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Studying the Foundations and Documentations of Personal Status Systems in Islamic Countries

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Personal status is a set of traits and status in a person distinguishing him from others and defining his legal position in society. In Islamic countries, there is a close relationship between the foundations of personal status and religion. In such a way that until the end of the 19th century, only the laws of Islam ruled over the Islamic countries, and since then, there have been gradual changes in the laws of the Islamic countries. These changes have a special trajectory that has continued until now. The question of the current research is the evolution of personal status systems in Islamic countries which foundations and documents have been based on. It seems that the personal status is based on certain epistemological foundations and documents. Accordingly, there are different systems in the field of personal status in different countries. Examining the change and evolution of jurisprudential and legal ideas in the issue of personal status, along with observing the documents and foundations of jurisprudence and law scholars in this issue, helps to approximate the approaches, and as a result, the regulations can be brought closer together in the feedback that is obtained in the legislation. This research, by examining the foundations and documentations of personal status systems of Islamic countries, in a descriptive-analytical method, shows that these systems are formed based on specific epistemological and methodological foundations and documentations, and the personal statuses of Islamic countries have significant commonalities.

Keywords: *personal status, evolution of personal status, foundations, documentation, legal system of Islamic countries*

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Introduction

Changing and transformation in human thought and knowledge is an undeniable fact that is completely evident in the course of time and space. Of course, this changing and transformation in the field of thought and knowledge was not the same and it was different depending on different subjects and cases, just as the cause and factors of these changes are also different and sometimes variable. The knowledge of law and jurisprudence and legal thoughts, which is an effort to serve man, society and human ideal, has not been excluded from this evolution; change and transformation and observing of scholars' ideas and thoughts of jurisprudence and law shows that legal findings have been accompanied by evolution, change and transformation in the context of time and space (Abu Zohra 2010: 24; Sabai 2001: 16).

Meanwhile, the issue of personal status, which has been the subject and focus of serious legal and jurisprudential debates, is also one of the topics on which it is necessary to examine the development and evolution of scholars' thought of jurisprudence and law. The explanation is that the law and civil rights regulating the relationship of some persons with others are divided into two major and main parts: personal status and transactions. The personal status determines the person's relationship with the family and the transactions determine the person's financial relations with others. The term personal status has no history in the laws of Islamic countries, and in recent centuries, it has been introduced from the laws of Western countries to the laws of Islamic countries (Shelbi 2010: 193). With the entry of this term into the field of law of Islamic countries and the necessity of drafting related laws, this issue has been independently discussed by Islamic jurists and has been the subject of dozens of books and articles and other research works. Although in Islamic countries, the jurisprudence schools influential in the formation of family law are not the same, but due to factors such as the close connection of the issues of this part of law with religious teachings and religious and moral beliefs, the general principles governing family law are the same in these countries. Based on this, in this research, firstly, the foundation of personal status and then the proofs and documents are examined.

1. Foundations of Personal Status

According to the reports of lexicographers, *mabani* is the plural of *mabna* used in the meaning of foundation, basis, base, and root (Tureihi 1995; Dehkhoda 2005). Therefore, the word *mabna* (foundation) implies the fundamental and basic issues of a phenomenon. In the field of sciences, especially social and human sciences, this word refers to the macro-presuppositions and

scientific and religious beliefs understanding and analyzing. Therefore, the scope of the *mabani* (foundation) concept includes the reasons, basic concepts and general principles of that knowledge, and sometimes with a development, it includes their theological and philosophical principles. Some jurists point to the scope of the *mabani* (foundation) concept, with the explanation: “The word *mabani* (foundation) is used a little wider than its philosophical meaning; namely, it is not only the statement of the reason for the requirements and the hidden origin of legal duties, but also deals with the main pillars of public law” (Katouzian 2006: 9). In their research in this field, and specifically regarding the concept of combining the word “interpretive foundations”, some acknowledge the pre-citation understanding of the concept of foundations; with this explanation that the foundations of Qur’an interpretation are those religious or scientific presuppositions and beliefs that the interpreter interprets the Qur’an by accepting and basing them on. In other words, it is necessary for every interpreter to clarify his basis regarding the basic elements involved in the process of interpreting the Qur’an. Some experts have divided the foundations of interpretation into two general categories: issuing foundations and brokering foundations (Hadavi Tehrani 1996: 31). Some other experts have divided the foundations of interpretation into two general categories: documental foundations and conceptual foundations (Ibid.).

Of course, it seems that the results of some research in the definition and explanation of the concept of foundations, which they have equated with theoretical reasons and documentation, are debatable (Shayan-Mehr 1986: 523). As some of the jurisprudence books, which are written with titles containing basics, because they only deal with documentation and use the word basics instead of documentation in the title of their work, they have followed an inappropriate path in choosing the title.

Authors of books such as *Tanqih Mabani al-Urwa*, *Mabani al-Urwa al-Wuthqa*, *Tanqih Mabani al-Ahkam*, *Mabani Minhaj al-Salihin*, *Mabani Tahrir al-Wasila: al-Qada wa al-Shahadat*…, have made this mistake and even though they have discussed the documentation in their books, they have chosen the title of *mabani* (foundation). Based on this, *mabani* (foundation) is infrastructure and fundamental foundations of one thing. In this sense, *mabani* (foundation) is different from sources, because sources are later than bases. Of course, some foundations are not necessarily dedicated to one doctrine. In other words, we can talk about general and specific foundations. In other words, the foundation is the emergence of theoretical topics related to the ontological, anthropological, epistemological and methodological fields, which is a direct and unmediated answer to a why. When we talk about the reason for the rights of personal status or the rules governing the relations of persons that have an executive guarantee, the answer to this “why” is called “basis” (Hekmatnia

