, as a result of all of these negative practices, a law was passed to criminalise forced marriages in United Kingdom on 16th June 2014, with its introduction stating: 'The new legislation introduced on 16 June 2014 by the UK government... is designed to help people in England and Wales. It also applies to UK nationals overseas who are at risk of becoming the victim of a forced marriage. The maximum penalty for the new offence of forced marriage is seven years imprisonment'.¹⁰⁴ A new law was needed for England and Wales, because Scotland had already passed a law criminalising forced marriage under an Act issued on 11th November 2011, which provided for the following:

¹⁰¹ See Quek, *a Civil Rather than Criminal Offence*, p. 8.

¹⁰² *forced-marriage-now-a-crime*, <https://www.gov.uk/government/news>.

¹⁰³ Gill and Anitha, *Reconceptualising consent and coercion*, p. 50.

¹⁰⁴ *forced-marriage-now-a-crime*, <https://www.gov.uk/government/news>.

- 1- Courts can issue protection orders specifically tailored to a victim's needs, for example by ensuring they are taken to a place of safety or by helping those in danger of being taken abroad for marriage.
- 2- Breaching such an order is a criminal offence, punishable by a fine, a two-year prison sentence or both.¹⁰⁵

2.12 Muslim Responses to Forced Marriage

It is necessary for the members of Muslim communities in the UK –especially those who acquired the right of its citizenship- to respect the laws, customs and regulations. This is one of the challenges that face Muslim communities when they find themselves obliged to live according to the law under the obligations which they obtained through citizenship, either by birth or by giving an oath and covenant to respect the laws and regulations of the country. This also includes the person who enters the United Kingdom by visa as he is also under a pledge not to violate the laws of the country, as the Qur'an commands of the fulfilment of the requirements of the covenants in the verse, "O you who have believed, fulfil [all] contracts" (Q., 5:1) and, "And fulfil [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned" (Q., 17:34). Therefore, the European Council for Fatwa and Research discussed topics related to 'Citizenship and its requirements', and one of the recommendations which was directed at Muslim communities living in Europe was 'the compliance with the prevailing laws'. Resolution No. 2/17 from the 17th session of the council's meetings stated:

- 1- The importance of knowing the language, custom and laws of the European community and accordingly committing to the general law.
- 2- Compliance with laws and regulations set by official authorities.¹⁰⁶

In confirmation of this call by the Council, it discussed the issue of forced marriage which is practiced by some Muslims in Europe. The members of the Council covered the subject with

¹⁰⁵ *New forced marriage law comes into effect in Scotland*, <http://www.bbc.co.uk/news/uk-scotland>.

¹⁰⁶ *The scientific Magazine of the European Council for Fatwa and Research*, issue 12-13, (2008); *Resolutions and fatwas issued by the European Council for Fatwa and Research*, p. 348.

research and studies of its legal aspects and social effects. Accordingly, a *fatwā* (legal opinion) by the European Council for Fatwa and Research on this subject was issued, which reads as follows:

The most sound opinion that must be followed and practiced is that parents and guardians must seek the permission of the girl in her marriage; if she approves it then the contract is valid, otherwise it is not with the evidence of the ḥadīth from the Prophet, “The virgin shall not be married until her consent is sought, nor a previously married woman until she overtly states her acceptance”. They (the people) asked ‘What is her permission?’ He replied “it is by her keeping silence” and the ḥadīth ‘A virgin came to the Prophet and mentioned that her father had married her against her will, so the Prophet allowed her to exercise her choice’ and in another narration, ‘the Prophet rejected her marriage’.¹⁰⁷

It is worthwhile to mention that in regard to forced marriage in the United Kingdom, Muslim communities in Britain currently have three authorities that are engaged in resolving marital conflicts:

- 1- Country law (courts),
- 2- Informal mediation institutions (such as The Sharīʿah Council),
- 3- The Muslim Arbitration Tribunal.¹⁰⁸

Moreover, It is worthy of note a question that was presented to the Islamic Jurisprudence Academy in India (*majmaʿ al-fiqh al-Islāmī al-hind*) from an organisation based in the United Kingdom that is involved in addressing and solving problems in relation to marriage and the provisions of the Muslim family. The question was regarding forced marriages in the

¹⁰⁷ *The resolutions and fatwas issued by the European Council for Fatwa and Research*, page 130.

¹⁰⁸ See Bano, Samia, ‘The Practice of Law Making and the Problem of Forced Marriage: What Is the Role of the Muslim Arbitration Tribunal?’, in *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), p. 178.

UK. Among what this organisation presented were cases in Britain related to forcing girls to marry someone chosen by the father, the mother or the brother where they take the girls back to their home countries, such as India or Pakistan, for the apparent purpose of visiting. After their arrival, they insist that the girls marry one of their relatives and threaten them with burning their passports, not taking them back to Britain and cancelling their British citizenship if they refuse to comply. This way the guardians forced the girls to marry while they dislike the marriage in reality.

The question added that many Muslims live in Britain, Europe and United States of America. Their numbers are increasing by the day and many of them have lived in these countries for generations, whilst their children are learning and embracing the culture of those countries without longing for their home countries where their fathers originate. Thus, the young men and women find it inappropriate that they choose their husbands and wives from amongst Muslims. On the other side, mothers and fathers try their best to keep the marriage of their sons and daughters within the family or they prefer to choose their husbands and wives from their home countries such as India or Pakistan, which turns into a conflict between the parents and their children, which often leads to dire consequences, especially in the case of girls. The question then raised the point that the main purpose of such marriages is to for the men who marry such girls to acquire British citizenship and, after returning to Britain, the girls refuse the marriage or to live with their husbands, some of them seeking the help of Muslim organisations such as the Sharī'ah Council to annul the marriage in order to find a way out.

Finally, the question referred to some facts relating to the problem of forced marriage in the UK and the way in which the government deals with such issues, adding that when the percentage of these cases increased the government ordered the preparation of reports about it. Such cases gave a negative image for the reputation of Muslims and distorted the image of a tolerant Islam. The media highlighted those events frequently, until organisations supporting the liberation of women and human rights claimed that Islam stripped women of their rights and even if she is mature, very well-educated and very aware she is still forced to

marry according to her guardian's wishes without her wilful consent. The question concluded:

You should put into consideration that the Islamic legislation granted the guardians the right of disposal in their children's affairs which requires them to show mercy and compassion and to choose the best for them and their future.

The Islamic Fiqh Academy of India held its 13th conference on the issue of 'The parents who force their children to marriage according to their wishes in Britain and Western countries and the dreadful events it led to'. The participants decided in this regard in a range of important points, (see the summary of the fatwa in the appendices). The fifth paragraph of the answer states that:

If it was proved to the judge and the judicial authorities that the guardians used coercion in the marriage of a major woman and they forced her to utter her consent while she was discontented with this marriage and she asks for annulment while the husband refuses to voluntarily leave her through divorce or *khul'*, then the judge has the right to annul this marriage in order to repel oppression.¹⁰⁹

The *Fatwa* has decided that the woman who is married off without her consent has the right to seek annulment from the Muslim judge or the legal counsel in order to repel oppression. However, The Sharī'ah Council in the UK has specified eighteen situations that can be reasons for the issuance of a divorce or separation between the spouses at the Muslim Tribunal or the Sharī'ah Council in a non-Islamic country; we will mention here those points which are closely related to the research topic.

¹⁰⁹ Majma' al-Fiqh al-Islāmi in India, *al-Ijbār 'Ala al-Zawāj*, V. 7:10 (Beirut: Dar al-Kutub al-Ilmiyyah, 2007), p.10.

2.12.1 Judicial separation because of dissension and harm

This can take many forms like:

- a- When a girl seeks refuge in shelters –whether governmental or not- that are allocated for women who suffer from dissension and domestic violence. This causes the acceleration in the process of separation between the spouses so the woman escapes a life of harm and injustice with someone who she is reluctant to live with
- b- The difference in the cultural and educational level between the spouses: like when a woman is born and raised in a European country and then forced to marry her cousin or one of her relatives who grew up in a Muslim country with an eastern culture. Therefore, compatibility between the spouses becomes difficult and the marital life becomes almost impossible.
- c- Marrying off the women in a Muslim country like Pakistan, for example, while the intent of marriage is to bring the husband to Britain in order for him to settle with her family and where there are opportunities for him to find a job but the British authorities refused to grant him a visa, arguing that the marriage is not authentic – *zawaj maşlaha*. The woman then, submits a request to appeal or challenge the decision of rejection of the visa. If the request to appeal is rejected and the wife at the same time refuses to move from Britain to the country of the husband because of the different environment or the financial conditions of the husband, then the woman is entitled to apply for a request in order to get a divorce.¹¹⁰

The council considered such reasons as good enough to permit the request of divorce and with a sound enough basis to grant separation between the spouses through the practical experience of the council. It is worth noting that the council did not state clearly that forced marriage is a reason that can warrant judicial separation. However, it has been mentioned in the second paragraph that when girls or boys have had marriage forced upon them with someone who is from a different culture or where there is a gap in education between them

¹¹⁰ See Suhaib Hassan, ‘Judicial separation through the channels of the Sharī‘ah Council’, in *The scientific review of the European Council for Fatwa and Research* issue 8-9 (2006), pp. 266 -70.

and their spouses, termination (*faskh*) can be granted. Furthermore, it is the view of the present author that the council should state their view clearly regarding the issue of forced marriage.

In addition to the laws that deal with forced marriages, the British government established the Muslim Arbitration Tribunal in 2007, which is authorised to deal with civil cases in Muslim communities such as marriage, divorce, inheritance, domestic violence and forced marriage in accordance with Shari'ah Law but within the framework of the laws of the country, similar to the rights granted to the Jewish minority.¹¹¹ Therefore, The Muslim Arbitration Tribunal is modelled on the Jewish 'Beth Din' which has operated under the auspices of arbitration legislation for many decades, to deal with private disputes in matters like business transactions and religious divorce.¹¹² Furthermore, the main purpose behind the Muslim Arbitration Tribunal is to enable Muslim communities to resolve disputes in accordance with Islamic Law instead of using the traditional courts and other tribunals.¹¹³

The Muslim Arbitration Tribunal has presented a proposal to solve the problem of forced marriage; this came after the introduction of the Civil Protection Act which provided civil protection against forced marriages and any form of violence against women as well as the means of protection, particularly for those who are at risk of being subjected to forced marriage. However, critics of this act raised objections such as: what about women who were compelled to marry and are already married? What about women who seek to terminate such a marriage? What about women who were tricked into accepting the forced marriage? What about when the victims are males and not females?

2.12.2 The proposal to solve the problem of forced marriage presented by the Muslim Arbitration Tribunal

In the introduction to the proposal presented to solve the problem of forced marriage in the UK, the Muslim Arbitration Tribunal clarified that, in the opinion of the judges working

¹¹¹ See, Lazreg, 'Forced Marriage: Introducing a Social Justice and Human Rights Perspective', in *Contemporary Sociology: A Journal of Reviews* 42.5 (2013), p. 744.

¹¹² See Bano, *The practice of law making and the problem of forced marriage*, p. 191.

¹¹³ Muslim Arbitration Tribunal, *Liberation from Forced Marriage*, p. 3.

with it, the arranged marriages (which were arranged by families) have a legal basis and origin whereas forced marriage has no legal basis and, therefore, it should be considered invalid according to Islamic principles.¹¹⁴ However, their proposal to resolve the problem carried no procedures in ruling the forced marriage as invalid, as they claimed; rather their proposal was as follows:

There is no doubt that there are some marriages which take place under the influence of compulsion and coercion in the UK but, most of the time, one or both of the spouses at some point in the process there is consent and approval from at least one of the spouses'; there is an opinion in the beginning but that opinion might change after some time. The proposal depends on the fact that many cases where coercion and compulsion are exercised are often exposed and then dealt with by teachers at schools, social service staff or by people who came to know of this problem and offer to help. This perception has something of a lack of realism, and gives priority to the perception that forced marriage happens only outside the United Kingdom so a foreign party participates in the marriage process, be it the husband or wife. Accordingly, the proposed solution focused generally on the existence of a British citizen, whose interests must be prioritised, and the foreign party. Based on that, the Muslim Arbitration Tribunal made the issue of 'Application for settlement in the UK on the basis of marriage' as a basis for the treatment of this problem as follows:

- 1- When the British citizen returns to Britain, coercion and compulsion are exercised on her/him in order to apply for a visa for a party located outside the United Kingdom.
- 2- He then submits the request to the relevant authorities.
- 3- A personal interview is conducted in the United Kingdom Consulate for the foreign party.
- 4- After the request for uniting the spouses and the completion of the required procedures after a personal interview, a visa for a period of two years is granted to the husband or wife and then another interview is conducted in order to grant him/her permanent residence.

¹¹⁴ Muslim Arbitration Tribunal, *Liberation from Forced Marriage*, p. 4.

The problem in this case is that it might be too late to know whether this marriage has taken place with full consent and approval, or under the influence of coercion. In case the visa application is rejected, the British citizen appeals the decision of the British authorities but in any case the appeal proceedings are very expensive. Furthermore, the Muslim Arbitration Tribunal admits that the foreign party is more concerned about entering the United Kingdom and improving his financial situation than whether his marriage took place though forcing the British party to the marriage. Not surprisingly, most failed marriages are those built on the vested interests of family and personal gains with a complete absence of any attention given to the interests of the individual and the extent of his benefit and enjoyment of the marriage. However, how can the Muslim Arbitration Tribunal admit that the foreign party is more concerned with the financial situation while then making him/her a part of the proposed solution? How will he answer truthfully when asked whether the marriage took place under the influence of coercion and compulsion when all what he seeks is his personal interest?

The Muslim Arbitration Tribunal confirms again that the interest of a British citizen is of its priorities in legal procedures to resolve the problem of forced marriages. It says:

- 1- The British citizen will be invited to appear before the Tribunal voluntarily and with her/his choice if she/he accepts to provide a testimony in front of the judges. It stresses that this testimony is voluntary and not obligatory from a legal perspective.
- 2- If the judges succeed in taking an acknowledgment from the British citizen that the marriage did not take place under influence, coercion or duress, they submit a written proclamation declaring that they are satisfied and convinced that there is no compulsion or coercion in this marriage.
- 3- The British citizen can then use this declaration as evidence to help support her/his request for a visa or residence for foreign citizens in the United Kingdom.

2.12.2.1 The Decision of the Judges in the Muslim Arbitration Tribunal

It is worth mentioning that all of the interviews and sessions of the Muslim Arbitration Tribunal take place under the observation of cameras for the protection of witnesses from any accusations from a third party. In addition, all the decisions of the judges are recorded in order to enhance confidence and transparency in the procedures. When the judge gives his decision he does not mention in his statement the reasons and motives but only clarifies whether the marriage took place under the influence of duress, coercion or not in his opinion. The judge may also issue a warning to the offender that his action may leave him exposed to investigations by the police and the judicial proceedings. Furthermore, he might also give some advice and guidance in this context and may request for the help of a prominent figure within the Muslim community in which the British citizen belongs in order to provide advice for the family and warn them of the consequences of violating the law. The involvement of such a figure might be a means to cause embarrassment for the family involved, and as a result stop them from exercising pressure on the British party in this type of marriage.¹¹⁵

However, in the final outcome the Muslim Arbitration Tribunal acknowledges that it does not have the final word with regard to forced marriages, cannot help the victim affected by forced marriage and cannot provide a legal solution by judging the dissolution and annulment of this marriage as decided in the forefront of the proposed solution. It wrote in bold under the section of providing guidance and advice:

How to make an application to bring about the termination of the marriage under UK laws and under the laws of the foreign country? It should be noted that the current legislation under the Forced Marriage Act 2007 does not provide for the process of the termination of marriage in cases where it is found that marriage was entered into by coercion or force. It simply allows

¹¹⁵ See Bano, *The practice of law making and the problem of forced marriage*, p. 189; Muslim Arbitration Tribunal, *Liberation from Forced Marriage*, pp. 14-15.

for the protection of the victim from continuing with marriage but leaves the marriage itself in a vacuum.¹¹⁶

They then said, ‘it is clear that the process envisaged by the Muslim Arbitration Tribunal will not give an absolute solution to the problem of forced marriage’.¹¹⁷ Again, the Muslim Arbitration Tribunal has admitted that it cannot provide a practical solution for this problem but it could take the role of providing a legal opinion on this problem and other family problems by giving an opinion on the dissolution or annulment of the marriage according to the provisions of the legislation and the personal status laws in Islamic countries and with reference to the family laws in the United Kingdom which approve the annulment of the marriage contract if coercion is proven.

In its preamble of the reasons for its establishment the Muslim Arbitration Tribunal stated that its mission is to find solutions for the Muslim minority in accordance with the provisions of Islamic law. However, what we have seen is not a solution to the problem but only a series of advice and recommendations before passing the case to the English court to give its verdict regarding forced marriages. Therefore, if the case eventually returns to the state court’s ruling and the decisions of its judge, what is the benefit received by the victim of a forced marriage? According to Marnia Lazreg, the Muslim Arbitration Tribunal does not provide any effective protection for the victim, with the exception of voluntary declaration that no coercion or compulsion was exercised in the marriage.¹¹⁸

2.12.2.2 Critique of the Outcome of the Report the Muslim Arbitration Tribunal

The following are some points related to the criticism to the outcome of the report made by the Muslim Arbitration Tribunal:

- 1- How voluntary submission can be the key factor in tackling forced marriage with foreign spouses.

¹¹⁶ Muslim Arbitration Tribunal, *Liberation from Forced Marriage*, p. 16.

¹¹⁷ Muslim Arbitration Tribunal, *Liberation from Forced Marriage*, p.17.

¹¹⁸ See Lazreg, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, p. 744.

- 2- How a community based court would be better placed to deal with the intricacies of community issues, as the community would be intolerant of state intervention.
- 3- One of the primary objections of their report is what is described as the limited effectiveness of Protection Orders on Forced Marriage.
- 4- The report does not sufficiently address the issue of power and power relations with the context of the family and home.

In regard to point 3, it is still too early to judge the impact of the forced marriage legislation only one year after it was introduced by the Muslim Arbitration Tribunal in 2008. Moreover, there were no changes or updates to the original law after the introduction of the new law which criminalises forced marriage in England and Wales, which has been effective since June 2014.

As for point 4, it can be argued that the issue of the powerlessness of many female victims of forced marriage has long remained a central issue in the challenge to eliminate this practice. In reality, the concept of dialogue, discussion, compromise and cooperation has a negative impact on the safety of female victims of forced marriage who do not occupy an equal position in the family in terms of the power, respect and prestige that are often granted to male members of the same household.¹¹⁹ However, Bano raised a very good point in her argument against the report of The Muslim Arbitration Tribunal with the question: Should we mediate in cases of forced marriage? The Muslim Arbitration Tribunal emphasises the community initiative on the basis that it encourages and promotes family and community cohesion and provides empowerment for all individuals who wish to resolve such issues within the framework of family, home and local community. Bano argued, ‘the mediation process can increase rather than reduce the level of harm and possible violence directed to women’.¹²⁰

Furthermore, Marnia Lazreg criticised the outcome of the report from the Muslim Arbitration Tribunal regarding forced marriage problem by saying, ‘the Muslim Arbitration

¹¹⁹ See Bano, *The practice of law making and the problem of forced marriage*, pp. 188,189,193.

¹²⁰ *Ibid*, p.193.

Tribunal does not propose any efficient protection from coercion. It basically acts as a tool to keep Muslims in the fold of the community'.¹²¹

When a victim of forced marriage resorts to the Muslim Arbitration Tribunal and Sharī'ah Council, she/he seeks a ruling in her/his case and a way out from his ordeal. This can only be achieved through the judicial authority which has the power to bind its provisions that are then executed by the executive authority. We also know that the Arbitration Tribunal and Sharī'ah Council process no such authority but they acquire their strength from the voluntary consent of both opponent parties in order to accept the verdict and oblige themselves to it.¹²² Therefore, there is no way to oblige any of the Muslims in the minority outside of Muslim countries to anything issued by the Muslim Arbitration Tribunal and Sharī'ah Council. The matter is left to their consciousness of Allah, their fear of God and their desire to refer to the provisions of the Islamic religion in their arguments.

The case of forced marriage is different from other family disputes, such as maintenance for the house, or maintenance for children, the father's right to see his children and other issues that are presented before the Muslim Arbitration Tribunal and Sharī'ah Council. Forced marriage is an issue that is related to Human rights, honour, and the legality of cohabitation between the spouses (which is accompanied by having children) and other marital rights and issues. Perhaps an even greater issue that is linked to forced marriage is the emergence of enmity and hatred between the spouses.

For Gupta and Sapnara, the preferred solution for many victims of forced marriage is not divorce, because of its resulting social stigma. Rather the most simple and straightforward solution for nullifying a forced marriage is by having it declared invalid because of coercion, according to act 12 (c) of the Matrimonial Causes Act (MCA) 1973, on the grounds that if one party of the marriage does not correctly accept the marriage as a result of coercion, mistake, unsoundness of mind or otherwise at the time of marriage though he/she capable of

¹²¹ See Lazreg, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, p. 744.

¹²² See Hassan, *Judicial separation through the channels of the Sharī'ah Council*, p. 258.

giving valid consent or if he suffers from any mental disorder within the criterion of the mental health Act 1983, then he is declared as unfit for marriage.¹²³

The solution however should not be through conciliation between the spouses, or by boards of reform, or by the influence of some members of society by pressurising the women to accept and be satisfied with the situation when she is reluctant to it while the husband refuses to release her voluntarily or through *khul'* (the right of a woman to seek a divorce from her husband in Islam for compensation, usually monetary, which is paid back to the husband from the wife). This occurs in the event that the Muslim Arbitration Tribunal and Shari'ah Council are unable to find a solution and a way out of this problem, which is indeed the reality as they do not have the authority to issue a judgment and to oblige anyone to accept their rulings. In this context, Hasan says:

The Council has no binding authority legally but it tries as much as possible to provide solutions to the conflicts between people; whether they are private family matters or other issues. It usually faces reluctance from the victim's side, a violent confrontation sometimes, or even a threat to raise a lawsuit against the Council before the courts [i.e. State courts in Britain].¹²⁴

If a Muslim who lives in a European country experiences injustice and he/she cannot resort to any authority which can remove that injustice apart from the legal authorities in the country in which he lives, then he/she is allowed to resort to them in order to get rid of that injustice. Therefore, if a woman is pressured into marrying a man through coercion and asks him for divorce because she dislikes living with him, but he refuses and she is aware that the Muslim Arbitration Tribunal and Shari'ah Council has no power to remove the oppression because they have no binding authority, can such a woman resort to a non-Muslim judge to grant her a way out or shall she remain with her husband while suffering from the oppression of having to live with him while she dislikes it? Before we answer this question,

¹²³ Teertha Gupta and Khatun Sapnara, 'The Law, The Courts And Their Effectiveness', in *Forced Marriage: Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), p. 165.

¹²⁴ Hassan, *Judicial separation through the channels of the Shari'ah Council*, pp. 258, 266.

it is worth mentioning that we focus on women more than men, as we know that Islamic Law provides men with the right to issue divorce in order to terminate their marriage. However, there are always some cases where the man can find it difficult to do so under pressure from families and his community. Generally, the Islamic law commands justice, it does not command the protection of the oppressors and does not approve the actions of wrongdoers, as the Qur'an said, "Indeed, Allah orders justice, good conduct and giving to relatives, and forbids immorality, bad conduct and oppression" (Q., 16:90). Women in situations such as domestic violence or forced marriage have no power and aid but from the authorities in the countries in which they live and shelters in the shadow of its laws which seek justice in the investigating procedures and judicial rulings. The urgent need leads them to this solution and allows her to resort to the non-Islamic judiciary.

Ordinarily, Muslims are required by Shari^cah to seek judgements from a Muslim judge. One of the principles of Islamic jurisprudence (*qā'idah fiqhiyyah*) is 'the cases of necessities permit the unlawful' (*al-ḍarūra tubīḥ al-maḥḍūrah*) and -in this case- the physical or psychological harm befallen on women who were compelled to marry is considered to be a necessity that allows seeking the ruling of a non-Muslim judge and the acceptance of their verdict. In this context, al-^cAmrānī quoted from Badawī his saying: 'if the necessity forces a Muslim to seek the ruling of a non-Muslim judge then the verdict of that judge is approved so the interests of Muslims are not hampered'.¹²⁵

However, one of the important issues that concern European Muslims was discussed by the European Council for Fatwa and Research surrounding the issue of 'the divorce issued by a non-Muslim judge'.¹²⁶

¹²⁵ See Mohammed al-Kaddi al-^cAmrānī, 'The Muslim Family In The West Between The Islamic Law And The Declaratory Laws' in *The scientific review of the European Council for Fatwa and Research*, vol. 7 (2005), pp. 199- 200. Ismā'īl Badawī, *Nizām al-Qaḍā'*.

¹²⁶ See Fayṣal Mawlawī, 'The Ruling of the Divorce Issued by a Non-Muslim Judge', in *The scientific review of the European Council for Fatwa and Research*, vol.1 (2002), pp.77- 88. It is important to mention that there is a wide range of conflict between laws, especially when the marriage is conducted in a country other than the European country and when one party in the conflict is a citizen of a Muslim country and does not reside permanently in the European country alongside the other, such as those mentioned previously, which might be a subject for future research.

The European Council of Fatwa and Research issued a resolution in this regard that states:

The principle is that a Muslim only resorts to a Muslim Judge or any suitable deputy in the event of a conflict. However, and due to the absence of an Islamic judicial system in non-Muslim countries, it is imperative that a Muslim who conducted his marriage by virtue of those countries' respective laws, to comply with the rulings of a non-Muslim judge in the event of a divorce. Since, the laws were accepted as governing the marriage contract, then it is as though one has implicitly accepted all consequences, including that the marriage may not be terminated without the consent of a judge. This case is similar to that in which the husband gives authority to the judge to do so, even if he did so implicitly, and which is considered acceptable by the vast majority of scholars. The principle of Islamic jurisprudence applicable in this case is that whatever is normal practice is similar to a contractual agreement. Furthermore, implementing the rulings of a non-Muslim judiciary is an acceptable matter, as it falls under the bringing about of what is considered to be of interest and to deter what is considered to be of harm and may cause chaos, as stipulated by more than one of the most prominent Islamic scholars, such as al-[°]Izz b. [°]Abd al-Salām, Ibn Taymiyyah and al-Shāṭibī'.¹²⁷

In conclusion, forcing young people into marriage will lead to harm befalling family members or anyone else who practice the forced marriage of those over whom they have the right of guardianship. An established principle (*qā'idah thābitah*) in Islamic jurisprudence is the issue of 'consequences of acts' (*Ma'ālāt al-af'āl*). This refers to the effect resulting from an act, whether good or bad, and whether intentional or not. It means for the act to result in a ruling that is in accordance with its consequences.¹²⁸ Thus, the consequences of the act are the effects and implications that result from the ruling; which might even lead to an allowed

¹²⁷ European Council of Fatwa and Research, *Resolutions and Fatāwa*, Resolution number: 15, 3/5, pp. 48-49.

¹²⁸ See Khalid, Ḥanafī, 'Ṭuruq al-Kashf [°]An al- ma'ālāt', in *The scientific Magazine of the European Council for Fatwa and Research*, issue 39 (2013), p. 39.

act becoming forbidden because of the harm it leads to, as indicated in Qur'an: "And do not insult those they invoke other than Allah, lest they insult Allah in enmity without knowledge" (Q., 6:108).¹²⁹

Thus, the crime of 'forced marriage' is an impediment towards the human being's freedom to choose her/his life partner and an aggression towards her/his dignity by forcing her/him to live with someone she/he dislikes. Such an act is not in accordance with the tolerance of Islam and incompatible with its just legislation. In Islam the actions of the Muslim, who is an adult of sound mind, are only considered if they were issued with free will and approval without the influence of any physical or psychological coercion.

Abū Zahrah said, when he stressed that any form of coercion is considered a crime which cannot be a means to approve a right for the one who commits it, 'If we are to accept the contract or the statement that takes place under the influence of coercion –which usually approves rights for the compeller- then we would be approving a right which is an effect of a crime'.¹³⁰

¹²⁹ Yusuf, Al-Qaradhawi, 'Fiqh al-Ma'ālāt', in *The scientific Magazine of the European Council for Fatwa and Research*, issue 19-20 (2013), pp. 20-21.

¹³⁰ Abū Zahrah, Muḥammad, *'Usūl al-Fiqh* (Dar Al-Fikr Al-Arabi, [n.d.]), p. 359.

Chapter 3

Marriage in Islam

3.1 Introduction

Marriage as an anthropological notion is cohabitation, sexual access, affiliation of children and food sharing. It is the creation of new social relations, not only between husband and wife, but also between kin groups of both sides.¹³¹ In Islam, marriage is defined as a strong bond (*ribāṭ wathīq*) between a man and a woman that is lasting and continuous, and is contracted with each party's full consent and acceptance according to detailed Sharī'ah rulings.¹³² The objective of the institution of marriage in Islam is to be a means for procreation, to preserve chastity, to satisfy sexual desire (which is considered to be a part of human nature), to form a family and to create links and ties between members of the community. Therefore, Islamic legislation affords great care to the issue of marriage, considering it one of the greatest aims due to its position as the point of origin of the family. Furthermore, Islamic law is attentive to the means and methods of contracting a marriage in order to ensure the consent of the woman and her family for the contract (from the woman's side) and the good intent of the man in seeking a permanent marriage with sincere affection.¹³³

This chapter will reflect upon the role of marriage in the preservation of lineage (*nasab*) and honour (*ʿird*) as marriage's primary functions, as expounded in Islamic legislation. Moreover, we will mention the most important components of the marriage contract in order to give a general view of marriage in Islamic jurisprudence, leaving behind some details that are not relevant to the subject of this research. We do not, of course, claim that the Islamic

¹³¹ See Niel J. Smelser and Paul B. Baltes, *International encyclopedia of the social & behavioral sciences*, (Amsterdam: Elsevier, 2001), XIV, p. 9258.

¹³² International Islamic Committee for Woman and Child (IICWC), *The Islamic Charter On Family*, Trans. by Heather Shaw, 1st edn (Cairo, Egypt: International Islamic Committee for Woman and Child, 2007), p. 53.

¹³³ See Muḥammad al-Ḥabīb, Ibn al-Khaūjah, *Bayina ʿIlmayi al-Fiqh wa al-Maqāsid*, 1st edn (Doha, Qatar: Ministry Of Endomens And Islamic Affairs, 2004), II, p.341; Wahbah al-Zuḥaylī, *al-Usrah al-Muslimah Fī al-ʿĀlam al-Muʿāṣir*, 1st edn (Damascus, Syria: Dar al-Fikr, 2000), p.40.

view of marriage makes considerations that are unprecedented in previous divine legislations. Indeed, marriage has long been a means for organising various communities that are concerned about the welfare of families, which are borne out of the marital relationship.

3.2 Islam as a Regulator of Sexual Relationship

With regard to marriage amongst Arabs in the pre-Islamic era, historical studies illustrate a picture of chaos and lack of discipline with regard to sexual relations. The advent of Islam in Mecca was in the midst of this complete sexual liberalism and, as such, began to organise such relations and control the situation of chaos through divine guidance.¹³⁴ An example of one of the earliest revelations concerning the regulation of sexual relations is found in the Qur'anic text: "And do not approach unlawful coitus. Indeed, it is ever an immorality and is evil as a way" (Q., 17:32). This is a Meccan chapter (revealed in Mecca) in the opinion of the majority of interpreters (*mufasssirūn*) of the Qur'an.¹³⁵ According to al-Bukhārī, this chapter was amongst the first to be revealed in the Meccan period based on the narration of Ibn Mas'ūd that, "chapters *al-Isrā'* (Q., 17), *al-Kahf* (Q., 18) and *Maryam* (Q., 19), are amongst the first revealed to Muḥammad in Mecca".¹³⁶ The second verse, in which the prohibition of unlawful sexual intercourse is mentioned, is *al-Furqān*, (Q., 25), a Meccan chapter in its entirety in the opinion of the majority of interpreters. This is further corroborated by Ibn 'Āshūr who said 'the style and purpose of the chapter confirms that it is Meccan'.¹³⁷

The prohibition of unlawful sexual intercourse and the regulation of relationships between the two sexes by Islam did not come suddenly. Instead, Islam transformed people gradually from one state to another and progressed in legislative rulings from one step to another

¹³⁴ See J. Schacht, 'Nikāḥ', *The Encyclopaedia of Islam*, Edit. By C.E. Bosworth and others, (Leiden: Brill, 1995) VIII, pp. 26-29.

¹³⁵ See Maḥmūd, al-Alūsī, *Rūḥ Al-Ma'ānī* (Beirut, Lebanon: Dar Ihya' al-Tourath al-Arabi, '[n.d.]'), LI, p.12.

¹³⁶ See Muḥammad Ibn Ismā'īl, al-Bukhārī, *Ṣaḥīḥ al-Bukhārī, al-Jāmi' al-Musnad al-Ṣaḥīḥ, Mawsū'ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999), *ḥadīth* number (4708).

¹³⁷ Muḥammad al-Ṭāhir, Ibn 'Āshūr, *al-Taḥrīr Wa al-Tanwīr*, 1st edn (Tunis, Tunisia: al-Dar al-Tunisiyyah, 1984), XVIII, p.313.

during the thirteen years in Mecca and for a further ten years in Madina. During that period, the Qur'an was revealed both in response to events and incidents, and also to prepare Muslims to receive rulings that would require great adaptation on the part of the faithful. This gradual process of legislation is one of the most important reasons why the Qur'an was revealed over a twenty-three year period. 'Ā'isha the wife of the prophet said:

The first Qur'anic revelations were the concise chapters, *al-mufaṣṣal* which made mention of Hellfire and Paradise when the people embraced Islam and their beliefs became firm. Then the orders of lawful and unlawful were proclaimed. If the first revelation of the Qur'an had been 'do not drink wine' the people would have said 'we are never going to stop drinking' and if the first thing that was revealed from the Qur'an was 'do not commit unlawful sexual intercourse' the people would have said 'we are never going to stop committing unlawful sexual intercourse'.¹³⁸

All sexual relations that were common amongst the Arab in the pre-Islamic era were either modified and regulated, or forbidden by Islam. This left marriage as the only acceptable and legitimate means by which a man and woman could engage in an intimate relationship.¹³⁹

¹³⁸ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī, ḥadīth* number (4993).

¹³⁹ See Muḥammad, al-Bahiyy, *al-Fikr al-'Islamī wa al-Mujtama' al-Mua'āṣir*, 3rd edn (Cairo, Egypt: Dar al-Tawfeq, 1982), pp. 167-68.

A woman becomes sexually lawful for a man by one of two reasons:

- A marriage contract
- Possessing through purchase contract or for a woman to be of the war captives

The latter reason was amongst the regulations known to previous nations in the old ancient times when the provisions of war stated that if a woman falls into captivity then her marriage is considered cancelled if she was married. As for *milk al-Yamīn* (the possessed woman, or slave girl) the Qur'an states: "And [also prohibited to you are all] married women except those your right hands possess" (Q., 4:24). i.e. the master of a slave girl can indulge in a sexual intercourse with her but she is not considered as a wife. That is why the Qur'an differentiated between wives and possessed women when it states: "And those who strictly guard their private parts, Except from their wives or those their right hands possess, for indeed, they are not to be blamed" (Q., 23:6-7). Therefore, sexual relation between a man and a woman becomes lawful due to marriage, purchase or captivity. In Islamic religion, it is unlawful for a man to have a mistress with whom he can establish a sexual relation as Qur'an says "And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, when you have given them their due compensation, desiring chastity, not unlawful sexual intercourse or taking [secret] lovers" (Q., 5:5) meaning;

3.3 The Purpose of Marriage

Muslim scholars recognise the sexual instinct is innate in humans and therefore does not ignore it; rather they seek its fulfilment in a manner which preserves and benefits both the individual and society at large, which in turn leads to the benefit of mankind in general.¹⁴⁰ Hence, the points that jurists and Muslim intellectuals mention when discussing the wisdom and purpose behind marriage are shared and can be summed up as:

- 1- Preserving lineage and reproduction: Marriage was legislated to become a social system through which lineage is preserved and the human race continues.
- 2- Restraining sexual desire: Marriage becomes a means by which to prevent an individual from falling into the sin of unlawful sexual intercourse and thereby protecting a central tenet of Islamic legislation which is preserving the honour of each person.
- 3- Housekeeping: the wife is the main agent in managing the house's affairs as the house is the place of living, comfort, tranquillity and intimacy.
- 4- A structure within which to provide for the family, take care of raising and educating it and to fulfil the rights of the wife and the children.¹⁴¹

It is generally agreed that appeasing sexual desire is not the only purpose of marriage in Islam, but that there are other social, psychological and religious meanings behind, as mentioned by Abū Zahrah. These include:

married on the manner legislated by Islam which is marriage. *Mukhadanah* means; for a man and a woman to have a permanent fornication relation without anyone intervening between them.

¹⁴⁰ See Muḥammad Abū Ḥamid, al-Ghazzālī, *'Iḥyā' 'Ulūm al-Dīn*, (Beirut, Lebanon: Dar al-Jeel, [n.d.]), II, pp.75-85. ; 'Abd al-Wahhāb, Khallāf, *Aḥkām al-Aḥwāl al-Shakhṣiyya 'Ala Madhhab Abū Ḥanīfah*, 1st edn (Kuwait: Dar al-Qalam, 1997), pp. 16-17.

¹⁴¹ See Moḥammad, 'Uqlah, *Nizām al-'Usrah Fī al-Islām*, 1st edn (Amman, Jordan: Maktabat al-Risalah al-Hadithah, 1983), I, pp .80-82; Sayyid, Sābiq, *Fiqh al-Sunna*, (Beirut, Lebanon: Dar al-Fikr, 1995), II, pp. 9-10.

- a- Marriage is the main foundation upon which to form a family, which is the first step towards building a community and the first environment that the human is brought up in.
- b- Marriage is the place where the rights and duties which are imposed by religion meet and the one who is engaged in the marriage contract is compelled to appreciate it as a great and respectable bond that goes beyond merely satisfying sexual desire.
- c- Marriage brings psychological comfort and stability for the spouses, as expressed in Qur'anic verse (Q., 30:21) which employs the words tranquillity, affection and mercy.
- d- Marriage includes responsibilities, consequences and social duties to which spouses are obliged with regard to their nuclear families, wider families, which include in-laws and other relatives, and the community in general.¹⁴²

Marriage in Islam has been seen as a way for human societies to adjust aspects of their civil life in order to fulfil human sexual desire and form the family, which results in kinship, paternity, maternity, son-ship, fraternity, paternal relations, lineage, in-laws relations and other more distant kinship ties.¹⁴³

Abū Zahrah discussed the jurists' definitions of marriage and criticized them regarding understanding the purposes of Islamic legislation when the definitions of jurists does not express the purpose of this contract as the legislator intended. He then defined it with a definition that expresses its real meaning, and the purpose of the Wise Legislator is a must. Perhaps the definition that is most clear is that 'it is a contract that means the lawfulness of association and cooperation between a man and a woman and which determines the rights and duties of both of them'. The rights and duties inferred by this definition are defined by the legislator (Allah) and not subject to the conditions of the two parties. That is why the

¹⁴² See Muḥammad, Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, 3rd edn (Beirut, Lebanon: Dar Alfikr al-Arabi, 1957), pp. 18-21.

¹⁴³ See Moḥammad al-Ṭāhir, Ibn ʿĀshūr, *Maqāṣid al-Sharīcaḥ al-Islamiyya*, Trans. by Mohamed El-Tahir El-Mesawi, 2nd edn (Herndon, USA: International Institute Of Islamic Thought, 2011), p. 247.

marriage contract, in most nations, comes under a religious guise in order for its consequences to gain sanctity in that the spouses willingly accept the rulings of the religion.¹⁴⁴

Abū Zahrah shows great courage in criticising the familiar definitions of the marriage contract given by jurists who described it as a means by which a woman gives the right to a man to benefit from her private parts, in return for which the man pays a dowry. Whereas we see that the Qur'an made domestic stability, which is an integral part of establishing tranquillity in marital life, a purpose of the marriage contract. If the whole matter is confined only to granting sexual enjoyment in return for dowry, then the objectives of marriage mentioned in the Qur'anic verse (Q., 30:21), which are to achieve comfort, stability and participation in marital life, are made void.

The link between the marriage contract and the sexual pleasure a man gets from a woman in the opinion and views of some jurists and commentators is nothing but the focussing on a very narrow aspect of this great social system and a stripping away of the great meanings and purposes of this great blessing that Allah has bestowed upon his servants as granted by the verse:

And Allah has made for you from yourselves mates and has made for you from your mates sons and grandchildren and has provided for you from the good things. Then in falsehood do they believe and in the favour of Allah they disbelieve? (Q., 16:72)

It seems that jurists have been concerned about the limits and nature of the contract (i.e. from the legal aspect); therefore, they dealt with it as any other contract without considering the components that might attach to it later.¹⁴⁵ This means they didn't pay attention to the social and psychological aspects of the marriage contract, and this one criticism against the definitions of early jurists to the marriage contract.

¹⁴⁴ See Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp.17-18.

¹⁴⁵ See Al-Bahyyi, *al-Fikr al-Islāmī wa al-Mujtama' al-Muā'āšir*, pp.169-70.

3.4 The Shari'ah's Rules of Marriage

The defining law (*al-ḥukm al-taklīfī*) among jurists is for the marriage to be: permissible (*mubāh*), recommended (*mandūb*), obligatory (*wājib*), disliked (*makrūh*) or prohibited (*ḥarām*).¹⁴⁶ Therefore, a legitimate description of marriage differs depending on the situation of the competent and legally obliged person (the *mukallaf*) and whether he is capable of fulfilling the duties and rights that he is obliged to by the marriage contract, as well as whether he fears falling into the sin of unlawful sexual intercourse.¹⁴⁷ Islamic legislation classifies the defining law of marriage in a way that considers the interests and benefit (*maṣlahah*) for each individual, and seeks to prevent harm (*mafsadah*) -either personal or public-. It is on this basis that legislation prevents the marriage if it becomes a means of bringing about harm to one or each of the spouses; as the legal principle states: preventing harm (*mafsadah*) is prior to bringing benefit (*maṣlahah*).

If marriage becomes a cause of harm to one or each of the spouses and becomes like a door for evil instead of tranquillity, affection and mercy which were mentioned in the verse (Q., 30, 21), then the legislation forbids it because of the harm which results from it and the evil it might cause to the two parties of the marriage contract. The period of the marriage contract only ends in one of two ways; divorce or death. That is why anyone committing him/herself to a marriage contract must have sufficient knowledge of the other party's rights, and this can be achieved in the stages preceding the marriage contract, which is the prelude to the contract itself, i.e. the engagement period.

3.5 Engagement (*Khiṭbah*)

Any contract is usually preceded by some kind of initial agreement. In the case of the marriage contract, this agreement is the engagement (*khiṭbah*). *Khiṭbah* is an introduction to

¹⁴⁶ 'Defining law' is a locution or communication from the lawgiver addressed to the competent person (*mukallaf*) which defines rights and obligations. See Moḥammad Hashim, Kamali, *Principles of Islāmic Jurisprudence*, 3rd edn (Cambridge: The Islamic Texts Society, 2003), p. 413.

¹⁴⁷ See Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 22.

marriage and a way for the suitors to become familiar with one another by coming to know the ethics, temperament and tendencies of one another. If agreement and harmony is achieved and some common qualities attract the suitors to each other and encourage them to proceed to marriage then they do so with reassurance and confidence. Thus, *khiṭbah* is the stage that precedes the marriage contract and it can be described as any statement or action by the suitor through which he expresses his desire for marriage leading him to propose to the family of the woman, explaining his situation and expressing his desire to marry, negotiate with them in regards of the marriage contract, listen to their demands and explain his demands in regards of the contract and the marriage.¹⁴⁸

Engagement is approved by Sharīḥ and is an ancient custom found in various traditions and cultures through history and across the world in various forms. Amongst the important legal considerations related to engagement which is intrinsically relevant to forced marriage is that both suitors see each other in order to ascertain whether they wish to become engaged or not.¹⁴⁹ The Prophet encouraged the suitor -and the fiancée- to look at that which might help him/her make their decision regarding marriage. The fact of the permissibility for the suitors to see each other takes into account that the main intention behind marriage which is that they must be absolutely clear when choosing and accepting the person they want to marry. This plays an important role for each party in finding what he/she likes and therefore encourages them to get married; the Lawgiver is keen for the marriage to take place in an atmosphere of satisfaction. Therefore, the Lawgiver considers the desire for marriage and the engagement as a means that lead to marriage. This demonstrates that forced marriage contradicts the objectives which the Sharīḥ sought from the *khiṭbah* and marriage.

Ibn Baṭṭāl (d. 449 AH / 1057AD) mentioned in his explanation of Ṣaḥīḥ al-Bukhārī, quoting from al-Ṭaḥāwī (d. 321 AH / 933 AD), that amongst the Ḥanafī evidence regarding the permissibility of seeing before marriage, there is a report by Muḥammad b. Sulaymān b. Abī

¹⁴⁸ See Wahbah, al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, 2nd edn (Damascus, Syria: Dar al-Fikr, 1985), VII, p.10; Also See al-ʿAṭṭār, ʿAbd al-Nāṣir Tawfīq, *Khiṭbat al-Nisa' fi al-Sharīḥ al-Islamiyyah*, (Cairo, Egypt: Matbaat al-Saadah, [n.d.]), pp. 5-6.

¹⁴⁹ See Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp.18-21; al-Ṣartāwī, Maḥmūd ʿAli, *Sharḥ Qānūn al-Aḥwāl al-Shakhṣiyyah*, 2nd edn (Amman, Jordan: Dar al-Fikr, 2010), p.16; ʿUqlah, *Nizām al-ʿUsrah*, I, p. 157.

Ḥathamah, who said: ‘I saw Muḥammad b. Maslamah intensely chasing Thubayitah bint al-Daḥḥāk (who was on the roof of her house) with his eyes. I said: ‘Are you doing that when you are one of the companions of the Prophet?’ He replied: ‘I heard the Prophet saying “If the desire of marrying a woman is placed in someone’s heart then there is no harm if he looks at her”’.¹⁵⁰ It seems as though this Companion of the Prophet, Muḥammad b. Maslamah, understood that engagement and the desire for marriage is a reason to permit looking at a woman and trying to see of her that which might encourage him to marry her, as the Prophet declared in the *ḥadīth* narrated by Jābir. Jurisprudents sought to limit that to the face and the hands, whilst some added the feet, and noted that the face indicates the beauty of the woman and the hands indicates the build of her body, which is enough for he who wants to know the woman.¹⁵¹ He can also seek the help of a trusted woman who can give him a description of the woman he wants to marry with any specifics that he may wish to know. All of what has been mentioned is precautions taken by the jurisprudents to subvert any means that may lead to immoral behaviour.¹⁵²

When the Prophet encouraged the man to look at the woman until he saw that which might encourage him to marry her, the Prophet did not specify the face and the hands, but Jābir said ‘I engaged a woman from the people of Bani Salamah, so I kept hiding until I saw from her that which I liked’.¹⁵³ Therefore, if the face and the hands are amongst what is exposed of a woman usually then there was no need for Jābir to hide between palm trees to see them, rather he must have been trying to see what is beyond them. Therefore, the *ḥadīth* did not specify what exactly to look at but left this to the discretion of the one who is looking with the intention of marriage.

The opinion that achieves the purposes of harmony and coherence, in addition to facilitating an inclination towards one another for the purposes of marriage, is confirmed by what the

¹⁵⁰ Ibn Baṭṭāl, °Ali b. Khalaf, *Sharḥ Ṣaḥīḥ al-Bukhārī*, 1st edn (Riyad, Saudi Arabia: Maktabat al-Rushd, 2000), VII, pp. 236-37. This *ḥadīth* is in Sunan Ibn Mājah, number: (1864).

¹⁵¹ See Abu al-Walid Muḥammad b. Aḥmad, Ibn Rushd (*al-ḥafīd*), *Bidāyat al-Mujtahid*, Trans. by: Imran Ahsan Khan Nyazee, 1st edn (Reading, England: Garnet Publishing Ltd, 1996), II, p. 2.

¹⁵² See Sābiq, *Fiqh al-Sunnah*, II, p. 20.

¹⁵³ Sulaymān b. al-Ash°ath, Abū Dāwūd, *Sunan Abū Dāwūd, Mawsū°ah°at al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999), *ḥadīth* number: (2082).

Prophet said to al Mughīrah b. Shu‘bah when he engaged a woman: “Go and look at her because this will be a reason for matching and harmony”. Al-Tirmidhī said: ‘This is a good *ḥadīth* (*ḥasan*) and some people of knowledge commented on this *ḥadīth* by saying: “there is no harm to see of her that which is not forbidden”’.¹⁵⁴

It might be assumed from these *ḥādīths* that a woman should also be able to see the man she wishes to marry; just as he should be pleased by her appearance, so should she be pleased by his.¹⁵⁵ Therefore, this ruling is not limited to men only but it is confirmed for women as well, so she is allowed to see and like of him that which he would like to see of her. According to Sayyid Sābiq, the modest opinion which is for the man to see of the woman that which she usually exposes in front of her father, brother or family and for him to see of her that which the suitor likes to see in his future wife.¹⁵⁶

Generally, the opinion of the majority of jurists is that engagement is a proposal for marriage and an introduction to it. Engagement, as has been mentioned before, is the first step into marriage; a time for introducing, assessing the others’ qualities and a chance to establish affinity and affection between the future spouses. Being forced into an engagement and the completion of marriage without being given the chance to annul the engagement would be an arbitrariness that is unfair to the party that disapproves of the marriage, compelling him/her to do that which he/she does not desire and compromising the very purpose of marriage which aims to find love and intimacy between the spouses.¹⁵⁷

Abū Zahrah says, ‘the fulfilment of the promise of engagement is not binding because doing so -against the will of one party- will lead to ratifying a marriage contract with a

¹⁵⁴ Muḥammad b. ‘Isā, al-Tirmidhī, *Jāmi‘ al-Tirmidhī, Mawsū‘ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999), *ḥadīth* number: (1087).

¹⁵⁵ See Dawoud, El-Alami, *The Marriage contracts in Islamic Law*, 1st edn (London: Graham and Trotman Ltd, 1992), p. 12.

¹⁵⁶ See Sābiq, *Fiqh al-Sunnah*, II, p. 20.

¹⁵⁷ See Al-Ashqar, ‘Umar Sulaymān, *Al-Wāḍiḥ Fī Sharḥ Qānūn al-Aḥwāl al-Shakhṣiyyah*, 4th edn (Amman, Jordan: Dar al-Nafaes, 2007), p. 48. Also see Khallāf, *Aḥkām al-Aḥwāl al-Shakhṣiyyah*, p. 21; Maḥmūd, Shaltūt, *al-Islām ‘Aqīdah wa Sharī‘ah*, 13th edn (Cairo, Egypt: Dar al-Shuruq, 1985), p. 149.

person he/she is not contented with. Judiciary has no authority to force such dangerous contracts'.¹⁵⁸

3.6 The Marriage contract

For Joseph Schacht, Marriage in an Islamic context is a contract of civil law. This contract is the only legally relevant act in concluding a marriage which leads to privacy (*khalwa*) between husband and wife and consummation (*dukhūl*).¹⁵⁹

Islam seeks to make sexual relations between a man and woman permissible through the establishment of the marriage contract. As made evident in the previous discussion, a contract is an expression of intent to commit between two people as a result of mutual consent. As intention is something intangible, the contract provides a tangible expression of this intent. The Qur'an calls it *ʿuqdat al-nikāh*, the tie of marriage (Q., 2:235).

According to Esposito, Islam considers marriage to be an important safeguard for chastity and it regards marriage to be central to the growth and stability of the society. Also, marriage (*nikāh*) in Islam is a highly respected contract; however, it is not religious in the sense of a sacrament as it is in other religions.¹⁶⁰ The Qur'an describes marriage as a 'solemn covenant' (Q., 4: 21). This Qur'anic expression gives a clear indication of the importance of the marriage contract and of its high status in the life of the individual, family and society.

An examination of the Qur'an reveals that the only other times the word 'covenant' is mentioned is when an issue of the utmost importance is being announced, and where the addressee is required to pay heed. For example when God commands monotheism and worship of Him Alone or where He orders the acceptance of divine law and the application of its legislation.¹⁶¹ Therefore, a solemn covenant indicates that the marriage contract is made with a sincere intention to show long-lasting affection, as women take a covenant from

¹⁵⁸ See Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 35.

¹⁵⁹ See Joseph, Schacht, *An Introduction to Islamic Law* (Oxford, England: Oxford University Press, 1964), p.161.

¹⁶⁰ See John L. Esposito and Natana J. Delong-Bas, *Women in Muslim Family Law*, 2nd edn (Syracuse, New York: Syracuse University Press, 2001), pp. 14-15.

¹⁶¹ See Shaltūt, *al-Islām ʿAqīdah wa Sharīʿah*, p. 146.

men to treat them kindly.¹⁶² Riḍā (d. 1865 AH / 1935 AD) said, ‘it means a firm covenant that joins you to them [women] in the strongest way’.¹⁶³

According to Ibn ʿĀshūr, Islam commands the spouses to deal kindly with each other, for the woman’s rights to be taken care of and for men to be in charge of women in everything that protects and secures her interests. For this purpose, Islam considers the failure to do so a valid reason to grant an annulment of the marriage contract through divorce if any harm is proven.¹⁶⁴ Esposito notes that the marriage contract in Islamic jurisprudence is a civil contract which legalised the relationship between a man and a woman. It is a mutual voluntary contract between two parties based on mutual consent to bind two parties to its legitimate provisions which are the rights and obligations established by the contract in a particular subject.¹⁶⁵

3.7 Legal Objectives of the Marriage contract

Marriage is seen by jurists as the means by which lineage is protected and honour is preserved. In reaction to the various forms of relationships that may take place between a man and a woman in the Arab in pre-Islamic era, Islamic law saw to differentiate the marriage contract from all other forms of relationship between men and women which would cast doubt to lineage. Jurists believe that contracting marriage prevents doubt regarding lineage in three ways:

1. The guardian of the women shall manage the execution of her marriage contract in order to make it clear that the woman does not seek to marry herself without the knowledge of her family. This constitutes the difference between marriage and unlawful sexual intercourse, secret affairs and prostitution. The wisdom behind this is that, generally speaking, the guardian would not accept the latter kind of

¹⁶² See Ibn ʿĀshūr, *al-Taḥrīr wa al-Tanwīr*, IV, p. 290.

¹⁶³ Riḍā, Muḥammad Rashīd, *Tafsīr al-Manār*, 2nd edn (Cairo, Egypt: Dar al-Manar, 1947), IV, p. 460.

¹⁶⁴ Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p.259.

¹⁶⁵ See Esposito, *Women in Muslim Family Law*, p.14-15.

association between a man and a woman. Therefore, the guardian of a woman carrying out her marriage contract allows him to take care of her interests and to have the support of his extended family and neighbours in defending this honour.¹⁶⁶

2. A dowry (*mahr*) shall be paid by the husband to his wife. Marriage in its legitimate form takes the form of contracts because of the existence of the offer, the acceptance and some form of dowry which gives it an incidental feature and certainly differentiates between it and other types of contracts like sales. However, it must be noted that the dowry is not compensation for the enjoyment of the private parts like some jurists might say.¹⁶⁷ *Mahr* (*ṣadāq*) wherever it is mentioned in early jurisprudence text books it always has been described as compensation for the enjoyment of the private part. However, generally, late jurists seemed to disagree with this description given to *mahr*, and therefore, they preferred to define it as a bridal gift. Ibn ʿĀbidīn (d. 1252 AH / 1836 AD) stated that *mahr* defined in *al-ʿināyah* as ‘the sum of money due to woman in the marriage contract upon husband as a compensation for the enjoyment of the private part’.¹⁶⁸ Ibn ʿĀshūr totally disagreed with this description and therefore he stated that dower in Islam is neither a substitute for the husband’s exclusive relationship and sexual enjoyment with the wife nor as an approximate comparison as expressed by certain jurists.¹⁶⁹ (This will be discussed later under sub-section 3.8.4).
3. The announcement (*ishhār*) of the marriage means that the marriage cannot be hidden, which if done would make it more like unlawful sexual intercourse and might be a reason for people to not defend or respect the marriage. It also brings

¹⁶⁶ See Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p.253.

¹⁶⁷ See Abū Zahrah, *al-Aḥwāl al-Shakṣiyyah*, p.169; Muḥammad b. ʿArafah, *al-Dusūqī, Ḥāshiyat al-Dusūqī*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1996), III, p. 130.

¹⁶⁸ Muḥammad Amīn, Ibn ʿĀbdīn, *Ḥashiyat radd al-Muḥtār*, 2nd edn (Beirut, Lebanon: Dar al-Fikr, 1979), III, p.100.

¹⁶⁹ See Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p. 254.

doubt to the lineage identity (*nasab*) of its offspring and detracts from the principle of the woman's chastity.¹⁷⁰

We will show the most important components of the Islamic marriage contract in the following sections.

3.8 The Cornerstones and Conditions of a Marriage contract

Generally speaking, for every contract to exist there are fundamental requirements which can be described as follows:

1. The two parties
2. The objectives of the contract
3. The subject of the contract
4. The principles of the contract, which make up the components of the contract itself

A contract cannot exist without these basic elements, whether they were principles in technical terms, i.e. essential parts of the contract itself, or those required by logical inference, such as the existence of the two parties and the object of the contract, as the existence of any contract is not imagined without these particulars.¹⁷¹

The Lawgiver may declare that a set of facts must exist or an act must take place before the cause can take effect and invoke the related rule (*ḥukm*). The existence of such a set is called a condition (*sharṭ*). The condition is considered a sign or an indication on which the existence of another thing depends. For example, the marriage contract legalises sexual enjoyment between the spouses; however, this is on the condition of the presence of two witnesses or public declaration.¹⁷²

¹⁷⁰ See Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, pp. 253-57.

¹⁷¹ See Rayner, Susan E, *The Theory of Contract in Islamic Law*, 1st edn (London, England: Graham And Trotman, 1991), pp. 103-5.

¹⁷² See Nyazee, Imran Ahsan Khan, *Islāmic Jurisprudence*, 2nd edn (New Delhi, India: Adam Publishers and Distributors, 2004), pp. 75-76.

The legal consequences of a contract is not fully realised without the fulfilment of its necessary conditions. A cornerstone (*rukn*) of a contract is that element which establishes the contract; without it, a contract does not exist. A condition also differs from a cornerstone in that the latter is part of the essence of a thing. This would mean that the rule (*ḥukm*) could not exist in the absence of its *rukn*.¹⁷³ Therefore, when the whole or even a part of the *rukn* is absent, the *ḥukm* collapses completely, with the result that the latter becomes null and void (*bāṭil*). While, on the other hand, the condition (*sharṭ*) is not part of the essence of a *ḥukm*, although it is a complementary part of it. Thus a cornerstone and a condition converge in that both of them are a requirement for the legal existence of a contract, but they differ in that cornerstone is an intrinsic part of the matter that is being contracted, while the condition is not.¹⁷⁴

Generally, Jurists disagree on what they consider a cornerstone and what they consider a condition. The distinction between what is considered a cornerstone and what is considered a condition in any contract is based upon what causes the contract itself to be valid or invalid and whether it can take place or not.

Generally speaking, the cornerstones (*arkān*) for a valid marriage contract are as follows:

- a. The formula (*ṣīgha*): which consists of the offer (*ījāb*) and the acceptance (*qabūl*)
- b. The subject matter (i.e. the spouses)
- c. The dowry (*mahr*)
- d. The guardian (*walī*)
- e. The witnesses. (*shuhūd*)

¹⁷³ See Kamali, *Principles of Islamic Jurisprudence*, pp.434-35.

¹⁷⁴ See *Al-Mawsūʿah al-Fiqhiyyah*, Ministry Of Endowments And Islamic Affairs in Kuwait, 1st edn (Kuwait, Ministry Of Endomens And Islamic Affairs in Kuwait: 1992), XXVI, p.6; for more See al-Zarqa, *al-Madkhal al-Fiqhī*, I, pp. 394-400.

However, some jurists prescribe some of the above as *arkān* while others stipulate some of them as conditions and the rest as cornerstones. Nevertheless, all agreed that the main feature of the form of the marriage contract is the mutually understood expressions of intention by the two parties or their representatives.

3.8.1 The Formula (*ṣīgha*)

In view of this, the form comprises of two parts; offer and acceptance (*ījāb* and *qabūl*). Generally, the jurists have set certain requirements to be observed in the formula (*ṣīghah*) of offer and acceptance to enable the contract to be concluded, among the most important of which is that the offer should be an expression of the desire and intention of one party to marry the other, while acceptance should be an expression of agreement by the other party. However, the expressions used in the contract should be definite in the meaning in which they indicate the desire to marry. The expression may be strictly literal, meaning marriage (*zawāj* or *nikāḥ*), or they may be in the form of metaphor supported by the context in such a way that they become clearly an expression of this desire.¹⁷⁵

Also, jurists are agreed that the expressions used in the formula (*ṣīgha*) should indicate permanence. Therefore, the formula of *ījāb* and *qabūl* must not include any indication that restricts the marriage to a specific period or attaches the marriage to a condition. The formula must indicate the instant establishment of a contract and for the woman to be lawful for the man. The jurists have, therefore, ruled certain kinds of contracts invalid because they contradict the principle of permanence. These include *mut'ah* and *mu'aqqat* marriages.¹⁷⁶

3.8.2 Witnesses (*shuhūd*)

Because the marriage contract has such importance attached to it due to its role in preserving lineage and honour (*'ird*),¹⁷⁷ and for the implications and rights which result from it, it is necessary to document it with a testimony of witnesses. The presence of witnesses to the

¹⁷⁵ See El-Alami, *The Marriage contracts in Islamic Law*, p. 23.

¹⁷⁶ See Ibid, pp.24-25. *Mut'ah* and *mu'aqqat* marriages are two forms of temporary marriage. See J. Schacht, 'nikāḥ', *EF*².

¹⁷⁷ Arabic term corresponding approximately to the idea of honour, but somewhat ambiguous and imprecise, as the hesitations of the lexicographers testify. See B. Fares, '*'ird*', *EF*².

marriage contract is required when carrying out the offer and acceptance in order to underline the importance of the marriage contract and to eliminate any accusation of unlawful sexual intercourse.

Generally jurists are agreed that the presence of witnesses in the marriage contract is a condition for the marriage to be valid, as is the declaration of marriage, and therefore this is considered a dividing line between what is lawful and what is unlawful. Witnessing is a condition which is required in many transactions, especially money lending. The jurists conclude that if witnesses are required in financial matters, therefore, by analogy they must be a condition for marriage. They also found that the Qur'an (65:2) instructs that witnesses are required for divorce and reconciliation so there is all the more reason why they should be required in marriage.¹⁷⁸

However, the presence of witnesses has the effect on differentiating between what is lawful and what is unlawful. According to Ibn al-Mundhir (d. 318 AH / 930 AD), 'there is no authentic evidence for the requirement of two witnesses'.¹⁷⁹ Ibn Taymiyyah's opinion is that declaring the marriage is the intended purpose and that the Prophet commanded that when he said, "Declare the marriage" because not declaring the marriage can introduce doubt about unlawful sexual intercourse. Therefore, he states that the presence of witnesses without declaring the marriage is a reason to reconsider the validity of the marriage. By this opinion they agree with the Maliki School in their opinion regarding the issue of declaring the marriage.¹⁸⁰ According to Ibn Taymiyyah, there is no doubt the marriage is valid if it was declared even without the two witnesses, but if it was the other way around (witnessing the marriage but not declaring it) then it should be reconsidered.¹⁸¹

¹⁷⁸ See El-Alami, *The Marriage contracts in Islamic Law*, p. 65.

¹⁷⁹ Abū Bakr Muḥammad, Ibn al-Mundhir, *al-Ishrāf^c Ala Madhāhib al-^cUlamā*, ed. by Abū Hāmed Ṣaghīr al-Anṣārī, 1st edn (Ras al-Khaimah, United Arab Emirates: Maktabat Makkah al-Thaqafiyah, 2004), V, p. 31.

¹⁸⁰ Alā' al-Dīn ^cAli b. Aḥmad, al-Mardāwī, *al-'Inṣāf Fī Ma^crifat al-Rajih min al-Khilāf*, ed. by Muḥammad Ḥasan Isma^cīl al-Shāfi^cī, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1997), VIII, pp. 99-100; Also see Ibn Qudāmah, Muwaffaq al-Dīn, *al-Kāfi*, ed. by ^cAbd Allah b. ^cAbd al-Muḥsin al-Turki, 1st edn (Cairo, Egypt: Dar Hajr, 1997), IV, p.238.

¹⁸¹ Aḥmad, Muwāfi, *al-Jami^c li al-Ikhtiyārāt al-Fiqhiyyah Li Ibn Taymiyyah*, 2nd edn (Riyadh, Saudi Arabia: Dar Ibn al-Jawzi, 1995), II, pp. 609-14.

