AN ASSESSMENT OF TALAQ AND ITS CONSEQUENCES IN ISLAMIC LAW: KANO STATE AS A CASE STUDY

BY

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BEING A THESIS SUBMITTED TO THE SCHOOL OF POST GRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE AWARD OF A MASTER OF LAWS DEGREE - LL.M

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DECLARATION

I declare that the work in this thesis entitled "An Assessment of *Talaq* and Its Consequences in Islamic Law: Kano State as a Case Study" has been carried out by me at the faculty of law. The information derived from literature has been duly acknowledged in the text, and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution

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Abdulwasiu Oladele SALAUDEEN

CERTIFICATION

This thesis entitled “AN ASSESSMENT OF TALAQ AND ITS CONSEQUENCES IN ISLAMIC LAW: KANO STATE AS A CASE STUDY” by (Abdulwasiu Oladele SALAUDEEN meetsthe regulations governing the award of the Degree of Masters of Law (LL.M Degree)of the Ahmadu Bello University, and is approved for its contribution to knowledge and literacy presentation.

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ABSTRACT

The right of divorce (talaq) is vested in the husband by Islamic law to terminate a marriage that fails to achieve its objectives, in order to protect the couples from the possible evil that may result from the failure of marriage. However, in the case of this research, the finding of the writer is that this right of divorce has turned to a tool, for the destruction of family institution as a result of the abuse in its use by some Muslim husbands especially in Kano State. Directorate of societal Reorientation of Kano state in a research conducted about the high rate of divorce in the state in 2008 revealed that out of every two marriages, divorce is recorded. On this note therefore, the statement of the problem of this thesis is that there is high rate of divorce in the society particularly in Kano state which has given rise to negative impact on the society which includes juvenile delinquency, prostitution by young ladies, drug abuse by youth and begging. Thus, the objective of thesis is to identify the reasons for the prevalence of divorce in the society particularly in Kano state and to proffer measures to addressing them. This objective was achieved by examining the rules and regulations guiding the exercise of divorce in Islamic Law in relation to how divorce is effected in Kano State to determine whether or not the practice is in conformity with the provision of Islamic Law and to examine the reasons responsible for the high incidence of divorce in the state. On this basis, interviews were made with relevant government institutions and stakeholders such as Kano State Hisbah Board, the divorcees and Muslim Scholars. The research finally concluded by recommending that the government and other relevant stakeholders should engage in massive enlightment strategies so as to guide the Muslim community on the rules and regulation of *talaq* and the thesis also recommends provision of sanction where necessary to make people comply with rules on *talaq.* The sources of information relied upon here, are the Qur'an, Hadith, judicial authorities and the internet materials.

TABLE OF CONTENTS

Title page

Declarations i

Certifications ii

Acknowledgement iii

Abstract iv

Table of contents v

Table of cases vi

Chapter One

General Introduction 1

1.1 Introduction 1

1:2 Statement of the Research Problem 3

1.3 Aim and Objectives 4

1.4 Scope of the Study 4

1.5 Justification 5

1.6 Methodology 5

1.7 Literature Review 5

1.8 Organizational Layouts 14

Chapter Two

Talaq, its Basis and Conditions 15

2.1 Introduction 15

2.2 Definition of *Talaq* 15

2.3 Legal Basis of *Talaq* 16

2.4 *Talaq* as a Right of the Husband 21

2.5 Advantage of Vesting the Power of Divorce on the Husband 23

2.6 Capacity of the Husband to Pronounce *Talaq*. 23

2.7 The Subject matter of Divorce 33

2.8 Methods or Formulas of Effecting Divorce 33

2.9 Witnesses in Divorce 36

2.10 Types of *Talaq* 37

Chapter Three

Consequences of Divorce 49

3.1 Introduction 49

3.2 *Iddah* 49

3.2.1 Advantages and Wisdoms behind Observance of *Iddah* by A Divorced Wife 50

3.2.2 Types of *Iddah*. 51

3.2.3 Maintenance during *Iddah* 54

3.3 Custody, Maintenance and Suckling of Children after Divorce. 56

3.3.1 Authorities Why Custody of Children Is Given To the Mother 57

3.3.2 Qualification of the Custodian 58

3.3.3 Loss of the Right of Custody 58

3.3.4 Restoration of the Right of Custody 59

3.3.5 Wages for Custody. 60

3.3.6 Suckling (*Rada'a*) after Divorce. 60

3.3.7 Wages for Suckling Mother 61

Chapter Four

An Assessment of the Practice of Divorce and its Consequences in Kano State 63

4.1 Introduction 63

4.2 An Assessment of Law and Practice of Divorce in Kano State 63

Chapter Five

Summary and Conclusion 103

5.1 Summary 103

5.2 Observations 104

5.3 Recommendations 118

Bibliography 126

Appendix (A copy of Questionnaire)

TABLE OF CASES **PAGES**

1. Amina Mustpaha Haye vs. Bashiru Zamfara Cv/165/12

   (Unreported) Upper Shair Court Bompai, Kano…….64, 66

2. Baraatu Suleman Fagge vs. Ibrahim Musa Zuma Cv/1139/13

   (Unreported) Waje Shariah Court No. 7 Fagge Kano…….66

3. Rabi Salisu Zanfo Dakata vs. Muhammad Haruna Gayawa, Cv/132/12

   (Unreported) Upper Shair Court Bompai, Kano ……67,112

4. Naima Ahmad Gwammaja vs. Danladi Haruna Cv/787/13 (Unreported) Waje Shari'ah Court No. 7 Fagge, Kano……..78,85

5. Habiba Muhammad Tisama vs. Abbas Idris Tisama Cv/27/12

   (Unreported), Upper Sharia'ah Court, Bompai, Kano…….75,108

6. Maryam Musa Sauna vs. Husaini Isa Tsamiya Cv/138/12

   (Unreported), Upper Shariah Court Bompai, Kano……..81,110

   Tayyiba Dauda Aderaye vs. Musa Musa Cv/256/12

   (Unreported), Giginyu Shariah Court, Dakata Yankaba, Kano……..78

7. Halima Usman Kurna vs. Abdullahi Babantale Cv/60/2014

   (Unreported) Waje Shariah Court, Fagge, Kano……..89

8. Binta Mudi Sharada vs. Bashir Ali Cv/246/12

   (Unreported) Upper Shariah Court, Bompai, Kano……..89

9. Saadiyah Sani Haye vs. Akilu Ahmed Jarimawa Cv/246/12

   (Unreported), Upper Shariah Court, Bompai, Kano……..91

10. Furaira Haruna Gwammaja vs. Nasiru Usman Cv/52/2014

(Unreported) Waje Shari'ah Court No. 7 Fagge, Kano……..94

11. Bayi, Abubakar & 1 Or vs. Inusa Jibrin Cv/70/12

(Unreported), Upper Shariah Court Bompai, Kano……95

Chapter One

General Introduction

1.1 Introduction

The institution of marriage is the foundation of Muslim society. *Islamic* law therefore pays considerable attention to the principles guiding the contract of marriage as well as its dissolution. Islamic law vests the right of divorce in the husband through *Talaq*. Foremost, Islamic law discouraged divorce except in certain circumstances where it is inevitable and instead, the law recommends forbearance, patience, self-restraint and continuation of marital relationship even in the face of disagreement and some sufferings. The prophet (S.A.W) said that "of all the permitted things, divorce is the most abominable to God"[1] Even when a husband is not satisfied with his wife, the Quran enjoins forbearance. It says "And retain them (the wives) kindly. Then if you hate them, it may be that you dislike a thing while God has put abundant good in it"[2] Abu Hurayrah (R.A.) reports the prophet to have said "let not the faithful man hates the faithful woman; if he dislikes some of her habits, he may like others"[3]

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[1] Sabiq, S. *Fighus-Sunnah* Vol.2, Darel Kitabul- Arab, Beirut, (1975) p.241

[2] Abdullah, Y.A. *The Holy Qur'an: Text, Translation and Commentary*, Amana Corporation, Brentwood, Maryland, U.S.A.(1989) p.190[2]

3. Ahmed, K.N. *The Muslim Law of Divorce.* Kitab Bhavan, New Delhi (1981) p.4

In Islamic law, divorce is permitted as a matter of necessity for the avoidance of a greater evil which may result from the continuation of a marriage in order to achieve peace in the family which is the first unit of the society, because peace among members of the family amounts to peace in the society and peace in the society will enhance progressive development. Before divorce is pronounced, Islamic law recommends firstly for an attempt at reconciliation depending on the source of the marital disputes. Thus, if the source of the conflict is on the part of the husband, the law requires the couples to amicably resolve their differences as reconciliation is the best.[4]

And where the source of the conflict is from the wife, i.e. where she is disobedient to her husband, the law recommends certain disciplinary measures to be taken by the husband against the wife to make her return to obedience [5] and lastly where the source of the dispute is not known whether it is from the husband or the wife, the law recommends that two arbiters one each from the couples' families should be appointed to look into the conflict with a view to reconcile the couples,[6] Thus if after these attempts at reconciliation, the couples could still not reconcile, the law permits the spouses to part ways. [7]

[4] See Qur'an 4: 128
[5] See Qur'an 4: 34
[6] See Qur'an 4:35
[7] See Qur'an 4:130

When pronouncing the divorce, the law requires that the pronouncer must have a complete legal capacity to do so[8]. A person is said to have no legal capacity when he acts under the influence of self induced intoxication or under the Impulse of a momentary provocation or he is under age, or where he is suffering from insanity or he is in a state of sleepiness

1.2 Statement of the Research Problem

The right of divorce is vested in the husband by Islamic law to terminate a marriage that fails to achieve its objectives, in order to protect the couples from the possible evil that may result from the continuation of failed a marriage. However, this right of divorce has turned to a tool, for the destruction of family institution as a result of the abuse in its use by some Muslim husbands especially in Kano State. Directorate of societal Reorientation of Kano state in a research conducted about the high rate of divorce in the state in 2008 revealed that out of every two marriages, divorce is recorded. Another research claims that only about 32% of marriage in Kano survived after a period of three-six months, and one conservative opinion argues that there are more divorces than weddings in Kano state every week, a situation that has turned Kano into a divorce factory [9]

This high incidence of divorce in the state has negative consequences on the society as recent finding in the state indicated that it is the disruption in the

[8]Sabiq, S. op. cit. p.247, Yazid, M., Sunnan Ibn Majah Vol.1, Darul- Fikr, Beirut,((n.d), p.658
[9] See www. Weeklytrust.com.ng/index php/philosofaith/9196-a-disturbing-trend. 10th September, 2014

family system that leads to number of social problems such as juvenile delinquency, prostitution by young ladies, drug abuse by youth and begging.[10] These problems of alarming rate of divorce and its negative impact on the society prompted this research work.

1.3 Aim and Objectives

The aim of this research work is to examine the rules guiding the exercise of divorce in Islamic law in relation to how such divorces are practised in Kano state with a view to achieving the following objectives:

a. To examine the law of divorce in Islamic law by appraising the works of the classical Jurists on the subject
b. To determine whether or not the practice of divorce in Kano state is in conformity with provision of Islamic law
c. To examine the reasons responsible for the high rate of divorces in Kano state
d. To proffer suggestions to the anomalies noticed in the practice of *talaq* in Kano state.

1.4 Scope of the Study

The scope of this research work is limited to the concept of talaq and its consequences in Islamic law in relation to its practice in Kano state.

[10] *www.allafrica.com:nigeria:*why divorce rate is high in Kano. 10th September, 2014

1.5 Justification

In view of the wide spread of the abuse of the exercise of the right of divorce in Kano state, this research work will be of immense benefit to the Muslim community as it is intended to enlighten them by providing a material for use in an effort towards tackling the problems of high rate of divorce in Kano state.

1.6 Methodology

The methodology adopted in this research work, is both the doctrinal and empirical methods. The research work was carried out in the Law Library of Ahmadu Bello University Zaria Library and other reputable Libraries. Attempt was also made of empirical method of research through the application of questionnaire and interview with learned scholars and the stakeholders on the subject and through examination/analysis of decided cases.

1.7 Literature Review

This thesis will attempt at reviewing some earlier works on the subject. The literatures include classical works of Muslim scholars.

1. Sabiq, S.[11] in his book titled "Fiqh Sunnah" aptly discusses the law of divorce in Islamic law and he defines *talaq* as the release from the marriage tie.[12] The author explains that Islamic law discourages divorce because one of the objectives of

[11] Sabiq, S., op. cit. pp.241-293
[12] Ibid, P. 241

marriage is that it should last for the life time of the couples; this is the reason why the law recommends reconciliation and resolution of disputes that may serve as impediment to achieving this objective.[13] The Learned author examines the legal position of talaq from the point of views of the Muslim Jurists and he submitted that talaq is prohibited unless there is a cogent reason for it.[14] He also examines the capacity of the husband to pronounce *talaq and* he submitted that for a divorce to be valid, the person pronouncing it must have complete legal capacity[15] He also considers the formula of pronouncing *talaq* and according to him divorce can be pronounced by writing or verbal expressions[16].

The author also classifies talaq into two namely; sunny and bid'iy. Talaq sunny according to him is one that was pronounced in accordance with the teachings of the Qur'an and sunnah of the prophet (S.A.W.) while tataq bid'iy is one pronounced in contravention of the law[17]. This makes the work of this author very relevant and useful in the preparation of this thesis. However the limitation of the work is that it is general in nature and it is unexhaustive of the divergent views of the various schools of Islamic jurisprudence

~~2.~~ Ahmed, K.N[18] in his book titled "The Muslim law of Divorce" also discusses divorce in a great detail and proffered the most comprehensive definition of

[13] Ibid
[14] Ibid, p.242
[15] Ibid, P. 247
[16] Ibid, P. 257
[17] Ibid, p.263-266
[18] Ahmed, K.N the Muslim Law of Divorce Kitab Bhavan, New Delhi (1981), pp.1-104

divorce to mean "release from the marriage tie either immediately or eventually by the use of certain words, whether spoken or written, by the husband"[19]. The author also discusses the capacity of the husband to effect divorce, the author submitted that divorce under duress will only be ineffective where the threat comes from someone who is capable of carrying it out and the husband is under conviction that the threat would be carried out unless he divorces his wife.[20]

The author also discusses the formula of divorce and he said that divorce can be effected by express or implied expressions and according to him, examples of implied expressions include phrases such as "You are not to me as a wife", or "Go back to your family" [21]

This also makes the book of the author very relevant and useful in the preparation of this thesis. However, the book is silent on the consequences of *talaq* like *iddah,* custody of children etc.

3. Hussaini, U.[22] in his book titled "Siraju Salik (Sharhu Ashal Al-Musalik), also discusses the subject of divorce and he considers divorce as inappropriate (i.e. Khilaful-Awla)[23] and according to him, when divorce becomes necessary, it must satisfy the condition of validity namely: it must be pronounced once; it should be pronounced while the wife is in a state of fresh purity; she must not have had sexual intercourse at any time during this period of fresh purity and the *talaq*

[19] Ibid, P. 28
[20] Ibid, p.53
[21] Ibid, p.78
[22] Hussaini, U. hiraju Salik (Sharhu Ashal al-Musalik), Vol.1Darel Fikri, Beirut (1982), pp.69-85
[23] Ibid, p.69

should not be pronounced during Iddah.[24] The author submitted that sanction should be applied to a person who effects divorce in contravention of sunnah.[25] The author also submitted that, four elements are essential for effective divorce namely: the husband who effects the divorce; intention: that is he must indent the divorce (as the divorce of a coerced is ineffective); express or implied words; the talaq must be by express or implied expression as there cannot be a divorce by conduct [26] He also examines the condition of validity of divorce namely: Islam, sanity and maturity.[27]

The work of the author as it relates to this thesis is a very good source of information but the limitation of the work is the fact that the views contain in the book are that of Maliki School of thought only and it did not cover the divergent views of the various scholars of Islamic jurisprudence[28]

4. Malik, A.[29] in his book titled "al-Mudawanatul - Kubra" discusses the formula of talaq extensively. He classified the formula into two namely: express and implied. He said that only the use of these three words namely *Talaq*, *Firaq* and *Sirah* (i.e. divorce, separation and release) are accepted as express *talaq*, because these are

[24] Ibid, p.70
[25] Ibid, p.71
[26] Ibid
[27] Ibid
[28] Ibid, P. 69 - 85
[29] Malik, A. al-Mudawamanatul – Kubrah Vol. 2 Darel Fikri, Beirut (n.d), pp.258-268

the three words used in the Qur'an.[30] And where these three words are used even without intention, talaq is effective[31]

The limitation of this book also is that the views expressed in it are limited to that of Maliki school of Jurisprudence without examining the views of other Islamic Scholars and the book did not cover the consequences of divorce.

5. Aliyu, I.A.[32] in his dissertation titled "Termination of marriage and its legal consequences under Islamic law" discusses the concept of *talaq* and its consequences in a great detail. The Author examines the various views of the Muslim Scholars on the legal basis of talaq and he submitted that talaq is haram (forbidden) unless there is a cogent reason for it. He also analyses the conditions under which talaq pronounced by the husband may be ineffective. He submitted that the divorce of insane, minor and a coerced is of no legal consequences[33] The learned author also discusses the formula of effecting talaq and he said that any formula used that clearly indicates to the wife the intention of the husband to terminate the marital relation is accepted. He listed the formulas to include expressed words, writing, sign or gesture[34], this makes the work of the author very relevant and useful to this research work. However, the work did not go far enough to discuss the marital dispute reconciliation mechanism.

[30] Ibid, p.265
[31] Ibid.
[32] Aliyu, I.A, Termination of Marriage and its Legal Consequences under Islamic Law, Ph.D Dissertation (Unpublished) Faculty of Law, A.B.U Zaria (1996), pp.1-50
[33] Ibid, p.29
[34] Ibid, p.47-50

6. Abdur-Rahman, A. [35] in his book titled "Fiqhu ala Mazhabul- ar'ba'a" exhaustively discussed the subject of talaq according to the views of the four sunni schools of law. The learned writer traced the origin of the term "talaq" to the Arabs of the pre-Islamic era who used the word to mean separation between a husband and his wife and when Islam came, it adopted the term and reformed the practice.[36] He gave comprehensive definitions of talaq according to the sunni school of law as "A descriptive rule that terminates the lawful enjoyment of a wife by her husband"[37] The Author submitted that before there can be a valid talaq, there must exist four elements namely: husband, wife, formula and intention.[38] The learned author also discusses the conditions of validity of divorce namely: sanity (i.e that the person pronouncing talaq must be sane); maturity (i.e. that he must be of age); voluntariness (i.e he must pronounce the talaq voluntarily); expression (i.e. that the expression used for divorce must either be express or implied as there cannot be divorce by conduct); Islam (i.e it is not a condition that a person that will pronounce talaq must be a Muslim before his divorce can be valid as the divorce of a zimmi 'a person who has peace accord with the Muslims' is valid.)[39]

The author also discusses the legal basis of talaq and according to him, the origin of talaq in law is that it is reprehensive[40] he classifies talaq in terms of its methodology into sunni and bid'iy, he presented the views of the Muslim Jurists

[35]Abdur-Rahman, A. Kitabul-Fiqhi ala Mudhabul-Ar'ba'a,Vol.5, Darul Fajri kutubil al-alamiyya, Beirut, pp278-603
[36] Ibid, p.278
[37] Ibid, p.279
[38] Ibid, 280
[39] Ibid, p.281
[40] Ibid, p.296

on triple divorce; he said the majority of the Jurists considers triple divorce as three divorces while the minority consider it as taking the effect of one talaq[41] The author discusses the types and the consequences of talaq which makes the work very relevant and immensely enhancing to this research work. The limitation of the work however is that the views expressed in the book are limited to the four Sunni schools of law and it rarely makes references to the Qur'an or Hadith.

7. Sada, I.N.[42] in his Thesis titled "Dissolution of Marriage in Islam: Case Study of Concept and Practices in Northern Nigeria" also discusses the concept of divorce as a right of the husband and the wisdom behind the vesting of the right in him by the law. The learned author submitted that the law vests the right of talaq in the husband because he is saddled with the responsibilities of paying sadaq (dowry) and maintaining the wife and he is more emotionally balanced than the wife [43] He also classifies talaq into sunny and bid'iy, raj'iy (revocable) and bain (irrevocable and he extensively discusses the conditions of each of them.[44] This makes the work of the erudite scholar relevant to this research work but the limitation of the work is that it is too general in nature. The Author presented the law in general form without covering the divergent opinions of the Muslim Scholars.

