

THE USAGE OF CUSTOM IN THE CONTEMPORARY LEGAL SYSTEM OF SAUDI ARABIA: DIVORCE ON TRIAL

GÜNÜMÜZ SUUDİ ARABİSTAN HUKUK SİSTEMİNDE ÖRFÜN KULLANIMI:
MAHKEMELERDEKİ BOŞANMALAR

SUMEYRA YAKAR

DR. ÖĞRETİM GÖREVLİSİ, İĞDİR ÜNİVERSİTESİ İLAHIYAT FAKÜLTESİ TEMEL İSLAM BİLİMLERİ
ANABİLİM DALI

ASSISTANT PROFESSOR, UNIVERSITY OF İGDİR, FACULTY OF THEOLOGY, DEPARTMENT OF
ISLAMIC STUDIES

sumeyrayakar@hotmail.com

 <https://orcid.org/0000-0001-8335-6819>

 <http://dx.doi.org/10.29228/k7auifd.14>

Makale Bilgisi / Article Information

Makale Türü / Article Types

Araştırma Makalesi / Research Article

Geliş Tarihi / Received

30 Ekim / September 2019

Kabul Tarihi / Accepted

22 Aralık / December 2019

Yayın Tarihi / Published

Aralık / December 2019

Yayın Sezonu / Pub Date Season

Aralık / December

Atıf / Cite as

Yakar, Sumeyra, "Günümüz Suudi Arabistan Hukuk Sisteminde Örfün Kullanımı: Mahkemelerdeki Boşanmalar [The Usage of Custom in the Contemporary Legal System of Saudi Arabia: Divorce on Trial]". Kilis 7 Aralık Üniversitesi İlahiyat Fakültesi Dergisi - Journal of the Faculty of Theology 6/11 (Aralık/December 2019): 371-394.

İntihal / Plagiarism: Bu makale, en az iki hakem tarafından incelendi ve intihal içermediği teyit edildi. / This article has been reviewed by at least two referees and scanned via a plagiarism software.

Copyright © Published by Kilis 7 Aralık Üniversitesi, İlahiyat Fakültesi - Kilis 7 Aralık University, Faculty of Theology, Kilis, 79000 Turkey. All rights reserved.

For Permissions

ilahiyyatdergisi@kilis.edu.tr



THE USAGE OF CUSTOM IN THE CONTEMPORARY LEGAL SYSTEM OF SAUDI ARABIA: DIVORCE ON TRIAL

Abstract

Islamic law plays a crucial role in the survival of Saudi Arabia and establishes the parameters of what is permissible; within this framework, a great variety of individually unique and culturally specific relationships can exist. The practices of divorce and woman-initiated divorce are controversial issues amongst Muslim scholars in general, Saudi Arabia specifically. To a great extent, Saudi Arabia's cultural, social, and political features have been shaped by the Wahhābī understanding that adopts a literal interpretative technic when handling issues regarding marital problems. Social and cultural environment in which Saudi judges are born and grow up sometimes visibly sometimes invisibly influence these judges' thoughts and perceptions. The main questions that the paper aims to answer: how do the Saudi scholars succeed in generating a workable religious system from the accumulation of Ḥanbalī works? Which legal principles the judges applied and how they utilized the concept of *'urf* for the court decisions? The descriptive conclusion aims to clarify Wahhābī approaches to custom (mainly referred to as *'urf* and *'āda*) and compare them to the decisions of contemporary Saudi judges. Whether the decisions in the contemporary legal system completely depend on the classical Ḥanbalī religious sources or draw indirectly on customary norms is central to this research. With the intent of perceptibly unfolding the interaction between *'urf* and legal practice related to divorce issues, the article examines the usage of custom or *'urf* in the *shar'ī* system of Saudi Arabia and the approaches of Saudi judges towards custom in the divorce implementation.

Summary

Much of Saudi Arabia's identity is built around the establishment of Islamic law (*sharī'a*) which they use to support that they are the true representatives and protectors of Islam. Islamic law plays a crucial role in the survival of the country and establishes the parameters of what is permissible; within this framework, a great variety of individually unique and culturally specific relationships can exist. The practices of divorce and woman-initiated divorce are controversial issues amongst Muslim scholars in general, Saudi Arabia specifically. The acts of divorce that the Saudi system legitimises are strongly dependent upon the *sharī'a* and are closely aligned with sociocultural currents that run throughout Saudi society. To a great extent, Saudi Arabia's cultural, social, and political features have been shaped by the Wahhābī understanding that adopts a literal interpretative technic when handling issues regarding marital problems. There are some social elements that direct Saudi judges towards handling the issues from different perspectives, so Islamic legal decisions (*hukms*) cannot be independently evaluated from their social contexts (*'urf*) in which these decisions are issued. Social and cultural environment in which Saudi judges are born and grow up sometimes visibly sometimes invisibly influence these judges' thoughts and perceptions. Connecting varieties only with the legal sources or sectarian differences of countries does not offer a reasonable explanation for the current situation in the Mena region. The influence of local customs over the interpretation of religious sources in general and in personal issues specifically highlights the importance of environmental factors and clarifies different solutions on the same issue.

With the intent of perceptibly unfolding the interaction between *'urf* and legal practice related to divorce issues, the article examines the usage of custom or *'urf* in the *shar'ī* system of Saudi Arabia and the approaches of Saudi judges towards custom in the divorce implementation. The forms of direct or indirect custom and its legal credibility are centres of focus. The objective of paper is to investigate whether there

is a gap between theory and practice in the contemporary legal system of Saudi Arabia. The first part of the paper will briefly describe what makes Saudi jurisprudence unique and different from other existing *shar'ī* legal systems and the status of custom in the contemporary legal perspective. In the second part, one divorce type known as *tafriq* (court dissolution), its conditions, its legal procedure and its possible outcomes will be the centre of focus. *Tafriq* divorce (judicial dissolution) can be initiated upon a number of separate grounds and both the husband and wife are entitled to apply to the court in order to terminate their marriage. Judicial authorities have assumed responsibility for resolving legal issues that arise between spouses when the respective parties are unable to agree upon the conditions of divorce. The analysis focuses on a court decision given by an official Saudi judge on the issue of *tafriq* divorce that was obtained by the researcher during the area research. The function of custom (*'urf*) in the implementation of this court judgement will be examined broadly to stress on the various elements of the decision. There is a difference between what the text says, how a scholar interprets it, and how it is implemented in the practice. The focus centers on the customary components of court decisions and methodological justification of custom depending on the interpretation style of the judges.

The main questions that the paper aims to answer: how do the Saudi scholars succeed in generating a workable religious system from the accumulation of Hanbali works? To what extent the treatment of *'urf* is different from classical methods and texts? Which legal principles the judges applied and how they utilized the concept of *'urf* for the court decisions? The descriptive conclusion aims to clarify Wahhābī approaches to custom (mainly referred to as *'urf* and *'āda*) and compare them to the decisions of contemporary Saudi judges. Whether the decisions in the contemporary legal system completely depend on the classical Hanbali religious sources or draw indirectly on customary norms is central to this research.

