

APPLICATION OF *MAQĀSĪD* IN THE JURISPRUDENCE OF MINORITIES: THE CASE OF '*ZAWĀJ AL-MAŞLAĤAH*' IN THE WEST

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ABSTRACT

This study examines the application of Syarī'ah objectives (Maqāşid) to legal questions concerning family law for Muslim minorities. It focuses on Zawāj al-Maşlahah/the marriage of convenience, which is present in the West, explains classical forms of marriages resembling it, and elucidates the Muslim response and scholarly Fatwas delivered on this form of marriage. The study relies on a descriptive and analytical method and concludes with several important findings. We conclude that a marriage of convenience resembles the following three types of marriages under scholarly dispute: the enjoyment marriage, marriage with the intention of divorce, and the formal marriage. Nevertheless, the marriage of convenience violates the Maqāşid of Syarī'ah and trivialises the ideal and ethical aspects of marriage. The authors recommend two different legal decisions concerning this type of marriage based on the Maqāşid. These decisions are to invalidate this marriage before its realisation or to validate it if it has

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been realised, specifically if the wedding ceremony or sexual intercourse have occurred.

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INTRODUCTION

The marriage of convenience is a controversial issue that Muslim minorities encounter in the West (Europe), and challenges the stability of families. Contemporary Muslim jurists have different approaches concerning how to adjust and expand the legitimacy of this invented marriage. Muslim youth, who migrate to the West in search of a better livelihood, stability and prosperity may, to a certain extent, deviate from the fundamental teachings and primary objectives of Islam and from the dictates of parents and society. Muslim youth may undertake acts that may not be legal to confront the difficult problems they face while acclimatising to the circumstances of their new homeland. The marriage of convenience is likely one of these actions.

LITERATURE REVIEW

There is an abundance of literature exploring the objectives of *Syarī'ah*. The two important contributors to *Maqāşid* discipline, Abū Ishāq al-Syāḫibī¹ and Ibn 'Āsyūr,² have explained the objectives of *Syarī'ah* in family affairs. However, the marriage of convenience has not been given its due deliberation. Despite the fact that this issue has been addressed in many Fatwa records provided by individuals and institutes, there is only one unilateral study examining marriages of convenience from a *Maqāşidī* viewpoint. This study was authored by Waşfī 'Āsyūr Abū Zayd in the "Majallat al-Wa'ī al-Islāmī" entitled, "Ḥukm Zawāj al-

¹ Abū Ishāq al-Syāḫibī, *al-Mūwāfaqāt fī Uşūl al-Syarī'ah* (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1991).

² Ibn 'Āsyūr, *Maqāşid al-Syarī'ah al-Islāmiyyah* ('Ammān: Dār al-Nafā'is, 2001).

Maṣlaḥah fī Ḍaw’ al-Maqāṣid al-Syar’iyyah li al-Zawāj.”³ However, this study is lacking many essential elements regarding Maqāṣidi analysis, and it virtually ignores the debate on the legitimacy of this marriage.

DEFINITION OF “MAQĀṢID” AND “ZAWĀJ AL-MAṢLAḤAH”

The “objectives of *Syarī’ah*” are defined by Ibn ‘Āsyūr as, “the meanings and wise purposes on the part of the Lawgiver which can be discerned in most or all of the situations to which the Law applies such that they can be seen not to apply exclusively to a particular type of ruling. Included here are the occasions for the Law’s establishment, its overall aim, and the meanings discerned through the Law. It likewise includes objectives which are not observable in all types of rulings, although they are observable in many of them.”⁴

The “objectives of *Syarī’ah*” are also defined by Aḥmad al-Raysūnī as, “the purposes that the Law was established to fulfil for the benefit of humankind.”⁵

Muslim scholars have classified the entire range of *Maqāṣid* in the following three descending categories of importance: the Ḍarūriyyah (the essential), the Ḥājiyyah (the complementary), and the Taḥsīniyyah (the desirable). The Ḍarūriyyah are seen as absolute requirements to the survival and spiritual well-being of individuals to the extent that their destruction or collapse would precipitate chaos and the demise of normal order in society. The Ḍarūriyyah are enumerated as five, namely, the preservation of life, intellect, faith, lineage and property. The Ḥājiyyah are defined as benefits that seek to remove severity and hardship where they do not pose a threat to the survival of the normal order. The

³ Waṣfī ‘Āsyūr Abū Zayd, “Ḥukm Zawāj al-Maṣlaḥah fī Ḍaw’ al-Maqāṣid al-Syar’iyyah li al-Zawāj,” *Majallat al-Wa’ī al-Islāmī*, 554 (2011).

⁴ Ibn ‘Āsyūr, *Maqāṣid al-Syarī’ah*, 251.

⁵ Aḥmad al-Raysūnī, *Imam al-Syatibi’S Theory of the Higher Objectives and Intents of Islamic Law*, transl. Nancy Roberts (Kuala Lumpur: Islamic Book Trust, 2006), xxiii.

