

Divorce under Islamic Family Law: Mere Disliked Action or Illegal Action

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Introduction

The oft quoted *hadith* "Of all the lawful acts the most detestable to Allah is divorce"¹ cannot be construed as an open permission to sever the marital tie whimsically without fully complying with the comprehensive scheme of Islamic Family Law as espoused in the Qur'an and authentic Sunnah of the Prophet (PBUH). Rather, Islamic Shariah explicitly encourages to found the marriage on a firm basis of mutual love and respect instead of dissolving it. However, considering the web of domestic relations in the light of historical reality of human civilization, Islamic law permits divorce instead of compelling the spouses to spare their lives in an environment of disharmony and disrespect. Though divorce itself is not inherently illegal illegality may and in ultimate analysis shall incur if the marital tie is not disbanded in accordance with the well-established canons of Islam as espoused in the Qur'an and authentic Sunnah of the Prophet (PBUH). Contemporary Muslim world being bemused by the divergent *fiqhi* rulings often fail to understand the true intents of divine writ and blindly take recourse to their own school of thought. This paradox leads Muslims to distort the egalitarian values of Islam relating to family in the name of God. Flexibility of Shariah², to a greater extent, is

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¹ Sunan Abu Dawud, Vol. 3, Divorce (Kitab al- Talaq) Book 12, Hadith no. 2173. See also Hadith no. 2172. This hadith is also found in al-Mustadrak, vol. 2, Hadith no. 196. Renowned Hadith scholar Nasir uddin Al-Albani, in *Irwaa'ul-Ghaleel*, after meticulous scrutiny grades this hadith da'eef (weak). He further mentioned that "As for al-Hakim, an authentic chain of narration". On the other hand, adh-Dhahabee added to it saying, ' I say: it is upon the conditions of Muslim.' However, there exists differences of opinion regarding Muhammad Ibn 'Uthman Ibn Abi Shaybah'; his name is mentioned by adh-Dhahabee in al-Mizan and in other than it. It is sufficient to mention that adh-Dhahabee himself declared him to be da'eef: he further continued to say that 'Abdullah Ibn Ahmad declared him to be a liar and Saalih Jazrah declared him to be reliable. Albani wonders how Imam adh-Dhahabee authenticated his hadith. He also disagreed with Imam Abu Dawud. Then Albani opines that Imam adh-Dhahabee failed to give due consideration to this difference of opinion since if he could give proper consideration he would not have authenticated the hadith. At last, Albani says Allah knows best. See Albani, Nasir uddin, *Irwaa'ul-Ghaleel*, vol. 6, hadith no. 2040, pp. 106-108. Adapted from, Shaykh Badce'ud-Deen As-Sindhee, *The Legislated Divorce* (Abu Hafsa Kashiff Khan trans , Sunnah Publishing and Masjidul Bayaan, 2007)10-11.

For a critical discussion on the flexibility of the Shariah see Al-Qaradawi, Dr. Yusuf, *Islamic Law in the Modern World*, translated by Al-Hadi A. Khalifa, (King Faisal Center for Research and Islamic Studies and Wamy House International, 2000) 63-119. Moreover, for a critical appraisal on the freedom in the Shariah, see Ashur, Muhammad Al- Tahir, *Ibn Ashur Treatise on Maqasid al-Shariah*, translated from the Arabic and Annotated by Mesawi, Mohamed El-Tahir El

diluted within the rigid domain of fiqh. This problem becomes acute due to the misogynist interpretation of the Islamic rulings. In this article, we intend to identify the circumstances, conduct of the contracting parties, ills and malaise wuhich render the divorce invalid and thus paving the route to ruin the very basic unit of human civilization. To accomplish this purpose, we will inquire into different prevailing practices of dissolution of marriage in consonance with *fiqhi* rulings; attempt to analyze the nature and complexity of the problems involved and at last to explore the relevant Qur'anic and Sunnatic provisions to assess the situation and to provide the impetus for interpretation and inevitable reforms.

Rethinking Divorce: Appreciating the Divine Legislation against Personal Whims

Since marriage under Islamic law is divinely ordained and spirited institution it should never be snapped off whimsically and arbitrarily. Arbitrary exercise of talaq/divorce and consequent infliction of *zulm* upon the wife will be tantamount to mockery with the commandments of Allah (SWT) and the dictates of the Sunnah of the Prophet (PBUH). Marriage under Islam is not premised only on love rather also on other humane virtues namely loyalty, mutual respect, care and dignity. Even the so called robust infatuation boiled by naked sexual urge should not be given open license to allow one person to desert his wife and marry another woman who seems attractive to him in any way. Islam demands from him very prudent, gentle and goodly manner and commands him to suppress his evil desire and consequently turn back to the guidance of Allah (SWT) by showing kindness, sympathy and mercy to his wife. During the Caliphate of Umar ibn al-Khattab, the second Caliph of Islam, a person came to him and expressed his yearning to divorce his wife since he did not like her. Umar, in response to this, asked that man "Are families built only on love? Where would you, then, place loyalty and mutual care?"³

Marriage in Islam is based on mutual love, affection, compassion and sympathy and springs out of free consent of contracting parties. It is this institution which works as the corner stone of human civilization and serves as elixir to strengthen the moral fabric of ummah. Therefore, its sanctity must be preserved and should not be subject to caprice and whims of the husband. One renowned exegete of the Qur'an comments:

The marriage bond is something to be treasured, not to be severed in response to a passing whim. Marriage is a human institution of great importance. It must be viewed seriously. Its continued existence must not be subject to outbursts of temper or sudden changes of superficial sentiment.⁴

The Qur'anic commandment even explicitly provides positive orientation to the husband to keep up the marital bond intact. It ordains:

(The International Institute of Islamic Thought, London, Washington, 2006)154-164.

³ Qutb, Sayyid, *In the Shade of the Qur'an* (Adil Salahi trans, Islamic Foundation UK, 2007) Vol. 3, 66. [trans of: *Fi Zilal al-Quran*, 1951]

⁴ Ibid.

And consort with your wives in a goodly manner; for if you dislike them, it may well be that you dislike something which God might yet make a source of abundant good.⁵

The aforesaid verse clarifies that it is the foremost duty of the husband to sail with the wife in a peaceful manner and to be foresighted since which he dislikes regarding his wife may be proved wrong in the long turn. And it is, of course, within the purview of the authority of Allah (SWT) to bring ultimate happiness, prosperity and success to the family by enabling wife to be adorned with other virtues necessary for successful and effective conjugal life. One exegete of the Qur'an has aptly sketched the philosophy of the above verse in the following manner:

...if the wife is either not beautiful or has some shortcoming because of which she does not seem attractive enough to her husband, the latter should not suddenly decide, in a fit of rage and disgust, to part with her. Rather he should act with patience and forbearance. It often happens that a woman lacks physical attraction but has other qualities which are of much greater value for the success of married life. Hence if such a woman finds the opportunity to express her qualities, the same husband who initially felt revulsion towards her becomes captivated by her attractive conduct and character. Sometimes in the early stages of married life a husband dislikes certain things in his wife, and this initial dislike may even grow to revulsion. Were a man to be patient and allow all the potentialities of the woman to be realized, it would become evident to him that her merits outweighed her weaknesses. Hence a man's haste in taking the decision to rupture the matrimonial bond is not praiseworthy. Repudiation of marriage should be a man's last resort, a resort towards which he should turn only in unavoidable circumstances.⁶

Since mercy, tolerance and justice lie at the heart of Islamic values it instructs husband to ignore the negative aspects of wife's conduct and to positively take into consideration the good manner of her.

