

Islamic Law

Teaching Material

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Introductory Remarks

This is course of two credit hours. Mainly, it consists seven chapters and each chapter has sub sections. Attempt has been made to discuss issues which are relevant for practical purposes.

Possible attempt has also been made to use Quran as the primary source, and necessary prophet's (PBUH) Hadis is utilized through the course of the preparation of this material..

Objectives are set at the beginning of each chapter.

Students are advised to work on the questions for which are given at the end of each chapter they will help them to evaluate their understanding of the course.

CHAPTER I

The Historical Development of Islamic Law

Objective

Up on the completion of this chapter students will be able to identify:

- What had been the conditions in the Arabian Peninsula before the Prophet (PBUH) start teaching Islam?
- The stages Islam had undergone and the development of Islamic Jurisprudence.
- The interrelation between the life of the Prophet Mummhamed and Islamic Law

Introduction

This chapter discusses five topics:

- The pre-Islamic Period
- The Period of the Prophet Mohammed (PBUH)
- The Period of the Caliphs (Khalifs)
- The Period of the Ummayds and
- The Period of the Abbasids¹

1.1. The Pre-Islamic Period

The place where Islam was born is Arabian Peninsula. This country has a land of one million square miles (or 625,000 squares Kms) which is mainly dominated by desert and steppe areas. It was inhabited by Bedawin tribes who were nomads and pastoralists. They were moving from place to place looking water and pasture for their flocks of sheep and

¹ Dr.Akbar Ali malik; A theoretical and practical approach to Islamic Law P.1 Here after Dr. Akbar.

camels. The community was based on tribe that consisted of descendants of the same blood and was bound not only together through blood but also a strong almost unbreakable sense of fraternity.²

The tribe had rules which held it together. These rules differ from tribe to tribe so we may say there were no uniform set of laws. This task was left to be accomplished by Islam as we will discuss next.

1.2. The Period of the Prophet (PBUH)

To understand this period it is worthy to know about the life of the Prophet Mohammed (PBUH) very briefly. The Prophet was born in 570 A.D. He lost his father and mother at his child hood. For that reason he was looked after by his grandfather who died when the Prophet was eight. In spite of all those lose the Prophet was strong hearted.³

In 595 AD at the age of 25 he married a rich widow named Khadijah who was not simply a wife. Rather she was a disciple. Another woman who played an important role in Islam was Aisha. It seems why Attallah. N. wrote” Central to the Story of the birth of Islam are two remarkable women; Khadijah, the Prophet’s first wife and disciple, and Aisha, the girl who became his youngest wife and the source for much of hadith”⁴

Prophet Mohammed received the first revelation through the Angel Jibril (Gabriel) in 610A.D. First he started teaching Islam to his friends and family. Then in 613 A.D he started teaching in public. This brought him opposition which led to the boy-cott of the Hashim, Muhammed’s clan. The purpose of that boy-cott was organized to isolate him and expose him for attack.⁵

² Dr. Akbar P.2

³ Dr. Akbar P.83

⁴ Attallah,N “women” at P.36

⁵ Dr. Akbar 83-8

This led him to seek a suitable place to spread the message without obstacles. Therefore in 620 A.D, he began consultation with clans in Medina to facilitate his move there. Consequently he was visited by 12 men from Medina in 621 A.D. Again in 622 A.D he was visited by a group of 75 persons who declared their support for him and his message.⁶ This resulted in his migration from Mecca to Medina in 622 A.D. This period of departure and emigration of Mohammed and his followers from Mecca to Medina is known as the *hijrah* to Muslims [PBUH], and is the starting point of Islamic history.⁷

1.3. The Period of the Caliphs (Khalifs)

The prophet (PBUH) died in 632. The period of the caliphs followed. It was between 632-661 A.D. Four caliphs succeeded the Prophet (PBUH). They were Abu baker (573-634 AD), Umar (584-644 AD), Uthman (577-656 AD) and Ali (600-661 AD). Now we will discuss each caliph at a time very briefly.

1.3.1 Abu baker

We are not going to discuss the life history Abu baker in detail. What we will do is we will discuss what were the measure things attributed by him to Islam which we will do, as well, for other caliphs. It is worth to raise one point related with the appointment of Abu baker. Some historians say that the Prophet (PBUH) had selected Abu-Baker to precede him after his death. For this argument they mention the fact that the Prophet (PBUH) shortly before his death selected Abu-Baker to lead the Muslims in one of the most important religious functionaries (Friday Prayer)⁸

Others say this is against the very essence of democracy that exists in Islam. They argued that the prophet left this open. For “Abu baker’s designation as a leader was symbolized by the offering of *baya* (Oath), a handclasp used by the Arabs to seal a contract, in this

⁶ Ibid
⁷ Ibid
⁸ Ibid P.9

case an oath of obedience and allegiance⁹ The reason why the Sahaba (Companions of the Prophet) gave this baya was for the Sahaba Knew him to be the best among them.¹⁰

He also demonstrated that by accomplishing the following;

- 1) He took up on himself the task of collecting the Quran. During the life time of the Prophet the text of the Quran was preserved.
 1. In memories
 2. Inscription on such material as stones wood and bone¹¹
 - He quenched the insurgency that had arisen immediately after the Prophet's (PBUH) death¹²
 - Islam expanded to lands of Syria, Iraq and Palestine.
 - He ordered the codification and collection of the traditional sayings (Hadith) of the Prophet (PBUH) before they were forgotten with the sands of time.

1.3.2. Umar

He was the second caliph who stepped into the seat of leadership that was vacated when Abu baker died in Medina in 634 AD. Before we enumerate the task he accomplished it is worth to mention one point about Umar which describes how he was fearsome among his tribes. Al-Misri writes "(I)bn Masud later observed, "(W)e were not able to pray by the Kaaba until Umar became Muslim"¹³

The following tasks were undertaken by him

- a. Egypt and all Arabian Peninsula were added to the dominions of Islam.
- b. 12,000 Mosques were built
- c. He related about 537 Hadith, from the Prophet (PBUH).

⁹ Mad wi, A.H.A, Islam and the word at P.80

¹⁰ Al-misri, The Reliance of the Traveller P.1038

¹¹ Dr. Akbar P.9

¹² Ibid

¹³ Kaaba is a house built by Ibrahim (Abraham) in Mecca. The Muslims all over the world pray by facing towards Kaaba which is a symbol of Unification.

d. Dated Islamic events from the year of the Hijrah ¹⁴

1.3.3. Uthman

He was the third caliph who received the caliphate shortly after Omar's death in AH 23¹⁵.

Some of the tasks accomplished by Uthman were

- a) Much of the Balkans, Cyprus and much of the North Africa were added to the dominions of Islam.
- b) The task of collection, verification and systematic compilation of the Holy Quran which was commenced with Abu baker was completed. Thus written copies were compiled in to one single volume. This copy was sent to all sectors of the Islamic world.¹⁶
- c) He had related 146 Hadith from the Prophet (PBUH)

1.3.4 Ali

He was the fourth and the last caliph. He was born in 600 AD in Mecca. He was the cousin of the Prophet (PBUH) who latter arranged a marriage between Ali and his daughter Fatima whom he cherished and adored

Ali transferred the capital city from Mecca to Kufa when he took office in AH.35. Some of his attributes were he:

- a. He was among the learnt ones among the companions
- b. He related hundreds of Hadith
- c. He was a diplomat and states man of the highest echelon and showed familiarity of the highest order in the political administrate in social and legal duties a governing body owed to its people.¹⁷

¹⁴ Hijrah the Arabic term referring to the prophet's migration from Mecca to Medina in 622 A.D. signifying the commencement of the Islamic Calendar.

¹⁵ AH means, After Hijrah

¹⁶ Dr. Akbar P.11

¹⁷ Ibid P.13

1.4. The Period of Umayyad

In the previous sections we have seen how Islam brought its domain into vast areas during the caliphate period. Thus, people within the Islamic Empire became aware of the importance, force and wielding that political power could bring.¹⁸ Among many factors, that was then one that led to the establishment of the Umayyad governance which was first established by Mu'a Wiyah. The Umayyad dynasty stayed on power from 661 AD to 750AD.

During this period significant progress was made in Islamic Law. The public law sphere was standardized, codified and established while the private law spheres remained diverse. The first Islamic Jurisprudence schools, whose main purposes were to spread and teach the message of Islam, were established

1.5 The Period of the Abbasids

The Abbasids, who are the Prophet's (PBUH) cousins, came to the throne in 750 AD. They did that with the help of the Persians. They accused the Umayyad for distortion and dilution of the Islamic Law to suit the exigencies of the times without a proper consideration and due regard to the basic tenets of Islam. What are the achievements in Islam?

1. A scholarly theology evolved where in the articles and principles of Islamic faith and the Attributes of Allah were examined and conversed about, in order to ascertain the Unity of Allah the Most High.
2. The doctrine of constitutionalism was created. Thus every community was represented by a council of state.
3. Legal scholars were encouraged to respect, examine and deduce the mode of operation of the law within the Muslim Community,

¹⁸ Ibid p.14

4. Traditions of the Prophet (PBUH) were collected and the jurisprudence of the sources of Islamic Law were codified and written.
5. The Quran was analyzed.¹⁹
6. This resulted in the birth of four notable Sunni schools of legal thoughts. These are:
 - a. The school of Abu Haifa (700-795 Ad)
 - b. The school of Malik ibn Anas (713-795AD)
 - c. The school of Mohammed ibn-Idris Ash Shafi (767-820Ad)
 - d. The school of Ahmad Ibn-Hanbli (780-855Ad)

In the next two consecutive chapters we will discuss the Sources of Islamic Law and then the school of legal thoughts.

Review Questions

- 1. What were the conditions that convinced the population to accept Islam?**
- 2. Discuss the critical stages Islam had undergone.**
- 3. Discuss the two views concerning Abu baker's succession to the Prophet.**
- 4. What were the differences between the Periods of Ummayds and Abbasid?**

¹⁹ Ibid P.14-16

CHAPTER II

SOURCE OF ISLAMIC LAW

OBJECTIVES:

Upon completing this Chapter students will be able to:

- differentiate between primary and secondary sources of Islamic Law.
- discuss the relationship among different sources of Islamic Law.
- master the skill required to utilize those sources to resolve problems.

Introduction

‘The literal meaning of sharia is ‘the road to watering hold’, the clear, right or straight path to be followed. In Islam, it came to mean the divinely mandated path, the straight path, the straight path to Islam, that Muslim were to follow, God’s will or law. However, because the Quran does not provide an exhaustive body of law, the desire to discover and delineate Islamic Law in a comprehensible and consistent fashion led to the development of the science of law, or jurisprudence (fiqh). Fiqh, ‘understanding’, is that science or discipline that sought to ascertain, interpret, and apply God’s will or guidance (shariah) as found in the Quran to all aspects of life’²⁰

Thus for any idea to arise certain customs and usages other than economic factors are relevant. This is especially true for law as it is for any other social science. Thus the Islamic legal system as is well known had its origin in Arabia and has been developed by Arabia jurists, and we should, therefore, naturally expect to find on it the impress of Arabia’s social history and the Arab mind and character. In other words the ground

20 Esposio. I. John, ‘the straight path’ expanded edition (oxford university press, 1994) here after Esposio

works of Islamic legal system, like that of other legal systems, is to be found in the customs and usages of the people among whom it grew and developed.

The sources are four: *The Quran*, the *Sunna*, the *Ijma* and *Qiyas*. They are referred as “roots” of Islamic jurisprudence. The first two *Quran* and *Sunna* are wholly developed in the life time of the Prophet [PBUH] and *Quran* is the supreme source of the Islamic law. While the Holy *Quran* and the *Sunnah* comprises the primary sources, the *Al-Ijma* and *Al-Qiyas* are known as secondary sources²¹

2.1 Quran- The First Primary Sources of the Shera

“The Quran is the Book of God. It is the eternal, uncreated, literal word of God sent down from heaven, revealed one final time to the Prophet Muhammed as guide for humankind”²²

The Quran, which consists of 114 chapters of 6,000 verses, has been revealed to the Prophet (PBUH) over a period of 22 years. Its chapters are arranged according to length, not chronology. The longer chapters, which represent the later Medinian revelations, precede the shorter ones representing the earlier Meccan revelation to Mohammed.²³

Quran means ‘reading’ or recitation and is derived from the word *qar’a* which literally means ‘to read’. The Quran also calls itself by alternative means such as *Kitab* (Book), *Huda* (Guide), *Furqan* (Distinguished) and *Dhikr* (Remembrance)²⁴

Quran is held to consist of revelations made by Allah to the Prophet (PBUH). Now the question is how that made possible? Dunn-Mascetti gives us the answer.

21 Dr. A. Malik P.65

22 Ibid P.64

23 Esposio p. 65

24 Dr. A. Malik P.65

Mohammed took to spending nights in a hill cave near Mecca. There he pondered the problems which were afflicting Mecca: tribal solidarity was breaking up, and rich merchants preferred to pursue individual (interests) rather than fulfill their duties towards the more unfortunate ones. One day Mohammed heard a vision saying to him 'You are a Messenger of God'. This was the beginning of vocation as Prophet of God. From this time onwards, at frequent interval until his death, he received 'revelation'-messages that came directly from God. In about 650 CE the messages were collected and written down in the Koran, the sacred scriptures of Islam ²⁵

Finally but mainly, *Quran* can be divided into two: the oldest one dating from Mecca; that is the first period of the prophet's life time, contains religious matters which are written in a poetical, often lyrical style while the Medians chapters have much of political and legal nature. These differences correspond to two periods; when the movement began at Mecca; as purely religious and moral reaction against pagan society and ended in Medina with the establishment of a new political – religious community.

2.2. Sunna (Hadis): The Second Primary Source of the Shera

Sunna was regarded in the ancient times among the Arab society as a determinant norm in the conduct of life of the individual and of society. So this concept is not invented by the Muslims, for it was already well known to the ancient pagans of the period before Islam. Islam, however, changed the concept and meaning of this ancient term to mean anything that could be proven to have been the practice of the Prophet [PBUH] and his oldest disciples. Slight difference exists between Sunna and Hadis. "The Sunna is restricted to the conduct of the Prophet Muhammed (PBUH), specially his expressed opinion, deeds and tacit approvals"²⁶ Thus, while the former one refers to the life and teachings of the Prophet (PBUH), the latter one is their classification, collection and codification.

