Al-Islam.org
Ahlul Bayt Digital Islamic Library Project
Published on *Al-Islam.org* (https://www.al-islam.org)

7. Divorce

Divorce

The Divorcer (al-Mutalliq)

A divorcer should possess the following characteristics:

1. Adulthood: Divorce by a child is not valid, even if of a discerning age (*mumayyiz*), according to all the schools except the Hanbali, which observes: Divorce by a discerning child is valid even if his age is below ten years.

2. Sanity: Divorce by an insane person is not valid, irrespective of the insanity being permanent or recurring, when the divorce is pronounced during the state of insanity. Divorce by an unconscious person and one in a state of delirium due to high fever is also not valid. The schools differ regarding the state of intoxication. The Imamiyah observe: Such a divorce is not valid under any circumstance. The other four schools[1] remark: The divorce is valid if the divorcer has voluntarily consumed an unlawful intoxicant. But if he drinks something permissible and is stupefied, or is coerced to drink, the divorce does not materialize.

Divorce by a person in a fit of anger is valid if the intention to divorce exists. But if he loses his senses completely, the rule which applies to an insane person will apply to him.

3. Free volition: All the schools except the Hanafi concur that divorce by a person under duress does not take place in view of the tradition:

> رُفع عن أُمتي الخطأ والنسيان وما استكرهوا عليه

My ummah have been exculpated of genuine mistakes, forgetfulness, and that which they are coerced to do.

The Hanafis say: Divorce by a person under duress is valid.
The practice of the Egyptian courts has been not to recognize the divorce by a person under duress or intoxication.

4. Intention: According to the Imamiyyah, divorce pronounced unintentionally or by mistake or in jest is not valid.

Abu Zuhrah says (page 283): The Hanafi school considers divorce by all persons except minors, lunatics and idiots as valid. Thus divorce pronounced by a person in jest or under intoxication by an unlawful intoxicant, or under duress, is valid. On page 286 he writes: It is the accepted view of the Hanafi school that a divorce by mistake or in a state of forgetfulness is valid. On page 284 he observes: Malik and al-Shafi'i concur with Abu Hanifah and his followers regarding a divorce pronounced in jest, while Ahmad differs and regards such a divorce as invalid.

Ibn Rushd states (*Bidayat al-mujtahid*, vol. 2, p. 74): Al-Shafi'i and Abu Hanifah have said, "Intention (*niyyah*) is not required in divorce".

The Imamiyyah have narrated from the Imams of the Ahl al-Bayt (A):

لا طلاق إلاّ لمن أراد الطلاق ، لا طلاق إلاّ بنية

No divorce (takes effect) except by one who intends divorce. Divorce does not take place except by intention.

The author of *al-Jawahir* says: If one pronounces divorce and subsequently denies intention, his word shall be accepted as long as the divorcee is undergoing her *'iddah*, because the fact of his intention cannot be known except from him.

Divorce by the Guardian (Talaq al-Wali)

The Imamiyyah, the Hanafi and the Shafi'i schools state: A father may not divorce on behalf of his minor son, because of the tradition:

الطلاق لمن أخذ بالساق

The Malikis state: A father may divorce his minor son's wife in the *khul'* form of divorce. Two opinions are ascribed to Ahmad.

The Imamiyyah observe: When a child of an unsound mind matures, his father or paternal grandfather may pronounce divorce on his behalf if it is beneficial for him. If the father and the paternal grandfather do not exist, the judge may pronounce the divorce on his behalf. As mentioned earlier, the Imamiyyah allow the wife of a lunatic to annul the marriage.

The Hanafis state: If a lunatic's wife suffers harm by living with him, she may raise the issue before a judge and demand separation. The judge is empowered to pronounce divorce to rescue her from the harm and the husband's father has no say in this affair.

All the schools concur that divorce by a stupid husband (*safih*) and his agreeing to *khul'* are both valid.[2]

The Divorcee (al-Mutallaqah)

There is consensus that the divorcee is the wife. For the validity of the divorce of a wife with whom intercourse has occurred, the Imamiyyah require that she should not have undergone menopause nor she should be pregnant, that she be free from menses at the time of divorce, and that intercourse should not have occurred during the period of purity. Thus, if she is divorced during her menses or *nifas*,[3] or in a period of purity in which she has been copulated with, the divorce will be invalid.

Al-Razi in his exegesis of the first verse of *Surat al-Talaq*:

يَاأَيُّهَا النَّبِيُّ إِذَا طَلَّقْتُمْ النِّسَاءَ فَطَلِّقُوهُنَّ لِعِدَّتِهِنَّ

has said, "By *'iddah* is meant the period of purity from menses, by consensus of all Muslims. A group of exegetes has observed that by divorce at the time of *'iddah* is meant that the wife may be divorced only during the period of purity in which intercourse has not occurred. In brief, it is compulsory that divorce occur during the period of purity, otherwise it will not be according to the Sunnah, and divorce according to the Sunnah is conceivable only in the case of an adult wife with whom marriage has been consummated, and one who is neither pregnant nor menopausal."

For there is no *sunnah* concerning the divorce of a minor wife, a wife who has not been copulated with, or a wife in menopause or pregnancy. This is exactly what the Imamiyyah hold.

In *al-Mughni* (vol.7, p.98, 3rd.ed.) the author states: "The meaning of a *sunnah* divorce (*talaq al-sunnah*) is a divorce in consonance with the command of God and His Prophet (S); it is divorce given during a period of purity in which intercourse with her has not occurred." He continues (p. 99): "A divorce contrary to the *sunnah* (*talaq al-bid'ah*) is a divorce given during menses or during a period of purity in which she has been copulated with. But if a person pronounces such a divorce, he sins, though the divorce is valid according to the view generally held by the scholars. Ibn al-Mundhir and Ibn 'Abd al-Birr have said: None oppose the validity of this form of divorce except the heretics (*ahl al-bida' wa al-dalalah*)"! If to

follow the command of Allah and the Sunnah of His prophet (S) is heresy and misguidance, then it is of course proper that following Satan be called *'sunnah'* and 'guidance'.

Whatever the case, the Sunnis and the Shi'ah concur that Islam has prohibited the divorcing of an adult, non-pregnant wife with whom marriage has been consummated, who is either undergoing periods or has been copulated with during her period of purity. But the Sunni schools add that the Shari'ah's prohibition makes the divorce *haram* (unlawful) but not invalid, and one who pronounces divorce in the absence of these conditions sins and is liable to punishment, but the divorce will be valid. The Shi'ah state: The Shari'ah's prohibition is for invalidating such a divorce, not for making it *haram*, for the mere pronouncing of divorce is not *haram* and the sole purpose is to nullify the divorce as if it had not taken place at all, exactly like the prohibition of sale of liquor and swine, where the mere recital of the contract of sale is not *haram*, only the transfer of ownership fails to take effect.

The Imamiyyah permit the divorce of the following five classes of wives, regardless of their state of menstruation or purity:

1. A minor wife under the age of nine.
2. A wife whose marriage has not been consummated, regardless of whether she was a virgin or not, and irrespective of his having enjoyed privacy with her.
3. A menopausal wife; menopause is taken to set in at fifty for ordinary women and at sixty for Qurayshi women.
4. A wife who is pregnant.
5. A wife whose husband has been away from her for a whole month and the divorce is given during his absence from her, since it is not possible for him to determine her condition (whether she is in her menses or not). A prisoner husband is similar to a husband who has been away.

The Imamiyyah state: The divorce of a wife who has reached the age of menstruation but does not have menses due to some defect or disease or childbirth, is not valid unless the husband abstains from intercourse with her for three months. Such a woman is called *al-mustarabah* (a term derived from *rayb*, doubt).

The Pronouncement of Divorce (al-Sighah)

The Imamiyyah observe: Divorce requires the pronouncement of a specific formula without which it does not take place. This formula is:
أنت طالق (you are divorced), or **فلانة طالق** ('so and so' is divorced), or **هي طالق** (she is divorced).
Thus if the husband uses the words: **الطالق** or **المطلّقة** or **طُلّقت**, or **الطلاق** or **المطلّقات** etc., it will have no effect even if he intends a divorce because the form **طالق** is absent despite the presence of its root (*t-l-q*). It is necessary that the formula be properly recited without any error in pronunciation and that it be unconditional. Even a condition of certain occurrence such as, 'at sunrise', etc. is not adequate.

If the husband gives the wife the option of divorcing herself and she does so, divorce will not take place according to Imami scholars. Similarly, divorce will not take place if the husband is questioned. "Have you divorced your wife", and he answers affirmatively with the intention of effecting a divorce. If the husband says, "You are divorced, three times", or repeats the words, "You are divorced", thrice, only a single divorce takes place if the other conditions are fulfilled. Divorce does not take place through writing or by gesticulation, unless the divorcer is dumb, incapable of speech. It is necessary that the divorce be recited in Arabic when possible. It is better for a non–Arab and a dumb person to appoint an attorney, if possible, to recite the divorce on his behalf. Similarly, according to the Imamiyyah, divorce will not take place by an oath, a vow, a pledge or any other thing except by the word **طالق**, on fulfillment of all the limitations and conditions.

The author of *al–Jawahir*, citing a statement from *al–Kafi*, says: "There can be no divorce except (in the form) as narrated by Bukayr ibn A'yan, and it is this: The husband says to his wife (while she is free from menses and has not been copulated with during that period of purity): **انتِ طالق** (You are divorced), and (his pronouncement is witnessed by two just (*'adil*) witnesses. Every other form except this one is void". Then the author of *al–Jawahir* quotes *al–Intisar* to the effect that there exists consensus on this issue among the Imamiyyah.

Consequently, the Imamiyyah have restricted the scope of divorce to its extreme limits and impose severe conditions regarding the divorcer, the divorcee, the formula of divorce, and the witnesses to divorce. All this is because marriage is a bond of love and mercy, a covenant with God. The Qur'an says:

و كيف تأخذونهُ و قَدْ أَفْضَى بَعْضُكُمْ إِلَى بَعْضٍ وَأَخَذْنَ مِنْكُمْ مِيثَاقاً غَلِيظاً

***How can you take it back after one of you hath gone in into the other, and they* (*the wives*) *have taken a strong pledge from you?* (*4:21*)**

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنفُسِكُمْ أَزْوَاجاً لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً

***And one of His signs is that He created mates for you from yourselves that you may find tranquility in them, and He ordained between you love and compassion.* (*30:21*)**

وَلاَ تُمْسِكُوا بِعِصَمِ الْكَوَافِرِ

***…And hold not to the ties of marriage of unbelieving women….* (*60:10*)**

Therefore, it is not permissible in any manner that one break this bond of love and compassion, this

pledge and covenant, except with a knowledge that leaves no doubt that the Shari'ah has surely dissolved the marriage and has broken the tie which it had earlier established and confirmed.

But the other schools allow divorce in any manner in which there is an indication of it, either by oral word or in writing, explicitly or implicitly (such as when the husband says: "You are *haram* for me", or "You are separated" or "Go, get married", or "You are free to go wherever you want," or "Join your family," and so on). Similarly, these schools allow an unconditional as well as a conditional divorce (such as when the husband says: "If you leave the house, you are divorced," or. "If you speak to your father you are divorced," or "If I do this, you are divorced," or "Any woman I marry, she is divorced:" in the last case the divorce takes place as soon as the contract of marriage is concluded!). There are various other pronouncements through which divorce is effected, but our discussion does not warrant such detail. These schools also permit a divorce in which the wife or someone else has been authorized to initiate it. They also allow a triple divorce by the use of a single pronouncement. The legists of these schools have filled many a long page with no result except undermining the foundation of the family and letting it hang in the air.[4]

The Egyptian government has done well in following the Imamiyyah in most aspects of divorce. Apart from this, the four schools do not consider the presence of witnesses a condition for the validity of divorce, whereas the Imamiyyah consider it an essential condition. We hand over the discussion to al-Shaykh Abu Zuhrah regarding this issue.

