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Part Ten: Right of Divorce

In no age has the danger of the breaking-up of the family and the evil side-effects that arise from it been the object of so much attention as in ours, and in no age were human beings involved in this danger and in the evil consequences springing from it as they are in this age.

Law-makers, jurists, psychologist, — all of them try, with all the means in their control, to further strengthen, stabilize and render indestructible the structure of marriage, but all effort have failed and have instead aggravated the disease. Statistics show that year after year the number of divorces increases, and that there is imminent danger of the breaking up of many other homes.

Usually, whenever some disease attracts attention, and material and intellectual efforts are expended to combat and defeat it, the number of cases decreases as a result and very often the disease is eradicated; but in the case of divorce it is just the opposite.

The increase of divorce in modern life

In the past little thought was given to divorce, its evil effects, the causes of its occurrence and increase, and the ways of preventing its incidence, while at the same time there were fewer divorces, fewer broken homes. Certainly the difference between the past and the present is that now the causes of divorce are on the increase. Social life has assumed a form in which the causes of separation, disunion and the breaking of the ties of home life have been multiplied, and that is the reason why the efforts of the experts and the well-intentioned have not as yet been at all successful. Unfortunately, in the future it is likely to become more serious.

On February 13th 1967, Newsweek published an article under the title: “The Divorced Woman – American Style” (later translated into Persian and printed in *Zan-e ruz* (no. 105), there it was written: “Getting in and out of divorce is almost like getting in and out of taxis.”

It also writes that American people have an expression: “The worst reconciliation is preferable to the best divorce.” This expression was first coined by the Spanish writer Cervantes in 1600. Another saying,

this time from 1960 and contrary to first one says: “Love is lovelier the second time around”, and comes from the pen of one Sammy Kahn, songwriter.

From the text of the article it appears that the second saying is now being realized in America, for it writes: “The allure of the marriage-go-round has grown so potent that it is attracting not only teen-agers and young marrieds but more and more of their mothers. The U.S divorce barometer is not on the rise; in fact, it has hovered around the 400,000 a-year level in World War II. . . Nearly 40 per cent of all ruptured marriages today have lasted ten years or more and 13 per cent have survived more than twenty years. The median age of the U.S’s two million divorcees is now 45. Furthermore, belying the myth that progeny preserves marriages, some 60 per cent (vs. 42 per cent in 1948) of today’s divorced women have children under 18 at the time of their breakup.”

The article continues: “Yet for all her privilege and plenty the divorcee — mature or not — is hardly gay. Her *tristesse* is revealed in the incidence of divorced women seeking psychoanalysis, in their rate of alcoholism, (one in four) and suicide (three times that of married women)....In short, once outside the courtroom, many a newly divorced woman discovers that things are not what she deemed... . The partnered world has yet to form a cohesive set of attitudes towards the female ex-partner. She may be respected, admired, even envied — but she does not fit snugly into other people’s private lives.”

The magazine then goes on to ask whether the cause of speedy divorces is disharmony and the absence of sexual compatibility between husband and wife. It writes: “To judge by court records, money, sex and incompatibility are still the prime reasons for divorce among all ages and classes. What underlies the failure of so many marriages is not a new form of friction — but a new unwillingness to tolerate the old frictions. In the age of the pill, the sexual revolution and the feminine mystique, the notion that happiness takes precedence over family solidarity has clearly captured the female imagination.”

“A wife today,’ says Unitarian minister Rudolph W. Nemser, of suburban Washington, D.C., ‘is less willing to tolerate incompatibility without questioning her situation. The husband, by contrast, is more likely to accept the fact of a bad marriage and will persevere with it.’ According to Psychiatrist Wahl, women are becoming more demanding of sexual gratification and more intolerant of sexual incompatibility”

Divorce in Iran

The rise in the divorce-rate is not confined to America. It is a universal disease of the times. Wherever western manners and customs have influenced the lives of people more, the number of divorces has also gone up. If, for example we consider the case of our own Iran, cases of divorce are found more in cities than in the country. In Tehran, where western manners and habits are more wide-spread, divorce cases occur in greater number than in other cities.

In issue no. 11512 of the daily newspaper *Itla‘at*, a short statistical record of the marriages and divorce

in Iran was made. It was mentioned that “more than a quarter of the number of divorces recorded are entirely connected with the area around Tehran, that is, twenty seven per cent of the divorces recorded occurred in Tehran, in spite of the population of Tehran being ten per cent of the total population of the country. On the whole the percentage of divorces in Tehran is higher than the percentage of marriages. Marriages in Tehran account for fifteen per cent of all the marriages of the whole country.”

The environment in divorce-infected America

Let us leave aside now the fact that talk of an increase in divorce first arose in America, and as it was said in *Newsweek*, an American woman prefers her own enjoyment and pleasure to the well-being and safety of her own home, and let us precede a step further and see why the American woman has become like this. Certainly it is not related to the nature of American woman; it must have some social cause. It is surely the social environment in America that has created this mentality among American women. Our worshippers of the west try to direct and push the women of Iran onto the tracks along which American women have passed. If their wish is fulfilled, there can be no doubt that the Iranian woman and Iranian family-life will meet the same fate as the American woman, and the Iranian home will become like the American home.

In issue no.66 (4.5.1344.SH), the weekly *Bamshad* wrote: “See how far matters have gone! The voice of French people is raised in protest. ‘The Americans Have Perpetrated Another Outrage.’ This heading is from an article in the French newspapers *France-Soir* which says that in more than two hundred restaurants and cabarets in the State of California female attendants work topless. In that article it is written that a special skin-tight costume like a bathing-costume, which does not cover the breasts, has been officially recognized as a working dress in San Francisco and Los Angeles. In New York city a considerable number of cinemas show only those films which are based upon sex, and the naked pictures of women at their doors confront the eyes. These films are called ‘Wife-Swapping’, ‘The Vice-Girls’, ‘Revealing Panties’ and so on. In the shop-fronts and book-stalls there may be very few books on the front of which there is no picture of a naked woman. Even the classics are not exempted from this rule. In the midst of these books one can find a large number of books with titles such as: ‘The Sexual Behavior of American Husbands’, ‘The Sexual Behavior of Western Husbands’, ‘The Sexual Behavior of Youths under Twenty Years of Age’, ‘New Methods in Sexual Behavior on the Basis of the Latest Surveys’.

“The writer of the article in *France-Soir*, surprised and thoughtful, asks himself at this stage: ‘To what extent does America want to go.’

At this point *Bamshad* writes: The truth is that it will go anywhere it wants to.....only my heart aches for these people of my country who think that they have found an ideal standard to follow, and are completely confused in this path.”

So it is clear that if an American woman has become playful and prefers her own pleasure to faithfulness

to her husband and her home, she is not very much to blame. It is the social environment which has struck the destructive blow at the roots of the household. It is strange that the leaders of our times are continuously giving encouragement to the social causes of divorce and the breaking up of the family. Amongst themselves, they try to excel each other in their attempts in this direction, and then raise cries of woe and wonder why divorce is so frequent. With one hand, these people add to the causes of divorce, and with the other, they want to repress it by force of law. It is like asking for the impossible.

Assumptions

Now let us begin discussing the subject at its roots. Firstly we should see whether, in principle, divorce is a good thing or a bad thing. Should recourse to divorce be entirely unrestricted?

If divorce is a good thing then every circumstance that increases the already increased occurrence of divorce is quite all right. Or maybe the way to divorce should be completely barred, and union by marriage should be forcibly kept intact for ever, and every circumstance and innovation which causes slackness in the sacred union of marriage should be strictly dealt with. Or there is the third course, the proper course to be adopted, which is as follows. The law should not entirely bar the way to divorce to man and woman, but rather it should leave the way open to it in those cases in which it is deemed necessary and unavoidable.

When the law does not completely ban it, society should simultaneously take adequate steps to bring about such conditions that the causes of dissension between husband and wife should not occur. Society should take a firm stand against the causes which are the source of the disunion and separation of husband and wife, and the loneliness of children. If society itself furnishes the causes of divorce, no legal prohibitions can be fruitful.

If it is considered proper that the law should keep the door of divorce open, then under what conditions and in what way, should it be left open? Should it remain open only for the husband, or only for the wife or else for both of them? In the case of the latter alternative, should the door be kept open for both husband and wife in the same way? Should the law allow the husband and wife to step out of marriage both in the same manner, or is it preferable that for each one, the husband and the wife there should be different procedures for dissolving this tie.

In all there are five angles from which the problem of divorce can be discussed:

1 The unimportance of divorce, and the lifting of all moral and legal checks and hindrances for the control of divorce.

2. Those people support this view who consider marriage only as a source of sexual pleasure, and do not imagine it to have an aspect of inviolability, and do not consider the integrity of the family to be an asset or society. They think, in accordance with the saying 'the second love is more enjoyable', that the sooner that a new, different marriage is entered upon, the greater a source of sexual pleasure for

woman and man it will be. In this point of view both the social value of peace of the home has been ignored, and also the joy, purity, cordiality and happiness which is found in a continuous married life; and the occurrence and recognition of the unity of two spirits as if has been disregarded. This point of view is the most superficial and the most frivolous.

2. Marriage is a sacred pact. It is a union of heads and souls, and must always remain intact and secure. The word “divorce” should be dropped from the vocabulary of human society. A wife and a husband, who many each other should know that nothing except death can separate them from each other.

This view is the one the Catholic Church has maintained for centuries and is not prepared to relinquish at any cost.

The supporters of this view are on the decrease in the world. Except in Catholic Italy and Spain, this law is not enacted these days. Time and again we read in newspapers how the wailings of Italian men and women are raised against this law; they attempt to get the law of divorce officially approved so that many unsuccessful marriages be prevented in their troubled country.

Some time back, in one of the current daily newspapers, the translation of an article from the *Daily Express* was published under the headline “Marriage in Italy—Slavery of women”, and I went through it. In this article it was said that at present in Italy because there is no divorce, many people enter into illicit sexual relations. According to the article “at present more than five million Italians believe that their lives are nothing, but sheer sin and illicit relationships”.

In the same newspaper it was quoted from the French *Le Figaro* that the non-availability of divorce is the cause of great distress among the Italian people. There are many persons who have given up Italian Citizenship for this very reason. One Italian institute at last sought the opinion of Italian women as to whether the introduction of the provisions of divorce was against the principles of religion or not. Ninety-seven per cent of the women gave their replies in the negative.

The Church persists in its view, and argues all the more in support of the sanctity and inviolability of the marriage pact.

The sanctity of marriage, a necessity for its inviolability and indestructibility is of course acceptable, provided that the relationship of the husband and the wife can be securely maintained in practice; but there arise occasions when compatibility between the husband and the wife is impossible. On such occasions it is not feasible to keep them tied up together by force of law and call it the union of husband and wife. The discarding of the opinion of the Church is certain. It is not unlikely that the Church may revise its belief, so it is not necessary to scrutinize and discuss further the viewpoint of the Church.

3. Marriage may be dissolved and terminated by the husband. As for wife, it is not dissoluble at her discretion it all.

May be in former days this view was entertained, but at present I do not think that any supporters will be found for this view. At any rate, it too requires no further discussion and criticism.

4. Marriage is sacred and the peace of the family to be respected, but recourse to divorce on special conditions for both husband and wife should be possible. Moreover, the way to step out of this blind alley should be the same for both.

Those who support the identicalness of the rights of man and woman in family affairs, and who misrepresent this as equality of rights also support this view. In the opinion of this group all those conditions, requisites and limits that apply to the wife should also apply to the husband, and the very same way that the man has to get out of this blind alley should be the right of the woman as well. If there is any difference, there will be cruelty, discrimination and injustice.

