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Leiden  
The Netherlands

## **Islam and disability : perspectives in islamic theology and jurisprudence**

Ghaly, M.

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## Chapter Seven: Revenues of Financial Aid within the Family

The well-known Arabic terms *usra* or *‘ā’ila* used now to mean “family” are modern terms. No direct mention of these terms can be traced in early juristic texts. Other equivalent terms such as *āl*, *ahl* and *‘iyāl* convey the same concept.<sup>1</sup> Initially, it is decidedly important to point out the connotation of family institution in Islam. Islam does not prescribe any specific organizational family type. Traditionally, the Muslim family structure has been, and remains in our times, closer to the extended than to the nuclear type. A Muslim family primarily includes the self, the spouse and the immediate ascendants and descendants.<sup>2</sup> Members of the Muslim family may or may not occupy a common residential unit. Residential confines may be shared by all members included, or some or all of them may be living separately and independently. In all these cases, the family ties remain intact and the family obligations towards one another must be discharged by all the members.<sup>3</sup> Thus there is mutual responsibility between the individual and his immediate family as indicated more than once in the Qur’ān (17:23 & 24, 31:14 & 15, 33:06). This mutual responsibility is the foundation that holds family together which is considered to be its basic building block. It is based on the firm inclinations of human nature and upon the sentiments of affection and love and the requirements of interest and necessity.<sup>4</sup>

### 7.1 Maintenance (*Nafaqa*)

*Nafaqa*, generally translated as maintenance, signifies in the juristic sense all those things essential to the support of life, such as food, clothes, lodging, toilet requisite and excludes luxuries like the hair-dye, Kohl, lipstick and similar articles of comfort. Being entitled to the right of maintenance is established by the reasons of relationship, marriage, and property (*milk*) by which a person becomes incumbent to maintain another.<sup>5</sup> Maintenance in this form is obligatory (*wājib*) according to the Qur’ān, Sunna and the consensus of the jurists.<sup>6</sup> Here discussion will be restricted to maintenance established by the reason of relationship or marriage.

In most cases of *nafaqa*, the maintained person has to be *mu‘sir* and he/she is to be maintained till he/she reaches *ḥadd al-kitāya*. Understanding these two juridical terms, frequently used in discussions on *nafaqa*, is a must in the beginning.

The exact juristic definition of the term *al-mu‘sir*, translated as the needy or someone who is financially dependent, is a point of disagreement among Muslim

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<sup>1</sup> Wizārat al-Awqāf wa al-Shu‘ūn al-Islāmiyya bi al-Kuwayt (1), vol. 4, pp. 223 & 224.

<sup>2</sup> Mahmood, Tahir (1989), p. 33; Wizārat al-Awqāf wa al-Shu‘ūn al-Islāmiyya bi al-Kuwayt (1), vol. 4, p. 223.

<sup>3</sup> Mahmood, Tahir (1989), p. 33.

<sup>4</sup> Quṭb, Sayyid (1349/1974), p. 65.

<sup>5</sup> Zaylā‘ī, ‘Uthmān b. ‘Alī al- (1), vol. 3, pp. 50 & 51; Qadrī, Anwar Ahmad (1963), p. 167.

<sup>6</sup> Doi, ‘Abdur Rahmān I. (1404/1984), p. 204.

jurists. Some of the Ḥanafī jurists said that *al-mu‘sir* is a person who is permitted to receive the charity (*sadaqa*) and whose money did not reach the *niṣāb* (the prescribed amount) by which he would be required to pay *zakāh*. The other Ḥanafī jurists stated that the needy person is that who is pushed for money. Such a person may even own a house. He cannot be obliged to sell the house; his son must give him sufficient money.<sup>7</sup> According to the Ḥanbalī School, the needy is that person who has no extra money after meeting his and his wife’s basic needs.<sup>8</sup> The Jurists of the Zāhirī School see that a needy person is the one who has no money after meeting his basic needs, in its broad meaning, and clothing.<sup>9</sup> Opinions within the Zaydī School state that a needy person is one who has no income and insufficient foodstuffs for ten nights after fulfilling his basic needs such as clothes, housing, furniture, and servant. Other Zaydī jurists who represent the authoritative opinion of the Zaydī School define *al-mu‘sir* as one who has no food for lunch or dinner. This is the stronger opinion in this School. However, it is stipulated that the needy be unable to earn money due to old age, persistent illness, and the like.<sup>10</sup> A needy person, as defined by the jurists of the Imāmiyya School is someone who has no extra money to spend on any given day and night other than the amount sufficient for his and his wife’s food.<sup>11</sup> The Jurists of the Ibādiyya School say that a needy person is someone who is destitute and has no money. If he needs money but he owns a house, then he has to sell the house to buy food unless he/she is a father or a mother.<sup>12</sup> In the absence of clear-cut textual evidence supporting any of the aforementioned opinions, defining *al-mu‘sir* remains a point of *ijtihād* (personal reasoning) that took place in different contexts of time and place. Practicing this reasoning in modern time should also keep in view the context where every individual live.

Broadly speaking, the term *ḥadd al-kifāya* (sufficiency level) denotes reaching the level in which all basic needs have been met. Again defining this level precisely remains a point of disagreement among jurists. One group, including the Shāfi‘īs, favors a precise definition and state that it is two *mudd* every day for the wealthy husband, one *mudd* for the poor and one and half for the middle-class husband. The second group mainly represented by the Ḥanafīs and advocated by the majority of modern jurists opines that this level is to be decided by the judge on basis of the social and economic milieus where the couples live.<sup>13</sup> Hence, the flexibility of the term should be considered when calculating the items of maintenance. In case of people with disabilities, special needs should be also taken into consideration. For instance, one would think of hearing aids for people

<sup>7</sup> Majlis al-A‘lā li al-Shu‘ūn al-Islāmiyya, al- (1386-1411/1966-1990), vol. 18, part 16, p. 318; Khallāf, ‘Abd al-Wahhāb (1357/1938), p. 231.

<sup>8</sup> Majlis al-A‘lā li al-Shu‘ūn al-Islāmiyya, al- (1386-1411/1966-1990), vol. 18, part 16, p. 322.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., p. 324.

<sup>11</sup> Ibid., p. 324. This is the opinion adopted by the Egyptian Legal Code of personal status, Khallāf, ‘Abd al-Wahhāb (1357/1938), p. 222.

<sup>12</sup> Al-Majlis al-A‘lā li al-Shu‘ūn al-Islāmiyya (1400 A.H.), p. 325.

<sup>13</sup> Jazīrī, ‘Abd al-Rahmān al- (1420/1999), vol. 4, pp. 454-460; Sābiq, al-Sayyid (1417/1997), vol. 2, pp. 233-235.

with hearing disabilities. The same would also apply to the blind sticks or canes for people with blindness. By the same token, if one's disability makes him in need of a wife to look after him or to a servant to help him, maintenance of this wife or servant shall be incumbent on the one who is to provide maintenance.<sup>14</sup>

On the basis of their position within the family institution people with disabilities will be studied as a) parents and grandparents, b) children, c) wives and finally, d) relatives in general.

### 7.1.1 Parents with Disabilities

Broadly speaking, parents with disabilities enjoy all financial rights guaranteed by Islam to parents in general. Furthermore, special consideration is to be given to their helplessness and impotence caused by the disability. For instance, al-Shāfi'ī stated that the needy parent is entitled to maintenance only when he suffers *zamāna* (enduring disease or disability) or madness. Other jurists did not stipulate this condition.<sup>15</sup>

In Islamic Jurisprudence, the general rule, which governs entitlement to of financial rights, is that every adult male should maintain himself using his own money as long as he has the means to maintain himself. Concerning females, if they are single then their maintenance is incumbent on their fathers on their husbands if they are married.<sup>16</sup> How to prove that the father is in need or suffers poverty? The Mālikīs state that maintenance of parents will not be obligatory on a son unless their condition of need is proved by the testimony of two just male witnesses. The testimony of a just male witness along with two female witnesses or the testimony of a just male witness along with an oath will not suffice.<sup>17</sup> The Shāfi'īs state that the word of father will be accepted without an oath if he claims to be in need.<sup>18</sup> The Ḥanafīs state that need is presumed unless there is proof to the contrary. Therefore if the person claiming maintenance pleads indigence, his word will be accepted on the oath and the person from whom maintenance is claimed is burdened to disprove the claim of the claimant. And if the person from whom maintenance is claimed pleads indigence, his word will be accepted on oath and the claimant will be burdened with proving the former's financial capacity. If the presence of financial capacity was established in the past and incapacity is subsequently claimed, the former state will be presumed to exist until the opposite is proved.<sup>19</sup> The Ja'farīs concur with the Ḥanafī position on this issue, because it is in accordance with the principles of the Sharī'a, except where the person claiming

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<sup>14</sup> Abyānī, Muḥammad Zayd al- (1342/1924), p. 352; Ḥillī, 'Abd al-Karīm Riḍā al- (1366/1947), p. 106, quoted by Nasir, Jamal J. (1990), p. 197.

<sup>15</sup> See Ibn Qudāma, Abū 'Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 171; Ābādī, Abū al-Ṭayyib Muḥammad Shams al-Ḥaqq (1415/1994), vol.9, p. 323; Ibn 'Abd al-Barr, Abū 'Amr Yūsuf (1407/1986), vol. 1, p. 299.

<sup>16</sup> Fityān, Farīd (1986), p. 219.

<sup>17</sup> Dasūqī, Muḥammad b. 'Arafa al- (1), vol. 2, p. 523, quoted by Bakhtiar, Laleh (1996), p. 494.

<sup>18</sup> Jazīrī, 'Abd al-Raḥān al- (1420/1999), vol. 4, p. 485.

<sup>19</sup> Ibid.

indigence owns known assets. If he does, his plea will be rejected and the word of the person claiming his financial capacity will be accepted.<sup>20</sup>

Jurists unanimously contend that the parent entitled to maintenance must be sustained from his children's property and, according to the majority of jurists, this applies also to the needy grandparent.<sup>21</sup> According to the Mālikīs, the grandson does not have to maintain his needy paternal or maternal grandparents. On the other hand the Zāhirī School states that the rich child must maintain the needy of his parents, grandparents, children, and grandchildren equally and simultaneously without giving precedence to any of them.<sup>22</sup>

In this particular regard both male and female children are equal in the sense that are they both required to maintain their needy parent as long as they [the children] have the means to do so.<sup>23</sup> According to the Shāfi'īs, if the parent has a lot of male and female children, then the contribution of the son has to be the double of that of the daughter.<sup>24</sup> According to the Mālikī<sup>25</sup> and Zāhirī Schools<sup>26</sup> and also implied in the Ḥanbalī School, there is no difference between the male and female children in this regard.<sup>27</sup> Jamila Hussain, Lecturer of law, University of Technology, Sydney, shares the same opinion saying that "Children, both sons and daughters, are under an obligation to contribute to the maintenance of their parents, the father, when he is unable to maintain himself, and the mother regardless of her ability to earn money for herself".<sup>28</sup>

As to be deduced from the above-quoted tradition of the female Companion with her non-Muslim mother Asmā', religious uniformity is not a condition in Islamic law for the enforcement of rules of maintenance. Hence, jurists did not stipulate, in this regard, the uniformity of religion between the parent and the child. Hence, if a parent with disability was a non-Muslim and the child was Muslim, the child remains obliged to maintain him. That is because *nafaqa* here is to preserve one's life and this has nothing to do with the unity of religion.<sup>29</sup>

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<sup>20</sup> Bakhtiar, Laleh (1996), pp. 494 & 495.

<sup>21</sup> Ibn Qudāma, Abū 'Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 172; Mahmood, Tahir (1989), p. 38

<sup>22</sup> Abū Zahra, Muḥammad (ed.) (1963), pp. 319 & 322.

<sup>23</sup> See Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (1409/1989), vol. 5, p. 222; Dardīr, Aḥmad al- (1), vol.2, pp. 523 & 524.

<sup>24</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, p. 485.

<sup>25</sup> Ḥattāb, Abū 'Abd Allāh al- (1412/1992), vol. p. 209. See also, 'Abdarī, Abu 'Abd Allāh Muḥammad b. Yūsuf (1398/1977), vol. 4, p. 209.

<sup>26</sup> Ibn Ḥazm, Abū Muḥammad 'Alī (1347-1352/1928-1933), vol. 10, p. 100.

<sup>27</sup> Abū Zahra, Muḥammad (ed.) (1963), pp. 322&23; This is also the opinion of the Ḥanafī School and adopted by the Egyptian Legal Code of personal status, cf. Khallāf, 'Abd al-Wahhāb (1357/1938), p. 222.

