

The Custom of Nahawa in Iraqi Society: A Comparative Study Between Iraqi law and Islamic Jurisprudence

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Summary:

There may be some customs or beliefs prevalent in a society that may cause harm to individuals or society as a whole, and these customs may be rooted in culture or traditions and may be difficult to change, and among these customs is the habit of niha in Iraqi society, and this research aims to shed light on this custom, which means the right of the relative to prevent the marriage contract or to force a woman to marry her relative, which is contrary to what the rulings of jurisprudence have said. In order to achieve the goal, the descriptive-analytical comparative approach was believed, and the research reached the agreement of the Iraqi Personal Status Law with the provisions of Islamic jurisprudence on the right of a woman to consent to be her husband, which is contrary to the tribal custom, and the research recommends that the responsibility for practicing the custom of nahwa in Iraqi society should be applied and follow the provisions of the Islamic jurisprudence.

Keywords: Habit of Prohibition, Coercion, Marriage Contract, Clans.

Abstract:

There may be some customs or beliefs prevalent in a society that may cause harm to individuals or society as a whole. These customs may be deeply rooted in culture or tradition and may be difficult to change. Among these customs is the custom of "Nahwa" in Iraqi society. This research aims to shed light on this custom, which implies a relative's right to prevent a marriage contract or force a woman to marry a relative. This contradicts the provisions of Islamic jurisprudence. Islamic schools of thought agree that a marriage contract is a consensual contract in which the offer is

coupled with acceptance, and that there is no room for coercion in marriage contracts. To achieve this goal, the descriptive, analytical, comparative approach was adopted. The research concluded that Iraqi Personal Status Law agrees with the provisions of Islamic jurisprudence regarding a woman's right to consent to her husband, which contradicts tribal custom. The research recommends the implementation of accountability for practicing the custom of "Nahwa" in Iraqi society and the adherence to the provisions of Islamic jurisprudence.

Keywords: The habit of Nahawa, coercion, marriage contract, tribes.

Introduction:

Social heritage is one of the traditions and customs that are practiced in the context of social relations, which control the structure and decisions of society, and are stable and accepted by most members of society, and it is not easy to try to change or replace them.¹

Iraqi society, like other societies, is surrounded by many social customs and traditions in the behavior of its members, sometimes this effect is positive, and sometimes it is negative, and one of those negative customs (tribal nehat) is one of the old tribal social customs, which is still applied in many areas of Iraq, both in cities and in the countryside, and its idea is based on a very old tribal custom that prohibits a girl from marrying a man who is a stranger to the clan or its members, and this custom enables the cousin Or the uncle forbids the girl to marry her to one of her relatives².

This custom is one of the most prominent manifestations of violence against women in Iraq, as it can prevent a girl from marrying what has been offered to her, and the justification for this prohibition is that the applicant

1 Khudair, Hamza Jawad, Matrud, Ahmed Jassim, Socio-Economic Changes and Their Reflection on the Iraqi Rural Family, Journal of the Faculty of Basic Education for Educational Sciences and Humanities, Vol. 26, April 2016, p. 300.

2 Obeid, Hussam Taklif, Customs and Traditions and Their Impact on the Behavior of the Individual in Iraq: The Tribal Tradition as a Model, Journal of the Faculty of Arts, University of Kufa, 2019

for marriage is not a member of the clan, and therefore the cousin is the first to marry her¹.

According to this custom, a family or a branch of the clan "forbids" a girl who is close to the family from marrying someone other than a person she chooses for her, and if she refuses to marry him, she is often forced to do so, and in a few cases, when she is not forced, the family or branch of the clan prevents the girl from marrying someone other than the designated person, and if someone breaks this prohibition, whether the girl or a strange family has proposed to marry her, it usually leads to confrontations. This shows that the tribes are the de facto rulers in the countryside and even in some towns.

Article 9 of Law 188 issued in 1959 stipulates that "no relative or non-relative shall have the right to compel any person, male or female, to marry without his consent, and the contract of forced marriage shall be considered void if the marriage is not entered, and no relative or non-relative shall have the right to prevent a person who was eligible for marriage under the provisions of this law from marrying, so the penalty shall be for a period not exceeding 10 years or imprisonment for a period of not less than 3 years."

