

## Opinions of Contemporary Muslim Jurists on the Registration of Marriages

Mek Wok Mahmud\*

### Abstract

Registration of marriages is one of the debatable issues among contemporary Muslim scholars. Considering the fact that it was not implemented during the Prophet's (s.a.w) time, many scholars discuss the validity of its practice as one of Shari'ah requirements to recognize a marriage contract. There is a need to critically analyze the opinions of contemporary Muslim scholars on the registration of marriage as a requirement for a marriage contract to be recognized and officially authenticated, as currently practiced in many Muslim countries. Adequate attention is needed to be paid to the issue of the *Shari'ah* status of marriage registration, as it has no basis among the *Shari'ah* requirements for a valid marriage contract. This paper takes into consideration ten principles of Islamic jurisprudence such as *al-Qiyās*, *Sadd al-Dharā'i'*, *al-Istihsān*, *Maqāsid al-sharī'ah* and *as-Siyāsah al-Shar'īyah* to prove that the registration of marriage cannot be regarded as alien to Islamic law.

**Keywords:** Registration of Marriage, *Istihsān*, *maqāsid al-Sharī'ah*, *al-Maṣāliḥ al-mursalah*, *as-Siyāsah al-shar'īyah*.

### Abstrak

Pendaftaran perkahwinan adalah salah satu isu-isu yang diperdebatkan di kalangan ulama kontemporari Islam. Memandangkan fakta bahawa ia tidak dilaksanakan pada zaman Nabi (saw), kebanyakan ulama membincangkan kesahihan amalan-nya sebagai satu keperluan Syariah untuk mengiktiraf kontrak perkahwinan. Terdapat keperluan untuk menganalisis secara kritikal pendapat ulama Islam kontemporari tentang pendaftaran perkahwinan sebagai keperluan untuk kontrak perkahwinan yang diiktiraf dan disahkan secara rasmi, sebagaimana yang diamalkan pada masa ini di kebanyakan negara Islam. Perhatian yang sewajarnya perlu diberi kepada isu status pendaftaran perkahwinan Syariah, kerana ia tidak mempunyai asas di antara keperluan Syariah untuk kontrak perkahwinan yang sah. Karya ini mengambil kira sepuluh perundangan Islam seperti *al-Qiyās*, *Sadd al-Dharā'i'*, *al-Istihsān*, *Maqāsid al-sharī'ah* dan *as-Siyāsah al-Shar'īyah* untuk membuktikan bahawa pendaftaran perkahwinan tidak boleh dianggap sebagai sesuatu yang asing kepada undang-undang Islam.

**Keywords:** Pendaftaran Perkahwinan, *Istihsān*, *maqāsid al-Sharī'ah*, *al-Maṣāliḥ al-mursalah*, *as-Siyāsah al-shar'īyah*.

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\*Associate Professor, Department of Fiqh & Usul Al-Fiqh, International Islamic University Malaysia, e-mail: mekwok@iiu.edu.my

## Introduction

For Muslims, the *Sharī'ah* is the law of God. God alone is the giver of law; the function of man is to comprehend the law and to obey its divine provisions. The *Sharī'ah* covers all aspects of life and every field of law – constitutional, international, criminal, civil, and commercial – but at its very heart lays the law of the family.

Although by the mid-nineteenth century, many areas of traditional Islamic law had been swept away by, *inter alia*, the *Tanzimāt* reforms, the changes in the law of the family came later and were undertaken with great delicacy. The countries of the Islamic world which felt the need to effect changes in the law of the family in order to address contemporary requirements attempted to do so within the framework of Islamic legal principles, so preserving the Islamic context of the law.

More radically, in other cases, verses of the *Qur'ān* were examined and given noble interpretations in order to effect what was felt to be much-needed reform. As an instance of this, with the terse enactment “Polygamy is forbidden”, Tunisia became the first country to abolish polygamy within the framework of the *Sharī'ah*. The Memorandum accompanying the Law of Personal Status of 1956 states that the juristic basis for this reform is the *Qur'ānic* verse concerning polygamy itself. This verse permits polygamy only where a man has no fear that he may be able to treat more than one wife equally. That, say the reformers, would be impossible for all but a prophet, so that in fact the *Qur'ān* itself effectively forbids polygamy.<sup>1</sup>

In the same vein, the Supreme Court of Pakistan has also employed *Qur'ānic* reinterpretation to bring about change in the law. In *Khurshid Bihi v. Mohammed Amin*<sup>2</sup> the Court gave its own interpretation to the verse on *khul'* to give women the right to obtain a judicial *khul'* in cases where there was found to be an irretrievable breakdown of the marriage.

In some countries of the Middle East, however, at the present time, such changes, legislative or judicial, are now gathering momentum as it is widely reported recently, that Saudi Arabia may ban marriage for

<sup>1</sup> El-Alami, Dawoud and Hinchcliffe, Doren, *Islamic Marriage and Divorce Laws of the Arab World*, (Cmel Books Series, 1996), no. 2, p. 3-4.