²⁵ Dunn-Mascetti in. Sanits, "the chosen Few" P.101

²⁶ Dr. A.Malik P.71

This source was necessitated for decision of the often raising question, for the solution of which no direct revelation was forthcoming, or certain points had to be explained and made clear. Thus the Prophet [PBUH] made pronouncements on these matters. They are equally regarded, however, as sacred as *Quran* though they are communicated orally by the prophet, while the *Quran* is “a revelation made in God’s own words”.

2.3 Ijma (consensus)

The third source of shera is *Ijma* which is “the infallible consensus of the community”.²⁷ The Prophet (PBUH), during his life time discussed, approached and considered new problems that arose with his companions. The Prophet (PBUH) also consulted his close companions on issues that were not directly supported by the revelations but which sought their advice and guidance on application of those revelations to various matters. The methodology to utilizing and arriving at this application was the doctrine of *Ijma* or consensus at all.²⁸

This was necessitated for the reason that fresh facts and new circumstances arose for which no provision has existed in the *Quran* or *hadith* – specially as the affairs of the community became more complex with the growth of Islamic empire. Thus to meet these changes the *Quran* and the *hadith* had to be interpreted. And only that interpretation and application of the *Quran* and *Hadith* were correct, provided these interpretations were accepted by consensus.

An interesting question may be raised here: How was possible to attain the consensus of the community? In other words how consensus constitutes authoritative interpretation? First it was tried in vain the consensus of the community to be expressed or shown as consensus of the companions of Muhammad or of the old authorities of Median but such limitation was found to be too restrictive and therefore abandoned .

²⁷ Herbert J.L The Law of the Near and Middle East P.20

²⁸ Ibid P.76

On the other hand, it can not be left completely to the instinctive feelings of the masses. Thus “the term was defined as the agreed opinion and teachings of the acknowledged Islamic jurist – theologians of a given period.”²⁹ Thus it is safe, if we say. *Ijma* is used [other than the foundation of Shera] as means of attaining the ever changing needs of different places and periods through interpreting the *Quran* and *Sunna*.

2.4 Qiyas (Judicial Reasoning)

Despite the fact that all the three sources are used still there may exist a gap, which has to be filled. This is true for all other legal systems. For a judge may not deny rendering a decision on the ground that there are gaps. Thus in the Shera the device to fill this gap is *Qiyas*. As the name indicates it means an inductive process governed by the rules of logic. “It is ... extending the principles contained in the sources discussed above, and thereby covers cases not expressly covered. It should be noted, however that as a source, judicial reasoning occupies a subordinate position o the first three sources discussed above, and can not contradict the rules established by them.”³⁰

In order to do this the judge has two alternatives: if he can not give solution through applying Quran and Sunna he looks into another similar cases in order to search whether a rule can be deducted or not; or he will see to it “whether a solution can be derived from the totality of the law, considering it carefully as a whole and applying to the case in question the solution which corresponds best to the general spirit of the law.”³¹

Therefore, the sources of Islamic law are *Quran*, *Sunna [Hadith]* *Ijma* and *Qiyas* which are the integrated whole of Islamic legal system. Thus whenever cases arise one has first to resort to the *Quran* and if the case is not resolved with the help of *Quran* help can be obtained from the other three sources respectively. Meaning “... right judgment can be arrived at through four sources: the express words of the book [*Quran*], unanimously

29 Herbert P.17

30 Ibid P.18

31 Ahmed Hassen; The Early Islamic Development of Islamic Jurisprudence P.14

recognized traditions (*hadith*), logical reasoning [*Qiyas*] and consensus of the community [*ijma*].”³²

Review Questions

1. Write down a vers (es) from *Quran* that indicates Quran as a source of law.
2. What is the importance of the remaining three sources other than *Quran*?
3. What is the deference between Sunna and Hadith?
4. Do you agree with a statement which states Ijma came after the death of the Prophet? Why or Why not?
5. Discuss how the enlarging of the territories influenced the development of Islamic Law

³² Ibid

CHAPTER THREE

DIFFERENT SCHOOLS AND ISLAM IN ETHIOPIA

Objectives

Upon completing this Chapter the students will be able to:

- a. Identify different Schools in Islamic Jurisprudence.
- b. Discuss the relationship between the Schools.
- c. Enumerate the Contributions each School made to the Islamic Jurisprudence.
- d. Explain why Ethiopia received the migrants from Arabian Peninsula.
- e. Discuss the role Islamic Law played in the development of Ethiopian Jurisprudence.
- f. Appreciate the religious tolerance that exists in EDRE.
- g. Appreciate the religious freedom recognized by the FDRE Constitution.
- h. Appreciate the impact the difference has on the development of the Islamic Jurisprudence.

Introduction

Bearing this in mind let us now see the four schools in the Islamic law. The name of the schools is the Hanefite, the Malaikite, the *Shafite* and the *Hanabalite* schools, named after those individuals who are responsible for the creation of each. The individual were *Abu Hanafi, Malik bin Anus, Mohammed bin idris al Shafi and Ahmed bin Hanbli*.

Before the schools became known through the name of an individual master, these schools were geographically determined. This was not, nonetheless, without reason. Different geographical areas were specialized with different aspects of the law. Hence while the one which was represented by the Iraqis was known for its use of opinion

[reasoning] [*ray*] and analogy [*qiyas*], the other group which was represented by the Hijazi was known for its use of tradition [hadith].

Thus, we can classify the jurists of the time into two: The Methodologists and the Traditionalists. “The Methodologists were led by Au-Hanifa... (And) were in favour of the use reasoning by analogy to resolve legal problems where need arose. On the opposing and diametrically opposite side were the traditionalists, led by Malik ibn Anas, who sought to limit and curb the scope of interpretation of the law” Thus, they favoured the use of traditions of the Prophet (PBUH) as well as the precedents that he lay down, as the exclusive sources of Islamic Law. Saying this much about their classification, now we will discuss very briefly each school at a time:

3.1. Imam Hanbli

He was born in AH 80 in Kufa. Kufa was a military city close to the conquered territories comprising a mixed population. Abu Hanafi was the first to analyse Islamic Jurisprudence, divide it into subjects, distinguish its issues and determine their range and criteria for analogical reasoning (Qiyas) there in.³³

He had collected Hadith from Mecca and Medina as well as from Kufa. He only missed narrators from Damascus. That seems the reason why Shafi used to say of him, in jurisprudence, all scholars are the children of Abu Hanafi”³⁴

The time of Imam Hanafi was known for its Hadith forgers. For that reason “he rejected any Hadith that he was not reasonably sure was authentic. Consequently, he applied relatively select range of Hadith evidence in sacred law.”³⁵ Thus, any of qualification and modification must come through a Hadith with three separate channels of transmission before acceptance. In other words a qualification or modification that comes through only one channel of transmission was unacceptable.

³³ Dr. A.Malik P.17

³⁴Quoted by Dr. Akbar on P.17

³⁵ Ibrid P.18

3.2 Malik Ibn Anas

He was born in 712 in the city of Medina. He was the leader of the traditionalist. He was known for his love and devotion to the Prophet (PBUH). He tried to collect the Hadith of the Prophet (PBUH) in his know work Al-Muwatta (the trodden path) ³⁶

It seems for that Imam Shafi used to say of him, “After the Book of Allah, no book has appeared on earth that is sounder than Malik’s”.

Attempt was made to find a compromise for the conflict between the two Schools of thought for this division threatened to divide the Muslim Community. More over as the territory that came to the embrace of Islam increases it became difficult to have direct access to the companions of the Prophet (PBUH) for seeking solutions. Consequently, as Kamali observes, the possibility of the textual sources became more prominent. Disputation and diversity of juristic thought in different quarters accentuated the need for clear guidelines, and the time was ripe for Al-Shafi to articulate the methodology of *usal-al-Afiqh* ³⁷

3.3. Mahammad Ibn Idriss Ash Shaffi

Imam Shafi was born in 767 in Gaza, Palestine from a family that descent from the great grandfather of the Prophet (PBUH). He was brought up by his mother for he lost his father in his early child hood. In spite of the fact that he was brought up in circumstances of extreme poverty and want, he memorized the Holy Quran at the age of seven years. ³⁸ Not only that At the age of ten he was authorized by his sheikh (teacher), Mulimibn Khalid al-zig, the Mufti of Mecca, to give a formal legal opinion (Fatwa).³⁹

³⁶ Ibid p. 18-19

³⁷ Kamali P.1-13

³⁸ Dr. Akbar P.20

³⁹ Ibid

His brilliance did not end there. After studying under Imam Malik in Medina and then travelling to Baghdad and studying under Imam Muhammad bin Hasan Shaybno, the colleague of Abu Hanafi, he produced two works. The first school of jurisprudence al-madman *al-madhan al-qadim* and entirely new school of jurisprudence (*al-madhab-al-jadid*). Both are embodied in this seven volume al-Umm (the mother).⁴⁰

Other works accomplished by him were.

1. Al-Risala (the letter) was the first work in the history of mankind to investigate and examine the theoretical and practical bases of jurisprudence.
2. In Quran exegesis, he was the first person to formulate the principles of the science of which the verses abrogate others and which are abrogated (*Ilm al-nasikh wa al-mansukh*)

It is not therefore, exaggeration of Imam Shafi if he is referred to as the Imam of the world, the Mujahidin.⁴¹ Thus Scholars from all Muslim worlds travel to learn from him. Hence let us windup this part by a remark made by Almisri.

“His students were such awe of him that they could not drink a glass of water while he was looking upon them”.⁴²

3.4 Ethiopia the First Country to Receive Muslims in Migrants

Ethiopia is the first country to receive the Muslims from Arabian Peninsula when they were prosecuted by the Qureshi. At that time Ethiopia was a Christian Country led by a Christian King referred to as king An-Negashi. The Prophet Mohammed (PBUH) advised his followers to migrate to Ethiopia where they could find protection. When king Nejasha died the Prophet (PBUH) Prayed slate on him.

40 Ibid P.20

41 Mujahidin is the one has qualified to make ijthadi A school of Islamic jurisprudence.

42 Al-Misri, “The Reliance of the Traveller” 1095-1096

As it was predicted by the Prophet (PBUH), king Negashi received and refused to hand over the migrants to those who came to take them back and execute them. He rather allowed the fugitives to live and practice Islam in Ethiopia. One of the fugitives was the Prophet's daughter Rukiya. Thus, it is from that time on words that Islam was practiced in Ethiopia and the two religions have been living side by side with tolerance. Their relationship had been regulated through customary norms. When modern laws were introduced it became necessary to regulate the Shera Courts similarly. Thus various Proclamations were issued among which one was Proclamation No. 12/1942.

3.5. Contents of Proclamation No.12/1942

This proclamation was issued to establish Kadi Courts in the country. Thus, one of the purposes of that proclamation was to regulate the personal relations among Ethiopian Muslims. Accordingly the proclamation under its article 2(a) stated that the Kadi Courts shall have Jurisdiction on,

Any question regarding marriage including divorce and maintenance guardianship of minors and family relationship provided that the marriage to which the question relates was concluded in accordance with Mohammedan law or the parties are all Mohammedan.

If correction is to be made concerning that provision we may re-write it as follows: Kadis Courts were vested with powers to see and give judgment on marriage, divorce, maintenance, guardian ship and other family relationship provided that the marriage to which the questions relates was concluded in accordance with Shera or the parties are all Muslims. More over, it has to be clear that Kadi Courts use Shera to entertain matters related with their jurisdictions. It is worth to mention one point before we wind-up this sub-topic. After Eighteen years, the Civil Code of Ethiopia tried to repeal this Proclamation under article 3347(1). Nevertheless, the Kadi Courts continued to Exercise the jurisdiction they were empowered by that Proclamation.

3.6. Proclamation No 188/1999

This Proclamation was issued to consolidate the Federal Courts of Shera. The Proclamation used the word consolidated for it is stated in the FDRE Constitution under article 78(5) Religious and Customary Courts that had state recognition and functioned prior to the adoption of the constitution shall be organized on the basis of recognition accorded to them by this constitution.

Thus the FDRE constitution has not established new Kadi Courts. Rather it recognized the already existing courts giving them Federal Structure. Here we will briefly state those elements which were not included in the previous proclamations issued to establish Kadi Courts.

Consent

The FDRE Constitution does not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Following this, Proclamation No.188/1999 under article 5 regulates how the consent of a disputing party is confirmed. Thus, when a case is brought before a court that court issues summons to the other party for confirmation in accordance with the form attached to the Proclamation.

The party who is served properly with the summon, either has to confirm his objection or consent by appearing before the registrar of a court. If he fails to do any of the two, the presumption is that he is not objecting the jurisdiction and the case shall be heard expert.

Contempt of court

As per article 7 of the Proclamation any person who, in whatever manner shows improper conduct in the course of any proceedings or who, without good cause, fails to comply

with an order of the court shall be punishable with imprisonment for up to one month or to a fine of up to Birr 1,000.00

Appointment of kadis

The recruitment of the kadis is made by the Supreme Council for Islamic Affairs, where a request is made by the Federal Judicial Administration Commission. To submit the name of an individual to the Federal Judicial Administration Commission the nominee should have received the support of the majority of the Council. The appointment made by the Council has to be approved by the Federal Judicial Administration Commission.

Budget

The budget of the Kadi Courts are not wholly covered by the government. As per article 19 of the Proclamation the sources of the budget are two: the budgetary subsidy to be allocated by the Federal Government and assistance from other sources. Thus the Federal Government simply gives subsidies. The reason could be the fact that as per article 11 of the FDRE Constitution, state and religion are separate. But the question is what are those other sources? For sure it can not be foreign source for this would amount to compromise the independence of the courts. Could the source be the Supreme Council for Islamic Affairs?

Finally let us see the common jurisdiction of the Federal Shera courts and windup this sub chapter. Thus on top of those items stated in proclamation 12/1942 the following matters are under the jurisdiction of the Kadi Courts. Any question regarding wakf, gift Or Hiba, succession or wills provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.