3.8.3 Social Equity (*Kafā'a*)

Many communities and cultures see that suitability and social equity is required when marry their daughters, in order to avoid being the subject of mockery because of their intermarriages and their approval of the marriage requests from people of a lower status. We can see this in conventional marriages which are based on patriarchal values, such as: bloodline, piety, modesty, caste, sect/religion, consanguinity, family background, family honour, etc. Controlling these values is believed to enhance family honour and these values could be seen as causes and factors for forced marriages.¹⁸²

As for considering social equality as a condition for marriage based on a practice from ancient societies, although many communities still practice this a way of preserving the structure of their society, family sect, religion or customs, the question is whether or not the jurists have evidence from the Qur'an or *Sunna* to support the request of social equality as a condition for the validity of the marriage. Jurists who considered suitability to be a condition for marriage believe that both customs and experience prove that any abuse to the condition of *kafā'a* causes damage to marital life. Therefore, in order to repel this social embarrassment and to preserve the marital bond that serves a great purpose in Islamic law which is preserving lineage, the jurists stipulate *kafā'a* in marriage.¹⁸³ Abd al-Wahhāb Khallāf commented upon the consideration given by the jurists to the requirements of *kafā'a* in the marriage, and his comments as follow:

- a. The issues of *kafā'a* is not a religious matter. Therefore, if a woman and her guardian approves a non *kuf'* husband then the lawgiver has no objection to the marriage.
- b. Objection is a right for either the woman or her guardian if she/he does not approve in order to avoid harm as well as social embarrassment.

¹⁸² See Zubaida, Melto, 'The Perception Of Honour Among the British-Pakistani Community in Watford, United Kingdom' (unpublished doctoral thesis, University of Leeds, School of Modern Languages and Cultures, 2012), p. 169.

¹⁸³ See Al-'Shqar, *al-Wāliḥ*, pp.104-5; Burhān al-Dīn al-Farghānī al-Marghīnānī, *al-Hidāyah fī Sharḥ Bidāyat al-Mubtadī*, Trans. by Imran Ahsan Khan Nyazee, 1st edn (Bristol, England: Amal Press (Ltd), 2006), p. 501.

Khallāf claims that, this clarifies the mistake in affirming that Islam considers *kafā'a* and thus becomes a religion devotes social class and making Muslims divided.¹⁸⁴ Khallāf decides, therefore, that the issue of *kafā'a* is legally considered for social reasons only, in order to preserve the interests of marriage and family associations. However, Islamic law did not introduce the issue of *kafā'a* to make it a condition for the validity of marriage contract. It is worth mentioning, for the sake of argument, that the prophet gave his daughters in marriage to some of his companions while none of them matched his religious status. Moreover, al-‘Ashqar claims that the evidence quoted by those who considered suitability to be a condition in marriage are either explicit but not authentic, and if they are explicit they do not indicate that it is required.¹⁸⁵

Jurists make social equality a right for the wife and her guardians. It is a mutual right between them because the consent of either side does not negate the right of the other, as the consent of everyone is required. In the case of a woman who married herself to someone who is not *kuf'* with full knowledge and consent, but without the consent of her guardians, the contract is considered invalid (*bāṭil*). However it is considered to be suspended (*mawqūf*) until the consent of the guardian is granted. In the case that she marries herself to someone who she thinks is socially equal (*kuf'*) or she is tricked by someone who describes his as *kuf'* but who is not, then she has the option to either annul the marriage or to continue it. The guardian has the right to object to the contract if the husband is not socially equal (*kuf'*) or he does not fulfil the requirements of social equality (*kafā'a*).¹⁸⁶ Hence, we see how the Ḥanafī jurists dealt with the issue of *kafā'a* where they gave the woman her freedom of

¹⁸⁴ Khallāf, *Aḥkām al-Aḥwāl al-Shakhṣiyyah*, p.72.

¹⁸⁵ See Al-A‘Shqar, *al-Wāḍiḥ*, p.105. See Maḥmūd b. Aḥmad Badr al-Dīn, al-‘Aaynī, *al-Binayah Fī Sharḥ al-Hidāyah*, 2nd edn (Beirut, Lebanon: Dar al-Fikr, 1990), III, pp. 617-19; ‘Abd Allah b. Yusuf, al-Zayla‘ī, *Naṣb al-Rāyah*, ed.by Muḥammad ‘Awwamah (Beirut, Lebanon: Al-Rayan Publishers, [n.d.]), III, pp.196-98. Al-Albānī’s finding was that most of *ḥadīths* in the subject of social equality are not authentic narrations. See Al-Albānī, Muḥammad Nāṣir al-Dīn, *‘Irwā’ al-Ghalīl*, 1st edn (Beirut, Lebanon: Al-Maktab al-Islami, 1979), VI, p.264. However, the Prophet said to the family of Bayāḍa, ‘marry to Abū Hind (someone of your women) and marry from him women (i.e. his daughters),’ and yet Abu Hind was a cupper and people at that time used to look down on one whose career as cupping. See Aḥmad b. ‘Ali, Ibn Ḥajar, al-‘Asqalānī, *Bulūgh al-Marām*, Trans. by Dar-us- Salam Publications, 1st ed (Riyadh, Saudi Arabia: Dar-us-Salam, 1996), p. 353. *Hadīth* number: (857).

¹⁸⁶ See El-Alami, *The Marriage contracts in Islamic Law*, pp. 68-69.

choice but at the same time they place the principle of *Kafā'a* as a condition for the validity of her marriage.

Thus, if she uses that right properly they approved her choice and the marriage is considered valid, on other hand, if her guardian sees that she misuses that right then they give the guardian right to take this case to the court, and the judge (*qāḍī*) must investigate whether the man misrepresented his social status to the bride's family, as well as whether the guardian was responsible for contracting the marriage or whether the woman contracted the marriage herself. The judge must then exercise his own discretion in deciding whether to annul the marriage (*faskh*) on the basis of the investigation, if he finds that the marriage is not consummated and the woman is not pregnant and that no more than a year has elapsed since the inequality was discovered.¹⁸⁷ If all of these considerations are verified, her choice is not approved and the marriage is considered invalid. This indicates the comprehensive consideration from Ḥanafi jurists when they make the element of social equality a common right between women and her guardian, yet, the final decision is made by the court.¹⁸⁸

3.8.4 Dowry (*mahr/sadāq*)

After the consent and approval of the marriage between the spouses and their families takes place, the dowry is agreed upon as it is essential in the marriage contract. It is unacceptable for a marriage to take place without a dowry paid by the husband to the wife. It is a gift given by the husband to his wife due to the marriage contract. The dowry is a right for the woman based on the Qur'an (Q., 2:236). Generally speaking, the jurists believe that the reasoning for this is that no blame is attached to the husband who divorces his wife before consummation in the case where the dowry is not specified in the contract.¹⁸⁹

According to Ibn Rushd (d. 595 AH / 1198 AD), all jurists agreed that the ruling of dowry (*mahr*) is a condition for the validity of the marriage and agreeing to drop it is impermissible

¹⁸⁷ See Esposito, *Women in Muslim Family Law*, p. 21; Khallāf, *Aḥkām al-Aḥwāl al-Shakhṣiyyah*, p. 69.

¹⁸⁸ Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 136. For more see Muḥammad b. °Abd al-Wāḥid, Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr* (Damascus, Syria: Dar al-Fikr, [n.d.]), III, p.291. ; al-°Aaynī, *al-Binayah Fī Sharḥ al-Hidāyah*, III, p. 617.

¹⁸⁹ See El-Alami, *The Marriage contracts*, pp.107-8.

because of the verse “And give the women upon marriage their bridal gifts graciously/as free gifts” (Q., 4:4) and “So marry them with the permission of their people/guardians and give them their due compensation according to what is acceptable” (Q., 4:25).¹⁹⁰ Kecia Ali states that in most societies throughout history, marriage transferred wealth. Dower (*mahr* or *ṣadāq*) was the primary male obligation resulting from marriage. Moreover, dower has historically served as an important source of economic capital for women.¹⁹¹

Ibn ʿĀshūr states that dower in Islam is not a substitute for the husband’s exclusive relationship and sexual intercourse (*buḍʿ*) with the wife, as expressed by some jurists. Moreover, Ibn ʿĀshūr argues that if dowry were a substitute, the amount of the benefit that it would compensate should have been taken into account. However, this should, in turn, have required that another sum of money must be paid by the husband when it is clear that the previous sum has already been exhausted by the benefits that he has enjoyed during the time he has spent with his wife, just as in a contract of hire (*ijārah*).¹⁹²

According to Abū Zahrah, dowry was approved as an obligatory gift, not as recompense. He quotes from Ibn al-Humām his saying:

‘It was legislated as a condition for the validity of the marriage contract not as recompense, like a price or a fee, otherwise it must be defined. The Qur’an called it *ṣadāq* and *niḥla* (free gifts) in the verse “And give the women [upon marriage] their [bridal] gifts graciously/as free gifts” (Q., 4:4). This expression indicates that dowry was legislated to be a gift from the husband to his wife, but an obliged gift that can be postponed without any addition or subtraction and without causing difficulty’.¹⁹³

However, jurists are in agreement that dropping the dowry or having a condition to drop it is impermissible. It is recommended that dowry is defined when concluding the contract and it

¹⁹⁰ See Ibn Rushd (*al-ḥafīd*), *Bidāyat al-Mujtahid*, II, pp. 20-21.

¹⁹¹ Kecia, Ali, *Marriage and Slavery in Early Islām* (Harvard, Massachusetts: Harvard University Press, 2010), p.49.

¹⁹² Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p. 254.

¹⁹³ See Abū Zahrah, *al-ʿAḥwāl al-Shakhṣiyyah*, pp.169-70.

becomes obligatory either when concluding the contract or at the time of consummation (*al-dukhūl*). The wife is entitled to her dowry, either as defined in the contract or *mahr al-mithl* (the marriage dowry received by similar brides) if the dowry is undefined in the contract.¹⁹⁴

3.8.5 Guardianship (*wilāya*)

The requirement of a guardian in the marriage contract is the majority view of jurists, with the exception of Abū Ḥanīfah, who stipulated it only for the marriage of the young and the insane.¹⁹⁵

Jurists disagreed whether guardianship is one of the conditions for the validity of marriage. Mālik (d. 179 AH / 795 AD), Shāfiʿī (d. 204 AH / 820 AD) and Aḥmad b. Ḥanbal (d. 241 AH / 855 AD) stipulate that there is no marriage without a guardian and that guardianship is a condition of validity. Abū Ḥanīfah (d. 150 AH / 767 AD) rules that if a woman contracts her marriage with someone of equivalent status (*kufʿ*) it is permitted to do so without a guardian.¹⁹⁶ More explanation and detail regarding the issue of guardianship (*wilāya*) is provided in the next chapter.

3.9 The Marriage contract and its Legal Description (*al-waṣf al-Sharʿī*)

Validity (*ṣiḥḥah*), irregularity (*fasād*) and invalidity (*buṭlān*) are Sharīʿah values that describe and evaluate legal acts incurred by the competent person who is in possession of his faculty of reason (*mukallaḥ*). These descriptions result from the examination of the act of the *mukallaḥ* whether or not he fulfils the essential requirements cornerstones (*arkān*) and conditions (*shurūṭ*) that the Sharīʿah has prescribed for it, and whether or not there exist any obstacles (*mawānīʿ*) to deter its appropriate conclusion.¹⁹⁷

The valid (*ṣaḥīḥ*) contract is: the contract where all its cornerstones and conditions are fulfilled and therefore it results in its intended rulings and the invalidity (*buṭlān*) of a

¹⁹⁴ See Ibn Rushd, *Bidāyat al-Mujtahid*, II, p. 20.

¹⁹⁵ See Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p. 254.

¹⁹⁶ See Ibn Rushd, *Bidāyat al-Mujtahid*, II, p. 9.

¹⁹⁷ See Kamali, *Principles of Islamic Jurisprudence*, p.438.

contract is: the legal consequence of the contract being unfulfilling of all of its cornerstones with all of their conditions met.¹⁹⁸

Therefore, validity in regards of the marriage contract means the resulting of the legal effects like the permissibility of the sexual enjoyment between the spouses, the wife's ownership of half of the defined dowry before consummation and the full defined dowry after it and other rulings that become binding by the marriage contract. Invalidity in regards of marriage means stripping off the rulings from the contract so it loses the description of being a reason for the approval of the resulted rulings.¹⁹⁹

However, Ḥanafīs distinguished an intermediate category between the valid and invalid, namely the irregular (*fāsīd*). Generally, Invalid (*bāṭil*) and irregular (*fāsīd*) have the same meaning in the opinion of the majority of scholars (Mālikīs, Shāfi'īs and Ḥanbalīs). Both terms can describe any action that takes place not in accordance to the Sharī'ah and therefore no legal effects result from it.²⁰⁰

Ḥanafīs differentiate between the invalid (*bāṭil*) and the irregular (*fāsīd*) and consider them as two different types. For example, an irregular contract is a contract when the deficiency is in a condition only, therefore, this contract according to Ḥanafīs is *fāsīd* but not invalid. The irregular (*fāsīd*) contract is a level of invalidity (*buṭlān*) known only to the Ḥanafīs. Other schools of law do not distinguish between the invalid and the irregular as both of them are invalid (*bāṭil*); they call it *bāṭil* sometimes and *fāsīd* some other times.²⁰¹

¹⁹⁸ See °Abd al-Razzāq, al-Sanhūrī, *Naẓariyyat al-Ḥaqq Fi al-Fiḥ al-Islāmi*, 2nd edn (Beirut, Lebanon: Al-Halabi, 1998), IV, p. 83.

¹⁹⁹ See Wahbah, al-Zuhaylī, *'Usūl al-Fiḥ al-Islāmī*, 1st edn (Damascus, Syria: Dar al-Fikr, 1969), I, pp.104-06.

²⁰⁰ See Schacht, *An Introduction to Islamic Law*, p. 121.

²⁰¹ See Kamalī, *Principles of Islamic Jurisprudence*, p. 438-39; Schacht, *An Introduction to Islamic Law*, p. 121. For more see Al-Sanhūrī, *Naẓariyyat al-Ḥaqq Fi al-Fiḥ al-Islāmi*, IV, p. 126.

The distinction the Ḥanafīs made between the invalid (*bāṭil*) and the irregular (*fāsīd*) contracts in the field of financial transaction caused a lot of confusion amongst researches who mixed between the invalid (*bāṭil*) and the irregular (*fāsīd*) contracts in the field of financial transaction and the invalid (*bāṭil*) and the irregular (*fāsīd*) contracts in the field of worships. They thought that this similarity in definitions automatically means a similarity in rulings which is not right. For moare details, see J.N.D Anderson, *Invalid and Void Marriage in Ḥanaḥī Law*.

The Ḥanafīs judged that the irregular (*fāsid*) marriage contract must be annulled before consummation and that consummating the marriage depending on a irregular (*fāsid*) contract is invalid but if this happens then the legal punishment (*ḥadd*) of unlawful sexual intercourse is cancelled and the resulted legal rulings mentioned before become binding.²⁰²

Al-Kāsānī said, ‘Marriage can only be either valid (*ṣaḥīḥ*) or invalid (*bāṭil*)’.²⁰³

Jurists agree upon the unlawfulness of carrying out the irregular contract (*fāsid*). Therefore, the lawgiver grants the right for the judiciary to intervene in order to terminate the invalid (*bāṭil*) or irregular (*fāsid*) contract.²⁰⁴

To conclude, jurists of the main four Sunnī schools of law agreed not to distinguish between the invalid (*bāṭil*) and the irregular (*fāsid*) marriage. Therefore, they all approved legal effects that result from such marriage if consummation takes place. Ibn Taimiyyah (d.728 AH / 1328 AD) said, ‘when someone consummates the marriage with a woman depending on what he thinks of as marriage then that approves lineage/paternity and the unlawfulness of intermarriage with the agreement of all scholars as far as I know although the marriage is considered as invalid (*bāṭil*) with the Lawgivers (Allah)’.²⁰⁵

However, it is argued that based on practical implementation, the opinion of the jurists related to the irregular (*fāsid*) and invalid (*bāṭil*) marriage contract is still a controversial issue. The jurists dealt with such incident, from the judicial aspect. Therefore, if the marriage was consummated it becomes associated with an invalid (*bāṭil*) or an irregular (*fāsid*) contract. In this case, a practical incident requires practical effects and legal rulings like cancelling the punishment [of an unlawful sexual relation], the approval of lineage, the

²⁰² See Al-Ṣarṭawī, *Sharḥ Qāmūn al-Aḥwāl al-Shakḥsiyyah*, p.87.

²⁰³ See Al-Kāsānī, *Badāi’ al-Ṣanā’i’*, III, p. 605; Also, see Ibn ‘Ābidīn, *Radd al-Muḥtār*, III, p. 132.

²⁰⁴ See al-Ashqar, *al-Wāḍiḥ*, pp.167-69; See ‘Ali Muḥiyy al-Dīn, al-Qarahdāghī, *Mabda’ al-Riḍa Fī al-‘Uqūd*, 2nd edn (Beirut, Lebanon: Dar al-Bashaer al-Islamiyyah, 2002), I. p. 156.

²⁰⁵ Aḥmad b. ‘Abd al-Ḥalīm, Ibn Taymiyyah, *Aḥkām al-Zawāj*, ed. by Muḥammad ‘Abd al-Qādir ‘Atā, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyyah, 1988), p.19.

obligation of *ʿidda* (the period a woman must observe after the death of her spouse or after a divorce) and dowry (*mahr*).²⁰⁶

In conclusion, this chapter presents the most important components of the marriage contract. It also underlines the essential objective related to the institution of marriage in Islam and the role of marriage in the preservation of lineage (*nasab*) and honour (*ʿird*).

Marriage definitions given by jurists have been criticised in the light of understanding the purposes of Islamic legislation when early jurists did not express the purpose and objectives of this contract in their definitions.

Islamic legislation classifies the defining law of marriage in a way that considers the interests and benefit (*maṣlaḥah*) for each individual, and seeks to prevent harm (*mafsadah*) - either personal or public. If marriage becomes a cause of harm to one or each of the spouses, it becomes like a door for evil instead of tranquillity, affection and mercy which were mentioned in the verse (Q., 30:21).

²⁰⁶ See Al-Sanhūrī, *Maṣādir al-Ḥaqq*, IV, pp.138-40.

Chapter 4

Guardianship (*wilāya*) in Marriage contract

4.1 Introduction

In this chapter, we will discuss the subject of guardianship (*wilāya*) in Islamic jurisprudence with regard to marriage contract in order to clarify issues related to forced marriages. Perhaps the most important issue surrounding discussion about forced marriages is the role of guardianship in marriage and the conduct of guardians toward those who are under their guardianship from sons and daughters. Accordingly, we will introduce the meaning, concept and the legal objectives (*al-maqṣad al-sharʿī*) of guardianship, as well as legal judgements (*al-ḥukm al-sharʿī*) surrounding guardianship (*wilāya*) in the marriage contract. Moreover, this chapter will reveal whether it is a cornerstone or a condition of the contract, as well as if it is required only to achieve certain purposes and benefits for the marriage. All of this will be after the production of evidence from Qurʿan and *Sunna*, used by jurists to support their reasoning (*ijtihād*).

4.2 The Concept of Guardianship (*wilāya*) in Islamic Jurisprudence

Islamic legislation takes into account the personal and financial affairs of wards in order that they be raised properly, with all of their rights preserved, protecting their property to ensure a stable life in which they live safely and are taken care of exactly like majors. The legislation also takes into account the weakness of wards and does not oblige them to fulfil any legal responsibilities until they attain legal maturity (*bulūgh*) and it appoints the guardians (the father, grandfather, custodian, judge, etc.) to fulfil this duty on their behalf. It also grants custody rights to the mother or female relatives because they are considered to be naturally more compassionate towards wards than men.²⁰⁷

It is well known that the humanbeing passes through different stages in his/her life, starting with the embryonic stage in his/her mother's womb until he/she becomes capable of managing his/her own affairs and is qualified to fulfil his/her legal duties and

²⁰⁷ See Al-Zuhaylī, *al-'Usra Al-Muslima Fi al-Ālam al-Muʿaṣir*, p.161.

responsibilities. This status is called legal capacity (*ahliyyat al-‘adā’*, lit. ‘capacity to exercise’) and one who has not reached this stage is described as a ward (*qāṣir*). Minors are in constant need of someone to take care of them and their interests as they are considered to have an incomplete legal capacity (*nāqis al-ahliyya*).²⁰⁸ For this reason, divine law agreed upon the principle of appointing someone to take care of wards in order to ensure the achievement of their needs.²⁰⁹ Therefore, guardianship in Islamic jurisprudence (*wilāya*) starts as soon as children are born and there is no *wilāya* over them for anyone before their birth.²¹⁰ Therefore, the principle of *wilāya* is based on an essential foundation of representing the other in order to achieve their interests. Regarding this, al-Zarqa said, ‘*wilāya*, in its real meaning, is a form of representation which generally means for someone to represent someone else in managing his/her affairs’.²¹¹

Accordingly, the guardian (*walī*) is regarded as the legitimate representative of the ward who shall take his place in all matters where representation is accepted such as performing contracts. Moreover, this act of representation can be optional, like in the case where someone authorises another person to represent him in performing certain contracts or following up some of his affairs and it can be compulsory when commissioned by the law or the judicial authority in order to act in the interest of the ward.

Therefore, *wilāya* is where a mentally mature major manages the personal and financial affairs of a ward (*qāṣir*). The reason for the existence of the authority of *wilāya* is the absence of capacity (*ahliyya*), either fully or partially, so it is necessary to clarify the meaning of *ahliyya* and some of its rulings; this will be briefly explained in sub-section 4.8.1.

²⁰⁸ The *qāṣir* is the one who does not attain legal maturity. See Ibrahim and others, Mustapha, , *Majmac al-Lughā al-‘Arabiya, al-Mu‘jam al-Wajīz, 2nd edn (Istanbul: al-Maktabah al-Islamiyyah, 1972)*, p.504.

²⁰⁹ See Mustafa, al-Zarqa, *al-Madkhal al-Fiqhī al-‘Ām* , 2nd edn (Damascus, Syria : Dar al-Qalam, 2004), II, p.843.

²¹⁰ See *MFK*, 1st edn (2006), XLV, p. 156.

²¹¹ Al-Zarqa, *al-Madkhal al-Fiqhī*, II, p. 844.

4.3 Definitions

4.3.1 Guardianship (*wilāya*) in Literal Terms

Wilāya in Arabic literally means: to support, to be close and to take charge of a matter.²¹² Thus, these combined meanings were taken into account when scholars of Islamic jurisprudence defined *wilāya* technically. The word *wilāya* also gives the sense of measure, capacity and the ability to act. Therefore, whoever who does not acquire these qualities does not fulfil the requirements of *wilāya*. Accordingly, the guardian of an orphan is the one who is in charge of his affairs and care and the *walī* of a woman is the one who is in charge of her marriage contract.²¹³

Guardianship (*wilāya*) in Technical Terms

As a legal term *wilāya* means representation, the power of individual to personally initiate an action. It is the power of a *walī* to represent his ward.²¹⁴

Al-Jurjānī (d. 861 AH / 1456 AD) provides in his book '*al-Ta^crīfāt*' a definition of *wilāya* that is hardly missed by any other book addressing the issue. He says, 'It is to apply the judgment on others; with or without their approval'.²¹⁵ This is a general definition that includes all general types of *wilāya* (like governance and the judiciary) as well as specific types of *wilāya* (like *wilāya^c ala al-nafs*, which is over a person, and *wilāya^c ala al-māl*, which is over property). He has defined it with its requirements and provisions that in this sense include all kinds of guardianship in Islamic Jurisprudence. Therefore, al-Zarqa criticised the definition al-Jurjānī gave to *wilāya*, saying: 'This definition is incorrect because it defines *wilāya* according to its ruling not its real meaning'.²¹⁶ Al-Zarqa thereafter

²¹² See al-Ḥusayn b. Muḥammad al-Rāghib, al-aṣḥāhānī, *Mufradāt Alfāz al-Qur'ān*, 2nd edn (Damascus: Dar al-Qalam, 1997), p. 885; Kuwait, *al-Mawsū^ca al-Fiqhiyya*, Kuwait, XLV, p. 135.

²¹³ See Niḍāl, Abu Snīnah, *al-Wilāya Fī al-Nikāh Fī al-Sharī^cah al-Islamiyah*, 1st edn (Amman, Jordan: Dar al-Thaqafah, 2011), p.32.

²¹⁴ See Mawil Y. Izzī Dien, 'wilāya', *EF²*.

²¹⁵ Ali b. Muḥammad, al-Jurjānī, *al-Ta^crīfāt*, ed. by Muḥammad Siddiq al-Minshawī (Cairo, Egypt : Dar al-Fadhilah, '[n.d.]'), p. 213; And also see *KMF*, XLV, p. 135 ; Qāsim, al-Qunuwī, '*Anīs al-Fuqahā*', 1st edn (al-Dammam, Saudi Arabia: Dar Ibn Aljawzi, 2006), p.144.

²¹⁶ Al-Zarqa, *al-Madkhal al-Fiqhī*, II, pp.844-45.

defined *wilāya*, as: ‘it is for a mentally mature major to manage the personal and financial affairs of a ward’.²¹⁷

However, it seems this definition is more appropriate, because guardianship is about care, protection and managing the minor’s affairs by an adult not just an emphasis on the authority of the guardians, as it is in Jurjāni’s definition. Therefore, Shalabī defines *wilāya* as an authority that proves for the one who is capable of it the ability to initiate contracts/actions and to implement them.²¹⁸

Thus, guardianship is about taking care of the rights and interests of the ward. These definitions serve one meaning, which is that *wilāya* is a form of authority given by the legislation or judicial authority for a qualified person who is able to fulfil the need of a relative ward who is unable to be in charge of his personal affairs (like conduct, transactions and contracts) with the condition that the person who takes the position of guardian must always take into account the benefit of the ward.

This will become yet clearer as we continue the analysis of the concept of *wilāya* in Islamic jurisprudence.

4.4 Guardianship (*wilāya*) in Marriage contract and Its Divine Purposes (al-Maqāṣid al-Shar‘iyyah)

It is widely believed among Muslim jurists that rulings in Islamic legislation were introduced in order to achieve the interests of people, so when the Lawgiver (i.e. Allah) prescribes a ruling, then He intends for that ruling to be a law that organises human beings conduct as well as his every speech and action towards himself or others. The Legislator prescribed marriage to preserve the human race by a bond that intends to safeguard the individual's psychological and social interests.

²¹⁷ Al-Zarqa, *al-Madkhal al-Fiqhī*, II, p. 843.

²¹⁸ Muḥammad Muṣṭafa, Shalabī, *Aḥkām al-Uṣra Fi al-Islām*, 4th edn (Bierut, Lebanon: Al-Dar al-Jamieyyah, 1983), p. 271.

The purpose of appointing a guardian in the marriage contract is to achieve the interest of the ward by approving that which achieves the purposes of the marriage; the essential foundation of the concept of guardianship in Islamic jurisprudence, as previously discussed. Repelling harm, encouraging that which bring benefit and doing that which is best must be a priority for the *walī* without necessarily being a condition imposed by the law. However, what if the guardian fell short in fulfilling that responsibility; in this case, the judiciary interferes in order to protect the interests of the individual as well as the public right. In this light, it is important to note that according to ʿIzz al-Dīn b. ʿAbd al-Salām (d. 660 AH / 1262 AD), uprightness (*ʿadālah*) is a condition in any form of *wilāya* for it to prevent any deficiency in seeking interests and preventing harm.²¹⁹

The guardian is usually the father, his father (the grandfather) or a paternal male relative if both of them are missing. Therefore, the bond of lineage and fatherhood must be the deterrent that motivates the *walī* to properly take care of the ward and for him to be upright (*ʿadl*), so he should fulfil the duty of guardianship as prescribed by the lawgiver when he seeks to achieve the interest of the ward.

The bases for the condition of guardianship in the marriage contract are three:

- 1- The woman is believed to be modest and unable to cope in a domain dominated by men if she takes charge of her own marriage contract.
- 2- The presence of a guardian in the marriage contract maintains the status of the women and highlights her honour and status in her family in the community.
- 3- The concept of guardianship is based on the principle of solidarity in social responsibility in regard to this important contract which makes the unlawful (sexual intercourse) lawful.²²⁰

²¹⁹ See ʿIz al-dīn b. ʿAbd al-Salām, *Qawāʿid al-Aḥkām*, 2nd edn (Beirut, Lebanon: Al-Ryan, 1990), p. 252.

²²⁰ See Al-Šādiq ʿAbd al-Raḥmān, al-Ghiryānī, *Mudawwanat al-Fiqh al-Māliki*, 1st edn (Beirut, Lebanon: Al-Rayan, 2002), II, pp. 556-57. Also See Ibn Rushd, Abū al-Wālīd Muḥammad b. Aḥmad (al-jadd), *al-Muqaddimāt* (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, [n.d.]), V, p. 259.

As for Ibn ʿĀshūr, the lawgiver made the marriage contract different to all other sexual relations known to the Arabs in the pre-Islamic era. The legislating of marriage in Islamic law was based on distinguishing between marriage and any other relations that might cause doubt to the lineage. Removing doubts about lineage, according to Ibn ʿĀshūr, can be achieved by three things; however, we will only mention the one which is related to the issue of *wilāya* in the marriage contract.²²¹ He claims that a *walī* should take charge of a woman's marriage contract to make it clear that she did not choose the man alone without the knowledge of her family, because that is the first difference between marriage from one side and unlawful, secret affairs on the other side. When a *walī* takes charge of the woman's marriage contract, he then becomes a guard of her interests and against sexual immorality and it is for his clan and family to help in defending this honour.²²²

With such justifications of the purposes of the legislation, jurists interpreted the reason for requiring the condition of *wilāya* in the marriage contract. Now we shall explore the link between *wilāya* and marriage. However, before that, we should clarify some important rules related to guardianship issue, such as: the ruling and effect of guardianship, the guardian (*walī*) and the legal capacity (*ahliyya*).

4.5 The Ruling and Effect of Guardianship (*wilāya*)

Generally speaking, the reason for the legitimacy of guardianship (*wilāya*) over others is to protect the interests of the wards and guard their personal and financial rights due to their inability and weakness, so that their property does not get damaged or looted and their rights are maintained.²²³ All the actions taken by the guardian under the right of guardianship are approved as long as the duty of *wilāya* fulfils all of its legal requirements. With regards to this point, jurists have different views on the issue of whether or not the ward has the right (*khiyār al-bulūgh*) to oppose the action of the *walī* after he/she attains full legal capacity.

²²¹ The other two are: Marriage contracts must include a dower (*mahr*), and public declaration (*ishhār*).

²²² Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p.254.

²²³ See al-Zuhaylī, *al-ʿUsra Al-Muslima Fi al-ʿĀlam al-Muʿaṣir*, p.162.

Generally speaking, jurists hold different views regarding who has the right to act as *walī* to contract the marriage of a ward. Mālik grants this right exclusively to the father, or to his executor (*waṣī*), whilst Abū Ḥanīfah permitted this to all guardians, but he granted the ward the right of option (*khiyār*) after attaining puberty, while Mālik did not give the ward this right if the guardian who concluded marriage contract was the father. Moreover, some jurists also have disagreements over distinctions between the minor boy and the minor girl. However, it can be argued that, the male possesses the right to divorce when attaining puberty, while the female does not. For this reason Abū Ḥanīfah has granted both the option upon attaining puberty.²²⁴

4.6 The Guardian (*walī*)

The *walī* in Islamic jurisprudence is normally a kinsman and there are specific circumstances which mean he is allowed to exercise the duties of *wilāya* over others. These circumstances create a relationship between the *walī* and the ward and give him the ability to take care of his/her interests, and can be called a legal bond between the *walī* and the ward. They include the following:

- 1- Family relationship: the lineage relation as a result of birth; it includes the father, son, brothers and uncles, and so on.
- 2- Judicial authority: the jurists call it the authority of the state (*imāmat al-sulṭān*) as mentioned in the *ḥadīth*: ‘The *sulṭān* (ruler) is the guardian (*walī*) of that who does not have a guardian (*walī*)’.²²⁵ Judicial authority is a description of the relationship between the state authority and the Muslims in a Muslim state as the state is the protector of peoples’ interests, guarding them and their rights, but it has no authority in this respect unless no parental relatives from the male consanguinity (*‘aṣabah*) exist, as mentioned in the *ḥadīth* above.

²²⁴ This is a point of discussion with jurists that can be checked in books of jurisprudence for more details. See Ibn Rushd, *Bidāyat al-Mujtahid*, II, pp.7-8.

²²⁵ Sulaymān b. al-Ash‘ath, Abū Dāwūd, *Sunan Abū Dāwūd, Mawsū‘ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999), *ḥadīth* number: (2083).

- 3- Testamentary will (*waṣiyya*): where a relative of the ward (such as the father) entrusts someone else with the wisdom and ability to take care of his family after his death so that ‘custodian’ or ‘executor’ manages their financial affairs or gets them married, but only after the death of the relative.²²⁶
- 4- Religion: because the Islamic religion links its followers by the bond of religious brotherhood as the Qur’an says “The believers are but brothers” (Q., 49:10) and “The believing men and believing women are allies of one another” (Q., 9:71).²²⁷

Through these circumstances, the *walī* must be someone who meets the meaning of the diligence and ability. That is why legally *wilāya* is the right for the nearest relative to the ward, such as the father or the son of the mentally insane, as relatives and family members are the nearest people to their ward and the ones who are given priority in guarding his personal and financial affairs. Therefore, the father who is the head of the family is usually the most eager relative in respect of the future of his children, followed by the paternal grandfather (*al-jadd al-‘āṣbī*), so the legislation gives them priority in managing the affairs of the wards in that order. *Wilāya* as described by al-Zarqa is ‘Firmly related to the family system and its interests; its main foundation is for the *walī* to have the ability and the eagerness to take care of the ward and guard his rights’.²²⁸

Thus, *wilāya* is a responsibility and a trust and requires the necessary experience to act in a way that achieves the interest of a ward. It requires the fulfilment of certain conditions in order to achieve its objectives. Therefore, by the authority of the lawgiver the *walī* acquires the rights to be a guardian of the interests of the ward; these rights are approved in order to

²²⁶ Jurists differed in approving the *wilāya* in the marriage contracts depending on the testamentary well (*waṣiyya*).

²²⁷ Jurists have different views in regard to approving the religious brotherhood to be a reason that allows *wilāya* over the affairs of wards; for more see Moḥammad Ri‘fat, ‘Uthmān, *‘Aqd al-zawāj, Arkānuh wa Shurūt Ṣiḥḥathī* ([n.p.]: [n.d.]), p 175-76); Abū Snīna, *al-Wilāya Fi al-Nikāh*, p.77; Also See Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World*, 2nd edn (Kashmiri Bazar, Lahore, Pakistan: S H. Muhammad Ashraf, 1973), p.406.

²²⁸ Al-Zarqa, *al-Madkhal al-Fiqhī*, II, pp.854-46. *Al-Jadd al-‘aṣbī* (grandfather, the father of the father) is also called *al-Jadd al-Ṣaḥīḥ* in the Islamic inheritance law.

achieve both his rights and the ward's rights. We will give an example of those rights in the issue of *wilāya* over others in marriage.²²⁹

4.6.1 The Rights and Duties of the Guardian (*walī*)

4.6.1.1 The Rights of the *walī*:

Here we will give two examples of the rights of the guardian that are related to marriage. It should be pointed out that *wilāya* in this context relates only to a female ward.

- 1- Achieving the interest of the ward, like choosing a suitable husband for the girl; known by jurists as the concept of *Kafā'a* in marriage. They justified that with the argument that a suitable (*kuf'*) husband is important for a healthy marriage and therefore important to achieve the purpose of the marriage. Jurists claim that finding a suitable husband cannot be done without the involvement of a *walī* as he has more knowledge of men and is more able to choose a suitable husband. Hence, he has the right to choose the right husband for the sake of the interest of the ward.
- 2- Achieving the interest of the *walī* himself by granting him the right to indulge in intermarriage relationships with a socially equal man from a noble family in the community because, from a social point of view, marriage is not limited to the bond between the spouses, but it also creates relationships between the families through intermarriage. Therefore, the jurists give the guardian the right to choose a suitable husband from a noble family for the sake of safeguarding the interests of the family in the form of the intermarriage relationships.²³⁰

Jurists then differed in their consideration of these rights; some gave the *walī* a full right to choose and obligated that the wards act according to his opinion in order to fulfil their mutual interests, because of his apparent compassion and care. They limited this to two persons only: the father and the paternal grandfather, which is the opinion of the majority. However, other jurists gave the *walī* the right of *wilāya* over minors only, allowing them to

²²⁹ See al-Zuhaylī, *al-'Usra Al-Muslima Fi al-'Ālam al-Mu'asir*, p.165.

²³⁰ See al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, VII, p.182.

choose after they attain maturity. This group of jurists did not give the *walī* the right of *wilāya* over the one who is adult and of sound mind (*al-bāligh al-‘aqil*), which is the opinion of Ḥanafīs.

4.6.1.2 The Duties of the (*walī*)

The duties of the *walī* can be extracted from his rights. He is legally obliged to seek the interests of the ward; to not harm him/her and to not misuse the rights granted to him by the legislation. Therefore, if the *walī* does not fulfil his duty then the state, which is represented by the judiciary, has the right to intervene to prevent any harm being inflicted on the ward. An example for that is the issue of prevention (*‘aḍl*), when a *walī* prevents the woman under his *wilāya* from marrying a suitable husband, whom she wants to marry, for no legal or accepted excuse, or when a *walī* prevents the divorcee from going back to her husband. We can see this illustrated in the Qur’anic verse which states: ‘Do not prevent them from marrying their former husbands, if they mutually agree on reasonable basis’ (Q., 2:232) and also in the verse (Q., 4:19) and other cases mentioned in Islamic jurisprudence. For this reason, some jurists like the Shafi’is put conditions for the *walī* to be able to marry off the woman under his *wilāya*; one of which is for him not to have hostility with her, and another is that the guardian must make sure there is no hostility between the woman and the prospective husband, so he does not harm her.²³¹

We can conclude from all of this that *wilāya* has three requirements:

- 1- The presence of compassion and care,
- 2- Consideration of the interests of the ward, and
- 3- Seeking the suitability (*kafā’a*) of the prospective couple.

²³¹ See ‘Abd al-Karīm Zaidān, *al-Mufaṣṣal fī Ahkām al-Mar’ah wa al-Bayt al-Muslim*, 1st edn (Beirut, Lebanon: Al-Risalah Publishers, 1993), VI, pp. 352-53, (p.361); Abū Bakr b. Mas‘ūd, al-Kāsānī, *Badā’i‘ al-Ṣanā‘*, ed. by ‘Ali Muḥammad Ma‘wwaḍ and ‘Ādil Aḥmad ‘Abd al-Mawjūd, 2nd edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 2003), III, p. 345; Muḥammad b. al-Khaṭīb, al-Sharbīnī, *Mughnī al-Muḥtāj*, 1st edn (Beirut, Lebanon: Dar al-Marifah, 1997), III, p. 201.

Thus, if the *walī* is disobedient (*fāsiq*) in a way that brings harm to the ward or if his harm and not seeking the interest of the ward is proven, then the right of *wilāya* will be transferred from him to the authority of the judiciary.²³²

4.7 Divisions and Types of Guardianship (*wilāya*)

Wilāya in Islamic jurisprudence is generally divided into two types:

- 1- Restricted guardianship (*wilāya qāṣira*): the authority of the person over himself (like getting himself married) and over his property or over one of them. It is also called personal guardianship (*wilāya dhātiyya*) and is described as restricted (*qāṣira*) because it cannot be extended over others.
- 2- Unrestricted guardianship (*wilāya muta^caddiya*): the authority imposed by the legislation or judiciary under which a person's statements and actions over others are approved, with or without their approval. Some examples for this are when a father marries off his daughter or when he uses his son's property. It is also called complete guardianship (*wilāya tāmma*) because it can be extended over others.²³³

Unrestricted guardianship (*wilāya muta^caddiya*) is divided into two categories:

- 1- General and unrestricted (*muta^caddiya ^cāmma*): the authority is for a general reason like the *wilāya* of the judge. In other words, it is the *wilāya* of the general authority and any authorities ensued from it.
- 2- Specific and unrestricted (*muta^caddiyya khāṣṣa*): the authority in respect to the individuals which is not caused by a general reason, like in the former case. This type takes effect on individuals and property, and so it can be also divided into:
 - a- Specific and unrestricted over the person (*muta^caddiya khāṣṣa ^calā al-nafs*): it gives the *walī* the ability to carry out actions that are related to wards, for example marrying them off.

²³² See al-Zuhaylī, *al-'Usra Al-Muslima fī al-'Ālam al-Mu^caṣīr*, p. 165.

²³³ See Zaydān, *al-Mufaṣṣal fī Ahkām al-Mar'ah*, VI, pp. 339-40.

- b- Specific and unrestricted over the property (*muta^caddiya khāṣṣa ^calā al-māl*): it gives the *walī* the ability to initiate contracts and transactions that are related to the ward.²³⁴

Therefore, *wilāya* includes an authority of two parts:

- a- *Wilāya* over the person (*^calā al-nafs*): an authority over the affairs of the ward which is related to personal affairs, such as getting married, educated, medically treated and working.
- b- *Wilāya* over the person's property (*^calā al-māl*): authority over the financial affairs of the ward like contracts, transactions, savings and spending.²³⁵

The type that concerns us here is the guardianship over the person, specifically guardianship in marriage (*wilāya al-tazwīj*) which is the authority to marry.²³⁶ They mean: the person's capacity to initiate a marriage contract for him/her-self or others; this will be discussed in the next sections.

4.8 The Reason for Guardianship (*wilāya*) Over Others in General, and Specifically in Concluding the Marriage contract

Generally in Islamic jurisprudence, a person's conduct is judged to be valid or void, depending on whether the person who carries them out is legally qualified to do so. If he is not, then they are considered void as one of the conditions for the soundness of contracts are for the person to possess full legal capacity. Accordingly, there is no *wilāya* over anyone unless the person is of either no or partial legal capacity (*ahliyya*).

²³⁴ See Wāṣil, Naṣr Farīd, *al-Wilāyāt al-Khāṣṣah*, 1st edn (Cairo, Egypt: Dar al-Shuruq, 2002), pp.9-12; *KMF*, XLV, p.159; ^cUthmān, *^cAqd al-Zawāj*, pp.174-75; Abū Snīna, *al-Wilāya Fī al-Nikāh*, pp.39-40.

²³⁵ See Al-Zarqa, *al-Madkhal al-Fiqhī*, II, pp. 845-46; *Kuwait, al-Mawsū'ah al-Fiqhiyyah*, XLV, p.159; Wāṣil, *al-Wilāyāt Al-Khāṣṣah*, pp.9-12.

²³⁶ See Zaydān, *al-Mufaṣṣal Fī Ahkām al-Mar'ah*, VI, pp.340-341.

4.8.1 Definition of (*ahliyya*)

4.8.1.1 In literal Terms

Ahliyya is absolute fitness or ability.²³⁷ It is a processed verbal noun from the word ‘*ahl*’ which literally means suitability and competence to carry out an action.²³⁸

4.8.1.2 As a Technical Term

As for Al-Jurjāni, *ahliyya* is the eligibility of a person to establish rights for him and obligations upon himself.²³⁹ According to Nyazee, it is the ability or fitness to acquire rights and exercise them and to accept duties and perform them. It is the Legal Capacity.²⁴⁰ As for El-Alami, *ahliyya* it is the fitness of a person to enter into obligation, that is, to bind and be bound.²⁴¹ Al-Zarqa tried to give a comprehensive definition to *ahliyya*, and he defined it as ‘a quality that the Lawgiver estimates in the person which makes him eligible to receive the legal addresses’.²⁴²

Ahliyya is the criterion of obligation (*taklīf*) and the existence of that character in a person makes him eligible to be legally addressed by the lawgiver. As long as *ahliyya* is a characteristic of the human personality, it makes him eligible to earn rights and perform duties when they exist.²⁴³ Al-Ashqar favoured the definition given by al-Jubūrī who reviewed the definitions of *ahliyya* given by most of jurists then said:

Although definitions of *ahliyya* differed in words, they are all consistent in its significance which means: the eligibility of a person for his rights and duties after

²³⁷ See Nyazee, *Islamic Jurisprudence*, p. 110.

²³⁸ *KMF*, 2nd edn, (1986), VII, p. 151.

²³⁹ See al-Jurjānī, *al-Taʿrīfāt*, p. 36.

²⁴⁰ See Nyazee, *Islamic Jurisprudence*, p110.

²⁴¹ See El-Alami, Dawoud S, ‘Legal Capacity with Specific Reference to the Marriage contracts’, *Arab Law Quarterly*, v.6, No. 2 (1991), p.191.

²⁴² Al-Zarqa, *al-Madkhal al-Fiqhī*, II, p. 783.

²⁴³ See *Ibid*, II, pp. 782-83.

fulfilling the required conditions in the competent person (*mukallaf*) for the validity to establish rights for and obligations upon himself.²⁴⁴

Ahliyya is a quality gained by the person through the stages of his physical and intellectual growth, starting with the fetal stage in his mother's womb until he reaches the stage of maturity. It is a gradual integration through which he moves from one stage to another; he gains rights first then becomes incompetent to bear them, then he becomes eligible for his actions then he becomes accountable for his actions and obligations. The criterion of *ahliyya* is for the person to be physically free of any objections that might make him incompetent to take care of his own affairs or implement the rulings of the legal address, and for him to be free of any mental illness that might prevent him from acting with sanity. Moreover, *ahliyya* is something that accompanies the person and grows with him so it has the nature of growing, expanding and becoming complete like all other talents.²⁴⁵

Generally, there are two Types of (*ahliyya*)

- a- The eligibility for duty (*ahliyyat al-wujūb*), to receive rights and obligations.
- b- The executive capacity (*ahliyyat al-adā'*), the active exercise of rights and obligations.

Scholars of principles of jurisprudence (*uṣūl al-fiqh*) say: these two types of *ahliyya* are due to every human being.

- a- The eligibility for duty (*ahliyyat al-wujūb*): the eligibility of a person to acquire rights and obligations. It is the eligibility for the person to be obliged and for him to commit. *Ahliyya al-wujūb* is a legal description given to the human being because of the advantage he was granted over all other creatures which is called (*dhimma*) human status that makes him eligible for rights and duties.²⁴⁶ This type of *ahliyya* is approved to the human being as long as he is alive, male or female, young or old,

²⁴⁴ See Al-Ashqar, *al-Wāḍiḥ*, p.59.

²⁴⁵ See Al-Zarqa, *al-Madkhal al-Fiqhī*, II, p.783.

²⁴⁶ *Dhimma*: Liability. The equivalent of legal personality in ositive law. The receptacle for the capacity of acquisition.

foetus or infant with more details given by the scholars of *Usūl* and jurists. In law, it is called the legal personality.²⁴⁷

- b- The executive capacity (*ahliyyat al-adā'*): for the human himself to be legally competent. The criterion of this type of *ahliyya* is intellect and distinction, clarity and rationality (*tamyīz*), as well as the attainment of the age of reason, and is not restricted to the human who is alive. Accordingly, it becomes complete if his intellect is complete (at the age of maturity) and incomplete if his intellect is incomplete. In other words, if he is fully rational he has the executive capacity in full, but if he is a ward or not of sound mind it does not apply. *Ahliyyat al-adā'* means for the human being's speech, action and conduct to be approved legally, so if he performs a contract then the contract is legally approved and results in legal effects. If he/she causes harm or commits a crime then he/she will be accounted for with regard to it. In other words, this type of *ahliyya* means 'responsibility' and its criterion is intellect and distinction, clarity and rationality (*tamyīz*) as mentioned above.²⁴⁸

Therefore, the person who is an adult of sound mind (*al-bāligh al-^caqil*) has the legal capacity to exercise rights and obligations (*ahliyyat al-adā'*). Some jurists added the condition of *rushd* (discrimination, maturity of actions) and others made it a condition for financial transactions only. It appears that when a person reaches a particular stage of growth he/she becomes eligible to acquire the description of legal capacity in exercising rights and obligations (*ahliyyat al-adā'*) in addition to the legal capacity of exercising rights and obligations which is legally approved for every living person. Therefore jurists believe that the types of complete *ahliyya* are approved to the adult with sound mind; *ahliyya al-*

²⁴⁷ El-Alami, *Legal Capacity*, p. 191.

²⁴⁸ See Nyazee, *Islamic Jurisprudence*, pp.118-19; El-Alami, *Legal Capacity with Reference to Marriage contracts*, p.191). For more details see Mūḥammad, al-Khuḍarī, '*Uṣūl al-Fiqh* (Cairo, Egypt: Al-Maktabah al-Tijariyyah al-Kubra, [n.d.]), pp. 90-91; ^cAbd al-Wahhāb, Khallāf, '*Ilm 'Uṣūl al-Fiqh*, 12th edn (Cairo, Egypt: Dar al-Qalam, 1978), p136; ^cAbd al-Karīm, Zaydān, *al-Madkhal Li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 6th edn (Beirut: Lebanon, 2003), pp. 261-62.

wujūb and *ahliyyat al-adā'* so he/she becomes eligible to fulfil legal duties and to be accountable for his/her conduct.²⁴⁹

However, a woman is said to obtain incomplete legal capacity. Those who hold this view deny her the right to practice certain duties, such as; to be a judge (*qāḍī*), to be the head of state, and the right to testify in cases being tried under legal punishments (*ḥudūd* and *qīṣās*). Nyazee claims that this led certain Orientalists to believe that the 'woman is half a man' and he tried to give an explanation of some important issues concerning them -Orientalists-.²⁵⁰ What concerns us with this issue is why the majority of jurists (except Abū Ḥanīfa) prevent women from concluding a marriage contract for herself. Is it because she possesses incomplete legal capacity? According to Kecia Ali, legal capacity for males is a simple matter: before maturity they are subject to their guardians, after it they are not. Any major male who is of sound mind has the right to control his marital affairs. In terms of a woman's capacity to contract a marriage, jurists have a disagreement over the issue of whether her consent is necessary in order for a valid marriage to be contracted for her. For this reason, Kecia Ali considers this subject to be complicated.²⁵¹

Jurists considered reaching the age of maturity to be a reason to gain full legal capacity to exercise rights and obligations, because a mature person usually has complete physical and mental capacity. The age of maturity, which is usually constituted by puberty, is called *bulūgh* which means 'attainment' in Arabic, because the person at this age reaches a complete physical and mental capacity and is not considered being a minor anymore, meaning that he/she has attained the capacity to endure legal obligations. The Qur'an says, "And when Joseph reached maturity (*balagh ashuddah*), we gave him wisdom and knowledge" (Q., 12:22) al-Qurṭubī (d. 671 AH / 1272 AD) explains the word (*balagh*

²⁴⁹ See 'Abd Allah b. Yusuf, al-Juday^c, *Taysīr 'Ilm 'Uṣūl al-Fiq*, 1st edn (Beirut, Lebanon: Al-Risalah Publishers, 1997), pp. 88-89.

²⁵⁰ See Nyazee, *Islamic Jurisprudence*, pp.120-23.

²⁵¹ See Ali, *Marriage and Slavery in Early Islam*, pp.31-32.

ashuddah) as reaching a complete capacity, and Mālik explains the phrase (*balagha ashuddahu*) as reaching puberty.²⁵²

Maturity (*bulūgh*) is the stage in the human's life in which he moves from childhood to being adult and as soon as he/she enters the stage of maturity he/she becomes able to fulfil his/her legal duties and responsibilities. According to al-Zarqa, jurists agreed that as soon as the person reaches maturity then he becomes included in the legal address issued by the Lawgiver (*khiṭāb al-shāriʿ*) and so becomes obliged to fulfil all duties issued by that address with their legal conditions.²⁵³

Jurists assessed maturity by physical signs, normally menarche for a girl and the first nocturnal emission for a boy, though other signs of physical maturation could be taken into account.²⁵⁴ In the case of the absence of these signs, *bulūgh* can also be presumed at the age of fifteen in both males and females according to the majority of jurists, whereas the Mālikis the age of eighteen for males and females is considered and Ḥanafis consider eighteen for males and seventeen for females. This indicates that it is a matter of *ijtihād* (personal reasoning) as there is no legal text to state which year a person should attain the age of maturity, even to indicate certain signs. However, Nyazee argues that attaining *bulūgh* alone is not sufficient for a person to acquire complete legal capacity of exercising rights and obligations (*ahliyyat al-ʿadāʾ*) and states that in addition to puberty, the possession of *rushd* (discrimination; maturity of actions) is stipulated as well.²⁵⁵

This is what most modern legislation takes into account; the maturity of action which is based on reaching a special age -in the UK it is 16- The Qur'an mentions: 'Make trial of orphans until they reach the age of marriage (maturity); then if you find sound judgment in them (*rushd*) (i.e. maturity of action), release their property to them...' (Q., 4:6). Nyazee argues that this verse lays down clearly that there are two conditions that must be fulfilled

²⁵² Muḥammad b. Aḥmad, al-Qurṭubī, *al-Jāmiʿ Li-Aḥkām al-Qurʿān* (Beirut, Lebanon : Dar al-Kutub al-Ilmiyah, 1993), IX, p.107.

²⁵³ See Al-Zarqa, *al-Madkhal al-Fiqhī*, II, p.815.

²⁵⁴ See Ali, *Marriage and Slavery in Early Islam*, p.32.

²⁵⁵ See Nyazee, *Islamic Jurisprudence*, p.113.

before the wealth of orphans can be handed over to them. These are: puberty (*bulūgh*) and maturity of action (*rushd*). However, some jurists specify this rule only for financial matters, while Shāfi'ī jurists define *rushd* as maturity of actions in matters of finance as well as *dīn* (religion). In their view, a person who has attained puberty and is adept in dealing with financial matters cannot be called *rāshid*, unless he obeys the rules of the law of Allah (*aḥkām al-sharī'ah*) in other matters like acts of worship (*Ibādāt*).²⁵⁶

So, the legal address (*khiṭāb al-shāri'ah*) is directed to the competent person (*mukallaf*) only and the person does not become suitable for legal responsibility unless he fulfils two conditions:

- 1- Maturity (*bulūgh*)
- 2- Intellect (*‘aql*)

Maturity of action may be added as well, as mentioned above, because we may need other signs to prove a person's maturity.²⁵⁷ The evidence for seeking other signs that is the saying of the Prophet, “The pen has been lifted from three: the insane until he regains his sanity, the sleeper until he wakes up, and the child until he reaches puberty”.²⁵⁸ The meaning of ‘the pen has been lifted’ is that the person is not accountable or legally responsible for his actions.²⁵⁹

Accordingly, as soon as the person attains the full legal capacity to exercise rights and obligations, the executive capacity (*ahliyyat al-‘adā’*) through which he can initiate contracts and conducts, he becomes eligible to gain rights and be obliged to duties because of him/her being an adult of sound mind. Accordingly, his/her acts of worships and civil actions, like contracts, will have no legal effect unless he/she has the intellect and perception to realise the consequences of his/her actions and therefore there is no legal capacity of

²⁵⁶ See Nyazee, *Islamic Jurisprudence*, p.113.

²⁵⁷ For more details see *Kuwait, al-Mawsū‘ah al-Fiqhiyyah*, 2nd edn (1986), VIII, pp. 186-205; Wāṣil, *al-Wilayāt al-Khāṣṣah*, pp.25-26; Zaydān, *al-Madkhal Li-Dirāsah al-Sharī'ah*, p.264.

²⁵⁸ Abū Dāwūd, *Sunan Abū Dāwūd*, ḥadīth number (4403).

²⁵⁹ See Kamali, *Principles of Islamic Jurisprudence*, p.451.

exercising rights and obligations before he/she becomes capable to understand the legal rulings and fulfil legal duties.²⁶⁰

To conclude, guardianship is a legal authority the purpose of which is to provide protection and safeguard the interests and rights of someone who has incomplete or no legal capacity (i.e. minor or insane). The person who has reached the age of maturity and discernment, in that he/she is an adult of sound mind, has full legal capacity, specifically, has full executive capacity. Therefore, the question here is; does the person with full legal capacity still need a guardian (*walī*) in order to manage his/her affairs and carry out certain action like marriage contract and so forth. This is what is known as personal authority (*wilāya dhātīyya*), which applies to a person who has full legal capacity, who has the capacity to act in their own right in all matters; whether personal or financial, including the right to conclude marriage contract. Ḥanafis gave this right to everyone who is adult of sound mind male or female, while the majority of jurists restrict personal authority (*wilāya dhātīyya*) with regard to women in general, specifically the virgin girl (*bikr*), and for those previously married (*thayyib*).²⁶¹

Therefore, what has restricted the freedom of women with regard to concluding a marriage contract? Is it the Sharḥah itself (i.e. Qur'an and *Sunna*), the jurists who are influenced by their time and communities, or it is a matter of capacity or incapacity with regard to women? If it is a clear rule from the Sharḥah, jurists would not have differed; however, it may be a problem of understanding the text whilst under the influence of customs and traditions found in their context which may reinforce notions regarding the capacity or incapacity of women.

Generally speaking, an essential element in the marriage contract is the authority of the individual to conclude the contract. According to El-Alami, this depends upon the individual legal capacity which is essentially the fitness of a person to enter into obligations. With regard to marriage, it is the status of the legal capacity of the individual that decides the form

²⁶⁰ See El-Alami, *Legal Capacity*, pp.191-92. Also see al-Zarqa, *al-Madkhal al-Fiqhī*, II, p.787.

²⁶¹ See Ali, *Marriage and Slavery in Early Islam*, p.32.

of guardianship which is appropriate.²⁶² Why did jurists stipulate guardianship (*wilāya*) in the marriage contract? Answering this question and an explanation of the link between guardianship and marriage contract will be the topic of the following section.

4.9 The Relation between Guardianship (*wilāya*) and the Marriage contract

The definitions of guardianship (*wilāya*) with regard of the marriage contract is defined by some modern jurists as ‘an authority granted to the parental relatives (*‘aṣba*) or those who represent them, which allows marrying off the one who is not suited to performing his/her own marriage contract’.²⁶³

Marriage in Islam is a contract and it requires contracting parties who perform the contract and issues contractual formula i.e. the offer (*ijāb*) and the acceptance (*qabūl*) as previously discussed in chapter three. Because amongst the purposes of the legislation are the preservation of property, lineage and honour, the jurists believed that not everyone is suitable to be a contracting party, from whom offer and acceptance are approved as there are four types of people in regard to the initiation of contracts:

- 1- Those whose statements are disapproved; so they do not initiate the contract and the contract has no legal effects, such as the insane (*majnūn*) and the idiot (*ma‘tūh*)
- 2- Those whose statements are approved in some contracts and conducts only, such as the ward (*ṣabi*) who can accept a gift (*hibah*) for example, but cannot conclude a financial transaction contract unless his/her guardian approved it, which is the next point.
- 3- Those whose statements are dependent or independent on the approval or consent of his/her guardian.

²⁶² See El-Alami, *The Marriage contracts in Islamic Law*, p.49.

²⁶³ See ‘Aawaḍ b. Rajā’, al-‘Aawfī, *al-Wilāya Fī al-Nikāh*, 1st edn (Madinah, Saudi Arabia: Islamic University Press, 2002), I, p.29.

- 4- Those whose statements are approved in all contracts and conducts without the need of the consent of any other party. This is for one who has attained complete capacity (adult of sound mind).²⁶⁴

According to Zaydān, this difference in regards to peoples' conducts and statements in their contracts are due to the extent of their legal capacity (*ahliyya*) and whether they have the right to full, partial or no legal capacity. The one who has no legal capacity and guardianship will have his/her statement disapproved and any who have partial legal capacity and guardianship (or at least one of them) will have his statement partially approved. The one who fulfils all requirements for *ahliyya* and *wilāya* will have his statement fully approved in all contracts and conducts.²⁶⁵

Therefore, no contract becomes effective unless two conditions are fulfilled in the contracting party:

- 1- To have full legal capacity to exercise; so the contract is initiated, the conduct is approved and the effects of the contract are implemented.
- 2- To possess the full guardianship (*wilāya*) which ensures the implications of his conduct and therefore effects are implemented.²⁶⁶

Jurists considered the legal capacity (*ahliyya*) and guardianship (*wilāya*) in judging the person's conduct and they also considered whether the contracting party –who is an essential foundation in the contract- possesses the means of legal capacity for his/her contract to be approved and effective. Therefore, *ahliyya* means for the person to be capable of acting correctly in a way that doesn't bring harm to him/herself or others and for his/her actions to be legally correct and accepted. *Wilāya dhātiyya* (personal Authority) requires for the person to be in possession of the legal authority over himself and his property, so effects result from his/her actions in case he uses that authority.

²⁶⁴ See Zaydān, *al-Madkhal Li-Dirāsāt al-Sharī'ah*, p.261.

²⁶⁵ See Ibid, p.261-62.

²⁶⁶ See Ibid, p.279.

Accordingly, the person with full legal capacity (*ahliyya*) has the full right to willingly initiate a marriage contract as stated by Islamic jurisprudence which respects the wish and choice of the person to marry whoever he likes and wants to be connected to by the bond of marriage. As we have learned from above that only the person with full legal capacity is the one whose conducts and contracts are approved without the need of approval from any other party as al-Juday^c stated that the adult of sound mind fulfils a full eligibility to acquire rights for and upon him (*ahliyyat al-wujūb*) and the eligibility to execute or discharge his/her right and duties in a manner recognised by law (*ahliyyat al-'adā'*) so he/she is eligible to fulfil all of his/her legal duties and to be responsible for all of his/her conducts.²⁶⁷

However, jurists found in the legal texts –Qur'an and *Sunna*- the requirement for the authority of a guardian (*walī*) in the marriage contract. Some of those texts are explicit and some are not, so they tried to extract the ruling of the condition of having a *walī* in the marriage contract from non-explicit texts, depending on the explicit texts in order to support the idea of guardianship which exists in culture, custom and tradition in Muslim society. Thus, guardianship (*wilāya*) in the marriage contract is a legal authority mostly caused by ties of kinship. It grants the person the right to marry off those under his *wilāya* (those with either no or partial *ahliyya*). There are certain conditions which may affect legal capacity (executive capacity); if a person is affected by one of them he/she will be subjected to a type of guardianship called 'compulsion guardianship' (*wilāyat al-'Ijbār*).²⁶⁸

Jurists stipulate that only the adult of sound mind (*al-bāligh al-āqil*) has the right to initiate a marriage contract for him/herself. Therefore the ward (*al-ṣaghīr*) or the insane (*al-majnūn*) does not acquire the legal capacity that allows him/her to take an action by him/herself, so the lawgiver appointed a *walī* to represent him/her; this *wilāya* is called *wilāya ʿala al-nafs* (over the person).²⁶⁹ Therefore, for a marriage contract to be fully effective and legally recognised, jurists place the condition that it must be performed by someone with full legal capacity or initiated by one of his/her representatives. This representation is acquired by

²⁶⁷ See Al-Juday^c, *Taysīr ʿIlm Usūl Al-Fiqh*, p.88-89.

²⁶⁸ See El-Alami, *Legal Capacity*, p.192.

²⁶⁹ See Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p.107.

legislation and the representative of the one concerned in initiating the marriage formula for him/her.

Compulsion guardianship (*wilāyat al-ijbār*) means that the *walī* is entitled to conclude the marriage contract for the ward without her/his consent, which is called compelling guardianship. Jurists approved this type of *wilāya* over wards and therefore granted the right to the guardian to marry them off, whether they are male or female. They disagreed on which guardian can be granted this right and other specific rulings related to this issue. The opinions of jurists in the issue of marrying off wards can be summarised as follows:

- No one has a right to marry off wards because they don't benefit from it and they do not understand the concept of marriage. This is the opinion of Ibn Shubruma and Abū Bakr al-Aṣamm.
- The guardian has right over ward females only excludes ward males. This is the opinion of al-Zāhiriyya.
- The guardianship is approved over all wards; males and females. This is the opinion of the majority of jurists; the Ḥanafis, Shafi'is, Mālikis and Hanbalis.²⁷⁰

This will be discussed in more detail later in sub-section 4.12.