In addition, the provisions of Islamic jurisprudence have agreed on the prohibition of coercion in marriage, and from this point of view it is clear that the *tithe nahwa* is a traditional social system in Iraq based on tribal relations, which is considered part of the Iraqi cultural heritage, but it can have a negative impact on law and justice and is rejected by the provisions of Islamic law².

Importance of the Research:

The habit of tribal *nawah* is one of the bad habits that lead to the instability of societies and its occurrence due to a state of insecurity, and Iraqi law considers any form of "tribal *nahwa*" as a crime punishable by imprisonment for a period of up to three years, in addition to violating the provisions of Islamic jurisprudence, which forbids coercion in marriage.

1 Al-Awaili, Hamoud Haider Mubarak, Negative Tribal Customs from the Perspective of Legal Texts, *Uruk Journal of Humanities*, 2021, p. 2563.

2 Rashid, Asmaa Jameel, Marriage in Iraq: Its Patterns, Forms, and Cultural and Historical Contexts, *Journal of the Faculty of Basic Education for Humanistic Educational Sciences*, No. 47, June 2020, p. 108.

Research Objectives:

This research aims to shed light on the tribal custom of Nahwa, as it is a prevalent and inherited custom in the societies ruled by the tribe, and this custom is considered one of the backward traditions that contradict our religion, due to the lack of awareness among the members of the clan and the society in which this custom prevails.

Research Problem:

The problem of the research is to try to answer the following question: What is meant by the tribal habit of Nahwah? What is the legal and jurisprudential adaptation to it?

Research Methodology:

In this research, I followed the descriptive-analytical-comparative approach, by addressing the custom of tribal prohibition in Iraqi law and comparing it with the provisions of Islamic jurisprudence.

Research Plan:

The First Requirement: The Concept of the Tribal Habit of Prophethood in the Tribal Society

The second demand: the legal adaptation of the tribal tradition in Iraq.

The third demand: the jurisprudential adaptation of the tribal habit of Nahwah.

The fourth demand: A comparison between Iraqi law and Islamic jurisprudence about the habit of nihwa.

The first requirement

The Concept of Nahwa in Iraqi Society

Nahwa is derived from nahi, which means prohibition, as nahwa marriage refers to the absolute right of a cousin to marry his cousin and to prevent her from marrying others, and hence it is the most strict type of internal marriage, as it is prescribed only for marriages between cousins.¹

1 Mahmoud, Asmaa Abu Bakr, Hussein, Mahmoud Abdel Hamid, and Ibrahim, Mustafa Mahmoud Mustafa, 2020, Customs, Traditions and Customs as a Basic Haunted of Social Values, Journal of Reading and Knowledge, p. 223, p. 163. -

The tribal custom, which prevailed in the countryside and among the urban tribal groups until the 1970s, affirms the right of the cousin to marry his cousin and his absolute right to "annul" her marriage to any person, whether from the same clan or from outside¹ it.

First: Definition of Nahwa:

We have not noticed a clear and specific definition of the word "nahwah" in the law, as well as the explanations of the law, as it is a word that is far from the legal texts, but the echo of this word has hit the joints of the law strongly, which prompted us to investigate the clarification of the word "nahwa", as some have defined it as "old social customs according to which a male or female relative is forced to marry or forbids it based on the bond of kinship and tribal affiliation"², as defined by others as "very old customs that prohibit a girl from marrying a man who is a stranger to the clan)³.

We can also define it as "an old dangerous social custom in which women are often persecuted by preventing them from marrying someone from outside the clan, and this custom is usually resorted to by the uncle or cousin in order to marry her to himself or a relative."

The Iraqi judiciary has dealt with it on the basis of what is stated in the Personal Status Law in force as "the process of preventing marriage by a relative of the wife, often an uncle or cousin".⁴

For example, when another foreigner, i.e. one of her relatives, proposes to her, her cousin prevents her from marrying her, because this social custom is largely limited to the countryside, and may also extend to the city and everywhere in Iraq.

