

## ABSTRACT

From the beginning and throughout Islamic history, mut<sup>ca</sup> marriage has been a controversial issue, the subject of constant dispute between the jurists of the different legal school in Islam. The view that mut<sup>ca</sup> marriage was permitted by the Prophet and practised by the most prominent Companions in the early period of Islam is not disputed by any Muslim jurist. Rather, the debate between Sunnî and Shî'î jurists centers around its legality after that early period.

Sunnî jurists argue that it was permitted for merely a short period of time and subsequently outlawed by the Prophet himself. Shî'î jurists do not doubt that the Prophet might have indeed recommended mut<sup>ca</sup> marriage to his Companions in the expedition, but they take issue with the Sunnî position that it was meant to be only a temporary phenomenon. In their view, the Prophet sanctioned it as a legitimate form of marriage.

There is no conflict of opinion about the fact that mut<sup>ca</sup> marriage was abolished by the second caliph, 'Umar, who assigned the harsh penalty of stoning for those who continued to practice it. Shî'î jurists, however, consider his command as legally non-binding and religiously ineffective. They argue that 'Umar's prohibition of mut<sup>ca</sup> marriage is based on his personal reasoning (ijtihâd).

It has been narrated by both Sunnî and Shî'î jurists that 'Umar, on many occasions, did not follow the Prophet's decree; rather, he relied on his own discretion. During his caliphate, he opposed the Qur'ân and the Sunna explicitly and relied on his ijtihâd. For this very reason, some Sunnîs regarded 'Umar a mujtahid and, consequently, his personal opinion was considered to be a form of ijtihâd over and against the nass.

Sunnî jurists still condone mut'at al-hajj, which was prohibited by 'Umar together with mut'at al-nisâ'. They do not consider stoning as the punishment for mut'a marriage assigned by 'Umar. My argument, therefore, is that the prohibition of mut'a marriage is not based upon the Qur'ân and the Sunna, as it is widely claimed, but rather on the personal reasoning of 'Umar. Nonetheless, the Sunnî jurists had to resort to the Qur'ân and the Sunna in order to establish this prohibition on legally accepted grounds.

## RÉSUMÉ

Dès le début et tout au long de l'histoire de l'Islam, le mariage de mut'a fut un thème controversé, sujet de longues disputes parmi les docteurs de la loi affiliés à différentes écoles juridiques islamiques. L'affirmation que le mariage de mut'a, dans la période matinale de l'Islam, était permis par le Prophète et pratiqué par ses compagnons les plus éminents, n'est contestée par aucun juriste. Le débat entre les juristes sunnites et shi'ites est plutôt centré sur sa légalité après cette première période.

Les juristes sunnites affirment que ce type de mariage fut permis pendant une brève période et ensuite banni par le Prophète lui-même. Les juristes shi'ites, à leur tour, ne nient certes pas que le Prophète aurait recommandé le mariage de mut'a à ses compagnons pendant une expédition, mais contestent la position sunnite qui prétend que toute l'affaire n'était que temporaire. À leur avis, le Prophète a légitimé ce type de mariage.

Par contre, il n'y a aucun conflit d'opinion concernant l'abolition du mariage de mut'a par le deuxième calife, 'Umar, qui a ordonné la lapidation comme punition à ceux qui continuaient à le pratiquer. De leur côté, les juristes shi'ites considèrent cet ordre comme non obligatoire et religieusement nul. Ils affirment que la prohibition décrétée par 'Umar est basée sur un raisonnement

personnel (ijtihâd).

Les juristes sunnites et shi'ites relatent que 'Umar à plusieurs reprises n'a pas suivi les ordres du Prophète. Il s'est basé plutôt sur son propre jugement. Pendant son califat, il allait ouvertement à l'encontre du Qur'an et le Sunns et s'est basé sur son propre ijtihâd. Pour cette raison, quelques juristes sunnites considèrent 'Umar comme un mujtahid et, donc, son opinion est considérée comme une forme d'ijtihâd au delà et contre la lettre du texte ou le nass.

les juristes sunnites approuvent le mut'at al-hajj que 'Umar a lui-même prohibé avec le mut'at al-nisâ'. Ils refusent la lapidation comme punition pour stipulée par 'Umar le mariage de mut'a. En conclusion, mon argument est que la prohibition du mariage de mut'a n'est pas basé sur le Qur'an et le Sunna, comme il est généralement soutenu. Elle est basée plutôt sur le raisonnement personnel de 'Umar. Mais les juristes sunnites devaient se référer au Qur'an et le Sunna afin d'établir cette prohibition sur de base plus acceptables.



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## NOTE ON TRANSLITERATION AND DATES

The transliteration system of Arabic terms follows the style adopted by the Institute of Islamic Studies, McGill University, with the following exceptions: The transliteration of the feminine ending tâ' marbûṭa (آ, ة) is rendered as "a" when it is not pronounced, in words such as mut<sup>ṣ</sup>a, and "at" when it appears in a construct (idâfa) formation, as in mut<sup>ṣ</sup>at al-ḥajj. The respective hijrî and Christian dates are separated by a slant. The translations from the Qur'ân have been taken from Mohammed Marmaduke Pickthall's The Meaning of The Glorious Koran. Mecca: Muslim World League, 1977.

## ACKNOWLEDGMENTS

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## Introduction

Although not a central issue in Islamic law, temporary marriage (mut<sup>c</sup>a) in Islamic law has been and still is, subject to intense discussion. The fact that mut<sup>c</sup>a marriage existed in the early period of Islam is agreed on by all Muslim jurists. The Shî'îs, however, assert that mut<sup>c</sup>a marriage continues to be legitimate, basing themselves on the Qur'ân and the Sunna. Prominent Sunnî jurists share the viewpoint of the Shî'îs that the Qur'ânic verse 4:24 refers to and acknowledges the institution of mut<sup>c</sup>a marriage and relate that some outstanding Companions of the Prophet used to recite this verse in a manner which could only signify mut<sup>c</sup>a marriage. In fact, there is no conflict of opinion among Muslim jurists about the fact that mut<sup>c</sup>a marriage was practised by the prominent Companions of the Prophet. It was reported that the Prophet practised it himself.

The bone of contention centers around the abrogation of mut<sup>c</sup>a marriage. Sunnî jurists argue that under the pressure of circumstances mut<sup>c</sup>a marriage seemed to have continued for a short time in the early period of Islam. They assert that the Qur'ânic reference to mut<sup>c</sup>a and the traditions (ahâdîth) were both abrogated by several, subsequently revealed verses in the Qur'ân itself and by the Sunna. They refer to four Qur'ânic verses in particular and some traditions attributed to the Prophet. Furthermore, they insist that mut<sup>c</sup>a marriage is a kind of "adultery".

Rejecting all Sunnî objections, the Shî'î jurists counter that mut<sup>ca</sup> is indeed a form of marriage and, therefore, legitimate. They insist that it was permitted and practised during the lifetime of the Prophet, the reign of the first caliph Abû Bakr and in the beginning of 'Umar's caliphate. Shî'î jurists refute the assertion that mut<sup>ca</sup> marriage was abrogated and attribute its illegal status to 'Umar himself. They affirm that the caliph 'Umar prohibited this form of marriage on the ground of personal opinion (ijtihâd). Undoubtedly, it was 'Umar and not the Prophet, the Shî'îs conclude, who equated mut<sup>ca</sup> with fornication and voiced the strongest condemnation of its practice. In order to corroborate their argument, Shî'î jurists refer to 'Umar's prominent statement, reported by both Sunnî and Shî'î jurists, that there were "two pleasures in the lifetime of the Prophet, one is the enjoyment [related to] women (mut<sup>ca</sup>at al-nisâ'), and the second, the enjoyment [related to] pilgrimage (mut<sup>ca</sup>at al-hajj), but I prohibit them and will punish whoever practices them." Furthermore, the Shî'îs maintain that some of the Companions of the Prophet still held its legitimacy even after 'Umar's prohibition.

Since my thesis deals with the Prophetic traditions, it would be worthwhile to shed some light on the controversy concerning hadîths and their reliability in the attempt to reconstruct history. In the critical analysis of

hadīth, Goldziher was certainly a pioneer. Nevertheless "the systematic development of his thesis, the detailed formulation of criteria for the evaluation of hadīth, and their application to a wide range of materials in the original Arabic sources, was the work of Joseph Schacht."<sup>1</sup> But Schacht himself conceded that his conclusions only authenticated and elaborated the grand theory produced by his predecessor, Goldziher.<sup>2</sup> According to Schacht, the starting point for the formulation of Islamic law did not originate in the lifetime of the Prophet. Schacht set forth his view that for most of the first century of hijra, Islamic law as we know it today did not as yet exist.<sup>3</sup> The beginning of the second century A.H. was the era in which, Schacht argues, the Islamization of law had its starting point.<sup>4</sup> To support his main thesis, Schacht traces the authenticity of the formation of Prophetic traditions which, according to him, played a significant role in the formation of Islamic law. Schacht firmly concludes that Prophetic traditions had been fabricated by later

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<sup>1</sup> N.J. Coulson, "European Criticism of hadīth Literature," in Arabic Literature to the End of the Umayyad Period, A.F.L. Beeston, T.M. Johnston, and G.R. Smith (Cambridge: Cambridge University Press, 1983), 318.

<sup>2</sup> Joseph Schacht, The Origins of Muhammadan Jurisprudence (Oxford: Clarendon Press, 1959), 4-5.

<sup>3</sup> Joseph Schacht, An Introduction to Islamic Law (Oxford University Press, 1979), 19.

<sup>4</sup> Schacht, Origins, 190.

generation and projected back coming from the mouth of the Prophet.

Several responses have been addressed to Schacht's thesis. Some of them generally accept the thesis but offer a critique of certain aspects of it, while others vehemently oppose it and even accuse him of fostering a "misconception" of the position of law in Islam and of paying scant attention to Qur'ânic legislation. Scholars like David Powers support Coulson's view that it is hard to account for the discontinuity that Schacht created between the Qur'ân and the formation of Islamic law.<sup>5</sup> Azami, Abbott and Sezgin are of the opinion that, in contrast to Schacht thesis, the process of recording hadîth certainly started during the lifetime of the Prophet.<sup>6</sup> Juynboll, while acknowledging the existence of some traditions in the lifetime of the Prophet, "argues that the formal, standardized transmission of information about the Prophet began to developed only at some point in the period between A.H. 670 and 700".<sup>7</sup> The viewpoint that a large number of Prophetic traditions were fabricated and projected backward to the Prophet I concur with; yet many others, including

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<sup>5</sup> David S. Powers, Studies in Qur'ân and hadîth: The Formation of the Islamic Law of Inheritance (Berkeley: University of California Press, 1986), Preface xii, Introduction 3.

<sup>6</sup> Ibid., Introduction 4-6.

<sup>7</sup> Ibid., 6.

jurists as authentic, and thus far I have no reason to think otherwise.

I have chosen to write on the subject of mut<sup>c</sup>a marriage because it recommends itself on the following grounds:

1- This kind of study, which is focused on the historical aspect of the issue, receives scant attention in Middle East universities, and is virtually neglected in the West. For instance, in her book Law of Desire, Haeri pays little attention to the closely associated juridical aspects of mut<sup>c</sup>a marriage; she focuses on the sociological aspect of its practice in Iran. The bulk of her work is devoted to interviewing men and women who practise mut<sup>c</sup>a.

2- Temporary marriage has been and still is a controversial issue among Sunnî and Shî'î jurists, and they have not reached an agreement on it even though they share some common ground. One may note, for instance, that some classical Sunnî jurists, such as Abû Hanîfa, permitted a similar type of marriage which was limited to a specific period of time.

3-The subject is both significant and somewhat sensitive, perhaps because this kind of marriage is not merely a theoretical issue, but one that relates closely to daily life.

This thesis will deal primarily with the juridical aspects of the institution of temporary marriage. It will be divided into three chapters.



In the first chapter, I will examine the etymological and technical implications of mut<sup>ʿ</sup>a marriage, especially in the Qur'ânic context. I will also investigate the legitimacy of mut<sup>ʿ</sup>a from the perspective of the Qur'ân, the Sunna, and ijmâ<sup>ʿ</sup> (consensus).

The second chapter will be concerned with the Sunnî argument that mut<sup>ʿ</sup>a marriage has been abrogated. The abrogation of mut<sup>ʿ</sup>a is asserted on the basis of three types of argument, namely, the Qur'ân, the Sunna, and ijmâ<sup>ʿ</sup>. In this chapter, I will follow the various types of abrogation applied to the mut<sup>ʿ</sup>a and the refutations presented by Shî'î jurists.

The third chapter deals with the prohibition of mut<sup>ʿ</sup>a marriage. The important issue to be discussed here is that the caliph ʿUmar prohibited mut<sup>ʿ</sup>a on grounds derived from personal reasoning (ijtihâd). ʿUmar practised his own ijtihâd on numerous occasions during both the Prophet's lifetime and his own caliphate. I will investigate the reasons for his prohibition of mut<sup>ʿ</sup>a marriage and how it was subsequently understood by Sunnî jurists.

## Chapter One

### The legitimacy of mut<sup>ca</sup> marriage

#### I. The Qur'ânic perspective

In order to provide an adequate picture of the issue at hand, it would be instructive to take a cursory glance at the question of whether mut<sup>ca</sup> marriage was a pre-Islamic custom or an institution sanctioned by the Qur'ân 4:24 and the Sunna. There is a curious account of discussion on this issue. While Howard postulates that the institution of mut<sup>ca</sup> is "...a form of marriage that certainly existed at the time of the Prophet," and "...seems to be sanctioned by the Qur'ân 4:24,"<sup>1</sup> Hammûda claims that there is unanimity among the 'ulamâ' on the fact that the mut<sup>ca</sup> marriage was practised by the ancient Arabs, without providing any evidence to substantiate his thesis.<sup>2</sup> Heffening not only insists that mut<sup>ca</sup> marriage was an old Arabian practise, but he also argues that "temporary marriage is found among other peoples, according to many Western scholars."<sup>3</sup> In support of his view concerning the "abominable practices of

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<sup>1</sup> I.K.A. Howard, "Mut<sup>ca</sup> Marriage Reconsidered in the Context of the Formal Procedures for Islamic Marriage," Journal of Sematic Studies 20 (1975):82.

<sup>2</sup> 'Abd al-<sup>c</sup>Âtî Hammûda, The Family Structure in Islam (Nigeria: American Trust publication, 1978), 103.

<sup>3</sup> Willi Heffening, "Mut<sup>ca</sup>ah," Encyclopaedia of Islam, 3:2. (Leiden: E.J. Brill and Luzac, 1913), 774.

ancient Arabia," Hughes refers to Burckhardt's version which differs from mut<sup>ca</sup> marriage, for its provisions are not materialized in this version.<sup>4</sup> Burckhard, in his version, states that "it was a custom of their [the ancient Arabs] forefathers to assign to a traveller who became their guest for the night, some female of the family, most commonly the host's own wife."<sup>5</sup> Robertson Smith deems mut<sup>ca</sup> marriage as a medium for a "temporary alliance" between a stranger and the tribe which gave him a protection as a refugee, which was in vogue at the time of the Prophet.<sup>6</sup> Concurring with the viewpoint of the majority Muslim scholars that mut<sup>ca</sup> marriage did not gain footing in pre-Islamic practices,<sup>7</sup> al-Amîn insists that it was not considered to be an ancient Arabian marriage by any classical historian or scholar, except for al-Ālūsî,

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<sup>4</sup> T.P. Hughes, "Mut<sup>ca</sup>ah," Dictionary of Islam, 1st ed. (Lahore: Premier Book Publisher and Booksellers, 1885), 424. For the conditions of mut<sup>ca</sup>ah marriage see Ameer Ali, Mahomedan law, 2 vols. (Calcutta: Printed by Thacker, Spink and co., 1908), 2:438-441.

<sup>5</sup> Ibid.

<sup>6</sup> William Robertson Smith, Kinship and Marriage in Early Arabia (Boston: Beacon Press, 1903), 82.

<sup>7</sup> See, for example, 'Abd al-Ḥusayn Aḥmad al-Amînî, al-Ghadîr fil-Kitâb wal-Sunna wal-Adab, 11 vols. (Beirut: Dâr al-Kitâb al-<sup>ca</sup>Arabâ, 1403/1983), 237, Muḥammad Ḥusayn al-Ṭabâṭabâ'î, al-Mîzân fî Tafsîr al-Our'ân, 20 vols. (Beirut: Mu'assasat al- A<sup>ca</sup>lamî, 1393/1973), 4:308, and Muṣṭafâ al-Râfi<sup>ca</sup>î, islâmunâ fil-Tawfîq bayna al-Sunna wal-Shî'ca (Beirut: Dâr al-kitâb, 1968), 147.

Muḥammad Thâbit al-Miṣrî and Mûsâ Jâr Allâh.<sup>8</sup> The most authoritative tradition relied upon, pertaining to the kinds of pre-Islamic marriage, is voiced by ʿĀ'isha, the wife of the Prophet.<sup>9</sup>

All the multifarious arguments originate from the divergent interpretations of the Qur'ânic verse 4:24. After presenting all the classes of women with whom marriage is forbidden, the Qur'ân goes on to say: "Lawful for you are all beyond those mentioned, so that ye seek them (in marriage) with your wealth, but not in fornication, so give them their reward (ujûr) for what you have enjoyed (istamtaʿtum) in keeping your promise."<sup>10</sup>

The word istimtâʿ is derived from the root m-t-ʿ which

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<sup>8</sup> Muḥsin al-Amîn, Naqq al-Washîʿa (Beirut: Dâr al-Taʿâruf, 1406/1986), 259.

<sup>9</sup> Muḥammad Ibn Ismâʿîl al-Bukhârî, Ṣaḥîḥ al-Bukhârî, 9 vols. (Beirut: Dâr al-Turâth al-ʿArabî, n.d.), 7:19-20. According to ʿĀ'isha, there were four kinds of marriages in ancient Arabia:

1- A regular marriage which had been sanctioned by Islam; namely, a man asks the hand of a woman from her wâlî by paying her a dower. 2- A husband would ask his wife to have intercourse with a famous person, in order to have a child from him.

3- A number of men used to have sexual union with a woman. After becoming pregnant, she would summon them to assemble in order to ascribe the child to one of them.

4- A group of men used to visit a prostitute, who used to fix a flag on her door, as a sign of her calling. They assembled, when she had a child, and a physiognomists would decide on the paternity of the child.

<sup>10</sup> Qur'ân, 4:24.

means "to carry away, to take away."<sup>11</sup> The Qur'ân uses the words' mata<sup>c</sup>, tamattu<sup>c</sup> and istimtâ<sup>c</sup> in several places and are all associated with the sense of enjoyment.<sup>12</sup> The mut<sup>c</sup>a marriage is a "marriage which the contract stipulates will last for a fixed period of time"<sup>13</sup> in return for a dower which could be no more than "a few grains of wheat."<sup>14</sup>

There is a dispute among Muslim jurists on whether the Qur'ânic verse 4:24 established the legality of mut<sup>c</sup>a marriage. On the one hand, the Shî'î jurists are unanimous in their assertion that this verse regulates and sanctions the validity of mut<sup>c</sup>a marriage.<sup>15</sup> The Sunnî jurists, on the other hand, hold two differing opinions in their interpretation of the verse 4:24. They argue that the verse in question belonged either to a regular marriage or to a mut<sup>c</sup>a marriage, but was later abrogated by another verses.<sup>16</sup> This issue will be discussed in detail in the

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<sup>11</sup> Sachiko Murata, Temporary Marriage in Islam (London: Muhammadi Trust, 1978), 27.

<sup>12</sup> Jamâl al-Dîn Ibn Manẓûr, Lisân al-°Arab, 15 vols. (Beirut: Dâr Şâdir, n.d.), 8:329. See also for the definition of mut<sup>c</sup>a "enjoyment, pleasure", Fakhr al-Dîn al-Ṭirayhî, Majma<sup>c</sup> al-Bayân, 6 vols. (Tehran: al-Maktaba al-radawiyya, n.d.), 4:390.

<sup>13</sup> Murata, Temporary marriage, 27.

<sup>14</sup> Ibid., 37.

<sup>15</sup> Muḥammad Jawâd al-Balâghî, Âlâ' al-Rahmân, 2 vols. (Qum: Intishârât Maktabat al-Faqîh, n.d.), 1:75.

<sup>16</sup> See, for example, Fakhr al-Dîn al-Râzî, in his remarkable al-Tafsîr al-Kabîr, 32 vols. (Beirut: Iḥyâ' al-Turâth, n.d.), 10:49, the two opinions are presented, and

second chapter. The question that needs to be posed at this juncture is, why the Sunnî jurists hesitate to adopt this interpretation of verse 4:24? What are the reasons behind this hesitation? At first glance, it seems that there are two reasons for this. One is that the Sunnî jurists found, in their hadîth books, that some of the prominent Companions of the Prophet and their Followers (tabi'ûn) maintain the legality of mut'â marriage, which relate to verse 4:24. The second is that Ibn 'Abbâs and some other Companions used to recite the verse 4:24 in a different manner which indicated, without any doubt, the legality of mut'â marriage. Concerning the interpretation of the verse 4:24, al-Qurtubî presents in his exegesis what Abû Bakr al-Tartûsî had confirmed about how 'Imrân Ibn al-Ḥaṣîn, Ibn 'Abbâs, some of the Companion, and a group of Ahl al-Bayt (the household of the Prophet) had permitted mut'â marriage.<sup>17</sup> Mujâhid states, on the authority of 'Abd Ibn Hamîd and Ibn Jarîr, that the verse refers to mut'â marriage. Also, on the authority of Ibn Jarîr, al-Suddî maintained that this verse belongs to mut'â marriage through

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he holds the view that mut'â was permitted, by this verse (4:24), yet it was abrogated. See also Shihâb al-Dîn al-Ālûsî, Rûḥ al-Ma'ânî, 30 vols. (Beirut: Dâr Iḥyâ' al-Turâth al-'Arabî, n.d.), 5:5.

<sup>17</sup> Muḥammad Ibn Aḥmad al-Qurtubî, al-jâmi' Liḥkâm al-Qur'ân, 20 vols. (Cairo: Dâr al-Kâtib al-'Arabî, 1387/1967), 5:133.

which the man weds the woman for a period of cohabitation.<sup>18</sup> al-Amînî relates on the authority of Aḥmad Ibn Ḥanbal that Ibn al-Hasîn asserted that the verse was revealed in the book of God and that the Companions practised it during the Prophet's time; it was not abrogated by any other verse and the Prophet did not forbid it until his death.<sup>19</sup> The same tradition was differently reported; instead of "until his death"; Ibn al-Ḥaṣîn said "...until one person said [about mut<sup>c</sup>a marriage], on the ground of his opinion, what he wanted."<sup>20</sup> Al-Bukhârî relates another tradition on the authority of ʿImrân Ibn al-Hasîn which may be considered an admixture of the two earlier traditions.<sup>21</sup>

The other reading of the verse by some Companions of the Prophet, especially Ibn ʿAbbâs, did not allow the Sunnî jurists to pass the interpretation of the verse without hinting at mut<sup>c</sup>a marriage. On the authority of Abû Naḍra, it is said that he asked Ibn ʿAbbâs about mut<sup>c</sup>a marriage. In response to the question, Ibn ʿAbbâs said: "Have you not

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<sup>18</sup> Jalâl al-Dîn al-Suyûtî, al-Durr al-Manthûr fil-Tafsîr bil-Ma'thur, 6 vols. (Beirut: Dâr al-M<sup>c</sup>rifa, n.d.), 2:140. See also Muḥammad Ibn Jarîr al-Ṭabarî, Jâmi<sup>c</sup> al-Bayân fî Tafsîr al-Qur'ân, 30 vols. (Beirut: Dâr al-Ma<sup>c</sup>rifa, 1406/1986), 5:9.

