

Abuse in The Exercise of Rights in islamic Law and the Civil Codes of Arab Countries**

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INTRODUCTION

The recent civil codes of Most Arab Countries codify the concept of abuse in the exercise of rights. A review of the explanatory Memoranda of those codes reveals that the reference, in most of those countries, has been made to the Islamic Jurisprudence.

In Egypt the authors of the civil code refer to two sources: foreign civil codes and Islamic Jurisprudence. In Lebanon, the french Dean Jossierand influenced the law of contracts and obligations. The Tunisian and Moroccan Codes of obligations and contracts do not refer to the Islamic Jurisprudence.

In contrast, authors of the Jordan Civil Code assume that the reference in this field, is to the Islamic Jurisprudence.

In this work, I will first clarify the concept of abuse in the exercise of rights in Islamic Law and in the Civil Codes of the Arab Countries (I). Then I will deal With the criteria of this concept in both the Islamic Law And the Civil Codes of these Countries (II).

I. The Concept of abuse in the Exercise of Rights

The classic Islamic Schools apply this concept widely though the word "abuse" itself has not been defined by them. One coeval Islamic Jurist⁽¹⁾ defines this term as, "abuse in the exercise of right is defined as any conduct, which is licit in principle, but which contradicts the purpose for which the rights was legislated." He further makes it clear that the purpose of the right is not, necessarily a mere private benefit of its holder. Instead, it is the end that the holder must achieve without ignoring the general rules of Shari'a⁽²⁾.

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(1) Al-Durayni, F., *Nezariyat Al-Taasuf fi Istiamal AL-Hag fi AL-Figh AL-Islamic* (Theory of the Abuse of Exercising the Right in the Islamic Jurisprudence), 4th ed. (1988). at p. 87.

(2) *Ibid*, at p. 40.

Thus, there is a relationship between the right and the purpose that it is legislated for. any use of the right against this purpose will be considered abusive.

All the Arab Civil Codes which codify this concept call it an unlawful exercise of the right. AL-Sanhouri⁽³⁾ based it on the idea of fault. Therefore, there is no distinction between the liability resulting from the abuse of exercising the right and the responsibility which is based in most of the Arab Civil Codes⁽⁴⁾, on fault.

It should be noted that since the end of the nineteenth century, the French Courts have applied the concept of abuse in the exercise of rights. These courts applied the 1804 french civil code. as the code ignores the concept of the abuse of rights, the courts based their results on sections 1882 and 1883 relating to delicts and quasi-delicts⁽⁵⁾. It is obvious that Al-Sanhouri, who graduated from france, followed the approach of the french Courts.

The criterion applied for finding fault is the test of reasonableness in the exercise of the right under the circumstances. Thus, if the conduct clearly exceeds the limits of the ordinary use of the right, by a careful and prudent person its actor will be considered abusive.

In fact, this criterion cannot cover all cases of abuse in the exercise of rights. for example, the owner who sets up a factory on his own land is exercising the right of ownership. If the whole area around his land becomes a building however, and the inhabitants have been injured because of the noise and pollution from his factory, he must reduce production or cease operation. Otherwise he will be considered abusive. Even if he adopts a top level engineering technique to prevent such dangers, holds the appropriate permit or authorization (issued by the competent administrative authority), and achieves the valuable social purpose of his right (e.g. manufacturing of goods for human consumption) his behavior will still be considered abusive.

The reason for such judgement is to prevent serious damage resulting from the use of the right. It is clear that the test of reasonableness of the exercise of the

(3) AL-Sanhouri, A., AL-Wasit, Vol, I (1952), at pp. 832 & 842.

(4) See, for instance, the Egyptian Civil Code (s. 163), the Syrian Civil Code (s. 164) and the Libyan Civil Code (s.166).

In contrast, the Jordan Civil Code based this responsibility on the tortious result of the person's act, even he is not a non-discerning person (s. 256). This is also the case of the Civil Code of the United Arab Emirates (s. 299).

(5) Section 1382 provides: "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation". And section 1383 provides: "Each one is liable for the damage which he causes not only by his won act but also by his negligence or imprudence". The translation of these two section is taken from John H. Crabb's translation of the French Civil Code, published by Rothman & Co., South Hackensack, New Jersey (1977), at p. 253.

right is irrelevant. The reference here must be made to the result of exercising the right. therefore, if it causes injury to others to such an extent that they can no longer endure, the holder of the right will be considered abusive.