It should be noted that there is no definition of nahwa in the provisions of Islamic jurisprudence, because these customs are contrary to the teachings of Islam, which forbids compulsion to marry.

1 Abbas, Bakr Ali, Hussein, Ahmed Fadel, Abbas, Abdul Basit Abdul Rahim, Tribal Customs under the Iraqi Constitution and Laws, Journal of Politics and Law, No. 15, June 2016, p. 629.

2 Zaid al-Araji, "Al-Nawah breathes its last breath after firm judicial proceedings", article published on the website of the Iraqi Supreme Judicial Council: www.hjc.iq

3 Duaa Azad, Tribal Nahwa, article published on the website of the Iraqi Supreme Judicial Council: www.hjc.iq

4 Article 9 of the Iraqi Personal Status Law No. 188 of 1959.

Second: The Effects of the Tribal Tradition:

Its presence leads to some of the negative "social and psychological" effects of the girl, if the girl refuses to marry the one who forbids her, her fate is either murder, spinsterhood, or running away with the one who forbids her, and in this case it is called (the plunderer), often when the girl marries the one who forbids her, life is very bad, and this in turn leads to family disintegration.

There are many cases of suicide, and divorce stories that result from this social custom in Iraq, as it infringes on human rights and freedoms, its idea may be based on suppressing the freedom of the girl to choose her life partner, and establishing a family life based on sound foundations. The marriage contract is one of the consensual contracts that are concluded between a "male and a female"¹ that is lawful for him.²

The second requirement

Legal Adaptation of Tribal Leadership in Iraqi Law

The habit of forbidding is an example of a backward mentality, as women are forced to choose their life partner and do not even have the right to express their opinion on it, as it is just a tool for having children and raising them, the power here belongs to the strongest, and women are always the weakest link, and on top of them lies calamities, amid these problems and oppression, and the most important question revolves around whether the law has taken upon itself to protect women from this injustice that falls on them or not.

In fact, the vocabulary of the law is very broad, as the law, as it is known, is diverse and multiple, including criminal and civil ... But what matters to us are the relevant laws such as the Penal Code, the Personal Status Law, and the Anti-Terrorism Law, given that these laws are related to the subject of the crime. To which we will answer as follows:

1 Al-Douri, Ali Talfah Mohammed, The Crime of Preventing Marriage in Iraqi Legislation, Journal of Comparative Legal Studies, Vol. 7, No. 2, 2021, p. 733.

2 Rashid, Asmaa Jameel, op. cit., p. 109.

First: Prohibition in the Penal Code:

This is the position of most laws, as they often refrain from mentioning the texts themselves in order to prevent elaboration in the legal text.¹ Whether it is material or moral, and the penal text criminalizing this act applies, which may be punishable by up to seven years or imprisonment, and this is what the judge can resort to in this type of case, because he is governed by the text and does not deviate from it.

However, we believe that this provision does not apply or is not compatible with the nature of the criminal incident, by which a person is persecuted in a horrible and cruel manner, and its effects remain for life. Before criminals escape punishment, we hope that the Iraqi legislature will address this either by amending the Penal Code, by adding a provision criminalizing these negative customs, or by amending the text of the threat in a manner commensurate with the gravity of the incident².

The act of "tribal prohibition" is known in circles and in tribal customs, so the tribal custom considers it forbidden in Sharia and law, as it infringes on the rights of others, whether it is by preventing the girl from marrying whoever she wants, or it is forcing her to marry, in both cases this act is considered one of the legally criminalized acts that require punishment, because marriage is a contract based on "consent and acceptance", which is one of the basic conditions to prove its validity. It is considered a form of adultery, so it is forbidden by law and must be combated³.

Second: The Iraqi Personal Status Law:

Referring to the Iraqi Personal Status Law No. 188 of 1959 and its amendments, it has been found that it plays a pivotal role in regulating family relations and the rights and duties of family members in Iraq, and this law aims to achieve justice and gender equality, guarantee the rights of women and children, and enhance the stability of the family and society.