<sup>19</sup> ʿAbd al-Ḥusayn al-Amînî, al-Ghadîr, 6:229.

<sup>20</sup> Ibid., 232. See also Muḥammad al-Ṭâhir Ibn ʿĀshûr, Tafsîr al-Tahrîr wal-Tanwîr, 30 vols. (Tunis: al-Dâr al-Tûnisiyya lil-Nashr, 1984), 5:10.

<sup>21</sup> Bukhârî, Ṣaḥîḥ al-Bukhârî, 6:33.

read chapter al-nisâ'?" Abû Naðra answered in the affirmative. Ibn ʿAbbâs then said "Did you not read: 'for what you have enjoyed of them - for a definite period (ilâ ajalin musammâ)?' " Abû Naðra was surprised at this new recitation of the verse. He is reported to have said: "if I had read it like this I would not have asked you." Then Ibn ʿAbbâs affirmed that it is indeed recited in this way. In another tradition Ibn ʿAbbâs is reported to have asserted that "God revealed verse 4:24 in the same manner I recite it," and he repeated the statement thrice.<sup>22</sup>

It seems that this reading of the verse was well known among the Companions of the Prophet, for Ibn ʿAbbâs asserts that mutʿa marriage was prevalent at the beginning of Islam, and that the Companions were reciting this verse as follows: "... for what you have enjoyed of them for a definite period (ilâ ajalin musammâ),"<sup>23</sup> and, according to al-Nîsâbûrî, none of the Companions rejected this reading.<sup>24</sup> Some other Companions participated in Ibn

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<sup>22</sup> al-Ṭabarî, Jâmiʿ al-Bayân, 5:9. See also al-Suyûtî, al-Durr al-Manthûr, 2:140. Heffening, after hinting to this reading of the verse (2:24), goes too far to say "a reading which naturally has not found its way into Sunni circles but is often added in Shiʿa books". See Heffening, "mutʿa" Encyclopæia of Islam, 774. In fact, this reading has found its way into all Sunnî exegesis. To get a glimpse of the sources, see al-Amînî, al-Ghadîr, 6:230-244.

<sup>23</sup> al-Suyûtî, al-Durr al-Manthûr, 2:140.

<sup>24</sup> Al-Ṭabarî, Jâmiʿ al-Bayân fî Tafsîr al-Quaʾân, with the comments of al-Nîsâbûrî, 30 vols. (Beirut: Dâr al-Maʿrifa, 1406/1986), 5:18.



‘Abbâs’s reciting of the verse according to both al-Qâsimî and Ibn Kathîr who narrate that Ibn ‘Abbâs, Ubay Ibn Ka‘b, Sa‘îd Ibn al-Jubayr, and al-Suddî were reciting the verse 4:24 as follows: "...for a period of time."<sup>25</sup> Ibn Mas‘ûd also used to read the verse the same way.<sup>26</sup> This reading has found its way in the Shî‘î circle, and the Shî‘îs have insisted on this reading to advocate their assertion of the legitimacy of mut‘a.<sup>27</sup> On the authority of the household of the Prophet (Ahl al-Bayt), especially al-Şâdiq, who are viewed as the most authentic expositors of the Qur’ân in the eyes of the Shî‘îs, many versions were narrated to indicate that they (Ahl al-Bayt) used to read the verse thus: "...for a definite period".<sup>28</sup> On the issue of whether this reading part of the Qur’ân or not, there are two opinions. Some jurists hold the opinion that "...for a definite period" is not a part of the Qur’ân; rather, it

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<sup>25</sup> Ismâ‘îl al-Qarashî Ibn Kathîr, Tafsîr al-Qur’ân al-‘Azîm, 4 vols. (Cairo: Maṭba‘at al-Istiḳâma, 1376/1956), 1:474. See also Muḥammad Jamâl al-Dîn al-Qâsimî, Maḥâsin al-Ta’wîl, 17 vols. (Damascus: Dâr Ihyâ’ al-Kutub al-‘Arabiyya, 1377/1957), 5:1187.

<sup>26</sup> Al-Ālûsî, Rûḥ al-Ma‘ânî, 5:5. See also, Yaḥyâ Ibn Sharaf al-Nawawî, Sharḥ Ṣaḥîḥ Muslim, 18 vols. (Beirut: Dâr al-Qalam, 1407/1987), 9:189.

<sup>27</sup> Al-Amîn, Naqd al-Washî‘a, 276-277.

<sup>28</sup> Muḥammad Bâqir al-Majlisî, Bihâr al-Anwâr, 110 vols. (Beirut: Mu‘assasat al-Wafâ’, 1403/1983), 100:305. Also al-Hurr al-‘Āmilî, Wasâ’il al-Shî‘a, 20 vols. 5th ed. (Tehran: al-Maktaba al-Islâmiyya, 1398), 7:439.

indicates the interpretation of the verse (4:24).<sup>29</sup> For this very reason, some Sunnî jurists contend that this recitation reflects merely the interpretation of verse 2:24, by some Companions, which is irregular and not bound.<sup>30</sup> Al-Shawkânî states that there can be no justification for Ibn ʿAbbâs, Ubay Ibn Kaʿb, Saʿîd Ibn al-Jubayr to read the Qurʾânic verse by adding to it the words "for a definite period" to show that it relates to mutʿa. No such words can be added to it and the reading of the Qurʾânic verse in a different manner cannot provide a basis for argument.<sup>31</sup> On the other hand, some jurists believe that it is a part of the Qurʾân, yet it does not necessitate the distortion of the Qurʾân, for it is considered one of the different modes of the Qurʾân's recitation.<sup>32</sup>

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<sup>29</sup> Muḥammad Ḥusayn Kâshif al-Ghiṭâʾ, Asl al-Shîʿa wa Uṣûluhâ (Qum: Dâr al-Qurʾân al-Karîm, n.d.), 167. See also al-Balâghî, Ālâʾ al-Rahmân, 1:76. Al-Balâghî says that some of the Companions used to insert when copying the Qurʾân what they believed to be its interpretation, and they connect it, in their recitation, with the Qurʾân as if it is part of the Qurʾân. And they, al-Balâghî continues, say that the Qurʾân was revealed like this.

<sup>30</sup> Aḥmad Ibn ʿAlî al-Jaṣṣâs, Aḥkâm al-Qurʾân, 4 vols. (Bierut: Dâr al-Kitâb al-ʿArabî, n.d.), 2:148. See also Muḥammad Rashîd Riḍâ, Tafsîr al-Manâr, 12 vols. (Cairo: Dâr al-Manâr, 1367/1947), 5:13.

<sup>31</sup> Muḥammad Ibn ʿAlî Ibn Muḥammad al-Shawkânî, Nayl al-Awtâr ʿan Ahâdîth Sayyid al-Akhyâr, 8 vols. (Beirt: Dâr al-Jîl, 1973), 5:274-275.

<sup>32</sup> Al-Amîn, Naqd al-Washîʿa, 277. See also the comments of Muḥammad Bâqir on Kanz al-ʿIrfân fî Fiqh al-Qurʾân, 2 vols. (Tehran: Al-Maktaba al-Râḍawiyya li-Iḥyâʾ al-Āthâr

Referring to this recitation, which Ahl al-Bayt agreed on its soundness, Shî'î jurists insist that verse 4:24 is adequate to validate the institution of mut<sup>c</sup>a marriage. Many other traditions, on the authority of Ahl al-Bayt, are to be found in Wasâ'il al-Shî'a, one of the most authoritative Shî'î books. The most interesting is that which is reported on the authority of Abû Ḥanîfa, the founder of the Ḥanafî school, who asked al-Ṣâdiq about mut<sup>c</sup>a marriage. When al-Ṣâdiq was sure that Abû Ḥanîfa was asking about mut<sup>c</sup>a marriage and not mut<sup>c</sup>at al-ḥajj, he replied "Glory to God, have you not read the Qur'ân in which it is stated: 'So those of them whom you enjoy, give them their appointed wages'?"<sup>33</sup> Abû Ḥanîfa then said "By God, it is a verse I do not seem to have read".<sup>34</sup> In this connection, it is important to shed some light on the meaning of mut<sup>c</sup>at al-ḥajj. mut<sup>c</sup>at al-ḥajj or ḥajj al-tamattu<sup>c</sup>, according to the jurists, is incumbent on those who do not reside in the city of Mecca while performing ḥajj; whoever wants to perform the ḥajj he or she should begin with ʿumra and

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al-Ja'fariyya, 1343/1923) 2:151, by al-Siyûrî. To justify his opinion, Muḥammad Bâqir refers to Ibn Qutayba, in his book Mushkil al-Qur'ân, to show that the reading of Ibn ʿAbbâs of the verse 4:24 belong to one of the faces of recitation of the Qur'ân, stipulated in Ibn Qutayba's book.

<sup>33</sup> Qur'ân, 4:24.

<sup>34</sup> Al-ʿĀmilî, Wasâ'il al-Shî'a, 7:439.

finish with hajj.<sup>35</sup> All the duties of mut'at al-hajj, which are similar to those of al-hajj, should be performed in al-masjid al-harâm.<sup>36</sup> Because mut'at al-hajj and al-hajj are not separated from each other, their times are same; namely, shawwâl, dhul-qi'da and dhul-hijja.<sup>37</sup> The main difference between hajj and mut'at al-hajj is that when the duties of the latter are performed everything becomes lawful for the pilgrims even contacting women.<sup>38</sup> This kind of pilgrimage was considered libertinism before Islam if performed in the time of hajj, yet it was practised by the Prophet<sup>39</sup> and sanctioned in the Qur'ân. The Qur'ân says: "...And if ye are in safety, then whosoever contenteth himself with the Visit for the pilgrimage [faman tamatta'a bil-'umrati ilal-hajj] (shall give) such gifts as can be had with ease. And whosoever can not find (such gifts), then a fast of three days while on the pilgrimage, and of seven when ye have returned; that is, ten in all. That is for him whose folk are not present at the Inviolable place of

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<sup>35</sup> Murtaḍā al-Ḥusaynī al-Fayruzabādī, al-Sab'a minal-Salaf (Qum: Manshûrât Maktabat al-Fayruzabādī, 1402/1982), 104. See also Murtaḍā al-'Askarī, Ma'âlim al-Madrasatayn, 3 vols. (Tehran: Mu'assasat al-Bi'tha, 1406/1986), 2:188-189.

<sup>36</sup> For all the details concerning hajj and mut'at al-hajj see Muḥammad Bâqir al-Ṣadr, al-Fatâwâ al-Wâdiha (Beirut: Dâr al-Ta'âruf lil-Maṭbû'ât, 1401/1981), 665-668.

<sup>37</sup> Ibid., 666.

<sup>38</sup> al-'Askarī, Ma'âlim al-Madrasatayn, 2:188.

<sup>39</sup> Ibid., 190.

Worship..."<sup>40</sup>

In spite of the fact that Shî'î jurists refer to Ahl al-Bayt in order to affirm the legitimacy of mut<sup>c</sup>a marriage from the Qur'ân, they derive their own argument from verse 4:24 itself. Their argument focuses on three points. The first point concerns the meaning of the word istamta<sup>c</sup>tum. They argue that the word istamta<sup>c</sup>tum has two meanings: one is "to enjoy" (which represents the literal meaning of the word), and the other is "temporary marriage" (which symbolizes the conventional usage of the Sharî'a). According to the principles of jurisprudence, the Shî'î jurists assert, the conventional usage of the Shari'a should be taken in this case, just like the words salât, zakât, siyâm and hajj.<sup>41</sup> In a conversation with Abû al-Qâsim al-Darakî, when he asked al-Shaykh al-Mufîd about verse 4:24, and why it could not mean a permanent marriage, the latter said: "In spite of the fact that the word istimtâ<sup>c</sup> has a real meaning of "enjoyment", yet if it is connected to the marriage without any restriction it means nothing but mut<sup>c</sup>a marriage." Al-Mufîd continues to say "For it (the word istimtâ<sup>c</sup>) is a sign for the mut<sup>c</sup>a marriage, according to the Sharî'a, and the people of the Sharî'a are accustomed to it.

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<sup>40</sup> Qur'ân, 2:196.

<sup>41</sup> Kâshif al-Ghiṭâ', Asl al-Shî'a, 180. See also Tawfîq al-Fakîkî, al-Mut<sup>c</sup>a wa-Āthâruhâ fil-Islâm al-Ijtimâ'î (Cairo: Maṭbû'ât al-Najâh, n.d.), 64, on the authority of al-Muhaqqiq al-Hillî in his book al-Sarâ'ir.

Don't you see that if somebody says: I yesterday married this woman in mut<sup>c</sup>a, ...or so-and-so believes in mut<sup>c</sup>a marriage, nobody understands from his statements anything but the marriage [mut<sup>c</sup>a] that the Shî'îs uphold.<sup>42</sup> A similar approach is explored by al-Ṭabarsî.<sup>43</sup>

The second point, according to the Shî'î jurists, is that the Qur'ân, in this verse, ties the payment of the dower to the enjoyment, which refers to mut<sup>c</sup>a marriage. For, in case of permanent marriage, if somebody divorces his wife without any consummation or enjoyment, he still has to pay half of the her dower,<sup>44</sup> according to all Muslim jurists. However this norm is not applied to the verse in question.<sup>45</sup> The last point, according to Sharaf al-Dîn, is that chapter al-nisâ' deals with the different kinds of legitimate sexual relationships, either by marriage or concubinage. According to Sharaf al-Dîn, the Qur'ân has explained, in the beginning of this chapter (4:3), the legitimacy of permanent marriage, and then enumerates all categories of the woman with whom marriage is forbidden, and then follows up with verse 4:24. So if verse 4:24 is

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<sup>42</sup> Al-Shaykh Al-Mufîd, al-Fuṣūl al-Mukhtâra (Beirut: Dâr al-Aḍwâ', 1405/1985), 124.

<sup>43</sup> al-Faḍl Ibn al-Ḥasan al-Ṭabarsî, Majma<sup>c</sup> al-Bayân fî Tafsîr al-Qur'ân, 10 vols. (Beirut: Dâr al-Ma'rifa, 1406/1986), 3:52.

<sup>44</sup> Al-Balâghî, Ālâ' al-Rahmân, 1:75. See also al-Ṭabarsî, Majma<sup>c</sup> al-Bayân, 2:52-53.

<sup>45</sup> al-Wâ'ilî, Min Fig al-Jins, 137.

also about permanent marriage it will be reiterating the same legal ruling in one chapter, thus, it is more likely that the latter verse refers to mut<sup>c</sup>a marriage.<sup>46</sup>

## II. The legitimacy based on Sunna

All Shî'î and Sunnî jurists agree that mut<sup>c</sup>a marriage was permitted by the Prophet, and it was in vogue in his time. Heffening goes further to insist that the Prophet "was even said to have practised it".<sup>47</sup> In Rawdat al-Muttaqîn, al-Majlisî maintains that the Prophet practised mut<sup>c</sup>a marriage, according to Imâm al-Şâdiq. al-Majlisî refers to the version that Imâm al-Şâdiq was asked once whether the Prophet practised mut<sup>c</sup>a marriage or not? Imâm Şâdiq replied "Yes" and recited the verse 66:3-5 which reveals, according to al-Majlisî, his servants (Mâriya) and contracted with her a mut<sup>c</sup>a marriage.<sup>48</sup> Many traditions have been advanced by outstanding Muslim jurists concerning the permission of mut<sup>c</sup>a marriage by the Prophet:

1- A famous tradition was narrated by a great Muslim jurists that the Prophet permitted mut<sup>c</sup>a marriage in the expedition. On the authority of Jâbir Ibn 'Abd Allâh al-

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<sup>46</sup> 'Abd al-Husayn Sharaf al-Dîn, Masâ'il Fiqhiyya (Tehran: Sabhar, 1407/1987), 62-63.

<sup>47</sup> Heffening, "mut<sup>c</sup>ah" Encyclopaedia of Islam, v.2:3, 774- 775.

<sup>48</sup> Muḥammad Bâqir al-Majlisî, Rawdat al-Muttaqîn, 14 vols. (Qum: al-Maṭba'at al-'Ilmiyya, n.d), 8:507.

Anṣārî and Salma Ibn al-Akwa<sup>c</sup>, al-Bukhârî relates that they were in the army when a messenger of the Prophet came and informed them that the Prophet has permitted them to contract mut<sup>c</sup>a marriage.<sup>49</sup> The same tradition was narrated twice by Muslim in his Sahîh. In another tradition, instead of "...a messenger of the Prophet came", Muslim relates that the Prophet himself came.<sup>50</sup> In the same spirit, a well known hadîth was recited by al-Bukhârî, on the authority of ʿAbd Allâh Ibn Masʿûd, that the Companions asked the Prophet to allow them to castrate themselves when they were fighting with him without their wives. The Prophet forbade them to do so, but permitted them to marry women for exchange of a robe for a specified period of time. ʿAbd Allâh Ibn Masʿûd then recited this verse: "O ye who believe! forbid not the good things which Allah hath made lawful for you, and transgress not. Lo! Allah loveth not transgressors" (5:87).<sup>51</sup> In his Sahîh, Muslim narrates three traditions in the same sense, yet in the last tradition, ʿAbd Allâh Ibn Masʿûd did not say that the Companions were in expeditions, instead, he said "We were

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<sup>49</sup> Bukhârî, Sahîh al-Bukhârî, 7:16.

<sup>50</sup> Muslim Ibn al-Ḥajjâj al-Qashîrî, Sahîh Muslim, 5 vols. (Cairo: Maṭbaʿat Muḥammad ʿAlî Ṣabîḥ wa Awlâduh, n.d.), 4:130-131.

<sup>51</sup> Ibid., 7:5. Muḥammad Ibn ʿAlî Al-Shawkânî, in his book Nayl al-Awtâr ʿan Ahâdîth Sayyid al-Akhyâr, 8 vols. (Beirut: Dâr al-Jîl, 1973), 5:268, when finished reciting the verse (5:87), said: "this hadîth agreed on it".



youths".<sup>52</sup>

2- Salama Ibn al-Akwa<sup>c</sup> reported on the authority of his father that the Prophet permitted mut<sup>c</sup>a marriage. The Prophet said that whoever (man or woman) wishes to conduct mut<sup>c</sup>a marriage, their cohabitation may last three nights. If they wish to extend it or to separate, they may do so.<sup>53</sup>

3- On the authority of Sabra Ibn Ma<sup>c</sup>bad, a group of traditions were narrated, whose substance is as follows: The messenger of God permitted mut<sup>c</sup>a marriage; Sabra therefore went with a man (in some traditions his uncle) to a woman (from Banû <sup>c</sup>Āmir) and each offered his cloak. She chose the younger (who was Sabra) with the shabbier cloak and slept three nights with him.<sup>54</sup>

4- Another tradition was reported, concerning the permission of mut<sup>c</sup>a marriage by the Prophet, on the authority of al-Râzî who relates that when the Prophet came to Mecca, in his farewell (umra), Meccan women adorned themselves for him. As a result, the Companions of the Prophet complained to him about the length of their celibacy. Then he said: "Marry from these women."<sup>55</sup>

5- A conversation between <sup>c</sup>Abd Allâh Ibn <sup>c</sup>Umar and a

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<sup>52</sup> Muslim, Ṣaḥîḥ Muslim, 4:130.

<sup>53</sup> Bukhârî, Ṣaḥîḥ al-Bukhârî, 7:16.

<sup>54</sup> Ibid., 4:131-132. See also, Shams al-Dîn al-Sarakhsî, al-Mabsûṭ, 30 vols. (Egypt: Maṭba<sup>c</sup>at al-Sa<sup>c</sup>âda, 1324/1904), 5:152.

<sup>55</sup> Al-Râzî, al-Tafsîr al-Kabîr, 10:49.

man from Syria is strong evidence that Ibn ʿUmar supported the legitimacy of mutʿa marriage as established by the Prophet himself. It is said, in Ṣaḥīḥ al-Tirmidhī, that a man from Syria asked Ibn ʿUmar about mutʿa marriage. When Ibn ʿUmar responded that it was lawful, the man objected that his father, ʿUmar, announced its prohibition. ʿAbd Allāh Ibn ʿUmar then argued that if his father prohibited it and the Prophet did it (Ṣanaʿahā), Muslims should not reject the Sunna and follow his father's statement.<sup>56</sup> A similar tradition was narrated on the authority of Aḥmad Ibn Ḥanbal in his Musnad. To use Heffening's words, he says: "the angry exclamation of Ibn ʿOmar when he was asked about mutʿa: "By God, we were not immodest in the time of the Prophet of Allah nor fornicators."<sup>57</sup>

It may be argued, according to some of the above-mentioned traditions, that the Prophet may have permitted mutʿa marriage for a short time on particular occasions. The

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<sup>56</sup> See ʿAbd al-Ḥusayn Shrafi al-Dīn al-Mūsawī, al-Fuṣūl al-Muḥimma (Beirut: Dār al-Zahrāʾ lil-Ṭibāʿa wal-Naṣr, 1397/1977), 80, al-Fâkîkî, al-Mutʿa, 42, and Muḥammad Ḥasan al-Muẓaffar, Dalâʾil al-Ṣidq, 3 vols. (Tehran: Maṭbaʿat al-Najâḥ, n.d.), 3:167, on the authority of al-Ḥillî in his book Nahj al-Haqq wa Kashf al-Ṣidq. It should be noted here that some scholars have narrated this tradition in reference to mutʿat al-hajj instead of mutʿat al-nisâʾ. See, for example, al-Amīnî, al-Ghadîr, 6:201-202. For this reason al-Muẓaffar, in Dalâʾil al-Ṣidq 184, says that he found, in Ṣaḥīḥ al-Tirmidhī, the tradition related to hajj, however he states that "it may have been omitted from the correct copies nowadays, or the compiler (al-Ḥillî) may have made a mistake".

<sup>57</sup> Heffening, "Mutʿah" Encyclopaedia of Islam, 775.

Shî'î jurists do not dispute the fact that the Prophet might have indeed permitted mut<sup>c</sup>a marriage in the army for his solders, but they take issue with the Sunnî position that it was meant to be only a temporary institution. To support their argument that the legitimacy of mut<sup>c</sup>a marriage have persisted during the Prophet's lifetime until his death, the Shî'î jurists adduce the following traditions:

1- 'Umran Ibn al-Ḥaṣīn is one of the authorities who insisted that mut<sup>c</sup>a marriage continued to be practised during the lifetime of the Prophet. Many traditions are narrated by him, on this scope, with slight variations. He relates, according to al-Bukhârî, that mut<sup>c</sup>a was revealed in the Book of God, and it was practised by the Companions while the Prophet was alive. He insisted that no verse was revealed abrogating it, and the Prophet did not prohibit it until he died.<sup>58</sup> al-Râzî relates the same tradition, on the authority of Ibn al-Ḥaṣīn, in a manner which gives mut<sup>c</sup>a marriage a strong position. Instead of "...we practised it while the Prophet was alive", according to al-Râzî, Ibn al-Hasîn says "...and the Prophet commanded us to practice it and we practised it."<sup>59</sup> The same tradition was also

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<sup>58</sup> Bukhârî, Ṣaḥîḥ al-Bukhârî, 6:33.

