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ق أحكام الطلاق

Islamic Law of Divorce



M.S. Omar

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Islamic Law of Divorce

by

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Foreword

The major and significant portions of the text were read to me by the author. I was pleasantly surprised to find such a well-researched and authentic book.

In the light of the scope and purpose of the work, I am convinced that very little could be said or added to the subject. In my view, the author has set out the subject matter clearly and concisely.

The work is a need of the times, and as far as I am aware the first published work on the subject in South Africa. For this reason I congratulate the author on his fine achievement and pray that many more such works flow from his pen from time to time.

The authorities and references quoted are completely authentic - whether Quran, Hadith or Legal Treatises.

Maulana Abdul Rehman Ansari
Jamiatul Ulama Natal, South Africa

Preface

The objective of this book is to set out the basic rules of the Islamic Law of Divorce in a clear, concise and simple manner. Accordingly, technical terminology has been avoided from the body of the text wherever possible to facilitate understanding and easy reference.

It is hoped that this work dispels some of the doubts that have arisen in regard to the law of divorce, and stimulate further research into this interesting field of Law.

The second edition of this book incorporates further articles that were written by the author since publication of the first edition in 1983.

My sincere thanks to all those who gave me valuable advice in the preparation of the text. Of particular mention are my colleagues DAWOOD KADWA and SHABBIR BANOOBHAI.

May the Almighty accept this humble endeavour and render it a source of benefit to all.

Mahomed Shoaib Omar

Chapter One

INTRODUCTION

The Islamic law of divorce is probably the most misunderstood branch of Islamic Law. This misunderstanding may be attributed not only to Non-Muslims but also to many Muslims who, due to ignorance of its basic rules and procedure, have abused the right of divorce and exercised it in a manner that is opposed to the Islamic Law itself. Such abuse of this right has resulted in legal consequences to the detriment of the parties concerned eg. the pronouncement of three divorces simultaneously in a fit of anger or under provocation.

A. SOURCES OF ISLAMIC LAW

It is appropriate, before dealing with the subject of divorce, to discuss briefly the sources of Islamic Law from which legal rules are derived. These sources are four in number, namely:

- 1) Qur'an
- 2) Sunnah
- 3) Ijma
- 4) Qiyas

1) QURAN

This is the highest source of authority as it is the Word of Allah. It constitutes the primary source of law in that the rules contained therein are binding on Muslims for all times. The Qur'an was not revealed in isolation. Allah sent a teacher, that is, the Prophet Muhammad (May the peace and blessings of Allah be upon him) whose main function was to interpret, explain and implement the text of the Qur'an. In this regard, Allah states in the Qur'an:

وَأَنزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نُزِّلَ إِلَيْهِمْ

“And we have revealed the Qur'an to you in order that you may clearly explain to the people what has been revealed to them.”

(S16: V44)

It logically follows that the correct interpretation of the Qur'an is that of the Prophet (S.A.W) and his companions who were most closely associated with him and who understood the context in which the Qur'an was revealed and witnessed the practical implementation of its teachings.

2) SUNNAH

This term refers to the sayings and actions of the Prophet (S.A.W.) which have been recorded in the form of Hadith.

The Sunnah is the second source of law being an exposition and elaboration of Qur'anic principles as stated above¹. Accordingly, it is clear that the Qur'an cannot be understood without reference to the example and interpretation of the Prophet (S.A.W.). This, in turn, means that the application, interpretation and transmission of Islamic Law and teachings is dependent on the preservation of both the Qur'an and the Hadith. Allah himself has taken the responsibility of preserving these two fundamental sources of Islamic Law which shall remain in existence until the day of resurrection. The Qur'an states in this regard:

إِنَّا نَحْنُ نَزَّلْنَا الذِّكْرَ وَإِنَّا لَهُ لَحَافِظُونَ

"Verily we have revealed the Qur'an and we are its Protectors." (S15:V9)

In this verse the word "Zhikr" refers to both the words and the meanings (ie. The Sunnah) of the Qur'an. This is so because the words "Qur'an" signifies both words and meanings.

In short, if an impartial study relating to the science of the authenticity, proof and transmission of the Hadith is made, one is left with no doubt that such an ingenious system could only have been divinely planned and ordered as the above verse testifies.

3) IJMA

This term refers to the unanimity of opinion of the companions and successors on a particular point of law or legal rule. It is not

permissible to hold a contrary view when a matter has been decided by IJMA. The proof of Ijma as a source of law may be adduced from both the Qur'an and Hadith. For instance, the Quran says:

وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُسْلِمِينَ نُوَلِّهِ مَا تَوَلَّى وَنُصْلِهِ جَهَنَّمَ وَسَاءَتْ مَصِيرًا

“Whoever follows a path other than the path of the Muslims, We shall assign to him what he has chosen and shall cause him to enter the fire, an evil Journey’s end.” (S4: V115)

The reference to *“the path of the Muslims”* in this verse is a reference to Ijma.

4) QIYAS

This term refers to inference based on analogy. This source of law is applied in the absence of an express text of the Qur'an or Hadith and enables Islamic Law to be applied to changing situations and needs. Qiyas is subject to a defined set of conditions which are beyond the scope of this booklet.²

B. MARRIAGE AND DIVORCE IN LIGHT OF QUR'AN AND SUNNAH

In order to understand the Islamic Law of Divorce, it is necessary to know the nature of the marriage contract in Islam.

Marriage in Islam is not a simple contract like other commercial contracts such as sale, hire, suretyship, partnership, donation etc. In essence, the marriage tie in Islam consists of two elements: an element of contract and that of Ibadat³ (*Worship*). Marriage viewed from one perspective is a contractual relationship in that it is based on the consent of the parties. From another perspective, it is an act of Ibadat.

This difference in the nature of marriage as opposed to ordinary commercial contracts is due to the following reasons:

Firstly, the presence of two witnesses is an essential requirement for the validity of the marriage. In the case of ordinary contracts the absence of witnesses does not affect their formation.

Secondly, the Khutba (“*Preliminary address*”) and the E’hlaan (“*Announcement*”) confer on the contract the element of Ibadat.

Thirdly, marriage has been greatly emphasised as opposed to other contracts. Take the following two Ahadith:

النِّكَاحُ مِنْ سُنَّتِي

Marriage is of my sunnah

مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ

“Whoever has the ability to marry, he must marry.”

Accordingly, having regard to the differences between the marriage contract and ordinary contracts in relation to their formation, the manner of dissolution of these contracts differs. The dissolution of the marriage is subject to certain conditions which are set out in the next chapter.

Chapter Two

Conditions Relating to Dissolution

1. DIVORCE - INSTRUMENT OF LAST RESORT

The fact that marriage includes an element of Ibadat means that the marriage relationship must be a permanent one and not terminated willy nilly at the instance of the husband.

Accordingly, in the event of disputes between the parties, the Qur'an has specified certain preliminary steps such as admonishment in a kind manner,⁴ which are directed towards the settlement of these disputes and the maintenance of the marriage relationship. This is so because stable family relations are considered as a cornerstone of a healthy society. Marriage breakdowns not only cause considerable hardship to the parties concerned and any children born of the marriage but are also detrimental to society at large.

If these preliminary steps fail, the Qur'an provides that an effort be made to resolve the dispute by means of arbitration. In this respect the Qur'an states:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا
إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا ۚ إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا

"If you fear a breach between them (husband and wife) appoint a judge from his family and a judge from her family, if they both (Arbitrators) wish for peace Allah will cause their reconciliation. Allah is all knowing, the most great." (S4: V35)

The wisdom of appointing arbitrators belonging to the families of the parties is that the dispute is confined to the family and is not given adverse publicity. At the same time the arbitrators would most properly understand the dispute being familiar with the parties lifestyles and habits and would be most inclined to upholding the marriage. Again, as the verse states, if the arbitrators sincerely desire reconciliation they would receive the unseen help of Allah and

such reconciliation would in fact be achieved.