4.10 The Legal Sources (*al-dalīl al-shar'ī*) Supporting Guardianship (*wilāya*) in the Marriage Contract

It is clear from the previous discussion that the Ḥanafīs stand on the opposite side of the majority (Mālikis, Shāfi'is and Ḥanbalis) with regard to the authority of the guardian in marriage contract and regarding the requirement of the guardianship for the validity of the contract. Why did the two groups disagree? Ibn Rushd suggested that the reason for their disagreement is based on the fact that no verse from the Qur'an or clear *ḥadīth* from the *Sunna* stipulates *wilāya* in marriage, let alone an explicit text (*naṣṣ ṣarīḥ*). All of the verses and *ḥadīths* which they usually use in their arguments are open to possible interpretations as

²⁷⁰ See Shawqī Ibrāhīm 'Allām, *al-Wilāya Fī 'Aqd al-Nīkah*, 1st edn (Alexandria, Egypt: Dar al-Wafa al-Qanuniyah, 2013), pp.114-20; Abū Snīnah, *al-Wilāya FI al-Nīkah*, pp. 232-233.

to whether to approve or disapprove of the conditioning of *wilāya* in the marriage contract. As for *ḥadīth*, in addition to the fact that they are open to interpretation, there is also disagreement in regard to their authenticity.²⁷¹

The methodology of argument used by both groups (Ḥanafis and *al-Jumhūr*) is open to all possibilities in their implication of legal texts. For example, it can be argued that if the woman is sane, mature and of good conduct, then it is acceptable for her to conclude her marriage contract on her own just as she has the right managing her property, as in the opinion of the Ḥanafis. The majority (*al-jumhūr*) claim that we do not need to prevent the woman from performing the marriage contract on her own while she is sane and major but, despite that, we consider the significance of the legal texts (*ḥadīth*) that request guardianship in the marriage contract such as “A woman may not give a woman in marriage, nor may she give herself in marriage”.²⁷² Also, the *ḥadīth*: “There is no marriage without a guardian”.²⁷³ Therefore, guardians should be allowed to practice their duty of protecting the woman, which is similar to the duty of *ḥisba* (guarding against infringements),²⁷⁴ and therefore they have the right to seek the annulment of the contract if they have objections to the woman’s conduct by taking the whole matter to the authority of the state (judiciary).

This is what is meant by saying the issue of guardianship in marriage is open to a number of possibilities. However, the group who prevent a woman from concluding a marriage contract by herself, also claim that it is the law which is in legal texts such as: “There is no marriage without a guardian”, which allow us to stipulate from it that guardianship is considered to be a condition of validity of marriage.²⁷⁵

According to Ibn Rushd, if the lawgiver (*al-shāriʿ*) intended to make the guardian (*walī*) a condition of marriage, then he would have specified the gender, types and levels of

²⁷¹ See Ibn Rushd, *Bidāyat al-Mujtahid*, II, p.9.

²⁷² Ibn Mājah, Muḥammad b. Yazīd al-Qazwīnī, *Sunan Ibn Mājah, Mawsūʿah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999), *ḥadīth* numbr (1882).

²⁷³ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number (2085); al- Tirmidhī, *Jāmiʿ al-Tirmidhī*, *ḥadīth* number (1101).

²⁷⁴ The supervision of moral behaviour. See CL. Cahen and M. Talbi, ‘ḥisba’, *EI²*.

²⁷⁵ See Ibn Rushd, *Bidāyat al-Mujtahid*, II, p. 11.

guardians in the same text, because delaying the clarification from the time of necessity is impermissible. Marriage is common in communities, so it is considered an issue of public affliction (*ʿumūm al-balwā*), so the legislation must come up with a clear and explicit rule to remove any uncertainty and confusion.²⁷⁶

Before we go on to clarify the position of jurists regarding the requirement of guardian in the marriage contract and his authority in concluding the marriage contract of his ward, and the legal texts which have been used as evidence, it is worth delineating the methodology which jurists adopt when dealing with legal texts, especially texts from the *Sunna* (*ḥadīths*). Schacht states that 150 A.H. (A.D.767) marked the beginning of the development of technical legal thought.²⁷⁷ Moreover, during this period legal activity was based only on the Qur'an and on what was thought to be the practice of the Prophet and his Companions (*ṣaḥābah*) and the following generation named the Successors (*tābiʿūn*). Accordingly, knowledge in this period was the knowledge of the Qur'an and the traditions and example of the Prophet, and its opposite was *ra'y*, considered opinion. One can claim that up to 100 years after the *hijrah*, legal issues were limited to those who had knowledge and who associated with the Prophet or with his Companions.²⁷⁸ In the second century of Islam, the term *Sunna* of the Prophet became a legal term for Iraqi scholars. They defined the term *Sunna* as the idealised practice of the local community and the doctrine of its scholars. However, by the time of al-Shāfiʿī took another definition; the words of the Prophet or his acts (*al-ḥadīth*).²⁷⁹ As for Hallaq, in the end of the first century, the term *Sunna* signifies the source of Muslim conduct.²⁸⁰

However, the time of the *Ṣaḥābah* came to the end between the years 90 and 100 A.H., and was followed by the time of the *Tābiʿūn*, whose scholars became responsible for *fiqh* and dealing with legal issues. Jurists came after the period of the *tābiʿūn* and took the *ḥadīth* of

²⁷⁶ Ibn Rushd, *Bidāyat al-Mujtahid*, II, pp. 11-12.

²⁷⁷ See Schacht, *An Introduction to Islamic Law*, p.40.

²⁷⁸ See Wael .B, Hallaq, *A History of Islamic legal Theories*, 2nd edn (Cambridge, England: Cambridge University Press, 1999), p.16.

²⁷⁹ See Schacht, *An Introduction to Islamic Law*, p33.

²⁸⁰ Hallaq, *A History of Islamic legal Theories*, p.16.

the Prophet, the legal verdicts of the *Ṣaḥābah* and the *Ṭabiʿūn* (*fatwa al-ṣaḥābah wa fatwa al-ṭabiʿūn*) and also the third generation, and produced their own reasoning (*ijtihād*).²⁸¹ Perhaps this may have become the time of the emergence of two schools of Islamic jurisprudence; the rationalists (*ahl al-raʿy*) and the traditionalists (*ahl al-ḥadīth*), and the appearance of differences between them concerning source methodology and legal issues.

Nevertheless, these two schools claim that they have a strong connection with the approaches of the preceding two generations, although in this time the differences (*al-ʾIkhtilāf*) in issues of *fiqh* became clear. Writers on Islamic legal history emphasise that the rationalists' school was an extension of the school of the Companion ʿAbd Allah b. Masʿūd (the companion who used *rāʾī* most extensively), al-Nakhaʿī (d. 96 AH / 714 AD) and Ḥammād (d.120 AH / 738 AD) who was the teacher of Abū Ḥanīfah.²⁸² According to al-Awani, the school of traditionalists (*ahl al-ḥadīth*) was based on the methodology of those *Ṣaḥābah* who were fearful of contradicting the texts (*nuṣūṣ*), which made them careful not to go any further than the texts themselves. This was the case with ʿAbd Allah b. ʿUmar b. al-Khaṭṭāb and ʿAbd Allah b. ʿAbbās.²⁸³ Thus, the school of *ahl al-ḥadīth* became widespread in the Ḥijāz (Makka and Madina) for many reasons, of which perhaps the most important were the great number of *ḥadīth* narrators, as well as this being the place of the emergence of Islam.²⁸⁴ The school of *ahl al-raʿy*, on the other hand, gained currency in Iraq. The scholars of this school believed that the legal interpretations of the *Shariʿah*'s texts should have a basis in reason, should take into account the best interests of people, and should be backed by discernible wisdom.²⁸⁵

Through their methodology the rationalists criticised the traditionalists for having little intelligence and less understanding (*fiqh*), while *ahl al-ḥadīth* claimed that the opinions of *ahl al-raʿy* were based on no more than conjecture, and that they had distanced themselves

²⁸¹ See Taha Jabir, al-Alwani, *Source of Methodology in Islamic Jurisprudence*, 3rd edn (Herndon, USA: The International Institute Of Islamic Thought, 2003), pp.23-24.

²⁸² See Schacht, *An Introduction to Islamic Law*, pp.32, 35; Hallaq, *An Introduction to Sunni Usul Al-fiqh*, p.18.

²⁸³ See Al-Alwani, *Source of Methodology of Islamic Jurisprudence*, p.24.

²⁸⁴ See Yasin, Dutton, *The Origins of Islamic Law*, 2nd edn (London, England: RoutledgeCurzon, 2002), p.14.

²⁸⁵ See Al-Alwani, *Source of Methodology of Islamic Jurisprudence*, pp.23-24.

from the necessary circumspection in those matters of religious significance which could be ascertained only through recourse to the source texts. However, *ahl al-ḥadīth* agreed with *ahl al-ra'y* on the necessity of having recourse to reason wherever a matter occurred for which there is no specific ruling in the source texts. Rationalists generally agreed that the one who has clearly understood the *Sunna*, may not reject it in favour of someone's opinion. Their reason in all those cases in which they were criticised for contradicting the *Sunna* can be outlined as follow:

- a) They did not know any *ḥadīth* with reference to the matter in dispute,
- b) -or that they did know a *ḥadīth* but did not consider it sound enough owing to some weakness in narrators or some other fault they found in it,
- c) -or that they knew of another *ḥadīth* which was considered sound and which contradicted the legal purpose of the *ḥadīth* accepted by others.²⁸⁶

Abu Ḥanīfah was the leading figure of the Iraqī school, whereas Mālik, and after him al-Shāfi'ī, led the Ḥijāzī school of legal thought.²⁸⁷ Abu Ḥanīfa is known for his reliance on *ra'y* and *qiyās* (personal opinion and analogy respectively), which is widely believed to be one of the features of theoretical Ḥanafī jurisprudence.²⁸⁸ However, among the traditionalists is Mālik b. Anas, who would rely on a solitary *ḥadīth* on conditions such as the soundness of its chain of transmission (*isnād*) and that it did not disagree with the practice of the Medinans (*amal ahl al-madīnah*).²⁸⁹

The difference in the methodology of both schools is typified by attitudes to one of the types of *ḥadīth* known as *aḥad ḥadīth* (a solitary *ḥadīth*, also known as *khābar al-wāḥid*) which is a *ḥadīth* which is reported by a single person or by odd individuals from the Prophet. This type of narration, in the view of traditionalists does not impart positive knowledge on its

²⁸⁶ See Al-Alwani, *Source of Methodology of Islamic Jurisprudence*, p.30.

²⁸⁷ See Moḥammad Hashim, Kamali, *Sharī'ah Law: An Introduction*, 1st edn (Oxford, England: Oneworld Publications, 2008), p.70.

²⁸⁸ Ibid, p.71.

²⁸⁹ Dutton, *The Origins of Islamic Law*, p.14.

own unless it is supported by circumstantial evidence, like two of the other types of narration; the *mutawātir* (continuous) and the *mashhūr* (well-known) *ḥadīths*.²⁹⁰

Generally speaking, traditionalists accept and rely on an *aḥad ḥadīth* with certain conditions. Rationalists (mainly the school of Abū Ḥanīfa) set additional conditions, one of which is that: the narrator's action must not contradict his narration, as we will see later how the Ḥanafis did not act on a *ḥadīth* of ʿĀ'ishah when she narrates that the Prophet said: "Any woman who marries without her guardian's permission, her marriage is void", which is one of the main *ḥadīths* about the issue of guardianship in marriage contract. The Ḥanafis argue that ʿĀ'ishah acted to the contrary when she contracted the nikāḥ of her niece, the daughter of her brother ʿAbd al-Raḥmān, while he was absent in Syria.²⁹¹ We will see later that Ḥanafis entitle an adult woman of age to conclude her own marriage contract, a ruling which is different from that of the majority of other schools. Their argument was because guardianship over the person must accordingly be restricted to the needs of the ward and there is no such need after the ward has attained the age of maturity. Moreover, Ḥanafis argue that since the Sharīʿah grants an adult woman full authority over her property, there is no reason why this should not be the case with regard to her marriage.²⁹²

As mentioned above, jurists disagreed whether or not guardianship in the marriage contract is a condition (*sharṭ*) for the validity of the marriage and whether it is a cornerstone (*rukṅ*) of the contract or not. The origin of this disagreement in this issue was that many evidence in the Qur'an and *Sunna* stipulated the presence of a *walī* in the marriage contract, so jurists understood those evidence differently and therefore built rulings depending on their their independent reasoning (*ijtihād*). Accordingly, the four main Sunnī schools of law were divided into two groups with regard to this issue; the majority group is represented by the Mālikis, Shafi'is and Hanbalis, and the Ḥanafis represent the other group. The majority

²⁹⁰ The *mutawātir* (continuous) *ḥadīth* means continuously recurrent, and also means a *ḥadīth* reported by an indefinite number of people from the Prophet. Generally speaking, the majority of scholars accept the authority of a *mutawātir ḥadīth*, and it imparts certainty of knowledge (*al-ʿilm al-yaqīnī*). The *mashhūr* (well-known) which is originally reported by one, two or more of the Companions from the Prophet, or from another Companion, however, it has later become well-known and transmitted by an indefinite number of people.

²⁹¹ See Kamali, *Principles of Islamic Jurisprudence*, pp.96-102.

²⁹² See Kamali, *Sharīʿah Law*, p.71.

consider *wilāya* as a condition for the validity of the marriage. Some of them said that it is a *rukn* and that the marriage is invalid without the presence of a *walī*. Therefore, the woman has no right to conclude marriage contract for herself or for others or to assign someone other than her *walī* to perform the marriage contract on her behalf. The opinion of the Ḥanafis is that *wilāya* is not a condition (*shart*) for the validity of the marriage of the adult woman of sound mind and not a *rukn* either. Therefore, the woman has the right to marry to conclude marriage contract for herself or for others or to assign someone other than her *walī* to perform the marriage contract on her behalf.²⁹³ Abū Ḥanīfa rejected any compulsion for majority females, both virgin and non-virgin.²⁹⁴

This is what distinguishes the Ḥanafī school when they granted women freedom regarding the marriage contract as well as in every contract.

4.11 Rational Evidence (*dalīl^c aqlī*)

The Ḥanafis argue that the marriage contract have purposes in respect of the woman which none of her guardians share with her. This requires that she takes charge of this contract which fulfils these purposes because of what becomes due to her as a result of the marriage contract, such as dowry, the right to housing (*sukna*) and financial maintenance (*nafaqa*) and other things she acquires as a result of the marriage contract. The legal starting point with regard to such a contract is that it should be performed by the person who acquires these benefits and purposes. The other can only object to her conduct in case he thinks that she has caused harm to herself, has neglected some of her rights or violated the right approved to him by legislation, by taking the matter to the judiciary.²⁹⁵

The main requirement in the matter of *wilāya* is maturity (*al-bulūgh*) and sanity (*al-^caql*) as a sane major person has full legal capacity over him/herself and his/her property. This *ahliyya* is approved for the woman as well as the man with no difference. Therefore, this

²⁹³ See Muwaffaq al-Dīn, Ibn Qudāmah, *al-Mughnī* (Beirut, Lebanon: Dar al-Kitab al-Arabi, 1972), VII, p327; Al-Kāsānī, *Badā^c al-Ṣanā^c*, III, pp 357-358.

²⁹⁴ See Ali, *Marriage and Slavery in Early Islam*, p.33.

²⁹⁵ See Ibn al-Humām, *Fath al-Qadīr*, III, p. 257.

approved *ahliyya* allows the woman all actions including performing the marriage contract like any other contract. The Ḥanafis then accepted that the guardians have the right for their permission to be required in regard to the marriage of the woman under their *wilāya*. They can also perform the marriage contract but only with her approval and consent. This is an implementation of what the *ḥadīths* regarding the issue of *wilāya* approved and of the practice of the Prophet when he wanted to marry off one of his daughters he would sit behind her veil and say, “so and so [the name of the man] is mentioning (i.e. propose to marry) so and so [the name of the daughter]” If she speaks and expresses her unwillingness he would not marry her off and if she remains silent he would.²⁹⁶

According to the Ḥanafis, attaining maturity removes incapacity and completes intellect. Therefore, the full legal capacity is approved for the mature woman and she becomes eligible for legal rulings and duties. They explained the permission they granted for the female adult of sound mind to perform the marriage contract on her own, or with her permission or authorisation as if she acted in something of her own right. Because she is allowed to exercise her right because of her maturity and sound mind, her actions cannot be restricted as long as that restriction is not from the lawgiver. No one has *wilāya* over her and exactly as she has the absolute right to act on her property in selling and purchasing she also has the right to choose her husband as well as accepting and rejecting the marriage.²⁹⁷ This is the case, whether or not the woman is a virgin. That is because the main reason for the *wilāya* in the first place is necessitated by the need to protect the ward because of his/her weakness and inability to take charge of his/her affair when he/she is young so the *wilāya* of the father over his daughter in respect of her property is removed from him and approved to her as soon as she attains maturity and complete intellect and her *wilāya* over herself is approved.²⁹⁸

²⁹⁶ Abū Bakr Aḥmad b. al-Ḥusayn, al-Bayhaqī, *al-Sunan al-Kubrā* (Beirut, Lebanon: Dar al-Marifah, 1992), *ḥadīth* number: (13710).

²⁹⁷ See Al-^cAynī, *Al-Bināyah Fī Sharḥ al-Hidayah*, IV, p.577.

²⁹⁸ See Al-Kāsānī, *Badā^c al-Ṣanā^c*, III, p.373.

They further considered the guardianship over such as woman who attains maturity and complete intellect as recommended (*mustahabb*), meaning that it is recommended for a woman to leave the issue of the marriage contract between her guardian and her husband because customs and traditions might cause her embarrassment because it requires her to attend the gathering of men when the contract is performed. Therefore, they restricted this to customs and traditions only which is why it is considered to be recommended but not a *rukṅ* (cornerstone) or a *sharṡ* (condition) for the validity of the marriage contract, supporting their opinion with the interpretations of verses and the significance of *ḥadīths* which granted the woman the right of being consulted for her permission of approval and that she should not be forced into the marriage contract without her consent.²⁹⁹

Jurists of other schools argued that, how Ḥanafis give the woman freedom to conclude her marriage contract just as she is free in concluding any financial transactions, while, they granted her guardian the right to ask for her marriage to be annulled if she married someone who is not suitable (*kufu'*)? They see this from Ḥanafis as a contradiction, because if someone has freedom to perform a contract for him/herself while someone else has a right to object and ask for the contract to be annulled can be evidence for the invalidity of the contract in the first place. Moreover, the majority claim that the marriage contract is a partnership (*mushārah*) contract not an exchange (*mu'āwadah*) contract, so it cannot be measured against the latter. However, it can be claimed that the Ḥanafis see it as a sale or exchange contract when they allow the formula of the contract (*ṡīgha*) to include expressions such as sale, gift and *milk* (ownership), which would appear to be a contradiction.³⁰⁰

For the majority of jurists, the marriage contract also has important legal effects which distinguish it from any other type of contract and it differs from the sale contract. Al-Qarāfi (d. 684 AH / 1285 AD) states that the marriage contract is much more important than

²⁹⁹ See Al-°Aynī, *Al-Bināyah fī Sharḥ al-Hidayah*, IV, p.474; Al-Kāsānī, *Badā° al-ṡanāi°*, III, pp.357-358.

³⁰⁰ See °Ali b. Aḥmad, al-Māwardī, *al-Ḥāwī al-Kabīr*, 1st edn (Beirut Lebanon: Dar al-Kutub al-Ilmiyah, 1994), IX, p.42.; Abū Bakr Muḥammad b. °Abd Allah, Ibn al-°Arabī, *°Arīḍat al-Aḥwadhī* (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, '[n.d.]'), III, pp.12-14; °Ali b. Aḥmad b. Sa°id, Ibn Ḥazm, *al-Muḥalla bi 'Āthār*, ed. by Abd al-Qhaffār al-Bandārī, (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, ('[n.d.]'), IX, p.34.

contracts regarding property, no matter how great the value of property. Financial contracts are based on measure and quantity (*mukāyasa*), whereas the marriage contract is based on virtue and quality, honour and kindness (*mukārama*).³⁰¹ In addition to that, there is a difference between the nature of the man and the nature of the woman which might cause her to give up some of her rights and also the harm which might befall the guardians as a result of indulging in intermarriage relations with a husband who is not suitable (*kuf*).³⁰²

The Ḥanafis response to the majority's argument was that they did not measure marriage against sale contracts; however, their main consideration is the validity of the action. Just as the sane major person with full legal capacity has the absolute freedom in all of his/her actions, the sale contract performed by a sane major woman is also valid, so her marriage contract is valid when she performs it on her own. The legal starting point is that everyone who has the right over his/her property also possesses the right over him/herself. The majority claim that the emotional nature of the woman might cause weakness to her which may lead her to marry someone who is not suitable (*kuf*) and that will bring shame to both herself and her guardian. However, we can say that the harm or shame is not caused by every woman who marries herself without her *walī* and the rule should not relate to women only. Moreover, the occurrence of the harm or shame the majority talk about is only a possibility and the mere occurrence of that possibility does not oblige it. Furthermore, if the *walī* experiences any of that he can always take the whole matter to the judiciary. The likelihood of a *walī* finding any kind of embarrassment in it is small. Therefore, as long as the possibility of the occurrence of harm or shame is small and admitting it after its occurrence is also small then that possibility is negated so the woman has the right to marry while she has full legal capacity. This is why the Ḥanafis said that she has the freedom of choosing her husband so she does only marries the one she accepts.³⁰³

³⁰¹ See Aḥmad b. Idrīs, al-Qarāfī, *al-Furūq*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1998), III, pp.247-48. Farq number (154).

³⁰² See Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p.255.

³⁰³ See Ibn al-Humām, *Fath al-Qadīr*, III, pp.258-259; Ibn ʿĀbdīn, *Radd al-Muhtār*, III, pp.55-56.

Ibn Qudāmah (d. 620 AH / 1223 AD) claimed that because the woman is not trusted on the matter associated with sexual intercourse (*buḍʿ*) because of the incompleteness of her intellect (*nuqṣān ʿaqlihā*) and easiness of her being deceived, she isn't given the authority over her own sexual relationship (*buḍʿ*) exactly like the one who is a spendthrift in regard to property.³⁰⁴ However, the Ḥanafīs believe this type of incompleteness (*naqṣ*) does not prevent a woman from knowing the interests behind marriage so it does not strip her of the right to conclude the marriage contract. This is why her legal capacity vis-a-vis financial conduct is not stripped of her unless it is proven that her conduct caused some kind of harm, although financial transactions always include some kind of risk, hazard or uncertainty (*gharar*) that cannot be discovered except by careful appraisal. Her recognition of limits and retribution is also valid and she is also addressed (*mukhāṭaba* and *mukallaḥa sharʿan*) by the address from the lawgiver (*khiṭāb*) (i.e. she is legally a competent person) which indicates that she has enough intellect. The evidence for that is that it considered her intellect in choosing the husband so if she asks her *walī* to marry her off to a suitable person (*kufʿ*) then he is obliged to do so otherwise the judge (*qāḍī*) will marry her off.³⁰⁵

It seems that the response from the Ḥanafīs about what Ibn Qudāmah has claimed is strong, because he generalised the *ḥadīth* of the Prophet when he said:

‘I have not seen anyone more deficient in intelligence and religion than you. A cautious sensible man could be led astray by some of you.’ A woman asked, ‘O Allah's Messenger! What is deficient in our intelligence and religion?’ He said, ‘Is not the evidence of two women equal to the witness of one man?’ They replied in the affirmative. He said, ‘This is the deficiency in her intelligence. Isn't it true that a woman can neither pray nor fast during her menses?’ The women replied in the affirmative. He said, "This is the deficiency in her religion.”³⁰⁶

³⁰⁴ See Ibn Qudāmah, *al-Kāfi*, III, p11.

³⁰⁵ See al-Kāsānī, *Badāʿ al-Ṣanāʿi*, III, pp. 374-75.

³⁰⁶ Al-Bukhārī, Ṣaḥīḥ al-Bukhārī, *ḥadīth* number; (304).

He has made it a general rule regarding women's actions, which seems incorrect as it contradicts the practice of the Prophet (*sunna*) when he consulted his wives and sought their opinions, like with Umm Salama she was privileged of being consulted on matters of very important concern to the community, for example; when he took her advice in the incident of *al-hudaybiya*.³⁰⁷ Also, the status of his wife 'Ā'isha in his life and after his death, where people used to take legal statements (*fatwa*) from her and ask her about the *Sunna* of the Prophet, and she used to correct the understanding of many narrations. Moreover, history has proven that many women played an important role in different aspects of many communities.³⁰⁸

4.12 The Legal Sources Supporting the Concept of Guardianship in the Marriage Contract

In this section we will present the sources of both groups, how each group reasoned their understanding of the texts from Qur'an and *Sunna* and how each group used these sources in order to support their argument against the other group. We will mention some examples and we will not go through evidence where the process of deducing the rule (*istidlāl*) is unclear, to avoid prolonging the discussion by indulging in unnecessary detail.

4.12.1 Evidence from the Qur'an

- 1- "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you".³⁰⁹ (Q., 2:221)

The majority of jurists understood from this verse ('*āya*) the presence of the *walī* is a condition for the validity of the marriage contract. Al-Qurṭubī said, 'this '*āya* is evidence

³⁰⁷ See Safi-ur-Rahman al-Mubarakpuri, *The Sealed Nectar*, revised edn (Riyadh, Saudi Arabia: Darussalam, 2002), p.405.

³⁰⁸ See *Women In Islam*, Tran. and eid. by Nicholas Awde, 1st ed. (Surrey, England: Curzon Press, 2000); Fatima Mernissi, *Women And Islam*, Tran. by Mary Jo Lakeland, 2nd ed. (Oxford, England: Basil Blackwell, 1991), p.116.

³⁰⁹ *The Qur'ān*, Arabic Text with Corresponding English Meanings, ed. by Ṣaḥeeḥ International (Jeddah, Saudi Arabia: Abul-Qasim Publishing House, 1997).

that no marriage is valid without a *walī*.³¹⁰ Ibn ʿAṭīyah (d. 546 AH / 1151 AD) furthermore notes that some scholars said “*wilāya* in marriage is approved by text in this verse”.³¹¹ According to Ibn Ḥajar al-ʿAsqalānī (d. 852 AH / 1448 AD), the significance of this verse is that the Qur’an addressed the men but not the women. It is like if it said, ‘do not marry –O guardians- the women under your guardianship (*wilāya*) to polytheistic men’.³¹² which is what was understood by the majority. If the matter of marriage is related to women, then the address would have been directed to them not to their guardians and it indicates that the woman has no authority (*wilāya*) in marriage. Therefore, the majority used this verse as evidence that the woman is not allowed to perform the marriage contract herself and she cannot choose her husband alone without the approval of her guardian even if she is an adult of sound mind. Accordingly, they stipulated the presence of the *walī* in marriage and therefore it is invalid, in their opinion, for a woman to perform her marriage contract and to marry off herself or others.

However, it can be argued that there is no clear evidence in this *āya* to support the opinion of the majority. Al-Alūsī -Ḥanafī scholar- (d. 1270 AH / 1853 AD) states that the significance of this *āya* is unclear because the verse forbids the committing and permitting of marrying polytheistic men to Muslim women, and all Muslims (i.e. the community) are considered as guardians in this matter.³¹³

Ḥanafīs considered the expression of marrying ‘*tunkiḥu*’ used in this *āya* (verse) is in accordance with the prevailing custom and that marriage is assigned to women with explicit texts in other places in Qur’an such as the verse “And if he has divorced her [for the third time], then she is not lawful to him afterward until after she marries (*tankiḥ*) a husband other than him” (Q., 2:230), and in case of the widow: “And those who are taken in death among you and leave wives behind – they, [the wives, shall] wait four months and ten [days]. And

³¹⁰ Al-Qurṭubī, *al-Jāmiʿ Li-Aḥkām al-Qurʾān*, III, p. 49.

³¹¹ See Ibn ʿAṭīyah, *Al-Muḥarrar al-Wajīz*, I, p. 297.

³¹² See Aḥmad b. ʿAlī al-ʿAsqalānī, Ibn Ḥajar, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. by ʿAbd Al-ʿAzīz b. Bāz, 3rd edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 2000), IX, p.230.

³¹³ Al-Alūsī, *Rūḥ Al-Maʿānī*, II, p. 120.

when they have fulfilled their term, then there is no blame upon you for what they do with themselves in an acceptable manner” (Q., 2:234).

Ḥanafis argue that the Qur’an has assigned the action of marrying to women as noticed in the verse which is an explicit indication that the statement of the woman is sufficient enough for the contract and that her contract is considered valid and effective because the verse assigned the action of marrying without involving anyone else. They also suggest that everyone agrees that the origin of the legitimacy of *wilāya ‘alā al-naḥs* (over the person) is to achieve the interests of those under the guardianship (*wilāya*) and, therefore, the interest of the woman is to be free in her actions. There is no harm in restricting her action in marriage so she marries a suitable person (*kuf*) and get a dowry (*mahr*) like similar women of her age and similar status in the society. Meanwhile, the Ḥanafis stipulate that the guardian has a right to object to the conduct of the woman in her affairs with judiciary in case she misused that right.³¹⁴ It can be said that, Ḥanafī jurists granted women freedom in their actions and at the same time they preserved the right of the guardians, taking into account the social aspect of guardianship.

Thus, one can see that each group sought to use the ‘*āya* as an evidence to prove the validity of their opinion and *Ijtihād*, in order to argue against the opinion of the opposite group. The reason for that is that the ‘*āya* is not an explicit text in stipulating the presence of the *walī* in marriage contract, as al-Alūsī suggested. To support this, many scholars of Qur’anic exegesis (*tafsīr*) did not mention this verse as evidence for stipulating the presence of the *walī* in marriage contract, including Ibn Kathīr (d. 774 AH / 1372 AD), al-Shawkānī (d. 1250 AH / 1834 AD) and al-Baghawī (d. 516 AH / 1122 AD), but their commentary focussed on issues of legal issues surrounding ‘the marriage of a Muslim man to a polytheistic woman’ and ‘the marriage of a Muslim woman to polytheistic man’.³¹⁵

³¹⁴ See Muḥammad, Abū Zahrah, *Zahrat al-Tafsīr* (Cairo, Egypt: Dar al-Fikr al-Arabi, 1987), II, p.722; Wahbah, al-Zuhaylī, *Sharḥ al-Wilāya fī ‘Aqd al-Zawāj*, 1st edn, (Damascus, Syria: Dar al-Maktabi, 2001), pp. 9, 17; Abū Snīnah, *al-Wilāya Fī ‘Aqd al-Nikāḥ*, pp. 58-59.

³¹⁵ See Ismā‘īl b. ‘Umar, Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Azīm*, ed. by ‘Abd al-Razzaq al-Mahdi (Beirut, Lebanon: Dar al-Kitab al-Arabi, 2004), I, p.518; al-Shawkānī, Muḥammad b. ‘Alī, *Fath al-Qadīr*, ed. by ‘Abd

Al-Rāzī (d. 606 AH / 1209 AD) questioned whether this verse initiates a new ruling, or whether it is related to the issue of marrying off orphans, which was mentioned in verse (Q., 2:220) prior to the verse used by the majority as evidence (Q., 2:221). He stated: ‘Know that scholars of Qur’anic exegesis disagreed with regard to that, therefore, we can understand from this the significance of the verse is unclear about the condition of a *walī* in the marriage contract using this text.’³¹⁶ According to Ibn ‘Āshūr, the meaning of the verse (Q., 2:221) that; do not marry a Muslim woman –O Muslims- to a polytheistic man, which is the apparent meaning of the text and therefore it can be calimed that it came to establish this ruling only.³¹⁷ As for Ibn Rushd, the following verse: “Then there is no blame upon you for what they do with themselves in an acceptable manner (*ma‘rūf*)” (Q., 2:234), is a stronger argument that the woman can perform her marriage contract than arguing using the verse “And do not marry polytheistic men [to your women] until they believe” (Q., 2:221) to prove that the *walī* is the one who performs it.³¹⁸

It seems that the Ḥanafī jurists’ opinion regarding this verse is sounder than the opinion of the majority, because the disagreement between the two groups revolves around specifying who is addressed by the phrase ‘*lā tunkihū*’ ‘do not marry polytheistic men [to your women]’ and whether it is addressing the guardians or the community. Ibn Rushd’s interpretation of this verse is the more sound opinion because the address is directed to the general Muslim community first of all then to the ruler and the judge because the state and the authority has the right to take care of the implementation of the provisions of the legislation as well as the right to legislate laws and regulations that achieve the purpose of the legislation behind rulings like the ruling of prohibiting marrying a Muslim woman to polytheistic man.³¹⁹

al-Raḥmān ‘Amīrah, 2nd edn (al-Mansurah, Eygpt: Dat al-Wafa, 1997), I, p.394 ; al-Ḥusayn b. Mas‘ūd, al-Baghawī, M‘ālim al-Tanzīl, 1st edn (Beirut, Lebanon: Dar al-Fikr, 1985), I, p.290.

³¹⁶ See Muḥammad Fakhr al-Dīn, al-Rāzī, *al-Tafsīr al-Kabīr, Maḥāṣin al-Ghayb*, 1st edn (Beirut, Lebanon: Dar al-Fikr, 1981), VI, p. 58.

³¹⁷ See Ibn ‘Āshūr, *al-Tahrīr Wa al-Tanwīr*, II, p. 360.

³¹⁸ Ibn Rushd, *Bidāyat al-Mujtahid*, II, pp. 10-11.

³¹⁹ Ibid, II, p. 10-11.

- 2- “And when you divorce women and they have fulfilled their term, do not prevent them (*ta^cduluhunna*) from remarrying their [former] husbands if they agree among themselves on an acceptable basis. That is instructed to whoever of you believes in Allah and the Last Day. That is better for you and purer, and Allah knows and you know not” (Q., 2:232).³²⁰

Al-Shāfi^cī believed that this verse is the clearest *‘āya* in the Qur’an which indicates that a woman cannot marry herself off and that the marriage is done with the consent of their *walī* as well as the consent of the prospective husband and wife.³²¹ However, it is important to note here that al-Shāfi^cī confirms that not only the consent of a woman’s guardian is required for the marriage contract, but also the consent of the prospective couple.

Al-Bukhārī (d. 256 AH / 869 AD) reported:

‘Al-Ḥasan al-Baṣrī narrated: Ma^cqil b. Yasār told me that in fact this verse was revealed concerning him. He said, ‘I’ve married my sister to a man, then that man divorced her. So when the *‘iddah* has passed, the man (ex-husband) came to ask for her hand back, i.e. to remarry her, I told him: ‘I have married her to you and I have honoured you, then you divorced her, now you come to ask for her hand? No! By Allah, she will never be returned to you. He was a good man, and the woman wanted reconciliation with him so Allah revealed this verse “do not prevent them (women) from remarrying their [former] husbands” (Q., 2:232), so I said, ‘Now I’m going to do it (return my sister to her ex-husband) O Messenger of Allah.’ Then Ma^cqil b. Yasār marries his sister to him’.³²²

³²⁰ *‘Adl* in this verse means; ‘prevention’ when the guardian is preventing the woman under his guardianship from marriage. See Muḥammad b. Jarīr , al-Ṭabarī, *Jāmi^c al-Bayān ‘An Ta’wīl ‘Āy al-Qur’ān*, ed. by ‘Abd Allah b. ‘Abd al-Muhsin al-Turki, 1st edn (Cairo, Egypt: Dar Hajr, 2001), IV, pp.195-96.

³²¹ See Muḥammad b. Idrīs, al-Shāfi^cī, *Aḥkām Al-Qur’ān*, 2nd edn (Cairo, Egypt: Maktabat al-Khaniji, 1994), I, p.174. Also, See Abū Bakr Muḥammad b. ‘Abd Allāh, Ibn al-‘Aarabī, *Aḥkām al-Qur’ān*, ed. by Muḥammad ‘Abd al-Qādir ‘Aṭa (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1996), I, p. 272.

³²² Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (5130).

Ibn Ḥajar claimed that it is clear evidence for approving the presence of the *walī* because; otherwise, there will be no meaning for his prevention.³²³ Although, Ḥanafī jurists considered this *‘āya* (Q., 2:232) as evidence to support their opinion that the presence of the *walī* is not a condition for the validity of the marriage and then the adult woman of sound mind can perform the marriage contract for herself. Al-Jaṣṣāṣ (d. 370 AH / 980 AD) believes that this verse indicates -from different aspects- the validity of the marriage when the woman performs the contract without her *walī* or his permission. Amongst what he mentioned of the aspects of this process of deducting the rule (*istidlāl*) are:

- a- The verse attributed the contract to the woman without conditioning the permission of the *walī*.
- b- The verse forbade the *walī* from prevention (*‘aḍl*) in case the spouses agreed (to go back to each other)

Al-Jaṣṣāṣ also discussed the opinion of the majority by assuming their sayings:

- a- If they say: If it is not a right for the *walī* to prevent the woman from marriage then he wouldn’t have been prevented from doing so.

Answer: Because the prohibition in the *‘āya* denies any right for the guardian in that which he is prohibited from so how can that be used to approve that right for him.

- b- If they say: the Qur’an prohibited prevention (*‘aḍl*) in case they [the spouses] agree among themselves on an acceptable or reasonable basis (*‘Idha tarāḍau baynahum bil-mā‘rūf*) so it is not of acceptable or reasonable basis that someone other than the *walī* performs the marriage contract.

Answer: It is unacceptable that ‘reasonable basis’ (*bil mā‘rūf*) here means that it is impermissible for the woman to perform the marriage contract without the permission of her *walī* because that denies what the *‘āya* actually approves. This will be the case

³²³ Ibn Ḥajar, *Fath al-Bārī*, IX, p. 234. Also, See Al-Ṭabarī, *Jāmi‘ al-Bayān*, IV, pp.195-96.

only if the ruling was abrogated, which is not possible as the ruling of *al-nāsikh wa al-mansūkh* (the abrogating and the abrogated) cannot be combined in one statement (*khiṭāb*) because abrogation can only take place after the first ruling is well established and acted upon. This confirms that the reasonable basis conditioned by the *‘āya* is absolutely not the guardian (*walī*).³²⁴

The two groups of jurists differ in the understanding of this text because it does not explicitly provide clear evidence for the requirement of *wilāya* in the marriage contract. The majority believe that the Qur’an in this *‘āya* (Q., 2:232) has addressed the guardians and prohibited them from preventing the women under their guardianship. If the issue of marriage is not their right, then there is no meaning in preventing them from something they do not possess in the first place. They argue that the prohibition in the verse came in regard of a right that is possessed by the guardian that is marrying off the women under their guardianship, otherwise there will be no meaning for the verse and that is nonsense and should not be attributed to the Qur’an. In the personal reasoning of the majority, the addressed party in the *‘āya* are the guardians who were prohibited from preventing women from going back to their ex-husbands after the end of their *‘iddah* if they wanted to.

Ḥanafīs opposed this by saying that attributing the feminine pronoun to the word *yankihna* (remarrying) in the *‘āya* “do not prevent them from remarrying their [former] husbands” (Q., 2:232) is evidence that the woman has the right to marry herself off. Therefore, the prohibition of prevention in this *‘āya* approves the woman’s right to act in something which is purely her right, i.e. performing her own marriage contract, because the marriage contract is purely a specific right of the woman and no one else can share it with her. That is why her offer (*ijāb*) and acceptance (*qabūl*) must be valid in the marriage contract as in any other transaction. Moreover, Ḥanafī jurists believe that everyone who has the right to execute an

³²⁴ See Abū Bakr Aḥmad b. ‘Alī, al-Jaṣṣaṣ, *Aḥkām al-Qur’ān*, ed. by Muḥammad Ṣadiq al-Qamḥāwī (Beirut Lebanon: Dar Ihya’ al-Tourath al-Arabi, 1992), II, pp. 100-01.

action in regard to his property also has the right to execute an action in regard of him/herself (*nafsih*). This is a juristic rule of the Ḥanafis in the field of transactions.³²⁵

The Ḥanafis also believe that the address in the *‘āya* is directed towards husbands and not to guardians. Therefore, the meaning of the *‘āya* will be: if you divorce women- O husbands- and their *‘iddah* has passed then do not prevent them (*la-ta^cḍuluhunn*). Therefore, the statement: *‘la-ta^cḍuluhunn*’ (do not prevent them) is directed to the one who possess the right to divorce, i.e husband, which makes the meaning of (*‘aḍl*) in the *‘āya* preventing woman from getting married by lengthening her *‘iddah*, as the Qur’an states in other verses in the case when the husband divorces his wife, and she completed her *‘iddah* ‘do not keep them, intending harm, to transgress [against them]’ (Q., 2:231).³²⁶

However, al-Rāzī mentioned that scholars of Qur’anic exegesis (*tafsīr*) differed in specifying who is addressed by this *‘āya*. As previously mentioned, the majority consider it to be addressing the guardians, whilst others said it is the husbands. He then said, ‘this is the sounder opinion’, meaning that the address is directed to husbands not to guardians. Then al-Rāzī argued the validity of this preference as follows:

- The *‘āya* is formed of protasis (condition - *sharṭ*) and apodosis (answer - *jawāb*). The protasis is “And when you divorce women and they have fulfilled their term”, and the apodosis is the part “do not prevent them” (*la-ta^cḍuluhunn*)
- There is no doubt that the protasis (*sharṭ*) in “And when you divorce women” is an address directed to husbands so the address in its apodosis (*jawāb*) in “do not prevent them” (*la-ta^cḍuluhunn*) must be directed to husbands also.
- If the address is not directed to husband then the verse will mean: “if you divorce women -O husbands- then do not prevent them [from going back to their ex-husbands] -O guardians-” and therefore there will be no connection between the protasis (*sharṭ*) and the apodosis (*jawāb*) so the context of the speech will be

³²⁵See Al-Kasānī, *Badā’i^c al-Ṣanā’i^c*, III, pp. 375-76; Al-Zuhayli, *Sharṭ al-Wilāya fī ‘Aqd al-Nikāh*, pp.19-20; Abū Snīnah, *al-Wilāya fī ‘Aqd al-Nikāh*, pp.59-60.

³²⁶See Al-Jassās, *Aḥkām al-Qur’ān*, II, p.103.

inconsistent and unorganised which is unsuitable description to the words of the Qur'an.

Then, al-Rāzī supported the validity of his opinion by the argument that the address in the context of the speech starting from the first verse (i.e. from *'āyah*: (Q., 2:226) regarding the rulings of divorce was directed to husbands when the Qur'an commands them to treat their wives kindly; the guardians were never mentioned in those verses.³²⁷

Al-Kāsānī -Ḥanafī jurist- (d. 587 AH / 1191 AD) extracted the following from the verse (Q., 2:232):

- The Qur'an attributed marriage to women by using the feminine pronoun in the address which indicates that their statement is sufficient to approve the validity of the marriage without the need of conditioning the presence of the *walī*.
- The Qur'an prohibited guardians from preventing women from remarrying their ex-husbands in case the spouse agreed. Prohibition requires assuming the prohibited act (which is prevention (*ʿaḍl*) in this case).³²⁸

The majority responded to this argument of the Ḥanafīs by suggesting that this interpretation is incorrect. The correct interpretation is that the address is directed to the guardians with the evidence of the reason of the revelation (*sabab al-nuzūl*), for this verse which was revealed in regard to the issue of prevention (*ʿaḍl*) committed by guardians. Ibn Jarīr (d. 310 AH / 923 AD) and other scholars of *tafsīr* mention that the reason for revealing this verse was the story of Ma^cqil b. Yasār.³²⁹ Ibn Ḥajar commented on the *ḥadīth* of Ma^cqil saying:

‘This is a clear indication that the reason of the revelation of this verse is this story. This cannot be denied by the fact that the apparent address is directed to husbands in “And when you divorce women” as the verse goes on to say

³²⁷ See Al-Rāzī, *Maḥāṭib al-Ghayb*, VI, p.120.

³²⁸ See Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, III, p.373.

³²⁹ See Al-Ṭabarī, *Jāmi' al-Bayān*, IV, pp.187-88 ; Ibn al-ʿArabi, *Aḥkām al-Qur'ān*, I, p. 272.

“from remarrying their [former] husbands” which clarifies that the issue of prevention (*‘aḍl*) is related to guardians’.³³⁰

Ibn ‘Abd al-Barr (d. 463 AH / 1070 AD) claims that opening the verse with an address (*khiṭāb*) to husbands then turning it to guardians represents something common in the usage of Arabic language. He gave an example of this in the verse “And bring to witness two witnesses from among your men” (Q., 2:282) where the address is directed to the two contracting parties, then the verse continues “from those whom you accept as witnesses” where the address is directed to judges. Then Ibn ‘Abd al-Barr said: ‘and this is often’ meaning: turning the address (*khiṭāb*) to differed recipients in the same text often takes place in the Qur’an and the usage of Arabic language. By this he responded to the Ḥanafis’ claim of denying the possibility of addressing different recipients in the same text.³³¹

The Ḥanafis responded to this argument by claiming that the *ḥadīth* of Ma‘qil b. Yasār, which is used by the majority to support their opinion that the presence of the *walī* is a condition in the marriage contract is indeed disapproved by the scholars of knowledge in the field of the narration of *ḥadīth* because it included an unknown man in its *isnād* (chain of narration) which makes the *ḥadīth ḍa‘īf* (weak).³³² Some Ḥanafī jurists argue that even if we assumed the validity of the *ḥadīth* of Ma‘qil and the soundness of its chain of narration, it still does not prevent the approval of *wilāya* for the woman in the marriage contract. This is because Ma‘qil prevented his sister from getting married so the Qur’an prohibited him from doing so; therefore, his right of prevention (*‘aḍl*) was disapproved. The disapproval of prevention (*‘aḍl*) with regards to the woman approves her right in performing the marriage contract on her own. This is the apparent meaning of the verse (*ẓāhir al-naṣ*) where the

³³⁰ Ibn Ḥajar, *Fath Al-Bārī*, IX, p. 234. Also, See Al-Māwardī, *al-Hāwī al-Kabīr*, IX, p. 39.

³³¹ See Yusuf b. ‘Abd Allah Abū ‘Umar, Ibn ‘Abd al-Barr, *al-Tamhīd lima fī al-Muwaṭṭa‘a min al-Ma‘ānī wa al-Asānīd*, 1st edn (Beirut, Lebanon: Dar Ehia al-Tourath al-Arabi, 2000), VII, p. 57.

³³² See Maḥmūd b. Aḥmad Badr al-Dīn, al-‘Aaynī, *‘Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 2001), XX, p. 171; Al-Jaṣṣāṣ, *Aḥkām al-Qur‘ān*, II, p.103.

Ibn Ḥajar respond to this claim from Ḥanafis by stating that, the saying of Al-Ḥasan al-Baṣrī, ‘Ma‘qil b. Yasār told me’ is clear to elevate the rank of this *ḥadīth*. Then he mentioned that this *ḥadīth* is *Mawṣūl* (*ḥadīth* with a connected chain of narrators) by the following of ‘Abbād b. Rāshid who narrated this *ḥadīth* connected from another chain of narration which also clarified that Al-Ḥasan al-Baṣrī has heard it from Ma‘qil b. Yasār. See Ibn Ḥajar, *Fath al-Bārī*, IX, p. 233.

address was directed to husbands not guardians because the verse prohibits the husbands from prevention (*ʿaḍl*) of marriage after the end of *ʿiddah*.

Al-Ṭaḥawī (d. 321 AH / 933 AD) also hinted to that when he commented on the *ḥadīth* of Maʿqil by arguing that when the Qurʾan commanded the guardian not to commit prevention (*ʿaḍl*) it indicates that the *walī* has the right to perform the marriage contract so both meanings are possible. It is also possible that the prevention (*ʿaḍl*) which has been done by Maʿqil was in the form of encouraging his sister not to go back to her ex-husband so he was commanded to abandon that (prevention).³³³ For al-Bayhaqī however, prevention (*ʿaḍl*) cannot be in the form of discouraging.³³⁴

Ibn Rushd assumed another response for the Ḥanafīs which is that if it is accepted that the *ʿāya* (Q., 2:232) is directed toward guardians –as the majority say- we cannot accept that the address proves that the presence of the *walī* is a condition for the validity of the marriage contract as the address only prohibited guardians from prevention (*ʿaḍl*). He then said that, ‘the part of the *ʿāya* (Q., 2:232) “*la-taʿḍuluhunn*” (do not prevent them) only prohibits the family and *ʿaṣaba* (parental relatives) from preventing the woman’s marriage. Prohibiting them from (*ʿaḍl*) prevention does not mean the conditioning of their approval for the contract if it is to be considered valid, either in its metaphorical or actual meaning.³³⁵

Ibn al-Qayyim (d. 751 AH / 1350 AD) used another verse to prove that the address is directed towards husbands not guardians where the word prevention (*ʿaḍl*) was mentioned “And ‘*la-taʿḍuluhunn*’ do not make difficulties for them in order to take [back] part of what you gave them [i.e. the dowry]” (Q., 4:19). He claims that this verse is evidence that the prohibition from *ʿaḍl* is directed towards the husband who makes it difficult for the woman in order for her to pay him off for divorce (*khulʿ*); by doing so he becomes a transgressor

³³³ See Aḥmad b. Muḥammad b. Salamah Abū Jaʿfar, al-Ṭaḥāwī, *Sharḥ Maʿānī al-ʿĀthār*, ed. by Muḥammad Zuhry al-Najjār and Muḥammad Sayyid Jād al-Haqq, 1st edn (Beirut, Lebanon: Alam al-Kutub, 1994), III, p.11.

³³⁴ See Abū Bakr Aḥmad b. al-Ḥusain, al-Bayhaqī, *Maʿrifat al-Sunan wa al-ʿĀthār*, 1st edn (Cairo, Egypt: Dar al-Wafa, 1991), X, p.28.

³³⁵ Ibn Rushd, *Bidāyat al-Mujtahid*, II, p.10.

and whatever he takes from her is unlawful and he cannot possess it.³³⁶ Therefore, Ibn al-Qayyim inclines to the opinion that the prohibition of prevention (*‘adl*) in the Qur’an is directed toward the husband who seeks to harm his divorcee. It implies that this *‘āya* can’t be used as evidence to stipulate that guardianship is a requirement for the validity of marriage contract.

- 3- “And marry the unmarried among you (*wa-a-nkiḥu al-Ayāma minkum*) and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-Encompassing and Knowing” (Q., 24:32)

Again, the two groups differed in their understanding of the text of this verse in determining who is addressed by it. The majority believe that this address in *‘wa ankiḥū* ‘and marry’ is directed to men only, which is evidence that the Qur’an addressed the guardians of the women to marry her off.³³⁷ According to al-Qurṭubī, the *‘āya* is addressing guardians; he also mentions a view that it was directed towards husbands.³³⁸ Therefore, for the majority, what is meant by ‘marrying’ in the verse is providing support, easing off the matter of marriage and allowing it to men and women who seek chastity and to guard their private parts from falling into unlawful relations. However, the Ḥanafis responded to this by suggesting that the term *‘ayāma*’ (the unmarried) is a plural form of the word *‘ayyim*’ which is a general term that includes men as well as women, so it is not possible that the addressee here are the guardians otherwise men would have to have guardians too. In all, it is highly improbable that we do not accept that the address in the verse is directed to guardians; rather it seems more likely it is directed either to husbands to marry the unmarried women when the need arises, or to people in general to marry off any one who does not have a spouse.

³³⁶ See ‘Alī al-Ḥamad, al-Ṣāliḥī, *al-Daw’ al-Munīr ‘Alā al-Taḥsīn ,Taḥsīn Ibn al-Qayyim* (Unaizah, Saudi Arabia: Al-Nuor Publishers, [n.d.]), I, p. 408.

³³⁷ See Ibn Ruṣhd, *al-Muqaddimāt*, V, p. 259.

³³⁸ See Al-Qurṭubī, *al-Jāmi‘ Li-Aḥkām al-Qur’ān*, XII, p. 159. Also see al-Shawkānī, *Faḥ al-Qadīr*, IV, p. 39.

Therefore it cannot be used as evidence by those who say that there is no marriage except with the presence of the *walī*.³³⁹

Al-Kāsānī -a Ḥanafī jurist- chose an opinion similar to the opinion of the majority, agreeing with them that the address in the verse is directed to the guardian to marry off the women under their *wilāya* not as the rest of the Ḥanafīs argued. However, he still didn't see in that a valid piece of evidence to claim that the presence of the *walī* is a condition for the validity of the marriage. He decided that the 'āya (Q., 24:32) came according to the prevailing customs and traditions of the people in that time, which prevented women from performing their marriage contract on their own because that might bring embarrassment to the woman when she attended a place full of men. Al-Kāsānī suggested that the woman's modesty and timidity usually prevents her from doing so and she might even be accused of boldness, so it seems that the address in the verse is directed to guardians to perform the marriage contract for women with their consent. Therefore, he said in this matter: 'The address of commanding to marry off came in accordance with customs and traditions in the form of recommendation (*nadb/istiḥbāb*), not in the form of obligation ('*ijāb*)'.³⁴⁰

The above verses were among the clearest evidence used by the two groups in order to prove the validity of their reasoning (*ijtihād*) on this issue. In addition to that, the Ḥanafīs used the following verses to support their opinion:

- 1- "And a believing woman if she gives herself to the Prophet [and] if the Prophet wishes to marry her, [this is] only for you, excluding the [other] believers" (Q., 33:50)
- 2- "And if he [husband] has divorced her [for the third time], then she is not lawful to him afterward, until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits

³³⁹ See Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, V, p. 178. Also see Al-^cAynī, *Umdat al-Qārī*, XX, p.171.

³⁴⁰ Al-Kāsānī, *Badā'ī^c al-Ṣanā'ī^c*, III, p. 374.

of Allah. These are the limits of Allah, which He makes clear to a people who know” (Q., 2:230)

- 3- “And those who are taken in death among you and leave wives behind – they, [the wives, shall] wait four months and ten [days]. And when they have fulfilled their term [^c*idda*], then there is no blame upon you for what they do with themselves in an acceptable manner (*ma^crūf*). And Allah is [fully] Acquainted with what you do” (Q., 2:234)

Ḥanafīs believe that the first ^c*āya* (Q., 33:50) indicated that the validity of the marriage is with the statement of the woman as there was no *walī* present at the time of the incident in the context of which this verse was revealed, so it is evidence for the validity of the marriage contract if the woman performs it on her own.³⁴¹ This deduction (*istidlāl*) from the Ḥanafīs was argued against by the majority with suggestions that there is no evidence in this verse for the validity of the woman marrying herself off to someone other than the Prophet as the woman gave herself to him without *mahr* (dowry) or *walī* (guardian); this is a specific characteristic (*khāṣṣ*) of the Prophet, i.e. marrying without the presence of a *walī*. Ibn Kathīr reported Qatada’s statement: ‘a woman has no right to give herself to a man without a *walī* (guardian) or *mahr* (dowry) except to the Prophet’.³⁴²

The argument of the Ḥanafīs was proven by this verse, while the argument of the majority is that this verse is only for the Prophet. However, al-Bukhārī seems to agree that a woman can

³⁴¹ Al-Kāsānī, *Badā’ al-Ṣanā’i^c*, III, p. 372.

Al-Jassas said, ‘an indication for that is the Prophet’s reply –in the *ḥadīth* of the reason of the revelation of this verse- “I have no need in women”. A man stood up and asked him to marry her to him so the Prophet married her to that man without asking her whether she had a *wali* or not and he did not condition the presence of a *wali* for the validity of her marriage contracts’. Al-Jaṣṣāṣ, *Aḥkām al-Qur’an*, II, p.102. This incident was mentioned in some *ḥadīths* such as: ‘A woman came to Allāh’s Messenger and said, ‘O Allāh’s Messenger, I came to offer myself to you,’ Allāh’s Messenger looked at her from feet to head and from head to feet, then Allāh’s Messenger stooped his head. When the woman saw that he had not made a decision regarding her she sat down’. See Ibn Ḥajar, *Bulūgh al-Marām, ḥadīth* number: (832), p. 345. Some Commentators think this applies to Zainab bint Khuzaima who had dedicated herself to the poor and was called the mother off the poor (*Umm-ul-masākīn*), others think it is applies to Maymūna bnt al-ḥārith. See al-Qurṭubī, *al-Jāmi^c li Aḥkām al-Qur’an*, XIII, pp. 134-35.

³⁴² See Ibn Kathīr, *Tafsīr al-Qur’an al-^cAzīm*, V, p.198 ; Al-Shawkānī, *Fath al-Qadīr*, IX, p.218 ; ^cAli b. Khalaf, Ibn Baṭṭāl, *Sharḥ Ṣaḥīḥ al-Bukhārī*, 1st edn (Riyad, Saudi Arabia: Maktabat al-Rushd, 2000), VII, pp. 220-221.

offer herself to a righteous man using *ḥadīths* narrated by Sahl b. Sa^cd, Anas b. Mālik³⁴³ and ʿĀ’isha as evidence, the latter of which comes under the title in his *Ṣaḥīḥ*: ‘Is it permissible for a woman to gift (*tahabu*) herself to someone (in marriage)’, to which he narrates the following:

ʿĀ’isha said: “Doesn't a lady feel ashamed to gift (*tahabu*) herself to a man?” But when the verse: “(O Muhammad) You may postpone (the turn of) any of them (your wives) that you please,” (Q., 33:51) was revealed, “ʿĀ’isha said, “O Allah's Messenger! I do not see but that your Lord hurries in pleasing you”.³⁴⁴

This therefore implies a number of things, including that the answer to the question given in the title is “yes”. Al-Ṭaḥāwī -a Ḥanafī jurist- stated in relation to this, that the unique case (*khusūṣiyya*) mentioned in the verse (Q., 33:50) is specifically to do with the dowry, because the Prophet can accept a woman in marriage if she gifts herself to him (i.e. with no *mahr*). This is in contrast to the view of the majority who claim that the specificity (*khusūṣiyya*) of this event is in relation to guardianship. It would seem, therefore, that the Ḥanafī view is very coherent as they have taken into account the linguistic features of the evidence and drawn rational conclusions from them, while the majority dealt with this on the basis that there are many unknown factors surrounding the incident, clinging on to the principle that *wilāya* is a requirement of the contract.

It may be argued that the *khaṣā’iṣ* (unique cases) of the Prophet is a very problematic issue, because it challenges the idea of *Sunna* and specifying the unique cases of the Prophet without evidence, specifically from the Qur’an, the *Sunna* or the consensus, causes disruption in its implementation. Thus, whether or not the address in the Qur’an to the Prophet is for him alone, it is still a matter of disagreement between the scholars of the principles of jurisprudence (*‘ulamā’ al-uṣūl*). Scholars of Uṣūl believe that the address in the Qur’an to the Prophet is also an address to the nation, not by the format of the text, but by the significance of his being a messenger who is ordered by Allah to convey the message

³⁴³ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (5120) and (5121).

³⁴⁴ Al-Bukhārī, *ḥadīth* number (4788).

and explain the rules. However, when it is stated in the text of the Qur'an that the address is only for him alone, such as the words 'this is only for you' (as in the verse under discussion) then the text cannot be generalised.

As for the second verse (Q., 2:230), the Ḥanafis used it to support their claims, from two aspects:

- a- The Qur'an attributed marriage to the women in the verse, which requires the validity of the woman to perform her marriage contract on her own.
- b- The term *yatarājā'ā* 'returning to each other' means 'marry each other' so marriage was attributed to the spouse without mentioning the *walī*.³⁴⁵

They also used the same method of deduction (*istidlāl*) with regard to 'āya (Q., 2:234), as the Qur'an attributed marriage to woman so that gives them the right to marry themselves off. It is also indicates the validity of the marriage contract with their statement as the 'āya "Then there is no blame upon you for what they do with themselves in an acceptable manner" (Q., 2:234) clarifies that the woman has the right to marry herself off without the presence of the *walī* and approving the condition of the presence of a *walī* actually denies what the verse approves.³⁴⁶ Furthermore, according to the Ḥanafī scholar °Uthmān b. °Ali al-Zayla°ī (d. 743 AH / 1343 AD), the phrase '*ḥattā tankih*' (until she marries) makes it clear that marriage is concluded by a woman. The phrases '*fīma fa°alna fī anfusihinna*' (what they do with themselves) and '*yatarājā'ā*' (returning to each other) are clear that the woman is the one who does and return. According to al-Zayla°ī, those who claimed that marriage by the woman's statement is invalid have rejected a Qur'anic text.³⁴⁷

The majority challenge these arguments from two aspects:

- a- What is meant by removing the blame from women in the verse is that they shouldn't be prevented from marriage in case they want it, but that doesn't mean that the

³⁴⁵ Al-Kāsānī, *Badā'ī° al-°anā'ī°*, III, pp. 372-73.

³⁴⁶ See Al-Jaššāš, *Aḥkām al-Qur'ān*, II, p. 101.

³⁴⁷ See °Uthmān b. °Ali, al-Zayla°ī, *Tabyyīn al-Ḥaqā'iq Sharḥ Kanz al-Dqā'iq*, 1st edn (Cairo, Egypt: al-Matba'ah al-Kubra al-Ameiriyyah, 1895), II, p.117.

woman can conclude the marriage contract on her own without the presence of the *walī*. As she cannot conclude the marriage contract without the presence of the witnesses she also cannot perform it without the presence of the *walī*.

- b- The verse “What they do with themselves in an acceptable manner” (Q., 2:234) requires that the marriage contract should be carried out according to the acceptable manner known between people and it is not acceptable manner that a woman marries herself off without the presence of the *walī*.³⁴⁸

These are the most important verses from the Qur’an which have been used by each group in order to support their personal reasoning (*ijtihād*). Now we will present their evidence from the *ḥadīth* in order to see how they have used those *ḥadīths* to stipulate the condition of guardianship *wilāya* in marriage contract.

4.12.2 Evidence from the *Sunna* (*ḥadīth*) and narrations from the companions

We have chosen two *ḥadīths* from a multitude of *ḥadīths* used by jurists to support their opinions in the issue of ‘*wilāya*’ guardianship in the marriage contract, to exemplify how the jurists of each group dealt with the evidence presented by the other group. Also, we will add to that some narrations from the companions.

Ḥadīth 1: “No marriage (*nikāḥ*) (should be performed) without a guardian (*walī*)”.³⁴⁹

Ḥadīth 2: “Any woman who marries without her *walī*’s permission, her marriage is void, her marriage is void, her marriage is void. If he (i.e. the husband) performs intercourse with her, the *mahr* (dowry) becomes her right because he consummated

³⁴⁸ See Al-Māwardī, *Al-Ḥāwī al-Kabīr*, IX, pp. 42-43.

³⁴⁹ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2085); al-Tirmidhī, *Jāmi‘ al-Tirmidhī*, *ḥadīth* number: (1101); Ibn Mājah, *Sunan Ibn Mājah*, *ḥadīth* number: (1881). Ibn Ḥajar said, ‘the well-known (*mashhūr*) version is the *ḥadīth* reported by Abū Musa al-Ash‘arī which is elevated and attributed to the Prophet (*marfū‘*) in regards of its text, it was also reported by Abū Dāwūd, al-Tirmidhī and Ibn Mājah and al-Ḥakim judged it as authentic (*ṣaḥīḥ*)’ See Ibn Ḥajar, *Fath al-Bārī*, IX, p. 229. Al-‘Albānī said about it, ‘Authentic (*ṣaḥīḥ*) and came from the *ḥadīth* narrated by Abū Musa al- Ash‘arī, ‘Abd Allāh b. ‘Abbās and Abū Huraira’. Al-‘Albānī, *Irwā‘ al-Ghalīl*, VI, pp. 235-36.

the *nikah*. And if they dispute, the ruler would then be the *walī* of the one who does not have a *walī*”.³⁵⁰

The majority consider that *ḥadīth 1* clarifies that the presence of the (*walī*) is a condition in the marriage contract and the marriage is considered invalid without his presence which leads to the negation of legal reality of the marriage (*haqīqa sharʿiyya*), which means that the contract was not performed in a valid way because of the absence of the (*walī*). Therefore, the apparent meaning of this *ḥadīth* indicated the disapproval of the marriage without a (*walī*) and its significance indicated that it is impermissible for the woman to perform the marriage contract for herself or others.³⁵¹

The Ḥanafis questioned the chain of narration (*isnād*) of this *ḥadīth*. Amongst the challenges they put forward is the view of Ibn al-Humām (d. 861 AH / 1457 AD) about its narration. He claimed that it is *muḍṭarib ḥadīth* (confused) for being connected (*mawṣūl*) and broken (*munqaṭiʿ*).³⁵² As evidence he used the statement of al-Tirmidhī (d. 279 AH / 892 AD) who commented that ‘There is disagreement in regard to this *ḥadīth*’. He also states that it is *mursal*.³⁵³ According to Abū Jaʿfar al-Ṭaḥawī, this *ḥadīth* is invalid as evidence because more proven narrators who were better known for memory, like Sufyān al-Thawrī (d. 161 AH / 778 AD) and Shuʿba (d. 160 AH / 777 AD), have reported it in a broken form (*munqaṭiʿ*). He then continued responding to all attempts by the other group to prove that the *ḥadīth* is a connected (*mawṣūl*) *ḥadīth*.³⁵⁴

The response of the majority was that this *ḥadīth* was proven to be authentic (*ṣaḥīh*), connected (*mawṣūl*) and elevated (*marfūʿ*) in many ways. They also confirmed that many

³⁵⁰ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2083); al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, *ḥadīth* number: (1102); Ibn Mājah, *Sunan Ibn Mājah*, *ḥadīth* number: (1879).