The text of Article IV of that law included the stipulation that: "The marriage contract shall be concluded by consent, in the language or custom

1 Article 430 of the Iraqi Penal Code No. 111 of 1969.

2 Abbas, Bakr Ali, Hussein, Ahmed Fadel, Abbas, Abdul Basit Abd al-Rahim, op. cit., p. 629.

3 Al-Kaabi, Wafaqan Khudair, Abbas, Najla Taleb Khudair, Customary Prohibitions of Marriage: "Tribal Prohibition as a Model of Arbitrariness", Digital Knowledge Center, p. 20.

of one of the contracting parties and the acceptance of the other, and the agent shall act in his place.

The text of this article promotes the rights of individuals to freely choose their life partner, guarantees the protection of their personal rights, contributes to the achievement of justice and equality in marital relations, and promotes the stability of the family and society.¹

It is clear from the foregoing that the Iraqi legislature did not deal with the crime of forbidding in the Personal Status Law, but it did deal with the issue of coercion that occurs in order to conclude a marriage or, on the contrary, the prohibition of its infliction, whether on the male or the female, by relatives and according to their degrees as well as by others². Imprisonment for a period not exceeding ten years or imprisonment for a period of not less than three years.

This is in accordance with the text of Article 9 of the Personal Status Law, which affirms that: "No relative or non-relative shall have the right to force any person, male or female, to marry without his consent, and the marriage contract shall be considered invalid, if the entry is not made, and no relative or non-relative shall have the right to prevent a person who was eligible for marriage under the provisions of this law from marrying. by one of these two penalties if he is a first-degree relative, but if the offender is a non-custodial person, the offence shall be imprisonment not exceeding ten years or imprisonment for a period of not less than three years." ³

When reading and analysing the above text, we find that the Iraqi legislature did not mention the crime of forbidding in the text, but rather dealt with the issue of coercion in marriage, and this happens in a different way, whether through the adoption of a custom or in any way in which it confiscates the right of women to give their opinion on the most important issue in their lives, on the basis of which their personal life is completed.

We also find that the legislator has made an unwarranted distinction between two cases of punishment, as we find that it reduces the punishment

1 Refer to the Iraqi Personal Status Law No. 188 of 1959, Iraqi Chronicle, p. 20, part one.

2 Article (9) of the Personal and Personal Status Law of Iraq in force No. (188) of (1959)

3 Article (9) of the Personal and Personal Status Law of Iraq in force No. (188) of (1959)

for the nearby criminal and tightens it on the strange criminal, which is an unjustified distinction and discrimination, as in both cases he is considered a criminal and has committed a major crime.

The issue of initiating criminal proceedings in these crimes is also somewhat difficult for the victim, as she is often helpless in the midst of the dominance of her parents and cousins, as she fears that the crime has been committed against her and that a complaint has been filed against them, in addition to the fact that this crime has occurred on the victim, which is an event that is not of legal age, which requires the filing of a complaint with her guardian¹ It is often the one who commits the crime against her, which further complicates this problem, so we call on the Iraqi legislator to intervene legislatively and amend this text in order to guarantee the rights of the victims and punish the perpetrators with the most severe punishments.

Article 9 of the Iraqi Personal Status Law confirms that "tribal nawah" is an act that violates the law and its perpetrators entail civil liability towards the affected individuals, this responsibility includes compensation for psychological, moral and social damages, and the annulment of any marriage that was done under duress or under the pressure of "nahwa", thus the law helps to protect the rights of individuals and promote social justice. By obliging the perpetrators of "nahwa" to pay compensation to those affected, the law strengthens the concept of the rule of law and ensures justice for affected individuals².

The Iraqi Civil Status Law considers the contract by coercion to be invalid, and granting the coercion after marriage the permission to request judicial separation, as stated in Article (40/4) of the Personal Status Law, as coercion is considered a crime according to the above article according to the elements of the crime of forced marriage referred to in the penal text of the Iraqi Personal Status Law No. 188 of 1959, as amended. If the offender who caused the coercion to enter into a marriage contract is a first-degree relative of the victim, such as the father, son and mother, their punishment shall be imprisonment for a period not exceeding three years and a fine or one of these two penalties, and the penalty shall be a misdemeanor