Where all efforts towards reconciliation fail and there is no prospect whatsoever of reconciliation, then in such event the husband may exercise his right of divorce as an instrument of last resort and by way of necessity. In such a case the right may be exercised because it would be unjust to both parties to maintain a marriage which has irretrievably broken down. The right of divorce as an instrument of last resort is clear from the following Hadith:

ابغض الحلال إلى الله عز وجل الطلاق

“The worst of permissible things in the sight of Allah is Talaaq.”

2. RIGHT OF DIVORCE MUST BE EXERCISED IN THE PRESCRIBED TIME: PERIOD OF PURITY

The contract of marriage should not be cancelled at any time at the arbitrary will of the husband. Ordinary contracts, on the other hand, may be cancelled at any time bilaterally or unilaterally by words, conduct or writing thereby entitling the contracting parties to enter into new contracts with third persons. This difference in the manner of termination between ordinary contracts and marriage is due to the fact that the latter contract must only be dissolved in the case of the utmost necessity.

The Qur'an has specified a fixed period within which the right of divorce must be exercised:

إِذَا طَلَقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ

“When you divorce women, divorce them at their prescribed periods.”
(S65: V1)

The “*prescribed periods*” referred to in this verse mean a period of purity in which sexual relations have not taken place. This also appears from a statement of a well-known companion and jurist Ibn Masud⁵:

عن ابن مسعود رضي الله عنه في قوله تعالى : “فطلقوهن لعدتهن”
، قال : “في الطهر من غير جماع . (فتح الباری ، ٩ : ٣٠١)

“On the authority of Ibn Masud who said: The statement of Allah “Divorce them at their prescribed period” means (Divorce them) in a period of purity in which sexual intercourse has not taken place.”

In short, therefore, the right of divorce must be exercised in a period of purity in which sexual relations⁶ have not taken place.

The benefit of prescribing a fixed time is that by awaiting the arrival thereof, the possibility of reconciliation remains in that tempers may cool and normal family life restored in the intervening period. It is, therefore, clear that the right of divorce is not a mere tool to be manipulated at the will of the husband and subject to his whim and fancy.

3. CORRECT MANNER OF GIVING DIVORCE

The correct manner of giving divorce⁷ according to the sharia is as follows:

- (a) An express divorce (ie; in the following form: “*I Divorce You*” or “*You are Divorced*”) must be given by the husband to the wife in a period of purity in which sexual intercourse has not taken place. After such pronouncement the wife must be allowed to complete three menstrual periods (in the case of menstruating women) known as Iddat⁸. The prescribed period of waiting or Iddat differs in the case of different women as appears below.
- (b) Upon the pronouncement referred to in paragraph (a) above, the husband is entitled to re-take the wife in the sense of resuming normal conjugal relations before the expiry of the prescribed period of waiting or Iddat. The re-taking or “Return” is effected

without performing a marriage ceremony, (*Nikah*) and becomes attached to the original *Nikah* which is revived.

- (c) Upon the expiry of the prescribed period of waiting or *Iddat*, the wife is free to marry a third party of her choice or re-marry her previous husband.

كانوا (اي الصحابة) يستحبون أن يطلقها واحدة
ثم يتركها حتى تحيض ثلاث حيض. رواه ابن أبي شيبه
بإسناد صحيح (درأية. ٢٢٦)

“The companion of the Prophet (may peace be upon him) used to like that (women) be divorced once and thereafter left to complete three menstrual cycles” (Diráya 622)

- (d) It is preferable that the pronouncement referred to in paragraph (a) be evidenced by two witnesses so to avoid any dispute.

4. IRREVOCABLE CANCELLATION OF MARRIAGE BOND: THREE STAGES

The situation may arise where a person may wish to dissolve his marriage finally and irrevocable. For this purpose the sharia has given him the right to pronounce an express divorce in three distinct stages as follows:

The husband pronounces an express divorce in a period of purity in which sexual relations have occurred. Thereafter, he pronounces one express divorce in two subsequent distinct periods of purity. In short, an express divorce is pronounced in three separate periods of purity as appears from the following statement of the Prophet (S.A.W.) reported on the authority of Ibn Umar (R.A.):

”طلاق السنة تطليقة وهى طاهرى غير جماع،
فاذا حاضت وطهرت طلقها أخرى،
فاذا حاضت وطهرت طلقها اخرى

“Sunnah (as opposed to Bidah-see below) is to divorce the wife expressly in a period of purity in which sexual intercourse has not taken place. Thereafter to divorce her for a second time expressly when she has menstruated and become pure. Thereafter, to divorce her for a third time expressly after she has menstruated and become pure”.

The purpose of the sharia is that one divorce be given in a state of purity so that the doors of reconciliation remain open and that the marital relationship may be resumed at a subsequent period.

Accordingly, a person, who, out of crass stupidity,¹⁰ may desire to give three divorces, is entitled to do so provided he gives these divorces in three separate stages as provided herein.

The three divorces in three separate periods of purity is referred to as “Sunnah”¹¹. This term has been used not to indicate preferability on the part of the Prophet (S.A.W.) but in contradistinction to Bidah which is the issuing of three divorces simultaneously (see below) and which is prohibited.

The matter is succinctly summarised by a well known commentator of the Qur’an as follows:¹²

“The intention of the Prophet (S.A.W.) in using the term “sunnah” is not that reward will be received because the act of giving three divorces in three separate stages of purity is permissible - This act is not liked or recommended. On the contrary the meaning is that this procedure has been adopted in religion - that is there will be no punishment for the adoption of this procedure.”

روح المعاني

TWO CONSEQUENCES OF DIVORCE

Upon the pronouncement of divorce, the following two consequences take effect:

- 1) The wife is released from the marriage (*Nikah*) of the person giving divorce. In the absence of re-taking as previously mentioned, she is not regarded as his wife, although she is required to observe the prescribed waiting period. This is why the Qur'an has referred to such woman as "divorced" even before the expiry of the waiting period in the following verse:

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَ قُرُوءٍ

"And divorced women shall wait for three menstrual periods".

(S2: V228)

Women who have not enjoyed a period of privacy with their husbands may at their discretion marry any third party upon the pronouncement of divorce because they are not required to observe the prescribed waiting period of Iddat. This is clear from the following Qur'anic verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَكَهَّنْتُمُ الْمُؤْمِنَاتِ ثُمَّ طَلَقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَسُوهُنَّ
فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُونَهَا فَمِنْ تَحْتَهُنَّ سَرَاحًا جَمِيلًا ۝

"O Believers! If you marry believing women and then divorce them before you have touched them, you are not required to calculate a waiting period for them. Hence make provision for them at once and release them in a becoming manner". (S33: V49)

- 2) The second consequence relates to the fact that upon the expiry of the mandatory waiting period, or Iddat, the wife is entitled to conclude another marriage with a third party. Its effect is therefore suspended until the expiry of the Iddat.

Chapter Three

Effect of Three Divorces: Irrevocable Dissolution

Where a person gives three divorces simultaneously, or in one period of purity (see below) or in three separate stages over a period of time, the marriage bond is irrevocably dissolved. For the purpose of computation of the number three, all previous pronouncements of divorce are taken into account.¹³

In such a case where three divorces are given the husband has exercised all his rights in this regard. Once the Iddat has expired the wife is at liberty to marry a third person. The husband loses his right of re-taking as herein before mentioned before the expiry of the Iddat. The marriage bond is irrevocably severed and the parties cannot marry again except in one situation, namely, where the wife marries a third person who consummates the marriage and subsequently divorces her in the ordinary course of events¹⁴. In such event the wife may marry her previous husband¹⁵. This is clear according to the express text of the Qur'an which is as follows:

فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّى تَنْكِحَ زَوْجًا غَيْرًا

"Then if he has divorced her (for the third time), she is not lawful unto him after such third divorce until she has married another husband". (S2:V230)

فَإِنْ طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يَتَرَاجَعَا

"Then if the second husband divorces her there shall be no sin on either of the two if they return to each other". (S2:V230)

IDDAT OR PRESCRIBED PERIOD OF WAITING

In the case of Iddat, three situation must be distinguished:

- 1) In the case of women who experience menstruation, the mandatory period of waiting is three menstrual periods¹⁶.

وَالْمُطَلَّاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

“And divorced women shall wait for three menstrual periods”.
(S2:V228)

- 2) Women who have not reached the age of puberty, or who have passed the age of monthly courses, shall wait for a period of three months.

وَالَّذِي يَيْسُنَ مِنَ الْحَيْضِ مِنْ نِسَائِكُمْ إِنْ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ
وَالَّذِي لَمْ يَحِضْنَ

“And those of your women who have passed the age of monthly courses, their prescribed period if you have doubt is three months, and for those (minors) who have no courses (it is the same).” (S65:V4)

- 3) In the case of pregnant women, their period shall be until the delivery of their children.

وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

“The period of pregnant women is until they deliver their burdens”.
(S65:V4)

Chapter Four

Three Divorces Simultaneously¹⁷: Legally Effective but Prohibited

It is clear from the preceding discussion that the right of divorce may be exercised in the case of necessity. The correct manner of such exercise is that one clear express divorce must be given in a state of purity wherein sexual relations have not occurred.

This leaves open the possibility of reconciliation by the procedure of retaking, or after the expiry of the Iddat gives the wife the right to conclude a new marriage. Although it is permissible to issue divorce in three separate stages, the act being per se abhorrent may be exercised in its lowest degree, i.e., once. The Qur'an envisages a maximum exercise of two divorces in two separate stages or periods of purity in the following verse:

الطَّلَاقُ مَرَّتَيْنِ

"Divorce is (permissible) twice..." (S2:V229)

Where, however, a person fails to avail himself of the procedure prescribed by Islam with its attendant advantages and benefits, and gives three divorces simultaneously (such as: *"I divorce you"*, *"I divorce you"*, *"I divorce you"*), the following two questions arise in relation to such pronouncement:

- (a) whether such pronounced is legal or illegal,
- (b) whether legal effect will be given to such pronouncement irrespective of its legality or illegality.

In regard to (a), the matter is simple: such pronouncement is illegal and prohibited. The utterer is a sinner who has incurred the wrath of Allah and His Prophet (S.A.W.). In numerous Ahadith the Prophet (S.A.W.) indicated his intense anger of the persons who made such pronouncements. They have been likened to playing with the Qur'an. The jurists have termed such pronouncements as *"Bidah"* (Innovation).

In relation to (b), the Prophet (S.A.W.) notwithstanding his abhorrence has given such pronouncements full legal effect and has accorded them the status of three divorces. In the result, the marriage bond is irrevocably dissolved, the right of re-taking is lost and the parties cannot re-marry except in the situation previously described.

At this stage an objection may be raised as follows: *“How is it possible for an unlawful act to bear consequences?”* The answer is that the illegality of an action is not a bar to the consequences of such action from coming into operation. Take the following examples: Intentional murder is a serious crime but the unlawful act of say shooting does not prevent the consequence (namely, death) from being operative. The act of theft is unlawful, but the consequence (namely, removal of property) nevertheless ensues.

In the case of pronouncements of three divorces made at one time, two situations must be distinguished:

1) where a person says to his wife *“I divorce you”, “I divorce you”, “I divorce you”* at one time with the express intention of giving three divorces. In such a case, the Prophet (S.A.W.) held that three divorces took effect although the utterer is a sinner. As an illustration, take the following two Hadith:

عن علي رضي الله عنه قال سمع النبي صلى الله عليه وسلم رجلاً

طلق البتة فغضب و قال تتخذون آيات الله هزوا ولعباً! من طلق

البتة الزمانه ثلاثاً لا تحله حتى تنكح زوجاً غيره. (المغني لابن

قدامة ص 103 ج 7)

“On the authority of Ali (may Allah be pleased with him) who said: The Prophet (S.A.W.) heard of a person giving three divorces. He became angry and said “You take the verses of Allah as mockery and play?” Whoever gives three divorces at one time will be deemed to have given three and his wife will not be permissible to him until she marries another husband”.

و في حديث ابن عمر رضي الله عنه قال قلت يا رسول الله
أريت طلقته ثلاثا قال اذا عصيت ربك وبانت منك امرأتك
(مغني ص 103 ج 7)

“In the Hadith of Ibn Umar who said: “What is your view if I gave my wife three divorces” The Prophet (S.A.W.) Replied: “You have sinned and your wife shall become separated from you (ie. Divorced).”

ii) Where the words “*Talaaq*”, “*Talaaq*”, “*Talaaq*” are repeated merely by way of emphasis and not for the purpose of giving three *talaaq* then the position is as follows:

- a) During the time of the Prophet (S.A.W.), Hazrat Abu Bakr (R.A.) and the early period of the caliphate of Hazrat Umar (R.A.), these words of divorce uttered by way of emphasis were construed as one divorce in accordance with the intention of the person granting divorce because general reliance could be placed on the honesty, integrity and trustworthiness of the persons of that period.
- b) Hazrat Umar (R.A.) however, during the latter part of his reign after due consultation with the companions held that three divorces whether intentionally uttered or merely by way of repetition would be deemed as three because of the deterioration in the standards of honesty, integrity, trustworthiness and religious spirit. The companions did not object to the judgement and it was held to be in accordance with the Qur'an and Sunnah.

In short, therefore, three divorces uttered simultaneously whether intentionally or by way of repetition will constitute three according to the consensus of the overwhelming majority of the jurists including the founders of the Hanafi, Shafei, Maliki and Hanbali schools.

This consensus is recorded by the well-known scholar Imam Nawawi (R.A.) in the following words:

قال الشافعي و مالك و أبو حنيفة و أحمد و جماهير العلماء من
السلف و الخلف يقع الثلاث - وقال طاؤس و بعض أهل الظاهر
لا يقع بذلك الا وحده (شرح مسلم)

“Imams Shafei, Malik, Abu Hanifah, Ahmed Bin Hanbal and the general body of Ulema preceding and succeeding have held that three divorces take effect. Hazrat Taus and some literalists (Ahl-uz-Zahir) held that one divorce took effect”.

It must be mentioned that the pronouncement of Divorce in a state of menstruation is also Bidah and prohibited. The divorce nevertheless, takes effect. It is obligatory in such a case to take her back and divorce her in a state of purity, or¹⁸ retain her.

Chapter Five
**Divorce by Implication¹⁹ -
No Right of Re-taking**

This refers to an expression or words which, by virtue of coinage, may be used in two senses:

- a) the words or expression may have been employed to mean pronouncement of divorce;
- b) the words or expression may have been used to convey another meaning, ie., a meaning other than that of divorce.

Such category of words or expression are known in Islamic Law as KINAYAH. For example, a husband says to his wife:

“YOU ARE SEPARATED”. This expression may mean:

- a) separated from the marriage - tie; or
- b) separation from all that is good or evil.

Accordingly, because the expression or words bear the potential of at least two meanings, reference must be made to the intention of the husband to fix a particular meaning. If the husband intended by the use of such words or expression to pronounce a divorce, such divorce will take place.

The divorce uttered by the use of such expressions will be of the category of **BAIN**. This means that the husband does not have the right to re-take the wife prior to the expiry of the Iddat (as opposed to express divorces). Once the Iddat has expired, the wife is free to marry any person of her choice.

The above rule is subject to an exception:

In the case of a discussion relating to divorce the surrounding circumstances will legally impute an intention to divorce the husband. In such a case, there is no need for a reference to the intention of the husband. *For example:* a wife says to her husband:

“I REQUEST THAT YOU DIVORCE ME”, the husband, in reply, says: “YOU ARE SEPARATED”, provided, however, that the words used in such discussions convey the meaning of a separation.

