

## THE LEGAL AND SHARI'A NATURE OF DELEGATION IN DIVORCE: A COMPARATIVE STUDY

### A NATUREZA JURÍDICA E DA SHARIA DA DELEGAÇÃO NO DIVÓRCIO: UM ESTUDO COMPARATIVO

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#### Abstract

The framework that involves determination of Shari'a and legal nature of delegated divorce is addressed in the current study. The researchers dwell upon two key approaches that could be applied to explain this nature. The former method is anchored on the idea of agency, as it is believed that delegation enables the wife to bring about divorce on behalf of the husband, whether through the use of the term empowerment or choice. Such interpretation presents problems of application since by agency a similarity between the authorization and power of attorney is assumed when a distinct difference between the two is apparent in terms of foundation and effects hence this theory is weak in explaining delegation. The second approach, in its turn, offers a more coherent account of delegation, founded on the theory of conditional divorce based on the will of the delegatee. Under this method, delegation is not simply agency; but a divorce on the part of the husband, in which the effect of delegation is referred to the will of the person to whom the will of the delegate is allied, such that the entire effect of the delegation is contingent on the decision of the delegate. In this case, the will of the delegate is also an element of the formation of the divorce, as opposed to merely executing the will of the husband, and thus the approach is more apt to identifying the real sense of delegation, on both Shari'a and legal views. This second interpretation also has its problems, however. This paper is devoted to providing these interpretations and the problems related to them.

**Keywords:** Delegated Divorce. Islamic Jurisprudence (Shari'a Law). Agency Theory. Conditional Divorce Theory.

#### Resumo

*O presente estudo aborda o quadro que envolve a determinação da Sharia e a natureza jurídica do divórcio delegado. Os pesquisadores se debruçam sobre duas abordagens fundamentais que poderiam ser aplicadas para explicar essa natureza. O primeiro método baseia-se na ideia de agência, pois acredita-se que a delegação permite que a esposa promova o divórcio em nome do marido, seja por meio do uso do termo empoderamento ou escolha. Tal interpretação apresenta problemas de aplicação, uma vez que, por agência, pressupõe-se uma semelhança entre a autorização e a procuração, quando é evidente uma diferença distinta entre as duas em termos de fundamento e efeitos; portanto, essa teoria é fraca para explicar a delegação. A segunda abordagem, por sua vez, oferece uma explicação mais coerente da delegação, fundamentada na teoria do divórcio condicional baseado na vontade do delegado. Sob esse método, a delegação não é simplesmente agência, mas um divórcio por parte do marido, no qual o efeito da delegação remete à vontade da pessoa à qual a vontade do delegado está ligada, de modo que todo o efeito da delegação depende da decisão do delegado. Nesse caso, a vontade do delegado também é um elemento da formação do divórcio, em oposição à mera execução da vontade do marido, e, portanto, a abordagem é mais adequada para identificar o sentido real da delegação, tanto do ponto de vista da Sharia quanto do jurídico. Essa segunda interpretação também apresenta seus problemas, no entanto. Este artigo se dedica a apresentar essas interpretações e os problemas a elas relacionados.*



*Palavras-chave:* Divórcio Delegado. Jurisprudência Islâmica (Lei da Sharia). Teoria da Agência. Teoria do Divórcio Condicional.

## 1 INTRODUCTION

To study the legal and religious character of delegated divorce, it is necessary to carefully examine the sources of Islamic jurisprudence and textual statutes because this character is not fully determined, and it is impossible to ensure sufficient clarity of practice. Although it directly influences the formation of the foundation of delegation and may be rooted in jurisprudence and law, the problem has not been given enough consideration in legal and jurisprudential literature. This subject is relevant because it is the gateway that shows the theoretical framework that underpins the delegation in divorce, and the decisions it involves when considering its establishment, the intent of the husband, and its religious and legal definition. In this respect, the introduction is subdivided into the following parts:

### 1.1 First: definition of the topic

This research addresses the legal and religious nature of delegation in divorce, aiming to clarify the foundation on which this system rests and define its nature in light of its various forms. Studying the rules of delegation reveals two approaches that can be relied upon to interpret its nature: the basis grounded in the theory of agency and the basis grounded in the theory of conditional divorce. This is derived from the organization of delegation rules in Islamic jurisprudence and statutory legislation.

### 1.2 Second: research problem

The research problem lies in identifying the most appropriate theory to describe the nature of delegation in divorce. This issue arises from the hesitation between considering the authorized person as a representative of the husband, who has the authority to effect divorce based on the theory of agency, and viewing delegation as a

form of conditional divorce contingent on the will of the delegated party, whose effect is realized when they choose to divorce, according to the theory of conditional divorce. The study aims at examining these two theories and assessing their ability to explain delegation, define its nature, and determine its characterization from a religious and legal perspective, considering the effects it produces in the external world once enacted.

