'Urf' And Custom In Common Law And Islamic Law: Common Law Marriage*, Zawag Orfi* And *Zawaj Misyar*

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Islamic legal tradition is discursive; it developed through discourses at two levels, one between jurists and society, and the other between jurists and state. The part played by differences of opinion (*Ikhtilaf*) and juristic reasoning (*Ijtihad*) cannot be overstressed. It provided strong basis for legal pluralism and accommodation of social practices, especially in the area of marriage and divorce. State efforts to centralize law did not meet the approval of the jurists. Since state had no direct role in the development of *fiqh*, the systematization of *Fiqh* and Law Schools was achieved through consensus. Looking back at the history of Islamic law, we find that local practices in various cities like Medina and Kufa generated diverse legal doctrines and gradually produced more than nineteen schools of law (*madhhab*); about seven are still in practice today. The distinct mark of the development of *fiqh* in this period is the diversity of views among the jurists on almost each and every doctrine. This diversity was welcomed by Islamic legal theory as a valid manifestation of *Ijtihad*. It is typically usual in the *Fiqh* texts to mention more than one view on almost every point. This is evident even in *Fiqh* texts like *Fatawa Alamgiri*, which were designed as a guide book for the qadis. Instead of giving just one doctrine of law, these texts refer to different opinions. It looks strange, but the underlying concept seems to be that it was not for the jurist, to choose between these varying opinions.

It was the discretion of a Mufti or a Qadi to select one of these opinions when he or she was dealing with a specific case. Some jurists assigned this role also to Imam (or state), but majority of the jurists allowed this prerogative to Imam only through the qadis. In fact, the early jurists when resisting official adoption of one school text as normative law explained that such a move would undermine the difference of opinion.

It is generally in the domain of marriage and divorce that social practices vary and often pose challenge to the legal system. In this essay I want to take up recent examples of common law marriages in the Western countries and *Zawag Orfi* and *Zawaj Misyar* in Muslim countries and show how these marriage practices came to be recognized by law. An analysis of these specific examples requires a detailed overview of the jurisprudential aspect of normativity in common law and Islamic law. The question is: how custom and *Urf* are accommodated? Is it an issue of legal pluralism or religion, ethics and norms?

1. Jurisprudence

1.1. Common Law and Jurisprudence

Jurisprudence as a subject in the teaching of law in the Western Universities began only in 1656. Still, teaching of jurisprudence in the law faculties remained usually marginalized. It is only recently that the jurisprudence gained significance. In English speaking countries, jurisprudence is still, however, synonymous with philosophy of law.

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It largely remains focused on political philosophy, logic and epistemology. In fact, it is since the social theory, especially anthropology, began exploring the domain of law that the jurists have come to realize the complexity of the normative aspects of law and have begun to pay attention to the relations between legal and social practice.

With the dominance of political philosophy and positivism, the jurists viewed law necessarily as a political institution and believed that it cannot exist without a state. Sanction, courts and codes came to be known as the hall marks of law. These were the anthropologists who explored law and order in societies without a state and found that law has a much wider sense than a state law. The contribution of the social scientists, particularly in exploring the aspect of normativity in legal order has clarified the idea of legal pluralism and the significance of studying legal practice in Muslim societies (Dupret 2002). As I understand, the social sciences help us to shift the emphasis from abstract to concrete. Law is not only a body of rules but also a social institution that regulates a society.

1.2. Islamic Law and Jurisprudence

Malik b. Anas, (d. 796), the founder of the Maliki school in Medina opposed Caliph Mansur's (d. 775) move to adopt Malik's compilation *al-Muwatta'* as state law, because it would undermine the other views (Ibn Sa'd 1983, 440). Malik did not like to privilege one school over the others, because they were also equally valid.

The doctrine of *taqlid* (adherence to one of the Schools of law among the Sunnis and to follow one expert in Islamic law among the Shi'a), although apparently an attempt to restrict *Ijtihad* and diversity, had significant influence on the development of Islamic law. Qadis from different schools of law were appointed and Muslim judicial systems continuously recognized the legitimacy of these schools as diverse sub-systems of Islamic law. The people had a choice to go to the court of their choice. *Fiqh* also recognized parallel existence of state enactments in several areas like criminal, fiscal, and administrative laws, though extraneous or supplemental to *Shari'a*. This sense of pluralism that we have described above is supported by Islamic legal theory, *Usul al-Fiqh*.

1.2.1. *Usul al-Fiqh*

Although in Islamic legal education *Usul al-Fiqh* enjoyed the status of the "queen of sciences", but often in conjunction with theology. Gradually, however, *Usul al-Fiqh* came to be known more as a science of the sources of Islamic law than that of legal method, and thus gained more focus on theological aspects. While *Usul al-Fiqh* could make valuable contributions to the contemporary jurisprudence in the domain of textual analysis, legal reasoning and cultural implications of legal concepts, it has been reduced to a science of sources and justification. It does not interact with current legal thinking and practice, not to speak of playing a leading role. Let me now turn to an analysis of the term 'normativity' and the related ideas in *Usul al-Fiqh*.

2. Normativity

2.1. Western Legal Thought

Generally, the term 'norms' is used to mean accepted conventional ways of accomplishing a task. The semantic field of this term denotes a 'standard' that is binding,

authoritative, and regulatory. The usage of the term is, nevertheless, ambiguous. On the one hand it is a statement of justification; e.g., 'P is normative' means that it conforms to a norm, a standard. On the other hand, it is a statement of obligation; 'P is normative' means that it is obligatory. The ambiguity is created by a missing step between these two statements: Why is P obligatory? It is obligatory because one has agreed that if P conforms to the norm one shall abide by it. This agreement is a pre-condition, but it is a missing step in the argument. Norm is, thus, ultimately a social construction and implies a social agreement. Normativity is the reason and understanding that informs this social agreement.

Obedience to a sovereign command could be explained by the fear that the sovereign could punish for disobedience. But this fear alone does not make it normative; there must be some social understanding that justifies that fear. For example, some Muslim theologian jurists, lawful need not be justified as just and reasonable, it was sufficient to say that it was a divine command. For others, *Shari'a* was not a command without any purpose. It was not designed merely to test obedience to God, but it was rather for the welfare of mankind.

As recent social theories have demonstrated, law is one of the various normative orders, which regulate the daily life of an individual in a society. Normativity of law is thus informed by several normative orders. There are at least two types of norms: legal norms and social norms. Both are connected with each other but operate on different levels and different ways. However, they must support each other, if there is a conflict between them the system collapses. Recent discussions on Normativity in the fields of ethics, law and social theory have revisited this question in a modern context.

2.1. 1. *Ethics*

Christine M. Korsgaard opens her analysis of normativity with an interesting remark: "It is striking about humans that they have 'values'" (Korsgaard 1996, 1). She explains that these values have a normative sense because they not only describe what is good but also make claims on us. If an action is right, we ought to do it. However, why is this claim normative? She observes, "[T] he issue of how normativity can be established has seldom been directly or separately addressed as a topic in its own right" (Korsgaard 1996, 10). The question was generally explored as reason or philosophy behind laws, and usually traced to God or Nature. According to her, Hugo Grotius is often identified as the first modern moral philosopher because he asserted that human beings would have obligations even if God did not exist to give us laws (Korsgaard 1996, 21). This observation implies that modern thinking seeks a human internal and rational source of normativity rather than from outside, e.g. divine or nature. However, the positivist legal philosophy continued to look for sources of normativity in sovereign authority, and replaced God and Nature by State.

Korsgaard finds four main approaches in philosophy and ethics to the questions about sources of normativity in modern ethical thinking: Voluntarism, Realism, Reflexive Endorsement, and Appeal to Autonomy. Voluntarism explains obedience in terms of will of an authority whose command must be obeyed. Hobbes and Pufendorf, for instance, argued that it takes God or God like sovereign to impose moral obligation, because human actions are by themselves morally indifferent (Korsgaard 1996, p. 21). Nature, as

claimed by some philosophers to be the source of normativity, is indifferent and mechanical. It does not assign moral values to acts.