³⁵¹ See al-Zuhaylī, *Sharḥ al-Wilāya Fī ʿAqd al-Zawāj*, p. 23; ʿAllām, *al-Wilāya Fī ʿAqd al-Nikāh*, pp. 68-69; Abū Snaina, *al-Wilāya Fī al-Nikāh*, pp.57-159. Also See Ḥamad b. Muḥammad, al-Khaṭṭabī, *Maʿālim al-Sunan* (Aleppo, Syria: Matbaat Muhammad Raghīb al-Tabbakh, 1933), III, p. 198.

³⁵² *Muḍṭarib* is a *ḥadīth* whos contents are inconsistent with a number of other reports, none of which can be preferd over the others. *iḍṭirāb* in *ḥadīth* can be in *matn* (subjet-matter) or *isnād* (transmission). For more see Kamali, *Principles of Islamic Jurisprudence*, pp. 65, 111.

³⁵³ Ibn al-Humām, *Fath Al-Qadīr*, III, p. 259. The narration of successor (*tabiʿi*) when he directly attributed to the Prophet without mentioning the last link.

³⁵⁴ See al-Ṭaḥawī, *Sharḥ Maʿānī al-ʿĀthār*, VIII, p.10.

reputable imams have proven that this *ḥadīth* is elevated (*marfūʿ*) to the Prophet, like Al-Ḥākim (d. 405 AH / 1015 AD) in *al-Mustadrak* where he said about the *ḥadīth*: ‘This is the original narration that Bukhārī and Muslim (*al-shaikhān*) could not help but include in their collections’. Then he presented his narration of this *ḥadīth* through Isrāʿīl b. Yunus (d. 160 AH / 777 AD) to Abu Ishāq al-Sabīʿī (d. 127 AH / 745 AD) and said, ‘All of these narrations are authentic and proven to be connected by the early Imāms’.³⁵⁵ According to Ibn ʿAbd Al-Barr this *ḥadīth* was reported from Abū Burda as *mursal* so whoever accepts the *mursal* must accept it. As for those who do not accept the *mursal ḥadīth*, they must accept the *ḥadīth* of Abū Burda here because those who considered it as connected *mawṣūl* are of the people of memorisation and reliability. Isrāʿīl and those who followed-up his narrations are considered to be of the best memorisers (*ḥafāẓa*) whose addition is accepted especially if it was supported by authentic origins.³⁵⁶ Ibn ʿAbd al-Barr here is indicating to an issue that forms part of the principles of Islamic jurisprudence; the disagreement between jurists in regard to the validity of acting upon a *mursal ḥadīth* as mentioned above.³⁵⁷

Scholars have different opinions with regard to the validity of arguments using a *mursal ḥadīth*, the most famous of them are:

- 1- It is valid, with the condition that the one who elevates it is known for his reliability and uprightness (*ʿadl*) with the scholars of the science of criticizing and praising the

³⁵⁵ Abū ʿAbd Allah al-Ḥākim, al-Naysabūrī, *al-Mustadrak ʿAla al-Ṣaḥīḥayn*, 1st edn (Cairo, Egypt: Dar al-Haramayn Publishers, 1997), II, pp.201-03. For more details See Ibn Ḥajar al-ʿAsqalānī, *Talkhīṣ al-Ḥabīr*, IV, pp. 323. Al-ʿAlbānī said, ‘the approved version reported by Shuʿba and Sufyān from Abī Ishāq from Abī Burda is (*mursal*)’. He also said, ‘there is no doubt that the opinion of al-Tirmidhī that the most authentic narration reported by Shuʿbah and Sufyān from Abū Ishāq from Abū Burda from Abū Musa al-Ashʿarī is elevated (*marfūʿ*) which is correct because the chain of narrations is apparently authentic and that is why a group of scholars authorised it like ʿAlī b. al-Madīnī and al-Dhahbī and al-Ḥākim also reported. But it can be argued against them that Ishāq al-Sabīʿī reached a stage when he started to mix [in his narration] and it is unclear whether he reported the *ḥadīth* as connected (*mawṣūl*) before or after that stage’. Al-ʿAlbānī, *ʿIrwāʾ al-Ghalīl*, VI, pp. 236-37; and also See Aḥmad b. ʿAlī al-ʿAsqalānī, Ibn Ḥajar, *Talkhīṣ al-Ḥabīr*, 1st edn (Saudi Arabia: Qurtubah Publishers, 1995), IV, pp.322-23.

³⁵⁶ See Ibn ʿAbd al-Barr, *al-Tamhīd*, VII, pp. 59-60.

³⁵⁷ The *mursal ḥadīth* is ‘the *ḥadīth* where the successor (*tabīʿī*) elevates to the Prophet by saying, ‘the Prophet said’ without mentioning the chain of narration (*al-isnād*) so, if the successor (*tabīʿī*) attributed *ḥadīth* directly to the Prophet without mentioning the last link in the chain, namely the Companioning (*al-Ṣaḥābī*) who narrated it from the Prophet. According to Kamali this is the definition of the majority of jurists. See Kamakli, *Principles of Islāmic Jurisprudence*, p.108.

narrators of *ḥadīth* (*al-Jarḥ wa al-Taʿdīl*). The people of this opinion consider the *mursal ḥadīths* amongst the authentic (*ṣaḥīḥ*) *ḥadīths*. This opinion is related to al-Awzāʿī (d. 157 AH / 774 AD), Abū Ḥanīfa and his companions Abū Yūsuf (d. 182 AH / 798 AD) and Muḥammad al-Shaybānī (d. 189 AH / 804 AD), as well as Mālik and the scholars of Madina. The companions of Aḥmad b. Ḥanbal also mentioned that sounder opinion related to him is the validity of arguments using a *mursal ḥadīth*.

- 2- It is invalid: as it is considered of the weak (*ḍaʿīf*) *ḥadīth* because of the broken chain of narration (*isnād*). This opinion is related to ʿAbd Allah b. al-Mubārak (d. 181 AH / 797 AD), al-Shāfiʿī, another narration of Aḥmad b. Ḥanbal and most of the people of the science of *ḥadīth*.³⁵⁸
- 3- There is another opinion in accepting the *mursal ḥadīth* related to al-Shāfiʿī who states certain conditions to approve the validity of acting upon the *mursal ḥadīth*.

To conclude, Ibn ʿAbd al-Barr said, ‘so the *mursal* narration of he who is known for accepting the narration of weak narrators is disapproved whether he was a successor (*tabīʿī*) or lower, whereas the *mursal* and concealed (*mudallas*) narrations of the one who is known for accepting only from a trustworthy (*thiqa*) narrator is accepted’.³⁵⁹

However, there is no general agreement among scholars with regard to using a *ḥadīth mursal*. Therefore, it can be claimed that there are two methods of dealing with it. The first is the method of scholars of *ḥadīth* who concentrate on the *isnād* (chain of narration) of the *ḥadīth* and whether it is connected or broken. The second is the method of jurists who concentrate on the significance of the *ḥadīth*. Therefore, if the meaning of the *ḥadīth mursal*

³⁵⁸ See ʿAbd Allah b. Yūsuf, al-Judayʿ, *Tahrīr ʿUlūm al-Ḥadīth*, 1st edn (Beirut, Lebanon: Al-Rayan, 2003), II, pp. 941-43.

³⁵⁹ Ibn ʿAbd al-Barr, *al-Tamhīd*, I, p.155. Al-Albānī stated that this *ḥadīth* is unquestionably authentic (*ṣaḥīḥ*) as the narration of Abū Musa is approved by a group of scholars. It is in the worst case *mursal* and Abū Ishāq al-Sabīʿī made a mistake in elevating it but if it was supported by the narrations of those who reported it with a connected chain (*isnād mawṣūl*) and other supporting evidences which are not as weak as the *isnād* in Abū Musa’s narration –like the *isnād* of the narration of Jābir and the *isnād* of the narration of Abū Hurairah. Al-Albānī believed that this *ḥadīth* is authentically related to Ibn ʿAbbās as a stopped narration (*mawqūf*) at him and none of the companions disagree with him’ see *ʿIrwāʾ al-Ghalīl*, VI, pp. 237-43.

is correct and supported by other evidence that indicates the *ḥadīth* has a strong origin, they arrive at a position that the validity of its significance is probable. So basically, their argument is built upon the evidence surrounding the *ḥadīth* not just the text of the *ḥadīth* itself.³⁶⁰

4.12.3 The Jurists' Understanding (*fiqh*) of the *ḥadīth* “No Marriage (*nikāḥ*) (should not be performed) without a *walī*”

As for al-Māwardī (d. 450 AH / 1058 AD), these legal texts (*ḥadīths*) are evidence for the invalidity of marriage without a guardian.³⁶¹ Depending on their understanding of this *ḥadīth*, the majority of jurists claimed that it is part of the evidence that state that no marriage is valid without the presence of a *walī* and that the *walī* is a *rukṅ* in the marriage contract and therefore it is the legal starting point in regard to marriage. Moreover, the woman cannot conclude a marriage contract for herself or others. Her statement in the contract has no legal effect and in case a woman performs her marriage contract or assigns someone else to do that on her behalf then the contract is considered invalid. According to al-Shawkānī, marriage without a guardian is invalid as stated by the *ḥadīth* narrated by ʿĀʾisha and as indicated by the *ḥadīth* narrated by Abū Huraira because prohibition (*nahy*) indicates irregularity (*fasād*) which is equal to invalidity (*butlān*). Also, he claimed that this was the opinion of ʿAlī, ʿUmar, Ibn ʿAbbās, Ibn ʿUmar, Ibn Masʿūd, Abū Huraira, ʿĀʾisha, Al-Ḥasan al-Baṣrī (d. 21 AH / 728 AD), Ibn al-Musayyib (d. 14 AH / 94 AD), Aḥmad b. Ḥanbal, Al-Shāfiʿī and the majority of scholars; they said, ‘the contract is considered invalid without a guardian’. Ibn Al-Mundhir (d. 319 AH / 931 AD) claimed that he does not know any of the companions who said anything different to this.³⁶²

However, Ḥanafis argue that even if it is approved that the *ḥadīth* is authentic, it is still not evidence for the majority opinion, because the *ḥadīth* might give rise to differing interpretations, such as:

³⁶⁰ See Al-Judayʿ, *Tahrīr ʿUlūm al-Ḥadīth*, 1st edn (Beirut, Lebanon: Al-Rayan, 2003), II, pp. 947.

³⁶¹ See Al-Māwardī, *Al-Ḥāwī al-Kabīr*, XI, p. 60. Also see Ibn Qudāma, *al-Mughnī*, VII, p. 337.

³⁶² Muḥammad b. ʿAlī, al-Shawkānī, *Nayil al-Awtār*, ed. by Rabiʿ Abu Bakr ʿAbd al-Bāqī, 1st edn (Beirut, Lebanon: Dar al-Jil, 1992), VI, p. 119.

- a- The *walī* mentioned in the *ḥadīth* might be the nearest of her parental relatives (*ʿaṣba*).
- b- It might be any man appointed by the woman whether he is a relative or not.³⁶³

Moreover, they mentioned several possibilities for the meaning of (*walī*) in the *ḥadīth*; one of the most significant is that the *ḥadīths* which stipulate the presence of the *walī* are related to marrying off the minor not the unmarried major girl. Therefore, as long as this *ḥadīth* has many possibilities, it cannot be directed to one specific purpose without the support of extra evidence from either the Qur'an, and *Sunna* or '*ijmāʿ*' (unanimous consensus).³⁶⁴ The Ḥanafīs also responded to the majority in using this *ḥadīth*, claiming it is not valid to be used as evidence in their disagreement with the majority because their opinion of the validity for the woman to conclude her marriage contract by herself is indeed a marriage with the presence of a *walī* because the woman is the *walī* of herself, like the man is the *walī* of himself. It is also because the *walī* has the right of *wilāya* over those under his *wilāya* and the woman has that right in regard to her property, so she also has the same right [of *wilāya*] over herself.³⁶⁵ They suggest that even if we accept the authenticity of this *ḥadīth*, we still do not see that it conditions the presence of the *walī* in the marriage contract, as the negation (*naḥy*) indicates the negation of perfection (*naḥy kamāl*), but not the validity of the contract. Therefore, this *ḥadīth* must be taken on the meaning of recommendation i.e. it is recommended for a woman to appoint from her parental relatives (*ʿaṣba*), or someone to perform the marriage contract on her behalf, but she is not obliged to do so.³⁶⁶

In conclusion, the Ḥanafī jurists believe that all of these interpretations are acceptable in the texts that include generality and which are unrestricted, so a general address can be directed

³⁶³ See Al-Ṭaḥāwī, *Sharḥ Maʿānī al-ʿĀthār*, III, p. 10.

³⁶⁴ See Al-Ṭaḥāwī, *Sharḥ Maʿānī al-ʿĀthār*, III, p.10.

³⁶⁵ See Al-Kāsānī, *Badāʾiʿ al-Ṣanāʿ*, III, p. 374; Al-Jaṣṣaṣ, *Aḥkām al-Qurʿān*, II, p. 103.

³⁶⁶ See Muḥammad b. Ibī Sahl, al-Sarakhsī, *al-Mabsūṭ* (Beirut, Lebanon: Dar al-Macrifah, '[n.d.]'), V, p. 12; Ibn ʿĀbdīn, *Radd al-Muḥtār*, III, p. 56.

to a specific purpose; such an interpretation must be used to avoid any conflict between texts, so they can combine the meanings to form a complete context.³⁶⁷

The majority responded with the view that they did not accept the Ḥanafīs claim that the negation (*nafy*) in the *ḥadīth* indicates the negation of the perfection (*nafy kamāl*) of the contract but not the validity of it because interpreting it on the meaning of recommendation contradicts the original rule regarding the legal texts, as the original rule is negation (*nafy*) of the legal reality (*ḥaqīqah sharʿiah*), so a marriage without the presence of a *walī* must be legally invalid. Moreover, the text of the *ḥadīth* states that the *walī* must be a man not a woman. If the address was directed to a woman the *ḥadīth* would have a feminine pronoun (*wilāya*) and if the address is directed to the woman –as you are saying- then it would not bring anything new because we already know that there is no marriage without the presence of the woman, i.e. the wife. Moreover, the one performing the marriage contract for him/herself is not called a *walī* –as Al-Khaṭṭabī (d. 388 AH / 998 AD) said- and if that is approved in the issue of guardianship (*wilāya*) it must be also approved in the issue of witnessing making the woman witness for herself which is invalid in the issue of witnessing. It must therefore be invalid in the issue of guardianship also.³⁶⁸

According to al-Khaṭṭabī this *ḥadīth* indicates the negation of the approval of the marriage generally and specifically, except with the presence of a guardian. Although, Ḥanafīs interpreted it as a negation of perfection (*nafy kamāl*), al-Kaṭṭābī claimed that this is invalid interpretation from Ḥanafīs, because the general address comes depending on its origin either in the form of permissibility [incomplete] or perfection [complete] and the negation requires invalidity in transactions because they have one possibility only, unlike acts or worship which can have two possibilities of validity; complete and incomplete.³⁶⁹ Additionally, Ibn Ḥajar believes that using the *ḥadīth* “No marriage (*nikāḥ*) (should be done) without a guardian (*walī*)” as evidence needs reconsideration because it is a formula that needs weighting, so the *ḥadīth* is suitable [as evidence] to those who assumed the negation

³⁶⁷ See Ibn ʿAbdīn, *Radd al-Muḥtār*, III, p. 56.

³⁶⁸ See Al-Māwardī, *Al-Ḥāwī al-Kabīr*, XI, p. 60; Al-Khaṭṭabī, *Maʿālim al-Sunan*, III, pp. 198-99.

³⁶⁹ See Al-Khaṭṭabī, *Maʿālim al-Sunan*, III, p.198.

of validity and unsuitable to those who assumed the negation of perfection and therefore, the first possibility needs to be supported by extra evidence. Moreover, Ibn Ḥajar considered what al-Bukhārī stated as a title, ‘Whoever said, “A marriage (*nikāḥ*) is not valid except through the *walī*” as evidence to support the first possibility. Ibn Ḥajar then explained that reason why al-Bukhārī did not mention the *ḥadīth* “No marriage (*nikāḥ*) (should be performed) without a *walī*” in his *Ṣaḥīḥ* was because the *ḥadīth* did not fulfil the conditions set by al-Bukhārī to accept the *ḥadīth*.³⁷⁰ Likewise, Muslim did not mention this *ḥadīth* in the chapter on marriage in his *Ṣaḥīḥ* because it did not meet his standard.

4.12.4 The Jurists’ Understanding (*fiqh*) of the *ḥadīth* “Her Marriage is Void”

Now we turn to the other evidence which used by jurists to prove that the guardian is a condition or pillar for the validity of the marriage contract, which is the *ḥadīth*: “Whichever woman marries without her guardian’s permission, her marriage is void, her marriage is void, her marriage is void. If he (i.e. the husband) performs intercourse with her, the dowry (*mahr*) becomes her right because he consummated the marriage (*nikah*). And if they dispute, the ruler (*sulṭān/ qāḍī*) would then be the guardian of the one who does not have a guardian”. As for Ḥanafīs, this *ḥadīth* has two deficiencies: one in its chain of narration (*sanad*) and one in the text itself (*matn*), so, these are the two reasons that stop Ḥanafīs acting upon any lone-narrated *ḥadīth* (*aḥād*). Accordingly, the Ḥanafīs object to the majority’s use of this *ḥadīth* for the aforementioned reasons in line with acting upon the significance of the text.

First, they claim that this *ḥadīth* is weak (*ḍa‘īf*) so it is not accepted for use as evidence (*istidlāl*) because:

- a- One of its narrators in the chain is questionable; Sulaymān b. Mūsa (d. 119 AH / 737 AD)

³⁷⁰ See Ibn Ḥajar, *Fath al-Bārī*, IX, p. 229.

b- Al-Zuhrī (d. 124 AH / 742 AD) denies this *ḥadīth*, despite him being one of the narrators.³⁷¹

Second, they claim that it was proven that ʿĀ’isha’s practice was opposite to the significance of her narration and so was al-Zuhrī’s legal opinion (*fatwā*). Ibn ʿAbd al-Barr mentioned that, this saying, ‘al-Zuhrī, who has one narration of this *ḥadīth*, used to say, ‘If a woman marries someone who is suitable (*kuf*)’ without the permission of her guardian (*walī*) then that is permissible’.³⁷² Abū Jaʿfar al-Ṭahāwī also said: ‘If what is reported from al-Zuhrī was proven (denying his narration of the *ḥadīth* of ʿĀ’isha) then it would have been narrated from ʿĀ’isha that which contradicts with her narration. It was reported that ʿĀ’isha married off the daughter of her brother, Ḥafṣah bint ʿAbd al-Raḥmān, to al-Mundhir b. al-Zubair while ʿAbd al-Raḥmān had gone to Syria (*shām*). When ʿAbd al-Raḥmān returned he became upset and said: ‘Is this done to someone like me?’ ʿĀ’isha then talked to al-Mundhir who replied: ‘That is for ʿAbd al-Raḥmān to decide’ and ʿAbd al-Raḥmān replied: ‘I would not undo something you (ʿĀ’isha) did’ so he left Ḥafṣah with him and that wasn’t considered to be a divorce, i.e. the rejection from ʿAbd al-Raḥmān to what ʿĀ’isha has done.’³⁷³ Therefore, the Ḥanafī jurists deduce from that it is impossible that ʿĀ’isha considered marrying off the daughter of ʿAbd al-Raḥmān without his presence acceptable and considered the contract as valid while she knew that the Prophet said, “No marriage (*nikāḥ*) (should be performed) without a guardian (*walī*)”, or said, “Whichever woman marries without her guardian (*walī*)’s permission, her marriage is void, her marriage is void, her marriage is void”. This proves the unsoundness of what was related to al-Zuhrī in this regard.³⁷⁴

Al-Kāsānī argues that the *ḥadīth* of ʿĀ’isha is dependent on al-Zuhrī who denied it when it was presented to him and that causes a weakness in the approval of the *ḥadīth*. Moreover, He believed that this weakness is even more clearly by the fact that its narrator is ʿĀ’isha,

³⁷¹ See al-Ṭahāwī, *Sharḥ Maʿānī al-ʿĀthār*, III, pp. 7-8.

³⁷² Yusuf b. ʿAbd Allah, Ibn ʿAbd al-Barr, *al-Istidhkār*, ed. by, ʿAbd al-Razzaq al-Mahdi, 1st edn (Beirut, Lebanon: Dar Ehia Al-Tourath Al-Arabi, 2001), IV, p. 395.

³⁷³ Mālik, Ibn ʿAnas, *al-Muwaṭṭaʾ*, Ahmad Ratib Armush, 2nd edn (Beirut, Lebanon: Dar al-Nfaes, 1977), *ḥadīth* number: (1171).

³⁷⁴ See Al- Ṭahāwī, *Sharḥ Maʿānī al-ʿĀthār*, III, p. 8.

whose opinion is the permissibility of marriage without a *walī* with the evidence that she married off the daughter of her brother ^cAbd al-Raḥmān to al-Mundhir b. al-Zubair. Therefore, if that is her opinion in regard to this issue then how can she narrate a *ḥadīth* that she does not practice?³⁷⁵ And according to al-Sarakhsī, this proves that what was narrated of the *ḥadīth* of ^cĀ'isha was unsound because if the narrator gives a *fatwā* (legal opinion) that contradicts the *ḥadīth* then that is considered as evidence for the weakness of the *ḥadīth*.³⁷⁶ In addition for the narrator to be a trustworthy (*thiqa*) and upright person (^c*adl*), Abū Ḥanīfah stipulated that the narrator doesn't practice the opposite of what he narrates and they considered that a criticism to his opposing narration. Amongst the examples they gave for this rule is the *ḥadīth* of ^cĀ'isha on the invalidity of the marriage without a guardian (*walī*) and they justified this with the argument that the narrator's practice would contradict with the significance of his narration only if he knew that an abrogation took place or that the Prophet's intention behind the rule was different to that which others understood.³⁷⁷

Thus, it is one of the conditions that Ḥanafis gave for their acceptance of a solitary *ḥadīth* (*al-āḥād*) that the narrator does not abandon practising the rule mentioned in the *ḥadīth* or choose a different opinion. According to al-Juday^c,³⁷⁸ this is a methodology that is approved by the majority of scholars in criticising the *ḥadīth*, as they considered it to be a cause of deficiency in the *ḥadīth*. Therefore, the Ḥanafis were not singled out in this regard. It is a common issue in the science of the principles of Jurisprudence (^c*Ilm al-Usūl*) which caused disagreement between scholars.³⁷⁹

³⁷⁵ See Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, III, p. 375; also See Ibn al-Humām, *Fath al-Qadīr*, III, p. 260.

³⁷⁶ Al-Sarakhsī, *al-Mabsūṭ*, V, p.11.

³⁷⁷ See Al-Bukhārī, ^cAbd al-^cAzīz b. Aḥmad, *Kashf al-'Asrār*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1997), III, pp. 96-102; Muḥammad b. ^cAbd al-Ḥamīd, al-Asmandī, *Badhl al-Nazar Fī al-'Usūl*, ed. by Muḥammad Zaky ^cAbd al-Bar, 1st edn (Cairo, Egypt: Dar al-Turath, 1992), pp. 481-82 ; Abū Zuhra, *'Usūl al-Fiqh*, p.109.

³⁷⁸ ^cAbd Allah b. Yusuf b. Ya^cqūb al-Ya^cqub al Juday^c is one of the leading scholars of our time, specially *ḥadīth* science, and a key reference-point for the ^cUlama in the West and beyond, born in al-Basra, Iraq in 1958.

³⁷⁹ See Al-Juday^c, *Taḥrīr 'Ulūm al-Ḥadīth*, II, pp. 754-55 .For more details also See Aḥmad b. Maḥmūd, al-Shanqīṭī, *Khābar al-Wāḥid wa Ḥujjatuh*, 1st edn (Madinah, Saudi Arabia: Islamic University of Madinah Press, 2002), pp. 330-48.

Abū Zayid al-Dabbūsī (d. 430 AH / 1039 AD) confirms this rule of the Ḥanafīs, and claim that Abū Ḥanīfah and Abū Yusuf did not act upon this *ḥadīth* stating that the reason for this is that Ibn Jurayj (d. 150 AH / 767 AD) asked al-Zuhrī about this *ḥadīth* and he didn't know it.³⁸⁰ However, according to al-Dabbūsī, this rejection of the solitary *ḥadīth* (*ḥadīth āḥād*) is restricted by conditions including:

- a- If the narrator denies the narration before he narrates his own version, the *ḥadīth* then would have no consideration because his knowledge increased by the second [later] narration.
- b- If the narrator denies the narration after he narrates his own version of the *ḥadīth* then:
 - If his abandonment of the *ḥadīth* is built on his own interpretation then the proof of the rule (*ḥujjah*) remains in the *ḥadīth* because his own interpretation is only an opinion like any other opinion.
 - If his practice contradicts with what he has narrated then his abandonment of practising the [rule] in the *ḥadīth* without any interpretation caused the *ḥadīth* to become rejected (*mardūd*) because that can only be a result of negligence, denial or forgetfulness, or a knowledge he has of an abrogation of the *ḥadīth* he narrated.

Therefore, the practice of ʿĀ'isha when she married the daughter of her brother ʿAbd al-Raḥmān to al-Mundhir without his permission indicates that she knew the rule in the *ḥadīth* which she narrated from the Prophet.³⁸¹ As long as Ḥafṣah bint ʿAbd al-Raḥmān stayed with her husband al-Mundhir b. al-Zubair with ʿAbd al-Raḥmān saying to his sister ʿĀ'isha, 'I wouldn't undo something you did' the Ḥanafī jurists believe that it wasn't a divorce, so this requires that the opinion of ʿĀ'isha is that marriage without a guardian (*walī*) is valid as it is

³⁸⁰ Al-Dabbūsī, ʿUbaid Allah b. ʿUmar Abū Zayid, *Taqwīm al-Adillah*, ed. by Khalīl al-Mays, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 2001), p. 202.

³⁸¹ See Ibid, pp. 201-03; also See Nyazee, *Islāmic Jurisprudence*, pp.174-75.

not possible that ʿĀʿisha and ʿAbd al-Raḥmān had knowledge from the Prophet of the invalidity of the marriage without a *walī* then choose a different opinion.³⁸²

The Ḥanafīs argued by suggesting that even if we accept the validity of this *ḥadīth* and clear it of all causes of criticism surrounding it, we still refuse to consider it as evidence for the invalidity of the marriage just because the *walī* of the woman does not conclude the marriage contract on her behalf. Rather, we give that rule to the woman who marries a non-suitable husband (*kufʿ*) so it means that if the woman marries with a dowry less than the dowry given to similar brides (*mahr al-mithl*) or to a man who is not socially suitable to her, then the marriage is considered to be invalid. Thus, we would act upon the significance of this *ḥadīth* and approve the ruling of invalidity mentioned in it. This was the opinion of the later Ḥanafī scholars like al-Sarakhsī but the authentic approved transmissions of the legal opinions of the school (*ẓāhir al-riwāya*) in the Ḥanafī school of thought judges that the marriage of the woman who marries with a dowry less than the dowry given to similar brides (*mahr al-mithl*) or to a man who is not socially suitable is valid but the guardians have the right to annul the marriage through the judiciary (*al-qaḍāʾ*).³⁸³ It is interesting to note here that some academics have highlighted that Iraq, the birthplace of the Ḥanafī School, was very different in nature to other centres of knowledge, with a much less egalitarian culture than Medina and Egypt, which may have influenced the jurists various positions with regard to suitability.³⁸⁴

The responses of the majority to the objections presented by Ḥanafīs were as follows:

³⁸² See Aḥmad b. Muḥammad b. Salamah Abū Jaʿfar, al-Ṭaḥawī, *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ*, ed. by ʿAbd Allah Nadhīr Aḥmad, 1st edn (Beirut, Lebanon: Dar al-Bashayr al-Islamiyyah, 1995), II, p. 249. In *al-Muwaṭṭaʾ* Mālik mentioned this *ḥadīth* in the chapter of divorce, al-Zarqānī reported that Mālik’s saying, ‘that [action] was specific to ʿĀʿisha because of her position to the Prophet’, meaning that no one can marry off a virgin who has a father but her father or grandfather or whoever comes next in order from her *ʿaṣbah* (parental relatives) and ʿĀʿisha is not one of them and it wasn’t proven that ʿAbd al-Raḥmān has authorised her which indicates that the approval of her action was specific to her. See Muḥammad b. ʿAbd al-Bāqī, al-Zarqānī, *Sharḥ al-Muwaṭṭaʾ*, 1st edn (Beirut, Lebanon: Dar al-Fikr, 1996), III, p.205.

³⁸³ See Muḥammad Anwar Shah, al-Kashmīrī, *al-ʿArf al-Shathī Min Sharḥ Sunan al-Tirmithī*, ed. by Maḥmūd Shākīr, 1st edn (Beirut, Lebanon: Dar Ihya al-Tuorath al-Arab, 2004) II, p. 363; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, III, p. 260.

³⁸⁴ See Ali, *Marriage and Slavery*, p. 42.

1- The answer to the first objection is as follows:

If al-Zuhrī had forgotten what he narrated or denied the narration of Sulaymān b. Mūsā related to him, the *ḥadīth* is still more famous than al-Zuhrī denying or forgetting it. There is no legal effect for the narrator's denial of the *ḥadīth* after he narrates it as the constant knowledge of the narration by the narrator is not a condition for the soundness of his narration.³⁸⁵ Ibn Ḥajar responded to that –with the assumption that the *ḥadīth* is sound– giving the argument that al-Zuhrī's forgetting the *ḥadīth* doesn't necessary mean that Sulaymān b. Mūsā was deluded in his narration.³⁸⁶ Ibn Ḥibbān said, 'this narration deluded those who did not master the science of *ḥadīth* into judging it as having broken chain (*munqatiʿ*) or a *ḥadīth* with no origin because of what Ibn ʿUliyya reported from Ibn Jurayj after mentioning this narration. He (Ibn Jurayj) said, 'I met al-Zuhrī and mentioned that [the narration] but he didn't know it'. Ibn Ḥibbān commented, 'this is not a reason that causes weakness to the narration because the good, trustworthy (*thiqah*) and skilled narrator amongst the people of knowledge might narrate a *ḥadīth* then forget it, or not know it when asked about the *ḥadīth*; his forgetting the narrations he narrated does not mean the unsoundness of the original narration'.³⁸⁷

And al-Ḥākim said about this *ḥadīth* of ʿĀ'isha, 'this *ḥadīth* is authentic (*ṣaḥīḥ*) with the conditions of *al-shaykhān* [al-Bukhārī and Muslim] who did not report it' (*lam yukhrijāh*).³⁸⁸

However, the Ḥanafis still cannot accept this *ḥadīth* based on their principle of acceptance of a solitary (*āḥād*) *ḥadīth*.

³⁸⁵ See Al-Māwardī, *al-Ḥawī al-Kabīr*, IX, pp. 40-41.

³⁸⁶ See *Talkhīṣ al-Ḥabīr*, III, p. 156.

³⁸⁷ Muḥammad, Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān*, Tartīb Ibn Balabān, ed. by Shuʿayb al-'Arna'ūt, 2nd edn (Beirut, Lebanon: Al-Risalah Publishers, 1993), IX, pp. 385-86 ; Also See Ibn al-Jawzī, ʿAbd al-Raḥmān b. ʿAli Abu al-Faraj, *al-Taḥqīq Fī Masā'il al-Khilāf*, ed. by ʿAbd al-Muʿī Amīn Qalʿahjī, 1st edn (Aleppo, Syria: Dar al-Way al-Arabi, 1998), VIII, p. 273.

³⁸⁸ Al-Ḥākim, *al-Mustadrak*, II, p. 200. Al-Albānī judged this *ḥadīth* as authentic (*ṣaḥīḥ*), and he explain that as all the narrators in the chain of narration of this *ḥadīth* are all trustworthy (*thiqāt*) apart from Sulaymān b. Mūsā –regardless of his high status in jurisprudence– as al-Dhahabī described him in his book '*al-Duʿafā*' as: honest (*ṣadūq*) and Al-Bukhārī said: 'he has *manakīr* narrations (*ḥadīth* whose narrator cannot be classified to be upright and retentive of memory)', and then al-Albānī said, 'it is a fact that this *ḥadīth* wasn't reported by Sulaymān b. Mūsā only but a group of narrators followed-up him in this narration and so, depending on that, this *ḥadīth* is authentic (*ṣaḥīḥ*). See *Irawā' Al-Ghalīl*, VI, pp. 246-47.

2- The answer to the second objection is as follows:

The practiced rule in the science of *ḥadīth* is that what is important is what the narrator narrates not his independent reasoning (*ijtihād*), because if the narration is approved then it would be enough proof as his approved narration from the Prophet is the original cause for the obligation of acting upon the [rule] in the narration. As for the narrator's opinion, it is his own personal reasoning (*ijtihād*) which might be wrong because of his human nature and the *ijtihād* of someone cannot be considered to be a proof over anyone else. Therefore, the *ḥadīth* is a clear text in its significance with no possibility for interpretation or contradiction so there will be no interpretation in case the narrator contradicts with what he has narrated except by assuming possibilities, such as: he might have come across a text that abrogated the first rule; it might even be a cause of abrogation in his opinion but not in the opinions of others; he might have interpreted the text depending on his own understanding, so it is unacceptable to abandon the main text which is a proof without any possibilities and follow the independent reasoning of the narrator which is opened to possibilities. Thus we can explain ʿĀ'isha's practice that contradicted the significance of the *ḥadīth* she narrated regarding the invalidity of the marriage without a *walī* and al-Zuhri's opinion of the permissibility of marriage without a *walī* but their abandonment of the practice upon the *ḥadīth* they narrated is not considered as evidence enough to stop practising the significance of the *ḥadīth*.³⁸⁹

The majority of jurists also respond to the Hanafi's objection by noting that ʿĀ'isha's opinion was that a marriage without a *walī* is valid because she married the daughter of her brother while he was absent. ʿĀ'isha's narration is not explicit in confirming that she concluded the marriage contract herself as the term *zawwajat* (married) might mean that she facilitated the means of marriage like engagement, dowry and consent, but did not conclude the contract herself so the marriage was attributed to her because of her choice of the bridegroom and permission. Following this, she may have appointed a person who has the

³⁸⁹ See Al-Āmidī, ʿAli b, Ibī ʿAli Sayf al-Dīn, *Al-Iḥkām Fī 'Uṣūl al-Aḥkām* (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, '[n.d.]'), II, pp. 342-43; Ibn Ḥazm ʿAli b. Aḥmad, ed. by Aḥmad Shākir, *al-Iḥkām Fī 'Uṣūl Al-Aḥkām* (Beirut, Lebanon: Dar al-Afaq al-Jadedah, 1979), II, pp. 16-20.

right of *wilāya* in the absence of her brother °Abd al-Raḥmān, in order to conclude the marriage contract. Following on from this, the suggestion that an indication for the soundness of this interpretation is what Ibn Rajīḥ °Abd al-Raḥmān Ibn al-Qāsim narrated from his father from °Ā’isha, that she married a woman from the daughters of her brother to a man from the daughters of her sisters; she made a veil between them and talked until nothing remained but the contract. She then ordered a man to perform the marriage contract and said: “The matter of marriage is not [a right] of women”.³⁹⁰ Thus, the majority of jurists said that the meaning of the term *zawwajāt* (married) thus became clear and it does not contradict with what she narrated from the Prophet because she was among the latest narrators who narrated the saying of the Prophet, “No marriage (should be done) without a *walī*”. Ḥanafīs claim that it was possible that she ordered a man to perform the marriage contract so the marriage was attributed to her because she ordered it [to be done].³⁹¹ However, the majority had no response but to interpret the action of °Ā’isha in a way that negated its contradiction with her narration.³⁹² Ibn Al-Qāsim –the great student of Mālik- did the same thing and assumed possibilities to explain °Ā’isha’s action. He assumes that she authorised someone else at the time of performing the contract, but he then said: ‘scholars stated that the *walī* of a woman cannot authorise but another man and °Ā’isha cannot be the representative of her brother, so how can she authorise someone else?’ He didn’t find any answer to his question but to say: ‘if the *walī* authorises someone to authorise someone else to perform the marriage contract, then there is no objection for him (i.e. the *walī*) to authorise a woman for example’.³⁹³

According to al-Māwardī, the majority’s opinion in regard to the *ḥadīth* of °Ā’isha is evidence for the invalidity of marriage without a *walī* with no specifications (*takhṣīṣ*) or distinction (*tamyīz*)’ (i.e. it is for every woman in any circumstances), so we cannot specify this *ḥadīth* for the invalidity of the marriage of the ward [male or female], or the woman

³⁹⁰ Ibn Abī Shaybah, Abū Bakr, *al-Kitāb al-Muṣannaḥ*, ed. by °Abd al-Salām Shāhīn. 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1995), III, p.444.

³⁹¹ See Al-Ṭaḥawī, *Mukhtaṣar Ikhtilāf Al-°Ulamā’*, II, p. 249.

³⁹² See Ibn °Abd Al-Barr, *al-Istidhkār*, V, p. 35; al-Zayla’ī, *Naṣb al-Rāyah*, III, p.186.

³⁹³ See al-Zarqānī, *Sharḥ al-Muwatta’*, III, p. 205.

who marries off herself to one who is not *kuf*' or with a dowry less than *mahr al-mithl* because that is a form of control of the outcome of the text without an evidence.³⁹⁴

Al-Khaṭṭābī claims that, if the contract is concluded without the permission of the guardian then it is considered invalid even if the guardian allows it afterwards. The Prophet invalidated the marriage, repeating it three times. It is a confirmation of the annulment and cancelation of the contract.³⁹⁵

Moreover, besides these two well-known *ḥadīths* about the *wilāya* in marriage, Ḥanafis have used others to support their argument against the majority, asserting that most of the *ḥādīths* that condition the presence of a *walī* in the marriage contract have been criticised in their *isnād* (chain of narration). They also understood from some *ḥādīths* something different to that what the majority understood; in order to support their *ijtihād* (independent reasoning), and they opposed the evidence used by the majority by other *ḥādīths* such as:

- 1- The *ḥadīth* of the Prophet: “A woman without a husband –previously married- (*‘aiyyim*) should not be married until her permission is asked, nor should a virgin (*bikr*) be married without her permission”. They (the people) asked ‘What is her permission?’ He replied “it is by her keeping silent” and in another narration by ‘Ā’isha “silence is her acceptance”.³⁹⁶
- 2- The *ḥadīth* of the Prophet: “A woman who has been previously married (*thayyib*) has more right over her person than her guardian, and a virgin (*bikr*) must be consulted by her father for her consent, and her consent is her silence” or he might have said “silence is her approval”.³⁹⁷
- 3- The *ḥadīth* of ‘Ā’isha: “I asked Allah's Messenger about a virgin who is married by her family, whether it was necessary or not to consult her. The Messenger said, “Yes,

³⁹⁴ See Al-Māwardī, *al-Ḥāwī Al-Kabīr*, IX, p. 40.

³⁹⁵ See Al-Khaṭṭābī, *Ma‘ālim al-Sunan*, II, p. 566.

³⁹⁶ Al- Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (5136).

³⁹⁷ Muslim b. al-Ḥajjāj, al-Naysabūrī, *Ṣaḥīḥ Muslim, Mawsū‘ahat al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999), *ḥadīth* number: (3478).

she must be consulted”. ^cĀ’isha reported: “I told him that she feels shy”, whereupon the Messenger said: “Her silence implies her consent”³⁹⁸

Ḥanafīs argue that these *ḥādīths* apparently approved the right of the woman in marrying off herself without a *walī* and that there is no consideration for the *walī* in the marriage contract as the adult woman of sound mind is the *walī* of herself and no one has a *wilāya* over her.³⁹⁹

According to al-Ṭaḥāwī, the saying of the Prophet, “A woman who has been previously married has more right over her person more than her guardian”, is clarifying that she has the right to marry off herself not her *walī*. He also claims that the *ḥādīths* also indicate that the virgin (*bikr*) has the same ruling, meaning that there is no authority for her *walī* over herself and that her father is ordered not to marry her off without seeking her permission first, just as he is ordered not to marry off the previously married without seeking her approval first.⁴⁰⁰ Therefore, if the father marries off his virgin daughter without seeking her permission first –abandoning the order of the Prophet by doing so- then this marriage by him is impermissible until her permission is granted.⁴⁰¹

The Ḥanafīs’ opinion is that the term (*‘ayyim*) in these *ḥādīths* means the woman who has no husband whether she is a virgin, previously married, a divorcee or a widow. They said that this is the opinion of the scholars of language in regards the term (*‘ayyim*). They also believe that these *ḥādīths* informed that it is right of the *walī* to perform the marriage contract with the woman’s consent and that the Prophet gave her more right, so the only way she gets more right is if she has the right to marry off herself even without her guardian’s consent.⁴⁰² For al-^cAynī, there is no doubt that in the saying of the Prophet, an *‘ayyim* has more right over her person” *‘ayyim* is a general term that includes the previously married, the virgin and the widow. Therefore, the generality in the text must be acted upon and the rule it came with is definitely obligatory and Abū Ḥanīfah prefers acting

³⁹⁸ Muslim, *Ṣaḥīḥ Muslim*, *ḥādīth* number (3475).

³⁹⁹ See Al-Kāsānī, *Badā’i^c al-Ṣanā’i^c*, III, p. 373; Al-Sarakhsī, *al-Mabsūṭ*, V, pp. 10-12.

⁴⁰⁰ See Al-Ṭaḥāwī, *Sharḥ Ma^cānī al-‘Āthār*, III, p. 11.

⁴⁰¹ See Khālīd Maḥmūd, al-Ribāṭ, *Tuḥfat al-Akhyār bi Tartīb Mushkil al-‘Āthār*, 1st edn (Riyadh, Saudi Arabia: Dar Balansiyah, 1999), III, pp. 486-87.

⁴⁰² See Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, III, p. 262; Al-^cAynī, *al-Bināyah*, IV, p. 581.

upon the general form to the specific form.⁴⁰³ Therefore, Ḥanafis believe that there is no difference between the woman who has been previously married (*thayyib*) and the virgin (*bikr*), but the virgin usually has more shyness so she doesn't declare her wish to marry or seek to, whereas the woman who has been previously married and who has therefore got experience of marriage is usually less shy than the virgin. Therefore, the Lawgiver took into account the situation of the virgin and settled for asking for her consent by seeking her permission in order for her to express her approval of the marriage.⁴⁰⁴

However, the majority of jurists argued this from a number of different angles. For instance, the term (*'ayyim*) in the Arabic is given to a woman without a husband, whether she is a virgin or previously married, and also the man without a wife, whether he has married before or not. It is also used for a woman if she marries and then becomes lawful to marry again -either by divorce or death- whether she is a virgin or previously married.⁴⁰⁵ The majority claim that giving this description to the virgin is not common, therefore, it can be assumed that it is a metaphor that is commonly used. The description of *'ayyim* as given to the man without a wife is a form of analogy between his situation and the situation of the woman without a husband. However some linguistic scholars give the same term to both man and woman; this is related from Ibn Abī °Ubayd and al-Naḍr b. Shumayl.⁴⁰⁶

Thus, the scholars disagreed about what is meant by the term *'ayyim* in these *ḥādīths* despite the agreement between Arabic linguists that it is given to the woman without a husband whether she is young or old, virgin or previously married, but then jurists disagree over what is meant by this term in this case. The scholars of Ḥijāz and all jurists said; it is the *thayyib* supporting their opinion with the arguments the second narration explained it as the *thayyib* by making the previously married woman different to the virgin and because it is more commonly used for *thayyib* in the language. The scholars of Kufa said that *'ayyim* is every

⁴⁰³ See Al-°Aynī, *al-Bināyah*, IV, pp. 580-81.

⁴⁰⁴ See Al-Zuḥaylī, *Sharḥ al-Wilāya fī °Aqd al-Zawāj*, pp. 21-22.

⁴⁰⁵ See Muḥammad b. Abī Bakr b. °Abd al-Qādir, al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, 1st edn, (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 1990), p. 22; Aḥmad b. Zakariyya, Ibn Fāris, *Maqāyyīs al-Lughah* (Cairo, Egypt: Dar al-Hadith, 2008), p. 64.

⁴⁰⁶ See Ibn °Ashūr, *al-Tahrīr wa al-Tanwīr*, XVIII, p. 215.

woman without a husband, whether she is a virgin or previously married as required by the significance of the language.⁴⁰⁷

With regard to the saying of the Prophet ‘has more right over her person’ (*‘aḥaqq bi nafsīha*), the word *‘aḥaqq* is used to indicate a common right between two parties with one of them has more right than the other. It is a possibility that what is intended by it is that the woman is entitled to more rights than her *walī* in everything, or that she is more entitled of the consent in regards of her marriage.

Shafī^cīs believe that both of them (the guardian and the previous married woman) have a right and the *thayyib* has more right. Probably, the right of the woman is her consent and freedom to choose and the right of the *walī* is accepting the permission to conclude the contract. However, they claim that the virgin (*bikr*) wasn’t granted the same right as the *thayyib* because of the difference between them (i.e. that the *thayyib* has experienced marriage and living with a man, while the virgin has not), so the Prophet gave the *bikr* the right that her permission should be sought by the father and the grandfather only, which is *mustaḥabb* (recommended). As for other guardians, seeking the permission of the virgin is obligatory and she must not be married before granting that permission, whereas that *thayyib* has more right over her person than her guardian, so she must not be forced if she refuses to marry or prevented (*‘adl*) if she seeks to marry.⁴⁰⁸

The *ḥādīths* required a *walī* for the woman in her marriage contract, despite the fact that she has more right over her person, conclude that the right of the *walī* over her is not dropped under any circumstances but the right of the woman is her consent and freedom to choose and the right of the *walī* is accepting the permission to perform the contract. This combines these *ḥādīths* and the *ḥādīth* of “No marriage (should be done) without a *walī*” and the other *ḥādīths* that condition the presence of the *walī*. Therefore, no marriage contract is valid

⁴⁰⁷ See Yahya b. Sharaf al-Dīn, al-Nawawī, *al-Minhāj, Sharḥ Ṣaḥīḥ Muslim*, ed. by Khalīl Ma'mūn Shīḥah, 5th edn (Beirut, Lebanon: Dar al-Marefah, 1998), IX, p. 208.

⁴⁰⁸ See *Ibid*, IX, p. 208.

without a *walī* after the woman approves or her permission is granted, but she cannot perform it on her own.⁴⁰⁹

Ibn Al-^cArabī argued that if it is said that the saying of the Prophet about a previously married woman, “She has more right over her person than her guardian” grants the woman a more clear right, then it should be noted that this is true as the woman has the right to accept or refuse the marriage and she chooses the husband, dowry and consent to the contract. The *walī* has the right to conclude the contract legally.⁴¹⁰ Thus, the *walī* has no right to force the previously married woman, but that does not mean that she can conclude the marriage contract without her *walī* exactly like she cannot conclude it without witnesses.⁴¹¹

The Ḥanafis responded by arguing that the right –in regards to marriage- is for the woman over and above her guardian, not for him over her. This is evidenced by the permissibility for her to marry in case he is absent, in a way that might cause her to miss a marriage opportunity to a suitable man (*kuf*). Furthermore, the judge can force the *walī* if he is present but refuses to marry her to someone she accepted and the judge can also prevent the marriage if she refuses and the *walī* accepts, indicating that she has the right over him.⁴¹²

Also, the Ḥanafis opposed the opinion of the majority using the following evidence from a *ḥadīth* of Ibn ^cAbbās: ‘A virgin came to the Prophet and mentioned that her father had married her against her will, so the Prophet allowed her to exercise her choice’. They asserted that it means that her father married her without her consent, and the Prophet gave her the right to allow the marriage or to disallow it.⁴¹³ Abū Ja^cfar al-Taḥawī believes that this *ḥadīth* confirms that the *walī* has no right over the virgin (*bikr*) in regard to her marriage without her approval.⁴¹⁴ This is further supported by the *ḥadīth* of ^cĀ’isha: ‘A girl came to her and said: ‘My father married me to his nephew (brother's son) so that he might raise his own social status thereby, and I was unwilling.’ She (^cĀ’isha) said: ‘Sit here until the

⁴⁰⁹ See Al-Māwardī, *al-Ḥawī al-Kabīr*, IX, p. 43.

⁴¹⁰ See Ibn Al-^cArabī, *Ārīḍat al-Aḥwadhī*, III, p.14.

⁴¹¹ Al-Māwardī, *al-Ḥawī al-Kabīr*, IX, p.40.

⁴¹² See Al-Kāsānī, *Badāi^c al-Ṣanāi^c*, III, p. 375.

⁴¹³ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2096).

⁴¹⁴ See al-Ribāt, *Tuḥfat al-Akhyār bi Tarṭīb Mushkil al-‘Āthār*, III, p. 491.

Prophet comes.' Then the Messenger of Allah came, and I told him what she had said. He sent word to her father, calling him, and he left the matter up to her. She said: 'O Messenger of Allah, I accept what my father did, but I wanted to know whether women have any say in the matter of their marriage'.⁴¹⁵

The Ḥanafis claim that these *ḥādīths* are a proof (*ḥujja*) and even the criticism that it is *mursal* is invalid because the *mursal ḥadīth* is considered proof with the Ḥanafis and with the *jamhūr* (majority) and the *isnād* of the *ḥadīth* mentioned by al-Nasā'ī (d. 303 AH /915 AD) is not *mursal*.⁴¹⁶ Also, Ḥanafī jurists deduce from this *ḥadīth* that the guardian has no fixed right in the matter of the marriage but it is only a recommendation by the lawgiver. Moreover, these *ḥādīths* include evidence of the Prophet's approval to the woman's request as well.⁴¹⁷ Ḥanafīs also claim that since the Prophet gave the girl (*bikr*) the authority to annul the marriage after the initiation of the contract, this indicates that she has the right of her marriage not her *walī* because if the right of marriage is for the *walī* he wouldn't have granted her the right to choose. The significance of this *ḥadīth* according to the Ḥanafīs is that if the *walī* has concluded the contract it will not be legally effective and that the woman marries herself off by her own permission and approval and the *walī* only performs the marriage contract on her behalf.⁴¹⁸

In the view of the majority, if the *ḥadīth* of Ibn 'Abbās is approved then it still cannot be used as proof for what the Ḥanafis deduced because the Prophet has rejected a marriage that was concluded by a *walī* only. The majority would argue that the Ḥanafis would need proof that the Prophet has approved a marriage that was concluded by a woman without her *walī*. Moreover, in this *ḥadīth* the Prophet rejected the idea of coercion with regard to this marriage, which was conducted by her father, and gave the girl the right to accept it or to ask

⁴¹⁵ Al-Nasā'ī, *Sunan al-Nasā'ī*, *ḥadīth* number: (3269).

⁴¹⁶ 'Ali Ibn Adam al-Athyūbī said: 'this *ḥadīth* is *ṣaḥīḥ* (authentic)' he explained that he built his judgement on the fact that al-Nasā'ī strengthened the *ḥadīth* in al-Sunan al-Kubra'. See Muḥammad b. al-Shaykh 'Ali b. 'Ādam, al-Athyūbī, *Sharḥ Sunan al-Nasā'ī*, 1st edn (Riyadh, Saudi Arabia: Dar al-Meraj al-Dawliyah, 1996), XXVII, pp. 229-30.

⁴¹⁷ See Ibn al-Humām, *Fath al-Qadīr*, III, p. 263.

⁴¹⁸ See al-Mawṣilī, 'Abd Allah b. Maḥmūd b. Mawdūd, *al-Ikhtiyār Li Ta'īl al-Mukhtār* (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, [n.d.]), III, p. 91.

for its dissolution by the order from the Prophet who represents the judicial authority in this case.⁴¹⁹ This is a ruling from the Prophet which rejects this kind of marriage, where women are forced to marry against their free will. Therefore, in this regard, the Prophet rejected the idea of forced marriage in the first place. In another narration, a girl came to the Prophet and stated that her father married her against her will, and the Prophet ruled for her marriage to be void because the marriage was concluded under coercion.⁴²⁰

Ibn ʿAbd al-Barr suggested that it is possible that her *walī* married her to a person who is not *kufʿ* or someone who might harm or not protect her, assuming that the *ḥadīth* of Jarīr is sound (*ṣaḥīḥ*).⁴²¹

As for the *ḥadīth* of ʿĀʾisha, the majority claim that if it is proven to be a sound *ḥadīth* then it is in regard to the virgin who is married to a person who is not *kufʿ*. However, in the *ḥadīth* the girl herself mentioned that her father sought to raise his social status by way of this marriage, therefore, the husband must be *kufʿ*. The assertion that this *ḥadīth* relates to the virgin who is married to a person who is not *kufʿ* would therefore appear to be false. Ibn Ḥajar claimed that this is a specific case so its ruling cannot be generalised, and there is no need for criticising this *ḥadīth* because it was reported by different chains of narration that strengthen each other.⁴²² However, it seems when the majority were unable to criticise these *ḥadīths* they considered that the ruling of the Prophet with regard to these two incidents were because they were specific cases, which cannot therefore be generalised as Ibn Ḥajar has suggested.

Moreover, the majority quoted many ʿ*āthār* (precedents of the Companions of the Prophet) to prove their opinion of considering the *walī* as a condition or cornerstone in the marriage contract and argued that this consideration was known to them without any denial. Ibn al-Mundhir mentioned ʿ*ulamāʾ* among the *ṣaḥābah* (Companion of the Prophet) who said that

⁴¹⁹ See Al-Māwardī, *al-Ḥāwī al-Kabīr*, IX, p.40.

⁴²⁰ See Al-Ribāt, *Tuḥfat al-Akhyār bi Tartīb Mushkil al-ʿĀthār*, III, p. 593.

⁴²¹ See Ibn ʿAbd al-Barr, *al-Istidhkār*, IV, p. 405. Ibn Ḥajar stated that the men [in the chain of narration] of this *ḥadīth* are *thiqāt* (trustworthy) and that Ayyūb b. Suwayd reported it from Sufyān al-Thawrī from Ayyūb al-Sikhtiyānī in a connected form (*mawṣūl*). See Ibn Ḥajar, *Talkhīṣ al-Ḥabīr*, III, p. 330.

⁴²² See Ibn Ḥajar, *Fath al-Bārī*, IX, p. 245.

there is no marriage without the presence of a *walī* including: ʿUmar b. al-Khaṭṭāb, ʿAli b. Abī Ṭālib, ʿAbd Allāh b. Masʿūd, ʿAbd Allāh b. ʿAbbās, Abū Hurairah.⁴²³ Saʿīd b. al-Musayyab narrated from ʿUmar b. al-Khaṭṭāb saying, ‘A woman is only married with the consent of her guardian, someone of her family with sound judgement (wise man) or the *sultan* (authority)’.⁴²⁴ Also, they used another narration from ʿUmar b. al-Khaṭṭāb when he rejected the marriage of a woman who married without the presence of a *walī*.⁴²⁵

The Ḥanafis supported their opinion of the permissibility of marriage without the presence of a *walī* with some *ʾāthār* related to the companions, such as what was reported from ʿAli b. Abī Ṭālib where he allowed the marriage of a woman without a *walī* after her mother married her off with her consent. Furthermore, al-Zuhrī was asked about a woman marrying without a *walī*, to which he replied: “If he is suitable (*kuf*) it is permissible.” Al-Shaʿbī said “If the husband is suitable (*kuf*) then it is permissible [i.e. for woman to marry herself off without the presence of her *walī*].”⁴²⁶

To conclude, from the way that the jurists argue their respective cases and the methods they employ to verify their opinions, it can be claimed that there is a problem in implementing the text, due to the lack of an authentic text with a definitive indication to prove the invalidity of the marriage without a guardian. Therefore, most of the evidence was subject to various possibilities of interpretation, or open to be challenged by other texts which might be indicative of something else, whilst being stronger in terms of their *isnād*. Thus, it wasn’t easy for jurists to claim that there is a definitive and explicit text from the Qur’an which can provide clear statements with regard to the requirement of the guardian in the marriage contract or to state that guardianship is also required for the validity of the marriage. So, it does not seem possible to prove the validity of the compulsion guardianship (*wilāyat al-ijbār*) over the adult of sound mind (*al-bāligh al-ʿāqil*). Nevertheless, the Ḥanafī school is distinct from all of the *Sunni* schools with regard to guardianship in marriage. Generally

⁴²³ See Ibn al-Mundhir, *al-Ishrāf ʿAla Madhāhib al-ʿUlamāʾ*, V, p. 14.

⁴²⁴ Ibn ʿAnas, *al-Muwaṭṭaʾ*, *ḥadīth* number: (1104).

⁴²⁵ Ibn Abī Shaybah, *al-Kitāb al-Muṣannaḥ*, III, p.442 ; also See Al-Albānī, *Irwāʾ al-Ghalīl*, VI, pp. 249-50.

⁴²⁶ See Ibn Abī Shaybah, *al-Muṣannaḥ*, III, pp. 443-44.

speaking, one can call them ‘the most liberal school in Islamic law’, which can be seen with this specific example as they gave woman freedom in initiating a marriage contract for herself without her guardian. Her guardian can only object to her conduct if he thinks that she has caused harm to herself or has neglected some of her rights by taking the matter to the judiciary. It can be claimed that these discussions are mainly concerned on the legal capacity of women, and their rights and freedom to dispose. Ḥanafis built their doctrine on the basis of the recognition of the person’s freedom (who is adult of sound mind) in all his/her actions, regardless of gender. The following are some explanations for the disagreement between the two groups:

The use of certain rules of Arabic language and principles of jurisprudence (*‘uṣūl*) can be seen as causes of the disagreement between the Ḥanafis and the majority of jurists in using evidence from legal texts (Qur’an and *Sunna*). In regard to the linguistic rules they employed, there is a discussion about whether a negated noun when mentioned in a legal text indicates the negation of the legal reality of the notion and whether or not it is considered *mujmal* (ambiguous/ambivalent), which refers to a category of unclear words that need clarification. For example, the *ḥadīth* “No marriage (*lā nikāḥ*) should be done without a *walī*”. This according to Ḥanafis is *mujmal* (ambiguous) because what is intended is to negate the legal effect as the mere term is not enough to negate the application of the act while no rule has a priority over another rule, so the address will have no significance. The majority’s opinion is that it is not *mujmal* (ambiguous) as they said, ‘the negation of essences does not necessarily mean ambiguousness’.⁴²⁷ Therefore, using the term ‘*lā*’ ‘No’ that negates genus (*lā’ li-nafy al-jins*) with a legal term in an indefinite form (*nakirah*), like the term *nikāḥ* (marriage), does originally negate the soundness (*ṣiḥḥah*) of the thing, in the opinion of the majority. The implication can be directed to negate perfection (*kamāl*), only with additional evidence that diverts it from its original implication. Negation of the

⁴²⁷ See Ibn Qudāmah, Muwaffaq al-Dīn, *Rawḍat al-Nāzir Wa Jannatu al-Manāzir*, ed. by Shaḥban Isma‘il, 1st edn (Beirut, Lebanon: Al-Rayan, 1998), I, p.521.

soundness (*nafy al-ṣiḥḥah*) means the invalidity of the prohibited conduct but the negation of the perfection (*nafy al-kamāl*) means that it is incomplete or deficient.⁴²⁸

According to Ḥanafīs, the *ḥadīth* “No marriage (*nikāḥ*) should be performed without a *walī*” negates either the reality (form) of the marriage or its ruling. They said: the first possibility is invalid because the reality of the marriage can exist in any form so it must negate the legal effect of the marriage. However, rulings can be numerous and equal so it is possible that the intended purpose is to negate soundness (*ṣiḥḥah*), perfection (*kamāl*) or something else, so the address remains indecisive and that is why it is *mujmal* (ambiguous).

The majority responded with the argument that the Ḥanafīs’ claim that the address is *mujmal* (ambiguous) is based on the fact that they regard the term as unclear as to whether the legal or literal meaning is intended. However, legal terms, also called juridical, (*ḥaqīqah sharʿīyyah*) in the address of the lawgiver have dominance over literal meanings, also called linguistic, (*ḥaqīqah lughawiyyah*) and implications, so the literal meanings become a form of metaphor compared to the legal terms.⁴²⁹ Accordingly, the *ḥadīth* “No marriage (*lā nikāḥ*) (should be done) without a *walī*” must be understood depending on its legal meaning; no marriage is legally valid without the presence of the guardian.⁴³⁰

In regard to the principles of jurisprudence about which they have disagreement,⁴³¹ is a rule in the Arabic language when certain words from the sentence are dropped which are indicated by the rest of it, known as *dalālat al-iqtidāʾ*’ (the required textual implication).⁴³² *Iqtidāʾ*’ literally means to seek and demand, and technically means: for the term to indicate an outside meaning [unrelated to the text] that can be a measure for the authenticity and the soundness of the text. Thus if the soundness and authenticity of the text both religiously and

⁴²⁸ ʿAbd Allah Al-Judayʿ, *Taysīr ʿIlm ʿUsūl al-Fiqh*, pp. 260-61. The *mujmal* (ambiguous) denotes a word or text which is inherently unclear and gives no indication as to its precise meaning. See Kamali, *Principles of Islamic Jurisprudence*, p. 135.

⁴²⁹ See the commentary and explanation of Shaʿbān Muḥammad Ismaʿīl on *Rawḍat al-Nāẓir*, I, pp. 521-22.

⁴³⁰ For more details See al-Asmandī, *Badhl al-Nazar Fī al-Usūl*, pp. 283-84; Al-ʿĀmidī, *al-Iḥkām fī ʿUsūl al-Aḥkām*, III, p.16; ʿAbd al-Wahhāb, al-Subkī, *Jamʿ al-Jawāmiʿ*, ed. by ʿAbd al-Munʿim Ibrāhīm, 1st edn (Beirut, Lebanon: Dar Al-Kutub Al-Ilmeiyah, 2001), p. 56.

⁴³¹ Although it is a linguistic matter, it is still considered a point of ʿuṣūl.

⁴³² See Kamali, *Principles of Islamic Jurisprudence*, pp. 176-77.

logically depends on estimating an additional meaning that is unrelated to its words, then this estimation is called *dalālat al-iqtidā'* because it is required for the text to make sense. The cause for estimating the additional meaning for the phrase of the text is called *al-muqtaḍā'*. Furthermore, the additional meaning which is estimated in addition to the phrase of the text is called *al-muqtaḍā'*. The indication that the text does not make sense without that additional estimation is called *al-iqtidā'*.⁴³³

The debate then circles around whether or not *muqtaḍā'* indicates generality. Scholars differed in regards of the generality of *muqtaḍā'*; some approved it and some did not. This disagreement has an impact on the rulings:

- 1- The opinion of Shāfi'is and Mālikis is that the *muqtaḍā'* is general and comprehensive because its estimation is required for the text to make legal and logical sense, and therefore it takes the status of the text itself. So the ruling which is established through *dalālat al-iqtidā'* (the required textual implication) is like the ruling which is established by the text.
- 2- The majority of Ḥanafis and some jurists from other schools of law hold that the *muqtaḍā'* has no generality because the implication of *iqtidā'* is added for the necessity of clarifying the text. If the text is clear without it then it should not be approved both linguistically and legally.⁴³⁴

In conclusion, *dalālat al-iqtidā'* is indication, not by the format of the text or its words, nor its meaning, but by additional matters that are required to estimate the meaning for the text to become correct, sound, true and direct in its meaning. Moreover, it is estimation by the *mujtahid* in order to accurately understanding the text. Both parties used it to suit their

⁴³³ For more details, see °Abd Allāh b. al-Shaykh Maḥfūz, Ibn Bayyah, *Amālī al-Dalālāt wa Majālī al-Ikhtilāfāt*, 1st edn (Beirut, Lebanon: Dar Ibn Hazm, 1999), p. 111; Muḥammad °Adīb, Šāliḥ, *Tafsīr al-Nuṣūṣ Fī al-Fiqh al-Islāmī*, 4th edn (Beirut, Lebanon: Al-Maktab al-Islāmī, 1993), I, p. 548; °Abd al-Salām °Abd al-Wahhab, Ṭawīlah, *Athar al-Lughah Fī 'Ikhtilāf al-Mujtahidīn*, 2nd edn (Cairo, Egypt: Dar al-Salam, 2000), p. 311; Hishām, Qarīṣah, *al-Istidlāl Wa 'Atharuh Fī al-Khilāf al-Fiqhī* (Beirut, Lebanon: Dar Ibn Hazm, 2005), p. 146.

⁴³⁴ See Ibn Bayyah, *Amālī al-Dalāla*, pp. 114-15.

principles and support their theory; it is not a *dalīl* in itself, rather it is part of the process of *ijtihād*.

