

***Fiqh***  
**of**  
**the Muslim family**

A Manual Book  
in Islamic Jurisprudence



*Hasan Ayyoub*

Translated by:

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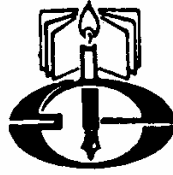
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# Glossary

## **-Ansar:**

(singular: Ansari) The Companions of the Prophet (pbuh) from the inhabitants of Madinah who embraced and supported Islam and who received and entertained the Muslim emigrants who had emigrated from Makkah, and other places.

## **-`Awrah:**

one's private parts that he/she is not allowed to uncover except for certain people and in certain cases. The term `awrah may also be used for other meanings, as in the opinion that says that the voice of a woman is a `awrah. Here `awrah means that a woman's voice is something that she is not allowed to let everybody hear.

## **-Bid`ah divorce:**

It consists of either making a pronouncement of divorce during one of the woman's menstrual periods or during an interval between them in which they have had sexual intercourse.

## **-Dhimmi:**

Anyone of the People of the Book who are living under the protection of an Islamic government.

## **-Dinar:**

The basic gold unit of currency.

**-Dirham:**

The basic silver unit of currency.

**-Du`a':**

This is an Arabic term to signify supplications and invocations directed to Allah by His servants.

**-Faskh:**

In marriage, faskh signifies the nullification of the marriage contract due to a legal reason, such as foster relationship.

**-Fatwa:**

A personal legal opinion issued by a qualified, well-versed scholar of Fiqh (Islamic Jurisprudence).

**-Fay'ah: In Ila',**

fay'ah means that a man returns to having sexual intercourse with his wife with whom he has made ila'.

**-Fiqh:**

Islamic Jurisprudence

**-Fiqhi:**

pertaining to Fiqh (Islamic Jurisprudence).

**-Hadith:**

The traditions of the Prophet (pbuh) represented in his saying and deeds as well as his tacit approval.

**-Hanafis:**

The disciples and followers of Imam Abu Hanifah An-Nu`man.

**-Hanbalis:**

The disciples and followers of Imam Ahmad Ibn Hanbal.

**-Hijrah:**

The well-known emigration of the Prophet (pbuh) from Makkah to Madinah.

**-Ihdad:**

Ihdad, linguistically means avoidance, and in Sacred Law means that the woman whose husband has died avoids or refrains from perfume and adornment.

**-`Iddah:**

a woman's waiting period after divorce.

**-Ijab wa qabul:**

proposal and acceptance (of marriage).

**-Ijma`:**

"Consensus" or "Agreement". The third most important source of Islamic Law, where it denotes the unanimity of the practice and belief of all, part of, and the total community of the believers.

**-Ijtihad:**

Personal Reasoning. It is a secondary source of Islamic Law.

**-Ila':**

In sacred law, ila' means that the husband swears that he will not have sexual intercourse with his wife, either for an unrestricted period or for more than four months.

**-Imam:**

A term with numerous connotations, all revolving around the idea of "leadership."

**-Jama`ah (in Hadith):**

literally, Al-Jama`ah means "The group". This group comprises Al-Bukhari, Muslim, Abu Dawud, At-Tirmidhi, Ibn Majah and An-Nasa'i.

**-Jizyah:**

Head-tax imposed by Islam on the people of the Scriptures and other people who have a Heavenly Book (non-Muslims) when they are under the Muslim rule.

**-Khalwah:**

it is that a man is alone with a marriageable woman.

**-khiyar al-majlis:**

It is a right of unilateral repudiation of contract during the session.

**-khiyar ash-shart:** Is a stipulated right of cancellation.

**-Khul`:**

it is that a woman gives her husband some amount of money to let him release or divorce her.

**-Li`an:**

If a man is sure that his wife has committed adultery, he makes a plea to the ruler or his deputy. The ruler orders them to observe the oath of condemnation (Li`an). (The way in which li`an is made is explained inside the book.)

**-Madhhab:**

An Islamic School of Jurisprudence.

**-Malikis:**

the disciples and followers of Imam Malik Ibn Anas.

**-Mawla:**

in Arabic, this word is used for many meanings such as friend, fellow, client, servant, and freed man.

**Mudd:**

(0.51 litres of food). A Mudd equals 1/2 Egyptian Qadah. A Qadah equals 1.25 kilos.

**-Mufawwidah:**

This is a title of the woman who authorizes society to decide her dowry according to local customs.

**-Muhallil:**

this term refers to a man who temporarily takes a woman in marriage, has sexual intercourse with her, and then divorces her to go back to her ex-husband's bond after the termination of her `iddah. This type of marriage is called "Muhallil Marriage".

**-Mukallaf:**

In the Islamic Shari`ah, the mukallaf is the sane, mature person to whom the rulings of the Shari`ah are directed and who



is entitled to follow and carry them out. In short, he may be described as "a responsible person".

**-Mut`ah (in divorce):**

Indemnity payable in certain cases of repudiation.

**-Mut`ah marriage:**

It is a personal contract between a man and a woman to cohabit for a limited period of time at the end of which she becomes automatically divorced, in return for a certain remuneration payable by the man.

**-Nafaqah of a wife:**

Nafaqah here linguistically means maintenance, and it legally means that a wife has the right to be maintained by her husband in return of his holding her and enjoying her.

**-Raj`ah:**

In revocable divorce, the husband can take his wife back. This is called "raj`ah".

**-Rak`at:**

In prayer, a rak`ah is a set of actions beginning with recitation (of Al-Fatihah, the opening Surah of the Qur'an) and ending with prostration.

**Sa`:**

(2.03 litres of food)

**Sahih al Bukhari:**

it is the title of the book of Hadith that has been authorized by Imam Muhammad Al-Bukhari.

**-Sahih Muslim:**

it is the title of the book of Hadith that has been authorized by Imam Muslim.

**-Shafi`i:**

the disciples and followers of Imam Muhammad Ibn Idris Ash-Shafi`i.

**-Shahadah:**

The testification of faith, i.e., declaring that there is no god but Allah and that Muhammad is the Messenger of Allah.

**-Shar`i:**

pertaining to Shari`ah (The Islamic Law).

**-Shighar marriage:**

It is the marriage in which a man exchanges his daughter for another man's daughter on condition that no reciprocating of dowry is required.

**-Sunnah divorce:**

It is to make a pronouncement of divorce in an interval between menstruations in which no sexual intercourse with the wife has taken place.

**-Sunnah:**

All the traditions and practices of the Prophet (pbuh) that have become a model to be followed by Muslims.

**-Sunni:**

Pertaining to the Sunnah of the Prophet (pbuh).

**-Surah:**

the qur'an is divided into a hundred and fourteen chapters. Every chapter is referred to as a surah, but it has its own name, such as, Al-Fatihah and Al-Baqarah.

**- Shari`ah:**

The Islamic Law.

**- Ummah:**

The religio-political community of all Muslims.

**-Two sahihs:**

Sahih Al-Bukhari and Sahih Muslim. They are the most authentic books of Hadith.

**-Waliy:**

In marriage, a waliy is a legal guardian who is specified by the Shri`ah to marry off a certain woman.

**-Zhahiris:**

a fiqhi Islamic school named after Ibn Hazm Az-Zahiri.

**-Zihar:**

The origin of zihar is that a man says to his wife, "To me, you are just like my mother's back." In Islam, this is not regarded as divorce. Allah the Almighty appointed expiation thereof.

**-Zina:**

the Arabic term "zina" signifies either adultery or fornication.

# Introduction

Praise be to Allah Lord of the worlds and blessings and peace be upon the best of the prophets and messengers, Muhammad and upon his family and companions.

Whenever the intelligent people, who are free from straying whims, psychological destructive desires and spites that derange one's discretion and cover his vision, contemplate the way how Allah controls the world and manages its affairs they clearly observe how perfect His legislation is and how wise His management is. Yet, human beings can never describe this or realize its uses and effects overall. How truthful are the Divine words that read,

*"And We reveal of the Qur'an that which is a healing and Mercy to the believers."*

(Al-Isra': 82)

Marriage is one of the aspects of this perfection.

Once the young people, male or female, reach puberty with full animation and hope in life, they go ahead trying to satisfy their blooming desires. On top of these desires is the sexual one.

The youth go through every way and direction to destroy the chains that prevent them from gratifying this desire. Observing the man-made laws concerning the sexual instinct, one can see that they are like a semi-ruined wall facing a flood running

down from a very high mountain; the wall is not qualified to resist properly, nor does the flood recede. Meanwhile, people have no way to run while being surrounded by all forms of tribulation and immorality.

There have appeared a great number of psychological diseases, physical maladies, ethical looseness and social inferiority. Much money has been spent in the course of remedying such diseases. This grievous condition has led to the destruction of many families and communities. Contemplating Allah's methodology and legislation regarding man's protection against the predation of this instinct, one can observe that these legislations provide him with the guidance he needs in the different stages of his life. They always bestow on him means that raise him best. They bear for him love, mercy, good care, and satisfaction of desires with nobility, purity and superiority. All these sets are accompanied by overwhelming control and observation of Allah the Almighty.

The laws resolved by Allah the Almighty make for the Muslim family an internal system along with an external one. Inside the family, there are certain proprieties that must be considered, instructions that must be followed and directions that must be maintained. All these laws, if fulfilled, protect the family against everything that may threaten its honor, dignity, and rapture.

As far as the relation between the family and society is concerned, there are given rules and legal processes that keep it safe in the face of shattering storms as well as the mistakes that bring about grief and hardships. These instructions deal with the family wisely, pay its attention to the aside dangers, order it to

marry off its youth at an early age, and prescribe particular rights upon and for the spouses, so that their maternal life can be truly radiant, stable and productive.

In reality, inasmuch as a family follows Allah's methodology and legislation, it enjoys a happy life and serves as a guide lighthouse in society. On the other hand, wretched is the family that neglects the teachings of the Allah the Most High and the directions of the Prophet (pbuh). Furthermore, everyone who coexists with such a family faces the same sufferings. How sufficient are the Qur'anic words that read,

*"But whosoever turns away from My remembrance, he shall surely have a straitened life, and We will gather him on the Day of Resurrection blind."*

(Taha: 124)

Dear honorable readers! You will find inside this book satisfactory, divine rules and laws concerning marriage and divorce as well as care for the Muslim family. Allah willing, they will make you - if you are fair - say, "By Allah, this is the true beauty, perfection and glory!"

*Hasan Ayyoub*

# CHAPTER ONE

## Marriage

### Meaning:

*Nikah* is an Arabic word which means joining, and it literally refers to “marriage”. In the sacred law it means the contract held between spouses to make sexual intercourse lawful. It is real when referring to the contract but figurative when referring to the intercourse.

Allah Almighty says,

﴿ *So marry them with the permission of their masters.* ﴾

(An-Nisa': 25)

Intercourse cannot be allowed with any permission. Abu Hanifah says that it is real when referring to intercourse but figurative when referring to the contract. The Prophet (pbuh) says, "*Marry one another, that you may increase.*"

The legal basis for marriage, prior to scholarly consensus and the Sunnah is such Qur'anic verses as,

﴿ *Then marry women of your liking, two, three, four.* ﴾

(An-Nisa': 3)

﴿ *And marry those among you who are single, and the virtuous ones among your slaves, male or female.* ﴾

(An-Noor: 32)

and *hadiths* such as,

"O Ye young people, whoever can afford marriage should marry." (Narrated by Al-Bukhari and Muslim)

There is also a scholarly consensus that marriage is lawful.

## **The Ruling of Marriage**

In his book "*Al-Mughni*" Ibn Qudamah says, "In marriage, people are of three categories:

- A) A man who fears to approach a prohibited woman or any other forbidden sexual outlet because of sexual desire. For such a man it is obligatory to marry in order to protect his religion and keep himself away from the unlawful.
- B) It is recommended for a Muslim who has desire for sexual intercourse, but he can suppress it, to marry. Being occupied with marriage is better than indulging into supererogatory devotional acts.

Ibn Mas`ud says, "If I would live for no longer than ten days, I would marry lest I fall into a trial." Ibn `Abbas says to Sa`id Ibn Jubair, "Marry since the best of this nation married to several women!" Ibrahim Ibn Maysarah reports Tawus to have said, "You should marry or I will say to you what `Umar said to Abu az-Zawa'id, "You do not marry because of either impotence or corruption." Ahmad also says, "Celibacy is not a part of Islam. Whoever calls you to other than marriage calls you to other than Islam." Ash-Shafi`i says, "Devoting oneself to worshipping Allah is superior, because Allah praised Yahya by saying, ﴿Honourable and chaste.﴾ (Al `Imran: 39) Chaste in this verse means that he did not approach women. Thus if marriage



is a good characteristic, Allah will not praise Yahya by leaving it aside.

Allah also says,

﴿Made tempting to people is the love of lusts, women and children.﴾

(Al `Imran: 14)

Marriage is mentioned in the Qur'anic verse in the context of unfavorable acts.

### **Proof of the first opinion:**

- 1) The aforementioned verses and *hadiths* that encourage marriage.
- 2) The Prophet (pbuh) says,

*"I fast and break my fast, perform Prayers and sleep and (also) marry women. Whoever does not follow my Sunnah (tradition) is not from me"* (Al-Bukhari)

Sa`d reports, "The Prophet (pbuh) forbade `Uthman to remain celibate. Had he allowed him to do that, we would have got ourselves castrated." (Al-Bukhari and Muslim)

Anas reports, "The Prophet (pbuh) would order us to marry and forbid celibacy by saying,

*"Marry the woman who is kind and gives birth. I will boast over all other nations by your number on the Day of Resurrection."* (Narrated by Abu Dawud)

It turns out that the above *hadiths* encourage marriage and warn whoever neglects it. The Prophet (pbuh) himself had many wives and so did his companions. They must undoubtedly have done the most superior acts.

Amazingly, those who preferred celibacy got married. Was it reasonable on their part to contradict what they thought of to be superior?

Moreover, marriage has many interests: It protects the spouse's religion, produces offspring, multiplies the people of the nation and achieves the boast of the Prophet (pbuh), etc. As for Yahya's celibacy, it was the injunction of the sacred Law during his time, but we have a different injunction.

C) A man, who does not need marriage, i.e., he is undesirous of it because of a physical defect like impotence or he might no longer have desire because of old age or a chronic illness. Such a person may apply either one of these two opinions:

1) He is recommended to marry for the above reasons.

2) It is superior for him to devote himself to worship instead. This is because he cannot fulfill marital duties and further he might detain his wife who could have such duties done for her by another one.

### **Marriage and the Righteous Women**

`Abdullah Ibn Mas`ud (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"O young people! Whoever can afford marriage should marry, for that will help him lower his gaze and guard his modesty (i.e. private parts from committing illegal sexual intercourse, etc.) Whoever is not able to marry is recommended to fast, as fasting diminishes (his) sexual power."* (Narrated by Al-Bukhari and Muslim).

The Prophet (pbuh) also says,

*"There are four things among the traditions of the Messengers: Hinna', <sup>(1)</sup> perfume, Siwak (tooth stick) and marriage."*  
(Narrated by At-Tirmidhi.)

`Abdullah Ibn `Amr Ibn al-`As reports the Prophet (pbuh) to have said,

*"The worldly life is an enjoyment, the best enjoyment of which is a righteous woman."* (Narrated by Muslim, An-Nasa'i and Ibn Majah)

Ibn `Abbas (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"There are four things, when being granted to someone he will obtain the goodness of this world and the next: a thankful heart, an admonishing tongue, a patient body against trials and a wife who does not commit any sin concerning herself or his property."* (Narrated by At-Tabarani)

Muhammad Ibn Sa`d Ibn Abi Waqqas reports the Messenger of Allah (pbuh) to have said,

*"There are three things that bring happiness: a righteous woman whom you admire when seeing her, and whom you trust as regards your honor and property when leaving her, a good mount that enables you catch your friends, and a wide house that has many utilities. But there are three things that bring adversity: a woman whom you dislike when seeing her, who hurts you with her tongue, and whom you do not trust as regards your honor and property when leaving her, a bad*

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1. A mashed material used for coloring one's hands or hair.

*mount that bothers you if you beat it, and if you do not beat it, it does not help you catch your friends, and a narrow house that has few utilities." (Narrated by Al-Hakim)*

Anas (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"Whoever Allah grants him a righteous woman has got one moiety of his religion. Thus, he should fear Allah in the other moiety." (Narrated by At-Tabarani)*

Another version by Al-Bayhaqi reads,

*"When a man gets married, he gets one half of the religion. Thus, he should fear Allah in the other half."*

Abu Hurayrah (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"There are three people whom Allah will surely help: a warrior in the cause of Allah, a slave who wants to free himself by a payable contract and whoever seeks chastity by marriage." (Narrated by At-Tirmidhi.)*

Anas Ibn Malik reports that a group of three men came to the houses of the wives of the Prophet (pbuh) asking how the Prophet (pbuh) worshipped Allah, and when they were informed about that, they considered their worship insufficient and said, "Where are we from the Prophet (pbuh) as his past and future sins have been forgiven." Then one of them said, "I will perform Prayer throughout the night forever." The other said, "I will fast throughout the year." The third said, "I will keep away from women and will not marry forever." Allah's Messenger (pbuh) came to them and said,

*"Are you the same people who said so and so? By Allah, I fear Allah and I am conscious of Him better than you; yet I fast and break my fast, I perform Prayer and sleep, and I (also) marry women. So he who does not follow my Sunnah (tradition) is not from me (i.e. not one of my followers)." (Narrated by Al-Bukhari and Muslim)*

Abu Hurayrah (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"A woman is married for four reasons: her property, lineage, beauty and religion. You should better marry the religious one otherwise you will lose."*

### **Desirable Characteristics in a Bride**

It is recommended for a man to marry a woman who has the following characteristics:

**1- Affection:** a woman who has such a characteristic kindly attracts her husband and pleases him to the extent that he could hardly abandon her. Allah the Almighty says,

*﴿And from His signs is that He created from yourselves your wives, that you find serenity with them, and He has set between you affection and mercy﴾*

(Ar-Rum: 21)

An affectionate woman is the one who adorns herself for her husband and pleases him. Just as a woman is required to be affectionate, a man should be likewise. There ought to be a special kind of love between them to have the joys of marital life continued.

**2- Fertility:** in a virgin, this characteristic can be observed from her relatives. One of the major goals of marriage is to produce offspring to achieve one of the aims for which man is created, namely the population of the earth. Allah the Almighty says, by the tongue of Zakariyya,

*﴿ And I fear my near of kin after I am gone; and my wife is barren. So grant to me from You, an heir, who shall be my inheritor and the inheritor of the House of Jacob; and make him, my Lord, one with whom You are well pleased. ﴾*

(Maryam: 5-6)

The Prophet (pbuh) says,

*"Marry a woman who is affectionate and fertile, for I will boast over all nations concerning your number." (Narrated by Abu Dawud, An-Nasa'i and Al-Hakim)*

**3- Virginit**y: the Prophet (pbuh) asked Jabir, *"Have you married a virgin or a non-virgin?"* He replied, *"a non-virgin."* The Prophet (pbuh) said, *"Would you not marry a virgin to play with each other?"* This is because a virgin woman has the luster of pleasure, clings to her husband and is easy to be learned what her husband wants to implant of good manners.

**4- Not a close relative:** Ash-Shafi`i says, *"Marrying one's close relative mostly leads to dullness of her progeny."* It is a well-known fact that the reason behind the diminishing of a race is that nothing new intervenes in such a race.

**5- A good family:** the Prophet (pbuh) says,

*"A woman is married for four reasons: her property, lineage,*

*beauty and religiousness. You should better marry the religious one otherwise you will lose."*

**6- Religiousness and good manners:** a religious wife who has a good character and disposition helps her husband in all walks of life. She brings up children well, treats her husband's kin well, obeys her husband, fulfills his oath, pleases him when coming, and guards his property and reputation when leaving. Allah the Almighty says,

*﴿So the righteous women are obedient, and protect in the absence of their husbands that which GOD ordains to be protected.﴾*

(An-Nisa': 34)

And the Prophet (pbuh) says,

*"The worldly life is an enjoyment. The best of its enjoyment is a righteous woman." (Narrated by Muslim)*

**7- Beauty:** it is an appealing characteristic for marriage, but it is relative, for everyone prefers a different kind of beauty. For example, someone may prefer a short woman or a tall one; others may prefer a black or white one. Therefore, it is recommended for a man to marry whomever he likes of beautiful women so as to be content with what he has.

### **Looking at One's Prospective Spouse**

It is recommended for a prospective groom to look at his prospective bride and vice versa.

Al-Mughirah reports that when he got engaged to a woman The Prophet (pbuh) says,

*"Look at her, for it is more likely to create affection and consent between you." (Narrated by At-Tirmidhi and An-Nasa'i)*

Jabir reports the Prophet (pbuh) to have said,

*"If a man wants to betroth a woman, he can look at what entices him to accomplish his marriage."*

Jabir, accordingly, says, "After I had betrothed a woman, I tried hiding myself in order to see her until I saw what enticed me to accomplish my marriage."

There is a scholarly consensus that when one wants to marry a woman he is only allowed to look at her face and hands because they are not a part of her *`awrah*.

The face indicates her beauty and the hands her robustness of body.

This is permissible, even if the woman does not give her permission to do so. Just as a man is allowed to look at his prospective bride, a woman can also look at her prospective groom.

A man is also allowed to hold a short session with the woman he wants to marry in the presence of one of her unmarriageable kin. This is to be acquainted with her culture, opinions, good manners and the way she speaks. Such a session must not be repeated since she is not his wife or unmarriageable kin.

The fiance and the fiancee are not allowed to meet each other alone. The Prophet (pbuh) says,



*"Never let a man be alone with a (strange) woman, for Satan will be their third (companion)." (Narrated by At-Tirmidhi)*

He is also not allowed to look at her out of lust.

Eventually, we can conclude that, a man who wants to marry a woman can only look at her face and hands. Allah the Almighty said,

*﴿And reveal not their adornment, except that which must appear.﴾*

(An-Noor: 31)

Ibn `Abbas says, "What appears of a woman is her face and hands." As for looking at the parts of this woman's body other than the face and the hands, there are two rulings:

- 1) It is not permissible for a man to look at them because The Prophet (pbuh) says, "*Woman is `awrah.*"
- 2) Ahmad Ibn Hanbal says, "There is no harm if he wants to look at her unveiled i.e., displaying what she is accustomed to display while working at home such as the head, the neck, the arms, and the chin. Ash-Shafi`i holds that he can only look at her face and hands.

### **Looking at Female Unmarriageable Kin**

A man is allowed to look at what ordinarily appears of his female unmarriageable kin, such as the neck, the head, the arms, the legs, etc. Allah the Almighty says,

*﴿They should draw their veils over their bosoms and not display their beauty except to their husbands, their sons, their husbands sons, their brothers or their brothers sons or their sisters' sons, or their women, or the slaves whom their right*

*hands possess, or male attendants children who have no knowledge of carnal knowledge of women. ﴿*

(An-Noor: 31)

As for what does not ordinarily appear of a woman while working or staying at home such as chest, back or what is between the navel and knees it is forbidden for unmarriageable kin to look at such parts except the husband.

### **Further Details about `Aurah**

Abdul-Rahman Ibn Abu Sa`id al-Khudri reports the Messenger of Allah (pbuh) to have said, "*A man is prohibited to look at the `awrah of another man, and a woman (is prohibited) to look at the `awrah of another woman. Let no man be covered with another man by one cover, and let no woman be covered with another woman by one cover.*" (Narrated by Muslim)

Imam Al-Baghawi says, "A man is prohibited to look at the `awrah of another man. A man's `awrah is what is between his navel and knees, and so is a woman to another woman. As for the rest of the body, it is permissible to look at it on condition that there is no lust."

Malik and Ibn Abi Dhi`b hold that the thighs are not a part of the `awrah, but most scholars say that they are. Ahmad and Al-Bukhari report the Prophet (pbuh) to have said when passing by Mu`ammar whose thighs were uncovered, "*O Mu`ammar! Cover your knees; they are (a part of) `awrah.*" Ibn `Abbas also reports the Prophet (pbuh) to have said, "The thighs are (a part of) `awrah."

Al- Qurtubi says, "It is not permissible for a man to sleep adjacent to another man without a cover or a barrier lest they

touch the *`awrah* of each other, and the same for a woman to another woman."

When children reach the age of ten years, they should sleep separately. This is because they might become adolescent in that age. The Prophet (pbuh) says,

*"When your children attain the age of seven years, order them to perform Prayers, and beat them (in respect of negligence) in this behalf, when they are ten years old. Let them sleep in separate beds."*

### **Looking at Members of the Opposite Sex**

It is unlawful for a man to look at a woman who is not his wife or one of his unmarriageable kin except at her face and hands. Allah the Almighty says,

*﴿That they should not display their beauty and ornaments except what (ordinarily) appears thereof.﴾*

(An-Noor: 31)

Ibn `Abbas said, "What appears of a woman is her face and hands." In his book of the exegesis of the Qur'an entitled *Al-Kashshaf*, Az-Zamakhshari said, when commenting on the aforementioned verse, "A woman's ornament is jewelry and kohl. Thus, what appears of such ornaments like rings, kohl, khidab may be displayed for marriageable men; but things like bracelets, leg-lace, necklace or earrings must not be displayed except to her unmarriageable kin mentioned in the same verse. Ornament is used in the verse instead of the parts of the body that are to be ornamented as a kind of euphemism. In other words, ornament is mentioned in the verse to indicate that the

part of the body it adorns should have the priority of being concealed. There is no harm when there is a real need for a woman to disclose such ornamented parts of her body for commercial dealings or testimony in court. However, when there is likelihood of temptation, it is obligatory for a man to lower his gaze away from the whole body of a woman: face and hands are also included. Allah the Almighty says,

﴿ Say to the believing men that they should lower their gaze and guard their modesty. ﴾

(An-Nur: 30)

A Muslim is not allowed to look intentionally at a woman without necessity.

Jarir Ibn `Abdillah reports that he asked the Prophet (pbuh) about the sudden glance. The Prophet answered, "*Keep your gaze away.*" (Narrated by Muslim and Abu Dawud.) Buraydah also reports that the Prophet (pbuh) said to `Ali, "*Do not look again because the first glance is permissible but the second is forbidden.*" (Narrated by Ahmad)

It is the sudden glance which is permissible not the intentional one except for necessity such as seeking marriage, purchasing a bond woman or delivering testimony in a court. There is no harm for a faithful physician to look at a woman's `awrah for treatment.

As for a woman's looking at a man other than her husband or unmarriageable male relatives, it is unlawful, just as a man's looking at her is also unlawful. Umm Salamah narrated that she was sitting with Maymunah when Ibn Umm Maktum came to the Prophet (pbuh) after the enjoining of the veil upon the

Prophet's wives. Thereupon the Prophet (pbuh) said, "*Hide yourselves from him*". I (Umm Salamah) wondered, "O Messenger of Allah, he is just a blind man." Then the Prophet (pbuh) replied, "*But what about you, are you blind as well?*" (Narrated by Ahmad and At-Tirmidhi)

Ash-Shawkani said, "The above mentioned Hadith was cited by those who held that a woman is forbidden to look at a man other than her husband or unmarriageable male relatives just as a man's looking at her is." That is the superior point of view as also held by An-Nawawi. Allah the Almighty says,

*﴿And say to believing women, that they cast down their glances and guard their chastity.﴾*

(An-Noor: 31)

Lowering one's gaze serves to prevent the kind of temptation that might lead to sexual intercourse or its preliminaries.

Some scholars maintain that there is no harm for a woman to look at a man except for what is between his navel and knees. They cited the Hadith narrated by `A'ishah as a proof for what they say. `A'ishah (may Allah be pleased with her) reports,

*"The Prophet (pbuh) was screening me with his garment to enable me to watch the Abyssinians who were playing with spears in the mosque."* (Narrated by Al-Bukhari and Muslim)

An-Nawawi comments on the above hadith by saying, "A'ishah had not reached the age of puberty at that time, or she might have done that before the enjoining of the veil." But Al-Hafiz Ibn Hajar says, "Such an incident happened after the

coming of the Abyssinian delegate to the Prophet (pbuh) in the seventh year of Hijra when `A'ishah was sixteen years."

They also hold that the Prophet (pbuh) went to women on the day of `Id (Feast) accompanied by Bilal, to admonish them after the `Id speech. He admonished them to give in charity on that day.

But a sermon can be heard without looking at the speaker. Trying to gather these hadiths together, Abu Dawud says that the hadith related by Umm Salamah is specified to the Prophet's wives, and the others for all women.

This is supported by the fact that only women are allowed to go outdoors veiled as held by Imam Al-Ghazali.

According to some scholars, a man may look at his unmarriageable female relatives, and a woman may look at her unmarriageable male relatives, viewing any part of the body except what is between the navel and the knees.

A man may look at the whole body of his wife (and vice versa), though it is offensive for either husband or wife to look at the other's genitals. Furthermore, it is offensive for a man to uncover his *`awrah* without necessity even if he is alone. The Prophet (pbuh) says, "*Allah is the most worthy to be shy of Him.*" (Narrated by of Al-Bukhari)

### **A Woman's *`Aurah* with Regard to Male Children**

There is no harm for a woman to veil herself before a male child who has not reached the age of discretion. But if he has reached that age he is to be treated like unmarriageable relatives. Other scholars say that that he is allowed to look at what

ordinarily appears to him of the whole body of a woman, except at what is between her navel and knees. Allah the Almighty says,

﴿Let those whom your right hands possess, and those who have not attained puberty, ask your permission three times before they come to your bedroom before the dawn prayer, and when you put off your garments at noon, and after the evening prayer. These are three times of privacy for you. Outside these times there is no blame on you or them, if you move about attending to each other. Thus GOD makes clear to you the Signs, and GOD is All-Knowing, All-Wise. And when your children attain puberty, let them ask permission, as those before them asked permission. Thus GOD makes clear to you His signs, and GOD is All-Knowing, All-Wise.﴾

(An-Nur: 58-59)

### **Men Looking at Female Children**

There is no harm for a man to look at a female child who has not attained the age of marriage. But if she has attained the age of marriage such as a nine-year old girl, she would be treated like the adult one. The Prophet (pbuh) says, "*Allah does not accept the Prayer from a menstruating woman without a veil.*"

(Narrated by Al-Bukhari, Muslim, Ahmad, At-Tirmidhi and Abu Dawud.).

We can conclude from the above hadith that a girl who has not reached the age of menstruation is allowed to perform Prayer without a veil. Thus, she may be treated like unmarriageable kin like a male child with a woman.

## **The Ruling of Looking at Old Women**

There is no harm to look at what ordinarily appears of an old woman that is not a target of men's lust and desire. Allah the Almighty says,

﴿And such elderly women who have no hope for marriage.....﴾

(An-Noor: 60)

Commenting on the verse, ﴿Say to the believing men, that they cast down their glances.﴾ and the verse, ﴿And say to believing women, that they cast down their glances.﴾ (An-Noor: 30-31) Ibn `Abbas says, "He (Allah) abrogated and made an exception from this for elderly women who have no hope for marriage. Similarly, the same ruling applies to disfigured women."

## **Being Alone with a Marriageable Woman**

It is unlawful for a man to be alone with a marriageable woman. The Prophet (pbuh) says, "*Beware of entering upon women.*" A man asked, "*O Messenger of Allah! What about the hamu* <sup>(1)</sup>? *The Prophet replied, "(Beware of) the hamu (like) death."* (Narrated by Al-Bukhari and Muslim.)

The Prophet (pbuh) also says,

*"Whoever wishes the midst of the Paradise should stick to the group because Satan always befriends individuals and keeps away from couples. A man is forbidden to be alone with a woman because Satan is the third of them. Whoever is pleased*

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<sup>1</sup> Hamu is defined as a relative of the husband, such as his brother, uncle, etc.



*of his good deeds and is worried about his bad deeds is a believer."* (Narrated by Ahmad ad At-Tirmidhi.)

A man is allowed to be alone with a woman of his unmarriageable relatives, but he should seek her permission at the three times mentioned before: before Fajr Prayer, after `Isha Prayer and at noon like the marriageable adolescent.

A man is not allowed to enter his mother's room without permission lest he might see her `awrah. Allah the Almighty says,

﴿ *And when your children attain puberty, let them ask permission.* ﴾

(An-Noor: 59)

## Suitability in Marriage

Scholars disagree about the definition of suitability in marriage. Suitability means that a man should be eligible when marrying a woman. But there is no harm for a man to marry an unsuitable woman. It is the man who gives the woman her name and the same social status that he lives in. Children take on the same social position of their father as well. Some scholars hold that such suitability is a condition for the validity of marriage. Others consider the agreement of the parties concerned to be the sole condition for the validity of marriage.

Although suitability is required, it is not a condition for the validity of marriage. This is the opinion of Ahmad and the majority of scholars. `A'ishah (may Allah be pleased with her) said, "Abu Hudhayfah Ibn `Utbah Ibn Rabee' adopted Salim, who was freed by a woman from the Ansar (Helpers), and married him to his niece, Hind Bint al-Walid Ibn `Utbah." (Narrated by Al-Bukhari)

"The Prophet (pbuh) asked Fatimah Bint Qays to marry Usamah Ibn Zayd, a man who was freed by him. He in turn got married to her by the Prophet's command." (Narrated by Al-Bukhari and Muslim)

He (pbuh) gave his cousin, Zaynab Bint Jahsh to Zayd Ibn Haritha in marriage.

Ibn Mas`ud, furthermore, advised his sister by saying, "By Allah, do not marry but a Muslim even if he is a red Roman or a black Abyssinian."

Suitability is not regarded in marriage if a woman and her guardians agree to such an unsuitable marriage.

## Principles of Suitability

Scholars also disagree about the principles of suitability. Malik and Ash-Shafi'i hold that suitability in religion should be the only concern.

Some scholars assume that suitability concerns six aspects: lineage, religiousness, freedom, profession, wealth, and being free of the four defects that annul the marriage agreement: Al-Judham, Al-Baras (both resemble leprosy), insanity, and impotence.

Religiousness is the most important principle to be taken into consideration. But a woman or her guardians are allowed to adhere to customs and demand for suitability in lineage, wealth, profession etc. as mentioned in Subul as-Salam by As-San'ani.

In the book "Subul as-Salam" we read, "Scholars disagree about suitability but the majority of scholars are of the opinion that suitability concerns only religiousness. Allah the Almighty says,

*﴿ Surely the most honourable of you in the sight of GOD is the most pious of you. ﴾*

(Al-Hujurat: 13)

The Prophet (pbuh) says, "*All people are the offspring of Adam*" and says, "*And Adam was (created) from dust.*"

Suitability of religiousness is required for the validity of marriage because a Muslim woman is forbidden to marry an unbeliever. Principles other than religiousness, are no more than inherited customs from the Pre-Islamic Period. Besides, in some hadith the Prophet (pbuh) states that boasting over one another concerning lineage is from among four things which relate to the

Pre-Islamic Period and people will not desert

## **The Bride's Consent before Marriage**

Whenever the bride is young and immature, the father or the grandfather may marry her to someone without her permission because she is still not aware of marital life.

But it is not permissible to marry an immature orphan girl until she reaches puberty and permits such a marriage.

The permission of an adult non-virgin is required for a valid marriage. Should her guardian marry her to someone without her verbal permission, the contract is nullified.

Some scholars hold that an adult virgin should be treated like a non-virgin and should give her permission of marriage either verbally or by silence. A virgin's silence is considered to be permission.

Imam Al-Baghawi says that it is a scholarly consensus that it is not permissible to marry an adult non-virgin to someone without her permission. The contract of marriage is nullified if she does not agree. If the adult virgin is of sound mind when being married to someone without her permission, the contract of marriage is nullified because The Prophet (pbuh) says, "*And a virgin must be asked for permission.*"

This is the position of Al-Awza'i, Sufyan ath-Thawri and the Hanafis. Some other scholars like Al-Qasim Ibn Muhammad, Salim Ibn `Abdillah, Malik, Ash-Shafi`i, Ahmad and Is-haq take the position that it is permissible for the virgin's father or grandfather to marry her without her permission. The above mentioned hadith may be interpreted as referring to her self-consent. Thus, it is better to mention as much proofs and

comments of scholars as we can in order to conclude the most superior one.

`A'ishah (may Allah be pleased with her) relates that the Prophet (pbuh) married her when she was six years old and consummated his marriage with her when she was nine. She stayed with him for nine years." (Al-Bukhari and Muslim)

the author of Muntaqa al-Akhbar mentions this hadith to indicate that it is permissible for a father to marry his young daughter to someone without her permission. Al-Hafiz says, " It seems that such a marriage might have happened before enjoining that a virgin must be asked for permission because the story occurred in Makkah before Hijrah."

In this hadith we may also conclude that it is permissible for a father to marry off his immature daughter.

However, Ibn Shubrumah says that a father is not allowed to marry his daughter to someone before the age of puberty and without her permission, and that in the case of `A'ishah's marriage, it is one of the Prophet's privileges.

Ibn `Abbas reports the Prophet (pbuh) to have said,

*"The non-virgin woman is worthier to organize her affairs than her guardian. As for the virgin, she must be asked for permission. Her silence is (a token of) her permission." (Narrated by the Jama`ah except Al-Bukhari)*

Another version Narrated by Ahamd and An-Nasa'i reads, "As for the orphan girl, she must be asked for permission."

Khansa' Bint Khaddam al-Ansariyyah reports that her father married her to someone while she was a non-virgin. She disliked

such a marriage and went forward to the Prophet (pbuh) who annulled her marriage. (Narrated by the Jama`ah except Muslim)

Abu Hurayrah (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"An aiyim <sup>(1)</sup> cannot be married until she orders it (i.e. marriage), nor can a virgin be married until she gives permission." Someone asked, "O Messenger of Allah! How (do we know) her permission?" He said, "When she keeps silent."*  
(Reported by the Jama`ah.)

Ibn `Abbas (may Allah be pleased with him) reports, "Once a virgin woman came to the Messenger of Allah (pbuh) complaining that her father had compelled her to marry someone whom she disliked. Accordingly the Prophet gave her the choice (to cancel it or not)." (Narrated by Ahmad, Abu Dawud, Ibn Majah and Ad-Daruqutni.)

There is a difference between an aiyim's order and a virgin's permission. The former can only be concluded verbally or by silence. Therefore, we have to tell the virgin in advance that her silence stands as permission, as Ibn al-Mundhir said.

Two points of view have been discussed concerning the bride's consent before marriage. The first of which is that an adult virgin should give her permission before concluding the marriage contract otherwise it is nullified. This is the position of Al-Awza'i Ath-Tawry and the Hanafis. On the other hand, Malik, Ash-Shafi'i, Ahmad and Is-haq hold that it is permissible for her father to marry her off to someone without asking her permission. The latter point of view may be opposed by the Prophetic hadith, "As for the virgin, her father must ask her

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<sup>1</sup> An *aiyim* is anyone not in the bond of wedlock, whether unmarried or lawfully divorced, or widowed.

permission." Also, Abdullah Ibn Buraydah relates on the authority of his father, "Once there was a girl who came to the Messenger of Allah (pbuh) complaining. She said, "My father has married me off to his nephew to elevate himself." Thereupon, the Prophet (pbuh) gave her the choice. She said, "I accept what my father has done. But I wanted that women should know that fathers cannot compel them into marriage." (Narrated by Ibn Majah, Ahmad and An-Nasa'i)

According to manifestation, the permission of the virgin or the non-virgin woman is a condition of the validity of the marriage contract. In the case of `A'ishah, she was too young to consult her, as she was just six years old when the Prophet (pbuh) betrothed her.

### **An Orphan Bride**

The majority of scholars are of the opinion that it is permissible for a father or a grandfather to marry their young virgin daughter to someone whom they like because the Prophet (pbuh) married `A'ishah while she was six years old without asking her permission. There is no reasonable permission at such a tender age. As for an orphan girl, it is a valid marriage, as the Hanafis argue, when she grows up. On the other hand, Ash-Shafi'i holds that it is an invalid marriage because The Prophet (pbuh) says, "*Ask the permission of the orphan girl.*" Such permission has no sense before the age of puberty.

However, the superior point of view is that it is not permissible for an orphan girl to be married before reaching the age of puberty when she can give her permission.

## **A Marriage Contract without a Guardian**

There is a lot of evidence that forbids a woman to conduct her own marriage or to marry off another woman. There should be a guardian who is responsible for concluding her marriage. The guardian may also commission another to marry off his charge to someone. The contract of marriage becomes invalid without a guardian. This is the position of the majority of scholars. However, the Hanafis hold that it is permissible for a woman to conduct her own marriage as she makes commercial dealings, rents things, puts up collateral, etc. but Malik says "It is the inferior woman who can do so, not the honorable one." The Zahiris are of the opinion that it is permissible for the non-virgin woman to conduct her own marriage but not the virgin.

As for the guardian who is supposed to conclude the contract of marriage, there are many arguments concerning him. Therefore, it is better to mention all that has been said so as to deduce the most superior point of view.

Allah the Almighty says,

﴿And marry those among you who are single.﴾

(An-Noor: 32)

﴿So marry them with the permission of their masters.﴾

(An-Nisa': 25)

The Prophet (pbuh) says,

*"Invalid is marriage without a woman's guardian. (Thrice the Prophet (pbuh) repeats this statement.) If the groom copulates with her she deserves the dowry because of (the enjoyment of)*



*her vulva he has made lawful to himself. When they argue with each other (they can resort to) the ruler (because he) is the guardian of those who do not have a guardian."* (Narrated by Abu Dawud, At-Tirmidhi and Ibn Majah)

The majority of scholars and the majority of the Prophet's companions invalidate the contract of marriage that does not include a guardian. The Prophet (pbuh) says, "*Marriage is invalid without a guardian.*".

On the other hand, the Hanafis hold that a woman may conduct her own marriage as in commercial dealings. They interpret the above-mentioned hadiths as referring only to the young girl. Malik says that it is the inferior woman who conducts her own marriage or issues a command to someone to marry her, not the honorable one." The Zahiris hold that it is permissible for only the non-virgin woman to conduct her own marriage not the virgin.

Whenever a woman asks to marry a suitor who is a suitable match, the guardian must marry her to him. The Muslim judge marries her to such a groom if the guardian:

- (1) in the presence of the judge refuses to marry her to the groom;
- (2) is on a journey farther than 81 Km/50 mi. from home;
- (3) or in a state of pilgrim sanctity (Ihram) (for Hajj, `Umarah or both.)

In such cases, the guardianship does not move on the next most eligible lawful guardians. If the guardian is on a journey of less than 81 km/50 mi. from home, the bride may not be married to someone without the guardian's leave. This is the position of

Ash-Shafi`i.

The Hanafis hold that unknown departure of a guardian gives the right of guardianship to the next eligible one. There is a scholarly consensus that if the closer guardian dies, the right of guardianship will go to the next eligible one.

In case of argumentation, a woman who has many guardians who are of equal standing such as brothers, nephews, uncles or cousins may appoint whomever she likes to be her guardian. They can also draw lots, if she does not specify someone to be her guardian.

The marriage agreement is valid whenever one of the eligible guardians takes the priority of marrying her to someone who is a suitable match even if he does not take the permission of the other guardians, as long as it is done with her acceptance.

If such a groom is not a suitable match, the rest of the guardians may reject that marriage even if she accepts him because of the inferiority that may entail after that marriage. A further guardian has no right to reject a non-suitable match if made with her acceptance.

There is no contradiction between the aforementioned hadiths and the Prophet's saying,

*"The non-virgin woman is worthier to organize her affairs than her guardian. As for the virgin, she must be asked for permission."*

Such a hadith may be interpreted as referring to the selection of the groom because the virgin may get coy when selecting her groom. Thus, this hadith refutes the Zahiris's point of view that

states it is permissible for the non-virgin woman to conduct her own marriage (without a guardian) not the virgin.

The majority of scholars argue that a guardian should be one of the male relatives from the paternal side. But Abu Hanifah permits him to be from the maternal side also. I (the author) say, "Guardianship must not be restricted to those of the paternal side because we may find some maternal relatives who may be closer to the woman than her paternal guardian. He may be stained with inferiority more than the paternal guardian, if there occurs a non-suitable match. Therefore, it is better not to restrict guardianship to male relatives from the paternal side.

If a woman's guardian is on a journey farther than 81km/50 mi. from home and the woman asks to marry a suitor who is a suitable match, the Muslim judge judge can marry her to such a groom on condition that they do not want to wait for the absent guardian. The Prophet (pbuh) is reported to have said that the single woman when betrothed by a suitor who is a suitable match. is one of three people whose cases should not be delayed. This is related in a hadith narrated by At-Tirmidhi and Al-Hakim.

The male relatives of a woman are the ones who can marry her off. The order as to who has the right to be her guardian begins with her father, father's father, sons, brothers, step brothers, nephews, brothers' sons, sisters' sons, father's brothers, mothers' brothers and so on. If there are two of equal standing (two brothers for example), precedence is given to the oldest, most learned in sacred law, and most god-fearing. But if one of them (even if he is the youngest) marries her to the groom, the marriage is valid. If both insist on being the one, they draw lots

to see who will do it.

### **A Woman's Son as a Guardian**

Ash-Shafi'i argues that a woman's son is not allowed to be her guardian unless they both are of the offspring of the same grandfather. Someone is not allowed to be a guardian of his mother just because he is her son. On the other hand, Malik, Abu Hanifah and Ahmad Ibn Hanbal (may Allah have mercy on them) permit such guardianship. But they disagree about the order of his guardianship. Malik, Abu Yusuf and Is-haq hold that he is prior to the father. Muhammad and Ahmad Ibn Hanbal say that the father is prior to him. But Abu Hanifah argues that they are alike.

### **An Atheist as a Guardian of a Muslim Woman and Vise Versa**

It is not lawful for an atheist guardian to marry off a Muslim woman. Likewise, a Muslim cannot be the guardian of an atheist woman unless it is the judge who can be a guardian for both Muslims and non-Muslims. This is the position of the majority of scholars. Allah the Almighty says,

﴿And the unbelievers are allies of one another.﴾

(Al-Anfal: 73)

Moreover, two people of different religions cannot inherit each other. As for the Muslim judge, he can be the guardian of all people who live in an Islamic state irrespective of their religions such as the *dhimmis*.<sup>4</sup> However, unbelievers can be guardians of one another. For example, there is no harm for a Muslim to marry a *dhimmi* woman whose guardian is a

non-Muslim because he is her natural guardian. This is the position of Abu Hanifah, Ash-Shafi'i and Ahmad (may Allah have mercy on them all.) On the other hand, Al-Qadi says that none can marry her to another but the Muslim judge because Ahmad points out that it is not permissible for a Jewish or a Christian to marry off a Muslim man or a Muslim woman. This is because such a contract requires two Muslim witnesses. But the former point of view is the superior one because contrary to guardians, witnesses are only required to confirm marriage before the judge.

### **Authorizing a Woman to Effect Marriage Agreement**

It is not permissible for a woman to be commissioned to effect the marriage agreement. But Abu Hanifah argues that the guardian may commission the woman to utter the offer of marriage and the groom may also commission her to accept the marriage agreement on his behalf. The first point of view is supported by the following hadith: "Let no woman marry a woman to another or marry herself to another." (Narrated by Ibn Majah)

It is reported that `A'ishah (may Allah be pleased with her) witnessed, one day, a marriage agreement in which she delivered a speech. Afterwards, she said, "(O men), you can conduct the marriage because women cannot do so." Such a tradition, though it is weak in transmission, it refers to a scholarly consensus.

## **A Groom who Is the Guardian of his Bride**

If the guardian of a woman wants to marry her, like for example, he is the son of her father's brother or the judge, then they can let a different man stand in as guardian, after she declares her acceptance. But could he state both the proposal and its acceptance by himself? There are two points of view:

- (1) Al-Hasan, Ibn Sirin, Malik, Ath-Thawri, Ahmad, Abu Hanifah, Is-haq, Abu Thawr and Ibnul-Mundhir, all agree that he can do so. This is because Al-Bukhari narrates Abdur-Rahman Ibn `Awf to have said to Umm Hakim Bint Farit, "Would you allow me to conduct your affair?" She replied, "Yes, you can." He said, "I took you in marriage." Because it is a contract that includes a form of proposal uttered by an eligible guardian and a form of acceptance stated by an eligible husband, he himself can conduct each one of them together or separately. It is also narrated that the Prophet (pbuh) freed Safiyyah and made her freedom as her dowry.
- (2) He is not allowed to state both the proposal and its acceptance for one marriage. But he may rather let a different one stand in as guardian. The first opinion is the superior one for the argument and narrations stated above.

## **Conditions of Valid Guardianship**

The marriage agreement is not valid without a guardian who is sane, free, Muslim, male, adult and upright. The following may not be a bride's guardian: an insane person, a slave, a non-Muslim, a child, a corrupt person, or anyone whose

judgement is unsound because of old age or weak-mindedness.

As for the uprightness of the guardian, there are two opinions:

- (1) it is conditional because the Prophet (pbuh) says, "There is no marriage without a respectful guardian and two upright witnesses." But Ahmad said, the most correct narration is the version of Ibn `Abbas that reads, "There is no marriage without a guardian and two upright witnesses, and whenever a cursed guardian marries a woman to another, such a marriage is invalid."
- (2) It is not conditional. Muthanna Ibn Jami' asked Ahmad about the marriage that is concluded by a corrupt guardian but the witnesses are upright. Ahmad answered that it is a valid marriage. This is the position of Malik, Abu Hanifah and one of the Shafi`is opinions. This is because he himself can marry. Moreover, the real reasons of such guardianship are the kinship relation.

### **Bequeathing the Guardianship of Marriage**

Al-Hasan, Hammad, the Hanbalis and Malik are of the opinion that there is no harm if someone bequeaths the right of guardianship to another one. On the other hand, Ath-Thawri, Ash-Shu`abi, an-Nakh'i, Abu Hanifah, Ash-Shafi`i and Ibnul-Mundhir hold that the bequest of the guardianship of marriage is not effective because it generally moves on to another eligible guardian such as the right of custody.

## **Authorizing Another Person to Effect Marriage Agreement**

The guardian may commission another to marry his charge to someone, whether the commissioner is absent or not. It is reported that the Prophet (pbuh) commissioned Abu Rafi` to marry him to Maymunah, and so did he with `Amr Ibn Umayyah when marrying Umm Habibah. Such commissioning may be restricted (i.e., when we have a specific groom) or unrestricted. Some of the Shafi`is forbid the latter type of commissioning in which the commissioner gives a free hand to the guardian of the woman to marry her to whomever he likes. It is related that once someone of the Arabs left his daughter to `Umar and said, "If you find a suitable match, you can marry her even if he gives you his shoes as a dowry." Accordingly, `Umar married her to `Uthman Ibn `Affan. No one rejected that marriage.

It is not conditional to ask the permission of the woman in the commissioning, nor is it conditional that two witnesses witness it. Yet, some of the Shafi`is hold that commissioning cannot be valid without the permission of the woman. Al-Hasan Ibn Salih also says that there must be two witnesses because it is like the marriage contract by which we make intercourse lawful. But commissioning only requires the guardian's permission not the woman's because the guardian is not the woman's agent in marriage.

Suffice it to say that the agent has the same rights given to the commissioner even the right to compel the bride permission.

## **Conditional Marriage**

The Hanbalis and the Shafi`is forbid conditional permission



to effect marriage, irrespective of the one for whose permission the marriage is made conditional.

In other words, it is not permissible to make the legality of marriage conditional on the permission of the guardian, the groom or the bride.

On the other hand, Abu Hanifah holds that such types of marriage are valid. Malik thinks that marriage may be conditional on one's agreement for a short period of time, since a long time may invalidate it.

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### **The Permission of an Insane Woman in Marriage**

Just as it is permissible for a father to compel his sane virgin daughter to marry a suitable match if she has not reached puberty, he can do so with his insane virgin daughter.

If an insane woman is of the type for whose guardian it is not permissible to compel her to marry in case she was sane, there are three positions for this:

- (1) It is permissible for a father or the one whom he bequeaths, to marry his insane non-virgin daughter to another. This is the position of the Shafi`is, the Hanafis and the Hanbalis but some of them say that to marry an

insane non-virgin woman means to compel her whereas the non-virgin should not be compelled. The former point of view is the superior one because the sane non-virgin can express herself not the insane one.

- (2) It is permissible for the Muslim judge to marry off an insane woman if she starts to desire men to keep her away from corruption regardless of her permission. This is the position of some of the Hanbalis and Abu Hanifah. Ash-Shafi'i says that a guardian of a young girl who is insane cannot marry her to another but he can do so with the adult one if the physicians say that she will be recovered by marriage
- (3) It is permissible for the guardian of an insane woman to marry her to another when she desires men even if he is not her father or an Islamic judge.

### **The Marriage of the Child, the Insane Person and the One under Interdiction**

It is permissible for only the father (or the one whom the father bequeaths) of an insane person to marry him to a woman. This is the position of Malik and Ahmad. However, Abu `Abdillah Ibn Hamid says that it is permissible for the Muslim judge to marry him off if he starts to desire women as also argued by Ash-Shafi'i who adds, "If marriage will recover him, it is permissible for him to marry."

As for a sane child, it is permissible for his father to marry him off, as held by the majority of scholars.

## **When a Woman has Two Guardians**

If a woman permits two guardians to marry her to whomever they like or a specific man, and every one of them marries her to a different man, the marriage which takes place first is valid whether the other man has consummated his marriage with her or not. This is the position of Al-Hasan, Ahmad, Ash-Shafi`i, the Hanafis, and others.

`Ata' and Malik argue that if the other one consummated his marriage with her, he is worthier to be her husband.

**Proof of the first opinion:** the Prophet's saying,

*"Whenever two guardians marry off a woman (to two men), the first (husband) is worthier of her."* (Narrated by Abu Dawud, At-Tirmidhi and An-Nasa'i)

## **The Witnesses**

Ibn `Abbas (may Allah be pleased with him) reports the Prophet (pbuh) to have said, *"Whores are those who conduct their own marriage without proof<sup>(1)</sup>."* (Narrated by At-Tirmidhi)

`Umran Ibn Husayn (may Allah be pleased with him) reports the Prophet (pbuh) to have said, *"There is no (valid) marriage without a guardian and two upright witnesses."*

The above hadith has a weak chain of transmission, and so has the following hadith: `A'ishah (may Allah be pleased with her) reports the Prophet (pbuh) to have said, *"Marriage is invalid without a guardian and two upright witnesses. In case of argument, the Muslim judge is the guardian of those who have no guardian."* (Narrated by Ad-Daruqutni and Al-Bayhaqi)

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<sup>1</sup> It is said that proof here is either the two witnesses or the guardian. (Translator)

Although the hadiths speaking of the witnesses are weak, they can be taken as a legal proof because they strengthen one another. Moreover, there is a scholarly consensus that the witness is an integral part of marriage. It is a condition of the validity of any marriage. This is the position of the Prophet's companions, the Early Muslims and many others. They disagree about the validity of witness when the two witnesses give their witness separately. The scholars of Al-Kufah argue that the two witnesses must give their witness altogether while concluding the marriage contract.

But Malik Ibn Anas holds that the witness is valid if they declare that they have given their witness before.

Ahmad and Is-haq take the position that it is permissible for witnesses to be a man and two women.

On the other hand, Ibn `Umar, Ibnuz-Zubayr, and others hold that marriage may be concluded without witnesses. Malik also says that it is sufficient to declare marriage. But the first opinion that considers witnesses to be a condition for the validity of marriage, is the superior one.

They also disagree about the uprightness of the witnesses. Ash-Shafi`i says that the two witnesses must be upright. However, Abu Hanifah does not consider uprightness to be a condition of the validity of marriage. Actually, the first opinion of Ash-Shafi`i is the superior one because of the above mentioned *hadiths*.

## The Dowry

In his book *Dhad al-Ma'ad*, Ibnul-Qayyim mentions that "Muslim narrates `A'ishah to have said, "The dowry which the Prophet (pbuh) gave to his wives was only twelve uqiyyahs and a nash." (I.e. five hundred *dirhams*, because the amount of uqiyyah equals forty *dirhams* and the *nash* equals twenty.) `Umar (may Allah be pleased with him) says, "I have never known that the Prophet (pbuh) gave more than twelve uqiyyahs as a dowry to his wives likewise he received the same amount when marrying off his daughters." (Narrated by At-Tirmidhi who said it is a sound, authentic hadith.)

Sahl Ibn Sa`d reports that the Prophet (pbuh) once said to a man, "*Get married even with a ring of iron.*" (Narrated by Al-Bukhari.)