The problem with this theory is that it distinguishes also between law and morality. It does not regard obedience, which is based on moral values. Obedience to sovereign is prompted by sanctions. The difficulty lies in the fact that obedience, unless internalized, is not voluntary.

The second approach to the question is Realism. Samuel Clarke, Richard Price, G. E. Moore, E. D. Ross, and Thomas Nagel, the main proponents of this approach argue that moral values are real; they do not depend on external authority to define their goodness or obligation. These values exist in these actions themselves. Human beings act in a certain way because they are confident that it is right. They obey an authority because they are certain about its legitimacy. Korsgaard finds that this approach also cannot answer the normative question (Korsgaard 1996, p. 48). Not every human being feels obliged to obey laws per se. This obedience evolves through a certain process of reflection.

The third approach, Reflexive Endorsement, claims that human nature is essentially moral. It looks at actions in terms of good, bad, right, and wrong. Francis Hutcheson, David Hume, John Stuart Mills, and Bernard Williams approach the problem of normativity in this manner. Korsgaard explains, "[N] ormativity is a problem for human beings because of our reflective nature" (Korsgaard 1996, p. 49). The reflexive approach differs from the Realism approach in the sense that while Realism is concerned with the substantive aspect of normativity, the reflexive approach distinguishes between substantive moral values and human moral disposition. Human disposition could be natural or cultivated by social life and pragmatism (Korsgaard 1996, 78).

The fourth approach, The Appeal to Autonomy, looks at normativity, as an active process of human will, rather than as a mechanical or passive process. According to this approach, which goes back to Kant, philosophers like John Rawls, find the source of normativity is in the agent's own will, or autonomy. The reflective structure of human consciousness makes it possible for human beings to distance from themselves and the actions and to question them. It gives them authority over themselves to make laws to be obeyed (Korsgaard 1996, 130).

Korsgaard's analysis explains how certain acts are considered normative. This theory of normativity explains that certain actions become norms as well as normative due to the autonomy of human mind to reflect and to oblige her. This explanation presupposes essentially a very moral mind. It does not tell us how members of a community come to agree on a set of norms. Firstly, it does not explain normativity in legal and social norms per se. Second, it implies an elitist sense of obligation and normativity. It means that only selected persons would be able to reflect autonomously and to objectively make laws for themselves. A considerable number of people cannot or do not approach the question of obligation in that manner. Does it mean that they must follow the elite or the elite must force them to adopt these norms? The issue of normativity in the context of society and state remains unresolved.

2.1. 2. *Law*

Richard D. Schwartz explores the question of normativity in the context of social organization. First, he distinguishes law from a normative order. He defines norms as "standards of behavior held as shared attitudes by a society or by substantial segments of it", and laws as "standards of behavior explicitly enunciated by specialists charged by the society with responsibility for the enforcement of social control" (Schwartz 1986, 66). Schwartz's distinction, however, arises from his idea of different stages of the evolution of social organization. He describes them both as standards, but not as norms. The differentiation is the product of transition from folk society to a complex society. The folk societies adhere to sets of mores and enjoy a normative consensus. At this stage, no legal system or authority is required. The disputes are resolved at the most by a mediator who only refers to the normative consensus.

Complex societies, which evolve due to social changes that produce normative diversity, require integration of these varying normative orders. The social evolution causes a decline in the normative consensus and generates a need for normative integration. At this complicated level of social organization, legal authority emerges to fulfill this need. It not only integrates these norms, but also enunciates new norms for settling future disputes and for further integration of social norms. These norms, in the form of laws, deal with the existing norms in several different ways: selecting and absorbing some of them, replacing some by formulating new ones, and often just facilitating the formation of norms in the society (Schwartz 1986, 64).

Schwartz explains that the traditional theories of law emphasized either absorption or authority of law in normative integration. For instance, Eugen Ehrlich found that "law fails sufficiently to incorporate the norms of living law" and emphasized their absorption (Schwartz 1986, 67). Austin, on the other hand narrowed the province of law by excluding any reference to nature and morality. Law was the command of the sovereign. The positivist theory defined normativity in terms of sanctions. Schwartz prefers a mutualist approach, saying that law and norms affect each other in this process of integration. He concludes, "When norms and law do not correspond at all, that is, when they reach an extreme of incongruence, law loses its effectiveness as a regulator of behavior and an integrator of the society" (Schwartz 1986, p. 67).

Schwartz has very clearly shown the correlation between norm and law, but he avoids using the term legal norm because he assumes that normative order is a primitive stage in the evolution of society. Law, by implication is not a normative order; legal obligation is different from moral obligation. Modern debate over the question of normativity seems to be concerned with 'value' and 'power'. I would like to look at norm simply as a standard in a very basic sense. If it is accepted as a standard, this acceptance makes it normative. Social norms are socially constructed standards but they become acceptable through a social process of consensus that provides them normativity. Similarly law also constructs its norms or standards by which laws, rules and regulations are measured. A law or rule is legal if it conforms to that standard. In this sense legal norms may differ from one legal system to the other. We may call this the normativity of justification; a law or a decision is legal, lawful i.e., justified to be so because it is in accordance with the norms. We speak of normativity in legal matters in another sense as well. A law may be justified as a legal norm but it may not be a just law. In this sense we are referring to the close relationship between law and society, or legal and social norms,

or better between legal and social practice. Schwartz speaks about the integration of social norms into law, but to understand this integration we have to accept that law is also a normative order.

2.1. 2. 1. *Custom in Common Law*

Common law grew out of customs, but gradually the idea of a unified law excluded customs from the domain of law. In England, people were governed by unwritten local customs that varied from community to community. It was in 1066 William the Conqueror imposed institutionalized stability that common law began to evolve. Common customs were assimilated in thirteenth and fourteenth centuries into a state law. The customs that were not common were allowed but their application was restricted as 'special' customs. Blackstone theorized this practice classifying customs into General and Special customs. Only special customs were valid and their recognition was subjected to following conditions: it does not conflict with common law, it must be reasonable, certain and continuous. Its continuous practice must be from immemorial time, for which the year 1189 was fixed as the most ancient. The legal positivist thinking even postulated that only developed societies had laws; the other had customs. It was on this presumption that the Europeans as colonial powers treated the laws of their colonized people as customs, special customs with limited application.

Studies in the origin of custom also began from this presumption. Historians like Henry Maine explored customs, particularly in India and the Middle East, to understand the evolution of law. Although the basic presumption continued, i.e., non-European laws were no more than customs, but the quest that studies of these customs may explain the origin of law, provided important insights about the evolution of law, for instance its growth from status to contract. Historians and anthropologists also offered a better understanding of normativity. For instance, historians of law explained that habit played a central role in primitive communities and habits of the community created norms. Customs grew by the desire of an individual to satisfy public opinion about these norms. Llewellyn and Hoebel, the anthropologists of law observed that norms were created out of the conflict between three elements in a society: group, divergent desires and claims of some members against others in the group. Norms grow to settle this conflict. According to them, norm was a very local phenomenon; there were no universal norms. The implicit distinction between norm and custom refers probably to the development of norms as proto law.

Historians of law made it clear that law is not created from anew; customs are the raw material for law. The anthropologists showed that reverence for code could be traced to reverence for custom. Furthermore, the coercive aspect of law is also traceable to customs. Custom is not always just; it is often supported by force. In fact the main difference between law and custom is that if custom is recognized by a court, or enforced by the state it transforms into law without any problems. In fact, as illustrated by the example of common law marriages, when a custom becomes common it almost gains the capacity to be transformed into law, even though law does not meet the conditions prescribed for the validity of a custom.