Tahṣīniyyah, however, seek to attain refinement and perfection in the outcomes and conduct of people at all levels.⁶

‘Marriage of convenience’ could be defined as a verbal contract intending the realisation of extraneous objectives more than the primary objectives of an ordinary marriage. For example, a man and woman agree to marry in return for a sum of money according to their agreement, with the opportunity to terminate the contract after attaining nationality or official permanent residency in the country of immigration. The agreement remains secret from and unauthorised by the concerned authorities because it violates the provisions of the law in force. This marriage mostly does not involve sexual intercourse, cohabitation or co-residence in one house. The couple may meet but only to direct formal administrative procedures in the concerned municipality.

For instance, the Hespess magazine reported that a judge in Spain has decided (on 12th March 2010) the nullity of a civil marriage between an immigrant from Morocco and a Spanish female, though the marriage was registered in the Alculitga municipality. The judge’s statement came on the ground that the couple could not provide any evidence to show the sincerity of their marriage such as wedding picture, address of co-residence and joint bank account. The public prosecutor saw the marriage contract was used by a specialized network in the “marriage of convenience” to help the illegal immigrant stabilize his status and obtain Spanish residence in return for a sum of money.⁷

LEGAL ADJUSTMENT OF “ZAWĀJ AL-MAŞLAĤAH”

The demonstration of differences between this marriage and several other assimilated forms that comply with the principles of *Syarī‘ah* is necessary. This category of marriage can employ a variety of objectives of which some violate *Syarī‘ah* principles. For example, in response to a single question from a woman, a

⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Selangor: Ilmiah Publishers, 2004), 397-398; Ibn ‘Āsyūr, *Maqāṣid al-Syarī‘ah*, 300-310.

⁷ HESPRESS Magazine, 15 April 2010. See: <http://hespress.com/marocains-du-monde/20255.html>.

scholar determined the conceptualisation of this marriage, its limits and scope.⁸ The case presented to him represents only a small percentage of the many cases under this category of marriage. Despite the woman describing her marriage in a form containing all the components of a legal marriage, the Mufti still declared a legal verdict that cannot easily apply to the marriage. The verdict includes the woman’s marriage with general cases categorised as ‘marriages of convenience’ because a promise was involved regarding help in obtaining a visa. The woman expressed her question in this way: “A man married me and the marriage contract was authorised by the Shari’a court... Sexual intercourse transpired and he treated me as a spouse of his own”.⁹ In response and because of the promise involved, the scholar regarded her marriage a marriage of convenience, considering it a form of temporal or formal marriage because of the promise of a man to a woman with a certain purpose. This type of marriage is prohibited. The Permanent Committee of Fatwa in the Emirate of Sharjah commented on the Fatwa and objected to the adjustment of the case as a marriage of convenience. The comment of the Committee reads as follows “As long as the woman has been married to her husband by a *Syarī’ah* court and intercourse between them takes place, the marriage contract is valid. The promise given by the husband as to work out a visa for her at his own cost does not invalidate the marriage. It is considered a piece of good cohabitation with one’s wife. Adversely, the man should commit to his promise and work out a visa for her and bear the cost. The fulfilment of agreements with the capacity to do so is obligatory, and it is amongst the ethics and moralities that are highly urged by Islam.”¹⁰

The difference between these two categories is clear. A marriage of convenience is based on a stipulation to the right of rescission and separation after a particular interest is attained. A marriage of convenience is usually a formal marriage, which involves neither intercourse nor civil cohabitation. The marriage of a woman who is promised something, by contrast, is free from

⁸ See the Fatwā and the comments on it in *Fatāwā al-Lajnah al-Dā’imah li al-Ifīā’ bi Imārat al-Syāriqah* (al-Syāriqah: al-Amānah al-‘Āmmah li al-Awqāf, 2013), 4:35-37.

⁹ *Fatāwā al-Lajnah*, 4:35.

¹⁰ *Fatāwā al-Lajnah*, 4:37.

any similar stipulation and there is no formality involved because the marriage involves intercourse and cohabitation. Therefore, these two categories are different, and the marriage of a woman who is promised something cannot be considered a marriage that is prohibited by Islamic law.

A marriage of convenience based on shared material interests, in its true form, resembles three categories of disputed marriage, namely, a temporal marriage called enjoyment marriage, '*Zawāj al-Mut'ah*,' a marriage with the intention of divorce, '*al-Zawāj bi Niyyāt al-Ṭalāq*,' and a formal marriage, '*al-Zawāj al-Šūrī*.'

