

# MUSLIM FAMILY LAW AND PRACTICES

**A Practical Guide to the Laws of Marriage  
and Dissolution of Marriage**



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Senior lecturer, Faculty of Islamic Studies and Arabic Language,  
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## INTRODUCTIONS

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Muslim family law, known as "*Al-ahwal al-shakhsiyyah*", plays a significant and profound role in shaping social relations in Islamic communities. As the legal framework most intimately connected to the everyday lives of citizens and intricately tied to the fundamental unit of society – the family – it governs the intricacies of Muslim family affairs and the interactions among its members. This law meticulously delineates the rights and duties of each family member, defining their relationships and responsibilities. The Personal Status Law serves as the regulatory authority for matters such as marriage, divorce, child custody, and the psychological and financial repercussions arising from marital dissolution. Beyond its practical implications, it acts as a revealing barometer of the status of women in the social hierarchy – a highly sensitive and critical aspect. Moreover, it reflects the application of human rights principles within the legislative framework of Islamic societies. This textbook generally discusses how to establish a marriage contract, including the introductions that precede it and the associated conditions. These conditions encompass those for contracting (*'Inqad*), validity (*Siha*), effectiveness (*Nafa'*), and permissibility (*Jawaz*). The book also elucidates the mutual rights and responsibilities of spouses. Finally, it explains the ways of terminating marital relations, initiated either by the husband, known as *Talāq*, or by the wife, referred to as *Khulu*. Separation can also be initiated by a Qadi, termed as *faskhi* (termination of the marital relationship due to a breach of the pillars or conditions) and *Tafriq* (termination of the marital relationship due to the husband's negligence or harm to the wife). Additionally, the book discusses separation based on *Īlā* (Vow of continence), *Zihār* (Injurious Comparison), and *Li'an* (oath of condemnation) as types of judicial dissolution. The comparative method was instrumental in exploring the intricate nuances of family laws across various Islamic jurisdictions, drawing insightful parallels and

distinctions. This approach allowed for a comprehensive examination of how different Islamic doctrines interpret and implement legal principles in the context of family matters. The book consists of nine chapters, featuring various activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions at the end of each unit to reinforce and assess the understanding of the material. The justification for writing a textbook on Muslim family law is rooted in the importance of understanding and disseminating knowledge about the legal principles governing Muslim families. A textbook on Muslim family law serves as an essential educational resource for students, legal professionals, and scholars interested in comprehending the legal intricacies of Islamic family matters. It helps build a strong foundation of knowledge about the principles governing familial relationships within the Muslim community. The textbook can serve as a guide for Muslim communities, providing clarity on legal aspects related to marriage, dissolution of marriage, and other familial matters. It can empower individuals to make informed decisions in accordance with their religious beliefs and legal obligations. The development of a textbook on Muslim family law contributes to academic scholarship in the field of Islamic law. It provides a platform for researchers and academics to delve into the complexities of legal interpretations, historical developments, and contemporary challenges within the context of Muslim family matters.

# CHAPTER ONE



## ***KHITBAH* (BETROTHAL)**

### **Introduction of the Chapter:**

The marriage contract is one of the most significant agreements entered into by individuals, and it holds a special place due to its profound implications. This is why God Almighty has referred to it as a solemn covenant. Consequently, Islamic legislation places great emphasis on the preliminary steps that precede it, which reflect the commitment of the parties involved in finalizing the contract. These preliminary steps are known as "*khitbah*," which signifies a mutual promise of marriage. By the end of this unit, you will be able to understand the meaning of *Khitbah* (Betrothal), the nature of *khitbah*, the rules and wisdom of engagement, the limits of looking at one's fiancée, impediments to the Betrothal, and the retraction of the Betrothal. Finally, I have included a variety of activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions at the end of the unit to help reinforce and assess your understanding of the material.



### **Objective of the Chapter:**

After reading this chapter the student should be able to:

- i. Define the meaning of *Khitbah* (Engagement).
- ii. Illustrate the general rules associated with *Khitbah*.
- iii. Solve cases related to *Khitbah*.

## 1. Meaning of the *Khitbah* (Engagement):

The word "*Khitbah*" is indeed an Arabic term, but its primary meaning is "proposal" or "engagement."<sup>1</sup> It refers to a marriage proposal made by a man to a specific woman either directly or through her guardian (*wali*) in certain ways, with the intention of marrying her.<sup>2</sup> The purposes of an engagement are as follows: (a) to strengthen the relationship between two families. This leads them to understand each other better and cooperate in preparing for the wedding. (b) Engagement is akin to a symbolic commitment; once it is made, an agreement is automatically established. (c) To determine the dowry and other related matters. During the engagement period, the future groom has more time to prepare the dowry, Bride's feast, and other necessities. It is also a time for the couple to learn how to manage their finances wisely. (d) Engagement serves to signify to the surrounding community that the woman is committed to someone. (e) To decide upon the date and location of the wedding. During the engagement period, the couple can agree upon the specific date and venue for the wedding ceremony.

### Activity 1.

*How the engagement process is traditionally conducted within your tribe or city?*

## 2. Nature of the *Khitbah*:

Engagement is a mutual promise of marriage between a man and a woman. It does not establish any legal rights or make any prohibited actions permissible.<sup>3</sup> The only thing that is permitted between parties intending to engage in marriage is the opportunity to see and talk to each other during the engagement period so that they can get to know each other. If a man proposes to a girl and she responds positively, then an engagement has taken place between them. It is important to note that

this agreement is not considered a marriage contract, and it does not allow them to mingle with each other without a *mahram* (a close family member or guardian). In this regard, the Prophet Mohammad (SAW) said, "Whenever a man is alone with a woman the devil makes a third."<sup>4</sup> So, it is permissible to converse with a *Makhtubah* (proposed girl) in the presence of a *Mahram*, ensuring her safety, security, and protection from potential future risks, such as the possibility of the engagement being terminated or other issues arising. However, it is not allowed to engage in sexual intercourse.

### 3. The Ruling on the *Khitbah*:

*Khitbah* (engagement or proposal) is permissible, as mentioned in the Qur'an and *Sunnah*. Allah (SWT) says, "There is no blame on you if you make an offer of betrothal or hold it in your heart. Allah knows that you cherish them in your hearts" (QS 2: 235). The Prophet Muhammad (SAW) said, "When one of you gets engaged to a woman, if he can look at what will induce him to marry her, he should do so."<sup>5</sup> The Prophet recommended that persons intending to marry should have the opportunity to see each other to avoid an error of judgment to occur and defeat the purpose of marriage. But this 'seeing' should not be the means to lead to courtship as in other cultures. Based on the aforementioned information, it is clear evidence that engagement is permissible, and there is a consensus among Muslims in agreement on this matter.

#### Activity 2.

Can engagement be classified into categories of permission, prohibition, or obligation? Please discuss this with your lecturer.

The institution of *Khitbah* (marriage proposal) was legalized due to the following reasons or wisdoms: (a) Announcement of the marriage contract.

(b) Facilitation of achieving the purposes of marriage by providing a reason for reconciliation and continued familiarity and affection. Al-Mughira b. Shu'ba said: I asked a woman in marriage and God's Messenger asked me whether I had looked at her. When I replied that I had not, he said, "Then look at her, for it is better that there should be love between you."<sup>6</sup>

(c) Betrothal is a lawful and proper way that allows the *Khatib* to observe his future wife. It provides an opportunity for a man to see a woman openly and in a formal manner without the need for secret meetings. (d) Preparation and planning before the marriage. (e) A means for a man to assess the character and suitability of a woman in a dignified and Islamic manner without compromising moral values. (f) To give the fiancée's family enough time to ask about the suitor and find out his situation, and vice versa. This was clearly indicated in the following Hadith. "A woman may be married for four reasons, for her property, her rank, her beauty and her religion; so get the one who is religious and prosper."<sup>7</sup>

### Activity 3.

*As long as the customary practice is not contrary to Shari'ah, it can be followed. Discuss with your colleagues any legal violations associated with the engagement.*

### 4. Limits of looking at one's fiancée:

Since marriage is one of the commitments intended to last a lifetime, it is essential for both individuals, before taking this significant step, to carefully consider their choices, contemplate important matters, and assess the compatibility of their potential spouse. When a man identifies these qualities in a woman, he may propose to her; otherwise, it is wise to refrain and reconsider. This right is not exclusive to men; it is equally applicable to women. Marriage is a partnership, and the rights established for one partner are equally valid for the other. Islam permits a man to look

at a woman for the purpose of engagement. The Prophet Muhammad (SAW) said, "When one of you asks a woman in marriage, if he is able to look at what will induce him to marry her, he should do so."<sup>8</sup> Muslim jurists have stated that it is *Sunnah* for a suitor to look at his fiancée before marriage, as it encourages intimacy.

This allows both parties to become acquainted with each other's physical, vocal, and intellectual qualities.

Muslim jurists differed regarding the extent to which it is permissible for a man to look at a woman. Their majority, the Malikis and Shafi'is, held that what is permissible is to look at her face and hands, because the face is the place of beauty and reveals a woman's psychological and physical features in general, and because the hands indicate the quality of the skin. Its attributes include softness, fertility, and the like.<sup>9</sup> Some Hanafi scholars have added to this by stating that it is permissible to look at a woman's face, palms, feet and arms.<sup>10</sup> According to the Hanbali School, it is permissible to look at any part of a woman that would typically be visible and might encourage a marriage proposal, such as her palm, neck, foot, or body.<sup>11</sup> This view aligns with the hadith of Prophet Muhammad (SAW), which states, "If he is able to look at what will induce him to marry her, he should do so." Imam Hanbali's opinion is that the hadith does not specify any particular body parts. Imam Dāwūd al-Zāhirī is known for holding the view that it is permissible to look at the entire body.<sup>12</sup> Furthermore, there is no specific way for a man to look at his fiancée, but he can do so using whatever means he wants. However, this should be done without the knowledge of the fiancée in order to avoid affecting her psychologically. This was reported by Jabir (R.A). "I got engaged to a woman and I was hiding for her until I saw something from her that invited me to marry her, so I married her."

#### Activity 4.

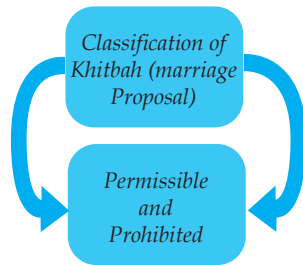
What is your opinion on what is highlighted by Muslim jurists regarding looking at one's fiancée? Please discuss this with your lecturer.

#### 5. Types of *Khitbah*:

Muslim jurists have indeed classified *Khitbah* (marriage proposal) into two categories:

(1) Permissible: Muslim jurists have stated that it is permissible to propose to a woman as long as there are no prior engagements (i.e., she is not already engaged to someone else) and there are no legal impediments. Therefore, it is permissible to engage with

her explicitly or implicitly through a proposal. (2) Prohibited: It is not acceptable to propose to a woman when there are legal impediments in place such as (i) previous engagement: It is prohibited for a Muslim to propose marriage to a woman who is already engaged to another Muslim, unless the first suitor apologizes or is rejected. The Prophet Muhammad (SAW) said, "Do not ask for a woman in marriage when another Muslim has already done so."<sup>13</sup> Another Hadith "No one of you should ask a woman in marriage when his brother has done so already, until the one who has proposed (to her) before him gives her up, or gives him permission."<sup>14</sup> (ii) Prohibitions based on marriage: It is forbidden for a man to propose to a woman to whom marriage is permanently prohibited due to kinship. Allah (SWT) says, "Also, forbidden to you for marriage are your mothers, your daughters, your sisters, your paternal and maternal aunts, your brother's daughters, your sister's daughters, your foster-mothers, your foster-sisters, your mothers-in-law, your stepdaughters under your guardianship if you have consummated marriage with their



mothers – but if you have not, then you can marry them – nor the wives of your own sons, nor two sisters together at the same time – except what was done previously. Surely Allah is All-Forgiving, Most Merciful” (QS 4: 23). Likewise it is not permissible for him to propose to a woman with whom marriage is temporarily prohibited until the cause of prohibition ceases. (iii) Prohibition based on waiting period: It is forbidden to propose to a woman during her waiting period, whether through a direct or indirect proposal in the revocable divorce (*Talāq Raj'ī*). This prohibition is due to the woman's husband retaining the right to remarry her during the waiting period. Therefore, proposing to her during this time would indeed violate the rights of her current husband. Allah (SWT) says, “And their husbands reserve the right to take them back within that period if they desire reconciliation” (QS 2: 228). In the Hanafi school of thought, it is not permissible to propose explicitly or implicitly to a woman during her waiting period (*Iddah*) if the type of divorce is irrevocable (*Talāq Bain*). This prohibition is due to the mixing of lineages.<sup>15</sup> However, it is important to note that the majority of jurists, as well as the Shi'a school of thought, maintain that it is permissible to propose marriage to a woman during her waiting period after an irrevocable divorce. This permissibility is based on the understanding that an irrevocable divorce effectively ends the marriage relationship. Furthermore, it is not permissible to propose marriage to a woman during her waiting period if her husband has passed away. This is because she locks herself up to mourn the death of her husband and to reflect on her matrimonial life. Given this situation, it is not appropriate to formally engage her, but it is permissible to express interest in marriage to her implicitly.<sup>16</sup> Allah (SWT) says, “There is no blame on you for subtly showing interest in divorced or widowed women or for hiding the intention in your hearts” (Suratul Al-Baqarah: 235). This is applicable to a woman whose husband has passed away because this verse comes after the rules of the waiting period for those who have lost their husbands.