2.1. 3. *Social Theory*

That law is a social and normative order became obvious with anthropological studies of law. In 1930s Malinowski showed that primitive societies were familiar with

the institution of law, although they did not have the institution of state. The basic function of law is social control, and in this sense law did exist in these societies. In 1940, Ehrlich found further evidence of the existence of non-state law. He coined the term living law to distinguish it from state law. To him, law stands for normativity. In 1971, Popsils expounded that law is not restricted to state. Law functions in societies at several legal levels. During1989-1995, Boaventura de Sousa Santos developed the idea of legal levels further. He calls this phenomenon "Inter-legality". He finds that there different legal spaces in a society that are superimposed on each other. He points out that basically there are six clusters of laws that relate to the following six areas: family, labor, commerce, society (social laws), state, international law. This view of law gives due consideration to the practice of law and how it is closely connected with social practices. In1997, Brian Tamanaha explained more clearly that legal norms have foundations in social behavior and practice.

I presented this very sketchy overview of the anthropological studies of law (See for details Dupret 2002), to note that normativity is a social fact and law is closely related with this fact. Further, legal norms arise from legal practice in the same ay as social norms emerge from social practice.

Let me now turn to a thorny question about normativity. Why do certain acts or values become normative? Legal philosophers explained normativity in terms of collective interests and common good. Law regulates individual interests to serve these collective interests. From this perspective, pursuit of self-interests is regarded as selfishness and contrary to the purpose of common good. It presents a paradoxical situation. In order to become common good, a good has first to be perceived as good for an individual. One cannot deny, therefore, self-interest. These theories tried to solve this paradox in terms of moral and ethical obligation; one has to sacrifice personal benefits for the collective good.

Shifting emphasis from social morality to individual interest, modern law stresses right rather than duty or obligation. Modern legal theories assign more active role to the individual and demystify the concept of normativity. Yet, the conflict between individual and collective interest, and common good, seems unresolved. The concept of right necessitates an institution, e.g. state, to enforce rights, otherwise only the mighty will be able to exercise their rights. Dismissing common good as a source of normativity, role of individual in creating norms remains ambiguous.

Habermas's communicative action theory explains how through discourse individuals form interest groups and subgroups. These groups continuously develop agreements among themselves by further discourse. The consensus reached in this way creates norms for law. An example of this social process is custom, but the positivist theories have not been able to view this institution from this perspective. Let me explain this point

2.2. Islamic Legal Thought
Use of the term normative in the discourses on *Shari'a* is even more complex. The issue of normativity arises with reference to the *Shari'a* in two ways in the modern debates on law. First, in contemporary usage, the *Shari'a* is described as a normative set of rules in order to distinguish it from law in the positivist sense. The positivist

distinction between law and morality, the latter being normative, suggests a problematic view of normativity. It implies that the law enforced by the state is not normative. Does it mean that normativity is a social construct and state law is not? Legal positivist fixation on the deconstruction of traditional authority and the separation of law from morality has unnecessarily resulted in the denial of normativity outside the law. The communicative action theory has redressed this weakness by suggesting the role of self-interest in normativity.

It needs no explanation that language plays a very essential role in this process. In the past, a very complex use of language in the *Shari'a* writings limited the discourse among the experts. In modern media, where the Ulama had to communicate with masses this complex language obstructed them to reach a layperson. It is often complained that not to speak of a common person, even a person learned in other sciences finds it difficult to read a *Shari'a* text. Consequently, laypersons were advised to consult jurists even in reading the books that the Ulama wrote for public consumption. In one of his treatises on the issue of judicial divorce, Mawlana Ashraf Ali Thanawi, who is known for his efforts for the promotion of education among Muslim women, advised his readers to not to read the book unaided by an expert and pious Muslim (Masud 1996, 199). The Shari'a writings share this problem with law books in general. It is thus not surprising that in modern times the Muslim writers who gain popularity were either journalists or began writing in journals. The public sphere in modern times has questioned this closed expert approach to law and stressed the need for a more communicative language.

Mass education and new communication media have enhanced the need and role of communicativity. The new media have introduced new voices in the public debate on the *Shari'a*. It is no longer the exclusive domain of the religious scholars (the Ulama or Fuqaha); engineers, medical doctors, lawyers and journalists are also participating in the debates. Second, the debate is no longer confined to mosques, Madrasas and scholarly publications; the *Shari'a* issues are being discussed in the press, on television, in public forums, assemblies and on Internet.

As elaborated above, the normativity of the *Shari'a* is based on idea of the common good. The common good remain very general and abstract unless the interests of the common man measure it. It becomes normative when a society comes to accept it in concrete terms, which are known by an ongoing consensus. Communicative action presupposes the idea of common good, but the details are continuously defined discursively. Their acceptability depends on how a society comes to define *maslaha/masalih*. Accepted practice is in fact the result of discourses that help to construct this practice. Discourse requires the participation of non-experts; otherwise it will be only a convention or a special custom of a group of experts. Communication act is not a sufficient condition but it is necessary to bring about acceptability, as it defines normativity, and explaining how a certain practice is reasonable. Political power can facilitate the construction of a certain group to dominate but they do not become normative unless they demonstrate their communicability. They remain the social construction of a certain group but do not gain acceptability unless other groups also find that construction suitable to their interests. Various other strategies in the form of education and enactment of laws create a favorable environment but a consensus, even if a silent one develops after a negotiation of various interest groups. Public sphere provides a space for forming or influencing public opinion.

In the above discussion we have seen that both liberal (1961), and Islamized (1979-1984) constructions of *Shari'a* were introduced with the help of state power; in fact both by Martial law ordinances. They were challenged by the affected groups in the third sets of contentions and helped to remove the misunderstanding that state legislation creates norms.

In Islamic legal thought, the problem of normativity arose quite early in the tenth century as a question whether the human reason can discover the values of good and bad by itself or they are known only by Divine revelation. Mu'tazila, a rationalist school of Muslim theology, claimed that the values of good and bad in things are known by human reason, and that the revelation is not contrary to human reason because God is just, which means that His laws are just as well as justifiable. The Asha'ira, another school of theology, opposed this view declaring that the knowledge of what is good and bad is based only on revelation (*Shar'*). The jurists explore the question of normativity also with reference to customs and social practices. They recognize the normative value of social practice and custom *Sunna* is the practice of the Prophet Muhammad. A large number of pre-Islamic practices became part of *Sunna* under the category of *Sunna taqriri* (tacit approval), i.e. those practices that the Prophet did not reject explicitly. The jurists also discussed the normativity of Companions' practices (*fi'l al-sahabi*), and of earlier religious traditions (*shara'i' ma qabl al-Islam*) as *Shari'a* norms. Malikis argued in favor of the normativity of the practice (*'amal*) of Medina. Later, when other Muslims from non-Arab cultures joined Muslim community, their customs and practices also came under discussion, hence the place of *'urf* (customs) and *'ada* (practices, habits) was investigated by the jurists. The Hanafi School is particularly known to recognize the normativity of customs. Ibn 'Abidin (1884) wrote a treatise explaining the validity of customs in Islamic law. The Hanafi maxim *al-'Adatu muhakkimatun* (Custom overrides) is very well known.

In *Usul al-Fiqh*, the jurists explored the questions of legal obligation and obedience as issues of normativity in Islamic law. As these discussions are quite relevant to the subject of normativity, let me illustrate it by summarizing the views of Abu Ishaq al-Shatibi (d. 1388) and Shah Waliullah (d. 1762).

2.2. 1. *Abu Ishaq al-Shatibi* (d. 1388)
Abu Ishaq al-Shatibi, who lived in the fourteenth century in Granada, is the most frequently quoted jurist in modern debates on *Shari'a* (Masud 1996, 2000). He refuted the idea that *Shari'a* is to be obeyed only as a command of the Lawgiver. He argued that all laws aimed to protect universally recognized five basic human interests: religion, life, family, property, and reason (Shatibi 1975). He called these interests *maslaha*, which were the objectives (*maqasid)* of *Shari'a.* He defined *maslaha* saying, "I mean by *maslaha* that which concerns the subsistence of human life, human livelihood, and that what emotional and intellectual faculties require of human beings in an absolute sense" (Masud 2000, 151). Shatibi developed a model of Islamic law consisting of three concentric circles.