In a Mut'ah marriage, the parties marry for a particular duration. This type of marriage is called Mut'ah/enjoyment marriage because the incentive is the enjoyment of sex more than the production of offspring and attainment of other objectives.¹¹ This marriage is prohibited because of the stipulation of time whereas an ordinary marriage maintains the stability of the family and preserves other sacred intentions that cannot be met in a temporal marriage. The prohibition of this marriage accords with mainstream Muslim scholars. However, this type of marriage is recommended by the Syī'a a denomination. The similarity between enjoyment and a marriage of convenience is evident. Both marriages are limited by time, resembling a contract of rent more than a marriage. The sacred objective of ordinary marriage, which can be seen through the establishment of a continuing partnership for the longest time possible, is infringed. However, the two parties of either enjoyment marriage or a marriage of convenience tend to qualify the contract with subsidiary conditions and marginal objectives lessening or even eliminating the existence and implication of an ethical marriage.¹²

Therefore, it is not surprising that the European Council for Fatwa and Research likens the marriage of convenience to the marriage of enjoyment in its decision. "This form of marriage does not greatly differ from the marriage of enjoyment that the Prophet (peace is upon him) explicitly prohibited. This is due to the time involved in the creation of this marriage as it ends with

¹¹ 'Abd al-Karīm al-Rāfi'ī, *Fath al-'Azīz Syarḥ al-Wajīz* (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1997), 7:505.

¹² Ibn 'Āsyūr, *Maqāšid al-Syarī'ah*, 439.

the obtaining of immigration documents, and the marriage will be rescinded after that.⁷¹³

The second type is marriage with the intention of divorce. Muslim jurists have different opinions regarding this type of marriage. Some scholars consider it permissible.¹⁴ Some scholars reprehensibly permit it.¹⁵ Other scholars clearly prohibit marriage with the intention of divorce.¹⁶ The authors believe that the opinion of the majority of the Ḥanbalī School¹⁷ that nullifies this marriage is preferable and complies most with the objectives of *Syarī‘ah*. Moreover, other scholars who consider it reprehensible, such as Mālik, regard it as deception, fraud and unethical against the higher moralities of man. An overwhelming majority of females will not accept this marriage unless they are uninformed concerning the intention of divorce.¹⁸ The invalidity of this marriage can be proven by different justifications. Marriage with the intention of divorce is a type of enjoyment marriage because it is a time-based contract, and it runs counter to *Syarī‘ah* objectives. Marriage with the intention of divorce is similar to a rent contract and resembles prostitution. The person who marries with the intention of divorce will substitute disloyalty and deception for the objectives of marriage, which are to establish a family and contribute to the

¹³ *Fatāwā al-Majlis al-Awrūpī li al-Ifiā’ wa al-Buḥūth*, volume II-III, 57-58.

¹⁴ This is the opinion of al-Syāfi‘ī, Ibn ‘Abd al-Barr, Ibn Taymiyyah and al-Syātibī. Al-Zarqānī claims that approval of this type of marriage is the opinion on which a scholarly consensus is held. Muḥammad b. Idrīs al-Syāfi‘ī, *al-Umm* (Bayrūt: Dār al-Ma‘rifah, 1983), 6:253; Muḥammad al-Zarqānī, *Syarḥ al-Mūwaṭṭa’* (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1997), 3:155; Al-Syātibī, *al-Mūwāfaqāt*, 1:220; Ibn Qudāmah al-Maqdisī, *al-Mughnī* (al-Qāhirah: Dār Ḥajar, 1988), 10:48-49.

¹⁵ This is the opinion of Mālik. Ibn Rusyd al-Jadd, *al-Bayān wa al-Taḥṣīl* (Bayrūt: Dār al-Gharb al-Islāmī, 1984), 4:309.

¹⁶ This is the opinion of the Ḥanbalī scholars. Maṣṣūr al-Bahūtī, *Kasysyāf al-Qinā’ ‘an Matn al-Iqnā’* (al-Riyāḍ: ‘Alam al-Kutub, 1983), 5:97; Mūsā al-Ḥajāwī, *al-Iqnā’* (al-Riyāḍ: ‘Alam al-Kutub, 1999), 3:352.

¹⁷ Al-Bahūtī, *Kasysyāf al-Qinā’*, 5:97; Mūsā al-Ḥajāwī, *al-Iqnā’*, 3:352.

¹⁸ Ibn Rusyd, *al-Bayān*, 4:409.

social welfare of the community. Therefore, this type of marriage should be nullified because, “the deeds of the man are null if they are intended to divert the objectives of *Syarī'ah* and violate the main purposes for which they are legitimised.”¹⁹

The difference between the marriage with intention of divorce and the marriage of enjoyment is nothing more than image, and this imaginary difference does not create any considerable implication on the legal perception of the marriage. “[T]he whole account is given to the meanings of words and deeds of the man. The verbal difference does not make a difference in meanings if the deeds are the same. The similarity of words while there is difference in meanings does not bring about unity of the legal rule. And upon this concept, the meanings of the legal order, prohibition, reward and punishment should be inferred and deduced.”²⁰

The marriage of convenience amounts to a marriage with the intention of divorce. The two contracting parties consciously agree to separation after completion of the particular interest, though they do not express it in the contract to guard against legal liability in the country of immigration. The main similarity of these two types of marriage is their temporal nature, however, the omission of legal objectives and enabling the methods of evil are also manifest.