### **1.3 Third: research methodology and scope**

The chosen research method is an analytical-comparative one, which examines the principles of delegated divorce in the Islamic jurisprudence of the four Sunni schools that endorse delegation (Hanafi, Maliki, Shafi, and Hanbali) and then compares it with the laws that allow delegated divorce, starting with the Iraqi law and then the personal status laws of Syria, Jordan, Morocco, Bahrain and the UAE. The approach emphasizes areas of agreement and disagreement and shows the premises these legislations are based on when delegating.

### **1.4 Fourth: research structure**

The topic is addressed in two main sections: In the first section, “The Legal and Religious Nature of Delegated divorce Based on the Theory of Agency,” two subsections are presented: the first subsection examines the perspective that delegated divorce is based on the theory of agency, and the second subsection discusses and analyzes this approach. The second section addresses “Determining the Legal and Religious Nature of Delegated divorce Based on the Theory of Conditional Divorce,” also divided into two subsections: the first presents the perspective that delegation relies on the theory of conditional divorce, and the second discusses this approach and evaluates its suitability for explaining the nature of delegation.

### **1.5 Section one: determining the legal and religious nature of delegated divorce based on the theory of agency**

The issue of defining the legal and religious nature of delegated divorce based on the theory of agency has occupied an important place in jurisprudential and legal research, due to the overlap between the concepts of authority and will in effecting divorce. Delegation is a certain type of authority transfer, that is, the husband delegates his wife the direct authority to accomplish the divorce, either by transfer of ownership, which will enable her to act on her own, or by selective form, which will leave the decision-making to her. This has been borrowed in some contemporary legislations, in which the wife has been granted such a right in the terms of the marriage contract or through statutory provisions, but in most cases, they have not directly borrowed the theory of agency in their determination of the nature of delegation in divorce.

It is significant to study delegation in relation to the theory of agency, to discuss whether this delegation is a true representation between the husband and his wife in effecting the divorce or it is a mere assigning of an independent right by the wife, independent of the will of the husband. Judging by this problem, this section is split into two subsections, the first of which will consider the point of view according to which delegated divorce is grounded on the theory of agency, its jurisprudential foundation, and evidence, whereas the second subsection will focus on the discussion of this point of view and the assessment of the reasonability of delegation as an application of the theory of agency in light of relevant jurisprudential and legal texts.

### **1.6 Subsection one: the perspective that delegated divorce is based on the theory of agency**

The view that delegated divorce is centered on the agency theory. The opinion that delegated divorce is founded on the theory of agency or proxy is also one of the most prominent approaches to jurisprudence, which attempt to define the nature of such delegation and find their Sharia base. Advocates of this opinion assert that delegation, as either (takhyeer) delegation by choice or (tamleek) delegation by authority, is little more than a kind of agency, whereby the husband delegates a third party, most frequently his

wife, to accomplish the divorce. When a person other than the wife is granted such representation, then it is called proxy (*tawkeel*); when the wife is granted such representation, it is called delegation (*tafweedh*). This is simply based on the fact that the right to divorce is held by the husband, and any exercise of it by a wife can only be done under his delegation or permission. Accordingly, both delegation by choice and delegation by authority represent practical applications of the theory of agency in jurisprudence, as the husband delegates his wife to exercise his right within the limits he has prescribed. The application of this approach will be examined in relation to the nature of delegation in both forms of divorce delegation: delegation by choice and delegation by authority.

### **1.7 First: the basis for agency in choice-delegated divorce**

Delegation by choice (*takhyeer*) is one of the common forms of delegation in jurisprudence, whereby the wife is granted the right to choose. Jurists considered *takhyeer* (delegation by choice) the original form of delegation in divorce, based on its linguistic and technical definitions:

Linguistically, *takhyeer* means “showing preference among things, or preferring one over another,” and the phrase “*khayyara fulanan*” means “he authorized to him the choice between two matters.” (Abu Al-Azm, 2013). Accordingly, divorce of delegation by choice is considered a form of delegation, as it grants the wife the right to decide on the divorce. In linguistic terms, divorce of delegation by choice means giving the wife the choice between remaining married to her husband or pursuing divorce, which is why delegation is characterized as divorce of delegation by choice.

In juristic terminology, the characterization of delegation as divorce of delegation by choice (*takhyeer*) is based on the view that divorce of delegation by choice constitutes the original basis for legislating delegated divorce according to those who uphold it. Jurists have held that delegating to the wife means granting her the choice either to remain within the marital bond or to leave it (Al-Hattab, 1995). The formula used in this context includes expressions such as “choose yourself” or “choose your matter,” whereby the husband transfers the authority to initiate or effect divorce to another party, as will be explained later in the formation of delegation. Moreover, any expression by which the

husband delegates the wife to remain in the marriage or to leave it indicates that he is granting her such choice (Al-Dardir, n.d.). Thus, choice is not confined to specific terms such as “I give you the choice” or “choose,” but extends to any expressions that carry the meaning of choice. This is because the permissibility and legislative foundation of delegation in jurisprudence originate from the “verse of choice,” as previously noted, as well as from the report of ‘A’isha, who stated: “The Messenger of Allah (PBUH) gave us the choice, and we chose Allah and His Messenger, and that did not count as anything against us” (Al-Bukhari, 1981).

