EJIMEL
Electronic Journal of Islamic and Middle Eastern Law

Vol. 5 (2017) pp. 1-27

The Normalization of Saudi Family Law

by Chibli Mallat

University of Zurich[UZH]

EJIMEL Electronic Journal of Islamic and Middle Eastern Law

Vol. 5 (2017)

EJIMEL Vol. 5 (2017)

Published by
The Center for Islamic and Middle Eastern Legal Studies (CIMELS), University of Zurich, Zurich, Switzerland

Suggested citation style
Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), Vol. 5 (2017), pages, http://www.ejimel.uzh.ch

ISSN 2504-1940 (Print)
ISSN 1664-5707 (Online)

The Normalization of Saudi Family Law

*by Chibli Mallat**

Table of Contents

Abstract

This article examines a large set of court decisions made public recently by the Saudi government in family matters. In 2007, the publication of law reporters finally allows lawyers and scholars to examine detailed decisions of disputes adjudicated in court. The full range of family law litigation is examined here in the light of court decisions: Marriage, divorce, maintenance, custody, filiation, and succession, including hereditary trusts. The overall picture is one of a functioning legal system, coherent and balanced, which begs the need for a comprehensive family code. Even in the absence of a code, it concludes, legal norms in the field of Saudi family law are established and fathomable.

* Presidential Professor of Law, University of Utah; EU Jean Monnet Professor of Law, Saint Joseph's University, Beirut. This article is part of a book in progress on Saudi law.

Note on transliteration. With the rise in importance of Islamic law in the world, a number of words have become common, such as fatwa, which the *Oxford English Dictionary* has now adopted in the English lexicon. It is therefore not italicized here. Similarly, I do not italicize the following familiar names amongst scholars: mufti (the issuer of fatwas), qadi (judge), talaq (repudiation, divorce), waqf (trust), hadith (Prophetic saying). I generally adopt the transliteration of the *International Journal of Middle Eastern Studies*, without the diacritics. *Al al-ta'rif* is sometimes dropped for aural convenience or common use, such as Shatibi instead of al-Shatibi. There are no capital letters in Arabic, but I use a capital at the beginning of a sentence, and for personal names. When two dates are mentioned, the first is Hijri, the second is Gregorian. The internet has several sites that allow easy conversion.

I. Introduction

With the adoption by Qatar, the United Arab Emirates and Bahrain of comprehensive family law codes in the first decade of the 21st century, Saudi Arabia is the last important Middle Eastern country holding out on codification in this central area of the law.[1]

Family law codification is much easier than the codification of civil law. The field is better circumscribed, and includes four central areas which legislation deals with comprehensively: (a) marriage and marital life (b) separation and maintenance, (c) children, including custody and filiation, and (d) succession, including sometimes hereditary trusts, waqfs.

With the fall into obsolescence of slavery in the 20th century,[2] family law was restricted to the categories mentioned above. This is true for all schools of law, including the Hanbalis who are now well represented by the Qatar Family Law.[3] Tiny Qatar is particularly interesting for the Saudi neighbour, because it is the only other independent state in the world which professes to be Hanbali. Qatari judges are asked by the law to apply the Hanbali school precepts before turning to the other four schools.[4] The Qatari law is divided in five books: marriage[5] (book 1), separation[6] (book 2), a short two-article book on capacity and guardianship[7] (book 3), a book on gifts and wills[8] (book 4), and a final book on inheritance[9] (book 5).

Hanbalism in family law is dented by the now century-long tradition of eclecticism in the codification process between the four Sunni schools.[10] The Qatar Family Law of 2006 owes as

[1] The United Arab Emirates adopted a family code in 2005, Qatar in 2006, Bahrain in 2009. In the Arab Gulf, this comes after Oman in 1997 and Kuwait in 1984. Recurring reports to codify family law in Saudi Arabia appeared in recent years, see e.g. 'Kingdom to codify personal affairs law', *Saudi Gazette*, 27 July 2016 (mentioning three months for the Shura Council to transfer a family Code to the King for approval).

[2] Classical law presents a more complex scene because of slavery and the additional layers that slavery forced onto a highly stratified system, both for civil (sale and property, manumission) and family law (marriage, filiation, inheritance). Women and male slaves, and their children, stand at the lower side of a social spectrum compared to their free human counterparts in the classical age, and there are several gradations at all levels, often noted in the law treatises. This is also true for some court cases extant from the classical age. We have from Middle Eastern courts before the modern era a fair amount of cases dealing with slaves. In one of the earliest decisions available, from the Jerusalem Haram al-Sharif in 1394, manumission was central. Plaintiffs were former slaves who claimed they had been freed by their owner, only to be turned down by the judge on account that the owner was under age when the manumission took place. *Al-Muqaddam at-Tawashi 'Anbar et al. v. estate of Muhibb ad-Din Ahmad ibn Qadi al-Qudat Burhan ad-Din Ibrahim ibn Jama'a*, Case 31, dated 19 Muharram 797/14 December 1394, see my *Introduction to Middle Eastern Law*, Oxford 2007, 63 n. 228 [hereinafter MALLAT, IMEL].

[3] *Qanun al-usra*, Law 22 of 2006, hereinafter QFL, available on the internet at Al Meezan (*al-mizan*), the Qatar Legal Portal, in Arabic and in English.

[4] QFL Art. 3: 'In what does not get mentioned in this Law, the preponderant opinion (*ra'i rajeh*) of the Hanbali school is applied, so long as the court does not decide otherwise for reasons it must explain in its decision. If there is no preponderant opinion in the Hanbali school in a case for which no text applies in this Law, the judge may apply what he sees adequate amongst the opinions of the four schools. If this is not possible, the judge applies the general rules of Islamic law (*shari'a*).' Article 4 is murkier however: 'This law applies to those on whom the Hanbali school applies, otherwise the rules that are specific to them will apply. For non-Muslims, the rules that are specific to them apply. In all cases, this Law applies on those who request it or are different in religion or in school.'

[5] *nikah*.

[6] *firqa*.

[7] *ahliyya wa wilaya*.

[8] *al-hiba wal-wasiyya*.

[9] *irth*.

[10] On eclecticism, *takhayyur*, in modern family law, see MALLAT, IMEL, 363-4. On schools (*madhhab*, plural *madhaheb*), see MALLAT, IMEL, 111-21.

much to the long comparative effort that culminated in a model Arab Family Code of 1986, as it owes to purely Hanbali dispositions.[11] Saudi Arabia could easily follow in the steps of its Qatari neighbour,[12] but the Saudi scene is marginally complicated by a significant minority of Shi'is in the Kingdom.[13]

There is, however, no urgency. Saudi courts do not look particularly at loss in the absence of a written family code. A significant set of published decisions in Saudi Arabia allows an effective mapping of the field of family law even in the absence of a dedicated legislation. Contrary to received wisdom, family law in Saudi Arabia can now draw on a solid set of published court decisions. A code would not particularly change its landscape.

Professional, public reporting of court decisions started decisively with the Mudawwana,[14] a Saudi reporter published in three volumes in 2007.[15]

At first instance, the court consists of one judge, who is mentioned here. In cassation there are usually three judges, whose names are mentioned only when the first instance judge's decision is reversed. Other judicial bodies or quasi-judicial bodies often include the names of the judge or judges, or the mufti in some cases. The parties are never named in the Saudi decisions. Sometimes the date mentioned in the heading is not the same as the one found in the text. The slight discrepancy is probably due to the difference between the decision and the writing up of the case, which can take place a few days after it was issued. The decision is usually read in the presence of the parties, and the judge explains the appeals' procedure, important especially with regard to divorce cases because the decree of divorce is final only upon confirmation in cassation. For the first time in the history of the country, the lawyer, litigator, judge, law professor, can look at disputes and the way judges ground their judgments to solve them in everyday life. The Mudawwana is particularly alluring as a compilation because the decisions are selected from all Saudi regions, with cases almost invariably starting in first instance

[11] Presentation and discussion in MALLAT, IMEL, 367-77. In the case of the Arab Gulf, legislation is also inspired by a similar family law restatement known as 'the Muscat Document' (full title '*wathiqat masqat lil-nizam (al-qanun) al-muwahhad lil-ahwal al-shakhsiyya*), Muscat Document of the GCC Common Law of Personal Status'), adopted by the members of the Gulf Cooperation Council states in 1996. See generally MOELLER LENA-MARIA, Struggling for a modern family law: A Khaleeji perspective, in YASSARI NADJMA (ed.), *Changing God's law: The Dynamics of Middle Eastern family law,* Routledge, London/New York 2016, 83-112.

[12] Recurring rumours on imminent codification of family law are confirmed in the press, see *supra* n. 1, together with serious public discussions around delicate or controversial issues. A lengthy report carried out by the newspaper *al-Riyadh* on 23 April 2013 shows the extensive discussions about family law rights in expectation of a Saudi family law code, '*Nizam "al-ahwal al-shakhsiyya" yantasir lil-'adala wa himayat al-usra* (The Law of 'Personal Status' (would) vindicate justice and the protection of the family)', available at www.alriyadh.com/828651.

[13] Bahrain ignored the problem of its Shi'i population with a family law, passed in 2009, that applies only to Sunnis. See WELCHMAN LYNN, Bahrain, Qatar, UAE: First time family law codifications in three Gulf States, in ATKIN BILL (ed.), *International Survey of Family Law 2010 edition*, July 2010, 163-178.

[14] This is a compilation in three volumes of Saudi cases undertaken by the Ministry of Justice and published as *Mudawwanat al-ahkam al-qada'iyya* (Reporter of judicial decisions), Riyadh, 1428/2007 to 1429/2008. It is available at the time of completing this article on feqhbooks.com [Hereinafter Mudawwana] Note that *mudawwana* simply means notebook, register, here reporter, and is also the official name of the Family Law of Morocco, passed initially in 1958 and significantly revised in 2004. See MALLAT, IMEL, 400-2. The most famous *Mudawwana* in the Arab legal tradition is the mostly hadith-based compilation of the eponym of the Maliki School, Malik ibn Anas (d. 795), whose *Muwatta'* was edited by his student Sahnun (d. 854) under the name *al-Mudawwana al-kubra*, 16 vols, Cairo, 1906 and other editions.