The marriage of convenience also resembles the formal marriage. Formal marriage is defined as a marriage that two parties pretend to have in appearance only without either sexual intercourse or sustainable cohabitation.²¹ A formal marriage ends with obtaining a desired interest. This type of marriage may be involved in *Nikāḥ al-Taḥlīl*, a marriage to a divorced woman with the intention to divorce again to legitimise a second marriage with the ex-husband. Because the Prophet SAW shamed the act of *Taḥlīl*, it appears formal marriage is also disfavoured. The similarity of marriage of convenience to formal marriage is obvious. As evidence of this fact, some contemporary scholars

¹⁹ Al-Syāṭibī, *Al-Mūwāfaqāt*, 2:615.

²⁰ Syams al-Dīn Ibn Qayyim al-Jawziyyah, *A'lām al-Mūwaqqi'īn 'an Rabb al-'Ālamīn* (al-Qāhirah: Dār al-Sa'ādah, 1974), 3:181-183.

²¹ Ṣalāḥ al-Ṣāwī, “*al-Zawāj al-Ṣūrī wa al-Nafaq al-Mūzlim*,” at: <https://ar-ar.facebook.com/SalahAlSawy/posts>.

have defined the marriage of convenience as a formal marriage on the ground that the two parties follow administrative procedures in a municipality and then separate from one another. There is no regular meeting, no cohabitation, and no partnership in a shared house until the maturity of the interest, which is to gain citizenship or permanent residency after which the parties separate and decide to divorce.²²

In conclusion, the marriage of convenience is a formal and temporal marriage deprived of the moral content and legal objectives of ordinary marriage, such as partnership, cohabitation, control of sexual desire, producing offspring and safeguarding against social disorder. Because an entire contract is determined by its meanings and objectives,²³ this marriage should be prevented and forbidden, especially in a religion whose main purpose is to realise marriage, eradicate social injustice and resist unjustified exploitation.

The great scholar, al-‘Izz b. ‘Abd al-Salam, describes marriage as, “There is nothing expressly cautioned and safeguarded in Islam greater than sex and its gates, as induced in the context of *Syarī‘ah* provisions and its juristic evidences.”²⁴

THE FATWĀ LEGALIZING “ZAWĀJ AL-MAṢLAḤAH” IN CONSIDERATION OF OUTCOMES

The profound Muslim scholar, Syaykh ‘Abd Allah b. Bayyah, legalises the marriage of convenience, disagreeing with the unanimous opinion held by qualified individual and collective Muslim bodies that prohibit it. Syaykh ‘Abd Allah b. Bayyah mainly permits it for two reasons.

1. Marriage in Islam is not intended merely for a single objective, which is the facilitation of a permanent and sustainable cohabitation, but marriage has many other

²² *Fatāwā al-Lajnah al-Dā‘imah li al-Ifṭā’ bi Imārat al-Syāriqah*, 4/36.

²³ Ibn Qayyim al-Jawziyyah, *A‘lām al-Mūwaqqi‘in*, 3:109.

²⁴ Al-‘Izz b. ‘Abd al-Salām al-Sulamī, *Syajarat al-Ma‘ārif wa al-Aḥwāl wa Ṣāliḥ al-Aqwāl wa al-Af‘āl* (al-Riyāḍ: Bayt al-Afkār al-Dawlīyah, n. d.), 229.

primary and secondary objectives. Prophet Muhammad expressed four objectives, saying, “Women may be married for four reasons: her wealth and lineage, her beauty, and her religion/piety.”²⁵ The great scholar, al-Syātibī, also stated many objectives behind the legitimacy of marriage, such as the reason stated in the prophetic tradition, “Marry the loving and fertile woman.”²⁶ Therefore, the intention of divorce does not invalidate the marriage in its entirety as long as the other objectives are partially or completely present.²⁷

2. The prohibition of this type of marriage does not guarantee the obstruction of evil, such as adultery and other great sins. If the youth are not allowed to marry with the intention of divorce, they may resort to adultery to satisfy their sexual eagerness.²⁸ Therefore, the permissibility of the marriage of convenience rests on the principle that, “The outcome of deeds is considered by law and intended by the Lawgiver.”²⁹

According to the authors, these justifications could be criticised from different perspectives. The primary objective of marriage should remain intact to maintain its legitimacy. Secondary objectives, such as immunisation, providing shelter and controlling sexual desire, do not legitimise a marriage unless the main purpose could be achieved. Secondary objectives can accomplish, not replace, the primary objective, namely, the provision of a continuing family life and cohabitation. Furthermore, the amenability in a marriage contract for divorce does not legitimate the intention to divorce because there is a clear difference between the continuity that is amenable to interruption and the continuity

²⁵ Muḥammad b. Ismā‘īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, al-Nikāḥ, no. 5090 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2007). Muslim b. al-Ḥajjāj, *Ṣaḥīḥ Muslim*, al-Riḍā‘, no. 1466 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2006),

²⁶ Aḥmad b. Syu‘ayb al-Nasā‘ī, *Sunan al-Nasā‘ī*, Karāhiyyat Tazwīj al-‘Aqīm, no. 3227 (Ḥalab: Maktab al-Maṭbū‘āt al-Islāmiyyah, 1986).