<sup>59</sup> al-Râzî, al-Tafsîr al-Kabîr, 10:49-50.

narrated by al-Ṭabarsî on the authority of al-Thaʿlabî.<sup>60</sup>

2- The mutʿa marriage of Asmâʾ, the daughter of the first caliph Abû Bakr, to al-Zubayr was a recurrent theme in Ibn ʿAbbâs' argument in favour of mutʿa marriage. Many traditions were narrated, on the authority of Ibn ʿAbbâs, indicating that Asmâʾ contracted mutʿa marriage. Ibn ʿAbd Rabbih, in his remarkable book al-ʿIqd al-Farîd, relates, on the authority of Ibn ʿAbbâs, that al-Zubayr family (Āl al-Zubayr) were the first to celebrate mutʿa marriage.<sup>61</sup> Ibn al-Zubayr opposed mutʿa marriage and objected to Ibn ʿAbbâs for his adamant views in favour of mutʿa. He warned Ibn Abbâs that he would stone him to death if he practised it.<sup>62</sup> His severe position toward Ibn ʿAbbâs prompted him to speak out frankly to Ibn al-Zubayr about his mother's mutʿa marriage. Ibn ʿAbbâs once requested Ibn al-Zubayr to ask his mother how she conducted mutʿa marriage between his father and her. When Ibn al-Zubayr asked his mother she replied that she, indeed, gave birth to him in mutʿa marriage.<sup>63</sup> When ʿUrwa, the son of Asmâʾ, advised Ibn ʿAbbâs to be God-fearing in permitting mutʿa marriage, Ibn ʿAbbâs also told

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<sup>60</sup> Al-Ṭabarsî, Majmaʿ al-Bayân, 3:52.

<sup>61</sup> Al-Amînî, al-Ghadîr, 6:209.

<sup>62</sup> al-Ālûsî, Rûh al-Maʿânî, 5:6.

<sup>63</sup> Al-Amînî, al-Ghadîr, 6:209. See also al-Fâkîkî, al-Mutʿa, 45-46.

him to ask his mother about it.<sup>64</sup> Another tradition, on the authority of Muslim al-Qarashî, reported that Asmâ' was asked by a group of men pertaining to her contracting Mut<sup>c</sup>a marriage in the time of the Prophet. Al-Qarashî narrates that a group of people called on Asmâ' and asked her about mut<sup>c</sup>at al-nisâ'. She confirmed the fact that she practised it in the lifetime of the Prophet.<sup>65</sup> Muslim, in his Sahîh, relates another tradition on the authority of al-Qarî (probably a misprint for al-Qarashî), that he asked Ibn 'Abbâs about mut<sup>c</sup>at al-hajj. Ibn 'Abbâs, according to al-Qarî, advises them (it seems that there were some other people with al-Qarî) to ask Asmâ' about it. Al-Qarî continues to say that when they called on her, they found a big blind woman, who told them that the Prophet permitted it.<sup>66</sup>

Although Muslim used mut<sup>c</sup>at al-hajj in his hadîth, yet he said that 'Abd al-Rahmân, in his hadîth, said "al-mut<sup>c</sup>a" and did not say: "mut<sup>c</sup>at al-hajj". And Shu'ba said, Muslim continues, that Muslim (al-Qarî) was hesitating between mut<sup>c</sup>at al-hajj and mut<sup>c</sup>at al-nisâ'.<sup>67</sup> On the use of mut<sup>c</sup>at

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<sup>64</sup> Ibid., 208-209.

<sup>65</sup> Murtaḍā al-ʿAskarî, Maʿâlim al-Madrasatayn, 3 vols. (Tehran: Muʿassasat al-Biʿtha, 1406/1986), 2:247. See also, al-Amînî, al-Ghadîr, 6:209. Both narrated this tradition on the authority of Abû Dâwûd al-Ṭayâlisî, yet instead of "al-Qarashî" al-Amînî put "al-Qarî".

<sup>66</sup> al-Amînî, al-Ghadîr, 6:209.

<sup>67</sup> Ibid.

al-ḥajj instead of mutʿat al-nisâ', al-Amînî comments that some of the traditions were restricted to mutʿat al-ḥajj only in order to protect the dignity of Ibn al-Zubayr and to hide the fact that he was born by mutʿa marriage.<sup>68</sup>

In order to support the fact that mutʿa marriage persisted after the death of the Prophet, the following traditions were narrated by Shîʿî jurists: In his Ṣaḥîḥ, Muslim relates three traditions, on the authority of Jâbir Ibn ʿAbd Allâh al-Anṣârî, concerning the practise of mutʿa marriage in the days of the Prophet, Abû Bakr, and ʿUmar.

1- It is related by Ibn Jurayj, on the authority of Abû al-Zubayr, that Jâbir states that the Companions of the Prophet used to contract mutʿa marriage in return for a handful of dates and some flour in the days of the Prophet and Abû Bakr until ʿUmar forbade it in the case of ʿAmr Ibn Hurayth.<sup>69</sup>

2- On the authority of ʿAṭâ', Ibn Jurayj relates that Jâbir came (to Mecca) to perform ʿumra and a group of people went to see him, in his place of residence. The people asked him of many things, and they mentioned mutʿa marriage. Jâbir insisted on the fact that mutʿa marriage was practised at the time of the Messenger of God, Abû Bakr, and ʿUmar.<sup>70</sup>

3- It was reported, on the authority of Abû Naḍra,

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<sup>68</sup> Ibid.

<sup>69</sup> Muslim, Ṣaḥîḥ Muslim, 4:131.

<sup>70</sup> Ibid.

that when Jâbir was told about the argument between Ibn ʿAbbâs and Ibn al-Zubayr concerning mutʿat al-nisâ' and mutʿat al-hajj he declared that both of them were practised in the days of the Messenger of God but, thereafter, ʿUmar prevented people from practising it, so that they never repeated them again.<sup>71</sup> Al-Amînî mentions the last tradition with chains of transmission.<sup>72</sup>

A well known statement attributed to the second caliph, ʿUmar, has been employed by many prominent figures and jurists as a strong piece of evidence for the legitimacy of mutʿa marriage. His statement runs as follows: "There are two mutʿas which existed in the lifetime of the Messenger of Allâh, mutʿat al-hajj and mutʿat al-nisâ', and I prohibit them and will punish whoever practices them."<sup>73</sup> From the statement of ʿUmar, al-Ma'mûn, the ʿAbbâsid caliph, announced the legitimacy of mutʿa marriage once more, yet he withdrew his announcement.<sup>74</sup> In this respect, al-Haeri says: "In the ninth century the Caliph Ma'mun proclaimed mutʿa marriage legal once again, but faced with stiff opposition and the threats of denunciation from the Sunni

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<sup>71</sup> Ibid.

<sup>72</sup> Al-Amînî, al-Ghadîr, 6:210-211.

<sup>73</sup> All the sources of this statement are mentioned by al-Amînî in his remarkable al-Ghadîr, 6:211.

<sup>74</sup> Aḥmad Ibn Muḥammad Ibn Khallikân, Wafayât al-Aʿyân, 8 vols. (Beirut: Dâr Şâdir, 1374-1376/1955-1956), 6:149-150.

ulama (religious scholars), he was forced to withdraw his edict".<sup>75</sup>

Another story that illustrates the significance of 'Umar's statement is reported by al-Râghib. He relates that Yaḥyâ Ibn Aktham, a famous jurist, once asked an old man from Basra about his proclaiming the permissibility of mut<sup>c</sup>a marriage. The old man responded that he imitated the caliph 'Umar in permitting mut<sup>c</sup>a marriage. Yaḥyâ then said: "In what way? 'Umar was very adamant in his view." The old man responded that because it was reported in the correct tradition (al-khabar al-sahîh) that 'Umar ascended the pulpit and said: "God and his Messenger permitted for you two mut<sup>c</sup>a and I prohibit them and will punish whoever practices them", so we accepted his testimony and rejected his prohibition.<sup>76</sup> On the authority of the family of the Prophet (Ahl al-bayt), the Shî'î jurists narrate many traditions, concerning the legitimacy of mut<sup>c</sup>a marriage during the lifetime of the Prophet and after his death, in their books.<sup>77</sup>

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<sup>75</sup> Shahla al-Haeri, Law of Desire (New York: Syracuse University Press, 1989), Introduction, 1.

<sup>76</sup> Al-Amînî, al-Ghadîr, 6:212.

<sup>77</sup> See, for instance, al-ʿĀmilî, Wasâ'il al-Shî'a, 7:437-446, and al-Majlisî, Rawdat al-Muttaqîn, 8:453-483.



### III. The legitimacy based on consensus (ijmâ')

In order to reinforce the legitimacy of mut'a marriage, the Shî'îs invoke the consensus of Muslims. To support his argument concerning the consensus, Sharaf al-Dîn insisted that the people of Qibla all agree that God sanctioned mut'a marriage in Islam without any doubt being cast by any Muslim legal school. Furthermore, he continues to say that the legitimacy of mut'a may be supplemented, in the eyes of the people of Ilm, to the constant requirements, attributed to the Prophet, which absolutely no Muslim can disavow.<sup>78</sup> An approach similar to this is also upheld by al-Balâghî. He asserts that based on the requirements of Islam, no one, with even a scant knowledge of this religion, can disown mut'a marriage; a contract for a definite period was sanctioned and permitted by the Prophet and practised by a group of the companions, during the Prophet's lifetime and afterwards. He confirmed that there is agreement by all exegetes on the fact that a number of prominent Companions like Ibn 'Abbâs, Jâbir, 'Umrân Ibn al-Ḥaṣîn, Ibn Mas'ûd, Ubay Ibn Ka'b, and some others delivered a legal opinion of mut'a marriage and read verse 4:24 (...for a period of time).<sup>79</sup> The consensus has also been confirmed by al-Mufîd who says that mut'a marriage was sanctioned by the Prophet

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<sup>78</sup> Sharaf al-Dîn, Ajwibat Mûsâ Jâr Allâh (al-Najaf: Maṭba'at al-Nu'mân, 1386/1966), 92.

<sup>79</sup> al-Balâghî, Ālâ' al-Raḥmân, 75-77.

with the agreement of the consensus of the umma and the family of the Prophet (Āl Muḥammad). He also asserts that the prominent followers (tabiʿūn) have agreed on its legality.<sup>80</sup> Al-ʿĀmilī and al-Wā'ilī also affirmed the consensus among all Sunnī and Shīʿī scholars.<sup>81</sup> To support his argument pertaining to the consensus, al-Balāghī refers to the Qur'ānic verse 4:24. He asserts that all traditions indicate that verse 4:24 is related to mutʿa marriage according to the literal meaning of the verse and many traditions of the Companions and the followers. He goes further to say that the tradition was persistently circulated on the legitimacy and practice of mutʿa marriage from the days of the Prophet, Abū Bakr, and half of ʿUmar's lifetime.<sup>82</sup> Mughniyya refers to the books of tradition (ḥadīth), positive law (fiqh) and exegesis in order to demonstrate the agreement on the legality of mutʿa marriage and how the Prophet ordered his Companions to practice it.<sup>83</sup> Al-Rāzī is considered among the Sunnī jurists who admitted the existence of consensus on the legitimacy of mutʿa marriage. He says that the Muslims agreed that mutʿa

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<sup>80</sup> al-Shaykh al-Mufīd, ʿIddat Rasā'il (Qum: Maktabat al-Mufīd, n.d.), 236.

<sup>81</sup> See Ḥusayn Yūsuf al-ʿĀmilī, al-Mutʿa fil-Islām (Beirut: Dār al-Andalus, n.d.), 31, and al-Wā'ilī, Min fiqh al-Jins, 151.

<sup>82</sup> Al-Balāghī, Ālā' al-Raḥmān, 2:77.

<sup>83</sup> Muḥammad Jawād Mughniyya, Tafsīr al-Kāshif, 8 vols. (Beirut: Dār al-ʿIlm lil-Malāyyīn, 1968), 2:295.

marriage was permitted in the beginning of Islam, and it was reported that when the Prophet went to Mecca to perform the pilgrimage, Meccan women adorned themselves so that the Companions complained about the length of separation from their wives. He then ordered them to marry these Meccan women.<sup>84</sup> Al-Mâzinî and al-Qâḍî 'Iyâḍ also acknowledged this consensus.<sup>85</sup>

In addition to the fact that the argument of the legitimacy of mut<sup>c</sup>a marriage is supported by the Qur'ân, the Sunna, and consensus, some Shî'î jurists have advanced two further arguments. Some of the Shî'î jurists argue that reason (‘aql) dictates that every deed which has no harm sooner or later should be lawful. Since mut<sup>c</sup>a marriage is void of any kind of harm, must be lawful. Any claim to the contrary must be supported by sufficient evidence.<sup>86</sup>

Finally, as al-Ṭabâṭabâ'î relates, Shî'î jurists dispute the fact that Sunnî jurists assert the abrogation of mut<sup>c</sup>a marriage, which implies its legality during the lifetime of the Prophet to be subject of the abrogation.<sup>87</sup>

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<sup>84</sup> al-Râzî, al-Tafsîr al-Kabîr, 10:49.

<sup>85</sup> Al-Nawawî, Sharḥ Ṣaḥîḥ Muslim, 9:89,194.

<sup>86</sup> See al-Suyûrî, Kanz al-‘Irfân, 2:159, al-Fakîkî, al-Mut<sup>c</sup>a, 63, and Fath Allâh Kâshânî, Manhaj al-Sâlihîn, 10 vols. (Tehran: n.p., 1346), 2:485.

<sup>87</sup> Al-Ṭabâṭabâ'î, al-Mîzân, 4:300-301.

## Chapter Two

### The abrogation of mut<sup>ʿ</sup>a marriage

#### I. The abrogation by the Qur'ân

This chapter will focus on the Sunnî jurists' assertion that the mut<sup>ʿ</sup>a marriage was abrogated and on the refutation of this affirmation by Shî'î jurists. The first protest is based on the Qur'ân. The whole argument introduced by Sunnî jurists is based on four Qur'ânic verses.

1- Verses 23:5-6 and 70:29-30, which are identical in form and content, are at the core of the Sunnî argument. Both verses read as follows: "And they who guard their modesty- Save their wives or the (slaves) that their right hand possess, for then they are not blameworthy."<sup>1</sup> Although there are three other verses presented by Sunnî jurists to advance their demand, the main argument revolves around these two verses which are supported by two traditions. The first of these is attributed to Ibn ʿAbbâs and the other to ʿĀ'isha, the wife of the Prophet. Sunnî jurists point out that Ibn ʿAbbâs is reported to have said that the mut<sup>ʿ</sup>a marriage was instituted at the beginning of Islam; a man travelling to a place where he has no relatives may seek a woman to protect his properties and look after him. It was deemed lawful, according to Ibn ʿAbbâs, for this man to

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<sup>1</sup> Qur'ân, 23:5-6, and 70:29-30.

conclude mut<sup>c</sup>a marriage with her for the duration of his stay in the country. Ibn ʿAbbâs goes on to say that this kind of relationship had been legal until the verse (23:5-6, 70:29-30) was revealed, making this relationship illegal.<sup>2</sup> It is noteworthy in his remarkable exegesis al-Durr al-Manthûr, which contains most of the prominent traditions, al-Suyûtî quotes on the authority of al-Ṭabrânî and al-Bayhaqî the earlier tradition in a variant reading. Ibn ʿAbbâs relates, according to al-Suyûtî's tradition, that mut<sup>c</sup>a marriage was lawful in the beginning of Islam and that Muslims used to recite verse 4:24 as follows: "... for a period of time" then verse 4:23 was revealed, revoking the first one (4:24) so that mut<sup>c</sup>a marriage became illegal.<sup>3</sup> It is very obvious from al-Suyûtî's version that Ibn ʿAbbâs did not make reference to verse 23:5-6 and 70:29-30 as the abrogating verses of mut<sup>c</sup>a marriage, as it is commonly believed by the Sunnî jurists; rather, he referred to verse 4:23 which was revealed before verse 4:24. For this very reason, al-Balâghî was very astonished at the previous tradition narrated by al-Suyûtî. He contends that verse 4:23 is of no relevance in dealing with the issue of the

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<sup>2</sup> Muḥammad Ibn ʿAlî al-Shawkânî, Nayl al-Awtâr ʿan Ahâdîth Sayyid al-Akhyâr, 8 vols. (Beirut: Dâr al-Jîl, 1973), 5:269.

<sup>3</sup> Jalâl al-Dîn al-Suyûtî, al-Durr al-Manthûr fil-Tafsîr bil-Ma'thûr, 6 vols. (Beirut: Dâr al-Maʿrifa, n.d.), 2:140.

abrogation of mut<sup>ca</sup> marriage.<sup>4</sup> Nevertheless, some Sunnî and Shî'î jurists have many reservations regarding both the contents and chain of transmission.

Muḥammad Rashîd Riḍâ believes, from the content of the tradition, that it was manipulated during the period after the death of the Companions for the following reasons:

1- It is opposed by many reliable traditions; narrated by Muslim in his Ṣaḥîḥ and some other jurists, to the effect that mut<sup>ca</sup> marriage was sanctioned in the latter years of the hijra period.

2- The verses 23:5-6 and 70:29-30 mentioned by Ibn 'Abbâs were both revealed in Mecca, which can in no way, according to the principles of abrogation, be regarded as the abrogating verses of 4:24, which was revealed in Madina.

3- It is well-known that, at the beginning of Islam, Muslims had rarely travelled to other countries for lengthy periods of time and, therefore, had no opportunity to contract mut<sup>ca</sup> marriage, as evidenced in the tradition narrated by Ibn 'Abbâs. The reason is that Muslims were oppressed in Mecca and that they had no safe haven anywhere else during that period. Riḍâ goes on to say that travelling may not have been impossible for Muslims at that time, but it contradicts the available evident (khilâf al-

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<sup>4</sup> Muḥammad Jawâd al-Balâghî, Ālâ' al-Raḥmân, 2 vols. (Qum: Maktabat al-Wijdânî, n.d.), 2:81-82.

zâhir) and there is no tradition referring to it.<sup>5</sup>

With respect to the chain of transmission, al-ʿAskarî relates that Mûsâ Ibn ʿUbayda, one of the transmitters, is classified according to Aḥmad amongst the unreliable transmitters inasmuch as he narrated several unidentified and unapproved traditions.<sup>6</sup> Al-Shawkânî also regarded Mûsâ as a weak narrator.<sup>7</sup> Pertaining to the text of the tradition, al-ʿAskarî says: "I do not know, if this tradition was expressed by Ibn ʿAbbâs, then why was he involved in an altercation with Ibn al-Zubayr over the legitimacy of mutʿa marriage, half a century after its revelation? Is mutʿa marriage not a temporary marriage, marriage for a period of time?." <sup>8</sup> In addition, it is widely known among the jurists, according to al-Wâ'ilî and al-Amînî, that Ibn ʿAbbâs persisted in upholding the legitimacy of mutʿa marriage.<sup>9</sup>

The second tradition to which some Sunnî jurists refer was ascribed to ʿĀ'isha. It is reported that when Ā'isha was

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<sup>5</sup> Muḥammad Rashîd Riḍâ, Tafsîr al-Manâr, 12 vols. (Beirut: Dâr al-Fikr lil-Ṭibâ'a wal-Nashr, 1393/1973), 5:15.

<sup>6</sup> Murtaḍâ al-ʿAskarî, Maʿâlim al-Madrasatayn, 3 vols. (Tehran: Mu'assasat al-Bi'tha, 1406/1986), 2:260.

<sup>7</sup> al-Shawkânî, Nayl al-Awtâr, 5:269.

<sup>8</sup> al-ʿAskarî, Maʿâlim, 2:261.

<sup>9</sup> Aḥmad al-Wâ'ilî, Min Fiqh al-Jins (Beirut: Mu'assasat Ahl al-Bayt, 1986), 143. See also ʿAbd al-Ḥusayn Aḥmad al-Amînî, al-Ghadîr fil-Kitâb wal-Sunna wal-Adab, 11 vols. (Beirut: Dâr al-Kitâb al-ʿArabî, 1403/1983), 6:224.

questioned about mut<sup>ca</sup> marriage, she said: "Between you and me stands the Book of God". She then recited verses 23:5-6 and 70:29-30 in order to give the impression that mut<sup>ca</sup> marriage was abrogated by these two verses.<sup>10</sup>

Al-Balâghî asserts that the above-mentioned tradition is unacceptable as an abrogating verses of mut<sup>ca</sup> marriage on account of these considerations:

1- The idea deduced by Sunnî jurists, namely, that ʿĀ'isha in this tradition supports the abrogation of mut<sup>ca</sup> marriage by referring to 23:5-6 and 70:29-30, is repudiated. For, according to al-Balâghî, ʿĀ'isha may have believed in the legitimacy of mut<sup>ca</sup> marriage by referring to verses 23:5-6 and 70:29-30 in order to corroborate the argument that the woman in this contract is a spouse.

2- al-Balâghî contends that if ʿĀ'isha really believed in the abrogation of mut<sup>ca</sup> marriage by the two verses 23:5-6 and 70:29-30, as the Sunnî jurists understand from the earlier tradition, it would, therefore, simply be the product of her own legal effort. For, al-Balâghî adds that 23:5-6 and 70:29-30, as we mentioned before, were both revealed in Mecca before 4:24, which was revealed in Madina.

3- "Wife" is considered to be a woman married by a legal contract and a woman in mut<sup>ca</sup> marriage has the same

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<sup>10</sup> Shams al-Dîn al-Sarakhsî, al-Mabsûṭ, 30 vols. (Egypt: Maṭbaʿat al-Saʿâda, 1324/1907), 5:152.



status.<sup>11</sup>

As we mentioned before, the Shî'î jurists assert that 23:5-6 and 70:29-30 cannot be abrogating verses, based on the standard meaning of abrogation. According to all jurists (‘ulamâ’), abrogation aims to annul something permanent by subsequent evidence or to manifest the termination of a legitimate verdict by a subsequent authentic one.<sup>12</sup> But it is inconceivable for a preceding verse to abrogate a latter one, and, in our case, 4:24 is a Meccan and 23:5-6 and 70:29-30 are Madinan.<sup>13</sup>

The Sunnî jurists believe that 23:5-6 and 70:29-30 constitute a powerful proof for the abrogation of mut‘a marriage in view of the fact that they recognize only two types of women having a legal status; namely, the wife and female slave. They object that the woman in mut‘a marriage is neither a wife proper nor a female slave, and, therefore, has no legitimate status.<sup>14</sup> The fact that the woman in mut‘a marriage is not a female slave is very intelligible and does not need proof. The Shî'î jurists agree with their Sunnî counterparts on this point. Sharaf

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<sup>11</sup> al-Balâghî, Ālâ’ al-Rahmân, 1:85.

<sup>12</sup> al-Wâ’ilî, Min Fiqh al-Jins, 140.

<sup>13</sup> Muḥammad Ḥusayn Kâshif al-Ghiṭâ’, Asl al-Shî‘a wa Uṣûluhâ (Qum: Dâr al-Qur’ân al-Karîm, n.d.), 170.