1 Article (3) of the Code of Criminal Procedure in force No. 23 of 1971.

2 Al-Omari, Reem Rami, Coercion and its Impact on Marriage Contracts, Journal of Islamic Sciences, Arab Journal of Science and Research Publishing, Issue 3, Volume 2, June 2019, p. 80.

according to the legal division of the type of crime, but if he is a relative of the second or third degree, the penalty in this case shall be imprisonment of the offender for a period not exceeding ten years or imprisonment for a period of not less than three years. It is one of the types of marriage that is contrary to Islamic law and the law, because it is not carried out in accordance with the conditions of the marriage stipulated in Article (6) of the Personal Status Law, which requires consent and the association of the offer with acceptance and other conditions of the marriage of this sacred bond.¹

The Third Requirement

The Habit of Eating in Islamic Jurisprudence

The Islamic schools of thought agree that the marriage contract is done with affirmation and acceptance, and they agree that the marriage contract is one of the consensual contracts, which is represented by the association of the offer with acceptance, and there is no place for compulsion in marriage contracts, and the Holy Qur'an has confirmed this (and one of its verses is that He has created for you from among yourselves spouses that you may dwell in them, and He has made between you affection and mercy.²

The books of Tafseer have dealt with this verse in more detail and the foundations required to build the marital relationship between husband and wife, and for the clarity of the intention of the legislator in this verse without referring to the books of Tafseer, there is no peace between the spouses if the marriage is based on coercion and hatred, and it is one of the effects of the crime of murder, and the payment of revenge and the love of revenge that continues in the heart of the husband towards the wife who is forced to have that relationship³

⁴ The Almighty said: "O you who believe, it is not lawful for you to inherit women against your will, and not to harass them so that you may take away

1 Al-Moussawi, The Legal Position on Negative Tribal Customs, The Phenomenon of Quarterly Marriage or Forced Marriage as an Example.

<http://www.m.ahewar.org/s.asp?aid=471528&r=0>

2Verse 21 of Surah al-Rum.

3 Abbas, Bakr Ali, Hussein, Ahmed Fadel, Abbas, Abdul Basit Abdul Rahim, op. cit., p. 635.

4Verse 19 of Surah An-Nisa.

some of what you have given them, except that they come with a manifest indecency, and treat them with kindness.

It was narrated from Prophet Muhammad (peace and blessings of Allaah be upon him) that he said: "Do not marry a maiden until she has been commanded, and do not marry a maiden until she has asked permission."¹²

The guardian must ask the woman's permission before marrying her, and he does not make any distinction whether she is a virgin or a dress, and he has no right to force her to marry whoever she wants.

It was narrated in al-Bukhari from the great companion Khansa bint Khaddam al-Ansariyyah: She was wearing a garment and her father married her while she was hateful, so the Messenger of Allah (may Allah's peace and blessings be upon him) came to tell him about her marriage.

This is the view of the majority of jurists from the Malikis, Shafi'is, Hanbalis and Ja'faris and we present their views as they are mentioned in the texts³:

Imam Malik (may Allah have mercy on him) said: "It is not permissible for a person who is disliked to do anything, neither emancipation, divorce, marriage, sale nor purchase." ⁴

Imam al-Shaafa'i (may Allah have mercy on him) said: "If he fears this, then the ruling on what he is disliked is waived from him, whether it is a purchase, a sale, an acknowledgment of a man's right or a hadd or an acknowledgment of marriage, emancipation, divorce, or any of these

1 Al-Jubouri, Taha Saleh Khalaf Hamid, Coercion of Marriage, Al-Rafidain Journal of Law, No. 53, Vol. 15, Year 17, 2012, p. 184.

2 Al-Omari, Reem Rami, op. cit., p. 73.

3 Fakhr al-Din Othman bin Ali al-Zail'i al-Hanafi, Tabin-ul-Haqiqat, Sharh Kanz al-Daqa'iq, vol. 2, Dar al-Kutub al-Islami, Cairo, 1313 AH, vol. 2, pp. 195-196.