3.7. Geographic distribution of the Schools

The Muslims today follow the tradition of one of the four Schools. Therefore, in order to know the school which is followed by the Ethiopian Muslims, it is helpful to know the world wide geographical distribution of the four schools. The distribution, as it is stated by Herbert j. liebesny is as follow:-

“The Hanefite rite was the official rite of the ottoman Empire. It is prevalent among Muslims in Turkey, Syria Lebanon, Jordan, India, Pakistan, and Afghanistan. It also has official status in Iraq, Egypt, Israeli, the Sudan, and Libya. The Mallkite rite is the rite of North Africa, and the Muslims of West Africa. Kuwait also is Mallkite. The Shafite is prevalent in Lower Egypt, the Hijazi, Southern Arabia, East Africa, Indonesia and Malaya. The Hanbli School is the official rite of Arabia And in a few adjacent areas, such as Qatar.” [Emphasis added]

Therefore, since Ethiopia is geographically located in the Eastern part of Africa, it is highly probable that the Shafite rite is the prevalent one. This is true for “the Shafite is the most widely diffused madhab [rite] since most of the Somalis and Oromos belong to it “

This does not mean, however, there are no others who are followers of other schools. For instance, Barias and kunamas belong to Mallkite. Hanefite rite also has followers in like Sahos, the Afar of Buri and Jabarti of Begamder ^[22]

This distribution was affected by the centers from which Islamic influence first came and through political events. For instance during their brief occupation of Harar region, the Egyptians introduced their official Hanefite Code. And the diffusions of Shafite, among the populations of Somalis and Oromos were due to the influence of the Islamic current coming from Arabia

In Ethiopia, therefore one can say the three Islamic schools are in existence and out of them the Shafit School is the prevalent one due to its wide spread in the two large population of the Ethiopian Muslims. Ethiopia is the first country to give recognition to Islam at state level. This is what we are going to discuss next.

Review Questions

1. Write down the schools in Islam.
2. Write down two differences between Hanafi and other Jurists.
3. Why Shafi is dominant in Ethiopia?
4. Discuss the two main classification of the schools
5. One of the schools was developed in Kufa. That school was in the classification of the methodologists. Do you think Kufa had any influence for that school to be so? How?
6. Imam Shafi had studied under leaders of two schools discusses how that influenced Imam Shafi?

CHAPTER FOUR

MARRIAGE

OBJECTIVE

Upon completing this chapter students will be able to;

- a. Identify the requirements for valid marriage
- b. Discuss defective consent
- c. Identify effects of marriage
- d. List down the types of marriage those existed before the coming of Islam.

4. 1 Definition and types of marriage

You can not find any law in the world that does not give protection to a family for family is the foundation of human civilization. So if you have a good family you have strong nation.

Family starts with the association formed between the human male and female. This association is referred to as marriage or *zawaj* or Nikah in Arabic. Following this bond different relations emerge. One is kinship that includes descendants and ascendants. The other relationship that is created is the in law relationship.

All these relationships should be regulated. Hence family law is among many laws a nation could have. Thus *shera* as one of the legal system in the world has instituted the most just, most sound and most sublime rules for the regulation and functioning of the family. Now we will try to discuss those requirements to valid marriage.

Before Islam came there were four types of marriage in the pagan Arab community as it was narrated by Aisha, the wife of the Prophet (PBUH)

One type was similar to that of the present day, i.e. a man used to ask some body else for the hand of a girl under his guardian ship or for his daughter's hand by giving her a dower in Arabic *Mahr*

The second one was the one which a husband orders his wife after she become clear from her menstruation to have sexual intercourse with someone usually who had a noble lineage. After the wife had that sexual relation the husband would keep away from his wife till it became clear she was pregnant. That marriage was called *wife lending*.

The third type was where a group of men most of the time not more than ten would have sexual intercourse with a woman and made her pregnant. The woman would call the men, after giving birth to a child, and choose one who may not refuse to be the father of the child.

The fourth one was where many men visited a prostitute who delivered a child and the father was identified by the *qadis* that is people skilled in recognizing the likeness of a child to its father. The identified one, among those all who visited the prostitute would be recognized as the father of the child. Mohammed [PBUH] abolished all of the marriages mentioned here in above except the one recognized by *shera* to day. This is the one which we are going to discuss now. To have a valid marriage the following requirements should be observed.

4.2 Conditions for a valid marriage

4.2.1 Valid Consent

The consent of a woman is given through her guardian while a man directly gives his consent by himself. So the contract of marriage is made between the guardian and the future husband. The guardian could be a particular or general guardian. The general guardian is a court judge where the woman has no guardian who is a blood relative.

Particular guardians are either the father, in leau of him a brother who attained majority or an uncle from the side of her father.

Abu *Hanafi* has not accepted a representation of a woman by a guardian unless the woman is a young, an insane i.e. disabled for whatever reasons. Whether the consent is given directly by the woman or through her guardian it should not be defective. Any factor that has the power to influence and affect the normal functioning of the human mind can become a cause for defective consent.

Jurists divide the causes into two kinds: natural causes [*samawiyah*] and acquired causes [*mukeasabah*]. Now we will, briefly, discuss both and their further classification.

A. *Natural causes*

These are causes that are beyond the control of the subject. Under this heading, the jurists list ten causes. These are:

- I. *Sighar* [Minority]
- II. *Junun* [Insanity]
- III. *Atah* [Idiocy}
- IV. *nisyan* [Forgetfulness]
- V. *Nawm* [Sleep]
- VI. *Ighma* [unconsciousness, fainting, epilepsy]
- VII. *Riqq* [slavery]
- VIII. *Marad* [Illness]
- IX. *Hayd* [Menstruations]
- X. *nifas* [{post-natal state of woman]

I. Minority [*Sighar*]

It is the state or condition of a human being after birth and before puberty. Since according to *shera* marriage age coincides with puberty a consent given before a man or woman attained puberty shall be regarded as defective.

II. Insanity [*Junun*]

A person who is insane lacks *aql*. His transactions are void. Hence consent given for marriage by an insane person is defective.

III. Idiocy [*atah*]

It is a state in which a person at times speaks like a sane and normal person, while at others he is like a madman. It is also described as a state in which grown up has a mind of a child and act like a child. So where an idiot gives his/her consent while he/she is normal shall have effect. But when he or she acts like a madman his consent is defective

IV. Sleep and epilepsy or fainting [*Nawm, ighma*]

The capacity of persons, in such a condition to understand things is temporarily affected and prevented from normal functioning. Hence a consent given in such condition is defective.

B. Acquired causes

These causes are those that are created by man or in which human will and choice are the basic factors. Muslim jurists list seven such causes.

1. Ignorance [*jahl*]
2. Intoxication [*sukr*]

3. Jest [*hazl*]
4. Indiscretion [*safah*]
5. Journey [*safar*]
6. Mistake [*khata*]
7. Coercion [*ikrah*]

The relevant ones for our purpose are intoxication, jest, mistake and coercion. So we will discuss one at a time.

I. Intoxication [*sukr*]

Drunkenness is a state caused in a human being due to the use of an intoxicant, which temporarily suspends the proper functioning of the mental faculty. We have already said that the basis for the capacity for execution is *aql* [reason] and *rushd* [discretion]. These will be negated in the case of the drunken person by the state of drunkenness. So a consent given, while a person is under such kind of condition, is defective.

II. Jest [*hazl*]

When a person uses words without intending to convey either their primary or their secondary meanings, that is their denotations or their connotations, he is said to speak in jest [*hazl*]. Such a person may for instance use words employed for the contract of marriage, but do not intend the *hukm* [effect] of such a contract. Hence his/her consent is defective.

III. Mistake [*khata*]

This is a doubt in the mind of the subject at the time of commission or omission of an act. They are classified into.

1. *Shubbahfi al dalil* [mistake of law]
2. *Shubhah fi al-milk* [Mistake as to ownership]
3. *Shubha fi alfil* [Mistake in the commission of an act] and
4. *Shubhah fi al-aqd*[mistake in the governing law in the contract]

For example assuming that in the early days there was a person who was under the impression that temporary marriage is permitted, that is he may not be aware of the abrogating evidence. If he entered into a temporary marriage, the marriage contract would be declared void for his consent is defective.

If for example, a person concludes marriage with his brother's daughter thinking he is doing it with his cousin his mistake is both mistake of fact and law. His marriage shall be void for his consent is defective.

IV. Coercion and duress [*ikrah*]

Coercion or *ikrah* is a situation in which one is forced to do something without his willingness. It negates free consent and willingness. Jurists are divided on the classification of *ikrah*. According to Shafi *ikrah* arises under a threat of death, hurt, perpetual confinement and the like. It does not arise for causes of a lesser gravity like a threat to property.

So if a person is threatened with his life or person and as a result he/she gives his/her consent to marriage that marriage is void for his consent is defective. If, however, a person is threatened with his/her property that threat is not serious. It cannot be a ground for invalidation of a marriage.

4.2.2. Dower

The second requirement is a dower called *Mahr* to be given by the husband to the wife. The practice is that when a marriage is dissolved by divorce the wife is required to give back the dower. This is, however, against the word of *Quran* as you can understand from the following

But if ye decide to take one wife in place of another, Even if ye had given the latter A whole treasure for dower, Take not the least bit of it back: Would ye take it by slander And a manifest wrong? (4:20)

We can understand the second requirement to be dower from the following verse of Quran.

Lawful unto you in marriage Are (not only) chaste women who are believers, but chaste women among the People of the Book Revealed before your time- when ye give them Their due dowers, and desire charity, not lewdness Non secret intrigues. [5:5]

So marriage is different from fornication and cohabitation. And the dower is different from that is given by a man to a woman for fornication and cohabitation.

4.2.3. Capacity or Marriage Age

The third requirement is legal capacity. Legal capacity or *Ahliyyah* is the ability or fitness to acquire rights and exercise them to accept duties and perform them. Capacity for execution is defined as the capability of a human being to issue statements and perform acts to which the Law Giver has assigned certain legal effects.

The question we certainly could raise is at what stage we say a person has acquired legal capacity. Jurists differ on this point. Most, except Hanafi, do not indicate any specific age. For them the basis of the capacity for execution is *aql* /intellect/ and *rushed* discretion.

What do we mean by *aql*? When do we say a person is *aql*? *Aql* implies the full development of the mental faculty. As there is no definitive method for checking when this faculty is fully developed, the Law Giver has associated it with *bulugh* or puberty. Thus, the presumption is that a pubescent person is assumed to possess “*aql*” necessary for the existence of the capacity for execution.

For the Hanafi jurists there is no way to determine whether the minor /*sabi*/ has attained discretion or not. The Hanafi jurists have, therefore, fixed the minimum age of seven years for assigning such capacity. Hence according to the Hanafi jurists any one over seven years of age, but who has not yet attained puberty may be assigned such a capacity, but the law makes this dependent on the guardian’s will and discretion.

Classification of Capacity

Muslim jurists divide legal capacity into three types. Complete, deficient and imperfect. We are not going to discuss all. For our purpose we will discuss complete capacity only which is found in a human being after his birth. This makes him eligible for the acquisition of all kinds of rights and obligations. Complete capacity for execution is established for human being when he or she attains full mental development, and acquires the ability to discriminate.

This stage is associated with the external standard of puberty. The physical signs indicating the attainment of puberty are the commencement of ejaculation in a male and menstruation in a female.

These biological signs may not appear early for some individuals. In the absence of these signs, therefore, puberty is presumed at the age of fifteen in both males and females according to the majority of the jurists. Hanafi jurists differ on this as well. For them it is eighteen for males and seventeen for females.

Attaining *bulugh* /puberty/ alone is not sufficient to say there is a complete capacity. Besides that the possession of *rushd* /discrimination; maturity of action/ is requirement. This is what we understand from the following verse of the *Quran*;

Make trial of orphans until they reach the age of marriage; then if ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up /4:6/

The marriage age is, therefore, attaining the puberty which may vary from person to person. Where, however, an individual attains fifteen, according to the majority of jurists, before puberty that fifteen is the marriage age. For Hanafi either puberty or eighteen for males and seventeen for female is the marriage age.

4.2.4. Witnesses and publicity

There must be at least two competent witnesses so that the progeny's of legitimacy will be safe guarded. The witnesses should be with legal capacity.

Related to the condition of witnesses is the question of publicity. Not only is marriage to be intended as a lifelong bond, it must be publicized widely. Hence an agreement to keep the marriage secret invalidates the marriage contract in the opinion of some jurists. Other jurists maintain that the contract is valid but the secrecy is non religious and thus reprehensible.

4.3. Impediments

One important effect of marriage is the creation of direct and collateral lineage. In the direct lineage ascendant-descendant relationship is created. Marriage between ascendants and descendants is prohibited. On the collateral, marriage between second degree lineages is also prohibited. It will be wise if we quote Quran in this respects.

“And marry not women whom your fathers married except what is past. It was shameful and odious abominable custom indeed "[4:22].

So marriage between a step mother and step son is forbidden.

The following vers from the *Quran* broadly discusses the prohibited degree.

Prohibited to you [for marriage] are your mothers daughters, sisters, father’s sisters, mother’s sisters, brother’s daughters, sister’s daughters. Foster-mothers [who gave you suck] foster sisters, your wives mother; your step daughters under your Guardian ship born of your wives to whom you have gone in. No prohibition if have not gone in.

[Those who have been] wives of your sons proceeding from your lions; and two sisters in wedlock at one and the same time; except for what is past for God is Oft for giving most merciful [4:23]

The above site from the Quran needs few explanations. It starts with father's widows or divorcees. So you cannot conclude marriage with your father's widows and divorcees even if they are not your biological mother.

The other point worth mentioning is the fact that the scheme is drawn upon the assumption that the person who proposes to marriage is a man. If it is a woman the same scheme will apply *mutatis matandis*. It will read: Your father's sons, brothers etc.

Mother includes grand mother through the father and mother great grand mother etc. " Daughter " includes grand daughter through son or daughter great grand daughter etc. Sister includes full sister and half sister, father's sister includes grand father's sister etc. Mother's sister includes grand mother's sisters, etc.

Special relationship which does not appear in most other legal system is Fosterage. A Fosterage or milk relationship creates similar relationship like blood relationship. It would therefore seem not only foster mothers and foster sisters but foster mother's sister etc. All come with in the prohibited degrees.