Textual legal analysis is the main methodological tool in which I aim to bring together relevant literature with a view to contextualization and categorization of the opinions. The study also draws on the consequentialist theory, since it may explain the cultural presumptions within the process of court ruling. Applying textual analytical methodology and legal anthropological analysis, the study aims to uncover the existent connection between Islamic legal practices and different cultural contexts when judges address any problems and issues related to family problems. The study puts bluntly that the social perceptions and cultural atmosphere regarding women in Saudi Arabia directed judges towards applying different implementations.

Keywords: Islamic law, Shari'a, Saudi jurisprudence, Wahhabism, Court divorce (*tafriq*), Judicial custom (*'urf*).

GÜNÜMÜZSUUDİARABİSTAN HUKUKSİSTEMİNDE ÖRFÜN KULLANIMI: MAHKEMELERDEKİ BOŞANMALAR

Öz

Bu makale Suudi Arabistan'daki güncel hukuk uygulaması ve bu hukuk uygulamasının temel kaynağı olan Hanbali fıkhı arasındaki ilişkiyi göstermektedir. Günümüz Suudi Arabistan'ında özellikle Hanbali fıkıh mezhebine ait klasik kaynaklar temel kanun hükmünde kabul edilerek, hukuk sistemi bu eserler üzerine bina edilmiştir. Diğer Müslüman ülkelerden bir nebze farklı olarak Suudi Arabistan'ın sosyal kimliği ve devletin otoritesi şeriat üzerine kurulmuştur. Ülke sınırları içerisinde kanunlara dayalı anayasal maddelerden oluşan resmi bir medeni kanun metni yoktur ve bu-

nun eksikliği özellikle evlilik, boşanma, miras gibi kişisel hukuk davalarında çok daha belirgin bir şekilde ortaya çıkmaktadır. Bu sistemin bir sonucu olarak bugünkü Suudi mahkemelerinde Hanbeli fıkhına ait furu' hükümleri Vehhabi anlayışla yorumlanarak kullanılmakta ve hükümler klasik kaynaklardan güncel problemlerin çözümüne uyarlanmaktadır. Klasik kaynakların güncel problemlere uygulanması aşamasında, Vehhabi anlayışının temelini oluşturan kelimelerin gerçek ve sözlük anlamını mecaz veya yorumsal anlamların üzerinde tutma anlayışı ön plana çıkmaktadır. Hukuki hükümlerin klasikten güncel uyarlanması aşamasında, hakimler içinde buldukları toplumun örfünü ve sosyokültürel yapısını göz önünde bulundurmakta, eğitim aldıkları ilim merkezlerinde hâkim olan genel Vehhabi anlayışı kararlarına yansıtılmaktadırlar.

Özet

Günümüz Suudi Arabistan'ında diğer ülkelerden ve özellikle batıda yerleşmiş hukuk sistemlerinden farklı olarak şeriat dayalı bir hukuk sistemi uygulanmaktadır. Uygulanan bu şeriat hükümlerinin temelini yüzyıllar boyu üretilmiş olan klasik Hanbeli fıkıh kaynakları oluşturmaktadır. Fakat bu kaynakların kullanılmasında, yorumlanmasında ve pratiğe dönüştürülmesinde, Vehhabi eğitim bölgelerinde eğitim almış devletin resmi hâkim ve kâdılar görev yapmakta ve sonuç olarak ortaya Vehhabi doktrinine göre yorumlanmış bir hukuk sistemi çıkmaktadır. Vehhabilik anlayışındaki lafzi/gerçek (yani görünen) anlamın yorumsal/mecâzî (yani görünmeyen) anlamı tercih edilmesi ve bu prensibin hükümlerin uygulanmasında da ön planda olmasıyla ortaya değişik bir hukuk pratiği çıkmıştır. Makalenin ilk bölümünde, Suudi Arabistan'daki hukuk sisteminin temeli, işleyişi, hakimlerin hüküm vermede temel aldığı klasik Hanbeli kaynaklar ve mahkeme işleyişinin genel prosedürü açıklanmıştır. Bu kısım günümüz Suudi Arabistan hukuk sisteminin temellerini açıklamakta ve mahkeme prosedürünün ana kurallarını hakimlerin içinde bulunduğu kültürel ortamla bağlantılandırmaktadır. Vehhabi anlayışının hâkim olduğu eğitim merkezleri, alimlerin kültürü ve ilmi birikimi üzerinde de etki göstermiş ve bu kültür bugünkü Suudi Arabistan toplumunun hâkim yapısı konumuna gelmiştir. Buna ek olarak alimlerin içinde buldukları coğrafi şartlar, bölgesel etkiler, sosyokültürel normlar ve örf de fıkıh kaynaklarının yorumlanmasında etkisini hissettirecek derecede belli olmaktadır. Bölgesel örfün hukuk hükümleri üzerindeki etkisine ek olarak bir de örfün klasik fıkıh kaynaklarına bağlı olarak fer'i bir delil şeklinde kullanılması ve özellikle *ahvali şahsiyye* (kişiler hukuku) alanındaki belirli konularda hükümlerin örf üzerine bina edilebilmesi hukuki alanda çeşitliliği artırmaktadır. Örfün hukuki bir delil olarak varlığının kabulü ve bu delilin mahkemedeki davaların çözümlenmesi aşamasında kullanımı, hukuk sistemine işlevsellik ve pratiklik kazandırmakla birlikte, pratikte çok çeşitliliğe ve örfün kapalı olduğu bazı durumlarda karmaşıklığa sebebiyet vermektedir.

Özellikle evlilik ve boşanmayı içeren aile hukukuyla ilgili konularda klasik Hanbeli kaynaklarında örfün kullanımı, aile hukukunda örf geniş bir kullanım alanı açmış ve hükümlerin örf üzerine bina edilmesine şer'i bir zemin hazırlamıştır. Örfün zamanın şartlarına göre değişkenlik göstermesi, bölgesel veya coğrafi farklılıklara açık olması, somut olarak belgelendirilememesi, fikhî bir delil olarak yorumlanmasında görecelikliklerin bulunması örfün delil olarak kullanılmasını günümüz Suudi Arabistan yargı sisteminde sorgulamaya açmıştır. Delil olarak örfün kullanımındaki bu problemlerden dolayı Suudi Arabistan'daki hakimler mahkemede verdikleri kararlarını sadece örf üzerine inşa etmekten bazı durumlarda çekinmişler ve eğer örfü destekleyen başka fer'i deliller varsa kararlarını genelde bu deliller üzerine bina etmişlerdir. Bu metot verilen hükümlerin mahkemedeki taraflar açısından kabulünü kolaylaştırmış ve hükümlerin dini geçerliliğinin sorgulamasını kapatma işlevi görmüştür. Bu sebepten dolayı, mahkeme davalarında hakimler örfü bir delil olarak

