



GOVERNING INHERITANCE STATUTES  
AFTER THE ENTRY INTO FORCE  
OF EU SUCCESSION REGULATION

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# Repudiation

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# SESSION 1

# Principles



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**In this first session we will look at the following topics:**

- 1 - Introduction**
- 2 - The source of Islamic law, the so-called «usul al fiqh»**
- 3 - The Shari'ah**
- 4 - The orthodox schools of thought (Islamic jurisprudence)**



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## Introduction

- In Islam marriage is based on the common will of the husband and wife to create a durable relationship. If such will ceases to exist, the marriage will be resolved.
- Marriage is a contract entered into based on the will of the parties.
- Islamic marriage is resolved following natural causes or pursuant the will of the husband or as a result of legal reasons.
- Repudiation is a unilateral decision of the husband who decides to terminate the marriage.
- Repudiation is part of Islamic culture and comes from the pre-Islam era.
- Before addressing Islamic repudiation, we will look at basic concepts such as the sources of Islam and the different Sunni orthodox schools of thought. Our course will end with an description of domestic, EU and international case law.



# The source of Islamic law, the so-called «Usul al Fiqh»

## **Quran**

(The sacred text)

## **Sunna**

(The sayings and actions of the Prophet)

## **Ijma**

(The will of the community)

## **Qiyas**

(Legal analogy)

# Quran

(The sacred text)

- Contains the revelations of Allah to the Prophet.
- 114 chapters in non-chronological order.
- Divided in chapters from the Mecca and from the Medina.
- 500 verses contain legal rules.
- Muslims are required to follow the rules therein.
- It contains the guidelines for the Muslim to follow in life.
- The word of Allah is at the center of the text.



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# Sunna

(The sayings and actions of the Prophet)

- The second source of Islamic law.
- The path walked by the Prophet and his conduct before God.
- The Prophet's habits, sayings and his actions.
- The content is found in *ahadith* and each *hadith* is composed of the text and the narration preceded by a list of names, the so-called *isnad* that contains the names of those who have passed down its content.
- It provides instruments to resolve disputes.



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# Ijma'

(The will of the community)

- The third source of Islamic law and is based on the Prophet's saying: «my community will never find consent over a mistake».
- When the community of believers finds consensus, that can be traced back to divine inspiration.
- The main objective of such source is to ensure the historical authenticity of the Quran and the Sunna. It can be compared to the *communis opinio doctorum*.
- The Muslim experts are crucial to the formation of the community's consensus.



# Qiyas

## (Legal analogy)

- The Qiyas or legal analogy is a rule of interpretation and application of Islamic law.
- It is among the most controversial sources since it is grounded in a human thought process and, therefore, imperfect and potentially fallacious.
- If a controversy cannot be solved in the sources of law then a solution can be elaborated based on precedent or similar cases.



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# Shari'ah

(Divine law)

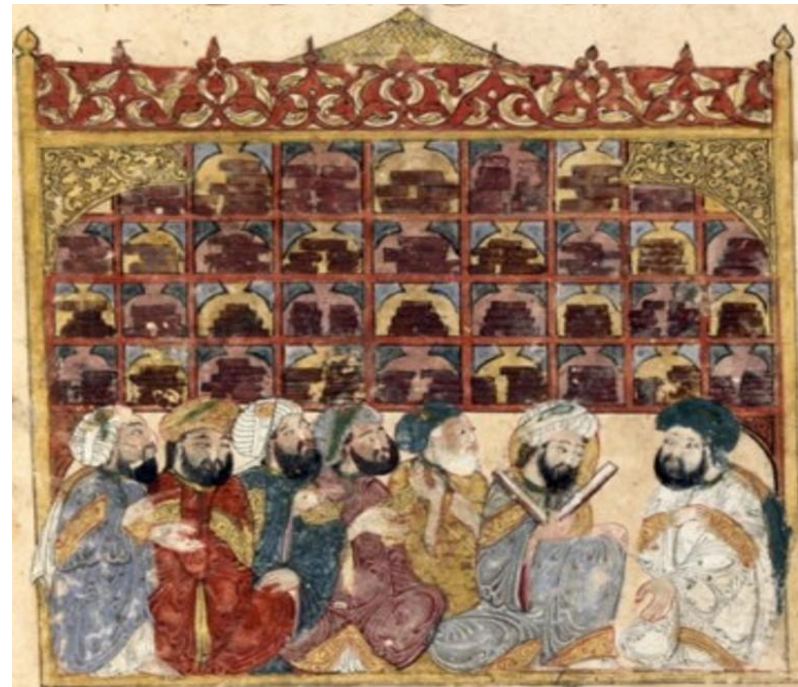
- It is not the product of the human mind but the word of God as revealed to the Prophet.
- The word Shar'ah mean the «the way revealed by Allah».
- It is the law that guides human conduct, *a'mal al-badan* and the an individual's conscience *a'mal al-qalb*.
- The Shari'ah sets the limits so-called *hudud* laid out by divine revelation on human conduct.
- Shari'ah experts are known as *fuqaha*, *i.e.* doctors, sages, those who are knowledgeable of the word of God.