Divorce and Witnesses

In *al-Ahwal al-shakhsiyyah* (p. 365), al-Shaykh Abu Zuhrah has observed: "The Twelve-Imami Shi'i legists and the Isma'iliyah state: A divorce does not materialize if not witnessed by two just (*'adil*) witnesses, in accordance with the Divine utterance regarding the rules of divorce and its pronouncement:

فَاذا بلغنَ اجَلَهُنَّ فَأمسِكوهُنَّ بِمعروفٍ أو فارِقوهُنَّ بِمعروفٍ وَأَشْهِدُوا ذَوَى عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكُمْ يُوعَظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجاً * وَيَرْزُقْهُ مِنْ حَيْثُ لاَ يَحْتَسِبُ

Then when they (***the wives***) ***have reached their 'iddah retain them honourably, or part from them honourablv. And have two just men from among yourselves bear witness, and give testimony for Allah's sake. By this then is admonished he who believes in Allah and the Last Day. And whoever is careful of*** (***his duty to***) ***Allah, He will provide for him an outlet and give him sustenance from whence he never reckoned ....*** (***65:2-3***)

This command about the witnesses in the Qur'an follows the mention of divorce and the validity of revoking it. Therefore, it is appropriate that the calling in of witnesses should be related to divorce. Moreover, the reason given for calling in the witnesses, that God seeks thereby to admonish those who

believe in God and the Last Day, confirms this interpretation, because the presence of just witnesses is not without the good advice which they would offer to the couple; and this could bring about for them an escape from divorce, which is the most hated of lawful things in the eyes of God. If it were for us to choose the law to be acted upon in Egypt, we would choose this opinion, which requires the presence of two just witnesses for effecting a divorce".

Together with the restrictions that the Imamiyyah have laid down for the divorcer, the divorcee, and the pronouncement of divorce, they have also laid down an additional limitation regarding the witnesses by demanding that if all conditions are fulfilled except that the two just witnesses do not hear the pronouncement of the divorce, the divorce will not take place. Therefore, a single witness will not suffice even if he is a good substitute, not even if he is an infallible (*ma'sum*) person.[5]

Further, the witnessing of the pronouncement by one of them by listening and of the other by testifying to their admission (of having concluded the divorce) is not sufficient. The testimony of a group of people will also not suffice, even if it is big enough to make the divorce a known public fact. The testimony of women, with or without the testimony of men, is not sufficient. Similarly, if the husband pronounces the divorce and then brings in the witnesses, it will have no effect.

The Case of a Sunni Husband and a Shi'i Wife

If a Sunni husband divorces his Shi'i wife, either through a conditional divorce contingent upon something, or in a period of purity during which sexual intercourse has occurred, or during menses or *nifas*, or without two just witnesses being present or by an oath of divorce, or by saying, **حبلك على غاربك** ; "Go wherever you want," or in any other form which is valid in accordance with Sunni law and invalid according to Shi'i law, is such a divorce considered valid by the Shi'ah, so that the woman may remarry after completing her *'iddah*?

The answer is that there is consensus among the Imami jurists that every sect is bound by its own precepts,[6] and that the transactions of its followers, as well as their affairs pertaining to inheritance, marriage and divorce, are valid if performed according to rules of their *shari'ah*. A tradition has been narrated from the Imams of Ahl al-Bayt (A):

ألزموهم من ذلك ما ألزموا أنفسهم

Bind them with the laws with which they have bound themselves.

In another tradition, al-Imam al-Sadiq (A) was questioned regarding a woman who had been divorced by a Sunni husband against the principles of the Sunnah, whose compliance is necessary for the validity of a divorce according to the Shi'ah. The Imam (A) replied:

تتزوج، ولا تُترك المرأة من غير زوج

She will marry, and a woman shall not be left without a husband.

In a third tradition it is stated:

يجوز على أهل كل دين ما يستحلّون

For the followers of every religion, that which they consider lawful is permissible for them.

A fourth tradition says:

من دان بدين قوم لزمته أحكامهم

One who follows the religion of a particular sect, is bound by its rules, (*al-Jawahir*, vol. 5, the discussion regarding *sighat al-talaq*).

Consequently, if a Shi'i husband divorces his Sunni wife according to the principles of her school and not his, the divorce is invalid, and if a Sunni divorces his Shi'i wife according to the principles of his own school, the divorce is valid.

Revocable and Irrevocable Divorce

A divorce is either revocable or irrevocable. The schools concur that a revocable divorce is one in which the husband is empowered to revoke the divorce during the *'iddah*, irrespective of the divorcee's consent. One of the conditions of a revocable divorce is that the marriage should have been consummated, because a wife divorced before consummation does not have to observe the *'iddah* in accordance with verse 49 of *Surat al-Ahzab*:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا نَكَحْتُمْ الْمُؤْمِنَاتِ ثُمَّ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمَسُّوهُنَّ فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُّونَهَا

O believers! When you marry the believing women and then divorce them before you touch them, you are not entitled to reckon for them an 'iddah....

Among the other conditions of a revocable divorce are that the divorce should not have been given on the payment of a consideration and that it should not be one which completes three divorces.

The divorcee in a revocable divorce enjoys the rights of a wife, and the divorcer has all the rights of a husband. Therefore, both will inherit from each other in the event of death of one of them during the

'iddah. The deferred *mahr* payable on the occurrence of any of the two events, death or divorce, will become payable only after the expiry of the *'iddah* if the husband does not revoke the divorce during that period. On the whole, a revocable divorce does not give rise to a new situation except its being accountable for ascertaining whether the number of divorces has reached three.

In an irrevocable divorce, the divorcer may not return to the divorced wife, who belongs to one of the following categories:

1. A wife divorced before consummation, by consensus of all the schools.

2. A wife who has been divorced thrice. There is consensus here as well.

3. A divorcee through *khul'*. Some legists consider this form of divorce void and say that it is not a divorce at all.

4. A menopausal divorcee, in the Imami school, which observes: She has no *'iddah* and the rules applicable to a divorcee before consummation apply to her as well. According to it, in verse 4 of *Surat al-Talaq*:

وَاللاَّئِي يَئِسْنَ مِنْ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلاَثَةُ أَشْهُرٍ وَاللاَّئِي لَمْ يَحِضْنَ

If you are in doubt concerning those of your wives who have ceased menstruating, know that their waiting period is three months, and* (*the same is the waiting period of*) *those who have not yet menstruated ...

the phrase· **اللائي يئسن** does not imply those women who are known to have reached menopause but those whose menses have stopped and it is not known whether the reason is disease or age; consequently, their *'iddah* is three months. There is no question of doubt regarding those whose menopause is certain. The doubt arises in cases of uncertainty, as indicated by the words: **إِنْ ارْتَبْتُمْ** (if you are in doubt) of the verse, because it is not the Lawgiver's wont when explaining a law to say: "If you are in doubt regarding the law regarding something, the law is that....". This confirms that the doubt mentioned in the verse relates to the fact of menopause, in which case she is to observe an *'iddah* of three months. As to the phrase: **وَاللاَّئِي لَمْ يَحِضْنَ** it refers to women who despite attaining the age of menses do not have them due to some congenital or contingent factor. Many traditions have been narrated from the Imams of the Ahl al-Bayt (A) with this interpretation of this verse.

5. The Hanafis say: Valid seclusion (*khalwah*) with the wife, even without consummation, requires the observance of *'iddah*. But the divorcer is not entitled to return to her during the *'iddah*, because here the divorce is irrevocable.

The Hanbalis state: Seclusion is similar to consummation in all respects so far as the necessity of *'iddah*

and the right of revocation is concerned. As mentioned earlier, seclusion has no effect according to the Imamiyyah and the Shafi'i schools.

The Hanafis observe: If a husband says to his wife: "You are divorced irrevocably" or "divorced firmly," "(with a divorce as firm) as a mountain," and such similar strong words, the divorce will be irrevocable and the divorcer will not be entitled to return during the *'iddah*. Similarly, a divorce pronounced by using words which connote a break of relationship (such as, "She is separated," "cut off," "disassociated").

The Triple Divorcee

The schools concur that a husband who divorces his wife thrice cannot remarry her unless she marries another person through a valid *nikah*, and this second person consummates the marriage, in accordance with verse 230 of *Surat al-Baqarah*:

فَإِنْ طَلَّقَهَا فَلاَ تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّى تَنكِحَ زَوْجاً غَيْرَهُ

So if he divorces her, she shall not be lawful to him afterwards, until she marries another husband .... (***2:230***)

The Imami and the Maliki schools consider it necessary that the person who marries her (*muhallil*) be an adult. The Hanafi, the Shafi'i and the Hanbali schools consider his capacity for intercourse as sufficient, even if he is not an adult. The Imami and the Hanbali schools state: If in a marriage contract *tahlil* (causing the woman to become permissible for her former husband to remarry) is included as a condition (such as when the second husband says, "I am marrying you to make you *halal* for your divorcer), the condition is void and the contract valid. But the Hanafis add: If the woman fears that the *muhallil* may not divorce her after the *tahlil*, it is permissible for her to say, "I marry you on the condition that the power to divorce be in my hands," and for the *muhallil* to say, "'I accept this condition." Then the contract will be valid and she will be entitled to divorce herself whenever she desires. But if the *muhallil* says to her: "'I marry you on the condition that your affair (of divorce) be in your own hands," the contract is valid and the condition void.

The Maliki, the Shafi'i and the Hanbali schools state: The contract is void *ab initio* if *tahlil* is included as a condition. The Maliki and Hanbali schools further add: Even if *tahlil* is intended and not expressed the contract is void.

The Malikis and some Imami legists consider it necessary that the second husband (*muhallil*) have intercourse with her in a lawful manner (such as when she is not menstruating or having *nifas*, and while both are not fasting a Ramadan fast). But most Imami legists give no credence to this condition and regard mere intercourse, even if unlawful, to be sufficient for *tahlil*.

Whatever be the case, when a divorcee marries another husband and is separated from him, either due

to his death or by divorce, and completes the *'iddah*, it becomes permissible for the first husband to contract a new marriage with her. Then, if he again divorces her thrice, she will become *haram* for him until she marries another. This is how she will become *haram* for him after every third divorce, and will again become *halal* by marrying a *muhallil*, even if she is divorced a hundred times.

But the Imamiyyah state: If a wife is divorced nine times in the *talaq al-'iddah* form, and is married twice (i.e. following *tahlil* after every third divorce), she will become permanently *haram*. The meaning of *talaq al-'iddah*, according to the Imamiyyah, is a divorce in which the husband after divorcing returns to her during the *'iddah* and has intercourse with her, and then divorces her again in another period of purity, then returns to her and has intercourse, then divorces her for a third time and remarries her, after a *muhallil* does the *tahlil*, by concluding a fresh contract, and divorces her thrice in the same manner, with a *muhallil* doing the second *tahlil*, and remarries her again. Now if he divorces her thrice again, the ninth *talaq al-'iddah* completed, she will become *haram* for him permanently. But if the divorce is not a *talaq al-'iddah* (such as when he divorces her, then returns to her and then divorces her again before having intercourse), she will not become *haram* perpetually, and will become *halal* through a *muhallil*, even if the number of divorces is countless.