<sup>2</sup> P.L.D. (1967) S.C 97.

girls younger than 18. A government minister said, after a case of an eight-year old girl marrying a man more than 40 years her senior drew international criticism: "Among the options that are available and excluding the issue of puberty, is to ban marriage for [people] under 18," Justice Minister Mohammed al-Eissa told *Al-Sharq al-Awsat* newspaper. He was responding to a question about his ministry's plan to deal with the marriage of young girls. "A girl below 18 is often not fit to take the family responsibility especially if she quickly gives birth [after marriage]"<sup>3</sup>

Registration of marriage is one of the contemporary controversial issues relating to Islamic rules and regulations on marriage contracts taking into consideration various rights attached to it in this contemporary world. It is as important as the other *sharī'ah* requirements for a valid marriage, a situation demanding further research and study especially from the Islamic perspective, more so that the registration of marriage contracts, until recently has not been accorded any importance in the Islamic world. This might not be unconnected with the circumstances and the situation of things which have not made the exercise a pressing issue. But now that the circumstances have changed and the status quo cannot be maintained, the nature of contemporary life has to be considered in accordance with the various interests associated with the contract. The importance of marriage registration cannot be overemphasized studying carefully the importance accorded to marriage contracts in Islam, which is evident in setting rules and regulations governing it, with a clear cut stipulation of the rights and obligations of the parties concerned. Despite the fact that the validity of a marriage contract is associated with criteria regarded as the prerequisite for its recognition, the contemporary situation is now necessitating the introduction of new dimensions to these criteria, such as setting a minimum age for marriage and medical certification of the intending spouses. Prominent among them is the mandatory official documentation of the marriage contract (registration of marriage contract) for its recognition, due to the adverse effects associated with unregistered marriage contracts in recent times. In order to know whether the practice is accepted in Islam and to what extent it is applied, the research will analyze opinions from contemporary scholars regarding

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<sup>3</sup> Saudi Arabia to consider banning marriage for girls younger than 18  
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the registration of marriage contracts since it is not touched by the primary sources, al-Quran and Sunnah.

The research therefore will utilize an inductive approach for related verses of the Holy *Qur'ān* and *Hadīth* of the holy Prophet followed by an analytical method to analyze collected academic materials according to the various views of the scholars with their collaborating evidences.

### 1.0: Marriage Contract

Islam, unlike other religions is a strong advocate of marriage. There is no place for celibacy, like for example in the case of Roman Catholic priests and nuns. The Prophet (*pbuh*) has said, "there is no celibacy in Islam"<sup>4</sup>. Marriage is a religious duty and is consequently a moral safeguard as well as a social necessity. Islam does not equalize celibacy with high "*taqwa*" or "*Imān*". The Prophet has also said: "Marriage is my tradition, whosoever keeps away there from is not from amongst me"<sup>5</sup>. Marriage acts as an outlet for sexual needs and regulates it; so one does not become a slave to his or her desires. It is a social necessity; because through marriage, families are established and the family is the fundamental unit of our society.

Furthermore, marriage is the only legitimate or *halāl* way to indulge in intimacy between a man and a woman. Islam takes a middle of the road position to sexual relations, it neither condemns it like certain religions, nor does it allow it freely. Islam urges us to control and regulate our desires, whatever they may be so that we remain dignified and do not become like animals.

### 1.1: Meaning and purpose of marriage

In Islam marriage is known as "*al-zawāj*" or "*al-nikāh*". Depending on the perspective from which it is being defined, different definitions are being given to marriage when viewed from its syntactical property, only that their semantic properties indicate uniformity of aim

<sup>4</sup> Ibn Hajar, Ahmad Ibn 'Ali Ibn Hajar Abū al Fadhl Al-'Asqalāni Al-Shafi'i, *Fath al Barī sharh Ṣaḥīḥ Al Bukhārī* (Bayrūt: Dār al Ma'rifah, 1379), Vol. 9, p. 111.

<sup>5</sup> Al-Aṣbahī, Mālik Ibn Anas Abu 'Abdillāh, *Muwatta' Al Imām Mālik – Riwayah Muḥammad Ibn Anas*. Taḥqīq by Dr. Taqīyu al-Dīn Al-Al Nadawī (Damascus: Dār al-Qalam, 1<sup>st</sup> edn, 1991), Vol. 2, p.427.

and objectives of these definitions. According to Abu Zahrah, *Al-zawāj* is defined as, “a contract availing legality of relationship and cooperativeness between a man and a woman with clear cut rights and duties.”<sup>6</sup> A similar definition is also given by Dr. al-Turmanini with the addition of “as regulated by law or custom”<sup>7</sup>

With marriage, being a multifaceted phenomenon, personal status laws of various Muslim countries deem it fit to give marriage comprehensive definitions suitable for the contemporary challenges conforming with Islamic aims and the objectives of *Sharī‘ah* on marriage. Some examples of these definitions are:

Articles 1, 2, 3, 4 of the Algerian personal status law give prominence to the family as a unit of society with marriage and parenthood as the bond among its members with clear definition of marriage as follows:

- 1) All relationships between members of the family are regulated by the provisions of this law.
- 2) The family is the fundamental unit of the society and is made up of persons joined by the bonds of marriage and of parenthood.
- 3) The family relies in its manner of living on solidarity, understanding, sound education, good morals and the elimination of social ills.
- 4) Marriage is a contract which takes place between a man and a woman according to the legal formulae. It has amongst its aims the founding of a family based on affection, compassion and cooperation, the protection of the morals of the spouses and the preservation of family relations.<sup>8</sup>

Dealing with “Matter Preceding Marriage” the Kuwait personal status law in its Article 1 defines marriage as “a contract between a man and a woman who is lawfully permitted to him, the aim of which is cohabitation, chastity and national strength.”<sup>9</sup>

In the same vein “The Code of Personal Status of Morocco” gives the definition of marriage as “a lawful pact between a man and a woman to unite and remain together in a permanent manner, its aim being

<sup>6</sup> Abū Zahrah, Muḥammad. *Al-aḥwāl al-shakhsiyyah* (Dār al-fikr al-‘arabī, n.d.), p. 17.

<sup>7</sup> Al-Turmanini, ‘Abd al-Salām. *Al-zawāj ‘inda al-‘arab fī al-jaḥīliyyah wa fī al-islām*, (Ḥalab: Dār al-qalam al-‘arabī, n.d.), p. 17.