In the two Sahihs (Al-Bukhari and Muslim), it is related, "Once a woman came to the Prophet (pbuh) and said, "I dedicate myself to you (for marriage)." She stayed for a long period of time, then a man said, "O Messenger of Allah! If you do not want her, marry me to her." The Messenger of Allah (pbuh) said, "*What do you have to give as a dowry?*" "I have nothing but *Izar* (waist sheet)." The man replied. The Prophet (pbuh) said, "*If you give her your Izar, you will have no Izar to wear, so find something (else).*" He said, "I have nothing." The Prophet (pbuh) said, "*(Try to) find (something) even if (it is) a ring of iron.*" But the man went back with nothing. The Prophet (pbuh) said, "*Do you memorize something of the Qur'an?*" The man said, "Yes, I memorize such and such" and named some surahs. Then The Prophet (pbuh) said, "*I gave you to each other in marriage for what you memorize of the Qur'an.*" (Al-Bukhari and Muslim.)

An-Nasa'i reports that when Abu Talhah betrothed Umm Salim, she said, "By Allah, no one can reject the like of you, but you are an atheist and I am a Muslim woman. I am not allowed to marry you. If you embrace Islam, this will be my dowry, nothing else." When he entered Islam, she married him and that was her dowry. Thabit said, we never heard about a woman whose dowry was more honorable than Umm Salim's. When he consummated his marriage with her, she gave birth to a son. (Narrated by An-Nasa'i)

Thus, there is no limit to the dowry. Such hadiths indicate that the expensive dowry is offensive. But there must be a dowry stated in the contract of marriage even if it is a ring of iron or anything the bride accepts as a dowry. But Abu Hanifah and Ahmad restrict the dowry to property.

No one can claim that these hadiths are not general and only belong to the Prophet (pbuh). As a matter of fact, these hadiths were applied during the lifetime of the Prophet (pbuh) and thereafter. Sa'id Ibnul-Musayyab, one of the successors of the Prophet's companions is reported to have married his daughter off in return for a dowry of two *dirhams*.

A woman's father can marry his daughter off even if he does not receive the same amount that is usually given to similar brides. But Ash-Shafi'i says that he is not allowed to do that. In case of marrying her off without the appropriate dowry, the amount stipulated is void and the usual amount received is paid instead. The first point of view is the superior one because of the following: the Prophet (pbuh) did not give his wives as a dowry more than twelve *uqiyyahs* (more than four hundred and eighty *dirhams*). `Umar Ibnul-Khattab once delivered a speech to admonish people not to give or receive expensive dowries. Sa'id

Ibnul-Musayyab married his daughter off in return for a two-*dirham* dowry. It was well known that such payment of marriage was not the same amount given to similar brides at that time.

Moreover, marriage does not mean to receive the dowry of the bride, but rather means to give the woman to whomever can suffice her, protect her and treat her kindly. Fathers, naturally put these points into consideration when marrying their daughters to any one. Other than fathers, no guardian can marry a woman off with less than the amount given to similar brides. If someone does this, the marriage is valid but the amount stipulated is void and the amount usually received is paid instead.

### **Non-Stipulated Dowry**

The majority of scholars are of the opinion that marriage is valid even without stipulating the amount of dowry. Allah the Almighty says,

*﴿There is no blame on you if you divorce women before consummating the marriage, or apportioning for them their dower.﴾*

(Al-Baqarah: 236)

It is related that Ibn Mas`ud was asked about a man who had not specified his wife's amount of dowry until he died before consummating his marriage with her. Ibn Mas`ud said, "She completely deserves the usual amount of dowry given to similar brides: She has also to wait for a period of time (four months and ten days) before marrying again and has the right of inheritance." Thereupon, Ma'qil Ibn Sinan said, "This is the

judgement of the Prophet (pbuh) in the case of a woman called Birwa' Bint Washiq." (Narrated by Abu Dawud and At-Tirmidhi)

In addition, marriage payment is not the main goal of marriage. Therefore, non-stipulated dowry in the marriage contract does not invalidate it. Thus, the bride deserves the amount of marriage payment given to similar brides, if the groom has consummated his marriage with her. If however she is divorced before consummation, she deserves only the mut`ah. This is the position of Ahmad, Ash-Shafi`i, the Hanafis and others.

A woman's father can marry her off without a dowry, as argued by Malik and The Hanbalis. In case of marrying her without a dowry, she deserves the amount typically received as marriage payment by similar brides. On the other hand, Malik, Al-Layth and Ibn Abu Layla hold that a woman's mut`ah is recommended but not obligatory because Allah says (speaking of this gift), "...is a duty on the benevolent." Thus, it can be given by way of charity. Unless it is recommended, there will be other people included in the verse other than the benevolent. But the first group of scholars cites Allah's saying,

*﴿And for the divorced women a fair gift is a duty on the pious.﴾*

(Al-Baqarah: 241)

*﴿O you who believe! When you marry believing women, and then divorce them before you have touched them, no prescribed term should be accounted for them, so make provision for them.﴾*

(Al-Ahzab: 49)



The above verses are formed in an imperative way that makes the question obligatory on Muslims.

However, if he divorces her before consummation, but after the fixation of dowry, then she deserves half of such a dowry, as argued by Ibn `Umar, Ash-Shafi`i, the Hanbalis and others. Allah the Almighty says,

*﴿And if you divorce them before consummating the marriage, and you have already appointed a dowry for them, then half of the appointed dowry is due to them, unless they pardon you from that.﴾*

(Al-Baqarah: 237)

Ahmad and Abu Hanifah take the position that she only deserves mut`ah not dowry. Ahmad and others say that every divorced woman has to be given a present because of Allah's saying, *﴿And for the divorced women a fair gift is a duty on the pious.﴾* (Al-Baqarah: 241) and his saying (addressing the Prophet), "Say to your wives, *﴿If you desire the life of this world and its adornment, then come and I will make for you provision and set you free in kindness.﴾*

(Al-Ahzab: 28)

It can be concluded that the position of the Hanbalis is that only the divorced woman who does not fix her dowry deserves such a mut`ah if she is divorced before consummation.

The amount of such a mut`ah is specified according to the capability of the husband because Allah the Almighty says, *﴿The rich as he can afford, and the poor as he can afford.﴾*

(Al-Baqarah: 236)

Consummating the marriage with a woman before paying her dowry.

It is permissible for a man to consummate his marriage with a woman before paying her anything whether he fixed her right of dowry or not, as argued by Al-Hasan, Ash-Shafi'i and others. But Ibn `Abbas, Malik and others hold that he is not allowed to consummate his marriage with her before giving her any amount of dowry.

Abu Dawud reports one of the Prophet's companions to have said that when `Ali got married to Fatimah, he wanted to consummate his marriage with her, but the Prophet (pbuh) prevented him to do so before giving her something (of her dowry). `Ali said, "O Messenger of Allah! I have nothing to give." The Prophet (pbuh) said, "Give her your mantle?" Having paid her the mantle, `Ali consummated his marriage with her.

Ibn `Abbas also relates that when `Ali got married to Fatimah, the Prophet (pbuh) asked him to give her anything, but `Ali said, "I have nothing to give." The Prophet said, "*Where is your mantle (which is called) Al-Hutamiyyah?*" (Narrated by Abu Dawud and An-Nasa'i)

On the other hand, the first group of scholars who allows a man to consummate his marriage with his wife before giving the dowry cites the following hadith: `A'ishah (may Allah be pleased with her) relates, "The Messenger of Allah (pbuh) asked me to give a woman to her husband in order to consummate his marriage with her before giving her anything." (Narrated by Ibn Majah)

In addition, marriage is like an act of transaction in which we can receive an article before paying. As for the above hadiths that prevent a husband to consummate his marriage with his wife before paying her dowry, it can be interpreted that it is recommended to do that according to the people's custom and to distinguish between women who dedicate themselves to men and other cases.

### **The Death of the Husband of the *Mufawwidah* before Consummation**

The spouse can inherit each other even if one of them dies before consummation. The woman also must be given her dowry. There is no disagreement about inheritance. Concerning dowry, Ahmad and others hold that she must be given the dowry usually given to similar brides. `Ali, Ibn `Abbas, Malik and others take the position that she does not deserve dowry because this is a separation that came after a legal authorization before consummation, so it does not require dowry, like the separation caused by divorce. Ahmad also has another opinion that allows her to receive only a half of the dowry.

The first group of scholars cites the following hadith: It is relates that Ibn Mas`ud was asked about a man who had not specified his wife's amount of dowry until he died before consummation. Ibn Mas`ud said, "She completely deserves the usual amount of marriage payment given to similar brides. She has also to wait for a period of time (four months and ten days) before marrying again and has the right of inheritance." Thereupon, Ma'qil Ibn Sinan said, "This is the judgement of the Prophet (pbuh) in the case of a woman called Birwa' Bint Washiq." (Narrated by At-Tirmidhi)

Unlike divorce, death makes it obligatory for a woman whose husband dies before consummation to apply her `iddah. The woman has also to receive her dowry in full on her husband's death.

### **Seclusion after Concluding the Marriage Contract**

Once a man stays in seclusion with his wife after concluding the marriage contract, he is to give the dowry to her even if he does not have sexual intercourse with her, as argued by the Rightly-Guided Caliphs, the Hanbalis, the Hanafis, Ash-Shafi`i (in his original *madhhab*) and others.

Shurayh, Ibn Sirin, Ash-Shafi`i (in his later *madhhab*) and others are of the opinion that only by sexual intercourse must he pay the dowry. " Ahmad adds, "If the woman says that he did not have sexual intercourse with her, he is not required to give her dowry in full but she must apply her `iddah. Allah Almighty says,

﴿And if you divorce them before consummating the marriage, and you have already appointed a dowry for them, then half of the appointed dowry is due to them.﴾

(Al-Baqarah: 237)

The first group of scholars argues that what they say is the position of the Prophet's companions (may Allah have been pleased with them) Imam Ahmad and Al-Athram report Zorarah Ibn Abu Awfa to have said, "The Rightly-Guided Caliphs hold that whoever screens himself accompanied by his bride by a door or a curtain must pay the dowry in full and she must apply her `iddah. (if she is divorced thereafter or if the husband dies." This is also the position of Al-Ahnaaf, Sa`id Ibnul-Musayyab

and Zayd Ibn Thabit. As for Allah's saying, "before consummating the marriage", it may be interpreted as a kind of metaphor in which the result is mentioned to refer to the stimuli (staying with a woman in seclusion) rather than the action.

### **Enjoyment without Intercourse**

Touching one's bride with sexual desire such as amorous play or kissing makes it obligatory for him to pay dowry in full. Ad-Daruqutni reports on the authority of Thawban that the Prophet (pbuh) said, "*Whoever uncovers a woman's veil and looks at her, must pay the dowry whether he consummates his marriage with her or not.*" But the majority of scholars hold that the word "consummating" in the verse refers only to sexual intercourse. Therefore, full dowry is not obligatory except for the one who copulates with his bride.

### **A Bride Who Forgoes her Dowry**

It is permissible for a wife to waive her right of dowry or to decrease it. Allah the Almighty says,

*﴿But if they are happy to offer you any of it, accept with happiness and with wholesome pleasure.﴾*

(An-Nisa': 4)

### **A Wife Who does not Have the Stipulated Characteristics**

If a husband requires that his wife is a Muslim but he discovers later that she is not, he has the choice to annul the marriage or not. But if he stipulates that she is virgin and he discovers later that she is non-virgin, there are two points of view:

1- He is not allowed to annul his marriage because there are only other eight defects that permit the annulment of marriage.

2- He can annul it.

Az-Zahari narrates that once a man got married to a woman whom he found non-virgin. Her hymen was torn by menses. Thereupon, `A'ishah told him that menses certainly do so. Al-Hasan and others say that if a man discovers that his bride is non-virgin, he is not allowed to annul his marriage. This is because the hymen may be torn because of a vault, much menses, work, or heavy loads.

If he stipulates that his bride is of a certain lineage or a bondswoman but it turned out that she is of a higher lineage or a free woman, he has no right to annul his marriage.

When marriage is annulled before consummation, the woman does not receive her marriage payment. If he annuls the marriage after consummation because of some way of deceit planned by one of those who usually receive dowry, he does not have to pay anything. If however the deceit is planned by someone else, he must pay the dowry and then get its value back from the one who has deceived him.

### **Words That Effect Marriage Agreement**

Marriage is contracted with words denoting "marrying off", as they are the words referring to this bond in the Qur'an. For example, the guardian may say, "I have married you to my daughter" and the suitor then says, "I have accepted to marry her."

If the suitor says, "Have you married me to your daughter?" and the guardian says, "Yes." then the marriage is contracted with these mutual words, as long as there are two witnesses. Ash-Shafi`i says, marriage is not to be concluded but with two spoken forms, one of which expresses proposal of marriage and the other expresses acceptance, for proposal and acceptance are of the pillars of the contract.

Marriage cannot be conducted except by plain words of marriage (on words derived from it). This is also the position of Ash-Shafi`i, Ahmad and others.

On the other hand, Al-Hasan, Abu Hanifah and others agree that marriage can be conducted by words such as to offer, to present, to sell, or to own. The Prophet (pbuh) married a man to a woman by saying, "*I have made you own her against what you memorize of the Qur'an.*" (Narrated by Al-Bukhari)

But the first group of scholars cites Allah's saying,

*﴿and any believing woman who grants herself to the Prophet, if the Prophet wishes to marry her, this is only for you, and not for the believers.﴾*

(Al-Ahzab: 50)

Such a way of marriage was limited to the Prophet (pbuh). Moreover, these words may also be used in other commercial dealings and we should be as plain as possible for the sake of accurate witness.

### **Do Foreign Words Effect a Marriage Agreement?**

The marriage agreement may be conducted by any language on condition that both the bride and the groom understand that

what they are speaking about is a marriage agreement even by means of truthful translators.

### **Can a Marriage Contract be Conducted by a Mute Person**

The marriage agreement is valid if done by a mute person whose gestures can be understood as referring to marriage. In other words, a mute person's gesture is as binding as the words of a person who is able to speak.

### **Can the Acceptance be Uttered before the Proposal?**

If the words expressing acceptance are uttered before the words expressing proposal when contracting a marriage, the Hanbalis say that such a marriage contract is invalid.

Abu Hanifah, Malik and Ash-Shafi'i maintain that the contract is valid because both the proposal and the acceptance are expressed, so it is correct, just as if the proposal was uttered first.

### **Non-Serious Agreement of Marriage**

A marriage agreement is valid even if done in jest. The Prophet (pbuh) says, "*(There are) three (things) whose seriousness is serious and jesting is serious (too)*"<sup>(1)</sup> *(They are) marriage, divorce and revocation (of divorce)*." (Narrated by Abu Dawud and At-Tirmidhi) `Umar also says, "There are four things that are always valid once uttered: divorce, marriage, freeing a slave, and vowing."

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1. It means their result is always the same, whether they are taken seriously or with jesting. (Translator)



## **The Interval between the Proposal and the Acceptance**

The marriage agreement is valid even if there occurs a long interval between the proposal and its acceptance on condition that both the groom and the guardian are still together and aware at the time of agreement.

If they separate before uttering the acceptance of marriage, the marriage and the agreement become invalid because it gives the impression that one is averse to accepting. Likewise, if they are preoccupied by doing something other than the marriage agreement it becomes an invalid agreement (the criterion being whether it gives the impression that one is averse to accepting, not merely indulging in other work)

## **Stipulating an Option to Cancel a Marriage Agreement**

When the marriage agreement is concluded, it is not permissible for either the groom or the guardian to cancel it. This ruling applies to both khiyar al-Majlis and khiyar ash-Shart. Unlike commercial dealings, each of the spouses are supposed to think and investigate before the final agreement. Moreover such an option may bring harm to the bride if the groom refuses to accomplish marriage.

## **Desirable Acts when Marrying**

### **(1) Delivering an address before the contract:**

It is recommended for the groom to give a short address when making a marriage proposal. The Prophet (pbuh) says,

*"Every matter that does not begin by praising Allah will be cut off."*

If one wants to be brief, he may simply say, "Praise be to Allah there is no god but Allah and Muhammad is the Messenger of Allah. Blessings and peace be upon the Messenger of Allah.

If recommended to give the address of `Abdullah Ibn Mas`ud: "The Messenger of Allah (pbuh) instructed us to utter the testification of faith whether in Prayer or in anything else. The form of testification of faith in anyone's affair is as follows:

"Praise be to Allah, we thank Him, seek His help and His forgiveness. We seek refuge in Allah from the evils of ourselves and that of our bad deeds. He whom Allah guides, is truly guided, and he whom Allah leaves to stray, none can guide him. I bear witness that there is no god but Allah, besides Him there is no other partner and I bear witness that Muhammad is His Messenger." Then they read the following three verses of the Qur'an,

*﴿ Submit sincerely in devotion to GOD, and do not die except as Muslims. ﴾*

(Al `Imran: 102)

*﴿ And fear GOD to whom you are answerable and the rights of the womb relationships. Indeed GOD is ever watching over you. ﴾*

(An-Nisa': 1)

*﴿ Fear GOD and speak relevantly; and He shall set right your deeds for you. ﴾*

(Al-Ahzab: 70-71)<sup>(1)</sup>

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1. This hadith is narrated by Abu Dawud and At-Tirmidhi.

It is also narrated that when `Umar was invited to marry a woman to a man he used to say, "Praise be to Allah and blessings and peace be upon Muhammad (pbuh). It is such and such who wants to marry your daughter. If you agree, we praise Allah, but if you do not agree, we have nothing to say but to glorify Allah."

## **(2) Announcing the marriage by beating the tambourine and singing:**

Ar-Rubayyi` Bint Mu'awwidh Ibn `Afra' says, "On (the day of ) the consummation of my marriage, the Prophet (pbuh) came and sat on my bed as (far from me as) you are sitting now. Our little girls started beating the tambourine and mourning my ancestors who had been killed in the battle of Badr. One of them said, "Among us is a Prophet who knows what will happen tomorrow." On that the Prophet (pbuh) says, "*Leave this (saying) and keep on saying that which you had been saying before.*" (Narrated by Al-Bukhari.)

`A'ishah also narrates that when she married a woman to a man from the Helpers (*Ansar*), the Prophet (pbuh) said,

*"O `A'ishah, what do you have of amusement to present, since the Helpers like amusement."* (Narrated by Al-Bukhari)

Therefore, hadiths indicate that marriage must be announced publicly, and that it is permissible to play the tambourine at weddings unless it is accompanied by a prohibited singing. But what occurs of abominable things, at weddings nowadays is ultimately unlawful.

At-Tabarani narrates on the authority of As-Sa'ib Ibn Yazid that the Prophet (pbuh) permitted this (i.e. beating tambourines

at weddings) Songs which are to be sung must be delicate and decent. Fragrant and impolite songs should be eliminated. Such songs are unlawful at weddings and on any other occasions.

## **Music and Singing Instruments**

Abdur-Rahman Ibn Ghanam relates on the authority of Abu Amir (or Abu Malik al-Ash`ari) that he heard the Prophet (pbuh) as saying,

*"There will be people of my nation who will hold zina (adultery or fornication), silk, khamr (wine and the like), and musical instruments to be lawful."* (Narrated by Al-Bukhari)

In another version The Prophet (pbuh) says,

*"There will be people of my nation who will drink khamr, which they will call other than its name. (They will also) listen to musical instruments and female singers. Allah will make the earth swallow them up and metamorphosize them into monkeys and pigs."* (Narrated by Ibn Majah)

Abdullah Ibn Umar also reports the Prophet (pbuh) to have said, *"Allah has prohibit khamr, gambling, Kubah<sup>(1)</sup>. and ghubayra<sup>(2)</sup>. And, all intoxicants are prohibited."* (Narrated by Ahmad and Abu Dawud)

Ash-Shawkani in his Nayl al-Awtar says, "There are many hadiths mentioned under that title. But some scholars hold that they are weak hadiths. Ibn Hazm says that there is no sound hadith under that title and all cited hadiths concerning music and songs are fabricated."

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1. A long drum with a narrow middle.

2. A musical instrument.

In his book Al-Fath, Al-Hafiz says that the hadith narrated by Abu `Amir is a sound hadith and of a well-known chain of transmission. Al-Bukhari may have narrated it in an incontiguous way relying on a previous narration in his book.

The majority of scholars hold that singing that is accompanied by musical instruments is prohibited. They rely on the previous evidence.

On the other hand, the people of Madinah and some other scholars permit listening to singing even if it is accompanied by a lute.

In his opinion about listening to singing, Abu Mansur al-Baghdadi says, "Abdullah Ibn Ja`far does not see any harm in singing. He used to compose melodies for his female slaves. He also used to listen to them when singing these melodies with musical instruments. This occurred during the era of `Ali Ibn Abi Talib (may Allah be pleased with him.)

Evidence stipulated by those who permit singing is as follows:

- 1- The argument of Ibn Hazm mentioned above.
- 2- The chain of transmission of such a hadith include Sadaqah Ibn Khalid about whom Ibn al-Junayd relates on the authority of Yahya Ibn Ma`in that he was not reliable. Al-Mazzy also relates on the authority of Ahmad that he was not upright. (But it can be argued that he is among the narrators of sound hadiths.)
- 3- The hadith has a defect in its chain of transmission and its text. The narrator of the hadith was hesitant when

mentioning the name of the Prophet's companion who reports the hadith. As for the defect mentioned in the text, the phrase, "Hold it to be lawful" is missing in other versions. (However it can be argued that a narrator may leave out some words to mention it again in another position.)

- 4- The phrase, "musical instruments" is not mentioned by Abu Dawud. (But it can be argued that it is mentioned by others.)

Those who are of the opinion that singing is unlawful, cite all hadiths included under that title as evidence. They also assume that regardless of the weakness of such hadiths, they all strengthen one another.

### **Of such hadiths are the following:**

1- *"Song makes hypocrisy grow in the heart as water does herbage."*

2- The hadith that forbids listening to female singers.

3- *"There are two cursed voices whether in the worldly life or next: a flute while blessing and a cry during affliction."*

Abu Bakr Ibn al-`Arabi, Al-Ghazali and Ibn an-Nahawi all hold that there is no authentic hadith that forbids singing. On their commentary on Allah's saying, ﴿*And there are among people some who buy vain talk to lead astray from GOD's Way.*﴾ (Luqman: 6), Ibn Mas`ud and Ibn `Abbas say that "vain talk" here means singing. Actually the context of the verse may refute their opinion. This is because Allah says in the same verse, "to lead astray from GOD's Way" and whoever does that is called

an unbeliever. Even if someone buys a copy of the Glorious Qur'an to lead astray from GOD's Way, he is called an unbeliever.

Al-Fakahani says, "I have never seen any verse or an authentic hadith that made music and singing unlawful." Ibn Rushd also cites Allah's saying,

﴿And when they hear people speaking nonsense, they avoid it.﴾

(Al-Qasas: 55)

This is used as evidence for forbidding singing and music. But there are four interpretations mentioned by exegeses of the Qur'an:

- 1- This verse was revealed on the part of a Jewish people, who after embracing Islam were insulted and reviled by other Jews.
- 2- When those Jewish people who embraced Islam heard what the Jews distorted of the Torah concerning the description of the Prophet (pbuh) turned away therefrom.
- 3- It is the Muslims who turn away from nonsense.
- 4- It was revealed on behalf of some People of the Book, who were neither Jews nor Christians, but were true believers that were waiting for the final Messenger (pbuh). When they knew that he had appeared at Makkah, they went to him, where he (pbuh) taught them the Glorious Qur'an and therefore they entered Islam. Accordingly the people of Quraysh mocked and despised them.

However Ibn al-'Arabi says that the last interpretation is misleading because there is no reference to it in the verse.

Among the textual evidence cited as proof for maintaining singing as prohibited is the following hadith:

*"A believer has only three kinds of lawful amusement: cuddling his wife, taming his horse and shooting arrows."*

Al-Ghazali comments on this saying that lawful amusement means a useful kind of amusement. However, could watching the Abyssinians playing with their spears in the mosque be considered useful amusement?

Furthermore, those who permit listening to singing and music argue that if we hold amusement to be prohibited, all that we do of worldly acts is prohibited because Allah says,

﴿The life of this world is only play and diversion.﴾

(Al-Hadid: 20)

It is significant to note that what is meant in the verse is a specific kind of amusement, namely, the idle talk.

For further reading you may refer to my (the author) treatise called *Ibtal Dawā' al-Ijma' 'ala Tahreem Mutlaq as-Sama'* (Abolishing the plea of the majority of scholars concerning holding every kind of song as prohibited).

Beating the tambourine by women at the arrival of a traveler and the like

Buraydah relates, "When the Prophet (pbuh) came back from one of his conquests, a black female slave came and said, "O Messenger of Allah! I swore an oath to beat the tambourine and



sing before you if you came back, by Allah's willing, in a good manner." The Prophet (pbuh) said, "*If you swore, you can do so.*" When she started to beat the tambourine, Abu Bakr, `Ali and `Uthman ` came successively while the woman was beating. When `Umar came the woman she sat on the tambourine quickly to hide it. Accordingly the Prophet (pbuh) said, "*Satan fears you `Umar.*" (Narrated by Ahmad and At-Tirmidhi)

The occasions wherein beating the tambourine and singing is allowed include marriage celebrations, as mentioned before. `Ids (festivals and the like) also are included in this meaning. `A'ishah relates, "Abu Bakr entered upon me while listening to two female slaves, from among the Helpers'. They were singing the verses commemorating the day of Bu'ath. But they were not singers. Abu Bakr said, "Satan's flutes are in the Prophet's home!" This occurred on a day of festival. Then the Prophet (pbuh) said, "*O Abu Bakr, every people has a festival and this (day) is ours.*" (Al-Bukhari and Muslim)

An-Nasa'i narrates the Prophet (pbuh) to have said to `Abdullah Ibn Rawahah, "Encourage the people!" and then he in turn started to recite poetry.

To summarize, much has been said about singing and musical instruments because there are many arguments which have broken out between those who make it prohibited and those who do not. This is because most of songs are accompanied by more grievous sins such as the mixing of men and women, *tabarruj* (showing women's adornment), tempting speech, drinking wine, and many other kinds of behavior that bring on Allah's punishment: swallowing by the earth or changing into monkeys or pigs.

It may be desirable that women have a female singer and men have a male singer, as long as what they sing is decent and chaste, even if songs are accompanied by music. May Allah guide us to what is better and useful!

### **Secret Marriage**

The secret marriage is legal if there is a guardian and two witnesses but it is offensive, as argued by Abu Hanifah, Ash-Shafi`i and others. They cite the Prophet's hadith, "*Marriage is invalid if there is no guardian*" as a proof. This hadith indicates that marriage is valid if there is a guardian present during the marriage agreement.

On the other hand, Abu Bakr `Abdul-`Aziz says, such a marriage is invalid because Ahmad says that "The marriage agreement which has a guardian and two witnesses is not legal unless it is publicized." This is also the position of Malik. They cite the hadiths concerning the obligation of announcing the marriage agreement. But such hadiths only recommend the marriage agreement to be announced publicly.

Additionally, announcing the marriage agreement occurs only after the conclusion of the contract.

### **(3) Du`a' for the new spouse:**

It is recommended to invoke good upon a person who has married recently by saying the Prophet's statement,

*"May Allah bless (it) for you, and bless (it) on you, and gather you together in good (connection)!"* (Narrated by Ahmad, Abu Dawud, At-Tirmidhi, and Al-Hakim)

Narrated Anas Ibn Malik: `Abdur-Rahman Ibn `Awf came to Allah's Messenger (pbuh) and he had the marks of *sufrah* (yellow perfume). Allah's Messenger (pbuh) asked him (about those marks). `Abdur-Rahman Ibn `Awf told him that he had married a woman from the Helpers. The Prophet (pbuh) asked, "*How much dowry did you pay her?*" He said, "I paid gold equal to the weight of a datestone." Allah's Messenger (pbuh) said to him, "*Give a wedding banquet, even if with (only) one sheep.*"

#### **(4) Performing two rak`ats when consummating the marriage with one's wife:**

Ibn Mas`ud, Abu Dhar, Hudhayfah and many other companions said to Abu Sa`id (a freed man of Abu Usayd) when marrying: "When you enter upon your wife (for the first time), you have first to perform two rak`ahs and then hold your wife's head and say, "O Allah! Bless my wife for me, bless me for my wife, give her bounty out of me, and give me bounty out of her!" Then you can do what you want."

`Amr Ibn Shu`ayb reports that the Prophet (pbuh) said,

*"When anyone of you marries a woman or buys a servant, let him say, "O Allah, I ask You her good, and the good You created in her; and I seek refuge from her evil and the evil You created in her." (Narrated by Abu Dawud)*

#### **(5) Giving a wedding banquet:**

The Prophet (pbuh) said to `Abdur-Rahman Ibn `Awf,

*"Give a wedding banquet, even with (only) one sheep." (Narrated by the Jama`ah)*

Reported Anas (may Allah be pleased with him) that the Prophet (pbuh) did not give a better wedding banquet on the occasion of marrying any of his wives of more than one sheep."

Reported Safiyyah Bint Shaybah, "The Prophet (pbuh) gave a banquet of barley on marrying some of his wives."

Reported Anas (may Allah be pleased with him), "The Prophet (pbuh) stayed for three nights at a place between Khaybar and Madinah, and there he consummated his marriage with Safiyyah. I invited Muslims to his banquet that included neither meat nor bread. Then the Prophet (pbuh) ordered for leather dining sheets to be spread, and then dates, dried yogurt and butter were provided on it, and that was the banquet (*walimah*) of the Prophet (pbuh). Muslims asked whether Safiyyah would be considered his wife or a slave girl of what his right hand possessed. Then they said, "If the Prophet (pbuh) screens her from the people, then she is the Prophet's wife but if he does not screen her, then she is a slave girl." So when the Prophet (pbuh) proceeded he made a place for her on the camel behind him and screened her from people." (Al-Bukhari)

### **The Ruling of the Banquet**

The Zahiris hold that the wedding banquet is binding because the Prophet (pbuh) said, "*Give a wedding banquet, even with (only) one sheep.*" This is also the position of Ash-Shafi'i which is mentioned in his book, Al-Umm. Ahmad narrated on the authority of Buraydah that the Prophet (pbuh) said, when `Ali betrothed Fatimah, "*There must be a (wedding) banquet.*"

Abu Hurayrah (may Allah be pleased with him) relates, "The wedding banquet is a duty and a *sunnah*. Whoever is invited to attend and does not respond to it, has disobeyed (Allah)."

On the other hand, Ahmad says that the wedding banquet is a *sunnah*, but the majority of scholars say that it is recommended. The most correct point of view is that it is a *sunnah*.

### **The Time of the Banquet**

An-Nawawi says that The Early Muslims disagree about the timing of the wedding banquet. Al-Qadi `Iyad says that the Malikis hold that it is recommended to occur after consummation. Some other Malikis say that it is recommended at the time of the marriage agreement. Ibn Jundub also says it is desirable both at the time of the marriage agreement and after consummation. As-Subki argues that it should be after consummation according to the Prophet's guidance.

It is desirable to be done after consummation because of the hadith narrated by Al-Bukhari on the authority of Anas,

"When the day dawned, the Prophet (pbuh) was a bridegroom and he invited the people to a banquet."

As a matter of fact, the wedding banquet can be held any time according to one's circumstances and custom.

### **Responding to the Banquet**

Reported `Abdullah Ibn `Umar (may Allah be pleased with him) that "Allah's Messenger (pbuh) said,

*"If anyone of you is invited to a wedding banquet, he must accept the invitation."*

Imam Al-Baghawi says that scholars disagree about the ruling concerning responding to the wedding banquet. Some hold that it is desirable, while others say that it is obligatory for

whoever is invited to attend. If somebody refuses an invitation (to a banquet) without a valid excuse he is sinful. Abu Hurayrah (may Allah be pleased with him) reports, "The worst food is that of a wedding banquet to which only the rich are invited. And he who refuses an invitation (to a banquet) disobeys Allah and His Messenger (pbuh)." (Al-Bukhari and Muslim)

Abu Hurayrah reports that the Prophet (pbuh) said,

*"The worst food is that of a wedding banquet from which is prevented whoever comes to it and to which is invited whoever refuses (to come). And whoever does not respond to the invitation has disobeyed Allah and His Messenger (pbuh)."*  
(Narrated by Muslim)

Imam Al-Baghawi says that it is obligatory for a Muslim to attend. If he attends, it is recommended to eat, though not obligatory, in case he is not fasting. Jabir reports the Prophet (pbuh) to have said,

*"Whoever is invited to have food must respond, and let him eat if he wants it, otherwise he should not do."* (Narrated by Muslim)

Abu Hurayrah also relates that the Prophet (pbuh) said,

*"If anyone of you is invited, he must respond. In case he is fasting he should invoke (Allah) otherwise he should eat."*  
(Narrated by Ahmad and Muslim)

Imam Al-Baghawi says that it is permissible for those who have an excuse or who have difficulty due to distance, not to attend. `Ata' narrates, "Once Ibn `Abbas was invited to have food while engaged in presenting water to pilgrims. Accordingly

he said to the people, "Respond to the invitation of your brother, deliver my greeting to him and tell him that I am busy." (Narrated by Abdur-Razzaq)

Concerning the issue of responding to one's invitation in other situations than marriage, it is desirable and not obligatory.

Ibn `Umar (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"If anyone of you invited another, he must accept whether it is to a marriage or to any other party."* (Narrated by Muslim)

Ibn `Umar, therefore, used to accept people's invitations whether it was to a marriage or anything else, even when he was fasting.

But if a person sees something offensive (from the religious standpoint) in the party, he must leave unless they eliminate it upon his presence or request.

Narrated `A'ishah (may Allah be pleased with her) the wife of the Prophet (pbuh), "I bought a cushion having pictures on it. When Allah's Messenger (pbuh) saw it, he stood at the door and did not enter. I noticed the sign of disapproval on his face and said, "O Allah's Messenger! I repent to Allah and His Messenger. What sin have I committed?" Allah's Messenger (pbuh) said, "*What is this cushion?*" I said, "I have bought it for you so that you may sit on it and recline on it." Allah's Messenger (pbuh) said, "*The makers of these pictures will be punished on the Day of Resurrection, and it will be said to them, 'Give life to what you have created (i.e. these pictures).'*" The Prophet (pbuh) added, "*Angels do not enter a house in which there are pictures.*"

## **Drawings and Pictures**

In his book, *Al-Mughni*, Ibn Qudamah says, "There is no harm if he sees drawings and pictures of trees, etc. This is because such drawings are as permissible as images depicted on cloth. In the case of images of animals that are abased and walked upon and are depicted on rugs and pillows, then they are permissible. As for images of animals that are portrayed on curtains, walls and untrodden objects, it is better to leave unless the form of such depictions has been altered or distorted by cutting their heads. Ibn `Abdil-Bar says that this is the most moderate opinion. This is also the position of Sa`d Ibn Abi Waqqas, Ibn Sireen, Sa`id Ibn Jubair and Ash-Shafi`i and others.

However, Abu Hurayrah and Malik hold that all kinds of pictures are disliked, but not prohibited. The Prophet (pbuh) says,

*"Angels do not enter a house in which there is a picture."*  
(Al-Bukhari and Muslim)

It is related that Ibn Mas`ud (may Allah be pleased with him) refused to enter a house when he knew that there was a picture inside the house. Once they destroyed it, he entered the house.

### **Proof of the first opinion:**

`A'ishah relates, "The Prophet (pbuh) returned from a trip, and I had draped a cloth with pictures on it over a small closet. When he saw it, he asked, "Do you drape a cloth with pictures on it over the closet?" Then he ripped it down. Thereupon I made two pillows using it. I think, I saw the Prophet (pbuh) reclining on one of them." (Narrated by Ibn `Abdil-Bar)



Being walked on and abased it would not be like idols that are worshipped. It was narrated that when Abu Talha was asked, "Did the Prophet (pbuh) not say, '*Angels do not enter a house in which there is a picture or a dog.*'" He said, 'Did you not hear him saying, '*except an image drawn on a cloth.*'" (Al-Bukhari and Muslim)

It can be interpreted that only pictures, which are hung, are not permissible because of the hadith reported by `A'ishah. When the head of the form is removed, it becomes permissible.

An-Nasa'i narrates that Abu Hurayrah (may Allah be pleased with him) said, "Gabriel (upon him be peace) asked the Prophet for permission to enter his house, and when the Prophet (pbuh) told him to come in, Gabriel replied, "How can I come in when there is a curtain in your house with pictures on it? You should either remove their heads or make it a mat to walk on, for we angels do not enter a house in which there are pictures."

If a picture lacks a portion without which the figure could not live, such as the chest or the belly, then there is no harm in it.

There is another version of the above-mentioned hadith that reads, "The Prophet (pbuh) said,

*"Once Gabriel came to me and said, "Yesterday, I came but I did not enter (your home) because there was an idol at your door, a curtain with pictures on it in your home and a dog. You should order that the head of the image be removed so it resembles the form of trees, derive two pillows of the curtain to be reclined on and order that the dog leaves."*

Accordingly, the Prophet (pbuh) did so." (An authentic hadith)

## **Making Idols and Pictures**

Picture making is prohibited for the hadith reported by Ibn `Umar that the Prophet (pbuh) said,

*"Those who make pictures will be tortured on they Day of Resurrection. It will be said to them, 'Put life into what you have created.'"*

Masruq says, "We entered, accompanied by `Abdullah, into a house where there were some idols. He pointed to one of these idols saying, "Whose idol is this?" They answered that it was Mary's. Thereupon he reported the Prophet (pbuh) saying,

*"The most severely punished among people (on the Day of Resurrection) are the picture makers." (Al-Bukhari and Muslim)*

Just as picture-making is prohibited, so too is procuring them. We have also to take into account that photography is not picture making. What is prohibited is making picture by hand.

## **Entering a House in which there are Idols or Pictures**

To enter a house in which there is a picture is not prohibited. But it is permissible to refuse the invitation into such a house as a kind of punishment to the one who invited him. If he noticed the pictures hanging on the wall after entering the house and being served with food, should he leave? Ahmad says, "Do not make it strict. He may rather advise or rebuke them (i.e., he does not have to leave). This is also the position of Malik who holds that pictures are not prohibited but undesirable.

On the other hand, most of the Shafi'is are of the position that pictures are forbidden, if drawn on curtains or on untrodden objects, because angels do not enter such places. Because it is not prohibited, one does not have to refuse the invitation.

In his book *Futuh ash-Sham*, Ibn `A'id says, "When Umar arrived in Ash-Sham, Christians invited him to a meal. He asked them, "where?" They said, "In the church." Therefore, he refused, and asked `Ali to go with the people to have lunch there. Having gone, had lunch and seen the pictures, he said, "What is wrong if the leader of the believers comes and eats (with us)."

In addition, it is not prohibited for a Muslim to enter churches or houses in which there are pictures. Houses that have pictures or dogs are not forbidden to be visited even if the angels do not enter them. As for refusing the invitation to such houses, it is for punishing the owner or advising him.

### **Curtains over Walls**

It is permissible to put curtains on walls, as a necessity, to shelter from heat or cool weather, but it is offensive to put curtains on walls without necessity. Such an act can be an excuse for those who are invited for a banquet not to attend. Salim Ibn `Abdullah Ibn `Umar reports, "I got married during the lifetime of my father who invited people to my marriage banquet. Among the people who were invited was Abu Ayyub. There were green curtains draping over my home. Then, Abu Ayyub when noticing the home covered by these green curtains said, "O `Abdullah, do you cover the walls?" My father said coyly, "Women overcame us, Abu Ayyub." Thereupon, Abu

Ayyab said, "I will not have your food or enter your home." Then, he went away." Narrated by Al-Athram)

Covering the walls with curtains is not prohibited but rather undesirable as argued by Ash-Shafi`i and Ahmad. This is because there is no textual evidence that forbids it. It is narrated that Ibn `Umar and others did so during the lifetime of the companions of the Prophet (pbuh).

It is undesirable to do this because it may be extravagant like excessive clothing or overeating.

## Conditions in Marriage Contracts

Conditions in a marriage contract are divided into three categories:

**First:** conditions that must be fulfilled. These refer to stipulations that are beneficial to the wife herself. For example, the man would not ask her to depart her home or country, he would not compel her to join him in travel, or he would not take a second wife. The husband must meet these conditions; otherwise she may demand dissolution of her marriage. This is the opinion of `Umar, `Umar Ibn `Abdil-`Azeez, Imam Ahmad and others.

Az-Zuhri, Malik, Al-Shafi`i, the Hanafis and others invalidate these conditions.

According to Abu Hanifah and Imam Ash-Shafi`i the woman's dowry, rather than her marriage is invalidated, and she receives a dowry equal to that of her social counterparts. They say in support of their opinion what the Prophet (pbuh) says,

*"All conditions as are not concluded in compliance with the Book of Allah (Qur'an) are invalid, even if they were a hundred ones."* (AL-Bukhari and Muslim)

They argue that such stipulations are not included in the Qur'an because they are not required in the Shari`ah. The Messenger also says,

*"Muslims are bound by their stipulations with the exception of a condition that bans the lawful or permits the prohibited."*

This forbids the lawful, i.e. marrying off and travelling. In addition, this stipulation is not beneficial as regards the contract and its requirements.

On the other hand, the first view may be enhanced by the saying of the Prophet (pbuh),

*"The most deserving conditions to be fulfilled are those through which you have taken vulvas as lawful." (Al-Bukhari and Muslim)*

He is also reported to have said,

*"Muslims are bound by their stipulations."*

The companions of the Prophet are said to have reached a unanimous agreement on this point.

Al-Athram reports that a man took a woman in marriage, and he stipulated that she must stay in her home. Later on, he sought to move. Her guardian brought the matter to `Umar Ibnul-Khattab who said that her condition must be fulfilled, upon which the man replied, "Then, you will be divorced." `Umar answered: "Rights are cut out by stipulations." This condition is beneficial to the woman, and its objective does not impair that of the marriage itself; thus it is inevitable, as if she stipulated increase of her dowry or its being paid in another currency.

Furthermore, the Prophet's words "Every condition that is not included in the Book of Allah is invalid." means the condition being at odds with the Shari`ah. But this type is validated. However, some jurists may argue that it bans the lawful. In fact, it does not. It rather gives the woman the ability

to choose either to maintain or dissolve her marriage in case that the man does not comply with the condition. As for their saying, "this stipulation is not beneficial as regards the contract and its requirements", I say that it is beneficial as regards the woman's interests.

It is not a valid stipulation that a woman stipulates that her husband should divorce her fellow wife. On the authority of Abu Huarirah (may Allah be pleased with him), the Prophet (pbuh) forbade a woman to stipulate her sister's (fellow wife) divorce" In another version, the Messenger (pbuh) says, "*A woman is not to ask for her sister's<sup>(1)</sup> divorce in order to be taken in marriage.*"

The ban necessitates dissolution of the point that comes under it.

Abul-Khattab says that it is inevitable, for it is not in contradiction with the contract and is beneficial to her. It resembles her stipulation that he should not take another wife along with her. However, this view is invalid, as we have already discussed it in detail.

**Second:** conditions that are invalid but the contract is still operative. For example, he may stipulate that she receives no dowry or no maintenance; she may ask him not to cohabit with her or to perform coitus interruptus with her.

Such conditions are invalid due to the fact that they run against the contract. They also imply forgoing inevitable rights. The contract itself is valid because conditions are extra and contain additions to it.

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1. I.e. her sister in Islam.

They affect the contract in no way as if he designated a forbidden dowry in it, for example, wine or pork. Marriage is valid even if the dowry itself is not known.

When asked about a man who married a woman and stipulated that he would spend one night every week with her, but the woman after that said, "I accept only that you stay with me one night after another" Imam Ahmad said, "She has the right to comply with the condition, but if she accepts nothing but division of nights, it is her right upon him. She asks for it whenever she desires."

Concerning a man who marries a woman and stipulates to have intercourse with her during the day, Al-Athram reports Imam Ahmad to have held that it is lawful and she can repeal the condition. He also maintains regarding a man who marries a woman provided that she will spend five *dirhams* on him every month that, the marriage is lawful, and she has the right to repeal the stipulation."

**Third:** conditions that invalidate marriage, such as determining the period of marriage (i.e. *Mut'ah* marriage), specifying the time of divorce or making the marriage contingent on something. For example, the guardian may say to the suitor, " I will give her to you in marriage if her mother accepts."

He may also stipulate that her dowry is to give another woman in marriage to so and so swapping (*shighar* marriage).



# Forbidden Marriages

## Seeking the Hand of a Girl who has a Suitor

On the authority of 'Uqbah Ibn `Amir, the Prophet (pbuh) says,

*"Believers are brothers. Therefore, it is prohibited for a believer to bargain over the purchase of his brother, or to seek the hand of a girl already betrothed to his brother unless the latter gives up his claim."* (Narrated by Imam Ahmad and Muslim)

On the authority of Abu Hurayrah, the Messenger (pbuh) says,

*"A man is not to propose to a girl already sought by another man till the latter either gets married to another girl or gives up his claim."* (Narrated by Al-Bukhari and An-Nasa'i)

On the authority of Ibn `Umar (may Allah be pleased with him) the Prophet (pbuh) says,

*"A man must not seek the hand of a girl who is already proposed to by another man unless the latter either gives up his claim or authorizes such a betrothal."* (Narrated by Ahmad, Al-Bukhari and Al-Nasa'i)

It becomes crystal clear from the above-mentioned traditions that such a form of betrothal is banned, as explicitly stated in Al-Bukhari's version.

The majority of scholars maintain this ban, but they say that it does not invalidate the marriage contract, as reported by Al-Khattabi and Al-Hafiz.

Dawud Al-Zahri states, "If the girl marries the second suitor, the contract is void both before and after consummation."

The Malikis have two opinions. Some of them argue that the contract is invalid before consummation, rather than after it.

The author of Al-Fath says that the majority of scholars argue that the ban is only restricted to betrothal which is not a condition of marriage. Thus, the marriage is not dissolved due to its being invalid. A fiancée and her guardian enjoy the right to dismiss a suitor even after she accepts him. The same applies to her suitor.

### **Shighar Marriage**

On the authority of `Abdullah Ibn `Umar (may Allah be pleased with him), the Prophet (pbuh) prohibits *Shighar* marriage. It is the marriage in which a man exchanges his daughter for another man's daughter on condition that no reciprocating of dowry is required.

Ibn `Umar (may Allah be pleased with him) also reports that the Prophet (pbuh) said,

*"There is no Shighar in Islam."* (Narrated by Imam Ahmad and Muslim)

Imam Al-Baghawi says that *Shighar* takes the form described in the Prophetic tradition, and it is banned. The Arabic word "*Shaghr*" linguistically refers to the meaning of "uplifting". Thus, this form of marriage is given this name because the two parties lift the dowry amongst themselves.

As far as the validity of this contract is concerned, scholars are not unanimous. Some hold it as invalid, like *mut'ah* marriage.

Marriage and marrying a woman along with her paternal or maternal aunt at one and the same time. This is the position of Malik, Ash-Shafi`i, Ahmad and others. `Ali Ibn Abi Hurayrah likens it to a man who gives his daughter in marriage with the exception of an organ of hers, and this is unanimously nullified. Likewise, *Shighar* is nullified, for every one of the parties marries off his daughter making the copulation with her as a dowry of the other woman.

The Hanafis and others argue that the marriage contract is legal and each one of the two women deserves a dowry equal to that of her counterparts. Imam Ash-Shafi`i states that in case a dowry is assigned to both or any of them, it is not the forbidden *Shighar*, and the marriage is valid, while the dowry is not, and each woman deserves a dowry equal to that of her counterparts.

### ***Mut'ah* Marriage**

On the authority of `Ali Ibn Abi Talib. "The Prophet (pbuh) prohibited the *Mut'ah* marriage on the battle of *Khaybar* as well as the flesh of tame donkeys." (Al-Bukhari and Muslim)

Imam Al-Baghawi says, "The *Mut'ah* marriage was practiced for some time after the rise of Islam. It was a personal contract between a man and a woman to cohabit for a limited period of time at the end of which she becomes automatically divorced, in return for a certain remuneration payable by the man. The Messenger (pbuh) banned this form of marriage."

Imam Al-Baghawi further states, "The *Mut'ah* marriage is unanimously termed invalid by all Muslims scholars. Ibn `Abbas is reported to have made it lawful for every single man whose celibacy would be extremely long, but on knowing the prophetic ban he condemned it."

The author of *Ar-Rawdah an-Nadiyyah* says, "The *Mut'ah* marriage was substantiated by the Islamic Shari`ah. Allah says,

﴿Give them their dowries for the enjoyment you have of them as an obligation.﴾

(An-Nisa': 24)

It is also narrated by Al-Bukhari and Muslim that `Abdullah Ibn Mas`ud said, "We fought with the Messenger of Allah (pbuh) while having no woman along with us. We wondered, "Should we not get ourselves castrated?" but he forbade us to do so. Afterwards, he granted us permission to take women in marriage against (a specific amount of money even if it is) a robe for an appointed term." However, this rule is abrogated by a number of hadiths. Sabrah al-Jahinni reported that he accompanied the Prophet (pbuh) in the conquest of Makkah. The Messenger allowed them to marry women for *Mut'ah* (enjoyment)." He adds, "The Messenger did not leave Makkah till he had made it prohibited." In another version of the hadith we read,

*"And Allah has surely forbidden it till the Day of Resurrection."*

Ibn `Abbas is narrated by At-Tirmidhi to have said, "Marriage for enjoyment was practiced after the advent of Islam, but when this verse was revealed, "Except from their wives and what their right hands possess" (Al-Mu'minun: 6), it was legitimately repealed.

In fact, the narration, which perpetuates the prohibition till the Day of Resurrection, is taken as the most outstanding proof in this regard. It was articulated by the Prophet (pbuh) in

Makkah, the last town visited by the Prophet. His death followed thereafter by four months, thus, making it inevitable for all Muslims. However, this cannot be contradicted by what is reported from some other companions that they maintained such marriages during the Prophet's lifetime as well as after his death. Indeed, the companions who knew of the eternal abrogation formed a ground of evidence against those who did not know it. Likewise, those who maintained such marriages did not know the new rule of law.

However, some scholars in later times, hold that the Prophetic tradition that permits *Mut'ah* marriage is decisive, while its counterpart which bans it, is speculative. And it is legally established that the later does not repeal the former. Besides, Al-Muqbili argues that the majority of jurists failed to provide a counter argument.

Technically speaking, if it is said that *Mut'ah* marriage is lawful because it is stated in the Qur'an, the reply would be that if the text is decisive in its contents, its implications are not necessarily the same due to two reasons:

- 1- The text may be held to refer to enjoyment resulting from the legal marriage.
- 2- The text is general in character, and this makes its implication speculative. At-Tirmidhi narrates that Ibn `Abbas said, "*Mut'ah* marriage was practiced until the verse, ﴿Except from their wives and what their right hands possess﴾ (Al-Mu'minun: 6) was revealed. Thus all else are forbidden."

Both the abrogated and abrogating texts are virtually decisive, if we are to agree with the legal view that a decisive

rule can only be repealed by another decisive rule. However, I hold a different opinion.

### **Muhallil Marriage**

Ibn Mas`ud (may Allah be pleased with him) reports that the Prophet (pbuh) "*cursed the muhallil and the one to whom it (i.e. this marriage) is effected.*" (Narrated by Ahmad and others) *Muhallil* here refers to the man who temporarily takes a woman in marriage, has sexual intercourse with her, and then divorces her to go back to her ex-husband's bond (after the termination of her *`iddah*).

In case the contract stipulates separation, it is invalid like the *Mut'ah* marriage. This form of marriage is named due to the underlying intentions of making the woman's marriage to her ex-husband permitted legally.

Some jurists hold that the contract, rather than the stipulation, is effective; and the woman is entitled to receive her dowry. However, if both parties are resolved to act as such, while not putting it in the contract as a condition, it becomes reprehensible and the contract is valid. When that man has sexual intercourse with her and divorces her, then her *`iddah* is terminated, the majority of scholars allow her to re-marry her former husband.

According to Ibrahim An-Nakh`i, unless her re-marriage is willingly motivated, it is nullified. Thus, if one of the parties, the ex-husband, the woman or the muhallil, presumes to legalize the re-marriage, it is virtually prohibited and void.

Sufyan Ath-Thawri and Imam Ahmad are of the view that if the second man marries that woman in order to make her

re-marriage accessible, but rather prefers to keep her, let him divorce her and initiate a new contract.

### **Betrothal during `Iddah**

Women who apply `iddah are divided into three groups:

- 1- the widow, the irrevocably divorced woman, and the woman whose marriage is dissolved due to a legal reason such as foster relationship, when she becomes perpetually impeded to re-marry her ex-husband. In such cases, it is permissible to seek her hand in marriage indirectly. Allah says,

*﴿And there is no blame on you if you make indirect proposal of marriage to widows (during their waiting term)﴾*

(Al-Baqarah: 235)

Fatimah Bint Qays reports that the Prophet (pbuh) said to her, "On being cleared from your `iddah let me be informed." This is an indirect offer of betrothal during 'iddah. So, an explicit proposal is forbidden, for Allah has only permitted the indirect one. In addition, the obvious unseemly offer many wrongly bind a woman to express the expiry of her `iddah even long before its due time.

- 2- The revocably divorced woman: Being a potentially eligible wife for her revocable husband, both explicit and implicit proposal of marriage is prohibited.
- 3- The irrevocably divorced woman who is marriageable to her husband as in *khul'*, for example. The husband who has made *khul'* with this woman enjoys the right of proposing to her both explicitly and implicitly, for he has

the right to have sexual intercourse with her during her *`iddah*., as she is like the woman who is not applying *`iddah*.

One may wonder: can anyone else indirectly seek her hand in marriage? there are two reports about the Shafi`is and the Hanbalis. First, it is lawful due to the general nature of the Qur'anic verse (Al-Baqarah: 235), and she is irrevocably divorced. Second, it is forbidden because her husband may go into her as if she were revocable to him.

Al-Qasim Ibn Muhammad says that the terminology of indirect offers may be expressed as follows: "Truly, I find you a noble match", "in fact, I am inclined to you" or "Allah will award you an honorable blessing."

Az-Zuhri says. "It is to say, 'you are quite handsome" or "you are inclined to.'

Mujahid says that explicit proposals are those which stand for nothing but marriage, such as, "would you marry me?" or "when your *`iddah* is over, I will marry you."

However, if a man overtly proposes to a woman during her *`iddah*, and takes her in marriage after its termination, the contract is valid.

Imam Mailk argues that such a man should divorce her for one time, then remarries her. In fact, this is not correct, for such a banned, implicit proposal does not coincide with the contract. It therefore, leaves no effect on it.



## Women Who are Prohibited to Men

The Qur'an has clearly enumerated the women whom men are prohibited to marry. These women are of fourteen categories, thirteen of which are mentioned in (An-Nisa': 23)<sup>(1)</sup>, and the fourteenth category is mentioned in the verse,

*﴿And do not marry the women who your fathers have married.﴾*

(An-Nisa': 22)

These fourteen categories include seven women who are prohibited due to kinship relationship, two due to foster relationship, four due to marriage relationship, and one due to having two sisters, for example, together in marriage. The seven categories of women who are prohibited due to kinship relationship comprise the mother, the daughter, the sister, the paternal aunt, the maternal aunt, the brother's daughter and the sister's daughter.

It is obviously forbidden either to take one's mother in marriage or copulate with her.

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1. The verse reads,

*﴿Forbidden to you to marry are your mothers, and your daughters, and your sisters, and your paternal aunts and your maternal aunts, and your brother's daughters, and your sister's daughters, and your mothers in suckling, and your sisters in suckling, and the mothers of your wives, and your step-daughters who are in guardianship being born of your wives with whom you have consummated marriage, but if you have not consummated marriage with them, there is no blame on you in marrying them, and the wives of your sons who are of your own loins, and that you should not have in marriage two sisters together, except what has already passed. Surely GOD is All-Forgiving, All-Merciful.﴾*

- The term "mothers" in the verse (An-Nisa': 23) includes one's mother, the mother's mother, and the father's mother downwards.
- The term "daughters" includes one's daughters, daughter's daughters, and son's daughters upwards.
- The term 'Sisters' is generally applied to both full and stepsisters.
- "Paternal aunts" comprises the full and stepsisters of one's father.
- Likewise, "maternal aunts" covers the full and stepsisters of one's mother, as well as grandfather's and grand mother's sisters.
- "Brother's daughters" includes the daughters of one's brother directly by consanguinity as well as the daughters of this brother' sons and daughters.
- Likewise, "sister's daughters" encompasses the daughters of one's sister as well as the daughters of this sister's sons and daughters.

### **Women Prohibited due to Foster Relationship**

This group covers two categories: foster mothers and foster sisters. Allah says,

﴿...and your mothers in suckling, and your sisters in suckling.﴾

(An-Nisa': 23)

Therefore, when a man's wife gives suck for five separate times, to a baby who is less than two years of age, both the man

and his wife become the child's foster parents, and it automatically becomes their foster son or daughter.

Consequently, intermarriage between them both is permanently legally impeded due to foster relationship. The foster son is prohibited to the foster mother as well as her ancestors and descendants, and vice versa.

The same ban applies to foster aunts, whether maternal or paternal, full or step, as well as the foster niece according to the same details mentioned above regarding the brother's daughter who is prohibited due to kinship relationship.