4 Malik ibn Anas ibn Malik ibn Amer al-Asbahi al-Madani, al-Muwadda al-Kubra, vol. 2, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, without a year of printing, researched by: Zakaria Amirat, p. 436, and see: Muhammad Alish, Manah al-Jalil, Commentary on the Mukhtasar of Sayyid Khalil, vol. 4, Dar al-Fikr, Beirut, 1409 AH-1989 AD, p. 56.

things which is makruh, then which is more recent and which is makrooh is not obligatory." ¹

It is narrated in al-Mughni to Ibn Qadamah from the Hanbalis: "It is not valid to free the one who is forced to do so, just as it is not valid to divorce him, nor to sell him, nor any of his actions, because it is a statement that was imposed on him unjustly, and no ruling has been established for him like the word kufr if he is forced to do so." ²

The owner of al-Rawd al-Murabba explained that marriage has four conditions and said: "For the condition of 'the second: their consent', it is not valid if one of them is forced to do so unjustly, such as selling, 'except for the adult, who is a fool, and his father or guardian marries him in the marriage.'" ³

It is stated in the fatwas of Ibn Taymiyyah that "and what is indicative of the contracts of the makrah and his sayings such as his sale, loan, mortgage, marriage, divorce, return, oath, vow, testimony, ruling, acknowledgment, apostasy, and other sayings, all of these sayings of him are nullified and wasted, and more than that is agreed upon." ⁴

Al-Ja'fariyyah said: "If a man is forced to divorce, then he utters it, which means that the compulsion is paid for himself, which has not happened to us, as well as belief and other contracts." ⁵

Sayyid Qutb pointed out that the Holy Qur'an depicted the relationship between the spouses in a sensual way that stems from the actions of the

1 Al-Shaff'i, Abi Abdullah bin Idris, Al-Umma, vol. 3, Dar al-Fikr for Printing, Publishing and Distribution, 1400 AH/1980 AD, p. 240.

2 Al-Maqdisi, Abdullah bin Ahmad bin Qudama, Al-Mughni fi Fiqh of Imam Ahmad bin Hanbal Al-Shaybani, vol. 10, Dar Al-Fikr, Beirut, 1405 A.H., p. 281.

3 Al-Hanbali, Abd al-Rahman ibn Muhammad ibn Qasim al-'Asmi, footnote to al-Rawd al-Murabba Sharh Zad al-Mustaq', vol. 6, 1st edition, without place and date of publication, p. 255.

4 Al-Harrani, Abi al-Abbas Taqi al-Din Ahmad ibn Abd al-Halim ibn Taymiyyah, al-Fatawa al-Kubra by Shaykh al-Islam Ibn Taymiyyah, vol. 3, Dar al-Ma'rifa, Beirut, without a year of publication, p. 147.

5 Al-Sarkhsi, Shams al-Din Abu Bakr Muhammad bin Abi Sahl, Al-Mabsut, vol. 5, 1st edition, Dar al-Fikr for Printing, Publishing and Distribution, Lebanon, 1421 A.H., 2000 A.D., p. 51.

soul that attached to its spiritual companion and described it in gentle, gentle and suggestive expressions that make a person feel the value and sanctity of this great relationship and the amount of reassurance and security in the words of the Almighty: "Let you dwell in it", and he feels the amount of merciful love by saying "And He has made between you affection and mercy", and he feels the need to think about this relationship with deep meanings by saying "In this They know the divine wisdom of the great Creator in making both man and woman compatible with each other, so that he can satisfy his needs that he has been given to him, such as intellectual, spiritual, physical and psychological needs¹.

Finally, the aforementioned subject (the habit of tribal prohibition) has no place in the provisions of Islamic jurisprudence, Islamic Shari'ah and the clear verses of the Holy Qur'an.

The Fourth Requirement

A Comparison between Iraqi Law and Islamic Jurisprudence on the Habit of Nahwa

At first, the Iraqi legislator did not deal with the custom of forbidding the prohibition between its legal texts, but it prohibited compulsion to marry, which is in line with the provisions of Islamic jurisprudence, which forbade compulsion to enter into a marriage contract and considered it a consensual contract that is made with the affirmation and acceptance of both parties.

However, the Iraqi legislator considered the contract of marriage by force to be invalid if it was not entered into and valid if it was entered, while the majority of Muslim jurists considered it to be an invalid contract whether it was entered into or not, and the Hanafi jurists considered it a valid and binding contract, and some ancient and modern jurists considered it a contract that is suspended on the permission of the coerced contractor after the removal of the coercion, which is the most likely opinion to protect the interest of the coerced contractor.

