

The Impact of Arbitrariness The Use of Marital Rights In Light of The Provisions of Islamic Sharia and Law

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Article Info	Abstract
<p><i>Article History</i></p> <p>Received: August 02, 2021</p> <p>Accepted: March 02, 2022</p> <hr/> <p>Keywords : Arbitrariness, Society, Phenomenon, Institutions, Individuals</p> <p>DOI: 10.5281/zenodo.6325968</p>	<p><i>Arbitrariness in the use of marital rights is a widespread and common social phenomenon among all groups in society, because it is a phenomenon that is felt and realized by everyone in this world, where everyone hears this news and it is circulated between houses and many members of society feel injustice because of this family arbitrariness, and the owners of associations, institutions, individuals and courts are also circulated; which searches for ways to reduce this arbitrariness or to solve the problems and effects that result from the arbitrariness of rights by spouses, especially in ignorant societies or societies where the proportions of the cultured and educated are low. The institutions and individuals of Sharia (The Divine law) play a major role in limiting this arbitrariness through what they have of the strong argument and legal evidence sourced from the Holy Qur'an and the Sunnah of the Prophet (Allah's blessing and peace be upon him), and the courts and lawyers also play an important role in limiting this arbitrariness, and making the law strict in some cases to limit this arbitrariness.</i></p> <p><i>The family is the cell of society and is considered one of the most influential systems in the individual and the formation of his personality, starting from the socialization and the extension of permanent relationships and interactions between its members, which are mostly face-to-face. Perhaps one of the most important features of the family system is that it contains forms of human interaction such as power, influence, and primary relationships between its members, and that any defect that affects one of its sub-systems extends to the rest of the other systems. The family, like any social system in society, is affected by the social and economic changes that have taken place in societies around the world. Its structure has changed and its functions have shrunk, and family problems did not exist before, among them the problems of mismatch of passion, jealousy, cheating, cultural dissonance and tendencies between spouses, which resulted in prevalence of family arbitrariness.</i></p>

Introduction

The Study Problem

Islam has clarified the provisions that the husband must abide by towards his wife and vice versa in all aspects of life, from cohabitation, communication, and material and moral rights, as well as the importance and necessity of avoiding arbitrariness, whether by the husband or wife, and the study problem can be formulated in the following main question:

What is the impact of arbitrariness on the use of marital rights in light of the provisions of Islamic Sharia and positive law? Several sub-questions emerge from this question:

1. What are the Sharia and legal constraints regulating the use of marital rights in arbitrariness?
2. What are the ways and means that spouses use to arbitrariness of their marital rights?
3. What are the necessary proposals to reduce arbitrariness of marital rights from a Sharia, legal and social perspective?

The Objectives of The Study

1. Outline the Sharia and legal constraints regulating the use of marital rights in abuse.
2. Explanation of the ways and means that spouses use to arbitrariness of their marital rights.
3. Identifying the necessary proposals to reduce arbitrariness of marital rights from a Sharia, legal and social perspective.

The Importance of Studying

The importance of the study lies in dividing it into practical and theoretical importance, according to the following:

Theoretical (Scientific) Importance:

1. The Theoretical Importance of the study stems from its handling of the theoretical framework of marital relations from a Sharia and legal perspective.
2. The present study is theoretically characterized by presenting the causes and consequences of arbitrariness of marital rights.
3. The current study is comprehensive of Islamic Legislation and Positive Law applied in many countries now and the importance of adhering to it.

Practical Importance:

1. Providing a procedural basis for those in charge of associations and institutions concerned with family affairs.
2. Empowering decision makers in societies to promote the correct and real foundations of family structure and its requirements.
3. This study is a scientific and practical guide for new spouses in determining and knowing marital rights and not misusing them.

The Study Approach

The study relied on the analytical descriptive method by describing the phenomenon of arbitrariness through Sharia and legal texts and analysing it to reach the most important results while relying on the comparative approach between Islamic Sharia and Laws.

The Study plan:

The First Topic: The Nature of Marital Arbitrariness in the Use of the Right and its Effect.

The First Subject: The Concept of Marital Arbitrariness.

The Second Subject: The Effect of Marital Arbitrariness.

The Second Topic: Sharia Constraints and Legal Mechanisms of the Theory of Arbitrariness of the Right.

The First Subject: The Legal Constraints of The Theory of Arbitrariness in The Use of The Right.

The Second Subject: Legal Mechanisms of The Theory of Arbitrariness of The Right.

Conclusion**Findings and Recommendations**

The First Topic: The Nature of Marital Arbitrariness in the Use of the Right and its Effect.