<sup>8</sup> El-Alami, Dawoud and Hinchcliffe, Doren. *Islamic Marriage and Divorce Laws of the Arab World*, p. 39-40.

<sup>9</sup> Ibid, p. 115.

integrity and chastity and the growth of the population of the nation by the founding of a family under the care of the husband, based on stable foundations, and requiring the contracting parties to bear its burdens in trust, peace, affection and respect”<sup>10</sup>.

It is important to note the clarity in those definitions about the sexes of the partners in the marriage contract; that the contract must be between a male and female (opposite sexes), to actualize the general purpose of marriage which is that: the sexes can provide company to one another, love one another, procreate children and live in peace and tranquility to the commandments of Allah. Marriage serves emotional and sexual gratification and as a means of tension reduction. It is also a form of “*Ibādah*” because it is obeying Allah and His messenger.

In Western civilization, the situation is different as a marriage contract is not necessarily between opposite sexes, paving the way for same sex-marriage. Marriage, based on that, is defined as “*a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners and accords status to their offspring (if any).*”<sup>11</sup> As a consequence, by the 21<sup>st</sup> century, the nature of marriage in Western countries—particularly with regard to the significance of procreation and the ease of divorce—had begun to change.

*“In 2000, The Netherlands became the first country to legalize same-sex marriages; the law came into force on April 1<sup>st</sup>, 2001. Belgium passed a similar law in 2003, except that it limited marriageable partners to those whose national laws allowed such marriages (i.e., Belgians could only marry Belgians or Netherlanders). Court decisions in some Canadian provinces made same-sex marriages legal there in 2002–04. Some Scandinavian countries extended benefits and obligations to same-sex couples by means of a registered domestic partnership or civil union, both of which terms meant different things in different contexts. This type of union was also recognized by some U.S. states.”*<sup>12</sup>

The clarity about the marriage contract in Islam, its importance, objectives and rights associated with the contract are all evident in the following quotations from the *Qur’ān* and *Sunnah*:

<sup>10</sup> Ibid, p. 198.

<sup>11</sup> Common law Marriage. *Encyclopædia Britannica 2009 Student and Home Edition*. (Chicago: Encyclopædia Britannica, 2009).

<sup>12</sup> Ibid.

1) *“Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things” [ Qur’ān 24:32]*

2) *“If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And Allah hath full knowledge about your faith. Ye are one from another: Wed them with the leave of their owners, and give them their dowers, according to what is reasonable” [Qur’ān 4: 25]*

3) *“O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women;- reverence Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (That bore you): for Allah ever watches over you” [Qur’ān 4:1].*

4) *“O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things) [Qur’ān 49:13]*

5) *“And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect”. [Qur’ān 30:21]*

6) *“Whoever marries has completed half of his religion so let him fear Allah in the remaining portion...”<sup>13</sup>*

7) *“A believer must not hate a believing woman (i.e. his wife): if he dislikes one of her characteristics, he will be pleased with another.”.*  
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Based on the above, marriage is seen as the only possible way for the sexes to unite. One could choose to live in sin, however by choosing marriage one is displaying obedience to Allah.

Marriage, being *“mithāq ghalīdh”* (a solemn covenant-agreement), is not a matter which can be taken with levity. It should be entered into with total commitment and full knowledge of what it involves. It is not

<sup>13</sup> Al-Ṭabarānī, Sulaymān ibn Ḥammād, Al-Amu‘jam Al-Awsaṭ, , Ḥadīth No: 339.

<sup>14</sup> Muslim, kitāb al-rḍā‘, Ḥadīth No: 1469

like a sale transaction where a lot of concessions are enjoyed, one partner should be another's choice for life. One should be mature enough to understand the demands of marriage so that the union can be a lasting one<sup>15</sup>; as a result certain conditions must be met for a marriage to be valid prominent among which are:

- 1) Consent of both parties.
- 2) "*Mahr*" a gift from the groom to his bride.
- 3) Witnesses- two male or female.
- 4) The marriage should be publicized; it should never be kept secret as it leads to suspicion and troubles within the community.

Those conditions serve as apparatus to safeguard the rights associated with this vital contract, included in these rights are, primarily, the rights of the contracting man and woman, followed by the rights of the children and the rights to be enjoyed by the community in general from an authentic marriage contract. The above quotations from both the *Qur'an* and *Sunnah* are meant to illustrate the importance of the rights and various interests associated with the marriage contract and how they are protected through the strong conditions prescribed for the marriage contract to be authentic.

As it is evident in the above, these rights are multidimensional and complex in nature, only that this complexity has temporarily assumed a new dimension necessitating the introduction of new mechanisms to block all the loopholes leading to evasion and avoidance of these rights due to insincerity of people in abiding by the *Sharī'ah* rules and regulations, as people nowadays, for flimsy reasons resort to giving false testimony, breaking the promise and betraying trusts, consequently the traditional way of authenticating marriage contracts such as its witnessing by at least two witnesses and its publicity prove ineffective in addressing the contemporary problems associated with the authenticity of this contract. The introduction of mandatory official documentation of marriage contract has been recently resorted to by various government of the world, as a means of curbing the menace of legitimate rights being denied.