Apart from this, if the alleged conflict is related to the wife's conduct, husband is enjoined to be tolerant, responsibly and graciously consider her conduct and endeavor to settle the dismay. But if he fears insolent recalcitrance from the wife continuously he is directed to follow a three phased disciplinary action namely mild admonition, separating the bed meaning deliberately avoiding wife in sexual intimacy without disclosing the fact to others, and lastly to move away from the home for a certain period of time.⁷ If husband fails to settle the dispute amicably he may make a vow of continence (*ila*), complete abstention from

⁵ An-Nisa 4: 19. Translation in this article is adapted from Asad, Muhammad, *The Message of the Qur'an* (Dar al Andalus, Gibraltar, complete edition, 1980)

⁶ An-Nisa 4:19, footnote: 30, Mawdudi, Sayyid Abul A'la, *Towards Understanding the Qur'an*, (Zafar Ishaq Ansari trans, The Islamic Foundation UK, 1989, Reprinted 2004) vol. 2, p. 20. [trans. of: *Tafheemul Qur'an*]

⁷ For details see, Mohammad Azharul Islam, 'Qur'anic Approach to the Marital Discord' (2008) 13 *The Chittagong University Journal of Law* 1-40. See also Sulayman, Abdul Hamid A. Abu, *Marital Discord Recapturing the Full Islamic Spirit of Human Dignity* (International Institute of Islamic Thought, London, 1st edition, 2003). See also, Lang, Jeffrey, *Losing my Religion, A Call for Help* (amana publications, Maryland, 2004) 425-442.

sexual intercourse up to four months. Expiry of four months will terminate the marital bond.⁸

On the other hand, if the husband is liable and the wife fears cruelty, desertion or aversion, they are jointly enjoined to melt the ice and make peace.⁹ In this regard Allah (SWT) ordains:

And if a woman has reason to fear ill-treatment from her husband, or that he might turn away from her, it shall not be wrong for the two to set things peacefully to rights between themselves: for peace is best, and selfishness is ever-present in human souls. But if you do good and are conscious of Him - behold, God is indeed aware of all that you do.¹⁰

Within the framework of *Shariah*, the wife can take following steps to rectify the manner of her *nushuz* husband:

Firstly, the wife will urge the husband in a very gentle manner to be very well behaving and act conscientiously. Secondly, she should take a serious attempt to find out the cause of aversion of the husband towards her and try to devise a mechanism to reach into an amicable solution through a joint effort. Thirdly, she can lodge a complaint to a judge regarding the cruel and inhuman conduct of the husband. Maliki school in this regard opines that the judge should have the authority to exhort the husband to mend his behaviour. If the husband even after that continues his recalcitrance, the judge can order a temporary separation of the spouse to rectify the stubborn husband. If this step fails and proves ineffective, the judge may order for physical chastisement of the husband or if he or she thinks fit can order for imprisonment.¹¹

Even after this stage, Qur'an commands to settle their disputes with the help of a family council of two arbitrators representing the both spouses.¹²

If all these efforts prove an utter failure, the parties are permitted to dissolve the marital bond in accordance with the norms espoused in the Qur'an and Sunnah of the Prophet (PBUH).

The aforesaid steps prompted a group of scholars to hold that divorce meaning *talaq* is prohibited except for very exceptional reasons. Besides, a large and influential group of scholars regard divorce is proscribed except for justification e.g. adultery of the wife. On the other hand, another group of scholars consisting mainly of scholars of *Mutazila* School, held that divorce without the intervention of an

⁸ Ati, Hammudah Abd al, *The Family Structure in Islam* (American Trust Publications, 1st edition, 1977, The Other Press, Kuala Lumpur, 2008) 230.

⁹ Ibid.

¹⁰ An-Nisa 4: 128.

¹¹ Badawi, Jamal A., *Islamic Teaching Course*, vol. 3, *Social System of Islam*, G-25, *Selection of Spouse and Engagement*, retrieved from <http://www.wintess-pioneer.org/vil/Books/JB/Islamic Teaching Course-3.html#G-25>, accessed on April 04, 2010.

¹² See above n. 8.

unbiased judge is not allowed. Their contention is based on verse 35 of the Sura an-Nisa which instructs to appoint arbitrators from the side of both spouses.

Considering the web of modern family we believe that each and every state should follow the last opinion and penalize the parties guilty of violating the Qur'anic and Sunnatic provisions and also legislate to order the violator to recompense the victim.

Divorce during Menses and Pregnancy

Qur'anic and Sunnatic laws relating to divorce are designed to protect the family from doom and perdition by specifying the mode and time of annulment of marriage and putting different types of restrictions on the exercise of the power of dissolution of marriage.

As regards time of divorce, Sharia intends to pronounce the divorce when the woman is in a state of fresh purity (*tuhr*) following her regular menstrual period or the period of postnatal fluxes following childbirth. Apart from this, no copulation between the spouses should take place during this period.

Islamic law thus puts restriction on the permissibility of divorce during the period of menstruation and puerperal discharge following childbirth. The underlying philosophy of not pronouncing divorce during this period may be attributable to the psychological tension of husband breeding from sexual depression and anguish since the wife remains in a period when consummation is outright prohibited.¹³ Apart from this, divorce during menstruation period prolongs the period of *iddat* since this period is not taken into consideration and the woman becomes the prey to intolerable pains and sufferings.¹⁴ The Qur'an states:

They ask thee concerning women's courses. Say: They are a hurt and a pollution: So keep away from women in their courses, and do not approach them until they are clean. But when they have purified themselves, ye may approach them in any manner, time, or place ordained for you by Allah. For Allah loves those who turn to Him constantly and He loves those who keep themselves pure and clean.¹⁵

The Sunnah of the Prophet (PBUH), to curb the abuse of the power of dissolution of marriage by the husband and to prevent the infliction of injustice upon the blameless wife, prohibits divorce during this period. Prophet (PBUH) through his *ahadith* advised the husband to wait until the wife reaches *tuhr* period and if he really intends to sever the sanctified religious contract then he is allowed to do so before the resumption of conjugal relations but subject to the principles laid down in the Qur'an and Sunnah.

In a hadith 'Abdullah bin 'Umar narrated that he had divorced his wife while she was menstruating during the lifetime of Allah's Apostle. 'Umar bin Al-Khattab asked Allah's Apostle about that. Allah's Apostle

¹³ See above n. 8, p.228.

¹⁴ Al-Kasani, *Bada'i-al-Sana'i*, (Cairo, 1328 A.H.) vol. II, 229.

¹⁵ Quran 2: 222.

said, "Order him (your son) to take her back and keep her till she is clean and then to wait till she gets her next period and becomes clean again, whereupon, if he wishes to keep her, he can do so, and if he wishes to divorce her he can divorce her before having sexual intercourse with her; and that is the prescribed period which Allah has fixed for the women meant to be divorced."¹⁶

Wisdom behind the aforesaid Prophetic tradition can be gathered from the following explanations:

When the wife enters her period of purity, she is usually fresh and pleasantly companionable, both desirous and desirable, more considerate and responsive. She has not only the capacity, but also the opportunity to strengthen the marriage tie and command the husband's love, compassion and devotion.¹⁷

Apart from the prohibition of divorce during menstruation period, Shariah also enjoins¹⁸ not to pronounce divorce between menstruation periods if copulation between the spouses takes place. The underlying philosophy of Islamic Law is that due to the consummation the wife may conceive and if the husband is aware of this fact he may not be interested in pronouncing divorce. Rather he may intend to keep the marital bond unharmed and unbroken for the sake of the embryo in her wife's womb.¹⁹

Thus, the principles derived from the Qur'an and Sunnah of the Prophet (PBUH) dictate that the husband does not have unfettered freedom in divorcing his wife though generally it is interpreted that the husband can divorce his wife without rhyme or reason.

During pregnancy divorce is permitted only if the husband is fully aware of the pregnancy of the wife. The ruling regarding this finds its recognition in the following hadith:

Ibn 'Umar (Allah be pleased with them) reported that he divorced his wife while she was in the state of menses. 'Umar (Allah be pleased with him) made mention of it to Allah's Apostle (may peace be upon him) and he said: Command him to take her back, then divorce her when she is pure or she is pregnant.²⁰

Why divorce is permissible during pregnancy, a critical moment in the life of a woman, the answer perhaps, is the deep-rooted antipathy of the husband towards the wife due to certain reasons other than sexual frustration.

¹⁶ Sahih Bukhari Vol. 7, Book 63: Divorce, Hadith no. 178.

¹⁷ Hammudah Abd al Ati, *The Family Structure in Islam* (American Trust Publications, 1977) 228.