EXPRESS DIVORCE²¹ AND THE RIGHT OF RE-TAKING

This refers to words which can only be used to denote a divorce, such as, “I Divorce You”, in such a case, the husband has the right to retake²² the wife before expiry of the Iddat in the sense of resuming normal conjugal relations. The right of re-taking is effected without the need to perform a new Nikah, and must result from genuine motives of reconciliation. This is clear from the following verse of the Qur’an:

فَإِمْسَاكِ بِمَعْرِوْفٍ أَوْ تَسْرِيَةٍ بِإِحْسَانٍ

“Retain her in fairness and without hurt to her or release her kindly.”
(S2:V229)

The words “*Imsaak Bi Maraf*” indicate two matters. First, the retention or re-taking does not require a new Nikah but is based on the previous Nikah. Second, that the right of re-taking must be based on a sincere desire to reconcile, failing which, the wife must be allowed to undergo Iddat which implies that upon expiry thereof, she is freed in the sense that she is entitled to conclude a new marriage of her choice. Again, the verse points to the fact that the right of re-taking should not be used as an instrument of oppressing the wife.

The Qur’an provides that the right of re-taking be preferably evidenced by two witnesses. This has two benefits: First neither party may deny that a re-taking has been effected: and second, that the husband may not falsely claim after the expiry of the Iddat that he has exercised his right of re-taking merely to cause hardship to the wife. The provision relating to witnesses is as follows:

وَأَشْهِدُوا ذَوَىٰ عَدْلٍ مِّنكُمْ وَأَقْبِمُوا الشَّهَادَةَ لِلَّهِ

“And take for witness two just persons from among you (Muslims) and establish the witness for Allah.” (S65:V2)

The right of re-taking is available twice, (ie., where two express divorces have been given) so that it may not be used by an unjust husband to perpetually oppress the wife.

Chapter Six

Oppressive Husband: Wife's Remedy

It is clear from the preceding discussion that Islam has given the right of divorce to the husband, who must exercise this right only in the case of necessity and subject to certain conditions.

The wife has not been accorded the right in order to prevent divorce from being a tool of impulse since women are more prone to act impulsively and on the spur of the moment.

However, this does not mean that a woman must undergo all kinds of afflictions and torments without recourse to legal rights. The wife is entitled to petition an Islamic Court (or in its absence, a duly constituted (committee) and demand that the marriage be dissolved by proving her complaints²³ as the function of such court or committee is to remove the suffering experienced by the wife.

At the same time the Qur'an warns those husbands who, after giving an express divorce, re-take their wives merely to oppress them and without any desire to fulfill their rights. In the absence of reconciliation a wife should be released kindly. The words of the Quran are as follows:

وَلَا تُسْكُوْهُنَّ ضَرَارًا لِّتَعْتَدُوْا ۚ وَمَنْ يَفْعَلْ ذٰلِكَ فَقَدْ ظَلَمَ نَفْسَهُ ۚ وَلَا تَتَّخِذُوْا
آيَاتِ اللّٰهِ هُزُوًا ۗ

“Do not take them back to hurt them so that you may transgress (in this way) and whoever does that then he has wronged his soul. And do not treat the verses of Allah as a mockery”. (S2:V231)

In the South African context, this verse of the Qur'an is an appropriate reminder to those husbands who obtain a divorce order from a South African court but, at the same time, stubbornly refuse to grant their wives an Islamic divorce on grounds of spite, malice and a desire to cause hardship to them.

TRANSFER OF RIGHT OF DIVORCE TO WIFE IN ANTE-NUPTIAL CONTRACT

The husband may validly transfer his right of divorce to his wife who may exercise it under conditions specified in a written ante-nuptial contract²⁴. Once granted, such transfer cannot be unilaterally revoked or cancelled by the husband. An example of a clause in this regard in such an ante-nuptial contract is as follows:

“The husband hereby transfers his right of divorce to his wife who may exercise it in the following circumstances:

- (a) *Where the husband is guilty of misconduct whether in the form of beatings, assaults, or persistent abuse which conduct renders living with him intolerable.*
- (b) *Where the husband maliciously deserts his wife and refuses to return to her.*
- (c) *Where the husband sues for a degree of divorce in a South African Court in terms of South African Law and/or obtains a decree of divorce from such court.*
- (d) *Where the marriage between the parties has irretrievably broken down and there is no prospect of reconciliation.*
- (e) *Where the husband refuses to maintain his wife or afford her the marital privileges.*

*The exercise of the right of divorce by the wife hereinbefore stated would constitute an exercise in the category of **BAIN**, ie., the husband is unable to re-take his wife before the expiry of the prescribed monthly periods in the absence of a valid **NIKAH**, and upon expiry of such prescribed period the said wife is free to conclude a marriage of her choice.”*

Chapter Seven

Miscellaneous Rules²⁵

1. The following persons possess capacity to grant a divorce:
 - i) a person who has attained the age of maturity and is in full possession of his mental faculties.

The divorce of a minor boy, or insane husband is of no effect.

2. Divorce given by the following persons is valid and of full force and effect:
 - i) a divorce uttered under duress or threat of force²⁶.
 - ii) a divorce uttered in a state of intoxication²⁷.
 - iii) a divorce uttered in jest²⁸.
 - iv) a divorce given by a dumb person by means of his signs.
3. A divorce which is subject to a future condition shall become operative upon the fulfillment of such condition. For instance, a person says to his wife: *"If you enter the home you are divorced"*. The divorce takes effects upon the wife's entry into the home.
4. The husband is entitled to assign the right of divorce to his wife which must be exercised by her in the meeting in which such right is assigned unless the terms of the assignment indicate that the right may be exercised at any time. For instance, a husband may validly say to his wife:
"I hereby assign my right of divorce to you and you are free to exercise such right whenever you wish".
5. Where a husband gives separate divorces to his unconsummated wife (such as, *"I divorce you"*, *"I divorce*

you”, “I divorce you”), the first divorce takes effect because an unconsummated wife is not required to observe Iddat. The second and third divorces are valid.

6. A person who divorces his wife in mortal illness (Marad-ul-maut) who subsequently dies before the expiry of the Iddat does not succeed in disinheriting his wife who shall be entitled to inherit from him.
7. In the case of an express divorce (such as, “*You are divorced*”), no recourse is had to the intention of the person pronouncing divorce so that one divorce takes place notwithstanding that more than one may be intended.
8. If the husband, after the expiry of the Iddat, claims that he has exercised the right of re-taking and the wife denies such claim, then in such event the statement of the wife will be believed in the absence of proof.
9. Where a woman marries a third person after being divorced by her former husband once, twice or thrice, and such marriage, which occurs after the expiry of the Iddat, is consummated by such third person, then: if the woman remarries her first husband then such husband acquires the right to grant three divorces, all previous divorces being nullified.
10. A husband is entitled to divorce his wife in writing. For instance, a husband states in a letter to his wife: “*I hereby record that I have divorced you*”.

According to these words, a valid express revocable divorce takes effect. The husband is entitled to take his wife back before the expiry of the Iddat. Upon expiry, she is free to marry a person of her choice.

Chapter Eight

Conditions in a Marriage Contract according to Islamic Law

Because marriage in Islam is a special, sacred contract, with far-reaching implications, both for the parties thereto and for society at large, the shariah has strictly regulated it. In this context, and as appears below, the parties' right to agree to conditions in a marriage contract is not absolute but is limited by overriding provisions of the shariah, designed to preserve the sanctity of marriage.

Certain invariable consequences flow from the marriage contract itself, automatically by operation of the shariah. These consequences cannot be varied by contract because such a variation would be contrary to the essence of the marriage contract itself. For example, a contractual stipulation to the effect that the husband would not be obliged to maintain his wife during the subsistence of the marriage is void, because the husband's obligation to maintain his wife, during the subsistence of the marriage, is imposed by the shariah as an automatic *ex lege* invariable consequence of the marriage itself²⁹.

In such a case, the condition itself is void, but the marriage is valid. As the well known Hanbali jurist Ibn Qudama states:

فهذه الشروط كلها باطلة في نفسها لأنها تنافي مقتضى العقد

"These conditions are void in themselves, because they are contrary to the essence of the contract"

The question arises whether the prospective spouses may agree on a condition, which is not per se contrary to the essence of the marriage contract itself (in the sense of varying an invariable consequence), but may or may not be construed as being opposed to the objects of the marriage or an express text of the Quran and Sunnah. For example, can the parties stipulate in the marriage contract that the husband undertakes, during the subsistence of the marriage, not to take a further wife?