Finally let us conclude this section by quoting the next verse from *Quran*.

Also [prohibited are] women already married except those whom your right

Hands possess thus hath God ordained [prohibition] against you except for these all others are lawful provided you seek them in marriage.

4.4. Polygamy

Polygamy is where a man concludes marriage with more than one woman. It is bigamy in a sense that a man is concluding a marriage while he is already bound by a previous marriage. Under Islamic law a man can conclude a second, a third and fourth marriage while this is not allowed for a woman. The reason why that kind of discrimination is

made is obvious. In a case where a man has more than one wife it is possible to determine paternity. If, however, a woman has more than one husband it is difficult to determine paternity.

It is however, to mention the circumstances under which polygamy is allowed as per Islamic law. Directly we quote from the primary source, i.e. Quran

If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, Two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one,

It is worthy if I use the two explanations given by A.Yusf Ali in relation to the above verse. The first one is the time when this verse of the Quran was revealed.

“It was after the Uhod war, when the Muslim community was left with many orphans and widows and some captives of war.”

The Uhod war was the second war the Muslims waged against the non-Muslims of Mecca. In that war Hamza, the general was killed and so many others. Even the Prophet (PBUH) him self was wounded. Due to that many orphans and many widows were left. So under those circumstances it was allowed to marry more than one wife but not exceeding four.

The other point is related with the unrestricted number of wives of the “time of Ignorance” was now strictly limited to a maximum of four, provided you could treat them with perfect equality in material things as well as in affection and immaterial things. As this condition is most difficult to fulfill the recommendation is monogamy.

So the conclusion is that marrying more than one wife is permissible where men are killed in a war and many widows and orphans are left behind. And even if that is a case,

you have to be able to treat them equally in every respect which is humanly difficult if not impossible.

4.5. Effects of marriage

Once marriage is concluded, it has many legal effects. We will discuss some of them

4.5.1. Personal Effects

1/ Respect and support each other

In many verses of Quran we can see that spouses should respect and love each other. Let us look for some.

“Permitted to you, on the night of the fasts, is the approach to your wives. They are your garments and you are their garments/2:187/

The meaning given to this vers by A.Yusf Ali is as follows; men and women are each other’s garments, i.e. they are for mutual support, mutual comfort, and mutual protection. Fitting into each other as a garment fits the body. So spouses are obliged to love, support and respect each other.

The following verse from the Quran is a guide to husbands for how to handle their wives.

And consort with your wives in a goodly manner; for if you dislike them, it may well be that you dislike some thing which good might yet make source of abundant good [4:19]

So hatred or dislike is not advisable in Islam. So spouses should love respect and support each other.

2/ Consummation of marriage

Generation has to continue. To that end families have to be established to give of springs. That requires the consummation of marriage which is also undertaken for pleasure. In Islam talking sex between spouses is not a taboo as we can understand from the following verse.

**Your wives are as a tilth unto you; so approach
your tilth when or how ye will; But do some good
act for your souls before hand /2: 223/**

So sex in marriage is not a thing to be ashamed of, or to be treated lightly or to be indulged to excess. It is as solemn a fact as any in life. It is compared to a husbandman's teeth; it is a serious affair to him. He sows the seed in order to reap the harvest. But he chooses his own time and mode of cultivation. He does not sow out of season nor cultivate in a manner which will injure or exhaust the soil.

So making love is imperative to the pleasure of both spouses. The husband should not always make love to his wife without winning her affection. So both spouses feeling should be observed.

4.5.2. Pecuniary Effects

1/ Maintenance

The husband has an obligation to maintain his wife even if she is a rich woman. So the fact that the wife is rich does not exempt the husband from that obligation. The husband also has an obligation to supply maintenance to the children. It is not the obligation of the wife to maintain them even if she is rich.

2 Common Properties

In Islam there is no common property that is created by the fact that marriage is concluded between a man and a woman. Each owns his or her property. This is true for the whole life time of the marriage. The consequence is that when the marriage dissolves, say for instance, due to divorce there is no partition of property for there is no common property. Each takes what she or he has. In case the marriage dissolves by death of one of the spouses the survival inherits the deceased. Thus, as per Shera marriage does not have effect upon the property of the spouses. Nevertheless, they can create common property by entering into contractual agreement. This, however, is governed by contract law not by family law.

Review QUESTIONS

- **Compare and contrast the requirements for valid marriage between Shera and Revised Family Cods 2000.**
- **Compare and contrast the effects of marriage between Shera and the Revised Family code 2000.**

CHAPTER FIVE

Causes for Dissolution of Marriage

Objectives

By the time students complete this chapter they will be able to:

- discuss causes for dissolution of marriage
- Enumerate effects of divorce
- Discuss the rationale of prohibition of re-marriage between former spouses.
- discuss the rationale why period of Iddah is observed

Introduction

In Islam marriage could be dissolved for different reasons. These are:

1. Divorce
2. Death of one of the spouses
3. Faith

5.1. Causes for Dissolution of Marriage

I. Faith

Divorce will be discussed in detail after we discuss briefly the third cause. Thus, “Islamic law allows marriage with the women of Ahl-alakitab” people of the Book” “but not vice versa”⁴³ This means a Muslim man can conclude a marriage with a woman of People of the Book, i.e. Christians and Jews. Nevertheless, a Muslim woman can not conclude a marriage with a man of People of the Book.

Thus, if a Muslim woman concludes a marriage with a man of People of the Book unknowingly that marriage has to be dissolved or where a Muslim man converts into another non-Muslim religion then that will be a ground to dissolve the marriage. Similarity if a Muslim woman or a woman from People of the Book converted to another

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religion then that dissolves the marriage. Let us make one remark and proceed to death. While in turkey a Muslim man can marry everyone belonging to any religion, in Cyprus, Lebanon and Israel it is provided that marriage of Muslim women with non-Muslim men is prohibited⁴⁴.

II. Death

The death of one of the spouses dissolves the marriage. The consequence upon the widower and the widow differs. In case of the widow, she has to observe the waiting period or Iddah before the contracting another marriage. Nevertheless it is to tell the obvious the widower may conclude another marriage immediately upon his wife's death though this is difficult if not impossible humanly. The other consequence of dissolution of marriage by death is the fact that the spouse inherits one another.

III. Divorce

The most common method of divorce is “one-sided disclaimer of marriage on the part of the husband. This disclaimer may either may be explicit or can be revoked. An express revocation of marriage will not consequently dissolve the marriage. (For) the revocation can be retracted during the waiting period called Iddah. (Ibid P. 101)

5.2. Divorce Defined and Its Types

There are indeed a number of different ways in which a marriage may be ended in Shera, most of which could be loosely classified under the heading of divorce. Mainly, divorce can be pronounced by unilateral declaration of the husband; it can come by the renunciation made by the wife; through the mutual consent of the spouses and by the order of the Qadis at the instance of the husband or the wife. We will discuss the first three one at a time.

44 (Dr. Malik P.103)

This part up to p.74 is adopted from Abdulmalik Abubaker “Effects of divorce in civic code and Shera” Senior Research paper, June 1990.A.A.U Unpublished.

5.2.1 KHUL

The first type that is based on the consent of the wife and renunciation made by her is referred to as *Khul*. Its literal meaning is “put off” as one puts off his garment. In law it is *Laying down by husband of his right and authority over his wife at instance on acceptance of consideration by means of the word “Khul”* [**This definition seems to be based on the injection in the Quran which reads,**]

**Then if you fear that they cannot keep within
the limits of Allah, there is no blame on them
for what she gives to be come free thereby.
[2:229]**

According to Muslim jurists, therefore, for the due application of *Khul* the following conditions must be fulfilled.

- a. Apprehension of husband and the wife that they can not live within the limits of Allah.
- b. It is the wife who seeks a separation from the husband and it must be she who is to pay the consideration. That is to say, if a stranger, [may be who wants to marry the would be divorcee] pays the consideration obviously this will not amount to a *Khul*

Shortly we may say, therefore, this type of divorce is dissolution of marriage granted by the husband on the basis of financial consideration offered by the wife.

In relation to what have been said there are two issues which I consider to be raised and answered. These are

- a) Can the wife dissolve the marriage under the doctrine of *Khul* by herself or can it only be done with the intervention of the *Qadi* [judge] and.
- b) Is the consent of the husband a condition precedent to the dissolution of the marriage under *Khul* or has the *Qadi* had the power to dissolve the marriage even when the husband does not want or agree to it

Quran may not be much helpful in our attempt to find answers for the above two issues. So we have to necessarily resort to the tradition of the Prophet [PBUH] i.e. *Hadith*.

The two leading cases we find in the tradition are *Jamilah Abdullahi V Thabit Ibnqays* and *Hbibah Suhay V Thabit Ibnqays*. In those cases it was mentioned that both Thabit's wives came, at different times, to the Prophet [PBUH] to seek divorce under the doctrine of *Khul*. The Prophet [PBUH] after asking both if they would return the orchard given by Thabit to them as dower and both replied they would, he then asked Thabit to take back the orchard and release them from the marriage tie by divorcing them which Thabit did.

On the other hand we do not find any case that was decided by the Prophet [PBUH] or the Caliphs where the wife divorced her husband under *Khul* and then informed the Prophet [PBUH] or the Caliphs. Rather in all those cases decided under *Khul* the wives thought the intervention of the Prophet [PBUH] or the Caliphs.

Moreover, as we have discussed the doctrine of *Khul* involves the payment of pecuniary values by the wife to the husband, and the amount and the quality of the consideration may raise disputes among the parties which may make the intervention of a third party unavoidable. Hence, for all the above reasons, or arguments, we may say a wife can not dissolve her marriage under *Khul* by herself but she has to get it done by the *Qadi*

The next question to be considered is whether the husband's consent is a condition precedent to the dissolution of marriage under the provision of *Khul* or has the *Qadi* the

power to separate the parties against the wishes of the husband when he is satisfied that the spouses can not live together. In other words, is *Khul* demandable by the wife as a matter of right under the Muslim Law?

The cases decided by Prophet [PBUH] and the Caliphs strongly lead to the view that the decision of such case does not depend on the will of the husband. In the case sighted above it has been stated there that the Prophet [PBUH] asked Thabit to divorce his wives.

But some may argue that when Thabit divorced his wives he did so on account of his great reverence he had for the Prophet [PBUH] and those incidents do not establish the view that the *Qadi* has the right to dissolve the marriage. They argue that where the *Qadi* is satisfied there is in genuine need for separation between the wife and the husband he has to ask the husband to divorce her and if the husband fails or refuses to do so, he only becomes a transgressor of the verse in the *Quran* namely, “To keep the wives with humanity” and the *Qadi* is seized of power to divorce the wife on behalf of the husband.

But others argue that since *Quran* says “Then retain them in kindness or set them free with kindness”, if the husband can not be deemed to be keeping his wife with kindness, it is his duty in obedience to the above injunction of the *Quran* to release her from the marital-tie. But “if he fails to do so then it is the duty of the *Qadi* to see that the wrong done to the wife is rectified and so he shall order the husband to divorce her.”⁴⁵

If the husband refuses or falls to comply with this order, he becomes a transgressor and it, being the duty of the *Qadi* to redress wrong, he shall use his power to separate the wife from her husband.

The writer concurs with the second view. For one thing, the Quranic duty to keep them [wives] with kindness requires that if mutual love cannot work, the husband should

45 Ahmed K.N Muslim Law of Divorce Vo.1 P.17

release the wife from the bond of marriage. But if this is not done the wife shall have to remain tied to her bond though she may transgress the limits incumbent on her under Islam and may even be led to immoral life. It would be, therefore, unreasonable to think that such a wife can be allowed no relief.

Second if *Khul* is made to depend on the will of the husband then the very purpose of the doctrine of *Khul* is rendered inoperative and there would be no differences between other types of divorces,

5.2.2. M U B A R H

The second form of divorce which operates on consent is *Mubarh*. It is the termination of marriage tie by mutual consent. Unlike *Khul*, therefore, it represents dissolution of marriage on the basis of mutual release of the spouses from any out-standing financial commitments arising from the marriage relationships. Hence as the marriage is terminated at the desire of both the husband and the wife, no consideration is to be paid in such a case by the wife to the husband. Besides it would not be necessary for the parties to have any recourse to the *Qadi*.

5.2.3. T A L A Q

The most frequent form of divorce in the *Shera*' is the *Talaq* or unilateral repudiation of a wife by a husband. In other words it is "the release from the marriage-tie either immediately or eventually, by the use of certain words-whether spoken or written by the husband". The fact of repudiation of the wife by the husband was not unique for the Islamic law alone. For "Germanic customs, just as the Jewish law, permitted a husband to repudiate his wife, at his pleasure and without specific reasons."⁴⁶

Similarly while repudiating his wife; the Muslim husband need not have to show any reasonable ground. In this regard, "the present Muslim practice allows the husband full

⁴⁶ Planiat m. Treatise on the civil Law Vol. 1.P1,P.630

power to dissolve the marriage at his will without assigning any reason or without even there being a reasonable ground for the divorce,” As a matter of fact, therefore, the wife has no say in the matter.

Hence, the wife’s consent or lack of consent to the husband’s exercise of the right to dissolve the marriage is immaterial. She can not object to a divorce by her husband.⁴⁷ Even the information of her divorce need not be necessarily communicated to the divorcee. “The only consequence of the husband’s failure in giving the information is that his liability in respect of his wife in certain matters continues till she gets information to that effect”.⁴⁸

Therefore, since the husband has the power to repudiate his wife at his will and whim, no intervention by the *Qadi* or any other official body is required. Thus to the legal validity of this, virtually no restriction have been imposed what so ever.

Hence the Muslim wife indeed has always lived, as far as the law is concerned, under the ever present shadow of divorce, a shadow lessened only in comparatively rare cases by certain precautionary devices

Talaq is classified into two: *Raji* [revocable] and *Bain* [irrevocable]. The former one does not bring a final severance of the marital tie. It is such as does not immediately dissolve the marriage but leaves it within the power of the husband to revoke it within the prescribed period of *Iddah*”

The husband, therefore, can take his wife back if he revokes the *Talaq* before the expiry of the *Iddah* period. But if the *Iddah* expires before he revokes the *Talaq* its effect is similar with that of *Bain*.

