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Recent Developments in the Application of the Rule of Obligation and Their Study Through Practical Cases

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Abstract: *This research examines the functions of The Rule of Ilzam, the Principle of Binding Obligation, in Islamic Jurisprudence today, within the variable and complex different legal systems now operating. The emphasis here is upon the ways in which this fundamental principle may enable resolution of the key issues now so very much in dispute within all three of the major areas of law dealing with personal status, contracts and transactions, namely in order to arrive at and to implement a just and even in the teeth of very considerable challenge to achieve a stable solution(s). Above all, a principal focus of this work is upon an examination of those significant limitations upon The Rule of Ilzam today – as regards both implementation in practice within individual countries' legal systems and, even, where The Rule has been fully codified, the scope of its effective operation within such systems – with particular, though by no means exclusive, reference to key considerations of legislative as well as constitutional nature, and notably in respect of issues of equal rights and freedom of belief. This study will also look into the codification of Islamic Jurisprudence and the way the Rule of Ilzam has been implemented by various jurisdictions. Some examples of jurisdictions that are discussed in detail are Iraq, Lebanon and Sudan. The study will identify some of the challenges faced by various jurisdictions in dealing with issues of sectarianism, such as conflict of laws, jurisdiction and lack of provisions in legislation. It will also examine the implications of designating an official School of Jurisprudence and the way the Rule of Ilzam could be used to tackle sectarian discrimination whilst at the same time ensuring the protection of individual rights and the rights of minorities in accordance with the higher objectives of the Shariah (Maqasid al-Shariah).Examples of the judicial application of the Rule of Ilzam in terms of current cases in Iraq, Lebanon, Central Asia and the Indian subcontinent, including inter-sectarian marriage, divorce and khulʿ, have been presented and analysed in detail. Analysis is also made of its application to civil contracts and banking guarantees. Opinions of Islamic jurisprudential bodies and of relevant institutions and individuals from around the world have also been discussed in detail.Rule of Ilzam has thus developed beyond the confines of a legal maxim and is now a practical tool in the hands of judges, politicians and legislation, trying to facilitate contact between members of different Islamic schools in a modern society. Above all, the author is of the opinion that adequate legal frameworks are required which are suitable to the various patterns of jurisprudential thought, yet at the same time contain adequate safeguards for the ends of the Sharia, and thus lead to justice, equality and legal certitude.*

Keywords: Rule of Ilzam; Transformations; Modern Developments; Practical Cases.

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INTRODUCTION

Research Problem

Sectarian diversity is a historical, social, and even political fact in the Islamic world. It is also a source of richness for the various schools of thought and of intellectual diversity; however, it also constitutes a challenge to the application of the Islamic law (ash-sharia), particularly in relation to the personal status laws and to the contracts. The various schools of thought — Sunnite as well as Shiite — and even the various schools within each of these two categories have different opinions regarding the most basic questions of the law, i.e., marriage, divorce (talac), inheritance, and the guarantees (in particular the al-magnadir at-remepped guarantees).

Sectarian diversity in the Islamic world represents a historical, social and political fact that has greatly affected the legal and judicial structures of countries with major Islamic populations. Consequently, a lot of difficulties are encountered in the application of Islamic law, and these differences stem from diverse interpretations of different schools of thought, whether Sunni or Shiite, as well as of different branches of each school. To be able to resolve these differences in a manner that is compatible with legislation and does not lead to injustice to the parties to litigation, judges and lawmakers need to be provided with a set of rules and principles that are of a jurisprudential nature. One of the most important of these principles is that of the Ilzam rule, which is frequently defined as the Rule of Ilzam, which is *binding an adherent of another school of thought by the determinative rulings of his own school*.

The central research problem can be stated as the ongoing debate within Islamic legal scholarship regarding the legitimacy of applying the Rule of Ilzam in present-day times. A question which is still strongly contested within Islamic legal scholarship is whether the said maxim is general and applicable to all areas of the Shariah or whether it is an exception for times of hardship or necessity.

The query of whether individuals are to be bound by a ruling issued and grounded in the teachings of a particular school of law to the exclusion of another which the individual or one of the parties follows is likewise significant. Would not such a ruling constitute compulsion against the individual? What is the nature of such compulsion – is it coercive in nature, or is it in fact a matter which is necessary in order to protect individual rights and to achieve due process?

On the other hand, numerous issues, from Applying more lenient legislation or following public interest, while applying the principle of Ilzam, to considering possible unequal consequences brought upon by one or the other party to a dispute that could be even considered as being against the child's best interest and thus possibly against the Koran and Islamic laws in general, all of these

pose serious challenges to the types of solutions that might be acceptable and of use within the realms of religious and state courts.

Research Objectives

The objectives of the research can be listed out to detail further the researcher's ambitions with this study in order to realise the described research problem.

Clarifying the Jurisprudential and Legal Concept of the Rule of Ilzam

In particular, in respect of the definition of Ilzam's Rule, the study tries to achieve a very precise understanding of it, especially as it concerns adherents of other schools of thought being bound by their very own legal positions. In this respect a very detailed analysis shall be given regarding the several Schools of thought' versions of the aforementioned Rule.

Investigating Contemporary Transformations in the Application of the Principle

The study further will analyse in how far the principle of the Rule of Ilzam as a theoretical concept of Islamic Jurisprudence has developed into a codified rule in different countries and into a legal norm within the frame of a civil code or a codification of Shariah.