In addition, the conduct, in the case of the abusive exercise of the right, leads to a different theory of recovery than the fault does. It is only the former theory which can play a Protective role. In other words, if the owner wants to set up a factory on his parcel, the neighboring inhabitants may prevent him from doing so, because it will injure them by its noise and pollution.

To conclude, the concept of Abuse in the exercise of rights is not equivalent to the unlawful exercise of the right. Of all the Arab Civil Codes, only the Algerian Code correctly labels this concept as the abuse of exercising the rights⁽⁶⁾.

II. The Criteria of Abuse in the Exercise of Rights in Islamic and Arab Civil Laws

There are many guidelines on the theory of abuse in exercise of rights either in Quran or in Sunah (the Prophet ahadith). The classic Islamic jurists also apply this concept in many cases. From these guidelines and applications, the person can deduce the following criteria to define Abuse in the exercise of rights:

1. Disregarding the purpose for which the right was legislated.
2. Intention to harm.
3. Disproportion between damage and profit.
4. Contradiction between the holder's interest and the public's interest.
5. Causing gross damage.

A. Disregarding the Purpose for which the right was Legislated

This criterion is general in nature; it covers all situations of abuse in the exercise of rights in Islamic Law. Of the many applications of this criterion in Islamic Law, I will only deal with two.

1. Nikah al-Tahlil

In Islam, the family is the nucleus of society, and marriage is the only way to attain this goal. The purpose of marriage is not solely to satisfy mere carnal pleasure, but also to establish an institution whereby men and women may guard against lewdness and indecency to procreate and preserve the human race, and to satisfy normal sexual urges for security, comfort and happiness.

As there are times in a man's life when it becomes impossible to continue a cordial relationship with his wife, Shari'a permits divorce.

Divorce, in Islamic, exists in three categories. after the first and second divorce, the husband can, during his ex-wife's waiting period, return and take

(6) Sec s. 41.

her back As his wife, without her permission. after the third divorce however there is a severe restriction. The man cannot remarry his ex-wife unless she marries another person first, under a valid and binding contract. She must then be divorced by this man, after a bona fide consummation of marriage, and must complete a waiting period after this second divorce.

Thus, it is obvious that Islam warns against any pre-arranged scheme in which A certain man marries a certain woman with the understanding that he will divorce her again in order that the former husband may remarry his divorced wife⁽⁷⁾.

In the case of Tahlil, a marriage stipulates that the union is not to be permanent at the time it is made. This is clearly contradictory with the purpose for which marriage originally existed⁽⁸⁾. Therefore, he who marries a divorced woman with the intention of Tahlil would be considered abusive in using the right of marriage that belongs to him.

2. The Right of Guardianship of a minor

The natural guardian of A child is his father (who is usually called Wali) or the father's executor. In their absence, the judge normally Appoints the guardian for the child (wasi).

The guardian must look after the child's wealth (if any), until he reaches the age of majority. this wealth must be used to the ward's benefit⁽⁹⁾. He cannot, for example give any gifts from the child's property as this would not benefit the child.

Thus, if the guardian uses his ward's property to his own advantage and to the disadvantage of the child, he may be considered abusive and he would eventually have to reimburse the child.

With respect to the arab legislations, the Lebanese Code of Contracts and Obligations clearly codifies this criterion. Section 124 provides: "a person is bound to make compensation for the damage he has caused to others by exercising his right outside the bounds set by the food faith or outside of the purpose for which the right was granted to him"⁽¹⁰⁾.

It should be noted that section 30 of 1980 Kuwaiti Civil Law also codifies this criterion. In Egypt, section 5 of the 1949 Civil Law provides: "the exercise of a right is considered unlawful in the following cases:

(7) Ibn Taimiyah, AL-Fatawa AL-Kubra, Vol. 6 (1987), at p. 31.

(8) Ibid, at pp. 75 & 76.

(9) A'isawi, A. A'., "Nazariyat AL-Taasuf fi Istiamal AL-Haq fi AL-Figh AL-Islami", in Review AL-Ulum AL-Qanuniya Wal-Iqtisadiya, Egypt (1976), Vol. 2, at p. 101.

(10) Free translation by the author.

(c) if the benefit it is desired to realize is unlawful."⁽¹¹⁾

This formula has been adopted almost word for word by the Civil Codes of Syria (1949)⁽¹²⁾, Iraq (1951)⁽¹³⁾, Libya (1953)⁽¹⁴⁾, Algeria (1975)⁽¹⁵⁾, Jordanian⁽¹⁶⁾, Sudan (1984)⁽¹⁷⁾, and United Arab Emirates (1986)⁽¹⁸⁾.