Doubt in the Number of Divorces

The schools (except the Maliki) concur that he who has doubt regarding the number of divorces (whether a single divorce has taken place or more) will base his count on the lower number. The Malikis observe: The aspect of divorce shall preponderate and the count will be based on the higher number.

Divorcee's Claim of Tahlil

The Imami, the Shafi'i and the Hanafi schools state: If the husband divorces his wife thrice, and he or she knows nothing about the other for some time and thereafter she claims having married a second husband and separated from him and having completed the *'iddah,* her word will be accepted without an oath if this period is sufficient for her undergoing all this, and her first husband is entitled to marry her if he is satisfied regarding her veracity, and it is not necessary for him to inquire further. (*al-Jawahir*, Ibn 'Abidin, and *Maqsad al-nabih*)

1. The Hanafi and the Maliki schools are explicit regarding the validity of a divorce by an intoxicated person. Two opinions have been narrated from al-Shafi'i and Ahmad, the preponderant among them is that the divorce does take place.
2. Al-Ustadh al-Khafif writes in his book Farq al-zawaj (p.57): "The Imamiyah accept the validity of a divorce by a safih, if effected by the permission of his guardian, as expressly mentioned in Sharh Shara'i' al-Islam." There is no mention of this statement in the said book. Rather, such a statement is not present in any Imami book, and that which is mentioned in Sharh Shara'i' al-Islam is that the safih husband is entitled to divorce without the permission of his guardian. See al-Jawahir, vol.4, "Bab al-hijr".
3. Nifas means the vaginal discharge of blood at the time of birth or thereafter, for a maximum period of: ten days according to the Imamiyah, forty days according to the Hanbalis and the Hanafis, and sixty days according to the Shafi'is and Malikis.
4. The author of Ta'sis al-nazar (1st ed. p.49) has narrated from Imam Malik that he has observed: If a person resolves to divorce his wife, the divorce takes place by mere resolution, even if he does not pronounce it.

5. The use of the expression ‘infallible’ (ma’sum) here belongs to the author of al-Jawahir.
6. In Ta’sis al-nazar of Abu Zayd al-Dabusi al-Hanafi it is stated: “According to Abu Hanifah the presumption ab initio is that non-Muslims living under the protection of an Islamic state will be left to follow their beliefs and precepts. But his two disciples, Abu Yusuf and Muhammad, say that they will not be left to themselves.”

Al-Khul'

Khul' is a form of divorce in which the wife releases herself (from the marriage tie) by paying consideration to the husband. Here we have the following issues.

The Condition of the Wife's Destestation

When they both agree to *khul’* and she pays him the consideration to divorce her, though they are well settled and their conduct towards each other is agreeable, is their mutual agreement to *khul’* valid?

The four schools state: The *khul’* is valid and the rules applicable to it and their effects will follow. But it is *makruh*1 (detestable though lawful).

According to the Imamiyyah, such a *khul’* is not valid and the divorcer will not own the consideration. But the divorce (so pronounced) will be valid and revocable if all the conditions for revocability are present. The proof they offer are traditions of the Imams of the Ahl al-Bayt (A) and verse 229 of *Surat al-Baqarah*:

فَإِنْ خِفْتُمْ أَلاَّ يُقِيمَا حُدُودَ اللَّهِ فَلاَ جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ

…Then if you fear that they cannot maintain the limits set by Allah, there is no blame on the two for what she gives to release herself ..

wherein the verse has made the validity of consideration contingent upon the fear of sinning in case the marital relationship were to continue.

Mutual Agreement to Khul' for a Consideration Greater than Mahr

The schools concur that the consideration should have material value and that its value may be equal to, lesser, or greater than the *mahr*.

Conditions for Consideration Payable in Khul'

According to the four schools, it is also valid to conclude a *khul'* agreement with anyone apart from the wife. Therefore, if a stranger asks the husband to divorce his wife for a sum which he undertakes to pay and the husband divorces her, the divorce is valid even if the wife is unaware of it and on coming to know does not consent. The stranger will have to pay the ransom to the divorcer. (*Rahmat al-ummah* and *Farq al-zawaj* of al-Ustadh al-Khafif)

The Imamiyyah observe: Such a *khul'* is invalid and it is not binding upon the stranger to pay anything. But it is valid for a stranger to act as a guarantor of the consideration by the wife's permission and ask the husband, after the wife's permission, to divorce her for such· a consideration guaranteed by him. Thus, if the husband divorces her on this condition, it is binding on the guarantor to pay him that amount and then claim it from the divorcee.

All that which is validly payable as *mahr* is also valid as consideration in *khul'*, by consensus of all the five schools. It is also not necessary that the amount of consideration be known in detail beforehand if it can be known eventually (such as when she says: "Grant me *khul'* for that which is at home", or "in the locker", or "my share of inheritance from my father", or "the fruits of my garden").

If *khul'* is given in return for that which cannot be owned, such as liquor or swine, the Hanafi, the Maliki and the Hanbali schools observe: If both knew that such ownership is *haram*, the *khul'* is valid and the divorcer is not entitled to anything, making it a *khul'* without consideration. The Shafi'is say: The *khul'* is valid and she is entitled to the *mahr al-mithl* (*al-Mughni*, vol. 7).

Most Imami legists state: The *khul'* shall be void and the divorce will be considered revocable if it is an instance of revocable divorce; otherwise, it will be irrevocable. In all the cases, the divorcer shall not be entitled to anything.

If the husband grants her *khul'* for a consideration that he believes to be *halal* and it later turns out to be *haram* (such as when she says: "Grant me *khul'* for this jar of vinegar," which turns out to be wine) the Imami and the Hanbali schools observe: He shall claim from her a similar quantity of vinegar. The Hanafis state: He shall claim from her the stipulated *mahr*. According to the Shafi'i school, he shall claim from her the *mahr al-mithl*.

If she seeks *khul'* for a consideration she considers to be her property and it turns out to be someone else's, the Hanafi school and most Imami legists observe: If the owner allows it, the *khul'* will be valid and the husband will take it, but if he disallows, the husband is entitled to a similar consideration either in cash or kind. The Shafi'i school states: The husband is entitled to *mahr al-mithl*. This is in accordance with the Shafi'i principle that when a consideration becomes invalid, it becomes void and *mahr al-mithl* becomes payable (*Maqsad al-nabih*). According to the Malikis, the divorce becomes irrevocable, the consideration becomes void, and the divorcer gets nothing even if the owner permits (*al-Fiqh 'ala al-*

madhahib al-'arba'ah, vol. 4).

If the wife seeks *khul'* by undertaking to nurse and maintain his child for a certain period, the *khul'* will be valid and she will be bound to nurse and maintain the child, as per consensus. The Hanafi the Maliki and the Hanbali schools further clarify that it is valid for a pregnant wife to seek *khul'* from her husband in return for maintaining the child in her womb on the same grounds on which it is valid for her to seek *khul'* by undertaking the maintenance of a born child. I have not come across in the Imami and Shafi'i sources accessible to me anyone who has dealt with this issue, although the principles of the Shari'ah do not prohibit it, because the cause, which is the child in the womb, is present, and the wife's pledge is a condition by which she binds herself to the effect that in the event of the child being born alive she will be responsible for its nursing and maintenance for a specific period, and Muslims are bound by the conditions they lay down, provided this does not result in a *halal* becoming *haram* or vice versa. Hence this condition is valid in itself, for it does not suggest anything legally void; therefore its fulfillment is compulsory because it is part of a binding contract. The uncertainty concerning the child being born alive or dead, and its dying after birth before the stipulated period, is overlooked in a *khul'*.

The furthest one can go in asserting its impermissibility and invalidity is by likening a pledge to maintain with a discharge from maintenance. Therefore, when a discharge from maintenance is invalid because it is an annulment of something not binding, similarly a pledge to maintain is not valid because it is not presently *wajib*. But there is a great difference between a pledge and a discharge, because it is necessary that a discharge be from something present and actual, while a pledge need not be so. Apart from this, we have already discussed in the chapter on marriage regarding *khul'* in return for foregoing the right to custody of a child by the father or the mother.

A Related Issue

If a husband grants *khul'* to his wife in return for her maintaining the child, she is entitled to claim the child's maintenance from its father on her not being able to maintain it, and he will be compelled to pay the maintenance. But he can reclaim this maintenance from the mother if she comes to possess the means. If the child dies during the stipulated period, the divorcer is entitled to claim a compensation for the remaining period in accordance with the words of the verse (2:229) فِيمَا افْتَدَتْ بِهِ . It is better for a woman to undertake the nursing and maintenance of the child for a certain period so long as it is alive. Then the divorcer will not have the right to a claim against her if the child dies.

Conditions for a Wife Seeking Khul'

There is consensus among the schools that a wife seeking *khul'* should be a sane adult. They also concur that the *khul'* of a stupid (*safih*) wife is not valid without the permission of her *wali* (guardian). The schools differ regarding the validity of *khul'* where the guardian has granted her the permission to seek *khul'*. The Hanafis observe: If the guardian undertakes to pay the consideration from his own personal

assets, the *khul'* is valid; otherwise, the consideration is void, while the divorce takes place according to the more authentic of two traditions (Abu Zuhrah).

The Imami and the Maliki schools state: With the guardian's permission to her to pay the consideration, the *khul'* is valid by payment from her wealth not his. (*al-Jawahir* and *al-Fiqh 'ala' al-madhahib al-'arba'ah*)

The Shafi'i and the Hanbali schools consider the *khul'* of a stupid wife as invalid irrespective of the guardian's permission. The Shafi'i school allows one exception to the above opinion, wherein the guardian fears the husband's squandering her wealth and grants her permission to seek a *khul'* from him for the protection of her property. The Shafi'is then add: Such a *khul'* is invalid and the divorce is revocable. The Hanbalis say: Neither the *khul'* nor the divorce will take place except when the husband intends a divorce through *khul'* or if the *khul'* takes place in the words of a divorce.

If a woman seeks *khul'* during her last illness, it is considered valid by all schools. But they differ where she pays as consideration more than a third of her wealth or more than the husband's share to be inherited from her on assumption of her death during the *'iddah*. As said above, they inherit from each other in this situation.

The Imami and the Shafi'i schools state: If she seeks *khul'* for *mahr al-mithl*, it is valid and the consideration is payable from her undivided legacy. But if it exceeds *mahr al-mithl*, the excess will be deducted from one-third of her legacy.

The Hanafis observe: Such a *khul'* is valid and the divorcer is entitled to the consideration if it does not exceed either one-third of her wealth or his share of inheritance from her were she to die during the *'iddah*. This means that he will take the least of the three amounts: the consideration of the *khul'*, his share of inheritance from her, or a third of her legacy. (Therefore, if the consideration for the *khul'* is 5, his share of inheritance 4, and a third of her legacy 3, he shall be entitled to 3).

According to the Hanbali school, if she seeks *khul'* in return for a consideration equaling his share of inheritance from her or something lesser, the *khul'* and the consideration are valid. But if she seeks *khul'* for a higher consideration, only the excess will be void (*al-Mughni*, vol. 7).