The majority of the classical jurists state that such a condition is void because it is not expressly sanctioned by the Holy Quran. In this regard, the Hanafi, Shafei and Maliki schools of interpretation, are of the view that a condition is invalid, unless the same is expressly and specifically sanctioned or permitted by an express text of the Holy Quran and Sunnah.³⁰

The Hanbali jurists, on the other hand, permit such a condition. They state that a condition (which is unrelated to an invariable consequence) and which is beneficial only to the wife is valid and enforceable to the extent that, in the case of a breach thereof by the husband, the wife is entitled (but not obliged) to claim a dissolution of the *marriage*. The basis of this view is that the condition is not only beneficial, but is also not opposed to the objects of marriage itself. As Ibn Qudama states:

ولأنه شرط لها فيه منفعة و مقصود لا يمنع المقصود من النكاح

“The contractual stipulation in favour of the wife has a benefit and rationale which is not opposed to the object of marriage”

The difference of opinion between the majority (jumhur) view, and the Hanbali view, centers upon those conditions, in relation to which, there is no express permission, or express prohibition,

in the shariah sources, In this sense, the conditions are neutral, the majority opting to prohibit them, the minority (Hanbali) opting to permit them.³²

The Hanbali view is most consonant with modern conditions, particularly in Muslim minority societies.

In those societies, where women are extremely vulnerable and often wronged, an appropriate marriage contract would assist in preventing injustices and preserving the marriage bond.

The Hanbali view has in essence been adopted by the Islamic Fiqh Academy of India which passed a resolution in the following terms:³³

1. Any condition inserted in a marriage contract which reaffirms an obligation owed by the husband to the wife is valid, and the husband is obliged to fulfill that obligation.
2. Any condition, which is contrary to the essence of the marriage itself, is invalid. For eg. A condition that the husband will not be obliged to maintain the wife.
3. Any condition, otherwise, which has not been imposed by the shariah, or, prohibited by it, is valid and enforceable.

Chapter Nine

Tafwid Ul Talaaq at the Time of Marriage

The Muslim jurists are unanimous that the right of talaaq is vested in the husband only. He may exercise the right of talaaq himself, or, he may do so through an intermediary. Where he does so through an intermediary, this may essentially take two forms. First, **tawkeel**, where the husband appoints a third party as his agent to pronounce the talaaq on his behalf, in accordance with the terms of the mandate. Because this is a principal-agent relationship, the mandate is revocable at any time. Second, **tamleek**, where the husband delegates the power to pronounce the talaaq to a third person, strictly according to the terms of the delegation or authority conferring the power.

In the case of tamleek, therefore, the operation of the talaaq so delegated is in a sense suspended so that the third party (who is the recipient of the delegation) simply pronounces the talaaq in accordance with the terms of the delegation. Hence, the delegation in the form of tamleek is not revocable by the husband. As the well known jurist, Imam Khaasani (KA) states:

فهو أنه لازم من جانب الزوج حتى لا يملك الرجوع عنه و لا
نهي المرأة عما جعل إليها و لا فسخ ذلك... ولأن هذا النوع من
التمليك فيه معنى التمييق

“The delegation by means of tafwid binds the husband, so that the husband is precluded from revoking the delegation, nor is the husband entitled to prevent the wife from implementing the tafwid (by pronouncing talaaq, if she chooses to do so)...because this form of tamleek has the effect of suspending the operation of the talaaq (in the

*sense that it is conditional upon the exercise thereof by the wife”.*³⁴

In essence, therefore, the tafwid ul talaaq comprises the following elements:

- (a) the husband delegates his power to exercise talaaq to his wife according to specified terms and conditions;
- (b) the husband is not entitled to revoke the delegation at any time;
- (c) the husband at all times retains his right to pronounce talaaq and never loses it, despite the delegation in the form of tafwid to the wife, with the result that both spouses have the equal right to terminate the marriage.

It is appropriate, to insert a tafwid ul talaaq clause in an antenuptial contract. The question, however, arises whether such a clause should be in absolute terms, or, should otherwise be restricted so that the wife is only entitled to exercise the power in strictly defined circumstances. The view has been expressed that a tafwid in absolute terms may not be desirable, and may in fact lead to the arbitrary exercise thereof by the wife.³⁵

A clause in an antenuptial contract providing for a tafwid in absolute terms may take the following form:

“In contemplation of the marriage to be hereafter contracted between husband and wife on..... The husband

delegates his power of talaq to the wife, by means of tafwid ul talaq, so that the wife shall be entitled (but not obliged) to pronounce upon herself, at any time (whenever she wishes) One talaq baain and thereby terminate the marriage, and the wife hereby accepts such TAFWID”

On the other hand, a tafwid which is conferred in more limited terms may take the following form/;

“In contemplation of the marriage to be hereafter contracted between the (prospective) husband and (prospective) wife, the husband delegates his power of talaq to the wife, in the form of tafwidul talaq, so that the wife shall be entitled (but not obliged) to pronounce upon herself, at any time (whenever she wishes) one talaq baain, and thereby terminate the marriage. Provided that the wife shall not be entitled to make such pronouncement unless and until two persons who have expertise in matrimonial matters, (appointed by her) certify or confirm in writing that:

- (a) the marriage has irretrievably broken down, and there is no reasonable prospect of reconciliation between the spouses: or
- (b) the husband has been guilty of substantial misconduct; or
- (c) the husband has taken a second wife; or
- (d) the husband has failed to maintain or support his wife;

and the wife hereby accepts the **TAFWID** subject to the condition aforesaid”

The well known Hanafi authority, Fataawa AlamGiri, provides precedents of both absolute and limited tafwid clauses.³⁶

An example of an unqualified clause is as follows:

شهر و أن فلانا جعل أمر امراته فلانه بيدها على أن تطلق نفسها
ما شاءت من واحدة أو ثلاث و متى شاءت ابدا و انها قبلت منه
هذا الأمر.

“This contract, through the witnesses who have subscribed hereto, records that the husband(...) Has conferred upon the wife (...) The affair in her own hands, on the basis that she may divorce herself, once or thrice as she wishes, and whenever she wishes at any time; and the wife has by virtue hereof accepted this delegation”

Chapter Ten

The Nature and Effect of Talaaq (divorce)

Marriage in Islam is a permanent institution, and is regarded as a cornerstone of society. Because a divorce or dissolution of marriage is destructive of the purposes and benefits of marriage of marriage, it is frowned upon, to be resorted to in the last, when all reasonable attempts at reconciliation of the spouses have failed, and the marriage has irretrievably broken down. In this situation of necessity, where the benefits in continuing the marital relationship is outweighed by the harm, the shariah permits a talaaq or divorce.

The word talaaq, in its legal sense, signifies the dissolution of the marriage bond or contract by the use of specific words, pronounced by the husband or his agent or intermediary including words communicated in written form (eg. Letter addressed to the wife, which must be construed according to ordinary principles). For example, a husband writes to his wife: *"I hereby divorce you"*, the divorce takes effect immediately. But if the letter states that: *"When this letter reaches you, you are divorced"*, then, the divorce only takes effect when the terms of the letter are communicated to the wife.³⁷

The words used to indicate a talaaq may be clear, express and unambiguous, in the sense that they are used generally in ordinary usage in the meaning of the termination of the marriage itself. For example, the word "divorce" when ascribed or attributed by the husband to the wife. In this case, the words speak for themselves, so that recourse to intention is not permitted to fix the meaning, the divorce being imputed by the use of the words themselves. This applies to all languages

and is not subject to changes in usage.³⁸

On the other hand, the words used by the husband are not coined, in their primary meaning, to signify a divorce or dissolution of marriage; they are ambiguous in the sense that they have more than one meaning, including the meaning of divorce in a latent sense.

For example, the word “separation” could simply mean a physical separation, or, could be construed as meaning a separation (in the sense of a dissolution) of the marriage bond itself. In this case (save for the exceptions, mentioned below, where the surrounding circumstances legally fixes the intention), it is necessary to have recourse to intention, in order to fix the meaning in its proper context. If the husband states that by the use of the expression, he intended a divorce, then that intention would be given effect to, and a divorce would accordingly take effect as from the time of pronouncement.