In brief, the prohibited categories due to foster relationship, are the same as those due to kinship relationship. On the authority of `A'ishah (may Allah be pleased with her) the Prophet (pbuh) says, "*Foster relationship prohibits that which kinship relationship prohibits*" (Narrated by Al-Bukhari) In another version "*that which delivery prohibits.*"

### **Women Prohibited due to Marriage Relationship**

According to the Qur'an, women who are prohibited to men to marry due to marriage relationship are four: the mother of one's wife, the stepdaughter who is in his guardianship as her mother's husband, the wife of one's son, and the wife of one's father. Allah the Almighty says, *﴿and the mothers of your wives, and your step-daughters who are in guardianship being born of your wives with whom you have consummated marriage, but if you have not consummated marriage with them, there is no blame on you in marrying them.﴾* (An-Nisa': 23)<sup>(1)</sup>

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<sup>1</sup> The Qur'anic text speaking of the prohibition of the wife of one's father reads, *﴿And do not marry the women who your fathers have married.﴾* (An-Nisa': 22)

As for the mother of one's wife, when a man concludes a marriage contract, his wife's own mother and her foster mother along with their female ancestors become legally prohibited to him, whether he has consummated the marriage or not. All scholars subscribe to this view, but Imam `Ali (may Allah be pleased with him) is reported to have said, "Like the step-daughter, she (i.e. the mother of one's bride) is only prohibited when the marriage is consummated with her daughter."

Zayd is reported to have said, "Death serves as a consummation of marriage, for Allah the Almighty says, " ...and the mothers of your wives", so once he concludes the contract, the woman is named as his wife. `Amr Ibn Shu`ayb reports the Messenger (pbuh) to have said,

*"When a man marries a woman and then divorces her before consummating the marriage with her, her mother becomes prohibited to him, but not her daughter."*

A stepdaughter is the daughter of a man's wife. This daughter becomes prohibited to him only by the consummation of marriage with her mother. He, however, is allowed to marry her if he divorces her mother or the latter dies all before the consummation of marriage, whether this stepdaughter is in his own guardianship or in that of someone else. The majority of scholars hold this view.

Dawud says that a man is prohibited to take in marriage only the step-daughter who is under his guardianship. Otherwise, he is not, even if he consummated the marriage with her mother. The same view is held by `Ali Ibn Abi Talib. Zayd Ibn Thabit says that she becomes prohibited to him on the consummation of the marriage with or death of her mother.

The proponents of the first opinion proves it with the hadith narrated on the authority of `Abullah Ibn `Amr Ibn al-`As (may Allah be pleased with them) that the Prophet (pbuh) said,

*"When a man conducts marriage with a woman and then divorces her before consummating the marriage with her, her mother becomes prohibited to him, but not her daughter."*

Putting the daughter under his guardianship would be ineffective, as if the man were to do this to a strange girl. The verse under discussion does not, however, put "guardianship" as a condition. It is rather a description to acknowledge the step-daughter; for it is customary to have step-daughters under the guardianship of their mother's husband.

When a man enters into a marriage contract with a woman this woman becomes permanently prohibited to his father. Allah says, ﴿...and the wives of your sons who are of your own loins﴾ (An-Nisa': 23). The contract designates the woman as a wife. The term "sons" here covers the foster sons of a man as well as their male descendants.

If someone argues: The verse qualifies "sons" as "who are of your own loins", thus, a man may be permitted to marry the wife of his foster son. The answer is that this view could have been true, had it not been contradicted by an authentic text. The Prophet (pbuh) says, "*Foster relationship prohibits that which delivery prohibits.*"<sup>(1)</sup> This hadith is a stronger text in this connection.

As for the wife of one's father (stepmother), when a man marries a woman, she becomes permanently prohibited to his

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1. Narrated by Abu Dawud on the authority of `A'ishah

son, whether he consummated the marriage or not. Allah says,

﴿And do not marry the women who your fathers have married, except what has already passed (before Islam).﴾

(An-Nisa': 22)

"Father" here includes one's own father, the foster father, and the ancestors of this father.

### **Consequences of Committing Zina with a Woman**

According to the *madhhab* of Ash-Shafi'i *zina* does not ban marriage, even a man can marry the mother of the woman with whom he had illicitly cohabited. In this regard, there are many Prophetic traditions, every one of which has its respective connotation that is held by the scholars who differ with this opinion. On the authority of Abu-Hurayrah (may Allah be pleased with him), the Messenger of Allah (pbuh) says,

“A flogged fornicator marries only a woman (who is) like him.” (Narrated by Ahmad and Abu Dawud)

On the authority of `Abdillah Ibn `Amr, once a man sought the Prophet's (pbuh) permission to marry a woman called Umm Mahzul, who was a harlot. She stipulated that she would provide for him. The Prophet of Allah (pbuh) recited before him

﴿And the adulteress shall not marry except an adulterer or idolater.﴾

(An-Nour: 3)

On the authority of the grandfather of `Amr Ibn Shu'ayb, Marthad Ibn Abi Marthad al-Ghanawi was in charge of the captives in Makkah and he had a female friend called `Inaq and she was a prostitute. Mathrad said, "I came to the Prophet

(pbuh) and said, "Oh Messenger of Allah! May I get married to `Inaq? But the Prophet remained silent until ﴿And the adulteress shall not marry except an adulterer or idolater﴾ (An-Nour:3) was revealed. Then the Prophet summoned me and recited it before me and said, "*Do not marry her*" (Narrated by Abu Dawud, An-Nasa'i, and At-Tirmidhi)

To bring these narratives together, it may be said that the prohibition is applicable to such women as continue practicing prostitution. This may be supported by a report from Ibn `Abbas by Abu Dawud and An-Nasa'i, "A man came to the Messenger of Allah and said, "My wife does not interdict any man's hand. The Prophet said, "*Divorce her.*" But the man said. "I am afraid, I may not dare forsake her (after divorce)." Whereupon the Prophet (pbuh) said, "*Then enjoy her.*"<sup>(1)</sup>

An-Nasa'i has transmitted it as a hadith reported from `Abdullah Ibn `Ubaydillah Ibn `Umayr on the authority of Ibn `Abbas and has concluded that it is not confirmed to be authorized.

In fact, Imam Ahmad says that "does not interdict any man's hand" means that she used to spend out of his property. Yet, Abu `Ubaydah states that it means that she was immoral. Imam Ahmad replies, "It is nothing more than that she used to spend out of his wealth. Besides, the Messenger of Allah (pbuh) would have never commanded him to retain her while she was immoral (i.e. adulteress)." Anyhow, some scholars say it refers to immorality and others say it refers to *zina*.

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1. Al-Mundhiri says, "Its transmitters are considered an authority in the two sahihs (of Al-Bukhari and Muslim)."

Another hadith is narrated by Al-Bayhaqi on the authority of Jabir similar to that of Ibn `Abbas. All these proofs forbid a woman to marry an adulterer, and vice versa. This may be supported by another part of the above verse, ﴿...that it is forbidden to the believers﴾ (An-Nour: 3) This denotes an explicit ban. However, Ibn Rushd argues that scholars are different as regards the ban expressed in these words whether it refers to prohibition or dispraise, and whether the pronoun (that) refers to *zina* or marriage. He states that the majority of jurists take the forbiddance as dispraise, not prohibition, as indicated in the above-cited hadith of Ibn `Abbas.

According to `Ali, Ibn `Abbas, Ibn `Umar, Malik, Ash-Shafi`i, and others, an adulterous woman is not banned to the man who illicitly cohabited with her. Allah says,

﴿Lawful to you beyond that, is that you may seek using your wealth such wives as you enjoy thereby﴾

(An-Nisa': 24)

And, the Messenger (pbuh) says, "*The prohibited does not prohibit the lawful.*" (Narrated by Ibn Majah on the authority of Ibn `Umar)

As for Al-Hasan al-Basri, both the adulterer and the adulteress are banned to marry each other forever. He cites the verse (An-Nour: 3) in support of his view.

In *Al-Bayan*, it is mentioned that *zina* does not ban marriage, therefore, a man is not forbidden to marry the woman with whom he illicitly had intercourse, nor her mother nor her daughter. The same applies to the man's father and his sons who



may take in marriage such an adulterous woman. That same rule applies to the man in case he touches desirously or kisses her or even if he illegally casts a lustful look at her vulva. Additionally, Al-'Awza`i and Ahmad hold that if a man commits sodomy with a boy, he becomes prohibited to that boy's daughter and mother.

Abu Hanifah opines that when a man illicitly and lustfully either touches or kisses a woman, or discloses her vulva and looks at it, he becomes prohibited to marry her. If a man kisses the mother of his wife, his marriage contract becomes void.

**Proof of the first opinion:** The verse that reads,

﴿Lawful to you beyond that, is that you may seek using your wealth such wives as you enjoy thereby﴾

(An-Nisa': 24)

and the verse,

﴿And GOD is the One Who fashioned mankind from water, and established relationship of lineage (by men) and kinship (by women).﴾

(Al-Furqan: 54)

Thus, Allah the Almighty has established “kinship” wherein He has established “lineage”. So, as “lineage” is not established with *zina*, “kinship” cannot be established with it either.

It is reported that `Umar (may Allah be pleased with him) flogged a man and a woman (because of committing *zina*), and he was bent on binding them in marriage.

Ibn `Abbas was once asked about a man who committed *zina* with a woman, could he marry her? His answer was in the

affirmative and said, "Suppose that a man robbed another man and bought the stolen object from him, was it then lawful?"

If a man illegally went into a woman, and she delivered a girl who might be born of him as if the woman brought her six months after the *zina*, neither the girl would be ascribed to him, nor would he reciprocate inheritance with her.

As far as his marriage to the woman is concerned, Al-Ash-Shafi`i says. "It is detestable, but if he marries her, I see that he does not have to dissolve the contract."

The Shafi`is differ as regards the underlying cause of abhorring marriage to such a daughter. Some of them hold that it is detestable only to find a way out from divergence among scholars. Other Shafi`i jurists argue that it is only detestable for she might be of his own loins.

According to Abu Hanifah and Ahmad, it is not permissible for him to marry her. The Hanafis, however, are different in respect of the underlying reason for this ban. The early Hanafis say that it is prohibited because she is a daughter of the woman with whom he committed *zina* not because she is his *zina*-production daughter.

On the other hand, later Hanafi scholars argue that she is prohibited to him due to her being created from his own sperm. Accordingly, she is also prohibited to both his ancestors and descendants. This hold opinion as preferable.

The former view is supported by the fact that she is not virtually ascribed to him in lineage because they do not reciprocate inheritance, nor is any rule of childbirth applicable to

any of them. Accordingly, she is treated as a foreign marriageable girl.

If a man forces a woman into *zina*, and she gives birth to a girl from him, the ruling here will be as if she willingly let him do it, for he himself commits *zina* in either cases.

### **Zina of a Woman does not Dissolve her Marriage**

Most of scholars hold that when a man illicitly cohabits with the wife of another man, the woman's marriage is not nullified.

Imam `Ali and Al-Hasan al-Basri say that it is nullified.

**Proof of the first opinion:** The hadith narrated by Ibn `Abbas concerning the man who said to the Prophet (pbuh), "My wife does not resist any man's hand." This report has already been transmitted. The man metaphorically meant adultery but the Prophet did not invalidate her marriage.

However, we have previously stated that such an expression bears many connotations. Hence, it forms no stable ground for evidence. Nevertheless, this view may be supported by the fact that neither the Prophet (pbuh) nor his caliphs were reported to have informed the Muslim community that the marriage of an adulterous wife would be dissolved, though it is extremely serious.

### **Women Prohibited to be Gathered in Marriage**

It is prohibited for a man to marry two sisters at the same time. The revelation is clear in surat an-Nisa',

﴿...and that you should not have in marriage two sisters together, except what has already passed.﴾

(An-Nisa': 23)

In addition, taking two sisters in marriage will lead to enmity and severance of kinship ties.

The ban also applies to a woman with any of her paternal or maternal aunts. On the authority of Abu Hurayrah, the Messenger (pbuh) says,

*"A woman is not married along with (any of) her paternal or maternal aunts."* (Narrated by Ahmad, Al-Bukhari, Muslim, and the sunan compilers.

On the authority of `Isa Ibn Talhah, the Messenger (pbuh) forbade taking a woman in marriage together with her relatives for fear of severance (of kinship ties)." (Abu Dawud and Abu Shaybah)

According to Ibnul-Mundhir, there is no disagreement among scholars concerning this point. However, only a group of the Khawarij permits such a form of marriage. Al-Qurtubi also confirms that there is consensus of opinion about this issue and adds that the view of these Khawarij is not reliable.

### **Its Rules in Details**

The Divine texts explicitly ban marrying two sisters at one and the same time, be they full, step, or foster sisters. It is also customary that when a man takes two wives in marriage, they hate each other, become envious and detect the shortcomings of each other. Hence, if they were two sisters in this situation, it would result in severance of kinship. Accordingly, if a man entered into one marriage contract with both of them, none of them would be his legitimate wife, for each of them does not command privilege over the other. But in case he takes one of

them in marriage, then afterwards concludes a contract with the second, the latter is invalid because she falls within the rule under discussion.

Likewise, it is prohibited for a man to take in marriage, at one and the same time, a woman along with any of her maternal, paternal or foster aunts as well as their female ancestors.

Our proof is the successively transmitted hadiths that we have mentioned.

Al-'Umrani says, "This prohibition may also be due to the presumption that if a woman of the two happened to be changed into a man, this man would be prohibited to marry the other woman. In that way, they are banned to be taken in marriage at one and the same time like two sisters."

Ibn Abi layla states, "It is prohibited because if the man's daughter happened to be changed into a man, this man would be prohibited to marry his father's wife, so they are treated like two sisters." Allah says,

*﴿Lawful to you beyond that, is that you may seek using your wealth such wives as you enjoy thereby.﴾*

(An-Nisa': 24)

This is because if a man's wife were changed into a man, he would be allowed to marry the other woman.

It is permissible for a man to marry a woman along with her stepmother, for there is neither blood nor foster relationship binding them. Likewise, if a man, who has a daughter, marries a woman, who also has a daughter, another man may get married to these two daughters at one and the same time due to the absence of blood and foster relationship.

If a man, who has a son, marries a woman who has a daughter, this boy can get married to that girl. It is reported that a man who had a son married a woman who had a daughter, and the boy illicitly cohabited with the girl. On being asked by Umar (may Allah be pleased with him), they admitted their crime and he flogged them. Then he suggested that they marry each other because there was no blood or foster relationship between themboth, but the boy refused.

One may argue, "If such a woman bears a son from this man, he will be the boy's as well as the daughter's brother. How come it is allowable for the boy to marry his brother's sister?" We answer, " A man is banned to marry his own sister, rather than his brother's. Thus, when every one of them is given a son from his own woman, the father's will be both a paternal and maternal uncle to the son's son. If the father marries a woman, and his son marries her mother, it will be lawful, for the mother is prohibited to his father, not to him. Besides, if the father and the son are given a son each, the father's will be a paternal uncle to the son's, and the son's will be a maternal uncle to the father's.

If a man marries a woman, then divorces her, but afterwards seeks to marry her sister or any of her aunts, or if he is married to four women, then divorces them all and seeks to marry other four women, or if he divorces only one of them and seeks to marry another woman, there are details. If divorce is effected before consummation, it is valid to marry him off because he has no `iddah on the divorced woman. If divorce is revocable, it is invalid to marry him off before the expiry of the `iddah, for the position of an irrevocably divorced woman is still similar to that of a wife, as she may be taken back during her `iddah..

However, if divorce is irrevocable, we hold that another marriage is permitted even before termination of the `iddah.. Zayd Ibn Thabit, Az-Zuhri and Malik hold this opinion too.

Ath-Thawri, Abu Hanifah, `Ali and Ibn `Abbas ban this marriage. They prove it by saying that the irrevocably divorced woman becomes prohibited to her ex-husband, thus, he may take her sister in marriage like the case of a woman who is divorced before consummation.

In his book Al-Um, Ash-Shafi`i says, "If a man revocably divorces his wife, then claims that she has informed him of the expiry of her `iddah, it is rejected and does not absolve him from her maintenance. If he also seeks to take her sister or aunt in marriage, and she accepts his claim, the contract will be legally valid; the right is virtually Allah's and it is confined between the man and Him alone."

### **Prohibition of Taking more than Four Wives Together**

There is no disagreement among scholars that a man is forbidden to take more than four wives at one and the same time. However, Al-Qasim Ibn Ibrahim is reported to have permitted nine wives, for Allah says, ﴿...then marry women of your liking, two, three, four.﴾ (An-Nisa': 3) "The Arabic conjunction "waw" meaning "and", he argues, is additive.<sup>(1)</sup> He further states that the Prophet (pbuh) left nine wives behind after his demise. In fact this view is looked upon as unreliable and

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1. The translation of the meaning of the verse mentioned above does not contain any manifest reference to this *waw* (and) [pronounced in the verse as *wa*] due to the English style followed by the translator. Yet, the Arabic text reads, "*mathna wa thulatha wa ruba`*" literally meaning "two and three and four". This is why Al-Qasim permits nine (two and three and four equal nine). (Translator)

refutable. It also represents an outright departure from the Sunnah. The Messenger (pbuh) is reported to have said to Ghaylan Ibn Salamah when he converted to Islam with ten wives under his marriage bond, "*Keep (only) four (of them) and separate from the rest of them.*" The verse quoted above deals only with the matter of choice between two, three or four wives. We read in the Qur'an (where Allah speaks of the Angels) ﴿...with wings, two, three, four.﴾ (Fatir: 1). It has never been reported that an angel has nine wings. If Allah had meant it, he would have clearly stated it. Any view other than this reflects ignorance of Arabic. As for the Prophet (pbuh), the concession of have more than four wives at the same time was made specific for him.

### **Marrying the Sister of One's Divorcee during the `Iddah of the Latter**

When a man marries a woman, her mother becomes prohibited to him forever; and he is prohibited to marry along with her any of her sisters, paternal and maternal aunts as well as her nieces. When a man takes four wives in marriage, he cannot add a fifth wife to them. When he revocably divorces one of them, the ban unanimously still exists till the termination of the `iddah. If divorce is irrevocable or marriage is legally dissolved, Imam Ahmad holds the same view. `Ali, Ibn `Abbas, the Hanafis and others are reported to have held the same view as well.

On the other hand, Malik, Ash-Shafi'i and others permit him to marry any of all the categories we have mentioned under this rule. The same is reported from Zayd Ibn Thabit, for the prohibition applies to marriage at one and the same time. Allah



says, ﴿Forbidden to you to marry are your mothers....﴾ Then He says using conjunction, ﴿...and that you should not have in marriage two sisters together, except what has already passed.﴾ (An-Nisa': 23) Besides, an irrevocably divorced woman is no longer a wife, so she resembles that woman who is divorced before consummation.

**Proof of the first opinion:** it is the opinion of `Ali and Ibn `Abbas. Additionally, `Ubaydah As-Salmani says, "The companions were never known to be unanimous as they were in respect of performing four voluntary *rak`ahs* before *Zuhr* (Noon) Prayer, and banning a woman to be taken in marriage along with her sister." The Prophet (Pbuh) is reported to have said,

*"Let him who believes in Allah and the Last Day never put his sperm in the wombs of two sisters together (i.e. when having them together in marriage).*

Furthermore, Abuz-Zinad narrates, "Al-Walid Ibn `Abdil-Malik had four wives, but he divorced one of them thrice and took another wife before the expiry of the divorcee's *`iddah*. Most jurists blamed him for doing so. Sa`id Ibn Mansur said, "It is sufficient that Sa`id Ibnul-Musayyab denied his deed!" This is because such a woman is prevented from marriage in her divorcee's behalf, for it is his right. Thus it resembles the case if the divorce was revocable. Moreover, because she is still applying the *`iddah* after he has divorced her, her case is like that of a woman who has been revocably divorced.

## **Separating from or Dissolving the Marriage of a Wife is Like Divorcing her**

If the husband of a magian or a pagan adopts Islam, or if the marriage is dissolved due to *khul'*, foster relationship, defect, insolvency etc. the husband is banned to marry any of the women whom he is forbidden to gather with his wife together in marriage till the expiry of her *`iddah*, whether prompt separation is required or not.

If the wife of a magian or a pagan becomes a Muslim, and he marries her sister during her *`iddah*, then both the man and his second wife adopt Islam also during the *`iddah* of the former, this man must choose only one of them, as if he initially married both of them together. But if he converts to Islam after the *`iddah* of the former has finished she becomes irrevocable to him and the second marriage becomes firmly established.

## **Marrying a Man off to a Woman Other than the One to Whom he has Proposed**

A man may seek the hand of a certain woman, and his request is granted, but the marriage is concluded to another woman whom he unknowingly thinks to be his fiancée; therefore he accepts it. This contract is nullified, for his proposal is virtually related to some other woman. It resembles the case if he purchased a robe, but concluded unknowingly the contract for another robe; if he came to know it afterwards but was content, it would not be valid.

On being asked about a man who proposes to a woman, but her guardian gives him her sister instead, and he knows it afterwards, Imam Ahmad said that they must be separated, and

the dowry of this separated woman is awarded against her guardian due to his deception and the guardian is required to marry him off to her sister (to whom he proposed first) and pay the expenses of the marriage out of the dowry he had paid for her. If the woman he unknowingly married bears him a baby, it will be ascribed to him. The Imam's wording, "to marry him off to her sister" may infer effecting a new marriage contract after termination of the *`iddah* of her sister if he has gone into her, for the contract that he has concluded is applicable to neither of them for proposal was related to one and acceptance to the other. Thus, no contract is concluded. But if the guardian and the man agree later on to enter into a new contract regarding any of the two sisters, it is lawful.

Concerning a man who enters into a marriage contract with a woman and her sister is made to consummate the marriage with him, Imam Ahmad says, "The latter is entitled to the dowry due to his (sexual) enjoyment with her, and her sister receives a dowry too." It is said, "Must he pay two dowries?" Imam Ahmad answers, "Yes, and he can claim compensation from her guardian." This is like the dissolution of the marriage of a leprous woman due to her illness.

According to Imam `Ali, the man is not liable to compensate her. Compensation is only liable to a woman who is ignorant of the rule. Accordingly, if she is sure that she is not his legal wife and let him copulate with her, she will not be eligible to receive dowry because she is thus an adulteress. But if she does not perceive the situation, she will take the dowry, and he can demand compensation from the one who deceived him (i.e. the guardian).

It is reported that Imam `Ali (may Allah be pleased with him) said concerning two men who married two women and each of them was made to wed to the wrong spouse, "Dowry is liable to both of them, and every man must not approach his woman till the expiry of her `iddah." This view is held by the Hanafis, Ash-Shafi`i and others.

### **Marriage to a Fetus**

If a man says to another, "I give you the fetus of this woman in marriage", it will be invalid, for the rulings of girls are not estanlished for a fetus before its delivery but in inheritance and bequest. It seems as if he says, " I marry you off to whomever is in the house" while they do not know who is in it. If he says, "If my wife gives birth to a girl, I will give her to you in marriage.", it will not be valid because this is a form of the conditional marriage. In fact, marriage never depends on any condition, and his saying is only a promise that forms no firm ground for the contract of marriage.

### **Doubtful Cohabitation**

If a man cohabits with a woman due to a doubt, such as if he thinks she is the one for whom he has concluded a marriage contract, this woman's female ancestors and descendants become perpetually prohibited to him, since it is a cohabitation to which lineage is connected, and, therefore, it bans marriage. It is also because it gives connotation that makes the woman a bedmate, so the prohibition of marriage is connected to it.

If a man lustfully has sexual affair with a woman away from the vulva due to doubt, will this act ban marriage, and the woman's daughter will be eternally prohibited to him? There are

two views:

**First**, Imam Malik and Abu Hanifah say that it bans marriage. They add that `Umar Ibnul-Khattab is reported to have maintained this, and no other companion held a divergent opinion. They also support their view by stating that as this sexual activity leads to enjoyment, it bans marriage to the woman's daughter, like full cohabitation. The word "enjoyment" excludes doing this act without sexual desire, and the phrase "sexual activity" excludes mere glancing.

**Second**, Ash-Shafi`i and Ahmad say that it does not ban marriage because Allah says,

*﴿...and your step-daughters who are in guardianship being born of your wives with whom you have consummated marriage.﴾*

(An-Nisa': 23)

The said action is not consummation, nor is it an intercourse that necessitates washing of the whole body. Hence, like undesirous contact, it does not prohibit marriage.

If he casts a lustful look at her vulva it neither bans marriage, nor does it make the stepdaughter prohibited to him. However, Ath-Thawri and Abu Hanifah hold that it bans marriage. The same opinion is reported from Imam Ash-Shafi`i by Al-Mas`udi, but it is not well-known.

**Proof of the first opinion:** Such a look is cast only on a specific part of the woman's body; therefore, it does not forbid marriage. It is as if he glanced at her face.

If a man takes a woman in marriage, and doubtfully cohabits with her mother or her daughter, or if a father doubtfully does

the same thing with his daughter-in-law, or a son with his stepmother, the marriage will be dissolved because such intercourse requires prohibition forever. So, once it occurs, the marriage contract is nullified, just as in foster relationship.

## **Marriage to Non-Muslims**

Ash-Shafi'i says, "The people of the book whose intermarriage with Muslims is permitted are only Jews and Christians, rather than magians."

In detail, polytheists come under three categories: those who have a Divine Book, those who neither have a Divine Book, nor do they claim that they have any, and those who claim that they have a Divine Book. As for the first group, they are Jews and Christians. It is overwhelmingly agreed among scholars that intermarriage is permitted between Muslim men and Jewish and Christian free women. This is reported from `Umar, `Uthman, Talhah, Hudhayfah, Salman, Jabir and others.

Ibnul-Mundhir says, "It is untrue that any of the Early Muslims banned such marriage."

On the authority of Al-Khallal, Hudhayfah, and others married women from the people of the Book.

The Shi'i Imamites forbid this marriage holding fast to the verse,

*﴿ And do not marry polytheist women unless they believe ﴾*  
(Al-Baqarah: 221)

and the verse,

*﴿ And hold not fast to the ties of marriage with unbelieving women. ﴾*

(Al-Mumtahanah: 10)

**Proof of the first opinion:** Allah says,

*﴿ They ask you what is permitted for them, says, "Permitted*

*to you is all that is good and pure, and what the hunting animals catch and hold for you, which you have trained to hunt according to the knowledge GOD has given you, so eat from what it catches and holds for you, and you should invoke the Name of GOD over it." And fear GOD, surely GOD is swift at reckoning. All that is good and pure has today been permitted to you, and the food of the people of earlier Scripture is permissible to you, and your food is permissible to them, and you are permitted to marry caste believing women from among the people who were given earlier Scripture before you. ﴿*

*﴾*  
(Al-Ma'idah: 4,5)

Ibn `Abbas says, "This revelation has abrogated ﴿*And do not marry polytheist women unless they believe ﴿*﴾, for Surat al-Ma'idah was revealed after Surat al-Baqarah.

`Uthman took a Christian wife and Hudhayfah a Jewish one. Jabir Ibn `Abdillah was asked about taking a Jewish or a Christian woman in marriage. He replied: "We married them in the year when we conquered Iraq because we did not find any Muslim women. Later on, when we departed, we divorced them. Their women (the people of the Book) are lawful for us, but our women are not lawful for them."

As for those who neither have a Divine Book, nor do they claim that have any, they are the pagans who worship stones, idols, animals, the sun, the moon, fire, rivers, or trees. Their faith must be condemned and their free women must not be married by Muslim men. Allah says,

﴿*And do not marry polytheist women unless they believe ﴿*﴾

*﴾*  
(Al-Baqarah: 221),



and says,

﴿And hold not fast to the ties of marriage with unbelieving women.﴾

(Al-Mumtahanah: 10)

Hence, intermarriage with polytheist women is banned.

As regards the third category, namely, those who claim to have a Divine Book, they are magians, it is generally agreed that they do not have a Divine Book. One may wonder: Had they had a Divine Book, then it was taken away? Two views are expressed which will be discussed later on.

If it is established that they have a book, their religion may be acknowledged by Muslim men through receiving *jizyah*, but it is not permissible to marry their women. Abu Is-haq Al-Marwazi is reported to have said, "If we admit their having a scripture, their free women become lawful for Muslim men". However, the first view is dominant.

For Ibn Hazm, as they are entitled to pay *jizyah*, their free women are marriageable to Muslim men.

**Proof of the first opinion:** Allah says,

﴿And do not marry polytheist women unless they believe.﴾  
(Al-Baqara: 221)

and says,

﴿And hold not fast to the ties of marriage with unbelieving women.﴾

(Al-Mumtahanah: 10)

Both revelations impart a general rule that encompasses all polytheist women with the exception of those who were singled

out by another text, i.e. the people of the Book. But this group under discussion does not adhere to any book; thus, intermarriage with their women is prohibited.

Ibrahim al-Harbi says, "More than ten companions (may Allah be pleased with them) are reported to have stated that it is prohibited to take their women in marriage." A similar group in modern times is the Communists; they are even worse in disbelief for they deny the existence of Allah.

We, Muslims, are not allowed to marry women from among the people who adhere to the scriptures revealed to the prophets (peace be upon them), such as Abraham's scriptures, nor are we allowed to eat from the meat of the animals they have slaughtered. Ash-Shafi'i (may Allah be pleased with him) says that this refers to two reasons:

**First**, these books only include religious exhortations, rather than rules of law. Thus, they establish no sanctity.

**Second**, they are not words of Allah's (Glorified and exalted be He), but they were revealed from Him. No doubt, He may reveal something other than the Qur'an. To illustrate, the Prophet Muhammad (pbuh) says,

*"Gabriel came to me and commanded me to read in public,  
﴿In the Name of Allah, the All-Merciful, the Ever-Merciful.﴾"*

This was not put as part of the Qur'an or of Allah's words. Shaykh Abu Hamid and Al-'Imrani are reported to have mentioned this.

As for Samaritans and Sabians, Ash-Shafi'i says, "Samaritans are a Jewish sect whereas Sabians are a Christian

one."

It is reported that when Al-Qahir al-`Abbasi sought juristic opinion regarding Sabians, Abu Sa`id Al-Astakhri said, "They do not belong to the people of the Book, for they claim that celestial sphere is a creature that has life and a capacity of speaking and that the seven celestial bodies, namely, the sun, the moon, Jupiter, Saturn, Mars, Venus, and Mercury are gods. Accordingly, their heads must be cut off." Al-Qahir gathered all of them to slit their heads, but they ransomed themselves against huge amounts of money and Al-Qahir released them. Both this group and the ancient Greeks used to worship Mars, Venus and other things.

Samaritans are those who followed Moses the Samiri. They inhabited Nablus in Palestine.

Al-Maqrizi says, "In my knowledge, Samaritans do not belong to the Sons of Israel altogether. They came from the East, resided in Palestine and adopted Judaism. People knew them as "Samaritans", for they resided in Samaria, the city of Nablus.

Ash-Shafi`i says, "I detest marriage with the enemies' women only because they may tempt a Muslim to relinquish his religion."

If it is established that such a woman belongs to the enemy, it becomes detestable and reprehensible to take her in marriage, for she may seduce her husband to give up his religion or at least undermine the belief of his offspring. Many people have become atheist and treacherous as a result of being affected by their non-Muslim mothers and friends, who hate Islam and wish no

dignity for its followers.

### **Marrying a Woman in her `Iddah**

It is not lawful to take a woman in marriage during her `iddah from another man. Allah says,

﴿And do not intend the marriage until the waiting term expires.﴾

(Al-Baqarah: 235)

It means here, "Do not make up your minds to conclude marriage contracts with women during the `iddah, but if you decide to do so after its termination, there is no harm."

A woman may doubt whether she is pregnant or not. If such doubt happens before the expiry of her `iddah, which comes to an end either through periods (of menstruation) or through months, but doubt still remains, such a woman is not permitted to enter a new marriage for she is not sure as regards termination of her `iddah. What is originally relied on under such circumstances is that the `iddah is still present.

In case her `iddah expires without doubt, then she gets married, but later on she becomes skeptical about pregnancy, it bears no effect, for her marriage has been manifestly held as valid.

But if her `iddah comes to an end through either periods or months, but later on she doubts, it is reprehensible for her to get married. However, if a man takes her in marriage, will it be valid? There are two viewpoints:

**First**, it is not valid due to her doubt of pregnancy, as if she were skeptical about it before termination of the `iddah.

**Second**, it is valid because this is such doubt that occurred after the conclusion of her *`iddah*. So it is not effective, as if she was taken in marriage after the expiry of the *`iddah*, then she doubted. This is the preferable opinion.

### ***`Iddah of a Woman Who Commits Zina***

If a woman commits *zina*, she is not entitled to obscure any *`iddah*, whether she is pregnant or not. If she is not pregnant, the man who illicitly cohabited with her or anyone else may marry her. If however she is pregnant, it is reprehensible to enter into a marriage contract with any man before delivery. This is according to the *madhhab* of Ash-Shafi`i and a report about Abu Hanifah.

On the other hand, Ahmad, Malik, and others hold that she must apply *`iddah*, just as the woman with whom someone has doubtfully cohabited. Accordingly, if she is not pregnant, her *`iddah* will be three periods (of menstruation), but if she is pregnant, her *`iddah* will terminate with her delivery, and no man will be allowed to marry her before delivery.

Imam Malik says, "When a man takes a woman in marriage, and he does not know that she has committed *zina*, then later on he discovers that she is illegitimately pregnant, let him separate from her. If he has copulated with her, he should pay her a dowry equal to that of her counterparts."

Furthermore, Ibn Sireen and Abu Yusuf maintain that if this woman is not pregnant, she observes no *`iddah*, whereas if she is pregnant, no man is allowed to take her in marriage till delivery. Abu Hanifah as informed about him in another report also holds this.

## **Marriage of Polytheists**

Intermarriage between polytheists is valid and ratified if they either become Muslims or seek arbitration, so long as the woman is initially marriageable. Both the nature and character of their contract are not considered. Besides, the conditions of the Islamic contract are not applicable to it, i.e., guardian, witnesses, proposal and acceptance, etc.

Ibn `Abdel-Barr says, "Scholars unanimously agree that if both spouses adopt Islam at one and the same time they may maintain their marriage unless there is a ban due to kinship or foster relationship between them. Many men converted to Islam during the lifetime of the Prophet Muhammad (pbuh) along with their wives, and their marriages were sanctioned and the Prophet (pbuh) verified the conditions of their marriage contracts or their character. This has been consecutively transmitted and known with certainty. However the actual situation should be taken into account. If the woman is initially marriageable, her contract is upheld. If otherwise, as if she is, for instance, prohibited to the man due to a ban of kinship or foster relationship, or because she is a renegade or a Magian, it will not be upheld. Moreover, if he takes her in marriage during her *`iddah*, and they both become Muslims after its termination, their contract is affirmed because of her being initially marriageable."

## **Conversion to Islam by One of Two Disbelieving Spouses before Consummation**

When one of two pagan or Magian spouses, or a Christian or a Jewish man who is married to a pagan or a Magian woman, converts to Islam before consummation, they must be separated

simultaneously from the time of conversion. This separation is called nullification (*faskh*), not divorce. This is the opinion of Ash-Shafi`i.

According to Imam Abu Hanifah, separation should not be speedily demanded. Rather, if the couple happens to be resident of an Islamic state, Islam should be introduced to the other party. If he/she persists in disbelief, separation is effected at once. On the other hand, in case one of the parties is a citizen of an abode of war, the issue should be delayed till the termination of the wife's *`iddah*. If the other party still maintains disbelief, separation takes place. However, if persistence in disbelief is on the part of the husband, separation is counted as divorce, for he stands as its cause, as if he verbally pronounced the word of divorce. But if it is the woman who rejects to convert to Islam, separation comes under nullification (*faskh*), for a woman cannot divorce herself.

Imam Malik opines that if the woman happens to be a Muslim, Islam should be introduced to the man. If he does not accept to be a Muslim, separation is effected. But if the man is Muslim and the woman disbelieving, separation takes place at once, for Allah says,

﴿ *And hold not fast to the ties of marriage with unbelieving women.* ﴾

(Al-Mumtahanah: 10)

Furthermore, if this separation takes place before consummation due to the husband's conversion to Islam, the wife is entitled to receive half of the designated dowry if it is validly designated. But if it is invalid, as if the man makes her

dowry wine or pigs, she becomes eligible to take half of the dowry usually received by her counterparts.

In addition, if separation is because of the woman's conversion to Islam, she receives nothing, since she is the substantial cause of it. Malik, Ahmad, Ash-Shafi'i, and others hold this opinion.

Another view from Imam Ahmad states that if she is a Muslim, she will receive half of the dowry. Abu Bakr, Qatadah and Ath-Thawri hold this opinion. The same is inferred from the words of Abu Hanifah because separation is effected as a result of his decline to adopt Islam. As for the woman, she has done what Allah has commanded her to do, so she receives what Allah has ordained for her, namely half of the dowry, as if he made her divorce contingent on her performance of Prayer, and she performed it.

### **Conversion to Islam by Both of the Spouses**

When both of the spouses convert to Islam, they maintain their marriage before as well as after consummation. Scholars unanimously agree on this ruling.

Ibn `Abdel-Barr stated that it is unanimity among all scholars, for these spouses do not adhere to different religions. On the authority of Ibn `Abbas, a man came as a Muslim to the Messenger of Allah (pbuh), then his wife came as a Muslim too. The man said, "Oh Messenger of Allah, she adopted Islam with me." The Prophet (pbuh) gave her back to him.

Both the husband and his wife are required to pronounce and proclaim their conversion to Islam in one utterance at one and



the same time so that none of them should antecede the other, or else their marriage would be annulled. However, they may proclaim Islam in one session lest they should not pronounce the word of Islam (*shahadah*) at one and the same time. Thus, if taken into account, all spouses adhering to Islam should be separated before consummation with the exception of few rare cases, and so *ijma`* would be invalid.

### **Conversion to Islam by One of the Spouses after Consummation**

When one of two disbelieving spouses convert to Islam after consummation, there are two reports about Imam Ahmad holds concerning this:

**First**, separation should be suspended till termination of the woman's *`iddah*. If the other party proclaims Islam, marriage is maintained, otherwise separation is effected from the time of conversion. The woman is not required to resume her *`iddah*. This opinion is also held by Ash-Shafi`i, and others.

**Secondly**, Separation is promptly effected. This also maintained by Al-Hasan, Al-Hakam, and others.

As for Abu Hanifah, he holds a similar view in respect of adherence to Islam by one of the spouses before consummation. However, he adds that if the woman happens to be in the abode of war, her *`iddah* terminates and separation is effected, then she resumes observing her *`iddah*.

According to Imam Malik, when a man converts to Islam before his wife, Islam will be introduced to her. Unless she adopts Islam too, separation takes place. But in case she is far

away, separation will be promptly observed. On the other hand, when a woman adheres to Islam, she waits for the expiry of her *`iddah*. Those scholars who advocate prompt separation support their view by the verse,

﴿And hold not fast to the ties of marriage with unbelieving women.﴾

(Al-Mumtahanah: 10)

Besides, when marriage is obligatorily nullified, it makes no difference whether this happens before or after consummation, like foster relationship.

**Proof of the first opinion:** in his *Muwatta'*, Imam Malik reports from Ibn Shihab that there was about one month between Safwan Ibn Umayyah's conversion to Islam and that of his wife, the daughter of Al-Waleed Ibnul-Mughirah. She adopted Islam on the conquest of Makkah, but he persisted in disbelief and witnessed both *Hunayn* and *At-Ta'if* expeditions. Later on, he adhered to Islam and the Prophet (pbuh) did not separate him from her. He maintained his wife through the former marriage contract. Ibn `Abdel-Barr says, "This hadith is more famous than its chain of transmission.

Furthermore, Ibn Shihab also reported that: `Umm Hakeem adopted Islam on the conquest of Makkah. Her husband `Ikrimah fled to Yemen. She traveled to him there and introduced Islam to him; whereupon he became a Muslim. `Ikrima pledged allegiance to the Messenger of Allah (pbuh), and they remained in marriage lock.

Ibn Shubrumah says, "Spouses during the lifetime of Prophet (pbuh) used to adhere to Islam one before the other. As long as

the other party converted to Islam before the expiry of the woman's *`iddah*, the marriage was maintained, otherwise it was nullified.”

In addition, Abu Sufyan had adopted Islam before the Prophet (pbuh) entered Makkah in the year when the latter was conquered. His wife Hind did not accept Islam till the conquest had taken place, yet they maintained their marriage. Hakeem Ibn Hizam adhered to Islam before his wife. Abu Sufayan Ibnul-Harith and `Abdullah Ibn Umayyah set out to the Prophet (pbuh) in the year of conquest and accepted Islam in Al-Abwa' before their wives. The Messenger of Allah (pbuh) had never been known to separate a new Muslim from his disbelieving wife (who converted to Islam later on).

Practically speaking, it is unlikely that they accept Islam in one utterance. Separation takes place before consummation due to the absence of *`iddah*, thus, divorce is prompted like the woman who is divorced for one time, and here she has to observe *`iddah*. When her *`iddah* terminates, separation is counted from the time of the first party's adherence to Islam. Therefore, no other *`iddah* is required because the spouses' difference in religion is the cause of their separation, thus, the time of separation starts from its occurrence, like divorce.

### **Marriage Is Nullified Simultaneously when `Iddah Terminates**

When one of the spouses accepts Islam, but the other lags behind until the end of the *`iddah*, their marriage will be annulled, as maintained by most scholars. Ibn `Abdel-Barr says, "Scholars unanimously agree on this ruling. However,

An-Nakh`i is reported to have held an unusual viewpoint, but none agreed with him. He argued that the woman would be given back to the man in that very marriage however long the period might be. Ibn `Abbas reports that the Prophet (pbuh) restored Zaynab to her husband Abul-`As in her first marriage. (Narrated by Abu Dawud) Imam Ahmad is said to have sought proof through this narration. He was asked, "Is it not reported that the Prophet restored her to her husband in a new marriage?" He answered, "This is groundless." Yet, it is claimed that there were eight years between Zaynab's conversion to Islam and her restoration. In *Al-Huda*, Imam Ibnul-Qayyim prefers Imam Ahmad's view, and supports it with convincing evidence.

**Proof of the first opinion:** Allah says,

*﴿Neither are these women lawful for them, nor are those unbelievers lawful for them﴾*

(Al-Mumtahanah: 10)

In the same verse Allah says,

*﴿And hold not fast to the ties of marriage with unbelieving women.﴾*

In addition, unanimity has been reached on the prohibition of marrying unbelieving women. As for the incident of Abul-`As, Ibn `Abdel-Barr says, "It is possible that it took place long before the ban, thus it was abrogated by the new ruling. Zaynab might have been pregnant till her husband's conversion to Islam. She also might have been ill, so that she did not have three periods of menstruation till his adherence. Furthermore, she might have been given to him in a new marriage contract. Ibn Abi Shaybah narrates in his *Sunan* on the authority of `Amr

Ibn Shu`ayb that the Prophet (pbuh) restored Zaynab to her husband Abul-`As in a new marriage contract. It is also narrated by who adds that Yazeed Ibn Harun said, "The chain of transmitters of Ibn `Abbas's narration is more authoritative than that of Ibn Shu`ayb."

### **Consequences of Intermarriages of Unbelievers**

The intermarriages of unbelievers are connected to the rulings of a valid marriage, such as occurrence of divorce, requirement of dowry, etc. a number of jurists, including Ahmad and Ash-Shafi`i, validate the divorce of unbelievers, while Malik and others do not confirm it.

**Proof of the first opinion:** This divorce is pronounced by an adult sane man in a valid marriage. Hence, like a Muslim man, his divorce is taken into effect. One may argue that we do not admit to the validity of their marriages. The answer is that Allah mentions them in the Qur'an in the genitive mode. For example, He says, ﴿ *the wife of Pharaoh.* ﴾ (At-Tahrim: 11) The true nature of this mode requires that they were connected by a valid marriage. When such marriage contracts are proven valid, all their rulings become applicable, like Muslims' contracts.

Accordingly, if an unbelieving man divorces his wife thrice, then remarries her before being married to another man, and he copulates with her, and then they both accept Islam, their re-marriage will not be acknowledged. When he divorces his wife revocably, then they both adhere to Islam, he may maintain her under the remaining time of divorce. When a Jewish or Christian man takes that woman in marriage and goes into her, she becomes lawful to her irrevocable ex-husband, whether he is

a Muslim or an unbeliever.

### **Apostasy by One of the Spouses**

The majority of scholars hold that when one of the spouses abandons Islam before consummation, marriage will be dissolved. However, Dawud is reported to have argued that it will not be annulled, for the basic rule is maintenance of marriage.

**Proof of the first opinion:** Allah says,

*﴿And hold not fast to the ties of marriage with unbelieving women.﴾*

(Al-Mumtahanah: 10)

and in the same verse Allah says,

*﴿Do not return them to the unbelievers, neither are these women lawful for them, nor are those unbelievers lawful for them.﴾*

Furthermore, their difference in religion bans going into the woman, thus their marriage must be dissolved, the same as the woman's conversion to Islam while marrying an unbeliever. After that, if the woman happens to be the apostate, she receives no dowry. Whereas if the man is the apostate, he gives her half of the dowry, for he is the direct cause of the dissolution of the contract.

Concerning apostasy by one of the spouses after consummation, there are two reports about Imam Ahmad:

**First**, separation must be effected promptly because when a marriage contract is inevitably dissolved, it makes no difference

whether its cause was before or after consummation, as in foster relationship. Abu Hanifah, Malik and others also hold this opinion.

**Secondly**, separation is postponed till the end of the woman's *`iddah*. If the renegade party adheres to Islam before its expiry, they maintain their marriage; otherwise, she becomes irrevocably divorced from the time of apostasy. Ash-Shafi'i holds the same opinion. This is because apostasy causes separation. Therefore, if it takes place after consummation, the latter is adjourned until the *`iddah* comes to an end, like revocable divorce or apostasy after going into the woman. Thus, marriage is not dissolved at once like the conversion of a wife in the abode of war.

As for sustenance, prompt separation excludes it, due to the fact that the woman is irrevocable. But if it is postponed till the end of the *`iddah*, and the woman happens to be the apostate, it is also precluded. On the other hand, if the man is the renegade, he affords her maintenance, for he can adhere to Islam again, and, thus, re-marry or enjoy the same woman.

### **Intercourse after Apostasy**

When one or both of the spouses apostate from Islam, the husband is banned to have sexual intercourse with his wife. But if he cohabits with her, and prompt separation is demanded, he must pay her a dowry equal to that of her counterparts. If, however, separation is postponed till the end of her *`iddah* during which the renegade returns to Islam, then she deserves no dowry, for her marriage is actually maintained. If one or both of them persist in disbelief till the woman's *`iddah* terminates, she

is given a dowry equal to that of her counterparts because he cohabited with her outside of lawful marriage, as their separation had taken place since the time of apostasy.

If one of them adheres to Islam, then apostatizes, we should consider it in details. If the other one does not accept Islam during the woman's *`iddah*, separation will be effected once apostasy occurs. The woman's *`iddah* starts from the date of conversion to Islam. If the other one accepts Islam before the apostasy of the first one during the *`iddah*, *`iddah* should be counted from the date of apostasy because the ruling of difference in religion, which has come to existence because of the first mate's acceptance of Islam, is nullified by the other mate's acceptance of Islam during the *`iddah*.

If a man accepts Islam while having more than four wives who also adhere to Islam along with him, but he apostatizes, he cannot choose any of them because he is not permitted to initiate a marriage contract with them in this case. The same ruling applies if his wives apostatize from Islam with or without him.



## Kind Treatment between the Spouses

Abu Hurayrah (may Allah be pleased with him) reports the Prophet (pbuh) to have said,

*"Never a believer hates a believing woman. If he hates one of her manners, he may admire another."* (Narrated by Ahmad and Muslim)

`A'ishah relates, "I used to play dolls in the house of the Messenger of Allah (pbuh). I had also female friends who used to play with me. When the Messenger of Allah (pbuh) entered, they would hide themselves. But he called upon them to go on playing with me." (Al-Bukhari and Muslim)

Abu Hurayrah also relates that "The Prophet (pbuh) said,

*"The best of you is whoever treats his wife kindly."* (Narrated by Ahmad and At-Timidhi)

`A'ishah narrates that the Prophet (pbuh) said,

*"The best of you is whoever treats his wife kindly and I am the best one who treats his wife kindly."* (Narrated by At-Tirmidhi)

Umm Salamh reports the Prophet to have said, *"If a women dies while her husband is pleased with her, she will enter Paradise."* (Narrated by Ibn Majah and At-Tirmidhi)

Abu Hurayrah reports that the Prophet (pbuh) said,

*"It is not lawful for a woman to fast (voluntarily) when her husband is present, except by his permission nor permit anyone into his house except with his permission."* (Narrated by the five transmitters of Hadiths except An-Nasa'i)

Narrated Abu Hurayrah (may Allah be pleased with him) that the Prophet (pbuh) said,

*"Whoever believes in Allah and the Last Day should not hurt (trouble) his neighbor. And I advise you to take care of the women, for they are created from a rib and the most crooked portion of the rib is its upper part; if you try to straighten it, it will break, and if you leave it, it will remain crooked, so treat women well."* (Narrated by Al-Bukhari)

Narrated Jabir (may Allah be pleased with him) "We were with the Prophet (pbuh) in a conquest, and when we approached Madinah and were going to enter (it), the Prophet (pbuh) said, *"Wait until you enter (it) at night (i.e. in the first part of the night) so that the women with unkempt hair may comb their hair, and those whose husbands have been absent (for a long time) may shave their pubic hair."* (Al-Bukhari and Muslim)

In another version of Al-Bukhari it reads,

*"When anyone of you is away from his house for a long time, he should not return to his family at night."*

The above hadith indicates that it is better for anyone who has been away from his house for a long time to inform them of the time of his arrival so as to be ready when receiving him so that he may not see anything unlikable in his wife's appearance.

### **The Prohibition of Revealing the Spouses' Privacy unless Necessary**

Narrated Abu Sa`id al-Khudri (may Allah be pleased with him) that the Prophet (pbuh) said,

*"Among the worst people in Allah's sight on the Day of Resurrec-*

*tion will be the man who copulates with his wife and she to him, and divulges her secret." (Narrated by Muslim)*

This hadith serves as evidence of the prohibition of divulging what occurs between the husband and the wife of copulation. It is apparent that mentioning the details of copulation between the spouse is prohibited. It is permissible if it is necessary to mention that there was sexual intercourse, but it is offensive to say this without necessity. The Prophet (pbuh) says,

*"Whoever believes in Allah and the Last Day should say what is good or keep silent."*

### **The Wife's Rights**

Hakim Ibn Mu`awiyah relates on the authority of his father (may Allah be pleased with them), "I asked the Messenger of Allah (pbuh), "O Messenger of Allah, what is the right of one's wife?" He answered,

*"To feed her when you eat, to clothe her when you clothe yourself, not to slap her face or insult her, and not to abandon her except inside the home." (Narrated by Ahmad, Abu Dawud, An-Nasa'i and Ibn Majah)*

The above Hadith indicates that the wife's financial support is obligatory according to one's circumstances. As for abandoning her, it may be interpreted as refraining from sleeping with her, or giving her his back after cohabiting with her, but not leaving her to live in another house.

### **What a Man should Say on Having Sexual Intercourse with his Wife**

Narrated Ibn `Abbas (may Allah be pleased with them both)

that the Prophet (pbuh) said,

*"Let anyone of you, when being about to have sexual intercourse with his wife, say, Bismil-lah, Allahumma Jannibna-sh-Shaitan wa Jannib-i-sh-Shaytan ma razaqtana (In the name of Allah! O Allah! Protect us from Satan and take Satan away from what You bestow upon us (i.e. offspring). If it is predestined that they should have a child, then Satan will never be able to harm him" (Al-Bukhari and Muslim)*

### **The Wife's Obedience to her Husband**

Abu Hurayrah (may Allah be pleased with him) reports that the Prophet (pbuh) said, *"Whenever a man calls his wife to his bed (for intercourse) but she refuses it (without legal excuse), and he (then) becomes angry, the angels curse her until morning."* (Narrated by Al-Bukhar)

Another version narrated by Muslim reads, *"When a woman does not spend the night in her husband's bed, and refuses him then He Who is in heaven (i.e. Allah) remains displeased with her, till her husband has reconciled with her."*

Obedience to one's husband is not restricted to the night only as may be understood from the above Hadiths. Rather she must obey him all the time both day and night. The Prophet (pbuh) says,

*"There are three (kinds of) people whose Prayers are not accepted by Allah, nor does any good deed of theirs rise up to heaven: a fleeing slave until he returns to his master and helps him, a woman whose husband is angry with her, and a drunkard until he becomes conscious."* (Narrated by Ibn Hibban)

## **Coitus Interruptus**

Judhamah Bint Wahb (may Allah be pleased with her) relates that she heard the Messenger (pbuh) as saying, "*I was about to forbid gheelah but I noticed that the Romans and the Persians did that without causing any harm to their babies.*" Then people asked the Messenger (pbuh) about coitus interruptus and he said, "*This is the hidden burying (of one's infants) alive*" (Narrated by Muslim)

The word gheelah means having sexual intercourse with one's wife while she is suckling her baby. It was thought that such a practice brings harm to the baby, but the Prophet indicated that there is no harm in it because the Persians and the Romans used to do that without causing any harm to the baby.

Coitus interruptus means that when one copulates with his wife until he feels an impending orgasm, then he withdraws to ejaculate sperm outside the vagina. The husband usually does this to prevent the occurrence of pregnancy.

Owing to the aforementioned Hadith Ibn Hazm holds that coitus interruptus is prohibited. But the majority of scholars take the position that it is permissible for the husband to do so after asking the permission of his wife. They say that there is another Hadith contradicting the foregoing one. Jabir (may Allah be pleased with him) says, "We had bondwomen with whom we practiced coitus interrupus. Jews said, "it is the lesser form of killing one's infants (alive)." When the Prophet (pbuh) was asked about that, he said, "*Jews have lied. If Allah wanted to create it, you would not be able to prevent it.*" (Narrated by An-Nasa'i and At-Tirmidhi)

At-Tahawi says. "We can compromise between the above Hadiths by holding that the prohibition mentioned in the Hadith Narrated by Judhamah is a kind of prohibition which is closer to the permissible." However, Ibn Hazm says that it is closer to the prohibited.

However, although coitus interruptus is similar to burying one's children alive, it does not have the same ruling because the former prevents the coming of a baby, whereas the latter takes an existing life.

B.N. the medical practice to aborting the embryo (clot) from the woman's uterus before Allah puts life in it is subjected to the same differences of scholars concerning coitus interruptus. Accordingly, those who think that coitus interruptus is prohibited maintain that this kind of abortion is prohibited. Likewise, the contraceptives taken to avoid pregnancy have the same ruling. On the other hand the Safi`is are of the opinion that it is offensive to do such practices, because they originally forbid coitus interruptus.

### **Taking Turns with Wives**

`A'ishah (may Allah be pleased with her) relates, "The Messenger of Allah (pbuh) would spend his nights with his wives in turns justly saying,

*"O Allah, this is what I can do of dividing what I have. May You not blame me in what You have but I do not have (i.e. love)"*

The aforementioned Hadith indicates that the Prophet (pbuh) would justly spend his nights with his wives in turns. But was that obligatory for him to do or not? Some scholars say that is

was not obligatory for the Prophet (pbuh) to do that because Allah says,

﴿You may putt off any of them as you please.﴾

(Al-Ahzab: 51)

Some other interpreters of the Qur'an hold that it was one of the personal practices of the Prophet (pbuh). He justly spent his nights with his wives in turns, though he was not obliged to do so, because of his ideal character and his kind treatment to them. Moreover, the Hadith indicates that love and emotion are beyond one's power. Allah only possesses them. Allah the Almighty says,

﴿GOD is the One Who united their hearts, had you expended all the riches of the earth, you could not have united their hearts together, but GOD united them.﴾

(Al-Anfal: 63)

Narrates Abu Hurayrah (may Allah be pleased with him) that the Prophet (pbuh) said,

*"Whoever has two wives and inclines to one of them, will come on the Day of Resurrection with an unbalanced side."* (Narrated by Ahmad)

The above Hadith indicates that it is obligatory for the husband (who has many wives) to treat them justly. He is not allowed to give more privileges to anyone of them. Allah the Almighty says,

﴿yet do not lean wholly towards one wife.﴾

(An-Nisa': 129)

Thus, such a husband must spend his nights with them in

turns and give them an equal share of financial support. Nevertheless, he is not required to love them equally because emotional inclination is out of his power.

Narrated Anas (may Allah be pleased with him): "It is (part of the) the Prophet's Sunnah (pbuh) that if someone marries a virgin and he has already had a matron, then he should stay with the virgin for seven days; and if someone marries a matron, then he should stay with her for three days, and then he turns." (Narrated by Al-Bukhari)

Such a stay must not be interpreted like staying all the night and the daytime with the new wife. It may be done as is customary in his country. Thus we have to take into account that some scholars, as Ibn Daqeeq al-`Id says, exaggerate the issue by saying that such a stay may give him a legal excuse to leave the *Jumu`ah* (Friday) Prayer, and that he should spend these days successively.