Further supporting the view that divorce of delegation by choice granted to the wife constitutes, in reality, delegation of the divorce right are the reports and juristic opinions cited in jurisprudential works indicating that choice inherently includes the meaning of delegation. For example, it is reported in some Zaidi sources from Yahya ibn al-Husayn that: “If a man says to his wife, ‘I have placed your matter in your hands, so choose,’ her decision regarding herself is valid: if she wishes, she may separate herself, and if she wishes, she may remain with her husband and uphold the marriage” (Al-Qasim, 1407 AH). Likewise, one contemporary scholar stated: “If the husband says to his wife, ‘Choose yourself’ or ‘your matter is in your hands,’ intending to delegate the divorce to her, she may choose so long as she remains in the same session if present, or upon being informed if absent” (Basha, 1907). Another scholar also noted that: “What the Prophet (peace and blessing be upon him) did was to authorize the divorce to them, as he left the choice to them” (Al-Shamm’ah, 1995).

From the foregoing, it becomes evident that deriving the legal nature of this form of delegation (choice delegation) on the basis of the theory of agency is both conceivable and theoretically plausible. The husband being the person who makes the decision to keep the marriage or to dissolve it, therefore may assign the decision to be made on his behalf to the wife. Concerning the personal status legislations that are under investigation, in Syria, Jordan, UAE, Bahrain, Morocco, and Iraq, the principle of divorce by delegation by choice is not implemented directly in the statutory texts, because of the variation in legal draftsmanship tradition with the traditional jurisprudential decisions. (Syrian Personal Status Law No. 59, 1953; Jordan Personal Status Law No. 36, 2010; UAE Personal Status Law No. 41, 2024; Bahrain Family Law No. 19, 2017; Moroccan Family Code No. 70.03, 2004; Iraqi Personal Status Law No. 188, 1959). Nevertheless,

considering that these personal status laws recognize the legitimacy of delegation and rely on Islamic law and jurisprudence as primary sources of legislation, referred to in the absence of explicit legal provisions, the concept of delegation by choice can be implicitly understood as one form of delegation in divorce.

### **1.8 Second: the basis for agency in ownership-based divorce**

Delegated divorce may take the form of granting ownership of the right to divorce to another, both in jurisprudence and law. Some scholars consider the terms delegation (*tafweedh*) and transferring ownership of the divorce authority (*tamleek*) synonymous in this context, as both convey the same meaning. The linguistic and technical definitions play a significant role in characterizing delegation as ownership of the divorce right.

Linguistically, *tamleek* comes from the verb “*mallaka*,” which means “he promised to grant ownership of his property: he made it his own.” (Abu Al-Azm, 2013). It also means “she was given control over her matter,” as in “*mallakat al-mar’a amraha*”, she was given the right to her own divorce. (Mas’ud, 1992). Expressions such as “*mallaka al-shay’a mulkan*” indicate exclusive control over it, and “*amallakat fulanatu amraha biyadiha tamleekan*” implies that she has effected divorce. (Al-Fayruzabadi, n.d). The term conveys the same meaning: making something owned by another, giving them exclusive control. Thus, saying “*mallakat al-mar’a amraha*” linguistically means granting her the right to divorce. (Al-Husayni, 1994)

It can thus be concluded from the linguistic definition of “ownership” that it means to make something the property of another, granting them exclusive authority to act upon it. Therefore, when it is said, “She was given ownership of her affairs,” it signifies granting her the right to initiate divorce.

Technically, characterizing delegation as ownership of divorce is supported by Islamic jurisprudence, which considers ownership one form of delegation, enabling the person granted the right to effect the divorce. This view is explicitly recognized in schools of thought that permit this form of delegation, allowing another person to be granted the right to effect divorce. Malik school defines delegation as a right to divorce, and the right of divorce is stated both in terms of form and content. They believe that a husband is in a position to give his wife the right to divorce in three ways: proxy (*tawkeel*), assigning the

ownership of the divorce right (*tamleek*), or assigning a choice (*takhyeer*). In this regard, Malikis categorize delegation either as ownership or choice. For example, if the husband tells his wife, “The matter is in your hands,” it constitutes explicit ownership, and if the wife divorces herself based on this, the divorce is valid. (Malik ibn Anas, 1323 AH)

The Shafi'i school likewise considers *tamleek* (granting ownership of the divorce right) as a form of delegation in divorce, which only takes effect when the husband delegates his wife to divorce herself. It is reported from Al-Shafi'i that he said: “Malik ibn Sa'id ibn Sulayman ibn Zayd ibn Thabit informed us, from Kharijah ibn Zayd, that he was sitting with Zayd ibn Thabit when Muhammad ibn Abi 'Atiq came to him with tears in his eyes. Zayd asked him: ‘What is the matter with you?’ He replied: ‘I granted my wife control over her matter, and she separated from me.’ Zayd said: ‘What led you to do that?’ He replied: ‘Destiny.’ Zayd then said: ‘Take her back if you wish; it is only one [divorce], and you have more right over her’”(Al-Shafi'i, n.d.; Al-Nawawi, n.d).