5. Marriage is sacred and the peace of the family to be respected, and divorce an unpalatable and detestable thing. Society is responsible for removing the causes and incentives to divorce, but at the same time the law should not bar the way of divorce for incompatible marriages. The way to get out of the bond of marriage should be kept open for the husband as well as for the wife. The door by which the husband is to come out of this situation is different from that which the wife is to use. One of the matters in which a man and a woman have different right is divorce.

This is the view which Islam has proposed, and Islamic countries, though half heartedly, do act upon it.

Divorce 2

Divorce in our age is a great world problem. Everyone moans and complains. Those people under whose laws divorce is totally prohibited complain that they do not have the remedy of divorce for those unsuccessful marriages which are bound to take place. On the other hand, the cries those who have kept the way to divorce open equally for man and woman rise to the heavens, complaining about the increase in divorces and the instability of the family structure with all its associated ills and uncalled for side-effects. Moreover, those who have given this right only to man complain on two accounts.

Firstly, about the unmanly divorces of certain men who, having lived together with their wives as husbands, suddenly develop a fancy for a new wife, and the first wife, who spent her vitality, youth, energy and health on their home and never imagined that her cozy abode would one day be seized from her, is driven away from her repose, forsaken and utterly dejected, by only one visit to the office of the registrar of divorces.

The other is the unmanly refusal of certain men to divorce their wives when there remains no hope of a harmonious and united life.

It can happen that due to some special reasons, the differences between a husband and wife reach a stage where there is no hope of their finding a settlement. All attempts at reconciliation prove fruitless: a great dislike exists between the husband and wife; they live separately, and each of them has practically nothing to do with the other. In such circumstances, any reasonable person would be convinced that the only thing proper for them is that the relation which has to all intents and purposes been cut should also legally be served, and that each of them may be allowed to make the selection of some other partner.

Nevertheless some men, if only to torment the other party and depriving her of the benefit of enjoying a married life, keep their unfortunate wife in a state of suspense for nothing (in the words of the Qur'an) (*ka'l-mu 'allaqah*) كالمعلقة like someone hanging on).

As this kind of person knows nothing about Islam and Muslims except the name, and then they do these things in the name of Islam and by leaning on the laws of Islam, a doubt is created in some people who are not conversant with the depth and the real spirit of Islamic teachings as to whether Islam really advocates that the business of divorce should be like this.

With a voice of complaint, these people say: Has Islam really allowed men, sometimes by giving divorce and sometimes by withholding divorce, to persecute women in any way they like? Those people who act in the above mentioned way are completely satisfied that they are correct in the way they take advantage of their religious and legal rights. Those who raise objections say: Is that not cruelty? If this is not cruelty, what is cruelty? Do you not say that Islam is against injustice in any form and in any shape, and that Islamic laws are based upon justice and truth? If these acts are cruel and unjust, and Islamic laws are based up on truth and justice, tell us, so that we may see what provision is made by Islam to check these cases of injustice.

There is no denying that these acts are cruel. We will point out afterwards that Islam has provided correctives for these practices and has not left them to themselves. Nevertheless, there is one other point which should not be lost sight of, and that is to think over what methods should be adopted to check these cruelties and injustices. Is the only thing which causes cruelties of this description to be committed the divorce law, and will only amendment of the divorce law amend these things? Or should the root cause of these cruelties be looked for elsewhere, because changes in the law alone cannot stop these things.

The difference between the view of Islam and some other views about solving social problems is that some people, holding views other than that of Islam, imagine that all problems can be solved by passing and altering laws. Islam, on the other hand, clearly makes the point that although the law can certainly be effective as far as the everyday affair of the people and matters revolving around contracts, etc. are concerned, in cases where the problem is characterized by feelings of affections and love and pertains to individual likes and dislikes, in short, in cases with an emotional aspect, then the law alone cannot be effective. Other causes and factors should be investigated, and other provisions brought into use to obtain the desired goals.

We shall prove that Islam has made use of the law in places where it can be effective, and has not been neglected in this direction.

Dishonourable divorces

Firstly, we shall discuss the foremost problem of our times, namely dishonorable divorces.

Islam is strongly against divorce and wants divorce to be avoided as far as possible. Islam has provided his remedy only for occasions in which there is no alternative but separation. Islam considers as enemies of God those men who marry one woman after the other and divorce them in quick succession and whom it calls *mutallaq* (lit: a divorcer).

In the book al-Kafi¹ it is narrated: The Prophet went to a man and enquired: “What did you do about your wife?”

He said: “I divorced her.”

The Prophet asked, “Did you see anything objectionable in her.”

He replied, “No, I did not see anything objectionable in her.”

The matter stopped here, and that man married again. The Prophet asked him, “Did you marry another wife?”

He said, “Yes.”

After some time the Prophet again went to that man and asked him; “What did you do about your wife?”

He said: “I divorced her.”

The Prophet asked him, “Did you see anything evil in her.”

He said: “I did not see anything evil in her either.”

The matter closed again here, and that man married for the third time.

The Prophet asked him: “Have you taken another wife?”

He said: “Yes, O’ Messenger of Allah!”

A considerable time passed and the Holy Prophet went to him and asked: “What did you do about the wife you married?”

He said: “I divorced her also.”

The Prophet asked: “Did you see anything evil in her?”

He replied: “No, I did not see anything evil in her either.”

The Prophet said “Allah considers as His enemy and damns the man who relishes changing wives one after the other, and the woman who delights in changing husbands one after the other.”

The Prophet was informed that Abu Ayyub al-Ansari was determined to divorce Umm Ayyub, his wife.

The Prophet personally knew Umm Ayyub, and knew also that the divorce of Abu Ayyub was not grounded in an genuine cause. He said:

إِنْ طَلَّقَ أُمُّ أَيُّوبَ لِحُوبٍ

“Verily, the divorce of Umm Ayyub is a great sin.” The Prophet also said: “Jibra’il (Gabriel) so much commended the cause of the woman, and so counseled me as to give me the impression that except in the clear case of adultery the wife does not deserve to be divorced”.

Imam (Ja’far) as-Sadiq quoted the Holy Prophet as saying: “To God no house is dearer than the house where there is the union of marriage, and no house exists which deserves His wrath more than that in which the union of marriage is broken by divorce.” Imam as-Sadiq then said that the word *talaq* (divorce) occurs repeatedly in the Qur’an, and that the details of the matter of divorce have been honored with the attention of the Holy Qur’an, The reason for this is that God is an enemy of separation.

Tabarsi² in *Makarimu’l-akhlaq* (Noble Deeds of Morality) quoted from the Prophet: “Get married, but do not divorce because the throne of Allah shudders when there is divorce.”

Imam as-Sadiq said: “No lawful thing is the object of so much wrath and hate in the eyes of Allah as divorce is. Allah considers the man who repeatedly divorces as His enemy.”

This thing is not especially found in traditions from Shi’ite sources. The Sunnis have also quoted similar traditions. In the Kitab as-Sunan, Abu Dawud quotes from the Holy Prophet that Allah declared lawful nothing so abominable to Him as divorce.

Mawlavi (Jalalu’d-Din Rumi) in his well-known story of Musa (Moses) and the shepherd alluded to the same tradition of the Prophet when he said:

As far as possible do not step into separation.

For ‘the most detestable thing to me is divorce’.

In the biographies of the leader, and guides of our religion it is observed that, as far as possible, they abstained from divorce. It was, therefore, very rare that they divorced a woman, and when they did there was a very reasonable and logical reason for that. For example, Imam (Muhammad) al-Baqir wedded a woman who was dearly loved by him. Then the Imam became aware that the woman was *nasabiyyah*, that is, she detested Ali ibn Abi Talib and nourished a grudge against him in her heart. The Imam divorced her.

The Imam was asked, “The woman was loved by you, why did you divorce her.” The Imam replied, “I did not want that a flame from the fires of Hell should be by my side.”

A malicious tale without any truth

Here it is necessary to refer briefly to a baseless and scandalous story which was fabricated by the criminal ‘Abbasid Caliphs, and was spread about amongst people in general and mentioned in books, that Imam al-Mujtaba,³ the honored son of ‘Ali, Amir al-mu’minin, was one of those who wedded large number of women and then divorced them. Because the foundation of this malicious tale was laid almost

a century after the death of the Imam, it spread everywhere.

The admirers and followers of the Imam also began to talk about it without looking into the truth of the matter and without thinking over the fact that in the view of Islam this is an abominable and detestable thing and is befitting only for a sensuous and ignorant person. It is not the work of a person who used to go to *Hajj* (pilgrimage to Mecca) on foot from Medina. During his lifetime, more than twenty times he divided up all his wealth and holdings among the needy and the poor; he took half of it and the other half he distributed among the destitute. How can this mischievous tale accord with the high standing position of utmost piety and infallibility and the Imamate of that venerable personality?

As we know, with the change of the caliphate from the Umayyids to the 'Abbasids, the Bani al-Hasan, that is, the grandson of Imam Hassan cooperate with the Bani al-'Abbas, while the grandsons of Imam Husayn, at the head at that time was Imam as-Sadiq, abstained from cooperating with them. The Bani al-'Abbas, though in the beginning they showed esteem and respect for the Bani al-Hasan and gave them to understand that they thought them to be worthier of the caliphate than themselves, ultimately betrayed them. Most of them were eliminated from the scene by being beheaded, and some were imprisoned.

The Bani al-'Abbas began to propagate lies against Bani al-Hasan for the purpose of firmly establishing their political position. One item of their mischievous propaganda was that Abu-Talib, who was the great-grandfather of the Bani Al-Hasan and the uncle of the Prophet, was not a Muslim, and had died an infidel, while 'Abbas who was another uncle of the Prophet, embraced Islam and died a Muslim. So the Bani al-'Abbas, who were the progeny of the Muslim uncle of the Prophet, deserved the caliphate more than Bani al-Hasan, who were the progeny of an infidel uncle of the Prophet. So as to make this view popularly acceptable, they spent large sums of money and invented false stories. Today, also, a section of the Sunnis, under the influence of the same propaganda and plan, declare Abu Talib to be an unbeliever. However if research were carried out in real earnest among Sunni scholars on this subject, they would be able to correct this matter in line with history.

The other item of propaganda which they started against the Bani al-Hasan was that they said that the forefather of the Bani al-Hasan, Imam Hasan, succeeded his father to the caliphate, but because he was a libertine, he occupied himself with wedding women, and divorcing them. That is why he could not succeed in the duties of the caliphate. He accepted sums of money from Mu'awiyah, his strong rival, abdicated the caliphate in favour of him, and applied himself to the sensuous activities of wedding and divorcing women.

Fortunately in the end, eminent scholars of the subsequent period carried out research and arrived at the root of this falsehood. The above comment was first of all made by a judge who was in the service of Mansur ad-Dawaniqi, the 'Abbasid caliph, and it was commanded to publicize this falsehood. One of the historians remarked on this circumstance, that if Imam Hasan had wedded so many wives, where was all his children? Why was the number of his sons and daughters so small? The Imam was not sterile, and birth-control and abortion were not the practice of that day.

I am amazed at the senseless credulity of the Shi'ite narrators of traditions. On the one they narrate a large number of traditions from the Holy Prophet and the pious Imams saying that God considers as His enemies men who divorce irresponsibly, and that He condemns them.

On the other hand, they write that Imam Hasan was a person who divorced excessive number of women. These people never reflect that they should make a choice of one of three courses. Either they should say that there is nothing wrong with divorce and God does not consider as His enemy a man who divorce women in great number, or they should say that Imam Hasan was not a person who divorced many women.

The third possibility is for them to declare, God forbid, that Imam Hasan did not abide by Islamic law. However, on the one hand these venerable personages take the traditions of the detestableness of divorce as authentic and genuine, and on the other hand they believe in the exceeding holiness and piety of Imam Hasan and display great esteem and respect for him. Along side this they quote the excessive number of divorces of Imam Hasan, and, without critically looking into the matter, pass on.