2008a: 260). The explanation that the foundations of law are the general supports and arguments that on the one hand tells the government and the government why legal rules should be imposed and on the other hand tells the people why they should obey the law and legal rules that have been enforced by the government (Katouzian 2012: 7; Madani 2009: 32). Therefore, any legal system whose rules are manifested in a coherent and purposeful way, gives the adequate answer to this question (Hekmatnia 2008a: 261). Also, when a specific legal sub-system is discussed, such as jurisprudence and law of personal status, we face the question of why the rules of this sub-system are like this, or what its rules should be like. Or, what is the source of the enforcement of rules and regulations related to personal status? Because these questions can be answered by knowing the main foundations of law, therefore, in examining the foundations of personal status, one must first consider the foundations of the Islamic legal system in general, and then discuss the foundations of the sub-system of personal status. Since in the cognition system of Islam, the basis of the legitimacy of the laws is the conformity of the legal rules with the divine will (Hekmatnia 2008a: 267), which have long been used in the expressions of the jurists of the Islamic schools of thought, or *Manat*, and the purposes of the Sharia regarding the motivation of legislation. Based on this, what is being examined at this stage oversees two things: one is the foundation of the Islamic law system and the other is the foundation of the sub-system of personal status.

In order to achieve this goal, ontological, value-cognitive, epistemological, anthropological and methodological foundations are important but, due to the fact that the first three methods do not have a significant effect in the current research, in the discussion related to the foundation of the Islamic legal system, only two areas of anthropological and methodological foundations are examined.

1. 1. Anthropological Foundations

In the discussion of anthropological foundations, man is considered in different fields from the legal point of view, the most important field being that he is the subject of legal rules. Man who is the subject of legal rules should be considered from the aspects of his nature, regardless of his kind, the relationship of man with his god and his relationship with others. In this sense, it is important to know the human being and his nature in the society and his place in the system of personal status, family and his status in a special institution such as the inheritance institution of heirs and the rules governing it. The two-dimensionality of man, the appeal of man, the free will of man, as the subject of his rights and his status in the law of personal status, have

received the attention of jurisprudence and law researchers from many aspects (Hekmatnia 2008b: 157). According to the Qur'anic evidence and narrative documents, the nature of man is a being that has two dimensions of "duality" and "dualism", and in this, authenticity is with the soul (Vaezi 1997: 18). Another is that man has authority. He is also not cut off from the Creator and is on earth as the Caliph of God and according to the caliphate, he should pay attention to the one who made him caliph, as the basis of the legitimacy of the rules governing him is the wise will of God.

It seems that regarding the relationship of man with his own kind, the effect of the difference between religion and the effect of physical and psychological differences in legal rulings is one of the most important parts in the field of personal status that needs to be taken into consideration. In this area, according to religious teachings, men and women exist independently of each other and one is not dependent on the other, as men and women are different from each other in many ways and these differences cause differences in rights and duties as well.

1. 2. Methodological Foundations

In the Arabic language, methodology is interpreted as *ilm al-manhaj*. Due to the importance of this knowledge, it is sometimes called *ilm al-ulum* (science of sciences) (Hekmatnia 2008b: 40). This term has many uses in different sciences. Sometimes methodology means knowing the tools, techniques and methods of learning knowledge in a certain field, as methodology means examining the theoretical foundations of a certain philosophical school. That is, the examination of the assumptions, infrastructures and basic concepts of that school has also been used. In other words, the logic of school understanding can be considered equivalent to this application, as it can be said, methodology is a science in which the method of acquiring knowledge is investigated, and we mean methodology in this article with the same meaning, that is, a science in which the method is discussed. The explanation is that, in the history of human knowledge, the discovery of many and various errors in normal human cognitions drew the attention of scientists to the point that they should think of solutions to prevent these errors and achieve more stable knowledge in accordance with reality and to know the ways to achieve knowledge and its slippages and ways to prevent those slippages. The result of this way of thinking was a conscious and deep attention to the methods of knowledge and the emergence of principles and rules and the method of acquiring knowledge (Hekmatnia 2008b: 40).

It should be said that the method usually has specific rules and steps that must be taken into account in order to obtain the most correct and accurate

knowledge. Finding this system and navigating it was so important in the eyes of scientists that in the age of enlightenment, they believed that in knowledge, only the correctness of the result is not enough, but the way and method of reaching it must also be free from any errors. In other words, they believed that regular and methodical use of reason prevents any mistakes. As a result, in their opinion, “method” was considered the criterion of “truth”. In this sense, “methodology” becomes very important and science has no meaning without method.

The origin of the difference in personal status laws in Islamic countries is sometimes the difference in the principle of the method and sometimes the difference in the effectiveness of the methods. The approaches of Muslim thinkers in the field of jurisprudence and legal research can be divided into several major approaches, according to the amount of emphasis on expression and text, and the amount of attention paid to the reason and purposes of Sharia. It was divided into narrative and intellectual (Hakmatnia 2008b: 48).

One of the ways to reach the truth or knowledge is narration. There is no difference in the legitimacy of the transmission method between Islamic schools and religions; but some are caught in extremes and consider narration as the only way to discover the truths of religion. According to this idea, the only source of understanding the principles and branches of religion is the appearances of the hadiths and verses of the Qur’an, and not only do they stop at the appearance of these texts and do not interfere with the intellect, but they do not give credit to the intellect in the knowledge of the principles of belief either (Ibn Hazm, n. d.: VIII/353). Akhbarism is another approach similar to the approach of Ahl al-Hadith, with the difference that both in terms of life span and in terms of followers, were much less than the current of Ahl al-Hadith.

Another method of understanding religious truths is reason. According to rationalist thought, reason has a special place next to books and traditions. This approach has appeared in the ideas of voterism and paying attention to the purposes of Sharia in public jurisprudence. Although the trend of voterism did not have a codified system in the beginning, but as a result of the emergence of new ideas, it has a disciplined system in the use of analogy and *Istihsan* (juristic preference) and *Masalih Mursala* (unspecified public interests), etc.