[41] Ibid, p.341
[42] Sada, I.N. *Dissolution of Marriage in Islam*: *Case Study of Concept and Practices in Northern Nigeria*, LL.M Thesis (unpublished), Faculty of Law, A.B.U. Zaria (1983) pp.25-40
[43] Ibid
[44] Ibid

8. Ibn Qudama, A.[45] in his book titled "Sharhu Kabir" also discusses the concept of talaq in great details. He defines "Talaq" to mean "To untie the knot of marriage".[46] He gave a comprehensive analysis of the legal basis of talaq and he submitted that talaq derived its legality from the Qur'an, Sunnah and Ijma (consensus opinions of Muslim Jurists)[47]. The Learned Author also discusses the legal capacity of the husband to pronounce talaq and he is of the view that for talaq to be effective, the pronouncer must possess complete legal capacity.[48] The Author classified talaq into sunniy and bid'iy with detailed explanations of each class. This makes the work useful in the preparation of this thesis. But the limitation of the work is that views expressed in the book represent Hambali School of law only.

9. Muhammad, A. [49] in his book "Bidayatul-Mujtahid Wa-Nihayatul-Muqtasid" aptly discusses the concept of talaq in Islamic law under four categories namely: types, conditions, revocation and rules of divorcee. On the type of divorce, the author submitted that it is classified into two namely revocable and irrevocable talaqs. Revocable talaq according to him is one in which the husband has right to revoke the talaq during iddah without the consent of the wife and irrevocable talaq on the other hand is one in which he cannot revoke the talaq during iddah e.g separation

[45] Ibn Qudama, A. Sharhu al-Kabir, Vol. 4, Darul-Fikril,Beirut, (n.d) p.402
[46] Ibid.
[47] Ibid, p.403
[48] Ibid, p.404
[49] Muhammad, A. Bidayatul-Mujtahid Wa-Nihayatul Muqtasid Vol. 2, Darul-Fikri, Beirut, (n.d) pp. 49-101

through khulh (self redemption) or the third talaq[50] The learned author also discusses the condition of divorce in terms of sunniy and bid'iy and he is of the view that talaq sunny is one pronounced once at a time during the period of fresh purity when the husband has not had sexual intimacy with the wife while talaq bid'iy is one pronounced thrice at once, or during iddah or menstruation[51] On revocation, the author said that it can be by words or action and notification of revocation is necessary to avoid the confusion that may result thereof.[52] And on divorcee, the author submitted that they are entitled to maintenance and shelter during the iddah of first and second talaqs but they are not entitled to anything during the third talaq except they are pregnant[53]

The author concluded the work by discussing the appointment of family council for the resolution of marital disputes.[54] But the limitation of this work is the fact it did not cover the introductory of talaq like the meaning, legal basis, capacity etc.

Notwithstanding the great contributions of these authors on the topic, the thesis will improve upon them by appraising them in a wider perspective by the use of other available materials and data for analysis to bring forth suggestions and recommendations.

[50] Ibid
[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid, p.79

Finally, there is a growing concern about the high rate of divorce in Kano State but there are no research materials on the problems associated with the practice of divorce and its remedies in the state. This research work is a modest attempt to fill this vacuum.

1.8 Organizational Layout

This thesis has been divided into five chapters and discussed as follows:

Chapter one discuses the general introduction and the preliminary matters on which the thesis is based in order to ensure proper understanding of the work. Accordingly, the work discusses the statement of the research problem, aims and objectives, scope of the study, justification, methodology, literature review and organizational layout.

Chapter two focuses on the meaning of *talaq*, legal basis of *talaq, talaq* as a right of the husband, capacity of the husband when pronouncing talaq, formula of *talaq* and types of *talaq*. Chapter three discusses the consequences of *talaq*, while chapter four examines the practice of talaq in Kano State, and chapter five concludes the work and it consists of a summary of the work, the observations or findings and finally, it proffers solution or suggestion to the problems noticed in the practice of divorce in Kano State in an effort to reduce, to a barest minimum, the high incidence of divorce in the state.

Chapter Two

Talaq, its Legal Basis and Conditions

2.1 Introduction

For a talaq pronounced by a husband to be valid and effective in Islamic law, certain conditions must be satisfied. Some of these conditions affect the husband pronouncing the talaq as well as the wife who is the subject of the talaq. Thus where the conditions are not satisfied the talaq may the invalid. These conditions as well as the legal basis of talaq are discussed in this chapter.

2.2 Definition of *Talaq*

The term *"Talaq"* has its origin from the Arabs of the pre-Islamic era, who used it to mean "The separation of the wife from her husband" and Islam adopted the term and reformed the practice[55].

Talaq literally means "to release", "to let loose" or "to free", to untie a knot". And technically it means "release from marriage-tie or termination of marital relationship"[56] *Talaq* can also be defined as "The release from marriage-tie, either immediately or eventually, by use of certain words, whether spoken or written, by the husband" [57]

[55] Abdur-Rahman, A. Kitabul-Fiqhi ala Mudhabul-Ar'ba'a,Vol.5, Darul Fajri kutubil al-alamiyya, Beirut, (n.d) p.278

[56] Aliyu, I.A. *Termination of Marriage and its Legal Consequences under Islamic Law*, Ph.D Dissertation (Unpublished), Faculty of Law, A.B.U. Zaria, (1996) p.17 as quoted by the Author from Fiqhus-Sunnah Darulul-Kitabu- Arabiy, Vol. 2, Beirut, (1975) p.241.

[57] Ahmed, K.N. *Muslim Law of Divorce*, Kitaba Bhavan, New Delhi (1981) p.28

Talaq is also defined by the Maliki School of law to mean "A descriptive rule that terminates the lawful enjoyment of a wife by her husband"[58] and according to Shafi'i school, talaq means "To untie the knot of marriage contract with the use of certain words that connote separation or having similar meaning"[59]. Ibn Qudama of Hambali School also defines talaq to mean "To untie the knot of marriage contract."[60]

From the above definitions of talaq, four elements must be present before there can be a valid talaq: namely: husband who will effect the divorce; wife who is the subject of talaq; formula which is the expression through which the talaq is conveyed and intention.[61]

2.3 Legal Basis of *Talaq*

Divorce was practiced before the advent of Islam. The Jew, Christian and Arab pagans resorted to the practice in an oppressive manner. Islam came and reformed the practice by regulating it.[62] Divorce in *Islamic* law derives its lawfulness from the Quran, the *Sunnah* of the Prophet (S.A.W.) and the *ijma.*

Several verses of the Qur'an unequivocally permit divorce. For instance Qur'an, chapter 2, verse 229 provides "Divorce is permissible twice, after that the

[58] Abdur-Rahman, A., op.cit. p.250
[59] Ibid, p.251
[60] Ibn Qudama, Sharhu Kabir Vol.4,Darul-Fikr, Beirut (n.d), p.402
[61] Ibid, 280
[62] For instance the Arabs of the pre-Islamic Era married unlimited number of Wives but Islam reformed the practiced and limited the number to four

parties should either hold together on equitable terms or separate with kindness" [63]

The prophet (S.A.W.) was reported by Suwaid bn Saeed to have divorced Hafsa and returned her[64]. This hadith of Suwaid shows the lawfulness of talaq through the practice of the prophet. In another hadith, the Prophet (S.A.W.) was reported by Abu Hurairah (R.A.) to have said "there are three things of which the seriousness is serious and the frivolous is serious, namely: marriage, divorce and *raj'ah*" [65]

The Muslim jurists differ on the legal position of *talaq* but the preponderant view among them is that *talaq* is prohibited (*haram*) unless there is a cogent and compelling reason for it. This is the view of Hanafi and Shafi Schools.[66] They support their views with the following authorities.

(a) The Prophetic hadith which says "May Allah's curse fall on the sex-hungry man who is prone to divorcing women"[67]

(b) They argued that marriage is Allah's favour while divorce is ingratitude to Allah's favour and it's unlawful to show ingratitude to Allah. That is one who divorces his wife shows ingratitude to Allah's favour unless he has a cogent reason to so divorce. Example of such cogent reasons, according to

[63] Abdullah, Y.A. *The Holy Qur'an: Text, Translation and Commentary*, Amana Corporation, Brentwood, Maryland, U.S.A. (1989) p.92
[64] Yazid, M. Sunnan Ibn MajahVol.1,Darul-Fikr,(n.d), p.650
[65] Ibid, p.658
[66]Sabiq, S. op. cit. p. 242.
[67]Ibid.

them, is where the husband reasonably suspects his wife of immoral conduct or where he deeply dislikes her. [68]

The Maliki jurists, on the other hand, consider *talaq* as inappropriate (i.e *Khilaful-Awla*) that is one that is not up to the level of *Makru* (reprehensive).[69]

The Hambali School appears to have more comprehensive classification of *talaq* in that they categorized *Talaq* into four namely: *Wajib* (obligatory); *Haram* (forbidden); *Mubah* (permissible) and *Mandub* (recommended). The explanation of this is as follows:

(a) *Talaqul – Wajib* (Obligatory divorce)

Divorce which is obligatory is the one effected by two arbiters appointed in accordance to *Quranic* verse 4:35 as a result of *shiqaq* (breach) between the spouses, if the arbiters after considering the conflict, resolve that *Talaq* is the only suitable means to end the conflict. *Talaq* is also obligatory, according to Hambali school where the husband vows to abstain from having sexual intercourse with his wife (ila) after waiting for four months without having the sexual relation with her,[70] and according to the school, this is the rule provided for in the *Qur'anic* verse, i.e.2:226-227. "For those who take an oath for abstention from their wives, a waiting for four month is ordained, if then they returned, Allah is often-

[68] Ibid.
[69]Hussaini, U. Shiraju Salik (Sharhu Ashal al-Musalik),Vol. 1Darel Fikri, Beirut (1982), p.69
[70] Sabiq, S.op.cit. p.243

forgiving, most merciful. But if their intention is firm for divorce, Allah hearth and knows all things". [71]

(b) *Talaq Muharram*: (Forbidden Divorce)

Divorce is forbidden if effected without any cogent and justifiable reason. Divorce without any justification is forbidden because it is harmful to the husband as well as the wife and it is against their interests. It is, by analogy, waste of money (israf) and since it is harmful it is also contrary to the prophetic tradition which says "There should be neither harming nor reciprocating harm"[72]

(c) *Talaq Mubah* (Permissible Divorce)

Divorce is lawful when effected by the husband because of the need for it. That is where the wife has bad character which may have negative influence on the husband especially where the husband feels that it will be detrimental to him to continue living with such a wife.[73]

(d) *Talaq Mandub* (Recommended Divorce)

Divorce is recommended when the wife neglects to perform Allah's duties imposed on her, such as *Salat*, (daily prayers) *Sawm* (Annual obligatory fasting) etc. and all efforts made by the husband to make her perform them prove abortive and it is not possible for him to force her to perform them. Divorce is also recommended (*Mundub*) if the wife is not chaste. [74]

[71] Abdullah, Y.A., op. cit.p.91
[72] Sabiq, S. op.cit. p.243
[73] Ibid
[74] Ibid.

Imam Ahmad Ibn Hambal is of the view that where a wife neglects the duties of Allah and or she is unchaste, it is not right for a husband to hold on to such a wife because she may have negative impact on his religion and she may be involved in extra marital sexual relationship thereby ascribing to him a child that is not his own. According to the Imam, it is, therefore, right for the husband to be harsh to such a wife so as to make life unbearable for her in order for her to seek for the dissolution of the marriage through *Khul'* (by paying ransom to him) as provided by Qur'an 4:19 which reads "…Nor should you treat them (the wives) with harshness, that you may take away part of the dower you have given them, except where they have been guilty of open lewdness."[75] Ibn Qudama is of the opinion that divorce could be obligatory where the wife neglects the duties of Allah imposed on her as well as where she is unchaste.[76]

Abdur-Rahma Al-jajiri is of the opinion that, the following conditions must be satisfied before there can be a valid talaq:

a. Sanity (i.e that the person pronouncing talaq must be sane); maturity (i.e. that he must be of age);
b. Voluntariness (i.e he must pronounce the talaq voluntarily);
c. Expression (i.e. that the expression used for divorce must either be express or implied as there cannot be divorce by conduct);

[75] Abdullah, Y.A., op. cit. p.190
[76] Sabiq, S. op. cit.p.243-244.

d. Islam (i.e it is not a condition that a person that will pronounce talaq must be a Muslim before his divorce can be valid as the divorce of a zimmi 'a person who has peace accord with the Muslims' is valid.)[77]

2.4 *Talaq* as a Right of the Husband

The right to divorce a wife is primarily vested on the husband by the Shariah. The Muslim Jurists advance many reasons why the law vests the right in the husband. The reasons range from textual authorities to rational reasons.

(a) Textual Authorities.

Some verses of the Qur'an and the Prophetic Traditions vest the authority to divorce a wife in the husband. For instance, the Qur'an provides in chapter 2:237 that: "There is no blame on you if you divorce women before consummation..." [78] Abdullah Yusuf Ali, the famous Qur'an commentator while commenting on this verse said that Hanafi Jurists are of the view that this verse refers to the husband. [79]

In the Hadith narrated by Ibn Majah, on the authority of Ibn Abbas, a man complained to the Prophet (S.A.W.) that his master married his slave to him and then he wanted to separate her from him and the Prophet said "The right of divorce belongs to the husband".[80]

[77] Abdur-Rahman, A. op. cit. p.281
[78] Abdullah, Y.A., op. cit. p.97
[79] Ibid.
[80] Yazid, M. op.cit.p.672

This hadith establishes the principle that a master of a slave or husband's father cannot compel him to divorce his wife.

b. Rational Reason

Another reason why the right to divorce a wife is vested in the husband is the fact that he (the husband) spends his wealth to contract the marriage and pays for the *sadaq*. He also maintains the wife during the marriage as well as during the waiting period after he divorced her. These expenses he cannot recover if he divorces the wife, and if he wants to marry another wife, he will also incur new financial expenses to contract a new marriage. Furthermore where *sadaq* is outstanding, it becomes due after divorce and he is under obligation to pay. With all these in mind, a husband will always exercise restrain before divorcing his wife. The same however cannot be said of the wife who does not incur any of the above expenses and might always be in a haste to exercise the right had it been vested in her. Furthermore women by their nature are more emotional and sentimental than men and they are more likely to effect divorce the moment they are angry merely on emotions without considering the consequences of their actions if they are vested with the power to divorce their husbands. This is not to say that some men are not emotional or sentimental but rules are based on the general conduct and not the exceptions.[81] Prof. Ibrahim Na'iya Sada sums it up "By nature, man is more composed and patient and also less emotional in face of

[81] Sada, I.N. *Dissolution of Marriage in Islam*: *Case Study of Concept and Practices in Northern Nigeria*, LL.M Thesis (unpublished), Faculty of Law, A.B.U. Zaria (1983) p.25

provocation than the woman. He is likely to be more patient and careful in pondering over the repercussion and consequences of a divorce…"[82]

2.5 Advantage of vesting the Power of Divorce on the Husband

It serves as a check on the high rate of divorce because were the women given the same right of divorce as the men, the rate of divorce would have been alarmingly higher.[83] Because women are more emotional and would exercise the right at the slightest provocation.

Though the Shariah vests the right of *Talaq* (divorce) on the husband, that does not exclude the wife to seek for the termination of the marriage through *Khul*, or judicial termination where the husband inflicts harm on her, or where he has serious bodily defect, or where he is unable to maintain her, or where his absence causes injury to her. [84]

2.6 Capacity of the Husband to Pronounce *Talaq*.

Muslim jurists agree that, for a divorce to be legally binding and effective, the husband who pronounces the *Talaq* must be of complete legal capacity. A man is said to be of complete legal capacity when he is sane, of age, and pronounces the *Talaq* voluntarily. Therefore, where the husband is insane, or a minor or he effects the divorce under coercion, his action is of no legal consequences and the divorce is ineffective.[85]

The following authorities support the above assertion:

[82]Ibid
[83] Ibid.
[84] Sha'aban, Z.D., al- Ahkamulsh-shar'iyyah lil-Ahwalish-shakh-Siyyah, Libya University,(n.d) pp.407-408
[85] Aliyu I.A., op. cit. p.29

"The pen is raised off from three persons, an insane until he becomes sane, a minor till he becomes of age, and a sleeping person till he becomes awake"[86]

"Every divorce is permissible, except the divorce of the coerced"[87]

"A divorce effected by a person that is drunk or effected under compulsion is not valid" [88].

Even though the Muslim jurists agree on this, they differ in respect of the divorce pronounced under the following conditions: -

(a) Divorce under the influence of intoxication

(b) Divorce under compulsion

(c) Divorce by jest

(d) Divorce by mistake

(e) Divorce under Excessive Anger

(f) Divorce by idiot

(g) Divorce by person suffering from death sickness

a. Divorce under the influence of intoxication

Divorce pronounced by the husband under the influence of intoxication is of two categories: namely: -

1. Involuntary Intoxication

2. Voluntary Intoxication

i. Involuntary Intoxication:

[86] Yazid, M. op.cit.p.658, Sabiq, S. op. cit. p.247

[87] Muhammad,M.K. *Sahih al-Buhari(English Translation),*Vol.7, Darel Fikril,(n.d) p.146

[88] Ibid.

Involuntary Intoxication involves cases where the husband becomes drunk against his will or where he takes liquor under necessity and as a result of the liquor; he gets intoxicated and divorces his wife.

All Muslim jurists agree that the divorce so pronounced by such a husband is not effective because his act of getting drunk was not voluntary and he cannot be held responsible for the *talaq* pronounced. [89]

ii. Voluntary Drinking:

Where the husband becomes intoxicated voluntarily, as a result of which he divorces his wife, the Muslim jurists differ as to the legal position of such divorce. The majority of them are of the view that such divorce is binding and effective since he becomes intoxicated voluntarily. This will serve as a deterrent and punishment for his sinful conduct. The second view held by the minority of the Jurists is that such divorce is not effective because the validity of any action under the law depends on the intention of the person making it and an intoxicated person who divorces his wife under the influence of voluntary intoxication cannot be said to have intended such divorce. He is in the same position as an insane person in terms of the effectiveness of his action.[90]

[89] Aliyu, I.A., op. cit. p.35
[90] Ibid.

Ibn Qayyim subscribes to the view that if the husband takes an oath that he was out of his senses when he pronounced the *talaq*, he would be entitled to his wife but would be punished for voluntarily taking the intoxicant. [91]

There is also another view to the effect that to hold the divorce of a person who voluntarily gets drunk effective amounts to inflicting double punishments on him which is in excess of what the law prescribed [92]

b. Divorce under compulsion

The Hanafi Jurists define compulsion to mean "The act or speech of a person that affects another so much as to force him to do the act demanded of him against his will"[93].

The majority of the jurists including Maliki, Shafi and Hambali Jurists are of the view that divorce pronounced as a result of duress is ineffective because the husband does not intend the divorce. In holding this view, they rely on Qur'anic verse 16:106 which provides thus: "Anyone who after accepting faith in God utters unbelief, except under compulsion, his heart remaining firm in faith" [94.] The Jurists also rely on the following traditions of the Prophet (S.A.W):

(i) "Three things are excused by Allah for my Ummah (community), what is done by mistake, out of forgetfulness or under compulsion[95].

[91] Ibn Qayyin, *ilamul-Muwaqqi'in,* Maktabatul-Kulliyyah al-Azhariyyah, Egypt,(1968) p.40

[38] Aliyu, I.A., op. cit. p.35

[39] Ahmed, K.N., op. cit. p.53

[40] Abdullah Y.A., op. cit. p.665

[41] Sabiq, S., op. cit.p.248

(ii) There is neither divorce nor emancipation by force"[96].

The Hanafi Jurists, on the other hand, hold that a divorce effected by the husband under compulsion is binding and effective contending that coercion only negates the consent of the coerced but it does not negate his choice, since he can choose between the two alternatives namely divorcing his wife and escape the threatened harm or he can choose to refuse to divorce his wife and suffer the harm. They argue that if the husband chooses to divorce his wife, that is his choice, his divorce is effective.[97]

They further rely on a tradition where a man complained to the Prophet (S.A.W) that he was sleeping when his wife threatened to cut his throat unless he divorced her three times which he did for fear of his life and the Prophet said the divorce was effective.[98] Ibn Hazm however condemns this Hadith as unauthentic.[99]

For a divorce pronounced by the husband under compulsion to be considered ineffective, the following essential elements must be present: -

(i) The person who threatens the husband must be in a position to carry out the threat;

(ii) The husband should be under the conviction that the threat would be carried out unless he complies with the demand to divorce his wife;

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[42] Ahmed, H. *Sunnan Abu Dawud* Vol.2 (English Translation), Kitab Bhavan, New Delhi (1990), p.590

[43] Aliyu, I.A., op. cit. p.31

[44] Ibn Hazm, *al-Muhalla*, Vol.10, al-Muktabut-Tijariy Littiba'ah wan-Nashar, Beirut, (n.d), p. 203

[45] Ibid.