The Outcome of this Disagreement

The *ḥadīth* “No marriage (*nikāḥ*) (should be performed) without a guardian (*walī*)” includes a linguistic negation for marriage without a guardian. The apparent significance of the text indicates the negation of the marriage itself, because originally this negation indicates the negation of marriage’s existence, which is unimaginable. Scholars were divided into two groups on this matter: A group which understood that this *ḥadīth* approves the negation of the soundness of marriage (*ṣiḥḥah*) which is a general additional meaning (*muqtaḍa*) term that negates virtue, perfection and completeness and other estimations. This group is the majority of jurists who approved the generality of the additional meaning (*‘umūm al-muqtaḍā*) and therefore they assert that no marriage is valid without the contract being concluded by the *walī* of the woman. As for al-‘Āmidī, it must be approved to negate its soundness (*ṣiḥḥah*) and the completeness (*kamāl*), and this can be seen from two aspects:

- a- Because it is closer to agreeing with the textual implication of the term in approving negation.
- b- Because if the term indicates the negation and non-existence of the act then the nearest metaphors to the term must be assumed when it is not possible to understand it with its real significance.⁴³⁵

Al-Nawawī (d. 676 AH / 1277 AD) claims that Mālik and al-Shāfi‘ī argued the famous *ḥadīth* “No marriage (*nikāḥ*) (should be done) without a guardian (*walī*)” required the negation of the soundness of the contract (*ṣiḥḥah*).⁴³⁶ As for al-Zarkashī (d. 794 AH / 1392 AD), it is a negation of the legal reality (*haqīqah shar‘iyyah*), meaning that no legal marriage exists in the legislation without the presence of a *walī*.⁴³⁷ Al-Ḥaṭṭāb (d. 954 AH /

⁴³⁵ See Al-‘Āmidī, *Al-Iḥkām*, III, pp. 17-18.

⁴³⁶ See Al-Nawawī, *Al-Minhāj Sharḥ Ṣaḥīḥ Muslim*, IX, p. 209.

⁴³⁷ See Muḥammad b. ‘Abd Allāh , al-Zarkashī, *Sharḥ Matn al-Khiraqī*, ed. by ‘Abd al-Malik b. ‘Abd Allāh b. Dahaysh, 3rd edn (Mecca, Saudi Arabia: Maktabat al-Asadi, 2009), III, p. 112.

1547 AD) reported Ibn Rushd's saying, 'It negated the validity of the marriage except in this form' i.e. the guardian should conclude the contract.⁴³⁸ Al-Mubārakfūrī quotes from al-Suyūṭī (d. 911 AH / 1505 AD) that the majority understood from this *ḥadīth* that it as a negation of the soundness (*ṣiḥḥah*) of the contract and Abū Ḥanīfah as a negation of its completeness (*kamāl*). Al-Mubārakfūrī suggested that the sounder opinion is that it is a negation of the soundness (*ṣiḥḥah*) which is the approved opinion because of the supporting *ḥadīth* "Any woman who marries without her guardian's permission, her marriage is void".⁴³⁹ However, this estimation still needs to be strengthened and supported by evidence from outside texts, such as circumstantial evidence (*qarīna*). Therefore, the preponderance of one of them over the other will be difficult.

The other group of jurists disapproved the generality of the additional meaning (*ʿumūm al-muqtaḍā*) in this *ḥadīth* and decided that it indicated one meaning only which is specified by the circumstantial evidence (*qarīna*); the negation of the completeness of the marriage but not its reality. So, according to their understanding the *ḥadīth* means that no marriage is considered complete without the presence of the guardian (*walī*). This group includes the Ḥanafīs and those who adopted a similar opinion.⁴⁴⁰ Ibn al-Hummām suggested it is a possibility that negation is directed to the completeness of the requirements of contract.⁴⁴¹ Therefore, the contract is valid as long the cornerstone of the contract exist, i.e. the offering and acceptance (*ṣiḡha*).

This disagreement with regard to the generality of the additional meaning (*ʿumūm al-muqtaḍā*) takes place only when there is no proof (*dalīl*) or circumstantial evidence (*qarīnah*) that gives preponderance to one of the possibilities.⁴⁴² The majority consider the *ḥadīth* of ʿĀ'isha "Any woman who marries without her guardian's permission, her marriage

⁴³⁸ Al-Ḥaṭṭab, Muḥammad b. Muḥammad, *Mawāhib al-Jalīl*, ed. by Zakariyya ʿAmayrāt, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah 1995), V, p.187.

⁴³⁹ See Muḥammad b. ʿAbd al-Rahmān, al-Mubārakfūrī, *Tuḥfat al-Aḥwadhī*, ed. by ʿAbd al-Rahmān Muḥammad ʿUthmān (Beirut, Lebanon: Dar al-Fir, [n.d.]), IV, p. 227.

⁴⁴⁰ See Ibn ʿĀbidīn, *Radd al-Muḥtār*, III, p. 56.

⁴⁴¹ Ibn al-Humām, *Fath al-Qadīr*, III, p. 260.

⁴⁴² See Al-Shawkānī, Muḥammad b. ʿAli, *Irshād al-Fuḥūl*, ed. by Sami b. al-Arbi, 1st edn (Riyadh, Saudi Arabia: Dar al-Fadilah 2000), I, p. 579.

is void” as evidence that gives preponderance to the estimation that no marriage is legally valid. Whereas, the Ḥanafī scholars used other *ḥādīths* to prove that the presence of the *walī* is not a condition in the marriage contract and therefore they estimated the additional meaning (*muqtaḍā*) is that no marriage is complete or recommended without the presence of the *walī*.

Although al-Bukhārī and Muslim did not report either *ḥadīth* (“No marriage should be performed without a guardian” and “Any woman who marries without her *walī*’s permission, her marriage is void”) they both depended on the authentic (*ṣaḥīḥ*) *ḥadīth* “A woman who has been previously married (*thayyib*) has more right over her person than her guardian”. The practical outcome of the different opinions of jurists in their understanding of those *ḥādīths* can be seen through their disagreement in regard to the textual implication of those *ḥādīths*. According to al-Nawawī, if a marriage without a *walī* is consummated, then the dowry given to similar brides (*mahr al-mithl*) becomes due and there is no legally prescribed punishment (*ḥadd*) whether that marriage is concluded by someone who assumed the prohibition or permission of such an act depending on his personal reasoning (*ijtihād*) or his following of another opinion (*taqlīd*) or mere assumption, although the one who assumes the prohibition of such as act shall be subjected to corporal punishment (*ta^czīr*).⁴⁴³

Al-Juwaynī stated that, if a *qāḍī* (judge) judges a marriage concluded without a guardian to be valid, his ruling will stand if that takes place after the consummation of the marriage because the judge applied his own personal reasoning (*ijtihād*). Al-Juwaynī (d. 478 AH / 1085 AD) argued that if it was said that the ruling of the *qāḍī* shall not stand because it contradicts a text that is not open for any interpretation, ‘The text (*naṣṣ*) is missing in regard to this issue (i.e. there is no legal text with a clear injunction or definitive ‘*qaṭ^cī al-dalāla*’) and the *ḥadīth* that is related to this ruling is open to multiple interpretations’.⁴⁴⁴ According to Ibn Qudāmah, if a *qāḍī* judges the validity of the contract, or he himself performs the

⁴⁴³ Yahya b. Sharaf Abu Zakariyya, al-Nawawī, *Rawḍat al-Ṭālibīn*, ed. by °Adel °Abd al-Mawjūd and °Ali Muḥammad Ma^cwwaḍ, special edition (Riyad, Saudi Arabia: Dar Alam al-Kutub, 2003), V, p. 399.

⁴⁴⁴ °Abd al-Malik °Abd Allah b. Yusuf, al-Juwaynī, *Nihāyat al-Maṭlab Fī Dirāyat al-Madhhab*, ed. by °Abd al-°Azīm al-Dīb, 1st edn (Jeddah, Saudi Arabia: Dar al-Minhaj, 2007), II, p. 42.

contract then it is not possible to invalidate the contract. This is the case for all irregular marriage contracts because it is a disputed issue that is open to personal reasoning (*ijtihād*).⁴⁴⁵ Al-Qarāfī stated that, the jurists use the *ḥadīth* “Any woman who marries without her guardian’s permission, her marriage is void, void, void” to argue the invalidity of the opinion of Abū Ḥanīfah. The significance of the *ḥadīth* indicates that if the *walī* grants his permission for the marriage then the contract becomes valid. It can also be deduced from the *ḥadīth* that the opinion of Abū Ḥanīfah is correct from the perspective that if the conclusion of the contract is valid with the permission of woman’s guardian then it is valid absolutely because no one say that there is a difference between the two cases.⁴⁴⁶

Therefore the practical result of this disagreement is that the jurists do not give the woman who marries without the permission of her *walī* the same ruling as the one who actually commits unlawful sexual intercourse and therefore she and the man she marries shall not be punished with the legal punishment (*ḥadd*). Rather, they approved the right of inheritance between them, obliged the man to present the dowry and confirmed other rulings related to marriage without the presence of the *walī*. Therefore, they decided that if a Ḥanafī *qāḍī* judges such contracts to be valid, then a Shāfi‘ī *qāḍī* cannot judge it to be invalid. Al-‘Amrānī (d. 558 AH / 1163 AD) clarifies this by saying, ‘that is because the verdict of the first judge –the Ḥanafī one- took place in an issue that is open for personal reasoning (*ijtihād*)’. He also claims that this opinion is the sounder of the two opinions of Shāfi‘ī.⁴⁴⁷

As for the Mālikis, Ibn ‘Abd al-Barr reported the opinion of Isma‘īl b. Iṣḥāq (*ismā‘īl al-qāḍī*) (d. 282 AH / 895 AD) clarifying the opinion of Mālik in regards to acting upon the *ḥadīth* “No marriage (*nikāḥ*) should be done without a *walī*” as, ‘if a woman marries without the permission of her *walī* then the marriage must be annulled. If the marriage is consummated and a long period of time passed and birth took place then it is not annulled because none of the rulings are annulled except that which is clearly unlawful or which is clearly wrong with

⁴⁴⁵ See Ibn Qudāmah, *al-Mughnī*, VII, p. 339.

⁴⁴⁶ See Al-Qarāfī, *al-Furūq*, *Farq* number: (154), III, p. 249.

⁴⁴⁷ See Al-‘Amrānī, Yahya b. Abī al-Kkaiyr, *al-Bayān Fī al-Madhhab*, 1st edn (Beirut, Lebanon: Dar al-Minhaj, 2000), IX, p. 157.

no doubt, but that which is open for personal reasoning (*ijtihād*) and disagreement shall not be annulled.⁴⁴⁸

Thus, the disagreement in this issue is a result of differences in using the evidence and because the authentic text was not definite (the legal text has no clear injunction or definitive ‘*qaṭʿī al-dalāla*’) in specifying the invalidity and the cancellation of the contract. The terms that prohibited marriage without the presence of the *walī* in the *ḥādīths* were understood on the meaning of organising the issue of marriage in society, so that the woman does not fall victim to the manipulation of malicious men. Therefore, the opinion of the Ḥanafis in regard to the permissibility for a woman to act on her own in concern of concluding her marriage contract without any control by her guardian (*walī*) but by consulting him and making him participate in the choice, the intended purpose is fulfilled and the right of the guardians is protected, because they can take the matter to judiciary in case they think that the marriage of the ward might bring harm to her, or to the family.

However, some believe that jurists who request guardianship in marriage see it as a duty, rather than the right of the guardian, or perhaps both. Moreover, they claim that the duty of the guardian is to achieve the best interests of the ward and that the guardian is required to take the ward’s desires into consideration. However, negligence and abuse do occur and, therefore, the right of the guardian -like any other right- is restricted by the requirement that it be used for the purposes for which it exists. If he uses it for other reasons, such as the intention of harming the interests of the person under his guardianship or for some profit to himself, then this is considered to be *ʿaḍl* (prevention) and the case should be taken to the judge (*qāḍī*) to investigate and rule on.⁴⁴⁹ (For more details see sub-section 4.6.1.2)

The above illustrates to us the importance involving of kinsmen in arranging and concluding womens’ and girls’ marriages, which is a common practice in various Islamic communities. Moreover, paternal involvement was not limited to the marriage of daughters. Therefore, jurists give fathers the power of compulsion guardianship (*wilāyat al-ijbār*) over children of

⁴⁴⁸ See Ibn ʿAbd al-Barr, *al-Istihkār*, IV, p. 396.

⁴⁴⁹ See El-Alami, *The Marriage Contract in Islamic Law*, pp.52-53.

both sexes.⁴⁵⁰ This could be seen as one of many reasons which led to the practice of forced marriage within Muslim communities. This is unlikely, however, as the motive of parents and relatives to force their children into marriage is probably related to customs and traditions, or perhaps the protection of honour, along with other factors such as that the husband of the girl must be Muslim or from the country or tribe of origin. Moreover, compulsion guardianship may remain an influential factor in forced marriage, but the question is how strong is that influence? Therefore, what concerns us here, with regard to the disagreement of the two groups of jurists, is the compulsion guardianship which has a strong link to forced marriage. Consequently, it is necessary to clarify this concept in order to see the link between it and forced marriage.

4.13 Compulsion guardianship (*wilāyat al-ijbār*)

Compulsion guardianship (*wilāyat al-ijbār*) means that the guardian (*walī*) has the right to initiate the marriage contract alone, the ward has no right to object and the marriage contract becomes binding with this conduct of the *walī*. For Kecia Ali, the term compulsion (*ijbār*) gives a false impression of control because although the jurists occasionally discussed the permissibility of contracting such a marriage, for the most part wards were presumed too young to have any opinion.⁴⁵¹ Generally speaking, jurists believe that the fathers could compel marriage of daughters who were both virgins and minors.

However, generally compulsion guardianship applies to the minor and the insane person, because they have less or no experience and are also not responsible by law, therefore, they should be subject to guardianship.⁴⁵² The disagreement of jurists with regard to the marriage contract of a virgin adult girl is about whether she should be compelled or she should give her consent. The jurists used the *ḥādīths* of the Prophet as evidence to prove the father's power of compulsion over his virgin daughter. For Mālikis and Shāfi'is, the reason for the right of compulsion guardianship is virginity. Unlike Ḥanafis, the majority of jurists give a

⁴⁵⁰ See Ali, *Marriage and Slavery in Early Islam*, p. 31.

⁴⁵¹ See Ibid, p. 31.

⁴⁵² See El-Alami, *The Marriage Contract in Islamic Law*, p. 50.

father power over his daughter because of her virginity, rather than her age or maturity. The right of compulsion continues to apply when the daughter attains majority.⁴⁵³

The Ḥanafī School

In the Ḥanafī opinion, *wilāyat al-ijbār* (compulsion guardianship) is granted to all *‘aṣaba* (paternal relatives). However, Abū Ḥanīfah granted it for the *‘aṣaba* as well as blood relatives, so relatives other than *‘aṣaba* (paternal relatives) have the right of *wilāya* but it is approved to the *‘aṣaba* (paternal relatives) first through lineage. The main cause for approving *wilāya* in their opinion is the relatives’ relationship in general as they don’t look at the level of kinship but that can be a reason to give priority in *wilāya*. Accordingly, the father and the paternal grandfather have the priority because they are usually the most compassionate towards the ward and it is expected that they show full care and consideration for the interests of the ward.⁴⁵⁴

Those who are subjected to compulsion guardianship (*wilāyat al-ijbār*) in the Ḥanafī School are:

- 1- The ward: the reason for the *wilāya* over the ward is the weakness of his intellect and the incompleteness of his/her mental capacity which he/she needs in order to distinguish between that which is beneficial and that which is harmful, and that which includes benefit and that which includes corruption.
- 2- The ward girl who has been previously married (*thayyib*).
- 3- The insane and the mentally unstable (*ma‘tūh*): the reason if the same as in the case of the ward, i.e. the mental incapacity and the weakness of his intellect.⁴⁵⁵

⁴⁵³ See Ali, *Marriage and Slavery in Early Islam*, p. 33.

⁴⁵⁴ See Al-Kāsānī, *Badāi‘ al-Ṣanāi‘*, III, pp. 345-55; Ibn Al-Humām, *Faṭḥ al-Qadīr*, III, pp. 277, 285-86.

⁴⁵⁵ Regarding the insane (*majnūn*), it is not permissible for him/her to conclude the contract, including marriage, for him/herself or for others; he/she has no legal capacity because of a lack of intellectual capability. However, this will not prevent him from getting married indefinitely. Therefore, the jurists allow the guardian to marry him/her off if there is general benefit or out of compassion. The motivation for this is not logical, rather it is allowed on compassionate grounds, on the basis that it may provide assistance to him/her in his/her difficulty. However, modern personal status law in Muslim countries rules that the judge has to give

It is worthwhile to mention here that there is a group of jurists who argue that there is no guardianship for wards in marriage as minors do not comply with the requirements of the marriage contract which cannot therefore come into effect before maturity is reached and is not therefore necessary at this stage. Thus there is no need for the guardianship of a ward in that the reason for guardianship is the ward's need for it and so long as there is no need for marriage, then guardianship is not applicable. This view is supported by ʿUthmān al-Battī, Ibn Shubroma and Abū Bakr al-Aṣamm.⁴⁵⁶ Marrying off wards was one of the practices of ancient societies, and Kecia Ali claims that marrying off a ward child was not a Muslim innovation. It has parallels in other ancient legal systems and precedents in pre-Islamic Arabia, where parents might arrange marriages for their young children.⁴⁵⁷

Thus, the condition, with Ḥanafīs, for compulsion guardianship (*wilāyat al-ijbār*) is for the ward to be a male minor, a virgin (*bikr*) minor, or a previously married (*thayyib*) female an insane major male and female. Ḥanafīs consider minority as the main cause for *wilāyat al-ijbār* (compulsion guardianship) but not virginity status (whether the girl is a virgin or previously married) so its existence depends on the existence of its cause.⁴⁵⁸ Therefore, compulsion guardianship is disapproved over every person who has full legal capacity as such person is the *walī* of him/herself and no one has the right of *wilāya* in marriage over him/her nor can he/she be forced to marry. They said that it is impermissible for the *walī* to force the major virgin (*bikr*) to marry.⁴⁵⁹ Al-ʿAynī said, ‘if he [the guardian] marries her [virgin girl] off without her consent then the marriage is suspended (*mawqūf*) until her consent is granted in our opinion. If she rejects it then the marriage becomes invalid.’⁴⁶⁰ However, if a ward male or female were married off by someone else other than their father

permission for the insane to marry, if the general benefit was proven by a medical report. This is because the guardian may take these steps in order to fulfil some personal gain, and this rule prevents any harm coming to him/her through this means.

⁴⁵⁶ See El-Alami, *The Marriage Contract in Islamic Law*, pp. 50-52.

⁴⁵⁷ See Ali, *Marriage and Slavery in Early Islam*, p.31.

⁴⁵⁸ See Al-Kāsānī, *Badāiʿ al-Ṣanāʿi*, III, pp. 357-58 ; Ibn Al-Humām, *Fatḥ al-Qadīr*, III, pp. 260-61.

⁴⁵⁹ See Al-Marghīnānī, *al-Hidāya*, p.491.

⁴⁶⁰ Al-ʿAynī, *al-Bināyah*, V, p. 584.

or paternal grandfather then they will have the right to choose after they attain majority whether to continue the marital life or to annul the marriage through the judiciary.⁴⁶¹

We shall mention some safeguards imposed by the Ḥanafis in regard to *wilāyat al-ijbār* (compelling guardianship) in order for the *walī* not to abuse this right which is granted to him by legislation.

- 1- If the guardian is known for his bad conduct and immorality then caution must be taken in order to protect the right and interest of the ward. If the guardian marries her off to a suitable husband (*kuf'*) with the dowry given to similar brides (*mahr al-mithl*) then the marriage becomes valid and effective but if he marries her off to a non- suitable husband or with a dowry less than *mahr al-mithl* then the marriage is considered invalid and ineffective because it neglected the benefit of the ward and did not protect her interests.
- 2- If the guardian marries the female ward to an unsuitable person or with a dowry less than *mahr al-mithl* then she is granted the right to correct what her guardian has ruined as soon as she attains majority. The judge gives her the choice in order to remove harm away from herself so she can request for the marriage to be annulled because of the harm befalling her, even after the consummation of the marriage.
- 3- If the closest guardian refuses to marry off the ward to a suitable husband who presents *mahr al-mithl* or more without an acceptable excuse then the *walī* is considered as an oppressor who abuses the right of guardianship and therefore the right of guardianship is transferred to a further *walī* or even to the judge. That is because *‘adl* (prevention) is a form of oppression so the *wilāya* is removing that oppression within the authority of judiciary.⁴⁶²

⁴⁶¹ Al-^cAynī, *al-Bināyah*, IV, p. 602.

⁴⁶² See Khallāf, *Aḥkām al-Aḥwāl al-Shakhsyyah*, pp. 59-65; Also see Ibn ^cĀbdīn, *Radd al-Muḥtār*, III, pp. 65-70; Al-Kāsānī, *Badāi' al-Ṣanā'i'c*, III, pp. 366-67.

However, Ḥanafīs have another type of *wilāya* called *wilāyat al-ikhtiyar* (optional guardianship) which means that the woman has the right to marry herself off to anyone she wants, or to appoint a man in order to marry her off to the suitor of her choice.⁴⁶³ So the mature major virgin (*bikr*) shall not be married off until her guardian grants her permission to marry. When the *walī* seeks the permission of a mature major virgin in regard to her marriage and she comes to full knowledge of it and the identity of the husband then her consent is granted through keeping silent or smiling in a way that does not indicate ridicule and derision as the *ḥadīth* states “A virgin must be asked by for her consent for herself, and her consent is her silence”. The main thing in this case is the signs that indicate her satisfaction and acceptance and eliminate the possibility of dissatisfaction and rejection.

However, acceptance through silence is accepted only if the one who is asking the woman is the closest guardian, like her father or paternal grandfather, but if her guardian is another relative then her silence is not enough because she might not pay attention to his speech or take him seriously and therefore the signs mentioned above are not enough to approve her acceptance. In this case it is a condition that she talks clearly and declares her acceptance or rejection. This is restricted to the customs and traditions of communities.⁴⁶⁴

As for the one who lost her virginity through a cause other than marriage (illness or injury for example) i.e. the illness caused her hymen to be broken, she is still considered a virgin in the opinion of Ḥanafīs, as is the woman who stays unmarried in her family’s house beyond the ordinary age of marriage (the spinster). The one who lost her virginity through unlawful sexual intercourse is still considered to be a virgin in the opinion of Abū Ḥanīfah. As for the one who lost her virginity through a doubtful or invalid marriage, she has the same ruling as the one who has been previously married (*thayyib*).⁴⁶⁵

⁴⁶³ See Al-^cAynī, *al-Bināyah*, V, p. 574.

⁴⁶⁴ See Ibn al-Humām, *Fath al-Qadīr*, III, p. 264; More details can be found with al-Kāsānī, *Badāī^c al-Ṣanāī^c*, III, pp. 358-62.

⁴⁶⁵ See Al-^cAynī, *al-Bināyah*, IV, pp. 592-94; also see Al-Kāsānī, *Badāī^c al-Ṣanāī^c*, III, p. 363.

Thus, the opinion of Ḥanafis is that the woman can absolutely conclude the marriage contract for herself and others because it is her right, which is the same as her acting with her wealth and property through selling and purchasing. They said that the legal starting point is that everyone who has the right to act upon his wealth also has the right to act upon himself and any woman who is not forbidden from acting upon her wealth also has the right to act upon herself with regard to marriage. However, it is recommended for her to appoint someone to perform the contract on her behalf or grant permission to her *walī* to do so which is the opinion of Abū Ḥanīfah. And in another narration related to him, if she marries herself off to a *kuf* then her marriage is considered valid but if she marries herself off to a non-suitable husband then the marriage is considered invalid. There are other narrations which are related to the two companions of Abū Ḥanīfah, Abū Yusuf Al-Qāḍī and Muḥammad b. Al-Ḥasan al-Shaybānī (*al-ṣaḥibān*), but Ibn al-Humām said, ‘the three of them (*imāms*) agreed upon the absolute permissibility [of such marriage] whether to a *kuf* or *non-kuf*. However, the *walī* is requested so dispraised insolence and boldness are not attributed to the woman’.⁴⁶⁶ According to al-Marghinānī (d. 593 AH / 1197 AD), the marriage of the sane major woman is initiated by her consent even if the marriage is not performed by a *walī*, and this is according to Abū Ḥanīfah and Abū Yusuf recorded as *ṣāḥir al-riwāyah* (the authentic approved transmissions of the legal opinions of the school).⁴⁶⁷

As for the previously married woman (*thayyib*), she cannot be married off except with her consent as the Prophet said, “The guardian has no right/authority over (i.e. to force) the previously married woman (into a marriage)”.⁴⁶⁸ Therefore, the guardian (*walī*) must seek the permission of the previously married woman in regard to her marriage and he cannot conclude the contract on his own until she clearly grants him her permission by telling him of her desire to get married or ordering him to marry her off to the person she wants. The Lawgiver granted her this right because she has been already married before, knows how to

⁴⁶⁶ Ibn al-Humām, *Fatḥ al-Qadīr*, III, p. 256. For more details with regard to this point see al-Kāsānī, *Badāi’ al-Ṣanāi’*, III, pp. 369-76; Ibn ‘Abdīn, *Radd al-Muḥtār*, III, pp. 55-56.

⁴⁶⁷ See al-Marghinānī, *al-Hidāyah*, p. 491.

⁴⁶⁸ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2100); Al-Nasā’ī, *Sunan al-Nasā’ī*, *ḥadīth* number: (3262).

deal with men and she no longer has the modesty that is usually associated with a virgin girl. Therefore, she was granted the right to explicitly declare her desire to marry without that being considered a lack of modesty.⁴⁶⁹

Accordingly, the marriage can be initiated with the statement of the woman who is an adult of sound mind in the opinion of Ḥanafis. Therefore she can conclude the contract on her own and her guardian has no right or authority to force her into marriage, which contradicts the Mālikī, Shāfiʿī and Ḥanbalī schools of thought.

The Mālikī School

According to the Mālikis, the compelling guardian (*walī mujbir*) is the one who possesses the right to marry off the virgin (*bikr*) ward under his care even if she is major and even if she has been previously married (*thayyib*) without their permission. He has the right to singly conclude their marriage contract and no one can share this right with him.⁴⁷⁰

The father is the *walī mujbir* (compelling guardian), and he was granted this right over his daughter because it is expected that he cares for her rights, seeks her interest, treats her with mercy, kindness and compassion and therefore he deserve this authority over his child. Therefore, the father possesses the right of *wilāyat al-ijbār* (compulsion guardianship) in marrying off his daughter without her consent if she is characterised as having one of these two characteristics:

- a- Being a ward: which mean that she has not attained the age of majority so the father can compel the minor girl to marry without her consent whether she is a virgin or previously married because she is of partial legal capacity (*ahliyya*) and she cannot

⁴⁶⁹ See Ibn Al-Humām, *Fath al-Qadīr*, III, pp. 269-70.

⁴⁷⁰ See al-Ghirānī, *Mudawwanah al-Fiqh al-Mālikī*, II, p. 559; al-Ḥabīb, Ibn Ṭāhir, *al-Fiqh al-Mālikī wa 'Adillatuh*, 1st edn (Beirut, Lebanon: Al-Maaref, 2003), III, p. 210. Also see Ṣaliḥ ʿAbd al-Samīʿ, al-ʿUbbi, *Jawāhir al-Iklīl*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1997), I, p. 390; Muḥammad b. Aḥmad, Ibn Juzay, *al-Qawānīn al-Fiqhiyyah* ed. by ʿAbd al-Karim al-Faḍily (Casablanc, Morocco: Dar al-Rashid al-Hadithah, 2003), p. 225.

choose her husband on her own. This also applies to the insane and the one who suffers of deficiency in her intellect.

- b- Being a virgin: the father has the right to compel his virgin daughter to marry whether she is ward or major. As for the spinster, they said that he also has the right to compel her as long as she is still a virgin and they also said that he does not have the right to compel her if she is in charge of her affairs and able to fulfil her interests because she would then be like the one who has been previously married (*thayyib*) who experienced the life of men and their affairs. The previously married woman is not compelled to marry but asked for her permission; if she grants it then her *walī* marries her off and if she doesn't then he does not marry her off.⁴⁷¹

If the girl lost her virginity because of illness, unlawful sexual intercourse or an accident, she is still considered a virgin in the opinion of the Mālikī jurists and therefore can be compelled to marry. If the father instructed another man (executor) to compel his daughter (after his death) to marry before or after she attains majority like by saying 'compel my daughter to marry' or if the father specifies a husband to him, then the trustee takes the father's position in his status and conduct under the right of *wilāyat al-ijbār* (compulsion guardianship). If the father does not specify marriage in his will like by saying 'I make you an executor to my daughter' then the executor does not have the right to compel to marriage and he cannot marry off anyone of them before they attain majority.

The Maliki's condition for the validity of the marrying off by the father's executor is that the husband presents a dowry suitable for similar girls. Otherwise he cannot compel the girl to marry because he is not exactly like her father.⁴⁷²

⁴⁷¹ See Al-Ghirānī, *Mudawwanat al-Fiqh al-Mālikī*, II, pp. 560-63.

⁴⁷² See Ibn Ṭāhir, *al-Fiqh al-Mālikī wa Adillatuh*, III, pp. 210-17; also See Ibin Juzay, *al-Qawānīn al-Fiqhiyyah*, pp. 225-26.

Furthermore, to control this right of compulsion guardianship given to the father and the father's executor in regards of marriage, the Mālikī jurists imposed restrictions in order to control the exercising of this right, some of the following restrictions can be applied:

- a- To prove that the father does not intend to harm his daughter and the executor doesn't intend to harm the girl under his trust. If that is the case then *wilāyat al-ijbār* (compulsion guardianship) is disapproved.
- b- In case the husband is socially not suitable, unequal to the woman's piety and status like being immoral (*fāsiq*), if he has defects that prevent achieving the main purpose of the marriage, or if there is a clear harm falling on the girl if she marries such a man then the father has no right to compel her to this marriage.
- c- If the father approves the status of *rushd* (a person who has attained discretion at the time of attaining puberty or after it) to his daughter and says to her, 'you are mature, have reached the age of full mental majority and know where your interest lies so you are free to carry out your own conduct' then such girl is not subjected to *wilāyat al-ijbār* (compulsion guardianship) anymore.
- d- If a virgin girl gets married, stays in her husband's house for more than a year then he divorces her while she is still a virgin then her father has no right to compel her because she will be like the previously married (*thayyib*) who experienced marriage.
- e- The father is required –on a recommendation basis- to consult with his daughter in regard to her marriage. She must be informed that she can grant her permission through silence if she feels modest. In case she refuses the marriage then it is recommended for the father not to compel her and to respect her choice.⁴⁷³ The Mālikī jurists have said that the Prophet implied to this in his saying, "A virgin should not be married until her consent is asked." They (the people) asked 'What is her permission?' He replied "it is by her keeping silence" and in another narration, "silence is her acceptance".⁴⁷⁴

⁴⁷³ See al-Ghirānī, *Mudawwanat al-Fiqh al-Mālikī*, II, pp. 561-69; Al-'Ubbī, *Jawāhir al-Iklīl*, I, pp. 393-94.

⁴⁷⁴ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīths* number: (5136), (5137).

The Mālikī scholars made some exceptions to the rule mentioned in the previous *ḥadīth* in regards of the virgin's right, "silence is her acceptance" in that some types of virgin must explicitly declare their consent to the marriage, as their silence only is not enough. These are:

- 1- The major virgin who is married off by a non-compelling *walī* without asking for her permission first and she dislike the marriage as soon as she learns of it.
- 2- The major virgin whose father grants her the status of *rushd* and freedom to choose.
- 3- The virgin whose father has prevented her marriage without any acceptable excuse, but rather out of oppression and seeking to harm her. She has the right to take the matter to the judiciary so the judge marries her off to the one she desires as a husband but with the condition that she expresses her consent explicitly.
- 4- The virgin who is married off by her father or his trustee to a man who has defects or suffers from an illness that makes the marital life difficult and does not achieve the purpose of marriage.⁴⁷⁵

As for the husband, he cannot be compelled to marry in the opinion of the Mālikis unless he has no legal capacity (*fāqid al-ahliyya*), such as the insane or the mentally unstable that can fall into the sin of unlawful sexual intercourse, on the condition that his marriage does not result in a bigger harm.⁴⁷⁶ Moreover, the Mālikī jurists say that no one has the right to compel to marriage apart from the father or his executor. In case the father is absent without him leaving a will that explicitly or implicitly allows someone to compel his daughters to marriage, and then no one has the right to exercise *wilāyat al-ijbār* (compulsion guardianship) in the marriage without clear and explicit permission. Therefore, the major virgin girl is not married off without her permission and the ward virgin is not married off until she attains majority and grants her permission.⁴⁷⁷

⁴⁷⁵ See Ibn Ṭāhir, *al-Fiqh al-Mālikī wa Adillatuh*, III, pp. 224-25; Al-Dusūqī, *Ḥashiyat al-Dusūqī*, III, pp.16-17, 23-24.

⁴⁷⁶ See Al-Ghirānī, *Mudawwanat al-Fiqh al-Mālikī*, II, p. 564.

⁴⁷⁷ See Ibn Ṭāhir, *al-Fiqh al-Mālikī wa Adillatuh*, III, p. 217; Al-Dusūqī, *Ḥashiyat al-Dusūqī*, III, p. 189.

The Shāfiʿī School

The compelling guardian (*walī mujbir*) in the Shāfiʿī school includes:

- 1- The father
- 2- The paternal grandfather, when the father is not available.

Shāfiʿī jurists granted the right of marrying off the woman without her permission to her father and paternal grandfather because they are the most compassionate towards the woman and nothing is expected from them but to show full care and consideration for her interests. None of the other guardians has the right to marry off the woman without consulting with the woman and granting her permission first. The woman who is sought for marriage can either be a virgin (*bikr*) or previously married (*thayyib*). If she is a virgin (*bikr*) she can be either a minor or major, so the types of women can be categorised as follows:

- 1- The ward virgin
- 2- The major virgin
- 3- The previously married (*thayyib*).⁴⁷⁸

As for the major virgin in the opinion of the Shāfiʿī school, she can be compelled to marry without her permission by her father or paternal grandfather only; none of the other guardians has the right to do so before she attains majority. However, the first opinion of al-Shāfiʿī was that it is recommended for the father not to marry off the virgin ward until she attains majority and justified this opinion with the argument that by attaining majority she will be able to grant her permission because of the right which will be due on her as a result of the marriage.⁴⁷⁹ Likewise, the major virgin's father and paternal grandfather have the right to compel her to marry, in the Shāfiʿī school, without her permission even if she expresses signs of refusing their decision. However, Shāfiʿī jurists say that it is recommended for the father and paternal grandfather to ask for her permission first because

⁴⁷⁸ See Al-ʿAmrānī, *al-Bayān*, IX, p.179.

⁴⁷⁹ See Al-Nawawī, *Rawḍat al-Ṭālibīn*, V, p. 402.

of the *ḥadīth* which directed towards that, i.e. a virgin must be asked for her consent for her marriage.⁴⁸⁰ As for guardians other than the father or paternal grandfather, they do not have the right to marry her off without her consent, and it must be explicitly uttered –which is one of two opinions in the school of law- because as long as the validity of her contract is dependent on her permission then it must be granted explicitly as long as she can utter it. However, the approved opinion with the Shāfi'is is that uttering is not required and her silence is enough after her permission is granted because she is still a virgin and her modesty might prevent her from declaring her desire for marriage, as the *ḥadīth* mentioned that a virgin must be asked by for her consent for herself, and her consent is her silence.⁴⁸¹

However, with regard to the previously married woman (*thayyib*), none of the guardians have the right to force her to marry whether he was a father, paternal grandfather or anyone else. Her marriage is valid only with her permission, which must be explicitly uttered. In the case of a ward, no one can compel her to marriage before she attains majority whether he was a father, paternal grandfather or anyone else.⁴⁸² They used as evidence the *ḥadīth* of Khansā' Bint Khidām al-Anṣāriyah, who was major, that “her father gave her in marriage and she had been previously married, she went to the Messenger of Allah and mentioned that her father had married her against her will, and he revoked the marriage”.⁴⁸³ They also used the *ḥadīth* “The guardian has no right (to force) the previously married woman (into a marriage)”.⁴⁸⁴

The Shāfi'ī jurists imposed conditions for the father or paternal father to be able to compel her to marry without her consent:

- a- No clear hostility should be between him and the woman, to ensure her interests are secured.
- b- To marry her off to someone who is suitable (*kuf*) to her.

⁴⁸⁰ See Al-^cAmrānī, *al-Bayān*, IX, p. 181.

⁴⁸¹ See Al-Nawawī, *Rawḍat al-Tālibīn*, V, pp. 401-02.

⁴⁸² See Ibid, V, p. 404. Also see al-^cAmrānī, *al-Bayān*, IX, pp.181-83.

⁴⁸³ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (5138).

⁴⁸⁴ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2100).

- c- To marry her off with a dowry similar to the dowry presented to similar woman.
- d- For the dowry to be of the currency of the place.
- e- For *hajj* (pilgrimage) not to be due on her and he desires that she perform *hajj* before she gets married as marriage might prevent her from performing *hajj*.
- f- No hostility should be between the woman and the future husband so he does not harm her.

Shāfi'īs claim that these conditions are imposed either for the validity of the marriage without the permission of the woman, or they can be conditions for the validity of intending the contract and they divided them into two categories: the first three conditions are for the validity of the contract and the rest are conditions for the validity of intending the contract.⁴⁸⁵ Therefore, this division clarified that the Shāfi'ī jurists approved *wilāyat al-ijbār* (compulsion guardianship) as a right for the father and the paternal grandfather over the virgin women whether she attains majority or not. The criterion for the validity of the *ijbār* (compulsion) is the virginity status and *wilāyat al-ijbār* is limited to the father and the paternal grandfather only in their opinion. Marriage is not valid except by the one who has a full legal capacity (*ahliyya*) by being a major sane with absolute disposal. Therefore, the marriage of the child and the insane is invalid as is the marriage of the *safih* (the one who has no good control over his wealth and affairs) as he needs the permission of his *walī*.⁴⁸⁶

Accordingly, this allows the father to marry off his ward son if he sees an interest for him in that. Some Shāfi'īs believe that he does not have the right to marry him off because a ward is in no need for marriage. They also said that it is impermissible for the father, the paternal grandfather, the executor, the ruler or the judge to marry off the insane ward because he is in no need for marriage.⁴⁸⁷ Therefore, as the father has the right to marry off his ward virgin daughter he also has the right to marry off his ward sane son. When the son attains majority

⁴⁸⁵ See Al-Khaṭīb al-Sharbīnī, *Mughni al-Muḥtāj*, III, p. 201.

⁴⁸⁶ See Yahya b. Sharaf al-Dīn, al-Nawawī, *al-Majmū' Sharḥ al-Muḥadhdhab*, ed. completed by Muḥammad Najīb al-Muṭṭī, (Jeddah, Saudi Arabia: Maktabat al-Irshad, 1977), XVII, p. 204; Also see al-^cAmrānī, *al-Bayān*, IX, pp.108-09.

⁴⁸⁷ See Al-Nawawī, *al-Majmū'*, XVII, p. 293.

the father cannot compel him to marriage and when he attains *rushd* he can conclude the contract without the need of his father.⁴⁸⁸ According to al-^cAmrānī, there are two opinions, the sounder of which is he does not because the ward is in no need of marriage.⁴⁸⁹

As for those who do not have the right of *wilāyat al-ijbār* of ^c*aṣaba* (paternal relatives) and kinship –other than the father and the paternal grandfather- it is impermissible for anyone of them to marry off the woman without her permission. As for al-Ghazzālī (d. 505 AH / 1111 AD), the ^c*aṣaba* (paternal relatives) do not have the right of *wilāyat al-ijbār* (compulsion guardianship) at all but they can marry off the virgin (*bikr*) and the previously married (*thayyib*) after they attain majority and with their consent.⁴⁹⁰ In case no compelling guardian (*walī mujbir*) or non-compelling guardian (*walī ghayr mujbir*) from the ^c*aṣaba* (paternal relatives) is available then the woman is married off by the ruler or the judge. They can marry off the major woman only and with her consent.⁴⁹¹

The Ḥanbalī school

It seems that Ḥanbalis take the same approach as the Shāfi^cīs but they disagree with them in specific issues like the issue of approving the *wilāya* (guardianship) by *waṣiyya* (will) which is an approved reason for *wilāya* in their opinion, which is contrary to the opinion of Shāfi^cīs. Al-Mardāwī said, ‘the *waṣī* (executor) of the *walī* takes his status’, and he said, ‘this is the approved opinion in the school of thought’.⁴⁹² As already mentioned, they do not differ from the opinion Shāfi^cīs in regard to their divisions of *wilāya* in the marriage contract as they followed the Shāfi^cīs’ approach in issues related to the principle of *wilāya*.

⁴⁸⁸ See Al-Juwaynī, *Nihāyat al-Maṭlab*, XII, p.43.

⁴⁸⁹ See Al-^cAmrānī, *al-Bayān*, IX, p. 211. Also see Muḥammad Abū Ḥamid, al-Ghazzālī, *al-Waṣīṭ Fī al-Madhhab*, 1st edn (Cairo, Egypt: Dar al-Salam, 1997), V, p. 63.

⁴⁹⁰ al-Ghazzālī, *al-Waṣīṭ*, V, p. 67.

⁴⁹¹ See Al-Nawawī, *Rawḍat al-Ṭālibīn*, V, p. 404.

⁴⁹² Al-Mardāwī, *al-Inṣāf*, VIII, p. 83.

Ḥanbalis limit *wilāyat al-ijbār* to the father only so no one except the father can marry off the ward even his paternal grandfather. If the father marries off his son using his right of *wilāyat al-ijbār* then the son has no choice in the marriage but he acquires the right of divorce when he attains majority. The one who is most entitled to marry off the woman is her father and no one shares this right with him. However, they give the executor the right to marry off wards without their permission.⁴⁹³

Those who are subjected to *wilāyat al-ijbār* according to the Ḥanbalis are as follow:

1. The minor sons and the virgin daughters:

- a- The sane wards under the age of majority are married off by their father with or without their permission and consent.
- b- The virgin daughter who is nine years old or more but she has not attained majority yet. This opinion is exclusive to the Hanbalis who approved this age in marrying off the girl with the evidence of a narration that is related to ʿĀ’isha who said, ‘if the girl reaches the age of nine then she is considered as a woman’.⁴⁹⁴ They claim that ʿĀ’isha meant to say that the girl of nine years old is usually suitable to get married if she reaches the age of nine and therefore becomes like the major girl. There are two narrations in regard to the girl who reaches the age of nine according to the Ḥanbalis. The first opinion is that she is like the one who has not reached the age of nine, so she has the same ruling as the ward. Therefore, her father has the right to marry her off without her permission. The second is that she has the same ruling as the major and her father can marry her off without her permission, although it is recommended to ask for her permission and her permission is her silence.
- c- The virgin who is under the age of nine. The father has the right to marry her off without her approval and consent with no disagreement. Ibn Qudāmah said, ‘as for the ward virgin, there is no disagreement in her regard’. He also reported the opinion

⁴⁹³ See Ibn Qudāmah, *al-Kāfi*, VII, p. 346; Muḥammad, Ibn Mufliḥ, *al-Furūʿ*, ed. by Rā’id Ṣabrī (Amman, Jordan: Bayt al-Afkar al-Dawliyyah, 2004), VIII, p. 67.

⁴⁹⁴ Al-Albānī stated that, this narration is *ḍaʿīf* (weak), See *Irwāʾ al-Ghalīl*, I, p. 199.

of Ibn al-Mundhir when he said, ‘all the scholars whom we learned from were unanimous that it is permissible for the father to marry off his virgin ward daughter if he marries her off to a *kuf*’ even with her unwilling’.⁴⁹⁵

- d- The insane ward. Her father has the right to marry her off without her permission.
- e- The major sane virgin, Ibn Qudāmah said that Aḥmad b. Ḥanbal has two opinions in regard to marrying off the major sane virgin:
 - 1- He has the right to compel her to marriage, so he can marry her off without her permission like the ward.
 - 2- He doesn’t have the right to marry her off without her permission. There is another narration in the school of thought which is that it is recommended to ask for her permission and it is also recommended to ask for the mother’s permission in regard to her daughter’s marriage.⁴⁹⁶
- f- The insane and the idiot, because of the incapacity to take charge of their own affairs and the invalidity of their conduct.⁴⁹⁷

2. As for the woman who lost her virginity through a means other than marriage, such as illness, intense period, jumping or any other reason, she is subject to the same rulings as the virgin in the issue of *wilāyat al-ijbār*. And for the ward who is previously married her rules are as follow:

- a- The previously married (*thayyib*) of sound mind who is under nine years old: the father has the right to compel her to marriage without her permission. It was also said that he doesn’t have the right to do so.
- b- The previously married (*thayyib*) who is over nine but has not attained majority yet: there are two narrations from Aḥmad b. Ḥanbal in regards of marrying her off without her permission:

⁴⁹⁵ See Ibn Qudāmah, *al-Mughnī*, VII, p. 378.

⁴⁹⁶ See Ibid, VII, pp. 380-81, 384.

⁴⁹⁷ See Ibid, VII, p. 389.

- i. Her father cannot compel her. Most of the Hanbalis follow this narration.
 - ii. It is permissible for the father to marry her off without her permission.
- c- The previously married (*thayyib*) ward: it is impermissible for her father to compel her to marriage because the criteria of *ijbār* (compulsion) is the status of the virginity not the age so she must be left until she attains majority and choose for herself as her permission is required unlike the situation of the virgin. There is another opinion in the school of thought which say that the father can compel the previously married ward because she is still a ward and doesn't have the capacity to realise her interest.⁴⁹⁸

However, the major and previously married (*thayyib*) have the right of guardianship through permission (*wilāyat al-idhn*). She is, therefore, not subjected to *wilāyat al-ijbār*. The same thing applies for the one who lost her virginity through unlawful means, like unlawful sexual intercourse or rape. Therefore, in the case of the sane major *thayyib*, it is impermissible for her father or any of her guardians to marry her off until she explicitly utters her permission because the tongue usually expresses what is in the heart. That is because she is mentally mature (*rashīdah*) and knows the purpose of the marriage, has experienced marriage and already lived with a husband before. This is why she cannot be compelled to marriage and the Prophet ordered for her permission to be asked.⁴⁹⁹ Ibn Qudāmah said, 'he (the father) doesn't possess the right to marry off the *thayyib* daughter without her consent because of the Prophet's saying: "A woman who has been previously married (*thayyib*) has more right over her person than her guardian".⁵⁰⁰ Also, Ibn ʿAbbās reported the Prophet's saying: "A guardian has no concern with a woman previously married (*thaiyyb*)".⁵⁰¹

⁴⁹⁸ See Al-Mardāwī, *al-Inṣāf*, VIII, pp. 50-55; Maṣūūr b. Yunus, al-Buhūtī, *Kaṣḥf al-Qināʿ ʿAn Matn al-ʿIqnāʿ*, ed. by Muḥammad al-Amīn al-Ḍinnāwī, 1st edn (Beirut, Lebanon: Aalam al-Kutub, 1997), IV, pp.40-41; Ibn Muflīḥ, *al-Furūʿ*, pp.1254-56.

⁴⁹⁹ See Burahān al-Dīn Ibrāhīm, Ibn Muflīḥ, *al-Mubdīʿ Sharḥ al-Muqniʿ*, 1st edn (Beirut, Lebanon: Dar al-kutub al-Ilmiyah, 1997), VI, p. 101.

⁵⁰⁰ Muslim, *Ṣaḥīḥ Muslim*, *ḥadīth* number: (3477).

⁵⁰¹ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2100). See Ibn Qudāmah, *al-Kāfi*, IV, pp. 243-44.

Moreover, the woman's permission is required in case one of the guardians other than the father seeks to marry her off because no one but the father can compel a girl to marry, as previously mentioned. No other guardian has the right to marry her off without her permission because they are unlike her father in his care and compassion towards her. Again Ibn Qudāmah said, 'no one apart from the father possesses the right to compel the major [woman] or marry off the ward whether he was a paternal grandfather or any other guardian'.⁵⁰² If the husband is a sane major, he cannot be compelled to marry without his consent because his consent is a condition for the validity of the marriage contract as he initiates it exactly like he initiates a sale contract - if a person cannot be compelled to a sale contract then it is of more priority he cannot be compelled to a marriage contract. Al-Mardāwī (d. 885 AH / 1480 AD) said, 'the father doesn't possess the right to marry off his sane major male sons without their consent'.⁵⁰³

Finally, if the woman is in a place where she has no guardian and there was no ruler or judge where she is, then the opinion of Ḥanbalis is that a man from the Muslim community who is *'adl* (upright of good character) can marry her off with her consent.⁵⁰⁴

Here, we finish with the suggestion from Ibn Rushd who suggested that if the lawgiver had intended the stipulation of guardianship, he would have elaborated all of the conditions required for guardians. Moreover, delay of the elaboration beyond the time at which it is needed would cause harm, especially when there is a general public need which requires that the stipulation of guardianship and the evidence should be *mutawātir* (consecutive), or as close to it as possible. That did not happen and therefore two possibilities shall be assumed:

- 1- *Wilāya* (guardianship) is not a condition for the validity of marriage, but guardians have the right of inquiry in it; i.e to supervise the validity of the woman's conduct, and they have the right of *ḥisbah* (guarding against infringements), or that

⁵⁰² Ibn Qudāmah, *al-Mughnī*, VII, p. 383.

⁵⁰³ Al-Mardāwī, *al-Inṣāf*, VIII, pp. 51-52. Also see Ibn Qudāmah, *al-Kāfi*, IV, pp. 243-44; Maṣūb b. Yunus, al-Buhūṭī, *Sharḥ Muntaha al-'Irādāt* (Beirut, Lebanon: Aalm al-Kutub, n.d), III, pp. 13-14.

⁵⁰⁴ See Ibn Qudāmah, *al-Mughnī*, VII, pp. 350-52; Ibn Muflīḥ, Ibn Burhān al-Dīn, *al-Mubdi^c Fi Sharḥ al-Muqni^c*, VI, p.107. Also See Al-Mardāwī, *al-Inṣāf*, VIII, p. 69.

2- If guardianship is a condition for the soundness of the marriage contract then it is required to specify the gender, type and categories of the guardians for the *wilāya* to be valid, rather the contract is considered valid with the presence of any guardian (*walī*).⁵⁰⁵

It would seem from the above discussion that *wilāyat al-ijbār* is a type of coercion (*ikrāh*), even if it has not been clearly stated by early jurists. Furthermore, some eminent jurists rejected the idea of *ijbār* (compulsion) in marriage and they did not distinguish between it and *ikrāh*.⁵⁰⁶ It can be claimed, therefore, that forced marriage is *ikrāh*, i.e. marriage with coercion. The next chapter will clarify *ikrāh* and its link with *wilāyat al-ijbār* (compelling guardianship) in depth.

⁵⁰⁵ See Ibn Rushed, *Bidāyat al-Mujtahid*, II, p. 13.

⁵⁰⁶ See section 5.10.

Chapter 5

The Effect of Coercion on the Marriage contract

5.1 Introduction

Based on the discussion of guardianship thus far, it is clear that scholars have mixed views on the significance of guardianship for the marriage contract, ranging from those who consider it a pillar of the contract, those who see it as one of the conditions of its soundness and those who see it as an aspect of its perfection which does not affect the validity of the contract, rather it is a recommended aspect of it. Opinions seem to be informed by the way scholars interpret the concept of human freedom and the state of legal capacity. So, for example, the Ḥanafis approve the complete freedom and independence of a woman in all her affairs, as long as she is mature and of a sound intellect. The other three schools of law apparently give priority to protecting a woman's interests by giving more authority to her guardian who is –in their opinion- more experienced in dealing with the opposite sex (i.e. men).⁵⁰⁷

In the previous chapter, we learned that the Islamic Jurisprudential system of guardianship in regards to the self and wealth was introduced in order to fulfil the interest of the ward in such a way as to benefit him or her as members of the family unit and as members of the wider community. It would be an exaggeration to suggest that the legislation of the system of guardianship in Islamic jurisprudence aimed to deny the ward agency in the marriage process by somehow stripping them the right to choose, spend or to pursue other rights; the ward is an honourable human being with respected rights, feelings and personal choices. This is the spirit and purpose of Islamic law, which came to preserve the five necessities; religion, life, intellect, lineage, and wealth in order to seek benefit and repel harm (*jalb al-maṣlahah wa-daf' al-mafsadah*).⁵⁰⁸

⁵⁰⁷ See al-Zuhaylī, *Shart al-Wilāya Fī 'Aqd al-Zawāj*, p.6.

⁵⁰⁸ See Nyazee, *Islāmic Jurisprudence*, p. 195; Ibrāhīm b. Musa, al-Shāṭibi, *al-Muwāfaqāt*, 1st edn (Al-Khubar, Saudi Arabia: Dar Ibn Affaan, 1997), II, p. 20.

The Qur'an highlights the following: "And We have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference" (Q., 17:70). Qutb said, explaining the meaning of this verse, 'One aspect of God's favour is to make human beings responsible for themselves, accountable for their actions. This is the first quality which distinguishes mankind and makes them worthy of their exalted position on earth: freedom of choice and individual responsibility'.⁵⁰⁹

The fact that the ward might be incapable of fulfilling and taking care of his or her own interests does not automatically award full freedom to the guardian to control the ward in a way that does not fulfil their interests. This is what is clearly stated in the Qur'an when it forbids the guardian or the custodian to unjustly take the orphan's wealth by squandering or spending it just before the orphan attains majority, thinking that he will waste it as soon as he attains majority and obtain full control over his/her wealth, which is a form of oppression. Because the orphan in this context is under the age of full mental maturity, the Qur'an guides the guardians and the custodians to take care of the ward's rights and to preserve their trust, as they usually neglect this and keep squandering and following their own caprice. There should be no fear of the orphan attaining majority and becoming free of their guardianship to have full authority of their own wealth on the part of the guardian.

The Qur'an further says:

And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor – let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant. (Q., 4:6)

⁵⁰⁹ Qutb, Sayyid, *Fī Zīlāl al-Qur'ān*, 25th edn (Cairo, Egypt: Dar al-Sruq, 1972), IV, p. 2241.

This verse includes rulings relating to the rights of orphans under guardianship. It clarifies the procedures of handing over wealth from the custodians to the orphan and stress upon hastening to hand them over in full as soon as the orphan attains majority, and after confirming the orphan's capability to act responsibly, as regards himself and his wealth; the verse suggests that the guardian carries out a practical test that proves the ward's eligibility to receive his own wealth. This procedure was decreed in order to protect the orphan's interests as well as to prevent the oppression of the guardian or custodian. The verse also guides guardians and custodians to refrain from taking a fee from the orphan's wealth when they are financially self-sufficient or to take the minimum amount in case they are poor. 'Ā'ishah explained that this verse refers to a situation in which a man is in charge of an orphan girl and he is also her heir. She may enter into a marriage partnership with him. He may not want to marry her himself, as she may not be suitable in his eyes. At the same time, he may not want her to marry anyone else, lest the new spouse takes a share of the wealth. Her guardian, then, prevents her from marrying anyone. This verse explains that the severest oppression is exercised by the guardians or custodians over young orphan girls who have wealth when they prevent the girls from accessing their wealth or lock them up to marry them (when they attain the age of marriage), or marry them off to their sons, seeking their wealth, or by preventing them from marrying from outside the family.⁵¹⁰

This was also the case in the issue of marriage as guardians used to abuse the right of their wards by consuming their dowries and preventing them from getting married, which is a clear abuse of the right of taking care of the affairs of women granted to them by law. Here the Qur'an says, "But if they give up willingly to you anything of it, then takes it in satisfaction and ease" (Q., 4:4). This verse describes the reality that women used to live in – and unfortunately still do in many places- where a woman is oppressed and her rights are abused in many ways; one of which is when a guardian takes her dowry for himself as though she is a bargaining tool owned by him. Thus, the Qur'an addressed men and forbade them from oppressing women, it giving guidelines and how to avoid such oppression. The verse obliges the guardian or the husband to give the full dowry to the woman for her to

⁵¹⁰ See Ibn 'Āshūr, *al-taḥrīr wa al-tanwīr*, IV, pp. 244-45; also see al-Ṭabarī, *Jāmi' al-Bayān*, VII, p. 531.

takes full possession of it, and to give it to her in kindness as though he is giving her a gift. The verse also forbids men from taking any amount of the woman's dowry without her consent, and therefore the verse grants the woman her full right and will, respecting her personality and character.⁵¹¹

Another pre-Islamic practice which appeared not to protect the rights of women was a form of marriage called *shighār*, which refers to an arrangement in which the guardian gives a girl under his guardianship in marriage on the condition that his counterpart gives a girl under his guardianship to him in marriage, without any dower being paid by either. There was another form of marriage which involved a woman being inherited like any other item. When her husband died, his heir would come and throw his garment over her signalling that she now belonged to him. He could marry her without paying her any dowry, or he could give her in marriage to someone else, but in this latter case he would receive her dowry for himself. In another arrangement, if a man no longer wanted his wife then he would be at liberty to ill-treat her. He could leave her in suspense, neither married nor divorced, until she bought her freedom from him with her own money.⁵¹²

All of these practices were forbidden through the Qur'anic legislation. The Prophet too condemned them. A notable verse in this regard is:

O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness, for if you dislike them - perhaps you dislike a thing and Allah makes therein much good. But if you want to replace one wife with another and you have given one of them a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin? And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant? (Q., 4:19-21)

⁵¹¹ See Al-Ṭabarī, *Jāmi' al-Bayān*, VI, p. 382 ; Quṭb, *Fī Zilāl al Qur'ān*, I, p. 585.

⁵¹² Quṭb, *Fī Zilāl al Qur'ān*, I, p. 585.

However, one of the purposes of marriage according to Muslim scholars is "to achieve tranquillity, love and compassion", because the marital relationship is not only a physical one. In marriage, the spouses should find calmness in each other and that results in love and compassion between them. The legislation sought to establish marital relations on a solid foundation of these principles, and to achieve the purposes that provide for each spouse a happy and calm marital life built on love, compassion, cooperation and psychological and social stability.⁵¹³

These purposes cannot be achieved in an environment where oppression is exercised against the woman or when she is compelled to live with someone she does not love or want to spend the rest of her life with - and certainly not a husband who she was compelled to be with. In Islam, marriage should be built on the foundation of two souls that willingly choose each other and establish a marital life on the principles of full consent, complete freedom of choice, satisfaction that stems from the hearts and compassion, which includes no restrictions. The Qur'an is clear:

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 people who give thoughts." (Q., 30:21)

Ibn Taymiyya used the general guidance in this verse -which includes the legitimate purposes of marriage- to insist on the invalidity of compelling a woman into a marriage and he used it as an argument against those who approved the validity of compelling the woman to marry by saying:

As for marrying off a woman who is averse to the marriage, it is contrary to both the principles of Sharīḥ and the sound intellect. Allah, Exalted is He, does not allow her guardian to compel her to sell or lease contracts except with her permission; neither does He allow the guardian to compel her to

⁵¹³ See Amīn, al-Ḥazmī, 'Iṭibār al-M'ālāt fī Fiqh al-'Usrah fī al-Gharb', in *Scientific Review Of The European Council For Fatwa And Research*, 19-20, (Dublin, Ireland: The European Council For Fatwa And Research, 2013), pp. 147-188.

food, drink or dress; so how can he compel her to have a relationship with someone she hates.⁵¹⁴

The Qur'an forbids all kinds and forms of coercion because Islam is a religion that doesn't accept for a person to be forced to anything against his will under any circumstances as the Qur'an says, "There shall be no compulsion in [acceptance of] the religion" (Q., 2:256). The jurists though excluded one type of coercion which they called 'coercion with right' –an example of this is when a judge forces the indebted to sell some of his properties in order to pay back his debt. Ibn al-^cArabī (d. 543 AH / 1148 AD) said about the negation in this verse, 'it is a general statement in negating invalid coercion', meaning the type of coercion which the jurists called 'coercion without right' which will be explained later.⁵¹⁵ This negation of this invalid coercion is called categorical negation (*naḥy al-jins*) by the scholars of Arabic language, meaning coercion is categorically negated to begin with. It is as though the Qur'an denies the possibility of coercion, which is beyond simply commanding not to do it. The scholars of the Arabic language stated that forbidding using the form of negation (*al-naḥy fī ṣūrat al-naḥy*) has a deeper impact; it is a confirmed indication.⁵¹⁶ According to Quṭb, this reflects the honour God has reserved for man and the high regard in which man's will, thought and emotions are held, as well as the freedom he is granted to choose his beliefs and the responsible position he is afforded to be judge of his own actions, which is of the main characters of the human freedom.⁵¹⁷

Al-Bukhārī reported that a woman called al-Khansā' bint Khidām al-Anṣāriyah was given by her father in marriage though she disliked that marriage. She came and complained to the Prophet, and he declared that particular marriage invalid.⁵¹⁸ Al-Bukhārī gave this *ḥadīth* the title 'If a man gives his daughter in marriage without her consent, then her marriage is invalid'. The jurists said that this narration indicates that the marriage of a pubescent

⁵¹⁴ Aḥmad b. ^cAbd al-Ḥalīm, Ibn Taymiyyah, *Majmū'c al-Fatāwā*, ed. by ^cĀmir al-Jazzār and Anwar al-Bāz, 1st edn (Cairo: Egypt, Dar al-Wafa, 1997), XXXII, p. 21.

⁵¹⁵ Abū Bakr Muḥammad b. ^cAbd Allāh, Ibn al-^cAarabī, *Aḥkām al-Qur'ān*, ed. by Muḥammad ^cAbd al-Qādir ^cAṭa (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1996), I, p. 310.

⁵¹⁶ See Quṭb, *Fī Zilāl Al Qur'ān*, I, p. 291.

⁵¹⁷ See Ibid, I, p. 291.

⁵¹⁸ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (5138).

daughter is rejected if she dislikes it. Only the one who understands the meaning of things can express his/her discontent.⁵¹⁹

Furthermore, one cannot find in the Qur'an or in the authentic *Sunna* of the Prophet -in what is related to the issue of marriage specifically- anything that allows the use of compulsion (*ijbār*) and there is no existence for the root of *ja-ba-ra* to compel in any text in the field of marriage from Qur'an or *Sunna*. One might ask: where did jurists bring this word compulsion (*ijbār*) from to make it a right for the guardian to exercise over his ward?

If you are to check in the Arabic dictionaries you will find that the root word for compulsion (*ijbār*) is *ja-ba-ra* which, as we will see, totally contradicts the spirit of marriage and its legitimate purposes, which are based upon love, compassion, mercy and intimacy. The original meaning of *ijbār* indicates greatness, strength and might. It can also be used to suggest coercion, it is said: *ajbartuhu* 'I compelled him to something', meaning: I forced him to do it. Ibn Fāris (d. 395 AH / 1004 AD) said, 'that can only be through compulsion and a sort of expressing greatness over the person'.⁵²⁰ However, amongst the meanings of the root *ja-ba-ra* is a positive meaning which is the antonym of breaking i.e., reparation of broken machines or bones. The piece of wood which is used to bring the broken bone together is called *jibāra*. There is another positive meaning for the same root with the verb form *ijtabarahu* which means to do good to someone and to make him rich after poverty. Such positive meanings are more worthy to be used in the issue of marriage and better than the compulsion guardianship (*wilāyat al-ijbār*) which includes meanings of oppression and coercion.⁵²¹

⁵¹⁹ Ibn Hajar, *Fath al-Bārī* IX, p. 243; Al-^cAaynī, *Umdat al-Qārī*, XX, pp. 182-83.

⁵²⁰ See Ibn Fāris, *Maqāyyīs al-Lughah*, p.183; Also see Majd al-Dīn Muḥamad b. Ya^cqūb, al-Fayrūz'abādī, *al-Qamūs al-Muḥīṭ*, ed by Muḥammad Na^cīm al-^cIrsūsī, 6th edn (Beirut, Lebanon: Al-Risalah Publishers, 1998), p. 360.

⁵²¹ See Jār Allah Abū al-Qāsim Maḥmūd b. ^cUmar, al- Zamakhsharī, *Asās al-Balāghah*, ed. by ^cAbd al-Raḥīm Maḥmūd (Beirut. Lebanon: Dar al-Marefah, 1982), pp. 50-51; Ibn Fāris, *Maqāyyīs al-Lughah*, p.183; Also See Al-Fairūzabādī, *al-Qamūs al-Muḥīṭ*, p. 360.