<sup>14</sup> ‘Abd Allâh al-Ghurayfî, al-Tashayyû‘; Nushû‘uh, Marâhiluh wa-Muqawimâtuh (Beirut: Dâr al-Mawsim lil-I‘lâm, 1411/1990), 544.

al-Dîn adduced the following argument: When the Sunnî jurists are asked on why 23:5-6 and 70:29-30 cannot be considered as abrogating verses of the marriage between a slave woman and a man who is not her master, which is a legal condition in the eyes of all Muslim jurists, since in this case the slave married woman is neither a wife nor slave. Then their response is that the two verses are Meccan yet the marriage of the slaves mentioned in surat al-nisâ' is Madinan. Consequently, the Meccan verses do not have the power to abrogate the Medinan, since the abrogating verses, in this case, would precede the one abrogated. Sharaf al-Dîn asserts that Sunnî jurists, in fact, offered this solution for on this question but they overlook the fact that mut<sup>ca</sup> marriage was established in Madina and that its conditions were revealed in surat al-nisâ'.<sup>15</sup> The question that may be asked at this juncture is why the Sunnî jurists do not regard mut<sup>ca</sup> marriage as a licensed marriage, since it includes a contract and a dower? That mut<sup>ca</sup> marriage cannot be considered a legitimate marriage, according to the Sunnî jurists, even if it based on a contract and includes a dower, rests on the fact that it lacks the characteristics of permanent marriage, such as inheritance, divorce, maintenance...etc.<sup>16</sup>

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<sup>15</sup> 'Abd al-Husayn Sharaf al-Dîn al-Mûsawî, Masâ'il Fiqhiyya (Tehran: Sabhar, 1406/1987), 65.

<sup>16</sup> Ibid.

Although the Shî'î jurists had prepared a cogent response to the Sunnî jurists's assertion concerning the abrogation of mut<sup>c</sup>a marriage by the verses 23:5-6 and 70:29-30, they developed a solid argument nevertheless for each point in the Sunnî discussing comparing between mut<sup>c</sup>a and permanent marriage.

### Inheritance

The Sunnî jurists argue that because inheritance is not envisaged in the mut<sup>c</sup>a marriage contract between the wife and the husband, in contrast to permanent marriage, then mut<sup>c</sup>a marriage is illegitimate. Sunnî jurists delivered their argument on the ground that inheritance is fundamental to marriage and is by no means separable.<sup>17</sup> In order to support their argument, some Sunnî jurists refer to verses 23:5-6, 70:29-30 while others refer to verse 4:12, well-known as the inheritance verse, which reads as follows: "And unto you belongeth a half of that which your wives leave,...".<sup>18</sup> The Shî'î jurists, for their part, rejected such an approach for the following reasons:

1- They assert that inheritance is not a part of the marriage, as the Sunnî jurists argue, but derived from the general sense of the inheritance verse (4:12) (âyat al-mîrâth). They go on to argue that 4:24, which established

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<sup>17</sup> al-Wâ'ili, Min Fiqh al-Jins, 140.

<sup>18</sup> Qur'ân, 4:12.

mut'a marriage, is a verse which particularizes (mukhassisa) this general sense ('umûm).<sup>19</sup>

2- Shî'î jurists present various instances in Islamic law (Sharî'a) where, inheritance between spouses in permanent marriage is absent. They do so in order to demonstrate that inheritance is not intrinsic to marriage. For instance, a woman from the people of the Book, which the legality of whose contract marriage by Muslims all Sunnî jurists acknowledge, has no legal rights, according to the Sunnî jurists, to inherit from her Muslim husband.<sup>20</sup> A murderer who kills his or her spouse is likewise forbidden to inherit. A woman whose marriage was conducted during her husband's illness is one more example. If her husband passes away before consummation, there will be no inheritance between them.<sup>21</sup> In response to the first example presented by Shî'î jurists, Ibn Taymiyya adduced the following argument: If it is said that women, such as a dhimmiyya (Christian women under Muslim rule) and a captive women, can become wife although they cannot inherit, the reply is that they can inherit but the only obstacle is disbelief on the part of dhimmiyya and slavery on the part of captive women. Likewise, establishment of paternity entitles the son to inherit from his father, but he cannot

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<sup>19</sup> al-Wâ'ilî, Min Fiqh al-Jins, 140.

<sup>20</sup> Ibid., 140-141.

<sup>21</sup> Kâshif al-Ghiṭâ', Aṣl al-Shî'a, 170.

inherit if he is a disbeliever or a slave. On the removal of these obstacles the son may inherit from his father and the wife from her husband, but not so with the women taken in mut<sup>c</sup>a marriage.<sup>22</sup> Kâshif al-Ghiṭâ' developed a distinct method for deriving a sound basis upon which the separation of marriage and inheritance can be established. He asserts that the woman is sometimes entitled to inherit from her husband even when relation between them are discontinued. The same is true in the case of the wife's waiting period completed before the end of the first year of her divorce, provided that the contract marriage was concluded during the year of her husband's sickness.<sup>23</sup>

3- There is no consensus, according to Kâshif al-Ghiṭâ', among the Shî'î jurists concerning the nonexistence of inheritance in mut<sup>c</sup>a marriage. He states that a group of them give the woman, in mut<sup>c</sup>a marriage, the privilege of inheritance without any conditions. Some accord her the prerogative of inheritance with a condition, while others still forbid it altogether.<sup>24</sup>

4- Some Shî'î jurists contend that there is no advantage in resorting to verse 4:12 in order to strengthen

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<sup>22</sup> Aḥmad Ibn 'Abd al-Ḥalîm Ibn Taymiyya, Minhâj al-Sunna al-Nabawiyya fî Naqd Kalâm al-Shî'a wal-Qadriyya, 4 vols. (Cairo: al-Maṭba'a al-Kubrâ al-Amiriyya, 1321/1905), 2:155-157.

<sup>23</sup> Kashif al-Ghiṭâ', Aṣl al-Shî'a, 170.

<sup>24</sup> Ibid.

the abrogation of the mut<sup>c</sup>a marriage, since this would lead to a circular argument. The Shî'î jurists assert that demonstrating the abrogation of mut<sup>c</sup>a marriage, according to the Sunnî jurists, is based on nonexistence of the inheritance in the contract of mut<sup>c</sup>a marriage, and evidence that the inheritance in mut<sup>c</sup>a marriage is absent itself depends on an abrogation, which is clearly begging the question.<sup>25</sup>

5- Although verse 4:12 necessitates inheritance between man and woman in a mut<sup>c</sup>a marriage contract, because they are wife and husband, a close examination of the traditions indicates the absence of inheritance in mut<sup>c</sup>a marriage. These reliable traditions are said by Shî'î jurists to particularize (mukhassis) the Qur'ân.<sup>26</sup> In order to explain the absence of inheritance in mut<sup>c</sup>a marriage, al-Balâghî suggests as a cause the weakness of the relationship between man and woman in temporary marriage.<sup>27</sup>

### Divorce

An identical argument is presented by Sunnî jurists concerning divorce. Had women in mut<sup>c</sup>a marriage been a wife, they contend, talâq (divorce) would have been applicable to

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<sup>25</sup> Ḥusayn Yûsuf Makkî al-<sup>c</sup>Āmilî, al-Mut<sup>c</sup>a fil-Islâm (Beirut: Dâr al-Andalus, n.d.), 60.

<sup>26</sup> al-Balâghî, Ālâ' al-Raḥmân, 1:83. See also Kâshif al-Ghiṭâ', Asl al-Shî'a, 170.

<sup>27</sup> Ibid., 83.

her, but as it do not apply to her it means that she is not wife. In their argument, some Sunnî jurists refer to verses 23:5-6 and 70:29-30 and some mention verse 65:1, which is acknowledged as a divorce verse and which reads: "o Prophet! When ye (men) put away women, put them away for their (legal) period and reckon the period...".<sup>28</sup> Likewise, the Shî'î jurists introduce various incidents of segregation between the spouses in the permanent marriage's contract where there is no divorce, in order to contradict the Sunnî position. They offer the following examples which do not require divorce: The separation of the apostatize wife, the separation of the sold slave from her master, the segregation of spouses in the case where a defect stipulated by the Sharî'a is discovered <sup>29</sup> and, finally, the separation of spouses through sworn allegation (li'ân).<sup>30</sup> Kâshif al-Ghiṭâ' believes that there is no demand for divorce in the contract of mut'a marriage, since the passage of the stipulated period fulfils the purpose of divorce.<sup>31</sup> The circularity of the argument is also recognized by the Shî'î jurists referring to verse 65:1. They believe that proof for the abrogation of mut'a

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<sup>28</sup> Qur'ân, 65:1.

<sup>29</sup> al-Wâ'ilî, Min Fiqh al-Jins, 141.

<sup>30</sup> Muḥammad Ibn al-Nu'mân al-Mufîd, al-Fuṣûl al-Mukhtâra min al-'Uyûn wal-Maḥâsin (Beirut: Dâr al-Aḍwâ', 1405/1985), 120.

marriage, according to the Sunnî jurists, depends on the absence of the divorce in mut<sup>c</sup>a marriage and that the demonstration of the absence of divorce in mut<sup>c</sup>a marriage, in turn, relays on its abrogation.<sup>32</sup>

#### Maintenance (nafaqa)

Financial support, according to all Muslim jurists, is not required in mut<sup>c</sup>a marriage. The woman is entitled only a dower. Consequently, the Sunnî jurists do not view the woman in a mut<sup>c</sup>a marriage contract holding a legal status. The same approach is adopted here by Shî<sup>c</sup>î jurists. The Shî<sup>c</sup>î jurists contend that nafaqa is not deemed fundamental in marriage, but rather a condition of permanent marriage, one that is not necessary in mut<sup>c</sup>a marriage.<sup>33</sup> Besides, a disobedient wife (nâshiz) does not deserve nafaqa, even though she remains a wife.<sup>34</sup>

#### Kinship (nasab) and the waiting period (ʿidda)

With regard to the nasab, al-Shaykh al-Mufîd, in a conversation with an unnamed Sunnî jurist, refuted the latter's claim that the Shî<sup>c</sup>îs disavow the parentage between the son in mut<sup>c</sup>a marriage and the father. According to al-Mufîd, not only the Shî<sup>c</sup>îs but also all Sunnî jurists, who

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<sup>32</sup> al-ʿĀmilî, al-Mut<sup>c</sup>a fil-Islâm, 60.

<sup>33</sup> al-Wâ'ilî, Min Fiqh al-Jins, 141.

<sup>34</sup> Kâshif al-Ghiṭâ', Aṣl al-Shî'a, 170.



consider mut<sup>c</sup>a marriage unlawful, recognize the parentage between the father and his son.<sup>35</sup>

In relation to the waiting period, Rashîd Riḍâ relates that some of the exegetes narrated that it is not incumbent upon the woman in mut<sup>c</sup>a marriage to observe her waiting period.<sup>36</sup> In response to this claim, the Shî'îs have nothing to say but to reject it completely.<sup>37</sup>

#### Marriage (al-nikâh)

It was reported, on the authority of the fourth caliph 'Alî that sanctioning the permanent marriage (al-nikâh) rendered invalid the legitimacy of mut<sup>c</sup>a marriage.<sup>38</sup>

The Shî'î jurists, according to al-'Askarî, refute this tradition very strongly on the grounds that it implies that the legitimacy of mut<sup>c</sup>a marriage was established before that of permanent marriage. If this is true, al-'Askarî contests, all marriages in Islam before the legislation of the permanent marriage were in mut<sup>c</sup>a, a fact that nobody concurs with.<sup>39</sup> In addition, the earlier tradition contradicts a group of traditions which indicate clearly

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<sup>35</sup> al-Mufîd, 'Iddat Rasâ'il, 239.

<sup>36</sup> Rashîd Riḍâ, Tafsîr al-Manâr, 5:13-14.

<sup>37</sup> Abû al-Qâsim al-Khû'î, al-Bayân fî Tafsîr al-Qur'ân (Tehran: Intishârât Ka'ba, 1366/1948), 316.

<sup>38</sup> al-Suyûtî, al-Durr al-Manthûr, 2:140.

<sup>39</sup> al-'Askarî, Ma'âlim al-Madrasatayn, 2:263.

that 'Alî upholds the legitimacy of mut<sup>c</sup>a marriage and condemns 'Umar's prohibition of it.<sup>40</sup>

2- The second verse which the Sunnî jurists consider to be the abrogating verse of mut<sup>c</sup>a marriage is 4:12 which is known as the inheritance verse. The argument concerning this verse was dealt with earlier.

3- According to Ibn 'Abbâs, mut<sup>c</sup>a marriage was abrogated by verse 56:1, mentioned above and known as the divorce verse. The entire discussion concerning this verse was explored in the earlier section. On the authority of Ibn 'Abbâs, some Sunnî jurists mention 2:228 as the abrogating verse of mut<sup>c</sup>a marriage.<sup>41</sup> Verse 2:228 runs as follows: "Women who are divorced shall wait, keeping themselves apart, three (month) courses."<sup>42</sup> Sunnî jurists argue that because the waiting period in mut<sup>c</sup>a marriage is less than the one in permanent marriage, which is stipulated in verse 2:228, it is not deemed as a legitimate marriage. In spite of the fact that Ibn 'Abbâs persisted in his support of the legitimacy of mut<sup>c</sup>a marriage, as we mentioned before, the Shî'î jurists assert that there is a group of traditions which indicate that the waiting period in mut<sup>c</sup>a marriage is two (monthly) periods, as in the case of the married slave; on which all Shî'îs and Sunnîs agree,

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<sup>40</sup> al-<sup>c</sup>Āmilî, al-Mut<sup>c</sup>a fil-Islâm, 70-71.

<sup>41</sup> al-Suyûtî, al-Durr al-Mathûr, 2:140.

<sup>42</sup> Qur'ân.

except Dâwûd and his Companions.<sup>43</sup>

In order to substantiate their argument, Sunnî jurists refer to Ibn Mas'ûd's tradition that the verses related to inheritance, divorce, maintenance and the waiting period are considered to be the abrogating verses of mut'a marriage.<sup>44</sup> Regarding Ibn Mas'ûd's tradition al-°Askarî believes that there is a problem both in the chain of transmission and in the content. According to al-°Askarî, there are two chains of transmission for this tradition. In the first chain, there is al-Ḥajjâj Ibn Urṭât who is ignored on the basis that he fabricated the traditions in his own words.<sup>45</sup> In the second chain, al-Ḥakam Ibn °Utayba narrated directly from Ibn Mas'ûd, which is impossible according to al-°Askarî, due to the fact that al-Ḥakam died in 113 A.H in his 60s and Ibn Mas'ûd died in 32 A.H.<sup>46</sup> Besides, the content of the tradition contradicts Ibn Mas'ûd's view of mut'a marriage, which he continued to believe to be legitimate.<sup>47</sup>

3- The final verse to which some of the Sunnî jurists allude in support the abrogation of mut'a marriage reads as follows: "...so that ye seek them with your wealth in

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<sup>43</sup> al-Balâghî, Ālâ' al-Raḥmân, 83.

<sup>44</sup> al-Suyûtî, al-Durr al-Manthûr, 2:140.

<sup>45</sup> al-°Askarî, Ma°âlim al-Madrasatayn, 2:263.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

honest wed-lock, not debauchery...."<sup>48</sup> This claim is attributed to Ibn ʿAbbâs, who is said to have stated that mutʿa marriage occurred at the beginning of Islam; a traveller may seek a woman to look after him and his properties until it was abrogated by this part of verse 4:24 (muḥsinîn ghayr musâfiḥin).<sup>49</sup> The Sunnî jurists maintain that the man in mutʿa marriage who commits fornication would not be subjected to stoning. In other words, he is not considered a muḥṣan and, consequently, the mutʿa marriage is no longer legitimate.<sup>50</sup> The Shīʿî jurists bring up many points to refute this argument.

1- The tradition attributed to Ibn ʿAbbâs is not true on the basis that he continued to insist on the legitimacy of mutʿa marriage.<sup>51</sup> al-Zamakhsharî relates that when Ibn ʿAbbâs was questioned about verse 4:24, which establishes mutʿa marriage, he replied that it is a muḥkama. al-Zamakhsharî clarified that the expression (muḥkama) signifies that mutʿa marriage was not abolished.<sup>52</sup>

2- This tradition is solitary (ḵabar wâḥid) and, according to all Sunnî and Shīʿî jurists, the Qurʾân cannot

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<sup>48</sup> Qurʾân, 4:24.

<sup>49</sup> al-Suyûtî, al-Durr al-Manthûr, 2:140.

<sup>50</sup> Rshîd Riḍâ, Tafsîr al-Manâr, 5:13.

<sup>51</sup> al-ʿĀmilî, al-Mutʿa fil-Islâm, 58-59.

<sup>52</sup> Maḥmûd Ibn ʿUmar al-Zamakhsharî, al-Kashshâf ʿan Ḥaqâʾiq Ghawâmiḍ al-Tanzîl, 4 vols. (Qum: Nashir Adab Ḥawza, n.d.), 1:498.

be replaced by a solitary tradition.<sup>53</sup>

3- The meaning of the word ihsân in this verse is extensive and not confined to permanent marriage. Ihsan means to protect the man from committing fornication through legitimate marriage.<sup>54</sup> To substantiate this view, al-Balâghî presents some instances where the husband in a permanent marriage would not be stoned to death if he committed adultery. According to Mâlik, one of the founders of the Sunnî legal school, a man during the time of his wife's waiting period and during fasting is subjected to stoning to death if he commits fornication.<sup>55</sup>

4-There is no unanimity among Shî'î jurists on whether the man in mut'â marriage is exempt from punishment by stoning to death if he commits fornication.<sup>56</sup>

To support their argument, the Shî'î jurists maintain that there are many traditions attributed to the Companions of the Prophet and Ahl al-Bayt which confirm that mut'â marriage was not abrogated by any verse.<sup>57</sup> A well-known tradition among Sunnî jurists, on the authority of 'Imrân Ibn al-Ḥaṣîn is usually cited. 'Imrân is reported to have

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<sup>53</sup> Ibid.

<sup>54</sup> al-Wâ'ilî, Min Fiqh al-Jins, 144.

<sup>55</sup> al-Balâghî, Ālâ' al-Raḥmân, 1:85.

<sup>56</sup> Jamâl al-Dîn al-Miqdâd al-Suyûrî, Kanz al-'Irfân min Fiqh al-Qur'ân, 2 vols. (Tehran: al-Maktaba al-Raḍawiyya li Iḥyâ' al-Āthâr al-Ja'fariyya, 1343/1924), 2:149.

<sup>57</sup> al-Wâ'ilî, Min Fiqh al-Jins, 141.

said that the verse on mut<sup>c</sup>a marriage was "revealed in the Book of God and we practised it with the Prophet; no verse abrogated it and the Prophet did not deprive us of practising it until he died".<sup>58</sup> Another tradition was narrated in this connection which reports that when al-Hakam was asked about the abrogation of mut<sup>c</sup>a marriage he replied in the negative.<sup>59</sup> Ibn ʿAbbâs, as mentioned before, is reported to have said that the verse on mut<sup>c</sup>a marriage is a muhkam verse, which suggests for al-Zamakhsharî that it was not revoked.<sup>60</sup>

## II. The abrogation by the Sunna

The second argument presented by Sunnî jurists is that mut<sup>c</sup>a marriage was abrogated by a group of traditions attributed to the Prophet. The traditions listed by the Sunnî jurists are inconsistent as far as the place of prohibition of mut<sup>c</sup>a marriage is concerned. The prohibition of mut<sup>c</sup>a marriage, according to these traditions mentioned by Sunnî jurists, occurred in seven locations:

1- Khaybar. A famous tradition which Sunnî jurists adhere to is ascribed to the forth caliph ʿAlî. According to Sunnî jurists, ʿAli is reported to have said to Ibn

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<sup>58</sup> Fakhr al-Dîn al-Râzî, al-Tafsîr al-Kabîr, 32 vols. (Beirut: Iḥyâ' al-Turâth, n.d.), 10:49-50.

<sup>59</sup> al-Suyûṭî, al-Durr al-Manthûr, 2:140.

<sup>60</sup> al-Zamakhsharî, al-Kashshâf, 1:498.

‘Abbâs that the Prophet forbade mut<sup>c</sup>a with women and also eating of the meat of the domesticated donkeys at Khaybar.<sup>61</sup>

Another tradition concerning the prohibition of mut<sup>c</sup>a marriage by the Prophet at Khaybar is attributed to ‘Abd Allâh Ibn ‘Umar.<sup>62</sup>

2- Ḥunayn. Al-Nisâ’î in his Sunan narrates, on the authority of Ibn al-Muthannâ, that ‘Alî announced that the Prophet outlawed mut<sup>c</sup>a marriage at Ḥunayn.<sup>63</sup>

3- Tabûk. The tradition of prohibition of mut<sup>c</sup>a marriage attributed to the Prophet, during the expedition of Tabûk was narrated by three Companions; namely, ‘Alî, Jâbir Ibn Abd Allâh al-Anṣârî and Abû Hurayra.<sup>64</sup>

4- Conquest of Mecca. A group of traditions whose content is inconsistent with each other were narrated by al-Rabî‘, on the authority of his father Sabra. They indicate that the Prophet banned mut<sup>c</sup>a marriage at Mecca in

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<sup>61</sup> Muḥammad Ibn Ismâ‘îl al-Bukhârî, Saḥîḥ al-Bukhârî, 9 vols. (Beirut: Dâr Iḥyâ’ al-Turâth al-‘Arabî, n.d.), 7:16.

<sup>62</sup> al-‘Āmilî, al-Mut<sup>c</sup>a fil-Islâm, 70.

<sup>63</sup> Jalâl al-Dîn al-Suyûtî, Sunan al-Nisâ’î, 8 vols. (Cairo: al-Maktaba al-Tijâriyya al-Kubrâ, n.d.), 6:126.

<sup>64</sup> ‘Alî al-Ḥusaynî al-Mîlânî, "Min al-Aḥâdîth al-Mawḍû‘a (5): Aḥâdîth Taḥrîm al-Nabî Mut<sup>c</sup>at al-Nisâ’ (Risâla fil-Mut<sup>c</sup>atayn)" Turâthunâ, 31 vols. (Qum: A quarterly issued by Āl al-Bayt establishment for the Islamic heritage), Forth Number (25) Sixth Year (Shawwâl 1411/1990):59-60.

the year of its conquest.<sup>65</sup>

5- farewell pilgrimage. On the authority of Sabra also many traditions were reported by his son al-Rabîc that mut<sup>c</sup>a marriage was prohibited by the Prophet in the year of farewell pilgrimage.<sup>66</sup>

6- The year of Awṭâs. On the authority of his father, Salama Ibn al-Akwa<sup>c</sup> is reported to have said that the Prophet permitted mut<sup>c</sup>a marriage for three days in the year of Awṭâs then prohibited it.<sup>67</sup>

7- The lapsed minor pilgrimage. It was reported on the authority of al-Ḥasan al-Baṣrî, that mut<sup>c</sup>a marriage was not permitted except for three days only during lapsed; neither before nor after it.<sup>68</sup> Contrary to the Shî'îs, Sunnî jurists maintain that traditions with regard to the prohibition of mut<sup>c</sup>a marriage show that the Prophet had confirmed the abrogation of mut<sup>c</sup>a marriage at many places.<sup>69</sup> However, al-Shawkânî apposes this viewpoint due to the fact that it contradicts the famous tradition

<sup>65</sup> Muḥsin al-Amîn al-<sup>c</sup>Āmilî, Naqd al-Waṣḥî<sup>c</sup>a (Beirut: Mu'assasat al-<sup>c</sup>Ālamî lil-Maṭbû<sup>c</sup>ât, 1403/1983), 298-300.

<sup>66</sup> Ibid., 300-302.

<sup>67</sup> Muslim Ibn al-Ḥajjâj Ibn Muslim al-Qashîrî, Ṣaḥîḥ Muslim, 8 vols. (Cairo: Maṭba<sup>c</sup>at Muḥammad Alî Ṣabîḥ wa Awlâduhu, n.d.), 4:131.

<sup>68</sup> Muḥammad Ḥasan al-Muẓaffar, Dalâ'il al-Ṣidq, 3 vols. (Tehran: Maktabat al-Najâḥ, n.d.), 3:181.