## Example of implicitly

*“No one is quite like you” and “Success comes to someone who  
finds a woman like you*

### 6. The qualities required in each of the suitors:

Marriage has lofty goals and purposes, with spouses cooperating to establish the foundational pillars of a strong and sound Muslim society. In this context, Islam emphasizes the importance of making the right choice of a life partner. Islamic law intervenes in certain aspects of this decision and delineates the qualities that a man should seek in his prospective life partner, including: (a) Religious commitment and character: Allah (SWT) says, “Do not marry polytheistic women until they believe; for a believing slave-woman is better than a free polytheist, even though she may look pleasant to you” (QS 2: 221). The Prophet Muhammad (SAW) said, "If there comes to you one with whose character and religious commitment you are pleased, then marry (your daughter or female relative under your care) to him, for if you do not do that there will be *Fitnah* in the land and widespread corruption."<sup>17</sup> Both the Qur'an and Hadith indicate that the most important and primary qualities that must be verified for the presence of a life partner are religion and character, with other qualities being subordinate and complementary. (b) Wealth, lineage, and beauty, as indicated in the hadith. “A woman may be married for four reasons, for her property, her rank, her beauty and her religion; so get the one who is religious and prosper.”<sup>18</sup> (c) A good family and a good environment, as indicated in the Hadith. "Choose the best for your sperm, and marry compatible women and propose marriage to them."<sup>19</sup> (d) Having a good level of reason and management is crucial due to the effective role it plays in raising children, its impact on building their personality, and the stability of marital life. In the words of Ali (RA), he cautioned, 'Beware of marrying a foolish woman, for her company will bring affliction, and her child will be at a disadvantage.'<sup>20</sup> (e) Virginity: the Prophet Muhammad (SAW) said, “Marry virgins, for they have the sweetest mouths, the most prolific wombs, and are most satisfied with little.”<sup>21</sup> Another Hadith,

'Why didn't you marry a young girl, so that you may play with her and she with you?'<sup>22</sup> (f) To be fertile and bear children, not sterile, the Prophet Muhammad (SAW) said, "Marry women who are loving and very prolific, for I shall outnumber the peoples by you."<sup>23</sup>

## 7. Break off an Engagement:

The engagement may be broken off by either or both suitors after it has been completed and they are satisfied. As previously mentioned, engagement is considered a promise of marriage, and according to the majority of scholars, breaking such a promise is generally discouraged. Therefore, according to the Maliki school of thought, retracting an engagement is disliked.<sup>24</sup> On the contrary, the Hanafis and Hanbalis hold that it is permissible to break off an engagement, but the Hanbalis add that it is disliked to do so without a valid reason.<sup>25</sup> The Malikis demonstrated that evidence from the Noble Qur'an and the Purified *Sunnah* indicates that breaking off an engagement is considered disliked. Allah (SWT) says, "Honour your pledges, for you will surely be accountable for them" (QS 17: 34). The covenant requires fulfillment, and it is one of the matters that God Almighty will ask the servant about on the Day of Resurrection. The least that can be said is that breaking a promise is disliked. The Prophet Muhammad (SAW) said, "There are three signs of a hypocrite: when he speaks, he tells lies; when he makes a promise, he breaks it; and when he is entrusted, he betrays his trust."<sup>26</sup> The promise of engagement is considered non-binding even according to the opinion that stipulates the obligation of the promise, according to some Malikis, because the obligation of the promise, in this opinion, is only in financial contracts, not in the marriage contract. Due to the seriousness of the implications of this contract<sup>27</sup> Imams Hanafi and Hanbali said that it is permissible to break off an engagement based on the following evidence: "No one of you should ask a woman in marriage when his brother has done so already, until the one who has proposed (to her) before him gives her up, or gives him permission."<sup>28</sup> The Prophet Muhammad (SAW) granted the

first suitor the right to dissolve the engagement and allowed him to yield to the second suitor. The Prophet (SAW) allowed the abandonment of the engagement in two ways: either by directly relinquishing it or by granting permission for someone else to propose to the girl, which includes a formal notice of relinquishing the right, all stemming from the abandonment of the initial proposal. The Prophet (SAW) did not make the permissibility of abandonment contingent on a specific reason but rather established it as a right for the first suitor. Another piece of evidence is that Ali (may Allah be pleased with him) proposed to the daughter of Abu Jahl, and when the Prophet (peace be upon him) expressed his disapproval, Ali (may Allah be pleased with him) declined the proposal.<sup>29</sup>

#### Activity 5.

*Please return to the library and search for the most relevant opinion regarding the break of engagement, then engage in a discussion with your lecturer*

#### 8. Consequences of Breaking an Engagement:

If the suitor presents the dowry to his fiancée in advance before the marriage contract, and subsequently one of the parties withdraws from the engagement or passes away, what is the legal status of this pre-received dowry? Muslim jurists unanimously agree that it is obligatory to return the dowry paid to the fiancée, whether it is still available, has perished, or has been consumed. This is because the obligation of the dowry arises only after the marriage contract has been formalized, and as long as the marriage has not been consummated, the fiancée is not entitled to the dowry.<sup>30</sup>

Muslim jurists disagreed on the gift given to the fiancée and held various opinions, including: (a) The Hanafi school of thought holds that gifts take

the same ruling as a gift, and they are returned to their owner unless they fall under one of the seven impediments to returning a gift, which are: (i) Increase in value. (ii) Death of the donor or donee. (iii) Compensation for the gift. (iv) The gifted property leaving the possession of the donee. (v) An existing marriage between the donor and the donee at the time of the gift. (vi) A *Mahram* relationship between the donor and the donee. (vii) Destruction of the gifted property in the hands of the donee.<sup>31</sup> (b) The Malikis distinguished between cases in which withdrawal was initiated by a man or a woman. If the withdrawal is initiated by a man, he forfeits any right to recover his gifts, whether they are in existence or have been spent. This is because he offered the gifts with the condition of completing the marriage, and since he failed to fulfill this condition, he is not entitled to reclaim any of his gifts. On the other hand, if the withdrawal is initiated by the woman, the suitor has the right to reclaim all the gifts he provided, whether they are still available or have been consumed. This ensures that the suitor does not suffer from both rejection and financial loss simultaneously.<sup>32</sup> (c) Shafi holds two opinions on this matter: (i) According to the first opinion, he has the right to reclaim the gift, whether it was food, drink, candy, or jewelry, regardless of whether the withdrawal was initiated by him or her. This is because he only spent it with the intention of marrying her. (ii) In the second opinion, it aligns with the view of Imam Malik and applies when the withdrawal is initiated by a woman.<sup>33</sup> (d) Ibn Hanbal holds that a gift will be subject to the same rules as a gift that is not permissible to be returned after receipt.<sup>34</sup>

#### Activity 6.

*As you note, Muslim jurists disagree on whether the return of the gift was caused by a man or woman. Explore the predominant stance on this matter in Saudi Arabia, Sudan, Pakistan, and Malaysia.*

## SUMMARY

Khitbah is the promise of marriage and is permitted to enable the parties to know each other. It is also allowed to look at the faces, hands feet and arms among other aspects, according to Islamic *madhhab*. Some preferred qualities in choosing suitors include religiosity, wealth, lineage, beauty, good family background, virginity and fertility.

Furthermore, if the khitbah is breached, it becomes obligatory to return the dowry paid to the fiancée. There are various opinions among Muslim jurists regarding the gifts given to the fiancée.

## QUESTION

**One:** please provide answers to the following questions

1. Define the meaning of "*Khitbah*" both literally and technically.
2. Discuss the nature of "*Khitbah*".
3. Provide an illustration from Islamic jurisprudence regarding the limitations on looking at one's fiancée.
4. What is the legal status of breaking off an engagement?
5. Write a brief explanation of the legal impediments to engaging with a woman.

**Two:** Please indicate whether the following sentences are correct (✓) or incorrect (✗).

6. Hanafi jurisprudence states that it is permissible to look at the face and hands of a woman during the *khitbah*. (.....)
7. Engagement is a mutual promise of marriage between a man and a woman and it does not establish any legal rights (.....)
8. It is permissible to engage a woman who is in her waiting period in the revocable divorce. (.....)

9. It is prohibited for a Muslim to propose marriage to a woman who is already engaged to another Muslim. (.....)
10. *Khitbah* was legalized because of the announcement of the marriage contract (.....)

**Three:** Fill the gaps in the following:

11. A woman may be married for four reasons, for her
12. It is permissible to propose to a woman as long as ..... and there are.....
13. Malikis and Shafi'is, hold that what is permissible is to look at her face and hands, because the face ....., and because the hands.....
14. The institution of *Khitbah* was legalized due to the following wisdoms: .....
15. Jabir (R.A) said, "I got engaged to a woman....."

**Four:** Read the following cases and analyse based on a Shari'ah point of view

16. In one of the cases, a man filed a lawsuit against the guardian of his fiancée, stating in his claim, "I proposed to the defendant, Othman, proposing to his daughter in approximately the sixth month of the year 2000. He asked me for a dower of 71,000 Ksh, and I handed him an amount of 20,000 Ksh, along with a gold set worth 4,000 USD, and an additional amount of one thousand Ksh per ceremonial. Subsequently, problems arose, and as I was asked for an additional 11,000 Ksh in the dowry, I decided to cancel the engagement, and the marriage contract was not concluded. I am requesting that the defendant, Othman, be sentenced to return the amount I delivered to him. This is my claim."

### **Text Books/articles for Further Reading**

1. Personal Status, Ahmed Ali Dawood, (Jordan: Dar al-Thaqafa, 2009)
2. Personal Status, Ahmed Almustafaa, (Beirut: Muasasat al-Haditha, 2003)
3. David Pearl & Werner Menski, Muslim Family law, (Sweet and Maxwell, 1998)
4. Maaïke Voorhoeve, Family Law in Islam: Divorce, Marriage and Women in the Muslim World, (I.B.Tauris, 2016)
5. Raffia Arshad, Islamic Family Law, (Sweet & Maxwell, 2010)
6. Saliu Ishola Abdullahi & Abdulrahman Manswab, Fundamentals of Valid Marriage in Islamic Law: An Evaluation of Muslim Practices in Nigeria Journal of Islamic Law Review, Vol. 14, No. 2, December 2018, pp. 285-313

## CHAPTER TWO



# CONCEPT OF MARRIAGE IN ISLAM

### **Introduction of the Chapter:**

Marriage serves as an institution that legitimizes the intimate relationship between a man and a woman, with the aim of preserving the human species, fostering the growth of descendants, promoting love and unity between the individuals involved, and providing mutual support for livelihood. It is permissible for two individuals of opposite genders to marry, provided there are no natural or legal obstacles to their cohabitation. Regardless of whether one views marriage as a sacrament or a contractual agreement, it carries certain mutual rights and responsibilities and grants the status of husband and wife to the couple, as well as legitimacy to their offspring. One noteworthy aspect of Muslim jurisprudence is that Muslims initially considered marriage as a civil contract, even as their legal thinking evolved. However, to the extent that Hindus and Christians regard their marriages as sacraments and permanent unions, Muslim marriages can also be seen as acts of devotion, referred to as "*ibadat*". The Muslim understanding of marriage differs from the Hindu perspective, which regards marriage not just as a civil contract but as a sacrament. Finally, I have included a variety of activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions at the end of the unit to help reinforce and assess your understanding of the material.



## Objective of the Chapter:

After reading this chapter the student should be able to:

- I. Define the meaning of marriage.
- II. Illustrate the general rules associated with marriage.
- III. Discuss various conditions of marriage.
- IV. Resolve cases associated with marriage.

### 1. Meaning of Marriage:

Marriage is synonymous with "*Ziwaj*" or "*Nikah*" in the Arabic language, which means union, coupling, connection, joining, and interpenetration. Allah (SWT) said, "Or grants them a mix of males and females" (QS 42: 50) means bring them together. Another verse from Qur'an, "Gather those who committed wrong, their kinds, and what they use d to worship" (QS 37: 22). A word which, in its literal sense signifies conjunctions, but which is in the language of law implies the marriage contract.<sup>35</sup> Muslim jurists have held differing definitions of the concept of marriage. Some have defined it as a contract based solely on the pleasure of enjoying a human being (typically with a female partner),<sup>36</sup> additionally, some have considered it a contract that signifies the intentional ownership of pleasure, as seen in the Hanafi school of thought. In contrast, the Shafi'i school of thought defines it as a contract that includes the permissibility of intercourse, either explicitly using the term 'marriage' or by conveying the same meaning.<sup>37</sup> On the other hand, Hanbali jurists describe it as a contract with the wording '*ziwah*' or '*nikah*' for the purpose of enjoying pleasure.<sup>38</sup> According to the Kuwait Encyclopedia of Family Law, '*Nikah*' is defined as a contract that enables both the man and the woman to enjoy each other in a legitimate manner.<sup>39</sup> Sheikh Muhammad Abu Zahra defined it as follows: "It is a contract that establishes the resolution of the relationship between a man and a woman in a manner that aligns with human nature, their cooperation for life, and delineates the family rights and duties of both parties."<sup>40</sup> These are such as, obedience, dowry, inheritance, good relations, and justice among others.

## 2. The legality of marriage in Islam:

The first legal marriage in history is believed to be the union of Adam and Eve. Marriage is considered the only lawful way for a man and a woman to establish a legitimate relationship in Islam. It is viewed as one of the signs of the Almighty God, serving as a means to safeguard humanity from extinction. In Islam, marriage is highly valued and desired in various forms. God Almighty has elevated its significance to the point where it is referred to as a solemn covenant, symbolizing loyalty and commitment based on adherence to what is right and separation from wrongdoing. Marriage was legalized in the Qur'an, the *Sunnah*, and the consensus of Muslim jurists. Allah (SWT) said, "if you were to marry them, then marry other women of your choice—two, three, or four. But if you are afraid you will fail to maintain justice, then content yourselves with one" (QS 4: 3). The Prophet Muhammad said, "O young men, those of you who can support a wife should marry, for it (marriage) controls the gaze and preserves one from immorality. And whoever cannot (marry) should fast, for it is a means of reducing the sexual desire."<sup>41</sup> It was narrated from Anas that there was a group of the Companions of the Prophet, one of whom said: "I will not marry women." Another said: "I will not eat meat." Another said: "I will not sleep on a bed." Another said: "I will fast and not break my fast." News of that reached the Messenger of Allah and he praised Allah then said: "What is the matter with people who say such and such? But I pray and I sleep, I fast and I break my fast, and I marry women. Whoever turns away from my *Sunnah* is not of me."<sup>42</sup> Islam forbids *at-Tabatul* (monasticism), which is abstaining from women and abandoning marriage. While Islam encourages marriage as a virtuous institution and a means to fulfill one's desires and procreate, it forbids *at-Tabatul* because of interruption of birth and the extinction of the human species. Similarly, Islam forbids *al-Rahbaniyyah*, which involves dedicating oneself to worship and forsaking worldly adornments, including marriage. *Al-Rahbaniyyah* (celibacy) was initiated by Christians; they considered marriage dirty.<sup>43</sup>

## Activity 1.

*Discuss with bishops and clergy the pros and cons of why, in the Catholic Church, priests, bishops, and other clergy are required to take vows of celibacy, which means they commit to remaining unmarried and abstaining from sexual relations.*

In Islam, there are many rules associated with marriage. It revolves around the five rulings, which are determined based on a person's condition. These rulings can be categorized as follows: Obligation, Prohibition, Dislike, Recommendation, and Permissibility.<sup>44</sup>

(i) Obligation: This applies for someone who desires marriage, fears he may engage in adultery if he remains unmarried, and has the financial means to provide maintenance. Ibn Hazmi said, "It is obligatory for every person who is capable of engaging in sexual relations, if he possess the means to marry or find a suitable partner, to pursue one of these options. If he is unable to do so, then he should engage in fasting regularly. This is the belief held by a group of the Salaf."<sup>45</sup>

(ii) Prohibition: If it is certain that the woman will be treated unfairly and harmed if he marries and he is unable to afford the costs of marriage.

(iii) Dislike: This applies to someone who has no interest in marriage, and if he was to marry, he would be unable to perform good deeds, and he lack the financial means to provide for a family.

(iv) Recommended: In the case of moderation, which is the opinion of the majority of scholars, and it is the prevailing state among most people.

(v) Permissibility: According to most Muslim jurists, with the exception of the Shafi'i school of thought, it is generally recommended to marry

when a person has a balanced temperament. This means they should neither fear engaging in adultery if they stay single nor fear treating their spouse unfairly if they decide to marry. This balanced disposition is quite common among people.<sup>46</sup>

Based on the aforementioned points, marriage falls within a spectrum ranging from obligation to recommendation. This is due to the abundance of encouragement found in the Qur'anic texts and *Sunnah*, as well as the prohibition of celibacy and monasticism. The Qur'an and *Sunnah* also emphasize the importance of urging young people to marry. Additionally, marriage is considered the *Sunnah* of the Messenger of God, may God bless him and grant him peace. It offers various religious, psychological, social, and health benefits, especially in an era where temptations have increased. The division of marriage into different levels of obligation or recommendation arises from the varying opinions among scholars regarding the understanding of the legal texts.