(iii) The threat should relate to something serious such as loss of life, limb, grievous hurt or imprisonment either to himself or to a person closely related to him;

(iv) The husband would not have divorced his wife in the absence of the threat;

(v) The husband is not in a position to save himself from the threatened act.[100]

c. Divorce in Jest

The Muslim Jurists differ regarding the divorce pronounced in jest. The source of their differences is the consideration of whether intention should be considered in divorce pronounced in jest or not.

The majority of the jurists are of the view that a divorce pronounced in jest is binding and effective notwithstanding the fact that the husband does not intend such divorce. In holding this view, they rely on the tradition narrated by Abu Hurairah (R.A.) in which the Prophet (S.A.W.) was reported to have said "There are three things which are treated as serious whether or not they are undertaken seriously or in jest; Marriage, divorce and revocation of divorce" [101]

Maliki and Hambali schools, on the other hand, hold that divorce in jest is ineffective because there is no intention for divorce. In holding this view they rely on the Hadith in which the Prophet (S.A.W) was reported to have said, "All actions are to be judged according to intention" [102]

[100] Ahmed, K.N., op. cit. P.53
[101] Muhammad, T.A., op. cit p. 221
[102] Muhammad M.K., op. cit p. 146

They further rely on the Qur'anic verse 2:227 which reads "But if their intention is firm for divorce, Allah hears and knows all things"[103].

The view of the majority seems to be more sound and rooted in specific authority on the subject matter while the minority's view relies on a general authority on intention which should not apply in the presence of a specific rule.

d. Divorce by Mistake

Where a divorce is pronounced by the husband by mistake without any intention for it, the Hannafi jurists consider such divorce as religiously ineffective but legally effective. It means that the marriage subsists so long as the case is not brought before the court, in which case, the court will give effect to it. This is because the court has to decide cases on the facts proved before it.[104]

Another reason why the divorce is legally binding is the fact that if mistake were accepted as an excuse for divorce many husbands who intentionally divorce their wives would simply claim that the divorces were out of mistake.[105]

Maliki and Hambali Jurists, on the other hand, hold a different view according to which divorce by mistake is both religiously and legally ineffective on the condition that it must be shown by evidence that the husband who

[103] Abdullahi, Y.A., op. cit p. 91,
[50] Aliyu, I.A., op. cit. p.37
[51] Ibid.
[52] Sabiq S., op.cit p. 250

pronounced the divorce by mistake has not intended the divorce and in the absence of such evidence, the divorce shall be legally but not religiously effective[106].

e. Divorce under Excessive Anger

The divorce pronounced in a state excessive anger is ineffective. This means that for a divorce pronounced in anger to be ineffective, it must have been pronounced under an excessive anger such that the person making the divorce does not know what he says or does and could not, therefore, have intended such divorce. This view has been based on a Hadith narrated by Ahmed, Abu Dawud, and Al-Hakem on the authority of Aisha (R.A.) that the Prophet (S.A.W.) said "There is neither divorce nor emancipation (of a slave) in the wrath". [107]

f. Divorce by Idiot (Safih)

The Muslim Jurists unanimously agree that an Idiot needs the interdiction of a guardian from disposing his property irrationally. But they differ on whether or not an Idiot can validly divorce his wife without the ratification of his guardian.

Hanafi jurists are of the view that an idiot can validly divorce his wife without the ratification of his guardian for since he is entitled to marry without the guardian's ratification; he is also entitled to effect divorce without his ratification. They argued that the interdiction required by law in this case is only in respect of

[107] Ahmad H., op.cit, p.590

the idiot's dealings in his property and not marriage or divorce. This is the accepted view to Maliki, Shafi and Hanbali Jurists.[108]

Imam Ata and Shi'a Imamiyyah, on the other hand, hold the view that divorce of an idiot is not binding except with the permission of his guardian. This is because divorce is disadvantageous to him and he has no right to contract marriage without the consent of his guardian [109]and he cannot divorce as well without the guardian ratification[110].

g. Divorce by a person suffering from Death Sickness

Those who are considered to be in state of death sickness include a person who is in a ship about to sink or in an airplane expected to crash or any person who is a moment of fear of death. It also includes a person who though is healthy but is sentenced to death by a court of competent *jurisdiction.* A person who is in the battle-field and a pregnant woman of six months old and above are all considered to be in a state of death sickness. Neither the Qur'an nor the Sunnah provides any categorical rule regarding divorce by person suffering from death sickness.[111]

Thus Muslim Jurists unanimously agree that such divorce is effective whether the divorce is revocable or irrevocable but they differ in respect of the right of the wife to inherit the husband if he dies during that sickness.[112]

[108] Aliyu, I.A., op. cit. p.38
[109] Sah'aban, Z.D., op. cit. p.408
[110] Ibid
[111] Sabiq, S., op. cit. p.278
[112] Aliyu, I.A., op. cit. p.39

However, it was reported that the third Caliph Othman Ibn Afan gave judgment to a woman called Tadammur to inherit her husband Abdulrahman Ibn Auf who divorced her during his death sickness. The fourth Caliph Ali Ibn Abi Talib also gave judgment to another woman called Um Al Baneen to inherit the third Caliph Othman who divorced her while he was besieged and killed. [113] In this regard, there is no difference between husband suffering from death sickness and another who is not.

Where the divorce is irrevocable, the jurists differ as to whether the wife is entitled to inherit the husband. Some jurists who hold the view that the wife should inherit him gave the reason that by divorcing her during his death sickness, he may have the intention of depriving her from inheritance. So they allow the wife to inherit him so as to treat him contrary to his intention while other jurists hold that as long as his divorce is in order and it is irrevocable there is no reason to allow the wife to inherit him. Shafi'i school of law holds this view[114]

Hanafi School on the other hand holds the earlier view that irrevocable *talaq* during death-sickness will entitle the wife to inherit on a condition that she will only be entitled to inherit if the husband dies during her *Iddah* period, as the marital tie is severed as soon as the *Iddah* expires. Hambali school also subscribed to this view.[115]

[113] Sabiq, S., op. cit. p.279
[114] Ibid
[115] Ibid.
[62] Ibid. p.251, Muhammad, A. Bidayatul-Mujtahid Wa-Nihayatul Muqtasid Vol. 2, Darul-Fikri, Beirut, (n.d) p.67

2.7 The Subject-Matter of Divorce

Before there can be a valid and effective *talaq*, marital relationship must exist between the wife and the husband. This includes where the wife is serving the *iddah* of revocable divorce, or where she is serving the *iddah* of separation considered by Hambali Jurists as a divorce. Such as where the husband refuses to embrace Islam or where the couples undergo the process of *lian*.[116]

2.8 Methods or Formulas of Effecting Divorce

Any method or formula used by the husband that clearly indicates to the wife his intention to terminate the martial relationship is accepted as *Talaq*. It can be by expressed words, writing, sign or gestures. It can also be through an agent.

a. *Talaq* by Express Words

A husband can effect divorce by words, the words can either be Sarih (express) or Kinayah (implied)

i. Sarih (Express)

This is an expression used by the husband to effect a divorce which is clear and unambiguous and is understood to mean divorce.

Imam Shafi'i is of the view that only the use of these three words namely *Talaq*, *Firaq* and *Sirah* (i.e. divorce, separation and release) are accepted as express *talaq*, because these are the three words used in the Qur'an. Maliki and Shafi'i schools subscribe to the view that where the express words are used in divorce, it is considered effective without the need to ascertain the intention of the husband.

The *Zahiri* school also subscribes to the view of Imam Shafi'i that only the use of the above three words makes *talaq* effective[117]. And where these three words are used, talaq is effective without intention, Imam Malik ibn Anas provides three views (a) divorce is effective without intention; (b) divorce is effective with intention even if the talaq is not pronounced along with the intention (c) divorce can only be effective with the words and intention[118]

ii ***Kinayah* (Implied Expression)**

This is an ambiguous expression that may either mean divorce or something else. The following are examples of such expressions:

i. "You are not to me as a wife"

ii. "Go back to your family"

iii. "I don't desire you"

iv. You are of no use to me" etc. [119]

Where a divorce is effected by using such ambiguous words, it will not be effective unless it is evident from the surrounding circumstances that the husband actually intends to divorce the wife. An example of indirect expression can be found in an Hadith narrated by Aisha (R.A.) that one of the wives of the prophet entered on to him when he called her and said to him "I seek refuge in Allah from you" then the Prophet said to her, "You sought refuge from something big, "Go

[117] Ibid p. 253, Muhammad, A. op. cit. p.60
[64]Malik, A. al-Mudawamanatul – Kubrah Vol. 2 Darel Fikri, Beirut (n.d), p.265
[65] Ahmed, K.N., op. cit. p.78
[66]Sabiq, S. op.cit.p.254

back to your people" [120] this indirect expressions used by the Prophet are construed as meaning and intending a *talaq* due to the circumstances.

(b) Divorce in Writing

Divorce in writing is valid and effective even where the husband can express himself verbally, provided the writing is manifest i.e. one that can be read and comprehended. It must also be addressed to the wife. Imam Abu Hanifa and Malik subscribe to this view. Imam Ahmed holds that two male witnesses must testify to the fact that the hand writing is that of the husband. But Imam Malik and Shafi'i hold that it is not a condition [121]

(c) Divorce by Sign or Gestures

Where the husband is deaf and or dumb and cannot pronounce *talaq* and cannot write it, he can employ signs or gestures to effect divorce and such divorce is valid and effective. Hanafi School holds that where a dumb knows how to write, he must effect the divorce in writing. But Imam Malik and Shafi'i subscribe to the view that a dumb husband can effect divorce by writing or sign [122].

(d) Divorce through a Messenger

[121] Aliyu, I.A., op. cit. p.49-50
[122] Ibid p. 50

Divorce can also be effected by sending an agent to convey the *talaq* by the husband to the wife. [123]

2.9 Witnesses in Divorce

The Majority of the jurists including the four Sunni Schools are of the view that even where no witness is called to witness the pronouncement of divorce, the divorce is still valid and effective. They argue that *talaq* is exclusively the husband's right which Allah (S.W.T.) has given to him as there was no any authority from the Prophet or the companions supporting the calling of witnesses to divorce [124]

But the *Shi'a and Zahiri* schools understand the phrase "And take for witness two persons" used in the Qur'an 65 verse 2, which reads "…And take for witnesses two persons from among you, endued with justice and establish the evidence as before Allah" [125] to mean taking of evidence on the *talaq* and *raja'ah* as obligatory and any divorce without it is void. They further rely, in their argument, on the saying of Caliph Ali when somebody told him that he had divorced his wife and the Caliph asked "did you take the evidence of two witnesses as ordered by the Almighty Allah? The man replied "No". Then the Caliph said go away this is not a proper divorce"[126]

2.10 Types of *Talaq*

[123] Sabiq, S., op. cit. p.258
[124] Sabiq S., op. cit p. 257
[125] Abdullah, Y.A., op. cit. p.1484
[126] Sabiq S., op. cit p. 258, Ahmed, H., op. cit p.588

Talaq is classified in terms of its methodology into two namely: *talaq Sunni* and *talaq* bid-i and in terms of its revocability, it is also classified into two namely: raji'i and bain. And *talaq bain* can further be divided into two namely: *bainuna sugrah* and *bainuna kubrah*.[127] Each of the above divisions of *Talaq* is discussed below:

1. Classification of *Talaq* in terms of Methodology.

(a) Talaq Sunni

Talaq sunniy is one pronounced by the husband in accordance with the procedures and teachings of the Prophet (S.A.W) which must satisfy the following three conditions:

1. The *Talaq* should be pronounced while the wife is in a state of "fresh purity", that is immediately after the period of menstruation before any sexual relation or post natal period immediately after bath, the maximum days are about 15 and 40 days respectively. This view is agreed upon by all the Muslim Jurists.[128]

In holding this view they rely on the *Hadith* of Abdullahi bn Umar (R.A.) who said he divorced his wife while she was observing her menstruation and his father Umar bn Khatab asked the Prophet who said "Order him to take her back and keep her till she is clean and then wait till she menstruates for the second time and becomes clean again, where upon if he wishes to keep her , he can do so, and

[127] Ahmed, K.N., op. cit.pp.62 and 8
[128] Hammudah A. *The Family Structure in Islam, Islamic* Publication Bureau, Lagos (1982), p.228

if he wishes to divorce her, he can divorce her before having intercourse with her" [129] Also Qur'an 65:1 provides "O Prophet! When you divorce women, divorce them at their prescribed period ...."[130] Prescribed period means when women are in a state of purity and thus they can immediately start reckoning their *iddah*.

2. The wife must not have had sexual intercourse at any time during this period of fresh purity.

3. The *Talaq* must be pronounced once.

4. The *talaq* should not be pronounced during Iddah.[131]

Imam Sha'fi-i agrees with imam Malik on this fourth point but Imam Abu Hanifah disagrees and holds that divorce effected during *Iddah* is as good as *Talaq* sunni[132]

Qur'an chapter 2: verse 229 provides "A divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness"[133]

The process of talaq Sunniy is that it is one single divorce at the first instance, followed by a revocation, then another divorce at a second instance that can also be followed by revocation. After these two divorces, the husband has an

[129] Muhammad,M.K., op. cit. p.146

[76] Abdullah, Y.A., op. cit. p.148

[77].Hussaini, U. Shiraju Salik (Sharhu Ashal al-Musalik), Vol. 1Darel Fikri, Beirut (1982), p.70, Muhammad, A. Bidayatul-Mujtahid Wa-Nihayatul Muqtasid Vol. 2, Darul-Fikri, (n.d), Beirut, p. 49

[78] Sabiq, S. op. cit. p264, Muhammad, A. op. cit. p.51

[79] Abdullah, Y.A., op. cit. p.92

option to either retain the wife in fairness or separate with her with kindness. The talaq is pronounced in an atmosphere of love without any form of bitterness.

The wisdom behind this is that if a woman is divorced during her iddah, she cannot immediately commence the counting of her iddah, she will have to wait until she completes the iddah. This will prolong her iddah which brings about harm to her. And if she is divorced in her purification after the husband had intercourse with her, she will not be able to know whether she is pregnant or not hence she may not know the type of iddah to observe: whether the iddah of women who menstruate or that of a pregnant women[134]

The advantage of talaq sunniy is that it does not terminate the marriage completely nor does it bring about any resentment or unkindness because the man is obliged to keep the woman in the same home or furnish her with a comfortable residence accessible to him. She must not be ejected nor should she leave unless she has committed a manifest act of indecency. The husband must adequately provide for the wife during the waiting period.

Thus keeping the wife under the same roof with the man may change the situation favourably and the man may have to reconcile with his wife.

This is provided by the Qur'an in chapter 65:1 thus "O prophet when you do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and turn them not out of their houses nor shall they (themselves) leave except in case they are guilty of open lewdness, those are limits

[134] Hammudah A. The Family Structure in Islam, Islamic Publication Bureau, Lagos,(1982), p.228

set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation"[135]

(b) *Talaq Bid-i*

This is the opposite of Sunni *talaq*. It is a *talaq* effected contrary to the teachings of the Qur'an and *Sunna*, three divorces at once, divorce during menstruations or during post natal blood or during the state of purity when the husband has had intercourse with her.[136]

All the Muslim Jurists agree that *talaq Bid-i* is prohibited and the husband who effects it commits a sin. They, however, differ on whether *Talaq Bid-i* is legally binding or not. The majority of the jurists including the four *sunniy* schools hold that *talaq Bid-i* is legally binding and effective. They argue that it is not covered by the general meaning of the *Qur'anic* verses on *Talaq*.

The minority, including Ibn Taymiyya, Ibn Qayyim and Ibn Hazm argue that *Talaq Bid'iy* is religiously forbidden and legally binding. In holding the view, they rely on the following:

a. *Talaq Bid'iy* is not the type of *talaq* that Allah ordained when He says "Divorce them at their prescribed period..." [137]

b. The Hadith of Ibn Umar where the Prophet said "Order him to take her back...."[138] shows that the Prophet was angry and he could never have been

[135] Abdullah, Y.A., op. cit. p. 1483
[136] Sabiq S., op. cit p.264-265
[137] Abdullah, Y.A., op. cit. p.1483

angry on anything that is permissible in the sight of Allah. They also rely on the *Hadith* of Aisha (R.A.) that the Prophet said, "Any deed that is not in accordance with our affairs (i.e. Islam) is rejected"[139].

Maliki and Hanafi jurist subscribe to the view that it is obligatory for the husband that divorces his wife in her menses or during the post natal blood to take her back. Maliki Jurists hold further that where he refuses to do so (in cases of first and second talaq), he should be threaten to do so by means of arrest or beating. And where he persists, he should be beaten and detained, if he still refuses to return her, the judge should do so on his behalf and he is at liberty to divorce her after the completion of the menses or post natal blood without having sexual intercourse with her.[140] But the Hanafis hold that the Judge has no right to take the wife back on behalf of the husband he should rather impose suitable punishment on him to serve as deterrent to others.[141]

(i) Triple Divorce

Triple divorce is another aspect of talaq bid'iy with special rules from other types of talaq bid'iy hence it is treated as a sub-heading. It is a divorce pronounced with an expression that means three divorces at once such as "I divorce you three times" or "I divorce you, I divorce you, I divorce you"

The Muslim Jurists all agree that triple divorce is harmful to the wife because it blocks the chances of reconciliation given to the couples in the event of

[138] Muhammad, M.K., op. cit. p.146
[139] Sabiq, S., op. cit. p.266, Hussaini, U. op. cit. p.71
[140] Usman, H. Sirajus-Salik, Vol.2,Darul-Fikril, p.71
[141] Abdur-Rahman, A. al-Fikhu Alal-Madhal-Ar'ba'a, 2nd Ed., Darul-Fijril,Cairo (n.d), .pp.277-9

regret and change of mind and it is a violation of Qur'an chapter 2 verse 229 which reads: "a divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness"[142]

In an hadith narrated by An-Aasai, the Prophet was very angry with a man who divorced his wife three times at once and he said "You are playing with the book of Allah while I'm still among you"[143]

The Jurists differ however, as to whether triple divorce is effective or not. There are two views proffered by the Jurists. The first view by the majority comprising of Abu Hanifa, Malik, and Shafi'i is that triple divorce is effective and is considered as three separate divorces. They argue that the verses of divorce in the Qur'an show that divorce is effective whether it is pronounced twice or thrice. They also support their view with the hadith of Ubaidah bin Samit who reported that his grandfather divorced his wife 1000 times and he informed the Prophet who said "your grandfather did not fear Allah, he has the right to effect three divorces, but the remaining 997 is transgression (of Allah's limit) and injustice for which Allah may punish him if He wills"[144]

The second view held by Taus, Akrama bn Ishaq, Ibn Abbas and some Maliki, Hambali and Hanafi Jurists is to the effect that triple divorce is considered as only one single revocable divorce. They support their view with the hadith transmitted by Muslim and Abu Dawud, in which it was reported that Abus-Sahba

[142] Abdullah, Y.A. op. cit.p.1483
[143] Sabiq, S. op. cit. p.269
[144] Ibid

said to Ibn Abbas, do you know that a divorce by three pronouncements (at a time was made a single one during the time of the Prophet (S.A.W.) and of Abubakar and in the early days of the caliphate of Umar? He replied "yes"[145]

Ibn Taymiyyah also hold this view and argues that there is no authorities from the Qur'an, Sunnah, Ijma or Qiyas to the effect that triple divorce is three divorces. He explains that it was Umar who made it thrice through his Ijtihad in order to remedy the abuse and for it to serve as deterrent, it is not right to discard the decision of the Prophet for that of the Umar[146]

2. Classification of *Talaq* in terms of Revocability.

a. *Talaq Raj'iy* (Revocable Divorce) and Bain (Irrevocable)