## Breach between the spouses

Allah the Almighty says,

﴿And if you fear disunity between them, then send an arbiter from his side and an arbiter from her side.﴾

(An-Nisa': 35)

`Ubaydah (may Allah be pleased with him) speaks concerning this verse saying, "A man and a woman came to `Ali, each accompanied by a group of people. `Ali ordered them to send an arbiter from his folk and an arbiter from hers. When they did he said to the two arbiters: "Do you know what you have to do? What you have to do is to reconcile them if you see they can be reconciled, and you separate them if you see they have to be separated." `Ubaydah added, 'The woman said, 'I am pleased with the Book of Allah, what it contains both upon and for me.' But the man said, 'I do not want separation.' Thereupon `Ali said, 'You have told a lie. By Allah, (nothing will be settled) until you agree upon that which she has agreed upon.'<sup>(1)</sup>

Imam Al-Baghawi says, "When a breach takes place between spouses and their condition is doubtful, and the man neither forgives nor divorces (his wife), nor does the wife fulfil her duty or set herself free by some means of payment, and they both start to do and say things that are prohibited, then the Imam has to send him an arbiter from his folk and send her an arbiter from her folk. The two arbiters must be free, reliable men. He sends them to investigate and understand the cause of the problem, and whether they want reconciliation or separation.

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1. Narrated by Ash-Shafi'i, At-Tabar, `Abdur-Razzaq and Al-Bayhaqi, and it is soundly transmitted.

After that the two arbiters meet together and carry out what they have agreed upon in order to do what is appropriate according to the situation."

There is a difference of opinion about the permissibility of sending the two arbiters without the consent of the spouses. There are two opinions concerning this. The most authentic opinion is that it is not permissible except with their consent.

The arbiter of the husband is not to divorce except with his permission, nor is the wife's arbiter to apply Khul' through her property except with her permission. This is what the followers of Abu Hanifah say. This is because `Ali (may Allah be pleased with him) said to the man who said, "I do not want separation." "You have told a lie. By Allah, (nothing will be settled) until you agree upon that which she has agreed upon." This indicates that settlement relies on the man's agreement and consent.

The second opinion says that it is permissible to send the two arbiters without their consent, and it is permissible for the arbiter of the man to divorce without his permission, and for her arbiter to apply Khul' without her consent, as long as they see that this is both suitable and beneficial for them. This is similar to the case of the judge who judges between two people, although it might be against their will. This viewpoint is held by `Ali and Malik maintains it as well. But, the judge or the ruler are the ones who are entitled to send the arbiters. However, the first opinion is more suitable.

In his Tafsir, Ibn Kathir says, "Scholars unanimously agree that the two arbiters can reconcile and separate. Ibrahim An-Nakh'i says, "The two arbiters can separate the spouses with

one, two, or three divorces." This is also attributed to Malik.

Al-Hasan Al-Basri says, "The two arbiters arbitrate as regards reconciliation not separation." Qatadah, Zayd Ibn Aslam, Ahmad Ibn Hanbal, Abu Thawr, and Dawud also hold this opinion. They all say that Allah the Almighty does not refer to separation in the verse reading,

﴿If they wish for reconciliation GOD will effect harmony between them.﴾

(An-Nisa': 35)

But if they are two representatives from the folk of the husband, their judgement is agreed upon to be carried out, as regards both reconciliation and separation.

Imams of Fiqh differ concerning the two arbiters: whether they are sent from the ruler, where they can judge even without the spouses' consent, or they are agents of the spouses. The majority of scholars choose the first opinion, for Allah the Almighty says,

﴿Then send an arbiter from his side and an arbiter from her side.﴾

(An-Nisa': 35)

In this verse, Allah calls them arbiters. The arbiter is known to judge without the consent of the one judged. This is the manifest meaning of the verse. Ash-Shafi'i, in his new *madhhab*, holds the second opinion, and so do Abu Hanifah and his followers. They depend on `Ali's saying to the husband, "you have told a lie. By Allah, (nothing will be settled) until you agree upon that which she has agreed upon", when he said, "I do not want separation." They say that if they were arbiters, `Ali

would not need the husband's agreement. However, Allah knows best.

Shaykh Abu `Umar Ibn `Abdel-Barr said, "Scholars unanimously agree that when the judgement of one of the two arbiters differs from that of the other, there will be no consideration for the judgement of the other arbiter. They also agree that their judgement is to be fulfilled concerning reconciliation, even if the spouses do not authorize them. Yet scholars differ whether their judgement concerning separation is to be fulfilled or not. The majority of scholars are said to have held that their judgement can be fulfilled without authorization.

### **The Prophet's Judgement Concerning a Woman's Service to her Husband**

Ibn Habib says, "The Prophet (pbuh) judged between `Ali Ibn Abi Talib (may Allah be pleased with him) and his wife Fatimah (may Allah be pleased with her) when they complained to him about housework. He (pbuh) ordered that Fatimah handle the internal housework, while `Ali was to do the outside work." Ibn Habib adds: "The internal work includes preparation of beard, cooking, sweeping, fetching the water and so on."

In Sahih Al-Bukhari and Sahih Muslim, Fatimah (may Allah be pleased with her) is reported to have come to the Prophet (pbuh) to complain about the hardship she used to suffer from, when preparing bread, and to ask him for a servant. She did not find the Prophet but she delivered her complaint to `Aishah (may Allah be pleased with her), who delivered it to the Prophet (pbuh) after he had returned home. `Ali said, "The Prophet (pbuh) came to us after we had already settled in bed. We were

about to get up but he said, "Stay where you are." He then came and sat between us, so that I felt the coldness of his feet on my belly, and he said,

*"May I guide you both to something that is better for you than the thing for which you have asked. When you settle in bed (to sleep) say Tasbih<sup>(1)</sup> thirty-three (times), Hamd<sup>(2)</sup> thirty-three (times), and Takbir<sup>(1)</sup> thirty-four (times). This is better for you than a servant."*

`Ali said, "After that I never neglected (saying) them." Someone asked him: "Even at the night of Siffayn<sup>(4)</sup>?" `Ali said, "Even at the night of Siffayn."

In an authentic report, Asma' is reported to have said, "I used to do everything for Az-Zubayr inside the house. Besides, I used to serve and look after his horse." Another authentic report states that Asma' used to present fodder to her husband's horse, fetch water and fix its container, prepare food and transfer date pits on her head walking a great distance.

Jurists differ concerning this kind of woman's work. Some of the Early Muslims and their successors made it obligatory that a woman should serve her husband in everything inside the house. Abu Thawr says, "She has to serve her husband in everything." Another group of jurists, including Malik, Ash-Shafi'i Abu Hanifah, maintain that it is not obligatory. They say, "This is because contract of marriage requires only enjoyment with her not using her for service and performing work." They also say,

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1. *Tasbih* is to say, "*Subhanal-lah*" meaning "Glory be to Allah."

2. *Hamd* is to say, "*Al-hamdu li-llah*" meaning "Praise be to Allah."

3. *Takbir* is to say, "*Allahu akbar*" meaning "Allah is greater."

4. A famous battle.

"The Hadiths mentioned in this regard indicate only voluntary work and good morality, so where is the obligation?"

The ones who make it obligatory, prove it by saying that this is well known for those whom Allah (Glory be to Him) addressed with His words. However, it is deniable that woman must amuse and serve her husband, sweep, prepare food and the bed, wash and do all the housework for him. Allah the Almighty says,

﴿And women have rights equal to the obligations on them, in all fairness.﴾

(Al-Baqurah: 228)

And He says,

﴿Men are the supporters of women.﴾

(An-Nisa': 34)

Also, the dowry is paid for sexual enjoyment, and both spouses benefit from each other in this. Moreover, Allah (Glory be to Him) ordains that she must be given her cost of living, clothed and housed against his enjoyment with her, and against her service to him, and other things that husbands need.

Contracts of absolute terms are applied to local customs, and customary law ordains that woman should serve her husband and do the internal housework. As for their saying that the service handled by Fatimah and Asma' was voluntary and out of beneficence is refuted by the fact that Fatimah complained about the hardship of her service, and the Prophet (pbuh) did not say to `Ali that she did not have to work; yet he said that he had to work also. No doubt, The Prophet (pbuh) was never partial to

anyone in judgement. When he saw Asma' carrying fodder on her head, while Az-Zubayr was in his company, he did not say that she did not have to work, or that this was a wrong thing imposed upon her; rather, he agreed to her work. He also agreed about the work done by the wives of all of his Companions for them, although he was aware that some of those women were dissatisfied.

There should be no differentiation between the noble woman and the humble one, or the rich and the poor in this matter. Fatimah, who is one of the most honorable women in the world used to serve her husband, and when she came to her father, the Prophet (pbuh), to complain about the hardship of her work he did not agree about her complaint. He (pbuh) describes woman, in an authentic Hadith, as captive; he says, "Be conscious of Allah with regard to women, for they are captives in your hands."

It is known that the rank of a captive requires him to serve the one in whose hand he is. No doubt, marriage is a form of slavery, as one of the Early Muslims says, "Marriage is slavery, so let everyone of you see in whose hand he enslaves his daughter." No just man can be perplexed as to which of the two sayings is more acceptable, and which of the two proofs is stronger.

# Summary

## **The Meaning of Marriage**

In Jurisprudence, marriage is a contract made between two people, who can engage in sexual intercourse by virtue of this contract.

It is real with regard to contract but figurative with regard to copulation. Some scholars however hold a contrary opinion.

Marriage is authenticated by the Qur'an, the Sunnah and Ijma`. Texts of its proof are necessarily well known in the religion.

Marriage may be obligatory when the Muslim fears that he would commit a prohibited act if he did not get married, especially when he is able to secure its expenses.

It may be desirable when he does not fear committing something prohibited, and he is able to secure its requirement. It is likeable here because it helps him to maintain his chastity and that of the woman to whom he will get married, and to produce Muslim progeny that will add strength and duration to society, so that diversion and diseases which are caused by the increase of the number of spinsters may decrease.

The ones, who are not able to meet the requirements of marriage because of financial or sexual disability, are better not to get married. Some scholars say it is prohibited for these people to get married, since it would cause harm to the wives.

Once a man is able to get married, he has to seek a pious, friendly and productive woman, whose origin is good, family is religious and morals are honorable. This is in accord with the



Hadiths said by the Prophet (pbuh) on this issue. This, no doubt, secures a good life with such a wife who is qualified to help him do so, and secures such a progeny who will suck from their pious mother the milk of honorable morals, good works, love of good and hatred of evil.

It is not forbidden that man should like to marry a beautiful or rich woman, or a woman of high rank and great honor. These things are naturally likeable, and Islam is the religion of sound nature. Yet harm is always greater when man does not consider the aspect of religiousness and good morals. Undoubtedly, to marry the woman who is suitable to the individual is better both materially and spiritually.

### **Lawful Looking of a Man at a Woman**

It is lawful for the one who has decided to betrothe a certain woman to hide, so that he may see something from her that encourages him marry her. This can be done whether he does it with or without her knowledge, and whether she likes it or not. By the same token, it is lawful for a woman to see her suitor and talk with him in accordance with the legislated limits in order to see whether she likes him or not. This is not particularized only for man, otherwise it would be wrongful to woman. This is why the Legislator ordains she must be asked about her opinion in her suitor, whether she is a virgin or has been formerly married. How could she express her opinion about a man she has never seen or heard, nor has she known anything about his morals, conditions and abilities?

Most jurists say that the suitor can see only the face and the hands from his fiance 's body.

Some jurists say it is permissible for him to see more of her body, such as hair, arms and legs. (There are details on this point that you may refer to in its place in the book.)

During the period of betrothal, it is not lawful for the fiance to be alone with his fiancee or to see from her what he is forbidden to see from other women. To clarify, in this period, she is still regarded as totally strange to him just as any woman who is not lawful for him or not one of his unmarriageable kin. Being so, Muslim jurists unanimously agree that things, such as private meetings and picnics carried out by the suitor and his fiancee are prohibited, for they are not to be lawful except after the marriage has been contracted.

### **Woman's *`Aurah* with Regard to her Male Unmarriageable Kin**

With regard to his female unmarriageable kin, it is lawful for a man to look at the parts that usually appear during the women's work at home when there is no strange man with her. Thus, he can look at her face, hands, feet, legs, head, neck and chest, and the part of the back opposite to it, provided that looking is not accompanied with lust, for it then becomes prohibited. Some jurists say that woman's *`Aurah* for her unmarriageable kin are the parts, which are between her navel and her knee.

A man's female unmarriageable kin is every woman who he is eternally prohibited to marry by virtue of kinship, foster-relationship or relation caused by sound marriage.

## **Further Details about `Awwrah**

It is permissible for a man to look at the whole body of another man except the part, which is between the navel and the knee. Some jurists believe that the thighs are not a part of the `awrah.

Also it is permissible for a woman to look at the whole body of another woman except the part between the navel and the knee, even if this other woman is her daughter, mother or sister.

It is not permissible for a man to sleep beside another man when they are naked lest they touch each other's `awrah.

Similarly, a woman is not allowed to sleep beside another woman when they are naked lest they touch each other's `awrah.

When children become ten years old and they are used to sleeping naked or semi-naked, so that they can touch one another, it is obligatory that they should be separated lest they fall in to temptation.

It is not allowed for a man to look at a strange woman with lust, even if he is not looking to the `awrah . This ruling applies to woman also.

A man is allowed to look at the whole body of his wife. Similarly, a woman can look at the whole body of her husband.

It is detestable for a man to uncover his `awrah without reason, even when he is alone, since Allah is most worthy of his shyness.

It is lawful for a male doctor to only look at the part which is affected by disease in a woman, even if it is part of the `awrah as long as it is necessary and female doctor is not available. The

same ruling applies to a female doctor with a man.

It is not obligatory that a woman should veil herself in front of a child who is not able to recognize the nature of nakedness. However, when he is able to recognize and understand it, then it is only permissible for him to see other than the part between the navel and the knee from strange women. This means that the woman does not bear a sin if he sees such a part from her.

It is permissible for a man to look at the whole body of a female child as long as it does not cause lust. But if she is lusted but has not reached maturity, she is treated in the same way the unmarried woman is treated.

It is permissible to look at the parts that almost appear from the body of the woman who does not cause lust or is not liked by men because she is old. The same ruling applies to the disfigured woman.

### **Importance of Suitability in Marriage**

Suitability here means that a woman should marry a man who will not bring deficiency or disgrace to her family according to the customs and traditions of that society, that are included in the Shari`ah.

Because suitability in marriage is largely defined by customs, jurists differ concerning it. Some of them consider this customary suitability to be a stipulation determining the validity of the marriage contract. Some others say that if the legal guardians of the woman agree along with her, then the contract is valid, otherwise it will be invalid. However, there are other opinions of a similar nature.

In matters determining the definition of suitability, differences of opinions arise. Yet most scholars say it is not a stipulation for the validity of the contract, but it is desired. The contract is valid without it, since it is only a right of the woman or of her legal guardians, or of both, so it is not stipulated that it should exist as long as consent exists. It is authenticated, for example, that the Prophet (pbuh) married his client, Zayd Ibn Harithah to his female cousin (daughter of his father's sister), Zaynab Bint Jahsh. There are many other examples. It is worth noting that if any of the legal guardians are dissatisfied, they can cancel the contract, for everyone of them has the right in considering suitability.

Jurists differ regarding the definition of suitability. Malik sees it to be in religiousness, and this is the most acceptable opinion. Ash-Shafi`i is reported to have held the same notion. Nevertheless, there is another report which says that he said it is of six parts: honor, religion, freedom, employment, being well-to-do, and being free from four vices, namely leprosy, itch, mania and (sexual) impotence.

Abu Hanifah and others agree with Ash-Shafi`i in most of these points. Many scholars believe that suitability in religion and morals is what is originally meant, but other aspects should not be neglected according to customs and social considerations. In all events, priority must not be given to any aspect over religion. (You may refer to Subulus-Salam and other books).

### **The Woman's Opinion of her Suitor**

If the fiance is not mature, only her father and grandfather can marry her off without her permission, for she is too young to

sufficiently understand what marriage is.

If she is mature but formerly married, she must express her permission directly and clearly, otherwise the contract is invalid.

If she is mature and a virgin, jurists differ as regards the taking of her permission. Some of them say if someone other than her father and grandfather obliges her to get married, the marriage is invalid. Some others say that even if her father and grandfather oblige her, it is invalid too, but some jurists hold that it is valid; the former is more acceptable.

The way in which the virgin expresses her approval is determined in compliance with local customs, as it may be expressed with silence, laughter, weeping or whatever.

### **Special Ruling for Orphan Girls**

The orphan girl is the one who has no father, but if her grandfather exists, he can replace her father in her marriage contract. If there is neither father nor grandfather, and someone else marries her off before her maturity, the followers of Abu Hanifah say the contract is valid, and when she reaches maturity she has the right to choose whether she cancels it or not.

Ahmad opines that when she becomes nine years old, her legal guardian can give her in marriage, and she will not have any right to choose when she reaches maturity.

Ash-Shafi`i says her marriage is not valid until she becomes mature and gives permission. This is the most acceptable saying. Most scholars say that it is not permissible for a custodian who is not one of the legal guardians to marry off the daughters of the one who has made him their custodian whether before or after maturity, even if the father has authorized him. Malik

maintains that it is permissible if the father has authorized him, and Shurayh says he can marry her off even if the legal guardians dislike it.

### **Importance of the Legal Guardian in the Marriage Contract**

There is strong shar`i evidence that it is not permissible for a woman to conduct her own marriage or the marriage of another woman. Besides, the Shari`ah rejects such an act, and most jurists say that the contract is invalid.

The followers of Abu Hanifah say that she can take charge of marrying herself off, just as she handles all other contracts, such as partnership, selling and the like.

Malik says that noble women cannot do this ignoble ones can do it.

The Zahiris say that a formerly married woman can do so but a virgin girl cannot. This is based on an authentic Hadith. (You may refer to this point in the book for more details.)

The majority of scholars hold that the legal guardian is the one who is closer in paternal relations. Abu Hanifah is reported to have held that owners of kinship are from amongst legal guardians.

No doubt, some relatives are closer to this matter than others. Fathers and sons are closer than others, then come full brothers, then brothers on the paternal or maternal side, then grandsons, then nephews, then uncles on the paternal and maternal side, then come those who are after them in this arrangement.

If the woman has the legal guardians of the same degree, it is

desirable that priority goes to the older, more knowing, and more pious among them. However, if one of them marries her off on the basis of her permission but the others do not agree, the contract is valid (as long as the husband is suitable). If two equal guardians marry off a woman, priority goes to the first of them. If the legal guardians quarrel, or there are none present, guardianship goes to the ruler, who may authorize someone else, such as a judge to marry her off.

Jurists other than Ash-Shafi'i hold that the son can be responsible for the marriage of his mother. Some of them give him priority over the father, and some others hold the contrary opinion. Yet Abu Hanifah says that both the father and the son are equal.

There is a consensus of opinion that disbelievers have no right of legal guardianship over Muslim women. Muslims has also no right of legal guardianship over disbelieving women unless it is handled by the leader of the nation. In this regard, it is ascertained that the disbeliever can be a legal guardian over people of his own religion.

If the Muslim gets married to a *dhimi* woman and she does not have a Muslim legal guardian, it is permissible that her disbelieving legal guardian marries her off.

As a woman cannot marry herself off, she cannot be an agent to the agreement of marriage for another woman. According to Abu Hanifah, this is permissible.

If a man who is the legal guardian of a woman wants to get married to her, he should authorize another man to marry her off, on the basis of her permission. Most jurists say that he can



do it himself while saying in the contract, "I have married myself off to so and so and I agree to this marriage." Malik and Abu Hanifah say it is sufficient that he says, "I have married myself off to so and so woman" or "I get married to so and so woman."

There are six conditions, for the validity of legal guardianship. They are the person's Islam, maturity, sanity, freedom, being male, and probity.

The contract of marriage, like any other contract of selling, buying and the like, may be handled by the man concerned or by his agent. Thus, a legal guardian can also authorize someone to be his agent to make a contract of marriage.

It is permissible that the one who authorizes makes this authorization absolute. To clarify, he can for example say to his agent, "Marry me off to any woman you want." It is also possible that authorization is restricted. For example, he may say, "Marry me off to so and so, the daughter of so and so."

A woman's permission is not necessary to form the authorization, nor does it affect its validity, whether the agent is her father or anyone else, neither does it require the attendance of two witnesses.

Every right that is given to the one who authorizes is also given to the agent, such as the right of obligation.

Ahmad and Ash-Shafi`i do not validate that a man can get married to a woman through the guardianship of a man who is not her legal guardian while waiting for the permission of the

real the legal guardian, or that the legal guardian of a woman marries her off to a man without his permission. The same ruling applies to similar cases. Abu Hanifah says that such a form of marriage is valid unless the one whose permission is waited for later rejects it. Malik also maintains that it is valid but that waiting for permission must be for a short period, otherwise it is invalid.

There are details in the *madhhabs* concerning the marriage of men and women who are insane, the idiotic, the one who is placed under guardianship and the minor. There are more details on this issue but we may cite in this summary that some scholars maintain that it is permissible for a father to marry off his minor son as well as his maniac son. It is not permissible that they permit it, for they are not legally competent for this. The father is to say when contracting the marriage, "I accept the marriage of so and so woman to my son so and so."

The *madhhab* of Ahmad states that it is permissible for a ten-year-old boy to contract his own marriage because he himself can divorce, and because he can contract trade transactions himself.

Father can marry off his minor or maniac son, but can he divorce their wives too? There is a difference of opinion here. Ahmad permits it, but Abu Hanifah, Malik and Ash-Shafi'i do not.

Scholars are unanimous that people other than the father have no right to divorce, whether they are guardians or rulers.

If a woman has two legal guardians and she permits both of them to marry her off, it will be permissible. If the two legal

guardians married her off to two men, then the first marriage would be valid, whether the second man consummated the marriage with her or not. Some scholars say if the second man consummates the marriage, he is more entitled to the marriage. However, the first saying is more proper and supported by evidence.

### **Witnessing a Marriage Contract**

Witnessing the contract of a marriage is obligatory and it is a condition of the validity of the contract. Many scholars, including Abu Hanifah, Ash-Shafi'i and Ahmad hold this opinion. At-Tirmidhi says that only a group of later scholars differs about it. He adds that scholars differ concerning the case if one of the witnesses, witnesses the contract after the other. Most Kufi scholars and others say that a marriage is not permissible until the two witnesses witness the contract together. Malik and others say if one of the witnesses, witnesses after the other and they announce this, then it becomes permissible. At-Tirmidhi goes on to say that Ahmad and Is-haq maintain that it is permissible that one man and two women witness a contract of marriage.

Some scholars say that the witnessing of marriage is not necessary and it is sufficient to be announced publicly.

The best opinion is that which includes witnessing since there are Hadiths about it; although these Hadiths are weak, they strengthen one another.

### **The Dowry**

Dowry-giving is an obligatory right of the wife, for there are

many texts concerning this issue. No one can do anything to this dowry except with her permission. Moreover, it is desirable that it be presented to her, either as a whole or in part before the consummation of the marriage, as a sign of good-will to her, and as a proof of the intention to start a good life with her.

There are Hadiths indicating that there is no particular or limited amount for dowry. It is permissible to be as much as even millions. It is also permissible to be as little as even an iron ring. It is worth noting that extravagance in dowry is detestable, and that the lesser the dowry is, the more the marriage is easy and blessed.

The dowry may be material, such as *dirhams*, *dinars*, wheat and barley, or it may be spiritual, such as helping the wife to memorize a part of the Qur'an. People who opine differently have no evidence.

Generally, scholars maintain that marriage is valid without including dowry. The wife is then called *mufawwidah*, for she does not say anything concerning her own dowry. This wife is given a dowry like her family counterparts take, when her husband consummates the marriage with her or dies. If he divorces her before consummation, she takes nothing except *mut`ah*<sup>7</sup>. Ahmad is reported to have said that she takes half of the dowry taken by her counterparts. Malik says *mut`ah* is desirable for her, not obligatory. Moreover, most jurists say that *mut`ah* is desirable for every divorced woman except this *mufawwidah* under discussion.

*Mut`ah* is subjected to the financial condition of the husband. Some scholars, however, say it is subjected to the condition of the woman, for it is the thing from which the dowry

is considered.

If a man lives with his wife after contracting marriage, most jurists say that the dowry of this wife is incumbent on him, and she herself must apply *`iddah*, even if he has not copulated with her. Some scholars say the Companions unanimously agreed upon this.

Some other jurists say that the dowry is incumbent only if he copulates with her.

Whoever sexually enjoys his wife in places other than the vulva without being alone with her, such as kissing and suchlike, some scholars say he must complement the dowry because of this enjoyment. Most jurists, however, say he must not complement the dowry.

There is a consensus of opinion that it is permissible that the woman waives her dowry or part of it, if she is entitled to act upon her property.

### **Conditions in Marriage Contracts**

If a man agrees to marry a woman whom he requires must be Muslim, and then he discovers she is Christian or Jewish, he has the right to choose whether he keeps her or not.

If he stipulates that she must be a virgin and then he discovers that she was formerly married, or for any stipulation that generally affects marriage and stirs peoples' concern, there are two opinions concerning this: first: the husband has no right to choose, nor can he revoke the marriage. Second: he has the right to choose because he stipulated a particular quality that he discovered later to be absent. This opinion is more acceptable.

However, if he stipulates that she must be of honorable kinship, and he discovers that her kinship is even more honorable than he thought, or she is generally better than what he required, he has no right to choose.

If he cancels the contract, before the consummation of marriage, for any of the reasons with which he can choose, he is not required to pay dowry. If he cancels after the consummation as a result of deceit by the one who would receive the dowry, he is also not required to pay anything. On the other hand, if someone other than this, plans deceit, the husband must pay the dowry then he may have it back from the one who has deceived him.

### **Making a Marriage Contract**

It is unanimously agreed that a marriage is to be contracted with the word *tazwij* (marrying off), as long as there is both a request and an acceptance between the two parties.

For instance, one of the two parties may say, "I have married you to my daughter." Then the other one says, "I have accepted this marrying off - or I have accepted this marriage", as it is not stipulated that the two expressions must be convenient. These words must be said in the past tense, as this is the way of establishing contracts, as in "I have sold, bought, hired" and the like.

If one of them says, "Do you marry me off to your daughter?" and the other one says, "Yes" this is not regarded as a contract, for it is inquiry about the future.

If one of them says, "Did you marry me off to your

daughter?" and the other one says, "Yes" some scholars say that the marriage is contracted, whereas some others say it is not. The latter is more acceptable.

Does a marriage contract become established without the word *tazwj* or not? Some scholars say it does but some others say it does not.

There is no difference whether a contract of marriage is conducted with Arabic or non-Arabic words. Ahmad and a report about Ash-Shafi'i say that it is not valid in the case that the one who knows Arabic does not use it in his expressions in the contract. Abu Hanifah says that it is valid.

The contract held by the mute person is valid on condition that his gestures are understood.

If proposal precedes acceptance, the contract is valid according to the four Imams except Ahmad. Additionally, the marriage is contracted even if the contractor takes it as a jest.

There is neither *khiyar ash-shart* nor *khiyar al-majlis* in marriage.

If there is a time between request and acceptance, the contract is still valid, as long as they happen at the same session, and they are not interrupted by unusual speech.

It is desirable at the time of making the contract that the suitor or someone else delivers a speech before it, even if it is reciting the *shahdatan*<sup>(1)</sup> and praying that the blessings and peace of Allah be upon the Prophet (pbuh).

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1. The *shahdatan* here is a word signifying one's saying that he bears witness that there is no god but Allah and that Muhammad is the Messenger of Allah.

It is a part of the Sunnah that the marriage is celebrated with tambourines and suchlike, and with girls' singing, that involves no prohibition. Contract of marriage is however valid without announcement, even if it is secret, as long as it is contracted by a legal guardian, two witnesses and a husband; yet this is disliked. The ones who say it is invalid have no evidence; these include Malik and Ahmad Ibn Hanbal.

It is desirable that people pray for the spouses with some invocation like *"May Allah bless (it) for you, bless (it) on you, and gather you together in good (connection)!"* It is also desirable that the husband performs two *rak'ahs* when he enters to (consummate the marriage with) his wife. He then puts his hand on her forehead and says, *"O Allah! Bless my wife for me, bless me for my wife, give her bounty out of me, and give me bounty out of her!"*

Some scholars say that the wedding banquet is obligatory, and some others say it is part of the Sunnah. After all, it is made according to one's capacity, even with a small quantity of dates. In addition, it is valid to make it at or after the contract, and before or after the consummation.

Some scholar say that accepting a wedding invitation is obligatory even without eating, and some others say it is part of the Sunnah, provided that it contains no prohibitions. The proof for obligation here is stronger. Whoever does not attend it because of a valid excuse or suchlike is not to blame, as long as his absence does not cause harm to the people of the banquet.

In Al-Mughni, Ibn Qudamah mentions proper speech about inscription, statues and paintings. He says that if the guest sees



inscriptions and paintings of trees and the like, there is no blame on him, for they are as flags on garments.

It is also permissible that there are paintings for animals in some places where the subject is underfoot and lying down, such as the ones in carpets and cushions.

However, if they are on curtains and walls and so on and he can remove them or cut off their heads, let him do so, otherwise it is desirable that he leaves. Most scholars maintain this idea and it is the *madhhab* of Ash-Shafi`i. As for Malik, he detests pictures and paintings in order not to approach something involving doubt, but he does not see them as prohibited. Malik and Ahmad, moreover, say it is not prohibited that one enters a house containing paintings, nor is it obligatory for the one who sees them inside to leave.

Most of the companions of Ash-Shafi`i say that paintings which are not underfoot are prohibited, whether they are on curtains or on walls. Ibn Qudamah sees that the first opinion is more acceptable.

The making of statues and paintings of animals when they are so realistic is prohibited. The Prophet (pbuh) says,

*"Verily Painters are (the ones who receive) the most strenuous torment on the Day of Resurrection."* (Narrated by Al-Bukhari and Muslim).

## **Types of Conditions in Marriage Contract**

Conditions in marriage contract are of three types:

**First:** a type whose fulfillment is obligatory. This is the one

whose use and benefit is for the wife. For example, her folk may stipulate that he must not travel with her away from her house and country, or that he must not get married to another woman along with her. If he does not fulfil these stipulations, she can, as held by some scholars, including Ahmad, cancel the marriage.

Malik, Abu Hanifah Ash-Shafi`i and others say these stipulations are invalid.

Abu Hanifah and Ash-Shafi`i say that only the dowry, not contract is invalidated, and she deserves a dowry equal to that of her counterparts. This is because this is a stipulation that is not in the Book of Allah, and it prohibits something that is lawful.

**Secondly:** a type with which stipulation becomes invalid and the contract remains valid. For instance, he may stipulate that she will not receive a dowry or means of subsistence, or she may stipulate he will not copulate with her, in addition to any stipulation that which contradicts the contract.

**Thirdly:** a type with which marriage basically becomes invalid. To illustrate, it may be stipulated that marriage will last for a certain time, or that it is dependent on her mother's consent.

### **Forbidden Forms of Marriage**

The Prophet (pbuh) forbade certain forms of marriage that had existed in the Jahiliyyah period. We may cite some of them.

The Prophet (pbuh) forbade that a man proposes marriage to the woman whom his brother has already proposed to until he leaves her or permits him. The majority of scholars say that this forbiddance means prohibition, but some others say that it means it is detested. Abu Dawud says that if the second man

marries her, the marriage may be revoked before or after consummation.

Another form is *shighar* marriage which means that man gives his daughter in marriage to another man on condition that the latter gives the former his daughter or sister in marriage without paying their dowries. Thus, it is a such marriage that brings benefit to both of them with no consideration to the two women, as if they own them. Malik, Ahmad, Ash-Shafi`i and others say this form of marriage is invalid. The Hanafis and others say that it is permissible, and the two women deserve dowries equal to the ones their counterparts receive.

Another forbidden form of marriage, is marriage for enjoyment (*mut`ah* marriage). Scholars agree that it is prohibited because it is authenticated that the Prophet (pbuh) forbade it. Mut`ah marriage is to contract marriage with a woman for a specified time. Marriage for *tahlil* (lawfulization) is also prohibited. It is that when a man divorces his wife three times, she gets married to another man after the end of her `iddah to make her lawful for the former again after he has copulated with her and then divorces her. Most scholars say this form is invalid, but some others say that the marriage is valid but the condition is invalid, and she deserves a dowry equal to that of her counterparts. Yet, if this is not stipulated in the contract and is only intended, then it is detestable but the marriage is valid. So, if he copulates with her and then divorces her and her `iddah comes to an end, most scholars say she then becomes lawful for the first man.

## **Proposing to the *Mu'tadah* for Marriage**

*Mu'taddahs* are of three types:

**First:** the *mu'taddah* after her husband's death, after having been divorced three times, or after nullification of her marriage because of becoming prohibited for her husband for reason such as foster relationship and the like. Such women are not to be directly proposed for marriage during *`iddah*. Nevertheless, it is permissible that men propose to them indirectly; one for example may say to her, "tell me when your *`iddah* has finished."

**Second:** the *mu'taddah* after revocable divorce. It is not lawful for a man to propose to this woman for marriage, whether directly or indirectly, in her *`iddah*, for she is still regarded as the wife of her husband, as he can take her back during her *`iddah* even without her permission.

**Third:** the *mu'taddah* after irrevocable divorce. It is lawful for the husband of this woman to remarry her just as the *mu'tadah* after revocable divorce because of nullification for reasons such as absence or reduction to poverty or because of divorce having taken place before the consummation of marriage and suchlike. The ex-husband of this woman can propose to her directly.

Some scholars say that for men other than him are in the same case as the *mu'taddah* after revocable divorce, and some others say that the ruling here is like that of the *mu'taddah* after three divorces.

## **Women Who are Prohibited for Men**

Women to whom a man is forbidden to get married are of four

categories:

One category is prohibited because of kinship relationship, one because of marriage relationship, one because of foster relationship, and one because of having (two sisters, for example,) in marriage at the same time.

Scholars unanimously agree on the prohibition of marrying more than four women.

It is also prohibited that a man gets marries the divorced woman's sister, or her aunt or niece from both the paternal and maternal side, if the divorce is revocable. If however it is irrevocable or because of nullification, some scholars hold the same ruling, whereas some others say that he can get married to any one of these women.

If the husband of a magian or an idolatrous woman confesses Islam, or their marriage is nullified because of Khul or foster relationship, or because of absence or reduction to poverty or whatever, he cannot get married to anyone of the women he is forbidden to have in marriage, together with his wife until her *`iddah* terminates.

Whoever copulates with a woman because of some doubt of the marriage contract, her mother, grandmother, daughters, and granddaughters become forbidden to him forever, but it proves kinship relation. If he has a sexual affair with her out of lust but away from the vulva, the Hanafis and the Malikis hold the same ruling. If however he does this without lust, this ruling does not apply to it.

The Hanbalis and the Shafi`is say that having a sexual affair with lust does not lead to prohibition of marriage relation or

getting married to her daughter from another man. If he looks at her vulva with lust, only Abu Hanifah and Ath-Tawri say the prohibition applies.

If a man proposes to a woman for marriage and her family marry him to her sister, and the legal guardian contracts for this sister without telling the suitor, the contract is invalid and the man deserves the dowry he has paid in addition to any other gifts.

### **Marrying from the People of the Book and during the `Iddah**

It is permissible for the Muslim to get married to a woman from Jews or Christians, provided that she is free. Yet, he is forbidden to marry from the people who have no divine books because such are idol-worshippers.

If a woman commits *zina*, the *`iddah* is not obligatory to her whether she is pregnant or not. If she is not pregnant, it is permissible for the one who has committed *zina* with her or anyone else to get married to her. If however she is pregnant because of *zina*, Ash-Shafi`i and others say getting married to her is detestable before delivery. Malik, Ahmad and others say that the woman who commits *zina* must apply an *`iddah*, and if she is pregnant, it is not valid to marry her before delivery.

Disbelievers' marriages to one another are regarded as valid, and we welcome them if they convert to Islam or ask for our judgement if the woman is one of the women whose marrying is permissible to be carried out immediately.

If one of a magian or idolatrous spouse converts to Islam

before the consummation of marriage, they must be separated quickly from the moment of his or her conversion. This separation is nullification not divorce. This is the *madhhab* of the Shafi`is and the Hanbalis.

Abu Hanifah says separation is not to be done quickly. Rather, if they are in the abode of Islam, the other one should be invited to Islam; if he\she refuses to convert to it, separation then applies. If however they are in the abode of war, this is committed to the termination of the wife's *`iddah*; if the other one does not confess Islam, they must be separated.

If the spouses confess Islam together, their marriage is intact before or after the confession. This is counted by their confession in one word together, or at one sitting.

If one of the spouses confesses Islam before the consummation, some scholars say separation is carried out to the termination of the *`iddah*. Some others say they must be separated quickly.

### **When One of the Spouses Apostatizes**

If one of the spouses apostatizes from Islam before the consummation of marriage, most scholars say this nullifies the marriage. Dawud is reported to have said apostasy does not nullify marriage because its continuation is the base.

If apostasy takes place after consummation, Abu Hanifah, Malik and (a report about) Ahmad say that they must be separated quickly. Ash-Shafi`i and (another report about) Ahmad say separation is committed to the termination of the *`iddah*; if the apostate re-confesses Islam before its termination,

their marriage is still intact, but if it terminates before he\she does, separation takes place from the day of apostasy.

### **Maintaining a Good Relationship and the Spouse's Rights on Each Other**

This is a matter of morality that is very important and its details must be studied. This highlights how interested Islam is in establishing the Muslim family and a good conjugal relationship between the husband and wife, aiming at achieving a good life on the whole. Out of such families and communities, a high-enlightened society with good morals and supreme humanity and religiousness is expected to prevail and spread.



# CHAPTER TWO

## Foster Relationship

`A'ishah (may Allah be pleased with her) said that the Prophet (pbuh) said,

*"One sip or two sips do not cause prohibition<sup>(1)</sup>." (Transmitted by Muslim)*

This hadith indicates that a baby's sipping at the breast once or twice does not mean that it is a foster son (or daughter). There are three sayings concerning this issue:

**First**, according to the context of this hadith and the hadith narrated in different words, "Sucking one or two times does not cause prohibition." Dawud and others say that three sips or more cause prohibition.

**Secondly**, `Ali, Ibn `Abbas, Malik, the Hanafis, and others say that suckling, whether little or much, causes prohibition. Its limit, they add, is what reaches the stomach by itself. In addition, some people claim that there is consensus that the quantity causing prohibition is like that which causes the breaking of one's fast. They prove it by saying that Allah the Almighty commits the prohibition to the noun "foster relationship", so wherever the noun exists its ruling exists also. Moreover, a hadith in the same regard came in convenience with the verse; the Prophet (pbuh) said,

*"Foster relationship prohibits that which kinship relationship prohibits",*

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1. "Causing prohibition" in this chapter means causing the prohibition of establishing a marriage contract between a foster son (or daughter) and any of the women (or men) whom the Shari`ah has specified. (Translator)

and `Uqbah's hadith in which the Prophet (pbuh) said,

*"How (can it be) although you claim she suckled you?"*

"and he did not ask about the number of times of suckling. These are their proofs. Their sayings however are inconvenient concerning the limit and nature of the suck. In reply to their argument that Allah commits the prohibition to the noun "foster relationship", we say that it is a general name whose details of number and limit the Shari`ah has shown. So no one can say that the Prophet (pbuh) neglected asking about the details.

**Thirdly**, Ibn Mas`ud, Az-Zubayr, Ash-Shafi`i, and (a report about Ahmad) say that five times of suckling cause prohibition. They prove it with `A'ishah's hadith (which will be mentioned later), in which five times of suckling are mentioned, and that Sahlah Bint Suhayl suckled Salim five times (and it will also be mentioned later). This may contradict the context of the hadith of the "one sip or two sips", but the judgment in this hadith of the "five" is referred to clearly, and this is stronger than relying on the context of the other hadith, for it is given priority over it. Although `A'ishah narrated that this was from the Qur'an, it is acted upon like the one-transmitter statement, as is known in the principles of Fiqh. Furthermore, it is supported by Sahlah's hadith in which she narrated that she suckled Salim five times in order to make him prohibited for her. In spite of being an act of a female companion, it indicates that they knew well that (not lesser than) five times of suckling cause prohibition.

In *Ar-Rawda an-Nadiyyah*, we read that Ibn Mas`ud, `A'ishah, Ash-Shafi`i, Ahmad, (a report about) `Ali Ibn Abi Talib and others hold that five times of suckling cause

prohibition.

The author goes on to say that hadiths and *Madhhabs* widely differ regarding this matter. To help readers understand the correct position in which all proofs gather, we may say that every text which is without specification of the number is specified by the hadiths including the mentioning of the number, as the case is always with the absolute and the specified. The hadith reading, "*One sip or two sips, and sucking one or two times, do not cause prohibition*", and the hadith reading, "*One suck does not cause prohibition*" show that suckling one or two times does not cause prohibition. If it were that these two hadiths are the only texts on the issue, three times of suckling would require prohibition. Yet, there is an authenticated hadith stating that `A'ishah (may Allah be pleased with her) said, "Ten known times of suckling cause prohibition" then she added, "Five known times of suckling cause prohibition" and stated that the "ten" were abrogated with the "five". She also stated that "The Prophet" (pbuh) died and these (words) were (still) among what was recited from the Qur'an." Successiveness of transmission, for what is held to be correct is not a condition of the Qur'an. If this is sound, the one-transmitter recitation will be placed on the same footing of one-transmitter statements. Here however is confusion. It is that the hadith, "*One sip or two sips do not cause prohibition.*" indicates with the context of number, that three and four sips confirm prohibition, whereas the hadith of the "five" indicates with its context that two sips do not cause prohibition.

The author of *Ar-Rawdah an-Nadiyyah* adds that using the present tense in statements (in Arabic) gives specification. Thus,

the context of specification is connected to the context of number in the "five", so prohibition is not to be confirmed without them. This is furthermore supported by some of the words narrated in the hadith of Sahlah Bint Suhayl that "the Prophet (pbuh) said (to her), *"Suckle Salim five times and you will be prohibited for him."* This structure strongly gives the meaning of "If you suckle him five times, you will be prohibited for him."<sup>(1)</sup> Therefore, the context of conditioning is added to the context of number and that of specification. As these proofs are appropriate for specifying the absolute of the Qur'an, they are also appropriate for specifying the hadith,

*'Foster relationship is (caused by) that which grows flesh and raises bones.'*

and the hadith,

*"Foster relationship is through huger (i.e., infancy)."*

This is based on the presumption that one time or two times of suckling grow flesh, so the meaning is that the thing that is required to cause prohibition because of suckling, is that which grows flesh and takes place during the time of infancy with a specific description, namely five times of suckling.

In *Subulus-Salam*, the author says, "As for the true nature of the suck, it is specified with suckling one time. Thus, when the baby starts to suck the breast and leaves it by himself, then it is counted as a suck. However, breaking suckling by some reason such as breathing or a short rest, or by something amusing for a little while, all this does not affect its being one time of suckling,

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1. This is an explanatory sentence and not a Prophetic saying." (Translator)

just as what happens when someone leaves his meal for a little while and then comes back to it. It is still considered to be one meal. This is the *madhhab* of Ash-Shafi`i, and it is relevant to the language used. Therefore, if it happens that five times of suckling having these characteristics, take place, they cause prohibition.

Once the Prophet (pbuh) entered to `A'ishah and found a man with her. His face hanged as if he disliked it. Thereupon she said, "He is my brother." The Prophet said, "*(O women!) Look who your brothers are, for foster relationship is through (nothing but) hunger.*" (Narrated by Al-Bukhari and Muslim) Ibn Hajar says, "I think this man is a son of Abul-Qa`is's."

The Prophet's saying, "*(O Women!) Look*" is an order to women to investigate and confirm what the reality is concerning foster relationship: is it out of a sound foster relationship that matches the conditions and characteristics set for it. This is because the ruling of foster relationship is established when the set conditions are fulfilled.

Abu `Ubayd says it means that when the baby feels hungry, the only food which is to gratify its hunger is breast-milk, no other sorts of food other than this milk. This is such an analysis that produces likelihood and deep investigation regarding foster relationship. It also means that the foster relationship with which prohibition is confirmed, is that which takes place out of the suckling at the time when the baby can have only breast-milk because of the weakness of its stomach at that age. Breast-milk is then sufficient for the stomach, and for the growth of flesh. Consequently, the baby becomes, with it, part of the woman, who suckles it, which means it becomes prohibited for her like

her children. In short, there is no adopted foster relationship except that which is produced because of suckling which gratifies hunger, or which feeds when being hungry. This is the meaning of the hadith narrated by Ibn Mas`ud,

*"The only (adopted) foster relationship is that which raises bones and grows flesh."*

and the hadith narrated by Umm Salamah,

*"The foster relationship which causes prohibition is (only) that which causes rupture in the bowels<sup>(1)</sup>"* (Transmitted and authenticated by At-Tirmidhi).

Some scholars take these hadiths as proof that getting fed with the breast-milk causes prohibition whether this happens through drinking, or inserting the milk gradually into the mouth, or inserting it from the nose, or through inserting it from the anus, as long as this satisfies the hunger of the baby. This is the opinion of the majority. The Hanafis and others say that insertion of the milk through the anus does not cause prohibition. It seems if they say that it is not to give the meaning of the name "foster relationship". I say, "Their saying applies if consideration goes to the meaning "derived" from foster relationship, but if it extends to the meaning of the "name" of foster relationship, it then includes only suckling the breast, as the Zahiris say. They literally say that only this causes prohibition because the hadith restricts foster relationship to hunger. `A'ishah (may Allah be pleased with her) is moreover reported to have said, "Sahlah Bint Suhayl came (to the Prophet (pbuh)) and said, "O Messenger of Allah! Salim, Abu Hudhayfah's

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1. This happens when the bowel is pushed through the stomach wall out of stretching. (Translator).

*mawla*, lives with us in our house and he has become a man." The Prophet said,

*"Suckle him (and) you will be prohibited for him."* (Narrated by Muslim).

In *Sunan Abi Dawud*, the narration reads, *"so suckle him five times"* and then he was like a foster-son to her." This proves that suckling a man causes prohibition; it does not involve the meaning of "Foster relationship is through huger", though.

To clarify, the story was that Abu Hudhayfah adopted Salim and married him off. Salim was a slave of a woman from the Ansar. When Allah revealed the Qur'anic words reading, ﴿ *Call them by the names of their fathers.* ﴾ (Al-Ahzab: 5), every adopted one who had a father was called by his name, and who had none was a brother in faith and a *mawla*. Thereupon Sahlah came to the Prophet (pbuh) as mentioned above.

The Early Muslims differ concerning this ruling. `A'ishah (may Allah be pleased with her) holds that prohibition is confirmed even if the suckled person is mature and sane. `Urwah says, "Aishah, the mother of believers, adopted this hadith, and she ordered her sister Umm Kulthum and her nieces to suckle the men whom they liked to let enter to their private rooms."<sup>(1)</sup> (Narrated by Malik). This ruling is also attributed to `Ali Ibn Abi Talib and others. Their proof is Sahlah's hadith, which is no doubt authentic. There is furthermore a part of a verse indicating its context, it reads, ﴿ *And your mothers in suckling, and your sisters in*

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1. In another book, the majority of scholars say that suckling here must be carried out with a cup, and not directly from the breast. (Translator)

*suckling.* ﴿ (An-Nisa': 23) It is clear that there is no specification of time in the text.

The majority of scholars, including the companions, their successors and jurists maintain that suckling, which causes prohibition, is only that which takes place during the early age of the baby. They however differ as for determining the time of this early age. The majority among them says the suckling that takes place during the first two years causes prohibition, and there is no prohibition caused by suckling taking place after that. These jurists prove it with the Qur'anic words reading,

﴿... for two years fully, if the fathers wish to make complete the term of suckling.﴾

(Al-Baqarah: 233)

A group of them says that the prohibiting suckling is that which occurs before weaning; yet they do not assess its time.

Al-Awza'i says that if the baby is weaned at the age of one year and the weaning continues, then it sucks<sup>(1)</sup> within the two years, this suckling causes no prohibition. Nevertheless, if it is not weaned, sucking<sup>(1)</sup> within the two years causes prohibition, but suckling after that does not cause prohibition even if it continues for a long time.

There are other sayings on the issue but they are not worth noting.

The majority seek proof in the hadith, "*Foster relationship is through (nothing but) huger*", which has been mentioned before. Accordingly, this meaning applies to every baby that is satisfied

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1. Sucking here is connected to the breast of a woman other than the baby's mother. (Translator).



with the breast-feeding, and the latter must be its only source of feeding. So, mature men are not involved in this meaning, especially the hadith is narrated with the voice of exception.

They reply to the proof that depends on Salim's hadith by saying that it was specific to the story of Sahlah, so its ruling does not apply to anyone else. Moreover a saying of Umm Salamah, the mother of believers, to `A'ishah (may Allah be pleased with them both) gives indication to it. The saying is, "We see this is specially for Salim, and it may be a license for Salim" It also may be abrogated.

The ones who hold that suckling the mature causes prohibition reply to this by saying that the verse<sup>(1)</sup> along with the hadith, "*Foster relationship is through (nothing but) huger*" are ordained to show the kind of suckling that which makes obligatory the maintenance for the woman who nurses at the breast, whether the parents like it or not. The end of the verse reads,

﴿The father, in the fair known way, shall be responsible for their maintenance and clothing.﴾

(Al-Baqarah: 233)

In addition, `A'ishah (may Allah be pleased with her) was the reporter of the hadith, "*Foster relationship is through (nothing but) huger.*" and she was the one who reported the suckling of a mature person and that it causes prohibition. This indicates that she understood the meaning of the verse and the hadith in the way that we have mentioned above. As for Umm Salamah's saying that it was specially for Salim, this was mere

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1. They mean the verse no. 233 in Surat al-Baqarah. (Translator).

presumption. Besides, `A'ishah replied to her saying, "Do you not find a noble model in the Messenger of Allah?" and then Umm Salmah kept silent. As for abrogation, it is refuted by the fact that the story of Sahlah took place after the verse of the two years had been revealed. This is why Sahlah asked the Prophet (pbuh), "How can I suckle him while he is a man?" This question she delivered was out of her denial of suckling the mature.

I say it is quite clear that suckling lexically applies to those who are still babies. and the verse of the two years was revealed according to language, and so was the hadith, "*Foster relationship is through (nothing but) huger.*" The saying that the verse<sup>(1)</sup> is for showing the kind of suckling that which makes maintenance obligatory, does not contradict that it is also for showing the time of suckling, rather for the time set for the parents who want to complete the term of suckling.

Ibn Taymiyah has a word here that is the best in gathering Sahlah's hadith together with the hadiths that seem to contradict it. He says, "The age of babyhood is what is adopted in foster relationship unless need calls for the suckling of the man whom the woman cannot avoid his being with her from time to time, as in the case of Salim with Abu Hudhayfah's wife. When such a man is suckled, his suckling gives influence; yet babyhood is stipulated in other cases."

This is an adequate opinion that gathers between the hadiths concerned with no contradiction to their manifest meanings by means of specialization, abrogation, or nullification of that which the language adopts and hadiths indicate.

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1. The verse, no 233, Al-Baqarah. (Translator)

`A'ishah (may Allah be pleased with her) reports that Aflah, the brother of Abul-Qays, asked for her permission to enter to her after *hijab* (veiling) had been prescribed. She says, "I refused to give him permission. "When the Prophet (pbuh) came, I told him about what I had done, and he ordered me to give him permission, and said, "*He is your uncle (i.e. your foster uncle<sup>(1)</sup>).*" (Narrated by Al-Bukhari and Muslim).

This hadith proves the confirmation of the ruling of foster relationship as for the husband of the foster mother as well as for his relatives, just as it is confirmed for the woman herself. This is because the husband of the foster mother along with her are the reason standing behind the existence of the milk being suckled, so it is obligatory that the cause of foster relationship comes from both of them. Accordingly, this husband is considered to be a foster father for the one being suckled, and the brother of the husband is his foster uncle and so on. The majority including the companions, their successors and the people of *madhhabs* maintain this. The hadith mentioned above is a clear proof of their belief. Interestingly enough, Abu Dawud's narration of the same hadith gives a more manifest statement. According to this narration, `A'ishah says, "When Aflah entered to me. I hid myself. He said, "Are you hiding yourself from me, while I am your uncle?" I said, "For what relationship?" He said, "My brother's wife suckled you." I said, "It was the woman who suckled me, and not the man who suckled me..."

Another group of scholars including `A'ishah, Ibn `Umar , other companions, a group of their successors, and others hold

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1. From the paternal side

otherwise. They say that the ruling of foster relationship is not confirmed for the man because it is the woman who suckles and the milk is from her. They add that this is indicated by the Divine words reading, ﴿*And your mothers in suckling.*﴾ (An-Nisa': 23). In reply, it is said that these words do not contain anything that contradicts the hadith, for the mentioning of mothers does not indicate that people other than them are not meant for the same ruling. Besides, a group of the companions holds this *madhhab*. The opinion that is clearer is that of the majority.

ʿA'ishah (may Allah be pleased with her) reports, "From among the revelation of the Qur'an were (these words), "*Ten known times of suckling cause prohibition.*" Then they were abrogated with five known (times of suckling). When the Prophet (pbuh) died, they were still recited in the Qur'an." (Narrated by Muslim).

She means that the abrogation with the five times of suckling was so late, that some people were still reciting the verse including the five times of suckling as part of the Qur'an when the Prophet (pbuh) died. This was because they did not know about the abrogation because it had taken place very soon before the Prophet's death. Yet, when they knew it was no longer part of the Qur'an, they stopped to recite it. This is included in the abrogation of the recitation without the ruling, which is one of three parts comprising the types of abrogation. They are:

**First:** abrogation of the recitation with the ruling, as in "*Ten known times of suckling cause prohibition.*"

**Secondly:** abrogation of the recitation without the ruling, as in "*Five times of suckling cause prohibition.*"

**Thirdly:** abrogation of the ruling without the recitation. The examples of this type are many. We read for example, in the Qur'an, ﴿And those of you who die and have wives behind﴾ (Al-Baqarah: 240) As already mentioned, acting upon the ruling of this Hadith is the most acceptable opinion. As for the saying that this hadith of `A'ishah is not part of the Qur'an because it is not to be confirmed with a one-transmitter statement, nor is it a hadith because she did not report it as a hadith, this saying is refuted. It is refuted by saying that she reported it from the Prophet (pbuh), so it upholds the ruling of a hadith in application, even if it is not confirmed as being part of the Qur'an nor is it subjected to the ruling of the Qur'anic words. As a matter of fact, scholars apply such a ruling. Ash-Shafi`i and Ahmad, for example, apply it in this situation, and Malik and the Hanafis apply it in other cases. Additionally, not acting upon this hadith has no excuse. This is why we have chosen to act upon it.

`Uqbah Ibnul-Harith reports that he married Ummu Yahiya Bint Abi Ihab. Then a woman said that she suckled both of them. When `Uqbah told the Prophet (pbuh) about it he said, "*How (can it be), although it is said<sup>(1)</sup>?*" So, `Uqbah separated from her, and she married another one. (Transmitted by Al-Bukhari)

This hadith proves that the testimony of the woman who suckles is sufficient by itself. Ibn `Abbas, Ahmad and others opine this. However, Malik maintains that there must be a testimony of two women. The Hanafis say that foster

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1. I.e. how can your marriage continue, although it is said you were suckled by the same woman? (Translator)

relationship, like other matters, requires the testimony of two men or a man and two women, and the testimony of the woman who suckles is not sufficient, for she only confirms her own action. According to Ash-Shafi`i, the testimony of this woman is to be acceptable with three other women on condition that she does not do it against a payment.

Some scholars say that the ruling of this hadith is taken for wishing good and as a means of caution against doubtful thoughts.

In reply, it is said that this is not convenient with the manifest meaning of the hadith, especially the man repeated his question to the Prophet (pbuh) four times and he answered him, "*How (can it be), although it is said<sup>(1)</sup>?*" Moreover, in another narration, the Prophet (pbuh) said to him, "*Leave her.*" And according to Ad-Daraqutni's narration, "*There is no good for you in her.*" If it were to be for caution, he would have ordered him to divorce her; yet there is no mentioning of divorce in all narrations. Therefore this ruling is specific from the generality of the testimony in which a number is adopted, and they adopt this in women's `awrah and say that the testimony of one woman is sufficient there, justifying it by saying that men rarely look at such things and necessity requires its adoption. This justification applies to this case too. (Ash-Shawkani)

If the baby can do without breast-milk before the end of the two years and is weaned, and then a woman suckles it, does this suckling cause prohibition or not? Malik says it does not, whereas Ash-Shafi`i and Abu Hanifah say that it does.