[15] *Note on cases and case citation*. No uniform citation, in English or in Arabic, has yet been adopted for Saudi cases. The reports themselves come in different shapes and with different types of headnotes. The first time a case is mentioned in this article, the footnote includes the full reference and pagination, so that the reader can appreciate the length of the case. The second time the case is mentioned, mention appears in the main text (e.g., M.2.33, for Mudawwana volume 2 page 33). Following the system I adopted in IMEL, I have reduced as much as possible the use of Arabic words in the text.

jurisdictions across the vast country. The language of the Mudawwana reports is often raw. Saudi decisions give a strong flavor of real disputes, almost as if the reader were in the midst of a reality television show. Litigants speak their mind in open court before the judge with their words reported often verbatim. The parties' behaviour, as well as that of the witnesses and the qadi/judge, are richly documented in the decisions.

Most of the cases in the Mudawwana operate in first instance, and are rarely reversed on appeal to the court of cassation, owing to the fiction in the Kingdom that there is no formal appeal. Cassation[16] is considered more of a court of verification[17] in order not to jar with the received notion that the qadi's decision could not be reviewed by another judge. We therefore end up with reports of mainly first instance court decisions. When they are reversed or queried on 'verification', the issue is often a controversial one, and the law gets refined in 'grey areas'. As elsewhere in the world, the facts matter more and are presented in more detail in first instance, than on appeal or in cassation.

The 2007-8 Mudawwana stands as a breaking moment in the legal history of Saudi Arabia. At the beginning of the first decade of 21st century, the government undertook the publishing of hundreds of decisions by general courts, as well as rulings of administrative courts and agencies.[18] The Mudawwana provides a remarkable record of its own. The breadth of its stories is remarkable. It offers unprecedented insight into daily life in Saudi Arabia, as well as its legal system and the reasoning and sources used by its judges.

With the Mudawwana and subsequent efforts to publish decisions, Saudi law has normalized. Through the prism of the courts in the classical age, Islamic law becomes 'normal'.[19] I use the word normal in this article in both meanings of the word as usual, expected, using common sense to adjudicate and solve a conflict; and normal as bearer of norms, common rules by which society lives. With Saudi cases now available to the public, and to the professionals of the law, judges, lawyers, law professors and notary-publics, norms emerge which create precedent, and therefore more order, more regularity, more stability, and more accountability. Citizens can now rely on a solid framework of reference for their family affairs. By the mere

[16] *tamyiz* in the Levant, *naqd* in Egypt. In 2007, a comprehensive law (Nizam al-qada', 19.9.1428/1.10/2007) reformed the judicial system, introducing a three-tier structure including courts of first instance, courts of appeal, and a supreme court, *al-mahkama al-'ulya*, (Art. 9). The change has been implemented slowly.

[17] *tadqiq*.

[18] Until the publication of the first volume of the Mudawwana in 2007, case-law reporting was inexistent, except for a few registers of mostly uninteresting cases in Diwan al-Mazalem around 1980. Typed, photocopied decisions circulated only amongst prominent law offices looking for precious precedents and examples. Since 2007, a determined effort by the Ministry of Justice, together with the courts' administration, has resulted in series of reported judgments, including the Mudawwana and Diwan al-Mazalem's *Majmu'at al-ahkam wal-mabade'* (Collection of decisions and principles), which is available on the internet on the Diwan's site, www.bog.gov.sa, and in the paper publication by the Diwan's technical department of six annual sets of decisions covering the Hegire years 1427-1432 (2006-2012, the latest set for 1432/2012 published in 1436/2015). The Diwan has been the main commercial and administrative court of the Kingdom, but it has no jurisdiction in family law matters. Starting around 2012, the Ministry of Justice started publishing a large number of cases from the courts across the Kingdom. This includes *Majmu'at al-ahkam al-qada'iyya*, a massive collection of court decisions in 30 volumes bearing the date 1436/2015, which was made available by the Ministry of Justice for decisions issued in 1434/2013 and posted on the internet on https://beta.moj.gov.sa/ar/SystemsAndRegulations/Pages/System1434.aspx. [Herein Ahkam, followed by the volume and the pagination]. Unlike the Mudawwana, Ahkam reports do not mention the name of the judges.

[19] See for the argument of the common sense and 'normality' of law in the classical age studied from the perspective of the judge dispensing justice, the section entitled 'Courts, judges, case-law' in MALLAT, IMEL, 61-85.

publication of its court records, Saudi Arabia has normalized its law, including Islamic law, which its judges apply to solve everyday conflicts.

II. Marriage and marital life

I start with a colorful case in which the plaintiff is a first wife requesting fair treatment by her polygamous husband.[20] She is specifically asking the court to force him to spend the same amount of time with her as he does with his second wife, to not travel with the second wife more often than he travels with her, and to not visit the second wife too often during the day. Her three requests are rooted in the Qur'anic verse on the need for a husband 'to treat all his wives fairly.'[21] All three demands were granted by judge Tamim al-'Unayzan:

> The situation being as described, and considering her request to be treated well and justly with his other wife in both residence and travel inside the Kingdom, and her request for him not to be absent without excuse; and since it appears that the defendant lives with his other wife in Hufuf, the place where the plaintiff resides, and since he stated that he did not treat the plaintiff well, and expressed his readiness to stay in the plaintiff's house in… [location omitted], night after night, and to travel with her like he travels with his other wife; and since he doesn't accept her leaving [him] and since she is ready to return home; and considering what the scholars' opinion in the section on the treatment of women, which requires for each spouse to treat the other well and in pleasant companionship, to reject any harm, to provide for each other generously, and to not deflect this [generosity] with mendacity or harm; and since each of the spouses is bound to improve his companion's character and be kind to him and prevent harm from affecting him; and since the man who has two wives or more must divide his stay night by night. Night sets the standard because a human being repairs at night to his house and takes comfort with his family and usually sleeps in his bed with his wife. His livelihood is by day, and it is forbidden for him to go to another [woman] during the day except for a special need such as paying maintenance owed or visiting for health reasons or asking about something he needs to know, or visiting because he has been away for a long time. And the husband can travel with one of his wives only after a draw of lots[22] or if the other wives agree to that, for God has ordered to 'treat them fairly', and to give 'wives the good they deserve as well as the good they owe';[23] 'Aisha [said to be the favorite wife of Prophet Muhammad] is reported to have said: 'The Prophet used to divide matters between us justly.' (M.1.78-9)

This is powerful literalism by the judge in favour of the wife left behind.[24] Judge 'Unayzan's decision does not reveal why the defendant husband did not simply repudiate his first wife, instead of undergoing all this timesharing exercise she was requesting. The matter of his children living with her appears to have weighed in favour of the defendant husband

[20] M.1.76-81. Decided 20.1.1419/16.5.1998, confirmed in cassation on 16.2.1419/11.6.1998.
[21] Qur'an 4: 129.
[22] *qur'a*.
[23] Qur'an 4:19 and 2:228 respectively.
[24] The Qur'anic request of dealing fairly between his wives was first underlined by Muhammad 'Abduh (d. 1905), and effectively used by the Tunisian legislator reading fairness as full equality, and concluding that equality of treatment was impossible in practice, and that the law must ban polygamy to avoid the problem altogether. Details in MALLAT, IMEL, 113, n. 463 and accompanying text.

remaining in the first marriage, or, more cynically, he may have been reluctant to divorce because she had more means to spend on the children than he could afford for their upkeep as a divorced father.

Judge 'Unayzan was behind another sensible judgment. The case was brought on behalf of his mentally impaired son by a father who was requesting that his son's wife, who was also mentally impaired, return to the marital home.[25] In court, she protested that their marital flat over the father's house was sparse and unfit for her. When the father explained that he could not let his son live totally separately because of his condition (and hers), and the financial difficulties the son had, earning 1000 riyals (ca. 250 USD) per month, the judge proceeded with a request for medical assessment of the mental deficiencies of the spouses. The medical report found that the husband was indeed impaired and needed assistance. The wife was found mentally sounder, but still required assistance. After some further negotiations in court under the judge's supervision between all the parties involved, including the spouses' parents, an agreement was reached for the return of the wife to the marital flat, on condition that her father-in-law leaves it totally for their use.

Before the Riyadh judge, the plaintiff was a daughter insisting on her right to get married against the opposition of her father, and succeeding in persuading the court that he was unreasonable.[26] In the particulars of this unusual case, a woman aged 28, and formerly married with two children, brought a suit to the general court of Riyadh against her father, who was refusing to let her marry a local religious leader of good reputation and acceptable means. The father appeared in court to defend his decision because of the suitor's lack of courtesy towards him. He also explained that he asked around about the suitor nonetheless, and concluded that the suitor lacked social standing to marry his daughter.[27] Clearly unnerved by his daughter's case against him, he reluctantly stood before the court to make this argument, saying he was not ready to appear again, and suggesting that this one court appearance as defendant against his daughter was humiliating enough. And since he was so unhappy to show up as a defendant in a case brought by his own daughter, he concluded that he was ready to abide by the court decision, however it turned, to avoid returning to the defendant's box. He then put his arguments in writing, repeating points put orally to the judge in a previous ex parte meeting, on the inadequacy of the suitor's social standing and personal behaviour. He also reiterated in writing his wish not to be bothered any further.

Judge 'Unayzan asked for the suitor's appearance. The suitor came and stated his readiness and keenness to marry the plaintiff, and defended the adequacy of his social status: already married with kids, and a preacher in the locality, he was studying for a Master's degree in Islamic law. Then the frustrated plaintiff appeared again in court to insist that her father was being excessive and abusive, that she was missing a chance of getting married, probably the last chance since the suitor was the only man 'in two years of solitude' to have approached her; and that the social standing argument was not convincing since her aunt had married in similar circumstances.

[25] M.3.46-51. Decided 13.1.1422/7.4.2001, confirmed in cassation on 30.1.1422/24.4.2001.
[26] M.1. 378-84. Decided 14.6.1427/11.7.2006, no appeal.
[27] *kafa'a*, equality in social standing.