<sup>69</sup> Yaḥyâ Ibn Sharaf al-Nawawî, Sharḥ Ṣaḥîḥ Muslim, 18 vols. (Beirut: Dâr al-Qalam, 1407/1987), 9190.



narrated by Sabra that the Prophet outlawed mut<sup>c</sup>a marriage at Mecca once and for all.<sup>70</sup> Although Sunnî jurists often refer to the above well-known traditions to substantiate their argument that mut<sup>c</sup>a marriage was abrogated, nevertheless they differ on the question of how many times and when mut<sup>c</sup>a marriage was abrogated.<sup>71</sup> Sunnî jurists are disagree on the number of times the mut<sup>c</sup>a was abrogated which show the contradiction of the traditions attributed to the Prophet. For this very reason, it would be expedient to present the Sunnî viewpoint in this regard. Ibn al-<sup>c</sup>Arabî, for instance, believes that mut<sup>c</sup>a marriage was an unusual institution in Sharî<sup>c</sup>a, for it was permitted at the beginning of Islam, prohibited at Khaybar; permitted during the expedition of Awṭâs, outlawed once again, after which nothing had been changed.<sup>72</sup> Kâshif al-Ghiṭâ' states that according to the traditions narrated by Sunnî jurists mut<sup>c</sup>a marriage had been permitted and prohibited five or six times.<sup>73</sup> After pointing out the differences of the jurists concerning the number of permissions and abrogations of mut<sup>c</sup>a marriage, al-Qurtubî states that one will come to the

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<sup>70</sup> al-Shawkânî, Nayl al-Awṭâr, 5:274.

<sup>71</sup> Muḥammad Ibn Aḥmad Ibn Rushd, Bidâyat al-Mujtahid wa-Nihâyat al-Muqtaṣad, 2 vols. (Cairo: al-Maktaba al-Misriyya, n.d.), 2:49. See also Aḥmad Ibn Alî Ibn Ḥajar al-<sup>c</sup>Usqalânî, Fath al-Bârî Bisharḥ Saḥîḥ al-Bukhârî, 20 vols. (Beirut: Dâr al-Ma<sup>c</sup>rifa, n.d.), 9:169.

<sup>72</sup> Muḥammad Ibn <sup>c</sup>Abd Allâh Ibn al-<sup>c</sup>Arabî, Aḥkâm al-Qur'ân, 2 vols. (Beirut: Dâr al-Ma<sup>c</sup>rifa, 1407/1987), 1:389.

<sup>73</sup> Kâshif al-Ghiṭâ', Aṣl al-Shî<sup>c</sup>a, 172.

conclusion that mut<sup>c</sup>a marriage was permitted and abrogated seven times.<sup>74</sup> Some Sunnî jurists believe that the abrogation in the Shari<sup>c</sup>a occurred once and for all. For this reason, Ibn Qayyim al-Jawziyya states that if mut<sup>c</sup>a marriage was abrogated in the time of Khaybar the abrogation would be twice, which has no parallel in the Shari<sup>c</sup>a.<sup>75</sup> In the wake of the above-mentioned traditions concerning the number of times that mut<sup>c</sup>a marriage was abrogated, Ibn Kathîr discusses three different viewpoints by the jurists as follows:

1- According to al-Shâfi<sup>c</sup>î, a group of the 'Ulamâ' are of the opinion that mut<sup>c</sup>a marriage was permitted and abrogated twice.

2- According to some, it was permitted and banned more than two times.

3- Some jurists assert that it was permitted and abolished only once.<sup>76</sup>

Sunnî jurists disagree not only on the number of times that mut<sup>c</sup>a marriage was abrogated, but also on the time of the abrogation. The traditions regarding the abrogation of mut<sup>c</sup>a marriage contradict each other and Sunnî jurists have

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<sup>74</sup> Muḥammad Ibn Aḥmad al-Qurṭubî, al-Jâmi<sup>c</sup> li Ahkâm al-Qur'ân, 20 vols. (Cairo: Dâr al-Kâtib al-<sup>c</sup>Arabî lil-Ṭibâ'a wal-Nashr, 1387/1967, 5:131.

<sup>75</sup> Muḥammad Jamâl al-Dîn al-Qâsimî, Mahâsin al-Ta'wîl, 17 vols. (Damascus: Dâr Iḥyâ' al-Kutub al-<sup>c</sup>Arabiyya, 1377/1957), 5:1189.

<sup>76</sup> Ismâ'îl Ibn Kathîr al-Qarashî, Tafsîr al-Qur'ân al-<sup>c</sup>Azîm, 4 vols. (Cairo: Maṭba'at al-Istiḳâma, 1376/1956), 1:474.

no authentic tradition on which to rely. al-Qâḍî 'Iyâḍ presents all the traditions concerning the abrogation of mut<sup>c</sup>a marriage and the different viewpoints of the jurists concerning the date of abrogation, thus indicating their mutual contradiction.<sup>77</sup> To exhibit the discrepancy of these traditions and the inconsistency of the Sunnî jurists' position on the abrogation of mut<sup>c</sup>a marriage, al-Amînî collects fifteen different Sunnî viewpoints.<sup>78</sup> To substantiate his idea, al-Amînî provides one example which refers to a well-known tradition concerning the abrogation of mut<sup>c</sup>a marriage at Khaybar. He relates that while al-Qâḍî 'Iyâḍ confirms the undoubted authenticity of the tradition concerning the abrogation at Khaybar, al-Suhaylî asserts that no one among the traditionist recognizes that the abrogation of mut<sup>c</sup>a marriage took place in Khaybar.<sup>79</sup>

The Shî'î jurists developed two arguments to rebut the claims of Sunnî jurists concerning the abrogation of mut<sup>c</sup>a marriage. In the First, they reject the whole Sunnî argument on the basis of the following reasons:

1- There is no consensus among the Sunnî jurists with regard to the fact that the Qur'ân can be superseded by the Sunna. Al-Āmidî relates that al-Shâfi'î and most of his companions maintain that the Qur'ân cannot be superseded by

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<sup>77</sup> al-Nawawî, Sharḥ Ṣaḥîḥ Muslim, 9:191-193.

<sup>78</sup> al-Amînî, al-Ghadîr, 6:225.

<sup>79</sup> Ibid., 226.

the Sunna. And the other group of Sunnî jurists, al-Āmidî asserts, who believe that the Qur'ân can be abrogated by the Sunna are at odds with each others in the operation of this obrogation.<sup>80</sup> This view with respect to the mutawâtir tradition. With reference to the solitary tradition (al-khabar al-wâhid), Shî'î jurists maintain that the Qur'ân cannot be replaced by a solitary tradition.<sup>81</sup>

2- The traditions regarding the abrogation of mut'a marriage are opposed by a group of other traditions narrated by both Sunnîs and Shî'îs. They signify that mut'a marriage was not abrogated and that the Prophet did not prohibit it until his demise.<sup>82</sup> Al-Jaṣṣāṣ takes issue with the Shî'îs, arguing that all the traditions concerning the permission and the abrogation of mut'a marriage had equal status.<sup>83</sup>

3- The traditions concerning the abrogation of mut'a marriage are inconsistent and contradictory.<sup>84</sup> The discrepancy of these traditions, al-Āmilî contends, prevents them from being viable testimonies to be sustained in the face of the traditions regarding the legitimacy of

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<sup>80</sup> al-Āmilî, al-Mut'a fil-Islâm, 37.

<sup>81</sup> al-Khû'î, al-Bayân, 317. See also Kâshif al-Ghiṭâ', Asl al-Shî'a, 172.

<sup>82</sup> Ibid. See also al-Wâ'ilî, Min Fiqh al-Jins, 149-150.

<sup>83</sup> Abû Bakr Aḥmad al-Jaṣṣāṣ, Aḥkâm al-Qur'ân, 3 vols. (Beirut: Dâr al-Kitâb al-Ārabî, n.d.), 2:153.

<sup>84</sup> al-Ghurayfî, al-Tashayyûc, 547.

mut<sup>c</sup>a marriage. Therefore, al-<sup>c</sup>Āmilî insists that we should in this case refer to the traditions which demonstrate the persistence of the legality of mut<sup>c</sup>a marriage.<sup>85</sup> Al-Jaṣṣāṣ objects that if some traditions differ as to the date of the prohibition, the abrogation of mut<sup>c</sup>a marriage then must be left undated and the traditions regarded as still correct.<sup>86</sup>

4- There is a well-known tradition among both Sunnî and Shî'î jurists attributed to the second caliph <sup>c</sup>Umar, who outlawed mut<sup>c</sup>a marriage. <sup>c</sup>Umar is reported to have said, "There were two forms of mut<sup>c</sup>a in the time of the Prophet. I prohibit them and shall punish whoever practices them". If the prohibition of mut<sup>c</sup>a marriage were announced by the Prophet, as is argued; then Shî'î jurists contend that <sup>c</sup>Umar should also have to ascribe this prohibition to the Prophet rather than to himself.<sup>87</sup> Sunnî jurists reject the earlier argument on two bases. First, they relate that the second caliph, <sup>c</sup>Umar, declared that the Prophet had permitted mut<sup>c</sup>a marriage then prohibited it, and so he just followed the Prophet's decree.<sup>88</sup> Second, They contend that it is impossible that the Companions of the Prophet should know

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<sup>85</sup> al-<sup>c</sup>Āmilî, al-Mut<sup>c</sup>a fil-Islâm, 72.

<sup>86</sup> al-Jaṣṣāṣ, Aḥkâm al-Qur'ân, 2:151.

<sup>87</sup> al-Khû'î, al-Bayân, 324-325. See also al-Qâsimî, Mahâsin al-Ta'wîl, 5:1192.

<sup>88</sup> Muḥammad Ibn Yazîd al-Qazwînî, Sunan Ibn Mâja, 2 vols. (Halab: Dâr Iḥyâ' al-Kutub al-<sup>c</sup>Arabiyya, 1372/1952), 1:631.

about the prohibition of mut<sup>c</sup>a marriage by the Prophet and still continue to practice it. Perhaps, they practised it in the days of the Prophet and continued in this manner as the prohibition order did not reach them untill <sup>c</sup>Umar declared it openly.<sup>89</sup>

5- According to some Shî'î jurists, the existence of the traditions concerning the prohibition of mut<sup>c</sup>a marriage during the lifetime of the Prophet does not imply that it was abrogated. For, there are numerous traditions which confirm the legitimacy of mut<sup>c</sup>a marriage in the last days of the Prophet and, consequently, one may come to the conclusion that if the tradition concerning the prohibition of mut<sup>c</sup>a marriage are authentic they may exist before mut<sup>c</sup>a marriage was permitted.<sup>90</sup> In response to this, same approach is produced by al-Jaṣṣāṣ that the existence of traditions regarding the permission of mut<sup>c</sup>a marriage during the lifetime of the Prophet does not signify its continuity.<sup>91</sup>

The second argument advanced by Shî'î jurists is that those traditions regarding the prohibition of mut<sup>c</sup>a marriage, which are reliable in the eyes of the Sunnî

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<sup>89</sup> Ibn Ḥajar, Fath al-Bâri, 9:172. See also Shams al-Dîn Muḥammad Ibn Qayyim al-Jawziyya, Zâd al-Ma'âd fî Hudâ Khayr al-<sup>c</sup>Ibâd, 4 vols. (Cairo: Sharikat wa-Maṭba'at Mustafâ al-Nâbulî al-Ḥalabî, 1369/1950), 1:185.

<sup>90</sup> Ibid., 317-318. See also al-Balâghî, Ālâ' al-Raḥmân, 1:80.

<sup>91</sup> al-Jaṣṣāṣ, Aḥkâm al-Qur'ân, 2:153.

jurists, do not hold when examined individually. Many examples are introduced in this regard. Concerning the prohibition of mut<sup>ca</sup> marriage during the lapsed minor pilgrimage (‘umrat al-qaḍâ’), Ibn Ḥajar does not believe in its authenticity because of the weakness in the chain of transmission. He asserts that this tradition was narrated by al-Ḥasan (mursal al-Ḥasan) and all his traditions (marâsîluh) are weak in view of the fact that he accepted the traditions from any individual without scrutiny.<sup>92</sup>

The traditions regarding the prohibition of mut<sup>ca</sup> marriage in Tabûk were narrated by Abû Hurayra and Jâbir, who are both weak narrators, according to Ibn Ḥajar. Ibn Ḥajar states that the tradition which was reported by Abû Hurayra is unacceptable because it was narrated by both Mu‘ammil Ibn Ismâ‘îl and ‘Ikrima Ibn ‘Ammâr whose reliability is questionable.<sup>93</sup> And Ibn Ḥajar asserts that the tradition narrated by Jâbir is erroneous because it is narrated by ‘Abbâd Ibn Kathîr who is considered a persona non grata (matrûk).<sup>94</sup> In fact, Ibn Ḥajar believes that there is a defect (‘illa) in the traditions concerning the prohibition of mut<sup>ca</sup> marriage except the one which took place during the expedition of al-Fath.<sup>95</sup>

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<sup>92</sup> Ibn Ḥajar, Fath al-Bârî, 9:170.

<sup>93</sup> Ibid., See also al-‘Askarî, Ma‘âlim al-madrasatayn, 2:262.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

Some of the jurists believe that the prohibition of mut<sup>ca</sup> marriage in Awṭâs cannot be constitute a separate occasion because the year of Awṭâs and al-Fath are similar.<sup>96</sup> The Shî'î jurists discuss this tradition in its chain of transmission and text as well. Kalanter in his commentary on al-Lum<sup>ca</sup> al-Dimashqiyya believes that this tradition has no basis, but is a fabrication (firya) attached to a great Companion named Salama Ibn al-Akwa<sup>c</sup>.<sup>97</sup> For this reason, Kalanter contends that al-Bukhârî in his Sahîh omitted this tradition. Contrary to this, Kalanter asserts, he reports the permission of mut<sup>ca</sup> marriage on the authority of Salama Ibn al-Akwa<sup>c</sup>.<sup>98</sup> In the chain of transmission, Kalanter relates, there is Yûnus Ibn Muḥammad and 'Abd al-Wâḥid Ibn Ziyâd. Concerning Yûnus Ibn Muḥammad, Kalanter states that three great jurists cast doubt on his trustworthiness, namely, Ibn Mu'în, al-Nisâ'î and Aḥmad Ibn Ḥanbal. And with regard to 'Abd al-Wâḥid Ibn Ziyâd, Kalanter relates that Yaḥyâ and Abû Dâwûd do not rely on his traditions.<sup>99</sup>

At the beginning of the tradition narrated by Salama Ibn al-Akwa<sup>c</sup>, concerning the prohibition of mut<sup>ca</sup> marriage

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<sup>96</sup> Ibid., 169. See also al-Muḥaffar, Dalâ'il al-Ṣidq, 3:180.

<sup>97</sup> Muḥammad Ibn Jamâl al-Dîn al-°Âmilî, al-Lum<sup>ca</sup> al-Dimashqiyya, 10 vols. (Brirut: Dâr al-°Âlam al-Islâmî, n.d.), 5:262.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid., 263.



in the year of Awtâs, the Prophet limited the acceptance of mut<sup>ca</sup> marriage for only three days, contrary to other traditions. This limitation, according to al-Muẓaffar, reflects its falsity.<sup>100</sup> The tradition reads as follows: "The Prophet permitted mut<sup>ca</sup> marriage for three days in the year of Awtâs, then prohibited it (thumma nahâ °anhâ)". al-Khû'î states that it is not obvious from the content of the tradition that the prohibition of mut<sup>ca</sup> marriage was announced by the Prophet, inasmuch as the word (nahâ) could be taken in the passive voice (nuhiya °anhâ), thus signifying that °Umar prohibited mut<sup>ca</sup> after the Prophet had permitted it.<sup>101</sup>

A famous tradition among Sunnî jurists concerning the prohibition of mut<sup>ca</sup> marriage in Faṭḥ Mecca and Ḥajjat al-Wadâ° both were narrated by Sabra Ibn Ma°bad only. However, the trustworthiness of Sabra is not beyond question. Ibn Qayyim relates that a group of jurists do not accept the tradition regarding the prohibition of mut<sup>ca</sup> marriage in the year of al-Faṭḥ because it was narrated by Sabra. For this reason, Ibn Qayyim contends, that al-Bukhârî neglected his tradition in his Ṣaḥîḥ.<sup>102</sup> Al-Qâḍî °Iyâḍ even repudiates the tradition concerning the permission of mut<sup>ca</sup> marriage

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<sup>100</sup> al-Muẓaffar, Dalâ'il al-Ṣidq, 3:182.

<sup>101</sup> al-Khû'î, al-Bayân, 324.

<sup>102</sup> al-Qâsimî, Mahâsin al-Ta'wîl, 5:1192.

which was narrated by Sabra.<sup>103</sup> The tradition attributed to Sabra was narrated exclusively by his son al-Rabîc, who is unidentified among the jurists and the traditionist.<sup>104</sup> The texts of the traditions narrated by Sabra that, when the Prophet permitted mut'a marriage, he and his cousin offered mut'a to a woman in return for a cloak are very diverse. In the first tradition, according to Muslim, the man who accompanied Sabra was his friend. In the second, the man was his cousin. In the third tradition, according to Muslim also, he was from Banû Sulaym.<sup>105</sup> There is a difference among these traditions on who was more beautiful, who had a satisfying cloak and who was accepted by the woman.<sup>106</sup> Al-Amîn presents all traditions narrated by Sabra from the authoritative Sunnî jurists in order to exhibit their textual inconsistency. He states that in some traditions, according to Muslim, Sabra and the man were present on the day of al-Fath; while in the traditions narrated by Ibn Ḥanbal and Ibn Mâja, they were in Ḥajjat al-Wadâc. In some traditions, according to Ibn Ḥanbal and Ibn Mâja, al-Amîn relates, the date is anonymous.<sup>107</sup> Al-

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<sup>103</sup> Ibn Ḥajar, Fath al-Bârî, 9:192.

<sup>104</sup> al-<sup>c</sup>Āmilî, al-Lum'a al-Dimashqiyya, 5:264. See also al-Suyûrî, Kanz al-<sup>c</sup>Irfân, 2:166.

<sup>105</sup> al-Balâghî, Ālâ' al-Rahmân, 1:81.

<sup>106</sup> Ibid., See also al-Amîn, Naqd al-Washî'a, 303.

<sup>107</sup> al-Amîn, Naqd al-Washî'a, 298-303.

Fakîkî claims to have traced all the speeches of the Prophet in Fath Mecca and Ḥajjat al-Wadâ° from the most reliable historical sources and came to the conclusion that there is no hint by the Prophet to any prohibition of mut°a marriage.<sup>108</sup> Al-Fakîkî provides another proof that the tradition concerning the prohibition of mut°a marriage in Fath Mecca is invalid. He asserts that the tradition is solitary, and unsupported by any other Companion; in spite of the fact that there were more than ten thousand fighters in Fath Mecca.<sup>109</sup>

The prohibition of mut°a marriage in Khaybar attributed to °Alî, whose validity is acknowledged by most of the Sunnî jurists,<sup>110</sup> was the subject of a thorough discussion by the Shî°î jurists. The Shî°î jurists rejected its validity for many reasons:

A- The traditions ascribed to °Alî contradict each other in the date of the prohibition. In this regard, Sunnî jurists relate five dates concerning this tradition all of which are on the authority of al-Zuhrî.<sup>111</sup>

B- Another reason is based on the agreement among Sunnî jurists concerning the prohibition of mut°a marriage

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<sup>108</sup> Tawfîq al-Fakîkî, al-Mut°a wa-Āthâruhû fil-Islâh al-Ijtimâ°î (Cairo: Maṭbû°ât al-Najâh, n.d.), 84-94.

<sup>109</sup> Ibid., 87.

<sup>110</sup> Ibid., 80.

<sup>111</sup> al-Mîlânî, Turâthunâ, 25:66.

at Khaybar. Ibn Taymiyya insists, on the other hand, on the authenticity of the tradition concerning the prohibition of mut<sup>c</sup>a marriage in Khaybar on the basis that it was narrated in the two Sahîhs by the al-Zuhrî.<sup>112</sup> Ibn Hajar and al-Suhaylî both confirm that there was no contract of mut<sup>c</sup>a marriage on the day of Khaybar subject to prohibition, which is unanimously accepted by the biographers and narrators.<sup>113</sup> To reinforce what Ibn Hajar and al-Suhaylî have stated, Ibn Qayyim al-Jawziyya affirms that there were no Muslim women in Khaybar eligible for mut<sup>c</sup>a marriage; rather, there were only Jewish women, with whom none of the Companions had a mut<sup>c</sup>a marriage. According to Ibn Qayyim, it was illegal to wed with the People of the Book at that time due to the fact that permission to marry them granted after Hajar al-Wadâ<sup>c</sup> and following Khaybar.<sup>114</sup> For this reason, the Sunnî jurists try very hard to demonstrate that the tradition narrated by <sup>c</sup>Alî that the Prophet prohibited mut<sup>c</sup>a marriage and eating of the domestic donkeys on the day of Khaybar was solely related to the domestic donkeys. However, Shî<sup>c</sup>î jurists assert that the text of this tradition does not reinforce what the Sunnî jurists endeavour to demonstrate.<sup>115</sup>

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<sup>112</sup> Ibid., 68

<sup>113</sup> al-<sup>c</sup>Askarî, Ma<sup>c</sup>âlim al-Madrasatayn, 2:268.

<sup>114</sup> Ibid., 267-268.

<sup>115</sup> al-Khû'î, al-Bayân, 322.

C- The narrator of all the traditions concerning the prohibition of mut<sup>c</sup>a marriage, attributed to <sup>c</sup>Alî, is Muhammad Ibn Shihâb al-Zuhrî, who was a recognized opponents of <sup>c</sup>Alî.<sup>116</sup> Al-Zuhrî is not trustworthy in the eyes of both Ibn Mu<sup>c</sup>în and <sup>c</sup>Abd al-Ḥaqq al-Dahlawî. Ibn Mu<sup>c</sup>în has no confidence in him because of the fact that al-Zuhrî narrates from <sup>c</sup>Umar Ibn Sa<sup>c</sup>d, who slaughtered Imâm Ḥusayn, and he was working on behalf of Bnû Umayya. Al-Dahlawî himself does not trust him due to the fact that he was not a righteous man and was condemned by his contemporaries for his conduct.<sup>117</sup>

D- It is well known among the Muslim jurists that <sup>c</sup>Alî was opposed to the prohibition of mut<sup>c</sup>a marriage and he rebuked the announcement of <sup>c</sup>Umar's interdiction of mut<sup>c</sup>a marriage. And it was well known that <sup>c</sup>Alî was reported to have said that were it not for the prohibition of <sup>c</sup>Umar nobody would commit fornication but the most wretched.<sup>118</sup> In addition, al-Muẓaffar contends that if <sup>c</sup>Alî had notified Ibn <sup>c</sup>Abbâs that the Prophet prohibited mut<sup>c</sup>a marriage how can we comprehend the fact that Ibn <sup>c</sup>Abbâs insisted on its legitimacy until the time of Ibn al-Zubayr?<sup>119</sup>

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<sup>116</sup> al-Milânî, Turâthunâ, 25:71.

<sup>117</sup> Ibid., 24:31-32.

<sup>118</sup> al-Muẓaffar, Dalâ'il al-Ṣidq, 3:182.

<sup>119</sup> Ibid.