<sup>28</sup> Hussain, Jamila (1999), p. 82.

<sup>29</sup> 'Abd al-Ḥakīm, Ibn Muḥammad (1332/1914), p. 344. Cf. Ibn Qudāma, Abū 'Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 186; Dasūqī, Muḥammad b. 'Arafa al- (1), vol. 2, p. 522; Dardīr, Aḥmad al- (1), vol.2, p. 522; Mahmood, Tahir (1989), p. 38.

### 7.1.2 Children with Disabilities

Jurists are unanimous that a child who has no property of its own is entitled to receive maintenance, in the first instance from his father. This is based on the Qur'anic statement "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms" (Qur'ān 2:233) and the tradition of the Prophet who told a woman complaining to him of the parsimony of her husband, "Take of his property what suffices for you and your child according to fair custom."<sup>30</sup> However this right is subject to three conditions. First, the child is in need, i.e., indigent and unable to earn a living.<sup>31</sup> Second, the father has the means to provide maintenance from capital.<sup>32</sup> Finally, the child should be born free (*hur*) not a slave. The Ḥanbalīs added that the father himself should be born free too. Otherwise, he is not under obligation to maintain his child.<sup>33</sup> Considering their relevance to the present time, focus will be on the first two conditions.

Inability to earn a living can be a matter of age, and physical or mental condition. According to the Sunni and Shī'ī schools, a boy with no property of his own shall lose his right to maintenance on reaching the age by which he can earn a living, even before puberty (*bulūgh*) but shall retain that right if he cannot work due to an illness or disability.<sup>34</sup> In this regard, the Mālikīs state that once the child attains the age of puberty (*bulūgh*) when he is sane and able bodied, then he is no longer entitled to be maintained by his father even if he got later inflicted with madness or disability. However, the Mālikīs add, if the child attained the age of *bulūgh* when he is mad or unable to earn his living by his won, then his maintenance is to continue as if he is still a minor child.<sup>35</sup>

However, according to the Sunnis, the maintenance of a student shall continue after that stage provided that the course he pursues is religiously acceptable.<sup>36</sup> The son who has reached majority shall also be entitled to maintenance by his father if the son is incapable of earning a living because of a chronic disease, a mental or physical disability and has no private means.<sup>37</sup>

As for the daughter who has no property, the condition of her being in need is fulfilled by the very fact of her sex, even though she may have the ability to earn her own living not to mention if she was already with disability. The duty to maintain her shall pass to her husband once she marries.<sup>38</sup> However if she later ceases to be maintained, for example on divorce or because of disobedience to her husband, her father shall be bound once more, to maintain

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<sup>30</sup> Nasir, Jamal J. (1990), p. 193.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, pp. 478-481.

<sup>34</sup> Nasir, Jamal J. (1990), p. 194.

<sup>35</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, p. 480.

<sup>36</sup> Nasir, Jamal J. (1990), p. 194.

<sup>37</sup> Abū Zahra, Muḥammad (1369/1950), p. 415.

<sup>38</sup> Abdullah, Omar (1968), p. 630; Hillī, 'Abd al-Karīm Riḍā al- (1366/1947), pp. 102 & 103.

her.<sup>39</sup> The Shāfi'īs state that maintenance of the children shall include purchasing medicine, doctor's fees and the servant even if the children needed such items due to chronic disease (*zamāna*) or illness.<sup>40</sup>

Now we move to the one responsible for this type of maintenance, namely, the father. As previously stated, the father with sufficient means or capable of earning a living shall be solely liable for the maintenance of his needy children. The Ḥanafīs state that if the father is well-off and abstained from maintaining his children, he shall be ordered to do so, under the pain of imprisonment if he refuses. If he is impoverished but can earn a living, then he shall be ordered to work. The Mālikīs state that the indigent father should never be forced to work even if he has a craft (*ṣan'a*).<sup>41</sup> However, if he cannot earn enough for himself and his children, or if no livelihood is available, the obligation of the children's maintenance shall pass to the person next to the father.<sup>42</sup> Here Shī'ī and Sunnīs jurists are not in agreement on who is the next to the father.

The Shī'īs relegate this liability to father's father, failing him, to the latter's father and so on how-high-so ever, then to the children's mother, then to her father and mother and so on. All maintenance paid like this cannot be claimed back from the father when his financial conditions improve.<sup>43</sup>

According to the Sunnīs, this obligation passes to the mother if she has means, otherwise to the father's father whose duty is to provide maintenance to his son, and likewise to his guardian. In both cases, the maintenance paid shall be a debt repayable by the father when he can afford it.<sup>44</sup>

But if the father is incapable of earning a living due to a chronic illness, paralysis or disability, he shall be released from the obligation to maintain his children as if he were dead. The children's maintenance shall then be incumbent upon the nearest relatives without being repayable debt.<sup>45</sup> The Shī'īs rule that the order of maintaining relatives shall be the same as in the case of the impoverished father.<sup>46</sup>

The Sunnīs set a different order for the obligation to maintain the children whose father is dead. Relatives are either ascendants, how-high-so ever, or collaterals. They also may or may not be presumptive heirs. There are three possible contingencies: (i) that all relatives are ascendants; (ii) that some are ascendants and others are collateral; (iii) that they are all collaterals.<sup>47</sup>

(i) In the first contingency, four cases are possible; (a) that some are and some are not presumptive heirs but they are all equal in nearness. Here it is upon the presumptive heir that maintenance shall be incumbent, e.g., the father's father rather than the mother's father; (b) the same

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<sup>39</sup> Abyānī, Muḥammad Zayd al- (1342/1924), p. 349.

<sup>40</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, p. 481.

<sup>41</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, p. 484.

<sup>42</sup> Nasir, Jamal J. (1990), p. 197.

<sup>43</sup> Ḥillī, 'Abd al-Karīm Riḍā al- (1366/1947), p. 103.

<sup>44</sup> Abyānī, Muḥammad Zayd al- (1342/1924), p. 344, quoted by Nasir, Jamal J. (1990), p. 197.

<sup>45</sup> Abyānī, Muḥammad Zayd al- (1342/1924), p. 344.

<sup>46</sup> Ḥillī, 'Abd al-Karīm Riḍā al- (1366/1947), p. 103.

<sup>47</sup> Nasir, Jamal J. (1990), p. 197.

case but not equal in nearness: here maintenance shall be incumbent upon the nearest regardless of the right to inheritance, e.g., upon the mother rather than her father and upon the mother's father, who does not inherit, rather than the father's father who does: (c) and (d) that they are all presumptive heirs but vary in the degree of nearness: here maintenance for the children shall be shared in the proportion to the presumptive inheritance share.<sup>48</sup>

- (ii) In the second contingency, two cases are possible: (a) that some are presumptive heirs and other are not: here maintenance shall be incumbent upon the ascendants regardless of the right to inheritance, e.g., a father's father shall be liable for maintenance rather than a full brother; (b) that both ascendants and collateral relatives are presumptive heirs: here they shall be liable for the maintenance of the child according to their inheritance shares, e.g., mother shall be liable to one third and a full brother for two thirds.
- (iii) In the third contingency, all the collaterals shall contribute to the maintenance in the proportion of their inheritance shares.<sup>49</sup>

### 7.1.3 Marriage of People with Disabilities

Prior to speaking about the *nafaqa* of a wife with disability, it is inevitable to sketch the broad lines of juristic discussions on the marriage of people with disabilities. Broadly speaking, *nikāḥ* and *zawāj* are the most well-known terms used in early and modern legal texts in chapters having these two titles with main focus on issues pertaining to marriage. References to people with disabilities in these chapters remain sporadic most of the time. These scattered marriage-rulings collected by five main studies, four in Arabic<sup>50</sup> and one in English,<sup>51</sup> form the basis of discussions below.

Based on the Qur'anic references to marriage (4:1; 7:189; 30:21; 16:72), Muslim jurists tried to deduce the main objectives of marriage. Vardit Rispler-Chaim (Haifa University) tried to compose the long list of these objectives.<sup>52</sup> Two main objectives are with direct relevance to people with disabilities namely, enjoying sexual relationship (*istimtāʿ*) and enjoyable companionship (*ʿishra ṭayyiba* or *sakan* according to the Qur'anic expression). Keeping in mind that these two elements are prohibited to take place between man and woman outside the marital relationship, they become high priorities in marriage. That is why jurists unanimously paid great attention to safeguarding these two objectives and agreed in principle that any defect in any of the spouses hindering their realization can be of legal effect to the validity of marriage contract. Despite this agreement on this general principle, jurists disagreed in

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<sup>48</sup> Ibid, p. 198.

<sup>49</sup> Abyānī, Muḥammad Zayd al- (1342/1924), p. 345-347.

<sup>50</sup> Quḍāt, Muṣṭafa al- (1406/1985), pp. 180-183; Kīlānī, Sarī Zayd al- (1), pp. 251-292; Quḍāt, Muṣṭafa al- (1412/1992), pp. 148-151; ʿAbd Allāh, Laylā Muḥammad (1418/1997), pp. 153-168.

<sup>51</sup> Rispler-Chaim, Vardit (2007), 47-65.

<sup>52</sup> Ibid, p. 47.



applying it to specific cases. Two main criteria govern subsequent discussions on this point. The first criterion is the time of being afflicted with a disability or the time of discovering that the other partner has a disability, namely before or after marriage. The second criterion is the relevance of disabilities to one of the aforementioned two objectives, viz., sexual relationship or good companionship.

#### 7.1.3.1 Rules Pertaining to the Situation before the Contracting of Marriage

Marriage of people who suffer *junūn* (insanity/madness) occupied the minds of both early and modern jurists.

A few Ḥanbalī and Mālikī jurists regarded a marriage contract with a mentally retarded person as valid and the consent of the guardian not to be required.<sup>53</sup> Other jurists agree that the contracting parties should be of sound mind. Thus, people who are mentally retarded can marry but only with the consent of the guardian. Here jurists distinguished between males and females and also between minors and adults. One of the most detailed presentations of this issue is given by the well-known Ḥanbalī jurist, Ibn Qudāma. According to him, an insane girl who was still virgin (*bikr*), jurists agreed that her guardian, whoever the guardian was, can marry her off. In case of the non-virgin (*thayyib*), the character of the guardian was decisive. If the guardian was the father, then he could marry her off according to Abū Ḥanīfa and al-Shāfi‘ī. Other jurists opined that he was not entitled to do so because the non-virgin could not get married without her consent and it is not possible to know this because of her insanity. If the guardian was the ruler, then he was not entitled to marry her off. Another opinion contended that it was permissible only in two cases, viz., if she showed off signs of sexual desires or if physicians (*ahl al-tibb*) stated that her sickness could be healed by marriage. The insane minor boy, on the other hand could get married with the consent of his father. Al-Shāfi‘ī said that the father was not permitted to do so as long as there were no signs of a need to do so because marriage implied financial costs.

Also according to Ibn Qudāma, marriage of people with a mental disability, the views of the Shāfi‘ī, Ḥanbalī and Ja‘farī Schools was not valid without the consent of the guardian. If the insane person was adult, the father was entitled to marry him off whether he showed sexual desires or not, according to the Shāfi‘īs and Ḥanbalīs. Others did not give the father this right whereas a third group said that he is entitled to marry his insane son as long as there was a need or want (*hājā*) to do so. Ibn Qudāma opined that restricting the notion of “need” to satisfying the sensual appetite does not do justice to the term. This term would imply one’s need to protection and sharing place to live with someone. He added that marriage itself can be a sort of medication.<sup>54</sup>

The contemporary Moroccan scholar, Muṣṭafā b. Ḥamza said in this regard, “It is by no means impossible for people with mental disabilities to marry and

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<sup>53</sup> Bakhtiar, Laleh (1996), p. 424.