Another rationalistic approach has emerged concerning the purposes of Sharia, explaining that the purposes of Sharia and expediency among Sunnis are used in the form of secondary sources of jurisprudence in the document of Sharia ruling; but in the contemporary era, it is considered as an independent science among them. This theory tries to infer the purposes of Sharia by presenting a certain method and after that to reread the existing jurisprudence and, on the other hand, to respond to newly emerging issues in the field of personal and social relations. An example of this work has been done by some

contemporary jurists in relation to family jurisprudence. For example, with the premise that the purpose of family rights is to preserve and reproduce the generation, to create peace and to establish and stabilize the family system, and the purpose of legalizing divorce is to prevent the continuation of continuous losses (Al-Khadimi 2001: 183). Creating and establishing a male sperm bank, transferring male sperm to a non-wife's womb and renting a womb are prohibited and illegal because these actions cause corruption and loss of modesty and chastity and contradict the intentions of the mother and the age of life (Ibid.).

2. Evidences and Documents of Personal Status

In this topic, we will first deal with legal evidence and documentation (*ijtihadi*) and then with legal evidence and documentation in two parts of law and international obligations.

2. 1. Ruling Evidence and Documents (Ijtihadi)

Mustanad is a third participle noun that is more passive. "Document" means cited and what is cited. In other words, it means document, reason and evidence. *Mustanadat* is the plural of *mustanad,* meaning proofs and documents. Therefore, jurisprudential sources are valid and cited evidences in jurisprudence. Based on this, the authors of the books entitled *Mustanad Al-Shi'a fi Ahkam al-Sharia* and *Mustanad Tahrir al-Wasila*, where they investigated and researched the evidence and documents of jurisprudential issues, have been careful in choosing the title according to the topic of their discussion and have not been caught by the mistakes and confusion of some authors.

In this research, jurisprudential documents mean authentic and independent evidences in the jurisprudence of religions, i.e. the propositions and teachings of the Qur'an, Sunnah, consensus and reason, as well as related and discovered sources such as, analogy, *Masalih Mursala* (unspecified public interests), *Istihsan* (juristic preference) and custom.

The first and most important means of understanding and inferring divine decrees is God's book, the Qur'an. The Qur'an is the primary source of religious knowledge, jurisprudence, legal rulings, and personal and social relationships, and at the same time, it is the most reliable source. The Qur'an is definitive from the point of view of issuance, and the scientists of principles of Islamic Jurisprudence have given authority to the appearances of the book (Hakim 2017: 91). Therefore, the most important source of legislation in Islam is the Holy Qur'an. According to the famous opinion of scholars and commentators, the number of Qur'anic verses that contain jurisprudential rulings is 500 verses (Bahrani n. d.: I/21). Of course, some have stated

that the number of these verses is fewer or more than this number (Qurtubi 1993: I/22). Sheikh Shaltut has counted *Ayat al-Ahkam* about three hundred and forty verses of which about seventy verses are related to personal status (Shaltut 2004: 459). Abdul Wahhab Khalaf also emphasizes that the rules of the Qur'an in the field of personal status, relatives and family are about seventy verses (Khalaf 2013: 31).

In fact, the verses of *al-Ahkam* have laid the foundations of personal status and the basis of family rights. Discussions of family law take benefit from verses containing general principles and rules, such as negation of hardship (Tawba: 92), reduction in duty (Nisa: 32), acquittal (Baqarah: 23), negation of path from righteous people and justice (Ma'idah: 8). Another group of *ayat al-Ahkam* has been revealed in special chapters of personal affairs and related to topics such as marriage (Nisa: 3–4), divorce (Talaq: 1–2), inheritance (Nisa: 6, 8 and 176) and will (Baqarah: 180–181), the prohibition of marriage with *mahrams* (relative, foster and causal) (Nisa: 22–23), rulings of divorced women regarding marriage (Baqarah: 231), rulings on marrying polytheists and people of the book (Mumtahanah: 10), multiplicity of wives and its conditions (Nisa: 3 and 129) prohibition of multiple husbands at the same time (Nisa: 19), invalidity of Nikah Sighar (Nisa: 23), making one woman's dowry the marriage dowry of another woman and prohibiting the marriage of two sisters (Nisa: 6, 8, 176), inheritance and the share that the relatives have from the property of the deceased (Nisa: 6), how to divide the inheritance (Nisa: 176) and the rules of will (Baqarah: 180–181) are among the other issues that the Holy Qur'an has dealt with.

Also, jurists consider tradition as one of the sources of legislation and have defined it as everything issued by the Prophet, whether it is a speech or a deed or a signature (Khalaf 2013: 41). Most scientists of principles accept this definition (Ibid.), but the difference is in its development that the Sunnis consider the tradition of the Companions to be part of it, and they have arranged its rulings, which are authentic, on the tradition of the Companions, but the Imamate have extended the tradition to the tradition of Ahl al-Bayt. Some Qur'anic propositions including verses: "Accept (and implement) what the Messenger of God brought to you and refrain from what he forbade" (Hashr: 7) and "O you who believe! Obey God and obey your Messenger and your commanders (successors of the Prophet). So, if you dispute about something, refer it to the judgment of God and the Prophet, if you believe in God and the Resurrection. This (referring to the Qur'an and tradition to resolve disputes) is better and has a better end" (Nisa: 59) indicate the authority of tradition. There is no doubt that all Islamic sects consider themselves obedient to the tradition in its general sense, and in practice, the Sunnis usually adhere to the traditions transmitted from the Prophet by their companions and followers as the Imamiyyah trust the hadiths of the Prophet and Imams.

In the field of legal issues, tradition has many signature provisions, and there are fewer foundational cases in it, and this prevents the separation and general difference in content between the tradition and legal sources. As it is known, this source is one of the exclusive sources of Islamic law. In any case, the tradition, which has now been compiled in reliable narrative and hadith collections, has dealt with personal circumstances in important parts.