### III. The abrogation by consensus (ijma')

The last argument presented by Sunnî jurists is that mut'a marriage was abrogated by the consensus of Muslim jurists. After posing the question on whether mut'a marriage was abrogated or not, al-Râzî declares that the great majority in the community (umma) uphold that it was abrogated.<sup>120</sup> al-Nîsâbûrî also, after conveying the unanimity of all Muslim jurists on the legitimacy of mut'a marriage in the beginning of Islam, asserts that the majority of the umma advocate its cancellation.<sup>121</sup> In his remarkable book Bidâyat al-Mujtahid Ibn Rushd insists that most of the Companions and all of the jurists (fugahâ') persisted on its annulment.<sup>122</sup>

The Shî'î jurists take issue with their Sunnî counterparts, maintaining that their argument is baseless on two grounds. First, according to the Muslim jurists, consensus cannot be considered as an abrogating element.<sup>123</sup> Most Muslim jurists (al-Jumhûr), according to al-Taftâzânî, assert that the decisive (al-qat'î) consensus— in other words the unanimity of the Companions— cannot be replaced

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<sup>120</sup> al-Râzî, al-Tafsîr al-Kabîr, 10:49.

<sup>121</sup> Muḥammad Ibn Jarîr al-Ṭabarî, Jâmi' al-Bayân fî Tafsîr al-Qur'ân, commented on by al-Nîsâbûrî, 30 vols. (Beirut: Dâr al-Ma'rifa, 1406/1986), 5:16.

<sup>122</sup> Ibn Rushd, Bidâyat al-Mujtahid, 2:49.

<sup>123</sup> al-Āmilî, al-Mut'a fil-Islâm, 38.

or abrogated by any other subsequent consensus.<sup>124</sup> Al-Taftâzânî continues to say that the consensus agreed upon by the jurists cannot be replace, as the maxim which utilized by jurisprudent status: namely, that the decisive consensus (al-ijmâ' al-gat'î) neither abrogates nor is abrogated (lâ yunsakh wa-lâ yunsakh bih).<sup>125</sup> The Shî'î jurists contend that there was a consensus on the legitimacy of mut'a marriage in the beginning of Islam by all Muslim jurists, and this harmony cannot be annulled by any later one.<sup>126</sup>

The second reason is that the argument that mut'a marriage was abrogated by the consensus of all Muslim jurists, as it was widespread among Sunnî jurists, is comprehensively repudiated by Shî'î jurists. Although al-Râzî, they maintain, related that the great majority of the umma advocated the abrogation of mut'a marriage, he also stated that the bulk of them persisted on its legitimacy.<sup>127</sup> To support their argument Shî'î jurists set forth a list of outstanding figures among the Companions, followers (tâbi'ûn) and jurists (fuqahâ') who endorse the legitimacy of mut'a marriage.<sup>128</sup>

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<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid., 43-44. See also al-Wâ'ilî, Min Fiqh al-Jins, 151.

<sup>127</sup> Ibid., 44.

<sup>128</sup> See al-Amînî, al-Ghadîr, 6:221-223.

Mâlik, the founder of the Mâlikî school of law, permitted mut<sup>c</sup>a marriage.<sup>129</sup> He was reported to have said that mut<sup>c</sup>a marriage was legitimate and remains legitimate until its abrogation is proved.<sup>130</sup> Concerning the prohibition of mut<sup>c</sup>a marriage, Howard says:

There are indications of some resistance among jurists to the prohibition of mut<sup>c</sup>a in Malik's time and even Malik himself was not too certain of the absolute nature of the prohibition. He entitles his chapter simply nikâh al-mut<sup>c</sup>a without including any prohibition.<sup>131</sup>

Howard believes that mut<sup>c</sup>a marriage was makrûh in the eyes of Mâlik for he says:

Al-Sarakhsî (d. 438 A.H.) maintains that Mâlik actually permitted mut<sup>c</sup>a, but this may have been a misunderstanding of Mâlik's position, which was probably in agreement with al-Shaybânî's statement that mut<sup>c</sup>a was makrûh.<sup>132</sup>

According to a tradition attributed to Mâlik, al-Qurṭubî notes that Mâlik did not advocate lapidation as a punishment for mut<sup>c</sup>a marriage, for he did not consider it illegitimate.<sup>133</sup> In Connection with this, Howard says: "Al-Shâfi'î reproaches Mâlik for not advocating lapidation as punishment for mut<sup>c</sup>a."<sup>134</sup> Abû Bakr concludes that Aḥmad,

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<sup>129</sup> al-Sarakhsî, al-Mabsûṭ, 5:152.

<sup>130</sup> al-Amînî, al-Ghadîr, 6:223.

<sup>131</sup> Howard, Mut<sup>c</sup>a Marriage, 89.

<sup>132</sup> Ibid.

<sup>133</sup> al-Qurṭubî, al-Jâmi' li Aḥkâm al-Our'ân, 5:133.

<sup>134</sup> Howard, Mut<sup>c</sup>a Marriage, 89.



the founder of the Ḥanbalî legal school, had also considered mut<sup>ca</sup> marriage to be makrûh according to a tradition which, when asked, he preferred not to do.<sup>135</sup> In another tradition, it was reported that Aḥmad permitted mut<sup>ca</sup> marriage in case of necessity.<sup>136</sup>

Hughes narrates the story of a king which reflects the opinion of the four imâms (the founders of the legal schools) concerning the legitimacy of mut<sup>ca</sup> marriage. The king married more than four wives and asked the lawyers to find a solution to his problem. As the 'ulama' assembled at the request of the Emperor, the following summary was given:

Imâm Mâlik, and the Shî'ahs are unanimous in looking upon mut<sup>ca</sup> marriage as legal; Imâm ash-Shâfi'î and the great Imâm Abû Hanîfah look upon mut<sup>ca</sup> marriage as illegal. But should at any time a Qâzî of the Malaki [Mâlikî] sect decide that mut<sup>ca</sup> is legal, it is legal, according to the common belief, even for Shâfi'îs and Hanafîs.<sup>137</sup>

It is noteworthy to mention that three kinds of marriages similar to mut<sup>ca</sup> marriage were recognised by the great Sunnî jurists.

1- According to Abû Ḥanîfa, al-Ḥasan Ibn Ziyâd relates

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<sup>135</sup> 'Abd Allâh Ibn Aḥmad Ibn Maḥmûd Ibn Qudâma, al-Mughnî, 12 vols. (Beirut: Dâr al-Kitâb al-'Arabî, 1403/1983), 7:571.

<sup>136</sup> al-Qâsimî, Mahâsin al-Ta'wîl, 5:1187. See also Ibn Kathîr, Tafsîr al-Qur'ân al-'Azîm, 1:474.

<sup>137</sup> T.P. Hughes, "Mut<sup>ca</sup>," Dictionary of Islam, 1st ed. (Lahore: Premier Book Publisher and Booksellers, 1885), 424.

that mut<sup>ca</sup> marriage is valid if the spouses could not survive the time period specified in a contract exceeding the normal life span of the spouses.<sup>138</sup> Al-Fakîkî states that mut<sup>ca</sup> marriage can be effective for a long time, e.g. 100 years or more, and as a result all Muslim jurists agree on the legitimacy of the marriage for lengthy periods of time.<sup>139</sup>

2- It seems that, according to the Sunnî jurists, the stipulation of a fixed period of time in the contract is the key element making for the prohibition of mut<sup>ca</sup> marriage. It was agreed among the Sunnî jurists that marriage was valid if the husband intended to leave his wife after a fixed period of time, even if he informed his wife about his intention. This contract is legitimate, according to the Sunnî jurists, provided that the intention of the husband to leave his wife is not included in the contract.<sup>140</sup> Al-Shâfi'î permits this type of marriage. A useful picture of this marriage was drawn by Heffening:

but in spite of their refusal to recognise mut<sup>ca</sup> the Sunnis made concession by which mut<sup>ca</sup> gained a footing in another form. It became the practice not to insert a definite period in the contract; any agreement made outside the contract was not

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<sup>138</sup> al-Fakîkî, al-mut<sup>ca</sup>, 53. See also al-Sarakhsî, al-Mabsûṭ, 5:153. Yet al-Sarakhsî did not mention Abû Ḥanîfa in the tradition of al-Ḥasan.

<sup>139</sup> Ibid., 54.

<sup>140</sup> 'Abd al-Raḥmân al-Jazîrî, al-Fiqh 'alâ al-Madhâhib al-Arba<sup>ca</sup>, 4 vols. (Cairo: Sharikat Fann al-Ṭibâ'a, n.d.), 92-94. See also Ibn Qudâma al-Mughnî, 7:573.

affected by law. Al-Shâfi'î for example, declared a marriage valid when it was concluded with the unuttered resolution (niya) to observe it only for the period of stay in a place or for a few days only, so long as this was not expressly stipulated in the contract. Similarly if agreement to this effect (murâwada) had been previously made and even if made on oath; but he describes such an agreement as makrûh.<sup>141</sup>

al-Bâjî al-Andalusî narrates that according to Imâm Mâlik whoever does not wish to keep his wife, but rather to enjoy wedlock for a period of time only, it is permitted to do so.<sup>142</sup> The Ḥanafî legal school permits this kind of marriage, since it allowed marriage with a woman for a relatively brief period so as to be legal marriageable for her former husband.<sup>143</sup> Ibn Taymiyya relates three viewpoints attributed to Imâm Aḥmad Ibn Ḥanbal concerning a traveller who contracts a marriage and has the intention to go back to his country without stipulating this condition in the contract; namely, It is permitted, which is the viewpoint of the jumhûr, it is not permitted, and it is makrûh. Ibn Taymiyya upholds its legality and confirms that it is not mut'â marriage.<sup>144</sup> Although Sunnî jurists admitted this kind of marriage, nevertheless some of them rejected it, however, al-Awzâ'î, for instance, considers

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<sup>141</sup> Heffening, "Mut'â", 755.

<sup>142</sup> al-Wâ'ilî, Min Fiqh al-Jins, 168.

<sup>143</sup> al-Jazîrî, al-Fiqh 'alâ al-Madhâhib al-Arba'a, 4:94.

<sup>144</sup> Aḥmad Ibn 'Abd al-Ḥalîm Ibn Taymiyya, Majmû' Fatâwî al-Shaykh Ibn Taymiyya, collected by 'Abd al-Raḥmân Muḥammad Ibn Qâsim, 34 vols. (Morocco: Maktabat al-Ma'ârif, n.d.), 32:147-148.

this marriage to be mut<sup>c</sup>a,<sup>145</sup> and Rashîd Riḍâ believes that this contract is worse than mut<sup>c</sup>a marriage.<sup>146</sup>

3- Some Sunnî jurists permit a marriage in the form of "hire", on the basis of the verse 4:24 (...give unto them their portions [ujûrahunn]...). Because the Qur'ân uses the word ujûr, which is usually used for lease, instead of mahr, some Sunnî jurists concluded that it is lawful for a man to "hire" a woman for a period of time provided that he gives her the ajr.<sup>147</sup> From this point of view; Abû Ḥanîfa, the founder of the Ḥanafî school of law, believes that a "hired" women is not an adulteress, but rather she is subject to a legal contract which terminates at the end of the lease.<sup>148</sup> Because God used the word ajr instead of the word mahr, al-Jaṣṣâs asserts that a hiring women for the purpose of committing fornication, according to Abû Ḥanîfa, is correct. Something similar to this, al-Jassâs goes on, is attributed to ʿUmar Ibn Abî al-Khaṭṭâb.<sup>149</sup> Two traditions narrated by Ibn Ḥazm which convey the same meaning, that a hungry woman in the desert asked a shepherd for some food which he refused unless she put her body at his disposal. She was obliged to accept what he demanded in

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<sup>145</sup> Ibn Qudâma, al-Mughnî, 7:573.

<sup>146</sup> Rashîd Riḍâ, al-Manâr, 5:17.

<sup>147</sup> al-Wâ'ilî, Min Figh al-Jins, 173.

<sup>148</sup> Ibid., 174.

<sup>149</sup> al-Jaṣṣâs, Aḥkâm al-Qur'ân, 2:146.

return of three handfuls of dates. When she told ʿUmar about what had happened, he said: "God is the greatest," and he repeated the word "mahr" thrice and did not punish her.<sup>150</sup> After reporting this tradition, Ibn Ḥazm relates that Abû Ḥanîfa held the view that adultery which includes payment or hire is not considered as fornication and does not involve punishment.<sup>151</sup> Ibn Ḥazm condemned such position and was surprised that the followers of Abû Ḥanîfa followed ʿUmar in dropping the penalty in this case. He contests that they consider three handful of dates as a dower in such case in spite of the fact that they do not allow less than this dower in the permanent marriage.<sup>152</sup> The question arising here is that if this kind of marriage, which is lawful in the eyes of Abû Ḥanîfa and his followers, is neither a permanent marriage, as is very obvious, nor at the same time considered fornication, then what is it?

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<sup>150</sup> ʿAlî Ibn Aḥmad Ibn Ḥazm, al-Muhallâ, 11 vols. (Cairo: Idârat al-Ṭibâʿa al-Miṣriyya, 1352/1933), 11:250.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

## Chapter Three

### The prohibition of mut<sup>c</sup>a marriage

#### I. The prohibition by <sup>c</sup>Umar

The Shî<sup>c</sup>î jurists are in agreement on the issue that the Caliph <sup>c</sup>Umar was the first to announce the prohibition on mut<sup>c</sup>a marriage. The fact that <sup>c</sup>Umar outlawed mut<sup>c</sup>a marriage, which is almost certain according to Heffening,<sup>1</sup> lead some Sunnî jurists to agree with the Shî<sup>c</sup>îs on this point. In this connection, Ibn Qayyim al-Jawziyya narrates that there are two groups of opinion on the prohibition of mut<sup>c</sup>at al-nisâ' and mut<sup>c</sup>at al-ḥajj announced by <sup>c</sup>Umar. Some Sunnî jurists, Ibn Qayyim relates, cast no doubt on the fact that <sup>c</sup>Umar himself prohibited mut<sup>c</sup>a marriage but at the same time they believe that the Prophet ordered the people not to relinquish the path of the rightly guided caliphs.<sup>2</sup> Others, Ibn Qayyim states, believe that mut<sup>c</sup>a marriage was banned by the Prophet, but that the prohibition was not well-known and unknown to some Companions until <sup>c</sup>Umar made his announcement.<sup>3</sup> In order to support their argument, Shî<sup>c</sup>î jurists constantly refer to al-Suyûṭî who insists in his Ta'rîkh al-Khulafâ' that <sup>c</sup>Umar was the first to forbid

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<sup>1</sup> Heffening, "Mut<sup>c</sup>a" Encyclopaedia of Islam, v.2:3. (Leiden: E.J.Brill and Luzac, 1913), 775.

<sup>2</sup> Shams al-Dîn Muḥammad Ibn Qayyim al-Jawziyya, Zâd al-Ma'âd, 4 vols. (Cairo: Sharikat wa-Maṭba'at Mustafâ al-Ḥalabî, 1369/1950), 1:184.

<sup>3</sup>Ibid., 185.

mut<sup>ca</sup> marriage.<sup>4</sup> A well-known proclamation by ʿUmar prohibiting mut<sup>ca</sup>at al-nisâ' and mut<sup>ca</sup>at al-ḥajj, considered beyond reproach by all Muslim jurists.<sup>5</sup> al-Sarakhsî relates that on many occasions ʿUmar declared to some of those who had entered into mut<sup>ca</sup> marriage that if he had prohibited mut<sup>ca</sup> marriage earlier he would have stoned them to death.<sup>6</sup> Numerous traditions were reported by both Sunnî and Shîʿî jurists on the authority of some companions which clearly indicate that mut<sup>ca</sup> marriage was outlawed by ʿUmar. Two traditions were narrated by Muslim, in his Ṣaḥîḥ, on the authority of Jâbir. In the first tradition Jâbir insists that mut<sup>ca</sup> marriage was practised, in return of handful for dates and flour in the lifetime of the Prophet and Abû Bakr until ʿUmar prohibited it in the case of ʿAmr Ibn Ḥarîth.<sup>7</sup> Jâbir is reported to have said, in the second tradition, that Muslims practised mut<sup>ca</sup> marriage while the Prophet was alive, but did not return back to it in the time of ʿUmar

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<sup>4</sup> ʿAbd al-Ḥusayn Sharaf al-Dîn al-Mûsawî, Ajwibat Mûsâ Jâr Allâh (al-Najaf: Maṭbaʿat al-Nuʿmân, 1386/1966), 101.

<sup>5</sup> ʿAbd al-Ḥusayn Aḥmad al-Amînî, al-Ghadîr fil-Kitâb wal-Sunna wal-Adab, 11 vols. (Beirut: Dâr al-Kitâb al-ʿArabî, 1403/1983), 6:211. Another report has ʿUmar saying: "there are things from the time of the Prophet which I prohibit and punish whoever practices them: mut<sup>ca</sup>at al-nisâ', mut<sup>ca</sup>at al-ḥajj and come to the best of work (ḥayya ʿalâ khayr al-ʿamal) in the adhân." Ibid., 213.

<sup>6</sup> Shams al-Dîn al-Sarakhsî, al-Mabsûṭ, 30 vols. (Cairo: Maṭbaʿat al-Saʿâda, 1324/1907), 5:152.

<sup>7</sup> Muslim Ibn al-Ḥajjâj al-Qashîrî, Ṣaḥîḥ Muslim, 8 vols. (Cairo: Maṭbaʿat ʿAlî Ṣabîḥ wa-Awalâduh, n.d.), 4:131.

because he commanded them not to practice it.<sup>8</sup> ʿImrân Ibn al-Ḥaṣīn, insisted that the Prophet did not try to prevent the people from practising mutʿa marriage. He is said to have stated that the verse related to mutʿa marriage was revealed in the Book of God; no verse abrogated it and the Prophet ordered Muslims to practice it.<sup>9</sup> Two traditions attributed to ʿAlī signify, without any doubt, that he denounced ʿUmar's prohibition of mutʿa marriage. He is reported to have pronounced that had it not been for ʿUmar's previous opinion I would have ordered mutʿa marriage and nobody would have committed adultery except the miserable.<sup>10</sup> Ibn ʿAbbâs, too, lamented ʿUmar's announcement the prohibiting mutʿa marriage; it is widely known that Ibn ʿAbbâs was reported to have said that mutʿa marriage was nothing but a grace from God and, but for ʿUmar's prohibition, few people would have resorted to fornication.<sup>11</sup>

The questions that may be posed here are the following. Under what circumstances did ʿUmar prohibit mutʿa marriage? Why did ʿUmar not make his announcement in the beginning of his caliphate? What are the factors behind his

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<sup>8</sup> Ibid.

<sup>9</sup> al-Amīnī, al-Ghadīr, 6:208.

<sup>10</sup> Ibid., 207.

<sup>11</sup> Muḥammad Ibn Aḥmad Ibn Rushd, Bidâyat al-Mujtahid wa-Nihâyat al-Muqtaṣad, 2 vols. (Cairo: al-Maktaba al-Miṣriyya, n.d.), 2:150.



anger and behind his subsequent threats to stone whoever committed mut<sup>c</sup>a marriage? As a matter of fact, five stories have been reported which mention explicitly the motives behind ʿUmar's prohibition of mut<sup>c</sup>a marriage. In four of these incidents the pregnancy of the women lies at the root of ʿUmar's furious reaction, in the other the witnesses.

1- The story of ʿAmr Ibn Ḥarīth provided the context for ʿUmar's prohibition, as narrated on the authority of Jābir.<sup>12</sup> Jābir is reported to have said that ʿAmr Ibn Ḥarīth contracted a mut<sup>c</sup>a marriage with his servant. She was brought before ʿUmar to be asked about her marriage, as she was pregnant. Her pregnancy provoked ʿUmar to declare the prohibition of mut<sup>c</sup>a marriage.<sup>13</sup>

2- Umm ʿAbd Allāh narrated a story of a man who appeared from Shām asking her to find a woman for the purpose of mut<sup>c</sup>a marriage. She found a woman with whom he cohabitated for a period of time. ʿUmar was notified about what had taken place and interrogated the man about his motives. The man informed ʿUmar that he used to contract mut<sup>c</sup>a marriage in the time of the Prophet and Abū Bakr, and that neither of them had prohibited it. The man also informed ʿUmar that he had contracted mut<sup>c</sup>a marriage in ʿUmar's time and that he was not aware of any prohibition

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<sup>12</sup> Murtaḍā al-ʿAskarī, Maʿālim al-Madrasatayn, 3 vols. (Tehran: Muʿassasat al-Biʿtha, 1406/1986), 2:248.

<sup>13</sup> ʿAbd al-Razzāq Ibn Hammām al-Ṣanʿānī, al-Musannaf, 11 vols. (Karachi: al-Majlis al-ʿilmī, 1392/1972), 500.

by him. ʿUmar, then, swore by God that had he outlawed mutʿa marriage he would have stoned him.<sup>14</sup>

3- It was reported that Rabīʿa Ibn Umayya contracted a mutʿa marriage with a woman with two women as witnesses, as among whom was Khawla Bint Ḥakīm. When the married woman became pregnant, Khawla recounted the story to ʿUmar who became very angry and announced the punishment for committing mutʿa marriage- namely, death by stoning.<sup>15</sup>

4- It was reported that Salama Ibn Umayya entered a mutʿa marriage with a woman who became pregnant and had a baby. When Salama disavowed his baby, his story reached ʿUmar's ears who, thereupon, prohibited mutʿa marriage.<sup>16</sup>

5- al-Majlisī narrates that, according to al-Ṣādiq, once ʿUmar had come to his sister's house, he found her nursing a baby. When ʿUmar asked about the baby, she told him that she had contracted mutʿa marriage. So, ʿUmar called the people to assemble in the mosque and informed them that mutʿa marriage, which was allowed in the time of the Prophet, was to be forbidden.<sup>17</sup>

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<sup>14</sup> al-ʿAskarī, Maʿālim al-Madrasatayn, 249. See also Abul-Qāsim al-Mūsawī al-Khūʾī, al-Bayān fī Tafsīr al-Qurʾān (Tehran: Intishārāt Kaʿba, 1366/1948), 323.

<sup>15</sup> al-ʿAskarī, Maʿālim al-Madrasatayn, 2:249.

<sup>16</sup> Ibid.

<sup>17</sup> Muḥammad Bāqir al-Majlisī, Bihār al-Anwār, 110 vols. (Beirut: Muʾassasat al-Wafāʾ, 1403/1983), 100:303-304.

## II- 'Umar's Ijtihād

Before we take up the subject of 'Umar's own ijtihād against the precepts of the Qur'ân and the Sunna, it would be instructive to shed some light on his attitude in the Prophet's lifetime and to see whether he followed the Prophet or objected to his commands?

On several occasions, 'Umar preferred his own opinions to the Prophet's. This was rationalized by Sunnî jurist. raziyyat al-khamîs, as Ibn 'Abbâs used to call it and over which he wept whenever he remembered it, is a well-known incident in Islamic history. On the eve of his death, the Prophet ordered Muslims, including 'Umar, to join the expedition of Usâma Ibn Zayd and condemned whomever had stayed behind. 'Umar did not follow Usama, but stayed with the Prophet.<sup>18</sup> The Prophet then asked the Muslims, who were surrounding him because of his sickness, to bring him an inkwell (dawât) and a shoulder blade (katif) on which to write his will so that the umma would not be plunged into chaos. 'Umar was not satisfied with the will the Prophet wanted to write, saying, "Sufficient unto you the Book of God" and declaring that the Prophet was overwhelmed by pain and did not know what he was uttering.<sup>19</sup>

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<sup>18</sup> Muḥammad 'Abd al-Karîm al-Shahristânî, al-Milal wal-Nihâl, 2 vols. (Qum: Manshûrât al-Sharîf al-Raḍî, 1408/1986), 1:29. See also al-Ḥasan Ibn Yûsuf al-Ḥillî, Nahj al-Ḥaqq wa-Kashf al-Ṣidq (Beirut: Dâr al-Kitâb al-Labnânî, 1982), 236.