The innermost circle deals with the essential laws (*daruriyat*) concerning the five basic interests. The second circle (*hajiyat*) covers those laws and practices that are not directly related to the above-mentioned laws but are assimilated into *Shari'a* because of

public needs. The third, outermost circle (*tahsinat*) consists of laws informed by finer elements of the social practices such as modesty, cleanliness and other cultural norms.

Shatibi explains that *maslaha*, or good, does not exist in a pure and absolute form. It is always mixed with discomfort, hardship, or other painful aspects because the world of existence is created from a combination of opposites. Human experience determines what is good and bad in view of that which predominates in a given act. If the good elements are overwhelming, it is called good. Shari'a endorses these criteria and confirms the findings of human reason (Shatibi 1975, 2:307). Shatibi finds that in the absence of Divine revelation (*fatra*), human reason could perceive what was good and bad (Shatibi 1975, 2: 307).

In Shatibi's view, cultural considerations come to play a significant role in normativity. For instance, cultural perspective (*tahsinat*, the third circle mentioned above) requires preventing free mixing of sexes in order to protect family (*daruriyat*, the innermost circle) and hence the social norms of modesty (*satr al-'awra*) are introduced (Shatibi 1975, 2:11-12). Shatibi, however, finds that the Shari'a laws assimilated from customs, when universalized and adopted into the *maqasid* structure, they become norms of *Shari'a*. They cannot change.

Shatibi's examination of the concept of obligation (*taklif*) provides valuable insight into his idea of normativity. Instead of asking why one is obliged, or ought to do things required by law, he examines whether humans are obliged to do things beyond their capacity. The need for this investigation was generated by the conceptions of normativity propounded by philosophers, literalist jurists and the Sufis who insisted on a sense of obligation that denied any role to the human capacity to understand and obey the command. For instance, in Shatibi's days, the Sufis demanded that during prayer, a person was obliged to free his mind from all thoughts other than that of God. Shatibi argued that this was not real obligation. A real obligation is what a common person can undertake and perform without hardship.

Shatibi extended the meaning of impossible obligation beyond the theological notion of *taklif ma la yutaq* (physically impossible) to *ghayr maqdur* (unfeasible) and *mashaqqa* (hardship). He argues that one is not obliged to intend for hardship as the objective of *Shari'a*, as some Sufis do. The standard for measuring hardship and impossibility is derived from *'Ada* (habit), if a certain act is not considered impossible in common practice it is normal, even though it may be hardship for some individuals. Here, Shatibi is not speaking about the cases where it is physically impossible for an individual to carry out a certain obligation (Shatibi 1975, 2:101).

On the other hand, the reality of normativity also recognizes the physical needs. For instance, the expressed objective of marriage is protection of family and reproduction. If a person intends to marry only to satisfy his sexual desire, the marriage should be allowed because it is part of the larger objective to fulfill lawful desires and to remove hardship (Shatibi 1975, 2:101).

Shatibi analyzed the notion of *hukm* as a legal value. Instead of taking the common view of five legal values (*wajib, mandub, mubah, makruh* and *haram*) as a starting point, he clarifies that the starting point is *mubah*, an indifferent legal value. The normative

categories are only *halal* and *haram*, in between is the area of '*afw*. *Mubah* is legally neither obligatory nor forbidden. All acts are in principle legally indifferent. *Shari'a* declared them *Haram* and *Halal* because of the evil (*mafsada*) and good (*maslaha*) for humans. For instance, an act is recommendable (*mandub*) when it is no longer indifferent and is found to be good. The *Shari'a* declares it obligatory when it is dominantly good (Shatibi 1975, 1:137).

2.2. 2. *Shah Waliullah* (d. 1762)

Shah Waliullah opens his work *Hujjatullah al-Baligha* refuting those who compared *Shari'a* with the commands of a master intending only to test his slaves' loyalty and sense of obedience. Like Shatibi, he argued that *Shari'a* laws are not revealed merely to test human obedience to God; they require obedience because they have human welfare as their goal (1879, 1:4). He devoted a chapter to the psychology of obedience entitled "Reasons that motivate the human mind to act" (Waliullah N.D. 1: 27-31). Although, according to him, the most powerful motivation comes from instincts, Shah finds that humans are motivated by several other reasons like experience, accidents, and reflection (*nazar*). He mentions that '*Adat* fashion human mind to perceive ideas and values. Shah distinguishes between religion and laws and explains that religion is based on the principle of unity, while laws are based on the principles of change and diversity (Waliullah 1879, 1:86).

2.2.3. *Maslaha*

Above, while discussing the concept of normativity, I referred to the idea of self-interest as an essential element in the social process of normativity. In Islamic thought debate over self-interest arose in at least two contexts: *hawa* and *huzuz*. I will discuss this point here very briefly, because I have treated it in detail elsewhere (Masud, forthcoming)

In Islamic legal thought, in order to establish the authority of *Hadith* and *Qiyas*, the independent opinions (*ra'y*) were denounced as *hawa* (desire, self-interest or selfishness). Refutation of the use of human reason as *hawa* was quite problematic for legal theory. The Shafi'i and Hanbali schools, which promoted this juridical theology of *Qiyas*, disproved Hanafi principle of *istihsan* that recognized the principle of goodness (*hasan*). Ghazali rejected both *istihsan* and *istislah* as invalid principles of reasoning: "*man istaslaha fa qad shara'a kama ann man istihasana fa qad shara'a*" (Whoever exercised the principle of *istislah*, he in fact invented *shari'a*, as he who exercised *istihsan* invented *shari'a* (Ghazali 1970, 1:315).

As mentioned above, Ghazali criticized the use of *maslaha* as self-indulgence. Shatibi found that an inductive study of the Qur'anic verses led him to conclude that protection of human interests (*maslaha*) is the main objective of *Shari'a*. These interests were interconnected with human natural desires, pleasures and pain. They are built on the instincts and passions, which motivate a person to protect these interests or demand them as rights. Even penal laws, are eventually meant to protect self interests (Masud 2000, 196 ff.). Shatibi found the doctrine of *tark huzuz* (denial of self-interest) contrary to the objectives of *Shari'a*. Since laws are meant to protect the human interests (*maslaha*), he stressed that individual self- interest (*hazz*) are not contrary to *maslaha*. In the pursuit of interests like protection of life, family and property, the personal motives cannot be denied; rather legal obligations cannot be performed without fulfilling them. They may

not be the primary objectives, but they are certainly included as secondary objectives (Masud 2000, 200-201).

2.2. 4. *Custom and Islamic Law*

Shatibi divides the *Shari'a* laws into '*Ibadat* (religious matters) and '*Adat* (other than religious matters). '*Ibadat*, according to him, are the laws that aim to protect religious interests. '*Adat*, which constitute most of the *shari'a* laws consist of laws relating to the protection of life, family, and property. While the benefits of '*Ibadat* laws are beyond human reason to understand, because their goodness cannot be decided by human experience, '*Adat* laws are within the scope of human reason, which discovers good and evil as learned in human experience. He elaborated that *maslaha* or good did not exist in a pure and absolute form; it was always found mixed with discomfort, hardship or other painful aspects because the world of existence is created as a combination of opposites. Human experience determines what is good or bad in view of their predominance in a given matter. If the good elements are overwhelming it is called good. The *Shari'a* endorses these criteria and confirms the findings of human reason (Shatibi 1975, 307).