¹⁸ The underlying reason of using 'enjoin' instead of 'authorize' is that the former implies obligation and the latter permission. Apart from this, the latter term is less vibrant and vigorous in nature. Jeffrey Lang, *Losing My Religion: A Call for Help* (Amana Publication, Maryland, 1st edition, 2004) 172-73.

¹⁹ Yusuf, al Qaradawi, *The Lawful and Prohibited in Islam*. Chapter 4: The Halal and the Haram in Marriage and Family Life, Section 5: Divorce. Retrieved from http://www.witness-pioneer.org/vil/Books/Q_LP/ch4s2pre.htm.

²⁰ Sahih Muslim: Vol: 3 Book: 9 *The Book of Divorce (Kitab al-Talaq)* Hadith no: 3479.

Though Islam permits divorce during pregnancy it must be exercised with due care and caution. The *hadith* narrated by Ibn Umar as quoted above bears the evidence of permission of divorce.

Divergences among jurists persist regarding the effects of divorce during these prohibited periods. The prevailing opinion suggests that *talaq* shall be lawful though the husband incurs sin by pronouncing *talaq* in contravention of the well-established principles of Qur'an and Sunnah. On the other hand, a group of jurists vehemently oppose this sort of *talaq* and opine that it would not be effective since repudiation does not give effect to the intents of the Omnipotent, Omniscient Legislator Allah (SWT). They hold that whatever is not legal cannot be correct nor enforced.²¹ The following *hadith* supports their opinion.

Abdullah ibn Umar narrated that Abdur Rahman ibn Ayman, the client of Urwah, asked Ibn Umar and Abuz Zubayr was was listening: What do you think if a man divorces his wife while she is menstruating? He said: Abdullah ibn Umar divorced his wife while she was menstruating during the time of the Apostle of Allah (peace be upon him). So Umar asked the Apostle of Allah (peace be upon him) saying: Abdullah ibn Umar divorced his wife while she was menstruating. Abdullah said: He returned her to me and did not count it (the pronouncement) anything. He said: When she is purified, he may divorce her or keep her with him. Ibn Umar said: The Prophet (peace be upon him) recited the Qur'anic verse: "O Prophet, when you divorce women, divorce them in the beginning of their waiting period."²²

But the *hadith* mentioned in Sahih Al-Bukhari contradicts the above *hadith*.

Anas bin Sirin narrated that Ibn 'Umar said: "I divorced my wife while she was menstruating. 'Umar mentioned that to the Prophet. The Prophet said, (to my father), "Let your son take her back." I asked (Ibn 'Umar), "Is such a divorce counted (i.e. as one legal divorce)?" Ibn 'Umar said, "Of course." Narrated Yunus bin Jubair: Ibn 'Umar said, "The Prophet said to 'Umar, 'Order him (Ibn 'Umar) to take her back.'" I asked, "Is such a divorce counted (as one legal divorce)?" Ibn 'Umar said, "What do you think if someone becomes helpless and foolish?"²³ In another *hadith* Ibn 'Umar narrated that divorcing his wife during menstruation was counted as one legal divorce.²⁴

These prophetic traditions intend to convey the very message that Islam proscribes to pronounce divorce during this period of time and urges concerned parties be very cautious, not very hasty, in effecting divorce. Even if it can be strappingly argued that divorce pronounced during menstruation was counted as one legal divorce Prophet (PBUH) forthrightly told Umar, to order his son Ibn Umar to take her wife back. This insistence of the Prophet (PBUH) should be construed pedantically to infer his sever aversion of divorce during menstruation.

²¹ Above n. 19.

²² Sunan Abud Dawud, Book 12: Divorce, Hadith no.2180.

²³ Sahih al Bukhari vol 7, Book 63: Divorce, Hadith no. 179.

²⁴ Sahih al Bukhari vo. 7, Book 63: Divorce, Hadith no. 180.

Divorce uttered in Intoxicated Condition.

The Arabic terminology for intoxication is *sakr*. In Islamic legal parlance, it is used to denote that state of intoxication in which one loses his capability to understand both right and wrong, benefit and detriment and failure to draw distinctions between them.²⁵ The person who intoxicated is known as *Sakran* and the divorce uttered by him is called *Talaq al Sakran*.²⁶

The dominant Hanafi scholars like Imam Abu Hanifa, Sahibayan (two eminent and illustrious disciples of Imam Abu Hanifa namely Imam Abu Yusuf and Imam Muhammad Shaybani) opine that divorced pronounced in a self-induced intoxicated condition shall be valid and effective.²⁷ To them divorce in this circumstance, is a punishment for being intoxicated and consequently serve as a deterrent against intoxication. On the other hand other Hanafi jurists like Tahawi, Karkhi, Rabiah b. Abdur Rahman, Layth b. Sa'd and Ishaq b. Rahwayh oppose their view and held that divorce will be unlawful and ineffective.²⁸

Zaydiyah School holds the same verdict like Imam Abu Hanifa and his two disciples. However, the jurists of this School opine that if intoxication is created due to the use of wine as medicine which is allowed under Shariah, the divorce shall not be effective.²⁹

Other three eminent Imams i.e. Imam Malik³⁰, Imam Shafi³¹ and Imam Ahmad b. Hanbal³² opine that divorced uttered in an intoxicated condition is invalid and consequently ineffective. The basic cause is that intoxication temporarily renders one's prudence inoperative and debilitates his or her power of determination. Shia scholars, on the same line of argument, hold the same opinion.³³ World famous jurists Ibn Taymiyah and his disciple Hafiz Ibn al-Qayyim support the views of three Imams.³⁴ Ibn Hazm of Zahiri School of thought concurs with them.³⁵

²⁵ Rahman, Dr. Tanzil-ur, *A Code of Muslim Personal Law* (Hamdard Academy, Karachi, 1st edition) vol I, 361.

²⁶ Ibid.

²⁷ Renowned Hanafi scholar Ala al Din al-Kasani in his celebrated book *Bada'i al-Sana'i* has supported and recorded this opinion. See Ibn al-Humam: Kamal al-Din, *Fath al-Qadir*, (Cairo, 1356 A.H.) vol. iii, 41. Mentioned in note no.25, 362. The same opinion finds its recognition in the rulings of eminent jurists namely Sa'id b. al-Musayyib, 'Ata, Mujahid, Hasan al-Basri, Ibn Shabruma and Sulayman b. al-Harab.

²⁸ See Ibn Humam above n. 27, vol. iii, 40. See also note no. 25, 362.

²⁹ Shaykh Abdullah b. Maftah, *Al-Muntazi al-Mukhtar* (Cairo, 1352 A.H.) vol. ii, 352. See also note no.25, 364.

³⁰ Al-Kasani, above note 4, 99. Ibn Humam, above note 27, 41. See also note 25, 362.

³¹ Al-Haskafi, *Radd al-Muhtar*, (Cairo, 1252 A.H.) vol. ii, 435. See also, Al-Kasani, note 14, vol. iii, 99. See also note no.25, 362.

³² Ibn Qudamah, *Al-Mughni*, (Cairo, 1367 A. H.) vol vii, 115-16. See also, above note 25, 362.

³³ Above n 25, 363.

³⁴ Above n 25, 364.

³⁵ Abu Muhammad Ibn Hazm, *Al Muhalla*, (Cairo, 1352 A.H.) x. See note no.25, 363.