The abolishment of common law-marriage (marriage undertaken without either a civil or religious ceremony) in Western civilization was largely due to the problems associated with the rights of those involved

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<sup>15</sup> For further reading, see *Islam in Focus*, by Hammudah Abdalati. (n. p., n.d.), p. 84-91.



in marriage contracts. In a common-law marriage, the parties simply agree to consider themselves married. *“The common-law marriage is a rarity today, mainly because of the legal problems of property and inheritance that attend it in complex urban societies. Common-law marriages were valid in England until Lord Hardwicke's Act of 1753. The act did not apply to Scotland, however, and for many years thereafter couples went north across the border to thwart the ban. On the European continent, common-law marriages were frequent in the Middle Ages, but their legality was abolished in the Roman Catholic countries by the Council of Trent (1545–63), which required that marriages be celebrated in the presence of a priest and two witnesses.”*<sup>16</sup>

The equivalent of common-law marriages is what is known today as “customary marriage” (in some African countries or “*Al-zawāj al-urfi*”-marriages not officially documented - in Muslim countries) *“British colonial rule in Africa did much to eradicate this equivalent of common-law marriages there, but the independence of African nations has led to a reemergence of what is called customary marriage, although certain formal requirements remain, such as registration. In the United States by the second half of the 20<sup>th</sup> century, common-law marriages were valid in about one-third of the states, absolutely or conditionally (if entered into before a certain statute-defined date) defectively solemnized (e.g., because of an error on the marriage license) was often declared valid as a common-law marriage.”*<sup>17</sup>

## **2.0: Registration of marriage**

### **2.1: The meaning of registration of marriage**

Literally, the phrase “Registration of Marriage” is self-explanatory and can be simply identified as the process of documenting marriage contracts regardless of being in accordance with any specification or being subjected to any rule and regulation, but a quick perusal into various literatures on personal or family laws provide for a broader and specified meaning which is in conformity with the purpose of the process. In this light, Dr. Ashqar defined the phrase as "Underwriting the marriage contract under the supervision of a judge as an empowered

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<sup>16</sup> Common-law marriage, *Encyclopædia Britannica 2009 Student and Home Edition*.

<sup>17</sup> Ibid.

authority for marriage contracts or any delegated authority by the judge for the purpose of documentation and authentication of marriage contracts<sup>18</sup>.

## 2.2: Historical profile on registration of marriage.

Based on the nature of the Muslim community and the official requirements of the past, Islamic Scholars did not regard official registration of marriage contracts through a judge or a scholar as a prerequisite for its recognition or validity, as the contract is simply conducted between the two parties involved by oral pronouncement of affirmation and acceptance in the presence of witnesses. Muslims were not requested to register their marriage contracts. Once the attestation, desirability of its declaration and celebration are satisfied, the contract is regarded as *Sharī'ah* compliant. This assertion is firmly established by the fact that, it was never established in any classic Islamic jurisprudence literature to create a role for an administrator or a judge in administering a marriage contract, be it to register or to authenticate it. Documentation of marriage contracts could only be traced back to the time when Muslims started postponing the payment of dowry or part of it (as reported by Ibn Taymiyah) as the document where the postponed dowry is recoded then serves as authentication of the marriage contract. To corroborate this assertion, Ibn Taymiyah said, "The companions of the Prophet (*SAW*) were not used to writing down the dowries, for they did not marry on postponed dowries, but when people married on postponed dowry for a long period of time and this often lead to its being forgotten, its documentation specifying the nature and the amount was introduced to avoid all circumstances that may lead to forgetting or disputing it. This process then serves the purpose of averment of the dowry and the authenticity of the marriage"<sup>19</sup> For simplicity, "registration of marriage" may be classified into three stages as follows:

### First stage: partial or conditional registration

At this stage, not all marriage contracts are registered, the registration is circumstantial; for it was only exercised on marriages

<sup>18</sup> Al-'Ashqar, 'Umar. *Sharḥ qānūn al-ahwāl al-shakhsīyyah*, p. 93.

<sup>19</sup> Ibn Taymiyah, Aḥmad Ibn 'Abd al-Ḥalīm, *Al-Fatāwā al-Ḥamawīyyah* (n.p, 1386), vol. 3, p.188.

contracted on delayed dowry, as mentioned above. The postponement of dowry or part of it for a long period of time necessitated the documentation of the marriage contract in the first instance, to guard against any dispute regarding the nature, the amount and the payment of the postponed dowries, but indirectly, preserving the rights of women and the children, for the proof of marriage and be assured of the legality of the contract, indicating that the introduction of this exercise was brought about by the demands of the situation and circumstances. At this stage a marriage generally may be proved by:

1) Direct evidence, where two witnesses, whose testimony is admissible in a *Sharī'ah* court; give evidence that they were present at the conclusion of the contract.

2) Indirect evidence, failing direct evidence, a marriage can be proved by indirect evidence, for example by proof of long cohabitation as husband and wife, or where the man acknowledges the woman as his wife. In such cases presumption of marriage arises, and it is for the person denying the fact of the marriage to rebut the presumption.<sup>20</sup>

#### **Stage two: General non-mandatory registration**

The registration of marriage assumed a new dimension when the exercise of registration was widely practiced. The reason for this being that many countries of the Muslim world have enacted provisions for the registration of marriage and that, in these countries, obviously the best means of proving a marriage is by the production of the certificate of marriage. But at this stage, the proof of marriage through direct or indirect evidences can still be recognized and accepted as a means of settling any claim or counterclaim relating to the marriage contract, in other words, the introduction of marriage registration did not assume its mandatory status at this stage, as marriage related disputes can still be entertained in law courts without being officially documented.

• In *Majallah al-Aḥwāl al-Shakṣiyyah*, book one, article 4 of the Tunisian personal law, it states: “A marriage shall only be proved by an official document prescribed by law. Marriage contracted outside the

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<sup>20</sup> El-Alami, Dawoud and Hinchcliffe, Doren. *Islamic Marriage and Divorce Laws of the Arab World*, p. 8.