This demonstrates that, according to the Shafi'i school, granting ownership of the divorce right constitutes one of the methods by which divorce may be effected without the husband's direct pronouncement, meaning that they characterize delegation as *tamleek* of divorce. The Hanbali school also considers *tamleek* (granting ownership of the divorce right) to be one of the forms of delegation in divorce. According to their doctrine, the wife becomes entitled to divorce herself if the husband says to her: “Your matter is in your hands.” They further hold that this ruling resembles that of delegation by choice (*takhyeer*), as the expression “your matter is in your hands” is regarded as a form of granting choice, whereby the woman is entrusted with the decision of divorce herself (Ibn Qudamah, n.d.; Al-Bahuti, 1997; Ibn Qudamah, n.d.). Moreover, given that delegation can be considered as granting ownership (since it carries that meaning both literally and substantively), we can assert that the concept of “agency” is realized in this scenario (the ownership possibility), because granting someone ownership over their verbal act (such as contracts or declarations) amounts, at most, to deputizing another to act on one's behalf. Thus, those who focus on the ownership aspect of delegated divorce recognize that the precise nature of delegated divorce is, in essence, agency (*inaba*).

After characterizing delegated divorce as granting ownership of the divorce right to the wife in jurisprudence, we turn to examine the legal legislations addressing this matter. It is observed that legislations related to delegated divorce can be divided, in terms

of wording or legislative expression, into two main groups: one group explicitly adopts the term “empowerment or ownership,” and the other merely refers to “delegation.”

### 1.9 First: legislations explicitly using the term “ownership of divorce”

The legislations of certain Arab countries, such as the UAE, Bahrain, and Morocco, have incorporated expressions such as “granting the wife ownership of the divorce” or “granting her control over her own affairs” within their provisions regulating authorization, which suggests acceptance of this characterization of delegated divorce as a form of agency.

1. **UAE Legislation:** Article 55 of the Personal Status Law states: “1. It is valid for the husband or wife, if she has been granted ownership of her own divorce, to delegate another, male or female, to effect the divorce through a special notarized mandate.” The explanatory memorandum clarifies: “The law chose ownership of divorce as a form of delegation, allowing the woman to divorce herself if the husband granted her control over her matter.” (Al-Jundi, 2011)
2. **Bahraini Legislation:** Article 83 provides: “The divorce by the wife is a single irrevocable divorce if the husband granted her ownership of her own divorce under the marriage contract,” and paragraph (c) adds: “The divorce is a single revocable divorce if she was delegated during the marriage.”
3. **Moroccan Legislation:** The Moroccan Family Code affirms ownership-based divorce in Article 89: “If the husband grants his wife the right to effect divorce, she may exercise this right by submitting a request to the competent court.” The Family Code explicitly expresses delegated divorce as ownership of the divorce right. (Al-Shafi’i, n.d.)

### 1.10 Second: legislations that only mention “delegation”

This approach is reflected in the personal status laws adopted in Syria, Jordan, and Iraq, where delegation is not assigned a specific legal characterization, such as granting

ownership (*tamleek*), nor are its forms or cases detailed; rather, these legislations merely recognize the permissibility of delegation:

1. **Jordanian Legislation:** The legislator limited itself to stipulating the permissibility of the husband delegating to his wife the right to divorce herself, without providing further clarification regarding its forms. However, commentators on Jordanian personal status law have defined delegation as “granting the wife the right to exercise divorce”( Al-Sartawi, 2007; Al-Jundi, 2011).
2. **Syrian Legislation:** The Syrian legislator followed the same general approach, merely referring to delegation without addressing the details of its legal characterization, leaving this matter to legal scholars, who have defined delegation as “granting the wife the right to divorce herself” (Al-Sabouni, 1998).
3. **Iraqi Legislation:** The Iraqi legislator adopted a similar position, limiting itself to recognizing the permissibility of divorce being effected by the wife if she has been delegated such authority, without further elaboration. Iraqi legal commentators have likewise defined delegation as granting the wife the right to effect divorce (Al-Asadi, 2021; Al-Nawawi, n.d.; Al-Sharbini, 1985; Al-Kubaisi, 2015).

It appears that legislators in this group of countries have left the issue of the legal characterization of delegation, and the clarification of its dimensions, to legal scholars, reflecting the absence of detailed legislative treatment of this matter. Since the first group does not constitute a genuine “legislative trend” in determining the precise legal nature of delegation in divorce, given that it primarily addresses the wording of delegation, this second group cannot be regarded as a contradictory legislative trend. Rather, these are legislations that merely refer to general delegation while leaving its legal characterization to juristic interpretation.

