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6. Marriage

The Marriage Contract and its Conditions

All the five schools of fiqh concur that marriage is performed by the recital of a marriage contract which contains an offer made by the bride or her deputy (*na'ib*), such as her guardian or agent (*wakil*), and a corresponding acceptance by the groom or his deputy. A mere agreement without the recital of the contract does not amount to marriage.

The schools also agree that a marriage contract is valid when recited by the bride or her deputy by employing the words, *ankahtu* or *zawwajtu* (both meaning. I gave in marriage) and accepted by the groom or his deputy with the words, '*qabiltu*' (I have accepted) or '*raditu*' (I have agreed).

The schools of *fiqh* differ regarding the validity of the contract when not recited in the past tense or recited by using words other than those derived from the roots *al-zawaj* and *al-nikah*, such as, *al-hibah* and *al-bay'*.

The Hanafi's say: A marriage contract is valid if recited by any word conveying the intention of marriage, even if the words belong to the roots *al-tamlik*, *al-hibah*, *al-bay'*, *al-'ata*, *al-'ibahah* and *al-'ihlal*, provided these words indicate their being used for the purpose of marriage. But the contract will not conclude if the word used are derived from *al-'ijarah* (hiring) and *al-'i'arah* (lending), because these words do not convey the meaning of perpetuity and continuity.

They have based their argument on this narration from the Sahih al-Bukhari and the Sahih Muslim. A woman came to the Prophet (S) and said: "O Apostle of Allah. I have come to offer myself to you." On hearing this, the Prophet (S) lowered his head and did not reply. Then one of those present said: "If you do not want her marry her to me." The Prophet (S) asked him: "Have you anything?" He replied, "By God. I have nothing." Again the Prophet asked him. "Have you any knowledge of the Qur'an?" He replied regarding the extent of his knowledge of the Qur'an. Then the Prophet said. "I make her your property in

exchange for your knowledge of the Qur'an" (using the word *mallaktul*)[1].

The Maliki's and the Hanbali's say: The contract is valid if recited by using the words *al-nikah* and *al-zawai* or their derivatives and is also valid when the word used is *al-hibah*, with the condition that the amount payable as dower (*mahr* or *sidaq*) is also mentioned. Words other than these cannot be used. They have based their argument for the use of the word *al-hibah* on this verse of the Qur'an (see Abu Zuhrah. al-'Ahwal al-shakhsiyyah [1948] p. 36):

وَامْرَأَةً مُؤْمِنَةً إِنْ وَهَبَتْ نَفْسَهَا لِلنَّبِيِّ إِنْ أَرَادَ النَّبِيُّ أَنْ يَسْتَنْكِحَهَا

***...And a believing woman if she gave* (*wahabat, derived from al-hibah*) *herself to the Prophet, if the Prophet desired to marry her...* (*33:50*)**

The Shafi'i scholars consider it wajib that the words used in the contract should be either the derivatives of the root *al-zawaj* or that of *al-nikah*.

The Imamiyyah say: It is *wajib* that the offer be made by using the words *ankahtu* and *zawwajtu* in the past tense. The marriage is not concluded if the word used is not in the past tense and does not belong to the roots *al-zawaj* and *al-nikah*, because these two roots conventionally convey the meaning of marriage and the past tense conveys the meaning of certainty and also because the Qur'an testifies their use:

فَلَمَّا قَضَىٰ زَيْدٌ مِنْهَا وَطَرًا زَوَّجْنَاكَهَا

أُرِيدُ أَنْ أُنْكِحَكَ

(33:37 ,28:27).

Apart from -this, the absence of consensus invalidates the use of words other than these in such a contract. For acceptance, according to them, the word *qabiltu* or *raitu* can be used.

The Imamiyyah, the Shafi'i and the Hanbali schools mention 'immediacy' as a condition for a marriage contract. By immediacy they mean the acceptance of the offer without any delay. The Malikis consider a minor delay inconsequential, such as a delay caused due to the recital of a short sermon or the like of it. The Hanafi school is of the opinion that immediacy is not necessary.

Even if a man addresses a letter to a woman conveying his proposal of marrying her and the woman gathers witnesses and reads out the letter to them and says. "I marry myself to him," the marriage is performed (*al-Fiqh 'ala al-madhahib al-'arbiah*, vol. 4. the discussion regarding conditions of marriage;

al-'Abwal al-shakhsiyyah by Muhammad Muhy al-Din 'Abd al-Hamid).

All the schools concur that the contract can be recited in any language when it is impossible to recite it in Arabic but differ as regards the validity of the contract when so recited despite the possibility of its being recited in Arabic. The Hanafi, the Maliki and the Hanbali schools consider this as valid. The Shafi'i and the Imamiyyah Schools consider it as invalid. (Abu Zuhrah. *al-'Ahwal al-shakhsiyyah*. p. 27)

The Imamiyyah, the Hanbali and the Shafi'i schools consider a contract in writing as invalid. The Hanafi school is of the opinion that a written contract is valid provided the bride and the groom are not present together at the place of contract. The schools concur that a dumb person can convey his intention to marry by signs in case he is incapable of expressing it in writing. If he can express it in writing, it is better for him to combine both, writing and signs. in conveying his intention.

According to the Hanbali and the Hanafi schools, if a clause is included in the contract giving a choice to the bride and the groom to annul the contract. The contract is valid but the condition is void. The Maliki school is of the opinion that, if the marriage is not consummated, this condition as well as the contract are both void. But if the marriage has been consummated, the condition is void, not the contract. The Imamiyyah and the Shafi'i schools have declared both the contract and the condition as void irrespective of whether the marriage has been consummated or not.2 (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4; *al-Tadhkirah* by al-'Allamah al-Hilli, vol. 2; and *al-Masalik* by al-Shahid al-Thani, vol. 2J)

As a matter of course, the offer is made by the bride and is accepted by the groom. The bride says, '*zawwa jtuka*' (I have married myself to you) and the groom accepts by saying, '*qabiltu*' (I have accepted). The question which now arises is, is the contract valid when the acceptance precedes the offer and the groom addresses the guardian of the bride saying, '*zawwijnihu* ' (marry her to me) and the guardian replies, '*zawwa jtukahu* ' (I have married her to you)? The Hanbali school considers it as invalid while the other schools concur on its validity (al-Tadhkirah by al-'Allamah al-Hilli, vol. 2). Al-'Allamah al-Hilli, an Imamiyyah scholar, in his book al-Tadhkirah, says, "A marriage contract cannot be made contingent on a future event because certainty is one of its conditions. If a condition is included prescribing a certain time or a certain quality, such as, when the offer is made with the condition that the marriage will conclude at the beginning of the forthcoming month and this offer is accepted, the contract is not valid. Al-Shafi'i is of the same opinion."

Abu Zuhrah, a Hanafi scholar, writes m his book *al-'Ahwal al-shakhsiyyah*: "A marriage should be concluded on the recital of the contract, because marriage is a contract and the consequences of the contract cannot be delayed after its conclusion. Therefore it is not possible to postpone the consequences of a contract till the fulfillment of a future condition". In the book *A'lam al-muqlin,* Imam Ahmad has been referred to as validating a conditional contract of marriage.

A Subsidiary Issue

Al-Fiqh 'ala al-madhahib al-'arba'ah, quoting Hanafi and Shafi'i scholars, states: If an illiterate person mispronounces the word '*zawwaitu*' and says instead, "*zawwajtu*," the contract is valid. Al-Sayyid Abu al-Hasan al-'Isfahani, an Imamiyyah scholar, in his *Wasilat al-najat,* gives a similar fatwa.

Witnesses

The Shafi'i, the Hanafi and the Hanbali schools concur that the presence of witnesses is a necessary condition for a valid contract. The Hanafi school considers as sufficient the presence of two men or a man and two women. However, if all the witnesses are women, the contract is not valid. This school does not consider '*adalah*' (justice) as a condition for the acceptability of the witnesses. The Shafi'i and the Hanbali schools consider as necessary the presence of two male Muslim witnesses possessing the quality of '*adallah*'.

According to the Malikis, the presence of witnesses is not necessary at the time of the contract but their presence is necessary at the time when marriage is to be consummated. Therefore, if the contract is recited without the presence of witnesses, it is valid. But, when the groom intends to consummate the marriage it is incumbent upon him to have two witnesses. If the marriage is consummated without the witnesses, the contract becomes void compulsorily, and this is considered as amounting to an irrevocable divorce. (*Bidayat al-mujtahid* by Ibn Rushd: *Maqsad al-nabih* by Ibn Jamii'ah al-Shafi'i)

The Imamiyyah do not consider the presence of witnesses as *wajib* but only *mustababb*.[3]

1. The Imamiyyah have narrated this tradition with different words. According to their version: A woman came to the Prophet (S) and said, "'Get me married." The Prophet then announced, "Who is ready to marry her?" One of those present stood up and said, "I". The Prophet (S) then asked him, "What can you give her?" He replied, "I have nothing." The Prophet said, "No." The woman repeated her request and the Prophet (S) repeated the announcement but none stood up except the same man. The woman again repeated her request and the Prophet (S) announced again. Then the Prophet (S) asked him, "Do you have any good knowledge of the Qur'an?" He replied, "Yes. I do." The Prophet (S) then said, "I marry her to you (zawwajtukaha) in exchange for your teaching her what you know well of the Qur"an." Therefore, the word used was al-zawaj, not al-milk.
2. This is the view of most of the Imamiyyah scholars. But some of them, such as Ibn Idris among the early legists, and al-Sayyid Abu al-Hasan al-'Isfahani among the recent ones are of the opinion that the contract is valid and the condition is void. Accordingly, the Imamiyyah scholars in both their views are on the whole like the scholars of the other schools.
3. Dr. Muhammad Yusuf Musa, in his book al-Ahwal al-shakhsiyyah (1958) page 74, states: "The Shi'ah consider the presence of witnesses as necessary for marriage." He considers the Shi'ah and the Hanafi, the Shafi'i and the Hanbali schools to hold a common view. But there is no source of reference for what he states.

Capacity to Enter into a Marriage Contract

All the schools agree that sanity and adulthood (*bulugh*) are necessary qualities for both the parties to the contract, unless the contract is concluded by the guardian of any of them. The contract with the guardian shall be discussed later. The schools also agree that there should be no obstacle to marriage between the man and the woman such as consanguinity or any other disabling factor of a permanent or temporary character. We will discuss the legal obstacles to marriage in a separate chapter.

The schools also consider the ascertainment of both the parties to the contract as necessary. Therefore, when it is said. "I marry you to one of these two daughters." or "I marry myself to one of these two men." the contract will not be valid.

All the school except the Hanafi consider free consent as a *sine qua non* without which the contract does not conclude. The Hanafis are of the opinion that the contract is concluded even if coercion is present (*al-Fiqh 'ala al-madhahib al-'arbdah*). Al-Shaykh Murtada, al-'Ansari, an Imamiyyah scholar, after mentioning free consent as a condition, writes: "That which is commonly held by the Imamiyyah scholars of the latter period is that, when a person coerced consent freely later on, the contract is valid. In the book *al-Hada'iq wa al-riyad* their consensus has been reported on this issue." Al-Sayyid Abu al-Ha'san al-'Isfahani, an Imamiyyah legist, in his *al-Wasilah* in the chapter on marriage, writes: "Free consent of both the parties is a necessary condition for a valid contract. If both of them or any of them is coerced, the contract is invalid. But if the party coerced consents later, the reason in favor of the validity of the contract seems strong." According to the above-mentioned criterion, if the man or the woman pleads coercion and then willingly live together like a married couple and show the happiness of a newly married bride and groom, or if the woman takes the *mahr* or does any other act proving consent, the claim of coercion will be rejected and no other evidence will be accepted contradicting the consent.

According to the four school of fiqh, a contract recited in jest concludes the marriage. Therefore, when a woman says jokingly. “I marry myself to you” and the man accepts it in a similar fashion, the contract is concluded. Divorce and the freeing of a slave also conclude if recited in jest according to the tradition:

ثلاث جدهن جد وهزلهن جد: الزواج والطلاق والعتق

The three whose intentional and jestful* (*recital*) *is considered intentional are: marriage, divorce and freeing of a slave.

The Imamiyyah school considers all contracts involving jest as null and void due to the absence of the will to contract and as regards the above-mentioned tradition, they consider the narrators as unreliable.

The Hanafi and the Hanbali schools regard the marriage of an idiot as valid irrespective of whether the

guardian has given permission or not. The permission of the guardian is necessary in the view of the Imamiyyah and the Shafi'i schools.

According to the Imamiyyah and the Hanafi schools, the consent given when the two conditions of sanity and adulthood (*bulugh*) are present concludes the marriage as per the authority of the tradition.

إقرار العقلاء على أنفسهم جائز

The consent of sane persons even if detrimental to their interest, is valid.

Al–Shafi'i, in the latter of his two views, considers the marriage as established when the bride being a sane adult acknowledges the marriage and the husband confirms her acknowledgement, because marriage is the right of both the parties. Malik recognizes a difference here. According to him, when the bride and the groom are in a foreign land their acknowledgement establishes the marriage; but when they are in their hometown they will have to furnish a proof of their marriage because it i convenient for them to do so. This was the former view of al–Shafi'i. (*al–Tadhkirah* by al– Allamah al–Hilli)

Bulugh

There is consensus among the schools that menses and pregnancy are the proofs of female adulthood. Pregnancy is a proof because a child comes into being as a result of the uniting of the sperm with the ovum: and menses, because, like the production of sperm in male, is a mark of female puberty. All schools, except the Hanafi, consider the growth of pubic hair as a sign of adulthood, but the Hanafis consider them no different from other hair of the body. According to the Shafi'i and the Hanbali schools, the adulthood of both the sexes is established on their completing fifteen years. According to the Malikis, it seventeen years for both the sexes. The Hanafis consider eighteen years for a boy and seventeen years for a girl a the age of maturity (Ibn Qudamah, *al–Mughni*, *Bab al–Hijr*. vol. 4). The Imamiyyah have mentioned fifteen years for a boy and nine years for a girl as the age of maturity on the authority of the following tradition narrated by Ibn Sinan:

إذا بلغت الجارية تسع سنين دفع إليها مالها وجاز أمرها وأقيمت الحدود التامة لها وعليها.

When a girl reaches the age of nine her property will he returned to her and it will be rightful for her to handle her own affairs, and the hudud are applied against her and in her favor.

Experience also proves that a girl can conceive at the age of nine, and the ability to conceive is equivalent to conception in all aspects.

Note: That which the Hanafis have said regarding the age of maturity is the maximum age limit for

maturity. The minimum age limit according to them is twelve years and nine years for a boy and a girl respectively: because at this age it is possible for a boy to ejaculate and to impregnate, and for a girl to have orgasm. to menstruate, and to conceive (Ibn 'Abidin [1326 H.] *Bab al-hijr*, vol. 5, p. 100).

Stipulation of Conditions by the Wife

The Hanbali school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city, or will not take her along on journey or that he will not take yet another wife, the condition and the contract are both valid and it is compulsory that they be fulfilled, and in the event of their being violated, she can dissolve the marriage. The Hanafi, the Shafi'i and the Maliki schools regard the conditions as void and the contract as valid, and the Hanafi and the Shafi'i schools consider it compulsory in such a situation that the wife be given a suitable *mahr*, not the *mahr* mentioned (Ibn Qudamah. *al-Mughni*. vol. 6. chapter on marriage).

According to the Hanafi school, when the man puts the condition that the woman would have the right to divorce, such as when he says. "I marry you on the condition that you can divorce yourself," the condition is invalid. But if the woman makes such a condition and says to the man, "I marry myself to you on the condition that I shall have the right to divorce," and the man says in reply. "I accept." the contract and the condition are both valid and the woman can divorce herself whenever she desires.

According to the Imamiyyah school, if at the time of contract, the woman stipulates such conditions as that the man shall not take another wife, or shall not divorce her. or shall not prohibit her from leaving home whenever she wants and wherever she wants to go, or that the right to divorce will be hers, or that he shall not inherit her, or any other such condition which is against the spirit of the contract, the condition will be considered void and the contract will be valid.[1] But if she lays down such conditions as that the man will not make her leave her city, or will keep her in a specific home, or will not take her along on journeys, the contract and the condition are both valid. But if any of these conditions are not met, she does not have the right to dissolve the marriage.

However, if in such a situation the woman refuses to accompany him, she still enjoys all the rights of a wife, such as being provided with maintenance and the like of it.[2] When the wife pleads of having included a valid condition in the contract and the husband repudiates the inclusion of such a condition, the wife will have to furnish evidence, because she has pleaded this extra condition. On the wife being unable to furnish the evidence, the husband will take an oath regarding the non-inclusion of the condition because he is the one who negates it.

1. According to the Imamiyyah, an invalid condition in a non-marriage contract results in the contract becoming void. But in a contract of marriage such a condition does not cause the contract nor the mahr to be void unless a choice is given

regarding the voiding of the contract or a condition is laid that none of the consequences of the contract will follow, which is against the spirit of the contract. They have argued on the basis of reliable traditions that there is a difference between a marriage contract and other forms of contract.

Some of the legists have said: "The secret of this difference is that marriage is not an exchange in the true sense of the word as in the case of other forms of contract." The Imamiyyah scholars have extensive discussions on these conditions the like of which are not found in books of other schools. Those who want further information regarding these conditions may refer to al-Makasib of Shaykh Murtada al-'Ansari and Taqrirat al-Na'ini of al-Khwansar i, vol. 2, and the third part of Fiqh al- Imam al-Sadiq by this author.

2. In Farq al-zawaj of Ustadh 'Ali al-Khafif. it is stated that the Imamiyyah consider these kind of conditions as void. This is a mistake which has been caused as a result of confusing these kind of conditions with those which negate the spirit of the contract.

Claim of Marriage

If a man claims having married a woman and she repudiates the claim, or the woman claims so and the man repudiates it, the burden of proof will lie on the claimant and the party negating the claim will take an oath.

The schools concur regarding an acceptable proof that it requires the testimony of two just men. The evidence of women alone or along with a man is not acceptable except to the Hanafi school which considers the evidence of a just man and two just women as acceptable. Therefore, the '*adalah* of witnesses is necessary according to the Hanafi school, at the time of establishing the fact of manage when any of the parties negates or contends it, but not a condition at the time of conclusion of the marriage contract.

The Hanafi and the Imamiyyah schools consider the testimony of a witness as sufficient without his mentioning any conditions and details of the marriage. But the Hanbali school considers it necessary that the witness describe the conditions of marriage because there is a divergence of opinion regarding the conditions and it is possible for a witness to believe in the validity of a marriage whereas it may have been actually invalid.

The Imamiyyah, the Hanafi, the Shafi'i and the Hanbali schools regard a marriage as proved even if a few people have knowledge of it and it is not necessary that it be commonly known.

Does the Living Together of a Couple Prove Marriage?

From time to time claims of marriage are brought before Shari'ah courts and often the claimant brings witnesses to prove their living together and having a common residence in the manner of a husband and wife. The question now is, does this prove marriage or not?

On the face of it, it can be said that marriage is prima facie considered as established unless the contrary is proved. This means that the living together of a man and woman apparently establishes marriage, and this conclusion compels the acceptance of the claimant's contention unless he is proved to lie. Apart from this, to decide the contention of the claimant claiming marriage as a lie is very difficult on the basis of the Imamiyyah view which considers the presence of witnesses as not necessary at the time of marriage. But this prima facie conclusion in favor of the claimant is contrary to the general rule according to which every event–marriage or something else–whose occurrence is doubtful is assumed not to have occurred unless there is evidence to the contrary.

Accordingly, the stand of the respondent, repudiating the claim of marriage, becomes congruent with the general rule. Therefore, the proof of marriage will be demanded from the claimant, and in the event of his failure to do so the respondent will take an oath and the claim will be dismissed.

This way of settling a claim is the right approach which corresponds with the rules of the Shari'ah, because the Imamiyyah scholars accept the rule that, when there is a conflict between a prima facie conclusion and a general rule, the rule will be given precedence and the prima facie conclusion will not be given credence without additional proof in its favor and there is no such proof in this case.

When it is known that a marriage contract has been recited, but there is a doubt regarding its having been carried out correctly, the contract will be undoubtedly considered valid. But when there is a doubt as regards the occurrence of the contract itself, it is not possible to substantiate it on the strength of the social intercourse or co–residence of the two.

A question can be raised here: The principle that the act of a Muslim is to be considered as valid on the face of it, compels the acceptance of the claim of the person claiming marriage by giving precedence to *halal* over *haram* and to good over evil. We are also commanded a regards every act in which there is a possibility of it being valid or invalid, that we rule out the possibility of its invalidity and give credit to the possibility of its validity.

The reply is that, the consideration of the act of the claimant as valid in the present problem does not prove marriage, and that which is proved is that the two have not committed any *haram* by social intercourse and sharing a common residence. The absence of any ground to consider their association as illegitimate may be due to marriage or due to a misconception (*shubhah*) on their part about the legitimacy of marriage, such as when both of them imagine it as *halal* and later on discover it to be *haram* (details of this will come later while discussing doubtful *nikah*). It is obvious that a general premise does not prove a particular one. For Instance, when you say, "There is an animal in the house," it does not prove the presence therein of a horse or a deer. In the same manner, here, when a man has social intercourse with a woman, not knowing the cause we may say, "She is his wife," but we should say that, "They have not committed *haram*," for it is possible that their associating with one another may be the result of marriage or the result of a misconception of marriage.

We shall give another example to further clarify the point. If you hear a passer-by say something without knowing whether that utterance is a curse or a greeting, it is not permissible for you to consider it a curse. Also, in such a situation it is not binding on you to return the greeting, because you are not sure of the greeting. But if you are certain that he greeted you and doubt whether it was meant as a greeting or intended to ridicule, it is binding upon you to return the greeting, considering it to be a genuine greeting and by giving precedence to good over evil. Our problem is also like this. Even if living together be considered valid, it does not prove the presence of a contract. But if we are sure about the occurrence of a contract and doubt only its validity, we will consider the contract as valid without any hesitation.

In any case, the social intercourse by itself does not prove anything, but it supplements and strengthens any other proof available. The decision in such a situation depends upon the view, satisfaction, and assessment of the judge. on the condition that he does not consider their living together as an independent proof in itself for basing his judgement.[1]

The above-mentioned conclusion was as regards the establishment of marriage. But as regards children, the rule of considering the act of a Muslim as valid compels the regarding of the children as legitimate at all times, because the living together of the parents is either the result of marriage or the result of a false impression of marriage, and the children born due to such false impression are equal in status to children born of marriage for all legal purposes. Therefore, if a woman has claimed a man as her lawful husband and also of having a child by him, while the man refutes marriage but acknowledges the child is his, his claim will be accepted because it is possible that the child was born due to a false impression of marriage.

To conclude, it needs to be mentioned that this problem is based on the supposition that witnesses are not required for concluding a marriage contract, as is the Imamiyyah view. But according to the other schools, it is for the party claiming marriage that it mentions the name of the witnesses, and if the party pleads its inability to present the witnesses due to their death or absence, it is possible that the above-mentioned criterion be applied.

It is also necessary to point out that the living together does not prove marriage when there is contention and disagreement to that effect; but when there is no such disagreement; we settle the claim of inheritance and it's like by giving credit to the possibility of marriage, and on this issue there is a consensus among the schools.

1. Apart from this, the statements of the legists in al-Bulghah, al-Shara'i', and al-Jawahir (chapter on marriage) regarding the question at hand indicate that living together prima facie shows the presence of marriage, and this is not farfetched.

The Prohibited Degrees of Female Relations (al-Muharramat)

One of the conditions of a valid marriage contract is that the woman be free from all legal obstacles, which means that she be competent to contract marriage. The restrictions are of two kinds: the prohibition due to consanguinity and those due to other causal factors. The first include seven categories which permanently prohibit marriage. Of the second, ten categories prohibit marriage permanently and others only temporarily.