<sup>54</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 7, pp. 37 & 38.

establish their own families. Islamic *fiqh* states that the father, the guardian or the judge can decide marrying off the mentally sick if he fears that he/she (a person with mental disability) could commit fornication (*zina*) and expects (i.e., the guardian) that marriage is in favor of that person. The bridal money (*mahr*) in such case is to be paid from the money of the father or the guardian who concludes the marital contract. If the person used to have recurring insanity, then he himself should conclude his marital contract while he is sane, otherwise his guardian shall marry him off.”<sup>55</sup>

In a fatwa from Gaza (1998) Sheikh Muḥammad Dīb Qūsa was asked whether retarded people may marry at all. He concluded that they may, only if they demonstrate attraction to members of the opposite sex. He explained that sanity (*‘aql*) is not a prerequisite for marriage. In an Egyptian fatwa, the mufti distinguished between *‘atah* (mental deficiency) and *junūn* (insanity), claiming that *‘atah* is a “quiet” insanity and *junun* is a violent extrovert insanity. He permitted the marriage of a *ma‘tūh* (one who has *‘atah*) only as long as he or she can differentiate between good and evil, and if he has his guardian’s consent to marry. *‘Atah*, contrary to *junūn*, is believed to be less hazardous to the partner. In another fatwa dated June 24, 1981, the late grand Imam of al-Azhar Jād al-Ḥaqq declared an existing marriage null and void considering that the husband had been continuously insane since 1968 – namely prior to the marriage, which was concluded in 1978. This is also grounded in Egyptian law no. 462 of 1955, which stipulated, in the Ḥanafī spirit of the law, that if both partners are not sane when the contract is made the marriage is void.<sup>56</sup>

As for physical defects affecting sexual ability, jurists discussed this case when speaking about people having no sexual appetite (*shahwa*) because of suffering congenital impotence (*‘unna*). Keeping in view that enjoying sexual relationship is one of the main objectives of marriage; some jurists opined that marriage of those people is reprehensible (*makrūh*). Others saw that such people can still marry because sexual relationship is not the sole objective of marriage.<sup>57</sup> As for other disabilities which have no effect in this respect such as blindness, lameness, dumbness and the like, early jurists agree that being afflicted with any of these disabilities does not disqualify a person to marry and according to some jurists they can also fulfill the role of a guardian (*walī*) in the concluding of a marriage.<sup>58</sup> But should the other partner be informed before marriage about the disability? They agreed that this should happen in case of elephantiasis (*judhām*), leprosy (*baraṣ*) and other defects affecting sexual capabilities, as to be detailed below, while disagreeing on the other disabilities.<sup>59</sup> The majority of jurists did not stipulate telling the other partner before marriage about disabilities like blindness, paralysis and amputated organs.<sup>60</sup> Other jurists

<sup>55</sup> Ibn Ḥamza, Muṣṭafā (1414/1993), p. 31.

<sup>56</sup> Rispler-Chaim, Vardit (2007), p. 52.

<sup>57</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 7, p. 5.

<sup>58</sup> Nawawī, Yahyā b. Sharaf al- (1), vol. 9, p. 367.

<sup>59</sup> Wizārat al-Awqāf wa al-Shu’ūn al-Islāmiyya bi al-Kuwayt (1), vol. 29, p. 68.

<sup>60</sup> Kīlānī, Sarī Zayd al- (1), pp. 278 & 279, note 2; Quḍāt, Muṣṭafā al- (1406/1985), pp. 180-182.

considered concealing such disabilities as an illicit deceit by which the other partner would be entitled to end up marriage and claim financial compensation for the harms he suffered.<sup>61</sup>

Despite the main trend in the modern time calling for promoting, safeguarding and protecting rights of people with disabilities, modern voices objecting to marriage of people with disabilities are still heard. In his commentary on the Qur'anic verse on polygamy (4:2), the well-known Qur'ān exegete, Jamāl al-Dīn al-Qāsimī (d. 1332/1914) quoted an article entitled "Islam and Improving Progeny (*Al-Islām wa iṣlāḥ al-nas*)" by an anonymous author described as a sociologist and Muslim philosopher. The author's suggested eugenics was based on two procedures which both were first devised by two contemporary Western philosophers, one from Germany and the other from England. The first procedure was preventing people with disabilities, chronic diseases and a serious criminal record to marry so that their offspring, which in most cases would suffer the same problems, would come to an end. The second procedure was allowing polygamy for genius (*nawābiḡh*) people so that their offspring would increase. Al-Qāsimī comments on the article by saying, "This is a marvelous inference!"<sup>62</sup>

ʿUmar Riḍā Kaḥḥāla (d. 1905-1988)<sup>63</sup> follows almost the same tendency. Referring to "physicians", he concludes that whoever suffers from a contagious disease or chronic illness, and cannot recover from it, may not marry. He even suggests that proper legislation be enacted on this subject. Kaḥḥāla enumerates the following diseases as marriage bars: gonorrhea, syphilis, pulmonary tuberculosis, alcoholism, nervous diseases, defects in the reproductive organs, a too narrow vagina, physical deformations, heart, liver, kidney diseases and cancer. In his view, "every couple should be tested prior to getting married, and of course avoid marriage if one of them suffers from any of the above diseases. In Kaḥḥāla's view, the absence of such a document renders the marriage legally invalid.<sup>64</sup>

On the other hand, other voices today speak for the right people with disabilities to establish a family: "It is not fair to determine that those who are not perfectly healthy should not marry, because many people who suffered a chronic disease or a birth defect have married, and their marriage have turned out to be as happy as can be imagined."<sup>65</sup> According to the Egyptian law no. 25/1920, the wife has the right to request dissolution if her husband has an incurable disability. But only physicians are authorized to determine whether a condition is curable or not.<sup>66</sup> Since no time limit is stipulated in the law for the

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<sup>61</sup> Kīlānī, Sarī Zayd al- (1), pp. 280-287; Quḍāt, Muṣṭafa al- (1406/1985), pp. 183; Laylā Muḥammad ʿAbd Allāh (1418/1997), pp. 167 & 168; Rispler-Chaim, Vardit (2007), p. 55.

<sup>62</sup> Qāsimī, Jamāl al-Dīn al- (1424/2003), vol. 3, pp. 24-26.

<sup>63</sup> On him, see Rispler-Chaim, Vardit (2007), p. 143.

<sup>64</sup> Ibid, pp. 51 & 52, quoting from Kaḥḥāla, ʿUmar Riyāḍ (1977), p. 201-203.

<sup>65</sup> Kaḥḥāla, ʿUmar Riyāḍ (1977), p. 201, quoted by Rispler-Chaim, Vardit (1996), p. 101.

<sup>66</sup> ʿAbd al-Ḥamīd, Muḥammad Muḥyī al-Dīn (1966), pp. 314 & 315.

desired cure to occur, this law tends to protect the right of the disabled man who would want to continue the marriage-bond.<sup>67</sup>

### 7.1.3.2 Rules Pertaining to the Situation after the Contracting of Marriage

The main question here is whether the affliction with a disability entitles the other partner to ask for dissolving the marriage?

An introductory note is in order first. We should know that there are different financial consequences if marriage ended through the husband's claim on the basis of the wife's disability or the opposite, that is, the wife's claim on the basis of the husband's disability. Financially, the first way is in favor of the husband whereas the other is in favor of the wife.<sup>68</sup> As for the wife, since divorce had become a reality she could not prevent, the best financial terms could have been achieved through a *talāq sharʿī* (repudiation according to the Shariʿa), in which the husband is required to pay the wife the postponed part of the dower provided this was stipulated in the marital contract, as well as maintenance of the waiting period of a divorce.<sup>69</sup> Prove that the disability existed before consummating marriage is the husband's responsibility and it is preferable that a doctor's opinion supports such proof. If the husband cannot furnish sufficient proof, the guardian has to swear that he did not know of the disability, hence he was not deceitful.<sup>70</sup> Others claim that if the husband is deemed trustworthy, his statement is accepted as true. Another view is that if the guardian is a distant relative of the wife such as a third cousin, his word will be valid; if not, the husband's statement will count as the truth.<sup>71</sup>

Now we move back to the main question. One of the requirements for the marriage contract to be binding is that the contracting parties should be 'free from defect'. 'Defect' here refers to these physical or mental flaws in one of the parties, which makes marital life unfruitful.<sup>72</sup> If one of the parties finds in the other some defect, which makes it impossible to live with, then marriage is not binding and he or she has the right to dissolve it. This right is not absolute, as there are essential disagreements among the jurists.

As for defects affecting the first objective, viz., sexual relations, jurists did not come up with a unified list. The Ḥanafīs state that such defects are legally considered when they afflict the husband only. They named three defects, viz., *jabb* (amputation, extirpation or cutting off of the penis and/or testicles), *ʿunna* (impotence, too small or too large penis and therefore unable to penetrate, or lack of erection; the state of someone who does not desire women by reason of impotence) and *khisāʿ* (castration).<sup>73</sup> The majority of jurists did not make a

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<sup>67</sup> Rispler-Chaim, Vardit (1996), p. 101.

<sup>68</sup> Ibid, p. 104.

<sup>69</sup> Ibid, pp. 92 & 93. For further details about the difference between dissolution and divorce, see Alami, Dawoud S. al- (1), pp. 138-140.

<sup>70</sup> Wansharīsī, Aḥmad b. Yaḥyā al- (1981-1983), vol. 3, p. 177 & 178; Mirdāwī, ʿAlī b. Sulaymān al- (1), vol. 8, p. 203.

<sup>71</sup> Mirdāwī, ʿAlī b. Sulaymān al- (1), vol. 8, p. 203.

<sup>72</sup> Alami, Dawoud S. al- (1), p. 74.

<sup>73</sup> Wizārat al-Awqāf wa al-Shuʿūn al-Islāmiyya bi al-Kuwayt (1), vol. 29, p. 67. Translating the

difference between man and woman concerning the legal validity of these defects. However, they disagreed again on what these defects are. To the Mālikīs, they are in case of a man *jubb*, *khisā*, *ʿunna* and *iʿtirāḍ* (lack of erection) and in case of a woman *rataq* (the meatus of the vagina is sealed by a tissue which prevents a penetration), *qarn* (a protruding tissue or bone that blocks the vagina), *ʿafal* (scrotal hernia; a piece of flesh coming forth in her vulva similarly to a man's hernia), *ifdāʿ* (the uterine tract and the urine tract are intertwined) and *bakhr* (bad odor released from the vagina).<sup>74</sup> To the Shāfiʿīs, they are in case of a man *ʿunna* and *jubb* and in case of a woman *rataq* and *qarn*. To the Ḥanbalīs, they are in case of man *ʿunna* and *jubb* and in case of woman *rataq*, *qarn* and *ʿafal*.<sup>75</sup> Modern scholars state that it should be kept in view that most of the aforementioned defects are curable nowadays since modern surgery is capable of correcting them. Thus, a chance should be first given to the partner having the defect to try medical treatment.<sup>76</sup>

Under the category of defects affecting the good companionship which are joint between man and woman, three main disabilities are mentioned, viz., *junūn* (madness/insanity), *judhām* (elephantiasis) and *baraṣ* (leprosy).<sup>77</sup> According to the Jaʿfarī and Zaydī schools, blindness is annexed to the defects legally considered to by jurists to bring a marriage to an end.<sup>78</sup>

As for *junūn*, Michael Dols and lately Rispler-Chaim meticulously noted that this term should be carefully approached and studied in Islamic sources. Dols says that *majnūn* (mad/insane) was often a social decision more than a clinical one.<sup>79</sup> Tracing early jurists' discussions on this point shows clearly that the medical diagnosis did not play a central role in defining who is to be considered *majnūn*. Jurists were more concerned with searching for and studying rulings with pertinence to this group of people rather than defining their disease. This overwhelming social-cultural dimension of the term *majnūn* remains up to the present time.<sup>80</sup>

The majority of jurists including the Mālikīs, Shāfiʿīs and Ḥanbalīs allow either spouse to request dissolution of marriage when the other suffers madness. The Mālikīs include under the term *junūn* epilepsy and *waswās* (melancholia, delirium, confusion of the intellect). It depends, however, on when the *junūn* first occurred. If it was before the contract, and the other spouse was not aware of it, each has the right to request *radd* (annulment of contract), whether the revelation of the disability came before or after consummation. If it is a periodic *junūn*, with intermissions of sanity, such as epilepsy (*ṣara*), then no grounds for *radd* can be furnished. It is worth noting

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terms is based on Rispler-Chaim, Vardit (2007), p. 55.

<sup>74</sup> Wizārat al-Awqāf wa al-Shuʿūn al-Islāmiyya bi al-Kuwayt (1), vol. 29, p. 68. Translating the terms is based on Rispler-Chaim, Vardit (2007), p. 53.

<sup>75</sup> Wizārat al-Awqāf wa al-Shuʿūn al-Islāmiyya bi al-Kuwayt (1), vol. 29, p. 68.

<sup>76</sup> Rispler-Chaim, Vardit (2007), p. 54.

<sup>77</sup> Wizārat al-Awqāf wa al-Shuʿūn al-Islāmiyya bi al-Kuwayt (1), vol. 29, pp. 67 & 68.

<sup>78</sup> Kilānī, Sarī Zayd al- (1), p. 282.