The divisions of *Talaq* in terms of its effects are into revocable (*Raj'iy*) or irrevocable (Bain). *Talaq Raj'iy* is one that the husband can revoke any time during the *Iddah* period and the couples resume marital relationship without a new marriage contract. For a divorce to be revocable it must satisfy the following conditions:

i. It must be pronounced for the first or second time;

ii. It must be pronounced after consummation of the marriage;

iii. It is not pronounced on material consideration.[147]

iv. *Talaq* can also revocable where it is dissolved though judicial decree for lack of maintenance or by oath of abstinence (Ila).[148]

[145] Hasan, A. Sunnan Abu Dawud (Translation), Vol. 2, p.593-594, Abdur-Rahman ,A, op. cit.p341
[146] Sabiq, S. op. cit. p.271. See also Ibn Taymiyyah, *al-Fatawil-Kubrah* Vol.2, (n.p, n.d) p.22
[147] Sada, I.N., opt. cit p. 41

1. Right of Revocation (Raja'a)

A husband who divorces his wife for the first or second time without consideration has the right to revoke the *Talaq* and return the wife back before the expiration of the *Iddah* without her consent if the divorce takes place after consummation as provided by *Qur'anic* verse 2:228 thus "Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah hath created in their wombs, if they have faith in Allah and the last day. And their husbands have the better right to take them back in that period if they wish for reconciliation..."[149]

But if the divorce takes place before consummation, the husband will have no right to revoke it because she will not observe *Iddah* as the right to revoke is exercisable during *Iddah*. As provided in *Qur'anic* verse 33:49 thus "O ye who believe when you divorce them before ye touch them no period of *Iddah* have you to count in respect of them..."[150]

(2) How Revocation is effected

Revocation can be by express words, in any language that means termination of divorce. Like to say "I return you back". It can also be by action i.e. sex or its preliminaries such as kissing or touching with pleasure. This is the view of Imam Malik. Hanafi and Hambal[151], Imam Malik added that revocation of

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[148] Ibid.
[149] Abdullah, Y.A., op. cit. p.92
[150] Ibid p. 1071
[151] Sabiq S., op. cit. pp.274-275, Muhammed, A. op.cit. p.68

divorce by action is only permissible when it is preceded by intention, and the action serves the same purpose like words otherwise, it is not permissible. Imam Abu Hanifa is of the view that revocation can always be by action irrespective of whether or not the person revoking intents it because once he has sex with her, it is evidence of revocation.[152]

Imam Sha'fi'i, however holds a contrary view that revocation can only be effected by words and not action. This is also the view of Zahiri School.[153] Imam Shafi'i argues that since God ordered that witnesses should be called to witness revocation; it can only be by words as witnesses cannot witness revocation by action like sex or its preliminaries.[154]

(3) Witnessing of Revocation (*Raja'a*)

Muslim Jurists differ on the meaning of Qur'an 65:2 which reads "Thus when they fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms and take for witnesses two persons among you endued with justice..."[155]

The majority of the Muslim Jurists including Malik, Abu Hanifa and Ahmed hold that taking of two witnesses when making *raja'a* is recommended and not compulsory. Imam Shafi'i, *Zahiri* and the *Shia* schools hold that evidence of two witnesses is obligatory.[156]

[152] Ibid
[153] Ibid
[154] Ibid,
[155] Abdullah, Y.A., op. cit. p.1484
[156] Sabiq, S., op. cit. p. 258-259., Muhammad, A. op. cit.p.68

(4) Notification of the Wife.

The four Sunni schools are of the view that it is recommended to notify the divorced wife about her *Raja'a* (revocation) and where she is not notified, the revocation is still valid because her consent is not necessary but the *Zahiri* and *Zaidia* schools hold that notification is compulsory and where she is not notified, the revocation is void[157]. Imam Malik is of the view that where a husband divorces his wife while he is away from home and subsequently revokes the divorce, but only the message of divorce got to her and she did not receive the message of revocation until she completes her iddah, and contracts a new marriage, the new marriage is valid and subsisting whether or not it has been consummated. But Imams Abu Hanifa and Shafi'i hold that the first husband who revokes the marriage is entitled to his wife whether or not the second husband has consummated the marriage. While Ibn Umar said that the first husband should be given the option either to take her back or leave her with the second husband[158]

(b) *Talaq Bain* (Irrevocable divorce)

Talaq Bain is one effected by the husband without the right to revoke the divorce and it includes the following:

i First and second *talaq* if not revoked before the expiration of the *Iddah* period.

ii Any *talaq* before consummation.

[157] Ibid, pp.274-275
[104] Ibid, p.69

iii. Any *Talaq* after consummation for the first or second time if there was material/monetary consideration

iv. Any *Talaq* for the third time

v. Any *Talaq* passed by court of law for any reason other than lack of maintenance or oath of abstinence (ila)

The above listed types of *talaq* constitute *talaq bain* and can further be classified into two namely:

a. *Bain Bainuna Sugra* and

b. *Bain Bainuna Kubra*

Bain Bainuna Sugra constitutes all the *Talaqs* listed under numbers. i – iv above and in all these types of divorce, the husband cannot revoke the *Talaq* during *Iddah*, he can only remarry the divorced wife through a new marriage contract.[159]

Talaq Bain Bainuna Kubra comprises of *Talaq* pronounced for the third time. In this case, the husband can neither revoke the *talaq* during *Iddah* nor re-marry her after

Iddah. He can only re-marry her after the woman had married another man who consummated the marriage and on his own volition, divorces the woman or dies.[160] This is based on the *Qur'anic* verse 2:230 which provides thus "So if a

[159] Sabiq, S., opt. cit. p.277
[160] Muhammad, A. op. cit.pp.69-70

husband divorces his wife (for the third time), he cannot after that remarry her until after she married another husband and he has divorced her. In that case, there is no blame on either of them if they reunite provided they feel they can keep the limit ordained by Allah..."[161]

Note that the marriage with another man must not be arranged in order to make the woman lawful for her former husband. The second husband must consummate the marriage before she can be lawful for the first husband as the Prophet (S.A.W.) explained the woman of Rifa who wanted to go back to her former husband when the second marriage has not been consummated. "No until you taste his sweetness and he tastes your sweetness".[162]

Lastly, Islamic law provides for these detailed regulations about divorce in order to take care of the interests of both the persons making the divorce and the women being divorced as well as the society at large

[161] Abdullah, Y.A., op. cit. p.93
[162] Sabiq, S., op. cit. p.278

Chapter Three

Consequences of Divorce

3.1 Introduction

The Consequences of divorce are the events that legally follow the pronouncement of *talaq* by the husband. These events include:

1. *Iddah* (waiting period)
2. Maintenance during *Iddah*
3. Custody, maintenance and suckling of children.

A pronouncement of *talaq* does not necessarily mean immediate and final termination of the marriage tie especially where the divorce is for the first or second time as the husband has the right to revoke the divorce and return the wife to marital relationship thereby ending all the consequences of the divorce that are in place. But to terminate the consequences, the husband must revoke the *talaq* within the period the wife observes the *iddah*. These and many more are the subject of discussion in this chapter.

3.2 *Iddah*

The word "*Iddah*" is derived from an *Arabic* word "*adad*" which literally means numbers or the statistics of days or months which the women count. [163]

[163]Sabiq, S. *Fighus-Sunnah* Vol.2, DarelKitabul- Arab, Beirut, (1975) p.324

Technically, "Iddah" is the period of waiting imposed by law on a woman who is separated from her husband either by divorce, annulment by court or death to ascertain the purity of the womb.[164]

All the Muslim Jurists agreed that observance of *Iddah* is obligatory.[165] They rely on the following authorities:

1. Qur'an 2:228 which provides thus "Divorced women shall wait concerning themselves for three monthly periods" [166]
2. The tradition of the Prophet (S.A.W.) in which he was reported to have instructed Fatima Bint Qais to perform the *iddah* in the house of umm *maktum*.[167]

3.2.1 Advantages and Wisdoms behind Observance of *Iddah* by a Divorced Wife

1. The *Iddah* period is meant to ascertain whether the divorced wife or the woman whose husband died is pregnant or not in order not to mingle the progeny of the divorcing husband or the deceased husband with that of the subsequent suitor.
2. It is a period during which the parties can reconcile and resume their marital relationship again.
3. *Iddah* period shows how great and solemn the marital relations are and same should not end promptly.[168]

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[2]Abubakar, H. *Ashal-Madarik (Sharhu Irshad Salik*), Vol.2, Darel-Fikri, Beirut, (n.d) p.183

[165] Ibid.

[166] Abdullah, Y.A. The Holy Qur'an: Text, Translation and Commentary, Amana Corporation, Brentwood, Maryland, U.S.A.(1989)p.92

[167]Abdullahi, S. Sahih Muslim (English Translation), Vol.2, Kitab Bhavan New Delhi, (2004), p.911

[168]Abubakar, H.,op. cit. p.183

3.2.2 Types of *Iddah*.

i. *Iddah* of women who menstruate.

ii. *Iddah* of pregnant women.

ii. *Iddah* of minor and women who have reached menopause.

iv. *Iddah* of women whose marriages have not been consummated

i. *Iddah* of Women who Menstruate.

The *Iddah* of a divorced woman who menstruates is three menstrual periods. Qur'an 2:228 provides "Divorced women shall wait concerning themselves for three *quru'us*.."[169]

Such a divorced woman must not re- marry during *Iddah* until the expiration of the period. Muslim Jurists differ as to the meaning of the word "*Quru'u*" used in the verse quoted above. Some of them interpret it to mean "Hayd" that is menstruation while to some of them it means "Tuhur" i.e. state of purity.

Imam Malik, sha'fi'i and Ahmed IbnHambal interprets the word to mean state of purity, while Imam Abu Hanifah interprets it to mean menstruation. The legal implication of the two opinions is that a divorced woman finishes her *Iddah* the moment she starts the third menstruation according to the majority of the Muslim

[169] Abdullah, Y.A., op. cit. p.92

Jurists, while according to Abu Hanifah, a divorced woman finishes her *Iddah* at the end of the third menstruation.[170]

Note that where a revocably divorced woman commences her *Iddah* and the husband who divorces her dies during her *Iddah* period, her *Iddah* will change from *iddah* of divorce to the *Iddah* of death. This is so because divorce did not completely severe the marital relationship between them and she will inherit him. But if the woman was irrevocably divorced, she will only complete the *iddah* of *talaq* and no more because irrevocable divorce severe marital relationship completely and she will not inherit the "husband".[171]

ii. *Iddah* of Pregnant Women

The pregnant women who are divorced will observe the *iddah* until they deliver their babies. Qur'an 65:4 provides thus "For those who carry (babies in their wombs) their waiting periods is until they deliver their burdens..." [172]

Note that to constitute "delivery" the delivery must be complete delivery of the pregnancy because where a pregnant woman who is revocably divorced carries twins in her womb but delivers one, delivery is not complete and before she delivers the second baby the husband can still revoke the divorce and return her to marital relationship. [173]

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[170]Sayyid U.H. Shiraju Salik (*SharhuAshal al-musalik*), Vol.1, Darel Fikril (1982),Beirut, p.117-118, Muhammad, A. Bidayatul-Mujtahid Wa-Nihayatul Muqtasid Vol. 2, Darul-Fikri, Beirut, (n.d) p.67

[9] Muhammad, A. D. *Hashiyatul-Dasuki* Vol.2, Darul-Fikril, Beirut, (n.d) p.475

[10] Abdullah, Y.A., op. cit.1485

[11]Abubakar, H., op. cit. p.183

ii. *Iddah* of Minor Girl and Woman who has reached Menopause

The *Iddah* or waiting period for divorced old women who has reached menopause as well as a minor girl who has not started menstruation is three months. This is in accordance with *Qur'anic* provision that provides: "Such of your women as have passed the age of monthly courses, for them, the prescribed period if ye have any doubts, is three months, and for those who have no courses (it is the same)..."[174]

There is no fixed age at which a woman reaches menopause but mostly it is 50 to 60 years of age[175]. If however during the three months waiting period, either of them (i.e. the old woman or the minor girl) happens to menstruate, her *Iddah* will change from three months to three *quru'u*.[176]

iv. *Iddah* of a woman divorced before Consummation of the Marriage

A wife that is divorced before consummation will not observe any *Iddah* at all. She can decide to marry the moment she is divorced. This is in accordance with *Qur'anic* verse 33:49 that provides "Oh you who believe when you marry believing women, and then divorce them before you have touched them, no period of *Iddah* have you to count in respect of them..." [177]

[174] Abdullah, Y.A., op. cit.1485
[175]Sabiq, S., op. cit. p.329-330
[176]Abubakar, H.,op. cit. p.183
[177] Abdullah, Y.A. , op. cit.p.1071

But in case of death, she will serve *iddah* of death which is in accordance with *Qur'anic* verse 2:234 that provides "If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days…"[178]

3.2.3 Maintenance During *Iddah*

Maintenance here includes feeding, clothing and lodging. The Muslim Jurists consider maintenance of a divorced woman from the perspective of revocable and irrevocable divorce. The four *sunniy* schools unanimously agreed that all revocably divorced women are entitled to maintenance during *Iddah*. They also hold that irrevocably divorced women who are pregnant are also entitled to maintenance during *Iddah*. In holding this view, they rely on the *Qur'anic* provisions (i.e. 65:6-7) "... Let them live in the same style as you live... everyone should expend according to his means..."[179] And in another verse, "... and if they carry life in their wombs then spend your substance on them until they deliver their burden..." [180]

The Jurists, however differ in respect of an irrevocably divorced woman who is not pregnant. Imam Abu Hanifa holds the view that an irrevocably divorced woman is entitled to maintenance whether or not she is pregnant because she is obliged to observe the *Iddah* and she is prohibited from contracting a marriage.[181]

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[178] Ibid, p.96
[179] Ibid, p.1485-1486
[180] Ibid.
[181] Abdur-Rahman A. *Kitabul-FiqhAlaMazhabul –Arba'a*. Vol. 4,Darel-Fikr, Beirut (1989), p.574, Muhammad,A.op. cit.p.76

Imam Malik and Shafi'I hold that irrevocbly divorced woman who is not pregnant is only entitled to accommodation but not food and clothing.[182] In holding this view, they rely on *Qur'anic* verse 65:1 which reads "And turn them not out of their houses and nor shall themselves leave..."[183]

They hold that she is not entitled to food and clothing because of *Quranic* 65 which reads as follows "...and if they carry baby in their womb then spend your substance on them until they deliver their burden..."[184]

Imam Ahmad bnHambal on the other hand, holds that irrevocably divorced woman who is not pregnant is not entitled to any maintenance. In holding the view he rely on the *Hadith* where Fatimah bintu Qais complained to the Prophet (S.A.W.) that her husband divorced her irrevocably and he did not give her maintenance and the Prophet said to her "You are not entitled to maintenance unless you are pregnant"[185]

Women serving the *Iddah* of death are not entitled to maintenance whether they are pregnant or not [186] because whatever property that might be left behind by the deceased husband constitutes inheritable estate.

Finally, Divorced women serving *Iddah* must remain in their husbands' houses during the *Iddah*. They shall not leave and the husband shall not force them

[182] Muhammad,A. op.cit. p.76
[183]Abdullah, Y.A., op. cit. p. 1483
[184]Ibid,
[185]Muhammad Muhsin Khan, *Sahih Al-Buhari*(Arabic-English) Vol.7,Darel-Fikr,Medina,(n.d) p.911
[186]Abubakar, H., op. cit. p.189

to leave except where they commit a manifest offence of indecency or where she is in a lonely place and she is prone to danger in such a case she is allowed to go out of her husband's house[187].

3.3 Custody, Maintenance and Suckling of Children after Divorce.

During the subsistence of a marriage, a child of a marriage is brought up by his parent jointly under their custody but in the case of divorce and separation, the question of custody arises. Under Islamic law, a child is under the care and custody of its mother until the boy becomes matured and the girl gets married and the marriage is consummated [188]

The father is under obligation during this period to look after the child's upbringing in terms of maintenance which includes food, clothing, accommodation, education, medication, training and circumcision [189]

The above view is subscribed to by Maliki School. The majority of the Jurists however are of the view that the child will remain in the custody of the mother until it can easily serves itself and dispense with the mother's care that is until the child can bath and dress itself without the help of others. The schools estimate the age to be seven years for the boy and nine years for the girl.[190]

[25]Abdullah, Y.A., op. cit. p. 1483
[188]Malik, A. *al-Mudawanatul- Kubrah* Vol.2, DarelFikril, Beirut, (n.d) p.356
[189]Sabiq, S., op. cit.p.345
[190]Ibid,346-347

3.3.1 Authorities Why Custody of Children is given to the Mother

The reason why the law prefers the mother over the father on the issue of custody is that the mother knows better how to take care of child, she has the patience and time for the welfare and protection of a child. On the Authority of Abdullahi bn Amr, a woman said "Oh messenger of Allah, this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care" to which the Prophet replied "You are worthier of custody of your child as long as you do not marry"[191].

Also on the authority of Yahya bn Said who reported that Umar bn Khatab (R.A) tried to take his son Ashim from his grandmother, she complained to Khalif Abubakar who gave her the child and addressed Umar "that her smell, her touch and her kiss to the child is better than the best thing you have"[192].

The following are the people who are entitled to the custody of children in order of priority:

1. Mother (irrespective of her religion);
2. Mother's mother how high so ever;
3. Maternal aunt;
4. The mother's maternal aunt;
5. The father's mother;
6. The father;

[191]Ibid, P. 211
[192] Ibid.

7. The paternal aunt;
8. The child sister;
9. The father's executor;
10. Any one appointed by the court;
11. The child's brothers, Uncle and paternal grandfather[193].

3.3.2 Qualification of the Custodian

1. The custodian must be an adult.
2. She/he should be sane.
3. He/she must be a fit and capable custodian – old, ill, or blind persons are not qualified.
4. He/she should live in secured premises.
5. He/she should be a pious person.
6. He/she should not have infectious diseases like leprosy.
7. He/she should not be extravagant so as not to waste the child's property.
8. She should not marry other than a *Muharam* to the child.
9. For a matured girl, only a custodian who is *Muharam* to her is entitled[194].

3.3.3Loss of the Right of Custody

The mother having the right of custody of her child forfeits it under the following circumstances:

[193]Muhammad, A. D. *HashiyatuDasuki* Vol.2, Darul-Fikril,(n.d) pp.528-530
[194] Ibid

1. If she marries and consummates a marriage with a non-*Mahram* unless the father or the person entitled to custody keeps silent without excuses for a period of one year[195].
2. If she takes the child to a far place from the residence of its father since the father will be deprived of the right of looking after the child's affairs[196].
3. By apostasy. That is if the custodian converts to another religion after having the custody of the child.

3.3.4 Restoration of the Right of Custody

Imam Malik is of the view that where a custodian forfeits the right of custody on her free will, the right will never be restored to her again. For instance where the woman having the custody re-marries and later separates from the second husband, the right will not be restored to her[197].

But where she forfeits the right involuntarily e.g. by illness , or lack of milk in her breast, or where she embarks on a journey to perform hajj, or where the father travels far away from her residence , her right of custody will be restored to her as soon as she returns to her position before the forfeiture. [198]

[195]Ibid, p. 531
[196]Ibid, pp.528-530
[197]Abubakar, H.,op. cit. pp.117-118
[198] Malik, A., op. cit. p.356

The majority of Muslim Jurists hold a contrary view that once a mother forfeits her right of custody she cannot later claim the right.[199.]

3.3.5 Wages for Custody.

The Muslim Jurists hold different opinions as to whether a mother or a custodian is entitled to wages. Maliki school is of the view that custodian is not entitled to any wages for the custody. The father is only responsible for the maintenance of the child

But the majority of the Muslim Jurists subscribe to the view that the custodian is entitled to payment of wages in addition to the maintenance of the child[200]

3.3.6 Suckling (*Rada'a*) after Divorce.

The responsibility of suckling babies is imposed on mothers by the law based on the *Qur'anic* verse 2:223 which provides thus "Mothers shall give suck to their offspring for two whole years, for him who desires to complete the term..."[201]

All Muslim Jurists agree that it is religiously obligatory on mother to suckle her baby during the subsistence of the marriage, after divorce or even during or after *Iddah* and where she refuses to suckle the baby; she is considered to have committed a sin [202]

[199]Abdur-Rahman A., op. cit.p.602
[200]Ibid.
[201]Abdullah, Y.A., op. cit. p.95
[202]Sayyid, U.H.*Sirajus-Salik fi Sharhi Ashal Masalik*, Vol.1, Darel Fikril, (n.d) pp.117-118

However, the Jurists differ as to whether it is legally obligatory on mother to suckle her baby. Maliki Jurists are of the view that it is legally obligatory on mother to suckle her baby whether during the subsistence of the marriage or after a revocable divorce (but during the *iddah*), and where she refuses to suckle without any legal justification like illness, she should be compelled by a judge to do so on a condition that her family usually suckle, but where she comes from a noble family who normally do not suckle their children, there is no legal obligation on her to suckle [203]. But it is not obligatory on a wife who is divorced irrevocably to suckle her baby born to the husband that divorced her even if her *Iddah* has not expired unless she is paid wages for the suckling as provided in the *Qur'anic* verse 65:6 "... And if they nurse your offspring give them due recompense..."[204].

