TERMINATION OF MARRIAGE AND ITS LEGAL CONSEQUENCES UNDER ISLAMIC LAW

BY

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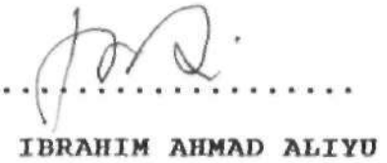
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ZARIA.

DATE; August, 1996

DECLARATION

I hereby declare that this project has been produced by me. It has not been presented on any previous application for a higher degree. All quotations are indicated in the footnotes and sources of information are duly acknowledged by means of references.



.....

IBRAHIM AHMAD ALIYU

CERTIFICATION

This thesis entitled **TERMINATION OF MARRIAGE AND ITS LEGAL CONSEQUENCES UNDER ISLAMIC LAW** by Ibrahim Ahmad Aliyu meets the regulation governing the award of Doctorate of Law {P.hD} of Ahmadu Bello University, Zaria, Nigeria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This study is dedicated to the Practising Muslim Scholars without whose references, this work would not have been a reality.

ACKNOWLEDGEMENT

All praise is due to Allah who imparted into man the power of expression. I am grateful to Him for enabling me to write this thesis in the present hard condition.

In the process of writing this thesis, several people have helped me tremendously who are too many to be mentioned and is thus not possible for me to give an exhaustive list of them. However, I will mention very few of them by names with the hope that those whose names have not been mentioned will not feel offended.

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I am solely responsible for all the shortcomings and errors in this thesis for which I pray Allah's forgiveness because they have not been committed intentionally. May He forgive us all our errors and shortcomings for He is oft-Forgiving, Most Merciful.

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ABSTRACT

Even though marriage, under Islamic Law, is not meant to be a temporary affair, the reality of life shows that some marriages are better terminated, because the objectives for which marriage has been instituted cannot be achieved through them. Thus, terminating such failed marriages is allowed so as to protect the welfare of the community ad social morality.

Since the Shari'ah has allowed the termination of any marriage which has not achieved and cannot achieve its objectives, it provides detailed explanations regarding the circumstances and rules of terminating such marriage and anything that appertains to that.

But unfortunately the vast majority of Muslims, in our society, are ignorant of these rules, especially the rules that deal with talaq (divorce), Khul (divorce with consideration), termination of marriage by judicial process, iddah (waiting period before re-marrying) and hadanah (custody of children after termination of marriage). The result is, in most cases, depriving some of the spouses, especially the women, of their legal rights which consequently has a serious repercussions not only on the spouses or their immediate family, but also on the society generally.

The worst part of it is that even the judges to whom most of

the cases of terminating marriage are brought are more often than not, not well-versed in or are totally ignorant of many of these rules. The undesirable consequences of this is that, many cases (regarding termination of marriage) are wrongly decided by these judges, thereby committing a serious injustice to some of the spouses, especially the wives, regarding their rights to maintenance during the iddah, or their rights to hadanah and Khul What usually exacerbates the injustice is the ignorance of the spouses regarding their rights.

In view of the above and similar reasons, there should be a detailed work, based on the original and detailed (Arabic) sources, dealing with termination of marriage and its legal effect, under the shari'ah (without confining this to one particular madhhab), in the language that many of our literate Muslim brothers and sisters understand so that they know much of these rules. This may hopefully help in mitigating most of our problems emanating from ignorance of the rules. Hence the choice of the topic of this thesis.

Chapter one of the thesis is the general survey on the islamic conception of marriage and its termination. The chapter also discusses the differences between talaq (divorce) and faskh (annulment of marriage) and the legal implication of the differences and the circumstances when termination is legally considered as talaq and when it is considered as faskh.

Then the thesis is divided into two parts: part I deals with the procedure of talaq and under it: chapter two deals with talaq, its definition, and wisdom for legislating it, the extent of each of the spouses rights regarding it. It also deals with capacity of the person effecting talaq and the subject matter of talaq methods of effecting divorce and witnesses in divorce.

Chapter three discusses the question of making talaq subject to certain conditions and delegating power to someone to divorce by the husband. Various views of schools of jurisprudence, especially Maliki and Hanafi schools regarding the issues, are extensively discussed.

Chapter four deals with classifications of talaq: Talaq sunni, talaq bid'iy and tripple t a l a q , tlaq raj'iy and talaq ba'in. Revocation of talaq after effecting it by the husband is also dealt with in the chapter, extensively.

Chapter five is an extensive exposition of khul (Divorce with consideration) and its legal effect; court's role in it and capacity of the parties to it; and whether khul is legally considered as talaq or faskh.

In chapter six termination of marriage through judicial process is extensively discussed. In it, the grounds for such terminations are expounded.

Chapter seven deals with termination by means of ila (vow of continence) and li'an.

Zihar is also dealt with even though is not actually a termination. But it was historically considered as termination and it also creates a temporary prohibition of conjugal relationship between the spouses until the husband performs exiation (kaffarah).

Part two of the thesis is a detailed exposition of the legal consequence of termination of marriage. Under it chapter eight deals with iddah (waiting period which is observed by a divorcee before she marries). The philosophy and various types of iddah, the wife's right to nafaqah (maintenance) during the iddah, are thoroughly discussed.

Chapter nine is the extensive exposition of rada (suckling) and hadanah (custody of children) after talaq., The question of payment to child's mother for suckling the child after separation from the child's father, and who is entitled to have the custody of the child after divorce, and who is responsible for paying the expenses of the hadanah, including the remuneration of the custodian and provisions for accommodation and servant are all discussed.

Chapter ten is the summary of what has been discussed in the

main body of the thesis, observations of what is practically obtaining in our society concerning termination of marriage and some recommendations, which will hopefully help in solving problems concerning termination of marriage (in particular) and marriage itself, in general.

Alhamdu Lillah.

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3. Sarkin Fulani Vs. Alhaji Dahiru Dayi, Sharia Law Report (1980) Centre for Islamic Legal Studies, Vol. 1, No.1 at p.9.
4. Hadiza Abubakar Kawara Vs. Atiku Direba, Unreported case. Appeal No. SCA/JG/876/88.

ABBREVIATIONS

AS - Alaihis-Salam (meaning May Peace be Upon him)

bn. - Ibn (meaning the son of)

HHS - How High soever

i.e. - which is to say (from Hornby, A.S. (1974) Oxford Advanced Dictionary of Current English, Oxford University Press)

n.d. - No date

R.A. - Radiyallahu ʿAnhu, or "ʿAnha," or "Anhuma" or ʿAnhum (meaning: may Allah be pleased with him or her or them (dual) or them (plural).

S.A.W. Sallal Lahu ʿAlayhi Wasallam, meaning: May the blessing and peace of Allah be upon him).

S.W.T. Subhanahu Wa Taʿala, meaning: The glorified and Exalted one.

GLOSSARY

Adha	-	Harm or injury
Ahadith	-	is the plural of hadith which means the reprted speech of the Prophet Muhammad (S.A.W.)
A'immah	-	The plural of imam and imam is in the context used in this thesis a leader of a school of Islamic jurisprudence.
Ajnabi	-	A person with whom there is no any relation between him/her and another person that creats legal prohibition in marriage.
ʿAma	-	Blindness
Amirul Muminin	-	(Commander of the faithful). Title with which Muslim leader is addressed. The first Muslim leader to be addressed with the title is Umar bn. Khattab, the second caliph.
ʿAgar	-	Immovable property
ʿAqdu muʿawadah	-	Commutative contract
ʿArj	-	Lameness
Badha	-	obscenity
Ba'in	-	Irrevocable (divorce)
Baras	-	Leucoderma
Batil	-	Void

Iglaq	-	Excessive anger
Ihdad	-	Mourning
Ijhhad	-	Efforts by Muslim jurists to deduce rules of shari'ah from their detailed evidence in the sources.
Ila	-	Vow by the husband that he will abstain from sexual intimacy with his wife for a period of at least 4 months.
Innin	-	Somebody who suffer from unnah and unnah means the shortness of of male organ in such a way that penetration with it is impossible.
Isnad	-	Chain of narrators in a hadith
Istibra	-	a period after committing zina, or having sexual intercourse with some man mistakenly, for which a woman must wait before she can marry, so as to inter alia ensure that there is no confusion about the paternity of children.
'iwad	-	exchange and in business contract transaction it means consideration
Judham	-	Leprosy
Junun	-	Insanity; lunacy

Kaffarah	-	expiation. And kaffatul yamim, is a special expiation performed for an oath (to do something or not to do without fulfilling it.
Kaffaratul yamin		Expiation of oath
Kasbun	-	Earning a leaving
Khalwah sahihah	-	The meeting of spouses with each other, after contracting a valid marriage, in a secluded place where they are confidently certain that nobody can come in or even discover their presence, and at the same timone of them has any physical or legal impediment that may prevent them from sexual intercourse.
Khilaful-awla	-	inapproapriate
Khisa	-	Castration and khissiy is the person who has been imptent
Khul'	-	termination of marriage at the instance of the wife in lieu of a consideration payable to the husband.
Kitabiyya	-	Jewess or christian woman.
Li'an	-	Literally, mutual cursing, is legally an oath taken five times by each of the spouses, when the

husband accuses his wife of committing adultery but he has no witnesses to establish the accusation.

Madhhab (Plural is Madhahib) school of Islamic Jurisprudence

Madhhab	-	School of jurisprudence
Mafqud	-	Missing
Mafsadah	-	Evil
Majbub	-	Someone whose male organ jubb and testicles have been amputated.
Mahjur ʿalayh	-	a person who is legally interdicted.
Mahrim	-	A person with whom marriage is prohibited. The plural form is maharim.
Majlis	-	Meeting place
Mandub	-	recommendable
Manfaʿah	-	Asufruct
Manqul	-	Movable propery
Maradul-Mawt	-	death-sickness
Mashi'atul-lah	-	wills of Allah
Maslahah	-	Exisgency, interest
Muʿallaq	-	conditional
Muʿtarid	-	Someone who suffers from i'tirad
Mu'amalat	-	Civil transaction
Mubah	-	lawful

Mudaf	-	suspended
Muharram	-	prohibited
Mujtahid	-	a jurists who is qualified to exercise ijtihad
Mumayyiz	-	A rational person who, though has not attained majority, has the capacity to distinguish between right and wrong.
Munajjaz	-	unconditional (effectuated and accomplished)
Muqim	-	someone who is not undertaking a journey
Murtaddah	-	Female apostate
Mutarakah	-	Seperation
Mu'sir	-	Insolvent
Musir	-	Solvent
Musnad	-	any book of hadith collection arranged according to the names of the Companions on whose authority the ahadith were transmitted. It is also used to mean any hadith of unbroken isnad.
Mutaqawwam	-	Inviolable property
Muwakkil	-	The principal (who delegates his poer or authority to another or others).

Nafaqah	-	maintenance
Nifas	-	Confinement (after delivery of child)
Nukul	-	Refusal
Qadhf	-	False accusation
Qira'ah	-	Recitation
Qisas	-	Retaliation
Qiyas	-	Analogy (which is one of the sources of Islamic Law).
Raj'ah, (muraja'ah)		revocation of divorce
Raj'iy	-	Revocable divorce
Rashidah	-	rational (female gender), male gender is rashid.
Rukshah	-	Concessionary rule
Sabab	-	Cause
Sadaq	-	dower; marriage-portion
Saddudh-Dhari'ah		blocking the means of committing an evil
Sahih	-	Valid
Salaf	-	Venerabe predecessor Muslim scholars
Sharifah	-	A woman of high status
Shiqaq	-	dissension or discord
Shubhah	-	judicial error
Sukna	-	Accommodation
Sultan	-	leader of Islamic Government

Sunnah	-	Sayings, practices or approval of others' saying or action by the Prophet (S.A.W.).
Tabarru'	-	gratuitious disposition of property
Tabi'un	-	The followers of the Companions of the Prophet (S.A.W), i.e. generation after them.
Tabarrnuj	-	Displaying woman's charm
Takhlit	-	Indiscriminate intermingling especially between the oppostie sexes
Talaq	-	Divorce
Tarsh	-	Deafness
Thayyib	-	A matron, that is a woman who though previously married is not, at the moment, married.
Tuhmah	-	Suspecion
Tuhur	-	State of purity
Ujrah	-	Wages
'Ulama (singular Alim)		Muslim scholars
Ummah	-	community
Usulul-Fiqh	-	The principles of Islamic jurisprudence
al-'Uyubut Tanasuliyyah		-Defects of reproductive orgqans.
Wajib	-	obligatory
Waliy	-	Guardian

Wakil	-	Agent
Wikalah	-	Agency
Wilayah	-	Guardianship
Yamin	-	Oath
Zawajul Mut'ah	-	Temporary marriage
Zina	-	adultry (fornication)

Abdurrahim also subscribes to this view. That is why he writes:

> The Muhammadan jurists, therefore, regard the institution of marriage as partaking both of the nature of ibadah or devotional act and Mu'amalat or dealings among men. It is founded on contract for which the consent of both the parties is essential.[4]

Some other scholars like Shukri asserts that marriage is a "Sacrament in so far as in this world; it is an act of worship for it preserves mankind from pollution; it is an institution ordained for the protection of society in order that human beings may guard themselves from unchastity.[5]

From all that has been said, it is clear that the moderate view, i.e. the one according to which marriage has two elements of contract and sacrament, is the cogent one. This is because the fact that marriage is a contract cannot prevent it from being a sacrament or an act of worship. There are ahadith to the effect that he who marries completes half of his religion. Conversely, the fact that it is an act of worship, cannot prevent it from being a contract, because it has elements of contract, especially agreement of the parties and dissolubility.

1 .2 Termination of Marriage According to Islam: General Survey

Since Marriage, in Islam, is not a temporary union, every effort to keep it intact, must be made. Thus anything that may weaken and contaminate it, is highly condemned by Islam. It was narrated by Abu Dawud and Nisa'i, on the authority of

Abu Hurairah (R.A) that the Prophet (S.A.W) was reported to have said, "Anyone who incites a woman against her husband, is not one of us"[6]

It was also narrated by Abu Dawud and al-Hakim, on the authority of Ibn Umar, that the Prophet (S.A.W) was reported to have said, "Of all the lawful acts the most detestable to Allah is divorce."[7]

However, where all hope of love and companionship between the spouses is gone and the marriage thus fails to achieve its objectives, no insistence should be made to keep the wnwilling partners tied together, despite their mutual hatred and distrust of each other. It is in their interest and in the interest of the society that their separation be permitted. In this matter, the Islamic law has maintained a balance between its concern for the demands of human nature and its regard for the preservation of the good social order of the society. Islam keeps the door of separation open but not as wide-open.[8]

1.3 Categories of Termination:

Termination of Marriage is of two categories:

1. Termination which is Talaq
2. Termination which is faskh

However, the Muslim jurists are of different views as to which termination can be regarded as talaq and the one which can be regarded as faskh. Thus, according to Maliki jurists, any termination that occurs after a valid marriage, is legally considered as talaq, except where it is effected as a result of something extraneous (i.e. incidental) which causes permanent prohibition. Moreover, there is distinction between termination effected at the instance of the husband or his agent and the one effected at the instance of the wife or the judge.

Where the termination is effected after an invalid marriage, then if there is unanimity regarding the invalidity of the marriage, the termination is considered as faskh. The examples of such termination are:

i) termination effected after zawajul-mut'ah (temporary marriage);

ii) termination effected after marriage with one of the prohibited women for reason of consanguinity, affinity or fosterage;

iii) termination effected after marriage with a woman observing iddah (at the time of contracting the marriage), etc.

However, if there is no unanimity regarding the invalidity of the marriage, then the termination is considered as talaq but not faskh.

i) termination effected after a marriage which has been contracted without a waliy (marriage guardian), in which the woman gave her hand by herself in marriage. Such marriage is invalid, according to Maliki School, but valid, according to the Hanafi School;

ii) termination effected after a marriage in which the husband urged the witnesses to conceal any information about the contract. (This is what is legally called Zawajus-Sir, Secret marriage). This kind of marriage is invalid, according to Maliki School, while it is valid, according to other Schools. Any separation that follows such marriage is legally considered as talaq."

1.3.1 When Termination is Talaq:

On the basis of the foregoing explanation, termination is legally considered as talaq in the following circumstances:-

(a) Where a valid or invalid marriage regarding the validity of which the Muslim jurists differ is terminated through an expression which is legally normal.

(b) Where a valid or invalid marriage regarding the validity of which there are juristic differences, is terminated through an expression by virtue of which the termination becomes khul'.

(f) Where the marriage is terminated for reasons of lack of nafaqah (maintenance), absence of the husband or his cruelty and ill-treatment to the wife.

(g) Where termination is effected for reason of apostasy of one of the spouses.

The termination in all of the above-mentioned cases takes place after a valid marriage contract, as a result of some incidental reasons. And as it has already been explained, any termination subsequent to a valid marriage or invalid marriage regarding the invalidity of which the Muslim jurists differ, is legally considered as talaq[11]

1.3.2 When Termination is Faskh

Termination is considered faskh in the following circumstances:

(a) Where the termination is effected due to the fact that it has become evident that the marriage was invalidly contracted, such as where it has been realized that the "wife" is a sister to the " husband." (This rule is applicable whether the relationship is for reason of consanguinity or affinity or fosterage); or that the woman is another's wife; or that the marriage has been contracted before the divorced woman's Iddah expired.

(b) Where the termination is effected for reason of the occurrence of an incident which creates permanent prohibition such as where one of the spouses has had sexual relationship with one of the ascendant or descendants of the other spouse, such that creates affinal prohibition, that is sexual relationship by reason of shubhah (judicial error).

(c) Where termination is effected for li'an (recrimination) This is because permanent prohibition is one of the legal consequences of li'an, by virtue of a prophetic tradition in which the Prophet (S.A.W) was reported to have said, "The spouses who are evolved in a case of li'an shall never meet (by way of marriage) for ever."[11]

However, Abu Hanifah is of the view that such termination is irrevocable divorce, because it is always effected at the instance of the husband and that any termination of this nature is legally considered as talaq and not faskh.[12]

(d) Where the marriage is terminated as a result of the refusal of the husband to embrace Islam after the wife had done so, or the wife who is not a kitabiyyah (i.e. Christian or jewish woman) refuses to embrace Islam while her husband had done so. This is so because if a wife becomes a Muslim and her husband refuses to do so, she is legally prohibited to him. However, this is not

applicable except after calling the husband to Islam and his refusal to accept it.

1.4 Distinction Between Talaq and Faskh

Termination of marriage which is considered as talaq differs from the one which is considered as faskh, in the following respects:-

(a) That while faskh severs marital relationship with immediate effect, in the sense that it does not depend on the expiry of the iddah, talaq does not sever the relationship immediately, except where the talaq is ba'in (irrevocable). But if it is raj'iy (revocable), the marriage is not terminated until the Iddah expires.

(b) That faskh does not reduce the number of divorces a husband has the right to effect on his wife. Thus, if termination which is considered as faskh occurs between a husband and a wife and then they enter into a new contract of marriage, the husband is entitled to divorce the wife three times (at separate intervals). Talaq, on the other hand, reduces the number of divorce, the husband has the right to effect, whether the talaq is revocable or irrevocable. Thus, if the wife returns to her husband, (after being divorced for the first time) then the husband has the right to divorce her (at a

subsequent time) twice and if he divorces her for the second time, then he can only effect divorce on her once.

(c) That in the case of faskh which occurs before consummation, the wife does not deserve any sadaq, whether its reason is from the husband or from the wife. But in case of talaq, if it occurs before consummation, the wife deserves half of the specified sadaq, and in its absence she deserves mut'ah.[13]

1.5 Termination Dependent Upon Judicial Decision:

Whether termination is talaq or faskh, is divisible into two:

(a) The one that depends, for its legal effectiveness, on judicial decision, for being established on reason which is controversial. This is because controversy can only be settled through judicial action.

(b) The one that does not depend on judicial decision before it becomes effective, because it has been established on definite and clear-cut reasons which can not be subject to any controversy. Thus it does not need any judicial decision.[14]

1.5.1 When Termination is Dependent Upon Judicial Decision

Termination is dependent upon judicial decision in the following circumstances:

(a) When it is effected for reason of bodily defects which entitles either of the spouses option to continue or to terminate the marriage, such as jubb (amputation of sexual organ), or annah (impotence) or Khisa (castration), or qarn (hinderance in woman's sexual organ) or ratag (malformation of tissues in vagina which is blunt).

(b) Where it is effected for reason of (lack of) kafa'ah (compatibility between the spouses).

(c) Where it is effected due to lack of nafaqah (maintenance), that is where the husband is not capable of maintaining his wife or where he intentionally refuses to maintain her, while he is capable of doing so.

(d) Where it is effected due to ill-treatment and discord.

(e) When it is effected due to the absence of the husband or his being imprisoned or detained.

(f) Where it is effected due to the refusal of one of the spouses to accept Islam after the other has done so. This is because it is necessary to call the spouse who has refused to accept Islam to do so before the termination is effected. And it is the judge who is legally responsible to do so.[15]

1.5.2 When Termination is Not Dependant Upon Judicial Decision

Termination is not dependant upon judicial decision, in the following circumstances:-

(a) Where it is effected by way of the usual verbal pronouncement of talaq. Tafwid, (i.e. giving the right of divorce to the wife by the husband), is legally considered as the same as verbal pronouncement of talaq.

(b) Where it is effected by way of Khul'.

(c) Where it is effected due to the invalidity of the contract (initially), such as where it becomes evident that the "wife" is a sister to the "husband."

(d) Where it is effected due to the fact that one of the spouses has had sexual relationship with one of the ascendant or descendants of the other spouse such that creates legal prohibition, that is sexual relationship by reason of shuhhah. (Judicial error) or invalid marriage.[16]

(e) Where it is effected for reason of apostasy of either of the spouses. Thus where either of the spouses apostates, the marriage is immediately terminated without any need for judicial decision.

However, where both of the spouses apostate, the marriage, according to the preponderate view of the Hanafi Jurists, is not terminated. Accordingly, whenever they return to Islam, their marital tie is legally intact. In holding this view, they rely on the decision of the Companions of the Prophet (S.A.W.) in respect of apostates, during the caliphate of Abubakar (R.A.), because when the apostates returned to Islam, they were not separated between them and

their wives. In other words, their marriages were not terminated.

(f) Where marriage is terminated as a result of li'an, according to the famous view of the Maliki School. However, Abu Hanifa is of the view that such termination is not legally effective except through judicial decision..[17]

1.5.3 Distinction Between the Two Categories of Termination and Their Implication

The main distinction between the two categories of termination explained above, is that one of them depends on judicial decision before it can be effective, while the other is effective without any need for judicial decision.

The implication of this distinction is quite clear especially from the point of view of inheritance.. Accordingly, if a cause for terminating marriage exists, but before the judicial decision takes place, either of the spouses dies, then if the termination depends, on the judicial decision, the other (surviving) spouse will inherit the deceased, except where there is an impediment to that, such as where the spouses belong to different religion. This is because marital tie, between the spouses, is legally presumed to have been in existence in the circumstance, until judicial decision is given to the contrary.

But where the termination does not depend on judicial decision, for its effectiveness, then the other surviving spouse is not entitled to inherit the deceased. This is because marital tie is legally presumed to have ceased (in the circumstance), the moment there is the cause for the termination. And marital tie is the cause for inheritance between the spouses,[18] (which is absent, in the circumstance).

However, where the termination is through the usual pronouncement of talaq, and the talaq happens to be a revocable one, then the spouses are entitled to inherit each other, if either of them dies before the expiration of the iddah.

FOOTNOTES AND REFERENCE

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6] This hadith has been transmitted in: Awnul-Ma'abud, Commentary of Sunan Abi Dawud (at pp. 224; Vol. VI) and also in Hasan, A. Sunan Abu Dawud (translated), Vol.2 p. 585.

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8] Maududi, A. A. (1983), The Laws of Marriage And Divorce In Islam, Islamic Books Publishers, Safat, Kuwait, p.28

9] Sha'aban, Z.D. (1971), Al-Ahkamush-Shar'iyyah Lil Ahwalish-Shaksiyyah, Libyan University, pp. 362-63.

10] Ibid.

11] This hadith has been quoted in Sha'aban, Z.D. al-Ahkamush-Shari'iyyah... p. 363.

12] Sabiq, S. (1973), Fiqhus-Sunnah, Darul-Kitabil-Arabiy, Beirut, Lebanon, Vol.2, p. 323; Sha'aban, Z.D. (1971), al-Ahkamush-Shari'iyyah... op. cit. at p. 363.

13] Ibid at pp. 363-64.

14] Ibid at pp. 364-65.

15] Ibid at pp. 364-65.

16] It should be noted that Zina does not create affinal prohibition. This is by virtue of a hadith according to

which a woman who is lawful cannot be unlawful by virtue of Zina.

17] Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah.. op. cit at p. 365.

18] Ibid at pp. 364 - 66; see also Musa, M.Y. (1958) Ahkamul-Ahwalish-Shakhsiyyah Fil Fiqhil-Islamiy, Darul-Kitabil Arabiy, Egypt, pp. 247-49.

PART I

THE LEGAL PROCEDURE OF TALAQ

Chapter 2

TALAQ AND ITS PROCEDURES

It has been explained in the introduction, that termination of marriage is of two categories: talaq and faskh. And since talaq is of various kinds which needs thorough explanation and extensive exposition, this chapter and the three subsequent chapters deal extensively with it.

2.1 Definition of Talaq:

Talaq is an Arabic word which literally means "to release", "to let loose" or "to free", or to "untie a knot". And technically it means "release from marriage-tie or termination of marital relationship".[1]

Another definition, which is more comprehensive is "The release from marriage-tie, either immediately or eventually, by the use of certain words, whether spoken or written, by the husband."[2]

2.2 Wisdom Behind It:

Marriage, under Islamic Law, is contracted with a view to achieving certain noble objectives without which it is meaningless to contract it or even to continue with it.[3]

However, sometimes it may not be possible to achieve the objectives due to a variety of reasons. Thus an aversion may develop between the spouses and becomes deeply - rooted which

may render marital life a miserable one. Either of the spouses, may for instance, observe from the other spouse, some behaviour or moral defect with which he can never agree or accept. Either of them can also be affected by some disease with which the continuity with marital life is not possible. It may also be that the marriage is not able to achieve one of the most important objectives for which it has been contracted. And it is not possible, under the circumstances, for the spouses to mutually cooperate, concerning matrimonial affairs and their mutual rights and duties, as Allah (S.W.T) has decreed.

In view of all these, there has to be a dignified and decent means through which the spouses can get rid of such relationship which cannot achieve its purpose; that means is talaq (divorce). This is because to insist on the continuity of the relationship, in spite of the aversion between them, can lead them to find any possible means of terminating it, no matter how immoral or unreasonable it may be. And this cannot be accepted by Islam.

Thus, "when Islam makes divorce obtainable by mutual consent or by interference of the court, on behalf of the wronged party," says Abdal Ati, "it stands firmly on guard for morality and human dignity." He further mentions that Islam does not force a person to suffer the injustice and harm of an unfaithful partner. It does not drive people to immorality and indecency. He goes on to say that what is morally and

humanly most remarkable about Islam in this respect, is that it does not force any person to lower his or her dignity and degrade his morality just to obtain divorce. It is not necessary for a Muslim to separate from his or her partner some year before divorce can be granted. Nor is the granting of divorce conditional to adultery. This is because, according to him, separation, as endorsed by many systems, can and certainly does involve immoral and indecent actions. In case of such a separation, the person concerned can neither enjoy his rights nor fulfill his obligations of marriage. He is tied as tightly as can be, yet he is so loose that no restrictions affect him. He cannot get a divorce or re-marry, but he can move with whomever he wants unchecked and unrestricted and at the long run, he can obtain a divorce. Then he concludes thus:

> "This is something that Islam can never accept or endorse because it would violate the whole system of moral values which Islam cherishes.... This is the stand of Islam on the matter. If divorce has to be obtained as a last resort, it must be granted with dignity and due respect."[4]

However, even though Islam permits divorce, it considers it as the most detestable thing permitted, according to a hadith narrated by Abu Dawud and al-Hakim, on the authority of Ibn Umar[5] That is why it is permitted only as a last resort when all efforts of living together between the spouses miserably fail, in order to avoid greater evil which may result from continuance of marriage.

divorce is not lawful without a justifiable cause. The example of such a justifiable cause is where the husband reasonably suspects the conduct and movements of his wife. Another example is where her dislikeness has been deeply rooted in his mind or vice-versa.[8]

Maliki Jurists, on the other hand, are of the view that talaq is not even up to Makruh (reprehensive). It is merely Khilaful-Awla (inappropriate).[9]

Hanbali jurists have detailed exposition regarding the legal position of talaq, because Talaq, according to them, is either Wajib (obligatory), Muharram (prohibited), mubah (Lawful) or Mandub (recommendable).

Talaq which is Wajib is the one effected by al-hakamain (arbiters), in the event of Shiqaq (dissension or discord) between the spouses, if the arbiters deem that talaq is the only suitable means of ending the dissension.

It is also Wajib where the husband vows to abstain from conjugal relationship with his wife, after waiting for four months. This is in accordance with the Qur'anic verses which reads:

> For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful. But if their intention is firm for divorce, Allah heareth and knoweth all things."[10]

Talaq Muharram is the one effected without any justifiable need for it. It is haram because it is harmful to both the husband and the wife and contrary to their own interest. Thus, it is, on analogy, like wasting money. And also by virtue of a prophetic tradition in which the Prophet (S.A.W.) was reported to have said, "There should be neither harming nor reciprocating harm" (La Darara wa La dirar).[1]

Talaq Mubah is the one effected where there is need to do so due to the fact that the wife is of bad characters, or where she is creating problems for the husband badly, or where he feels it will be detrimental for him to continue living with her.

Mandub Talaq is the one which takes place due to the fact that the wife neglects what is due to Allah on her (huqugul-lahil-Wajibah 'Alayha), such as salat and the like, and it is not possible for the husband to coerced her to do that, or due to the fact that the wife is not chaste. Imam Ahmad bn. Hanbal is of the view that it is not proper for the husband to hold together with the wife under the circumstance, because it will have a negative effect upon him religiously. Furthermore, he cannot be certain whether she defiles his matrimonial bed (by committing illicit affairs with another man) and ascribes to him a child that is not actually his own. It is proper then, according to Ahmad, under the circumstance, to be harsh to the wife so as to make her seek for Khul'.

This is in accordance with the Qur'anic verse (4:19) which reads:

> Nor should you treat them with harshness that ye may take away part of what ye have given them (in a form of sadaq) except where they have been guilty of open lewdness ...[13]

It may be implied that talaq under these two circumstances[14] is obligatory[15].

2.4 Reason For Vesting The Right To Divorce In the Husband

The right to divorce, is primarily vested in the husband. Vesting this right in the husband is tantamount to protecting his right, and also checks the growth of the divorce rate, for the following reasons:-

1. It is the husband who spends, in order to contract the marriage and also maintain the wife even after divorcing her but before the expiration of her Iddah, Moreover, he is the looser after the divorce because he cannot claim back what he had already given the wife as sadaq. And if he wants to start a new marital life with another woman or even with his divorced wife but after the expiration of her Iddah (where the divorce is revocable) or even before its expiration(where the divorce is irrevocable), he has to incur a new financial expenses to pay the sadaq.

In view of all that has been explained, the husband must think twice before embarking on divorcing his wife. On the

contrary the wife does not incur all these financial expenses. Thus if she were to be vested with the right to divorce, she might exercise the right merely for flimsy reasons without thinking of the consequences.

Maududi beautifully explains the wisdom of vesting the right in the husband and the reason why it cannot be so vested in the wife.This, he does, by using an analogy where he says:

> The right could not be given to the wife. If she were to be given this right, she would grow over-bold and easily violate the man's rights. It is evident that if a person buys something with his money, he tries to keep it as long as he can. He parts with it only when he cannot help it. But when a thing is purchased by one individual, and the right to cast it away is given to another, there is little hope that the latter will protect the interest of the buyer, who invested the money. [16]

2. The second reason has to do with the natural disposition of the spouses, because naturally there are some physiological and physchological differences between man and woman. Thus the primary functions of each of them differ from that of the other. Accordingly, woman is more emotional and sentimental than man, so as to suit her primary duty of bringing up of the children. If, in view of this, the right to divorce were to be invested in the wife, she might, most probably, effect divorce the moment she becomes angry or she desires to do so, merely on emotion and sentiment after a small conflict, without thinking about the consequences. "It is in consideration of woman's delicacy of spirit," as Sayyid

M.R. Musawi said," that the power of ending a shared life is not granted to her." [17]

However, there is no denying the fact that even among men there are those who are more emotional than some women and that among women there are those whose sense of resistance and rational judgement override their emotions and sentiments, but this is rare and exceptional. And rules are based on general and not exceptional cases.

Beside these two logical reasons, there are some textual reasons in both the Qur'an and the Sunnah to the effect that the right of divorce is primarily vested in the husband, and not the wife or any other person. Thus, in its discussion on divorce, the Qur'an has consistently ascribed the act of divorce to the husband.[19] It provides clear testimony that it is the husband who has been vested with the power to divorce. Thus in 2:237, it unequivocally declares that marriage-tie is in husband's hand.

Furthermore, there is a hadith narrated by Ibn Majah, on the authority of Ibn Abbas which expounds this principle. According to the hadith, a man came to the Prophet (S.A.W.) and complained that his master had married his slave -girl to him and then wanted to separate her from him. At this juncture, the Prophet (S.A.W.) delivered an address to the people, "O people! Why is it that one of you married his maid to his slave and now wants a separation between them?

The right of divorce belongs to the husband." [20]

It is pertinent, at this juncture to critically observe the view of, in the words of professor Fazl Ahmad, [20] "Some people who like Western ways (and who) want to take away, the right of divorce from the husband (absolutely) and hand it over to the court." This practice, according to him, (and this is the correct view), is contrary to the Qur'an and Sunnah. He cites some examples from the text of the Qur'an and Sunnah to that effect, and then concludes thus:

> So both according to the verdict of Allah and His Messenger, it is not lawful to deprive the husband of the right to the divorce and hand over this right to the court. This step is wrong even on grounds of common sense. This can only lead to publicizing shameful domestic affairs in courts, as is happening in Europe. [22]

Zakiyyud-Deen Sha'aban, a contemporary Muslim jurist, is of the view that to deny husband the right to divorce and hand it over to judge is, legally speaking, to ignore the following facts:

(a) That to vest the right to divorce in the husband, in the sense that nobody has the right, except the husband to effect it, except where he delegates the power to another person, is a divine decision established by sound textual authorities which cannot be interpreted otherwise. Thus, it is not lawful for the judge (or any other person) to interfere, except where the husband does not live with the wife in kindness and refuses to part with her in kindness. Then the judge, in such a circumstance, shall interfere to

separate between the spouses so as to prevent the husband from perpetrating injustice against the wife.

(b) That to transfer the right of divorce to the judge is tantamount to implying that all men, without distinction between learned and illiterate are idiots who must be interdicted in order to safeguard and preserve the sacredness of marital-tie.

In other words, if men were deprived of the right to divorce, it means, that they would legally be declared to have lacked legal capacity. And this is contrary to the principles of the Shariah, because, legally speaking, men are guardians of their wives and children. So they do not need permission of the judge to divorce their wives.

(c) Termination of marital-tie, may sometimes be actuated by natural dislike and lack of harmony in character between the spouses. . And this is something which is dependant on psychological feeling and, therefore, judicially difficult to establish. Thus, if, for instance, the right to divorce were to be vested in the judge and then the husband institutes an action seeking for divorce for reason of his hatred against the wife, after trying to reach a compromise with her but to no avail, then how can he establish the hatred? Can the judge effect divorce, under the circumstance? If he can do so, then what is the difference between his divorce and that of the husband? If, however, the judge

cannot (or does not) effect divorce, can there be meaningful marital relationship in which the spouses find peace and tranquility and in which children are properly brought up? Undoubtedly this cannot be achieved in such a situation. Terminating the marital-tie in the circumstance, is, therefore, the proper and sensible decision, so as to protect the interests of the spouses (and probably that of the children). And definitely there is no difference whether the termination is effected by the husband or by the judge.

Where the marital - relationship becomes sour and unbearable due to some reason other than hatred, such as immoral conduct of the wife(which creates suspicion in the mind of the husband), or a hidden bodily defect with her, exposing of which is haram according to Shari'ah, then it is not for the interest of the public to be publicizing such things in court-room and recording them in the proceeding books (and therefore, it is much proper to effect the divorce, under the circumstance, by the husband).

2.5 Wife's Right Regarding Talaq:

The fact that the right to divorce has been primarily vested in the husband does not mean that the wife has no right at all concerning termination of marital-tie. Thus, wife is entitled to seek for termination, under certain circumstances. And the judge must listen to her plea and even terminate the marriage where there is justifiable cause for doing so, in

accordance with the principles of the Shari'ah. The examples of such circumstances is where the husband inflicts a harm on her, such that cannot ordinarily be tolerated by a woman of her status; or where the husband has serious bodily defect; or where he is not able to maintain her; or where his absence causes injury to her.[24]

2.6 Capacity To Divorce

The fact that the husband is vested with the right to divorce, does not mean that any divorce effected by any husband has legal efficacy. Thus, for a divorce to be legally efficacious, according to the consensus of the Muslim jurists, the husband must be of complete legal capacity, i.e. he must be sane, and of age. In addition, according to the majority of the jurists, the husband must have effected the divorce voluntarily. Accordingly, if the husband is insane or minor (according to all the jurists unanimously), or he has been under coercion, (according to the majority of the jurists), then his action has no legal efficacy. This is because the husband, in the circumstance, has no complete legal capacity.

Tirmidhi and Bukhari narrated, on the authority of Abu Hurairah that the Prophet (S.A.W.) was reported to have said, "All divorces are legally valid except that of a person who has been overpowered upon his sense (i.e. insane).

Ibn Abbas also was reported to have said, "A divorce effected by a drunk or effected under compulsion is not valid".

Bukhari also narrated that Aly bn Abi Talib (R.A) was reported to have said, "Don't you know that the pen is raised off from three (i.e. they are exempted from being liable of the legal consequences of their actions): an insane person till he becomes sane; a minor person till he becomes of age; and a sleeping person till he becomes awake?"[25]

However, the muslim jurists have divergent views regarding the following:-

1. Divorce under duress;
2. Divorce under the influence of intoxication;
3. Divorce under excessive anger;
4. Divorce under jest;
5. Divorce by mistake
6. Divorce by an idiot
7. Divorce by a person suffering from death- sickness

2.6.1 Divorce under duress

There are divergent views, among the Muslim jurists, regarding the effectiveness of divorce pronounced by the husband under duress. Thus the majority of the jurists, including Umar bn. al-Khattab, Aly bn Abi Talib, Abdullah bn. Umar, Ibn Abbas, Malik, Shafi'i, Ahmad, and Dawud are of the view that any divorce pronounced under duress is ineffective.

This is because, the husband, under the circumstance, cannot be said to have intended the consequences of his action.

In holding this view, the jurists rely on the hadith in which the Prophet (S.A.W.) was reported to have said, "Allah forgives the acts and deeds done by my Ummah (i.e. community) by mistake or through forgetfulness or under duress."[26]

They also rely on the hadith in which A'isha (R.A.) reported that she heard the Prophet (S.A.W.) saying, "There is no divorce and no emancipation by force."[27]

Hanafi Jurists, on the other hand, hold a divorce pronounced under duress to be effective, contending that compulsion does not negative the choice or intention of the person subjected to it, (even though it negatives his consent). This is because he can (in the circumstance) choose between the two alternatives namely not doing the act he has been compelled to do (i.,e. divorcing his wife) and suffer the threatened pain, or doing it and escape the threatened suffering. Thus if he chooses to effect divorce, (under duress), then he is considered to have an option of some sort and accordingly the divorce is effective.

In holding this view, these jurists, rely on some ahadith which are not authentic, one of which narrated on the authority of Sa'id bn. Mansur that a man came to the Prophet (S.A.W) and informed him that his wife sat on his chest and

put a knife on his throat, threatening to kill him, saying, "You should divorce me or I will kill you." So he divorced her and then came to the Prophet (S.A.W.) and informed him. But the Prophet (S.A.W) told him that in the case of divorce (it is operative irrespective of whether it has taken place during sleep or under compulsion." However, Ibn Hazm condemns the "hadith" as unauthentic.[28]

The preponderant view, therefore, is that of the majority of the jurists. This is because the Hanafi jurists' view has not been based on any cogent reason and the authorities upon which they rely, in holding it, are not authentic. Moreover, it is contrary to the consensus of the Sahabah (i.e. Prophet's Companions).[29]

2.6.2 Divorce under the influence of intoxication

Where the husband becomes intoxicated involuntarily, such as where he is made to drink liquor against his will, or where he takes it under necessity, and then under the influence of the intoxication, he divorces his wife, all Muslim jurists unanimously agree that the divorce shall not be effective. This is because, his act, under the circumstance, cannot be said to have been done voluntarily and thus he cannot be held responsible for it. It follows then that pronouncing divorce by him would not be effective.

However, where he becomes intoxicated through an unlawful means, that is where, for instance, he takes an alcoholic

drink, or uses any intoxicant, voluntarily, without being compelled by necessity, and as a result he becomes intoxicated and then divorces his wife, the jurists differ as to whether the divorce is effective or not. Thus, majority of them, including Malik, Shafi'i, Ahmad (in one of his two views), majority of the Hanafi jurists and many among the Tabi'un, are of the view that the divorce is effective, their reason being that since he gets intoxicated voluntarily, which is haram, then his divorce will be considered effective, so as to serve as a deterrent and punishment for his sinful act.

Some jurists, on the other hand, are of the view that such divorce is ineffective. This is because, according to them, effectiveness and validity of any transaction, depends on volition and intention of the person making the transaction, and the intoxicated person cannot be said to have done what he has done under the influence of intoxication, out of his volition and intention. His action, in terms of being ineffective and inoperative is the same with that of an insane person. This view is held by Zufar, Abu Ja'afar al-Tahawiy, Abul Hasan al-Karkhiy and Abu Yusuf (among the Hanafi jurists) and al-Muzanniy and Ibn Shurayh (among the Shafi'i jurists). This is also the view of the Zahiri School.[30] The same view is also held by Ibnul-Qayyim who also reported that Umar bn. Abdul'azziz was of the same view because, during his reign, a man was brought to him who divorced his wife under the influence of intoxication, and he asked him to take an oath that, he was not in his senses when he effected the

divorce. The man took the oath and Umar returned his wife to him and then inflicted hadd punishment (for drinking) upon him.[31]

He also narrated that Uthman bn. Affan, the third caliph (R.A.) was reported to have said, "An insane person and an intoxicated person cannot effect divorce." Ibn Abbas was also reported to have said, "Divorce (effected) by an intoxicated person and (the one effected) by a coerced person are not effective."[32]

However, some contemporary Muslim jurists, such as Professor Zakiyuddeen Sha'aban and Professor Muhammad Yusuf Musa, [33] subscribe to the latter view, contending that to consider the divorce of the intoxicated persons effective, on the ground that it would serve as punishment, means that double punishments are inflicted upon him. And this is, legally speaking, wrong because it is an established principle under the Shari'ah that it is unlawful to impose double punishment for committing a single offence (on one person) Furthermore, considering the divorce as a punishment, will affect a third party, namely the wife and probably the children (of the spouses), and it is an established principle that it is not lawful to inflict punishment on the person who has committed the offence in such a way that an innocent person will be affected.[34]

2.6.3 Divorce under excessive anger:

Where husband divorces his wife while he is so angry that he does not know what he says or does, his divorce is ineffective, because he cannot, in the circumstance, be considered to have intended what he has done. This is by virtue of a hadith which was transmitted by Ahmad, Abu Dawud, Ibn Majah and Hakim, on the authority of A'ishah (R.A.) that the Prophet (S.A.W) said, "There is no divorce or emancipation (of a slave) in the state of "Iglaq"[35] This is the accepted view to Malik, Shafi'i and Ahmad bn Hanbal.

However, Ibn Taimiyyah categorizes anger, as it affects the effectiveness of divorce, into three:-

(a) The type that makes someone looses his self control just as intoxicant does. Divorce, in such type of anger, is undoubtedly ineffective.

(b) The type that does not prevent one from understanding what he says or intends. Divorce, in such type of anger, is effective.

(c) The type that may be severe but not to the extent of making one loose his self control; it only prevents him from being steady and also makes him loose his equilibrium. As far as this type is concerned, there is no decision as to whether a divorce effected under it, is effective or not, thus it is subject to Ijtihad.[37]

However, there is a view to the effect that divorce, under such type of anger is ineffective. And this view is a strong and acceptable one.[38]

2.6.4 Divorce in jest:

Divorce, according to the majority of Muslim jurists, is a serious thing which is not a fit subject for jest. Therefore, a divorce pronounced in jest is considered as effective even though it is against the intention of the husband. In holding this view, they rely on the hadith transmitted by Ahmad, Abu Dawud, Ibn Majah, Tirmidhi and Hakim, on the authority of Abu Hurairah that the Prophet (S.A.W.) was reported to have said, "There are three things which whether undertaken seriously or in jest, are treated as serious: marriage, divorce and raj'ah (revocation of divorce)." This means that effect would be given to a man's words even when spoken inadvertently or as a joke. It is obvious that these are serious matters and a person cannot be allowed to undo the effect of his words by saying that he was not in earnest but has uttered the words by way of a joke."[39]

However, Maliki and Hanbali jurists hold a contrary view. Thus, according to them, such divorce is ineffective because, divorce is an act that needs intention for its validity. And a person who acted in jest cannot be said to have acted with intention. This is by virtue of a hadith in which Prophet (S.A.W) was reported to have said, "All actions are to be

judged according to intention."[40] They further support their view with the Qur'anic verse (2:227) which reads thus:

> But if they are resolved on divorce, behold, Allah is All-hearing, all-Knowing".

To resolve on divorce (as indicated by the verse), implies intention to effect it, which means that without the intention there cannot be any effective divorce.[41]

2.6.5 Divorce by mistake:

Where the husband mistakenly pronounces divorce without intention to do that, the Hanafi jurists are of the view the divorce is religiously ineffective, that is between and Allah (S.W.T.) but it is legally effective. It then lies that if the case is not brought before a court of law then the husband, legally speaking, has the right to continue with marital relationship with his wife, without incurring any sin. But where there is dispute between the spouses and as a result the case is brought before a judge, the judge shall give judgement to the effect that the divorce is effective. This is because judge is obliged to decide cases on the basis of what is overtly established before him. And also because if the claim that action of the husband under the circumstance, is out of mistake were to be accepted, some husbands, who intentionally divorce their wives, could claim that it was out of mistake while actually it is not.

However, such divorce is according to Maliki School, ineffective, religiously and legally, provided it has been

established that the husband has not intended to divorce. But where there is no evidence to that effect, then the divorce is legally but not religiously effective.[42]

2.6.6 Divorce by an idiot:

Idiot has legally been defined as: someone who disposes of his property irrationally. Such a person is often interdicted from disposing of his property anyhow he likes. This is done by appointing a guardian for him who will look after the property and prevent him from misuse of it.

Where such person divorces his wife, some jurists are of the view that the divorce is legally effective without subjecting it to the ratification or consent of his guardian. This is because since an idiot is entitled to marry, he is also entitled to divorce the wife. And also because he is interdicted only in respect of dealing in his property. But marriage, with all its legal effects and consequences, is not part of such dealing. This is the established view in the Hanafi School which has been accepted by Maliki, Shafi'i and Hanbali Schools.

Ata, an eminent jurists among the Tabi'un, and Shi'a Imamiyyah, are of the view that divorce (effected) by an idiot is not effective except where he effects it with the permission or consent of his guardian. This is because, according to them, divorce is a transaction which is virtually

disadvantageous or even injurious to the idiot; thus he has no right to contract it without the consent of his guardian.[43]

2.6.7 Divorce By a Person Suffering From Death Sickness:

A sickness is said to be death-sickness (Maradul-Mawt) if it has fulfilled the following conditions:-

(a) that generally death results from it. This is usually known through medical reports and or testimony of experienced medical practitioner.

(b) that death must actually result from it either directly or approximately, i.e. where the sick person though dies from a cause other than the sickness, such as by drowning or through killing or another sickness which is more severe and more devastating than the earlier one.

Any person who is suffering from such sickness is said to have been suffering from death-sickness. Persons who, though look healthy but are in a condition that makes them to be waiting for death, such as a person who has been sentenced to death, are legally considered to be in the same position with a person who is actually suffering from death sickness. Likewise, a person who is in battle-field, and a pregnant woman whose pregnancy is six months old (and above)," [44]

With regard to divorce pronounced by a person suffering from death-sickness, there is no any categorical rule, either in the Qur'an or in the Sunnah to the effect that it is

different from the one pronounced by a person not suffering from such sickness. That is why the Muslim jurists, unanimously agree that such divorce is effective.
But they differ regarding the wife's right to inherit the husband.

Thus, Hanafi jurists hold the view that divorce effected by husband who is suffering from death-sickness is effective, provided the sickness does not affect his mental ability such that it renders him like an insane person. And if the divorce is irrevocable and the husband is suspected to have divorced the wife with the intention to escape from inheritance, by depriving the wife of her entitlement to inherit him, then the wife will be entitled to inherit him, provided he dies during her iddah, so as to treat him contrary to his intention. However, if the wife predeceases him, he will not be entitled to inherit her even if, at the time she dies, her iddah has not expired. This is because, marital-tie(which is the basis of inheritance between the spouses) is considered to have been severed immediately after irrevocable divorce. And also because the wife is not, under the circumstance, suspected of trying to deprive the husband of his right to inherit her.

In holding this view, the Hanafi jurists, rely on the following:-

(a) That it was reported that Abdurrahman bn. Awf (R.A.),a companion of the Prophet (S.A.W.) divorced his wife Tadammur

bint Asbag irrevocably for the third time, during his sickness in which he consequently died. And Uthman (R.A.) the third caliph of the Prophet (S.A.W.) decided that she was entitled to inherit the husband.[45] This happened during her iddah. This decision took place in the presence of the Companions but none of them showed any disagreement with it. It is, therefore, considered as an ijma'

(b) That it was reported that Uthman bn Affan (R.A.) divorced his wife Ummul Baniyn bint Uyaynah bn Hisn, while he was under siege, in his house. So when he was killed, she came to Sayyidina Ali and complained. And he decided that she was entitled to inherit him. [46]

Ahmad and Ibnu Abi Layla are of the view that the wife is entitled to inherit the husband even if her iddah expires, provided she has not re-married.

Malik and Layth hold that the wife is entitled to inherit the husband, whether her iddah has expired or not and whether she has re-married or not. [47]

Ibn Hazm is of the view that the divorce pronounced by a person suffering from any type of sickness (including death-sickness) is effective just like the one pronounced by a healthy person, without any distinction. And it makes no difference whether the husband died as a result of that sickness or not. Thus, if the divorce pronounced by the sick

person is triple divorce or the third and final one; or it is pronounced before consummation, and then either of the spouses dies before or after the expiration of the iddah neither of them will inherit the other. The rule applies where the divorce is revocable but the husband has not revoked it up to his death or her death or after the expiration of the iddah.

2.7 The Subject-Matter Of Talaq:

Since divorce severs marital relationship and brings it into an end, the relationship must be subsisting before a woman be divorced. Where a husband effects a revocable divorce, he can also effect another divorce, if the iddah has not expired, because revocable divorce does not sever marital relationship until the iddah expires,and accordingly the wife is a subject of divorce while she is in her iddah.

Where the wife is divorced irrevocably and the irrevocability is a major one (that is where the divorce is for the third time) and her iddah has not expired, all the Muslim jurists, unanimously agree that the husband cannot effect any other divorce (on her). This is because the husband has no right to divorce his wife (consecutively) more than thrice. And if he divorces her for the third time, the marital relationship (between them) is absolutely severed. Thus any other divorce afterwards is ineffective..

Where the irrevocability of the divorce is a minor one (that is where the divorce is for the first or second time), then the Muslim jurists differ as to whether the husband can divorce her again during the iddah. Thus Maliki Shafi'i and Hanbali jurists are of the view that the husband is not entitled to effect another divorce on the wife, because legally, speaking, the woman cannot be considered as his wife, for their marital relationship has come to an end by virtue of the minor irrevocable divorce.

Hanafi jurists, on the other hand, hold that the husband is entitled, under the circumstance, to effect another divorce on the wife because the marital relationship between the spouses is legally considered to be subsisting throughout her iddah. This is by virtue of the fact that the divorced wife is entitled to nafaqah and staying in the matrimonial home, during her iddah and that she is prohibited to be married by any other man, once her iddah has not expired. [4]

2.8 Divorce Before Marriage Contract:

Where a man divorces a woman subject to marrying her, such as where he says," If I marry Zainab, she stands to be divorced", the divorce is ineffective. This is in accordance with a hadith transmitted by Tirmidhi on the authority of Amr bn. Shu'aib, from his father, from his grandfather that the Prophet (S.A.W.)said "A man cannot vow regarding thing which he does not own; he cannot emancipate what (i.e. the slave) he

does not own; and he cannot divorce what (i.e. the woman whom) he does not own (i.e.he does not marry)".

This is the view held by the majority of Prophet's companions. Thus it was reported from Ali bn Abi Talib, Ibn Abbas, Jabir bn. Yazid (R.A.) and many jurists among the Tabi'un.

Abu Hanifa, on the other hand, holds a contrary view. Such divorce, according to him, is effective whenever the condition comes into existence whether the divorcer generalizes or specifies it with a particular woman. He calls such divorce Talaq-al-Mu'allaq (conditional divorce).

Malik subscribes to the same view (held by Abu Hanifa), but with a difference. According to him, if the husband specified it (with a particular woman), then it is binding on him (and thus it is effective). Example of generalization is where a man says; "If I marry any woman (or a woman), she is divorced (or I divorce her)." And the example of specification is where a man says, "If I marry Khadija, then she is divorced (or I divorce her)".

2.9 Methods Of Effecting Divorce:

Divorce may be effected through any means that clearly shows the intention of the husband to terminate his marital

relationship with his wife, whether verbally, in writing, or by sign. Following is the intensive exposition of this:

2.9.1 Verbal Pronouncement: mode of expression:

Verbal pronouncement concerns the mode of expression used in effecting divorce. And the pronouncement, from the point of view of lucidity, is divisible into two:-

(a) Sarih (express). This is an expression the purpose of which is quite clear and unambiguous and is normally used in effecting divorce, such as the term talaq (divorce) and its derivatives. It also includes expressions that have acquired a particular significance by long usage and are not used in any other sense than divorce.

Where such expression is used (in any form); in the pronouncement of divorce, the divorce is legally effective without necessarily ascertaining the husband's intention, provided the pronouncement is made willingly and freely. All the Muslim jurists, unanimously agree on this.[51]

Where a husband is asked whether he has divorced his wife and he replies in the affirmative, this will amount to sarih divorce. And if a wife says to her husband, "Am I divorced?" and the husband replies in the affirmative, this will also amount to a sarih divorce [52]

(b) Kinayah (Implied). This is an expression which is ambiguous, such that may mean divorce as well as something else, and thus the actual purpose of the speaker is not clear. Any divorce effected by using such expression is not effective unless there is proof or it is clearly inferred from the surrounding circumstances that the husband intends divorce with his pronouncement. In other words, intention (to terminate the marriage) is a prerequisite of such divorce for its effectiveness.

Some examples of such ambiguous expression are:

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;

v) I give up all relations with you and will have no connection of any sort with you."

Maliki School categorizes kinayah into two: (a) Kinayah Zahirah; and (b) Kinayah Khafiyyah

(a) Kinayah Zahirah is the expression that indicates divorce indirectly. Where such expression is used in pronouncing divorce, the intention of the husband is immaterial and thus he shall be considered to have divorced

his wife by a revocable divorce, unless there is proof or circumstantial evidence to the contrary.[54]

(b) Kinayah Khafiyyah is an expression which does not clearly indicate a divorce. Where such an expression is used in divorce, then it is not considered as effective unless the husband intends so.[55]

Shafi'i on the other hand, is of the view that where husband uses kinayah in divorcing his wife, this will amount to such a divorce as intended by the husband. Thus, the nature and number of such divorce, depends on the husband's intention. And in the absence of such intention, the divorce is effective as only one revocable divorce.[56]

2.9.2 Divorce By Writing

All Muslim jurists of the Sunni Schools, unanimously agree that divorce in writing is validly effective. Its effectiveness is just the same as that of a divorce pronounced verbally even if the husband is able to express himself verbally.

However, before a written divorce is considered effective, the following conditions must be fulfilled.

(a) That the writing must be what is legally known as al-kitabah al-Mustabinah, namely a manifest writing, such as

can be read and comprehended, like the one written on paper, wall, etc. Thus divorce cannot be effected by means of wiring what is termed as al-kitabah Ghayr Mustabinah (that is non-manifest writing),such as writing in the air or on the surface of water. This is because such writing cannot be read and comprehended.

(b) Even where the writing is al-Mustabinah (Manifest), it has to be al-Marsumah and not Ghayr Marsumah. Writing is said to be marsumah where it is superscribed and addressed to the wife, as in the case of ordinary letters, while Ghayr Marsumahn is the one which is not superscribed and not addressed. Thus where the husband employs Gyayr Marsumah type of writing in divorcing his wife, then the divorce is ineffective unless his intention is established to that effect. This is because expression of such writing is legally considered as having the same effect with kinayah (implied) pronouncement.

This is the accepted view to Abu Hanifah, Malik and Shafi'i. They contend that if the writing is Gyayr Marsumah, the intention of the husband cannot be inferred, without ambiguity and thus it may be possible that he did not intend divorce, but instead he just wrote the divorce merely to test his pen or merely by way of exercise, to improve his writing or even to frighten his wife.[57]

(c) That two upright male witnesses must testify to the fact that it is the husband's hand-writing. And that the testimony of the conveyer of the written document (which contains the divorce) is not accepted, except where another witness testifies along with him. This is because any document that contains a legal right can legally be accepted only if attested by two male witnesses. This is the view of Imam Ahmad.

Shafi'i is of the view that the testimony of two witnesses is inadmissable except where they were present when the husband was writing the divorce. However, the preponderant view (according to other sunni jurists), which has been accepted by Shi'a Ja''fariyyah is to the effect that this is not a condition.[58]

Ibn Hazm is of the view that written divorce is not effective. He then explains the divergent views of the Muslim jurists on the issue. He thus mentions that Nakha'i Sha'abi, and Zuhri were reported to have held that if a husband wrote a divorce to his wife with his own hand writing, then it would be considered as a binding divorce on him. Auza'i, Al-Hasan bn. Hay and Ahmad bn Hanbal subscribe to the same view. However, Malik is of the view that where husband divorces his wife in writing, if it is his intention to

divorce, then it is so, otherwise it is not. This is also the view of Layth and Shafi'i. He then concludes:

> "Allah (S.W.T.) says, 'Divorce is only twice', and also says, 'Divorce them at (the time) of their iddah'. And according to the language in which Allah and His Apostle address us, (the term) 'divorce' does not include, 'writing' (the divorce)'; it only means divorce by verbal expression. Thus divorce by writing cannot be an effective divorce and for divorce to be effective, it has to be pronounced verbally."[59]

2.9.3 Divorce By Sign

Where the husband is dumb and thus is not able to express his intention verbally, then he can effect divorce by sign through which his real intention can be construed. However, if he knows how to write, then he must, according to the Hanafi School, effect the divorce in writing instead of effecting it by sign.[60]

Malik is of the view that a dumb person can effect divorce either by writing or by sign.[61] This is usually the accepted view to Imam Shafi'i[62] Some of the Shafi'i jurists, however, hold that if a dumb person is literate, he can effect divorce in writing only [63] Ahmad is of the same view with Malik. [64]

2.10 Witness In Divorce:

The multitude of the Muslim Jurists, both classical and contemporary, are of the view that divorce can be effected without necessarily calling witnesses. This is because divorce is a legal right of the husband for the exercising of which he needs no any witness. Moreover, there is no any authoritative reason, either from the Prophet (S.A.W.) or from his companions to the effect that calling witnesses is a necessary condition for the validity of divorce.