In short, the words used by the husband, in either form, must in effect indicate an intention to divorce. As the well known Hanafi jurist Imam Khaasani states:

هو جعل دلالة على معنى الطلاق من صريح او كناية.

“Words are expressed to indicate the meaning of talaaq, either in the express, unambiguous form (“sareeh”), or, in the ambiguous latent tense (“kinaayah”).

As stated above, where the expression used by the husband conveys the meaning of divorce in a latent sense (and not in a primary sense), and falls within the category of KINAAYAH, then, recourse must be had to the intention of the husband. The principle is, however, subject to an exception: The surrounding circumstances or the contextual setting in which the expression is used may in a particular case suffice to indicate that the only reasonable inference is that, the husband intended to divorce his wife, in which event such an intention would be deemed to be legally imputed to the husband. The well known jurist Ibn Abideen (RA) in his Raddul Muhtar has defined such contextual circumstances, known technically as **DALAALA UL HAAL** as follows:

المراد بها الحالة الظاهرة المفيدة المقصودة.

“Daala UL Haal means the apparent contextual setting (in which the expression is used) which demonstrates its purpose (by fixing the meaning of the expression)”

An example of such apparent surrounding circumstances (which would speak for themselves) is the case where, during, the course of a discussion on divorce, the wife asks the husband for a divorce, and he responds in language which can only be construed, in that context, as signifying only a divorce. For example, he may respond, “separate from me” “or the affair is in your hand”. In this case, the expression used by the husband, in its proper context, is only consistent with a divorce and accordingly is treated on the same basis as an express (“Sareeh”) divorce, without recourse to his subjective intention itself, evidence thereof not being admissible.

Chapter Eleven

Grounds for Dissolution of a Marriage in Islamic Law: Rights of the Wife

Although the right of divorce, in the Shari'ah, is restricted to the husband only, the wife has also been given a right to apply to a court of law, in certain situations, for the dissolution of her marriage. If the court is satisfied after hearing both the parties that the application is based on such grounds as warrant the dissolution whereby the marriage is dissolved.

New and changed circumstances and conditions have created new problems in the social, political and economic arenas of life. As a result, the legal rules of the one madhhab (school of law) are sometimes inadequate to deal with the changed circumstances.

In recognition of this reality of applying rules to suit new circumstances and customs, the Muslim jurists have held that in cases of necessity the applicable rule of another madhhab may be selected in accordance with certain conditions. Similarly, and in the absence of a clear text of the holy Qur'an, or Hadith (sayings of the Prophet), or a consensus of jurists (ijma), the qualified jurists (who satisfy certain criteria of ability and insight) may by means of interference, analogy and legal reasoning deduce rules directly from the primary sources, the Qur'an and Sunnah (practice of the Prophet), to deal with the new problems. In view of the fact that the Shari'ah (laws of Islam) is the Divine code of law to last until the Day of Judgement, the answers to all new problems may easily be inferred by the mujtahid (person qualified to exercise ijtihad). The scope and application of ijtihad is, however, beyond the scope of this article.

In the sphere of Family Law also, certain rules of the Hanafi school, for example, do not provide adequate solutions to certain family problems which are products of modern conditions. For instance, as will appear later, serious hardship is caused to a wife whose husband is missing. To resolve such problems the well-known scholar Maulana Ashraf Ali Thanvi (R.A.) wrote the book entitled *AL-HILAHAL-NAJIZAH*. What follows purports to be no more than a summary of the principles contained in that book, and other authentic references including *Kitab-Ul-Faskh Wath Tafriq* published by Muslim Personal Law Board of India (Bihar and Qrissa).

1. MISSING HUSBAND

The Hanafi rule is that a missing husband, whose living or death is unknown, is presumed to be alive until persons of his age living in his locality die. It follows that, until such event, his wife could not validly contract a new marriage. This rule is subject to the exception that, where the husband disappears in circumstances, such as sea voyage, war and extreme sickness, which on a preponderance of probability indicates that he died, the judge may dissolve the marriage by fixing a period which in the circumstances would satisfy him that at the expiry thereof, the person missing is most probably dead.

The later Hanafi jurists, however, on the basis of necessity, and having regard to the changed circumstances and conditions, and the hardships that would befall a wife (if a long period of waiting was fixed) adopted the rule of Maliki madhhab (school of law), namely, that a waiting period of four years be fixed from the date of the wife's application, to the judge, or in his absence, a judicial committee, for a dissolution of the marriage.

Obviously, before the fixing of the four year period, the judge or judicial committee (as the case may be) must be satisfied that:

- i) the applicant was married to the missing husband
- ii) the husband is missing or cannot be found or traced; and
- iii) there is no reasonable prospect that the missing husband could be found, traced or located.

This rule is subject to two exceptions:

- i) If the judge or judicial committee is satisfied on a preponderance of probability that the wife cannot wait for four years without committing adultery or becoming involved in sin, a waiting period of one year may be fixed whereupon the marriage will be dissolved. According to the Hanbali school, the period in such case is six months; or
- ii) If the wife cannot be maintained for the duration of the four year period, she may demand immediate dissolution of her marriage.

The position is clearly summarised by a well known Maliki scholar in the following words:

“Know, that a Muslim woman whose husband is missing must wait for four years. Thereafter, she must undergo a period of iddah³⁹ of four months and ten days. However, if the missing husband has not made provision

اعلم أن المرأة المسلمة التي فقدت زوجها تعتد أربع سنين ثم تعتد عدة اربعة و عشر. أن المفقود عنها زوجها و لم يترك لها نفقة

for maintenance for the wife who is in dire need thereof, or such wife cannot exercise self restraint and fears, that she may commit fasad⁴⁰, then the wife is entitled to a decree of divorce without waiting for any period”⁴¹

واحتاجت غاية الاحتياج او
خافت على نفسها الفساد-ان لها
التطليق بلا تأجيل

2. ABSENT HUSBAND WHOSE ADDRESS IS KNOWN

As opposed to the missing husband, this refers to the husband who leaves the matrimonial home and whose whereabouts are known. For instance, he may be employed in another city or country.

From a practical viewpoint, however, there is no difference between the case of the missing husband and the husband who is absent in that both breach their duty to maintain the wife and fulfil the marital obligations.

The aggrieved wife who, in such circumstances, applies to a judge or judicial committee for a dissolution of her marriage must prove that:

- i) she is married to the absent husband;
- ii) such husband does not maintain her, and has made no provision for her maintenance;
- iii) she has not waived her right to maintenance; and
- iv) the husband has breached his obligation to maintain her.

Thereupon, the judge or judicial committee, will call upon the husband to properly maintain his wife and fulfil her rights within a period of one month, failing which, the judge or judicial committee, will dissolve the marriage.

The Hanafi jurists have in this case also followed the ruling of the Maliki madhhab:

“The procedure of obtaining the divorce of the wife of the missing or absent husband who cannot be traced, or if traced, refuses to comply, when the application for dissolution of the marriage is based on a failure to maintain the wife is for the wife to prove by means of two witnesses that the absent person is her husband; and that he has made no provision for maintenance for her; and that she has not waived her right to maintenance; she is required to take an oath on these matters where upon the judge will say:

و طريق تطليق زوجة المفقود او
الغائب الذي تعذر الارسال اليه
فتعاند- ان كان لعدم النفقة- فإن
الزوجة تثبت نشاهدين ان
فلانازوجها غائب عنها و لم
يترك لها نفقة و لا وكيلا بها- و
لا اسقطها عنه و تحلف على
ذلك فيقول الحاكم

I have dissolved the marriage or I have divorced you on his behalf; or he orders her to divorce herself and makes the divorce an Order of Court. This takes place after the expiry of a period, such as one month”⁴²

فسخت نكاحه او طلقت منه- او
يامرها بذلك. ثم يحكم به وهذا
بعد التلوم بنحو شهر

3. BREACH OF OBLIGATION TO MAINTAIN

In the case of maintenance, two situations must be distinguished:

- i) where the husband is absolutely unable to maintain his wife because of poverty and lack of means; and
- li) where the husband has sufficient means and is able to maintain his wife but, out of stubbornness or, for other reasons, refuses to maintain her.