# The four Sunni schools

(Divine law)

- Hanafi
- Maliki
- Shafi'i
- Hanbali



## SESSION 2

# Focus on repudiation



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## **In this second session we will look at the following topics:**

- 1- What is repudiation?**
- 2- What is the source of repudiation?**
- 3- The sources of repudiation**
- 4- Some examples (Marocco, Egypt, India)**
- 5- What are the fundamental elements of repudiation?**
- 6- What are the forms to exercise repudiation?**
- 7- What are the effects of repudiation?**



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## What is repudiation?

- Also known as talaq (طلاق) it is legal form prescribed by the Shari'ah.
- Comes from the word «talaqa» which means to separate, cut loose.
- In Islam only the husband has the right to repudiate since a man is considered to be more emotionally stable than a woman in Islam.
- It is a form of renunciation of the husband's rights over the woman.
- Ibn Arafah defines it as so: “repudiation is the legal status in which the husband may no longer benefit from his wife”.
- The effects occurs upon pronouncing of the words “anti taliq”: “I divorce you”.
- The formula will determine legal effects only after three months have elapsed (this period of time is known as “idda” and provides for a window in which the husband can go back on his decision). It then becomes irrevocable.



## How scholars see repudiation

- All schools agree that to repudiate is reprehensible (“makrouh”) but nevertheless has legal effects.
- An author (D. Santillana, *Istituzioni*, vol. I, p. 201) has noted that repudiation is an imperfect act since it is unilateral in nature while marriage is bilateral.
- It should be noted that while the foundation of repudiation is religious, each country will have its own positive law on the dissolution of marriage.
- If the Quran is unclear or lacks specific rules, the Sunna will supply additional guidance and is considered an authentic interpretation of the Quran.
- In the following slides we will look at three countries:
  - **Marocco**
  - **India**
  - **Egypt**



# Divorce in Morocco

- Moroccan citizens who reside abroad, who are married and who desire to dissolve their marriage may do so in two ways:
- before the Moroccan courts;
- before the foreign courts and seek judicial recognition of the decision of such courts in Morocco.

## Before the Moroccan courts

- The request for a divorce must be filed with the office of the Courts where the spouses have elected their domicile, the domicile of the wife or here residence, or the place where the marriage took place (in this order).
- The applicant will ask for a divorce to the judge before two *adouls*.
- The Court will attempt conciliation if both are in Morocco or seeks assistance of the diplomatic envoys.
- Moroccans residing abroad may ask for a consensual divorce according to article 114 of the Family Code.



# Divorce in Egypt

- There has been controversy on admissibility of oral repudiation.
- The University of Azhar issued a *fatwa* (binding decision in the Islamic community) in which it is found and prescribed that only written repudiation may have its legal effects as it protects the rights of the woman and ensures certainty.

# Divorce in India

- Today there is a legal restriction to oral repudiation (the triple talaq formula).
- Violations are punished with three years of incarceration (this will be addressed in Section 3 later on).