Ijma (consensus) is the third document of jurisprudence. *Ijma* is the consensus of jurists on the Shar'i ruling. *Ijma* in the thought of Imamiyyah jurists, contrary to the opinion of Sunni jurists; although it is counted among the four reasons, it is not an independent reason. Rather, the saying of the infallible is a proof, and the consensus is a proof if it is a definite revealer of the saying of the infallible. The principle of legitimacy of marriage and divorce, encouragement to start a family, the conditionality of verbal composition in the marriage contract, the realization of sanctity through foster parents, the sanctity of marriage with a child born of adultery, the invalidity of an insane marriage, the execution of the marriage contract by a qualified minor as a lawyer, the non-optionality of the marriage contract, the declaration of sanctity by means of a marriage contract, and many rulings and issues related to other examples and cases of personal circumstances are unanimous (Shelby 2010: 23), as *Aql* (reason) is one of the most important documents. The explanation is that many propositions in the Holy Qur'an indicate the high position of the reason (Zumar: 20; Baqarah: 160) given that the understanding of reason and paying attention to it has a privileged position in the Shia school, to the extent that reason is described as the inner prophet based on the teachings of this school (Kuleini 1984: I/10). Paying attention to reason as an independent proof or a supplement to other documents and proofs, both in the field of meaning and in the field of understanding texts, is one of the characteristics of living jurisprudence based on wisdom. Reason understands the importance and necessity of preserving Islamic religion, identity and independence, along with the necessity of facilitating religious life in the modern world and believing in comprehensive, universal and eternal Islamic doctrines and on this basis, according to the situations and requirements of time and place, it gives a different understanding in the international issue (Darbandi n. d.: II/98). Believing in this rule and paying attention to the capacities and potentials of reason understanding, the Imami jurists emphasize that all events have a Sharia ruling (Sobhani Tabrizi 2013: I/9; Darbandi n. d.: II/8). This emphasis is based on the fact that if there is no Sharia text in issues and events to explain its ruling, the intellect provides the necessary potential to discover its ruling at the disposal of the jurists. This intellectual capacity is a suitable source for monitoring new issues related to personal status rights and responding to them. There are also sources for deriving rulings in Sunni jurisprudence that are dedicated to

them. These sources are also called "follower sources", that is, resources that can be checked in the framework of basic resources. *Qiyas*, *Istihsan*, *Istislah* (*Masalih Mursalah*), *Sadd wa Fath Zarai*, custom, *Sharia Salaf* and *Sahabi Mazhhab* are among these sources (Hakim 2017: 239). Sunnis do not agree on the authenticity and validity of these sources, with the exception of *Qiyas*, as there are several ideas in the validity of *Istihsan*. According to Abu Hanifa and Malik's opinion, *Istihsan* is authentic and they have a lot of trust in it. Nevertheless, from Shafi'i's point of view, *Istihsan* is an invalid presumptive reason (Makarem Shirazi 2016: 200; Abu Zohra 2010: 263). Also, the Shafi'is and Zahiris do not consider *Istislah* (*Masalih Mursalah*) as valid, while the Hanafis and Malikis consider it valid (Hakim 2017: 347).

Custom is one of other evidence of the Sunnis, especially the Hanafis. Custom and its position is one of the most important and challenging topics of legal systems, including the Islamic legal system. From the point of view of sociology, law assigns a strong role to custom, and on the other hand, in the written legal system, whose originality is with the law, they have tried to minimize the role of custom and habit by drafting laws (Javan 2013: II/106) as these two concepts are interred in another way in Islamic jurisprudence. By presenting the theory of separation between the purposes of the Sharia and the way of achieving the purposes, some have taken a step towards the sociological thought of law and have given a strong role to custom (Qurtubi 2011: II/54; Shelbi 2010: 321). As custom has an important place in the Hanafi school, popular jurists rely on the narration of "what Muslims consider good, it is good in the sight of God" (Ahmad ibn Hanbal 2006: H914) to prove the validity of custom. Custom in Islamic jurisprudence has a wide scope, but not every custom is signed by the Sharia, such as minor marriage, sale of goods for goods, and some of the usual types of sale during the time of ignorance were not accepted. This point is one of the main differences between custom in the Islamic legal system and other systems. Currently, in many countries based on the system of written law, if a custom becomes common and does not contradict the text of the law, it is accepted as an act and supported by the government. In most Islamic countries, which are influenced by the Roman-Germanic legal system, the supremacy of written law has been accepted. Therefore, if a custom becomes common and does not contradict the text of the law, it will be supported. It is for this reason that some jurists have said in the definition of custom: "custom is a rule that has gradually and spontaneously become customary among all people or a special group as a binding rule" (Katouzian 2012: II/474). Here it is necessary to remember that custom, which in the thought of some Muslim thinkers and jurists is introduced as a source of personal law, has been considered as the basis of law in another sense (Ibid.), as the Sunnis, especially the Hanafis, have considered custom as

one of the best tools with which Islamic jurisprudence can be coordinated with the developments of the world society and meet the ever-increasing needs and transformation of the society flexibly (Al-Zarqa 1968: I/36).

2. 2. Legal Evidence and Documents

The legal sources of personal status in Islamic countries are discussed in two parts of law and international obligations.

2. 2. 1. The Law

In legal terms, the law is a general rule that it is established by a competent authority (Jafari Langrudi 2003: IV/2846). In the Roman-German legal system, which many Islamic countries also followed, the superiority of written law (law) over other sources is accepted (Rene & John 2002: 363). The law includes the constitution and ordinary law; the ordinary law also includes the civil law and special laws of personal status.