### **1.11 Subsection two: discussion of the perspective that delegated divorce is based on the theory of agency**

We can respond to the view that delegated divorce is based on the theory of agency as follows:

### 1.12 First: linguistically

It is evident from the foregoing that the linguistic definitions of both *takhyeer* (delegation by choice) and *tamleek* (transfer of ownership (of the power of divorce)) inherently encompass the meaning of delegation. Linguistically, *takhyeer* (delegation by choice) denotes “authorizing the power of choice,” while *tamleek* (transfer of ownership (of the power of divorce)), or placing the woman’s matter in her own hands, signifies “granting her authority to dispose of the divorce,” as reflected in the expression “she was given control over her divorce.” On this basis, it appears that proponents of this view rely on the linguistic meaning to determine the nature of delegation in divorce. However, this raises the question of whether the linguistic meaning alone constitutes a valid basis for determining a Shari‘a ruling. It can be said that jurists use linguistic meanings in order to explain the meanings of legal terms, but these meanings are not a separate legal evidence unless backed with authoritative evidence of the Quran or the Sunnah. The advocates can answer that they did not solely depend on linguistic meaning, but transmitted evidence by these sources came along with it. However, it can be refuted that the Islamic jurisprudence has failed to come to agreement with regard to treating the expressions of *takhyeer* (delegation by choice) as an actual delegation to the wife during divorce. In addition to this, their definition of ownership is more of a customary (socially recognized) than linguistic definition. They can claim that there are two aspects of words: a general linguistic meaning and a particular tradition (legal) meaning. In case of conflict, preference will be given to the traditional meaning since it bears the intended meaning when used in jurisprudence. Yet, this customary meaning itself is disputed among jurists, making reliance on it insufficient for establishing a definitive legal ruling on the nature of delegation.

### 1.13 Second: legally

Proponents of this view argue that delegation, in both its forms, *takhyeer* (delegation by choice) and *tamleek* (transfer of ownership (of the power of divorce)), is grounded in the concept of agency (*inaba*), on the basis that the husband is the original holder of the right to divorce, and that the wife may only exercise it by his delegation.

However, this foundation raises two key issues. The first concerns the ambiguity of the concept of *agency (inaba)* itself, as it ultimately leads back to the theory of proxy (*wakala*), which constitutes its basis. It has already been established that there is a clear distinction between agency in divorce and delegation in divorce. The second issue relates to the extent to which the concept of agency (*inaba*), in its precise juristic sense, can be applied to all forms of delegation. In jurisprudence, *inaba* (agency) is linked to agency, whereby an act is performed on behalf of the right-holder, while the right itself remains vested in that holder without being transferred, as previously explained. The agent is empowered to act within the confines of the delegation to him. By contrast, authorization, especially that of *tamleek* (assigning the power of divorce), has a different legal impact, in that it transfers to the wife the power to accomplish divorce wholesome and completely without the need of a fresh authorization of the husband. This transfer is an approximation of the transfer of the right, and not of the exercise of it in place of another. This kind of characterization cannot be supported because the difference between delegation and agency is well established, and they are of a different nature with different legal implications. The proponents of this opinion can also use the evidence of the texts, like the verse of choice and the fact that the Prophet (PBUH) provided his wives with the choice. But, even granting the genuineness of these documents, they do not render a general rule of agency, since they are a special and narrow delegation in reference to a given and particular case, and without any general grant to the wife of a right to produce divorce. Accordingly, such texts cannot serve as a basis for a general rule that delegation is grounded in *inaba* (agency or proxy) in all cases. The same applies to the expression “your matter is in your hands,” which in jurisprudence indicates an immediate transfer (*tamleek* (transfer of ownership (of the power of divorce) of the authority to divorce, rather than mere delegation based on agency. Therefore, this expression cannot be considered conclusive evidence supporting the concept of *inaba* (agency), as it establishes an effect that exceeds its scope. Accordingly, linking delegated divorce to the theory of agency in an absolute sense is not tenable from a juristic perspective, due to the fundamental differences between delegation and agency in both nature and legal effects, and because the evidence relied upon by this view does not substantiate the existence of a general or continuous form of agency.

#### **1.14 Third: in terms of the effects of delegation in divorce**

It is well established that delegated divorce is irrevocable by the husband; it is also confined to the session (if it is not temporally specified), and it does not require the wife's acceptance for its formation. All of these features are difficult for the theory of agency to adequately explain.

#### **1.15 Fourth: in terms of legal characterization**

Upon examining personal status legislations (even assuming that their provisions extend beyond merely prescribing the formula to defining the nature), it becomes apparent that modern laws have not adhered to a unified characterization of delegation. Others clearly use the term *tamleek* (transfer of ownership (of the power of divorce)) and others simply state that there is delegation without more detail. This dispersion suggests that the legislator did not consider authorization to be simply a kind of agency, but rather something more comprehensive, which involves the concept of delegation to independent disposition, which is more tantamount to *tamleek* (transfer of ownership (of the power of divorce)) than to *inaba* (agency). Additionally, referring to delegation as agency would mean that the husband has the right to withdraw or discontinue it before the divorce. But it can be seen that legislations acknowledging *tamleek* (transfer of ownership (of the power of divorce)) give the wife all the right to have the right exercisable after the delegation has been made. This shows that the application of legislature is not entirely in line with the juristic meaning of agency. Considering all of the above, it can be assumed that the agency theory cannot be applied to establish the Shari'a, even the legal essence of delegation in divorce.