There were further attempts from the court to bring the parties together, to no avail. Finally, the judge found that the father was being excessive in the matter,[28] on no less an authority than ibn Taymiyya (d. 1328) and ibn Qudama (d. 1123).[29] He ruled that the court would substitute itself in the father's role as his daughter's guardian, and ended up marrying the frustrated couple over the father's obstinate refusal. The father did not avail himself of his right to appeal. The judgment concluded as follows:

> On the basis of what preceded in court in the accusations and responses made, and considering the above mentioned letter of the Emirate of the region of Riyadh and what the two parties decided, as well as the attempts to reconcile them; and considering the situation of the plaintiff from the previous marriage, and her age, and the fact that the defendant did not provide evidence showing that the suitor was not adequate in religion or morals or social standing, and the testimony of two righteous witnesses about his good moral standing and social adequacy; and considering the occurrence of harm in delaying the marriage of the plaintiff where she presently stands, and what the defendant mentioned in terms of no other suitor coming forward after her divorce from her previous husband and the precedent in a similar marriage taking place [the daughter arguing that her aunt had married a suitor like hers in standing]; and considering one of the two reports of Imam Ahmad [ibn Hanbal, d. 855] – and the preferred view of Shaykh al-Islam ibn Taymiyya – to the effect that if the nearer guardian[30] frustrates her,[31] she is removed [i.e. authority over her passes on] to the Sultan. Transfer of guardianship to the closer guardian who accepts or rejects marrying her, and taking over by the ruler/judge[32] of this [i.e. marrying her], allows the prevention of evil.[33]

Maintenance.[34] Of note in the set of cases on marriage is a maintenance case which appears as a surviving evidentiary and procedural practice found in pre-modern courts, and allows the parties to use the court for purposes of registering an already agreed settlement.[35] The case was initiated by the father of a woman living at his house with her three children, and he appeared as her representative in court against her husband. Before the judge, he pleaded for adequate maintenance by the defendant, including a separate marital home for her and the children, and the return of the equivalent of 10,000 riyals in gold that he had paid in the last years for her and her children's upkeep. The defendant husband agreed on the spot on all facts and demands, and requested a grace period of nine months to secure housing, also committing to pay back

[28] The term used in Saudi courts to qualify the excessive guardian in the matter of marriage is *wali 'udal*, from *'adl* with a dad, deriving from Qur'an 2:232, '*la ta'duluhunna*', translated in the context of the verse as 'do not prevent women from marrying their former husbands' once a certain number of condition are fulfilled. Note the extension of the concept of *'adl* in modern cases. For six other cases of *'adl*, which is considered a priori illegal by Saudi courts, see Ahkam, 11, 73-124.

[29] In his classical treatise, *al-Mughni*, 15 vols, Riyadh 1986, 9:383, the Hanbali jurist ibn Qudama provides a definition: 'the meaning of *'adl*: prohibiting the woman from marrying an equal (*kuf'*, from *kafa'a*) if she asks, when both [she and her suitor] wish to marry.'

[30] *al-wali al-aqrab*.

[31] *'adalaha*.

[32] *hakem*.

[33] M.1.383, prevention of evil, *dar' li-hadhih al-mafsada*. The last sentence is awkward in the original Arabic. The judge probably meant that the authority to marry the frustrated daughter passes on to the judge to avoid harm to the single woman.

[34] *nafaqa*.

[35] M.1.256-9, judge 'Abdallah ibn 'abd al-Rahman, court of Riyadh decision 16.9.1426/19.10.2005, date mentioned at 259 but the date of case in the heading is six days later, at 22.9.1426/25.10.2005. No appeal here obviously, since the two parties are in agreement. For the use of the classical courts to register an agreement, see MALLAT, IMEL, 64-6.

the maintenance debt in monthly instalments effective immediately. The agreement is simply recorded by the court, and dated. With no mention of an appeal, this suggests that the arrangement had been reached by the parties before the case was brought before the judge, and that the court was simply used to register it more effectively than if the agreement had just been concluded privately.

In another minor case of maintenance, a wife brought a case against her husband who had married another woman and forced her to live with the second wife. She requested to have a separate house for her and her children, and they agreed before the judge that the husband would secure separate housing on condition that 'she treats him well and abstains from going out of the house without his knowledge and his permission.'[36]

III. Separation

1. Cases of Marital Disputes

Saudi courts adjudicated several cases of marital disputes in which an unhappy wife sought a divorce in court, and almost invariably prevailed. In one instance before the general court of Riyadh, a Palestinian wife requested the divorce[37] from a Palestinian husband who, a year after the marriage, had not had sexual intercourse with her, and treated her shabbily, being 'profligate with insults'.[38] The defendant husband appeared in court, denying his bad behavior but confirming the absence of sexual intercourse. He immediately agreed to the divorce, on condition that the dower he had paid for the marriage be returned to him, 10,000 riyals and some gold. Judge Ibrahim al-Khudayri acquiesced to the common request, making the husband repudiate his wife in court in return for the dower, and registered the divorce.

The same judge granted the divorce of an abandoned wife, mother of two children for whose upkeep she alone was paying.[39] She had been married for twelve years, had not heard from her Jordanian husband for the last six years, and was unable to ascertain his whereabouts after he left the country. In his decision, the judge explained to her that she had the choice to be patient or to get the divorce on the well-known 'no harm' principle;[40] and that, should she decide upon the latter before him, which she quickly did, she could not remarry before the lapse of the three months waiting period. The authorities on the matter were plentiful:

> Building on the above, considering Article 34/10 of the Law of Procedure,[41] what the scholars have decided, the Prophetic saying on 'no harm',[42] and what the scholars stated in *Zad al-Ma'ad* (4/11), *al-Rawd al-Murabba'* (p. 134), *al-Mughni* (p. 576), *al-Muqni'* (30/318, 'if he

[36] M.1.283-6. Decided 21.12.1426/21.1.2006, Agreement in the Riyadh court recorded before judge 'Abd al-Rahman al-Dahash. Quote at 286.

[37] *khul'*

[38] M.1.92-4. Judge Ibrahim al-Khudayri, 29.7.1425/14.9.2004. No appeal. 'Profligate with insults, *shadid al-sabb wal-shatm*', at 93.

[39] M.1.136-9. Decided 26.11.1424/18.1.2004, confirmed in cassation 17.1.1425/9.3.2004.

[40] '*la darar wa la dirar*', the no harm principle hadith which establishes liability in Islamic law, see MALLAT, IMEL, 250.

[41] Nizam al-murafa'at, which refers here to the 1421/2000 Nizam al-murafa'at al-shar'iyya, the law of civil procedure. It is not clear what the reference to Art. 34/10 means, since Art. 34 does not have ten paragraphs. Article 34 in the 1421 Law organizes territorial competence. An amended code of civil procedure was passed in 1435/2014.

[42] Short for '*la darar wa la-dirar*'.

> goes away and does not provide her with maintenance and she is unable to have access to his money or borrow against it, then she has the right to divorce.)'[43] Divorce is not allowed without a decision from the judge,[44] and it is an irrevocable divorce according to the [Hanbali] school.[45] This is supported by Shafi'i and ibn al-Mundhir, and reported back to 'Umar and 'Ali and Abi Hurayra; it was also said by Ibn al-Musayyab and al-Hasan and Malek and Ishaq and others; 'Umar was asked about men who went away from their wives, and he ordered them either to provide maintenance or to divorce.
>
> Considering the evidence in the case, the situation of this woman and her needs for care and probity,[46] and her insistence on the rescission of her marriage, and since the objectives of the law[47] are for marriage to secure abode,[48] purity and probity, and this is not achieved in the case of this woman plaintiff, the conditions for rescission are met. We explained to her that she has the choice between rescinding her marriage, and exercising patience and persistence. She chose divorce. It is clear to me that the wife is harmed by remaining under her missing husband's control,[49] so I granted her the divorce.[50]

Despite the absence of a Code, and perhaps thanks to that absence since the judge is less constrained by a clear statute than by his interpretation of more obscure scholarly texts, one finds Saudi courts comfortably adapting old legal principles to technological advances. The continued absence of the husband seems to be a recurrent problem in Saudi Arabia, leading the court to facilitate divorce to free the wife from her AWOL husband. The court will also take advantage of novel situations, illustrated by repudiation over a mobile phone.[51] Here, before judge 'Atiq in the Riyadh court, an abandoned wife sought a divorce on the basis of a conversation others had heard from her husband, away for jihad, in a call he made over his mobile phone. The judge found the evidence sufficient, likening the divorce by telephone to a divorce amongst people present. The main authority sought was that of Majma' al-fiqh al-islami,[52] which accepts contracts made over the phone as valid, although classical jurists were also cited to liken the case to blindness: similar to the repudiation of the blind man who does not see his wife, a repudiation made over the phone is taken at face value. Note that the argument is made by the wife, who sought deliverance from marriage with an absentee husband, and that the request was granted even though the call was not made directly to her. It is not clear whether the court would hold in the same way if termination had been made by the husband over a mobile phone.

Divorce was also granted to another Palestinian woman who had been abandoned for three years by her husband.[53] She knew he was in Morocco, and tried to track him down for

[43] Rescission of the marriage, *faskh*.
[44] *hakem*.
[45] *madhhab*.
[46] *siyana wa 'afaf*.
[47] *maqased al-shari'a*.
[48] *sakan*.
[49] *'isma*.
[50] M.1.138-9. *Zad al-Ma'ad* is by Ibn Qayyim al-Jawziyya (d. 1392). *Al-Rawd al-Murabba'* is by Buhuti (d. 1641). *Al-Mughni* and *al-Muqni'* are by Ibn Qudama (d. 1123). They are all Hanbalis. Shafi'i (d. 820) is the eponym of the Shafi'i school. Ibn al-Mundhir (d. 932), and the other scholars and companions of the Prophet mentioned, are early specialists or tradents of hadith.
[51] M.2.60-66, decided 17.4.1426/26.5.2005, confirmed on cassation 20.5.1426/27.6.2005.
[52] The Islamic Fiqh Academy, established by the Organization of the Islamic Countries in 1981.
[53] M.1.206-12. Decided 17.3.1426/26.4.2005, Judge Naser Jarbu', general court of Riyadh.

maintenance and other marital obligations. The response the husband made to the Saudi consulate offices in Morocco was that he was too ill to take care of her, and that he could therefore not bring her over to Morocco. Upon which judge Naser Jarbu' of the general court of Riyadh issued a judgement of divorce[54] to remove 'the harm to the wife in her person and her religion and the undermining of her legal rights, for the law requests the removal of harm', here 'resulting from the abandonment of the husband for three years without paying maintenance.' (M.1.210) The plaintiff was also informed by the judge that she could not remarry before the lapse of three menstrual periods from the date the judgement was final. The missing husband had to be notified, however, and the procedure of notification was initiated by the relevant authorities, though no answer came about his whereabouts.