Court shall be proved by the methods employed in the laws of the country in which the marriage is contracted,”<sup>21</sup>

- Iraq’s marriage law after maintaining that “Any man who contracts a marriage outside the court shall be punished,” *Article 11* of the same reiterates that “If a man affirms to a woman that she is his wife and there is no lawful or legal impediment to this and if she confirms this then her marriage to him shall be proved by his affirmation. If a woman affirms that she has married a man and he confirms this during her lifetime and there is no legal or lawful impediment, the marriage between them shall be proved. If he confirms it after her death the marriage shall not be proved.

- *Article 22* of the Algerian Civil Status law states that “Marriage may be proved by the presentation of an extract from the Register of Civil Status. In the absence of a register entry it may, however, be made valid by a (court) judgment if the elements which constitute the marriage are fulfilled in accordance with the provisions of the law. Once this formality is completed, it shall then be entered in the Register of Civil Status.”

### **Stage three: Mandatory registration**

At this final stage, registration of marriage provisions in various Muslim countries assumed a full fledged mandatory status, as all civic rights without an officially authenticated marriage are denied and non officially registered marriages will not be entertained as a subject of litigation in law courts. Article 92, Chapter Six captioned as: “Claim of Marriage” of the Kuwait personal status law states that: “With regard to events occurring after this law comes into effect.

- No claim of marriage shall be heard where it is disputed unless the claim is established by an official marriage document or the denial of marriage was preceded by some reference to the marriage in official papers. An exception to this shall be if the claim is a factor in a separate claim from paternity or a claim for paternity leading to some other right.

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<sup>21</sup> Article 4, book one of Tunisian Personal Status Law- *Majallat al-Aḥwāl al-Shakhsiyyah* as quoted in El-Alami, Dawoud and Hinchcliffe, Doren. *Islamic Marriage and Divorce Laws of the Arab World*, p. 240.

In this case, the decree of paternity shall as a result be a decree establishing marriage.”<sup>22</sup>

• Egyptian law enacted in 1931 that no disputed claim of marriage was to be entertained where the marriage could not be proved by an official certificate of registration, and no such certificate could be issued if the bride was less than 16 or the bridegroom less than 18 years of age at the time of the contract.<sup>23</sup>

### 3.0: Registration of marriage from Islamic perspective

Among contemporary Muslim jurists, a marriage that satisfies the requirements and conditions prescribed by Islam, but is not officially authenticated (documented) i.e. not registered in a *Sharī‘ah* court, is known as Customary marriage (*Al-Zawāj al-‘Urfī*), though it may be written down in the presence of the *Walī* and the witnesses. This type of marriage is Islamically recognized, and was prevalent among Muslims in the past, until the official authentication of marriage in recent times became known and practiced among the Muslims as prescribed by personal status laws of many Muslim countries. In Egypt, the Personal Status Code required the registration of the marriage officially, as stated in Article XVII as follows:

1) “ A Suitor must consult a judge or his deputy to carry out the contract.

2) The marriage must be conducted by a deputy authorized by a judge in accordance with an official document, or by the judge himself in exceptional cases, with the permission of the chief judge.

3) If the marriage is solemnized without an official authentication, all parties involved -the knitter, couple and witnesses- are liable for punishment as provided in the penal code.

4) All authorized officials vested with the registration exercise are also liable for punishment as specified above and shall be removed from office.”

Despite the fact that registration of marriage has now become a necessary legal formality to marriage in most Muslim countries, to give

<sup>22</sup> Article 92, chapter six of Law No. 51 of 1984, concerning personal status, as quoted by El-Alami, Dawoud and Hinchcliffe, Doren. In “*Islamic marriage and divorce laws of the Arab World*”, p. 133.

<sup>23</sup> “Sharī‘ah.” *Encyclopædia Britannica 2009 Student and Home Edition* (Chicago: Encyclopædia Britannica, 2009).

the process a clean bill of *Sharī'ah* compliance remains controversial among contemporary scholars. The source of the controversy has its reference in the different perspective through which registration of marriage is studied, those who see marriage as being well defined in Islamic law, stood the ground that marriage and divorce upon the fulfillment of its Islamic requirements will be considered valid and binding even without being registered as no stipulation regarding registration of both can be clearly traced to both the *Qur'ān* and *Sunnah*. This stand is based on the fact that, the marriage contract is knotted by mere offer and acceptance (*Ijāb wa Qabūl*) from the two intending spouses in the presence of at least two witnesses, as a result, documentation of marriage by an appropriate authority is only a means of granting the contract an official recognition which has nothing to do with its validity.<sup>24</sup>

But, for the view that gives prominence to the benefits derived from its documentation, registration is not a mere official recognition requirement as it helps in actualizing *Sharī'ah* objectives or purposes of marriage and blocking all pretexts jeopardizing the interests of the parties concerned. With that, registration of marriage should not be regarded as an alien to the Islamic requirements, or mere administrative requirement, but a religious obligation that must not be taken with levity.

After this brief introduction, to determine the stand of *Sharī'ah* on this issue, in the opinions of contemporary Muslim jurists, their evidences regarding desirability or otherwise of the documentation of marriage contracts can be enumerated as follows:

#### **First opinion:**

The registration of marriage does not carry any religious impact, it is just a formal or administrative regulation meant to realize certain objectives, such as the protection of marriage, and safeguarding the interests of the contract as related to the individuals, society, and the nation in general. Despite their realization of the benefits attributed to this process, the advocates of this opinion still maintain that registration of marriage and other related issues are mere rules and regulations which are not in conflict with *Sharī'ah*, but have nothing to do with the

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<sup>24</sup> Afanah, Huseim al-Din. *Fatāwā Yasa'lūnak (Qānūn al-'Aḥwāl al-Shakhṣiyyah al-Mi'yāriyyah, n.d).*

authenticity of the contract, as a result, no religious impact can be assigned to it. This view is held by many contemporary scholars, among them: Tanzil al-Rahman, Dr. Peunoh Daly, Sheykh ‘Afanah, Sheykh al-Azhar Jad al-Haqq, and Jamil J. Nassir.