The Imamiyyah moreover require the wife seeking *khul'* to fulfil all the requirements in a divorcee (such as her purity from menses, non-occurrence of intercourse in the period of purity if her marriage has been consummated, her being neither menopausal nor pregnant, her not being a minor below the age of nine). Similarly, they require the presence of two just witnesses for the *khul'* to be valid. But the other schools validate a *khul'* irrespective of the state of the wife seeking it, exactly like a divorce.

Conditions for a Husband Granting Khul'

Excepting the Hanbali, all the other schools concur that a husband granting *khul'* requires to be a sane adult. The Hanbalis state: *Khul'* granted by a discerning minor (*mumayyiz*) is valid, as is a divorce given by him. As mentioned at the beginning of this chapter on divorce, the Hanafis permit a divorce pronounced in jest, under duress, or in a state of intoxication, and the Shafi'i and the Maliki schools concur with them concerning divorce pronounced in jest. A *khul'* granted in a state of rage is valid if the rage does not eliminate the element of intention.

There is consensus among the schools concerning the validity of a *khul'* granted by a stupid (*safih*) husband. But the consideration will be given to his guardian, and its being given to him is not valid.

Regarding a *khul'* granted by a sick husband on his death bed, it is undoubtedly valid, because when his divorcing without receiving any consideration is valid, a divorce along with consideration would be more so.

The Pronouncement of Khul'

The four schools permit the use of explicit words – such as derivatives of *al-khul'* and al-*faskh* (dissolution) – in the pronouncement, as well as implicit words (such as "*bara'tuki*" [I relinquish you] and "*abantuki*" [I separate myself from you]). The Hanafis have said: The use of the words *al-bay'* (to sell) and *al-shira'* (to purchase) is valid (for instance, when the husband says to the wife: "I sell you to yourself for so much", and the wife replies: "I purchase", or when he says: "Buy your divorce for so much", and she replies: "I accept"). Similarly the Shafi'i school accepts the validity of a *khul'* pronounced with the word *al-bay'*.

The Hanafis allow the conditional *khul'*, the *khul'* by exercise of an option, and the *khul'* in which the pronouncement and the payment of consideration is separated by an extended time interval (such as, where a husband is away from his wife and it reaches him that she has said, "I seek a *khul'* for so much," and he accepts it). Similarly the Malikis also do not consider the time factor an impediment.

Khul' is valid according to the Hanbali school even without an intention if the word used is explicit (such as *al-khul'*, *al-faskh* and *al-mufadat*); but it requires that the pronouncement and payment take place simultaneously and unconditionally.

The Imamiyyah have said: *Khul'* does not take place by using implicit words or even explicit words other than *al-khul'* and *al-talaq*. If desired, they can be used together or singly (thus, she may say: "I pay you this much for divorcing me", and he will reply: "I grant you *khul'* for it, and therefore you are divorced". This form of pronouncement is the safest and most suitable in the view of all Imami legists. It also suffices if he says: "You are divorced in return for it," or "I grant you *khul'* in return for it"). The Imamiyyah require that *khul'* should be unconditional, exactly as in divorce, and consider necessary the absence of

any time gap between its pronouncement and payment of consideration.

1. Al-Ustadh al-Khafif, Farq al-zawaj (1958), p.159.

Al-'Iddah

There is consensus among Muslims about the general necessity of *'iddah*. Its basis is the Qur'an and the Sunnah. As to the Qur'an, we have the following verse:

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنفُسِهِنَّ ثَلاَثَةَ قُرُوءٍ

Women who are divorced shall wait, keeping themselves apart, three (***monthly***) ***courses.*** (***2:228***)

As to the Sunnah, there is the Prophet's tradition commanding Fatimah bint Qays:

اعتدّي في بيت ابن أُم مكتوم

Observe *'iddah* in the house of Ibn Umm Maktum.

They differ, however, regarding: the *'iddah* of a wife separated from her husband due to divorce or annulment of marriage; the *'iddah* of a widow; the *'iddah* of a woman copulated by mistake; the relief of an adulteress (from menses); and the *'iddah* of a wife whose husband has disappeared.

Divorcee's 'Iddah

The five schools concur that a woman divorced before consummation and before the occurrence of valid seclusion has no *'iddah* to observe. The Hanafi, the Maliki and the Hanbali schools state: If the husband secludes with her without consummating the marriage and then divorces her, she will have to observe *'iddah*, exactly as if consummation had occurred.

The Imamiyyah and the Shafi'is observe: Seclusion has no effect. As mentioned earlier in relation with the distinction between revocable and irrevocable divorce, the Imamiyyah do not require a menopausal wife with whom coitus has taken place to observe *'iddah*. The reasons given by the Imamiyyah for this opinion were also mentioned earlier.

The *'iddah* for every kind of separation between husband and wife, except the one by death is the *'iddah* of divorce irrespective of its being due to: *khul'*, *li'an*, annulment due to a defect, dissolution arising from

rida' (breast-feeding), or as a result of difference of religion.[1]

Moreover, the schools concur that the *'iddah* is *wajib* on a wife divorced after consummation and that the *'iddah* will be one of the following kinds:

I. The five schools concur that a pregnant divorcee will observe *'iddah* till childbirth in accordance with the verse:

وَأُوْلاَتُ الأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

And as for pregnant women, their term shall end with delivery. (***65:4***)

If she is pregnant with more than one child, her *'iddah* will not terminate until she gives birth to the last of them, as per consensus. The schools differ concerning a miscarriage if the foetus is not completely formed: the Hanafi, the Shafi'i and the Hanbali schools observe: Her *'iddah* will not terminate by its detachment. The Imami and the Maliki schools state: It will, even if it is a lump of flesh, so far as it is a foetus.

The maximum period of gestation is two years according to the Hanafis, four years according to the Shafi'is and the Hanbalis, and five years according to the Malikis, as mentioned by *al-Fiqh 'ala al-madhahib al-'arba'ah*. In *al-Mughni*, it is narrated from Malik to be four years. Details of this were mentioned in the chapter on marriage.

A pregnant woman cannot menstruate according to the Hanafi and the Hanbali schools. The Imami, the Shafi'i and the Maliki schools allow the possibility of its occurrence.

She will observe an *'iddah* of three lunar months if she is: an adult divorcee who has not yet menstruated or a divorcee who has reached the age of menopause.[2] This age is seventy years according to the Malikis, fifty years according to the Hanbalis, fifty-five years according to the Hanafis, sixty-two years according to the Shafi'is, and according to the Imamiyyah fifty for ordinary women and sixty for those of Qurayshi descent.

Regarding a wife copulated with before her completing nine years, the Hanafis observe: *'Iddah* is *wajib* on her even if she is a child. The Maliki and the Shafi'i schools state: *'Iddah* is not *wajib* on a minor incapable of intercourse, but *wajib* on one who is capable even if she is under nine. The Imami and the Hanbali schools do not consider *'iddah wajib* on a minor under nine years even if she has the capacity for intercourse. (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4, discussion on the *'iddah* of a menopausal divorcee).

A divorcee over nine who has had monthlies and is neither pregnant nor menopausal has an *'iddah* of three *quru'*, as per consensus. The Imami, the Maliki and the Shafi'i schools have interpreted the word

qara' to mean purity from menses. Thus, if she is divorced at the last moment of her present period of purity, it will be counted as a part of *'iddah*, which will be completed after two more of such terms of purity. The Hanafis and the Hanbalis interpret the term to mean menstruation. Thus, it is necessary that there be three monthlies after the divorce, and the monthly during which she is divorced is disregarded. (*Majma' al-anhur*)

If a divorcee undergoing this kind of *'iddah* claims having completed the period, her word will be accepted if the period is sufficient for the completion of *'iddah*. According to the Imamiyyah, the minimum period required for accepting such a claim is twenty-six days and two 'moments', by supposing that she is divorced at the last moment of her first purity, followed by three days of menses (which is the minimum period) followed by a ten-day purity period (which is the minimum period of purity according to the Imamiyyah) followed again by three days of menses, then a second ten-day purity followed by menses. The period of *'iddah* comes to an end with the sole recommencement of menses, and the first moment of the third monthly is to make certain the completion of the third period of purity.

Nifas is similar to menses, in the opinion of the Imamiyyah. Accordingly, it is possible for an *'iddah* to be completed in twenty-three days, if the wife is divorced immediately after childbirth but before the commencement of *nifas* (in which case the *'iddah* is 23 days, considering a moment of *nifas* followed by ten days of the first purity, followed by three days of menses – which is the minimum period for it – followed by a second ten-day purity).

The minimum period for accepting such a claim by a divorcee is thirty-nine days according to the Hanafi school, by supposing his divorcing her at the end of her purity, and supposing again the minimum three-day period of menstruation, followed by a 15-day purity (which is the minimum in the opinion of the Hanafis). Thus, three menses, covering nine days, separated by two periods of purity, making up thirty days, make up a total of thirty-nine.

Maximum Period of 'Iddah

As mentioned earlier, a mature divorcee who has not yet menstruated will observe a three-month *'iddah,* as per consensus. But if she menstruates and then ceases to do so – as a result of her nursing a child or due to some disease – the Hanbali and the Maliki schools observe: She will observe *'iddah* for one complete year. In the later of his two opinions, al-Shafi'i has said: Her '*iddah* will continue until she menstruates or reaches menopause; after this, she will observe an *'iddah* of three months. (*al-Mughni*, vol. 7. "bab al-'idad")

The Hanafi school is of the opinion that if she menstruates once and then ceases perpetually due to disease or breast-feeding a child, her *'iddah* will not terminate before menopause. Accordingly, the period of *'iddah* can extend for more than forty years in the opinion of the Hanafi and the Shafi'i schools. (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4. the discussion on *'iddat al-mutallaqh idha kanat min dhawat al-hayd*).

The Imamiyyah observe: If menstruation ceases due to some accidental cause the divorcee will observe an *'iddah* of three months, similar to a divorcee who has never menstruated. If menses resume after the divorce, she will observe *'iddah* for the shorter of the two terms. i.e. three months or three *quru'*. This means that if three *quru'* are completed before three months, the *'iddah* will be over on their completion, and if three months are completed before three *quru'*, then again the *'iddah* will terminate. If she menstruates even a moment before the completion of three months, she will have to wait for nine months, and it will not benefit her if she is later free from menses for a period of three months. After the completion of nine months, if she gives birth before the completion of a year, her *'iddah* will terminate, and similarly if she menstruates and completes the periods of purity. But if she neither gives birth nor completes the periods of purity before the end of the year, she will observe an additional *'iddah* of three months after completing the nine months. This adds up to a year, which is the maximum period of '*iddah* according to the Imamiyyah.[3]

The Widow's 'Iddah:

There is consensus among the schools that the *'iddah* of a widow who is not pregnant is four months and ten days, irrespective of her being a major or a minor, her being menopausal or otherwise, and regardless of the consummation of her marriage, in accordance with the verse:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجاً يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْراً

And those among you who die and leave behind wives, (***these wives***) ***should keep themselves waiting for four months and ten days.*** (***2:234***)

This is the case when she is sure of not being pregnant. But if she has a doubt she is bound to wait until delivery or attainment of certainty that she is not pregnant. This is the opinion of many legists belonging to different schools.