There are certain others who have gone so far in this matter as to say Amir al-mu' minin, Ali (a.s.) was displeased with this behavior of his son. He informed people publicly from the pulpit, and advised them not to marry their daughters to his son because he would divorce them. Despite this, the people answered that they would be proud of the honor of having their daughters married to the grandson of the Prophet. If he wanted them, he could keep them, and, if he did not want them, he could divorce them.

Perhaps some people consider the consent and agreement of the daughters and the members of their families sufficient to tone down and do away with the detestability of divorce. They think that divorce is to be hated only when the other side is not agreeable to it; but that when the woman desires to have the honor of living a few days with a man she is proud of, there is no harm in divorce.

But it is not like this. The consent of the fathers of the girls, and the consent of the girls themselves do not weaken the degree of the detestability of divorce. The reason is that Islam wants only that the ties of marriage should be steadfastly maintained. The agreement of the husband and the wife about separation does not; in this respect very much alter the situation.

Islam considers divorce detestable not to oblige or favour woman, and not to receive her gratitude and that of her family members. Her consent and the consent of the members of her family cannot do away with the detestability of divorce.

The reason I have brought up the subject of Imam Hasan, besides the point that a false accusation about a historical figure should be refuted whenever possible, is that some persons who are not afraid of God may act in this manner, and then excuse themselves in the light of the example of Imam Hasan.

Anyhow, what cannot be denied is that divorce and the separation of husband and wife is detestable and hated in the eyes of Islam.

Why did Islam not make divorce illegal?

At this point a relevant question can be raised. If divorce is so detestable that someone who divorces a woman is considered to be an enemy of God, why did Islam not declare it unlawful? What hinders Islam from making divorce unlawful, and allowing it only on specifically determined occasions. In other words, would it not be preferable for Islam to prescribe conditions, and only allow a man to divorce a woman in those circumstances? And if divorce were conditional, a judicial aspect would necessarily have entered it. Whenever a man intended to divorce his wife, he would first of all have to submit evidence before the judiciary concerning the fulfillment of the required condition. If the judiciary considered his proof reliable and his arguments reasonable, he would get permission for the divorce, otherwise not.

What after all is the underlying meaning of the words: 'the most detestable of lawful things is divorce?' If divorce is lawful, it is not detestable, and if it is detestable, it is not lawful. Being detestable and being lawful are contradictory.

Besides all this, the question is whether society, in other words, what is called the judiciary, which represents the society, has the right in divorce, which you say a detestable and hated, to interfere to such a degree that it can hold back a hasty divorce and delay it so much that the man may go back on his determination. At other times, society, that is, this same judiciary, may realize that the marriage in question is an incompatible one, and, that it is preferable that the relationship be dissolved.

Divorce 3

The discussion has reached the point that in the eyes of Islam divorce is vehemently hated and detested. Islam inclines towards maintaining the contract of steadfast and firm marriage. At this point we took up for consideration the question as to why, when divorce is hated and detested to this extent, Islam did not declare it unlawful. Does Islam not prohibit every activity which is detestable like drinking, gambling and tyranny? Why did Islam not declare divorce altogether unlawful, and why has it not put a legal prohibition on it? What is the logic in saying that divorce is a lawful but detestable thing? If it is lawful, what does it mean to say that at the same time it is detested; and if it is detestable, why should it be lawful?

On the one hand Islam frowns at the man who divorces his wife, and feels disapproval and disgust towards him, but, on the other hand, when the man wants to divorce his wife, it puts no legal barrier up against him. Why should this be so? This is a very relevant question. All the mystery lies in this very point. The real secret, the crucial point, is that marriage and the life of a husband and wife is a spontaneous relationship and is not based upon contract; special laws have been stipulated in nature for it. The pact is intrinsically different from all other social agreements, such as sale agreements, leases, conciliations, mortgages, and the power of attorney and so forth, all of which are merely a series of social contractual agreements; one's nature and disposition have nothing to do with those things.

Moreover, neither have any laws in the natural or innate sense been determined for them; in contrast to the marriage agreement, in which the natural inclination of the two parties, which has, so to speak, a special mechanism, should be taken into account.

For this reason, if the marriage contract has provisions which other agreements and contracts do not have, it should not be an occasion for surprise.

Natural laws in the case of marriage and divorce:

In civil and social life, the natural law is the law of freedom and equality. All social arrangements should be based upon the two principles of freedom and equality and not anything else, unlike the pact of marriage, for which, in nature, principles other than freedom and equality have also been provided, and there is no alternative except to observe these laws. Divorce, like marriage, has a law in the framework of nature prior to any contractual, positive law. Just as in the start of the matter and in its intermediary period, that is, during married life, the laws of nature should be observed, so also in divorce which is its termination, these laws must be kept in view. (We mentioned these things in the sections on proposing, on dower and maintenance, and especially in the section on the differences between men and women). To leave the matter wholly to nature would serve no purpose, for, as Alexis Carrel has said, the biological laws pertaining to life, are like the laws of the heavens: strict, cruel and unopposable.

Marriage is unity and coming together, and divorce is separation and breakage. When nature has contrived the law of pairing and union of man and woman in such a way that from the one side there is effort to take possession and from the other side there is giving way for the purposes of charm and attraction, the feelings of the one side are based on getting the person of the other and the feelings of the other side are based on capturing the heart of the other. When nature laid the foundations of marriage on love, unity and sympathy of feeling, and not on the basis of working together and comradeship, and when the nature has arranged the design of the family on the centrality of the more delicate sex and the orbiting of the coarser sex, the separation, disunion and breaking up of this home and the wreck of this harmonious system should also follow a special arrangement.

In our fifteenth article, we quoted an eminent thinker as writing "Finding a mate means for men an attack for domination and for women giving way for the purposes of charm and attraction. The actions of man, since he is by nature a hunting animal, are aggressive and positive and woman is for him a prey which he must trap. Finding a partner is a battle and a combat and marriage is possession and authority."

The contract which is based on love and unity, and not on working together and comradeship, cannot be forced or coerced. It is possible to bind two individuals to work together by force of law, and they consider their contract to work together to be based upon justice, and so, worthy of being respected, and they will go on for a number of years working together. However, it is impossible to order two individuals to love each other and be sincere to each other, to command one to devote him or herself to the other, and to consider the happiness of the other, as his or her own happiness by force of law.

If we want such relations to exist between two individuals, we must make use of other practical and social contrivances apart from the imposition of legal obligations.

The natural mechanism of marriage, on which Islam has based its laws, is that the woman should have a position of being loved and respected in the family order. Consequently, if, for some reason, the wife has fallen from this position and the warmth of the love of the husband for her has cooled down and he has lost his affection for her, the foundation and the main pillar of the family had been destroyed. In other words a natural social unit has been destroyed by a rule of nature. Islam views this situation with regret, but once it is evident that the natural basis of that marriage has been destroyed, Islam cannot continue to imagine it to exist and be alive from a legal point of view. Islam tries, and takes specific steps to maintain the life of a family, that the woman should remain in the position of being loved and being sought after, and the man in the position of the seeker, the lover, ready to help.

Islam recommends that a woman should make herself attractive to her husband, that she should employ her skills in new ways for her husband, that she should satisfy her husband's libidinal needs and that she should not turn down his advances and thereby create complexes and neuroses in him.

Correspondingly, Islam has recommended the man to be kind and affectionate towards his wife and to demonstrate his affection and love for her; he should not be reticent in his love for her. The plan of Islam in these recommendations is that the enjoyment of sex should be confined to milieu of the family. Large gatherings should be an environment for work and other activities, and not a focus of sexual pleasures.

The recommendations of Islam are all grounded in this principle that contacts between men and women outside the frame of reference of the marriage must necessarily and definitely be morally impeccable and without lubricity. All these things have as their sole and unique aim that the family units of the society should be guarded and protected from being broken up and destroyed.

The natural status of man in family life:

In the eyes of Islam, the greatest insult for a woman is that her husband should say to her, "I don't love you. I hate you", but at that stage the law may seek to keep the woman forcibly and by compulsion in the house of that man. Law can by compulsion retain the woman in the house of that man, but it cannot possibly keep her in her natural position in the conjugal environment, that is, the position of being loved and centrality. The law has the power to safeguard the material interests of the wife like enforcing her right to maintenance, and so forth, but it has no power to force the husband to maintain his position as a devoted person lovingly revolving round his wife.

So whenever the fire of the love and affection of the husband is extinguished, the union of marriage, from the natural point of view, subsists no more.

We are confronted with another question here. If that fire of love is extinguished on the side of the woman, what is the situation? Does family life continue and flourish in spite of the fact that the wife's

warmth of affection for her husband has cooled down, or does it not? If it does, what is the difference between a woman and a man, whereby man's indifference and apathy is the cause of the end of family life, while the woman's apathy is not the cause of its breaking up? If an end in the warmth of a wife's love brings family life to a stop, and if and when the woman declares her apathy towards her husband, should we consider the marriage to have ceased to exist and should we give the wife also the right to divorce?

The answer is that family life depends upon the affections of both sides, not of one. The only thing is that the psychology of women and men is different in this respect, and we have established this point on the authority of eminent thinkers in our previous articles. Nature has devised the ties of the husband and wife in such a form that the part of the woman is to respond to the love of the man. The affection and love of a woman which is genuine and stable can only be that love which is born as a reaction to the affection and admiration of man towards her. So the attachment of the woman to the man is the result of the attachment of the man to the woman and depends upon it. Nature has given the key to the love of both sides to the man, the husband. If he loves his wife and is faithful to her, the wife also loves him and remains faithful to him. It is an admitted fact that woman is naturally more faithful than man, and that a woman's unfaithfulness is a reaction to the unfaithfulness of the man.

Nature has deposited the key of the natural dissolution of marriage in the custody of man. In other words, it is man who by his own apathy and unfaithfulness towards his wife makes her cold and unfaithful. Conversely, if the indifference begins on the side of the wife, it does not effect the affection of the man, rather; incidentally it makes the affection more acute. Consequently, the indifference of the man leads to indifference on both sides, but the indifference the woman does not lead to indifference on both sides. Coldness and the extinction of love in the husband is the death of the marriage and the end of the family life, but the wife's coldness and the extinction of her affection towards the husband drives her to the state of a half dead patient with a hope of recovery. When the coldness begins on the side of the wife, if the husband is wise and faithful, he may regain the warmth of affection of the wife by expression of love and kindness. It is not an insult for man to keep his disillusion beloved by force of law until she gradually regains her affection, but it is unbearable for a woman to have to seek the force and the constraint of the law to keep her supporter and his love.

This is of course in such situations where the cause of the apathy of the woman is not the immorality and cruelty of the husband. If the husband begins to tyrannize his wife and she because of the oppression and cruelty of her husband becomes unaffectionate towards him that is quite another thing. We shall discuss this matter separately, man, in connection with the second problem to be discussed, we shall put forth our point of view that is, we shall discuss the unmanly way in which some husbands withhold divorce. Concerning this we shall say that this kind of men should not be allowed to take advantage of his wife and keep her with him to be cruel to her and to tyrannize her.

Briefly, then, the difference between the man and the woman lies in the fact that the man needs the person of the woman, while the woman needs the heart of her husband. The affectionate support and kindness of the husband is so valuable for the wife that without this the marriage becomes unbearable for her.

The view of a female psychologist:

In issue number 113 of *Zan-e ruz*, an article was published from a book called the psychology of mothers by a French woman, Beatrice Marbeau. According to the article, she is a psychiatrist. She is a psychologist and psychoanalyst attached to the Paris hospitals, and is herself a mother with three children.