#### **1.16 Section two: determining the legal and jurisprudential nature of delegation based on the theory of conditional divorce**

This view gives a variant interpretation of delegation since it is related to the theory of conditional divorce that is subject to the will of the wife. The characterization is based on the notion that delegation does not confer the wife an independent right but

condition the divorce upon its being issued by the husband. This approach closely reflects the legal and jurisprudential understanding of delegation within the framework of divorce rules. Accordingly, this section is divided into two subsections: the first presents the view connecting delegation to conditional divorce, and the second discusses this view.

### **1.17 Subsection one: the perspective that delegated divorce is based on conditional divorce**

To clarify this theory, it is first necessary to define the concept of divorce contingent upon the will of another and then apply it to delegation to determine whether it can be used to establish the nature of delegation:

A conditional divorce is a divorce whose effectiveness and legal consequences are suspended upon the occurrence of a future event or condition to which the husband attaches the ruling by means of a conditional expression. (Ibn Najim, 1997; Ibn Qudamah, n.d.; Scholars' Group, n.d.; Al-Hifnawi, n.d.). This is in contrast to an immediate divorce, which takes effect as soon as it is pronounced in a definitive form. The validity of a contingent divorce depends on several conditions: (Ibn-Najim, n.d.; Ibn Abidin, 1995; Al-Shrawani & Al-Abadi, n.d.; Ibn Qudamah, n.d.)

1. The condition upon which the divorce is suspended must not exist at the time of pronouncement but must be capable of occurring in the future. If the condition is impossible or already fulfilled at the time of suspension, the contingency has no legal effect.
2. The condition must occur while the marital relationship exists, either in reality or by legal recognition, as the existence of the marriage is a prerequisite for the wife to be a valid subject of divorce.
3. The condition must be ascertainable; a contingency based on something that cannot be verified or controlled is not legally valid, such as a husband saying, "You are divorced, if Allah wills," which does not constitute a valid conditional suspension.

Regarding the legal effect of conditional divorce, juristic schools differ. The major one which includes the Hanafi, Maliki, Shafi in addition to Hanbali schools of thought is that divorce becomes effective after the contingency is accomplished, and this

contingency can be in form of an oath or the confirmation of divorce. (Ibn-Najim, n.d.; Ibn Abidin, 1995; Al-Shrawani & Al-Abadi, n.d.; Ibn Qudamah, n.d.)). Conversely, the Imami, and the Zahiri schools do not accept conditional divorce at all, as they believe that it is not valid in the first instance. (Al-Tusi, n.d.; Al-Hilli, 1415 AH; Al-Najafi, n.d.; Ibn Hazm, n.d.) In this light, specifically among the Hanafi school the Sharia character of delegated divorce can be interpreted as a kind of divorce that is dependent upon the will of the wife. This description is informed by the analysis of the expressions employed in delegation which the Hanafis categorize into four formulations all suggesting suspension of divorce at the discretion of the wife: your matter is in your hands, choose, you are divorced if you wish and divorce yourself.

The three initial expressions have the same legal interpretation and are considered as tools of conditional divorce, whereas the term choose has a slight difference in usage. In the cases where the husband employs an absolute form of delegation, as when he says, your matter is in your hands, divorce yourself, you are divorced, as you wish, the right to effect divorce is transferred to the wife in case she is present in the council, and to the wife in the knowledge that she is absent. When she decides herself under this structure, the divorce cannot be reversed to the number of divorces that the husband wants. E.g. in case he has an intention of one or two, then that number shall prevail; in case of three then all three shall prevail. The Hanafi school follows this decision since they believe that these expressions are figurative (metonyms) that are used to mean divorce, and therefore have to depend on the intention of the husband.

In the case of temporally limited formulations, as in the case of your matter is in your hands one day or one month or we say your matter is in your hands at all times, the Hanafi school is that the wife has the right to exercise the delegated divorce within the specified period, and the divorce will be effective in case she decides to do so within the period (Al-Kasani, 1989). The phrase choose is parallel to the preceding phrases in this ruling but differs in two ways: First, when the husband wishes to have three divorces, he cannot have three divorces (as it is), but he can have three divorces with your matter is in your hands or divorce yourself, which are phrases that indicate something but have possibilities of repetition. The repetition of the word choose is not possible. Secondly, we have to have the explicit reference of the self (the wife) in the words of the husband or in the reaction of the wife. An example is when the husband will say, choose yourself, and

the wife will say, I have chosen myself. Should the husband say, choose and the wife answer, I have chosen, without the addition, myself, the divorce does not become effective. (Ibn Najim, n.d.; Ibn Abidin, n.d.).

This presentation reveals that Hanafi jurisprudence linked delegation to conditional divorce in terms of its structure and mechanism of effect. The husband does not directly pronounce the divorce; rather, he suspends its occurrence on the will of the wife, and the divorce becomes contingent on her choice at the specified time and council. Likewise, the type and number of divorces depend on the husband's intention, justified by the fact that the words of delegation are expressions of divorce that require the husband's intent. It appears that the basis relied upon by this approach is considering delegation as an application of the theory of conditional divorce. Furthermore, when they asserted that the husband cannot revoke or dismiss the wife after her authorization, this stems from a positive act issued by the husband in pronouncing the divorce, and since divorce does not admit annulment, his act is final (Al-Samarqandi, 1993).