Some legal writers⁽¹⁹⁾ said that it is similar to the Islamic test adopted in this field.

Josserand, who is the author of the recent Lebanese Law of Contracts and Obligations, is considered the creator of the theory of the social function of rights. He said that subjective rights are function rights. In other words, if the use of the right is incompatible with its object, its spirit and its purpose, the actor may be considered abusive⁽²⁰⁾.

The legal writers⁽²¹⁾ criticized this test by saying that it disregards the individual's personality. The person, according to this doctrine, is just an employee who must always fulfil the needs of society.

This test is imprecise, since it is difficult to discover the exact purpose for which the right existed. The adoption of the social function criteria means that the personal, political and social opinions of the judge are bound to play a major role which could create grave risks of arbitration.

In Islamic Law, the individual has his own personality. He must use his rights, granted him by Shari'a, to achieve the purpose for which they exist. This means that he may achieve his private benefit without disregarding society's interests.

Therefore the criterion of the social purpose of the right adopted in the

(11) This translation is taken from the translation of the Egyptian Civil Code by Perrott, Fanner & Marshall, S., published by the new word publisher, Cairo (1949).

(12) See s. 6/c.

(13) See s. 7/2-c.

(14) See s. 5/c.

(15) See s. 41/c.

(16) See s. 66/2-b.

(17) See s. 29/2-b.

(18) See s. 106/2-b.

(19) See, for instance, AL-Bayumi, A.Kh., "Zawabit AL-Taasuf fi Istiamal AL-Haq fi AL-Qanun AL-Masri wa AL-Sharia AL-Islamiyah" (Criteria of the Abuse of Exercising the Right in the Egyptian Law and Sharia), AL-Muhamah Journal, Cairo (1988), at pp 44 & 45. Hanbuli, M.A., AL-Wazifa AL-Ijtimaya li AL-Mulkiyah AL-Khasa (Social Function of the Private Property), 1973 at p. 642.

(20) Cited in AL-Durayni, F., op. cit. supra n. 1, at pp. 322, 323.

(21) Ibid, at pp. 324 & 325.

arab Civil Codes does not conform to Islamic Law, unless it implies the Islamic view of rights.

B. The Intention to Harm

We have mentioned that using the right against the purpose for which it was legislated is considered to be abusive. Obviously, using the right for a purpose to harm another does not conform to the purpose for which the right exists. Thus, if the person exercise his right with an intention to cause damage to others, he will be considered abusive.

The following are examples of the application of this criterion in Islamic Law:

1. The Right of a Person to Bequest

In principle, bequest (wasiyya) is optional on the part of both he who makes the bequest and he who is the beneficiary. He who makes the bequest can make it or not as he pleases, while the beneficiary is free either to accept or reject it.

In Islam, " (N) o bequest to a successor is valid "(22). The amount of the bequest is limited to one-third of the estate owned by a person who makes the bequest(23). In other words, any bequest that exceeds this limit will be considered null and void.

Thus, every bequest made by a person during his life time within this limit is valid and, eventually, executable after his death. Nevertheless, he who makes such a bequest may be considered abusive if his main aim is to cause injury to the heirs by reducing their shares of his estate after his death. In this respect Quran says: "After a will that may be bequested therewith, or a debt not injurious. This is an enjoyment of God. And god is knowing, Benign"(24).

2 - The right of the Man to Return his Divorced Woman

In the pre-Islamic period, the right of divorce possessed by the husband was unlimited.-They recognized no rule of humanity or justice in the treatment of their wives-They used to divorce them at any time, for any reason whatsoever - They were also in the habit of revoking the divorce, and divorcing again as many

(22) Sunan Abu Dawud, Vol. 3, at p. 113 (-free translation by the author).

(23) This restriction rests upon a tradition that the Holy Prophet (may peace be upon him) forbade Sad b. Abu Waqqas from bequesting more than one-third of his estate. See Sahih AL-Bukhari, Vol. 4, at p. 4 (translated by Muhsin Khan, M., published by Dar AL-Arabia, Beirut (1985).

(24) Quran 4, 12 (translated by Khatib, M. M., published by Macmillan Press, London (1986), entitled "The Bounteous Koran"). It should be noted that the translation of Quran addresses the meaning of God's verses.

times as they pleased⁽²⁵⁾. Therefore, they could have no intercourse with their wives, though still living with them.

Obviously, the husband, at this time, was exercising his right to return the divorced woman with the sole intention of harm.