In this article, a woman's need of the love and kindness of her husband when she is pregnant has been well explained. She says, "From the time that a woman has the feeling that she will shortly be a mother, she begins to watch, examine and smell the different parts of her body, especially when it is her 1st child. This state of inquisitiveness is very important. It is just like the state of a woman who is a stranger to herself and wishes to discover herself. When, for the first time, the woman feels the slight movements of her tiny child within her womb, she begins to listen to all the sounds of her body, The presence of another being within her body gives her such a feeling of well-being and pleasure that she gradually seeks to be apart and alone and cuts connections with the outer world The reason for this mental state is that she wishes to be alone with her embryonic child who has not yet come into this world....

"During the days of the pregnancy of their wives, husbands have a very important job on their hands but they always, regretfully, avoid carrying out these duties. The future mother wants to feel that her husband understands her, loves her and supports her. Otherwise when she sees that her stomach has swollen and her beauty is impaired, and she feels sickness and is afraid of the delivery, she will put the blame on her husband for all those discomforts for it was he who made her pregnant...It is the duty of the husband to stay by the side of his wife much more than before. The members of a family need to speak directly to a kind father of all their difficulties, sorrows and pleasures, even if their talk is senseless and boring. A pregnant woman very much needs to talk about her child. All the pride and honor of a woman is in her being a mother, and when she feels that her husband is indifferent towards the child whom she shall soon bring forth into the world, that feeling of pride and honor is changed into hate and futility. She begins to hate the thought of being a mother, and pregnancy begins to mean for her arriving at the point of death. It has been proved that mothers who have become disillusioned in this way bear the pains of birth with very great difficulty...

The relation of a child and its mother is not the relation of two individuals. As a matter of fact it is the relation of three persons, the mother, the baby and the father; and the father, even if he is absent (he may have divorced his wife), has a basic role in the inner life of the woman, in her ideas and thoughts, and also in her feeling of being a mother.

These are the ideas of an eminent woman thinker who is a psychologist as well as a mother.

The structure which is built on affections and feelings:

Now seriously consider whether a person who depends to this extent upon the sympathies, sincere affection, support and kindness of another person, and who is able to endure everything on the strength of that person's affectionate behavior and kindness, so much so that even that person's own child has no proper significance without that other person's feelings of love and affection and not just his presence, whether that needing person can possibly be forced by law to be attached to the other being who is man.

Is it not a mistake that, on the one hand, we provide sources to encourage permissiveness and incentives for men to lose interest in their wives, and everyday provide more and more circumstances to excite sexual passions, and then, on the other hand, we want to bind wives to their husbands by force of law? Islam has provided the conditions for the husband to really want and love his wife, but Islam has never wanted to unite woman and man by force.

As a general rule, whenever there is a question of the interest of the heart, devotion, sincerity and the such like being the basic determining factor, the force of law has no place. It may be regrettable in some cases, but there is no point in compulsion, coercion and obligation.

For example we know that in communal prayers (*salatu 'l-jama'ah*) the righteousness of the Imam and the confidence of those who follow him in prayers in his righteousness is a necessary condition. The relation of the Imam and those who follow him in prayers is a relation which has for its base the righteousness of the Imam and the confidence, devotion and sincerity of those who follow him. The heart and the feelings are the basic pillar of this relation. For this very reason this relation does not admit of any force or coercion. The law cannot guarantee the continuance and maintenance of this relation. If the followers in prayers sever their connections with the Imam and their faith and devotion is disturbed, this connection automatically breaks up, irrespective of whether this lapse of faith and devotion is well-founded or not.

Suppose the Imam had the distinction of having the highest degree of righteousness, piety and competence, but he could not make people follow him in prayers. It would be ridiculous for the Imam to approach the court of law and complain against the people about how they have no faith in him, and how they should not devoted to him and finally how they do not follow him in prayers. Rather, it would be a most contemptible thing for the Imam to compel people to follow him in prayers by force of law.

The same is the case of members of Parliament and their constituency. The nature of this relation is such that it should be based on a feeling of trust and faith. A feeling of devotion and goodwill is the vital pillar of this relation and cooperation. People must have faith, trust und confidence in the representative whom they elect. If people do not elect an individual, he cannot and should not force people to elect him,

even if the people are mistaken in their assessment and the man is the most competent and deserving candidate, because the nature of electioneering and voting is incompatible with compulsion, and such a man cannot, on the strength of his competence, approach a court of law with a complaint about how people, in spite of his being so—and– so did not elect him.

What is required in circumstances like this is that the level of thought of the people should be raised. Their education should be carried out in the right way so that whenever they want they can perform their religious duties in a correct way. They should find out who really are the righteous persons, and then attach themselves to them and follow them. When they want to perform their duties in society they should be able to find out the competent persons, and, according to their inclinations and loyalties, cast their votes for them. If it happens, after some time, that people change their convictions and move towards some other person, and have even done this without any justification for their action, it is, no doubt, regrettable; but it is not an occasion for compulsion and the use of force.

Family duties are just like religious duties and social duties. The main point is that we should understand that Islam considers family life to be a natural social unit and that for this natural social unit a special mechanism is called for, and that it is necessary and unavoidable to keep that mechanism within view.

One of the miracles of Islam is that it has determined what this mechanism is. The Western world has ignored this aspect of human relations and that is why it cannot overcome the difficulties surrounding family affairs. Every day a new difficulty arises. However, fortunately, scientific research is gradually bringing it to light. I am quite sure and can confidently assert that by scientific enlightenment the western world will gradually accept principles in the regulation of their family life. Of course, I realize that my concept of the sound and enlightening teachings of Islam is not what most people understand it to be.

It is something more than equality which strengthens the foundation of the family:

What the Western world professes to be fond of is equality, but it does not know that Islam has already solved the question of equality fourteen centuries ago. In the affairs of the family, which has its own order, there is something which is superior to equality. Nature has decreed equality only in civil social life and that is all, but in the family unit it has designed other laws, too, besides that of equality. Equality alone is not sufficient to regulate family relations. In relations, all the laws of nature should be kept in view.

Equality in corruption:

Unfortunately the word 'equality', has lost its true connotations and meaning due to much repeated and excessive use. A few think that the meaning of 'equality' is equality of rights, and they imagine that when they have applied the concept of equality to one situation their work is finished. These uninformed persons think that formerly men used to deceive women, but that now, since women also deceive men, everything is all right, because equality in deception has been established. In the past, ten out of a

hundred marriages were terminated by divorces and separations which were in the hands of men, but now, in some parts of the world, forty per cent of marriages are terminated by divorce, and in half this number the move is made by the wives. So they should rejoice and be happy that perfect equality has been established.

Formerly it was only the men who were treacherous to women, and it was only men who were not God-fearing and pious. Today, fortunately, women also commit breaches of mist and are not pious and God-fearing. What can be better than that? Long live equality! Down with inequality! Formerly men were the symbols of cruelty and oppression. It was they who, despite having a few darling children, went after a new love, leaving behind the wife and children. And now wives, long-married, after living for years joined with their husbands in matrimony and with several children, abandon their hearth and home with complete cruelty and faithlessness, impressed by an introduction to another man at a party. They leave to satisfy their desires. What a good thing. What can be better than that? Men and women have come to stand on the same footing and equality has been established.

Instead of remedying the endless number of social ills, reforming the weakness of men and women, and strengthening the structure of the family home, we are further damaging it and making it more unstable, yet we rejoice and make merry and are perfectly satisfied that, anyhow, we are stepping forward in the direction of equality. Perhaps our only fear is that gradually women will gain victory over men in corruption, perversion, heartlessness and cruelty.

It is thus clear why Islam, despite the fact that it considers divorce to be detestable and hated, does not legally ban it. By now the meaning of a legally permissible but detested thing should have become clear. The question as to how it is possible for a thing to be legally permissible but intensely detested and hated should now have been solved.

Divorce 4

From our previous discussions we hope it has become clear that Islam is opposed to divorce and the dissolution of the family home; it is her enemy in and Islam has resorted to various kinds of moral and social precautions to safeguard the environment of the family against the danger of its breaking up. Islam has used every means and every weapon to avoid the occurrence of divorce except force and the weapons of the law.

Islam is against the use of force and the weapons of the law to restrain man from divorce and to keep the wife in the house of her husband. It is considered incompatible with the position and the status which a wife should maintain within the family. The reason for this is that the main pillar and the foundation of home life are the affections and the sentiments; and the person who should be the recipient, the central object and the beneficiary of the kindness and love, and who should in her own turn transmit this love and affection to her children is the wife. Apathy and coldness in the affections of a husband towards his wife makes the family environment dark and dismal. The sentiments and the attitude of the husband

towards his wife have much bearing even upon the motherly feelings of the wife towards her children. According to Beatrice Marbeau, whose extract we quoted in the previous section, motherly feelings are not instinctive in the sense that in all circumstances it follows that a mother will always have the same warmth of feeling, not more and not less. The kindness and affection of her husband towards her have a great effect on her maternal feelings.

The result is that wife should receive kindness and affection from her husband so that she may be able to feed her children at the bountiful springs of her love and affection.

The husband is like the highlands, the wife is like a spring and the children are flowers and plants. The spring receives and stores the rain from the highlands so that it may give rise to clean and limpid streams which will irrigate and cause flowers, plants and meadows to flourish. If rains do not fall on the highlands, or if they are of a kind that does not absorb anything, the springs will dry up, and the flowers and plants will fade and die.

So just as the main source of life for plains and fields are the rains, especially the rains of the highlands, the main source of family life is the kind and affectionate feelings of the husband towards his wife. It is from these sentiments that the wife's life as well as that of the children is serene, bright and flourishing.

How can it be possible to have recourse to the law as a weapon and scourge against the husband, when the sentiments and affections of the husband towards his wife have this vital position and produce this animating effect in the very spirit of the life of the family.

Islam is completely against unmanly divorce, by which we mean that a man after undertaking to live with a woman as a husband, and after living together with her for a period, takes a fancy to a new woman, or indulges in some other aspiration, and drives away his former wife. However, the remedy, according to Islam is not to force the unmanly husband to keep his wife. This kind of keeping is intrinsically incompatible with the natural law of family life.

If the wife wants to return to the house of her husband by the power of the law and the administration, she can forcefully secure the occupation of that house, but she cannot regain the position of the woman of that family and be the intermediary in reviving the affections of her husband and transmitting them to the children. She is also unable in this way to satisfy her own inward urge to receive the devoted affections of her husband.

Islam has endeavored to do away with unmanliness and with unmanly divorces, and has advised men they should be generous towards their wives and behave towards them with affection and kindness. Nevertheless, in its capacity as law-giver, and bearing in view the position of the woman as the centre of the family system and as the intermediary in the receiving and transmitting of sentiments, Islam does not agree with forcibly and compulsorily retaining the woman in the home of an irresponsible person.

What Islam has done is exactly the opposite of what occidentals and worshippers of the west have done

and are doing. Islam vehemently fights against the factors of unmanliness, faithlessness and promiscuity, but it is not willing to force a woman to stay with an unmanly and faithless person. Nevertheless, every day occidentals and those who worship the West add to the factors which cause waywardness, promiscuity and sensual gratification in men and then want the woman to remain with a promiscuous, faithless and irresponsible man.

We hope it will be acknowledged that, in spite of the fact that Islam has not forced wives to stay with undesirable persons and has set them at liberty; it has diverted all its endeavors towards enriching the human spirit and its decency. It has been able in fact to lower the number of unmanly divorces by its very noticeable sense of equilibrium, although others, who are unmindful of these matters, which resort to force and try to get everything they want at the point of the bayonet, have had very little success in this connection. With the exception of these cases of divorce which take place on the initiative of wives on the plea of incompatibility, and, in the words of Newsweek, because women are becoming more demanding of sexual gratification.....those cases of divorce which have taken place and are still taking place there through the capriciousness of husbands to gratify their sexual whims far exceed in number the cases which take place in our midst.