kullanmak yerine diğer şer'i delillere başvurmuş ve örfün hukuktaki kullanımını açık değil kapalı bir şekilde gerçekleştirmişlerdir. Makalede, Riyad'daki aile mahkemesinde gerçekleşen bir mahkeme boşanması incelenmiş, hâkimin verdiği hükümde Suudi Arabistan'ın örfüne yaptığı atf değerlendirilmiş ve klasik fıkıh eserlerinin nasıl kullanıldığı açıklanmıştır. İslam hukuku şer'i bakımdan boşanma yetkisini erkeklere vermekle birlikte kadınlara da belli şart ve koşullarda boşanma hakkı tanımıştır. Günümüz Suudi Arabistan'ında evli olan bir kadın boşanmak istediğinde resmi bir mahkemeye başvurarak boşanma davası açma hakkına sahiptir ve sonuç tarafların dinlenmesi, fiillerin değerlendirilmesiyle hâkim tarafından karara bağlanır. Bu şekilde gerçekleşen boşanmalara, erkeklere ait hak olan *talak* şeklindeki boşanma değil *fesih* şeklindeki ayrılık denmektedir ve kayıtlara mahkeme boşanması olarak geçer. Hâkimin boşama yetkisine sahip olması bazı alimler tarafından tartışılmış, şeriatte erkeklere ait olan *qivama* (vekillik ve velilik hakkı) anlayışına zarar verdiği noktasında eleştirilmiştir. Bu tartışmalara rağmen, mahkeme boşanmalarında hüküm tamamıyla hâkime aittir ve taraflara hâkimin hükmünden farklı bir uygulama gerçekleştirme veya boşanmayı kabul etmeme gibi bir tercih hakkı verilmemiştir. Makalede incelenen boşanma davasında kadın kocasından ayrılmak için mahkemeye başvurmuş ve sebep olarak eşinin sözlü şiddet uyguladığını mazeret göstermiştir. Koca tarafından eşine yapılan mehir ödemesinin iade edilip edilmemesi ve evlilik süresi boyunca kocanın eşine verdiği hediyelerin durumu boşanma sonrası ortaya çıkan temel problemler olmuştur. Hâkim mahkeme davaları boyunca farklı zamanlarda tarafları dinlemiş ve son celsede bu iki konu üzerindeki kararını belirtmiştir. Mahkeme tutanağı, hâkimin modern sistemde resmi olarak klasik fıkıh kaynaklarını kullanmasını göstermesi bakımından önemlidir, çünkü hâkim klasik kaynaklarda yer alan alimlerin görüşüne doğrudan atf yapmıştır. Aynı zamanda Kur'an ve sünnetten delillerle görüşünü sağlamlaştırmış ve en sonunda da günümüz Suudi Arabistan'ında meşhur olan alimlerin görüşlerine yer vererek hükmünü karara bağlamıştır. Hâkim verdiği hükümde direk olarak bahsetmemesine rağmen karar verme aşamasında bölgede hâkim olan örfü kullanmış ve hükmünü onun üzerine bina etmiştir. Mahkeme tutanağının şer'i ve örfi unsurlar bakımından incelenmesi bize, kararda kullanılan temel fikhî kaynakları ve fikhî delillerle desteklenen örfi faktörleri açıkça göstermektedir. Makale Suudi Arabistan'daki genel hukuk sistemini açıklamakla birlikte, şeriat sisteminin modern dünyada uygulanmasını gerçek bir örnekle göstererek, örf ve toplumsal kültürün şeriat üzerindeki etkisine vurgu yapmaktadır. Örfün ve kültürün kararlar üzerindeki bu etkisinin bilinmesi şeriatın pratiğe dönüşmesinde bölgelere ve ülkelere göre değişen hükümlerin açıklanmasını kolaylaştırmakta ve kararların saf şer'i hüküm olarak kabul edilmesinden ziyade kültüre açık şer'i hükümler olarak değerlendirilmesinin önünü açmaktadır.

Anahtar Kelimeler: İslam hukuku, Şeriat, Suudi Arabistan hukuku, Vehhabilik, Mahkeme boşanması (*tafriq*), Örf.

1. THE PECULIARITY OF SAUDI LEGAL SYSTEM AND STATUS OF CUSTOM¹

The legal system of Saudi Arabia is supposedly governed by the traditional framework of Islamic law and there is no separation between the legislative, executive and judicial branches.² However, its legal system has experienced modernization from within the state issued decree-laws (*marsum al-malik*) – new legal provisions in the spheres of international trade or medicine.³ The administrative and institutional developments and rationalizations of the legal system have also forced the Ḥanbalī element in the system to be modified. Even with these changes, the Saudi legal system protects its unique position among the countries in which apply *sharī'a* because the system presents itself as maintaining the implementation of classical Ḥanbalī regulations in the field of personal relations.

In a general sense, the reference to custom or welfare in harmony with context is relevant to the sphere of personal relations or transactions (*mu'āmalāt*), as opposed to the area of rituals (*'ibādāt*) – this is because the privileged consideration of easiness and best interests for the believers (*maṣlaḥa*) as an objective of the *sharī'a* enables legal authorities to make relative alterations and reforms in the scope of *mu'āmalāt*.⁴ The ruling relying on *maṣlaḥa* obtains validity in relation to non-religious matters that cover social transactions, but the concept does not have unrestricted priority over textual rulings. Although the terms *'urf*, *āda* and *ma'rūf* are interchangeably used to refer to custom, habit or good deeds, there is a tendency

¹ I would like to offer my gratitude to my supervisor, Prof. Robert Gleave, for his encouragement, support and seminal counsel during the completion of this article. His guidance and kindness have contributed enormously in bringing this study to light. I also send my thanks to my colleague, Emine Enise Yakar, for thought-provoking comments and questions. This helped me handle the issue in more detail from different perspectives.

² "Basic Law of Governance," Article 1, *Royal Embassy of Saudi Arabia*, March 1, 1992 (Accessed 1 March 2019).

³ The development of the Saudi legal system has been affected by the concurrent influences of traditionalist and modernist movements. For further information, see Ayoub M. Al-Jarbo, "The Role of Traditionalist and Modernists on the Development of the Saudi Legal System," *Arab Law Quarterly* 21 (2007), 191-229. Financial initiatives of the government is creating a dualistic legal system between the *shar'ī* and *non-shar'ī* elements. For further information, see Amr Daoud Marar, "Saudi Arabia the Duality of the Legal System and the Challenge of Adapting Law to Market Economies," *Arab Law Quarterly* 19 (2004), 107.

⁴ *'ibādāt* covers the relationship between God and his servants while *mu'āmalāt* concern man's affairs with man. *Maṣlaḥa* (interest) is only to be used on inter-human affairs, *mu'āmalāt*, not on *'ibādāt* rituals. Further information for the usage of public interest in social transactions see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: St Edmundsbury Press, 1991), 275, and Knut S. Vikor, *Between God and the Sultan: A History of Islamic Law* (London: C.Hurst-Co, 2005), 3, 67.

among the *'ulamā'* to address the term *'urf* within the legal area with reference to the cases mentioned in the text. It is typically held that the lacuna of contradictive source against the prevalent custom or the absence of a statement (whether this takes the form of an approval or rejection by the classical sources) entitles the customary act to be legal and permissible. From the perspective of the legal, the legitimacy of custom functions to legitimise these customary actions.