Impact of Sectarian Diversity on Legal Systems

It examines the impact of sectarianism upon the Personal Status Laws of Islamic states, their conflict-of-laws rules and their judicial structures, particularly in the countries of Iraq and Lebanon. Moreover, the study investigates the degree to which the Rule of Islam helps to or hinders the resolution of the conflicts generated by the diverse patterns of Islamic sectarianism within the realm of law.

Examining Practical and Judicial Cases

This research will provide examples of decisions made by religious and civil courts concerning cases of inter-sectarian marriages that are due to be dissolved either by divorce, *khulʿ* or by financial contracts which have been entered into by parties of different Islamic schools of jurisprudence. Examples of these decisions will be analysed in order to illustrate the application of the Rule of Ilzam in practice.

Investigating Contemporary Jurisprudential Opinions

Moreover, legal opinions and decisions issued by the above-mentioned bodies and institutions such as the International Islamic Fiqh Academy, the Egyptian Dar al-Ifta, the Supreme Islamic Shiite Council, and other similar entities and institutions, will be analysed and discussed to identify

current stances of these international, religious, and juridical bodies and institutions regarding contracts entered into by individuals belonging to different Islamic jurisprudential schools of thought.

Reconciling the Principle with Constitutional Norms

Another objective of the present research study is to explore the ways of application of the Rule of Islam in conjunction with some of the modern constitutional principles and within certain parameters so as to preserve the equality between all Muslim individuals and to ensure their right to freedom of belief.

Providing Legislative and Judicial Recommendations**

Recommendations are developed to assist in the application of the Rule of Ilzam by legislators as well as in the decision-making of the judiciary to achieve the aims of justice within differing jurisprudential models. Proposals for harmonised legislation are put forth with a view to decreasing differences between the various Islamic schools of jurisprudence.

Significance of the Research

The significance of the present study is demonstrated in a number of diverse theoretical and practical areas of study within Islamic legal studies and Islamic law.

Academic and Jurisprudential Significance

The researcher can explore new ideas on comparing different Islamic schools of thought. This research also sheds light on bringing different jurisprudential perspectives closer to each other. In addition to this, different shared principles can be recognised for making judgements in cases of parties belonging to different schools of thought.

Finally, the study aims to create awareness on the extent to which there are common elements amongst different schools of thought in Islam that may facilitate the resolution of legal issues of parties whose legal ejaculations are rooted in different jurisprudential schools.

Legal and Legislative Significance

Significance and relevance of the Rule of Ilzam to the legal codification of Islamic laws in Islamic countries and its relationship to other sources of law. The study examines how the Rule of Ilzam could be incorporated into a code for personal status laws in order to arrive at a nuanced understanding of Islamic Shariah laws as compared with and in relation to positive laws.

The investigation into how the Rule of Islam could be codified into the statute book, especially within the framework of the laws governing personal status, sheds light on how Islamic Shariah could be developed into positive law.

Legislation can use this study to explore a number of examples in order to understand how it is possible to incorporate Islamic legal rules into legislation and to accommodate different schools of thought within the parameters of Islamic law.

Practical Judicial Significance

The research is of value to those who seek to apply different schools of jurisprudence in disputes between parties from different schools of thought. The study provides legal principles that have been applied in various cases from around the world, including Iraq and Lebanon, as well as from other countries, and will serve as a useful comparative analysis for the purpose of judicial interpretation. Analysis of judicial cases of countries like Iraq, Lebanon, and others can provide legal principles and a comparative approach for consideration by judges in cases of inter-sectarian marriage or financial contracts between parties of different schools of thought. By the abovementioned approach the number of contradictory judgements may be decreased, and consistency will be created in the way of making judgements by the judges.

Social Significance

The study tackles a sensitive issue that affects families of inter-sectarian marriages and can lead to their break-ups and the subsequent suffering and hardship of wives and children.
The Rule of Ilzam can help stabilise the family of an inter-sectarian married couple and safeguard the rights of the wife and the children. This understanding also would prevent the breakdown of family relationships amongst the members of the different religions and can lead to further solidification of the communities comprised of different religions.

Economic Significance

Research into the application of the Rule of Ilzam with respect to financial transactions also has considerable value, as it reveals how the greatest obstacles to investment and to commercial transactions with other parties can be overcome. Thus, by offering insights into transactions entered into by individuals and/or companies from schools of Islamic thought, the research will contribute to enhancing Islamic financial services.

Providing legal clarity on contracts between different schools of thought will further foster confidence in transactions between individuals and corporations from all over the Islamic world and ultimately promote unity in the development of Islamic financial markets.

Comparative Significance

The research undertakes a comparative study of a number of countries including Iran, Morocco, Lebanon, Iraq, Pakistan and India. In each of these countries the researcher looks at how legal systems of different kinds have dealt with the same jurisdictional problems.
This comparative research has been useful in adding to legal scholarship and will aid in guiding a number of countries with diverse legal structures to develop their laws in a way that is appropriate to reflect their varying degrees of Islamic content.

Section 1: Modern Implementation of the Rule of Ilzam in the Islamic Countries
1. The Impact of Codifying Islamic Jurisprudence on the Implementation of the Rule of Ilzam in Sharia Courts

First Branch: The Role of Codifying Islamic Jurisprudence in Standardising Judicial Procedures and Harmonising Jurisprudential Schools. At the end of the last century, Islamic countries attempted to codify Islamic jurisprudence to apply it in courts, either as Shariah or as part of a mixed civil law system. In some countries, Islamic jurisprudence was codified in the form of conditions and ways of implementing the Rule of Ilzam, in view of the existence of many schools of thought within Islamic society. The code therefore confines the application of the Rule of Ilzam to the schools of thought recognised by the state or to the schools followed by the judges. According to this approach, the differences among the schools are removed, and one of the schools is adopted to be applied by the courts in all cases. Such an application would necessarily lead to injustices in some cases.