Shia Imamiyyah jurists hold a contrary view. Thus, according to them calling witnesses is a condition for the validity of divorce. They substantiate this view with the Qur'anic verse (65:2) which reads:

> "... And take for witness two persons from among you, endued with justice, and establish the evidence (as) before God..."

Those who hold this view among the Companions, include Aly bn Abi Talib and Imran bn. Husaiyn (R.A.). And among the Tabi'un, they include Imam Muhammad al-Baqir, Imam Ja'afar as-Sadiq and their descendants (R.A.), Ata, Ibn Jurayj and Ibn Sirin.

In Jawahiril-Kalam, it was reported that a man asked Aly concerning divorce and he asked the man if he had taken two persons endued with justice to witness the divorce as enjoined

by Allah (S.W.T.). And when the man replied in the negative, Aly said, "Go! Your divorce is not a (valid) divorce."[65]

Moreover, Abu Dawud, in his as-Sunan, narrated, on the authority of Imran bn. Husayn (R.A.) that a man had divorced his wife without calling witnesses and then revoked the divorce by having intercourse with her without calling witnesses and then asked Imran (regarding the legality of what he had done). In answering the question, Imran said, "You had pronounced the divorce contrary to the Sunnah and you revoked it contrary to the Sunnah. Call witnesses to (witness) the divorce and its revocation. And you should not repeat (what you have done)."[66]

Sayyid Murtada, in al-Intisar said, "The authority relied upon by the Imamiyyah School, in holding the view that two witnesses endued with justice must be called before a divorce is effective, is what Allah (S.W.T.) says (in 65:2).

> "And take for witnesses two persons from among you endued with justice..."

Thus Allah, (in this verse), decrees that witnesses must be called because, legally speaking, command by itself, when it is not attended by clues or circumstances that might give it a particular meaning, implies obligation only. And to construe otherwise is contrary to the legal usage without any cause."[66]

Sayuti in Durrul Mansur reported from Abdurrazzaq and Abdu bn. Humayd from Ata, who said, "Marriage is (validly contracted) with witnesses and Muraja'ah (revocation of divorce) is (effected) with witnesses."[68]

Imam Ibn Kathir, in his book of Tafsir (commentary of the Qur'an) reported from Ibn Jurayj that Ata used to say, concerning what Allah says (in 65:2) "And take for witness two persons from among you..." that marriage or divorce or revocation of divorce is not valid except where two witnesses "endued with justice" are called upon to witness, in accordance with what Allah (S.W.T) says, unless there is (genuine) excuse for not calling them). This implies that, according to him, it is obligatory to call witnesses when effecting divorce, because divorce is as the same with as marriage. Since it is so and since calling witnesses is a condition for the validity of marriage contract, it is also a condition for the validity of divorce.[69]

Then he (Ibn Kathir) concludes, from the foregoing explanation, that calling witnesses (while effecting divorce) is necessary for the effectiveness of the divorce and that this is the view of the Companions and Tabi'un. Thus to claim that there is consensus that it is merely recommendable to do that, only means the consensus of the jurists of a particular

Madhhad (school of Jurisprudence) but not that of all the Muslim Jurists.[70]

Procedures of talaq, wisdom behind it and conditions for its validity have so far been dealth with. In the next chapter the various types of talaq tied to condition, and the ones effected through delegation of power by the husband, will be discussed.

FOOTNOTES AND REFERENCES

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2. Ahmad, K. N. (1981) Muslim Law of Divorce, Kital Bhavan, New Delhi, p. 28 as quoted (by the author) from al-Fatawil Hindiyyah.

3. For the detailed exposition of these objectives see Aliyu, I.A. (1988) Legal Basis and Objectives of Marriage Under Islamic Law (LL.M. Thesis), at pp. 334-66

4. Abd al-Ati, H. (1978) Islam In Focus, International Islamic Federation of Students' Organizations (IIFSO), pp. 205-6.

5. This hadith has been quoted in Sabiq, S. (1977) Fiqhus-Sunnah, Darul-Fikr, Beitut, Lebanon, Vol. 2, p. 206.

6. Siddiqi, A.H. (1976) Sahih Muslim (translated), Muhammad Ashraf, Kashimir Bazar, Lahore, Pakistan, Vol.2 , pp. 754-55, quoting, Haran, H.I. (n.d.), Islamic Religious, Political, Social and Economic Study, at p. 274.

7. This Hadith has been quoted by Sabiq, S. (1977) Fiqhus-Sunnah, Vol. 2, 207, without mentioning either the narrators or the companions who reported it.

8. Sabiq, S. (1977) Fiqhus-Sunnah, infra at . 208.

9. al-Juzairi, A.R. (1969) Kitabul-Fiqh 'Alal-Madhahibil-Arba'ah, Darul-Fikr, Beitut, Vol. IV, P. 296.

10. Suratul-Baqarah, (chapter 2), verses 226-27

11. This hadith was narrated by Ibn Majah, ad-Dar Qutniy and others and ranked as Musnad, that is hadith with complete chain of authorities from the narrators up to the Prophet (S.A.W.). The hadith was also narrated by Imam Malik in his al-Muwatta as Mursal (that is hadith in which the companion who reported the hadith was not mentioned). See Ibrahim, E. and Davies, D.J. (1976) an-Nawawiy's Fourty Hadith (translated), The Holy Qur'an Publishing House, Damascus, Syria, at p. 106.

12. Sabiq, S. (1977) Fiqhus-Sunnah, op. cit. at p. 208.

13. Ali, A.Y. (1978), The Holy Qur'an Text, Translation and Commentary, Islamic Foundation, U.K., p. 184 - 85.

14. Namely where she neglects what is due to Allah on her and where she becomes unchaste.

15. Ibn Qudamah, (n.d.) al-Mugniy, Maktabatul-Jamhuriyyah, Cairo, Vol. VII, p. 97.

16. Maududi, A.A. (1983), The Laws Of Marriage And Divorce In Islam, Islamic Book Publishers, Kuwait, p. 27.

17. Musawi, M.R. (n.d.), Western Civilization Through Muslim Eyes, p. 101.

18. Sha'aban, Z.D. (1973) al-Ahkamush Shar'iyyah... infra at p. 373; Sabiq S. (1977) Fiqhus-Sunnah, infra at p.209; Musa, M.Y. (1958), Ahkamul Ahwalish-Shakhsiyyah Fil-Fiqhil-Islamiy Darul-Kitabil-Arabiy, Egypt, at p. 254.

19. See, for instance: 2:230, 232, 236, 237, 33, 49, 65:1 of the Qur'an

20. This hadith has been quoted in Sha'aban, Z.D. (1971) al-Ahkamush-Shar''iyyah... infra at p. 373.

21. Professor Fazl Ahmad is the translator of Maududis book The Law of Marriage and Divorce in Islam.

22. Maududi, A.A. (1983) The Law of Mariage and Divorce, infra at pp. 26-7.

23. Sha'aban, Z.D. (1971), Al-Ahkamush-shar''iyyah... infra at pp. 375-77.

24. Ibid at pp. 374-75.

25. This hadith is Mauquf, i.e. of incomplete isnad (chain of narration in Sahih al-Bukhari). However, the same hadith was transmitted with full isnad ascribing it to the Prophet (S.A.W.) on the authority of Aly bn. Abi Talib (R.A.) by As'habus-Sunan (i.e. Abu Dawud, Ibn Majah, Tirmidhi and Nisa'i).

26. This hadith was narrated by Ibn Majah, Ibn Hibban, Daru, Qutniy, Tabaraniy and al-Hakim, on the authority of Abu Dharr and Abu Hurairah (R.A.).

27. It was transmitted by Ibn Majah.

28. Ibn Hazm, (n.d.) al-Muhalla, al-Maktabut-Tijariy lit-tibaʿah Wan-Nashar, Beirut, Vol. X, p. 203.

29. Sabiq, S. (1977), Fiqhus-Sunnah, infra at p. 212; Sha'aban, Z.D. (1973), al-Ahkamush-Sharʿiyyah...., infra at pp. 407-8; Musa, M.Y. (1958) Ahkamul-Ahwalish-Shakhsiyyah..., infra at pp. 260-1; Ahmad, K.N. (1978), Muslim Law of Divorce, infra at pp. 52-3.

30. Ibn Hazm discusses this issue extensively in his al-Muhalla, Vol. X, pp. 208-11 where he argues vehemently in support of this view and refutes the argument of the majority.

31. Ibnul-Qayyim, (1968), Zadul-Maʿad Drul-Fikr, 2nd ed;, Vol. IV, p. 40.

32. Ibnul-Qayyim, (1968), Iʿlamul-Muwaqqiʿin, Maktabatul-Kulliyyah al-Azhariyyah, Egypt, Vol. p. 40.

33. Professor Zakiyyuddeen Sha'aban and Professor Muhammad Yusuf Musa are Professors of Islamic Law in Libya and Egypt respectively.

34. Musa, M.Y. (1958), Ahkamul-Ahwalish-Shakhsiyyah... infra at pp. 261-63; Sabiq, S. (1977), Fiqhus Sunnah, infra at p. 212-13; Sha'aban, Z.D. (1973), al-Ahkamush-Sharʿiyyah..., supra at p. 405-409; Ibnu-Hazm (N.D), al-Muhalla, op. cit. at pp. 208-11; Ibnul-Qayyim, S.D. (1968), Iʿlamul-Muwaqqiʿin, Supra at pp. 47-9.

35. Sabiq, S. (1977) Fiqhus-Sunnah, infra at p. 213.

36. Hasan, A. (1988) Sunnah Abu Dawud (translated) al-Madina Publications Ltd;, New Delhi, Vol. II, p. 590.

37. Ibnul Qayyim, S.D. (1968) Iʿlamul-Muwaqqiʿin, infra at p. 50.

38. Sabiq. S. (1977), Fiqhus-Sunnah op. cit. at p. 213.

39. Ahmad, K.N. (1981), Muslim Law of Divorce, infra at pp. 58-9.

40. This was transmitted by Bukhari and Muslim on the authority of Umar bn. al-Khattab.

41. Sabiq, S. (1977) Fiqhus-Sunnah infra at p. 214.

42. Sab'aban, Z.D. (1973), al-Ahkamush-Shar'iyyah..... supra at p. 410; Sabiq, s. (1977),Fiqhus Sunnah, at p.215.

43. Sha'aban, Z.D. (1973) al-Ahkamush-Shar'iyyah..... supra at p. 408.

44. Ibn Juzayr, M.M. (n.d.) al-Qawaninul-Fiqhiyyah.... p. 276; Sha'aban, Z.D. (1973) al-Ahkamush-Shar'iyyah..... infra at p. 434; Musa, M.Y. (1958), Ahkamul-Ahwalish Shakhsiyyah.... infra at p. 293

45. This hadith was quoted in Sha'aban, Z.D. (1973) al-Ahkamush Shar'iyyah... infra at . 437.

46. This hadith was quoted in Sabiq, S. (1977) Fiqhus-Sunnah, at p. 239.

47. Sha'aban, Z.D. (1973), al-Ahkamush-Shar'yyah... infra at pp. 434-38; Sabiq, S. (1977) Fiqhus-Sunnah... infra at pp. ; Musa, M.Y. .(1950) Ahkamul-Ahwalish Shakhsiyyah.... infra at pp. 296-98.

48. Ibn Hazm (n.d.) (1973), al-Ahkamush-Shar'iyyah..... supra at p. 223.

49. Sha'aban, Z.D. (1973), al-Ahkamush-Shar'iyyah... Supra at pp. 410-11.

50. Sabiq, S. (1977), Fiqhus-Sunnah, Supra at p. 217.

51. Ibid, at p. 217; Ahmad, K.N. (1981), Muslim Law of Divorce infra at pp. 74-5.

52. Ibn Abidin (n.d.) al-Hashiyah, Vol. II, p. 442.

53. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 217-18; Ahmad; K.N. (1981), Muslim Law of Divorce, infra at p. 78.

54. Ibn Rushd (n.d.), Bidayatul-Mujtahid... al-Maktabatut-Tijariyyah al-Kubra, Vol. II, p. 63 as quoted in Ahmad, K.N. (1981), Muslim Law of Divorce, op. cit. at p. 78

55. Ibn Qudamah (n.d.), al-Mughniy Maktabatul Jamhuriyyah, Cairo, Vol VII, pp. 128-32 and Ibn Rushd (n.d.), Bidayatul-Mujtahid, op. cit at p. 63 as quoted in Ahmad, K.N. (1983) Muslim Law of Divorce, infra at p. 79.

Maliki School further divides Kinayah Zahirah into five, and Kinaya Khafiyyah into three. But because there is very deep and Complex linguistic exposition concerning the issue, which I think is not relevant to our practical need, I have deliberately omitted the divisions. However, for the detailed exposition of these divisions, see: al-Juzayr (n.d.) al-Fiqhu 'Alal-Madhahibil-Arba'ah, Vol. IV, pp. 326-30.

56. Ibn Qudamah (n.d.) al-Mughniy, op. cit. at p. 128.

57. Sha'aban, Z.D. (1973), al-Ahkamush-Shar'iyyah... infra at p. 413; Ibn Qudamah (n.d.), al-Mughniy, infra at p. 239; Sabiq, S. (1977), Fiqhus-Sunnah, infra at p. 219; Musa, M.Y. (1958) Ahkamul-Ahwalish Shakhsiyyah... supra at p. 268.

58. Ibn Qudamah, (n.d.), al-Mughniy, infra at pp. 241-42; al-Hassan, J.I. (1377 A.H), Shara'i'ul-Islam, Tehran, P. 207. As quoted in Ahmad, K.N. (1983), Muslim Law of Divorce, infra at. p.102.

59. Ibn Hazm (n.d.), al-Muhalla, supra at pp. 196-97.

60. Ibn Abidin (1318 A.H), Raddul-Mukhtar, Cairo, Vol. II, p. 436 as quoted in Ahmad, K.N. (1981) Muslim Law of Divorce, infra at p. 103.

61. Ibn Sa'id, (1323 A.H), al-Mudawwanatul-Kubra, Cairo Vol. VI, p. 24 as quoted in Ahmad, K.N. (1981), Muslim Law of Divorce, op. cit. at p. 103.

62. al-Bakri, A. (1938), I'anatut-Talibin, Cairo, p. 16, as quoted in Ahmad, K.N. (1981), Muslim Law Of Divorce, op. cit. at p. 103.

63. Ibn al-Humam (1356 A.H.) Fat'hul-Qadir, Cairo. Vol. III, p. 42 in Ahmad K.N. (1981), Muslim Law of Divorce, op. cit. at p.103

64. Ibn Qudamah (n.d.), al-Mughniy, supra at p. 239.

65. Quoted in Sabiq, S. (1977), Fiqhus Sunnah, infra at p. 221.

66. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 221; Ibn Kathir, I. (n.d.) Tafsirul-Qur'anil Azym, Darul-Fikr, Vol. IV, p. 389.

67. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 221;

68. Ibid

69. Ibn Kathir, I. (n.d.) Tafsirul-Qur'anil Azym, op. cit at p. 389.

70. Ibid; Sabiq, S. (1977), Fiqhus-Sunnah, op cit at p. 221.

Chapter: 3

DELEGATED AND CONDITIONAL TALAQ

In the previous chapter we have seen the institution of talaq and the procedures of effecting it. In this chapter, we intend to discuss the types of talaq tied to conditions and that which is effected through delegation of authority by the husband.

3.1 Conditions and Stipulations in Talaq

Talaq, when considered from the point of view of conditions that may be stipulated in it, is divisible into three:-

1. Talaq Munajjaz (unconditional divorce)
2. Talaq Mudaf (Conditional divorce)
3. Talaq Mu'allaq (suspended divorce)

3.1.1. Talaq Munajjaz (unconditional divorce).

This type of talaq has been defined by the muslim jurists as a divorce whose sighah (pronouncement) is not made subject to or contingent on the fulfillment of certain condition or subject to a specified future time. The example of such divorce is where the husband says to his wife, "You are divorced", or "I divorce you".

This type of divorce is effective as soon as it is pronounced by the husband and its legal effects immediately

follow, provided the husband is competent to effect the divorce and the wife is such a woman who can be divorced.[1]

3.1.2 Talaq mudaf (conditional divorce) :

This type of divorce is the one which is pronounced and is not meant to take effect immediately but to remain in suspense until some specified future time. The example of such a divorce is where the husband says to his wife "You are divorced tomorrow," or "You are divorced at the beginning of next month," or "next year".

When such divorce is pronounce, it takes effect only on the arrival of the same time to which it has been subjected provided the marriage is subsisting and the husband is competent to divorce, at the time (specified). This is the view of Imams Shafi'i and Ahmad.

Abu Hanifa and Malik, on the other hand, are of the view that such divorce comes into effect immediately it is pronounced.[2]

Ibn Hazm holds a completely contrary opinion. Such divorce, according to him, is absolutely ineffective, because there is no any authority, either in the Qur'an or in the sunnah to the effect that divorce pronounced in this way is effective. He further argues that:

> Allah has taught us how to divorce a wife with whom marriage has been consummated (al-

madkhulah biha), likewise a wife with whom marriage has not been consummated (Gayrul-Madkhulah biha). And this type of divorce (i.e. talaq mudaf is not among what Allah has taught us"[3]

He then quotes a Qur'anic verse, the portion of which reads:

> "And anyone who transgresses the limits of Allah does verily wrong his (own) soul."[4]

And then concludes thus:

> Furthermore, if it were to say that every talaq does not take effect at the time it is pronounced, then it would not be possible to take effect at a time other than the one in which it is pronounced.

3.1.3 Talaq mu'allaq (Suspended divorce)

This is a divorce which has been effected subject to occurrence of certain things at a future time, such as where the husband says to his wife, "If you travel, you are divorced," or "If you speak to so so person, then you are divorced."

As Regard the Condition to which conditional divorce is subjected the jurists categorized such conditions into two:
a} The one that may be a voluntary action the omission or commission of which is possible. And this includes the following:

i. Voluntary act of husband, such as where he says "If I do not pay the debt I owe so person, tomorrow, then my wife is divorced."

ii. Voluntary act of the wife, such as where the husband says to his wife," If you go to so and so place, then you are divorced", and she went to the place.

iii. Voluntary act of a third party, such as where the husband says to his wife, "If your brother travels to so and so country, then you are divorced."

b) The one that is not a voluntary act of any human-being such as where the husband says to his wife, "If the sun rises, then you stand to be divorced."

So where the condition to which the divorce has been subjected to is a voluntary act of either the husband or of the wife, then the divorce is legally known as talaq mu'allaq (suspended divorce) or yamin (divorce based on oath).

But where the condition is the voluntary act of a third party, or where it is not a voluntary act of any human being, then some jurists regard it as talaq mu'allaq although they do not regard it as yamin (oath). This is because the condition, in the circumstance, does not imply what oath implies i.e. inducement to commit or omit certain thing, or emphasizing certain news. Thus there is no similarity between these (two types of divorce). Some other jurists, on the other hand, consider such divorce as an oath because it implies what oath implies.[6]

Conditions for the validity of Talaq Mu'allaq: Talaq Mu'allaq is valid and as such effective upon the fulfillment of the following conditions:-

1. That the condition to which the talaq has been subjected must not have occurred but may or may not occur. Accordingly

if it has already occurred, at the time of pronouncing the talaq, then the talaq will take effect immediately, as if it is unconditional. The example of this, is where the husband says to his wife, "If you went out yesterday, then you are divorced," and it happened that she actually went out yesterday.

Where the condition has not occurred and its occurrence is impossible, such as where the husband says to his wife "If you ascend to the heaven" or "If Allah brings your brother back to life after his death, then you are divorced," the divorce is totally ineffective, because subjecting divorce to something the occurrence of which is impossible implies that the intention (of the husband) is not to divorce but to emphasize the fact that there is no intention to divorce. The same rule applies where the divorce is subject to the will of Allah (Mashi'atul-lah), such as where the husband says, to his wife, "You are divorced if Allah wills". Thus, the divorce, according to Hanafi school is ineffective.[7]

However, Maliki school holds a contrary view. This is because, according to it, if the condition is ambiguous then the divorce is considered as unconditional and as such takes effect immediately.[8]

2. That the condition must be in existence during the subsistence of the marriage or during the Iddah, i.e. where the wife had already been divorced with a revocable divorce (according to the majority view) or even with a minor

irrevocable divorce (talaq ba'in, baynunah sughrah, according to Hanafi school). Thus, if a man says to a woman who is not his wife, "If you speak to so so person, then you are divorced", and he married her afterwards, and the condition then occurs, namely she speaks to the person, divorce (under the circumstance) cannot take effect. This is because there is no marriage-tie between the spouses, at the time of pronouncing the conditional divorce. The same rule applies where a husband says to his wife," If you travel to your hometown, you are divorced", and then effects an unconditional divorce on her and then after the expiration of her iddah, she travels to her home-town, thus the divorce which has been suspended on her travelling to her home-town cannot take effect, because the condition occurs at a time when there is no marriage-tie between the spouses."

Where the husband divorces his wife and the divorce is revocable (raj'iy) and then he says to her," If you speak to so person, you are divorced", and she speaks to the person during her iddah, the majority of muslim jurists are of the view that the divorce, under the circumstances, will take effect. However, if the divorce is a minor irrevocable (ba'in baynunah sugrah), then the three Imams (i.e. Malik, Ahmad and Shafi'i), are of the view that the (conditional) divorce will not take effect due to the fact that marriage- tie had already been severed by virtue of the minor irrevocable divorce. But Hanafi jurists, on the other hand, are of the view that the (conditional) divorce shall, under the circumstance, take effect, because after minor irrevocable divorce, the marriage

is legally considered to be subsisting until the iddah expires.

It is not a condition that, the husband, at the time of the occurrence of the condition, must be legally capable of effecting divorce. Accordingly, where the husband pronounced divorce, on condition that certain thing occurs, at a future time, and at the time he did so, he was sane and then the condition afterwards comes into existence, (while the husband is insane), the divorce, under the circumstance, will take effect. This is so because when the husband pronounced the divorce he was legally responsible for all his actions. And accordingly, the legal consequences of what he had done, in the circumstance, will automatically follow."

When talaq mu'llaq takes effect: If the husband suspends the divorce of his wife to the occurrence of certain thing and then the thing to which the divorce has been suspended occurs, the muslim jurists differ as to whether the divorce is legally effective or not. There are three juristic views on this:-

1. That the divorce which has been suspended to the occurrence of a certain thing, comes into effect immediately the thing to which it has been suspended comes into existence, whether it is a voluntary act of the husband or of the wife, or of a third party, or a natural thing with which nobody can interfere, irrespective of the husband's intention. This is the view of the four Imams of the sunni schools of

Islamic jurisprudence (i.e. Malik, Ahmad, Shafi'i and Abu Hanifah). In holding this view, they rely on the following:

(a) That the textual authorities that deal with talaq and vesting the right to divorce in the husband are unrestricted, i.e. they do not distinguish between one type of divorce and another. The implication of this is that the husband is legally entitled to effect it as he likes: unconditionally or suspend its effectiveness to the occurrence of certain thing, or to a future time.

(b) That talaq mu'allaq took place during the period of the Companions; they were even asked regarding it and they decided that it took effect, provided the condition occurred, even if it is in a form of oath. Thus it was reported by al-Bukhari on the authority of Abdullahi bn. Umar that a man divorced his wife irrevocably, if she went out, and asked Ibn Umar, who said, "If she goes out, an irrevocable divorce shall take effect, but if she does not go out, then there is nothing."[11]

It was also related by al-Bayhaqi, in his Sunan that Abdullahi bn. Mas'ud was asked regarding a man who said to his wife, "If you do such and such thing, then you are divorced," and then she did that thing and Abdullahi said, "This is one revocable divorce."[12]

It was also narrated by Ibn Hazm in his al-Muhalla, on the authority of al-Hasan, that a man married a woman, and when (afterwards) he wanted to travel, the wife's family

insisted that he must send the wife's nafaqah (maintenance). And they made it a condition that if he did not send the nafaqah, within one month, then the wife would stand to be divorced. (But he did not accept that). The time stipulated (by the wife's family) passed but the husband did not send anything. Thus, when he came back, they brought their case before Aly bn. Abi Talib requesting him to terminate the marriage and separate between the spouses. But Aly refused to do that and said "You coerced him until he made her divorced".[13]

Thus, Aly's decision, is not to the effect that conditional divorce is ineffective. Rather, he just decided, in this particular case, that the talaq is not effective due to the fact that the man did not consent to the condition. It is, therefore, clearly implied that had the husband consented to it, Aly would have decided that the divorce was effective.

Furthermore Bayhaqi reported from Abuz-zinad that the jurists of Madina used to say, "He who says to his wife, if you go out from now up to night-fall, then you are divorced', and then the wife went out before night-fall, without his knowledge, the wife is divorced".

(c) That since divorce has been allowed as a last resort, circumstances may demand its suspension on some conditions, which may or may not occur. It may be that the husband hates certain things being done by the wife and despite the fact

that he has asked her to desist from doing them, she persisted in her doing those things. But the husband does not want to divorce her, hoping that she may reform. Thus, he needs to suspend the divorce on doing what he hates from her, that is to say she must either desist from doing, what he hates and do what he likes, i.e. normalizing or improving their relationship, or she stands to be divorced.[15]

2. The second view is that this type of divorce will never come into effect at all, even if the condition to which it has been suspended comes into existence. This is the accepted view of Zahiri school and some of the Shi'a jurists. in holding this view, they rely on the fact that suspending divorce is a kind of taking oath, and taking oath by anything other than Allah (S.W.T.) is unlawful. This is by virtue of the hadith in which the Prophet (S.A.W.) was reported to have said "Whoever wants to swear he should not swear except by Allah."[16]

However, the argument is, according to Zakiyyud Deen Sha'aban, refutable, by virtue of the fact that conditional divorce (Talaq Mu'allaq) is neither legally nor literally considered as an oath (Yamin). And those who use it in that sense, do so only metaphorically. Thus, the hadith cited above to substantiate this (second) view is not relevant to Talaq Mu''allaq and consequently its ineffectiveness cannot be construed from it.[17]

3. The third view is that if this type of divorce is pronounced in the sense of an oath, then it will not come into effect, even if the condition to which it was suspended occurs.However, it is obligatory upon the husband (who has pronounced it), to observe kaffarah (expiration) for violating an oath. But if the divorce is pronounced not in the sense of oath, then it will take effect. Ibn Taymiyyah and his eminent disciple Ibnul-Qayyim subscribe to this view.[18]

They substantiate the view with the fact that where the main purpose of the conditional Talaq is to incite (the wife) to do a certain thing, or to prevent (her) from doing a certain thing, or to emphasize an information, then it will be included within the Qur'anic verse in which Allah (S.W.T.) Says:

> "Allah has already ordained for you, the expiation of your oaths...."[19]

And in another verse, Allah (S.W.T.) says

> ".... That is the expiation for the oaths ye have sworn ...."[20]

However, this argument has been refuted by Sha'aban in the same way he refuted the second view by saying that the question of an oath does not arise here.[21]

It is evident from the foregoing discussion that the first view (out of the three views discussed, concerning talaq mu'allaq), is the preponderant one. This is by virtue of the textual authorities in the Qur'an and Sunnah (already cited)

and the consensus of the companions and eminent Mujtahids after them.

3.2 Delegation of Power To Divorce:

Since talaq is one of the inalienable rights of the husband, he is entitled to delegate it to whomsoever he wants; even to his wife. There are, however, divergent views regarding this.

3.2.1 Delegation of power to divorce according to Maliki school:

Delegating power to divorce is known, according to Maliki School, as Tafwid, and it is divisible into three: Tawkil, Takhyir and Tamlik.

Tawkil is to delegate the power to pronounce talaq by the husband to another person - his wife or any other person- while he retains the right to prevent that another person from effecting the divorce.

Takhyir is to delegate the power to effect triple divorce, to the wife, by giving her the right to choose between the marriage and divorce. The husband, usually does so by saying to the wife, "Choose me or choose yourself."

Tamlik is to vest the right to effect talaq (triple talaq, in most cases) in another person (especially the wife). One of the formulae of this type of delegation is where the

husband says to his wife, "I put your affairs (or "your divorce") in your hand."[22]

The delegation, is, according to Hanafi school divisible into two: Tawkil and Tafwid.

Tawkil is, according to the Hanafi jurists, where the husband appoints someone to dissolve his marriage on his behalf. The example of this is where the husband says to someone, "I authorize you to divorce my wife." Thus if the person who has been so authorized accepts the delegation of authority and then says to the wife of the person who has authorized him, "You are divorced," or he says, "The wife of the person who has authorized me is divorced," then divorce will take effect.

This delegation of power to divorce is a sort of agency, and the position of the person who has been delegated by the husband is that of an agent. And it is an established principle of the Shari'ah that an agent is under an obligation to do what he has been authorized to do by the principal. Thus he has no right to do anything outside the scope of the power delegated to him. And if he does so, his action is legally considered as ultra vires and therefore, void, unless the principal ratified it.[23]

Since this is the position of the person authorized by the husband to divorce his wife, he can use the power

chapter 33 verses 28 - 29 of the Qur'an where Allah (S.W.T.) Says:

> "O Prophet! Say unto thy wives: 'If you desire (but) the life of this world and its chasing - well, then, I shall provide for you and release you in a becoming manner. But if you desire God and His Apostle, and (thus the good of) the life Hereafter, then (know that), verily for the doer of good among you God has readied a mighty reward."[25]

When, immediately after the revelation, the Prophet (S.A.W.) recited the above two verses to his wives, all of them emphatically rejected all thought of separation and declared that they had chosen "God and His Apostle and the (good of the) Hereafter."[26] This implies that had they chosen themselves, it would have been effective divorce.

Zahiri jurists, on other hand, do not agree with this interpretation. Thus the implication, according to them, is that: had they chosen themselves, the Prophet (S.A.W.) would have divorced them and not that they were divorced by merely choosing themselves.[27]

Where the wife chooses herself, the majority of jurists (who accept that divorce can be effected by means of the expression: ("Ikhtariy Nafsaki:), have divergent views as to the type of divorce that comes into effect. Thus some of them hold that it is one single revocable divorce. This is what was reported from Umar, Ibn Mas'ud, Ibn Abbas, Umar bn Abdul'aziz, Ibn Abi Layla, Sufyan, Shafi'i, Is'haq, Abu Ubaydah and Abu Thawr.[28]

Some other jurists, on the other hand, are of the view that if the wife chooses herself, then it is one single irrevocable divorce. This view was reported from Aly bn Abi Talib (R.A.), and Hanafi jurists subscribe to it.

Malik is of the view that if the wife chooses herself, then it is regarded as triple divorce). But if she chooses her husband, then it is one single (revocable) divorce. However, this view is contrary to the clear precept of the Hadith narrated by Bukhari, Muslim, Abu Dawud, Tirmidhi, Nisa'i and Ibn Majah, on the authority of A'ishah (R.A.) who said, "The Apostle of Allah gave us the right to choose (between ourselves and him) and we chose him. But he did not consider this anything (i.e. he did not consider it a divorce).[29] In another version narrated by Muslim, it was reported that the Apostle of Allah gave his wives the right to choose (between him and themselves) but this was not considered as divorce.[30]

2. Amruki biyadiki: (Your affair is in your hand). This is where the husband entrusts his power of divorce to the wife, who is legally capable of exercising it, just like the husband. Where the husband entrusts the power to the wife, the power is considered to have been vested in her, provided the following conditions have been fulfilled:-

(a) That is must be established that the intention of the husband, in the circumstance, is to divorce (the wife). This is because the expression is kinayah (implied) by

which Talaq cannot be effective unless and until the husband intends it to be so.

(b) That the wife must be aware of the fact that the power to pronounce talaq has been vested in her by the husband. Thus, if she is aware of this fact, then the power will be in her hand and accordingly, entitled to divorce herself, provided the vesting of the power by the husband has not been tied to a specified period, or it has been so tied but the period has not expired. But if it has expired, then she is not entitled to divorce herself whether she is aware of the fact that she has been vested with the power before or after the expiration of the specified period or not.[32]

This type of Tawfid may be Munajjaz(unconditional), or Mu'allaq (conditional, subject to the occurrence of certain thing at a future time), or Mudaf (suspended to a specified future time).

Tafwid Munajjaz (unconditional delegation) may be tied to a specified period of time and it may not be so. Where it is not so tied to a specified period of time, such as where the husband says to his wife, "Your affair is in your hand", then the power to divorce herself is considered to be in her hand as long as she remains at the place (where she has been vested with the power). Thus if she leaves the place without choosing to divorce herself, or she declines to show her acceptance, then the Tawfid is void.

But if it has been tied to a specified period of time, such as where the husband says to his wife, "Your affair is in your hand, today", or "this month," or "for one year," then she is entitled to make up her mind (as to whether to divorce herself or not) within the specified time. And if she chooses to divorce herself (and actually did so), within the specified time, then she is not entitled to effect another divorce (even if the period has not expired).

Where Tawfid is Mu'allaq, such as where the husband says to his wife, "If so and so person returns from his journey, then your affair is in your hand," then the wife is entitled to choose between the marriage and divorce, when the person returns and she is aware of that.

Where Tafwid Mu'allaq is tied to a particular period of time, such as where the husband says to his wife, "If so person returns from his journey, then your affair is in your hand on the day he returns," then she has the right to choose (to divorce herself) whenever she becomes aware of his return throughout the day (of his return), right from the very moment he returns. (that is within twenty four hours).[32]

The type of talaq that comes into effect through tafwid: Where the wife, acting upon the power to divorce (herself) vested in her by her husband, divorces herself, then this is considered as one single divorce. This is the view of Umar

bn. al-Khattab, Abdullahi bn. Mas'ud, Sufyan ath-Thawri, Shafi'i and Ahmad.[33]

It was reported that a man come to Abdullah bn. Mas'ud, and said, "Something that normally happens between people (i.e. conflict), happened between me and my wife and for that reason she said to me, "If my affair which is your hand were in my hand, you would know what I would do". So I said to (to her), 'What is in my hand is (now) in your hand' she thus said, (to herself), 'You are divorced.' (On hearing this) Ibn Mas'ud said, "I consider this as one single divorce. And you are more entitled to have her (as your wife) than any other man, as long as her iddah has not expired. However, I will meet Amirul Muminin Umar (and inform him),' Thereafter, he met Umar and narrated to him the story, and he asked him, 'What then did you say about that" I replied, 'I said I considered that as one single divorce and that he (the husband) was more entitled to have her (as his wife) than any other man. Umar said, "That is also my view and had it been that you had a contrary view, I would have known that you were wrong."[34]

Hanafi jurists are of the view that such divorce is, legally speaking, one single irrevocable divorce, because vesting the power (to divorce) in the wife (by the husband) implies the forfeiture of the husband's right and power (to divorce her). Thus if she accepts this (vesting of power) it must then be transferred from him which is only possible if the divorce is irrevocable.[35]

3. Talliqiy nafsaki (divorce yourself): Hanafi jurists are of the view that where the husband say to his wife, "Divorce yourself", without the intention to effect divorce or with the intention to effect one single divorce, and the wife says, "I divorce myself", it is considered as one single divorce. And where she effects triple divorce and the husband has intended this, then it will be considered as such.

Where he says to her, "Divorce yourself," and she says "I have chosen myself," then she is not, legally speaking, considered as divorced". And where he says to her, "Divorce yourself whenever you want," she is entitled to divorce herself during and after the meeting.[36]

Malik is of the view that the divorce that takes effect, where the wife has been given choice (between subsistence of the marriage and divorce), or where she has been given the right to divorce herself, is triple divorce.[39]

Revocation of tafwid: Ibn Qudamah is of the view that where the husband, (after vesting his wife with the power to divorce herself) revokes the power vested in her, or says, "I revoke what I have vested in you", then the Tafwid (under the circumstances) becomes invalidated. This is the view of Ata, Mujahid, Nakha'i, Awza'i and Is'haq.

Zahuri, Thawri, Malik and Hanafi jurists, on the other hand, hold that the husband has no right to revoke the power vested in the wife by him.

Ibn Qudamah is also of the view that where the wife, voluntarily gives up the power to divorce vested in her, then the Tafwid is also considered to be invalidated.[38]

Tafwid does not, however, forfeits the husband his right to divorce. Accordingly, the husband, after vesting the power to divorce in he wife, can still effect divorce on her. Whichever comes after will be counted as the second or third respectively. Thus it is like any other Tawkil (agency).[39]

Time of Tafwid: Tafwid, according to the Hanafi jurists, can be made at the times of contracting the marriage or any time after it. The example of Tafwid made at the time of contracting the marriage is where the woman (who is the prospective wife) says to the man (who is the prospective husband, "I marry you on condition that the issue of my divorce is in my hand, so that I may divorce myself whenever I want," and the man accepts.

However, Hanafi jurists stipulates a condition for the validity of Tafwid, made at the time of contracting the marriage, that the offer must emanate from the woman or her representative. Thus where the man makes the offer accompanied by tafwid, such as where he says to her, "I marry

you on condition that your affair (of divorcing you) is in your hand, so that you may divorce yourself whenever you want, "and the woman accepts, then the marriage is valid but the tafwid is ineffective. This is so because in such a circumstance, the husband had vested the power in the wife to divorce herself, before the marriage was concluded. And the husband then had no such power to divorce and since he did not have that power he cannot, therefore, alienate it to the wife or any other person.[40]

Distinction Between Tafwid and Tawkil: Even though tafwid and tawkil are, according to the Hanafi jurists, the same in that neither of them forfeits the husband his right to divorce, they, however, differ in the following respects.

(a) That after making tafwid, the husband is not entitled to revoke it, while in the case of tawkil the husband is entitled to revoke it, provided the wakil (i.e. the agent) has not executed what he has been delegated to execute.

(b) That in Tafwid, the Mufawwad (i.e. the authorized person) acts in accordance with his will because the Mufawwid (i.e. the husband) has subjected the issue of talaq to his will. Accordingly, he possesses this power to divorce vested in him which he can exercise anytime he wants. But in Tawkil, the wakil has only been vested with the power to divorce according to the directions given to him by the Muwakkil (i.e. the husband) and thus he cannot act ultra vires. This is because a wakil cannot legally be considered as his principal's agent

unless he executes what he has been authorized to do by his principal, according to the principal's direction.

(c) That where Tafwid is Mutlaq (unspecified), then it will be specified in the Majlis (that is the meeting place where the Tafwid has taken place), excepts where it has been made at the time of contracting the marriage, in which case it will not be specified in the Majlis. Tawkil, on the other hand, is not generally, specified in the Majlis. Thus the wakil can effect the divorce either at the Majlis or at any time after it, if the Tawkil is not restricted to a particular period of time. (that is if it is general).

(d) Tafwid cannot be invalidated due to the subsequent insanity of the husband because it is legally like Talaq which also cannot be invalidated as a result of the husband's subsequent insanity. But Tawkil becomes invalidated as a result of husband's insanity. This is because the moment he becomes insane, he looses his legal capacity. And once (in Tawkil or wikalah) the wakil or muwakkil looses his legal capacity, the wikalah becomes invalidated. [41]

Ibn Hazm has a totally different view from the above juristic views, on the issue of delegation of power to divorce. Thus, according to him, it is not legally permissible for the husband to vest in the wife the power to divorce herself. And if he does so, it is not binding on him and even if the wife divorces herself, the divorce is

21. Sha'aban, Z.D. (1971) Al-Ahkamush-Shar'iyyah... infra ta p. 448.

22. Ibid.

23. Ibid - at pp. 450 - 1

24. Ibid.

25. Asad, M. (1980) The Message of the Qur'an, Dar Al-Andalus Ltd., Gibraltar, p. 644

26. Ibid.

27. Sabiq, S. (1977), Fighus-Sunnah, infra at p. 242

28. Ibn. Qudamah, (n.d.) al-Mugniy, Maktabul-Jamhuriyyah Al-Arabiyyah, Vol.7 VII, p. 142.

29,30. These two Hadiths have been quoted in Sabiq, S. (1977), Fiqhus-Sunnah, Vol. II infra at p. 242.

31. Musa, M.Y. (1958), Ahkamul-Ahwalish-Shakhsiyyah... infra at p. 286

32. Ibid. at pp. 285-88

33. Sadiq, S. (1977), Fiqhus - Sunnah, Vol. II, op. cit. at p. 242

34. Ibn-Rushd, (n.d.) Bidayatul-Mujtahid, at-Maktabatut Tijariyyah al-Kubra Vol. II p. 61.

35. Sabiq (1977) Fiqhus - Sunnah, Vol.II, Infra at p. 243.

36. Ibid at p. 344

37. Sha'aban, Z.D. (1971) al-Ahkamush-Shar'iyyah.. infra at p. 456

38. Ibn Qudamah, (n.d.) Al-Mughniy, Vol.VII op. cit. at p. 142

39. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah... supra ta p. 454.

40. Ibid

41. Ibid - at pp. 445 - 6

42. Ibn Hazm (n.d.), al-Muhalla, Vol. X, p. 216.

43. Ibid. at p. 196.

divorce is legally lawful during that tuhur (state of purity) just as in the case of other tuhurs.

However, the first version which contains "He should keep her until she becomes clean and then she menstruates for the second time becomes clean," consists of an addition (to the contents of the second version), which must be complied with.

And accordingly, talaq effected during the tuhur that immediately follows menstrual periods in which the talaq bid'iy took place, is not considered as talaq Sunni. To be talaq Sunni, the wife, after the talaq bid'iy, must become clean and menstruates and then become clean and then after that the husband can divorce her.[7]

4.1.2 Talaq Bid'iy: This is a divorce effected contrary to the principles of the Qur'an and the Sunnah. This includes a triple divorce (i.e. three divorces at once), or divorce during menstruations, or during nifas (post natal confinement) or during the state of purity of the wife in which the husband had intercourse with her.

All the Muslim jurists unanimously agree that such type of divorce is prohibited and that any husband who effects it is a sinner. However, they differ as to whether it is effective or not. The majority them, including the imams of the four Sunni schools of Islamic jurisprudence, are of the view that it is effective. In holding this view, they rely on the following reasons:-

1. That talaq Bid'iy is included within the general meaning of the Qur'anic verses that deal with talaq.

2. That Ibn Umar mentioned that when he divorced his wife during her menstruation, and the Prophet (S.A.W) ordered him to take her back, that divorce was counted as an effective divorce."

Some jurist hold that this type of divorce is ineffective, contending that it cannot be included within the general meaning of the Qur'anic verses and ahadith regarding talaq. This is because, according to them, it is not the type of talaq which Allah has permitted. Rather it is contrary to the one permitted by Him, by virtue of (a) the Qur'anic verses which reads, "Divorce them at their prescribed periods..."[9]

(b) the hadith in which the Prophet (S.A.W) said to Umar (R.A.) "Order him to take her back..." They further argued that the Prophet was reported to have reacted angrily when the news (that Abdullahi divorced his wife during her menstruation) reached him; and he would not have re-acted so angrily if what Abdullahi had done were something permissible.[10]

On the report that Abdullahi's talaq pronounced on his wife, during her menstruation, was counted as an effective divorce, Ibn Hazm argues that he (Abdullahi) did not mention who counted it as such. And no action or statement of anyone

is legally considered as an authority, except the statement or action of the Prophet (S.A.W.).[11]

It was rather narrated on his (Abdullah's) authority, by Ahmad, Abu Dawud and Nisa'i that he (Abdullah) divorced his wife during her menstrual periods and the Apostle of Allah (S.A.W.) returned her (to him) and he did not consider that anything. The Isnad (chain of narration) of this hadith is sound and that it clearly indicates that it was the Apostle of Allah (S.A.W.) who did not count what Abdullah had done anything. Thus it cannot be contradicted by what Abdullah said, according to which that the Prophet (S.A.W) counted his divorce during the wife's menstrual periods as an effective divorce).[12]

However, had it been that the version which includes the additional sentence that reads, "Order him to take her back and count this as one (effective) divorce," were authentic, it would have been a categorical authority. But it is not authentic as it was confirmed by Ibnul-Qayyim in al-Huda.[13]

The jurists further argue that there is consensus among all the Muslim jurists that any talaq which is contrary to talaq Sunni is known as talaq Bid'iy. And it was reported that the Prophet (S.A.W.) said, "Any bid'ah (innovation) is dalal (deviation)." Furthermore there is consensus (among jurists) to the effect that this type of talaq (i.e. talaq bid'iy) is contrary to what has been prescribed by Allah and

His Apostle; it is thus rejected, (religiously condemned and legally ineffective), in accordance with the hadith narrated, on the authority of A'isha, that the Prophet (S.A.W.) said, "Any action that is not in accordance with our own affair (or teaching), then it is not acceptable (as a valid one)." [14]

The holders of this view include Abdullah bn. Umar, Sa'id bn. al-Musayyab, Tawus, Khallas bin Umar, Abu Qalabah, Imam bn. Aqil, (one of the Hanbali jurists), Imam Ahmad, (in one of his two views), Zahiri school, Ibn Taymiyyah and his disciple Ibnul-Qayyim.[15]

However, a contemporary muslim jurist, Zakiyyuddeen Sha'aban, is of the view that the view of the jamhur (majority) is the preponderant one, especially because the argument of Ibn Hazm that Abdullah bn. Umar did not mention who counted his divorce which he effected during the wife's menstrual period as an effective talaq, was refuted by al-Hafiz Ibn Hajar in his Fat'hul-Bari) where he explained that it was the Prophet (S.A.W) who ordered him to take the wife back and guided him as to how he should, afterwards, divorce her, if he wanted. Thus, when Ibn Umar mentioned that the divorce was considered and counted as valid, it must be inferred that it was the Prophet (S.A.W.) who counted it so, for to infer otherwise is contrary to the context of the story (about Ibn Umar's divorce). This is because it is unthinkable that Ibn Umar would do something, in this story, while reporting from the Prophet (S.A.W), according to his own

opinion, knowing that the Prophet (S.A.W) became very angry with what he had done, without contacting him.[16]

Ibn Hajar further refutes the argument (of those who consider talaq bid'iy as ineffective) by reporting what Ibn Abdulbar said regarding the version of Ibn Umar's hadith which includes, "..... And he did not consider that, (i.e what Ibn Umar did) as anything." He (Ibn Hajar) reported that Ibn AbdulBar said, "The phrase, 'And he did not consider it anything has been categorized (by traditionists) as Munkar,[17] because nobody reported it except Abuz-Zubyr. Thus it cannot be an authoritative reason against a contrary opinion, especially where the contrary opinion is stronger. And even if the phrase were sound, it might mean, to me, Allah knows the best, that: he (the Prophet) did not consider it anything correct, because it was not effected according to the Sunnah."

With regard to taking the wife back after divorcing her during her menstruation, all the jurists who hold such divorce to be effective, unanimously agree that the husband must take the wife back, if it is legally possible to do so, that is where the divorce is not irrevocable. And after taking her back, the husband must hold her until she becomes in a state of purity, and then she menstruates again, then if (afterwards) she becomes in a state of purity, he can divorce her before he has intercourse with her, if he wants.

delegated to him and divorce the wife, immediately after being vested with the power, or at a later time and any where, except where the principal (i.e. the husband) has specified, during the delegation, a particular time or place, in which case the agent must exercise the power within the stipulated time or place, otherwise his action is legally considered as Ultra Vires and as such void and of no any legal effect. Where the agent acts Ultra Vires, the principal (i.e. the husband) has the right to depose him and if he does so, the agent has no right, any more, to divorce the wife (of the principal), and even if he does so, the divorce is ineffective.

Maliki jurists, on the other hand, are of the view that the principal has no right to depose the agent (where the wife is the agent and) where her right has been made the condition of the agency, such as where the husband says to his wife, "if I marry another woman during the subsistence of our marriage', or "If I marry another woman while I am with you (as my wife), then your affair is in your hand."[24]

Tawfid is vesting the power by the husband in the wife to divorce herself, which is usually done through one of the following expressions:

1. Ikhtariy Nafsaki (choose yourself). The Majority of Muslim jurist agree that Talaq can be effected by means of this expression, because it has been legally accepted to be one of the formulae of Talaq. This is by virtue of

This taking back of the divorced wife, is obligatory, according to Maliki and Hanafi jurists, except that the Maliki jurists hold that where the husband refuses to take the wife back, he must be coerced to do so, by arresting or even beating him until he takes her back. And if despite this, he insists on not taking her back, then the judge should do so on his behalf by saying, "I have taken the wife of so and so back to him," or "I have imposed the taking back of the wife of so and so on him."

If the judge does this, the wife is presumed to have been taken back to the husband (and the divorce revoked). And if, accordingly, either of the spouses dies (afterwards), the other is entitled to inherit him or her, and also if both of them are alive, the marital rights exists between them.[18]

Hanafi jurist, on the other hand, hold a contrary view regarding the issue of taking the wife back to the husband by the judge. Thus, the judge, according to them, has no right to do so, and if he does, his action is inoperative. But where the husband takes the wife back, this will serve as a repentance for the sin he has committed. And where he refuses to take her back, then the judge shall impose a punishment on him which he deems suitable in the circumstance, which will serve as deterrent, since there is neither fixed punishment nor expiation (kaffarah) regarding this abominable act. [19]

4.1.3. **Divorcing Pregnant Woman, Ayisah (a woman who has reached menopause) and minor girl:** It is lawful for the husband to divorce his pregnant wife anytime he wants.

This is in accordance with a hadith narrated by Muslim, Nisa'i, Abu Dawud and Ibn Majah that Ibn Umar divorced his wife while she was menstruating and informed the Prophet (S.A.W.) who said, "Order him to take her back and then divorce her if she becomes pure or while she is pregnant".

However, the Muslim jurists differ as to whether the pregnant wife can be divorced more than once during her pregnancy. Thus according to Abu Hanifa, she can be divorced more than once, provided there is an interval of at least one month between the two divorces, until the final one (i.e. the third one) is effected. But according to Muhammad and Zufar (the two most prominent disciples of Abu Hanifa), she cannot be divorced more than once during her pregnancy. The other talaq must wait until after her delivery [20] Imam Malik is of the same view.[21].

With regard to an ayisah, i.e. a woman who has reached menopause and minor girl who has not started experiencing menstrual periods, they can be divorced anytime, provided the divorce is one single divorce.[22]

4.1.4. **Triple Talaq:** This is a divorce with an expression denoting three divorces at once, such as, "I divorce you three times," or I divorce you, I divorce you, I divorce you." All

the muslim jurists unanimously agree that this type of divorce is haram (i.e. unlawful and reprehensible) because it blocks the chances of reconciliation for the spouses in the event of regret and change of mind which has been given to them by the Quran and Sunnah. Thus, it contradicts the categorical statements of the Qur'an and the Sunnah. For instance, in chapter 2 verse 229 Allah (S.W.T) says:

> "Divorce may be (revoked) twice: after that, the parties should either hold together on equitable terms, or separate with kindness...."

Lawful divorce which is permitted, according to the verse, is one single divorce followed by a revocation, and another one at the second instance which is also followed by a revocation then the final one which is irrevocable. This implies that the three divorces (permitted by virtue of the verse) must be at three different occasions and not at once, as in the case of triple talaq.

Moreover, it was narrated by Nisa'i, on the authority of Mahmud bn. Labid, that the Prophet (S.A.W) became very angry with a man who effected triple divorce and considered what he had done as playing with Allah's divine book (i.e. the Qur'an). [23] This hadith also shows that triple talaq is contrary to the principles of the Shari'ah.

But with regard to the effectiveness or otherwise of such divorce, the muslim jurists differ. There are, accordingly, three divergent views on this issue:-

1. That the divorce is effective and should be considered as it has been effected, i.e. as three separate divorces. This is the view of the majority of the jurists, including the four great imams of the four Sunnai schools (i.e. Abu Hanifa, Ahmad, Malik and Shafi'i). The same view was also reported to have been held by many companions including Umar, Abdullah bn. Umar, Abdullah bn. Abbas, Abdullah bn. Mas'ud, Uthman bn. Affan, Ali bn. Abi Talib, Abu Hurairah and others. In holding this view, these jurists, rely on the following authorities:

(a) Verse 230 of Chapter 2 which reads:

> "So if a husband divorces his wife (irrevocably for the third time), he cannot, after that, remarry her until after she has married another husband..."[24]

(b) Verse 236 of Chapter 2 which reads:

> "There is no blame on you if you divorce woman before consummation or fixation of their dower..."[25]

(c) Verse 236 of Chapter 2 which reads:-

> "And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the marriage-tie.."[26]

They agree that these three verses obviously indicate that talaq is valid whether it is pronounced once or twice or thrice at a time, because they make no distinction between effecting it once or twice or thrice at a time.

(d) They also cited verse 229 of chapter 2 which reads:

> "Divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness...."[27]

They also argue that the verse implies that divorce pronouncement twice or thrice is effective as such, whether it is pronounced at one and the same time or pronounced separately. {e} They also substantiate their view with a hadith transmitted by Abdulrrazzaq, in his book, on the authority of Ubadah bn. Samit who reported that his grandfather divorced his wife 1000 times; and when he went to the Prophet (S.A.W) and informed him, he said, "Your grandfather did not fear Allah. He has the right to effect three divorces, but (the remaining) 997 is transgression (of Allah's limits) and injustice for which Allah may punish him, if He wills."[28]

And in another version (of the same hadith), the Prophet (S.A.W) said, "Your father did not, in fact, fear Allah so as to grant a way out unto him. The wife has been repudiated irrevocably by virtue of three divorces which have been effected contrary to the Sunnah. And the (rest of) 997 is a sin which have been tied to his neck."

{f} In Rukana's hadith, when he (Ruknah) divorced his wife three times at one sitting and later on insisted he meant only one single divorce, the Prophet (S.A.W.) asked him to swear (by Allah) that he intended only one single divorce. And this implied that had he intended three divorces it would have, in effect, been so. [29]

{g} The hadith transmitted by Bayhaqi, in his Sunan that one A'isha was married to al-Hassan bn. Ali bn Abi Talib (R.A.). When Ali, (his father) dies she congratulated him on the

expectation that he would be the caliph (thereby succeeding his father). He was so angry with what she had done that he effected triple divorce on her. And when her iddah expired, he sent her some gifts and her deferred Sadaq. (When she got his message) she said something which made him regret and wished to take her back had it been legally possible by saying, "Had it not been that my father informed me that he had heard my grandfather saying, 'Any man who divorces his wife thrice at one sitting or at every menstruation, then she is not lawful for him until she marries another husband,' I would have brought her back...."30.

(h) That it was reported from many Companions, including Uthman bn. Affan, Ali bn. Abi Talib, A'isha, Ibn Mas'ud, Abdullah bn. Umar, Abu Hurairah, Anas bn. Malik, Ubadah bn. Samit, Mugirah bn. Shu'bah, that triple divorce was counted as three divorces. And there was no (authentic) report that someone, among the companions expressed disagreement with their view. Thus it became an Ijma (consensus) among them.[31]

However, Ibn Rushd, a prominent Maliki jurists and author of Bidayatul-Mujtalid criticized the above majority view pointing out that it is unnecessarily harsh on the parties. He says:

"In considering triple talaq as three divorces, it seems that the majority of the jurists (who have held this view) seem to have done so hoping that it would serve as a kind of

prevention (against breach of Allah's injunction) - saddudh-Dhari'ah (blocking the means). However, this is an obstacle to the rukhsah (concessionary rule) which gives a sort of concession regarding certain things. It is also contrary to the objectives of Allah's injunction in 65:1."[32] It is obvious that this view is more convenient and more beneficial to the society than the other views.

2. The second view is that triple talaq is considered as only one single effective revocable divorce. The holders of this view defend their view with the following authorities:-

{a} The hadith transmitted by Muslim and Abu Dawud, in which it was reported that: "Abus-Sahba 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 (the first two years) of the caliphate of Umar? He replied, 'Yes'"[33]

In support of this view Professor Ahmad Hasan quotes an-Nawawi's commentary on this hadith as follows:

> "This sound tradition indicates that a divorce by three pronouncements at a time, is considered as a single divorce.This is the opinion of Abdullah lbn. Abbas, Zubayr bn. Awwam and Abdurrahman bn. Awf. Ali and Ibn Mas'ud are also reported to have held this view, according to a statement ascribed to them. However, according to another statement, they held a different opinion...

This view is also held by some of the Maliki, Hanbali and Hanafi jurists..."[34]

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In another version (of the above-quoted hadith) transmitted by Muslim, on the authority of Ibn Abbas, it was reported that: 'talaq by three pronouncements at a time was considered as a single divorce, during the time of Abubakar, and in the first two years of the caliphate of Umar. Umar said, "People made haste in a matter in which they were given time to consider. Henceforth, we will make them operative." So he made them operative (i.e. made triple talaq as three separate talaqs)" divorces.[35]

{b} The hadith narrated by Abu Dawud and Ahmad, in which it was reported that Rukanah bn. Abd Yazid (R.A) divorced his wife Suhaimah absolutely (i.e by three pronouncements at a time). And the Prophet (S.A.W.) was informed about this matter. Rukanah said to him, "I swear by Allah that I meant it to be only a single utterance of divorce. The Apostle of Allah (S.A.W.) said, "You swear by Allah? Rukanah said, "I swear by Allah that I meant it to be a single divorce." The Apostle of Allah returned her to him. Then he divorced her for the second time in the time of Umar and for the third time in the time of Uthman.[36]

{C} Verse 229, Chapter 2, (already quoted above), because it indicates that the three divorces which the husband is entitled to effect must be so effected separately, one after the other, up to the final one which is irrevocable but not the three at the same time. And anything that is meant to take place one after the other (at an interval), nobody has the right to effect it at one and the same time. Thus if

anyone effects it twice or thrice in one single sitting, it takes effect as only one single divorce.

Ibn. Taymiyyah is among the jurists who are of the view that triple talaq should be considered as one single divorce. He contends that there are no authorities in the Qur'an, Sunnah, Ijma' or Qiyas to the effect that it is three divorces. He further stated that it has been reliably reported that it was considered as one single divorce during the periods of the Prophet (S.A.W) and Abubakar and at the beginning of Umar's Caliphate. It was Umar who later decided, through his Ijtihad, that it should be considered as three divorces; he did so in order to remedy the abuse of such divorce by some Muslims and to serve as a deterrent. And it is not right to discard the decision of the Prophet (S.A.W) (for Umar's decision).[37]

It should be noted that according to Taymiyyah, there is no single authentic hadith to the effect that triple talaq is legally considered as three divorces, while as it has been explained (above) the jurists who hold this view substantiate it with many ahadiths. Thus he has probably taken that position because he considers those ahadith: (relied upon by those who hold that triple talaq, is considered as three divorces) as unauthentic.