The First Subject: The Concept of Arbitrariness.

Clarifying the concept of arbitrariness requires us to know its linguistic and idiomatic meaning, and the importance of this is highlighted in the fact that this theory was the subject of great controversy between a denier and asupportive, as it is a fully-fledged theory, and it has actual applications represented in the sum of the cases in which it can be achieved, and the arbitrariness of the right can be defined according to the following:^{*}

Linguistically: Arbitrariness is derived from the verb "Assaf", which means walking without guidance. It is said that "AssafaAlwoulah" which means "the tyranny of rulers"

Idiomatically: This theory has a supportive opinion and a denial opinion: the opinion that denies it believes that the right to property is an absolute right, and it justifies this according to its philosophical background resulting from the individual central tendency, which makes the human being the center and objective of the right. Among the reasons it cites in its denial of arbitrariness, we find that rights take precedence over the law, society and the state. The release of the right encourages the right, which constitutes a real pillar of development in society. The public interest for them is nothing but a picture of the private interest so that it is achieved by simply observing the latter always, and among the most prominent jurists who deny the arbitrariness of the right, we find the jurist Planiol, who believes that the right can only be used if it is legitimate.

As for the supportive opinion, it appeared after the negative effects resulting from the individual doctrine. Modern jurisprudence settled on recognizing real estate as a social function, in order to coordinate between the various properties and an attempt to balance the satisfaction of individual needs and social needs. Among the most prominent advocates of this French jurist, Josserand, who believes that every right granted to its owner aims to achieve a social goal.[†]

^{*} Nabil, Khadem, (2020), The Independence of the Unusual Neighborhood Hazards Theory from the Theory of Abuse of Right (A Study in the Light of Algerian and Egyptian Jurisprudence), Journal of Land Law and Environment, Algeria, Vol. 8, Issue 2, p. 279-303.

[†] Nabil, Khadem, (2020), aforementioned reference, p. 287.

The Second Subject: The Effect of Arbitrariness.

There is no doubt that the husband's arbitrariness of his marital rights has serious effects on all family members, including spouses and children, among which we will mention:[‡]

1. **Lack of trust between spouses:** Marital arbitrariness leads to her distrust of her husband because she lives in a state of anxiety, instability and frustration, as well as the case for the man, who lives an unstable life, so he becomes suspicion and mistrust of everything his wife does, which makes him lose balance.
2. **Women's defeatism and mental illness:** which make women suffer from a disorder in her personality because of the thoughts and worries that she has, and her feeling of fear and anxiety about the future.
3. **Lack of a suitable environment for raising children:** the arbitrariness of the husband leads to an increase in the chances of delinquency in children; Because it is the phase in which this person's concept of life and his view of it is determined.
4. **Stumblein the relationship between children and parents:** arbitrariness leads to children deliberately limiting their relationships for fear of their parents, which leads to disruption of the role of parents in the health education process for children.
5. **Weak marital relations and resorting to divorce:** If the relations between family members deviate from the correct path, life becomes unbearable, which leads women to seek separation to limit theharm.
6. **Wife's cheating:** the arbitrariness sometimes pushes the wife to take revenge on the husband, by taking revenge on him herself by betraying him and desecrating his bed, thinking that she is doing him harm.

[‡]Obeidat, Shibli, and Al-Sharifin, Youssef, (2017), Husband's arbitrariness of his wife and its impact on the stability of the Muslim family, Journal of Al-Quds Open University for Research and Studies, Issue 42, Volume 1, p. 154-166. p. 160.

The Second Topic: Sharia Constraints and Legal Mechanisms of the Theory of Arbitrariness of the Right.
The First Subject: the legal constraints of the theory of arbitrariness in the use of the right.

Wives must know the constraints and their spouses' rights over them. The husband's failure to use his marital rights and at that time feels unjust, so she must know those rights and implement them - and also - make the husband not to find any justification for him to arbitrariness of marital rights. Among the rights of the husband over his wife are the following: **Obey him without obstinacy:** The Prophet, Allah's blessing and peace be upon him, was asked "Which woman is best?" and he said: 'The one who makes him happy when he looks at her, obeys him when he commands her, and she does not go against his wishes with regard to herself nor her wealth.' (Hasan)

Surrender herself to him whenever he asks to pleasure him: The Prophet, Allah's blessing and peace be upon him, said: "By the One in Whose Hand is the soul of Muhammad! No woman can fulfill her duty towards Allah until she fulfills her duty towards her husband. If he asks her (for intimacy) even if she is on her camel saddle, she should not refuse." (Sahih: Narrated: Ibn Majah)