Consanguinity (al-nasab)

The schools concur that the female relatives with whom marriage is prohibited are of seven kinds:

1. Mother, which includes paternal and maternal grandmothers.

2. Daughters, which includes granddaughters how low so ever.

3. Sisters, both full and half.

4. Paternal aunts, which includes fathers' and grandfathers' paternal aunts.

5. Maternal aunts, which includes fathers' and grandfathers' maternal aunts.

6. Brother's daughters how low so ever.

7. Sister's daughters how low so ever.

The above prohibition has, its origin in the following verse of the Qur'an:

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ

Forbidden to you are your mothers and your daughters und your s1siers and your paternal aunts and your maternal aunts and brother's daughters and sister's daughters... (***4:23***)

These were the prohibited degrees of relations as a result of consanguinity. Those which are the result of causal factors (*al-sabab*) are as follows:

Al- Musaharah (Affinity)

Affinity is the relationship between a man and a woman which forbids marriage between them; it includes the following:

1. The schools agree that the father's wife is forbidden for the son and the grandson how low so ever by the sole conclusion of the marriage contract irrespective of the establishment of sexual contact. The origin of this concurrence is this verse of the Qur'an:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ

And marry not women whom your fathers married... (***4:22***)

2. The schools concur that the son's wife is forbidden for the father and grandfather, how high so ever, merely by the conclusion of the contract. This view is based on the following verse of the Qur'an:

وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ

...And the wives of your sons who are of your own loins... (***4:23***)

3. The schools concur that the wife's mother and her grandmother how high so ever, is forbidden on the mere conclusion of the contract, though sexual contact may not have been established as per this verse of the Qur'an:

وَأُمَّهَاتُ نِسَائِكُمْ

... And the mothers of your wives... (***4:23***)

4. The schools agree that marriage with the wife's daughter is not forbidden merely on the conclusion of the contract, and they consider it permissible for a man, if he divorces that wife before sexual intercourse, or before looking at her or touching her with a sexual intent, to marry her daughter on the authority of this verse of the Qur'an:

وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ

... And your step-daughters who are in your guardianship, (***born***) ***of your wives to whom you have gone in...*** (***4:23***)

The condition فِي حُجُورِكُمْ explains the general situation. The schools concur that the daughter is forbidden when a person marries her mother and establishes sexual contact with her. But the schools differ as regards the daughter being forbidden when the marriage has been concluded and sexual contact has not been established but when he has looked at her or touched her with a sexual intent.

The Imamiyyah. the Shafii and the Hanbali schools are of the view that the daughter would be forbidden only on sexual intercourse and looking and touching with or without sexual intent does not have any effect. The Hanafi and the Maliki school consider both, looking and touching with sexual intent, as sufficient causes for prohibition and are like sexual intercourse in all aspects. (Bidayat al-mujtahid vol. 2; *al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4, the chapter on marriage)

There is a consensus among the schools that the establishment of sexual contact due to a mistake or a false impression is like marriage itself in establishing affinity and creating its related prohibition. The meaning of 'sexual contact due to mistake' is occurrence of sexual contact between a man and a woman under the false impression that they are lawfully wedded followed by the discovery that they are strangers and that the contact was a result of a mistake of fact. As a consequence of this latter knowledge, the two will separate immediately and the woman will observe an obligatory period of *'iddah*[1] and a reasonable *mahr* will become *wajib* on the man. Affinity would be established as a result, but the two will not inherit each other and the woman will not have the privilege of alimony (*nafaqah*).

II. Consanguinity Between Wives

The schools concur that combining two sisters in marriage at the same time is forbidden according to this verse of the Qur'an:

وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ

...And that you should have two sisters together... (***4:23***)

The four schools agree that a man cannot combine in marriage neither a woman and her paternal aunt nor a woman and her maternal aunt because they have a general rule that it is not permissible to marry two women of whom if one were to be a male it would be haram for him to marry the other. Therefore, if we suppose the paternal aunt a male, she would become a paternal uncle and it is not permissible for an uncle to marry his niece and if we suppose the niece a male, she would become a nephew and it is not permissible for a nephew to marry his aunt. The same rule applies to a maternal aunt and her sister's daughter.

The Khawarij considered as permissible combining as wives the aunt and her niece, irrespective of whether the aunt has granted permission for marrying her niece or not.

Among the Imamiyyah legists there is a divergence of opinion. Some of them concur with the view of the other four schools, but most of them are of the opinion that if the niece is the first to be married. It is permissible for him to marry her paternal or maternal aunt even if the niece does not grant permission for this marriage. But if the paternal or the maternal aunt has been first married, the marriage with her niece is permissible only by her permission. The proponents of the above view have based their argument on the following verse of the Qur'an:

وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذٰلِكُمْ

...And lawful to you are (***all women***) ***besides those...*** (***4:24***)

In this verse, after mentioning those women with whom marriage is forbidden, the rest have been permitted, and this permission extends to combining the aunt and the niece together in marriage, and had it been *Haram* the Qur'an would have explicitly mentioned it as it expressly mentions the prohibition regarding combining two sisters in marriage. As regards the general rule which supposes one of the two women to be a male, it is *istihsan*, which is considered unreliable by the Imamiyyah. Apart from this, Abu Hanifah has considered it permissible for a man to marry a woman and her father's wife despite of the fact that if any of these two were supposed a male, his marriage with the other would not be permissible. Obviously, it is not permissible for a man to marry his daughter or step-daughter, in the same way as it is not permissible for him to marry his mother or his father's wife. (*Kitab ikhtilaf Abi Hanifah*: Ibn Abi Layla, the chapter on marriage)

III Fornication (al-Zina)

It comprises the following issues:

1. The Shafi'i and the Maliki schools consider a man's marrying his daughter born of fornication as permissible and so also marrying his sister, his son's daughter, his daughter's daughter, his brother's daughter, and his sister's daughter, because she is legally a stranger to him and because the law of inheritance does not apply between them, nor the law of maintenance. (al-Mughni. vol. 6, the chapter on marriage)

The Hanafi, the Imamiyah and the Hanbali schools regard marriage with a daughter by fornication as haram (prohibited) as one with a lawful daughter, because. they say, the daughter by fornication is born of his seed and is therefore considered his daughter in the literal sense and by the society in general. Her legal disability to inherit does not negate the fact of her being his daughter: it only negates such legal effects as inheritance and maintenance.

2. The Imamiyyah have observed: He who commits fornication with a woman or establishes sexual contact with her by mistake, while that woman is either married or is observing the *'iddah* period as a

result of a revocable divorce, she would become *haram* for him permanently, i.e. it is forbidden for him to marry her even if she separates from her husband as a result of an irrevocable divorce or death. But if he establishes sexual contact with a woman while she is unmarried or is undergoing the *'iddah* period as a result of the death of her husband or as a result of an irrevocable divorce, she would not be forbidden for him.

According to the four schools, fornication or adultery is no obstacle to marriage between the two, regardless of whether the woman is married or unmarried.

3. According to the Hanafi and the Hanbali schools fornication and adultery establish affinity. Therefore, he who establishes illegitimate sexual contact with a woman, the mother and daughter of that woman will become *haram* for him, and that woman will be *haram* for his father and his son. These schools do not make any difference between the establishments of such illegitimate contact before marriage or after it. Therefore, when a person establishes sexual contact with his wife's mother or a son with his father's wife, the wife will become *haram* for her lawful husband permanently; rather, according to the Hanafi book *Multaqa al-'anhur* (volume 1, the chapter on marriage): "If a person intends to wake up his wife for intercourse and his hand reaches her daughter and he caresses her with sexual emotion while she, thinking it to be her mother, entertains it, her mother will become haram for him permanently. The same will apply to a woman who intends to wake up her husband and (mistakenly) caresses his son from another wife."

The Shafi'i school is of the opinion that fornication does not establish affinity in the light of this tradition:

الحرام لا يحرم الحلال

A *haram* does not illegitimate a *halal*.

The Malikis have two views on this question.

One of them favors the Shafi'i view, the other, the Hanafi view. The Imamiyyah consider fornication as capable of creating the prohibition pertaining to affinity. Thus, he who fornicates with a woman, makes her haram for his father and his son. But as regards adultery after marriage, they observe that it does not illegitimate the lawful conjugal ties. Thus he who commits adultery with his wife's mother or his wife's daughter, his marriage with her stays as it is. The same applies to a father who commits adultery with his son's wife or a son with his father's wife; in both the cases the wife would not be considered *haram* for her lawful husband.

IV. Number of Wives

The legal schools concur that it is permissible for a man to have four wives at a time2, but not a fifth as

per the verse:

فَانْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ

… Then marry such women as seem good to you, two and three and four… (***4:3***)

When any one of those wives is released from the bonds of marriage, either due to her death or divorce, it becomes permissible for him to marry another. The Imamiyyah and the Shafi'i schools say: When a man gives one of his wives a revocable divorce, it is not permissible for him to marry another till the expiry of the *'iddah* period. But if it be an irrevocable divorce it is permissible for him to do so. Also, it is permissible that he marry his irrevocably divorced wife's sister during his wife's *'iddah* because an irrevocable divorce prohibits marriage and breaks the marital bond.

According to the other schools, it is not permissible for him to marry a fifth wife or the sister of his divorced wife until the expiry of the *'iddah* period irrespective of whether the divorce is a revocable or an irrevocable one.

V. Li'an

When a man accuses his wife of adultery or denies the paternity of her child, and she denies the charge and he has no proof to offer, it is permissible for him to pronounce the *lian* against her. The method of taking the oath of condemnation is that, first the man swears by Allah four times that he is indeed speaking the truth in accusing her, and the fifth time that the curse of Allah fall on him should he be lying. Then the woman will swear four times by Allah that he is lying, and the fifth time that the wrath of Allah be on her if he be speaking the truth.

If the man ref uses to pronounce the *lian*, he is punished with the *hadd* (for *qadhf*); but if he takes the oath of *li'an* and the woman refuses to pronounce the *lian*, she is liable to the badd for adultery. If both of them pronounce *lian* against each other, none is liable to *hadd* and the two will separate and the child whose paternity he had denied would not be given to him.

The source of the above discussion is these verses of the *Surat al–Nur*:

وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ ۙ إِنَّهُ لَمِنَ الصَّادِقِينَ

وَالْخَامِسَةُ أَنَّ لَعْنَتَ اللَّهِ عَلَيْهِ إِنْ كَانَ مِنَ الْكَاذِبِينَ

وَيَدْرَأُ عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعَ شَهَادَاتٍ بِاللَّهِ ۙ إِنَّهُ لَمِنَ الْكَاذِبِينَ

وَالْخَامِسَةَ أَنَّ غَضَبَ اللَّهِ عَلَيْهَا إِنْ كَانَ مِنَ الصَّادِقِينَ

If a man accuses his wife but has no witnesses except himself, he shall swear four times by Allah that his charge is true, calling down upon himself the curse of Allah if he is lying. But if his wife swears four times by Allah that his charge is false and calls down His curse upon herself if it be true, she shall receive no punishment. (***24:6–9***)

There is consensus among the school that it is *wajib* for the two to separate after the *lian*. But they differ as to whether such a wife is permanently *haram* for her husband so as to make it impermissible for him to remarry her later, even if he denies his own charge, or if she is *haram* only temporarily so as to permit him to marry her after withdrawing his own accusation.

The Shafi'i, the Imamiyyah, the Hanbali and the Mailiki schools forbid her permanently for him even if he denies his own accusation. The Hanafi school considers separation due to the *lian* like divorce; it would not make her Haram permanently because the prohibition arises from the *lian* and is removed on the withdrawal of his accusation. (*al–Mughni*, vol. 7; al–Sha'rani, *al–Mizan*, the chapter on *mula'anah*)

VI. Number of Divorces

The schools concur that if a man divorces his wife for the third time having resumed conjugal relations twice earlier, she will become *haram* for him and will not become *halal* for him again unless she marries another husband. This requires that she observe the *'iddah* after her third divorce and after the completion of this period consummate a permanent marriage with another man. Then if she separates from the second husband, due to his death or as a result of divorce, and completes the *'iddah*, it becomes permissible for the first to remarry again. After this, if he again repeats the same sequence and divorces her three times, she becomes *haram* for him until she consummates marriage with another man. Similarly, she becomes *haram* for him after every third divorce and becomes *halal* by marrying another, even if she be divorced a hundred times. Accordingly, every third divorce is considered a temporary not a permanent obstacle to marriage.

But the Imamiyyah observe: If a woman is divorced nine times in the *talaq al–'iddah* form she becomes *haram* permanently. By *talaq al–'iddah* they mean that the husband first divorces his wife, then resumes conjugal and sexual relations: then he divorces her again during another period when she is not having menses, then again resumes conjugal and sexual relations; then divorces her in yet another period when she is free from menses. Now she will not be *halal* for him until she consummates a permanent marriage with another man. Now, if this first husband marries her again after her separating from that second husband and divorces her three times in the *talaq al–'iddah* form, she becomes halal again by consummating marriage with another. If he then marries her (for the third time) and divorces her in the *talaq al–'iddah* form, the divorces completed, she will become *haram* for him permanently. But when the divorce is not a *talaq al–'iddah*, such as when he returns to her and then divorces her without

establishing sexual relations or marries her by another fresh contract after her completing the *'iddah,* she will not become *haram* for him even if she is divorced a hundred times.

VII. Difference of Religion

The schools agree that it is not permissible for a male Muslim nor for a female Muslim to marry those who do not neither a revealed nor a quasi-revealed scripture, or those who worship idols, fire or the sun, the stars and other forms, or non-believers who do not believe in Allah. The four schools concur that marriage is not permissible with those who a quasi-scripture, such as the Zoroastrians. By 'quasi-scripture' is meant a scripture which is said to have originally existed, as in the case of the Zoroastrians, but was changed, causing it to be lifted from them.

According to the four schools, it is permissible for a Muslim man to marry a woman belonging to the Ahl al-Kitab, which implies Christians and Jews. But it is not permissible for a Muslim woman to marry a man belonging to the Ahl al-Kitab. The Imamiyyah scholars agree with the other four schools that a Muslim woman cannot marry a man belonging to the Ahl al-Kitab, but differ among themselves regarding the marriage of a Muslim man with a female belonging to the Ahl al-Kitab. Some of them hold that intermarriage, either permanent or temporary, is not permissible. They base their argument on these verses of the Qur'an:·

وَلَا تُمْسِكُوا بِعِصَمِ الْكَوَافِرِ

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

وَلَا تَنْكِحُوا الْمُشْرِكَاتِ حَتَّىٰ يُؤْمِنَّ

... And do not marry the idolatresses until they believe... (***2:221***)

Here they interpret shirk as kufr and not having faith in Islam. According to the Qur'an the Ahl al-Kitab are not *mushrikun*, as this verse shows:

لَمْ يَكُنِ الَّذِينَ كَفَرُوا مِنْ أَهْلِ الْكِتَابِ وَالْمُشْرِكِينَ مُنْفَكِّينَ حَتَّىٰ تَأْتِيَهُمُ الْبَيِّنَةُ

The unbelievers among the People of the Book and the pagans did not break off (***from the rest of their communities***) ***until the proof came unto them.*** (***98:1***)

Others are of the opinion that such a marriage, both temporary and permanent, is permissible, and as a proof they quote the following verse of the Qur'an:

وَالْمُحْصَنَاتُ مِنَ الْمُؤْمِنَاتِ وَالْمُحْصَنَاتُ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ مِنْ قَبْلِكُمْ

***...And the chaste from among the believing women and the chaste from among those who have been given the Book before you* (*are lawful to you*)*...* (*5:5*)**

This verse, according to them, explicitly permits marriage with women of the Ahl al-Kitab. The third group, seeking to reconcile the texts in favor and against such intermarriage, only permits temporary not permanent marriage. They take those texts which forbid such marriage to imply permanent marriage, and those which permit it are taken to imply temporary marriage. On the whole most of the contemporary Imamiyyah scholars consider permanent marriage with a woman belonging to the Ahl al-Kitab as permissible and the Imami Shari'ah courts in Lebanon marry a Muslim male to a female belonging to the Ahl al-Kitab. They register such a marriage with all the legal effects proceeding therefrom.

All schools, except the Maliki, recognize the marriages of all non-Muslims as valid if performed according to their tenets. The Muslims confer upon such a marriage all the legal effects of a valid marriage without differentiating between the Ahl al-Kitab and others-even if they permit marriage within prohibitive limits of consanguinity. The Malikis consider such a marriage as invalid because, they explain, it would be invalid if performed by a Muslim. Therefore, the same is true of non-Muslims. This stance of the Malikis is not reasonable, because it makes non-Muslims scared of Islam and leads to anarchy and disruption of the social order. Apart from this, the Imamiyyah have recorded these traditions which confirm their stance:

من دان بدين قوم لزمته أحكامهم...

For one who follows the religion of a community, its rules would be binding upon him...

وألزموهم بما ألزموا به أنفسهم.

***And require them to follow that which they consider binding upon themselves.* (*al-Jawahir, chapter on divorce*)**

Litigation Between the Ahl al-Kitab

In the Imamiyyah work, *al-Jawahir* (chapter on *jihad*), there is a useful discussion which is relevant here. Its summary is as follows:

If two non-Muslims litigate before a Muslim judge, should he give his judgment according to the laws of their religion or according to the Islamic law? The answer is: If the litigants are *dhimmis*, the judge has

discretion to either judge according to the Islamic law or to dismiss the case without any hearing. The following verse of the Qur'an gives this discretion:

فَاحْكُمْ بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ ۖ وَإِنْ تُعْرِضْ عَنْهُمْ فَلَنْ يَضُرُّوكَ شَيْئًا ۖ وَإِنْ حَكَمْتَ فَاحْكُمْ بَيْنَهُمْ بِالْقِسْطِ

...Judge between them or turn aside from them, and if you turn aside from them, they shall not harm you in any way; and I/ you judge, judge between them with fairness... (***5:42***)

It was asked of al-'Imam al-Sadiq ('a) regarding two men of the Ahl al-Kitab between whom there is a dispute and they take the case before their own judge and when this judge judges between them, the one against whom the judgment was given refuses to comply and asks that the issue be settled before the Muslim judge. The Imam ('a) replied, "The judgment shall be according to the law of Islam."

If the litigants are those who are at war with the Islamic State (*harbi*), the judge is not obliged to settle their dispute and to protect some of them against others, as he is in the case of *dhimmis.*

If one of the litigants is a *dhimmi* or a *harbi* and the other a Muslim, the judge is obliged to accept the suit and to judge between them according to the Islamic law, in accordance with the Divine command:

وَأَنِ احْكُمْ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ

Pronounce judgement between them in accordance with Allah's revelations and do not be led by their desires. Take heed lest they should turn you away from a part of that which Allah has revealed to you... (***5:49***)

Moreover, if a *dhimmi* woman sues her husband, the judgment will be given according to the Islamic law.

The above discussion makes it clear that Muslims should recognize as valid all those transactions of non-Muslims which are in conformity with their religion, as long as they do not refer it to Muslims for a decision. But if they seek a decision from Muslims, it is *wajib* for them to decide, at all times, according to the Islamic law. As is understandable from the verses of the Qur'an and the traditions, it is also *wajib* to judge between them in accordance with the norms of justice and fairness.

VIII. Fosterage (al-Ridi')

All the schools concur regarding the veracity of the tradition:

يحرم من الرضاع ما يحرم من النسب

(That which becomes *haram* due to consanguinity becomes *haram* due to fosterage). According to this tradition fosterage includes the same limits of relationship prohibitive to marriage as consanguinity. Thus any woman who as a result of breast-feeding becomes a foster-mother or a foster daughter or a sister or an aunt (both maternal and paternal) or a niece, marriage with her is *haram* according to all the schools. But the schools differ regarding the number of breast-feedings which cause the prohibition and the conditions applicable to the foster-mother and the foster-child.

1. The Imamiyyah say: It is necessary that the woman's milk be the result of lawful sexual relations, and if it secretes without marriage or as a result of a pregnancy due to adultery, the prohibition does not come into effect. It is not necessary that the woman remain conjugally bound to the person who is the cause of her turning lactiferous. Even if he divorces her or dies while she is pregnant or lactiferous, the prohibition comes into effect if she breast-feeds a child, even though she marries another and has intercourse with him.

The Hanafi, the Shafi'i and the Maliki schools are of the opinion that there is no difference between the woman being a virgin or a widow and between her being married or unmarried as long as she has milk with which she feeds the child. According to the Hanbali school the legal effects of fosterage will not follow unless the milk is the result of a pregnancy, and they do not set a condition that the pregnancy be due to lawful intercourse (Muhammad Muhyi al-Din 'Abd al-Hamid in *al-'Ahwal al-shakhsiyyah*).

2. The Imamiyyah consider it necessary that the child should have sucked milk from the breast, so if it is dropped in his mouth or he drinks it in a manner other than direct sucking, the prohibitive relationship would not be established. The other four schools consider it sufficient that the milk reach the child's stomach, whatever the manner (*Bidayat al-mujtahid ; Hashiyat al-Bajuri, "Bab al-rida"*). According to *al-Fiqh 'ala al-madhahib al-'arba'ah* , the Hanbalis consider it sufficient that the milk reach the child's stomach, even if through his nose.

3. According to the Imamiyyah, the prohibitive relationship is not realized unless the child is suckled one day and one night in a manner that his exclusive diet during this period be the milk of that woman without any other food, or is breast-fed fully fifteen times uninterrupted by breast-feeding by another woman. In the book *al-Masalik* the giving of food has been considered effect-less. The reason given for the above-mentioned quantity is that it leads to the growth of flesh and hardens the bones.

The Shafi'i and the Hanbali schools regard five breast-feedings as the minimum necessary. The Hanafi and the Maliki schools consider that the prohibitive relationship is established simply by being breast-fed irrespective of the quantity fed. be it more or less or even a drop. (*al-Fiqh 'ala al-madhahib al-'arbaah*)

4. The Imamiyyah, the Shafi'i, the Maliki and the Hanbali schools have mentioned the period of breast feeding to be up to two years of the age of the child. The Hanafi school considers it to be two and a half years.

5. According to the Hanafi, the Maliki, and the Hanbali schools, it is not necessary that the foster-mother

be alive at the time of feeding. Therefore, if she dies and the child crawls up to her and sucks from her breast, it is sufficient to establish the prohibitive relationship. But the Malikis have gone further and observed that even if there is a doubt as to that which the child has sucked, whether it is milk or not, the prohibitive relationship would be established. (*al-Fiqh 'ala al-madhahib al-'arbaah*)

The Imamiyyah and the Shafi'i schools consider it necessary that the woman be alive at the time of breast-feeding and if she dies before completion of the minimum feedings, the prohibitive relationship would not be established.

The schools concur that the *sahib al-laban*, i.e. the husband of that woman, will become the foster-father of the breast-fed child, and between the two all those things which are *haram* between fathers and sons will be *haram*. His mother will become a grandmother for the breast-fed child, and his sister the child's aunt in the same manner as the woman who breast-feeds the child becomes his mother and her mother his grandmother and her sister his aunt.

IX. Al-'Iddah

There is consensus among the schools that marriage with a woman undergoing *'iddah* is not permissible and she is like a married woman in all aspects, irrespective of whether she is undergoing *'iddah* due to the death of her husband or as a result of divorce, revocable or irrevocable, in accordance with the following verses of the Qur'an:

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

And the divorced women should keep themselves in waiting far three menstrual courses... (***2:228***)

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا

And (***as for***) ***those of you who die and leave wives behind, they*** (***the wives***) ***should keep themselves in waiting for four months and ten days...*** (***2:234***)

The meaning of *al-tarabbus* is to be patient and to wait.

