

The Use of Conjugal Rights between Arbitrariness and Governing Controls In Light of the Provisions of Islamic Sharia and Positive Law

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Article Info	Abstract
<p>Article History</p> <p>Received: August 02, 2021</p> <p>Accepted: March 02, 2022</p> <hr/> <p>Keywords : Abuse of Right Theory, The Concept of Arbitrariness, Controls of Arbitrariness, Reasons of Arbitrariness, The Use of Right Theory.</p> <p>DOI: 10.5281/zenodo.6326004</p>	<p><i>This research aims to explain the abuse of right theory, clarify the concept of arbitrariness, clarify the controls of arbitrariness in Islamic law as well as the rule of Islamic Sharia in the arbitrariness of the husband. The researcher adopted the scientific inductive reasoning method by tracing the information related to the subject of the research from its own perspective, and the analytical method was also adopted in analyzing and commenting on some issues related to the subject of research. The researcher concluded several results as follows: The concept of arbitrariness is not exotic to the Islamic jurisprudence, as it was mentioned by Muslim scholars in many chapters of their writings of jurisprudence, but under another name and different terms, ones of which are: intransigence, abuse, and blameworthy use. The meaning of arbitrariness is the contradiction between the intention of the guardian and the intention of the wise legislator in exercising a legal right in the original, and a person shall be considered abusive and arbitrary in the use of his right if he intends to exercise his legal right only to cause annoyance, harm, or injury to another, or to use it for a purpose other than the interest for which it was prescribed. The media plays a major role in sensitizing members of society about the dangers of the arbitrariness of the husband and abusing the right of his wife and the impact of this abuse on the Muslim family stability, as well as its impact on the school curriculum.</i></p>

Introduction

Before the man-made laws, Islamic Sharia was concerned with the theory of arbitrariness in the use of the right, based on the Sharia rule "Damage is Removed", and according to the Prophet "Allah's blessing and peace be upon him" who said: "There should be neither harming nor reciprocating harm." Islamic Sharia has placed restrictions on special rights when using them so as not to overuse this right, and so as not to harm others, whether the intention of using the right is to harm or not. Arbitrariness in the use of the right is considered a departure from the limits of the right itself. A Muslim has the right to use his own right, provided that this use does not cause harm to the interest of others.

Therefore, the use of the legitimate right is not absolute, but rather restricted, and the use of the right absolutely causes corrupts absolutely, and one of the most important constrains and restrictions is not to intend to harm others and not to arbitrariness the using right. The Islamic Jurisprudence defined and gave some models that lead to the arbitrariness of using the right, which requires the intervention of the judiciary to lift the excess of the arbitrariness of using the right and the annulment of the act. One of these forms is that a person intends by exercising his right to harm others without an interest that he derives from this use, such as in the case of terminal illness divorce, with the intention of depriving his wife of the inheritance. Likewise, if the use of the right is intended to achieve an illegitimate purpose, such as the one who interferes to reconcile between the spouses with the intention of ruining the relationship between her and her husband in order to marry her. A person is considered arbitrariness in his use of his right with the intent of achieving a legitimate interest, but it entails greater or equal harm to others. Therefore, every arbitrariness of rights, whether special or public, causes harm to others, which is prohibited by Islamic Sharia. The theory of arbitrariness in the use of the right is a theory whose origins are in the Holy Qur'an and Sunnah, and its applications have varied in the jurisprudence of the companions and followers and after them, then the positive law came to take the glorious Sharia as an Imam that guides it in legislating texts and laws. Among these legislations is the UAE legislation. It was the first version of the draft Personal Status Law in 1978, which was prepared by the Supreme Islamic Legislation Committee, which was formed by His Highness the Late Sheikh Zayed, may Allah have mercy on him. Then the construction of this law was completed by the Uniform Law in 1985, then in 1997 the state formed a committee that included many scholars and consultants to prepare a draft Personal Status Law, and it was finished, but like previous drafts, it never came out. In 2002, a technical committee was formed to return this draft, which was actually implemented, in 363 Articles, and was published in 2005, then the Family Guidance

Committee was established in 2008, and this indicates the keenness of the Emirati legislator to enact laws that control society and suit the conditions of the country and people.

The Research Significance:

The significance of the research lies in shedding light on a matter of the utmost importance that is the use of conjugal rights between arbitrariness and governing controls in light of the provisions of Islamic sharia and positive law, and explaining the concept, reasons, controls of arbitrariness and the rule of Islamic sharia in the same.