In being confronted by a novel issue that was not directly addressed by the Qur'anic injunction or textual sources, the religious authorities instructed the pursuit of the dominant opinion (the approach taken by most jurists to a given issue) or a preferred opinion (the approach based on what is customarily performed or what is socially desirable), while maintaining that both could be employed in accordance with circumstance. While there are no specific techniques that are recommended for identifying when each approach can be applied, it could be assumed that the overall orientation is itself closely intertwined with concepts of custom and public welfare and the decisions are grounded within a wider set of cultural assumptions.⁵ However, although it resembles the approach adopted by traditional Ḥanbalī scholars, *'urf* is not, in comparison with other sources of law, accepted as an independent source of contemporary Saudi jurisprudence.

Contemporary Saudi jurists and official scholars have focused upon defining the concept of *'urf* in the regulatory system (*qānūnī*) and its establishment as the most credible component in comparison to other elements has been a clear benefit that has emerged from their engagement. 'Abd al-Karīm Sayī, a contemporary Saudi Ḥanbalī scholar, also provides important insight into the definition of regulatory custom and important distinctions among scholars. He states:

“There are numerous definitions for it –custom- depending on the branches of private or public law in the form of applications imposed by the legal centre. Therefore, this diversity hides a profound unity behind reflections and accumulates various forms of social phenomenon.”⁶

Mubārakī, another contemporary Saudi scholar, defines *'urf* by observing that what the majority of individuals are accustomed to or what is fol-

⁵ May al-Dabbagh and Ghaliya Gargani, “Saudi Arabia”, *Arab Family Studies: Critical Reviews*, ed. Suad Joseph (New York: Syracuse University Press: 2018), 279, 283.

⁶ Fahd ibn Maḥmūd bin Aḥmad Al-Sisī, *Makānat al-'Urf fī al-Sharī'ati al-Islāmiyyet wa Athāruhū fī Sinni al-Inzīmati fī Mamlakat al-Arabiyya al-Su'ūdiyya* (Medina: Kulliyā al-Sharī'iyya fī al-Jāmi'a al-Islāmiyya, Master thesis, 2009), 42.

lowed all over the country or in particular parts of it, at particular times, can be conceptualized as custom.⁷ Mubārakī demonstrates how *‘urf* can be considered in the majority of circumstances, but he does not seek to refract it through a specific community with the intention of extending it to the general population.⁸ In engaging with the jurisprudential or official dimension, scholars have sought to limit custom as a source or basis of regulatory law. However, the majority of definitions have no application, whether in conceptual or practical terms, to the jurisprudential system’s customary regulations. Because the consideration of custom does not extend its influence, the regulation in itself can be said to be the result.

The restriction of customary implementation to the period when the custom is prevalent is the feature that serves to most clearly distinguish Islamic and statutory jurisprudence (the statutory system accepts the proposition that customary knowledge and its associated nature embody features that adjust to a specific condition, place or time).⁹ It might be observed that the statutory law (*qānūnī*) is frequently restricted to particular issues and that this feature functions to destabilise custom-based regulations. Within the statutory law, the concept of *‘urf* includes social practices and behaviours and applies irrespective of its strength in Islamic law – this is why the scholars of the statutory system focus upon material and spiritual elements, which are the two main pillars of custom. Because customary values build community or collective identity, it is necessary for the statutory approach, which is the adoptive method deployed within the contemporary Saudi legal system, to acknowledge their importance. A comparison of the *nizāmī* (statutory) and *shar‘ī* (religious) concept of *‘urf* reveals that the statutory regulations which possess customary character can be traced back to the consolidative character of community and the establishment of punishments; in contrast, the power of Islamic law derives from respect for community and a stable society that is grounded within a clear vision of the public good.¹⁰ When the state creates its own legislation (*qānūnī*), the components of the statutory law that embody the knowledge of collective identity and nation can be used as evolutionary

⁷ Ahmad ibn ‘Ali Sir Mubārakī, *Al-‘Urf wa Atharuhū fī al-Shar‘īati wa al-Qānūn* (Riyadh: 1993), 35.

⁸ Mubārakī, *Al-‘Urf wa Atharuhū*, 35-36.

⁹ Al-Dabbagh and Gargani, “Saudi Arabia”, 282-283.

¹⁰ Al-Sīsī, *Makānat al-‘Urf*, 46.

criteria to interpret Islamic sources –that is what I conceptualised as a ‘judicial custom.’¹¹

2. THE LEGAL PROCEDURE AND POSSIBLE OUTCOMES OF TAFRÎQ (COURT DISSOLUTION)

Judicial authorities have assumed responsibility for resolving legal issues that arise between spouses when the respective parties are unable to agree upon the conditions of divorce. Judicial dissolution known as *tafrîq* or *fash* can be initiated upon a number of separate grounds and both the husband and the wife are entitled to apply to the court in order to terminate their marriage through *tafrîq*. Bābakī observes, with reference to contemporary practices, that the right of divorce can be obtained under particular circumstances, both with or without witness testimony. This action can be legitimately pursued, if the husband has a drug addiction, is negligent upon religious matters, possesses specific defects (behavioural, physical, mental) or if he is unable to provide sufficient maintenance.¹² As in the example of the traditional Ḥanbalī school, the marriage can be justifiably dissolved if neither party was aware of its counterpart’s defect/s prior to the marriage. In cases where the wife could not obtain her husband’s consent for a mutual divorce agreement, she is permitted to ask the court to permit a divorce upon the grounds that it is impossible for the marriage to continue. In doing so, she accepts the consequences that relate to the payment of compensation and also agrees to waiver remaining financial rights.

Questions pertaining to extra-judicial divorces may conceivably appear before the courts in the wider context of various allegations which include absence, cruelty, desertion, failure to maintain, hardship, illness or imprisonment. The reasoning that underpins a court-ordered dissolution of marriage has traditionally derived from the doctrines of the dominant Ḥanbalī school, and its attendants focus upon the man’s inability to fulfil marital obligations (as a result of financial or medical problems) and the general security and stability of the marriage.¹³ In general terms, the court procedure seeks to secure religiously established rights for both spouses; sometimes

¹¹ Further information about the concept of judicial custom see Ahmed Fekry Ibrahim, “Customary Practices as Exigencies in Islamic Law Between a Source of Law and a Legal Maxim”, *Oriens* 46 (2018), forthcoming, 226.

¹² ‘Alī Ibn Yahyā Bābakī, *Qaḍāyā al-Ṭalāq, wa al-Ḥaḍānat wa al-Nafaqāt wa al-Ziyārat* (Riyadh: Maktaba Diwān al-Muḥāmin, 2015), 9,10.

¹³ ‘Abdullah ibn Ahmad ibn Muḥammad Ibn Qudāma al-Maqḍisī, *Al-Kāfi Al-Kāfi fi Fiqh Ahmad Ibn Hanbal* (Dār al-Kutub al-‘Ilmiyya, 1994), 3/42.

it allows damages to be awarded to whichever spouse is blameless in the divorce whereas in other instances it invokes the principle of compensation when confronted by an abuse of rights. The court judge retains the authority to nullify an irregular marriage and his limited scope of discretion extends to a number of points. These include: categorization within the framework of reasonable cause (abuse of rights, avoidance of financial responsibilities, health problems), maximum or minimum amounts of compensation (including payment method and instances in which the judge is entirely convinced that one party is entirely at fault) and sufficiency of proofs (whether the court can terminate the marriage with or without compensation).¹⁴ In attending to specific disputes, judges inspect the duration of marriage in order to identify lineage and to exert control over *shar'ī* time prescriptions that govern the validity of legal acts.