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1. See the previous footnote.

The person for whose milk these rulings are confirmed is the woman, whether she is mature or not, whether she menstruates or not, whether she has a husband or not, and whether she is pregnant or not.

If breast-milk is mixed with water until the latter consumes the former, some scholars say it does not confirm prohibition and some others say it does. (Ibn Rushd, *Al-Bidayah*)

## Summary

Many *Shar`i* rulings are based on foster relationship. For example, the suckled person becomes a foster son of the woman who suckled him. Everyone who sucks from this woman becomes a brother of her sons by kinship relationship along with her sons by foster relationship. Her brother becomes an uncle, her sister an aunt, her husband a father, her father a grandfather all by foster relationship, just as they are in relation to her sons by kinship relationship. Allah the Almighty says of the prohibited women,

﴿And your mothers in suckling, and your sisters in suckling.﴾

(An-Nisa': 23)

The Prophet (pbuh) says,

*"Verily, Allah prohibits with foster relationship that which He prohibits with kinship relationship."* (Narrated by Muslim)

He (pbuh) also says,

*"That which is prohibited with parturition is prohibited with foster relationship."* (Narrated by Al-Bukhari)

The rulings of foster relationship are: prohibition of marriage, permissibility of looking and being able to travel alone with one another, but not other than this, such as inheritance and other rulings of kinship relationship. According to this prohibition regarding the foster mother, her relatives are relatives of the suckled person. Yet, the relatives of the suckled person, except his/her progeny, have no relation with the foster



mother, so none of the rulings are confirmed for them.

Scholars differ concerning the quantity and number of times of the Prohibiting suckling. A group of Early Muslims and late scholars say that suckling, whether little or much, causes prohibition. This is also the *madhhab* of the Hanafis and the Malikis. There is a claim that scholars unanimously agree that the quantity of milk that is equal to that which causes the breaking of a fast, causes prohibition.

Dawud, his followers, and a group of scholars say that three times of suckling upwards cause prohibition, as it is understood from the context of the hadith narrated by Muslim, "*One sip or two sips do not cause prohibition.*"

One suck is counted if the baby holds the breast in its mouth and sips the milk until it leaves it by itself without interruption. If the interruption is caused by breathing or a short rest, or by something amusing and the baby comes back to sucking soon after, this does not prevent its being one time of suckling. This is the *madhhab* of Ash-Shafi`i.

The adopted age in foster relationship is that suckling baby must be at the age when milk gratifies its hunger because its stomach is so small, that milk is enough for it and for the growth of the flesh, so it becomes part of the foster mother.

Getting fed with breast-milk causes prohibition, whether the baby takes it through suckling, through receiving it gradually in its mouth, or through giving it to it from the nose or the anus. This is the saying of the majority. Nevertheless, the Hanafis and others say that giving it through the anus does not cause prohibition. Additionally, the Zahiris say it is not to be a foster

relationship except by holding the breast with the mouth and sipping the milk from it.

The majority of Early Muslims and late scholars maintain that suckling a man does not cause prohibition. They say that only suckling at the age of babyhood causes prohibition. They, however, differ as regarding this age. The majority among them says that suckling causes prohibition as long as it takes place within the first two years and suckling afterwards does not cause prohibition.

A group of scholars opine that the prohibiting suckling is that which happens before weaning; yet they do not mention a given time for it.

Al-Awza'i says that if the baby is weaned at the age of one year and its weaning continues, then it sucks from a woman other than its own mother within the two years, this suckling does not cause prohibition. If however it is not weaned, its suckling within the two years causes prohibition, but suckling afterwards does not cause prohibition. This opinion seems to be an explanation of the opinion of the majority.

A group of scholars says that the ruling of foster relationship is confirmed for the suckled person even if he/she is mature and sane. This is the opinion of `A'ishah, the mother of believers, Ibn Hazm and others. Their proof is that the Prophet (pbuh) said to Sahlah Bint Suhayl concerning Salim, Abu Hudhayfah's *mawla*, "*Suckle him. (and) you will be prohibited for him.*" (Narrated by Muslim)

Seeking a connection between Sahlah's hadith and the other hadiths, Ibn Taymiyah says that the age of babyhood is adopted

in foster relationship unless necessity requires otherwise, as in the case of Salim that is mentioned above.

Another important issue regarding foster relationship, is the ruling of foster relationship, which is confirmed as for the husband of the foster mother and his relatives: can he be considered a foster father for the suckled person and his brother a foster uncle and so on or not?

The majority including the companions, their successors and the people of *madhhabs* hold that the ruling of foster relationship is confirmed for this husband if the milk is from him. This saying is the most acceptable, and has proof.

A foster relationship is confirmed with the testimony with which people are reassured. However, scholars differ in this also. Ibn `Abbas, Ahmad and others say that the testimony of the woman who suckles is sufficient by itself. Malik says he accepts only two women in confirmation of foster relationship. The Hanafis and others opine that foster relationship requires, like all other matters, the testimony of two men or a man and two women. As for Ash-Shafi`i, he maintains that the testimony of the woman who suckles is acceptable with three other women.

The person for whose milk these rulings are confirmed is the woman, whether she is mature or not, whether she menstruates or not, whether she has a husband or not, and whether she is pregnant or not. Finally, if breast-milk is mixed with water, some scholars say that this confirms prohibition and some others say it does not.

# CHAPTER THREE

## Divorce

### The Rationale of Divorce

Marital life is originally based on affection, love and mercy. In this life, each spouse plays a major role with which he/she complements the role of the other. The more harmony, understanding and familiarity they have, the happier they are. This leads to establishing a sound, upright family. Nevertheless, there may occur something negative, such as the usual quarrels and breaches between the spouses with when life may become impossible. At this point, the only solution would be divorce. It is, undoubtedly, bitter, but it is the last recourse.

Had it been that Islam did not legislate divorce to serve as a way-out of such unhappy situations, life would certainly be unbearable and an intolerable prison that is full of pain and torment. Consequently, children would have to face a miserable life in their early age that could not stand the tumult resulting from the divorce of their parents. It always happens that whenever parents meet troubles, children face the same destiny. With these terrible situations, there comes a society full of envy, hatred, oppression, darkness, and extravagance inclining to looseness and evil amusement as a means to escape from a bitter status quo and a depressing life.

It is clear then that divorce becomes the only means of escape and the gate to mercy that is opened for the spouse to correct their position and start a new experience, each with a new more suitable partner. This may reduce the amount of loss caused by the wound of the previous experience, which may

also be, although bitter, a reason for a sweet life to come. Thus, divorce is a social, psychological, and perhaps financial remedy.

Those who prevent divorce, in fact close the gate to a way-out for the spouse when their life becomes impossible. They kill in both of them the feelings of mercy, brotherliness and humanity towards each other. This is because they dislike each other, and may curse and wish calamities for each other. At such times and under such circumstances, the spouse may tend to prohibited ways to get out of that horrible situation. Divorce, as a lawful way, cannot be ignored or prevented.

Ironically, man who usually pursues democracy, freedom, and dignity is the same creature who has established a hateful, odious dictatorship as a law of marital life. They, moreover, attribute it to religions, while they are free from it; there is none of these chains neither in the Torah nor in the Gospels. They are made by man to destroy mankind. How sufficient is the maxim saying, "Woe to man from man".

The rulings of divorce in the Islamic Shari`ah are stamped with beauty, perfection and glory. They have been set to serve as a treatment for man's mistakes and a means of salvation. May Allah help us all to do what He likes!

## Definition

Divorce is defined as “dissolution of the marriage union.” Its legality is supported by the Qur'an, the Sunnah, and *Ijma`*.

In the Qur'an, Allah says,

*﴿And divorce is only to be effected twice, then either stay together with honour or separate in kindness.﴾*

(Al-Baqarah: 229 )

And He says,

*﴿O Prophet! When you divorce women, divorce them at their prescribed periods.﴾*

(At-Talaq: 1)

Narrated `Abdullah Ibn `Umar (may Allah be pleased with him) that he divorced his wife while she was menstruating during the lifetime of Allah's Messenger (pbuh). `Umar Ibnul-Khattab asked Allah's Messenger (pbuh) about that. Allah's Messenger (pbuh) said,

*"Order him (your son) to take her back and keep her (in his wedlock) until her menstrual period ends and then to wait until she has the next period and then it (the period) ends, whereupon, if he wishes to keep her, he can do so, and if he wishes to divorce her he can divorce her before having sexual intercourse with her. This is the prescribed period that Allah has fixed for (the) women (meant) to be divorced."*  
(Al-Bukhari and Muslim)

There is a common belief that divorce is permissible when the marital life between the spouses becomes impossible to continue and there is no door for reconciliation.

## Categories of Divorce According to the Five Rulings

There are five categories of divorce:

- 1- **Obligatory (*wajib*):** this is the divorce of those who make ila' with their wives and refuse to return to having intercourse with them. In addition to that is the divorce held by the two arbiters who are appointed to reconcile between the spouses when breach takes place between them but they think that divorce is the only outlet for them. It also applies to every divorce without which there would be unbearable harm usually on the part of the wife, or every divorce without which the spouse would commit sins.
- 2- **Offensive (*makruh*):** this applies to the divorce, which is done without a pressing necessity. Scholars say, concerning that kind of divorce, that it is forbidden for a husband to divorce his wife because he causes harm to her by such divorce. The prophet (pbuh) says,

*"There is no harm to be inflicted or reciprocated."*

Others say that it is permissible because the Prophet (pbuh) says,

*"Of all things permitted by law, divorce is the most hateful thing in the sight of Allah."*

In another version the Prophet says,

*"No permissible thing is more detested by Allah than divorce."*

(Narrated by Abu Dawud)

- 3- **Permissible (*mubah*):** when the wife has displeasing

qualities or morals.

4- **Recommended** (*mandub*): when the wife does not adhere to Allah's rights prescribed upon her such as prayers, etc, or when her husband expects her to be unchaste.

5- **Forbidden** (*mahzur*): when occurring during the woman's menstrual period or during an interval between a woman's menstruations in which the husband has had sexual intercourse with her. There is a scholarly consensus that forbids such divorce. It is called *bid`ah* divorce. This is because the man who divorces in this way contradicts Allah's injunctions and the Prophetic Sunnah concerning that matter. Allah the Almighty says,

﴿Divorce them at their prescribed periods.﴾

(At-Talaq:1)

The Prophet (pbuh) says,

*"If he wishes to keep her, he can do so, and if he wishes to divorce her he can divorce her before having sexual intercourse with her. This is the prescribed period that Allah has fixed for (the) women (meant) to be divorced."* (Al-Bukhari and Muslim)

## **Sunnah Divorce**

*Sunnah* divorce is to pronounce divorce according to Allah's command mentioned in the above mentioned verse and the Prophet's hadith. It is to make a pronouncement of divorce in an interval between menstruations in which no sexual intercourse with the wife has taken place. Then the husband can leave her until her prescribed `iddah has passed.



Commenting on Allah's saying ﴿Divorce them at their prescribed periods﴾, Ibn Mas'ud says, "In an interval between her menstruations without having sexual intercourse with her". Furthermore, the Prophet says, in the hadith mentioned above,

*"...and keep her (in his wedlock) until her menstrual period ends and then to wait until she has the next period and then it (the period) ends, whereupon, if he wishes to keep her, he can do so, and if he wishes to divorce her he can divorce her before having sexual intercourse with her. This is the prescribed period that Allah has fixed for (the) women (meant) to be divorced."* (Al-Bukhari and Muslim)

Ahmad says, "The *sunnah* divorce is to divorce her once, then to leave her until she menstruates thrice". This is also the position of Malik, Ash-Shafi'i and others. Abu Hanifah and Ath-Thawri hold that the *sunnah* divorce is to divorce her three times: one in each interval between her menstruations. They therefore, cite the above-mentioned hadith related by Ibn `Umar as evidence. An-Nasa'i narrates on the authority of `Abdullah, "The *sunnah* divorce is that a man divorces his wife once while she is in an interval between her menstruations in which no sexual intercourse with her has taken place, then he divorces her (once) after the next (the second) menstrual period comes and then ends, then he divorces her (once) after the next (the third) menstrual period comes and then ends, then she waits as a *`iddah*' for one menstrual period."

### ***Bid`ah* Divorce**

*Bid`ah* divorce consists of making a pronouncement of divorce during one of the woman's menstrual periods or during an interval between them in which they have had sexual

intercourse. There is a scholarly consensus that such a man is sinful and what he pronounced of divorce counts. This is because when Ibn `Umar divorced his wife while menstruating the Prophet (pbuh) ordered him to take her back. And, in another narration, Ibn `Umar said, "I said, 'O Messenger of Allah! If I had divorced her threefold, would it have then been permissible for me to take her back?' The Prophet (pbuh) answered, 'No, she would have been divorced irrevocably and you would have committed a sin'" (Narrated by Ad-Daruqutni)

Ibn Jubayr said that he asked Ibn `Umar "Is such a divorce counted?" Ibn `Umar said, "Yes, what do you think if someone becomes disable and foolish?"<sup>(1)</sup>

Thus, it is recommended for whoever divorces his wife while menstruating to take her back. Divorce in such a case does not count, as argued by the majority of scholars. Whenever one effects such a divorce, it is recommended to take the wife back, if he did not pronounce it in the full number of (three) times.

Neither *sunnah* nor prohibited innovation (*bid`ah*) refers to the divorce of a wife who is prepubescent, postmenopausal, pregnant, or one with whom one has not yet had sexual intercourse.

On the other hand, some early Muslim scholars are of the opinion that such a divorce does not count because the divorce mentioned in the verse, "*Divorce them at their prescribed periods*" applies only to the Sunnah divorce. The Prophet (pbuh) angrily ordered Ibn `Umar to take his wife back. He (pbuh) never got angry about lawful things.

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1. It means that out of foolishness somebody may divorce his wife while she is menstruating. Despite this, the divorce is counted. (Translator)

As a whole, the non-*sunnah* divorce is called *bid`ah* divorce (innovative divorce). The Prophet (pbuh) says, "*Every innovation is misguidance.*" Such a divorce also contradicts what is mentioned in Allah's Book and in the Prophet's hadith narrated by Ibn `Umar. Everything that is not in accordance with what Allah and His Messenger (pbuh) prescribed should be abandoned.

Narrated `A'ishah that the Prophet (pbuh) said,

*"Every deed which is not subjected to (the commands of) our religion is rejected."* (Narrated by Al-Bukhari and Muslim)

### **Threefold Divorce**

If one states the three pronouncements of divorce at the same time, for example he may say, "You are divorced three times", or "You are divorced" repeating it thrice, if one makes such a divorce during his woman's menstrual period or during an interval between menstruations in which they have had sexual intercourse, he will be doing two innovations:

1. Making a pronouncement of divorce during a prohibited period.
2. Stating the three pronouncements of divorce altogether.

We have elaborately discussed the first case. Now we are going to discuss in detail the second one.

Some scholars, including the four Imams, hold that such a divorce is counted as a threefold divorce regardless of the above restrictions. Some others say that it causes nothing, for it does not accord with Allah's shar`. Some other scholars say that if such a divorce occurs during the interval between menstruations

in which the spouses have had sexual intercourse, it counts as only one and he can take her back thereafter. This is the position of Ibn Taymiyah, Ibnul-Qayyim and others.

In his book *Al-Mughni*, Ibn Qudamah says that when a man has pronounced a threefold divorce, the divorced wife is prohibited for him to remarry until she has married another husband. There is no difference whether it is done before or after the consummation of the marriage. This is also the viewpoint of Ibn `Abbas, Ibn `Umar and other companions of the Prophet (pbuh) in addition to the majority of scholars.

On the other hand, `Ata', Tawus, and others say that whoever divorces a virgin thrice, the divorce is counted as only once". Tawus relates on the authority of Ibn `Abbas that threefold divorce was counted as only once during the lifetime of the Prophet (pbuh), Abu Bakr and two years of `Umar's caliphate" (Narrated by Abu Dawud)

Al-Athram reports that he asked Abu `Abdillah, "How could you justify the hadith narrated by Ibn `Abbas?". He said that the meaning of this hadith is that the people during the lifetime of the Prophet (pbuh) and Abu Bakr used to divorce only once, otherwise `Umar was not allowed to do what may be thought to be different from the common position held by the Prophet (pbuh) and Abu Bakr. Likewise, Ibn `Abbas could never narrate something from the Prophet (pbuh) and then contradict it.

Some scholars argue that divorce cannot be successive. Whatever number of divorces one pronounces, it counts as only one. This is the position of Ibn Abbas, Ibn Taymiyah and many others.

On the other hand, the majority of scholars refer to the following hadith to indicate that a single pronouncement can validly effect a threefold divorce. It is narrated that Rukanah divorced his wife Suhaymah irrevocably. He told the Prophet (pbhu) about it and said "By Allah, I did not intend it except as one time." The Prophet (pbuh) said, "*By Allah, you did not intend it except as one time?*" Rukanah said, "By Allah, I did not intend it except as one time." Thereupon the Prophet (pbuh) returned her to him. This hadith is transmitted by At-Tirmidhi and others but Imam Ahmad says that all its ways of transmission are weak.

Scholars have mentioned many hadiths to indicate that divorce can be successive. Yet, they are not as authentic as that which is narrated on the authority of Ibn `Abbas. It reads, "Threefold divorce was counted as only one during the lifetime of the Prophet (pbuh), Abu Bakr and the beginning of `Umar's caliphate. When the people started to pronounce divorce many times, `Umar then agreed".

Much has been said about the position of the *Shari`ah* concerning the threefold divorce. There still remains the linguistic approach that may clarify the argument. It is a well-known fact that the numerical modified noun means that such a noun was repeated as much as the mentioned number. For example, if one says, "I said that five times", this means that the number of his pronouncements were five. To illustrate this from the Qur'an, we may refer to the verse,

﴿ *The testimony of one of them is that he shall swear by GOD four times that he is truthful.* ﴾

(An-Noor: 6)

It is insufficient for anyone who wants to make *li`an* to say, "I testify that I am truthful four times." Rather he should repeat that statement four times. When we are required to make *tasbih* <sup>(1)</sup> thirty three times it does not only mean to say, "*Subhanal-lah* thirty three times", but to repeat it thirty three times.

Eventually, we can argue that if one says to his wife, "you are divorced three times", this divorce will count only as one. There is no disagreement concerning that kind of divorce, but some scholars differ concerning the case in where a man says three times to his wife, "You are divorced". This is what `Umar counted as a threefold divorce.

### **The Divorce of the Intoxicated and the Like**

Scholars unanimously agree that the divorce of an unconscious person because of some reason other than intoxication and the like is not effective. This is the opinion of the four Imams and others. They also agree that the word of divorce is not valid if said during sleep. The Prophet (pbuh) says,

*"(There are) three people who are not blamed (for their actions): the sleeping person until he wakes up, the child until he becomes mature and the crazy person until he becomes conscious".* (An authentic hadith narrated by Abu Dawud and others)

As long as a man is unconscious, no matter what the cause of unconsciousness is, his divorce is not valid. This is a unanimous viewpoint. If, however, he takes something like a narcotic while being aware of its nature and intends to deceive, then the ruling

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1. *Tasbih* is to say, "*Subhanal-lah*" meaning "Glory be to Allah".

of the intoxicated regarding divorce applies to him. This is the opinion of the followers of Ash-Shafi`i, but the followers of Abu Hanifah say that his divorce does not take place because he does not enjoy the drinking of this thing.

There are two reports about Ahmad concerning the divorce of the intoxicated:

**First**, his divorce is counted. This is also maintained by Al-Hasan, Malik, (one of two reports about) Ash-Shafi`i, Abu Hanifah and others. They authenticate it with the Prophetic hadith, "Every divorce is permissible (i.e. counted) except that of the idiotic person." Nevertheless, Ibn Hazm states that this hadith is very weak.

In the same connection, Ali, Mu`awiyah and Ibn `Abbas are reported to have held the same view. Ibn `Abbas said, "The divorce of the intoxicated is correct". The companions of the Prophet (pbuh) considered the intoxicated to be like the conscious person regarding the punishment of *qadhf* (slandorous accusation), as it is such a divorce made by a *mukallaf* who is not under coercion. He is regarded as a *mukallaf* because he will be executed if he kills somebody and his hand will be amputated if he steals something, so he is different from an insane person

**Secondly**, his divorce is not effective. This is also maintained by `Uthman, `Umar Ibn `Abdil `Aziz and others. Ibnul-Mundhir says that none of the companions disagreed with `Uthman about this. But to what extent is a man regarded as intoxicated? Scholars say that it is when he mixes his words irregularly and illogically and becomes unable to recognize

things and so on. This is because Allah the Almighty has indicated the removal of intoxication as when a man becomes able to understand all that he says. Allah says,

﴿O you who believe! Do not approach prayers while you are intoxicated, until you can understand all that you say.﴾

(An-Nisa': 43)

`Umar is reported to have said, "Let him recite the Qur'an or put his garment between other garments. If he recites the Qur'an or recognizes his garment, (then he is not intoxicated) otherwise apply the punishment to him". It is not considered a mark of intoxication that a man is not able to distinguish the sky from the earth or a man for a woman because these things are well known for the insane, so he is more expected to know them.

### **The Divorce of a Child**

Scholars agree that the divorce of an unconscious child is not effective, but the divorce of the child who is conscious of the meaning of divorce is counted, as argued by Ahmad, Al-Hasan and others.

In another report about Ahmad, Abu Talib says that the former maintains that his divorce is not legal until he reaches the age of maturity. This opinion is also held by Malik, Ath-Thawri, Abu `Ubayd and others. Abu `Ubayd adds that it was maintained by the people of Iraq and those of Hijaz. Ibn `Abbas is, moreover, reported to have opined this because the Prophet (pbuh) said,

*"A child is not blamed (for his actions) until he reaches maturity."*  
and because he is not *mukallaf*, so his divorce is not counted,



just like an insane person. Abul-Harith reports that Ahmad says that the divorce of a child is regarded, as long as he is aware of its meaning and nature and is between ten and twelve years of age. Sa'id Ibnul-Musayyab opines that his divorce is permissible if he performs all prayers properly and observes fasting in *Ramadan*.

The *madhhab* of those who say that the divorce of a child is permissible requires that he can also both be authorized to divorce instead of others and authorize others to divorce instead of him. The *madhhab* of Ahmad denotes that this is permissible on condition that the child is conscious of the nature of divorce as a whole. Nevertheless, Abu Bakr says that Ahmad maintains that he is not entitled to be authorized in divorce until he becomes mature. Abu Bakr himself holds this opinion too.

### **The Divorce of a Foolish Person**

Most people of knowledge, including Malik, Ash-Shafi'i and Abu Hanifah say that the divorce of a foolish person is correct. This is an opinion that is near to correctness because this person is *mukallaf* and has the right to handle divorce, so his divorce takes place like an intelligent person. To be under interdiction with regard to his property does not prevent a foolish person from managing affairs other than this property, like an insolvent person.

### **The Divorce of a Coerced Person**

Ahmad is reported to have opined that the divorce caused under coercion is not effective. This is also maintained by `Umar, `Ali, Ibn `Abbas, Malik, Ash-Shafi'i and others.

Abu Hanifah, Ath-Thawri and others hold that this divorce is correct, since it is a divorce that is caused by a *mukallaf* person in something which he has the right to manage, so it affects just as the divorce of a non-coerced person.

**Proof of the first opinion:** the Prophet (pbuh) says,

*"Indeed Allah does not blame my nation for (sins resulting from) mistaking and oblivion, and for what they do under coercion"* (Narrated by Ibn Majah)

ʿA'ishah (may Allah be pleased with her) reports, "I heard the Messenger of Allah (pbuh) as saying,

*"There is no divorce with closure"*. (Narrated by Abu Dawud, Ahmad and others)

Al- Qutaybi says, "Closure means coercion". This meaning also applies to the insane people. This opinion is considered to have been based on *ijma`* because no one disagreed about it with the companions in their time. Additionally, divorce caused under coercion is not to establish a correct ruling, just as the word of disbelief does not lead to a charge of disbelief if said under coercion.

### **When a Person is Regarded as Coerced**

A man is not regarded as coerced until he is tormented with something like beating, strangling and the like accompanied by threatening. By then, he is undoubtedly coerced. It is reported that when ʿAmmar was tormented by the polytheists of Makkah until they compelled him to say polytheist words, the Prophet (pbuh) said to him,

*“(These) polytheists captured you and made you to sink in water, and ordered you to set partners beside Allah, and you did so. If they take you again, then do what you did before.”* (Narrated by Abu Hafs)

If a man is threatened only, there are two opinions about it:

**First**, this is not coercion, for the coercion which involves permission is that which is referred to in the hadith speaking of `Ammar, so the ruling of coercion applies as long as tormenting is actually taking place.

**Secondly**, threatening means coercing even if it is not accompanied by tormenting, but there must be a fear of being killed or heinously beaten. This is the opinion of most scholars including Abu Hanifah and Ash-Shafi`i. They say that threatening creates coercion, and when a man is seriously threatened of murder and he pays no attention, he in fact throws himself into destruction, which is forbidden. In this regard, Sa`id narrates that a woman threatened her husband that she would cut a rope with which he was suspended if he did not divorce her three times simultaneously. When the man did this `Umar Ibnul-Khattab brought the woman back to his bond. It is obvious that this was a threat.

### **Conditions of Coercion**

Coercion is involved in three matters:

1. It must be done by someone who has a certain power such as a ruler or by a tyrant, such as a thief and the like. The hadith of `Ammar may be quoted here as well.
2. The man under coercion must be almost sure that the threat

will be implemented if he does not divorce.

3. The nature of the means of threatening must be of those things that cause much harm, such as killing, heinous beating, long imprisonment and the like.

Thus, if for example a man threatens another that he will take only a little amount of his money if he does not divorce his wife, this is not coercion. Interestingly enough, if a threat of light beating is directed to a certain person whose position does not stand such beating, as it may cause him vilification, then the ruling of a threat of severe beating with regard to others applies to him. Also, a threat of tormenting one's son is coercion, although the harm will not be directed to the man himself but to his son.

### **The Divorce of an Angry Person**

`A'ishah (may Allah be pleased with her) reports, "I heard the Prophet (pbuh) as saying, "*There is neither divorce nor emancipation with closure.*" (Narrated by Ahmad and others) Ahmad says that closure in the hadith means anger.

In his *sunan*, Abu Dawud says, "I think it is anger." Abu `Ubayd and others interpret it as coercion, and others interpret it as mania. Some scholars say it means that divorcing three times simultaneously is forbidden because then the gate will be closed for more divorces.

Imam Ibn Taymiyah says, "The true nature of closing is that a man's heart is closed, so that he becomes unaware of his speech, as he does not mean it, as if his intention and will have been locked up. The divorce of a coerced or an insane person is

involved here as well as the divorce of anyone who becomes unconscious by means of intoxication or anger, and everyone who is not in a case that enables him to intend or recognize."

Ibn Taymiyah, furthermore, divides anger into three types:

**First:** the anger, which totally removes recognition. The divorce of a person who is under such anger is unanimously incorrect.

**Secondly:** the anger that is still in its preliminaries, so that it does not prevent recognition. Here divorce affects.

**Thirdly:** the anger which is really great but not to such an extent that removes recognition as a whole, but stands between man and his intention, so that he regrets what he did when the anger has gone. This type is subjected to consideration.

## **Explicitly, Implicitly and Intention in Divorce**

Divorce does not take place except when it is verbally expressed. If a man intends it with his heart but without expression, most scholars including Ash-Shafi'i, Ahmad and Al-Hasan say that this is not effective.

Az-Zuhri says that if he has determined it, his wife is divorced. Ibn Sereen also asks, "Is it not that Allah knows that he has determined to divorce her?"

**Proof of the first opinion:** the Prophet (pbuh) says,

*"Indeed Allah does not blame my nation for (things resulting from) what they speak of in themselves as long as they do not express it verbally or through action."* (Narrated by An- Nasa'i and At-Tirmidi)

Additionally, this act leads to the removal of possession, which cannot occur with mere intention, as in selling.

If he intends divorce in his heart and gestures with his finger, it is not effective either because of what is mentioned above. The divorce, which is explicitly expressed with words takes place even without intention, but intention is required in the implicit divorce.

### **Explicit Divorce**

The explicit divorce may be handled with either of three words: divorce, separation, or setting free as well as every word derived from them. This is the *madhhab* of Ash-Shafi'i and Ahmad.

Abu Hanifah, Malik and Abu `Abdillah Ibn Hamid say that

explicit divorce affects only when it is expressed with the word "divorce" or its derivatives. Malik, however, says that divorce is counted with the words "separation and setting free" without intention. This is because manifest implicit expressions of divorce do not require intention in his *madhhab*.

**Analysis of the first opinion:** These words are mentioned in the Qur'an in the meaning of separation between the spouses, so they are as explicit as the word "divorce" itself. Allah the Almighty says,

﴿...then either stay together with honor or separate in kindness.﴾

(Al-Baqarah: 229)

He also says,

﴿...then come and I will make for your proven and set you free in kindness.﴾

(Al-Ahzab: 28)

The opinion of Abu Hanifah, Malik and Ibn Hamid is more correct, for explicit originally means that the word does not stand for any probability of other meanings except in a very far possibility. Yet, the words "separation and setting free", although mentioned in the Qur'an in the meaning of separation between the spouses, they themselves are mentioned in many places in the same Book (the Qur'an) for other denotations. To illustrate, we read, ﴿And adhere to the bond of GOD all together, and do not separate﴾ (Al `Imran: 103), meaning, "do not be divided". Therefore, it does not make sense that the word "separation" is specialized only for the separation caused by divorce.

Accordingly, if someone says to his wife, "You are divorced" she becomes divorced even without intention. However, if he says, "I have separated from you" those who regard this saying as explicit say that it has caused divorce even without intention, but those who do not consider it explicit say that it has caused divorce only if he intended it. If he says he meant that he separated from her only with his body or heart, his saying is accepted.

If he, when being about to say something in particular, says the word of divorce instead as a slip of the tongue, divorce does not take place. But if he presents this justification although he said this while being angry or after she had asked him for divorce, his saying is not accepted because divorce was explicitly expressed in addition to the situation that denoted it. So his justification contradicts reality from two aspects. If, however, this was not the case when saying these words, Jabir Ibn Zayd and others say that his justification is accepted.

Al-Qadi says that there are two reports about this, one of which is the above-mentioned and it is involved in the manifestation of Ahmad's opinion on this issue. The second report says that the justification of this man is not accepted, for it contradicts what is required in the issue according to custom. This report is attributed to Ash-Shafi'i.

If he says, "You are divorce<sup>(1)</sup>", Ahmad, Abu Hanifah and Malik opine that it causes divorce whether he intends it or not. The followers of Ash-Shafi'i are reported to have given two analyses:

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1. 1. This is not a slip of the typist. It is "divorce" as a noun, not "divorced".



1. It is not explicit because it is a noun.
2. "Divorce" is an explicit word that requires no intention.

### **Implicit Divorce**

If a husband says to his wife, while being angry, that she is free, or he slaps her saying that this is a token of divorce, then she becomes a divorcee.

This matter involves two points:

**First:** an implicit expression of divorce becomes direct only when the husband intends that it really expresses divorce. However, divorce never takes place without intention, nor does it happen by mere indication of a certain situation.

We do not know that any scholar opposes the idea that the saying "you <sup>(1)</sup> are free" is an implicit expression of divorce. But if he slaps her and says, "this is a token of your divorce." a large number of scholars hold that this is not an implicit expression of divorce, and it does not cause divorce, even if the husband intended it.

This is because this act does not denote the meaning of divorce, nor is it regarded as a cause or a ruling, so it is not, consequently, counted as a correct expression of divorce, just as in the case of the saying, "may Allah forgive you!"

Ibn Hamid says, " This causes divorce even without intention, since it means " I<sup>(2)</sup> have divorced you, and this slapping is for this". In this meaning, his words become explicit

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1. I.e. the wife.

2. I.e. the husband in the case mentioned above.

in expressing divorce. Al-Kharqi's belief may involve this ruling too. It is also possible that this causes divorce if he is angry, so that anger may be an alternative to intention, just as it is an alternative to it when he says, "you are free". Similarly, his slapping of her may stand also as an indication serving as an alternative to intention, for it happens as a result of anger, and so it is given the same ruling. The right opinion however is that it is an implicit expression of divorce, since it may have the meaning, which Ibn Hamid cites. Moreover, perhaps it means that the husband means that it is a cause of divorce because divorce depends on it; so it is correct that he expresses divorce with it. Yet, it is not an explicit expression, for it needs to be appraised. If it were explicit, it would not need this. After all, this act is not established in the Shari`ah or by Customary Law, and thus it is similar to implicit expressions.

**Secondly:** when the husband uses an implicit expression of divorce while being angry: Al-Kharqi says that divorce occurs in this case, but Al-Qadi , Abu Bakr and Abul-Khattab narrate two reports about this. The first report says that divorce takes place, and the second one says that it does not take place. The second report is attributed to Abu Hanifah and Ash-Shafi`i , but the former says that expressions such as, "start your *`iddah*", "choose", and "you now control your own affair", are given the same ruling we hold in the occurrence of divorce. They both prove it by saying that this is not an explicit expression of divorce, nor does it pinpoint it. So it cannot be regarded as a cause of divorce like that which takes place out of consent, and because the requisite of the word does not change by consent or anger.

Implicit expressions may not be used in matters other than the ones pertaining to separation save in rare cases, as in expressions such as, "you are free for the sake of Allah", "you can start your *`iddah`*", "you can do whatever you want", and suchlike. These expressions cause divorce in case of anger, and when answering a proposal of divorce without intention of divorcing. This is because anger and proposal of divorce are mere indications. Also, the same ruling applies to expressions used widely for purposes other than divorce, such as, "go", "get out", and "go out". These expressions do not cause divorce except with intention.

Abu Hanifah's notion is similar to this, but Ahmad and Al-Kharqi's words, which say that divorce takes place are said with regard to the husband's saying, "you are free" that is not normally used by a man with his wife but to implicitly express divorce. And, it is not necessary that this should mean divorce when said while angry without intention. This is because expressions that are widely used do not mean divorce with consent; this is the same with anger, for the husband is not originally prevented from using them in such a way that is customarily unusual. In addition, because such expressions are used in a tight scope for matters other than divorce, they are thought of to denote divorce by the mere mentioning. If we add to this that they are used immediately after the proposal of divorce or in case of anger, it becomes nearer to the mind that they mean divorce.

If implicit expressions are used when proposing divorce, then it will take the same ruling as their use while angry (involving the same details and differences).

## Implicit Expressions Causing Threefold Divorce

If a husband says to his wife, "you are not married any more", "you are free of marriage", "your case is irrevocable", "do whatever you want", or "go to your family", most reports narrate Imam Ahmad to have mentioned that he disliked giving *fatawas* concerning such expressions, but he tended to regard them as expressing threefold divorce. In *Al-Irshad*, Ibn Abi Musa narrates two reports about him:

**First:** they express threefold divorce.

**Secondly:** the husband's intention must be referred to. Abul-Khattab chooses the second opinion. It is also held by Ash-Shafi'i, who says he must reveal his intention; if he has intended nothing, only one divorce takes place. An-Nakh'i holds a similar belief but says that threefold divorce takes place, for the words require irrevocability not number. Hanbal narrated about Ahmad that which indicated this also; he said that he should increase her dowry if he wants to revoke the divorce. If it was threefold, he would not permit revocation; and if her divorce was irrevocable, he would not need to increase her dowry.

Ash-Shafi'i proves it with what Abu Dawud narrated that Rukanah Ibn `Abd Yazid divorced his wife, Suhaymah, irrevocably. He told the Prophet (pbuh) about this, and swore by Allah that he meant only one divorce. The Prophet (pbuh) brought her back to his bond. Rukanah divorced her for the second time in the era of `Umar, and for the third time in the era

of `Uthman. `Ali Ibn Muhammad at-Tanafisi says, "How honorable this hadith is!" This is also because the Prophet (pbuh) said to Bint al-Jawn, " *Go to your family*"; and he (pbuh) was never to divorce three times at one and the same time, as he himself forbade it. It is also because an implicit expression combined with intention is considered to be explicit. So, when it is said in an absolute manner, as when he says, "you are divorced", only one time of divorce takes place.

Ath-Thawri and the followers of Abu Hanifah say, "If he intends to divorce her three times in one word, then three times are counted, and if he intends they are two or one, only one time, not two, takes place, for implicit expressions require irrevocability not number. In addition, irrevocability is of two types: minor and major. The minor irrevocability requires one time of divorce, whereas the major one requires three times. Thus, if we count them as two, it means we apply the requisite of number, a ruling that is not to be a requisite of it."

Rabi`ah and Malik say, "Three times are counted here, even if he does not intend it except when applying *Khul`* or before the consummation of marriage. This is because in such cases only one time takes place, for it then requires irrevocability, and irrevocability is applied in *khul`* and before the consummation of marriage with one time of divorce. Nothing more is counted because the word itself does not require increase in number. In cases other than these two cases, three times are counted, for irrevocability then does not apply except with them. Besides, the companions of the Prophet (pbuh) hold this ruling, as narrated about `Ali, Ibn` Umar, and Zayd Ibn Thabit. Ahmad says that it is authenticated that `Ali and Ibn `Umar hold it in the cases in

which the husband says to his wife, " you are not married any more", "you are free of marriage", or "your case is irrevocable."

ʿAli, Al-Hasan and Az-Zuhri say that expressions meaning irrevocability cause threefold divorce. An-Najad narrates, with his own transmission, that Nafi` reported that a man came to ʿAsim and Ibnuz-Zubayr and said, " This man has divorced his wife irrevocably before consummation. Do you know if there is a legal excuse for him?" Both of them said, " No, but we have left Ibn ʿAbbas and Abu Hurayrah at ʿA'ishah's house, so go and ask them and then come back to tell us (what they will say about it). When he asked them. Abu Hurayrah said, " She shall not be lawful to him until she marries another spouse." And Ibn ʿAbbas said that it was a threefold divorce. ʿA'ishah was also reported to have held their opinion.

An-Najad narrates, with his own transmission, that ʿUmar (may Allah be pleased with him) made the expressions meaning irrevocability to cause one divorce, then he made it three later. There is no difference among the companions concerning the point, so that it is considered a consensus. Moreover, because the husband divorced his wife during wartime that required irrevocability, the ruling should have been that divorce be irrevocable, just as if he divorced her three times or intended to make it three. The requisite of irrevocability is manifest in his saying, "your case is irrevocable" or "it is irrevocable", for irrevocability is an inevitable word. This is why it is used to express threefold divorce. Refa`ah's wife says, "Refa`ah divorced me using irrevocability." There is no way to irrevocability without three times of divorce, for the word " irrevocability" requires this, as the Shari`ah considers only requisites of words. One time of divorce cannot establish irrevocability, as this does not happen with even explicit

expressions, while the expression used in this case is implicit. Meanwhile, jurists do not differentiate between the wife whose marriage is completed (with consummation) and wives of other cases. This is because the companions did not do that, and because every word establishing three divorces, as in "you are divorced three times", in the case of the wife whose marriage is completed also establishes the same divorce with other cases.

However, concerning the hadith reported by Rukanah, Ahmad says that its transmission is weak, so he neglects it. As for the Prophet's saying to Bint Al-Jawn, "*Go to your family*", it indicates that this expression does not require three divorces. Furthermore, it is not one of the expressions that the companions judge as establishing three divorces, nor does it resemble them, so its ruling applies only to the expressions pinpointed in their judgments.

### **Categories of Implicit Expressions**

Implicit expressions of divorce are of three categories:

**First category:** manifest implicit expressions, and it has six forms, namely, "you are not married any more", "you are free of marriage", "your case is irrevocable", "your case is absolutely decided", "you are out of marriage", and "you control your own affairs".

The ruling concerning them has been already clarified in this chapter. Also, if the husband says, "you are irrevocably - or decisively - divorced", the same ruling applies, and it needs intention because explicit divorce is involved. Nevertheless, if he says, "you are divorced, and I do not have the right to revoke

it", after the consummation of marriage, three divorces are counted. Ahmad says that if he says to his wife, "you are irrevocably divorced", three divorces take place, just as in the cases of the wives receiving the words, " you are not married any more" and "you are free of marriage". Abu Hanifah also maintains this. And, if the husband says, " you are divorced and I will not revoke it", the same ruling applies, but the followers of Abu Hanifah say this causes revocable divorce because he does not describe the divorce but only uses conjunction<sup>(1)</sup>.

If he says, "you are divorced one irrevocable time - or one decisive time", there are three reports about it:

**First:** it causes one irrevocable divorce, and what is after it is cancelled, for he describes the divorce with something that is not in it, so the description is consequently cancelled, as if he said, "you are divorced for a divorce that does not apply to you". This is the *madhhab* of Ash-Shafi`i.

**Secondly:** it causes three divorces, for he said that which requires these three, so they are counted as three and his saying of one is cancelled, as if he said, "you are divorced for one three times." This is the saying of Ahmad.

**Thirdly:** (narrated by Hanbal about Ahmad) If man divorces his wife decisively, her affair comes to her hand, and he must increase her dowry if he wants to have her back. This indicates that he divorced her for one irrevocable divorce, as he makes her affair in her hand. If it was revocable, her affair would not be in her hand, nor would she need the increase in her dowry. In addition, if it was counted as three, it would not be lawful for

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1. With the underlined "and".



him to have her back.

**Second category:** this category has two types:

**First type:** implicit expressions cited in books of Fiqh. They are, "go to your family", "do whatever you want", "I have nothing to do with you", "you cause restriction for me", "you are prohibited to me", "go and get married if you want ", "cover your hair", "you are free", and "I have set you free". There are two reports about Ahmad concerning this point: first: these cause three divorces. Second: he must reveal his intention; if he has intended nothing, one divorce takes place, like all implicit expressions.

**Second type:** expressions relying on those cited in books of Fiqh by means of analogy. They are, "check if you are pregnant", "you are lawful for a new husband", "have a mask", and "I have no power over you". These have the same meaning of the first type, so they take the same ruling. Yet the correct ruling as regards "go to your family" is that it causes one divorce; it cannot cause three except with intention because the Prophet (pbuh) said to Bint Al-Jawn, "*Go to your family*" (Narrated by Al-Bukhari and Muslim). There is no way that the Prophet (pbuh) ever divorced three times simultaneously, while he forbade his nation to do so.

The sayings, "start your *`iddah*" and "check if you are pregnant" are not specific for three either, for they are for one as well as for three. Abu Hurayrah reports the Prophet (pbuh) to have said to Sawdah Bint Zam`ah, "*Start your `iddah*" and made it one divorce. Hashim also reports that Na`im Ibn Dujajah Al-Asdi divorced his wife twice. Then he said, "she causes

restriction for me". When Na'im wrote to `Umar Ibnul-Khattab about it he said, "Really, it is not the lightest among them."

As for all expressions, if we say they are manifest, it will be because their meaning is the same as the manifest expressions. This is because his sayings, "I have nothing to do with you", and "I have no power over you" apply only in case of irrevocability but he has power over and something to do with the woman whom he has the right to revoke her divorce. His saying, "you are free" or "I have set you free" requires removal of slavery, which is marriage here. His saying, "you are prohibited" requires irrevocability, for revocability does not cause prohibition. This also applies to "you are lawful for a new husband because your case is irrevocable" as well as to the other expressions. If we say they cause one divorce, this will be because it is possible, for his saying, "you are lawful for another husband" means after your *`iddah* has finished, as she cannot be lawful before this, and one divorce makes her lawful. The meaning of the expression "let anyone you want marry you" as well as all other expressions apply after her *`iddah* has finished.

**Third category:** hidden implicit expressions, such as "get out", "go", "choose", and every expression indicating separation and giving the meaning of divorce except the ones pinpointed above. These expressions cause one, two or three divorces according to his intention. In addition, they cause one divorce if he makes them absolute. Ahmad holds the same ruling, but Ash-Shafi'i says that if it is cited that he must reveal his intention, this will be applied to all implicit expressions.

Abu Hanifah says these do not cause two divorces, and if he intends them, only one takes place. If he says, "you are one" it

will be a hidden implicit expression and it will cause only one even if he intends three, for it does not stand except for one divorce. Furthermore, if he says, "may Allah make you independent!" it will also be a hidden implicit expression, as it is possible that he means the meaning of the verse reading,

﴿And if the spouses do separate, then GOD will make each one of them independent of the other by His vast resources.﴾

(An-Nisa': 130)

According to the manifestation of Ahmad's *madhhab* and the opinion of Ash-Shafi'i, divorce caused by implicit expressions is revocable unless three divorces are counted. Abu Hanifah says they all cause irrevocability except "start your `iddah", "check if you are pregnant", and "you are one". This is because they all require irrevocability as "you are divorced for three times".

### **Expressions not Causing Divorce**

Expressions such as, "sit down", "stand up", "eat", and suchlike expressions that do not indicate divorce or separation are not regarded as implicit expressions of divorce, nor do they cause it, even if he intends to divorce. This is because their words do not stand for this meaning. Abu Hanifah and the followers of Ahmad maintain this. The followers of Ash-Shafi'i, however, differ concerning the saying "eat and drink" whether it is implicit or not.

If he says to her, "I am your divorcee" or makes her control her own affairs and she says, "you are divorced", Ahmad, Ibn `Abbas and others say that this does not cause divorce. Malik, Ash-Shafi'i and others say that this causes divorce if he intends it, for divorce means removal of marriage, which is joined

between both of them. If it is valid for one of them, then it is valid for the other too. After all, there is no difference that this does not cause divorce without intention.

## **Intention in Explicit Divorce**

Explicit divorce does not need intention. Rather, it takes place without purpose. There is no difference concerning this. This is because direct words in matters such as divorce and selling are sufficient without intention, whether they are said out of seriousness or otherwise. The Prophet (pbuh) says,

*"(There are) three (things) whose seriousness is serious and (whose) jesting is serious (too)<sup>(1)</sup>. (They are) marriage, divorce and revocation (of divorce)."*(Narrated by Abu Dawud and At-Tirmidhi, and the latter added that it is a sound hadith.)

Ibnul-Mundhir states that all scholars unanimously agree upon this. He also says that jurists, who consider words indicating "separation" and the like to be explicit, say they cause divorce without intention. On the other hand, jurists, who do not regard them as explicit, say they do not cause divorce except with intention, and they will then be on the footing of hidden implicit expressions.

If a non-Arab man says to his wife in Arabic, "anti taliq" meaning "you are divorced" while he does not understand it, it does not cause divorce, for he has not meant it. His case is like the case of the one who divorces by coercion.

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1. It means that their result is always the same, whether they are taken seriously or with jesting. (Translator)

## **Matters Pertaining to Divorce**

If someone asks a man, "do you have a woman?" and he says, "no", meaning to lie, nothing is imposed upon him. If he says, "I divorced her," meaning to lie, divorce takes place.

The four Imams and others hold that nothing is imposed on him in the first saying because it is an implicit expression that requires intention for divorce. If he intends divorce, she is divorced, for it becomes an implicit expression connected with intention. Abu Yusuf and Muhammad say that she is not divorced because this is not an implicit expression. Rather, it is a statement based on lying.

If someone asks him, "Did you divorce your woman?" and he answers with "yes", Ash-Shafi`i, Al-Mazni and the followers of Ahmad hold that she is divorced by this, for "yes" here is an explicit answer that refers to his agreement to divorce. Nevertheless, if he repeats it only to tell someone about it, it does not cause a new divorce, even if he lies to him. Abu Bakr chooses that he should bear responsibility for what he confesses.

If he dedicates his wife to her family and they accept the dedication, one divorce takes place, and he can have her back if he has consummated the marriage with her. If they do not accept it, nothing occurs. Ahmad, Malik, Ibn Mas`ud and others hold this, but `Ali Ibn Abi Talib and An-Nakh`i say that if they accept the dedication, one irrevocable divorce takes place, otherwise one revocable divorce takes place.

## **Putting Divorce in the Hand of One's Wife**

The husband has the right to choose whether he wants to divorce by himself or to authorize someone to do it for him or to commit it to the wife herself, making it to her choice. Its proof is that the Prophet (pbuh) asked his wives if they chose him, and they did. Whenever a man puts the affair of his wife in her hand it is still in her hand with no restriction to the sitting<sup>(1)</sup>. Ahmad, `Ali Ibn Abi Talib, and others are reported to have maintained this. Malik, Ash-Shafi`i, and Abu Hanifah say this is restricted to the sitting, and she has no right in divorce after leaving it, for it is the granting of choice to her, so it is restricted to the sitting, as his saying, "choose".

**Proof of the first opinion:** `Ali ibn Abi Talib said in the case of a man who put the affair of his wife in her hand, "It is her right until she revokes it." This is regarded as ijma` because we do not know any companion who differed about it, and because it is some kind of authorization in divorce. But, if the husband revokes his authorization, Ahmad and others say it becomes invalid.

Malik, Abu Hanifah and others say he has no right to revoke it because it is a kind of giving possession and it is like the case if he divorces her.

**Proof of the first opinion:** this is authorization, so he can revoke it as in selling, and as if he concludes it with a strange person. As for their saying that it is a kind of giving possession, it is not correct, for divorce is not to be given in possession, nor

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1. i.e. the sitting at which this giving of the right of choosing happens.

is it to be transferred from the husband. It is only that someone may do it for him in the form of mere authorization. Even if it is endorsed to be a kind of giving possession, this can also be revoked before agreement is connected, as in selling.

Most scholars, including Ash-Shafi`i, Ahmad and others say that if she revokes the matter authorized to her, authorization becomes invalid and causes nothing to occur. Qatadah, however, says this causes one revocable divorce.

**Proof of the first opinion:** this is an authorization revoked by the authorized person or it is an unaccepted giving of possession, so it does not cause anything, just as in the case of all forms of authorization and giving of possession. Nevertheless, if he intends to divorce her with it immediately, divorce takes place immediately, and he will not then need her agreement, as if he says, "do whatever you want".

If the woman who is given possession or the right of choice says, "I choose myself", Ibn `Abbas and others are reported to have said that this causes one revocable divorce. Ahmad, Ash-Shafi`i, and others hold the same opinion.

`Ali is reported to have said it causes one irrevocable divorce; Abu Hanifah also holds this. This is because his putting her affair in her hand, requires that he no longer has power over her, and if she accepts this with her own choice, it becomes obligatory that he has no power over her: this does not take place with the continuation of revocability.

Zayd Ibn Thabit is reported to have said that it causes three divorces. Malik and others say the same, but Malik adds that if he did not consummate the marriage with her, it is acceptable

that it causes one or two divorces if he intends this. They prove it by saying that this requires that he has no more power over her and this does not happen except with three divorces.

**Proof of the first opinion:** he does not divorce her with a word indicating three, nor does she intend this, so it does not cause three divorces, as if the husband uses a hidden implicit expression. This takes place if she does not intend more than one, otherwise what she intends will be counted, for she has the right to get divorced explicitly, so she has it implicitly, just as the husband does. When she uses any implicit expression, the ruling concerning it as pertaining to the husband applies to her expressions as well.

Ahmad says that if he says to her, "your affair is in your hand" and she says, "let him not enter to me except with my permission" she must reveal her intention; if she says she has intended one divorce, then one divorce takes place. If she says she wanted to enrage him, nothing occurs. Similarly, if he puts her affair in the hand of a strange person and the latter uses these implicit expressions, nothing takes place until the agent intends to divorce. In addition, if he divorces with an explicit word indicating three, or with a manifest implicit expression, three divorces are counted. Even when he uses a hidden implicit expression, that which he intends will take place.

Abu Hanifah, Ash-Shafi`i and Ahmad say that his sayings, "your affair is in your hand" and "choose yourself" are implicit expressions if said by the husband and they need intention or indication of condition like all implicit expressions. If these two are not available, no divorce takes place, for this is not explicit, but rather implicit.



Malik says it does not require intention. for it is one of the manifest implicit expressions.

It is also an implicit expression for the woman if she accepts it with its implicit word. Ahmad and Ash-Shafi`i maintain this too.

Abu Hanifah says that the occurrence of divorce does not require her intention if the husband already intends. This is because he thus commits divorce to an action that she does, so it does not need her intention, as if he says, " if you speak, you are divorced" and she speaks. He also says that only one irrevocable divorce takes place, even if she intends three, for this is the granting of choice, and the number does not enter the granting of choice, just as the granting of choice of the bondwoman who is being set free

**.Proof of the first opinion:** she causes divorce with an implicit expression, so it needs her intention like the husband. Moreover, three divorces take place if she intends it when using a word that stands for three. Therefore, if both of them intend it, it takes place, like his saying, "your case is irrevocable".

If she divorces herself for three divorces and he says that he has given her the right to one divorce only, his saying is not considered, and her judgment applies. `Ali and other companions and Ahmad and other scholars hold this opinion. `Umar, Malik, Ash-Shafi`i and others say that one divorce takes place. Ash-Shafi`i says that if he intends three, she has right to three divorces, but if he intends something else she is not divorced three times, and the number is committed to his intention.

Ahmad is reported to have said that if he intends one, so it is one, for it is a kind of granting of choice in which his intention must be revealed, as in his saying to her, "choose".

**Proof of the first opinion:** this is such a word that which requires generality in all her affairs, and it involves the three divorces. Moreover, his saying that he wanted only one divorce is not accepted, for it contradicts the requisite of the word used. Meanwhile, he has no right to say this because this is one of the manifest implicit expressions, and these require three divorces.

### **Putting Divorce in the Hands of Strangers**

It is legal that a man puts the affairs of his wife in the hands of a strange person, and its ruling is the same as if he puts it in her hand, that it is in his hand at and after the sitting as Ahmad states. Ash-Shafi'i agrees with this in regard to this strange person, for it is authorization, and whether the husband says to him, "the affair of my woman is in your hands", "I give you the right of choice in my woman's divorce", or "divorce my woman".

The companions of Abu Hanifah say this is restricted to the sitting, for it is a kind of granting of choice that is similar to the case if he says to her, 'choose'.

**Proof of the first opinion:** this is absolute authorization, and so it is like an authorization in selling. If he ascertains this, he will be able to divorce her unless the husband cancels it or copulates with her. He can also divorce for one or three divorces like the woman.

It is not lawful for the husband to put his woman's affair but in the hand of a person who is qualified for authorization. He

must be sane, but the child and the maniac are not to be authorized. If he authorizes them, and one of them divorces, his divorce is not valid. However, Abu Hanifah says that their divorce is valid.

### **Swearing in Divorce**

If the husband says, "You are divorced. I will surely stand up"<sup>(1)</sup> and then he stands up, most scholars, including Al-Hasan, Abu Hanifah, Ahmad and others say that this does not cause divorce. Yet, if he does not stand up at the time he appoints, he then breaks his oath.

Shurayh says that this causes divorce, even if he stands up, for this is a divorce that is not committed to a stipulation, so it takes place as if he does not stand up.

**Proof of the first opinion:** this is an oath, which he keeps by standing up, as if he swears by Allah the Almighty. If he says, "You are divorced. Your brother is sane"<sup>(2)</sup> and her brother is sane, he then does not break his oath. If, however, the brother is insane, he breaks his oath, as if he says, "By Allah, your brother is surely sane". If they doubt his sanity, no divorce takes place because the base here is continuation of marriage, which does not collapse by mere doubt.

### **Divorcing Using Gestures or writing**

Divorce does not occur with something other than explicit or implicit words except in two situations:

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1. The saying between brackets is a literal translation of an Arabic saying that some people used to denote the use of divorce as an oath. (Translator)
  2. The style of this saying is similar to that of the saying referred to in the previous footnote.(Translator)

**First:** when the person concerned is unable to speak, such as the mute: the four Imams hold that the divorce made by this person with gesturing takes place. Because there is no other way but gesturing, it stands as words without intention as in marriage. As for the person who is able to speak, it is not valid that he divorces with gesturing, just as he cannot get married with it. When gesturing to denote divorce, if the mute man gestures with three fingers, threefold divorce takes place, for his gesture stands as the speech of the one who is able to speak.

**Secondly:** when he writes divorce down: if he intends divorce, Abu Hanifah, Malik, Ahmad and others say that the divorce takes place. Ash-Shafi`i also is cited to have said the same, but some of his companions say that he has another saying in which he holds that divorce does not take place even if he intends it. This is because this is such an action, which is handled by someone who is able to divorce, so divorce does not take place with it like gesturing.

**Proof of the first opinion:** people can understand divorce with written words. Therefore, if he uses writing in a way that can be understood, with the intention of divorcing, divorce takes place. Moreover, writing stands as the saying of the writer. To prove, when Allah the Almighty commanded the Prophet (pbuh) to deliver the message he did that orally, and with writing to kings. Similarly, the judgment written by the judge stands as his spoken judgement in proving people's rights.