By contrast, Islam protects the wives by preventing their husbands from doing this. Quran says: "If you divorce a woman, who reaches her term, either retain her with kindness, or let her go with kindness. But retain her not intending to hurt her in transgression, for who ever does that will be iniquitous to himself. Never make God's verses a mockery."⁽²⁶⁾

It further says: "... The husband has more of a right to restore the wife in such a state, if he so desires to reconcile."⁽²⁷⁾

In addition, Imam Malik has given the following situation prevalent in the early days of Islam coming down from the pre- Islamic period:"a man used to divorce his wife and then take her back and his intention was not to keep her but to extend the iddah severally so as to do her harm."⁽²⁸⁾

To conclude, the husband will be considered abusive if he uses his right to return his wife conferred upon him by Sharia with the intention to harm her by extending her waiting period.

It should be noted that the Islamic Jurists ⁽²⁹⁾ considered the objective test of the absence of lawful interest as a context helping the judge to find the intention to harm. In other words, the person who causes harm to another, by using his right in a way not remotely beneficial to himself, acts intending to cause harm

Abu Ishaq Al-Shatibi ⁽³⁰⁾, a Maliki Jurist, also said that if a person, in exercising his right, chooses the way that is harmful for others, where there is a choice among equally beneficial ways in using this right, he may be considered to be acting with an intention to harm.

Regarding the Arab Civil Codes, all of them codify this criterion. According to section 103 of the 1906 Tunisian Code of Obligations and Contracts, the person who causes damage to another, in the exercising of a right, must make compensation to him if it is shown that the right was exercised for the purpose of causing the damage. This is also the case in section 94 of the 1913

(25) Hashmi, H., *Islamic Jurisprudence in Early Islam*, Los Angeles (1989), at pp. 46 & 47.

(26) Quran 2,231 (translated by Khatib, M.M., op. cit., supra n.24).

(27) Quran 2,228 (translated by Khatib, M.M., op. cit., supra n.24).

(28) Imam Malik, *Muwatta*, translated by Rahimuddin, M., Pakistan (1980), at p. 264.

(29) AL-Bayumi, A.Kh., op. cit., supra n. 19, at p. 38. AL-Durayni, F., op. cit., supra n. 1, at p. 246.

(30) Al-Shatibi, *AL-Muwafaqat fi Osoul AL-Sharia*, Vol. 2, at p. 149.

Moroccan Code of Obligations and Contracts.

It should be pointed out that these two codes only codify this criterion of the abuse of exercising the right.

In Lebanon, the flexible criterion of good faith, mentioned in section 124 of the Code of Contracts and Obligations, encompasses the test of the intention to harm.

In Egypt, section 5 of the Civil Code provides: "The exercise of a right is considered unlawful:

(a) if the sole aim thereof is to harm another person"⁽³¹⁾. This is also the case of the civil Code of Syria (s. 6/a), Iraq (s.7/2-a), Libya (s.5/a) and Kuwait (s. 30/b).

According to this formula, the person will not be considered abusive unless his intention to harm is the sole purpose of exercising the right. Obviously, this does not conform to Islamic Law, whereby the holder will be considered abusive if the intention to harm is his main aim.

In Jordan, section 66/2 provides that: "The exercise of a right shall be unlawful:

a. if there is an intent to aggress"⁽³²⁾ This is also the case in the Laws of the Civil Transactions of both Sudan (s. 29/2-a) And United Arab Emirates (s.106/2-a).

There is a big difference between the intention to harm and the intention to agrees. The conduct itself, in the case of aggression, is illicit. In contrast, the conduct is licit in the case of abuse in exercising the right. The liability of the holder in the latter case results from his intention to cause harm to another.

Therefore, this criterion, either in Egyptian Civil Code or in the Jordan Civil Code, does not reflect the Islamic view on this matter.

By contrast, section 41/A of the Algerian Civil Code correctly reflects the criterion adopted by the Islamic Jurists in this field. It provides: " The exercise of a right is considered abusive in the following cases: - if the purpose thereof is to harm others'.⁽³³⁾

C. The Disproportion Between Damage and Profit

Initially, it should be noted that this criterion is objective in nature It depends on the result of the exercised right. The judge, in applying this test must

(31) Translated by Perrott & others, op. cit. supra n. 11.

(32) The translation of this section and the following sections concerned is taken from Hashim, H.R.'s translation of the Civil Code of Jordan, Published by AL-Tawfiq Printing Press, Amman ((1990), entitled "The Jordan Civil Code of Muslem Jurisprudence".