The schools differ regarding one who marries a woman during her *'iddah*, as to whether she will become *haram* for him. According to the Maliki School she becomes *haram* for him permanently if intercourse takes place, otherwise not. According to the Hanafi and the Shafi'i schools the two should separate, there being no impediment to remarriage on completion of the *'iddah*. (Bidayat al-mujtahid)

It is mentioned m the seventh pan of al-Mughni, a book of the Hanbali s (chapter on *'iddah*): "If a person

consummates marriage with a woman during her *'iddah* and both know it and know that marriage is *haram* during *'iddah*, both of them would be considered fornicators and liable to punishment." In the sixth pan of the same book (chapter on marriage) it is stated: "If a woman fornicates, marriage with her will not be *halal* for one who knows it unless these two conditions are fulfilled: completion of the *'iddah* and penitence for fornicating... If these two conditions are fulfilled, there is no obstacle to her marriage with the fornicator or someone else." This shows that according to the Hanbalis, marriage during *'iddah* does not result in permanent prohibition to marriage.

According to the Imamiyyah, marriage with a woman during *'iddah*, after a revocable or an irrevocable divorce, is not permissible, and if one marries her with the knowledge of the *'iddah* and the related prohibition, the contract is void and she would become *haram* for him permanently, irrespective of sexual contact. But if he has no knowledge of the *'iddah* and of such marriage being *haram*, she would not become *haram* permanently unless he has had intercourse with her. If he has not had intercourse, only the contract would become void, and he may marry her after the completion of the *'iddah* (al-Masalik, vol. 2, chapter on divorce).

X. Al-'Ihram

The Imamiyyah, the Shafi'i, the Maliki and the Hanbali schools say:· A *muhrim* for Hajj or 'Umrah, man or woman, cannot marry nor conclude marriage on behalf of another acting as a guardian or an agent. The marriage, if performed, is void in accordance with the tradition:

لا ينكح المحرم ولا ينكح ولا يخطبز

A muhrim may not propose, nor marry, nor conclude marriage for another.

The Hanafi school considers *ihram* as no hindrance to marriage. The Imamiyyah hold that if a marriage is performed without the knowledge of the prohibition during the state of ihram, it will make the woman temporarily *haram*. When they are relieved of ihram-or he, when the woman had not been in the state of ihram at all-it is permissible for him to marry her. But if concluded with the knowledge of the prohibition, the two should separate. and she would become permanently haram to him. The other schools hold that she would become haram only temporarily. (*al-'Allamah al-Hilli in al-Tadhkirah*, vol. 1, chapter on Hajj; *Bidayat al-mujtahid*, chapter on marriage).

1. 'Iddah is a period of waiting prescribed by the Shari'ah to be observed by a woman on divorce or the death of her husband. The 'iddah for divorce is three months (three menstrual cycles): for death, four months and ten days. (Tr.)
2. It is strange that al-Shaykh Abu Zuhrah, in al-'Ahwal al-shakhsiyyah, page 83, ascribes it to some Shi'ahs that they consider it valid to have nine wives at a time on the basis that mathna, thulath, and ruba' (in the Qur'anic verse about the permissible number of wives) i.e. two, three and four, adds up to a total of nine! Firstly, there is no source for this statement. Al-'Allamah al-Hilli, in al-Tadhkirah, says, "This view is attributed to some Zaydiyyah, but they categorically deny it, and I have not seen anyone expressing this view."

Matrimonial Guardianship

Wilayah in marriage implies the legal authority granted to a competent guardian to be exercised over one under a legal disability for his or her advantage. This discussion comprises the following issues:

Wilayah over a Mature and Sane Girl

The Shafi'i, the Maliki and the Hanbali schools are of the opinion that the *wali* (guardian) has the sole authority with respect to the marriage of his sane and major female ward if she is a maiden. But if she is a *thayyib* (that is, a girl who has had sexual intercourse), his authority is contingent on her consent. Neither he can exercise his authority without her consent, nor she can contract marriage without his permission. It is *wajib* that the *wali* take the responsibility of concluding the contract, which would not conclude if the woman recites it, though it is essential that she consent.

The Hanafis regard a sane, grown-up female as competent to choose her husband and to contract marriage, irrespective of her being a maiden or a *thayyib*. No one has any authority over her, nor any right to object, provided she chooses one her equal and does not stipulate less than a proper dower (*mahr al-mithl*) for the marriage. If she marries someone who is not her equal, the *wali* has the right to object and demand the annulment of the contract by the *qadi*, and if she marries her equal but for less than the proper dower, the *wali* has the right to demand annulment if the husband does not agree to a proper dower. (Abu Zuhrah, *al-'Ahwal al-shakhsiyyah*)

Most of the Imamiyyah scholars are of the view that a sane girl of full age, on maturing, is fully competent to decide her contractual as well as non-contractual affairs and this includes marriage, regardless of her being a maiden or *thayyib*. Therefore, it is valid for her to contract for herself or on behalf of others, directly or by appointing a deputy, by making an offer or giving her acceptance, and irrespective of her having or not having a father, a grandfather, or other relatives. It is of no consequence whether the father agrees or not. The social status of the girl, higher or lower, and whether she marries a respectable or an abject person, is of no consequence. No one has a right of objection in this regard. Thus, she is in all respects on a par with a male, without any difference whatsoever. The scholars support this argument by quoting the following verse of the Qur'an:

فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ

... Then do not prevent them from marrying their husbands... (***2:232***)

The following tradition of the Prophet(S) narrated by Ibn al-'Abbas also supports their view:

الأيم أحق بنفسها من وليها

An aym has more authority over him/herself than his/her guardian.

'*Aym*' is one who is without a mate, man or woman; a maiden or *thayyib*.

The scholars have also put forth a rational argument and observed that reason dictates that every human being has total liberty regarding his own affairs and no other person, regardless of his being a near or distant relative, has any authority over him. Ibn al-Qayyim has well observed when he says: "How can it be legitimate for a father to marry his daughter without her consent to anyone of his choice, while she disapproves such a marriage and regards him as the most detestable person in the world, and yet he should forcefully marry her and hand her over as a captive to him!..."

Wilayah in Cases of Minority, Insanity and Idiocy

The legal schools concur that the guardian is authorized to contract marriage on behalf of his minor or insane ward (male or female). But the Shafi'i and the Hanbali schools have limited this authority to the case of a minor maiden, and as regards a ward who is minor *thayyib*, they do not recognize any such authority for the guardian. (al-Mughni, vol. 6, Chapter on Marriage)

The Imamiyyah and the Shafi'i schools consider only the father and the paternal grandfather as competent to contract marriage on behalf of a minor ward. The Malikis and the Hanbalis further limit it to the father. The Hanafi School extends it to other relatives, even if it be a brother or an uncle.

The Hanafi, the Imamiyyah, and the Shafi'i schools regard a contract of marriage with an idiot as invalid without the consent of his guardian. The Maliki and the Hanbali schools consider it valid, and the consent of the guardian is not required. (*al-Tadhkirah*, vol. 2; *al-Mughni*, vol. 2, chapter on *hijr*)

The Order of Priority in Guardianship

The Hanafis give priority to the son as regards *wilayah* over his mother, even if he be an illegitimate one. After the son, his son is given the right to *wilayah* and then follow: the father, the paternal grandfather, the full brother, the half-brother (paternal), the full brother's son, the half-brother's son, the paternal uncle, the paternal uncle's son, and so on.

From this it is clear that the executor of the ward's father's will does not have matrimonial guardianship even if he has been explicitly given this authority.

The Malikis give priority to the father and after him the *wilayah* goes to the executor of his will. Then comes the turn of the son, even if he be an illegitimate one. Thereafter come the brother, the brother's son, the paternal grandfather, the paternal uncle... and so on. On this order being exhausted the *wilayah*

will finally lie with the *hakim*.

The Shafi'i scholars give the father priority in exercising *wilayah*. After him, the paternal grandfather, the full brother, the half–brother (paternal), the brother's son, the paternal uncle, the paternal uncle's son, and so on, will exercise *wilayah* in the descending order till it finally reaches the *hakim*.

The Hanbalis regard the father, and after him the executor of his will, as those competent to exercise *wilayah*. After these two, the order follows the pattern of inheritance till it finally reaches the *hakim*.

According to the Imamiyyah, only the father and the paternal grandfather–and on some occasion, the *hakim* –are those authorized to exercise *wilayah* with respect to marriage. Both the father and the grandfather are independent in the exercise of their *wilayah* over a minor (girl or boy) or over an adult whose lunacy or idiocy precedes his adulthood. That is, when he/she has been a lunatic or an idiot when a minor and this state has continued into adulthood. But if lunacy or idiocy has resulted after maturity, the father and the grandfather have no authority for contracting marriage on behalf of such an adult. In this case the *hakim* will exercise his *wilayah* despite the presence of the father and the grandfather.

When the father chooses one mate and the grandfather another, the latter's choice shall prevail.

The marriage contracted by the *wali* –be it the father, the grandfather or the *hakim*–comes into effect if it is not against the interests of the ward. If it is, the ward has the option of dissolving the marriage on attaining maturity.

The Hanafis have observed; When the father or the grandfather of a minor girl marries her to a person who is not her equal or for less than *mahr al–mithl*, the marriage will be valid unless it is evident that there has been a misuse of authority. But if such a marriage is concluded on behalf of a minor girl by her *wali* who is neither her father nor her grandfather, the marriage will be considered void *ab initio*.

The Hanbali and the Maliki schools have said: The father may give his daughter in marriage for less than *mahr al–mithl*. The Shafi'i school says that he may not, and if he does so, the daughter has the right to claim *mahr al–mithl*.

The Imamiyyah have said; If the *wali* gives his minor female ward in marriage for less than *mahr al–mithl* or contracts marriage on behalf of his minor male ward for more than such *mahr,* the contract and the *mahr* will both be valid on there being a good reason for doing so. In the absence of such a reason, only the contract will be valid and the validity of the *mahr* will depend upon the ward's agreeing to it after maturity. If the ward does not agree the mahr will be reduced to the *mahr al–mithl*.

There is consensus among the schools that a just ruler (*hakim*) can contract marriage on behalf of a lunatic, male or female, if he/she has no wait from among their relatives. This consensus is based on the following tradition:

السلطان ولي من لا ولي له.

The ruler is the wali of him who has no wali.

The Imamiyyah and the Shafi'i schools do not consider the *hakim* competent to exercise *wilayah* over a minor girl. The Hanafi School gives this authority to the *hakim*, but does not consider the contract so concluded as binding. Therefore, the girl can set it aside on maturity. Thus the position of the Hanafis is in fact similar to that of the Imamiyyah and the Shafi'i schools because the *hakim* becomes redundant in this matter. According to the *Maliki* school, the *hakim* is competent to contract marriage on behalf of a minor or a lunatic (male or female) with their equals on their not having any relative to act as *wali*. The *hakim* is also given competence to conclude marriage on behalf of a sane grown-up girl, with her consent.

The schools concur that it is necessary for a *wali*: that he be an adult Muslim male. As to the condition of *'adalah* (justice), it is required in the *hakim* who is acting as wali, not for a relative acting as such, except by the Hanbali school which considers *'adalah* as necessary for every *wali* regardless of his being a relative or a *hakim*.

Al-Kafa'ah (Equality)

The meaning of "*al-Kafa'ah*", according to those who consider it as consequential in marriage, is that the man be an 'equal' of the woman in certain things. Moreover, they require *kafa'ah* of men only, because it is not something dis-approvable for a man to marry a woman lower in status as against a woman doing the same.

The Hanafi, the Shafi'i and the Hanbali schools concur in requiring kafa'ah in religion (Islam), freedom[1] (i.e. in his not being a slave), profession and lineage. These schools differ regarding *kafa'ah* in prosperity and wealth. The Hanafi and the Hanbali schools recognize it, while the Shafi'i school does not.

The Imamiyyah and the Maliki schools do not accept the notion of *kafa'ah* except in religion, in accordance with the following tradition:

إذا جاءكم من ترضون دينه وخلقه فزوجوه إلا تفعلوه تكن فتنة في الأرض وفساد كبير

When someone, whose faith and conduct is acceptable to you, comes to you with a proposal, then marry him. If you don't, it will result in corruption upon the earth and great discord.

In any case, the condition of *kafaah* in marriage does not harmonize with the following verse of the Qur'an:

إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ

...Surely the most honorable amongst you in God 's sight is the most pious amongst you... (***49: 13***)

The condition of kafa'ah contradicts a basic principle of Islam which says:

لا فضل لعربي على عجمي إلا بالتقوى

There is no superiority for an Arab over a non-Arab except on the basis of taqwa(piety).

Also, it is opposed to the practice (sunnah) of the Prophet (S), who ordered Fatimah bint Qays to marry Zayd ibn Usamah and ordered Banu Bayadah to marry Abu Hind, who was a cupper. That is why we see a group of eminent scholars, such as Sufyan al-Thawri, al-Hasan al-Basri, 'al-Karkhi among the Hanafis and Abu Bakr al-Jassas and the followers of these two among the scholars of Iraq' (Ibn 'Abidin, vol. 2, chapter on marriage) disregarding *kafa'ah* as a condition in marriage.

1. By including freedom' as one of the conditions of al-kafa'ah, the Hanafi school contradicts one of its own fundamental principles. This school allows the death penalty of a freeman for murdering a slave and that of a slave for murdering a freeman, whereas the other schools, including the Imamiyyah, have said: A freeman may not be killed for killing a slave, but a slave will be killed for killing a freeman. Apart from this, the Hanafis do not consider it necessary that a guardian, in a contract of marriage, be a freeman, and this is contrary to the opinion of some other schools.

Al-'Uyub (Defects)

Is it possible for one of the spouses to dissolve the marriage on finding a certain defect in the other? The schools have differed regarding the defects which justify the dissolution of the marriage and also regarding the rules that apply in these circumstances.

Al-'Anan (Impotence)

Al-'anan is a disease which renders a man incapable of sexual intercourse. All the five schools give the wife the right to dissolve the marriage in such a situation. But in a situation where the husband's inability is limited to his wife and he is capable of intercourse with any other, the schools have different views

regarding the wife's right of dissolving the marriage.

The Imamiyyah have said: The wife's right to dissolve the marriage is not ascertained unless the husband is incapable of having intercourse with any woman whatsoever. Therefore, on his inability being limited to his wife and not others, the right of dissolving the marriage does not accrue,[1] because the source of this right is a rule which gives the power of dissolving marriage to the wife of an impotent man; one who is capable of having intercourse with other women is not considered impotent in the true sense of the word. This is so because impotence is a bodily defect which renders a man incapable of intercourse with any woman, exactly like a blind man who cannot see anything.

In a case where a person is incapable of intercourse, with his wife and not others, then the reason is necessarily an external cause apart from an innate physical defect. The reason could be shyness or fear or a quality of the wife which makes her detestable, or something else. It has also been observed that there are such criminals whose dislike of legitimate (sexual) relations has reached such a degree that they are unable to perform it. On the contrary, their inclination towards *haram* is such that it gives them the required strength and the pleasure of performing it.

According to the Shafi'i, the Hanbali and the Hanafi schools, a person's inability to copulate with his wife gives her the right to dissolve the marriage despite his being capable of it with other women, because in such a case he will be considered impotent with respect to her. Besides, they point out, of what benefit is to the wife if he is capable of having intercourse with other women!

However, there is consensus among the schools that when a woman pleads the impotence of her husband and he denies the charge, the burden of proof will rest on her to prove that he is impotent. On no proof being offered[2] it will be seen whether she was a maiden prior to marriage or not. If she had been one, she will be referred to female specialists to determine her present condition, and their opinion will be acted upon. In a case where the wife is not a maiden, the husband will be made to take an oath because it is he who denies the charge made by the wife claiming the presence of a defect sufficient for dissolving the marriage. If he takes the oath, the wife's claim will be dismissed. But on his abstaining from taking the oath, the wife will take the oath and then the *qadi* will give him a lunar years' time.

When this period also does not yield any benefit for the wife, the *qadi* will grant her the option of remaining with him or of dissolving the marriage. If she elects to remain with him, the choice is hers and if she desires dissolution, she will herself annul the marriage or the *hakim* on her request. According to the Imamiyyah, the Shafi'i and the Hanbali schools, she does not require a divorce for the separation. The Malikis have said: She will divorce herself by the order of the *qadi*. This observation of the Malikis does in fact mean annulment. The Hanafi school is of the opinion that the *qadi* will order the husband to pronounce the divorce and on his refusal the *qadi* will pronounce the divorce.

The Hanafis, in such a case, regard the payment of the full *mahr* as necessary: the Imamiyyah consider the payment of half the *mahr* as sufficient. The Maliki, the Shafi'i and the Hanbali schools are of the

opinion that she will not be entitled to receive any *mahr*.

If the husband's impotence is subsequent to the consummation (*al-'aqd wa al-dukhul*) of marriage, the wife will not have the choice of dissolving the marriage. However, if impotence occurs after the contract but before the consummation of marriage, she will have the choice of annulment in the same manner as when impotence precedes the contract.[3]

Al-Jabb and al-Khisa'

Al-jabb means; the state of mutilation of the male organ and by *al-khisa'* is meant castration, either by the removal or by the crushing of both testicles. Both, *al-jabb* and al-khisa, if present before the consummation of marriage, give the wife the immediate right to annul the contract. But if these two defects occur after the consummation of marriage, the right to annul the marriage will not result.

The Hanafis have observed that if the castrated person has the capacity of erection, the right to annul the marriage does not arise, even though ejaculation be absent. The other schools regard ejaculation as a necessary condition regardless of erection, because the inability to ejaculate is a defect similar to impotence.

Al-Shahid al-Thani, in the chapter on marriage of his book *al-Masalik*, volume 1, has narrated that a castrated person can penetrate and have orgasm, and his condition during the act is more intense than a normal male, although he does not ejaculate. This inability is sufficient for rescinding the contract, because the traditions prove the right of the wife of a castrated person to opt for separation.

The Hanafi have said: When the contract is rescinded as a result of any of these two defects, the wife shall be entitled to full *mahr*. The other schools have observed that. if the contract is annulled as a consequence of *al-jabb*, no *mahr* need be paid because marriage has not been consummated. But if *al-khisa* be the cause for rescinding the contract, she will receive *mahr* only when consummation has occurred.

The Hanafi School does not recognize any ground on which the husband may annul the contract, even though there may be tens of defects in the wife. On the contrary, the wife has the right of annulling the marriage on the basis of any of the three above-mentioned defects, i.e. *al-'anan*, *al-jabb* and *al-khisa*. Therefore, the Hanafis have nothing to say about the forthcoming defects.

Insanity

The Maliki, the Shafi'i and the Hanbali schools concur that the insanity of one spouse gives the other the right to annul the marriage. But these schools differ regarding the details. The Shafi'i and the Hanbali schools have granted the right of annulment irrespective of whether madness results before or after marriage, and even after consummation. There is no period of waiting before annulment, as required in

the case of impotence.

According to the Malikis, if the insanity occurs before marriage, the right to annul the contract results for the sane spouse, on the condition that he or she suffers harm in living with the other. But if the insanity results after marriage, only the wife has the right to annul the marriage after a probationary period of a year granted by the judge. The husband cannot annul the marriage if his wife loses sanity after marriage.

According to the Imamiyyah, the husband will not annul the marriage where the wife has become insane after marriage, because he has the option of divorce. The wife, on the contrary, can annul the marriage on the husband's insanity, regardless of its preceding the marriage or occurring afterwards, and even after consummation.

The Imamiyyah, the Hanbali, the Shafii and the Maliki schools concur that the wife is entitled to receive full *mahr* if the marriage has been consummated, and nothing if not.

Leprosy and Leukoderma

According to the Imamiyyah, leprosy and leukoderma are among defects that give the husband, not the wife, the right to annul the marriage on condition that such disease be antecedent to the marriage without the husband's knowledge. The right to annul the marriage does not exist for the wife if her husband suffers from any of these two diseases.

The Shafi'i, the Maliki and the Hanbali schools regard these two diseases among the causes that give both the man and the woman an equal right to annul marriage. On one of the spouses suffering from any of these two diseases, the other acquires the right to annul the contract. According to the Shafi'i and the Hanbali schools, the rule that applies in the case of insanity applies here as well.

The Malikis are of the opinion that the wife has the right of annulment equally whether the husband's leprosy antedates the marriage or follows it. As regard the husband's right. he can do so on the wife's being leprous before marriage or at the time of marriage. Regarding leukoderma, both the spouses have the choice of annulment if the disease precedes marriage, and if it occurs after marriage. Only the wife can exercise her choice and not the husband. The milder forms of leukoderma, on their appearance after marriage, do not give rise to any right. The judge gives a probationary period of one lunar year for those suffering from these two diseases for there is a possibility of cure.

Al-Ratq, al-Qarn, al-'Afal & al-'Ijda

...These four defects,[4] which occur only among women give the husband according to the Malikis and the Hanbalis the right to annul the marriage contract. According to the Shafi'is, only in case of either *al-ratq* or *al-qarn* the husband has such a right; not when the wife suffers from *al-'ifda* or *al-'afal*.

According to the Imamiyyah, such a legal effect follows only in the case of *al-qarn* or *al-'ifda'*, not in the case of *al-rarq* or *al-'afal*. They also state that the husband, if he wishes, can annul the marriage contract when he finds blindness or visible lameness in the wife after the conclusion of the contract if he had no knowledge of it before. But either of the defects when found in the husband does not give such a right to the wife.

In our opinion, any disease, regardless of its being peculiar to one of the sexes or its being common to both of them, that is capable of being diagnosed and cured without leaving behind any deformity or defect, does not give rise to any legal right and its occurrence, like its non-occurrence, is legally without any effect. The reason behind this opinion is that, when a disease becomes curable, it becomes similar to any other ordinary disease that may affect any person. The time-honored significance attached by the legists to the above-mentioned defects is because they could not be treated surgically during the past.

Immediacy (al-Fawriyyah)

According to the Imamiyyah School, the choice of annulling the marriage exists so long as it is exercised immediately. Therefore, if the man or the woman, on knowing the defect, does not initiate the proceedings for annulling the marriage, the contract will become binding. The same rule applies for annulling the marriage in a case of deception

The author of *al-Jawahir* has said that ignorance regarding the right to annul the marriage, and even immediacy, is a good excuse, considering that this right has been given without imposing any conditions. He has also observed that the annulment of marriage, in all its forms does not depend on the judge. He has only the power to grant a probationary period in the case of impotence.

1. Al-Shahid al-Thani, in al-Masalik, quotes al-Shaykh al-Mufid: The criterion regarding the annulment of marriage by a woman is that her husband be incapable of intercourse with her irrespective of his ability regarding other women. The general notion supports this view.
2. A case of similar nature was brought before me and I referred the respondent tor medical check-up. The reply given was: Medical science has not yet devised any method for diagnosing impotence and the inability to have sexual intercourse is the only method of proving it.
3. After this, in the original Arabic text, the author in a note discusses the opinion of the Imami author of al-Jawahir relating to a case of allegation of impotence against the husband. This note, which extends over a page of the book, has been deleted in this translation. (Trans.)
4. Al-ratq means the presence of obstruction in the vaginal opening making intercourse difficult. al-qarn (lit. horn) means the presence of a horn-like protrusion inside the vaginal passage: Al-'afal means a fleshy obstruction in it. Al-'ifda · means the condition of merging of anal and vaginal passages. (Trans.)