The nature of peace in the family is different from all other forms of peace:

Peace and amity should definitely exist between wife and husband. Nevertheless, the peace and amity which should pervade family life are very different from the peace and amity that should obtain between two colleagues, two partners, two neighbors or two adjacent countries which have common frontiers.

The peace and amity in the life of the married couple is similar to the peace and amity that should subsist between parents and their sons and daughters; which means generous treatment, self-denial, concern with each other's future, breaking down the barrier of duality, considering the happiness of the other to be his or her own happiness and the misfortune of the other to be his or her own misfortune. This is different from the peace and amity that holds between colleagues or partners, or neighbors or two countries.

The peace which we mean by the peace between colleagues and so on signifies non-intervention in, and non-encroachment on, the rights of each other. Between two enemy countries even 'suspension of armed hostilities' is sufficient. If some third power interferes and occupies the border-land between the two countries and hinders the armed confrontation between the two countries, peace subsists, because a political peace has no other meaning than non-intervention and non-interference.

However, the peace of the family is different from political peace. In the peace of the family, non-encroachment on the rights of one by the other is not sufficient. An armed peace is of no avail. Something both more advanced and more basic is needed. Unity, oneness and the union of spirits into a single whole should be established as in the case of the peace and amity between, fathers and sons, and something more exalted than non intervention is necessary.

Unfortunately, because of certain historical reasons and possibly because of its geographical position, the west is stranger to sentiments (even within the environment of the family). In the thinking of westerner, the peace of the family has little difference from a political or social peace. According to the same pattern as the accumulation of strength on the border of two countries, he makes peace. He wants to make peace while focusing his strength on the frontier of the lives of the wife and the husband, and he is oblivious to the fact that the foundation of family life rests upon the dissolution of these frontiers, upon oneness and upon considering every other power as foreign.

Instead of diverting the attention of occidentals towards their mistaken conception of family life and their pride in their own impressive individuality, the worshippers of the west are so far lost in imbibing occidental ways of life that they are utterly confused and have even forgotten themselves. But this state of being lost to them cannot last for ever. The time when the east will discover her own personality, rend asunder this halter of worshipping the west, and rely on its own ways of thought and its own philosophy, is not far off.

At this stage, it is necessary to mention two points.

1. Islam welcomes any factor that will do away with divorce:

Some persons may possibly have got the impression from what we said so far, that we believe that there should be no obstacle for a man to divorce, and that as soon as a man makes up his mind to divorce, the way to it should be cleared for him in every respect and from all directions. No, we never meant such a thing. What we said concerning the Islamic view was only that there should be no recourse to compulsion and legal force as a deterrent to prevent a man from divorce. Islam welcomes everything which could be instrumental in dissuading a man from divorce, and has purposely laid down conditions and has ordained hard and fast rules which naturally have the effect of delaying, and may, in all probability, result in dispensing with, the divorce.

Besides advising the administrators of the marriage oath (*sighah*), the witnesses and others to make efforts to dissuade the man from divorce, Islam has ordained that the divorce should not be considered lawful and rightly administered except in the presence of two righteous witnesses. This condition is for the good reason that when a divorce is to be administered in their presence, because of their righteousness and piety, they will try their best and make an extreme effort to bring about reconciliation between the wife and the husband.

Despite this, the present practice is that the person carrying out the divorce pronounces the divorce before two righteous witnesses who have never seen the husband and the wife before and do not recognize them. Only the names of the wife and the husband are mentioned before them. However this is all a meaningless routine and it has nothing to do with the viewpoint and the purpose of Islam. In our midst the practice is that those carrying out the divorce gather two righteous persons and pronounce the names of the wife and the husband before them, for example, they say: "The husband is Ahmed and the

wife is Fatimah; I, as a representative of the husband, divorce the wife.” However, who are that Ahmad and Fatimah? And have the righteous witnesses, who listen to the pronouncement of words of divorce, ever seen them. If there arises an occasion some day when evidence is required, could they bear witness that the divorce of these two particular persons was administered in their presence? Of course not I am quite sure.

In any case, one of the things which, tends to dissuade men from divorce is the presence of these two virtuous persons, provided that the right method is adopted. Islam has not laid down the presence of two righteous persons as a necessary condition for marriage, which is the beginning of the contract because it did not want to cause practical delay in a virtuous deed. But for divorce, in spite of its being the end of the contract, the presence of two righteous persons is laid down as a necessary condition.

Like wise, Islam has not laid down that the woman’s monthly period of menstruation should be an obstacle in the performance of the marriage agreement, while it has laid down this thing as an obstacle to obtaining a divorce, even though, as we know, menstruation (as far as the Divine law is concerned) prevents the husband and wife having sexual intercourse and thus has relation to marriage but not to divorce which is the occasion of a final separation, from which time on the man and the woman will have nothing to do with each other.

Normally speaking, Islam should have prohibited the marriage agreement taking place during the period of menstruation, so as to avoid the danger of an infringement of the necessary staying apart of a man and woman who are with each other for the first time. Divorce, on the other hand, results in separation, and menstruation is of no consequence in this connection. Islam for all its being in favour of ‘union’ as against ‘separation’, laid down the monthly period as an obstacle to the lawfulness of divorce, while Islam did not deem it necessary that this period should stand in the way of the lawfulness of the marriage contract. In some cases a period of three months during which no intercourse took place is required before it is permissible to divorce.

It is evident that all these obstacles and hindrances are meant to ensure that during this period the violence of passions and the displeasure which may have contributed to the decision to divorce should subside, that the man and the woman may have time to make amends, and thus the divorce may be dispensed with.

Besides that, when the cause of the divorce is the displeasure of the husband and the divorce takes place in the form of a revocable divorce, the man is allowed period of grace called *‘iddah*, during which he can revoke the divorce and return to his wife.

Since Islam has laid down that the expenses of the marriage, the expenses of the period of *‘iddah*, and the expenses of the maintenance of the children should be the responsibility of the man, it has there by devised a practical obstacle to a man’s going to that length. A man who wants to divorce his wife and marry some other woman must pay for the maintenance of his former wife during the period of *‘iddah*, he

must be responsible for the expenses of the children that he may have had by the wife he is divorcing, he must provide a dower for the new wife, and he must once more bear the burden of the living expenses of the new wife and the children that are born to her.

These things, in addition to the responsibility of the supervision of the motherless children, present an awful prospect for the man who would divorce. All these things are themselves a check on his determination to divorce.

Over and above all these things, where there is a fear of the dissolution and the break up of the family peace, Islam has required that a family “tribunal” be formed and set in motion. It should be arranged in this manner, that one individual arbiter representing the husband and another representing the wife be chosen to investigate and reconcile.

The arbiters have to try their best to remove the hurdles and differences, and if then, after direct consultation with the wife and the husband, they discern that separation between them is the only remedy; they can carry out a separation between them. In the event that persons having the ability to arbitrate can be found in the families of the wife and the husband, they are to be preferred to the others; this is the actual saying of the Qur’an. In verse 35 of the chapter *an-Nisa’* (The Women), the commandment comes in the following words:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا

And if you fear a breach between the two, bring forth an arbiter from his people and from her people an arbiter, if they desire to set things right; Allah will compose their differences; surely Allah is All-knowing, All-aware.

The writer of the commentary al-Kashshaf, commenting upon the word حُكْم ‘arbiter’ writes: “the person who is selected, should be trustworthy, influential and impressive in his talk, acceptable and capable of proper peace-making arbitration”. He afterwards says that the reason the arbiters should be selected in preference from among the members of the families of the husband and the wife is that closely related persons better know the actual position that exists between them. Besides that, since they are relatives, they are more interested in their reconciliation than strangers. Moreover, the wife and the husband will disclose their inner secrets better to relatives than to strangers. They will speak out secrets before their own kith and kin which they would not be prepared to speak out in front of strangers.

There is a difference of opinion amongst religious scholars as to whether the setting up of the arbitration

tribunal is obligatory or merely recommended. Some eminent researchers believe that that is a duty of the government of the day, and is obligatory. Shahid ath-Thani, in *al-Masalik*⁴ explicitly pronounced his legal decision that the matter of arbitration, in the manner we have mentioned, is obligatory and necessary, and that it is the duty of the ruler always to see that it happens.

Sayyid Muhammad Rashid Rida,⁵ the writer of the Qur'an commentary *al-Manar*, after putting forth his view that the convening of the arbitrating body is obligatory, refers to the controversy of religious scholars concerning whether it is obligatory or recommended says: "If there is one thing that does not exist among the Muslims it is the taking of action according to this commandment and benefiting from its infinite advantages. Discords and disputes take place every day. Discords and disputes make their way into homes, but not the slightest use is made of the principle of arbitration which is commanded by the actual text of the Holy Book. All the energy of religious scholars is being spent in debates and disputes as to whether it is obligatory or recommended. None came forward to ask why, if it is obligatory or recommended, whichever it may be; no practical steps are taken to comply with this clear commandment? Why should all your energies be spent in debates and quarrels? If it has been decided that no action is in actual fact to be taken, and that people are not to benefit from its advantages, what is the difference in its being obligatory or recommended?"

Shahid ath-Thani⁶ says concerning the powers and the authority which the two arbiters have that they may, for example, oblige the husband that he should put up the wife in such and such house, or that he should not keep his mother or his other wife in that house, not even in a separate room, or, for example, that he should pay any dower money to his wife which he had promised to pay in cash, or in case he had borrowed money from her, that he should pay it back.

The purpose is that every strategy which can bring about a reconciliation, or at least delay the divorce, is right and desirable in view of Islam.

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Here it is necessary to answer the question which can be put in this form: Has society, that is, the body, whether it is called a department or whatever, which is the representative of society, the right to interfere in the matter of divorce, which, in the view of Islam is detestable and disliked, with a view to preventing or delaying the decision of the husband to divorce?

The reply is that of course it can do such a thing. The reason is that all decisions which are taken to divorce are not indications of a real death of the union of marriage. In other words all decisions which are taken to divorce the wife are not due to the complete extinction of the fire of love of the man, or the falling of woman from her natural position, or, finally, the inability of the husband to maintain the wife. Most decisions are taken under the influence of emotion and rashness, and in error. By all means society may take steps to any extent to see that decisions arising from hastiness and rashness should not come to fruition. This is a proper step and is a thing which Islam would welcome.

The departments who represent society should prevent the persons in charge of the divorce court from

carrying out a divorce until the department has informed them of its failure in its attempts to bring about reconciliation between the husband and the wife. The department should try to make the husband and wife return to amity and goodwill, and only if it has evidence that there is no possibility of reconciliation and adjustment between the husband and wife, should it issue a certificate of the non-feasibility of reconciliation and inform the divorce court accordingly.

2. The wife's past services to the household:

The other point is that in unmanly divorces, over and above the dissolution of the sacred peace of the family, there arise special difficulties for the wife which should not be overlooked. The wife conducts herself sincerely while she lives for years in the house of her husband. As she has no idea of any duality between herself and the husband, and considers the house to be her own house and her own refuge, she does her best and strains every nerve to furnish, equip and improve the facilities of the home. Most women (with the exception of the modern town woman) work hard, and take pains to economize in food, dress and the other expenses of the house to such an extent that their husbands disagree with them. They very often refuse to employ a home-help for economic reasons; they sacrifice their energy, their youth and their health for the home, their abode, their refuge, and, in reality, they do all this for the sake of the husband. Now, suppose that the husband of a wife like this, after years of life as a partner, takes a fancy to a new wife and divorces the previous wife, and wishes to bring the new wife into the refuge and home of the first wife, which was created at the price of her life-blood, her youth, her health and her frustrated aspirations. He wants to live in luxury with the second wife on the product of the labors of the first wife. What is the proper course to pursue in cases like this?