2. 2. 1. 1. Constitution Law

According to the constitution of many Islamic countries, the official religion of Islamic countries and the main source of legislation is Islamic law (Article 2 of the Egyptian Constitution). According to the constitutions of Islamic countries, the family is the basis of the society, which is based on the foundations of religion and ethics. The government tries to preserve the original entity and characteristic of the family and all the values and traditions that the family represents, and at the same time, seeks to improve this characteristic within the relations among the society. In relation to the main source of legislation regarding personal status and religious affairs and the selection of spiritual leaders, the constitution stipulates: the principles of other divine laws in Islamic countries such as Christianity and Judaism are the main source of legislation regarding personal and religious affairs and the selection of their spiritual leaders (Principle 3 of the Egyptian Constitution). After the victory of the glorious Islamic revolution of Iran, inspired by Islam's attention to human dignity and the respect it has for divine rituals, some principles of the Islamic Republic of Iran's constitution were dedicated to the rights of non-Shia Iranians, both Muslims and non-Muslims. In the twelfth principle, while determining the official religion of the country, it has guaranteed the observance of the rights related to the personal status of the four Sunni and Zeidi schools. According to the 13th principle of this law, Zoroastrians, Kalimi and Christians are religious minorities who are free to perform their religious ceremonies

within the limits of the law, to act according to their religion in their personal status and religious teachings (Articles 12 and 13 of the Iranian Constitution). In Article 131 of the new Constitution of Afghanistan approved in 2012 it is stated: "Courts for Shia people, in cases related to personal status, apply the rulings of the Shia religion in accordance with the rulings of the law". In other lawsuits, if there is no ruling in this constitution and other laws, the courts will settle the case according to the rulings of this religion (Constitution of Afghanistan, Article 131).

2. 2. 1. 2. Civil Law

As a general law and a source of many rulings and personal status, civil law has a special place in the legal system of many Islamic countries. According to this law, in these countries, the rulings and matters of personal status are subject to the Islamic Sharia and the laws governing it (Egyptian New Civil Code, Article 15). In the 12th to 16th articles of the new civil law, the Egyptian legislator stipulates: the basic conditions for the validity of marriage are subject to the law of each of the spouses. In relation to the effects and dissolution of marriage, Article 13 says: the effects of marriage, including its effects on the property of the spouses, are subject to the law of the spouse's country, at the time of the marriage. Similarly, dissolution of marriage is subject to the law of the spouse's country at the time of termination, while divorce and separation are subject to the law of the spouse's country at the time of filing the lawsuit. In relation to the conditions of couples, the civil law considers only the Egyptian law to be the governing one and stipulates: as in articles 12 and 13 — if one of the spouses is Egyptian at the time of the marriage, only the Egyptian law is the governing one, with the exception of marriage eligibility (Article 12 of the Egyptian Civil Code). Also, in relation to the status of inheritance and will and other effective transactions after death, the new Egyptian civil law stipulates: inheritance, will and other effective transactions after death, will be subject to the law of the heir or the testator or the person who transferred money at the time of death (Article 17 of the Egyptian Civil Code). The fifth article of Iran's civil law also stipulates that except in exceptional cases; all Iranian people are subject to a single law, and in its seventh article, the issue of the personal status of foreign nationals was clearly foreseen: "Foreign nationals residing in Iran will be subject to the laws and regulations of their respective government in terms of issues related to their personal status and eligibility, as well as in terms of inheritance rights within the limits of treaties" (Article 7 of the Civil Code of Iran). According to this article, the competent authorities of Iran respect the personal status and inheritance rights of the foreign government towards its nationals within the limits of the treaties and laws.

2. 2. 1. 3. Personal Status Laws

Islamic countries, except for a few of them, have borrowed their collections of civil laws from the West, but every time they have refused to include the topics related to marriage, divorce and descent in these collections (Senhouri 1998: I/235). They also did not include provisions related to inheritance and will in these collections. These issues form a separate branch in the statutory law system of these countries, which is usually called "personal status". Only countries like Iran and Turkey have not observed this issue and have included family rights and all related issues in the civil law. Ottoman Family Law (1917) is the first law that has been compiled in Islamic countries regarding personal status. The legislator has included the regulations governing marriage and divorce in a set of laws, that is, in the form of articles that have a number and sequence. As stated in the second topic, a comprehensive and complete law has not been compiled in Egypt regarding personal status that includes all chapters and examples of personal status (Sabai 2001: 14). In Lebanon, Sunnis act according to the Ottoman Family Law approved in 1915. In this law, various schools of jurisprudence were used and the legislator did not limit himself to the Hanafi religion. Some of the innovations in this law were the need to draw up a document in the presence of a judge to conclude a marriage, the need to declare divorce to the judge, to create a judicial divorce based on the request of the wife (Shehata 1998: 16). Of course, this law was not applied in Lebanon before the publication of the Sharia Courts Regulation Law in 1943. And after that, it was implemented only on Sunni Muslims (Qasim 2007: 184). Sunni Sharia courts are obliged to issue their rulings based on this law, which is derived from the Hanafi school of thought. In this law, it is emphasized that in cases where the judge does not find the ruling of the issue in this law, he is required to refer to the best sayings of the Hanafi religion (Mahmassani 1965: 242). The Shia judge is also obliged to rule based on Jafari jurisprudence or what is in the family law approved in 1915 in accordance with the Shia religion. Also, the judicial process and judicial organization of Sunnis and Shiites in Lebanon was approved in a law called the Judicial Regulation Law in 1962. Also in the Syrian Arab Republic, despite the separation of Syria from Osmani until 1953, the law of 1917 Osmani (laws available in magazine *Ahkam Adlia*) ruled over personal issues. Then in this year, a law regarding personal status was approved. This law is considered the first comprehensive law that has been enacted in a Hanafi country regarding personal status, as the Tunisian law of 1956 is the first personal status law in Maliki countries. The most recent law in Islamic countries is related to the personal status of Shiites, which was approved in 2008 in 18 chapters and 249 articles. This law has been enacted based on Article 131 of the Afghan Constitution

in order to regulate matters related to the personal status of Shiites. In other Islamic countries, the laws of personal status are more or less similar (Shehata 1998: 80).