The Rule of Ilzam applies in a state of affairs in which there is the attempt to apply a set of rules with reference to various schools. In that case it is natural that the provisions regarding judicial procedures would serve to establish the degree of standardisation of the required application of all schools of a party. In that sense there are stipulations of specific judicial provisions concerning various schools, designed to facilitate judgements which are in line with the commitments of a party to one of the schools of a disputing party or parties. In this manner, in order to validate a marriage, for example, it is sufficient that the required elements for the validity of that marriage are fulfilled in accordance with any school or schools which are recognised by a state or country. This obviously does not relate to the school of the judge, nor to the school or schools of the state in which the lawsuit is conducted by the parties.

Most of the above-mentioned Muslim countries are striving to harmonise the differing schools of thought within a framework of public interest. The said legislative efforts aim at promulgating a unified code that recognises and gives effect to the contractual relationship of parties to a dispute in accordance with the respective school of thought to which they may belong. By acknowledging

the diverse schools of thought, the harmonious efforts would guarantee justice and bring about a degree of consistency in the Islamic judicial system.

Legislation regarding Islamic law has also been promoted by several Islamic Jurisprudential bodies as well as by certain legislative institutions. The International Islamic Fiqh Academy, an independent body of learning and research affiliated with ISCA, in its efforts to promote the codification of Islamic law, recommended that such legislation be framed in such a manner as to avoid the exclusion of recognised schools of law and to take into account the legal status of the parties as determined by their respective schools. Such legislation within countries with diverse Islamic juristic authorities would, therefore, facilitate the implementation of the rule of Ilzam.
Although codification of Islamic jurisprudence is still in progress and encounters many difficulties, it nonetheless represents an important step in the institutionalisation of Islamic laws and thus has enabled the application of the Rule of Ilzam in practice.

Practical Implementation of the Rule of the Ilzam in the Legislation of Islamic Countries.
Islamic countries of today are experiencing important developments in the codification of Islamic jurisprudence in an attempt to reach a unified system of Sharia laws which are to be implemented in Sharia as well as in civil courts of these countries. Such codification aims at numerous objectives. Chief among them are efforts to establish a single and unified legal system, to diminish differences in various judicial verdicts and decisions, to introduce stability and continuity in interpretative efforts and to ensure the protection of legal rights and lawful interests of individuals and groups in the Islamic community. It is within such an endeavour and within such broad objectives that references to the Rule of Ilzam have appeared either explicitly or implicitly in a variety of cases and contexts pertaining to personal status, contractual relations and transactions of economic activities of individuals belonging to different Islamic schools of thought.

One of the legal systems that is presently being applied within the framework of established laws is that of the personal status of the various religious communities existing within the Lebanese society and that of the various Islamic schools, as well as the other various religious communities. For example, this system would, according to Article 19 of the marriage law, apply the legal commitments of a party in a marriage to the school of that party's religion. Thus, for example, the marriage of a Muslim woman to a Druze would be valid, and the couple would be subject to the approval of the Druze religious authority for divorce, under the terms of the applicable school of that religion.

Under Iraq's Personal Status Law No. 188/1959 — largely based on Islamic laws — even recognised schools are implemented differently in practice. Thus, for example, Number 39 of the main body of provisions sets out that divorce is not effective unless it is expressed by the proper formula for declaration of divorce. There are a number of schools of Islamic law, and their divorce

formulae are different. Therefore, the husband's school would be a factor which a judge might consider when determining the circumstances in which he would hold that he had effectively divorced his wife. Such an implementation is in line with the spirit behind the Rule of Islam.

On the other hand, there are certain provisions within the Jordanian personal status legislation (dowry, divorce, and child custody) that are based on the provisions of the Hanafi school of thought which is the major school of thought which is recognized by the state and thus followed by the courts and the judiciary. Sometimes in such legislation certain provisions are made with respect to the other party who is a party to the contract or to the dispute before the court. That other party is from an officially recognized school of thought. In such cases, the application of the principles of the aforementioned school of thought would reflect a partial codification of the rule of Ilzam even if it were not to be expressly mentioned in the legislation.

Sudan as illustrated above in its rules governing personal status in Sharia courts permits the Judge to base his decision taking into consideration the School of Jurisprudence of one of the parties, should it differ from that of the Court's. This also is an explicit reference to Ilzam and considered to be one of the pioneer countries in this respect.These various cases are yet another proof to confirm that the application of the Rule of Ilzam has been codified in the various Islamic systems. The Rule of Ilzam has thus been implemented within a number of Muslim countries through their State's legal framework by a variety of legislative means. At the right time it is to be hoped that the Rule of Ilzam could become an effective aid to help achieve just ends within the parameters of the Islamic System which is bent on upholding its unity and maintaining the Institute of Government in due order.

The Challenges of Codifying the Rule of Ilzam for Multi-Sectarian Societies within Islamic Jurisprudence to be incorporated into the Legislations of Religious States.

Personal Status Laws in countries with sectarian diversity face unique challenges in terms of both legislative content and implementation. One of the biggest challenges is that of attaining the required degree of acceptance by Islamic scholars, to various degrees, as to the extent to which a follower of one school can be bound by the rulings of another. This challenge extends to finding a proper social (and legal) medium to implement the above-mentioned Rule, as well as preserving its core of achieving justice between parties while maintaining social cohesion and avoiding any sort of conflict.