3. The third view is that triple talaq is absolutely ineffective because, according to the jurists who hold this

view, this type of talaq is categorized under talaq bid'iy which is considered ineffective. And they quoted the same authorities which have been quoted to substantiate the argument that talaq bid'iy is ineffective.[38]

Divergent views of the four Sunni Schools Regarding Triple Talaq: where it is pronounced in three consecutive pronouncements: Where triple talaq is effected in three consecutive pronouncements (i.e. "I divorce you, I divorce you, I divorce you"), in one sitting the four Sunni schools differ as to whether the divorce is to be considered as three divorces or as merely one single divorce.

Thus the Hanafi jurists are of the view that this type of divorce will judicially be considered as three divorces which are binding on the husband. And even if he claims that his intention, regarding the second and the third pronouncements, is merely to emphasize the first pronouncement (but not to make them second and third divorces respectively), the judge should not believe him. This is because, by virtue of the obvious meaning of the expression used, (in effecting the divorce), it is three divorces that must come into effect. Thus the claim that it has been used just to emphasize (the divorce), is contrary to the obvious meaning and as such unacceptable. However, the Hanafi jurists further argue that such claim is religiously acceptable, which means that the divorce may be accepted as a single divorce (as claimed by the husband), if it is not brought before a court of Law.

> the Muslim Ummah has held a contrary view regarding this issue, under any circumstance. The contrary view has been held only by some few individuals with whom their contemporary fervently disagreed. This few individuals even used to hide their view, (which is an indication that it is not valid).[41]

However, Ibn Rushd argues that, though this view (that triple talaq is considered as three divorces) may serve as a deterrent (against the breach of Allah's law), it is an obstruction to the doctrine of rukhsah (i.e. concession given by the Shari'ah, by virtue of it's natural simplicity). He further explains that the view is also contrary to the main purpose of chapter 65 verse 1 of the Glorious Qur'an, which gives an opportunity to the spouses to reconcile (and restore their marital tie). [42]

It seems that by virtue of the strength of its authorities and the fact that, in the circumstances, it is more suitable, the second view is more cogent and more reliable. Furthermore, the claim by Ibn Rajab that none among the sahabah, tabi'un and the a'immah among the salaf held the view that triple talaq was considered as one single divorce may not be correct. This is because Shawkani, in his Naylul-Awtar mentions that the view (of considering triple talaq as one single divorce) has been reported from eminent jurists among the Sahabah, the Tabi'un and their followers. He specifically mentions that it has been reported from Abu Musa, Ali, Ibn Abbas (R.A.), Tawus, Ata, Jabir (R.A.) Ibn Zayd, al-Hadi, al-Qasim, al-baqir, Ahmad bn. Isa, Abdullah bn. Musa bn. Abdullahi and Zayd bn. Ali. It has also been reported by

Mughith from Ibn Mas'ud, Abdurrahman bn. Awf and Zubayr (RA). This is also the view held by the jurists who came after (the above-mentioned jurists) such as Ibn Taymiyyah and his eminent disciple Ibnul-Qayyim. [43]

4.2. Classification of Talaq Into raj'iy And Ba'in:

Talaq from the point of view of revocability or otherwise, is divisible into raj''iy and Ba'in.

4.2.1 Talaq Raj''iy: This type of talaq takes effect where the husband divorces his wife with whom he has actually consummated the marriage, without any material consideration, in a circumstance whereby he has never divorced her before, or he has once effected only a simple revocable divorce on her. This type of divorce does not terminate the marriage-tie, completely until the iddah expires. Thus, before the expiration of the iddah, the husband is entitled to restore full marital relationship (with the wife) by simply revoking his pronouncement, either verbally (by saying, "I have revoked the divorce I have effected on you")or by deeds, for example "by paying the woman a suggestive compliment, kissing her, etc. To facilitate the reunion, nothing else is required other than this initial revocation"[44]

4.2.2 Talaq Ba'in: This is sub-divided into two :- Ba'in Baynunah Suqhra (the intermediate) and Ba'in Baynuna Kubra (the ultimate). The Ba'in Baynuna Suqhra means that the

resumption of the broken marital relationship is only possible with new marriage contract (without necessarily the need for the wife to marry another man before that). The Ba'in baynuna kubra means that it is absolutely prohibited to resume broken marital tie unless the wife marries another man and the marriage is valid and is consummated and then terminated through talaq or death of the subsequent husband and the wife observes the iddah.

(a) Circumstances in which talaq is Ba'in baynunah kubra. Talaq is legally considered as ba'in baynunah kubra in the following circumstances:-

(1) Where the divorce is for the third time. This means that if the husband effects one single revocable divorce (on the wife) and he revokes the divorce and then effect another divorce for the second time and then revokes the divorce and then effect another one for the third time, it is considered as ba'in baynunah kubra. All Muslim jurists unanimously agree on this.

(ii) Where three divorces are effected in one single pronouncement, for instance where the husband says to his wife, "You are divorced three times." And where he says to her, "You are divorced thus" and he demonstrates with his three fingers to mean three divorces.

(iii) Where three divorces are effected in three successive pronouncement, such as where the husband says to his wife,

"You are divorced, you are divorced: you are divorced." If the husband says this to his wife, then the talaq is ba'in baynuna kubra (which is ultimate), unless his intention regarding the second and the third pronouncements is to emphasize on the first pronouncement, in which case it will be considered as only one single divorce, provided he takes an oath to that effect, according to some jurists (as it has been explained under discussion on triple talaq).

The legal effect of this type of talaq is that once it is effected, it absolutely severs marital relationship between the husband and the wife. It also creates a temporary legal impediment between the spouses by virtue of which the divorced wife is unlawful to the husband, until she marries another man (and the subsequent marriages is actually consummated and then terminated and the iddah expires). This is in accordance with the Qur'anic verse which reads:

> If he divorces her (finally), she shall thereafter not be lawful unto him unless she first takes another man for her husband.....[45]

Another legal effect of this type of talaq is that it excludes the spouses from inheriting each other, where the husband effects the divorce during his death-sickness (maradul-mawt), for under that circumstance, there is legal presumption that the husband's intention is to exclude the wife from inheriting him. That is why he will be treated contrary to his intention. [46]

(b) Circumstances in which talaq ba'in is baynunah sughrah: Talaq is legally considered as ba'in baynunah sughra i.e. intermediate irrevocable divorce, in the following circumstance:-

(i) Where the husband divorces his wife before actual consummation of the marriage but after the conclusion of the contract. This type of divorce is considered irrevocable because it does not impose the obligation of iddah on the wife. This is in accordance with the Qur'anic verse which reads:

> "O ye who have attained to faith! If you marry believing woman and then divorce them before you have touched them, you have no waiting-period whatever upon which you should count..."[47]

Since, according to this verse, iddah is not obligatory upon the woman who has been divorced before consummating the marriage, then the revocation of the divorce is not legally possible because revocation can only be effected during the iddah. Thus talaq effected before consummating the marriage, cannot be revoked.

(ii) Where the talaq is effected on material consideration (i.e, khul'). Thus, where the husband divorces his wife, in lieu of some material consideration which he receives from her, on the agreement that he will divorce her, the divorce, (under the circumstance), is irrevocable. This is because the sole purpose of paying the consideration (by the wife to the husband) is to obtain divorce so as to be able to gain her full freedom of controlling her affairs and to prevent the

husband from taking her back into full martial life (by revoking the divorce) even without her consent.

(iii) Where the marriage is judicially terminated, namely where the judge effects the talaq at the instance of the wife, on the ground of the husband's bodily defect, or his cruelty to her, or his absence, or because he has been imprisoned, or for dissension and discord that persists between them. This is because the wife's recourse to judicial action, under the circumstances, is to protect herself from the infliction of injury and settle dispute between her and her husband. And this can only be achieved, under the circumstance, through irrevocable talaq by virtue of which the husband has no right to take her back by revoking the divorce.

The legal effects of this type of talaq (i.e. ba'in bainuna sughra) are as follows:-

(i) That immediately it is effected, the marriage-tie is considered to have been severed, and that what only remains is iddah, and its legal consequences. Thus, it is not lawful for the husband to have sexual intercourse with the wife or even to be alone with her, in a secluded place. In addition, the husband cannot resume marital relationship with her except with a new marriage contract. However, such talaq does not create any legal impediment between the couple. Thus, the divorcer can enter into a new marriage contract with the divorcee, during her iddah or after its expiration.

(ii) That it reduces the number of divorces the husband can effect on his wife. Thus, where the husband has effected irrevocable talaq for the first time,then he is entitled to effect two other divorces for the second and third times. In other words, the earlier talaq pronounced in the first marriage is carried over into the new marriage. And where he has effected the talaq for the second time, then he can only effect one more talaq finally, for the third time, after which the wife is prohibited to him until she marries another man.

(iii) That it excludes the spouses from inheriting each other. Thus if one of them dies even if it is during the iddah, the other will not be entitled to inherit, him or her, because such talaq severes marital relationship which is the basis of inheritance between spouses. There is, however,an exception to this general rule, that is where the husband divorces the wife during his death-sickness (mardul-mawt), and the circumstantial evidences show that his intention is to exclude the wife from inheriting him. [48]

(c) Circumstances in which talaq is raj'iy: Talaq is raj'iy in any circumstance where by it is neither ba'in bainunah sughra or ba'in baynuna kubra, that is where it is effected after actual consummation of the marriage; and it is not effected at the instance of the wife on material consideration (i.e. it is not khul'); and it is not the third divorce (according to all the jurists) or triple divorce (according to some of the jurists); and it is not effected through judicial

process, except where the judge effects it for a reason of lack of maintenance, or as a result of ila (vow of continence). Talaq is considered raj'iy in the above-mentioned circumstance, whether it is effected by kinayah expression (impliedly) or by sarih expression (expressly once the husband intends to divorce.

The reasons why any talaq that is not ba'in is considered raj'iy are:

(i) the Qur'anic verse which reads: "Divorce may be pronounced twice; then keep the wife with honour or let her leave gracefully...."[49]

(ii) Qur'anic verse which reads:

> "Divorced woman must wait for three monthly courses... their husband's are best entitled to take them back as their wives during this waiting period, if they desired reconciliation..."[50]

These two verses imply that the husband is entitled to retain his divorced wife or take her back (into marital life), during her iddah. And no distinction has been made, by the verse, between talaq effected impliedly or expressly. This shows that the original position of talaq is that it is raj'iy. And it cannot be exempted from this general meaning except where there is an evidence to that effect, that is in cases of three divorces, divorce before consummation, divorce based on material consideration (khulc)or divorce effected through judicial decision.[51]

Talaq raj'iy according to Hanafi jurists, does not sever marital relationship and as such does not effect the relationship between the spouses. Thus even though it is a means of terminating marriage, it has no any legal effect on it until after the iddah expires. Meanwhile, the couple are legally considered as husband and wife. And accordingly, they can have sexual intercourse with each other, (in which case there is revocation of the talaq) and in the event of death of either of them, before the expiration of the iddah, in which case there is revocation the surviving one is entitled to inherit the deceased. In addition, the husband is responsible for maintaining the divorced wife throughout her iddah. And where the sadaq, or the part thereof, is deferred, the wife will not be entitled to it until the iddah expires. [2]

legal Consequence of talaq raj'iy: There are, according to Hanafi jurists, two obvious consequences of this type of talaq which are as follows:

{a} That it reduces the number of divorces the husband is entitled to effect on his wife. Thus where the husband has effected such type of divorce, for the first time, then he has the right to effect two other divorces on the wife. And if he has effected it for the second time, then he has the right to effect only one other divorce, after which the wife will be temporarily prohibited to him, until she marries another husband.

(b) That it limits the period of marital relationship to the expiration of iddah, while before, it was not so limited. Thus, if the iddah expires, without revoking the talaq (and taking the wife back to marriage-bond), the marriage will come to an end and accordingly all its legal effects will cease.

Maliki and Shafi'i jurists are of the same view with the Hanafi jurists on this issue, except that they do not agree that the spouses may have sexual enjoyment during the iddah.[53]

4.2.4 Revocation of Talaq (Raj'iy:

Talaq raj'iy, as previously explained, does not sever marital relationship immediately it is effected. Rather the severance of the relationship is subject to the expiration of the iddah. But meanwhile, the husband is entitled to revoke the divorce and return the divorcee to marital life, without the need to contract a new marriage. This revocation and returning the wife (to marital life) is what is technically known, in Islamic jurisprudence, as ar-Raj'ah.

Various definition of raj'ah: Various schools of Islamic jurisprudence have various definitions of raj'ah. Thus Hanafi school defines it as: retention of marriage during the iddah. This is because since talaq raj'iy limits the period of marital relationship to the expiration of the iddah, if the husband returns his wife during the period (of iddah, the return is considered as a retention of marital relationship

(which has not been severed), and putting aside the limitation of the marital relationship.

Maliki jurists define raj'ah as: returning the divorced wife to marital bond without contracting a new marriage.

Shafi'i jurists define it as: returning the (divorced) wife to marital relationship, during her iddah as a result of a revocable talaq.

It is clear from this explanation, that the definition of the Hanafi jurists is more comprehensive than that of the Maliki and Shafi'i jurists, because it implies that the marriage, after the (revocable) talaq, is still subsisting, provided the iddah has not expired. And that raj'ah, is a retention of the marriage and not a new contract nor resumption to a former marriage after it has been terminated.

The definitions by Shafi'i and Maliki jurists, on the other hand, imply that the marriage, by virtue of talaq raj'iy, comes to an end the resumption to which can only be effected through raj'ah (returning the wife by revoking the divorce) after being terminated.

Hanafi jurists' definition is more appropriate and more cogent than that of Shafi'i and Maliki jurists, because it is in conformity with textual authorities (i.e. the Qur'an and Sunnah) according to which all the legal effects of marriage,

are intact after talaq raj'iy, provided the iddah has not expired. And the fact that the legal effect of marriage are intact, implies that the marriage itself is subsisting.[54]

The Right to Revocation: Revocation of divorce is an inalienable right of the husband, provided the iddah has not expired. This is in accordance with the Qur'anic verse which reads:

> "..... Their husbands are best entitled to take them back as their wives during this (awaiting period), if they desire reconciliation:::" [55]

Since it (the revocation) is legally considered as the inalienable right of the husband, the consent or even the knowledge of the wife, regarding the revocation, is not a condition for its validity. However, it is recommendable to let her know about it, so that she will not remarry after spending the period of iddah under the wrong assumption that the marriage has come to an end, and also so as to avoid dispute between the spouses, in the future. This is because if the wife is not aware of the revocation and the period of iddah lapses and the husband argues that he has returned her before the lapse of the iddah period, she may deny this, due to the fact that she was not aware of that and hence dispute ensues. [56]

This right (of raj'ah) cannot be forfeited even if the husband waives it. This is because Shari'ah has made it consequent upon revocable talaq. This is in accordance with the Qur'anic verse which reads:

> "Divorce may be pronounced twice; then keep the wife with honour or let her leave gracefully...."[57]

How raj'ah is effected: Rajcah may be effected in either of the following two ways:

{a} Verbal pronouncement which may either be express such as where the husband says, "I return my wife," or "I retain my wife", or "I revoke the divorce which I had effected upon her and I hereby take her back". It can also be in an implied way, such as where the husband says to his divorced wife, "You are my wife," or "You are now as you were before."

The express pronouncement does not need any intention to make the revocation, while the implied pronouncement cannot effect the revocation except where there is intention or indication to that effect.

{b} By conduct, namely by committing an act that creates prohibition (in marriage) by reason of affinal relationship, such as sexual intercourse, or kissing or embracing, e.t.c whether the husband intends revocation by such actions or not. This is the view held by Hanafi jurists who contend that such an act by the husband is an indication of his desire to retain his wife whom he has divorced. Its effect is just the same as that of verbal pronouncement. And there is no difference, in effect, whether the act is done by the husband or by the wife, with the full knowledge of the husband (such as where she kisses,or embraces or caresses him) while he is awake (and

in his senses) but he does not prevent her. All Hanafi jurists are unanimous on this. However, they differ where such act is done by the wife furtively or while the husband is asleep. Thus Abu Hanifah and Muhammad (one of his two eminent disciples known as as-sabiban) are of the view that raj'ah is effected by such an act, the reason being that since such an act (by the husband or by the wife) causes prohibition for reason of affinity, it also by analogy, effects raj'ah.

Abu Yusuf (the other eminent disciple of Abu Hanifah) on the other hand, does not subscribe to this view. Raj'ah according to him, cannot be effected by committing such an act by the wife(i.e. furtively or while the husband is asleep), because it would imply that raj''ah could be vested in the wife while it is a legally established principle that raj'ah is vested in the husband and not in the wife. This is the preponderate view (according to Zakiyyud Deen Sha'aban).[58]

Shafi'i is of the view that raj'ah cannot be effected by action, whether with or without intention to that effect, and whether the action is in the form of sexual enjoyment or not. This is because, the wife, according to him, after divorce is effected (even if the divorce is revocable), becomes unlawful to the husband (until he revokes the divorce and takes her back). This is in consonance with his definition of raj'ah. Thus, sexual intercourse, or sexual enjoyment of any sort, with the divorced wife is unlawful. And raj'ah cannot be effected through what is haram (unlawful). Furthermore,

raj'ah, according to him, is resumption to marriage bond after it has been terminated. This is by virtue of chapter 2, verse 228 of the Qur'an (which has been quoted above). And resumption cannot be effected except by verbal pronouncement. [59]

Ibn Hazm is of the same view with Shafi'i because if, according to him, the husband has intercourse with the divorced wife (in case of revocable divorce), this cannot be considered as raj'ah. He contends that before raj''ah is valid, it must be effected through verbal pronouncement. [60]

Malik is of the view that rajah may be effected through an act (or relationship) that establishes legal impediment in marriage for reason of affinity, provided the husband has intention to that effect, otherwise it cannot be effected even if such act (or relationship) is in form of sexual intercourse. This is because mere act is not a strong indication of the husband's desire to take the divorced wife back, for as it may indicate that desire, it may also mean that it is for some other reason, such as a mere satisfaction of the husband's sexual desire.[61]

The jurists of the Shi'a Imamiyyah School have the same view with the majority of the jurists of Sunni Schools. Thus, according to them, raj'ah may be effected by one of the above-mentioned ways, i.e. by verbal pronouncements or by conduct. However, as to whether the husband must have intention to that

effect or not (as held by Malik), they have two opposing views, the stronger of which is similar to Maliki's view.[62]

However, the view that raj''ah may be effected by an act, is the preponderant view. Shawkani subscribes to this view. That is why he reasons as follows:

> "This is because iddah is the period of exercising the power of choice, and choice can validly be made either verbally or by action. Moreover, the obvious meaning of the verse (which reads); "Their husbands are best entitled to take them back", and the hadith in which the Prophet (S.A.W) said, "Order him to return her," indicate that raj''ah can validly be effected by action, because no distinction has been made between verbal pronouncement and action. And whoever claims that there is distinction (between the two), must substantiate his claim with authoritative reason.[63]

But Imam Maliki's view is, according to Zakiyyuddeen Sha'aban, the preponderant one by virtue of the strength of its evidence and also because it is the moderate one .[64]

Conditions for the validity of raj'ah: Rajah cannot be valid unless and until the following conditions are fulfilled:

(a) That the talaq must be revocable. Thus, where it is irrevocable, raj''ah cannot be exercised. This is because the irrevocable talaq severs marital relation immediately it is effected. And as a result, the divorced wife attains her freedom, which means that the husband will have no right to

return her to marital relationship, except through a new contract (with her consent).

(b) That the raj''ah must take place before the expiration of the iddah. This is because immediately iddah expires, the talaq becomes irrevocable by virtue of which raj''ah is not legally possible.

(c) That the raj'ah must be munajjazah, that is which has not been subjected to a condition. This is because raj''ah is like marriage in the sense that it is a resumption of marital relation. And for that reason it must take effect immediately, just like marriage. Thus, where the husband revokes his divorce subject to some future event, such as where he says, "If my father comes back from his journey, then I will return you", the raj'ah is invalid. The rule also applies where the husband suspends the revocation of his divorce to a future time, such as where he says to his divorced wife, "I will return you tomorrow," or "at the beginning of next month. "[65]

Witnesses to Raj'ah: The Muslim jurists differ as to whether there must be witnesses to raj''ah or not before it can be valid. Thus, the jamhur (majority of muslim jurists), including Imam Malik, are of the view that witnesses are not a condition of the validity (of Raj'ah). Thus, it is valid without them, even though their presence is commendable for fear of possible denial by the wife of the fact that the

divorce has been revoked before the expiration of her iddah while it may not be possible for the husband to establish that. Moreover, the testimony of the witnesses protects the husband from suspicion and accusation, because if people are aware of the fact that he has divorced his wife but they are not aware of the fact that he has taken her back (because there are no witnesses), they may accuse him of cohabiting with her illegally.[66]

However, Ibn Hazm, Imam Shafi'i (according to his former view), Ahmad (according to one of two reports from him) and some of the Shi'a jurists, are of the view that calling witnesses to raj''ah is a condition of its validity. But it was reported that Imam Shafi'i subsequently changed his view. And his subsequent view is similar to that of the majority. [67]

The source of this difference, is the difference of the jurists regarding the injunction contained in 65:2 of the Qur'an which reads:

> And so, when they are about to reach the end of their waiting-term, either retain them in a fair manner or part with them in a fair manner. And let two person of (known) probity from among your own community witness (what you have decided); and do yourselves bear true witness before God.....[68]

The obvious meaning of this verse, according to Ibn Hazm (and those who subscribe to this view), implies that calling two witnesses (of known probity), is obligatory when ever raj'ah is effected.. And this obvious meaning cannot be changed to the contrary unless there is reason to that effect.

But there is no such reason in the circumstance. Moreover, since calling of witnesses, according to the majority view of the Muslim jurists, is a condition for the validity of marriage contract, it is also a condition for the (validity of) retention of marriage (which is the raj'ah)."[69]

The multitude of the Muslim jurists, on the other hand, interpret the verse to mean that calling witnesses in the case of raj''ah is merely recommendable (mandub) and not obligatory (wajib). In giving this interpretation, they rely on some reasons one of which is that rajah was effected, on many occasions, during the earlier days of Islam and there has not been any report to the fact that witnesses were called whenever raj''ah was effected. For instance, it was reported that Abdullah bn. Umar divorced his wife during her menstrual periods, and the Prophet (S.A.W.) ordered him to return her, but did not order him to call two witnesses to witness the return. Had it been that calling witnesses is a condition for the validity of rajah, the Prophet (S.A.W.) would have ordered him to do that. In addition, there has not been any report from the Companions to that effect or that witnesses are called by them, on such occasions.

These jurists (i.e. the majority of Muslim jurists) contend that all these explanations mentioned above show that calling witness to raj''ah, which has been required by the verse (i.e.65:2), is not obligatory, it is rather recommendable.

Moreover, raj'ah is the inalienable and exclusive right of the husband the exercise of which does not depend on the consent of the wife (or any other person). Thus, it does not require the calling of witnesses, just like his other exclusive rights. And also because calling of witnesses is a condition only (for the validity) of marriage and not for (the validity of) its retention. And raj''ah is a retention of the (subsisting) marriage (and not a new marriage) and therefore, it does not require any witness.

Dispute between spouses regarding raj'ah: Dispute between the spouses about raj''ah may take one of two respects:

(a) It may be in respect of the existence (or non-existence) of the raj'ah per se;

(b) It may be in respect of its validity (or otherwise), even though there is no dispute about its existence. Dispute in respect of the existence of the Rajah per se, may arise, where the husband claims that he has effected it at a specified period of time but the wife denies the claim and instead counter claims that he has not effected it (at all). This may occur either before or after the expiration of the iddah. So where the dispute ensues before the expiration of the iddah, it is the claim of the husband that will be accepted. This is because by making the claim, the husband is considered to have given an information about something which he is entitled to initiate. And it is a legally established principle that: whoever has given an information about what he is entitled to initiate at the time of giving the information,

he will be believed regarding his information. So to deny his claim is, under the circumstance, useless since if his claim is not accepted, he can effect the raj''ah at the moment and return the wife, provided her iddah has not expired.

But where the dispute ensues, after the expiration of the iddah, the burden of proof is on the husband in order to establish his claim. Thus, where he is able to prove (through the testimony of at least two male Muslims endued with justice) that he has effected raj'ah, the judge must give judgment to that effect. And where the wife has already remarried, under the erroneous belief that her iddah has expired, then the subsequent marriage must be annulled and the woman be separated from the subsequent husband, whether the subsequent marriage has been consummated or not. Then after annulling it the woman must be returned to her former husband.[71]

Where the husband is not able to establish his claim, then the judge must decide the case in favour of the wife (that the husband has not effected raj'ah) without necessarily extracting an oath (from the wife), according to Abu Hanifa. But according to as-sahiban (i.e the two eminent disciples of Abu Hanifa: Abu Yusuf and Muhammad as-Shaybani), the wife must take an oath (that the husband has not effected raj'ah.[72]

The dispute (as it has been explained), may also be in respect of the validity of the raj'ah. This is where the

husband declares that he has revoked the talaq and returned his divorced wife, and the wife claims that her husband revoked the talaq after the expiration of her iddah and, therefore, the revocation of the talaq is invalid, but the husband counter-claims that the revocation (rajah) is valid because he effected it during the iddah. So if the iddah is observed by aqra (menstrual periods) and the period between the talaq and the time when she claims, that the iddah has expired is such that can be observed within it, then her claim shall be accepted, provided she takes an oath to that effect. That is because the expiration of such iddah cannot be confirmed except from her. Thus if she takes an oath that her iddah has expired (when the husband claims to have revoked the talaq), the husband's claim will not be accepted. However, if the wife declines to take an oath (to establish her claim), then the case must be decided in favour of the husband, thereby establishing the validity of his revocation. This is because her refusal (to take the oath) is an admission (on her part) of his claim. All Muslim jurists, including Shia Imamiyyah, unanimously agree on this. [73]

But if the period is not such that iddah can be observed within it, that is if it is in less than the minimum period of iddah, her claim will not be considered as a valid one, ab initio. And the case must be decided to the effect that the raj''ah is valid. The minimum period of iddah, according to Abu Hanifah, is sixty days, while according to Maliki school, it is one month.[74]

Where the husband effects talaq raj'iy on his wife while she is absent (on a journey) and then revokes the talaq, and then the wife received the information about the talaq but did not receive any information about the revocation, and accordingly she re-married after her iddah had expired, the Muslim jurists have divergent view regarding this. Thus,Malik holds that she is the legal wife of the second husband, namely the subsequent marriage is valid whether it has been consummated or not. that is what has been reported from him in his al-Muwatta, because he was reported to have said, "Her first husband who divorced her has no means of access to her whether or not the new husband consummated the marriage.[75]

He further relied on what Ibn Wahab reported from Yunus from Ibn Shihab from Sa'id bn al-Musayyab who said:

> "The Sunnah has been established, regarding a man who divorced his wife and then revoked the divorce but concealed the fact of the revocation from her until she became lawful (i.e. her iddah expired) and then she married another man, that he had no any right over her whatsoever. Rather she belonged to the man who (subsequently) married her.[76]

Awza'i and Layth, subscribe to this view. It is also the view of Umar bn. Khattab.[77] However, Ibnul-Qasim[78] reported in al-Mudawwanatul Kubra that Malik changed his view about one year to his death and held that if the subsequent marriage had not been consummated, the former husband was more entitled to the wife.[79]

Shafi'i, Abu Hanifa and some other jurist,on the other hand,are of the view that the former husband is more entitled to have the wife, whether the subsequent marriage has been consummated or not. This is also the view of Abu Thawr, Dawud and Ali bn Abi Talib. These jurists, in holding this view, rely on the fact that all the fuqaha (Muslim jurists) unanimously agree that raj''ah is valid even if the wife is unaware of it, and thus the former husband is more entitled to her before she remarries. And since the rajah is valid, the subsequent marriage is fasid (irregular) and accordingly has no any effect in invalidating the raj''ah, whether before or after consummation. This view, according to Ibn Rushd, is the preponderant one because it has been substantiated with a hadith narrated by Tirmidhi, on the authority of Samurrah bn Jundub, that the Prophet (S.A.W) said, "Any women who has been married by two (men), she is for the first one. And whoever sells a commodity to two people, then it is for the first one".[80]

There is also another report narrated from Umar bn. Khattab to the effect that: "Her first husband, chooses when he comes either her bride-price or his wife."[81]

The view of Umar bn Khattab accepted by Malik, Awza'i and layth is more cogent because it is closer to the spirit of the Shari'ah of establishing justice. The other view seems to have held the wife and the subsequent husband responsible for something they are not aware of, which is unjustifiable.

FOOTNOTES AND REFERENCES

1. Qur'an: 2:229. See Asad,M (1980), The Message of the Qur'an Dar-Andalus, Gibraltar, P 50.

2. Sabiq, S (1977), Fiqhus- Sunnah, Darul-Fikr, Beirut, Vol.II,p. 225

3. Qur'an, infra at 65:1 See: Ali, A.Y. (1978) The Qur'an, Translation and Commentary, M.S.A. of U.S.A. and Canada, p.1562

4. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 225

5. This hadith was narrated by Bukhari and Muslim. See Khan, M.M. (1976), Sahihul-Bukhari, (Trd) Hilal Yayinlari, Vol. VII, P 129; Siddiqi, A. (n.d.) Salih Muslim (trd) Darul Arabiyyah, Beirut, Vol.II, p. 755

6. This hadith was narrated by Nisa'i, Muslim, Ibn Majah and Abu Dawud

7. Sabiq, S. (1977), Fiqhus-Sunnah, infra at PP^ 225-6

8. Ibid. at p. 226

9 Qur'an op. cit. 65:1 See: Ali A.Y. (1977), The Holy Qur'an Translation and Commentary, American Trust Publications, p.1562.

10 Sabiq, S (1977), Fiqhus-Sunnah, infra at p. 227

11. Ibn Hazm, M.A. M.A. (n.d.)al-Muhalla, al Maktabatut Tijariyyah littiba ah Wan-Nashr, Beirut, Vol.X, 165.

12 Sabiq, S. (1977), (Fiqhus- Sunnah, op. cit. at p.227.

13. Ibid.

14. It was narrated by Bukhari and Muslim.

15. Sabiq, S. (1977) Fiqhus-Sunnah, op. cit. at pp. 226-7; Ibn Hazm (n.d.)al-Muhalla, supia at p. 163.

16. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah... at p. 385

17. Munkar hadith has been defined as: the hadith in whose Isnad (chain of narrators) there is a narrator whose mistake is serious, or who forgets too much, or whose moral bankruptcy is apparent. And according to another definition it is a hadith narrated by a weak narrator in contradiction to what has been narrated by trustworthy. (see Tahhal,M(1981) Taysiru Mastalahil-Hadith, Darut-turathil Arabiy, Cairo, at p. 71)

18. Ibn Hajar (n.d.)Fathul-Bari, al-Maktabatus-Salafiyyah, V.IIx, p. 354; Shawkani, M.A. (1973), Naylul-Awtar, Darul-jiyl, Berut, Vol.VII, p.

19. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah... infra at pp. 387-8

20. Sabiq, S (1977) Fiqhus-Sunnah, infra at pp. 227-8

21. Malik, I (n.d.) al-Mudawwanatul-Kubra, Mu'assasatul Halabi, Cairo., Vol.II, p.420

22. Ibid

23 This hadith was quoted in Sabiq, S (1977), Fiqhus-Sunnah, Vol.II p. 228.

24. Ali, A.Y. (1978), The Qur'an: Translation and Commentary, Islamic Foundation, Leicester, U.K. p.91

25. Ibd at p. 94

26. Ibid at p. 95

27. Ibid at p. 91

28. This hadith was quoted in Sabiq, S (1977) Fiqhus-Sunnah, infra at p. 230.

29. This hadith was also quoted in Sabiq S. (1977) Fiqhus-Sunnah, op. cit. at p. 230 Shawkani also quoted it in his Naylul-Awtar (1973), Vol. vii at p. 11.

30. This hadith was quoted in Sha'aban, Z.D. (1971), al-Ahkamush Shar'iyyah..., infra at p. 391.

31. Ibid at p. 392.

32. Ibn Rushd M.A. (n.d.) Bidayatul-Mujtahid..., Darul Fikr, Lebanon, Vol.II p. 46

33. Hassan, A. (1985) Sunan Abu Dawud (translated), Vol.II pp. 593-4.

34. Ibid at p. 594 as quoted in 'Awnul -Ma'bud, Vol.II p. 228-9.

35. Quoted in Hassan, A. (1985) Sunan Abu Dawud (translated), supra at p. 593; It was also narrated in Muslim, A, (1978), Sahih Muslim, Darul-Fikr, Beirut, Vol.II p. 1099

36. This hadith has been quoted in: Shawkani, M.A. (1973), Naylut-Awtar, op cit. at p. 11

37. Ibn Taymiyyah (n.d.), al-Fatawil-Kubra, Vol.II, p. 22 as quoted in Sabiq, S. (1977) Fiqhus-Sunnah, infra at p. 231.

38. Sabiq, S. (1977) Fiqhus-Sunnah, infra at pp. 231-32; Sha'aban, Z.D. (1971), al-Ahkamush-Sharciyyah... supra at p.390

39. Ibid at p. 396.

40. Ibn Rajab (736-795 A.H.) was born in Bagdad and Studied in Damascus and Egypt. He is one of the eminent scholars of hadith (tranditionist). He authored many books some of which are Sharh (commentary) on Tirmidhi (about 20 volumes), Sharh on al-Arba'unan Nawwiyyah and al-Dawa'id Fil-Fiqhil Islamiy (on Islamic Jurisprudence).

41. Ibn Rajab (n.d.) Bayanu Mushkilil-Ahadithil-Waridah Fiy 'Annat-Talaqath-Thalath Wahidah, quoted in Sha'aban,Z.D. (1971) al-Ahkamush-Shar'iyyah... infra at pp. 397-98

42. Ibn Rushd, (n.d.) Didiyatul-Mujtahid,... op cit. at p.46

43. Shawkani, M.A. (1973), Nayul-Awtar, infra at p. 16

44. Abd al-Ati (198), Family Structure in Islam, Islamic Publication Bureau, Lagos Nigeria, p. 232.

45. Asad, M. (1980) The Message of the Qur'an, Daru al-Andalus, Gibraltar, p. 51

46. Sha'aban, Z.D. (1971), Al-Ahkamush-Shar'iyyah...op. cit. at pp. 416 and 420-1

47 Qur'an infra in 33:49. (See: Asad, M. (1980), The Message of the Qur'an, infra at p. 647.

48. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah.....op. cit at pp. 417 and 420.

49. Maududi, S.A. (n.d.), The Meaning of the Qur'an, London, Vol.1,p. 165.

50. Qur'an: supra in 2: 229; see Ibid.

51. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah..., op. cit. at p. 418

52. Ibid at pp. 18-19.

53. Ibid at pp. 19-20; Sabiq, S. (1977), Fiqhus-Sunnah infra at pp. 421-22

54. Ibid at p. 421-22

55. Qur'an supra at 22:20, See Maududi, S.A. (n.d.), The Meaning of the Qur'an, op. cit. at p. 165 .

56. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah..., op cit at pp. 422 and 425; Sabiq, S. (1977), Fiqhus- Sunnah, op. cit at p. 235.

57. Qur'an, infra in 2: 229. See Maududi, S.A. (n.d.), The Meaning of the Qur'an, op cit at p. 165.

58. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah..., infra at pp. 425.

59. Ibid at p. 496; Ibn Rushd, (n.d.) Bidayatul-Mujtahid....infra at p. 64.

60. Ibn Hazm (n.d.)al-Muhalla, al-Maktabut-Tijariy, Vol.x, p. 251; S. Sabiq (1977), op cit at p. 235.

61. Sha'aban, Z.D. (1971), al-Al-Ahkamush-Shar'iyyah... infra at p. 427.

62. Khumaini, R.M. (1404 A.H), Tahrirul-Wasilah, Mu'assisatun-Nashar al-Islamiy, Vol.II p. 310; Mughanniyy; M.J. (1960). al-fiqhu Alal- Madhabibil-Khamsah, (1960),pp.4443-44

63. Shawkani, M.A (1973), Naylul-Awtar, Darul Jiyl, Beirut, Lebanon, Vol.VII, pp. 42-3

64. Sha'abani Z.D (1971), al-Ahkamush-Sharciyyah..., op cit at p. 427.

65. Ibid at p. 423.

66. Ibid at p. 424.

67. Musa, M.Y. (1958), Ahkamul-Ahwalish-Shakhsiyyah..., Matba,atu Daril Kitabil-Arabiy, ^Egypt, pp. 280-81

68. Asad, M. (1980), The Messaqe of the Qur'an, infra at pp. 872-73

69. Ibn Hazm, M.A. (N.D), al-Muhalla, op. cit. at p. 251.

70. Sha'aban, Z.D (1971), al-Ahkamush-Sharciyyah... op cit. at PP 423-25; Ibn Rushd (n.d.)Bidayatul-Mujtahid... op cit at pp. 63.4; Sabiq S. (1977), Fiqhis-Sunnah, op cit.at pp. 235; Shawkani, M.A. (n.d.) Naylul-Awtar, op cit. Mustapha al-Babi and Sons, Egypt, Vol.II, p. 134.

71. Sha'aban, Z.D (1971), al-Ahkamush-Shar'iyyah..., infra ta pp. 428-29.

72. al-Kasaniy, A.D.(1907), Bada'icus-Sana'ic fiy Tarqibish-Shar'' Matba'tul-Jamaliyyah, Egypt, Vol.III, p. 185,

delegated to him and divorce the wife, immediately after being vested with the power, or at a later time and any where, except where the principal (i.e. the husband) has specified, during the delegation, a particular time or place, in which case the agent must exercise the power within the stipulated time or place, otherwise his action is legally considered as Ultra Vires and as such void and of no any legal effect. Where the agent acts Ultra Vires, the principal (i.e. the husband) has the right to depose him and if he does so, the agent has no right, any more, to divorce the wife (of the principal), and even if he does so, the divorce is ineffective.

Maliki jurists, on the other hand, are of the view that the principal has no right to depose the agent (where the wife is the agent and) where her right has been made the condition of the agency, such as where the husband says to his wife, "if I marry another woman during the subsistence of our marriage', or "If I marry another woman while I am with you (as my wife), then your affair is in your hand."[24]

Tawfid is vesting the power by the husband in the wife to divorce herself, which is usually done through one of the following expressions:

1. Ikhtariy Nafsaki (choose yourself). The Majority of Muslim jurist agree that Talaq can be effected by means of this expression, because it has been legally accepted to be one of the formulae of Talaq. This is by virtue of

in:Musa, M.Y. (1958), Ahkamul-Ahwalish-Shakhsiyyah ..., p. 281

73. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah...op cit at p. 428; Khumainiy, R.M. (1404 A.H) Tahrirul-Wasilah. infra at p. 311.

74. Sha'aban, Z.D (1971) al-Ahkamush-Shar'iyyah... infra at p. 429.

75. Tarjumanah, A. and John, Y. (1982), al-Muwatta of Imam Malik (translated), Diwan Press, p. 266.

76. Ibn Rushd M.A.(n.d.)Bidayatul-Mujtahid... op cit. at p.64.

77. Ibid.

78. Ibnul Qasim is one of the prominent desciples of Imam Malik.

79. Malik, I. (n.d.)al-Mudawwanatul-Kubra, Halabi Foundation, Cairo, Vol.II, p. 449.

80. Ibid at p. 65.

81. Turjumanah, A and Johnson, Y. (1982), al-Muwatta of Imam Malik (translated), op cit. at p. 266.

82. Ibid.

Chapter 5:

KHUL^{C} (DIVORCE WITH CONSIDERATION

5.1 Philosophy of Khul^{c}:

Marriage contract, under the Shari'ah is meant to last for the lifetime of the spouses. And marital co-existence can only last if it is established on mutual love, compassion and respect for each other, by virtue of which the spouse, are able to live together in a goodly manner by fulfilling each other's rights.

But a situation may arise whereby the husband hates the wife or vice versa. In such a situation, Islam admonishes and enjoins them to bear with each other and find means for reconciliation. However, the hatred may be increasing in such a way that it renders the relationship between them so strained that continuation of their union becomes undesirable. The spouses, under the circumstance, are allowed to terminate the marriage. And as it has been explained (in the previous chapter), the right to terminate marriage is primarily vested in the husband. Thus, he can terminate it on his own initiative. This right, however, is not absolute because the marriage can also be terminated at the instance of the wife. This is because Allah (S.W.T.), in 2: 228, says:

> ..... And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And God is Exalted in power, Wise.[1]

This verse shows that men and women have similar rights. Man have been given the right of divorce but women have not been deprived of the right to separation in case of necessity. This right has been given by the doctrine of Khul'.[2]

However, the moral aspect of Khul', as explained by Maududi, "is that it has to be used as the last resort and not for the appeasement of carnal desires".[3] He then quotes two hadiths to further elucidate the point. In one of the hadiths, the Prophet (S.A.W.) was reported to have said:

> Allah does not like sex-hungry men and sex-hungry woman. Allah's curse falls on the sex-hungry man who is prone to divorce women.[4]

And in another hadith, he was reported to have said:

> A woman who obtains a separation from her husband, without any misbehavior on his part, stands cursed by Allah, by angels and humanity. Woman who made Khul' a play thing are hypocrites.[5]

As for the improper use of the rights by either of the spouses, all that the Shari'ah can do is to lay down reasonable and workable restraints. However, this largely depends on the integrity and good conscience of the person exercising the right."

5.2 Its Definition and Institution:

Khul' is the verbal noun of Khala'a which means "to put off" (ones garment), because wife is regarded as husband's

garment and husband as wife's garment, as Allah (S.W.T.) says, in 2: 187: which reads: "They are as garment for you and you are as garment for them..."[7]

The muslim jurists define it as: Separation between husband and his wife in lieu of consideration payable to the husband.

The legal basis of Khul' is the textual authorities in both the Quran and the Sunnah. In the Quran, chapter 2, verse 229, Allah (S.W.T) says:

> And it is not lawful for you to take back anything of what you have given to your wives unless both (partners) have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up (to her husband) in order to free herself...[8]

And in the Sunnah, there are a number of highly authenticated ahadith to the effect that the wife of Thabit bn. Qays, Jamilah (the sister of the infamous hypocrite leader, Abdullah bn. Ubayy) who approached the Prophet (S.A.W) with the petition demanding Khul', because she disliked the husband, not on account of any depravity in his faith or morals, but on account of his ugliness. Thereupon the Prophet (S.A.W) ordained that she should return to Thabit the garden which he has given her as sadaq, at the time of their wedding and decreed that the marriage should be dissolved.[9]

Similar ahadith, narrated on the authority of A'ishah and relating to a woman called Habibah bint. Sahal are to be found

in the Muwatta of Imam Malik, in the Musnad of Ahmad, and in the collections of Nisa'i and Abu Dawud. (in one variant, the latter gives the woman's name as Hafsah bint Sahal)[10]

In accordance with the above quoted authorities, Islamic Law stipulates that whenever a marriage is dissolved at the wife's instance, without any offence on the part of the husband against his marital obligations, the wife is the contract-breaking party and must, therefore, return the dower which she received from him at the time of concluding the marriage. And in this event "there shall be no sin upon either of them" (as categorically mentioned in chapter 2, verse 229), if the husband takes back the dower which the wife gives up of her own free will.[11]

And from the above-quoted verse (i.e. 3:229), it could be inferred that "Khul'", in Maududi's words, "demands a situation in which there is a fear that limits set by Allah may be violated. The words, "There is no blame on two of them', (in the verse) suggests that though Khul' is undesirable like divorce, yet when there is a fear that limits of Allah might be violated, there is no harm in obtaining.[12]

5.3 Khul' Distinguished From Mubara'ah And Talaq 'Ala Mal:

Mubara'ah is to terminate the marriage-tie by mutual consent as a result of mutual aversion and disagreement. And Talaq 'Ala Mal or Talaq bi iwadil-mal is where the husband

"sells" the right of divorce to the wife or where the wife "purchases" the right to divorce from the husband.

Khulʿ differs from Mubara'ah in that in Khulʿ there is consideration to be paid by the wife, because it is effected at her instance, while in Mubara'ah, there is no consideration because the marriage is terminated at the desire of both the spouses. However, both of them (i.e. khulʿ and Mubara'ah) terminate marriage-tie.

Khulʿ and Talaq ʿAla mal have certain things in common, in that both of them terminate marriage-tie; that talaq ba'in comes into effect as a result of both, because in each of them the wife gives compensation in order to obtain her freedom. But they differ in the following respects:-

a) That in Khulʿ the wife forfeits all the marital rights (according to Abu Hanifah), while in talaq ʿala mal she does not forfeits any of her marital rights (al-huququz-zawjiyyah).

b) Where the consideration is unlawful, the divorce shall be irrevocable, in the case of khulʿ, but revocable in the case of talaqʿ ala mal. [13]

5.4 Expression Used in Effecting Khulʿ:

Majority of Muslim jurists are of the view that Khulʿ can be obtained or given in by using any expression, whether it is the term "Khulʿ" or any of its derivatives or any other expression, provided the compensation to be paid is understood

by the party concerned. Thus, according to Shafi'i School, any divorce with consideration of property constitutes Khul', irrespective of whether the term "khul'" has been used or not. It is, however, necessary that the expression must refer to Khul' expressly or impliedly. Maliki School subscribes to this view.[14]

Supporting this view, Ibnul-Qayyim, comments thus:

> He who looks into the reality and purpose of legal transaction, and not merely their terms, will consider Khul' as annulment with whatever terms it is effected, even if it is affected with the term "talaq".[15]

He then mentions that this is the preponderant view, contending that according to fiqh (jurisprudence) and its usul (principles), it is evident that what is important in transactions is their essence and significance, but not their modes and terms. He further argues that this is evident in the decision of the Prophet (S.A.W) on the issue of Khul' between Thabit and his wife where he ordered Thabit to divorce his wife with one single divorce. And despite this he ordered the wife to observe iddah by waiting for only one menstrual periods. This is an obvious indication that what took place is faskh, even though it was effected with the term talaq. Moreover, khul' has been described by the Qur'an 2:229 as fidyah (compensation) and it is a known fact that Allah (S.W.T) has not specified particular terms for the fidyah, and talaqul fidyah is a special talaq. Thus it does not come under the general rules of talaq.[16]

Hanbali School, on the other hand, is of the view that specific words, such as "Khul'". "Faskh". Fidyah (and their derivatives) must be used for effecting valid Khul'.[17]

5.5 Khul' Under Compulsion by the Husband:

It is haram for the husband to compel his wife to seek Khul' by depriving her some of her rights or by inflicting harm on her. Where the husband does so, some jurists are of the view that the khul' is invalid and if the consideration has been paid by the wife, it must be returned to her, even if a judgement has been given by the court to that effect. This view has been reported from Ibn Abbas, Ata, Mujahid, Sha'abi, Nakha'i, al-Qassim bn. Muhammad, Urwah, Amr bn shu'ayb, Humayd bn Abdurrahman and Zuhuri. Imam Malik, Thauri, Qatadah Shafi'i and Is'haq, subscribe to this view.[18] In holding this view, they rely on the following authorities:

(a) Chapter 4, verse 19 which reads:

> O you who have attained to faith! It is not lawful for you to (try to) become heirs to your wives (by holding unto them) against their will; and neither shall you keep them under-constraint with a view to taking away anything of what you may have given them, unless it be that they have become guilty, in an obvious manner, of immoral conduct....[19]

(b) Chapter 4, verse 20, which reads:

> "But if ye decide to take one wife in place of another, even if you had given the latter a whole treasure (for dower), take not the least bit of it back: would you take it by slander and a manifest wrong"? [20]

Abu Hanifah, on the other hand, is of the view that the **Khulʿ** is, under the circumstance, valid and the consideration is incumbent upon the wife, even though the husband is considered to be a sinner. [21]

Ibn Qudamah is of the view that where the husband has compelled the wife to seek Khulʿ without any justifiable cause, then he is not entitled to consideration but talaq,. Thus, if it is not the third one, then (it is talaq rajʿiy and) the husband is entitled to take his wife back, because rajʿah is forfeited by virtue of the payment of consideration and since it has been forfeited, the right of rajʿah remains valid. But if Khulʿ is regarded as faskh (annulment) and the husband did not intend divorce, then no divorce will come into effect, because Khulʿ without ʿiwad (consideration) is not effective. [22]

Where the wife, after obtaining Khulʿ, claims that she has sought for it due to ill-treatment (by the husband) and she brings evidence (even if it is a hearsay evidence, to prove her claim), Sidi Khalil is of the view that in such a case, the husband must give her back the ʿiwad. He says:

> The compensation (must) be returned on evidence, (even though merely hearsay, of ill treatment. It must also be returned, on proof of ill-treatment being offered) by her (i.e. the woman's oath), along with (the evidence) of one (male) witness or two females. [23]

The consideration, according to Khalil, may also be recovered, where, after its payment, the husband is found to

be suffering from defect which constitutes a ground of option, such as insanity, leprosy, etc. (as it will be discussed extensively in the next chapter). [24]

However, as an exception to the above-mentioned general rule, it is permissible for the husband to compel the wife to seek for Khul' by treating her with harshness in the event where she has committed fahishah. This is in accordance with chapter 4, verse 19 (previously quoted), in which there is a proviso "...unless it be that they have become guilty, in obvious manner, of immoral conduct (fahishah)". Moreover, since she has committed fahishah, the husband cannot be certain that she will not defile his bed and thereby ascribe a child who is not legitimately his own, which means she did not keep to the "limits set by Allah" (as mentioned in chapter 2, verse 229).[25]

But the Muslim jurists differ on the meaning of fahishah referred to in the above quoted verse which entitles the husband to compel the wife to seek khul', by dealing with her harshly. Thus according to al-Hassan, it means zina (i.e adultery), Abu Qilabah, Suddiy and Ibnu Sirin subscribe to the same view, except that Ibn Sirin and Abu Qilabah are of the view that it is not permissible for the husband to accept fidyah (compensation) from the wife, unless he saw a man on top of her (i.e. committing zina with her).

It is thus, essential for khul' (to be valid) that the wife should seek or agree to it of her willingness, except where she has committed fahishah (as it has been discussed).

It is also essential in khul' that the wife must be of complete legal capacity, namely she must be adult and sane. In addition, she must be in a position to understand the consequences of khul'[28]. Thus, according to Hanafi jurists, where the wife is of incomplete legal capacity, then she shall not be liable to pay the consideration (even if it has been stipulated by her), but a revocable talaq shall be effected, once the husband accepts the offer.[29] This is the accepted view to Maliki jurists and Shi'a Imamiyyah, except that according to Maliki jurists, it is irrevocable talaq that shall be effected and not revocable.[30]

Some other jurists, however, are of the view that where the wife is a minor who is not mumayizah (youth pubertati aproximus), talaq cannot be effected completely, because she has no legal capacity to accept the khul', even if it is without consideration, for the acts of minor who is not youth pubertati proximus, have no legal efficacy, even if the acts are beneficial to him or her.[31]

Where the wife, though mumayyizah is not rashidah (a rational woman who is capable of disposing her property gratuitously), talaq is effected, but the payment of consideration is not incumbent upon her.[32]

Even where she has attained majority, but is Mahjur'alaiha (interdicted), she is incompetent to obtain khul' because she is not in the position to understand or realize the consequences of her act, (i.e obtaining the khul'). However, revocable talaq shall be effected, in the circumstance, because she has legal capacity to accept it but consideration will not be incumbent upon her for she is not, legally speaking, capable of disposing of her property gratuitously. But if she does not accept the khul', talaq cannot be effected. [33]

5.6.1 Where The Wife Is Suffering From Death -Sickness:-

Where the wife is suffering from death-sickness, all muslim jurists unanimously agree that, she can seek and obtain khul' from her husband and the khul', when obtained is valid and that consideration, is incumbent upon her. They, however, differ regarding the quantum of the consideration, and their differences (of views) are due to their fear that she might give her husband preference over her legal heirs (by making will for his benefit). Thus Imam Malik holds that the quantum must not exceed what he is entitled to inherit from her estate. If, accordingly, it is more than that, then talaq shall be effected but the husband shall return the excess and the spouses, shall not inherit each other, even if the marriage is valid. Hanbali jurists subscribe to this view. Imam Shafi'i is of the view that, it is permissible for the wife to obtain khul', in return for the amount equivalent to her proper sadaq (sadaqul -Mithl) and if she adds to that, the

additional amount will be considered as part of the one third (of her estate regarding which she is entitled to bequeath, so it will be considered as gratuitous donation. [34]

Hanafi jurists are the view that such khul' (sought by the wife suffering from death-sickness) is valid, provided the consideration is not more than one third(1/3) of her property, and (provided) that she has given it gratuitously, because tabarru'u (gratuitous disposition of property), during mardul-mawt (death sickness) is wasiyyah (bequest) which cannot be executed unless it is not more than one third of the estate and unless the beneficiary is an ajnabi (alien) and the husband by virtue of the khul' is an ajnabi. Thus, if the sick wife died, in the circumstance, while she is observing the iddah, the husband is entitled to the least of these three things only: i.e. (i) compensation of the khul' (ii) one third of the wife's estate; and (iii) his legal share in the estate. This is so because there is suspicion that the wife might have conspired with the husband, during her sickness, so as to make him get more than his legal entitlement from her estate. Thus, the decision that the husband should only get the least of the three things is meant to serve as a protection of the other legal heirs' right against the possible connivance (of the spouses).

But where the wife recoveres from her sickness, then the husband is entitled to what has been stipulated in full,

because it is obvious then that her disposition (or dealing) did not take place during the death-sickness.

And where the wife died after the expiry of her iddah, then the husband is entitled to the consideration of khul', provided it does not exceed one third(1/3) of her estate, because it is legally considered as bequest, in the circumstance.

4.7 Capacity of The Husband:

Before khul' is valid, the husband must also be of complete legal capacity. Thus, a minor or insane husband cannot effect khul'. His guardian (even if he is his father), cannot also effect khul' on his behalf because he (the minor or insane) has no right to divorce his wife. And the guardian cannot possess a better right than that of the (minor or insane) husband. This is the view of Hanafi and Shafi'i Schools.

Maliki School's view is almost the same (with that of the above-mentioned view of Hanafi and Shafi'i Schools), except that the guardian of the minor or insane husband can effect khul' on his behalf. But the compensation is to be received by the husband himself directly.

The Hanbali jurists have almost a similar view, except that, regarding the power of the guardian to effect the khul' on behalf of the minor or insane, they have two opposing

views, according to one of which the guardian can do that, but according to the other, he is not competent to do so. [36]

5.8. Khulᶜ Between Husband And A Third Party:

The majority of the muslim jurists are of the view that it is lawful for the father, or any other guardian, of the minor or insane wife, to obtain khulᶜ on her behalf. However, the compensation, according to some of them, is incumbent on the guardian, [37] but according to some, it is incumbent neither on the guardian nor on the wife. The compensation is not incumbent upon the wife because she is not among those who can validly dispose of their property gratuitously. And it is not incumbent upon the guardian because he has not guaranteed to pay it, and therefore, it cannot be imposed on him. However, one revocable talaq will be effected. [38]

Maliki School is of the view that it is only the father of the minor wife that can obtain khulᶜ for her without her consent, even in place of the whole of her sadaq. Thus, testamentary guardian (wasiy) has no right to do that without her consent.[39]

Ibn Hazm is of the view that it is not lawful for a third party (even if he is the father of a minor or insane wife) to obtain khulᶜ for her. This is by virtue of a Qur'anic verse (6:164) which reads: Every soul draws the meed of its acts on none but itself ....[40]

And 4:29 which reads:

> O'you who have attained to faith: Do not devour another's possession wrongfully not even by way of trade based on mutual agreement.[41]

And obtaining khul' for the minor or insane wife by her father (or testamentary guardian, or sultan (leader of Islamic community), or any other person, is, according to him (i.e. Ibn Hazm), drawing the meeds of an act on another (kasbun 'alal-ghayr) which is unlawful. It is also "devouring wife's possession wrongfully" by the husband which is also unlawful.[42]

With regard to obtaining khul' for the wife by an ajnabiy (a Third party who is alien to the wife), the Muslim jurists differ. Some are of the view that it is lawful and that when obtained (by him), it is valid. But in such a case, it is incumbent upon him to pay the consideration. And the consent of the wife is not a condition for the validity of the khul', because the husband has the right to divorce her on his own initiative without her consent.

Abu Thawr is of the view that it is not valid because it is a stupidity to do that for to do that is to take pains (or waste one's energy) for no any compensation, because he is not going to have it.

But some of the Maliki jurists have restricted the permissibility of khul' by an ajnabi to establishing maslahah (exigency) or avoidance of a mafsadah (evil). Thus, if the

intention is to inflict harm on the wife, then, it is not valid. In Mawahibul-jalil, the author (who is a Maliki jurist), on this issue, has this to say:

> The (Maliki) Madhhab (School of Islamic Jurisprudence), has necessarily restricted the act of an ajnabi, to obtain Khul' from the husband (for the wife), to the fact that the purpose is to protect some interest of the ajnabi or to avoid some harm (which might affect him), provided the intention is not to inflict harm on the wife.[44]

5.9 Khul' By Proxy:

Either of the spouses may delegate another person to make the agreement of Khul' with the other spouses. And any person who is legally capable of making or obtaining Khul' is also capable of being delegated to do so. The delegate may be a male or a female, Muslim or non-Muslim, rashid (who is legally free to dispose of his property, gratuitously) or Mahjur 'alayh (interdicted). This is because each of these (above mentioned) persons may make an agreement in respect of Khul' (for himself or for herself). This is the Shafi'i's view.

The delegation is valid whether the amount of the consideration is specified or not, because it is a sort of commutative contract ('aqdu Mu'awadah) , such as contract of sale (bay'). It is however, recommendable (and not compulsory), to specify the amount, because it is better, for certainty, and is also easier for the delegate (or agent).

Where the husband has specified the amount, and the agent, in making the Khul' transaction, accepts the exact

amount specified, or accepts more than that, the Khul' is legally considered valid and the specified amount is incumbent upon the wife. This is because the delegate, in the circumstance, has done what he had been authorized to do.

But where the delegate accepts what is below the specified amount, there are two opposing views, according to one of which the Khul' is invalid. This is because, the delegate has, in the circumstance, acted contrary to the principal's instruction (which is ultra vires). This case is just similar to a case where the principal has given him instruction to negotiate Khul' transaction with a specified wife (among the principal's wives) but negotiated it with a different one. This is the view held by Ibn Hamid and Shafi'i. But according to the other view, the Khul' is valid even though compensation shall be incumbent on the wakil (the agent). [45] However, according to Maliki School, the agent is not bound thereby but the Khul' is not binding unless the agent makes up for the difference or the wife does so. [46]

Where the husband, having given his agent or his wife, unspecified (and unprecise) instruction as to the terms of the Khul', he subsequently swears that he had intended a Khul' for 'iwadul-Mithl (customary compensation), he will not be bound by the action of the agent.

Where the wife's agent, in procuring Khulʿ for her, exceeds the amount regarding which she has authorized him, he shall be held responsible for the excess. [48]

5.10 Court's Role In Khulʿ

Where both spouses want separation, there will be no difficulty, because they can mutually agree to the termination of the marriage, or the husband may divorce the wife subject to certain conditions, if any, as may be agreed upon between them. Similarly, the wife may seek Khulʿ to which the husband may agree. If this happens, there will be no difficulty, and in such a situation it will not be necessary for the spouses to have recourse to judicial action (in the court).