²⁷ ‘Abd Allāh b. Bayyah, *Ṣinā‘at al-Fatwā wa Fiqh al-Aqalliyāt* (Bayrūt: Dār al-Minhāj, 2007), 429.

²⁸ ‘Abd Allāh b. Bayyah, *Ṣinā‘at al-Fatwā*, 432.

²⁹ Al-Syātibī, *Al-Mūwāfaqāt*, 4:552.

with the prior intention to interrupt.³⁰ Moreover, it is unimaginable to produce and encourage the secondary objectives of marriage while the primary objectives are obscure or even made intricate and dispelled.

The prophetic tradition that Syaykh ‘Abd Allah b. Bayyah quoted does not signify that the four objectives separately motivate the existence of marriage. Instead, it identifies the human motives and expressly recommends the ethical ones. However, according to al-Syātibī, a marriage of convenience could be assimilated in a marriage for financial purposes that are legitimised to serve the main objectives of marriage manifesting in the preservation of offspring and a continuing partnership in a sustainable family. Unanimously, if a marriage of convenience preserves the family institution and maintains a legitimate partnership, it will be permissible. By contrast, the intention of divorce after the particular interest is attained renders this marriage controversial.

Considering the outcome also discredits this marriage. The likelihood of indulging adultery does not make this marriage justified because adultery is prohibited for objectives and outcomes analogous to the results of a convenience marriage. Considering *Syarī‘ah*, an outcome should be predictable in a definitive or considerable way. Otherwise, an outcome will be ignored, especially if there are other outcomes that are more likely to occur. Because the main motive of this marriage is to obtain immigration documents and is not generally associated with cohabitation or sexual intercourse, a marriage of convenience is not presumed to prevent the evil of adultery. However, this result can occur with some people who marry for the purpose of protection and purity. This possibility implies that an absolute prohibition cannot regulate every case, and judgments should be made on a case-by-case basis. Thus, we can conclude that the evils estimated from the prevention of this marriage are illusive and not comparable with the evils materialising from its legalisation. If a marriage of convenience removes hardship in limited cases, it will also likely infringe on the primary objectives of a legal marriage in typical cases. Therefore, “The real evil is preceding the illusive or

³⁰ Ibn Taymiyyah, *Bayān al-Dalīl ‘alā Ibtāl al-Taḥlīl* (al-Qāhiraḥ: Maktabat Linah, 1996), 545.

imaginary evils.”³¹ Thus, it is remarkable to give preference to the illusive interest over the real evils materialising from this marriage and to generally conclude that, “since this marriage contains all apparent conditions, it will be valid even if he intends not to have sex with her.”³² The question arising here is how can permissibility rest on the consideration of an outcome (adultery) although the outcome is discredited?

In conclusion, if we consider the purpose of *Syarī‘ah* and how it regulates the balance between good and evil, we observe that *Syarī‘ah* has cautiously managed cases of sex and marriage. A single evil or infringement on a single legal objective may prevent any act involving the evil. The various dangers and negative consequences driving a marriage of convenience should be grounds for a solid legal decision to stop all the evil coming from it.

The prohibition of this type of marriage should nullify the contract before the wedding occurs. However, if the wedding and sexual intercourse have occurred, the contract will be presumed valid and it should take the effects of a valid marriage. This situation can be referred to several evidences:

- a- The prophetic tradition prevents marriage of a woman without the attendance of the guardian (*walī*); however, if the marriage was accomplished and intercourse occurred, the marriage will not be nullified, and the woman deserves dowry for the man sexually enjoying her.³³ The scholars determine that an invalid contract may be validated on the basis of accomplishment to avoid the accumulation of more evil for the woman to bear, namely, the nullification of the contract and the loss of the dowry.³⁴
- b- Moreover, the scholars who assume the prohibition of a marriage of convenience base this decision on its similarity to some disputed types of marriage. This similarity is perhaps what converts the marriage from an invalid to a valid contract because the principle in the entire scholarly

³¹ Al-Bahūtī, *Kasysyāf al-Qinā‘*, 1:254.

³² ‘Abd Allāh b. Bayyah, *Ṣinā‘at al-Fatwā*, 432.

³³ Al-Ḥākīm al-Naysābūrī, *al-Mustadrak ‘alā al-Ṣaḥīḥayn*, no. 2630.