In instances where a wife resorts to judicial termination upon the grounds of injury, the inflicted harm is assumed to be a reasonable factor that authorises her, upon the basis that this will remove the damage, to seek divorce – under this circumstance, the divorce can be conceived against the will of her husband.¹⁵ However, the judge then proceeds to offset this impression of general application by noting that the wife, subject to proofs, is entitled to seek restitution for physical and psychological cruelty. The wife must demonstrate more than one of the recognized grounds that are cited in her divorce petition; in addition, she has to initiate litigation which might result in the repayment of half of the dowry (and in some instances even more). Upon presenting the reliable and trustable proofs, the judge will not oblige the wife to pay the compensation.

The wife should, in seeking to terminate her marriage through *faskh*, possess strong legal grounding – this is essential if she is to offset the accusation of *nushūz* (disobedience). In defending himself, the husband will frequently make this accusation – this is the reason why the court, in applying what is essentially a precondition for dissolution on the grounds of *tafriq*, seek proof which verifies that the wife is not guilty of *nushūz*. A number of acts can be cited in support of this accusation: these include, disruption of marital harmony, leaving the husband's home against his expressed wish, refusing to move with the husband to another location without justifiable

¹⁴ Christoph Wilcke, "Saudi Women's Struggle", *The Unfinished Revolution: Voices from the Global Fight for Women's Rights*, ed. Minky Worden (Bristol: The Policy Press, 2012), 93-106.

¹⁵ Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press: 2007), 110-111.

reason (marriage stipulations can sometimes provide an exception in this respect) and an unreasonable refusal to obey her husband's lawful will. Layish alleges that *nāshiza* (disobedient wife) is often a strategy that is initiated by the wife when there is no legal basis for annulment or the husband refuses to consent to divorce.¹⁶ If the wife openly expresses her wish for the marriage to end, she exposes herself to the accusation of *nushūz*. If the court rules that the wife should return to the marital home and the wife fails to obey the order, the husband is immediately divested of his financial responsibilities to his wife until her return. In addition, the husband is also enabled to apply for a divorce upon the grounds of disobedience. The divorce ruling on *nushūz* results in her forfeiting the deferred dower or half of the full dower if she has already received it – it then becomes a maintenance payment that extends for the length of the marriage. In this circumstance, the wife loses all her financial rights and is also required to make a compensation payment. Within the contemporary legal system, the absence of the husband for more than six months or his imprisonment for a period of more than one year provides the wife with sufficient grounds to apply for a divorce.¹⁷ In recognising that the absence or imprisonment of husband may significantly increase the wife's mental, physical and social insecurity, the legal system seeks to extend various protections that mitigate this vulnerability.

Compensation extended to the wife receives more extensive discussion in the judicial divorces both because the husband is entitled to seek divorce by right and also because this decision upholds the social status of the husband and the authority of male members of the family. Entrenched norms within society conceivably demonstrate that gender roles within Saudi society work in accordance with complementary functions rather than Westernised notions of gender equality. In male-dominated Saudi society, this feature can also possibly be traced back to *qiwāma* ('authoritative supervision'). This dominance appears to derive, in large part, from the classical interpretation of Islamic law within a patriarchal society where divorce is regarded as a unilateral right of the husband. The practice of personal law

¹⁶ Aharon Layish, *Women and Islamic Law in a Non-Muslim State, A Study Based on Decisions of the Shari'a Courts in Israel* (Tel Aviv: Tel Aviv University, 1975), 158.

¹⁷ This feature can most likely be traced back to the influence of the classical sources, which establish that the disappearance of the husband for more than six months provides a legally valid reason for the termination of the marriage. Further information, see Jamal J. Nasir, *The Status of Women under Islamic Law and under Modern Islamic Legislation* (London: Graham Trotman, 1990), 93.

in Saudi Arabia brings out its connection with custom and also reiterates its significance as both a legal tool and a facilitator of legal interpretation in instances where there are no explicit regulations. This ascendance of customary regulations, relatively contra the textual tradition of *fiqh*, results in men attaining a privileged position within society.

Critics of the judicial divorce generally converge upon the argument that *qiwāma* and *talāq* are the right of the husband while financial security and maintenance are the right of the wife. The granting of a right of divorce to a wife whose husband performs his duties significantly enhances the wife's power. For *tafriq*, the judge, in contrast to other divorce types known *talāq* (the husband's unilateral divorce right), *khul'* (divorce initiated by the woman), *tāliq* or *tafwīd* (conditional annulment), is in possession of full authority.¹⁸ Divorce (*talāq*) and annulment (*tafriq*) each other's antithesis because they reflect the divine and secular scopes of marriage. It could be argued that the removal of the husband's consent to a divorce directly violates the *shar'ī* regulations which are derived from traditional sources and texts. Because the courts' authority and power are maintained by state-issued regulations, the court's decisions have a sanctioning power and individuals are obliged to follow decisions that relate to the state control. State power is exerted over the jurisprudential system in order to uphold social order, but this influence is intended to assure that implementation closely corresponds to the *shar'ī* orders. It is also conceivable that licensing the court with the power to terminate a wife's application for a divorce agreement may significantly impair the husband's authority (*qiwāma*) within the marriage. This may have a devastating impact upon Saudi society and its underpinning foundation of patriarchal norms.

3. ANALYSIS OF A COURT VERDICT (RETURNING MARITAL GIFTS AFTER DISSOLUTION)

Hanan, the plaintiff and Saudi wife, claimed that the registered marriage was supported by a dower of 50.000 Saudi Riyal (SR) (equal to around 10.000 British Pounds). Once this was paid, the husband and wife obtained their marriage certificate from Diriyya's general court and then consum-

¹⁸ The restricted authority of the judge with religious sources gives him the right of referring custom in the jurisprudence because "Basic Law of Governance" Article 46 reads: "The judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic sharia." *Royal Embassy of Saudi Arabia*, March 1, 1992 (Accessed 12 September 2018). Further information, see Welchman, *Women and Muslim Family Laws*, 111, 222-223.

mated the marriage. The plaintiff claimed that the marriage soon unravelled when it became clear that her husband (defendant) was a bully prone to the use of verbal violence. In addition, the plaintiff also insisted that the husband had expelled her from the home on more than one occasion. His neglect extended to his religious rituals and his failure to perform his daily prayers. After observing these deficiencies, his wife decided to bring the marriage to an end. Ubaid, the defendant and Saudi husband, confirmed what had been told by Hanan. However, he denied the plaintiff's various accusations of ill treatment. In directly rejecting his wife's claim that he had physically expelled her from the house, he claimed that this was actually a sign of *nushūz* as she had left the house without his permission. He called for the lawsuit to be cancelled and for the marriage to continue.