Rule of Ilzam could thus be regarded as exceptional within Sunni Islamic legal schools. In many cases it is not recommended to be applied to criminal matters or to major financial transactions, because such a practice could enable people to evade being bound by definite Islamic rules and obligations under the guise of differences in Islamic juristic views. Some jurists of the Maliki and Shafi'i schools have even confined the practice to cases of extreme necessity.

Moreover, including the Rule of Islam in the personal status laws as well as in contractual regulations could pose problems and lead to apprehension in multi-sectarian societies such as Iraq and Lebanon. Codifying the principle might give the impression that one jurisprudential school is being favoured over another or even that an attempt is being made to make one school of law prevail over others in order to accommodate differences. Such an impression might attract opposition from different quarters, including religious ones, in countries with many different religious communities and strong religious institutions.

However, there are institutional differences that affect the possibility of applying the Rule of Ilzam. For a start, some countries recognise religious communities and have separate religious courts that apply different rules of law according to the religious affiliations of their members. This is the case of Lebanon. In other countries with a unified Islamic legislation (based on a single school of law), like Morocco and Tunisia, the introduction of the Rule of Ilzam in their legislation would create problems and conflict with their current institutional structure and structures of legislation.

There are also differences in the public's understanding of various aspects of Sharia law and the Ilzam rule in particular. While some individuals understand the basis upon which the Ilzam rule is applied and thus avoid any possible inconsistency in their transactions with members of other Muslim communities, many others perceive such inconsistency or even discrimination. In order to ensure that appropriate legislation concerning Islamic transactions and other aspects of Sharia law is introduced, the public must first be made aware of various aspects of Sharia law, its several schools and even the basis of various well-established principles of the Sharia. This must be achieved by means of religious education, by way of moderate religious discourse, as well as by way of legal education by means of law courses.

Ultimately, establishing a delicate equilibrium between religious and social issues on the one hand, and between differing jurisprudence and a single judicial system on the other hand, requires dialogue at the institutional level among Shariah scholars, lawmakers and the various religious sects.

Subsection Two: The Impact of Sectarian Diversity within a Single State (Lebanon and Iraq as Examples)

First Branch: The Influence of Sectarian Diversity on the Formulation of Personal Status Laws

The effect of sectarian diversity on the structure of laws of personal status in some countries with an Islamic majority is clearly visible in countries with diverse religions and different schools of law, such as in Lebanon with its 15 religious communities, all with their own laws of personal status, and their various churches. In some of these communities there are even different

denominations, all with their own laws of personal status. The various laws of personal status that currently are in force in some Islamic countries, such as the laws of personal status of the different communities in Lebanon and in some of the governors in Iraq, reflect the influence of the sectarian diversity prevalent in these countries. These laws have been drawn up by different communities of worshippers in the above-mentioned countries, each community with its own personal status laws that are applied by the religious courts of the community.

Divergent Islamic schools of law of personal status (IspS) that are recognised by the legislature and practised by the various communities in a given country have led to the establishment of multiple personal status laws. These in turn have led to the creation of 15 religious tribunals in Lebanon, such as the Ja'fari, Sunni, Druze and Christian tribunals. Each of these tribunals applies IspS according to the relevant school of law of that religion. There are considerable variations between the Ja'fari school of law of personal status and that of the Sunni schools. These variations affect fundamental issues such as the age of marriage, the competent authority to give effect to a marriage contract, whether a divorce is revocable or not and the prescribed waiting period of the divorced wife (Iddah). Such divergent issues of IspS would naturally lead to varying judicial decisions depending on the religious-juridical school of law that is recognised by the legislature or the specific religious-juridical court that is hearing a given case.

While the law relating to personal status matters of Muslim individuals may have been codified in the form of a unified Personal Status Law, enacted in 1959, in recent years Iraq has seen an upsurge of demands by various religious communities, especially the country's large Shia community, to have their personal status issues dealt with by the state through legislation tailored to their needs. One of the most notable examples is the proposed Ja'fari Personal Status Law. While this legislation was promoted by human rights groups and political organisations in Iraq, in some instances in opposition to religious fundamentalism, there are also misgivings concerning the differences that this law would reveal with the rest of the Personal Status Laws that are applicable to Muslims in Iraq, and also as to the possibility of the rules of this jurisdiction being applied on a sect-specific basis.

A) Practical Obstacles: In registering and recording marriage contracts and divorce agreements as well as in issuing and implementing judicial decisions, several differences and discrepancies occur. For example, while under the Ja'fari school a marriage between a man and a young girl is considered valid, under certain Sunni schools she is not of marrying age yet; while under other Sunni schools a woman of a certain age is considered of full legal capacity and can therefore enter into contracts, including marrying, under other jurisprudential schools she is not yet of full legal capacity at that age. Therefore, the Rule of Ilzam would be applied in these cases in order to reach a fair and just end.

Moreover, when most legal systems for personal status matters have not yet codified the application of the Rule of Ilzam, there remains considerable scope for various judicial decisions on the basis of similar circumstances. For this reason, legislative stipulations or judicial provisions containing elements of the rule are of considerable importance and should in no way be downplayed.

Second Branch: The Impact of Sectarian Diversity on Conflicts of Laws and Judicial Jurisdiction

Legislative rules governing areas of personal status in countries with diverse sectarian groups, such as Lebanon and Iraq, give rise to a host of problems with regard to conflict of laws and jurisdiction. For instance, parties to a marriage may both be Muslims and thus fall under the jurisdiction of religious courts, but one of them may be a follower of the Ja'fari school of law and the other a follower of a Sunni school. Thus, when a divorce is sought by one of the parties and child custody is also at issue, the two parties' cases will have to be adjudicated by different courts, with the risk of the two courts issuing conflicting decisions.