(33) free translation by the author.

balance the interest of the holder of the right with the damage he inflicts upon others in the use of the right.

Imam al-Shatibi⁽³⁴⁾ has divided the interests of useful purpose (maslaha) into three types:

1. When the interest is absolutely necessary. This interest is divided into five categories: preservation of faith (Din), preservation of life, preservation of the offspring (prohibition of adultery), protection of wealth, and finally preservation of reason (the prohibition of alcoholic drinks is based on this ground).

2. When the interest is not absolutely necessary but is merely expedient. For example, the institutions of sale and lease are based on this interest.

3. When the interest serves an end, for instance the promotion of good morals.

Thus, no one can use a right to achieve an interest of the third type if it is contradictory with the first or second listed interest.

moreover, regarding the first interest, the person cannot exercise his right for an end of the fifth category if it disagrees with any of the other categories. for example, he who is badly in need of food of another can eat it, if this food is necessary for him to live. The owner of the food cannot prevent him from eating, otherwise he may be considered abusive. Compensation must be made to the holder of the food⁽³⁵⁾.

It is obvious that injury inflicted upon the holder of the right (he who owns the food) will be smaller than the injury caused to others by exercising the right, in the event he withholds the food and exercises his right. A greater loss must not be caused to another in order to avoid a smaller loss.

This rule in Islamic Law is based on many general principles.

The examples of these would be:

1. "No injury shall be imposed nor shall it be inflicted on others as a penalty for another injury."⁽³⁶⁾

2. Damage cannot be put to an end by it's like (more damage).

(34) AL-Shatibi, op. cit. supra n. 30, at p. 8.

(35) See section 33 of Mejlle, the ottoman Civile Code of 1869, which provides that: "Constraint (Iztirar) doesnot destroy the right of another.

Consequently, if a man when he is hungry eat someone's bread, the payment of its value is necessary". The translation of this section, and the following sections of the Mejlle, is taken from Tyser, C.R., Demetriades, D.G. & Ismail Haqqi Effendi's translation published by Law Company, Lahore (1980), entitled "The Mejlle".

(36) See this Holy Prophet's Hadith in Sunan Ibn Maja, Kitab AL-Akam Vol. 2, at p. 743 (free translation by the author).

3. Severe damage should be made to disappear by lighter damage.
4. That, given a choice, the smaller of two harms is chosen.
5. Repelling mischief is preferred to the acquisition of benefits.⁽³⁷⁾

In the field of the arab Civil Codes, the Egyptian Code codifies this criterion. Section 5 considers the exercise of a right unlawful: "(b) if the benefit it is desired to realize is absolutely disproportionate with the damage inflicted thereby upon others".⁽³⁸⁾ The Civil Code of Syria (s.6/b), Iraq (s.7/2-b), Libya (s.5/b) and Kuwait (s. 30/c) have adopted this formula word for word.

In Jordan, section 66/2 of the Civil Law provides: " The exercise of the right shall be unlawful:

c. if the benefit therefrom is disproportionate with the damage inflicted on others." The Laws of Civil Transactions of both Sudan (s. 29/2-c) and United Arab Emirates (s. 106/2-c) have adopted this test almost word for word. This is also the case in the Civil Law of Algeria(s. 41/b).

Obviously, the Egyptian judge, under this provision cannot apply this test, unless the holder's benefit, in exercising the right, is absolutely disproportionate with the harm caused thereby to others. This means that if the holder's benefit, in exercising his right, is less than the damage inflicted on others, he may escape being considered abusive.

Thus, the Egyptian formula leads to the limitations of this criterion's applications. Fortunately, this is not the case of the Jordan Civil Code and the other Arab Codes that follow this approach.

To conclude, the Jordanian formula of this criterion is considered to conform with Islamic Law. Moreover, most of the Islamic general principles, mentioned earlier, are codified by the Jordan Civil Code⁽³⁹⁾.

D. The Contradiction between Holder's Inter and a Public Interest

This criterion is objective in character too. The reference must be made to

(37) See sections 25,27,29, & 30 of the Mejlle respectively.

(38) This translation is made by the author. Perrott translation of this section reads: "The exercise of a right is considered unlawful in the following cases: (b) if the benefit it is desired to realise is out of proportion to the harm caused thereby to another person".

(39) Section 62 provides: "Injury does not justify injury and damage shall be abated".

Section 63 provides: "Necessity does not void the right of others".

Section 64 provides: "Repelling of injuries is preferred to the earning of benefits".

Finally, section 65 provides: "Public injury shall be warded off by private injury and the more severe by the lesser injury".