The authors of this article, after thorough scrutiny of the aforesaid opinions, suggest that the long standing majority opinion of Hanafi School is premised on wrong juridical postulate as they consider divorce in a condition of intoxication as punishment which is not tenable in the light of Qur'an, Sunnah, *Ijma*³⁶, *Maslahah Mursalah*³⁷, *Maqasid al Shariah*³⁸ and even *Ijtihad*. Divorce as a punishment,

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- ³⁶ The very Arabic word '*ijma*', a verbal noun of another Arabic word '*ajma'a*', and the latter word reveals two meanings namely 'to determine' and 'to agree upon something'. A third meaning namely 'unanimous agreement' may also be attributable to the word '*ajma'a*'. Relying on the authorities of various renowned Islamic Scholars like Amidi, Shawkani, Abu Zahrah, Abd al-Wahhab Khallaf, Kamali ventured to define *ijma* as "the unanimous agreement of *mujtahidun* (Islamic scholars who have the skill and integrity to exploit the tool of *ijtihad* or juristic reason), of the Muslim community of any period following the demise of the Prophet Muhammad on any matter". See Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (The Islamic Texts Society, Cambridge, Revised edition, 1991) 169.
- ³⁷ Conceptualizing *Maslahah* is needed. In literal sense, *maslahah* is used to denote 'benefit' or 'interest'. However, *Maslahah Mursalah*, as Kamali, relying on the scholarship of eminent jurists namely Khallaf and Badran, asserts, means "unrestricted public interest in the sense of its not been regulated by the Law giver in so far as no textual authority can be found on its validity or otherwise. The very phrase *maslahah mursalah* is synonymously used with *istislah*. Kamali wonderfully endeavored to provide a technical definition of *maslahah mursalah*. He in this regard relied on prominent scholars like Badran and Sabuni. The definition runs as follows: "a consideration which is proper and harmonious (*wasf munasib mula'im*) with the objectives of the Lawgiver; it secures a benefit or prevents a harm; and the *Shariah* provides no indication as to its validity or otherwise". See above n. 36, 267.
- ³⁸ The Arabic word *maqasid* (sing. *Maqasid*) literally implies the higher purposes or objectives or intents. This term is commonly & recurrently used alone to refer to the higher objectives or end goals of Islamic Law in general, that is, *maqasid al-Shariah*. It may also be referred to as the spirit of the law and its guiding principles. The terms *maqasid al-Shari* (the higher objectives of the Lawgiver), *maqasid al-Shariah* (the higher objectives of Islamic Law), and *al-maqasid al-shariyyah* (legal objectives) are all terms which are used interchangeably. See Author's Preface on the Meaning of *Maqasid* and the Theory of Higher Objectives, Raysuni, Dr. Ahmad Al, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (the International Institute of Islamic Thought, Herndon, VA 22070, USA, 1st edition 2005) 21. Though Abu Ishaq al-Shatibi, the father of the discipline '*Maqasid al Shariah*' didn't define the term in his book *al-Muwafaqat* Ibn Ashur took pain to define the same in his noted book *Maqasid al-Shariah al-Islamiyah* (p. 50) in the following way: "The general objectives of Islamic Law are the meanings and wise-purposes on the part of the Lawgiver which can be discerned in most or all of the situations to which the Law applies such that they can be seen not to apply exclusively to a particular type of ruling. Included here are the occasions for the Law's establishment, its overall aim, and the meanings can be discerned throughout the Law. It otherwise includes objectives which are not observable in all types of rulings, although they are observable in many of them." Usually the five essential values of the *Shariah* namely faith, life, intellect, property and lineage are designated by the majority jurists as *maqasid al-Shariah*. Ibn Taymiyyah was serious critic of this approach of confining the scope of *maqasid* to any specific number and his strong conviction was that the ultimate goals of *Shariah* are numerous and they vary with circumstances. To him, *maqasid* should be seen as an open chapter rather than a close circuit. Dr. Yusuf al-Qaradawi also concurs with Ibn Taymiyyah in this regard. It is pertinent to mention here that jurists have classified *maqasid* into the three categories of

instead of serving as a deterrent, serves as a thunder bolt upon the helpless wife. Their intention of deterring husband by prescribing such punishment in no way deter him from consuming intoxicating substances rather throwing wife into ridicule, social hatred and stigma which, in a sense, beyond reparation. The scholastic opinions of Imam Malik, Imam Shafii, Imam Ahmad b. Hanbal, jurists of Shia School, Ibn Taymiya, Hafiz ibn al-Qayyim and Ibn Hazm are worth deserving due to their consonance with the parameters set by the Qur'an and Sunnah. Their contention that intoxication incapacitates a person's prudence and power of determination and so divorce uttered during that stage is a nullity, should be appreciated in the contemporary society to materialize the true spirit underlying Islamic Shariah especially Islamic Law of Personal status. It is desirable and should be incumbent on the state to legislate that divorce pronounced in an intoxicated condition is unlawful and punishable offence to play mockery with the teachings of Islam.

Few countries of the contemporary world namely Egypt,³⁹ Iraq,⁴⁰ Jordan,⁴¹ Morocco,⁴² Syria⁴³ and Sudan have already legislated that divorce by a drunkard is invalid and ineffective. Morocco, in its legislation has qualified the word 'drunkard' with replete meaning if the person pronouncing divorce while in an intoxicating stage can differentiate between right and wrong, benefit and harm, shall be effective.⁴⁴ Here, we submit that it is a question of fact and this subjective query shall be a really difficult task for the court to discern.

Divorced pronounced under Compulsion

To Hanafi scholars divorce pronounced under compulsion is valid and effective despite the husband's helplessness and inability to control the situation. Because they negate will as one of the sine qua non of divorce.⁴⁵ On the contrary, Imam Malik, Imam Shafii and Imam Ahmad b. Hanbal opine that divorce under compulsion is ineffective.⁴⁶ Their contention is premised on the basic dictum that volition and compulsion do not co-exist. The presence of compulsion annihilates volition. Since legitimacy of a religious action requires existence of will, unintended action of a person devoid of volition cannot be relied upon

essential (*daruiyyat*), complementary (*hajiyyat*) and embellishments (*tahsiniiyyat*). See Kamali, Mohammad Hashim, *The Dignity of Man: An Islamic Perspective*, published by Ilmiah Publishers, Selangor, Malaysia, revised edition, 2002, pp.90-91. Quoted from Mohammad Azharul Islam, 'Qur'anic Approach to the Marital Discord' (2008) 13 *The Chittagong University Journal of Law*, footnote no. 2, pp. 1-2.

³⁹ Qanun No. 25 of 1929, Section 1.

⁴⁰ Qanun Al-Ahwal al-Shakhsyah, Iraq No. 118 of 1959, Section 35.

⁴¹ Qanun Al-Huquq al-Ailah, Jordan, Section 68.

⁴² Mudawwanah al-Ahwal al-Sakhsyah, Morocco, Section 49.

⁴³ Qanun al-Ahwal al-Shakhsyah, Syria, 1953, Section 85.

⁴⁴ See above n. 25, p. 372.

⁴⁵ Al-Kasani, above n. 14, vol. iii, 100. See above n. 25, 382.

⁴⁶ Above note 25, 382.

and hence invalid and void of legal effects.⁴⁷ However, Imam Malik and Imam Ahmad b. Hanbal are of view that if some religious obligation dictates the divorce and works as the underlying reason of compulsion, then such divorce uttered under compulsion shall be effective. As for instance, divorced pronounced by an unwilling person under the compulsion of *Qadi* is valid and effective.⁴⁸ But it will be remiss on our part if we overlook the diverse juristic opinions produced in this specific area. It is not essential that husband should pronounce the divorce after the completion of four months rather it may take effect automatically or even the judge has the authority to go for reconciliation or snapping off the marital relation. Moreover, we think this is not the case of compulsion rather religious obligation. Other schools of thought namely Zahiri⁴⁹, Shia⁵⁰ and Zaydiyah⁵¹ also opine in favour of non-effectiveness of the divorce pronounced under coercion.

From above discussion, it is quite obvious that the stance taken by Schools of thought excepting Hanafi School is in harmony with the dictates of Qur'an and Sunnah. The basic reason is that a person's mere unanimated utterance devoid of free and sound volition cannot serve as a valid divorce. To regard such kind of utterance as valid divorce shall be liable to ruin many families.

Divorce in Ignorance of Meaning

Hanafi school opines that a divorce is effective in spite of its utterance in ignorance of the meaning of the words used.⁵² On the contrary, Imam Shafii⁵³ and Imam Ahmad b. Hanbal⁵⁴ held that divorce pronounced without understanding of the words cannot be construed as an effective divorce. To us, the opinions of Imam Shafii and Imam Ahmad b. Hanbal seems more logical and in consonance with the Qur'an and Sunnah. Because, it is quite illogical to give effect to the words of an utterer who himself is unaware of the meaning, nature and consequences of the utterance.