### 3. The purposes of marriage in Islam:

When you read Qur'anic verses and the noble Prophetic hadiths that address the institution of marriage, we can discern that Islam did not institute marriage solely for the purpose of facilitating sexual and physical pleasure between a man and a woman. Instead, it was established with the broader objective of serving legitimate purposes and encompassing religious, social, and humanitarian dimensions and goals. Furthermore, it plays a crucial role in safeguarding individuals, families, and society from corruption and deviance. These significant purposes of marriage can be summarized into four key points:

(i) Preservation of Progeny: Marriage is a *Sunnah* observed by the Messengers and Prophets, underscored by the Qur'an and *Sunnah*, with the primary purpose of procreation and the continuation of offspring. Through this, the preservation of the human species is ensured, preventing its extinction and disappearance. Allah (SWT) said, "And Allah has made

for you spouses of your own kind and given you through your spouses children and grandchildren” (QS 16: 72). Considering the significance of safeguarding lineage and progeny to ensure the continuity of the human species, scholars have included this objective among the higher objectives of Islamic law. Furthermore, Islam prohibits adultery, which can result in the mingling of family lines and the proliferation of illicit relationships. Additionally, it prohibits sodomy and homosexuality. In addition, Islam encourages early and prompt marriages, discouraging any unnecessary delays. It also encourages the choice of individuals who are capable of bearing children, including virgins. Islam prohibits celibacy, monasticism, family planning, abortion, and any practices that sever family ties or hinder procreation at birth. Finally, to safeguard lineage and offspring, Islam has established guidelines for guardianship, testimony, announcement, and public recognition of marriages. These measures help differentiate lawful marriages from incestuous relationships. ‘A’isha reported God's Messenger as saying, “Make this marriage publicly known, solemnise it in the mosques, and play tambourines in honour of it.”<sup>47</sup>

(ii) Immunity and prevention of immorality: one of the fundamental purposes of marriage is the preservation of offspring, the continuity of family lineage, and the safeguarding of family integrity. Consequently, this institution plays a pivotal role in ensuring the continuation of the human race, maintaining the lineage's purity, and safeguarding both the well-being of children and the family's assets. Chastity and fidelity serve as essential means to achieve these aims. Therefore, the Messenger, may God bless him and grant him peace, emphasized the importance of these virtues when he said: “for it (marriage) controls the gaze and preserves one from immorality.”<sup>48</sup> Islam has established specific measures to attain the objective of promoting moral integrity and safeguarding against immorality. It has enjoined women to observe modesty and veiling, while discouraging nudity and ostentatious displays. It has also instructed both believing men and women to maintain modesty by safeguarding their private parts and averting their gaze from that which is forbidden.

Furthermore, Islam prohibits any actions or situations that may pave the way for corruption, including indulging in lustful glances, being alone with unrelated individuals of the opposite sex, and engaging in illicit relationships.

(iii) Peace of mind: Psychological well-being, family harmony, stability, affection, and compassion are all Qur'anic principles and Shari'ah objectives that find their fullest realization through lawful and legitimate marriages. Allah (SWT) said, "And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between you compassion and mercy. Surely in this are signs for people who reflect" (QS 30: 21). The connection between psychological well-being and family housing extends beyond mere physical satisfaction and liberation. It is truly achieved through acts of kindness, fostering love and compassion, cohabiting under one roof, sharing a dwelling, and a mutual sense of responsibility between spouses. The Prophet Mohammad (SAW) said, "All of you are guardians and are responsible for your subjects. The ruler is a guardian and responsible for his subjects; the man is a guardian of his family; the woman is guardian in her husband's house and responsible for her wards".<sup>49</sup> This objective is reinforced by the existence of offspring, as children play a significant role in solidifying and maintaining a marriage. In pursuit of psychological and family stability, Islam mandates that the husband must provide maintenance for the wife.

(iv) Social interaction and human connection: One of the purposes for which God Almighty created people, both male and female, and diversified them into various peoples and tribes, is to foster acquaintance and communication among human beings. Marriage stands as one of the most effective means to facilitate understanding and socialization. It reinforces social bonds and strengthens the fabric of humanity. As God Almighty has stated: "O humanity! Indeed, we created you from a male and a female, and made you into peoples and tribes so that you may get

to know one another. Surely the most noble of you in the sight of Allah is the most righteous among you. Allah is truly All-Knowing, All-Aware” (QS 49: 13). For this reason, Islam encourages exogamy in marriage, wherein a man marries a woman from a family different from his own, to enhance social bonds between families.

#### Activity 2.

Discuss with your lecturer the permissibility of marrying individuals of different faiths, such as Christians and Jews, as a means to foster stronger social connections between families.

#### 4. Essentials of Marriage:

The essentials of marriage are the fundamental prerequisites for the validity of a marriage. If any of these requirements is not met, the marriage may become either void or irregular. The following are the essential elements of marriage according to various schools of thought. (i) The Hanafi doctrine states that the essential of marriage is the formula (*Sighah*), which consists of *Ijab* and *Qabul* (Offer and acceptance).<sup>50</sup> (ii) The Maliki doctrine states that the essential of marriage is the formula (*Sigha*), the spouses, the *Walī* (guardian), and the dowry.<sup>51</sup> (iii) The Shafi’i doctrine states that the essential of marriage is the formula (*Sighah*), the spouses, the *Walī* (guardian), and the two witnesses.<sup>52</sup> (iv) The Hanbali doctrine states that the essential of marriage is the formula (*Sighah*), and spouses.<sup>53</sup> To ensure the validity of a marriage contract, three essential elements must be present, as follows: (1) *Sighah*, (2) Competent parties, and (3) Conditions of marriage.

**1. *Sighah*:** in order for a contract to be a valid, the formation of a contract must be of mutual consent between parties. However, neither the Qur’an nor *Sunnah* has explained on how the mutual consent should be

established. Therefore, it was agreed among the jurists that consent can be manifested by an offer and acceptance (*Sighah*). Furthermore, there is a unanimous agreement among jurists that marriage cannot be solemnized without the use of the terms "*Nikah*" and "*Ziwaj*." However, apart from these specific terms, there is disagreement on the following: (i) Shafi'i and Hanbalis believe that marriage cannot be concluded except with the words "*Nikah*" and "*Ziwaj*".<sup>54</sup> They used the following evidence: "Fear Allah concerning women! Verily you have taken them on the security of Allah, and intercourse with them has been made lawful unto you by words of Allah."<sup>55</sup> The word "God's security" mentioned in the Hadith is *Nikah* and *Ziwaj*. (ii) The Hanafi school of thought believes that marriage is concluded using the words "*Nikah*", (marriage) "*Hadiyyah*" (gift), "*Sadaqa*" (dower), and "*Milkiyyah*" (ownership), and this opinion is supported by Al-Thawri and others.<sup>56</sup> They supported their opinion with the following evidence. "Also allowed for marriage is a believing woman who offers herself to the Prophet without dower if he is interested in marrying her—this is exclusively for you, not for the rest of the believers" (QS 33: 50). God Almighty permitted the woman who offered herself to the Messenger, may God bless him and grant him peace, to be married to him. In addition, The Prophet (SAW) said to the person, "I have married her to you for what you know of the Qur'an."<sup>57</sup> (iii) The Malik school of thought believes that marriage can be concluded using the word "*Hibah*" (gift) if the dower is possessed. Furthermore, there are two opinions regarding using the word "*Sadaqa*" (dower) and "*Milkiyyah*" (ownership). The first opinion states that it is concluded if the dower is mentioned along with it, while the second opinion states that it is not concluded, whether or not the dower is mentioned.<sup>58</sup>

Muslim jurists have agreed that it is permissible to use languages other than *Arabic* for someone who is not able to pronounce the Arabic language. However, they differ in the case of someone who is able to pronounce Arabic but uses their own language, categorizing it into two groups: (i) Hanafi and Shafi'i scholars believe that the marriage will be concluded

because the individual has expressed their intent.<sup>59</sup> (ii) Hanbali and another opinion within the Shafi'i school hold that the marriage will not be concluded for violating the specific words prescribed for it by Islamic law.<sup>60</sup>

Offer and acceptance (*sighah*) can be conveyed in a number of ways, namely by words, by gesture or indication. In this regards, The Prophet said: "A matron should not be given in marriage until she is consulted, and a virgin should not be given in marriage until her permission is sought, and her silence is her permission."<sup>61</sup> This is acceptance by the groom. This is expressed through the spoken form uttered by the groom in reply to the guardian by saying "I marry her or "I accept her marriage" the parties contracting a marriage must be acting under their free will and consent.

There was a difference of opinion regarding whether a marriage contract could be concluded in writing. The Hanafi school of thought held that it could be concluded in the absence of a person, not in their presence, if the writing was clear and could be read and understood, like writing on paper. The most correct opinion, according to the Shafi'is and Hanbalis, is that a marriage contract is not concluded by writing when the person is capable of speaking because writing is considered a metaphor, and they believe that marriage cannot be concluded through metaphors.<sup>62</sup> On the other hand, the marriage contract can be concluded through gestures for someone who is unable to verbally express the words of offer and acceptance, such as a mute person, according to the consensus of most jurists. It can also be formalized in writing.<sup>63</sup>

**Condition of *Sighah*:** it is worth noting that jurists have listed the same conditions as those found in a sales contract. The following are those conditions: (i) There should not be a significant delay between the offer and acceptance that might give the impression of a rejection. However, a brief delay is generally acceptable.<sup>64</sup> (ii) There should be no disparity between the offer and acceptance when using foreign languages or expressions. (iii) The offer and acceptance must align. If one party says, "I will marry

you to my daughter *Souad*," and the suitor responds with, "I accept the marriage of *Fatima*," then the contract is not valid in such a case.<sup>65</sup> (iv) Both parties involved in the contract must be fully competent at the time of the contract. If one of them becomes mentally incapacitated or faints during the process, the contract will be void.<sup>66</sup> (v) There must be evidence of the wife's identity, such as the guardian stating, "Your wife is so-and-so," and the husband confirming, "I accept her marriage." (vi) The *Sighah* used should not be conditional. For example, if someone says, "I will marry you when the sun rises," (vii) The formula used should not be temporary, such as someone saying, "I will marry you for a period of time" or "until so-and-so returns from his travel." Such temporary marriage contracts are considered void, as it has been reported from the Prophet Muhammad (SAW) that he forbade *Muta'* (temporary marriages).<sup>67</sup>

2. Competent parties: It is a requirement that the person entering into a contract possesses legal capacity (*ahliyyah*). If someone lacks the qualifications to engage in contracts, such as an individual who is lunatic or a minor, their contract will not be considered valid. However, if a mature minor initiates a marriage contract independently, the contract can be valid, provided that it receives approval from their guardian for the marriage. If the guardian approves it, there is no need to establish a new contract. In this regard, Muslim jurists have established certain conditions related to spouses.

1. Conditions for the husband include the following: (i) He must be a Muslim. It is not valid for a non-Muslim to marry a Muslim woman, in accordance with the teachings of Islam as stated by God Almighty. "And do not marry your women to polytheistic men until they believe" (QS 2: 221). (ii) He must not already have four wives, as it is prohibited to have more than four. Allah (SWT) has stated, "If you fear you might fail to give orphan women their due rights if you were to marry them, then marry other women of your choice—two, three, or four" (QS 4: 3). The Prophet Muhammad (SAW) instructed Ghailan bin Aslamah to divorce his wives if he had more than four.<sup>68</sup>

(iii) He must not be permanently sick; however, the Hanafi and Shafi'i schools hold a different view, permitting marriage for a person who is sick.<sup>69</sup> On the other hand, the Maliki school believes that terminal illness can render a marriage invalid.<sup>70</sup> (iv) To be certain of his maleness, it is not valid for a hermaphrodite to marry, however, it is permissible for a hermaphrodite to own a female slave and engage in lawful relations with her.<sup>71</sup> (v) It must be specific. It is not valid for someone to be married without a clear specification. For instance, it is not valid to say, 'I will marry you my daughters, (*Maimuna*) or (*Azaa*). In the case he has many daughters. It is imperative that both names of the bride and bridegroom must be accurately mentioned in the marriage contract to avoid any ambiguity. (vi) He must make his choice; it is not valid to marry someone who is forced.<sup>72</sup> Some jurists believe that coercion does not prevent the validity of the marriage contract. (vii) The woman should not be among those forbidden to him, as God Almighty says: "Also forbidden to you for marriage are your mothers, your daughters, your sisters, your paternal and maternal aunts, your brother's daughters, your sister's daughters, your foster-mothers, your foster-sisters, your mothers-in-law, your stepdaughters under your guardianship if you have consummated marriage with their mothers—but if you have not, then you can marry them—nor the wives of your own sons, nor two sisters together at the same time—except what was done previously. Surely Allah is All-Forgiving, Most Merciful" (QS 4: 23). (viii) He must not be in a state of ihram for *Hajj* or *Umrah*.<sup>73</sup>

2. Condition of the wife: (i) the wife must not be in a state of ihram for *Hajj* or *Umrah*.<sup>74</sup> (ii) The wife must be clearly specified, and this condition applies to the husband as well. For instance, if the guardian says, "I marry you my daughter," in the case he has many daughters. It is imperative that both names of the bride and bridegroom must be accurately mentioned in the marriage contract to avoid any ambiguity. (iii) The wife must not be currently married or in a waiting period. It is not permissible for a married woman or a woman observing a waiting period to enter into a new marriage. However, there are no impediments if she is in a waiting

period following a revocable divorce.<sup>75</sup> (iv) It is strictly prohibited to compel women into marriage except in cases of (*ijbar*). (v) The wife must not be prohibited to the husband by factors such as close blood relations (*Nasab*), breastfeeding (*Radā'a*), or affinity (*Muswāhara*). (vi) The wife must either be a Muslim or *Ahl al-Kitāb* (Christian/Jews). If she adheres to the faith of Zoroastrianism, paganism, or has renounced her faith, her marriage would not be considered valid. Allah (SWT) said, "Do not marry polytheistic women until they believe". (QS 2: 221)

Muslim scholars held varying opinions regarding the marriage of *Ahl al-Kitāb* (Christians and Jews), and these views can be categorized into two main perspectives: (a) Permissibility View: Some scholars believed that it is permissible for Muslim men to marry women from the People of the Book (*Ahl al-Kitāb*). This viewpoint found support among notable companions of the Prophet, including Uthman ibn Affan, Talha, Ibn Abbas, and others. Later companions, such as Saeed ibn al-Musayyab, Saeed ibn Jubayr, Ikrimah, and the majority of scholars, also endorsed this perspective. They argued that the verse from *Surat al-Baqarah* (2:221), which initially cautioned against marrying polytheistic women until they believe, was abrogated specifically concerning the women of *Ahl al-Kitāb*. They pointed to *Surat al-Maidah* (5:5) to support their stance, which permitted the marriage of women from *Ahl al-Kitāb*.<sup>76</sup> This verse states, "Today all good, pure foods have been made lawful for you. Similarly, the food of the People of the Book is permissible for you and yours is permissible for them. And permissible for you in marriage are chaste believing women as well as chaste women of those given the Scripture before you—as long as you pay them their dowries in wedlock, neither fornicating nor taking them as mistresses." (b) Prohibition View: On the other hand, some scholars believe that such marriages are not permissible, and they argue that the verse from *Suratul al-Baqarah* (2:221) abrogates the verse from *Surat al-Maidah*.<sup>77</sup> Furthermore, they support their opinion with the following Hadith, Whenever Ibn `Umar was asked about marrying a Christian lady or a Jewess, he would say: "Allah has made it unlawful for

the believers to marry ladies who ascribe partners in worship to Allah, and I do not know of a greater thing, as regards to ascribing partners in worship, etc. to Allah, than that a lady should say that Jesus is her Lord although he is just one of Allah's slaves."<sup>78</sup>

### Activity 3.

Make a group discussion on the history and stance of Sunnis and Shia regarding temporary marriage (Mut'ah).