But where the husband refuses to give Khulʿ , or where the spouses could not come to agreement on the conditions upon which Khulʿ is to be granted, it is then the role of the court to resolve the dispute. This is in accordance with the authoritative reasons (in the Qur'an and the sunnah). Thus, referring to verse 229 of chapter 2 (which has established the legality of Khulʿ), Maududi has this to say:

> The verse speaks of the spouses in the third person, "they". So the pronoun "you" cannot refer to them. Inevitably, it has to be conceded that it is the people invested with authority by the muslims who have been addressed. The divine mandate means that in case the spouses can arrive at no agreement in Khulʿ case, the matter should be referred to the people of authority.[49]

Then he goes on to say that the mere fact that women came to the Prophet (S.A.W.) and to the caliphs with Khul' petitions and the later listened and decided the cases, conclusively proves that in case of dispute, wife should have recourse to the law. Thus, the judge has the power to enforce his decision on an unwilling husband, otherwise recourse to the court would be a futile exercise. [50]

However, the judge has no right to make any inquiry in order to find out whether the wife's grievance is based on reasonable grounds or not. This is because, "...in none of the cases decided by the Prophet (S.A.W.) or the Caliphs did they try to remonstrate with the wives or even tried to find out if they had got a reasonable ground for separation [51].

It may, however, be argued that the grounds on the basis of which Jamila (Thabit's wife) obtained Khul' must have been known to the Prophet (S.A.W.) because she was his cousin and he must have judged on the reasonableness of the ground, for he was fully aware of her feelings. Besides, the ground which was the ugliness of Thabit was so obvious that inquiry was not necessary. But there is nothing in the case of both wives of Thabit (i.e. Jamila and Habibah) which supports or opposes this contention.[52]

Moreover, the decisions of the Caliphs establish the fact that it is not the concern of the judge to see whether the ground on which the wife seeks the Khul' is reasonable or not.

The examples of such decisions are: What was reported, during the reign of Umar bn. Khattab (R.A.) whereby a woman sought Khul' and Umar ordered her to refrain from that, and when she insisted, kept her in dirty stable for three days, and then called her and asked her whether she had given up, she did not give up. She, instead said to Umar "By Allah! I have never slept better than those three nights." On hearing this, Umar summoned the husband and delivered his judgement (in which he issued an order to the husband saying), "Grant her separation, even though it be in return for her ear-rings"[53]

The second example is that of Ruqayyah bint Mu'awwidh, which happened during the reign of Uthman bn. Affan, the third Caliph. Ruqayyah sought Khul' from her husband but he refused to grant her. So the case was brought before Uthman who accepted the woman's plea and told the husband to accept from the woman all her belongings, in return for separation (according to her offer).[54]

In both of those (two) cases, the reasonableness of the ground upon which the wife sought Khul' was not inquired.

One fundamental question concerning the Khul' is whether the judge is bound to terminate the marriage whenever the wife institutes a legal action seeking Khul'. In tackling this question, it is first and foremost necessary to refer to some Qur'anic verses that determine the husband's duty to live with

the wife with kindness. Thus in chapter 2, verse 231, Allah (S.W.T) says:

> And so, when you divorce women and they are about to reach the end of their waiting term, then either you retain them in fair manner of let them go in a fair manner. But do not retain them against their will in order to hurt (them): for he who does so, sins indeed against himself...[55]

And in chapter 4, verse 19, Allah (S.W.T.) says: "...Consort with them (i.e your wives) in a goodly manner....[56]

Even in the event of disagreement between the spouses, for reason of the wife's recalcitrance, husbands, after taking appropriate measures (as mentioned in verse 34 of chapter 4), were told, "...But if they return to obedience, seek not against them, means (of annoyance)"[57]

These and other similar verses made it clear that husbands are under solemn obligation to keep their wives with kindness failing which will make them transgressors. The Prophet (S.A.W.) himself has categorically stressed this question of kind treatment by the husband towards his wife.

The duty of kind treatment requires mutual love of both the spouses, in the absence of which the husband should release the wife from the bond of marriage. Thus, where, in spite of the wife's unhappiness, the husband refuses to release her, he shall be guilty of not complying with the injunctions of the Qur'an. The marriage shall, therefore, become liable to be dissolved, on the basis of husband's

defiance of Allah's injunctions. In other words, the wife shall be entitled to the termination of her marriage if it is proved, to the satisfaction of the judge, that harmony is not possible between her and her husband. And the cause of the disharmony between the parties is immaterial. It is also immaterial whether the husband is at fault or not. Thus, the judge shall give a relief to the wife by instructing the husband to divorce her. But if he refuses or fails to do so, the judge shall become competent to divorce the wife on his behalf. And since the husband is not at fault, but the marriage has to be dissolved, on account of the wife, the judge shall instruct the wife to compensate the husband as he (i.e. the judge) may deem it reasonable.[58]

5.11 Consideration For Khul':

The general rule is that whatever is legally accepted as sadaq is also legally accepted as consideration for Khul'. Accordingly, the consideration must be Mal-Mutaqawwam (inviolable property). But it can either be manqul (movable) or 'aqar (immovable). Manfa'ah (usufruct) or services, may also be acceptable.[59] This is in accordance with chapter 2, verse 229 (already quoted). Thus, it does not consist of any property which is not inviolable and which cannot lawfully be possessed or owned by a Muslim. It must also be known and its delivery possible.

It is clear from the foregoing explanation, that the following could be the consideration of Khul':

1. **Suckling of the child (during the iddah)**: Thus Khul' may ne obtained on the agreement that the divorced wife will suckle the child without any payment for it. And if, after the agreement, the wife refuses to suckle the child, or the child or the wife dies, before the agreed period expires, the equivalent of the payment for the remaining period of the suckling is incumbent upon the wife or her legal heir (as the case may be), except where there is a stipulation to the contrary, in which case the husband is not entitled to claim anything.[60] On this, Sheikh Khalil has this to say:-

> (Where a woman has obtained her releases, in consideration of her undertaking to suckle her child), if she dies, or her milk dries up, or she gives birth to twins (the expense falls) on her."[61]

Shi'a Imamiyyah jurists agree that suckling of the child can be the consideration for Khul', provided the period of the suckling has been specified.[62]

Ibn Hazm, on the other hand, does not accept undertaking to suckle the child, by the wife, to be the consideration of Khul', due to the uncertainty, because its value is not definitely known and the prices (of things needed for the suckling) may rise up or fall down (which is another uncertainty).[63]

2. Hadanah (custody of child): The wife may obtain Khul' from her husband's (who is her child's father), of her ijarah (wages) for bringing up her child (by the husband). And if agreement has been reached to that effect, it would be incumbent upon her to do so without payment (for doing the same). Thus, if she abandoned the child, or if she died or the child died, or she lost her competence to undertake the hadanah, then the husband is entitled to claim what is equivalent to the remaining period of the hadanah, from the wife or from her legal heirs."[4]

3. Maintaining the child: It is also permissible for the wife to obtain Khul' in exchange of undertaking, by her, to maintain the child. And when an agreement has been reached to that effect, between the spouses, it will be incumbent upon the wife to maintain the child throughout the period agreed upon between them. Thus, where the wife fails to do that, or where the child died or the wife died, before the expiration of the agreed period, then the husband can reclaim the value of the reminding period from the wife or from her legal heirs (as the case may be).

Where the wife becomes incapable of maintaining the child for reason of poverty, the husband shall be obliged to maintain the child, but he will be entitled to reclaim what he has incurred in the maintenance, from the wife, whenever she becomes financially capable to pay that. This is the overweighing view in the Hanafi School, and the famous

(mashhur) view in the Maliki School. It is also the view of the Shi'a Imamiyyah School. This is so because maintenance is the child's right which was originally the father's responsibility but transferred it to the mother in a form of consideration for Khul'. And since the mother is not capable of discharging the responsibility, the father is obliged to so in order to protect the interest of the child.[65]

4. Retaining the child until he or she attains majority: Where the wife obtains Khul' from her husband on the agreement that their male child will remain with her until he attains majority, the khul' is valid but the condition is inoperative.

This is because the right to take care of the male child after the expiration of the period of hadanah, has been accorded, by the Shari'ah, to the father, and not to the mother, because after that period, the child needs somebody to teach him good manners and conducts, and instill into him the good qualities expected of man. And father is more able to do that than mother. Thus the agreement (between the spouses), to leave the child with the mother after the expiration of the period (of hadanah) is tantamount to depriving the child his right. But if the child is female, the stipulation (to retain her by the mother, after the expiration of the period of hadanah) is valid and operative because, the child, in the circumstance, has not been deprived of her right, for she is in need of someone who will teach and train her regarding things which are normally women's affairs and the mother is more capable to do that than the father.

this is the view of the Hanafi School. The Maliki School, on the other hand, is of the view that the period of hadanah, in respect of male child, extends to his reaching majority, while in the case of female child extends to the time when she gets married and consummates the marriage with the husband. Thus, if the wife (while obtaining Khul'), stipulates that the male child will remain with her until he reaches majority, the stipulation is valid, likewise if she stipulates that the female child will remain with her until she attains majority, the stipulation is valid, because this is her legal right even if it is not stipulated." [46]

5. Forfeiture of the right to husband: Where the wife obtains Khul', on condition that she will forfeit her right to hadanah, the Khul' is valid, but according to the Hanafi School, the condition is inoperative. This is because the child also has the right to be under the custody of the mother until the period of hadanah expires. Thus mother has no right to forfeit it, in place of compensation for Khul'. Moreover, this condition will cause the right of others (who have the right of the child's custody after the mother) to be violated.

But according to Maliki School, mother's right, shall, by virtue of such stipulation, be forfeited, and the hadanah be transferred to the child's father, even if it is in the presence of others who deserve it before him, provided:-

a. That separating the child from the mother will not inflict any harm on him or her;

D. That the father has the capability of undertaking the hadanah.

If these two conditions could not be fulfilled, then divorce is effected, but mother's right to hadanah will not be forfeited. However, even though this is the famous view (of the school), the practice of the courts is to the effect that if the mother forfeits her right to the father, it will not be transferred to him; it will, instead, be relocated to whom is entitled to it after the mother.[67]

6. Forfeiture of the right to nafaqah (maintenance): during the iddah: Where the wife obtains Khul' from her husband, in lieu of the right to nafaqah during the iddah, (i.e what is legally known as: nafaqatul 'iddah), the khul', is valid and the husband is exempted from the nafaqah, even if its value is not known due to uncertainty, because the uncertainty is insignificant.

Where the spouses agree on Khul', in lieu of the forfeiture of accommodation (sukna) during the iddah period, the Khul' is valid but the accommodation will not be forfeited. This is because to provide a divorced woman with accommodation, during the iddah period, in the matrimonial home, is not only a right (of the divorced woman) but it is an obligation (on her) to stay there until the expiration of the iddah and the husband must make provision to that effect This is by virtue of chapter 65, verse 1 which reads, "...And

turn them not out of their houses, nor shall they (themselves) leave...." [68]

5.11.1 Unlawful consideration:

Where the consideration consists of things which are unlawful, such as pig, intoxicant etc., Hanafi jurists are of the view that, the Khul' shall be effected, but the consideration is not incumbent upon the wife. [69]

However, Sayyid Sabiq (a contemporary muslim jurist), is of the view that this view is applicable only if the husband is aware of the unlawfulness of the consideration, whether the wife is aware of that or not. Thus, if he is not aware of that, the Khul' is not binding upon him. [70]

Hanbali School is of the view that if a Muslim agrees with an unlawful consideration, it will be implied that he has agreed to effect Khul' without consideration. This is because he is aware that such unlawful things are not inviolable and as such cannot be owned by a muslim, and consequently he is not entitled to anything (in lieu of the Khul') . [71]

The view of the Maliki jurists is that anything that is unlawful, is forbidden to be a consideration for Khul'. And the husband (in a situation whereby he agrees to accept unlawful consideration) will not be entitled to anything, but the Khul' will take effect. And it is immaterial whether the unlawfulness is essential thereby affecting the whole of the

consideration, or it is not, thereby affecting only a part thereof, or it is accidental. Accordingly the husband cannot claim anything if he is aware of the unlawfulness, otherwise he is entitled to claim the value (of the consideration) or similar to it. [72]

Shafi'i school is of the view that where the consideration consists of unlawful things, the khul' shall be effected and the wife shall pay the husband sadaqul -Mithl (proper Sadaq). [73]

Majority of Shi'a Imamiyyah jurists are of the view that Khul' with such unlawful consideration is ineffective. However, talaq raj'iy, will, instead, take effect, provided it is its place (that is if no talaq has taken place before, or only one single talaq has taken place), otherwise talaq ba'in, will take place. And in any case the husband is entitled to nothing. [74]

5.11.2 The quantum of the consideration:

The majority of muslim jurists, including Shi'a Imamiyyah, [75] are of the view that consideration for Khul' may be any amount, even if it is more than what the wife received (as sadaq), at the time of contracting the marriage. This is because no limit has been fixed to it by the Shariah. Accordingly, it is lawful for the husband to receive more than what he has paid his wife as sadaq. In holding this view, the jurists, rely on the following authorities:-

a) Chapter 2, verse 229, the part of which reads thus:

> ...There shall be no sin upon either of them for what the wife may give up (to her husband) in order to free herself...

They argue that "what the wife may give up" could be any amount.

b) The hadith narrated by al-Bayhaqi, on the authority of Abu Sa'id al-Khudri who said, "My sister was marrying an Ansar and their relationship became strained so they brought their case to the Prophet (S.A.W.) and the Prophet (S.A.W.), said (to my sister), "Will you return his (i.e. your husband's) garden? She said, 'I will even add (something) on it". And she returned (to him) his garden with an addition."[77]

Some other jurists are of the view that it is unlawful for the husband to receive, as a consideration for Khul', more than what the wife had received from him (as sadaq). They substantiate their view with the hadith narrated by ad-Dar Qutniy, according to which Abuz-Zubair mentioned that he gave his wife a garden (as Sadaq) and (when she sought Khul') the Prophet (S.A.W) said (to her), "Will you return to him his garden which he gave you (as Sadaq)? She replied, "Yes, I will even increase". Then the Prophet (S.A.W) said, "With regard to the increase, no (you will not give it to him); it is rather the garden that you will return to him." She then said , "Yes".

The cause of divergence (of views) among the ulama (Muslim scholars), regarding this issue, according to Sayyid

Sabiq, is their divergence of view as to whether Qur'anic general rules could be specified with Ahad hadith, [78] or not. Thus, those who are of the view that the generalization of the Qur'anic rules can be specified with Ahad hadiths, hold that the increase to what the husband paid as sadaq is unlawful. But those who are of the view that the generalization cannot be specified with Ahad hadiths, hold that the increase is lawful. [79]

Ibn Rushd comments on this divergent thus:

> He who compares it (i.e. consideration for Khul') with consideration in other commutative contracts, holds that its quantum depends on mutual agreement, while he who considers the literal meaning of the hadith opines that the increase is unlawful. It seems that he (the latter) regards it from the point of view of usurping others' property without justification.[80]

It seems that the view of Hanafi jurists (on this issue) is that consideration which is higher than what the wife received as sadaq) and which contravenes the rule (established by Abuz-Zubair's hadith, quoted above), would only amount to a moral offence but the consideration would be valid, in law.[81]

5.11.3 Specification of the consideration:

As to whether the consideration of Khul' has to be specified or not, the Muslim jurists differ. Thus, the Hanafi jurists are of the view that where the consideration is unspecified, it could be one of the following:-

a] The wife may not mention any property but makes an expression which could mean both the availability or non-

availability of some property, such as where she says to the husband, "Give me Khul' for what is in my room" or "what is in my hand, as the consideration." Khul', in this case, is effected, even though there may be something in the room or in the (wife's) hand and there may not be anything. Thus, if the husband finds something in the room or in the hand, it will be the consideration, otherwise he will have nothing (as a consideration).

b. The wife may mention something (as the consideration) but which is not available at the moment, though it may be available later on, such as where she says, "Give me Khul' for whatever my date-palm may yield, this year". Khul' is also valid in this case, but the wife shall return to the husband what she received from him (as-sadag), irrespective of whether the date-palm yields fruits or not.

c. The wife may mention something (as consideration) which is unknown, even though it is available, at the time of making the agreement, such as where she says to the husband, "Give me Khul' for the foetus which is inside my she-camel's womb" or "for the fruits yielded by my date-palm", or "for the chattels that are inside my house." Khul', in such a case, is valid. And then if there is anything available, it belongs to the husband, otherwise she shall return to him, what she received from him as-Sadag.[82]

Hanbali School holds that consideration for Khul' can be unspecified such as where the wife says to her husband, "Give me Khul' for a camel" or "for a house", or "for a car, etc,

without specifying it. Khul' in such a case, is valid and it is incumbent upon the wife to give the husband less than (the value) of a camel or a house, or a car or any other thing mentioned by her.[83]

Maliki School is of the view that specification of consideration is not a condition for the validity of Khul'. Thus, the consideration my be something regarding which there is gharar (uncertainty), such as foetus in utero, or an escaped animal, or crops not yet matured or something undescribed. Where the consideration is feoutus in utero, then what the animal delivers will belong to the husband, but if it miscarries he is entitled to nothing. The same rule applies in the case of an escaped animal, or crops not yet matured and all other thing regarding which there is gharar. But in the case of undescribed thing, the husband will be entitled to an article or something of average value.[84]

However, specification of consideration, according to Shafi'i, is a condition for the validity of Khul'. Thus, where the wife obtains Khul' from her husband, for an unknown or unspecified consideration, such as a camel, or a dress, or a house, or a farm, without specifying it, talaq ba'in (and not Khul') is effected and it is incumbent upon the wife to give the husband Sadaqul-Mithl (proper Sadaq).

Ibn Hazm is of the view that Khul' with an unknown (or unspecified) consideration is invalid, because there is

uncertainty in the husband's claim (to the consideration). It is, thus, a void contract. Accordingly, there cannot be any separation by virtue of invalid Khul'. He then condemns the reasoning of those who hold a contrary view (regarding the issue), and reputes their arguments by saying:

> The argument that the Qur'anic expression that "There shall be no sin upon either of them for what the wife may give up (to the husband)", is 'umum (general, consisting, of everything), yes, (that is acceptable), but only concerning lawful transactions and what is legally possessed, and not unlawful (things). Otherwise it would have been lawful to release his wife for a consideration of committing zina (adultery) with her, anytime he wants, or for a consideration of wine, because they also come under the Umum, according to that argument).[86]

Shi'a Imamiyyah School is of the view that it is not a condition that the consideration of Khul' has to be specified in details, provided the specification will be known afterwards. The example of this, is where the wife mentions that the consideration is "What is in this box" or "my share of inheritance from my father", or "what my farm may yield".[87]

5.12 Time Of Effecting Khul'

It is lawful to effect Khul' at any given time, during the subsistence of the marriage, irrespective of whether it is during the wife's monthly periods, during her state of purity or even during her iddah, after being divorced irrevocably. All muslim jurists unanimously agree on this. In holding this view they rely on the fact that in chapter 2, verse 229, Allah (S.W.T) says, "There shall be no sin upon either of them (i.e. the spouses) for what the wife may give up (to her husband) in

order to free herself," without specifying this with any particular time.

They further argue that when the Prophet (S.A.W.) decided the two cases of Khul' between Thabit and his two wives, he did not inquire about their condition as to whether they were menstruating or not, despite the fact that he knew quite well that there was a possibility to that effect.[88]

5.13 Dispute Between Spouses Regarding Khul'

Where there is dispute between the spouses, regarding khul', then if it is the husband who claims that khul' has taken place between him and his wife while the wife denied it, irrevocable talaq will take effect, by virtue of the husband's admission (that khul' took place), though he is not entitled to claim anything as a consideration, from her, for she has denied it. However, her denial must be corroborated by an oath.

But if it is the wife who claimed that she has obtained khul' from her husband, and the husband denied that, the case shall be decided in his favour.

Where the spouses agree that khul' has taken place but they disagreed on the amount of the consideration, or its specification, or its description or whether it is prompt or deferred, it is the wife's claim that will be accepted. This is what was reported from Abubakar by Ahmad. This is also

the view of Imams Malik and Abu Hanifa. However, according to another view, which was reported from Imam Ahmad, it is the husband's claim that will be accepted.

Imam Shafi'i is of the view that even the husband (not only the wife) shall take oath (where the dispute concerns the consideration), because, in the circumstance, the spouses are legally considered as parties to the contract of sale.[89]

5.14 The Legal Position of Khul':

The Muslim jurists differ regarding the legal position of khul', that is whether it should be regarded as talaq (divorce) or faskh (annulment). Thus, the majority of them are of the view that it is talaq ba'in (irrevocable divorce). This is because, according to them, in Thabit's hadith, the Prophet (S.A.W) said to Thabit, "Take the garden and divorce her by a single talaq". And also because, in the case of faskh, the separation between the spouses does not depend on the husband's choice or volition, while in the case of khul' the separation may be dependant upon the husband's choice and agreement. This view was reported from Uthman bn Affan, Ali bn Abi Talib, Ibn Mas'ud and some jurists among the Tabi'un (the followers of the Companions). Imam Malik, Thawri, Awza'i, Imam Abu Hanifa and his disciples and Imam Shafi'i, in one of his two views, subscribe to this view. And Imam Malik is even of the view that, if the husband intends more than one divorce, it is binding on him, (otherwise it is only one).[90]

It was reported that Umm Bikrah al-Asla-miyyah, the wife of

Abdullah bn. Usayd, obtained Khul' from him. Then later both of them regretted (and wanted to resume marital relationship). Thus they brought their case to Uthman bn. Affan (the third rightly- guided caliph) who decided that it was lawful for them to do so and said, "It is one single talaq, except where something contrary to that is mentioned in which case it will be as it has been mentioned."[91]

Abu Thawr is of the view that where he husband has not used the term "talaq (divorce), then the khul' shall be considered as a mere separation (by faskh) and not talaq, but if he mentions tatliq (or talaq), then it is talaq.

Jurists who consider Khul' as talaq further differ. Thus, some of them hold that it is talaq raj'iy, while others are of the view that it is talaq ba'in. Ibn Hazm belongs to the former group, because, according to him, there are only three types of talaq, triple talaq, the third (and last) talaq and talaq before consummation of marriage all of which are irrevocable (ba'in) (and Khul' does not belong to any of them it is, thus revocable (raj'iy). Sa'id bn al-Musayyab also subscribes to this view. And he was reported to have held that if khul' had taken place and the husband wanted to take her back during her iddah, he had the right to do so, but he should give her back the compensation he had received from her and should call witnesses to that effect.[92]

Ibn Abbas, Ibn Umar, Tawus, Ikramah, Dawud, Is'haq and Ahmad, on the other hand, are of the view that Khul' is faskh but not talaq, except where the husband intends it to be so. In holding this view they rely on the hadith narrated, on the authority of Ibn Abbas that Ibrahim bn. Sa'ad bn. Abi Waqqas asked him regarding a man who divorced his wife twice and then she obtained Khul' from him. Was he entitled to marry her (before she married another)? To this he replied, "Yes", let him marry her because, according to him, Allah (S.W.T) in chapter 2, verse 229, says, "Divorce is only permissible twice" and then iftida (i.e. Khul') is mentioned, and then (in verse 230 of the same chapter), Allah (S.W.T.) says, "And if he divorces her (finally), she shall, thereafter not be lawful for him unless she, first takes another man for husband."[93]

The holders of this view argue that had khul' been talaq, it would have been the third talaq, after two talaqs mentioned in chapter 2, verse 229 and consequently the portion of chapter 2, verse 230 which reads, "If he (the husband) divorces her ..." could have been interpreted to mean the fourth talaq (which is contrary to Shari'ah).

They further substantiate their argument with a hadith narrate by Tirmidhi, Abu Dawud and ad-Dar Qutni, on the authority of Ibn Abbas, that the wife of Thabit bn Qays, separated herself from him for a compensation. And the Prophet (S.A.W.) made her waiting period (iddah) to be one menstrual course. [94]

It was also reported that Rubayyi'' bint Mu'awwidh bn. Afra obtained Khul' (from her husband), during the lifetime of the Prophet (S.A.W.), and he ordered her (or she was ordered) to observe iddah for a period of one menstrual period.

The argument here is that these two hadiths imply that Khul' is faskh but not talaq. This is because Allah (S.W.T.), in chapter 2, verse 228 says: "Divorced women shall wait concerning themselves for three monthly periods..."[95]

Had it been that obtaining khul' by the wife is legally considered as talaq, one monthly courses would not have been enough for the wife who obtained khul', to serve as an iddah."[96]

Ibnul-Qayyim also subscribes to this view. And he mentioned three things that distinguish Khul' from talaq which are:

a) that in the case of talaq, the husband has the right of raj'ah (revocation), before the expiration of the iddah (where the talaq is revocable), while in the case of khul' it has been established by some textual authorities and ijma' that if it is effected, the husband is not entitled to revoke it (and take the wife back to marriage-tie);

b) that iddah, in the case of talaq, is three quru (monthly courses or states of purity), while in the case of Khul', it has been established by the Sunnah (of the Prophet) and the fatwas (legal verdicts) of the Companions that it is only one monthly courses;

c. that talaq is counted (and regarded) among the three divorces (which the husband is entitled to effect on his wife) and after completing the three, the wife is unlawful until she marries another man, and the marriage being valid is consummated, while in the case of khul' (it is not counted among the three divorces and that is why) it is lawful to effect khul' and two talaqs and then effect a third talaq after that. This is a clear indication that khul' is not talaq. [97]

The legal implication of these differences (between talaq and Khul') is obvious, in counting the number of divorces (the husband is entitled to effect), because the jurists who hold that Khul' is talaq count it as one of the three divorces. Accordingly, if a husband divorces his wife twice and then she obtained khul' from him, then it is not lawful for him to take her back again, to marital life (even with a new contract), until she marries another man(and the man divorces her after consummating the marriage and she observes iddah). But those who hold that it is faskh (and not talaq) do not count it among the three divorces. Thus, if a husband divorces his wife twice and then she obtaines khul' from him, it will be lawful for him to take her back to marital relationship (with a fresh marriage contract), without any need for her to marry another man before that, because it is legally regarded that it is only two divorces that have taken place, the khul' being ineffectual (laghwu).[98]

5.14 Legal Consequences of Khulʿ

Once khulʿ has been concluded between the spouses, some legal consequences follow immediately. These consequences are as follows:

1. An irrevocable talaq (according to those who hold that khulʿ is talaq) will take effect. This is because the wife paid the compensation so as to free herself from the husband's dominion over her. And this cannot be achieved unless the talaq (that comes into effect as a result of Khulʿ) is irrevocable.

2. The wife is duty-bound to pay the compensation of khulʿ (badlul-Khulʿ), in whatever form it is (in accordance with the agreement between her and the husband). This is because the husband has made her release dependant upon the compensation to which she has agreed.

3. That any material rights which are due to either of the spouses, incumbent upon the other, will be forfeited, provided the rights are among the legal effects of the marriage in which Khulʿ has taken place. Thus, if for instance, the spouses agreed on Khulʿ for =N=1,000 consideration, then it is incumbent upon the wife to pay this amount. And if it happened that she has not received her sadaq or a part thereof, (up to the time when the khulʿ took place), then she will be forfeited of it, by virtue of the khulʿ, whether the khulʿ came into effect before or after consummation of the marriage. She will also be forfeited of the right to nafaqah (maintenance) for the period preceeding

the khul'. And if it happened that the husband has paid her the full sadaq, or he has paid her the cost of her nafaqah for the future period, and then the khul' takes place, before the consummation, (in the case of sadaq, or even after consummation, (but before the period regarding which the nafaqah, has been paid elapses), the husband forfeits all these and as such he is not entitled to be re-imbursed.

However, all the rights that are not in existence at the time when the Khul' took place, shall not be forfeited. The example of such right is nafaqatul-iddah (maintenance during the iddah period). Thus, where the wife obtained khul' from her husband, it is incumbent upon him to provide nafaqah (maintenance) for her, during the iddah, except where there is a stipulation to the contrary. Other rights which have no relationship with the marriage, are not also forfeited, except where there is a stipulation to the contrary. This is the view of Imam Abu Hanifah, his reason being that the sole purpose of khul' is to sever the marital relation between the spouses so as to settle dispute and controversy between them and that this cannot be effectuated unless all the rights which are the legal effects of the marriage are forfeited, at the time the khul' took place, whether the rights are those of the wife or those of the husband.

The other three Imams (i.e. Malik, Ahmad and Shafi'i) and Muhammad (one of the two most prominent and eminent disciples of Imam Abu Hanifa, known as as-Sahiban) are of the view that

there is nothing incumbent on the wife, by virtue of khul', except consideration. Thus, none of the marital rights is forfeited in the circumstance, except where there is stipulation to that effect. This is because legal rights are not forfeited except where there is evidence to that effect. And Khul', in whatever expression is effected, cannot legally be considered as an express term for forfeiting the already existent rights."[99]

It seems that the preponderant view is that of the three Imams and Muhammad. This is because once a legal right came into existence, it cannot be forfeited except where the person entitled to it expressly waves it, or where there is a clear indication to that effect.[100]

Ibn Hazm is of the same view with other jurists, regarding the rights which are subsequent to khul', such as nafaqatul-iddah, (i.e. such rights cannot be forfeited). He, however, differs with them in that where the divorce that came into effect, as a result of khul', is triple divorce or is the third divorce and, therefore, the final (after which marriage is not lawful between the spouses, unless the wife marries another man), the rights will be forfeited. The wife's deferred sadaq (as-Sadaqul Mu'ajjal) will also not be forfeited.[101]

We have seen, in the previous discussion, how marriage is terminated by way of khul', at the instance of the wife, which

is a clear indication that even though, the right to divorce has been primarily vested in the husband, that right is not absolute which means that even the wife has certain right regarding it. This is a clear evidence of the moderation and equilibrium of the Shari'ah. It could be noted that there is an extensive exposition of the issue of consideration for Khul'. This is due to its utmost importance, in khul'. Other important issues concerning Khul' have also been dealt with extensively with the hope that this will satisfy the need of our society. The next chapter deals with another process of terminating marriage, i.e. judicial process.

FOOTNOTES AND REFERENCES:

1. Ali, A.Y. (1977) The Holy Qur'an: Translation and Commentary, American Trust Publication, p. 90.

2. Ahmad, K.N. (1981) Muslim Law of Divorce, Kitab Bhavan, New Delhi, p. 219.

3. Maududi, A.A. (1983) The Laws of Marriage and Divorce in Islam, Islamic Books Publishers, Kuwait, p. 34.

4. Suyuti, J.D. (1978) Sunan Nisa'i, Darul-Fikr, Beirut, Vol. 6, p. 169.

5. Maududi, A.A. (1983) The Laws of Marriage and Divorce in Islam, op. cit. at p. 34.

6. Asad, M. (1980) The Message of the Qur'an, Daru Al-Andalus, Gibraltar, p. 39.

7. Ibid at p. 50.

8. There are several variants of this hadith narrated by Bukhari, Nisa'i, Tirmidhi, Ibn Majah and Bayhaqi on the authority of Ibn Abbas. See for instance: Khan, M.M. (1976), Sahih al-Bukhari (translated), Hilal Yayinlari, Turkey, Vol. vii, pp. 150-151; Bayhaqi (n.d.), as-Sunan al-Kubra, Darul-Fikr, Beirut, Vol. vii, pp. 313-314; Suyuti, J.D. (1978), Sunan an-Nisa'i (commentary), Darul-Fikr, Vol. vi, p. 169.

9. See for instance: Hasan, A. (1985), Sunan Abu Dawud (Translated), al-Madina Publications (p) Ltd., New Delhi, Vol. ii, p. 600; at-Turnumana, A.A. and Johnson, Y. (1982), Al-Muwatta of Imam Malik (translated), Diwan Press, p. 262.

10. Asad, M. (1980), The laws of Marriage and Divorce in Islam, infra at p. 35.

12. Musa, A.Y. (1958) Ahkamul-Ahwalish-Shakhsiyyah, p. 310; Ahmad, K.N. (1981) Muslim of Divorce, pp. 221 and 223.

13. Ibn Qudamah, (1307 A.H.), al-Mughniy, Cairo Vol. vii, p. 57 in Ahmad K.N. (1981) Muslim law of Divorce, p.251.

14. Ibnul-Qayyim (n.d.): Zadul Ma'ad, Vol. 4, p. 27 in Sabiq, S. (1978), Fiqhus-Sunnah, Vol.2, p. 254.

15. Ibid.

16. Ibnu Qudamah, (1307 A.H), al-Mughniy, op. cit. at p. 57 in Ahmad, K.N. (1981), Muslim law of Divorce, op. cit. at p. 251.

17. Sabiq, S. (1977), Fiqhus Sunnah, infra at p. 257; Ibn Qudamah, A.A. (n.d.) al-Mugniy, Maktabatul-Jamhuriyyah al-Arabiyyah al-Azhar, vol. 7, pp. 54-5; Ibnu Rushd, M.A. (n.d.) Bidayatul-Mujtahid, Darul Fikr, Vol. 2, p. 51.

18. Asad, M. (1980), The Message of the Qur'an, infra at 104.

19. Ali, A.Y. (1977), The Holy Qur'an: Translation and Commentary, infra at p. 185.

20. Ibn Qudamah (n.d.), al-Mugniy, op. cit. at p. 55.

21. Ibid.

22. Russell, A.D. and Suhrawardy, A.M. (n.d.), A Manual of the law of Marriage (from the Mukhtasar of Sidi Khalil, Kegan Paul Trench Trubner and Co. Ltd., p. 126; al-Abi, S.A. (n.d.) Jawahirul-Ikhil, published by A.A. Abus-Sa'ud and U. at-Tayyib, Kano, Nigeria, Vol. 1, p. 334.

23. Ibid.

24. Ibn Qudamah (n.d.) Al-Mugniy, infra at pp. 55-56

26. Qurtabi, M.A. (1967), al-Jami'u Li Ahkamil Qur'an, Darul Kabit al-Arabi, Cairo, Vol. 5, pp. 95-6.

27. Ibid.

28. Ibn Nujaim, (1311 A.H), al-Bahr ar-Raqi, Cairo, Vol. 4, p. 90; al-Hammam, K.D. (1356 A.H), Fathul Qadir, Cairo, Vol. 3, 223.

29. Ibn Abidin, (1318 A.H), Raddul-Mukhtar, Cairo, Vol. 2 pp. 583-84.

30. Russell, A.A. and Suhrawardy, A.M. (n.d., A Manual of the law of Marriage, supra at p. 113; Ibnul Hasan, J. (1136 A.H), Shara'i'ul-Islam, Tehran, p. 219.

31. Sharkhasi, S.D. (1331 A.H), al-Mabsut, Matba'atus-Sa'adah, Cairo, Vol. 3. p.179; Sabiq, S. (1977), Fiqhus-Sunnah, infra at p. 250.

32. Ibnul-Hammam, K.D. (1356 A.H.), Fat'hul-Qadir, supra at pp.219-20; Sabiq S, (1977), Fiqhus-Sunnah, op. cit. at p.259.

33. Musa, M.Y. (1958) Ahkamul-Ahwalish-Shakhsiyyah Fil Fiqhil-Islamiy, Darul Kitabil-Araby, Egypt, infra at pp. 312-13; Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 259.

34. Ibid. at p. 260.
35. Ibid.

36. Anonymous, (1344 A.H) al-Fatawi al-Hindiyyah, Kanpur, Vol. II, p. 125 in Ahmad, K.N. (1981) Muslim Law of Divorce, infra at pp. 251-52; ash-Sha'arani (1279 A.H.) al-Mizanul-Kubra, Cairo, Vol. II, p. 135; Ibn Rushd (n.d.) Bidayatul-Mujtahid, infra at p. 57.

37. ash-Sha'arani (1279 A.H) al-Mizanul-Kubra, op. cit. p.135.

38. Sabiq, S. (1977) Fiqhus-Sunnah, supra at p. 259; Ibn Qudamah, (n.d.) al-Mugniy, op. cit. at p. 84.

39. Khalil, S. (n.d.) Jawahirul-Iklil, supra at p. 330; Russell, A.D. and Suhrawardy, A.M. (n.d.) A Manual of the Law of Marriage (from the Muktasar of Sidi Khalil), supra at p. 113.

40. Asad, M. (1980) The Message of the Qur'an, infra at p. 108.

41. Ibn Hazm A.M. (n.d.), Fiqhus-Sunnah, supra at p 258 Ibn Qudamah (n.d.), al-Mugniy, supra at p. 259.

44. Mawahibul-Jalil

45. Ibn Qudamah, (n.d.) al-Mughniy, infra at p. 90-1.

46. Russell, A.D. and Suhrawardy, A.M. (n.d.) A Manual of the law of Marriage...., infra at p. 125; Khalil, (n.d.) Jawahirul-Iklil infra at p. 334.

47. Ibid.
48. Ibid.

49. Maududi, A.A. (1983), The Law of Marriage and Divorce in Islam, infra at p. 44.

50. Ibid.

51. Ahmad, K.N. (1981), Muslim Law of Divorce, Supra at p. 229.

52. Ibid.

53, 54. These hadiths and similar others, were narrated by Bayhaqi. See Suyuti, J.D. (1978) Sunan an-Nisa'i (commentary), infra at 282.

55. Asad, M. (1980), The Message of the Qur'an, supra at p. 51.

56. Ibid, at p. 105.

57. Ali, A.Y. (1977), The Holy Qur'an: Translation and Commentary, supra at p. 190.

58. Ahmad, K.N. (1981) Muslim Law of Divorce, infra at pp. 231-34.

59. Aliyu, I.A. (1988), Legal Basis and Objectives of Marriage Under Islamic Law (unpublished) p. 212.

60. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah Lil Ahwalish-Shakhsiyyah. p. 465.

61. Russel, A.D. and Suhrawardy, A.M. (n.d.) A Manual of the Law of Marriage..., infra at p. 129.

62. Khumaini R.M. (1404 A.H), Tahrirul-Wasilah, Mu'assisatun Nashril Islamiy (affiliated to) Jama'atul-Mudarrisin, Qum, Iran, Vol. II, p. 314; Muganniyyah, M.J. (1960), al-Fighu Alal Madhahibil-Khamsah, Darul Ilm Lil-Malayin, Beirut, p. 424.

63. Ibn Hazm A.M. (n.d) al-Muhalla, op. cit. at p. 244.

64. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah...., infra at p. 466.

65. Ibid; Mughanniyah M.J. (1979), al-Fiqhu 'Alal-Madhahibil-Khamsah infra at p. 425.

66. Ibid.

67. Ibid.

68. Ali A.Y. (1975), The Glorious Qur'an: Translation and Commentary, The Islamic Foundation, U.K., p. 1562.

69. al-Marginani, A.H. (n.d.), al-Hidaya, in New Delhi in Ahmad K.H. (1981), Muslim Law of Divorce, infra at p. 260.

70. Sabiq, S. (n.d.) al-Mughniy, supra at p. 90.

71. Ibn Qudamah, (n.d.), al-Mughniy, supra at p. 255.

72. Russell, A.D. and Suhrawardy, A.M. (n.d.), A Manual of The Law of Marriage..., supra at 115.

73. Ibn Qudamah, (n.d.), al-Mughniy, op cit. at p. 90

74. Mughanniyah, M.J. (1960), al-Fiqhu 'Alal-Madhahibil-Khamsah, op. cit. at p. 424; Khumaini, (1404), Tahrirul-Wasilah, op cit. at p. 314.

75. Ibid.

76. Asad, M. (1980), The Message of the Qur'an, supra at p. 50.

77. Sayyid Sabiq commented on this hadith by saying that Muhaddithun (traditionists) are of the view that this hadith is a weak hadith (which means it cannot be cited as an authority). See Sabiq, S. (1977), Fiqhus-Sunnah, infra at p.256.

78. Ahad or solitary hadith (also known as khabarul wahid) is a hadith which is reported by a single person or by odd individuals from the Prophet (S.A.W.). Imam Shafi'i refers to it as Khabarul Khassah which he applied to every hadith narrated by one, two or more persons from the Prophet (S.A.W.) but which fails to fulfil the requirements of wither Mutawatir (universally testified to be sound continously) or the Mashhur (well known) Kamali, M.H. (1989), Principles of Islamic Jurisprudence, Pelandul publications, Malaysia, p. 91.

79. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 256.

80. Ibn Rushd A.M. (n.d.) Bidayatul-Mujtahid, supra at p. 51.

81. Anonymous, al-Fatawil Hindiyyah, Kanpur (1349 A.H); Vol. 2, p. 118; In Ahmad, K.H. (1981), Muslim Law of Divorce, infra at p. 265.

82. Juzairi, A. (n.d.) al-Fiqhu 'Alal-Madhahibil-'Arba'ah, Darul Fikr, Vol. 4, pp. 307-08.

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84. Ibid at p. 411; Russell, A.D. and Suhrawardy, A.M. (n.d.), A Manual of the Law of Marriage...., supra at pp. 113-14.

85. Ibid at p. 414.

86. Ibn Hazm, M.A. (n.d.) alMuhalla, op. cit. at pp. 243-44.

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90. Qurtabi, M.A. (1967), al-Jami'u Li Ahkamil Qur'an, Darul-Katib al-Arabi, Vol. 3, 143.

91. Ibn Hazm, M.A. (n.d.) al-Muhalla, supra at p. 238.
92. Ibid at pp. 239-40.

93. Asad, M. (1980), The Message of the Qur'an, infra p. 51.

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95. Ali, A.Y. (1975) The Holy Qur'an: Translation and Commentary, The Islamic Foundation, U.K. pp. 89-90.

96. Qurtabi, M.A. (1967), al-Jami' Li Ahkamil-Qur'an, op. cit. at pp.l 143-44.

97. Sabiq, S. (1979), Fiqhus-Sunnah, infra at p. 261

98. Ibid at p. 262.

99. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah..., infra at pp. 468-69; Musa, M.Y. (1958), Alkamul-Ahwalish-Shakhsiyyah...., infra at p.. 307-07.

100. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah, op. cit. at pp. 469-70.

101. Ibn Hazm, M.A. (n.d.), al-Muhalla, op. cit. at p. 244.

Chapter 6

6.0 TERMINATION OF MARRIAGE THROUGH JUDICIAL PROCESS

It has been explained (in chapter one) that talaq is an inalienable right of the husband which has been vested in him by the shari'ah. Thus nobody has the right to effect it unless he has been expressly authorised by him to so, either through tawkil or tafwid. (as earlier discussed in chapter three).

However, this right (of the husband) is not absolute because the right of the wife regarding this, has not been neglected. Thus a wife has been given the right to seek termination, either through khul' or through judicial process by instituting a legal action in the court. And (as it will be discussed in this chapter) the court is duty-bound to listen to her complain and decide the case justly.

In this chapter, grounds for seeking termination of marriage, by the wife, through instituting court action will be discussed. These grounds are: 'Adamul-Infaq (lack of maintenance), al'Ayb (bodily defects), ad-Darar wa su'ul-'ishrah (bodily harm and ill-treatment or cruelty of the husband), Ghaybatuz-Zawj (absence of the husband). Where the husband is imprisoned, or detained or captured, this may also constitute a ground for termination.

6.1 Termination for Lack of Maintenance:

Where a husband fails to maintain his wife, then if he has some patent property from which the wife can maintain herself (and her children), she is legally allowed to take (from the property) what will equitably be sufficient for her (and her children). This is in accordance with the hadith narrated by Bukhari and Muslim, on the authority of A'isha (R.A) that Hind bint Utbah said to the Prophet (S.A.W), "O the Apostle of Allah. In fact Abu Sufyan is a miserly person and so he does not give me and my son (any sustenance), except what I take from him without his knowledge." The Prophet (S.A.W) then said "Take (from him) what will be enough for you and your son in an equitable manner."[1]

Where such patent property is available, the wife has no right to seek termination of marriage for reason of lack of maintenance (nafaqah), whether the husband is present or not. This is so because, she has been able, in the circumstance, to procure what she is entitled to, from the husband's patent property. She has even been accorded the right to demand for the absent husband's property which is in form of a debt against another person, or where the husband has entrusted it to someone's custody. She is also legally entitled to sell the husband's immoveable property ('aqar), in order to procure her nafaqah. This is the view of the three Imams (Malik, Ahmad and Shafi'i).[1] And regarding this issue Sheikh Khalil (a famous Maliki jurist and writer) has this to say:

> "where (the husband) is absent, (payment of her maintenance) will be decreed out of his property; or out of articles pledged to him or out of debts due to him."[2]

But where the husband has no patent property (because he has no property at all or because it is not apparently known), the Muslim jurists differ. Thus the Hanafi jurists hold that the wife has no right to seek termination (in the circumstance). She has, instead, the right to appeal to the judge so as to compel the husband to provide maintenance for her or give her permission to take loan against the husband (for the purpose of the maintenance). This rule applies whether the lack of nafaqah is due to mere refusal of the husband (to provide the nafaqah for the wife) or it is due to the husband's financial straits and inability. In holding, this view, they rely on the following authorities:

a) Chapter 85, Verse 7 which reads:

> Let him who has ample means spend in accordance with his amplitude; and let him whose means of sustenance are scanty spend in accordance with what God has given him; God does not burden any human being with more than He has given him...[3]

They argue that the implication of the verse is that it is not binding on the husband to maintain his wife if he is too insolvent to do that. And since it is so, he will not be considered a sinner for failing to maintain the wife and consequently this cannot be a ground for separation between him and his wife. Moreover, Imam Zuhri was asked about a man who was unable to provide maintenance for his wife; whether the spouses could be separated (on that ground) or not? And

he replied, "She should persevere with him, but they should not be separated." Then he recited the Verse (i.e. Chapter 65, Verse 7).[4]

Sha'aban, however, observes that the verse does not imply that the husband is not obliged to provide nafaqah for his wife, in the event of insolvency. It only implies that nafaqah is binding on the husband, according to his financial position. Thus if he is well-to-do, he must provide for her sufficiently according to his position, and if he is poor nothing is obligatory upon him except what he is capable to do. He adds that even if the verse has implied that poor husband is not obliged to provide nafaqah for his wife, it would not mean that the marriage cannot be terminated on that ground, if the wife petitions for it. This is because, the termination, in the circumstance, will be effected, in order to protect the interest of the wife and free her from the husband's authority so as to enable her earn her livelihood or marry another man who will provide nafaqah for her.[5] This observation of Sha'aban is cogent because it is in consonance with the general principle of justice which is fundamental in shari'ah.

b) Chapter 2, Verse 280 which reads

> If, however, (the debtor) is in strained circumstances, (grant him) a delay until a time of ease...[6]

They argued that, the implication of this verse, is that where the debtor is financially unable to settle the debt, the creditor should give him a respite until such a time when he is financially able to pay the debt. And nafaqah cannot be more than a debt which is binding on the husband who may be considered as a debtor, while the wife is a creditor. Thus, the wife is, by virtue of the verse, bound to give respite to the husband until such a time when he is able to pay the debt. And accordingly, she is not entitled to petition for termination of marriage (in the circumstance).[7]

On this Sha'aban also observes that, the verse, (in the circumstance) can only be relevant to the case of husband's failure to provide nafaqah for his wife for reason of strained condition (i.e. poverty). He further argues that, Hanafi jurists do not agree that the wife is not entitled to petition for termination due to lack of nafaqah, unless it is due to husband's refusal to do so. Thus, the relevance of the verse must be restricted to the situation of inability.[8]

c) They further argue that there were, among the companions, wealthy and poor, and that the number of the poor was far greater than that of the wealthy. But despite this no single case was reported to the effect that the Prophet (S.A.W) had ever separated between some spouses due to the inability of the husband to provide nafaqah for the wife or even to decide that a wife had the right to petition for that. This is because had it been that wife is legally entitled to do that, a single case, at least, could have been reported where a wife

petitioned to the Prophet (S.A.W), seeking termination on that ground, because women used to petition to him for issues that were less important than this.[9]

However, Sha'aban refutes this argument by saying that termination for reason of lack of maintenance (nafaqah), cannot be effected unless the wife institutes a legal action to that effect. And there is not even a single report that any of the Companions' wives petitioned for termination (on that ground), and their petitions were turned down. This argument, by the Hanafi jurists, cannot, therefore, be considered as a valid one.[10]

d) They also argued that termination for reason of lack of nafaqah if granted, is tantamount to depriving the husband of his right, but if it is not granted it will only amount to the deferment of the wife's right. And deferment of right is a lesser evil than deprivation of it. Thus, resorting to a lesser evil (between the two evils) is obligatory where both of the two evils cannot be avoided (as in this case). This is an established principle under the shari'ah.[11]

But this principle is only relevant where the reason for the lack of nafaqah is poverty. But if the reason for it is a mere refusal of the husband to provide it, then it is considered as an injustice perpetrated by the husband against his wife. Thus there is no justification for the deferment of the wife's right to the nafaqah.

The three Imams (i.e. Malik, Shafi'i and Ahmad), on the other hand, are of the view that the wife is entitled to petition for termination of marriage, where the husband fails to provide nafaqah for her. They substantiate their view with the following authorities:

a) Chapter 2, Verse 229 which reads:

> Divorce may be (revoked) twice whereupon the marriage must either be resumed in fairness or dissolved in a goodly manner..[12]

And lack of nafaqah is definitely contrary to resumption in fairness.

b) Chapter 2, verse 231 which reads:

> ....But do not retain them against their will in order to hurt (them): for he who does so sins indeed against himself...[13]

Husbands, according to the verse, are disallowed to retain their wives in order to injure them or to take undue advantage from them. And retaining them without maintaining them (intentionally) is tantamount to injuring them and taking undue advantage from them.[14]

c) It was reported that Abuz-Zinad asked Sa'id bn. al-Musayyab, regarding a man who is not able to provide nafaqah for his wife; whether they shall be separated. And Sa'id replied in the affirmative. Then Abuz-Zinad said, "Is this a sunnah?" Sa'id relied, "Yes, it is a sunnah"

However, Sa'id's statement that, "It is sunnah," does not necessarily imply that it is Prophet's Sunnah (i.e. his teaching). This is because many of the fatwas (legal

opinions) given by Tabi'un (Companions' disciples) that are designated as sunnah, were not even ascribed to the Prophet (S.A.W). They were, instead, ascribed to the companions who were famous in issuing fatwas. Thus they must have meant by the term "sunnah", the traditions of their predecessors. And since the statement of Sa'id (that it is sunnah) does not mean the sunnah of the Prophet (S.A.W), it cannot be an authority.[15]

d) It was reported that Umar bn. Khattab wrote to the commanders of the Muslim troops regarding men who were staying away from their wives, that they should order them to either provide them with nafaqah or divorce them. And (even) if they divorced them they should send them the nafaqah of the past period (which they had not paid).[16]

It should be noted that the men in respect of whom the instruction was given (by Umar) were able to provide nafaqah (for their wives) but only refused to do so. It cannot, therefore, be applicable in respect of others who were not able to provide the nafaqah due to their inability.[17]

e) It is an established principle (under Islamic Jurisprudence) that the judge shall terminate marriage due to husband's bodily defect (as it will be discussed), because it is injurious to the wife. And lack of nafaqah is more injurious to her and, therefore, a more justifiable ground for terminating marriage through court action.[18]

6.1.1. The Preponderant View:

From the arguments of these two opposing views, it is clear that the authorities invoked by Hanafi Jurists imply that it is not lawful to judicially terminate marriage (for reason of lack of nafaqah), if it is due to the inability of the husband. However, they (the authorities) do not imply that it is unlawful to terminate the marriage for any other reason than that (i.e. inability of the husband). And the authorities relied upon by the three Imams, imply that it is lawful to terminate the marriage due to the refusal of the husband to provide nafaqah for his wife, even though he has the ability to do so. But the authorities do not imply that it is lawful to terminate the marriage for any reason other than that.

In view of this, and in keeping with the spirit and nature of the Shari'ah (of moderation), an equitable balance between these two view must be stricken. And, accordingly it is lawful to terminate the marriage where the failure to provide the nafaqah for the wife is intentional refusal of the husband who has the ability to so. And that it is unlawful to effect the termination where the failure is due to the husband's inability for reason of poverty. This is in accordance with the principle of reciprocity that exists between the spouses. And by virtue of this principle, there must be cooperation between the spouses, under any circumstance (especially in difficult and hard times). It is by so doing that their relationship will be spiritual that stands on love and mercy, and not merely material or

commercial in which there is no sense of honour. For instance, where the wife is suffering from a sickness by virtue of which the husband cannot satisfy his sexual urge with her, it is not lawful to annul the marriage on that ground. Likewise it is not lawful to terminate the marriage due to the inability of the husband to provide nafaqah for the wife, because it is not his design to be in that condition (of financial inability), just as it is not the fault of the wife to be so sick that the husband cannot satisfy his sexual urge with her. Both cases must be based on the principle of reciprocity (and correlation of rights and duties).

6.1.2 The Type of Divorce Effected due to Lack of Nafaqah:

The divorce that judge effects for reason of lack of nafaqah is revocable, if it is effected after consummation of the marriage. Thus the husband, after this type of talaq, is entitled to revoke the talaq and return his wife, if he has proved his (financial) ability and preparedness to provide the nafaqah for her, provided her iddah has not expired. Where these conditions have not been fulfilled, the revocation (raj'ah) is not valid.[19]

6.2 Termination for Bodily Defects

It is stated by the Qur'an (chapter 2, verse 228), that:

> ....The rights of the wives (with regard to the husbands) are equal to the (husband's rights) with regard to them...[20]

By virtue of this verse, the spouses have reciprocal rights and obligations against each other. Thus if either of them fails to perform some of his or her obligations, he or she shall be deemed to have committed a wrong against the other. And as such the other (against whom the wrong has been committed) will be entitled to an adequate redress. Moreover, husbands have been enjoined by the Qur'an (in the same verse, i.e. chapter 2, verse 229) thus:

> ".....Either retain them in a fair manner or part with them in a fair manner...."[21]

Hence it is not proper for a husband to keep his wife tied to the marriage when she desires a separation from him on account of defects in him. Thus where the husband or wife is suffering from a defect which makes a happy companionship between them impossible, or renders the discharge of other obligations impracticable, it becomes imperative on the judge to give the aggrieved spouse relief, in the matter by terminating the marriage. Moreover, if the marriage is not terminated on this ground, there is a risk that the aggrieved party may be tempted to committing immorality which Islam does not tolerate.[22]

This view has been based on the Islamic conception of marriage, according to which marriage is a sacred contract which is dissolvable when the rights and duties which are fixed by law are not met, (as in the above-mentioned case, i.e. bodily defects).

6.2.1 Divergent Views of Jurists on the Issue:

There is no unanimity among the Muslim jurists on this issue. Thus some of them are of the view that it is absolutely not lawful to terminate marriage on the ground of any type of bodily defect in either of the spouses. This is the view of Ibn Hazm, (of Zahiri School). He opines that any marriage which has been validly contracted cannot be annulled for reason of judham (leprosy), or baras (leucoderma), or junun (lunacy), or unnah (impotence), or defect that prevent sexual intercourse or any other defect. This is because, according to him, there is no any reliable authority to that effect.[23] Shawkani subscribes to this view, and in his Naylul-Awtar, he argues that there is no authority whatsoever, to the effect that marriage can be annulled for bodily defect.[24]

Ibn Hazm is even of the view that where it has been stipulated, at the time of contracting the marriage, that the wife must be free from all defects, and then later the husband found some defect in her, the marriage, then is void and the husband has no right to ratify it. Accordingly there shall not be any sadaq or nafaqah (for her) incumbent on the man, and neither of the spouses is entitled to inherit the other; whether there is cohabitation between the spouses or not. This is so because, the women, in the circumstance, is legally speaking different from the one with whom the marriage contract was entered into, for she is defective while the one with whom the marriage has been contracted is free from

defect. Thus there is no marriage-tie between him and the one brought to him (who is defective).[25]

However, the majority of the Muslim jurists are of the view that it is lawful to judicially terminate marriage due to bodily defects, even though they differ as to whether the right to seek such termination belongs to both of the spouses or it only belongs to the wife. Thus Hanafi jurists are of the view that this right belongs to the wife only and that the husband has no such rights. This is because, according to them, the husband is able to prevent injury to him self (due to bodily defects of the wife) by means of divorce which has been vested in him, while the wife has no such ability to protect herself against such injury. The only remedy available to her, in the circumstance, is judicial termination of the marriage, for she has no right to effect divorce.[26]

The three Imams (Malik, Shafi'i and Ahmad), on the other hand, are of the view that, husband, like the wife, is also entitled to petition for termination of marriage (in the court) where he finds, in his wife, what is called 'aybun tanasuli (reproductive defect), which obstructs him from sexual intimacy with her, such as ratag or qarn[27] or where he finds in her the defects of junun (insanity) or judham (leprosy) or baras (leucoderma). This is because, these defects are usually injurious to the husband, and the marital relationship with such defects, cannot be sound (and normal). And therefore, the husband is entitled to seek judicial

termination of marriage on this ground, instead of divorcing the wife, because divorcing her will impose, on him, the payment of the whole of sadaq (if the divorce is effected after consummation of the marriage) or the half thereof (if the divorce is effected before consummation), which is unjustifiable.[28]

Ibnul Qayyim Subscribe to this view. He holds that defect, whether in the husband or in the wife, which may be revolting to the other spouse so that happiness, sympathy and affection, which are some of the most important objectives of marriage, are not achieved on that account, is a ground for dissolution of the marriage.[29]

This view, it seems, is more reasonable and closer to the spirit of justice, which is fundamental in the shari'ah. The difference between the two opposing view will only be clear when the effect of termination for reason of defect on sadaq is understood.

6.2.2. Defects that form grounds for Judicial Termination

With regard to the defects that five right (to spouses) to seek termination judicially, the Muslim jurists have divergent views as follows:

1. The view of Abu Hanifa and Abu Yusuf according to which the defects that form ground for judicial termination of marriage are only the one's that cause obstruction to the sexual intimacy, i.e. the ones that are known as al'Uyub at-

Tanasuliyyah (defects of reproductive organs), which are confined to husbands, such as 'unnah (impotency), jubb (missing of sexual organ), Khisa (castration), natural weakness, old-age or (incessant) sickness that does not allow sexual intimacy. This is so because the most important objective of marriage which are protection of chastity and procreation cannot be achieved, in the circumstance. In addition, these defects are perpetual that cannot be cured, which means that their resultant injury is also perpetual and can only be remedied through judicial termination of marriage.

2. The view of Imams Malik and Shafi'i according to which the defects are those of reproductive organs (al-Uyubut-Tanasuliyyah) which do not allow sexual intimacy. And they are not confined to the ones that are in the husband. The defects (that form grounds for judicial termination of marriage) which are peculiar to men are, according to Malik, jubb, 'unnah, Khisa and i'tirad.[30] And the defects peculiar to women are ratag, qarn, ifda, bukhr and istihadah[31]. The two Imams (i.e. Malik and Shafi'i), argue that defects of reproductive organs, in either of the spouses, prevent the achievement of the most important objectives of marriage which are procreation of human species and protection of chastity.

Thus where either of the spouses finds one of these defects in the other spouse he or she is entitled to seek remedy in judicial termination, even if it was not stipulated, at the time of the contract, that the party concerned should be free from the defect. However, defects, other than the

ones mentioned above, such as black complexion (sawad), lameness ('arj), having one eye ('awr), blindness ('ama) or lack of virginity ('adamul-bakarah), are not regarded (by these Imams) to be grounds of seeking termination of marriage, except where they were stipulated, in the contract, that the concerned party must be free from them.[32]

3. Imam Ahmad's view is that the defects which form grounds of judicial termination of marriage, are the defects that disallow sexual intimacy and diseases that are detestable or harmful which do not usually heal, or which take long before they heal, such as junun (insanity), judham (leprosy) or baras (leucoderma) or venereal diseases (which consist of syphilis, gonorrhoea lampho, granuloma and the like. And this can be established through an expert. But any other defect, such as 'uqum (infertility) 'arj (lameness) or kharas (dumbness) cannot form grounds for judicial termination, except where there is a stipulation, at the time of contracting the marriage, to that effect.