<sup>79</sup> Dols, Michael W. (1992), p. 4, quoted by Rispler-Chaim, Vardit (2007), p. 64.

<sup>80</sup> See Rispler-Chaim, Vardit (2007), pp. 64 & 65.

here that epilepsy in the medieval period was viewed as a sort of insanity, unlike today, when it is treated as a neurological disorder which can be largely controlled with medications.<sup>81</sup>

The question now is, are the aforementioned defects the only defects considered by jurists or are they just examples?

In their answer, jurists can be divided into two main groups. The first group, representing the majority of Ḥanafīs, Mālikīs, Shāfi‘īs and Ḥanbalīs, restricts the defects affecting the validity of marriage to the list mentioned above. Thus, disabilities such as blindness, one-eyedness, dumbness and the like do not count in this respect.<sup>82</sup> For instance, Ibn Muflīḥ al-Ḥanbalī (816-844/1413-1440) comments on the aforementioned disabilities saying, “Based on what has been mentioned, it is known that dissolution of marriage cannot happen on the basis of other defects such as ‘*awar* (blindness in one eye), ‘*amā* (full blindness), the loss of one hand, etcetera.”<sup>83</sup> However, according to the Mālikīs, both spouses are considered to possess the right to stipulate in the marriage contract that the other party is free from defects like loss of one eye (‘*awar*), lameness, paralysis, gourmandism and the like. Other jurists, including the Ḥanafīs, said that none of them was entitled to stipulate this. If the husband (who stipulated such condition) found out any of these defects before consummation, then he had the choice to accept [the defect] with the duty to pay all the bridal money agreed upon or to cancel marriage and then without any financial obligations. On the other hand, if the husband found out such defect after consummation, then the wife was entitled to *mahr al-mithl* (the dowry paid to the equal) unless the bridal money agreed upon was less than the *mahr al-mithl*.<sup>84</sup>

The other group is mainly represented by the two Ḥanbalī jurists Ibn Taymiyya and his disciple Ibn al-Qayyim. They stated that every defect affecting seriously the aforementioned two objectives of good companionship or sexual relationship, would have the same effect of the other defects previously enlisted by jurists. Thus defects such as amputated organs, dumbness, blindness and the like would represent, according to this group, a valid legal ground to bring marriage to an end.<sup>85</sup>

More problematic are the defects, which are believed to have existed before marriage but were concealed from the other spouse and discovered only after consummation. This circumstance calls in question the credibility of the spouse with disability, in addition to the unpleasant discovery of his/her disability.

In principle, a health problem in one partner that existed before the signing of the contract but was not reported to the other is considered a deception with regard to the *shart al-salāma* (lit. the condition of soundness). The impact of

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<sup>81</sup> Wizārat al-Awqāf wa al-Shu’ūn al-Islāmiyya bi al-Kuwayt (1), vol. 16, p. 108; Rispler-Chaim, Vardit (2007), pp. 58.

<sup>82</sup> Kīlānī, Sarī Zayd al- (1), p. 278.

<sup>83</sup> Ibn Muflīḥ, Ibrāhīm b. Muḥammad (1400/1979), vol. 7, p. 109.

<sup>84</sup> Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (3), vol. 5, pp. 97 & 98; Wizārat al-Awqāf wa al-Shu’ūn al-Islāmiyya bi al-Kuwayt (1), vol. 31, p. 40.

<sup>85</sup> Kīlānī, Sarī Zayd al- (1), pp. 280-287.

such a revelation on the fate of the marriage will depend on the type of health problem, and also on the stage when it was discovered: before or after the advanced payment of dower, or before or after consummation of marriage. Even when the disability does not dramatically affect the fate of the marriage it might reflect on the value of the *mahr*, and possibly lead to a call to apply *mahr al-mithl* instead. Once again we realize that the health situation is an important factor in the estimation of the *mahr*.<sup>86</sup>

One solution to cases where the deception (*tadlis*) was on the part of the wife and discovered by the husband before consummation was “sending her back to her parents’ home”. The marital contract is voided and the husband may take back all the gifts and money provided by him until then. Disabilities not reported prior to marriage and for which a wife may be sent back are only leprosy, elephantiasis, insanity, and a non-penetrable vagina (*qarn* and *‘afāḥ*), which means that she will never be able to bear children. But she can be sent back only if consummation has not taken place. Once consummated, the marriage cannot be annulled. Only in Shi‘ī sources do blindness and lameness of the wife constitute grounds for the nullification of marriage, but also only if there has been no consummation. If there is, no further grounds for annulment (*radd*) exist, since consummation is legally viewed as an expression of satisfaction or acceptance of the bride as she is.<sup>87</sup>

In all cases, if the husband still feels after consummation that he was tricked into the marriage he may sue the one who introduced the woman to him (her guardian) for the amount of the *mahr* he paid her. The guardian is usually a close relative of the wife, a father or a brother, and is expected to know if she is disabled or not, and therefore may be sued as indicated. If the guardian was a distant relative, such as a cousin, who claimed that he was not aware of her disability, there was no one to sue. If the woman and her guardian shared the deception they will bear the *damān* (compensation) on a fifty-fifty basis. As early as the 15<sup>th</sup> century the Mālikī jurist, al-Wansharīsī was asked about a case in which the husband charged the wife with being a leper, and her father claimed “she only had bright spots in her body” (*luma‘at fī jasadīha*). The husband probably intended to claim that the impairment existed prior to the contract, in order to prove that he was tricked into the marriage. The burden of proof lay on him. In the absence of such proof the wife’s guardian has to testify that the impairment was not there prior to marriage, and consequently *tafriq* (dissolution by court) would not be applicable. Only if the impairment was in her sexual organs and penetration was impossible the wife should be returned to her father (*radd*).<sup>88</sup>

Such questions were also posed to modern scholars. In 1979, a man approached Shaykh Jād al-Ḥaqq, the late Grand Imam of Al-Azhar who was the chairman of Dār al-Iftā’ al-Miṣriyya at this time, asking him to terminate his

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<sup>86</sup> Rispler-Chaim, Vardit (2007), p. 50.

<sup>87</sup> Ibid., p. 51.

<sup>88</sup> Ibid., pp. 54 & 55.

marriage with his epileptic wife.<sup>89</sup> The husband pointed out that the epilepsy was discovered by him only after consummation of marriage had taken place. The husband then suspected her guardian of having concealed relevant information about his future wife's health. Hence the husband wished to terminate marriage through dissolution (*faskh*), and demanded from the guardian the recovery of the dower paid, on the basis that the condition of physical integrity (*shart al-salāma*) in the contract was breached. Naturally, the husband wished to terminate the marriage on the best terms for himself, that is through *faskh*. The Muftī had therefore to determine the most just legal way of separating the couple.

In his response, Shaykh Jād al-Ḥaqq surveys the range of existing legal opinions on an illness or a disability discovered in one of the spouses after marriage:

- According to the Zāhirīs, neither spouse has legal grounds to claim dissolution of marriage (*faskh*) whether disability appeared before or after marriage.
- Certain disabilities constitute legal grounds for dissolution of marriage (*tafriq*), a procedure recognized by all four Sunni schools of law. The Ḥanafīs limit the application of *tafriq* to the case of disabilities found in the husband, while the Mālikīs, the Shāfi'īs, Ḥanbalīs, Zaydīs and Twelver Shi'īs allow the request for dissolution from either spouse. However, within each school, the scholars are divided as to the number and nature of the disabilities which, if they exist in a spouse, justify the request of dissolution by court.
- Any physical defect, in the husband or in the wife, is a legal ground for the other spouse's resort to dissolution. If, however, the husband finds after consummation a defect in the wife of which he was not informed prior to marriage, the husband may request the dower back from his wife's guardian. This view was supported by Ibn Qayyim and Ibn Qudāma and all the Ḥanbalīs and the Shāfi'īs "in old times" (*fī al-qadīm*). However, "recent generations" (*fī al-ḥadīth*) of the Ḥanafīs and the Shāfi'ī jurists do not permit any dissolution after consummation, arguing that with such an act the husband has availed himself of his right to sexual intercourse acquired by his payment of the dower. He may not claim the dower back thereafter.

Jād al-Ḥaqq concluded that the Egyptian law no. 28/1931 which is influenced by Ḥanafī law, does not acknowledge the right to request dissolution if the husband discovered a disability in his wife only after consummation. Apparently, he sided with the "recent generations" of the Ḥanafīs and Shāfi'īs. Hence, according to Shaykh Jād al-Ḥaqq, the husband who is unhappy to continue living with the epileptic wife, may terminate the marriage through *ṭalāq* for which he needs no judicial intervention, but must provide the wife

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<sup>89</sup> For the Arabic text of the fatwa, see Jād al-Ḥaqq, 'Alī Jād al-Ḥaqq (2005), vol. 3, pp. 246 & 247. The fatwa has been quoted and partially translated by Rispler-chaim, Rispler-Chaim, Vardit (1996), pp. 90-106.



with the financial rights of a divorcee, that is the postponed portion of the dower and the waiting-period maintenance (*nafaqat al-‘idda*).

It is to be noted that epilepsy (*ṣara*) is not specifically mentioned in the list of defects, mentioned by the Hanafis for instance, that give the spouse the right of request for dissolution. The husband in the fatwa under discussion, therefore, has no legal grounds, according to the four Sunni legal schools, for requesting the court to separate him and his wife through dissolution of the marriage. However, epilepsy was a known illness to Muslims since the Middle Ages.<sup>90</sup> This suggests that at least culturally epilepsy could have been considered a sort of madness and under this heading admissible in the list of wife’s disabilities entitling the husband to request the dissolution of the marriage according to many jurists, as mentioned above. Jād al-Ḥaqq did not apply this possible analogy, thereby safeguarding the wife’s financial rights.

In a recent fatwa, the mufti was asked about a defect that both the woman and her guardian were not aware of. From whom should the misled husband request reimbursement of the dower? The answer provided was that if the guardian did not know, the woman was required to compensate. However, if she did not know either, then no one was at fault and there was no one to sue.<sup>91</sup>

### 7.1.3.3 Wives with Disabilities

A general overview of the wife’s right to maintenance will be sketched and then financial consequences of being afflicted with disabilities will be detailed. Initially speaking, there is consensus among all Muslims that marriage is one of the causes that make maintenance obligatory. The Holy Qur’ān has explicitly mentioned the wife’s maintenance in the following verse, “The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms.” (Qur’ān 2:233) There is also a tradition which says, “The right of a woman over her husband is that he feed her, and if she acts out of ignorance, to forgive her.”<sup>92</sup>

The legal schools concur that the wife’s maintenance is obligatory if the requisite conditions, to be mentioned subsequently, are fulfilled and that the maintenance of the divorcee is obligatory during the waiting period of a revocable divorce.<sup>93</sup> The schools also concur that a woman observing the waiting period following her husband’s death is not entitled to maintenance, whether she is pregnant or not, except that the Shāfi‘ī and the Mālikī Schools state that if the husband dies, she is entitled to maintenance only to the extent of housing.<sup>94</sup>

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<sup>90</sup> Ibid, pp. 96 & 97.

<sup>91</sup> Rispler-Chaim, Vardit (2007), p. 55.

<sup>92</sup> See Bakhtiar, Laleh (1996), pp. 475 & 476.

<sup>93</sup> Ibid., p. 476.

<sup>94</sup> Ibid., p. 476.

The Shāfi'is said that if the husband separates from his wife while she is pregnant and then dies, her maintenance shall not cease.<sup>95</sup> The Ḥanafīs observe that if she is a revocable divorcee and the husband dies during the waiting period, her waiting period of divorce shall change into awaiting period of death, and her maintenance shall cease, except where she had been asked by the court to borrow her maintenance and she had actually done so. In this case, the maintenance shall not cease.<sup>96</sup>

There is a consensus that a woman observing the waiting period as a result of 'intercourse by mistake' is not entitled to maintenance.<sup>97</sup> The schools differ regarding the maintenance of a divorcee during the waiting period of an irrevocable divorce. The Ḥanafīs observe that she is entitled to maintenance even if she has been divorced three times, whether she is pregnant or not, on condition that she does not leave the house provided by the divorce (husband) for her to spend the waiting period. According to the Ḥanafīs, the rules which apply to a woman in a waiting period following the dissolution of a valid contract are the same as those which apply to a divorcee in an irrevocable divorce.<sup>98</sup>

According to the Mālikī School, if the divorcee is not pregnant, she shall not be entitled to any maintenance except residence, and if she is pregnant she is entitled to her full maintenance. It shall not subside even if she leaves the house provided for spending the waiting period, because the maintenance is intended for the child in the womb and not for the divorcee.<sup>99</sup> The Shāfi'ī, Ja'farī and Ḥanbalī Schools state that if she is not pregnant she is not entitled to maintenance, and if pregnant, she is entitled to it. But the Shāfi'is add that if she leaves the house of the waiting period without any necessity, her maintenance shall cease.<sup>100</sup> The Ja'farīs do not consider the dissolution of a valid contract similar to an irrevocable divorce. They observe that a divorcee undergoing the waiting period of a dissolved contract is not entitled to any maintenance whether she is pregnant or not.<sup>101</sup>

Would a working wife be entitled to maintenance? Jurists give more than one answer in this respect. The Ḥanafīs are explicit that a working woman who does not stay at home is not entitled to maintenance if the husband demands her to stay at home and she does not concede to his demand.<sup>102</sup> This view is in concurrence with what the other schools hold regarding the impermissibility of

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<sup>95</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, p. 472.