There was a twist that resulted from the disagreement of the court of cassation. The successful plaintiff wife did obviously not appeal, since she had won her divorce for harm, but there was an automatic appeal in cases where a party was not present in court. The cassation court objected to judge Jarbu''s decision, because he should had reserved the right of the husband, in case he returned, to make his case anew, and because the court should have tried to notify him.[55]

Judge Jarbu' was unfazed. He answered that the Executive Note for the Law of Civil Procedure[56] had not made a difference between a case of divorce and other cases involving an absentee defendant. In case the husband returned, he was entitled to make his case regardless of the nature of the divorce. As for notification, four months had already passed since the judgment was rendered, and there had been no answer from the husband. Delay only added to the plaintiff's harm. (M.1.211-2) The court of cassation confirmed without commenting further.[57]

The court of cassation would not be as tolerant of another judgment confirming the power of women over the termination of their marriage.[58] The first instance judge in that case, Hasan Aal Khayrat, had to confront three successive reviews of his decision by the court of cassation to see his decision in favour of the aggrieved wife finalised. In the particulars, the woman plaintiff appeared before the court on 16.6.1425/2.8.2004 to claim a divorce from a husband whom she accused of cursing and beating her, taking her money, and not caring for the ten children she had from him. She reminded the judge that she had come to him earlier to complain informally about the situation. All of this, she said, to no avail. She now requested a divorce because she was unwilling to live with him any longer,[59] and demanded further that he return her belongings after she left the marital home to live at her mother's. She also asked for custody over those amongst her children who were under age.

[54] *faskh*.

[55] Decision of cassation on 9.8.1426/13.9.2005 at M.1.211. Because the divorce granted by the lower court was 'final', the cassation judges objected that the husband's right had been breached. By this they probably meant that the decision could be final only when the cassation court had said so. Also, since the defendant was abroad, his notification required more than the two months mentioned by Jarbu' at first instance.

[56] *Al-la'iha tanfidhiyya li-nizam al-murafa'at al-shar'iyya*. This type of 'Note' accompanies major statute passed in the Kingdom with some comments and explanations.

[57] Decision in cassation on 6.9.1426/9.10.2005.

[58] M.1.306-25. Decided 17.8.1426/21.9.2005. No exact date for cassation, see below.

[59] *al-talaq li-'adam istita'ati al-'ishra ma'ahu*, M.1.308.

The husband denied the allegations of ill treatment, and said he did not beat her 'except in self-defense.' (M.1.309) He did not want to grant the divorce, but intimated he would acquiesce to it upon certain conditions. A longish period of mediation requested by the judge followed, with two designated arbitrators[60] concluding in a report to the court that their marital life could not be saved, that the marital and personal property should be distributed in a detailed way they prescribed, in addition to making arrangements for the children's custody. The judgment cites in full the report of the two arbitrators, reached on 30.7.1426/4.9.2005. Their conclusion reads as follows:

> First: the separation takes place between them with the wife being content with her dower.[61] The husband is not obligated to add anything to it. Second: the husband accepts the wife forfeiting what is left on the dower in return for the separation. He does not receive back what [the immediate dower] he already paid. Third: the jewelry owed by the husband [as deferred dower] is considered equivalent to the money he claims from his wife. She acknowledges this against the husband surrendering the property deed of his house following the annulment of that agreement and the agreement [of the two parties] not to pursue its course. Fourth: the wife receives all the above mentioned furniture as agreed by the spouses. Fifth: Order the two abovementioned daughters, or one of them, to be with one of the parents under the oversight of the judge, and with God helping us to success, we [the arbitrators] note that both parties, as mentioned, want the separation which therefore just needs to be registered and adopted. This is what the two arbitrators found, signed 1-... [withheld name of first arbitrator] 2- ... [withheld name of second arbitrator], issued Sunday 30.7.1426/4.9.2005.
>
> After being entered on the register, the report was read to the two parties. The wife agreed but the husband decided to disagree. (M.1.313-4)

A week later, on 9.8.1426/13.9.2005, judge Khayrat issued his first judgment:

> I decide as follows:
>
> First: I declare the rescission of the marriage[62] between ... [the wife] and her husband... against the compensation mentioned in the last report of the arbitrators, as developed above; I explained to both parties that the wife is not free to remarry[63] before the decision is made final by the proper court.[64] I also explained to them that she cannot allow her husband to have intercourse with her before the decision becomes final, and I explained to the husband that he may not approach her during that period.
>
> Second: I decide that the children who are of custody age stay with their mother so long as she does not remarry, and I rule that maintenance must be paid to them by their father in accordance with the relevant custom [i.e. relative to the social situation of the father], estimating payment of 200 riyals for each child monthly. As for the children over 7, in case

[60] *hakaman*.
[61] *mahr*. In the law of dower, a separation is made between money paid upon marriage (immediate, *mu'ajjal*) and money deferred for payment in case of divorce or other events (deferred, *mu'ajjal*).
[62] *faskh al-nikah*.
[63] *tu'tadd*, i.e. respects the *'idda* period, which is for divorced women three months.
[64] The court of cassation, which verifies/confirms the decision.

> they are girls they go with their father and in case they are boys they are asked to choose between the parents. They stay with the one they choose, and they are not prevented to visit the one with whom they choose not to stay. The girls who go with the father visit their mother once a month. (M.1.315)

The husband did not agree and appealed to the court of cassation. Here was the start of a painfully repetitive process where the court would reject some arrangements decided by the lower court, judge Khayrat would take the requested changes on board, another appeal would be lodged, and the cassation court would disagree again and send the judgment back to Khayrat for yet another review. This took place three times until the decision became final on 6.8.1427/31.8.2006.

The convoluted story is alluring both in substance and on procedure.

Procedurally, the amount of intercession and mediation by the judge, directly and through the arbitrators, is remarkable. Time and again he suggests to the spouses to be patient and try to make things work, and he and the arbitrators request a cooling off period twice. Most remarkable is the repeated to and fro between the first instance sole judge and the three judges sitting in cassation. Their disagreement allows the observer to see more clearly into the judicial mechanisms at work in Saudi Arabia. Throughout, the lower judge defers to his elders and seeks to abide by their decision, even when they sometimes appear to be moving the goalposts.

On substance, the sense that the wife could force her husband to grant a divorce, like in other cases in the Mudawwana, is remarkable. Once the right of the unhappy wife to get a judicial divorce is accepted, the dispute, as elsewhere in raucous divorces across the world, rests on particulars. As elsewhere, it becomes an issue of money and children's custody. How did the court of cassation correct judge Khayrat's decision on this score?

In the first cassation judgment, issued on 18.10.1426/10.11.2005, the reproach is that the first instance judge was not precise enough:

> We have decided to return the case to the judge in charge [Khayrat] to note the following: 1- His Honour[65] ruled that the marriage should be annulled and did not annul it. He needs to annul it first and then follow with the consequences in the judgement. Alternatively he could allow the wife to decide whether to end her marriage, and if she so chooses then he can rule on the consequences accordingly. 2- HH's disposition in the second paragraph of the decision is overly general, for he did not mention the names and ages of the children. The judgment should be straightforward and clear. 3- HH mentions that the son is made to choose between his parents, but it is he who should make him choose before deciding, so that he can draw the proper legal conclusions on the choice. 4- HH ruled that the father of the children must pay the maintenance in accordance with custom in a case like this, and mentioned that it is estimated at 200 riyals for each. The basis used for this estimate, and whether the father's income and support to the family and his means were taken into account, does not appear in the document. These must be taken into account. 5- The judgment on the visitation rights is not specific enough. The ruling should be clear and easy

[65] Literally His Virtue, *fadilatuh*.

to implement. 6- HH mentioned that the separation period starts after the judgment becomes final. In fact, it starts from the time of the rescission.[66]

Upon which judge Khayrat proceeded with the requested changes, after investigating the father's social situation, and ascertaining the kids' names and ages. Once this was done, the two parties were appraised again, on 18.12.1426/18.1.2006, of their right to appeal to the court of cassation. The husband appealed again. Again the court rejected Khayrat's decision. His last decision had been taken on 18.2.1427/19.3.2006, and there were two outstanding issues that needed to be corrected. Khayrat had requested the sons to choose at a time when they were already of age, and this was not necessary. Also, the cassation judges explained, the expression used by him to 'remove custody from the mother and pass it on to a better person if she remarries' was inappropriate. It made his decision 'premature'.[67]

Back to the drawing board for judge Khayrat. He duly obliged, told the sons that they need not choose since they were adults, and struck out the 'premature' judgment. Unfortunately, this was not the end of the matter, for he received on 7.5.1427/4.6/2006 another 'note'[68] from the court of cassation. The judges reminded Khayrat that the husband had mentioned a number of property deeds, and told him he could not finalize the judgement without properly ascertaining what these deeds said in order to consider whether they were related to the case. They also suggested he revisit the matter of the kids 'and do what was necessary for the benefit of the children because they are at the center of the case.' (M.1.323) He duly obliged again, but could only find some of the deeds, and concluded they were not related to the case. It is not clear what he did 'for the benefit of the children', but the spouses seem to have agreed on some deal, with the wife helping the husband to complete building a house against his readiness to accept 100 riyals monthly allowance if he could not pay the 500 riyals, which had been decided after the first revision. (M.1.323-4) Still, the husband decided to appeal the Khayrat revised decision of 6.8.1427/31.8.2006. (M.1.323)

Following three requested revisions, the court of cassation finally let the Khayrat decision stand.[69]

In contrast to the long and convoluted case with Khayrat, which turned on the details of the divorce arrangements, the court of cassation agreed to a wife's request for a divorce simply because her husband had AIDS: 'AIDS is one of the dangerous diseases which necessitates the alienation[70] of the spouse who has contracted it, and this is what scholars, like in *al-Rawd al-Murabba'*,[71] say about defects which confirm the right to terminate[72] the marriage, even if it occurs after the marriage contract and after sexual intercourse, although termination of the marriage needs the judge to decree it.'[73]

[66] *faskh*. M.1.317. Judgment of the court of cassation, 'first circuit dealing with personal status, waqfs, wills, minors and treasury. Signed: judge Saleh ibn Muhammad al-Nujaidi head of the circuit, with the two other judges Salem ibn al-Hamidi al-'Ayyad and 'Abd al-Rahman ibn Saleh al-Jabr'.