After verifying the marriage certificate, the judge referred the case to the Department of Reconciliation, reasoning that as the couple had only recently married, there was still hope for reconciliation. The Department of Reconciliation reported that continued disagreement, a lack of intimacy and a lack of will meant that it was not sustainable to ask Hanan to return to her husband's home and continue matrimonial cohabitation. After citing quotations from Ibn 'Abd al-Barr (978-1071), Ibn 'Arabī (1076-1148) and Ibn Bāz (1910-1999), the court judge announced that divorce and the distribution of compensation would be more appropriate than cohabitation. Scholars generally accept that compensation should be half of the dower that was put in place when the marriage was inaugurated. The judge, in issuing his final opinion, referred to a Qur'anic verse and a narration from Ibn 'Abbas.¹⁹ He held that in instances where there was disagreement between the spouses, the wife would be permitted to obtain her divorce through the payment of compensation (e.g. half of the dower). He proceeded to state that Hanan was obliged to repay half of the *mahr* (around 25,000 SR), in addition to 2,000 SR.²⁰ In referring to the legal basis for making this payment obligatory, the judge referred to gifts that had been given both at the beginning and during the marriage. Thus, the case is categorized within the framework that governs *tafriq* divorce.

The court procedures seek to secure religiously established rights for both spouses and sometimes allows damages to be awarded to whichever

¹⁹ Qurān, el-Nisa 4/35 reads: "And if you fear dissension between the two, send them an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, God will cause it between them. Indeed, God is ever knowing and acquainted (with all things)."

²⁰ 1 Pound is equal to 5 Saudi Riyal (SR).

spouse is deemed to be blameless in the divorce. It is important to note that neither domestic violence nor physical abuse were referred to and that non-respectful attitudes and verbal injury were instead the cited grievances.

Within Saudi Arabia, divorce is only put into effect when it is absolutely necessary – the marriage must therefore be, beyond reasonable doubt, dysfunctional, devoid of love and compassions and afflicted by intractable, irresolvable and irreconcilable differences. From the perspective of the judge, the main ambiguity arises from the absence of maintenance payments once the wife left the home and the gifts that were given to Hanan during the marriage. The Ḥanbalī textual tradition does not uphold strict laws on marriage gifts; however, the legal system does acknowledge the customary practice of society by ordering the wife to return jewellery and money that the husband had given to her. This extra payment might be regarded as a fine or penalty that is imposed upon the wife or as an attempt to deter violations of informal elements of the marital arrangement.

3.1. *Shar'ī* (Legal) Elements

The judge's stress upon the importance of living in harmony with the spouses entitles those who live within 'loveless' marriages to legitimately seek divorce. In recognising the importance of harmony between the spouses, the judge directly quoted Ibn 'Arabī, a twelfth century Mālikī scholar. The quotation reflects the judge's opinion upon the importance of peaceful and stable cohabitation and provides a rational basis for separation upon grounds of ill-treatment. It also demonstrates that the legal status of items owned during the marriage, whether they are held or returned, should be decided upon the basis of mutual consent between the parties. He presents oppression as a reasonable and valid basis for the termination of marriage. This clearly establishes that the wife has to give her husband care, love and obedience – the final contribution being particularly important because it alone can ensure harmony in the family. The judge, in highlighting harmony as an essential component of the marriage, presumably agrees that there will be no matrimonial problem when the husband and wife live as ordained – that is, in a spirit of harmony and mutual love. The preceding two quotations clearly affirm that contemporary judges tend to adopt a flexible approach that incorporates other schools, with this approach being privileged over strict alignment with classical Ḥanbalī sources

as Al-Atawneh mentions.²¹ Vogel further reiterates that Saudi judges are given discretion to practice broad *ijtihād* and are not therefore restricted to the Ḥanbalī or any other school.²² The judge proceeded to invoke Ibn Bāz, the prominent Saudi scholar, who was in turn referring to Ibn Taymiyya's reported opinion (upon whether it is permissible to nullify the marriage when there is dispute, either with or without compensation obtained from the wife). He said:

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

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

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

²¹ The scholars currently go beyond Ḥanbalism and draw inspiration not only from their Ḥanbalī intellectual predecessors, but also from a wide array of non-Ḥanbalī traditions and scholars. Further information, see Muhammad Al-Atawneh, *Wahhābī Islam Facing the Challenges of Modernity: Dār al-Iftā in the Modern Saudi State* (Leiden: Brill, 2010), 329.

²² Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), 107.

fallen likewise the price of the product changes upon having defect before the delivery.”²³

The approach advanced by Ibn Qudāma suggests that it is not important if the husband provides permission. Traveling to a particular destination or spending the night outside of the home negatively impacts the right of maintenance and to perform such actions in the absence of permission can be interpreted as disobedience. Additionally, the Permanent Committee accepts leaving from the husband’s house either obtaining his permission or providing a religious excuse that forces her to go out.²⁴ Although the Committee’s *fatwā* seeks to align with the traditional Ḥanbalī interpretation, this *fatwā* adopts a more flexible stance by allowing visits to be undertaken with the permission of the husband.

It should also be recognised that there is a clear distinction between dower and matrimonial or bridal gifts that are given during the marriage ceremony. *Mahr* is an integral element of Muslim matrimonial law while marital gifts are not a part of Muslim legal tradition and are instead part of customary tradition. The *mahr* is a legally preserved right of the bride that is subject to the control of her disposal. The latter are sums of money and presents that are provided by either the bride or groom’s family with the intention of showing respect to the other side. In instances of divorce, the legal status of the gift is not clearly expressed, with this feature being attributable to the influence of custom.

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

“It is permissible for you to take the car from your son-in-law. If he gave it to you as a *mahr*, it should go to your daughter. However, if he gave it to

²³ Ibn Qudāma, *Al-Kāfi*, 3/86.

²⁴ *Fatwā* No. 18280 in *Fatwās of the Permanent Committee*, 19/165 (Accessed 6 June 2018).

you as a gift; you may take it for yourself but your son-in-law has to pay a proper *mahr* to your daughter if he did not do so at the time of the conclusion of the marriage contract.”²⁵

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

“When the husband and wife differ in the household, (what is the solution)? The clothes of the women belong to woman likewise the clothes of the men belong to man. Then each takes an oath about what he or she owns of the rest of their household goods. Abū Dāwūd said: ‘What if there is doubt about the truthfulness of their oaths?’ Aḥmad said: ‘Then the rest of their household goods are divided up into equal halves.’ The situation of a slavery husband was asked to him and he said that the same procedure is followed, whether free or slave does not matter.”²⁶

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

3.2. ‘*Urfī* (Customary) Elements

Although complacency in religious obligations would appear to give the wife a legitimate basis for requesting a divorce, the judge did not take this factor into consideration when issuing his decision. When classical sources

²⁵ *Fatwā* No. 12354 in *Fatwās of the Permanent Committee*, 19/43 (Accessed 7 June 2018).