⁴⁷ Ahmed K.N P.17

⁴⁸ Ibid

Hence, if the husband repudiates his wife once or twice the divorce is revocable subject to the expiry of the *Iddah* period. It is only on the expiry of the period of *Iddah* that such divorce becomes irrevocable. Thus basically revocable divorce does not constitute a final severance of the marital-tie, since the husband may retract the repudiation at will during the wife's *Iddah*

Bain literally means separation as it separates the parties and leaves no right to resume conjugal relations except by renewing the marriage. This happens when the husband repudiates his wife using words such as "I repudiate you three times" at a time or at three different times. And the third *Talaq* is the final and irrevocable. It is sometimes referred as "*triple Talaq*". Thus *Bain* immediately dissolves the marriage on the very pronouncement of the divorce leaving no discretion to the husband to cancel it.

Apparently, therefore, we may say *Bain* dissolves the marriage automatically. Regarding this, however, Muslim jurists differ. The difference in the opinions of the Muslim jurists is due to the difference in their interpretation and application of Divorce Law.

One set of jurists is of the opinion that no leniency is to be shown in the application of the law, so that people should not take undue advantage on that account. So they hold that the pronouncements of three divorces at one and the same time should be treated as final and irrevocable. This view is advocated by Abu Hanafi and Malik.⁴⁹

Others hold that to say three repetition of the word divorce at one and the same time amount to three divorces is to lost sight of the policy of the Muslim Law. Their argument is based on two points: First they argue that the second and the third pronouncement could be made to emphasize the first pronouncement or second. They say that it can be done under a momentary excitement without the intention to pronounce the final and irrevocable divorce.

49 Ibid P.85

Thus, the champions of this view take into account the circumstances under which the pronouncement is made and the intention of the actor to determine whether it is final or not. They say, therefore, if it is done only to emphasize first pronouncement or under excitement without the intention to pronounce a final divorce, the husband can take his wife back though he uttered triple pronouncement. Shafi and Hanbli were the one who held this view.⁵⁰

Each line supports its argument re-calling back what had been done during the life time of the Prophet [PBUH] and caliphs. In one case during the life time of the Prophet a man named Rukanah ibn' Abdul Yazid, after divorcing his wife thrice came to the Prophet [PBUH] and informed him. He said "I call Allah to witness that I intended only a single divorce". But the prophet [PBUH] after making him swear he did not mean to divorce his wife thrice, made the wife to return.⁵¹

So, they argue that this tradition leaves no doubt that if a person pronounces one divorce against his wife and then repeats the divorcé a second or even a third time simply to emphasizes the first pronouncement and not with a view to effect a final divorce, it shall be open to him to explain his intention and take back his wife.

But the other line argues that during the second Caliph, Umar, it was held that pronouncement of three divorces at one and the same time shall be treated as three divorces. The explanation that the husband had used the three pronouncements simply for the sake of emphasize cannot change the nature of the divorce.⁵²

They further argued that this was done in order to discourage the undesirable practice that would appear if we simply follow the tradition. Moreover, while the second Caliph modified the law, there were living a very large number of the companions of the Prophet [PBUH] but they did not object this modification. Thus, we may say the companions

50 Ibid P.91-92

51 Ibid. P.88

52 Ibid P.86

accepted the modified law and so the modified law has become binding on the basis of ijma.

Now a day, however, the rule which states “pronouncement of three divorces at one and the same time shall be treated as three divorces or final one” is rejected in many Muslim countries. To name Egypt, Sudan, Jordan, Syria, Morocco and Tunisia are some among many.⁵³

The reason why they follow this line is that *Umar* modified the law at that time to meet the exigencies of his time through the doctrine of *ijma*. Therefore, it seems that what had been modified by Caliph *Umar* through the doctrine of ijma is also subject to be modified. Accordingly the afro-mentioned countries negating what *Umar* has modified resort to the previous tradition to meet their period of time. i.e. rejecting the rule which states “pronouncement of three divorces at one and the same time shall be treated as three divorces or final one”, they follow that triple divorce does not amount to final divorce if it is done to emphasize the first or the second pronouncement or if it is done under a momentary excitement without the intention to pronounce the final divorce.

By way of summarization, therefore, we may say in Shera, basically we have four types of divorce. Those which become operative depending on the consent of one spouse or both. Under this we have *khul* and *Mubarh*. On the other hand, we have *Talaq* which solely depends on the wishes of the husband and which enable him to repudiate his marriage unilaterally. The final one is the one which is to be discussed in the next chapter and it is the dissolution of marriage by the *Qadi* as the instance of either party.

The Muslim jurists are guided in the matter of marriage and divorce by an injunction in the Quran, namely “to keep them [the wives] with kindness or to separate [from them] with humanity” It is held, therefore, if a husband is not keeping his wife with kindness when the wife cannot live happily with him. So if there is any failure from the

53 Ibid P.88

side of the husband in fulfilling his matrimonial obligations the wife can have her marriage dissolved by the *Qad*.

It is not, however, every failure of the marital obligations that entitles the aggrieved party to the dissolution of the marriage and such right can be exercised only when the failure is of serious nature.

Accordingly, a marriage can be dissolved under certain circumstances or when one of the spouses suffers from certain defects. The defects may relate to physical, social cultural or moral conditions of the spouses. So under Muslim Law grounds for divorce can mainly be classified into three: defects, mainly physical defects found in the spouses, inequality between the spouses and other specific causes. So our main discussion will treat each cause separately and briefly.

5.3. Causes of Divorce and Its Notion

The Romans used to believe that since marriage came into existence by agreement and marital affection, so it was thought reasonable that it should cease to exist when these conditions were no longer present. Accordingly, in “Roman times there were two ways to bring to an end the marriage through mutual consent [*Divartium bonagratia*] or at the will of either party [*repadium*].”⁵⁴

Unlike the Romans, Christianity at one time in Europe used to preach “the two should walk hand in hand up the steeps of life and down it’s? Declivities and green slopes then lay themselves together for the final steep at the foot of the hill. Consequently there should be no divorce, no divorce courts, and no books on the law of divorce.”⁵⁵

In Arabia prior to Islam divorce was a frequent occurrence and every individual took as many wives as he could afford and then divorced them at his will. This tradition does

⁵⁴ This part is taken from Abdulmalik ababuker’s Senior Research Paper for LLB Effects of Divorce in the civil code could shera law
“AAU June 19990.

not have been completely rejected after the coming of Islam. For Muslim law does not compel the spouses to lead a miserable life when their marriage has proved a failure, but grants them the right to separate.”⁵⁶

So, divorce is not a recent phenomenon. It is as old as marriage itself. Further there can be no divorce without a previous marriage. So it is time to discuss what divorce is and its type.

5.3.1 Inequality between the spouses

The Muslim jurists have dealt with this matter under the heading of *Kufw* or equality. Hence, “a marriage is unequal where the status of the husband is inferior to that of the wife’s family, or he is inferior to the wife in respect of certain personal qualifications”.⁵⁷

As it is obvious from the definition, it is not the inferiority of the wife that is given due consideration to establish inequality. It is rather the inferiority of the husband visa-vis the wife. So if a man marries a woman who is of inferior status the marriage cannot be dissolved on this ground.

The arguments forwarded by the Muslim jurists for the above line of argument are two. Since under Muslim Law lineage is counted from the father and consequently, the woman on her marriage acquires the status of her husband as also the children born of the marriage, inferiority of the wife is not injurious. Second and which the writer found convincing is the fact that a husband can get rid of his wife any time if he so desires and he need not necessarily establish inequality in the marriage.

Therefore, it is not the inferiority of the status of the wife that is relevant to establish inequality and make it a ground for divorce, rather it is the inferiority of the husband’s

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status that matters. What follows, necessarily from this is for whatever reason it is not the husband who is entitled to invoke this ground of divorce but the wife.

The legitimate question that may arise is what constitutes in-equality? The Muslim jurists differ on this point. According to Abu Hanifa, equality in marriage pertains to the following matters:

1. *Islam* or religion
2. *Nasab* or family or lineage
3. *Hirfah* or profession
4. *Hurriyah* or freedom from slavery
5. *Diyannah* or piety or character
6. *Mal* or fortune or property i.e. financial condition.

The Maliks differ from the Hanifas in the conception of inequality. “According to them the only condition to constitute equality are Islam, piety and means to maintain the wife. They do not attach any importance to the question of lineage and profession”⁵⁸ Shafi agrees to a great extent with Abu Hanifa, the only difference being that he does not make fortune and lineage conditions of equality. Ahmed b. *Hanbali* does not as such enumerated what constitutes inequality in marriage. He only points out that it is a ground to dissolve marriage.

I, may, however, discuss very briefly some points for time and space constrain. Besides, as we may see soon the relevancy of these concepts in the Muslim law of divorce is daily diminishing.

For instance, according to all Muslim jurists, Islam is a necessary condition of equality in marriage. The idea is where and how does a person embrace Islam i.e by birth or has he embraced Islam later. Further, the difference is made between the one who him-self has embraced Islam whose father was not a Muslim and person whose paternal ancestor was a Muslim.

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The argument forwarded for this distinction must have been based on the fact that people who adopted Islam in the beginning were mercilessly persecuted and it required great courage to have adopted Islam in the early days. It seems, therefore, such people were considered superior to those who adapted Islam in later period for adoption of Islam involved no hardships.

Yet, now a day, this rule seems has neither lost importance nor it is applicable any long. For one thing, freedom of religion is respected. Second, no Muslim is generally speaking, is persecuted for what he beliefs now a days.⁵⁹

When we analyze Nasab or lineage, first we may find only Hanafi jurists attach importance to this essential while “Maliki, Shafi and Hanbal schools do not make equality in this regard. Second, in this regard, the Hanafis up hold this theory basing themselves on racial discrimination stressing people belonging to the *Quraysh* tribe are superior to the other Arabs while all other Arabas are superior to the non-Arabs. If we pay attention to Islam itself, we will find how this theory is obsolete and reactionary. First it is stated in the Quran that the believers are brethren. Second, the Prophet [PBUH] has stated, “The Arabs have no precedence over non Arabs nor the non Arabs over the Arabs, nor the white man over the black and vise versa except by excelling in righteousness”.⁶⁰

The same is true for the fact being free from slavery. During the time of the Prophet [PBUH] one individual by the name of *Billal* a liberated slave was married to an Arab girl, and this ascertains the Prophet [PBUH] and the companions did not follow this rule. Therefore, as far as there is no injunction in the *Quran* and *Hadith* for making the above points relevant to establish equality in marriage, one may say the inequality in this respect is unjustifiable.

⁵⁹ FDRE Constitution article

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Regarding profession and property again great importance is given only by Hanafi jurists. According to them equality in marriage is presumed if the husband is carrying on a profession which is inferior to the profession carried on by the members of the wife's family.

For instance, the marriage of the daughter of a merchant to a barber or a washer man was looked down upon and was considered to be a disgrace to the girl's family. But this adherence to one profession by a particular family is no longer the rule. For the status attached to various professions has undergone a radical change during recent time and the difference in profession can not be safe-guard to determine the equality of marriage. For instance, it was formerly considered that a petty shop keeper was superior to a washer man, but a dry cleaner may now be considered superior to a petty shop keeper.

To continue, by wealth means that the husband should be possessed of sufficient means to discharge his dower debt and provide for the wife's maintenance. If the man does not have this amount, it can be invoked as a ground for divorce. Those who advocate this do not take two things into consideration: the fact that wealth is an unstable thing that may be acquired in the morning and lost before night and the fact that now a days both spouses are becoming bread winner irrespective of differences in sex. Nevertheless, the former argument may raise one question, when is the time for determination of inequality?

The material time for determination of inequality is at the time of marriage. This means, if the husband was unequal to the wife, for instance, in social status at the time of the marriage then his subsequent rise in life shall not deprive the wife or her guardian of the right of dissolving the marriage on the basis of inequality. In the same token, if the husband was equal to the wife's family at the time of the marriage but subsequently becomes poor on account of losses then this change shall not affect the marriage.

Therefore, in spite of the existence of differences of opinion among the Muslim jurists as to what constitutes inequality in marriage and the concept becoming epitaph in face of contemporary human social relations, in the Shera, a Muslim wife can invoke inequality as a cause to dissolve marriage as far as this law is concerned, as it is done by Muslim jurists under the concept of *Kufw*.

5.3.2. Physical Defects in the Spouses

Under Islam marriage is both an act of devotion and a civil contract. Therefore, it is right to say, when a husband or wife is suffering from a defect which makes a happy companionship between them impossible or renders the discharge of other obligations impracticable it becomes necessary for the *Qadi* to give the aggrieved spouse relief in the matter by dissolving the marriage.

Though Muslim jurists are unanimous on the basic idea to dissolve a marriage when one of the spouses is suffering from certain specific defects they, however, differ on details. The first point of difference is whether a husband has the right to get his marriage dissolved through the *Qadi* on the basis of a defect in the wife. The second point relates to the defect on the basis of which a marriage can be dissolved.

As regards the first point the Hanafis do not allow the husband to dissolve the marriage through the *Qadi*, on the ground of a defect in the wife. This may be due to the fact that the husband enjoys wide power of divorce and can exercise it when he is not happy with his wife. They deny this right also because they do not want to deprive the wife of any portion of her dowry.

In spite of these differences these physical defects could be mainly classified as:

I. Defects in the husband

There are certain defects which are confined to the husband alone. These are "... three diseases which have been mentioned by all jurists and which, when presenting in the husband form a ground for dissolution of marriage on the complaint of the wife. These are *inneer* or impotency, *Majbub* and *Khassee*."⁶¹

A husband shall be considered, under the four schools, to be *inneer*, or impotent in respect of his wife if he is in-capable of capitulating the wife.

A person is called *majbub* if the male organ is missing. This condition may be from birth or be caused by accident or surgery. Further, even if the male organ is not absolutely missing but is too short in length to be unfit for penetrating the wife, then he shall be considered to be *majbub*.

A person is called a *khassee* when he has not testicles or they are unserviceable either by birth or due to accident or surgical operations.

The Hanafis, Malik and Hanbali add *Shakkas* or *Aitarad* as a fourth defect. *Shakkas* is a person who suffers from *ejucalation an teportus*. That is when the outflow of semen at the man's approach to his wife so that erection collapses just before penetration so he suffers from a pre-mature ejaculations.