[67] *al-hukm sabiq li-awanih*, M.1.321.

[68] *mu'amala*.

[69] M.1.324-5, date not specified.

[70] *nafrat*.

[71] By Mansur al-Buhuti, the leading Hanbali scholar of the 11/17th century.

[72] *faskh*.

[73] M.2.45, decision by judge Ibrahim Aal 'Atiq, from the General Court of Riyadh.

Other decisions confirm the pattern common to Saudi judges confronting unhappy wives' insistence to be freed from the marriage bond in cases far less dramatic than a husband afflicted by AIDS. The judge tries hard to salvage the marriage, appointing arbitrators to bring the spouses together. But even if the husband disagrees, the judge accepts that the distance between the two parties has become so large as to make it impossible for marital life to continue. In line with this clear trend, irretrievable breakdown of marriage regardless of fault appears well established in Saudi law. In one straightforward case of divorce upon the wife's demand, her argument was simply that she couldn't stand living anymore with her husband. She just hated him.[74]

The case starts with the husband as plaintiff requesting his wife to return to the marital home from her stay with her parents. Upon being questioned by judge Nayef al-Hamad at the general court of Riyadh acting as substitute for judge Khaled al-Luhaydan, the wife responded bluntly: 'I am staying at my parents, I hate him and I do not like him.' (M.2.29) She had previously asked for divorce,[75] but her husband effectively undermined the request by divorcing her in a sole repudiation. He then had her return to him. 'A month after I uttered the first repudiation, I asked her back because I love her and I want her back, but she did not return. We have no children, and I think she is inhabited by an evil eye, and I uttered a single repudiation so that the bad eye is removed. So the husband stated.' (M.2.30)

Two arbitrators were appointed by the court to bring the spouses together, and in case of failure, to see about the terms of the separation. They sat with the two parties, and concluded that the marriage had irretrievably broken down and that she would have to return the dower. The judge tried again to bring them together, failed upon the determination of the wife who repeated point blank that 'she hated him'. Quoting several verses of the Qur'an including 'the need for the husband to hold on to his wife in good faith or free her gently,'[76] the judge decided to follow the arbitrators' recommendation and avoid 'leaving a woman hanging in this day and age full of temptations.[77] She being young suffers from profound harm.'[78] She was freed from the marriage, with the understanding that she needed to observe the waiting period before remarrying, and that the judgment would only be final upon confirmation in cassation. The husband appealed to the court of cassation, which rejected his appeal and confirmed judge Hamad's divorce decree.

This is close to the irretrievable breakdown of marriage for no fault of either party as cause for separation. It shows how common it is for family cases in Saudi Arabia to consider a low standard of harm to the wife as sufficient cause for judicial divorce.[79] We have already seen her prevailing in convincing the judge in several trials. The protracted absence of the husband is common.[80] Similarly, 'drug addiction and harming the wife by beating her contradict the

[74] M.2.28-35. Judge Nayef ibn Ahmad al-Hamad at the general court of Riyadh, 13.2.1428/2.3.2007, confirmed in cassation 4.4.1428/22.4.2007.

[75] *khul'*.

[76] *'fa-imsak bi ma'ruf aw tasrih bi-ihsan'*, Qur'an 2: 229, M.2.31.

[77] *fitan*.

[78] *adrar baligha*, at M.2.34.

[79] This trend is confirmed in twenty-eight more recent cases reported under the category *faskh al-nikah*, Ahkam, 10, 167-405. They include the husband's long absence, no payment of maintenance, anal sex, mental disability, sterility, and simple strong dislike of him by his wife.

[80] See e.g. case in M.2.36-40 by judge Khaled al-Luhaydan, Riyadh, quote of *la darar wa la dirar* at 40; and the cases above at nn. 39, 51.

wisdom for which marriage was instituted.[81] This is shameful.[82] It impairs marital life and obligates marriage termination.'[83] The equality pattern in matters of divorce in the basis of harm is even established in a marital dispute where it is the husband who requests a judicial annulment[84] of the marriage on account of his wife refusing to have sex with him, and for refusing to return to the house soon after marriage.[85] He argued, and the defendant did not dispute the argument, that 'she had the eye'. (M.3.71) He of course could have simply repudiated her, but he wanted the dower returned to him, which would not have been possible upon repudiation. But the court rejected his plea for annulment, arguing that this was a case of disobedience[86] 'for which the proper way to deal is indicated in the well-known verse.' (M.3.72) Reference here is to Qur'anic verse 4:34 which suggests that disobedient wives be 'corrected', with modern interpretations ranging from 'educating' the wayward wife to beating her up into submission.[87] Despite 'the bad eye', the wife formally won the case, and the husband could not get an annulment with the return of the dower paid to her. The case does not say how he 'educated' her.

While the aggrieved wife seems to invariably get her way, obvious forms of inequality remain, including the husband's right to unilateral divorce in simple utterances of repudiation, and the compensation paid to him, usually by way of the return of the dower by the wife. This unilateral, extra-judicial termination by repudiation[88] remains distinct from the judicial termination[89] achieved by the wife after an elaborate trial. But the two parties appear generally equal in the possibility to terminate the marriage they are unhappy about. 'I hate him' is sufficient grounds for the judge to grant divorce to the wife who simply considers the continuation into the marriage as harmful to her happiness. The main difference is that she cannot terminate the marriage at will, as her husband remains capable of, albeit with constraints of registration of the divorce before the court. She must get the court to decree it. This general pattern conforms with Muslim family courts across the Middle East.

2. A mufti/qadi jurisdictional battle in three-time talaq

A telling testimony of the relation between judges and muftis appears in a relatively old case, which the reporter clearly found important to include in volume 2 of the Mudawwana.[90]

[81] *shurri'a*.
[82] *'ayb*.
[83] M.3.60-68, decision of judge Hamad ibn Hasan al-Hammad, head of courts of Aflaj, 26.1.1427/7.3.2005, court of cassation confirmation on 13.2.1427/13.3.2006, quote at 68. This is an interesting case for the sociology of drugs in Saudi Arabia. To appreciate the phenomenon in Saudi society, see full 5 volumes of decisions (out of the 28 volumes of Ahkam) on drug-related court cases. Ahkam, vol. 17 to vol. 22.
[84] *faskh*.
[85] M.3.68-75. Decision by judge Ahmad ibn 'Abdallah al-Ja'fari in General Court, 6.4.1428/23.4.2007 of Ras Tannura confirmed in cassation 9.5.1428/26.5.2007.
[86] *nushuz*.
[87] Qur'an 4:34: 'Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them.' Abdallah Yusuf Ali's translation (1934).
[88] *talaq*.
[89] *khul'*, when demanded by wife, *faskh* being the rescission itself.
[90] M.2.46-59. Decision dated 14.6.1392/25.7.1972.

The substantive issue was less important than the procedural one. The issue of substantive law was whether the three-time repudiation formula said in quick succession – 'you are repudiated'[91] repeated three times – leads to a full divorce, or whether it amounts to just one utterance and some time needs to pass between each instance of repudiation. The practical consequences are important. If a man utters the talaq formula three times in one full swoop, often the expression of a moment of extreme anger, the wife is considered divorced 'irrevocably'.[92] To return to her former husband, she needs in traditional Sunni law to complete the three-month waiting period,[93] then remarry a stranger, get a divorce from him and complete again another three-month waiting period. Only then can she remarry her former husband. Should the three-talaq formula be considered as only one, then the divorce is not complete; it is a revocable repudiation.[94] The husband may get his wife back at will, and the revocable repudiation is considered not to have taken place.

This was the crux of the issue at hand in that case, and two legal institutions in the Saudi State were involved at the highest level: the Grand Mufti, the famed 'Abd al-'Aziz ibn Baz (d. 1999), v. the local judges buttressed by the court of cassation. The Mufti's view was that the three-time repudiation amounted to only one and was therefore revocable. The lower court judge, following a practice confirmed by the court of cassation, considered such form of repudiation to lead to a final, irrevocable divorce.

From a social perspective, the issue has its advocates on both sides of the liberal divide. A wife freed from marriage after a three-time repudiation in one session is not left in limbo. With the repudiation considered final, the husband is made responsible for his decision, taken in anger or not, in the fateful three-time utterance considered as final. The wife is free from him and the divorce is total. To marry her again, she must remarry another man and get another irrevocable divorce before they get back together and enter into a valid marriage contract.

On the other hand, the unilateral dimension of a three-time repudiation taken in a moment of anger can put the wife at a strong disadvantage. To protect her from the irascible husband, ibn Baz and some classical jurists count it only as one of three strikes, so the husband and the wife have a chance to get back together and prevent a final divorce.

The debate is not new, and most Middle Eastern countries have chosen to give marriage a chance by holding, like ibn Baz, that the three-time divorce uttered as one unit should be considered as just one of the three utterances required for an irrevocable divorce.[95] Time must elapse between each of the three utterances, during which husband and wife may not have sex. If the husband expresses his wish to have her back, or if they have sexual relations, the previous one or two repudiations are considered no longer effective. The latest family law codification, in Hanbali Qatar, takes this view. In the Qatari family code, the three-time talaq in one unit is tantamount to just one utterance, and therefore a talaq of the revocable type.[96]

[91] *anti taleq*.
[92] *talaq ba'en*.
[93] *'idda*.
[94] *talaq raj'i*.
[95] All Middle Eastern countries have followed Egypt's early position, taken in 1925, to count triple talaq uttered in one session as one revocable talaq, save of course when it takes place on the third occasion.
[96] Art. 108.4 QFL considers that 'talaq does not take place… when successive or numbered in word or writing or by signal [since it is considered] as one utterance.' Numbered means that the husband, instead of repeating the formula of

The more unusual issue raised by the case was procedural, and concerned the relation between the mufti and the qadi. When ibn Baz was solicited by the husband to give his opinion on the matter, he took his time, asked a local judge to look into the matter and bring the spouses together if he could, and then gave his opinion to the husband that the three-time utterance was equal to one, so that he and his wife could live together again. After Ibn Baz's pronouncement, according to the report, husband and wife were back together for over a year. Then disputes arose again, leading eventually the court of Mecca to decide on the matter, probably by the wife who wanted to see the marriage terminated on the strength of the earlier three-time repudiation being considered as final. The court accepted her plea, and confirmed the irrevocability of the divorce.