### (3) Conditions of marriage:

The conditions in the marriage contract are categorized into four sections: conditions for contracting (*'Inqad*), conditions for validity (*Siha*), conditions for effectiveness (*Nafad*), and conditions for permissibility (*Jawaz*). There is a divergence of opinions among the majority of jurists, namely the Hanafi, Maliki, Shafi'i, and Hanbali schools, when it comes to stipulating these conditions in the marriage contract, and they differ in the specifics.

For instance, the Hanafi School regards marriage as having one pillar, which is the *Sighah* (offer and acceptance). However, they do not acknowledge the remaining pillars of the marriage contract, as stipulated by the majority of jurists. Instead, they classify these conditions as falling under the original conditions, which are considered pillars by the Maliki, Shafi'i, and Hanbali jurists. In contrast, the majority of jurists view these conditions as independent and essential components of the marriage contract.

(i) Conditions for contracting (*'Inqad*): These are the conditions that must be met within a contract, either collectively or individually. If any of these conditions are not fulfilled, the contract is deemed invalid according to the consensus of the four schools of thought. There are two types of

conditions for contracting a contract: one related to the contracting parties (spouses) and the other to the *Sighah* (offer and acceptance) of the contract. Both parties must possess the capacity to enter into the contract. If one of the contracting parties lacks the capacity, such as due to insanity or being a minor unable to make decisions, the marriage will not be valid according to its terms. Moreover, if the contract is formulated by another person on behalf of a minor or an insane individual, the contract will not be concluded. This is because a person who lacks discernment has no will, and it is not possible to imagine their consent being relied upon in the contract.<sup>79</sup>

(ii) Conditions for validity (*Siha*): These are the conditions that must be met within a contract for it to have legal validity. If any of these conditions are not fulfilled, the contract is considered voidable (*Fasid*) according to Hanafi jurists, while it will be deemed void (*batil*) in the majority of Maliki, Shafi'i, and Hanbali jurists. There are two conditions for validity: (a) the wife must not be prohibited to the person, either permanently or temporarily. (b) Two witnesses must be present during the marriage ceremony, and this condition is emphasized by Hanafi jurists, while others consider it a fundamental pillar of marriage.<sup>80</sup> According to the Qur'an, the witnesses must be two men or one man and two women, as stated in *Suratul Al-Baqarah*: 282, "Call upon two of your men to witness. If two men cannot be found, then one man and two women of your choice will witness." The significance of having witnesses is rooted in the fact that marriage legalizes a union that was previously forbidden, and this transformation is proclaimed in the presence of witnesses. Moreover, if a man and a foreign woman are seen together continuously without announcing their marriage and having people bear witness to it, it can lead to suspicion and mistrust among others.

(iii) Conditions for the Effectiveness of Marriage Contracts (*Nafa'*): To ensure the enforceability of a marriage contract, certain conditions must be met. These conditions revolve around the person responsible for

conducting the contract, who should have the authority to establish it. This person could be the guardian or custodian, especially when dealing with a minor of distinction. If a discerning minor (*Mumayaz*) initiates a marriage contract, its validity hinges on the approval of their guardian, who possesses the authority to establish it. If the guardian approves, the contract becomes enforceable; otherwise, it remains uncompleted. There are several conditions associated with the effectiveness of marriage contracts: (a) *Mumayaz*: When the contracting party is a distinguished individual who is not yet of legal age and conducts a marriage contract on their own behalf, the contract's validity relies on the consent of their guardian, such as their father or grandfather.

(b) Presence of Closest Guardian: If the furthest guardian, such as an uncle, enters into a contract while the closest guardian, such as the father, is present, the contract will lose its effectiveness upon the approval of the closest guardian.<sup>81</sup> The *Sahih* and *Nafadh* marriage contract has the following provisions: permissibility of sexual intercourse, payment of dowry, providing maintenance, proof of children's lineage, proof of inheritance rights, and proof of the sanctity of marriage.

(v) Conditions for permissibility (*Jawaz* or *Luzum*): These are the conditions upon which the marriage will continue. If any of the following scenarios are met, one of the contracting parties has the right to enforce and void the marriage. The following conditions are as follows: (a) if one of the contracting parties realizes genital defects, they have the right to request the annulment of the contract. (b) If one of the spouses falsely ascribes themselves to a tribe and later it becomes clear otherwise, the other party has the right to request the annulment of the contract.<sup>82</sup>

#### Activity 4.

*The marriage between Abdullah and Fatima was concluded in the presence of a guardian with a Christian witness. What is the ruling on this contract?*

### SUMMARY

Marriage, in correct terminology, is a contract that permits intercourse in a legitimate manner and establishes rights and obligations among the spouses. Its legalization is stipulated in the Qur'an, the Sunnah and the consensus of Muslim Jurist. Conversely, Islam prohibits at-Tabatul (monasticism) a practice initiated by Christians under Al-Rahbaniyyah (celibacy). The rules governing marriage vary, ranging from obligation to prohibition, dislike, recommendation, and permissibility. The objectives of marriage encompass the Preservation of Progeny, Immunity and prevention on immorality, Peace of mind, Social interaction, and human connection. Muslim jurists diverge on the essentials of marriage: Hanafi asserts it to be (Sigha), involving the spouses, the Wali (guardian), and the dowry; Shafi'i maintains that the essential components are the formula (Sighah), the spouses, the Wali (guardian), and the two witnesses; Hanbali specifies the essential elements as the formula (Sighah) and the spouses. Finally, conditions associated with marriage include "Inqad, Siha, Nafad and Jawaz.

## QUESTION

One: please provide answers to the following questions.

1. Write a short note on the significance of marriage.
2. Clarify the opinion of Muslim jurists regarding the marriage of *Ahl al-Kitab* (people of book).
3. Discuss the qualifications of a spouse before solemnizing marriage.
4. Illustrate the essentials of marriage based on different schools of thought.
5. Define and distinguish between valid, void and irregular marriage under Islamic law

Two: Fill the gaps in the following.

6. What is the matter with people who say such and such? But I pray and I sleep, I fast and I break my fast, and .....
7. Marriage will be compulsory for.....
8. *At-Tabatul* is.....
9. The main purpose of marriage is.....(b).....  
(c)..... (d).....
10. The Maliki doctrine state that the essential of marriage is the.....  
.....

Three: Please indicate whether the following sentences are correct (✓) or incorrect (×).

11. Celibacy, known as *Al-Rahbaniyyah*, was introduced by Christians who regarded marriage as impure. (.....)
12. A spouse must possess *ahliyah* before entering into a marriage contract (.....)
13. It is permissible to marry a woman who is in a state of ihram for *Hajj* or *Umrah*. (.....)
14. Shafi'is and Hanbali scholars state that a marriage contract is not

concluded by writing when the person is capable of speaking. (.....)

15. The rules of marriage revolve around the five rulings, which are determined based on a person's condition. (.....)

**Four:** Read the following cases and analyse based on a Shari'ah point of view

16. By a Petition dated 11th June 2012, the Petitioner who celebrated a civil marriage with the Respondent under the Marriage Act at the District Commissioner's Office Baringo on 6/6/2006 prayed for dissolution of marriage on the grounds of cruelty and irretrievable breakdown of the marriage. 2. The Petitioner gave as one of the particulars of cruelty that the Respondent had attempted to force the Petitioner into a polygamous marriage against her and insisted on remaining with a woman stranger in the matrimonial home when "between June 2010 and June 2011, the Petitioner went on a peace keeping mission outside Kenya, representing the Kenya Air-force and when she came back the Respondent had cohabited with another woman in the matrimonial home and became extremely cruel and hostile to the Petitioner." 3. Despite service and appearance by entry of Memorandum of Appearance dated 26th September 2012, the Respondent did not file an Answer to the petition but at the hearing with leave of Court made representation that: "I do not oppose the proceedings. I only seek that there be no order as to costs." 4. The Petitioner confirmed at the hearing that she did not wish to pursue costs. The cause then proceeded as undefended cause in accordance with the Registrar's Certificate of 4th July 2013. 5. The Petitioner testified as PW1 and, on a balance of probabilities in the absence of any answer and evidence from the Respondent, proved that upon return from a foreign peace keeping mission in 2011 she had come back to find the Respondent had already married another wife and the two were living together at Marigat at the Petitioner's matrimonial home, and that she did not agree to stay in a polygamous marriage in their rental home

with another woman who at the time was already pregnant. The Respondent had said that – “If I did not agree to stay with the other wife then I must leave. I was being forced to enter into a polygamous marriage when I intended to engage into only a single marriage. I was emotionally tortured. We have not lived together since 2012. We have lived separately.” 6. The issue for determination in this petition is whether cruelty and irretrievable breakdown of the marriage has been proved to warrant dissolution of the marriage.

### **Text Books/articles for Further Reading**

1. Abd al Ati, H. *The Family Structure in Islam*, (Indiana: American Trust Publications, 1997)
2. IICWC, *The Islamic Charter on Family*, (Giza: International Islamic Committee for Women and Child, 2007)
3. Moosa, N. *Unveiling the Mind: A History of the Historical Evolution of the Legal Position of Women in Islam*, (University of Western Cape: Community Law Centre 2004)
4. Al-Faruqi, L. *Women, Muslim Society and Islam*, (Indiana: American Trust Publications, 1994)
5. Nasir, J.J. *The Status of Women under Islamic Law and under Modern Islamic Legislation*, (London: Graham and Trotman, 1994)

## CHAPTER THREE



### PROHIBITED MARRIAGES

#### Introduction of the Chapter:

In the time of *Jahiliyyah* (pre-Islamic era), it was a common practice for a son to inherit his deceased father's other wives (i.e., not his own mother) as his own wife. However, the Qur'an prohibited this practice. The prohibition of marriage between individuals who are related in some way is based on three types of relationships that Allah (SWT) has permanently forbidden. These everlasting prohibitions can occur through lineage, marriage, or breastfeeding. In this unit, you will learn about permanently prohibited marriages, temporarily prohibited marriages, and the types of prohibited marriage practices both before and after the advent of Islam. Finally, I have included a variety of activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions at the end of the unit to help reinforce and assess your understanding of the material.



#### Objective of the Chapter:

After reading this chapter the student should be able to:

- i. illustrates prohibited marriages.
- ii. Differentiate between permanently prohibited marriages and temporarily prohibited marriages.

iii. Explain the reasons for the prohibition of marriage, whether permanent or temporary.

iv. Elucidate invalid marriage before and after the advent of Islam.

Muslim jurist classified prohibited marriage into two groups as follows:<sup>83</sup>

(i) Permanently prohibited marriages.

(ii) Temporarily prohibited marriages.

**1. Permanently prohibited marriages**, which forbid someone from marrying specific individuals due to blood relationships such as sonship, motherhood, and brotherhood, are categorized into three groups: (a) lineage (*Nasab*), affinity (*Muswahara*), or breastfeeding (*Radhā'*).<sup>84</sup>



Permanently prohibited marriages

- a. Lineage (*Nasab*)
- b. affinity *Muswahara*
- c. Breastfeeding *Radhā'*

Temporarily prohibited marriages

- a. Married women
- b. Women during their waiting period
- c. Marrying more than 4 wives
- d. The threefold divorce
- e. Disbelieving women
- f. Marrying the wife's sister, paternal aunt

(i) Prohibitions based on *Nasab* (lineage) occur between individuals related through blood relationships. Sheikh Wahba Zuheil classified them into four types: (a) the mother and grandmothers, whether on his father's side or her mother's side. (b) A person's daughters: It is not permissible for a person to marry his daughter, his daughters' daughters, or his sons' daughters. (c) It is not permissible for a person to marry his full sisters, paternal or maternal sisters. (d) Sister's daughters, their sons' or daughter's daughter how low so ever. (e) Brother's daughters, their sons' or daughters' daughter and how low so ever. (f) Paternal aunts and maternal aunts. The evidence for the prohibition of what was mentioned above is the Almighty's saying, "Also forbidden to you for marriage are your mothers, your daughters, your sisters, your paternal and maternal aunts, your brother's daughters, your sister's daughters" (QS 4: 23).

Based on the information above, Muslim jurists have different opinions on whether someone is allowed to marry their child born out of wedlock. The Shafi'is assert that it is permissible for him to <sup>85</sup>marry her. Their rationale is that what is forbidden does not inherently make something permissible. Additionally, they argue that the out-of-wedlock child is not considered her daughter. In this context, Prophet Muhammad (SAW) is reported to have said, "the boy is for (the owner of) the bed and the stone is for the person who commits illegal sexual intercourse."<sup>86</sup> Most Muslim jurists assert that it is forbidden to marry a child born out of wedlock due to the association of the sperm with adultery.<sup>87</sup>

The wisdom behind prohibiting the marriage of forbidden women in terms of lineage is due to the following:<sup>88</sup> (a) Creating a family requires bringing its members together and gathering them in one household. If marriage between these individuals is allowed and acceptable, it is advisable that the man avoids meeting any of these unfamiliar individuals alone, as such encounters can lead to desires and ambitions, potentially turning homes into stages for financial difficulties and division. (b) If marriage between these individuals is allowed, it can potentially lead to conflict within the family, as individuals may compete to win over one another. That is why Islam prohibits this to prevent greed from taking hold, fostering love among family members, and ensuring that interactions remain pure and innocent. (c) If marriage between these individuals is permitted, it may result in a breach of family kinship, which Allah (SWT) has commanded to be upheld. Marital relationships are founded on love and compassion, involving the exchange of rights and responsibilities. Allowing such marriages could lead to aggression and conflicts between families. Hence, Islam prohibits such unions based on *Nasab* (lineage).

## Activity 1.

Please provide clarification on the legal ruling when a man has contracted a marriage with a woman, but she passes away before consummation, and he expresses a desire to marry her daughter.

(ii) Prohibition based on *Muswahara* (affinity) occurs between individuals related through marriage. (a) The wives of one's father, the wives of one's grandfathers, how high so ever. It is not necessary that the marriage is consummated, once the contract is concluded, the mother-in-law becomes perpetually forbidden. Allah (SWT) says, "Do not marry former wives of your fathers—except what was done previously. It was indeed a shameful, despicable, and evil practice" (QS 4: 22). (b) Daughter and granddaughter of one's wife, how low so ever, are prohibited for one to marry once one consummates a marriage. Marriage with the wife's daughter or granddaughter is prohibited only if the marriage with the wife was consummated. Allah (SWT) says, "Prohibited to you (for marriage) are... your stepdaughter under your guardianship (born of your wives) to whom you have gone in but if you have not gone in unto them, there is no sin upon you...". (QS 4: 23) (c) The wives of one's son, the wives of one's grandsons how low so ever, are perpetually forbidden at the conclusion of marriage contract. "...and [also prohibited are] the wives of your sons who are from your [own] loins" (QS 4: 23) (d) the wife's mother, her grandmother, and how high so ever, are prohibited for one to marry as soon as the marriage contract is concluded. "... prohibited to you for marriage are... your wives' mother" (QS 4: 23).