If he writes this without intention, there are two reports about this presumption:

**First:** Ash-Shu`abi, Al-Hakam and others say that divorce takes place because of the reasons pinpointed above.

**Secondly:** Abu Hanifah, Malik, and Ash-Shafi'i, as cited about him, say that divorce does not take place except with intention. This is because writing is probable, as he may intend, for example, to try a pen with it, so divorce does not take place here without intention, as in the case of implicit expressions of divorce. However, if he intends only to try the pen, it does not take place because if he intends with spoken words something other than divorce, the latter does not take place; writing is closer to this regard.

If he writes a letter to his wife saying at the beginning, "you are divorced", divorce takes place immediately whether she has received the letter or not, and her *`iddah'* starts from the moment he writes this.

If he writes to her, "if you receive my letter, you are divorced", divorce takes place when she receives it, but if it does not reach her, no divorce takes place because the stipulation has not occurred.

A letter stating divorce does not come into effect except with the testimony of two reliable witnesses, who testify that it is his letter. This is the case with all written documents proving rights. The manifest indication of Ahmad's saying concerning this is that their testimony before her proves it even if they do not testify it before the judge. This is because it affects her right in the *`iddah'* and the permissibility of her getting married after it terminates. This is something that is connected only to her, so it is sufficient that she only hears the testimony.

If two witnesses testify that this is the handwriting of so-and-so, their testimony is not acceptable, for handwriting

may subject to forgery.

Some scholars say that the testimony of the two witnesses is not to be valid until they see him writing and then they do not lose him until they testify to it. This is the *madhhab* of Ash-Shafi`i. The correct ruling however is that this is not necessary, for it is not so in the document written by the judge; this is closer.

### **Conditioning Divorce by Allah's Will**

If man says to his wife, "you are divorced if Allah wills" the Shafi`is say there is nothing imposed on him because of it. Abu Hanifah, the Hanbalis and others hold the same opinion.

Ahmad and others say this exception affects divorce.

#### **Proof of the first opinion:**

Abu Dawud and others report the Prophet, on the authority of Ibn `Umar, to have said, "Whoever swears an oath and (then) says, "if Allah wills" there is no sin on him (if he breaks his oath)." Here there is no differentiation between swearing for divorce or anything else. Whenever a man conditions a divorce by Allah's will, it does not take place because Allah's will is not to be known in this way. Furthermore, if he says, "you are divorced if Allah does not will", divorce does not take place either, for we cannot know if He does not will, just as we cannot know if He wills.

If he said, "you are divorced unless Allah wills" there are two viewpoints regarding it:

**First:** divorce does not take place because he makes it contingent on Allah's will, as if he says, "if He wills".

**Secondly:** divorce takes place because he in fact causes it, and he only makes its non-occurrence contingent on Allah's will<sup>(1)</sup>, which is not to be known, so non-occurrence becomes invalid and divorce ascertained.

### **Conditions of the Validity of Exception**

To be valid, the exception must be connected with the speech because this is what is customarily ordained as regards exception. If something like tightness of breath disconnects it, it is considered to be connected, for it is because of an excuse. One of the Early Muslims reports that if exception were to be permissible with disconnection, no one would commit sin by breaking his oath, nor would he need to expiate.

Scholars differ concerning connection. Malik, Ash-Shafi'i, Al-'Awza'i and the majority say it means that his saying, "if Allah wills" is connected with the oath without silence between them. They add that the silence caused by breathing does not cause harm. Al-Hasan and others say that he can use exception unless he leaves his sitting.

### **Conditional Divorce**

If a man conditions his wife's divorce by something that is not impossible, divorce does not take place before this thing exists. This is whether the thing stipulated undoubtedly exists, as, "you are divorced if the sun rises" or its existence is probable, as, "you are divorced if so-and-so comes back from

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1. According to this interpretation, the expression mentioned above will be as if he said, "you are divorced unless Allah wills the non-occurrence of your divorce."  
(Translator)

travel". This is the *madhhab* of the Shafi`is. Abu Hanifah, Ahmad and others hold it too.

Malik and others say that if he makes her divorce dependent on something that undoubtedly exists, divorce takes place immediately before its existence.

**Proof of the first opinion:** the Prophet (pbuh) says,

*"Believers fulfil their stipulations."*

Moreover, he makes it contingent on a possible stipulation, so divorce does not take place before the fulfillment of the stipulation, as if he makes it dependent on the return of a traveler. If he makes it dependent on an impossible stipulation, some scholars say divorce takes place immediately, and some others say it does not.

### **Selected Forms of "Conditional Divorce"**

If the husband says, "you are divorced if so-and- so comes" and this so-and-so comes when she is in the case of the Sunnah, a *sunnah* divorce takes place. If however he comes when she is in the case of the *bid`ah*, *bid`ah* divorce takes place, but this is not a sin for him because he does not mean it.<sup>(1)</sup>

If he says to her, "you are divorced if you menstruate one time" when she is not in her menstruation period, divorce does not take place until she menstruates and then the period terminates, for he says, "one time" and this does not happen except with the termination of the period. If however she is in her menstruation period, divorce does not take place until the

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1. *Sunnah* divorce and *bid`ah* divorce are explained in this chapter under titles bearing the same names.



period terminates, then another period comes and terminates, and divorce will be a reason because it takes place with the beginning of the termination.

If he says, "you are divorced if you see blood" and she menstruates, divorce takes place. If he says that he meant blood other than that which she had seen, his saying is not acceptable in the judgment, for he claims something contradicting the manifest condition. If however something wounds her and causes bloodshed, divorce does not take place according to manifestation, for bloodshed here is not connected to menstruation.

If he says to a girl under maturity, "you are divorced if you menstruate," divorce does not take place until she menstruates. If he says to her, "you are divorced if your menstruation period terminates" divorce does not take place until she sees no blood after menstruation. This is because the true nature of absolute termination is termination after menstruation.

If he says to the woman who does not menstruate, "you are divorced if you menstruate" divorce does not take place because the description is non-existent. If he moreover says to her, "you are divorced if your menstruation period terminates" divorce does not take place either, for the true nature of this is that there must be termination after menstruation: the thing that she does not originally have.

Everything we have stated in this discussion is agreed upon among the jurists save two cases:

**First:** the making of divorce contingent on her menstruation, for if it appears that the blood is not of menses

because of its stop before the minimum expected period of stopping, it then becomes clear that divorce does not take place. Ahmad, the Hanafis and Ath-Thawri hold this belief.

Ibnul-Mundhir says, " Only Malik maintains other than this. Ibnul-Qasim reports him to have said that the husband commits a sin by saying this.

**Secondly:** the husband's saying to his menstruating wife, "you are divorced if your menstruation period terminates". When he says this, divorce takes place at the beginning of the termination, meaning with the end of menstrual blood before taking a bath. Ahmad is also cited to have said this."(*Al-Majmu`*, vol. 17)

## **Conditioning Divorce by a Time or an Act**

If a man conditions the divorce of his wife by a definite time or act, divorce will become binding only when that time falls due or when that act occurs. This is the opinion of Ibn `Abbas, Ash Shafi`i, the Hanafis, the Hanbalis and others.

However, Sa`id Ibnul-Musayyab, Al-Hasan, Malik and others are of the opinion that if a husband conditions the divorce of his wife by an act which will inevitably take place, such as sunrise, divorce will become obligatory on the spot. For, marriage must not be limited to a definite time.

**Proof of the first opinion:** Ibn `Abbas says about the man who says to his wife: "You are divorced in the beginning of the new year" that he can enjoy his wife up to the beginning of the new year.

The scholars of this opinion also quote Abu Dharr's words, "The slave shepherd who looks after my herd of camels will be free at the end of the year." Likewise, the conditional divorce is correlated with a situation that has not occurred yet, e.g. when a man says to his wife, "You are divorced as soon as the pilgrims return home". So, this dating does not restrict the period of marriage, but it rather times divorce. In other words, marriage cannot be confined to a limited time, but divorce can be.

If a man says to his wife, "you are divorced up to the month of such and such", it is as if he says, "In the month of such and such". In this case, divorce is not effected except with the beginning of the determined time. This view is approved of by Ash-Shafi`i and the Hanbalis. However Abu Hanifah admits that divorce, then, takes place at the moment, for a husband's

saying to his wife "You are divorced" results in divorce instantly. And his saying: "up to the month of such and such" is viewed as a kind of dating and termination, while marriage must not be limited to a term. So, it is cancelled and divorce takes place.

**Proof of the first opinion:** The scholars of this notion form their opinion depending upon the previously mentioned statements related by Ibn `Abbas and Abu Dharr. Besides, such dating refers to the time of effecting divorce, e.g. when a man says, "I will leave in a year", i.e. after a year. Moreover, if the statement is likely to give a double meaning, then divorce must not be caused by doubt. In a word, the argument to this point is outlined in two main items:

- a) Such dating determines the end of the time of divorce, whereas the latter is not to be determined with an end.
- b) Certainty, which is the base of our opinion is given preference over doubt, which is the means of theirs.

If the husband says, "I intended that she is divorced simultaneously, up to the year of such and such" divorce becomes binding on the spot, for he bound himself to an obligation whose significance can be perceived from the context.

If a husband says to his wife: "You are divorced as soon as I see the new moon", she will be divorced once at the beginning of the lunar month. That is the view of Ash-Shafi`i and the Hanbalis.

However Abu Hanifah says, "The wife in this case will not be divorced unless he surveys the new moon by himself, as if he

stipulated divorce on the sight of a certain person.

**Proof of the first opinion:** The examination of the new moon legally means to have certain knowledge of the beginning of the new lunar month. The Prophet Muhammad (pbuh) says,

*“Observe fasting when you see the new moon, and (like-wise) break your fast when you see it (in the following month)”.*

Hence, this prophetic tradition refers to the fact that seeing the new moon by some people is binding on all people to follow, and the individual survey is not a must.

### **Denying the effectiveness of divorce**

If a woman claims that her husband has divorced her, while he denies, or that he has divorced her threefold, while he confesses only one or two, and there is no plain testimony, the statement of the husband along with his oath will be given priority.

The Prophet Muhammad (pbuh) is quoted as saying,

*"The claimant must serve a testimony, and the defendant must be put to oath".*

The continuity of marital life and the admission of the minimum number of divorces are given preference. This is the view of Imam Ahmad and his followers.

The author of *Al-Mughni* states: "In case of disagreement about the number of times in which divorce has taken place, the husband's statement is taken for granted. However, if it comes to the wife's knowledge, or it is proved to her via two reliable

witnesses that he has divorced her threefold, it will not be lawful to her to have any kind of intercourse with him, and she must resist him as much as possible, and she may make *khul'* with him if possible".

Ahmad, Abu Hanifah and others maintain that she must not give him herself. Rather, she must flee away from him.

Imam Malik says, "She should not get adorned for him nor should she show herself before him, letting him not have her except unwillingly."

Al-Hasan, Az-Zuhri and Al-Nakh`i comment: "He must be sworn in. Then, (if he is a liar), he will be sinful".

### **Authorizing a Child, an Insane Person, or a Disbeliever in Divorce**

It is not lawful to entrust anyone with the execution of divorce except he whom is legally authorized to be in charge of proxies, namely, a sane man. Concerning the child and the insane person, it is not legal to authorize them to exercise divorce. However, if they do, their action will have no validity. Notwithstanding, some scholars consider it to be effective.

**Proof of the first opinion:** The child and the insane person have no reasonable discretion.

Nevertheless, a disbeliever is allowed to be authorized because he is entitled to exercise divorce on his own wife. Moreover, a woman can be deputized with regard to divorce because she was allowed to set free slaves instead of others. However, the male child's proxy to effect divorce on someone's

wife depends upon his ability to exercise divorce on his own wife. In addition, it is illegal to transfer the right to effect divorce to a female child until she reaches maturity. Anyway, if such people are given the power to exercise divorce on themselves, their resolution will be of no effect.

It is permissible for a man to entrust two other persons to divorce his wife, provided that they both do it together with one and the same decision. This is the view of Malik, Ash-Shafi`i, and others. However, if one of the two trusted persons happens to effect divorce one time and the other threefold, only one divorce takes place. This notion is held by Is-haq and the Hanbalis.

However another opinion viewed by Ath-Thawri renders this divorce as having no effect.

**Proof of the first opinion:** Both of the entrusted persons have exercised and agreed upon the minimum number of divorce, i.e. one divorce. So, it is more appropriate to effect the common number.

### **Rendering One's Wife Prohibited to Oneself**

Ibn `Abbas is related to have said, "If a man takes an oath that renders his wife prohibited to himself, he should offer an expiation for his oath." He added, "Verily, you have a good example with the Messenger of Allah." (Narrated by Al-Bukhari and Muslim).

Another narration states that someone came to him and said, " I have rendered my wife prohibited to myself" Ibn `Abbas

replied: "You have told a lie. She is not prohibited to you". Then he recited Allah's saying,

﴿O prophet! Why do you prohibit what GOD has made lawful to you.﴾

(At-Tahrim: 1)

Ibn `Abbas added, "You have to serve the most binding expiation, namely, to set a slave free." (Narrated by An-Nasa'i)

It is narrated on the authority of Anas that the Prophet Muhammad (pbuh) had a slave girl with whom he used to have coition. `A'ishah and Hafsa (two wives of the Prophet's) kept urging him (to refrain from her) until he finally rendered her prohibited to himself whereupon Allah the Almighty revealed the above-mentioned verse.

On another occasion, Ibn `Abbas reported that one of the bedouins came to him and said, "I have rendered my wife prohibited to myself." Ibn `Abbas replied: "She is not prohibited to you: Have you not read Allah's saying,

﴿All food was lawful to the Children of Israel, except what Israel (Jacob) had refrained from for himself.﴾

(Al `Imran: 93)

Ibn `Abbas added, "Israel was suffering from sciatica. So, he vowed to himself that of Allah saved him, he will never eat any kind of veins. However, they were not made prohibited for his entire nation.

Scholars have different views about rendering what is originally lawful as prohibited to oneself. If the prohibited object is one's own wife, there is also a difference of opinion among



scholars. Al-Qurtubi says, "Some of our jurists quote that the reason for this disagreement is found in the fact that neither the Qur'an nor the Sunnah include any explicit text that concisely expounds this issue. Therefore, it has become a point of controversy among scholars."

Their differences may be presented as follows:

1. Some scholars believe that nothing is binding upon the one who renders a lawful thing as prohibited to himself.
2. Some others say that it is an oath, depending on the manifest meaning of Allah's saying, ﴿*Indeed GOD has ordained the ab-solution from your oaths*》, which He registers after His say-ing, "*O Prophet, why do you prohibit what GOD has made lawful to you.*﴾

(At-Tahrim: 1,2)

3. There are others who say that the expiation in this case is binding, and it is not an oath. They view that it involves the meaning of an oath. Accordingly, the expiation is required.
4. Another opinion is that it results in one revocable divorce, depending upon the least probable apparent meaning of the expression that renders a woman prohibited.
5. Others consider it an irrevocable divorce, resulted from the continuity of prohibition as long as the marriage has not yet been renewed.
6. A notion that claims that the woman is to be divorced threefold, using the utmost probable meaning of the statement.
7. Other scholars hold this issue as a *zihar* case, taking in consideration the meaning of prohibition and disregarding

the point of divorce.

Al-Hafiz Ibnul-Qayyim elaborates this case in his book "A`lam Al-Muwaqqi`in" containing fifteen views. Here we mention the best five views among them.

**First**, one's saying to his wife, "You are prohibited to me" is nonsense and a vain oath that entails nothing. This opinion is supported by one of two narrations related from Ibn `Abbas, and most scholars approve of it. They base their proof upon Allah's saying,

﴿And do not say, to what your tongues falsely describe: "This is lawful and this is unlawful", in order to invent lies and ascribe them to GOD.﴾

(An-Nahl: 116)

and His saying,

﴿O prophet, why do you prohibit what GOD has made lawful to you.﴾

(At-Tahrim: 1)

as well as the prophetic tradition,

*"Whosoever brings about some deed which is not of our religion, will have it rejected".*

**Second**, if the husband intends to effect divorce, it will be so, otherwise, it will be an oath that does not cause divorce. This is the opinion of Ash-Shafi`i, Ibn Mas`ud and other scholars. Their proof is that this saying may be used as an implicit expression of divorce, so if he intends to effect divorce, it will be so, otherwise, it will be an oath. Allah says,

﴿ O prophet, why do you prohibit what GOD has made lawful to you, seeking the good pleasure of your wives? And GOD is All-Forgiving, Most Merciful. Indeed GOD has ordained the absolution from your oaths. ﴾

(At-Tahrim: 1,2)

**Third**, it requires an expiation of *zihar*. This view is approved of by Ibn `Abbas and others. Their proof is that Allah the Almighty has ranked as *zihar* the making one's lawful wife prohibited like a female unmarriageable kin, so the frank statement of prohibition is more probable. Furthermore, Allah has not authorized the *mukallaf* person to make things lawful or prohibited, and He has made this matter confined to Himself only. However, He has passed to him the mere words and actions from which the prohibition results. Accordingly, if he says, "You are (as prohibited to me) as my mother's back", he in fact has said a statement that is nothing but falsehood and a grave sin that requires a *zihar* expiation.

**Fourth**, the husband has full freedom to define the number of divorces, i.e. if he intends one, it will be an irrevocable divorce. But if he intends nothing, it will be a case of *ila'*. If he intends to lie, it will be nothing. This is the notion of Abu Hanifah and his followers. In *Al-Fat-h*, the Hanafis report: "If the husband intends two divorces, only one irrevocable divorce will take place. If he intends nothing, it will be a mere oath.

**Fifth**, this is a common oath that can be expiated. This opinion was approved of by Abu Bakr, `Umar, Ibn `Abbas, `A'ishah and other companions. Their proof was the manifest meaning of Allah's words, for He mentions the expiation of oaths next to forbidding what is lawful, so it must be involved therein.

The first opinion is chosen by a group of the late scholars as the preferable one. I (the author) myself hold it as the most superior view in case the prohibition of the thing itself is what he intends. But, if the intent is to cause divorce, there is no proof that prevents its occurrence therewith. With regard to Allah's saying,

﴿And do not say, to what your tongues falsely describe:  
"This is lawful and this is unlawful.﴾

and His saying,

﴿O prophet, why do you prohibit what GOD has made lawful to you.﴾

we say that this is required. Whereas, if he intends the prohibition of the wife herself, she will not be prohibited. However, if the intent is to cause divorce, there is nothing in the presented proofs that confines divorce to certain words and prevents its occurrence with words other than them. Besides, there is a text that contains permission of using other words, as in the Prophet's words to Bint al-Jawn, "*Go back to your family*". In addition, the Prophet's companions are related as effecting divorce by expressions such as, "You are prohibited to me", "You are free", and "You have the power to dispose of yourself".

If a man prohibits something other than his one wife, such as food and drink, the manifest meaning of the texts indicate that nothing will be prohibited, since Allah the Almighty has not entrusted man to permit or prohibit things such as these. This view is admitted by Ash-Shafi'i, while Ahmad says that the husband must offer an expiation of oath. Giving a clear outline of this quest, Imam Al-Baghawi comments, "When a man says

to his wife, "You are prohibited to me", if he means *zihar*, it will be so, and if he means divorce, it will be so, but if he makes it absolute (i.e. does not specify whether he means *zihar* or divorce), neither divorce nor *zihar* will take place and he must serve an oath expiation."

However, in case he means to render her prohibited to himself, his expression will have no action, and consequently he must submit an expiation of oath.

If a man prohibits some food or drink to himself, according to the most predominant proofs, nothing will be prohibited for him and he can eat and drink freely.

However if he says, "All that I possess is held prohibited for me" in case he has no wife, nothing will be prohibited for him. However, if he has a wife, he must serve an expiation of oath, whether he has one woman or more. According to the above-mentioned point, the phrase of prohibiting someone's wife is not a real oath, while it requires an expiation of oath. This is the view held by Ibn Mas`ud in one of two narrations about Ibn `Abbas, and it is also approved of by Ash-Shafi`i.

Yet, there is another group of scholars who still regard that the statement of prohibition is a real oath. It means that, if a man prohibits his wife for himself, it will have action just as if he has sworn to stop having intercourse with her. Therefore, if he has coition with her, he should offer an expiation of oath.

Likewise, if he prohibits some kind of food or drink but he later eats or drinks, he should fulfil an expiation of oath. This view is reported from Abu Bakr and `A'ishah, and is in accordance with one of Ibn `Abbas's two narrations.

Sa`id Ibnul-Musayyab is quoted to have said, "The statement of prohibition is a binding oath". This view of Sa`id is supported by Al-Awza`i and the Hanafis.

However, `Umar is related to have said that such a statement effects one revocable divorce. Az-Zuhri also approves this opinion. `Uthman is, moreover narrated to have maintained that it will be a case of *zihar*. Ahmad agrees upon this opinion. Ali, Zayd, and Abu Hurayrah are quoted to have said that such a statement results in a threefold divorce. Malik approves this opinion.

## Summary

Divorce means the disruption of marriage relationship. It is permitted according to the Qur'an, the Sunnah and ijma`.

Reason admits and recommends divorce when marital life becomes detestable for either one or both sides, and after all means to effect reconciliation have failed.

Divorce is classified into five categories:

- 1- **Obligatory (*wajib*)**: this is the divorce of those who make *ila'* with their wives and refuse to return to having intercourse with them. In addition to that is the divorce held by the two arbiters who are appointed to reconcile between the spouse when breach takes place between them but they think that divorce is the only outlet for them.
2. **Offensive (*makruh*)**: this applies to the divorce, which is done without a pressing necessity. Some scholars say, concerning that kind of divorce, that it is forbidden for a husband to divorce his wife because he causes harm to her by such divorce.
- 3- **Permissible (*mubah*)**: when the wife has displeasing qualities or morals.
- 4- **Recommended (*mandub*)**: when the wife does not adhere to Allah's rights prescribed upon her such as prayers, etc, or when her husband expects her to be unchaste.
- 5- **Forbidden (*mahzur*)**: when occurring during the woman's

menstrual period or during an interval between woman's menstruations in which the husband has sexual intercourse with her.

At any case, divorce must be handled according to the Sunnah.

Sunnah divorce is to make one pronouncement of divorce in an interval between menstruations in which no sexual intercourse with the wife has taken place. Then the husband can leave her until her prescribed *`iddah* has passed. He may also divorce her when being pregnant. In case she does not menstruate because she is still a child or she is very old, her husband can divorce her one divorce at any time.

Bid`ah divorce is the divorce in which a husband divorces his wife when she is menstruating, or in no-menses period during which he has had intercourse with her.

This category of divorce is prohibited. Jurists differ about its effect. Some of them, including the four Imams, say that it effects, while some others, including Ibn Taymiyah and Ibn Hazm, consider it ineffective.

The Sunnah divorce requires one revocable divorce. Thus, the husband, or the wife, may feel sorry and that they are still in need of each other. Hence, returning to marital life will be easy.

Muslim scholars differ concerning the case when a man divorces his wife threefold at one time, as to say to her: "You are divorced threefold" or "You are divorced, you are divorced, you are divorced", while being in the same meeting. A number of jurists, along with the four grand Imams, regard the case as a threefold divorce. Another group of jurists hold it to be only



one divorce, for it is considered a kind of bid`ah divorce, and the threefold divorce during the Prophet's lifetime used to be counted as only one divorce. The same rule, they add, was followed during the era of Abu Bakr and two years of `Umar's caliphate. This difference of opinion has risen only with regard to the case when a husband follows the Sunnah divorce. As for the bid`ah divorce, its ruling has been already discussed above.

### **Persons Whose Divorce Has no Effect**

- 1- Scholars unanimously agree that the divorce of an unconscious person because of some reason other than intoxication and the like is not effective. They also agree that handling divorce during sleep is ineffective. Their consensus, moreover, applies to the divorce of the one whose mind has been driven unconscious due to faint, a medication or coercion as well as the one who has drunk something intoxicating while being unaware of its nature.
- 2- There are two views concerning the one who has been intoxicated by something prohibited, one of which says that his divorce is effective, for he will be liable to legal punishment if while being drunk he commits slander, murder or theft.

The standard of inebriety that admits controversy among scholars, is that which causes the inebriate to falter in his speech and be unable to discriminate between things.

- 3- Divorce effected by a child will have no validity. However, if he is intelligent enough to be aware that his wife will be prohibited for him if he divorces her, most scholars regard his divorce as effective. Yet, some other scholars hold

it as naught.

With regard to the incompetent, his divorce, according to most scholars, is valid, for he has the right to dispose of things except his property which is under interdiction

4- The majority of jurists agree upon the view that divorce resulted in under coercion will have no effect. They base their opinion upon the principles of the Qur'an and the Sunnah.

However, a person could not be described as coerced unless he is aggressively tortured, e.g. to be severely shocked by electricity, threatened with something of this nature.

### **Coercion is Involved in Three Matters:**

- a- To be compelled by someone who is powerfully able to carry out his threat.
  - b- To be sure that he will be tortured unless he fulfils what he is asked to do.
  - c- To be severely hurt by the torture. Mere insulting, slandering, or usurping of a little money are not a type of compulsion. Light beating of those who can bear, it is not a measure of compulsion. However, if the compelled husband is of the highly ranked people of honor and manhood, a light beating is counted as coercion.
- 5- Concerning an angry husband, if his anger makes him unconscious so that he becomes unable to differentiate between right and wrong, his divorce is not valid, whereas if his anger is moderate, divorce takes place. If it is great anger but does not make him unconscious, there are different views

about it.

## **Explicit and Implicit Divorce**

According to the opinion of the majority of scholars, divorce cannot be effected by mere intention, for Allah the Almighty forgives thoughts, which commonly go on in peoples' minds. Hence, verbal expression remains a prerequisite to effect divorce.

Divorce is not confined to a definite set of expressions, since it takes place via explicit as well as implicit statements. The explicit expressions do not require the existence of an intention to bring about divorce. However, the implicit expressions must be accompanied and supported by intention or factual evidence.

Explicit expressions of divorce include all statements and expressions which openly refer to separation, such as, "I have divorced my wife" or " You are a divorcee". The words "separation and setting free" are held as explicit by some jurists, while others, including Abu Hanifah and Malik regard them as implicit, though the latter jurist admits them to effect divorce without intention in accordance with his view that plain implicit expressions of divorce do not require an intention.

If a man says, while being angry, to his wife, "You are free" or slapped her on the face, saying, "This is a token of your divorce", divorce will take place as long as he intends it. Some scholars elaborate that divorce in this case does not entail intention, for anger is appropriate evidence to divorce.

Anger is appropriate evidence to divorce when it

accompanies implicit expressions which are not commonly used for purposes other than separation, such as, "You are free for Allah's sake" and "Start counting your *'iddah*."

As to expressions which are used to express purposes other than separation, such as, "Go" and "Get out", they must be accompanied by the intention to result in divorce.

### **Serious Implicit Expressions**

If a man says to his wife, "You are free", "Go back to your family" or the like, and he intends to divorce her, some jurists, among them is Ahmad Ibn Hanbal, regard this case as a threefold divorce. Other scholars base the ruling of this quest on the intention of the husband. It means, if he has intended nothing, one revocable divorce takes place. This is the opinion of Ash-Shafi'i. An-Nakh'i says that one irrevocable divorce is counted. Ahmad, according to another narration, maintains the same view. Ath-Thawri and the Hanafis view that if the husband has intended three, three divorces are counted, but if he has intended one or two, only one irrevocable divorce is effected.

Rabi'ah and Malik understand the quest as, "A threefold divorce is to take place even though he did not intend it in a case of *khul'* or before the consummation of marriage".

Because of the various meanings, which the implicit expressions of divorce can indicate, scholars classified them, according to their common use during their time, to three categories:

**First category:** manifest implicit expressions, and it has six forms, namely "you are not married any more", "you are free of marriage", "your case is irrevocable", "your case is absolutely

decided", "you are out of marriage", and "you control your own affairs".

If a man says to his wife, "You are divorced with no revocability", Imam Ahmad and Imam Abu Hanifah view that a threefold divorce will take place. But if he says, "...and there will be no revocability", with the conjunction "and", the same ruling applies in all scholars' opinions except two followers of Abu Hanifa's who argue that it will be one revocable divorce.

**Second category:** this category has two types:

**First type:** implicit expressions cited in books of Fiqh. They are, "go to your family", "do whatever you want", "I have nothing to do with you", "you cause restriction for me", "you are prohibited to me", "go and get married if you want ", "cover your hair", "you are free", and "I have set you free".

If these expressions are accompanied by intention, a group of scholars say that they result in a threefold divorce. However, some other scholars argue that the case is wholly referred to the husband's intention. Therefore, unless he has assigned a definite number, only one divorce takes place.

**Second type:** expressions relying on those cited in books of Fiqh by means of analogy. They are, "check if you are pregnant", "you are lawful for a new husband", "have a mask", and "I have no power over you". These have the same meaning of the first type, so they take the same ruling.

**Third category:** hidden implicit expressions, such as "get out", "go", "choose", and every expression indicating separation and giving the meaning of divorce except the ones pinpointed above.

All these expressions, if the husband has intended a threefold divorce, effect a threefold divorce. If he has intended two, two divorces are effected. And, if he has intended one, or has not determined a definite number of divorces, only one divorce is counted. This is the opinion of Ash-Shafi`i and Ahmad. Abu Hanifah maintains that a twofold divorce is not accessible here, but if he has intended two, only one is counted, depending on his former rule that states, "Implicitly expresses irrevocability, and a minor irrevocable divorce brings about one divorce and a major irrevocable one results in a threefold divorce.

### **Expressions not Causing Divorce**

Expressions such as, "stand up", "sit down", "eat", etc, which by no means resemble divorce or signify separation, do not result in divorce even if they are concomitant with intention. This is the view of the Hanafis, the Shafi`is and the Hanbalis.

If a man says to his wife, "I have got divorced from you" or gives her the authority to effect divorce and then she says to him, "You are a divorcee", divorce, according to Ahmad, the Hanafis, and others, will not take place. Malik and Ash-Shafi`i say that divorce effects if he has intended to divorce her.

### **Joking in Divorce**

Explicit expressions of divorce do not require intention. They cause divorce even if they are said unintentionally or by way of joking.

If a non-Arab man says to his wife in Arabic, "anti taliq" meaning "you are divorced", while being ignorant of its

meaning, divorce will not be counted, for he has not meant it.

If a man is asked, "Do you have a woman?" and he says, "No", meaning to lie, divorce will not take place. However, if he says, "I have divorced her", while he is lying, his wife will be divorced.

Moreover, if a man is asked, "Did you divorce your wife?" and he answers in the affirmative, his wife will be divorced according to the opinion of the Hanbalis and the preponderant view of Ash-Shafi'i.

However, if a man says, "I have sworn to divorce" or he declares "I swear I will divorce", but he does not really mean to swear, he will have to fulfil what he has admitted in the judgement.

### **Putting Divorce in the Hand of One's Wife**

A husband has full option to effect divorce either by himself, by entrusting it to someone else or by authorizing his wife that she has the option to divorce herself.

Once a husband has given his wife the power to divorce herself, this power remains active forever, with no restriction of time, unless she passes it back to him. This is the view of Ibnul-Mundhir, Abu Thawr as well as the Hanbalis. Whereas Malik, Ash-Shafi'i and the Hanafis declare that the wife should benefit from this only during the session in which the authority of divorce is granted to her, and she has no right to divorce herself after leaving the session.

According to the first view, if the husband withdraws his concession or says to his wife, "The authority that I have given

you is invalid", such authority, will become powerless, as viewed by the Hanbalis and others on one side.

On the other, Malik, the Hanafis and others declare that the husband is not allowed to retreat from his authorization because he, by authorizing her, has put her in possession.

Once the wife has transferred this authority back to her husband, she will have no power to demand it back. In addition, Qatadah comments. "If she cedes the authority, one revocable divorce will take place". In fact, the first opinion has more superiority, for it is a mere authorization cancelled by the authorized person, so nothing results from this cancellation.

If the wife who is authorized to divorce says, "I have chosen myself", according to the opinion of the majority of scholars, one revocable divorce will be effected. The Hanafis argue that one irrevocable divorce will take place, for the implicit expressions of divorce bring on irrevocable divorce. On the part of Imam Malik and Al-Layth, they both declare it as one irrevocable divorce. The number of divorces is judged according to the wife's intention. If she has intended one or more the number will be counted according to her intention. Likewise, the implicit expressions that she may express are judged with the same rulings as if expressed by the husband.

If the husband passes the authority of divorcing his wife, to another person, the latter must express divorce in explicit expressions, otherwise, divorce will not be effected.

### **Divorcing with Gesturing or Writing**

Divorce expressed with no plain verbal announcement or decisive writing will not be effected except in two cases:



- (1) When the person concerned is unable to speak, such as the mute: the divorce made by this person with gesturing takes place, and if he registers with three fingers, a threefold divorce is effected.
- (2) When a husband writes down that he has divorced his wife while intending to divorce her. This divorce is effective in the view of the four Imams, but some of Ash-Shafi`i's followers say that it is not.

In case he writes it down without intention of divorce, there are two notions:

- a) The divorce is effective.
- b) The divorce is ineffective.

The latter opinion is formed by Abu Hanifah, Malik and supported by a text from Ash-Shafi`i and a narration from Ahmad.

The paper that contains divorce would have no power unless it is witnessed by two reliable persons who testify that that it was written by the husband. Mere testimony to the exactitude of the husband's handwriting will have no bearing, for handwriting may be alike. In a word, witnesses must testify that they were present at the occasion of writing such a document.

### **Exceptions and Conditions in Divorce and Authorization**

If a man says to his wife, "You are a divorcee if Allah wills", no divorce will be effected according to the view of the Shafi`is, the Hanafis, Ahmad and others.

Malik and Al-Layth state that exceptions only modify oaths, but an exception does not affect divorce, vows, or acknowledgments. Exceptions are valid as long as they are not separated from the preceding speech, except by a short time to take a breath.

Some scholars allow interruption, as long as the husband does not leave the session. If a man conditions divorce by the occurrence of something or some action, whether it be inevitable or circumstantial, the divorce will take place only when that action happens. A group of scholars adds, "If he conditions his divorce by an inevitable act, divorce will be effected immediately.

If a man says to his wife while she is not menstruating, "If you menstruate, you will be divorced", divorce will not take place until menstruation begins and then ends. However, if she is menstruating, divorce will not take place until menstruation ends then another period begins and then ends. If a man conditions divorce by a specific time or circumstance, most scholars view that divorce will not take place until that time or circumstance has existed.

Some scholars express that where a man conditions divorce by something inescapable, such as the sunrise, divorce will take place instantly, for marriage must not be terminated to a definite term. But the fact is that in this case it is divorce, not marriage, which is to be terminated.

It is lawful for a man to authorize any sane, *mukallaf* person to divorce his wife, whether this person is a man, a woman, or a disbeliever. There is a difference of opinion among jurists

concerning the authorization of a child.

### **Rendering One's Wife Prohibited to Oneself**

A man may render his wife prohibited to himself by saying, "My wife is prohibited to me". Scholars decide this case with different opinions:

- 1) Nothing is binding on him.
- 2) He must serve an expiation of oath.
- 3) He must offer expiation, and his expression is not a real oath of prohibition.
- 4) One revocable divorce takes place.
- 5) One irrevocable divorce is effected.
- 6) Irrevocable divorce is counted.
- 7) He must offer an expiation of *zihar*.

Ibnul-Qayyim says that the last view is the most superior, while Ash-Shawakani gives superiority to the first one.

## A Quote from Ibn Taymiyah's Fatwas

### Using a Prohibited Thing as an Oath

Scholars differ concerning a married man who takes an oath, saying, Q"Prohibition is binding on me if I do such and such", "The lawful is rendered prohibited to me if I do such and such" or the like. The predominant opinion is that this is a binding oath that does not result in divorce, even if it is intended. This is the view of Imam Ahmad. Moreover, If he says (to his wife): "You are prohibited to me like my mother's back" and he intends to divorce, it will not take place according to the view of most scholars. This point is dealt with in the Qur'an. Prior to the Qur'anic revelation, *zihar* and *ila'* were equivalent to divorce. So, Allah the Almighty abrogated this practice and decreed a great expiation regarding *zihar*, and rendered *ila'* as an oath which requires the man to refrain from having sex with his wife for four months. After the end of that period, they may continue living together as husband and wife or be separated by fair means.

All oaths can be expiated, as referred to in the Qur'an and the Prophetic Sunnah. However, if one takes an oath to divorce his wife or to make *zihar* with his wife, he must fulfil his oath, be it decisive or conditional. By no means can expiation replace the fulfillment of what he has sworn to accomplish.

Ibn Taymiyah was asked about the case of a man who marries and has children, and his mother is upset with his wife and urgently asks him to divorce her: should he divorce his wife

in order to please his mother? The great Imam answered, "He should not divorce his wife, and he must be good to his mother. But being good to his mother does not necessarily mean to divorce his wife."

He was also asked about a husband and a wife who are in harmony with each other, but the wife's mother wants to break up this marriage, while the wife does not support this idea. In this case, is the wife sinful for disobeying her mother?

He answered, "Once a woman has married, it is not obligatory upon her to obey her parents when they ask her to separate from her husband, nor should she visit them against his will. For, as long as the husband does not ask her to do something against Allah's law, obedience to the husband is given preference over that of the parents."

The Prophet (pbuh) says,

*"The woman, no matter who she is, who passes away while her husband is pleased with her, shall enter paradise".*

The mother who seeks to make dissention between her son/daughter and his/her spouse belongs to the same nature of Harrot and Marrot, and she has no authority to be obeyed, notwithstanding that she may invoke Allah against her child, unless the couple is doing something opposing Allah's legislation, or the husband is bidding his wife to commit a sin, while her mother is guiding her to the right way.

### **Swearing in Divorce**

Ibn Taymiyah (may Allah have mercy on him) relates, "If a man renders divorce an oath such as saying :'' Divorce is

obligatory on me if I do/do not do such and such", and he later breaks his oath, scholars hold two opinions concerning this case:

1. No divorce takes place. This is the very textual narration of Imam Abu Hanifah and the opinion of a group of Ash-Shafi`i's followers. This is also the formal legal opinion applied by many other jurists.
2. If a man uses oaths in divorce, saying: "Threefold divorce is binding on me if I do such and such" and he later does it, a group of the Early Muslims, their successors and many others say that threefold divorce will not be incumbent on him. However, a group of them view that only one divorce will be effected. This latter opinion is transmitted through some of the Prophet's companions and their successors in the book of (*At-Tanjiz*). Despite this opinion, these are still scholars who do not effect divorce in this case, and another group of scholars who differentiate between the case of a wife whose marriage has already been consummated and that of the one whose marriage has not been done so.

Some scholars of the first opinion, do not admit divorce to have taken place nor do they require the one who undertakes it to offer an expiation. Other jurists hold him binding to serve an expiation of oath. Anyway, many scholars maintain the two opinions.

There is no profound legal evidence that divorce can definitely be caused as a result of being used as an oath. Allah the Almighty says,

*﴿Indeed GOD has ordained the absolution from your*

*oaths.* ﴿

(At-Tahrim: 2)

and says,

﴿*That is the atonement for the oaths you have sworn.*﴾

(Al-Ma'idah: 89)

In addition, it has been proved authentic that the Prophet (pbuh) said,

*"Whoever swears an oath, but he later comes across something more righteous, should expiate his (former) oath and fulfil that which is more righteous instead".*

Expressions used to express divorce are classified into three types:

- a) The form of effectuation and absoluteness, such as one's saying to his wife, "You are a divorcee" or "You are divorced". Scholars unanimously agree that such a form results in divorce.
- b) The form of an oath, such as, "Divorce is obligatory on me if I do not do such and such". This is really an oath in the view of all linguists, jurists and common people.
- c) The form of a condition, such as one's saying, "If I do such and such, my wife will become a divorcee." Thereupon, if he has meant to use this as an oath, it applies to the same ruling of the second mentioned form of oaths. But if he has meant to effect divorce when the condition is implemented, such as one's saying to his wife, "If you commit adultery, you will be divorced", meaning that divorce will be inflicted on her if she

commits this vice, and not only to take an oath on her, in this case it is not an oath nor does it require an expiation. Rather divorce takes place whenever the condition occurs, for the oath phrase that concludes incitement, prevention, attestation or denial, whether in the form of swearing or requital is regarded as an oath.

If it is said that it is an oath, it has (as oaths generally have) only two rulings in the Qur'an and the Sunnah:

- a) If the oath is promissory worthy, its non-fulfillment requires expiation, and
- b) if it is not promissory or worthy, such as swearing by creatures, its unobservance does not render expiation obligatory.

### **Fulfilling One's Oath Forgetfully**

Ibn Taymiyah was questioned about the legal ruling of the husband who says to his wife, "If you get in the house, you will be a divorcee" and later on she enters the house forgetfully. He answered, "In this case, according to the most accurate view of scholars, divorce will not be effected. One of two narrations narrated about Imam Ahmad indicates that he held this view."

### **Basic Rules Related to Oaths**

Ibn Taymiyah relates, "Most quests which pertain to using oaths in divorce, swearing by Allah and other forms of oaths may be judged according to a set of rules:

1. If a man swears that he will stop doing something, but he later does it unintentionally, or forgetfully, his case is



decided by scholars in three ways:

- a) His oath will not be broken. This is the opinion of Ash-Shafi`i, Ahmad (according to one of two narrations about him) and others.
- b) The forms of oaths must be differentiated. Accordingly, oaths, such as swearing by Allah or those that are used in *zihar*, must be expiated. On the other hand, oaths, such as those that are used in divorce, do not require expiation. This is according to the other narration about Ahmad. Other scholars also opine it.
- c) His oath has been broken, regardless of the subject sworn on. That is the notion of Abu Hanifah, Malik and (a narration about) Ahmad.

The first view has more preference because incitement and prevention in oaths are equal to obedience and disobedience of commands and interdictions. The one who takes an oath upon himself, on his servant or on one of his kin that he will do or will stop doing something is quite sure that the latter will fulfil it. So, he confirms his statement with an oath. The Qur'an and the Sunnah demonstrate that whoever forgetfully or undeliberately commits something prohibited will not be held punishable by Allah. Likewise, the one who forgetfully or unintentionally produces something that he has sworn on to quit has not broken his oath. The same judgement is applied to the one who makes a mistake by misinterpretation, or by following a previous dictum or a view of a scholar, experiencing his/her own analysis

whether right or wrong. In other words, as long as he does not intend to break his oath on purpose and he rather thinks that his action does not contradict his oath, he will not be considered to have broken his oath.

2. If a person takes an oath to something, thinking of it to be as such but he finds it contrary to what he has deemed, his oath will remain unbroken. For this point, Abu Hanifah, Malik, and other scholars differentiate between this form and that of the above case of the forgetful and the unknowing one. They comment that in this form, the one who swears by Allah has not broken his oath, while in the form of oblivion and ignorance, he has broken it. In the first form, the oath is relevant to something in the past, so it is not promissory. This is because the one who took an oath to something in the past while being aware of it, was either truthful or mendacious. If he was mendacious, his oath would be *ghamus* (false). He may also have been wrongful and thinking that the case was as he had sworn on; in this case, that oath would be called *laghw* (thoughtless) which is not held as an oath of a liar.

Concerning divorce, the same ruling of the past and the future is applied, in conformity with what is related about Imam Ahmad. According to the *madhhab* of Ash-Shafi`i and Ahmad Ibn Hanbal, as they say that the futuristic oath taken by an ignorant or forgetful person is not broken, likewise, the same ruling is applied to the one who wrongfully breaks his oath while thinking that what he is doing is equal to what he has sworn on.

This is the most preferred view, for it is based on the

Qur'an and the Sunnah.

This is one of the oaths used by Muslims. So, it must be judged with the same rulings that deal with all oaths, namely, they deserve expiation when being broken, unless the one who has sworn chooses to effect divorce. If he does, he can effect it without expiation. This is the opinion of a group of Early Muslims and their successors, and it is applied by many scholars.

It is related that Ibn `Umar, Hafsa, Zaynab, `A'ishah and other companions of the Prophet, held that it is sufficient that this person submits an expiation of oath.

The same ruling is applied in swearing in vows, e.g. when one says, "If I do such and such, I will perform pilgrimage" or "I will observe fasting for a year."

Narrations supporting this rule are narrated from `Umar, Ibn `Abbas, `A'ishah and others. That is also related to Ash-Shafi'i, Ahmad, Abu Hanifah and a group of the Maliki jurists.

Ibn Taymiyah was inquired about a man who, while being angry, took an oath of threefold divorce, that his wife would never enter her aunt's house. Later on, the wife gave birth to a child. Then she entered her aunt's house. Some people told the husband that in case his wife gave birth and then entered her aunt's house, his oath would not be broken.

Ibn Taymiyah replied, "If the husband had initially thought that in case his wife gave birth to a child, his oath would not be broken and she entered the house according to this idea, his oath would not have been broken. However, if he knowingly and in anticipation observed the matter sworn on, in this case his oath had been broken.

He was questioned about the legal judgement of a man who had sworn on his wife, saying: "If you go out while I am absent, you will be divorced threefold". But when he came back home, she said to him, "I needed to get to the public bath, for I could not have a bath at home"

Ibn Taymiyah replied, "If she had thought that going to the public bath was not included in the range of his oath, and by doing this she was not violating his oath, the oath would not be broken".

He was also asked about a man who had two wives. A sum of money was taken away from his home. Consequently, he took an oath of threefold divorce on his second wife, saying that unless he found the lost money, he would divorce his first wife, thinking that she had stolen the money. How will the case be decided? He answered, "If he thought that his first wife was dishonest and, accordingly, he took an oath that unless she gave back the money, he would divorce her, but later he found out that she had not stolen the money, he must not divorce her, and his oath would still be in effect."

He was also inquired about the case of a man who took an oath of threefold divorce that he would not give his daughter in marriage to a specific man. Then, she got married to another man. But later, she was divorced from this man. In this case, would it be permissible for him to marry her to the first man?

He answered, "If the father's intent or cause of taking that oath is restricted to temporary conditions, for example, the first man demanded the father to offer expensive preparations for the wedding at first, but he later changed his mind and was content

with cheaper preparation, in this case, the father could give her in marriage to the first man. But if the conditions were still existing, the father's oath would be broken if he gave her in marriage to the first man.

Imam Ibn Taymiyah, moreover was inquired about the legal ruling of the case of a man who swore on his wife that she would never leave his home except with his permission. One day, she told him that she was going to have lunch with his mother on that day. He thought that his mother was going to have lunch with his wife at his home. However, it seemed to his wife that this was permission for her to go to the mother's home and have lunch with her there.

He answered, "Scholars have two opinions in this case, the most proper of which is that divorce will not take place, for this case is similar to that of an oath taken by a heedless or forgetful person. Difference of opinion in this regard is recorded and common. The right notion is that his oath will not be broken.

## Summary of Swearing in Divorce in the View of Ibn Taymiyah

In Al-Fatawa, Ibn Taymiyah says, "Oaths that are already sworn are classified into three types:

1. Invalid oaths, such as swearing by the Ka`bah, the angels, Kings, etc. Scholars unanimously agree that oaths taken by such objects are not promissory, and if unfulfilled, no expiation falls due. It is authentic that the Prophet (pbuh) said,

*"The one who takes an oath must swear by Allah (only), otherwise, he must keep silent". He (pbuh) also said, "Allah has prohibited you that you swear by your forefathers". And, he said, "Whoever swears by other than Allah has attributed an associate to Allah".*

2. Oaths formed with (the name of) Allah, such as, "By Allah, I will do such and such". This is a promissory oath whose non-fulfillment requires expiation.
3. Oaths that implement the import of swearing by Allah, and the significance of mentioning them is only to express the magnificence of the Creator. An example of these oaths is the oath used for vows. To illustrate, someone may say, "If I do such and such, I will observe fasting for a full month".

Concerning this type of oaths, scholars hold three views. First, if he breaks his oath, he must do what he has stipulated to do. Second, nothing is binding on him. Third, he must serve an

expiation of oath. However, other jurists say that using oaths in divorce requires the person to fulfil what he has sworn to do.

The most predominant opinion is that which agrees with the authenticated saying of the Prophet's companions, and it is indicated by the Qur'an and the Prophetic Sunnah as well as the subjective standpoint of view. Allah the Almighty says,

﴿That is the atonement for the oaths you have sworn.﴾

(Al-Ma'idah: 89)

and says,

﴿Indeed GOD has ordained the absolution from your oaths.﴾

(At-Tahrim: 2)

In addition, it has been proved authentic that the Prophet (pbuh) said,

*"Whoever swears an oath, but he (later) comes across something more righteous, should fulfil that which is more righteous (instead) and expiate his (former) oath".*

Hence, if he says, "Divorce is obligatory on me if I do such and such" an expiation of oath will be sufficient. However, if he offers an expiation of *zihar*, it will be more preferable. In an expiation of oath, a person has the full option to set a slave free, to feed ten persons in need, or to provide them with clothes. Once he has expiated his oath, divorce is not to take place. If, however, he has intended to effect divorce as considered by the legal standard, as to divorce his wife one divorce in a time of no menstruation during which he has had no coition with her, scholars unanimously agree that divorce must be fulfilled.

Divorce must also follow if he stipulates to divorce her in case she does such and such, and his statement is accompanied by a decisive intent to effect divorce. This is different from the case in which the husband intends to prevent her, with his oath, from doing something against his will, for in such a case divorce will not take place, and he must submit an expiation of oath.



# Summary of Ibn Taymiyah's View Concerning the Threefold Divorce

In his *fatawa*, vol. 33 page 7, with regard to the threefold divorce, Ibn Taymiyah states, "If a man divorces his wife threefold in a no-menses period with one word or more such as saying, "You are a threefold divorcee", "You are divorced for three times", "You are divorced tenfold (or a hundredfold)", in all these cases scholars hold three different notions, whether or not the marriage has been consummated. Here are the three views:

**First**, this is a permissible, required divorce. This is the view of Ash-Shafi'i and is consistent with the original narration of Imam Ahmad which is approved of by Al-Kharqi.

**Second**, it is a prohibited, required divorce. This is the opinion of Malik and Abu Hanifah. It is in agreement with the later narration of Imam Ahmad and is approved of by most of his followers. This view is also attributed to many companions of the Prophet and their successors.

**Third**, this is a prohibited divorce, and only one divorce is required. This view is narrated about a group of the companions of the Prophet like Az-Zubayr Ibnul-`Awwam, `Abdur-Rahman Ibn `Awf, `Ali and Ibn Mas`ud. Many of their successors, like Tawus, and Ibn Is-haq are said to have approved this view.

However, we have got an additional fourth innovated view which differentiates between the woman whose marriage has been consummated and the one whose marriage has not been consummated.

According to this fourth view, which is related to some of the Mu`tazilah and Shi`ah scholars, nothing is binding on him.

Interestingly enough, the third view is the one that is supported by the Qur'an and the Sunnah. In the Qur'an, the divorce that Allah has ordained that it must be effected concerning the woman whose marriage has been consummated is the revocable divorce. Allah the Almighty has not allowed a man to divorce his wife threefold at one time, nor has He permitted him to definitely divorce her after the consummation of the marriage. However, if he divorces her prior to consummation, she is definitely divorced. And if the wife whose husband has consummated the marriage with her is divorced and her *`iddah* is over she automatically becomes definitely divorced.

Divorce in the view of all scholars is classified into three categories:

- a) Revocable divorce, in which a husband can take his wife back, even against her will. And if one of the spouses dies during the *`iddah*, the other spouse will have the right to inherit from him/her.
- b) Irrevocable divorce which ends the marital life between the two couples, and they will not be lawful to each other except with both a new dowry and marriage contract.
- c) Prohibiting divorce which renders the wife prohibited to her husband unless she first gets married to another man. This form of divorce results when a husband divorces his wife three separate times on three different occasions.

According to the Qur'an and the Sunnah, no irrevocable divorce will take place during the three times of divorce, as long as the husband holds his wife back before the *`iddah* is over. Hence, it is the opinion of the hadith scholars, like Ahmad, Ash-Shafi`i, Is-haq and others, that *khul`* is an annulment of marriage and separation between the spouses, so it must not be counted within the three divorces. It is related through some of the Prophet's companions, like Ibn `Abbas, `Uthman Ibn `Affan and others, that the *`iddah* of such a woman does not last for three menstrual periods, but it takes only one menstrual period.

In another place of his *fatawa*, Ibn Taymiyah states, "Divorce is of two kinds:

- a) **Lawful:** in this kind, if the wife has menstruation, the husband can divorce her after she finishes her monthly period provided that he has not had sex with her. If the wife has reached menopause or if she is pregnant, then her husband is allowed to divorce her at any time. This kind is called the *sunnah* divorce.
- b) **Prohibited:** this means that a man divorce his wife during her menstrual period or in an interval between her menstruations in which he has had sexual intercourse with her. This kind is unanimously prohibited. Scholars hold two various opinions about its effectiveness; the strongest of them is that it is ineffective.

The lawful, *sunnah* divorce is that the husband either divorces his wife once and lets her until her *`iddah* ends, or takes her back before the *`iddah* is over. Then, if he divorces her threefold, or divorces her for the second or the third time during

this no-menses period, this will then be prohibited.

The husband in such a case is regarded as an innovator according to the view of most jurists, like Malik, Abu Hanifah and Ahmad in his well-known narration. Divorce is also prohibited if the husband divorced his wife twice or thrice without taking her back each time, or before the renewal of the marriage contract. This is according to the viewpoint of Malik, and the manifest indication of the view of Ahmad. But the question remains that how many divorces have taken place, two or three? Scholars hold two views:

1. Three divorces are required. This is the view of Ash-Shafi'i and the other three eminent Imams, Abu Hanifah, Malik and Ahmad.
2. Only one divorce is required. This is the view held by many of the Early Muslims and their successors as well as a group of Malik's and Abu Hanifah's followers. This opinion seems correct, for it is authentic that Ibn `Abbas said, "During the lifetime of the Prophet (pbuh), Abu Bakr and a part of `Umar's caliphate, the threefold divorce used to be counted as only one divorce."

In the Musnad of Ahmad, with a good chain of transmission, Ibn `Abbas relates that Rukanah divorced his wife threefold on one occasion. The Prophet (pbuh) said to him, "*It is only one divorce*".

Furthermore, nothing is related to the effect that the Prophet (pbuh) made the threefold divorce binding upon the person who has expressed it wholly. And the above-mentioned authentic hadith with regard to Rukanah powerfully supports this view.

## CHAPTER FOUR

### *Raj`ah*

### Taking Back One's Wife

When `Imran Ibn Husayn (may Allah be pleased with him) was asked about the ruling of a man who takes back his divorced wife without the attestation of witnesses, he said, "Get witnesses for both her divorce her *raj`ah*" (Narrated by Abu Dawud) Another version, by Al-Bayhaqi, states that when `Imran Ibn Husayn (may Allah be pleased with him) was asked about the ruling of whoever takes his divorced wife back without the attestation of witnesses, he said: "This is not according to the Sunnah. Let him invite the witnesses now". At - Tabarani adds to the above hadith: "..and (let him) ask Allah's forgiveness".

The above hadith, thus, indicates that taking back one's divorced wife is lawful. Allah the Almighty says,

﴿ *And their husbands are best entitled to take them back* ﴾

"Al-Baqarah: 228)

There is also a scholarly consensus that one can take his divorced wife back at any time before the end of her `iddah whether she wishes to return or not, if the divorce has happened after previously having had sexual intercourse with her.

Having witness when taking back one's divorced wife is also mentioned in the Qur'an. Allah says,

﴿ *And take two witnesses endued with justice from among you.* ﴾

(At-Talaq: 2)

The imperative point in the verse indicates that the attestation of witnesses is obligatory. However, there is a common belief that pronouncing divorce can be conducted without the attestation of witnesses, so is taking back the divorced wife, because the wife still belongs to her husband. However, the direct meaning of the verse may hold the attestation of witnesses to be obligatory.

It is said that the aforementioned hadith might be a personal reasoning of the *Sahabi* (any of the Prophet's companions). It is also said, "When the word "*sunnah*" is mentioned by a *Sahabi* it refers to the Sunnah of the Prophet. Hence, such a hadith is called "*marfu*"<sup>(1)</sup>. Taking one's divorced wife back may be handled through a word along with intention. Scholars differ as to notifying the wife before taking her back to prevent her from marrying other than him. The majority of scholars hold that he is not supposed to do so. Others say that he should do that. Thus, if she does not know that her husband has taken her back and she marries another one, scholars are different as to the validity of the second marriage. The majority of scholars hold that she should return to the first husband, but Malik says that she has become a wife of the second man.

Husbands have the right to take their divorced wives back provided that they treat them kindly. Allah the Almighty says,

*﴿And their husbands are best entitled to take them back in that period, if they both desire reconciliation.﴾*

(Al-Baqarah: 228)

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1. *Marfu* here means "traceable in ascending order of traditionaries to the Prophet (pbuh).