# What are the elements of repudiation?

- Sunni repudiation (prescribed by the Quran or in conformity with the tradition of the Prophet Mohammed) must have the following characteristics:
- It must be pronounced in a time of purity (not during the menstrual cycle of the women).
- It may be pronounced once and may be followed by a three month period of deliberation or three times (but it is makrouh – not preferred).
- During the time of deliberation the husband may not have intercourse with the wife.
- The husband must have the capacity to repudiate.
- There must be a valid marital relationship.
- The will to repudiate must come as unequivocal.



# How many forms of repudiation are there?

- In there are 4 forms of unilateral repudiation:
  - talaq- simple repudiation
  - talaq tulathi- triple repudiation
  - talaq zihàr
  - talaq ilà'
- **Simple repudiation (talaq):** the fundamentals of legal capacity under Islam apply. The husband must be Muslim, must have reached puberty, sane of mind able to manage his affairs. Who is insolvent, physically ill or wasteful is not prevented from repudiating although the effects on the inheritance rights of the repudiated wife are open for discussion.
- A solemn formula is not required but repudiation must ensue from a clear unequivocal manifestation of will. If the marriage has not be consummated then the dissolution of the bond occurs immediately. In the opposite case, the bond endures for some time.



# How many forms of repudiation are there?

- **Talaq tulathi:** Triple repudiation or *talaq taluthi*: in this case the *talaq* formula is uttered three times to dissolve the marital bond immediately and prevent another marriage between the same couple.
- To renew the marital bond, the repudiated woman first must marry and consummate the marriage with another man. Such form of dissolution is *makrouha* (not preferred) because it is not consistent with the Quranic ruling that prescribes that the process of repudiating features time for deliberation and the possibility for the couple to reunite for a maximum of three times.
- **Zihar:** this form of repudiation consists in a declaration made by the husband that he intends to consider the wife as the “back” (“zahr”) of a woman whom he cannot marry and is revocable. From the moment of the declaration the couple must live separately but the marital bond is not dissolved. Upon request of the wife, the qadi assigns a term to the husband to revoke the zihar if he chooses to.



# How many forms of repudiation are there?

- **Ilà:** this form of repudiation consists in the oath taken by the husband to refrain from having sexual intercourse with the wife. If the oath lacks an indication of time, after four months have elapsed from the day in which the oath was taken, the wife may ask the *qadi* to assign the husband a term to reinstate the marital relationship:
- If it happens, the husband is punished for the violation of the oath taken;
- if this does not happen, the repudiation is pronounced by the *qadi* and can be revoked until the wife's period of deliberation has not elapsed.

## The consensual dissolution of marriage or repudiation by “khul”

- The marital bond is dissolved after the woman gives a sum of money to the husband so he may consent to repudiate her. This form was practiced in Arabia before the time of Mohammed and is based on the self determination of the wife. However, it is considered “makhrouh” because it differs from Quranic teachings.



# What are the effects of repudiation?

- It is useful to keep in mind the fundamental distinction between:
  - Repudiation pronounced before consummation of marriage
  - Repudiation after consummation of marriage
- A. Repudiation before consummation is always final “ba’in” and is similar to the triple talaq form of repudiation. The dissolution of the marital bond is irrevocable but the former spouses can enter into a new marriage (with a new “mahr” or dower). Gifts given in connection with the marriage (not consummated) are considered final by the majority of Islamic scholars (Ibn Asim, Mayyarah, Halil). The repudiated wife is not bound to “iddah” and the husband is not under a duty to pay any form of alimony for the period that would otherwise be “iddah”.
- B. Repudiation after the marriage is consummated (actual or constructive consummation). In this case it is to be noted that the repudiated wife must observe “iddah” for three months – three months of purity “tuhr” in between one menstrual cycle and another.