Conditional Divorce

If a person divorces his wife on the happening of a contingency a group of scholars held its validity subject to the happening of that event.⁵⁵ On the other hand, scholars like Imam Daud Zahiri, Imam Shafii and one segment of Hanbali School of thought followed a middle course in

⁴⁷ Ibn al-Humam, see note 27, vol. iii, .39. See note no. 25, 389.

⁴⁸ Ibn Qudamah al-Maqdisi : vol. vii, p.118. See note no.25, 382.

⁴⁹ Ibn Hazm, above n. 25, 202. See note no.25 383.

⁵⁰ *Jawahar al Kalam*, vol. v, 272.

⁵¹ Abdullah b. Maftah Shykh, *Al- Muntazi al-Mukhtar*, (Cairo, 1332 A.H. vol. ii)382. See note no. 25, 384.

⁵² Ibn al-Abidin, Cairo 1318, 1327 & 1356 editions, vol. ii, p. 436. See note no. 25, p.400.

⁵³ Abu Hamid Al-Ghazali, *Al-Wafiz*, Cairo, 1317 A.H. vol. ii, p.56. See note no. 25, p.400.

⁵⁴ Sharaf al-Din Al-Magdisi, *Al Iqna*, Cairo, vol. iv,10-11. See note no.25, p.400.

⁵⁵ As-Sibayee, Dr. Mustafa, *Islam O Paschatyo Somaje Nari* (Akram Farooque trans, Bangladesh Islamic Centre, Dhaka, 4th edition September, 2007) 92-93 [trans of: *Al Mar'atu Baina'l Fiqhi Wal Qanun*, 1411 A.H.]

signifying their opinion regarding the validity of the divorce.⁵⁶ They opted to deliver the judgment after considering the intention of the person providing the stipulation. If a husband through his condition wishes to impose stringency upon the wife in effecting a particular task and does not have any specific intent to pronounce divorce that should not be considered as divorce. But divorce shall be effective if he really intends to do so.⁵⁷ Thus, it should be wise and compliant with the scheme of Islamic Shariah to contextualize a particular situation and judge the intention of the person providing the condition.

Divorce during Anger

Muslims are declared as the ‘middlemost community’ and the witness-bearer of truth.⁵⁸ This dignity entails responsibility and urges the Muslim community as well as individual Muslims to act moderately in each and every phase of life. Disbanding a martial bond is necessarily a crucial decision in one’s life. So, before dissolving the knot one has to act prudently, conscientiously and has to follow the steps as mentioned earlier in this article. Moreover, he should not act hastily and divorce the wife in a moment of rage and anger. Whether a divorce pronounced in a moment of anger will be jurisprudentially effective or not require meticulous analysis.

Jurists on the basis of their understanding of the Qur’an, Sunnah and realistic theatre of the human intercourse have typically classified anger into three types:

1. Mild Anger
2. Intense Anger and
3. Anger neither mild nor intense.⁵⁹

In case of first type of anger people generally possesses ordinary prudence and can understand his act and its consequences. All scholars unanimously held that divorce pronounced during this time will be effective.⁶⁰

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ The Qur’an proclaims: “And thus have We willed you to be a community of the middle way, so that [with your lives] you might bear witness to the truth before all mankind, and that the Apostle might bear witness to it before you.” (Al-Baqarah 2: 143). The very phrase ‘middlemost community’ is mostly construed to refer a community quite accomplished to maintain a sound and equitable balance between extremes and has gained the virtue of being realistic in its appreciation of human being’s nature and potentials, rejecting both debauchery and embellished asceticism. See Muhammad Asad, *The Message of the Qur’an* (Dar al Andalus, Gibraltar, complete edition, 1980), footnote 118, p. 30.

⁵⁹ Qaradawi, Yusuf al, *Fatwa*, Bangla Translation (ed. Hafiz Munir Uddin Ahmed), (Al Qur’an Academy London, London, 1st edition, 2004, 4th edition, 2013) 165. See also Shaykh Ibn Bazz, *Fataawa al-Talaaq*, pp. 19-21, compiled by Dr. ‘Abd-Allaah al-Tayyaar and Muhammad al-Moosa. Retrieved from <http://islamqa.info/en/45174> accessed on 20.06.2015. Ibn al-Qayyim, a very prominent jurist penned an essay entitled *Ighaathat al-Lahfaan fi Hukm Talaaq al-Ghadbaan*, in which he opined that anger is of three types. See *Mataalib Ooli al-Nuha*, 5/323; see also *Zaad al-Ma’aad*, 5/215.

⁶⁰ Ibid.

The second type of anger is very intense in nature and people loses his prudence and acts like an insane. Since persons during this time of intense rage cannot appreciate his actions and its ensuing implications divorce pronounced in this moment will not, according to all scholars, be legally effective.⁶¹

The last type of anger is neither mild nor intense. The person even does not act insanely. It becomes the bone of contention among the scholars whether divorce pronounced in such a moment of anger will be effective or not. Few scholars answer in the affirmative and others in the negative. Thus, to posit Islamic Law in its proper place, one needs to appreciate the Qur'an and authentic Sunnah of the Prophet (PBUH).⁶²

Ahmad⁶³, Abu Dawud⁶⁴ and Ibn Maajah⁶⁵ narrated from 'Aa'ishah (may Allaah be pleased with her) that the Prophet (peace and blessings of Allaah be upon him) said: "There is no divorce and no manumission in the event of *ighlaaq*."

The majority of scholars opined that *ighlaaq* means compulsion or anger, i.e., intense anger. Since intense anger makes one unable to appraise his actions divorce will not be effective in such a moment of intense rage.⁶⁶ Allah (SWT) proclaims:

God will not take you to task for oaths which you may have uttered without thought, but will take you to task [only] for what your hearts have conceived [in earnest]: for God is much-forgiving, forbearing.⁶⁷

The aforesaid view is also the endorsed and favoured by Shaykh al-Islam Ibn Taymiyah and his student Ibn al-Qayyim (may Allaah have mercy on them both).⁶⁸

Taking an Oath of Divorce

Maqasid al Shariah requires to keep intact the marital bond instead of severing it without any lawful justification. Principles of Islamic Jurisprudence strongly mandates not to take an oath of divorce vowing that if a particular incident takes place, his wife shall be divorced. Even prohibition vests with the threat which intends to dissolve the marriage

⁶¹ Ibid.

⁶² Ibid.

⁶³ It refers Musnad-e-Ahmad, Hadith no: 25828.

⁶⁴ *Sunan Abu Dawud*, Vol.3, Book: 7 Divorce (Kitab Al-Talaq), Hadith no. 2193. The hadith is hasan in nature. Compiled from *Sahih and Daa'if Sunan Abu Dawud*, (Bangla Translation) Translated by Ahsanullah bin Sanallah, Tahqiq: Nasiruddin Albanee, 1st edition April, 2011, vol. 3, p. 222.

⁶⁵ *Sunan Ibn Maajah*, vol. 2, Book: 10 Divorce (Kitab Al-Talaq), Hadith no. 2046. The hadith is hasan in nature. Compiled from *Sunan Ibn Maajah*, (Bangla Translation) Translated by the translation and research division of Tawhid Publications, Dhaka, Tahqiq: Nasiruddin Albanee, 1st edition July, 2014, vol. 2, p. 210.

⁶⁶ See above n. 59.

⁶⁷ Al-Baqarah 2: 225.