In such, situations, as mentioned above, the matter to be looked into is not only the question of the upsetting of the peace and tranquility of family, and the breaking up of the tie of conjugality. It is not the place here to say that the disgraceful behavior of the husband is the cause of the death of the union of marriage, and that forcing a woman to remain with an irresponsible man is below the natural dignity of the wife.

Here, there is another problem to be tackled. Here the matter of evacuation and of being homeless and of handing over one's own place of refuge to an intruding rival comes in. The thing to be considered here is a situation in which taking pains; toiling, enduring hardships and being of service come to nothing.

Forget about the husband, the peace of the family and the cooling down in family affections. Every human being needs a shelter, a place of refuge, and then with the shelter and the home, which one builds up with one's own hands for one's own use, one has affection and attachment. If you turn out a bird from its living-place, the nest that it has built for itself will naturally defend itself. Has the wife no right to defend her refuge and home? Is such a thing not severe cruelty in the part of the husband? What remedy has Islam provided for this aspect of the situation?

Our view is that this complicated matter requires full attention and careful thinking out. Most of the

difficulties that result from unmanly divorces are of this nature. It is in cases like this that divorce is not only the dissolution of conjugality, but is rather the break down and complete annihilation of the woman.

Nevertheless, as it was suggested in the posing of the problem itself, the matter of housing and shelter is distinct from the matter of divorce. These two difficult matters should be differentiated and considered separately from each other. According to the Islamic view and its laws, this difficulty has already been solved. It is due to an ignorance of Islamic laws, and the taking of advantage of the good intentions and faithfulness of wives by husbands, that this difficulty presents itself.

The source of this difficulty is that most husbands and wives imagine that the work and the services that a wife renders in the house of her husband and the gains that accrue from them, belong to the man. They believe that a husband has a right to give orders to her as if to a slave or a laborer, and that it is obligatory on her to carry out his orders in all and sundry matters. As we have repeatedly said, a wife has independence in connection with household work and activities, and any work that she does is for the benefit of herself. The husband has no right to pose as an employer. With the full economic independence that it has granted to woman, and, besides that, with the laying down of the responsibility of her expenses and the expenses of her children on the husband, Islam has given her enough leisure and the complete opportunity to make herself economically independent of man and to obtain the means of a respectable living.

This she should be do to such an extent that, in this regard, the divorce and the separation cannot create any problem for her existence. All those things which a woman may contribute to the house and her home should be considered by her to be her own property, and the husband should have no right to take those things from her. This kind of anxiety exists in the system of the family, because the husband considers his wife to be obliged to work in the house, and also imagines that the results of his wife's work belong to himself and not to his wife. The anxieties which exist amongst our men too are also due to ignorance and being unaware and unmindful of Islamic law.

The other cause of these discomforts is that husbands take undue advantage of the faithfulness of wives. Some women, not because of ignorance of Islamic law, but rather because they place their confidence in their husbands, make sacrifices in their homes. They wish there to be no question of 'mine' or 'yours' in between them and their husbands. On these grounds, they take no notice of their rights and do not care to take advantage of the opportunity which Islam has granted to them. Sometimes it so happens that they are disillusioned, and they come to know one day that they sacrificed their life for a faithless being, and that they missed the chance to avail themselves of the right which Islam has guaranteed them.

Such women should take care from the beginning:

How fortunate it is that affection arises on both sides. [7](#)

If a woman rises above making use of her legal right to save and keep money and wealth in her own

custody, to make arrangement for residence in her own name, and instead makes a gift of the energy of her work to her husband, the husband also, according to:

وَإِذَا حُيِّتُمْ بِتَحِيَّةٍ فَحَيُّوا بِأَحْسَنَ مِنْهَا أَوْ رُدُّوهَا

And when you are greeted with a greeting, greet with a fairer than it or return it; (Qur'an, 4:86)

should make a present of a reciprocal amount or more to the wife as a gift. Amongst thoughtful and considerate men, it has always been a practice, and still is, that in return for the sacrifices and sincere services of their wives, they give something of value, a house, or some other landed property, as a gift to their wives.

However what we want to say that the difficulty of the wife being shelterless has no connection with the law of divorce. Any amendment in the law of divorce will not reform or improve things in this connection. This difficulty is related to the question of the economic independence and non independence of the wife, and Islam has completely solved it. This difficulty in our society arises from the unawareness of number of women of Islamic teachings and the negligence and naivety of the others. If women are aware, take notice, and make use of the opportunity is granted to them in this connection, and are not so simple as to sacrifice and waive their rights in favour of their husbands, this difficulty is solved by itself.

Divorce 5

Our worthy reader may remember that in the second part of this section on divorce, we said that our worries about divorce came from two directions, we said that our worries about divorce came from two directions. One concerned the unmanly divorces arising from the faithless and callousness of a section of men. The other is the unmanly refraining from divorcing a wife by those men with whom there is no hope reconciliation. They restrain themselves from divorcing only so as to persecute the woman, and not so as to take advantage of such time to reach a compromise.

In the two previous chapters we have discussed the first category. We said that Islam welcomes all means that may serve as an obstacle to unmanly divorce, and it has itself endeavored by special contrivances to see that divorces of this description do not place. Islam is only against the use of force for the continuation of the union of marriage.

From what has been said it is evident that a family is a living unit, and that Islam endeavors that this living unit should continue to live. Nevertheless, when the living entity expires, Islam regards it with regret and issues the permission to bury it; but Islam is not ready to mummify its dead body with the balm of law, and does not approve of the idea that with this mummified body there should be a display of feigned liveliness.

The reason is now intelligible why a husband has the right of divorce. The association of married life

rests upon the pillar of spontaneous attachment and has a unique mechanism. Creation has given the key to strengthening it, and also the key to bringing it down and shattering it, into the hand of man. Under the command of creation, every woman and man has a certain disposition and certain characteristics, when compared with each other, which cannot be exchanged and are not the same. This disposition and these distinctive characteristics are by themselves the root-cause of many things and one of these things is the right of divorce.

In other words the source of this situation is the particular and distinctive role of both man and woman in love and in their search for a mate, and nothing else.

The right of divorce arises from the particular role of the man in the matter of love, and is not based upon his ownership:

From here you can have some idea of the worth of the propaganda of elements that are against Islam. These elements sometimes say that the cause of the giving of the right of divorce to men in Islam is that it does not acknowledge women as having the capacity to will, to desire or to want. It considers them in the category of material things and not persons. Islam considers man to be the owner of woman, and naturally, according to the law "*an-nas musallatuna 'ala amwalahum*" (people have mastery over their property) it gives them the right to discard his property at any time he may wish to.

It is clear that the logic of Islam is not based upon man's ownership and woman's status of being owned. This much is evident, that the rationale of Islam is too deep and too far above the level of comprehension of these writers. Under the guiding light of revelation, Islam has realized the secrets of the foundation and structure of the family and family-life to which learning and science, after a lapse of fourteen centuries, is trying to approach.

Divorce is a release in the same way as the inherent nature of marriage is dominance:

Sometimes these people ask: "Why does divorce take the form of a release, an emancipation? Surely it should have a judicial form." To these people it should be said: "Divorce is a release in the same way that marriage is a state of dominance. If you can possibly do so, change the natural law of seeking a mate in its absoluteness with regard to the male and the female, remove the natural state of marriage from the condition of dominance; if you can make the role of the male and female sex in all human beings and animals identical in their relations, and change the law of nature. Then you will be able to rid divorce of its aspect of release and emancipation."

One of these people writes, "Generally, the Shi'ite jurisconsults count the contract of marriage as an irrevocable contract, but I wish to say that the contract of marriage, according to Islamic jurisprudence and the Civil Law of Iran is irrevocable only in relation to woman. As far as man is concerned it is revocable contract, for he can any time make the above contract ineffective and breaks the marriage

pact.”

Afterwards he writes, “The contract of marriage is revocable as far as man is concerned, but as far as woman is concerned it is irrevocable. This is an injustice of the law that has made woman a captive of man. Whenever I read the wordings of sec. 133 of the Civil Law of the Royal Land of Iran (law of the right of man to divorce), I feel ashamed in front of Iranian women, in front of these schools and colleges and this age of atoms, satellites and democracy.”

This gentleman, first of all, could not understand a very simple thing. That is that divorce is different from the dissolution of marriage. When it is said that the contract of marriage in its essence is irrevocable, that means neither the husband and wife (with the exception of special cases) has the right to dissolve it. If a marriage is dissolved, all its consequences are nullified and it becomes a nullity. When in special circumstances a marriage is dissolved, all its consequences, including dower are eliminated. The woman then has no right to demand it.

Likewise, there is no question of maintenance for the period of *‘iddah*. In contrast to this is the case of divorce, in which the relation of conjugality is broken up, but the consequences of the marriage contract are not absolutely eliminated. If a man marries a woman and agrees to a dower of five hundred thousand tumans and after one day’s married life wants to divorce that wife, he must pay the whole amount of the dower and, over and above that, maintenance for the period of *‘iddah*. If a man, after the marriage contract, but before the consummation of marriage, divorces his wife, he must pay half the amount of the dower, and, because a woman thus divorced is not bound by *‘iddah*, maintenance for that period is out of question. So it is clear that divorce is not able to nullify all the consequences of the marriage contract; but in the case where the marriage is dissolved, the woman has no right to claim the dower. It is thus evident that divorce is different from dissolution.

The right of divorce being with the husband does not make marriage incapable of being an irrevocable contract. Islam has acknowledged two things: dissolution and divorce. The right of dissolution obtains in such cases where there may be some defect in the man or in the woman. This right is given to the man and also to the woman as opposed to the right of divorce. The occasion for divorce is on the death of family life, and this right exclusively belongs to the husband.

The fact that Islam has made a distinction between the category of dissolution and the category of divorce and has laid down different regulations for each of them, shows that the fact that the power of divorce has been given to man does not arise from the intention of Islam to favour man with a privilege.

To the above-mentioned gentleman it should be said that, so that they need not feel ashamed in front of the schools, colleges and satellites, it would be a good idea for them to take the trouble of receiving a little education and learning something for once. They may then be able to differentiate between dissolution and divorce, and they may also become acquainted with the deep and subtle philosophy of Islam concerning society and family life. In this way, they would not feel ashamed in front of schools and

colleges, but rather they would be able to pass them by holding up their heads. However, we are sorry to say that ignorance is a totally incurable disease.

Penalty for divorce:

In some of the world's legal systems they used to impose a penalty for the prevention of divorce. I do not know whether there exists any such law as this in the world at present or not. Nevertheless, records show that in the Holy Roman Empire penalties were imposed on husbands who divorced their wives for no good reason.

Obviously this is another manner of resorting to force but it is not effective.

Wife having the right of divorce as an entrusted right

At this juncture it is necessary to mention one thing. Up to this time all our discussion has been about the fact that divorce is a natural right peculiar to man. Nevertheless, a man can give his wife the right of divorce as an absolute attorney, or in special circumstances on his own behalf. This is something else which according to Islamic jurisprudence is, acceptable, and the Civil Law of Iran has also explicitly mentioned it.

By the way, so that the man may not waive his appointing of an attorney, and so that he may not deny the ceding to the woman of this right, that is, so as to give it the form of an irrevocable attorneyship, an attorneyship of this description is usually concluded by the contrivance of making it a binding condition in the marriage contract.

According to this condition, the woman may unconditionally, or in special circumstances that have been specified beforehand, divorce. In this way, from the olden times, those women who had a cause to be anxious about some aspects of their future husbands, kept the right of divorce, secure in their hands in the form of a binding conditions contained in the marriage contract, and made use of it when absolutely necessary.

Thus, in the view of Islamic Law, a woman has no inherent natural right of divorce, but as a stipulatory right, namely in the form of a condition contained in the marriage contract, she may have that right.