In supporting this view Tanzil al-Rahman (1984) agreed that the provision of registration is not found in the *Qur’ān* or *Sunnah*, but there are no prohibitory provisions either Muslim jurists, however, are of the view that the writing down (recording) of marriage (*kitābah*) is desirable. It may, however, be clearly noted that the registration or non-registration of marriage does in no way affect the legality or validity of marriage. If a *nikāh* has been duly performed according to the *Sharī’ah*, it is valid; mere non-registration will not affect its character. The condition of registration is, therefore, merely auxiliary. It is not a constituent condition of a marriage. The purpose of the enforcement of registration is to remove the difficulty of proving the marriage and dower. Therefore, there is no inappropriateness in appointing a registrar to achieve the above objectives.<sup>25</sup> According to Dr. Peunoh Daly (1994), to keep a record of marriage is important as it is for the benefit and protection of the society at large and is not against the Islamic law<sup>26</sup>.

Sheykh ‘Afanah while maintaining the same view submitted that : "The rule in Islam is that marriage is knotted by “*Ijāb wal qabūl*” or offer and acceptance between the two spouses or by their proxies or between one of them and the other proxy, in the presence of two witnesses with other conditions to be satisfied. Only recently, official documentation of marriage is introduced in order to among other objectives proof the authenticity of the marriage in case there is dispute, though documentation is not a precondition for the contract to be valid”<sup>27</sup> the same view is held by Sheykh al-Azhar-Jad al-Haqq”<sup>28</sup> and Jaml J. Nassir<sup>29</sup>.

<sup>25</sup> Tanzīl al-Rahman, *A Code of Muslim Personal Law*, (Karachi: Islamic Publisher, 1984), Vol. 2, p. 88.

<sup>26</sup> Dr. Peunoh Daly, *Hukum Perkahwinan Islam – Satu Studi Perbandingan kalangan Ahlus Sunnah & Negara-negara Islam* (Kuala Lumpur: Thinker’s Library, 1994), p. 124.

<sup>27</sup> ‘Afanah, Husam al-din. *Fatāwā Yasa’lūnak (Qānūn al-’Aḥwāl al-Shakhsiyyah al-Mi’yāriyyah)*.

<sup>28</sup> Jad al-Haqq ‘Allyy Jad al-Haqq. *Ministry of Endowment Web-Egypt*. <http://www.islamic-council.com>.

<sup>29</sup> Nassir, Jamal, J, *The status of women under Islamic Law* (London: Graham & Trotman, 1990), p. 28.

### Second opinion:

The registration of marriage is an Islamic requisite, being required by the contemporary circumstances, thereby making the registration of marriage in the law courts a religious duty. Prominent among the strong advocates of the view that the registration of marriage is compulsory and to be regarded as a mandatory religious duty is Dr. 'Ukam.

This second opinion is the choice of the researcher based on various legal justifications for the conditionality of this exercise for a marriage contract to be valid.

### 3.1: Evidences supporting registration of marriage contract as religious duty

**First**, the fact that in various laws of personal status of Muslim countries it is clearly stated that *Sharī'ah* and its sources, rulings of various schools of Islamic Jurisprudence (*Al-madhāhib al-fiqhiyyah*) and contemporary discretions are the sources of these laws, makes the laws of *Sharī'ah* based and its rules and regulations given the same status according to juristic issues determined by the discretions of classical Islamic scholars. To buttress this point, the following references may be suitable:

- The Algerian Personal status law, codified in 1984, was based on the Maliki School. The codified law, No. 84-11 of 9 June 1984 contains (in Article 222) a provision for reference to the *Sharī'ah*, The effect of this is that, rather than being restricted to a single school, judges are able to seek an appropriate solution to a problem from any of the sources of the *Sharī'ah*, including the primary sources – the *Qur'ān* and *Sunnah* as well as secondary sources such as *ijmā'* (juristic consensus), *qiyās* (analogy), *istihsān* (juristic preference) or *maṣāliḥ mursalah* (the considerations of public interest) and other tools of jurisprudence, the opinions of any of the Sunni or other schools of law, and even custom and convention<sup>30</sup>.

- For Iraq, all areas of Iraqi law were governed by the *Sharī'ah*, without distinction between civil and personal status law. In 1917, with

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<sup>30</sup> El-Alami, Dawoud and Hinchcliffe, Doren. *Islamic Marriage and Divorce Laws of the Arab World*, p. 39.



the reorganization of the courts, the *Sharī'ah* courts became responsible solely for the personal status affairs of the adherents of the Sunni schools. In 1918, the Regulation of the *Sharī'ah* Courts was issued, in which a “*Majlis Tamyīz al-Sharā'i*” (*Sharī'ah* Review Board) was established to review rulings issued by the Sunni *Sharī'ah* Courts.<sup>31</sup>

- The Jordanian personal status law is rooted in various schools of jurisprudence but relies overall on the Hanafi School. This law was based on schools other than the Hanafi School, but provision is made in Article 180 for reference to be made to the most appropriate opinion of Abu Hanifa in the case where no specific textual provision is found<sup>32</sup>.

- In Kuwait, cases relating to personal status are determined by the rulings of the *madhhab* or school of Imam Malik<sup>33</sup>.