⁶⁸ See above n. 59.

by stating that if she commits this or clings to that particular thing, she shall be divorced. Shariah only permits to take oath in the name of Allah (SWT). Regarding this matter, Ibn Umar narrated the following *hadith*:

Allah's Apostle met 'Umar bin Al-Khattab' while the latter was going with a group of camel-riders, and he was swearing by his father. The Prophet said, "Lo! Allah forbids you to swear by your fathers, so whoever has to take an oath, he should swear by Allah or keep quiet."⁶⁹

In another *hadith*, it is clearly spelt out that if any person swears by anyone except Allah is polytheist. Abdullah ibn Umar narrated that Said ibn Ubaydah said: Ibn Umar heard a man swearing: No, I swear by the Ka'bah. Ibn Umar said to him: I heard the Apostle of Allah (PBUH) say: He who swears by anyone but Allah is polytheist.⁷⁰

Repeated Divorce

Divorce naturally disintegrates family, shakes the moral and legal fabric of Islamic Shariah, throws wife and children into a situation of misery and helplessness and overall negatively affects the viability of Muslim Ummah. So, haste in severing nuptial tie is emphatically disregarded and sometimes discarded and declared unlawful and an abominable innovation. Divorce, as a last resort, is allowed and is to be pronounced in accordance with the Qur'an and authentic Sunnah of the Prophet (PBUH). The ideal mode of divorce is embodied in the following verse:

A divorce may be [revoked] twice, whereupon the marriage must either be resumed in fairness or dissolved in a goodly manner.⁷¹

The aforesaid verse was revealed in the backdrop of a tormenting and humiliating custom of pre-Islamic era namely marrying and divorcing a woman at the mere will of man without any regard of time, manner and will of the woman.⁷² The verse served as a serious blow to delimit the number of times for divorce. If divorce takes place for the first time, husband can revoke it within the waiting period. However, if waiting period elapses divorce shall be effective and final and in this case, fresh marriage contract along with fresh dower is required to get back wife. In both cases, husband is allowed to exercise one more option to repudiate wife. After this, if third time pronouncement comes into scene, divorce shall be irrevocable and consequently divorced couple shall be debarred from resuming conjugal life without an intervening marriage. It is worth mentioning here that such kind of marriage is absolute discretion of the divorced wife. If she voluntarily and spontaneously contracts a marriage and again family breaks due to the death of the husband or divorce she, if wishes, can come back to the former husband through a formal marriage. In this regard, the Qur'an proclaims:

⁶⁹ Sahih Bukhari, Vol. 8, Book. 78, Hadith no. 641. See also hadith no. 643. The similar types of *ahadith* also take place in *Sahih Muslim*, vol. 4, Book. 15, *Ahadith* no. 4035, 4036, 4037, 4038, 4039, 4040 and 4043.

⁷⁰ Sunan Abu Dawud, Vo. 3, Book 21, Hadith no. 3245.

⁷¹ Quran 2: 229.

⁷² See Rahim, Abdur, *Muhammadian Jurisprudence* (Allahabad Law Agency, Faridabad (Haryana), 2nd Reprinted edition, 2004, Reprint, 2010) 35-36.

And if he divorces her [finally], she shall thereafter not be lawful unto him unless she first takes another man for husband; then, if the latter divorces her, there shall be no sin upon either of the two if they return to one another provided that both of them think that they will be able to keep within the bounds set by God: for these are the bounds of God which He makes clear unto people of [innate] knowledge.⁷³

However, it is strictly proscribed to marry one divorced woman and divorce her for the purpose of making her halal for the former husband. It is usually done not for fulfilling the textual requirement of the Qur'an but for making money and avoiding public criticisms. If any person, instead of following these explicit commands of Allah (SWT), takes refuge of his whims and caprice and triply divorces wife, no chance of reconciliation, the primary goal of the Qur'anic Law of divorce shall subsist. Rather it will be apt to take stern action against him for playing with the dictates of Allah (SWT).⁷⁴

More importantly, the state should, among diverse juristic opinions, foster that construction which, best possibly, is in fine tune with the Qur'an. For instance, Shia school of thought invalidates the divorce. Najmuddin Abu Ja'far Al-Hilli in his reputed work "*Sharai al-Islam*" opined that the utterances of triple divorces in which no scope for reconciliation exists, pronouncement of divorce during menstruation and the pronouncement of divorce during that tuhr or period of purity where husband has had consummation with his wife, are according to Shia Sect, of no effect and void.⁷⁵ In support of their contention they mentioned that as three divorces in one sentence is absent in Sura al Baqara 2: 229 the same shall not be effective.⁷⁶ They also draw their support from the following tradition of the Prophet (PBUH).

It is narrated by Mahmud b. Labid that the Prophet was informed about a person who had pronounced three divorces on the spur of the moment to his wife. The Prophet having heard this got up in anger and said, "Is God's Book being made a plaything even when I am present amongst you. Thereupon a person stood up and said, O' Prophet; should I not behead that person."⁷⁷

Companions of Prophet (PBUH) namely Ali, Abdullah ibn Masud, Ibn Abbas (according to one assertion) and Sunni scholars like 'Ata, Taus, Said b. Jubair, Abu al-Shasa, Amru b. Dinar, Umar b. Ishaq and Hajjaj ibn Artat (as per one report) hold that only one divorce shall take effect. Apart from them, this opinion is also preferred by Zubayr b. Awam, Abdur Rahman b. Awf, Ibn Taymiyah and Hafiz ibn al-Qayyim. Their contention is that Allah (SWT) commanded to pronounce divorce in

⁷³ Quran 2:230.

⁷⁴ It is the discretion of a state to take any sort of appropriate action to eradicate such kind anomaly from the society. It may take any punitive or pecuniary or both action against such person.

⁷⁵ Al Hilli: *Sharai al-Islam*, Iran Part. iii, 209. See above n.25, 416.

⁷⁶ Al-Qurtubi, *Jami al-Ahkam al-Qur'an* (Cairo, 1936 A.H.) vol. iii, 129. See note no.25, p.416.

⁷⁷ Al-Nasai: *Al-Sunan* (Kitab-al-Talaq), Karachi, vol.ii, p.81. See note no.25, p. 417.

such a manner which would not hinder the opportunity of reconciliation. On this ground, one revocable divorce shall be effective. They, in support of their inference, cite from the following Prophetic Tradition.

Ibn 'Abbas (Allah be pleased with them) reported that the (pronouncement) of three divorces during the lifetime of Allah's Messenger (may peace be upon him) and that of Abu Bakr and two years of the caliphate of Umar (Allah be pleased with him) (was treated) as one. But Umar b. Khattab (Allah be pleased with him) said: Verily the people have begun to hasten in the matter in which they are required to observe respite. So if we had imposed this upon them, and he imposed it upon them.⁷⁸

A good number of Companions, their successors, scholars of Sunni schools of thought consider three divorces at a time as three irrevocable divorces.⁷⁹ Their stance is based on different Prophetic traditions. However, the following hadith shows that three divorces at a time were counted as one divorce even during the first two years of Umar's Caliphate. But, afterwards he as a punitive measure considered three divorces at a time as three divorces.

Ibn 'Abbas (Allah be pleased with them) reported that the (pronouncement) of three divorces during the lifetime of Allah's Messenger (may peace be upon him) and that of Abu Bakr and two years of the caliphate of Umar (Allah be pleased with him) (was treated) as one. But Umar b. Khattab (Allah be pleased with him) said: Verily the people have begun to hasten in the matter in which they are required to observe respite. So if we had imposed this upon them, and he imposed it upon them.⁸⁰

Few Hanafi scholars themselves admit that Umar's ruling was merely punitive and administrative.⁸¹ It is worth mentioning here that Umar himself retracted this ruling afterwards and returned from this punitive step. Even he regretting over this matter and other few administrative measures.⁸²

We, from the aforesaid discussion, can submit that the position taken by second group is in consonance with the Qur'an and the traditions cited by them are authentic. Even, their stance supports the *maqasid* of protecting lineage by preserving family tie since chance of reconciliation subsists in this mode of repudiation. The claim of first group can be reconsidered in the context of modern contemporary global order by the competent jurists of Islamic Jurisprudence. The third claim, since repugnant to the Qur'an, and Sunnah and unduly demolishes the family bond, should be discarded.

⁷⁸ *Sahih Muslim*, Vol. 3 Book:9, The Book of Divorce (Kitab Al-Talaq) chapter two; Pronouncement of three divorces, Hadith no.3491.

⁷⁹ See above n 25, p.416.

⁸⁰ *Sahih Muslim*, vol. 3 Book 9: The Book of Divorce (Kitab al-Talaq) Chapter 2: Pronouncement of Three Divorces, Hadith no.3491. See also ahadith nos. 3492 and 3493.