3.3.7wages for Suckling Mother

A suckling mother is not entitled to wages from the child's father during the subsistence of the marriage contract or during the *Iddah* period if the *Talaq* is revocable or even where the *talaq* is irrevocable if she is pregnant because in all these cases the suckling mother is entitled to maintenance. But where she observes the *Iddah* of irrevocable *Talaq*, she is not entitled to maintenance hence she is entitled to the payment of wages. [205]

[203]Ibid
[204]Abdullah, Y.A., op. cit. p.1483
[43]Sabiq, S., op. cit. p. 215

It is clear from the discussion that there is more to the pronouncement of *talaq* as *talaq* creates new rights and obligations for the divorcing couples; the law also takes care of the interests of the divorcing couples as well as their children including the unborn ones.

Chapter Four

An Assessment of the Practice of Divorce and its Consequences in Kano State

4.1 Introduction

Kano state is one of the 36 component states of Nigeria with a population of over nine million people, majority of who are Muslims. It has the largest number of Muslim population in Nigeria and it is widely believed to have the largest cases of divorce in Nigeria.[206]

In this chapter, efforts are made therefore to assess the law and practice of divorce and its consequences in the state to determine whether or not the practice is in conformity with Islamic law and to examine the reasons responsible for the high incidences of divorce in the state. The assessment is through the analysis of data obtained through the application of questionnaire to 100 divorcees across the state that had firsthand experiences as victims of divorce, decided cases and interview with learned Scholars and stakeholders on the matters of divorce in the state.

4.2 An Assessment of Law and Practice of Divorce in Kano State

Under this heading, the law and practice of divorce in Kano state including the consequences of divorce are discussed.

a. Formula of Effecting Divorce

i. Verbal and Written Divorce

Islamic law permits any formula to be used to effect divorce in so far as the formula will clearly indicate the intention of the husband to terminate the marital

[206] Kano State Hisbah Board Dakata Command expressed this View in an Interview with this Writer through its Marriage Counselor,Mallam Muhammad Soroma on 15th February, 2013 in his Office

relationship with the wife. These formulas could be by express or implied expressions, direct or indirect expression, conditional or unconditional expression, written, sign or gesture in case of a dumb husband.[207]

However, in Kano state, divorce is effected by verbal pronouncement and writing, but the most accepted practice of effecting divorce is by writing. In the case of *Amina Mustatapha Haye vs. Bashiru Zamfara*[208] the respondent divorced the petitioner in writing and the written divorce was tendered before the court and admitted in evidence and the court confirmed the validity of the divorce.

Furthermore, in response to a question on how their divorces ware effected,[209] 70 out of 100 respondents to the questionnaire, representing 70% of the respondents said they were divorced in writing and only 30% said they were divorced verbally.

Kano state Hisbah Board explains the rationale behind the widely acceptance of written divorce "Written divorce is considered as a proof of divorce and it enables the subsequent suitors the benefit of knowing when the *Iddah* expires so that they would not seek the hands of the divorced wife in marriage while she is still observing the *Iddah*".[210]

The data and the case is a reflection of the practice of how divorce is effected in the state. Even though, written divorce is widely accepted, oral or

[207] Sabiq, S. *Fighus-Sunnah* Vol.2, Darel Kitabul- Arab, Beirut, (1975) p.253
[208] CV 165/12 (Unreported) upper shari'ahBompai, Kano.
[209] See Question 22 of the Questionnaire attached in the Appendix
[210] Kano State Hisbah Board Dakata Command Express this View through its Marriage Counselor, Malam Muhammad Soroma in his Office on the 15th March, 2013.

verbal divorce is as valid as written divorce and the practice is in conformity with the provision of Islamic law.

However, could it be said that the practice of pronouncing divorce in the ratio of 70(written) to 30(oral)contributes to the high rate of divorce in the state? The answer to this poser will depend on the perspective one looks at the effects of the oral or written divorces. Thus while oral divorce ordinarily may have the tendency to reduce the high incidence of divorce in the state as the pronouncer (where there are no witnesses) may want to deny it or claims that he did not mean divorce by his verbal pronouncement, thereby saving a marriage that would have otherwise failed, the same cannot be said of a written divorce as the document will always speak for itself and the court will give effect to its content. In view of these submissions, one can rightly say that the wide use of written divorce contributes to the high incidence of divorce in the state as there may not be room for doubt.

ii. Indirect and Conditional Divorce

In Islamic law divorce could be effected either by the use of indirect or conditional expressions.However, where indirect expression is used the husband must be called upon to clarify his intention and where his intention is divorce; it will be treated as such. And where conditional divorce is pronounced, divorce takes place when the condition is fulfilled. [211]

In Kano state, it is common practice for the persons making divorce to use direct as well as indirect expressions to affect it or to base the divorce on the

[211]Sabiq, S., op. cit. p. 260

fulfillment of certain conditions. For example "I divorce you" or the phrases "Go to your house" are commonly used to effect divorce. In the case of *Bara'atu Suleman Fagge vs. Ibrahim Musa Zuma*[212] the petitioner sued her husband for dissolution of their marriageon the ground that he asked her to go home for a long period of time without providing maintenance for her. The husband denied the claim but decided to divorce the wife. The court affirmed the validity of the divorce and observed that divorce is permissible by expressed words as pronounced by the husband or implied words.

In a response to question on how they were divorced by their husbands[213], 45 of the respondents said they were divorced by indirect expressions, 35 said they were divorced by direct expressions while 20 said they were divorced by conditional expressions

This data shows that 45% of respondents were divorced by indirect expression such as "Go home" only 35% were divorced by direct expression such as "you are divorced" and 20% were divorced by conditional expression such as "If you go out of this house you are divorced". These forms of divorce are in conformity with the provision of Islamic law but the indirect and conditional expression should be used with caution because of its tendency to cause harm to the divorced wife. For instance where the phrase "Go to your family" is used and the wife goes home she may remain therefore a long period of time without the

[212] CV/1139/13 (unreported) WajeShari'ah court No. 7, Fagge, Kano.
[213] See question 23 of the questionnaire administered in Kano attached in the Appendix

guardian calling the husband to verify the intention of the husband, that is whether he means divorce or not with the expression and the wife's fate would be hanging, not knowing whether she is divorced or married.

Thus in the case of *Rabi Salisu Zango Dakata vs. Muhammad Haruna Gayawa*[214] the respondent divorced the petitioner by asking her to go back to her parent. The petitioner sued the respondent after spending six months at home without seeing or hearing from him. The respondent informed the court that the indirect expression he used meant divorce and the court affirmed the divorce and ordered the divorced wife to commence the reckoning of her iddah on the judgment day.

The next question to address is in what way can conditional divorce be said to be responsible for the high incidence of divorce in the state? Thus we have seen from the data that 20% of the respondents said they were divorced by the use of conditional expression such as "If you go out of this house, considered yourself divorced" This is a phrase that is commonly used when couples have dispute and the husband desires to enforce his authority as the head of the family to restrict the movement of his wife. Thus in law, the husband has the right to control the movement of his wife whether in time of peace or conflict, and where he makes the exercise of this right a condition for divorce and the wife obeys the order, she would have the reward of obedience and as well safe the marriage from collapsing and that will in turn have the effect of reducing to a barest minimum the number of

[214] CV/132/12 (unreported) Upper Shari'ah Court Bompai, Kano.

divorce in the state. But the lack of exercise of restraint on the part of the wives in disobeying their husbands thereby fulfilling the condition of the divorce by going outis responsible for up to 20% of the respondents divorces as shown by the data that is a good basis to draw an inference that conditional divorce is responsible for the high incidence of divorce in the state.

b. **Talaq Sunniy**

Talaq sunniy is one pronounced by the husband in accordance with the procedures and teachings of the Prophet (S.A.W) which must satisfy the following three conditions:

i. The *Talaq* should be pronounced while the wife is in a state of "fresh purity", that is immediately after the period of menstruation before any sexual relation or post natal period immediately after bath, the maximum days are about 15 and 40 days respectively. This view is agreed upon by all the Muslim Jurists.[215]

ii. The wife must not have had sexual intercourse at any time during this period of fresh purity.

iii. The *Talaq* must be pronounced once.

iv. The *talaq* should not be pronounced during Iddah.

Imam Sha'fi-i agrees with imam Malik on this fourth point but Imam Abu Hanifah disagrees and holds that divorce effected during *Iddah* is as good as *Talaq* sunni[216]

[215]Hammudah A.*The Family Structure in Islam, Islamic* Publication Bureau, Lagos, (1982), p.228
[216]Muhammad,M.K., op. cit. p.146, Ibn Jazi, Qawanina al-Ahkamul-Shar'iyyah,(n.d) p.334

The advantage of talaqsunniy is that it does not terminate the marriage completely nor does it bring about any resentment or unkindness because the man is obliged to keep the woman in the same home or furnish her with a comfortable residence accessible to him. She must not be ejected nor should she leave unless she has committed a manifest act of indecency. The husband must adequately provide for the wife during the waiting period.

Thus keeping the wife under the same roof with the man may change the situation favourably and the man may have to reconcile with his wife. This is provided by the Qur'an in chapter 65:1 thus "O prophet when you do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and turn them not out of their houses nor shall they (themselves) leave except in case they are guilty of open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation"[217]

The process of talaq Sunniy is that it is one single divorce at the first instance, followed by a revocation, then another divorce at a second instance that can also be followed by revocation. After these two divorces, the husband has an option to either retain the wife in fairness or separate with her with kindness. The talaq is pronounced in an atmosphere of love without any form of bitterness.

[217] Abdullah, Y.A., op. cit. p. 1483

In Kano state, this research shows that there are casesof divorces that comply with sunnah as discussed above. In a response to questions on how they were divorced by their husbands[218], The research shows that 40 out of the 100 respondents said their husbands divorced them during their state of purity, 60% of those who said they were divorced three times said they were divorced one after the other and 15% said they were divorced in an atmosphere of love and with kindness,10% said they observe their iddah in their matrimonial homes and they were maintained by their husbands.

This data which shows compliance with talaq sunny is a good news which can be improved upon especially in cases of divorce in an atmosphere of love which is15% and observance of iddah in the matrimonial homes and maintenance which is as low as10%.

The Pronouncement of divorce in accordance with law has the ability to reduce to the barest minimum high incidence of talaq. For instance theprocess of talaqSunniy is that it is one single divorce at the first instance, followed by a revocation, then another divorce at a second instance that can also be followed by revocation, and after each divorce, the husband will keep the wife under the same roof, this may change the situation favourably as he may have to reconcile with his wife thereby saving the marriage that would have collapsed on the pronouncement of talaq.

c. ***TalaqBid'iy***

[218]See Questions 4,6,9,10,11,12,13,14and 15 of the Questionnaire Attached in the Appendix

This is the opposite of Sunni *talaq*. It is a *talaq*effected contrary to the teachings of the Qur'an and *Sunna,* and it includes three divorces at once; divorce during menstruations or during post natal blood or during the state of purity when the husband has had intercourse with the wife or divorce during *Iddah.* All the Muslim Jurists agree that *talaq bid'iy* is prohibited and the husband who effects it commits a sin.[219]

However in Kano state, this research shows that there are cases of *talaq bid'iy* in form of divorce during menstruation, in a state of purity but after sexual intercourse, during iddah as well as triple divorce as 32% of the respondents to questionnaire said they were divorced during menstruation, while 30% said they were divorced in a state of purity but after sexual intimacy, 15% said they were divorced during *iddah* and 40% said they were divorced three times at a sitting.[220]

Furthermore, the research reveals that in Kano State, there are several cases of divorce pronounced in the atmosphere of acrimony and bitterness thereby resulting into resentment and unkindness. Most of the divorced wives observe their Iddah in their parents' houses and they are thereby denied maintenance during Iddah. In a response to questionnaire, about 85% of the respondents said they were divorced in a state of acrimony and hatred, 30% said they observed their iddahs in their family homes because they were ejected by their husband while 60% said they observe their iddah in their family homes because it is considered a

[219].Sabiq,S., op. cit. p. 265

[220]See Questions 4,6,9,10,11,12,13,14and 15 of the Questionnaire Attached in Appendix

disgrace and humiliation to observe iddah in the matrimonial homes. The 90% that observe their iddah in their parents' houses said they were not maintained by their husbands during the iddah period.[221]

In an interview with Malama Halima of Muhammad of Gabari quarters, on the 15th march, 2013 in Kano, she said her husband divorced her when she was eight months pregnant the third time and he ejected her and she observed her iddah in her parent's house without maintenance from her ex-husband. Further more in another interview with Malam Salisu Muhammad of Dakata quarters and Umar Aliyu of Gezawa quarters Kano, on the 16th march, 2013, they both expressed the view that they have divorced their wives in the past without knowing that only *talaq* during a state of purity is in accordance with the law.

These figures and empirical evidence about talaq bid'iy in Kano state pointed a frightening situation especially where 90% of the those divorced observed their iddah in their parents' homes not because they were guilty of open indecency but either because the husband ejected them or they left on their own because it is considered a humiliation to continue to remain in the house of the man that divorce them thereby losing their rights to maintenance during iddah and the chance of reconciliation which is even the aim of observing iddah in the matrimonial homes.

Talaq bid'iy as shown in this research work is one of the major factors responsible for high incidences of talaq in the state and the reason is not

[221]. Ibid

farfetched. Thus Allah (the Most High) created man and gave him guidance through which he would live a successful life on earth and earn His pleasure in the hereafter, and any deviation from the guidance will lead to failure and punishment, part of the guidance giving to man is to conduct his marital life including divorce in accordance with the teachings of the Islam, and talaq bid'iy is one of the deviations which is responsible for the sorry state of high incidences of divorce in the state.

In a specific term, whereas talaq sunny does not terminate the marriage completely nor does it bring about any resentment or unkindness because the man is obliged to keep the woman in the same home or furnish her with a comfortable residence accessible to him. She must not be ejected nor should she leave unless she has committed a manifest act of indecency, the husband must adequately provide for the wife during the waiting period, but talaq bid'iy is opposite of all these cases, as can be seen in the data presented as 85% of the divorced wives were divorced in a state of acrimony and hatred, 90% observed their iddahs in their family homes and they were not maintained by their husbands during the iddah period, talaq bid'iy terminates talaq at once, it brings about resentments and hatred, the husband will not keep the divorced wife under the same roof nor provide for her needs thereby loosing the right of reconciliation and when the opportunity for reconciliation is lost, the rate of divorce increases.

d. Triple Divorce

Triple divorce is one pronounced with an expression that means three divorces at once such as "I divorce you three times" or "I divorce you, I divorce you, I divorce you". The Muslim Jurists all agree that triple divorce is harmful to the wife because it blocks the chances of reconciliation given to the couples in the event of regret and change of mind and it is a violation of Qur'an chapter 2 verse 229 which reads: "a divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness"[222].The Jurists differed on whether triple divorce is effective or not. The majority comprising of Abu Hanifa, Malik and Shafi'i are of the view that it is effective and considered as three separate divorces. The minority view held by some Maliki, Hambali and Hanafi jurists and Ibn Taymiyyah is to the effect that triple divorce is considered as only single revocable divorce[223]

However, there are cases of triple divorce in Kano state, it is usually pronounced out of anger and in some cases the pronouncers of such triple divorce do regret their actions. Thus in an answer to a question[224] in a questionnaire administered in the state,60% of those that said they were divorced three times said the divorce took place one after the other while 40% said they were divorced three times at a sitting.

[222] Abdullah, Y.A., op. cit.p1483
[223]Sabiq, S. op.cit. p.268
[224] See Question 4 in the Questionnaire attached in the Appendix

In the case of *Naima Ahmed Gwammaja vs. Danladi Haruna*[225] the bone of contention in this case between the petitioner and the respondent is whether the triple divorce pronounced by the respondent is counted as one or three. While the respondent claimed that he meant one divorce by his pronouncement, the petitioner claimed that it was three divorces and the court held that three divorces at once are counted as three.

In another case of *Habiba Muhammad Tisama vs. Abbas Idris Tisama*[226] the petitioner sued the respondent on the claim that he divorced her three times at once but the respondent denied the claim asserting that he only divorced her once. The petitioner called evidence to establish that he divorced her three times and the court accepted the evidence and held that the respondent divorced the petitioner three times and the marriage was dissolved irrevocably.

These cases show that the respondents who divorced their wives three times at once but turned around to deny it have regretted their actions but without remedy because the law applicable in the state is the Maliki law which considered tripe divorce as taken the effect of three divorces and which is what the court applied in deciding the cases.

Triple divorce as noted above is one aspect of talaq bid'iy, it is harmful to the wife as well the husband who pronounces it especially where he regrets his action or where there still exist love and affection between the separation couples.

[225] CV/787/13 (unreported) Waje Shariah court No.7 Fagge, Kano
[226] CV 27/12 (unreported), upper Shari'ah Court, Bompai, Kano.

Sticking to the Maliki law which treats the divorce as triple,(even when there are other Jurists in the same school who hold that triple divorce should be considered as one revocable divorce) at all times without considering the circumstances of each case may create hardship for the spouses and that may lead to committing abomination.

On the question of how triple divorce contributes to the high incidences of divorce in the state, it is the same position as presented under talaq bid'iy above because triple divorce is responsible for 40% of those divorced three times. It blocks the chances of reconciliation and re-union between the couple thereby creating temporary bar of contracting marriage between the parties until the divorced wife marries another who voluntarily divorces her or dies. Triple divorce could therefore be said to contribute more to the high rate of divorce in the state than any other type of talaq bid'iy.

It is regrettable that even in these cases of talaq bid'iy, no sanctions are applied to deter others from violating the rules of divorce as sanction would have the effect of deterring people from violating the rules of divorce and consequently reduce to a barest minimum the high rate of divorce in the state. The following authorities support the application of sanctions where clear cases of violation of the rule of talaq are established.

On the authority of Nafiu from Abdullahi bin Umar (R.A.) who said he divorce his wife while she was observing her menstruation and his father Umar bin Khatab asked the prophet who said "Order him to take her back and keep her

till she is clean and then wait till she menstruates for the second time and becomes clean again, where upon if he wishes to keep her, he can do so, and if he wishes to divorce her, he can divorce her before having intercourse with her"[227]

Furthermore, Maliki and Hanafi jurist subscribe to the view that it is obligatory for the husband that divorces his wife in her menses or during the post natal blood to take her back. Maliki Jurists hold further that where he refuses to do so (in cases of first and second talaq), he should be threaten to do so by means of arrest or beating. And where he persists, he should be beaten and detained, if he still refuses to return her, the judge should do so on his behalf and he is at liberty to divorce her after the completion of the menses or post natal blood without having sexual intercourse with her.[228] But the Hanafis hold that the Judge has no right to take the wife back on behalf of the husband he should rather impose suitable punishment on him to serve as deterrent to others.[229]

e. *Talaq Raj'i* (Revocable Divorce)

Talaq Raj'i is one that the husband can revoke any time during the *Iddah* period and the couples resume marital relationship without a new marriage contract. The Qur'an provides in chapter 2:229 thus "A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness"[230]

[227] Muhammad, M.K. Sahih al-Buhari (English Translation),Vol.vii, Darel Fikril, (n.d), p.146
[228]Usman, H. Sirajus-Salik, Vol.2,Darul-Fikril, p.71
[229]Abdur-Rahman, A. al-FikhuAlal-Madhal-Ar'ba'a, Darul-Fijril,Cairo, 2nd Ed., (n.d) pp.277-279
[230]Abdullah, Y.A., op. cit.p. 1483

The import of this verse is that divorce which the law permits is to be one after another. It is permissible for the husband to return his wife after the first and second pronouncements of divorce.