In both these situations, there was no clear provision in the Hanafi law to dissolve the marriage.

The Hanafi jurists have accordingly adopted the provisions of the Maliki and Shafi'i law which provide for dissolution as follows:

- a) In the case where the husband is absolutely unable to maintain his wife ((I) above), the judge or judicial committee will, after proper proof of the husband's inability to maintain her, adduced by the wife, make demand on the husband to fulfil his obligations to maintain within a specified time limit, failing which, such judge or judicial committee, will dissolve her marriage. There is a difference of opinion as to the time limit to be given to the husband, but it is submitted that this would depend on the circumstances of each case.

“The proponents of dissolution of a marriage for failure of the husband to maintain the wife differ on the time limit to be fixed for the husband to comply. Malik (R.A.) states that the time period should be one or two months. Shafi’i (R.A.) states that the period should be three days.”⁴³

و قد اختلف القائلون بالفسخ في تأجيله بالنفقة، فقال مالك يؤجل شهرا او شهرين و قال الشافعي ثلاثة ايام.

- b) Where the husband is possessed of sufficient means (ii) above), then the judge or judicial committee is entitled to immediately dissolve the marriage without fixing any time limit by consensus of opinion according to the Maliki law.

“The judge or judicial committee will dissolve the marriage immediately.”⁴⁴

اي طلق الحاكم من غير تلوم.

The right of the wife to obtain a dissolution of her marriage on the ground of her husband’s failure to maintain her is the viewpoint of the overwhelming majority of jurists (jumhur).

If the husband is unable to maintain his wife, and she elects to seek the dissolution of her marriage to him, the judge or judicial committee will order such dissolution. This is the opinion of the overwhelming majority of jurists”⁴⁵

ان الزوج اذا اعسر عن النفقة امرأته واختارت فراقه فارق بينهما. و اليه ذهب جمهور العلماء.

4. FAILURE OF HUSBAND TO FULFIL WIFE'S RIGHT TO SEXUALINTERCOURSE

A situation may arise where a husband provides the wife with a residence and properly maintains her, but fails to fulfil the marital obligation of sexual intercourse. As a consequence, there is a serious danger that the wife may become involved in sin. The Hanafi law is that the husband is under an enforceable obligation to have sexual intercourse with his wife **once**. In other words, he may be compelled by Court Order to do so, failing which, the marriage may be dissolved.

Therafter, the Hanafi jurists are divided into two groups as follows

- i) One group is of the opinion that the husband is under an obligation to have further sexual intercourse with his wife, but that this obligation is not enforceable by law. In other words, the obligation is a purely religious one (ديانة).
- ii) The other group is of the view that the obligation of the husband to have further sexual intercourse is not only a religious one, but is also enforceable by law. In other words, the wife is entitled by decree of Court or a judicial committee to obtain dissolution of her marriage should the husband fail in his duty to have sexual intercourse with her.⁴⁶

“When the wife demands sexual intercourse, the husband is obliged to have intercourse with her. She may enforce this obligation in a Court of Law for the first time. Thereafter, according to some jurists, he is religiously obliged to have further intercourse, but this obligation is not enforceable. According to other jurists, the obligation to have further intercourse is enforceable.”⁴⁷

و اذا وجبت عليه - و يجبر عليه
في الحكم مرة - و الزيادة تجب
ديانة لا في الحكم عند بعض
اصحابنا - و عند بعضه يجب
عليه في الحكم.

Although there is basis in Hanafi law to dissolve a marriage for failure to have sexual intercourse, the Hanafi Ulama in recent times have adopted the Maliki law in this regard which provides that the wife may obtain a dissolution because the failure to have sexual intercourse is a greater harm than the failure to maintain.

Not having sexual intercourse can cause greater harm than the failure in not providing (the wife).⁴⁸

لأن ضرر ترك الوطؤ أشد من
ضرر عدم النفقة.

5. EMASCULATED HUSBAND

According to Hanafi law, if a wife applies to a judge or judicial committee for dissolution of her marriage on the ground that her husband is emasculated or castrated or that his penis is cut off, then the judge or judicial committee, after proof thereof,

will immediately pass a decree dissolving the marriage without fixing a period or return day.

و لو وجدت المرأة زوجها
محبوبا خيرا القاضي في الحال و
لا يوجل.⁴⁹

و إن كان محبوبا فرق بينهما في
الحال. إن طلبت لأنه لا فائدة
في التأجيل.⁵⁰

6. IMPOTENCY OF HUSBAND

An impotent husband means, according to the jurists, that the person who is unable to perform sexual intercourse with his wife as a result of disease, weakness, old age, senility or otherwise, notwithstanding the fact his sexual organs are intact.

In the case of the husband's impotency, the wife may apply to the judge or judicial committee will, in accordance with the procedure laid down by the jurists, fix a period of one year calculated from the date of the order of such judge or judicial committee, in order to give the husband an opportunity to take appropriate remedial measures to end the impotency. If the Court is satisfied at the expiry of the period, in accordance with the procedural and evidential requirements prescribed by the jurists, that the husband has not ceased to be impotent, it will dissolve the marriage.

عن سعيد بن المسيب قال :
قضى عمر بن الخطاب في العنين
أن يؤجل سنة.
Umar ibn al-Khattab (R.A)
decreed that a period of one
year be fixed in the case of
impotent husband.⁵¹

The wife loses her right to claim a dissolution of her marriage on this ground in the following circumstances:

- i) if she was aware of her husband's impotency prior to the marriage, and, notwithstanding married him; and
- ii) if she expressly consented to live with her husband after being informed of his impotency. For example, she says: "I am happy to stay with him although he is impotent." Silence in these circumstances will not be deemed to constitute consent.

7. INSANITY OF HUSBAND

The wife is entitled to obtain a dissolution of her marriage in the event of the insanity of her husband in circumstances where such insanity:

- i) causes extreme difficulty to her and renders cohabitation intolerable; and
- ii) constitutes an impediment to the fulfillment of her rights.

In this regard, two situations must be distinguished:

- a) insanity that is incurable and not accompanied by lucid intervals; and

b) insanity that is accompanied by lucid intervals

In the case of incurable insanity, on the application of the wife for dissolution and after proof thereof, the judge or judicial committee will forthwith dissolve the marriage.

In the second case, (b), the judge or judicial committee will, after proper proof of insanity, prescribe a period of one year so as to give the husband an opportunity to avail himself of medical treatment. If at the expiry of the period, the husband is not cured of his mental illness, then the judge or judicial committee will, at the instance of the wife, issue a decree dissolving the marriage.

The right to obtain an immediate annulment of the marriage in situation (a) above, accords with the viewpoint of the Hanafi madhhab. The remaining three madhhabs (maliki, Shafi'i and Hanbali) prescribe the period of one year in both situations before issuing a dissolution order.

The wife waives her right to claim a dissolution of marriage on the ground of her husband's insanity if:

- i) prior to her marriage, she had knowledge of his insanity; or
- ii) after becoming aware of his insanity, she expressly consents and agrees to live with him.

8. DISEASE OR DEFECT ON THE PART OF THE HUSBAND

The wife is entitled to obtain an order dissolving her marriage if the husband suffers from a disease or defect which causes her serious prejudice or harm and renders cohabitation intolerable.

Imam Muhammad's statement in regard to the first three (factors upon which a dissolution of the marriage may be obtained) namely insanity and leprosy, to these, Qahastani (R.A.) has added every defect which does not render cohabitation with the husband possible except with prejudice or harm.⁵²

قوله في الثلاثة الأول - و هي
الجنون و الجزام و البرمى و الحق
بهن القحستاني كل العيب. لا
يمكنها المقام معه الا بضرر.

9. CRUELTY OF HUSBAND

According to the Shari'ah, a husband is not permitted to treat his wife with cruelty. The cruelty of the husband may take various forms such as, continuous beatings, assaults and coercion to commit acts prohibited by Shari'ah.