⁸¹ Above n 2, 18.

⁸² Above n 2, 18-19.

The Prohibition of ill-treatment

Since one of the cardinal principles of Islamic Law is to establish justice husband cannot torture and arbitrarily compel his wife to seek divorce from him with a view to getting back dower or part of it or any sort of property which he has given to her at the time of marriage or during the subsistence of conjugal life. Only the explicit severe immoral character of the wife entitles the husband to take back the property. Clarifying this stance, Allah (SWT) ordains:

O YOU who have attained to faith!...and neither shall you keep them under constraint with a view to taking away anything of what you may have given them, unless it be that they have become guilty, in an obvious manner, of immoral conduct.⁸³

While some of the exegetes of the Qur'an interpreted the very term '*fahishah*' as adultery or fornication, Muhammad Asad annotated it as *anything that is grossly immodest, unseemly, lewd, indecent or abominable in word or deed*.⁸⁴

The husband, if already paid the dower, is entitled to reclaim the dower or portion of it from the wife in case of proof of her lewdness by the direct evidence of four witnesses, a well-established special mode of evidence recognized by Islamic Law. On the contrary, the husband will be absolved of paying the dower if he did not actually hand over it to his wife earlier.

Islam, as justice and lies in the core of it, dictates the husband not to take back anything from the wife due to his hatred towards her and especially proscribes to divorce the wife with a view to taking another wife. Allah (SWT) commands:

But if you desire to give up a wife and to take another in her stead, do not take away anything of what you have given the first one, however much it may have been. Would you, perchance, take it away by slandering her and thus committing a manifest sin? And how could you take it away after you have given yourselves to one another, and she has received a most solemn pledge from you?⁸⁵

Thus, the Qur'an explicitly prohibits to reclaim anything from the wife and clearly spells out that, as Muhammad Asad puts it, monogamy is the enviable norm. The Qur'anic injunction, considerably conceiving the ill practices of the pre-Islamic Arabian society, instructs the husband to be debarred from accusing the wife of immoral conduct falsely in the hope of taking back dower.

Vow to discontinue sexual relationship for an indefinite period

As both the spouses are enjoined under the protective umbrella of Islam to have certain rights and obligations none can escape from this liability without just causes as espoused in the Qur'an and Sunnah. Islamic Shariah proscribes husband not to be too angry with his wife to halt sexual relations for a period which seems excruciating for a wife. During pre-Islamic era it was customary among the men to vow to discontinue sexual relationship with their wives for an undetermined

⁸³ An-Nisa 4:19.

⁸⁴ See above n. 5, 104.

⁸⁵ Quran 4: 20-21.

period. On the one hand, they gratified their sexual lust with other wives, slaves, concubines and prostitutes and on the other hand, unhesitatingly deprived wives from their legal right to sexual intimacy. Due to its persistent emphasis on keeping the marital bond intact Islam followed a middle course here by allowing husband to take vow of continence for a period of four months as a gauge of discipline and meandering but effective deterrent to divorce.⁸⁶ Thus, it is quite contra Quran to take such vow of continence for a period exceeding four months. If husband, before the expiry of four months, resumes his sexual relations, the vow will terminate and it can be expected that Allah (SWT) will forgive him and allow him to go for repentance. But, he must undergo for the penance prescribed for a broken oath⁸⁷. On the other hand, if the term expires by smashing away all the possibilities of reconciliation the wife, as general rule, is divorced from husband.⁸⁸

Regarding the consequence of the expiry of four months diverse juristic opinions reign here since a group of jurists opine that divorce is automatic after the completion of said period and other group believe that the matter would be scrutinized by a competent judicial authority who, on the basis of circumstance, has the right to reconcile the couple or annul the marital tie.⁸⁹

This oath of abstention, known as *ila* in Islamic judicial parlance, finds its recognition in the following verse of the Qur'an:

Those who take an oath that they will not approach their wives shall have four months of grace; and if they go back [on their oath] - behold, God is much-forgiving, a dispenser of grace. But if they are resolved on divorce - behold, God is all-hearing, all-knowing.⁹⁰

The underlying cause for specification of four months is to provide the husband sufficient time to consider the matrix and chemistry of marital relationship, to unruffled himself and to restore the conjugal life of his own volition.⁹¹ Another justification in support of this period of time is drawn from the long standing belief that a woman can

⁸⁶ Above n 8, 237.

⁸⁷ Above n 19.

⁸⁸ World renowned Islamic scholar Dr. Yusuf al Qaradawi has described that divorce here is a just punishment for the husband due to his neglect towards the fulfillment of the rights of wife. To us, Qaradawi considers the matter from the perspective of relieving the wife from the tormenting clutches of cruel husband. It will in no way affect the right of a state to take more stringent measures to make the procedure of *talaq* as a subject of scrutiny of certain Qur'anic and Sunnatic mechanisms like arbitration and judicial intervention. Moreover, the state can penalize an act of divorce which is pronounced in an unauthorized manner and embody the right of compensation for the victimized divorced wife. This is due to the injury and trauma which the husband inflicts upon his wife.

⁸⁹ See above n 19 See also note 8, 238.

⁹⁰ Quran 2:226-227.

⁹¹ See above n 19.

endure her husband's abstention up to four months without showing any sort of atypical responses.⁹²

The Woman's Right to Demand Divorce

Under Islamic Law, women are entitled to dissolve the marital tie through *khula*. Islam unhesitatingly equips women with this right if they cannot lead conjugal life with their husband within the bounds set by the Qur'anic Laws. To avail and effectuate dissolution, subject to their mutual agreement, the wife requires to relinquish her *mahr* wholly or partly or other gifts gained from her husband. It is not desirable, as one author points out, that the husband should ask for more than he has provided to her.⁹³ The wife is enjoined to pay back dower or other gifts since the marriage is liable to be dissolved at her instance without any fault on the part of husband regarding marital obligations. The sanction of *khula* finds its recognition both in the Qur'an and the Sunnah of the Prophet (PBUH). Allah, the Most High ordains:

...And it is not lawful for you to take back anything of what you have ever given to your wives unless both [partners] have cause to fear that they may not be able to keep within the bounds set by God: hence, if you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself...⁹⁴

The right of *khul* as enunciated in the above verse of the Qur'an is unconditional right of the wife as agreed by the all authorities.⁹⁵ The following prophetic tradition also illustrates the right of the wife to annul the marital tie. Husband, in no way, is entitled to keep the wife within the marital bounds against her will.

Ibn Abbas narrated that the wife of Thabit bin Qais came to the Prophet and said, "O Allah's Apostle! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him)." On that Allah's Apostle said (to her), "Will you give back the garden which your husband has given you (as *Mahr*)?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once."⁹⁶

⁹² See note no. 8, p.238. In support of their opinions Exegetes of the Qur'an refer an incident which took place during the Caliphate of Umar, the second Caliph of Islam. While Umar, as a part of his administrative responsibility was making a round of Madinah, he heard a woman singing. The lyric of the song is as follows. "The night is long, the darkness all around me; I am sleepless, for I have no friend to play with. I swear by Allah that had there been no fear of Him, This cot would be shaking from side to side. In an inquiry Umar came to know that the woman's husband had gone on a military expedition for a long time. To reach into a concrete solution he consulted his daughter and the widow of the Prophet Muhammad (PBUH) Hafsah and she informed that a woman could tolerate separation up to four months. Consequently, Umar decreed that a combatant will not stay away from his wife for more than four months. See above n 19.

⁹³ See above n 19.

⁹⁴ Al-Baqarah 2: 229.

⁹⁵ See above n 5, commentary to Al-Baqara 2: 229.