<sup>96</sup> Bakhtiar, Laleh (1996), p. 476.

<sup>97</sup> Ibid.

<sup>98</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, pp. 470 & 471.

<sup>99</sup> Ibid, vol. 4, pp. 471 & 472.

<sup>100</sup> The opinions expressed by the Shāfi'is and the Ḥanbalīs are based on Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, pp. 470-472. The opinion of the Ja'farī schools is quoted from Bakhtiar, Laleh (1996), p. 477.

<sup>101</sup> Bakhtiar, Laleh (1996), p. 477.

<sup>102</sup> Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (1409/1989), vol. 5, p. 192; Bakhtiar, Laleh (1996), p. 486.

her leaving her home without her husband's permission.<sup>103</sup> The Shāfi'is and the Ḥanbalīs further state that if she leaves home with his permission for meeting her own requirements, her maintenance ceases.<sup>104</sup>

But another view would differentiate between a husband who knows at the time of marriage that she is employed and her employment prevents her staying at home, and a husband who is ignorant about her employment at the time of marriage. Therefore, if he knew and remained silent and did not include a condition that she leaves her job, he has no right in this case to ask her to quit her job. If he demands and she refuses to comply, her maintenance shall not cease. That is because he concluded the contract with the knowledge that she works.<sup>105</sup> But if the husband does not know that she works at the time of marriage, he can demand that she stops working, and if she does not comply, she shall not be entitled to maintenance.<sup>106</sup>

But what is the criterion of determining the amount of *nafaqa* due for a wife? The schools concur that a wife's maintenance is obligatory in all its three forms; food, clothing and housing. They also concur that maintenance will be determined in accordance with the financial status of the two if both are of equal status.<sup>107</sup> But when one of them is well-off and the other indigent, the schools differ whether maintenance should be in accordance with the husband's financial status or whether the financial status of both should be considered and a median maintenance be fixed for her.

The Ḥanbalīs state that if the couple differs in financial status, a median course will be followed.<sup>108</sup> The Shāfi'ī School along with some Ḥanafī jurists hold that maintenance will be determined in accordance with the financial status of the husband; this is regarding food and clothing. But regarding housing, it should be according to her status, not his.<sup>109</sup> Imam Mālik and Imam Abū Ḥanīfa state that *nafaqa* is to be determined according to the status of the wife.<sup>110</sup> However, if a judge determines a certain sum of money, or the spouses mutually settle in lieu of maintenance, it is valid to adjust it by increasing or decreasing it in accordance with changes in prices or changes in the financial conditions of the husband.<sup>111</sup>

#### 7.1.3.4 Financial Consequences of Disabilities

Two important issues are intimately related to the case of wife with disability. First, the issue of maintenance during sickness and secondly the issue of the expenses of medical treatment or surgery that could help this wife healing, or at least belittling the effects of, her disability. Concerning the first issue, the

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<sup>103</sup> Bakhtiar, Laleh (1996), p. 486.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid., p. 487.

<sup>106</sup> Ibid.

<sup>107</sup> Ibn Qudāma, Abū 'Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 156.

<sup>108</sup> Ibid.

<sup>109</sup> Jazīrī, 'Abd al-Raḥmān al- (1420/1999), vol. 4, pp. 461 & 462.

<sup>110</sup> Ibn Qudāma, Abū 'Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 156.

<sup>111</sup> Ibid.

question will be “Does the husband have to pay maintenance to his sick wife?” concerning the second issue, the question is: “Will the husband be compelled to afford the medical and surgical expenses that his wife having disabilities could she need?”

In an answer to the first question, The Ḥanbalī scholar, Ibn Taymiyya (d.728/1328), pointed out that a sick wife is unquestionably entitled to full maintenance by the husband in the opinion of the four founders of the major schools of law.<sup>112</sup> However, this answer can be taken for granted. To trace the different justice opinions in this respect, a distinction should be made between the wife whose disability does not affect her ability to discharge her household and marital duties such as the sexual fulfillment and that wife whose disability could affect the fulfillment of such rights properly. Concerning the first case, disability would be considered as non-existent and thus the wife would remain entitled to maintenance according all schools of law as stated in the fatwa of Ibn Taymiyya.

With reference to the second case, the jurists have disagreed. Main examples in this respect are defects affecting the woman’s ability to do the marital duties properly such as *al-raṭāq* or *al-qarn* (both diseases afflicting the sex organ that prevent sexual intercourse. They are birth defects in which the uvula is blocked or the side of the uvula are joined together).<sup>113</sup> Being afflicted with such disease, wife’s right of maintenance does not cease according to the majority of jurists including the Jaʿfarī, Ḥanbalī and Ḥanafī schools, and it does not cease also according to the Mālikīs if she is suffering a serious disease or if the husband himself is similarly ill according to all schools.<sup>114</sup> This opinion is mainly based on using the juristic principle of *istiḥsān* or Preference (a moral and practical consideration that overrules the formalities of law). On the basis of this principle, it is the husband’s obligation to provide for her because she is still his mate, whose companionship he enjoys even though illness may impede her performance in certain aspects, e.g., the sexual fulfillment.<sup>115</sup> A variant of this doctrine maintains that the *raison d’être* of the wife’s right to maintenance is marriage as such or the husband’s trusteeship (*qawwāmiyya*) over the wife. This right remains inalienable so long as she is his wife and he is the trustee. Her physical condition is inconsequential in this regard; it neither lightens his obligation nor negates her right.<sup>116</sup>

However, another group of jurists argue that formally, or analogously, a husband is not responsible for the maintenance of a sick wife because she is actually unable to meet her marital responsibilities. It has been objected that, being his wife, living in his household and giving him companionship would entitle her the right of maintenance even though she may be sick and incapable

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<sup>112</sup> Ibn Taymiyya (1949), p. 454.

<sup>113</sup> Nasafī, ‘Umar b. Muḥammad al- (1311/1893), vol. 46; Ibn Rushd (2000), vol. 2, p. 590.

<sup>114</sup> Bakhtiar, Laleh (1996), p. 478.

<sup>115</sup> See Ibn Nujaym, Zayn al-Dīn b. Ibrāhīm (2), vol. 4, p. 198.

<sup>116</sup> ‘Abd al-‘Aṭī, Hammūda (1977), p. 152. For further details see, ‘Abd Allāh, ‘Umar (1956), p. 250; Kasānī, Abū Bakr Mas‘ūd b. Aḥmad al (1406/1986), vol. 4, pp. 15.

of playing her full role. The advocates of this opinion responded by saying that if the husband is thus responsible for her maintenance because of the marriage – a contract for which she has already received her bridal money (*mahr*) – then she would be acquiring two rights, viz., *mahr* (bridal money) and *nafaqa* (maintenance) for one and the same reason, i.e., being a wife, or she would be receiving “two compensations for one and the same loss.” This is according to the argument, unlawful and unjust.<sup>117</sup>

In this regard, it is to be noted that the denial of maintenance of a sick wife does not mean that she will be left to exposure or starvation. If she has any property she must maintain herself of her own assets. Otherwise, the responsibility will be discharged by the nearest consanguine male who can afford it. If not, it becomes a community or state responsibility. Allah the Almighty says, “Allah commands justice, the doing of good, and liberality to kith and kin, and he forbids all shameful deeds, and injustice and rebellion: he instructs you, that ye may receive admonition” (Qur’ān 16:90), and says, “And render to the kindred their due rights, as (also) to those in want, and to the wayfarer: but squander not (your wealth) in the manner of a spendthrift” (Qur’ān 17:26).

With reference to the second question raised above, the main point was if medical care is part of maintenance or apart from it. When we refer to the canonical sources, we find that the Qur’ān makes the wife’s food and clothing obligatory. The traditions say that it is for the husband to satiate her hunger and clothe her.<sup>118</sup> Yet the application of this general principle to the case of a sick wife has stimulated curious arguments, difference of opinions and legal niceties.<sup>119</sup> The majority of jurists agree that the husband is not legally responsible for the cost of medicine, the physician’s fees, etc.<sup>120</sup> Some jurists, however, maintain that if the husband is financially comfortable and the cost of medical care is modest, he is responsible for it. Others argue that even if he is not *legally* responsible for the cost, it is still his *religious* responsibility out of compassion, courtesy, or in conformity with the social norms.<sup>121</sup> A minority among the Ḥanafī and Shī‘ī jurists consider medical care a means to save life and preserve health. Hence, it is as essential as food, shelter and clothing; it is therefore part of the husband’s responsibility.<sup>122</sup> This is the standpoint adopted by the absolute majority of contemporary jurists, some of whom are impatient with these formalistic interpretations of the law which, on one hand, enjoin the husband to furnish his wife with maids – an obvious luxury – but, on the other,

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<sup>117</sup> ‘Abd Allāh, ‘Umar (1956), p. 250.

<sup>118</sup> Bakhtiar, Laleh (1996), p. 484.

<sup>119</sup> Ibid.

<sup>120</sup> See for example, Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (1409/1989), vol. 21, p. 105, Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 159; Dardīr, Aḥmad al- (1), vol.2, p. 509.

<sup>121</sup> Jazīrī, ‘Abd al-Raḥmān al- (1420/1999), vol. 4, p. 456; ‘Abd al‘Atī, Hammūda (1977), p. 153.

<sup>122</sup> Jazīrī, ‘Abd al-Raḥmān al- (1420/1999), vol. 4, p. 456; Bakhtiar, Laleh (1996), p. 484; ‘Abd al‘Atī, Hammūda (1977), p. 153.

exempt him from the responsibility for her medical care.<sup>123</sup> These formal interpretations, they add, contain no explicit authoritative evidence.<sup>124</sup> Other jurists, adopt a more lenient reaction by saying that that early jurists have given detailed instances of things to be provided for as *nafaqa* during the time they were writing about it. These are to be adjusted in the light of modern necessities to suit the circumstances of the countries and their living standard.<sup>125</sup>

It is interesting to note that this position has been adopted by the courts of Syria and North Africa because it was considered to the spirit of the law even though it emanated from a partisan and traditionally adversary group.<sup>126</sup> In his definition of the wife's maintenance, Jamal J. Nasir, the former Minister of Justice of Jordan, says, "Maintenance is the lawful right of the wife under a valid marriage contract on certain conditions. It is the right of the wife to be provided at the husband's expense, and at a scale suitable to his means, with food, clothing, housing, toilet necessities, medicine, doctors' and surgeon's fees, baths and also the necessary servants where the wife is of social position which does not permit her to dispense with such services, or when she is sick." So he included medical expenses in the definition of the *nafaqa* and, then, stated that all modern Arab Codes on personal status more or less repeat this general Shari'a position with some slight modification.<sup>127</sup>

#### 7.1.4 Relatives with Disabilities

The main Qur'anic expression used to signify "relatives" is *dhawū* or *ulū al-qurbā* (2:83, 177; 4:8, 36; 5:106; 6:152; 7:41) [translated as kindred, kith and kin, kinsfolk, relatives]. Falling within this category would make the person entitled to a number of rights and duties as well. For instance, Islam enjoins that spending on poor relatives, by blood or marriage, is obligatory upon their well-off relatives because it is a part of *ṣilat al-raḥim* (upholding family ties), which literally means joining of uterus ties. This is proved by the following verse, "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms" (Qur'ān 2:233). This means that the maintenance on relatives by birth is obligatory. Then Allah said, "[...] an heir shall be chargeable in the same way" (Qur'ān 2:233). So it is concluded that maintaining ascendants, descendants and collaterals is mandatory as the heir may be one of these categories.<sup>128</sup>

However, Qur'anic references to "relatives" did not identify exactly who would fall under this category and who would not. As a consequence, jurists did

<sup>123</sup> See for example, Maḥmaṣānī, Subḥī, Rajab al- (1961), p. 124 & 125; Abū Zahra, Muḥammad (ed.) (1963), p. 335; 'Abd Allāh, 'Umar (1956), p. 250.