## CHAPTER FIVE

### *Ila'*

In sacred law, *ila'* means that the husband swears he will not have sexual intercourse with his wife, either for an unrestricted period or for more than four months. Allah the Almighty says,

﴿And whoever swears to deny themselves from their wives,  
they must wait for four months.﴾

(Al-Baqarah: 226)

The above verse was revealed to abolish one of the *jahiliyyah* traditions, namely, forswearing one's wife for one and two years, so Allah made it not to exceed four months.

#### **Conditions of Legal Ila'**

1. The husband must swear by Allah or by any of His attributes when making *ila'*. If a husband uses for making *ila'* something other than this such as divorce and zihar, there are two reports about it. First, this is not regarded as an act of *ila'*. This report is related to Ahmad and Ash-Shafi`i (in his original *madhhab*). Second, it is regarded as *ila'*. This is related to another report about Ahmad and Ash-Shafi`i (in his late *madhhab*).

Ibn `Abbas said that every oath that prevents someone to have sexual intercourse with his wife is called *ila'*. This is also the opinion of Malik, Abu Hanifah, and others.

2. He must swear that he will not have sexual intercourse with his wife for more than four months. This is the position of Ibn

ʿAbbas, Malik, Ash-Shafiʿi, Ahmad and others.

3. He must swear that he will not copulate with her in the vulva. Thus, if the husband says, " By Allah, I will not copulate with you in your anus", this will not be considered to be *ila'*.
4. The woman towards whom the oath of *ila'* is directed must be his wife.

### **Making Ila' with a Non-Muslim Wife**

*Ila'* is also valid if the wife is non-Muslim and even before consummation. This is the position of An-Nakhʿi, Malik, Al-Awzaʿi and Ash-Shafiʿi. On the other hand, ʿAta, Az-Zuhri and Ath-Thawri say that it is only valid after consummation.

### **The Husband Who is Entitled to Make Ila'**

*Ila'* is only valid from the husband who:

- a. has reached puberty,
- b. is able to have sexual intercourse, and
- c. is sane.

The *ila'* made by a child or an insane or an impotent man is not valid.

The *ila'* made by a *dhimmi* man will be regarded as valid if he asks for the judgement of Muslims. By then, he will be asked to do what Muslims are ordered to do in this regard. This is the opinion of Abu Hanifah, Ahmad, Ash-Shafiʿi and Abu Thawr. Yet, Malik maintains that the ruling of this man's oath will be cancelled if he converts to Islam.



## **Anger and Content in *Ila'***

Anger does not invalidate *ila'* nor does the intention of doing harm to the wife. This is the point of view of Ibn Mas`ud, Ash-Shafi`i, Ahmad and others. On the other hand, `Ali says " *Ila'* is not to be a means of reformation. Malik and others hold that if someone swears that he will not have sexual intercourse with his wife until she weans her baby, he is not considered to have forsworn his wife.

## **The Woman's Right Towards the Husband who has Made *Ila'* with her**

Such a husband may wait for four months without approaching his wife. Afterwards, the wife can take the case to the judge who will order him to return to having sexual intercourse with his wife. If he refuses, he will order him to divorce her.

Ahmad maintains the same ruling. This is narrated about many great companions of the Prophet (pbuh), Malik, Ash-Shafi`i and many others.

Ibn Mas`ud, Ibn `Abbas, the Hanafis and others hold that it will count as one final divorce, if the four months pass without approaching his wife whom he has forsworn.

## **Returning to Intercourse (*Fay'ah*)**

Returning to intercourse here is subjected to certain rules. At minimum, the head of the husband's penis must fully enter the vagina of his wife with whom he has made *ila'*.

If he returns to copulate with her (during the period that he has specified for himself), he should expiate for the oath he has broken (with his returning to intercourse). This is the position of the majority of scholars including Malik, Ahmad, and the Hanafis. Besides, according to the manifest meaning of a report about Ash-Shafi`i, he is thought of to have held the same opinion.

Ash-Shafi`i (in another report), Al-Hasan and An-Nakhi` say that there is no expiation prescribed on him because Allah the Almighty says,

*﴿Then if they revert, indeed GOD is All-Forgiving, All-Merciful.﴾*

(Al-Baqarah: 226)

**Proof of the first opinion:** Allah's saying,

*﴿But He will charge you for your deliberate oaths, the atonement of that is to feed ten needy persons from the food you serve to your families, or to clothe them, or to set free a slave, but whoever does not have the means then fast for three days, that is the atonement for your oaths you have sworn.﴾*

(Al-Ma'idah: 89)

Additionally, the Prophet (pbuh) says,

*"If you swear an oath and then it turns out that there is something better than that, then do what is better and expiate for your oath."* (Al-Bukhari and Muslim)

## **Divorce after Ila'**

Whenever the man who has made *ila'* with his wife is asked to return to having intercourse with her and he refuses in spite of his ability to do so, he will be ordered to divorce her. In case of divorce, the number of divorces is counted, whether it is one, two or three divorces. If he refuses to divorce her, the ruler will do it instead of him. This is the opinion of Malik and Ahmad. Interestingly enough, the divorce that is obligatory on the part of the husband is revocable whether it is carried out by the husband himself or the ruler, as viewed by Ahmad and Ash-Shafi`i. The manifest meaning of Ahmad's words indicates that if the divorce is to be performed by the ruler, the latter can divorce her once, twice, or thrice, and he can also make it as revocation (*faskh*). Yet Ash-Shafi`i says that he has only one divorce, for it is sufficient to fulfill her right therewith.

## **Not Having Sexual Intercourse with One's Wife without Taking an Oath**

If a husband does not have sexual intercourse with his wife without taking an oath, he is not considered to have forsworn his wife if he does not do that because of illness or absence. If, however, he does that to bring her harm, there are two points of views:

1. A period of four months should be specified for him. If he has sexual intercourse with her, it will be over, otherwise he will be called again to copulate with her. If he refuses to do it, there should be divorce as mentioned before.
2. No period is to be specified for him because he did not take

an oath. This is the position of Abu Hanifah, Ash-Shafi'i, and (according to a second report about) the Hanbalis.

# CHAPTER SIX

## *Khul`*

### **Definition and Rationale**

If a woman begins to dislike her husband because of his bad physical appearance, ill manners, defect in religion, or old-age and thereupon she fears disobeying him and thus, disobeying Allah the Almighty, she is permitted to give him some amount of money to let him release or divorce her. Allah the Almighty says,

*﴿But if you fear that they may not be able to abide by the bounds set by GOD, there is no blame on either of them if she returns what has been given.﴾*

(Al-Baqarah: 229)

It is related that the Prophet (pbuh) went out to the Dawn (*Fajr*) Prayer, where he found Habibah Bint Sahl at the door, standing in the dark. He (the Prophet) said, "*What is the matter with you?*" She said, (what means) 'I can no longer bear living with him (Thabit, her husband).' When Thabit came, the Prophet (pbuh) said to him, '*This is Habibah Bint Sahl, and she said what Allah has made her to say.*' Habibah said, 'O Messenger of Allah! All what he has given me is still with me.' The Messenger of Allah said to Thabit Ibn Qays, '*Take it from her.*' Upon that, he took it and she went to stay with her family. This is an authentic hadith with a sound chain of transmission, narrated by Imams Malik, Ahmad, and others.

In another version of the hadith narrated by Al-Bukhari, he said, "The wife of Thabit Ibn Qays came to the Prophet and said, 'O Messenger of Allah! I do not accuse neither Thabit's religion, nor his manners, but all what I fear is disbelief.' The Messenger of Allah asked her, 'Would you give him back his garden?' She said, 'Yes', and she gave it back to him and the Prophet ordered him to divorce her. In another version of the hadith, he said to him, 'Take the garden and give her a single pronouncement of divorce.' All jurists in Hijaz and Syria agree upon that.

Ibn `Abdel-Barr says, "No one else disagrees with that opinion but Bakr Ibn `Abdillah Al-Mazni who disapproves it and further claims that the verse of *khul`* was abrogated by the verse that reads,

﴿And if you desire to exchange a wife in place of another, and you have given to one as much as a qantar (a measurement of weight) then do not take back from it anything, and if you take it, it would be oppression and an evident sin.﴾

(An-Nisa': 20).

It has been narrated about Ibn Sirin and Abu Qulabah that *khul`* is not permitted until he finds her committing zina, as Allah the Almighty says,

﴿And do not constrain them so that you may take some of what you have given them, unless they commit a flagrant indecency﴾

(An-Nisa', 19)

**Proof of the first opinion:** the verse just cited and the narration and that this is the saying of `Umar, `Uthman, `Ali and other companions of the Prophet (pbuh) with no one disagreeing

about that and rendering it as consensus (*ijma`*). The claim of abrogation is not accepted till compromising between proofs becomes impossible, and that the abrogating verse was revealed later. Nothing of this has been reaffirmed.

If this was approved, it would be called *khul`* as the woman takes herself out (*takhla` nafsa*) of her husband's garment. Allah the Almighty says,

﴿*They are your garments and you are their garments.*﴾

(Al-Baqarah: 187)

In addition, it is called *iftida'* (ransoming) because she ransoms herself with a given amount of money to be submitted to the husband. Allah the Almighty says,

﴿*There is no blame on either of them if she returns what has been given.*﴾

(Al-Baqarah, 229)

The act of *khul`* is not dependent on the ruler. This is the view of Imam Ahmad who says, "*Khul`* without interference from the ruler is permitted". Also Al-Bukhari narrates this opinion after `Umar and `Uthman (may Allah be pleased with them both). Also, it is chosen by Malik, Ash-Shafi`i, the Hanafis and others.

Al-Hasan and Ibn Sirin say, "It is not permitted unless it is done before the ruler".

**Proof of the first opinion:** the saying of `Umar and `Uthman and the fact that it is some kind of bargain that is not dependent on the ruler such as selling and marriage and that it is

invalidating a contract willingly and mutually.

### ***khul`* During Menstruation**

There is no harm in making *khul`* during the menstrual period of the woman. This is because preventing divorce during the menstrual period is due to the harm that may come to her as her *`iddah* would be very long. Besides, *khul`* is legalized for removing the harm that may arise due to the mal-treatment she receives from him which is more harmful than waiting for a relatively long period. For this reason, the Prophet (pbuh) did not ask the woman who makes *khul`* about her condition.

### ***Khul`* Is Valid With what the Spouses Agree upon**

*Khul`* is valid even if the amount is higher than that of the dowry and if they agree on anything, it will also be valid as most scholars state. This has been narrated from `Uthman, Ibn `Umar, Ibn `Abbas, Malik, Ash-Shafi`i, the Hanafis, the Hanbalis, and others.

It is narrated that Ibn `Abbas and Ibn `Umar said, "If a woman ransoms herself from her husband with her inheritance or the thread with which she ties the hair of her head, it will be permissible."

`Ata' and others say, "He is not permitted to take more than what he has given her." This is narrated about `Ali Ibn Abi Talib with an intersected chain of transmission. Abu Bakr is also said to have approved it saying, "If he takes anything additional, he should return it back."

Sa`id Ibnul-Musayyab says, "I do not think he has the right to take all her property, but he should leave her something."



They take as evidence what has been narrated about the wife of Thabit Ibn Qays who came to the Prophet (pbuh) and said, "By Allah, I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in an un-Islamic manner (if I remain with him)." On that Allah's Messenger said (to her), *'Will you give back the garden which your husband has given you (as dowry)?'*" She said, 'Yes.' Then the Prophet (pbuh) said to Thabit, *'O Thabit! Accept your garden, and divorce her once.'* Thereupon, the Prophet ordered him to take the garden and prevented him from taking anything further. (Narrated by Ibn Majah)

**Proof of the first opinion:** the Qur'anic verse that reads,

*﴿There is no blame on either of them if she returns what has been given﴾*

(Al-Baqarah, 229)

It was also the opinion of those Companions mentioned earlier. Ar-Rubayyi` Bint Mu`awwidh said. "I have made *khul`* from my husband with less than the thread with which I tie the hair of my head (i.e. some trivial amount of money) and `Uthman Ibn `Affan permitted it and no one has objected to it, so it is considered to be consensus. `Ali Ibn Abi Talib is not reported to object to this either. So, if all this is confirmed, it is not recommended for the husband to take more than what he has given his wife. This is the opinion of Sa`id Ibnul-Musayyab, Al-Hasan, and others. If he takes more than what he has given, it will be detestably permitted. Nevertheless, Abu Hanifah, Malik and Ash-Shafi`i do not find it detestable.

Malik says, " *Khul`* can be given as much more than the dowry.

### **Groundless *Khul`***

If a wife makes *khul`* with her husband not because of dislike or the fear of not abiding with the ordinances of Allah the Almighty, it will be detestable for her to do so. If she does so, the *khul`* will be valid as regarded by most scholars, including Abu Hanifah and Ash-Shafi`i.

Ahmad's words may denote illegality as he says that *khul`* is like what is stated in the hadith of Sahlah, to dislike a man and offer him the dowry, this is the *khul`*. And this proves that it is not permitted in anything other than this case. This is also the opinion of Ibnul-Mundhir and Dawud.

Ibnul-Mundhir says, "The connotation of this is narrated about Ibn `Abbas and most scholars, and Allah the Almighty says,

*﴿ And it is not permissible for you to take from women any of that which you have given them, unless both fear that they would dishonour the marriage bond in violation of the bounds set by GOD. But if you fear that they may not be able to abide by the bounds set by GOD, there is no blame on either of them if she returns what has been given. ﴾*

(Al-Baqarah: 229).

This indicates that aggression may affect both of them in case she makes the ransom without fear, and then Allah the Almighty makes a harsh threat as He says,

*﴿ These are the bounds set by GOD, so do not violate them,*

*and if any do violate the bounds ordained by GOD, such are the evildoers ﴿﴾*

(Al-Baqarah: 229).

Thawban narrates, the Prophet (pbuh) said,

*"Any woman who asks her husband to divorce her without any wrong done, the fragrance of Paradise will be prohibited to her".*

Abu Hurayrah (may Allah be pleased with him) reports that the Prophet (pbuh) said,

*"Women who make khul` and who are disputant are the hypocritical ones".* (Narrated by Abu Hafs and Ahmad in his Musnad)

This indicates that making *khul`* needlessly is prohibited because it harms the wife herself and harms her husband and invalidates the tie of marriage with no excuse. Thus, it is made prohibited for the saying of the Prophet (pbuh) that reads,

*"There should be neither harming nor reciprocating harm",*

Those who permit it take the following Qur'anic verse as evidence,

*﴿﴾ But if they are happy to offer you any of it, accept with happiness and with wholesome pleasure ﴿﴾*

(An-Nisa', 4)

Ibnul-Mundhir says, " Permissibility in other than contracts does not necessitate permissibility in bargain. Allah the

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1. Narrated by Abu Dawud, Ahmad, Ad-Darimi, and At-Tirmidhi with a good chain of transmission (Al-Albani).

Almighty declared usury to be prohibited in contracts and not in the act of granting gifts. Those who consider it prohibited are given preference to those contradicting them. And, the peculiarity of the verse in terms of prevention should be given preference to the generality of the verse of permission along with the narrations it has been supported with. Finally, Allah knows best.”

### **Harming the Wife to Make khul`**

If the husband hurts his wife by beating, tightening the grip around her, preventing her from her rights in spending, or treating her in unequal terms with his other wives, etc, to force her to ransom herself and she does so, the act of *khul`* becomes invalid and she is entitled to take the money she offered him back.

This is narrated about Ibn `Abbas, An-Nakh`i, Az-Zuhri, and others, and upon it judges Imam Malik, Ash-Shafi`i, Ahmad and others.

Abu Hanifah says, "The contract is valid, the offered money is not returned, and he (the husband) is sinful and disobedient".

**Proof of the first opinion:** the Qur'anic verse that reads,

*﴿And it is not permissible for you to take from women any of that which you have given them, unless both fear that they would dishonour the marriage bond in violation of the bounds set by GOD﴾*

(Al-Baqarah: 229)

And, Allah the Almighty says,

﴿O you who believe! It is not lawful for you to inherit women forcibly, and do not constrain them so that you may take some of what you have given them﴾

(An-Nisa': 19)

The payment (compensation) that a husband may compel his wife to give to him against *khul`* is prohibited because of the coercion inflicted as well as the fact that he has no right to take it from her. If the husband does not owe the compensation *khul`* is considered divorce, divorce takes place without any compensation. If the divorce is with less than three times, he can take her back, for the act of taking her back is not originally effected as long as compensation does not exist. So when the compensation is replaced he can take her back. And, in case we say that "it is nullification with which he did not mean divorce", nothing takes place.

Malik says, "If he takes anything from her on this pretext, he should pay it back and the *khul`* becomes valid. A similar ruling will be produced if we say that the *khul`* becomes valid without compensation."

But, if he beats her for her recalcitrance and prevents her from her rights, she is permitted to make *khul`*.

If she commits zina and he begins to tighten the grip around her to ransom herself and she does, the *khul`* is valid. Allah the Almighty says,

﴿And do not constrain them so that you may take some of what you have given them, unless they commit a flagrant indecency.﴾

(An-Nisa': 19)

The exception from prohibition is regarded as permission. And, if she commits adultery, he cannot be sure that she will not attach a child to him from another man and spoil his bed as she may not observe Allah's Ordinances and borders in treating him and thus come under the Qur'anic verse that reads,

﴿ *But if you fear that they may not be able to abide by the bounds set by GOD, there is no blame on either of them if she returns what has been gives.* ﴾

(Al-Baqarah: 229)

This is one of the two sayings of Imam Ash-Shafi`i, and the other saying is that it is not valid as it is compensation she was forced to offer. But, the Qur'anic text is better to be taken into account.

### **khul` : Revocation or Divorce?**

The narration after Imam Ahmad regarding *khul`* has been disputed, because in one of the two narrations he says it is revocation. This opinion is held as well by Abu Bakr, Ibn `Abbas, (one of the two opinions of) Ash-Shafi`i and others.

The second narration: it is an irrevocable divorce. This is narrated about Sa`id Ibnul-Musayyab, Al-Hasan, Malik, the Hanafis and others.

The same has been narrated about `Uthman, `Ali and Ibn Mas`ud, but Imam Ahmad declares their hadiths to be weak in terms of transmission and says, "Nothing is more acceptable than the hadith narrated by Ibn `Abbas stating that it is revocation. Ibn `Abbas advances as reason the Qur'anic verse that reads,

﴿ *A divorce is only to be effected twice.* ﴾

(Al-Baqarah, 229)

then Allah says,

﴿There is no blame on either of them if she returns what has been given.﴾

(Al-Baqarah, 229)

then He says,

﴿So if a husband irrevocably divorces his wife, (upon the third divorce between them) she will not be lawful to him to marry after that, unless she consummates marriage with another husband with the intention of remaining married to him.﴾

(Al-Baqarah: 230)

and thus, he mentions two divorces out of three and *khul`* and then mentions a third divorce. If *khul`* was regarded as just a divorce, the number then would be four which is not acceptable. It is an act of separation void of an explicit divorce and its intention, so it is regarded as a mere revocation. This opinion has been given preference over any other by Imam Ibnul-Qayyim, Ash-Shawkani, and others.

Ibnul-Qayim says, "It is not authenticated that anyone of the companions of the Prophet (pbuh) said that it is an irrevocable divorce."

Ash-Shawkani says, "Obviously, it is revocation and not divorce."

Grounds for the second narration: She offered compensation to be separated from him, and the separation owned by the husband is not *khul`* ; it is rather divorce. Moreover, he used an implicit expression of divorce meaning to separate with her, so it

is divorce.

The benefit of the two opinions is that, if we were to say it is divorce and he accepted *khul`* for once, it would be counted as a single divorce, and if he accepted *khul`* three times, it would be prohibited for him to have her again till she gets married to another husband. But, in case we said it is revocation, she would never be prohibited for him even if he accepted *khul`* a hundred times.

This dispute arises in case he accepts *khul`* with pronouncements other than those of divorce and he does not intend divorce.

### **Expressions that affect *khul`***

Expressions of *khul`* can be divided into both explicit and implicit:

The explicit is represented in three expressions: *khala`tuki* (I accept your compensation), this is the conventional one; the second is *fadaytuki* (I accept your returning what have been given), for it is said in the Glorious Qur'an in that way, in the verse that reads,

﴿ *There is no blame on either of them if she returns what has been given* ﴾

(Al-Baqarah, 229)

The third is *fasakhtu nikahaki* (I revoke marriage with you), for that is what really is done. Thereupon, if he pronounces one of these expressions, the *khul`* becomes effective even without his intention. Expressions save these such as: *barra'tuki*, *abra'tuki* and *Abantuki* are all implicit. *Khul`* is one of two kinds



of separation, so it has explicit and implicit expressions just like divorce. This is Ash-Shafi`i's opinion. Thus, if she asks for *khul`* and gives the compensation and he agrees either in explicit or implicit expressions, the *khul`* becomes valid and effective even without intending it.

### **Divorcing a Woman during her `Iddah after Khul`**

Divorce cannot be applied to a woman who made *khul`*. This is the opinion of Ibn `Abbas, Ibnuz-Zubayr, Al-Hasan, Malik, Ash-Shafi`i, Imam Ahmad, and others.

It has been reported from Abu Hanifah that the divorce made with explicit statement applies to her. The like has been reported from Sa`id Ibnul-Musayyab, Shurayh, and others. They base their judgment on the hadith reported about the Prophet (pbuh) that reads,

*"Divorce can be applied to the woman who makes khul` as long as she is in her `iddah."* <sup>(1)</sup>

**Proof of the first opinion:** The fact that this is the opinion of Ibn `Abbas and Ibnuz-Zubayr who were never objected to during their own age. Additionally, she cannot be lawful for him once more except with a new contract, so divorce does not apply to her just like the woman who is divorced before consummating the marriage or the one whose *`iddah* has come to an end. Moreover, he no longer permitted to have intercourse with her just like the prohibited one (for him). And, it does not make any difference if he faces her with divorce as to say, "You are divorced", or says it indirectly as to say, "So and so is divorced".

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1. A groundless hadith as will be stated later.

Finally, the hadith they cited has no foundation whatsoever and is not mentioned by any of the compilers of the Prophetic hadiths.

### **Taking a Woman back during her `Iddah after Khul`**

The husband of the woman who has made *khul`* with him cannot take her back, whether this *khul`* is said to be a revocation or a divorce. This ruling is held by most scholars, including Malik, Ash-Shafi`i, and Ahmad.

Az-Zuhri and Sa`id Ibnul-Musayyab are reported to have maintained that the husband has two options: to keep the compensation but without having any right to have her back, or to pay it back against having the right to have her back.

Abu Thawr says, "If the *khul`* was made with the word of divorce, he would have the right to have her back, for this is a right attached to divorce, so it is not cancelled by compensation.

**Proof of the first opinion:** the Qur'anic words that read,

﴿...if she returns what has been given﴾

(Al-Baqarah: 229)

In fact, she returns what has been given when she is already away from his control and authority. Yet, if it were permissible for him to have her back, she would be brought back under his control, which would, consequently, cause harm to her, while

the main purpose of *khul`* is to remove harm away from her.

### **Making *Khul`* against Nursing the Husband's Child for Two Years**

If she makes *khul`* with him against nursing his child for two years, more or less, the *khul`* is valid and accepted. This is the opinion reported about Imams Ahmad and Ash-Shafi`i. Nursery is something with which compensation is acceptable in *khul`* and other dealings as well. Moreover, if she makes *khul`* with him against nursing his children but without determining the period of nursing, the *khul`* is valid.

The followers of Imam Ash-Shafi`i say, " If they do not determine the period, the *khul`* is invalid.

### **Making *Khul`* against Caring for the Child for Ten Years**

If he makes *khul`* with her against caring for his child for ten years, it is valid as maintained by the followers of Ahmad Ibn Hanbal, even without determining the period of nursing or the amount of food, etc., and when no period is determined they should adhere to the expenses usually paid for the child's counterparts.

Imam Ash-Shafi`i says, " It is not rendered valid until he determines the period of nursing, the amount and type of food along with determining the total sum of money, and the amount to be paid per day."

### **Ruling of Making *Khul`* without Compensation**

Making *khul`* without compensation is valid. This is the

saying of Imam Malik and Ahmad (in a narration about him), for it is some kind of untying of marriage so it is valid without compensation just like divorce. Also, the principle of the legality of *khul`* is that there is a desire on the woman's part to separate from her husband and she asks for that and on his part if he agrees, the underlying idea of *khul`* applies as if it were with compensation.

Ahmad's second narration: *khul`* is not valid without compensation. So, if he pronounces it without compensation and intends divorce, it becomes a revocable divorce, and if he does not intend divorce, it will be nothing. That is also the saying of both Abu Hanifah and Ash-Shafi`i.

### **The `Iddah of the Woman who Makes *Khul`***

Relying on the view stating that *khul`* is considered a divorce, the *`iddah* of the woman who makes *khul`* is the same as her *`iddah* in divorce.

At-Tirmidhi says, "Most scholars among the Companions of the Prophet (pbuh) and others say that the *`iddah* of the woman who makes *khul`* is just like that of divorce. But, if *khul`* is considered revocation, her *`iddah* becomes just a single menstruation. As stated on Ar-Rawdah An-Nadiyyah, on the hadith of Ar-Rubyyi` Bint Mu`awwidh as narrated by An-Nasa'i about the story of the wife of Thabit Ibn Qays that the Prophet (pbuh) said to him, "*Take your right from her and let her go.*" He said, "Yes." And the Prophet (pbuh) ordered her to wait for just a single menstruation and then to go to her family." All the men included in its chain of transmission are trustworthy. There is also another hadith whose chain of transmission includes

Muhammad Ibn Is-haq, the hadith is transmitted by At-Tirmidhi, An-Nasa'i and Ibn Majah and states that the Prophet (pbuh) ordered her to wait for a single menstruation."

Also, Abu Dawud and At-Tirmidhi have transmitted a hadith on the authority of Ibn `Abbas that the woman of Thabit Ibn Qays made *khul`* with her husband, and the Prophet (pbuh) ordered her to wait for a single menstruation.

Also, Ad-Daraqutni and Al-Bayhaqi have transmitted with an authentic chain of transmission about Abuz-Zubayr a hadith that includes that "... he took it and let her go." Ad-Daraqutni says, " Abuz-Zubayr heard it from more than one.

All these hadiths prove that the *`iddah* on *khul`* is a single menstruation. They also prove that it is revocation because the *`iddah* of divorce is three menstruations. Moreover, "to let go" is to revoke and not to divorce.

Ibnul-Qayyim says, " People dispute over the *`iddah* of the woman who makes *khul`*. Is-haq and Ahmad in his most accurate narration say that she should wait for a single menstruation, which is the *madhhab* of `Uthman Ibn `Affan and `Abdullah Ibn `Abbas. And it is said that there was a complete consensus of the Companions of the Prophet (pbuh) concerning this point and we know no one who disagreed with them. Also, the action of the Prophet (pbuh) stands as a proof for this. This is the preferred opinion and the chosen one to be acted upon. Abu Ja`far An-Nahhas mentions in his book *An-Nasikh wal Mansukh* (The Abrogating and The Abrogated) that the Prophet's Companions (Peace be upon them all) unanimously agreed upon this"

## Summary

If a woman dislikes her husband for any reason and fears that she may not be able to fulfil his rights as a husband, she is allowed to ask him to divorce her, or separate from her against a payment with which she can ransom herself. In the Shari`ah, this is called khul`. According to the Islamic law, the husband or the legal guardian cannot compel a woman to live with a husband whom she dislikes.

This khul` is established in the Qur'an and the Sunnah, and all scholars agree on its validity except Bakr Ibn `Abdillah al-Mazini who says that the verse concerning khul` has been abrogated.

Ibn Sereen and Abu Qilabah are reported to have maintained that khul` is not lawful unless the husband finds his wife committing adultery.

Most scholars say that it is permissible to make khul` without the ruler.

Khul` is also permissible during the woman's monthly period as well as the period in which she does not have menses and during which her husband copulates with her.

Some scholars maintain that the husband is not allowed to take from her more than that which he has given her (for dowry).

It is reprehensible for a wife to ask for khul` if she does not bear hatred towards her husband, nor do they both fear that they cannot keep the bounds set by Allah. However, most scholars

hold that khul` here is a lawful practice. A minority among them opine that khul` is not correct unless it is subjected to the case which is mentioned in the Qur'an, namely, when they fear that they cannot keep the bounds set by Allah.

Whoever constrains his wife, does not maintain her sufficiently, hurts her, or prevents her from her rights to force her to ransom herself from him and she does, most scholars maintain that khul` is invalid, and the compensation must be paid back.

Abu Hanifah says that the contract is correct, the compensation is required and the husband is sinful.

Imam Malik says that if he takes something from her in this way, he must pay it back, and the khul` is correct.

If a woman deals with her husband badly and consequently he constrains her to ransom herself from him and she does, the khul` is correct.

Scholars differ about khul` whether it is an irrevocable divorce or a revocation of marriage (*faskh*)? The most superior opinion is that it is *faskh*. They also differ concerning the *`iddah* which is to be applied after it: is it like the *`iddah* observed after divorce or is it one menstrual period after which it becomes clear whether the woman's womb contains pregnancy or not. The most superior view is that it is one menstrual period.

The explicit expressions of *khul`* are derived from *muhkala`ah* (making *khul`*), *mufadah* (ransoming oneself) and *faskh* (revocation). Accordingly, if he says, "*khala`tuki* (I accept your compensation), *fadaytuki* (I accept your returning what have been given) or *fasakhtu nikahaki* (I revoke marriage with

you), separation takes place even without intention.

The implicit expressions of *khul`* require intention. An example of these expressions is "*abantuki* (I have separated from you irrevocably)." The intention here may be replaced with something that indicates it. To illustrate, the woman may pay compensation and ask for *khul`* and then the husband says to her, "I have separated from you irrevocably without intention."

Divorce is never attached to the woman who makes *khul`*, as maintained by most jurists. Yet, some of them say that only explicit divorce is attached to her, and not the implicit one.

Most scholars are of the opinion that a man cannot take back the woman with whom he has made *khul`*, whether it is said that this *khul`* is a revocation or a divorce.

A woman can make *khul`* against suckling her husband's child for two years, or against taking care of him for ten years.

As held by most scholars, *khul`* is not made without compensation, but Malik says that it is permissible to make it without compensation.



## CHAPTER SEVEN

### **Zhihar**

Allah the Almighty says in the Ever-Glorious Qur'an,

*﴿GOD has indeed heard the saying of she who discusses with you about her husband, and she complains to GOD. And GOD hears your conversation, surely GOD is All-Hearing, All-Seeing.﴾*

(Al-Mujadalah: 1)

It is narrated about `A'ishah (may Allah be pleased with her) that she said, "Praise be to Allah Who hears all things! the disputant woman who came to the Prophet (pbuh) and spoke to him while I was in a corner of the house and could not hear what she was saying, though Allah the Almighty revealed His Saying that reads,

*﴿GOD has indeed heard the saying of she who discusses with you about her husband, and she complains to GOD. And GOD hears your conversation, surely GOD is All-Hearing, All-Seeing.﴾*

(Al-Mujadalah: 1)

(Narrated by Imam Ahmad, and also by Al-Bukhari as a suspended hadith) Also, in a narration by Ibn Abi Hatim,

ʿA'ishah said, "All Blessings are due to Allah the Almighty Who hears everything! I could hear only some of the speech of Khawlah Bint Tha`labah while she was complaining about her husband to the Prophet (pbuh) saying, 'O Messenger of Allah! He spent out of my property, consumed my youth and I gave birth to his children until I got too old to give birth any more, he made zihar with me. O Allah! To You I do complain.' She (ʿA'ishah) said, 'She did not leave until Gabriel came down with this Qur'anic verse that reads,

*" GOD has indeed heard the saying of she who discusses with you about her husband, and she complains to GOD. And GOD hears your conversation, surely GOD is All-Hearing, All-Seeing".*

(Al-Mujadalah, 1)

She (ʿA'ishah) said, 'Her husband was Aws Ibnus-Samit.'

Allah the Almighty says,

*﴿Those among you who divorce their wives by zihar they are not their mothers, but their true mothers are those who gave them birth. Indeed! They utter atrocious and false words. Surely GOD is All Pardoning, All Forgiving. But those who divorce their wives by zihar then go back on the words they uttered, he should free a slave before they approach each other, thus you are admonished to do, and GOD is well aware of what you do. And if anyone has not the means, he should fast for two months successively, before they approach each other. But if he is unable to do so, he should feed sixty poor persons, this, that you believe in GOD and His Messenger, and those are the limits imposed*

by GOD, and for the unbelievers there awaits a painful chastisement. ﴿

(Al-Mujadalah, 2-4)

On the authority of Khawlah Bint Tha`labah who said, "By Allah the Almighty! It is because of me and of Aws Ibnus-Samit that Allah revealed the beginning of Surah al-Mujadalah." She said, "I was living with him and he was an old man and his manners became bad. One day, he entered upon me and we disputed over something and he got angry and said, 'To me, you are like my mother.' She said, "And, he went out and spent an hour with his people and then entered upon me and tried to sleep with me." She said, "I said, 'Nay, by Him who rests in His Hand the soul of Khuwaylah! You will not approach me after what you have said earlier until Allah the Almighty judges between us with His Judgment.' She said, "He jumped over me but I overcame him as he was weak and old and I could throw him down." She said, "Then, I went out to one of my neighbors to borrow some clothes and then I went to the Messenger of Allah (pbuh) and I sat before him and made mention of what happened to me and I went on complaining about his ill-manners." She said, "The Messenger of Allah (pbuh) started to say, 'O Khuwaylah! Your cousin is an old man, avoid harming him.' She said, "By Allah! Not a long time passed and some Qur'anic verses were revealed concerning me." The Prophet (pbuh) said, 'O Khuwaylah! Allah the Almighty revealed some Qur'anic verses concerning you and your husband' , then he began to recite, ﴿GOD has indeed heard the saying of she who discusses with you about her husband, and she complains to GOD. And GOD hears your conversation, surely GOD is All-Hearing,

*All-Seeing.* ﴿ to the Qur'anic words, ﴿...and for the unbelievers there awaits a painful chastisement.﴾ (Al-Mujadalah, 1-4) She said, "And the Messenger of Allah said to me, 'Tell him to emancipate a slave.' She said, "I said, 'O Messenger of Allah! He has no slaves to set free.' The Prophet (pbuh) said, 'Let him fast two consecutive months.'" She said, "I said, 'He is too old to fast.' The Prophet (pbuh) said, 'Let him feed sixty indigent persons each a Wasq of dates.'" She said, "I said, 'By Allah! O Messenger of Allah! He does not have this either.' The Prophet (pbuh) said, 'We will aid him with a Faraq of dates.'" She said, "I said, 'And I will aid him with another Faraq.' The Prophet (pbuh) said, 'That is good what you are doing, so go and give it in charity on his behalf and take care of your cousin.'" She said, "I did." (Narrated by Ahmad and Abu Dawud) This is the reason behind revealing this Qur'anic Surah.

### **The Lexical Meaning of the Word**

The word *zihar* is derived from *zahr* meaning "back". This is due to the fact that during the pre-Islamic period anyone who practiced *zihar* with his wife used to say, "You are to me just like the back of my mother." *zihar* as for the pre-Islamic period people was regarded as divorce, but Allah the Almighty provided nation of Prophet Muhammad (pbuh) and prescribed an expiation thereof and regarded it unlike divorce. This is the saying of a great number of the earlier scholars of this *Ummah* (Nation).

The earlier scholars and Imams are different as regards what is meant by the saying of Allah that reads,

﴿...then go back on the words they uttered﴾

(Al-Mujadalah, 3)

as some of them say, "To return is to return to the term *zihar* itself and repeat it." This saying is totally invalid, it is the choice of Ibn Hazm and the saying of Dawud, and it is narrated about Abu `Umar Ibn `Abdel-Barr after Bakir Ibnul-Ashajj and Al-Fara' and others.

Ash-Shafi`i says, "He keeps her after practicing *zihar* for a long period during which he could divorce her but he did not."

Ahmad Ibn Hanbal says, "He returns to have sexual intercourse with her or intends to, while he is not permitted to do so until he makes an expiation."

Imam Malik says, "It is the determination to have intercourse with her."

Imam Abu Hanifah says, "He returns to *zihar* after declaring it prohibited. When a man practices *zihar* with his wife, he declares her prohibited. And, this cannot be dismissed unless he pays the expiation. That is the opinion of Abu Hanifah's followers and Al-Layth Ibn Sa`d." (Ibn Kathir)

On the authority of Ibn `Abbas (may Allah be pleased with him) "that a man practiced *zihar* with his wife and then he had intercourse with her. He went to the Prophet (pbuh) and said, "I had intercourse with her before making the prescribed expiation." The Prophet (pbuh) said, "*Do not approach her until you do what Allah has ordered you to.*"<sup>(1)</sup> It is narrated by Al-Bazar in another narration after Ibn `Abbas (may Allah be

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1. Narrated by the four Imams, declared as authentic by At-Tirmidhi, and Incompletely-transmitted by An-Nasa'i.

pleased with them both) and he added "Pay the expiation and do not do it again."

Being an incompletely-transmitted hadith bears no harm as stated in *Subul as-Salam*.

Scholars agree that *zihar* takes place when likening one's wife to one's mother's back, but they differ concerning some issues:

**First:** If he likens her to an organ other than the back. Most scholars consider it *zihar* as well. Also, it is said that: if he likens her to an organ to which looking is prohibited, it is considered *zihar*.

**Secondly:** They dispute also about the case in which he likens her to some of his female unmarriageable kin other than his own mother. Some scholars say that it is not deemed as *zihar* for the text is very clear in mentioning only the mother. Other scholars among whom are Malik, Ash-Shafi'i and Abu Hanifah see it as *zihar*. Their proof is analogy (*qiyas*), as the cause is absolute prohibition that is stated in the case of female unmarriageable kin, just as it is in the case of the mother. Ahmad and Malik say that it is valid even if the woman she was likened to is not prohibited forever, as any woman. In addition, Ahmad says, "Even in the case of animals." Finally, it is explicit that the text mentions nobody but the mother and here, analogy cannot stand as evidence for judgment.

**Thirdly:** they dispute over the possibility of practicing *zihar* by a disbeliever. Some say yes, because of the generality of the address in the Qur'anic verse. Others say no, for one of its requirements is paying expiation that cannot be done by a

disbeliever. Those who deem it possible for him to practice it say that he can make expiation through setting slaves free or feeding the indigent and not through observing fast for he is in no way entitled to do so. This opinion is replied to as follows: "Setting slaves free and feeding the indigent if done by way of expiation, they would be pious acts that are not to be accepted from a disbeliever."

**Fourthly:** The hadith proves the prohibition of having intercourse with the woman with whom *zihar* was practiced before paying the prescribed expiation. This opinion is agreed upon due to the Qur'anic words that read,

﴿...before they approach each other﴾

(Al-Mujadalah: 3)

So, if he had intercourse with her, the expiation could neither be dismissed nor duplicated because of the saying of the Prophet (pbuh) that reads, "Until you do what you are ordered to by Allah the Almighty." As-Salt Ibn Dinar says, "I have asked ten jurists about he who practices *zihar* with his wife and copulates with her before paying the expiation and they said, "He should pay a single expiation", which is also the opinion of the four grand jurists."

Ibn `Umar says, "He has to pay the expiation twice: once for the mere act of *zihar* after which they are to return, and the second due to the illegal intercourse just as having intercourse during the day of Ramadan. This opinion is clearly weak.

Az-Zuhri and Ibn Jubayr say, "It dismisses the expiation because its prescribed time has already expired as it should be paid before having intercourse." To this we may respond as

follows: "Passing over the performance time cannot dismiss the prescribed acts such as Prayer and others."

**Fifthly:** Scholars dispute over things like kissing and the like; some say it is similar to intercourse in terms of prohibition. This is the opinion of most scholars.

A minority of scholars say that things like kissing are not prohibited because what is meant in the Qur'anic verse is intercourse only and nothing else.

On the authority of Salamah Ibn Sakhr (may Allah be pleased with him) who said, "The month of Ramadan came upon us and I feared to have intercourse with my wife, so I practiced *zihar* with her. One night, I saw something of her and I had intercourse with her. The Messenger of Allah (pbuh) said to me: "*Set a slave free.*" I said, "I have nothing but myself." He (the Prophet) said, "*Fast for two consecutive months.*" I said, "Fasting was the reason behind all this!" He (the Prophet) said, "*Feed a Faraq of dates to sixty indigent persons.*"<sup>(1)</sup>

Topics related to the hadith:

**First:** It implies what the Qur'anic verse indicates in relation to establishing the types of expiation in order; the order upon which all scholars have agreed.

**Secondly:** The saying of the Prophet (pbuh) reading: "*Fast two consecutive months*" indicates the necessity of succession in observing the fast, the same as indicated by the Qur'anic verse. Moreover, the verse sets a condition that this should be done

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1. Transmitted by Ahmad and the four grand Imams save An-Nasa'i, and it declared to be authentic by both Ibn Khuzaymah and Ibnul-Jarud.



before they have intercourse with each other. So, if he has intercourse with her during the two months of fasting, he will start once more from the very beginning. All scholars make consensus about that, if he does so during the day intentionally. Abu Hanifah and others hold that he resumes fasting even if he has sexual intercourse during the night or forgets the verse. But, Ash-Shafi`i and Abu Yusuf view that it is harmless and moreover, it is permitted because the cause behind prohibition is invalidating the fast while having intercourse during the night does not invalidate the fast. But, the final comment is that the verse is general.

They dispute over the case in which he has intercourse during the day while forgetting. Ash-Shafi`i and Abu Yusuf say that it is harmless as it does not invalidate the fasting. While Abu Hanifah and others say he should resume his fast even though he has intercourse intentionally, for the verse is general in this respect.

**Thirdly:** they also dispute over the case in which he accidentally suffered from a hopeless excuse during his fast then it was cured. Should he continue or resume his fast? Malik, Ahmad and others say, " He should continue his fast for the separation was out of his control."

Abu Hanifah says, and this is one of the two sayings of Ash-Shafi`i that: "He should resume the fast, for separation was his own choice." But, the excuse has turned him into a helpless person who cannot choose out of his own will. Moreover, if the excuse was anticipated to pass over, it is said that he should continue. And, another opinion states that he should resume fasting from the beginning.

**Fourthly:** the saying of the Prophet (pbuh) to the inquirer: "*Observe fast*" after the inquirer's saying: "I have nothing but myself" is in full agreement with what is indicated by the Qur'anic verse that he should not move on to fasting unless he is unable to set a slave free.

If it is said, " Can a strong lust for intercourse be regarded as an excuse for a person to expiate with feeding and can this person be thus considered unable to fast? I say that this can be clearly derived from the hadith of Salamah and his saying when he tried to find an excuse not to expiate with fasting, "All what I have done was because of fasting." And the ratification of the Prophet (pbuh) to his excuse and his saying, "*Feed*" indicates that strong sexual desire is an excuse that enables him to move on to the act of feeding.

**Fifthly:** The Qur'anic text and the Prophetic one declare the necessity of feeding sixty indigent persons as if they prescribe an indigent person for each single day of the two months. Scholars dispute: is it a must that he feeds sixty indigent persons, or does it suffice him to feed a single indigent person for sixty consecutive days? Malik, Ahmad, Ash-Shafi`i, and others hold the first opinion as it can be understood in the verse. The Hanafis and others hold the second opinion, that it suffices him to feed a single indigent person for sixty days or more than one indigent person in such a way that equals feeding sixty persons because the next day he (the indigent person) would become deserving just as before receiving the first time and so on. But, their plea is replied that what is clearly taken from the verse indicates the necessity of the indigent persons to be sixty. There are three reports about Ahmad regarding this issue, two of

which are just like the two previous ones and the third is as follows: if he finds some indigent person other than the one whom he fed the first time, he is not permitted to give him the second time. But, if he does not find any, it suffices to give him again.

**Sixthly:** Scholars dispute over the amount of food to be given to each indigent person. The Hanafis and others consider it to be sixty *sa`*s of date, maize, barely, or half a *sa`* of wheat. But, Ash-Shafi`i deems it correct to give each indigent person a *mudd* that equals quarter of a *sa`*.

**Seventhly:** The hadith indicates that not all types of expiation are to be ignored when the person is incapable. This is a matter over which scholars dispute.

Ash-Shafi`i and in one of two sayings reported about Ahmad say that it is not allowable to abandon it when the person is disabled and the evidence can be found in the hadith of Abu Dawud that Khawlah Bint Malik Ibn Tha`labah said, "My husband, Aws Ibnus-Samit practiced *zihar* with me..." until the Prophet (pbuh) said to her, "*Let him set a slave free.*" She said, "He cannot." He said, "*Let him fast for two executive months.*" She said, "He is an old man who is unable to observe fast." He said, "*Let him feed sixty indigent persons.*" She said, "He has nothing to offer in charity." He said, "*I will aid him with a `irq* (some measure)...etc. So, if he were to be exempted due to inability, the Prophet would point this out and would not aid him at his own expense.

Moreover, Ahmad in his second saying, along with some scholars, considers it correct for expiation to be neglected in

case of disability, just as obligations can be neglected in case of disability.

**Eighthly:** The hadith indicated that limited *zihar* is just like absolute *zihar*. Limited *zihar* means that when one practices *zihar* with his wife, to a given period of time, then he practices intercourse with her before expiation of that stated period. Scholars dispute over the case in which he fulfilled his oath and did not break it. Malik and Ibn Abi Layla say, "If he said to his wife: "To me you are just like my mother's back till the night." He has to perform the expiation even though he did not approach her." The majority of scholars say, " He would not have to expiate if he did not approach her. Imam Ash-Shafi`i has two opinions in relation to the *zihar* which is limited to a specific time. One of these two sayings states that it is not regarded as *zihar*.

## Summary

The origin of *zihar* is that a man says to his wife, "To me, you are just like my mother's back." During the pre-Islamic period it was considered divorce, but Allah the Almighty made it easy for this Ummah and appointed expiation thereof and did not regard it as divorce.

So, when anyone practices *zihar* with his wife and wishes to return to an ordinary life with her and keep her in his hand, this would be illegal till he performs the appointed expiation.

Scholars agree that *zihar* is established when he likens his wife to his mother's back, but they dispute over other issues:

1. If he likens her to an organ of his mother's, will this be *zihar* or not? The majority deem it as *zihar*. But, some consider it *zihar* only when he likens her to an organ, at which looking is prohibited.
2. If he likens her to one of his unmarriageable relatives, it will be *zihar* as regarded by most scholars even if she were prohibited due to foster relationship.
3. Practicing *zihar* by the disbeliever is controversial. Those who say it is permissible say that he should expiate through something other than fasting.
4. Scholars agree that having intercourse with the wife with whom *zihar* has been practiced before performing the expiation, is prohibited. If he did so, he would perform a single expiation only as the majority of scholars say. But,

some say that he should perform the expiation twice. And, some say that the expiation becomes null for its prescribed time has passed. This last opinion is heard from Az-Zuhri and Ibn Jubayr.

5. Scholars dispute over things like kissing and hugging and the like: the majority say that they take the same ruling as intercourse before performing the expiation, so they are prohibited. The minority say that they are not prohibited. Moreover, Al-Awza`i says it is permitted for him to enjoy what is above her waist (i.e. the upper part of her body).

Scholars agree upon the order of performing parts of the expiation as stated in the Glorious Qur'an:

Setting a slave free, for the one who cannot, he observes fast for two consecutive months, for the one who cannot observe fast, he feeds sixty indigent persons, a *mudd* (the *Mudd* equals two handfuls) for each one. All this before they have intercourse. If he started to observe fast for two consecutive months and during this he touched her in intercourse during the day, he should resume his fast. Similarly, if he had the intercourse with her during the night, it should take the same ruling as during the day, and this is the opinion of the majority of scholars. But, Ash-Shafi`i and Abu Yusuf deem it permitted to have intercourse during the night, and moreover, if he had intercourse with her during the day while forgetting, he would be blameless. Others say that his fast would be invalid and he should resume it. And, if he had a hopeless excuse and he broke his fast then the excuse was removed, would he be entitled to resume or continue? There are two opinions concerning it.

One who is entitled to feed sixty indigent persons, is not permitted to feed a single person for sixty days, as the majority state.

One who is unable to expiate in any form, most scholars see it inevitable for him to expiate and nothing else.

One who practices *zihar* with his wife for a given period such as two or three days, some scholars say that he must perform expiation even if he fulfilled his oath. But, the majority of scholars say that he is entitled to do nothing.

# CAPTER EIGHT

## *Li`an*

The word *li`an* is derived from *la`n* meaning curse.

The case is that of a Muslim who finds his wife committing adultery with another man without having four witnesses to witness with him. If he speaks, he will be regarded as an accuser and will be given eighty lashes, which is the prescribed penalty for a false, unsubstantiated accusation of zina. If he keeps silent, he will be torturing himself and will suffer greatly therefrom. If he divorces her, she and her family will swear at him very roughly and they will demand expenses from him. Thereupon, Allah the Almighty has revealed the verses of *li`an*<sup>(1)</sup> as a mercy and relief for His servants, to put an end to a painful social catastrophe.

On the authority of Ibn `Umar (may Allah be pleased with him) who says, "So and so asked saying, "O Messenger of Allah! What do you see if someone from amongst us happened to find his wife committing adultery, what can he do? In case he talks, he talks on a grievous matter, and in case he keeps silent, he keeps silent on the same." He (the Prophet) did not answer him. Afterwards, he came back again and said, 'What I have asked you about is now my own affliction.' Then, Allah the Almighty revealed the verses of suraht an-Noor. The Prophet recited them for him, exhorted him and reminded him (of Allah),

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1. The verses: 6-9 in Surat An-Noor.



reminded him that the torture of this present life is much less than that of the Hereafter. He (the man) said, 'No, by Him who sent you with the truth! I did not tell lies about her.' Then, he (the Prophet) called her and exhorted her as well. She said, 'No, by Him who sent you with the truth! He is a liar.' He (the Prophet) began with the man who made four testimonies by Allah, and then the woman, then he separated them both."

(Narrated by Muslim)

The questioner on the hadith is `Uwaymir al-`Ijlani, as stated in most narrations.

Most narrations state that the cause behind revelation of the verses was the story of Hilal Ibn Umayyah and his wife, which preceded that of `Uwaymir, and that the Prophet (pbuh) recited them, for the ruling is general and is to be applied to the whole Ummah.

Issues around the hadith:

**First: his saying:** "He (the Prophet) did not answer him" as Abu Dawud states, "The Prophet (pbuh) disliked his questions and found fault with them". Al-Khattabi says, " He meant questioning about what is not needed by the questioner." Ash-Shafi`i says, " At the time of revelation, inquiring about something that had not been revealed about, was forbidden in order not to let something be revealed that may lead them to difficulty as Allah the Almighty says,

*﴿O you who believe! Do not question things which if they were revealed to you would only vex you, but if you ask such questions while the Qur'an is being revealed, they will be explained to you. GOD has pardoned those things, for*

*GOD is All-forgiving, All-Forbearing. ﴿﴾*

(Al-Ma'iddah: 101)

Also, an authentic hadith reads,

*"The most grievous of all people is the one who asks about something that is not prohibited and it was declared prohibited because of his inquiry."*

Al-Khattabi says, "We have found inquiry mentioned in the Book of Allah in two ways:

**First:** that of clarifying and educating in the matters that must be known in the religion.

**Secondly:** that of obstinacy and affectation.

The first is allowed and encouraged as Allah the Almighty says in His Glorious Book,

*﴿ Ask the people of knowledge. ﴿﴾*

(An-Nahl: 43)

Also, Allah the Almighty says,

*﴿ Ask those of the earlier scripture. ﴿﴾*

(Yunus: 94)

and,

*﴿ They ask you about the phases of the moon, say, "These are appointed times for the people and the Pilgrimage. ﴿﴾*

(Al-Baqarah: 189)

and,

*﴿ And they ask you about menstruation, say, "It is a harm." So keep away from women during their menstruation, and*

*do not approach them until they become clean, so when they have cleansed themselves, then approach them as GOD has commanded you. Surely GOD loves those who repent, and He loves those who are always pure. ﴿﴾*

(Al-Baqarah: 222)

There are other verses as well.

Concerning the second way, He says,

*﴿And they question you concerning the soul, say, "The soul is the concern of my Lord, and what you have been given of knowledge is very little. ﴿﴾*

(Al-Isra': 85)

and,

*﴿They question you about the Hour, when will it come? How should you know of such a great event? The final word concerning it belongs to your Lord. ﴿﴾*

(An-Nazi`at: 42-43)

So, these types of inquiry are disliked, and if they were met with silence, this would be some kind of reprimand and deterrence, and if they were met with an answer, it would be as a penalty and a hardship.

**Secondly:** In his saying: "He started with the man" indicates the necessity of starting with him which is in conformity with the legal ruling because he is the plaintiff, so he should be first. Also, the verse begins with him. It is a consensus of scholars that starting with him is a Prophetic Sunnah, but they dispute over starting with the man: is it obligatory or not? The majority of scholars agree that doing so is obligatory, for the Prophet

(pbuh) said to Hilal: "Get the evidence or you will receive a prescribed penalty on your back." So, the start must be with him to remove the prescribed penalty from the man himself and the matter has not yet been proved to start with the woman.

Abu Hanifah agrees with the view of starting with the woman, for the Qur'anic verse does not necessitate starting with the man because the conjunction is made with "and" which does not indicate ordering. He was replied as thus: even if it does not indicate an order, Allah the Almighty does not start with other than that which deserves priority and importance. Also, his action (pbuh) shows this, so it is like his saying, "*We start with what Allah has started with, related to the obligation of starting with the hill of As-Safa.*"

**Thirdly:** his saying, "Then, he separated them both", indicates that separation between the spouses in such cases is not validated unless it is done by the ruler and not by the mere act of *li`an*. This is the opinion of most scholars taking their evidence from the terms of this hadith and from the other hadith transmitted in the two *Sahihs* of Al-Bukhari and Muslim, that a man divorced his wife thrice after fulfilling *li`an* and the Prophet (pbuh) did not mind. So, if separation was to be validated by fulfilling *li`an*, the Prophet (pbuh) would show the man that his divorce was not valid.

The majority of scholars say that separation is validated by the act of *li`an* itself. And they dispute over the following: Is separation effected by fulfilling his *li`an* only without hers? Ash-Shafi`i says, "Yes." Imam Ahmad said, " No, it cannot be effected unless both of them fulfill it," which is the chosen view as for the Malikis and Zahiris. They take their evidence from

what has been transmitted in the Sahih of Muslim, as the Prophet (pbuh) said, "*This is separation between each two couples involved in the case of li`an.*" Ibnul-`Arabi says, "If separation needed a ruling, it would thus be done by the great ruler, Muhammad (pbuh) who said, "*This is separation between each two couples involved in the case of li`an.*" They said, "And his saying, "separated between them" means that he clarified and declared the ruling and not that he established that kind of separation between them. They say that divorcing her was not based on the order of Prophet Muhammad (pbuh) and that it reaffirmed the prohibition caused by *li`an*, so it did not require denial. They also say that if divorce was required to separate them, he would be able to take her in marriage again after she had got married to another person.

Abu Dawud narrates from Ibn `Abbas the hadith that reads, "The Messenger of Allah (pbuh) ordained that he is not entitled to secure a house for her staying or to feed her because their separation is not caused by divorce or death."

Abu Dawud narrate from Sahl Ibn Sa`d the hadith related to the couple who are involved in the case of *li`an* saying: "According to the Sunnah, the couple involved in the case of *li`an* must not reunite again."

Al-Bayhaqi narrates this hadith in the following words, "The Messenger of Allah (pbuh) separated them and said, '*They would never reunite again.*'"

It is narrated that `Ali and Ibn Mas`ud said, "According to the Sunnah, the couple involved in the case of *li`an* must not reunite again."

On the authority of `Umar who said, "They get separated and never reunite again."

**Fourthly:** Scholars dispute over the separation caused by *li`an*, is it revocation or irrevocable divorce? Ash-Shafi`i, Ahmad and others are of the opinion that it is regarded as revocation, for it causes perpetual separation and thus it is likened to the separation due to foster relationship as the couple never reunite again and also because *li`an* is not made in clear terms of divorce.

But, Abu Hanifah regards it as an irrevocable divorce, arguing that it cannot be done with anybody but the wife so it is one of the marriage-related rulings. Thus, it is divorce as it is one of the marriage-related rulings unlike revocation that can be one of the rulings of something other than marriage, such as revocation due to defects. He is answered that to be a marriage-related ruling does not necessitate that it is divorce, and expenditure on the husband's part is not necessary as well.

If the husband belies himself after fulfilling *li`an*; can he take his ex-wife back? It is a controversial matter. Abu Hanifah says, " Yes, he can, for the hindrance is removed", which is the saying of Sa`id Ibnul-Musayyab who says, "If he belies himself, he will be one of her suitors." And, Sa`id Ibn Jubayr says, "She goes back to him as long as her *`iddah* is not expired." Ash-Shafi`i and Ahmad say, "She never goes back to him for the Prophet (pbuh) said, '*You have no right over her*', but I say that this may be refuted by saying that: the Prophet (pbuh) said that to the one who made *li`an* and did not belie himself.