Their differences with regard to rules relating to marriage and divorce are another significant area of variation between the schools. Thus for example in respect of marriage the minimum age for both men and women is considered to be 15 years by the Shi'i school, while both the Hanafite and Malikite schools set the minimum age for women at 10 years but allow it to be lowered to as little as 9 years in exceptional circumstances with the consent of a Guardian. This has clear relevance to child custody disputes where one party is a divorced parent and the other is a Guardian. On the other hand, the rules with regard to witnesses to a marriage contract as stipulated by the Sunni schools differ from those stipulated by the Ja'fari school. While the latter requires the testimony of two upright witnesses to the validity of a marriage contract the former school requires the presence of at least two witnesses.

For instance, Article 9 of the Lebanese Constitution of 1926 states, "Complete freedom of religion and conscience is permitted in Lebanon and for all citizens wherever they reside; and the personal status of every citizen shall be regulated in accordance with his religion and the law." Therefore, fifteen religious communities have their own religious courts. For instance, the disputes of the Christian communities are resolved in the courts of their respective churches. This also applies to the other communities. An exception is constituted by marriages between Muslims and non-Muslims as well as by cases in which the religious courts lack the necessary legal rules for their adjudication of the case. Such cases are usually resolved in the civil courts of the relevant country according to general legal rules.

This has become an acute issue following Article 41 of the Constitution which in addition to permitting recognition of the personal status laws of religions, has enabled many sectarian groups to lobby for specialized courts in order to apply their own religious laws. A threat to judicial unity in laws governing personal status of individuals in a state, some research studies have indicated that recognizing a person's sect for jurisdictional purposes would make him easily prone to abuse of law and would enable him to litigate in jurisdictions that he deems more suitable to his interests, within the four corners of his own sect's laws that would be more advantageous to his case than those of his own sect's law. Therefore, it is proposed that jurisdiction be determined by other criteria such as the place where a party resides, the nature of the contract to be performed or the laws governing it, or the husband's sect as stipulated in the marriage contract. However, in all cases, application of such alternate laws would not be without its own difficulties and conflicts.

There are some other approaches of determining jurisdiction in these types of disputes. Some legislative bodies have approached the problem by determining jurisdiction based on other factors, such as the address of the parties, the type of contract involved, or even the husband's school in cases of divorce and his affairs being governed by the terms of his marriage contract.

This is manifested in the form of cases in which contrary judgments are given for the same dispute in different religious and civil courts. A court of a Sunni school of law may, for example, declare invalid a contract of marriage, while a court of a Ja'fari school of law treats it as binding because it contains all the conditions stipulated by Ja'fari law. In such a case, the Rule of Ilzam would, in practice, be sufficient to resolve the dispute, by virtue of each party being bound by his commitments under the school of law of which he is adherent. As has already been noted, however, this would have to be in accordance with the principles of public order. In the absence of explicit legislative incorporation of the Rule of Ilzam into the rules of personal status, disputes of this nature are likely to continue to cause difficulty.

Section Two: Practical Case Studies from Courts and Contemporary Fatwas.

Section 2: Practical Case Studies from Courts and Contemporary Fatwa

Section Two: Practical Case Studies from Courts and Contemporary Fatwas (continued)

The Rule of Ilzam applies in situations where individuals from different Islamic schools of thought enter into a marriage contract. For example, there are many Sunni/Shia marriages in Iraq between Hanafi/Sunnis and Twelver Shiite Ja'fari Muslims. The issue of the application of the Rule of Ilzam in matters of marriage contracts between individuals from different Islamic schools of thought is best exemplified by the Iraqi context. Shutterstock.

A marriage between a Sunni male (Hanafi School) and a Shiite lady (Twelver Ja'fari School) was contracted without a marriage guardian (wali) being present and the marriage offer not being expressed in Arabic. In the view of the Hanafi School, a marriage of a sane adult male of sound mind and full age who has not previously consummated a marriage can be validly contracted without a wali present and with the marriage offer expressed in any language which the parties understand. The source text considered the Ja'fari position on the essential elements and conditions of the marriage contract, including the requirement for a wali and for the marriage offer to be expressed in Arabic. In this case the judge applied the Rule of Ilzam by requiring the Shiite lady to acknowledge the validity of the contract according to the husband's School (i.e., as if he were a Ja'fari) on the grounds that she had already accepted all the essential elements and conditions of the contract as specified by the source text for the Ja'fari School, which did not contradict any other essential element or condition for the contract as specified by the Sharia for either School.
However, other cases reveal that Sharia courts grant legitimacy to inter-sectarian marriage contracts. In 2016, a Sharia court in Baghdad gave its permission for the marriage of a Hanafi Sunni man to a Twelver Ja'fari Shiite woman in a Sunni court. Although important requirements and stipulations had not been fulfilled according to Ja'fari Shiite Islam within the marriage contract concluded by the couple, the wife did not object to the contract. The court pronounced the marriage contract to be valid and decided to recognise it. The core of its judgement reads as follows: "The marriage contract is valid because the necessary requirements of the husband's school of law have been fulfilled in full detail. The wife is bound by the same conditions which she accepted when concluding the marriage contract. Any objection by her with regard to the latter can only be based on an impediment based on Sharia grounds, and that prevents both spouses from living as a married couple."

An illustration of the practical application of the Rule of Ilzam has already been given above. This would be how a judge from one school of jurisprudence could apply the essential requirements for the marriage contract of another school. Some judges have utilised this method to try to ease hardship and promote the public interest and even to prevent the breakdown of families because of the trivial differences between the essential requirements for the contracts of different schools of jurisprudence.