After explaining the basis on which jurisprudence relies in classifying authorization as conditional divorce, we turn to the legislations under study to determine whether the theory finds its place in legal application. This step begins by identifying each legislation's stance on the occurrence of conditional divorce, as accepting authorization as an application of this theory depends primarily on recognizing the effects of suspension: Legislative positions are limited to two main directions: the first direction acknowledges the validity of conditional divorce and enforces its effect upon the fulfillment of the condition, provided the husband's statement is linked with the intention of divorce and is not intended to compel an action or omission. This path is represented by the legislations of the UAE, Bahrain, Jordan, and Syria. (The UAE legislator, in paragraph 6 of Article 56, states: "*A conditional divorce based on doing or refraining from doing something, or on the occurrence or non-occurrence of an event, shall not take effect unless the intention to divorce is established.*") The Bahraini legislator, in paragraph 1 of Article 86, provides: "*A conditional divorce based on doing something to encourage an act, or refraining from something to prevent it, shall not take effect unless it is intended as a divorce.*" The Jordanian legislator, in Article 88, states: "*a. Conditional divorce is valid, and the husband's revocation is not accepted. b. If the condition on which the divorce is suspended is impossible in reason or custom, rare, or doubtful at the time of*

*pronouncement, the divorce shall be null.*” The Syrian legislator, in Article 95, provides: *“A non-executed divorce shall not take effect if it is intended only to encourage someone to act or refrain from acting, or if an oath is used merely to affirm information.”*). However, accepting the idea of suspension in this direction makes the husband’s intent a constitutive element of the effect.

The second direction rejects conditional divorce altogether; it does not assign any legal effect to the suspension, regardless of intent or wording, and this approach is reflected in the Moroccan and Iraqi legislations. (The Moroccan legislator, in Article 93, provides: *“A conditional divorce based on doing or refraining from doing something shall not take effect.”* The Iraqi legislator, in Article 36, states: *“A non-executed, conditional, or divorce pronounced in the form of an oath shall not take effect”*). In these cases, suspension is not recognized as a means of terminating the marital relationship. This divergence directly affects the applicability of the theory of conditional divorce to delegation; legislations that acknowledge suspension remain capable of constructing delegation based on this theory, while legislations that deny suspension entirely close off this path.

### **1.18 Branch two: discussion of the view that delegated divorce is based on the theory of conditional divorce**

The given approach is based on the premise that there is no fundamental difference between delegation and conditional divorce yet, this relationship brings up a number of issues which need to be looked at with great attention:

**First:** There is a need to bear in mind the meaning behind each concept. Conditional divorce is associated with the future presence of the divorce, whereby the direct power to bring divorce is vested in the wife once the husband gives her a formula that allows her to state divorce. This difference reveals that the two are not the same in sense that in conditional divorce, the action of the husband is still the action, and that divorce is based on his discretion, but in delegation, the wife is granted direct authority to accomplish the same. However, one can say that delegation also includes something that resembles the notion of conditionality since the divorce does not take place unless the wife decides to bring it about. In this case the will of the wife is the condition which

fulfills the effect of the pronouncement of the husband, and in favour of those who consider delegation to be a conditional divorce.

**Second:** The other question being is who is the authority to divorce under each concept. In conditional divorce, the husband will still own the divorce irrespective of the condition of the wife to act. In delegation, the wife becomes the owner of the power to effect divorce after the issuing of the delegating formula. This distinction is frequently used to criticize the comparison of authorization with conditional divorce. But it can be responded that the power of the wife does not stand alone; it is attached to the initial will of the husband. The husband does not part with his right to divorce; he only lets the wife fulfill the impact of the formula that he started, and delegation is more akin to conditional divorce premised on the choice of the wife.

**Third:** It can be seen through the analysis of the positive side of this view that it corresponds to the nature of the formulas of delegation. Such words like *Your matter is in your hands* or *Choose* are considered to be figurative words which are appropriate to answer, and their impacts do not happen through the direct intent when they are spoken (Al-Masry, 2013).