2. 2. 2. International Obligations

There are two types of treaties and covenants that Islamic countries have joined: one, bilateral agreements and the other, multilateral agreements. There are many international agreements and treaties that many Islamic countries have accepted and specifically or generally refer to personal rights, among them, the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child, the executive mechanisms established for these documents and even the structures established in regional institutions; some Islamic countries have included the guarantee of the implementation of international treaties and agreements in their fundamental laws or constitution (Article 7 of the Afghan Constitution).

2. 2. 2. 1. Charter of the United Nations

United Nations Charter on June 26, 1945: it was signed in San Francisco at the end of the United Nations Conference on the formation of an international organization and entered into force on October 24 of the same year. There has never been a charter of family or parental rights in the United Nations, but there is one for women and children separated from the family. However, Article 1 and Clause C of Article 55 emphasize universal and effective respect for human rights and basic freedoms for all without discrimination based on race, gender, language, and religion (Mehrpour 1986: 325).

2. 2. 2. 2. Universal Declaration of Human Rights and Covenants

The Universal Declaration of Human Rights is an international treaty that was approved by the United Nations General Assembly on December 10, 1948 in Paris (Mehrpour 1986: 346). The third paragraph of the declaration considers the family as the natural pillar and basis of society; the sixteenth article of this declaration states: “Every adult man and woman have the right to marry and form a family without any restrictions due to race, religion or nationality, and the family deserves the support of the society and the government”. Since the family is not a random social structure, the government must act in various ways such as political, social, economic and legal measures to strengthen

and support the family, which is the cornerstone of any successful society. It should be noted that the rules related to economic, social and cultural rights are established in paragraph 2 of Article 2 of the International Covenant, and Article 3 confirms the equal rights of men and women to benefit from all the rights specified in the Covenant. While Article 7 emphasizes equal pay for equal work, the Covenant of Civil and Political Rights in Article 3 also stipulates the equal benefit of genders from all the rights included in this covenant. Also, this covenant protects pregnant women against the death sentence in article 6, paragraph 5, and article 23, paragraph 2 emphasizes the equal right to marry, and article 2, paragraph 1 and article 24 and article 26 prohibit all gender discrimination.

The Universal Declaration of Human Rights and Covenants has been reflected and influenced in the constitution and ordinary laws of Islamic countries, as things like “freedom”, “equality before the law”, “prohibition of torture”, “education”, “woman and family” exist as principles in the constitution and ordinary laws of Islamic countries without disturbing the Islamic foundation (Mehrpour 1986: 348). In line with these views and their continuation since the approval of the Universal Declaration until now, we have witnessed the direct or indirect presence of signs of human rights in the basic and ordinary laws of Islamic countries. Among others, we can mention the constitution of Morocco (1961), Algeria (1963), United Arab Emirates (1964), Pakistan (1964), Afghanistan (2003) and the constitution of the Islamic Republic of Iran.

2. 2. 2. 3. Convention on the Elimination of Discrimination against Women

The Convention on the Elimination of Discrimination against Women (CEDAW) was approved by the United Nations in 1979. The emphases of the clauses of the articles of the convention are on equal rights of men and women and somehow protecting women’s rights. There are biological and natural differences between men and women, but these differences cannot be the source of differentiation and differences in the establishment of rights and laws. The United Nations places great emphasis on the correct implementation of the articles of the Convention. Therefore, the convention has a committee to monitor the correct implementation of the articles, and the governments are required to submit a report on the implementation of this convention to that committee based on a scheduled schedule. The Convention considers the equality of men and women to be applicable at all levels (Article 15 of the Convention on the Elimination of Discrimination against Women). Therefore, its unconditional acceptance will create many problems for Islamic countries. For example, the various clauses of the 16th article of the convention, which

deals with family relations, marriage, divorce and joint responsibilities in marriage, are incompatible with Islamic values. Therefore, although Islamic countries have ratified some conventions, some other governments including Islamic Republic of Iran and Sudan have not yet joined the convention. Many Islamic countries such as Egypt, Saudi Arabia, Oman, Iraq, Jordan, Malaysia and Libya have also conditionally accepted the Convention on the Elimination of Discrimination against Women (Mehrpour 1986: 131).

3. Analysis and Review

There is no doubt that all Islamic schools of thought consider the book and the Sunnah as the main sources of Islamic jurisprudence and everyone agrees on the fundamental nature of the two. However, the difference in views regarding the interpretation of the divine verses and the authenticity of the documents and the validity of the Sunnah is undeniable. But reason, which according to the Imamiyyah, with special conditions and consensus, in order to discover the truth and connect it to reality (the infallible word), is considered the second and third religious reason, most of the Sunni jurists give credit to opinions and analogies instead of reason and they value consensus because of credibility of those who agree and with regard to other reasons for disagreement, such as *Istihsan*, *Masalih Mursala*, consensus of the people of Madina and *Sadd Zara'i*, just as it is not accepted by Imamiyyah and Zahiriyyah, the people of the *Sunan* themselves also disagree about their authenticity. According to the perspective that was presented from the sources of Sharia in the field of jurisprudence, now some points are mentioned to explain the common foundations of Islamic religions and consequently Islamic countries.