In such circumstance, the wife is entitled to certain relief. under the Hanafi law, the wife is entitled to obtain a Court order restraining the husband from the commission of such unlawful acts, but she is not entitled to a dissolution order on this ground alone.

On the other hand, under the Maliki law, the wife is entitled to obtain an order dissolving her marriage in consequence of her husband's beatings, assaults and ill-treatment.

Accordingly, in circumstances, where the ill-treatment causes serious prejudice to the wife and renders her life a misery, she may claim a dissolution after properly proving her claim.

“The Hanafi madhhab is that the husband who harms his wife, for example, by seriously beating her is entitled to be restrained from such conduct by Order of Court. The wife is entitled to claim such a Court Order. On the other hand, the Maliki Madhhab, is that the wife is, in such circumstances, entitled to obtain a Court Order dissolving her marriage⁵³

مذهب الحنفية أن الزوج الذي
يضار زوجته بنحو الضرب
المبرح يستحق التعزير للزوجة أن
ترفع أمرها إلى القاضي طالبت
تعزيره - و مذهب المالكية أن
للزوجة في هذه الحالة أن تطالب
إلى القاضي أن يطلقها منه.

Footnotes

1. At the same time, it must be noted that the Hadith is also an independent source of law apart from the Qur'an in the sense of establishing legal rules which are contained in the Qur'an. This law-creating role of the Hadith independent of the Qur'an is clear from the following statement of the Prophet (S.A.W.):

“And indeed the Prophet of Allah has prohibited certain things just as Allah has done”.

In any event the specific function of the Hadith would be an exposition of the Qur'an in that its scope would fall under the following general Qur'anic command:

“Whatever the Prophet (S.A.W.) Gives you, take it and whatever he forbids, refrain (from it).” (S59:V7)

See “The Qur'an and Hadith”, Maulana Qari Muhammad Tayyib, Fadhul-Bari, Vol 1, Eng, p113-114.

2. IJMA and QIYAS are not primary sources but are subordinate to the Qur'an and Sunnah in the sense that they are based on these two primary sources and cannot exist apart from them. See “Qur'an and Hadith” op cit p105. Qiyas based on personal opinion is invalid.
3. According to the great jurist Imam Hanifah (R.A.) The element of Ibadat is the predominating one, on the distinction between the marriage contract and ordinary contracts, see generally:
 - a) *Tafsir Maariful Qur'an*: Mufti Muhammad Shafei (R.A.) : Vol 1 (S2:V229)
 - b) *“Our Family Problems”* (in Urdu), Maulana Muhammad Taqi Usmani: p156-157.

4. And also the separation of beds within the matrimonial home and minor light beating without causing pain or injury. (S4:V54)

Striking the face is prohibited. Beating is not the practice of noble men, nor was it resorted to by the Prophets. In fact, the Hadith says: *“Noble husbands shall never beat their wives”*.

The verse postulates fault on the part of the wife by reference to the immediately preceding words:

“And as far those women whose disobedience you fear”.

See *“Tafsir Maariful Qur’an”*, Vol 2, op cit, at S4: V34.

5. Quoted in *“Ihlaa-us-Sunnan”*, Maulana Zafar Ahmed Usmani, (Arabic), p144, Vol 2 (hereinafter referred to as “Sunnan”).
6. So that the waiting period of Iddat is not unduly prolonged for fear of pregnancy, as the waiting period of pregnant women extends until delivery. See *“Tafseer Marriful Qur’an”*, Vol 1, p552.
7. As opposed to ordinary contracts for which no specific procedure is laid down. They may be cancelled verbally, in writing or by conduct indicative of repudiation.
8. In other words, no further divorce must be given prior to the expiry of the Iddat, so as to cause the least harm to the wife (Sunnan, p144) and leave open the option of reconciliation.
9. Sunnan, p143.
10. By abandoning the procedure prescribed.
11. Imams Malik, Shafei, and Hanbal were of the view that the Sunnah procedure is the giving of divorce in a period of purity in which cohabitation has not occurred and thereafter, the wife be left to complete her prescribed waiting period as

stated under the title: "The correct manner of giving divorce". For instance, Imam Hanbal says:

"Sunnah divorce is one. Then the wife is left to complete three menstrual periods".

However, the Hanafi jurists divided Sunnah divorce into two:

- i) Ahsan, or the best procedure which coincides with the Sunnah divorce of Imama Malik, Shafei and Hanbal - ie., Pronouncing one divorce in a period of purity as stated above.
- ii) Hasan, which refers to the procedure of giving one divorce in three separate stages of purity, and has been used in apposition to Bidah (ie., The prohibited manner of giving three divorces simultaneously, or in one period of purity, or the giving of divorce during menstruation or in a period of purity wherein sexual relations occurred).

See Sunnan, p144.

12. Maulana Taqi Usmani, op cit, quoted at p164.
13. The divorce precedent to the exercise of the right of re-taking would be included in the computation.
14. Or, the husband dies.
15. The Prophet (S.A.W.) Cursed the parties who entered into a scheme with the express purpose of remarriage to the first husband in the following words:

"The Prophet of Allah cursed the (second husband) who makes the divorced wife lawful and the person (first husband) for whom such woman is made lawful". (Sunnan p126)

16. The Shafei view is that the waiting period is three periods of purity on the basis that the word “Quru” in the verse cited refers to “purity” and “menstrual period”. The Hanafi jurists have chosen the latter meaning on the basis of its use in the Hadith. See Sunnan p253.
17. In accordance with the Hadith relating to Ibn Umar (R.A.) in this regard, see Tafseer Mazhari. This applies to a consummated wife.
18. See generally Maulana Muhammad Taqi Usmani op cit, p193-202.
19. Known as Kinayah.
20. See Durrul Mukhtar on this section.
21. Known as Sareeh
22. Technically called Rujat.
23. See Tafsir Marriful Qur’an, op cit.
24. See generally Durrul Mukhtaar and Al Heelatul Naajizah - Maulana Thanvi.
25. See generally Hedayah and Durrul Mukhtar
26. Because the speaker is in control of his speech although he does not agree with the effect thereof. Imam Shafei and Malik dissent in this regard. Coercion may be used to extract a divorce from an oppressive husband who refuses to grant it out of spite.
27. Because the intoxication was caused by a culpable act.
28. See reason set forth in note 26.
29. “Another example is a contractual stipulation to the effect that the husband will not pay or grant the wife a dower”.

30. see, generally, Al-Ahwal Ul Shaksiyah. Imam Abu Abu Zahra, Cairo, the chapter on the consequences of a valid marriage, at p163-p169
31. See AL Migni IBID, rule no. 5322
32. See AL Ahwal UL Shaksiyah, IBID, page 166
33. See volume 1 of the Academy's publication, edited by Qadi Mujaadil Islam, a distinguished jurist of India.
34. See: Khasani, Badai US Sanai, vol 3, Lebanon edition, vol 3, p180
35. See: Maulana Ashraf Ali Thanvi (RA)) AL Hila AN Naagizah, chapter 1, dealing with tafwidul Talaaq at any time of marriage, and the model contacts drafted by the learned scholar.
36. See: Kitabus Shurut, volume 6, the section dealing with divorce under the heading: *إذا ادّاد الرجل أن يجعل امرأته بحراً فهو مشتمل على ألواح*
37. See: Badai US Sanai, chapter on divorce
38. see: Raddul Muhtaar, shapter on Kinaayah p299.
39. iddah: prescribed waiting period
40. fasad: immoral acts, such as adultery
41. Thanvi, Maulana Ashraf Ali: Al-Hilah al-Najizah, p. 181-241
42. Al-Hilah al-Nijizah, op cit.
43. ibid
44. Al-Hilah al-Najizah, op cit
45. Nayl al-Awtar, quoted by Maulana Zafar Ahmad Uthmani in the I'la al-Sunnan
46. Al-Hilah al-Najizah, op cit.
47. Al-Bahr Al-Ra'iq
48. Al-Hilah al-Najizah, op cit.
49. Fatawah Aalamgiri
50. Al-Hidayah
51. I'la al-Sunnan
52. Al-Tahawi
53. Ahwal al-Shakaiyyah