The Research Objectives:

The research aims to clarify a set of objectives, which are as follows:

- 1- Explain The Abuse of Right Theory
- 2- Clarify the Concept of Arbitrariness
- 3- Clarify the Controls of Arbitrariness in Islamic Law
- 4- Explain the Rule of Islamic Law in Husband Arbitrariness

The Research Problem:

Considering the destabilization and disintegration of society in general and the family in particular, due to the man's intransigence and his arbitrariness against his spouse, which sometimes pushes the spouse to the path of stubbornness, and it comes to mutual insults, and sometimes even cause physical damage, we will try through these problems to answer these questions

- 1- What is the abuse of right theory?
- 2- What is the meaning of arbitrariness?
- 3- What are the controls for the use of the right in Islamic law?
- 4- What is the rule of Islamic law in husband arbitrariness?
- 5- What are the reasons for husband arbitrariness?

The Research Approach:

The researcher adopted the scientific inductive reasoning method by tracing the information related to the subject of the research from its perspective, and the analytical method was also adopted in analyzing and commenting on some issues related to the subject of research.

The Research Plan:

First Topic: The Abuse of Right Theory.

First Chapter: The Concept of Arbitrariness.

Second Chapter: Controls of Arbitrariness in Islamic Law.

Second Topic: The Rule of Islamic Law in Husband Arbitrariness.

First Chapter: Reasons for Arbitrariness.

Second Chapter: Signs of Husband Arbitrariness.

The Research Conclusion.

The Research Results and recommendations.

First Topic: The Theory of Arbitrariness in The Use of the Right

There is no doubt that the Islamic Sharia came for the righteousness of people, and to lend a helping hand through this life, so that they may be every last one of them be happy, and it legislated what would achieve and preserve their interests, and these interests were considered one of its necessary and inevitable purposes, which is to preserve religion, soul, the offspring, the mind, and properties, so it legislated what establishes its pillars of the presences. It also legislated what is prevented from nullification and negligence in the aspect of nothingness, through the commands and prohibitions contained in the Sharia, and therefore the preservation of religion comes in the first place from these purposes. Through it, the conscience of faith is formed that binds the link of divine connection, and the feeling of divine control over all these purposes, and ensures their preservation and maintenance, and not deviating from the intention of the legislator.

Therefore, Islamic Sharia considers the law's reliance on morals as the highest degree of legislative supremacy, which brings humanity to the perfection towards which the purposes of Sharia aim. All of these objectives indicate the use of the right that the intent of the competent must agree with the intent of the legislator, and that

the rights be compatible with their general purpose and social function so that the intentions and rights do not tend to harm others and are not inclined to illegal motives. *

First Chapter: The Concept of Arbitrariness

The concept of arbitrariness is not exotic to Islamic jurisprudence, as it was mentioned in the books of Islamic jurisprudence. If we considered the language of such era, we would find that the word of arbitrariness was not mentioned, but rather it came to us from legal scholars, and an equivalent term to arbitrariness was mentioned in the books of the Fundamentals of Fiqh, which is the Blameworthy use †.

The word intransigence appears in the writings of the scholars, as they intended to use the right without benefit. They used to prevent intransigence from harming and transgressing others.

The Semantic Definition of arbitrariness:

It is a word extracted from the word arbitrary, and is the quality of being determined by chance, whim, or impulse, and not by necessity, reason, or principle, and it refer to a choice made without any specific criterion or restraint ‡.

The Definition of arbitrariness as a term:

One of the definitions that we have identified is the definition of Dr. Fathi Ad-dryny: It is the act that contradicts the intention of the legislator in a legally authorized behavior according to the original.

Dr. Ahmed Fahmy Abu Sunna also defined it as: It is the unusual behavior in Shariah of a person against himself.

Researcher opinion: The first definition was accurate in dealing with the concept of arbitrariness, and thus by saying it contradicts the intention of the legislator as if the guardian used the right given to him by the legislator as an excuse to cause harm on others. We also see the inaccuracy of the definition in his saying that he is legally authorized according to the origin, so he wanted to take out the illegal acts because the person committing the illegal acts by themselves or in terms of the origin is called an assault and not arbitrary.