4. The view of Qadi Shurayh, Ibn Shihab, az-Zuhuri and Abu Thawr, according to which any repulsive defect which make either of the spouses to be avoiding the other and dislikes him or her and with which some of the most important objectives of marriage, namely, love and mercy, cannot properly be achieved is a ground for judicial termination of marriage. Infertility, dumbness or lameness come under this category of defects and, therefore, constitute grounds for the termination.[33]

Ibnul Qayyim subscribes to this view. Supporting the view, he explains that there is no justifiable reason to restrict these defects to specific number without including other defects which may be more serious and more devastating or at least equivalent to the restricted ones. For instance, blindness ('ama), dumbness (khars), deafness (tarsh), and amputation of arms (or hands), or legs or one of them, may be among the most repulsive defects and concealing such defects is one of the most infamous fraud. Thus in Zadul-ma'ad, he states that termination of marriage would be necessary in case of every defect which gives rise to disgust in the other spouse such that love and affection, which among other things, are the objectives of marriage may not be achieved. (due to the disgust).[34]

5. The view of Shia Imamiyyah School, according to which the defects, which are legally regarded as the grounds for judicial termination are: ratag, qarn, afal,[35] insanity, leprosy, leucoderma, blindness and complete lameness. However, ratag and afal will form a ground for termination of marriage only when they form an absolute obstruction to penetration and when the defect cannot be cured or when the wife refuses to be treated.[36]

It seems that the overweighing view (among these views), is that of Ahmad, because unlike the other views it does not limit the defects which constitute grounds for judicial termination of marriage, to any particular number of diseases or to any particular disease. But instead, he considers

these defects (enumerated by other jurists) and other defects which are equivalent or even more harmful than the limited ones. And unlike the three Imams: he does not consider defect which only hinders the perfection of the achievement of the objectives of marriage. He only considers the defects with which the very objectives of marriage cannot be achieved, to be the grounds for judicial termination of marriage.

6.2.3. Conditions for the termination:

Before either of the spouses will be entitled to termination of marriage, the following conditions must be fulfilled:

(a) That the spouses, seeking the termination, must not have been aware of the defect in the other spouse before the contract. Thus if he or she is aware of the defect, then he or she is not entitled to seek termination, because entering into the contract while fully aware of the defect is an implied consent to the defect.[37]

(b) That the spouse must not have expressed his or her consent to the defect if he or she came to know about it after the contract. Thus where she or he showed his or her consent expressly by saying, "I consent," or by acquiescence (for example, agreeing to consummate the marriage), while fully aware of the defect, then he or she is not entitled to seek judicial termination of the marriage.

(c) That the wife must have attained majority. Thus if she is a minor, her guardian has no right to seek termination,

on her behalf, because she may assent to the defect, after attaining majority.

(d) That the husband must have also attained majority, because minority might have been the cause of his inability. But if, after attaining majority, he is not able to have sexual intercourse with the wife, the judge shall adjourn (the case) for the period of one year (after which he shall terminate the marriage if the husband is still unable to have intercourse with the wife).[98]

(e) Even where the above-mentioned conditions have been fulfilled, the marriage can only be terminated through judicial process. This is because there are differences of views among the Muslim jurists regarding termination of marriage for reason of bodily defects which cannot be determined except through judicial decision. And also because often dispute ensues, between spouses, regarding the (existence of) the defect or whether the defect is such that it forms ground for termination or not. And this dispute can only be settled through judicial decision.[99]

However, the shi'a Imamiyyah School is of the view that the marriage can be terminated by the spouses, on account of the specified defects, provided it is not impotency, in the case of which the wife must have recourse to judge, for the annulment of the marriage, in the first instance. But the wife, in such a case, can terminate the marriage on the expiry of the prescribed period of one year, if the husband has not been cured of his defect; it is not necessary for her to obtain a second order of the judge in the matter. The school

is also of the view that the aggrieved spouse must terminate the marriage promptly on becoming aware of the defect in the other spouse and that delay in so doing is tantamount to acquiescence in the marriage which means that the right will be forfeited.[40]

6.2.4. Defects subsequent to contract:

The muslim jurists have divergent views regarding the defects that appear subsequent to the marriage. Thus, according to Hanbali school, marriage can be terminated if it is after consummation of the marriage, provided the aggrieved party has not expressed his or her assent to the marriage after he or she has come to know of the defect.[41]

Shafi'i school is of the view that either of the spouses is entitled to judicial termination of the marriage even where the other spouse is free from the defect, at the time the marriage was contracted, and only afflicted with it subsequently, whether before or after consummation (according to one interpretation)[42] or before consummation only (according to another interpretation).[43] However, if the defect is unnah which appears after consummation, the wife is not entitled to termination because there is probability of its cure.[44]

Maliki school distinguishes between husband and wife regarding this type of defect. Thus where the defect appears in the wife after the marriage (even before) consummation, the

husband is not entitled to judicial termination of marriage, because, the right to divorce has been vested in him, so if he does not assent to live with the wife due to the defect, he can divorce her. But if the defect appears in the husband after contracting the marriage, but before consummating it, the wife is entitled to seek judicial termination. However, if the defect is that of reproductive organs and husband had sexual intercourse with her, then she is not entitled to seek termination of the marriage. But if it is any other defect, then she is entitled to seek the termination provided the defect is one of the three defects (mentioned earlier) i.e. insanity, leprosy and serious leucoderma.[45]

Shi'a Imamiyyah school is of the view that where a defect appears in the wife subsequent to the marriage and to the consummation of the marriage, the husband is not entitled to its termination. This is the unanimous view of the school. But where the wife is afflicted with the defect after the marriage (has been contracted) but before its consummation, there are divergent views (in the school). However, the generally accepted view (to the jurists of the school) is that the husband will not have such right. It seems that this view has been based on the fact that the wife, at the time of contracting the marriage, is free from the defect, and that any thing that happens subsequently, cannot affect the validity of the contract.[46]

6.2.5 When the termination comes into effect:

Where, subsequent to the marriage, the wife finds the husband to be majbub (a man with amputated sexual organ), she will be entitled to seek the termination of the marriage judicially (as it has been discussed previously). According, if she is able to establish her claim, the judge shall order the husband to divorce her immediately, without any delay. And if he refuses to comply with the judge's order, then the judge shall divorce her on his behalf, in order to protect the wife from the injury that may befall her as a result of this defect.

But where the wife finds the husband innin (who suffers from unnah) or khissiy (who suffers from khisa) and as a result he was not able to have sexual intercourse with her, she will be entitled to institute a legal action seeking separation between her and the husband. And if the husband admits that he has the defect (as his wife has claimed), then, the judge shall not terminate the marriage immediately (as in the case of majbub), but he shall instead adjourn the case for one lunar year, according to the unanimous view of the muslim jurists. This is by virtue of a report from Umar bn. Khattab according to which a woman complained to him that her husband was not having sexual intercourse with her and Umar adjourned the case (to give the husband chance to cure the defect), for one year. After the expiry of the period, he gave her option to choose between continuing with the marriage or terminating it (thereby choosing herself), and she chose the latter. And Umar, accordingly terminated the marriage

and held that the termination is one irrevocable talaq. Similar decisions were reported from Abdullah bn. Mas'ud, Uthman bn. Affan and Aly bn. Abi Talib. And all these decisions were given in the presence of other companions but none of them dissented from them. Hence this is considered as an ijma'.[47]

The reason why the termination shall be adjourned in the case of 'unnah and khisa but shall not be adjourned in the case of jubb is that in the case of jubb, there is no possibility that in future, the majbub husband will be able to be free from the defect and as such be able to have sexual intercourse with the wife. Thus it is meaningless to give any adjournment. But in the case of 'unnah and khisa, the inability of the 'innin and khissiy, to have sexual intercourse with the wife is as a result of something incidental the disappearance of which is quite possible. Thus the adjournment facilitates way of establishing the case on certainty instead of on mere supposition, because if, after the adjournment of one year, the husband is still unable to have sexual intercourse with the wife, it will then be clear that the defect is deeply rooted and not merely incidental.[48]

The specified period of the adjournment (i.e. one year), according to Maliki school, starts from the time of giving decision by the court, on the adjournment). And the time within which the husband is absent or the time within which

the wife is so sick that sexual intimacy with her is not possible, within the period of adjournment, is not counted.

If after the expiration of the period of adjournment, the wife insists that the marriage should be terminated, claiming that the husband is still unable to have intercourse with her, then if the husband did not refute her claim and counter-claimed that he had had the intercourse with her, the judge shall order him to divorce her and if he refuses the judge shall divorce her on his behalf. But where the husband claimed that he had intercourse with her, within the specified period of the adjournment, the judge shall order him to take an oath and if he complied, his claim shall be accepted and the judge, shall not, therefore, terminate the marriage. If, however, (in spite of his claim that he had intercourse with the wife), he refuses to comply with the court order (of taking an oath), the wife shall take an oath that he did not have intercourse with her. And if she complied then the judge shall terminate the marriage. But if she refused to comply (with court's order (of taking the oath), her refusal shall be considered as an assent to the husband's claim. This is according to Maliki school.

Hanafi school, on the other hand, is of the view that where the husband claims that he had intercourse with the wife, within the specified period of adjournment, his claim will be accepted, if, at the time the marriage was contracted, the wife was a thayyib (divorcee or widow), provided he

corroborates his claim with an oath. This is because there is the presumption that he is free from the alleged defect, even though the presumption must be corroborated with an oath. If, accordingly, the husband takes an oath (to corroborate his claim), the wife's claim shall be dismissed. But if he refuses to take an oath, then the judge shall give her two options: either to continue with the marriage notwithstanding the husband's condition (of defects), or to choose the termination of the marriage, in which case the judge shall give judgement to that effect.

But where the wife is bikr (virgin), the judge shall order two women who are experienced in such affairs (of women), to examine her. And if, after examining her, they testify that she is a thayyid (who has been disvirgined), then the husband's claim shall be accepted as valid, provided that he corroborates it with an oath. However, if the two women testify that the wife is still virgin, then the judge shall terminate the marriage, if she chooses that.[49]

Hannafi school's view is, according to Sha'aban, the best which should be adopted, and that there is no justification to adopt the other views.[50]

With regard to any defect other than jubb, 'innah, and khisa, the Maliki jurists are of the view that if the defect is incurable, then the judge shall terminate the marriage instantly. But if the defect is curable, then the judge

shall adjourn the termination for one year, provided the defect is usually common to both men and women such as insanity, leprosy and leucoderma. And if it is peculiar to women the period (for which the termination shall be adjourned) depends on ijtihad (reasoning) in accordance with the demands of medical treatment.

Where the wife denies that there is defect in her which is peculiar to women, or where she claims that the defect has been cured, then her claim shall be accepted, provided she takes an oath (to corroborate her claim). And she will not be forced to be examined, (in order to prove her claim). This is because even if the defect in her injures the husband, he is capable of separating himself from her through talaq, without any need to institute a legal action (to seek separation), which may even lead to publicising what should not be revealed.[51]

6.2.6 Nature of the termination:

Muslim jurists differ as to whether termination for reason of defect is talaq or faskh. Thus according to Maliki and Hanafi jurists, it is talaq ba'in, because the judge, while terminating the marriage, is acting on behalf of the husband. And also because any termination of marriage after the contract has validly been concluded, is considered, by the Maliki jurists as talaq and not as faskh. It is considered ba'in because the purpose of the termination is to remedy the harm inflicted upon the wife (by virtue of the defect), which

can only be achieved through talaq ba'in so as not to leave it within the power of the husband to revoke it.

Shafi'i, Hanbali and Shi'a Imamiyyah jurists, on the other hand, are of the view that the termination (for reason of defect) is faskh and not talaq, because the cause of it is the wife, either by seeking the termination (by her) where the defect is in the husband, or because the defect is in her where the marriage is terminated as a result of the husband's petition. And any termination the cause of which emanates from the wife is legally considered as faskh.[52]

The implication of this juristic difference is in regard to reducing the number of divorce the husband has the right to effect on his wife. Thus those who are of the view that termination for reason of defect is talaq, then it reduces the number of divorce (the husband is entitled to effect on his wife), while according to those who are of the view that it is faskh, the number of the divorce is not reduced by virtue of this type of termination.[53]

6.2.7. Effect of the termination on Sadaq:

Where the judge terminates marriage for reason of defect in one of the spouses, the Maliki jurists are of the view that if the termination takes place before consummation, the wife deserves no sadaq, at all, whether the defect is in the wife or in the husband. This is so because if the defect is in the wife, then her action is legally considered as fraudulent for

not revealing the defect to the husband before the contract took place. But if the defect is in the husband, then seeking termination by the wife for that reason, before what would entitle her to claim sadaq (i.e. before consummation) comes into existence, implies that she assents to waiving her right of sadaq.[54]

However, Sheikh Khalil is of the view that the judge shall adjourn (the case) for the specified period (which is one year), in the case of Mu'tarid, innin and majbub. And where on the expiry of the probationary period of one year, the wife, being entitled to termination, she claims it, then she will have a right to full sadaq. This is by virtue of her stay (with the husband), their intimacy etc. But if the termination occurs within the year, only half of the sadaq is due (to her).[55]

But where the termination has taken place after consummation, the wife is entitled to the whole of as-sadaqul-Musamma (specified sadaq), if the defect is in the husband. This is because by concealing the defect from the wife, the husband is considered to be fraudulent and also because he has consummated the marriage with her which established her full right to sadaq. But if the defect is in the wife, then she deserves full sadaq, even though the husband is entitled to recover it from her wali (guardian), if he is a garib (close relation), from whom the defect cannot be concealed, such as father and brother, provided the defect is an apparent one,

such as leprosy and leucoderma. Thus where the waliy is a ba'id (distant relation) who may unlikely be aware of the defect, such as an uncle or he is not the woman's relation, like a judge, or where the defect is not an apparent one (even if the wali is the woman's close relation), then the husband will be entitled to recover the sadaq from the wife (if he has already paid it, otherwise he will not pay her anything). This is because the fraud, under the circumstances, has been committed by her. If, however, the distant wali knew of the defect, the husband will be entitled to recover the sadaq from him. And on a mere suspicion of wali's knowledge (about the defect), he may be called upon to take an oath, but if he declines, the husband, on taking an oath to the fact that he (the wali) deceived him, will have recourse against the wali.[56]

Hanafi jurists, on the other hand, are of the view that termination for reason of defects is not lawful, unless the defects are what is legally called: al-'uyubut-Tanasuliyyah (defects of reproductive organs), and unless they are in the husband (not in the wife). If, accordingly, the termination has taken place (due to such defects), before consummation, the wife is entitled to half of the sadaq. This is because the ground for the termination is from the husband's part and that the wife has been compelled to seek termination as result of being injured by living together with the husband with the defect in him. Thus seeking termination by her cannot be considered as her assent to waive her right of sadaq. But if

the termination is effected, after consummation, then the wife is entitled to full sadaq (for consummating the marriage).[57]

6.3 Termination for illtreatment and cruelty:

The muslim jurists differ on whether it is lawful to judicially terminate a marriage for reason of harm inflicted upon the wife by the husband. Thus Hanafi and Shafi'i jurists are of the view that it is not lawful to terminate a marriage for that reason, no matter how severe the harm is. This is because, according to them, the wife can be protected against the harm through some means other than the termination of the marriage. This can be done by instituting a legal action against the husband regarding the infliction of the harm. And whenever such action is instituted, the judge shall order the husband to stop injuring the wife and live with her in a goodly manner (thereby complying with the Qur'anic injunction to that effect). But if he refuses to comply with the order, then the judge shall discipline him with what he deems adequate.

Maliki and Hanbali schools, on the other hand, are of the view that the wife has the lawful right to seek termination of the marriage where she is claiming that the husband is inflicting harm on her such that cannot ordinarily, be tolerated by a woman of her own status, such as beating, abusing, etc or compelling her to commit an evil, verbally or by action. This is the preponderant view, because if the relationship between the spouses becomes sore and distressful,

it will cause some serious evils the consequence of which may extend to their individual families and any other person related to them by consenguinity of affinity. And consequently their marital life will become a disaster of which the spouses must get rid, by terminating the marital relationship.

Thus where the wife is able to establish her claim (that the husband is inflicting harm on her), or where the husband admits to that, and the harm is such that cannot be tolerated by women of her own status, and the judge is not able to reconcile between her and the husband, then he (the judge), shall terminate the marriage with a single irrevocable talaq. But if she could not establish her claim, or the husband has not admitted to that, then her claim shall be dismissed. If, however, the complains recurs and the wife is still not able to establish her claim, then the judge shall appoint two arbiters from amongst spouses' relatives to arbitrate between them. This is by virtue of chapter 4, verse 35, which reads:

> "And if you have reason to fear that a breach might occur between a (married) couple, appoint an arbiter from among his people and an arbiter from among her people; if they both want to set thing aright, God may bring about their reconciliation. Behold, God is indeed all-knowing, Aware.[58]

Moreover, in chapter 2, verses 229 and 231 and chapter 65, verse 2, Allah (S.W.T) enjoins husbands to either retain their wives in fair manner or release them in fair manner. And since the husband, in the circumstance, has failed to live

with the wife in a fair manner, she must then be released in a fair manner.

The Prophet (S.A.W) was also reported to have said, La Darara wa la dirar (meaning, "You should not inflict harm to others and others should not inflict harm on you").

6.3.1 Conditions for the Arbiters (Hakaman) and their duties:

Some conditions have been laid down, regarding the arbiters (between spouses, al-hakaman), which are as follows:

(a) That they must be males

(b) That they must be men of probity ('adlayn);

(c) That they must have possessed the sense of rationality (rushd)

(d) That they must have the ability to reconcile between the spouses.

(e) They must be fully aware of the condition of the spouses.

(f) They must be from among the relatives of the spouses. However, where such relatives are not available, the judge then shall appoint any two other people whom he deems capable of arbitrating between the spouses But it is desirable that they could be among the spouse's neighbours who have the knowledge of their affairs.

In addition, the arbiters must be fully aware of the reason for the discord between the spouses and try their best to reconcile between them.

As to whether the arbiters have the power to terminate the marriage (if they deem it necessary), or they must maintain it, the Muslim jurists differ. Thus, according to Ibrahim an-Nakha'i, Malik, Awza'i, Mujahid and Is'haq, the arbiters have power to either maintain the marriage or terminate it. They can do which ever they deem proper. The jurists who hold this view rely on the reasoning that Allah (S.W.T), in chapter 4, verse 35 has called each of the arbiters hakam (judge), and hakam has an absolute authority, in all matters, which include authority to terminate the marriage and separate between the spouses.[59]

It is also reported that Ali bn. Talib expressed the view that it is valid for the arbiters to maintain the marriage or to terminate it. Contending that through arbiters, Allah brings (the spouses) together as well as separate them. It thus means that the arbiters have the power to maintain the marriage or to terminate it.[60]

It is also reported that a husband and his wife and some other persons complained to Aly bn. Abi Talib, the fourth caliph, who inquired of them what the matter was. he was informed that there was a quarrel between the spouses. Caliph Aly quoted the verse of the Qur'an about the appointment of arbiters and asked them if they would abide by the verdict of arbiters. The wife said she would abide by the injunction in the Qur'an, but the husband said he would not agree with separation if so decided by the arbiters. Caliph Aly

thereupon said, "Thou art a liar (that is, at fault in not accepting the injunction of the Quran), thou canst not leave this place until and unless thou also agreest to abide by the decision of the arbiters as has been done by the woman."[61]

Abu Hanifa and his two eminent disciples and Ahmad and Shafi'i, on the other hand, are of the view that the arbiters have no power to terminate the marriage unless the husband has given them authority to do so. Thus in the absence of such authority they cannot give an order for termination. They base their view on the ground that divorce is vested in the husband. Hence the marriage cannot be terminated unless he has given this power to the arbiters.[62]

Where the arbiters could not agree, on one single decision, the judge shall then order them to inquire more, into the case until they arrive at a unanimous, decision, otherwise he shall replace them with others.[63]

6.3.2. Nature of the termination:

The talaq effected by the judge for reason of infliction of harm established by the wife or based on the decision of hakaman (arbiters), is regarded as talaq is ba'in. This is because the harm cannot be prevented except if the talaq ba'in (irrevocable) for if it is not so, the husband will be able to revoke it and return the wife to his authority before her iddah expires, and consequently the harm (inflicted on the wife) cannot be remedied.[64]

6.4 Termination for Husbands Absence:

As to whether the wife has the right to seek termination of marriage or not, where the husband is absent from her and his absence inflicts harm on her, the muslim jurists differ. Thus, Hanafi and shafi'i jurists hold that the wife has no such right, no matter how long the absence is. This is because, according to them there is no any authoritative reason to that effect.

Maliki and Hanbali jurists, on the other hand, are of the view that the wife is entitled to seek termination of the marriage due to husband's absence, provided the absence is long and harmful to her, even if the husband has left sufficient provision for her maintenance. This is the preponderant view because, for a woman to stay for a long period of time, far away from her husband and at the same time be able to safeguard her chastity is something that may be beyond her human capability. Moreover, the absence (of the husband) is an injury against which the wife must be prevented, by virtue of the hadith in which the Prophet (S.A.W) was reported to have said, "You should not inflict harm to others and others should not inflict harm on you (La darara wa la dirar)."[65] And prevention against such an injury is possible only through terminating the marriage judicially, where the husband refuses to come back to the wife or to take her to where he stays, or his whereabouts is not even known.

6.4.1 Divergence between Maliki and Hanbali jurists:

Even though Maliki and Hanbali jurists agree on the fact that it is lawful to terminate marriage for reason of long absence of the husband, where the wife institute an action to that effect, they hold divergent views regarding the following:

1. the nature of the absence;
2. the length of the absence;
3. whether the termination shall be effected immediately (the wife institutes the action) or after writing to the husband and notifying him;
4. the nature of the termination for that reason

Thus Maliki jurists are of the view that, terminating marriage for reason of husband's absence is lawful unconditionally, that is whether there is a justifiable cause warranting the absence, such as seeking knowledge, trading etc, or not. They contend that husband's absence for whatever reason is harmful to the wife. They, however, specify the length of the period of the long absence with one year and above. Accordingly, if the husband is absent from his wife for a period of one year (and above) and the wife institutes a legal action to seek judicial termination of the marriage for this reason, then if the husband's whereabouts is known and letters reach him, the judge shall not instantly terminate the marriage. He shall, instead write him, instructing him to either come back, or take the wife with him, wherever he lives or divorce her within a specified period of time, as the judge deems appropriate. Then if after the expiration of the

specified period, he has not complied with the judge's order, the judge shall terminate the marriage.

But if the husband's whereabouts is not known, or letters do not reach him, then the judge shall instantly terminate the marriage without any need for writing him or specifying any period of time. And if the judge terminate marriage, the termination is legally considered as talaq ba'in, because any termination by judge is considered as such, except where the termination is for reason of ila (vow of continence) or lack of nafaqah.[66]

Hanbali jurists, on the other hand, are of the view that termination for husband's absence, is lawful only where there is no justifiable cause warranting it. And they specify the length of the period (of the absence) with six months and above relying on Umar's decision, because it was reported that he asked his daughter Hafsah (RA) about the longest period within which a woman could bear her husband's absence and she replied that she could bear that for five or six months. And, he, accordingly, decreed that the Muslims going for jihad should not be absent from their wives for more than six months. Thus if a wife seeks termination of marriage for reason of her husband's absence of the specified period (i.e. six months and above), the judge shall decide in her favour (by terminating the marriage), provided she is able to establish her claim. And such termination is considered as faskh but not talaq, because it has been effected at the wife's instance.[67]

6.5 Termination for Husband's Imprisonment, Detention or Capture

Where the husband is imprisoned, or detained or captured in such a way that he is not able to frequently meet with his wife, he will be considered and treated as an absent person and as such the rule governing the case of absent husband shall apply in his own case. Thus the wife, according to Hanafi and Shafi'i jurists, is not entitled to seek termination for that reason. Hanbali jurists also hold the same view, because, according to them, absence of detained, or imprisoned or captured person is a justifiable absence and for that reason termination of marriage due to it is not permissible.

Maliki jurists, on the other hand, are of view that, the wife is entitled to seek termination where her husband is imprisoned, detained or captured for the period of one complete year and above. And the judge shall decide the case in her favour without any need to write to the husband or to wait for him because there is no use in doing so. Where the termination ie effected for that reason, the termination is considered as an irrevocable talaq.[68]

6.6 al-Mafqud (Missing Husband):

Mafqud is a missing person who has disappeared or has been captured in a battle by the enemies, and it is not known

whether he is still alive or not; and whose whereabouts cannot be ascertained and have not been known."[69]

There is no categorical authority, either in the Qur'an or in the Sunnah, regarding a missing husband about whom nothing (concerning his whereabouts) is known. That is why the Muslim jurists even among the companions, differ regarding it. Thus Umar, Ibn Umar and Ibn Abbas, among the companions, are of the view that the wife of the missing husband shall wait (for him) for four years. The same view is also held by Ibnul-Musayyab, Nakha'i, Ata, Mak'hul, Sha'abi, Shafi'i and Ahmad subscribe to this view. This is also the view of Maliki school. Thus Sheikh Khalil (in his al-Mukhtasar) explains that a woman whose husband has disappeared shall apply to the judge or any person to whom formerly belonged both civil and religious affair, so as to make inquiries concerning the husband. But if there is no government official where the wife is, she may apply to the community of the muslims. And then a delay may be granted, extending to four years. Then after the expiry of the period of delay, she must observe the iddah, of woman whose husband died (i.e. four months, ten days).[70]

The basis of fixing the four years is an order passed by Umar bn. al-Khattab, the second caliph, who fixed such period at four years in the case of woman whose husband was lost and his wife complained to Umar who instructed her to wait for four years and after she complied with the instruction, he

then instructed her to observe iddah of woman whose husband died, namely a waiting period of four months ten days.[71]

The jurists of the Maliki school have divided the cases of al-mafqud into three categories:

1. Where the mafqud has not left behind enough property for the wife from which she can maintain herself (and her children, if she has any). In such a case the court shall not tell the wife to wait. but instead, after a probe into the case, it shall forthwith use its powers to divorce her or authorise her to divorce herself. Hanafi and Shafi'i jurists subscribe to this view, because, according to them, the lack of living expenses (nafaqah) is in itself a sufficient ground for termination.

2. Where the husband has left no property at all. In such a case the judge shall look into the material details of the case. Thus where the wife, is youthful and keeping waiting for a long period of time may expose her to moral indecency (of committing extra-marital sexual affairs), then the judge shall order her to wait for some months or (at most) for a year, as the he may deem appropriate. Hanbali jurists subscribe to this view. In the extreme cases, both schools (i.e. Maliki and Hanbali schools) agree that immediate termination is permissible. They also agree on the fact that to determine whether there is the exposure to moral indecency or not, it is not necessary for the woman to declare bluntly that the retention of the marriage-tie will certainly drive

her to such indecency. The judge shall, therefore, inquire into the conditions of the woman: regarding her age, her upbringing, her social environment, the period she has already spent waiting and how long she can continue waiting without any danger to her morals.[72]

3. Where the missing husband has left behind enough means of maintenance and there is no fear that the wife may be exposed to moral indecency, it may be one of the following:-

(a) That the husband might have disappeared in a muslim country or in some other civilized country, where search for him can be made. In such a case the wife shall have to wait for four years.

(b) That the husband might have disappeared in the battle-field. In such a case the wife shall wait for a year, after every possible search for him.

(c) That the husband might have disappeared in a local riot or fight. In such a case, every possible search for him shall be made, after the riot or fight. then if, thereafter, he could not be found, the court shall (declare the marriage terminated and) order the woman to immediately start iddah of women whose husband died.

(d) That the husband might have disappeared in wilderness where it is impossible to search for him. In such a case the wife shall wait until such a time when the husband is to reach the normal life expectancy. But the normal life-expectancy has been given divergent meaning by various jurists: to some it is seventy years and some hold that it is

eighty years. However, the wife may only wait for such a period of time as long as there is sufficient maintenance for her and provided she may not be exposed to moral indecency.[73]

Aly bn. Abi Talib, and Abdullah bn. Mas'ud, on the other hand, are of the view that the wife of the missing person shall wait until he is either found or his death is confirmed. This view has been subscribed to by Sufyan ath-Thawri, Imams Abu Hanifah and Shafi'i (in one of his two views).

Hanafi jurists are of the view that the wife of a mission person shall wait until other man of his age, living in the community are not alive. Some of them have fixed the period of the waiting to be the age of expectancy.

Shafi'i, in his earlier view, agreed with Malik and accordingly held that a mission husband shall be presumed dead on the expiry of four years, but subsequently changed his view and adopted the view of the Hanafi jurists and accordingly fixed the requisite period at ninety years.[74]

6.6.1 The Preponderant View:

It is obvious, according to Maududi, that Umar's view, on the missing husband adopted by Malik and some other jurists, is the preponderant one, for the following reasons:-

(a) That it is in conformity with the nature and spirit of the shari'ah as well as with its concern for justice and balance. For instance, the permission to marry up to four

wives, is accompanied by the warning, "Do not totally lean to one of them, leaving the rest suspended." Thus the warning, according to him, highlights the Qur'an's abhorrence of leaving a woman suspended. He then said:

> When such is the case in the existence of the husband, how can the Qur'an approve of keeping a woman suspended indefinitely, when the husband is missing?[75]

Another example (of maintaining justice and balance) is concerning the case of women left alone in their beds, in the case of ila (vow of continence), regarding which the Qur'an puts the maximum limit at four months, (that is in chapter 2, verse 226-27), beyond which divorce becomes necessary. "This mandate" in Maududi's words, "underlines the fact that Islamic Law does not approve of depriving a woman of sex to the extent that causes her harm or drives her to transgress Allah's limits."[76]

Another example is contained in chapter 2, verse 231 which reads thus:

> Do not retain them against their will in order to hurt (them): for he who does so, sins, indeed against himself....[77]

The clear implication of this verse, according to Maududi, is that marriage should not be a source of injury. And if the wife of the missing husband has to wait for the rest of her life, the harms inflicted on her can well be imagined. Then he concludes thus:

> In this background, take a look at the mandate, 'if there is a danger that Allah's limits will be transgressed,

> there is no harm if they separate.[78] This amounts to observing Allah's limits above the retention of the marriage-tie. Who can deny that a woman, whose husband has been missing, will find it increasingly hard to stay within the limits of Allah? Taking a hard look at these mandates and their implications for social good, one can easily understand that it is wrong to keep the wife of a missing husband in suspense for an indefinite period.[79]

(b) Secondly, the view that the wife of a missing husband must wait until he is found or his death is confirmed, or even to ignore the categories of the missing persons, provided by the Maliki school and give ruling for four years waiting period, in all cases (without due consideration of the differences between the various categories of missing persons), is not right, especially, as Maududi explains, "in the present age which has spawned a host of demoralising entertainments. Thus, to insist that every woman with a missing husband should wait for four years, runs counter to the objectives of the shar'ah. Modern Muslim society has lost the cohesion of its early days. Restraints imposed by Islam to tame carnal lust of the flesh, have been swept away by pornographic literature and pictures, vulgar radio songs, obscene film and disgusting T.V programmes distinguished as cultural shows, all of them exude, round the clock, torrents of lurid stuff shows... The law of the land permits prostitution. The veil prescribed by the shari'ah, is almost gone. The free inter-mixing of the sexes naturally excites base passions. But it has become almost a routine and finds it hard to lead a life of piety and restraint."[80] He goes on to say that in such a social setting described above (which is

how most of the contemporary Muslim societies are), it is not advisable to make a woman, whose husband is mission, wait for two, three or more years, because the evil consequence of this will not only afflict the woman but also infect the whole society. he then concludes:

> So the right thing is to adopt the Maliki ruling with all its stipulations.[81]

This is the cogent view on the issue of the missing husband.

6.6.2 The Return of the Missing Husband

Where the husband returns (after the expiry of the prescribed period of waiting but) before the wife re-marries, she shall return to him. Shafi'i jurists, however, are of the view that if (a specified period of time has been fixed for her within which she should wait for the husband), and the period expired, the marriage of the missing husband (with her) is considered to have been annulled. But the former view is, according to Ibn Qudamah, the cogent one.[82]

Where the missing husband returns after the wife has re-married, then if the marriage has not been consummated, he will be entitled to claim her (as his wife), as if the second marriage has not taken place.[83] This case shall be considered (and decided), similarly as the case of a woman with two walis (marriage guardians) and each one of them contracted marriage for her with a different man, which means she will belong to the missing husband, if he turns up or if he is proved to be alive, or dead during her iddah or after the iddah (and

getting married) but before dukhul (consummation) with the subsequent husband, or even after dukhul where the subsequent husband is aware of the facts (of the case).[84]

But if the marriage (with the subsequent husband) has been consummated, the former husband shall be given an option: either to have the wife or to take back the sadaq paid by him to the wife. This is the view held by Ahmad, Al-Hasan, Ata, Khallas bn. Amr, Nakha'i, Qatadah, Malik and Is'haq. This view is in conformity with the reports from Umar and Uthman (the second and third caliphs respectively), as has been narrated by Ma'amar from Zuhri and Sa'id Ibn. al-Mussayyab.[85]

Then where the husband, in exercising his right of this option, he chooses to have his wife, then she shall return to him, without any need of contracting a new marriage, because his early marriage is legally valid. However, as to whether the subsequent husband must, under the circumstance, divorce the wife (before the former husband can take her back) or not, the jurists differ. Thus Ahmad is of the view that the subsequent husband needs not to divorce her, because his marriage with the wife, is intrinsically void. But Qadi opines that the subsequent husband must divorce her first, because jurists differ on the validity of the subsequent marriage. Thus the subsequent husband must effect divorce so as to sever the legal effect of the subsequent marriage, as in the case of other irregular marriages (al-Ankihah al-Fasidah) regarding whose validity the jurists differ. In any case,

however, the former husband must stand aloof from the wife until her iddah expires, (if the subsequent husband consummated his marriage).[xi]

But where he chooses to take back his sadaq paid to the wife), she will then be with the subsequent husband (as his wife, without any need to contract another marriage, (according to some jurists). However, the preponderant view, is, according to Ibn Qudamah, that a new marriage must be contracted, because, with the return of the former husband, the second marriage has become invalidated. And this is the view of the Companions because someone's wife cannot automatically become another's wife, just by virtue of the fact that he has deserted her.

And where the former husband has chosen to take back his sadaq, he should then claim it from the subsequent husband. This is the unanimous decision of the Companions. The reason for this decision is that the subsequent husband, by contracting marriage and consummating it, has blocked the chance of the former husband of re-uniting with his wife without inconvenience. And with regard to the quantum of the sadaq to be claimed by him (i.e. the former husband), Ahmad has expressed two different views which are: (a) that he should claim the sadaq he had paid her. This is what has been reported from Abubakar, al-Hasan, Zuhri, and Qatadah; (b) that he should claim the quantum paid to the wife by the subsequent husband. It has been reported from Ibnul Madiniy

that he should be given the option to either take the wife back, or claim the sadaq, the quantum of which is to be specified by him.[87]

As to whether the subsequent husband is entitled to reclaim, from the wife, what the former husband has received from him, there are two opposing views, among the jurists. However, the view that he is not entitled to do so is the cogent view, because the other view (according to which he is entitled to do so), is contrary to the decisions of the Companions (especially Umar's decision) on the issue.[88]

It was reported from Aly bn. Abi Talib that the woman shall remain the wife of the former husband even though she has already married another man and born children. Abu Qalabah, Nakha'i, Thawri, Ibn Abi Layla, Ibn Shabramah and Shafi'i in his subsequent view subscribe to this view, relying on a hadith in which the Prophet (S.A.W) was reported to have said, "The wife of a mafqud, shall remain his wife until he returns." Ibn Qudamah has, however, described this hadith as an unauthentic. There are also some reports purporting to Umar's approval of this course of action but Imam Malik reject these reports as untrustworthy.[89]

The view of Shi'a Imamiyyah school, on mafqud is almost similar to that of the Maliki School, except that the jurist of the school hold that where the mafqud returns, at the time when the wife has contracted a second marriage (even if it has

not been consummated), or even where the period of the iddah has expired, then his right to take the wife back is forfeited and accordingly he cannot take her back.[90]

It is obvious from all that has been explained that even though the shari'ah has primarily vested the right to divorce in the husband, it also permits the court to terminate marriage (at the instance of the wife) thereby providing relief to the aggrieved wife, in unbearable cases: i.e. in the case where the wife is not provided with the nafaqah; or where the husband suffers from bodily defects with which marital relationship is not feasible; or where the husband treats the wife with cruelty; or where the husband is absent or even disappeared completely. In the next chapter some other means of terminating marriage will be dealt with.

FOOTNOTES AND REFERENCES

1. Sha'aban, Z.D. (1980), al-Ahkamus-Shar'iyyah Lil Ahwalish-Shakhsiyya, P. 474.

2. Russell, A.D. and Suhrawardy, A.M. (N.D.) A Manual The Law of Marriage (from the Mukhtasar of Sidi Khalil), P. 316; Khalil, (N.D.), Jawahirul-Iklil, Vol. I, P.

3. Asad, M. (1980), The Meaning of the Qur'an, Gibralta, P. 874

4. Sabiq, S. (1978),, Fiqhus-Sunnah, Darul-Fikr, Vol.2, P.247.

5. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah... infra at P. 475

6. Asad, M. (1980), The Message of the Qur'an, supra at P. 62

7. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah...., op cit. at p. 475

8. Ibid.

9. Ibid.

10. Ibid at PP. 475-76

11. Ibid.

12. Asad, M. (1980), The Message of the Qur'an, supra P. 50.

13. Ibid at P. 51.

14. Sabiq S. (1978), Fiqhus-Sunnah, supra at p. 246.

15. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah.... infra at P. 477

16. Ibid.

17. Ibid.

18. Ibid.

19. Ibid at P. 481.

20. Asad, M. (1980), The Message of the Qur'an, op. cit. at P. 50.

21. Ibid. at PP. 872 - 73.

22. Ahmad, K.n. (1981), Muslim Law of Divorce, Kilab Bhavan, New Delhi, P. 340

23. An extensive exposition on this issue, has been provided by Ibn Hazm in his al-Muhalla, Vol. X, pp. 109-155

24. Shawkani, (N.D.), Naylul-Awtar, Vol. NI, P. 157

25. Ibn Hazm (n.d), al- Muhalla, op. cit. at P. 115

26. Sha'aban, Z.D. (1980) Al-Ahkamush-Shar'iyyah..., infra at pp. 482-83

27. Rataq and Qarn have been discribed, by jurists, as bones in the vagina. And some consider them to be malformation of tissues. in Shara'i'ul-Islam, the author explains that a woman will be considered to be rataqa (i.e. who suffers from rataq) when her vagina is so much constricted with flesh as to leave no passage for penetration. (see: al-Hilli, J.A. (1377 A.H), Shara'i'ul -Islam, Tehran, P. 190 in: Ahmad, K.N. (1981), Muslim Law of Divorce, infra at p. 346).

28. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah....) op. cit. at P. 483

29. Ibnul Qayyim, (1369 A,H), Zadul-Ma'ad, Vol. IV, P. 31, Cairo in Ahmad, K.N. (1981) Muslim Law of Divorce, supra at p. 341

30. Jubb, according to Maliki school is the amputation of both male organ and testicles, while 'unnah means shortness of the male organ, in such a way that penetration with it is not possible; khisa is the amputation of sexual organ or testicles, if there is no ejaculation, while i'tirad means inability to have sexual imtimacy due to some sickness and the like. (see the footnotes of Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah... infra at P. 484).

31. Rataq and qarn have already been explained (at foot note No. 28, above). But ifda (or Recto Vaginal Fistula) is the rupture of the partition, either wholly or partially, between vagina and rectum (see: Ibn Qudamah (1307 A.H), al-Mughniy, Cairo, Vol VI, P. 651 in Ahmad, K.N. (1981) Muslim Law of Divorce, infra at P. 347). And bukhr (or halitosis) is a very foul and stinking smell in the genital parts. It is usually due to some bad infection causing foul smelling discharge or it may be caused by some disease like ulcer. It can also be caused by ifda. And istihadah is a continious vaginal bleeding (see Ahmad, K.N. (1981), Muslim Law of Divorce, infra at P. 349.

32. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah..., op. cit at PP. 484.

33. Ibid.

34. Ibnul-Qayyim, (1369 A.H), Zadul-Ma'ad, Cairo, Vol. Vol. IV, P. 31.

35. Afal (or Stresia Vaginae) is narrowing of the vagina due to abnormal fleshy growth or tumour at the mouth of Vagina or inside it to the extent that it does not leave passage for penetration. (see: Ibn Qudamah (1307 A.H), al-Mughniy, Cairo, Vol. VI, P. 651 in Ahmad K.N. (1981), Muslim Law of Divorce, supra at P. 347).

36. Abid Hussayn (1305 A.H), al-Jami'' al-Abbasi (Urdu tr.), New Delhi, P. 169 in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at p. 349

37. Sha'aban, Z.D. (1980) al-Ahkamush-Shar'iyyah... infra ta P. 485.

38. Ibid, at PP. 485-86

39. Ibid. Musa, M.Y. (1958), Ahkamul-Ahwalish- Shakhsiyya, Darul-Kitabil Arabiy, Egypt, P. 331.

40. al-Hilli, J.H. (1377 A.H), Shara'i'ul-Islam, Tehran, op. cit. at P. 190-191 In Ahmad, K.N. (1981), Muslim Law of Divorce, infra at P. 370 and 372.

41. Ibn Qudamah, (1307 A.H), al-Mughniy, infra at p. 653; al Maqdisi, A.R (1382 A.H.), al-Uddah, Cairo, Vol. III, P. 200, in: Ahmad, K. N. (1981), Muslim Law of Divorce, op cit. at P. 369)

42. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah..., infra at P. 487

43. An-Nawawi, (1914), Minhajut-Talib (translated), London, In Ahmad, K.N. (1981), Muslim Law of Divorce, supra at P. 368.

44. Sha'aban, Z.D. (1980), al-Ahkamush-Shar''iyyah... op. cit. at p. 487; at-Juzayriy, A.R. (n.d), ALFiqhu 'Alal Madhabil-Arba'ah, Darul Fikr, Vol. IV, P. 195.

45. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah..., op. cit. at P. 487; Khalil, S. (1916), al-Mukhtasar (translated) Ruxton, London, P. 104. in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at P. 368 Juzayriy, A.R. (n.d), al-Fiqhu'Alal-Madhahibil-Araba'ah, supra at P. 192.

46. al-Hilli, J.H. (1377) A.H.), Shara'i'ul-Islam, op. cit. at P. 190.

47. Sha'aban, Z.D. (180), al-Ahkamush-Shari'yyah... infra ta PP. 487-88

48. Ibid.

49. Ibid. at P. 488-89.

50. Ibid.

51. Ibid

52. Ibid; Musa M.Y (1958), Ahkamul-Ahlish-Shakhsiyyah.... P.232; al-Hilli, J.H. (1377 A.H), Shara'i'ul- Islam, P. 192 in Ahmad, K.N. (1981), Muslim Law of Divorce, P. 372.

53. Sha'aban, Z.D. (1980) al-Ahkamush-Shar'iyyah..... op. cit. at P. 490

54. Ibid at P. 491.

55. Russell, A.D. and Suhrawardy, A.M. (N.D.) A Manual of the Law of Marriage.... supra at PP. 48-9

56. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah... op. cit. at pp. 490-91; Russell, A.D. and Suhrawardy, A.M. (n.d), A Manual of the Law of Marriage... infra at P. 51-52.

57. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah...., op. cit. at P. 491.

58. Asad, M. (1981) The Message of the Qur'an, supra at P. 110.

59. Ali, S.A. (1926), Tafsir Mawahib al-Rahman, Lucknow Vol. V, p. 36, in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at P.285-86

60. Ibid.

61. al-Razi, F. (1308 A.H), Mafatihul-Ghayb, Cairo, Vol. III, P. 216. in Ahmad, K.N. (1981), Muslim Law o f Divorce, infra at P. 287.

62. Ahmad, K.N. (1981), Muslim Law of Divorce, op. cit. P.288; Sabiq, S. (1977), Fiqhus-Sunnah, infra at P. 248

63. Sabiq, S. (1977), Fiqhus-Sunnah, infra at P. 249.

64. Sha'aban Z.D. (1980) al-Ahkamush-Shar'iyyah... infra ta P.494

65. This hadith was narrated by Ibn Majah, Dar Qutni and other narrators. Malik also narrated it in his a l - muwatta. See Ibn Rajab, 2 (n.d) Jami'ul-Ulum wal-Hikam, Riyadh, P. 265

66. Sha'aban, A.D. (1980), al-Ahkamush-Shar'iyyah..., infra at P. 497.

67. Ibid. at P. 498.

68. Ibid at pp. 498-99

69. Anynomous (n.d), al-Fatawil-Hindiyya, Vol. II P. 296; Shakhzadah, (n.d) Majmu''ul Anhur, Vol. I, P.721. in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at P. 501

70. Russell, A.D and Suhruwardi, A.M. (N.D.), A Manual of The Law of Marriage.... infra at P. 269.

71. Ibn Qudamah (n.d) al-Mughniy, Maktabatul-Jumhuriyyah al'Arabiyyah, Vol. 7, P. 490.

72. Maududi, A.A. (1983), The Law of Marriage And Divorce, Islamic Book Publishers, Safat, Kuwait, P. 92. S e e Also Dasuqi, M.A. (n.d) Hasiyatud-Dasuqi 'Alash-Sharhil-Kabir, Daru Ihya'il-Kutubil- 'Arabiyyah, Vol. II, at PP. 92-93/PP. 479-90.

73. Ibid at PP. 92-93.

74. Ibn Qudamah (1367), al-Mughniy, Cairo, Vol, VIII, P.488, in Ahmad, K.N. (1981), Muslim Law of Divorce infra at P. 505.

75. Maududi, A.A. (1983), The Laws of Marriage And Divorce in Islam, supra at P. 90.

76. Ibid at P. 91.

77. Asad, M. (1980), The Message of the Quran, infra at P. 51.

78. Maududi, A.A (1983) The Laws of Marriage And Divorce In Islam, op. cit. at P. 91.

79. Ibid. at P. 93.

80. Ibid at P. 94.

81. Ibn Qudamah, (n.d), al-Mughniy, infra at P. 492.

82. Ibid.

83. Russell, A.D. and Suhrawardy, A.M. (n.d), A Manual of The Law of Marriage...., infra at P. 271.

84. Ibid.

85. Ibn Qudamah, (n.d), al-Mughniy, op. cit at P. 492.

86. Ibid. at 493.

87. Ibid at P. 493-94.

88. Ibid at P. 490.

89. al-Hassan, J. (1377 A.H), Shara'i'ul-Islam, Tehran, P. 213, in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at P. 510.

Chapter 7

TERMINATION BY OTHER MEANS

In the previous chapter termination of marriage through judicial process has extensively been discussed. In this chapter, termination by other means i.e by means of Ila, and li'an will thoroughly be examined. Zihar, even though is not really a termination of marriage under the Shari'ah, will also be examined, because it was historically considered as termination, during the Jahiliyyah period which was later abolished by the Shari'ah. Thus, it only create a temporary prohibition as it will be explained later.

Ilas and Li'an were not discussed in the previous chapter despite the fact that judicial process is involved in both of them, because they are not, legally speaking, considered as termination. Rather, termination is merely the legal effect of them.

7.1 Ila (Vow of Continence):

The literal meaning or Ila is to vow by taking to do or not to do something. But technically it means vow by the husband that he will abstain from sexual intimacy with his wife for a period of four months. This is by virtue of a Qur'anic provision in 2:227-28 which reads:

> "Those who take an oath that they will not approach their wives, shall have four months of grace; and if they go back (on their oath) behold, God is much-forgiving, a dispenser of grace. But if they are resolved on divorce

behold, God is all- hearing, all knowing."[1]

7.1.1 Conditions for its validity:

Before ila is considered to be valid, the following conditions must be fulfilled:-

a) That the husband must be competent to effect the ila, that is to say he must be competent to effect talaq, which means he must be an adult and sane.

b) That the woman in respect of whom the vow has been made, must be the wife of the person making the vow, at the time when the vow is being made, or that she is observing iddah, as a result of talaq raj'iy, effected by the husband. However, Hanafi jurists, are of the view that ila may be made in respect of a woman who is not yet the wife of the Muliy (the person making the ila), provided it is to take effect in future, at a time when the marriage actually takes place and she becomes his wife.

c) That the vow must be accompanied with an oath, according to the majority of Muslim jurists. Malik, however, does not subscribe to this view. Thus, oath, according to him, is not a necessary condition, provided the husband has intention to inflict harm on the wife.[1] Abul A'ala Maududi subscribes to this view for the following reasons:

(i) When the Quran pronounces a comandment about a particular case, it does not mean that it covers just that particfular case. Thus, the Qur'anic verse (concerning ila) i.e. 2:231), does not imply that the

verse is applicable only to cases where an oath has been taken.

(ii) It is an established principle of Islamic jurisprudence, which is almost unanimously accepted, that when a case seems not to be covered by any categorical precept, it should be placed in a categorical one where it exists, provided the basic reasons beyond the precept are the same as the basic issues involved in the uncovered case. And it is undoubtful that the main reason for prescribing a period of four months for the man who has sworn not to have intercouse with his wife, and that if after the expiration of the prescribed period he does not resume sexual relations with her, he shall have to divorce her, is that refusal to have sexual relations with the wife for more than four months is injurious to her, and the Shari'ah wants to save wives from injury. That is why there is a categorical commandment to that effect which reads, "Do not retain them just to injure them or to take undue advantage. If any one does that, he wrongs his own soul..."[4] And in another verse, Allah says, "Do not lean exclusively to one of the wives leaving the other one suspended..."[5] This indicates that keeping a woman tied down by marriage and keeping her suspended just to inflict injury on her, is not accepted by the Shari'ah. That is the reason why four-month time limit has been prescribed in the case of ila. So, when a husband purposely cuts off sexual

relation with his wife, even without an oath, the case should be covered by the verse of ila (i.e. 2:227)"

iii) Since one of the most important objective of marriage is the preservation of morals and chastity, the only remedy (in the circusmstances of ila), is for the husband to restore sexual relations with the wife (so as to preserve her chastity) or to divorce her so that she can marry someone who will preserve her chastity by gratifying her sexual urge, irrespective of whether the husnband has taken an oath for abstention from having sexual intimacy with the wife or not.

d) That he must have taken the oath that he would obstain from having sexual intimacy for the period of more than four months. This is the view of Ibn Abbas, Tawus, Sa'id bn. Jubair, Awza'i, Shafi'i Abu Thawr and Abu Ubaidah. But Ath-Thawri and As'habur-Ra-ay (the Rationalists)[7] are of the view that if the husband has taken an oath that he will abstain from the sexual intimacy for the period of even only four months, he will be considered as a muli. This is also the view of Ahmad. However, Nakha'i, Qatadah, Hammad, Ibn Abi Layla and Is'haq are of the view that the length of time is immaterial once he has taken an oath not to have sexual intimacy with the wife. They argue that this is because in 2:227 Allah says, "Those who take an oath that they will not approach their wives (without specifiying this with a limited time) they shall have four months grace." Thus, what has been specified only

is the "grace" they have been given."[8] Ibn Hazm is of this view."[9]

7.1.2 The legal effect of ila:

Where the husband taken an oath that he will not have sexual intimacy with his wife, but before the expiration of the prescribed period of grace (i.e. four months), he has the sexual intimacy with her, then ila comes to an end but kaffaratul-yamin [10] is binding on him.

But where the prescribed period expires and the husband has not have the sexual intimacy with the wife, the majority of the Muslim jurists are of the view that there will not be an automatic talaq but wife is entitiled to demand (from the husband) either the sexual intimacy or talaq. And if he refuses to do either of the two, then Malik is of the view that the judge is entitled to divorce the wife on behalf of the husband, so as to protect her from injury. Ahmad, Shafi'i and Zahiri jurists, however, hold that the judge has no right to divorce the wife; he shall, instead coerce the husband to divorce her by himself.

Sa'id bn. al-Musayyab, Mak'hul, Zuhri and some other jurists, are of the view that after the expiry of the prescribed period, there shall be automatic talaq Raj'iy and, therefore, the husband will have the right to revoke it and take his wife back before the expiry of the iddah period.

Hanafi jurists are of the view that if the period expires without having sexual intimacy with the wife, then talaq ba'in shall come into effect automatically. And the husband, therefore, has no right to revoke the talaq . This is also the view of Abdullah bn. Mas'ud.[13]

The basis of these juristic differences is the differences of the jurists, interpretation of the Qur'anic verses 2:227-28. Thus, the Hanafi jurists' interprepation is that, "If the husband goes back (to his wife) before the expiration of the prescribed period of four months, then Allah is Much-forgiving, Most-Merciful." This means, according to them that Allah (S.W.T.) will forgive the husband what he has intended to do, namely vowing to abstain from having sexual intimacy with the wife, with a view to inflict harm on her. But if the husband does not go back to the wife within the prescribed period, and instead continues with his vow, then this shall be considered as a clear indication of his intention to divorce the the wife. Thus, after the expiration of the period, talaq will automatically come into effect without any need of effecting it by either the husband or the judge. In giving this interpretation, they rely on Ibn Mas'ud's version of the qira'ah (recitation) of 2:227 which includes the term "Fiyhinna" meaning "within them," i.e. within the prescribed period of four months. And the term, "fiyhinna," even though not conclusively regarded as part of the Qur'an, for it has no tawatur i.e. (continuous testimony of definitive nature), it

is, nevertheless, considered as part of the sunnah, which means that it is a valid authority regarding this issue. Moreover, reports from the companions (regarding this issue), have confirmed this interpretation.[14] It was reported that Uthman and Zayd bn. Thabit said, "If the four months expires, then it is one single (irrevocable) Talaq and as such the woman has more right, regarding herself (than the husband). Similar decisions were reported from Aly bn. Abi Talib, Abdullah bn Umar, Abdullah bn. Mas'ud and Abdullah bn. Abbas.

Maliki jurists and those who subscribe to their view, interpret 2:226 to mean that those who have taken oath that they will abstain from their wives, shall have four months grace. Thus, if they go back and abstain from what they have taken oath on, after the expiry of the prescribed period, then Allah (S.W.T) will forgive them for taking the oath and "resolving" to commit the injustice (against the wife). But if, after the expiry of the prescribed period, they resolve on divorce, Allah hear, and knows all things. They substantiate this interpretation with a report from Sahal bn. Abu Salih from his father who said, "I asked twelve of the Companions of the Prophet (S.A.W), regarding a man who has taken an oath to abstain from his wife. And all of them replied that there was nothing against him until four months, expires without going back. Thus if, after the expiry of the four months, he had not gone back, the judge should divorce the wife, on his behalf. [15]

The view of the Maliki jurists, is however, the prepondrate one, from all indication. This is because there is no indication in the verse (i.e. 2: 226), that the husband cannot make up his mind (either to go back to the wife or to diverce her), except within the prescribed four months and that immediatety the period expires, talaq automatically comes into effect. Rather 2:227 clearly indicates that talaq does not automatically come into effect on the expiry of the prescribed period, otherwise the verse would not have read, "If they (i.e. the husbands) are resolved on diverce...." after coming into effect of the divorce, on the expiry of the period (according to interpretation of the Hanafi jurists). Moreover, Ibn Mas'ud's version of qira'ah (recitation) is no more than his own understanding and interpretation of the verse which is speculative (zanniy), while its clear and express meaning is definitive (qat'iy) and it is a well-established principle of Islamic jurisprudence that whenever there is conflict between speculative authority and definitive one, the latter prevails.

7.1.3 Courts Power in Ila

Where, after the expiry of the prescribed period, the husband neither revokes his ila nor divorces the wife, then the wife, according to the three Imams (i.e. Malik, Shafi'i and Ahmad), is entitled to have recourse to legal action. If she does so, the judge shall ask the husband to divorce her and if he fails or refuses to comply with the court's

order, then the judge shall terminate the marriage.[14] However, Shia Imamiyyah are of the view that the judge has no right to terminate the marriage. He shall, instead arrest the husband until he chooses one of the two alternatives: going back to the wife or divorcing her.[18] Ibn Hazm is also of the same view. He is even of the view that if the judge divorces the wife on behalf of the husband, the divorce is ineffective.[19]

7.1.4 Nature of Talaq Effected as a Result of Ila:

Abu Hanifa is of the view that the talaq that comes into effect, as a result of ila is an irrevocable one. This is because if it were revocable, the husband would be in the position to revoke it and return her (to marital tie with him), for revocation is his right. And by so doing the interest of the woman cannot be protected and she cannot be safeguarded against the injury inflicted upon her by the husband through the ila.

Maliki, Shafi'i, Ahmad, Sa'id bn al-Musayyab and Abubakar bn. Abdulrahman, on the other hand, are of the view that it is revocable talaq that comes into effect. This is because there is no any authoritative reason to the effect that it is irrevocable. And also because it is divorcing a woman, with whom the marriage has been consummated, without any compensation (which is legally speaking a revocable

as will not allow their meeting together, during the prescribed period of ila.

Where the ila has been constituted by a vow in the name of Allah (i.e by taking oath), then the kaffarah (expiration) is, according to the majority of jurists, incumbent, for the breach of the vow. This view was reported from Zayd, Ibn Abbas, Ibn Sirin, an-Nakha'i, Thawri, Qatadah, Malik, Abu Ubayd, Ibnul Mundhir and some other jurists. It is also one of the two views of Shafi'i. It seems that this view is based on the following authorities:

a} 5:89 which reads:

> God will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths: for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or clothe them; or give a slave his freedom. If that is beyond your means, fast for three days. That is the expiation for oaths ye have sworn. But keep to oaths. Thus doth God make clear to you His signs, that ye may be grateful.[23]

b} 66:02 which reads:

> God has already ordained for you, (o men), the dissolution of your oaths (in some cases): and God is your Protector and He is full of knowledge and Wisdom.[24]

c} The hadith narrated by al-Bukhari on the authority of Abdulrrahman bn. Samurah, that the Prophet (S.A.W.) said:

> "...If you take an oath to do something and later on find another thing better than that, then do what is better and make expiation for (the dissolution of) your oath."[25]

In support of this view, it is further argued that the fact that kaffarah (expiation) is incumbent upon the husband for the cancellation of the vow, does not contradict the fact that Allah (S.W.T.) forgives the husband for what he has done, i.e. ila (as indicated by 2:227).

This is because even the Prophet (S.A.W) was forgiven for whatever he had done and whatever he would do (i.e. he has no sin), but inspite of this, he was reported to have said:

> "... By Allah! Allah willing, if I take an oath and then later find another thing better than that, I do what is better, and make expiation for the oath." [26]

Some jurists, on the other hand, are of the view that kaffarah is not incumbent upon the husband. This is the accepted view to al-Hasan and an-Nakha'i. It is also another view of Shafi'i. In support of this view, 2:227 has been quoted, where Allah says, "if they resume their relations, Allah is forgiving and Merciful."