The four Sunni schools state: The *'iddah* of a pregnant widow will terminate on delivery, even if it occurs a moment after the husband's death. This permits her to remarrying immediately after giving birth, even if the husband has not yet been buried, as per the verse:

وَأُوْلاَتُ الأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

And as for pregnant women, their term shall end with delivery. (***65:4***)

The Imamiyyah state: Her *'iddah* will be whichsoever is longer of the two terms, i.e. delivery or four months and ten days. Thus if four months and ten days pass without her giving birth, her *'iddah* will continue until childbirth; and if she delivers before the completion of four months and ten days, her *'iddah*

will be four months and ten days. The Imamiyyah argue that it is necessary to combine the verse 2:234:

يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ و عشراً

with the verse 65:4:

أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

The former verse has fixed the *'iddah* at four months and ten days, and it includes both a pregnant and a non-pregnant wife. The latter verse has stipulated the *'iddah* of a pregnant wife to last until childbirth, and it includes both a divorcee and a widow. Thus an incompatibility emerges between the apparent import of the two verses regarding a pregnant widow who delivers before the completion of four months and ten days. In accordance with the latter verse her *'iddah* terminates on delivery, and in accordance with the former the *'iddah* will not terminate until four months and ten days have been completed. An incompatibility also appears if she does not deliver after the completion of four months and ten days; according to the former verse her *'iddah* terminates when four months and ten days are over, and in accordance with the latter the *'iddah* will not terminate because she has not yet delivered. The word of the Qur'an is unequivocal, and it is necessary that parts of it harmonize with one another. Now, if we join the two verses like this:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجاً يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْراً ،وَأُوْلاَتُ الأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

the meaning will be that the *'iddah* of a widow who is not pregnant, or is pregnant but delivers within four months and ten days, is four months and ten days; and that of a widow who delivers after four months and ten days is until the time of her delivery.

If someone questions how the Imamiyyah specify the *'iddah* of a pregnant widow to be the longer of the two terms (delivery or four months and ten days) while the verse **وَأُوْلاَتُ الأَحْمَالِ** is explicit that the *'iddah* of a pregnant woman terminates on her giving birth, the Imamiyyah say: How have the four schools said that the *'iddah* of a pregnant widow is two years, if the gestation period so extends, in spite of the verse:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجاً يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْراً

which is explicit that it is four months and ten days? If the questioner replies: The four schools have done so acting in accordance with the verse **أُولات الأحمال**, the Imamiyyah reply: We have acted in accordance with the verse: **والذين يتوفّون** .

Therefore it is not possible to apply both the verses except by stipulating the longer of the two terms as *'iddah*.

The schools excepting the Hanafi, concur that *al-hidad* is *wajib* on the widow, irrespective of her being major or minor, Muslim or non-Muslim. The Hanafis do not consider it *wajib* for a non-Muslim and a minor widow because they are not *mukallaf* (responsible for religious duties).

The meaning of *al-hidad* is that the woman mourning her husband's death refrain from every adornment that makes her attractive. It determination depends on prevailing customs and usage.

The Imamiyyah observe: The *'iddah* of divorce will commence on the recital of the divorce, irrespective of the husband's presence or absence. The *'iddah* of a widow commences on the news of his death reaching her, if he is away. But if the husband is present and she comes to know of his death after some time, her *'iddah* will commence from the time of his death, as per the predominant opinion among Imamiyyah legists.

The schools concur that if the husband of a revocable divorcee dies while she is undergoing *'iddah*, she is bound to start anew with a widow's *'iddah* from the time of his death, irrespective of the divorce taking place during the husband's mortal illness or health, because the marital bond between her and the husband has not yet broken. But if the divorce is irrevocable, it will depend. If he divorces her while healthy, she will complete the *'iddah* of divorce and will not have to observe any *'iddah* due to the husband's death, as per consensus, even if the divorce was without her consent. Similar is the case if he divorces her during his mortal illness on her demand. But what if he divorces her during his mortal illness without her demanding it, and then dies before the termination of her *'iddah*? Shall she start the widow's '*iddah*, like a revocable divorcee, or shall she continue to observe the *'iddah* of divorce?

The Imami, the Maliki and Shafi'i schools state: She shall continue to observe the *'iddah* of divorce without changing over to the *'iddah* of widowhood.
According to the Hanafi and the Hanbali schools, she shall change over to the *'iddah* of widowhood.

In short, a revocable divorcee will start observing the '*iddah* of widowhood if the divorcer dies before the termination of her *'iddah* of divorce, and an irrevocable divorcee will continue to observe the *'iddah* of divorce, as per the concurrence of all the schools except the Hanafi and the Hanbali, who exclude an irrevocable divorcee if the divorce takes place during the divorcer's mortal illness without her consent.

'Iddah for Intercourse by Mistake

According to the Imamiyyah, the *'iddah* of 'intercourse by mistake' is similar to the *'iddah* of a divorcee. Therefore, if the woman is pregnant, she will observe *'iddah* until childbirth; if she has menstruated, her *'iddah* will be three *quru'*, otherwise three months. An 'intercourse by mistake' is, according to the Imamiyyah, one in which the man involved is not liable to penal consequences, irrespective of the

woman being one with whom marriage is unlawful (such a wife's sister or a married woman) or lawful (such as any unmarried woman outside the prohibited degrees of marriage). The view held by the Hanbalis is nearly similar to this view, where they observe that every form of sex relations necessitate the observance of *'iddah*. They do not differ from the Imamiyyah except in some details, as indicated below on the discussion of the *'iddah* of a fornicatress.

The Hanafis state: '*Iddah* is *wajib* both as a result of intercourse by mistake or an invalid marriage. *'Iddah* is not *wajib* if the marriage is void. An example of the 'mistake' is a man's having relations with a sleeping woman thinking her to be his wife. An invalid (*fasid*) marriage is one with a woman with whom marriage is lawful but in which some essential conditions remain unfulfilled (such as where a contract has been recited without the presence of witnesses). A void (*batil*) marriage is a contract with a woman belonging to the prohibited degrees of relatives (e.g. sister or aunt). The *'iddah* for intercourse by mistake according to them is three menstruations if she menstruates, or three months if she is not pregnant. If she is pregnant, the *'iddah* will continue until childbirth.

The Malikis state: She will release herself after three *quru'*; if she does not menstruate, by three months; if pregnant, on childbirth.

Whatever be the case, if a man who has had intercourse by mistake dies, the woman will not observe the *'iddah* of widowhood, because her *'iddah* is due to intercourse, not marriage.

The 'Iddah of a Fornicatress

The Hanafi and the Shafi'i schools, as well as the majority of Imamiyyah legists, remark: *'Iddah* is not required for fornication, because the relations have no sanctity. Thus, marriage and intercourse with a fornicatress is lawful, even if she is pregnant. But the Hanafis permit marriage with a woman pregnant through fornication without allowing intercourse with her before her delivery.

The Malikis state: Fornication is similar to intercourse by mistake. Thus she will release herself in a period equal to the period of *'iddah* except when she is to undergo the punishment, in which case she will release herself after a single menstruation.

The Hanbalis observe: '*Iddah* is as *wajib* on a fornicatress as on a divorcee (*al-Mughni*, vol.6 and *Majma' al-anhur*).

The 'Iddah of a Kitabiyyah

The schools concur that a *kitabiyyah* (a non-Muslim female adherent of a religion having a scripture) wife of a Muslim will be governed by the laws applicable to a Muslim wife concerning the necessity of *'iddah*, and *al-hidad* in an *'iddah* of widowhood. But if she is a wife of a non-Muslim *kitabi*, the Imami,[4] the Shafi'i, the Maliki and the Hanbali schools consider *'iddah wajib* upon her. But the Shafi'i, the Maliki

and the Hanbali schools do not consider *al-hidad wajib* for her while observing the *'iddah* of widowhood.

The Hanafis state: A non-Muslim woman married to a non-Muslim does not have an *'iddah*. (al-Shi'rani, *Mizan*, bab al-'idad wa al-'istibra')

Wife of a Missing Husband

A missing person can be in one of these two situations: First, where his absence is continuous but his whereabouts are known and news about him is received. Here, according to consensus, his wife is not entitled to remarry. The second situation arises where there is no more any news of him and his whereabouts. The imams of the various schools differ regarding the law applicable to his wife.

Abu Hanifah, al-Shafi'i according to his later and preferred opinion, and Ahmad according to one of his two traditions, observe: Marriage is impermissible for the wife of a missing husband as long as he may be considered alive on the basis of a usual life-span. Abu Hanifah has fixed this period at 120 years; al-Shafi'i and Ahmad at 90 years.

Malik states: She shall wait for 4 years and then observe an *'iddah* of four months and ten days, after which she may remarry.

Abu Hanifah and al-Shafi'i in the more reliable of his two opinions state: If the first husband returns after she marries another, the second marriage shall become void and she will become the first's wife.

Malik observes: If the first husband returns before the consummation of the second marriage, she will belong to the first husband, but if he returns after consummation she will remain the second's wife. It will be *wajib* however, for the second husband to pay *mahr* to the first.

According to Ahmad, if the second husband has not consummated the marriage she belongs to the first; but if he has, the choice lies with the first husband: he may either reclaim her from the second husband and give him the *mahr* or allow her to remain with him by taking the *mahr*. (*al-Mughni*, vol. 7 and *Rahmat al-ummah*) 5

The Imamiyyah state: The case of a missing person who is not known to be living or dead will be studied. If he has any assets by which the wife can be maintained, or has a guardian willing to maintain her, or someone volunteering to do it, it is *wajib* for her to patiently wait for him; it is not permissible for her to marry in any circumstance until she learns of his death or his divorcing her. But if the missing husband has neither any property nor someone willing to maintain her, if the wife bears it patiently, well and good; but if she wants to remarry, she will raise the issue before the judge. The judge will order a four-year waiting period for her from the time the issue was brought to him, and then start a search for the husband during that time.

If nothing is known, and the missing husband has a guardian or an attorney in charge of his affairs, the

judge will order him to divorce her. But if the husband has neither a guardian nor an attorney, or has, but has prohibited him from divorcing, and it is not possible to compel him, the judge will himself pronounce the divorce by using the authority granted to him by the *Shari'ah*. After this divorce the wife will observe an *'iddah* of four months and ten days after which she may remarry.

The method of search is that the judge will question about his presence and seek information from those coming from the place where there is a possibility of his being present. The best way of it is to depute a reliable person from among the people of the place where the search is being conducted to supervise the search on his behalf and report to him the result. A search of an ordinary extent is sufficient, and it is neither necessary that his whereabouts be inquired in every place which can possibly be reached, nor that the inquiry be conducted continually. When the search is completed in a period of less than four years in a manner that it becomes certain that further inquiry is fruitless, the search is no longer *wajib*. Yet it is necessary that the wife wait for four years; this is in compliance with an explicit tradition and the demand of precaution in marital ties, as well as the possibility of the husband returning during these four years.

After the completion of this period the divorce will take place and she will observe an *'iddah* of four months and ten days without *hidad*. She is entitled to maintenance during this period, and the spouses inherit from each other as long as she is in *'iddah*. If the husband comes back during the *'iddah*, he may return to her if he wants or let her remain as she is. But if he comes back after the completion of the *'iddah* but before her marrying another, the preferable opinion is that he has no right over her; and more so if he finds her married.[6]

The Rules Governing 'Iddah

We said in the chapter on maintenance that there is consensus regarding a revocable divorcee's right to maintenance during her *'iddah*. We also said that there is a difference of opinion regarding an irrevocable divorcee during her *'iddah*. Here we shall discuss the following issues:

Inheritance between a Divorcer and a Divorcee

There is consensus that when a husband revocably divorces his wife, their right of inheriting from each other does not disappear as long as she is in *'iddah*, irrespective of the divorce being given in mortal illness or in condition of health. The right to mutual inheritance is annulled on the completion of the *'iddah*. There is a consensus again regarding the absence of mutual inheritance if the husband divorces his wife irrevocably in health.