²⁶ Sulaymān ibn al-Ash’ath Abū Dāwūd, *Masā’il al-Imām Aḥmad Riwāyat Abū Dāwūd Sulaymān ibn al-Ash’ath al-Sijistānī* (Beirut: Dar al-Ma’rifah, 1980), 181.

are the objects of reference, this complaint can conceivably be accepted as a justifiable reason for divorce; however, the judge shifted away from traditional methods and therefore gave this complaint little credence. Vogel refers to a divorce trial that was initiated by a wife in order to divorce her drunkard husband who was also abusive to her.²⁷ During this case, the judge sought to establish whether the facts corresponded to significant harm or if the accusation of drunkenness was merely being used to excuse divorce. In addressing themselves to *hadd* (prescribed punishment), the judges focused upon worldly rather than religious accusations. The interpretative approach clearly demonstrates how the method of the proof-evaluation, even by a judge who uniformly applies accepted Hanbali rules, could lead to diversities by virtue of judicial custom. The question of whether the change is connected with the custom or not requires further research; however, the fact that religious factors were not engaged in great length during the decision process lends further strength to the proposition that judges are increasingly orientating towards contemporary or customary influences.

The question of what constitutes disobedience is subject to interpretation and is largely dependent upon the social circumstances of the respective parties. In the case, the wife has been found guilty for the reason that she left her husband's home without his permission and she would automatically forfeit the financial right.²⁸ The husband's rejection of all accusations at the court procedure laid the burden of divorce on the wife. *Nushūz* was probably the final element of the judge's decision, which clearly established that the wife should reimburse the husband for gifts that were given during the marriage. The husband's denial of his wife's accusations impacted negatively upon the Court's perception of the wife by clearing the way for the charge of disobedience, along with the forfeiture of the value of the gifts that had been given to her during marriage.

In issuing his decision, the judge ordered the wife to pay the amount of 2000 SR, along with half of the *mahr*. The legal grounding for making this amount obligatory can be traced back to gifts provided at the beginning and duration of the marriage. Considering the verdicts of the Permanent Committee in the court case, the judge clearly sought to apply his own method or a further innovation – this was clearly indicated in the fact that

²⁷ Vogel, *Islamic Law*, 140-141.

²⁸ If the wife is found guilty, she would automatically forfeit her financial rights. Further information, see Welchman, *Women and Muslim Family Laws*, 110.

the wife was not given ownership of the gifts. The judge's decision somehow surmounted the limitations of the legal sphere and rooted itself within the Saudi social context. Wynn suggests that within contemporary Saudi Arabia, it is widely expected that the woman, in the aftermath of divorce, will return to her family – whether a brother, father or even sister.²⁹ The expectation that she will leave her home is further reiterated by the fact that the majority of people believe that the contents of the home and household expenses are the responsibility of the groom: the house is his property and his contributions during the marriage will revert to him in the instance of divorce. Oman has reflected upon the implausibility of bargaining away the wife's claim on her husband's future assets or income in the marriage contract. He states:

“To be sure, a man who gets married under *sharī'a* law in Saudi Arabia may well expect that upon divorce his wife has no claim on the wealth he has acquired during the course of the marriage. This expectation, however, does not arise as a matter of contract. Rather, it arises because of the background rules of Islamic property law.”³⁰

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

“If the matter is exactly as what is mentioned in the question, there is no impediment to include such a *qa'ymah*³¹ with the document of the contract of marriage. Both the bride and the groom may sign it to define for sure what the husband has bought in case that a dispute between the two sides arises as a *khul'* (divorce at the request of the wife in return for compensation to the husband) is to take place.”³²

When household goods are registered on behalf of the spouses, they

²⁹ Wynn, “Marriage Contracts and Women's Rights in Saudi Arabia: Mahr, Shurūt, and Knowledge Distribution”, *The Islamic Marriage Contract Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Massachusetts: Harvard University Press, 2008), 205.

³⁰ Nathan B. Oman, “Bargaining in the Shadow of God's Law: Islamic *Mahr* Contracts and the Perils of Legal Specialization”, *Wake Forest Law Review* 9/46 (2010), 21.

³¹ *Fatwā* No. 8875 in *Fatwās of the Permanent Committee*, 19/39 (Accessed 7 June 2017). (Question: What is ruling on the so called *Qa'ymah* (list) of all house items, whether bought by the groom or anyone else that is attached to the marriage contract? It is noteworthy that such a *qa'ymah* is claimed to be among the public interests especially in this age with the spread of fraud, and that it is a similar document to the marriage contract itself.)

³² *Fatwā* No. 8875 in *Fatwās of the Permanent Committee*, 19/39 (Accessed 7 June 2017).

are treated as personal properties with this privilege clearly distinguishing them from both bridal gifts and *mahr*. If disputes arise, it is accepted that the respective owners are legally entitled to retrieve their personal belongings. Although this is appropriate for personal items, this does not extend to gifts and *mahr*.

This outline appears to relate a social custom that is not anticipated or sustained in the classical sources that relate to the status of marital gifts; in this instance, it appears that the judge unintentionally used his customary background in order to resolve the dispute. This is the usage of the custom in the form of indirect reference by virtue of judicial custom as Ibrahim states.³³ It should be recognised that both the *ḥadīth* and the early juristic literature are, with the exception of the *ṣadāq* (deferred dower),³⁴ almost completely silent upon marriage gifts. Rapoport's article that compares the legal situation of matrimonial gifts in Egypt, observes that Islamic law transformed the gifts of the groom into the essential element of the marriage contract known as *mahr*; however, its implementations occurred within a wider context strongly influenced by local traditions of marriage settlements.³⁵ In excluding the legal position of *ṣadāq* and considering it as part of dower, the legal status of the matrimonial gift, as opposed to *mahr*, is decided in accordance with the prevalent custom established by the school. When these two factors do not function in harmony, a tension between local practices and the requirements of Islamic law (not only of the one school but also other schools) will result. Egypt resembles Saudi Arabia in this respect – in both contexts, the extension of property rights over endowments and gifts is left as an open question and operates largely within the unofficial sphere while being closely aligned with custom. This development is also, it should be noted, mirrored by the development of the relationship between law and society. In operating under changing social conditions, the criteria governing the status of marriage gifts within instances of divorce has remained flexible, with the consequence that it is continually contested within both the judicial (most notably in the interpretative approach depending on judicial custom) and public arenas. The legal regulation of matrimonial gifts should therefore be understood as an

³³ Ibrahim, "Customary Practices", 226, 248.

³⁴ *Ṣadāq* means part of the dowry which is postponed until the termination of the marriage by death or divorce. Further information, see Welchman, *Women and Muslim Family Laws*, 90-91.

³⁵ Yossef Rapoport, "Matrimonial Gifts in Early Islamic Egypt", *Islamic Law and Society* 7/1 (2000), 22-24.

interaction between local practice and the *sharī'a* in which the respective elements have interacted and shifted over time.

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

CONCLUSION

The analysis of the court decision offers the scope of distinctions for today's procedure and reveals the effect of custom by virtue of judicial custom. The status of dowry and gifts that were given by the husband to her wife in the course of marriage became a subject of dispute for the case. The verdict of judge and his quotations from traditional sources in order to justify the decision reveals the *sharī* and customary components of the contemporary legal approaches. Underscoring the concept of *qiwāma* or 'authoritative supervision' in the judgement clarifies that the practice of personal law in Saudi Arabia is connected with its custom not only as a legal tool but also as a facilitator of legal interpretation where there is no explicit regulation. This allusion to the principle provides considerable insight into the judge's ruling because the *sharī* principles permit a judge to refer to *maṣlaḥa* in the schema of law with the intention of excluding fixed ordinances and ritual law. Its use is particularly suited to deciding upon new cases for which no attestation can be found within the main sources of the law. The judge's reference to the principles of *istiḥsān* (juristic preference) or *maṣlaḥa* (public interest) endows the legal decision with validity and demonstrates how legal jurisprudence is compatible with the classical way of thinking even in the implementation of custom.