The Option to Include Conditions (Khayar al-Shari)

The difference between *shart al-khayar* and *khayar al-shari* is that in the first the option to annul the marriage be included in the contract. For example, when the bride making the offer says, "I marry myself to you on the condition that I shall have the choice of annulling the marriage within three days," and the groom accepts with a *qabiltu*, or when the bride says, "I marry myself to you." and the groom, while accepting. says, "I accept on the condition that I shall have the choice to annul the marriage within such and such a time;" we see that in both the cases the option to annul the marriage is mentioned in the contract itself, and this, as has been mentioned earlier, results in the contract becoming null and void, according to all the five schools.

But in *khayar al-shari*(the option to annul the marriage is not mentioned as a condition *per se* in the contract. That which is mentioned as a condition in this case, is a particular quality-such as the bride's virginity or the groom's possessing a university degree-in a manner that if the said quality is not found to exist the other shall have the right to annul the contract. The schools have a difference of opinion in this regard.

The Hanafi's have said: If a spouse mentions a negative condition in the contract, such as the absence of blindness or a disease, or a positive condition, such as presence of beauty, virginity, etc., and then the opposite of it comes to light, the contract will be valid. Regarding the condition, it will not apply except when the wife lays down a condition related to *al-kafa'ah*; such as a condition regarding lineage, profession or wealth. Here she has the right to annul the contract. But as regards the husband, any similar condition laid down by him will not be considered applicable because *al-kafa'ah*, as mentioned earlier, is a condition with reference to the husband, not the wife.

The Maliki, the Shafi'i, the Imamiyyah and the Hanbali schools have said: The condition is valid and if not satisfied results in the spouse laying the condition acquiring the option of either upholding or annulling the contract. The following tradition is cited in support of this view:

المسلمون عند شروطهمز

The Muslims are bound to (fulfil) their conditions.

Furthermore, they state, therefore said conditions are not against the spirit of the contract and do not contradict the Qur'an or the Prophet's Sunnah; neither they amount to changing *halal* into *haram* nor vice versa.

Deceit (Tadlis)

The Imamiyyah have discussed under this head the deception of the groom by the bride by either hiding a defect or by claiming a merit which is absent. In the first case, i.e., her hiding a defect and not mentioning it. The right to annul the contract will not accrue if he has not mentioned the absence of such a condition specifically in some way or another. A tradition is narrated from al-'Imam al-Sadiq ('a) which says:

في الرجل يتزوج إلى قوم فإذا امرأته عوراء ولم يبينوا له قال: لا ترد

About a person who marries i n a family and finds his wife to be one-eyed while they have not revealed it to him. The Imam said: The contract will not be withdrawn.

This is the opinion of all the schools.

As regards the second form of deceit i.e., where she claims a merit which in fact she does not possess- if the claimed merit has been mentioned as a condition in the contract, as said earlier, the condition will hold good according to all except the Hanafis. But if the claimed merit has not been mentioned in the contract as a condition-i.e., it has either been mentioned simply as a quality in the contract, or has been mentioned before the contract and the contract has been recited on that basis-then two different situations arise:

1. The merit has been mentioned in the contract as a quality, such as when the bride's attorney says, "I marry this maiden to you." or, "I marry this girl who is free from any defect to you." The Imamiyyah state that when it is known that she does not possess the mentioned merit, the husband has the choice to annul the contract.

2. The merit has neither been mentioned as a condition nor as a quality in the contract, but has been mentioned during the course of the marriage negotiations, such as when she herself or her attorney says that she is a virgin and has no defect, and then the contract is recited on the basis of this statement, so that it is understood that the contract has been recited on the girl's possessing this particular quality. In the legal sources that I have referred to, I have not come across anyone who has discussed this particular aspect except the Imamiyyah, among whom there is a difference of opinion as to whether in such a case the husband has an option of annulment. Some of them, including al-Sayyid Abu al-Hasan al-Ishfahani, in al-Wasilah, uphold the husband's option, because they point out, the negotiations of the contracting parties regarding a particular quality followed by the conclusion of the contract on their basis, makes this quality similar to an implicit condition. Others, who oppose this view, have said that it will have no effect unless the quality is mentioned in the contract or its presence in the contract established in some way or another. Al-Shahid al-Thani, in *al-Masalik*, holds the same opinion, on the basis that a contract is binding unless there is categorical proof of its invalidity and such a proof is not present in this

case.

To summarize, if the quality has been recognized in the contract in one of the three ways (i.e., as a condition, as a quality mentioned in the contract. or when mentioned during pre-contract negotiations), the husband has the option to annul or retain the contract. If he retains it, he will not have any right of reducing her *mahr*, whatever the defect except when the condition was virginity. According to the Imamiyyah, in this case, the husband may reduce the *mahr* by an amount equal to the difference between a maiden's *mahr* and that of a woman who is not a maiden.

If he chooses to annul the contract, she will not be entitled to receive any *mahr* if marriage has not been consummated according to the Imamiyyah and those of the four schools who permit the option of annulment in case of deceit. On the marriage being annulled after consummation, she will receive the *mahr al-mithl*, and, according to the Shafi'i school. The husband paying such *mahr* will not claim it from the person responsible for the deceit.

The Imamiyyah observe: It depends upon who is responsible for the fraud. If it is the bride, she will not be entitled to any *mahr*, even after consummation. If someone else, then she will receive her full *mahr*, and the husband will claim this amount from the deceiver in accordance with the rule, 'the deceived will level his claim against the deceiver.'

Supplementary Issue

1. If after marriage, one of the spouses finds a defect in the other and claims that the contract was concluded after freedom from such defect was understood through one of the three above-mentioned modes, the other refuting, the burden of proof will lie with the claimant. If the claimant furnishes the proof, the judge will grant him/her the right to dissolve the marriage. If the claimant is unable to prove his/her claim, the respondent will take an oath and the case will be dismissed by the judge.

2. When a person marries a woman after it has been understood, through one of the three mentioned ways, that she is a virgin, and then finds her to be otherwise, he will not be entitled to dissolve the marriage, unless it is proved that her loss of virginity preceded the contract. This can be proved, either by her confession, or through evidence, or any such circumstantial evidence a may lead to certain knowledge-such as when after the marriage, intercourse takes place within a period during which the chances of her losing her virginity (due to other causes) do not exist.

If the issue stays unsettled and it cannot be proved in any of the said ways, whether she lost her virginity before the marriage or after it the right to dissolve the marriage will not accrue to the husband, because the presumption is that her loss of virginity does not precede the marriage, and also because the possibility of her having lost it due to an unknown reason-such as riding or jumping- also exists (*al-Masalik* of al-Shahid al-Thani. vol. 2, Chapter on Marriage in Imamiyyah Fiqh).

3. Al-Sayyid Abu al-Hasan al-Isfahani. in al-Wasilah. the chapter on marriage. writes: If a man marries a girl without virginity being mentioned in the negotiations previous to the marriage without the contract being based on it. and without it being included as a condition or a quality in the contract, but only believing her to be so because of her not having married anyone before him. He will not have the right to dissolve the marriage if it is later proved that she was not a virgin. But he has the right to partly reduce her *mahr*. This reduction will be proportional to the difference between the *mahr* of her like if a virgin and if not a virgin. Therefore, if her *mahr* be fixed at 100 and the *mahr* of a virgin like her is 80 and a non-maiden like her is 60, he will reduce from 100 a fourth part, i.e. 25, with 75 remaining as *mahr*.

Accordingly, al-Sayyid al-'Isfahani envisages four possible conditions regarding virginity:

i. Where virginity is mentioned m the contract as a condition:

ii. Where it is mentioned in the contract as a quality:

iii. Where it is mentioned during settlement of marriage and the contract is based upon it;

iv. Where he marries her believing her to be a virgin and does not mention it, neither before the contract nor in the contract.

In the first three conditions, the husband has the choice to annul the marriage; in the fourth, he has no such choice, but can reduce a part of the *mahr* in the above-mentioned manner.

Al- Mahr

Mahr is one of the (pecuniary) rights of a wife established in the Qur'An and the Sunnah, and on which there is consensus (*ijma'*) among Muslims.

There are two kinds of *mahr: al-musamma* and *mahr al-mithl*.

1. Al-Mahr al-Musamma:

Al-mahr al-musamma is the *mahr* agreed by the couple and specified by them in the contract. This *mahr* does not have any upper limit, by consensus of all the schools, in accordance with the following verse of the Qur'an:

وَإِنْ أَرَدْتُمُ اسْتِبْدَالَ زَوْجٍ مَكَانَ زَوْجٍ وَآتَيْتُمْ إِحْدَاهُنَّ قِنْطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا

And if you wish to take a wife in place of another and have given one of them a heap of gold, then take not from it a thing. (***4:20***)

But the schools differ regarding the lower limit. The Shafi'i, the Hanafi and the Imamiyyah schools observe: Everything which is valid as price in a contract of sale is valid as *mahr* in a marriage contract, though it be a single morsel.

The minimum *mahr* according to the Hanafi is ten dirhams, and a contract concluded for a lesser amount is valid and the minimum–i.e. ten dirhams–shall be payable.

The Malikis have said: The minimum is three dirhams. Therefore, if something less is specified and later the marriage is consummated, the husband will pay her three dirhams; if it has not been consummated, he has a choice between giving her three dirhams or dissolving the contract by paying her half the specified *mahr.*

Conditions of Mahr

It is valid that *mahr* be specified in terms of currency, jewelry, farmland, cattle, profit, trade commodities and other things of value. It is necessary that the value of the *mahr* be known, either exactly (e.g. a thousand Lira) or approximately (e.g. a particular piece of gold or a particular stock of wheat). If the mahr is totally vague, so that its value is unascertainable in any manner, according to all the schools except the Maliki, the contract is valid and the *mahr* void. The Malikis observe: The contract is invalid and will be considered void before consummation but if consummation has occurred it will be valid on the basis of *mahr al–mithl*.

Among the conditions is the being *halal* of the *mahr* and its being valued in terms of a commodity whose transaction is considered legal by the Islamic Shari'ah. Therefore, if it is mentioned in terms of liquor, swine or *m'aytah* or anything else whose ownership is invalid, according to the Malikis the contract shall be invalid if it has not been consummated, and if consummated, shall be valid and the *mahr al–mithl* shall be payable.

The Shafi'i, the Hanafi, the Hanbali and most of the Imamiyyah legists have said: The contract is valid and she shall be entitled to the *mahr al–mithl*. Some Imamiyyah legists have entitled her to the *mahr al–mithl* only if the marriage has been consummated, while others amongst them lay no such condition and are in consonance with the other four schools.

If the *mahr* is usurped property, such as when she is married for a farm as her *mahr* and later it is known to belong to the groom's father or someone else, the Malikis have said: If the farm is known to the two and both happen to be sane, the contract shall be invalid if not consummated and if consummated shall be considered valid on the basis of *mahr al–mithl*. The Shafi'i and the Hanbali schools regard the contract as valid and entitle her to the *mahr al–mithl.* The Imamiyyah and the Hanafi schools are of the

opinion that the contract is unconditionally valid; but regarding the *mahr* they observe: If the owner agrees, she shall receive the farm itself; if the owner ref uses, she shall be entitled to receive a similar farm or its price because the stipulated *mahr* in this case is capable of being validly owned though ownership does not materialize, in contra t with liquor or swine which cannot be owned at all.

Mahr al-Mithl

The concept of *mahr al-mithl* is relevant in the following cases:

1. There is consensus among the schools that *mahr* is not an essential ingredient (*rukn*) of a marriage contract, as price is in a contract of sale. On the contrary, *mahr* is only one of the effects of a marriage contract, and even without its stipulation the contract is valid. Thus, *mahr al-mithl* shall be payable on consummation (when *mahr* was not specified) and if he divorces her before the consummation of marriage, she shall not be entitled to any *mahr*, but will receive *al-muat'ah*, which is a gift given by the husband to his wife (at the time of divorce) in accordance with his status, such as a ring or a dress, etc. If they both agree on this gift it will suffice: otherwise it will be fixed by the judge. The issue whether the couple's retiring to seclusion (*khalwah*) is tantamount to consummation or not, will be discussed later.

The Hanafi and the Hanbali schools observe: If the husband or the wife dies before consummation, full *mahr al-mithl* shall be payable as if the marriage had been consummated (*Majma' al-'anhur* and *al-Mughni*, chapters on marriage).

According to the Malikis and the Imamiyyah, no *mahr* is payable if any of the two dies before consummation (*al-Mughni* and *al-Wasilah*).

The Shafi'ls have two views: (a) That the *mahr* shall be payable; (b) no *mahr* shall be paid (*Maqsad al-nabih*).

2. If the marriage contract is concluded with specification of *mahr* in terms of a commodity which cannot be owned, e.g. liquor or swine, as mentioned earlier.

3. All the schools agree that *mahr al-mithl* becomes *wajib* as a result of intercourse-by-mistake. Intercourse-by-mistake is intercourse with someone with whom it is not legally permissible, though without the knowledge of it being so; such as a person marrying a woman without the knowledge of her being his foster sister and coming to know of it later, or his having intercourse with her after both have appointed their deputies for reciting the contract, thinking it to be sufficient for establishing sexual contact. In other words, intercourse-by-mistake is intercourse without proper marriage, though the presence of a legal excuse precludes penal action. On this account the Imamiyyah include under this head intercourse by a person who is either insane or intoxicated or in sleep.

4. The Imamiyyah, the Shafi'i and the Hanbali schools have said: One who coerces a woman to fornicate shall bave to pay *mahr al-mithl*; but if she had yielded voluntarily she shall not be entitled to anything.

5. A marriage concluded on the condition that no *mahr* shall be paid is valid according to all except the Malikis who say: The contract shall be invalid if not consummated and valid if consummated due to the obligation to pay *mahr al-mithl.* A large number of Imamiyyah legists have said: He shall give her something, be it much or little. Traditions from the Ahl al-Bayt ('a) support this view.

According to the Imamiyyah and the Hanafi schools, if an invalid marriage contract is recited with a certain *mahr* and the marriage is consummated, she shall be entitled to receive the *mahr* stipulated even though it was less than the *mahr al-mithl* because of her prior consent. But if the stipulated *mahr* is more, she shall receive only the *mahr al-mithl*, because she is not entitled to receive more than *mahr al-mithl.*

Mahr al-mithl is computed by the Hanafis by taking into account the *mahr* of her equals from the paternal, not the maternal side. According to the Malikis, her *mahr* shall be commensurate with her physical and mental qualities. The Shafi'is, take the *mahr al-mithl* of the wives of her paternal relatives as reference, i.e. the wife of her brother, that of her paternal uncle, then her sister etc. For the Hanbalis, the judges shall compute the *mahr al-mithl* by taking into account the *mahr* of her female relations, such as the mother or maternal aunt.

The Imamiyyah have said: There is no fixed way of determining mahr al-mithl in the Shari'ah. It is estimated by those who know her status, descent, and all those aspects which influence the increase or decrease of *mahr*. But this *mahr* shall not exceed the *mahr al-sunnah*, which is equal to five hundred dirharms.

Immediate and Deferred Payment of Mahr

All the schools concur regarding the validity of deferred payment of *mahr*, fully or partly, provided that the period be known, either exactly (such as when it is said, "I marry you for a hundred, of which fifty shall be paid immediately and the rest after one year") or in an indeterminate manner (such as when it is said, "The *mahr* is deferred till death or divorce"). The Shafi'i school disapproves the latter form of deferment.

But if the period is so mentioned that it is totally vague, such as when it is stated that the payment of mahr shall be made on the return of a certain traveler, the time clause shall be void.[1]

The Imamiyyah and the Hanbali schools have said: If the *mahr* has been mentioned without specifying whether its payment is immediate or deferred, the entire *mahr* shall be immediately payable.

According to the Hanafis, the local practice shall be observed; i.e. the portions to be immediately paid and deferred will follow the local custom.

The Hanafis have also said: If the *mahr* is deferred without mentioning the period of deferment (such as when it is said, "Half of it is immediately payable and the rest deferred"), the full *mahr* shall be

immediately payable.

The Hanbalis observe: The *mahr* can be deferred until death or divorce.

The Malikis are of the opinion that such a marriage is invalid; it is voidable before consummation, though valid after it on the basis of *mahr al-mithl*.

The Shafi'is state: If the period is known not exactly but in an indeterminate manner (such as until death or divorce) the *mahr* stipulated shall become invalid and the *mahr al-mithl* will be payable (*al-Fiqh 'ala al-madhahib al-'arba'ah*).

The Hanafi and the Hanbali schools have said: If the bride's father apportions for himself, as a condition. A part of her *mahr*, the *mahr* is valid and the condition shall have to be complied with.

The Shafi'is say: The *mahr* stipulated shall become invalid and *mahr al-mithl* shall be payable.

According to the Malikis, if this condition is included at the time of marriage, the bride shall receive the entire *mahr*, including her father's share; and if the condition is laid after the marriage, the bride's father shall receive his share (*al-Mughni and Bidayat al-mujtahid*).

The Imamiyyah observe: If her *mahr* has been specified with a fixed portion of it mentioned for her father, she shall get her full stipulated *mahr* and her father will not get his share.

The Wife's Right to Refuse Her Conjugal Society

There is consensus among the schools that the wife, simply after the recital of the contract, has the right to demand her full specified *mahr* immediately and to ref use her conjugal society until the *mahr* is paid. But, if she surrenders once willingly without demanding the *mahr*, she loses her right of refusal; all concur on this issue except Abu Hanifah. He observes: She has the right to ref use even after surrender. Abu Hanifah's disciples, Muhammad and Abu Yusuf oppose his view.

The wife is entitled to receive maintenance if she ref uses her conjugal society until the payment of *mahr*; because her refusal in such a case is legally valid. But if she refuses to fulfill her conjugal duties after receiving *mahr* or after voluntary surrender, she shall not be entitled to maintenance except according to Abu Hanifah.

If the wife be a minor unfit for marital relations and the husband a major, it is up to her *wali* to demand the *mahr*; it is not necessary that he wait until her maturity. Similarly, if the wife be a major and the husband a minor, the wife has the right to demand the *mahr*, from his *wali*, and it is not necessary for her to wait until his maturity.

The Imamiyyah and the Shafi schools state: If a dispute arises between the couple, with the wife refusing to surrender until payment of *mahr* and the husband refusing payment until her surrender, the

husband shall be compelled to deposit the *mahr* with a trustee and the wife will be asked to surrender. Then if she surrenders, she shall receive her *mahr* and be entitled to maintenance. But if she ref uses, she shall not receive the *mahr* and will not be entitled to any maintenance. If the husband refuses to deposit the *mahr*, he will be ordered to pay her maintenance on her demanding it.

The Hanafi and the Maliki schools state: The payment of *mahr* has precedence over the woman's surrender, and the man may not say, "I will not pay the *mahr* until she surrenders". If he insists on this, he shall be ordered to pay her maintenance, and if she after receiving the *mahr*, refuses her conjugal society, the husband is not entitled to claim the return of *mahr*.

According to the Hanbali School, the husband shall be first compelled to pay the *mahr*.

This opinion concurs with the Hanafi view except that according to the Hanbalis, if she refuses her conjugal society after receiving the *mahr*, he has the right to demand the return of the *mahr*. (*Maqsad al-nabih, M ajma ' al-'anhur and al-Fiqh 'ala al-madhahib al-'arba'ah*)

Inability of the Husband to Pay the Mahr

The Imamiyyah and the Hanafi schools observe: If the husband is unable to pay the *mahr*, the wife is not entitled to dissolve the marriage, and the judge, too, cannot pronounce her divorce. But she has the right to deny her conjugal society.

The Malikis state: If his inability is proved before the consummation of marriage, the judge will grant him time according to his own discretion.

If, after the expiry of such period his inability continues, the judge will pronounce divorce, or the wife will divorce herself and the judge shall endorse its validity. But if he has consummated the marriage, she can in no way dissolve it.

The Shafi'i school is of the opinion that if his inability is proved while the marriage has not been consummated, she can dissolve it. But if it has been, she cannot dissolve it.

The Hanbalis state: She may dissolve the marriage even after its consummation, provided she had no knowledge of his inability before the marriage. Therefore, if she had the knowledge the question of dissolving the marriage does not arise. Even when the marriage is dissolvable, only the judge has the authority to do so.

The Father and His Daughter-in- Law's Mahr

The Shafi'i the Maliki and the Hanbali schools hold that if a father concludes the marriage of his pauper son, he shall be liable for payment of *mahr* even if the son be a major and the father acts as his *wali* for the marriage as his son's deputy. If the father dies before *mahr* is paid, which was *wajib* upon him, it

shall be paid out of his legacy.

The Hanafi school observes: The payment of *mahr* is not wajib upon the father, regardless of whether the son is a well-to-do person or a pauper, a major or a minor (*al-'Ahwal al-shakhiyyah* by Abu Zuhrah).

The Imamiyyah state: If the minor son possesses property and his father gets him married the *mahr* shall be paid from the son's assets and the father shall not be liable at all. But if the minor has no property at the time of marriage, the father shall be liable to pay the *mahr*; the husband (son) shall not be liable even if he becomes a man of means later. Also, the father is not required to pay the *mahr* of his major son's wife unless he guarantees it on the conclusion of the contract.

Consummation and Mahr

Sex relations with a woman fall within these three categories:

1. Fornication (*zina*) to which she surrenders with the knowledge of its being *haram*. In this instance, she will not get any *mahr*; rather shall be liable to penal action.

2. As a result of a misunderstanding on her behalf of its being legal, followed by later knowledge that it was haram. Here, her act has no penal consequences and she is entitled to receive *mahr al-mithl*, irrespective of the man's knowledge of the act being *haram*.

3. As a result of a valid marriage. In this case she is entitled to receive the specified *mahr* if it has been validly stipulated, and the *mahr al-mithl* if no *mahr* was specified in the contract or was specified in an invalid form (e.g. in terms of liquor or swine).

If one of the spouses dies before consummation, then, according to the four schools, she is entitled to receive the entire specified *mahr*. The Imamiyyah jurists differ. Some of them, in consonance with the four Sunni schools entitle her to the entire specified *mahr*, while others (including al-Sayyid Abu al-Hasan al-Isfahani in his *al-Wasilah* and Shaykh Ahmad Kashif al-Ghita' in *Safinat al-najat*) to half the specified mahr on a par with a divorcee.

Wife's Crime Against Husband

The Shafi, the Maliki and the Hanhali schools have observed: If a wife kills her husband before the consummation of marriage she shall not be entitled to any *mahr* According to the Hanafi and the Imamiyyah schools. she shall not be deprived of her right to *mahr*, though she loses her right to inherit him.

Al-Khalwah

According to the Shafi'i school and the majority of Imamiyyah jurists, the mere enjoyment of privacy or retirement by the couple has no effect on *mahr* nor any other consequence. Only the consummation of marriage is consequential in this regard.

The Hanafi and the Hanbali schools have observed: 'Valid seclusion· confirms *mahr*, establishes descent, and requires observance of *'iddah* in case of divorce, even though such seclusion does not result in consummation. The Hanbalis also consider gazing and touching with a sexual intent and kissing on a par with consummation and therefore sufficient for confirming *mahr*. By 'valid seclusion' is meant the seclusion of the couple in a place where they are secure from observation by others and where there is no impediment to intercourse.

The Malikis state: If the period of seclusion is prolonged, *mahr* is established even without consummation. Some of them have fixed the period of 'prolonged seclusion' at one complete year (*al-'Ahwal al-shakhsiyyah* of Abu Zuhrah: *Rahmat al-'ummah* of al-Dimashqi).