II. Defects in the wife

The defects in the case of wives are such as do not allow intimacy on account of some obstruction in the vagina or render the wife's condition disgusting. These are three- *Rataq*, *Qoron* and *Afal*.⁶²

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According to Islam a woman will be considered to be a *Rataq* or suffering from the same, when her vagina is so much constricted with flesh as to leave no passage for penetration.

Qoron is similar to *Rataq*. The difference between them is that if the malformation of tissue is blunt then it is called *Rataq*, but if it is pointed out like a horn it is called *qoron*. (*Qoron* literally means Horn). Thus *rataq* is called *Valva imperiva Coeunti* and *qoron* is termed as *Valve anteriore parte enascense*.⁶³

The third affection usually attributed to women is called *afal*. Muslim jurists consider it to be an abnormal fleshy growth or tumour at the mouth of the vagina or inside it to the extent as to leave no passage for penetration. The disease may be due to injuries, operation, oldage, infection or tumour of the vagina.

III. Defects common to both spouses

There are certain defects which can be present in the husband as well as the wife. These are *Bakhr*, *Adhite*, *Elephantiosis*, *Mashola* and *Janun* or madness.⁶⁴

Bakhr means a very foul smell from the mouth or body. Therefore, if it is so strong that the other spouse finds it difficult to tolerate it, then it forms a ground for dissolution of marriage. The back ground for this foul smell could be some disease.

Adhito is a disease in which the sufferer involuntarily discharges stool at the time of cohabitation. This disease is uncommon. It is obvious; however, its presence may make the whole life disgusting.

In elephantiosis, the consequence is abnormal overgrowth of the skin. It may affect any part of the body making the appearance of the sufferer. But what is interesting about this

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disease is that in certain locality it is prevalent so that the community there gets used to its sight and do not find any thing objectionable in the sufferer.

Mushala occurs when a person is suffering from incontinence of urine or the failure of voluntary control of urine. The only reason for considering it a ground for divorce can be the filthy condition of the sufferer, which the other spouse may find disgusting.

Madness or *jenun* means derangement of mental faculty and the Muslim jurists include under it a lunatic, an idiot, an imbecile, an insane person or a person of unsound mind.

As we can observe, the jurists have not differentiated between the above various classes of mental derangement. There is, however, a difference of opinion about the presence of *jenun* in one of the spouses. Abu Hanifa does not consider *jenun* to be a ground for the dissolution of marriage.

Finally, we have to bear in mind that the defects mentioned above either attributed to each spouse or both are not the only ones, the presence of which serves as a ground for divorce. It is only the important ones that are mentioned above.

5.4 Other Specific Causes

Under this section we will try to discuss other causes which may bring dissolution of marriage. These are missing of the husband, physical desertion, failure to support or maintain the wife and cruelty.

5.4.1. Missing of the husband

“A missing person according to Muslim law is one who has disappeared or has been taken a prisoner in a battle by the enemies, and it is not known whether he is still alive or not and whose whereabouts can not be ascertained and have not been known and it is

uncertain whether he is alive or has died.”⁶⁵ Therefore, if the husband’s disappearance is established, then the wife can make it a cause for divorce and petition the *Qadi* to release her from the marriage tie.

In determining the time when the husband is presumed to be missing, Muslim jurists differ. In determining the time they use two principles; *istishab al-hal* and principle of *Qiyas* or *analogy*.⁶⁶

According to the first principle, things continue in the condition in which they are until a change in them or in their condition is established. Consequently, the marriage should subsist until and unless the husband’s death or a divorce by him is proved. But the second one demands that the marriage should be dissolved, if his death is presumed, because the absence of the husband involves hardship to the wife.

The *Hanafis* have followed the first principle, while others adhered to *Qiyas*. Thus the *Haafis* take into consideration to determine the time, people of the missing persons’ age adding to it the constitution of his body and health etc. Therefore, what follows from this is that, a missing person should be declared to be dead when none of his coevals remain alive. “thus if a person is found missing at a time when he was twenty years old his death would be presumed after one hundred, ninety or eighty years according to the circumstance.”⁶⁷

But things are different regarding other schools. Under the *Maliki school* a wife can apply to the *Qadi* for the dissolution of her marriage when her husband has been missing. And the husband shall be presumed to be dead if he does not appear after four years from the time the suit was filed. We may say therefore, *Maliki* has fixed the period to be four years subject to the inquiry made by the *Qadi* about the missing husband upon the application made by the wife.

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Ahmed b. *Hanabli* has also fixed the period of time on the expiry of which a person shall be presumed to be dead at four years if the circumstances point to the early death of the husband. *Shafi* agrees also with *Hanifi* though at first he has been agreeing with Ahmed b. Hanbal.

To summarize we may say in spite of the differences among the Muslim Jurists as to when the missing husband is presumed to be dead, a wife can seek divorce claiming her husband has been missing. To do away with these differences and minimizing the hardship of a wife, certain Muslim countries have fixed the time to be four years.⁶⁸

5.4.2. Cruelty

In order that the spouses live a happy life, it is necessary that they should treat one another with kindness and affection. It is the negation of this obligation from the side of the husband that may in extreme case entitle a wife a separation. Under Muslim law, therefore, we say a husband treats his wife with cruelty under the following conditions:⁶⁹

- habitually assaults her or makes her life miserable by cruelty of conduct even when such conduct does not amount to physical ill-treatment or
- Associates with women of evil repute or leads an infamous life,
- Attempts to force her to lead an immoral life,
- Disposes her of property, or prevent her from exercising her legal rights over it,
- Obstruct her in the performance of her religious profession or practice etc.

It is clear from the above enumerations that cruelty need not be physical necessarily. When, for instance, a husband habitually uses vile expressions towards his wife it is sufficient cause for divorce.

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All, Sunni Schools, however, do not allow divorce in the presence of cruelty. The Hanafi School has no provisions which enable the wife to seek divorce on this ground. Nonetheless, the Hanafi jurists have formulated the rule to adopt the law of another Sunni sects when circumstances so require.

5.4.3. Absence of maintenance

It has been already stated under Muslim Law marriage is a civil contract. So certain obligations are imposed on the parties and certain rights are vested on them.

Thus one of the rights of the wife is that her husband should support her while she is under an obligation to look after the domestic comforts of the husband and to make herself available to him. Hence, if the husband fails to provide an adequate maintenance she can on her part seek divorce.

The fact that the wife is rich does not make difference under the Islamic Law. “Thus he has to maintain the wife even when he is ...destitute while the wife is rich”.⁷⁰ The reason seems that under Muslim Law, by his marriage the husband gets no control over the wife’s property. So she remains the full owner of the property belonging to her. This seems to be derived from the injunctions in the *Quran*, namely “Men shall have the benefit of what they earn and women shall have the benefit of what they earn”. But on the contrary the husband has “to provide for them (wives) the wealthy according to his means and straitened according to his means a provision according to usage. Moreover, this is strengthened by the Prophet [PBUH] when he said:”The customary maintenance of your wives is incumbent on you.”

There is a difference of opinion amongst the Muslim jurists about the effect of the husband’s failure or refusal to maintain his wife.

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Under the Hanafi School, a marriage is not to be dissolved on the husband's failure to maintain his wife. Only she is entitled to raise a loan on the husband's account for her support when she is authorized by the *Qadi* or to use such portion of her husband's property as may be necessary without an order from the *Qadi*. The only penalty the husband would face in this regard is imprisonment by the *Qadi*, provided it is established he is not destitute to the extent of not maintaining his wife.

Latter, however, the Hanafi Jurists thinking this to be injustice, they thought it proper that the Hanafi *Qadi* should entrust a case to a *Qadi* of Shafi sect so that the latter would separate the parties.

Therefore, under the Shafi School a marriage can be dissolved if the husband can not maintain his wife. The same is true under the Maliki school provided that the wife was not aware of his financial condition at the time of the marriage. Under the Hanbali school the marriage shall be dissolved by a decree of the *Qadi* provided the wife makes a demand for the same because maintenance is her right.

Hence, we may say the Shafi, Maliki and Hambali Schools provide for the dissolution of marriage when the husband is so poor as to be unable to maintain his wife or when he is capable of maintaining the wife but fails or refuses to do so. The Hanafis do not allow as a principle, the dissolution of the marriage on this ground, but it can be affected by adopting the provisions of other sects.

5.4.4. Desertion

Black's law Dictionary defines desertion as follow:-

The act by which a person abundance without justification, or unauthorized a station or Condition of public, social or family life, renouncing its responsibility and evading its duties.

Hence to say there is desertion at least three elements have to be fulfilled according to the above definitions. One, there should be a cessation of the co-habitation. Second, there must be intent to desert the other. That is to say, the desertion must be voluntary act. Further, the desertion should be against the will of the deserted party. The idea is if the other party gives his consent there is no desertion. Thus it is when one spouse ceased the co-habitation with the intent of deserting the other spouse, renouncing his responsibility and evading its duties that desertion exists.

Hence, since desertion is an intentional act, the knowledge of the deserted spouse on the whereabouts of the deserting spouse is immaterial. For instance, the deserting and deserted spouses could be in the same locality or even they could be neighbour but the deserting spouse after leaving the conjugal home may not have the intention to return renouncing its marital responsibility.

Before winding up this part I found it proper to raise two concepts which are relevant under Muslim Law to bring the dissolution of marriage. These are *conversion* and *Lian*.

By conversion here it means the adoption of Islam by a non-Muslim. But before discussing how and when conversion brings about the dissolution of marriage I found it note worthy to expose the reader to two points.

Under Islam, a Muslim can lawfully marry a *Muslimah* that is, a Muslim woman, and *Kitabiyah*, i.e. a woman belonging to a revealed religion. The revealed religions pursuant to Islam are Christianity and Judaism. But he cannot marry a pagan, atheist, or any other non-Muslim woman who does not belong to a revealed religion.

On the other hand, a *Muslimah* cannot marry or be married to a non-Muslim whether belonging to a revealed religion or not. Such a marriage is, therefore, absolutely forbidden.

The other point is the fact that Islam recognizes the validity of the marriage of non-Muslim solemnized according to the prescriptions of their own religion. So that if a non-

Muslim married couple embraces Islam, it shall not be necessary for them to solemnize it again according to the provisions of Muslim Law.

Therefore, the effects of conversion could be comprehended in three aspects.

One, if both couples converted, there is no problem for as it has been already stated Muslim Law accepts marriage to be valid if it is solemnized in accordance with the spouses rites.

Second, if the husband is the one who is converted the marriage will subsist valid, provided that the wife is *kitabiyah*.

Third, if the wife embraces Islam, but her husband refuses to convert, then the *Qadi* shall dissolve the marriage for such type of marriage is absolutely forbidden by Islam.

The conclusion, therefore is, it will be only on the husband's or non-*kitabiyah* wife's refusal or failure to embrace Islam that the marriage shall be dissolved by the *Qadi*.

The second concept is *Lian*. In Islam a wife can have her marriage dissolved by the *Qadi* through a procedure referred as *Lian*. *Lian* literally means to drive away. This happens when a husband accuses his lawfully wedded wife of adultery or indirectly as when he denies the paternity of a child born of her during wedlock.

When the husband accuses his wife of committing adultery, the wife has a right to apply to the *Qadi* to order the husband either to support his accusation by taking the special prescribed oaths or to admit the falsity of his charge. "This procedure of taking Oaths is called *lian* and consists in giving of evidence or testimony in person by the husband as well as by the wife before the *Qadi*."⁷¹

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Therefore the husband is obliged by the *Qadi* to enter into *lian* if he can not produce four witnesses and if he is unable to do both he is punishable as it is stated in *Quran* as follow.

And those who accuse free women (of adultery) and bring not four witnesses flog them with eighty stripes and never accept their evidence and these are transgressors.

As it can be seen above, since *lian* is more of procedure and evidence law than substantive law, and hence it is beyond the objective of this text, I found it unnecessary to discuss it further. Hence it suffices if we know the fact that the wife has the right to demand the dissolution of her marriage when her husband accuses her of unchastity but can not establish his charge by whatever means.

Finally, from what have been discussed one may conclude that grounds be present before divorce is had. But this is not necessarily true. For one thing, the husband has full right under *Talaq* to repudiate his wife anytime without revealing any ground. Second, when the wife uses her right under *khul*, she is not obliged to reveal any ground. Third, when both parties separate under *Mubarah* they need not explain why they do so. So whenever the parties do not need to reveal their grounds to the third party they resort to the above forms of divorce. But if the exposition of the grounds are found harmless they (specially the wife) may explain the grounds and seek divorce accordingly.

5.5 Effects of Divorce

Discussing those effects necessarily requires to have certain guideline that may help us in finding our way, in light of so many types and causes of divorces under *Shera* which may make the understanding the subject matter much easier.

So in the preceding unit attempt has been made to show that the causes for divorce are either imputable to the husband or to the wife. So if a marriage is dissolved for a cause imputable to the husband, then it has generally speaking, the effect of *talaq* or divorce.

On the ground that the dissolution of the marriage has been brought on account of the husband and so he should be deemed to have divorced his wife.⁷²

Thus if a marriage is dissolved on the ground that the husband is impotent or insane and the like then dissolution of the marriage will have the effect of *talaq* even though the marriage is dissolved by *Qadi* at the instance of the wife.

And the dissolution of marriage by or at the instance of the wife is called *faskh* [termination]. Similarly, therefore, if the marriage is dissolved due to a cause attributable to the wife then it shall have the effect of *faskh*. Thus if it is dissolved by the wife in the exercise of her right under *khul* or by the *Qadi* on the ground of some serious blemish in her, then it shall be deemed to be *faskh* by the wife.⁷³

The effect of both these methods is the same as far as dissolution of marriage is concerned. As we shall soon see the difference lies in the extend of husband's liability for payment of dower. In other aspects so we will try to pinpoint those exceptions as we come across in our discussions.

Bearing this in mind, let us have a look into the effects of divorce in the *Shera*. In Islamic law the dissolution of marriage by *talaq* or otherwise gives the following results:

1. The marriage becomes dissolved immediately in the case of an irrevocable divorce and in the case of a revocable divorce on the expiry of the wife's *iddah*.
2. The parties become absolutely prohibited to each other on the pronouncement of triple divorce and cannot even re-marry until and unless the wife marries another person and the second marriage is dissolved after consummation.