2.2.4. 1. Custom and Family Laws

As to the Islamic family laws, the jurists never fail to emphasize that customs played a very vital role in these laws. Initially, the Qur'anic injunctions about family laws were largely based on the pre-Islamic Arab practices. In a recent study, Ibrahim Fawzi examines in detail the pre-Islamic norms (*Ahkam*) of family relations, which were assimilated into Islamic family law, even in the Qur'anic revelations. For instances he discusses that Islamic laws on Dower (*mahr*), Child marriage (*sighr)*, social compatibility (*Kafa'a*), guardianship (*Wali*), custody (*hadana*), prohibited relations (*muharramat*), verbal repudiation of marriage contract (*talaq*), *Ila'*, *Khul'* and delegation of the right of divorce (*tafwid*) were generally based on the pre-Islamic Arabian customs (Fawzi 1983, 47ff, 60f, 63, 76, 84, 88 ff).

Shari'a adopts these elements because they reflect reasonability and cultural preferences within a society. Shatibi explains that for instance, while going out without covering one's head is regarded as an offence in the East, covering one's head is not considered a virtue in the West (Shatibi 1975, 2:284).

There is very little discussion of substantive family laws in Shatibi's works because his discussion is focused on legal theory. Still, we find references to this area of *Shari'a* here and there. Firstly, he defines family (*nasl*) as one of the five necessities of life, which *Shari'a* aims to protect. The family laws thus belong to the innermost circle of essential laws. He repeatedly clarifies that family laws in the Qur'an are largely similar to the social norms, which already existed in the pre-Islamic Arabian society. The Qur'an confirmed them in general. Only those norms and practices were abolished or reformed that did not agree with the Islamic values (Shatibi 1975, 1:175, and Shatibi, 1915, 2: 42).

The essential pre-Islamic principle like distinction between *nikah* (marriage, lawful relations) and *sifah* (fornication, unlawful relations) serves as a legal norm in *Shari'a* family laws as well. Pre-Islamic practices like payment of dower (*sadaq*, *mahr*) and *wali* (marriage guardian) were assimilated into Islamic family law, because these practices supported the above principle. In case of dower, even the question whether it

should be paid promptly or be deferred was left to local custom (Shatibi 1975, 2: 285, and 2:11-12). Several pre-Islamic marital practices, such as marrying father's wife, several husbands sharing one wife etc. were disallowed (Shatibi 1975, 1:175).

For Shatibi, the criterion for the assimilation or rejection of social practices is the *maqasid al-Shari'a*. In family laws, the objective is the protection of the institution of family. He argues that the social norms such as right to shelter, mutual cooperation, lawful earning, enjoying beauty, fidelity, social status due to family standing were transformed into mutual rights of husband, wife and children because they serve to protect the basic objective of family laws. Shatibi cites the example of caliph Umar marrying Ali's daughter with a view to developing family ties with the family of the Prophet. This example illustrates the continuity of the pre-Islamic social norm of pride in *nasab* (lineage). Shatibi says that although this is not the explicit primary objective of marriage in *Shari'a* family law but it becomes acceptable because it was a social norm that strengthened the family institution (Shatibi 1975, 2: 396).

Shatibi's analysis of '*ada* deals with it as a dimension of normativity in it several aspects. One of them is the certainty of law in the meaning of predictability. To Shatibi, this aspect of normativity comes from the repeatability of the actions. This repeatability is the characteristics of '*Adat*, by which Shatibi means both habits and social practices. The acceptability of *Shari'a* laws largely depends on their conformity with the '*Adat*. Since '*ada* is a known fact, not arbitrary and imagined, it provide certainty to laws.

In order to define the concept of '*Adat* more clearly, Shatibi contrasts it with *Shari'a*, '*Aql* and '*Ibadat*. Shatibi elaborates on how '*Aql* and '*Adat* determine the good and bad and *Shari'a* endorses the results. Shatibi distinguished between '*Adat* and '*Ibadat* as two divisions of *Shari'a* laws. The *Ibadat*, or ritual obligations, protect religious interests. '*Aql* plays no role in the formulation of '*Ibadat* laws because their goodness cannot be decided upon by human experience. They are *ta'abbudi* and must be obeyed. The '*Adat*, the remaining *Shari'a* laws, are indeed within the scope of human reason. They are *maslahi* in which human reason plays an effective role. Change and innovation are acceptable only in the area of '*Adat*. The changes in '*Ibadat* are called *bid'a*, which are not permissible.

In other words, Shatibi restricts the meaning of *bid'a* to '*Ibadat*, a smaller area of Islamic law. Changes in Islamic family law are not counted as *bid'a* because these laws are not *ta'abbudi* in principle. That is why new social norms were often assimilated into Islamic family laws, sometimes even recognizing it as *bid'a*, e.g. *talaq bid'i* of triple repudiation.

Shah describes Prophecy and revelation of Divine laws as a process of reform. The prophets examined the laws in practice. They retained most of them and reformed only those that had lost their aspect of human good due to changes in social practice (Waliullah N.D. 1:124). Discussing the Islamic laws of marriage, Shah explained that the Prophet Muhammad retained most of the pre-Islamic Arab practices such as engagement before marrying, the dower, and wedding feast. Similarly, the Prophet retained the pre-Islamic penalties, which the Muslim jurists assimilated into Islamic law as *Hudud* (Waliullah N.D. 1:125).

Shah Waliullah expounded the theory of the evolution of society in four stages and found that social norms played a central role in the evolution of laws (Waliullah N.D. 1:49). Shah Waliullah stated very clearly that social norms constituted the major material source of *Shari'a*. He explained in particular how the pre-Islamic Arab social practices formed bases (*madda tashri'iyya*) of the *Shari'a* (Waliullah N.D. 1:124). Shah analyzes in detail the reasons (*asrar, hikma*) of the various family laws. He deals with the following laws and institutions of family: engagement, modesty, marriage guardian, marriage ceremony, dower, prohibited relations, fosterage, marital rights, divorce, and types of divorce, waiting period, and *'Aqiqa* ceremony. Throughout his analysis, if a practice existed among the pre-Islamic Arabs and if Islam retained it as it is, Shah explains the reasons for the continuity of this practice and for the Islamic reforms. It is not possible even to present a summary of his analysis here. I shall give a few examples to illustrate his analysis.

Shah explains that prohibition of marrying close relatives like one's parents, children and brothers and sisters was common among the pre-Islamic Arabs. He finds two reasons for the prohibition of marrying close relatives. First, among these relations living under the same roof, close relationship and continuous contact make it impossible to maintain complete privacy, which is usually required between the sexes. If marriage between such relations were not forbidden close living without marriage would lead to very difficult relationship. Even when married, due to close relations, rights and duties would have no meaning (Waliullah N.D. 1:131). Since this prohibition was required because of these reasons, it was not only introduced, as a law but was also cultivated as a cultural habit and instinct. It was achieved by a wider and definitive acceptance of the prohibition and by the condemnation of those who violated this prohibition (Waliullah N.D. 1:133-34).

On the issue of polygamy, Shah explains that this social practice may harm family system (*tadbir al-manzil*). The law is therefore required to look into such matters and take action. If a man has more than one wives and he tends to discriminates among them, to the extant of being unjust to some. That is why Islamic family law made justice a condition for polygamous marriage. Since it is not possible to do clear justice, the law must demand to stop clear injustice (Waliullah N.D., 2:137).

To sum up this analysis, Shatibi and Shah Waliullah both find *Shari'a* family laws closely connected with the social norms. Their analysis explains that normativity of *Shari'a* was derived from the acceptability and certainty of these social norms.

3. Marriage Practices

3. 1. Common Law Marriage
Common law marriage is usually defined as the intent to be married combined with living together and holding one's self out to the world as married. This type of marriage is recognized in several states in the US and Europe. For example, continued cohabitation as husband and wife may be regarded as a valid marriage by the court where this form of common law marriage is recognized. There are several requirements for the formation of such a marriage. For example, the couple must express mutual consent and intent to be married, and "must openly and professedly live as husband and wife".

Because a common-law marriage is not formally recorded, the couple, if challenged, may have to prove it.