The reason for prohibiting this type of marriage lies in the fact that marriage necessitates a connection between the husband and the ascendants and descendants of his wife, forming a familial bond that brings them together in one household. If it were permissible for a man to marry both his wife's

mother and daughter, it would create opportunities for selfish desires and ambitions, ultimately undermining the integrity of the marital bond. Such a situation would undoubtedly lead to corruption, and this potential harm is evident.<sup>89</sup>

(iii) Prohibition based on breastfeeding (*Radhā'*). Muslim jurists define this prohibition based on an infant sucking milk from a human woman's breast at a specific time.<sup>90</sup> Therefore, breastfeeding for an older man is not considered forbidden according to the majority of Muslim jurists. When a child under the age of two years has been suckled by a woman other than its own mother, the woman becomes the foster-mother of the child. A man can not marry his foster-mother or her daughter or his foster sister. The Prophet Muhammad (SAW) said, "Breastfeeding makes what is forbidden through blood relations."<sup>91</sup> A man is prohibited to marry:<sup>92</sup>

- (a) His foster mother;
- (b) The mother of the foster mother;
- (c) The mother-in-law of the foster mother;
- (d) The sister of the foster mother;
- (e) The sister of the husband of the foster mother;
- (f) The daughter and granddaughter of the foster mother; and
- (g) Sister who he breastfed from the same the foster mother.

The evidence for the prohibition of what was mentioned above is the Almighty's saying, "your foster-mothers, and your foster-sisters" (QS 4: 23). The reason for prohibiting this type of marriage lies in the fact that breastfeeding constitutes a physical bond between the child and the breastfeeding mother. Just as the child is nourished by his mother's blood while he is in her womb, he is also nourished by his breastfeeding mother's milk, which is her essence. Therefore, the child becomes a part of her, just as his biological mother who gave birth to him is forbidden to him. Similarly, her sisters, aunts, and her children are also forbidden to him due to the bond created through breastfeeding.<sup>93</sup>

Muslim jurists agree that the duration of breastfeeding which establishes the inviolable bond between a breastfeeding woman and the one she breastfeeds is typically the first two years. Allah (SWT) said, "Mothers may breastfeed their children two complete years" (*Suratul al-Baqarah*: 23) and the Prophet Muhammad (SAW) said, "Suckling applies only (to infants) during the first two years".<sup>94</sup> In this regard, Dāwūd al-Zāhiri affirmed that there is no specific duration period for breastfeeding. He supported his opinion based on the following. Umm Salama said to 'A'isha (Allah be pleased with her): A young boy who is at the threshold of puberty comes to you. I, however, do not like that he should come to me, whereupon 'A'isha (Allah be pleased with her) said: Don't you see in Allah's Messenger (SAW) a model for you? She also said: The wife of Abu Hudhaifa said: Messenger of Allah, Salim comes to me and now he is a (grown-up) person, and there is something that (rankles) in the mind of Abu Hudhaifa about him, whereupon Allah's Messenger (SAW) said: Suckle him (so that he may become your foster-child), and thus he may be able to come to you (freely).<sup>95</sup> Muslim jurists have responded to the above Hadith, noting that it is specific to the case of Salim. Additionally, to establish the prohibition of breastfeeding, it is required that the milk reaches the stomach through the mouth or nose. However, it does not make marriage unlawful if the milk reaches the stomach through another means.<sup>96</sup>

Muslim jurists have differed regarding the amount of breastfeeding that is forbidden, with three different opinions. (i) Hanafis and Malikis maintain that even a small amount of suckling can render a relationship forbidden, even if it is just one or two instances. They support their opinion with the following verse from the Qur'an, "your foster-mothers" (QS 4: 23), without specifying a particular amount of breastfeeding.<sup>97</sup> (ii) Shafi'i and Ahmad said that the forbidden amount of breastfeeding is five full breast feedings. They support their opinion with the following Hadith: 'A'isha said that in what was sent down in the *Qur'an* ten known sucklings made marriage unlawful, but they were abrogated by five known ones, and when God's

Messenger died these words were among what was recited in the Qur'an. (iii) Dāwūd al-Zāhiri said that the forbidden amount of breastfeeding is three full breast feedings. Narrated 'A'ishah (RA): Allah's Messenger (SAW) said: "One or two sucks do not make (marriage) unlawful."<sup>98</sup> In Hadith, it is indicated that the forbidden amount of breastfeeding is three full breast feedings.

Breastfeeding can be approved by the following: (a) Admission: This is a statement made by the child or the breastfeeding mother, or both, indicating that she is breastfeeding a specific individual. (b) Witness: For a witness to be accepted regarding breastfeeding, it must be made by two just males or one male and two females.<sup>99</sup>

Muslim jurists have pointed out similarities between the prohibition of lineage (*Nasab*) and breastfeeding (*Radhā'*) as follows: Prohibition of Marriage: Both *Nasab* and *Radhā'* result in the prohibition of marriage between individuals who are considered *mahrāms* due to their lineage or breastfeeding relationship. Furthermore, they are allowed looking at each other, shaking hands, being alone and traveling together. However, there are differences between *Nasab* and *Radhā'* in the following aspects: (a) Inheritance: Unlike *Nasab*, there is no inheritance entitlement arising from the relationship established through breastfeeding. (b) Maintenance: The rules regarding maintenance and financial responsibility for relatives established through blood relatives (*mahrāms*) are not established in the same way as they are for breastfeeding (c) The agnates: A breastfeeding relative, whether a father, son, or brother, does not hold the same legal agnate (*Asaba*) role in matters of marriage or blood relationships as a blood relative. (d) Blood Money for Manslaughter: Breastfeeding relatives are not responsible for paying blood money (*diyyah*) in cases of manslaughter; instead, this responsibility falls upon the male blood relatives of the victim.<sup>100</sup>

## Activity 2.

*Abdullah and Fatima were married, and their marriage was consummated. Subsequently, Maryam, a relative, approached them and disclosed that she had breastfed Abdullah and Fatima. What is the legal ruling in this situation?*

### **2. Temporarily prohibited marriages.**

The prohibition on temporary marriages arises from situations that make the marriage invalid only for as long as the underlying reason for the prohibition exists. Once this reason is resolved, the incapacity ends, and the marriage becomes valid. This is distinct from permanent prohibited marriages, where the marriage is void from the beginning and can never become valid. The following are the cases of temporary prohibited marriage:

(a) Unlawful conjunction: it means marrying simultaneously two women so related to each that they could not have lawfully married with each other if they had been of different sexes. For example, marrying two sisters at one given time or marrying a woman and her maternal or paternal aunt at one time. Allah (SWT) said, “Nor two sisters together at the same time—except what was done previously” (QS 4: 23). Marrying two sisters at the same time is only permissible if there has been a previous divorce or death involving one of the sisters. The Prophet Muhammad (SAW) said, “A woman and her paternal aunt nor a woman and her maternal aunt are to be together (as wives of one man at the same time).<sup>101</sup> The reason behind this prohibition is that it generates envy, hostility, and hatred between relatives.

(b) Marriage of a fifth wife: It is forbidden for a Muslim to marry more

than four wives at the same time. If he wants to marry additional wives, he must first divorce one of their existing wives. The '*Idda*' (waiting period) must end, either in the case of a revocable or irrevocable divorce. According to Shafi'i scholars, in the case of an irrevocable divorce, it is permitted to marry another wife before the '*Idda*' is completed because the marital relationship has ended due to divorce.<sup>102</sup> Allah (*SWT*) says, "if you were to marry them, then marry other women of your choice – two, three, or four. But if you are afraid you will fail to maintain justice, and then content yourselves with one" (QS 4: 3). In this regard, the Prophet Muhammad (*SAW*) said to a man from Tha'qif who had ten wives when he became Muslim, 'Take four and separate from the rest.'<sup>103</sup> If his wife passes away, he has the right to marry her sister the day after her death, without having to wait for the waiting period to pass.

Islam permits polygamy if a single wife is not enough to satisfy his spouse needs. Allah (*SWT*) says, "if you were to marry them, then marry other women of your choice – two, three, or four. But if you are afraid you will fail to maintain justice, and then content yourselves with one" (QS 4: 3). Polygamy originated in antiquity and still exists today. However, the prior society did not specify the number of wives; some men married ten wives, while others married more. Through polygamy, women experience several issues such as discriminative behaviour of the husbands, unequal treatment with their wives, jealousy, poor marital satisfaction, unhealthy competition, lack of trust, and many other mental health disorders. To solve these difficulties, Islam has specified a number of wives that one can marry and does not permit the exceeded number of four wives. Furthermore, Muslim jurists put some conditions on polygamy as follows: (i) justice or fairness: It is permitted to marry more than one with the condition of treating them equally in terms of maintenance, spending the night with them, and other material things that are under his control. If he cannot, therefore it is not appropriate to engage in polygamy. On the contrary, love is not held accountable for him because he has no control over that. Hence, 'A'isha narrated that the Prophet used to divide his time

among his wives equally and say, "O God, this is my division concerning what I possess, so do not blame me concerning what Thou possessest and I do not."<sup>104</sup> (ii) Ability to finance more than one wife: It is not allowed to marry more than one wife because of a lack of financial means. This was captured in the following verse, where Allah (S.W.T) said, "And let those who find not the financial means for marriage keep themselves chaste, until Allah enriches them of His Bounty." (QS 24: 33)

(c) The threefold divorce: Major irrevocable divorce is that the husband does not have a right to return to his wife when the waiting period has lapsed or not lapsed unless she is married by another person and divorced or dies,<sup>105</sup> as mentioned in the Qur'an, "So if a husband divorces his wife three times, then it is not lawful for him to remarry her until after she has married another man and then is divorced. Then it is permissible for them to reunite, as long as they feel they are able to maintain the limits of Allah. These are the limits set by Allah, which He makes clear for people of knowledge" (QS 2: 230). Furthermore, it was narrated that 'A'ishah said: "The wife of Rifa'ah came to the Messenger of Allah and said: 'Rifa'ah divorced me and made it irrevocable. Then I married 'Abdur-Rahman bin Az-Zubair, and what he has is like the fringe of a garment.' The Messenger of Allah smiled and said: 'Do you want to go back to Rifa'ah? No, not until he ('Abdur-Rahman) tastes your sweetness and you taste his sweetness.'"<sup>106</sup>

(d) Disbelieving women: A Muslim is prohibited to marry disbelieving or polytheistic woman. Allah (SWT) said, "Do not marry polytheistic women until they believe; for a believing slave-woman is better than a free polytheist, even though she may look pleasant to you" (QS 2: 221). The wisdom behind prohibiting a Muslim from marrying someone who does not follow the same religion is to preserve and strengthen the bonds of faith within the marriage. This prohibition does not contribute to improved relations and may hinder the attainment of mutual housing and affection, which are among the primary objectives of marriage. Additionally, there is concern that in such marriages, the children may

be influenced by the beliefs and values of those outside the Muslim faith. However, it is generally accepted that a Muslim man can marry a person of the Book, such as a Jew or a Christian. Allah (SWT) said, “Today all good, pure foods have been made lawful for you. Similarly, the food of the People of the Book is permissible for you and yours is permissible for them. And permissible for you in marriage □ are chaste believing women as well as chaste women of those given the Scripture before you – as long as you pay them their dowries in wedlock, neither fornicating nor taking them as mistresses” (QS 5: 5). This verse is an explicit statement affirming the permissibility of marriage between Muslim men and women of the People of the Book. Such marriages are considered acceptable because women of the Book share common social virtues with Muslims, as the heavenly religions all trace their origins to a single source. Therefore, it is feasible for a relationship between a woman of the Book and her Muslim husband to thrive. However, it is advised that such marriages should ideally be based on mutual familiarity and affection to ensure a harmonious union. It is generally preferable for a Muslim not to marry a non-Muslim woman unless there is a strong foundation of mutual understanding and affection between the spouses.

### Activity 3.

*Saleh was interested in a girl and wished to marry her. However, he later found out that she did not have a religious affiliation. Is it permissible for him to marry her?*

(e) *Muhrimah*: is a woman performing pilgrimage (*Hajj*) or (*Umra*) until she completes the ritual. Similarly, it is prohibited for a man to conclude a marriage contract during the ritual until he completes the ritual. The Prophet Muhammad (SAW) said, “A *Muhrim* must neither marry himself, nor arrange the marriage of another one, nor should he make the proposal of marriage”.<sup>107</sup> In the days of *Tashreeq*, once a person has completed the

three rituals, which include stoning *Jamrat al-Aqaba*, shaving the head, and performing *Tawaf al-Ifadhah* and *Sa'i*, they are allowed to do so. It is permissible for them to be intimate with their spouse, and they can also enter into a marriage contract. On the other hand, the Shafi'is assert that if the marriage contract is finalized during *ihram* and before leaving *ihram*, it is considered invalid. On the other hand, the Hanafis maintain that the marriage contract of a *mahram* is valid, but they specify that sexual intercourse is prohibited. According to Hanafis, if consummation does occur, given the contract's validity according to their perspective, it necessitates the sacrifice of a sheep, with its meat being distributed in the sanctuary.

### 3. Invalid marriages:

An invalid marriage, whether before or after consummation, holds no legal validity. It fails to establish any legal rights or responsibilities between the individuals involved. Specifically, the wife does not have a claim to maintenance, and inheritance rights do not apply. However, if an invalid marriage has been consummated, the woman is entitled to dower. Children born from such a union are considered illegitimate. Importantly, the parties can choose to separate without the need for a divorce and are free to enter into another marriage under the law. The following are the types of invalid marriage.

1. *Mut'ah* (temporary marriage): Sheikh Mohammad al-Hamid defines *Mut'ah* as a temporary or non-perpetual marriage in which a man contracts with a woman for a specific period. The marriage concludes without the need for divorce, and there is no obligation for maintenance. The woman must observe a waiting period of two menstrual cycles, and there is no inheritance between them if one of them dies before the marriage term concludes.<sup>108</sup> In contrast, *Mut'ah* contradicts legal marriage in several ways: (a) *Mut'ah* is temporary over a specific period of time, unlike legal marriage, which is a permanent marital bond that



Mut'ah  
Shighar  
Muhalil

can only be terminated through divorce or other legal processes. (b) In *Mut'ah*, there is no inheritance between the contracting parties, especially if one of them dies before the marriage term concludes. In contrast, in legal marriage, the wife inherits from her husband, except in cases where there are impediments to inheritance. (c) *Mut'ah* does not involve divorce for the woman who has had sexual intercourse with her partner. Instead, separation occurs upon the expiration of the agreed-upon period. In a legitimate marriage, the marital bond can only be broken through divorce or other legal means. (d) In *Mut'ah*, there is no obligation for the man to provide maintenance for the woman except for the agreed-upon amount, unlike in legal marriage, where the husband is obligated to provide maintenance for his wife, unless she becomes disobedient (*Nashiz*). (e) Unlike legal marriage, *Mut'ah* does not require the presence of a guardian (*wali*) and witnesses for its validity, whereas witnesses are typically a condition for the validity of a legal marriage. (f) A person may enjoy relationships with multiple women at one time as he wishes, according to Shi'a scholars, unlike legal marriage, in which it is generally not permissible for a free person to have more than four marriages.