Half the Mahr

There is consensus among the school that if *mahr* is specified at the time of the contract and then the husband pronounces divorce without consummation, or seclusion–for those who consider the latter to be consequential–half the *mahr* shall be payable. But if the contract is recited without specifying *mahr* , she shall get nothing except *al-mut'ah*, as mentioned earlier in accordance with the following verse:

لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَّقْتُمُ النِّسَاءَ مَا لَمْ تَمَسُّوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً ۚ وَمَتِّعُوهُنَّ عَلَى الْمُوسِعِ قَدَرُهُ وَعَلَى الْمُقْتِرِ قَدَرُهُ مَتَاعًا بِالْمَعْرُوفِ ۚ حَقًّا عَلَى الْمُحْسِنِينَ

وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمَسُّوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ

There is no blame on you if you divorce women when you have not touched them or appointed for them a portion: yet make provision for them, the wealthy man according to his means and the needy man according to his means, a provision according to honorable usage: (***this is***) ***a duty on the good -doers. And if you divorce them before you have touched them and you have appointed for them a portion, then*** (***pay them***) ***half of what you have appointed...*** (***2:236--37***)

Therefore, if the husband, not having paid anything to the wife whose *mahr* has been specified, divorces her before consummating the marriage, he shall pay her half the *mahr*. But if he has paid the entire *mahr*, half of it shall be returned if it still exists and the equivalent of it in cash or kind if it has perished.

If the husband and wife do not specify *mahr* in the contract but later agree upon it and then the husband divorces her before consummation, in this case, shall she be entitled to receive half of the *mahr* agreed upon if the *mahr* had been specified in the contract, or shall she get nothing except the *mut'ah*, as if they had not agreed upon *mahr* later?

The Shafi'i, the Imamiyyah 2 and the Maliki schools are of the opinion that she is entitled to half the *mahr* agreed upon, and according to the Hanbali book al-*Mughni* (vol. 6, chapter on marriage), she is entitled to half the *mahr* agreed upon after the contract. but not *mut'ah*.

This discussion was related to the right to full *mahr* and the right to half *mahr*. Instances of annulment of the right to full *mahr* can be found in our above discussion on 'defects'.

An Exceptional Case

If the husband (by his finger or something else) causes the wife's loss of virginity, will it be considered consummation for the sake of confirming *mahr*?

There is no doubt that such an act followed by intercourse has all the legal consequences such as *mahr*, 'iddah, establishment of parenthood and so on.

But the question is, if he, without intercourse, divorces her after causing her loss of virginity in this manner, does it confirm only half the specified *mahr* because the marriage has not been consummated, or will the full *mahr* be payable on account of her loss of virginity?

I put this question to Ayatullah al-Sayyid Abu al-Qasim al-Khu'i. This was his reply: "The husband is liable to pay the full *mahr* because of the loss of virginity, on the basis of the tradition narrated by 'Ali ibn Ri'ab in which the Imam ('a) has stated: If they (wives) are as they were when they joined the husband, then she will get half the specified *mahr*. That which is understood from this conditional clause is that after divorce only half the *mahr* is to be paid if the wife's condition at the time of divorce is the same as it was when she joined him. Therefore, due to the general meaning connoted, it indicates that the wife, if she is not what she was, the husband is liable to pay the entire *mahr*, and it shall not be reduced to half irrespective of whether the change and loss of virginity occurs as a result of intercourse or some other factor."3

1. I had stated in my book al-Fusal al-Shariyyah that the deferring of mahr till death or divorce is not correct due to the need to avoid vagueness; is not the period of deferment. Later on, it occurred to me that it is correct. hecauc rnahr can stand vagucnc:-.s to a greater extent than price in a transaction of sale, and also becausc it is not a compensation ('nwad) in the real sense of the term. Thus, it is sufficient for mahr that it be determinable by sight (i.e. without being weighed or measured) or receivable or that it be teaching the wife of that which the husband knows of the Qur'an. Apart from this, one of the two terms (death or divorce) is in fact known, though not to the parties to the contract. Thus one of these two events, death or divorce, will inevitably occur. Moreover, it is also valid that a marriage be concluded without mentioning the mahr, as well as when a third person is delegated to determine the mahr.

2. The author of al-Jawahir has observed about the third problem relating to the issue of al-tafwid : whenever there is an

agreement on a thing, that thing shall be the mahr and shall in fact become the property of the wife, either by itself or in the form of a debt, immediately or in a deferred form, and all those rules which apply to mahr specified in the contract, shall apply to it.

3. It has been observed in a tradition on the authority of Yunus ibn Ya'qub that:

لا يوجب الصداق إلا الوقاع في الفرج

(Nothing makes mahr wajib except vaginal intercourse).

– This tradition is an explanation of the one narrated by Ibn Ri'ab, and on this basis the Imam's words:
فإن كن كما دخلن عليه

(If they are as they were when they joined him'), would appear to include only the natural form of copulation, not those instances where virginity is lost as a result of unnatural means, and the tradition narrated by Ibn Ri'ab fails to provide a valid basis for argument. Whatever be the case, the fatwa of al–Sayyid al–Khu'i concurs with those of al–Sayyid al–Hakim in Minhaj al–salihin (where he states: "If he causes her to lose her virginity by using his finger without her consent, the mahr shall be payable") and al–Shaykh Ahmad Kashif al–Ghita' in Safinat al–najat (chapter on hud'ud).

Disagreement between the Spouses

The spouses may at times differ regarding the consummation of marriage and sometimes regarding the specification of *mahr*, its value, its receipt by the wife or as to whether that which was received was given as a present or as *mahr*. Here we have the following issues:

1. Where the husband and wife differ regarding the consummation, the Hanafi school has two opinions, the more preferable of which is: If the wife claims the occurrence of consummation or seclusion, which the husband refutes. the wife's word shall be accepted and the burden of proof will rest on the husband, because it is she who actually contests the reduction of half her *mahr* (*al–Fiqh 'ala al–madhahib al–'arbah*).

The Malikis say: If the wife visits the husband at his home and then claims consummation while he denies it, her word shall be accepted on oath. If the husband visits her at her place and then she claims consummation while he denies it. his word shall be accepted on oath. And similarly, if they both go to see someone else at his place and she then claims consummation while he denies it, his word shall be accepted.

According to the Shafi'is, m case of dispute regarding consummation, the husband's word shall be accepted (*Maqsad al–nabih*).

The Imamiyyah observe: If the spouses differ regarding consummation and the wife denies its taking place in order to preserve her right to deny him her conjugal society until payment of her *mahr*, agreed to be paid promptly, and he claims consummation in order to establish his claim that her refusal is without

legal justification, or if he denies consummation seeking to reduce his liability to half the *mahr* and she claims consummation to have occurred, seeking to establish her right to full *mahr* and maintenance during the *'iddah*, in both these instances the word of the party denying consummation shall be accepted irrespective of whether it is the husband or the wife; and, as said earlier, seclusion has no effect.

This may lead a question to arise in one's mind: how do the Imamiyyah jurists accept in this case the word of the party denying consummation, while, as mentioned earlier, they accept the word of even an impotent man claiming consummation?

The answer is that the issue here is the act of consummation, which is an occurrence and an event claimed to have happened.

The presumption is that an event claimed to have happened has not occurred, and therefore the burden of proof rests on the party claiming its occurrence. That which was in dispute in the issue regarding impotence is the presence of this defect, which justifies dissolution of marriage. Therefore, the wife's denial of consummation implies that she is claiming the presence of that defect, and thereby becoming the claimant. The husband's statement that consummation has occurred implies that he refutes the claim of the presence of the said defect, thereby challenging the claim.

2. If they differ regarding the fact of stipulation of *mahr*, with one of them claiming that valid *mahr* was stipulated prior to the contract, while the other refutes it, saying that the contract was recited without *mahr* stipulation, the Imamiyyah and the Hanafi schools observe: The burden of proof rests on the party claiming stipulation and the party refuting it shall take an oath. But if the wife claims that the *mahr* has been specified and the husband refutes it, and takes an oath after her failure to prove the stipulation, she shall receive *mahr* al-*mithl* if the marriage has been consummated, on condition that *mahr al-mithl* does not exceed the amount she claims as having been specified. Thus, if she claims that the contract was concluded with a *mahr* of ten units while he denies it and the *mahr al-mithl* happens to be twenty units, she shall receive only ten, in view of her own admission that she is not entitled to more.

The Shafi'is are of the opinion that both the parties are claimants, i.e. each one of them is a claimant as well as a refuter. Therefore, if one of them furnishes proof while the other fails to do so, the judgement shall be given in favor of the party furnishing proof, and if both furnish proof or both fail to do so, they shall both take oath and *mahr al-mithl* shall be confirmed.

3. If both agree that *mahr* has been specified, but disagree regarding its amount, here the Hanafi and the Hanbali schools are of the opinion that the word of the party claiming an amount equal to the *mahr al-mithl* shall be accepted. Therefore, if she claims the *mahr al-mithl* or something else, her claim shall be accepted. If the husband's claim amounts to the *mahr al-mithl* or more, his word shall be accepted. (*al-Mughni* and *Ibn 'Abidin*).

The Shafi'is state: Both are claimants, and if both are unable to furnish proof, *mahr al-mithl* shall be confirmed after their oath.

According to the Imamiyyah and the Maliki schools, the wife is the claimant and the burden of proof shall rest on her. The husband challenging the claim shall take an oath.

4. Where the spouses disagree regarding the actual payment of *mahr*, with the wife denying that she received it and the husband claiming to have paid it, the Imamiyyah, the Shafi'i and the Hanbali school have observed: The wife's word shall be accepted because she challenges the husband's claim who shall have to furnish proof. The Hanafi and the Maliki schools observe: The wife's word shall be accepted if the dispute arises before consummation and the husband's word if consummation has occurred.

5. When both admit that she has received something and the wife claims that it was a present, while the husband claims it to have been *mahr*, the Imamiyyah and the Hanafi schools observe: The husband's word shall be accepted because he knows his own intention. Therefore, he shall take an oath and it is for the wife to furnish proof that it was a present (*al-Jawahir* and *Ibn 'Abidin*).

Such is the case when there is no circumstantial evidence such a local custom or a particular circumstance of the husband showing that it was a present, such as when it is something eatable or a gift of dress, or what the Lebanese call *al-'alomah* (mark or token) and the Egyptians *al-shabakah* (net), which is a ring or something similar given as a gift to the fiancée by the fiancé so that she may decline other proposals. Therefore, if the thing is something of this kind, the word of the wife shall be accepted.

If the fiancée changes her mind about the marriage after having accepted the ring but before the contract, she is liable to return the ring on his demanding it, and if the fiancé changes his mind, the custom gives him no right to claim it back. But the rules of the Shariah do not recognize any difference between his or her changing his/her mind and therefore she is liable to return the gift as long as it is with her and she has not sold it or gifted it or changed its form.

Dowry (al-Jihaz)

The Imamiyyah and the Hanafi schools concur that *mahr* is the sole property of the wife and one of her rights. She can use it according to her own will, bequeathing it or buying her dowry with it, or saving it for her own use at her pleasure, and no one has the right to question or oppose her. The responsibility of furnishing their home lies solely on the husband and she is in no way responsible for anything, because maintenance, in all its different forms, is required only of the husband.

The Malikis observe: It is incumbent upon the wife to buy from the *mahr* she has received all those things which women of her status buy as their dowry, and if she has not received any *mahr* then it is not *wajib* for her to bring dowry except in the two cases: (1) if the local custom considers it compulsory for

the wife to bring dowry even though she has not received anything; (2) if the husband sets the condition that she furnish their home with her own means.

If the husband and wife dispute regarding the ownership of any household item, it will be seen whether the item is used only by men or women or by both. Thus three different situations arise:

(1) Where the item is used by men only, such as his clothes, his books, his measuring instruments if he is an engineer or his medical apparatus if a doctor. The ownership of this kind of items shall be determined by accepting the word of the husband under oath, except when the wife furnishes proof that she is the owner. This is the opinion of the Imamiyyah and the Hanafi schools.

(2) Where the item is used only by women, such as her clothes, jewelry, sewing machine, cosmetics. etc., the ownership of these shall be determined by accepting her word under oath, except when the husband furnishes proof to the contrary.

(3) Where the item is used by both of them, such as carpets, curtains, etc. It shall be given to the party furnishing proof of its ownership. But if both are unable to furnish proof, each of them shall testify under oath that the said item belongs to him/her; then the items will be equally divided between them. If one of the parties takes an oath while the other abstains, the party taking oath shall be given the item. This is the opinion of the Imamiyyah.

Abu Hanifah and his pupil Muhammad are of the view that the husband's word shall be accepted regarding items of common use.

The Shafi'is say: If the husband and wife dispute regarding the ownership of household goods, these shall be divided between them irrespective of their being of individual or common use. (*Mulhaqat al-Sayyid* Kazim. chapter on *qada'; al-'Ahwal al-shakhsiyyah*: Abu Zuhrah)

Lineage (Al-Nasab)

Introduction

Every man is free within the limits of law and morality to say whatever he wants, and no one is entitled to stop him from doing so. But it is also not incumbent upon anyone to heed his statements or to consider them with respect. This is true irrespective of the speaker's station, whether high or low, venerable or otherwise, when his speech pertains to something outside the area of his specialty. Therefore, if an authority on law gives an opinion on a question of medicine or agriculture, it is not correct for a plaintiff to cite that opinion in support of his case, nor is it correct for a judge to base his judgment upon it.

Similarly, in the case of apostles, prophets, Imams and authorities on law, it is not obligatory upon anyone to believe their statements about issues concerning physical nature, such as the creation of the earth and the heavens, the distances between them, their origin and end, the elements of which they are composed and the forces therein. Sacred personalities at times explained a certain phenomenon in their capacity as a sacred authority; at other times they spoke about things in their personal capacity, like all other human beings who say what they conjecture or hear from others. Therefore, when they speak in their religious capacity, it is *wajib* upon us to listen to them and to obey them, as long as their religious decree does not exceed the limits of their specialty. But when they speak in their personal capacity, it is not *wajib* to follow them, because, here, their word is not regarding religion or things related to it.[1]

Thus a legislating authority, religious or secular, should limit itself to framing and expounding laws and regulations, with the aim of encouraging some acts and discouraging others, and explaining their causes and effects, approving one contract as binding together with its terms and conditions and invalidating another as not binding, and issues of this kind which safeguard the social order and ensure the common good.

But as regards natural phenomenon–such as the minimum or the maximum period of pregnancy–it is not within the domain of a lawgiver to either affirm or deny them or to make amendments. This is because the realities of nature and their causes are not alterable; they do not change due to the change of conditions and passage of time in contrast with social laws, which are laid down, abrogated and modified by the lawgiver's will.

It is obvious that a lawgiver does make external realities of nature the subject of his laws, for instance, when he lays down that a child in the womb has the right to inherit from the father, that the birth of a child leads to an increase in the statutory allowance of the mother, or that when the wheat produce exceeds the consumption of farmers, the surplus should be taken into government custody, etc. But the explanation of natural phenomena relating to the subject of laws is the task of specialists. If there is anything in the statements of legal authorities explaining or defining such phenomena, it is nothing but an attestation of what specialists have reported. Therefore, when a judge refers an issue for specialist opinion and the fact is known showing the error of its description by legists, it is not *wajib* that their observations be followed, because we know with certainty that the legists have spoken regarding a phenomenon which pre–existed legislation; the intent of their remarks was to explain this pre–existing fact. Thus, when the opposite is proved, to follow their word would be equivalent to acting against their purpose and intention. The legists themselves name this kind of mistake "mistake in application"; it is similar to the mistake of a person who asks for a cup while pointing towards a stone resembling it.

After this introduction, we move on to our actual subject. As the child is the subject of many Islamic laws–such as its right to inherit from the father; the illegitimacy of its marriage with it sibling, the father's right to act as a guardian of its person and property until maturity; the *wajib* of its maintenance, and such other legal and moral rights–the legists are forced to determine the minimum and the maximum period of

gestation. It is obvious that this issue pertains to the specialty of doctors of medicine not of law, and, therefore, it is not necessary that the word of legists be acted upon if it contradicts actual fact and reality. Because, in such circumstances, the logic of reality is stronger than their logic, and its proof prevails over their evidence. When the opinions of natural philosophers and physical scientists collapse before reality, it is more in order that the observations of those who are in no way connected with a particular field of specialization should collapse before facts. We mention here the views of different schools of Islamic law regarding the minimum and maximum period of gestation, on the assumption that one is not obliged to follow these views when they are not in consonance with facts.

The Minimum Period of Gestation

The opinion of all the legal schools of Islam, both Sunni and Shi'i, is that the minimum gestation period is six month because the 15th verse of the Surat al-'Ahqaf expressly states that the gestation period (*muddat al-haml*) along with the period of suckling (rida'ah) is thirty months

وَحَمْلُهُ وَفِصَالُهُ ثَلَاثُونَ شَهْرًا

and the 14th verse of the *Swat Luqman* states that the period of suckling is to be two complete years

وَفِصَالُهُ فِي عَامَيْنِ.

When two years are subtracted from thirty months, the remainder is six months, which is the minimum period of gestation. Modern medicine supports this view and the French legislature has also adopted it.

The following rules are derived from the above observations:

1. When within six months of her marriage a woman gives birth to a child, the child will not be attributed to her husband. Al-Shaykh al-Mufid and al-Shaykh al-Tusi-both Imami-and al-Shaykh Muhyi al-Din 'Abd al-Hamid of the Hanafi School have said that the choice of denying or accepting the child's parentage lies with the husband. If he accepts the child as his, the child shall be considered his legitimate offspring, and shall enjoy all the rights of a legitimate child. Similarly, the father shall have all those powers over it a over the other legitimate children.[2]

When the couple differs regarding the period of their conjugal relationship (she claiming that they existed since six months or more, and he denying it, claiming the period to be shorter than six months and denying the child to be his), Abu Hanifah is of the opinion that the wife's word shall be considered true and acted upon without her taking an oath.[3]

The Imamiyyah have said: If circumstantial evidence favors his or her contention, it will be acted upon,

and if no such evidence exists, the judge shall accept the wife's word after her taking an oath that sex relations with the husband had existed since six months; then the child shall be attributed to the husband.[4]

2. When a husband divorces his wife after intercourse and she, after observing the *'iddah*, marries another and gives birth to a child within six months of her second marriage, if six months or more–but not exceeding the maximum period of gestation–have elapsed since her intercourse with the first husband, the child shall be attributed to the former husband. But if more than six months have elapsed after her second marriage, the child is attributed to the second husband.

3. When a woman contracts a second marriage after divorce and then gives birth to a child within six months of intercourse with the second husband, if more than the maximum period of gestation has elapsed since intercourse with the former husband, the child shall not be attributed to any of them. For example, if eight months after divorce a woman marries another person and after living with him for five months gives birth to a child, supposing the maximum period of gestation to be a year, it is not possible to attribute the child to the former husband, because more than a year has elapsed since they had intercourse. It is neither possible to attribute the child to her present husband because six months have not yet passed since their marriage.

The Maximum Period of Gestation According to Ahl al-Sunnah

Abu Hanifah ha' said: The maximum gestation period is two years on account of a tradition narrated by 'A'ishah that a woman does not carry a child in her womb for more than two years. Malik, al-Shafi'i and Ibn Hanbal state the period to be four years, on the basis that the wife of 'Ajlan carried her child for four years before delivery. It is strange that the wife of his son, Muhammad, had a similar gestation period. In fact all women of Bani 'Ajlan have a gestation period of four years,[5] which indicates God's power over His creation.

This argument, if it proves anything, shows the piousness of these legists and their good intentions, and how often the logic of piety prevails over the logic of reality.

'Abbad ibn 'Awwam puts the maximum period of gestation at 5 years. al-Zuhari at 7 years, and according to Abii 'Ubayd there is no maximum period of gestation.[6]

It follows from these conflicting opinions, that if a person divorces his wife or dies and she, without marrying again after him, bears a child, the child shall be attributed to him if born after: two years, according to Abu Hanifah; four years, according to Shafi'is, Malikis and Hanbalis; five years, according to Ibn 'Awwam; seven years according to al-Zuhari; and twenty years according to Abu 'Ubayd.

Legislation in Egypt relieves us from a critical examination of these varied opinions. The Egyptian Shari'ah courts followed the Hanafi code until the passing of Act 25 of 1929. Section 15 of this Act

categorically mentions that the maximum period of gestation is one year.[7]

The Maximum Gestation Period According to the Shi'ah

There is a difference of opinion among Imami scholars regarding the maximum period of gestation. Most of them have stated it to be nine months, some of them ten months, and some others a year. Thus there is a consensus that the period does not exceed a year, even by an hour. Therefore, if a woman, divorced or widowed, gives birth to a child after one year, the child shall not be attributed to the husband, because there is a tradition from al-'Imam al-Sadiq (a):

إذا طلق الرجل زوجته وقالت أنا حبلى وجاءت به لأكثر من سنة ولو ساعة واحدة لم تصدق في دعواها

If a man divorces his wife and she claims to be pregnant, and then gives birth to a child after more than a year has passed , even though by an hour, her claim shall not be accepted.[8]

Walad al- Shubhah

Shubhah –that is a mistake which leads a man to have intercourse with a woman *haram* to him, as a result of his ignorance of her being such–is of two kinds: subhat 'aqd(mistake of contract) and sublat fil (mistake of act).

1. 'Mistake of contract' occurs where a man concludes a marriage contract with a woman in a manner in which legal contracts of marriage are concluded and later it is known that the contract was invalid due to the presence of a cause sufficient to invalidate the contract.

2. 'Mistake of act' occurs where a person copulates with a woman without there being between them any contract, valid or invalid, and he does so either without conscious attention or thinking that she is fulfill to him, and later the opposite is discovered.

Sexual intercourse by a lunatic, or an intoxicated person, or a person in sleep, or a man under the false impression that the woman is his wife, comes under this category. Abu Hanifah has extended the meaning of this form of 'mistake' to its utmost limits where he has observed: Where a man hires a woman for some work and then fornicates with her, or hires her for fornication and does so, the two will not be penalized for fornication. because of his ignorance that his hiring her does not include this act.[9]

Accordingly, if she is working in a business establishment or a factory and the proprietor of such establishment copulates with her believing this to be one of the benefits which accrue to him as a result of his hiring her, this act will not be termed fornication, but will be considered 'a mistake' and shall be a valid excuse for the proprietor in Abu Hanifah's opinion.

It follows from the above discussion that a child born as a result of 'intercourse by mistake' is a legitimate

offspring and is equal in all respects to a child born out of a valid wedlock, irrespective of whether the mistake is a 'mistake of contract' or a 'mistake of act'. Therefore, he who has intercourse with a woman while in a state of intoxication, or in sleep, or in a state of lunacy or under coercion, or before reaching the age of maturity, or under an impression that she is his wife, with the opposite being discovered later– in all such cases if she gives birth to a child, it shall be attributed to him.

The Imamiyyah have said: In all such cases of mistake, the legality of lineage is established and if the man ref uses to recognize the child as his, his refusal shall not be accepted and the child will be compulsorily attributed to him.[10]

Muammad Muhyi al–Din, in *al–'Ahwal al–shakhsiyyah*, p. 480, observes that lineage is not established in any form of 'copulation by mistake' unless the person acting mistakenly claims the child to be his and acknowledges it, because he knows himself better. But this view is incorrect when applied to a lunatic, to one in sleep, or to an intoxicated person, because they do not act with conscious intent. It is also inapplicable in the case of mistake of contract because there is no difference between a valid contract and an invalid contract except that the couple shall separate when the invalidity of the contract becomes known, and there is a consensus among the Sunni and Shi'i schools that whenever a mistake, in any one of its different forms is proved, it is *wajib* for the woman to observe *'iddah*, as observed by a divorcee; she is also entitled to receive the full *mahr*. Therefore, the rules which apply to a wife will apply to her as regards *'iddah*, *mahr* and child's lineage.[11]

The mistake may be from the side of the man as well as the woman so that both are ignorant and inattentive. It may be from only one side, such as when the woman knows that she has a lawful husband but hides it from the man, or when he is aware while she is a lunatic or in a state of intoxication. When the mistake is from both sides the child shall be attributed to both of them, and if the mistake is from only one side the child shall be attributed to the parent acting under mistake and not to the parent who was aware.