<sup>19</sup> al-Ḥillî, Nahj al-Ḥaqq wa-Kashf al-Ṣidq, 273, 332.

Another example reported by the Muslim jurists which displays how ʿUmar had rebuffed the Prophet's commands and behaved at his own discretion. When the Prophet sent Abû Hurayra to give the good news to the people that whoever testifies in good faith that there is no God but Allâh deserves paradise. ʿUmar hit Abû Hurayra when he met him and ordered him to go back to the Prophet. ʿUmar then explained his conduct when he was interrogated by the Prophet about what he had done, saying that the people may relinquish ritual, and rely upon this testimony alone.<sup>20</sup> al-Nawawî believes that ʿUmar did not reject the order of the Prophet, but found it preferable not to tell the people such news. This case was considered by Sharaf al-Dîn as ijtihâd over and above a nass.<sup>21</sup> For, Sharaf al-Dîn maintains, there are a group of verses in the Qur'ân which insist on the obedience of the Prophet, and the Prophet says nothing except from the reformulate wahî.<sup>22</sup> Fayrûzbâdî asserts that one may conclude from this account that ʿUmar believed himself more knowledgable about the good and bad than the Prophet and God himself. fayrûzbâdî argues that it is well known that the Prophet's commands and prohibitions are by

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<sup>20</sup> ʿAbd al-Ḥusayn Sharaf al-Dîn al-Mûsawî, al-Nass wal-Ijtihâd (Tehran: Abû Mujtabâ, 1404/1984), 191.

<sup>21</sup> Ibid., 192.

<sup>22</sup> Ibid., 193-194.

the authority of God.<sup>23</sup>

Another famous incident was reported by Muslim jurists suggesting that ʿUmar objected to the Prophet's compromise of al-Ḥudaybiyya. The compromise was reached between the Prophet and the people of Quraysh after they had prevented him from performing pilgrimage to Mecca. The Prophet agreed not to enter Mecca that year, but ʿUmar was dissatisfied with this agreement. This prompted him to utter some strong reservations to the Prophet.<sup>24</sup> Al-Ḥillî maintains that the earlier tradition suggests certain doubts about ʿUmar and his objections to what the Prophet had done by instruction of God.<sup>25</sup> ʿUmar did not only object to the Prophet through his tongue, but also used his hands, as in the case of Ubayy, who was known as a hypocrite. When Ubayy died and the Prophet wished to pray on his corpse by request of his son, ʿUmar pulled the Prophet and told him that God had prevented him from praying on hypocrites according to verse 9:80, which was misunderstood by ʿUmar.<sup>26</sup> According to Fayrûzabâdî, ʿUmar, in this story, believed that praying on Ubayy was unlawful and that the Prophet was performing a ḥarâm, so that ʿUmar was not satisfied with trying to

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<sup>23</sup> Murtaḍâ Muḥammad al-Ḥusaynî al-Fayruzabâdî, al-Sabʿa min al-Salaf (Qum: Manshûrât Maktabat al-Fayruzabâdî, 1402/1982), 107.

<sup>24</sup> al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 163-173.

<sup>25</sup> al-Ḥillî, Nahj al-Ḥaqq wa-Kashf al-Ṣidq, 336-337.

<sup>26</sup> al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 186-189.

dissuade him using words alone, but physically also.<sup>27</sup> That 'Umar had gone against the Qur'ân and the Sunna, based on his own ijtihad, is agreed on by all the Sunnî and Shî'î jurists. He also began rituals which had not existed in the time of the Prophet.

**i. 'Umar's ijtihad against the ruling of the Qur'ân**

On several occasions, 'Umar used his own judgement in a way which conflicted with the ruling of the Qur'ân. All these instances were collected by Muslim jurists and presented as follows:

1- It is widely known among all Muslim jurists that 'Umar prohibited mut'at al-hajj, which was then legal and practised by the Prophet and his Companions. Several traditions reported on the authority of 'Imrân Ibn al-Ḥaṣîn convey the same message, that the verse of mut'at al-hajj (2:196) was revealed in the Book of God, practised during the Prophet lifetime and was not abrogated before his demise.<sup>28</sup> It was reported also that 'Umar himself acknowledged the fact that the Prophet had acquainted him with the revealed verse concerning mut'at al-hajj.<sup>29</sup> An entire group of traditions were narrated by many Companions

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<sup>27</sup> Fayrûzabâdî, al-Sab'a minal-Salaf, 104.

<sup>28</sup> al-Amînî, al-Gadîr, 6:198-200. See also al-'Askarî, Ma'âlim al-Madrasatayn, 2:191.

<sup>29</sup> al-'Askarî, Ma'âlim al-Madrasatayn, 2:192.

regarding this practise by the Prophet.<sup>30</sup>

The basic act of prohibition of mut<sup>c</sup>at al-ḥajj, as we saw, was announced by ʿUmar when he became caliph.<sup>31</sup> Now the traditions concerning this prohibition may be divided into two groups. The first group is concerned with the prohibition of mut<sup>c</sup>at al-ḥajj as associated with mut<sup>c</sup>at al-nisâ',<sup>32</sup> which we have mentioned earlier. The second group is concerned with the prohibition of mut<sup>c</sup>at al-ḥajj alone, though on several occasions.<sup>33</sup> The question posing itself here concerns the reasons behind ʿUmar's prohibition, although mut<sup>c</sup>at al-ḥajj was permitted in the time of the Prophet and practised by the Prophet himself. From the evidence contained from in certain one may infer two possible justifications for ʿUmar's prohibition. According to some traditions, ʿUmar saw a man who brought his wife with him in the time of ḥajj. He was handsomely dressed and perfumed. When ʿUmar questioned him about his attitude, the man told him that he came for mut<sup>c</sup>at al-ḥajj. ʿUmar then prohibited mut<sup>c</sup>a in the time of ḥajj on the basis that people ought not to have relations with their wives and

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<sup>30</sup> Ibid., 194-196.

<sup>31</sup> Ibid., 202.

<sup>32</sup> al-Amīnī, al-Ghadīr, 6:209-213.

<sup>33</sup> Ibid., 198-205.

come well dressed.<sup>34</sup> ʿUmar confirmed that the Prophet and his Companions had practised mutʿat al-ḥajj, but he detested looking at the People coming to ḥajj with ablution water dropping from their heads.<sup>35</sup> For this very reason, ʿAbd Allāh Ibn ʿUmar tried to defend his father when he was requested to allow mutʿat al-ḥajj, even though his father did not. Ibn ʿUmar is reported to have said that God permitted it and the Prophet practised it, while ʿUmar prohibited it for the sake of good, but that we should not abandon the Sunna of the Prophet in order to follow ʿUmar. He attempted to find a pretext for his father's prohibition by pointing out that ʿUmar did not declare it ḥarām, but only believed that ʿumra would be better performed if it remained separate from ḥajj.<sup>36</sup> The second reason was for the sake of Meccans. ʿUmar believed that the main sources of the people who live in Mecca come from pilgrimage so that it would be better for their economic welfare that Muslims visit Mecca twice.<sup>37</sup>

2- It was agreed by all Muslim jurists that ʿUmar considered the uttering of the phrase "I divorce you" thrice in one session as constituting three divorces after

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<sup>34</sup> Ibid., 204-205. See also al-ʿAskarī, Maʿālim al-Madrasatayn, 2:203-204.

<sup>35</sup> ʿAbd al-Ḥamīd Ibn Abī al-Ḥadīd, Sharḥ Nahj al-Balâgha, 20 vols. (Qum: Manshûrât Maktabat al-Marʿashī, 1385/1965), 12:253.

<sup>36</sup> al-Amīnī, al-Ghadīr, 6:202.

<sup>37</sup> al-ʿAskarī, Maʿālim al-Madrasatayn, 2:206.



which the husband could return to his wife unless she marries another man. But this kind of divorce is an innovation (bid'a)<sup>38</sup> and harâm in the eyes of the a great majority of 'Ulamâ'.<sup>39</sup> The institution of divorce is sanctioned conclusively in the Qur'ân in verse 2:229-230 which reads: "Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness...And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if (the other husband) divorce her it is no sin for both of them that they come together again if they consider that they are able to observe the limits of Allah."<sup>40</sup> It is obvious, according to the exegetes, from the gist of the verses that divorce must be pronounced three times, but is in no way completed by repeating the phrase "I divorce you" thrice in one sitting.<sup>41</sup> In modern time, the famous Muḥammad 'Abdu insisted that repeating the phrase "I divorce you" thrice has no support in the Qur'ân.<sup>42</sup> Indeed, On the authority of

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<sup>38</sup> Muḥammad Rashîd Riḍâ, Tafsîr al-Manâr, 12 vols. (Cairo: Dâr al-Manâr, 1367/1946), 2:382. See also 'Alî Ibn Aḥmad al-Kûfî, al-'Istighâtha, 2 vols. (Qum: n.p, n.d.), 1:40-41.

<sup>39</sup> Ibid.

<sup>40</sup> Qur'ân, 2:229-230.

<sup>41</sup> Riḍâ, Tafsîr al-Manâr, 2:382. See also al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 245.

<sup>42</sup> Ibid., 382-383.

Ibn ʿAbbâs, it was reported that pronouncing the utterance "I divorce you" three times was considered one divorce in the time of the Prophet and Abû Bakr.<sup>43</sup> The Prophet rejected this kind of divorce, and when he was notified about a man who divorced his wife three times in one session he was very furious. He was reported to have commented that it is playing with the Book of God.<sup>44</sup> When ʿUmar became head of the community, he saw that many people performed this kind of divorce, so he grudgingly allowed it.<sup>45</sup> Ibn Qayyim argued that allowing them to maintain this practise as a punishment would ultimately lead them to retrace their steps to the Sunna of the Prophet. Ibn Qayyim came to this conclusion on the ground that the fatwâ would be changed in time depending on circumstances, but he referred to go back to the Book and the Sunna.<sup>46</sup> Ibn Taymiyya asserted that if ʿUmar had seen the misuse of this procedure by Muslims in later times, he would have returned to the type of divorce that was in vogue in the Prophet's time.<sup>47</sup> Because of Ibn Taymiyya's comments, according to al-Dawâlîbî, Egypt's judicial courts did in fact return to the type of divorce which had existed before on the ground

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<sup>43</sup> al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 246.

<sup>44</sup> Ibid., 247. See also Riḍâ, Tafsîr al-Manâr, 2:382.

<sup>45</sup> Ibid., 246.

<sup>46</sup> Ibid., 248-249. See also Riḍâ, Tafsîr al-Manâr, 2:386.

<sup>47</sup> Ibid., 249.

that time has changed.<sup>48</sup>

3- In the early days of the community, the Prophet used to pay a distinguished group of people from Quraysh a portion of the zakât in order to draw them close to Islam and to gain their assistance against his enemies.<sup>49</sup> Those people were al-mu'allafa qulûbuhum mentioned in verse 9:60, which reads as follows: "The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled..."<sup>50</sup> 'Umar, however, stopped these payments and, according to tradition, prevented Abû Bakr from giving them the share they used to receive during Abû Bakr's reign.<sup>51</sup> According to al-Dawâlîbî, the reason that 'Umar stopped applying certain injunctions of the Qur'ân because the circumstances had changed from the days of the Prophet.<sup>52</sup> In fact, 'Umar revealed his motive when he told al-mu'allafa qulûbuhum that the Prophet needed them in the time when Islam was weak, but now that God has

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<sup>48</sup> Ibid.

<sup>49</sup> al-Faḍl Ibn al-Ḥasan al-Ṭabarsî, Majma' al-Bayân fî Tafsîr al-Qur'ân, 10 vols. (Beirut: Dâr al-Ma'rifa, 1406/1986), 5:65.

<sup>50</sup> Qur'ân, 9:60

<sup>51</sup> 'Abd al-Ḥusayn Sharaf al-Dîn al-Mûsawî, al-Fuṣûl al-Muhimma (Beirut: Dâr al-Zahrâ' lil-Ṭibâ'a wal-Nashr wal-Tawzî', 1397/1977), 87-88. See also Ibn Abî al-Ḥadîd, Sharḥ Nahj al-Balâgha, 12:58-59.

<sup>52</sup> Muḥammad al-Tîjânî al-Simâwî, Fas'alû Ahl al-Dhikr (Qum: Intishârât al-Sharîf al-Raḍî, 1412/1991), 225-226.

consolidated its power they were no longer needed.<sup>53</sup> al-Wâ'ilî does not agree with the "reason" (ʿilla) that ʿUmar had mentioned for not paying al-mu'allafa qulûbuhum their portion for two reasons. First, al-Wâ'ilî argues that the ʿilla for the injunction of al-mu'allafa qulûbuhum was not the need to reconcile, as ʿUmar understood, before Islam had come to be strong. The reason was reconciliation as such, which has nothing to do with the condition of Islam. Second, al-mu'allafa qulûbuhum are not solely confined to those who are attracted to fight; there were others.<sup>54</sup>

4- ʿUmar did not pay the relatives of the Prophet their khums, as stipulated in the Qur'ân. The Qur'ân says: "And know that whatever ye take as spoils of war, Io! a fifth thereof is for Allah, and for the messenger and for the kinsman (who hath need) and orphans and the needy and the wayfarer,..."<sup>55</sup> ʿAlî is reported to have stated, according to Sulaym Ibn Qays, that the household of the Prophet consisted of the relatives of the Prophet which are mentioned by verse 59:7.<sup>56</sup> According to some traditions, it

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<sup>53</sup> Ibn Abî al-Ḥadîd, Sharḥ Nahj al-Balâgha, 12:59. See also Aḥmad Amîn, Yawm al-Islâm (Cairo: Dâr al-Maʿârif, n.d.), 161.

<sup>54</sup> Aḥmad al-Wâ'ilî, Min Fiqh al-Jins (Beirut: Mu'assasat Ahl al-Bayt, 1986), 159.

<sup>55</sup> Qur'ân, 8:41.

<sup>56</sup> ʿAlî Ibn al-Ḥusayn al-Mûsawî, al-Shâfi fil-Imâma, 4 vols. (Tehran: Mu'assasat al-Ṣâdiq lil-Ṭibâ'a wal-Nashr, 1410/1990), 4:187-188.

was reported that ʿAlī and Ibn ʿAbbās both refused what ʿUmar sought to give them, demanding all their rights.<sup>57</sup> Some Sunnī jurists argue that the fact that ʿUmar did not return Fadak, which was Jewish land taken by the Prophet without a fight, to Fāṭima, and denied the Prophet's relatives what they deserved is undeniable; but ʿUmar was a mujtahid and exercised his right to contradict the Prophet in this case.<sup>58</sup>

5- Based on the Qur'ān, it is agreed by all Muslim jurists that whoever is ritually impure for prayer needs to purify himself with clean sand or earth (tayammum) when water is unavailable.<sup>59</sup> tayammum is stipulated in two places in the Qur'ān. Basically, Muslims are admonished as follows: "...ye find no water, then go to high clean soil..."<sup>60</sup> Several traditions report that the Prophet taught the Muslims how to use sand in cases where they are ritually impure and there is no water.<sup>61</sup> But ʿUmar had another view. It is well-known, according to Ibn Ḥajar, that he was of the opinion that prayer should be abandoned

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<sup>57</sup> Fayrūzabādī, al-Sabʿa min al-Salaf, 108-109.

<sup>58</sup> al-ʿAskarī, Maʿālim al-Masrasatayn, 2:182. See also al-Wā'ilī, Min Fiqh al-Jins, 160.

<sup>59</sup> al-Mūsawī, al-Naṣṣ wal-Ijtihād, 274-275.

<sup>60</sup> Qur'ān, 4:43 and 5:6.

<sup>61</sup> al-Amīnī, al-Ghadīr, 6:85-86.

until water is found.<sup>62</sup>

One may be ask here why ʿUmar ignored prayer while the injunction of tayammum is very clear in the Qurʾân? Was it because ʿUmar did not know about the ahkâm of the Sharīʿa, as al-Ḥillî believes<sup>63</sup>? Or was ʿUmar not satisfied with this injunction, as Ibn Masʿûd narrated?<sup>64</sup> Fayrûzabâdî argues that it is difficult to understand how ʿUmar could have been unaware of the ahkâm, since he was a Companion who always accompanied the Prophet. Besides, tayammum is understood to be of the fundament of Islam. Fayrûzabâdî asserts that ʿUmar relied on his own opinion, raʾy, against God's "raʾy".<sup>65</sup> Al-ʿAynî has added that ʿUmar used his own ijtihâd in this case.<sup>66</sup>

#### ii. ʿUmar's ijtihâd against the Sunna

Many traditions were recorded by Muslim jurists showing that ʿUmar used his own ijtihâd in contrast with the Sunns. These traditions are as follows:

1-Two modifications were made by ʿUmar to the adhân (call to prayer) established at the time of the Prophet and

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<sup>62</sup> Ibid., 85. See also al-Mûsawî, al-Naṣṣ wal-Ijtiḥâd, 275.

<sup>63</sup> al-Ḥillî, Nahj al-Ḥaqq wa-Kashf al-Ṣidq, 346.

<sup>64</sup> Fayrûzabâdî, al-Sabʿa minal-Salaf, 81-85.

<sup>65</sup> Ibid., 84.

<sup>66</sup> al-Amînî, al-Ghadîr, 6:85.

Abû Bakr.<sup>67</sup> According to one well-known account, when the person who ritually invites people to prayer (mu'adhdhin) saw ʿUmar sleeping, he uttered this sentence: "Prayer is better than sleeping". ʿUmar took a favourable view of it and ordered it to be part of adhân.<sup>68</sup> It was reported, according to the household of the Prophet, that the angel taught the Prophet how to recite the adhân; and consequently, what ʿUmar did was a kind of ijtihâd which is counter to the nass.<sup>69</sup> It might have been for this reason that al-Shâfiʿî was reluctant to hear the sentence "prayer is better than sleeping" in the adhân.<sup>70</sup>

The sentence "Come to the best deed", on the other hand, was part of the adhân in the Prophet's and Abû Bakr's time. It was omitted by ʿUmar when he became a caliph. al-Qushjî insisted that ʿUmar omitted this sentence from the adhân based on his own ijtihâd. According to al-Qushjî, ʿUmar is reported to have declared that "Three things were permitted in the time of the Prophet. I prohibited them and shall punish whoever practices them; mutʿat al-nisâ', mutʿat al-hajj and hayya ʿalâ Khayr al-ʿamal.<sup>71</sup> Why ʿUmar omitted the sentence from the adhân, may be understood from ʿUmar

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<sup>67</sup> al-Mûsawî, al-Nass wal-Ijtihâd, 218.

<sup>68</sup> Ibid., 219.

<sup>69</sup> Ibid., 236.

<sup>70</sup> al-Hillî, Nahj al-Haqq wa-Kashf al-Şidq, 351.

<sup>71</sup> al-Mûsawî, al-Nass Wal-Ijtihâd, 240.

himself. It was reported that when Ibn ʿAbbâs was asked by ʿIkrima about the omission, he responded that ʿUmar did not want people to rely on prayer alone and to leave jihâd.<sup>72</sup> Sharaf al-Dîn explains ʿUmar's point of view by saying that if ʿUmar had left the words in the adhân the people would have imagined prayer to be the best kind of worship and, consequently, would have avoided jihâd, which, in the eyes of the caliphs, was the most important factor in spreading Islam.<sup>73</sup>

2- According to Muslim and al-Bukhârî, until the demise of the Prophet Muslims followed him in performing the night prayer during the month of Ramaḍân individually. The prayer of Ramaḍân had not changed by Abû Bakr's time and during the early period of ʿUmar's caliphate.<sup>74</sup> That ʿUmar was the first one to establish the congregational prayer of Ramaḍân, called tarâwîḥ, is a fact agreed up on by all Muslims.<sup>75</sup> ʿAbd al-Raḥmân Ibn ʿAwf reported that he went with ʿUmar, one night in Ramaḍân, to the mosque. When ʿUmar looked at the worshippers, he was unhappy that prayers were being performed individually, and decided to assemble

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<sup>72</sup> Ibid., 239. See also al-Faḍl Ibn Shâhân al-Nîsâbûrî, al-ʿîdâh (Beirut: Muassasat al-Aʿlamî, 1402/1982), 106.

<sup>73</sup> Ibid., 238-239.

<sup>74</sup> Ibid., 251.

<sup>75</sup> See for instance, al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 252-253. See also al-Muʿtazilî, Sharḥ Nahj al-Balâgha, 12:75.



all Muslims for prayer behind a single Imâm.<sup>76</sup> The new prayer ritual established by ʿUmar thus prompted Muslims to assemble together in the night of Ramaḍân. He sent word about this new prayer to other cities and appointed two Imâms in Madina, one for men and another for women.<sup>77</sup> To answer the question on whether the prayer of al-tarâwîḥ was an innovation or not, ʿAbd al-Raḥmân Ibn ʿAwf narrated that another day he and ʿUmar went to the mosque. When ʿUmar saw the Muslims following the Imâm during prayer he said: "How good is this innovation."<sup>78</sup> Al-Qaṣṭalânî asserts that ʿUmar called this prayer bidʿa for it was established neither in the Prophet's nor in Abû Bakr's time. Moreover, it did not take place at the beginning of the night, in the usual manner; nor did it have the same number of cycles (rakʿa).<sup>79</sup> Al-Murtaḍâ insists that it is certain that al-tarâwîḥ was an innovation, since the Prophet had confirmed that the congregation prayer in the night of Ramaḍân was bidʿa. He ordered Muslims not to assemble in the night of Ramaḍân.<sup>80</sup>

According to a group of ʿUlamâ' ʿUmar was also the

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<sup>76</sup> Ibid., 251-252.

<sup>77</sup> Ibid., 250, 255. See also Ṭâḥâ Ḥusayn, al-Shaykhân (Cairo: Dâr al-Maʿârif, n.d.), 219.

<sup>78</sup> Ibid., 252. See also al-Ḥillî, Naj al-Ḥaqq wa-Kashf al-Ṣidq, 289.

<sup>79</sup> Ibid.

<sup>80</sup> al-Mûsawî, al-Shâfî fil-Imâma, 3:219.

first to order people to perform the prayer for the deceased (ṣalât al-mayyit) with four takbîrs <sup>81</sup> which is against the Sunna of the Prophet, who performed it with five takbîrs.<sup>82</sup> Two traditions were narrated in support of the fact that the Prophet performed this prayer with five takbîrs. Traditions indicate that Zayd Ibn Arqam and Ḥudhayfa Ibn al-Yamân, both were Companions of the Prophet and performed their prayer for the deceased with five takbîrs. When they completed it and were asked about the number of takbîr, they said they neither forget nor erred, but only imitated the Prophet.<sup>83</sup> It should be noted here that al-Amînî related a group of traditions showing that the Prophet performed the prayer for the deceased with four, five, six and even seven takbîrs. al-Amînî then comments that the opting four takbîr all the time and rejecting the others, as in the case of ʿUmar, was a kind of ijtihâd which conflicted with the Sunna.<sup>84</sup>

3- All Muslims agreed that the Prophet allotted equal portions to the Muslims from zakât.<sup>85</sup> When ʿUmar began his reign, he differentiated between Muslims. He opted for the

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<sup>81</sup> al-Amînî, al-Ghadîr, 6:245.

<sup>82</sup> al-Mûsawî, al-Naṣṣ wal-Ijtiḥâd, 256.