For a divorce to be revocable it must satisfy the following conditions:

a. It must be pronounced for the first or second time;
b. It must be pronounced after consummation of the marriage;
c. It is not pronounced on material consideration (*khul*).
d. *Talaq* can also be revocable where it is dissolved though judicial decree for lack of maintenance or by oath of abstinence (Ila)[231]

But in some cases in Kano state, the divorced wife or her parent would refuse the revocation and insist that the divorced wife must conclude her *Iddah* or insist that the wife will not return to the husband. In the case of *Maryam Musa Sauna vs. Husaini Isa Tsamiya*[232] the petitioner sued the respondent claiming that he divorced her and she has completed her *iddah* period but the respondent insisted that he revoked the divorce before the expiration of the *iddah*.

The court ordered the respondent to produce evidence to prove that he revokes the divorce before the expiration of *iddah*. The respondent claimed that the revocation took place between the two of them and therefore has no witness. The court ordered the petitioner to take an oath of denial to which she declined and the court ordered the respondent to take the oath he also declined. The court

[231]Sada, I.N. *Dissolution of Marriage in Islam*: *Case Study of Concept and Practices in Northern Nigeria*, LL.M Thesis (unpublished), Faculty of Law, A.B.U. Zaria (1983) p.41

[232]CV 138/12 (Unreported), Upper Shari'ah Court, Bompai, and Kano.

held that the *talaq* was not revoked before the expiration of *iddah* and the marital relation between the parties was severed.

In another case of *Tayyiba Dauda Aderaye vs. Musa Musa*[233] the plaintiff sued the guardian of his wife for not allowing her to return to him having revoked the *talaq* during *iddah*. The plaintiff established by evidence before the court that he revoked the divorce during *iddah*. The court held that the guardian has no right to prevent a divorced wife return to her husband where he revokes the *talaq* during *iddah*, and the wife was ordered to return to the plaintiff.

Thus in answer to questions[234] in the questionnaire, 40% of the respondents said they refused the revocation of their divorce by their husband because they communicated the revocation to them after they have finished their *iddah* while 60% said they accepted the revocation.

In an interview with Malama Saadiyya Usman of Yankaba quarters Kano, on the 15th march, 2014, she said she refused the revocation of the divorce because she had already concluded her *iddah* before the revocation was communicated to her.

One noticeable problem associated with revocation of talaq in the state as reveals by this research work is the issue of communication of the revocation to the wife, who as seen in this work, observes iddah in her parent's home. Thus if she had observed her iddah in her matrimonial home as prescribed by law, this

[233] CV/256/12 (Unreported), Giginyu Shari'ah Court, Dakata, Yankaba, and Kano.
[234] See Questions 20 and 21 of the Questionnaire attached in the Appendix

problem would not have arisen as the husband would have easy access to her to revoke the talaq either by words or action. Furthermore this problem has far reaching effects on the high incidence of divorce in the state because 40% of the cases of revocation which would have meant saving of such marriages were lost to communication gap, thereby raising the template of cases of divorce in the state

f. How Revocation is Effected

Revocation can be by express words, in any language that means termination of divorce. Like to say "I return my wife" or "I retain my wife" or "I revoke the divorce which I effected on my wife and I hereby take her back". It can also be by implication such as "you are my wife" or: you are now as you are before". Revocation can also be by action i.e.by sex or its preliminaries such as kissing or touching with pleasure. This is the view of Imam Malik, Hanafi and Hambal. Imam Sha'fi'i, however holds a contrary view that revocation can only be effected by words and not action. This is also the view of Ibn Hazm of Zahiri School[235].The right of revocation cannot be forfeited even when the husband waives it because the law makes it consequent to revocable *talaq*.

The common method of revocation of *talaq* in Kano state is by expressed words. Thus in an answer to question [236]in a questionnaire administered in the

[235]Sabiq, S., op. cit. p.274-275
[236]See Question 18 of the Questionnaire attached in the Appendix

state, 80% of the respondents said their divorces were revoked by expressed words. This is not surprising as the majority observe their *iddahs* in their family homes as the chances of revoking by action really exist. Here, the problem still borders on the observance of iddah in the family home as against matrimonial home decrees by law. The wisdom behind a divorced wife observing her iddah in her matrimonial homes, is to afford her husband essay access to her in order to achieve reconciliation and revocation of the talaq especially by action, but where she is not accessible to him as the data shows, the chances of reconciliation will be slim thereby increasing the number of the cases of divorce in the state

g. Witnessing of Divorce and Revocation (*Raja'a*)

Muslim Jurists differ on the meaning of Qur'an 65:2 which reads "Thus when they fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms and take for witnesses two persons among you endued with justice..."[237]

The four Sunni schools hold that taking of two witnesses when making *raja'a* is recommended and not compulsory. *Zahiri* and the *Shia* schools hold that evidence of two witnesses as obligatory.[238] The former view is what is applicable in Kano state.

[237] Abdullah, Y.A., op. cit.p.1484 op. cit.p.1484
[238]Sabiq S., op. cit p. 258
[34] CV 138/2012 (Unreported), Upper Shari'ha Court Bompai, Kano.

Inthe case of *Maryam Musa Sauna vs. Husaini Isa Tsamiya*[239]the plaintiff was not able to prove his case of revocation of *talaq* during *iddah* because of the absence of witness.

In Kano state witnesses are not called to witness talaq or revocation of *talaq*. In an answer to questionnaire,[240] all the respondents said no witness was called to witness either their divorce or its revocation.Witnesses are not called to revocation in the state because the applicable Maliki law does not make its applicability obligatory. But as could be seen in this research, that proving of a case of revocation in court requires the evidence of two witnesses, and if no witnesses are called the court may dismiss the claim of the husband that he revokes the divorce during the iddah thereby raising the number of divorce cases in the state. Furthermore calling of witness to divorce will douse tension and anger between the disputing couple thereby saving their marriage from collapsing and lack of calling them is also responsible for the high rate of divorce in the state.

h. Talaq Bain (Irrevocable Divorce

Talaq Bain is sub-divided into two namely: bain bainunah sugrah (intermediate) and bain bainunah kubrah (ultimate)

Bain bainunah sugrah is a divorce effected by the husband without the right to revoke the divorce. Marital relationship is only possible with a new marriage contract and it includes the following:

35See Questions 22 and 39 of the Questionnaire attached in the Schedule

i. First and second *talaq* if not revoked before the expiration of the *Iddah* period.

ii. Any *talaq* before consummation of the marriage.

iii. Any *talaq* after consummation for the first or second time if there was material/monetary consideration (*khul*)

iv. Any *talaq* passed by court of law for any reason other than lack of maintenance or oath of abstinence (Ila). E.g. because of bodily defect of the husband, his absence or harm befalling the wife.[241]

In Kano state, there are cases of *talaq bain bainunah sugrah*. In an answer to questionnaire[242], 23% of the respondent said they were remarried after the expiration of their *iddah*s by their ex-husbands with new marriage contracts.

In an interview with Malam Umar Aliyu of Dakata quarters Kano on the 15th march, 2014, he said he divorced his wife once and he only returned her after the expiration of *iddah* with new marriage contract.

Thus when a husband divorces his wife, there are many factors that may hinder him from returning the wife during the iddah in the state. Some of them as shown by this research are the process of effecting the divorce in a state of acrimony, observance of iddah in the parents' homes which makes access to the divorced wives difficult for the husband and lack of witnesses of the revocation. When he cannot revoke the talaq during iddah, the only option left for him would be to compete with

[241]Sada, I.N. op. cit. p.25

[242] See a Copy of the Questionnaire Attached in the Appendix

other suitors in seeking the hands of the divorced wife in marriage, and where the divorced wife finds a better suitor the ex- husband may not succeed.

The point being made is that these problems that hinder the husband to revoke divorce during iddah contribute to the number of persons contracting new marriages with their ex-wives after the expiration of iddah (23% of the respondents to the questionnaire) and it has greater effect on the high incidences of divorce in the state.

i. Bain Bainunah Kubrah

Bain bainunah kubrah is the *talaq* where the couples are prohibited from resuming marital relationship unless the wife marries another man and the marriage is consummated and subsequently got terminated by *talaq* or death with the attendant observance of *iddah* by the wife, with a new marriage contract.

Talaqs *bain bainunah kubrah* are the *talaqs* pronounced for the third time. This occurs where the husband effects the first *talaq* on his wife and revokes it and effects the second one and also revokes it and subsequently effects the third one and in this case, the third *talaq* is considered as *bain bainuah kubrah* Similarly, where the husband effects three divorces in one pronouncement. The husband can neither revoke the *talaq* during *Iddah* nor re-marry her after *Iddah*. He can only re-marry her after the woman had

married another man who consummated the marriage and on his own volition, divorces the woman or dies. This is based on the Qur'anic verse 2:230 which provides thus "So if a husband divorces his wife (for the third time), he cannot after that remarry her until after she married another husband and he has divorced her. In that case, there is no blame on either of them if they reunite provided they feel they can keep the limit ordained by Allah..."[243]

The marriage with another man must not be arranged in order to make the woman lawful for her former husband. The second husband must consummate the marriage before she can be lawful for the first husband as the prophet (S.A.W.) explained the woman of Rifa who wanted to go back to her former husband when the second marriage has not been consummated. "No, until you taste his sweetness and he tastes your sweetness"[244]

In an answer to questionnaire, 60% of those that said they were divorced three times the divorce took place one after the other while only 40% of the respondents said they were divorced three times at a sitting and they did not remarry their ex-husbands again.[245]

In the case of *Naima Ahmed Gwammaja vs Danladi Haruna*[246] the respondent divorced the petitioner three times at a sitting but contended that he

[243] Abdullah, Y.A., op. cit.p.93
[244] Muhammad, R. *Muwwata Imam Malik(English & Arabic),*Banayatul-kharafi, Beirut, (n.d) p.522
[245] See Questions 4 and 5 of the of the Questionnaire Attached in the Appendix
[246] CV/787/13 (unreported) Waje Shari'ah Court Fagge, Kano

means only one *talaq,* the court rejected his contention and confirmed the divorce as three.

In considering the effect of the practice of talaq bain bainuna kubrah on the high rate of divorce in the state, one may say that the aspect of effecting the three divorces at a sitting (which constitutes 40% of such divorces) is not only against the law, it also contributes to the high rate of divorce in the state in that it blocks chances of reconciliation. And even though the other aspect of the divorce (i.e. one after the other) which constitutes 60% of such divorces conforms to the law, it nevertheless contributes to the high rate of divorce in the state because the objective of the marriage is for it to last for a life time.

4.3 Assessment of some Consequences of Divorce

In assessing the law and practice of the consequences of talaq here, the effort will be to consider whether or not the consequences conform to Islamic law and its effect on the society.

a. Denial of Custody of Children to Divorced wives

When a husband divorces his wife, the divorced wife is entitled to the custody of her children in the case of the male child until he reaches the age of maturity and the female until she is married and the marriage is consummated unless the divorced wife is married.[247]

[247] Yusuf, M. *Ihkamul-Ahkamala TuhfatilAhkam, Darulfikri,* Beruit, (n.d) p. 124 – 125.

However in Kano state some persons who divorce their wives are in the habit of snatching the children from the divorced wives and on the other hand it is the divorced wives that used to refuse to take custody. Thus in the case of *Amina Mustapha Haye vs Bashir Zamfara*[248] the petitioner sued the respondent who divorced her and took away her little girl. The court ordered the respondent to produce the girl in court and she was handed over to the petitioner.

In a response to questionnaire, 45 respondents said their husband took the custody of their children after divorce against their wish while 25 respondents said they refuse to have custody against the wish of their ex-husband and 30 said they have custody.[249]

The above case and the data gathered from the result of questionnaire administered in the state shows the practice of custody of children in the state. 45% of the respondents said their ex-husbands took away their children after divorce; this is in contravention of the law which guaranteed the right of the mother to the custody of her children so long as she is not married. On the authority of Abdullahi bn Amr, a woman said "Oh messenger of Allah, this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care" to which the Prophet replied "You are worthier of custody of your child as long as you do not

[248] CV 165/2012 (Unreported) Upper Shari'ah Court Bompai, Kano.
[249] See a Copy of the Questionnaire attached in the Appendix

marry"[250]. Also on the authority of Yahya bn Said who reported that Umar bn Khatab (R.A) tried to take his son Ashim from his grandmother, she complained to Khalif Abubakar who gave her the child and addressed Umar "that her smell, her touch and her kiss to the child is better than the best thing you have"[251].

More reprehensive is the 25% of the respondents who refused to have custody of their children who deserve to be under their custody in order to "punish" their husbands with the problem of suckling and maintenance. This attitude is also in contravention of the law. Qur'an 2: verse 223 provides "Mothers shall give suck to their offspring for two whole years, for him who desires to complete the term…"[252] Furthermore, Maliki law which is the applicable law in the state provides that it is legally obligatory on mother to suckle her baby whether during the substance of the marriage or after a revocable divorce (but during iddah), and where she refuses to suckle without any justification like illness, she should be compelled by a judge to do so. But it is not obligatory on her to suckle the baby where she is divorced irrevocably unless she is paid wages[253] as provided in Qur'an 65 verse 6 "…And if they nurse your offspring give them due recompense…"[254]

[250]Sabiq, S. op. cit. P.340
[251] Ibid.
[252] Abdullah, Y.A. , op. cit.p.1483.
[253]Sayyid,U.H. Sirajus-Salik fi Sharhi Ashal Masalik, Vol.1, Darul-Fikr, (n.d) pp.117-118
[254] Abdullah, Y.A., op. cit.p.1483.

Finally, only 30% of the respondents have the custodies of their children after divorce in conformity to the law. This is not satisfactory and it can be better with awareness.

Where a child does not have a right custody or does not have custody at all, it will have negative impact on him as it will affect his upbringing with its attendant negative consequences and social problems such as juvenile delinquency, prostitution by young ladies, drug abuse by youth and begging for the society.[255]

b. Maintenance of Children under Custody

In Islamic law, the father is under obligation to look after the upbringing of his children in terms of maintenance which includes food, clothing, accommodation, education, medication, training and circumcision during the subsistence of the marriage or after divorce and whether the children are under his custody or that of his divorced wives.[256]

However, in Kano state the parties hardly agree on the amount of money to be paid to the divorced wives for the maintenance of their children, the matter had always been resolved by the courts. Thus in the case of *Halima Usman Kurna vs. Abdullahi Babantale*[257] the plaintiff sued her ex-husband for the feeding allowance

[255] Ibrahim, Y.A *et al.,* "why divorce rate is high in Kano" Daily Trust 23rd December, 2013
[256] Ibid.
[52] CV/60/2014 (Unreported) WajeShari'ah Court, Fagge, Kano
[53] CV/246/12 (Unreported) Upper Shari'ah Court, Bompai Kano.

of his two children in her custody and the court awarded the sum of N5,000 monthly to her.

In another case of *Binta Mudi Sharada vs. Bashir Ali*[258] the plaintiff also sued her ex- husband for feeding allowance of his two children in her custody, and the court awarded N6000 monthly to her.

In an interview with Malama Halima Muhammad Inuwa of Gambari Quarters Kano at the premises of Waje Shariah court Kano she said the court awarded N7000 monthly to her for the custody of six children of her ex husband. She said that her ex husband was not paying the money as at when due.

The amount the courts in Kano state award as maintenance fee is not in tone with the economic reality. Though the law requires that the financial status and earnings of the husbands should be taken into consideration in fixing the feeding allowance, the courts must also not also forget that there are certain basic necessaries of life that must be met like feeding whether such fathers are poor or not. Furthermore, lack of maintenance or poor maintenance of a child who is a victim of divorce can also affect his upbringing and development with its deer consequences for the society.

4.4 Some Practices and Conducts that are Responsible for the High rate of Divorce in Kano State

Under this sub-title, some practices and conducts relating to marriage which are responsible for the high incidence of divorce in the state shall be

discussed and the lawfulness or otherwise of such practices will also be considered. These practices include self ejection by the wives, lack of patience and perseverance on the part of the couples, imposition of marriage partners on the marriage aspirants, excessive jealous of the wife, cultural practices and ignorance of the rules of talaq etc. Each of these causes is considered as follows;

a. Divorce Resulting from the practice of returning home by the Wives Due to Misunderstanding

The married women in Kano state are in the habit of returning back to their parents' home whenever they have misunderstanding with their husbands. The husband is expected to visit the parents of the wives for possible settlement of the disputes. (This is known as "yaji" in Hausa language). Some husbands who are not interested in the marriage may not visit the parent and the wives may not return to the matrimonial home because of shame. This practice usually results into divorce in that the wife and her guardian would file a case in court for separation. In the case of *Saadiyah Sani Haye vs. Akilu Ahmed Jarimawa*[259] the petitioner parked out of her matrimonial home because of the misunderstanding she had with her husband (the respondent) who did not go to her parents for settlement. She petitioned for divorce. The court gave them time to settle. The petitioner informed the court that the settlement failed and the respondent was asking her to pay N20,000 as ransom to gain her freedom from the marriage. The petitioner told the

[259] CV/246/12 (unreported) upper shari'ah court, Bompai, Kano.

court that she was ready to pay N10,000. The court dissolved the marriage and ordered the petitioner to pay N15,000 as ransom.

In a response to questionnaire[260], 30% of the respondents said they lost their marriage to the practice of self ejection. This practice is known in Kano as "Yagi" and as it can be seen from the data, it is responsible up to 30% of the divorce of the respondents to the questionnaire, this is very high and the next question to answer is whether or not the practice is in conformity with Islamic law. Thus in Islamic law, where there is misunderstanding or dispute between husband and wife; or where the wife claims that her husband is inflicting harm on her such that cannot ordinarily be tolerated by a woman of her status, such as beating, abusing etc or compelling her to commit evils and all efforts to settle the matter prove abortive, the right place to complain would be the court[261], this is so because according to this culture when the wife parks home the husband who feels the wife leaves his house without his permission may not visit for settlement and sometimes even when the his father in-law sends to him to come , and in cases like this the wife and her parent would not have any option than to approach the court for the dissolution of the marriage

b. Lack of patience and perseverance

Through the process of marriage, persons of the opposite sexes, different religion (in that a Muslim man can marry a woman of the Christian and Jewish

[260] See Questions 25,26 and 27 of the Questionnaire attached in the Appendix
[261] Sabiq, S. op. cit.p.289

faith) or even tribes are brought together under one roof with the hope that they will live in happiness, love, mercy, tranquility and harmony. But human beings by their nature differ in opinion, thought, taste, temperament, inclination and behavior all of which are capable of arousing disputes between the marrying couples. Each of these differences may play a vital role in the failure of marriage where the couples fail to exercise self restrain, patience and perseverance in the face of a slight provocation.

In an answer to a questionnaire[262], 52 out of the 100 respondents said they lost their marriages due to impatience and perseverance. In an interview with Malam Umar Abdullahi of Dakata quarters Kano on the 15th march 2013, he said he divorced his wife out of anger because she cooked a salty food for him.

So many verses of the Qur'an and the hadith of the Prophet enjoin Muslims to exercise self restrain, patience and perseverance. For instance:"o ye who believe! Persevere in patience and constancy; vie in such perseverance; strengthen each other; and fear Allah that ye may prosper"[263] and in another verse, the Qur'an provides"And be steadfast in patience; for Allah will not suffer the reward of the righteous to perish"[264]Abu Hurayrah (R.A.) reports the prophet to have said "let not the faithful man hates the faithful woman; if he dislikes some of her habits, he may like others"[265]

[262] See Question 37 of the Questionnaire attached in the Schedule
[263] Abdullah, Y.A., op. cit.p.181
[264] Ibid, p.541
60 Ahmed, K.N. *The Muslim Law of Divorce*. Kitab Bhavan, New Delhi (1981) p.4

Divorce for lack of patience and perseverance as shown by this research is in contravention of these authorities and no doubt being up to 52% of the respondents to the questionnaire painted a frightening picture of how this attitude is responsible for high incidence of divorce in the state.

c. Divorce Resulting from the Exercise of the Power of Ijbar (Coercive Power)

The basis of the practice of imposition of marital partners on the other in Kano state derives its source from the point of view of Maliki school of thought applicable in the state which holds that the father or his representative has coercive power to give the hands of his young and virgin daughter in marriage without her consent[266]The father is vested with the power because of his experience and maturity in knowing what is the best for the daughters. But unfortunately, the fathers are being beclouded in choosing suitors for their daughters by other worldly consideration like how rich is the suitor etc with little or no regard for religious considerations

An example of this practice can be seen is in close relation marriage "Auren Zumunci" where one family gives out in marriage the hands of their daughter to the son of a close relation in order to cement the family relationships without regard to the feelings of the couples.