<sup>124</sup> 'Abd al-'Atī, Hammūda (1977), pp. 153 & 154.

<sup>125</sup> Doi, 'Abdur Raḥmān I. (1404/1984), p. 204.

<sup>126</sup> 'Abd al-'Atī, Hammūda (1977), p. 153.

<sup>127</sup> Nasir, Jamal J. (1990), p. 102.

<sup>128</sup> 'Abd al-Ḥakīm, Ibn Muḥammad (1332/1914), pp. 231 & 232.

not agree on who are those family-members who belong to the category of “relatives” or *dhawū al-qurbā* as indicated by the Qur’ān.

According to the Ḥanafīs, the criterion for the responsibility of the relative to provide maintenance of another is the prohibited degree of marriage. So that if one of them is supposed a male and the other a female, marriage between them would be considered unlawful.<sup>129</sup> Therefore, generally this responsibility includes fathers – howsoever high – and sons – howsoever low – and also includes brothers, sisters, uncles and aunts, both paternal and maternal, because marriage between any two of them is prohibited. The nearest relative shall be liable to provide maintenance.<sup>130</sup> Imam Mālik and Imam al-Shāfi‘ī said that the only obligatory *nafaqa* in Islam is that of one’s parents and children.<sup>131</sup> The Ja‘fari School has adopted the same opinion.<sup>132</sup> The Ḥanbalīs state that it is obligatory that fathers, howsoever high, provide and receive maintenance. Similarly, it is obligatory that sons, howsoever low, provide and receive maintenance, irrespective of their title to inheritance. Maintenance of relatives not belonging to the two classes is also obligatory if the person liable to provide maintenance inherits from the person being maintained either by *fard* (obligatory share) or *ta‘ṣīb* (the residue share). But if being excluded from inheritance, he will not be responsible maintenance.<sup>133</sup> Thus if a person has an indigent son and a well-to-do brother, neither may be compelled to maintain him, because the son’s indigence relieves him of the responsibility, and the brother by being excluded from inheritance due to the son’s presence.<sup>134</sup>

#### 7.1.5 Conditions for the Obligation of Maintenance

Initially speaking, it should be noted that being on good terms between the spender (*munfiq*) and the maintained person (*munfaq ‘alayh*) is not a prerequisite to make maintenance obligatory. The main guidance in this regard is derived from the following verse: “Let not those among you who are endued with Grace and amplitude of means resolve by oath against helping their kinsmen, those in want, and those who have left their homes in Allah’s cause: let them forgive and overlook, do you not wish that Allah should forgive you? For Allah is Oft-Forgiving, Most Merciful” (Qur’ān 24:22).

Each family has a few persons who bear some personal dislikes or disputes with a few other members. The Qur’ān commands that these differences should not prevent a person from meeting his family obligations, that the rich in the family should always help the poor members of the family. For instance,

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<sup>129</sup> Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (1409/1989), vol. 5, p. 223. Cf. Bakhtiar, Laleh (1996), p. 490.

<sup>130</sup> Bakhtiar, Laleh (1996), p. 490.

<sup>131</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (2), vol. 2, p. 320.

<sup>132</sup> Fityān, Farīd (1986), p. 212.

<sup>133</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1408/1998), vol. 3, pp. 373 & 374.

<sup>134</sup> Bakhtiar, Laleh (1996), p. 490. For a detailed discussion on the significance on the term *qarāba* and who falls under this category, see Wizārat al-Awqāf wa al-Shu‘ūn al-Islāmiyya bi al-Kuwayt (1), vol. 33, pp. 66-69.

when Abū Bakr swore in the heat of his anger over his maligned honor that he would exclude Miṣṭaḥ, a relative of Abū Bakr who was involved in the affair of false accusation against Abū Bakr's daughter, 'Ā'isha, from the charity he had been giving him, there was revealed the previous *ayah*.<sup>135</sup>

Jurists mentioned six main conditions, some of which are points of agreement and others are not, after meeting them, maintenance will be obligatory. They are as following:

1. The poverty of the maintained person; he should be *mu'sir*, as defined above, because the main target of *nafaqa* is to help the needy not the rich.<sup>136</sup>
2. Being unable to work and gain money due to advanced age, childhood or any other reasonable excuse.<sup>137</sup> Concerning the relatives who are able to make their living by their own, other than parents and grandparents, the Ḥanafī<sup>138</sup> and Shāfi'ī<sup>139</sup> schools state that their maintenance is not obligatory, rather they will be compelled to make a living, and one who neglects to work or is sluggish commits a crime against himself. But the Shāfi'īs say regarding a daughter that her maintenance is obligatory on the father until she gets married.<sup>140</sup> The Mālikī, Ḥanbalī and the Ja'farī schools state that if one who was earlier making his livelihood by engaging in a trade that suited his conditions and status later neglects to do so, his maintenance is not obligatory upon anyone, irrespective of whether it is the father or the mother or the son. The Mālikīs agree with the Shāfi'īs' position regarding a daughter and the reason for this is that formerly women were considered generally incapable of earning their livelihood.<sup>141</sup>
3. The affluence of the *muntfiq* (spender). That is because maintenance is the financial form of upholding the family ties and this form of *ṣilat al-rahim* is incumbent only on the well-to-do persons.<sup>142</sup> The only condition here is the presence of the ability to maintain or the presence of the ability to earn. Therefore, a father who is capable to work will be ordered to maintain his child, and similarly a son with respect to his father, except where one of them is indigent and incapable of making an earning due to physical or mental disorder such paralysis, blindness, deafness, dumbness etc and did not learn a profession form which he can earn his livelihood.<sup>143</sup> Dr. Badrān Abū al-'Aynayn, Faculty of Law, Alexandria University, comments on this by saying, "The physical or mental disorder in itself cannot be a sign of inability to earn one's livelihood [and hence, being entitled to maintenance]. For instance, nowadays a person suffering from blindness can master a

<sup>135</sup> Qutb, Sayyid (1349/1974), p. 89.

<sup>136</sup> Majlis al-A'lā li al-Shu'ūn al-Islāmiyya, al- (1386-1411/1966-1990), pp. 317-318.

<sup>137</sup> 'Abd al-Ḥakīm, Ibn Muḥammad (1332/1914), p. 333.

<sup>138</sup> Kasānī, Abū Bakr Mas'ūd b. Aḥmad al (1406/1986), vol. 4, p. 34.

<sup>139</sup> Bujayramī, Sulaymān b. Muḥammad al- (I), vol. 4, p. 119.

<sup>140</sup> See Badrān, Abū al-'Aynayn Badrān (1988), p. 115; Bakhtiar, Laleh (1996), p. 492.

<sup>141</sup> Bakhtiar, Laleh (1996), pp. 492 & 493.

<sup>142</sup> Majlis al-A'lā li al-Shu'ūn al-Islāmiyya, al- (1386-1411/1966-1990), p. 318.

<sup>143</sup> Badrān, Abū al-'Aynayn Badrān (1988), p. 113; Bakhtiar, Laleh (1996), p. 493.



number of professions by which he can earn money. Furthermore, he can follow the way of education and get the highest educational levels. Hence the criterion is the inability to earn.”<sup>144</sup> The schools differ regarding the degree of the financial ease necessary to cause the liability for providing the maintenance to a relative. According to the Shāfi‘īs, it is the surplus over the daily expenditure of his own, his wife’s and his children’s.<sup>145</sup> The Mālikīs add to this the expenditure incurred upon servants and domestic animals.<sup>146</sup> According to the Ḥanbalī and the Ja‘farī schools, it is the surplus over the expenditure of oneself and one’s wife, as the maintenance of descendants and ascendants belong to the same category.<sup>147</sup> Ḥanafī jurists differ in defining the state of financial ease. According to some of them, it is possession of an amount of wealth which gives rise to the incidence of poor-due (*niṣāb*). According to others, it should be enough to prohibit his taking of *zakāh*. The third opinion differentiates between the farmer and the worker allowing the farmer his and his family’s expenditure for a period of one month and the worker a day’s expenditure as a deduction.<sup>148</sup>

4. The unity of religion between the spender (*munfiq*) and the maintained person (*al-munfaq ‘alayh*).<sup>149</sup> That is because *nafaqa* here is obligatory on the basis of inheritance and there is no inheritance between two persons of different religions.<sup>150</sup> According to the Ḥanbalīs, their belonging to the same religion is necessary. Thus if one of them is Muslim and the other a non-Muslim, maintenance is not obligatory.<sup>151</sup> The Mālikī,<sup>152</sup> Shāfi‘ī<sup>153</sup> and the Ja‘farī<sup>154</sup> schools state that their belonging to the same religion is not necessary. Therefore, a Muslim can maintain a relative who is not a Muslim, as in the case when maintenance is provided by a Muslim husband to his wife belonging to the People of the Book (*ahl al-kitāb*). The Ḥanafīs observe that belonging to the same religion is not required between ascendants and descendants, but necessary between other relatives. Therefore, a Muslim will not maintain his non-Muslim brother and vice versa.<sup>155</sup>
5. The unity of place between the spender and the maintained person. There is no *nafaqa* on the person who is not present (*ghā’ib*) even if he was rich.<sup>156</sup>

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<sup>144</sup> Badrān, Abū al-‘Aynayn Badrān (1988), p. 113.

<sup>145</sup> Khaṭīb, Muḥammad b. Aḥmad Shirbīnī al- (1), vol. 3, p. 447.

<sup>146</sup> Badrān, Abū al-‘Aynayn Badrān (1988), p. 118.

<sup>147</sup> Bakhtiar, Laleh (1996), p. 493.

<sup>148</sup> Ibid.

<sup>149</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 322.

<sup>150</sup> ‘Abd al-Ḥakīm, Ibn Muḥammad (1332/1914), p. 336.

<sup>151</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 170.

<sup>152</sup> Badrān, Abū al-‘Aynayn Badrān (1988), p. 123.

<sup>153</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 8, p. 170.

<sup>154</sup> Bakhtiar, Laleh (1996), p. 494.

<sup>155</sup> Ibid.

<sup>156</sup> Fityān, Farīd (1986), p. 213.

6. The decree of the judge. Hence the mandatory *nafaqa* starts from the day of such decree.<sup>157</sup> The schools concur that the past maintenance of relatives will not be payable if the judge had not determined it; the spirit of mutual assistance and fulfillment of need being the reason behind it, it can not be made good for past time.<sup>158</sup> The schools differ where the judge determines it and orders its payment, as to whether outstanding maintenance must be paid after the judge's order or whether it is annulled by the passage of time as if he had not ordered its payment at all. The Mālikīs state that if a judge orders the payment of maintenance to a relative and then it remains unpaid, it will not be annulled.<sup>159</sup> The Ja'fari, Ḥanafī and some Shāfi'ī jurists observe that if the judge orders maintenance to be borrowed and the relative entitled to receive maintenance does so, it is obligatory to clear his debt. But if the judge does not order the borrowing of maintenance, or orders it but it is not borrowed, the maintenance will be void.<sup>160</sup> The Ḥanafīs require the payment of past maintenance after the judge's order or if it accrues for a period of less than one month; so if the judge orders payment and month passes since its becoming due, the relative will be entitled to claim the maintenance of the current month only, not of the past month.<sup>161</sup>

It should be noted that if a relative entitled to maintenance receives the maintenance of a day or more through litigation, gift, the poor-due or through some other manner, then maintenance due to him will be deducted to the extent of what he received through these means, even if the judge has ordered the payment of maintenance.<sup>162</sup>

#### 7.1.6 The Order of Relatives on whom Maintenance is Obligatory

The Ḥanafīs hold that if there is only one person responsible for maintenance, he will pay it. If two or more belonging to the same category and capacity – such as two sons or two daughters – they will share equally in providing maintenance, even if they differ in wealth, after their financial capacity has been proved.<sup>163</sup> But where they are of different categories of relationship or of varying capacities, there is confusion in the views of the Ḥanafī jurists in providing the order of those responsible for maintenance.<sup>164</sup>

The Shāfi'īs state that if a person in need has a father and a grandfather who are both well-off, his maintenance will be provided by father solely. If he has a mother and a grandmother, the maintenance will be solely provided by the mother. If both parents are there, father will provide the maintenance. If he has

<sup>157</sup> 'Abd al-Ḥakīm, Ibn Muḥammad (1332/1914), p. 337.