If a person copulates with a woman and then claims ignorance regarding its being *haram*, his word shall be accepted without proof and oath.[12]

In any case, the legal principles, according to Sunni and Shi'i schools, do not permit any ruling ascribing illegitimate birth to a child born of a father when there is a possibility of ascribing its *qadi* to a mistake. Therefore, if a *qadi* has evidence before him to suggest 99% probability of the child's illegitimate birth and only 1% probability suggesting it is 'a child by mistake', it is incumbent upon him to accept the latter evidence and disregard the former, giving preference to *halal* over *haram* and legitimacy over illegitimacy, in consonance with the Divine injunctions:

وَقُولُوا لِلنَّاسِ حُسْنًا

And speak good to the people (***2:83***)

اجْتَنِبُوا كَثِيرًا مِنَ الظَّنِّ إِنَّ بَعْضَ الظَّنِّ إِثْمٌ

Eschew much suspicion, for surely some suspicion is a sin. (***49:12***)

Commentators of the Holy Qur'an have narrated that one day when the Prophet (S) was delivering a sermon, a man who was taunted by people regarding his lineage, stood up and asked, "O Prophet, who is my father?" The Prophet (S) replied, "Your father is Hudhayfah ibn Qays." Another person asked him (S), "O Prophet, where is my father?" The Prophet (S) replied, "Your father is in hell." Here verse 101 of the Swat al-Maidah was revealed:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَسْأَلُوا عَنْ أَشْيَاءَ إِنْ تُبْدَ لَكُمْ تَسُؤْكُمْ

O believers, question not concerning things which, if they were revealed to you, would vex you [13]

Traditions of the Prophet (S) recorded by Sunni and Shi'i sources state:

الحدود تدرأ بالشبهات

Penal consequences are repelled hy doubts.

دع ما يريبك إلى ما لا يريبك

Leave that which puts you into doubt for that which does not. [14]

Imam 'Ali ibn Abi Talib ('a) has said:

ضع أمر أخيك على أحسنه

Give the best interpretation to your brother's act.

Al-'Imam al-Sadiq ('a) has said:

كذب سمعك وبصرك عن أخيك

Reject the evidence of your ear and eye regarding your brother. [15]

The above-mentioned verses of the Qur'an and the reliable and unambiguous traditions quoted, as well as many other verses and traditions of the kind, make it incumbent upon every person to abstain from testifying and judging anyone as an illegitimate offspring unless there exists certainty that he is not in reality a child of mistake in any of its forms.

Child Born of al-Mut'ah

There is something in this regard of which most people are not aware, and I thank the person who wrote me a letter inquiring about this issue. Now, with the present opportunity to explain this legal and historical issue, I intend to be brief to the best of my ability. I shall be a narrator, not a partisan or critic, and shall leave the reader to judge for himself, keeping the matter open for him to affirm or reject.

There is a consensus amongst the Sunni and Shi'i schools that *mutah* (temporary marriage) was *halal* by the order of the Prophet (S) and that Muslims performed *mut'ah* during his time. But they differ regarding its revocation. The Sunnis say: M ut'ah has been revoked and made *haram* after being *halal* earlier.[16]

The Shi'ah state: Revocation has not been proved: it was *halal* and shall remain so until the Day of Judgment. The Shi'ah cite verse 24 of the *Surat al-Nisa'* a evidence:

فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً

...Give them their dowry for the mut'ah you have had with them as a duty... (***4:24***)

And that which Muslim ha narrated in his *al-Sahih* as a proof:

إستمتع الأصحاب في عهد رسول الله وأبي بكر وعمر

The Companions of the Prophet (S) performed *mut'ah* during his lifetime and during the reigns of Abu Bakr and 'Umar.

The *mut'ah* form of marriage is a marriage for a fixed period of time, and according to the Shi'ah it is similar to the permanent marriage a regards the recital of a contract proving express intention of marriage.

Consequently, any form of sexual contact between a man and woman without a contract will not be considered *mut'ah* even if it is by mutual consent and inclination. When the contract is recited it becomes binding and its observance becomes obligatory.

It is compulsory that *mahr* be mentioned in the contract of *mut'ah*. This *mahr* is similar to the *mahr* of a permanent wife, there being no prescribed minimum or maximum limit. and half of it subsides when the

stipulated period is gif ted or expires without consummation, in consonance with the rule applied in the *mahr* of a permanent wife divorced before consummation.

It is incumbent upon the woman with whom *mut'ah* has been contracted to undergo the *'iddah* after the completion of the stipulated time, with the difference that a divorcee observes an *'iddah* of three months or three menstrual cycles, while in *mut'ah* she observes an *'iddah* of two menstrual cycles or forty–five days. But as to the *'iddah* observed on the death of the husband, the wife in *mut'ah* observes it for four months and ten days, which is the same as observed by a permanent wife, irrespective of consummation.

The child born of this form of marriage is legitimate and enjoys all the rights of a legitimate child without the exception of a single legal or moral right.

It is compulsory that *mut'ah* be contracted for a fixed period of time and it is necessary that this stipulated time be mentioned in the contract. The wife in *mutah* does not inherit from her husband and her maintenance is also not obligatory upon him. in contrast with the permanent wife, who both inherits and is entitled to maintenance. But a wife in *mut'ah* can stipulate at the time of the contract that she shall inherit and be entitled to maintenance, and if the contract is concluded on these terms, the wife in *mut'ah* becomes similar to a permanent wife.[17]

In spite of their belief in the validity of *mut'ah*, the Shi'is of Syria, Iraq and Lebanon do not practice it, and the Ja'fari Shariah Courts in Lebanon, since their inception, have neither applied this form of marriage nor authorized it.

The Illegitimate Child (Walad al–Zina)

One who studies the verses of the Qur'an, the traditions of the Prophet (S) and the statements of Muslim legists, finds that Islam leaves no room for anyone to accuse others of fornication. Islam has framed the related rules of furnishing proof and giving judgment in a manner that makes this task difficult or even impossible. Whereas Islam considers two just (*'adil*) witnesses sufficient for proving homicide, in the case of fornication it requires four just witnesses to testify that they have witnessed the act of penetration itself. It is not sufficient for them to say that so and so fornicated with so and so, or that they saw the two naked hugging each other in a bed under a single cover. If three witnesses bear witness while the fourth abstains, each of the three shall be liable to a punishment of eighty lashes. Similarly a person who accuses a man or a woman of fornication shall be liable to eighty lashes.[18]

The purpose behind all this is to cover the deed' of people, to protect their honor, to protect the family from the fear of ruined descent and the children from homelessness.

Fornication is the committing of the act by a mature and sane person with the knowledge of its being *haram*. Therefore fornication cannot be committed by a person who has not attained maturity or is

insane or is ignorant or has been coerced or is in a state of intoxication. The act committed by these people will be considered 'intercourse by mistake', and we have discussed earlier the rules which apply to it. From the above discussion, it becomes clear that the Islamic Law gives a very restricted interpretation to fornication; firstly, by limiting its application to an act committed with knowledge and intention, wherein there is no scope for attributing it to a mistake or fault in any manner. Secondly, it has restricted the manner of proving it in court by requiring four just witnesses who have seen it with their own eyes, whereas, generally, such an act is not observable. It is possible for a single witness to have seen it, while it is almost impossible for three or four persons to do so. All this clearly indicates that Islam has firmly closed the door in the face of those who seek to raise this thorny issue, because God does not like the spread of indecency among His creatures.

There is a consensus among legists of all the legal schools that when fornication is proved in its above-mentioned meaning and manner, the child born of it shall not inherit from the father because no legal lineal bond is established between them.

But the legists have landed themselves in a legal difficulty by giving the fatwa that an illegitimate issue cannot inherit, and are puzzled in finding a way out of this difficulty: If an illegitimate child is not attributable legally to its male 'parent', then, accordingly, in such a situation, it cannot be impermissible for a man to marry his illegitimate daughter and for an illegitimate son to marry his sister or paternal aunt as long as he is considered a stranger to the male 'parent'.

Therefore, an illegitimate son is either a legally recognized issue and thereby entitled to everything to which legally recognized children are entitled, including the right of inheritance and maintenance, or he is not a legally recognized issue and thereby entitled to all those things which are established as regards those who are legally unrelated, including the marriage with a daughter or a sister. To differentiate between the effects of a single undivided cause is to claim something without requisite proof: it amounts to inclining towards something without any reason for doing so. Therefore, we see the legists differ on this question after having concurred earlier (i.e. in excluding him from inheritance). Maliki and al-Shafi' have said: It is permissible (in such a case) for the person to marry his daughter, his sister, his son's daughter, his daughter's daughter, his brother's daughter and his sister's daughter when these relations have been established as a result of fornication, because they are 'strangers' to him and no legal lineal bond exists between them.[19] But this manner of solving the problem reminds one of the saying: "The cure is worse than the disease."

Imamiyyah legists, Abu Hanifah and Ibn Hanbal have observed: We ought to differentiate between the two situations. We must disqualify the child from inheriting, while at the same time prohibiting matrimonial relationship between the child or its father within the prohibited degrees of relationship. Apart from marriage, to touch and to look at each other is also *haram* for both of them. Therefore, a father cannot look at or touch his illegitimate daughter despite her inability to inherit from him and his of inheriting from her.[20]

They argue that the establishment of matrimonial relationship is *haram* by pointing out that an illegitimate child is after all an offspring, both literally and by general acceptance. Consequently, whatever is *haram* between fathers and children is also *haram* for the illegitimate child and its father. Their argument about the child's disqualification from inheriting is based upon the fact that the child is not acknowledged by the Shari'ah as its father's offspring and this is expressly stated by the verses of the Qur'iin and traditions.

Al-Laqit

Al-laqit is a child found by a person in a state in which it is incapable of fending for itself, whom he takes and brings it up along with the rest of his family. All the legal schools concur that the *laqit* if and its guardian do not inherit from each other, because the act of giving shelter to an abandoned child is purely an act of kindness done in the spirit of cooperating in the performance of good and righteous deeds. It resembles the gif ting of a fortune to someone making him prosperous after earlier indigence and distress with the hope of acquiring God's grace. As this act of kindness is no cause for inheritance, similarly the giving of shelter to an abandoned child.

Adoption (al-Tabanni)

Adoption is the taking by a person of a child of known parentage and attributing it to himself. The Islamic Shari'ah does not consider adoption as a cause of inheritance, for it does not change the actual fact from what it is; the lineage of the child is both known and established and lineage can neither be abrogated nor eliminated. This has been clearly mentioned in this verse of the *Surat al-'Ahzab*:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِنْ قَلْبَيْنِ فِي جَوْفِهِ ۚ وَمَا جَعَلَ أَزْوَاجَكُمُ اللَّائِي تُظَاهِرُونَ مِنْهُنَّ أُمَّهَاتِكُمْ ۚ وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ۚ ذَٰلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ ۖ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ

ادْعُوهُمْ لِآبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ

***...Neither has He made your adopted sons your sons* (*in fact*). *That is your own saying, the words of your mouths; but God speaks the truth, and guides on the way. Call them after their true fathers; that is more equitable in the sight of God...* (*33:4,5*)**

The exegetes have mentioned an interesting episode in relation to the revelation of this verse. Zayd ibn Harithah was made captive during the *jahiliyyah* and the Prophet (S) bought him. After the advent of Islam Harithah came to Makkah and asked the Prophet (S) to sell his son to him or to free him. The Prophet (S) said: "He is free; he can go wherever he wants." But Zayd refused to leave the Prophet(S). His father, Harithah, became angry and said: "O people of Quraysh; bear witness that Zayd is not my son." The Prophet (S) then said: "O people of Quraysh, bear witness that Zayd is my son."[21]

The legists have mentioned many other subsidiary issues under this head, and of these are some which are neither acceptable to human reason nor in harmony with the Shari'ah. One of them is the one quoted by the author of *al-Mughni* (vol.7, p.439) from Abu Hanifah, who holds: If a man marries a woman in a gathering and then divorces her in the same gathering before leaving it, or marries her while he is in the east and she in the west, either way if she gives birth to a child six months after the marriage, the child shall be attributed to the husband.

Other opinions are such as whose validity seems questionable from the viewpoint of medical science. The author of *al-Mughni*, in the same volume and on the same page, says: "If the husband is a child of 10 years and his wife becomes pregnant, the child shall be attributed to him."

Similar is the one quoted by the Shi'i author of *al-Masalik* (vol.2, Fasi *ahkaim al-'awlad*): "If penetration occurs without discharge taking place, the child shall be attributed to the husband."

1. The Editors· Note: The late author's statement about prophets and Imams does not seem to be in accordance with the Shi'i belief in their 'ismah. To say that prophets and Imams, like ordinary human beings, make statements about things unknown to them on the basis of conjecture and hearsay, goes against the doctrine of ‘ismah, i.e. the belief that they, as God's representatives and the trustees of His doctrines and laws, are saved by God from falling not only in minor sins but even errors and omissions.

An important question relevant here is that pertaining to the relationship between religion and nature.

From the viewpoint of Islam, religion, as a system of doctrines and laws, is closely associated with nature and reality. While the doctrines of the faith, in order to be true, must reflect the reality, the entire philosophy of law in Islam is based on the close association between law and nature. The lawgiver, in order to be able to legislate beneficial laws, must know thoroughly the facts and realities which are relevant to his laws.

Hence God's prerogative to legislate is based, in addition to His Sovereignty and Beneficence, upon His Omniscience: that His knowledge encompasses all things. Now if God authorizes prophets and Imams to legislate about certain matters and to lay down rules and regulations, it cannot be without His putting at their disposal the knowledge of the realities related to those rules and regulations.

Furthermore, we know from the Qur'an that it is a Divine command that one should not go beyond the limits of one's knowledge to make statements based on conjecture and hearsay:

وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهِ عِلْمٌ ۚ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولَٰئِكَ كَانَ عَنْهُ مَسْئُولًا

And pursue not that thou hast no knowledge of the hearing, the sight and the heart--all of these shall be questioned. (17:36)

Therefore, it is not possible for prophets and Imams, who are most obedient to God in all matters and hence are models for other human beings to emulate, to make statements about things of which they are ignorant.

Nevertheless, the author is right in rejecting tradition as a source of knowledge in a field which lies well within the scope and range of scientific inquiry, for it is not possible to ascertain the authenticity of traditions with certainty.

2. The Shi'i work al-Jawahir, Bab al-zawaj, ahkam al-'awlad and al-Ahwal al-shakhsiyyah of Muhammad Muhyi al-Din, p.476.
3. Al-Durar fi sharh al-Ghurar, vol.1. p.307.
4. Al-Mughni of Ibn Qudamah, 3rd edition, vol.7, p.477, and al-Fiqh ala al-madhahib al-'arba'ah, 1st ed. vol.4, p.523,

mention the maximum period of gestation according to the Malikis to be five years.

5. Al-Mughni, 3rd ed. vol.7, p.477.
6. Al- Ahwal al-shakhsiyyah, p.474.
7. See al-Jawahir, al-Masalik, al-Hada'iq and other Shi'i books.
8. Al-Mughni, 3rd. ed. vol.8, p.211.
9. Al-Jawahir, al-Hada'iq and other Shi'i works.
10. Al-Mughni, vol.7, p.483; vol.6, p.534; and the Shi'i works al-Jawahir and al-Masalik.
11. Al-Mughni, vol.8, p.185.
12. See Majma al-Baylm fi tasfsir al-Qur'an.
13. Al-Rasa'il, al-Shaykh al-'Ansari , chapter on al-Bara'ah.
14. Ibid, chapter on Asl al-sihhah.
15. Al-Mughni, 3rd. ed., vol.6, p.644
16. Al-Jawahir
17. The Shi'i work al-Lum'ah, vol.2, the chapter on hudid; the Sunni work al-Mughni, vol.8, p.198 ff.
18. Al-Mughni, 3rd. ed., vol.6, p.578.
19. Al-Mughni, vol.6, p.577, and the Shi'i work al-Masalik, vol.1, chapter on marriage, fasi al-musaharah.
20. Majma al-Bayan fi tafsir al-Qur'an.
21. Al-Jawahir and al-Masalik, chapters on hudud.

Artificial Insemination

A hot debate is going on in the West regarding the answer to this question: If a barren husband agrees with his wife that she be artificially inseminated with a stranger's sperm, is this legally permissible?

This question was raised before the House of Commons in England and a committee of the House was set up to deliberate on the issue. In Italy the Pope declared it illegal. In France, the doctors observed: It is permissible if done by the couple's consent. In Austria, the government recognizes the child as a legitimate issue of the couple unless the husband makes a formal objection.

As to Islamic legists, I doubt whether they have dealt with this question, since it is a problem of recent origin. The Imamiyyah scholars have narrated a tradition under the head of *hudud*. Al-Hasan ibn 'Ali ('a) was asked regarding a woman who after intercourse with her husband engages in Lesbian intercourse with a virgin transferring his sperm to her, consequently making the latter pregnant. The Imam ('a) replied: The *mahr* of the virgin shall be exacted from the married woman because the child would not be delivered without the virgin losing her virginity. Then, the other woman shall be stoned to death because of her marital status. Regarding the pregnant woman, they shall wait until she delivers and the child shall be given to the father, i.e. the person of whose sperm it was born. After this, she shall be flogged.[1]

Four rules can be deduced from this tradition:

(1) Stoning of the married woman, (2) Liability of the married woman to pay the *mahr* of the other woman

as a compensation for her lost virginity. (3) Flogging of the other woman, (4) Attribution of the child to the person of whose sperm the child was born.

The Imamiyyah legists differ regarding application of this tradition. Of those who have applied this tradition in totality are al-Shaykh al-Tusi and his followers. Others, who accept the last three rules without accepting the first one, include the author of *al-Sharai*, who holds the punishment of the married woman to be flogging instead of stoning.2 Ibn Idris has rejected the tradition totally, objecting to the statement about the stoning of the married woman, because the sentence for Lesbian intercourse is flogging, not stoning. He also objects to the attribution of the child to the person of whose sperm it was born, because it was not born as a result of intercourse through valid marriage or by mistake. He even objects to the rule which compels the married woman to pay the *mahr* of the pregnant woman, because, according to him, the woman made pregnant was not coerced, and Lesbian intercourse with consent is similar to fornication, which does not result in liability to pay *mahr*.

This is what I have found in the legal books closely or distantly relating to the question at hand. In any case, we have two questions at hand: (1) Is artificial insemination permissible or not in the Islamic Shariah? (2) If, as a result of artificial insemination, a child is born, what shall be its legal status and to whom shall it be attributed?

Artificial Insemination is Prohibited

Regarding the first question, there is no doubt that such insemination is prohibited due to following reasons: (1) Our knowledge of the Shariah, and its warning and emphasis concerning sexual matters, tell us that permissibility of anything in this regard rests upon permission of the Shari'ah. Therefore, the mere possibility of its being impermissible is sufficient for making restraint and caution obligatory. (2) In the thirty-first verse of Surat al-Nur:

وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ

And say to the believing women that they cast down their looks and guard their private parts... (***24:31***)

God has commanded women that they 'safeguard' their organs of reproduction; but He has not mentioned from what they are supposed to be safeguarded. Neither has He specified that they safeguard them from intercourse or some other thing. The jurisprudents as well as linguists of the Arabic language concur that any proposition devoid of any particular specification implies the generality of inclusion. Similarly the inclusion of a specification in a proposition limits the proposition to that extent. For example, if it is said, "Safeguard your wealth from thieves", it denotes that wealth must be protected only from being robbed. But if it is said, "Safeguard your wealth," without specifying any specific thing, it implies that wealth is to be protected from being robbed, from damage, from waste, etc. Accordingly, the

verse of the Qur'an connotes that the organs of reproduction be safeguarded from everything including insemination. This verse is reinforced by verses 5–7 of the Surat al–Mu'minun:

وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حَافِظُونَ

إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ

فَمَنِ ابْتَغَىٰ وَرَاءَ ذَٰلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ

And who guard their private parts. Save from their wives or those whom their right hands own, for then they surely are not blameworthy. But whoever seeks to go beyond that, those are the transgressors. (***23:5–7***)

The phrase

لِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ

indicates that any act contrary to the guarding of the parts amounts to transgression of the lawful limits, except that which occurs through marriage or ownership.

Though the verses speak specifically of men, it does not hinder their application to women, because there is consensus that there is no difference between men and women in rules of this kind.

Some may say that the phrase

يَحْفَظْنَ فُرُوجَهُنَّ

does not prove that this kind of insemination is *haram*. It only indicates the impermissibility of (extra–marital) sexual relations, and this is the meaning that comes to mind and is understood from the verse. In other word, this verse may imply a wider meaning which includes artificial insemination or something else; but that which is apparent from its word is fornication, and it is a known fact that it is the generally understood meanings of dicta that are accepted for deriving the rules of the *Shari'ah*, not their literal meaning.

The answer is that this apparent meaning of the verse is not inherent in it; rather, this meaning has come to be associated with the verse because of its frequent usage in that context (i.e. to mean fornication). This is similar to the use of the word 'water' in Baghdad to mean the water of the Tigris and in Cairo to

mean the water of the Nile, but this apparent meaning is of no consequence at all, for it fades on a little amount of reflection. No one can claim that the word 'water' in Baghdad was coined to mean only the water of the Tigris and in Cairo to mean only that of the Nile. Moreover, if artificial insemination were considered permissible on this ground, so would be the licking of dogs..., because both these notions are far removed from the meaning which immediately comes to the mind.

The Offspring by Artificial Insemination

Now a child is born as a result of artificial insemination: shall it be a legitimate child, and to whom shall it be attributed?

The answer i: As regards the sterile husband, the child cannot be attributed to him under any circumstances, and adoption is not valid in Islam:

وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ

And He has not made those whom you call your sons, your sons. (***33:4***)

As to the woman who bears it, some legal schools attribute the child to her, because an illegitimate child inherits from its mother and from its relatives through her and they inherit from it.[3] Therefore, if an illegitimate child can be attributed to its mother, a child born by artificial insemination is better entitled to be similarly attributed.

The Imamiyyah, who do not attribute an illegitimate child to the fornicator or the fornicatress, observe: The child born by artificial insemination does not inherit from its father or mother, and neither do they inherit from it. Ayatullah al-Sayyid Muhsin al-Hakim al-Tabatab'i has differentiated between an illegitimate child and a child born by insemination. He observes: A child born by insemination shall be attributed to its mother, because there is no valid reason to negate its status, and the grounds which prohibit an illegitimate child from attribution to its mother do not apply here.

But as regards the man whose sperm is inseminated, al-Sayyid al-Hakim says: The child shall not be attributed to him, because in order for a child to be attributed to a person it requires that he should have had intercourse irrespective of whether he performs it, or is unable to perform it but has his sperm reach her reproductive organ during his effort, or is transferred to another woman as a result of Lesbian intercourse as mentioned in the tradition from al-'Imam al-Hasan ('a). Apart from these cases, a child shall not be attributed to the person of whose sperm it was conceived, even if he is the husband."

Whatever the case, artificial insemination is *haram* and no Muslim may pronounce it *halal*. But the impermissibility of artificial insemination does not necessarily imply that the child born of it is an illegitimate issue, for at times intercourse may be prohibited but the child born of it is considered

legitimate–as in the case of the person who has intercourse with his wife during her menses or during the fast of Ramadan, in both of which cases it is a prohibited act; but nevertheless the lineal bond between the child and the parents shall be established.