[61]Al-Jaziri, A. *Kitabul – Fiqhu ala Muzahibularba'a* Vol. 4, Darul - Kitabul Al-alamiyya, Beruit,(n.d) P. 33

In the case of *Furaira Haruna Gwamaja vs. Nasiru Usman*[267] where the couples contracted marriage of close relation "Auren Zumunchi" the petitioner sued her husband before the court praying the court for dissolution of their marriage because she did not love him and was ready to return the N5000 dowry he paid to him. The court set up two arbiters each from the both families to settle the dispute. The arbiters could not settle the dispute and they recommended to the court that the husband should divorce the wife without the return of the dowry and the court affirmed their decision.

The second dimension to the marriage against the will of the marriage couples is "auren dole" that is marriage against the will of the bride or without her consent. After the marriage, the consequences of lack of love will manifest in many fold and result in divorce and other evil consequences for the couple. For instance on 11th April, 2014, a 14years old bride in Kano by name Wasila Umar killed her husband Umar Sani (35years old) and three of his friends by lacing their meal with rat poison because she wasmarried off to a man she did not love[268]

In the case of *Bayi Abubakar & 1or vs. Inusa Jibrin*[269] the first petitioner is the mother to the second petitioner. They jointly sued the respondent who is a senior brother to the husband of the first petitioner and a father to the second petitioner who was late on the ground that the respondent has no right to give the hands of the second petitioner in marriage against her will. The respondent

[267] CV/52/2014 (unreported) Waje Shari'ah court No.7 Fagge, Kano.
[268] See www.cknnigeria.com/201404/forced-marriage. 21st November, 2014
[269] CV/70/12 (unreported) upper shari'ah court Bompai, Kano.

established by evidence that the late father of the second petitioner authorized him to marry her to the husband. The court accepted his evidence and confirmed the validity of the marriage.

The practice of imposing marriage partners as couples by the parents against their will is also responsible for the high incidences of divorces in Kano state. The parents that indulge in this practice always tend to rely on the view of Maliki School that authorizes father or his representative to give in marriage the hands of their young and virgin daughters without their consent.[270] The courts in Kano state have also been applying this principle of law to affirm the practice in the face of clear Prophetic traditions which prohibit such practices. Abu Hurairah reported the prophet (s.a.w) as saying: "A woman who has been previously married should not be married until her permission is asked, nor should a virgin be married without her permission" The people asked: What is her permission Apostle of Allah? He replied "it is by her keeping silent"[271] In another *Hadith* narrated by Ibn Abbas who said "A virgin came to the Prophet (S.A.W.) and mentioned that her father married her against her will, so the prophet allowed her to exercise her choice[272]

d. Excessive Jealous by the Wives

Islamic law permits a Muslim to marry up to four wives where he can do justice among them. Many divorces result from the exercise of this right by the

[270] Al-jaziriri, A. *Kitabul-fiqh ala Mazhabul-Arba* Vol.4, 7th Ed., DarelKitab al-alamiyya, Beirut, (n.d) p.33
[66]Hasan, A. *Sunan Abu Dawud*, Vol.2,Kitab Bhavan, New Delhi,(1990), p.560

[272] Ibid, p.561

husband out of excessive jealousy by the first wife. In an answer to questionnaire on the causes of divorce of the respondents, 40 of the 100 divorced women said they lost their marriage because of their excessive jealousy against the second wife.[273]

There is a popular adage in Hausa language that "jealous is the adoration of women". This adage seems to encourage married women to engage in excessive jealous when their husbands want to take second wife, no doubt jealous is natural and part of the attributes of women but it must be practiced with moderation as Islam encourages moderation in all things. The fact that 40% of the respondents to the questionnaire lost their marriages to excessive jealous shows that jealous is one factor responsible for the high rate of divorce in the state.

(e) Practice of Dispute Resolution Mechanism

[67] Ibid, p.561

[68] See Question 37 of the Questionnaire attached in the Appendix

correctional measures to be taken by husband where he notices disloyalty and ill conduct from his wife, these measures include:1. Admonition, 2. Desertion on bed, 3. Non injurious beating and submission of the dispute to family council. The husband is enjoined to take these measures instead of resulting to pronouncing divorce at a slight provocation, and where the measures are taken with the sincere aim of reconciliation, same will be achieved. "If they wish for peace, Allah will cause their reconciliation: for

[273]See Question 37 of the Questionnaire attached in the Appendix

Allah has full knowledge and is acquainted with all things"[274]. These measures are provided for in Qur'an 4 verses34 and 35 as follows:

"34. As to those woman on whose part you fear disloyalty and ill-conduct, admonish them (first) (next) refuse to share their beds (and lastly) beat them lightly; but if they return to obedience seek not against them means (of annoyance) for Allah is most High, Great (above you all) 35. If you fear abreach between them twain, appoint (two) arbiters, one from his family and the other from hers, if they wish for peace, Allah will cause their reconciliation: for Allah has full knowledge and is acquainted with all things" [275]

Disloyalty and ill-conduct of the wife to the husband includes disobedience to the husband's lawful orders; refusal to answer the husband's call for sexual relation, without lawful excuse (e.g. menstruation and sickness); going out of his house without his permission etc[276]

Abdullah Yusuf Ali while commenting on this verse has this to say:

"In case of family jars four steps are mentioned, to be taken in that order (1) perhaps verbal advice or admonition may be sufficient; (2) if not, sex relation may be suspended; (3) if this is not sufficient, some slight physical correction may be administered;… (4) if all these fail, a family council is recommended"[277]

1. Verbal Advice or Admonition

The husband that notices ill-conduct on the part of his wife should remind her of her marital duties to him and he should warn her of the sin of her disobedience. (For instance where the wife denies her husband sexual intercourse without lawful excuse, the husband should inform such wife that the Angels will curse her till the

[274] Abdullah, Y.A. , op. cit.p.196
[275] Ibid
71.Sabiq, S. op. cit. p.207

[72.] Abdullah, Y.A. op. cit.p.195

day break), the husband should also remind his disloyal wife of the punishment attached to such disobedience. He should also remind her of what she would loss of her marital rights if she persists in her ill-conducts. For example her rights to maintenance which includes feeding, clothing, and shelter.[278]If the wife takes to admonition and submits to her husband, reconciliation is achieved and no further step needs to be taken against her.

2 Suspension of Sexual Relation

If the wife makes no amend after the admonition, and instead she continues in her refusal to submit to her husband, then the husband would cease sexual relation with her or emigrate from her bed. Emigration here is only restricted to bed as emigration in words is not permissible for more than three days.[279]

3. Non Injurious Beating

The third step a husband may take to make his disloyal wife submissive is to beat her lightly, if he thinks violence will have the desired effect. The blows are not to cause fracture, wound or serious bruise.[280] He must avoid the face and the

[278]Ruxton, F.H. Maliki Law Nigeria p.119

[279]SayyidSabiq, op. cit. p.207
[280]Ruxton, F.H. Maliki Law: English Translation of Mukhtasar of Sidi Khali, London,(1914) p.119
[76]SayyidSabiq, Op. cit .p.208
[77]See Qur'an 4 Verse 134

dangerous part of the body because the intended is the punishment and not destruction.[281]

If the husband takes all the above three steps to achieve reconciliation with his wife and same is achieved, the husband should not revert to past faults which should be forgiven and forgotten.[282]

4. Practice of Arbitration and Family Council

Where the husband could not achieve reconciliation with his wife after taking the above steps or where the source of the dispute or grievance is not known. That is whether it is from the husband or the wife, the process of arbitration is resorted to. The procedure involves the appointment of two arbitrators from among the relatives of each of the spouse. The arbitrators shall endeavor to understand the nature and causes of the grievances of the spouses and try to bring about reconciliation between them.[283]

Thus if after these attempts at reconciliation, the couples could still not reconcile, the law permits the spouses to part ways."But if they disagree (and must part), Allah will provide abundance for all from His All-Reaching bounty, for Allah is He that cares for all and Wise" [284]

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[78]Muhammad, A. Bidayatul-Mujtahid Wa-Nihayatul Muqtasid Vol. 2, Darul-Fikri, Beirut,(n.d), p.79
[284]. Abdullah, Y.A. op. cit. p.227

The next question is to find out whether or not these divorce preventive measures are in practice or not in Kano state. Thus in a response to questionnaire, 90 out of the 100 respondents who are divorcee said their husbands did not take this disciplinary measures before divorcing them[285].This shows that only 10% of the respondents these measures were applied to. The absence of the wide practice of the marriage safeguard measures is no doubt responsible to the high incidences of divorce in the state.

f. Traditional practice

Traditional practice is also responsible for divorce in Kano state, practice such as the use of the words "Dan *halal*" this word is used by the parent of the groom especially the mother to challenge the groom to divorce his wife where the mother feels that the brides offends her. "Dan *halal*" means legitimate son, that is, if you are a legitimate son divorce your wife. The groom being afraid of being called illegitimate son succumb to the blackmail of his parent and divorces his wife.[286]

Thus in a response to questionnaire, 20% of the respondents said they were divorced by their husbands through the influence of their parents.[287] Parents who want their sons to divorce their wives have always wanted to rely on the hadith of Abdullah Ibn Umar who was asked to divorce his wife by his father Umar bn Khattab because he (Umar) hated her and he (Abdullah) complained to the Prophet

[285] See a Copy of the Questionnaire attached in the Appendix
[286] The Board expresses this view through its Marriage Counselor Malam Soroma on the 15th March, 2013.
[287]See a Copy of the Questionnaire attached in the Schedule

who told Abdullah to comply with the order of his father[288]. Some Jurists are of the view that this Hadith may not serve as excuses for parents to order their sons to divorce their wives because Umar is a very sincere and pious person, who conducts his affairs with divine inspiration while other parents may not be like him. Imam Ahmad bn Hambal is one of the Jurists that subscribed to the above view, and the Imam was once asked by someone who was ordered to divorce his wife by his father and the Imam told him not to obey his father, the man argued that but Umar ordered his son Abdullah to divorce his wife and he complied. Then the Imam said "until your father becomes just like Umar" [289]

In the Hadith narrated by Ibn Majah, on the authority of Ibn Abbas, a man complained to the Prophet (S.A.W.) that his master married his slave to him and then he wanted to separate her from him and the Prophet said "The right of divorce belongs to the husband".[290]

In the face of these authorities, it is right to say that, this practice is in contravention of the law. The practice is also responsible for the high incidences of divorce in the state up to 20% of the respondents to the questionnaire

[288]Muhammad,M.K. *Sahih al-Buhari (English Translation),*Vol.7, Darel Fikril,(n.d) p.146
[289]Aliyu, I. op. cit. p.17
[290]Yazid, M. op.cit.p.672

Chapter Five

Summary and Conclusion

5.1 Summary

The right of divorce is vested in the husband by Islamic law to terminate a marriage that fails to achieve its objectives in order to protect the couples from the possible evil that may result from the failure of marriage. In such circumstances, it is fruitless to insist that the marriage should continue. The law provides for the rule of *talaq* through which the husband can achieve the termination of the marriage. While pronouncing the *talaq*, he must possess complete legal capacity .i. e. he must be sane, of age and the pronouncement of the *talaq* must be voluntary. The woman on whom he seeks to pronounce the *talaq* must be married to him; he could pronounce it by expressed words, in writing, by gestures or signs in case of deaf or dumb husbands and by delegations. Some Muslim scholars hold the view that for *talaq* to be valid, it must be pronounced in the presence of two witnesses while others hold the view that *talaq* without two witnesses is valid [291]

Talaq in terms of methodology is classified into two namely: *sunniy* and *Bidi'iy*. *Talaq Sunniy* is one pronounced in accordance with the teachings of the Qur'an and the practice of the Prophet (S.A.W.). *Talaq Bid'i*, on the other hand, is contrary to *sunnah* and it is religiously sinful and legally binding according to the majority of the Muslim Jurists

[291]Sabiq, S. *Fiqhus-Sunnah*,Darulul-Kitabu- Arabiy, Vol. 2, Beirut, (1973) p. p.258-259

In terms of revocability, *talaq* is also divided into *Raj'i* and Bain (revocable and irrevocable respectively) .The law provides that the husband must have consummated the marriage before he can revoke it and revocation can either be by express words or by actions. Furthermore, taking of two witnesses when making *raja'a* is compulsory according to the *Zahiri* school and it is recommended according to the majority of the Sunni scholars.[292]

Irrevocable divorce is divided into two: *bain bainuna sugrah and bain bainuna kubrah*. In case of the former, the husband cannot revoke the *talaq*, he can only re-marry the divorced wife through a new marriage contract and in the case of the later, the husband cannot revoke the marriage but he can only re-marry her after the divorced woman had married another man who consummates the marriage and divorces her or dies. [293]

There are consequences that follow a divorce; they include observance of *iddah* by the divorced wife, maintenance of the divorced wife during *iddah*, custody and maintenance of the children. The practice of divorce in Kano state vis-a- vis the rules of *talaq* is also discussed.

5.2 Observations

Even though *talaq* is permitted by law when it is desirable to serve as remedy for many marital problems, the practice of divorce by some Muslims in

[292] Ibid P. 128

[293] Abdullah, Y.A. *The Holy Qur'an: Text, Translation and Commentary*, Amana Corporation, Brentwood, Maryland, U.S.A.(1989)p.92

Kano state today aggravates the social problems instead of solving them as this research has found that some of the divorces effected in the stateare in contravention of the law and some of these contraventions are responsible for the high incidence of the divorce in the state. Some of these practices are examined as follows:

1. Divorce in Contravention of Sunnah

a. Pronouncement of Divorce in a Hostile Manner

In most cases, divorce is pronounced in an atmosphere of acrimony, conflict, threat and in a disgraceful manner. This practice is in violation of the rule of Islamic law that enjoined divorcing couples to separate with kindness and this practice is also responsible for the high rate of divorce in the state becausewhen divorce are pronounced with conflict, acrimony and in an atmosphere of hatred, this will make the chances of reconciliation during the period of iddah impossible, hence the high rate of divorce in the state

b. Pronouncement of Divorce during Menstruation or *Iddah* etc

In some cases, divorces are pronounced while the wives observe their menstruation, or during a state of purity but after sexual intercourse or during *iddah.* Even though divorces in these circumstances are effective, it not in conformity with the teachings of the Prophet (S.A.W);and secondly it is harmful to the divorced

wife as it may prolong the period of her iddah as she will have to start counting her iddah after the completion of the iddah in which she was divorced and in case of divorce during a state of purity but after sexual intercourse, this may cause confusion as may not know whether she is pregnant or not; thirdly the persons pronouncing has committed a sin for which he may be may be punished be God if he fails to repent.

c. Ejection or Parking out of the Divorced Wives from their Matrimonial Homes

Because of the ill- manner in which divorce is effected in the state, the divorced wives are ejected from the matrimonial homes even where they did not commit any offence of indecency. On the other hand, some divorced wives on their own pack out from their matrimonial homes because it is considered a humiliation to continue to live under the same roof with men who divorced them in hostile manners. This practice is a violation of the rule of Islamic law that provides that divorced wives should observe their iddahs in their matrimonial homes and they should not be ejected or packsout unless they are guilty of open act of indecency. Furthermore, this practice is also responsible for the high rate of divorce in the state in that one of the aims of the observance of iddah in the matrimonial homes is to give the husband unreserved access to the divorce wife

to reconcile and revoke the divorce either by words or action. We have seen in this research that about 90% of the respondents to the questionnaire said they observe their iddah in their parents' homes, thereby denying the husband the opportunity to revoke the divorce by action, and even where revocation is effected by words, it is communicated late or denied. In all these instances, chances of reconciliation are lost and divorce recorded.

d. Forfeiture of Maintenance during *Iddah*

The divorced wives by law are entitled to maintenance during *Iddah* but because they are divorced in an atmosphere of acrimony and hatred as a result of which they park out to their parents' home, they lose their rights to maintenance during *iddah* as they many do not even know that they are entitled to it while other see it as a humiliation to claim anything from a husband that divorce them in a humiliating manner. This problem still has it root cause from the manner of divorce against the law and it has overall effect on the chances of reconciliation and increase in the number of divorce in the state.

f. Triple Divorce

In some cases, this research found that divorces are pronounced with an expression that means three divorces at once such as "I divorce you three times" or "I divorce you, I

divorce you, I divorce you". And such pronouncement is treated as three divorces in the state. The research also found that the pronouncers of such divorces do regret their actions without any redress available to them. This is what happened in the cases of *Habiba Muhammad Tisami vs. Abbas Idris Tisami*[294] where the respondent divorced his wife three times but claimed that he meant one divorce and the court following the view of maliki school of thought confirmed the marriage as triple.

This practice of divorcing a wife three times at once is a talaq bid'iy which is not in conformity with the law and the pronouncer of such divorce commit sin. It is a violation of Qur'an chapter 2 verse 229 which reads: "a divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness"[295] Though the Muslim Jurists are not unanimous on whether is counted as one or three, while the majority holds that it is counted as three, some Jurists maintain that it is treated as one; Maliki school of law which is applicable in the state is one of the majority who holds that it is counted as three.

[294] CV/27/12 (unreported) Upper Shari'ah Court Bompai Kano
[295] Abdullah, Y.A. The Holy Qur'an: Text, Translation and Commentary op. cit.p1483

Triple divorce is one of the factors this research found to be responsible for the high rate of divorce in the state because it blocks the chances of reconciliation given to the couples in the event of regret and change of mind. Sticking to this view in all circumstances without considering other factors, circumstances and views, may create hardship for the spouses and may lead to committing abomination.

2. Dispute over Revocation of *Talaq*.

This research found that some divorced wives observe their *iddah* in their family homes, and often a time the husbands would communicate their revocation of the talaq to the wives but the wives would claim they have completed their *iddah* or they may not want to go back to their matrimonial homes. Here, the problem still borders on the observance of iddah in the family home as against matrimonial home decrees by law. The wisdom behind a divorced wife observing her iddah in her matrimonial homes, is to afford her husband essay access to her in order to achieve reconciliation and revocation of the talaq especially by action, but where she is not accessible to him and there is communication gap between the couple as the data shows, the chances of reconciliation is slim in the state and that is responsible for the increasing the number of the cases of divorce in the state

3. Calling of Witnesses to Talaq and *Raja'a*

The difference of opinion among the Muslim jurists on the need to call two witnesses to talaq and revocation of divorce, is whether it is recommended or obligatory and this research found that no witnesses are called to witness talaq and revocation of talaq in Kano state, this makes it easy for the husband to divorce his wife or the divorced wife who is not interested in the marriage to easily deny the revocation and the husband can only establish the case of revocation of talaq in court by two witnesses. In either case, lack of calling of witnesses is responsible for the increasing cases of divorce in the state. In case of divorce, the presence of witnesses would have douse the tension of the husband who wants to divorce his wife as the research has shown that a great number of the divorce in the state are pronounced out of anger. In the same vein, the absence of the witnesses contributes to the high rate of divorce since they are not on ground to witness and or douse the high tension leading to divorces. While in the case of revocation of divorce, the presence of witnesses would save marriage in cases of denial of such revocation by the wife and we have seen in the case of In the case of *Maryam Musa Sauna vs. Husaini Isa Tsamiya*[296] the petitioner sued the respondent claiming that he divorced her and she has completed her *iddah* period but the respondent insisted that he revoked the divorce before the expiration of the *iddah.*

The court ordered the respondent to produce evidence to prove that he revokes the divorce before the expiration of *iddah*. The respondent claimed that the revocation took place between the two of them and therefore has no witness.

[296] CV 138/12 (Unreported), Upper Shari'ah Court, Bompai, and Kano.

The court ordered the petitioner to take an oath of denial to which she declined and the court ordered the respondent to take the oath he also declined. The court held that the *talaq* was not revoked before the expiration of *iddah* and the marital relation between the parties was severed.

4. Ignorance of the Rules of *Talaq*

This research found that in some cases, the husband and the divorced wives do not know the rules governing *talaq*. For instance the research found that some men who divorced their wives do not know it is against the law to divorce her during menstruation and some divorced wives did not know that divorce during menstruation is against the law or that they are entitled to maintenance during *iddah* and ignorance of the rule of talaq is one of the factors responsible for the high rate of talaq in the state.

5. Divorce by Indirect or Conditional Expressions

The research finds that the use of indirect expressions like "Go back to your family" in the dissolution of marriage by the husband is harmful to the wife because the statement could only mean divorce if the intention of the husband is ascertained to mean so. But often at times a husband will ask his wife to go home and she would remain there for a period of six months without her guardian taking steps to ascertain the intention of the husband and the wife will remain in a state of confusion as to whether she was divorced or married to the husband with the attendant harm befallen her as she could not contract a fresh marriage and where the husband confirms that his intention was divorce after six months, the divorced

wife will have to observe *iddah* from the day of confirmation as can be seen from the case of *Rabi Salisu Zango Dakata vs. Muhammad Haruna Gayawa*[297] where the petitioner was divorced by the respondent by indirect expression "Go to your family" and she spent six months at home before she instituted an action in court to confirm the intention of the husband who said he meant divorce and she observed her *iddah* after having waited for six months.