Paragraph (1) of Article (9) of the Iraqi Personal Status Law No. 188 of 1959, as amended, stipulates that: "No relative or non-relative shall have the right to compel any person, male or female, to marry without his consent, and the contract of marriage by force shall be considered invalid if the marriage contract is not entered."

1 Al-Jubouri, Taha Saleh Khalaf Hamid, op. cit., p. 185.

According to this text, the Iraqi legislator considered the contract of marriage by force to be invalid if it was not entered, and considered it to be a valid contract if it was entered, and this is evident from the concept of contravention of this text, and through the text of paragraph (4) of Article (40), which stipulates that: "Each of the spouses may request separation when one of the following reasons exists: if the marriage was performed outside the court by means of coercion." The legislator's statement (for the spouses to request separation) indicates their right to keep the marriage contract or request for separation, and this can only be done in the valid contract, and the term "spouses" indicates that they are husband and wife, and they cannot be described as such if the contract is invalid, but it is said that the man and the woman are invalid.

Here, the legislator made the mere contract by coercion a void contract, and gave the possibility of turning it into a valid contract if it is entered, and in this regard, ignoring the nature and reality of the invalidity¹, since the invalid contract is not concluded at all and is not followed by a license in any way, and there is no possibility of turning it into a valid contract, as in financial contracts, since the marriage contract is either valid or invalid, and each description has different provisions.

Also, considering the entry as a correction of the marriage contract by coercion is contrary to logic, as the man may force the woman to enter into the marriage contract, and then hasten to enter into the marriage contract against her will in order to negate the invalidity of the contract, as if the legislator is implicitly encouraging the coercion (by breaking the opinion) to hasten the entry instead of deterring it.

The Iraqi legislator considered the marriage contract to be invalid if it was not entered into and valid if it was entered, while the majority of jurists considered it to be an invalid contract whether it was entered into or not, and the Hanafi jurists considered it a valid and binding contract, and some ancient and modern jurists considered it a contract that is suspended on the permission of the coerced contractor after the end of the compulsion, which is more likely to protect the interest of the coerced contractor.

This is the view of the majority of jurists from the Malikis, Shafi'is, Hanbalis and the Ja'faris of the view, such as the saying of Imam Malik

1 Al-Khatib, Ahmed Ali, Al-Kubaisi, Hamad Obaid, Al-Samarrai, Muhammad Abbas, Explanation of the Personal Status Law, Part One, First Edition, 1400 A.H. 1980 A.D., p. 45.

(may Allah have mercy on him): "It is not permissible for a person who is disliked to do anything, not to be freed, not to divorce, not to marry, not to sell or to buy."¹

We prefer the view that the marriage contract of a forced marriage should be made a contract that is suspended on the permission of the forced marriage for the following reasons:

First: The words of the Almighty: "Unless it is a trade with your consent²."

On the other hand, the Hanafi jurists allow the person who is forced to enter into a contract of sale to authorize or annul the contract as a suspended contract, and they do not allow the person who is forced to marry to give permission or annul it because they consider it a valid contract that is binding and cannot be annulled³.

Second: What al-Nisa'i and Ahmad quoted from 'Aisha as follows: "A girl came to her and said: 'My father married me to his nephew Ya'raf ibn al-Ishma' (i.e., his meanness) and I am hateful, she said: 'Sit down until the Messenger of Allah (may Allah's peace and blessings be upon him) comes, and the Messenger of Allah (may Allah's peace and blessings be upon him) came and told him, so he sent to her father, and he invited him, and he made the matter up to her, and she said: 'O Messenger of Allah, I have permitted what my father did, but I wanted to teach women that fathers have nothing to do with^{it4}.'"

1 Malik ibn Anas ibn Malik ibn Amer al-Asbahi al-Madani, al-Muwadda al-Kubra, vol. 2, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, without a year of printing, researched by: Zakaria Amirat, p. 436, and see: Muhammad Alish, Manat al-Jalil, Sharh 'ala Mukhtasar Sayyid Khalil, vol. 4, Dar al-Fikr, Beirut, 1409 A.H., 1989 A.D., p. 56.