What we see in the first definition is that he made the basis of arbitrariness to be the unusual behavior, and in fact, arbitrariness is not limited to the unusual behavior, but also includes the usual, given the purpose of the right and the result of its use, as a person may act against him in a normal way, but the result of this behavior is unlawful, and thus it is arbitrary.

Second Chapter: Controls of Arbitrariness in Islamic Law

First Governing Control: intention of harming:

We must look at the psychological factors that prompted the owner of the right to dispose or waive of his right with the intention of harming others so that it would be free of moral principles, and the disclosure of these factors can only be reached by apparent material matters such as evidence indicating them.

Second Governing Control: Use other than the interest for which it was prescribed:

The basic principle is that a person uses the right for the benefit for which it was prescribed, as its use for a purpose other than the interest for which it was legislated or prescribed would be in contradiction to the intent of the legislator §.

Third Governing Control: Imbalance of interests or disproportion:

Islamic Sharia considers rights and interests in a holistic view, it has approved the criterion of balance and proportionality between opposing interests, and reconciling them with what is required by justice and wisdom. Therefore, a person's use of his right in a way that upsets the balance between the interest he wants and the harm that results from his use of his right becomes illegal**.

* Imam Shatibi, Al-Muwafaqat fi Usool al-Sharia, 2/10, Hussein Hamed Hassan, *Theory of interest in Islamic jurisprudence*, pg.25.

† Al-Zayla'i, Indicate the facts explain treasure minutes, 5/368, and also Ibn Al-Humam, Explanation of Fath al-Qadeer, Volume 8, pg.10.

‡ Ibn Manzur, *Lisān al- Arab*, Fā letter, ayn section, Volume 9, pg. 245, and Ahmad bin Faris bin Zakaria al-Qazwini, *Maqāyīs Al-Lugha*, madat easaf, Volume 4, pg.114.

§ Imam Shatby, Almuafaqat, Volume 2, pg.267, Fathi Ad-dryny, aforementioned reference, pg 240.

** Imam Shatby, Almuafaqat, Volume 3, aforementioned reference, pg. 167.

Second Topic: The Arbitrariness of Husband of the right of his spouse

The basic principle is that a person uses his right in a legitimate way, without harming others. Which results in harm to the spouses, and the evidence for this is from the Qur'an, the Almighty's saying: "And if you divorce women and they have reached their term, then keep them kindly, and do not hold them in harm's way to transgression. Allah, and know that Allah is All-Knowing of everything." ^{††}.

Allah Almighty has commanded the husband, after returning his spouse to a revocable divorce, to do what is required of her over him. He divorces his spouses and then takes her back, and he has no need for her, and he does not want to hold her, in order to prolong the waiting period for her, and to harm her, and he does not want to hold her, in order to prolong the waiting period for her and cause harm to her. Whoever does that has exposed himself to the punishment of Allah Almighty. ^{††}

Accordingly, the husband must treat his spouse in good terms, by giving her what she is entitled to, from the dowry and alimony, and not to frown in her face, without sin, and not to be rude or harsh, and not to appear inclined to others. It is an obligation on the husband, and if he shows the opposite, he becomes abusive in his dealings with his wife ^{§§} And the saying of the Prophet, may Allah's prayers and peace be upon him, suffices him, "There is no harm nor harm, as if this hadith is the basic rule for controlling the use of the truth." ^{***}.

First Chapter: Manifestations of Husband Arbitrariness

1- Non-compliance with the legal foundations of family formation:

The Islamic religion has defined a set of legal foundations for the formation a family, which guarantees stability and permanence for this family in an atmosphere of intimacy, love and affection.

Among these foundations is the choice of each of the spouses to the other according to the scale established by the Sharia, as Islamic religion urges the selection of the upright woman in her religion and morals, because religion respects rights and protects the soul from tyranny and oppression, in addition to her manners, by spreading affection and love, which will tceffa the marital life, and make it strong between both spouses.

2- Weakness of religious faith of the spouses:

The Islamic religion wanted the spouses to be accompanied by faith in all the details of their lives, in their religious practices and performance of worship, and in their dealings with each other, and in every moment of their lives, as they will be protected by Allah if they stick to their religion.

The deviation of one's religion is considered the main reason that lies behind the misery of his family life, as Religion is the rule that governs the behavior and attitude of the spouses, without which there will be an imbalance in their family life, which will negatively tceffa them.