See also section 5/a - b & 28 of the Law of Civil Transactions of Sudan and section 105 of the Law of the Civil Transaction of the United Arab Emirates.

the result of the exercised right and not to the aim or purpose of the holder.

Without any doubt, a person will be considered abusive if he uses his right in order to achieve a benefit that disagrees with a public interest, the latter being the most important. In other words, the judge must always prefer the public interest.

The following situations are just examples of the applications of this criterion in the Islamic Law:

1. Monopoly (Ihtikar)

If the merchant monopolizes food which the people need, and sells it later at a higher price, he will be considered abusive, even though he aims to gain a profit. Obviously, the balance is between the merchant's private benefit (to gain profit) and the interest of the people (to get the food); the second choice is preferable, since it is in the interest of the public.

It should be noted that the merchant can, in principle, sell his commodities whenever he pleases, If his conduct causes harm to the people however, he must be prevented from doing this.

The Holy Prophet (may peace be upon him) says: "He who hoards is a sinner"⁽⁴⁰⁾. He further says: "No one hoards but the sinner"⁽⁴¹⁾.

In this example, it is enough that the merchant's abusive conduct affects most of the people, not necessarily all of the people.

2 - The Sale Concluded between the Town dweller and the Desert Dweller (Bai' Hadir Li Badi)

In this respect, the Holy Prophet says: "Do not go to meet the caravans on the way (to buy their goods without letting them know the market price), a town dweller should not sell the goods of a desert dweller on behalf of the latter, And Tawus asked Ibn Abbas: "What does he mean by not selling the goods of a desert dweller by town dweller?" He said, "He should not become his broker"⁽⁴²⁾.

From this Hadith, it becomes clear that two types of transactions are forbidden⁽⁴³⁾. The first is when the town dweller has a lot of merchandise in the town which he could easily sell. But, in order to make a big profit, he takes the commodities to sell in the desert, even though the town dwellers are badly in need of the merchandise.

The second transaction forbidden is when the town dweller tries to stop the

(40) This translation is taken from Siddiqi, A.K.'s translation of Sahih Muslem, Vol. 3, published by Dar AL-Arabia, Beirut (1960), at p. 845.

(41) Id.

(42) Sahibi Muslem, op. cit., supra n. 40, Vol. 3, at pp. 205 & 206.

(43) AL-Durayni, F., op. cit. supra n. 1, at pp. 142 & 143.

direct sale between desert dwellers and town dwellers, becomes a self imposed agent on behalf of the desert dweller, and sells the commodities on his own behalf at a high price.

In the first transaction, the town dweller can normally sell his commodities to whomever he likes. He may be prevented from doing this however, if the town dwellers are in need of his commodities. Otherwise, he would be considered abusive in exercising his right of selling.

Obviously, there is a balance between the town dweller's benefit (the merchant), and the benefit of the rest of the town dwellers who need his merchandise. Preference is given to the public interest, that of the town dwellers, rather than the interest of the merchant.

In the second transaction, the town dweller may also be considered abusive if he sells the desert dweller's commodities on the latter's behalf at a high price, although the agency is, in principle, permitted by Islamic Law.

Obviously, the desert dweller gains a big profit, while the town dwellers suffer a big loss. Thus, the Holy Prophet forbids such transactions in order to protect the interest of the town dwellers. The Hadith only asks the town dweller not to stop the direct sale between the desert dwellers and the town dwellers.

In the field of Arab Legislations, the Civil Law of Egypt does not codify this criterion. Section 6 of the primary draft of this law⁽⁴⁴⁾ codified this test. Unfortunately, the committee of the revision of this draft in the Egyptian Parliament omitted it.

The Civil Code of Syria, Libya, Kuwait and Algeria also do not codify this test.

Section 26 of the Mejlle, the Ottoman Civil Code based on the Hanafi school, codifies this criterion. It provides: "To repel a public damage (Zarar) a private damage is preferred. The prohibition of the unskilful doctor is a branch of this rule".

In Jordan, section 66, codifying the criteria of abuse in the exercise of rights, does not include this criterion. It is however, codified by section 65 thereof. This is also the case in the Iraqi Civil Code (s. 214) and the Laws of Civil Transactions of Sudan (s. 28) and United Arab Emirates (s. 105/1). The latest section, for instance, provides: "It is proper that a private harm be borne to avert a public harm"⁽⁴⁵⁾.

(44) It provided that: "The exercise of the right becomes unlawful in the following cases: b-if it is contradicting with an essential public interest "(free translation by the author).