The presence of *urf* within the decision-making process is indicated by the fact that the rule is not encountered within the *fiqh* literature nor the *marsūm al-maliks*. The judge issued this decision because he was fully aware that customary norms require the gifts and jewellery to be returned.

At this point, the emphasis should focus on the dependent usage of customary norms in the form of judicial custom. Because the authoritative sources do not straightforwardly resolve the status of the gift, the judge indirectly invokes the custom by placing it under the *maşlahā* principle.

BIBLIOGRAPHY

- Abou El Fadl, Khaled. *Speaking in God's Name: Islamic Law Authority and Women*. Oxford: Oneworld, 2001.
- Abū Dāwud, Sulaymān ibn al-Ash'ath. *Masā'il al-Imām Aḥmad Riwāyat Abū Dāwud Sulaymān ibn al-Ash'ath al-Sijistānī*. Beirut: Dar al-Ma'rifah, 1980.
- Al-Atawneh, Muhammad. "Wahhābī Legal Theory as Reflected in Modern Official Saudi Fatwās: Ijtihād, Taqlid, Sources, and Methodology". *Islamic Law and Society* 18 (2011), 327-355.
- Al-Atawneh, Muhammad. *Wahhābī Islam Facing the Challenges of Modernity, Dār al-Iftā in the Modern Saudi State*. Leiden: Brill, 2010.
- Al-Dabbagh, May ve Gargani, Ghaliya. "Saudi Arabia". *Arab Family Studies: Critical Reviews*. Edited Suad Joseph, 275-294. New York: Syracuse University Press, 2018.
- Al-Jarbou, Ayoub M. "The Role of Traditionalist and Modernists on the Development of the Saudi Legal System". *Arab Law Quarterly*, 21 (2007), 191-229.
- Al-Sisī, Fahd ibn Maḥmūd bin Aḥmad. "*Makānat al-'Urf fi al-Sharī'ati al-Islāmiyyet wa Athāruhū fi Sinni al-Inzīmati fi Mamlakat al-Arabiyya al-Su'ūdiyya*". Medina: Kulliyya al-Shar'iyya fi al-Jāmi'a al-Islāmiyya, Master thesis, 2009.
- Bābakī, 'Alī Ibn Yahyā. *Qaḍāyā al-Ṭalāq wa al-Ḥaḍānat wa al-Nafaqāt wa al-Ziyārat*. Riyadh: Maktaba Dīwān al-Muḥāmin, 2015.
- Ibn Qudāma al-Maqdisī, 'Abdullah ibn Aḥmad ibn Muḥammad. *Al-Kāfi fi Fiqh Ahmad Ibn Hanbal*. Dār al-Kutub al-'Ilmiyya, 1994.
- Ibrahim, Ahmed Fekry. "Customary Practices as Exigencies in Islamic Law Between a Source of Law and a Legal Maxim". *Oriens* 46 (2018), 222-261. (Forthcoming).
- Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge: St Edmundsbury Press, 1991.
- Layish, Aharon. "Saudi Arabian Legal Reform as a Mechanism to Moderate Wahhābī Doctrine". *Journal of the American Oriental Society* 107 (1987), 279-292.
- Layish, Aharon. *Women and Islamic Law in a Non-Muslim State: A Study Based on Decisions of the Shari'a Courts in Israel*. Tel Aviv: Tel Aviv University, 1975.

- Marar, Amr Daoud. "Saudi Arabia the Duality of the Legal System and the Challenge of Adapting Law to Market Economies". *Arab Law Quarterly*, 19 (2004), 91-123.
- Mubārakī, Aḥmad ibn 'Alī Sīr. *Al-'Urf wa Atharuhū fī al-Sharī'ati wa al-Qānūn*. Riyadh: 1993.
- Nasir, Jamal J. *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*. London: Graham Trotman, 1990.
- Oman, Nathan B. "Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization". *Wake Forest Law Review* 9/46 (2010), 1-27.
- Rapoport, Yossef. "Matrimonial Gifts in Early Islamic Egypt". *Islamic Law and Society* 7/1 (2000), 1-36.
- Recki, Birgit. "Culture". *Religion, Past, Present: Encyclopedia of Theology and Religion*, 4th ed. 3. Leiden: Brill, 2007.
- Rosen, Lawrence. *The Anthropology of Justice: Law as Culture in Islamic Society*. Cambridge: Cambridge University Press, 1989.
- Rosen, Lawrence. *The Justice of Islam: Comparative Perspectives on Islamic Law and Society*. New York: Oxford University Press, 2000.
- Shabana, Ayman. "Custom, as a Source of Law". *Encyclopedia of Islam*. 3rd ed. Brill Online. Accessed 25 October 2018, http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/custom-as-a-source-of-law-COM_24632.
- Shabana, Ayman. *Custom in Islamic Law and Legal Theory: The Development of the Concept of 'Urf and 'Ādah in the Islamic Legal Tradition*. New York: Palgrave Macmillan, 2010.
- Spectorsky, Susan A. *Chapters on Marriage and Divorce Responses of Ibn Hanbal and Ibn Rahwayh*. Austin: University of Texas Press, 1993.
- The Qur'an English Meanings*. Translated by Ṣaḥēeh International. Riyadh: Al-Muntada al-Islami, 2010.
- Vikor, Knut S. *Between God and the Sultan: A History of Islamic Law*. London: C. Hurst - Co, 2005.
- Vogel, Frank E. *Islamic Law and Legal System: Studies of Saudi Arabia*. Leiden: Brill, 2000.
- Welchman, Lynn. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*. Amsterdam: Amsterdam University Press, 2007.
- Wilcke, Christoph. "Saudi Women's Struggle". *The Unfinished Revolution: Voices*

from the Global Fight for Women's Rights. Edited Minky Worden, 93-106. Bristol: The Policy Press, 2012.

Wynn, Lisa. "Marriage Contracts and Women's Rights in Saudi Arabia: Mahr, Shurūt, and Knowledge Distribution". In *The Islamic Marriage Contract Case Studies in Islamic Family Law*. Edited Asifa Quraishi and Frank E. Vogel, 200-214. Massachusetts: Harvard University Press, 2008.

Yamani, Maha A. Z. *Polygamy and Law in Contemporary Saudi Arabia*. Reading: Ithaca, 2008.

Yargi, Mehmet Ali. *Suudi Arabistanin Yargi Sistemi*. Istanbul: IFAV, 2014.

Yasarī, Muhammad. *Al-Maşlahā fī al-Tashrī' al-Islāmī*. Cairo: Dār al-Yasr, 1954.

WEBSITES

<http://www.alifta.net/Default.aspx?languagename=en>.

<https://www.saudiembassy.net/basic-law-governance>.