The majority of Muslim jurists argue that *Mut'ah* is not acceptable, except within the Shi'a Imamate school of thought. They support their opinion with the following evidence: Allah (SWT) said, "And those who guard their private parts. Except from their wives or those their right hands possess, for indeed, they are not to be blamed" (QS 70: 29-30). Allah (SWT) has forbidden sexual intercourse except in two ways: through marriage and possession of slaves. It is important to note that the Qur'anic verse does not mention *Mut'ah* (temporary marriage). Additionally, *Mut'ah* is not considered a form of marriage because it lacks provisions for divorce, maintenance, and inheritance. The Prophet Muhammad (SAW) prohibited the contracting of temporary marriage.<sup>109</sup> Finally, there was a consensus among Muslims to prohibit *Mut'ah* because it was seen as a form of adultery. *Mut'ah* itself is merely the fulfillment of desire. God Almighty considered the practice of renting a girl to herself as a form

of prostitution and prohibited it. Allah (SWT) said, "And do not compel your slave girls to prostitution, if they desire chastity, to seek [thereby] the temporary interests of worldly life" (QS 24: 33).

Shi'a Imams have asserted that *Mut'ah* (temporary marriage) is acceptable based on the following proofs: Allah (SWT) said, "So for whatever you enjoy from them, give them their due compensation as an obligation" (QS 4: 24). The verse used the term "enjoyment," not "marriage." It prescribes the payment of wages, similar to a usufruct contract. The compensation is to be provided after the enjoyment, which distinguishes it from dower in marriage, implying a separate agreement unrelated to marriage. Finally, they cite the following Hadith: We used to participate in the holy wars carried on by the Prophet (SAW) and we had no women (wives) with us. So we said (to the Prophet (SAW)). "Shall we castrate ourselves?" But the Prophet (SAW) forbade us to do that and thenceforth he allowed us to marry a woman (temporarily) by giving her even a garment, and then he recited: "O you who believe! Do not make unlawful the good things which Allah has made lawful for you."<sup>110</sup>

The majority of Muslim jurists respond to the accusations made by the Shi'a Imams as follows: the meaning of "enjoyment" mentioned in *Suratul an-Nisaa* refers to marriage. Additionally, another synonym for "compensation" is marriage, as mentioned in the Qur'an, "O Prophet, indeed we have made lawful to you your wives to whom you have given their due compensation." Furthermore, they argue that there is no difference regarding providing payment after enjoyment, which is similar to paying dower after the marital relationship has been established. They also assert that the previous Hadith was abrogated by the following Hadiths. Salama b. al-Akwa said that in the year of Autas God's Messenger permitted a temporary marriage for three nights, but afterwards he prohibited it.<sup>111</sup> Another Hadith, "O people, I had permitted you to contract temporary marriage with women, but Allah has forbidden it (now) until the Day of Resurrection. So he who has any (woman with this type of marriage

contract) he should let her off, and do not take back anything you have given to them (as dower).”<sup>112</sup> Based on the aforementioned points, it is clear that temporary marriage is considered void because, in such a marriage, the wife is not entitled to receive dower, *Nafaqa* (maintenance), separation may occur without formal divorce, and there are no mutual rights of inheritance between the parties.

2. *Shighar* marriage (quid-pro-quo marriage) is also known as *Ziwaj al-Badal*. Islamic law prohibits such marriages because they entail unfair treatment of women, the denial of their rights, and the exploitation of guardianship positions. Ibn ‘Umar said God’s Messenger prohibited *Shighar*, which means that a man gives his daughter in marriage on condition that the other gives his daughter to him in marriage without any dower being paid by either.<sup>113</sup> It was narrated that Jaabir ibn ‘Abdullah (may Allah be pleased with him) said: The Messenger of Allah (blessings and peace of Allah be upon him) forbade *Shighaar* marriage.<sup>114</sup>

There are three forms of exchange marriage (*Shighaar*).<sup>115</sup> The first one is when two men marry each other's female relatives or women under their guardianship, without making the condition that one marriage depends on the other. In this case, they each give a specified dowry. This type of marriage is not considered *shighaar* marriage and is considered acceptable. The second form of marriage involves a contract where both parties agree to marry the ward of the other, without specifying a dower (*mahr*), and they exchange intimacy with one of the women for intimacy with the other. This falls under the category of *shighaar* marriage, which is prohibited according to the Prophetic *Sunnah* and the consensus of scholars. (c) The third form is when a man gives his daughter, sister, or a woman under his guardianship in marriage to another man, on the condition that the other man gives his own daughter or ward in marriage in return, with dowries for each of them, whether the dowries are the same or different. There is a difference of opinion among scholars regarding this type of marriage. Some scholars consider it to be a *shighaar* marriage

and therefore prohibited, arguing that the stipulation of this condition alone makes it *shighaar*. This view is held by the *Zaahiris* and was also favored by certain Shafi'i and Hanbali scholars. According to Imam ash-Shafi'i (may Allah have mercy on him), if a man marries off his daughter or a woman under his guardianship to another man, with the condition that the other man also marries his own daughter or a woman under his guardianship in return, specifying certain dowries for each, whether the dowries are less or the more, this does not fall under the prohibited category of *shighaar* marriage.<sup>116</sup>

3. *Muhalil* marriage: Marrying a woman who has been divorced three times, with the condition that the new husband will divorce her after the marriage has been consummated, with the intention of making her lawful to remarry her former husband, is invalid if the second husband's intention is solely to facilitate her remarriage to her former husband or if they had previously agreed on this arrangement.<sup>117</sup> Narrated Ibn Mas'ud (RA): Allah's Messenger (SAW) cursed the man who made a woman lawful for her first husband and the one for whom she was made lawful (the men involved in *Halalah*).<sup>118</sup> The Prophet Muhammad called the perpetrator to billy goat (*Tais Mustaar*). 'Uqbah bin 'Amir narrated:

The Messenger of Allah said: 'Shall I not tell you of a borrowed billy goat.' They said: 'Yes, O Messenger of Allah!' He said: 'He is *Muhalil*. May Allah curse the *Muhalil* and the *Muhalil lahu*.'<sup>119</sup> Muslim jurists held different opinions regarding this type of marriage, with two main viewpoints: (a) The Hanafis and Shafi'is maintained that the marriage is considered valid even if the specific condition is not included in the contract, although it is discouraged according to the Shafi'i school. In this view, the woman becomes permissible for the first husband to have intercourse with. This is because, in matters of transactions, intention is generally not taken into account. The marriage is valid because the necessary conditions for validity in the contract have been met, and it is permissible for the first husband to remarry the woman, as if they had intended to reconcile their

relationship.<sup>120</sup> (b) The Malikis, Hanbalis, and Dāwūd al-Zāhirīs held that a marriage intended to be permissible, even without a condition in the contract, is invalid if the two contracting parties colluded on something mentioned before the contract, and then they entered into the marriage with that intention. According to this view, a woman is not permissible for her first husband in accordance with the principle of blocking pretexts and in alignment with the words of the Messenger (SAW) who cursed the man who made a woman lawful for her first husband and the one for whom she was made lawful (the men involved in *Halalah*).<sup>121</sup>

#### Activity 4.

Discuss with your lecturer the meanings and legal status (whether they are recognized or not) of 'Zawaj al-Misyar', 'Zawaj al-Urfi', 'Zawaj al-Madani', 'Zawaj al-Misyaaq', and 'Zawaj al-Miqradh'.

### SUMMARY

Muslim jurist classify prohibited marriages into two groups as follows: (i) Permanently prohibited marriages, which forbid someone from marrying specific individuals due to blood relationships such as sonship, motherhood, and brotherhood, are categorized into three groups: lineage (NAsab), affinity (Muswahara), or breastfeeding (Radha). (ii) The prohibition on temporary marriages arises from situations that make the marriage invalid only for as long as the underlying reason for the prohibition exists. Once this reason is resolved, the incapacity ends, and the marriage becomes valid. The following are the cases of temporary prohibited marriage: unlawful conjunction, marriage of a fifth wife, the threefold divorce, disbelieving women, and Muhrimah. Apart from the above-mentioned, there are invalid marriages which consist of Mut'ah (temporary marriage). Shighar marriage (quid-pro-quo marriage),

Muhalil marriage, among others.

## QUESTIONS

**One:** please provide answers to the following questions.

1. Discuss the duration and frequency of breastfeeding, which can lead to restrictions on marriage between a breastfeeding woman and someone who has breastfed.
2. Clarify the similarities between the prohibition of lineage (*Nasab*) and breastfeeding (*Radhā'*).
3. Illustrate the reasons and conditions for polygamy in Islam.
4. Write a short note on the prohibition of *Mut'ah* (Temporary marriage).
5. Elaborate on the opinions of Muslim jurists regarding the permissibility of marrying one's child born out of wedlock.

**Two:** Fill the gaps in the following.

6. There are two types of prohibitions in marriage. The first type, which involves the prohibition of ....., has multiple reasons for its restrictions. It is prohibited due to various factors, including (a)....., (b) ....., and .....
7. The duration of forbidden breastfeeding is.....
8. The prohibition based on *Muswahara* (affinity) was enforced as follows.....
9. Breastfeeding makes what is forbidden through.....

10. The Prophet Muhammad (SAW) said to a man from Thaqif who had ten wives when he became Muslim, 'Take four.....

**Three:** Please indicate whether the following sentences are correct (✓) or incorrect (×).

11. It is forbidden for a Muslim to marry a polytheist. (.....)

12. Among the conditions of polygamy are justice or fairness, the ability to finance, and equality in love. (.....)

13. *Shighar* is the practice of exchanging brides between two families without a dowry. (.....)

14. *Muhalil* is not commonly known as *Tais Mustaar*. (.....)

15. The Hanafis say that whoever commits adultery with a woman is prohibited from marrying her daughter. (.....)

**Four:** Read the following cases and analyse based on Shari'ah point of view.

16. A civil case has come before the Mandera court. Ahmed and Fatima got married and had a daughter. Four years later, Safiya arrived from Somalia to visit her full brother, Ahmed, and subsequently informed Fatima that she had breastfed Ahmed during his childhood. How should this situation be judged?

### **Text Books/Articles for Further Reading**

1. Khan, S. *Why Two Women Witnesses?* (London: Ta-Ha1993)
2. MA Ambali, *The Practice of Muslim Family Law in Nigeria* (3<sup>rd</sup> edn, Princeton & Associates Publishing Co Ltd 2014) 215; M. A. Ambali, *The Practice of Muslim Family Law in Nigeria* (2nd edn, Tamaza Publishing Company Limited 2003)
3. Masud A. Taiwo, *Marriage under the Shariah and Yoruba Custom* (private publication, Abeokuta, Nigeria, 2001) p9; A Rhman I Doi, *The Cardinal Principles of Islam* (Islamic Publications Bureau, 1972)
4. Abdulrahman, M. M., & ElSayfi, H. elDin. (2018). Rules of Cohabitation in Islamic Jurisprudence a Comparative Study with Digo Customs in The Republic of Kenya: *International Journal of Fiqh and Usul Al-Fiqh Studies*, 2(Sp1), 55–68.
5. Luqman Zakariya & Manswab Mahsen Abdulrahama. (2018) Marriage Customs among Duruma Muslims in Kenya: An Evaluation study in light of the Quran and Sunnah. *Al-Risalah: Journal of Islamic Revealed Knowledge and Human Sciences (ARJIHS)*, 2(4), 147–170.

## CHAPTER FOUR



### GENERAL RULES OF MARRIAGE

#### Introduction of the Chapter:

In Islam, marriage is a matrimonial relationship and an institution that legitimizes the sexual union between a man and a woman with the purpose of having children, fostering love, providing mutual support, and establishing families, which are regarded as a fundamental building block of society. When a marriage lacks certain formalities or is hindered by correctable impediments, it is considered irregular, but this irregularity is not permanent and can be resolved. Therefore, the marriage itself is not unlawful and can be validated once the prohibitions are addressed. Marriages under such circumstances, or those that involve prohibitions, are referred to as '*Fasid*' marriages. In this unit, you will explore topics like the role of the Guardian (*Walī*), the significance of Witnesses (*Al-Shahid*), and the competence of the parties (*Kufū*). Finally, I have included a variety of activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions at the end of the unit to help reinforce and assess your understanding of the material.



#### Objective of the Chapter:

After reading this chapter the student should be able to:

- i. Clarify general rules associated with guardian, witness and competence of spouse

- ii. Elucidate consequences of existence of guardian, witness and compatibility of spouse.
- iii. Solve cases related to guardian, witness and compatibility of spouse.

### **1. Guardianship in Marriage (*Wilaya*)**

In Arabic, the term "*Wilaya*" carries the profound connotations of love and protection, as elucidated in the Qur'an. Allah (SWT) emphasizes this concept, stating, "And whosoever takes Allah, His Messenger, and those who have believed, as Protectors, then the party of Allah will be the victorious" (QS 5: 56). Muslim jurists did not offer a precise definition of guardianship in marriage. Instead, they relied on specific terms and expressions to convey the idea of guardianship in marriage, which can be summarized as follows: assuming responsibility and providing care for individuals who are unable to care for themselves, including minors, the mentally ill, those with intellectual disabilities, individuals lacking capacity, and adult virgin women.<sup>122</sup> This concept is recognized in the following verse where Allah (SWT) said, "If the person incurring the debt is ignorant, incompetent due to young age or insanity or unable to dictate for himself for any reason, then his guardian should dictate for him faithfully and honestly" (QS 2: 282). Guardianship is the lawful entitlement to supervise the movements and acts of a person who is unable to care for himself and handle his own affairs due to mental flaws, such as an infant, an imbecile, or a lunatic. The welfare of the child plays the most important role in the appointment of the guardian.

Guardianship is a crucial requirement for the validity of marriage. A marriage cannot take place without the presence of a guardian. This stipulation exists because, regardless of a woman's level of maturity, she is not authorized to enter into marriage independently. The marriage contract must involve two male parties: one being the husband and the other acting as the wife's guardian. Allah (SWT) said, "When you divorce women and they have completed their waiting term do not hinder them

from marrying other men if they have agreed to this in a fair manner” (QS 2: 232). Imam Rashid stated that restricting women's marriage was a prevalent practice in the pre-Islamic era. During that time, men held authority over the marriage of women, and no one could marry a woman without her guardian's consent. This system allowed a guardian to marry a woman to someone she might not like and prevent her from marrying someone she genuinely loved, solely based on his desires.<sup>123</sup> The Messenger of Allah (SAW) said: “The marriage of a woman who marries without the consent of her guardians is void. (He said these words) three times.”<sup>124</sup> Guardianship was legislated in the context of marriage contracts due to the belief that men, being more experienced with the circumstances of men, were considered better suited to handle the intricacies of such contracts compared to women. This belief stemmed from the notion that men, through their frequent interactions and involvement in various aspects of life, had a better grasp of these matters. On the other hand, women were often perceived as less experienced and potentially more susceptible to influence and deception. As a result, the practice of having a guardian oversee a woman's marriage contract was established with the intention of safeguarding her interests.<sup>125</sup>

### Activity 1.

What is the Islamic ruling on the situation where some girls, if their father rejects a suitor they love, go to the Islamic center and claim the guardianship of their guardian for themselves in order to transfer it to someone else or to marry the director of the Qadi's court if they do not have another guardian? This can sometimes lead to conflicts between guardians, the husband, and the girl. What is the religious perspective on this matter?