Accordingly, if a person has artificial insemination performed despite its impermissibility, the child born shall not be attributable to the husband because it was not born of his sperm, nor shall it be attributable to the man whose sperm was inseminated, because he has not had sexual intercourse, neither by marriage nor by mistake. But the child shall be attributed to its mother because it is her actual offspring and her legal child, and every actual offspring is a legally recognized issue unless the opposite is proved.

1. As mentioned in al–Jawahir, most Shi'i legists observe that the sentence for Lesbian intercourse is 100 lashes for a married as well as an unmarried woman, irrespective of the passive or active roles of the participants. In Ibn Qudamah's al–Mughni, 3rd. ed. vol.8, p.189, it has been observed: There is no hadd for Lesbian intercourse because there is no penetration involved, and it is for the judge to award a suitable punishment (tazir) to the two culprits.
2. Al–Mirath fi al–Shari'at al–'Islamiyyah of al–'Ustadh 'Ali Hasb Allah, 2nd. ed. p.94; Ibn 'Abidin, and Ibn Qudamah in al–Mughni, chapter on inheritance. fasi al–'asabat (male relatives).
3. The letter of al–Sayyid al–Hakim, dated 7th Ramadan 1377, in reply to a question regarding this issue.

Custody (Al–Hidanah)

Custody has no connection with guardianship (*wilayah*) over the ward with respect to marriage; it is limited to the care of a child for its upbringing and protection for a period of time during which it requires the care of women. Custody is the right of the mother by consensus, though there is a difference of opinion regarding: the period after which it expires, the person who is entitled to custody after the mother, the qualification for a woman to act as a custodian, her right to receive a fee for it, and other aspects which we shall discuss subsequently.

The Right to Act as a Custodian

If it is not possible for a mother to act as the custodian of her child, to whom will this right belong?

The Hanafis observe: It is transferred from the mother to the mother's mother, then to the father’s mother, then to the full sister’s, then to the uterine sister’s, then to the paternal sister’s, then to the full sister's daughter, and so on till it reaches the maternal and paternal aunts.

The Malikis say: The right is transferred from the mother to her mother, how high so ever; then to the full maternal aunt; then the uterine maternal aunt, then the mother's maternal aunt, then the mother's paternal aunt, then the father's paternal aunt, then his (father's) mother's mother. then his father's mother

and so on.

The Shafi'is say: The mother, then the mother's mother, how high so ever, on condition that she inherits: then the father, then his mother, how high so ever, on condition that she inherits; then the nearest among the female relatives, and then the nearest among the male relatives.

According to the Hanbali, the mother is followed by her mother, then her mother's mother, then the father, followed by his mother: then the grandfather followed by his mother; then the full sister; then the uterine sister; then the paternal sister; then the full maternal aunt; then the uterine maternal aunt, and so on.

The Imamiyyah observe: The mother, and then the father. and if the father dies or becomes insane after he has taken the child's custody, the right to custody will revert to the mother on her being alive, because she is better entitled than others–including the paternal grandfather–even if she has married a stranger. If the parents are not there, the custody of the child will lie with the paternal grandfather, and if he isn't there nor has an executor, the child's custody will lie with its relatives in order of inheritance, the nearer taking precedence over the remote. If there is more than one relative of the same class, such as the maternal and paternal grandmothers or maternal and paternal aunts, the matter will be decided by drawing lots in the event of contention and dispute. The person in whose name the lot is drawn becomes entitled to act as the custodian till his death or till he forgoes his right.[1] This is also the view of the Hanbalis (*al–Mughni*, vol. 9, *bab al–hidanah*).

The Qualifications for Custody

The scholars concur regarding the qualifications required for a female custodian, which are: her being sane, chaste and trustworthy, her not being an adulteress, a dancer, an imbiber of wine, or oblivious to child care. The purpose of these requirements is to ensure the proper care of the child from the viewpoint of physical and mental health. These conditions also apply if the custodian is a man.

The schools differ as to whether being Muslim is a condition for custodianship. The Imamiyyah and the Shafi'i schools say: A non–Muslim has no right to the custody of a Muslim.

The other schools do not consider Islam as a requirement for a custodian, except that the Hanafis say: The apostasy of a custodian, male or female, terminates his/her right to custody.

The Imamiyyah state: It is compulsory that the female custodian be free from any contagious disease.

The Hanbali school says: It is compulsory that she should not suffer from leprosy and leukoderma, and that which is important is that the child should not face any harm.

The four schools have said: If the mother is divorced and marries a person who is unrelated to the child, her right to custody shall terminate. But if the husband is of the child's kin, the right to custody remains

with the mother.

The Imamiyyah observe: The right to custody terminates with her marriage irrespective of whether the husband is related to the child or not.

The Hanafi, the Shafi'i, the Imamiyyah and the Hanbali schools have said: If the mother is divorced by the second husband, the disability is removed and her right to custody reverts after its earlier termination due to her marriage.

According to the Maliki school, her right to custody does not revert.

The Period of Custody

The Hanafis say: The period of custody for a boy is 7 years, and for a girl 9 years.

The Shafi'i school observes: There is no definite period of custody; the child shall remain with it mother until it is able to choose between the two parents; and when it has reached the discriminating age it will choose between the two. If a boy chooses to stay with his mother, he will stay with her during the night and spend the day with his father, so that the father can arrange for his instruction. If a girl chooses to stay with her mother, she will continue to stay with her during the day as well as in the night. If the child chooses both the parents together, lots will be drawn between them, and if the child keeps quiet and does not choose any one of them, the custody shall lie with the mother.

The Malikis consider the period of custody for a boy to be from birth until puberty and for a girl until her marriage.

According to the Hanbali school, it is 7 years irrespective of the child's sex, and, after that, the child can choose to live with one of the parents.

The Imamiyyah have said: The period of custody for a boy is 2 years, and for a girl 7 years. After this, the custody shall lie with the father until the girl reaches the age of 9, and the boy the age of 15; there after they can choose to live with one of the parents.[2]

Fee for Custody

The Shafi'i and the Hanbali schools state: A female custodian has the right to claim a fee for her services irrespective of whether she is the mother or someone else. The Shafi'i's clarify that this fee shall be paid from the child assets if any; otherwise it is incumbent upon the father, or upon whoever is responsible for the child's maintenance.

The Malikis and the Imamiyyah[3] observe: The female custodian is not entitled to any fee for her services. But the Imamiyyah add: She is entitled to be paid for breast-feeding. Therefore, if the child has

any assets she shall be paid out of that: otherwise, the father shall pay it if he is capable of doing so (*al-Fiqh 'ala al-madhahib al-'arbdah*, vol.4: *al-Masalik*; vol.2).

The Hanafi school has said: The payment of fee for custody is *wajib* if: there does not exist any marital relationship between the female custodian and the child's father: if she is not in the course of observing the *'iddah* of a revocable divorce given by the child's father: if she is observing the *'iddah* of an irrevocable divorce of an invalid marriage, in which case she is entitled to receive maintenance from the child's father. If the child has any property, the payment shall be made from it: otherwise the payment shall be made by the one responsible for the child's maintenance (*al-'Ahwal al-shakhsiyyah* by Abu Zuhrah).

Travelling With the Child

In case the mother takes the child under her custody, and the father intends to travel with his child to settle down in another town, the Imamis and the Hanafis say: He cannot do so. The Shafi'i, the Maliki and the Hanbali schools observe: He can do so.

But if it is the mother who intends to travel with the child, the Hanafi school gives her the right to do so if the two following conditions are met: (1) That she be migrating to her own town; (2) that the marriage contract should have been recited in the town to which she is migrating. If any of these two conditions is not met, she is forbidden to travel except to a place so near that it is possible to return before it gets dark.

The Shafi'i and the Maliki schools, and Ahmad in one of the two traditions narrated from him, observe: The father has greater right over the child irrespective of whether he is moving or she (*Rahmat al-'ummah fi ikhtilaf al-'a'imah*).

The Irnamiyyah state: A divorced mother is not permitted to travel with the child under her custody to a far-off place without the consent of the child's father. The father, too, is not permitted to travel with the child to any town which is not the mother's hometown while the child is in her custody.

Voluntary Breast-Feeding and Custody

The difference between custody and breast-feeding (*al-ridad*) is that by 'custody' is meant only the upbringing and care of the child: it excludes breast-feeding, which involves the infant's nourishment. Because of this difference, it is valid for a mother to forgo her right to breast-feed while her right to custody remains intact. The Imamiyyah and the Hanafi schools concur that if a woman volunteers to breast-feed a child gratuitously while the mother refuses to breast-feed without recompense. the woman volunteering shall be given precedence over the mother, whose right to suckle her child is lost. But her right to the custody of her child shall remain as it is, and the child shall be under her care while the nurse comes to feed it or it is taken to the nurse to be fed.

If a woman volunteers to act as a child's custodian, the child shall not be separated from the mother, according to the Imamiyyah and the other schools which do not require compensation for a custodian's services.

But the Hanafis, who consider the payment of compensation for custody as *wajib*, observe: Where the mother refuses to act as a custodian unless she is paid and another woman volunteers to act as a custodian, the mother is better entitled to custody if the compensation is to be paid by the father, or if the woman is an outsider and there are no women custodians among the child's relatives. But if the woman volunteering is related to the child and the compensation lies upon an indigent father, or is to be paid from the child's property, the other woman shall be preferred, because, in such a situation, the child is saved from payment of fee out of its assets by the woman volunteering. Therefore, she shall be given preference over the mother in the child's interest (*al-'Ahwal al-shakhsiyyah* by Abu Zuhrah).

Surrendering of the Right to Custody

Is the right to custody specifically the right of a female custodian that terminates on her surrendering it- similar to the right of pre-emption which can he surrendered- or is it a right of the child that binds the female custodian precluding her right to surrender it, as in the case of a mother's right which cannot be surrendered?

The Imamiyyah, the Shafi'i and the Hanbali schools observe: Custody is the specific right of a female custodian, and she can surrender it whenever she pleases and she shall not be compelled to act as a custodian on her refusing to do so. There is a tradition from Malik regarding this. and the author of *al-Jawahir* has argued on its authority that the legists have not concurred that a female custodian can be compelled to act as a custodian, and the Shari'ah does not express y mention such compulsion; on the contrary, the texts of the Shari'ah apparently consider custody similar to breast-feeding, and, consequently, she has the right to surrender her custody at will.

The same principle applies where a child's mother seeks a divorce from her husband by surrendering in his favor her right to custody of the child, or when the husband surrenders to her his right to take away the child after the expiry of her period of custody. This form of divorce is valid and neither of the two can refrain from discharging their agreement after it is concluded, except by mutual consent Similarly, if the two compromise and she surrenders her right to custody or he surrenders his right to take away the child, the compromise is binding and its fulfillment is *wajib*.

Ibn 'Abidin has reported a difference of opinion amongst the Hanaf'is on this issue. He has pointed out that it is better that custody be considered as a right of the child, so that the mother does not have the right to surrender her responsibility to act as a custodian to make compromise over it, or to exchange it for securing a divorce.

The Sunni Shari'ah courts in Lebanon consider a divorce of this kind as valid, but consider as invalid the

condition that she would surrender her right to custody; any compromise which includes the surrendering of her right to custody is considered void *ab initio*. But the Ja'fari Shariah courts consider the divorce, the condition and the compromise as valid.

1. Al-Jawahir and al-Masalik, bab al-zawaj: al-hidanah.
2. The child's right to choose to live with the father or the mother on reaching this age is not in conflict with the (Lebanese) law according to which the age of majority is 18 years; because this age has been considered by the law as a condition for marriage and not for choosing between the parents.
3. The author of al-Masalik has inclined towards the absence of any compensation for custody, and the author of al-Jawahir has inclined towards its presence. Considering that there is no explicit reference in the Shari'ah about compensation being wajib, and considering that it is not customary to pay compensation for custody, the opinion expressed by the author of al-Masalik is correct.

The Right to Maintenance

There is consensus among all Muslims that marriage is one of the causes that make maintenance wajib. A similar consensus exists regarding kinship (*al-qarabah*). The Holy Qur'an has explicitly mentioned the wife's maintenance in the following verse:

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ

...And on the child "s father (the husband) is their food and clothing... **(*2:233*)**

By the pronoun هُنَّare meant wives and theالْمَوْلُودِ لَهُ is the husband. There is also a tradition which says:

حق الزوجة على زوجها أن يشبع بطنها ويكسو جثتها وإن جهلت غفر لها

The right of a woman over her husband is that he feed her, clothe her, and if she acts out of ignorance, to forgive her.

The Qur'an has referred to the maintenance of relatives in the phraseإحسانا وبالوالدين , and the Prophet (S) has said (You and your property are for your father).

Our discussion comprises two issues: first, the maintenance of a wife and her maintenance during the *'iddah* period; second, the maintenance of relatives.

The Maintenance of a Wife and a Divorcee During 'Iddah

The legal schools concur that the wife's maintenance is *wajib* if the requisite conditions, to be mentioned subsequently, are fulfilled, and that the maintenance of a divorcee is *wajib* during the *'iddah* of a revocable divorce. The schools also concur that a woman observing the *'iddah* following her husband's death is not entitled to maintenance, whether she is pregnant or not, except that the Shafi'i and the Maliki schools state: If the husband dies, she is entitled to maintenance only to the extent of housing.

The Shafi'is have said: If he separates from her while she is pregnant and then dies, her maintenance shall not cease.

The Hanafis observe: If she is a revocable divorcee and the husband dies during the *'iddah*, her *'iddah* of divorce shall change into an *'iddah* of death, and her maintenance shall cease, except where she had been asked (by count) to borrow her maintenance and she had actually done so. In this case, the maintenance shall not cease.

There is consensus that a woman observing *'iddah* as a result of 'intercourse by mistake' is not entitled to maintenance.

The schools differ regarding the maintenance of a divorcee during the *'iddah* of an irrevocable divorce. The Hanafis observe: She is entitled to maintenance even if she has been divorced thrice, whether she is pregnant or not, on condition that she does not leave the house provided by the divorcee (husband) for her to spend the period of *'iddah*. According to the Hanafi school, the rules which apply to a woman in an *'iddah* following the dissolution of a valid contract are the same as those which apply to a divorcee in an irrevocable divorce.

According to the Maliki school, if the divorcee is not pregnant, she shall not be entitled to any maintenance except residence, and if she is pregnant she is entitled to her full maintenance; it shall not subside even if she leaves the house provided for spending the *'iddah*, because the maintenance is intended for the child in the womb and not for the divorcee.

The Shafi'i, the Imamiyyah and the Hanbali schools state: If she is not pregnant she is not entitled to maintenance, and if pregnant, she is entitled to it. But the Shafi'is add: If she leaves the house of her *'iddah* without any necessity, her maintenance shall cease.

The Imamiyyah do not consider the dissolution of a valid contract similar to an irrevocable divorce; they observe: A divorcee undergoing the *'iddah* of a dissolved contract is not entitled to any maintenance whether she is pregnant or not.

A Disobedient Wife (al-Nashizah)

The schools concur that a disobedient wife is not entitled to maintenance. But they differ regarding the extent of disobedience which causes the maintenance to subside. According to the Hanaf"is, when a wife confines herself to her husband's house and does not leave it except with his permission, she shall be regarded as 'obedient' even if she denies him her sexual company without any valid reason. Therefore, though such an act is Haram for her, it shall not cause her maintenance to cease. Thus, the cause which entitles her to maintenance, according to the Hanafis, is her confining herself to her husband's home, and her denial of her sexual company has no effect at all. This view of the Hanafi school is contrary to the view of all the other schools who concur that if a wife does not allow her husband free access to her person without any legal and reasonable excuse, she shall be considered 'disobedient' and shall not be entitled to any maintenance. The Shafi'is further add: Her allowing him free access is not enough unless she comes forth and says expressly to him: 'I surrender myself to you'.

In fact, the criterion for ascertaining 'obedience' and 'submission' is the general custom and there is no doubt that the people consider a wife obedient if she does not deny him access when he demands it, and they do not consider it necessary that she offer herself to him morning and evening. Whatever be the case, we have here the following questions concerning 'obedience' and 'disobedience'.

(1) If the wife is a minor, unfit for intercourse, and the husband a major capable of it, shall maintenance be *wajib*?

The Hanafis say: There are three types of female minors:

(i) A minor wife who is neither of any use for service nor for sociability, shall not be entitled to maintenance.

(ii) A minor wife with whom intercourse is possible enjoys the rights of a major wife.

(iii) A minor wife who is of use for service or for sociability alone, but not for intercourse, shall not be entitled to maintenance.

The remaining schools state: A minor wife is not entitled to maintenance even if the husband is a major.

(2) If the wife is a major capable of intercourse while the husband is a minor and incapable of it, the Hanafi, the Shafi'i and the Hanbali schools observe: Her maintenance is *wajib* because the hindrance is from his side, not her.

The Malikis and some scholars of the Imamiyyah have said: Maintenance is not *wajib* because the sole granting of access from her side has no effect while there exists a natural disability in the husband, and a minor husband is free of obligations (*ghayr mukallaf*), and as to the duty of his guardian, there is no proof (that he is responsible for his ward's wife's maintenance).

(3) If the wife is sick or suffers from *al–ratq* or *al–qarn*,[1] her maintenance does not cease according to the Imamiyyah, the Hanbali and the Hanafi schools,[2] and it does according to the Maliki school if she is suffering from a serious disease or if the husband himself is similarly ill.

(4) If the wife apostatizes, her maintenance ceases according to all the schools. The maintenance of a wife belonging to the *Ahl al–Kitab* is *wajib*, and there is no difference between her and a Muslim wife from the viewpoint of maintenance.

(5) If a wife leaves her husband's home without his permission or refuses to reside in a house which fit her status, she shall be considered 'disobedient' and shall not be entitled to maintenance according to all the schools. The Shafi'i and the Hanbali schools further add: If she goes out with his permission for his need she shall be entitled to maintenance, and if she goes out not for his need, her maintenance shall cease even if he had granted her permission to do so.

(6) If she goes out for performing the obligatory Hajj pilgrimage, her maintenance shall cease according to the Shafi'i and the Hanafi schools, and according to the Imamiyyah and the Hanbali, it shall not.

(7) If the wife is obedient to the husband in granting him access and resides with him wherever he wants. but uses harsh language while talking to him, frowns in his face and opposes him in many matters, a is the case with many women, shall this be a cause for the maintenance to cease or not?

I have not come across the views of the schools on this question, but in my opinion if the wife has a hot–tempered disposition by nature and this is her way of behavior with everyone including her parents, she shall not be considered disobedient. But if she is not so by nature and is well–disposed towards everyone except her husband, she should be considered disobedient and not entitled to maintenance.

(8) If the wife refuses to obey her husband unless she is paid her *mahr*, agreed to be paid immediately, shall she be considered disobedient? The schools have divided the question–as mentioned in the chapter on *mahr* –between her refusing him before granting him access to her person and her refusal after granting him access willingly before taking the *mahr*.

In the first case, her refusal is due to a legally valid excuse and therefore she shall not be considered disobedient. In the second case, her refusal is without any valid excuse and. therefore, she shall be considered disobedient.

(9) I have come across an opinion expressed by the Hanbali's that if a wife imprisons her husband, demanding her maintenance or *mahr*, her maintenance shall cease if he is indigent and unable to meet her monetary rights, and if he has the means to pay but delays doing so it shall not.

This opinion is both good and firm because if she has imprisoned him while he is an indigent man unable to pay, she is oppressing him; and if she has imprisoned a husband who has the means to pay her but delays doing it, he is oppressing her. A verse of the Qur'an says:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ

And if the debtor is in straitness, let there be postponement till the lime of ease... (***2:280***)

And there is a tradition which says:

الواجد تحل عقوبته وعرضهز

It is permissible to punish and dishonor a person who possesses (*but does not pay his liabilities*).

It has also been narrated that 'Ali (A) used to detain one who delayed his creditors and release him if his penury was ascertained. Accordingly, a judge, after having ascertained that the circumstances of the husband are straitened and that the wife is entitled to maintenance, will order it to be considered a debt payable by the husband until further notification. If the judge determines the maintenance without mentioning the period during which it is to be paid, and the wife then imprisons the husband despite indigence and poverty, the husband is entitled to approach the judge to have her maintenance annulled from the date of his imprisonment, and the judge is bound to respond to his plea.

(10) If a wife is divorced while she is disobedient. she will not be entitled to maintenance; and if she is undergoing the *'iddah* of a revocable divorce and turns disobedient during this period, her maintenance shall cease; but on her reverting to obedience, it shall resume from the date of his knowledge of her becoming obedient.

(11) If the wife remains at her father's home after –the recital of the marriage contract for a period of time and then claims maintenance for that period, shall she be entitled to it?

The Hanafis observe: She is entitled to maintenance even if she hasn't shifted to her husband's home, either because the husband hasn't asked her to do so, or has but she has refused to come until she is given her *mahr* (Ibn 'Abidin).

According to the Maliki and the Shafi'i schools, she is entitled to maintenance if the marriage has been consummated or she has offered herself to him.

The Hanbali school states: If she doesn't offer herself, she is not entitled to maintenance even if she remains in such a state for years.

The Imamiyyah consider her entitled to maintenance from the date of the consummation of marriage– even if such consummation should occur while she is with her family–and from the date of her asking him to take her along with him.

From the above–mentioned views, it follows that all the schools entitle her to maintenance if she has

offered herself and showed her readiness to comply, and also if the marriage has been consummated, except that the Hanafis do not suffice with consummation but consider her willingness to confine herself also necessary. Apart from this, it has been pointed in the answer to the eighth question of this section that the wife has the right to refuse obedience till she is paid her prompt *mahr*, and her doing so is legally valid and does not cause her maintenance to cease.

(12) The Maliki, the Shafi'i and the Hanbali school state: An absent husband is similar to a husband present in regard to the rules of maintenance. Therefore, if an absent husband has any known assets, the judge shall order her maintenance to be paid from them, and if he does not possess such property, the judge shall pass an order of maintenance against him and the wife will borrow against his name. This is the procedure followed in Egypt (*al-'Ahwal al-shakhsiyyah*, Abu Zuhrah).

In *al -'Ahwal al-shakhsiyyah* (1942, pp. 269. 272) of Muhammad Muhyi al-Din 'Abd al-Hamid it is stated: The Hanafi school presumes that the absent husband has left in his property a share for his wife... and if he has not left any property, the judge shall consider him liable to pay the maintenance and will order the wife to borrow against his name. If she complains of not having found a person ready to lend her in her husband's name, the judge shall order the person on whom her maintenance is *wajib* to lend her on the supposition that she has no husband, and if this person refuses to lend her maintenance. The judge will imprison him.

The Imamiyyah observe: If the husband disappears after her surrendering herself to him, her maintenance is *wajib* upon him on the supposition that her obedience still persists from the time he left her; and if he disappears before consummation, she shall appear before the court and declare her obedience and willingness to live with him. The judge will then order the husband to present himself to inform him of her willingness. If the husband presents himself, or sends for her, or sends her, her maintenance, it suffices. But if he does not fulfill any of these alternatives, the judge shall allow a period of time sufficient for the issuance of a notification and the reception of his reply or for his sending of her maintenance; he will not issue any order during this period. After the expiry of this period he shall issue orders. If, for instance, such a period is two months, he shall order the payment of maintenance beginning from the date of expiry of the two months. Or if the wife informs the husband of her state without the mediacy of the judge and proves it, it shall also suffice. Then she shall be entitled to maintenance from that date.

(13) If the wife pleads before a judge to pass an order against the husband for the payment of her maintenance without mentioning the date from which she is entitled to receive it, the judge shall order payment from the date of her demanding maintenance, after ascertaining that the conditions have been fulfilled. If the wife mentions a date which is prior to the date of demand, shall the judge order payment of her maintenance for the period prior to the date of demand?