Understandably, the losing husband took the matter to ibn Baz again. In turn, ibn Baz, whose authority was now being challenged by a lower instance judge, brought it to the King. The King directed the Minister of Justice to raise the matter with the High Judicial Council (HJC),[97] a parallel authority to the court of cassation at the time. The important matter in dispute was no longer the nature of the repudiation, but the authority of the mufti vis-à-vis the qadi's.

The solution to the dispute was pragmatic. Five judges on the HJC, including another leading Saudi jurist at its head, Muhammad ibn Jubayr,[98] found for the Mufti.

> From what precedes in the words of the author of the *Iqna'*, and the *Muntaha*, and the *Ghaya*, and the *Muswadda* of ibn Taymiyya, and the opinion of Amidi and *Jame' al-Jawame'* and other leaders from the four Sunni schools, when the layman[99] who seeks a fatwa from the Mufti, receives it, and abides by its ruling, he is not authorized to abandon it for the opinion of another jurist.[100]

The HJC noted the specificity of the case: the spouses sought the opinion of the Mufti, it was given to them, and they lived by it. They cannot go to another jurist, including the qadi, to avoid it. The husband, the HJC said, is right. The wife is not allowed to go to court to seek another interpretation of the three-time repudiation that makes it irrevocable, simply to sidestep the Mufti whose fatwa she originally sought with her husband (or at least did not openly oppose). Importantly for the HJC, it noted that the couple observed the fatwa and implemented it for a full year.

This makes sense in the legal system of Saudi Arabia, even if it underlines the two orders of authority fighting each other's competence. A different answer would have dramatically undermined the authority of the Grand Mufti on the most outrageous premises, a case where

---

repudiation three times in full, says '*anti taleq bil-thalath*, I repudiate you thrice.' Art. 88c of the Family Law of Bahrain of 2009 includes a formula mentioned 'numbered' but not 'successive'. However the repudiation must take place in court to take effect (Art. 91).

[97] *Al-hay'at al-ulya lil-qadaya*, composed of senior judges and reporting to the Minister of Justice.

[98] 'Shaykh Muhammad Ibn Jubayr, who has held many 'ulama' leadership positions, including president of the judiciary, president of the Board of Grievances, and member of the Board of Senior 'Ulama, and who is currently president of the Consultative Council…', cited in VOGEL FRANK, *Islamic law and the legal system of Saudi Arabia*, The Hague 2000, 97. Shaykh Muhammad Ibn Jubayr died in 2002.

[99] *muqallid*.

[100] M.2.58. Musa al-Hijawi (d. 1580) is the author of the *Iqna'*. Ibn al-Najjar (d. 1584) is the author of *Muntaha al-iradat*; Mar'i al-Karmi (d. 1624) is the author of the *Ghaya*. They are all Hanbalis. Amidi (d. 1233) is a Shafi'i jurist, as is Suyuti (d. 1505), the author of *Jame' al-Jawame'*.

the fatwa had been initially requested by the married couple. Turning later to the qadi to undermine the Mufti so directly appears to be simply unconscionable.

The fine print, however, is important. Ultimately, the HJC, not the Mufti, had the ultimate word. In a typical show of authority, the judges were suggesting that outside the narrow grounds of a fatwa applied by both parties, the judge might not be as kind to the Mufti's authority. The ultimate decision rests squarely with the judge.

Several questions remain unanswered. What if one of the two spouses had not sought the fatwa? Or did not accept it? Would he or she have the right to go to court? Or conceivably go to another mufti, since not all the muftis in the Kingdom have the considerable status of the Grand Mufti ibn Baz?

Of note also in the long report is that the authorities quoted do not concur fully on this central point of who is the final arbiter. The HJC cites, as we saw, several classical jurists, who do not see eye to eye on the matter. They do converge to a large extent, however, on the authority of the fatwa once sought and/or applied by the petitioner. Ibn Taymiyya considers that if a fatwa contradicts another fatwa, the fatwa seeker can choose the one he wishes to follow. But once he has followed it, he cannot renege and resort to the opposite fatwa. (M.2.54) Amidi, the Shafi'i scholar also quoted by the HJC, does not allow the person who has followed the opinion of a mufti *and* started to execute the fatwa received, to then change course and seek another opinion. (id.) Others, like the Maliki jurist ibn al-Hajeb (d. 1249), allow the change, but the commentators reject it in favour of the prohibition to change course once the fatwa is executed. This, in one of the classical opinions quoted at length, does not prevent the lay person[101] from choosing the expert opinion he prefers in case of a contradictory views between two or more experts. But if one *starts* implementing an opinion, then seeking another mufti or using a contrary fatwa is no longer possible.[102]

There is a further twist. This case shows conflicting positions at the highest level, between the Mufti (ibn Baz) and the HJC, and an additional complication. After the protest of ibn Baz triggered the HJC reaction, the case was transferred to the court of cassation, which forwarded it back to the judge handling the case.[103]

> He [the judge] built his decision in this case on a circuit order[104] of the late Shaikh Muhammad ibn Ibrahim number 14595/2 of 1/11/[19]80 which includes the need to act in all courts by considering final[105] the three-time repudiation uttered in one single instance.[106] A fatwa cannot be issued instead of a judicial decision, on the preponderant view in the school,[107] and previously issued decisions like the present one were confirmed by the court of cassation. HH concluded his letter by insisting on his decision in this case. (M.2.48-49)

[101] *'ammi*.
[102] Quoting *Mukhtasar al-tahrir fi usul al fiqh,* by ibn al-Najjar. M.2.56-7.
[103] Not totally clear in the report who he was, see M.2.48. He is referred to as His Virtue, *fadilatuh*, maybe 'Abd al-Malik ibn Dahish.
[104] *amr ta'mimi*.
[105] *batt*.
[106] Uttered in one expression, *bi-lafz wahed*.
[107] *al-rajeh fil-madhhab*.

While ibn Baz's contrary view, namely that the three-time repudiation amounted to only one repudiation rendering the divorce revocable, the strenuous efforts to save the Grand Mufti's reputation through the acceptance and implementation of the fatwa by the spouses did not succeed in legal terms. The court held on substance that a three-time repudiation uttered as one unit was indeed irrevocable.

A more recent case, decided in 1425/2004 and published in the third volume of the Mudawwana, sides on this issue with ibn Baz.[108] Judge 'Abdallah ibn Sulayman al-Mukhallaf of the general court of Madina opines in an obiter that a three-time repudiation is considered to be equivalent to only one repudiation, and is therefore of the revocable type: 'The divorce was in violation of the rules',[109] since 'it was reported that the husband uttered the three-time repudiation in a single word, which stands for the first repudiation only.'[110]

We have therefore two contradictory decisions on substance in Saudi Arabia. One considers a three-time repudiation as irrevocable and terminates the marriage. The other considers the three-time repudiation as only the first of three, and therefore revocable, allowing the estranged spouses to resume marital life by simply getting back together again when they so decide. We have seen that the 'liberal' view leans towards to the second, more lenient position of allowing the marriage to resume. In this way, the unilateral fiat of the husband leading to a full marital break is dented, thus offering the wife some protection by way of allowing some time to pass after the first irascible moment. On the other hand, the wife left with one or two utterances of repudiation is kept hanging without a set deadline in an uncertain, often cruel situation. To get a divorce, she must go to court and plead for the harm occasioned to her, a burden that the husband does not face in similarly stark terms. There is no Solomonic solution to the debate, and it may well be that courts could benefit from a case by case situation without being bound by a sharp rule, so that they can champion the wife's preference when a three-time repudiation is uttered in one session. She might want to be free once and for all. Or she might prefer not to see the three-time repudiation irrevocably terminate the marriage at once.

The last case cited, the one decided by judge Mukhallaf, is interesting for additional reasons, as it sheds light on two thorny issues. The first, and most important, is the illegality of a repudiation made during the last days of a deceased person, and the court casting doubt on the sanity of the husband in such an instance. Quoting both ibn Qudama and a common Ottoman Majalla principle,[111] the judge considered that the repudiation, which was pronounced three days before the husband's death in addition to having been said on his deathbed,[112] was intended to deprive the wife from her share in the inheritance. It was therefore vitiated, and the classical jurists mention several examples in which the repudiated wife is still considered to

[108] M.3.32-39. General court of Madina, decided 5.4.1425/25/5/2004, confirmed in cassation 20.12.1425/31.1.2005.

[109] *li-anna al-talaq waqa'a mukhalifan*, M.3.35-6.

[110] *haythu nusiba ilayh al-talaq thalathan bi-lafz wahed wa hiya al-talqa al-ula*, M.3.36. See also the case of a three-time repudiation conditioned on the wife not going to hajj with her parents. It can be rescinded if the husband thought that the condition had been met whereas it was not. The explanation is confused. M.3.56-59, decision of *hay'a qada'iyya*, ibn Jubayr presiding, 8.4.1393/11.5.1973.

[111] M.3.36: '*man ta'ajjala shay'an qabla awanih 'uqiba bi-hirmanih*, by accelerating a matter before it is due, one gets deprived from it', which is a legal rule (*qa'ida*) found in in the *Qawa'ed* of ibn Rajab (Hanbali d. 1393, Beirut ed. 1988, rule 102), and in the *Ashbah* of ibn Nujaym (Hanafi, d. 1563, Beirut ed. 1999, at 156). It was adopted with a slight variation (*man ista'jala*) by the Ottoman Majalla as Article 99.

[112] *marad al-mawt*, Ibn Qudama, cited at M.3.36: '*li-anna hadha – ay al-mutalliq fil-marad – qasada qasdan fasidan*, because he, i.e. the one who repudiates in death sickness, means ill.'

be in the revocable period when this happens. She is not considered therefore to have been divorced, and inherits her share as if she was still married to the deceased. (M.3.37)

This last case is also interesting for evidence. To prove the divorce had taken place, the son of the deceased produced a written document stating that his father's wife was repudiated. The document was read in full in court. It was a statement that the son had taken from his father on his deathbed. It was signed by the father and witnessed by two adult males, one of whom was the son himself. The court brought in the second witness who said that the deceased had called him on the phone and told him that he was tired, did not go out, and that he had repudiated his wife thrice in an irrevocable manner. The witness recounted that the deceased said he would send a paper to this effect to him with his son, who was his work colleague. The witness signed the paper sent to him and kept a copy, which he produced in court. While the evidence seemed stretched, the court did not reject it as such, and preferred to resort to the argument of the deathbed action as vitiating the written documentation.