<sup>158</sup> Bakhtiar, Laleh (1996), p. 495.

<sup>159</sup> Badrān, Abū al-ʿAynayn Badrān (1988), p. 128.

<sup>160</sup> Bakhtiar, Laleh (1996), p. 495.

<sup>161</sup> Ibn Nujaym, Zayn al-Dīn b. Ibrāhīm (2), vol. 5, p. 204.

<sup>162</sup> Bakhtiar, Laleh (1996), p. 495.

<sup>163</sup> Sarakhsi, Muḥammad b. Aḥmad b. Abī Sahl al- (1409/1989), vol. 5, p. 222; Badrān, Abū al-ʿAynayn Badrān (1988), pp. 130-132.

<sup>164</sup> Ibid.

a grandfather and a mother, the grandfather will provide the maintenance. If he has a paternal grandmother and a maternal grandmother, according to one opinion, both are equally responsible, according to another opinion, the paternal grandmother will be solely liable.<sup>165</sup>

The Ḥanbalīs state that if a child does not have a father, his maintenance will be on his heirs; and if he has two heirs, they will contribute in proportion to the share of each in the estate. If there are three or more heirs, they will contribute in proportion to their share in the estate.<sup>166</sup> Thus if he has a mother and a grandfather, the mother will contribute one-third and the grandfather the remainder, as they inherit in the same proportion.<sup>167</sup>

The Jaʿfarīs state that the child’s maintenance is obligatory on the father. If the father is dead or indigent, then maintenance will lie upon the paternal grandfather; and if the grandfather is dead or indigent, the mother will be liable for maintenance. After her, her father and mother along with the child’s paternal grandmother will share equally in the maintenance of the grandchild if they are financially capable. But if only some of them are well-off, the maintenance will lie only on those who are such. If an indigent person has a father and a son, or father and a daughter, they will contribute to his maintenance equally. Similarly, if he has many children, it will be shouldered equally by them without any distinction between sons and daughters. On the whole, the Jaʿfarīs consider the nearness of relationship as criterion while determining the order of relationship who are liable to provide maintenance on their belonging to the same class, they are compelled to contribute equally without any distinction between males and females or between ascendants and descendants, except that the father and the paternal grandfather are given priority over the mother.<sup>168</sup>

## 7.2 Bequest (*Waṣīyya*)

*Waṣīyya*, literally, comes from the Arabic word *waṣṣā* which means he conveyed. In other words *waṣīyya* means a gift of property by its owner to another contingent on the giver’s death.<sup>169</sup> The law of *waṣīyya* in Islam supplements the compulsory inheritance rules. The individual is not free to determine the future of his property after his death by favoring or depriving legal heirs. Under the *ultra vires* doctrine, two restrictions exist with regard to wills, one quantitative and the other personal: no more than one third (net) of the estate [after the payment of debts] may be bequeathed, and nothing may be bequeathed to a legal heir if the other heirs do not give their consent.<sup>170</sup> The Shiʿī doctrine does not include the personal restriction.<sup>171</sup> It is reported that the Prophet – Peace and Blessing be

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<sup>165</sup> Shīrāzī, Ibrāhīm b. ʿAlī b. Yūsuf al- (1), vol. 2, pp. 166 & 167.

<sup>166</sup> Ibn Qudāma, Abū ʿAbd Allāh Muḥammad b. Aḥmad al-Maqḍīsī (1405/1985), vol. 8, p. 173.

<sup>167</sup> Bakhtiar, Laleh (1996), p. 496.

<sup>168</sup> Ibid., pp. 496 & 497.

<sup>169</sup> Doi, ʿAbdur Rahmān I. (1404/1984), p. 328.

<sup>170</sup> Ibn Rushd (2000), Vol. II, p. 406.

<sup>171</sup> Coulson, N.J. (1971), pp. 31-34, 41 & 42, 243.

upon him – said, “No bequest to an heir.”<sup>172</sup> Muslim scholars disagree on when the heirs agree. The majority said that it is permitted while the Zāhirīs and the Shāfi‘ī scholar al-Muzanī said it is not permitted.<sup>173</sup>

The legal Qur’anic injunctions in respect of Bequest or Will were contained in the following two verses, “It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing” “If anyone changes the bequest after hearing it, the guilt shall be on those who make the change. For Allah hears and knows (all things),” “But if anyone fears partiality or wrong doing on the part of the testator, and makes peace between (the parties concerned), there is no wrong in him: for Allah is Oft-Forgiving, Most Merciful” (Qur’ān 2:180-182).

In his commentary on verse 180, Imam al-Shāfi‘ī viewed that it is reported that the Prophet – Peace and Blessings be upon him – said, “No bequest for an heir”. This means that the legislation on inheritance has abrogated bequests for the parents and the wife. A great number of jurists also have held that the legislation allowing bequests for relatives was abrogated and is no longer obligatory; for whenever they are entitled to inherit, their entitlement arises by virtue of the law of inheritance; but when they are not entitled to inherit, it is not obligatory that they should inherit by a bequest. A few other authorities, however, held that the legislation concerning bequests for parents and wives has been abrogated, but that the legislation concerning relatives was confirmed for relatives who are not entitled to inherit. Therefore, it is not permissible for the testator to bequeath to persons other than relatives.<sup>174</sup> The proof of these jurists is in the words of Allah, “It is prescribed, when death approaches any of you, if he leave any goods, that he make a will to parents and next of kin, according to reasonable usage; this is due from the God-fearing.” They are of the opinion that the article *al* (prefixing the word “will”) implies comprehensiveness restricted to those mentioned and exclusion of others.<sup>175</sup> However, the majority of jurists said that it is valid for other than the close relatives, but is considered reprehensible (*makrūh*). The majority argued on the basis of the well-known tradition of ‘Imrān Ibn Ḥusayn that “a man manumitted six slaves that he had during his illness, and he had wealth besides them. The Messenger of Allah – Peace and Blessings be upon him – drew lots between them and freed two keeping the other four enslaved.” Those slaves were not relatives (of the deceased).<sup>176</sup> A Muslim is also allowed to bequeath a part of his property to another person of a different religion. The Ḥanbalī School stated

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<sup>172</sup> This Ḥadīth is transmitted by the author of *Maṣābiḥ al-Sunnah* (Lamps of the Sunnah) who categorized it as *ḥasan*. (This term literally means “good”. It is one of the categories used for the purpose of evaluating the reliability of Ḥadīth). The term *hasan* indicates that the Ḥadīth is less reliable than *ṣaḥīḥ* (sound) and more reliable than *ḍa‘īf* (weak). See Shepard, William E. (1996), p. 364.

<sup>173</sup> Ibn Rushd (2000), p. 406.

<sup>174</sup> Doi, ‘Abdur Rahmān I. (1404/1984), pp.328 &332.

<sup>175</sup> Ibn Rushd (2000), p. 405.

<sup>176</sup> Ibid.

that *waṣīyya* is valid even if it was from a Muslim to a non-Muslim.<sup>177</sup> Likewise, the Muslim is allowed to accept the bequest of a non-Muslim.<sup>178</sup>

It is to be noted here that the execution of *waṣīyya* must be done after paying the debts and before the distribution of *mīrāth*.<sup>179</sup> When Allah talks about the specified shares of heirs, He says: “[...] The distribution in all cases is after the payment of legacies and debts” (Qur’ān 4:11).

### 7.2.1 The Beneficiaries

*Waṣīyya* is legislated mainly to provide for certain situations in which someone has a connection with the family but is not included as an heir. The *waṣīyya* legislation allows the testator (*mūṣī*) to make provision for such a person, and also gives him a scope to distribute some of the legacy by way of charity.<sup>180</sup> In this sense, we discern that the dependent members of the family such as those with disabilities still have other financial revenues even if they were not included in the list of heirs.

The beneficiary of a will may be an individual or individuals, a more or less defined group of persons, or an organization, or the proceeds of a bequest may be used for some purpose. In the event of many beneficiaries, under the Ḥanafīs, the whole bequest shall be taken by the surviving beneficiaries if one or more die before the testator, unless each beneficiary was allotted a definite part of the bequest, with each having such part of the bequest as he would have taken if all the beneficiaries had survived the testator.<sup>181</sup> According to the Shī‘a, a bequest to a person who predeceased the testator shall pass to his/her heirs.<sup>182</sup>

Jurists stipulate that the beneficiary must be identifiable, in existence at the time of the making of the will, and not belligerent nor murderer or accomplice to the murder of the testator and not an heir.<sup>183</sup> Apart from individuals, the beneficiary may be a juristic person of a charitable object, in which case it is not required to be in existence at the time the bequest is made.<sup>184</sup>

Muslim jurists unanimously rule that no will is valid for a beneficiary who causes the death of testator. They disagreed whether such beneficiary would be denied the rights to benefit from the will even if death happened after the act of will.<sup>185</sup> Modern legislators agreed also that the murderer would not benefit from the will as long as the act of killing was for no just cause or reasonable excuse and the murderer was of sound mind and not under the age of 15.<sup>186</sup> From this we conclude by stating that beneficiary with mental disability will benefit from the will even if he/she was a murderer of the testator.

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<sup>177</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), p. 367.

<sup>178</sup> ‘Abd al-Ḥakīm, Ibn Muḥammad (1332/1914), p. 295.

<sup>179</sup> Fityān, Farīd (1986), p. 228.

<sup>180</sup> Quṭb, Sayyid (1349/1974), p. 67.

<sup>181</sup> Nasir, Jamal J. (1990), pp. 266 & 267.

<sup>182</sup> Ḥillī, ‘Abd al-Karīm Ridā al- (1366/1947), p. 163.

<sup>183</sup> Nasir, Jamal J. (1990), p. 267.

<sup>184</sup> Ibid, p. 268.

<sup>185</sup> For details about this disagreement see, Nasir, Jamal J. (1990), p. 268.

<sup>186</sup> Ibid, p. 269.

### 7.2.2 The Mandatory Will

This kind of will has been elaborated, became codified law and enacted in a number of Arab countries. This is a disposition created as a remedy to a growing source of complaints, namely, the position of the grandchildren whose parents die during the lifetime of their father or mother, or die, or are deemed to die with them, e.g. as a result of sinking ship, building collapse, or fire. Such grandchildren rarely inherit on the death of their grandparents, as they are often excluded from inheritance, even though their dead parents might have contributed to the growth of their grandparents' wealth. Indeed, on the death of their father they might have been supported and maintained by their grandfather who would have left them part of his property but died too soon after that, or was prevented from doing so through some temporary events.<sup>187</sup> Keeping in view that this type of will is mandatory in the case of the grandchildren who were excluded from inheritance on the basis that they are dependent and helpless, then it is more mandatory in case of grandchildren having disabilities. Obviously they are more helpless and dependent than normal children.

On these grounds, the Egyptian Act no. 71/1946 rules that if the deceased has left no will for the descendants of a child of his who died before, or is deemed to have died with him, bequeathing to such grandchildren the share of the estate that would have been devoted to on the child had been alive, there shall be a mandatory will in the amount of such share within the limits of one-third of the estate, provided that the said descendants has not given thereto, for no consideration, by another disposition, the amount due thereto. If the gift is less than the said amount, the will shall be for the balance. Such a will shall be to the benefit of the first class of the descendants of the lineal daughters or sons, how-low-so ever, with every descendant excluding the respective but any other descendant. The share of every ascendant shall be divided among the descendants thereof according to the rules of inheritance as if the ancestor(s) thorough whom they are related to the deceased had died after him.<sup>188</sup> Under Article 77, if the beneficiary who is qualified to benefit of a mandatory will has been left in will by the deceased a bequest in excess of what is due thereto, the excess shall be deemed a voluntary will. If deceased left a will for only some of those qualified for a mandatory will, the rest shall be entitled to their due. <sup>189</sup> Under Article 78, the mandatory will shall take precedence over all voluntary wills.<sup>190</sup>

The modern legislator, as pointed out in the Explanatory Note to the Egyptian Act No. 71/1946, derives the doctrine of the Mandatory Will for the non-heirs among relatives from a multitude of Followers, Jurists and the Authorities of Jurisprudence and Tradition among whom are Sa'īd b. al-

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<sup>187</sup> Ibid., p. 271.