Divorce by a Sick Person

The schools differ when a sick person divorces his wife irrevocably and then dies in the same sickness.

The Hanfis entitle her to inherit as long as she is in *'iddah*, provided the husband is considered attempting to bar her from inheriting from him and the divorce takes place without her consent. In the absence of any of these two conditions she will not be entitled to inherit.

The Hanbalis state: She will inherit from him as long as she does not remarry, even if her *'iddah* terminates.

The Malikis state: She inherits from him even after her remarriage.

Three opinions of al-Shafi'i have been reported, and one of them is that she will not inherit even if he dies while she is observing *'iddah*.

It is notable that apart from the Imamiyyah the other schools speak of a divorce by a sick person only when it is irrevocable. But the Imamiyyah have observed: If he divorces her while sick, she will inherit from him irrespective of the divorce being revocable or irrevocable, on the realization of the following four conditions:

1. That the husband's death occurs before the completion of one year from the date of divorce. Thus, if he dies one year after the divorce, even if by an hour, she will not inherit from him.

2. That she does not remarry before his death. If she does and he dies within a year (of the divorce), she will not inherit.

3. That he does not recover from the illness in which he divorced her. Thus, if he recovers and then dies within a year, she will not be entitled to inherit.

4. That the divorce does not take place on her demand.

'Iddah and Location

The schools concur that a revocable divorcee will observe *'iddah* at the husband's home. Therefore, it is not permissible for him to expel her. Similarly, it is not permissible for her to leave it. The schools differ regarding an irrevocable divorcee. The four schools are of the opinion that she will observe *'iddah* like a revocable divorcee, without there being any difference, in accordance with the verse:

وَلاَ تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلاَ يَخْرُجْنَ إِلاَّ أَنْ يَأْتِينَ بِفَاحِشَةٍ مُبَيِّنَةٍ

Do not expel them from their homes, and neither should they themselves go forth, unless they commit an obvious indecency. (***65:1***)

The Imamiyyah state: An irrevocable divorcee is free to decide about her own affairs and may observe *'iddah* wherever she wants, because the marital bond between her and the husband has snapped;

neither do they inherit from each other, nor is she entitled to maintenance, unless pregnant. Accordingly, the husband is not entitled to confine her. As to the above verse, they say that it relates specifically to revocable divorcees, and there are many traditions from the Imams of the Ahl al-Bayt (A) to this effect.

Marriage with a Divorcee's Sister in 'Iddah

If a person marries a woman, it is *haram* for him to marry her sister. However, if she dies or is divorced and her period of *'iddah* terminates, it becomes *halal* for him to marry her sister. But is it *halal* for him to marry her sister before her *'iddah* comes to an end? The schools concur that it is *haram* to marry the sister of a divorcee in *'iddah* if the divorce is revocable, and differ where the divorce is irrevocable. The Hanafi and Hanbali schools observe: Neither marriage with her sister is permissible nor the marrying of a fifth wife (if he had four, one of whom he has divorced) until the completion of her *'iddah*, irrespective of the divorce being revocable or irrevocable.

The Imami, the Maliki and the Shafi'i schools state: It is permissible to marry the sister of a divorcee and a fifth wife before the completion of *'iddah* if the divorce is irrevocable.

Can a Divorcee in 'Iddah be Redivorced?

The four schools state: In revocable divorce, he is entitled to divorce her again while she is observing *'iddah*, without returning to her, but not if the divorce is irrevocable (*al-Mughni*, vol.7, chapters on *khul'* and *raj'ah*; *al-Fiqh 'als al-madhahib al-'arba'ah*, the discussion on conditions of divorce).

The Imamiyyah observe: Divorce of a divorcee, revocable or irrevocable, does not take place unless he returns to her, because it is meaningless to divorce a divorcee.

1. The Imamiyah state: When the husband, a born Muslim, apostatizes, his wife will observe the 'iddah of widowhood, and if he apostatizes by returning to his former faith, she will observe a divorcee's 'iddah.
2. As mentioned earlier, the Imamiyah do not consider 'iddah wajib for a menopausal woman. But they say: If he divorces her, and she menstruates once before reaching menopause, she will complete her 'iddah after two more months. The four Sunni schools observe: She will start observing 'iddah anew, for three months, and her menstruation will not be included in the 'iddah.
3. The authors of al-Jawahir and al-Masalik have mentioned the prevalent opinion (mashhur) in this regard, acting in accordance with the tradition narrated by Sawdah ibn Kulayb. Both have discussed this issue at length and narrated other views which are not mashhur and which most Imamiyyah legists have deliberately ignored.
4. The following observation has been made in al-Jawahir, (vol.5, bab al-'idad). The 'iddah of a non-Muslim woman is exactly like that of a free Muslim woman in regard to both divorce and death. I have not come across any difference of opinion because of the generality of the proofs and an explicit tradition from al-Sadiq (A) from al-Sarraj, who asked him (A): "What is the 'iddah of a Christian woman whose husband, a Christian, has died." He replied: "Her 'iddah is four months and ten days."
5. This is when she does not raise the issue before a judge. But if she suffers as a result of his absence and files a complaint in court demanding separation, both Ahmad and Malik allow her to be divorced in such a situation. Details follow under the section on divorce by a judge.
6. See al-Jawahir, appendices to al-'Urwah of al-Sayyid Kazim, al-Wasilah of al-Sayyid Abu al-Hasan, and other books on Imamiyyah fiqh. But the greater part of our discussion is based on al-Wasilah, because it is both comprehensive and

lucid.

Return To The Divorcee (Al-Raj'ah)

Al-raj'ah in the terminology of legists is restoration of the divorcee and her marital status. It is valid by consensus and does not require a guardian, or *mahr*, or the divorcee's consent, or any action on her part, in accordance with the verses:

وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ

Their husbands are better entitled to restore them.. (***2:228***)

إذا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ

So when they have reached their prescribed term retain them honourably or separate from them honourably... (***65:2***)

The schools concur that it is necessary that the divorcee being restored be in the *'iddah* of a revocable divorce. Thus there is no *raj'ah* for: an irrevocable divorcee of an unconsummated marriage, because there is no *'iddah* for her; for a triple divorcee, because she requires a *muhallil*; and for the divorcee of *khul'* against a consideration, because the marital bond between the two has been dissolved.

There is consensus among the schools that the return is effected by oral word, and they consider it necessary that the pronouncement be complete and unconditional. Thus if the *raj'ah* is made contingent upon something (such as when he says: "I return to you if you so desire"), it will not be valid.[1] Accordingly, if neither an act nor a satisfactory declaration proving *raj'ah* takes place on his part after the unsatisfactory pronouncement and the period of *'iddah* expires eventually, the divorcee will become a stranger for him.

The schools differ regarding the possibility of *raj'ah* being effected by an act, such as sexual intercourse or its preliminaries, without any pronouncement preceding it. The Shafi'is observe: It is necessary that *raj'ah* be either by spoken word or in writing. Thus it is not valid by intercourse even if he intends *raj'ah* through it, and such intercourse with her during *'iddah* is *haram*, making him liable to *mahr al-mithl* because it is an 'intercourse by mistake.'

The Malikis state: *Raj'ah* is valid by an act if it is with the intention of *raj'ah*. Thus, if he has intercourse without this intention, the divorcee will not return to him. But such intercourse does not make him liable

to any penal consequences nor *mahr*, and if she becomes pregnant consequently, the child will be attributed to him; and if she does not become pregnant she will release herself after a single menstrual course.

The Hanbalis are of the opinion that *raj'ah* is valid by an act only if he has intercourse. Thus, where he has intercourse, she will be considered restored even if he does not intend it. Any act apart from intercourse, such as caressing and kissing, etc., does not result in *raj'ah*

According to the Hanafis, *raj'ah* is effected by intercourse, as well as caressing, kissing, etc., by the divorcer and the divorcee, provided it is with a sexual intent. Also. *raj'ah* by an act of one in sleep, or by an act performed absent-mindedly or under coercion, or in a state of insanity (as when the husband divorces his wife, turns insane, and has intercourse with her before the termination of her '*iddah*) is valid. (*Majma' al-anhur*, bab al-raj'ah)

The Imamiyyah state: *Raj'ah* is effected through intercourse, kissing and caressing, with and without a sexual intent, as well as by any other act which is not permissible except between a married couple. It is not necessary that *raj'ah* be preceded by an oral pronouncement, because the divorcee is a wife as long as she is observing '*iddah*, and all it requires is an intention of *raj'ah*. The author of *al-Jawahir* goes a step further, observing: "Perhaps the unconditional nature of the canonical texts (*al-nass*) and the fatwas requires that *raj'ah* take place by an act even if he does not intend to restore her by it." Sayyid Abu al-Hasan writes m *al-Wasilah*: "It is highly probable that it (the act) be considered *raj'ah* even if the intent is absent."

The Imamiyyah attach no significance to an act of a person in sleep or something done absent-mindedly, or under a false impression (such as his having intercourse under the impression that she is not his divorcee).

Raj'ah and Witnesses

The Imami, the Hanafi and the Maliki schools state: *Raj'ah* does not require witnessing, though it is desirable (*mustahabb*). A tradition narrated from Ahmad conveys the same, and so does the more reliable opinion of al-Shafi'i. Accordingly, it is possible to claim a consensus of all the schools regarding the non-necessity of witnesses in *raj'ah*.

Raj'ah of an Irrevocable Divorcee

The restoration of an irrevocable divorcee during *'iddah* is possible only in the case of a divorcee who has been granted *khul'* in return for a consideration, provided that the marriage has been consummated and the divorce is not one which completes three divorces. The four schools concur that the law applicable here is the one which applies to a stranger and requires a new marriage contract, along with *mahr*, her consent and the permission of the guardian (if necessary), with the exception that she is not

required to complete *the 'iddah.* (*Bidayat al-mujtahid*, vol. 2)

The Imamiyyah observe: A divorcee of *khul'* is entitled to reclaim what she has paid as a consideration as long as she is in *'iddah*, provided the husband is aware of her reclaiming the consideration and has not married her sister or a fourth wife. Thus, when he is aware of it and there is no impediment, he is entitled to recant the divorce. By his recanting she becomes his lawful wife and there is no need for a new contract or *mahr*. If he becomes aware of her reclaiming the consideration but does not recant the divorce, the divorce which was irrevocable becomes revocable and all the rules applicable to it and its consequences will follow, and the divorcer will be compelled to restore what the divorcee had given him for divorcing her.

Disagreement During the 'Iddah

If there is a disagreement between the divorcer and a revocable divorcee, such as when he claims: "I have returned to her," and she denies it, the divorcer will be considered to have made the return if it takes place during the *'iddah*, and similarly if he denies having divorced her at all, because his saying this guarantees his connection with the wife.