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3. Cohabitation between the parties becomes un-lawful from the time of the pronouncement of an irrevocable divorce and in the case of a revocable divorce from the time of expiry of the wife's *iddah*.
4. The wife shall be entitled to contract another marriage on the expiry of her *iddah*
5. The husband cannot marry after divorce, certain women prohibited to him on account of his marriage. He also can not marry another woman during this period [*iddah*] if the divorced wife was one of four living wives.
6. The wife has to observe *iddah* for the prescribed period unless she is exempted from its observance.
7. The husband's liability for maintenance of the wife terminates on the expiry of the period of the wife's *iddah*
8. The wife's prompt dower becomes due in the case of revocable divorce on the expiry of the wife's *iddah* and immediately in the case of irrevocable divorce without any demand being made by the wife.
9. The parties' right to inherit to each other's property ceases immediately in the case where an irrevocable divorce is pronounced. In the case of revocable divorce the right shall cease on the expiry of the period of the prescribed *iddah*.
10. *Nasab* or legitimacy of a child shall be established only if it is born within a certain period of the time of dissolution of marriage.⁷⁴

Nonetheless, these effects, generally speaking, can be combined and discussed under the following sub headings.

1. Remarriage between former spouses.
2. The right to contract another subsequent marriage.
3. Maintenance and Residents.
4. Dowr.
5. The parties' right to inherit the property of one another.
6. *Nasab* or legitimacy.

5.5.1. Remarriage between Former Spouses

If the husband divorced his wife by triple *talaq*, the divorcee is forth with rendered unlawful to him. The effect is that he cannot re-marry her, unless the wife marries first another person by a valid and binding contract and divorced by this person after a *bonafide* consummation of marriage and completes the period of *iddah* consequent upon such repudiation.

If, however, it is revocable divorce, things may differ slightly. As it has been discussed in previous chapter, revocable divorce may become similar to that of irrevocable divorce upon the expiry of the *iddah* period. So until such period is lapsed, there would not arise any occasion for re-marriage for the marriage is subsisting. If, however, the husband failed to take advantage of the prescribed period and is determined to break from his wife the expiry of the *iddah* turns the revocable divorce into irrevocable one. Therefore, the consequence in regarding re-marriage is the same as irrevocable divorce.

This prohibition of re-marriage is meant to restrain the frequency of divorce among Muslims. But this rule is not unique to Islam alone since it has been applicable among the Hebrews.

In France as well the original code did not permit, such union, i.e. new marriage between divorced couples. It used to read, to that effect as follow: “the spouses divorced for any cause what so ever may never be re- united again”.⁷⁵ The aim was to avoid having divorce suites start carelessly. So it was up to the parties to think it over very carefully before getting a divorce. But in 1884 certain changes were made in this regard. Yet the interesting fact was, that, unlike Islam, divorced couples can not re-marry if the subsequent marriage is dissolved by divorce.

Lastly, when the divorce is the product of *lain* there is a difference of opinion as to whether the husband can re-marry his former wife. According to Maliki and Shafi the

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wife becomes prohibited to the husband for ever. So that he cannot re-marry her under any circumstances and even on the retraction by him. This opinion is based on a tradition that the Prophet [PBUH] said “the two [the spouses] who make imprecations can never come together”⁷⁶

But according to Hanifi “the spouses can remarry after the Qadl’s decree if the husband admits the falsity of his accusation or the wife confirms the husband’s charge’.⁷⁷

5.5.2. The Right to Contract another Marriage

This subsection invites us to look into prohibited degree of marriage in Islam. So in *Quran* it is written as follows:

And marry not those women whom your father married, except what hath already happened [of that nature] in the past. Lo! It was even lewdness and abomination; and an evil way. For- bidden unto you are your mothers, and your daughters and your sisters and your father’s sisters, and your mother’s sisters And your brother’s daughters and sister’s daughters and your Foster-sisters and your mothers in-law and your step-daughters Who are under protection [born] of your women unto whom you Have gone in but if you have not gone into them, then it is Not sin for you [to marry their daughter]. And wives of your sons who [spring] from your own loin’s and [it is forbidden unto you] that you should have two sisters together, except what hath already happened [of that nature].

Normally, therefore a man can not marry those prohibited to him permanently after his first marriage is dissolved by divorce. And further there are those whom he may not marry while his first marriage subsists. For instance, though polygamy is permitted under Shera law, a man is not allowed to have as co-wives two sisters.

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But if the marriage is dissolved for what ever reason, say by divorce, that ban to marriage as regarding affinity do not subsist. Therefore, a man can marry his sister-in – law after he divorced her sister and the latter one observed her *iddah*.

Regarding this, Muslim jurists argue that “... on the severance of the marital tie, they have nothing more to do with each other, so that there can be no hindrance to the marriage of the former husband to the unpredicted relations of the wife.”

Finally, once a marriage is dissolved a man can enter into another contract of marriage. But a man who divorced his four wives can not marry another wife till the *iddah* period of the divorced wife has expired. The reason seems that, till this period expires, the divorcee retains the status of a wife. So if he marries another wife in the meantime, the new bride is considered the fifth wife which is contrary to Islam. But the wife can marry after her marriage is dissolved by divorce observing the period of *iddah*.

Therefore, we may say, while those impediments based on blood relations are absolute, some bars which came into existence through affinity relations do not subsist though the marriage that produced them is dissolved by divorce.

5.5.3. Maintenance and Residence

Among the marital obligations which are incumbent upon the husband is maintenance of the wife. Necessarily the rapture of the marriage brings to an end this obligation. Nonetheless, as an exception to the above rule the husband has to maintain the divorcee during the *iddah* period. The reason for this is the fact that though the marriage is dissolved absolutely on the pronouncement of an irrevocable divorce yet the wife retains her status of being a wife during the period of her *iddah* for certain purposes.⁷⁸

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For instance a wife cannot contract a second marriage during this period. Hence the liability of the husband to maintain his wife continues during the period of *iddah* irrespective of the fact whether the divorce is revocable or irrevocable.

This rule holds good only as long as she stays in his home during her *iddah*. So, logically if she leaves his house voluntarily against his wish it is deemed as if she has renounced her right So that no maintenance shall be incumbent on him. It's stated in Quran:

Thus the husband has no right to expel the divorce from his residence. This is based on the injunction laid down in *Quran* namely expel them not from their houses nor let them go forth unless they commit open immorality". This is only subject to one exception. If the house is rented and does not belong to the husband, it is open to a wife to undertake the payment of the rent of a house. Otherwise she has no right to force the husband to pay for the rent during her *iddah* period.⁷⁹

Further, if the divorcee happened to be pregnant, maintenance is due till the time of delivery as it is only then that the *iddah* expires. If the husband, however, dies she may not be entitled to maintenance, though she is en-cient. This exception to the exception seems to be based on two grounds: on the husband's death his property immediately vests in his heirs and as we will see soon the wife is one of them. Moreover, the liability for maintenance lies only on the husband and the heirs are not responsible for the same.⁸⁰

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5.5.4. Dower

In ancient Roman times dower was given by a bride to her bridegroom. Hence, “Dowe [dos] is a gift to the husband coming from the side of the wife and intended as a contribution to the expenses of married life, which fall upon the husband”⁸¹

But in Shera it is given by the bridegroom to his bride at the time of the conclusion of marriage agreement. It is an essential part of a Muslim marriage. This is written in *Quran* as follows:

And lawful for you are all women besides these, provided that you seek them with your property, taking them in marriage not committing fornication. Then as to those whom you profit by [marriage] give them their dowries as appointed.

The time for payment is either at the consummation of marriage or after words. And the payment can be full or partial. Therefore, the only effect of divorce on dower arises in the case of a deferred dower on the pronouncement of a revocable divorce. Consequently, if the husband has not paid the full amount, he is obliged to pay the deferred amount on the pronouncement of divorce.

There is, however, disagreement on the time when this deferred dower becomes payable. According to one version it becomes payable on the pronouncement of the divorce, while according to another it does not become payable till the expiry of the period of *iddah*. It would be logical if we say that if the divorce is irrevocable, the deferred amount should be payable immediately upon the pronouncement of the divorce. Because such type of divorce brings an immediate end to the marriage. But if it is revocable the dower could remain deferred till the expiry of the period of *iddah* and shall become due only on the expiry of that period.

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It is only when the marriage is dissolved through *khul* that a husband is free from paying the deferred amount. Under the *khul* doctrine, since divorce is given by the husband for a money value given by the wife, she is obliged to return the amount she has received as dower.

5.5.5. Inheritance

In *Shera* the fact that a man and a woman being solemnized as a husband and a wife may not create common property. Both remain, rather, full owner of their individual property. This has been made clear in the *Quran* where it is stated.

**“Men shall have the benefit of what they earn and
women shall have the benefit of what they earn”**

On the other hand, each spouse is vested with a right to inherit the deceased spouse with regard to this while the husband has the right to inherit half of what his wife left and the wife inherit one fourth of her husband's estate. [This is discussed in the next chapter]

If, however, the marriage is dissolved by divorce, the right of each spouse to succeed one another terminates with it. This rule is, nonetheless, subject to two exceptions. One, in case one of the married couple dies during the period of *iddah* following a revocable divorce, the survival inherits from the deceased. It is immaterial whether the husband was in good health or on his deathbed when he pronounced the divorce. Similarly, the fact whether the divorce was pronounced at the desire of the wife or by the free-will of the husband against the wishes of the wife would not affect the matter of inheritance.

Things defer in case of irrevocable divorce. Accordingly, if the husband was healthy while he pronounced the divorce, the wife cannot succeed him despite the fact that he died while she was observing her *iddah*. Yet, if he was in his death bed when he pronounced the divorce and died within the prescribed period of *iddah* she shall inherit him. The

reason for such distinction could be the mental status the husband has while he is healthy and he is in his death bed. So the doubt that may exist at the time of bed lines is construed in favor of the wife.

The exception to this last exception is the fact that she may not inherit him if the divorce is given at her will. For instance if a wife gets a *Khul* while the husband is suffering from illness resulting in death, the wife shall not be entitled to her right of inheritance. On the contrary, according to the *Malik* law the husband shall not inherit her, if he divorced his wife and she died while she is in her *iddah*, because he has personally divested himself of his right.

Last but not the least, according to *Shera* apostasy by one of the spouses brings an end to a valid Islamic marriage. If it is the husband who apostate and dies in the prescribed period of *iddah* the wife shall not inherit him irrespective of the fact whether he was in good health or in his death bed, at the time of his apostasy. The same is good for the husband whose wife died during the term of *iddah* provided that she was in good-health at the time of apostasy. Yet if she apostatizes in health illness he does inherit from her.

5.5.6 Child custody

It is necessary for various purpose such as guardianship, maintenance, inheritance etc. to as-certain the person who can be considered to be the father of a certain child. For this purpose under Muslim law stress is laid on the time of conception of a child and it is an essential condition. That is it should be conceived by the purported father after his marriage with the child's mother.

To this effect "under Muslim law the presumption of paternity from marriage follows the bed, that is, the paternity of a child born in lawful wedlock is presumed to be the husband of its mother if certain conditions are satisfied.

These conditions are:

- 1) the status of parents of the child,**
- 2) the conduct of the alleged father,**
- 3) the nature of the marriage, and**
- 4) the period of gestation.**

1. The status of parents of the child : this may mean, in other words the person who is responsible for its conception should be the lawful husband of the child's mother at the time of conception. That is to say both parties should be lawfully husband and wife. It is only when a man has no right or even the semblance of a right in a woman that their off-spring is considered a bastard.

2. The conduct of the alleged Father: This is as to whether he has admitted expressly or impliedly that the child is his. Thus the failure to deny his parent-age of the child when it is legally open to him to disown it constitutes an implied admission that the child belongs to him.

Therefore, the husband has the right to disown the child within a limited period of time. This period of time, however, varies according to different jurists. Some say it extends up to forty days from the mother having given birth to a child, while some say it is seven days.

3. The nature of the Marriage:- Under Muslim law there are void and voidable marriage. A child born of void marriage is illegitimate, pursuant to Muslim law. But if it is born of voidable [fasid] marriage, though the marriage may be terminated when it comes to the knowledge of the *Qadi*, a child is legitimate. We say there is a *fasid* marriage where a man marries a woman under a genuine misapprehension of the fact that the woman was not permissible to him and when she is not absolutely forbidden to him. Such incident may happen if a man marries a woman who is observing *iddah*. Therefore, a child born under such type of marriage is legitimate.

4. **The Period of gestation:** this is a period of time both minimum and maximum during which a fully developed child can be born. The minimum period is six months. That is to say a fully developed child cannot be born before six months. Hence, a child shall be considered legitimate if it is born at or after six months of a marriage.

Therefore, what follows from this if a fully developed child is born within six months he is not legitimate for the reason that the child must have been conceived before the marriage? Further, the period of six months shall be counted from the date of a valid marriage.

There is no agreement in matters related to the maximum. So some, like *Abu Hanifa*, fix it to be two years while others like *Malik* say it is four years. But now days, however, the former view has acceptance. Therefore, a child shall be considered to be the legitimate child of the former husband if it is born within two years of the dissolution of a marriage.

But this rule has to pass through two tests: one is related to revocable divorce. In the case of revocable divorce it is lawful for the husband to be intimate with his divorced wife during her period of *iddah*, namely three courses; so the maximum period of gestation, namely, two years should be increased by that period. Therefore, a child born within two years and the period of *iddah*, which is ordinarily considered to consist of a maximum period of three months shall be deemed to be the lawful child of that person.

Yet, if it is irrevocable divorce, the child should be born within the two years, to be presumed the legitimate child of the man who had divorced the child's mother. Otherwise the child is illegitimate, because in such a case it is not possible for the husband to approach his wife after the pronouncement of irrevocable divorce, even during the period of *iddah*.

Therefore, the conclusion is as follows: for those children born after divorce; If it is born after six months of the dissolution of the marriage there can be no doubt of its legitimacy. If the divorce is revocable, we add to these six months the period of *iddah* and we presume the child be legitimate if it is born within nine months of the dissolution of the marriage.