**Fifthly:** in the hadith concerning the case of *li`an* of Hilal

Ibn Umayyah who accused his wife in the presence of the Prophet (pbuh) of committing adultery with Shurayk Ibn Sahma', the hadith that is narrated about Abu Dawud and others. Al-Khattabi says, " If a man accuses his wife of committing adultery with a given man then those involve in a case of *li`an*, *li`an* will drop (i.e. cancel the application of ) the prescribed penalty thereof. Because the Prophet (pbuh) said to Hilal Ibn Umayyah, "*Get the evidence or you will receive the prescribed penalty on your back.*" And, when they carried out the Oath of Condemnation (*li`an*), Hilal did not receive the penalty. It has not been mentioned in any of the narrations that Shurayk Ibn Sahma' pardoned him, and thus the prescribed penalty for accusing him of adultery was dropped by practicing *li`an*. This is because he is obliged to cite the man involved in the case to remove harm from himself without intending accusation or harming him personally.

I say, it is obvious that there is no necessity for citing the man involved in adultery. And Imam Ash-Shafi`i says, "The prescribed penalty is dropped only if he makes mention of the man and gives his name, and if he does not do so, he receives that prescribed penalty."

Abu Hanifah says, "He must taste the prescribed penalty and the man is allowed to demand its being carried out."

Imam Malik says, "He must taste the prescribed penalty as the man's right, and practice *li`an* as for his wife."

I say, there is no evidence in the hadith of Hilal Ibn Umayyah on dropping the prescribed penalty for it is the right of the accused, and it is not reported that he demanded it and the

Prophet (pbuh) answered him saying: It was dropped by carrying out *li`an* or by executing the prescribed penalty of the husband for defamation, and thus making the ruling clear.

### **Further Rulings**

On the authority of Ibn `Umar (may Allah be pleased with him) that the Messenger of Allah (pbuh) said to the couple involved in the case of *li`an*, "*Your accounts will be with Allah, one of you two is a liar, you have no authority over her.*" He said, "O Messenger of Allah! My property!" He said, "*If you were telling the truth concerning her, that would be in return of what you have enjoyed of her, and if you were telling lies concerning her, that would be a more remote (transgression).*" (Narrated by Al-Bukhari and Muslim)

The hadith refers to the separation that happened between them earlier, and that one of them should be a liar and that his/her accounts would be with Allah and that the man cannot have anything of the dowry returned to him. Because, if he were telling the truth, she would deserve that money for he had enjoyed her, and if he were lying, she would deserve it for the same reason. And, it is rejected that he takes it back again, for he lied and thus wronged her.

The hadith also indicates that *li`an* on the part of a pregnant woman is valid and it is not necessary to delay it until she delivers. This is the view of the majority of scholars. Moreover, Abu Hanifah, Ahmad and others say that there cannot be a case of *li`an* to reject pregnancy for it might be nothing and thus *li`an* itself would be meaningless. I say that that is as if they mean there is no *li`an* on basis of the mere guesswork that she is



pregnant through adultery and not because they found the man with her which is what we find in texts.

The hadith also indicates that *li`an* causes denial of the child's lineage even if denial was not mentioned in the oath. This is the view of some Zahiris. However, some Malikis and some of Ahmad 's colleagues deem it invalid to practice *li`an* while there is pregnancy except on condition that the husband mentions that he denies the child's lineage and that it is valid to deny the child's lineage while still an infant and the case for *li`an* is to be delayed till the time of delivery; yet these matters have no evidence. Anyway, the correct view is that of the Zahiris where denial of the child's lineage did not take place in the presence of Prophet Muhammad (pbuh) and it was not indicated in the two hadiths of Hilal or `Uwaymir, and there were no cases of *li`an* during the life of the Prophet (pbuh) other than these two cases.

As for the case of *li`an* practiced by a pregnant woman, it is confirmed through these hadiths. As Malik compiles from Nafi` on the authority of Ibn `Umar that the Prophet (pbuh) made *li`an* between a husband and his wife. The man declared denial of the child's lineage and the Prophet (pbuh) separated them and gave the child to the woman. Moreover, in the hadith of Sahl whose wife was pregnant, he denied and declared denial of the child's lineage, but this does not indicate stipulating denial of the child's lineage, for the man did so on his own account and by himself.

Abu Hanifah says that it is invalid to declare denial of the child's lineage and making *li`an* thereof, so if he makes *li`an* with her while she is pregnant and she gives birth to the child, the latter will be his own child and he will not be able to deny its

lineage in principle. Because *li`an* cannot be except between a husband and his wife and here, she was irrevocably divorced during pregnancy. The comment is that this view contradicts the well-stated text of the main hadith in this section and that of the hadith narrated by Ibn `Umar. Though Al-Bukhari makes it clear that his saying "and she was pregnant" is part of the words of Az-Zuhri, the main hadith of the section is clear-cut and authentic.

On the authority of Ibn `Abbas (may Allah be pleased with him),"the messenger of Allah (pbuh) ordered a man to put his hand on the fifth (testimony) over his mouth and said that it requires (Allah's wrath and punishment)".<sup>(1)</sup>

The hadith indicates that the fifth oath of condemnation is obligatory. The way in which oaths are made is indicated in the hadith narrated by Al-Hakim and Al-Bayhaqi on the authority of Ibn `Abbas and related to making oath by Hilal Ibn Umayyah, that the Messenger of Allah (pbuh) said to him, "*Say: 'I swear by Allah but Whom there is no god that I am telling the truth'*", saying this four times.<sup>(2)</sup>

On the authority of Sahl Ibn Sa`d (may Allah be pleased with him) about the story of the couple involved in the case of *li`an* said that when they had finished carrying out *li`an*, he said, "O Messenger of Allah! I am not going to be truthful with her if I keep her", and he divorced her thrice before he was ordered by the Messenger of Allah (pbuh)." (Al-Bukhari and Muslim)

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1. Narrated by Abu Dawud and An-Nasai', and its chain of transmission is trustworthy.

2. Al-Hakim says The hadith is authentic on Al-Bukhari's condition.

## Summary

If a man is sure that his wife has committed adultery, he makes a plea to the ruler or his deputy. The ruler sends for the woman to come, then he starts to admonish them both and invite them to repent and return back to Allah the Almighty. If they insist on their stand, the husband accusing her of committing adultery and the wife denying, the ruler orders them to observe the oath of condemnation (*li`an*).

He starts with the man and orders him to say four times, "I swear by Allah but Whom there is no god that I am telling truth concerning my accusation of her committing adultery" and on the fifth he swears that the curse of Allah shall be upon him if he is lying."

Then, he makes the woman swear four times that her husband is lying and on the fifth she swears that the wrath of Allah shall be upon her if he is telling the truth." If they both swore, the separation between them both becomes effected for good without interference of the ruler as most scholars agree.

Scholars dispute over this separation, is it revocation or divorce? Some of them say that it is revocation. Others say that it is an irrevocable divorce. According to the two views she does not deserve to be paid maintenance or anything else, but she deserves the agreed-upon dowry. The husband must pay it in full. If the husband is truthful, he should pay the dowry for the pleasure he has enjoyed with her. And, if he is lying, he does not deserve anything therefrom, for he wronged and disgraced her.

If a woman is pregnant during *li`an* and the husband denies her pregnancy, the child will belong to its mother and not the husband. May Allah guides us all to that which may please Him!

## CHAPTER NINE

### ***`Iddah and Ihdad***

*`Iddah* is the name of the period a woman waits and does not marry following her husband's death or separation from him. The period is counted on the basis of delivery, menstrual periods, or months.

*Ihdad* linguistically means avoidance, and it legally means that the woman whose husband has died avoids or refrains from perfume and adornment.

On the authority of Al-Miswar Ibn Makhramah that Subay`ah Al-Aslamiyyah (may Allah be pleased with her) gave birth (to a child) some nights following her husband's death. She went to the Prophet (pbuh) taking his leave to get married and he permitted her to do so and she did." (Narrated by Al-Bukhari)

In another narration, "She gave birth following her husband's death by forty nights."

In another narration by Muslim, Az-Zuhri says: "I see nothing wrong with her getting married while she is still in her post birth bleeding but on condition that her husband is not allowed to touch her till she becomes pure."

The hadith indicates that the *`iddah* of the pregnant woman whose husband has died ends as soon as she delivers even if it is before four months and ten days pass. After that she is allowed to get married.

There is controversy about this issue. What has been shown by the hadith is the same as what has been adopted by the

majority of scholars from the Prophet's companions and others out of this hadith and the generality of Allah's saying,

*﴿And those who are pregnant, their period will be until they lay down their burden.﴾*

(At-Talaq: 4)

Though the previous verse is concerned with the divorced women, this does not limit its scope. The generality of the verse is supported by what has been transmitted by `Abdullah Ibn Ahmad , after Ubayy Ibn Ka`b, who said, "I said, 'O Messenger of Allah! *﴿And those who are pregnant, their period will be until they lay down their burden.﴾* (At-Talaq: 4), is she the woman who has been divorced thrice or she whose husband has died?" He said, 'She is (both: the woman) who has been divorced thrice and she whose husband has died.'

On the authority of Ibn Mas`ud (may Allah be pleased with him) several narrations are reported to confirm this saying of his. Ibn Mirdawayh narrates after him saying, "The surah of Talaq has abrogated all `iddahs *﴿And those who are pregnant, their period will be until they lay down their burden.﴾* (At-Talaq: 4) Every pregnant woman who has been divorced or whose husband has died, her `iddah is to wait till delivery."

Some scholars as well as `Ali Ibn Abi Talib say that she waits till the end of either delivery even if it was delayed for more than four months and ten days, or the aforementioned period if her delivery was delayed further. They say that their evidence is in the Qur'anic verse that reads,

*﴿And those of you who die and leave wives behind, they should abstain from marriage for four months and ten days.﴾*

(Al-Baqarah, 234)

They say that the Qur'anic verse contains both generality and peculiarity and His saying, ﴿And those who are pregnant, their period will be until they lay down their burden.﴾ (At-Talaq: 4) as well, so they compromise the two texts by acting upon them both.

The reply is that the hadith of Subay`ah is regarded as a text stating the ruling that the verse of surah At-Talaq refers to the woman whose husband has died. Also, this hadith is supported by other narrations and hadiths. Ash-Shu`abi says concerning the narration made on the authority of `Ali Ibn Abi Talib: "I don't believe that `Ali Ibn Abi Talib said that the *`iddah* of the woman whose husband has died is the last of the two periods."

Az-Zuhri's words are open regarding the permissibility of fulfilling the marriage contract even if she is still in her post birth bleeding and that it is not allowed to have intercourse with her because of the existence of this blood.

An-Nawawi says in his explanation of Sahih Muslim: Scholars of ours and others say whether the fetus is one or more, perfect or defected, a cling of blood or a chewed piece of flesh, her *`iddah* expires as soon as she gives birth to him, and whether he is clearly in the form of human or not. Ibn Daqeeqel-`Id says nothing about this subject because of the fact that when the word pregnancy is mentioned what is usually meant is the well-shaped and formed fetus "and this is the most probable and reasonable view."

The compiler says that this was the reason behind what has been narrated from Imam Ash-Shafi`i that the *`iddah* does not come to an end by delivering a piece of flesh without being

shaped in the form of a human even vaguely. The apparent meaning of the hadith and the verse is generality in respect of what can be recognized as a fetus, and not what cannot be recognized as thus. For it may be just a piece of flesh and while the `iddah becomes necessary on the basis of certainty, it cannot come to an end on a doubtful matter. (Subul As-Salam)

### **Right of the Divorced Woman to Housing and Maintenance till Expiry of the `Iddah**

Allah the Almighty says,

*﴿Do not expel them from their houses, nor shall they leave unless it is proven that they have committed an indecency.﴾*

(At-Talaq: 1)

And, *﴿Lodge them where you are lodging, according to your means.﴾*

(At-Talaq: 6)

On the authority of Al-Qasim Ibn Muhammad and Sulayman Ibn Yasar that Yahya Ibn Sa`id Ibnul-`As divorced the daughter of `Abdur-Rahman Ibnul-Hakam, the irrevocable divorce. Thereupon, `Abdur-Rahman Ibnul-Hakam had her moved (to his own house). So, `A'ishah sent to Marwan Ibnul-Hakam who was ruler of Madinah saying, "O Marwan! Be fearful of Allah and let the woman go back to her home." Marwan said in the hadith of Sulayman Ibn Yasar, "Abdur-Rahman overcame me!" and said in the hadith of Al-Qasim, "Have you not been informed of the story of Fatimah bint Qays?" `A'ishah said, "It will not harm you not to mention the hadith of Fatimah." Marwan said, "If you were to find evil, the evil between them both is great!" (Narrated by Al-Bukhari and Muslim)

Scholars agree that the revocably divorced woman deserves maintenance and housing. They dispute over the irrevocably divorced woman. Some say that she has no right to maintenance or housing unless she is pregnant. That is narrated after Ibn `Abbas, Al-Hasan, Ahmad and others.

And others say that she has the right to maintenance and housing whether she was pregnant or not as long as she is during her *`iddah*. This is narrated after `Umar Ibnul-Khattab, `Abdullah Ibn Mas`ud, the Hanafis and others.

A third group says that she has the right to housing anyway, but she has no right to maintenance unless she is pregnant. This is narrated after Imam Malik, Ash-Shafi`i and others. Sa`id Ibnul-Musayyab was once asked about a woman who was divorced while living in a rented house. The question arose who should pay the rent? He said, "Her husband." And if her husband had no money, she would pay it herself. And, if she could not, the ruler should pay it from the Treasury. Those who do not assign housing to her argue that it is narrated after Ash-Shu`abi on the authority of Fatimah Bint Qays that she was divorced thrice and the Messenger of Allah did not assign for her either housing, nor maintenance. Further, he ordered her to spend her *`iddah* at the house of `Amr Ibn Umm Maktum, the blind man, and she did so.

But, those who declare it to be her right to have housing, which is the saying of the majority, dispute over the reason behind moving Fatimah. It is narrated after `Urwah that `A'ishah denied Fatimah's view and said, "She (Fatimah) was in a deserted place and there was some fear concerning her, so the Prophet (pbuh) gave her permission (to move on)."



Al-Qasim narrates that `A'ishah (may Allah be pleased with her) said, "What is wrong with Fatimah? Does she not fear Allah? i.e. in what she says: There is neither housing, nor maintenance." (Transmitted by Al-Bukhari)

Sa`id Ibnul-Musayyab says that Fatimah was moved on for she used to insult her husband's relatives. `Amr Ibn Maymun Ibn Mahran narrates from his father after Sa`id Ibn Mahran who said, "Fatimah was not sweet tongued and she used to insult her husband's relatives. Thereupon, the Prophet (pbuh) ordered her to spend her *`iddah* at the house of Ibn Umm Maktum." This is narrated on the authority of Ibn `Abbas in interpreting the saying of Allah that reads, ﴿... , nor shall they leave unless it is proven that they have committed an indecency.﴾ (At-Talaq: 1) Ibn `Abbas said, "That she insults her husband's relatives, if she does so, it will be right to get her out." And, Ibn Mas`ud said that if she commits adultery, she will be taken out to receive the prescribed penalty.

`A'ishah and Ibnul-Musayyab deny that Fatimah Bint Qays did not mention the reason for which the Messenger of Allah (pbuh) ordered her to spend her *`iddah* in a house other than her husband's but only mentioned that the Prophet did not assign for her maintenance or housing. This way let the listeners think that the irrevocably divorced woman has the right to spend her *`iddah* wherever she wants.

During her *`iddah* she is permitted to move on from the house for necessity or need like if she becomes fearful of the demolition of the building, drowning, or fire. If there is no need and she wants to go out for some work, if the divorce is revocable, she will not be permitted to do so. But, if the divorce is irrevocable, she may go out during the day only and not at

night. It is narrated from Abuz-Zubayr on the authority of Jabir that he said, "My maternal aunt was divorced thrice. She went out to reap some dates of hers, and a man met her and blamed her for that. She went to the Prophet (pbuh) and mentioned that to him and he said, "*Go and reap your palms so you may give in charity thereof or do good.*" It is customary that dates or palms can not be reaped except during daylight and reaping during the night is further prevented. Ibn `Umar said that the woman whose husband has died and the one who has been irrevocably divorced are not allowed to spend the night outside their homes." This is the view of Ash-Shafi`i as well.

Abu Hanifah says that the woman who has been irrevocably divorced is not permitted to go out either by day or night. This applies to the woman whose divorce is revocable. The woman whose husband has died is permitted to go out during the day if she wants to.

If the husband of a Bedouin woman dies, `Urwah Ibnuz-Zubayr says that she can go wherever her people go. This is the view of the majority of scholars.

On the authority of Fatimah Bint Qays that Abu `Amr Ibn Hafis divorced her irrevocably while he was in Syria and sent her his agent with a certain amount of barley. She regarded it as insufficient. The agent said, "You owe us nothing." She went to the Messenger of Allah (pbuh) and made mention of what had happened. The Messenger (pbuh) said, "*You have no right to take maintenance from him*", and ordered her to spend her `iddah at the house of Umm Sharik then he said, '*She is a woman currently visited by my companions, go and spend your `iddah at the house of Ibn Umm Maktum as he is blind and you can behave*

*freely there.'* He added, *'When your `iddah expires, let me know.'* She said, "When my `iddah expired I told him that Mu`awiyah Ibn Abi Sufyan and Abu Jahm proposed to me. The Messenger of Allah (pbuh) said, *'Abu Jahm always bears his stick, while Mu`awiyah is pauper, for he has no property, (it is better to) marry Usamah Ibn Zayd.'* "She said, "I hated it. Then he said, *'Marry Usamah.'* And, I married him, then Allah made him good for me and I was so pleased." (Transmitted by Muslim)

Imam Al-Baghawi says that this hadith contains several juristic issues, foremost among which are:

- The woman who is divorced thrice or the one who makes *khul`* is not to be paid maintenance during her `iddah unless she is pregnant, but she deserves housing. Allah says,

*﴿Lodge them where you are lodging, according to your means, and annoy them not so as to restrict them. And if they are pregnant, expend on them until they deliver their burden.﴾*

(At-Talaq: 6)

And, Fatimah was denied housing for the insults she made by her tongue.

- Permissibility of hinting to the woman during her `iddah with engagement, for his saying (pbuh) (when your `iddah expires, let me know) is a hint to engagement.

- The majority of scholars agree that making the engagement clear during the `iddah of a divorced woman is not allowed. While, it is allowed during the `iddah of a woman whose husband has died. Allah the Almighty says,

﴿And there is no blame on you if you make indirect proposal of marriage to widows during their waiting term.﴾

(Al-Baqarah: 235)

As for the woman who has been divorced because of separation, if she is divorced from one to whom she cannot return, such as the woman who has been divorced thrice and the woman who has been irrevocably separated because of *li`an* or foster relationship, she can be engaged through hinting, just as the woman whose husband has died. But, if she can return to her ex-husband, as the one who has made *khul`* and the one whose marriage has been revoked, her ex-husband can propose to her either through hinting, or openly. Is it permitted to others to propose to her by way of hinting? There are two views:

**First:** it is permitted just as the one who is divorced thrice.

**Secondly:** it is not permitted because her ex-husband because of whom she is applying *`iddah* can have her back during the *`iddah*. Moreover, the woman whose divorce is revocable is not permitted to be proposed to by way of hinting. Scholars agree upon that.

Making proposals by way of hinting: That he hints to her of his desire to marry her without making it open, and the woman answers him in the same way. For instance, he may say: "When your *`iddah* ends, let me know, someone is keen on you, or how can one find your like!"

Also, the hadith indicates that wealth is something considered among the terms of suitability in marriage and that it is permissible to marry a woman off to someone who is not suitable for her as long as she is content, as Fatimah was from

the tribe of Quraysh while Usamah was one of the *mawlas* .

It also proves the permissibility of proposing to a woman who has not made her consent clear to a previous suitor. So, if she gave her consent to a man, no one else is allowed to propose to her.

It also shows that there is nothing wrong in mentioning some defects of the suitor before the woman by way of giving advice and counsel.

On the authority of Sa`d Ibn Is-haq Ibn Ka`b Ibn `Ujrah after his paternal aunt Zaynab Bint Ka`b, that Al-Furay`ah Bint Malik Ibn Sinan, sister of Abu Sa`id al-Khudri told her that she went to the Messenger of Allah (pbuh) to take permission to return to her people in the Banu Khudrah. As her husband went after some slaves of his who had escaped, he reached them in Al-Qadum and was killed at their hands. So, I asked Allah's Messenger to let me go back to my people as my husband left me in a rented house without any money. She said, "The Messenger of Allah (pbuh) said, 'Yes.' I left and while I was in the room or the mosque, he called me, or asked someone to call me. When I came, the Messenger of Allah (pbuh) said, 'What did you say?'" She said, "I said, 'I recounted the story of my husband.' He said, 'Stay at your home till your *iddah* expires." She said, "I said, 'I stayed there for four months and ten days.'" She said, "When `Uthman was made Emir of the Believers, he sent asking me about it, I told him, he followed and judged upon it." (*Al-Muwatta'*, Abu Dawud, At-Tirmidhi, Ad-Darimi, and At-Tirmidhi said it is a good and authentic hadith)

Imam Al-Baghwi says that scholars agree that the revocably

divorced woman deserves maintenance and housing from her husband.

As for the irrevocably divorced woman, she deserves housing, as maintained by most scholars. They dispute over her maintenance. Some say it is obligatory on him, while others say it is not, she has no right to it unless she is pregnant, which is the view of Ash-Shafi`i. Also, the woman who was involved in the case of *li`an* is just like the one divorced thrice as they have the right of housing, and maintenance if pregnant and the husband did not deny that he was the cause of this pregnancy. But, one whose marriage was declared invalid due to a certain defect or fault, she deserves neither maintenance nor housing even if she is pregnant.

The woman whose husband has died has no right to maintenance whether she is pregnant or not. Scholars agree on this. Ibn `Abbas said, ﴿*And those of you who die and leave wives behind, should make a will for their wives to provide for their maintenance for one year.*﴾ (Al-Baqarah: 240) was abrogated by the verse concerning inheritance that prescribed for them one-quarter or one-eighth, and abrogated the full year `iddah by making the period four months and ten days. (Transmitted by Abu Dawud with a good chain of transmission) Jabir said that the woman whose husband has died has no right to maintenance; her lot of inheritance suffices her.

They dispute over housing for the woman whose husband has died. Imam Ash-Shafi`i has two views over this:

**First:** she has no right to housing, and she is allowed to spend her `iddah wherever she wants. This is the opinion of `Ali

Ibn Abi Talib, `A'shah, `Ata', Abu Hanifah and others. They prove it by saying that the Prophet (pbuh) permitted Furay`ah to go back to her people. And, when he finally said to her: "Stay at your home till your `iddah expires", it indicated some kind of preference.

**Secondly:** she has the right to housing. This the most preferable view, and it is held by `Umar Ibnul-Khattab, `Uthman Ibn `Affan, Malik, Ahmad and others. They say that the Prophet's permission to Furay`ah initially was abrogated by his second saying, "*Stay at your home till your `iddah expires.*"

The hadith proves that it is permitted to abrogate the ruling before acting upon it.

### **Ihdad of the Woman Whose Husband has Died**

Humayd Ibn Nafi` reported that Zaynab Bint Abi Salamah told him these three hadiths. Zaynab said, "I entered upon Umm Habibah, a wife of the Prophet's (pbuh) following the death of her father, Abu Sufyan Ibn Harb. Then Umm Habibah ordered some yellowish perfume to be brought. She perfumed a girl thereof and then touched her own belly (with her perfumed hand) and said, 'By Allah! I am in no need of perfume, but I heard the Messenger of Allah (pbuh) saying on the pulpit, '*It is not lawful for a woman who believes in Allah and the Last Day to mourn for a dead person more than three days, save her husband (she is to mourn) for four months and ten days.*'" Zaynab said, "I heard my mother, Umm Salamah saying, 'A woman came to the Messenger of Allah (pbuh) and said, 'O Messenger of Allah! My daughter's husband has died, and she is suffering from some trouble in her eye, could we apply collyrium to it?' The Prophet

(pbuh) said, 'No.' then he said, 'It is only four months and ten days, while in the pre-Islamic period every woman of you used to throw away a dung after one year.'" Humayd said, "I said to Zaynab, 'What is the meaning of "to throw away a dung after one year?'" Zaynab said, 'When the husband of a woman died, she entered a humble hut and put on the worst of her clothes, and never touched perfume or anything (like it) until one year passed. Then a mount, a donkey, a goat or a bird was brought to her and she rubbed her hand over it, and it so happened that one on which she rubbed her hand died. After that she went out (of the humble hut) and she was given a dung to throw. She was then allowed to use perfume or something else.'" (Narrated by Al-Bukhari and Muslim)

The Imam says that *ihdad* means: To abstain from adornment and beautification.

At first, the *`iddah* of one whose husband had died was a full year as made clear-cut by Allah (Exalted be He) in His Glorious Qur'an,

﴿And those of you who die and leave wives behind, should make a will for their wives to provide for their maintenance for one year.﴾

(Al-Baqarah: 240)

Then, it was abrogated by His saying,

﴿And those of you who die and leave wives behind, they should abstain from marriage for four months and ten days.﴾

(Al-Baqarah: 234)

She must observe *ihdad* during the whole *`iddah* as viewed



by the majority of scholars. She must abstain from adornment and perfumes. She is not permitted to put any material on her head whether it is perfumed or not because it is originally some kind of adornment. She is permitted to put only non-perfumed materials on her body and, she is not permitted to put kohl that is perfumed or ornamented such as the black kohl. It is permissible to wear the Persian kohl for it has no ornamentation and on the contrary increases ugliness and tiredness of the eye. If she is in need (urgently) to wear ornamented kohl, many scholars see nothing wrong with that, foremost among them are Salim Ibn `Abdillah, Sulayman Ibn Yasar, `Ata', An-Nakh`i, Malik and the Hanifis.

Imam Ash-Shafi`i says that she is permitted to wear kohl by night and should remove it by day.

This is due to the one whose husband has died and she is observing the *`iddah*. The Imam says on Sharh As-Sunnah (Explaining the Sunnah) that the woman who observes the *`iddah* due to divorce: Is it a must for her to observe *ihdad* as well, during the *`iddah* or not? If the divorce was revocable, it would not be obligatory for her as she is permitted to do whatever may soften her husband's heart to take her back again. But, the one whose divorce was irrevocable due to *khul`* or the one who was divorced thrice, there are two views:

**First:** she must observe *ihdad* just like the woman whose husband has died. This is the view of Sa`id Ibnul-Musayyab and Abu Hanifah.

**Secondly:** It is not obligatory, which is the view of `Ata' and Malik. He says in Ar-Rawdah An-Nadiyyah that *ihdad* is not to

be observed for anything except death. As it is to pretend or make one's appearance for the purpose of indicating sadness and sorrow for separating from the husband by death and not for the mere fact of separation through divorce or the like because no text can be found indicating this and this was not done by any of the women during the life of the Prophet (pbuh) or his rightly-guided caliphs. So, anyone who says it must be observed by one whose husband has died must provide sound evidence.

### **Types of `Iddah in Brief**

Imam Al-Baghawi says that one should know that the *`iddah* due to the husband's death is four months and ten days. This is true whether the woman is one who has menses or not, and whether the husband died before or after the consummation of the marriage. However, if she is pregnant, she should observe the *`iddah* till she gives birth to her baby. When four months and ten days pass, her *`iddah* ends even if the period of her *`iddah* is not as usual. Malik says that if the period of her *`iddah* is not as usual, she should continue her *`iddah* till she has it. In terms of *ihdad*, no matter whether she is free, slave, young, old, Muslim or, non-Muslim.

Az-Zuhri says that he thinks it is allowed for the young woman whose husband has died to approach perfume, for she is observing her *`iddah*.

The Hanafis say that there is no *ihdad* for the young and the non-Muslim.

The one who has been irrevocably divorced and whose marriage has not been consummated, she is under no obligation to observe a *`iddah*, for Allah the Almighty says,

*﴿When you marry believing women and then divorce them before you have touched them, no prescribed term should be accounted for them.﴾*

(Al-Ahzab: 49)

And, if her marriage has been consummated, and she is pregnant, her *`iddah* will be until she delivers. Allah the Almighty says,

*﴿And those who are pregnant, their period will be until they lay down their burden.﴾*

(At-Talaq: 4)

And, if she is not pregnant, and she has never had her menses or has reached menopause (the age in which women always despair of menstruation), she will wait for three months as indicated in His saying (Exalted be He),

*﴿And your wives who despair of menstruation, if you doubt about them, their period of waiting will be three months, and those who have never had their monthly periods.﴾*

(At-Talaq: 4)

And, if she has her menses, her *`iddah* will be three menstrual cycles as shown by His saying (Exalted be He),

*﴿And divorced women must wait for a trial period of three menstruations.﴾*

(Al-Baqarah: 228)

If her menses stop before reaching menopause, the majority of scholars view that she is not to conclude her *`iddah* till three menstrual cycles have passed or until she reaches menopause. This is the view of `Uthman Ibn `Affan, `Ali Ibn Abi Talib,

Zayd Ibn Thabit, `Abdullah Ibn Mas`ud, `Ata', Ash-Shafi`i and the Hanafis.

It is narrated after `Umar Ibnul-Khattab (may Allah be pleased with him) that she should wait for nine months and if she does not find blood, she should observe three months. Imam Malik says the same, and Imam Ash-Shafi`i interprets the words of `Umar Ibnul-Khattab that he was referring to a woman who had only nine months left for her to reach menopause. Imam Ash-Shafi`i in an earlier view said that she should wait for four years which is the maximum period for pregnancy, then she should wait for three months. He afterwards abandoned that opinion.

Az-Zuhri says concerning the woman whose menses has stopped before she reaches menopause that her *`iddah* is a full year. Al-Hasan says that she should wait for a full year and if she did not have menses, she waits for additional three months.

Imam Al-Baghawi says that the woman who is bleeding (from the womb) inbetween her periods, waits in terms of menstrual cycles as viewed by the majority of scholars. If she was used to having menses, she should observe that in her menstruation and purity. If three menstrual cycles pass her, she ends her *`iddah*. And, if she forgot, her *`iddah* would end by the end of three months.

### **The Woman Whose Husband's Whereabouts are Unknown**

If a woman's husband is absent or his news cease to reach her, she will not be allowed to get married to another man unless she is sure of his death or that he has divorced her. This is the

view of the majority of scholars.

It is narrated that `Umar Ibnul-Khattab said that she should wait for four years, then she observes *`iddah* for four months and ten days, then she ends the *`iddah*.

Also, it is narrated that `Umar said that after fulfilling the *`iddah*, if her husband comes back, he is to be given the option either to take the dowry back, or to take the woman herself back. Some scholars disapprove this view of `Umar.

Imam Malik says that if she gets married after fulfilling the *`iddah*, her first husband will have no right over her, whether the marriage has been consummated or not.

Sa`id Ibnul-Musayyab says if he is missed during war, she should wait for him for one full year. In case the absent husband divorces her or he dies, her *`iddah* will begin from the time of divorce or death, as viewed by the majority of scholars; besides, her *`iddah* will be counted as already terminated if the news reach her after the end of the time prescribed for this *`iddah*.<sup>(1)</sup> This is the view of `Abdullah Ibn Mas`ud, Ibn `Abbas, Imam Malik, Imam Ash-Shafi`i and others.

It is narrated from `Ali Ibn Abi Talib that he said, "Her *`iddah* starts when she knows the news." This is the view of both Al-Hasan and Qatadah.

`Umar Ibn `Abdel-`Aziz says that if his death is confirmed with sound evidence, her period will begin from the time of his death. And, if his death is confirmed mere hearsay, she will start

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1 To illustrate, a non-pregnant woman may be informed that her husband died eight months ago, her *`iddah*, which is four months and ten days will be counted as already applied because its count depends on the date of the husband's death, which started eight months ago. (Translator)

her period from the time of hearing the news.

## **Two `Iddahs Come Together**

On the authority of `Umar Ibnul-Khattab (may Allah be pleased with him) who said, "Whenever a woman marries during her *`iddah*, if the new husband has not consummated the marriage with her, they must be separated, then she will continue the rest of her *`iddah* from the first husband. If, however, the new husband has consummated the marriage with her, they must be separated, then she will continue the rest of her *`iddah* from the first husband, then she will begin (another) *`iddah* from the other man, who will never be allowed to remarry her." Sa`id says, "She deserves her dowry because of the enjoyment he (i.e. the second man) has had from her." (From Al-Muwatta' and its narrators are trustworthy)

If a woman is to observe two *`iddahs* together from two persons when she, for example, is doubtfully copulated with during the *`iddah* due to the first, the two *`iddahs* will not intersect as maintained by the majority of scholars. Rather, if she is pregnant from one of them, the *`iddah* due to pregnancy will be given priority. If pregnancy is caused by the first, she will resume her *`iddah* that is due to the second, after giving birth. And, if pregnancy is caused by the second, her period from the second ends with delivery, then she will continue that of the first. And, if she is not pregnant, she will complete the *`iddah* of the first, then resume that of the second. If she gets married during the *`iddah*, the time she spends with the second husband will not be counted as part of the *`iddah*. for any of them. If they are separated, she will complete the *`iddah* of the first and then

resume that of the second.

Among those who see that the two *`iddahs* are not to be merged into one are `Umar Ibnul-Khattab, `Ali Ibn Abi Talib, `Umar Ibn `Abdel-Aziz and Ash-Shafi`i. Others see that they can be merged into one *`iddah*, and when three menstrual periods have passed after the time at which the second man copulated with her, she becomes free from the *`iddah* for both of them. This is the opinion of Imam Malik and the Hanafis.

Ibrahim says concerning the one who gets married during the *`iddah* and she has three menstrual periods, that she becomes irrevocably separated from the first.

His saying, "who will not be allowed to remarry her forever." is narrated only from `Umar Ibnul-Khattab that one who gets married to a woman observing her *`iddah* from another, they separate from one another then he cannot take her back in marriage. The majority of scholars see that he can take her back in marriage after fulfilling the *`iddah* of the first.

## Summary

The *`iddah* is a name given to the period through which the widow or the divorced must abstain from marrying. This period is counted in terms of delivery, menstrual cycles, or months.

*Ihdad* legally means avoiding and abstaining from perfume and ornament for one who is observing the *`iddah* following her husband's death.

The woman who separates from her husband and on whom waiting is a must, the separation may be due to the husband's death, divorce or invalidating the marriage contract.

If her husband dies, her *`iddah* will be four months and ten days if she is not pregnant. The pregnant woman's *`iddah* in all sorts of separation, is to give birth to her baby. Some scholars say her *`iddah* is the latest of the two terms: pregnancy or four months and ten days. Delivery is achieved by giving birth to whatever is in her womb which bears the shape and form of humans, whether the form is ambiguous so that only women or doctors could recognize it, or it is so clear that everyone could recognize it. This is narrated by An-Nawawi from the Shafi`is and others.

Ibn Daqiqel-`Id says that the term pregnancy is mostly attributed to the full-shaped and complete fetus. And delivering a piece of flesh or a clot of blood is rare. Thus, it is narrated that Ash-Shafi`i said that the *`iddah* does not come to an end by delivering a vague or unidentified piece of flesh.

The *`iddah* of the divorced woman is three purities or three



menses. Those who say it is to be counted in terms of menses comment that her *`iddah* does not end until after the purity of the third menses after pronouncing the divorce, and the menstruation during which divorce was made will not be counted.

Those who say it is to be counted in terms of purities further comment that her *`iddah* expires if the menses comes after the third purity, and the purity during which divorce was made will be counted if her husband did not cohabit with her (during this period).

As for the immature woman who has not yet had menstruation, her *`iddah* is to be three months. The same is applicable to the woman who despairs of menstruation due to old age.

The woman observing her *`iddah* due to the death of her husband has no right to housing or maintenance during the *`iddah* as seen by some scholars. Others say that she has the right to housing but not to maintenance.

The woman who is given a revocable divorce has the right to maintenance and housing, for the tie of marriage is still there. There is a dispute over the woman who is irrevocably divorced.

Some scholars say she has no right to maintenance or housing except when she is pregnant, which is the opinion of Imam Ahmad and Is-haq.

Some other scholars say she has the right to maintenance and housing just as the revocably divorced woman whether she is pregnant or not, which is the saying of the Hanafis.

Others say that she has the right to housing and not to maintenance unless she is pregnant, which is the saying of Imam Malik, Ash-Shafi`i, and others.

The revocably divorced woman must stay in her home and must not go out neither by day nor by night unless there is an urgent or necessary matter.

The irrevocably divorced woman can leave her home by day if she is in need but she is not allowed to go out by night.

The woman whose husband has died is not allowed to go out either by day or night. It is said that she may go out by day for necessity.

Abu Hanifah says the irrevocably divorced woman is not allowed to go out neither by day nor by night just like the revocably divorced one. And, the woman whose husband has died may go out by day if she wants but spends the night in her house.

Proposing to a woman during her *`iddah*: If she is observing the *`iddah* due to the death of her husband, no one is allowed to propose to her openly and it is permitted to do this by way of hinting. If she is revocably divorced, proposing to her is not permitted either openly or by way of hinting.

The woman given three pronouncements of divorce and the one who is separated from her husband by *Li`an* or foster relationship: proposing to her is permitted by way of hinting but not openly.

Observing *ihdad* by abstaining from perfume and adornment is obligatory on the woman whose husband has died. It is not

permitted for her to put any materials on her hair whether perfumed or not. She can put non-perfumed materials on her body. She cannot put kohl which is perfumed such as the black kohl and the like that are used nowadays by women. When necessary, she can apply the black kohl that contains adornment, as viewed by many jurists including Malik and the Hanafis. Imam Ash-Shafi`i says she is permitted to put it at night and remove it by day. This ruling encompasses all the women whose husbands have died whether they are young or non-Muslims. The Hanafis say that no *ihdad* is due on the young and the non-Muslim women.

The revocably divorced woman is permitted to wear perfume and apply ornaments and do whatever may attract her husband.

For the irrevocably separated woman either by *Khul`* or three pronouncements of divorce, there are two sayings: Abu Hanifah says that she must observe *ihdad*, the saying, which is groundless. The second saying is that it is not a must on her to observe *ihdad*, which is the saying of most jurists including `Ata' and Imam Malik.

The woman whose husband is absent and the news of whom has not been heard anymore has no right to get married to another unless she is certain about his death or her divorce from him, as viewed by most scholars. `Umar Ibnul-Khattab says that she waits for four years then observes her *`iddah* for four months and ten days, then she ends her *`iddah*. Malik says if she gets married after the expiry of her *`iddah*, the first husband will have no right over her whether the second has consummated the marriage or not. If the absent husband divorces her or dies, her *`iddah* will begin from the time she is divorced or that of his

death, as viewed by most scholars, even if the news reaches her after the expiry of her *`iddah*.

If a woman gets married during her *`iddah*, if the second husband has not consummated the marriage, they will be separated then she will complete her *`iddah* due to the first, and the second will be regarded as one of the suitors. If they have consummated the marriage, they will be separated then she will complete her *`iddah* due to the first and then observe a *`iddah* due to the second who will never be allowed to get married to her again and whose dowry she will be deserving of in return for his enjoyment with her.

# CHAPTER TEN

## Custody and Maintenance

### Wife's Maintenance

Allah the Almighty says,

﴿Let the man of means expend according to his means. And the man whose resources are restricted, let him expend according to what God has given him.﴾

(At-Talaq: 7)

Allah (Exalted be He) says,

﴿That is nearer to fairness, lest you deviate from the right path.﴾

(An-Nisa': 3)

Ash-Shafi`i says that lest those you care about be too many. This proves that a man must shoulder the maintenance of his wife.

Jabir Ibn `Abdillah narrated from the Messenger of Allah (pbuh) on the Farewell Sermon his saying, "*You should shoulder their maintenance and clothes in fairness.*" (Transmitted by Muslim)

Ash-Shafi`i says the Glorious Qur'an and the Prophetic Sunnah indicate that a man should shoulder all that is necessarily needed by his wife in terms of maintenance, clothes

and service.

Ash-Shafi`i says that maintenance is of two kinds: maintenance of the man of means and maintenance of the man whose resources are restricted. Each one of them should expend according to his means.

On the authority of Nafi` from Ibn `Umar that `Umar Ibnul-Khattab (may Allah be pleased with him) wrote to the emirs of the armies regarding some men who were absent from their wives and ordered them to force them (the men; soldiers) to spend (on thier wives) or divorce (them), and if they were to divorce, they should send the deserved maintenance for the time during which they had sent nothing." (Transmitted by Ash-Shafi`i in his Musnad)

The Imam says in Sharh As-Sunnah that it indicates that if the husband is absent, the wife's due maintenance will not be dropped, and if he abstains from spending on her for a given period, he will be thus in debt to her concerning her maintenance as well as food, clothes, and expense of the servant during this period. This is the opinion of Imam Ash-Shafi`i. The Hanifis say that the maintenance due to the wife is not to be regarded as a debt unless made so by the judge. But, if a woman is absent without taking her husband's leave, or if she flees away or becomes rebellious (*nashiz*), her maintenance will be dropped.

If he cannot have intercourse with her due to some malady, menstruation, birth blood or some sexual defect, her maintenance will not be dropped. If she is too young to bear intercourse, she will have no right to maintenance. If she is old enough and the husband himself is too young, he will shoulder

her maintenance. Moreover, her observing fast and prayers do not drop her maintenance. If a disbelieving woman embraces Islam after consummating her marriage but her husband does not, her maintenance will not be dropped, for she has practiced an obligation on her (i.e. her conversion to Islam), just as fasting and prayer. If the husband embraces Islam and she does not, she will not take any maintenance, for her abstaining from embracing Islam makes her a rebellious wife.

### **Maintenance due to Children and Relatives**

Allah the Almighty say,

﴿The father, in the fair known way, shall be responsible for their maintenance and clothing.﴾

(Al-Baqarah: 233)

This maintenance is made obligatory due to the child. Allah the Almighty also says,

﴿And if you wish to engage a wet-nurse for your children.﴾

(Al-Baqarah: 233)

i.e. to seek a wet-nurse for them.

On the authority of `A'ishah (may Allah be pleased with her) that Hind Bint `Utbah said, "O Messenger of Allah! Abu Sufyan is a miser and he does not give me what may suffice me and my children except what I used to take from him without his knowledge." He said, '*Take what suffices you and your children in terms of fairness.*' (Narrated by Al-Bukhari and Muslim)

This hadith is taken as evidence for the permissibility of mentioning flaws and defects of a specific person by way of

inquiring, seeking judicial opinion or complaint and the like. This is also one of the fields in which backbiting is made permissible.

The hadith also indicates the permissibility of listening to the complaint of one of the disputant two persons while the second is absent.

The hadith also indicates that if one attributes something bad to himself, he may accompany it with some rightful excuse or reason.

It also indicates that the basis in the case of maintenance is the wife's, for she is the one entitled to confess holding the maintenance or not. The husband's saying is not reliable in this respect; it is only the wife's.

It also indicates the obligation of spending on the wife and that maintenance is determined in terms of sufficiency, which is the saying of most scholars, and Ash-Shafi`i as reported by Al-Juwayni.

It also indicates that maintenance is to be regarded due to the status of the wife, which is the view of the Hanafis. Al-Khassaf chooses the view, which says that it is to be regarded in due to the status of them both.

The author of Al-Hidayah says: "We should join Allah's saying, "Let the man of means expend according to his means." to this hadith." The preferred legal opinion is based on this view. Imam Ash-Shafi`i regards the status of the husband as apparent in the verse, which is the opinion of some of the Hanifis as well.

The hadith also indicates that if one has a right at the hand of



another from whom he cannot take it back, he is permitted to take out of his money the same amount as his right, without his permission.

This is the saying of Ash-Shafi`i and a group of scholars. They prefer that he should not take other than the same type of his right except if this is not possible.

Abu Hanifah says this is forbidden, and in another report he is narrated to have said that he should take only the same right and not anything else except gold and silver, they can be taken one for another.

Three views are narrated about Imam Malik just like these. Imam Ahmad, however, is narrated to have said that this is prohibited altogether.

The hadith also indicates that the woman represents a dimension and a factor in the process of maintaining the children and spending on them. Also, convention is to be regarded when there is no legal opinion stipulated that no contradiction whatever may occur between it and a well-stated or fixed legal text.

On the authority of `A'ishah (may Allah be pleased with her) who said that the Messenger of Allah (pbuh) said,

*"The best thing a man can eat is that which he earns himself, and his child is of his earnings."* (An authentic hadith)

The late Imam Al-Baghawi says that a man must spend on his parents and children for the Prophet (pbuh) said to Hind: *"Take what suffices you and your children in terms of fairness."*

It indicates spending on the child by the father is obligatory.

Being so, the father must also spend on his own father, for the latter's sanctity is greater. He says (may Allah bestow His mercy on him) that a man of means must spend on those whose resources are restricted, of the children and parents. Spending on the rich among them is not a must just as the ones who can work to gain their living. This is the saying of Imam Ash-Shafi`i.

All jurists declare it to be a right on him to spend on those whose resources are restricted. Spending on relatives other than parents and children is not something obligatory.

The Hanafis deem it obligatory to spend on brothers, sisters, paternal uncles/aunts and maternal ones.

Maintenance of the relative is regarded in terms of sufficiency and cannot be viewed as a payable debt.

If the father whose resources are restricted is in dire need to marry, the well-to-do son must enable him to do so by giving him a suitable dowry for a woman. Then, the son has to maintain the wife or the slave-girl. The father is not obliged to get his son married. It is narrated after `Amr Ibn Shu`ayb from his father, from his grandfather that a man came to the Prophet (pbuh) and said, "I do have property and children and my father is in need of my money." He said,

*'You and your property are for your father: your children are of the best of your earnings; eat of the gain of your children.'*

This hadith indicates that if the son has no property and is capable of earning his living, he should work to gain money to spend on his father and his child as well.

Some scholars are of the view that the father is free to take

what he wishes of his son's property. But, the majority of them are of the view that he takes only that which he needs.

## **Custody of Children**

On the authority of Abu Hurayrah (may Allah be pleased with him) that the Messenger of Allah (pbuh) made a boy choose between his father and mother."<sup>(1)</sup>

The Imam says in *Sharh as-Sunnah* if a man separates from his wife and they have a child under seven, the mother will have more right to have him if she wishes and the father must shoulder his maintenance. If she does not want to keep him, the father should pay for a woman to take care of him and if the mother is not trustworthy, or she is a disbeliever and the father is a Muslim, she will have no right whatever to keep the child.

The Hanifis say that the mother has more right even if she is a non-Muslim. If the mother is free, Muslim and trust worthy, she has the right to keep him unless she gets married. When she gets married her right is cancelled unless she gets married to the uncle of the child, then her right is not dropped, as viewed by some scholars. When she is divorced, she resumes her right to have him once more, regardless of whether the divorce is revocable or irrevocable. Abu Hanifah says that if the divorce is revocable, her right cannot be resumed once more.

Imam Malik says that the right is not hers again for good. So, if the mother dies, or she is a disbeliever or gets married, then the maternal grandmother has more right to keep the child than the father unless she gets married. If she (the grandmother) gets married, her right drops unless she gets married to the child's grandfather.

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1. Transmitted by Ash-Shafi'i, Ahmad and At-Tirmidhi, and the latter said that it is a good and authentic hadith.

If there are no maternal grandmothers of any degree, the father has more right and is more deserving than any other person. If he is not there, his mother and her female ancestors have more right than the grandfather. The evidence for the mother having more right than the father, is what is narrated after `Amr Ibn Shu`ayb from his father from his grandfather `Abdullah Ibn `Amr, that a woman said, "O Messenger of Allah! This is my son; for him my womb was a vessel, my breast a drink, and my lap a bedding, and his father has divorced me and wants to take him away from me." The Messenger of Allah (pbuh) said, "*You have more right to keep him unless you get married.*" (Transmitted by Ahmad and Abu Dawud with a good chain of transmission)

The evidence for the maternal grandmother having more right than the father, is what is narrated by Malik from Yahya Ibn Sa`id that he said, "I heard Al-Qasim Ibn Muhammad saying, "'Umar Ibnul-Khattab had a child by a woman from among the Ansar (Helpers and supporters of the Prophet). The child was `Asim Ibn `Umar. Then, `Umar divorced her. One day he went on his mount towards Quba' where he found his son playing in the courtyard of the mosque. He took him and put him in front of him on the riding-mount. The child's grandmother arrived and They dispute over him till they came to Abu Bakr as-Siddiq. `Umar said, "My son", and the woman said, "My son". Abu Bakr said, "Let her take him." `Umar did not discuss it with him." (Muwatta' Malik)

If the female relatives of a child come together to have him, the one given priority is the mother, then the maternal grandmother, then the paternal grandmother and upwards, then

the grandfather's mother, then the sister from the father and mother's side, then the paternal sister, then the maternal sister, then the maternal aunt, then the paternal aunt, in order. No paternal, male relative can confront with these women in this respect. This is if the child is under seven, but when he comes to the age of seven, he is to be given the chance to choose between his father and mother, whether the child is male or female. He will be kept by anyone he chooses, which is the view of most of the Prophet's companions and also the view of Imam Ash-Shafi`i, Ahmad and Is-haq.

Ath-Thawri and the Hanifis are of the opinion that the mother has the right to keep the boy until he begins to feed and dress himself and the girl until she has her menses. After that the father has more right to keep them.

Imam Malik says the mother has more right to keep the young girl even if she starts to have menses unless she (the mother) gets married, and the young boy unless he becomes mature. If the boy reaches seven years and is not as sane as his counterparts, the mother will have more right to keep him just as the little baby. If the sane child chooses one of his parents then wishes to move to the other, his wish should be fulfilled at once, and, if he shows hesitation in moving or shifting from one to another and so on, this will indicate that he is not in good mental health and thereupon his mother will have the right to keep him just as she will do to the baby. He is to be given the freedom to choose one of them only if they are free, Muslim, and trustworthy. So, if one of them is a slave, a disbeliever or a heretic, the other one will have the right to keep him. And, if the mother gets married, he will have no options, and his father will

keep him. As the child who has reason is given the opportunity to choose between the mother and the father, he is also given the opportunity to choose between the mother and the grandfather and between the mother and the paternal uncle. In case the mother keeps the child and the father intends to travel, he is not permitted to take him away from her. But, if he wants to move to another country, he can take him away from the mother unless she moves also to the same country, then no one could take him away from her.

The mother cannot prevent the father from visiting the child and taking him to school or to learn a craft. And, if the child is kept by the father, he cannot prevent him from visiting his mother or to be visited by her. If the child is a girl, he cannot prevent the mother from visiting her, but he can prevent her from visiting the mother unless she is ill. Thereupon, the girl can visit her to enquire about her health.

# Summary

## Maintenance

The wife has a right to be maintained by her husband in return of his holding her and enjoying her. This maintenance is to be according to the status of the husband as shown in the Glorious Qur'an. Some say that it is to be according to that of the wife.

If the husband is a man of means, he will spend on her according to his means, and if he is a man of moderate means, or one whose resources are restricted, he will spend according to his means. Convention is to be regarded as well in judging the status of the husband in what is due from him for his wife.

This ruling is applicable to the maintenance due on a Muslim towards his parents and children who are with restricted resources.

Maintenance due to the wife includes food, drink clothing, housing, perfumes and ornaments needed by women. It also includes the servant and housekeeper if the wife deserves that due to her original status.

This maintenance is obligatory on the husband whether he is absent or present with his wife. Ash-Shafi`i says that this maintenance turns into a payable debt on the part of the husband if he delays payment to her.

The Hanifis say that it is not to be regarded as a debt unless the judge says so.

If a woman is absent without taking her husband's leave or that she flees away or becomes rebellious, her maintenance will be dropped. If he cannot have intercourse with her due to some malady, menstruation, birth blood, or some sexual defect, her maintenance will not be dropped. If she is too young to bear intercourse, she will have no right to maintenance. If she is old enough and the husband himself is too young, he will shoulder her maintenance. Furthermore, her maintenance is not dropped by her observing fasting and prayers.

Maintenance of the child due on the father is well established in the Glorious Qur'an and the Prophetic Sunnah. And, his parents have more right to maintenance than his own children. Maintenance becomes a must only when the parents and children are of restricted means and cannot work to earn their living. This is the view of Imam Ash-Shafi`i. All jurists view it as an obligation to maintain them when their resources are restricted even if they are not unable, to work and earn a living.

For relatives other than parents and children, it is not a duty on him to maintain them except as said by the Hanifis who declare it an obligation due to brothers, paternal and maternal uncles and aunts.

If the father whose resources are restricted is in need to marry, the well-to-do son should enable him to do this by giving him the dowry. Then, he should maintain his father's wife. Nevertheless, the father is not obliged to get his son married.

If the son has no property and is capable of earning his living, he should work to gain money to spend on his father and his own child as well. Some scholars are of the view that the



father is free to take what he wishes of his son's property. However, the majority of them are of the view that he takes only that which he needs. If the father is able to work, but his work is inferior and disgraceful and his son has a good rank, the son must save his father's dignity and make him leave that work. These are some ways of practicing righteousness towards parents.

### **Custody of Children**

If a man separates from his wife and they have a child under seven, the mother has more right to keep him if she wishes and the father must shoulder his maintenance. If she does not want to keep him, the father should pay for a woman to take care of him. If the mother is not trustworthy or she is a disbeliever and the father is a Muslim, she has no right whatsoever to keep the child. The Hanifis say that the mother has more right to keep him even if she is a non-Muslim.

If the mother is free, Muslim, and trustworthy, she will have the right to keep him unless she gets married. If she gets married, her right will be dropped unless she gets married to the uncle of the child, then her right will not be dropped, as viewed by some scholars. When she is divorced, she can resume her right to have him once more, regardless of whether the divorce is revocable or irrevocable. Abu Hanifah says that if the divorce is revocable, her right cannot be resumed. Imam Malik says that the right is not hers again. So, in case the mother dies, or she is a disbeliever or gets married, the maternal grandmother has more right to keep the child than the father unless she gets married. If she (the grandmother) gets married to the child's grandfather,

she will keep the right of custody. If there are no maternal grandmothers of any degree, the father has more right and is more deserving than any other person. If he is not available, his mother and her female ancestors have more right than the grandfather.

If the female relatives of a child come together to have him, the one to whom priority is given is the mother, then the maternal grandmother, then the paternal grandmother and upwards, then the grandfather's mother, then the sister, then the paternal sister, then the maternal sister, then the maternal aunt, then the paternal aunt in order. No paternal, male relative can confront with these women in this respect.

This is if the child is under seven, but when he becomes seven years of age, he is to be given the chance to choose between his father and mother, whether the child is male or female. Anyone he chooses, he will be kept by him, which is the view of most of the Prophet's companions and also held Imam Ash-Shafi`i, Ahmad and Is-haq. If the child chooses one of his parents then wishes to move to the other, his wish should be fulfilled. And, if he shows hesitation in moving or shifting from one to another and so on, this will indicate that he is not in a good, mental health and thereupon his mother will have the right to keep him.

Ath-Thawri and the Hanifis are of the view that the mother has the right to keep the boy until he begins to feed and dress himself and the girl until she has menses, after that the father has more right to keep them.

Imam Malik says that the mother is more entitled to keep the young girl even if she starts to have menses unless she (the mother) gets married, and the young boy until he becomes mature. If the boy reaches seven years and he is not as sane as his counterparts, the mother will be more worthy of keeping him, just as she will do to a little baby.

The child is to be given the chance to choose one of his parents only if they are free, Muslim, and trustworthy. So, if one of them is a disbeliever or a heretic, the other one will have the right to keep him.

And, if the mother gets married, he will have no option, and his father will keep him.

In case the mother keeps the child and the father intends to travel, he is not permitted to take him away from her. But, if he wants to move to another country, he can take him away from her.

If the child is kept by the mother and the father wants to visit or see him, she is not allowed to prevent him. And, if a boy is kept by the father, he cannot prevent the mother from visiting him, or the boy from visiting his mother.

## Conclusion

Praise be to Allah Who has guided us to goodness and truth.

I testify that there is no god but Allah Who has shown us all the gates to good through His perfect revelations, and I testify that Muhammad is His Messenger, His beloved, His chosen creature and the one who will have a praised position on the Day of Judgement. May Allah's blessings and peace be upon him, his family and companions and whoever follows him in goodness until the Day of Resurrection!

Now, with Allah's help the book "Fiqh of the Muslim Family" has ended. I hope that you found it easy and understandable. I also hope that it would be useful for everyone who seeks information through it and that it would be convincing for everyone who aims at comprehending the fiqhi rulings with their evidence as well as the different opinions of jurists concerning them. Afterall, it is Allah Who guides to the Straight Path and to Whom is our return.

Hasan Ayyoub