<sup>83</sup> Ibid., 257. See also al-Amînî, al-Ghadîr, 6:245-246.

<sup>84</sup> al-Amînî, al-Ghadîr, 6:244-245.

<sup>85</sup> al-Kûfî, al-Istighâtha, 30.

Quraysh over the Arabs and the Arabs over the others.<sup>86</sup> According to Mâlik; ʿUmar prevented non-Arabs from inheriting Arabs unless they were born on Arabian soil. Al-Amînî asserts that this was contrary to the Qur'ân and the Sunna.<sup>87</sup> ʿUmar also prevented Arab women to marry non-Arabs (al-mawâlî), also contrary to what the Prophet himself did.<sup>88</sup> Al-Kûfî goes one step further to say that ʿUmar prevented Arabs from marrying from Quraysh and the mawâlî.<sup>89</sup> ʿUmar failed exercise equality between Muslim women and Muslim men. He gave the wives of the Prophet more than the other women and ʿĀ'isha more than other wives of the Prophet.<sup>90</sup> When ʿUmar, according to Ibn al-Jawzî, wanted to give ʿĀ'isha her share she refused and notified him that the Prophet had preached equality among all his wives.<sup>91</sup> ʿUmar also distinguished between the muhâjirîn and the ansâr and between the muhâjirîn themselves. He granted more things to Usâma Ibn Zayd than to other muhâjirîn.<sup>92</sup>

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<sup>86</sup> Ibid.

<sup>87</sup> al-Amînî, al-Ghadîr, 6:187. See also al-Mûsawî, al-Nass wal-Ijtihâd, 267.

<sup>88</sup> al-Nîsâbûrî, al-Îdâh, 153. See also al-Kûfî, al-Istighâtha, 45.

<sup>89</sup> al-Kûfî, al-Istighâtha, 45.

<sup>90</sup> al-Muʿtazilî, Sharḥ Nahj al-Balâgha, 12:214. See also al-ʿAskarî, Maʿâlim al-Madrasatayn, 2:85-86.

<sup>91</sup> Ibid.

<sup>92</sup> al-Nîsâbûrî, al-Îdâh, 138. See also Ḥusayn, al-Shaykhân, 185.

When ʿUmar was asked by his son about the reason for his preference for Usâma over him, although they had both fought with the Prophet, ʿUmar responded that Usâma was closer to the Prophet than him.<sup>93</sup> al-ʿAskarî asserted that ʿUmar's preferential treatment of some Muslims had a very bad influence on the community; it was divided into two categories: one poor, the other rich. al-ʿAskarî also added that ʿUmar toward the end of his caliphate realized this negative effect and, according to al-Ṭabarî, on the eve of his demise he desired to give the excess money of the rich to the indigent among the al-muhâjirîn.<sup>94</sup>

4- The caliph ʿUmar prevented the people from reciting the traditions of the Prophet and even beat and imprisoned some of the most distinguished Companions who did.<sup>95</sup> Ibn Saʿd, in his Tabaqât, narrates that when ʿUmar observed that the traditions increased in his time, he asked the people to bring them all to him and ordered them burned.<sup>96</sup> It was reported, on the authority of Abû Qarḍa, that when ʿUmar sent a group of Companions to Iraq, he prevented them from reciting a ḥadîth.<sup>97</sup> ʿUmar did the same with Abû Mûsâ al-

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<sup>93</sup> Ibid.

<sup>94</sup> al-ʿAskarî, Maʿâlim al-Madrasatayn, 2:86.

<sup>95</sup> al-Amînî, al-Ghadîr, 6:294.

<sup>96</sup> al-ʿAskarî, Maʿâlim al-Madrasatayn, 2:44.

<sup>97</sup> Ibid., 45. See also al-Amînî, al-Ghadîr, 6:294.

Ash'arî.<sup>98</sup> However, some Companions persisted in narrating the traditions of the Prophet, which prompted 'Umar to reproach and to imprison them in Madina until his demise.<sup>99</sup> For this reason, Abû Hurayra related that the Companions could not narrate any more traditions on behalf of the Prophet in the time of 'Umar until his death. Abû Hurayra told the people that if he had recited the Prophet's traditions while 'Umar was alive, the latter would have hit him by his durra.<sup>100</sup> But al-'Askarî produced a group of traditions indicating that the Prophet approved the reciting of his traditions and the writing down of whatever the Companions heard from him.<sup>101</sup>

5- Lamenting the dead, especially the martyrs, according to al-'Askarî, was well within the Sunna of the Prophet.<sup>102</sup> Al-Amînî went a step further to insist that the Prophet himself cried on several occasions, approving it on some others and may have invited people to do so.<sup>103</sup> A group of traditions have it that the Prophet cried on the death of his sons and of some Companions. When he returned from the battle of Uhud, he even called for a public

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<sup>98</sup> al-Amînî, al-Ghadîr, 6:294

<sup>99</sup> Ibid., See also al-'Askarî, Ma'âlim al-Madrasatayn, 2:45-46.

<sup>100</sup> Ibid., 295.

<sup>101</sup> al-'Askarî, Ma'âlim al-Madrasatayn, 2:55-56.

<sup>102</sup> Ibid., 1:55.

<sup>103</sup> al-Amînî, al-Ghadîr, 6:280.

mourning for his uncle Ḥamza.<sup>104</sup> ʿUmar prohibited crying over the dead and, according to al-Bukhârî, even tried to prevent people from doing so by beating them with a stick and throwing stones and sand on them.<sup>105</sup> The conflict between ʿĀ'isha and ʿUmar on lamenting the dead revealed the reason for ʿUmar's banning of it. According to some traditions, ʿUmar believed that the dead will be punished for crying over deaths in their family. ʿĀ'isha insisted on the spuriousness of these traditions and swore by God that the Prophet never uttered such words.<sup>106</sup>

6- The fact that the hadd punishment and atonement kaffâra are sufficient punishment for sin is confirmed by the Sunna according to the traditions.<sup>107</sup> ʿUmar escorted his son, ʿAbd al-Raḥmân, to Madina for his intoxication, punished him repeatedly and imprisoned him. ʿUmar listened neither to ʿAbd al-Raḥmân Ibn ʿAwf, who informed him that his son had already been punished once, nor to his son's pleading for mercy on account of his unhealthy condition. ʿAbd al-Raḥmân, in fact, died soon after from his own father's punishment.<sup>108</sup> Sharaf al-Dîn comments that since

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<sup>104</sup> Ibid., 293-296. See also al-ʿAskarî, Maʿâlim al-Marasatayn, 1:55-57.

<sup>105</sup> Ibid., 297.

<sup>106</sup> Ibid., 299-300.

<sup>107</sup> al-Amînî, al-Ghadîr, 6:317-318.

<sup>108</sup> Ibid., 316-317. See also al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 367.

a sick man may not be punished until his recovery and that whoever has been punished cannot be imprisoned after that punishment, 'Umar was giving priority to his own opinions over nass.<sup>109</sup>

7- All pilgrims have to perform their prayer after tawâf at the tomb of Ibrâhîm, according to the verse 2:125, which reads: "And when we made the House (in Mecca) a resort for mankind and sanctuary, (saying): Take as your place of worship the place where Abraham stood (to pray)".<sup>110</sup> This place was closely associated with the House of ka'ba when the latter was built by Ibrâhîm and his son Ismâ'îl, but the Arabia before Islam removed his tomb which lay there. When the Prophet came he returned the tomb next to the House, where it was originally. When 'Umar became caliph he changed what the Prophet had done.<sup>111</sup>

8- The Prophet used to perform two cycles of prayer after the afternoon prayer, according to his wife 'Ā'isha. A group of traditions were narrated on the authority of 'Ā'isha that the Prophet had never omitted these two cycles.<sup>112</sup> 'Umar, however, prohibited Muslims from performing them and beat whoever did.<sup>113</sup> al-Munkadir and

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<sup>109</sup> al-Mûsawî, al-Nass wal-Ijtihâd, 368.

<sup>110</sup> Qur'ân, 2:125.

<sup>111</sup> al-Mûsawî, al-Nass wal-Ijtihâd, 279.

<sup>112</sup> Ibid., 276-277.

<sup>113</sup> Ibid.

Zayd were both beaten by the caliph ʿUmar when he saw them performing them after the afternoon prayer.<sup>114</sup> The reason given by ʿUmar for his prohibition, according to Zayd and Tamîm al-Dârî, was that he was afraid that some Muslim may perform this prayer during sunset, a time in which the Prophet had prohibited Muslims from praying.<sup>115</sup> Whether this reason is accepted or not, ʿUmar still prohibited Muslims from a prayer that the Prophet had not abandoned while he lived.<sup>116</sup>

9- ʿUmar forbade Muslims from fasting in the month of Rajab and even, according to Kharsha Ibn al-Ḥurr, beat the hands of the men to force them to break their fast and eat with him.<sup>117</sup> ʿUmar used to say that the month of Rajab was glorified by the people of Jâhiliyya, but when the Islam had come it was ignored.<sup>118</sup> In order to refute ʿUmar's statement, al-Amînî established two groups of traditions. The first group manifests the merit of Rajab. The second demonstrates the Prophet's endorsement of fasting in all months of the year without exemption and, especially, the Prophet's approval of fasting in Rajab.<sup>119</sup>

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<sup>114</sup> Ibid., 277-278.

<sup>115</sup> Ibid.

<sup>116</sup> al-ʿAskarî, Maʿâlim al-Madrasayan, 2:368.

<sup>117</sup> al-Amînî, al-Ghadîr, 6:282.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid., 282-290.



10- It was well-known among the historians that ʿUmar, on the eve of his death, declared that if Sâlim, Hudhayfa's slave, had survived he would have ordered him to succeed him as caliph.<sup>120</sup> Sâlim was neither from Quraysh nor from Arabs; rather, he was a slave of Abû Hudhayfa's wife.<sup>121</sup> Sharaf al-Dîn asserts that there is unanimity by all jurists that Imâma could not be executed by such a person.<sup>122</sup> However, a pretext on behalf of ʿUmar adduced and some jurists have used what ʿUmar had said on the basis of his own ijtihâd to argue this position.<sup>123</sup>

It is thus related that ʿUmar invented injunctions, based on his own ijtihâd, that had no ground in the Qur'ân and Sunna.

Ṭâhâ Husayn asserts that ʿUmar derived a specific form of punishment for those who drink alcohol which was unknown before his time. He adds that alcohol was prohibited in the Qur'ân though without any specific sanction.<sup>124</sup> Al-Muʿtazilî affirms that the Companions rejected a lot of the nuṣûṣ based on wellbeing (maṣlaḥa) and invented things which are not mentioned in the Qur'ân or traditions on the basis of their own ra'y, for example the punishment of

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<sup>120</sup> al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 386.

<sup>121</sup> Ibid., 390.

<sup>122</sup> Ibid., 391.

<sup>123</sup> Ibid.

<sup>124</sup> Ḥusayn, al-Shaykhân, 219.

alcohol.<sup>125</sup> Aḥmad Amîn relates that ʿUmar suspended the punishment for alcohol consumption, on the basis of his own ijtihâd, in the case of Abû Maḥjan al-Thaqafî because of his bravey in battle.<sup>126</sup>

When ʿUmar was notified that Saʿd Ibn Abî Waqqâṣ, who was his wâlî in Kûfa, had concealed himself from the people in his palace, he sent Muḥammad Ibn Salama to burn it and Muḥammad did what ʿUmar ordered him.<sup>127</sup> Another incident was narrated by Ṭâhâ Ḥusayn that ʿUmar burned the house of a man who used to sell alcohol.<sup>128</sup>

According to Sharaf al-Dîn, ʿUmar used to spy in the daytime and to patrol at the night for the benefit of country and people.<sup>129</sup> A famous story was narrated that ʿUmar was defeated by a drunk man concerning spying on people when ʿUmar climbed over his house in the night.<sup>130</sup>

ʿUmar's position, according to al-Wâ'ilî, concerning the veil of the slaves women is equally considered a product of his ijtihâd. Wicked people did not pursue veiled women because they believed that they were free (ḥurr). When the verse of ḥijâb (33:59) was revealed that the

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<sup>125</sup> al-Muʿtazilî, Sharḥ Nahj al-Balâgha, 12:83.

<sup>126</sup> Aḥmad Amîn, Yawm al-Islâm, 194.

<sup>127</sup> al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 363.

<sup>128</sup> Ḥusayn. al-Shaykhân, 219.

<sup>129</sup> al-Mûsawî, al-Naṣṣ wal-Ijtihâd, 94-95.

<sup>130</sup> al-Amînî, al-Ghadir, 6:121-123.

Muslim women should wear ḥijâb and, so would not to be harassed by the wicked, ʿUmar beat the slave women who wore ḥijâb in order not to prevent her from dressing in a manner resembling free women.<sup>131</sup> al-Wâ'ilî also relates that ʿUmar prohibited people from learning genealogy in order not to be proud of their kinship.<sup>132</sup>

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<sup>131</sup> al-Wa'ili, Min Fiqh al-Jins, 160.

<sup>132</sup> Ibid.

## Conclusion

The fact that mut<sup>ca</sup> marriage was legitimate at the beginning of Islam is agreed upon by all Muslim jurists. Prominent Sunnî jurists share with the Shî<sup>ci</sup>s the view that the Qur'ânic verse 4:24 establishes the institution of mut<sup>ca</sup> marriage. It was reported that Ibn 'Abbâs and some other Companions of the Prophet used to recite verse 4:24 in a way which gives little reason to doubt that this verse pertains exclusively to mut<sup>ca</sup> marriage. There was unanimity also, according to many traditions, among Muslim jurists that the Companions of the Prophet practised mut<sup>ca</sup> marriage during his lifetime. Some traditions even report that the Prophet practised it himself.

Mut<sup>ca</sup> marriage continued to be practised by the Companions after the Prophet's death, during both Abû Bakr's caliphate and half of 'Umar's reign until the latter banned it. The famous sermon given by 'Umar is the key element in the subsequent debate over the legality of mut<sup>ca</sup> marriage. Al-Ma'mûn, the 'Abbâsid caliph, for instance, once tried to revive mut<sup>ca</sup> marriage on the ground that it was prohibited solely by 'Umar.<sup>1</sup> While Sunnî jurists endeavour to demonstrate that mut<sup>ca</sup> marriage was abrogated by the Qur'ân, the Sunna and ijmâ<sup>c</sup>, Shî<sup>ci</sup> jurists developed strong arguments in refuting this assertion. They demonstrated

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<sup>1</sup> Aḥmad Ibn Muḥammad Ibn Khallikân, Wafayât al-A'yân, 8 vols. (Beirut: Dâr Şâdir, 1374-1376/1955-1956), 6:149-150.

that the Sunnî jurists themselves are at odds with each other on the number of times mut<sup>ca</sup> marriage was abrogated and when the abrogation took place. Shî<sup>ci</sup> jurists take issue with the Sunnîs that ʿUmar's declaration concerning the prohibition of mut<sup>ca</sup> marriage is clear evidence that its banning was based on his own legal opinion (ijtihâd). It was reported by Sunnî jurists that ʿUmar was the first to prohibit mut<sup>ca</sup> marriage. Both Sunnî and Shî<sup>ci</sup> jurists narrate through numerous chains of reliable transmitters that ʿUmar announced the prohibition in front of the Companions of the Prophet. Sunnî jurists maintain that ʿUmar banned mut<sup>ca</sup> marriage due to the fact that the Prophet had prohibited it. Shî<sup>ci</sup> jurists, on the other hand, pose two important questions concerning ʿUmar's sermon. First, why did ʿUmar not attribute the prohibition to the Prophet rather than to himself? If mut<sup>ca</sup> marriage were outlawed by the Prophet himself, the Shî<sup>ci</sup>s contend, it would have been more fitting for ʿUmar to indicate this in his sermon. Second, why did ʿUmar not mention this prohibition during Abû Bakr's caliphate and at the beginning of his caliphate? Al-Râzî advances a special argument in defense of ʿUmar's words. He states that ʿUmar made his announcement in a gathering of the Companions where no one had objected. He comes to the conclusion that all the Companions agreed with ʿUmar that mut<sup>ca</sup> marriage was prohibited by the Prophet. For, al-Râzî contests, if they upheld the

legitimacy of mut<sup>ca</sup> marriage and failed to protest earlier of <sup>ca</sup>Umar they are all, including <sup>ca</sup>Alî, unbelievers, which is impossible.<sup>2</sup> In response to this, Some Shî<sup>ca</sup>î jurists argue that after declaring the prohibition of mut<sup>ca</sup> marriage <sup>ca</sup>Umar threatened to apply punishment by stoning. All Sunnî jurists disavow this punishment in spite of the fact that none of the Companions protested. Moreover, the Shî<sup>ca</sup>î jurists maintain that <sup>ca</sup>Umar prohibited mut<sup>ca</sup> marriage associated with mut<sup>ca</sup>at al-ḥajj whereas all Muslims agree on its legality. Some Shî<sup>ca</sup>î jurists believe that the Companions did not object because they were afraid of his punishment, knowing <sup>ca</sup>Umar's rigorous application of the law.<sup>3</sup> Al-Mu<sup>ca</sup>tazilî narrates that the great Companions avoided <sup>ca</sup>Umar and kept aloof of him.<sup>4</sup> It is for this reason that Ibn <sup>ca</sup>Abbâs did not express his view on the legitimacy of mut<sup>ca</sup> marriage in the time of <sup>ca</sup>Umar.<sup>5</sup>

We observed in Chapter Three that <sup>ca</sup>Umar prohibited mut<sup>ca</sup> marriage on many occasions under particular

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<sup>2</sup> Fakhr al-Dîn al-Râzî, al-Tafsîr al-Kabîr, 32 vols. (Beirut: Iḥyâ' al-Turâth, n.d.), 10:49-50.

<sup>3</sup> See for instance, Muḥammad Jawâd al-Balâghî, Ālâ' al-Raḥmân, 2 vols. (Qum: Intishârât Maktabat al-Faqîh, n.d.), 1:86-87. See also <sup>ca</sup>Alî Ibn al-Ḥusayn al-Mûsawî, al-Shâfî fil-Imâma, 4 vols. (Tehran: Mu'ssasat al-Şâdiq lil-Ṭibâ<sup>ca</sup> wal-Nashr, 1410/1990), 3:197.

<sup>4</sup> <sup>ca</sup>Abd al-Ḥamîd Ibn Abî al-Ḥadîd, Sharḥ Nahj al-Balâgha, 20 vols. (Qum: Manshûrât Maktabat al-Mar<sup>ca</sup>ashî, 1385/1965), 1:173.

<sup>5</sup> <sup>ca</sup>Abd al-Razzâq Ibn Hammâm al-Şan<sup>ca</sup>ânî, al-Musannaf, 11 vols. (Karachi: al-Majlis al-<sup>ca</sup>Ilmî, 1392/1972), 7:502.

circumstances. According to some traditions, personal feelings were behind prohibiting mut<sup>ca</sup> marriage especially that when he saw some Arabian men disavow the paternity of their children through mut<sup>ca</sup> marriage. Some Shî'î Muslims assert that "Umar was motivated by a racial prejudice against non-Arabs, whom he perceived as a threat to the purity of Arab blood, and so tried to discourage sexual unions".<sup>6</sup> According to some traditions Umar questioned some people about the witnesses for their mut<sup>ca</sup> marriage. For this reason some Sunnî jurists believe that Umar prohibited mut<sup>ca</sup> marriage exclusively in cases where there were no righteous witnesses.<sup>7</sup> Another observation worth noting is that on many occasions Umar declared that if he had prohibited mut<sup>ca</sup> marriage before, he would have imposed punishment by stoning. According to Sharaf al-Dîn this implies that if Umar had demonstrated the abrogation of mut<sup>ca</sup> marriage from the Qur'ân and the Sunna he could have applied the punishment. Because of the fact that stoning to death was not regarded as proper punishment for mut<sup>ca</sup> marriage some Sunnî jurists believe that Umar announced this punishment merely to prevent the people from practising it. When he was notified that the people of Iraq

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<sup>6</sup> Shahla Haeri, Law of Desire, (New York: Syracuse University Press, 1989), 63.

<sup>7</sup> al-Şan'ânî, al-Muşannaf, 7:501. See also 'Alî Ibn Aḥmad Ibn Ḥazm, al-Muḥallâ, 11 vols. (Cairo: al-Ṭibâ'a al-Miṣriyya, 1352/1933), 9:520.

attributed the prohibition of mut<sup>ca</sup> marriage to him, ʿUmar, according to al-Sâdiq, sent a man to inform them that he had not outlawed mut<sup>ca</sup> marriage, but only meant to deter people from practising it.<sup>8</sup>

There is no doubt that ʿUmar's opinions based on his own ijtihâd went against the precepts of the Qur'an and the Sunna, as we observed in Chapter Three. As a caliph, he used his own ijtihâd on behalf of the community. ʿUmar explained his prohibition of mut<sup>ca</sup> marriage, according to one tradition, by claiming that God permitted it at a time when women were few. According to another tradition, he stated that the Prophet permitted it at a time of necessity. The Sunnî jurists, on the one hand, acknowledge that ʿUmar, being a Caliph or an Imâm, is entitled to use his own ijtihâd for the welfare of the community, as he did on numerous occasions. On the other hand, they also concede that mut<sup>ca</sup> marriage was legitimate in the beginning of Islâm and practised by the Companions during the lifetime of the Prophet, of Abû Bakr and the first half of ʿUmar's caliphate until it was prohibited. They also report that some of the prominent Companions and those who came after persisted in upholding its legality, but do not concede that ʿUmar prohibited it through his own ijtihâd. Here they resort to the Qur'ân and the Sunna in order to establish the

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<sup>8</sup> Muḥammad Bâqir al-Majlisî, Bihâr al-Anwâr, 110 vols. (Beirut: Mu'assasat al-Wafâ', 1403/1983), 100:319.



prohibition on firmer grounds. They trace back to the Prophet several traditions attributed to some prominent Companions. This seems to resemble the case of al-Zuhrî, who fabricated several traditions, concerning the prohibition of mut<sup>c</sup>a marriage by the Prophet. These traditions, however, contradict each other and are placed in 'Alî's mouth, in spite of the fact that al-Zuhrî was one of the most prominent opponents. In this connection, many traditions have been recorded by Sabra Ibn Ma<sup>c</sup>bad regarding the prohibition of mut<sup>c</sup>a marriage by the Prophet in Mecca, which are difficult to reconcile with one another. Had the Prophet outlawed mut<sup>c</sup>a marriage in Mecca, then other Companions would have been aware of it and, consequently, reported it. It is for this reason that al-Bukhârî did not mention these traditions. Muḥammad 'Abdu concurs with our conclusion when he argues against divorce through the repetition of the phrase "I divorce you" thrice in one session, contrary to 'Umar's position. Sunnî judges and muftis, he thought, rely on their own books rather than on the Book of God and the Sunna.<sup>9</sup> It would appear safe to agree with Heffening when he says: "But since on the other hand the caliph 'Omar prohibited mut<sup>c</sup>a, which there is no reason to doubt, we might regard the tradition of prohibition as representing later views, which, as is often

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<sup>9</sup> Muḥammad Rashîd Riḍâ, Tafsîr al-Manâr, 12 vols. (Beirut: Dâr al-Fikr lil-Ṭibâ'a wal-Nashr, 1393/1973), 2:368-387.

the case, are put back to the time of the Prophet."<sup>10</sup>

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<sup>10</sup> Wili Heffening, "Mut'ah", Encyclopaedia of Islam, 3:2.  
(Leiden: E.J. Brill and Luzac, 1913), 775.

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