It is clear from the forgoing discusion that the view of the majority is more cogent because their reasoning are more authoritative and, therefore, more convincing.

7.2 Li'an (Imprecations):

Li'an literally means "to drive away" and technically it means to drive away from Allah's mercy on account of imprecations involving the curse and wrath of Allah.

7.2.1 Its institution:

When a husband accuses his wife of committing zina (adultery) diretly, or indirectly such as where he denies the paternity of a child born of her during the subsistence of their marriage, then it has been prescribed by the Shari'ah that the spouses should have recourse to lain.

The first case of lain is the one decided by the Prophet (S.A.W) between Hilal bn. Umayyah and his wife, as narrated by al-Bukhari on the authority of Ibn Abbas (R.A), where Hilal accused his wife in the presence of the Prophet (S.A.W) of having committed adultery with Sharik bn. Sahma. The Prophet (S.A.W) said (to him), "Produce evidence or you must receive punishment on your back." He (Hilal) said, "Apostle of Allah! When one of us sees a man having intercourse with his wife he should go and seek evidence?" But the Prophet (S.A.W) merely said, "You must produce evidence or receive punishment on your back." Hilal then said, "By Him who sent you with the truth, I am speaking truly. May Allah send down something which will free my back, from punishment. Then the following verses were revealed (i.e. 24: 6-9). The Prophet (S.A.W) then returned and sent for them, and they came (to him). Hilal bn. Ummayyah stood up and testified and the Prophet (S.A.W) was saying "Allah knows that one of you is lying. Will one of you repent?" Then the woman got up and testified, but when she was about to do it a fifth time saying, "that Allah's anger be upon her if he was one of those who spoke the truth," they said to her, "This is the deciding one."

Ibn Abbas said, "She then hesitated and drew back so that we thought that she would withdraw (what she has said); but thereafter she said, "I shall not disgrace my people forever; and went on (with her imprecations). The Prophet (S.A.W) said, "Look and see whether she gives birth to a child with eyes looking as if they have antimony in them, wide buttocks and fat legs, if she did, Sharik bn. Sahma will be its father (inc). She then gave birth to a child of a similar description. The Prophet (S.A.W) thereupon said, "If it were not for what has already been stated in Allah's Book, I would have dealt severely with her.'"[28]

7.2.2 The Philosophy for its Institution:

Li'an has been instituted for the benefit of both the spouses. On the part of the wife, it gives her right to demand from the husband, when he wantonly accused her, to either substantiate his accusation by taking the prescribed oaths, or to admit the falsity of his charge against her. For this purpose, the wife can seek the help of the court in order to force the husband to agree to one of these two causes. Li'an thus helps the wife to retrieve her lost reputation. To the husband, li'an comes to his rescue, when he is unable to produce eye-witnesses in support of his accusation against the wife. In such a situation, he has two alternatives: either to continue to live with the wife in spite of her unchastity or to divorce her. He may be able to tolerate the first course while in the later course he may be confronted with one great difficulty, namely the

fact that the paternity of the child that may be ascribed to him which will not only be inequitable, but may also be disgusting to him. In such a situation, the husband can only disassociate himself with the child through li'an[29]

7.2.3 Conditions for its Applicability:

Before li'an becomes applicable, the following conditions must be fulfilled:-

a] The first condition relates to the accusation against the wife, and according to that condition, there must be accusation by the husband, charging his wife with zina. The accusation must be definite, certain and unambiguous. And it may either be express, such as where the husband says to his wife, "You adulteress," or "You have committed adultery," or "Your pregnancy is by adultery," or it may be implied, such as where the husband denied that a child born to his wife belongs to him.

Thus, where the accusation is uncertain or conditional, such as where the husband says to his wife, "I did not find you virgin," it does not give rise to li'an. This is so because the fact that he did not find the wife virgin does not necessarily mean. that she has committed Zina.[30]

b] Conditions that relates to the marriage, according to which there must subsist a marriage (between the spouses), de facto or de jure that is where the wife has been divorced revocably and the iddah has not expired where the marriage is de facto, it makes no difference whether it has been

consummated or not. Hanafi jurists stipulate that the marriage must be sahih (valid). Thus, if the marriage is batil (void) or fasid (irregular), there cannot be li'an' between the partners of the marriage, because it does not constitute marital relationship.[31]

Maliki, Shafi'i and Hanbali jurists, on the other hand, are of the view that if the marriage is fasid and the husband denied the paternity of a child born of the wife, he shall, in the circumstance, have the right to li'an. But if there is no child between the spouses, they have no right to li'an and hadd punishment for committing qadhf. (false accusation) shall be inflicted upon him. The reason why the husband has been given the right to li'an where there is a child between them (whose paternity the husband denied, but not where there is no child), in a fasid marriage, is that the child's paternity shall be ascribed to him unless he denies it); that is why he is given the chance to dissociate himself from the child through li'an. But where there no child between them, there is no need to accuse the wife with zina (without establishing this through witnesses), because the woman is legally speaking an ajnabiyyah (stranger) to the husband. That is why his accusation (with zina) against her, is considered an injury inflicted on her by him, without any justifiable cause, which consequently imposes had punishment (for qadhf) on him.[32]

c] Conditions that relate to the spouses, according to which the spouses must have full legal capacity (al-

Ahliyyatul-Kamilah), such that they are eligible to give a testimony in a case involving a Muslim, which means:-

i) That they must be muslims. This is because a non-Muslim is not competent to give a testimony against a Muslim. And even if both of the spouses are non-Muslims, they are still not competent to swear by Allah because it evolves Kaffarah (expiation) which they are not competent to perform;

ii) that they must be sane and of age, because minor and insane persons are not competent to give testimony or to take an oath;

iii) that they must be free, because a slave is not legally speaking, competent to give testimony;

iv) that they must have the ability to speak.

Thus, a dumb person has no right to li'an, because he or she cannot pronounce the prescribed oath (shahadah) and imprecation. And also because such person cannot accuse a woman of zina in words (verbally), while his sign may be misunderstood and imprecations are not incumbent unless the accusation is expressed in words; and

v) that neither of the spouses must have been convicted previously, for qadhf, because on being punished for committing qadhf, his or her testimony is legally inadmissible afterwards, in any case. This is in accordance with 24:4 which reads:

> And as for those who accuse chaste women (of adultery), and then are unable to

> produce four witnesses (in support of their accusation), flog them with eighty strips; and ever after refuse to accept from them any testimony - since it is they, they that are truly depraved. [33]

All the above-mentioned conditions must be fulfilled, according to Hanafi School. However, the three Imams (i.e Malik, Shafi'i and Ahmad), have only stipulated that the man (who has made accusation of committing zina against his wife) to be entitled to make li'an must be the husband who is legally competent to effect talaq on the wife, that is he must have attained majority and is sane and Mukhtar (i.e someone who has acted voluntarily and out of his volition). Thus, li'an, to them, is applicable whether spouses are Muslims, or non-Muslims and whether they have been convicted previously for committing qadhf or not and whether they are morally upright or not.[34] And Imam Shafi'i is of the view that li'an is incumbent, even if the husband is dumb, because his signs are equivalent to his spoken words.[35]

Beside the above mentioned conditions, there are, according to the Hanafi school, some other conditions the fulfillment of which is necessary before li'an can be applicable. These conditions are: (i) that the husband must be in a position to produce the prescribed number of witnesses, i.e. four, in order to establish the truth of his accusation; (ii) that the wife must have denied the truth of

the husband's accusation against her; and (iii) that it has to be at her instance. [36]

7.2.4 Its procedure

If a husband makes a charge of zina against his wife, or rejects the paternity of a child born of her, during the subsistence of their marriage, and the wife denies the charge and demand that the had punishment for qadhf be inflicted upon him, then the court shall order the spouses to swear and imprecate the curse and wrath of Allah, as it has been indicated in the Qur'an, 24: 6-8, which provide as follows:

> And for those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by God that they are solemnly telling the truth. And the fifth (oath) should be) that they solemnly invoke the curse of God on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) by God, that (her husband) is telling a lie. And the fifth (oath) should be that she solemnly invoke the wrath of God on her if (her accuser) is telling the truth.[37]

Thus, the procedure, according to the above-quoted verses, is that the court shall order the husband to either admit the falsity of his charge against his wife or take prescribed oath. And where he admits that his charge is false, then he becomes liable to punishment for qadhf (even though the marriage shall subsist). But if he persists in his accusation, then the court shall administer the oaths to him, four separate times by saying, before the court, "I bear

witness by Allah that I am telling the truth concerning my accusation against this woman (pointing to the wife, if she is present). After that he will be required to pronounce the imprecation by saying, "May the curse of Allah fall upon me if I have spoken falsely concerning the adultery with which I charge this woman and the denial of the paternity of her child."

Then after that the court shall administer to the wife the oaths four times, saying, "I bear witness by Allah that may husband's words concerning this accusation of Zina against me or his denial of my child's paternity, are all false." After that she shall be required to pronounce the imprecations by saying, "May the wrath of Allah fall upon me if my husband is telling the truth concerning his charge of zina against me, or his denial of my child's paternity.[38]

It could be noted that husband is the first to whom the oaths is to be administered. This is so because he is the complainer. And all muslim jurists unanimously agree that this is the accepted procedure. But they differ as to whether it is obligatory to follow. Thus, Shafi'i holds that it is obligatory and, if according him, the oaths are administered to the wife before the husband, then her li'an is not legally considered as a valid one. This is because li'an has been institutionalized so as to give the husband an opportunity to protect himself from the infliction of had punishment (for qadhf). Thus, if the oaths are administered

to the wife (before him), it will amount to protecting him from something which is not in existence.

Abu Hanifah and Malik, on the other hand, are of the view that where the oath is administered to the wife before the husband, the li'an is legally valid. This is so because there is no indication, in the verses of li'an, to the effect that the oath must be administered to the husband before the wife.[39]

7.2.5 Retraction by the husband:

Retraction here, means withdrawal of the accusation of zina made by the husband against his wife. Its essence is to give the husband the chance to continue the marital life with the wife. However, its most important object is to clear the character of the wife.

However, beofe retraction can be considered to be valid, the following conditions must be fulfilled:-

a) that the husband must admit that he had made the accusation of zina aginst the wife;
b) that he must clearly and unconditionally admit, in an unambigyuous language, that his accusation was false;
c) that the retraction must have been made before the close of the case (i.e. before making the li'an).[40]

Where the husband admits the falsity of his charge against his wife, the marriage shall not be dissolved but, he

shall be punished for qadhf.[41] And where he denied the paternity of her child (and then admits the falsity of the denial), then the paternity of the child shall be ascribed to him. Muslim jurists are, according to Ibn Qudamah, unanimous on this.[42]

7.2.6 Confirmaion by the wife

Where the wife accepted her husband's charge against her as true, the marriage shall continue to subsist, but the wife shall not be liable for punishment of zina even if she confirmed her husband's charge four times. This is due to the fact that the confirmation is merely meant for the avoidance of taking the oath and thus it does not amount to an admission of committing adultery.[43]

7.2.7 Refusal (nukul) to take the imprecation:

Where the husband resuses to take the imprecations, (after making lthe accusation against the wife), then the court shall, according to Hanafi jurists, arrest him, until he either takes the imprecations or admits the falsity of his accusation. The jurists, however, contend that hadd punishment for qadhf shall not be inflicted upon him because the Qur'anic provision (regarding li'an) does not indicate that in the event of husband's refusal to take the imprecations, he shall be liable to punishment. Thus to infer that, is tantamount to introducing extraneous element

into the nass (text i.e. the Qur'anic which is a form of naskh (abrogation). And naskh even by way of giyas (analogy) or through ahad (solitary) hadith, is, according to them, not valid. Moreover, if hadd punishment were to be inflicted (upon the husband), it would mean that taking imprecations is of no legal efficacy and ineffective in warding off the hadd punishment from the husband. Li'an is thus a special imprecation which must have special imprecation which must have special legal effect.[45]

Majority of jurists, including Maliki, Shafi'i and Hanbali jurists, on the other hand, are of the view that the husband, in the event of his refusal to take the imprecations, hadd punishment for committing qadhf, should be inflicted upon him. Their authority upon which they rely in holding this view, is that in the Qur'an, 24:6, it has been provided that:

> "And for those who accuse their own wives (of adultery), but have no witnesses except themselves, then the testimony of any of these, shall be four testimonnies by Allah that he is indeed telling the truth.[46]

And since he has not made the testimonies, he has become just like a stranger (al-ajnabiy) to the wife, in which case the general provision of 24:4 shall apply.[47] And 24:4 provides that:

> And for those who accuse chaste woman (of adultery) and then are unable to produce four witnesses (in support of their accusation), flog them with eighty stripes and ever after refuse to accept from them any testimony....[48]

Where the wife refuses to take the imprecations, then, punishment (for committing zina), shall, according to Malik, Shafi'i and Ahmad, be inflicted upon her. This they argue, is by virtue of the Qur'anic provision in 24:8, which reads:

> But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah that (her husband) is telling a lie.

The verse indicates that the cause for the punishment (for committing zina, on the wife) has come into being which cannot be averted except by taking imprecations by her. And the kind of punishment to be so averted has been indicated in 24:2, because the last portion of the verse (after explaining the nature of the punishment to be inflicted upon adulterer and adultress) it says, "...And let a party of believers witness their punishment."[50] Thus, to substitute this punishment with any other one which has not been mentioned or indicated by the text, is not permissible.[51]

Abu Hanifah, on the other hand, is of the view that where the wife refuses to make the imprecations (after the husband has made it), hadd punishment (for zina) shall not be inflicted upon her, but she should, instead, be detained until she either makes the imprecations or confirms her husband's accusation against her. And if she confirms his accusation, she shall be relased without inflicting the hadd punishment on her, because her confirmation is not, legally speaking, considered as a confessional statement made freely

and willingly so the offence of zina cannot be established on its basis (as it has been previously discussed).

In holding this view, he relies on the hadith according to which the Prophet (S.A.W) was reported to have said:

> The blood of a Muslim who bears witness that there is no deity worthy of worship except Allah and that I am the Messenger of Allah is unlawful, except in one of the three circumstances: (where he has committed adultery while he is a thayyib (who has married); where he has killed someone intentionally (without any justification); and where he has forsaken his religion and the Muslim community (by apostating).[52]

He also contends that shedding the blood (of the wife) in the process of inflicting the hadd punsihment (for zina, that is stoning to death), is contrary to the principles of the Shari'ah. This is because, in accordance with the principles of the Shari'ah, regarding any punishment that envolves human life, the punishment shall not be inflicted unless and until the offence has been established through the testimony given by witnesses of proven probity and integrity (udul), or through a legally valid confession. And the case of a wife who refuses to make imprecation and later confirmed the husband's accusation (against her), cannot be an exception.[53]

It seems that the view of Abu Hanifah is more cogent and stronger than that of the jamhur (majority). His contention is, in addition, closer to the spirit of the Shari'ah, as it

has even been opined by Abdul Ma'ali a Shafi'i jurist, in his al-Burhan, as mentioned by Ibn Rushd.[54]

7.2.8 Whether li'an is testimony of oath:

The Muslim jurists differ as to whether li'an is a testimony (shahadah) or oath (yamin). Thus, the majority of them (including the Imams of the three schools of Islamic Jurisprudence, i.e. Malik, Shafi'i and Ahmad) are of the view that it is oath and not testimony, even though it is called shahadah (testimony), for the following reasons:-

a) Nobody can validly testify in his own case.

b) It is the procedure of taking oath (and not that of giving testimony) that are used, in the process of making the li'an:

c) Man and woman, with regard to these procedures (of taking the oath of imprecation and its validity are regarded as the same. If li'an were testimony they would not be regarded the same, because the testimony of a woman is legally considered as half of that of man.

d) In li'an the oaths must be repeated by each of the spouses five times. If it were testimony it would not be so, because normally testimony is not repeated, while the contrary is the case with regard to oath as in qasamah.

e) Lian is made by the two parties, while testimony comes from one party only i.e. the mudda'iy (the complainant or plantiff).

But Hanafi jurists, on the other hand, are of the view that li'an is testimony (shahadah). In holding this view, they rely on 24:6 which provides, "Those who accuse their own wives (for adultery), but have no witnesses except themselves, then the testimony of any of these shall be four testimonies befor God...."55 They contend that, husbands, in the verse, are referred to as, "Shuhada" (witnesses) and their imprecations as "Shahadah" (testimony), which must be pronounced four times, just as in the case of the testimony for establishing zina. It also averts hadd punishment for qadhf from the husband (just as the testimony of witnesses does).[56]

The legal impliction of these differences is that li'an, to the majority of jurists (who consider it as an oath), can be made by the spouses, whether both of them are free or they are slaves or either of them is free and the other is slave; or whether both of them are morally upright or both of them are morally bankrupt; or either of them is morally upright and the other is morally bankrupt. But according to the Hanafi jurists, (who consider li'an as a testimony), li'an made by spouses cannot legally speaking, be valid unless the parties who have made it are competent to give a testimony (shahadah), which means they must be Muslims, free and morally upright ('adlayn). Thus non-Muslims, slaves and morally bankrupt cannot validly make li'an.[57]

The arguement of the Hanafi jurists that li'an is considered as testimony because, in 24:6, it has been referred to as "shahadah" (testimony), has been refuted by the majority of jurists, who argue that it has been called so because, each of the spouses, when making lthe li'an, he or she says, "Ashhadu" (i.e. I testify), while it is in fact taking oath by Allah's name.

It is undoubtedly clear from the arguements of these two groups of jurists, regarding this issue, that the view of the majority is the cogent one for the following reasons: a] That the Qur'anic provision regarding li'an is a general provision (Amm) because the conjunctive pronoun "walladhina" ("those who") which is generic in effect, has been used. Thus, the ruling is general (Amm), applicable to the case of all those who can possibly be included in its scope (i.e. all the husbands) and it remains so, unless there is evidence to warrant specification. And in this case there is no such evidence either in the Qur'an itself or in the Sunnah to that effect.

b] The li'an has been instituted so as to enable the husband to prove that his accusation is not false, because he may not be able to prove his allegation against his wife through the testimony of four witnesses, even if the allegation is true. Therefore, if he were to be barred from making the li'an for the simple reason that he is not competent to give a testimony (in accordance with the view of the Hanafi jurists) he will put in a serious difficulty.

This is because he may see his wife haviang sexual intimacy with another man, or he may be sure that a certain child by her is not, in fact, his child but he cannot take any action against that for he can only then, establish this through the testimony of four eye-witnesses, otherwise his claim will not be accepted. In addition, hadd punishment for committing qadhf against the wife, would be inflicted upon him. This is, in fact, tantamount to creating hardship unjustifiably against the husband, which is contrary to the objective of the shari'ah (which aims at making life easy as indicated by 2:185 which reads: "...God wills that you have ease, and does not will you to suffer hardship..."[58]

7.2.9 Legal consequences of li'an:

Once li'an has been concluded, the following consequences, take effect:-

a} Termination of marriage. Thus, immediately li'an has been concluded, the marriage of the spouses who have made the li'an, becomes terminated and absolutely irrevocable, without any need for the judge to decide to that effect. This is because the reason for the termination is the li'an itself which has taken place. This is the view of Malik, Shafi'i and Ahmad (according to one of his two views), and Zufar. In holding this view, they rely on the fact that the Prophet (S.A.W) separated between Hilal and his wife (after they had made a li'an). The jurists contend that there is an ambiguity as to whether the separation between the spouses was innitiated by the Prophet (S.A.W) or it was just

announced to them by him. Thus, Hilal's hadith cannot be an authority to the effect that the separation is subject to the court's decision. [59]

b} That the separation between the spouses (as a result of li'an) is legally considered by Abu Hanifah and Muhammad, as an absulutely irrevocable talaq. This is because it is dependent upon judicial decision, and any termination which is so, is legally considered as irrevocable talaq. Thus, it is absolutely haram (unlawful) for the husband to re-marry the devoced wife except ;in two cases:-

i] where the husbabnd admits the falsity of his accusation against the wife. This is so because that admmission is tantamount to withdrawal of testimony. And if a testimony is withdrawn, it is legally considered ineffective.

The three Imams (i.e Malik, Shafi'i and Ahmad, according to his other view), however, are of the view that the separation (through li'an) is faskh (annulment) that creates permanent prohibition (between the spouses), even if the husband subsequently admits the falsity of his accusation against his wife; or either of the spouses is not competent to give a testimony; or the wife has confirmed the husband's accusation against her. This is by virtue of a hadith narrated on the authority of Ibn. Abbas that the Prophet (S.A.W) said, "The two (spouses) who have made li'an (at-Mutala'inan) can never come together (as husband and wife)."[60]

They also argue that annulment of marriage (faskh) by means of li'an deprives the woman of the right to feeding and accomodation, during the iddah period. This is because she is only entitled to them during the iddah of talaq and not during the iddah of faskh. In support of this arguement, they quote the hadith narrated on the authority of Ibn Abbas (R.A.) regarding the case of li'an (which had taken place) betwen Hilal bn. Ummayah and his wife), in which it was reported that the Prophet (S.A.W.) decided that she had no right to feeding and accomodation, that the case was neither thecase of talaq nor that of a wife whose husband died.[61]

They further argue that if the husband's allegation against his wife is true, it is not appropriate for him to continue living with her (as his wife) and agree to be the husband of a whore, in spite of his knowledge about her condition. And if his allegation is false, then it is not appropriate to give him the opportunity to continue living with her for committing this serious maltreatment and disgrace against her.[62]

c] When the marriage is terminated after making the li'an, then the paternity of the child shall be disaffiliated from the husband. All muslim jurists agree on this. If the child's paternity has been disaffiliated from the husband of its mother, through li'an, then the child becomes an alien to him only regarding some issues, which are as follows:-

i) Inheritance. Thus, the husband and the child shall not inherit each other, which means there is no paternal relationship between them.

ii) Nafaqah (maintenance). Thus, the man shall not be responsible for the maintainance of the child. Conversely, the child, (when he becomes a grown up), shall not be responsible to maintain the man. (because he is not, legally speaking, his father).

But the child is not an alien to the man, which means there is still a relationship between the two, with regard to the following issues:-

i - Shahadah (testimony); that is to say the testimony of the man who has made a li'an (a mula'in) and that of his ascendant's, in a case involving the person whose paternity he has denied, is inadmissible and vice versa.

ii - Qisas (Retaliation). Accordingly, if the mula'in kills the person whose paternity he has denied, he will not be kulled, just as a father who has killed his son or daughter will not be killed.

iii - That nobody else except the mula'in is legally allowed to claim the paternity of the child which he has denied. Thus, even if someone else makes such claim, it will be considered invalid and, therefore, the paternity of the child cannot be affiliated to him. This is because there is the possibility that the mula'in may later admit the falsity of his accusation against the wife and as such the paternity of the child (which he has denied) will be affiliated to him.

That is why some ulama are of the view that if someone else claims the paternity of the child (which has been denied by the mula'in, after his death, his claim will be valid and, therefore, the paternity of the child will be affiliated to lhim. This is because the paternal relationship between the child and the mula'in is not certain and there is no any possibility that he may admit it for he has died.

iv - Legal impediment in marriage shall be created between the child and the mula'in. Thus, it is unlawful, for example, for the mula'in to marry his daughter to the person whose paternity he has denied. Where the child is a female. It is unlawful for the Mula'in's brother to marry her.[63]

7.3. Zihar (Injurious Assimilation):

Zihar is derived from the word zahr (back), because usually in zihar the husband says to his wife "Anti 'Alayya ka zahri ummiy (you are to me like my mother's back)."

Legally speaking zihar signifies a man comparing his wife to any of his female relations within such prohibited degrees of relationship, whether by blood, fosterage or affinity as renders marriage with her invariably unlawful.[64]

This definition is almost the same with the one given by Sheikh Khalil in his al-Mukhtasar, for he defines it as, "... A comparison made by a Muslim with powers of discernment (al-Mukallaf) between a woman whom it is

lawful for him to have as a wife or some part of her, and the back of a woman who is unlawful for him, or some (other) part of her."[65]

7.3.1 Its Classification:

Zihar, from the point of view of its sighah (formular), is classified into two:

a] Sarih. This is a clear expression which is given in such a spoken words, the meaning of which is unambiguous and for that reason it cannot mean anything other than zihar, such as where the husband says to his wife, "You are to me like my mother's back," or "my mother's thigh," or "my mother's stomach". The meaning then is that the wife is prohibited just as the mother's back, her thigh or her stomach are prohibited. Thus, where the husband has made such expressions and then says he has not intended zihar, or that he has intended talaq or ila, his claim shall not be accepted, and it shall legally be considered as zihar."[66]

b] Kinayah. This is an implied expression which is ambiguous as opposed to a clear expression. The ambiguous expression is such as can mean zihar or something else, such as where the husband says to his wife, "You are to me like my mother." which may mean that she is like his mother in terms of generosity or status, as it may mean that she is like her in terms of prohibition.

Where the husband makes such an expression to his wife and then claims that he means that she is as generous as his

mother, or she is like his mother in status, then it will not be considered as zihar. But if he says he means she is prohibited to him like his mother, then if he intends talaq by that, it will be considered as such. And if he intends zihar, it will be considered so. This is because the expression used may mean all these.

But Maliki jurists are of the view that where the husband intends, talaq by such expression, then it is triple talaq that will be binding on him. The same rule also applies where, for example, he says to his wife, "You are like my son," or "my boy," or (mentions) anything forbidden, according to the Qur'an. However, where consummation has not occurred, effect will be given to his intention.[67]

7.3.3 Its legal effects:

Zihar, during the jahiliyyah period was used to be considered as an ultimate termination of marriage, by virtue of which the wife became permanently prohibited to the husband. Even during the earliest days of Islam, the Muslims used to consider it as such, until the case of Aws bn. Samit who pronounced zihar concerning his wife Khawlah bint Tha'alabah. When that happened, Khawlah brought the case to the Prophet (S.A.W), complaining about what her husband had done. And since there was no revelation concerning that, the Prophet, (S.A.W) told her that she was forbidden to her husband (for ever as it was the case according to the custom). But Khawlah insisted that, should

not have been the case. So at last Qur'anic verses (i.e. 58: 2-4) were revealed which transformed the position of zihar from being talaq to only temporary prohibition of the wife to the husband, which comes to an end the moment the husband performs kaffarah (expiation). One of the verses revealed (i.e 58:2) clearly indicates the abolishing of the idea of zihar as a permanent prohibition of the wife for it provides as follows:

> As for those of you who (henceforth) separate themselves from their wives by saying, 'Thous art as unlawful to me as my mother,' (let them bear in mind that) they can never be as their mothers: none are their mothers save those who gave birth to them; and so, behold, they but utter a saying that runs counter to reason and is (therefore) false.[68]

There is also another verse (i.e 33:4) to that effect. The verse reads as follows:-

> Never has God endowed any man with two hearts in one body: and (just as) He has never made your wives whom you may have declared to be 'as unlawful to you as your mother's body" (truly) your mothers...[69]

It is by virtue of these verses that the position of zihar was transformed from what it used to be during the jahiliyyah period. Thus, from the moment the verses were revealed, zihar ceased to be considered as talaq, because (as the Qur'an puts it) is "a saying that runs counter to reason and is, therefore, false." Therefore, instead of being talaq, it only makes the wife unlawful to the husband temporarily. And she will not be lawful to him unless he performs kaffarah (expiation) for what he has committed.

This kaffarah is meant to serve as a severe penalty, (against the husband's transgression), because he has prohibited to himself what has been made lawful to him by Allah.[70]

7.3.3 Nature of the kaffarah:

The nature of the kaffarah has been explained in 58:3-4 which provides as follows:

> But those who pronounce the word of zihar to their wives, then wish to go back on the words they uttered, (it is ordained that such a one) should free a slave before they touch each other: this are ye admonished to perform: and God is well- acquainted with (all) that you do. And if any has not (the wherewithal), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones. This that ye may show your faith in God and His Apostle. Those are limits set by God...[71]

The kaffarah, then, according to the above-quoted verses, is one of the three alternatives, in the following order:-

a] Freeing or purchasing the freedom of a slave or captive, on condition that the slave or captives is free from any defect, according to the majority of jurists.[72] He should also be a Muslim, according to Malik and Shafi'i. However, Abu Hanifah and his disciples hold a contrary view which has been supported by Ibn Hazm.[73]

Muhammad Asad, a contemporary Muslim scholar, is of the view that when slavery is more or less non-existent, the concept of tahriru raqabah (freeing of a slave), may be

legitimately extended to redeeming of a human being from the bondage of debt or of great poverty.[74]

b] Where the husband is not able to free the slave or captive, either because he has no financial means or because he cannot find anyone else who could be redeemed from factual or figurative bondage, he should, then, fast for two consecutive months.

Where he breaks the sequence of the fast, (even if it is at the last day), without any justifiable cause, then he has to start afresh (until he completes the two months without any break). However, if he breaks (it) due to a justifiable reason, then he shall just complete what remains. This is the view of Sa'id bn. al-Musayyab, al- Hasan, Ata bn. Abi Rabah, Amr bn. Dinar and Sha'abi. This is also one of the two views (which is the cogent one) of Imam Shafi'i. Malik is of the view that if the reason for breaking the sequence of the fast is sickness (and not any other reason), then he is allowed to complete what remains. Abu Hanifah is of the view that if he breaks tee sequence, he has to start afresh under any circumstance. This is also the other view of Imam Shafi'i.[75]

Where the husband only had intercourse with the wife in the night, during the prescribed two months of the fasting, Shafi'i is of the view that his kaffarah is valid because night is not the time for fasting. But Malik and Abu Hanifah hold that the kaffarah, under the circumstance, will

be invalidated, [76] which means that he has to start it afresh, because Allah (S.W.T) prescribed that he has to perform the kaffarah, "before they touch each other" (i.e. before they have intercourse). Thus, if he has intercourse before the completion of the two months, then he has not complied with this injunction and as such he has to start the fast afresh.[77]

c] If he cannot perform the fast, he should, then feed sixty needy people. However, there are divergent views among the Muslim jurists regarding the quantum and beneficiaries of the feeding. With regard to the quantum, Maliki school is of the view that he should give one and two-thirds of a mudd[78] if it is wheat: or if the food of the people (of the country where he is, is dates or any other (agricultural) produce in which the zakkah of the breaking of Ramadan (zakatul-fitr) is paid, then an equivalent measure thereof.[79] Ibn Wahab and Mutarraf transmitted from Malik that the Muzahir (the husband who has pronounced zihar) shall give two mudds to each of the sixty needy people. This is also the view of Abu Hanifah and his disciples. But Shafi'i and others are of the view that he shall give only one Mudd. [80]

With regard to the beneficiaries of the kaffarah (i.e. the masakin or the needy people), it is sufficient or valid for the muzahir to feed less or more than the sixty masakin, according to Malik and Shafi'i.[81] Ibn Hazm subscribes to the same view.[82] But Abu Hanifah and his disciples, are of the view that even if he feeds one miskin (needy person) giving

him a mudd (at a time) until he complete the number (i.e sixty mudds), then that is sufficient and valid.[83]

7.3.4 When Kaffarah is Performed:

It is incumbent upon the husband who has pronounced the zihar (the muzahir) to perform kaffarah before he is legally permitted to have sexual intimacy with the wife (in respect of whom he has pronounced the zihar). But where he had the sexual intemacy with her before performing the kaffarah, the muslim jurists differ. Thus, Malik, shafi'i, Abu Hanifah, Thawri, Awza'i, Ahmad, Is'haq, Abu Thawr, Dauwud, Tabari and Abu Ubayd are of the view that only one kaffarah is still incumbent upon him. In holding this view they rely on the hadith in which it was reported that Salamah bn. Sakhr al-Bayadiy pronounced zihar in respect of his wife, during the period of the Prophet (S.A.W.) and then had intercourse with her before performing the kaffarah. Then he came to the Prophet (S.A.W) and informed him about that and the Prophet (S.A.W) enjoined him to perform one kaffarah (before having another intercourse with the wife), and repent to Allah.[84] In addition, Salt bn. Dinar said, "I asked ten jurists about muzahir who had intercourse (with the wife in respect of whom he had pronounced zihar) and they replied that it was only one kaffarah (which is incumbent upon him.[85]

Some jurists, on the other hand, are of the view that it is two kaffarahs that are incumbent upon the husband, in the

circumstance: one for his resolution to have intercourse with her, and the other for having the actual intercourse. This is what was reported from 'Amr bn. al-As, Qubaysah bn. Dhu'ayb, Sa'id bn. Jubayr and Ibn Shihab.

Another juristic view (on the issue) is that nothing is incumbent upon the husband: neither for the resolution (to have intercourse), nor for the actual intercourse, This is because Allah (S.W.T.) has made the valiadity of the kaffarah conditional upon the fact that it must be performed before having the intercourse. Thus, if the husband has the intercourse before performing the kaffarah, then its prescribed time has elapsed and it will not be obligatory upon him for the second time, unless there is an express command, to that effect), which is not available, in the circumstance. However, this is, according to Ibn Rushd, an anomalous view.[86]

Ibn Hazm is of the view that where the kaffarah is in the form of feeding (of the sixty masakin), then it is not unlawful for the husband to have intercourse (with the wife), before giving the feeding (to the masakin). The intercourse is haram (unlawful) only where the kaffarah is in the form of either freeing of the slave or fasting (of two consecutive months).[87]

Where the husband has more than one wife and he pronounces zihar in one single pronouncement, in respect of

all of them, Malik is of the view that one kaffarah is sufficient.[88] It was reported in al-muwatta of Malik, from Hisham bn. Urwah that his father said that a man who pronounced a zihar from his four wives in one statement, had only to do one kaffarah. [89] But Abu Hanifah and Shafi'i are of the view that the husband must perform kaffarah, according to the number of the wives in respect of whom he has pronounced the zihar.[90]

Where the husband pronounced zihar, in respect of his wife, on various accession, the Muslim jurists differ as to whether he has to do only one kaffarah or according to the number of occasions on which he has pronounced the zihar. Thus, Malik is of the view that only one kaffarah is incumbent upon him. However, where he pronounced the zihar and then did the kaffarah and then pronounced (another) zihar after he had done the kaffarah, he has to do (another) kaffarah again.[91]

Abu Hanifah is of the view that this depends on the husband's intention, if, according by his intention is just to emphasis his pronouncement of the zihar, then it is only one kaffarah that is incumbent upon him. But if he intends another zihar (by his subsequent pronouncements), then the number of the kaffarahs incumbent upon him depends on the number of his pronouncements. Yahya bn. Sa'id is of the view that the number of the kaffarahs incumbent upon the husband, depends on the number of his pronouncement of zihar

whether he has done so on one single occasion or on various occasions."[92]

But Aly bn Abi Talib, Qatadah and Amr bn. Dinar, are of the view that if the husband pronounces zihar in more than one pronouncement but on one occasion, then it is only one kaffarah that is incumbent on him, but if it is on more than one occasion, then the number of the kaffarah incumbent on him depends on the number of his pronouncements of zihar."[93]

Ibn Hazm is of the view that if the husband repeats the zihar for the second and third times, it is only one kaffarah that is incumbent upon him. This is because it is only by virtue of the second pronouncement that kaffarah becomes incumbent upon him. And the third one is a separate one which does not impose any kaffarah. However, if he repeats it for the fourth time, then another kaffarah is incumbent upon him."[94]

Where the husband divorces the wife before performing the kaffarah, then if the divorce is revocable and he revokes it before the expiration of the iddah, or he contracts another marriage with her after the expiration of the iddah, Imam Malik is of the view that, kaffarah is incumbent upon him. In al-Muwatta, he was reported to have said, "If he (the husband) divorced her and did not decide to retract his zihar of her and keep her and have intercourse with her, there would be no kaffarah incumbent on him." He then went on to

say that, "If he marries her after that he does not touch her until he has completed the kaffarah of pronouncing zihar."[95]

Shafi'i is of the view that if the husband revokes the divorce and returns her, during the iddah, the kaffarah is incumbent on him, otherwise, kaffarah is not incumbent upon him. Muhammad bn. al-Hasan is of the view that the kaffarah is incumbent upon the husband even if he marries her after a third divorce.[96]

Where a man pronounces zihar in respect of an ajnabiyyah (a stagger who is not his wife), and then marries her later, it is not lawful for him to consummate the marriage until he performs the kaffarah. This rule applies irrespective of whether he pronounces the zihar in respect of a particular woman, such as where he said, "If I marry so and so (mentioning her name), then she is to be like my mother's back," or he generalists, making it conditional to marriage, such as where he says, "Any woman I marry, she is to me as the back of my mother.' or unconditional such as where he says, "Every woman is to me as the back of my mother." This view has been reported from Umar bn. al-Khattab and has been subscribed to by Sa'id bn al-Musayyab, Urwah, Ata, al- Hasan, Malik and Is'haq."[97]

Thawri, Abu Hanifah and Shafi'i, on the other hand, are of the view that zihar may only be pronounced in respect of a lawfully married wife of the muzahir (the man who has

pronounced zihar). Hence if a man pronounces zihar in respect of a woman who is not his wife and then married her later, the kaffarah is not incumbent on him before consummating the marriage. This is what has been reported from Ibn Abbas (R.A.), relying upon 58:3 which provides that, "Those who pronounce zihar to their wives..." and that woman is not his wife when he pronounced the zihar."[98] Ibn Hazm subscribes to the same view. And refuting the other (contrary) view, he said, "Zihar is effective only when it has been pronounced. Thus, it is invalid to say that the consequence of the pronouncement (i.e. the obligation of kaffarah) will not come into effect at the time it has been made and then becomes effective at a time when it has not been made."[99]

Where the husband pronounced zihar in respect of his wife and then either of the pauses died, then the kaffarah is not incumbent upon the husband. This is the view of Ata, Naskha'i, Awza'i, al-Hasan, Thawri, Mujahid, Sha'abi, Zuhri and Qatadah, on the other hand, are of the view that kaffarah is incumbent upon the husband, just by virtue of the zihar per se (which he has pronounced). This is because it is the cause (sabab) of the kaffarah.[100] This is the accepted view to Ibn Hazm. Thus he is of the view that if the muzahir husband died before performing the kaffarah, then it will be performed out of his estate, irrespective of whether he has made a bequest to that effect or not.[101]

This is so far the end of the discussion on termination of marriage by other means, i.e. by ʾīla and li'ān. And as it has been explained, these two are not termination of marriage per se, but rather termination is one of their legal consequences. Zinhar also has been discussed even though it is neither a termination of marriage per se nor termination is its legal consequence. The next chapter is an extensive exposition of one of the most important legal consequences of termination of marriage, i.e. iddah (waiting period).

FOOTNOTES AND REFERENCES

1. Asad, M. (1980), The Message of the Quran, Darul-Andalus, Gibraltar, pp. 49 - 50.

2. Ibn Abidin (1318 A.H), Raddul-Mukhtar, Cairo, Vol. 2, p. 560 in Ahmad, K.N. (1981), Muslim Law of Divorce, Kitab Bhavan, New Delhi, p. 107.

3. Ibn Rushd, M.A. (n.d), Bidayatul-Mujtahid, Wanihayatul-Muqtasid, Darul Fikr, Beirut, Vol. II p. 76

4. Quran 2:231

5. Ibid. 4:129

6. Maududi, A.A (1983), The Laws of Marriage And Divorce In Islam, Safat, Kuwait, pp. 17-19

7. Ahlur-Ra'ay are the jurists of one of the two extinct schools of jurisprudence from which other school emerged. The other school is that of Ahlul-Hadith. The approach of Ahlur-Ra'ay is that they interpreted the nusus (textual authorities) in the light of their objectives (maqasidish-Shar'). See Sharafuddeen, A.A. (1969), Tarikhut-Tashri'ial-Islamiy, pp. 115-116.

8. Ibn Qudamah, A.A. (n.d), al-Mughniy, Maktabatu-Riyadil-Hadith, Riyad, Vol. VII, p. 300

9. Ibn Hazm (n.d) Al-Muhalla, al-Maktabut-Tijari, Beirut, Vol. X, p. 42

10. Kaffaratul-Yamin is the expiation which is performed for breaking an oath sworn to for doing something. This expiation is, according to 5:89, to feed 10 needy persons on a scale of the average food of ones family, or cloth them or freeing a slave, but if it is not possible, then one must fast for tree days.

11. Sabiq, S., (1977), Fiqhus-Sunnah, Darul-Fikr, Beirut, Vol. II, p. 171

12. Maududi, A.A. (n.d), The Meaning of the Qur'an, London. p. 160

13. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 171.

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16. Ibid.

17. Ibn Qudamah (1307 A.H), al-Mughniy, Cairo, Vol. VII, pp. 318-19, in Ahmad, K.N (1981), Muslim Law of Divorce, pp. 112-13

18. Muganniyah, M.J. (1979), al-Fiqhu 'Alal-Madhahibil-Khamsah, Darul 'Ilm Lil-Malayiyn, p. 458.

19. Ibn Hazm, A.M. (n.d), al-Muhalla, Infra at p. 48.

20. Sabiq, S. (1977), Fiqhus-Sunnah, op. cit. at p. 171.

21. Ibn alHasan, J. (1377) A.H), Kitabu Shara'i il-Islam, Tehran, p. 228 in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at p. 115.

22. Ibn Rushd M.A. (n.d), Bidayatul-Mujtahid, infra at p.76

23. Ali, M.Y. (1975), The Holy Qur'an (Translation), The Islamic Foundation, Leicester, U.K. p. 270.

24. Ibid at p. 1569.

25. Khan, M.M. (n.d), Sahih al-Bukhari (translated), Dar al-Arabia, Beirut, Lebanon, Vol.VII, p. 469.

26. Ibid at p. 468; Ibn Qudamah (n.d), alMugniy, Vol. VIII, p. 325

27. Ibn Qudamah (n.d.), al-Mughniy, op. cit. at p. 325

28. Hasan, A. (1985), Sunan Abu Dawud, (translated), al-Madina Publications (P) Ltd. N. Delhi, Vol.II, pp. 607-08 There are many similar ahadith collections.

29. Ahmad, K.N. (1981), Muslim Law of Divorce, infra at p. 454-55.

30. Ibid. at p. 459

31. Sha'aban, Z.D (1971), al-Ahkamus-Shar'iyyah..., supra at p. 512

32. Ibid.

33. Asad, M. (1980), The Message Of The Qur'an, infra at pp. 533-34

34. Musa, A.Y. (1958), Ahkamul-Ahwalish-Shakhsiyyah fil Fiqhil-Islamiy, Darul-kitab al Arabiy, Egypt, pp. 320-21; Sha'aban, Z.D (1971), al-Ahkamush-Shar'iyyah... op. cit. at 512-13; Ahmad, K.N. (198), Muslim Law of Divorce, infra at pp. 462-63.

35. Ahmad, K.N. (198), Muslim Law Of Divorce, op. cit. at

p. 464

36. Ibn Abidin (1318 A.H), Raddul-Mukhtar, Cairo, Vol. II, p. 603 in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at p. 468.

37. Ali, A.Y. (1977), The Holy Qur'an: Translation and Commentary, Muslim Students' Association of the U.S and Canada pp. 897-98

38. Sha'aban, Z.D. (1971), al-Ahkamush-Shar iyyah... supra at p. 508; Ahmad, K.N. (1981) Muslim Law Of Divorce, infra at pp 468-69.

39. Sabiq, S. (1977), Fiqhus-Sunnah, infra at p. 274.

40. Ibn Abidin, (1318 A.H), Raddul-Mukhtar, infra at pp.603-07 in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at pp. 472-75.

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42. Ibn. Qudamah (n.d) al-Mughniy, infra at pp. 419-20

43. Ibn Abidin (1318 A.H), Raddul- Mukhtar, op. cit. at p.603 in Ahmad, K.N. (1981), Muslim Law of Divorce, supra at p. 471.

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52. This hadith was transmitted by Bukhari, and Muslim. It was quoted in Sabiq, S. (1977), Fiqhus-Sunnah, infra at p. 428

53. Ibn. Rushd, (n.d) Bidayatul-Mujtahid, op. cit at p.90.

54. Ibid.

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59. Sha'aban, Z.D. (1981), al-Ahkamush-Shar'iyyah infra at p. 514; Ahmad, M. (n.d) Jawahirul-'uqud, p. 177, in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at p. 496.

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72. Ibn. Rushd, (n.d), Bidayatul-Mujtahid, supra at p. 84

73. al-Qurtabi, M.A. (1967), al-Jami'li Ahkamil-Qur'an, Vol. 17, p. 282; Ibn Hazm, (n.d) al-Muhalla, infra at p. 50

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75. Qurtabi, M.A. (1967), al-Jami' Li Ahkamil Qur'an Darul-Kitab al-Arabi for printing and distribution, Cairo. infra at p. 284.

76. That is where the intercourse is with the wife in respect of whom he has pronounced the zihar. Thus, if it is with any of his other wives, his kaffarah is valid. (see Russell, A.D.and Suhrawardy (n.d) A manual of the Law on Marriage... pp. cit. at p. 237.

77. Qur'tabi, M.A (1967), al-Jami' Li Ahkamil-Qur'an, op. cit. at 284.

78. Mudd is a measure which is equivalent to 3/4 (one and three quaters) of a pint of the standard of Baghdad; such was the mudd of the Prophet (mudun-Nabiy) which is the one meant here. (see Russell, A.D. and Suhrawardy A.M. (n.d), A Manual of the Law of Marriage..., infra at p. 240

79. Ibid.

80. Ibn Rushd, M.A. (n.d), Bidayatul-Mujtahid, infra at p. 85; Qurtabi, M.A (1967), al-Jami' Li Ahkamil-Qur'an, infra at p. 286

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83. Qurtabiy, M.A. (1967), al-Jami' Li Ahkamil Qur'an infra at p. 86.

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PART II

THE LEGAL CONSEQUENCES OF TALAQ

Chapter 8:

8.0 IDDAH (WAITING PERIOD)

In the previous chapters termination of marriage and other related issues have been extensively discussed. The termination has some legal consequences or effects, one of which is iddah, which will be discussed in full details in this chapter.

Iddah is a legally prescribed period which a divorcee, or a widow or a woman who has been separated from her husband through an annullment (of marriage) after consummation, must observe before she can re-marry.

8.1 It's Institution and Philosophy:

Iddah is prescribed on the wife whose marriage has been terminated after consummation. Thus, if the marriage has not been consummated, iddah is not incumbent on the wife. This is by virtue of the Qu'anic verse, 33:49 which provides as follows:

> 'O ye who believe! When ye marry believing women, and then divorce them before ye have touched them no period of iddah have ye to count in respect of them...'

Iddah has been prescribed for the following reasons:

1] Ascertainment of possible pregnancy so that the paternity of the child that may be born to the wife, after the death of her husband or after termination of the marriage may be determined.

2] To give the spouses an opportunity to reconsider their decision of divorce and possibly reconcile and resume their marital relation.

3] To serve as a mark of respect for the decessed husband, or as a mark of sorrow for the marriage which has been terminated by the death of the husband.[2]

4] To show the important position of marriage (under Islam), which cannot be constituted except by calling people to witness the contract and cannot also be terminated except through a legal process without which it could be seen as a jest.[3]

8.2 Circumstances of Iddah:

Iddah has been prescribed in the following circumstances:-

1] Termination of marriage through talaq. Thus, where the husband effects talaq on the wife, whether the talaq is revocable or irrevocable, the wife must observe Iddah provided the marriage is valid and has been consummated, or there has been khalwah sahihah (valid retirement), according to Hanafi, Maliki and Hanbali schools.

Where the marriage is batil (Void), no iddah is incumbent upon the woman except where the man have had actual intercourse with her before the separation. Thus, where he has only secluded himself with her, and then the judge separated them, or they left each other or the man died before the separation, then iddah is not incumbent on her. This is

because the sole purpose of performing iddah, as far as void marriage is concerned, is to ascertain whether the woman is pregnant or not, which is possible only where there is actual intercouse with the woman. This is the view of the Hanafi Jurists.[4]

Maliki jurists, however, are of the view that even where the man has merely secluded himself with the woman, the man being an adult and an eunuch, under conditions rendering intercouse possible, even though both of them deny its occurrence, then iddah is incumbent upon the woman.[5]

Ibn Abdin, on the other hand, is of the view that if the marriage is batil (void), then iddah is not incumbent on the woman even if the man have had intercouse with her. This is because the relationship of husband and wife does not exist in the case of such (void) marriage. And also because in the case of void marriage, the child that may be born to the woman is not affliated to the man (who is considered an adulterer). Thus, observance of iddah the primary object of which is to ascertain the parenthood of child, is not necessary. [6]

2] Termination of marriage due to the husband's death. Thus, iddah is incumbent on the wife upon the death of her husband, irrespective of whether the marriage has been consummated or not, and whether the wife is a minor or she has attained majority. The iddah, has been prescribed, in the circumstance, so as to serve as a mark of respect for the

deceased husband, provided the marriage is sahih (valid). Thus, where the marriage is fasid (irregular), iddah is not incumbent upon the wife unless it has actually been consummated; khalwah sahihah is, therefore, not sufficient to make the iddah incumbent upon the wife under the circumstances. The Hanafi, Maliki and Hanbali schools agree on this. This is because according to them, such marriage is not, legally speaking, considered as a proper marriage, except for the purpose of establishing the legitimacy of the child born of such marriage.[7]

3] Termination of marriage by court order. Where a valid marriage is terminated by a court, for any legally acceptable reason, such as the husband's impotence, iddah is incumbent on the wife, provided the marriage, according to all muslim jurists, has been consummated, or khalwah Sahihah, according to Hanafi, Maliki and Hanbali jurists, has taken place.[8]

4] Termination of marriage for reason of apostasy of either of the spouses. Thus, where the marriage is terminated automatically on the account of apostacy of one of the spouses, the observance of iddah is incumbent on the wife.[9]

5] Intercourse under shubhah (misapprehension). Thus, where a man had intercouse with a woman under misapprehension, namely under the wrong impreession that the woman is his wife then iddah is incumbent on her. [10] Ibn Abidin in his al-Hashiyah, quoting from Sharkhasi's alMabsut, cited a case of

a man who married two ladies for his two sons, but each of the two wives was taken to the brother who is not her husband (with whom the marriage has been contracted), mistakenly. The Ulama gave a decision to the effect that each of the two brothers should keep away from the lady with whom he had had intercourse so that she should observe iddah before going back to her rightful husband, after wards. However, Abu Hanifah decided that if each of the brothers accepts the woman with whom he had intercouse as his wife, then he should divorce the wife (with whom the marriage has been contracted) and then a new marriage be contracted with the woman with whom he had intercourse. And he can consummate the new marriage instantly, which means there is no need for observing iddah by the two women.

6] Iddah is also incumbent on a wife for having intercourse with a man (other than her husband) where the intercourse is manifestly illicit (i.e. Zina). The same rule applies where a ravisher (ghasib) or captor (Sabiy) has gone off with a wife during such a period as to render the occurrence of intercourse, possible even though the woman claims that no intercourse has taken place. However, Maliki jurists do not refer to such waiting period as iddah: they rather refer to it as Istibra. [1]

8.3 Categories of Iddah

Iddah has been categorised into four, depending on the cause for the termination of the marriage and the type and

A'ishah(R.A) said, "Quru are times of fresh purity after menstruation."[15]

The legal implication of these juristic differences, is that according to the first view, the iddah of a divorced woman (who is at the age of menstruation) expires when she finishes her third monthly periods (after the divorce). If, accordingly, a marriage is contracted during the third menstruation, after the divorce, the marriage is void being contracted during the iddah period. And all muslim jusrists unanimously agree that any marriage contracted during the iddah period is void.

But according to the second view, the iddah of a divorced woman expires immediately her third state of purity (after the divorce) comes to an end. And this happens the moment her third monthly period (after divorce) starts. Thus, according to this view, marriage can validly be contracted with the woman at that time because she is, legally speaking, regarded to have finished her iddah. [16] Thus, it was reported in al-Muwatta that A'ishah (R.A) took Hafsah bint Abdurrahman bn Abi Bakr as-Siddiq into her (matrimonial) house, (to her new husband), when she entered the third period of her iddah [17]. In addition, al-Qasim bn Muhammad and Salim bn. Abdullah were reported to have said, "When a woman is divorced and begins her third period, she is clearly separated from him (i.e. her husband) and is free to marry again." [18]

8.3.2 Iddah of woman who does not menstruate either because she is too young or she has reached menopause: The iddah of such woman is three consective lunar months. This is in accordance with the Qur'anic verse (65:4), which provides that:

> Now as for such of your women as are beyond the age of monthly courses, as well as for such as do not have any courses, their waiting period - if you have any doubt(about it) - shall be three (calender) months ....[19]

However, the generally accepted view to Shia Imamiyyah school is that iddah is not incumbent on the divorced woman who has passed child-bearing age (i.e. who has reached menopause), or who has not yet attained puberty, if she has reached nine years. [20] But it is obvious that this view is contrary to the above-quoted verse, and thus, it is invalid.

Elongated purity (tuhur): If a woman menstruated, even once, after reaching mojority, and then the menstruation is disrupted, (and as such it ceases for a long period) without her reaching menopause, and then later her marriage is terminated, either through talaq or faskh, her iddah expires by observing three qurus or by reaching menopause. And if, thereafter, she does not menstruate, she shall, then wait for three months (which is the iddah of a woman who does not menstruate). This is because she has been categorised ab initio among those who menstruate since she has already started menstruating. This is the view of Hanafi jurists.

Maliki jurists, on the other hand, are of the view that, the woman shall wait for nine months from the time of the divorce, so as to ascertain whether she is pregnant or not, because this is usually the normal period of pregnancy. If, after waiting for the nine months it is discovered that she is not pregnant, then she shall observe iddah for three months as if she has reached menopause. And if she does not menstruate up to the end of the three months, then her iddah expires. But if she menstruates, even if it is on the last day (of the three months), then she shall wait for the second menstruation (and the third one) or wait for a complete year, (if no other menstruation comes), after which her iddah expires. And then if she menstruates (before the end of the second year) she shall, then, either wait for the third menstruation or wait until the end of the year.[21]

In holding this view, the Maliki jurists, rely on what Yahya related from Maliki from Yahya bn. Sa'id and from Yazid bn. Abdullah bn. Qusay al-Laythi that Sa'id bn. al- Musuyyab said, "Umar bn. al-Khattab said, 'If a woman is divorced and has one or two periods and then stops menstruating, she must wait nine months. If it is clear that she is pregnant, that is that, if not, she must do an iddah of three months after the nine months and then she is free to marry."[22]

Imam Shafi'i subscribes to Malik's view saying that, "This is the decision of Umar bn. al-Khattab which he gave in

the presence of Muhajirun[23] and Ansar[24] and none of them disagreed with the decision."[25]

It is obvious that Maliki jurists' view is more cogent and more acceptable than that of the Hanafi jurists because it is more availing to women for the fact that it makes their Iddah shorter and it also serves the purpose of ascertaining whether the woman is pregnant or not. The view is thus, closer to the principle of the Shari'ah enunciated in various Qur'anic verses one of which is [2]: which provides that.

"...God wills that you shall have ease,
and does not will you to suffer hardship...[26].

In addition, the view is considered (by some jurists) as an ijma (consensus), among the companions because Uamr's decision, upon which Maliki jurists rely in holding their view, was given in the presence of the companions and none of them disagreed with the decision (as it has been explained above).

Maliki jurists are of the view that where the woman does not menstrunte due to brest-feeding, then her iddah lasts for a complete year, after the maximum period of suckling had elapsed, that is two complete years. But if she menstruates even if it is, on the last day of the year, she shall either wait for the second menstruction or wait for the completion of another one year. And if the year elases without menstruating then her iddah comes to an end. But if she menstruates, even if it is on the last day of the year, then she shall wait for

the third menstruation, or the completion of a year. Thus if she menstruates for the third time or one year elapses, her iddah expires.[27]

Where a woman is accustomed to having her menstruation only after long intervals, such as a year or more, Maliki jurist are of the view that she must reckon her iddah by menstrual periods. The same rule applies in the case of a Mustahadah,[28] who can distinguish between Istihadah [29] and her normal menstruation.[30]

With regard to Mustahadah who cannot distinguish between istihadah and her menstruation, she shall wait for nine months (so as to remove suspicion of pregnancy, the nine months being the normal period of gestation) and then observe an iddah of three months.[31]

However, Ibn Hazm is of the view that a Mustahadah whose menstrual discharges (al-Hayd) and the blood of Ishhadah are indistinguishable and who does not know the (exact) period of her menstruation, then if she is a Mubtadi'ah(who has never experienced menstruation), her iddah is three months. This is because she is categorised among those who have never had any menstrual periods, in accordance with Qur'anic verse (65:4) which has been quoted above). But if she is used to having menstruation of a definite period, but she forgets it, then she must wait for such a period within which she will be certain that she should have completed three consecutive

states of purity and two menstrual periods and should have started the third one. Then if such a period elapes, she can, lawfully be married.[32]

8.3.3 Iddah of pregnant woman:

The iddah of pregnant woman expires immediately she delivers. This is in accordence with the Qur'anic verse, 65:4 which provides that:

> "...For those who are pregnant their period is until they deliver their burdens..."[33]

Ibnul Qayyim, in his, Zadul-Ma'ad, commenting on the above quoted verse, says:

> "The expression "Ajluhunna an yada na hamlahunna" (their period is until they deliver their burden), mentioned in the verse, indicates that if the divorcee is pregnant with twins, her iddah does not expire until she delivers both of them. It also indicates that a pregnant woman on whom Istibra is incumbent, must wait until she delivers her pregnancy. It further indicates that the iddah of the pregnant woman expires the moment she delivers the pregnancy, in whatever form she delivers it: whether dead or alive; complete in its creation or imcomplete."[34]

Ibn Hazm and the majority of jurists are of this view. They are even of the view that even if it is alaqah (ie. coagulated blood which is the second stage of the development of a feotus) that she delivers, her iddah expires.[35]

In holding this view, Ibn Hazm quotes a hadith in which the Prophet (S.A.W.) was reported to have said:

> Verily the creation of each one of you is brought together in his mother's belly for forty days in the form of seeds (i.e. semen).[35(b)]

He further quotes the hadith narrated, on the authority of Hudhayfah bn. Usayd al-Ghifariy who said that he heard the Prophet (S.A.W.) saying, "If (pregnancy in a form of semen) passes through forty-two days, Allah sends an angel to it in order to give it (its) shapes: senses of hearing and seeing, its skin, its flesh and its bones and then (the angel) will say, "O my lord male or female ? "He (i.e. Ibn Hazm argues that these two ahadith indicate that the first stage of creating human feotus is the alaqah but not nutfah.[36]

Iddah of pregnant widow: Muslim jurists differ on the iddah of pregnant widow. Thus, the majority of them hold that her iddah is the delivery of her pregnancy. This is by virtue of the general provision of the Qur'anic verse concerning pregnant divorcee (which has already been quoted, i.e. 65.4).