- Libyan personal status law is also based essentially on the Maliki School. Article no. 87 of 1973 merged the civil and *Sharī'ah* courts in such a way that *Sharī'ah* Courts would deal with matters of personal status within the structure of the Civil Courts. In a manner very similar to other Muslim countries laws, Article 72 of Libyan law provides for reference to the sources of the *Sharī'ah*.<sup>34</sup>

- In Syria, the Explanatory Memorandum to presidential Decree, No. 59 of 1953, indicates that it was derived from a range of sources, including the customary (Hanafi) family rights law, Egyptian law, Qadri Pasha's *Ahkām al-Sharī'ah fī Masā'il al-Ahwāl ash-Shaksiyyah*,<sup>35</sup> opinions of schools other than the Hanafi school where these were found appropriate, and a draft of Personal Status Law presented by the Damascus Judge.<sup>36</sup>

- Following the reunification of North and South Yemen, personal status law was issued in 1992. This law according to Dawoud, El-Alami is eclectic in nature, drawing on all the Islamic schools of law.<sup>37</sup>

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<sup>31</sup> Ibid., p.63.

<sup>32</sup> Ibid., p.79

<sup>33</sup> Ibid., p.115

<sup>34</sup> Ibid., p.181

<sup>35</sup> *Sharī'ah* provisions on personal status. See *Introduction to Egyptian Law*, Chapter 3.

<sup>36</sup> El-Alami, Dawoud and Hinchcliffe, Doren. 1996. *Islamic Marriage and Divorce Laws of the Arab World*, p. 215.

<sup>37</sup> To read further on the historical background on the codification of law in Muslim countries, see “*Islamic marriage and divorce laws of the Arab World*” by Daid El-Alami, Doreen Hinchcliffe, (Cmel Books Series, 1996).

**Secondly**, this opinion is unequivocally and emphatically supported by the following principles and legal maxims of Islamic Jurisprudence:

1) The principle of “*sadd al-dharā’i*” (prohibition of evasive legal devices, or blocking the lawful means to an unlawful end).<sup>38</sup> Relating this principle to the topic of discussion, it is lawful to conduct a marriage contract, without registering it with an appropriate authority once it is *Sharī’ah* compliant, but for the fact that this action will certainly lead to an unlawful end it has to be prohibited.

However, there is disagreement among the jurists regarding the acceptance or rejection of this principle. The Maliki’s and the Hanbali’s say that all lawful acts which are certainly leading to an unlawful end may be prohibited. The Shafī’ī’s and the Hanafi’s say that these are lawful acts and they cannot be prohibited<sup>39</sup>.

The opinion of this paper is that this principle is an acknowledged principle of the *sharī’ah* and as long as any act leads to unlawful results, they should be prohibited, because this stand is in tandem with another sister principle known as “*Fath al-Dharā’i*” (permitting the unlawful means to a lawful end) which is unanimously agreed upon by jurists of different schools of thought. If the unlawful means to a lawful end is permitted, it is quite logical to forbid a lawful means to an unlawful end.

2) *Istihsān* (Juristic Preference): *Istihsān*, in the literal sense of it, means: “to consider something good,” but technically, according to Ibn al-‘Arabi as quoted by Nyazee, is defined as “sacrificing some of the implication of an evidence by way of exemption insofar as the exemption opposes some of these implications”. *Istihsān* simply is a method for looking at the consequences of a decision. For the purpose of this discussion, the consequences of strict application of the evidences on the requirement of a valid marriage contract have figured significantly in the preference of recommending registration of marriage which has more healthy consequences for the people. *Istihsān* is an efficient method of legal reasoning that ensures analytical consistency in the system and helps the jurist identify general principles and exemptions besides giving importance to the consequences of the decision.

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<sup>38</sup> Niyazee, Imran Ahasan Khan. *Islamic jurisprudence (Uṣūl al-Fiqh)* (n.p, 2003), p. 248.

<sup>39</sup> Ibid.

Though there are many types of *Istihsān*, there are only three types that are applicable to this topic, namely:

1) *Istihsān* on the basis of what is good. According to al-Sarkhasī, one meaning of *Istihsān* is where *Sharī'ah* is asking us to follow what is good (*ma'rūf*) and has left the determination of this *ma'rūf* to our opinion by following what the *Sharī'ah* would consider to be good, which is determined in accordance with the general principle of *Sharī'ah*. In this case all benefits derived from registration of marriage are unanimously considered to be good as they are in conformity with the general principles of *Sharī'ah*.

2) *Istihsān* on the basis of necessity (*Dharūrah*). The fitness of this type of *Istihsān* is very clear in that contemporary situation has necessitated the introduction of marriage registration, and in *Sharī'ah* "Necessity knows no laws" whereas in this case no law is violated by imposing registration of marriage as a religious obligation because it is a means of facilitating the perfect implication of *Sharī'ah* requirement on marriage contracts.

3) *Istihsān* on the basis of *Maṣlahah*

"*Al-Maṣlahah al-Mursalah*": *Al-Maṣlahah al-Mursalah* is another evidence of *Shari'ah* under which the registration of marriage can be legally determined<sup>40</sup>. Literally *al-Maṣlahah al-Mursalah* is simply defined as "the acquisition of *manfa'ah* (benefit) or the repulsion of *madharrah* (injury or harm), in a technical sense, it means "the preservation of the purposes of *Sharī'ah* or Islamic law in the settlement of a legal issue" The purposes of the law are the interest recognized by *Sharī'ah*. The relevance of this evidence of *Sharī'ah* in determining the status of registration of marriage is unambiguous; in that:

a) In relation to the preservation of the right of couples and their children, many benefits (*manf'ah*) are acquired and many injuries or harms (*madharrah*) are also repelled or avoided through the implementation of registration of the marriage, some of which can be enumerated as follows:

i. In many, if not all countries of the world, marriage contracts are not recognized unless they are officially authenticated which is only possible if they were registered.

ii. No claim can be laid to inheritance between couples unless their marriage is officially certified.