Nowadays, many couples decide to live together without getting married. The reasons for such a decision include such as the following: uncertainty as to one's choice of partner, disillusionment stemming from a previous marriage and outright refusal to make a commitment. This has created several problems.

Jeremy Collingwood (1994) has published a study on this practice in Britain. He refers to earlier studies: Greg Forester, *Marriage Before Marriage? The Moral Validity of 'Common Law Marriage'* (1988) and Edward Pratt, Living *in Sin?* (1991). He finds that common law marriage is informed by these attitudes: casual sexual relationship, trial marriage, provisional relationship, and substitute for legal marriage. He observes that the trend of living together as husband and wife outside a formal marriage has increased over the years. In 1972, only 16% lived husbands prior to marriage, in 1987 the number became 50%. In 1990 28.3 % births took place outside marriage, and 73% births were registered by both parents as extra-marital. According to a survey undertaken that year, 43% favored living together before marriage, and 37% preferred going direct to marriage. Still, 81% British regarded marriage relevant. I am not discussing here cohabitation or living together, which is not intended to be a marriage, because that is not the subject of this paper. I am referring to a practice that avoids formality of a legal marriage for a number of reasons (e.g., polygamy, expenses, legal responsibility), but the couple does wish to present themselves as husband and wife. Some of them later choose to go for a legal marriage when they find that common law marriage cannot allow some rights (e.g., inheritance, taxes etc.,). One may even look at such marriages as a survival of old customary marriages before the law ceased to recognize them as valid. Legal marriage insists on certain formalities, like registration. Earlier in 1753, a church ceremony became mandatory to prevent secret marriages. In 1836 this requirement was withdrawn and civil marriage was allowed. Now, if the purpose of registration is to ensure a marriage contract, this objective can be achieved in several other ways, as we will say later in case of *Zawaj 'Urfi* in Egypt.

3. 2. *Zawag Orfi*
Literally, *Zawag Orfi* [*zawaj 'urfi*] means customary marriage. This type of marriage takes place between two spouses who sign a marriage contract in the presence of two witnesses but it is not officially registered by the notary (*ma'dhun*) and transcribed in public records. The term *Zawag Orfi*, which originated in Egypt, is misleading. These marriages are customary but not entirely illegal. Largely, they are called so because they are not registered. But the reason why they are registered reveals their customary nature as they are used to avoid law of the country.

These marriages are concluded for various reasons. In case of polygamous marriage for instance the husband may wish to keep the subsequent marriage secret and not inform the first wife as required by Law No. 100 of 1985. This type of marriages is also used for minors who are not allowed to marry under law. Some times a couple also adopts this type of marriage to escape the high cost of marriage. Widows who want to remarry without forfeiting their widowhood pensions also use this marriage. Even more simply this form of marriage is opted to legitimate sexual relationships without concluding a formal marriage.

According to Egyptian law (Art. 99 § 4 of law 78 of 1931), no claim concerning marriage will be heard, when it is denied, unless it is supported by an official marriage document. A customary marriage, therefore, is not considered illegal, but in case the marriage is denied, the courts will be prohibited from hearing any dispute regarding such a non-registered marriage.

Zawag Orfi is, therefore, legally harmful to both spouses, but especially to the wives who cannot claim the right to divorce, alimony, maintenance or succession. With regard to children, though, the Explanatory Memorandum of Law 78 of 1931 had explicitly stated that courts could still hear suits for paternity. The main problem arises in case of contest between the spouses since the law forbids the judge to consider such non-registered marriages, making it impossible for the wife to ask for her divorce, to make her divorce effective (when she has been repudiated and her ex-husband comes back later on and requires her to resume their marital life), or to ask for the benefice of her subsequent rights.

Law No. 1 of 2000 introduces a very important change with that respect. Although Art. 17 al. 2 of the law reaffirms the non-admissibility of petitions concerning non-registered marriages, it gives the woman the right to use any written document to prove the existence of such marriage and to serve as the basis for her subsequent request in divorce (Art. 17 al. 1).

In Pakistan, the practice of *Zawag Orfi* does not exist, but since customarily often marriages are not registered for most of the reasons mentioned above. In addition to illiteracy and ignorance people resist registration on account of religious grounds. However, laws in Pakistan are lenient and proofs of customary and religious forms of marriage are acceptable. Serious situations arise in the absence of proofs and in case of those marriages, which are not recognized in law, for instance child marriages.

Zawag Orfi is comparable only in the sense that both are registered in law. *Zawag Orfi* nevertheless abides by the rules of formation of marriage contract under traditional Islamic law, and recognizes the rights and duties of the spouses under *Shari'a*. Common Law marriage is not a legal contract, and originally did not intend for legal consequences. Later, however, when complications arose the law began to protect the rights of the spouses married under Common law marriages.

3.3. *Zawaj Misyar*

While *Zawag Orfi* is generally attributed to Egypt, *Zawaj Misyar* is often assumed to have originated in Saudi Arabia. The Saudi muftis maintain that this form of marriage is not morally correct although it is legally valid. It is also claimed that *Misyar* marriage has been practiced in Egypt since 1825. These claims are hard to establish. In modern times, it is officially legalized in Saudi Arabia and Egypt.

The confusion about this form of marriage continues also on account of its literal meaning. Some writers consider the term derived from *sayr* (travel) and translate it into English as Travel marriage. In that sense it is often compared with the *Mut'a* marriage allowed in the Shi'i law. Others trace it *yusr* (easy) and translate it as Marriage of

convenience. Literally*, misyar* may also be derived *musayara* meaning adoption, accommodation and adjustment.

Zawaj Misyar is a marriage contract between a man and a woman, in which the woman waives some of the rights she would have in a normal Islamic marriage. These rights specifically relate to living together, and husband's duty to provide maintenance and house to live.

Women adopt this marriage for several reasons. One reason may that a woman when she gets older find it increasingly difficult to marry. She may then choose a husband who is not able to fulfill the normal marital duties like financial maintenance, or spending adequate time with her, for example. She considers that marrying such a husband is better than remaining unmarried. A young couple that cannot settle down due to their limited resources may also opt this marriage as a temporary solution. It is not comparable with *Zawag Orfi* or Common law marriage because it is legally concluded. *Zawaj Misyar* is conclude with a contract which requires consent and agreement of both parties to the terms of the contract, two witnesses, and payment of *mahr*.

Nor is it comparable with *Mut'a* because the contract does not stipulate a specific time period. A possibility of divorce is there but that also exists in normal marriage. Further, the wife in the *Misyar* contract is not barred from reclaiming her normal rights; in that case the husband has the option to agree to her demand or negotiate a divorce. We reproduce below extracts from the *fatwas* by the three muftis about *Zawaj misyar*: Shaykh Yusuf al-Qardawi (Qatr), Shaykh al-Azhar Muhammad al-Tantawi (Egypt), and Mufti Muhammad ibn Adam al-Kawthari (UK).

3.3.1. Yusuf al-Qardawi

Misyar marriage should be viewed as a form of legal relationship between man and woman regardless of any description attached to it. This is pursuant to the juristic rule: "What matters most in contracts are motives and meaning, not the wording or structure."

Therefore, in determining the legal nature of this marriage, we should not judge things according to names, for as we know, people feel free in naming or describing something.

Stipulating certain details in the marriage contract on both sides is acceptable. For example, some scholars maintain that a woman has a right to determine the timing of marriage; i.e., it can take place at day or night, however, she can also waive this right.

Therefore, based on what has been mentioned, we can state that *misyar* marriage, or something in similar form, has been in practice from time immemorial. It also serves the purpose of some women, who, for instance, may be rich but happen to be unable to marry at the proper time. So, such women can opt for this kind of marriage. Therefore, if anyone seeks my opinion on this marriage, I must reply him saying: What do you mean by *misyar* marriage. Then, if … all the Islamic legal requirements are met, then the marriage is valid. Those requirements are: an offer and acceptance from both parties; a specified dowry, according to the Qur'anic verse:[And give unto the women, (whom ye marry) free gift of their marriage portions] (An-Nisaa' 4: 4), and that the

contract wins the consent of the guardian. Thereby, no one has the right to brandish it as unlawful.