The burden of proof rests on the divorcer to prove *raj'ah* if the two differ regarding it after the expiry of the *'iddah*. On his failing to do so, she will take an oath that he has not returned to her, if he claims having returned to her by an act (such as sexual intercourse, etc.). If the divorcer claims *raj'ah* by oral word and not by an act, she will take an oath that she knows nothing about it. According to Abu Hanifah, her word will be accepted without an oath. (Ibn 'Abidin)

If they differ regarding the expiry of *'iddah*, such as when she claims its expiry by menstruation in a period sufficient for creating the possibility of her claim being veracious, her word will be accepted, as per consensus, though the Imami, the Shafi'i and the Hanbali schools also require her to take an oath. The author of *al-Mughni* (vol.7, bab al-raj'ah) has narrated from al-Shafi'i and al-Khiraqi: "In all cases where we said that her word will be accepted, she will have to take an oath if the husband denies her claim."

If she claims the expiry of *'iddah* by the completion of three months, the author of *al-Mughni*, a Hanbali, and the author of *al-Shara'i*, an Imami, observe: The husband's word will be accepted. Both argue that the difference is in reality regarding the time of divorce and not the *'iddah*, and divorce being his act, his word will be accepted.

But the author of *al-Jawahir* observes that the acceptance of the divorcer's word is in accordance with the principle of presumption regarding the continuation of *'iddah* (unless the opposite is proved) and the presumption that any new situation is a latter development; but it contradicts the literal import of the canonical texts and the prevalent opinion among the legists, which place the affair of *'iddah* in the woman's hand. He further adds: The sole possibility of her veracity in a matter concerning *'iddah* is

sufficient for its acceptance. This preference in accepting her word is in accordance with the tradition:

فَوّض الله إلى النساء ثلاثة أشياء: الحيض والطهر والحمل

God has placed three things in the hands of women: menstruation, purity, and pregnancy.

In another tradition, menstruation and *'iddah* are mentioned instead of the above three.

1. The author of al-Jawahir and al-Masalik state that the mashhur opinion among the Imamiyyah legists is that a conditional raj'ah is not valid. The author of al-Masalik (vol.2, bab al-talaq) says: The more mashhur opinion is that raj'ah will not take place, and even those who consider contingent divorce valid hold this opinion by placing raj'ah alongside nikah.

The Acceptance of a Claim without Proof

We have referred above to the acceptance of the woman's word in matters concerning *'iddah*. Here it is appropriate to explain an important rule of the Shari'ah closely related to our present discussion that has often been referred to in the works of the legists, especially those of the Imami and the Hanafi schools. However, these legists have discussed it as a side issue, in the context of other related issues. I have not come across in the sources I know of anyone who has written a separate section on this problem except my brother, the late al-Shaykh 'Abd al-Karim Maghniyyah,1 in his work *Kitab al-qada'*.

It is a known fact that both in the ancient and modern system of law the burden of proof lies on the claimant and the negator is burdened with an oath. The rule under discussion is just the opposite of it. According to it, it is binding to accept the claimant's word where it concerns his intention and cannot be known except from him, and which cannot possibly be witnessed. Examples of it abound in law, both in matters related to rituals (*'ibadat*) and transactions (*mu'amalat*). Some of them are the following:

1. If something is entrusted to a person and he claims having returned it, or claims its destruction without any negligence or misuse on his part, his word will be accepted on oath despite his being the claimant.

2. When a marriage contract is concluded between two minors by an officious third party, if one of them, on maturing, agrees and gives his/her consent to the contract and then dies before the other's majority, a part of his/her estate, equal to the minor's share will be set apart, and on his/her majority and agreement to the contract, he/she would also be required to take an oath that his/her consent is not motivated by greed for the legacy. On his/her taking the oath, he/she will take his/her share of the deceased's estate. This is so because the intention of a person can be known only from him.

3. If a person pronounces the divorce of his wife and then claims that he did not intend it, his claim will

be accepted as long as she is undergoing *'iddah*.

4. The claim of a person to have paid *zakat* or *khums* will be accepted.

5. The claim of a woman concerning her state of menstruation, purity, pregnancy and '*iddah* will be accepted.

6. The claim of indigence and need.

7. The claim by a woman that she is free of all impediments to marriage.

8. The claim of a youth that he has attained puberty (*ihtilam*).

9. The husband's claim that he has had intercourse with his wife, after she claims that he is impotent and the judge grants him a year's time. Details of it were mentioned while discussing impotence (in the chapter on marriage).

10. The claim of a working partner in a *mudarabah* partnership (where one partner contributes capital while the other contributes his skill, labour and know-how) that he has purchased a particular commodity for himself, which the partner contributing capital denies. Here the purchaser's word is accepted because he knows his intention better. There are other such examples.

Al-Shaykh 'Abd al-Karim has mentioned three proofs in his *Kitab al-qada'*:

The first proof is confirmed consensus, both in theory and practice. I have seen legists invoking this principle in all instances of its application, issuing *fatwas* on its basis in different branches of law, considering it as one of the most incontrovertible of principles. All this points towards a definite proof and a consensus regarding its being a general premise referred to in instances of doubt. The legists invoke this principle as a cause while accepting the word of an insolvent person, because if his word is not accepted, it will result in a sentence of perpetual imprisonment due to his inability to prove it...

The second proof is that which has been explicitly reported in some traditions. A certain narrator says. "I asked al-Imam al-Rida (A), '(What is to be done) if a man marries a woman and then a doubt arises in his mind that she has a husband?' The Imam (A) replied, 'He is not required to do anything; don't you see that if he asks her for a proof, she will not be able to find anyone who can bear witness that she has no husband?' "

Thus, the impossibility of producing witnesses is common to all these instances where another person's testimony is not possible due to the act being a private fact between the person and his Lord, which cannot be known except from the person himself. This is in addition to what has been narrated in the tradition regarding the acceptability of women's claim concerning menses, purity, *'iddah* and pregnancy.

The third proof is that in the event of not accepting the claimant's word in matters that cannot be known

except from him, the dispute would of necessity remain unresolved and there would be no means in the Shari'ah for deciding disputes, and this is contradictory to the basic principle that says that there is a solution for everything in the Shari'ah. Therefore, in such circumstances the claimant's claim will be accepted after his taking an oath, because apart from this there is no other way to settle the dispute.

As to the need for an oath, it is in line with the consensus that in every claim in which the claimant's word is given precedence, he is bound to take an oath, because disputes are solved either by evidence or oath, and when it is not possible to produce a proof, the claimant's oath is the only alternative. Here it is not possible to burden the negator with an oath, because among the requirements of an oath is certain knowledge of the fact for which the oath is being taken, and there is no way a negator can have knowledge of the claimant's intention. It is necessary to point out that the need to make such a claimant take an oath arises in the case of a dispute that cannot be settled except by his oath. But if there is no such dispute, his word will be accepted without an oath (e.g. his claim of having paid *zakat* and *khums,* or his claim of their not being *wajib* upon him because he does not fulfil the conditions for their incidence).

Also necessary for accepting the claim of such a claimant is the absence of circumstantial evidence refuting the veracity of his claim. Thus if an act of his proves his intention – such as when he buys or sells and then claims that it was unintentional – it would result in his proving his own falsity because the apparent circumstances establish his intention. As to the acceptance of a claimant that he did not intend divorce, it is limited, as mentioned earlier, to a revocable divorce as long as the divorcee is undergoing *'iddah*, and this claim of his is considered his reclaiming her. Hence his word will not be given credence and his claim will not be heard if the divorce is irrevocable or if he makes the claim after the completion of *'iddah*.

1. He died in 1936 and left behind many compilations, all of them related to law and jurisprudence, and none of which have appeared in print. Among them is a good and useful treatise on 'adalah. The best of these works is a big book on qada', and there exists only a single copy of this work written in his own hand. It is a unique work and no other book like it has been compiled on this issue. My first reliance in writing this section has been on that book, then on al–Jawahir and the appendices of al–'Urwah.

Court Divorce (Talaq Al-Qadi)

Is a judge entitled to divorce someone's wife against his will? Abu Hanifah says: A judge is not entitled to divorce someone's wife, whatever the cause, except when the husband is *majbub*, *khasi* or '*anin*,[1] as mentioned earlier in the section on defects. Thus, failure to provide maintenance, intermittent absence, life imprisonment, etc., do not validate a woman's divorce without the husband's consent, because divorce is the husband's prerogative.

Malik, al-Shafi'i and Ibn Hanbal allow a woman to demand separation before a judge on certain grounds, of which some are the following:

I. Non-provision of maintenance: These three legists concur that when the incapability of a husband to provide essential maintenance is proved, it is valid for his wife to demand separation. But if his inability is not proved and he refuses to provide maintenance, al-Shafi'i observes: The two may not be separated; Malik and Ahmad remark: Separation may take place, because the failure to provide his maintenance is similar to insolvency. The law in Egypt explicitly validates the right to claim separation on the failure to provide maintenance.

2. Causing harm to the wife with word or deed: Abu Zuhrah, in *al-Ahwal al-shakhsiyyah* (page 358). says: It is stated in Egyptian law, Act 25 of 1929, that if a wife pleads harm being caused to her by the husband, so that the like of her cannot continue living with him, the judge will divorce her irrevocably on her proving her claim and after the judge's failing to reform the husband. If the wife fails to prove her claim but repeats her complaint, the judge will appoint two just arbitrators related to the couple to find out the reasons for the dispute and to make an effort to resolve it. On their failing to do so, they will identify the party at fault, and if it is the husband or both of them, they will cause their separation through an irrevocable divorce on the judge's order. This law is based on the opinion of Malik and Ahmad.

The Sunni Shari'ah courts in Lebanon rule separation if a dispute arises between them and two arbitrators specify the necessity of separation.

3. On harm being caused to a wife by the husband's absence, according to Malik and Ahmad, even if he leaves behind what she requires as maintenance for the period of his absence. The minimum period after which a wife can claim separation is six months according to Ahmad, and three years according to Malik, though a period of one year has also been narrated from the latter. The Egyptian law specifies a year. Whatever the case, she will not be divorced unless he refuses both to come to her or to take her to the place of his residence. Moreover, Malik does not differentiate between a husband having an excuse for his absence and one who has none with regard to the application of this rule. Thus both the situations necessitate separation. But the Hanbalis state: Separation is not valid unless his absence is without an excuse. (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah and *Farq al-zawaj* of al-Khafif)

4. On harm being caused to a wife as a result of the husband's imprisonment. Ibn Taymiyyah, a Hanbali, has explicitly mentioned it and it has also been incorporated in Egyptian law that if a person is imprisoned for a period of three years or more, his wife is entitled to demand separation pleading damage after a year of his imprisonment, and the judge will order her divorce.

Most Imamiyyah legists do not empower the judge to affect a divorce, regardless of the circumstances except in the case of the wife of a missing husband, after the fulfillment of the conditions mentioned earlier. This stand of the Imamiyyah is in consonance with the literal meaning of the tradition:

الطلاق بيد مَن أخذ بالساق.

But a group of grand legal authorities (*al-maraji' al-kibar*) have permitted divorce by a judge, with a difference of opinion regarding its conditions and limitations. We cite their observations here.

Al-Sayyid Kazim al-Yazdi, in the appendices to *al-'Urwah* (*bab al-'iddah*), has said: The validity of a wife's divorce by a judge is not remote if it comes to his knowledge that the husband is imprisoned in a place from where he will never return, and similarly where the husband though present is indigent and incapable of providing maintenance, along with the wife's refusal to bear it patiently.