They further substantiate their view with a hadith narrated by Bukhari (with many variants), on the authority of Miswar bn. Makhramah, according to which Subay'ah al-Aslamiyyah gave birth to a child, a few days after the death of her husband. She then came to the Prophet (S.A.W.) and asked permission to remarry and the Prophet (S.A.W.) gave her the permission and she got married.[37] This is the view of Umar and Ibn. Mas'ud.[38]

Some jurists, on the other hand hold that her iddah is the longer period between the two periods provided by the Quranic two verses 65:4 (regarding the iddah of pregnant divorcee) and 2:234 (regarding the iddah of widow who is not pregnant, that is four months and ten days), so as to comply with the two verses, because they are both relevant in her own case, and there is no contradiction between them This is what has been repaorted from Ali bn. Abi Talib, Ibn Abbas and some other Companions of the Prophet (S.A.W.). This is also the view of Imam Malik.[39]

8.3.4 Iddah of a Widow:

The iddah of a widowhood is four months ten days, provided she is not pregnant. This is by virtue of the Qur'anic verse 2:234 which provide that:

> "If any of you die and leave wives behind, they shall undergo, without re-marrying a waiting period of four months and ten days; whereupon when they have reached the end of their waiting-term, there shall be no sin in whatever they may do with their persons in lawful manner. And God is aware of all that you do.[40]

8.4 Conversion of Iddah from One Type to Another:

The type of iddah which the wife has started may change to another, due to the fact that the circumstances in which she was, at the beginning, has changed. The detailed exposition of this is as follows:

8.4.1 Conversion from reckoning by months to reckoning by Quru:

Where a husband divorces his wife, while at the time of effecting the divorce, she was not among those who menstruate, by virtue of her young age or for attaining her menopause, and as such she has started reckoning her iddah by months and then she start her menstruation (before the expiration of the iddah), it is then incumbent on her to convert her reckoning (of iddah) by guru. And the iddah expires after observing three states of purity (tuhur), accordding to Maliki jurists, or three mentrual periods, (hayd), according to Hanafi jurists.[41]

8.4.2 Coversion from rekconing (iddah by guru) to reckoning by months:

Where the husband divorces his wife and the wife, at the time of effecting the divorce, was among women who menstruate and accordingly her iddah was being reckoned by gurus, and then the menstruation ceases for some time, her iddah shall not be reckoned by months, except where she has attained her menopause, according to Hanafi jurists. This is because, according to them, her menstruation may return to her. Thus, her iddah shall continue until she menstruates three times or she attains her menopause. And if she attains menopause (without menstruating), her iddah shall be reckoned by months (that is three months).[42]

Maliki jurists, on the other hand , are of the view that such woman shall wait for nine months from the time of effecting the divorce. And if the nine months elapse and it

is not apparent that she is pregnant, then she shall observe iddah of three months, just as the woman who has attained menopause will do .[43]

8.4.3 Conversion from reckoning by quru or by three months To reckoning by four months ten days:

If a husband effects a revocable talaq, on his wife and then died before her iddah expires, her iddah shall be converted from the iddah of a divorcee to that of a widow, that is four months and ten days (if she is not pregnant). This is because marriage, after effecting the revocable talaq, but before the expiration of the iddah, is legally speaking, considered to be subsisting and the woman as the wife of the divorcer, since he can revoke the talaq and take her back, any time he wants, before the expiration of the iddah.[44]

8.4.4 Coversion from reckoning by quru to reckoning by four months ten days where it is a longer period:

Where a husband effects an irrevocable talaq on his wife, while he is healthy or is suffering from death sickness (maradul - Mawt) but not with the intention to deprive her of her right to inherit him, and then he died, before the expiration of her iddah, the iddah shall not be converted from iddah of divorcee to iddah of widowhood. She shall instead complete her iddah as a divorcee. This is because irrevocable talaq severs the marital tie and as such the woman is not, legally speaking, considered as the wife of the man. Thus, she will not be considered within the meaning of "Azwaj"

(wives) as provided by 2:234 which says, "If any of you die and leave 'wives' behind....

However, where it is apparent that the intention of the husband for divorcing the wife, during death-sickness is to prevent her from inheriting him and then he died after divorcing her irrevocably, but before the expiration of her iddah, then her iddah shall be converted to that of a widowhood (i.e. four months ten days), if the period is longer than the period of the divorcee's iddah. Thus, if she is the type of woman who menstruates, she shall wait for four months and days from the time of the husband's death.

But if four months ten days elapse and she has not menstruated three times, then her iddah will not expire until she menstruates three times. This is the view of Abu Hanifah and Muhammad. This is because, according to them, the wife is, in the circumstance, entitled to inherit the husband and since she is so entitled, then the marriage is dejure subsisting, at the time of the husband's death. Thus, iddah of widowhood is, for this consideration, incumbent upon her. However, since the talaq is irrevocable, the marriage is not de-facto subsisting, at the time of the husband's death and acoordingly iddah of widow is not incumbent on her. It is in view of these two considerations that she must observe her iddah by waiting for a period that can combine the periods of the two types of iddah (i.e. iddah for divorce and iddah for husband's death). And by so doing the shorter period (Between

the two periods of iddah for divorce and that of widow hood) has been assimilated into the longer period.

That is the meaning of saying that she shall reckon her iddah by a longer period (between the above-mentioned two periods).

Maliki, shafi'i and Abu Yusuf, on the other hand, are of the view that she shall only observe the iddah of talaq. This is so because the marriage-tie has been severed, by virtue of the irrevocable talaq and not by virtue of the husband's death. It is only considered subsisting (de-jure but not de-facto), at the time of the husband's death so that the wife may inherit him(contrary to his intention)[45]

8.5 When the Reckoning of Iddah Starts:

The time when iddah starts depends on whether the marriage is valid (sahih) or invalid (fasid).

8.5.1 Where the marriage is valid:

Where the marriage is valid, (and then it is terminated), the iddah starts immediately the marriage is terminated, whether the termination is as a result of talaq or husband's death or as a result of annulment (faskh). Thus, according to jamhur (majority), once the termination occurs, the wife, is considered to have started her iddah; it is immaterial whether she is aware of the termination or not . And the iddah expires once its period elapses. This is because iddah has a

definite period specified by law which must be observed (within the period), after the termination of marriage, irrespective of whether the wife is aware of the cause (sabab) of the termination or not, and whether she is aware of the fact that the time has elapsed or not.

In addition, all Muslim jurists, unanimously agree that if the wife is pregnant and then the husband divorces her or he dies but she is not aware of that fact until she delivers, her iddah will be considered to have expired. Likewise if a non-pregnant wife is divorced or her husband dies and she is not aware of the fact (until the period elapses), her iddah will be considered to have to have expired. There is no difference between one type of iddah and another. Thus, where a woman claims that her husband has divorced her, at a particular time, and the husband denies that fact, but the wife established her claim through the testimony of witnesses, and accordingly, the judge decided in her favour, then her iddah shall be reckoned from the time the witnesses testified that the talaq had been effected and not from the time the decision is given.

But where the wife claims that the husband has divorced her, at a particular time, and the husband acknowledges her claim (regarding both the divorce and the time), or he acknowledges her claim regarding the divorce and denies it regarding the time, even though he could not prove that, then the decision differs, depending on whether there is suspicion

(tuhmah) regarding the acknowledgement of the husband or not. Thus, if there is no suspicion, then the iddah, starts from the time it was claimed that the husband effected the talaq and not from the time he made the acknoeledgement.

But if there is suspicion regarding the acknowledgement, such as where the husband is suffering from death-sickness (maradul-mawt) and collaborates with the wife so that she will get more than what she may be entitled, from the (deceased) husband's estate by way of inheritence. And as such he acknowledges that he had divorced her and her iddah had even expired so that she could be an ajnabiyyah (stranger) and accordingly his bequest for her will be executed. Or where the husband wants to marry the wife's niece or any of the wife's mahrem [46] (and that is why he acknowledges that he had divorced the wife and that her iddah had expired) so that he will be able to marry the niece or the wife's mahrem. In all such cases the iddah is considered to have started from the time the husband made the acknowledgement so as to avoid the suspicion.[47]

8.5.2 Where the marriage is invalid:

Where the marriage is invalid, no iddah is incumbent upon the woman unless sexual intercourse has taken place. Thus, where such intercourse has taken place, the iddah starts from the time the man withdraws from the woman and apparently shows his resolution not to have intimate relation with her again, or from the moment the court separates them. But Zufar

is of the view that her iddah starts from the moment she had her last intercourse with the man. This is becaause the reason for observing iddah, in the circumstance, is the intercourse and not the marriahge per se.[48]

However, Zufar's view is not cogent, because the cause for the iddah is the ambiguity of the invalid marriage, but not the intercourse per se and the ambiguity can only be removed by mutarakah, that is separation between the couple. Thus, the iddah starts only when the ambiguity is removed.

Where a man had intercourse with a woman under shubhah (misapprehension), Ibn Abidin is of the view that none among the muslim jurists had stated the time when the iddah starts. He, however, opines that it shall start from the last intercourse after the misapprehension, namely after realising that the man is not her husband. This, is because it is the intercourse per se that is the cause of the iddah but not the marriage, since there is , legally speaking, no any marriage,(between the couples) under the circumstances.[49]

8.6 Place of Iddah

It is incumbent on the divorced wife to observe her iddah in the matrimonial home where she was residing, at the time of terminating the marriage. This rule applies irrespective of whether the termination has occurred as a result of talaq, faskh or wafat (death). Even if the wife was not at the home, when the termination occurred, she must return to it

immediately. The basis of this rule is the Qur'anic verse which provides thus:

> O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed period: and fear Allah your Lord: and turn them not out of their houses, no shall (themselves) leave except in case they are guilty of some open lewdness.[50]

This verse indicates that husbands are prohibited to turn their divorced wives from matrimonial homes and the divorced wives are also prohibited from leaving the home. And it is a jurisprudencial principle that prohibition (nahy), primarily conveys the meaning of illegality (tahrim) of a thing which the person addressed has been prohibited from. This consequently means that observing iddah in the matrimonial home is obligatory (wajib).

However, Muslim jurists differ on the expression fahishah mubayyinah (open lewdness) which appears in the verse, and which provides an exception to the general rule that has been established by the verse. Thus, Ibrahim an-Nakha'iy holds that the expression means "going out" (from the matrimonial home without any justifiable reason). Accordingly, the divorced women observing iddah must stay at the matrimonial home. On themselves, they should not go out, and the husbands should not turn them out except where they develop the habit of going out (unjustifiably), which is fahishah mubayyinah. This expression is like the statement of "Nobody can abuse the Prophet (S.A.W) except a kafir (non-Muslim)," which means that even if it were a Muslim that abuses him, he

automatically becomes a kafir. Abu Hanifah subscribes to this view.

But according to another view, the expression (i.e. fahishah mubayyinah) means zina (adultery). Thus, it means that the divorced women observing iddah should not leave the matrimonial home nor should they be turned out of it unless they commit zina" in which case they should be taken out (of the matrimonial home) in order to impose hadd punishment, for committing zina, on them. Abu Yusuf subscribes to this view. Ibn Abbas is , however, of the view that fahishah mubayyinah means reculcitrance of the wife and the obscenity of her language against her husband's relatives. This is the over weighing view.[57]

The rule that the divorcee (al-mutallaqah) must observe the iddah in the matrimonial home, was further supported with a hadith narrated, on the authority of Furai'ah bint Malik ibn Sinan the sister of Abi Sa'id al-Khudriy. Furai'ah, according to the hadith, came to the Prophet (S.A.W) and asked him whether she could return to her people Banu Khidrah for because husband went out seeking for his slaves who ran away. When they met him at al-Qadum, they murdered him. (Furai'ah said), "So I asked the Apostle of Allah, 'Should I return to my people, for he did not leave any dwelling house of his own and mantenance for me?' The Prophet (S.A.W.) said, "Yes" She said, "I came out, and when I was in the apartment or in the mosque, he called for me, or he commanded (someone

to call me), and, therefore, I was called, and he said, "How did you say? So I repeated my story... thereupon he said, 'Stay in your house till the term lapses." She said 'So I passed my waiting period in it(i.e. matrimonial home) for four months and ten days. When Usman Ibn Affan became the Caliph, he sent for me about that; so I informed him and he followed it and decided cases accordingly.[52]

However, A'isha, Ibn Abbas, Jabir bn. Zayd, al-Hassan, Ata, Ali and Jabir, hold a contrary view. Thus, according to them, it is not incumbent on the woman to stay at the matrimonial home during the iddah. Ibn Abbas further mentions that: verse 240 of suratul Baqarah (that is Chapter 2) abrogated the rule of passing her iddah period with her people. The verse provides that "A year's maintenance and residence." She may (thus) pass the iddah now anywhere she wishes (in accordance with the said same verse which provides that, "If, however, they leave (of their own accord), there shall be no sin in whatever they may do with themselves."[53] Ata said:

> If she wishes she can pass her waiting period with the people of her husband and live in the house left by her husband, by will or she may shift if she wishes, according to the pronouncement of Allah, the Exalted: 'But if they leave(the residence) there is no blame on you for what they do'. Then the verse regarding inheritence were revealed. The commandment for living in a house (for one year) was (thus) repealed. She may pass her waiting period where ever she wishes.[54]

The jurists also differ on whether it is lawful for the woman observing iddah to be going out of the matrimonial house during the iddah (unless it is necessary to do so). Thus, Hanafi jurists hold that it is not lawful for the woman on whom a divorce, revocable or irrevocable, has been affected, to be going out of her matrimonial home, during the day time or night. But a widow (who is observing her iddah) may go out during day time and (the earlier) part of night, even though she shall not spend the night except in her matrimoinal home.

The difference between the two women, according to the jurists, is that the nafaqah of mutallaqah (divorcee) is incumbent upon the husband and as such it is not lawful for her to go out and that she must observe her iddah in the matrimonial home. Mutawaffa 'anha zawjuha (widow), on the other hand, is not entitled to nafaqah (maintenance) and for that reason she has the right to go out in search of her own livelihood. They, however, maintain that she has to observe the iddah in the house in which she was living, at the time of the termination of marriage (i.e at the time of the husband's death). Where her share in the deceased husband's house is not sufficient for her, or the other legal heirs eject her from their own share, then she must shift to another place. This is because, her staying in the matrimonial home (during the iddah), is an act of 'ibadah (worship) which becomes non-obligatory (on the muslim) where there is jurtifiable reason for not being able to discharge it (as in this case).

Where the matrimonial home is a rented house and the widow cannot afford to continue with the payment of the rent, she is then entiltled to shift elsewhere. This indicates that she is responsible for the rent, which means that she is not entitled to accommodation, even if she is pregnant. Malik, however, is of the view that she is entitled to accommodation, while Imam Shafi'i and Hanbali jurists havetwo opposing view.[55]

Hanbali jurists, on the other hand, are of the view that it is lawful for a woman who is observing iddah, irrespective of whether she is mutallagah (divorcee) or mutawaffa 'anha zawujuha (widow), to be going out during the day time, for her own needs. In holding this view, they rely on the hadith narrated on the authority of jabir who was reported to have said, "My maternal aunt was divorced by three pronouncements, and she went out to cut down fruits from palm-tree. A man met her and forbade her (to go out). So she went to the Prophet (S.A.W) and mentioned it to him. He said, 'Go out and cut down fruits, from your palm-trees, for perhaps you may give alms (sadaqah) or do an act of kindness (out of that)."[56]

Mujahid was reported to have said, "Some men died martyrs, during the battle of Badr so their wives came to the Prophet (S.A.W.) and said, 'We fell lonely and estranged from people, in the night can we then spend our nights with one of us and come back quickly to our houses in the morning? The Prophet (S.A.W) said,'You can chat at (the house of) one of

you, until when you intend to sleep, then every one of you should go back to her house.' "[57]

However, the Hanbali jurists hold that she (the woman who is observing iddah) has no right to spend the nights, except in her (matrimonial) house. She also has no right to go out in the night unless it becomes necessary to do that, because night is the time when fasad (immorality) is suspected to be happening more than the day time.[58]

8.7 Mourning (Ihdad) in Iddah

al-Ihdad (mourning) is for a woman whose husband has died to abstain from adorning herself with beautiful dresses and jewelries and using perfume, during the iddah period.
All muslim jurists unanimously agree that ihdad is incumbent upon a woman who is observing iddah, (al-mu'taddah), due to her husband 's death. This is by virtue of what has been reported, on the authority of Zaynab bint Abi Salamah, the wife of the Prophet (S.A.W.) When her father Abu Sufyan bn. Harb had died she for yellowy perfume, perhaps khaluq (safron) or something else. She rubbed the perfume first on the slave-girl and she wiped it on the side of her face and said , "By Allah! I have no need of perfume but I heard the Messenger of Allah (S.A.W.) says, 'It is not halal for a woman who believes in Allah and the last day to observe mourning for someone who died, for more than three nights, except for four months and ten days in the case of a husband ."[59]

The jurists also unanimously agree that it is not obligatory on a woman on whom revocable talaq has been effected to observe ihdad. This is because marriage -tie has been severed by virtue of such a talaq, and for that reason there is no point to show any sorrow about that. It is rather recommendable for her to adorn and beautify herself, during the iddah period in order to attract the husband so that there may be reconcilialation and consequently restoration of the marital relationship.[60]

They, however, differ on whether a woman on whom an irrevocable talaq has been effected should observe ihdad or not. Thus, Hanafi jurists, hold that ihdad is incumbent on her, because the purpose of ihdad is to show sorrow, regret and despair over Allah's favour of marriage which is a source of both moral and meterial protection to her and which she has lost. And as this may happen in the event of husband's death, it may also happen in the event of talaq ba'in.

Makili and Shafi'i jurists, on the other hand, are of the view that ihdad is not incumbent on her, because ihdad is meant to serve as a mark of sorrow and regret for separating from the husband who has fulfilled his duties in regard to the wife up to the time of his death. But the husband who has divorced her, has inflicted an injruty on her by divorcing her. There is no reason, therefore, why she should be obliged to show any sorrow and sadness for separating from him.[61] This view, it seems, is the cogent one.

8.6.1 Things which a widow should abstain from:

Woman who is observing ihdad is not allowed to use dyed garment except one of the types made of dyed yarn or apply collyrium. She is not also allowed to touch perfume except for a little costus or azfar, [62] when she is purified, after menstrual periods.[63]

Abu Dawud narrated that Umm Salamah, the wife of the Prophet (S.A.W) reported the Prophet's saying, "A woman whose husband has died must not wear clothes dyed with safflower (usfur) or with real ochre (mishq) and ornaments. She must not apply henna and collyrium (jala')[64]

Imam Makil was reported to have said, "A woman who is mourning for her husband, should not put on any jewellery, ring, ankeletes, or such-like, neither should she dress in any sort of colourful, striped garment unless it is coarse. She should not wear any cloth dyed with anything except black, and she should only dress her hair with things like lotus-tree leaves which do not dye the hair."[65]

She should also not put kouhl except where she is suffering from eyesore. Umm Hakim bint Usaid reported, on the authority of her mother that her husband died and was suffering from eyesore. She, therefore, applied collyrium (jala')."[66] Imam Malik was reported to have said, "A woman who is mourning for her husband should not put on any jewellery, ring, ankeletes, or such-like, neither should she dress in any

sort of colourful, striped garment unless it is coarse. She should not wear any cloth dyed with anything except black, and she should only dress her hair with things like Lotus-tree leaves which do not dye the hair."[65]

She should also not put Kouhl except where she is suffering from eyesor. Umm Hakkim bint Usaid reported, on the authority of her mother that her husband died and was suffering from eyesore. She, therefore, applied colyrium (jala)." Ahmad said, "The correct version is, 'glittering collyrium (Kuhl al-jala). She sent her slave girl to Umm Salamah and she asked her about the use of glittering collyrium (Kuhl al-Jala). She said, 'Do not apply it except in case of dire need which is troucbling you. In that case you use it in the night, but you should remove it in daytime. Then Umma Salamah said, 'The Apostle of Allah (S.A.W) came to visit me when Abu Salamah died and I had put the juice of alose in my eye. He asked 'What is this, Umm Salamah? I replied, 'It is only the juice of aloes and contains no perfume. He said, 'It gives the face a flow, so apply it only at night and remove it at daytime, and do not comb yourself with scent or henna, for it is a dye' I asked, 'What should I use when I comb myself, Apostle of Allah? He said'Use lote-tree leaves and smear your head copiously with them."[66]

Ibn Hazm is of the view that she must abstain from Kuhl at any time (day and night), irrespective of whether there is

necessity for that or not (under any circumstances), even if she will loose her sight.[67]

It is obvious that Ibn Hazm's view is contrary to the Shari'ah rule that necessity legalises what is prohibited (al-Daru'at Tubihul-Mahzu'ra't) which is in accordance with the Qur'anic verse (2:173) which provides that, "...But if one is driven by necessity - neither coveting it nor exceeding his immediate need - no sin shall be upon him."[68]

8.8 Maintenance During the Iddah:

Since iddah is one of the legal effects of marriage (because without marriage there cannot be its termination without which there cannot be an iddah), and that the wife, during the iddah period, is not entitled to contract another marriage, the liability to maintain her is on person who has divorced her (i.e. the husband), until her iddah expires. However, it is not every woman that is entitled to such maintenance. Thus, it is only the following women who are entitled to it:-

1] Divorcee observing iddah as a result of revocable talaq. Thus, where a revocable talaq is effected on a woman, she is then entitled to nafagah (i.e. maintenance with all its components: feeding, clothhing,accomodation and medication), during the iddah period. This rule applies whether she is pregnant ot not. This is because the wife, on whom a revocable talaq has been effected, is legally considered as

wife without any difference between her and the one on whom talaq has not been effected), as long as her iddah has not expired. Thus, she is entitled to nafaqah just as the wife on whom a divorce has not been effected. All muslim jurists, including Shia Imamiyyah, unanimously agree on this.

2] Pregnant divorcee observing iddah as a result of irrrvocable talaq. Thus, muslim jurists unanimously agree that a woman on whom an irrevocable talaq has been effected is entitled to nafaqah, during her iddah, provided she is pregnant. This is in accordance with the Qur'anic verse(65:6), which provides as follows:

> (Hence), let the woman (who are undergoing a waiting period) live in the same manner as you live yourselves, in accordance with your means and do not harass them with a view to making their lives a misery. And if they happen to be with child (i.e. pregnant) spend freely on them until they deliver their burden....[70]

The jurists, however, differ on whether a non-pregnant divorcee(on whom an irrevocable talaq has been effected) is entitled to nafaqah, during her iddah or not. Thus, Hanafi jurists hold that she is entitled to full nafaqah, (i.e. lodging, clothing, feeding and general care) just as pregnant divorcee is entitled to that. This is because, nafaqah is due to the wife, before talaq by virtue of the fact that she has been exclusively confined for the fulfillment of the husband's rights which necessitates living in his house. And this confinement (al-Ihtibas) continues even after the irrevocable talaq (but before the expiration of the iddah), whether the

woman is pregnant or not. This is the view of Umar bn. al-Khattab.

Hanbali jurists, on the other hand, are of the view that the woman is not entitled to any nafaqah. This is also the view of Ibn Abbas. In holding thsi view, they rely on the hadith transmitted by Sha'abi that the husband of Fatimah daughter of Qays pronounced, on her triple divorce. And the Prophet (S.A.W.) did not allow her maintenance and dwelling.[71] Shia Imamiyyah subscribes to this view.[72]

However, Maliki and Shafi'i jurists, are of the view that she is entitled to only accomodation (as-sukna). This, they argue, is in accordance with the Qur'anic verse which provides as follows:

> "Let the women (who are undergoing a waiting period) live in the same manner as you live yourselves in accordance with your means...[73]

The verse, according to the jurists, indicates that divorced woman is entitled to accomodation without stipulating a condition that she must be pregnant. This means that a woman on whom an irrevocable talaq has been effected must be provided with accomodation irrespective of whether she is pregnant or not. She is, however, not entitled to feeding and clothing, by virtue of the Qur'anic provision (in 65:6) which provides thus: "...^And if they happen to be with child, spend freely on them until they deliver their burden...[74]

This Qur'anic provision indicates, by its Mafhumul-Mukhalafah (divergent meaning)[75] that feeding and clothing is not due to a divorcee (who is divorced irrevocably) unless she is pregnant.[76]

3] Widow who is observing iddah due to her husbaand's death. All the four Imams (of the Sunni schools) unanimously agree that a woman who is observing iddah due to her husband's death is not entitled to any nafaqah at all. This is because there is no way of imposing it on the deceased husband for immediately he died, his ownership (to his property) comes to an end. Likewise it cannot be imposed on the legal heirs because it is one of the legal effects of marriage. And marriage is a private transaction between the wife and her deceased husband, thus it is legally unacceptable to impose a legal effect of a private transaction by either of the parties on a third party.

However, Malik is of the view that if the house (in which the wife is living during the iddah) belongs to the deceased husband, or it does not belong to him, but he had paid its rent(for the period that covers the iddah period) before he died, she is then entitled to stay in it until her iddah expires, otherwise she is not entitled to that.[77]

But this is not a cogent view because, as it has already been explained, with the demise of the husband, his ownership

to his property has come to an end and that the ownership will be allianated to his legal heirs.

4] Woman who is observing iddah as a result of fasid (invalid) marriage or Shubhah. Thus, where the woman is observing the iddah as a result of a fasid marriage or for having intercourse under Shubhah (misaprehension), she is not entitled, to nafaqah, according to the Hanafi jurists. This is because according to them, the entitlement to nafaqah, during the iddah, depends on the validity of the marriage. And since she is not entitled to nafaqah in a fasid marriage, she is, likewise not entitled to it during the iddah which resulted from having intercourse with her in the fasid marriage.

Maliki jurists are the view that where the woman is pregnant as a result of the fasid marriage or having intercourse with the man under shubhah, she is then entitled to nafaqah. This is because, according to them, she is in the circumstance, confined specifically for the fulfilment of the rights of the man (who has imprenated her) and thus her nafaqah shall be incumbent upon him until her iddah expires But if she is not pregnant, she is entitled to only accomodation. [78]

So far, in this chapter we have discussed Iddah, as one of the legal consequences of the termination of a marriage. The chapter that ffollows will contain an exposition of the

other conseqences of marriage termination i.e. Rada and Hadanah.

FOOTNOTES AND REFERENCES:

1. Anonymous, (n.d), The Holy Qur'an: English Translation of Meaning and Commentary, King Fahd Holy Qur'an Printing Complex 1257-58.

2. Sabiq, S. (1977), Fiqhus-Sunnah, Darul Fikr, Beirut, Vol.II, p. 277; Ahmad, K.N. (198), Muslim Law of Divorce, Kitab-Bhavan, N/Delhi, p. 844.

3. Ibid.

4. Sha'aban, Z. D. (1971), al-Ahkamush-Shar'iyyah... Lil-Ahwalish-Shakhsiyyah, Libya, pp. 522-23.

5. Russell, A.D. and Suhrawardy, A.M. (n.d.), A Manual of the law of Marriage (from the Mukhtasar of Sidi Khalil, Kegan Paul Trench, Trubner and Co. Ltd., London, p. 254.

6. Ibn Abidin, (1318 A.A)), Raddul-Mukhtar, Cairo, Vol. II, p.615, in Ahmad, K.N. (1981), Muslim Law of Divorce, infra at 846.

7. Marghinami, A.A. (n.d.) al-Hidyah N. Delhi, Vol. II, p.134; Ibn Abidin (1318) A.H), Radd-al-Mukhtar, op. cit. at p.615.

8. Ibid.

9. Ibid.

10. Ibid.

11. Ibn Abidin quoted this in his al-Hishiyah, Vol. II, p. 617 from al-Mabsut by as-Sarkhasiy. See Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah... op cit. at p.523.

12. Ruess, A.D. and Suhrawardy, A.M. (n.d.), A Manual of the Law of Marriage.. infra at p. 258; Sha'aban,

13] Asad, M. (1980) The Message of the Qur'an, Dar al-Andalus, Gibralter, p. 50.

14. The seven jurists of Madinah are: Sa'id lbn. al-Muhasayyab, Urwah bn. az-Zubair, Abubakar bn Abdurrahman, Abdullah bn Abdullah bn 'Utbah bn. Mas'ud, Kharijah bn. Zayd bn Thabit, al-Qasim bn. Muhammad bn. Abubakar and Sulayman bn. Yassar (see Sharafudden, A.A. (1969), Tarikhut Tashari' al-Islamiy, p. 69.

15. Malik, I. (1982), al-Muwatta ((translated), Diwan Press, Norwich, England, p. 267.

16. Sharafuddeen, A.A. (1969), Tarikhut-Tarikhut-Tashric al-Islamiy, op. cit. at p. 69.

17. Malik, I. (1982) al-Muwatta (translated), op. cit at p. 267.

18. Ibid.

19. Asad, M. (1980), The Message of the Qur'an, infra at p. 873.

20. al-Hakim, S. M. (1380 A.H), Muntakhabur-Rasa'il, Najaf, p. 110 and Musawi, R. (1390 A.H), Muhktasaru Tawdih al-Masa'il, Najaf, p. 362.

21. Sha'aban, Z.D. (1971), al-Ahkamush-Shar'iyyah... infra at p.. 530-31; Russell, A.D. and Suhrawardy, A.M. (n.d.), A Manual of the Law of Marriage... supra at pp. 256-57.

22. Malik, I. (1982) al-Muwatta (translated), infra at p. 269.

23. Muhajirun are the companions of the Messenger of Allah (S.A.W.) who accepted Islam in Makkah and migrated to Madinah.

24. Ansar (the Helpers are the Muslims of Madinah who welcomed and aided the Messenger of Allah (S.A.W.) and the Muhajirun.

25. Sabiq, S. (1977), Fiqhus-Sunnah, Darul-Fikr, Beirut, Vol. II, p. 281.

26. Asad, M. (1980), The Message of the Qur'an, supra at p. 39.

27. Sha'aban, Z.D. (198) , Al-Ahkamush-Shar'iyyah... op. cit. at p. 531.

28,29. Isihadah is the prolonged flowing of blood outside of the regular time (of menstruation). And Mustahadah is the woman with such prolonged flows of blood. (see: A. Sabiq, S. (1971), Fiqh us-Sunnah (translated), American Trust Publication, Vol. I, p. 72).

30. Russell, A.D. and Suhrawardy, A.M. (n.d.), A Manual of the Law of Marriage... supra at p. 256.

31. Ibid.

32. Ibn Hazm, A.A. (n.d.) al-Muhalla (Manshuratul Maktahatut-Tijari, Beirut, Vol. X, p. 268.

33. Anonymous (n.d.), The Holy Qur'an: English Translation of the Meaning and Commentary, King Fahd Holy Qur'an Printing Complex p. 1766-67.

34. Ibnul-Qayyim, (n.d.), Zadul Ma'ad.

35. Ibnul-Arabiy, A.M.(1968) Ahkamul-Qur'an, Isal-Babiy and Co., Vol. IV, p. 1826.

36. Ibn Hazm, A.A. (n.d.) al-Muhallah, infra at pp. 266-67.

37. Kahan, M.M. (n.d.), Sahih al-Bukhari (translated), Daru al-'Arabiyy, Beirut, Vol. VII, p. 184.

38. Sharafuddeen, A.A (1969), Tarikhut-Tashri' al-Islamiy p.71.

39. Ibid.

40. Asad, M. (1980), The Message of the Qur'an, infra at p. 52.

41. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah..., infra at p. 533.

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid at pp. 535-36.

46. Mahrim is a relative, male or female with whom marriage is prohibited. The plural is Maharim. Two females who have relationship in such that if one of them were male marriage between them is unlawful, such as two sisters, a woman and her aunt, are also considered as maharim. And marriage to such female relatives by one man simultaneously, is haram (prohibited).

47. Sha'aban, Z.D. (1980), alAhkamush-Shar'iyyah... infra at p. 538.

48. Ibid.

49. Ibid.

50. Anonymous (n.d.), The Holy Qur'an: English Translation of the Meaning and Commentary... supra at 545.

52. Hasan, A. (1985), Sunan Abu Dawud (translated), al-Madina Publications (P) Ltd, Vol. II, p. 625; Nasa'i, Ibn Mahaj and Trimidh al narrated the same hadith.

53. Ibid.

54. Ibid. at pp. 625-26.

55. Sabid, S. (1976), Fiqhus-Sunnah, infra at p. 286.

56. Hasan, A. (1985), Sunan Abu Dawud (translated), supra at p. 623.

57. Sabiq, S. (1976), Fiqhus-Sunnah, infra at p. 287.

58. Ibid.

59. Malik, (1982), al-Muwatta, (translated), infra at p. 273; Hasan, A. (1985), Sunan Abu Dawud (translated), infra at p. 624.

60. Sha'aban, Z.D. (1980) al-Ahkamush-Shar'iyyah.. infra at p. 549.

61. Ibid.

62. Azhar is an odoriferous substance resembling fingernails, used in incense (see: Hasan, A. (1985), Sunan Abu Dawud, infra at p. 626.

63. Ibid.

64. Ibid. at p. 227.

65. Malik, I. (1982), al-Muwatta (translated), infra at p. 274.

66. Hasan, A. (1985), Sunan Abu Dawud, infra at p. 629.

67. Ibn Hazm, A.A. (n.d.), al-Muhalla

68. Asad, M. (1980), The Message of the Qur'an, supra at p. 35.

69. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah..., supra at p. 542; Ahmad, K.N. (1981) Muslim Law of Divorce, infra at p. 850.

70. Asad, M. (1985) The Message of the Qur'an, infra at p. 873.

71. Hasan, A. (1985), Sunan Abu Dawud, Supra at p. 620.

72. Ahmad, KI.N. (1981), Muslim Law of Divorce, op. cit., at p. 850.

73. Asad, M. (1985), The Message of the Qur'an, op. cit., at 873.

74. Ibid.

75. Mafhunul-Mukhalafah (Divergent Meaning) is a meaning which has been derived from words of the text in such a way that it diverges from the explicit meaning thereof. (see Kamali, M.H. (1989) Principles of Islamic

Jurisprudence, Pelanduk Publications (M), Malaysia, p. 166.

76. Sha'aban, Z.D. (1980), al-Ahkamush-Shar'iyyah..., infra at pp. 542-43.

77. Ibid. at p. 544.

78. Ibid.

Chapter 9

9.0 RADA (SUCKLING) AND HADANAH (CUSTODY OF CHILDREN) AFTER TERMINATION OF MARRIAGE

Once marriage is terminated, certain effects immediately follow. Some of these effects are in form of legal rights, while others are in form of duties. Some of these rights and duties, i.e. iddah and its legal effects, have been extensively discussed in the previous chapter. In this chapter other rights and duties, which are consequent upon the termination of marriage, i.e. rada' (suckling) and hadanah (custody of children), will be extensively discussed.

9.1 Rada (Suckling)

Mother is undoubtedly the closest, most compassionate and most affectionate person to her child. And her breast milk is more useful more nutritious and more important to the child than any other food because it is natural and suitable under all conditions. For this reason, suckling of babies is made obligatory on mothers by the Shari'ah. Thus the Quran (2:233) provides that:

> "Mothers shall give suck to their offsprings for two whole years, for him who desires to complete the term..."[1]

This verse indicates that it is incumbent on mothers to suckle their children. Thus all Muslim jurists unanimously agree that it is incumbent on the mother, from religious point of view (diyanatan), to suckle her child, during the subsistence of her marriage (with the child's father), or

after its termination or even after the expiration of her iddah. And if she refuses to do that while she is capable of doing so, she is considered to have committed a sin.

The jurists, however, differ on whether it is a legal obligation on the mother to suckle the child or not. Thus Maliki jurists are of the view that it is incumbent on the mother to suckle the child during the subsistence of the marriage (between her and the child's father), or during the iddah following a revocable talaq effected on her by him. Where she refuses to do so without any justifiable cause she can be coerced to do that by the judge. This is because it is her legal obligation which she must discharge. This is on condition that her family or her people usually suckle their children. Thus if she happens to be among those who do not usually suckle their children by virtue of either their wealth or nobility, then it is not legally obligatory on her to do so, provided the child accepts the suckling of another woman and the child's father has the means to pay for the services of another woman. But if the child refuses to accept the suckling of another woman or that the child or its father lacks the financial ability to pay another woman for the suckling, then it becomes incumbent on the mother to suckle the child so as to protect his or her interest.[2]

The jurists (i.e. Maliki jurists), in holding this view, rely on the fact that before the advent of Islam, the wives of the wealthy and noble people were exempted from suckling their

children and the children were taken to other women (especially in villages) who suckled them. When Islam came and found the practice, it did not stop it. It, instead continued among the wealthy and nobel among the muslims. This indicates that the exemption of the noble women from suckling their children is an exception of the general rule provided by the Qur'anic verse (2:233) that "...Mothers shall give suck to their children..."[3]

It is not incumbent on the wife who has been divorced irrevocably to suckle her child born to her husband who has so divorced her, even if her iddah has not expired. This is by virtue of the Qur'anic verse (65:6) which provides that "....'And if they nurse your offspring give them their (due) recompense..."[4]

In this verse, husbands have been instructed to pay their wives whom they have divorced irrevocably, for suckling their children. This is an indication that the suckling is not incumbent on them, otherwise they would not have been entitled to any remuneration for it.

Hanafi jurists are of the view that even though it is, morally speaking, compulsory on the divorced mother to suckle the child, it is not her legal duty to do so. Thus where she refuses to suckle the child, even if she is capable of doing so, the court shall not coerce her to do that, except where

the suckling has become obligatory. And it becomes obligatory in the following three circumstances:-

[a] Where the father of the child is so poor that he has no means to pay the murdi'ah (that is the woman who suckles the child), and the child has no financial means and there is no one who has offered to suckle him or her voluntarily.

[b] Where it is not possible to get a wet-nurse to suckle the child with or without remuneration.

[c] Where, even though a wet-nurse is available, the child refused to accept her suckling.

In any of the above-mentioned circumstances, the mother shall be coerced to suckle her child so as to protect his or her interest. The jurists' reason for holding this view is the fact that suckling is the right of both the child and the mother. And that legally speaking, no one shall be compelled to accept (or claim) his or her right which is due to him or her, except where there is a cause that necessitates the compulsion. Moreover, mother is the most compassionate person to her child. That is why if she refuses to suckle the child, her refusal is deemed to be an indication of her inability to do so. Thus compelling her (to do so) is tantamount to inflicting harm on her (which will make her suffer). And to make a mother to suffer for the sake of her

child is unlawful by virtue of a Qur'anic verse (2:233) which provides that, "...Neither shall a mother be made to suffer because of her child, nor, because of his child he who has begotten it..."[5]

However, if the mother refuses to suckle the child, and the suckling is not compulsory on her, it is then incumbent on the husband to engage the services of a wet-nurse in order to suckle him or her so as to save his or her life.

Where the services of such a woman has been engaged to suckle the child, she must do that at the mother's residence. This is because hadanah is her right, and her refusal to suckle the child shall not forfeit her of that right for each one of them (i.e. the suckling and the hadanah) is independent of the other. Thus the waiver (or forfeiture) of either of them shall not automatically lead to the forfeiture of the other.[6]

But if the father refuses to engage the services of a woman to suckle the child, the mother is entitled to claim from him remuneration for the suckling so as to get some other woman to suckle him or her. And if he refuses to pay the remuneration, she has the right to institute a legal action against him and the court shall decide the case in her favour.[7]

9.1.8 Entitlement of mother to remuneration for suckling the child:

As to whether a mother who suckles her child voluntarily or under coercion, is entitled to remuneration for the suckling, there are three cases:

1] Where she suckles the child in wedlock or during the iddah as a result of revocable talaq, she is not entitled to remuneration. This is because, husband, on reciprocal basis, is obliged to provide nafaqah (maintenance) for her, under both of the circumstances. This is the view of the Hanafi jurists.

Maliki jurists are of the same view, provided the suckling is incumbent on the mother. Thus if it is not, that is where she comes from a noble family whose women usually do not suckle their children, then if she suckles the child, she is entitled to remuneration.

The basis of the view that mother is not entitled to remuneration under the two circumstances (mentioned above) is the Qur'anic verse (2:233) which provides that:

> Mothers shall give suck to their offspring for two whole years, for him who desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms...[8]

2. Where the mother suckles the child, after the expiration of the iddah, or where she is observing iddah of widowhood (iddatul-wafat), then she is entitled to remuneration for the suckling. All muslim jurists unanimously agree on this. This is by virtue of the Qur'anic verse (65:6) which provides

that: "... If they suckle your (offspring), give them their recompense..."

Allah (S.W.T), in this verse, enjoins men categorically to pay their divorcees the remuneration they deserve for suckling their children. In addition, providing maintenance for the (child's) mother is not incumbent on the (child's) father, in the circumstance, because marriage-tie between them has been severed and for that reason all its legal effects have ceased immediately the iddah expired or the husband died. Thus to impose the duty to suckle the child on the mother without remuneration, in spite of her weakness and for the fact that her maintenance (on the husband) has been discontinued (by virtue of the termination of the marriage and the expiration of the iddah), is tantamount to inflicting injury on her which is harmful.

3. Where the mother suckles the child during the iddah of an irrevocable talaq, then she is, according to Maliki jurists, entitled to remuneration for the suckling. This, they argue, is in accordance with the Qur'anic verse (65:6), which has been quoted under number 2, above. The verse indicates that it is incumbent upon the husbands to remunerate their wives on whom they have effected irrevocable talaq, for suckling their children. And the fact that the divorced wives are pregnant who are entitled to feeding and accommodation shall not make them forfeit them of their right to remuneration for suckling the children. This is because

either of the two (i.e. feeding with accommodation and remuneration for suckling the children) is due for a specific reason. Therefore, the fact that either of them is due cannot cause the forfeiture of the other.

Hanafi jurists, on the other hand, have two opposing views, the first of which is that she is not entitled to remuneration for the suckling. They argue that since she is entitled to nafaqah during the iddah of the irrevocable talaq, she is not entitled to remuneration for the suckling, just as in the case of a wife or a divorcee observing iddah from revocable talaq. But according to the other view, she is entitled to remuneration for the suckling because irrevocable talaq severs marriage-tie by virtue of which the wife becomes an ajnabiyyah (alien). Thus, if she suckles her child (born to the husband), she is, under this circumstance, entitled to remuneration.[10]

It is obvious from the previous discussion that the mother, according to Maliki School, is only entitled to remuneration for suckling her child (after termination of marriage) where the suckling is not incumbent upon her, that is where she is a sharifah ((i.e. a woman of high status who does not usually suckle her child by virture of her nobility or wealth).

But the criterion, according to Hanafi jurists is whether the mother is entitled to nafaqah (maintenance in form of

feeding and accommodation), or not. Thus where she is entitled to the nafaqah (that is where the marriage between the child's parents is subsisting or where the marriage has been terminated but the iddah has not expired), then she is not entitled to the remuneration. And if she is not entitled to the nafaqah (that is where, after the termination of the marriage, the iddah has expired), then she is entitled to the remuneration. She is also entitled to the remuneration where she enters into a mutual agreement with her husband to waive her right to nafaqatul-'iddah (maintenance during the iddah) as a consideration for obtaining Khul'.

9.1.2 Period within which mother is entitled to remuneration for the suckling

All Muslim jurists unanimously agree that the period within which the mother is entitled to remuneration for suckling her child is two years only, which is the maximum period of suckling, according to Qur'anic verse, 2:233 (quoted above). Thus if the child has reached two years, the mother is not entitled to seek remuneration for the suckling. And this is not subject to either mutual agreement between her and the child's father or judicial decision.[12]

9.1.3 Circumstance for deserving the remuneration

Where the Murdi'ah (the woman who suckles the child) is a different woman other than the child's mother, whose services has been engaged by the child's father, she shall be entitled to remuneration from the date of the agreement (of the suckling).

Where the murdi'ah is the child's mother who is neither the wife of the child's father nor mu'taddah (who is observing iddah) of revocable talaq (because she has been divorced by the child's father and her iddah has expired) but has undertaken to suckle the child by virtue of mutual agreement between her and the child's father, she is then entitled to remuneration from the time of the agreement. And where there is no such agreement, she will be entitled to the remuneration from the moment she has actually started the suckling. This is the view of the Maliki school.

But Hanafi school, on the other hand, is of the view that she is entitled to the remuneration from the moment she has actually started the suckling, as proclaimed by Ibn Nujaim the author of al-Bahrur-Ra'iq, or from the time she has made the claim to the remuneration, as proclaimed by the author of ar-Rams.[13]

The legal implication of these juristic differences is obvious where the child's mother suckles the child without any contractual agreement in respect of the remuneration between her and the child's father and then intends to claim it. In such a case, according to Maliki school, the court shall decide in her favour, their reason being that Allah (S.W.T), in the Qur'an (65:6), has made the entitlement to remuneration for the suckling conditional to performing the suckling, where He says:

> "...If they suckle your (offspring), give them their recompense..."[14]

Thus where the suckling has actually taken place the child's mother is then entitled to the remuneration, whether there has been many contractual agreement to that effect between her and the child's father or not. Secondly, entilement to remuneration for suckling the child by the child's mother is customarily known and accepted, which is, legally speaking, considered as a stipulated condition in a contract. Thirdly, the parents (of the child) may not have possibly entered into any mutual agreement, regarding suckling the child with remuneration while the mother may (urgently) be compelled to (start) suckling the child so as to protect the child from perishing. If the mother is not entitled to remuneration until after reaching a mutual agreement between her and the child's father, the delay before the agreement would be detrimental to the child.

However, the court shall not, according to the Hanafi school, decide in her favour. This is because, according to them, what the mother receives for suckling the child is a remuneration like any other remunerations (for rendering some services), which can only be deserved if there has been contractual agreement to that effect. Thus, she will not be entitled to it unless there has been a contractual agreement to that effect, or an indication in lieu of that, such as demanding for the remuneration before starting the suckling. If, accordingly, she suckles the child without any contractual agreement to that effect (and without demanding for it before

she actually started the suckling), she is then not entitled to the remuneration.[15]

9.1.4 Mother is given preference to other women over suckling

Since mother is more compassionate, more affectionate and more sympathetic to her child than any other person, she is regarded as more entitled to suckle it than any other woman. Thus if she desires and offers to suckle the child gratuitously without any remuneration, then the father has no right to prevent her from doing so. This is because suckling the child by its mother safeguards and protects the child's interest and is sare and not harmful to the father. Thus there is no any justification for preventing the mother from suckling it. Moreover, preventing her from suckling the child, in the circumstance, is tantamount to treating her unfairly which is haram (unlawful) by virtue of the Qur'anic verse (2:233) which provides that: ... No mother shall be treated unfairly on account of her child....[16]

But if she wants to suckle the child with remuneration, while the suckling is not incumbent on her, she is, according to the more preponderant view of the Maliki school, the most entitled to do so and shall be paid a proper remuneration which is commensurate to her own status, from the child's property if it has any, otherwise the child's father shall pay the remuneration, irrespective of the fact that he has got some other woman to suckle the child free of charge or with remuneration less than the one to be paid to the mother, even

if that other woman will suckle the child in the same place where the mother is living.

Hanafi school, on the other hand, is of the view that where she wants to suckle the child with remuneration, while she is neither the wife of the child's father nor observing iddah as a result of being divorced by him, she is then more entitled to suckle the child, than any other woman. The only exception to this rule is where another woman volunteers to suckle the child, or where she has voluntarily accepted to suckle it for a remuneration less than the one demanded by the mother. This is by virtue of the Qur'anic verse (2:233), quoted above by the Maliki jurists, which provides that: "...No mother shall be treated unfairly on account of her child. No father on account of his child..."

And it is an unfair treatment to the child's father to compel him to pay remuneration for suckling his child demanded by the child's mother while someone has offered to do that voluntarily or with remuneration less than the one demanded by the her. This rule applies irrespective of whether the child's father is mu'sir (poor) or musir (well-to-do). The child's mother shall, in the circumstance, be given three options: (i) To suckle the child voluntarily; or (ii) with the remuneration accepted by the other woman (which is less than the one demanded by her) or (iii) give it up to the other woman (for suckling).

However, where the mother has chosen the third option (i.e. to surrender the child to the other woman), it is incumbent upon the woman to undertake the suckling at the mother's residence, or somewhere else but shall bring him back to the mother, (so as to be under her custody). This is so because the custody (hadanah) is a right of the child's mother which cannot be forfeited by virtue of her refusal to suckle the child voluntarily.[18]

9.1.5 The quantum of the remuneration:

The quantum of remuneration for suckling the child paid to the child's mother, is determined in accordance with ajrul-mithl (proper remuneration) that is the remuneration which a woman other than the mother will accept for suckling the child. And this is left to the discretion of the court. If, accordingly, the mother demands a remuneration which is higher than the ajrul-mifhl, her demand shall not be granted.[19]

9.1.6 Who is responsible for the remuneration:

Suckling, to the child at its early age, is the food which it needs for its survival. It is through suckling that the child gets its nourishment which is necessary for its development. Thus payment for the remuneration of the suckling through which the child gets its food) is the responsibility of the father who is responsible for providing the child with maintenance, including food. This is in accordance with the Qur'anic verse (2:233) which provides that:

> The mother shall give suck to their offspring for two whole years for him who desires to complete the term, but he shall bear the cost of their food and clothing on equitable terms...[20]

And also in accordance with 65:6 which provides that:

> ....If they suckle your (offspring), give them their recompense...[21]

The two verses indicate that it is the responsibility of the mother to suckle the child, while the father is responsible for maintaining her, if she is his wife de facto (during the subsistence of their marriage) or de jure (after revocable talaq but before the expiration of the iddah). Thus where she is not so, he shall not be responsible for her maintenance and for that reason he must pay her for suckling their child, provided the child has no property out of which the recompense (remuneration) can be paid. But if the child has such property, then the remuneration shall be paid out of it. This is so because, suckling is in place of nafaqah (maintenance) of someone which does not become incumbent on another person unless there is a necessity that warrants it. And there is no such necessity in the case of a child who has some property (out of which the remuneration for suckling him can be settled).[22]

Where the father is poor (faqir) and the child has no any property, it is then incumbent on the mother to either suckle the child herself or engage the services of another woman to do so and pay her the remuneration. And where she does so, she is not, according to Maliki jurists, entitled to claim

reimbursement either from the child or from the child's father even if either of them later becomes solvent.

Hanafi jurist, on the other hand, are of the view that, where, due to the insolvency of the child's father the services of another woman could not be engaged, in order to suckle the child, the child's mother shall be compelled to suckle it herself. And if she is so compelled she will be entitled to remuneration which, in the circumstance of the insolvency of the child's father, it shall be a debt against him to be settled whenever he becomes solvent unless the mother waives it. This is because, the jurists argue, the remuneration is not considered as a nafaqah but as a good debt which never lapse, even in the event of the death of the child or its father, in which case she must be paid her remuneration out of the estate of the deceased child or father.[23]

9.2 Hadanah (Custody of Children)

Hadanah is the act of bringing up and orientation of a child, morally, physically and mentally, within a specific period of time, by someone who is entitled to do so.

The muslim jurists define it as bringing up of a child (whether male or female), or an idiot person who cannot distinguish between what is useful and otherwise and who also cannot take care of himself independently.

However, hadanah is discussed in this chapter as one of the legal consequences of talaq and not in its general context. And this type of hadanah is obligatory because without it the child will be exposed to destruction.[24]

9.2.1 Hadanah as a concurrent right:

Hadanah is a concurrent right enjoyed by both the child and its mother. In other words, as it is the right of the child, because it needs someone to take care of and protect it and look after it, it, is the right of the mother to do so. This is by virtue of the hadith narrated by Ahmad, Abu Dawud, Bayhaqi and al-Hakim, on the authority of Abdullah ibn Umar in which it was reported that a woman came to the Prophet (S.A.W) complaining that her husband (who had divorced her) wanted to take away her child born of him by her. The Prophet (S.A.W) told her that "You are more entitled to have his custody."

Since the child is entitled to hadanah, the mother shall be coerced to undertake it, where it becomes obligatory. And it becomes obligatory where the child needs her care and there is no other woman to take care of it properly.

However, where the hadanah is not obligatory, that is where the child has a grandmother and she has agreed to undertake it (hadanah), the right of the child's mother, shall, in the circumstance, be forfeited.[25]

Where the child's mother seeks for khul' from her husband (who is the child's father, on the condition that she will leave her child, who really needs hadanah, with the husband, the khul' is valid. But the hadanah shall not be forfeited, if, there is fear that the forfeiture will cause harm to the child by virtue of its attachment to the mother, or because the place where the child's father is residing is insecure. Thus, if the forfeiture of the hadanah will not cause any harm to the child, the mother's right in the hadanah shall, according to Maliki school, be forfeited. However, the hadanah shall not, in the circumstance, be transferred to the father; it shall, instead be transferred to the woman who is entitled to it after the mother. And the father is not entitled to take the child away from her and and hand it over to another woman (of his choice), except where there is legal justification to do that.[26]

Where the murdi'ah (who suckles the child) is different from the hadinah (who has the custody of the child), the murdi'ah must reside where the hadinah resides so that she will not be forfeit of her right to hadanah.[26]

However, majority of the jurists, are of the view that hadanah is a concurrent right between three persons: the child, the custodian [that is the mother of the child or any other person entitled to the hadanah] and the father [of the child or his representative]. Where these rights consistently and harmoniously meet together, they shall, then be fulfilled

but in the case of conflict [between them], the child's right shall prevail. This is because protecting the child from destruction and safeguarding its interests is the most important purpose of the hadanah. [27]

9.2.2 Hierarchy of the custodians:

Human being, in his tender age, is in need of some one who will take good care of him and manage all his affairs. This is because at that age he is incapable of controlling and managing his affairs and accomplishing his needs. Since parents are the closest people and the most compassionate people to the child, the Shari'ah vests in them the right to its custody, with due consideration to what serves its interests best. Thus, the Shari'ah puts the responsibility of rearing the child, managing its affairs and taking care of it generally, during its early age, in the mother's hand or other female custodians. But the other affairs of the child, especially its financial ones,have been put in the its father's hand, [or his representative], because he is regarded as more capable in managing these affairs than woman. And when the child reaches the age whereby he is independent of women's services [and support], in terms of conducting its affairs on its own [such as eating, wearing cloth, bathing, going to toilet etc], then male guardians are totally charged with the responsibility of supervising and controlling its affairs. This is because when the child has reached that stage, he is in dire need of someone who will be supervising

its affairs in respect of his education, orientation and moral protection. And men have more ability to do that than women.

From the above explanation, it is clear that women are more entitled to the custody of their young children. The hierarchy of those who are entitled to that right (among the woman), are as follows:

1. Mother, whether the marriage between her and the child's father is subsisting or not;
2. Mother's Mother [HHS] where the mother is not available or she is available but she is legally speaking, not competent to be the custodian;
3. Father's Mother;
4. Germane Sister;
5. Uterine Sister;
6. Consanguine sister;
7. Germane Sister's daughter;
8. Consanguine Sister's daughter;
9. Germane maternal aunt;
10. Consanguine maternal aunt;
11. Paternal aunt;
12. Consanguine Sister's daughter;
13. Germane brother's daughter;
14. Uterine brother's daughter;
15. Consanguine brother's daughter;
16. Germane paternal aunt;
17. Consanguine paternal aunt;
18. Mother's maternal aunt;

19. Father's maternal aunt;

20. Mother's paternal aunt;

21. Father's paternal aunt;

In each case preference is given to germane aunt [whether paternal or maternal].

In the absence of anyone from amongst the above mentioned hierarchy of the child's relatives, or if such relative though available but is not competent to be the custodian, then the right of the custody shall be transferred to the child's asabah [agnatic relatives], in order of their priority in inheritance. Thus the order shall be as follows:-

1. Father
2. Father's Father [HHS];
3. Germane brother;
4. Consanguine brother;
5. Germane brother's son;
6. Consanguine brother's son;
7. Germane paternal uncle;
8. Consanguine paternal uncle;
9. Father's germane paternal uncle;
10. Father's consanguine paternal uncle.

Where none of the above-mentioned child's relatives [among the asabah] is available or is available but is not competent, then the hadinah shall be transferred to his non-agnatic relatives, in the following order:-

1. Maternal grandmother;

2. Uterine brother;

3. Uterine brother's son;

4. Uterine paternal uncle;

5. Germane maternal uncle;

6. Consanguine maternal uncle;

7. Uterine maternal uncle

Then in the absence of any relative of the child, the judge shall appoint a hadinah [a female custodian] for the chaild. [28]

Where there is more than one custodian of the same degree such as germane sisters or germane paternal aunts, then preference shall be given to the one who is more compassionate who will take better care of the child between such custodians. But where they are equal in that respect, the one who is older (between them) in age, shall be given preference, because she tends to be more experienced and more acquainted with what is beneficial to the child. And where they are equal in that respect, then giving preference to one of them shall be by drawing lots (qur'ah) [29]

However, the child's father or his representative, is, in any case, entitled to watch over and supervise the child's affairs and send him to school and where he can be taught an occupation (sina'ah).

Whether the hadinah is the child's mother or not, she is entitled to receive the nafaqah (maintenance) for the child from the child's father. And the father has no right to demand that the child should be coming to him to eat, because this will inflict harm on the child. That is why the hadinah is not, legally speaking entitled to make an agreement with the child's father to that effect.[30]

9.2.3 Conditions for the hadanah

The upbringing of children is a serious issue that needs special attention. That is why the Shari'ah stipulates certain conditions that must be fulfilled before the person claiming the custody of the child (after termination of marriage) is entitled to it. This is because it is only by virtue of fulfilling these conditions that the desired goals of the child's upbringing can be achieved. Some of these conditions are general the fulfillment of which is obligatory whether the custodian is a man or a woman; some of them are peculiar to men while others are peculiar to women. The detailed exposition of these conditions is as follows:

The general conditions: Before a custodian, is entitled to the child's custody, the following conditions must be fulfilled, whether the custodian is a man or a woman:-

1. That the custodian must have attained majority. Thus a person who is a minor, even if he or she has attained the age of discernment (tamyiz), is not entitled to the hadanah. This

is because definitely a minor cannot take care of his or her own affairs properly, let alone the affairs of others.

2. That the custodian must be sane, because an insane person, like a minor, cannot take care of himself let alone of others. There is even fear that, by virtue of his or her insanity, he or she may inflict injury on the child.

3. That the custodian must have the ability to perform his or her duties as a custodian, in protecting the child and managing all its affairs and rendering all the services needed by it. Thus, a person who, by virtue of his weakness, due to old age, or sickness or by virtue of his too much engagements, is not able to perform these duties properly, is not entitled to be a custodian.

4. That the custodian must be morally upright. Thus a person who is morally bankrupt (fasiq) is not entitled to the hadanah. This is because there is fear that she or he may not take good care of the child, in addition to the fact that the child may be influenced by the custodian's immoral behaviours.

However, Abu Hanifah is of the view that where the custodian is morally corrupt, and for that reason there is fear that the child may be influenced by the custodian's moral corruption, she or he will still be entitled to the custody of the child until the child reaches the age of discernment, that is, according to him, seven years (of his or her age), or when there is fear that he or she may be familiar with the bad characters of the custodian, even if he or she is not up to seven years old. The custodian's right to hadanah, shall

therefore, be forfeited under the circumstance so as to protect the child from being corrupted morally.

5. That the custodian must be free from any contagious disease, such as leprosy leucoderma, mange [jirb] and the like. Thus where the custodian is suffering from one of such diseases, he or she is not entitled to the hadanah, even if the child is suffering from the same disease, because being with the custodian[with such disease] may increase the child's disease. This is the view of Maliki and Hanbali jurists.[31]

Special conditions in respect of Women: Where the custodian is a woman, the following, conditions' in addition to the above mentioned general conditions, must be fulfilled;

1. That the custodian must be one of the Maharim of the child, that is a female relative who has ties of consanguinity with the child, by virtue of which marriage between them is permanently prohibited, such as the child's mother, sister, maternal or paternal aunt, grandmother, etc. Thus if there is no such relationship between the custodian and the child, then the custodian is not entitled to the child's custody, even if there is foster relationship between them that creates permanent prohibition in marriage such as the child's foster mother or foster sister. The rule does not apply where the custodian has relationship of consanguinity with the child, which does not create permanent prohibition in marriage between them, such as paternal or maternal aunt's or uncle's daughters [i.e cousins].