There is no doubt that such marriage may be somehow socially unacceptable, but there is a big difference between what is Islamically valid and what is socially acceptable. This issue, therefore, needs a cautious approach. One should not feel free to condemn an act as absolutely forbidden, merely on social repugnance. Rather, one needs to have convincing evidence to determine the legal nature of each particular act (Qardawi 2006).

3.3. 2. Muhammad Tantawi

Sayyid Muhammad Tantawi made the following remarks in the Federal Territory Mosque, Kuala Lumpur on June 1, 2006.

According to Islam, a marriage was solomnised once "*ijab dan kabul*" (marriage vow), "*mas kahwin*" (dowry) and public proclamation were endorsed and there was no coercion. If the two parties mutually agree to absolve their entitlement (under normal marriage), a man and a woman can live harmoniously as husband and wife under *misyar* marriage." he said after giving a talk at the Federal Territory Mosque.

That *misyar* marriage was victimization of women's right was wrong for it took place with the agreement of the men and women. With *misyar* marriages, divorcees or widows can continue to take a righteous path consummated by their husband.

A *misyar* wife agrees not to ask for financial or material support as she is financially independent, he said, adding that the husband must visit her at least once a week to meet her sexual needs.

Misyar marriages are appropriate for women who like to be on their own, living together with their children (Tantawi 2006).

3.3. 3. Kawthari

Fatwa by Mufti Muhammad bin Adam al-Kawthari, from Darul Ifta, Leicester , UK, provides the Hanafi view in more details than others.

The term "*Nikah Misyar*" (translated sometimes as "travellers' marriage" or "marriage of convenience") is not found in the Qur'an, *Sunna* or classical works of Islamic jurisprudence. It is a term that has been introduced recently by those discussing a specific type of matrimonial arrangement. However, the concept of such an arrangement can be found being discussed in the works of classical Muslim jurists (*fuqaha*).

In order to understand the correct Islamic viewpoint regarding *Nikah Misyar*, it is essential to first be familiar with the exact meaning of this term, as understood by those who have discussed it.

Definition

A *Misyar* marriage can be defined as an official marriage contract between a man and a woman, with the condition that the spouses give up one, two or several of their rights by their own free will. These include: living together, equal division of nights

between wives in cases of polygamy, the wife's right to housing (*sukna*) and financial support (*nafaqa*). In some cases, only one right is relinquished by the spouses, such as living together, but the husband is still required to provide housing for the wife and maintain her financially, whilst in other instances, the wife gives up all her rights including housing and financial support. The bottom line in such arrangements is that the couple agrees to live separately from each other, as before their *Nikah* contract, and see each other to fulfill their needs in a lawful manner when they so desire. At times, a *Misyar* marriage is contracted on a temporary basis, which ends in divorce on the expiration date of the contract.

As for the Islamic ruling concerning such marriages, there are two issues to consider:
1)   Validity and permissibility;
2)   Appropriateness.

I. Validity and Permissibility
        If all the basic requirements for an Islamic marriage contract are fulfilled, then this type of marriage arrangement is permissible and valid, and the couple will not be guilty of being involved in an unlawful illicit relationship. The basic requirements for a valid marriage according to *Shari'a* are the following:

a)   Offer (*ijab*) from one party and acceptance (*qabul*) from the other in one session (*majlis*), and that this offer and acceptance is verbal and thus heard and understood clearly. In other words, the agreement of both parties.

b)   The presence of at least two male witnesses (*shahidayn*), or one male and two female witnesses, who hear and clearly understand the offer and acceptance. (*Mukhtasar al-Quduri* 2/140 & *Fath al-Qadir* 3/190)

c)   The consent of a legal guardian of the woman (*wali*) is also a necessary requirement according to the Maliki, Shafi'i and Hanbali Schools of Sunni Islamic Law. However, according to the relied upon position in the Hanafi School, the marriage of a free, sane and adult woman without the approval of her guardian (*wali*) is valid if the person she is marrying is a "legal" and suitable match (kuf') for her. Conversely, if the person she is marrying is not a legal match for her, then her marriage would be considered invalid. (*Radd al-Muhtar ala 'l-Durr al-Mukhtar* 3/56-57 & *I'la al-Sunan* 11/69 in the chapter: "Having a guardian is not a pre-requisite for the validity of an adult woman's marriage". For more details, please refer to the answer previously posted on this website titled: "Divorced woman marrying without her guardian's approval").

d)   The absence of a fixed time-period. It is a basic requirement of a valid marriage contract that it does not entail any agreement of it being limited to a specified time such as two moths or five days, since it is essentially the *Mut'a* marriage that has been explicitly prohibited by the Messenger of Allah (Allah bless him and give him peace).
        Classical jurists (*fuqaha*) have clearly stated the impermissibility and invalidity of time-limited (*mu'aqqat*) marriages. Imam al-Haskafi, the renowned Hanafi jurist, states:

"A *Mut'a* and time-limited marriage (*nikah mu'aqqat*) is invalid, even if the period [of marriage] is unknown to the wife or is prolonged..." (*Radd al-Muhtar ala 'l-Durr al-Mukhtar* 3/51. Also see for the Shafi'i School: *Mughni al-Muhtaj Sharh al-Minhaj* 4/231, for the Hanbali School: *Kashshaf al-Qina'* 5/96-97, and the Maliki School: *Hashiyat al-Dasuqi ala 'l-Sharh al-Kabir* 2/238-239)

As for when there is no explicit mention of the marriage being limited to a specified time, but both or one of the spouses intend to terminate the marriage some time in the future, the position of the majority of classical scholars is that such a marriage is valid, and the couple will not be guilty of involving themselves in an unlawful relationship.

It is stated in *al-Fatawa al-Hindiyya*, a renowned Hanafi reference work:
If a man marries a woman unconditionally [i.e. without it being limited to a specified time], and it is in his intention to remain with her for a time that he intends [and then divorce her], then the marriage is valid..." (*al-Fatawa al-Hindiyya* 1/283)

Likewise, Imam Ibn al-Humam (Allah have mercy on him) states in his *Fath al-Qadir*:

As for when the husband marries and it is in his intention to divorce her after a period that he intends, then the marriage is valid." (*Fath al-Qadir*, 3/152)

The Shafi'is also state that if one marries, and it is in his intention to divorce the wife after a period of time he has in mind, the marriage is considered valid. As for the Hanbalis, they have explicitly stated that if a person marries with the intention of divorcing the woman, even without stating it explicitly in the marriage contract itself, then the marriage is invalid, because it is a temporary marriage, which is invalid by explicit primary texts. (See: *al-Mawsu'a al-Fiqhiyya*, Kuwait)

Since Islam emphasizes upholding marriages, the couple will not be obligated to terminate their marriage according to their intention, rather they must not resort to divorce without a genuine reason. Marrying with the intention of ending the marriage after a given period is disliked according to *Shari'a*, and as such, a marriage contracted with such an intention in mind is also disliked, although valid per se. (Mufti Taqi Usmani, *Fiqhi Maqalat* 1/258)

So, the basic minimum requirement in order for a marriage to be considered Islamically valid is that there be a valid offer from one party and a corresponding acceptance from the other, in the presence of two male (or one male and two female) witnesses who are able to hear clearly and understand what is happening. The offer, acceptance and the presence of the witnesses must all take place in the same session and at the same place, and there must not be any explicit mention of the marriage being limited to a specified time. The consent of the woman's guardian is also necessary according to the three Schools, and in some cases, according to the Hanafi School also. As for the payment of dowry (*mahr*), this is the woman's right and should be stipulated at the time of the marriage contract, but it is not a pre-requisite for the validly of the marriage.