# “Iddah”

- The purpose of this period of time is to give the husband the possibility to reevaluate his decision since it may just follow a moment of rage. Furthermore it helps avoid *confusio sanguinis* should the woman enter into a new marriage in light of her former husband’s persistent will to dissolve the marital bond.
- During this time of reflection:
  - i. The woman may not remarry;
  - ii. The husband may not marry if he has already four wives including the repudiated wife;
  - iii. The husband has marital authority over the wife;
  - iv. The husband must provide for the wife’s needs;
  - v. The right of both spouses to live in the marital home;
  - vi. The husband may not marry the wife’s relatives;
  - vii. Inheritance rights between spouses remain intact if one of them dies during the three month period.



# SESSION 3

## Selected international case law



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## In this third session we will look at international case law:

- 1 – French case law
- 2 – Indian case law
- 3 – German case law
- 4 – The decisions of the European Court of Justice



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# French case law

- Most cases have been examined by the Court of Cassation on Moroccan or Tunisian couples.
- Bilateral agreements provide that the decisions one country are recognized as *res judicata* in the other.
- At first France recognized the judgements on a case by case basis checking that women had been given some opportunity to assert their rights.
- The *Dahar* judgement (18 December 1979) states that an act of repudiation in Algeria was not contrary to French public order since each party was able to assert its claims.
- The Rohbi judgement (3 November 1983) breaks the decision of a court of appeal which refused to recognize the effects of an act of repudiation in Morocco after finding that, in particular, the woman had not been summoned before the *adouls*.



# French case law

- From 1994 the Court of Cassation refers to Article 5 of the Additional Protocol no. 7 to the European Convention for the Protection of Human Rights (ECHR) which contains the declaration of the equal rights and duties of spouses.
- This is the case of El-Madani (1 June 1994).
- In the case of Kari (31 January 1995), the Court of Cassation stated: *“It is therefore right that the Court of Appeal has held that an act of repudiation rendered without contradictory was not likely to be recognized in France; the fact that the wife has applied for the increase of the pensions granted for each of the children born of the marriage can not be considered as an acquiescence in the repudiation.”*
- The principle of equality of the spouses rises to principle of international public policy (judgement 11 march 1947).



# French case law

- In 2004, the Court of Cassation refused to recognize Algerian and Moroccan repudiations because they do not conform to the legal principle of equality between spouses.
- Case law on Algeria spouses: decision n° 01-11549, decision n° 02.11618, decision n° 02-17479.
- Case law on Moroccan spouses: decision n° 02-15766, decision n° 02-10755.

On October 23rd, 2013 the French courts refused recognition of two decisions, one from Algerian and one from Morocco arguing a breach of the principle of equality between spouses.



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# Indian case law

- Several activist groups have strongly opposed the practice of «talaq» as discriminatory.
- However, advocates of Islamic law have pointed to the personal nature of «talaq» and therefore the fact that it is beyond the reach of legislative activity by the government.
- The Indian Supreme Court on August 22, 2017 declared that the practice of triple talaq is unconstitutional and a breach of Article 14 and 21 of the Indian Constitution.
- The decision was not unanimous and shows the existence of two different points of view on the subject.



# German case law

- The position of German courts is that irrespective of whether *talaq* is judicial in nature or not it must conform to German public policy.
- «Public policy» may refer to 1) procedural aspects or 2) substantive aspects.
- Procedural aspects of public policy require that the procedure in the country of origin must be acceptable according to German standards. For example, the parties' rights will be assessed.
- Substantive law become relevant insofar as *talaq* violates the fundamental tenet of equality. Therefore, if either A) the wife agrees to repudiation or B) (but it is not unanimous) the divorce could have been declared according to German law as well, then repudiation may be recognized.



# EU Court of Justice

- The matter brought before the Court was whether religious divorces pronounced outside the EU Member States could be recognized in the European Union.
- In case C-372/16 *Soha Sahyouni v. Raja Mamisch*, 20 December 2017, the issue of recognizing private divorces (including religious divorces) and therefore the scope of Regulation Rome III came before the Court following a request for recognition of a unilateral divorce pronounced before an Islamic religious court in Syria.
- The Court upheld that only public divorces (divorces pronounced either by a national court or by, or under the supervision of, a public authority) fall under the notion of “divorce” of regulation 1259/2010.
- Private divorces do not fall under the scope of the Regulation Rome III.