The Hanafis have said: Past maintenance may not be demanded from the husband; it is annulled by the passage of time except when the period is less than a month or if the judge has ordered its payment,

because maintenance ordered to be paid by court remains a debt for the husband irrespective of the passage of time.

The Malikis observe: If the wife demands her past maintenance, and the husband possessed the means to pay her during that time, she has the right to such a claim against him even if it had not been ordered by the court. But if the husband was indigent and unable to pay during that period, she cannot claim her maintenance from him, because, according to this school, indigence annuls maintenance; and if his indigence is subsequent to his affluence, the maintenance for the period of indigence shall be void and he shall be liable for the payment of the maintenance pertaining to his period of affluence.

The Imamiyyah, the Shafi'i and the Hanbali schools state: The wife's maintenance remains his liability, if the conditions entitling the wife to maintenance are fulfilled, no matter how much time has passed and irrespective of whether he was affluent or indigent during that time and regardless of whether the judge had ordered such payment or not.

1. The Hanafis state: If she falls sick at her husband's home, she is entitled to maintenance; and if she falls sick before consummation and it is not possible to shift her to his home, she will not be entitled to maintenance. This opinion of the Hanafis is in accordance with their basic principle that maintenance is a compensation for her confining herself to her husband's home.
2. The Malikis state: The wife's maintenance ceases during the husband's indigence, irrespective of consummation. If he becomes well-off later on, she does not have the right to claim maintenance for the period during which he was indigent.

Determination of Maintenance

The schools concur that a wife's maintenance is *wajib* in all its three forms: food, clothing and housing. They also concur that maintenance will be determined in accordance with the financial status of the two if both are of equal status. Here, by the financial status of the wife is meant the financial status of her family and its standard of living.

But when one of them is well-off and the other indigent, the schools differ whether maintenance should be in accordance with the husband's financial status (commensurable with his means if he is well-off and the wife indigent, and commensurable with hi indigence if he is indigent and she is well-off), or whether the financial status of both should be considered and a median maintenance be fixed for her.

The Maliki and the Hanbali schools state: If the couple differ in financial status, a median course will be followed.

The Shafi'i school observes: Maintenance will be determined in accordance with the financial status of the husband, and the status of the wife will not be considered: this is regarding food and clothing. But as regards housing, it should be according to her status, not his (al-Bajuri, 1343 H., vol.2, p.197).

The Hanafi's have two views. According to the first, the status of both will be considered, and according to the second only the status of the husband.

Most Imamiyyah legists; observe that maintenance will be fixed in accordance with her requirements of food, clothing, housing, servants and cosmetics used by women of her standing among her townspeople. Some Imamiyyah legists consider the husband's not the wife's financial status as the criterion for fixing maintenance.

Whatever the case, it is necessary that the financial condition of the husband be taken into consideration as the Qur'an has expressly stated:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أُولَاتِ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۚ وَأْتَمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۖ وَإِنْ تَعَاسَرْتُمْ فَسَتُرْضِعُ لَهُ أُخْرَىٰ

لِيُنْفِقْ ذُو سَعَةٍ مِنْ سَعَتِهِ ۖ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ ۚ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا

Lodge them where you are lodging, according to your means ..Let the man of plenty expend out of his plenty... . As for him who has his means of subsistence straitened, let him expend of what God has given him. God does not burden anyone ercep1 to the extent of what He has granted him... (***65:6,7***)

Under Egyptian law (act 25. 1929), the wife's maintenance, to be paid by the husband, is fixed in accordance with his financial condition, irrespective of the condition of the wife.

Here it becomes clear that providing a servant and expenses of tobacco, cosmetics, tailoring, etc., requires that two things be taken into consideration; the husband's condition and the custom prevailing among her likes. Therefore, if she demands more than that the husband is not obliged to comply, irrespective of his financial condition; and if she demands what her likes generally require, it is compulsory that the husband meet her demands if he is well–off , but not if his means are straitened. Here, the following questions are also pertinent:

Medical Expenses

If the wife needs medicines or surgery, will the husband be compelled to pay her medical and surgical expenses?

The answer to this question leads us to another one: Is medical care part of maintenance or something apart from it? When we refer to the canonical sources, we find that the Qur'an makes the wife's food and clothing *wajib*. The ahadith say: It is for the husband to satiate her hunger and to clothe her. There is no

mention of medicine and medical treatment in the Qur'an and the traditions. The legists have limited maintenance to the providing of food, clothing and housing, and have not touched the matter of medical care. On the contrary, some of them have explicitly said that it is not *wajib* for the husband. In *al-Fiqh 'ala al-madhahib al-*'arba'ah, it has been narrated from the Hanafis that medicines and fruits are not *wajib* on the husband during the period of dispute between the couple. In the Imami work *al-Jawahir* (vol. 5) it is stated: The wife is not entitled to claim from the husband medicine during illness, or the expenses of cupping and bathing except during winter. Al-Sayyid Abu al-Hasan observes in *al-Wasilah*: If the medicines are of common use and needed for common ailments, such medicines are included in maintenance and are *wajib* upon the husband; but if the medicines are for difficult cures and uncommon ailments, which require expensive treatment, they are not included in maintenance and it is not the husband's duty to provide them.

This was a summary of the opinions of the legists which I have come across. It is also said that the treatment of simple diseases, such as malaria and ophthalmia, is included in maintenance, as observed by the author of *al-Wasilah*. But regarding surgeries, which require large sums of money, if the husband is poor and the wife is financially well-off she will bear the expenditure; and if he is a man of means while she is poor, he will meet the expenses – for of all people the husband, being her life partner, is most entitled to be kind to her. If, both of them are indigent, they will share in meeting the expenses.

In any case, it is certain that the Shari'ah has not explicitly defined the limits of maintenance, but has only made it *wajib* on the husband, leaving it to be determined in accordance with *'urf* (usage). Therefore, we should refer to *'urf* and not make anything *wajib* for the husband except after ascertaining that it is considered part of maintenance by *'urf*. And there is no doubt that *'urf* disapproves the conduct of a husband who while possessing the means neglects his wife who needs medical attention, exactly as it considers a father blameworthy if he neglects his ailing children while having the means to buy medicines and pay the doctor's fee.

Expenses of Child-birth

The essential expenses of child-birth and the obstetrician's fee will be paid by the husband when called upon by need.

Adjustment of Maintenance

If a judge determines a certain sum of money, or the spouses mutually settle it in lieu of maintenance, it is valid to adjust it by increasing or decreasing it in accordance with changes in prices or changes in the financial condition of the husband.

The Wife's Housing

The Imamiyyah, the Hanafi and the Hanbali schools state: It is necessary that the house provided to the wife befit the couple's status, and that the husband's family and children not reside in it except by her consent.

Marriage

The Malikis observe: If the wife is of a humble status, she may not refuse to stay with the husband's relatives, and if of a high social status she can refuse to stay with them except if it had been mentioned as a condition in the contract. If so, it is *wajib* for her to reside with his family on being provided a room; where she can enjoy privacy whenever she desires and does not suffer from mistreatment by his family.

According to the Shafi'i school, it is *wajib* that the housing suit her and not his status, even if he is poor.

The truth is that it is necessary to consider the condition of the husband in everything concerning maintenance, without there being any difference between food, clothing and housing in this regard, because the Qur'an says,

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ

Lodge them where you lodge, according to your means, (***65:6***)

on condition that she have an independent home and does not suffer by staying in it.

A Working Wife

The Hanafis are explicit that a woman if she works and does not stay at home is not entitled to maintenance if the husband demands her to stay at home and she does not concede to his demand. This view is in concurrence with what the other schools hold regarding the impermissibility of her leaving her home without his permission. The Shafi'i and the Hanbali schools further state, as mentioned earlier, that if she leaves home with his permission for meeting her own requirements, her maintenance ceases.

But a correct view would be to differentiate between a husband who knows at the time of marriage that she is employed and her employment prevents her staying at home, and a husband who is ignorant about her employment at the time of marriage. Therefore, if he knew and remained silent and did not include a condition that she leave her job, he has no right in this case to ask her to forgo her job; and if he demands and she refuses to comply, her maintenance shall not cease, because he has concluded the contract with the knowledge that she works. And many men marry working women with an intention of exploiting them, and when they are unable to do so they ask the wives to stop working with the

purpose of harming them (financially).

But if the husband does not know that she works at the time of marriage, he can demand that she stop working, and if she does not comply, she shall not be entitled to maintenance.

Surety for Maintenance

Is the wife entitled to claim from her husband a surety to secure her future maintenance if the husband intends to travel alone without leaving anything for her?

The Hanafi, the Maliki and the Hanbali schools observe: She is entitled to do so, and he is bound to arrange a surety for maintenance, and on his refusal she can ask that he be prevented from making the journey. The Malikis further add: She is entitled to claim from him advance payment of maintenance if he intends to go for a usual journey, and if the wife accuses him of planning to go for an unusual journey she has the right to claim immediate payment of maintenance for the period of a usual journey and to provide her a surety for the period which exceeds the period of a usual journey.

The Imamiyyah and the Shafi'i schools state: She is not entitled to claim a surety for her future maintenance because its payment hasn't become due, and in the future the possibility of its ceasing due to her disobedience or divorce or death is always present.

My opinion is that she has the right to claim a surety because the cause on whose basis a surety is demanded is present, and this is her present obedience. Therefore, al-Shaykh Ahmad Kashif al-Ghita' has observed in his *Safinat al-najat* (*bab al-daman*): But the opinion (that she can claim a surety) is not farfetched if not opposed by consensus (*ijma'*), so that her future maintenance is insured like her past and present maintenance.

No the matter leads to consensus, it lacks strength from the Imami viewpoint, because, according to their principles of jurisprudence, every consensus reached after the period of the Imams (A) faces the possibility of being refuted. Thus if there is a possibility that the consensus of the concurring legists is based on their belief that future maintenance does not become payable presently because it is not correct to provide surety for something which has not become payable, the argument on the basis of consensus fails due to the presence of this possibility. Now it should be seen whether the rule (that everything which has not yet become payable does not require a surety) on which the legists have based their argument is correct and whether it can be applied here or not. Here, as already explained, the cause (the wife's obedience) is present, which is sufficient to justify surety. Accordingly, the wife is entitled to claim a surety for her maintenance if the husband intends to travel, especially when he cannot be relied upon and is known to be irresponsible.

Dispute between Spouses

If after the husband accepts the wife's right to maintenance, the two differ about the actual payment of maintenance (she denying that he has paid, and he claiming to have paid it) the Hanafi, the Shafi'i and the Hanbali schools observe: The wife's word shall be accepted because she ' the refuter and the burden of proof is not on her.

The Imamiyyah and the Maliki schools state: If the husband resides with her in the same house, his word will be accepted, otherwise her word.

If the husband concedes that he has not paid maintenance on the excuse that she is not entitled to it due to her not surrendering herself to him, his word will be accepted according to all the schools. The consensus on this issue is a corollary to the consensus of the schools on the issue that *mahr* becomes payable on the conclusion of the contract and becomes fully payable on consummation: but maintenance does not become payable solely on the conclusion of the contract, it is necessary for her to surrender herself to the husband. It is the practice of the Shari'ah courts of Lebanon, both Sunni and Shii, when the spouses differ regarding disobedience (*nushuz*) (he claiming that she is disobedient and she charging him with disobedience), to order the husband to provide a suitable house and to order the wife to reside in it. If the husband refuses to provide a house, he will be considered disobedient; and if he provides a house which fulfils all the conditions and she refuses to reside in it and to obey him, she will be considered disobedient.

The Wife's Claim of Expulsion

If the wife leaves her husband's home claiming that she has been expelled, and he denies this, the burden of proof will rest on her and he will be made to take an oath; because it is not valid for her to leave home without an acceptable excuse, and as she claims the presence of such an excuse, she is burdened with proving it.

Loss of Maintenance

When the husband provides his wife with maintenance for the future, and then it is stolen or destroyed while in her possession, it is not *wajib* upon the husband to replenish it, irrespective of whether such loss occurs due to an unavoidable cause or on account of her negligence.

Husband's Debt Claim against Wife

If a wife owes a debt to her husband, can he adjust this debt against her present or future maintenance?

The Imamiyyah legists have dealt with this issue; they observe: If she is financially well-off and yet refuses to repay the debt, it is permissible for him to adjust it from her day-to-day maintenance, which

means that he consider her debt to him as her maintenance for each day, separately. But if she is financially straitened, he cannot do so; because any payment towards debt should be from what exceeds her daily expenditures.

Maintenance of Relatives

Who are the relatives entitled to maintenance and who amongst them is liable to provide maintenance? What are the conditions which make such maintenance *wajib*?

Definition of a Relative's Maintenance

According to the Hanafi's, the criterion for the responsibility of the relative to provide maintenance of another is the prohibited degree of marriage, so that if one of them is supposed a male and the other a female, marriage between them would be considered *haram*.

Therefore, this responsibility includes fathers–how high so ever–and sons–how low so ever–and also includes brothers, sisters, uncles and aunts, both paternal and maternal, because marriage between any two of them is prohibited.

The nearest relative shall be liable to provide maintenance, and affinity here has nothing to do with the title to inheritance. Therefore, if there is someone in the two classes of lineal ascendants and descendants, maintenance will be *wajib* on him, even if he is not entitled to inherit (from the person he is liable to maintain). One not belonging to these two classes will not be liable to provide maintenance, though he should be entitled to inherit. For example, if a person has a daughter's son and a brother, his maintenance will be *wajib* upon the former and not the latter, though the latter alone be entitled to the entire legacy to the exclusion of the former (*al–Durar fi sharh al–Gharar*, vol. 1, *bab al–nafaqat*).

Similarly, between two relatives of the same class, the nearer one will be responsible, even if he isn't entitled to any share in the legacy. Therefore, if a child has a paternal great grandfather and a maternal grandfather, his maintenance will be *wajib* upon the latter not the former, though the former should be an heir to the exclusion of the other. The secret here is that the maternal grandfather is nearer though he does not inherit, while the paternal great grandfather is comparatively distant, though he is an heir.

The Hanafis also state: The well–to–do son is responsible for the maintenance of his indigent father's wife, and he is also liable to get his indigent father married if he needs a wife.

The Malikis observe: Maintenance is *wajib* only on parents and children, not on other relatives. Thus, a grandson is not responsible to maintain his paternal or maternal grandfathers or grandmothers, and,

reciprocally, a grandfather is not liable to maintain his grandsons and granddaughters. On the whole, the responsibility for maintenance is limited to parents and children, to the exclusion of grandparents and grandchildren.

They also state: It is *wajib* upon a well-to-do son to maintain the servant of his indigent parents, even if they don't need him; but it is not *wajib* for a father to maintain his son's servant. A son is also liable to maintain his father's wife and her servant and have his father married to one or more wives, if one wife does not suffice.

The Hanbalis state: It is *wajib* that fathers, how high so ever, provide and receive maintenance. Similarly, it is *wajib* that sons, how low so ever, provide and receive maintenance, irrespective of their title to inheritance. Maintenance of relatives not belonging to the two classes is also *wajib* if the person liable to provide maintenance inherits from the person being maintained either by *fard*1 or by ta'sib2; but if excluded from inheritance, he will not be responsible for maintenance. Thus, if a person has an indigent son and a well-to-do brother, neither may be compelled to maintain him, because the son's indigence relieves him of the responsibility, and the brother by being excluded from inheritance due to the son's presence (*al-Mughni*, vol. 7, *bab al-nafaqat*).

They also state: It is *wajib* on the son to arrange for his father's marriage and to maintain his wife, in the same way as it is *wajib* on the father to have his son married if he is in need of marriage.

According to the Imamiyyah and the Shafi'i schools, it is *wajib* for sons to maintain their fathers and mothers, how high so ever, and it is *wajib* for fathers to maintain sons and daughters, how low so ever. The obligation of maintenance does not transcend these two main lineal classes to include others, such as brothers and paternal and maternal uncles.

But the Shafi'is are of the view that a well-to-do father is liable to have his indigent son married if in need of marriage: and a son is likewise bound to arrange for his indigent father's marriage if in need of marriage. Moreover, the liability for a person's maintenance includes the maintenance of his wife (*Maqsad al-nabih*, *bab nafaqat al-'aqarib*).

Most Imamiyyah legists state: It is not *wajib* to arrange for the marriage of a person whose maintenance is *wajib*, irrespective of whether he is father or son. Similarly, it is not *wajiib* for a son to maintain his father's wife if she is not his mother, or for a father to maintain his son's wife, because the canonical proofs (*adillah*) which make maintenance *wajiib* include neither the father's wife nor the son's, and an obligation is assumed to be non-existent until proved.

Conditions for the Wujub of Maintenance

The following conditions are necessary for making the maintenance of one relative *wajib* upon another.

1. The person to be maintained must be in need of maintenance. Therefore, maintaining a person who is

not needy is not *wajib*. The schools differ regarding a person who is needy and can earn his livelihood but does not do so, as to whether it is *wajib* to maintain him or not.

The Hanafi and the Shafi'i school state: The inability to earn is not a necessary condition for the *wajib* of the maintenance of fathers and grandfathers. Therefore, their maintenance is *wajib* on sons even if they have the ability to work but neglect to do so. Regarding other relatives who are able to make a living for themselves, their maintenance is not *wajib*; rather, they will be compelled to make a living, and a one who neglects to work or is sluggish commits only a crime against himself. But the *Shafi'is* say regarding a daughter: Her maintenance is *wajib* on the father until she is married.

The Imamiyyah, the Maliki and the Hanbali schools state: If one who was earlier making his livelihood by engaging in a trade that suited hi condition and status later neglects to do so, his maintenance is not *wajib* upon anyone, irrespective of whether it is the father or the mother or the son. The Malikis agree with the Shafi'is' position regarding a daughter and the reason for this is that formerly women were considered generally incapable of earning their own livelihood.

2. That the maintainer be well-off, according to all the schools, except the Hanafi's who say: Being well-to-do of the maintainer is a condition only for the maintenance of those who are neither ascendants nor descendants; but financial capacity is not a condition in the maintenance of the scion by one of the parents or the maintenance of the parents by the scion. The only condition here is the presence of the actual ability to maintain or the presence of the ability to earn. Therefore, a father who is capable of work will be ordered to maintain his child, and similarly a son with respect to his father, except where one of them is indigent and incapable of making an earning, such as due to blindness. etc.

The schools differ regarding the degree of financial ease necessary to cause the liability for providing maintenance to a relative. According to the Shafi'i school, it is the surplus over the daily expenditure of his own, his wife's and his children's.

The Malikis add to this the expenditure incurred upon servants and domestic animals.

According to the Imamiyyah and the Hanbali schools: It is the surplus over the daily expenditure of oneself and one's wife, as the maintenance of descendants and ascendant belongs to the same category.

Hanafi legists differ in defining the state of financial ease. According to some of them, it is possession of an amount of wealth which gives rise to the incidence of *zakat* (*nisab*); according to others, it should be enough to prohibit his taking of *zakat*. The third opinion differentiates between the farmer and the worker, allowing the farmer his and his family's expenditure for a period of one month and the worker a day's expenditure as deduction

3. According to the Hanbalis, their belonging to the same religion is necessary: thus, if one of them is a Muslim and the other a non-Muslim, maintenance will not be *wajib* (*al-Mughni* , vol. 7).

The Maliki, the Shafi'i and the Imamiyyah schools state: Their belonging to the same religion is not necessary. Therefore, a Muslim can maintain a relative who is not a Muslim, as is the case when maintenance is provided by a Muslim husband to his wife belonging to Ahl al-Kitab.

The Hanaf'is observe: Belonging to the same religion is not required between ascendants and descendants, but necessary between other relatives. Therefore, a Muslim will not maintain his non-Muslim brother and vice versa (Ab Zuhrah).

Determination of Relative's Maintenance

It is necessary that maintenance paid to a relative be sufficient to cover his/her essential needs, such as food, clothing and housing, because maintenance has been made *wajib* to protect life and to provide its needs. Thus it is to be determined in accordance with the needs (*al-Mughni*, vol. 7. *al-Tawahir*, vol. 5).

It should be noted that if a relative entitled to maintenance receives the maintenance of a day or more through litigation, through gift, *zakat* or some other manner, the maintenance due to him will be deducted to the extent of what he reived through these means, even if the judge has ordered the payment of maintenance.

The Order of Relatives on Whom Maintenance is Wajib

The Hanafis observe: If there is only one person responsible for maintenance, he will pay it; if two or more belonging to the same category and capacity are responsible-such as two sons or two daughters-they will share equally in providing maintenance, even if they differ in wealth, after their financial capacity has been proved.[3]

But where they are of different categories of relationship or of varying capacities, there is confusion in the views of Hanafi legists in providing the order of those responsible for maintenance (*al-'Ahwat al-shakhsiyyah*, Abu Zuhrah).

The Shafi'is state: If a person in need has a father and a grandfather who are both well-off, his maintenance will be provided solely by the father. If he has a mother and a grandmother, the maintenance will be solely provided by the mother. If both the parents are there, the father will provide the maintenance. If he has a grandfather and a mother, the grandfather will provide the maintenance. If he has a paternal grandmother and a maternal grandmother according to one opinion, both are equally responsible according to another opinion. the paternal grandmother will be solely liable (*Maqsad al-nabih*, *nafaqat al-'aqarib*).

The Hanbalis state: If a child does not have a father, his maintenance will be on his heirs; and if he has two heirs, they will contribute in proportion to each's share in legacy. If there are three or more heirs, they will contribute in proportion to their share in legacy. Tutt if he has a mother and a grandfather, the

mother will contribute one–third of maintenance and the grandfather the remainder, as they inherit in the same proportion (*al–Mughni*. vol. 7).

The Imamiyyah state: The child's maintenance is *wajib* on the father, If the father is dead or indigent, its maintenance will lie upon the paternal grandfather; and if the grandfather is dead or indigent, the mother will be liable for maintenance. After him, her father and mother along with the child's paternal grandmother will share equally in the maintenance of the grandchild if they are financially capable. But if only some of them are well–off, the maintenance will lie only on those who are such.

If an indigent person has father and a son, or father and a daughter, they will contribute to his maintenance equally. Similarly, if he has many children, it will be shouldered equally by them without any distinction between sons and daughters. On the whole, the Imamiyyah consider the nearness of relationship a criterion while determining the order of relatives who are liable to provide maintenance; on their belonging to the same class, they are compelled to contribute equally without any distinction between males and females or between ascendants and descendants, except that the father and the paternal grandfather are given priority over the mother.

1. By fard is meant the specific share of inheritance decreed for an heir by the Qur'an.
2. Al–Tasib is a doctrine accepted by the Sunni schools. It applies in situations where the total shares of the decreed sharers fall short of the total legacy. Here, the Sunni schools assign the balance to be inherited by distant relatives, as the nearer relative have already received their decreed shares and are not entitled to anything in addition to their decreed shares. For example, if a person dies leaving behind a daughter and an uncle, the decreed share of the daughter being half, the other half will be inherited by the uncle and the daughter will not be entitled to inherit more than her decreed share.

   The Imamiyyah do not accept this doctrine and in the above example entitle the daughter to inherit the whole heritable interest to the exclusion of the father's uncle. They apply the rule: the nearer in degree excludes the remote.

3. Some judges distribute the maintenance of a relative between those on whom his maintenance is wajib in accordance with the financial capacity of each. Therefore, if an indigent father has two sons, one of them very rich, and the other merely well–off, the first will contribute more than the second to the father's maintenance.

   The Hanafis give no weightage to this difference in financial capacity and consider the two equally liable after their capacity has been proved. This is a right required by the legal bases, and the statements of the author of al–Jawahir also bear this out where he says: If he has a son who is presently well–off and another son who is in the course of becoming such, the two will contribute equally because the applicable adillah are unconditional.

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