2. That the custodian must not be married with someone who is ajnabi' to the child [i.e. an alien who has no any relationship with the child] or with whom, though there is consanguine relationship between him and the child, he is not among the child's maharim. Thus if she is married with the child's mahrim, such as his or her paternal uncle or grandfather, her right to the child's custody shall not be forfeited. This is by virtue of the hadith according to which a woman was divorced by her husband and then he attempted to take away their child from her and she complained to the Prophet [S.A.W.] and he told her, "you are more entitled to have his custody, provided you have not married." The explicit meaning of this hadith indicates that marriage by the custodians makes her forfeits her right to the child's custody, even if it is with the child's mahrim.

However, Hanafi, Maliki and Habali jurist are of the view that it is only marriage with an ajnabi or with the child's relative who is not a mahrim. that makes the custodian to forfeit her right to custody [hadanah]. In holding this view, they rely on the reason why the Shari'ah has made the re-marriage of the custodian to be the cause of the forfeiture of her right to the custody, that is the fact that the husband [to the subsequent marriage], may hate the child and regard it as an unnecessary burden on him. But this will not be the case where the husband[to the subsequent marriage] is one of the child's maharim. This is because [the mahrem of child]

is by virtue of the relationship between him and the child is usually affectionate to it just as its father. [32]

3. That she must not be [living] in the residence of someone who hates the child, even if there is consanguine relationship between him and the child, because this will expose the child to danger and harm, while the main purpose of hadanah is to protect and safeguard the child from any danger and harm. Thus, if the child's mother has married someone who is an ajnabi to the child as a result of which her right to hadanah has been forfeited and the hadanah transferred to her mother, (i.e. the child's grandmother) then if the mother's mother lives at the house of her daughter's husband [i.e. the husband of the child's mother who is not its father], the child's father is entitled to take it away from her. But if she lives in someone else's residence such as the residence of the child's maternal aunt's husband, then her right to the hadanah, shall not be forfeited, because this category of ajnabi does not, normally hate the child.[33]

4. That the custodian must be a muslim, if the child is a muslim. This is because hadanah [child's custody] is a form of wilayah [guardianship] and Allah [S.W.T.] has not given the guardianship of a muslim to a non-muslim. This is by virtue of the Qur'anic verse [4.141] which provides that, "Never will Allah grant to the unbelievers a way [to triumph] over believers."[34] This Hadanah is like guardianship of marriage and that of property (al-mal). And also because there is fear that the custodian may have negative influence on the child due to her religious belief (which is not in consonance with

the Islamic belief). This is because she may desire to bring it up in accordance with her religion, and it will be difficult for it to change later, which is the greatest harm that may afflict it.[35]

However, Hanafi and Maliki jurists are of the view that, it is not a a necessary condition that the woman custodian must be a Muslim. This rule applies in respect of mother and other custodians, even if she is a Kitabiyyah except that the Hanafi jurists stipulate that she must not be a murtaddah (i.e. an apostate woman). This is because a Murtaddah, according to them, shall be detained until she repents or dies in detention. She cannot, thus, have the opportunity to have the custody of the child. If, however, she repents, her right to hadanah shall be returned to her.[36]

But the jurists (i.e. Hanafi and Maliki jurists), differ regarding the maximum period within which the child can be with the non-muslim custodian. Thus, the child shall, according to the Hanafi jurists, remain with her until such a time when it can comprehend religious issues, that is seven years, or when it becomes obvious that she teaches the child her own religion, or she takes it to her place of worship, or she acquaint it with drinking or eating the Islamically unlawful food, such as pork and wine. Accordingly, if the child reaches that age the non-muslim custodian's right to hadanah is forfeited.

Maliki jurists, on the other hand, are of the view that the child shall remain under the custody of the non-Muslim woman up to the end of the prescribed period of hadanah. And the child shall not be taken away from her before the expiration of the period. However, she must be prevented from feeding him with unlawful food, such as pork and wine. And where there is fear that she will do so, the child shall be put under the surveillance of someone who is morally upright) to protect it from being corrupted (morally).[37]

The view of the Hanafi jurists, it seems, is more cogent than that of the Maliki jurists in that it is more protective to the child's interest (morally and otherwise, for it provides caution than the other view).

Specified conditions in respect of men: Where the custodian is a man, then, the following specific conditions, in addition to the general ones, must be fulfilled, before the custodian becomes entitled to the hadanah:-

1. That the custodian must be a muhrim relative, if the child is female. Accordingly, a man is not entitled to the hadanah of his uncle's daughter (i.e. his cousin), because, even though, he is her relative, he is not her mahrim. Thus in order to block this dhari'ah (means of committing evil), he shall not be given the right to her custody. However, as an exception to this rule, the judge may, (if he deems it right), give him her custody in the absence of any of her agnate

except him, provided he is confidently reliable about her own moral safety.

2. That the custodian must be living with a woman who is competent to take good care of the child, such as wife, mother or maternal or paternal aunt. This is because naturally man has less endurance with children's behaviour, trouble and inconveniences attached to taking care of them than a woman. Thus, if he is not living with a woman, then he is not entitled to hadanah. This is the view of the Maliki jurists,[38] which is the prepondarant one.

3. As to whether the custodian must be a muslim or not, the jurists differ. Thus the Hanafi jurists are of the view that he must be a Muslim. Accordingly, a non-Muslim is not entitled to the custody (hadanah) of a muslim child. This is because hadanah is a form of wilayah (guardinaship). And a non-Muslim is not supposed to have wilayah over a Muslim. And also because the right of men in hadanah, according to Hanafi jurists, is based on their rights in inheritance, and it is a general principle under the Shariah that people who belong to different religions do not inherit each other.

Maliki jurists on the other hand, do not subscribe to this view. Thus, being a Muslim, according to them, is not a condition for being entitled to have the right of hadanah by men. This is because the custodian is not entitled to hadanah except where he is living with a woman who is competent to take good care of the child, such as wife, or mother or paternal or maternal aunts. Thus, in actual sense it is the

woman who has the custody of the children. And Maliki and Hanafi jurists, unanimously agree that being a Muslim is not a condition for deserving the hadanah by a woman.[39]

9.2.4 Forfeiture of the right of hadanah:

Where the person who is entitled to hadanah has not claimed it, then his right to it, shall, according to Maliki school, be forfeited, provided the following conditions have been fulfilled:-

1. That the custodian must have been aware of the existence of the right. Thus if he is unaware of its existence and for that reason he or she keeps silent, (i.e. he or she did not claim it), the right shall not lapse no matter how long the period of the silence is.
2. That the custodian must be aware that silence forfeits his or her right to the hadanah. Thus, if he or she is ignorant of that, his or her right shall not be forfeited due to the silence. This is because issues are not clear to many or even majority of people.
3. One complete year must have elapsed from the time when the custodian came to be aware of the right. Thus if it is less than one year, the right shall not be forfeited.

However, where the right to hadanah has been forfeited for some reason (which causes it to be forfeited legally), and then the reason later is abated, Maliki jurists are of the view that if the reason (for the forfeiture) is something involuntary on the part of the custodian, the hadanah, shall

return to him or her. But if the reason is something caused voluntarily by him or her the hadanah shall not return to him or her, even if the reason has been abated.

If, accordingly, the custodian fell so sick that she is not able to take care of the child, or where she travels in order to perform an obligatory Hajj, or where the guardian of the child has travelled to a town and settled there and has taken the child along with him, and then the sick custodian recovers from the sickness or the custodian who travelled to perform Hajj returns from the hajj, or the guardian of the child returned to her town, the hadanah, in all of these circumstance, shall return to her. This is because the reason for the forfeiture, in the circumstance, has not been caused voluntarily by the custodian.

But if the custodian (where she is a woman) marries an ajnabi and the marriage is consummated or where she transfers her residence to another place, far away from the place where the guardian's residence is, and for that reason her right to hadanah was forfeited, and then the marriage is terminated (through talaq or the husband's death) or she returns to the place where the guardian resides, then hadanah, in all these cases will not return to her. This is because the reason for the forfeiture of the hadanah, in the circumstances, is voluntary.

Hanafi, Shafi'i and Hanbali schools, on the other hand, are of the view that where the right to Hadanah was forfeited due to some reasons and then the reasons are abated, the hadanah, shall return to the custodian irrespective of whether the reason is a voluntary act of the custodian or not. Accordingly, if the custodian married a man who is not a muhrem of the child (and for that reason she forfeited her right to hadanah, as it has already been discussed), and then the marriage is terminated (through talaq or the husband's death), her right to hadanah shall return to her. This is because the reason for the forfeiture has been abated.[40]

9.2.5 Expenses for the hadanah:

Expenses for hadanah consists of three things:-

1. Remuneration (paid to the custodian);
2. Rental of the dwelling place where the custodian and the child reside during the period of hadanah.
3. Provision of servant for the child.

Remuneration to the custodian: Maliki jurists are of the view that the custodian is not entitled to any remuneration. However, they opine that where the custodian renders some services (such as washing the cloth, preparing food, etc) to the child because the child is incapable of doing them, then the custodian is entitled to remuneration for such services.

Hanafi jurists, on the other hand, are of the view that hadanah is a sort of job for which the custodian is entitled to remuneration, unless it is done gratuitously. However,

where the custodian is the child's mother and the wife of the child's father, or is observing iddah, after a revocable talaq has been effected on her by him, then she is not entitled to any remuneration for the hadanah. This is because she is entitled to maintenance, by virtue of the subsistence of the marriage tie, or by virtue of the fact that she is observing iddah (of revocable talaq and thus the marriage is in fact subsisting). The rule also applies where her iddah has not expired after irrevocable talaq, according to one view of the Hanafi school."

The view of the Hanafi school, is legally speaking, the preponderant view, because hadanah is a sort of service rendered to the child by the custodian. And it is an established rule of the Shari'ah that any person who rendered a service to another person, is entitled to remuneration which is binding on the person to whom the service has been rendered, unless the service has been so rendered gratuitously.

When the custodian is entitled to the remuneration: The remuneration for the hadanah, according to the Hanafi jurists, (who are of the view that the custodian is entitled to remuneration) is similar to remuneration for rada' (suckling of the child), in respect of the date from which the custodian is entitled to claim remuneration. Thus, if an agreement has been made between the custodian and the child's father regarding a specified amount of the remuneration, or if the

court has given decision to that effect, the custodian is entitled to the remuneration as fixed under the agreement or the court's decision.

But where such agreement (between the custodian and the child's father) has not been made, or the court has not given such decision, then if the custodian is not the child's mother, she is not entitled to the remuneration for the period within which no such agreement has been made, except where the court has given decision to that effect. This is so because remuneration for hadanah is just like remuneration of any other service which is not due unless there has been an agreement (between the parties) or judicial decision to that effect.[42]

But if the custodian is the child's mother, she is entitled to remuneration from the moment the hadanah commences, after the expiration of her iddah, irrespective of whether an agreement has been reached (between her and the child's father or his representative) or not, or whether a decision has been given to that effect by the court, or not.[43]

Where remuneration for hadanah is due, it shall be treated as the remuneration for rada'. Accordingly, it shall be paid out of the child's property. But if the child has no property, then the person who is responsible for its maintenance (nafaqah), that is its father, shall pay. And if the father is financially incapable to pay, the remuneration

shall be debt binding on him which he must settle whenever he becomes financially able to do that.

Where the child's father is not available, or where he is incapable to earn a living then the remuneration shall be binding on the child's relative who is responsible for its maintenance.

Where the remuneration for hadanah is due, it cannot be forfeited due to the lapse of time, or that of the child or death of the person who is responsible for the payment of the remuneration, or that of the custodian.[44]

Dwelling for the Custodian: The second thing under the expenses of the hadanah, is dwelling for the custodian. Thus, where the custodian is in need of dwelling for bringing up the child, then she must be provided with one. This is because dwelling is part of maintenance.

The custodian is legally considered to be in need of dwelling where, at the time of deserving the right to hadanah, she is living with an ajnabi, (who is an alien) to the child and as such it becomes necessary, for her to transfer to a separate place for bringing up the child, and there is no one who is responsible for her dwelling. Thus, where she lives in a separate house owned by her or by someone, or where she lives with someone who is an ajnabi to the child but there is someone who is responsible for her dwelling, then payment for

the rental of the dwelling is not incumbent on the person who is responsible for the child's maintenance. This is because the child cannot have a dwelling separate from the custodian. Rather, it is dependant on the custodian. And since the custodian has a dwelling in which it is possible for her to bring up the child, there is no reason why the rental of dwelling should be paid by the person responsible for the child's maintenance. This is the Hanafi jurist's view.

Maliki jurists have divergent views on this issue, according to one of which it is incumbent on the child's father to rent a dwelling for the hadanah, according to the child's need only. And it is the descretion of the court to decide which dwelling is suitable to the child's need. This is the famous and prepondenrat view which has been explained in al-Mudawwah[45] and other references (of the Maliki School). The second view is that it is incumbent upon the child's father to rent a dwelling where both the child and the custodian can reside. This view is similar to that of the Hanafi School. And it is more cogent than the other view because there is no justification to compel the custodian to pay the rental of the dwelling after she had been compelled to live with the child in order to bring it up.

Servant for the child: Where the child needs a servant, it must be provided with one and the remuneration of the servant shall be paid by the child's father, provided he is financially capable of doing that.[46] In al-Muwadawwanah, it has been provided that:

> Where the person, having the right to hadanah, takes the child (with him), the (child's) father is responsible for feeding, clothing and providing dwelling for the child. It is also incumbent on him to provide the child with the servant in case he or she needs one, provided the father is well-to-do.[47]

9.2.6 Remuneration for the hadanah while there is a volunteer:

Hanafi school is of the view that where there is someone among the child's relatives, who is competent to have the custody of the child and he or she volunteers to do that, while the child's mother has refused to do that except with remuneration, then, if the child's father is well-to-do, it is incumbent on him to pay the mother the remuneration. And the child shall be left with the mother, because this is more advantageous to it.

However, where the child's father is poor (Mu'sir), the hadanah, in the circumstances, shall be transferred to the volunteer, since the father is unable to pay the remuneration and there is someone who is competent, among the child's relatives who has volunteered to do so free of charge. This rule applies only where the child's nafaqah is incumbent on the child's father (that is where the child has no property from which it can be maintained). But even if the child has such property, he or she shall be under the custody of the volunteer. This is in order to protect the child's property,

on one hand, and because there is someone among its relatives who has volunteered to take the responsibility of its custody, on the other.

Where the child's father is poor and the child has no property, and then the child's mother refused to accept its hadanah until she is paid remuneration while there is no one competent among the child's maharim who has volunteered to take up its custody, its mother shall, in the circumstance, be coerced to take up his or her hadanah and the remuneration shall be debt owed by the child's father which must be settled (by him) or be waived (by the mother) [48]

9.2.7 Transfer of custodian to another place and its effect on the hadanah:

The place of hadanah, after divorce and after the expiration of the iddah of the child's mother (where the custodian is the child's mother), is where the child's father, (or someone in his position) resides. Thus, the muslim jurists differ on whether the custodian is entitled to travel away [with the child] from the child's father (or any other guardian of the child) to some other place, with the intention to settle there (permanently). The Hanafi jurists categories this issue into three:-

a) Where the custodian is a divorced mother of the child and the child's father is available, and then the mother intends to transfer to another town (away from the father), with the child. In this case the mother is not entitled to do so, unless two conditions have been fulfilled, which are:-

i. That the talaq effected on her must have been irrevocable and where it is revocable her iddah must have been expired, otherwise she is not entitled even to leave the matrimonial home without a justifiable cause, until her iddah expires;

ii. That the town (or village) to which she intends to transfer must not be very far from the town (or village) where the child's father resides, in such a way that it is not possible for him to go and visit his child and come back on the same day, notwithstanding that the means of the transportation is fast or not.

However, the custodian is entitled to transfer to a far place on the following conditions:-

i. That the marriage (between her and the child's father which was terminated) was contracted at that place;

ii. That the place (to which she has transferred) is her country (or hometown).

b) Where the father is available but the custodian is not the child's grandmother, maternal aunt and the like, then she is not entitled to move away from where the child's father is residing, (with the intention of settling there permanently) under any circumstance, except with the permission of the father.

Conversely, the child's father is not entitled to transfer with the child, from the hometown of the child's mother (where she resides) as long as she is entitled to the

custody of the child. Thus, if she re-marries (another man), the father is entitled to do that, so long as the marriage is subsisting. But whenever her right returns to her (that is when the marriage is terminated), he must return (from where he has transferred).

c) Where the child's father is dead and the mother is observing her iddah, she is not entitled to transfer her domicile to another town (or country), with the child (from where the child's guardian resides), except with the permission of the guardian. But after the expiration of the iddah, some jurists hold that the child's guardian is entitled to prevent the child's mother from such transfer (with the child). The preponderant view, however, is that this is left to the discretion of the judge. And he shall do what he deems best in the protection of the child's interest.[49]

Maliki school is of the view that the custodian (even if she is the child's mother) is not entitled to travel with or without the child, to some town (or country) away from where the child's father or guardian resides, unless the following conditions have been fulfilled:-

i. That the distance between where she is travelling and where the child's father or guardian is residing, must be less than seventy-five miles (that is one hundred and thirty three kilometers).

ii. That the travelling (of the child's mother) must not have been undertaken with the intention of transferring her domicile to that place (to which she has travelled). Thus, if

the travelling has been undertaken for the purpose of trading (tijarah) or for other similar purposes, then she is entitled to undertake the travelling without forfeiting her right to hadanah. Not only that, she can even take the child along with her. However, the child's father or guardian is entitled to make her swear that her travelling is for the purpose which she has claimed (i.e. trading and similar purposes). And even so, she can only take the child with her in the circumstance, if the distance (between where she is travelling to and where the child's guardian resides) is short, provided the road and the place to which she is taking the child are safe.

Where the child's guardian intends to change his domicile from one town or country to another, he is entitled to take the child along with him, even if the child is being suckled (radi'), provided it accept the suckling of another woman. In such a case, the right of the child's mother to hadanah shall be forfeited, unless she agrees to travel with the child (to where the guardian has transferred). However, this rule shall apply only if the distance between where he is living and where he is moving to is one hundred and thirty three (133) kilometers and above. Thus, if the distance is less than that, then he is not entitled to take the child along with him, because in that case he will be able to watch over its affairs from where he is (since it is not too far).

Shafi'i jurists are of the view that where the custodian or the guardian intends to travel for the purpose of trading or for similar other purposes, the child shall remain with either of them who is not travelling until the other who has travelled comes back. But where either of them has undertaken to travel, with the intention to change his domicile, the child shall be with one of his or her agnates (asabah), that is its father and his relatives, whether the agnate is traveling or not, provided another agnate is not available where the custodian resides, otherwise the child, if he is a mumayyiz, shall be given option to live with either of them.[51]

Hanbali school is of the view that where either of the child's parents intends to undertake a journey to another locality, the child shall live with his or her father, even if it is he (i.e. the father) who is undertaking the journey, provided:-

i. that the distance from the two localities is such that it entitles one to performing qasr (i.e. shortening the obligatory sallahs from four to two raka'ahs); [54]

ii. that both the road and the locality to which the journey is being undertaken is safe;

iii. that the journey must have been undertaken for the purpose of changing domicile. Thus if it is for the purpose of trading or for performing Hajj, then the child shall be living with the muqim (the one not undertaking the journey) between them.

iv. that the intention of the child's father (for undertaking the journey) must not be the infliction of injury on the child's mother or to seize take it away from her. Thus if that is his intention, he will not be entitled to take the child along with him. However, where both of the parents travel to the same place (with the purpose of changing their domicile), then mother's right to her child's hadanah shall continue. And where the father has moved to another place and as a result the mother forfeited her right to hadanah and then later, she moved to that place, the right shall return to her.[52]

9.2.8 Father's right to see the child:

Where the child is with his or her mother, or with some other custodian, she has no right to prevent its father from seeing it. However, she will not be coerced to be sending the child (to the father's house). But she shall, instead, be ordered to be sending it to a certain place where it will be possible for the father to see it. This rule also applies where the child is living under the guardianship of its father, that is when the mother's right to hadanah has been forfeited, or when the period of the hadanah has elapsed. Accordingly, the father has no right to deny the child's mother to see her child. However, it is not incumbent on him to be sending the child to the mother's residence purposely to

enable her to see it. But he must take the child to a place whereby the mother will be able to see it.

As to how frequent the mother or the father or the guardian of the child is entitled to see it, the muslim jurists differ. Thus, the Maliki jurists are of the view that the (subsequent) husband (of the child's mother) has no right to prevent the children of his wife (born to the previous husband), to enter into his house so as to enable their mother to see them. However, if their frequent entering into the house causes injury to the husband, then her small children shall be allowed to enter the house, every day, so that she will be able to know about their condition. But her grown-up children shall be allowed to enter the house once in a week.

But the child's father, according to the jurists, (i.e. Maliki jurists), is entitled to take care of the child's education and orientation, which necessitates that he must see and meet the child from time to time. That is if it has reached the age of schooling. And if it has reached that age, then the father is entitled to see it everyday.[53]

Hanafi school has no categorical decision regarding the specified age-limit, within which either of the parents is entitled to see the child. However, an analogy between this case and the wife's right to visit her parents (about which the school has categorical decision) has been drawn. The

jurists of this school contend that as the child's mother is entitled to visit her parents once in a week, likewise she is entitled, on analogy, to see her child once in a week. This is because, in the former case, it is the descendant (far') who visits the ascendant while in the later case it is the vice-versa. Thus, the relationship between the two cases is the same, in the sense that it is the relationship between ascendants and descendants. The same rule also applies in the case of other relatives of the child, such as maternal aunt, even though she is only entitled to see the child once in a month. This is, however, not the famous view of the school.[54]

8.2.9 Lapse of hadanah

The muslim jurists differ on the exact time when hadanah elapses. Thus the Maliki jurists are of the view that it elapses, in the case of a male child, when he attains majority. And by attaining majority his hadanah elapses even if he is lunatic or sick, according to their famous view. But if it is the female child, the hadanah elapses when she marries and the marriage is consummated.[55]

Some of the Hanafi jurists are of the view that if the child is male, the hadanah elapses when he becomes seven-year old, but, according to others, when he becomes nine-year old. But in respect of the female child, they are of the view that the hadanah elapses when she sees her first menstruation (that is when she reaches the age of majority), according to one of their views, while according to the other view, the hadanah

elapses when the girl reaches the age of being admired (by men), which is nine years.

Thus when the male child is seven-year old, his father, according to the jurists, is entitled to take him away from the mother (or any other custodian). And if the child has become of age and he or she is sane and rational (rashid or rashidah), he or she is entitled to be independent (of the father), except where he or she is morally bankrupt (or there is fear that he or she will become so, in which case his or her father or one of his or her relatives, is entitled to have an authority of guardianship over him or her so as to discipline him or her.

When the female child becomes bikr (young matured virgin girl who has never married), her father or grandfather can take her away from the custodian. And if neither of them is available, her brother can take her, provided he is not morally corrupt, otherwise her paternal uncle, who is morally upright, can do so. Then in his absence, a muharrim, among her paternal relatives, will have the right to take her. And if there is no such relative, then the court shall put her under the care of a trustworthy woman, except where she has become elderly (even though she has never married), in which case she shall be given option to choose where to live.

But where she has become a thayyib (a matron who has once married but she is not married at the moment), her father has

no right to take her, except where she is not trustworthy regarding herself (for being morally corrupt), in which case the father or his father (i.e. her grandfather) is entitled to take her by coercion. And in the absence of both of them, her brother or paternal uncle is entitled to take her, provided he is not morally corrupt, otherwise, the court shall give her over to a trustworthy woman. [56]

Shafi'i school holds that, hadanah has no definite time within which it elapses. Accordingly, if the child can distinguish between its father and mother, then it is entitled to choose to be with either of them. It is also entitled to be given an option to choose between his or her mother and grandfather or between him or her father and uterine sister or maternal aunt.[57]

Hanbali jurists are of the view that, the hadanah elapses, in respect of both male and female, when the child is seven. Then after reaching seven, it is legally allowed, in the case of male child to live with either of the parents, if they mutually agree on that. But in case of dispute between them, regarding the issue, the child shall be given option to live with either of them. And his choice shall be given effect, provided that the choice is not detrimental to him, such as where he has chosen the parent that will be too lenient to him to the extent of being negligent in disciplining him. Thus where it is understood that the choice is detrimental to him, he shall be compelled to live

with the parent who will bring him up properly and instill discipline in him.

Where the child is female, the jurists are of the view that, after reaching seven or more years, it is the right of her father that she shall live with him, until she attains majority and gets married, even if her mother has offered to bring her up without remuneration. This is because the main purpose of hadanah is to protect and discipline the child which the father provides better than the mother. And if the father has taken her, she shall be with him (under his care), day and night but her mother shall not be prevented from seeing her. The same rule applies where the child is with the mother. Thus the child shall be with the mother day and night but the father shall not be prevented from visiting her. And in case she is sick, her mother is more entitled to sick-nurse her than the father (but) in the house of the child's father, provided that he will not seclude with the child's mother.[58]

9.2.9 Option to choose where to live, given to the child after the expiration of hadanah

Where the child's parents dispute, after the expiration of the hadanah, on the right to have the child, the muslim jurists differ on whether the child shall be given option to choose to live with either of the parents or not.

The Hanbali jurists hold that when the hadanah expires (that is when the child is seven, according to them), and the

child's parents dispute about whose right it is to take the child, then if the child is male, he shall be given an option to choose either of his parents with whom to live. If he chooses to live with his father, he will then be with him day and night, but he shall not be prevented from visiting his mother. And in case he falls sick the mother is more entitled to sick-nurse him in her residence.

But where the child has chosen his mother, he will be living with her during the night time and with the father during the day time so that the father will be able to educate, discipline and teach him how to write.

The child can change his mind, at any given time, and if he does so, he shall be returned to whom he has chosen (between the parents). And no matter how many times he makes the change, the choice shall be considered.

Where the child is given the option but has not chosen either of the parents, or has chosen both of them, the choice shall be determined by lot (qur'ah). However, if he later chooses the parent upon whom the lot has not fallen, he shall then be returned to him or her. This option is given to the child only where both parents are among the competent custodians. Thus, where either of them is not competent, then the child shall be with the competent one among them.[59]

The jurists (i.e. Hanbali jurists), in holding their view, rely on the hadith transmitted by Abu Dawud, on the authority of Abu Huraira, that a woman came to the Prophet (S.A.W) and said, "O the Apostle of Allah! My (former) husband wants to take away my child (from me), while the child fetches water for me from Abu Utbah's well, and does other services that benefit me." Thus the Prophet (S.A.W) said to the child, "This is your father and this is your mother. Hold the hand of either of them you want." And the child held his mother's hand, so she went away with him.[66]

In addition, Ibnu Qudamah, asserts that this is the consensus of the Prophet's Companions, because there have been many reports that Umar Ibn al-Khattab, Ali bn Abi Talib and Abu Hurairah gave similar decisions. And these reports are famous and well-known and no one among the Companions expressed his disagreement with them which amounted to ijma' (consensus).[67]

The jurists are of the view that where the child's father is not available, any of the child's aganates, such as his brother, uncle and uncle's son (i.e. cousin), shall be in his father's position. And accordingly, the child shall be given option to choose between his mother and one of his aganates. This is in accordance with the decision of Ali, because it was reported that he gave Ammarah al-Jurmiy, the option to choose between his mother and his uncle, when he was seven or eight years old.[62]

However, the jurists, are of the view that if the child is female, her father is more entitled to take her after the expiration of the hadanah and thus she will not be given option to choose between her parents. [63]

The reason for that, according to Ibn Taymiyyah, is that giving the female child this option, will cause her shuttling (and up and down) between the parents which will consequently lead her to too much exposure and tabarruj (displaying her charms). In addition, her father who is more capable to provide (moral) protection to the child than her mother will not have proper control over her, which may consequently lead her to moral corruption.[64]

Shafi'i jurists are of the same view with Hanbali jurists, except that they do not distinguish between male and female children and that they do not fix a specified time within which the child will be given the option, after the expiration of the hadanah.

Abu Hanifa's view (adopted by the Hanafi school) is that the child shall not be given any option to choose between either of his or her parents. But instead, if the child is male his father is more entitled to take him, whenever he is not in need of the services which are usually rendered to children by their custodians, in such a way that he can eat his food, do his toilet and wear his dress independently, without the help of the custodian. The reason why he will not

be given the option, is that his view is not, legally speaking, considered as a valid view (since he is a minor), because he does not have the mental capacity to distinguish between good and bad; useful and useless things. Thus, there is tendency for him to choose the parent who will allow him to do whatever he wants, even if it will be detrimental to him which will consequently cause his moral corruption or even his destruction. But if the child is female, her mother is more entitled to retain her until she marries or attains majority.[66]

Malik is of the same view with Abu Hanifah in that the child, whether male or female, shall not be given the option to choose between either of his or her parents. He, however, differs with him in that the male child shall be under the custody of his mother until he attains majority and then be under the guardianship of his father (or someone in the father's position). And the female child shall be under the mother's custody until she marries and the marriage is consummated.[67]

Ibn Hazm is of the view that the moment the child has attained majority and is sane, he or she is entitled to live wherever he or she wants. And there is no distinction, in that regard, between male and female children. He is however, of the opinion that if there is fear that the child may be committing evil deeds such as drinking, tabarruj or takhlit (indiscriminate intermingly between two sexes), if she or he is allowed to live independently then the child's father or

any of his aganates, or the hakim (the muslim leader), or neighbour, has the right to lodge the child where his or her affairs can be supervised. To substantiate his view, he quotes the Qur'anic verse (6:164) which provides that, "... Every soul draws the meed of its acts on none but itself..."[*]

He further quotes Salman al-Farisi's saying, "Give everyone who deserves a right his due," and contends that there is no justification, then to make a distinction between male and female children, regarding this issue, or to regard marriage as a condition to the female child's right to choose where to live after the expiration of the hadanah.

It is obvious from the above discussion on the option given to the child to choose to live with either of his or her parents, after the expiration of the hadanah, or to prefer either of the parents to the other, that there is no general rule agreed upon unanimously among the Muslim jurists. But instead, they unanimously agree that there are no hard and fast rules as to whether either of the parents should be given preference to the other. Rather, the child's interest and safeguard are the main criteria of preferring one parent to the other. If, for instance the child's father is negligent or incapable to take care of the child but the mother is not so, then she is more entitled (than the child's father) to take the child.

Ibnul Qayyim is of the same view. Thus, he has been reported to have held that preferring one parent to the other, whether by giving option to the child to choose (between his or her parents), or by qur'ah (lot), or by the child's personal choice, depends on whether it will safeguard the child's interests or not. Thus, if the mother is more zealous and more vigilant in protecting and safeguarding the child's interest than the child's father, then she shall be given preference to him, without any need to have recourse to qur'ah, or to the child's choice, under the circumstance. This is because the child may prefer idleness and playing.

He (Ibnul-Qayyim) then quotes the Qur'anic verse (66:6) which provides as follows:

> O ye who believe! Save yourselves and your families from a fire whose fuel is men and stone, over which are (appointed) angels stern and severe...[70]

In this verse, muslims are enjoined to guard not only their own conduct, but also the conduct of their families and of all who are close and dear to them. Thus if the mother will guard the child's conduct by taking it to school, teaching it the Qur'an, while the child prefers playing with its friends, and the father support it in that, then she is more entitled to take the child without the need of having recourse to qur'ah or giving the child option to choose (between his or her parents). Conversely, if it is the father who takes the child to school, while the mother allows

him to play with children (without going to school), then the father is more entitled to take him.[71]

From all that has been explained, in this chapter, regarding rada' and hadanah, it is obvious that the child's interest has been taken care of properly, by the Shari'ah, right from its birth, up to the time when it will be strong enough to take care of itself. That is why, as it has been explained, the child is entitled to be suckled, even in the circumstance whereby the marriage (between the parents) has been terminated. The child must also be taken care of, even after the suckling period (the maximum of which is two years) has expired, by its parents or their relatives. There are certain legal rights and obligations, regarding this issue which have been discussed extensively. The child's right to choose to live with either of his or her parents, or to give one of the parents preference to the other, regarding this issue, has also been discussed, including the divergent views of the Muslim jurists, regarding the issue.

FOOTNOTES AND REFERENCES

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Chapter 10

SUMMARY AND CONCLUSION

This chapter is the summary of our discussions on termination of marriage as discussed in the previous chapters. In this chapter, some critical observations, on what is practically obtaining in our society, including our courts, as regards termination of marriage (and the issues related to it), will also be discussed. And finally some recommendations will be given with a view to finding lasting solutions to the problems affecting our family system as a result of violating the rules of Shari'ah in the process of the termination of marriage, a violation which has adversely affected the entire society resulting in very serious moral crises which we are witnessing today.

10.1 The Summary

It has been discussed that where a marriage contacts fails to achieve its objectives it is fruitless to insist that it must subsist. This is because insistence on its subsistence may give rise to many evils. That is why the Shari'ah gives permission to both parties to the marriage, to terminate it and provide some channels through which they can actualize this, so as to protect them, their family and the society at large, from the possible evils that may emanate as a result of the failure of the marriage.

10.1.1 Methods and Channels through Which Marriage can be terminated:

Since both of the spouses are permitted, by the Shari'ah to terminate or seek to terminate their unsuccessful marriage, it provides various channels through which they can do so. Accordingly, the husband is allowed to terminated the marriage by means of talaq. And he is allowed to suspend the talaq to a future time or make it conditional to the happening of certain thing. This is in order to give both of the spouses an opportunity to think twice before taking a final decision concerning their separation (as a result of the purported talaq).

There are also several channels open to the wife through which she can get the marriage terminated. She can thus seek the termination by means of khul' (termination of marriage with consideration). And whenever she seeks for it, it is not the right of the husband or even that of the court to deny her that right. In addition to these channels, some of which are specifically for the husband, there is another channel through which either of the spouses can seek the termination of the marriage, i.e. judicial action. Accordingly, either of them can institute a legal action seeking the termination of the marriage, in the circumstances where either of them finds some defect with the other which consequently makes a happy companionship between them or the discharge of his or her obligations impossible. Moreover, the wife can institute a legal action (for seeking termination) for lack of nafaqah

(maintenance), husband's cruelty to her, and his absence (which is harmful to her) for whatever reason.

Where the husband refuses, intentionally to have conjugal relationship with his wife, for the period of four months and above, is another ground for the wife to seek for the judicial termination of the marriage. And under the circumstance, the husband must be ordered, by the court, to either discharge his marital duty (of having conjugal relationship with the wife) or divorce her so as to save her from the husband's injustice or possible moral corruption.

From the foregoing explanation, it is clear that there are various ways of terminating marriage open to both spouses. Thus, it may be through the husband's initiative, the courts decision on wife's initiative (for a legitimate reason) and the wife's initiative without even a "cause", provided that she returns to the husband the sadaq she received from him. This shows that, contrary to the misconception of those who are ignorant of the Shariah rules, concerning these issues, woman has more advantage in terminating her unsuccessful marriage than man.

It is worth noting that termination of marriage has certain consequences which affects both the spouses, their children and the society at large.

10.1.2 Legal Consequences of Marriage Termination

Certain consequences follow the termination of marriage.[3] Some of these consequences include the iddah, i.e. a waiting period within which the divorcee shall wait before she can re-marry. The real significance of the iddah is to give the spouses an opportunity to reconsider their decision on the termination and possiblly reconcile and return to marital life together. The other significance of iddah is to ascertain the paternity of the child that may be born after the termination of the marriage. That is why iddah has been prescribed under various circumstances as it has been explained in chapter 8.

Another consequence is that after the expiration of the iddah, the divorcee is free to re-marry. With regard to the husband, where he has four wives and effects a revocable talaq on one of them, he cannot marry another woman until the iddah of his divorced wife expires. This is because before the expiration of her iddah, she is legally speaking, considered his wife; that is why he can, at any time, before the expiration of the iddah, revoke the talaq and take her back.

Another consequence of the termination of marriage is that the spouses may, at the time of terminating the marriage, have a small child who is being suckled or who though has been weaned, is of tender age. And for that reason he or she needs a good custody where he or she can be brought up properly. In view of the fact that it is generally not incumbent on the divorcee to suckle the child, she is entitled to be paid for

the suckling. But alternatively the husband can get another woman to suckle the child. However, where the mother offers to suckle the child free of charge, the father has no right to take away the child to another woman for suckling, whether the woman will do so gratuitously or with remuneration. With regard to the custody of the child after divorce, the Shari'ah provides that, it is both the right and duty of the mother to take the child's custody so as to give him or her proper moral, mental and physical orientation,within a specified period of time, even though the muslim jurists differ regarding the length of the period. And because the custody of a child is a very serious matter, certain conditions have been laid down by the Shari'ah which must be fulfilled before the person claiming it is entitled to it, otherwise the up-bringing of the child will be seriously affected which will consequently have a serious repercussion on the moral values and even security of the society.

10.2 Observation

It is obvious that termination of marriage (particularly talaq), is a measure that cannot be avoided, under certain circumstances, because it is supposed to serve as an effective remedy of many social evils.

However, if we examine the practices of the muslims in our society or even of our courts of law, regarding it, we will find that, in many cases, it aggravates our social problems instead of solving them. Following are some few

examples of malpractices of both the courts and muslims in our society, regarding it:-

10.2.1 Regarding power to divorce:

Despite the fact that power to divorce has been vested primarily in the husband, some muslims, by virtue of their relationship with either of the spouses, feel that they are entitled to terminate the marriage, because they do not want it to continue, justifiably or unjustifiably. This happens mostly, where it is the husband's father or his mother that does not want the marriage to subsist, in which case he or she will just pronounce talaq on the wife thinking that this will terminate the marriage (without the same being ratified by the husband). And many people, out of ignorance of the rules of Shari'ah regarding the issue, will consider the action as a valid talaq. The worst part of it is that the wife, as a result of this so-called talaq, will observe the iddah, after the expiration of which, she will remarry. And it is a known fact, legally speaking, that such subsequent marriage is invalid, because the woman is still the wife of the first husband for marriage between them is still subsisting.

The husband is, in some cases compelled by his parents (especially, his mother) to divorce the wife just because the wife has offended her. But as it has been discussed (in chapter 2) any talaq effected by the husband, under compulsion, is ineffective.

It may, however, be argued that parents, especially the father, are entitled to order their son to divorce his wife, by virtue of Abdullahi Ibn Umar's hadith, according to which, his father Umar ibn al-Khattab ordered him to divorce his wife because he hated her. And Abdullahi complained to the Prophet (S.A.W.) on that but he told him to comply with his father's order.[1]

While this is true, some Ulama argue that Umar is a very sincere person who does not conduct his affairs out of selfish desire and whims. But he always thinks about the interest of Islam, and above all he considers things with divine inspiration, while other parents are not like this; hence they are not entitled to order their sons to divorce their wives relying on Ibn Umar's hadith, unless it is clearly justifiable for them to do so.

Those who subscribe to this view include al-Maqdasi who was reported to have said, 'If his father ordered him to divorce his wife he should not obey him.'

Ahmad Ibn Hanbal is of the same view. He was once asked by someone as to whether he should obey his father who had ordered him to divorce his wife or not. He answered that the man should not comply with his father's instruction. Then the man argued that Umar ordered his son Abdullahi to divorce his wife (which he did). Ahmad then said, 'Until your father becomes just like Umar'.[2]

10.2.2 Misconception regarding the procedure of talaq:

It is generally believed, by many Muslims in our society, out of sheer ignorance of the rules of the Shari'ah, that talaq cannot be valid unless it is effected in writing. Accordingly, they do not consider any talaq which has been effected verbally, as a valid one, even if the expression that has been employed in effecting it is an express one (sarih). Consequently the husband may effect talaq on the wife more than twice but still continue living with the woman as his wife, while (as it has been discussed previously) she is, after the third talaq, temporarily prohibited to him ''Until she marries another husband'' (according to Qur'an, 2:30).

10.2.3 On Talaq Mu'allaq (conditional divorce): It happens sometimes that the husband may pronounce talaq subjecting it to the happening of certain thing, such as, 'If you go out, I divorce you,' and then she goes out but neither of the spouses would consider this as a valid talaq. And then they continue living together as if nothing has happened. This may recur more than twice, in which case marriage, legally speaking, is temporarily prohibited between the spouses "until she marries another husband". But despite this they continue living together as husband and wife.

10.2.4 Sticking to one particular view regarding triple talaq. There are some authoritative reasons (as it has been discussed under chapter 3) to the effect that triple talaq is regarded as one single talaq, invoked by many eminent jurists

among the companions, the Tabi'un and their followers to support their view. Moreover, that view serves as a rukhsah (i.e. concession given by the Shari'ah) which is in conformity with one of the fundamental objectives of the Shari'ah, namely simplifying the whole life, which is in accordance with many Qur'anic verses and ahadith of the Prophet (S.A.W.), some of which are as follows:-

> (a) 2:185 which provides that, "...God wills that you shall have ease and does not will you to suffer hardship ..."[3]
>
> (b) 22:78 which provides: "He has chosen you, and imposed no difficulties on you in religion..."[4]

However, the vast majority of muslims, in our society, (Nigeria) stick to the view of the Maliki school regarding triple talaq, according to which it is considered as three talaqs which is not only irrevocable but also creates temporary impediment of marriage between the husband who effected it and his divorced wife, which means that after effecting it, he cannot marry her (even after the expiration of iddah) until she marries another.

Sticking to this view without considering different circumstances, creates hardship for the spouses and, in many cases leads to committing abomination. This is because the husband, not knowing the implication, may effect such talaq on his wife, either out of negligence or sheer ignorance or serious anger. And it may happen that the spouses, notwithstanding, love each other. Thus, after effecting such talaq, they may regret or become miserable and as such want to change the situation by revoking the talaq. And where the

— chance of doing this is blocked, the couple may be enjoying each other illegally i.e. through zina.

Moreover, where the spouses have children, their separation (through the means of this type of talaq i.e. triple talaq) may affect their upbringing more seriously than through a simple sunni talaq i.e. one single talaq. Thus, there is no maslahah in sticking to the view, in the circumstance, because it may lead to a more serious evil.

10.2.5 Errors Committed in Case of Khul':

Where (as it has been explained in chapter 5) a wife fears that limits set by Allah, regarding the rights of her husband will be violated, by her, as a result of the fact that she seriously hates him, she is entitled to obtain separation from the husband through the process of khul'.

However, in may cases, the wife (in our society) is deprived of this right and as such she is forced to continue living with the husband she hates. The result, in most cases, is that the marriage is rendered fruitless and (in some cases) even dangerous. So the continuation of the marriage is, under the circumstances, undesirable, from the view-point of the Shari'ah, since its fundamental objectives cannot be achieved.

Even where the court has given the wife the right to seek for khul', it sometimes, overburdens her with the payment of

heavy amount to the husband which she may not be able to pay, thereby indirectly compelling her to continue living miserably under a marriage-bond which she hates. And many a time, she may be living in her family house, for a long time, struggling to generate the amount which causes terrible hardship to her, in addition to the fact that this may lead her to indulge in immorality.

The courts, sometimes, ask the wife to pay the husband all that he has incurred for marrying her, even where the case is not supposed to be that of khul', such as where the wife institutes a legal action against her husband seeking for the termination of the marriage for reason of the husband's cruelty to her. But the court, instead of inquiring into the case to see whether there is substance in the wife's claim, it just ask the wife to go back to the husband. And where the wife insists on the termination, the court substitutes the ground with that of khul' which is wrong and unjust.

Another example is where the wife seeks for the termination of the marriage for the fact that the husband is suffering from serious defect by virtue of which living with him is intolerable, of which she is not aware before or at the time of contracting the marriage, as in the case of Rabi Usman Vs Usman Dandare Kawara[5]. In that case the wife instituted a legal action for the termination of her marriage with the defendant due to the fact that, he was suffering from adhyatah (outflow of loose faeces when having intercourse)

which is intolerable to her. The husband admitted his wife's claim. And in spite of this, the court pleaded with the wife to bear with the husband. But when she told the court that she could not tolerate and insisted that the marriage should be terminated for that reason, the court ordered her to refund to the husband the four thousand Naira (=N=4,000.00), which he had paid her as sadaq.

In another case Kulu Bashiru Abu Vs Abu M. Sabo[6], the wife instituted a legal action in Shuni Area court seeking for the termination of her marriage for reason of her husband's insanity, contending that she had never seen or even known him. At the time of instituting the action, the marriage was not consummated because the husband was, at that time, at a psychiatric asylum. The court terminated the marriage relying on the juristic rule in two authoritative works of the Maliki school the Kharshi commentary, (which is a commentary on the Mukhtasar of Sidi Khalil) and Bahaja (which is a commentary of Tuhfatul-Hukkam). And, on appeal the decision was affirmed, by the Upper Area Court. However, on appeal to Sharia Court of Appeal (Sokoto), the court substituted the decisions of the two Lower Courts, thereby making it the case of khul', and accordingly, ordered the wife to give the husband five thousand Naira (=N=5,000.00) as the consideration. In arriving at the decision, the court relied on the text of Mukhtasarul-Khalil which provides thus:

> "Option shall be exercised, if one of the contracting parties was unaware of the defects, or if aware had not waived them

and that no intercourse had taken place.,"[7]

It is clear that the issue in the above mentioned two cases is that of "intolerable defect" in the husband. Thus instead of separating the spouses by terminating the marriage without asking the wife to give anything to the husband, the courts, unjustifiably treated the case as khul', thereby compelling the wife to do what is not obligatory on her.

In addition, the marriage, in the second case (i.e. Kulu's case), may even be considered as a nullity, ab initio, because one of the contracting parties, i.e. the husband was not of complete legal capacity for he was insane, at the time the marriage contract took place. And it is a condition, for a marriage to be valid and operative that the husband must be of complete legal capacity (that is sane and adult). Thus, if he lacks full legal capacity (as in this case)1 the marriage is not valid.[8]

In most cases the court does not respond to the wife's request to terminate the marriage by way of khul' unless the husband agrees to that. The court, in such a circumstance would insist that she should go back to her matrimonial home, under the pretext that the husband has not accepted it. This is contrary to the established principle of the Shari'ah and practices of the Prophet (S.A.W) and his companions. This is because, as it has been extensively discussed, the judge has been vested with the power to enforce his decision on an unwilling husband in the circumstance, otherwise recourse to

court would be a futile exercise. And the judge has no right to inquire into the reasonableness of the grounds of the wife's grievances because in none of the cases decided by the Prophet (S.A.W.) or his Caliphs (R.A.), the reasonableness of the grounds for the separation was inquired into.

It is a known fact that the basis of harmony in marriage is love. Thus as the husband is entitled to divorce his wife, if the harmony is not possible (due to some reasons, such as lack of mutual love), the wife is also entitled to seek for the termination of the marriage through khul' for the same reason. That is why, as it has been explained (in chapter 5), where it has been proved, to the satisfaction of the judge, that harmony between the spouse is not possible, due to the fact that the wife is no more interested in living with the husband (without any fault on the side of the husband), the judge shall give relief to the wife, by simply terminating the marriage and instructing the wife to compensate the husband, without creating hardship on her.

However, the practice of some court, in this regard, is to subject the demand of the wife (to terminate the marriage by way of khul') to the acceptance and assent of the husband. Thus, if the husband does not assent to the khul', she cannot obtain it. Sometimes, the court creates serious hardship for the wife by bringing a serious obstacle on her way of obtaining the khul', such as where, it refuses to grant the wife her request just because she cannot pay the consideration

personally, such as in the case of Habiba Sarkin Fulani Vs Alhaji Dahiru Dayi,[9] where the Sharia Court of Appeal decided, inter alia, that statement or promise by the husband to accept khul' may (only) be binding where contractual relation can be inferred from the circumstances or where the wife is put to disadvantage.

Relying on authorities of Maliki school,[10] the court further held that husband's statement that, "We have arrived at the decision of Khul' of =N=500. Let her pay me and get released," is promise that he cannot be forced to fulfil unless it is noticed that much inconvenience is caused on the wife, like selling her property, before she gets the money." The court will force him to fulfil his promise because of the suffering she incurred. But production of the amount he mentioned will not make his promise binding on him.

Such decision is obviously harsh on the wife (without any justification) and also amounts to concentrating too much power in the husband's hand, which is contrary to the purpose of the Shari'ah for which Khul' has been instituted. This means that the wife under such circumstance, is forced to continue living with the man in whom she is no longer interested. And in such a situation there cannot be harmony between the spouses which means the marriage is useless.

The case of Hadiza Abubakar Kawara Vs Atiku Direba[1] is another example of the blunders committed by some courts which

result in injustice to the wife. In that case, the appellant sought for khul' after her claim that the husband was not shouldering his duty of maintaining her had failed for lack of evidence. However,due to the fact that the spouses could not reach agreement regarding the consideration of the khul' (even though they consented to the khul' itself), the court decided that the wife should go back to her husband. And the decision of the trial court (Andarai Area Court), was affirmed by the Sharia Court of Appeal (Sokoto). In giving their decisions both trial court and the Shari'a Court of Appeal did not rely on any authority.

It is obvious that both courts did not discharge their duty, of deciding on a reasonable amount to be paid by the wife, in order to free herself. But instead they unjustifiably decided that the wife should go back to the husband without thinking about the uselessness or even impossibility of that.

Sometimes, it is the husband against whom the injustice is perpetrated, in the case of khul', such as where the wife is ordered by the court to pay him some meagre amount which may be useless to him.

10.2.6 Errors regarding iddah:

Many errors are committed, regarding the iddah. Some of the serious errors, include the following:-

{a} Misconception about the length of period of the iddah, because many muslims, in our society cannot distinguish between the various types of iddah. They are under the wrong impression that in any case (probably with the exception of iddah of widowhood), after the termination of marriage, the divorcee must spend three months before she can re-marry, which is quite wrong.

{b} Many, among the Muslims, erroneously consider that whenever talaq is effected by the husband, even if the talaq is revocable, the marital relationship between the spouses has been completely severed. Accordingly, after effecting such talaq, on one of his four wives, the husband may immediately marry another wife, (before the expiration of the divorcee's iddah). But, as it has been explained previously, revocable talaq does not sever marital relationship until the iddah expires, without the talaq being revoked. Thus the marriage, is considered subsisting, before the expiration of the iddah. This means that if the husband marries another wife immediately after effecting revocable talaq, on one of his four wives, the subsequent wife is legally speaking, a fifth one which means that the marriage to her is void. This is because the man is only allowed to marry the maximum of four wives.[12]

(c) Refusal to observe iddah by the wife at the matrimonial home is one of the abominable practices committed by our Muslim women. This practice is categorically contrary to the Qur'anic verse (65:1), according to which, the main objective of prescribing that the wife must observe the iddah

in the matrimonial home is that "... perchance Allah will bring about thereafter some new situation..." [13] which, according to Ibn Abbas (as quoted by Razi) and several other authorities (like Ibn Kathir), is an allusion to the possibility of reconciliation, hence a resumption of marital relations before the divorce becomes final.[14]

The practice also makes the wife forfeit her right to maintenance, during the iddah period, where she leaves the matrimonial home without any justifiable reason, or the husband sends her out of it without committing any fahishah. (immoral conduct).

The practice is probably not unconnected with the way the marriage is terminated, because this is mostly done in a very disgraceful manner.

(d) Re-Marrying During the Iddah:

One of the abominable practices regarding the iddah, committed in our society, is contracting a marriage with the divorcee by someone other than the divorcer, before the expiration of her iddah. And it is a unanimous view of all the Muslim jurists that any marriage contracted with a divorcee, before her iddah expires, is invalid. Some of the jurists are even of the view that if such invalid marriage is consummated during the iddah, it creates permanent prohibition between the couple[15]

(e) Re-Marrying after revocation of talaq:

The husband may, sometimes effect a revocable talaq on his wife and before the expiration of her iddah decides to revoke the talaq and take back his wife. And since in our society, in most cases, the wife observes her iddah in her family's house, the husband communicates his decision (of revoking the divorce) to her or to her family. But the wife or her family may oppose to the decision. And instead of considering the husband's decision and go back to him (because by his decision the talaq is legally considered revoked), the wife continues to reckon her iddah (instead of stopping from doing that), and consequently re-marries. Such thing usually happens in our society. And it is obvious, legally speaking, that any subsequent marriage with the wife is void ab initio because, the moment the husband communicates to her his decision of revoking the talaq, the marriage continues to be subsisting.

10.2.7 The view of the Maliki School regarding suckling of the child:

That view, distinguishes between a wife who is sharifah (noble) and the one who is dani'ah (of low status), in the case of the responsibility of suckling the child. The former, according to the view, is not bound to suckle her child, while the latter is bound to suckle her own. This view is contrary to the, Qur'anic verse (i.e. 2:233) which imposes the duty of suckling the child on the wife (who is the child's mother) without making any distinction between sharifah and dani'ah. Moreover, the view is against the interest of the

child, because it is tantamount to denying him or her access to his or her mother's milk which cannot adequately be substituted by any other food.

10.2.8 Evil practice regarding custody of the child:

The child is sometimes snatched away unjustifiably from its mother, immediately after the divorce while it is in a very tender age. This, sometimes, is done with the support of the court. In some cases, however, it is the mother who leaves the child and refuses to have its custody. This practice, in many cases, affects not only the behaviour of the child but also his health, and is, therefore, contrary to Shari'ah, especially because, under the law, custody of child is a concurrent right between the child and it's mother and not only that of the mother.

10.3 Recommendation:

In the light of the above observations, we would like to conclude this work by putting forward the following recommendations:-

10.3.1 Mass enlightenment

Mass enlightenment about the provisions of the Shari'ah, regarding marriage, its termination and other related issues. This is because the violation of these provisions which results to many problems affecting the family, in particular and society in general, is due to the general ignorance of the community on these provisions.

10.3.2 Organising work-shops and seminars on marriage

Intensive courses specifically on marriage, its termination and other related issues, should be organized from time to time for Area Courts judges and their personnel to whom almost all cases of dispute between spouses, are brought. This is because mistakes or blunders committed by these judges, are usually as a result of the inadequate knowledge many of them have regarding the issues involved.

10.3.3 Relaxing the strick adherence to maliki school views

The study of juristic differences (al-Ikhtilafatul-Fighiyyah), especially regarding marriage, its legal effects, its termination and its legal consequences, should be pursued vigorously by the judges who adjucate on matters related to that. Muslim scholars, to whom the muslim populace refer for answers to their questions concerning their marital affairs and other issues, should also acquaint themselves with such juristic differences. This will definitely mitigate the unnecessary sticking (blindly) to the views of one particular madhhab (school of jurisprudence) without having consideration to their relevance and suitability or otherwise to the circumstances. And this will consequently facilitate ways of solving many problems concerning marriage and its termination easily.

10.3.4 Quality of Judges:

Judges, in handling the cases brought before them, should have regard to changing conditions and circumstances of our

society, instead of adhering to a particular juristic view irrespective of its relevance and suitability or otherwise, which may consequently create hardship (which is against the objective of the Shari'ah). This necessitate the improvement of the quality of the judges by giving them extensive education, because to be able to look into the cases with due regard to changing conditions and differing circumstances, demands that the judges must be well-versed in the rules of the Shari'ah and must have ability to give proper analysis of the facts brought before them. And it is also very important to give them moral training without which they will not have sense of accountability regarding the discharge of their responsibility: the only thing that can stop their corruption.

10.3.5 Including family law in school curriculum:

The provisions of Shari'ah regarding marital life (including termination of marriage) should be included in the syllabus of every school at the level of post-primary and above where Muslim youths study. This will give them opportunity to enter into marital life fully aware of their marital responsibilities which will consequently save many marriages from breakdown.

10.3.6 Arbitration and Counselling in marriage

The system of hakamain (arbiters) who are appointed to arbitrate between the disputing spouses should be effectively

implemented. This is in accordance with the Qur'anic verse (4:35) which provides:

> And if you have reason to fear that a breach might occur between a (married) couple, appoint an arbiter from among his people, and an arbiter from among her people; if they both want to set thing aright, God may bring about their reconciliation...[16]

This system is very effective and useful in settling disputes between spouses. And mostly, they prefer it to litigation in court so as to avoid publicity.

10.3.7 Marriage counsellors

A voluntary organization for arbitration, responsible for settling disputes between spouses and solving problems related to marriage, composing of elders and people who are knowledgeable in Shari'ah, should be set up in every locality. This will save the married couple, the trouble of litigation, its expenses and its publicity.

10.3.9 Providing the Muslim community with moral and spiritual education:

This type of education inculcates fear of Allah and the spirit of accountability in the Hereafter in the minds of the Muslims. By virtue of such education, they will be able to properly and with commitment, carry out the injunctions of the Shari'ah concerning marriage and its related issues in particular and other aspects of human endeavor in general. And this will definitely protect marriage particularly and family in general, from breakdown, and consequently (protect) the social system from collapse.

All praise be to Allah.

FOOTNOTES AND REFERENCES

1. The hadith was related by Abu Dawud, Nisa'i and Tirmidhi.

2. Ayyub, H. (1987), as-Sulukul-Ijtima'i Fil Islam,Darut-Turathil-Islamiy, Cairo, p.260.

3. Asad, (1980), The Message of the Quran, Dar Al-Andalus, Gibraltar, p.39.

4. Anonymous, (n.d.) The Holy Quran, English Translation of the Meaning and commentary, Kind Fahd Holy Quran Printing Complex, al-Madinah al Munawwarah, p.974.

5. Maiyama Area Court, case No. CU/110/94.

6. Shuni Area Court, case No. CU/105/94.

7. Al-Abi, S.A.(n.d.), Jawahirul-Iklil Sharh Mukhtasarul Khalil A.A. Abus-Sa'ud &A.At-Tayyib, Kano, Nigeria, pp.298-99.

8. Sabiq, S. (1978) Fiqhus-Sunnah, Darul-Fikr, Beirut Vol.2, p.117.

9. Sharia Law Report (1980) (Centre for Islamic Legal Studies), Vol.1, No. 1. at p.9.

10. The said authorities are Dasuqi's commentary to al-Mukhtasar of Sidi Khalid (vol. 2, at p.319), Jawahirul-Iklil (another commentary to al-Mukhtasar) and Ar-Rahuni's commentary to Zarqani.

11. Unreported case. Appeal No. SCA/JG/876/88.

12. One of my colleagues informed me about a similar thing that happened in his hometown (Keffi), where a man having four wives, divorced one of them. And before the expiration of the iddah of the divorcee, he married another wife, but he went to the divorcee and had intercourse with her (which means by law he had revoked the talaq), from which she became pregnant, and then the husband died. But there is a dispute as to the right of the child to inherit him. However, it could be noted that it is the subsequent "wife" (the wife number five), that is not entitled to inherit him, because the marriage with her, (which is the basis of her right to inherit) is invalid.

13. Anonymous (n.d.), The Holy Qur'an: English Translation of the Meanings and Commentary infra at p. 1764.

14. Asad, M. (1980) The Message of the Quran, infra at p. 872.

15. This is the view of the Maliki School relying on Umar Ibn Khattab's decision to that effect (see: Sha'aban, Z.D (1971), al-Ahkamush-Shar'iyyah Lil Ahkamish-Shakhsiyyah, University of Libya, p. 170 and Sharafudden, A.A. (1966), Tarikhut-Tashri'il-Islamiy, pp. 74-5.

16. Asad, M. (1980) The Message of the Qur'an, supra at p.110.

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