This was not sufficient for the court of cassation, which wanted to see the full probate decision,[113] and asked also for the wife to be put to the oath on this issue. She took the oath. The decision in her favour was confirmed in cassation.

IV. Children

Custody and filiation are the two main areas of disputes that courts adjudicate in cases involving children in Saudi Arabia. They tend to come with their own idiosyncrasies, especially for the establishment of filiation and the multiplicity of marriages in Islam, but common sense appears to guide the decisions of Saudi judges also here.

1. Custody

Modern Middle Eastern authors have distinguished between guardianship[114] and custody,[115] with guardianship inevitably inuring to the father as established *pater familias*, and custody being the effective daily control of child or children by the designated parent.[116] All the cases below refer to the latter category, which is evidently the most important. Both the classical and the modern canon establish an age before which minor children are the wards of the mother, after which the father has custody. As established elsewhere in the Middle East, the trend has been for modern courts to water down or ignore this general scheme 'in the interest of the child.'[117] Saudi Arabia's custody decisions confirm this overall trend.

In a typical case, judge Sulayman Ibrahim al-Hadithi at the court of Riyadh held for the 'right of the ward',[118] an eleven-year old girl whose father was claiming custody rights based on her age.[119] The particulars of the case resemble estranged parents' fight over their minor children

[113] *sakk hasr wiratha*, M.3.34.
[114] *wilaya*.
[115] *hadana*.
[116] See MALLAT, IMEL, 357-8.
[117] Id., 393-5.
[118] *haqq al-mahdun*.
[119] M.1.192-99, 9.2.1426/19.3.2005, confirmed in cassation, 3.3.1426/11.4.2005.

the world over. The parents had divorced a decade earlier, and their daughter grew up with her mother, who did not marry so long as the girl was with her. At age eight, following Hanbali custody (generally set at 7 years for boys and girls), her father took her to his house, where he lived on his own. He did not allow the mother to visit. Two years later, the mother waited for her daughter at the door of the school and took her home. When the mother succeeded in physically keeping her at her house, the father claimed his right to custody in court.

In court, the girl's mother and grandmother expressed their fear of leaving her alone with him, especially since he was without a job. At one point, the record shows the girl asking to be interviewed by the court officials alone.[120] Her deposition was taken, but no details were made public. The father's claim was then dismissed, with judge Hadithi ruling that the child's interest prevailed in law: 'The right is the ward's, this has been established by the scholars, and the rule is the interest of the ward. Since the defendant's mother did not marry again, the interest of the girl is to stay with her mother. This is in accordance with the Prophet's saying: 'you [the mother] have more right to the child [than the father] so long as you do not marry again.' (M.1.198)

The interest of the child, as shown in most jurisdictions in the Middle East, appears to have become the key consideration of judges in such cases. Saudi Arabia is no different when the situation appears to the judge as worrisome for the child. In this case, the father seemed unstable, invoking the death of his own mother as a spell on the family,[121] and living jobless alone with his daughter, whilst preventing her from seeing her mother. At one point the judge mentioned the rule of the mother losing custody if she remarries, and it transpires from the report that the mother did remarry for a couple of years between the surrender of custody to the father when the girl turned eight and the snitching episode which gave way to the court case brought by the father. However, despite what might have appeared as grounds for loss of custody, the judge remained severe with him, rejecting his claims outright and requesting that he exercise his right of visitation only upon a new judicial request. The girl must have made a damning deposition against her father in the *in camera* interview.

In contrast, sometimes the situation is so unfavorable to the mother that she is denied custody even when the children are minor. This was the case of a Russian mother who was married to a Saudi man who divorced her in 1426/2005. She had borne him two sons, in 1998 and 2002 respectively. He took them to Jordan, where the court granted him custody despite their young age. The wife did not live in Jordan, and a procedural device was used to assert the husband's custody over his small children. It was the husband's mother who brought the case in Amman demanding custody over her grandchildren against her son. With that 'fake' lawsuit, the husband was probably able to avoid notifying his previous wife, while engineering with his mother a phony case that would consolidate his effective custody over his sons. It worked, and the Amman court granted the father custody by denying the grandmother's (his own mother) request, 'who was demanding for the children to be surrendered over to her, and feared that the plaintiff woman [i.e. the mother bringing in the subsequent case in Riyadh her request for custody] would take the two sons to Russia, a country which was not Muslim; and the woman

[120] M.1.197.
[121] *sihr*, at M.1.196.

does not pray nor fast, and I [the husband] fear for the sons from her and for their beliefs [not to be impaired by their mother in that non-Muslim country].'[122]

So judge Sulayman ibn 'Abdallah al-Majed, in the general court of Riyadh, confirmed the judgment of his peers in Jordan by rejecting the mother's stronger rights under classical law for the protection of her infant children. He invoked their higher interest, namely to be brought up by their Muslim father.[123] In his conclusions, the Riyadh judge mentioned 'the agreement of the majority of Maliki, Shafi'i and Hanbali scholars that the father has the right [of custody] in this case, including ibn Qudama in the *Mughni*, vol. 8 p. 193 – if the country to which the father had moved was secure and the road to it secure, then the father has a better right than others, whether he resides in it or he moves.' (M.1.377)

The plaintiff/mother, he concluded, has visiting rights, and retains the right to request custody if the former husband returns to her place of residence. The attorney of the mother made an appeal but failed to follow up, making the lower court decision final.

While the bias was evident against a Russian mother who could educate the children as Christians back in her country if she had been granted custody, judge Majed seemed genuinely attentive to the child's interests in another decision in which he granted custody to the mother of a minor boy because 'she could better take care of him'.[124] To be precise, the judge argued that 'custody was a right both of the ward and the custodian,'[125] and concluded that 'the interest of the (toddler) child' prevailed.[126]

2. Filiation

A fair amount of filiation decisions appears in Saudi courts.

In one case, the judge accepted a filiation for a son born 18.1.1429/27.1.2008 almost two years after his father's death (22.2.1427/23.3.2006), on account that all the heirs had accepted it, and that the lapsed period remained within the maximum laid by ibn Qudama.[127]

In another case, following divorce, the filiation of a daughter was confirmed against the 'doubt' of the father.[128] The daughter was born during the marriage, but the father was seized with a

[122] M.1.372-402, at 373, with the full Amman decision of 2005 quoted at 374.

[123] M.1.376. There seemed to be doubt over the religion of the mother in the case, who argued that she had converted to Islam, see at 375.

[124] M.1.392-395, decision confirmed in cassation on 27.6.1427/24.7.2006.

[125] *kawn al-hadana haqqan lil-mahdun wal-haden ma'an*, at 394.

[126] In another case where the parents lived in different cities, custody went also to the father in a dispute where the mother of two boys, aged 11 and 13, had refused a judicial settlement requesting the father to deliver the boys to their mother during the weekend, and for a week during the holidays. M.1.296-99. The judge mentioned that 'the jurists had decided that if the home of the two parents differed, custody goes to the father but the children cannot be prevented from visiting their mother.' (at 298). Note the concept of *'hadana murtaja'a'*, i.e. the possibility of new requests when circumstances change, such as change in the residence of the divorced parents. This is also the case for visits of children to their divorced parents, which the court deems always subject to being reviewed for changed circumstances, see case M.3.50-55, at 55. Decision of 18.4.1391/13.6.1971 by *hay'a qada'iyya* presided over by Muhammad ibn Jubayr.

[127] M.3.40-44. Decided 25.2.1429/4.32008, confirmed in cassation 3.4.1429/10.4.2008. In *al-Mughni*, 9, 180, ibn Qudama mentions in special circumstances the acceptance of filiation up to two years, in some reports even four, after the father's death.

[128] Decision of judge 'Abd al-Rahman Aal 'Atiq, Riyadh, dated 21.3.1428/8.4.2007, confirmed by cassation 19.3.1428/6.4.2007, at 68-75.

strong sense of doubt as to his paternity, and brought a case in court to reject her filiation. Marriage and divorce documents were produced and ascertained by the court, including by deposing a plethora of witnesses. Against the father's doubt, the authority of Ibn Qayyim's *Zad al-ma'ad* was invoked: 'To the one whose wife gave birth to a child who could have been from him, the child is considered his if birth has taken place after half a year from the moment sexual intercourse was possible.' (M.2.74) This having been the case here, the father's denial of paternity failed.

In a third, unusual paternity case, the plaintiff came to court ten years after the divorce to claim as his son the boy who was born to his former wife ten months after their separation.[129] He had seen the evidence 'in his dream.' The court responded patiently with a long string of citations from classical jurists vindicating the wife's claim that having her period after the divorce was evidence that the son could not be the first husband's, as well as a rejection of his 'dream' as evidence. Both classical scholars Shatibi and ibn Taymiyya were quoted to dismiss proof by dream. In a reference prefiguring the Cartesian *malin génie*, the court quoted 'Shaikh al-Islam ibn Taymiyya R.I.P.':

> The one who sees a dream is often a liar. To appreciate his (dis)honesty, the one who might have brought the dream to him could well be Satan, and the pure vision that carries no proof as to its veracity cannot be used as evidence for anything by common scholarly accord. The verified sayings[130] of the Prophet establish it: 'The vision is of three types, a vision of God, a vision of what the person herself asserts, and a vision of Satan.' So if the vision is of three types, it is necessary to distinguish each. End of ibn Taymiyya's quote.[131]

The judge concluded: 'The vision of non-prophets will not be used in a court of law in any way, except if it confirms already existent legal rules. If it does so, it is accepted and applied, if not it must be dismissed and avoided.'[132] 'Silence of the claimant for over ten years is a strong sign of the invalidity of his claim'. (M.2.84) The claim was dismissed. The doubting father's appeal in cassation was summarily rejected.

V. Succession and trusts

One is not likely to find many cases on inheritance. The field has been well circumscribed following a common hadith emphasizing the importance for jurists to be acquainted with the 'science of shares'.[133] Sunni and Shi'i rules differ vastly, but the mathematical exercise that judges have mastered early on from the disjointed verses of the Qur'an is solid in both cases. In contrast to marriage and divorce, changes to the classical system in the modern world are limited, and the inheritance judge treads on firm grounds.[134] It is therefore on peripheral issues that disputes over inheritance tend to emerge.