³⁴ ‘Abd al-Malik al-Jūwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab* (Jiddah: Dār al-Minhāj, 2011), 12:41-42.

debate is that disputed marriages are to be validated after they are accomplished. Al-Syāṭibī states, “A scholarly disputed marriage could be validated on the basis of consideration of diversity in legal opinions, so the marriage will not be dissolved after the wedding ceremony took place for the sake of the outcomes associated with this situation and elevating the factors of validity. The severe consequences following from the nullification of the marriage may weigh or outweigh the implication of the ordinary evils following from the commitment of the forbidden act.”³⁵

- c- The negative outcomes on which this marriage is controversial will disappear with the marriage’s realisation and the principle, “That which was prohibited for a reason, will be permissible with its removal.”³⁶

ANALYSIS OF “ZAWĀJ AL-MAṢLAḤAH” IN THE LIGHT OF MAQĀSĪD

The collective and individual responses³⁷ of contemporary Muslim scholars agree on the prohibition of marriage of convenience because it is considered a verbal, temporal and formal contract that rests on fraud, exploitation and deception.

³⁵ Al-Syāṭibī, *Al-Mūwāfaqāt*, 4:561.

³⁶ C.R. Tyser et al., trans., *The Mejelle* (Kuala Lumpur: The Other Press, 2001), 24. The regulation was translated in this way: “When the prohibition has faded away, the forbidden thing returns.”

³⁷ This Fatwā is assured by the following: the Assembly of Muslim Jurists in America; the General Presidency for Scientific Research and Issuing Fatwas in Saudi Arabia; the Permanent Committee of Fatwā in Sharjah; and the European Council for Fatwa and Research. Furthermore, individual scholars who determine the prohibition of the marriage of convenience are the following: Syaykh ‘Abd al-‘Azīz Ibn al-Bāz; Syaykh Ṣāliḥ al-Fawzān; Syaykh ‘Abd al-‘Azīz; Syaykh Bakr Abū Zayd; and Syaykh ‘Abd al-‘Azīz al-Rājiḥī. See *Fatāwā al-Majlis al-Awrūpī li al-Iftā’ wa al-Buḥūth*, volume II-III, 57-58; *Fatāwā al-Lajnah al-Dā’imah li al-Iftā’ bi Imārat al-Syāriqah*, 4:35-37; *Fatāwā al-Lajnah al-Dā’imah li al-Buḥūth wa al-Iftā’* (Jiddah: Dār al-Mu’ayyad, 2004), no. 12087, 18:448.

In a marriage of convenience, the sacred objective beyond the legislation of marriage is completely or partially neglected, and it violates the public order and law of the host country. These and many other evils provide the basis for prohibiting this type of marriage by a realistic and conservative Muslim jurist who understands the *Syarī'ah* objectives to prevent evils. These evils include dissolution of the family, a breach of ethical values and violation of Islamic teachings concerning being fair and benevolent to others despite differences in race, colour and religion.

In the following sections, we examine how significantly the laws, ethics and ethos of Islamic *Syarī'ah* will be violated if the marriage of convenience prevails or disseminates in Muslim minorities in the West.

1) Violating *Syarī'ah* objectives:

The legitimacy of marriage in Islam is associated with various primary and secondary intentions and ethical objectives. The holy Quran exalts the position of marriage and describes it as a “Great Covenant.” Thus, the conditions of a marriage contract are venerated to protect and safeguard its honour and maintain its role in the reconstruction of the earth and preservation of the religion. “If these objectives donot materialise, marriage will deviate from its meanings and divorce will be more justifiable.”³⁸

The primary and secondary *Syarī'ah* objectives of marriage are included in the coherent statement of al-Syāṭibī, “The Lawgiver has codified the habitual and devotional rules for some primary and secondary objectives. For instance, marriage is legitimised for preservation of offspring as the primary intent, followed by achievement of harmony and partnership, provision of mutual worldly and spiritual benefits such as permissible relaxation, deliberation over the beauties of women, provision of care to his children from her or from another woman or to his younger brothers and sisters, protection of one’s self from prohibited sexual deeds, enhancement of the bounties of the Creator and the praise

³⁸ ‘Alā’ al-Dīn b. Mas‘ūd al-Kāsānī, *Badā’i’ al-Ṣanā’i’ fī Tartīb al-Syarā’i’* (Bayrūt: Dār Iḥyā’ al-Turāth al-‘Arabī, 1982), 2:337.

to Him in reply for His favor, and other similar utilities. These are all intended by the Lawgiver from the legitimacy of marriage.”³⁹

These primary and secondary intentions of marriage are frustrated in marriages of convenience and made the victim of a formal and temporal agreement devoid of ethical partnership and considerable cohabitation. Concurrently, this marriage ends with the fulfilment of a purely material interest, irrespective of the other objectives for which the Lawgiver legitimises.

In the following paragraphs, we further discuss the violations against the objectives of *Syarī'ah*.

a) Preservation of offspring:

The preservation of offspring to maintain the existence of humankind and increase the nations' population cannot be achieved without a marriage intended for that purpose.

Because the *Syarī'ah* has made preservation of offspring the first priority of marriage, it has regulated some ways for its achievement through several (dos) and (don'ts) disseminated in its discourse.