Al-Sayyid Abu al-Hasan al-Isfahani, in the *bab al-zawaj* of *al-Wasilah* (under the caption, *al-qawl fi al-kufr*), writes: If a husband refuses to provide maintenance while possessing the means to· do so and the wife raises the issue before a judge, the judge will order him to provide her maintenance or to divorce her. On his refusing to do either, and it not being possible to maintain her from his wealth or to compel him to divorce, the obvious thing which comes to the mind is that the judge will divorce her, if she so desires. Al-Sayyid Muhsin al-Hakim has given a similar fatwa in *Minhaj al-Salihin* (*bab al-nafaqat*).

The author of *al-Mukhtalif* has narrated from Ibn Junayd that the wife has the option to dissolve marriage on the husband's inability to provide maintenance. The author of *al-Masalik,* while discussing the divorce of a missing person's wife, observes: As per an opinion, the wife is entitled to break off marriage on the basis of non-provision of maintenance due to pennilessness. The author of *Rawdat al-jannat* (vol.4), in the biographical account of Ibn Aqa Mubammad Baqir al-Behbahani, one of the great scholars says: He wrote a treatise (*risalah*) on the rules of marriage concerning indigence, entitled *Muzhir al-mukhtar*. In it, he has upheld the validity of wife's annulling marriage in event of husband's refusing, despite his presence, to maintain or divorce her, even if his refusal is a result of poverty and indigence.

The Imams of the Ahl al-Bayt (A) are on record as having said: "If a husband fails to provide his wife clothes to cover her body (*'awrah*) and food to fill her stomach, the *imam* is entitled to separate them." This, along with other reliable traditions, especially the tradition:

الطلاق لمن أخذ بالساق,

bestows upon the Imami legist the authority to grant divorce on the fulfilment of the requisite conditions and no one may object to him for it as long as his act is in accordance with the principles of Islam and those of the legal schools.

There is no doubt that the scholars who have refrained from granting divorces have done so on account of caution and the fear lest this power should be misused by persons devoid of the necessary learning and commitment to the faith, resulting in divorces being granted without the fulfilment of the conditions of

the Shari'ah. This is the sole reason which has caused me to refrain despite the knowledge that if I do so I would be justified before God. I consider that a sensible solution to this problem and one which would prevent every unfit person from exercising this authority is the appointment by the *maraji'* of reliable representatives in Iraq or Iran bound by certain conditions and limitations within which they may affect a divorce – as was done by al-Sayyid Abu al-Hasan al-Isfahani.

1. For the meaning of these terms, see "Marriage according to Five Schools of Islamic Fiqh", Part 2, under "al-'Uyub (defects)", al-Tawhid, vol. IV, No.4, pp.39-41.

Al-Zihar

Zihar means a husband telling his wife: "You are to me like the back of my mother." The schools concur that if a husband utters these words to his wife, it is not permissible for him to have sex with her unless he atones by freeing a slave. If he is unable to do so, he should fast for two successive months. If even this is not possible, he is required to feed sixty poor persons.

The schools also concur in considering a husband who has intercourse before the atonement a sinner, and the Imamiyyah also require him to make a double atonement.

The Imamiyyah consider *zihar* valid if it takes place before two just male witnesses hearing the husband's pronouncement to the wife in a period of purity in which she has not been copulated with, exactly as in the case of divorce. Similarly, researchers among them also require her marriage to have been consummated, otherwise *zihar* will not take place.

The reason for opening a separate chapter for *zihar* in Islamic law are the opening verses of the *Surat al-Mujadilah*. The exegetes describe that Aws ibn Samit, one of the Prophet's (S) Companions, had a wife with a shapely body. Once he saw her prostrating in prayer. When she had finished, he desired her. She declined. On this he became angry and said: "You are to me like the back of my mother". Later he repented having said so. *Zihar* was a form of divorce amongst the pagan Arabs, and so he said to her: "I presume that you have become *haram* for me. She replied: "Don't say so, but go to the Prophet (S) and ask him". He told her that he felt ashamed to question the Prophet (S) about such a matter. She asked him to permit her to question the Prophet (S), which he did. When she went to the Prophet (S), 'A'ishah was washing his (S) head. She said: "O Apostle of God! My husband Aws married me when I was a young girl with wealth and had a family. Now when he has eaten up my wealth and destroyed my youth, and when my family has scattered and I have become old, he has pronounced *zihar*, repenting subsequently. Is there a way for our coming together, by which you could restore our relationship?"

The Prophet (S) replied, "I see that you have become *haram* for him." She said, "O Prophet of God! By Him Who has given you the Book, my husband did not divorce me. He is the father of my child and the

most beloved of all people to me." The Prophet (S) replied, "I have not been commanded regarding your affair." The woman kept coming back to the Prophet (S) and once when the Prophet (S) turned back she cried out and said: "I complain to God regarding my indigence, my need and my plight! O God, send upon Thy Prophet (S) that which would end my suffering". She then returned to the Prophet and implored his mercy saying, "May I be your ransom, O Prophet of God, look into my affair." 'A'ishah then said to her: "Curtail your speech and your quarrel. Don't you see the face of the Apostle of God?" Whenever the Prophet (S) received revelation a form of trance would overtake him.

The Prophet (S) then turned towards her and said: "Call your husband." When he came, the Prophet (S) recited to him the verses:

قَدْ سَمِعَ اللَّهُ قَوْلَ الَّتِي تُجَادِلُكَ فِي زَوْجِهَا وَتَشْتَكِي إِلَى اللَّهِ وَاللَّهُ يَسْمَعُ تَحَاوُرَكُمَا إِنَّ اللَّهَ سَمِيعٌ بَصِير * الَّذِينَ يُظَاهِرُونَ مِنْكُمْ مِنْ نِسَائِهِمْ مَا هُنَّ أُمَّهَاتِهِمْ إِنْ أُمَّهَاتُهُمْ إِلاَّ اللاَّئِي وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنْكَراً مِنْ الْقَوْلِ وَزُوراً وَإِنَّ اللَّهَ لَعَفُوٌّ غَفُورٌ * وَالَّذِينَ يُظَاهِرُونَ مِنْ نِسَائِهِمْ ثُمَّ يَعُودُونَ لِمَا قَالُوا فَتَحْرِيرُ رَقَبَةٍ مِنْ قَبْلِ أَنْ يَتَمَاسَّا ذَلِكُمْ تُوعَظُونَ بِهِ وَاللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ * فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ مِنْ قَبْلِ أَنْ يَتَمَاسَّا فَمَنْ لَمْ يَسْتَطِعْ فَإِطْعَامُ سِتِّينَ مِسْكِيناً ذَلِكَ لِتُؤْمِنُوا بِاللَّهِ وَرَسُولِهِ وَتِلْكَ حُدُودُ اللَّهِ وَلِلْكَافِرِينَ عَذَابٌ أَلِيم .

***God has heard the speech of her who disputes with you concerning her husband and complains to God. And God hears your colloquy. Surely God is the Hearer, the Seer. Those among you who pronounce zihar to their wives, they* (*the wives*) *are not their mothers. Their mothers are only those who gave them birth; and they indeed utter an ill word and a lie, and indeed God is Pardoning, Forgiving. And those who pronounce zihar to their wives and then recant their words, should free a slave before they touch each other. Unto this you are exhorted; and God is aware of your actions. And he who does not possess the means, should fast for two successive months before they touch each other. And he who is unable to do so, should feed sixty needy ones. This, that you may put trust in God and His Apostle. These are the limits set by God; and for unbelievers is a painful chastisement.* (*58:1–4*)**

After reciting these verses the Prophet (S) said to the husband: "Can you afford to free a slave?" The husband replied: "That will take up all my means." The Prophet (S) then asked him, "Are you capable of fasting for two successive months?" He replied: "By God, if I do not eat three times a day my eyesight becomes dim and I fear that my eyes may go blind." Then the Prophet (S) asked him, "Can you afford to feed sixty needy persons?" He replied: "Only if you aid me, O Apostle of God." The Prophet (S) said, "Surely I will aid you with fifteen *Sa'* (a cubic measure) and pray for blessings upon you." Aws, taking what the Prophet (S) had ordered for him, fed the needy and ate along with them and thus his affair with his wife was settled.

Al-Ila'

Ila' is an oath taken by a husband in God's name to refrain from having sex with his wife. The Qur'anic basis of this concept is verse 226 of the *Surat al-Baqarah*:

لِّلَّذِينَ يُؤْلُونَ مِنْ نِسَائِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ فَإِنْ فَاءُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ * وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ

Those who forswear their wives* (*by pronouncing ila'*) *must wait for four months; then if they change their mind, lo! God is Forgiving, Merciful. And if they decide upon divorce, then God is surely Hearing, Knowing. (***2:226--227***)

The Imamiyyah require that marriage should have been consummated in order for *ila'* to be valid, otherwise *ila'* will not take place.

The schools concur that *ila'* takes place where the husband swears not to have sex with his wife for the rest of her life or for a period exceeding four months.[1] The schools differ if the period is four months; the Hanafis assert that it takes place and the other schools maintain that it doesn't.

There is consensus that if the husband has sex within four months, he must atone (for breaking his oath), but the hindrance to the continuation of marital relations will be removed. The schools differ where four months pass without sex. The Hanafis observe: She will divorce herself irrevocably without raising the issue before the judge, or the husband will divorce her. (*Bidayat al-mujtahid*)

The Maliki, the Shafi'i and the Hanbali schools state: If more than four months pass without his having sex, the wife will raise the issue before the judge so that he may order the husband to resume sexual relations. If the husband declines, the judge will order him to divorce her. If the husband declines again, the judge will pronounce her divorce, and in all situations the divorce will be revocable. (*Farq al-zawaj* of al-Khafif)

The Imamiyyah state: If more than four months pass without sex, and the wife is patient and willing, it is up to her and no one is entitled to object. But if she loses patience, she may raise the issue before the judge, who, on the completion of four months,[2] will compel the husband to resume conjugal relations, or to divorce her. If he refrains from doing either, the judge will press him and imprison him until he agrees to do either of the two things, and the judge is not entitled to pronounce divorce forcibly on behalf of the husband.

All the schools concur that the atonement for an oath is that the person taking the oath should perform one of these alternatives: feed ten needy persons, provide clothing to ten needy persons, free a slave. If he has no means for performing any of these, he should fast for three days.

Furthermore, according to the Imamiyyah, only those oaths which are sworn in the name of the sacred Essence of God will be binding. The oath of a child and a wife is not binding if the father and the husband prohibit it, except when the oath is taken for performing a *wajib* or for refraining from a *haram*. Similarly, an oath will not be binding upon anyone if it is taken to perform an act refraining from which is better than performing it, or is taken to refrain from an act whose performance is better than refraining from it, except, of course, the oath of *ila'*, which is binding despite the fact that it is better to refrain from it.

1. The secret of stipulating this period is that a wife has the right to sex at least once every four months. It has been said that the difference goes back to the interpretation of the verse لِلَّذِينَ يُؤْلُونَ . Here there are those who say that the verse has not stipulated any period for ila', and others who consider it necessary that four months pass before the judge may warn the husband either to restore conjugal ties or to divorce here, and this obviously requires a period of more than four months, even though by a moment.
2. Most Imamiyyah legists state: The judge will allow the husband four months' time from the day the matter was brought to his notice, and not from the day of the oath.

Source URL:
https://www.al-islam.org/five-schools-islamic-law-muhammad-jawad-mughniyya/7-divorce#comment-0