<sup>40</sup> *Fatāwā* from center for *Fatwa* on Islamic web [www.islamweb.net](http://www.islamweb.net)

iii. Linage is the only means through which children can inherit their parents; its establishment can only be made possible through the official document showing the marriage contract between their parents.

iv. Hajj, one of the corner stones of Islam, cannot be performed by a woman without her *mahrim* – husband, father or brother- the proof of which can only be possible with officially certified marriage.

These and other benefits necessitate the classification of this exercise under *Al- Maṣlahah al-mursalah* which according to Al-Salibi is one of the Islamic jurisprudence principles considered by classical Muslim scholars as a means of determining the legality of any contemporary issue<sup>41</sup>.

b) All conditions for determining a legal issue through *al-Maṣlahah al-Mursalah* such as not clashing with a text (*naṣṣ*) or altering the implication of text, not clashing with existing principles and propositions of Islamic law (established practices of *sharī'ah*), and not being strange (*gharīb*) to *sharī'ah* (i.e. that the norm promoted must be among the purposes recognized by *Sharī'ah*) are satisfied.

c) The purposes recognized by *sharī'ah* which are actualized or supported by marriage registration are not less important than those actualized by well known examples of legal issues settled through *al- Maṣlahah al-Mursalah*. Ghazali said: on the basis of *al-Maṣlahah al-Mursalah* it is permitted to the ruler to impose taxes if the coffers are empty and he needs money for *Jihād* or for the preservation of the Muslim *Ummah*. There is no doubt that the preservation of interest of individual families from which Muslim *Ummah* is constituted is directly related to the security of the *Ummah*.

3) *Maqāsid al-Sharī'ah*: Necessities or exigencies associated with the registration of marriage contracts put it under the recognition of *Maqāsid al-sharī'ah* (general objectives of *Sharī'ah*) especially at this time in which marriage contracts are no more considered valid unless they are officially authenticated through registration, wife and children are no longer entitled to inheritance without official documents to prove the deceased's relationship of being husband and father to the children, so a lot of interest will be jeopardized for non registration of marriage.

4) *As-Siyāsah al-Shar'īyah*: That the necessity or regarding registration of marriage being compulsory is brought about by being

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<sup>41</sup> As-Salibi, *Al-I'tilām*, vol. 1, p. 185.

obedient to those who are in authority, as contained in [*Qur'ān* 4:59]: {O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best and most suitable for final determination}.<sup>42</sup>

Among the strong advocates of the view that registration of marriage is compulsory and should be regarded as a mandatory religious duty is Dr. 'Ukam, who also sees that registration of marriage is part of obedience to the people in authority. He states that even though a marriage contract compliant with *Sharī'ah* may be valid, but *Sharī'ah* itself disapproves of being disobedient to those who are charged with authority.<sup>43</sup>

With the evidences enumerated above, the position of the researcher is that registration of marriage should be seen as a religious duty, which, if violated, must be punishable for the following reasons:

a) For being unanimously accepted among contemporary Muslim scholars that there are objectives recognized by *Sharī'ah* and a lot of interests which can only be realized or protected in the contemporary world through the registration of marriage, thereby paving the way for its accommodation as a contemporary issue that needs to be contemporarily treated on the Islamic juristic principles meant for accommodation of such.

b) That *Sharī'ah* frowns at the act of disobeying those who are charged with authority, as they are the ones saddled with responsibility of safeguarding the interest of all people in their domain, once their actions are *Sharī'ah* compliant, any act of disobedience to their authority must be condemned.

### **Conclusion**

The concluding part of this study consists of the findings and the recommendations.

#### **A. Findings:**

i. Though there are two contending opinions regarding the registration of marriage as a basis for its official recognition, both are unanimous in recognizing its importance in this contemporary situation,

<sup>42</sup> 'Aqlah, Muhammad. *Nizām al-Ushrah fī al-Islām* ('Ammān: Maktabah Risālah Hadīthah, 1990), Vol.1, p.394.

<sup>43</sup> Qudsiyyat *al-Zawāj fī al- Sharī'ah wa al-Qānūn* published in Jarīdah al-Jamāhīr al-'arabiyyah of 30/ 3/2005 no. 11802

whereby a lot of harm may be caused and a lot interest may be jeopardized if the directive of registering this contract is not abided by, and that non compliance amounts to disobedience towards people who are charged with authority.

ii. Taking into consideration the objectives and purposes of *sharī'ah* realized through the documentation of marriage officially, the best opinion is the one regarding the documentation as a mandatory religious duty, for the belief that all what *sharī'ah* is aiming at, is to obtain benefit and maximize it and to deter harm or minimize it, which is realizable in this issue through registration of marriage.

iii. To address the juristic problem of proving *Sharī'ah* compliance of registration of marriage, there are many Islamic jurisprudence principles and legal maxims on which its legality is based such as: *Sadd al-dharā'i'*, *al- Maṣlahah al-mursalah*, *Istiḥsān* and *al-siyāsah al-shar'īyyah* as explained in this study.

## **B. Recommendations:**

i. Adequate study needs to be done on many contemporary issues which are of interest to “day to day activities” of the Muslim *Ummah*. The outright rejection of ideas and issues on the basis of being proposed, accepted or practiced by non- Muslims is un-Islamic as acceptance or rejection, must be based on evidence and not on dogma and emotions, such statements as “marriage registration is not Islamic”<sup>44</sup> must be rejected and denounced.

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<sup>44</sup> Rediff News-*Marriage registration not Islamic*, says Muslim board January 24, 2008 <http://www.rediff.com/news/2008/jan/24marriage.htm>.