Clause 1119 of the Civil Law lays down: "The parties to the marriage contract may put forth any condition that is not inconsistent with the named contract in connection with the marriage contract or some other binding contract. For example, there may be the condition: whereas the husband marries another wife, or disappears for a certain period, or ceases to maintain his wife, or has evil intentions against the life of his wife, or develops a bad character so that their life together become unbearable, the woman is an attorney and can appoint an attorney so that after the establishing of the condition in the law- court and before the legislature, she may consider herself divorced."

As you see, the thing which is all the time repeated, that, in the view of Islamic law and the Civil Law of Iran, divorce is a one-sided right and is absolutely denied the woman, is just not true.

In the view of Islamic law, and also according to the Civil Law of Iran, the right of divorce as a natural right is not meant for the woman, but as stipulated and conferred right it can exist, and can be made use of by her.

Now we have arrived at the stage where we can take up the second part of our subject, namely the cruel and unmanly refusal of certain men to divorce. We have to see whether Islam has provided some way for the solution of this difficulty which is really a very problematic situation. We shall discuss this subject under the heading of 'Judicial Divorce'. Meanwhile, we mention our regret that our discussion of the first part has become so long.

Judicial Divorce

By judicial divorce we mean a divorce which is obtained through a judge and not through the husband.

In many of the world's systems of law, the authority of divorce is altogether in the hands of the judges. The judiciary is the only forum which can adjudge the plea of divorce and the dissolution of marriage. Under those laws all divorces are judicial divorces. In our previous sections, by taking note of the spirit of the union of marriage and the purpose in setting up a peaceful family environment, and also by keeping in view the position and status that a wife should have in the family milieu, we clarified the invalidity of this approach. We have submitted our reasons, and have shown that divorces which culminate through the natural course of events and as a result of these events cannot depend upon the decision of a judge.

The question at present is whether, in the view of Islam, a judge (*qadi*) – with all the strict and stringent necessary attributes that Islam has prescribed for him – has no right to give a divorce in any case, situation or circumstances. Or whether under certain special conditions that right does devolve on him, however exceptional or rare those cases might be.

Divorce is a natural right of man, provided that he behaves in a normal manner towards his wife. The normal behavior of a husband towards a wife is that, if he likes to live with his wife he should look after her properly, respect her rights and behave with love towards her. In case there is no way in which he can continue to live with her, he should courteously and kindly divorce her, i.e., he should not abstain from divorcing her. He should pay what is due to her, and something over and above that as an expression of gratitude:

وَمَتَّعُوهُنَّ عَلَى الْمَوْسِعِ قَدْرُهُ وَعَلَى الْمُقْتَرِ قَدْرُهُ

Yet make provision for them, the affluent man according to his means, and according to his

means the needy man (2:236).

And inform her about the termination of their relationship as husband and wife. However, if the husband does not act according to the normal code of behavior, what should be done? We mean to say that we come across a man who does not wish to live with his wife, who neither behaves in a congenial manner nor provides a happy and Islamic environment for the family, nor even sets the wife free to her own fate, who in other words, neither cares to perform the responsibilities of married life, nor cares to take measures to create suitable situation for his wife, nor even consents to divorce his wife, in such circumstances what is to be done?

A normal divorce is similar to a normal childbirth, which makes natural progress by itself, but a divorce from a man who neither performs his duties as a husband nor consents to divorce his wife is similar to an unnatural and abnormal birth in which, with the help of a doctor and a surgeon, the new child has to be delivered.

Whether some marriages are a cancer which the wife must suffer and put up with:

Now let us see what Islam says about this kind of divorce and this kind of man. Does it still say that the matter of divorce depends completely upon the will of the husband? If this kind of man does not agree to a divorce, should the wife suffer and put up with it? Does Islam helplessly wash its hands before each of them and observe this cruel position from a far?

The belief of the majority of jurists is the same. They believe that there is no remedy for this in Islam. As if this is a sort of cancer, and as if, by chance, some individuals are made a victim of it and there is no remedy for them. The woman must grin and bear it till eventually she meets her end.

In my own opinion this way of thinking is absolutely inconsistent with the accepted principles of Islam, the religion which always declares its belief in justice, “*qiyam bi-qist*” (the upholding of justice), that is, which considers that the real and the basic purpose of all the prophets of God was to maintain and uphold justice:

وَمَتَّعُوهُمْ عَلَىٰ الْمَوْسِعِ قَدْرُهُ وَعَلَىٰ الْمَقْتِرِ قَدْرُهُ

Indeed, We sent Our Messengers with the clear signs, and We sent down with them the Book and the Balance so that men might uphold justice. (Qur'an, 57:25)

So, how is it possible that for such a clear and glaring justice as this no remedy has been provided. As if it is possible that Islam has arranged its laws in such a way that as a result of them a miserable person would suffer like terminal cancer patient.

It is regrettable that some individuals, in spite of their admission and acknowledgement that Islam is the

religion of justice, and in spite of counting themselves as followers of the doctrine of justice, express an opinion like this. If it is agreed that we can ascribe an unjust law to Islam under the excuse of 'cancer', there can be no grounds for raising an objection to some other peoples oppressive law which excuses itself as a 'tetanus', and someone else's law which counts itself as tuberculosis', and someone else's as 'paralysis', and another's' on some other pretext and their excuses should therefore be acceptable.

If it is really like this, what about the principle of justice which is the foundation stone of Islamic legislation, and what about the establishment of justice which was God's main purpose in sending the prophets.

They say 'cancer', I say all right, let it be cancer. But if a patient suffer, from cancer, and minor operation, if promptly done, can cure the patient, what then?

A woman submits herself to a man as a partner for life, and afterwards there is a change in the state of affairs, the circumstances take such a turn that the husband takes undue advantage of his authority and also refuses to divorce her. He takes this step only to prevent her from marrying some suitable man, and not so as to live with her thereafter amicably as husband and wife, and leaves her, in the words of the Qur'an, *like someone hanging on*. No doubt, such a woman is confined like a cancer patient, although, as a matter of fact, she suffers from a kind of which can be cured by means of a minor operation. The patient can become well, and can completely recover, by means of a minor operation. This kind of operation is possible at the hands of competent religious authorities and judges.

As we pointed out in our previous articles, one of the two difficult problems in our society is the abstention of a section of merciless men from divorce, and this act of severe cruelty they commit in the name of and under the pretext of religion. These cruelties are the outcome and an offshoot of a wrong conception of Islam, which, according to them, says; "A woman must bear such cruelties like a terminal cancer patient." This has created an impression of Islam which is more harmful than any of the evil propaganda against our faith.

In spite of the fact that the arguments concerning this matter are of a rather technical and a specialized nature and are somewhat out of place in these articles, I think it worthwhile to examine the factors surrounding this subject. My object is to show the pessimists that what Islam really says is different from the above nonsense.

Deadlocks:

Such deadlocks as this are not limited to matters of marriage and divorce. In other spheres of life, say, in money matters, situations like this present themselves. Firstly, let us see what Islam has done in matters other than marriage and divorce as regards certain difficult situations. Did it leave them as deadlocks and as irremediable phenomenon, or did it disregard the idea of a deadlock, and find a remedy?

Suppose two individuals get the right of ownership by succession or by some other way to an indivisible

property like a jewel or a ring, or an automobile, or a rare painting, and do not agree to make use of it in partnership. Neither of them agrees to the suggestion that the property should remain for sometime with one of them and for sometime with the other. Neither of them is prepared to sell his share to the other partner. Thus, they do not arrive at any mutual agreement about making use of that thing. Also we know that if one of them makes use of it, it depends upon the permission and consent of the other. Now, what should be done in situations like this? Should that property be left alone without being used and the matter be left as too complicated and insoluble? Or has Islam provided a remedy and a solution for situations like this?

The fact is that Islamic jurisprudence does not leave a problem like this as insoluble. When there is a case of property not being used and going to waste, Islam does not acknowledge the inviolability of the right of ownership and possession. In cases like this Islam allows the religious authority to deal with it as a matter of social welfare, to take his decision on it as problem of dispute, despite the will and obstinacy of the owners, and to make the correct arrangements. For example, the article in question may be rented out, and the rent may be divided according to their shares; or the property may be put up for auction and the sum received may be shared between them. Anyhow, it is the duty of the religious authority or the judge as “*wali-e mumtani*”⁸ to make proper arrangements. The owners of the property may agree or may not agree; it is immaterial.

Why is the right of ownership, which is a legal right, not kept in view? For the good reason that another basic principle is being taken into account. The principle of preventing property from going to waste and lying unused. Regard for ownership and possession by the owners is to be observed, as long as that right does not lead to the waste of property and wealth.

Suppose that the disputed item is precious stone or a sword or some other thing like this; and that neither of the owners is prepared to sell his share to the other partner; but suppose that each of them agrees to break the item into two, and each one is ready to accept half of it as his share. It means that they have gone to such a limit in their begrudging and ill-will that they are prepared to render the property worthless and spoil it. It is obvious that a precious stone, or a sword, or an automobile, when is broken into two, becomes useless. Does Islam allow this? No. Why not? Because this is a waste of property.

‘Allamah Hilli,⁹ one of the most celebrated jurisconsults in Islamic history, said: “If they want to do an act like this, the religious authority should prevent them from taking this step. The assent and agreement of the owners of the property is not enough for them to be allowed to do something like this.”

The deadlock of divorce:

Now let us see what is to be done in the problem of divorce. If the man has an incompatible attitude and does not grant those rights and perform those duties, which he is bound by Islam to do, what is to be done? Some of those duties are financial (maintenance). Some of them are moral (courteous behavior),

and some concern sexual matters (the right of sexual relations and intercourse), If he does not grant these rights and fulfill these responsibilities, or some of these responsibilities, and, in spite of that, is also not prepared to divorce the wife, what course is to be adopted. Does the maxim of (*asl-e lazim*) ‘priority of the principle’ or (*mawrid-e ahammiyati*) ‘the matter of priority’ apply in this case so that Islam can allow the religious authority or the judge (*qadi*) to take proper steps, in the same way as it allowed them in the matter of property; or does that maxim or principle not apply here?

View of Ayatu’llah Hilli:

Hence forward I would like to place this discussion in the hands of one of the first rank jurisconsults of our time, Ayatu’llah Hilli, who lived in Najaf. [10](#) This illustrious jurisconsult has given his view on this subject in a book called *Huququ ‘z- zawjiyyah* (Conjugal rights).

The summary of his opinions in so far as they are related to the rights of women and limitations on men are as under:

“Marriage is a sacred contract and is at the same time a kind of partnership between two persons, and this brings about a series of contracts between the two of them. The peace and prosperity of each one of them depends only upon compliance with the terms of those contracts. Moreover, the prosperity of society as a whole also lies in their prosperity and the performance of the terms of the contracts concluded by each one of them.

“The main rights of the wife are maintenance, dress, sexual relations and intercourse as husband and wife with courteous behavior. If man neglects to perform his duties towards his wife, and also abstains from divorcing her, what is the proper course for the wife to pursue, and how should the husband be dealt with?

“In eventualities like this, two courses become incumbent. One course is that the religious authority should have the right to intervene and by granting a divorce settle the matter for good. The second course is that the wife herself should, in the same way as the man, refrain from performing and complying with her part of the contract.

“Now, regarding the first line of action, namely, the intervention of the religious authority, let us see under what principle and on what grounds the religious authority has the right to intervene in situation like this.