3- Deficiencies in the psychological aspect:

Undoubtedly, deficiencies in the psychological aspect reinforce many problems within the family, which then reflects on the family relationship between spouses, and this constitutes one of the reasons for the emergence of abuse within the family, and one of the most important manifestations of psychological problems is not seeking excuses for the other, dismissing obstacles. One of snoitatsefinam eseht as well is each of the spouses is often intolerant of his opinion and adheres to it without taking into account the other opinion, so he is alone in his opinion without discussing matters related to the family.

4- Social Change:

The social change and the transition to the urban family and the rule of the revolutionary style have contributed to creating a kind of conflict between the roles of the husband and spouse, so the spouse has played multiple roles, which made the family relationship a source of tension and conflict, as women tend to define their role in the family relationship in a way that differs from the traditional image that it does not tend to estimate the husband's position to the same degree as the previous one ^{†††}.

^{††} Surah Al-Baqarah, Verse No. 231.

^{††} Al-Jassas, Ahmed bin Ali Abu Bakr, Ahkam al-Qur'an, Investigated by Abd al-Salam Shaheen, T1, Beirut, Dar al Kotob al Ilmiyah, 1415.

^{§§} Mahmoud Hassan, The Family and Its Problems, Beirut, Dar alnahda alarabia, 1388.

^{***} Samira Kharbati, Impact of Social and Economic Variables on Women's Crimes in Jordan, Master's Thesis, University of Jordan, 1992.

^{†††} Muhammad Alsherbiny, *Singer in need to know the meanings of the words of the curriculum*, Dar al Kotob al Ilmiyah, Beirut, 1994.

Second Chapter: Manifestations of The Arbitrariness of Husband in intercourse his spouse

1- The Arbitrariness of Husband of Abstaining from intercourse his spouse:

The spouse shall have the right to enjoy a good intercourse with her husband, causing her no harm, and in a manner that not depriving her of her rights, not causing her any physical or verbal abuse, and not abandoning her bed as well as not refraining from sexual intercourse with her except for disciplinary reasons^{†††}.

It would also be arbitrary for the husband to remove his penis from the woman's vagina if he had finished ejaculating before the wife had finished, thus he would have harmed her and prevented her from fulfilling her desire^{§§§}.

This is what is stipulated in Article (54/1) in the UAE law, which states: "Each spouse has the right to enjoy the other in a legitimate manner.

2- The Arbitrariness of Husband of disciplining his spouse:

The purpose of disciplining the spouse is to reform, chastise, punish, and discipline her in a way that ensures her obedience to her husband. Although the husband's right to discipline his wife, such right shall not be considered unlimited power or absolute to him, but rather a right restricted by the existence of legitimate reasons for disciplining the wife, such as disobedience in its various forms such as preventing the husband from having intercourse with her without a legal impediment, or the departure of spouse from his house without having his permission or other reasons that lead to impose such discipline^{****}.

In the case of the husband's deviation from the purpose or the reasons for which the discipline was prescribed, he shall be considered abusive in the use of his right, and the purpose of the discipline shall be considered as a revenge against his wife, or as an expression of his hatred for her, or an act to force her to commit a certain sin, or coercing her to spend her money in a way that she did not consider right^{††††}.

3- The Arbitrariness of Husband of preventing the spouse to work:

The basic principle for the spouse's work is to manage the affairs of her home, take care of her children, and fulfill the rights of her husband. The spouse may have the right to work, but she has to ask for her husband's permission at first, as such permission is considered a waiver from her husband of one of his rights, which are entitled to him under the marriage contract, as also she does not need any money because of the husband's sufficiency for her^{††††}. Islamic law does not stipulate that the spouse should not work, as long as she adheres to these conditions, and since her work does not cause harm to her husband and children^{§§§§}. The Article No.72 of Law No. 28 of 2005 stipulates that "a work of a woman shall not forfeit her alimony and is not considered a breach of her obligatory obedience if a man marries her while she is a worker, or accepts her work after being married, or stipulates such matter in the marriage contract."