⁹⁶ *Sahih al-Bukhari*, Vol. 7, Book 63: Divorce, Hadith no. 197. See also ahadith numbers 198, 199 and 200. The ahadith relating to the same incident is also

However, though the Qur'an and Sunnah of the Prophet (PBUH) permitted women to sever her marital tie through *khula*, it is not enjoined rather proscribed by the Prophet (PBUH) to dissolve the marital bond without any justification. This justification obviously refers to the cogent cases of dissolution as recognized by the Qur'an and the authentic Sunnah of the Prophet (PBUH). In one occasion Prophet (PBUH) told that if any woman asks her husband for divorce without some strong reason the odour of Paradise will be forbidden to her.⁹⁷

The aforesaid hadith serves as a moral exhortation but it can be argued that a state can delimit the right of *khula* through the proper and effective utilization of the weapon of *Siyasah Shariah*⁹⁸. A state can legislate that a *khul* without any justification is of no effect at all and penalize the person exercising this option of dissolving marriage in an unauthorized manner.

Reconciling Honorably or Separating with Kindness

The Qur'anic legislation commands the husband to treat his divorced wife fairly both in cases of retaining her and effecting divorce after the completion of the period of *iddat*. No sort of hurt or injury can be inflicted on her especially with the ill motive of prolonging the period of *iddat*. The Qur'an proclaims:

And so, when you divorce women and they are about to reach the end of their waiting-term, then either retain them in a fair manner or let them go in a fair manner. But do not retain them against their will in order to hurt [them]: for he who does so sins indeed against himself. And do not take [these] messages of God in a frivolous spirit; and remember the blessings with which God has graced you, and all the revelation and the wisdom which He has bestowed on you from on high in order to admonish you hereby; and remain conscious of God, and know that God has full knowledge of everything.⁹⁹

Thus, Allah (SWT) commands the believers either to settle with her respectably meaning resuming marital relation with the purpose of staying in peace and tranquility and secondly to release her from the marital tie in a just and reasonable manner and with mercy and kindness. As regards the method of release Qaradawi opines:

to free her and part with her in kindness by allowing the *iddah* to expire without arguments and harsh words, and without setting aside any of their mutual rights.¹⁰⁰

recorded in *Sunan Abu Dawud*, Vol.2, Book: 12 Divorce (Kitab Al-Talaq), Ahadith numbers 2219, 2220 and 2221.

⁹⁷ *Sunan Abu Dawud*, Vol.2, Book: 12 Divorce (Kitab Al-Talaq), hadith no. 2218.

⁹⁸ The very phrase *Siyasah Shariyyah*, as Kamali points out, means a "government in accordance with the goals and objectives of *Shariah*" and in its widest possible connotation, embraces all sorts of government policies within its domain. It is typically regarded as a sustainable mechanism of flexibility and pragmatism in *Shariah* to serve the egalitarian cause of justice and good government, especially when the imperatives of *Shariah* fails to address certain situations or developments. See Kamali, Hashim, Mohammad, *Shariah Law: An Introduction* (Oneworld publications, Oxford, 2008, 1st South Asian edition, 2009) 225-226.

⁹⁹ Quran 2:231.

¹⁰⁰ See note no.19.

Moreover, the Qur'an instructs the believers not to torment the wife, a notorious practice of the *jahiliya* period, by retaining her against her will. It is certainly unlawful, as Qaradawi puts, on the part of the husband to recommence marital tie just before the iddah is due to expire to torture the wife by dawdling the iddat and ultimately barring the wife from availing the opportunity to marry another person.¹⁰¹

The Qur'an, recognizing the freedom of the divorced women to marry again, proscribes the first husband to put barriers before them. The Qur'an says:

And when you divorce women, and they have come to the end of their waiting-term, hinder them not from marrying other men if they have agreed with each other in a fair manner. This is an admonition unto every one of you who believes in God and the Last Day; it is the most virtuous [way] for you, and the cleanest. And God knows, whereas you do not know.¹⁰²

Post-Divorce Misconduct

Misconduct towards divorced woman after the pronouncement of divorce is quite impermissible in Islam. This sort of demeanor may range from psychological torture to driving out the wife of from husband's residence. The Qur'anic commandment clearly spells out that the divorced woman should observe her iddat in her husband's abode. It is quite unlawful on the part of the husband to drive wife from his residence and in the same way it is proscribed for the wife to move away from her husband's house without any just, inevitable and compelling reason. The underlying philosophy is to ascertain the possibility of pregnancy and to allow the spouses to reconsider their decision, to transform antipathy into sympathy and overall to resume marital relations. Moreover, pronouncement is a mere warning signal and not the end of conjugal relation.¹⁰³ Possibility still waits which has the vigour to rekindle the relation once the circumstance leading to divorce is changed.¹⁰⁴ Allah (SWT) ordains:

O PROPHET! When you [intend to divorce women, divorce them with a view to the waiting period appointed for them, and reckon the period [carefully], and be conscious of God, your Sustainer. Do not expel them from their homes; and neither shall they [be made to] leave unless they become openly guilty of immoral conduct. These, then, are the bounds set by God and he who transgresses the bounds set by God does indeed sin against himself: [for, O man, although] thou knowest it not, after that [first breach] God may well cause something new to come about.¹⁰⁵

Thus, only acceptable ground to evict wife from husband's residence is to found her open guilty of lewdness. If afterwards no reconciliation

¹⁰¹ See note no. 19.

¹⁰² Al-Baqara 2:232.

¹⁰³ al Ghazali, Shaykh Muhammad, *A Thematic Commentary on the Qur'an* (Ashur A. Shamis trans , International Institute of Islamic Thought, Herndon, 2000) 658-59 [trans of: *Quran*]

¹⁰⁴ Ibid, 659.

¹⁰⁵ Quran 65:1.

takes place and family breaks man is enjoined to separate woman with self-respect and compassion instead of causing any injury, reproach, intrusion and infringement of rights. The Qur'an says:

...When they are about to reach the end of their waiting-term, either retain them in a fair manner or part with them in a fair manner.¹⁰⁶

In another place Allah (SWT) unequivocally ordains:

...the marriage must either be resumed in fairness or dissolved in a goodly manner.¹⁰⁷

In lieu of Conclusion

Family in Islam is not a mere formal institution rather a sacred establishment premised on divine revelation. So, parties involved in this institution must comply with the divinely ordained commandments before taking any decision. He or she is not enslaved or captivated but encouraged to maintain the sanctified thread of the family and thus assisting to build a sound civilization. None should act in such a manner which will inflict injury or oppression on others or on himself/herself.¹⁰⁸ Islamic Shariah empowers both the spouses to annul the marital tie but of course, subject to the prescribed rules and regulation embodied in the Qur'an and Sunnah. Before initiating divorce both the parties should be aware of time, circumstance and mode of dissolution and other conditions prescribed above in the light of Shariah. They should not be in bewilderment after being perplexed by different schools of thought regarding the true intents of the Shariah. Most importantly, whether divorce is a mere disliked action or illegal action depends on the particular situation and therefore, concrete contextualization of each and every individual case in the light of parameters set out by the Qur'an and authentic Sunnah is the most crucial test.

¹⁰⁶ Quran 65:2.

¹⁰⁷ Al-Baqarah 2: 229.

¹⁰⁸ A *hadith* of the Prophet (PBUH) explicitly says: "there should be neither harming (*darar*) nor reciprocating harm (*dirar*)". This *hadith* was related on the authority of Abu Sa'id Sa'd bin Malik bin Sinan al-Khudri. Ibn Maajah treats it as *hasan* (good) *hadith*; Ad-Daaraqutnee and others regard it as *musnad* (supported) *hadith*. It is also related by Imam Malik in his *Muwatta* in *mursal* (hurried, broken chain) form from Amar bin Yahya, from his father, from the Prophet (PBUH) but dropping (the name of) Abu Sa'id from the chain. Other chains of transmission of this *hadith* strengthen one another (thus it may be regarded as of sound *isnad* or chain). Imam Nawawi mentions it in his manual of Forty *Hadith*. *Hadith* no. 32. See <http://www.bible-quran.com/islam-hadiths-hadiths-32-34-nawawi/> accessed on 25 March, 2014. See also <http://www.40hadithnawawi.com/index.php/the-hadiths/hadith-32> accessed on 25 March, 2014. Quoted from footnote no: 137 Islam, Mohammad Azharul, Nahar, Azizun, 'Rethinking the Plights of Divorcee Under Islamic Family Law' (2011) 22(2) The Dhaka University Studies, Part- F, Dhaka University Law Journal 123.