‘The Qur’an in *surah al-Baqarah* (The Cow) makes the following commandment:

الطَّلَاقُ مَرَّتَانِ ۖ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ

Divorce is twice; then honourable retention or setting free kindly (2:229)

And again in *surah al-Baqarah* it is ordained:

وَإِذَا طَلَقْتُمُ النِّسَاءَ فَلْيُغْنِ أَجَلُهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ ۚ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ۚ وَمَنْ يَفْعَلْ ذَلِكَ فَقَدْ ظَلَمَ نَفْسَهُ

“And when you divorce women, and they have reached their term, then retain them honorably or set them free honorably; and do not retain them by force, to transgress; whoever does that has wronged himself (2:231)

“From these verses a general principle can be deduced and that is that every man in family life should make a choice between two alternatives: either he must fulfill all rights and perform all duties politely (‘honourable retention’) or break the tie of the union and set the woman free (‘setting free kindly’) Any third possibility that he may neither give her rights properly and politely nor divorce her, is not known in Islam. The phrase: *And do not retain them by force to transgress* negates this very possibility.

“It is not unlikely that the above phrase may connote a general rule; that is, it may include those cases when a husband intentionally and out of negligence makes the life of his wife difficult and miserable, and it may also include those cases where, in spite of the husband not being at fault intentionally, as far as the matter of honourable retention is concerned, there is nothing but loss and hurt for the wife.

“Although these verses were revealed in connection with the period of *‘iddah* and the revocation of divorce or its non revocation by man, and throw a light upon the proper course of action for him, yet he is advised that the revocation must be with the intention of behaving considerately and looking after the wife and not of harming or hurting the poor woman. Nevertheless, it is not limited exclusively to that occasion. It lays down a general principle, and lays down the rights of a wife for all times and in all conditions. It signifies that a husband should choose for himself one of the two above-mentioned alternatives, and that there is no third course possible for him.

“Some jurists are involved in an error at this very juncture, and have thought that these verses are exclusively about those men who want to revoke the divorce within the period of *‘iddah*. No, that is not so. These Verses shed a light on the duties of all husbands in all circumstances, in respect of their wives. Our argument concerning this, besides the sequence and trend of the verses is that the Holy Imams have expounded and cited these verses on occasions other than *‘iddah*. For example, Imam al-Baqir (a.s.) said, concerning a man who makes a vow of *“ila”* (which means that somebody declares on oath that he will not have sexual relations with his wife for four months or more) that he must, after the four months have passed, either break his oath and make atonement, or else he must divorce his wife, for the good reason that God commands, *honourable retention or setting free kindly*.

“On another occasion, when a man had appointed another man as his attorney to make a marriage contract with a woman on his behalf and to fix a dower, the attorney complied with the request but the

man who had appointed him as his attorney afterwards denied having given him that authority. Imam as-Sadiq (a.s) said that for that woman there was no obstacle to her choosing another husband. Nonetheless, if that man had really made another person his attorney and the marriage that took place was through a rightful attorney, the who appointed the attorney must, for the sake of God, divorce that woman and must not let her go without a divorce. The Imam said, ‘because God in the Qur’an commands: *then honourable retention or setting free kindly*’. Thus, it is clear that the Holy Imams have treated this verse as a general principle, and not limited it to specific occasions.

“When a man neither performs the duties which he must perform as a husband, nor divorces his wife, the religious authority should call the husband. Firstly, he should ask him to divorce his wife. If he does not divorce her, the religious authority should divorce them. In a tradition, related by Abu Basir, Imam as-Sadiq (a.s.) said, ‘If there is anyone who has a wife and does not arrange for her dress and does not provide her maintenance, it is obligatory on the leader of the Muslims to enforce a separation between them (through divorce).’”

This was a very short summary of the views of a contemporary first-rank jurisconsult. Anyone who wants to study his views in detail may go through the book *Conjugal Rights*, which is a compilation of his lectures for his students.

As you have seen, the phrase retention honorably or setting free kindly is a principle and a general rule in the frame of which the Holy Qur’an has inscribed the rights of wifehood. Therefore, under this principle, and in accordance with the emphasis with which the phrase *and do not retain them by force to transgress* is ordained; husbands are not allowed in any case to take undue advantage of their authority. A man is not allowed to keep his wife by force if he has no intention of living amicably with her and only wants to keep her in distress and prevent her from marrying another man.

Other arguments and citation:

Besides, the references and arguments which have been mentioned in the book *Conjugal Rights* there are other, more convincing arguments and references to support our viewpoint. On the strength of those arguments we arrive at the conclusion that in the view of Islam the Qur’anic phrase *retention honorably and setting free kindly* is a general and absolute principle. Within that framework the rights of women can be read and should be observed. The more a man studies the pros and cons of this point, the more clear he will find it, and the more intensely he will realize the soundness of the regulations of the sure religion of Islam.

In *al-Kafi*, vol.5, p. 205, Imam as-Sadiq (a.s.) is quoted as saying:

إذا أراد الرجل أن يتزوج المرأة فليقل: أقررت بالميثاق الذي أخذ الله: إمساكاً بمعروفٍ أو تسريحاً بإحسان.

Which means that whenever a man wants to marry a woman he should say:

“I acknowledge the promise which God has taken from me that I will retain the woman honorably or shall set her free with kindness.”

In verse 21 of Surah an-Nisa in Holy Qur'an it says:

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمُ إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنْكُم مِّيثَاقًا غَلِيظًا

How shall you take it, when each of you has been privily with the other, and they have taken from you solemn compact?

The Sh'ite and Sunni commentators both agree that by 'solemn compact' is meant the same covenant that God has taken from men with the phrase: retention honorably or setting free kindly, This is the same promise about which Imam as-Sadiq (a.s) said that, on the occasion of marriage, the man should promise and acknowledge: *retention honorably or setting free kindly*.

There is a well-knowing *hadith* of the Prophet which he said on the occasion of his last hajj (*hajjatu 'l-wida* ') and which the Shi 'ah and Sunni have both related:

إِتَّقُوا اللَّهَ فِي النِّسَاءِ فَإِنَّكُمْ أَخَذْتُمُوهُنَّ بِأَمَانَةِ اللَّهِ وَاسْتَحْلَلْتُمْ فُرُوجَهُنَّ بِكَلِمَةِ اللَّهِ

“O people! Keep Allah in mind and fear Him in respect of women, because you have taken them as trust from Allah and you have made lawful their chastity for yourselves by the word of Allah.”

Ibn al-Athir¹¹ in *Kitab an-nihayah* said: “by word of Allah”, which the Holy Prophet said, and by which the chastity of women becomes judicial, is the same as that which is expressed in the Qur'an by the phrase: *retention honorably or setting free kindly*.

The view of Shaykh at-Tai'ifah:

Shaykh at-Tai'fah at-Tusi¹² in the book *Khilaf*, vol.2, p. 185 after expressing his view regarding 'impotence', said that after it is proved that a man is impotent, the wife has the right to dissolve the marriage and there is consensus of opinion of the learned on this point. At that juncture he said: “and also it has been argued on the grounds of the verse retention honorably or set her free kindly, that, because an impotent man is unable to retain his wife honorably and properly, he should set her free”

From all this it can be understood for certain that Islam never allows a deceitful man to take undue advantage of the right of divorce, and retain a woman as a prisoner.

However, from what has been said it should be understood that not everyone who calls himself a *qadi* has the right to interfere in matters like this. In the eyes of Islam, there are very serious and stringent

conditions to fulfill to be eligible and to be competent as a *qadi* However, this is not the occasion to define and explain them.

The other point which requires due attention is that from the Islamic standpoint, in spite of all Islamic efforts to maintain the peace of the family, the occasion for judicial divorce only occurs in very rare, exceptional and uncommon cases. Islam never allows divorce to take the form which it has taken in Europe and America, examples of which we read daily in the newspapers. For example, a wife complains and demands a divorce from her husband on the ground that he does not appreciate the film which she likes most, or that her husband does not kiss Fifi, her dear dog, or other ludicrous matters like this, which are manifestations of the breakdown of human values.

The worthy reader will, we hope, have fully understood, by what we have said in these few articles, the points which we raised and set down to be thought over at the beginning of our section. In this section we have detailed five points regarding divorce the following order:

1. The unimportance of divorce and the lifting of all moral and social checks and hindrance from control over divorce.
2. The concept that all marriages are eternally binding, and that divorce is not permissible for any reason. (The view of the Catholic Church)
3. That marriage can be terminated by the man, but not by the woman in any circumstances.
4. That marriage should be terminable by the man as well as by the woman under special conditions, and that the way to put this into practice should be one and the same for both of them.
5. That recourse to divorce should be open for man and for woman too. It should not be altogether barred, but the door by which the husband should come out of the marriage should be different from the door for the wife.

We have said in this section, that Islam approves the fifth viewpoint. From what we have said regarding the conditions at the time of the conclusion of the marriage contract and also on the subject of judicial divorce, it is, we hope, clear that, although Islam does not recognize divorce as taking the form of a natural right for woman, yet it has not altogether barred the way for her and has provided special doors for her.

On the subject of judicial divorce, we could have said more in the light of the guidance of the Imams and the jurisconsults of all the sects of Islam, and how, according to those views, laws are enforced in all the countries of Islam. Anyhow, we think that what we have said in these articles will suffice.

[1.](#) Kitab al-Kafi, one of the most authoritative collections of hadith in both *usul* (principles of faith) as well as *fiqh* (jurisprudence) compiled by Abu Jafar Muhammad ibn Ya'qub ibn Is'haq al-Kulayni during the lifetime of the twelfth Imam. This particular hadith is in vol. 6, p.54 of the Tehran edition.

[2.](#) Al-Hasan ibn al-Fadl ibn al-Hasan ibn al-Fadl at-Tabarsi (d. 548/1154), expert in the science of Hadith.

[3.](#) Imam Hasan, the second Imam, brother of Imam Husayn.

[4.](#) See note #1 under "Freedom in determining one's future"

[5.](#) Muhammad Rashid Rida (1865–1935), Muslim scholar who spearheaded an intellectual response to the encroachment of

western values in Muslim countries. He published the newspaper al-Manar which published his Tafsir al-Manar in installments and which promulgated the views of the new Islamic reformist perspective of himself and his intellectual predecessors Muhammad 'Abduh and Jamalud-Din al-Afghani. His commentary was published in twelve volumes (incomplete, up to surah Yousuf) in Cairo (Tr.)

[6.](#) See note #1 under "Freedom in determining one's future"

[7.](#) Quotation, from the quatrains of the famous Iranian poet Baba Tahir Hamdani

[8.](#) "wali-e mumtani" (the guardian of withheld rights) is the name for the religious authority in his position as the restitutor of a right which one person claims from another when the latter will not give that right.

[9.](#) Jamalud-Din Hasan ibn Yusuf ibn 'Ali ibn al-Mutahhar al-Hilli (648/1250 — 726/1325). Apart from his studies in law, theology and usul (principles of faith), he also studied philosophy with Nasirud-Din at-Tusi, whose Tajrid he commented on (Sharh Tajrid al-i'tiqad). He wrote more than 500 works altogether. His move to Iran in 708/

1305 and conversion of the Il-Khanid of Iran from Sunnism to Shi'ism was one, of the, factors in determining Shi'ite Islam as the official religion of Iran.

[10.](#) The centre of Shi'ite religious education in Iraq and the resting place of Imam Ali (a.s). (Tr.).

[11.](#) Abu's-Sa'adah Majdu'd-Din al-Mubarak ibn al-Athir (544/1149-606/1210) worked in Mosul for its ruler and compiled a collection of sayings and acts of the Holy Prophet called an-Nihayah fi gharibu 'l-hadith wa 'l-athar.

[12.](#) Shaykh at-Ta'ifah Abu Ja'far Muhammad ibn al-Hasan ibn 'Ali at-Tusi (385/995- 460/1076). The greatest Shi'ite jurisconsult of the 5th / 11th century, whose title, Shaykh at-Ta'ifah means "the Chief Scholar of the Shi'ite Sect." His book Kitab al-khilaf fi'l-fiqh is a comparison of the difference sects of Islam in the domain of jurisprudence.

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