As such, if the above necessary factors are met, the marriage is valid according to *Shari'a*, even if it is a "*Misyar*" marriage. Thus, if the *Misyar* marriage is limited to a specified time, it is invalid, and the couple's relationship will be unlawful and sinful. Men who sometimes enter into a "temporary" *Misyar* marriage while on holiday must realize that if this is explicitly mentioned at the time of contracting the marriage, then it would make such a marriage invalid and unlawful, and more akin to *Mut'a.* If there is no explicit mention of this, but the man marries with the intention of divorce, then it is disliked, and unlawful [but valid] if it entails harm to the woman.

Giving up Rights

As mentioned earlier, the basic feature which distinguishes *Misyar* from a standard marriage is that the spouses, and more specifically the wife, gives up one or several of her rights by her own free will.

Islamically, it is permitted for both parties to mutually agree upon relinquishing one or several of their rights, which they would otherwise be entitled to in a standard marriage. The wife may forego her right to housing, spending time with her husband and/or financial support. The husband may give up the right of his wife living with him at his residence.

Sayyida A'isha (may Allah be pleased with her) relates that Sawda bint Zam'a (may Allah be pleased with her) gave up her [right of spending the] day [with the Messenger of Allah] to A'isha, and so the Messenger of Allah (Allah bless him & give him peace) used to give A'isha both her day and the day of Sawda (Allah be pleased with both)." (*Sahih al-Bukhari*, no: 4914)

Sayyida A'isha (may Allah be pleased with her) relates that in his fatal illness, the Messenger of Allah (Allah bless him and grant him peace) used to ask, "Where will I be tomorrow? Where will I be tomorrow?" wanting the day of A'isha. His wives gave him permission to be wherever he wished, so he was in the room of A'isha until he passed away by her..." (*Sahih al-Bukhari*, no: 4185)

It is stated in *al-Fatawa al-Hindiyya*:
"It is not wrong to marry a woman on a day-time basis (*nahariyyat*). This means that the man marries her on the condition that he will spend the day with her but not the night." (*al-Fatawa al-Hindiyya* 1/283)

It should be noted, however, that if a wife gives up her rights, she is entitled to reclaiming them. She may ask her husband to fulfill all her rights, including that he provide for her financially. The husband can also demand that she move in with him at his residence.

Imam al-Haskafi (Allah have mercy on him) states:

> "If a wife grants her right of spending time with the husband to her co-wife, then this is valid, but she has the right to reverse her decision in the future if she so desires." (See: *Radd al-Muhtar ala 'l-Durr al-Mukhtar*, 3/206)

II. Appropriateness

The above discussion was regarding the permissibility and validity of a *Misyar* marriage. As for whether such a marriage is appropriate according to *Shari'a*, generally speaking, the answer would have to be no, since it goes against the spirit and objectives of marriage, which is to establish a long-term relationship as a family, and raise righteous Muslim children. The children raised by their mother in a home from which the father is always absent may well suffer psychologically and spiritually.

It is even worse in a situation where the man is only concerned about his own sexual desires and has no regard for his wife. He does not hesitate in marrying and divorcing women as and when he so desires. Some irresponsible men go on holidays to poor countries and marry young women by offering them money, riches and a lavish lifestyle, only to divorce them after a few weeks or months. They do this on a continuous basis, marrying women and then divorcing them, without any regard for the creation of Allah Most High. As a result, the wife finds herself abandoned and leading a solitary life as before the marriage, but traumatized by the experience, while her social status and reputation degraded. Harming and deceiving others are both great sins in the eyes of the *Shari'a*.

On the other hand, a *Misyar* marriage may be the only option in certain situations. Some women, as they get older, find it increasingly difficult to marry. In such cases, the woman may marry a man who is not able to fulfill the normal marital duties like financial support or spending adequate time with her. Marrying such a husband is better for her than remaining unmarried.

A young couple may be engaged to one another and have the consent of their respective guardians (wali) to marry. They wish to marry as soon as possible, because they genuinely fear committing *Zina*, but the man does not have the financial resources to support his wife. This type of marriage could meet their needs allowing them to marry whilst living with their parents until they are ready to move in together.

Some divorced or widowed women, who have their own residence and their own financial resources, genuinely cannot, or do not, want to marry again in the normal manner. Some women, who are burdened with heavy duties and responsibilities, are unable to live with their husbands and serve them. A *Misyar* marriage may well be suited to them.

In fact, some classical scholars such as Imam Abu 'l-Faraj ibn al-Jawzi (may Allah have mercy on him) have suggested that it may even be healthy for the marriage if both spouses mutually agree to spend time apart from one another or sleep separately, and be together occasionally in order to maintain a high level of sexual passion for one another. (*Sayd al-Khatir*, P: 605- 606)

As such, in conclusion, whether a *Misyar* marriage is appropriate or not, this depends on each individual case and scenario. One should thus discuss the particulars of one's case with a knowledgeable and God-fearing scholar. As for its validity, if all the basic requirements for a standard Islamic marriage are fulfilled, it is valid, keeping in mind that the wife is entitled to reclaiming her rights that she gave up at the time of marriage whenever she so desires. And Allah knows best (al-Kawthari 2008).

4. Concluding Remarks

The above discussion and *fatawa* on some recent types of marriages practiced in the western and Muslim countries offers a valuable insight into the normativity of law. On the one hand it shows how legal norms sometimes fail to respond to social needs and how society and social practice offers solutions that become socially accepted. The social normativity makes it then possible to transform into legal norms. The above discussions have also suggested a tension between legal, social and moral understanding of social practices. Often, even though legal the moral aspect of the social practice makes it objectionable in the eyes of some law experts.

The main point of discussion is the concept of legal norm that legal positivism offers; a legal norm is defined by grund norm or a specific law-making procedure adopted in a legal system. This perspective separates moral and religious aspects of normativity. However, we have seen that not only the positivist legal system stands morally responsible for the efficacy of social practices in order that these practices or customs do not deprive the persons involved of their basic rights, but that as the practices persist the legal system finds ways to accommodate them.

In case of Islamic law, due to its rich juristic heritage of centuries it is always possible to find some opinions that are relevant to the case in question. *Zawaj Urfi* is a non-issue for the Islamic law experts and practitioners. It is nevertheless a difficult issue for reformists, policy makers and the legal and judicial system. It has posed questions and the system has to frequently accommodate these practices. *Zawaj Misyar* has been an issue for the Muftis for some time, especially for the Sunni experts who compared it in the beginning with Shi'a temporary marriages. Later on, however, Muftis found precedents of women giving up their rights in early Islam.

One finds in *Fiqh* and *Tafsir* literature interesting discussions with reference to the Qur'an 4: 128. The verse stipulates:

And if a woman has reason to fear ill-treatment from her husband, or that he might turn away from her, it shall not be wrong for the two to set things peacefully to rights between themselves, for peace is the best and selfishness is ever present in human souls (4:128).

It is significant that this verse was frequently interpreted from a patriarchal perspective, giving advantage to husband. Most of the jurists rule that in cases when husband ill-treats the wife then she is allowed to live with him by giving up some rights. The reasons given for her husband's ill treatment include wife getting old, ugly, poor or bad mannered. The verse could also be interpreted to mean peaceful settlement for divorce. In the above translation, 'ill-treatment' refers to the Qur'anic term *nushuz*. It is interesting that in another verse when the Qur'an uses this term with reference to woman (4:33), it is translated as 'rebellion' and 'misconduct' and the interpreters go for husband's right to discipline her (See for details CII 2009).

Taken together, the Qur'anic verses stipulate that besides the essential conditions of the marriage contract, the couple settle the terms of contract between themselves as long as the objective of the contract is not violated. The understanding of the objective of

the contract evolves with the social change and the concept of basic rights. The idea of the male being the provider and sustainer is undergoing social change. The law should adopt to it but never at the cost of one of the parties to the contract

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