<sup>188</sup> Ibid., p. 272.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

Musayyab, al-Ḥasan al-Baṣrī, Ṭāwūs, Imam Aḥmad, Dāwūd al-Tibrī and Ibn Ḥazm.<sup>191</sup> The ultimate authority is the Qur’anic ruling “It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing” (Qur’ān 2:180). While Abū Zahra praises this doctrine asserting a just and equitable principle,<sup>192</sup> some of other Egyptian jurists criticize it. Shaykh Sanhūrī objects that it is based on the premise that the orphan grandchildren are entitled to compensation for the lost share of their dead parent. But that the parent has not been entitled to any share if it differed in religion from the porosities, and therefore there would be no room in compensation, an opinion shared by his disciple Prof. Muḥammad S. Madkūr.<sup>193</sup>

### 7.3 Family Endowment (*Waqf Ahlī*)

*Waqf* literally means detention (*ḥabs*), but its legal meaning is the dedication or charitable gift of property for a good purpose pious or charitable. The establishment of *awqāf* (endowments) in other words, extinguishes the right of the *wāqif* (dedicator) and transfers its ownership to Allah. The establishment of *waqf* property came into existence in order to organize and institutionalize the voluntary charity. The scriptural basis for it is the ḥadīth related by Muslim that the Prophet (Allah bless him and give him peace) said, “When a human being dies, his work comes to an end, except for three things: ongoing charity, knowledge benefited from, or a pious son who prays for him,” from which scholars understand ongoing charity as meaning an endowment (*waqf*).<sup>194</sup>

Concerning the lawfulness of *Waqf*, Muslims jurists are divided into three groups. The first group, whose opinion is considered to be the most weighty, adopted the absolute permissibility (*jawāz mutlaq*) opined that it is unconditionally permissible and thus legalized *waqf* in houses, lands, slaves, clothes, etc.<sup>195</sup> To this group, belong the majority of Shāfi‘īs<sup>196</sup>, the Ḥanafīs<sup>197</sup>, the Zāhirīs<sup>198</sup>, the Zaydīs<sup>199</sup> and the Ja‘farīs<sup>200</sup>. The second group, mainly represented by the two companions, ‘Abdullāh b. Mas‘ūd and ‘Alī b. Abī Ṭālib restricted *Waqf* to fighting tools and remote lands (*kurā*).<sup>201</sup> The third group opted for an absolute prohibition. This opinion is advocated by Shurayḥ al-Qādī, one of the reports attributed to Imam Abū Ḥanīfa and the majority of the scholars of Kūfa.<sup>202</sup>

<sup>191</sup> Ibid. See also Shawkānī, Muḥammad b. ‘Alī b. Muḥammad al- (1973), vol. 6, p. 144; Ibn Ḥazm, Abū Muḥammad ‘Alī (3), vol. 9, p. 314.

<sup>192</sup> Abū Zahra, Muḥammad (1369/1950), p. 189.

<sup>193</sup> Nasir, Jamal J. (1990), p. 272.

<sup>194</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 5, p. 348.

<sup>195</sup> Kubaysī, Muḥammad ‘Ubayd al- (1397/1977), vol. 1, p. 91.

<sup>196</sup> Shāfi‘ī, Muḥammad b. Idrīs al- (1410/1990), vol. 1, pp. 274 & 257.

<sup>197</sup> Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (3), vol. 12, p. 27.

<sup>198</sup> Ibn Ḥazm, Abū Muḥammad ‘Alī (1347-1352/1928-1933), vol. 9, p. 157.

<sup>199</sup> Murtaḍā, Aḥmad b. Yaḥyā al- (1368/1949), vol. 4, p. 146.

<sup>200</sup> Ḥillī, Ja‘far b. al-Ḥasan al- (1), vol. 1, p. 246.

<sup>201</sup> Ibid.

<sup>202</sup> Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl al- (3), vol. 12, p. 29.

### 7.3.1 The Main Principles of *Waqf*

Seven main principles have been mentioned by jurists which should be considered to have a legally valid endowment. First, the founder (*wāqif*) must have full right of the disposal over his property; he must therefore be in full possession of his physical and mental faculties, be of age and a free man (*‘āqil, bāligh, ḥurr*). He must further have unrestricted ownership in the subject of the endowment. Endowments by non-Muslims are therefore only valid if they are intended for a purpose that is compatible with Islam (e.g. they must not be intended for Christian churches or monasteries).<sup>203</sup> Second, the object of the endowment (*mawqūf*) must be of a permanent<sup>204</sup> and yield a usufruct (*manfa‘a*), so that it is primarily real estate.<sup>205</sup> Third, the purpose of the endowment must be a work pleasing to Allah (*qurbā*).<sup>206</sup> Fourth, the endowment should concern a particular identified article (*‘ayn*) (it is invalid to make the mere “right to use something” an endowment, because it is not a particular article).<sup>207</sup> Fifth, The article should have a lawful use.<sup>208</sup> Sixth, the beneficiary should be some particular party, such as the poor around the founder (*wāqif*) himself, whether the endowment is an act of worship, like when the beneficiary is mosques, one’s relatives, or the general good. Or whether it is merely permissible, such as an endowment that benefits the wealthy, or Jewish and Christian subjects of the Islamic state. Finally, the endowment should be formally established by words that effect it such as “I make it an endowment,” or “I restrict such and such a thing to benefit So-and-so, “or I give such and such as non saleable charity.”<sup>209</sup>

It is important to emphasize that initially both types of *waqf* were equally considered *ṣadaqa* and were viewed together with mixed *awqāf*, as fully accepted variants of the same institution. The contesting of the religious character of *ahlī* endowments and the subsequent introduction of differentiation between them and *khayrī* endowments were indeed products of modernist terminology,<sup>210</sup> and were not even hinted at in tradition Islamic *fiqh* books.<sup>211</sup> Shaykh ‘Abd al-Majīd Salīm, the late Mufti of Egypt in his fatwa from 1932, says: “We did not find in the compilations of the well-informed jurists that *waqf* was divided into *ahlī* and *khayrī*. This division, however, is a customary (*‘urfī*) division.”<sup>212</sup>

Muslim societies, like other societies, have always been divided into social units according to various criteria. Most important of these social units are

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<sup>203</sup> See Kubaysī, Muḥammad ‘Ubayd al- (1397/1977), Kubaysī, Muḥammad ‘Ubayd al- (1397/1977), vol. 1, pp. 311-348.

<sup>204</sup> Haytamī, Shihāb al-Dīn Aḥmad b. Muḥammad b. Ḥajar al- (2), vol. 6, pp. 237 & 238.

<sup>205</sup> Ibn Nujaym, Zayn al-Dīn b. Ibrāhīm (2), vol. 5, p. 204; For further details on the conditions required in *al-mawqūf*, see Kubaysī, Muḥammad ‘Ubayd al- (1397/1977), vol. 1, pp. 351-392.

<sup>206</sup> Haytamī, Shihāb al-Dīn Aḥmad b. Muḥammad b. Ḥajar al- (1403/1983), vol. 3, p. 226.

<sup>207</sup> Haytamī, Shihāb al-Dīn Aḥmad b. Muḥammad b. Ḥajar al- (2), vol. 6, pp. 237 & 238.

<sup>208</sup> Khaṭīb, Muḥammad b. Aḥmad Shirbīnī al- (1), vol. 2, p. 377.

<sup>209</sup> Haytamī, Shihāb al-Dīn Aḥmad b. Muḥammad b. Ḥajar al- (2), vol. 6, pp. 235 ff.

<sup>210</sup> Hoexter, M. (1995), p. 141.

<sup>211</sup> Kubaysī, Muḥammad ‘Ubayd al- (1397/1977), vol. 1, p. 42. Cf. Ghānim, Ibrāhīm al-Bayyūmī (1419/1998), p. 47; Kawtharī, Muḥammad, Zāhid al- (1953), p. 202.

<sup>212</sup> Ghānim, Ibrāhīm al-Bayyūmī (1419/1998), p. 47.



those based on kinship or quasi-kinship. The Muslim *waqf* system had an important function in supporting and reinforcing these social units and their cohesion. There can be no doubt that a founder's primary concern for the position and welfare of his or her family and offspring is reflected in the institution of *waqf*.<sup>213</sup>

*Waqf Ahlī*, in particular, is created for the welfare of near relatives of the dedicator (*wāqif*) and his family to ensure that they get their needs from it for all their life, and then reverts to the welfare of the poor people after their death. It can consist of both movable and immovable property.<sup>214</sup>

Muslim Jurists said that if the dedicator made the *waqf* to the poor in general then the poor relatives should be given precedence over the non-relatives as long as they are of an equal level of poverty.<sup>215</sup> This juristic rule has its own application in reality in more than one incident. Here we mention one of them. In a controversy over the administration of the Sayyidnā 'Alī waqf (north of Jaffa), when the Supreme Muslim Council claimed that the *waqf* was dedicated for charitable purposes (*'alā wujūh al-birr*), the family replied, quoting the Qur'ān and the New Testament, that even if this were true, they were worthier than anybody else of receiving these gifts.<sup>216</sup> In fact the Prophet is quoted to have said, "The most excellent *sadaqa* [gift made with the hope of heavenly reward] is that a man bestows upon his family," which shows that Muslims clearly included such provisions in their understanding of the notion of beneficence (*birr*).<sup>217</sup>

### 7.3.2 The Future of Family Endowment

*Waqf ahlī* has always been an approach to get closer to Allah (*qurba*) and obtain His pleasure. This was the case of the incidents of *waqf ahlī* during the lifetime of the Prophet – Peace and Blessings be upon him – and his Companions – May Allah be pleased with them all.<sup>218</sup> Unfortunately this behavior was not strictly followed by following generations of Muslims. *Waqf ahlī* turned out to be a means of circumventing the Islamic rules of inheritance. A number of unconscientious founders took Family Endowment as a method to attain their malicious ends of depriving some of the legal heirs.<sup>219</sup> Undoubtedly early jurists were aware of this risk. For instance, Imam al-Shawkānī says in this regard, "One who makes *waqf* for the sake of injuring (the shares of) his heirs, then his *waqf* is invalid (*bāṭil*)."<sup>220</sup> However, this misuse of Family Endowment resulted in a number of calls for the annulment of this kind of *waqf*. Some of these calls succeeded in putting an end to

<sup>213</sup> Baer, Gabriel (1997), p. 265.

<sup>214</sup> Doi, 'Abdur Rahmān I. (1404/1984), pp. 338 & 340.

<sup>215</sup> Ibn Qudāma, Abū 'Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 5, p. 322.

<sup>216</sup> Mudīr al-Awqāf al-'Āmm to Supreme Muslim Council, 8 May 1940, and Muḥammad Sa'īd al-'Umārī to British Vice Consul, Damascus, 12 November 194, ISA, K/158/39. Quoted by Baer, Gabriel (1997), p. 265.

<sup>217</sup> Baer, Gabriel (1997), p. 265.

<sup>218</sup> Kubaysī, Muḥammad 'Ubayd al- (1397/1977), vol. 1, pp. 34 & 35.

<sup>219</sup> For a detailed discussion of this issue, see Layish, Aharon (1997), pp. 352-388.

<sup>220</sup> Shawkānī, Muḥammad b. 'Alī b. Muḥammad al- (1347/1928), vol. 2, p. 141.

*waqf ahli* whereas others did not.<sup>221</sup> Dr. al-Kubaysī commented on these calls by saying, “If this kind of *waqf* entails now a specific risk, then it is traced back to [misuse of unconscientious] people not to the system itself.<sup>222</sup> So what is required now is a reform not a complete abolishment.”

What we care about here is the case of the people with disabilities in the light of these circumstances. Abolishing this kind of *waqf* would harm family members with disabilities who could benefit from this kind of *awqāf*. Some jurists stated that it is not against the spirit of the Islamic Shari‘a if a father favored one of his children with *waqf* as a kind of consideration for his/her disability. For instance, Imam Aḥmad as stated by Ibn Qudāma in *Al-Mughnī*, that there is no harm if a father favored one of his children solely [with more money] in the form of *waqf* for a specific considerable reason such as need [*ḥājah*], chronic disease, blindness, [being responsible for] big families, being busy with seeking for knowledge or other similar virtues.<sup>223</sup> Still we believe that this kind of *waqf*, if reactivated in a fruitful way, could be an optimum financial source in supporting the impoverished members of family who has disabilities. It could save them a regular source of income.

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<sup>221</sup> For further details about the opinions of those opponents, their evidences and discussing these evidences, see Kubaysī, Muḥammad ‘Ubayd al- (1397/1977), vol. 1, pp. 42-50.

<sup>222</sup> Ibid, p. 35.

<sup>223</sup> Ibn Qudāma, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Maqdisī (1405/1985), vol. 5, p. 388.