3. 1. Common Qur'anic Foundations

The basic part of the discussion of the issue of personal status has its roots in the Qur'an and its general rulings, such as prohibition of marriage with *mahrams* (relative, foster and causal) (Nisa: 22–23), rulings of divorced women regarding marriage (Baqarah: 231), rulings of women in the state of *Iddah* (Talaq: 4), rulings on marrying polytheists and people of the book (Mumtahanah: 10), multiplicity of wives and its conditions (Nisa: 3, 129), prohibition of multiple husbands at the same time (Nisa: 19), invalidity of "child marriage" (Nisa: 23), making one woman's dowry a marriage of another woman, prohibition of gathering two sisters in marriage (Nisa: 6, 8, 176), the principle of permissibility and irrevocability of divorce, conditions of divorce, testimony on divorce (according to Imami jurisprudence), payment of dowry with differences in its conditions, types of divorce, *Iddah* and its rulings, recourse in

Iddah, the necessity of a mediator in the third divorce, the necessity of paying alimony and other matters. Moreover, with the emergence of verses and considering that the issues mentioned in the verses can be proven, some by the texts of the verses, some by the application of the honorable verses, the foundations of following the text, the appearance of the text, and the application of the text are formed. Based on this, Sunni jurists have used the divine verses in the mentioned titles; cases such as legality or legality of divorce, based on the application of the verse, the permissible amount of divorce in three separate purity and the obligation of *Iddah*, due to the rule of the subjects of the appearance of the verse and recourse in *Iddah* without the consent of the wife, following the principle of obedience to the text, recommending to testify on divorce (not obligation) due to the observance of the restriction of application and summation between the verses or the summation and comparison between the noble verse, the obligation of *Iddah* in marriage and the absence of it in non-marriage, the obligation of alimony for the wife, and the impermissibility of eviction from the wife's place of residence during *Iddah*, based on the basis of following the texts, it is part of the issues that show the basis of their *Ijtihad*. Imamiyya jurists, considering the abundance of *hadiths* received from the innocent, on the one hand and the generality of the verses related to divorce, on the other hand, have paid the most attention to the *hadiths* and yet, they have focused the discussion on the divine verses, although sometimes they have not mentioned it; the permissibility or excuse of divorce, by insisting on the application of the verses related to divorce, the proof of marriage before divorce, the permanence of the marriage to the absoluteness, the clarity of the divorce form, the appearance, the inadmissibility and sanctity of the divorce of the pregnant woman, the permissibility of three divorces in the purity separately, to the generality or the absoluteness of the invalidity of collective divorce, the obligation to testify on the divorce, the obligation of the mediator in the third divorce due to the obligation of the divorced party, the permissibility of reference in *Iddah* to the text, the amount of *Iddah* to the appearance of the text, the obligation of *Iddah* through the text, the obligation of alimony during *Iddah* and the non-dismissal of the pregnant woman and pregnant women according to the text, and the non-dismissal of an adulterous and pregnant woman according to the text, the non-obligation of it in cases other than the adulterer according to the text, the permissibility of entrusting the wife to divorce apparently, are issues that show the foundation of the Imamiyya jurists.

3. 2. Common Narrative Foundations

In principle, there is no doubt that all Islamic sects call themselves submissive to the Sunnah in its general sense, and in practice, Sunnis usually

receive traditions from the Prophet through his companions and followers and the Imamiyyah trust the hadiths received from the Prophet and Imams. Nevertheless, despite the bitter fate that happened to the *Sunnah* among the Sunnis after the Messenger of God and lasted until the time of Umar ibn Abdul Aziz Umayyad, a group of narrations of the Messenger of God which is quoted in Sunni sources and has valid documents, can be valid with Imamiyyah. In this regard, two points cannot be ignored:

1. The origin of the discord of jurists; with penetration of fake hadiths in all fields on the one hand and the destruction of many parts of the Prophet's narrations on the other hand, many differences in the field of jurisprudence, especially marriage and divorce, were introduced, because according to the mental background of people to the customs of *Jahili* and the lack of reliable and understandable narrations, in rejecting or confirming them, the jurists used old and ignorant customs to interpret the Sharia and this work, as it created inconsistency with the value content of Islam, strengthened the jurisprudential differences between the Sunni and Imami schools (which followed the Ahl al-Bayt), on the one hand, and the Sunni jurists themselves, on the other hand. In addition, perhaps a large part of the Israelite and fake things by individuals such as Ka'b al-Ahbar, Wahab bin Munabbih and Abdullah Salam, unconsciously or intentionally, were given to the Muslims as Islamic teachings, which were both impossible to separate and, over time, became an inseparable part of Sunnah.
2. Content sharing: there is no dispute that the role of hadiths is mostly the role of interpretation and explanation of the generalities of the verses of the Holy Qur'an; based on this, the appearance of a group of *hadiths*, although with different expressions, has a common content between Imamiyyah and Hanafiyyah. The abhorrence of the phenomenon of divorce, the invalidity of divorce before marriage, the invalidity of forced divorce, during menstruation, during childbirth, the obligation of marriage and divorce in non-pure situations and other cases of conditions and obstacles are matters that have been raised in the narrations of the parties which, in total, we can extract from common foundations such as following the text, the Sunnah, the emergence of the Sunnah and the absoluteness of the Sunnah, non-harm to the wife, interaction with charity, the permissibility of divorce during menstruation, during childbirth, divorce in non-pure situations, plural divorce in the assembly with single word, divorce with sarcasm…

Conclusion

1. Many jurisprudential differences between jurisprudential schools are caused by different foundation. Therefore, with fair reviews and flexibility in the position, it is possible to find common fundamentals for them. Changing the approach of new research, including jurisprudence, *hadith*, Qur'an and theology, to the comparative side and providing a common basis will be a great service to the unity of the Islamic world.
2. A large part of jurisprudence differences that appear in the actions and speech of Muslims are in the areas of worship and personal status. In these axes, with the method adopted in this research, the differences can be reduced to the minimum possible, and with this method, the jurisprudential foundations of any religion will not be damaged.
3. Jurists, professors and curators who prepare and edit textbooks of scientific centers can give a new life to the knowledge of jurisprudence by proposing the viewpoints of other religions and adopting a comprehensive and well-reasoned theory and have the greatest service to the legal system of Islam so that they can play their role against the legal system of the western world.
4. The most important foundations agreed upon in the issue of divorce in Imamiyyah and Hanafi jurisprudence are following the text, the *Sunnah* and the appearance and the absoluteness of the text and the *Sunnah*. It should also be noted that the common points between the two jurisprudential trends and their foundations in the issue of divorce are more than the points of difference and the disputed cases of divorce also do not have convincing and definitive documentation in the Hanafi and Imamiyyah jurisprudence. Therefore, by adjusting the jurisprudential views of the two religious approaches and being satisfied with the certainty of the issue and according to the procedure of the legislators of Islamic countries, it is possible to reach a single and binding legal system in the issue of divorce.