Asking his permission for voluntary fasting: The Prophet, Allah's blessing and peace be upon him, said: "It is not lawful for a woman to observe (voluntary) fasting without the permission of her husband when he is at home; and she should not allow anyone to enter his house without his permission." (Al-Bukhari and Muslim)

Preserving his religion and honour: The Prophet, Allah's blessing and peace be upon him, said: "Do not ask about three: a man who parts company with the community, rebels the ruler and dies while he is still a rebel. Do not ask about him. Or a slave or slave girl who runs away from his master. Or a woman whose husband is absent and who has sufficient provision and then displays her adornments to strangers and mixes freely." Sahih (Al-Albani)

Preserving his money: The Prophet, Allah's blessing and peace be upon him, said: "When a woman give charity from her husband's house, she will have a reward, and her husband will have a similar reward, and the storekeeper will have a similar reward, without the reward of any of them detracting from the reward of the others in the slightest. The husband will be rewarded for what he earned and she will be rewarded for what she spent." (Narrated: Al-Bukhari, Muslim, Al-Tirmidhi and Ibn Majah)

Serving him and taking care of his affairs: The Prophet, Allah's blessing and peace be upon him, said: "All of you are guardians and are responsible for your subjects; the woman is guardian in her husband's house and responsible for her wards." (Bukhari and Muslim)

Respect him and refrain any talking about him: The Prophet, Allah's blessing and peace be upon him, said: "Whenever a woman harms her husband in this world (that is without any due right), his wife among the (Houris in Jannah) says: 'You must not harm him. May Allah destroy you! He is only a passing guest with you and is about to leave you to come to us.'" (Sahih: Sahih Sunan Ibn Majah)

Kindness to his family: The Prophet, Allah's blessing and peace be upon him, said: "May he be disgraced! May he be disgraced! May he be disgraced, whose parents, one or both, attain old age during his life time, and he does not enter Jannah (by rendering being dutiful to them)." (Narrated: Muslim)

Honouring his Guests: The Prophet, Allah's blessing and peace be upon him, said: "virtuous behaviour and saying are among the deeds of Jannah." (Al-Mundhiri: Narrated: Al-Tabarani in Al-Awsat)

Women's rights during marriage (the effects of marriage), and their duties:

The rights and duties of a woman during marriage can be stated according to the following:[§]

1. **Kind Treatment:** Meaning, for example, it is not permissible for a husband to beat his wife; It is also not permissible for him to offend her or her family by word or deed, and she has the right to be safe for her possessions, herself and her home, and if the husband fails to do so, she has the right to resort to the court.
2. **The husband's commitment to the terms of the marriage contract:** A distinction must be made between a woman's condition on her husband's permission to educate her and the condition that the husband should bear the expenses of the study. The Sharia courts have ruled that the woman's condition on her husband be educated does not mean that the husband must bear the expenses of her education; The fact that this is outside the contents of the legally considered alimony.
3. **Dowry:** The woman must document the reality of the status of the dowry in the marriage contract in terms of receiving it in whole or in part or not.
4. **Alimony:** The husband shall bear his wife's alimony from the time of the conclusion of the contract.
5. **Legal Domicile:** The husband shall prepare a legal residence for his wife, and the lack of such a home is one of the defences with which a woman can drop the case of obedience.
6. **The most important duties of the wife in the right to obedience:** It is necessary to point out that a woman's work outside her home without her husband's permission may be classified as a disobedience. However, if the woman was working in the first place and before the husband, the

[§] The Palestinian Center for Independence of the Judiciary and the Legal Profession "MUSAWA", (2013), Dear Woman: Know your legitimate rights, Palestine, p. 1-20.

husband has no right to deprive her of it, as long as it was not stipulated at the time of the contract. Also, the wife who is expelled by the husband from her home is not considered a disobedient under the rule of law.

The Second Subject: Legal Mechanisms of The Theory of Arbitrariness of The Right.

The Algerian legislator regulated the provisions of arbitrariness in Article 124 bis of the Civil Code by stating: The arbitrary use of the right constitutes a mistake, especially in the following cases:^{**}

1. If it occurred with the intent to harm others.
2. If it is intended to obtain a small benefit in relation to the harm caused to others.
3. If it is intended to obtain an unlawful interest.

As for the Egyptian legislature, it has adopted it within the provisions of Article (5) of the Civil Code by stating: “The use of an unlawful right is in the following cases:^{††}

1. If it is only intended to harm others.
2. If the interests that it aims to achieve are so few that they are not commensurate with the harm that befalls others.
3. If the interests it aims at are illegal, even if the terminology differs.