(45) This translation is taken from Whelan, J. & Hali, M.'s translation of the Law of the Civil Translation of the state of the United Arab Emirates, published by Graham & Trotman, London / Dordrecht/ Boston (1987), entitled "The Civil Code of the United Arab Emirates".

Until the moment of preparing this research, the courts in these countries have not, I argue, revealed whether or not it is considered one of the criteria in determining abuse in the exercise of rights.

E. CAUSING GROSS DAMAGE

The significant application of this criterion is in the matter relating to the relations among neighbors. For example, if a factory is built in a certain area, and the neighbors are injured by its bad smell and noise, they can ask the court to get this factory closed, since it causes gross damage to them.

Mejelle has adopted this criterion. Section 1197⁽⁴⁶⁾ permits the owner to use his ownership as he pleases, unless it causes gross damage to others. Section 1199⁽⁴⁷⁾ defines the gross damage as that which weakens a building and causes it to fall down, or that which interferes with that of dwelling in it.

Mejelle also gives specific application of this criterion. If the owner makes a construction as high as he likes, or makes whatever he pleases within his own walls, the neighbors can not prevent him from building, unless there is gross damage (s. 1198)

Section 1200 thereof provides other examples which serve to illustrate further this criterion: A mill is erected very close to a house, and from its operation the construction of the house is weakened; A person in a parcel of land adjacent to a house, erects a factory which injures his neighbor with bad smoke to the extent which he can no longer inhabit his house: A person builds a water channel on his building site to carry water to his mill, and this channel, which is adjacent to the house of another, eventually weakens the wall of his neighbor's house. In all of these cases⁽⁴⁸⁾, the owner would be considered abusive and consequently the cause of the gross damage would have to be removed.

On the other hand, Mejelle gives cases in which the damage caused by the owner is not deemed to be serious. For example, it is not considered serious damage to erect a building which hinders the view of another, or prevents the sun from shining in his neighbor's house. To block the light completely from entering a neighbor's house is considered gross damage⁽⁴⁹⁾.

(46) See also section 1021, 518 & 1136 of the Civil Laws of Jordan Sudan and United Arab Emirates respectively.

(47) See also section 1024, 520/1 & 1137 of the Civil Laws of Jordan, Sudan and United Arab Emirates respectively.

(48) These examples are taken from section 1200 of the Mejelle and section 1675 of Mejjellet AL-Ahkam AL-Sharayah, which codifying the jurisprudence of the Hanbali School, published by Tihama Publications, Sudia Arabia (1981).

For more examples, see also sections 1202 & 1212 of the (Hanafi) Mejelle.

(49) Section 1201 of the (Hanafi) Mejelle.

Mejelle codifies the predominant view of the Hanafi School relating to Mu'amalat (transactions among people). Imam Abu Hanifa himself says that the right of ownership is described as absolute⁽⁵⁰⁾.

In contrast, Abu Yusuf (a disciple of Abu Hanifa), as well as the later Hanafi Jurists, holds that the owner will be considered abusive in exercising his ownership if his conduct leads to gross damage to others. This judgement is based on Istihsan (discretion)⁽⁵¹⁾.

Imam Malik and Imam Ahmad Ibn Hanbal also hold that the owner may be considered abusive if he exercises his right in a way that inflicts gross damage on his neighbors.

Imam Malik, for instance, says that every person can make a water well or a cesspool on his own land, unless it causes gross damage to the water well of his neighbor. He (the neighbor) can prevent him from digging the cesspool, and if the well or the cesspool is already made, he may have it closed.⁽⁵²⁾

Al-Buhouty, a famous Jurist of the Hanbali school, also holds that an owner cannot dig a well for water on his own land if it causes his neighbor's well to dry up⁽⁵³⁾.

In the Shafi'i School, the predominant rule is that the right of ownership is absolute and there is no liability attached to its exercise, even though injury to others may arise from its exercise⁽⁵⁴⁾.

AL-Ramli, a Jurist of the Shafi'i School, says that his father (AL-Imam AL-Shafi'i) decided that if an owner in a building site erected a factory in his yard, and the smoke was responsible for the deaths of children, he would be considered liable⁽⁵⁵⁾. He explains that this judgement is based upon the disagreement between custom and the owner's acts⁽⁵⁶⁾.

It should be noted that sections 1025/2, 520/2 & 1139 of the Civil Laws of Jordan, Sudan and United Arab Emirates (respectively) clearly forbade the owner from empeding any passage of light to his neighbor.