Thus while the use of indirect expression may not in itself be in contravention of the law, failure to take necessary steps when the expression is used may be in contravention of the law and it is this failure that is responsible for the high rate of divorce in the state as could be seen in the case of *Rabi Salisu Zango Dakata vs. Muhammad Haruna Gayawa*[298] cited above.

Furthermore, the use of conditional expression though permissible by law is also responsible for the high divorce in the state especially where the expression "If your go out of this house, consider yourself divorced", here the husband makes the exercise of his right to restrict the movement of his wife a condition of divorce and because of the existing dispute, the wife will disobey his order which will result into divorce

6. Traditional practices.

a. Divorce Resulting from the practice of returning home by the Wives Due to Misunderstanding

[297] CV/132/12 (unreported) Upper Shari'ah Court Bompai, Kano
[298] Ibid

This research has found that married women do relocate to their parents' homes whenever they have serious disputes with their husbands it, and the husbands is expected to visit the parent for possible settlement of such disputes; where the husband visits and the disputes are resolved the law may not be against it but where he refuses to visit; the wife will consider it a shame to return to her matrimonial home and the only option left for her would be to file a case in court for the dissolution of her marriage as can be seen in the case of In the case of *Saadiyah Sani Haye vs. Akilu Ahmed Jarimawa*[299] the petitioner parked out of her matrimonial home because of the misunderstanding she had with her husband (the respondent) who did not go to her parents for settlement. She petitioned for divorce. The court gave them time to settle. The petitioner informed the court that the settlement failed and the respondent was asking her to pay N20,000 as ransom to gain her freedom from the marriage. The petitioner told the court that she was ready to pay N10,000. The court dissolved the marriage and ordered the petitioner to pay N15,000 as ransom.

The practice of the bride relocating to her family house to the extent that it results into divorce is in contravention of the law as it is responsible for the high rate of divorce

b. Another traditional practice that the research finds that is also responsible for divorce in Kano state, is the use of the words "Dan *halal*" this word is used by the parent of the groom especially the mother to challenge the groom to divorce

[299] CV/246/12 (unreported) upper shari'ah court, Bompai, Kano.

his wife where the mother feels that the brides offends her. "Traditional practice is also responsible for divorce in Kano state, practice such as the use of the words "Dan *halal*" this word is used by the parent of the groom especially the mother to challenge the groom to divorce his wife where the mother feels that the brides offends her. "Dan *halal*" means legitimate son, that is, if you are a legitimate son divorce your wife. The groom being afraid of being called illegitimate son succumb to the blackmail of his parent and divorces his wife.[300]

This practice has also been found by this research to be in contravention of the law as the hadith of Abdullah bn Umar such parents seem to rely on may not avail them[301]

8. Pronouncement of Divorce under the Influence of Anger and impatience

The research also finds some cases of divorce in Kano state arising from the influence of anger and impatience. Anger in some cases leads so many who divorced their wives to pronounce triple divorce at a sitting and thereafter regretting their actions. Anger is one of the factors the research found to be responsible for the high incidence of divorce in the state and this is also in contravention of the law.

9. Imposition of Marriage Partners on the Intending Couples

The research has also found that the practice of imposing marriage partners on the couples by their parents against the couples' will is not only responsible for

[300] The Board expresses this view through its Marriage Counselor Malam Soroma on the 15th March, 2013 in his Dakata Command Office.
[301] See pages 89 and 90 Infra

divorce in the state but it results in commission of other heinous crimes, like the bride killing herself, absconding and engaging in prostitution or even killing of the groom[302]The parents that indulge in this practice always tend to rely on the view of Maliki School that authorizes father or his representative to give in marriage the hands of their young and virgin daughters without their consent[303] without regard to the intendment of the law which seeks to protect such young and virgin daughters, who are inexperienced in worldly matters. The father is vested with the power because of his experience and maturity in knowing what is the best for the daughters. But unfortunately, the fathers are being beclouded in choosing suitors for their daughters by other worldly consideration like how rich is the suitor etc with little or no regard for religious considerations and the courts in Kano state have also been applying this principle of Maliki law to affirm the practice in the face of clear Prophetic traditions which prohibit such practices. Abu Hurairah reported the prophet (s.a.w.) as saying: "A woman who has been previously married should not be married until her permission is asked, nor should a virgin be married without her permission" The people asked: What is her permission Apostle of Allah? He replied "it is by her keeping silent"[304] In another *Hadith* narrated by Ibn Abbas who said "A virgin came to the Prophet (s.a.w.) and

[12]See Page 83, The Kano State Hisbah Board also Expressed the same view in an interview with this Writer in their Office

[303] Al-jaziriri, A. *Kitabul-fiqhi alal Mazhabul-Arba* Vol.4, 7th Ed., Darel Kitab al-alamiyya, Beirut, (N.D) p.33

[14]Hasan, A. *Sunan Abu Dawud*, Vol.2,Kitab Bhavan, New Delhi,(1990), p.560

[15] Ibid, p.561

mentioned that her father married her against her will, so the prophet allowed her to exercise her choice[305]

10. Excessive jealous by the Wives

The research also found that first wife exhibition of excessive jealous when her husband intends to marry another wife is one of the factors that are responsible for of divorce in Kano state. Excessive jealous is also in contravention of the law as the always encourage moderation in all things.

11 Failure to employ dispute resolution mechanism.

The research also discovers that one of the reasons responsible for the high incidence of *talaq* in Kano state is the fact that husbands who felt offended by their wives rush to pronounce *talaq.* They do not seek compromise and reconciliation or take corrective measures provided by sharia in the following orders: admonition, suspension of sexual relation, non-injurious beating and lastly arbitration or family council.

12 Deprivation of Divorced Wife her Right to Custody of Children

The research also found that there are cases of husbands who divorced their wives and turn around to snatch the children unjustly from the divorced wives in contravention of the rules of the shari'ah in the state. Sometimes it is the divorced wives that leave the children and refuse to have the custody as a form of "punishment" to the husband. In either case the children suffer as they lack parental love and care which will ultimately

affect their upbringing with its attendant negative consequences and social problems such as juvenile delinquency, prostitution by young ladies, drug abuse by youth and begging for the society.[306]

Furthermore, even where the divorced wives have the custody of the children, the amount awarded by the courts in grossly inadequate to sustain a healthy growth and development of the children which can also have negative impact on the children and the society at large

13 Absence of Sanctions for Violation of the Rules of *Talaq*

The research finds that the view of the Muslim Jurists to the effect that a person that divorces his wife in contradiction of *sunnah* commits only religious sins without any sanctions attached thereto appears to be responsible for many husbands who violate the rules of *talaq* in the process of divorcing their wives and that is another reason why the incidence of divorce is very high in the state as no sanction whatsoever is applied by the courts against the violators of the rule of talaq. It is in human nature that some may obey the law without sanction while a great number of others would not without it. The Hadith of Ibn Umar where he divorced his wife in contravention of the law and the Prophet said "Order him to take her back...."[307] shows example of application of sanction. The *Hadith* of Aisha (R.A.) which reported the Prophet said, "Any deed that is not in accordance

[306]www.alafrica.com.nigeria:why divorce rate is high in Kano 10th September, 2014
[307] Muhammad, M.K., op. cit. p.146

with our affairs (i.e. Islam) is rejected"[308] is another basis for the application of sanction against the violator of divorce in the state.

Furthermore, other example of instances where sanction can be applied to serve as deterrence for others can be found in the views of the Muslim Jurists. Maliki and Hanafi jurist subscribe to the view that it is obligatory for the husband that divorces his wife in her menses or during the post natal blood to take her back. Maliki Jurists hold further that where he refuses to do so (in cases of first and second talaq), he should be threaten to do so by means of arrest or beating. And where he persists, he should be beaten and detained, if he still refuses to return her, the judge should do so on his behalf and he is at liberty to divorce her after the completion of the menses or post natal blood without having sexual intercourse with her.[309] But the Hanafis hold that the Judge has no right to take the wife back on behalf of the husband he should rather impose suitable punishment on him to serve as deterrent to others.[310]

5.3 Recommendations

In the light of the above observations, the following recommendations as a solution to the problems are suggested:

(a) Mass Enlightenment

There is the serious need for mass enlightenment of the Muslim public about the rules of the shari'ah regarding *talaq* because some of the cases of

[308]Sabiq, S., op. cit. p.266, Hussaini, U. op. cit. p.71
[309]Usman, H. Sirajus-Salik, Vol.2,Darul-Fikril, (n.d) p.71
[310]Abdur-Rahman, A. al-FikhuAlal-Madhal-Ar'ba'a, 2nd Ed., Darul-Fijril,Cairo, (n.d) p.277-9

talaq arise out of the ignorance of the persons pronouncing them. To this end it is recommended as a first step that the Muslim scholars should take advantage of the mass media to intensify their efforts in educating the Muslim public about Muslim family law, with particular emphasis on the remedies available to the vulnerable and oppressed ones. This will address cases of pronouncement of *talaq* in an atmosphere of acrimony, divorce during menstruation or other general state of impurity, ejection of the divorced wives from their matrimonial homes or observance of *iddah* by the divorced wives in their family houses, loss of chances of reconciliation, forfeiture of maintenance during *iddah*, snatching of the children from the divorced wives, excessive jealousy by the first wife and triple divorce, thereby reducing the high rate of divorce in the state .

b. Divorce in Compliance with Sunnah

Where there is enough enlightenment and education of the Muslim public about the rules of talaq, It is suggested that persons pronouncing talaq in the state should fear Allah by strictly adhering to the teachings of the Prophet in effecting divorce because divorce in compliance with law will earn the pronouncer a reward and It (talaq according to sunnah) has the ability to reduce to the barest minimum high incidence of talaq in the state. For instance the process of talaq Sunniy is that it is one single divorce with kindness at the first instance, followed by a revocation, then another divorce at a second instance that can also be followed by revocation, and after each divorce, the husband will keep the wife under the same

roof, provide for her needs, this may change the situation favourably as he may reconcile with his wife thereby saving the marriage that would have collapsed on a single pronouncement of bid'iy talaq

(c) Sanctions for the Violators of the Rules of *Talaq*

The government has important role to play in the compliance of the to the rules of *talaq* by the divorcing couples, because family is the first unit of the society and failure of that unit means failure of the entire society. To this end it is recommended as a second step that government should, by law, provide adequate sanctions for the violators of the rules of *talaq*. The law should provide remedy where the divorced wife is treated unjustly. The sanction may include payment of "mut'a" to the divorced wife at the point of divorce. The legal basis for this recommendation is Qur'anic verse 2:241 which provides "For divorced women, maintenance should be provided on a reasonable (scale).This is a duty on the righteous"[311]

Ibn Jarir (a famous Qur'an commentator) while commenting on this verse explains that every divorced woman is entitled to mut'a upon her divorce. He said that mut'a means what a divorced woman will need to live

[311] Abdullahi, Y.A., op. cit, P. 98

a comfortable life after divorce in terms of clothing, accommodation, feeding and house help.[312]

Furthermore where a clear case of violation of the rule of talaq is established, a law should be made to provide remedy. For instance where the husband divorces his wife and ejects her or where she packs out of the matrimonial home without committing act of indecency, she should be ordered to return; or where she is divorced during iddah, she should be returned; or she is denied maintenance during iddah, she should be reimbursed. The order of the prophet (S.A.W.) to Ibn Umar (R.A.) to return his wife whom he divorced during menstruation contrary to sunnah[313] is a good basis for sanctions for violators of rules of talaq today and most importantly, sanction will make people to obey the law and that will have the effect of reducing the high incidence of talaq in the state.

(d) TimelyConfirmation of the Intention of the Husband where he uses Indirect Expressions to effect Divorce

Where a divorce is effected by indirect expression, such as "Go to your family" it is suggested that the guardian should immediately call the husband to confirm his intention so that the wife can know her fate on time; that is whether she is divorced so that she can commence her iddah immediately or married so that the misunderstanding can be settled

[312]Abija'afar, M.J Jami'ul Bayan, Vol. 2 Darel Fikri, Beirut, (1998), pp. 790 – 792.
[313]Muhammad, M.K., op. cit, P. 146

amicably. Thus timely intervention of guardian in these cases can also have the effect of resolving marital disputes and save marriages from divorce thereby reducing the high rate of divorce in the state.

Furthermore, it is recommended that couple should exercise caution and restraint in the use of conditional expression for divorce. The husband should be circumvent in making the exercise of his right a condition of divorce and the wife should not disobey the lawful orders of her husband whether in peace or conflict time this will go a long way to reduce to barest minimum the high rate of divorce in the state.

In the same vein, it is also recommended that married women should exercise restraint and be moderate in the exhibition of jealous when their husbands want to marry other wives as this will also have the effect of saving marriages and reduce the high rate of divorce in the state.

(e) Calling of Two Witnesses to Witness *Talaq* and *Raja'a*

Marriage involves so many processes and requirements, one of these processes is the involvement of family members either as guardian or witnesses but in terms of divorce, it seems to be the husband's affairs where he and he alone decides when to terminate what the whole family had built. The view of the *Zahiri* and *Shi'a* schools to the effect that calling of two witnesses is mandatory should be adopted and made a law. This may have the effect of reducing the incidence of *talaq* as many *talaqs* are pronounced out of anger as the presence of two witnesses may douse the anger. The

view that two witnesses should be called to witness revocation of divorce if made a law will also have the effect of eliminating the disputes arising from the cases of denial of such revocations thereby saving such marriages and thereby bringing to a barest minimum the rate of divorce in the state.

(f) Amendment of the Exercise of the Power of Ijbar and the Rules of Triple Divorce

The Maliki law of coercive power to give the hands of young and virgin daughters in marriage without their consent should be amended to checkmate cases of abuse by the parents and where a case of abuse is established; the consent of the bride should be first sought and obtained before the parents can marry them off. This will go a long way to prevent the abuse by parents of the exercise of the power of *ijbar* and it will save the evils associated with the practice thereby reducing the high rate of divorce in the state.

In the seam vein it is recommended that government should take another look at the rule of triple divorce which makes it three divorces and foreclose the chances of reconciliation in case of regret thereby raising the bar of divorce in the state, and in its place the minority view of the Muslim Jurists which consider triple divorce as single divorce should be adopted as this will go along way to reduce the high rate of divorce in the state

(g) Increment of the maintenance Allowance to Children

The ridiculous amount being awarded by the court as maintenance allowance children under the custody of the divorced wives should be addressed by government by enacting law to reflect the prevailing economic reality. Furthermore, it is suggested government should enact a law that will make forceful taking of the children from the custodies of their mothers or refusal to have custodies by the mothers after divorce a criminal offence to address the lack parental love and care which may affect their upbringing and its attendant negative consequences and social problems such as juvenile delinquency, prostitution by young ladies, drug abuse by youth and begging for the society

(h) Practice of Arbitration and Family Council

The husband should take advantage of dispute resolution mechanism provided by law to resolve marital conflicts in this order- admonition; immigration from bed: and non injurious beating. Furthermore, the practice of family council or arbitration where two arbitrators are appointed to settle dispute between the spouses should be implemented through legislation by the government this will go a long way to nib in the bug the disputes that result into divorce thereby reducing the high incidences of divorce in the state to a barest minimum.

(i) Marriage Counselors

Marriage councilors comprising of elders who have practical life experience and knowledge in Islamic family law should be set up by the Government in every community of Kano state to settle marital dispute as it may arise. This will go a long way to save the couples the publicity and expenses associated with litigation. Couples should form the habit of reporting disputes to guardian for quick resolutions.

The effort of the Kano state Hisbah Board in settlement of marital disputes and in organizing marriages for divorcees and widows is highly commendable.

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LL.M RESEACH TOPIC: ***AN APPRAISAL OF THE LEGAL BASIS AND CONDITIONS OF TALAQ UNDER ISLAMIC LAW: KANO STATE AS A CASE STUDY***

QUESTIONNAIRES FOR DIVORCEE

INTRODUCTION

The questionnaire intends to elicit information about the practice of divorce in Kano state. The responses taken from the questionnaire will be treated as confidential and solely be used for academic purposes

Instruction: Among the options provided in the instrument, you are requested to chose an option that best describe your experience as a divorcee

1. What is your local government? ----------
2. Have you been divorced before?_____ (a) yes (b) no
3. How many times have you been divorced?_____ (a) once (b) twice (c) trice
4. What was the nature of the divorce? (a) one after the other (b) triple divorce at a sitting
5. In case of triple divorce, did you marry your ex- husband again?_____ (a)no (b) yes I married him after I married another person who divorced me.
6. When were you divorced? _____
   (a) During menstruation
   (b) During a state of purity
   (c) During a state of purity but after sexual inter-course
   (d) During iddah.
7. Do you know that only divorce during the period of purity before sexual intercourse is in accordance with the law? _____
   (a) Yes
   (b) No

8. Do you also know that divorce during menstruation, or during iddah, or state of purity but after sexual intercourse is against the law?---------- (a) yes (b) no
9. How were you divorced?---------- (a) with kindness (b) with hostility and resentment
10. Did you observe iddah after your divorce?_____ (a) yes (b) no
11. Where did you observe your iddah?_____ (a) at my matrimonial home (b) at my parent home
12. Why did you observe your iddah in your parent's home? Because_____ (a) because my ex-husband ejected me (b) I left on my own
13. Why did you leave to your parent's home to observe iddah because—__(a) it is the custom (b) it is considered a disgrace and humiliation to observe it in matrimonial home
14. Were you maintained by your husband during your iddah?_____ (a) yes (b) no
15. Do you know you have right to maintenance from your husband after divorce?_____ (a) yes (b) no
16. In case of triple divorce, how was it treated or counted?_____ (a) it was counted as three divorces (b) it was counted as once divorce
17. Was your divorce revoked during iddah?____ (a) yes (b) no
18. How was the revocation effected?_____ (a) by expressed words (b) by action (c) by phone call (d) by delegation /messenger

20. Do you accept or refuse the revocation of your divorce? (a) I accept it (b) I refuse it

21. Why did you refused it? (a) because I ve already finished my iddah before he notified me (b) because I don't want to marry him again.

22. Did your ex-husband called witnesses to the revocation to your divorce?_____ (a) yes (b) no
23. How was your divorce effected? ----------
    (a) by writing
    (b) by verbal pronouncement
    (c) by sign or gesture
    (d) Through messenger
24. How were you divorced? _____ (a) by direct expression (b) by indirect expression (c) by conditional expression

25. Have you ever relocated to your parent's home as a result of misunderstanding with your husband?_____ (a) yes (b) no
26. Did your husband visit your parent for settlement?_____ (a) yes (b) no
27. When he did not visit, what do you do (a) I filed a case in court for separation (b) I remain in my parent home
28. How many children did you have with your ex-husband when he divorced you?_____
29. What are the ages of children_____
30. Who have the custodies of the infant children of the marriage after divorce and why (a) My husband because (a) he denied me the right to their custody (b) I refused to have the custody to serve as a punishment for him. (c) I have the custody of the children
31. Where you have the custody of the children did your ex-husband pay for the maintenance of the children?_____ (a) yes (b) no
32. Did he pay you wages for the custody of the children (a) yes (b) no
33. Did you suckle your baby by yourself or a wet-nurse suckle for you?___ (a) I suckle myself (b)wet-nurse suicide my baby for me
34. Did your ex- husband pay you wages for suckling the baby after divorce?____ (a) yes (b)no
35. Did your husband take disciplinary measures in terms of admonition, desertion in bed, beating before divorcing you? (a) yes (b) no
36. Were you ever divorced by the arbiters appointed by a judge as result of the conflict between your husband?_____ (a) yes (b) no
37. What was the reason why your husband divorced you?_____ (a) as a result of irreconcilable differences (b) No cogent and justifiable reason (c) because of excessive jealous (d) because of the influence of his parents (e) lack of patience.
38. What was the state of mind of your husband when he divorced you (a) he acted under the influence of drug (b) he acted under the influence of his parents (c) he was under compulsion (d) he acted in jest (e) he acted by mistake (f) under excessive anger (g) he divorced me in his death sickness.
39. Did your husband call witnesses to your divorce?____ (a) yes (b) no