For example, the *Syarī'ah* urges marriage, prefers partnership with a woman who is fertile and productive, forbids castration and abortion and states many other (dos) and (don'ts) in its general and specific directives for the protection of mankind.⁴⁰

However, the preservation of offspring is neglected in a marriage of convenience because there is no regular meeting between the male and female, and the marriage will end with the satisfaction of the material interest.

Moreover, the preservation of offspring cannot materialise in this temporal marriage as long as the two parties intentionally avoid and ignore ideals and ethical objectives.

³⁹ Al-Syātibī, *Al-Mūwāfaqāt*, 2:670-671, 1:217.

⁴⁰ Muḥammad al-Yūbī, *Ithāf al-Qāsid bi Naẓm Aḥkām wa Qawā'id al-Maqāsid* (al-Madīnah: Maktabat al-Dār, 2001), 14.

b) Spiritual and psychological refinement:

The psychological well-being of people is a general objective of marriage in Islamic law without which a sustainable cohabitation is unattainable.

The holy Quran considers psychological relaxation one of the greatest outcomes of a successful marriage and, therefore, one of the greatest bounties of God on his creature, humankind. Allah SWT says:

(Among His Signs is that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your hearts: verily in that are Signs for those who reflect) (Quran (30): 21).

To realise this objective, the Lawgiver urges man to choose a good wife and see the woman before the contract. Simultaneously, the *Syarī'ah* enjoins good treatment and companionship between mates, specifies the right of the man on his wife, and forbids disobedience and unrest from the woman towards the husband⁴¹ to guard against disruption and remove anxiety from the family structure.

Adversely, the marriage of convenience contributes to the unrest and disruption of families and makes the agreement of marriage neutral, devoid and unethical. Contrary to the achievement of psychological stability, the two parties of a marriage of convenience will physically separate after the agreement is authenticated in court. The parties might not again see one another unless to satisfy a particular material interest after which they entertain the decision of their official divorce.

c) Sexual entertainment:

One of the main purposes of marriage is to enjoy sexual relaxation. Through marriage, one can satisfy his or her sexual eagerness and entertain the beauties and utilities of a legitimate sexual life, such

⁴¹ Aḥmad Maḥmūd al-Qa'dān, *Maqāṣid al-Syarī'ah al-Islāmiyyah wa 'Alāqatuhā bi Aḥkām Fiqh al-Uṣrah* ('Ammān: Dār al-Nafā'īs, 2001), 92-99.

as considering the physical beauty of the spouse and enjoying an interactive relationship with her. In this way, the married person will be virtually protected from the evils of forbidden sexual relations and unlawful sexual behaviours. As al-Syāṭibī mentions, “getting married to entertain sexually is intended by the Lawgiver, since the satisfaction of all human needs is intended and made the objective of *Syarī‘ah*.”⁴² Therefore, *Syarī‘ah* respects, not contradicts, human needs and the requirements of man’s nature.

The incentive motivating a marriage of convenience does not relate to these benefits because it is not designed for satisfaction of natural human needs. For this reason, the European Council for Fatwa and Research concluded that, “this agreement contradicts with *Syarī‘ah* objectives in marriage. It is rather a verbal agreement intended to do something other than marriage.”⁴³

2) Enabling the means of evil:

The marriage of convenience is perceived to permit a variety of evils and corruptions and provides excuses leading to forbidden deeds. Therefore, the reasons to prohibit a marriage of convenience are many. Ibn Taymiyyah states,⁴⁴ “*Syarī‘ah* is the law of the Creator who knows best the secrets of his creature and the hidden whims which lead to his destruction. Thus, those who create apologies to divert the laws of *Syarī‘ah* from its true path and those who advance justifications to legalise the unlawful by their allegorical interpretation will be liable before God for oppressing themselves and ignoring His commands. If they do not commit an explicit apostasy, they are no doubt guilty of transgressing the boundaries of Divine law or innovating illegitimate deeds in Islam and certainly lacking the true understanding of the religion.” Ibn Taymiyyah, thus, describes individuals who attribute themselves to the knowledge of *Syarī‘ah* while releasing the means of evil.

The main evils arising from a marriage of convenience are as follows.

⁴² Al-Syāṭibī, *Al-Mūwāfaqāt*, 2:681.

⁴³ See *Fatāwā al-Majlis al-Awrūpī*, volume II-III, 57-58.

⁴⁴ Ibn Taymiyyah, *Bayān al-Dalīl ‘alā Ibtāl al-Taḥlīl*, 352-353.

a) Undermining the value of the marriage contract:

A marriage of convenience in its true image and narrow perspective undermines the value of a regular marriage that is described in the Quran's discourse as the Great Covenant. A marriage of convenience underestimates the cautions surrounding sex.