## 2. Types of guardian:

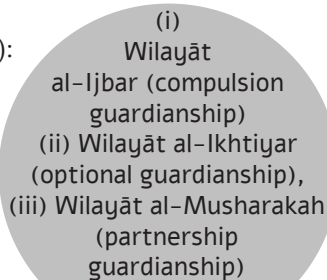
The Muslim jurists classified *Wilayā* related to marriage into three categories:

(i) *Wilayāt al-Ijbar* (compulsion guardianship):

This is the authority given to a legal guardian over the marriage of a woman without her consent.<sup>126</sup>

In this type of guardianship, authority is allocated solely to the guardian without any reference to the marriage of a woman. That is why some jurists referred to it as "*Wilayāt al-Istibdad*,"

which translates to the state of tyranny. Muslim jurists have varying opinions regarding who is subject to compulsory guardianship. It is confirmed by some Maliki jurists, as well as Shafi'i jurists. In a narration from the Hanbali School, it applies to minor, insane, and older virgin women.<sup>127</sup> The other group like Hanafi, and Hanbali jurists, in their alternate narration, along with the Zaidiyyah and the Dāwūd al-Zāhirī, asserted that compulsory guardianship applied to minors and the insane. Regarding sane adults, the concept of "*Wilayāt al-Ijbar*" is not applied to a virgin woman or a married woman.<sup>128</sup> The reason why jurists differed in this matter is their divergence in the foundation upon which compulsion is based. The Malikis, Shafi'is, and Hanbalis hold the view that the guardianship lies in the virginity of females, childhood in males, and insanity in both genders.<sup>129</sup> When this foundation is met in the person under the guardian's authority, the guardian's right to impose a marriage is confirmed. Thus, the guardian has the authority to marry off both insane individuals, whether they are young or old, and virgins, regardless of their age, without relying on their consent or choice. This group of jurists believes that virginity is the pivotal factor for guardianship, persisting whether the person is past puberty or not. If virginity is lost before puberty, guardianship ceases. If a virgin marries before puberty,

- 
- (i) Wilayāt al-Ijbar (compulsion guardianship)
  - (ii) Wilayāt al-Ikhtiyar (optional guardianship),
  - (iii) Wilayāt al-Musharakah (partnership guardianship)

and consummates the marriage, her second marriage is not valid until she reaches puberty and participates in the selection of her husband alongside her guardian, as guardianship over her becomes optional.<sup>130</sup>

The Hanafis and others maintain that the rationale for compulsion lies in childhood and is unrelated to virginity. They argue that guardianship is not established over a pubescent virgin due to the absence of her age, which forms the basis for establishing guardianship.<sup>131</sup> They support their opinion with the following evidence: Allah (SWT) said, “And those who no longer expect menstruation among your women – if you doubt, then their period is three months” (QS 65: 4). The above verse indicates that the waiting period for a minor is three months, which is a clear indication that it is allowed for a minor to enter into marriage without the guardian's permission. Furthermore, they asserted the permissibility of marrying a young woman based on their narrations, citing the example of the Messenger (SAW) who married *A'isha* (RA) at the age of six, and consummated the marriage when she reached the age of nine.

(ii) *Wilayāt al-Ikhtiyar* (optional guardianship): This is a form of guardianship in which a mentally sound adult woman has the autonomy and right to marry without being dependent on the opinions and approval of a guardian. She has the freedom to choose her spouse according to her own preferences.<sup>132</sup> However, it is considered commendable for a woman to entrust the responsibility of arranging her marriage to her guardian. This practice aligns with the principles of Shari'ah law and serves to fulfill the objectives of marriage in the most comprehensive way.<sup>133</sup> Therefore, this form of guardianship applies to mentally sound adult women, with the specific details and criteria being subject to variation among jurists.

Al-Shafi'i held the view that guardianship for a married woman is optional. However, when it comes to a virgin woman, guardianship over her is considered obligatory.<sup>134</sup> This viewpoint is also supported by the Hanbali school of thought and is shared by some of the Imamis and Malikis. They support their opinion based on the following Hadith, “A woman who has

been previously married (*Thayyib*) has more right to her person than her guardian; and a virgin's father must ask her consent from her, her consent being her silence, At times he said: Her silence is her affirmation."<sup>135</sup>

(iii) *Wilayāt al-Musharaka* (partnership guardianship): refers to a form of guardianship in which both the legal guardian and the adult woman collaborate and make decisions concerning marriage. In this arrangement, the opinions and preferences of both parties are considered and taken into account.<sup>136</sup> The guardian does not possess the authority to marry the woman under his guardianship without her consent. Simultaneously, the woman herself does not have the right to marry without the consent of her guardian. This type of guardianship entails that the guardian has both the responsibility and the prerogative in matters of marriage. This approach is supported by the followers of Abu Hanifa, specifically Muhammad ibn al-Hasan in a well-known narration attributed to him, and Abu Yusuf in another narration attributed to him. Additionally, the Shafi'i school of thought has also embraced this perspective on guardianship. However, there is a divergence of opinion between the schools of thought when it comes to the woman's role in initiating the marriage contract. Al-Shafi'i asserts that it is the guardian's responsibility to undertake the marriage contract, and the woman in question does not have the authority to initiate it. According to Al-Shafi'i, the marriage contract is not valid if initiated solely by the woman.<sup>137</sup> On the other hand, Hanafi scholars argue that it is permissible for a woman to execute the marriage contract herself after obtaining her guardian's approval. However, it is preferable, according to this school of thought, for her to delegate this responsibility to her guardian, as it serves to safeguard her interests and prevent potential excesses.<sup>138</sup>

3. Conditions for a Legal Guardian: Muslim jurists' certain conditions must be met by a guardian to be eligible to carry out matters of guardianship. However, scholars have reached a consensus on some of these conditions while disagreeing on others. We will outline these conditions, highlighting the areas of agreement and disagreement in their respective contexts:

(i) Puberty: The primary objective of a guardian's existence is to protect the interests of women and safeguard their moral integrity. This condition is unanimously agreed upon by Hanafi and Maliki jurists, as well as Shafi'i, Hanbali, Zaidi, and Dāwūd al-Zāhiri jurists.<sup>139</sup> The jurists elucidate this requirement because guardianship entails a perfect understanding, judgment, and the careful consideration of the guardian's interests, which a minor lacks. An individual who is a minor incapable cannot assume guardianship over themselves or others due to their lack of experience related to marital relationship.<sup>140</sup> This is in accordance with the following Hadith, "The Pen has been lifted from three: from the child until he reaches puberty, from the sleeper until he wakes up and from the insane until he regains his sanity."<sup>141</sup>

(ii) Mind: It is not sufficient for the guardian to be an adult; in addition to that, he must be of sound mind. This requirement arises from the fact that guardianship is predicated on the guardian's capability to care for themselves and manage their own affairs, and an individual who is mentally impaired lacks the capacity to do so. The same principle applies to others. The Hanafi, Maliki, and Shafi'i jurists unanimously concur on this condition.<sup>142</sup> Likewise, he is included in the case of the insane, those with intellectual disabilities, and prodigality in terms of the ruling if his mind is impaired due to illness or old age, as he is unable to comprehend the whereabouts of the fortune, and thus, he has no capacity for guardianship.

(iii) Freedom: Muslim jurists stipulate that anyone assuming guardianship responsibilities must be free.<sup>143</sup> A slave (*abdi*) is deemed unsuitable for this role because a slave is preoccupied with serving their master and meeting their demands, leaving insufficient time to oversee the affairs of others. Nevertheless, it is worth noting that we should not overly emphasize this condition, as the institution of slavery is expected to fade away.<sup>144</sup> However, certain scholars allow a slave to serve as a guardian for his daughter.<sup>145</sup>

(iv) Islam: The guardian must be a Muslim, meaning they must share the same religion as the person under their guardianship. If the guardian is a Muslim, then the person under their guardianship must also be a Muslim because a non-Muslim cannot have guardianship over a Muslim. Allah (SWT) says, 'And He will not give the disbelievers any means to overcome the believers' (QS 4: 141). Therefore, the reason for stipulating this condition is that God Almighty has severed allegiance between believers and unbelievers, as stated in His Almighty saying: 'Let not the believers take disbelievers as friends or helpers instead of believers.' Finally, guardianship is based on inheritance, and there is no inheritance between individuals of different religions.<sup>146</sup> Additionally, the guardianship of an infidel over a Muslim is humiliating for the latter, and there is a fear that the infidel guardian may try to convert the person under their care from the religion of Islam to another.<sup>147</sup> Therefore, Islamic jurists unanimously agree on the necessity of this condition.

(iv) Justice (*adala*): has been defined as the avoidance of major sins, refraining from insisting on minor ones, and maintaining a commitment to piety and chivalry. It encompasses the uprightness of one's religious beliefs, the integrity of character, and the diligent performance of religious duties. Muslim jurists held differing opinions regarding the necessity of a guardian, with two distinct viewpoints. The first perspective asserts that justice is a prerequisite for establishing guardianship, a position endorsed by the *Shafi'is*. Additionally, the Hanbali School adopted this stance in one of their two narrations, as did the Dāwūd al-Zāhiriyya.<sup>148</sup> They substantiate their viewpoint with the following evidence. "There is no marriage except with a guardian and two just witnesses".<sup>149</sup> The second opinion argues that justice is not a prerequisite for guardianship. According to this perspective, guardianship is primarily rooted in kinship, compassion, and the responsibility of caring for one's interests, even when individuals may still be in a state of immorality. Proponents of this viewpoint support their argument by referencing what is mentioned in the Holy Qur'an, as stated by Allah (SWT), "Marry those among you

who are single” (QS 24: 32). There is nothing in the verse that indicates a requirement for the guardian to possess justice, as God Almighty addressed the saints without distinguishing between a just guardian and an immoral one.<sup>150</sup>

(v) Male: Muslim jurists held differing opinions regarding this condition. Some of them argued that being male is a prerequisite for guardianship. Their reasoning lies in the belief that guardianship necessitates perfection, and they consider women as minors, thus asserting that guardianship is established over them due to their perceived inability to make decisions for themselves. Consequently, according to this viewpoint, women cannot be valid guardians for others as a matter of priority. This perspective was adopted by Maliki jurists, Shafi'i jurists, Hanbali jurists, Zaidi jurists, and Dāwūd al-Zāhirī jurists. They all share the view that a woman's guardianship is not valid due to her gender.<sup>151</sup> In contrast, Hanafi jurists do not consider maleness as a requirement for guardianship. Their stance is based on the teachings of Imam Abu Hanifa, who argued that guardianship extends to both male and female relatives after agnates, regardless of their gender.<sup>152</sup>

#### 4. The arrangement of a woman's guardian:

Muslim jurists differed regarding the arrangement of a woman's guardian. Some of them believe that the reason for guardianship is kinship and the strength of compassion, while others believe that the reason for the guardianship is fanaticism. The following is a statement of the ranking of the saints in each of the following schools of jurisprudence:<sup>153</sup>

No	Hanafi	Malik	Shafi	Hanbali
1	Son and how lower so ever	Son and how lower so ever	Father and how higher so ever	Father
2	Father and how higher so ever	Father	full brother and paternal brother and their children and how lower so ever	Grandfather and how higher so ever
3	full brother and paternal brother and their children and how lower so ever	Grandfather	full uncle and paternal uncle and their children and how lower so ever	Son and how lower so ever
4	full uncle and paternal uncle and their children and how lower so ever	The father's uncle, then his son.	Agnatic heirs	full brother
5	Mutik (A person who emancipated a slave).	Paternal grandfather and paternal uncle.	Mutik (A person who emancipated a slave).	paternal brother
6	Agnatic heirs	Mutik (A person who emancipated a slave).	Ruler (Chief Qadi or Qadis)	Brothers' children

7	Ruler (Chief Qadi or Qadis)	foster parent		Uncles and their children and how lower so ever. Then paternal uncle
8		Ruler (Chief Qadi or Qadis)		Mutik (A person who emancipated a slave).
9				Ruler (Chief Qadi or Qadis)

If a guardian of a higher rank gets married in the presence of someone who is closer to them, the contract is subject to the approval of the closer relative, unless this closer relative is young or mentally incapacitated, in which case the marriage contract of the more distant guardian is executed. If all the above mentioned are not present then the ruler will be responsible. The Prophet Muhammad (SAW) said, "The ruler is the guardian of the one who does not have a guardian."<sup>154</sup>

## Activity 2.

*In the case of a Christian woman who gave birth to a child with a Muslim man illegally, and the child subsequently converted to Islam and wishes to marry, who holds the rightful guardianship according to the four major schools of Islamic thought?*

## 2. Witness (*Shahada*):

1. The *Shahada* is an Arabic word that means "testimony."<sup>155</sup> It is used in the Qur'an, where Allah (SWT) says, "So whoever sights [the new moon of] the month, let him fast it" (QS 2: 185). In the Hanafi school of thought, the word *Shahada* is defined as a testimony, which involves giving information by pronouncing the word *al-shahada* in front of a judge and in the presence of parties to establish someone's right.<sup>156</sup> The *Shahada* (testimony) is considered one of the valid conditions in marriage, according to the majority of Muslim jurists. This is because of the unique characteristics of this contract, the potential social implications it carries, the financial commitments involved, the necessity of establishing the child's lineage, and the utility of the testimony in substantiating the contract if either party disputes it. Due to these reasons and more, the certificate of marriage was introduced to underscore the significance of this marital contract. Its purpose is to dispel any uncertainties or doubts and to prevent suspicions and misconceptions. This measure was implemented to address concerns raised regarding interactions between a man and a woman without a valid contract.

The Messenger (SAW) urged the necessity of bearing witness to it, in the following Hadiths: "There is no marriage without a guardian and two witnesses."<sup>157</sup> Ibn 'Abbas reported the Prophet as saying, 'Adulteresses are those women who marry themselves without evidence.'<sup>158</sup> The Prophet Muhammad (SAW) said, "There must be four things in marriage: A husband, a guardian, and two witnesses"<sup>159</sup> For this reason, the marriage contract differs from other contracts due to the requirement of testimony, which underscores its significance, absence of repudiation and ingratitude, and its function as a means of establishing proof and evidence in legal proceedings. A marriage not solemnized in the presence of at least two witnesses is considered invalid.

**2. Condition of witness:** Muslim jurists unanimously agree on the importance of announcing and making a marriage public.<sup>160</sup> This serves

the purpose of clarifying the marital status to the community, thereby preventing accusations and mistrust between spouses. The act of publicizing aims to differentiate between what is permissible and what is forbidden. Advertising the marriage is considered permissible, while concealing it is not. However, there is a difference of opinion among Muslim jurists regarding the necessity of testimony, with some allowing it and others not, as follows:

(a) A group of jurists, including prominent figures like Imam Abu Hanifa,<sup>161</sup> Imam Al-Shafi'i,<sup>162</sup> and the well-known opinion of Imam Ahmad,<sup>163</sup> hold the belief that it is a requirement for the validity of the marriage contract. This view is also supported by several *al-Tāb'īn*, including Saeed bin Al-Musayyab and others. They base their stance on the following evidence: "There is no marriage without a guardian and two witnesses"<sup>164</sup>. The preceding Hadiths unmistakably emphasize the requirement for two witnesses in a marriage contract, and the validity of the marriage contract hinges upon this condition.

(b) There is a group of scholars who do not consider it a prerequisite for the validity of the marriage contract. Imam Malik is one of the prominent figures in this group,<sup>165</sup> and among the followers are individuals like Yazid bin Harun, Abu al-Thawr, and others. This viewpoint is also favored by Sheikh al-Islam Ibn Taymiyyah.<sup>166</sup> They base their stance on the following evidence: "then marry those that please you of [other] women" (QS 4: 3). The noble verse does not specifically stipulate that the validity of the marriage is contingent on the presence of two witnesses.