4- The Arbitrariness of Husband of preventing the spouse to visit her family:

In general, staying at home is considered one of the rights legislated by the Islamic Sharia for the husband over his spouse, as she shall not leave the house of her husband without asking for his permission. While with regard to the spouse leaving her husband's house to visit her parents, the Hanafi and Maliki scholars have made it clear that the husband shall have no right to prevent his spouse from visiting her parents, especially when they need such care, whether due to old age, illness, disability or otherwise^{*****}. Article No. 3/55 stipulates the right of the spouse to be dutiful and kind to her parents, maintain her kinship ties, visit them and seek their protection in a reasonable manner, according to the rights stipulated by the jurists and Muslim scholars.

5- The Arbitrariness of Husband of divorcing his spouse:

Divorce is a fundamental right that Allah gave to the husband and deprived the spouse of: Because He, Almighty, is all aware of people's conditions and their nature, and a spouse shall have no right to divorce her husband unless the husband delegates such right to her, because a woman is susceptible to being affected, and she may get angry, and apply to divorce for the most trivial reasons. There may be women who are wiser than

^{†††}Saleh Al-Shukair, Divorce and its Impact on Crime, Master's Thesis, Naif Arab University for Security Sciences, 2008.

^{§§§} Abu Ishaq al-Shirazi, Polite in the jurisprudence of Imam Shafei, Dar al Kotob al Ilmiyah,

W. D.

^{****} Abdullah Azzam, Doctrine and its impact on the generation building, Amman, Al Aqsa library, 1980.

^{††††} Muhammad Aqla, Family system in Islam, Jordan, Al-Risala Al-Haditha Library, 1999.

^{††††} Muhammad Algharnati, Crown and diadem abridgment Khalil, Dar al Kotob al Ilmiyah, Beirut, 1994.

^{§§§§} Abeer Qaddoumi, Abuse of the right to personal status, Dar Al-Fikr, 2007.

^{*****} Ahmad bin Faris bin Zakaria al-Qazwini, *Maqāyīs Al-Lughā*, investigated by Abdel Salam Muhammad Haroun, Dar Al-Fikr, Beirut, 1970.

men, and who are more in control of themselves, but the rulings shall be based on the majority of people's conditions.^{††††}

If the husband initiates a divorce, violates this restriction and divorces his spouse without a reasonable reason, this divorce shall be considered null and void and the husband shall be considered sinful according to the Islamic Sharia, and also considered abusive in the use of his right, because he intended to conclude divorce to cause harm to the wife ^{†††††}. The wife shall have the right to apply for divorce in the following cases:

- 1- The husband's refusal to provide the expenses of the spouse or not having the apparent financial capability to adhere to the obligatory alimony in a short period of time (Article 124).
- 2- If the spouse finds in her husband a persistent defect that the husband cannot be cured from or that can be cured after a long time (Article 112).
- 3- If the husband causes any physical or emotional harm to the spouse, abandons her bed, or does any act that makes it impossible for her to maintain the marital relationship in a kind manner between them both (117).

Conclusion

At the end of this research, the researcher concluded the main results and recommendations as follows:

First: Results:

- 1- The concept of arbitrariness is not exotic to the Islamic jurisprudence, as it was mentioned by Muslim scholars in many chapters of their writings of jurisprudence, but under eman rehtona and different terms, ones of which are: intransigence, abuse, and blameworthy use.
- 2- The meaning of arbitrariness: The contradiction between the intention of the guardian and the intention of the wise legislator in exercising a legal right in the original,
- 3- a person shall be considered abusive and arbitrary in the use of his right if he intends to exercise his legal right only to cause annoyance, harm, or injury to another, or to use it for a purpose other than the interest for which it was prescribed.
- 4- The media plays a major role in sensitizing members of society about the dangers of the arbitrariness of the husband and abusing the right of his wife and the impact of this abuse on the Muslim family stability, as well as its impact on the school curriculum.

Recommendations:

- 1- Launching a national campaign to educate and to sensitize community members about the dangers of abuse and its impact on the family and society.
- 2- Establishing institutions and associations concerned with studying the causes, effects, and risks of the arbitrariness of the husband and abusing the right of his spouse.
- 3- Developing deterrent laws to reduce the phenomenon of husbands' abuse in their dealings with their spouses.
- 4- The necessity of working to strengthen the religious faith of spouses, and educating them with religious culture through lessons, seminars, lectures, and conferences that show the rights of each spouse over the other.

^{††††} Abu'l-Hasan al-Marghinani, *Al-Hidayah fi Sharh Bidayat al-Mubtadi*, Beirut, House of Arab heritage revival, W. D.

^{†††††} Al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, volume 3.

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