For more examples, see also sections 1203 & 1204 of the (Hanafi) Mejelle and section 1677 of Mejellet AL-Ahkam AL-Sharayah, op. cit. supra in. 48.

(50) AL-Kasani, Badaia AL-Sanaja fi Tarteeb AL-Sharaia, 2nd. ed., Vol. 5, Dar AL-Kitab AL-Arabi, Beirut (1982) at p. 264.

(51) AL-Zaylai, Tabyin AL-Haqaiq Sharh Kinz AL-Daqaiq, Vol. 4, at p. 196.

(52) Imam Malik, AL-Mudawana AL-Kubra, Vol. 4, Dar AL-Fikr, at pp. 377 & 378.

(53) AL-Buhouty, Kashaf AL-Qina an Matn AL-Aqna, Vol. 3, at pp. 396 & 397.

(54) AL-Ramly, Nihayat AL-Muhtaj ila Sharh AL-Minhaj fi AL-Fiqh Ala Mazhab AL-Imam AL-Shafai, Dar AL-Fikr, Beirut (1984), at pp. 336 & 337.

(55) Id.

(56) Id.

With respect to the Arab Countries, a review of their Civil Codes reveals that only the Kuwaiti, Jordanian, Sudanese and Emirati Codes codify this criterion- Section 30 of the Kuwaiti Civil Code explicitly provides that the exercise of a right becomes unlawful:

"(d) if it inflicts unfamiliar gross damage on others"⁽⁵⁷⁾.

In Jordan, section 66/2 provides: "The exercise of a right shall be unlawful:

d. if it exceeds custom and usage" - This is also the case of the Laws of Civil Transactions of both Sudan (s. 29/2-d) and United Arab Emirates (s. 106/2-d). Obviously, this wide and flexible criterion covers the case in which the owner exercises his right in a way which inflicts gross damage on others.

Thus, the provisions of these codes relating to relations among neighbors⁽⁵⁸⁾ are mere legislative applications of this criterion.

By contrast, the Civil Codes of other Arab Countries do not codify this test either explicitly or implicitly. Nevertheless, the provisions of these codes⁽⁵⁹⁾ relating to relation among neighbors, are also legislative applications of the general concept of abuse in exercising rights. The Algerian Civil Law explicitly considers an owner's conduct, in such cases, to be abusive⁽⁶⁰⁾.

(57) Free translation by the author.

(58) See sections 1027, 522 & 1144 of the Civil Laws of Jordan, Sudan and United Arab Emirates respectively.

For instance, section 1027 of the Jordan Civil Law provides:

"1 - The owner shall not exaggerate in the exercise of his right to the extent of causing damage to the neighbour's property.

2 - And the neighbor may not have recourse against his neighbor for the ordinary neighborly damage which is unavoidable but he may request the abatement of that damage if it exceeds the customary limit provided that consideration shall be given to custom, the nature of the buildings, the location of each of them in relation to the other and the purpose for which it is allotted, and the licence from the competent authorities shall not preclude the exercise of this right".

It should be noted that the Kuwaiti Civil Law does not embrace such provision. Obviously, the authors of this law considered that section 30 thereof, which relating to the abuse of exercising the right, is sufficient in this respect.

(59) See sections 807, 776, 1051 & 816 of the Civil Laws of Egypt Syria, Iraq and Libya respectively.

(60) Section 690 of this law provides: "The owner shall not abusively exercise his right to an extent of causing harm to the property of the neighbor.

The neighbor may not have recourse against his neighbor for the ordinary and unavoidable damage, but he may request the abatement of the damage if it exceeds the customary extent, providing that the judge, in this case, must take consideration to custom, the nature of the real properties, the location of each of them in relation to the other and the purpose for which it has been appropriated".

CONCLUSION

In conclusion, it is worth emphasizing that although the Civil codes of most Arab Countries refer to the Islamic Jurisprudence, the criteria defining the abusive exercise of a right , do not quite conform to Islamic Law. The concept of abuse in the exercise of rights has very wide applications under Islamic law. Thus, the criterion can be either subjective or objective in nature.

In order for the Arab Civil Codes to conform to Islamic Law in this Field, I suggest that the provision of this concept be worded as follows: "The exercise of a right is considered abusive if it occurs against the purpose for which the right exists, and especially in the following cases:

1. If the aim thereof is to harm others.
2. If the end benefit is disproportionate with the harm caused to others.
3. If the end benefit is contradictory to a public interest.
4. If it leads to gross damage on others".

The translation and the emphasis are made by the author.