[129] M.2.76-86, judge Nayef ibn Ahmad al-Hamad, court of Nafi, decision of 4.11.1415/16.9.1994, decision of the court of cassation 25.11.1415/24.4.1995.
[130] *sahih*.
[131] M.2.84, quoting ibn Taymiyya, *Majmu' al-fatawa*, 27, 458.
[132] M.2.84-5, quoting Shatibi, *I'tisam*, 1, 260.
[133] *'ilm al-fara'ed*. The Prophetic saying appears in various forms, including '*ta'allamu al-fara'ed wa 'allimuh fa-innahu nisf al-'ilm* (Learn the sciences of shares/inheritance and teach it, for it is half of all science.)'
[134] See for a summary of basic rules MALLAT, IMEL, 358-60.

One such case is a conflict mixing inheritance and marriage issues. The plaintiff, a woman repudiated after 25 years of marriage, appeared before judge Ahmad al-'Arini to request the annulment of a repudiation uttered a year earlier.[135] She argued that the repudiation was null because her husband had AIDS and cancer. She also claimed that the objective of the repudiation was to deprive her from her inheritance, and to deprive her nine children from benefits they are entitled to. The unsaid legal principle was the 'illness of death',[136] which allows the questioning of a donation because of the sick man's sanity that death illness may have impaired.

The defendant admitted to the cancer but did not mention AIDS. Following his statement, the court requested and received a long medical report quoted in full in the decision. The medical report confirmed that he had both AIDS and cancer, but also suggested that he was being treated effectively for it. (M. 1.303)

The judge asked the husband why he had repudiated his wife. He explained that he could not live with her any longer, and that he was committed now to another, previous wife, with whom he also had several children. The court also asked about his job. He was still working. This allowed the judge to conclude that illness had not impaired his sanity, especially since the repudiation had taken place over a year earlier. The defendant was then asked whether he would consider the return of the repudiated wife. He responded that was firmly opposed to taking her back. Judge 'Arini could only confirm that 'death illness' did not apply:

> Since the plaintiff confirms that the defendant continues to work, and considering that a full year has passed since the divorce, and the defendant remains alive and well, what the plaintiff stated is not persuasive, because the classical jurists[137] are of the view that death illness prevents a person from working. In view of all the above, I rejected the defendant's case and explained to her that her husband's repudiation remained valid and effective.[138]

The court of cassation rejected the wife's appeal. The consequence on her inheritance was stark. She had become estranged from her previous husband and from any entitlement to inherit his estate.

Hereditary trusts are also an area rife for disputes over succession. Waqfs (Arabic plural *awqaf*) are trusts of two kinds in both classical and modern law, and remain so in the countries where they still survive: the family or hereditary trust,[139] and the charitable trust[140] designated for non-kin beneficiaries at large, usually the poor and disenfranchised. Waqf rules are complex, and the institution plays a significant economic and social rule in the history of the Middle East. Where, as in Saudi Arabia, the waqf survives as an institution, its regulation is also complex. To the traditional system is increasingly superposed the commercial law of trust in its Western model, as in companies with trustees as fiduciaries. In company law, the fiduciary dimension adds a significant layer of complication.

[135] M.1.300-5. Decided 30.12.1426/30.1.2006, confirmed on cassation 14.2.1427/15.3.2006.
[136] *marad al-mawt*. See above n. 112.
[137] *fuqaha'*.
[138] M.1.305.
[139] waqf *dhirri*.
[140] waqf *khayri*.

Waqf terms are honored by Saudi courts, and judges are considered the ultimate trustees of a waqf. In a case reported in Ahkam, the terms of a waqf established as far back as 1279/1862 in the city of Madina were upheld.[141] With time however, the revenue from the waqfs, which is a condition for its effectiveness, may dry up, setting in complex dismantlement rules of changing the waqf into a disposable property.[142]

Normally, a person may dispose of property at will during lifetime or as specified upon death. A first case revolved over the difference between a will and a waqf. It came to the HJC from the first instance court of Jeddah by way of the Ministry of Justice.[143] The question was whether the deceased could have willed the third of his estate, the third being the maximum portion allowed for a will in the Islamic law of succession, to the benefit of 'the poor of village x in Hadramut.'[144] More specifically, was the distribution of that portion of the estate outside Saudi Arabia tantamount to a trust, in which case it would be forbidden on account of a statute prohibiting trust benefits to be spent outside the Kingdom?

The HJC allowed the will to stand. Despite language that looked like a trust, it argued, this was a will rather than a trust, and because of this, there was nothing to prohibit it from benefiting heirs abroad.

Free disposal of property by way of waqf was confirmed in another decision, issued in 1426/2005, for an important family trust established over fifty years earlier, on 1.12.1362/28.11.1943.[145] The case is complex, for the trust had been established in the form of a will dated 8 dhu al-hujja 1361/16.12.1942, which a probate judgment[146] acknowledged only on 11.9.1425/20.12.2004. Part of the trust had been respected by the heirs, some of it had been substituted over the course of time, but there emerged two outstanding issues which the court had to rule on: the claim by the children of the founder's daughters to a share in the inheritance, and the equality in trust benefits by the sons and daughters of the testator/founder in accordance with the waqf. The first claim did not seem serious, considering the rules on inheritance, which do not give any share of the estate to such distant relatives. The second claim, on the equality of male and female offspring in accordance with the trust deed, was more serious.

> Therefore I decided as follows: first, I explained to the daughters' children who intervened in the trial that they have no right in the trust which is the subject of this case. Second I explained to the trustee[147] defendant that he must divide the benefits of the trust in accordance with the wishes of the founder, equally between sons and daughters, and between the children of his sons but not the children of his daughters. The daughters' children have nothing for them in the trust. Third, I explained to the daughters x and y of the founder that they are entitled to bring a case against their brothers to reclaim, if they so wish, the difference between what they are owed and what they were given in the past,

[141] Ahkam, 9, 5-29. Decided 28.10.1433/15.9.201, confirmation on appeal 11.3.1434/23.1.2013.
[142] This is called substitution *istibdal*.
[143] HJC, *hay'a qada'iyya 'ulya*, four judges headed by Muhammad ibn Jubayr, M.2.18-21, decision dated 30.3.1392/12.5.1972.
[144] M.2.19. Hadramut is a province in Yemen.
[145] M.1.214-23. Decision of Ahmad ibn Sulayman al-'Arini, General Court of Riyadh, 25.5.1426/2.7.2005, confirmed in cassation on 5.9.1426/8.10.2005.
[146] *hasr al-irth*.
[147] *nazer*.

> because what they were deprived from contradicts the terms[148] of the trust. This is what appears to me [right] and I have ruled accordingly. (M.1.232)

On substance therefore, and with textual support found in authoritative Hanbali sources such as ibn Qudama's *Mughni*, the decision paves the way to inheritance arrangements by way of trust that make heirs equal irrespective of the intestate rules of 'two shares for a male, one share for the female.' (Qur'an 4:11) This is a remarkably enlightened decision resting on the sanctity of the trust founder's choice.

Also in the matter of waqf, the Judicial Council had issued a judgment, which, despite its brevity, may constitute a significant precedent on the totally opposite side of the sanctity of the trust.[149] In this brief case dated 1390/1970, a radical substitution ended[150] the waqf altogether.

The case arose upon the succession of children to a father who died insolvent without any property left to his children, yet had established a trust over four properties he owned in Mecca. The heirs were completely deprived from their inheritance by the trust, as the only property of the father was included in the waqf deed. Despite the established sanctity of the waqf as principle, the judges decided otherwise. After taking cognizance of the trust deed,[151] which had been authorized by the previous head of the Mecca court, the Judicial Council simply allowed it to be voided: 'Since the trust deed did not declare that the founder had not left behind any other property than the one he put into the trust, and considering the opposition of the heirs without anyone arising to confront them, the Council does not see an objection to hear the heirs' opposition to the validity of the trust, and do with it what the law dictates.' (M.2.24) The trust was dismantled.

VI. Conclusion

The span of judgements examined in this article provides a fair sample of how family law disputes are adjudicated and solved in Saudi Arabia. Overall, the litigants appear to get a fair hearing in court, and judges are attentive to their pleas irrespective of gender. The readiness for judges in matters of marriage to let a woman prevail over her father in choosing her husband, to let a wife get out of a difficult marriage because 'she hates her husband', to make the best interest of the child weigh in favour of a divorced mother, and to allow a family trust to give equal shares to daughters and sons if the founder of the trust has so chosen, all these judgments show pugnacious women seeking their day in court and prevailing. The language is simple, and the parties are heard clearly in the reports. Judges look into the tradition, quote classical scholars, and listen to the pleas of the litigants intently. They often defer to expert committees, whether legal as in the opinion of muftis, or medical when mental impairment or the affliction of AIDS need to be ascertained for the purpose of the trial. Procedurally, the report shows a simple process and an effective mode of operation. The timeframe between the first appearance in court of the litigants and the end of the generally two-tiered judicial system

[148] *shart*.

[149] M.2.22-24, decision of the Judicial Council, *al-hay'a al-qada'iyya*, of 14.8.1390/15/10/1970, probably the same High Judicial Council which issued the judgment of 1392/1972 discussed above at M.2.18. The report mentions at M.2.23 that it was the 'scientific council', *al-hay'a al-'ilmiyya* which issued the judgment, but does not give precisions on its composition.

[150] *inha'*.

[151] *sakk al-waqfiyya*, or *waqfiyya* simply.

is reasonable. Judges are interventionist and conciliatory, and do not hesitate to suggest compromises to the litigants, with a high degree of didacticism as they explain their rulings and court regulations to the parties at various stages of the trial, and propose to them their legal options.

Still, the discrimination prevailing at the root of the legal system is not challenged. Polygamy, the husband's absolute right to repudiate his wife, or intestate rules giving two shares for females as opposed to their counterpart males are the preserve of a traditionalist, pre-modern understanding of the law as unequal between genders. Here Saudi courts follow an established pattern common to most Muslim/Middle Eastern jurisdictions.

In the normalization of law as the article posits it, Saudi judges appear no different from their counterparts elsewhere in the world. In the massive majority of cases, their decisions are just and balanced, albeit within a legal system where women's equal rights are impaired. Normalization also operates, for the first time in the country in a hundred years, through the emergence of stable and consistent case-law, made finally available to the larger public. Even without a comprehensive family code, the Saudi citizen can now ascertain his and her rights and obligations precisely enough.