However, al-Rāghib al-Aṣfahānī (d. 502 AH / 1108 AD) mentioned that the root *ja-ba-ra* means ‘to repair something with the use of some force’.⁵²² He might have taken into consideration the fact that repairing a broken thing requires some force or pressure to bring the two broken parts together but -in my opinion- I don’t think that this befits the situation of marital life which is built upon compassion and mercy to begin with. Al-ṣfahānī reassured that the commonly used meaning for *ijbār* is mere coercion.⁵²³

Among philosophical theories in connection to theology (*‘ilm al-kalām*), there is a group known as *al-mujbira* or *al-jabriyya*. The name comes from the word *jabr* which means attributing any human act to the divine decree and Will (*al-qaḍā’ wa al-qadar*).⁵²⁴ This meaning might have found its way into the jurists’ definitions of “guardianship of compulsion” (*wilāyat al-ijbār*), which is forcing someone to do something whether he or she likes it or not, adopting the definition given by al-Jurjānī: ‘*Wilāya* legally is to force an opinion over others, whether it is with or without their consent’.⁵²⁵ However, jurists used the word *ijbār* in the sense of oppression and coercion although the term in the books of jurists has no specific definition. Rather, they used the term in the sense of oppression and coercion, such that whoever has authority has the right to compel those under his guardianship to marry a person with or without their consent.⁵²⁶ Thus, the word *ijbār* (compulsion) is very relevant to the meanings of pressure, harassment, distress, and coercion. Therefore, compulsion to marriage when the woman or the man dislikes it shall be included in the last type, i.e. the impermissible *ijbār*, because it is a form of exercising of pressure, harassment and coercion over someone to accept that which he/she does not want or accept.⁵²⁷

⁵²² Al-Rāghib al-Aṣfahānī, *Mufradāt al-fāz al-Qur’ān*, p.183.

⁵²³ See Al-Rāghib al-Aṣfahānī, *Mufradāt al-fāz al-Qur’ān*, p.183.

⁵²⁴ See Al-Jurjānī, *al-Ta’arīfāt*, p. 66.

⁵²⁵ See *Ibid*, p. 213.

⁵²⁶ *Shuf’ah* (right for pre-emption) is the right of possessing that which is approved for an old partner over a new partner in cases where properties can be exchanged for compensation. See Kuwait, *aL-Mawsū‘ah al-Fiqhiyyah* 1st edn (1992), XXVI, pp.136-69.

⁵²⁷ An example of permissible compulsion, for example, is to compel a mother to breastfeed and give custody of the child for the interest of the child, and a father to pay the expenses of the breastfeeding and the nursery (of the child), or when the state compels all or some of its citizens to something in order to achieve a public

5.2 Freedom a purpose of Islamic law

There is no doubt that compulsion and coercion are forms of control over human freedom (*hurriyyah*) and actions. Human freedom is a value that Islam has given great attention and consideration to because human freedom is a means to remove all kinds of pressure, coercion, injustice, humiliation and control of others' freedom of choice. This is why the meaning of the word 'freedom' has expanded to include human freedom; to get rid of all unfair authority or force that has befallen him.⁵²⁸

According to Kamali, the word *hurriyya* (freedom) was not as commonly used by classical jurists as it is now being used by modern writers in Arabic. Thus, the current usage of *hurriyya*, which conveys the full force of the concept of 'freedom', is of relatively recent origin. However, the Word '*ikhtiyār* (choice, free will) is more commonly used in writings of Muslim mystics (*ṣūfiyya*) and philosophers (*falāsifa*) than *hurriyya*. The word *hurriyya* does not occur in the Qur'an itself but other derivatives of the same root, such as '*al-ḥurr* (a free man) (Q., 2:178).⁵²⁹ Freedom means for a person to enjoy his/her independent will and his ability to execute that which he sees as right and accepts responsibility for. According to Ibn 'Ashūr as the term *hurriyya* means that the person enjoys the ability to act on himself and his affairs however he wishes, without anyone prevents him from doing so. The opposite of that is called 'prevention to act'.⁵³⁰

According to Ibn al-Khūja, freedom is one of the purposes of Islam (*maqāṣid al-Islām*); the freedom of one's conduct is what he/she obliges himself to out of his/her free will in the disposal of contracts and self-obligations in order to achieve a benefit for him/her. Al-Khūja adds that the meaning which agrees with the modern significance of freedom –which he argues is one of the purposes of Islamic law- is for the rational person to act in his affairs

interest or push away a public harm. Impermissible compulsion is like when an oppressor compels someone to sell his property or to say something that is unacceptable. This is a form of coercion. See Kuwait, *al-Mawsū'ah al-Fiqhiyyah*, 2nd edn (1983), I, pp. 311-14.

⁵²⁸ See Yusuf, al-Qaradāwī, *Malāmiḥ al-Mujtama' al-Muslim*, 3rd edn (Cairo, Egypt: Maktabat Wahbah, 2001), pp. 118-19

⁵²⁹ Mohammad Hashim Kamali, *Freedom, Equality And Justice In Islam*, 2nd edn (Cambridge, England: The Islamic Texts Society, 2002), pp.3-4.

⁵³⁰ See Ibn 'Aashūr, *Maqāṣid al-Shari'ah*, p. 155.

independently without the need of anyone's consent. For a person to be able to act in himself and his affairs as he pleases without any objection is freedom.⁵³¹

Ibn ʿĀshūr believes that this is the intended meaning of freedom in Islamic law because it is a character of human nature and there are many manifestations of freedom in Islam which all relate to one original rule in consideration of individuals' beliefs, speech and actions; for them to be completely free in all of their conducts –that are allowed by law- without being afraid of anyone. Amongst the manifestations of personal freedom in Islamic law is the freedom of action in regard to contracts and agreements. Ibn ʿĀshūr also believes that if it is not for the consideration of freedom of expression, then confessions, contracts, obligations, divorce pronouncements will have no legal effect. That is why these actions are ineffective once it is established that they have taken place under coercion.⁵³²

According to ʿAmāra, the freedom of people in conducts related to their own affairs is an original purpose of Islamic law because freedom is the value which grants access for humans to the real meaning of life. A human being with no freedom is like a dead human being even he is alive, eating, drinking, working and earning.⁵³³ Al-Duraynī confirms that it is an original rule in Islam that all human conduct is permissible and so he is granted the freedom to carry out all kinds of contracts unless he causes a clear harm to another person or the community, contradicts a specific text, violates the terms of the contract or uses it as a means to allow something that is prohibited or to abandon a duty.⁵³⁴ Stressing the same meaning, Abū Zahrah claims that the first manifestation of freedom is 'personal freedom', which includes the freedom of a person to believe in that which he thinks is right and to say that which he thinks is right and to act on his personal affairs in a way that results in his benefit with no interference from anyone and without any control by an authority in his free

⁵³¹ See Ibn al-Khūja, *Bayna ʿIlmayy al-Fiqh wa al-Maqāṣid*, II, pp. 131-32.

⁵³² See Ibn ʿĀshūr, *Maqāṣid al-Sharīʿah*, p. 162.

⁵³³ See Muḥammad, ʿAmāra, *al-Islām wa Huqūq al-ʿInsān*, ʿAlam al-Maʿrifah, v.89 (Kuwait: Al-Majlis al-Waṭani Li al-Thaqafah, May 1985), pp. 101-02.

⁵³⁴ See Fathī, al-Duraynī, *Naẓariyyat al-ʿAqd*, 2nd edn (Damascus, Syria: Damascus University Press, 1997), p. 288.

will.⁵³⁵ According to Rayner, intention and consent have become the two fundamental precepts to any contract, and the Qur'an and *ḥadīths* determine that bilateral contracts can only take place with the free consent of the parties.⁵³⁶ Thus, if this is the value of personal freedom in Islam, is it then accepted to strip away the person's freedom to choose for him/herself when choosing a husband or a wife, with whom they will spend a large portion of their lives with?

It is well known in Islamic jurisprudence that the principle of freedom in regard to contracts in Islamic law is based on a very essential requirement, which is consent (*riḍā*). That is why we find many rulings in Islamic jurisprudence with a close connection to consent, like the rulings of sales with options (*al-khiyārāt*) and the rulings of returning goods if they are defective, because the principle of *riḍā* is essential in contracts as well as other transactions. It was decided in the rules of Islamic jurisprudence, and in the jurisprudence of transactions specifically, that 'mutual consent is the foundation of the contract' (*al-riḍā asās al-^caqd*), meaning that any contract between two parties is not considered initiated except with the consent of the two parties. Some jurists might call it 'the principle of consent in contracts' (*mabda' al-riḍā fi al-^caqd*) and some others might call it 'the principle of freedom in contracting' (*ḥurriyyat al-ta^cāqud*). All of these labels lead to one original rule which is 'the authority of free-will in contracts' (*sulṭān al-irādah al-^caqdiyyah*).

5.3 The Principle of Consent (*riḍā*)

As mentioned above, consent is a basic rule in human transactions, particularly contracts. This is established with evidence from both the Qur'an and the *Sunna*. The Qur'an says, "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent (*tarāḍin*)" (Q., 4:29). Islamic jurisprudence made mutual consent the basis of all transactions and any other conditions which should be fulfilled are in addition to this.

⁵³⁵ See Abū Zahrah, Muḥammad, *Tanzīm al-Islām li al-Mujtama^c* (Cairo, Egypt: Dar al-Fikr al-Arabi, '[n.d.]'), p. 182.

⁵³⁶ See Rayner, *The Theory of Contract in Islamic Law*, pp. 115, 121.

Ibn al-^cArabī confirms that the verse enjoins consent (*riḍā*) as a foundation of all transactions and in everything issued verbally by a person to express his contentment with the contract.⁵³⁷ Because contentment is an inward condition that cannot be seen, the Islamic law attached it to the existence of an apparent sign that indicates it, which is the formula (*ṣīgha*) of the contract; which jurists describe as the offer (*‘ijāb*) and the acceptance (*qabūl*). However, among the conditions of *‘ijāb* and *qabūl* is for both of them to be in a confirmation form in order to confirm consent (*riḍā*).

Ibn Taymiyyah confirms that the original rule in regards to contracts are the mutual consent of the contracting parties and that what is obliged by contracts are indeed that which the contractors have committed and he argued this using the evidence of one of the verses from Qur’an which is related to marriage: “But if they give up willingly to you anything of it, then take it in satisfaction and ease” (Q., 4:4). He assumes the verse stipulates the husband’s consumption of the woman’s dowry to be a clear sign of her consent in this case. So, if the existence of consent is the reason that allows any taking from the dowry then that will be the case in any other types of donations, because it shares the same effective cause (*‘illa*) - by applying the process of analogical deduction (*qiyās*) - with the *‘illa* stated in the verse. Thus if the two contracting parties came to a mutual consent in a transaction, or if someone donated something willingly, then that becomes lawful by the evidence of the Qur’an-except a transaction that is declared to be unlawful by Allah and His Messenger-.⁵³⁸

Generally, Islamic jurisprudence stipulates rulings grant freedom to the contracting parties in order that they do not restrict themselves by such formalities that prevent their free will and consent. Therefore, it stipulates the existence of an essential requirement in all contracts which is offer (*ijāb*) and acceptance (*qabūl*), or what is known as the formula (*ṣīgha*) of the contract, which is what is issued by both parties as expressions of their consent. This consent is considered to be the binding element beside any other forms and manifestations. Furthermore, the legislation also equates men and women in the freedom of contracts and in

⁵³⁷ See Ibn al-^cArabī, *Aḥkām al-Qur’ān*, I, p. 523.

⁵³⁸ See Aḥmad b. ^cAbd al-Ḥalīm, Ibn Taymiyyah, *al-Qawā‘id al-Kulliyyah*, ed. by Mahaysin b. Abd al-Rhman al-Mahaysin, 1st edn (Riyadh, Saudi Arabia: Maktabat al-Tawbah, 2002), pp. 206-07.

respecting their will in all conduct such as sales, donations, commitments and marriages.⁵³⁹ In this context, al-Sanhūrī states that the basic rule, as delineated by jurists, is that offer and acceptance alone are enough in the formation of the contract.⁵⁴⁰

5.4 The Concept of Consent (*riḍā*) in Islamic Jurisprudence

Riḍā literally means the fact of being pleased or contented, indicating contentment and approval. In the Qur'an, the root of word '*riḍā*' and its derivatives occur frequently in the general sense of 'to be content'.⁵⁴¹ In Arabic *riḍā* is a verbal noun from the root *ra-ḍi-ya* which means the sense of pleasure and acceptance of something; the opposite is hatred and indignation. *Riḍā* can take many meanings like self-satisfaction or acceptance and ability to choose, someone says '*raḍītu bi al-shayi*', it means that you have chosen and approved something. This is how Qur'an used like in the verse, "I have perfected for you your religion and completed My favour upon you and have approved (*raḍītu*) for you Islam as religion" (Q., 5:3).⁵⁴²

Of the terms that are related to consent (*riḍā*):

- a- The will (*'irāda*): which means wanting something and going towards it.
- b- The intention (*nīyya*): This means to intend while the heart is determined to carry out the act, so it is connected to acting upon the intention.
- c- The advancement towards the establishment of an act (*qaṣd*). However, *qaṣd* and *nīyya* is almost the same thing.⁵⁴³

The opposite of *riḍā* is coercion (*ikrāh*) and compulsion (*ijbār*).⁵⁴⁴ Thus, phrases like freedom to choose, free-will and contentment all lead to one meaning which is 'the principle

⁵³⁹ See al-Zarqa, *al-Madkhal al-Fiqhi*, I, pp. 387-88.

⁵⁴⁰ See Al-Sanhūrī, 'Abd al-Razzāq, *Naẓariyyat al-Ḥaqq Fī al-Fiqh al-Islāmi*, 2nd edn (Beirut, Lebanon: Al-Halabi, 1998), II, pp. 40-41.

⁵⁴¹ See F. Babinger-[J. Schmidt], '*riḍā*', *EF*².

⁵⁴² See *MFK*, 2nd edn (1992), XXII, 227-38.

⁵⁴³ See *MFK*, XXII, pp. 228-38.

⁵⁴⁴ See *Ibid*, XXII, pp.228-38.

of freedom in action'. The opposite of them is coercion, compulsion, and being forced.⁵⁴⁵ Jurists are divided into two groups in defining *riḍā*. The Ḥanafis differed in their definition of *riḍā* because they differentiated between *riḍā* (consent) and choice (*ikhtiyār*), while the majority (the other three schools of thoughts) gave similar definitions for *riḍā* in general and therefore did not differentiate between *riḍā* and *ikhtiyār*.

One of the definitions of *riḍā* is mentioned by al-Taftāzānī (d. 793 AH / 1390 AD): 'preferring and favouring something'.⁵⁴⁶ Ḥanafis define consent (*riḍā*) as reaching 'the maximum point of contentment in a way that reflects on the limbs with signs of cheerfulness and satisfaction'.⁵⁴⁷ The majority defined *riḍā* as 'intending to carry out the act without any trace of coercion', or 'the satisfaction to do something'. They defined choice (*ikhtiyār*) as 'to select something and prefer it over other things'.⁵⁴⁸ Hence, choice (*ikhtiyār*) is to seek what is good and to do it. The good is everything that you seek such as intellect, justice, beneficial things, etc.; its opposite is evil. The good is what a person sees as good even if it was not in itself. *Ikhtiyār* is everything a person does without any coercion.⁵⁴⁹ The Encyclopaedia of Islam defines it as a philosophical term, (*ikhtiyār*) which means free choice, free will. However, from its very root *khayr* (good), *ikhtiyār* implies primarily not a sovereign indifference above good and evil, but free choice of what is good. And it is thus distinguished, in its connotations, from *hurriyyah*, personal and political freedom of exultation or autonomy'.⁵⁵⁰

Accordingly, the principle of *riḍā* for the Ḥanafis has a more specific significance than the principle of *riḍā* with the majority because the opinion of the majority is that *riḍā* is the mere intent to do something with the condition that it is free from any control or coercion by anyone, even if it is not a totally free choice or if the signs of pleasure are not apparent on

⁵⁴⁵ See Rafiq Yunus, al-Maṣrī, '*Usul Al-Iqtiṣād al-Islāmī*, 2nd edn (Damascus, Syria: Dar al-Qalam, 1993), p. 60.

⁵⁴⁶ Sa'īd al-Dīn, al-Taftāzānī, *al-Talwīḥ 'Ala al-Tawḍīḥ* (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, [n.d.]), II, p.162.

⁵⁴⁷ *MFK*, XXII, pp. 228-38.

⁵⁴⁸ See *Ibid*, XXII, pp. 228-38; also see al-Khudaṛī, '*Uṣūl al-Fiqh*, p. 105.

⁵⁴⁹ See Al-Rāghib al-Aṣfahānī, *Mufradāt Alfāz al-Qur'ān*, pp. 301-02.

⁵⁵⁰ See L. Gardet, 'ikhtiyār', *Et*.

the person's limbs. On the other hand, Ḥanafīs do not approve *riḍā* unless it is accompanied with approbation and preference in the process of choosing and therefore pleasure takes place and is reflected on the face. This means that Ḥanafīs think that *riḍā* and *ikhtiyār* are two different things, both in their conventional meaning and the rules which result from them, whereas the majority think that they are two similar things as all acts issued by a person must be accompanied by his choice (*ikhtiyār*). This choice is considered sound if it results from a person's own desire to do something and considered unsound if it is affected by any factors that tamper with the process of *ikhtiyār*. Therefore, we learnt from the above the Ḥanafīs and the majority differ in their perception of *riḍā* and *ikhtiyār*. This difference can be summed up as follows:

- a- *Riḍā* (consent) and *ikhtiyār* (choice) with Ḥanafīs are two different things in their meaning and their effect. *Ikhtiyār* is the intent to do something while *riḍā* is to prefer and favour something with comfort and pleasure.
- b- The majority did not differentiate between *riḍā* and *ikhtiyār*, either in their meanings the rules which result from them because they are the same thing.

5.5 The Connection between Consent (*riḍā*) and Choice (*ikhtiyār*), and their Effect on Conduct

Accordingly, *riḍā* in the opinion of the Ḥanafīs is a stage that is more specific than *ikhtiyār*. They justify that with the argument that a person might perform an act out of his free choice -meaning this he has the ability not to do it- while he is not fully satisfied with it, i.e. unwilling or uncomfortable to do it. Therefore, *riḍā* in their opinion is full free choice by a free will without any outside effect.⁵⁵¹ Ḥanafīs divide *ikhtiyār* into:

- 1- *Ikhtiyār ṣaḥīḥ* (valid choice): when the person has a full legal capacity without any strong coercion exercised on him. This case combines *riḍā* and *ikhtiyār* (choice) as long as no coercion is exercised, but if slight coercion is exercised then *ikhtiyār* is considered valid but *riḍā* is not.

⁵⁵¹ See Al-Zarqa, *al-Madkhal al-Fiqhi*, I, p. 452.

- 2- *Ikhtiyār bāṭil* (invalid choice): when the person is insane or a boy under the age of clarity (*tamyīz*) as there is no choice for these categories and therefore, none of their conduct has any effect. In this case, *riḍā* is disapproved because *ikhtiyār* is disapproved.
- 3- *Ikhtiyār fāsīd* (irregular choice): is built upon the choice of someone else, called *mukriḥ* (the one who exercise coercion), and under strong coercion. In this case *riḍā* does not exist because of the strong coercion, however, *ikhtiyār* exists so if a person chooses then his choice is approved but considered as *fāsīd* (irregular).⁵⁵²

Generally, according to the Ḥanafis, these three types have a strong connection to dividing the contracts as *ṣaḥīḥ* (valid), *bāṭil* (invalid) and *fāsīd* (irregular).⁵⁵³

Al-Zarqa summarised the above as follows:

- 1- Choice is considered as sound and valid if it results from free will.
- 2- Choice is considered as irregular if it was a choice of a lesser of two evils or harm. In this case choice exists but consent does not.⁵⁵⁴

Thus, the process of consent and choice is affected by external factors which have a direct reflection on the choice of someone and the extent of his satisfaction with it, resulting in a legal rule. The most prominent effect on consent and choice is the factor of coercion (*ikrāḥ*).

Depending on the difference the Ḥanafis established between consent and choice, this differentiation appears clearly in the issue of coercion where the Ḥanafis think that coercion has no effect on the choice but has an effect on the consent. That is because *riḍā* is to intend and seek something with full desire and preference. For example, a contract is not fulfilled unless it takes place with the desire to carry out the contract in a way that leaves a person feeling satisfied. All of this is not stipulated to fulfil *ikhtiyār*. Therefore, *riḍā* with the Ḥanafis is more specific than *ikhtiyār* but the latter can still exist without the existence of the

⁵⁵² See al-Qarahdāghī, *Mabda' al-Riḍa Fī al-'Uqūd*, I, pp. 205-07.

⁵⁵³ See Ibid, I, p. 207.

⁵⁵⁴ See al-Zarqa, *al-Madkhal al-Fiqhi*, I, p.451.

former in the case of slight coercion, because that eliminates the *riḍā* but it doesn't eliminate *ikhtiyār* or even causes it to be irregular. That is because *ikhtiyār* –in the Ḥanafī view- is the mere intent to do something even if it was not the result of an urgent desire or preference to do it over any other thing, whereas strong coercion eliminates consent completely and causes the choice to be irregular but doesn't affect the process of *ikhtiyār*. Based on the personal reasoning of the Ḥanafis, the existence of consent means the existence of choice but the existence of choice does not mean the existence of consent.

Thus, *ikhtiyār* for the Ḥanafis is connected to the expression that initiates the contract whereas *riḍā* is connected to the legal effects of the contract. Therefore, the one who is forced into a contract is considered a person who has a choice (*ikhtiyār*) because he intended the expression that initiated the contract, but at the same time is not content with the legal effects of the contract. Accordingly, every contract that stipulates the existence of *riḍā* (like contracts of sale and purchase) is considered as *fāsid* (irregular) if *riḍā* does not exist, where *riḍā* is not a condition, the contract is considered valid and effective as in the case of marriage and divorce. However, the majority accepted neither the differentiation the Ḥanafis established between *riḍā* and *ikhtiyār* nor the divisions of the types of *ikhtiyār* as they said that coercion is contrary to both *riḍā* and *ikhtiyār* because they are same thing.⁵⁵⁵

According to Ibn Al-Qayyim, the expressions do not become binding until the person means them and accepts their consequences. However, he must also mean and intend to utter the word, so two wills must be fulfilled:

- a- The will to freely utter the words.
- b- The will to intend the commitments and consequences of the contract.

⁵⁵⁵ See al-Qarahdāghī, *Mabda' al-Riḍa*, I, pp. 207-08.

The will to intend the meaning of the contract (the commitments and consequences of the contract) is even more confirmed than the will to freely utter its words because it is the intended meaning of the contract while the words are only tools by which to achieve it.⁵⁵⁶

Al-Shāṭibī (d. 790 AH / 1388 AD) stated that, if the act is combined with the intent then all defining laws (*aḥkām taklīfiyya*) become effective but if the act is not combined with intent then all defining laws becomes ineffective, like the acts of a sleeping person, the insane or the unaware. He then used as evidence the verse: “And they were not commanded except to worship Allah, [being] sincere to Him in religion” (Q., 98:5), and the verse: “So worship Allah, [being] sincere to Him in religion” (Q., 39:2), and the verse: “except for one who is forced [to renounce his religion] while his heart is secure in faith” (Q., 16:106), and he confirmed this meaning by the *ḥadīth* of the Prophet: “Actions are according to intentions, and everyone will get what he intended”. He then mentioned that if a person is forced into something in order to defied harm from himself then he did not intend to do what he was ordered to do because deeds are accepted only if combined with the right intention; if he had no intention then his deed is invalid and therefore it is considered non-existent (i.e. as if it never happened).⁵⁵⁷

Ibn Al-Qayyim also clarified that, ‘the intention is the spirit of the contract; it causes it to be valid or invalid’.⁵⁵⁸ He confirmed that the lawgiver gives more consideration to the intention than the words because the words can be directed to other purposes but the intention is directed to the contracts themselves. He then stated that whoever reflects upon the sources of the law will find that the Lawgiver has abolished all the phrases where the speaker did not intend their meanings, but uttered them unintentionally like the one who is sleeping, the intoxicated, the forgetful, the ignorant, the forced and the one who makes a mistake under the influence of great happiness, anger or sickness. Therefore, the main rule that must not be

⁵⁵⁶ See Muḥammad b. Abī Bakr, Ibn al-Qayyim, *F'lām al-Muwaqqi'īn*, ed. by Taha °Abd al-Raūf Sa°d (Beirut, Lebanon: Dar al-Jeel, 1973), III, p. 62.

⁵⁵⁷ See al-Shāṭibī, *al-Muwafaqāt*, III, pp. 9-12.

⁵⁵⁸ Ibn Al-Qayyim, *F'lām al-Muwaqqi'īn*, III, p.95.

overlooked is that intentions are considered in actions and speech, just as it is considered in acts of worships.⁵⁵⁹

Al-Duraynī explained the reason that the Ḥanafīs differentiate between *riḍā* and *ikhtiyār* and mentioning that they did so depending on their concept and effect. They see *ikhtiyār* as ‘the ability to do a thing and its opposite’ and *riḍā* as ‘seeking a thing and being comfortable with it’. They also explain *irāda* (will) as the mere intention to do a thing. Accordingly, *ikhtiyār* has a more general significance while *riḍā* has a more specific significance; for *riḍā* to exist, *ikhtiyār* must exist but *ikhtiyār* can exist without *riḍā*. This results in the fact that *ikhtiyār* and *riḍā* in the Ḥanafī school are two different things, and are not synonymous nor are they the same because *ikhtiyār* can exist while *riḍā* does not, as in the case of coercion.⁵⁶⁰

As mentioned in chapter two when explaining about the nature of the marriage contract and its cornerstones and conditions, we pointed out that formula (*ṣīgha*) is the essential pillar in any contract. Therefore, a contract is nothing more than an offer (*ijāb*) and acceptance (*qabūl*) which results in binding obligations. Moreover, we also mentioned that every party in the contract must have the intention or the will to initiate the contract and that will or intention must be expressed by a means of clarification like an explicit utterance, writing, gesture or any other means. This ‘will of contract’ exists in any transaction because it is the intention of a person to initiate the contract so it results in the transfer of possession in financial transactions or, in the case of marriages, makes the sexual intercourse between the husband and wife lawful.⁵⁶¹ Jurists divide this ‘will of contract’ into two types:

- 1- **The real internal will** (*‘irāda bāṭina ḥaqīqiyya*): which is a hidden will that no one can check. In this case, it is the mere intention and seeking to do the act even if it

⁵⁵⁹ See Ibn Al-Qayyim, *I‘lām al-Muwaqqi‘īn*, III, pp. 95-96.

⁵⁶⁰ See Fathī, al-Duraynī, *al-Nazariyyāt al-Fiqhiyyah*, 4th edn (Damascus, Syria: Damascus University Press, 1997), p. 475.

⁵⁶¹ See ‘Alī, al-Khafīf, *Aḥkām al-Mu‘āmalāt al-Shar‘iyyah* (Cairo, Egypt: Dar al-Fikr al-Arabi, 2008), p. 213.

was not combined with words or actions that indicate the intended meaning of the person.⁵⁶²

- 2- **The clear will** (*'irādah zāhira*): which is to express the real internal will by words or actions that issued by the parties of the contract. It is the 'words and the action' which are the effective factors in the initiation of the contract. There is no need to search for the intention behind initiating a contract and therefore the clear will is considered as a sufficient proof of the existence of the intention and will to initiate the contract and it can be approved –in the contract- with the existence of some sort accompanying evidence (*qarīna*) that indicates it, even with cultural practices.⁵⁶³

If there is any sign that indicates the absence of intention or a lack of will when initiating the contract, it is considered as a factor that affects the internal real will. However, if the real will is approved and does exist but there is a suspicion that it took place under the influence of fear, a mistake, deception, compulsion or coercion then these factors are called by jurists 'the defects in the consent' (*'uyūb al-riḍā*), because the main foundation of the contract in reality is the will and the intent of the contracted party.⁵⁶⁴ Obviously, this is directly connected to the issue of *ijbār* (compulsion) in marriage or when *ikrāh* (coercion) is exercised against one of the parties in the marriage contract. Therefore, anyone who gets married under the influence of compulsion or coercion is considered discontented with the contract because compulsion and coercion are considered to be factors that affect the will of the contract. This is called 'defect will' by jurists. Al-Sanhūrī clarified that it must distinguished between the non-existing will and the defect will:

- a- The non-existing will is just an external appearance for a will that has no reality, like that which comes out of the insane, the boy with no clarity (*tamyīz*), the intoxicated man or the one who is joking. Such will has no existence because the ability to make a clear choice is the requirement of an approved will and therefore the absence of

⁵⁶² See al-Zarqa, *al-Madkhal al-Fiqhī*, I, p. 435; also See al-Khafīf, *Aḥkām al-Mu'āmalāt al-Shar'īyyah*, p. 213.

⁵⁶³ See Ibid, I, pp. 436-37; Also See al-Khafīf, *Aḥkām al-Mu'āmalāt al-Shar'īyyah*, pp. 213-14.

⁵⁶⁴ See Ibid, I, pp.437-39; Also See al-Khafīf, *Aḥkām al-Mu'āmalāt al-Shar'īyyah*, p. 215.

that requirement means the non-existence of the will which causes the contract to be invalid and non-existent.

- b- The defect will do exist but it came out of a person who is unaware of his action (which is described as mistake) or out of a person against his will (which is described as compulsion).⁵⁶⁵

Consent can only exist when its requirements exist and it will have no effect unless all of its conditions of soundness and effectives are fulfilled. Moreover, consent is considered valid when it is not affected by any type of compulsion or coercion, and when it does not restrict the freedom of any party. It must also come out of a person who is fully aware of his disposal without any factors of ignorance, deceit or exploitation exercised by anyone. It is not hidden that the freedom of consent is not approved unless it wasn't affected by any type of compulsion of coercion.⁵⁶⁶

We learnt previously that the original condition for the validity of a person's conduct is for him to have full legal capacity by attaining the age of majority and mental maturity, in addition to the existence of the 'real internal will' which leads to free consent. Accordingly, as consent is one of the most important conditions in initiating contracts in the Islamic law, everything that affects it will also affect the 'real internal will' which is essential for consent. Therefore, all of the person's conduct must be disposed with his real will and free choice so he desires to do the act as soon as he intends it. However, a person is considered as 'having choice' as long as he has the ability to commit an act or refrain from it.

⁵⁶⁵ See al-Sanhūrī, *Maṣādir al-Ḥaqq*, II, pp. 97-98.

⁵⁶⁶ For more details see al-Qarahdāghī, *Mabda' al-Riḍā*, I, pp. 409-16.

5.6 The Impact of the Differentiation Established by Ḥanafis between *riḍā* and *ikhtiyār*

The impact of the differentiation established by Ḥanafis between *riḍā* (consent) and *ikhtiyār* (choice) appears in everything that affects the validity and the soundness of *riḍā* in transactions. Jurists mentioned things that are considered to affect *riḍā* and *ikhtiyār*, like mistakes, joking, intoxication, and coercion, and mentioned that in the books of principles of jurisprudence (*‘uṣūl al-fiqh*) in issues related to legal capacity (*ahliyya*) and the factors that affect legal capacity. We will choose the example of coercion (*ikrāh*) to clarify the impact of this differentiation because it has a close connection with the subject of the thesis and because coercion is one of the most prominent deficiencies of *riḍā* in Islamic jurisprudence. That is why jurists –Ḥanafis specifically- denoted chapters to coercion to discuss its rulings and impact upon the conduct upon peoples’ actions. The jurists of the other schools of law mentioned coercion in the fields of financial transactions and in the field of divorce –the divorce of the compelled- but what concerns us is the effect of coercion on the validity of the marriage contract. According to al-Sanhūrī, one of the most prominent defects which have a direct impact on the will of the contracted parties in Islamic jurisprudence is coercion (*ikrāh*), as he considered coercion to be the most objective and least subjective of those defects, because of the means of violence related to coercion which is clear and physical.⁵⁶⁷

Islamic jurists did not ignore the issue of coercion but discussed it extensively, as many verses in the Qur’an mention the issue of coercion (*ikrāh*) which all lead to the principle that any actions which have been carried out by a person under the influence of coercion cannot be legally binding. Those verses are considered as original rules in this issue, which is regarded as one of the most prominent influences on the freedom of the human being; his will and his choice. Amongst verses explicitly related to the issue of coercion is, “There shall be no coercion in [acceptance of] the religion” (Q., 2:256) which means that no one should be forced to embrace Islam.⁵⁶⁸ According to Ibn ‘Āshūr, negating

⁵⁶⁷ See Al-Sanhūrī, *Maṣādir al-Ḥaqq*, II, p. 183.

⁵⁶⁸ See Ibn Jarīr, *Jāmi‘ al-Bayān*, IV, p. 555.

coercion is a predicate that indicates prohibition and means to negate all causes of coercion in the rule of Islam, i.e. do not force anyone to accept Islam. It came in a form of categorical negation and encompasses any type of coercion because of the generality of the text.⁵⁶⁹ Thus, this verse is an evidence to disapprove of all acts whereby someone is forced to accept Islam, because accepting the faith is a matter that is built on conviction, consideration and free choice.

Another verse is, “Whoever disbelieves in Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith” (Q., 16:106). This verse is talking about the person who is forced to pronounce disbelief while his heart is secure in faith, satisfied with it, does not hate it and determined to stay on it. Such a person is excused by law because he uttered the words of disbelief under coercion.⁵⁷⁰ Ibn ʿĀshūr stated that this verse gives permission to the compelled person to show disbelief by showing any of the manifestations of actions or speech that are customarily considered to be disbelief.⁵⁷¹

Thus, if this verse grants permission for the compelled person to show disbelief then the permission becomes even more significant where actions other than disbelief are done under coercion. That will also be the case when oppression is exercised over others like in case of coercion in marriage and divorce. According to al-Qurṭubī, the Qurʾān allowed outward disbelief in Allah –although believing in Allah is a foundation of the faith- in instances of coercion without considering that disbelief to be real. Jurists applied this in all branches of the Shariʿah, so if coercion takes place then no action is considered as valid and no rulings or punishment result from that action.⁵⁷² Therefore, in jurisprudence this situation is described as a concession (*rukḥṣa*) for the competent person as a means of ease and to approve the principle that matters are judged depending on their intentions and objectives, as

⁵⁶⁹ See Ibn ʿĀshūr, *al-Taḥrīr wa al-Tanwīr*, XIV, p. 294.

⁵⁷⁰ See Ibn Jarīr, *Jāmiʿ al-Bayān*, XIV, p. 375.

⁵⁷¹ See Ibn ʿĀshūr, *al-Taḥrīr wa al-Tanwīr*, XIV, p. 294.

⁵⁷² See Al-Qurṭubī, *al-jāmiʿ li Ahkām al-Qurʾān*, X, p. 119.

the Prophet said, “Allah has pardoned my nation (‘*Ummah*) for mistakes, what they forget and what they are forced to do”.⁵⁷³

Generally, Islamic jurisprudence considers coercion (*ikrāh*) to be an illegal act and sees it as a defect in will which affects consent. Jurists consider all acts and contracts issued by the person under coercion as void and Ḥanafīs considered them as irregular (*fāsid*) or suspended (*mawqūf*). Both grades are considered to be stronger positions than those acts and contracts remain to be binding. The apparent judgement of their school of law is that the contract of the compelled is irregular and not suspended on the condition that the forced person allows it after the cause of coercion is removed. As for Māliki jurists, they considered the contract of the compelled to be non-binding so he can invalidate it after the removal of the cause of coercion. This is their judgement in the issues of sale, purchase and financial transactions. As for marriage contract, they judged that marriage contract under coercion is invalid.⁵⁷⁴

Coercion (*ikrāh*) is one of the defects that have an impact on will because it has a direct influence on the principle of consent in contracts. Because evidence and facts proved that forced marriage is indeed a compulsion to marry, this raises the question: what is the effect of coercion on the validity of marriage contract in Islamic jurisprudence? Before answering this question, we need to provide introductions that are necessary in this matter.

5.7 Coercion Definition

Coercion (*ikrāh*) is a legal term denoting ‘duress’, Nyazee states that *ikrāh* is coercion and duress. He describes *ikrāh* as: ‘a situation in which one is forced to do something without his willingness. He also classifies it as one of causes of defective legal capacity, as all jurists do when they write about “Legal Capacity”’.⁵⁷⁵

⁵⁷³ See Muḥammad Naṣir al-Dīn, al-Albānī, *Ṣaḥīḥ al-Jāmi‘ al-Ṣaḡhīr*, 3rd edn (Beirut, Lebanon: Al-Maktab al-Islami, 1988), *ḥadīth* number: (1836).

⁵⁷⁴ See Al-Gharyānī, *Mudawwanat al-Fiqh*, II, p.523.

⁵⁷⁵ Nyazee, *Islamic Jurisprudence*, p. 135.

Coercion is not consistent with love; rather, it is completely to the contrary. According to Ibn Fāris the origin of ‘kaf-ra-ha’ (*karaha*) gives the opposite of consent and love.⁵⁷⁶ Coercion in Islamic jurisprudence is: ‘to force others to do that which they are displeased with’.⁵⁷⁷ In other more precise words: ‘it is the call to action under threat’.⁵⁷⁸

There are many definitions for coercion as a result of the differences in views between jurists. Some of them clarified the linguistic significance of coercion whilst others added to that the effect of coercion, especially the Ḥanafis who differentiated between consent (*riḍā*) and *ikhtiyār* (choice) and the effect of coercion on both of them. Amongst the definitions that Ḥanafis gave to coercion is, ‘the action a person takes because of another’s will in a way that negates his consent and invalidates his free choice without disapproving his legal capacity or excusing him of a mistake’. This is because they considered the compelled person to be one who is afflicted with coercion but is still accountable and addressed with the provisions of the law.⁵⁷⁹

The person who is compelled is called ‘*mukrah*’; under threat, pressure and compulsion. His condition is to be incapable of resisting the threat befalling him with any means, and the compeller is called ‘*mukrih*’; the person who threatens and forces someone else to commit an act forcibly. His condition is to be seriously capable of implementing his threat. The action is called ‘*mukrah ʿalayh*’, which is the action that the compeller seeks to achieve with his threat; either a verbal action like carrying out a contract or other verbal conducts like sale and marriage. The means of fear is called ‘*mukrah bih*’; the means which the compeller uses when he threatens, like killing, beatings and imprisonment. Its condition is to be a harm that is disliked by the compelled whether it is a cause of harm to the self, one of his organs or a property, or a means of distress that causes a rational person to commit the request of the

⁵⁷⁶ Ibn Fāris, *Maqāyyīs al-Lughah*, p. 806.

⁵⁷⁷ Al-Sanhūrī, *Maṣādir al-Haqq*, II, p. 186.

⁵⁷⁸ See al-Kāsānī, *Badāiʿ al-Ṣanāiʿ*, VII, p. 175. Also See ʿAli, Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, Trans. by Fahmi al-Husayni, special edn (Riyadh, Saudi Arabia: Dar Alam al-Kutub, 2003), article (948), II, p. 658.

⁵⁷⁹ See Al-Sarakhsī, *al-Mabsūṭ*, XXIV, p. 38.

compeller out of his fear of that distress. These are known as pillars and conditions of coercion.⁵⁸⁰

Therefore, coercion is putting pressure on a person with harmful means and threatening him with it in order to compel him to either do or not do something. This implies that coercion can take two forms:

- 1- For a person to force another to commit an act by inflicting harm on him, so the compelled person complies out of his fear of suffering that harm again. This is legally described as ‘physical coercion’.
- 2- For a person to be threatened with harm in case he does not comply, so he complies out of his fear of the harm which will be inflicted if he refuses to comply. This is legally described as ‘psychological coercion’.⁵⁸¹

When reflecting upon all of these definitions, we notice that they do not differ much as they are all consistent in the meaning and the significance, even if they differ in words and phrases.

5.7.1 The Criterion of Coercion

The following section will assess whether or not the criterion for coercion is to cause fear in the compelled.⁵⁸²

We concluded from the definitions above that for coercion to exist, two factors must exist, a physical and a psychological. The physical one is the threat of causing harm and the psychological one is to cause the compelled fear, which is the main element in the issue of coercion because coercion through that fear affects the will and the intention of the individual. Therefore, coercion differs depending on peoples’ conditions: age, sex, strength, weaknesses, social position and status and so forth. Ibn Ḥajar said, ‘the scholars agreed that

⁵⁸⁰ See °Abd al-Qādir, °Awdah, *al-Tashrīc al-Jinā’ī al-Islāmī*, 10 th edn (Beirut, Lebanon: Al-Risaalah, 1989), I, pp. 565-68.

⁵⁸¹ See Al-Zarqa, *al-Madkhal al-Fiqhī*, I, pp. 452-53.

⁵⁸² See °Ali b. Aḥmad b. Sa°id, Ibn Ḥazm, *al-Muḥalla bi ’Āthār*, ed. by Abd al-Ghaffār al-Bandārī, (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, ([n.d.]’), VII, pp. 203-204.

the threat of death, causing harm to an organ of the body, severe beating and long imprisonment are all considered coercion. They disagreed in regard to light beating, a day's imprisonment and similar acts'.⁵⁸³ In case the act that the compelled person is forced to commit is initiating a contract, then it is stipulated in Islamic jurisprudence –if coercion is exercised in such case- that the coercion causes fear to the contracting party which causes him to carry out the contract. Al-Sanhūrī confirms that the psychological criterion which is considered in a case of contracts initiated under coercion is for the compelled to assume that the threat will be almost certainly implemented, so he carries out the contract because of this fear.

5.7.2 Could Coercion be Legitimate?

Generally, in Islamic law, coercion is dispraised because it contradicts with love and consent and it is usually takes place under threat, so it is unimaginable that coercion is legitimate in Islamic law. However, what if the purpose of coercion is to achieve a legitimate cause, a public interest, fulfilling a right or repelling injustice? In answering this question, al-Sanhūrī stated that requesting a person to fulfil his duty is legal no doubt and forcing him to fulfil that right is not described as coercion and doesn't invalidate the legal act through which the right is fulfilled. This type of coercion is considered to be a legitimate compulsion or 'coercion with right'. However, this can only be achieved through judicial system. This is also called 'coercion with legitimate means and purpose', and that is why jurists stipulate that it is not generally legitimate for coercion to have an effect on the contract. Therefore, when coercion is mere aggression on a person's will, without any right, then it effects the validity of his disposal.⁵⁸⁴ Coercion which is mere aggression on a person's will is 'coercion without right'.

Al-Duraynī stated that, by carefully considering the *fiqh* of this issue one can find the 'coercion with right' (*ikrāh bi ḥaqq*) and 'coercion without right' (*ikrāh bi-ghayri ḥaqq*) are different in regards of their rule and legal effects. The first is legitimate and allowed in order

⁵⁸³ Ibn Ḥajar, *Fath al-Bārī*, XII, p. 312; Also see Ibn Ḥazm, *al-Muḥalla*, VII, p. 203.

⁵⁸⁴ See Ibid, II, p. 194; Also See al-Zarqa, *al-Madkhal al-Fiqhī*, I, p.454.

to achieve justice and considered interest. The second one is not allowed because it includes prohibited compulsion and aggression on personal freedom without right. Al-Duraynī concluded that coercion with right is legitimate and obligatory if the purpose is legitimate because of the public interest. That is why the Sharīḥ does not consider it to be a cause to disprove free choice and consent and doesn't invalidate a person's actions, but rather approves them and the consequences of the contract become effective as if the person is fully content with sound will. Coercion without right, however, is a forbidden act legally and attributing the action and its effects to the accountable is a transgression against his personal independence and rights. This is why the Lawgiver disapproved that connection –between the person and attributing the action to him- both in its causes and its effects in order to guard his personal independence and protect his rights, so that he does not lose them against his will.⁵⁸⁵

Therefore, 'coercion with right' is legitimate coercion when no aggression against anyone's right takes place. For it to be legitimate, it must fulfil two conditions:

- 1- For the compeller to have the right to threaten.
- 2- For him to have the right to oblige [others] to the act.

Examples for coercion with right are: for the judge to compel the husband who took an oath not to have sexual intercourse with his wife either to do so or to divorce her after the expiry of the waiting time which is four months as set out in (Q., 2:226). Coercion without right is unjust coercion or coercion that is not allowed because either its means or purpose is forbidden. An example of this is when a person who is capable of inflicting harm on another person forces the other person to commit a prohibited act in Sharīḥ like committing unlawful sexual intercourse.⁵⁸⁶ This division is customary with Shāfi'ī,⁵⁸⁷ Whereas the Mālikis call it 'legal coercion' (*ikrāh sharīḥ*) and 'illegal coercion' (*ikrāh ghayr sharīḥ*).⁵⁸⁸

⁵⁸⁵ See al-Duraynī, *al-Nazariyyāt al-Fiqhiyyah*, p. 487.

⁵⁸⁶ See Zayn al-ʿĀbdīn b. Ibrahīm, Ibn Nujaym, *al-Ashbāh wa al-Nazā'ir*, ed.by ʿAbd al-Karim al-Faḍīliyy, 1st edn (Beirut, Lebanon: Al-Maktabah al-Asriyyah, 1998), pp.314-315; ʿAbd al-Rahmān Jalal al-Dīn, al-Suyūṭī, *al-Ashbāh wa al-Nazā'ir*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 1983), VI, p.104.

As for Ḥanafī jurists, they considered the strength of the coercion and the level of its effect upon the compelled and they divided it into two types:

- 1- Extreme coercion (*ikrāh mulji*): that which is based on fear of instant death, instant permanent impairing of any organ of the body, severe beating, lengthy imprisonment or an insulting action for a person of a high status in the community. This includes the person and those whom he fears for their safety like his parents, children, brothers or sisters. This ruling of such coercion is that it negates consent and causes the choice to be irregular.
- 2- Limited coercion (*ikrāh ghayr mulji*): when the means of the threat does not cause severe pain or distress. The ruling of such coercion is that it negates *riḍā* (consent) because the compelled has the capacity to endure it, but it does not affect the *ikhtiyār* (choice).

They can also be called strong coercion (*ikrāh qawī*) and weak coercion (*ikrāh ḍaʿīf*) respectively.⁵⁸⁹

Although the majority of jurists believe that any threat is considered to be coercion, it is usually combined with the threat of killing, torture or beating. The threat of any punishment or the mere fear of torture is a criterion for coercion. This extends beyond physical acts like torture, beating etc., because coercion can be physical and/or psychological.⁵⁹⁰ Furthermore, there is another type of coercion called ‘moral coercion’, which was not overlooked by the Sharīʿah because the threat of imprisoning the father or the son is not actually a physical harm that afflicts the person’s body but it afflicts his soul (*nafs*). It might seem physical to the relatives but it is moral and psychological for the compelled person. The difference between physical and moral coercion is that moral coercion is directed at the psychological side of the human while the physical coercion is directed at his body. Moreover, moral

⁵⁸⁷ See al-Taftazānī, *al-Talwīh*, II, pp. 196-97.

⁵⁸⁸ See al-Ḍasūqī, *Ḥāshiyat Al-Ḍasūqī*, III, pp. 249-50.

⁵⁸⁹ See Al-Zarqa, *al-Madkhal al-Fiqhī*, I, p. 453.

⁵⁹⁰ See ʿAwdah, *al-Tashrīʿ al-Jināʿī*, I, pp. 564-65.

coercion affects freedom of choice but it doesn't approve the will completely, as in the case of physical coercion. There is no stronger coercion than a person seeing his son or father exposed to torture.⁵⁹¹ Al-Sarakhsī praised the opinion of Ḥanafīs, which approves the effect that moral coercion has on the validity of contracts because a person is not usually content to see his father or son killed or imprisoned as that causes sadness to him, like if he himself was imprisoned or perhaps even worse.⁵⁹² The judgement of this type of coercion is considered ineffective.

5.7.3 Does Coercion Affect the Legal Capacity (*ahliyya*)?

All types of coercion mentioned previously do not have an effect on the capacity to acquire rights (*ahliyyat al-wujūb*) because its criterion is for a person to be a living human. This type of capacity is only affected by death, as already discussed in the section on legal capacity (*ahliyya*). None of the types of coercion previously discussed any effect on the capacity to execute (*ahliyyat al-'adā'*) and do not negate the person's eligibility to be accountable or addressed by the legislation. The effect is only limited to changing some rulings which result from the legal capacity to execute (*ahliyyat al-'dā'*) (while the person remains competent for two reasons:

- The existence of intellect and clarity which are the criteria for the legal capacity to execute (*ahliyyat al-'dā'*) and for the person to be addressed with the rulings of the legislation.
- The fact that the compelled is considered as afflicted in the case of coercion as well as in the choice between doing an act and refraining from it. This affliction is approved as soon as the person is addressed with the rulings of the legislation.⁵⁹³

⁵⁹¹ See Abū Zahrah, Muḥammad, '*Usūl al-Fiqh* (Dar Al-Fikr Al-Arabi, [n.d.]), pp. 357-58.

⁵⁹² See Al-Sarkhasi, *Al-Mabsūṭ*, II, p. 189.

⁵⁹³ See Zaydān, al-Wajīz, p. 137.

The reason for coercion not contradicting the two types of legal capacity is that legal capacity is approved by the fact that the person is alive, sane and major and coercion doesn't affect any of those things. The things the person might be compelled to do can be forbidden so committing them means that he has committed a sin like fornication. It might also be obligatory so not committing it means that he has committed a sin, such as eating a dead animal in case of necessity. It might also be a concession (*rukhsah*) so if he does not do it he does not sin and if he does it then he gets a reward, like uttering a word of disbelief when his life is threatened.⁵⁹⁴

Types of Actions in Case Coercion is exercised:

- 1- Actions that are allowed in essence, like eating or drinking: if a person is compelled to carry them out then he must commit the least of the two harms.
- 2- Actions that the Lawgiver allowed in times of necessity like drinking alcohol or eating dead animals and everything that is forbidden in order to preserve the Sharī'ah's right not people's rights: the compelled is allowed to commit them and he is even obliged to do so, so if his refusal to commit them would cause him death or the loss of an organ. The Sharī'ah allows them in times of necessity and consuming that which is forbidden in order to preserve the self is obligatory and must not be abandoned as Qur'an says: "He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful" (Q., 2:173). That is because necessity is a case that is more general than coercion which is in itself part of necessity.⁵⁹⁵

⁵⁹⁴ For more See ʿAbd al-Karīm, Zaydān, *al-Wajīz Fī 'Uṣūl al-Fiqh*, 7th ed (Beirut, Lebanon: Al-Risalah Publishers, 1998), pp. 137-44 ; Wahbah, al-Zuhaylī, *'Uṣūl al-Fiqh al-Islāmī*, 1st edn (Damascus, Syria: Dar al-Fikr, 1969), I, p. 187; Abu Zahrah, *'Uṣūl al-Fiqh*, p. 358.

⁵⁹⁵ Necessity is the situation when a person is exposed to danger or great hardship to the limit that he becomes afraid harm might affect his life, one of his organs, his honour or his property. In this case, he is allowed to commit that which is unlawful, abandon that which is obligatory or delay it from its prescribed time in order to repel the harm that he is most certain would happen to him otherwise.

- 3- Actions that the Lawgiver allowed in times of necessity but if the person remains patient until he dies then he will be rewarded, like apparently disbelieving in Allah or ridiculing the religion.
- 4- Actions that the person is not allowed to commit under any circumstances, like murder. If a person is compelled to commit murder, then he does not have the right to do so because by doing this he will be obeying a creature in an act of disobedience to the Creator and giving preference to himself over another person who has the same sanctity as him. Although the Sharīḥ allows uttering words of disbelief under coercion, it does not allow killing under coercion.⁵⁹⁶

5.7.4 The Effect of Coercion

Generally speaking, actions or conduct carried out by a person under coercion are divided into two categories:

- a- Practical conduct (actions)
- b- Verbal conduct (speech)

Jurists differed in their personal reasoning (*ijtihād*) in regard to holding the compelled person responsible for his actions. In the Ḥanafī opinion, coercion has no effect in holding the compelled person responsible for his verbal and practical actions, but it has an effect in transferring that responsibility to the compeller if possible, so he is judged accordingly. In the case the action cannot be attributed to the compeller then the compelled person becomes responsible for his action. They said, ‘the compeller becomes responsible only if he has full control over the compelled person so he becomes like a tool in his hand’. Thus, Ḥanafī jurists approved that conduct carried out by the compelled but the effect of coercion is to

⁵⁹⁶ See Al-Sarakhsī, *al-Mabsūṭ*, XXIV, pp. 45-47; al-Qurṭubī, *al-Jāmi‘ Li Ahkām al-Qur’an*, X, pp. 119-25. Also see *MFK*, 2nd edn (1986), VI, pp.106-107.

attribute the consequences of the action to the person who compelled him to commit that action instead of the compelled person.⁵⁹⁷

However, for jurists other than Ḥanafis, coercion with right (as explained above) has no effect and the conduct is considered as valid and effective. In the case of illegitimate coercion or coercion without right, they explained:

- a- If the action of the person who is compelled is not allowed under coercion, like murder, then the compelled is responsible.
- b- If the action of the compelled is allowed for the coerced, like destroying another's property, then he is not responsible and the compeller is held responsible.
- c- If the action of the compelled is verbal conduct (speech) then neither the compelled nor the compeller are held responsible.⁵⁹⁸

Schacht confirms that coercion is a defect of declarations (*iqrārāt*) as approved by both civil and criminal laws; when one party comes under the influence of the threat from the other party who is able to inflict the threat; the party under the threat complies. Schacht then states that there is a legal responsibility resulting from the declarations taken under threat, but the responsibility varies according to the level of threat.⁵⁹⁹

Scholars differed in their judgement of verbal disposals which take place under the influence of coercion. These disposals are divided into two types:

- 1- Initiations (*inshā'āt*)
- 2- Declarations (*iqrārāt*)

Ḥanafī jurists ruled that the effect of coercion varies depending on the type of verbal disposals; so, if the action that the compeller seeks to achieve with his threat (*mukrah*

⁵⁹⁷ See Zaidān, *al-Wajīz*, pp. 137-38; Abu Zahrah, *‘Uṣūl al-Fiqh*, p. 359. Also see al-Sanhūrī, *Maṣādir al-Ḥaqq*, II, pp. 207-08.

⁵⁹⁸ See Zaidān, *al-Wajīz*, pp.137-38; Abu Zahrah, *‘Uṣūl al-Fiqh*, pp. 359-61.

⁵⁹⁹ See Schacht, *An Introduction To Islamic Law*, p. 117.

^c*alayhi*) is a declaration, the effect of coercion will be to invalidate the declaration, whether the coercion was extreme or limited. Hence, if a person is forced to declare a marriage or a divorce then his declaration is considered void with no legal effect. This is because declaration is usually approved as the truthful part of it outweighs the untruthful part, which is not the case when coercion takes place. Indeed, coercion gives more weight to the untruthful part in the declaration because it is strong evidence that the confessor is untruthful in whatever he confesses to and that he only intends to defy the harm that he was threatened with, and therefore his declaration is considered void.

Generally, verbal disposals under the category of initiations like contracts and so forth are divided by Ḥanafīs into two groups:

a- Those which can be annulled

The validity of those disposals depends on the existence of *riḍā* (consent), like sale, lease mortgage and other contracts. Coercion in this case causes the disposals to be irregular but the contract is still considered initiated and valid whether the coercion was extreme or limited because the contract is issued by a person who is legally liable for his disposals and the contract is judged to be irregular because *riḍā* (consent) is a condition for its validity and effectiveness. Thus, if the compelled allows the contract after the removal of the coercion, the contract is considered valid because of the removal of the reason of irregularity. Accordingly, the effect of coercion on initiations which can be annulled like sale, gift and lease is to cause them to be irregular (*fāsid*) but not invalid (*bāṭil*). Their argument is that coercion negates *riḍā* (consent) but not *ikhtiyār* (choice) and consent is a condition for the validity of the contract but not for its initiation so the disposals are considered initiated but irregular (*fāsid*) and therefore take that ruling according to the Ḥanafīs.⁶⁰⁰

b- Those which cannot be annulled

⁶⁰⁰ See Al-Khafīf, *Aḥkām al-Muʿamlāt al-Māliyyah*, pp. 217-18. Also see al-Sanhūrī, *Maṣādir al-Ḥaqq*, II, pp. 208-09.

These are disposals that cannot be annulled in the Ḥanafī view like marriage, divorce, recovering a marriage (*rajʿah*), oath of divorce (*yamīn*), *zihār* (an oath by the husband that his wife is like his mother, meaning she is unlawful for him), ‘*īlā*’ (for a husband to swear not to have a sexual intercourse with his wife for a period of time), vows and so on which are all considered to be permissible in their view, even with coercion because coercion has no effect in such disposals as they result in their consequences as long as a person carries them out by his own choice and because the legislation considers that uttering such disposals equates to meaning them and approving their rule. That is why the Sharīʿah obliges the one who jokingly utters words of marriage or divorce, whether under the influence of coercion or not. Therefore –in their opinion- all of those initiations are valid and legally effective with no effect stemming from coercion. The Ḥanafīs’ argument is that those disposals result in their consequences as soon as the person carries them out because he did so by his own choice –depending on the fact that they differentiate between *riḍā* (consent) and *ikhtiyār* (choice) - as the compelled chose to carry them out and accepted their resulting rules while accepting the fact that his choice is irregular if the coercion was extreme.⁶⁰¹

On this basis, Ḥanafīs differentiated between contracts that can be annulled (trade-off financial contracts and similar contracts) and contracts that cannot be annulled. Ḥanafīs believe that *riḍā* (consent) is neither a cornerstone nor a condition of soundness in this last type of contracts and marriage, divorce, recovering of a marriage (*rajʿah*) and similar verbal disposals do not depend on the existence of *riḍā* (consent) and intention but rather on words uttered by the major sane person (*al-bāligh al-ʿāqil*). Therefore, they are not affected by coercion, mistake, unintentional speech, joking, intoxication or not understanding the meaning. Ḥanafīs justified this by claiming that intent is a hidden thing that cannot be approved in and of itself, but that reality is approved by the means that indicate that intent.⁶⁰²

Al-Ḥaṣakfī (d. 1088 AH /1677 AD) said, ‘realising the meaning of offer and acceptance is not required in disposals where there is no difference between seriousness and joking like

⁶⁰¹ See Al-Zuḥaylī, *‘Uṣūl al-Fiqh*, I, pp.189- 94; al-Khafīf, *Aḥkām al-Muʿamlat al-Māliyyah*, pp. 217-18.

⁶⁰² See al-Bukhārī, *Kashf al-Asrār*, IV, p. 384.

marriage and divorce and no intention is needed'. Ibn ^cĀbidīn justified this by the fact that realising the content of the words is considered in order to clarify the intent which is unconditioned in disposals where seriousness and joking make no difference, contrary to sales and other similar contracts.⁶⁰³

Al-Marghinānī stated that, if a person is forced to sell his property, to purchase a commodity or to lease his house under the influence of *ikrāh*, such as the threat of being killed, severe beating or imprisonment, he has the choice after the removal of coercion either to approve the sale or to disapprove it and return the commodity because mutual consent is one of the conditions of the validity of such contracts as the Qur'an says, "do not consume one another's wealth unjustly but only [in lawful] business by mutual consent" (Q., 4:29) and coercion in such contracts negates consent because if the condition does not exist then that which it is conditioned for does not exist either too.⁶⁰⁴

Ḥanafī jurists believe that consent is not a pillar for the validity of the financial contract but a condition for them to be sound and binding, as al-Marghinānī declared by saying, 'because mutual consent is one of the conditions for the validity of such contracts'.⁶⁰⁵

In summary, the Ḥanafīs considered the uttered statement but not the intent in verbal disposals, as they considered the statement uttered by a sane major person as the main cornerstone of the contract and the contract becomes effectual if the person approves it after it takes place, except in the case of a contract that cannot be annulled which becomes effective immediately without the need for approval because they include the Sharī^cah's right and they cannot be an object of jest. However, *riḍā* (consent) is a condition for the contract to become valid and binding in contracts that can be annulled but not a condition at all in contracts that cannot be annulled like marriage and divorce.⁶⁰⁶

⁶⁰³ See Ibn ^cĀbidīn, *Radd al-Muḥtār*, III, pp. 15-16.

⁶⁰⁴ See Al-^cAynī, *al-Bināyah*, X, pp. 45-46.

⁶⁰⁵ Ibid, X, p. 45.

⁶⁰⁶ For more see al-Khafīf, *Aḥkām al-Mu^camlat al-Māliyyah*, p.217.

5.7.5 The Effect of Coercion on Verbal Disposals in the Opinion of the Majority

The majority of jurists held a different view as they didn't divide contracts into those which can be annulled and those which cannot be annulled. They considered *riḍā* (consent) as a cornerstone in all types of contracts and therefore if it does not exist then the contract is considered invalid (*bāṭil*) whether it is a financial contract or any other type. Consent -as previously discussed- is to seek something with intent for its effect to be the result. It is a cornerstone in all types of contract in the opinion of the majority and accordingly it differs from the mere intention that expresses that something is sought.⁶⁰⁷

According to al-Shāṭibī, if the action is combined with an intention then the rules of the law (*al-aḥkām al-sharʿiyya*) result from it, but if the action is not combined with an intention then no rules of law result from it. This is the situation in case of the one who is asleep, unaware or insane. Al-Shāṭibī then mentioned that if a person is forced to an act in order to repel harm from himself, then his act is considered unintentional because an act becomes valid (*ṣaḥīḥ*) only if it is combined with the right intention and the coercion negates the intention in this case. Therefore, his act is invalid (*bāṭil*) and as a result the existence and nonexistence of that act are the same.⁶⁰⁸ Mālikis stated in the field of business transactions that a sale is considered initiated with any sign that indicates the mutual consent of the two parties whether by words, exchange, writing or gesture.⁶⁰⁹ They judged that if a person is forced to make a sale or a purchase, then his disposal is suspended until the removal of the reason of coercion and the person can choose with his free will whether to approve the sale or the purchase. They ruled that 'no consent [exists] when coercion is exercised'.⁶¹⁰ Also, they judged that a marriage is considered invalid (*bāṭil*) until it fulfils three conditions; the first of which is that no coercion is exercised. So the marriage of the compelled man or woman is considered void and if the marriage contract is carried out under threat or coercion then it is considered invalid.⁶¹¹ Shāfiʿis adopted the same approach and made intention a

⁶⁰⁷ See al-Qarahdāghī, *Mabda' al-Riḍā*, II, pp. 1001-07.

⁶⁰⁸ See al-Shāṭibī, *al-Muawāfaqāt*, III, p. 206.

⁶⁰⁹ See al-Ghiriānī, *Mudawwanat al-Fiqh al-Mālikī*, III, p. 206.

⁶¹⁰ See *Ibid*, III, p. 206.

⁶¹¹ See *Ibid*, III, p. 523.

cornerstone for divorce.⁶¹² Al-Ghazālī stated that divorce carried out by the compelled is disapproved because its intention is incorrect and it is only intended under the influence of coercion, so its judgement is the same as the act of a compelled person.⁶¹³

Therefore, Mālikis do not judge the disposal of the compelled to be irregular (*fāsīd*) or suspended (*mu^callaq*) but they judge it as non-binding (*ghayr mulzim*), so the compelled has the option to approve or disapprove the contract after the removal of the coercion. The Shāfi^c is completely contradict the Mālikis, in that they rule with irregularity or suspension, as judged by them, and judge the disposal of the compelled as invalid (*bāṭil*) whether in disposals that can be annulled (like sales) or those that cannot be annulled, like marriage. They believe that coercion negates consent and if consent does not exist then choice is not considered at all. Furthermore, coercion causes the legally approved choice to be irregular and any disposal is considered to be initiated with the statement that is uttered with intention and a legally approved choice.⁶¹⁴

According to al-Zarqa, consent is a condition for the validity and effectiveness of all verbal disposals and that is why coercion affects them whether strong or weak. This is the case whether they are contracts or single-will disposals like declarations.⁶¹⁵ In this context, al-Duraynī stated that it is legally approved -as a confirmed original rule in jurisprudence- that a person is not obliged except with what he/she obliges him/herself with out of his/her free choice and consent because free choice and consent is the foundation of all the legality of verbal disposals'. Therefore, if choice and consent do not exist then the disposal will have no legitimacy and become invalid with no legal existence either in its original rules or in its legal effect. The result of personal reasoning (*ijtihād*) in the Shāfi^c school was that coercion prevents responsibility although it has no effect with regard to legal capacity.⁶¹⁶

⁶¹² See Al-Ghazzālī, *al-Wasīṭ*, V, p.272.

⁶¹³ See Ibid, V, p. 387.

⁶¹⁴ See Al-Sanhūrī, *Maṣādir al-Ḥaqq*, II, p.212.

⁶¹⁵ See Al-Zarqa, *al-Madkhal al-Fiqhī* I, p.454.

⁶¹⁶ See Al-Duraynī, *al-Nazariyyāt al-Fiqhiyyah*, p. 474.