The case of marriage between a Ja'fari man and a Hanafi woman in the city of Najaf is worth mentioning here. After the marriage ceremony conducted by a Ja'fari jurist was concluded in the absence of the couple's family members, the family of the wife demanded its annulment for not having been concluded according to the rules applicable to the husband's school of law, the Hanafi school. The Ja'fari court in charge of the case rejected the wife's application. As the wife could not argue her wife's school of law after the contract of marriage had been fully completed, the wife was bound by the Rules applicable to the husband's school of law under the Rule of Ilzam.

The examples given above are cases where the Rule of Ilzam has been used to resolve inter-sectarian disputes. These include cases where the marriage of the two parties to be married are of different Islamic jurisprudential schools. The examples were given within the context of the Iraqi legal system, where different Islamic jurisprudential schools can co-exist and be applied within a broader legal framework. It should also be noted that the application of the Rule of Ilzam does not necessarily mean that reference is made to the term in the judicial decisions. Often the underlying principle is used in reaching a judicial decision, and the application of the Rule of Ilzam is implicit.

Second Branch: Practical Examples of the Rule of Ilzam regarding Divorce and Khul' between Spouses Belonging to Different Jurisprudential Schools in the Lebanese Judiciary.

For many years Lebanon has been operating a system of personal status based on the religious affiliation of its citizens. As there are 18 recognised religious communities in the country, including various Islamic schools of thought such as the Sunni and the Ja'fari schools of thought as well as the schools of thought of the Hanafi and the Shafi'i schools of thought, application of the Rule of Ilzam presents many practical challenges, particularly in relation to the implementation of divorce and khul' between spouses of different jurisprudential affiliations.

Another practical application of the principle was the case of a Sunni wife from the city of Tripoli, Lebanon, who initiated, by her lawyers, khul' proceedings against her Shiite husband, who was a religious student from the city of Najaf, Iraq. While the husband's school of jurisprudence required for the khul' to be pronounced by the husband while receiving a financial consideration within the conditions established by his school, the wife's school required no such conditions. The wife's school of Ja'fari jurisprudence required only that the wife's acceptance of the terms of marriage be recognised. The wife argued that as she was a Shiite wife married to a Sunni husband, within the marriage contract stipulated by the husband's school, she could invoke her school's conditions to allow her to dissolve the marriage on any grounds she deemed suitable. The wife's arguments were rejected by the court, however, on the grounds that, as she had accepted the terms and conditions of her marriage within her husband's school of Sunnijurisprudence, she was bound by those same terms and conditions when it came to the contract's dissolution as well.

A related case study referred to a Sunni Sharia Court in Tripoli (Lebanon), where a divorce case had been brought by a Ja'fari wife against her Sunni husband. During the proceedings, the Ja'fari wife had attempted to invoke the provisions of her school of law that would render the Sunni manner of conducting divorce invalid. However, the Sunni Court had maintained that since the parties had entered into a marriage contract under the provisions of Sunni law, the wife was bound by the terms and conditions that had been included in the contract. The wife was deemed to have accepted the terms and conditions of her husband's school of law at the time when she entered into the marriage contract.

In another example of application of the Rule of Ilzam, a Lebanese Sharia Court in Beirut dealt with a case of dissolution of marriage following an irrevocable divorce of the third degree. The Sunni party claimed that such a divorce is not valid under the Shafi'i interpretation, which requires documentation of such divorce. The Hanafi school of thought of the other party considered the divorce valid, and the Lebanese judge applied the Rule of Ilzam in order to establish the legal consequences of such divorce for both parties. Thus, the judge applied the most authoritative interpretation for enforcement purposes.

The examples provided illustrate how the Lebanese judiciary, practicing within a setting of religious pluralism, applies the Rule of Ilzam and accordingly reaches conclusions applicable to varying schools of thought within the body of Islamic law. Consequently, in cases that require the application of different jurisprudential principles, Lebanese courts implement the basic principle of the Rule of Ilzam and thereby render judgements that are consistent. Although judges and jurists do not constantly resort to naming the rule, instead permitting it to manifest in their judgements, it is clear that it serves as an intermediate position between two undesirable extremes in the family of Islamic law.

From a Lebanese viewpoint, the Rule of Ilzam is an intermediary solution between forbidding all parties to enter into contracts of family law and obliging all of them to resort to one school and allowing each party to invoke their school as they see fit in every case. This means that by virtue of the said rule, consideration shall be given to preserving the contract of family law and to defending it against annulment on grounds related to formalities and to ensuring that divorce and khul' are rendered effective in the best manner.

Section 2 – Application of the Rule of Ilzam to Sales Contracts and to Bank Guarantees between Different Religious Communities.

Another very important area of application of the Rule of Ilzam within sales contracts pertains to the parties' religions and hence to their respective schools of law (e.g., Hanafi and Twelver Shiism).

Another area where the Rule of Ilzam is applied is in the area of sales contracts between individuals of different schools of thought. In many countries today, like Iraq, there are many individuals from different backgrounds and religions and therefore from different schools of thought. In many cases the sales contract is concluded between individuals from two different schools of thought. In such cases both parties may enter into the contract in good faith without realising that the contract has not been concluded in accordance with the conditions of a valid contract as per the other party's school of thought. Therefore, in order to resolve such differences and to avoid further complications and in order to complete the transaction amicably, the Rule of Ilzam is applied.