This implies that the divorce is issued by the husband and it does not take place until the wife reacts and thus her will is a condition to the completion of the divorce. Similarly, the act and the amount of divorces will always be subjective to the intention of the husband during pronouncement and as such what the wife does is not an act in itself but a fulfilment of a divorce that the husband had initiated. Moreover, the failure of the husband to recall the delegation and sack the wife once issued is a further statement to the concept of delegation being an irreversible declaration of divorce, as divorce does not acknowledge annulment. All these factors help to conclude that the concept of delegation is actually conditional divorce, which depends on the decision of the wife, and understanding it in the context of the conditional divorce is more appropriate to the nature of the formula and its legal interpretation. It should be concluded, based on this discussion, that this method is the most able to identify the legality of delegated divorce and clarify on its impacts because it would answer questions that the former method was unable to address, including in the interpretation of practical impacts of delegation of divorce. In studying the comparative legislation, it is not enough to only consider the proclaimed stand of the conditional divorce; it must also be seen whether these

legislations implicitly embrace the concept by legal implications created by the laws on delegation in divorce. Most of the laws under study recognize conditional divorce when the husband's intention is established and the condition is not intended to urge an action, omission, or prohibition (UAE Personal Status Law, Art. 56; Bahraini Family Law, Art. 86; Jordanian Personal Status Law, Art. 88; Syrian Personal Status Law, Art. 95.). In these laws, establishing the legal nature does not pose a real problem, since the legislative framework already acknowledges the idea of conditionality. Exceptions to this approach are the Moroccan and Iraqi legislators, who did not explicitly recognize conditional divorce in its traditional form. However, this departure is not uniform (Bahraini Family Code, Art. 93; Iraqi Personal Status Law, Art. 36.). In Moroccan law, divorce is initially subject to judicial supervision, which allows flexible interpretation when handling delegation cases. The judge has the authority to assess the effects of delegation and adjust its characterization to reduce the tension between rejecting conditionality and permitting delegation.

In Iraqi law, the issue appears more evident. The legislator does not recognize conditional divorce as a principle, yet allows delegation of divorce to the wife. This begs the question as to whether such delegation is legal or not and the question on whether it is certainly disconnected as to the concept of conditionality. In order to respond, it is necessary to discuss the impacts of the delegation in terms of its structuring by the law and accepted jurisprudence. When the delegation is not limited by a certain time, it is not tied to the session, and it is released out of the control of the husband in a way that the husband does not have the right to cancel it, then it becomes practically the same as conditional divorce when the wife makes a decision. In this case, the divorce is not instantaneous but it is subject to the satisfaction of a later requirement symbolized by the decision of the wife. In this view, it can be concluded that even though the law in Iraq does not explicitly provide conditional divorce, it, indirectly, allows its use in the form of delegation regulation. Based on this, the comparison results in the conclusion that the theory of conditional divorce can be applied to delegation in the Iraqi divorce statutes as to effect, albeit not expressly, because its acceptance can be indicated implicitly through the manner in which the law structures delegation, so that delegation is practically on the verge of conditional divorce although there is no direct legislative expression of this.

## 2 CONCLUSION

After presenting the topic, a set of findings and recommendations can be drawn:

### **First: Findings**

1. The nature of delegated divorce depends on two approaches which are manifested in the jurisprudential exercise of the common forms of delegation. The formula can have either an agency meaning of divorce or a conditionality meaning of the will of the wife. Thus, it can be argued that the two theories are the most proximate to describing the reality of delegation, given that both theories represent the framework within which jurisprudence systematizes the provisions of delegation in divorce.
2. The approach that considers the delegated party as acting on behalf of the husband assumes that the original right to pronounce divorce belongs to the husband and that the wife acts in his stead. However, applying this view to delegation faces clear difficulties with the rules of delegation itself. Delegation, whether expressed in the form of empowerment or choice, transfers the authority to effect divorce to the wife once it is established, allowing her to exercise the right independently of the husband. This is due to the fundamental difference between agency and delegation in both concept and effect, including the question of whether the delegate can be removed, making this approach difficult to support as the proper basis for interpreting the nature of delegation in divorce.
3. Another approach links delegated divorce to the theory of conditional divorce based on the will of another. This approach views delegation as a divorce initiated by the husband but completed upon the choice of the other party. Some Hanafi jurists adopted this understanding to define the nature of delegation, considering it a form of conditional divorce. This aligns with the majority opinion on the permissibility of conditional divorce and shows that some delegation formulas fall within figurative expressions that result in divorce when accompanied by intention, supporting this approach and making it closer to the practical application of delegation in jurisprudence.
4. The legislations under study mentioned delegation and empowerment without clarifying their true nature, limiting themselves to recognizing them as powers

granted to the wife without specifying whether she exercises them on behalf of the husband or if the divorce depends on her will. It is pointed out that the delegation is referred to together with agency in these laws, which means that the legislator considers it independent of agency: agency is rooted in the concept of acting on behalf of someone, whereas delegation is not. In particular, agency is associated with power of attorney that contrasts with delegation in the legal organization and functioning. Therefore, the declaration of divorce following delegation will still be at the mercy of the will of the wife, thus the nearest explanation is that delegation is relating to the concept of conditional divorce according to another decision.

### **Second: Recommendations**

1. The stand of the Iraqi legislator with respect to the delegated divorce is not consistent because the text only mentions that the wife has the right to dictate divorce by delegation. It is suggested not to allow delegated divorce and to modify the first paragraph of Article 34 to be as follows: *"Divorce is the lifting of the marriage bond by the husband or the wife if entrusted, or by the judge, and divorce does not occur except with the formula prescribed for it by Sharia."* This formulation is most suitable for the Iraqi legal system, especially since the 2025 Shiite Personal Status Code did not implement delegation in divorce.

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