Accordingly, coercion in verbal disposals results in it having no legal effects in the opinion of the majority of jurists. Rather, all verbal disposals of the person who is compelled are considered invalid (*bāṭil*) so his/her marriage, divorce, sale and any verbal disposal issued by him/her are considered invalid (*bāṭil*). This is because coercion invalidates such contracts as they are not carried out with consent, full desire and sound choice. The compelled cannot be given the same rule as the one who utters the formula (*ṣīgha*) with free choice and desire but who intends to joke. Such a person must be legally punished and therefore the Lawgiver approved his verbal disposal. The compelled has no desire or choice in uttering the formula but intends to repel harm from himself which causes him to be treated with ease by the law, by disapproving his verbal disposal.⁶¹⁷

To conclude, the Ḥanafī jurists differentiated between consent and choice in their concept and legal effect. For the Ḥanafīs, consent and choice are two different things and therefore choice can exist while consent does not, like in the case of coercion. The compelled –in the Ḥanafīs view- is a person who intends to establish the formula (offer and acceptance) which is the means that causes contracts and all other disposals to be effective, so that formula is approved even if his intention was to merely repel harm. They justified this with the argument that he had the choice not to do it and to endure the harm which he was threatened with but he preferred the choice of establishing the formula over the choice of enduring the harm. In other words, he chose to commit the lesser of the two harms without being content with either of them, but nevertheless he made the choice. This is described as having ‘the ability to carry out the act or not’ which is the criterion of *ikhtiyār* (choice) in the Ḥanafī view.⁶¹⁸ *Riḍā* (consent) does not exist in the case of coercion –which is the known opinion of the Ḥanafīs as well as the majority of jurists- but consent in the Ḥanafī opinion is a condition for soundness but not for the contract to become effective, so in case coercion negates *riḍā* (consent) then the contract is considered irregular (*fāsid*) but the lack of soundness doesn’t invalidate the contract. That is why the compelled can approve the contract after the removal of compulsion in order to express his full consent and there will

⁶¹⁷ See Al-Zuḥaylī, *‘Uṣūl al-Fiqh*, I, p. 189.

⁶¹⁸ See Al-Khaṭṭāb, *Aḥkām al-Mu‘amlat al-Māliyyah*, pp. 218-19.

therefore be no reason for irregularity anymore so the contract becomes sound and binding, meaning that its consequences become effective from the time of its establishment not from the time of its approval by the compeller, and no party can annul it alone.⁶¹⁹

5.8 Evidence Used by the Ḥanafis to Prove That Consent is not Conditioned in Contracts That Cannot be Annulled

a- The rules of the issues of marriage, divorce and recovering a marriage in the Qur'an are not restricted to anything but the mere intent to initiate the marriage contract, the intent to divorce and the desire to recover the marriage in case of seeking reconciliation. The Qur'an does not stipulate consent, which suggests that the main condition in these issues is for the major and sane individual to issue the statement, as the Qur'an says, "when you divorce women, divorce them for [the commencement of] their waiting period" (Q., 65:1) and "then marry those that please you of [other] women" (Q., 4:3) and "and if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah" (Q., 2:230). They claimed that these verses are in regard to verbal disposals and do not restrict their initiation to consent, so they used the generality in those verses as evidence for the effectiveness of such disposals without specification or restriction.⁶²⁰ Therefore, divorce, marriage and similar disposals are simply statements and a person usually has clarity of mind when he issues a statement, and coercion does not negate that clarity. Furthermore, statements are the apparent means to express the internal desires of the self (*nafs*), so coercion has no effect over consent; it is not considered in all disposals and does not negate the consent and the intent because the compelled chose the least of the two harms.⁶²¹

b- The *ḥadīth* "There are three things which, whether undertaken seriously or in jest, are treated as serious: Marriage, divorce and taking back a wife [after a divorce

⁶¹⁹ See Al-Duraynī, *al-Naẓariyyāt al-Fiqhiyyah*, pp. 475-76.

⁶²⁰ See Al-Sarakhasī, *al-Mabsūt*, XXIV, p.57.

⁶²¹ *Ibid*, XXIV, pp. 57-58.

which is not final] (*raj' a*)". The Lawgiver approves the soundness of those disposals in case of jest because it considers uttering the statements like intending their meaning and rules even though the person does not intend their meaning. The compelled is similarly, he intends to establish them and chooses their rulings.⁶²²

They also supported their argument using narrations where ʿUmar b. al-Khaṭṭāb and ʿAli b. Abī Ṭālib approved the divorce of the compelled, including what ʿAbd al-Razzāq al-Ṣanʿānī reported from ʿAbd Allah b ʿUmar that ʿUmar approved the divorce of the compelled.⁶²³ Moreover, Ḥanafīs also argued using *qiyās* (analogical reasoning) by comparing the divorce of the compelled to divorce in jest. The point of comparison is that the person who jokes is not content with his divorce or marriage but they are still approved. Al-Kāsānī said, 'coercion negates consent definitely, but it [consent] is not a condition for the divorce to be approved because the divorce in jest is approved while the person is not content with it'.⁶²⁴

Therefore, the Ḥanafīs view of coercion was built upon the fact that it doesn't have an effect over speech because no one can use another person's tongue in order to change what the latter person wants, so everyone has the choice to say whatever he wants and he is not considered to be compelled in reality. As for actions, they are affected by coercion because the action can be attributed to the compeller by using the action as a means to do whatever he wants.⁶²⁵

Al-Duraynī explains that the Ḥanafīs' personal reasoning (*ijtihād*) regarding their judgement of the irregularity (*fasād*) of the contract of the compelled is a protection for his personal right but not the Shariah's right, so it is a specific type of irregularity. Al-Duraynī also believes that the reason behind this is that it is an aggression against human will, so their judgement is a way to protect the personal right of the compelled because of the lack of his consent. This is the process of deduction (*istidlāl*) used by the Ḥanafīs in approving the

⁶²² Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2194); al-Tirmidhī, *Jāmi' al- Tirmidhī*, *ḥadīth* number: (1184); Ibn Mājah, *Sunan Ibn Mājah*, *ḥadīth* number: (2039).

⁶²³ See Al-Sarakhasī, *al-Mabsūt*, XXIV, pp. 40-42.

⁶²⁴ See *Ibid*, XXIV, p. 42.

⁶²⁵ See *Ibid*, XXIV, pp. 56-57.

contract of the compelled if and when he approves it after the removal of coercion while being accountable and responsible.⁶²⁶

This was deduced by the argument that the verses they used to prove that intent is a condition of marriage, divorce and recovering the marriage do not actually indicate that statements alone are enough without the intent. The evidence for this is that the words of divorce issued by one who is asleep are disapproved with all jurists. So when the verse says, “divorce them” it means what is issued by the legally mature, sane person with free choice but not the compelled, the mistaken or the one who is unaware, as evidenced by the verse, “And if they decide on divorce – then indeed, Allah is Hearing and Merciful” (Q., 2:227). Al-Qurṭubī said, ‘the determination and resolve is that which you intend to do within yourself’.⁶²⁷ And al-Shawkānī said in explaining the same verse, ‘it means that they made their intention to carry out the action’.⁶²⁸

The Qur’an also stipulated the heart’s intent as a requirement in many issues and overlooked that which is issued by the tongue without that intent:

Allah does not impose blame upon you for what is unintentional in your oaths, but He imposes blame upon you for what your hearts have earned. And Allah is Forgiving and Forbearing (Q., 2:225)

And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful (Q., 33:5).

These verses indicate that mere statements issued by the tongue have no effect unless they are combined with the intent of the heart so that the tongue is expressing that intent. One of the confirmed rules in Islamic jurisprudence is the maxim: ‘matters are determined according to intention’ (*al-‘umūr bi maqāṣidihā*). Ibn Ḥajar stated that the rule is directed to

⁶²⁶ See Al-Duraynī, *al-Naẓariyyāt al-Fiḥriyyah*, p. 477.

⁶²⁷ Al-Qurṭubī, *al-Jāmi‘ Li Ahkām al-Qur’ān* III, pp. 73-74.

⁶²⁸ Al-Shawkānī, *Faṭḥ al-Qadīr*, I, p. 408.

the person who is sane, aware and with free choice because the one who insane or with no free choice has no intention in what he does or says. This is also the case for the mistaken, forgetful and compelled.⁶²⁹

5.9 Evidence used by the Majority to Prove that Consent is a Cornerstone in any Contract

- a- The verse, “O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent” (Q., 4:29). Their point of deduction was that the Qur’an restricted the lawfulness of consuming one another’s wealth to the case when there is mutual consent and the lawfulness here is the effect of the contract so if the consent does not exist then the foundation of the contract does not exist.⁶³⁰
- b- Amongst the evidence they used to prove the invalidity (*buṭlān*) of the marriage and divorce of the compelled was the verse, “except for one who is forced [to renounce his religion] while his heart is secure in faith” (Q., 16:106). The point of deduction is that the Qur’an allowed disbelief in Allah under the influence of coercion and it is not considered disbelief. Therefore, jurists applied the same principle in all branches of the Sharīḥ.⁶³¹ Disbelief is greater than the rulings of sale, purchase, marriage and divorce and the compelled does not intend what he is compelled to do and does not desire the resulting ruling, but he only intends to repel harm from himself.⁶³²
- c- The verse, “O you who have believed, it is not lawful for you to inherit women by compulsion” (Q., 4:19), i.e. while they dislike the marriage and are not content with it, until they agree to marry that one whom they accept as a husband.⁶³³ The point of deduction in this verse is that the Qur’an disapproves marriage and giving in marriage under coercion and made it that prohibited to Muslims, which clearly indicates that marriage under the influence of coercion and pressure is invalid.

⁶²⁹ See Ibn Hajar, *fath al-Bārī*, IX, p. 486.

⁶³⁰ See Ibn Taymiyyah, *al-Qawā'id al-Kulliyah*, pp. 406-07.

⁶³¹ See Al-Qurtubī, *al-Jāmi' li Ahkām al-Qur'ān*, XVI, p.106.

⁶³² See Al-Sanhūrī, *Maṣādir al-Ḥaqq*, II, pp. 208-09.

⁶³³ See Ibn Ḥāshūr, *al-Tahrīr wa al-Tanwīr*, IV, p. 283.

- d- Al-Bukhārī reported that Ibn ʿAbbās said, ‘The custom (in the Pre-Islamic Period) was that if a man died, his relatives used to have the right to inherit his wife and, if one of them wished he could marry her or they could marry her to somebody else, or prevent her from marrying if they wished, for they had more right over her than her own relatives. Therefore this verse was revealed concerning this matter’.⁶³⁴

Amongst the evidence from the *Sunna* which confirmed the meaning in the previous verses from the Qur’an are:

- 1- *Ḥadīth*, ‘Allah has forgiven my nation for mistakes and forgetfulness, and what they are forced to do’.⁶³⁵

The point of deduction in this *ḥadīth* is that, Allah has forgiven the nation of Muḥammad in that which they are forced to do, which are the rules which result from coercion not the action itself. The phrase ‘what they are forced to do’ is a general phrase that indicates coercion, whether verbal or practical, with no preference for one of them over the other and as long as there is no preference or detail then it is considered as on restriction with no sound reason.

- 2- *Ḥadīth* reported by Al-Bukhārī that a woman called Khansā’ bint Khidām was given by her father in marriage when she disliked that marriage. So she came and (complained) to the Prophet and he declared that marriage invalid.⁶³⁶
- 3- *Ḥadīth*, ‘A virgin came to the Prophet and mentioned that her father had married her against her will, so the Prophet allowed her to exercise her choice’ and in another narration, ‘the Prophet rejected her marriage’.⁶³⁷

⁶³⁴ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (4579).

⁶³⁵ Muḥammad b. ʿAbd Allah, al-Khaṭīb al-Tabrīzī, *Mishkāṭ al-Maṣābīḥ*, ed. by Muḥammad Nāṣir al-Dīn al-Alānī, 3rd edn (Beirut, Lebanon: al-Maktab al-Islami, 1985), *ḥadīth* number: (6293).

⁶³⁶ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* number: (6945).

⁶³⁷ Abū Dāwūd, *Sunan Abū Dāwūd*, *ḥadīth* number: (2096); Ibn Mājah, *Sunan Ibn Mājah*, *ḥadīth* number: (1875).

The majority of jurists believe that all these *ḥadīths* are clear in indicating the invalidity of the marriage and the divorce of the compelled. Ibn al-Qayyim said, ‘it wasn’t authentically reported to any of the companions that he approved the divorce of the compelled’.⁶³⁸ Therefore, the marriage contract takes the same rule with the majority.

Al-Duraynī stated that the Shāfi‘is believe that the contract of the compelled is void and his statement is ineffective, because of the fact that consent and choice are the same both in their concept and in their effect. They are synonymous, so if one does not exist then the other does not exist either. It is well known that coercion negates consent, so the choice become negated as well and, because there is no accountability without the existence of choice, the contract becomes invalid as the existence of choice is the condition for its initiation.⁶³⁹

As for the *ḥadīth*: “There are three things which, whether undertaken seriously or in jest, are treated as serious”, the majority said that the approval of the marriage and divorce in jest does not mean not to stipulate the intent in such contracts absolutely, because they are serious matters that the Lawgiver emphasised and they are considered part of the Sharī‘ah’s right, which must not be subjected to jest. That is why whoever utters words of disbelief in jest becomes a disbeliever under the law, because he/she intended and chose the words, and should not therefore be compared to the compelled, the mistaken or the one who utter the words unintentionally. The Sharī‘ah obliged the one in jest with regard these three matters as a punishment for his action of belittling issues that are related to honour. However, the view of the Ḥanafis is that marriage, divorce and recovering a marriage in jest is approved which indicates the validity of the verbal disposals of the compelled because the one in jest also issued the words without intent. One of the answers to this was that this opinion has no grounds because there is an essential difference. The one in jest carries out the conduct while knowing its meaning and its consequences, but he is only tampering whereas the compelled issues the words under the influence of compulsion without intending them or seeking their

⁶³⁸ Ibn al-Qayyim, *I‘lām al-Muwaqqi‘īn*, IV, p.52.

⁶³⁹ See Al-Duraynī, *al-Nazariyyāt al-Fiqhiyyah*, p. 478.

consequences, and he does so in order to repel harm from himself. Therefore, he is like the one who expresses the desire of someone else and if he was to be given his free choice he would not have said or chosen the same thing. Furthermore, the *ḥadīth* talks specifically about the verbal disposals of the one in jest, and no text that applies the same rule to the compelled is brought forward in their defence.⁶⁴⁰

Ibn Ḥazm confirmed the understanding from the majority in this regard and stated that speech does not become binding under the influence of coercion, even if the compelled utters the words like in cases of disbelief (*kufr*), false accusation of unlawful sexual intercourse (*qadhf*), declaration (*iqrār*), marriage (*nikāḥ*), marrying off (*tazwīj*), recovering a marriage (*rajʿa*), divorce (*ṭalāq*), sales (*bayʿ*), purchases (*shirāʾ*), vows (*nadhr*), oaths (*al-yamīn wa al-qasam*), gifts (*hiba*) and forcing the *kitābī* (the person from the people of the Scripture who is under the covenant of protection with the Muslims) to embrace Islam. Ibn Ḥazm explain this by saying that when the person said what he was compelled to say he was expressing the words that he was forced to say, so he is no doubt under no liability. Moreover, Ibn Ḥazm claimed that those who differentiated between the two cases [actions which can be declared null and others which cannot] have contradicted themselves because the Prophet said: “Verily, the reward of deeds depends upon the intention and every person will get the reward according to what he has intended” which indicates that if a person is compelled to make a statement without intending it by his free choice, then he is not obliged to it.⁶⁴¹

It seems that the opinion of the majority of jurists which disapproves any verbal disposal of the compelled is the soundest opinion as all verbal disposals should be considered invalid when they took place without consent. Therefore, consent must be preferred because it agrees with the purposes of the legislation in making it a foundation for any disposal issued by the person and considering his freedom in all of his choices, disposals and initiations, while holding him responsible for that which he does out of his free choice. Furthermore, the

⁶⁴⁰ See Zaydān, *al-Wājiz*, p. 141.

⁶⁴¹ See Ibn Ḥazm, *al-Muḥallā*, VII, p. 203.

requirement of mutual consent in sale contracts indicates that it is even more required in marriage as marriage has a higher priority because the issues of honour, lineage and the sanctity of the private parts (*furūj*) is greater than issues of property in the measure of Islamic law. As the Qur'an prohibited the consumption of another's property without mutual consent, then the private parts do not become lawful unless there is mutual consent which is required by the legislation in all transactions between people. This is why the Sharī'ah prohibited the guardian to marry off his ward without her consent.⁶⁴²

Ḥanafis do not allow coercion in any contract, which is in agreement with the majority but they differ with them when the contract is already concluded, where they divid contracts into those which can be annulled and those which cannot. They also give the same ruling to the one in jest. Ibn Taymiyyah claims that the opinion adopted by some jurists that marriage cannot be annulled has no evidence. Thus, the Qur'an, the *Sunna*, the narrations from the companions and analogical reasoning indicated the contrary, as marriage can be annulled based on the existence of defects in one of the contracting parties.⁶⁴³ However, al-Qarahdāghī believes that although the Ḥanafis' opinion can be justified from the jurisprudential point of view, but it does not reach the point of cancelling the need of intending and consenting to contracts that cannot be annulled like marriage and divorce. This is because, although such contracts are verbal disposals, they result in implications no less serious than the implications which result from written contracts that can be annulled, like sales. In fact, they could have even more serious consequences because they are have a direct link to free will, liberty of choice and honour, which jurists unanimously agree is sacred.⁶⁴⁴

Al-Duraynī believes that comparing the compelled person to the one who contracts in jest is not a direct analogy because coercion does not exist in the case of jest because the person has chosen to utter the words and act by his free choice, but he is discontent with the

⁶⁴² See Ibn Taymiyyah, Aḥmad b. °Abd al-Ḥalīm, *Naẓariyyat al-°Aqd*, (Cairo, Eygpt: Markaz al-Kitab, '[n.d]'), p. 146; Zaydān, *al-Wājiz*, p. 141.

⁶⁴³ Ibn Taymiyyah, *Naẓariyyat al-°Aqd*, p.146.

⁶⁴⁴ Al-Qarahdāghī, *Mabda' al-Riḍa*, I, pp. 445-63.

approval of its ruling as he is only joking. The situation of the compelled is different because of the existence of coercion, both in the act and the formula, so this is an assault on his consent and choice. He then goes on to explain the difference between the compelled and the one who contracts in jest by clarifying that both of them are discontent with the rule and the resulting effect, but legislation obliges the one in jest in issues of marriage, divorce and recovering the marriage because he is frivolous. Therefore the legislation intends to punish him for this to achieve a general legal interest in regard to marriage and divorce as it should not be subjected to jest and that is why the *ḥadīth* came for those cases specifically. The compelled is in different situation because he did not accept the rule and the resulting effect because of coercion, not because of frivolity and therefore he does not deserve to be punished but rather to be pardoned and protected because of the aggression which was exercised on his consent and free choice. Therefore, punishing the one in jest is for the sake of fulfilling the public interest and disapproving the effect of the disposal. In cases of coercion it is a protection for the individual interest which clarifies the difference between them in their concept, effect and intent.⁶⁴⁵

The majority of jurists disagreed with the opinion of Ḥanafīs and rejected their process of comparing compulsion to jest and they differentiated between compulsion and jest in marriage, divorce and recovering the marriage, where jest has no effect on them and the one in jest becomes obliged to them as the *ḥadīth* indicates. They also decided that compulsion has an effect on them and prevents their validity, as in all other disposals. Ibn al-Qayyim states:

Don't you see that Qur'an excused the compelled in case he utters words of disbelief while his heart is secure in faith but did not excuse the one in jest! Rather, the Qur'an says, "And if you ask them, they will surely say, "We were only conversing and playing." Say, "Is it Allah and His verses and His Messenger that you were mocking? Make no excuse; you have disbelieved

⁶⁴⁵ See Al-Duraynī, *al-Naẓariyyāt al-Fiqhiyyah*, pp. 483-84.

after your belief” (Q., 9:65-66). Therefore, the Sharīʿah excused the forgetful and the mistaken as well.⁶⁴⁶

According to al-Zarqa, the opinion of the majority is more sound and in line with the wisdom behind the legislation.⁶⁴⁷ Ibn Ḥajar said, ‘there is no difference between compulsion in speech or [compulsion in] acts in the opinion of the majority’.⁶⁴⁸

It seems that consent is a cornerstone in all contracts and that is the general rule in Islamic law. Therefore, no contract is considered initiated or valid without it except with a specific piece of evidence, as in the case of a marriage or divorce conducted in jest and a sale made by the ‘compelled with right’ in order to pay back his debt.⁶⁴⁹

The Effect of Coercion on the Marriage contract

The formula (*ṣīgha*) in marriage contract is verbal disposal that requires offer and acceptance; both are considered a sign of consent to the contract. However, we previously explored the issue that in the Ḥanafis’ opinion, consent is described as a full choice (*muntahā al-ikhtiyār*) and that consent is different than choice, whereas in the opinion of the majority consent and choice are the same thing. We also explored the issue that in Ḥanafis’ view only extreme coercion negates consent and causes the choice to be irregular and that limited coercion does not affect the choice at all but a type of it negates consent and another type causes consent to be irregular. The opinion of the majority is that coercion affects both of them absolutely.

We then discussed the subject of coercion and its impact on both consent and choice. The argument is that the Ḥanafis used to differentiate between consent and choice and the effect of the presence of one of them in the contract and the absence of the other and how jurists differed in regard to the effect coercion has in verbal and practical disposals. Furthermore, verbal disposals are divided into those which can be annulled, like sales and purchases, and

⁶⁴⁶ Ibn al-Qayyim, *Iʿlām al-Muwaqqiʿīn*, III, p.64.

⁶⁴⁷ See Al-Zarqa, *al-Madkhal al-Fiqhī*, I, p. 457.

⁶⁴⁸ Ibn Ḥajar, *Fatḥh al-Bārī*, XII, p. 386.

⁶⁴⁹ See Al-Qarahdāghī, *Mabda’ al-Riḍa*, II, pp. 1015-1017.

those which cannot be annulled like marriage and divorce (in the Ḥanafī's opinion). They also adopted the view that coercion has no effect on disposals that cannot be annulled, so they are considered to be sound even with coercion. The majority of scholars ruled disposals that take place under the influence of coercion to be invalid. Accordingly, jurists are in two camps in regard to the validity of marriage contract under the influence of coercion, which can be summarised as follows:

1- The Ḥanafī opinion

Marriage, in the personal reasoning of Ḥanafīs, is a contract that cannot be annulled so it is considered sound even with coercion. They justified this with the argument that marriage is a verbal disposal and that the compelled cannot logically be like a tool in the hand of the one who compels him/her. The evidence they used was based on the generality of the verses in regard to marriage in the Qur'an which came without specifying or restricting this disposal to the condition of consent. Amongst the evidence they used was the verse, "And marry the unmarried among you and the righteous among your male and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-Encompassing and knowing" (Q., 24:32). Al-Kāsānī said, 'the generality of the texts requires the validity of the disposals without any specifying or restriction. Coercion has no effect on verbal disposals because every speaker is free in what he says, so he is not compelled in reality'.⁶⁵⁰ Thus, whoever is compelled to marry and utters his acceptance is considered to be the same as one who chooses without coercion because he has chosen the least of two harms, even if he/she is discontented with what becomes binding as a result of the marriage contract. Therefore, he/she has no right to request the annulment of the contract, just like the one who is compelled to sell or purchase, because he/she is given the same rule as the one in jest. The Prophet said, "There are three things which, whether undertaken seriously or in jest, are treated as serious: Marriage, divorce and taking back a wife (after a divorce which is not

⁶⁵⁰ Al-Kāsānī, *Badā'i' al-Ṣanā'i'* IV, p.182.

final)”.⁶⁵¹ They claimed that the words of this *ḥadīth* indicate the validity of marriage contract in jest and coercion is given the same ruling as jest.

They also believe that the original rule is that anything which is considered valid under jest is considered valid under coercion because that which is considered valid under jest cannot be annulled and anything that cannot be annulled is not affected by coercion. Furthermore, Ibn ʿĀbidīn said in this context, ‘coercion has no effect in regard to preventing validity because coercion negates consent and the negation of consent causes the contract to be non-binding and that allows the compelled to annul the contract. Therefore, coercion allows the compelled to annul the contract after coercion is confirmed and coercion has no effect of disposals which cannot be annulled’.⁶⁵²

Based on this, marriage, in the opinion of the Ḥanafīs, is considered valid under jest as well as coercion because if jest has an effect in any contract then coercion also has an effect and if jest does not have an effect in any contract then coercion doesn’t have an effect. Any contract that cannot be annulled is not affected by coercion and any contract that is considered valid under jest cannot be annulled.⁶⁵³ They justified their position with the argument that legislation approved the requirement of the statement only in such disposals to indicate the intended meaning, so the presence of the statement causes the presence of their effect – whether or not the person meant it or intended its meaning. Intent and consent have no effect in regard to the validity of marriage contract, but the ruling is made based on actions, which are outward manifestations of the individual’s inner intent. Therefore, there is no disagreement among Ḥanafīs regarding the validity and the binding nature of the marriage of the compelled. Nyazee states that all transactions that do not accept rescission, and do not depend upon consent are valid under coercion, because they amount to the

⁶⁵¹ Al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, *ḥadīth* number: (2039). Also, see al-Albānī, *ʿIrwāʾ al-Ghalīl*, *ḥadīth* number: (1826), II, pp. 224.

⁶⁵² Ibn ʿĀbidīn, *Radd al-Muḥtār*, VI, p. 139.

⁶⁵³ See Al-ʿAynī, *al-Bināhyah*, X, pp. 76-77.

termination (*isqāt*) or relinquishment of a right, and relinquishment cannot be reverted, because these transactions are not dependent on consent.⁶⁵⁴ *Al-Fatāwā al-Hindiyyah* states:

The original rule is that all the disposals of the compelled are approved in our opinion. He can annul those disposals which can be annulled but those which cannot be annulled –like marriage and divorce- are binding.

It also states:

If it is a verbal disposal, which is open to seriousness or jest, then coercion has no effect, so the compelled is considered as one who carried out that disposal with his free choice.⁶⁵⁵

2- The opinion of the majority (Mālikis, Shāfi'is and Ḥanbalis)

Their opinion is that coercion in marriage causes the contract to be invalid and the contract is non-binding even after the removal of coercion and it results in no legal consequences.⁶⁵⁶

Al-Qurṭubī said, ‘the opinion of the majority is that the marriage, divorce and similar contracts of the compelled are invalid because of coercion’. He then quoted from one of the distinguished Mālikī scholars Saḥnūn:

Our companions are unanimous that the marriage of the compelled male and female is invalid. They rule that this marriage should not continue because it is not considered to have been initiated in the first place.

Saḥnūn also said:

The scholars of Iraq -meaning the Ḥanafis- allowed the marriage of the compelled...If a person is compelled to marry a woman with a dowry of ten

⁶⁵⁴ Nyazee, *Islamic Jurisprudence*, p. 137.

⁶⁵⁵ *Al-Fatawa al-Hindiyyah*, al-Shaykh Niẓām and others, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyā, 2000), V, p.45.

⁶⁵⁶ See Ibn Baṭṭāl, *Sharḥ Ṣaḥīḥ al-Bukhārī*, VIII, p. 299; See Ibn Ḥajar, *Fath al-Bārī*, XII, p. 359.

thousands *dirhams*, while the normal dowry of a similar woman is one thousand *dirhams*, then the marriage is approved and he is obliged to pay the one thousand but not the extra amount to *mahr al-mithl* (the dowry paid to similar women). Therefore, as they disapproved the extra dowry then they must disapprove marriage under coercion. Moreover, their opinion contradicts the confirmed *Sunna* in the *ḥadīth* of al-Khansā' bint Khidām al-Anṣāriyyah and the Prophet's command of seeking the woman's permission.⁶⁵⁷

Among the evidence the majority used was that the Prophet disapproved the marriage of a *bikr* (virgin) and a *thayyib* (previously married woman) after their fathers had married them off when they disliked the marriage. They deduced that the *ḥadīth* indicates the invalidity of the marriage contract in the case of coercion, whether the compelled woman is a virgin or previously married. Coercion causes the contract to be invalid and that is why the Prophet disapproved the marriage. Furthermore, they used the *ḥadīth*: "Allah has forgiven my nation for mistakes and forgetfulness, and what they are forced to do". The point of deduction is that its verbal significance states that no rule is applied in cases of mistake, forgetfulness and coercion and the absence of the rule requires the disapproval of the contract which the person was compelled to and therefore the marriage becomes invalid with no legal effects. Furthermore, they use the *ḥadīth* of al-Khansā' bint Khidām when she was given by her father in marriage and she disliked that marriage. Therefore, she came and complained to the Prophet and he declared that marriage to be invalid. The point of deduction in the *ḥadīth* is that it indicates the invalidity of the marriage contract when the woman is discontented with it, which further indicates that consent is a condition for the validity of the marriage contract and without it the contract is considered to be irregular.

⁶⁵⁷ Al-Qurṭubī, *al-Jāmi' Li Ahkām al-Qur'ān*, X, pp. 121-22.

We can sum up the views of the four schools of Islamic jurisprudence in the subject of coercion in terms of its impact on human conduct as follows:

- **1. The Ḥanafī school:** they divided coercion into two types:
 - a- A type that considers the strength and the weakness of the means of the threat, which is divided into:
 - i.) Extreme coercion (*ikrāh mulji*'): when the coercion reaches its highest point. They also call it complete coercion. This type is that which leads to death, the loss of an organ or a severe beating that causes death or the loss of an organ.
 - ii.) Limited coercion (*ikrāh ghayr mulji*'): when the coercion does not reach full strength. They also call it incomplete coercion. This type is that which includes imprisonment, being tied up and beatings that do not cause major harm.
 - b- A type that consider the effect of coercion in consent and free choice. This is divided into three types:
 - 1- That which negates the consent and causes the choice to be irregular (extreme coercion; *ikrāh mulji*'). It negates consent completely but the choice still exists because the act is initiated by the compelled by his choice but it is considered irregular because he/she wasn't completely independent in making that choice as he/she was affected by the choice of the compeller.
 - 2- That which negates consent but does not affect the choice, which happens in the case of threatening with something other than death or the loss of an organ.
 - 3- That which does not affect the choice but causes the choice to be irregular, which happens in the case when coercion is indirectly exercised on the person himself but towards those whom he cares about, like imprisoning the father, the mother or the son.

The last two types are under the category of limited coercion (*ikrāh ghayr mulji*). Accordingly, limited coercion can be divided into two types:

- 1- That which negates the consent.
- 2- That which does not negate consent but causes it to be irregular.

However, neither type affects the choice.⁶⁵⁸

- **2. The Mālikī school:** they divided coercion into two types:

- a- Legitimate (*ikrāh sharʿī*)
- b- Illegitimate (*ikrāh ghayr sharʿī*)

The first type is when coercion is exercised in case there is a right of another person, like when the judge forces the indebted person to sell some of his properties in order to pay back his debt. The second type is when coercion is exercised without being attached to any person's right. This type affects consent and causes the contract to be either void or suspended depending on the consent of the compelled after the coercion is removed.⁶⁵⁹

- **3. Shāfiʿī and Ḥanbalī schools:** Generally, they do not differ much from the classification given by the Mālikis, but they expressed it differently with the same outcome. They divided coercion into two types:

- a- Coercion with right (*ikrāh bi ḥaqq*)
- b- Coercion without right (*ikrāh bi-ghayr ḥaqq*).⁶⁶⁰

⁶⁵⁸ See Al-Sarakhsī, *al-Mabsūt*, XXIV, pp. 144-46; Al-Bukhārī, *Kashf al-Asrār*, IV, pp. 538-40 ; Al-Taftazānī, *al-Taṭwīḥ ʿAla al-Tawḍīḥ*, II, pp. 196-97.

⁶⁵⁹ See Ibn Ṭāhir, *al-Fiqh al-Mālikī wa Adillatuh*, IV, pp. 45-47; Al-Ghiryānī, *Mudwwanat al-Fiqh al-Mālikī*, III, pp. 222-26.

⁶⁶⁰ See Al-ʿĀmidī, *Al-Iḥkām Fī ʿUṣūl al-Aḥkām*, I, p.132 ; Muḥammad b. ʿUmar, al-Rāzī, *al-Maḥṣūl Fī ʿIlm al-ʿUṣūl*, ed. by Taha Jabir al-Alwani, 3rd edn (Beirut, Lebanon: Al-Resalah Publishers, 1997), II, pp. 267-70 ; Muḥammad b. Aḥmad , Ibn Ibn al-Najjār, *Sharḥ al-Kawkab al-Munīr*, ed. by Muhammad al-Zuhayli and Nazih Hammad (Riyadh, Saudi Arabia: Maktabat al-Aubaykan, 1993), I, pp. 508-10.

Although the classification which the Ḥanafīs gave to coercion (i.e. extreme and limited) is useful in some conducts, it is not very beneficial in issues of contracts and verbal conduct. In this context, al-Kasānī declared that, ‘in issues of sale and purchase, extreme coercion (*ikrāh mulji*’) and limited coercion (*ikrāh ghayr mulji*’) are the same because both of them negate consent’.⁶⁶¹ Madkūr claimed that he did not find a practical effect for the distinction between coercion types. He believed that it is only a theoretical distinction, because jurists did not differentiate between coercion types when discussing the contract of the compelled, even though this distinction has an effect in practical conduct, like forcing someone to commit murder. Therefore, according to Madkūr, in the case of the extreme coercion (*ikrāh mulji*’) Ḥanafīs approve that it negates both the contest and the choice.⁶⁶² However, the classification of coercion established by the Mālikī, Shāfi‘ī and Ḥanbalī jurists only clarifies the coercion which has an effect, because coercion with right has a legal effect but coercion without right has no legal effect.

5.10 The Opinion of Some Eminent Jurists who opposed the Idea of Forced Marriage

Though the majority of jurists approved the compulsion guardianship (*wilāyat al-‘ijbār*), they stipulated the condition of not causing harm to the interests of the ward, whether male or a female. The scholars who investigated this issue rejected the idea of compulsion absolutely, even with this restriction, and believed that compulsion contradicts the meanings of compassion and mercy (which from the Qur’anic point of view the marital life is built upon) and therefore they rejected the opinion that approved compulsion in marriage and considered it to be coercion that is exercised over the woman to live with someone whom she dislikes.

⁶⁶¹ Al-Kāsānī, *Badā’i’c al-Ṣanā’i’c*, X p. 126.

⁶⁶² See Madkūr, Muḥammad Salam, *al-Madkhal Li al-Fiqh al-Islāmī*, 2nd edn (Cairo, Egypt: Dar al-Kitab al-Hadith, 1996), p. 647.

- **Ibn Taymiyyah**

Ibn Taymiyyah, said, ‘Marrying off a woman while she hates that is contrary to both the original rules and sound intellect’.⁶⁶³ According to Ibn Taymiyyah, the Sharīḥ does not permit a guardian to compel a woman to a sale or lease contracts except with her permission, nor does it permit him to compel her to food, drink or clothes that she does not want, so how can her guardian compel her to live and be sexually active with someone she hates? Moreover, one of the Sharīḥ’s objectives from marriage is that it be creates love and mercy between spouses, so how can that be achieved if the wife hates the husband?⁶⁶⁴

It seems that the opinion of the majority which states that the contract of the compelled is invalid under the influence of coercion has more applicability in cases of forced marriage- where the types of psychological and social pressure exercised and the ways coercion is applied will naturally affect the full choice and consent to the marriage contract- because of the amount of evidence already mentioned that supports their opinion. It also seems that the opinion of the Ḥanafīs in regard to this issue is not strong because it depends on comparing the one compelled to marriage to the one who marries in jest, which in the opinion of the scholars of principles is a *qiyās maʿa al-fāriq* (analogical reasoning with difference) because the cause (*ʿilla*) in the new case -coercion- is not equal to the cause in the original case -jest. According to al-Duraynī, the personal reasoning of the Ḥanafīs is not in accordance with the logic of the legislation as the compelled cannot be held liable for the effect of the marriage contract that he/she was forced to initiate when he/she was stripped of his/her will and consent, which are the foundations of any disposal in the legislation. He also questioned how one can be forced to terminate his/her marital life through divorce and be obliged to endure the effects of that disposal. This is definitely not in accordance with the legislation of Islam and if the Ḥanafīs judge such disposals to be irregular or suspended for the sake of protecting the compelled, that would be better and closer to the spirit of the Sharīḥ.⁶⁶⁵

⁶⁶³ Ibn Taymiyyah, *Aḥkām al-Zawāj*, p. 102.

⁶⁶⁴ See Ibid, (102).

⁶⁶⁵ See al-Duraynī, *al-Nazariyyāt al-Fiqhiyyah*, p. 484.

It can also be argued that the opinion of the majority upholds equity and justice and clears Islam of the accusation that it is a religion that builds marital relations on the basis of coercion and oppression and overlooks the woman's right to have full consent and choice. We explored how the authentic *ḥadīths* (reported about the Prophet) conclusively demonstrate that Islam has approved the woman's right to marry whomever she wants, as long as she fulfils the requirements of being able to make a good choice. Moreover, exercising pressure and coercion over peoples' emotions is an ugly thing, exactly like unlawfully consuming their wealth and respecting the person's will and free choice must be given consideration, care and protection.

According to Ibn Taymiyyah, the soundest opinion is that no one can compel a major virgin (*al-bāligh al-āqilah*) into marriage because of what was narrated that the Prophet said, "A virgin should not be married until her permission is asked nor should a woman without a husband (*'ayyam*) be married without her permission". They (the people) asked whether 'the virgin is usually modest?' He replied "her permission is her silence". In another narration, "the father must seek the virgin's permission". Ibn Taymiyyah stated that the Prophet prohibited guardians from marrying off women without their permission and this includes the father or any other person. This was clearly stated in the second narration; that the father must seek her permission.⁶⁶⁶ Furthermore, there is plenty of clear evidence that stipulate full consent in marriage, as the Qur'an said, "And when you divorce women and they have fulfilled their term, do not prevent them from remarrying their [former] husbands if they agree among themselves on an acceptable basis" (Q., 2:232), where the Qur'an prohibited guardians from preventing those under their guardianship from marriage if they agree among themselves on an acceptable basis (*ma'rūf*). The Qur'an also says in regard to the dowry: "And there is no blame upon you for what you mutually agree to beyond the obligation" (Q., 4:24) which indicates that the criterion of marriage contract is mutual consent. Moreover, the Qur'an says, "So marry them with the permission of their people" (Q., 4:25) which indicates that marrying off is approved through permission, which is consent, and disapproved under the influence of coercion. The Prophet's tradition also indicates clearly

⁶⁶⁶ See Ibn Taymiyyah, *Majmū' al-Fatawā*, XXXII, p. 19.

that marriage is not approved except with mutual consent and furthermore that Prophet disapproved the marriage of the woman whom her father married off while she disliked it.

In addition to this, the opinion that coercion in marriage doesn't cause it to be annulled, invalidated or suspended can potentially open the door to dangerous consequences as marriage is closely linked to people's honour and cohabitation between the woman and the man, as well as serious consequences in relation of lineage. Therefore, it must be protected from any kind of oppression and coercion which is one of the purposes of the Sharī^cah.⁶⁶⁷

- **Ibn al-Qayyim**

As for Ibn al-Qayyim al-Jawziyyah who, after he mentioned a number of *ḥadīths* that approved a woman's right to choose and accept a marriage such as the *ḥadīth* of al-Khansā' bint Khidām (mentioned above) and the *ḥadīth* where the Prophet disapproved the marriage of a *bikr* and a *thayyib*. Ibn al-Qayyim stated that, the legal implication of this rule –given by the Prophet in the above *ḥadīths* - is that a major virgin (*al-bikr al-bāligh*) must not be compelled into marriage and she must be married off only with her full consent in accordance with the rule given by the Prophet, his commands, prohibition, the basis of Islamic Law and the interests of the community.⁶⁶⁸ Ibn al-Qayyim notes that the Prophet, judged by giving the choice to the virgin who disliked the marriage. He further states that it is in accordance with the command of the Prophet: “The virgin must be asked for her permission” which he states is a definite principle because it came in the form of a *khbar* (which indicates the confirmation of that which it tells about). Furthermore, he notes that it is in accordance with the prohibition of the Prophet when he said: “A virgin should not be married until her permission is asked” so he commanded, prohibited and ordered the woman to be given the choice which is the most effective way to confirm the rule.⁶⁶⁹

As it is in accordance with the basis of the legislation as Ibn al-Qayyim sees it, the matter can be summarised as follows. The father of a major sane mature virgin cannot act in the

⁶⁶⁷ See Al-Qaradāghī, *Mabda' al-Riḍā*, I, p. 549.

⁶⁶⁸ Ibn al-Qayyim, *Zād al-Ma'ād*, V, pp. 95-96.

⁶⁶⁹ Ibid, V, pp. 96-97.

lowest of her wealth without her consent and he also cannot force her to spend even a little amount it without her consent, so how can her guardian treat her like a slave by forcing her to live with someone she dislikes, because by doing so he makes her like a slave who is sold and purchased without having an opinion, consent or a choice in the matter. Therefore, the guardian should not give away a woman to someone with whom she will share her sexual life and whom she hates without her consent. Ibn Al-Qayyim then goes on to confirm these by stating that giving away all of her wealth without her consent is easier for her than giving her in marriage to someone without her consent. After all, Ibn al-Qayyim believes that it is clear that the interest of the woman is to marry whomsoever she chooses for the purposes of the marriage to be fulfilled. The opposite will happen if she marries someone she hates and rejects. Then he said, ‘even if the clear *Sunna* did not come with this clear judgement, sound analogical reasoning (*qiyās*) and the basis of the Sharīḥ would not require otherwise’.⁶⁷⁰

The majority of jurists also argued that the statement of the compelled is considered to be invalid and his/her contract is void and of no effect.⁶⁷¹ According Abū Zahrah, any form of coercion is a crime and a crime cannot be a means to approve any right.⁶⁷² As for Ibn Ḥazm (d. 456 AH / 1063 AD), consent is a condition for the soundness of the marriage contract. Therefore, the absence of consent causes the contract to be invalid.⁶⁷³

Depending on this we have no doubt that jurists are unanimous in preventing coercion originally and that it must not be exercised because of what it include in respect of oppression and aggression, but they differed in the judgement in the rule of the contract after it takes place under coercion.

⁶⁷⁰ Ibn al-Qayyim, *Zād al-Ma‘ād*, V, pp. 95-96.

⁶⁷¹ Zaydān, *al-Madkhal*, p. 254.

⁶⁷² Abū Zahra, *Uṣūl al-Fiqh*, p. 359.

⁶⁷³ Ibn Ḥazm, *al-Muḥallā*, VIII, p. 388.

5.11 Islamic Law of Personal Status Preventing Forced Marriage

Many modern Laws of personal status in Muslim countries clearly state the prohibition of exercising forced marriage or exercising coercion on any party of the marriage. For example, terms of Article VIII of the Libyan Personal Status Law (1984) states that:

- a- A guardian is not allowed to force a boy or a girl to marriage against their will
- b- A guardian is not allowed to prevent his ward from marrying the person he/she accepts as a husband.

In his explaining to this legal article, al-Hūnī says, ‘the Libyan legislature does not approve the guardianship of compulsion as indicated in this text, but approves the ‘guardianship of choice and participation’.⁶⁷⁴ However, we have already mentioned that Ḥanafī jurists adopted the opinion of the ‘guardianship of choice and participation’ while the Mālikīs adopted the opinion of the guardianship of compulsion. However, the Libyan legislation—which depends on the legislation regarding the personal status laws of the Mālikī school of law- abandoned the Mālikīs opinion and chose the Ḥanafīs’ in order to control the practice and also to limit the harm caused by coercion.

The Kuwaiti Personal Status Law (1984) also states the invalidity of the marriage of the compelled in article 25 of the family code.⁶⁷⁵ In Syria, Jordan and Morocco the personal status laws prevent all forms of coercion in marriage. The guardian still has the right to object to the marriage but they afford the judge the power to dismiss his objection.⁶⁷⁶ According to El-Alami, in Egyptian law, a woman with full legal capacity has the right to conclude her marriage, although her guardian still has the right to request a judicial annulment to the marriage if she marries someone who is unsuitable for her with regard to

⁶⁷⁴ Muḥammad Muṣṭafa, al-Hūnī, *Qanūn al-Zawāj wa al-Ṭalāq*, 2nd edn (Benghazi: Dar al-Fadheel Publishers, 2007), pp. 13-14.

⁶⁷⁵ See *Qānūn al-Aḥwāl al-Shakhṣiyyah al-Kuwaiti, Majmū‘at al-Tashrī‘āt al-Kuwaitiyyah*, Ministry of Justice, Kuwait, V. 8, 2011, 1st edn (Kuwait: al-Khat, 2011) p. 19.

⁶⁷⁶ See Jamal J., Nasir, *The Islamic Law of Personal Status*. 3rd edn (London: The Hague: Kluwer Law International, 2002), p. 55.

social status, which, as we know, is the opinion of the Ḥanafī school.⁶⁷⁷ El-Alami also thinks that the personal status laws in Egypt and Morocco reflect the nature and characteristics of those communities and highlight the fact that there are serious attempts to bring renewal and reform to those laws, but he confirms that no real reform will take place while the social reality of those communities remains the same without any change.⁶⁷⁸

El-Alami here refers to the existence of many practices which are contrary to Islamic principles that are wide spread in many Muslim societies today which are product of cultural heritage as well as the customs and traditions that stem from misconceptions of the law, even if they are mistakenly or deliberately given a religious nature. In this context, it is worth mentioning that Morocco has conducted a series of amendments to its marriage law in what is known as ‘Family Code’, under Law No. 03-70/5th of February 2004. The amendments preamble includes the following:

Guardianship is a right for the mentally mature woman which she can apply according to her interests and benefits depending on an interpretation of the holy verse which disapproves compelling the woman to marry someone other than the one she chooses in an acceptable basis: “do not prevent them from remarrying their [former] husbands if they agree among themselves on an acceptable basis” (Q., 2:232). The woman can -with her free will- delegate her father or one of her male relatives to do so.⁶⁷⁹

Also mentioned in the Moroccan ‘Family Code’ in the first section ‘*the legal capacity and guardianship in marriage*’/ Article (24): ‘The guardianship is a right for the mentally mature woman whom she can practise according to her interests and benefits’. Article 25 reads: ‘the legally mature woman can carry out her marriage contract or delegate her father or one of her relatives to do so.’⁶⁸⁰ Moreover, as for the issue of coercion in a marriage

⁶⁷⁷ El-Alami, *Legal Capacity*, p. 202.

⁶⁷⁸ Ibid, p. 203.

⁶⁷⁹ *Mudawwanat Al-Ussrah*, No. (5184), (Kingdom of Morocco: Official Gazette , 5th February 2004), p. 4.

⁶⁸⁰ Ibid, p.10.

contract, the Family Code states that the annulment of the marriage is allowed whether before or after the consummation of the marriage in the Article 26:

If one of the spouses were compelled or cheated to accept the marriage then he/she can request for the annulment of the marriage before and after the consummation of the marriage, within the period of two months after coercion is removed or when he/she discovers that he/she was deceived. He/she also has the right of compensation'.⁶⁸¹

The marriage law in Pakistan and Bangladesh is governed by the Hanafi School and amongst the articles of the marriage law are:

- 1- The marriage of a major sane Muslim –whether male or female- is considered as invalid with the disapproval of any party in the marriage.
- 2- The invalid marriage is not considered a marriage by law; therefore, no civil rights or obligations by any party result from it.⁶⁸²

In Pakistan, of the methods available to civil litigation with respect to the issue of forced marriage is the so-called Jactitation of marriage (declaring that the marriage is invalid for lack of consent and approval) or by requesting a judicial divorce. In the case that the marriage contract includes a clause that grants the right of divorce to the wife by her husband, she can exercise this right granted to her and get a divorce. If the marriage contract contains no such clause then she can apply for divorce through the family courts by establishing her lawsuit on the fact that the marriage took place without consent and approval or the fact that her approval was obtained through coercion.⁶⁸³

⁶⁸¹ *Mudawwanat Al-Usrah*, . No. (5184), (Kingdom of Morocco: Official Gazette , 5th February 2004), p.19.

⁶⁸² Hossain, Sara, and Suzanne Turner, 'Abduction for Forced Marriage–Rights and Remedies in Bangladesh and Pakistan', *International Family Law* 1.64 (2001), pp. 15-24.

⁶⁸³ See *Ibid*, p.18.

In Indian Muslim Personal Law, section 104 Part I *Law of Marriage*, we read: ‘It is necessary for the nearest guardian to contract the marriage of a sane and adult woman with her consent; and if he does not do so the marriage will be voidable at the girl’s option’.⁶⁸⁴ Furthermore, forced marriage violates a range of fundamental rights guaranteed by the Constitution of Bangladesh and Pakistan which consider compelling any person to marry as a punishable offence. To clarify how forced marriage is a harmful traditional practice that cannot be justified by culture or religion, a Pakistani court states:

In the issue of marriage, the woman is approved her right [by Islamic legislation] to choose her spouse; but unfortunately, our practical lives are influenced by many practices which were adopted by history, tradition and feudalism. Such a culture needs to be adjusted by law in order to suit the correct understanding of the Islamic objectives and values. Male chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values. An enlightened approach is called for.⁶⁸⁵

An example of this is that some cases raised the matter of consent in Islamic marriage. In one of the cases in 1990 in the Kerala High Court, a father of a major girl argued that he is allowed to approve the marriage depending on his understanding of both the Islamic law and the local custom, but the judge rejected his argument saying:

The original rule is that if a girl is major and mentally mature then no one can act as her guardian in giving approval to her marriage, although it is up to her to authorise her guardian to discuss the terms of the contract on her behalf, but that does not mean the he can give her in marriage without her consent. If

⁶⁸⁴ *Compendium of Islamic Laws*, under the supervision of: All India Muslim Personal Law Board, (New Delhi, India: All India Muslim Personal Law Board, 2001), p. 43.

⁶⁸⁵ See Hossain and Turner, *Abduction for Forced Marriage*, p.16.

the consent of both parties in the contract is not approved then the contract is considered as invalid'.⁶⁸⁶

This is the exact meaning of the concept of *wakālah* (agency/authorisation) instead of guardianship in marriage.

This was an example of the attempt at renewal and reform in family law and personal status within the framework of the legal provisions and purposes of Islamic law. Some may feel that such reforms are a mistreatment of legal provisions in order to adapt them to suit the peoples' modern life. Thus, we believe that this is acceptable as long as the intention behind this is to reform and renew in order to achieve the public interest and as long as those reforms are based on the principle of considering the general purposes of the Islamic legislation without distorting clear and explicit evidence from the Qur'an or the *Sunna*. As for the jurists' opinions and legal edicts in the issues that are open for personal reasoning (*ijtihād*), they are not binding on anyone as long as there is room to choose from them in a way that fulfils this interest. We shall also clarify that the personal reasoning of the jurists are not the Sharī'ah *per se*, rather they are the jurists' understanding of the Sharī'ah. Therefore, people who reject calls for reform and renewal stick to the opinions of jurists of specific schools of law which caused -and are still causing- a lot of problems and restrictions for people in their lives because of the stance of partiality and intolerance that such scholars adapt.

Generally speaking, it is well known in the origins of legislation that some discretionary provisions are based on the interests of a specific time or custom which prevailed in a community at that time, so when these factors change the legal edicts change accordingly. Some provisions were based on a specific custom or situation at the time of the early jurists and those who followed them, but when these customs or situations changed the legal edicts should also logically change because of the change in their effective causes. Moreover, one of the schools of law that is famous for this rule is the Ḥanafī school as we find a wide range

⁶⁸⁶ David Pearl and Werner Menski, *Muslim Family Law*, 3rd edn (London, England: Sweet & Maxwell, 1998), pp. 156-57.

of discretionary judgments given by their early jurists, which were abandoned by their later jurists who gave different edicts because of the change in customs and time. Amongst the most famous jurisprudential rules in the Ḥanafī school is the rule of ‘the custom is a means for judgement’ (*al-‘ādah muḥakkamah*) and they used the saying of ‘Abd Allah b. Mas‘ūd as evidence, ‘Allah considers good what people consider good’. Ibn ‘Ābidīn has a book about the changing of provisions when customs change.⁶⁸⁷

In this context, al-Qarāfī believes that for the provisions to continue without any change when their causes change is against the consensus and a lack of understanding of the Sharī‘ah. Everything in the Sharī‘ah follows the causes; the provision changes when the custom changes in a way that fulfils the interests of the renewed custom.⁶⁸⁸ Thus, the opinion of al-Qarāfī concerns the provisions that are established according to customs and traditions not the provisions that are approved of by definite texts. Depending on this rule, edicts shall consider the change of custom with time. Therefore, jurists should approve that which is approved by custom and disapprove that which it disapproves, and they should not stick to that which is written in the books indefinitely. Al-Qarāfī suggested that if a person from outside your county comes to ask a *mufīī* (one who is capable of giving legal statements, known as a *fatwā*) then he should not answer him according to his own custom but ask him about his customs and give him the edicts accordingly. Al-Qarāfī claimed that this is the clear truth; sticking to the opinions of the early scholars is a form of misguidance in Sharī‘ah and a misunderstanding of the purposes of the early Muslim jurists.⁶⁸⁹

⁶⁸⁷ See Yusuf, al-Qarādāwī, *al-Siyāsah al-Shar‘iyyah*, 1st edn (Cairo, Egypt: Maktabat Wahbah, 1998), p. 288-93.

⁶⁸⁸ See Aḥmad b. Idrīs, al-Qarāfī, *al-Iḥkām Fī Tamayyūz al-Fatawa ‘An al-Aḥkām*, ed. by ‘Abd al-Fattāh Abu Ghuddah, 2nd edn (Beirut Lebanon: Dar al-Bashaer al-Islamiyyah, 1995), p. 218.

⁶⁸⁹ See Al-Qarāfī, *al-Furūq*, Farq (28), I, pp. 322-23.

Chapter 6 Conclusion

Forced marriage is a marriage where one or both parties are coerced into a marriage against their will and under duress;⁶⁹⁰ duress includes physical and emotional pressure. Forced marriage has emerged as a harmful social practice, related to particular communities that have settled in the United Kingdom. The practice has already received the attention of a variety of scholars, writing within a diverse range of academic frameworks - sociology, law, and so on. Many have viewed it as a product of cultural and/or religious traditions. It is a phenomenon that is most often associated with the South Asian community; given that a large proportion of South Asians are Muslim, it has inevitably been seen as a specifically Muslim problem. This perspective is discernible in the media, among policy makers and within the general public. Islam and its teachings are cited as being among the major sources of the practice. Fewer voices would argue that forced marriage has no foundation in Islamic teaching.

This study aimed from the outset to explore the concept of forced marriage and its basis in Islamic teachings. Moreover, it sought to explore the connection between this practice and the provisions of guardianship (*wilāya*) in Islamic jurisprudence. The over-arching aim was to provide an understanding of marriage in the light of the wisdom of the Qur'an and normative practice of the prophet Muḥammad (*Sunna*). It also sought to provide a better understanding of the problem of forced marriage and its effects from a religious perspective. Additionally, it attempted to address the question of whether Islam tolerates forced marriage.

Guardianship (*wilāya*) in Islamic jurisprudence is a widely practiced tradition in Muslim communities, and has long been seen to provide religious legitimacy to forced marriage. Muslim jurists understand guardianship as a “right” granted to parents or male agnates, the purposes of which is to provide protection and safeguard the interests and rights of the ward who has incomplete or no legal capacity. *Wilāya* is posited as a legal requirement of the

⁶⁹⁰ HM Government, *The Right to Choose*; Multi-agency statutory guidance for dealing with forced marriage, (2014).

marriage contract by the majority of juristic Schools, with the exception of the school of Abū Ḥanīfa, who stipulated it only for the marriage of the minor and the insane.

If the purpose of appointing a guardian in the process of marriage is to protect and secure the interests of the ward, what happens if the guardian proves himself incapable of fulfilling the duty? Islamic law requires that the judiciary in such cases intervene in order to protect the interests of the individual. Complexities arise when religious law is observed, not as an official law of the place, but as an unenforceable law with no political authority, such as is the case for Muslim communities living in the West.

Research has demonstrated that the problem of forced marriage in the context of the UK is particularly acute within families of Pakistani, Bangladeshi and Indian descent; many of these follow *imams* and *muftis* (religious legal scholars) who represent the Ḥanafī School. These same *imams* and *muftis* determine when meat is *halal* and other matters relevant to daily life; yet it is strange that with regard to marriage they seem not to follow their own doctrine (*madhhab*). Here the question remains: why do they not follow the Ḥanafī school with regard to granting women the freedom of choice to contract their own marriages?

In this thesis I have demonstrated that the Ḥanafī school is distinct from all the other *Sunni* schools with regard to the necessity of guardianship in marriage. It would be fair to regard it as the most liberal school in Islamic law, insofar as it gave women freedom in initiating a marriage contract without stipulating guardianship. Her guardian can only object to her conduct if he thinks that she has caused harm to herself or has neglected some of her rights by taking the matter to the judiciary.

Ḥanafis built their doctrine on the basis of the recognition of the freedom of the person who is adult and of sound mind in their actions, regardless of gender. Therefore, the person with full legal capacity is not in need of a guardian (*walī*) in order to manage his/her affairs and carries out certain actions like marriage contract, as mentioned above. Ḥanafis gave this right to everyone who is adult and of sound mind, whether male or female, while the

majority of jurists restrict personal authority with regard to women in general, specifically the virgin girl (*bikr*).

An essential element of the marriage contract is the authority of the individual to conclude the contract. This depends upon the individual legal capacity (*ahliyya*) which is essentially the fitness of a person to enter into obligation. Accordingly, the person with full legal capacity has the full right and freedom to willingly initiate a marriage contract, which upholds the wishes and choices of the person to marry whoever he likes and wants to be connected to by the bond of marriage.

Yet the responsibility of guardianship in marriage is one of duty rather than right. Negligence of the duty of guardianship, and abuse of its right do occur, especially where force and coercion are used with regard to marriage. Therefore, the right of the guardian - like any other right - is restricted by the requirement that it be used for the purposes for which it exists. If the guardian causes harm to the person under his guardianship then his right is removed because of the damage and harm caused by him; such a case should be taken to the judicial authorities to investigate with a view to solving the issue.

Generally, texts from the Qur'an and the authentic *ḥadīth* indicate that guardianship in the marriage contract is a social element, rather than a legal requirement, and carries the meaning of care, guidance and protection of the ward. Therefore, jurists differed in their views about the significance of guardianship in marriage contract, ranging from those who consider it a cornerstone of the contract, to those who see it as one of the conditions of the soundness of the contract, and those who see it as an aspect of its perfection which does not affect the validity of the contract, rather it is a recommended aspect. That was because of the lack of an authentic text with a definitive indication to prove the invalidity of the marriage without a guardian. Therefore, most of the evidence was subject to various possibilities of interpretation, or open to be challenged by other texts which might be indicative of something else, whilst being stronger in terms of their *isnād*. Thus, it wasn't easy for jurists to claim that there is a definitive and explicit text from the Qur'an which can provide clear statements with regard to the requirement of the guardian in the marriage

contract or to state that guardianship is also required for the validity of the marriage. Therefore, it does not seem possible to prove the validity of guardianship by compulsion (*wilāyat al-ijbār*) over the adult of sound mind (*al-bāligh al-āqil*).

Thus, the terms that prohibited marriage without the presence of the *walī* in the *ḥadīths* were understood to imply emphasis for the sake of organising the issue of marriage in society, so that the woman does not fall victim to the manipulation of malicious men. Therefore, the opinion of the Ḥanafīs in regard to the permissibility of a woman acting on her own in concluding her marriage contract without any control by her guardian (*walī*) – except to the extent that she consult him and allow him participation in the choice - is fulfilled and the right of the guardian is protected. And here we should recall what Ibn Rushd has suggested: If the lawgiver had intended the stipulation of guardianship, he would have elaborated all of the conditions required for guardians.⁶⁹¹

This study has demonstrated that the majority of jurists approved the compulsion guardianship (*wilāyat al-ijbār*), with the proviso that no “harm” is caused to the ward. The scholars who investigated this issue rejected the idea of compulsion absolutely, even with this restriction, and believed that compulsion contradicts the meanings of compassion and mercy (which from the Qur’anic point of view form the basis of marital life). Therefore, they rejected the opinion which approved compulsion in marriage and considered it to be a type of coercion which is exercised over the woman to make her live with someone whom she dislikes. As some jurists have stated about marrying off a woman against her will, ‘It is contrary to both the foundational principles in Islam and the sound intellect’. The harm is increased within the context of Muslims in the UK because the expectations of the younger generations in the Muslim community which have been adopted from society are very different from of previous generations.

This study explored how these authentic *ḥadīths* conclusively demonstrate that the woman has the right choose to marry whomever she wants, as long as she fulfils the requirements of

⁶⁹¹ Ibn Rushd, *Bidāyat al-Mujtahid*, II, p.11.

being able to make a good choice, with guidance and support from her guardian or family. Moreover, exercising pressure and coercion over peoples' emotions is unethical, exactly like unlawfully appropriating their wealth. It can be also argued that the opinion of the majority upholds equity and justice and clears Islam of the accusation that it is a religion that builds marital relations on the basis of coercion and oppression and overlooks the woman's right to have full consent and choice.

Therefore, taking into consideration all of the evidence and the discussions of the scholars previously mentioned, the soundest opinion is that no one can compel a major virgin (*al-bāligh al-^cāqilah*) into marriage based on what was narrated from the Prophet when he said: "A virgin should not be married until her permission is asked nor should a woman without a husband (*'ayyim*) be married without her permission". They (the people) asked 'the virgin is usually modest?' He replied "her permission is her silence". In another narration, "the father must seek the virgin's permission".

In Islamic jurisprudence, freedom with regard to contracts is based on an essential requirement: consent (*riḍā*). Therefore, mutual consent is the foundation of the contract, which means that no contract between two parties is considered valid except with their consent. Therefore, it is possible to link 'consent' with 'satisfaction' and 'choice', although it has been demonstrated in this thesis that the matter is subject to disagreement among jurists who differed on how to assess the effects of coercion. Their differences were set out in this study, and are worthwhile repeating here:

- a) *Riḍā* (consent) and *ikhtiyār* (choice) according to Ḥanafis are two different things in their meaning and their effect. *Ikhtiyār* is the intent to do something while *riḍā* is to prefer and favour something with comfort and pleasure.
- b) The majority did not differentiate between *riḍā* and *ikhtiyār*, both in their meanings and the rules which result from them because they consider that they are the same thing.

The effect of this differentiation appears clearly in the issue of coercion, where the Ḥanafīs believe that coercion has no effect on choice but has an effect on consent. That is because consent is ‘to intend and seek something with full desire and preference’. While choice for the Ḥanafīs is connected to the expression (*ṣīgha*) that initiates the contract, consent is connected to the legal effects of the contract. Therefore, the one who is forced into a contract is considered a person who has exercised choice (*ikhtiyār*) because they intended the expression that initiated the contract, although at the same time they may not be content with the legal effects of the contract. Accordingly, every contract that stipulates the existence of *riḍā* (like contracts of sale and purchase) is considered irregular (*fāsid*) if consent does not exist. Where consent is not a condition, the contract is considered valid and effective as in the case of marriage and divorce.

The majority of scholars consider the parties to the contract and its subject as cornerstones of contracts; in addition they stipulated that the parties of the contract should be adult, of sound mind and be acting of their own free will and consent.

The Ḥanafīs base their view on a principle, namely the consideration and respect of all actions that result from an individual who is adult of sound mind cannot automatically be cancelled or ignored; Ḥanafī jurists will therefore search for ways to refrain from cancelling what has been entered into by the adult of sound mind. Though ostensibly sound, the view of the Ḥanafīs cannot be accepted since it is inconsistent with the general purposes and objectives of Islamic law. How can a marriage contract be considered valid that has been concluded under the influence of threat and coercion, while the actions of the coerced have been considered void and have no effect in the opinion of the majority of jurists, save for the Qur'an and the *ḥadīth* of the Prophet? The principle of respecting the freedom of the adult of sound mind, i.e. every word coming from him/her in a contract, agreement, declaration and approval, is without any doubt a result of their broad respect for individual freedom. It nevertheless has very serious implications which may open the door to tyrannical and oppressive behaviour. Some may take advantage of this opinion of the Ḥanafīs and use it as evidence to coerce and force individuals to marry or divorce. This can be seen as a

contradiction in the jurisprudence of the Ḥanafīs since on the one hand they highly respect the freedom of the individual who is adult of sound mind (*al-bāligh al-‘āqil*) in all his/her actions regardless of their gender - and they clearly state that no one can force him/her to enter obligations without his/her free will and consent- yet on the other hand, they accept the outcome of a contract or any legal obligation of the adult of sound mind (*al-bāligh al-‘āqil*) under the influence of threat, intimidation and coercion, making it a binding contract, despite the absence of free will, consent, and choice. According to Ḥanafī jurists, even if the contract was signed under the influence of coercion it still has legal effects.

This is in contrast to the opinion of the majority where a mere threat is considered to be coercion. This includes the threat of punishment or torture, and extends beyond physical acts like torture, beating etc., because coercion can be physical and/or psychological. As previously stated, this coercion will lead to the cancellation of the contract and, in the case of marriage, annulment. I would argue that, in this case, the opinion of the majority which states that the contract of the compelled is invalid under the influence of coercion, has more applicability in cases of forced marriage where the types of psychological and social pressure exercised and the ways coercion is applied will naturally affect the choice and consent to the parties of the marriage contract.