1. First: The Hanafi Position on Contractural Validity in Cases of Jurisprudential Differences
There are statements made by Hanafi jurists that enable application of the Rule of Ilzam in such matters. The most important of these statements is that concluded within the requisite framework of a particular school of law is binding on the parties thereto and the jurisidical status of the other party is of no account. Al-Kasani said in explanation of this principle: When a contract is concluded in a manner recognized by Sharia, it will be effective against the parties thereto, regardless of the school(s) of law followed by the other party or parties.

As the parties to the contract are one Twelver Shi`i person and the other a Hanafi person, in accordance with the provisions of the school of the first contracting party, the essential elements and conditions of the contract having been satisfied in accordance with the school of the first contracting party, the Rule of Ilzam would apply to both parties and both parties shall be bound by the terms and conditions of the said contract and shall be held to performance by the said contract.

Second: The Twelver Shiite Position on the Validity of Inter-Sectarian Contracts

However, Twelver Shiite law does consider valid a contract concluded by a non-Shiite party according to their school of law. However, such a contract is only recognized in respect of its legal consequences if it does not contain any prohibited element and is not excessively uncertain or usurious.

Similarly, another source reports that according to Sayyid Al-Sistani, it is permissible to conclude a contract with a person from another Islamic school of thought according to their methods. This contract is recognized in terms of its legal consequences as long as the contract does not contain elements of forbiddance or against justice within the jurisprudence of the contracting parties. This would mean that a contract would not be invalid if it contains elements of excessive uncertainty or usury, but only if it contains elements of complete forbiddance within the school of thought of one of the parties.

Third: Judicial Applications in Iraqi Courts

Another example given for an application of Ilzam in a judicial context refers to a Personal Status Court in Baghdad that upheld the sale of a residential house of a Shiite seller to a Hanafi buyer of another school of thought. The essential elements of a contract had been fulfilled. First, the parties had agreed upon the contract in good faith. The nature of the property, a residential house, did not differ from what the first party had agreed upon. Both parties had a common intention to contract the property. In such a case, Ilzam applied to recognize the validity of the contract between the two contracting parties of different schools.

This Court's decision of recognizing and upholding the obligations of a sale contract between a Hanafi party and a Shiite party further demonstrates how the Rule of Ilzam might be of assistance and promote concession among the various Islamic schools in a bid to overcome their formidable differences and structural contradictions and thus to respect and give effect to the respective legal disciplines and rules of each school.

Fourth: Contemporary Jurisprudential Classification of Inter-Sectarian Contracts

This point of view is now held by a number of contemporary Islamic jurisprudential councils and colleges, the Islamic Fiqh Council, for example, in its seventh session recognized that a contract between two parties from different legal schools is binding upon both of them and is to be reckoned in the manner of a contract which has been concluded in accordance with one of the Islamic schools, and does not in any way contradict an essential tenet of the religion which is considered to be a definite divine precept.

However, this rule is derived from a more comprehensive criterion in Islamic jurisprudence. Thus the criterion for recognizing contractual rights and duties is that such rights and obligations should be based on contracts which are entered into by both parties with mutual consent and on terms that are not prohibited by Sharia. This principle is based on another jurisprudential principle. This is the principle that people have authority over their properties. Hence all financial and trade transactions which are conducted lawfully between members of different schools of thought would be respected and recognized as contractual rights and obligations in both schools of thought.

Fifth: Comparative Jurisprudential Analysis

There is partial convergence between the two schools with respect to guarantee contracts. For example, both permit a guarantee to be given for an obligatory contract and in respect of goods that are obligatory to be purchased. Furthermore, the conditions and particulars that constitute an impediment to a guarantee contract are similar, in that they must not contain any Riba or excessive uncertainty. Nonetheless, there are considerable differences between both schools in respect of other aspects of guarantee contracts, which is why in multi-sectarian societies like Iraq a comparative approach to jurisprudence could be employed with a view to accommodating commercial practices and/or with a view to avoiding contradiction of some of the fundamental tenets of the various Islamic schools.

The little convergence observed between the Hanafi position and the Shia School may be sufficient to apply the Rule of Ilzam and therefore develop a comparative juridical approach that is suited to the modern commercial practice while remaining true to the essentials of the Islamic law.

Second Branch: Positions Taken by Islamic Jurisprudence with Respect to the Bank Guarantee that is Given by the Guarantor and the Beneficiary are from Different Schools of Jurisprudence.

Bank guarantees or financial guarantees are one of the most utilized and powerful financial instruments, used by individuals and by corporations in major transactions locally and abroad. With the increasing prevalence of having guarantors from various Islamic schools of thought, and also having the beneficiaries from various Islamic schools of thought as well, questions on the legitimacy of such guarantees, and also their enforcement in court in the event that the terms and conditions of such guarantees are not conformed to the terms and conditions as stipulated by the various schools of thought, would need to be resolved. Can the rule of Ilzam be applied?

First: Differences in the Jurisprudential Classification of Bank Guarantees

Islamic jurists differ when classifying bank guarantees. Hanafi jurists might regard the bank guarantee in issue as belonging to the genre of suretyship contracts and hence in principle permitted, provided that a number of conditions are fulfilled by the guarantor and guarantee. The main condition is that the beneficiary party consent to his undertaking guarantee and that his obligations in guaranteeing are valid and binding upon him. Some contemporary contracts of guarantee in common use are not covered by this school of thought.

On the other hand, some Islamic schools of law, like for example the school of Imam Maliki, others like Imam Shafi'i, permit the contract of suretyship in a more extensive manner than the school of Imam Hanafi. This means that a guarantee can be given even when there is no request on the part of the beneficiary. As for the Twelver Shiites, they, too, consider the suretyship contract to be admissible. In this case, however, the consent of both parties to the contract is required and suretyship is subject to specific conditions. As for independent guarantees of a kind that are not linked to any prior debt, they are deemed to be problematic by Islamic law in relation to the conventional banking guarantee.