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References

Holy Qur'an.

Abu Zohra, Muhammad (2010), *Personal status*, Cairo, Dar al-Fikr al-Arabi.

Ahmad ibn Hanbal (2006), *Al-Musnad*, 2nd ed., Beirut, Dar al-Kitab al-Ilmi.

Al-Khadimi, Nuruddin (2001), *Maqasid al-Sharia*, Beirut, Al-Ubaikan School.

Al-Zarqa, Mustafa Ahmad (1968), *Al-Madkhal al-Fiqhi al-Am*, Damascus, Matba'a Tarbin.

Bahrani, Seyyed Hashem Hossein (n. d.), *Al-Burhan fi Tafsir al-Qur'an*, Qom, Ismailian.

Darbandi, Agha ibn Abed (n. d.), *Khaza'in al-Ahkam*, Qom, Author's publications.

Dehkhoda, Ali Akbar (2005), *Dehkhoda Dictionary*, Tehran, Tehran University Press.

Hadavi Tehrani, Mahdi (1996), *Theological Foundations of Ijtihad in the Interpretation of the Holy Qur'an*, Qom, Khaneye Kherad Publications.

Hakim, Muhammad Taqi ibn Muhammad Said (2017), *Al-Usul al-Amma fi al-Fiqh al-Muqarin*, Qom, World Assembly of Ahl al-Bayt.

Hekmatnia, Mahmoud (2008a), *Philosophy of Family Law*, Tehran, Women's Cultural and Social Council.

Hekmatnia, Mahmoud (2008b), *Women's and Family Rights*, Tehran, Publications of Islamic Culture and Thought Research Institute.

Ibn Hazm, Abu Muhammad Ali ibn Said (n. d.), *Al-Muhalla*, Cairo, al-Tafqa al-Maniriyyah.

Jafari Langrudi, Mohammad Jafar (2003), *Expanded on Legal Terminology*, Tehran, Ganj Danesh Publications.

Javan, Musa (2013), *Fundamentals of Law*, Tehran, Rangin Goman.

Katouzian, Nasser (2006), *Philosophy of Law*, Tehran, Mizan Publishing House.

Katouzian, Nasser (2012), *Fundamentals of Public Law*, 2nd ed., Tehran, Mizan Publishing House.

Khalaf, Abdul Wahab (2013), *Science of Principles of Jurisprudence and Summary of Islamic Jurisprudence*, n. p.

Kuleini, Abu Jafar Muhammad bin Yaqub (1984), *Al-Kafi*, 4th ed., Tehran, Dar al-Kutub al-Islamiyya.

Madani, Seyed Jalaluddin (2009), *Fundamentals and Generalities of Legal Science*, Tehran, Paydar Publications.

Mahmassani, Sobhi (1965), *Al-Awda' al-Tashri'iyyah fi al-Duwal al-Arabiya*, Beirut, Dar al-Alam li al-Malayin.

Makarem Shirazi, Naser (2016), *Encyclopedia of Fiqh al-Muqarin*, Qom, Publications of Imam Ali Ibn Abi Talib School.

Mehrpour, Hossein (1986), *Human Rights and its Implementation Solutions*, Tehran, Ettela'at Publications.

Qasim, Muhammad Hassan (2007), *Al-Madkhal li Dirasat al-Qanun (Al-Qaida al-Qanuniyah)*, Beirut, Al-Halabi Publishing House.

Qurtubi, Abu Abdullah Muhammad ibn Ahmad (1993), *Al-Jami' li Ahkam al-Qur'an*, Beirut, Al-Wafa Institute.

Qurtubi, Abu Abdullah Muhammad ibn Ahmad (2011), *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, Qom, World Forum for Convergence between Islamic Religions.

Rene, D. & John, E. C. (2002), *Major Legal Systems in the World Today*, translated by Hossein Safai and others, 4th ed., Tehran, Markaze Nashre Daneshgahi.

Sabai, Mustafa (2001), *Commentary on the Law of Personal Status*, Beirut, Al-Maktab al-Islami.

Senhouri, Abdul Razzaq Ahmad (1998), *Al-Wasit fi Sharh al-Qanun al-Madani al-Jadid*, Beirut, Al-Halabi Publishing House.

Shaltut, Mahmud (2004), *Al-Islam: Aqidah wa Sharia*, Cairo, Dar al-Shuruq.

Shayan-Mehr, Alireza (1986), *Comparative Encyclopedia of Social Sciences*, Tehra, Keyhan.

Shehata, Shafiq (1998), *Islamic Law in the Middle East*, translated by Seyyed Mehdi Alavi, Tehran, Samt Publications.

Shelbi, Muhammad Mustafa (2010), *The Rules of the Family in Islam; A Comparative Study between the Jurisprudence of the Sunni Schools and Al-Ja'fari School and the Law*, Beirut, Dar al-Nahda al-Arabiya.

Sobhani Tabrizi, Jafar (2013), *Principal and Jurisprudential Rules*, Qom, Imam Sadiq Institute.

Tureihi, Fakhruddin (1995), *Majma al-Bahrain*, Tehran, Al-Ba'th Institute.

Vaezi, Ahmad (1997), *Man from the Perspective of Islam*, Tehran, Hawzah and University Cooperation Office/Samt Publications.