It should be noted that the discussion is but theoretical in the Muslim world, where the laws of Muslim countries today unanimously criminalise coercion in marriage, and also amend many Articles of religio-legal jurisprudence related to marriage provisions such as the guardianship of compulsion. What might have been appropriate in the context of classical Islamic law is not necessarily appropriate in every age and every place. This is because Islamic jurisprudence and its provisions are often based on the interests of a specific time or prevailing custom, such that when these factors change the legal edicts cease to be relevant. Jurists should be in the habit of approving that which is approved customarily and

disapprove that which is disapproved customarily; dogmatic attachment to jurisprudential treatises can be a very destructive approach.⁶⁹²

English law is clear in its position regarding forced marriage: the Forced Marriage (Civil Protection) Act 2007, and was introduced as a criminal offence in England and Wales in June 2014, making forced marriage a criminal offence. Courts have been able to issue civil orders to prevent forced marriage since 2008, but offenders will now be punishable by up to seven years imprisonment. The Scottish Government, having investigated these European examples, opted in 2009 to forgo criminalisation and, instead, created civil legislation based closely on FMCPA. Moreover, a number of European countries have already criminalised forced marriage.

We are yet to see how Muslims communities will reorient themselves in light of this legislation. Ordinarily, Muslims are required by Sharīḥ to seek judgements from Muslim judges. Given the well-known principle of Islamic jurisprudence (*qā'idah fiqhiyyah*) which was discussed in chapter two 'necessity permits the unlawful' (*al-darūra tubīḥ al-maḥḍūrah*), it remains to be seen if the community and its jurists will view the potential physical and/or psychological harm that can afflict women who are compelled into marriage as an exceptional case that would allow seeking the ruling of a non-Muslim judge and/or court.

6.1 Contribution and Significance of this Research

This research has contributed to the academic literature in three ways. Firstly, it has acknowledged and outlined the problem of forced marriage in Muslim communities within the UK from a Muslim perspective. Secondly, it has clarified that from the standpoint of Islamic law, *wilāya* (guardianship) is a duty of protection to the ward, rather than a right of the guardian. This is significant because the attitude of the *walī* should not be one of tyranny, rather it is one of love, care and duty, protecting the best interests of the ward and preserving his/her honour. The third contribution is that this work has clarified the meaning

⁶⁹² See Aḥmad b. Idrīs, al-Qarāfī, *al-Iḥkām Fī Tamyyīz al-Fatawā 'An al-Aḥkām*, ed. by 'Abd al-Fattāh Abu Ghuddah, 2nd edn (Beirut Lebanon: Dar al-Bashaer al-Islamiyyah, 1995), p. 218.

and significance of *wilāyat al-ijbār* (compelling guardianship), and it has demonstrated that there is a strong link between it and *ikrāh* (coercion). According to the majority of Islamic jurists, coercion invalidates the contract. It can be clearly seen from the discussions throughout this work that forced marriage *is* coercion. Therefore, forced marriages should be annulled. This is significant because it agrees with the two *fatwās* (legal statements) by the European Council for Fatwa and Research (ECFR) and the Academy of Islamic Fiqh in India (*Majma^c al-Fiqh al-Islāmī fi al-Hind*) which can be found in the Appendices. Both have approved juridical separation (*faskh*) but they have differing views regarding whether or not this can be executed through a non-Muslim judge.

6.2 Limitations

This research was limited to clarifying the position of the Sharī^hah regarding forced marriage. It did not conduct research into the extent and character of the practice and it did not attempt to conduct a survey to ascertain this because of the researcher's position in the community as Imam of a major mosque in Leeds.

6.3 Suggestions for Further Research into this Subject

There are a number of areas of research pertinent to the subject of forced marriage which are in need of further research. From the experience of the researcher, when someone is forced into marriage and it is annulled or divorce takes place, or when the ward rejects the marriage in the first place, the relationships within the family often begin to break down. This leads to *qaṭ^ʿ al-arḥām* (cutting familial ties) which is considered to be an enormity in Islamic teachings. This can lead to a number of complex situations and blame is often passed on by the family to the one who was forced into the marriage, rather than the one who was coercing the ward. In this respect, there is scope for research to be conducted into this issue, from the sociological effects of forced marriage, to research into what exactly Islamic law stipulates regarding this issue.

More research could also be done into why Muslims engage in this practice; is it because of customs, honour or a misunderstanding of Islam? Are there socio-economic factors which

drive people to this practice? Although these reasons may not justify the practice (from either an Islamic legal point of view or from a human rights point of view), it will help to explain the phenomenon and will provide avenues to explore how to address the issue on the ground.

Another area of research which would be of interest is the extent to which Islamic scholars, Imams and preachers are aware of the issue and whether they support the practice. This is useful as it will help to address the issue and will provide further explanation as to why certain attitudes exist within parts of the community.

An area of research which is absolutely necessary is in regard to the applicability of going to a non-Muslim judge to have marriage contract annulled or terminated, and whether this would become religiously binding. This is because the restrictions of the Muslim Tribunal and the Shariah Council are such that they are only able to refer cases and provide legal advice.

6.4 Further Recommendations

Ideally, the Muslim community need a recognised legal body who can deal with these issues to protect the rights of vulnerable Muslims, especially women. This body can help to find a legal avenue for those forced into marriage to get out of a marriage which he/she has been forced into. It is the researcher's belief that the government can play a positive role in establishing and empowering such initiatives which work alongside non-governmental organisations.

The issue of forced marriage in the Muslim community can be tackled by proper Islamic education and better understanding of the teachings of the Prophet Muhammad. This education should encourage Muslims to abandon harmful customs and traditions which contradict Islamic teachings. The researcher believes that this is not the role of the government; rather it is the role of the mosques; specifically the teachers and imams. The Friday sermon (*khutba*) is an ideal place for this, as the majority of Muslims will attend these gatherings, and therefore it will maximise exposure to the issue. This type of education

can include imparting knowledge of UK law regarding this issue, especially as it upholds justice which is a foundational Islamic principle.⁶⁹³ It should also seek that when parents arrange marriages, they do so with mutual and free consultation among the whole family, without any undue pressure, and most importantly with the free consent of the son or daughter.

⁶⁹³ Q., 4:135; 16:90

Bibliography

‘Ābādī, Muḥammad Shams al-Ḥaqq, *‘Awn al-Ma‘būd*, ed. by ‘Abd al-Raḥmān Muḥammad ‘Uthmān, 2nd edn (al-Madinah, Saudi Arabia: al-Maktabah al-Salafiyah 1968).

Abū Dāwūd, Sulaymān b. al-Sh‘ath, *Sunan Abū Dawūd, Mawsū‘ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999).

Abu Sadik Maruf, *Forced Marriage, A Study on British Bangladeshi Community*, (Bloomington, USA: AutherHouse, 2012).

Abu Snīnah, Niḍāl, *al-Wilāya Fī al-Nikāh Fī al-Sharī‘ah al-Islamiyah*, 1st edn (Amman, Jordan: Dar al-Thaqafah, 2011).

Abū Zahrah, Muḥammad, *Tanẓīm al-Islām li al-Mujtama‘* (Cairo, Egypt: Dar al-Fikr al-Arabi, [n.d.]).

Abū Zahrah, Muḥammad, *al-Aḥwāl al-Shakhṣiyyah*, 3rd edn (Beirut, Lebanon: Dar Alfikr al-Arabi, 1957).

Abū Zahrah, Muḥammad, *‘Usūl al-Fiqh* (Dar Al-Fikr Al-Arabi, [n.d.])

Abū Zahrah, Muḥammad, *Zahrat al-Tafāsīr* (Cairo, Egypt: Dar al-Fikr al-Arabi, 1987).

Aisha K. Gill and Sundari Anitha, ‘Framing Forced Marriage as a form of violence against women’, in *Forced Marriage, Introduction a Social Justice and Human Rights Perspective* ed. by Aisha K.Gill & Sundari Anitha. (London, England: Zed Books Ltd, 2011), pp. 1-22.

Albāni (al), Muḥammad Nāsir al-Dīn, *‘Irwā’ al-Ghalīl*, 1st edn (Beirut, Lebanon: Al-Maktab al-Islami, 1979).

Albānī (al), Muḥammad Naṣir al-Dīn, *Ṣaḥīḥ al-Jāmi‘ al-Ṣaḥīr*, 3rd edn (Beirut, Lebanon: Al-Maktab al-Islami, 1988).

Ali, Kecia, *Marriage and Slavery in Early Islām* (Harvard, Massachusetts: Harvard University Press, 2010).

Alūsī (al), Maḥmūd, *Rūḥ Al-Ma‘ānī* (Beirut, Lebanon: Dar Ihya’ al-Tourath al-Arabi, [n.d.]).

Alwani (al), Taha Jabir, *Source of Methodology in Islamic Jurisprudence*, 3rd edn (Herndon, USA: The International Institute Of Islamic Thought, 2003).

Āmidī (al), ‘Ali b, Ibī ‘Ali Sayf al-Dīn, *Al-Iḥkām Fī ‘Uṣūl al-Aḥkām* (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, [n.d.]).

Anderson, J.N.D *Invalid and Void Marriage in Ḥanaḥī Law*, <<http://www.jstor.org/stable/609279>> [accessed 8 April 2014].

Anitha, Sundari, and Gill, Aisha K. 'Forced Marriage Legislation in the UK: a critique', in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 138-157.

Anitha, Sundari, and Gill, Aisha K. 'Reconceptualising consent and coercion within an intersectional understanding of Forced Marriage' in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 46-66.

An-Na'im, Abdullahi, and C. H. Candler, 'Forced marriage', *Emory University, Atlanta* (2000), <<http://www.soas.ac.uk/honourcrimes/resources/file55689.pdf?filename=Forced+Marriage>> [accessed 4 March 2014]

Aṣḥānī (al) , al-Ḥusayn b. Muḥammad al-Rāghib, *Mufradāt Alfāz al-Qur'ā*, 2nd edn (Damasucs: Dar al-Qalam, 1997).

Ashqar (al) , °Umar Sulaymān, *Al-Wāḍiḥ Fī Sharḥ Qānūn al-Aḥwāl al-Shakhṣiyyah*, 4th edn (Amman, Jordan: Dar al-Nafaes, 2007).

Asmandī (al), Muḥammad b. °Abd al-Ḥamīd, *Badhl al-Nazar Fī al-'Uṣūl*, ed. by Muḥammad Zaky °Abd al-Bar, 1st edn (Cairo, Egypt: Dar al-Turath, 1992).

Athyūbī (al), Muḥammad b. al-Shaykh °Ali b. 'Ādam, *Sharḥ Sunan al-Nasā'ī* , 1st edn (Riyadh, Saudi Arabia: Dar al-Meraj al-Dawliyah, 1996).

Baghawī (al), al-Ḥusayn b. Mas°ūd, M°ālim al-Tanzīl, 1st edn (Beirut, Lebanon: Dar al-Fikr, 1985).

Bahiyy (al), Muḥammad, *al-Fikr al-'Islāmī wa al-Mujtama° al-Mua°āṣir*, 3rd edn (Cairo, Egypt: Dar al-Tawfeq, 1982).

Bano, Samia, 'The Practice of Law Making and the Problem of Forced Marriage: What Is the Role of the Muslim Arbitration Tribunal?', in *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp.177-99.

Bayhaqī (al), Abū Bakr Aḥmad b. al-Ḥusain, *Ma°rifat al-Sunan wa al-'Āthār*, 1st edn (Cairo, Egypt: Dar al-Wafa, 1991).

Bayhaqī (al), Abū Bakr Aḥmad b. al-Ḥusayn, *Al-Sunan al-Kubra* (Beirut, Lebanon: Dar al-Macrifah, 1992).

Bredal, Anja, 'Border control to prevent forced marriage: choosing between protecting women and protecting the nation', in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 90-111.

Buhūtī (al), Maṣṣour b. Yunus, *Al-Rawḍ al-Murbi° Sharḥ Zād al-Mustaḥṣi°* (Riyad, Saudi Arabia: Maktabat al-Riyad al-Hadithah, 1970).

Buhūtī (al), Maṣṣour b. Yunus, *Kashf al-Qinā° °An Matn al-'Iqnā°*, ed. by Muḥammad al-Amīn al-Ḍinnāwī, 1st edn (Beirut, Lebanon: Aalam al-Kutub, 1997).

Buhūti (al), Maṣūr b. Yunus, *Sharḥ Muntaha al-‘Irādāt* (Beirut, Lebanon: Aalm al-Kutub, n.d).

Bujayramī (al), Sulaymān b. Muḥammad b. ‘Umar, *Tuḥfat al-Ḥabīb, al-Bujayramī ‘Ala al-Khaṭīb*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1996).

Bukhārī (al) , Muḥammad b. Ismā‘īl, *Ṣaḥīḥ al-Bukhārī, al-Jāmi‘ al-Musnad al-Ṣaḥīḥ, Mawṣū‘ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999).

Bukhārī (al), ‘Abd al-‘Azīz b. Aḥmad, *Kashf al-‘Asrār*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1997).

Bulayihī (al), Ṣalīḥ b. Ibrāhīm, *al-Salsabīl Fī Ma‘rifat al-Dalīl*, 3rd edn ([n.p.] ,1981).

‘Aalā’ī (al), Ṣalāḥ al-Dīn, *Taḥqīq al-Murād Fī Anna al-Nahyi yaqtaḍī al-Fasād*, 1st edn (Damascus, Syria: Dar al-Fikr, 1982).

‘Aawfī (al), ‘Aawaḍ b. Rajā’, *al-Wilāya Fī al-Nīkāḥ*, 1st edn (Madinah, Saudi Arabia: Islamic University Press, 2002).

‘Aaynī (al), Maḥmūd b. Aḥmad Badr al-Dīn, *al-Binayah Fī Sharḥ al-Hidāyah*, 2nd edn (Beirut, Lebanon: Dar al-Fikr, 1990).

‘Aaynī (al), Maḥmūd b. Aḥmad Bdr al-Dīn, *‘Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 2001).

‘Allām, Shawqī Ibrāhīm, *al-Wilāya Fī ‘Aqd al-Nīkah*, 1st edn (Alexandria, Egypt: Dar al-Wafa al-Qanuniyah, 2013).

‘Amārah, Muḥammad, *al-Islām wa Ḥuqūq al-‘Insān, ‘Alam al-Macrifah*, v.89 (Kuwait: Al-Majlis al-Waṭani Li al-Thaqafah , May 1985).

‘Amrānī (al), Yahya b. Abī al-Kkayr, *al-Bayān Fī al-Madhhab*, 1st edn (Beirut, Lebanon: Dar al-Minhaj, 2000).

‘Atṭār (al), ‘Abd al-Nāṣir Tawfīq, *Khitbat al-Nisa’ fī al-Sharī‘ah al-Islamiyyah*, (Cairo, Egypt: Matbaat al-Saadah, [n.d.]’).

‘Awdah, ‘Abd al-Qādir, *al-Tashrī‘ al-Jinā’ī al-Islāmī*, 10th edn (Beirut, Lebanon: Al-Risaalah, 1989).

Chantler, Khatidja, Geetanjali Gangoli, and Marianne Hester, ‘Forced marriage in the UK: Religious, cultural, economic or state violence?’, *Critical social policy* 29.4 (2009), 587-612 < <http://csp.sagepub.com/content/29/4/587>> [accessed 4 March 2014].

Choudhry, Shazia, ‘Forced marriage: the European Convention on Human Rights and the Human Rights Act 1998’, in *Forced Marriage: Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 67-89.

Circular 010/2014: new forced marriage offences, <<https://www.gov.uk/government/publications/circular-0102014-new-forced-marriage-offences>> [accessed 3 March 2015].

Compendium of Islamic Laws, Under the supervision of: All India Muslim Personal Law Board, (New Delhi, India: All India Muslim Personal Law Board, 2001).

°Uqlah, Moḥammad, *Niẓām al-'Usrah Fī al-Islām*, 1st edn (Amman, Jordan: Maktabat al-Risalah al-Hadithah, 1983).

Dabbūsī (al), °Ubaid Allah b. °Umar Abū Zayid, *Taqwīm al-Adillah*, ed. by Khalīl al-Mays, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 2001).

Duraynī (al) , Fathī, *Naẓariyyat al-°Aqd*, 2nd edn (Damascus, Syria: Damascus University Press, 1997).

Duraynī (al), Fathī, *al-Naẓariyyāt al-Fiqhiyyah*, 4th edn (Damascus, Syria: Damascus University Press, 1997).

Dusūqī (al), Muḥammad b. °Arahaf, *Ḥāshiyat al-Dusūqī*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1996).

Dutton, Yasin, *The Origins of Islamic Law*, 2nd edn (London, England: RoutledgeCurzon, 2002).

El Alami, Dawoud S, 'Legal Capacity with Specific Reference to the Marriage contract', *Arab Law Quarterly*, v.6, No. 2 (1991), pp.190-204 < <http://jstor.org/stable/3381835>> [accessed 8 April 2014].

El-Alami, Dawoud, *The Marriage contract in Islamic Law*, 1st edn (London: Graham and Trotman Ltd, 1992).

Encyclopaedia of Islam. New Edition: Vol. III, Leiden: E.J. Brill – London & Luzac & Co, 1986; Vol. IV, Leiden: E.J. Brill, 1978; Vol. VIII, Leiden: E.J. Brill, 1995; Vol. XI, Leiden: E.J. Brill, 2002. [E²].

Ending Forced Marriage Worldwide, The United Nation Human Rights Office, (21 November 2013), <<http://www.ohchr.org/EN/NewsEvents/Pages/EnforcedMarriages.aspx>> [accessed 3 March 2014].

European Council for Fatwa and Research, *The Resolutions and Fatwas*, ed. by °Abd Allah b. Yusuf al-Juday^c, 1st edn (Beirut: Lebanon, Al-Rayan Institution Publishers, 2013).

Fatima Mernissi, *Women And Islam*, Tran. by Mary Jo Lakeland, 2 nd ed. (Oxford, England: Basil Blackwell, 1991).

Fayrūz'abādī (al), Majd al-Dīn Muḥamad b. Ya^cqūb, *al-Qamūs al-Muḥīṭ*, ed by Muḥammad Na^cīm al-°Iṛqūsī, 6th edn (Beirut, Lebanon: Al-Risalah Publishers, 1998).

Forced Marriage – Human Rights and Democracy 2012, The 2012 Foreign & Commonwealth Office Report, <<http://www.hrdreport.fco.gov.uk>> [accessed 3 April 2014].

Forced marriage - The Home Affairs Committee, <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/880/88003.htm>> [accessed 3 March 2014].

Forced marriage law sends powerful message, <<http://www.bbc.co.uk/news/uk-27830815>> [accessed 3 March 2014].

Forced marriage now a crime, ‘New forced marriage law comes into effect in Scotland’, <<https://www.gov.uk/government/publications/circular-0102014-new-forced-marriage-offences>> [accessed 3 March 2014].

Gangoli, Geetanjali, and others. ‘Understanding forced marriage: definitions and realities’, in *Forced marriage. Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 25-45.

Gangoli, Geetanjali, Melanie McCarry, and Amina Razak, ‘Child marriage or forced marriage? South Asian communities in north east England’, *Children & Society* 23.6 (2009), 418-429 <DoI:10.1111/j.1099-0860.2008.00188.x> [accessed 15 March 2014]

Ghazzālī (al), Muḥammad Abū Ḥamid, *al-Waṣīṭ Fī al-Madhhab*, 1st edn (Cairo, Egypt: Dar al-Salam, 1997).

Ghazzālī (al), Muḥammad Abū Ḥamid, *‘Thyā’ ‘Ulūm al-Dīn*, (Beirut, Lebanon: Dar al-Jeel, [n.d.]).

Ghiryānī (al), al-Ṣādiq ‘Abd al-Raḥmān, *Mudawwanat al-Fiqh al-Māliki*, 1st edn (Beirut, Lebanon: Al-Rayan, 2002).

Gill, Aisha K., and Anicée Van Engeland, ‘Criminalization or ‘multiculturalism without culture’? Comparing British and French approaches to tackling forced marriage’, *Journal of Social Welfare and Family Law* 36.3 (2014), 241-259 <<http://dx.doi.org/10.1080/09649069.2014.933587>> [accessed 14 October 2014].

Gill, Aisha, and Sundari Anitha, ‘The illusion of protection? An analysis of forced marriage legislation and policy in the UK’, *Journal of social welfare & family law* 31.3 (2009), 257-269 <<http://dx.doi.org/10.1080/096490609033544589>> [accessed 3 February 2014].

Gill, Aisha, and Sundari Anitha. *Forced marriage: Introducing a social justice and human rights perspective*, 1st edn (London: Zed Books, 2011).

H M Government, *The Right to choose*, Multi-agency guidance for dealing with forced marriage, (2014).

Hallaq, Wael .B, *A History of Islamic legal Theories*. 2nd edn (Cambridge, England: Cambridge University Press, 1999).

Ḥaṭṭab (al), Muḥammad b. Muḥammad, *Mawāhib al-Jalīl*, ed. by Zakariyya ‘Amayrāt, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah 1995).

Ḥaydar ,‘Ali, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, Trans. by Fahmi al-Husayni, special edn (Riyadh, Saudi Arabia: Dar Alam al-Kutub, 2003).

Hossain, Sara, and Suzanne Turner, 'Abduction for Forced Marriage—Rights and Remedies in Bangladesh and Pakistan', *International Family Law* 1.64 (2001), 15-24 <<https://www.soas.ac.uk/honourcrimes/resources/file55687.pdf> > [accessed 9 March 2014].

Hūnī (al) , Muḥammad Mustāfa, *Qanūn al-Zawāj wa al-Ṭalāq*, 2nd edn (Benghazi: Dar al-Fadheel Publishers, 2007).

Ibn Abī Shaybah, Abū Bakr, *al-Kitāb al-Muṣannaḥ*, ed. by °Abd al-Salām Shāhīn. 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1995).

Ibn al-°Aarabī, Abū Bakr Muḥammad b. °Abd Allāh, *Aḥkām al-Qur'an*, ed. by Muḥammad °Abd al-Qādir °Aṭa (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1996).

Ibn al-°Arabī, Abū Bakr Muḥammad b. °Abd Allah, *°Ariḍā t al-Aḥwadhī* (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, [n.d.]).

Ibn al-Humām, Muḥammad b. °Abd al-Wāḥid, *Sharḥ Faṭḥ al-Qadīr* (Damascus, Syria: Dar al-Fikr, [n.d.])

Ibn al-Jawzī , °Abd al-Rahmān b. °Ali Abu al-Faraj, *al-Taḥqīq Fī Masā'il al-Khilāf*, ed. by °Abd al-Mu°ṭī Amīn Qal°ahjī, 1st edn (Aleppo, Syria: Dar al-Way al-Arabi, 1998).

Ibn al-Jawzī, °Abd al-Rahmān °Alī Abū al-Faraj , *al-Taḥqīq Fī Masā'il al-Khilāf*, ed. by °Abd al-Mu°ṭī Ameen Qal°ahaji , 1st edn (Aleppo, Syria: Dar al-Waei al-Arabi, 1998).

Ibn al-Khaūjah , Muḥammad al-Ḥabīb, *Bayina °Ilmayi al-Fiqh wa al-Maqāṣid*, 1st edn (Doha, Qatar: Ministry Of Endoments And Islamic Affairs, 2004).

Ibn al-Mundhir, Abū Bakr Muḥammad, *al-Ishrāf °Ala Madhāhib al-cUlamā'*, ed. by Abū Ḥāmed Ṣaghīr al-Anṣārī, 1st edn (Ras al-Khaimah, United Arab Emirates: Maktabat Makkah al-Thaqafiyah, 2004).

Ibn al-Najjār, Muḥammad b. Aḥmad , *Sharḥ al-Kawkab al-Munīr*, ed. by Muhammad al-Zuhayli and Nazih Hammad (Riyadh, Saudi Arabia: Maktabat al-Aubaykan, 1993).

Ibn al-Najjār, Muḥammad b. Aḥmad , *Sharḥ al-Kawkab al-Munīr*, ed. by Muḥammad al-Zuhayli and Nazīh Ḥammād, 3rd edn (Mecca, Saudi Arabia: Umm al-Qura University Press, 2002).

Ibn al-Qayyim, Muḥammad b. Abī Bakr, *I°lām al-Muwaqqi°in*, ed. by Taha °Abd al-Raūf Sa°d (Beirut, Lebanon: Dar al-Jeel, 1973).

Ibn al-Qayyim, Muḥammad b. Abū Bakr, *Zād al-Mā°ād Fī HadiyyKhayr al-cibād* , ed. by Shu°ayb and °Abd al-Qādir al-'Arna'ūt, 28th edn (Beirut, Lebanon: Al-Risalah Publishers, 1995).

Ibn 'Anas, *Mālik, al-Muwaṭṭa'*, Ahmad Ratib Armush, 2nd edn (Beirut, Lebanon: Dar al-Nfaes, 1977).

Ibn Baṭṭāl, °Ali b. Khalaf, *Sharḥ Ṣaḥīḥ al-Bukhārī*, 1st edn (Riyad, Saudi Arabia: Maktabat al-Rushd, 2000).

- Ibn Bayyah, °Abd Allāh b. al-Shaykh Maḥfūz, *Amālī al-Dalālāt wa Majālī al-Ikhtilāfāt*, 1st edn (Beirut, Lebanon: Dar Ibn Hazm, 1999).
- Ibn °Abd al-Barr, Yusuf b. °Abd Allah Abū °Umar, *Al-Tamhīd lima fī al-Muwṭṭa' min al-Ma°ānī wa al-Asānīd*, 1st edn (Beirut, Lebanon: Dar Ehia al-Tourath al-Arabi, 2000).
- Ibn °Abd al-Barr, Yusuf b. °Abd Allah, *al-'Istidhkār*, ed. by, °Abd al-Razzaq al-Mahdi, 1st edn (Beirut, Lebanon: Dar Ehia Al-Tourath Al-Arabi, 2001).
- Ibn °Abd al-Salām, °Iz al-Dīn, *Qawā°id al-Aḥkām*, 2nd edn (Beirut, Lebanon: Al-Ryan, 1990).
- Ibn °Ābdīn, Muḥammad Amīn, *Hashiyat radd al-Muḥtār*, 2nd edn (Beirut, Lebanon: Dar al-Fikr, 1979).
- Ibn °Āshūr, Muḥammad al-Ṭāhir, *Treatise on Maqāshid al-Sharī°ah al-Islamiyya*, Trans. by Mohamed El-Tahir El-Mesawi, 2nd edn (Herndon, USA: International Institute Of Islamic Thought, 2011).
- Ibn °Āshūr, Muḥammad al-Ṭāhir, *al-Taḥrīr Wa al-Tanwīr*, 1st edn (Tunis, Tunisia: al-Dar al-Tunisiyyah, 1984).
- Ibn °Āshūr, Muḥammad al-Ṭāhir, *Maqāshid al-Sharī°ah al-Islāmiyyah* (Tunis, Tunisia: Tunisa Distribution Ltd, 1978).
- Ibn °Aṭīyyah, °Abd al-Ḥaqq b. Ghālib, *al-Muḥarrar al-Wajīz*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 1993).
- Ibn °Uthaymīn, Muḥammad b. Ṣaliḥ, *al-Sharḥ al-Mumtī° Ala Zād al-Mustaqnī°*, 1st edn (Dammam, Saudi Arabia: Dar Ibn al-Jawzi, 2006).
- Ibn °Uthaymīn, Muḥammad b. Ṣaliḥ, *Mudhakkirat al-Fiqh*, 1st edn (Alexandria, Egypt: Dar al-Baserah, 2004).
- Ibn Fāris, Aḥmad b. Zakariyya, *Maqāyyīs al-Lughah* (Cairo, Egypt: Dar al-Ḥadith, 2008).
- Ibn Ḥajar, Aḥmad b. °Alī al-°Asqalānī, *Talkhīṣ al-Ḥabīr*, 1st edn (Saudi Arabia: Qurtubah Publishers, 1995).
- Ibn Ḥajar, Aḥmad b. °Ali al-°Asqalānī, *Bulūgh al-Marām*, Trans. by Dar-us-Salam Publications, 1st ed (Riyadh, Saudi Arabia: Dar-us-Salam, 1996).
- Ibn Ḥajar, Aḥmad b. °Ali al-°Asqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. by °Abd Al-°Azīz b. Bāz, 3rd edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 2000).
- Ibn Ḥazm °Ali b. Aḥmad, ed. by Aḥmad Shākīr, *al-Iḥkām Fī 'Uṣūl Al-Aḥkām* (Beirut, Lebanon: Dar al-Afaq al-Jadedah, 1979).
- Ibn Ḥazm, °Ali b. Aḥmad b. Sa°īd, *al-Muḥalla bi 'Āthār*, ed. by Abd al-Qhaffār al-Bandārī, (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, ('[n.d.]').
- Ibn Ḥazm, °Ali b. Aḥmad b. Sa°īd, *al-Muḥalla bi 'Āthār*, ed. by Abd al-Qhaffār al-Bandārī, (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, ('[n.d.]').

- Ibn Hibbān, Muḥammad, *Ṣaḥīḥ Ibn Hibbān*, Tartīb Ibn Balabān, ed. by Shu^ʿayb al-'Arna'ūt, 2nd edn (Beirut, Lebanon: Al-Risalah Publishers, 1993).
- Ibn Juzay, Muḥammad b. Aḥmad, *al-Qawānīn al-Fiqhiyyah* ed. by ^ʿAbd al-Karim al-Faḍily (Casablanc, Morocco: Dar al-Rashid al-Hadithah, 2003).
- Ibn Kathīr, Ismā'īl b. ^ʿUmar, *Tafsīr al-Qur'an al-ʿAzīm*, ed. by ^ʿAbd al-Razzaq al-Mahdi (Beirut, Lebanon: Dar al-Kitab al-Arabi, 2004).
- Ibn Mājah, Muḥammad b. Yazīd al-Qazwīnī, *Sunan Ibn Mājah, Mawsū'ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999).
- Ibn Manzūr, Muḥammad b. Mukarram, Jamāl al-Dīn, *Lisān al-ʿArab* (Beirut: Dar al-Kutub, 2005).
- Ibn Muflīḥ, Burahān al-Dīn Ibrāhīm, *al-Mubdi' Sharḥ al-Muqni'*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyah, 1997).
- Ibn Muflīḥ, Muḥammad, *al-Furū'*, ed. by Rā'id Ṣabrī (Amman, Jordan: Bayt al-Afkar al-Dawliyyah, 2004).
- Ibn Nujaym, Zayn al-ʿĀbdīn b. Ibrāhīm, *al-Ashbāh wa al-Naẓā'ir*, ed. by ^ʿAbd al-Karim al-Faḍily, 1st edn (Beirut, Lebanon: Al-Maktabah al-Asriyyah, 1998).
- Ibn Qudāmah, Muwaffaq al-Dīn, *al-Mughnī* (Beirut, Lebanon: Dar al-Kitab al-Arabi, 1972).
- Ibn Qudāmah, Muwaffaq al-Dīn, *al-Kāfī*, ed. by ^ʿAbd Allah b. ^ʿAbd al-Muḥsin al-Turki, 1st edn (Cairo, Egypt: Dar Hajr, 1997).
- Ibn Qudāmah, Muwaffaq al-Dīn, *Rawḍat al-Nāẓir Wa Jannatu al-Manāẓir*, ed. by Sha^ʿban Isma'īl, 1st edn (Beirut, Lebanon: Al-Rayan, 1998).
- Ibn Rushd, Abu al-Walid Muḥammad b. Aḥmad (*al-ḥaḥīd*), *Bidāyat al-Mujtahid*, Trans. by: Imran Ahsan Khan Nyazee, 1st edn (Reading, England: Garnet Publishing Ltd, 1996).
- Ibn Rushd, Abū al-Wālīd Muḥammad b. Aḥmad (*al-jadd*), *al-Muqaddimāt* (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, [n.d.]).
- Ibn Ṭāhir, al-Ḥabīb, *al-Fiqh al-Mālikī wa 'Adillatuh*, 1st edn (Beirut, Lebanon: Al-Maaref, 2003).
- Ibn Taimiyyah, Aḥmad b. ^ʿAbd al-Ḥalīm, *al-Qawa'id al-Kulliyyah*, ed. by Mahaysin b. Abd al-Rhaman al-Mahaysin, 1st edn (Riyadh, Saudi Arabia: Maktabat al-Tawbah, 2002).
- Ibn Taymiyyah, Aḥmad b. ^ʿAbd al-Ḥalīm, *Aḥkām al-Zawāj*, ed. by Muḥammad ^ʿAbd al-Qādir ^ʿAṭā, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1988).
- Ibn Taymiyyah, Aḥmad b. ^ʿAbd al-Ḥalīm, *Majmū' al-Fatāwā*, ed. by ^ʿĀmir al-Jazzār and Anwar al-Bāz, 1st edn (Cairo: Egypt, Dar al-Wafa, 1997).
- Ibn Taymiyyah, Aḥmad b. ^ʿAbd al-Ḥalīm, *Naẓariyyat al-cAqd*, (Cairo, Egypt: Markaz al-Kitab, [n.d.]).

Ibn Taymiyyah, Majd al-Dīn Abū al-Brakāt (*al-jadd*), *al-Muḥarrar Fī al-Fiqh* (Cairo, Egypt: al-Sunna al-Muhammadiyah Publishers, 1950).

International Islamic Committee for Woman and Child (IICWC), *The Islamic Charter On Family*, Trans. by Heather Shaw, 1st edn (Cairo, Egypt: International Islamic Committee for Woman and Child, 2007).

Jaṣṣaṣ (al), Abū Bakr Aḥmad b. °Ali, *Aḥkām al-Qur'an*, ed. by Muḥammad Ṣadiq al-Qamḥāwī (Beirut Lebanon: Dar Ihya' al-Tourath al-Arabi, 1992).

Jizīrī (al), °Abd al-Raḥmān, *al-Fiqh °Ala al-Madhāhib al-Arba°ah* (Beirut, Lebanon: Dar Ihya al-Tuorath al-Arabi, 1969).

John L. Esposito and Natana J. Delong-Bas, *Women in Muslim Family Law*, 2nd edn (Syracuse, New York: Syracuse University Press, 2001).

Juday° (al), °Abd Allah b. Yūsuf, *Tahrīr °Ulūm al-Ḥadīth*, 1st edn (Beirut, Lebanon: Al-Rayan, 2003).

Juday° (al), °Abd Allah b. Yusuf, *Taysīr °Ilm 'Uṣūl al-Fiq*, 1st edn (Beirut, Lebanon: Al-Risalah Publishers, 1997).

Jurjānī (al), Ali b. Muḥammad, *al-Ta°rīfāt*, ed. by Muḥammad Siddiq al-Minshawī (Cairo, Egypt: Dar al-Fadhilah, '[n.d.]').

Juwaynī (al), °Abd al-Malik °Abd Allah b. Yusuf, *Nihāyat al-Maṭlab Fī Dirāyat al-Madhhab*, ed. by °Abd al-°Azīm al-Dīb, 1st edn (Jeddah, Saudi Arabia: Dar al-Minhaj, 2007).

Kalwadhānī (al), Mḥfūz b. Aḥmad Abū al-Khaṭṭāb, *al-Hidāyah Fī Madhhab al-Imām Aḥmad*, ed. by °Abd al-Laṭīf Humaym and Mahir Yasīn al-Faḥl, 1st edn (Kuwait: Gheras Publishers, 2004).

Kalwathānī (al), Abū al-Khaṭṭāb Maḥfūz b. Aḥmad, *al-Tamhīd fī 'Usūl al-Fiqh*, ed. by Mufīd Abū °Amshah, 1st edn (Beirut, Lebanon: Al-Rayan, 2000).

Kamali, Mohammad Hashim Freedom, Equality And Justice In Islam, 2nd edn (Cambridge, England: The Islamic Texts Society, 2002).

Kamali, Moḥammad Hashim, *Principles of Islāmic Jurisprudence*, 3rd edn (Cambridge: The Islamic Texts Society, 2003).

Kamali, Moḥammad Hashim, *Sharī°ah Law: An Introduction*, 1st edn (Oxford, England: Oneworld Publications, 2008).

Kāsānī (al), Abū Bakr b. Mas°ūd, *Badā'i° al-°Sanā°*, ed. by °Ali Muḥammad Ma°wwaḍ and °°Adil Aḥmad °Abd al-Mawjūd, 2nd edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 2003).

Kashmīrī (al), Muḥammad Anwar Shah, *al-°Arf al-Shathī Min Sharḥ Sunan al-Tirmithī*, ed. by Maḥmūd Shākir, 1st edn (Beirut, Lebanon: Dar Ihya al-Tuorath al-Arab, 2004).

Kaṭīb (al), al-Tabrīzī, Muḥammad b. °Abd Allah, *Mishkāt al-Ma°Sābīḥ*, ed. by Muḥammad Nāṣir al-Dīn al-Alānī, 3rd edn (Beirut, Lebanon: al-Maktab al-Islami, 1985).

Khafīf (al), °Ali, *Aḥkām al-Mu°āmalāt al-Shar°iyyah* (Cairo, Egypt: Dar al-Fikr al-Arabi, 2008).

Khallāf, °Abd al-Wahhāb, *Aḥkām al-Aḥwāl al-Shakhshiyya °Ala Madhhab Abū Ḥanīfah*, 1st edn (Kuwait: Dar al-Qalam, 1997).

Khallāf, °Abd al-Wahhāb, *°Ilm °Uṣūl al-Fiqh*, 12th edn (Cairo, Egypt: Dar al-Qalam, 1978).

Khanum, Nazia, *Forced Marriage, family cohesion and community engagement*, (Luton: Equality in Diversity, 2008).

Khaṭṭabī (al), Ḥamad b. Muḥammad, *Ma°ālim al-Sunan* (Aleppo, Syria: Matbaat Muhammad Raghīb al-Tabbakh, 1933).

Khinn (al), Muṣṭafa Sa°id, *Athar al-Ikhtilāf Fī al-Qawa°id al-Uṣūliyyah*, 2nd edn (Beirut, Lebanon: Al-Resalah Publishers, 2000).

Khuḍarī (al) , Mūḥammad, *'Uṣūl al-Fiqh* (Cairo, Egypt: Al-Maktabah al-Tijariyyah al-Kubra, [n.d.]).

Lazreg, Marnia, 'Forced Marriage: Introducing a Social Justice and Human Rights Perspective', *Contemporary Sociology: A Journal of Reviews* 42.5 (2013),743-745

< <http://csx.sagepub.com/content/42/5/743>> [accessed 4 March 2014].

Madkūr, Muḥammad Salam, *al-Madkhal Li al-Fiqh al-Islāmī*, 2nd edn (Cairo, Egypt: Dar al-Kitab al-Hadith, 1996).

Maggie Stratton, 'TV drive targets forced marriage problem', the *Yorkshire Post*, 16 March 2006, p.10.

Majid Khadduri, 'Marriage in Islamic Law: The Modernist Viewpoints', *The American Journal of Comparative Law*, v. 26, No. 2 (1978), 213-218 <<http://jstor.org/stable/839669>> [accessed 8 April 2014].

Majma° al-Fiqh al-Islāmī in India, *al-Ijbār °Ala al-Zawāj*, V. 7:10 (Beirut: Dar al-Kutub al-Ilmiyyah, 2007).

Managing Family Justice in Diverse Societies, ed. by Mavis Maclean and John Eekelaar, (Oxford, England: Hart Publishing, 2013).

Mardāwī (al), °Alā' al-Dīn °Ali b. Aḥmad, *al-'Inṣāf Fī Ma°rifat al-Rajih min al-Khilāf*, ed. by Muḥammad Ḥasan Isma°īl al-Shāfi°ī, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyyah, 1997).

Marghīnānī (al), Buhān al-Dīn al-Farghānī, *al-Hidāhah Fī Sharḥ Bidāyat al-Mubtadī*, Trans. by Imran Ahsan Khan Nyazee, 1st edn (Bristol, England: Amal Press (Ltd), 2006).

Maṣrī (al), Rafīq Yunus, *'Usul Al-Iqtisād al-Islāmī*, 2nd edn (Damascus, Syria: Dar al-Qalam, 1993).

Māwardī (al), °Ali b. Aḥmad, *al-Ḥāwī al-Kabīr*, 1st edn (Beirut Lebanon: Dar al-Kotob al-Ilmiyyah, 1994).

Mawṣilī (al), °Abd Allah b. Maḥmūd b. Mawdūd, *al-Ikhtiyār Li Ta°līl al-Mukhtār* (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, '[n.d.]')

Mawsū°ah (al), *al-Fiqhiyyah*, Ministry Of Endomens And Islamic Affairs in Kuwait, 1st edn (Kuwait, Ministry Of Endomens And Islamic Affairs in Kuwait: 2006).

Mawsū°ah (al), *al-Qānūniyyah, Qānūn al-Aḥwāl al-Shakṣiyyah al-Kuwaiti*, <<http://www.genderclearinghouse.org/upload/Assets/Documents/pdf/kanoun-ahwel-koueit.pdf>> [accessed 10 September 2014].

Melto, Zubaida, 'The Perception of Honour Among the British-Pakistani Community in Watford, United Kingdom' (unpublished doctoral thesis, University of Leeds, School of Modern Languages and Cultures, 2012).

Ministry of Justice, 'One year on: initial impact of the Forced Marriage Act 2007', *A report reviewing the impact of the Act in its first year of operation* (2009) 1-51 <<http://www.justice.gov.uk/publications/docs/one-year-on-forced-marriage-act.pdf>>.

Moḥammad Ri°fat, °Uthmān, °*Aqd al-zawāj, Arkānuh wa Shrūt Ṣuḥḥathī* ('[n.p.]: '[n.d.]').

Mubārakfūrī (al), Muḥammad b. °Abd al-Rahmān, *Tuḥfat al-Aḥwadhī*, ed. by °Abd al-Rahmān Muḥammad °Uthmān (Beirut, Lebanon: Dar al-Fir, '[n.d.]').

Mudawwanat Al-Usrah, . No. (5184). Kingdom of Morocco: Official Gazette , 5th February 2004.

Muḥammad °Abd al-Rahmān al-Mubārakfūrī, *Tuḥfat al-'Aḥwadhī*, ed. by °Abd al-Wahhab Abd al-Lateif (Damascus, Syria: Dar al-Fikr, '[n.d.]').

Mustapha, Ibrahim and others, *al-Mu°jam al-Wajīz* , Majma° al-Lugha al-°Arabiya, 2nd edn (Istanbul: al-Maktabah al-Islamiyyah, 1972).

Muwāfi, Aḥmad, *al-Jami° li al-Ikhtiyārāt al-Fiqhiyyah Li Ibn Taymiyyah*, 2nd edn (Riyadh, Saudi Arabia: Dar Ibn al-Jawzi, 1995).

Nasā°ī (al), Aḥmad b. Shu°ayb b. °Alī, *Sunan al-Nasā°ī, Mawsū°ah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999).

Nasir, Jamal J. *The Islamic Law of Personal Status*. 3rd ed (London: The Hague: Kluwer Law International, 2002).

Nawawī (al), Yaḥya b. Sharaf Abu Zakariyya, *Rawḍat al-Ṭālibīn*, ed. by °Adel °Abd al-Mawjūd and °Ali Muḥammad Ma°wwaḍ, special edition (Riyad, Saudi Arabia: Dar Alam al-Kutub, 2003).

Nawawī (al), Yaḥya b. Sharaf al-Dīn, *al-Majmū° Sharḥ al-Muhadhdhab*, ed. completed by Muḥammad Najīb al-Muṭ°ī, (Jeddah, Saudi Arabia: Maktabat al-Irshad, 1977).

Nawawī (al), Yaḥya b. Sharaf al-Dīn, *al-Minhāj, Sharḥ Ṣaḥīḥ Muslim*, ed. by Khalīl Ma°mūn Shīḥah, 5th edn (Beirut, Lebanon: Dar al-Marefah, 1998).

Naysabūrī (al), Abū °Abd Allah al-Ḥākīm, *al-Mustadrak °Ala al-Ṣaḥīḥayn*, 1st edn (Cairo, Egypt: Dar al-Haramayn Publishers, 1997).

Naysabūrī (al), Muslim b. al-Ḥajjāj, *Ṣaḥīḥ Muslim, Mawsūʿahat al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999).

New forced marriage law comes into effect in Scotland, <<http://www.bbc.co.uk/news/uk-scotland-15909237>> [accessed 3 March 2015].

Nyazee, Imran Ahsan Khan, *Islāmic Jurisprudence*, 2nd edn (New Delhi, India: Adam Publishers and Distributors, 2004).

Pat Strickland, 'Forced Marriage', House of Common's Library; Home Affairs Section, (23 March 2012) , < <http://www.parliament.uk/briefing-papers/SN01003/forced-marriage> > [accessed 5 April 2014].

Patel, Hanisha, 'Criminalising Forced Marriage Presents New Challenges', <<http://www.7br.co.uk/2014/06> > [accessed 13 October 2014].

Pearl, David and Menski, Werner, *Muslim Family Law*, 3rd edn (London, England: Sweet & Maxwell, 1998).

Phillips, Anne, and Moira Dustin, 'UK initiatives on forced marriage: regulation, dialogue and exit', *Political studies* 52.3 (2004), 531-551 < <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1467-9248.2004.00494.x> > [accessed 4 March 2014].

Qadri, Anwar Ahmad, *Islamic Jurisprudence in the Modern World*, 2nd edn (Kashmiri Bazar, Lahore, Pakistan: S H. Muhammad Ashraf, 1973).

Qānūn al-Aḥwāl al-Shakhṣiyyah al-Kuwaiti, Majmūʿat al-Tashrīʿāt al-Kuwaitiyyah, Ministry of Justice, Kuwait, V. 8, 2011, 1st edn (Kuwait: al-Khat, 2011).

Qaraḍāwī (al), Yusuf, *al-Siyāsah al-Sharʿiyyah*, 1st edn (Cairo, Egypt: Maktabat Wahbah, 1998).

Qaraḍāwī (al), Yusuf, *Malāmiḥ al-Mujtamaʿ al-Muslim*, 3rd edn (Cairo, Egypt: Maktabat Wahbah, 2001).

Qarāfī (al) , Aḥmad b. Idrīs, *al-Iḥkām Fī Tamyyīz al-Fatawa ʿAn al-Aḥkām*, ed. by ʿAbd al-Fattāh Abu Ghuddah, 2nd edn (Beirut Lebanon: Dar al-Bashaer al-Islamiyyah, 1995).

Qarāfī (al), Aḥmad b. Idrīs, *Al-Furūq*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1998).

Qarahdāghī (al), ʿAli Muḥiyy al-Dīn, *Mabdaʾ al-Riḍā Fī al-ʿUqūd* ,2nd edn (Beirut, Lebanon: Dar al-Bashaer al-Islamiyyah, 2002).

Qarīsah, Hishām, *al-Istidlāl Wa ʿAtharuh Fī al-Khilāf al-Fiqhī* (Beirut, Lebanon: Dar Ibn Hazm, 2005).

Quek, Kaye, 'A Civil Rather than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK', *The British Journal of Politics & International Relations* 15.4 (London: Political Studies Association, 2012) 626-646. <Doi: 10.1111/j.1467-856X.2012.00525.x>.

Qunuwī (al), Qāsim, *'Anīs al-Fuqahā'*, 1st edn (al-Dmmam, Saudi Arabia: Dar Ibn Aljawzi, 2006).

Qur'an (the), Arabic Text with Corresponding English Meanings, ed. by Şaḥeḥ International (Jeddah, Saudi Arabia: Abul-Qasim Publishing House, 1997).

Qurtubī (al), Muḥammad b. Aḥmad, *al-Jāmi' Li-Aḥkām al-Qur'an* (Beirut, Lebanon : Dar al-Kotob al-Ilmiyah, 1993).

Quṭb, Sayyid, *Fī Zilāl al-Qur'an*, 25th edn (Cairo, Egypt: Dar al-Sruq, 1972).

Rayner, Susan E, *The Theory of Contract in Islamic Law*, 1st edn (London, England: Graham And Trotman, 1991).

Rāzī (al), Muḥammad b. °Umar, *al-Maḥşūl Fī °Ilm al-'Uşūl*, ed. by Taha Jabir al-Alwani, 3rd edn (Beirut, Lebanon: Al-Resalah Publishers, 1997).

Rāzī (al), Muḥammad Fakhr al-Dīn, *al-Tafsīr al-Kabīr, Mafātīḥ al-Ghayb*, 1st edn (Beirut, Lebanon: Dar al-Fikr, 1981).

Rāzī (al), Muḥammad b. Abī Bakr b. °Abd al-Qādir, Mukhtār al-Şihāḥ, 1st edn, (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 1990).

Ribāṭ (al), Khālīd Maḥmūd, *Tuḥfat al-Akhyār bi Tartīb Mushkil al-'Āthār*, 1st edn (Riyadh, Saudi Arabia: Dar Balansiyah, 1999).

Riḍā, Muḥammad Rashīd, *Tafsīr al-Manār*, 2nd edn (Cairo, Egypt: Dar al-Manar, 1947).

Sābiq, Sayyid, *Fiqh al-Sunna* (Beirut, Lebanon: Dar al-Fikr, 1995).

Safi-ur-Rahman al- Mubarakpuri, *The Sealed Nectar*, revised edn (Riyadh, Saudi Arabia: Darussalam, 2002).

Şāliḥ, Muḥammad °Adīb, *Tafsīr al-Nuşuş Fī al-Fiqh al-Islāmī*, 4th edn (Beirut, Lebanon: Al-Maktab al-Islāmī, 1993).

Şāliḥī (al), °Ali al-Ḥamad, *al-Ḍaw' al-Munīr °Ala al-Tafsīr ,Tafsīr Ibn al-Qayyim* (Unaizah, Saudi Arabia: Al-Nuor Publishers, '[n.d.]').

Samad, Yunas, 'Forced marriage among men: An unrecognized problem', *Critical Social Policy* 30.2 (2010): pp. 189-207 <<http://www.csp.sagepub.com/content/30/2/189>> [accessed 4 March 2014].

Şan°ānī (al), Muḥammad b. Ismā°īl, *Subul al-Salām* (Amman, Jordan: Dar al-Furqan, '[n.d.]')

Sanhūrī (al), °Abd al-Razzāq, *Nazariyyat al-Ḥaqq Fī al-Fiqh al-Islāmī*, 2nd edn (Beirut, Lebanon: Al-Halabi, 1998).

Sarakhsī (al), Muḥammad b. Ibī Sahl, *al-Mabsūṭ* (Beirut, Lebanon: Dar al-Macrifah, '[n.d.]').

Şartāwī (al), Maḥmūd °Ali, *Sharḥ Qānūn al-Aḥwāl al-Shakḥsiyyah*, 2nd edn (Amman, Jordan: Dar al-Fikr, 2010).

- Şāwī (al), Aḥmad, *Bulḡhat al-Sālik li Aqrab al-Msālik*, ed. by Muḥammad °Abd al-Salām Shahīn, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1995).
- Schacht, Joseph, *An Introduction to Islamic Law* (Oxford, England: Oxford University Press, 1964).
- Shāfi°ī (al), Muḥammad b. °Idrīs, *al-Risālah*, ed. by Aḥmad Shākīr (Beirut, Lebanon: al-Maktabah al-cilmiyyah, [n.d.]).
- Shāfi°ī (al), Muḥammad b. Idrīs, *Aḥkām Al-Qur'an*, 2nd edn (Cairo, Egypt: Maktabat al-Khaniji, 1994).
- Shalabī, Muḥammad Mustāfa, *Aḥkām al-Usra Fi al-Islām*, 4th edn (Beirut, Lebanon: Al-Dar al-Jamiyyah, 1983).
- Shaltūt, Maḥmūd, *al-Islām °Aqīdah wa Sharī°ah*, 13th edn (Cairo, Egypt: Dar al-Shuruq, 1985).
- Shanqī°ī (al), Aḥmad b. Maḥmūd, *Khabar al-Wāḥid wa Ḥujjatuh*, 1st edn (Madinah, Saudi Arabia: Islamic University of Madinah Press, 2002).
- Sharbīnī (al), Muḥammad b. al-Khaṭīb, *Mughnī al-Muḥtāj*, 1st edn (Beirut, Lebanon: Dar al-Marifah, 1997).
- Shāṭibi (al), Ibrāhīm b. Musa, *Al-Muwāfaqāt*, 1st edn (Al-Kubar, Saudi Arabia: Dar Ibn Affaan, 1997).
- Shawkānī (al), Muḥammad b. °Ali, Faṭḥ al-Qadīr, ed. by °Abd al-Raḥmān °Amīrah, 2nd edn (al-Mansurah, Egypt: Dar al-Wafa, 1997).
- Shawkānī (al), Muḥammad b. °Ali, *Nayil al-Awṭār*, ed. by Rabi° Abu Bakr °Abd al-Bāqi, 1st edn (Beirut, Lebanon: Dar al-Jil , 1992).
- Shawkānī (al), Muḥammad b. °Ali, *Irshād al-Fuḥūl*, ed. by Sami b. al-Arbi, 1st edn (Riyadh, Saudi Arabia: Dar al-Fadilah 2000).
- Shaykh (al), Niẓām and others, *al-Fatawa al-Hindiyyah*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 2000).
- Smelser , Niel J. and Baltes, Paul B., *International encyclopedia of the social & behavioral sciences*, (Amsterdam: Elsevier, 2001).
- Subkī (al), °Abd al-Wahhāb, *Jam° al-Jawāmi°*, ed. by °Abd al-Mun°im Ibrāhīm, 1st edn (Beirut, Lebanon: Dar Al-Kutub Al-Ilmeiyah, 2001).
- Suyūṭī (al), °Abd al-Raḥmān Jalal al-Dīn, *al-Ashbāh wa al-Nazā'ir*, 1st edn (Beirut, Lebanon: Dar al-Kutub al-Ilmiyyah, 1983).
- Ṭabarī (al), Muḥammad b. Jarīr , *Jāmi° al-Bayān °An Ta'wīl 'Āy al-Qr'ān*, ed. by °Abd Allah b. °Abd al-Muhsin al-Turki, 1st edn (Cairo, Egypt: Dar Hajr, 2001).
- Taftazānī (al), Sa°d al-Dīn, *Al-Talwīḥ °Ala al-Tawḍīḥ* (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, [n.d.]).

Ṭaḥāwī (al), Aḥmad b. Muḥammad b. Salamah Abū Jaʿfar, *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ*, ed. by ʿAbd Allah Nadhīr Aḥmad, 1st edn (Beirut, Lebanon: Dar al-Bashayr al-Islamiyyah, 1995).

Ṭaḥāwī (al), Aḥmad b. Muḥammad b. Salamah Abū Jaʿfar, *Sharḥ Macānī al-ʿĀthār*, ed. by Muḥammad Zuhry al-Najjār and Muḥammad Sayyid Jād al-Haqq, 1st edn (Beirut, Lebanon: Alam al-Kutub, 1994).

Tāwdī (al), Muḥammad b. Muḥammad, *Ḥula al-Maʿāṣim maʿa al-Bahjah Sharḥ Tuḥfat al-Hukkām*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1998).

Ṭawīlah, ʿAbd al-Salām ʿAbd al-Wahhab, *ʿAthar al-Lughah Fī ' Ikhtilāf al-Mujtahidīn*, 2nd edn (Cairo, Egypt: Dar al-Salam, 2000).

Teertha Gupta and Khatun Sapnara, 'The Law, The Courts And Their Effectiveness', in *Forced Marriage: Introducing a social justice and human rights perspective*, ed. by Aisha K. Gill and Sundari Anitha, 1st edn (London, England: Zed Books Ltd, 2011), pp. 158-176.

The Qurʾān, Arabic Text with Corresponding English Meanings, ed. by Ṣaḥeeḥ International (Jeddah, Saudi Arabia: Abul-Qasim Publishing House, 1997).

The scientific Magazine of the European Council for Fatwa and Research, vol. 1 (2002), pp.77- 88.

The scientific review of the European Council for Fatwa and Research, vol. 7, (2005), pp. 199- 200.

The scientific review of the European Council for Fatwa and Research vol 8-9 (2006), pp. 266 -70.

Tirmidhī (al), Muḥammad b. ʿIsā, *Jāmiʿ al-Tirmidhī, Mawsūʿah al-Ḥadīth*, 1st edn (Riyad, Saudi Arabia: Darussalam, 1999).

Tribunal, Muslim Arbitration, 'Liberation from Forced Marriages', (2008) <http://www.matribunal.com/MAT_Forced_%20Marriage_%20Report> [accessed 15 October 2014].

Tusūlī (al), ʿAli b. ʿAbd al-Salām, *Al-Bahjah fī Sharḥ al-Tuḥfah*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyah, 1998).

Wāḥidī (al), ʿAli b. Aḥmad, *Asbāb al-Nuzūl*, 3rd edn (Damascus, Syria: Dar Ibn Kathir, 1997).

Wāṣil, Naṣr Farīd, *Al-Wilāyāt al-Khāṣah*, 1st edn (Cairo, Egypt: Dar al-Shuruq, 2002).

Women In Islam, Tran. and eid. by Nicholas Awde, 1st ed. (Surrey, England: Curzon Press, 2000).

Zaidān, ʿAbd al-Karīm, *al-Mufaṣṣal Fī Aḥkām al-Marʾah wa al-Bayt al-Muslim*, 1st edn (Beirut, Lebanon: Al-Risalah Publishers, 1993).

Zamakhsharī (al), Jār Allah Abū al-Qāsim Maḥmūd b. ʿUmar, *Asās al-Balāghah*, ed. by ʿAbd al-Raḥim Maḥmūd (Beirut. Lebanon: Dar al-Marefah, 1982).

- Zarkashī (al), Muḥammad b. °Abd Allah , *Sharḥ Matn al-Khiraqi*, ed. by °Abd al-Malik b. °Abd Allah b. Dahaysh, 3rd edn (Mecca, Saudi Arabia: Maktabat al-Asadi, 2009).
- Zarqa(al) , Muṣṭafa, *Al-Madkhal al-Fiqhī al-°ām*, 2nd edn (Damascus, Syria : Dar al-Qalam, 2004).
- Zarqānī (al) , Muḥammad b. °Abd al-Bāqī, *Sharḥ al-Muwaṭṭa'*, 1st edn (Beirut, Lebanon: Dar al-Fikr, 1996).
- Zaydān, °Abd al-Karīm, *al-Wajīz Fī 'Uṣul al-Fiqh*, 7th ed (Beirut, Lebanon: Al-Risalah Publishers, 1998).
- Zaydān, °Abd al-Karīm. *al-Madkhal Li Dirāsah al-Sharī°ah al-Islāmiyyah*, 6th edn (Beirut: Lebanon, 2003).
- Zayla°ī (al), °Abd Allah b. Yusuf, *Naṣb al-Rayah*, ed. by Muḥammad °Awwamah (Beirut, Lebanon: Al-Rayan Publishers, [n.d.]).
- Zayla°ī (al), °Uthmān b. °Ali, *Tabiyyīn al-Ḥaqā'iq Sharḥ Kanz al-Dqā'iq*, 1st edn (Cairo, Egypt: al-Matba'ah al-Kubra al-Ameiriyyah, 1895).
- Zuḥaylī (al), Wahbah, *'Usūl al-Fiqh al-Islāmī*, 1st edn (Damascus, Syria: Dar al-Fikr, 1969).
- Zuḥaylī (al), Wahbah, *al-Fiqh al-Islāmī wa Adillatuh*, 2nd edn (Damascus, Syria: Dar al-Fikr, 1985).
- Zuḥaylī (al), Wahbah, *al-Uṣrah al-Muslimah Fī al-°Ālam al-Mu°āṣir*, 1st edn (Damascus, Syria: Dar al-Fikr, 2000).
- Zuḥaylī (al), Wahbah, *Sharḥ al-Wilāya Fī °Aqd al-Zawāj*, 1st edn, (Damascus, Syria: Dar al-Maktabi, 2001).
- 'Ubbi (al), Ṣaliḥ °Abd al-Samī°, *Jawāhir al-Iklīl*, 1st edn (Beirut, Lebanon: Dar al-Kotob al-Ilmiyyah, 1997).
- Violence against Women in South Asian Communities: issues for policy and practice* ed. by Thiara, Ravi K., and Aisha K. Gill, (London, England: Jessica Kingsley Publishers, 2010).

Appendices

Appendix 1

The following resolution was built upon the perception of the situations of Muslims living in non-Muslim societies:

- 1- If the spouses are citizens of a Muslim country and they conducted their marriage there but reside in a European country, then originally they should seek the judgement of the courts of that Muslim country. If one party seek the judgment of the court in the country they reside in then that is considered being contrary to the teachings of Islam and the party is considered, from a religious point of view, a sinner.
- 2- If the law in the country of residence allows them to seek the judgment of the law in their original state then the spouses must claim the application of the provisions of the Muslim country.
- 3- If the constitution of country of residence does not allow the application of any law apart from the country's law then the ruling of the European courts becomes binding for the both of the spouses.
- 4- If one spouse is a citizen of a Muslim country, the other spouse is a citizen of a non-Muslim country and both of them reside in a non-Muslim country then, in this case:
 - a- If the marriage contract was conducted in a Muslim state, they should seek the rule of its courts. If they sought the rule of the courts in the state of residence they should claim the application of the provisions of the Muslim country. But usually the state of residence applies their own law claiming that one party in the conflict is of their citizens, so the verdict of the non-Muslim judge becomes binding to the Muslim party.
 - b- If the contract was conducted according to the law of the country of residence- the European country- and a conflict was between its citizens, then the court will apply the law of the country which is binding to Muslims.

- c- If the spouses hold the citizenship of a non-Muslim country, they are obliged to their marriage contract in accordance to the law in that country and to seek the judgement of that law in case of conflict.

It is important to mention that there is a wide range of conflict between laws, especially when the marriage is conducted in a country other than the European country and when one party in the conflict is a citizen of a Muslim country and does not reside permanently in the European country alongside the other, such as those mentioned previously, which might be a subject for future research.⁶⁹⁴ The European Council of Fatwa and Research issued a resolution in this regard that states:

- a- The principle is that a Muslim only resorts to a Muslim Judge or any suitable deputy in the event of a conflict. However, and due to the absence of an Islamic judicial system in non-Muslim countries, it is imperative that a Muslim who conducted his marriage by virtue of those countries' respective laws, to comply with the rulings of a non-Muslim judge in the event of a divorce. Since, the laws were accepted as governing the marriage contract, then it is as though one has implicitly accepted all consequences, including that the marriage may not be terminated without the consent of a judge. This case is similar to that in which the husband gives authority to the judge to do so, even if he did so implicitly, and which is considered acceptable by the vast majority of scholars. The principle of Islamic jurisprudence applicable in this case is that whatever is normal practice is similar to a contractual agreement. Furthermore, implementing the rulings of a non-Muslim judiciary is an acceptable matter, as it falls under the bringing about of what is considered to be of interest and to deter what is considered to be of harm and may cause chaos, as stipulated by more than one of the most

⁶⁹⁴ See Fayṣal Mawlawī, 'The Ruling of The Divorce Issued by A Non-Muslim Judge', in *The scientific review of the European Council for Fatwa and Research*, issue 1 (2002), pp. 77- 88.

prominent Islamic scholars, such as al-^ʿIzz b. ^ʿAbd al-Salam, Ibn Taymiyyah and al-Shāṭibī.⁶⁹⁵

Appendix 2

The Islamic Fiqh Academy of India held its 13th conference on the issue of ‘The parents who force their daughters/sons to marriage according to their wishes in Britain and Western countries and the dreadful events it led to’. The participants decided in this regard the following:

- 1- The Islamic legislation granted the major sons and daughters the right of disposal in their own affairs and the right to choose in marriage. This personal freedom is a character of the Islamic legislation.
- 2- Guardians cannot defiantly force the major woman or a major son to marriage without their consent. The guardians’ insistence and usage of different means of threat in order to force them to marriage is not but a condemned attempt to strip them of their rights which were granted to them by the Islamic legislation.
- 3- Sons and daughters shall trust the choices of their guardians in choosing their spouses because of their vast experience in life and the fact that they show full consideration for their children’s interest because of their mercy and compassion. This point may possibly indicate arranged marriage.
- 4- For marriage to be considered as initiated, consent must be expressed at the time of the marriage contract so when the son or daughter expresses their consent the marriage contract become initiated.
- 5- If it was proved to the judge and the judicial authorities that the guardians used coercion in the marriage of a major woman and they forced her to utter her consent while she was discontented with this marriage and she asks for annulment while the

⁶⁹⁵ European Council of Fatwa and Research, *Resolutions and Fatāwa*, Resolution number: 15, 3/5, pp. 48-49.

husband refuses to voluntarily leave her through divorce or *khul'*, then the judge has the right to annul this marriage in order to repel oppression.⁶⁹⁶

⁶⁹⁶ Majma' al-Fiqh al-Islāmi in India, *al-Ijbār 'Ala al-Zawāj*, V. 7:10 (Beirut: Dar al-Kutub al-Ilmiyyah, 2007), p10.