A marriage of convenience paves the way to the infringement of other accepted conditions in a lawful marriage, such as the attendance of a woman's guardian, attendance of two witnesses and payment of a dowry.

b) Enabling prostitution, corruption and adultery:

The marriage that is legitimised by the Lawgiver is completely different from unlawful sexual relations. To protect the parties and avoid adultery and prostitution,⁴⁵ the marriage should prevent manifestations of doubt and uncertainty. Otherwise, the implication of marriage will be obscure. In contrast, a marriage of convenience will remove the boundaries between lawful and unlawful sexual relations because it is distant from the higher intentions and objectives of legitimate marriage. A lawful marriage is replaced with a verbal agreement transgressing all considerable limits of the law and neglecting ethical content for an interest that contributes nothing to the primary and secondary objectives of the law.

In contrast to the fact that marriage protects society against adultery and prostitution, a marriage of convenience will provide a bridge between the lawful and unlawful and then undermine the value of 'the legal' in favor of 'the illegal'. The temporal interest that motivates this type of marriage will increase sins and immoralities among common people and help them easily transgress the limits of *Ṣyarī'ah*.

In addition, there is another evil regarding the protection of lineage. Women who temporarily marry regularly for the sake of some material interest are usually involved in adultery with other men, particularly in societies tolerating prostitution and adultery. These women may become pregnant and attribute the child to the

⁴⁵ 'Abd al-Mālik al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh* (al-Qāhirah: Dār al-Wafāh, 1998), 2:596.

Muslim husband who may or may not have had sex with her. This situation makes lineage a matter of obscurity and disagreement.

To draw a true image of temporal marriages considering *Syarī'ah* objectives, one may quote the statement of Ibn 'Āsyūr, "A time-based relationship brings to the soul of the concerned parties what makes them feel anxious and uncertain about their future. They will think all the time how to prepare for the future after maturity of the present relationship. The women will curiously and more eagerly seek after the promise of the men who are ready to give them a kind of surety and hope of marriage. However, if they lose the hope, they most likely transgress their limits and may take illegitimately from the property of the husbands for their personal pursuit and unlawful whim. All of these circumstances surely pave the way to intellectual unrest and psychological depression, lessen the loyalty of the two partners in return, and weaken the psychological relaxation and sexual protection of an ordinary marriage."⁴⁶

c) Distorting the true image of Islam in western countries:

A marriage of convenience will enhance the misunderstanding of Islam in western societies that have limited knowledge regarding the tenets and higher objectives of the Islamic legal system. This behaviour creates the impression that Islam does not respect the marital relationship and abuses women.

The absence of ethical and ideal incentives in this type of marriage inspires non-Muslims to believe that Islam treats others unfairly and that fraud and cheating are the normal behaviours of Muslims. In return, people who become the victims of this type of marriage will feel dissatisfied with the teachings of Islam and may distort the facts of this religion as revenge for the unfair treatment to which they were subjected. Making marriage a business for some material achievement that does not amount to any ethical values may show that Islam tolerates similar acts and justifies committing evils for the enjoyment of worldly interests.

Islam forbids any unethical treatment and establishes marriage on the basis of loyalty, peace and harmony; this is the reason why

⁴⁶ Ibn 'Āsyūr, *Maqāṣid al-Syarī'ah*, 439.

Islam tolerates the marriage of Muslims to non-Muslim females who follow divine religions. The Permanent Committee of Fatwa in Saudi Arabia has prohibited marriages of convenience and justified its decision on the rationale that “this marriage is a mere reflection of lies and deception.”⁴⁷

3) Prejudicing the public order in the host country:

Individuals involved in a marriage of convenience in the West will not explicitly express their intention of divorce in the contract to keep it from violating the law in the country of immigration. However, violating the public order of the host country is not lawful according to *Syarī'ah* as long as that order does not contradict with the regulations of Islam. If the public order in the country is harmonious with Sharī'ah law, the prohibition of an act will be more certain and authoritative in *Syarī'ah*.

Moreover, Islam respects agreements and prohibits the breaking of residency contracts with Muslim and non-Muslim entities. The European Council for Fatwa and Research includes infringement of public order and law in its decision on marriages of convenience and states, “The prohibition is ensured by its conflict with the law of the country that is harmonious with *Syarī'ah* Objectives.”⁴⁸

CONCLUSION

Marriage of convenience (*Zawāj al-Maşlahah*) is a formal and temporal marriage agreement that tends to be rescinded after the man or the woman obtains a particular immigration document. The agreement of separation remains secret between the two parties while they demonstrate before the authorities their commitment to the law and public order of the country. Because this marriage violates the regulations, objectives and ideal ethics of Islamic *Syarī'ah*, the majority of contemporary Muslim scholars consider it prohibitive. However, some scholars disagree with this decision and determine it permissible under the justification that this type of marriage impedes the means that lead to major sins such as

⁴⁷ *Fatāwā al-Lajnah al-Dā'imah li al-Buḥūth*, 18:448.

⁴⁸ *Fatāwā al-Majlis al-Awrūpī*, volumes I-II, 57-58.

adultery. According to the authors, this excuse is illusive and does not reflect the true image of a marriage of convenience. The negative outcomes of this type of marriage outweigh this imaginary and illusive excuse based on the principle that, "A real interest or a factual evil precedes the consideration of illusive outcomes."

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