2 Surah An-Nisa, verse 29.

3 Al-Kasani, Bada'i al-Sanaa'i, vol. 3, p. 11.

4 Al-Bayhaqi said: This is a messenger, and it is supported by another report on its subject, narrated by Ahmad, Abu Dawud and Ibn Majah, narrated by Abu Abbas, and narrated by al-Nasa'i, and he said: This is a hadith that they document, see Abu Muhammad Abdullah bin Yusuf al-Hanafi al-Zailghi, Nasr al-Raya for Hadiths al-Hidayah, vol. 3, Dar al-Hadith, Egypt, 1357, researched by: Muhammad Yusuf, p. 192, and see: Abu Abd al-Rahman Ahmad bin Shu'ayb al-Nasa'i, Sunan-al-

The hadith clearly indicates that a woman is forced to marry, and she has chosen between annulment and leave, so she has allowed the contract.

Finally, the aforementioned subject has no place in the provisions of Islamic jurisprudence, Islamic law and the clear verses of the Holy Qur'an, so this large overflow of legislative texts that deal with this issue obliges the three authorities to take the necessary measures to stand against those who practice this custom in order to preserve women's dignity, freedom and legislative achievement.

Nisa'i al-Kubra, vol. 3, 1st edition, Dar al-Kutub al-Ilmiyyah, Beirut, 1411-1991, hadith number, 5390, p. 284.

The end

After researching this topic on the tribal custom in Iraqi society and the legal and jurisprudential adaptation to it, it becomes clear to us that a set of findings and recommendations in this field will be presented in sequence:

First: Results:

- 1- The society in Iraq is a tribal society in which the clan plays an important role in all political, economic and social fields. Etcetera.
- 2- Iraq's criminal code, which includes the Penal Code and the Code of Criminal Procedure, has attempted to limit the influence of tribal tradition but has been largely unsuccessful.
- 3- The Personal Status Law was strict in dealing with tribal customs, especially in marriage, as its texts included a reference to penal provisions for those who impose these customs in marriage, as is the custom of tribal marriage.
- 4- The act of tribal prohibition is a dangerous social custom, as it is a form of abuse of the right and leads to human rights violations against individuals, including the right to life, liberty, and personal security.
- 5- The act of "tribal prohibition" is known in circles and in tribal customs, so the tribal custom gives it to it, as it is forbidden in Sharia and law, as it infringes on the rights of others.
- 6- The law holds accountable and severely punishes anyone who forces a woman under his jurisdiction to marry someone she does not approve of for herself.
- 7- The Iraqi legislature also imposed a penalty of deprivation of liberty on anyone who forced a person to marry and discriminated in punishment between a first-degree relative and a non-citizen.

Second: Recommendations:

Having explained all the above-mentioned results, we recommend the following to the Iraqi legislator:

- 1- Considering the contract of forced marriage as a suspended contract for the benefit of the coerced spouse.

- 2- Giving the coerced woman the right to claim material and moral damages as a result of this marriage.
- 3- The habit of coercion, i.e. coercion, is a crime for which the wise street is held accountable and punished by law, and no rational person or visionary is satisfied with it, and the intellectuals of the society and the elders of the tribes must fight this phenomenon and prevent it.
- 4- Abolish the penalty of a fine and limit it to imprisonment for relatives.
- 5- The punishment shall be increased in the case of compulsion to enter, and the sentence of rape shall be taken in terms of punishment.

The following text shall be adopted:

"Relatives or non-relatives shall not have the right to compel any person to marry, if the person who is forced to marry before or after the entry into force has authorized or terminated the contract within two months from the date of the termination of the compulsion, in addition to his right to claim compensation for the material and moral damage he has suffered as a result of this contract. The Other."

- 6- We call on organizations and associations concerned with family affairs to raise awareness of women's legitimate and legal rights, and to enhance women's self-confidence and the need to educate and guide them as the nucleus of society.
- 7- We call for the creation of associations for the protection of women so that women can turn to them in times of need.

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