Mechanisms of Arbitrariness in Arab Laws:

Mechanisms of arbitrariness of the right in accordance with the provisions of Arab Laws, in relation to the subject of the research:^{‡‡}

A guarantee shall be imposed on the person who unlawfully uses his right, through:

1. If there is an intent to infringe.
2. If the desired interest in the act is illegal.
3. If the benefit from it is not commensurate with the harm caused to others.
4. If tradition and custom are exceeded.

This is what the Civil Code of the United Arab Emirates took. As for the Egyptian, Syrian, Iraqi, and Algerian Codes, they agreed with the Jordanian Code on the first three clauses, and did not restrict arbitrariness by transgressing tradition and custom. As for the Lebanese Code of Obligations, Article 124 of it states:

Compensation is obligated to whoever harms others by exceeding, while using his right, the limits of good faith or the purpose for which this right was granted, and thus the Lebanese Code will overcome the idea of disproportion between interests, which is agreed upon by the previously mentioned Arab Codes, quoted from the Civil Transactions Code of the United Arab Emirates 5/1985 Article 106 Egyptian Civil Code No. 131 of 1948 with Articles 4 and 3, Syrian 1949 Articles 5 and 6, Iraqi No. 40 for 1951, Algeria for 1075 and Lebanon for 1932.

Arbitrariness In Modern French Law:

Where the judiciary first began by defining the idea of arbitrariness, explicitly and clearly, and this appears in its applications. As for the French jurisprudence, which was also credited with reviving the theory, it did not pay attention to the rulings of the judiciary until the late 19th century AD, and the banner of this theory was carried in the modern jurisprudence, Sally and Josserand, and the second accounted for the first and last rounds. In French jurisprudence, whoever considers the right illegal, no blame, there was no intention of harm as long as it targeted purposes other than those for which the right was legislated, as the mere transfer of the right from a social function is its use, and therefore the right -in the theory of these- a social function granted to the individual in order to perform a service for the group, not to achieve self-interest, as in parental authority, it is in the interest of the child more than the interest of the parents.^{§§}

^{**} Nabil, (2020), op. cit, p. 288

^{††} Nabil, (2020), op. cit, p. 288

^{‡‡} Atili, Sajida (2011). Arbitrary Divorce and Compensation for it between Islamic Sharia and Jordanian Law, Master's in Jurisprudence and Legislation, Faculty of Graduate Studies, An-Najah National University, Palestine, p. 38.

^{§§} Obaid, Fatima, and Hamlet, Amina (2011). Arbitrariness of the right, summary, Faculty of Law and Political Sciences, University of Dr. Moulay Tahar Université de Saida, Ministry of Higher Education and Scientific Research, Algeria, p. 1-73.

Conclusion

The principles of Islamic Sharia are among the sources of legislation in Islamic and Arab Countries for most marital rights. It has been determined when arbitrariness of the right occurs, if it occurs with the intent of harming others, and if the purpose is to obtain an unlawful benefit. The Islamic Sharia has developed various evidences that are suitable for protection from the arbitrariness of the right in any section of Sharia, and any type of arbitrariness, such as family, economic or educational arbitrariness. As for the Positive Law, it is specified with a guarantee that the person who unlawfully uses his right, and that the use of the right is unlawful. The forensic and legal evidence for the time when there is arbitrariness of the right, and the evidence for limiting the arbitrariness of the right in accordance with the legal theories of arbitrariness, have been stated.

Findings of the Study:

1. The frequent occurrence of conflicts between spouses as a result of the arbitrariness of one of them in the excessive use of his rights, and the resulting damage to one of them, and often the wife.
2. The wives' lack of knowledge in particular of their rights to claim compensation and rehabilitation, which wastes many rights and also wastes the dignity of many women.
3. The theory of arbitrariness in the use of right is the product of Islamic Sharia, which is characterized by generality and comprehensiveness, and this theory has been widely applied in all fields, except that the family environment is the fertile field for it, as it is not limited to rights and financial relations only, but extends to the rest of the rights and relations as is the case in the relationship between spouses and between the father and his children.

Recommendations of the Study:

1. The necessity of compensating the wife in the event of an arbitrary divorce in order to ward off the harm inflicted on her, and her support in that is the pleasure that some jurisprudence dictates to every divorced woman.
2. The need for the wife to know all the rights and obligations of the religious and legal reality.
3. Work on holding scientific and educational seminars for women and men to raise awareness of marital life to reduce the arbitrariness of the right of both parties.

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