Second: The Validity of a Guarantee Established According to the Jurisprudential School of Only One Party

Within the confines of the so-called bank guarantees – concluded between parties belonging to different Islamic schools – a number of issues are brought to the notice of a judge and the parties. Such for instance: Does the judge have to recognize a guarantee already entered into by the other party within the framework of their own school of thought, even if this does not comply with the views of the other party's school? Are all the conditions included in the guarantee contract in line with the views of the other party's school, i.e. do they not contradict the principles on which such school is based?

These examples illustrate the instances when guarantees in joint financing between Islamic and commercial parties issued by a Sunni or a Shia party have been recognized in transactions conducted through financial and banking institutions by courts in Iraq and Lebanon. What is significant here is that the guarantee was issued in a manner acceptable to the jurisprudential school of the guarantor, with parties consenting to the contract and documents being complete and drawn up in due form.

Third: The Impact of Jurisprudential Differences on the Terms and Conditions of Bank Guarantees

Another important issue is how the length of time that a guarantee will be in force, payment of interest, and stipulation of very severe penalties in case of late payment are viewed by the different schools of jurisprudence. The Twelver Shia school of jurisprudence is reported to hold that late-payment penalties contracted for as part of a guarantee constitute usury. As mentioned earlier, the Hanafi and Shafi'i schools of jurisprudence take a more relaxed view with respect to contractual penalties and guarantees.

This discussion further supports the application of the Rule of Ilzam, particularly when there are disagreements on the basis of the contract that is to be enforced by a third party, i.e. a judge from a different School of Thought. The primary consideration here is to determine the ruling based on the apparent contract and the parties' intention, and the obligations that they undertook.

CONCLUSION

Findings

This study has numerous practical implications. It proves the significance of the so-called Rule of Ilzam in modern Islamic law studies. Above all, it was found that this tenet is used in a large number of instances in personal status and civil law, as well as in judicial practice. In fact, this tenet of Islamic law, whose theoretical contents are described in detail in classical juridical works, is also applied in a great number of other practical situations in contemporary Islamic communities with a mixed confessional make-up.

By way of summary, the Rule of Ilzam (as understood within the parameters of the current study) is found to extend with equal force to a variety of further, related areas, including matrimonial law, financial rights and obligations between spouses, and divorce. Here again, its underlying function is one of particular relevance, and also here, it is found that the primary vehicle by which that function is discharged is that of the various, now established schools of Islamic jurisprudence (and their differing responses to the particular scenarios in question).

Regarding civil contracts, the study indicates that the Rule of Ilzam serves to protect the intent of contractual obligations of individuals belonging to different Islamic Schools of Jurisprudence. In any given contract where both contracting parties are of different Schools of Jurisprudence, a contract obligation would be considered binding according to the School of Jurisprudence of one of the parties, as long as such a contract does not contain anything that is contrary to Sharia and is lawful in nature. A number of fatwas and even judicial approaches have adopted a facilitative approach to issues of a contractual nature, facilitating issues between different Schools of Jurisprudence and tackling related issues in a liberal manner, all the while remaining committed to the fundamental tenets and provisions of Sharia.

In relation to the judicial domain, the Rule of Ilzam would be helpful to decide disputes and to give due credit to the testimony of witnesses and to other pieces of evidence, as the case may be, according to the School of Jurisprudence applicable to one of the parties or both. The application of this Rule would also facilitate the execution of judicial decisions rendered by courts of one School of thought within a country where all Schools coexist.

Recommendations

Research Findings and Recommendations from the Previous Sections of this Study for Legislators, Judges, and Other Researchers (Plus Schools of Thought)

1. The Rule of Islam should be clearly included in personal status laws and in civil laws of countries with a diverse sectarian population. Such laws must clearly delimit the scope of application of the rule, specify its conditions, and provide for sufficient legal protection. This could prevent a judge from acting entirely at his own discretion. Rather, he would be working within the scope of clearly defined laws.
2. Higher Jurisprudential Councils of Inter-Sectarian Nature: It will be highly beneficial if Islamic countries set up Higher Jurisprudential Councils comprising representatives of all Islamic schools of thought, which are recognised by the state. These bodies of experts can then be consulted by the Courts to settle inter-sectarian disputes. It is also anticipated that these councils of Higher Jurisprudential Learning would facilitate the legislative bodies of Islamic countries to work out means and methods to govern various affairs in a manner which is most conducive to promoting understanding of Islamic values and to achieving the said objectives while applying the Rule of Ilzam.
3. To deepen the knowledge of comparative Islamic jurisprudence among the judges: Ministries of Justice and specialised institutions for the training of the judiciary and judges should make it a subject for studies in judicial specialised training, for updating the knowledge of practising judges, and for integration into the curricula of higher institutes for judicial studies. This would enable the judges to deal better with the differences of doctrines among various Islamic schools and to apply the rule of Ilzam justly and fairly, far from their own school of thought.

4. Standardised Contracts in Economic Transactions: With regard to economic contracts and banking services provided by Islamic financial institutions, the author of the studied work recommends that bodies which regulate trade and commerce and these financial institutions create model contracts for various transactions within different Islamic schools of thought. These contracts must clearly state the jurisdictional school that would be applicable in case of any dispute. This would aid in avoiding ambiguities in contracts and save from potential disputes which could undermine confidence in Islamic financial services.

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