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# SESSION 4

## Italian case law



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## **In this fourth session we will look at Italian case law:**

**1 - Introduction**

**2 – Court of Appeal, Rome, 29 October 1948**

**3 - Court of Appeal, Turin 9 March 2006**

**4 - Court of Appeal, Venice, 9 April 2015**

**5 - Court of Appeal, Rome, 12 December 2016**

**6 - Court of Appeal, Cagliari 16 May 2008**

**7 - Conclusion**



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# Italian case law

- Two fundamental rules to keep in mind:
- **Art. 3, no. 2, letter e) of Law no 898/1970** which governs when a divorce may be requested by one of the spouses including the dissolution of marriage pronounced abroad.
- **Articles 64 et seq. of Law no. 218/1995** especially art. 65 that provides rules on when decisions rendered abroad may be recognized in Italy. The fundamental limit is that a foreign decision must not be in contrast with the notion of public order and must not disregards the fundamental rights of the parties.
- We find several decisions on repudiation in Italian case law. Some decisions recognize repudiation has having effect in the Italian system while others do not.



# Italian case law

- In 1948, the Court of Appeal in Rome provided some initial guidance stating that there is a difference between:
  - A. Repudiation as a unilateral and non-judicial manner of dissolving marriage which cannot be recognized inasmuch as it is contrary to public order; and
  - B. Repudiation as an initial act which initiates judicial proceedings the result of which may be recognized judicially in Italy as long as the final decision is consistent with the mandatory requirements set out for recognition.



# Italian case law

- In 2006, the Court of Turin decided a case involving a husband, an Italian citizen born in Morocco, and his Italian wife.
- During separation proceedings, the husband repudiated his wife according to Moroccan law. The court, however, rejected his request for recognition on these grounds:
  - A) The competence was of Italian courts;
  - B) Repudiation violates the principle of equality since the wife does not have the right to partake in the decision;
  - C) There is no assessment of whether a bond still exists among spouses;
  - D) The Moroccan decision did not contain any provision on the children and ensuing rights and obligations of the former spouses;

The formal act of repudiation may not be recognized under Italian law.



# Italian case law

More recently:

- The Court of Appeal of Venice, 9 April 2015 stated that a foreign decision acknowledging repudiation according to the Shari'ah cannot be recognized in Italy as it would violate the right of the wife to be heard and the principle of equality of the parties before a judge.
- The court of Appeal in Rome, 12 December 2016, ruled in favor of woman who demanded cancellation of a repudiation decision on the grounds that the decision rendered by the Palestinian authority violated the principles of public order.



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# Italian case law

However, in a decision handed down by the Court of Appeal of Cagliari on 16 May 2008, we read that

*“a ruling of divorce rendered by an Egyptian court following revocable repudiation (talaq) can be recognized in Italy as it is not purely a unilateral process but rather one in which the wife can be heard, the marital bond is found to be irrevocably compromised and hence the impossibility for the spouses to continue sharing a life in common. Further, the decision contains provisions governing patrimonial rights of the wife vis-à-vis the former husband.”*

Consider this ruling against the other decisions earlier in the session. Is there a contrast between the position of the Courts?



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# Conclusions



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# Conclusions

- The inflow of Muslims in the EU (including Italy) has turned the issues of recognition into an important matter of law that the judiciary, social workers and society as a whole will have to contend with more and more in the future.
- A common thread of European case law, including Italian jurisprudence, is that recognition of foreign decisions is premised on the respect for the principles of public order which include, *inter alia*, the principles of judicial equality and the right of both parties to be heard.
- Often in repudiation cases the lack of ancillary rulings on right and obligations of the former spouses with respect to money, inheritance and most importantly the children born during the marriage is a strong argument against recognition.
- Given the material consequences that ensue from repudiation, recognition is a very material issue that should be addressed with caution, mindful of the what appear to be the common principles expressed by the courts of EU Member States.



**END**



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