Further, if a child is born within two years and three months of a revocable divorce it shall be presumed to be the legitimate child of the former husband. In the case of irrevocable divorce since the period of *iddah* cannot be taken into consideration the maximum period of gestation is two years. The child is legitimate if it is born at or within the two years period.

Naturally if the legitimacy of a child born after divorce is established, a question of custody of that child follows. Under Muslim law, the mother is entitled to keep her minor children with her for a certain period, provided there is no special circumstance which may dictate the matter to take another course. These periods differ regarding a son and a daughter. She can keep her son with her till he is seven years old and a daughter till she attains the age of fifteen years. This rule is meant for the benefit of the children and it is considered that the mother is most suited to look after them till they reach the prescribed period or age.

Nonetheless when the divorce is due to the apostasy of one of the spouses the above rule may not hold good. For it is considered that a child should be brought up in a healthy religious atmosphere and since Muslim jurists consider Islam to be the best religion, it follows that the child would be given to the custody of a spouse who embraces Islam.

Review Questions

- 1. Compare and contrast between shera and the revised Family Code, 2000 concerning remarriage between former spouses.**
- 2. Compare and contrast between shera and the revised Family Code 2000 concerning the following issues.**
 - i. The right to contract another subsequent marriage.**
 - ii. Maintenance and residence.**
 - iii. The party's right to inherit one another.**
 - iv. Children.**

CHAPTER SIX

INHERITANCE

Objectives

Students!

When you finish this unit you will be able to list down:

- a. the grounds of inheritance
- b. requirements for inherit
- c. reasons for complete or partial exclusion from inheritance
- d. who are heirs.

6.1. Conditions Necessary for Succession

In any legal system there are certain conditions to be fulfilled before one success another. Similarly in Islamic law the following are the necessary conditions for succession to take place.

I. Death of a person to be inherited

The death could be natural or by a decree of a court of law which is referred too as presumption of death.

II. Heirs must be alive

1. Only heirs who were alive at the time of death of the person to be successive.
2. If an heir dies after the death of the deceased and before the distribution of the state his portion is inherited by his heirs.
3. An embryo inherits if it is born alive

III . Estate or property must be left by the deceased.

6.2. Causes of Succession

For a person to be capable of inheriting he/she must have a societal relation with the deceased in one of the following relations.

i. Marital tie (Nikah)

This is where a husband inherits his wife and vice versa.

ii. Blood relationship (Nasal)

Some heirs who could come under this classification are father, true grandfather, uterine brother, mother, true grandmother, daughter, etc.

iii. Fictitious relationship (*Sawa*)

Sawa literally means friendship and assistance. It is a bond between two individuals which creates a relationship between them allowing inheritance. This can be created through slave verses slave owner relationship or through a contract. The former one is mentioned for the sake of completeness and historical significance. (The Islamic Law of succession. Dr. Ahusain London house Newyork, Rihadh, jedduh and others 2005)

6.3. General Rules of Succession

Up on the death of an individual there are four issues those need to be addressed. These are:

1. Pay funeral and burial expenses.
2. Pay all debts.
3. Pay bequests /legacies up to 1/3 of the remaining estate.
4. Distribute the remaining estate amongst the heirs of the deceased according to *shera*.

6.4. Exclusion and disqualification

Exclusion could occur where a potential heir is either partially excluded (Hajb Nuqsain) or totally excluded (Hajb Hirman) from inheriting by the presence of another heir. The principles are the following:

- A person (e.g. brother) who is related to the deceased through another (i.e. father) is excluded by the presence of the latter. Thus, a father excludes full brother, consanguine brother, full sister, consanguine sister and true grandfather. The one exception to this rule is that a mother does not exclude a uterine brother or uterine sister, though her own share may be affected through their presence.
- An individual nearer in degree (Proximity) to the deceased excludes the one who is remoter within the same class of heirs.

Therefore, the son excludes grandson, the brother excludes brother's son and so on. Full blood excludes half blood through the father. For instance, a full brother excludes a consanguine brother and a full brother's son excludes a consanguine brother's son.

All collateral heirs are excluded by a lineal male (ascending or descending) inheriting as a residuary.

6.5. Impediments to succession

These impediments are those which disqualify the potential heir as an heir. These are:

- Homicide
- Difference of religion
- Slavery
- Difference of domicile

6.5.1 Homicide

As it is narrated by Abu Hurayrah, the Prophet (PBUH) said “one who kills a man can not inherit from him”. The reasons could be one should not be the beneficiary of his wrong doing. Second, if killers are allowed to inherit this may encourage incidents of homicide. The four Schools slightly differ on this point. Thus:

1. According to the *Hanafi School* any killing what so ever will rule out the right to inherit with the following exceptions.
 - a. Justifiable killing according to Shera
 - b. Killing as a result of self-defense
 - c. Lawful killing
 - d. Act of a mad man or minor
 - e. Indirect killing
2. According to the Shafi School, all forms of killing including the act of a lunatic or a minor are an impediment to inheritance.
3. According to the Malik School, killing is a bar to inheritance with the following exceptions
 - a. Justifiable killing according to Shera
 - b. Killing as a result of self-defense
 - c. Killing in retaliation
 - d. Unintentional killing

Minors and lunatic are also barred from inheriting under Maliki School if the killing is deliberate although they may not be liable for the penalty or retaliation.

4. According to the Hanbli School any killing that is punishable (including monetary punishment) is an impediment to inheritance. The exceptions are
 - a. Justifiable killing according to Shera.
 - b. Killing as a result of Self-defense and war
 - c. Killing in retaliation

6.5.2. Difference of religion

The Prophet said “A Muslim can not be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim”

The following points should be clear concerning difference in religion.

1. The religion of an individual as regards inheritance is his or her religion at the time of death of the deceased
2. A Muslim can not inherit from a non-Muslim and vies-versa
3. An individual who converts (or more accurately reverts) to Islamic can not inherit from his/her non Muslim relatives and they can not inherit from the Muslim revert.

6.5.3. Slavery

All Muslim jurists agree that slavery is a bar to inheritance. Thus, a slave will not inherit and will not be inherited. This is only for historical record for slavery in modern times does not legally exist.

6.5.4. Difference of domicile

The difference of domicile refers to allegiance to different states /countries or kings where there's no alliance between them. This is mentioned for the sake of completeness for it does not have any practical significance for one purpose.

Some Muslim jurists have pointed out ”... That the Islamic law of inheritance fosters the collective social spirit, because it favors the distribution of property among many heirs and thus holds in check the concentration of wealth.”

Other jurists hold that the Islamic law of inheritance is in favor of individualities, since every heir within certain grades inherits, and since all parents, sons, daughters, spouses, brothers, and sisters are treated equally and/or equitably.

6.6 The Grounds of heritance

Different legal systems at different times in history had different ground of inheritance. Greek – Roman law was determined by the domestic religion and thus excluded some immediate relatives, the daughters for instance. The Hebrew system largely followed the patrilineal lines of descent and preferred some heir to other. The pagan Arabian custom was arbitrary and basically determined by the so-called comradeship in arms. Hence it followed parental male descent, adoption and sworn alliance or clientage.

The Islamic system on the other hand was founded on two bases: natural, bilinear relationship through paternal and /or maternal lines, and actual affinity through marriage.

According to this ground some categories of persons were excluded and some were brought in. For instance those who formally succeeded to property on the bases of adoption, outright sworn alliance and arbitrary Will were no longer eligible under the new system of Islam.

The right of Will was reconsidered and held in check by certain measures. The historical reason was the fact that during the pre- Islamic age of pagan, ignorance [*Jahiliyah*] bequests used to replace inheritance and people tended to use them as a means of depriving even their next of kin in order to give their property for the sake of enhancing their reputation. To do away with this every Muslim was urged by the Prophet [PBUH] to write his will as soon as possible and to have it certified by two qualified witnesses. Second the Muslim was forbidden to dispose by will of more than one third of his net property without the future heirs' approval.

The reason told by the Prophet [PBUH] is “Leaving your heirs rich is better than leaving them poor to beg from people”.

New classes of heir are added. Accordingly large numbers of heirs were accorded certain rights. One’s sex, age, or order of birth no longer constituted a total impediment to eligibility for inheritance. For instance women (mothers, wives, daughters, sisters] minors of both sexes, and parents were now entitled to fixed shares which is proportionate to different degree of classes of heirs. Here it is worth mentioning to point out that prescribing fixed shares for the heirs mentioned in this context, Islam took a markedly different position. It “differed” from the Greek – Roman system, which generally excluded the daughter; from the Hebrew and mosaic system, which probably excluded the daughter; from the Hebrew and mosaic system, which probably excluded the wife and certainly the daughter if there were surviving sons and which granted the older son a double share; and the pre-Islamic Arabian system, which excluded women, minors, and incapable.

Requirements

- a) To inherit, the would be successor should not cause the death of the deceased. So homicide bars the murderer absolutely from inheritance of the property of the murdered.
- b) The deceased and the successor should not be followers of different religion so a non-Muslim may not inherit Muslim relative property. As to the inheritance of a Muslim from a non – Muslim relative, the same principle applies in the opinion of all jurists except the Imam Shafi. Who allowed the Muslim party to inherit from the non – Muslim relatives but not vice versa? ‘

Complete or partial exclusion

Some legitimate heirs could be completely excluded from inheritance because of the intermediacy of other relatives closer in lineal proximity to the deceased. Thus, a relative

of the second grade, e.g. a grand parent of the deceased, does not inherit if there is among the survivors another relative of the first grade, such as parents.

Those who come under partial exclusion are those heirs whose shares may vary, but are not entirely excluded. Its effect is a wider distribution of the property in smaller share. For example the husband's share dependence on whether or not the deceased wife is survived by any children. If she leaves one child or more, the husband's share is reduced from one half to one fourth of the net property. The same principle of reduction or partial exclusion is true of the shares of the wife, the daughters, sons, brother sisters and so on.

6.7. Quranic Schem

After that introduction now, we will briefly see how inheritance is governed in the *Quran*. To begin with, bequest is allowed in the *Quran*, as you can read from the following Verse:

It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage, [2:180].

Rejecting the inheritance practice in the pre-Islam Arabia, Islam gave right to wives to inherit their husbands:

Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence [2: 40].

This is on top of what the widow gets [$\frac{1}{8}$ or $\frac{1}{4}$ of the net property as we can understand from the following *Quranic* Verse:

In what ye leave, theirs [wives] share is a fourth, if ye leave no child, but if ye leave a child, they get an eighth; after payment of legacies and debts [4:12].

So wives can inherit their husbands. From the above quoted verse of the *Quran*, inheritance is affected after the payment of legacies and debts, i.e. on net property of the deceased.

It is not only the wives who inherit their husbands. The vice versa is also true.

**In what your wives leave,
Your share is a half, if they have not
Left a child, But if they
Leave a child, ye get a fourth [4:12]**

The husband takes a half of his deceased wife's property if she leaves no child, the rest going to residuary. If, however, she leaves a child the husband gets only a fourth. On the other hand following the rule that the female share is generally half the male share, the widow gets a fourth of her deceased husband's property, if he leaves no children and an eighth if he leaves children. If there are more widows than one, their collective share is a fourth or an eighth as the case may be which they divide equally among themselves.

In pre-Islamic Arabia, daughters were denied the right to inherit. This is done away by Islam. This can be understood from the reading of the following Verse of *Quran*:

God [thus] directs you as regards your children's [inheritance]; to the male a portion equal to that of two females; If only one, her share is a half" [4:11].

Let us assume there are three children one boy and two girls. The estate worth's Br. 300,000

According to the above verse the boy shall inherit Br. 150,000 while the two girls share the remaining Br. 150,000 equally between themselves. If the child is only one daughter she will inherit half of Br. 300,000 i.e. 150,000 If there are only two daughters they inherit the $\frac{2}{3}$ of 300,000 i.e. 200,000. They will have Br. 100,000 each.

The question is when the daughters inherit two third, who will inherit the remaining one third? We will find the answer from the following verse of the *Quran*.

**“For parents, a sixth share of the
inheritance if the
Deceased left children
If no children, and
The parents are the (only)
Heirs, the mother has a third;
If the deceased left brothers
[Or sisters] the mother has a sixth [4; 11]**

This verse deals with the portion allotted to children and parents. The children’s shares are fixed, but their amount will depend upon what goes to the parents. If both parents are living and there are also children, both father and mother take six each. If only one parent is living he or she takes his or her sixth and the rest goes to the children. If the parents are living and there is no children, but there are brothers or sisters (this is interpreted strictly in plural) the mother has the sixth, and the father apparently the residue, as the father excludes collaterals. This is far from being an exhaustive statement, but it establishes the proportion that children and parents have always some share if they survive but their shares are affected by the existence and number of the heirs in these categories.

Finally we have collaterals, i.e. brothers and sisters. The *Quran* orders the following

“if the man or woman whose inheritance is in question has left neither ascendant or descendants, but has he left a brother or a sister each one of the two gets a sixth but if more than two, they share a third” [4 ; 12]

So brothers and sisters come to inherit where the deceased has left behind no descendent or ascendants.

We may summarize as follows. The principles of inheritance law are laid down in broad outline in the *Quran*. The precise details have been worked out on the basis of the Apostle's and that of his companions' traditions, and by the interpretation and analogy. Muslim jurists have collected a vast amount of learning in this subject and this body of law is enough by itself to form the subject of life long study. Here we dealt only with the broad principle to be gathered from the text, as interpreted by the jurists accordingly.

- 1). The power of testamentary disposition extends over only one- third of the property. The remaining two thirds are distributed among heirs as laid down in the *Quran*.
- 2). All distributions takes place after the legacies and debts (including funeral expenses) have first been paid.
- 3). Legacies can not be left to any of heirs included in the scheme of distribution, or it will amount to absencing the shares and undue preference of one heir to another.
- 4). Generally, but not always, the male takes a share double that of a female in his own category.

Review Questions

- 1. Compare and contrast grounds of inheritance in Shera and the Civil Code 1960.**
- 2. Compare and contrast reasons to exclude heirs from inheritance in the Shera and the Civil Code 1960.**
- 3. Compare and contrast heirs in the Shera and the Civil Code 1960.**

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