The following condition pertains to witnesses:

(i) They must be accountable, i.e. adult and sound mind. Whoever lacks reason is akin to an insane person, rendering their statements worthless and futile. Consequently, they do not possess guardianship over others because giving testimony is a matter of responsibility. Allah (SWT) says, "And bring to witness two witnesses from among your men" (QS 2:

282), and in another verse, “And do not conceal testimony, for whoever conceals it – his heart is indeed sinful” (QS 2: 283). Allah has conveyed to us that the one who conceals testimony is a sinner, and typically, the testimony of a minor is concealed, indicating that the testimony of a minor will not be accepted.

### Activity 3

Why is the marriage of al-Mumayyaz accepted while his testimony is rejected?

(ii) The requirement for the number must be met. This is because the intention is to ensure the public acknowledgment and dissemination of the news of the marriage. The limited number of individuals capable of fulfilling this role can either be two men or a man and a woman, in line with the principles of transaction contracts according to the Hanafi and Maliki schools.<sup>167</sup> This differs from the views of the Shafi'is and Hanbalis. Allah (SWT) says, “And bring to witness two witnesses from among your men” (QS 2: 282). In this regard, Ibn Hanbal said Marriage cannot be concluded with the testimony of one man and two women.<sup>168</sup> Shafi'is hold the view that a woman's testimony is not accepted in matters of marriage, similar to its non-acceptance in cases of *huddud* (fixed punishment) and *Qisas* (retaliation).<sup>169</sup>

(iii) Islam: it is a requirement that the witness be a Muslim when it comes to matters of testimony. If both spouses are Muslims, it is not permissible for a non-Muslim to testify against a Muslim woman. However, if the husband is a Muslim, and the wife belongs to the People of the Book, there are differing opinions among jurists regarding this situation:

(a) The majority of jurists insist that the witness must be a Muslim, even if the husband is a Muslim and the wife is from the People of the Book.

They base this on the following Hadith, "There is no marriage except with a guardian and two witnesses of justice. If they quarrel, then the ruler is the guardian of the one who has no guardian."<sup>170</sup> The apparent meaning of this hadith is that non-Muslims do not possess the quality of justice required for testimony. Additionally, Muslim marriages cannot be solemnized with the testimony of non-Muslims.

(b) Some jurists permit the possibility of a non-Muslim, such as a Jew or a Christian, to act as a witness, especially if the wife is one of the People of the Book. This viewpoint is held by Imam Abu Hanifa and Abu Yusuf.<sup>171</sup> They argue that the wisdom behind requiring testimony is to establish the husband's ownership, particularly since the marriage contract involves a significant commitment and is seen as a contract with potential complications. Therefore, it is essential for this contract to take place in the presence of credible witnesses to ensure its validity. The validity of the marriage contract hinges on an exchange between the spouses: the first party offering the dowry, and the second party offering their consent. Thus, the apparent purpose of requiring witnesses is to demonstrate the husband's ownership of his wife. In light of this perspective, it is permissible for a non-Muslim to serve as a witness in cases involving non-Muslims, even if they later convert to Islam after the marriage has taken place.<sup>172</sup>

(iv) Hearing the wording of the contract: In order for the testimony to be valid, it is necessary that both witnesses hear the words exchanged between the contracting parties during the contract session. However, if the contract is conducted through written correspondence, the testimony will be deemed valid if both witnesses have heard the contents of the letter containing the initial offer and subsequently the acceptance from the other party, all within a single session.<sup>173</sup> The witness must hear the offers and acceptances made by both contracting parties to testify effectively. Furthermore, if you seek their testimony, their presence at the contract council becomes meaningless because the essential purpose of providing

testimony is not fulfilled. This is particularly crucial as a marriage contract is a legally significant agreement.<sup>174</sup>

The jurists have differing opinions regarding the testimony of a mute person, with two distinct viewpoints.<sup>175</sup> The majority opinion holds that the testimony of a mute person is insufficient to validate a marriage contract because it lacks clear and articulate speech, which a mute person is incapable of providing. If asked to testify, they would be unable to do so effectively. On the other hand, the Shafi'is maintain that if the testimony of a mute person can be understood and serves the purpose of conveying the necessary information, it can replace verbal speech in terms of comprehension.<sup>176</sup>

Muslim jurists had differing opinions on the validity of a marriage contract when a blind person served as a witness. These differing views can be categorized into two schools of thought. The first school of thought, represented by Imam Ahmad, Shafi'i and Ibn Hazm al-Zāhirī asserted that the marriage contract remains valid even with the testimony of a blind person.<sup>177</sup> The proponents of the first school of thought supported their argument with the following reasoning: (a) Testimony is essentially a statement made by both parties involved in the contract. Sighted individuals can hear the words spoken during the contract, and likewise, blind individuals can also hear these words. Therefore, the testimony of a blind person should be regarded as valid, just as it is for sighted individuals. (b) The validity of testimony hinges on the certainty of the voice and the absence of doubt. If a blind person is certain about the voice and has no doubts, their testimony should be accepted.<sup>178</sup> (c) Testimony serves as a statement of fact and is valid in transactions. Therefore, if a blind person fulfills the necessary conditions of justice, there is no reason to reject their testimony.<sup>179</sup>

The second group, represented by Hanafi and some Shafi'i scholars, contended that the testimony of a blind person should not be considered valid for several reasons.<sup>180</sup> One of their primary arguments was the

presence of suspicion, which arises from the difficulty in distinguishing between voices. As long as this suspicion exists, they believed that the testimonies, including that of a blind person, should not be deemed valid. Furthermore, they drew a comparison between blind individuals and deaf individuals. Just as the testimony of a deaf person is not accepted due to the common factor of being unable to verify the contracting parties, they extended this reasoning to the blind person as well. This commonality, the inability to verify the parties involved, led them to question the validity of the testimony of both blind and deaf individuals.<sup>181</sup>

### **3. Competence of the parties (*Kufu*):**

1. Competence refers to the equality of individuals in certain aspects between a man and a woman. Breaching this equality is considered detrimental to the harmonious marital life between spouses. Marriage was originally established to promote mutual interests and the foundations of peace and happiness between them. These goals can only be achieved through competence, and without it, the marital home can descend into misery and disorder. There is no doubt that considering competence is crucial, as disparities between spouses in certain social matters can lead to family unhappiness and harm to the wife's guardians. They may criticize a husband who is not competent for their daughter, and these matters should be taken into account. *Kafā* is an Arabic word that signifies equality between two things.<sup>182</sup> Zakidin defines competence as the equality between two spouses in specific matters, and breaching this equality can result in misery and disorder.<sup>183</sup>

2. The ruling on competence in marriage: Muslim jurists have differed on the competence of spouses, dividing into two groups as follows: (a) Abubakar al-Kurakhī, Al-Asami, and some jurists have stated that the compatibility of spouses is not a condition of marriage because it is not explicitly mentioned in the Qur'an and Hadith. They argue that all people are equal, with no superiority for an Arab over a non-Arab except through piety. Furthermore, they contend that anyone who advocates for

competence in marriage contradicts Islamic law.<sup>184</sup> They substantiate their viewpoint with the following evidence: the Prophet Muhammad (SAW) commanded the tribe of Bayadh to marry Abu Swafd. Additionally, when Bilal proposed but was initially refused by Qureish (Sister of Abdulrahman bin 'Auf), the Prophet advised them to accept the proposal. If compatibility is acknowledged, he would not instruct them to proceed with the engagement. (b) The majority of Muslim scholars, including Hanafi, have stipulated the importance of compatibility in marriage. They substantiate their viewpoint with the following Hadith: It was narrated from 'A'ishah that the Messenger of Allah said, "Choose the best for your offspring, and marry women who are compatible, and propose marriage to them."<sup>185</sup>

3. Qualities of Competence of the parties: Muslim jurists stated that competence applies to matters of lineage, religiosity, wealth, profession, freedom, and safety from defects.

(a) Lineage (*Nasab*) refers to a person's relationship with their parents and grandparents. Hanafi jurists emphasize the competence of lineage (*Nasab*), especially if two spouses are Arab. They reason that Arabs are the ones who protect their lineage, take pride in it, and even fight to preserve it.<sup>186</sup> They support their opinion with the following evidence. Narrated Wathilah bin Al-Asqa': that the Messenger of Allah (SAW) said: "Indeed Allah has chosen Isma'il from the children of Ibrahim, and He chose Banu Kinanah from the children of Isma'il, and He chose the Quraish from Banu Kinanah, and He chose Banu Hashim from Quraish, and He chose me from Banu Hashim."<sup>187</sup> In another Hadith, Allah's Messenger (SAW) said: "The Arabs are equal to one another and the *Mawali* (Non-Arabs, and originally former slaves) are equal to one another, except a weaver or a cupper."<sup>188</sup> Malik, the jurist, does not acknowledge lineage, as this is rooted in ignorant fanaticism, which was prohibited by Prophet Muhammad (SAW). In contrast, Shafi'i Jurist emphasized lineage, similar to Abu Hanifa, who, despite not being Arab himself, encouraged its significance.<sup>189</sup>

This does not imply despising individuals with less noble lineage. A person from a distinguished lineage may not hold much value in the sight of God, while someone regarded as having lower lineage by people might be someone who would fulfill an oath to God if sworn. Furthermore, anyone with even a tiny speck of arrogance in their heart will be denied entry into Paradise. After mentioning the above, we state: If a Muslim enters into a valid marriage contract following the principles of the guardian's proposal, the wife's acceptance, and the presence of witnesses, it is not permissible to compel them to divorce on the grounds of differing lineages, as we believe is the most probable scenario. However, if the ruling in the Shari'ah courts contradicts the *fatwa* we have issued, then it becomes obligatory. Muslims in that country are bound by the jurisdiction of the Shari'ah courts in their nation.

**(b)** Religiosity, which means piety and righteousness, is a concept that the majority of jurists have discussed. They assert that an immoral person is not deserving of a righteous and chaste woman. The basis for this consideration is rooted in the words of God Almighty: "Is then he who is a believer like him who is *Fasiq* (disbeliever and disobedient to Allah)? Not equal are they." (QS 32: 18). This perspective arises from the fact that the testimony of an immoral person is often rejected, and such individuals may face insecurity regarding their life and possessions, as well as a deprivation of guardianship. Therefore, it is not permissible for an immoral person to be a suitable match for a chaste woman; instead, they should seek companionship with someone of similar character. Moreover, in Islam, a person who has only one father is not considered equivalent to someone who has multiple fathers, as per the Shafi'i school of thought. According to Muhammad ibn al-Hasan, the assessment of competence in piety and righteousness should only be applied when the sinner behaves recklessly, mocks religion, or openly engages in improper conduct such as being intoxicated in public places. In the absence of such behavior, a marriage contract is permissible and necessary because matters of piety are not the sole basis for worldly judgments and rulings.<sup>190</sup>

(c) Freedom: It was highly esteemed by the Hanafis, Shafi'is, and Hanbalis. A slave is not equivalent to a free woman because the Prophet gave Barira a choice when she was liberated from slavery: she could either stay with her former owner or choose to separate from him.<sup>191</sup> The Hanafi and Shafi'i jurists considered the freedom of fathers. Someone whose father is a slave is not on the same footing as someone whose father is free, and someone who has two free fathers is considered equal to one whose fathers are both free. The reason for giving importance to competence in freedom is that slavery is often seen as more demeaning than one's lineage. Free individuals may face criticism for marrying slaves or those who have been emancipated, just as freed people may be criticized for marrying individuals with lower social status or lineage.<sup>192</sup>

(d) Wealth: The meaning of wealth in this context is the ability to provide a dower and support one's wife, not merely having wealth and affluence. Anyone who lacks this ability is not considered competent. According to the Hanafi school of thought, a man should be capable of providing maintenance for six months, and there is another opinion suggesting an additional month.<sup>193</sup> What is considered correct by this school of thought is that if he can sustain himself through earning income, he would be deemed competent. Competence in wealth was emphasized because people often take more pride in their wealth than their lineage or religiosity. The Hadith underscores the importance of wealth as a necessary condition in matrimonial relationships. Fatimah bint Qais (May Allah be pleased with her) said: I came to the Prophet (SAW) and said to him: "Muawiyah and Abul-Jahm sent me a proposal of marriage." The Messenger of Allah (SAW) said, "Muawiyah is destitute and he has no property, and Abul-Jahm is very hard on women."<sup>194</sup> Some jurists do not recognize wealth as a criterion for compatibility in marriage. They support their opinion with the following verse from the Qur'an. "And marry those among you who are single and (also marry) the *Salihun* (pious, fit and capable ones) of your (male) slaves and maid-servants (female slaves). If they be poor, Allah will enrich them out of His Bounty. And Allah is All-Sufficient for

His creatures' needs, All-Knowing." (QS 24: 32)

(e) "Profession" refers to the idea that the husband's occupation should be similar to or closely related to that of the husband's wife.<sup>195</sup> This consideration takes into account the customs of the people, as individuals often prefer to marry someone whose profession is comparable to their own. For instance, people tend to avoid marrying individuals with significantly different professions, such as a medical doctor and a driver. However, those who do not prioritize profession compatibility argue that a profession is a temporary matter. They believe that God has the power to elevate someone with a specialized skill to a higher level, and that God is the ultimate provider and can grant or withhold as He sees fit, as He is capable of all things.

Based on the preceding explanation, Muslim jurists have two different opinions regarding the issue of competence of spouses. First, it is said that the spouses' competence is obligatory, and Hanafy, Maliki, and Shafi'i support this opinion.<sup>196</sup> And they were guided by the following Hadith, "choose the best for your sperm, and marry compatible women and propose marriage to them"<sup>197</sup>. Hadith taught us to choose the women based on her descent, lineage, and religion and run away from women who grow up in bed seedlings. Secondly, the school said that the same level of competence between the spouses is not obligatory, and this opinion was seconded by Hanafi.<sup>198</sup> They quoted evidence from the Qur'an and Hadith. Allah said: "People, we have created you from a male and a female and made you into nations and tribes that you might know one another. The noblest of you before Allah is the most righteous of you" (QS 49: 13). The verses stated that all believers are equal in rights and duties, and there is no difference between them, and none was mentioned regarding the competence of spouses. Also, they agreed with the Hadith, "The Prophet (SAW) Affirmed that all people are equal like the teeth of a comb and that no Arab is superior to a non-Arab, nor is a white person superior to a black person, unless under personal integrity and moral rectitude"<sup>199</sup>

(f) Safety from defects was a concern for the Shafi' is and Malikis. They regarded certain defects, namely insanity and leprosy, as significant factors. According to them, anyone afflicted with these diseases was not considered on par with someone who was free of such conditions. On the other hand, the Hanafis and Hanbalis did not view safety from defects as a primary criterion for competence. However, they did acknowledge the possibility of annulling the marriage contract based on this criterion. According to the Hanafis, it was a basis for annulling the contract for the wife, while the Hanbalis allowed the option of annulling the contract for both spouses.<sup>200</sup>

4. Time to consider competence in marriage: Muslim jurists unanimously agree that the assessment of the parties' competence should be considered at the time of the formulation of the contract. If a person was deemed competent during the consummation of the marriage, any subsequent change in their competence will not have any legal consequences. For instance, if they were wealthy before consummation but became poor afterward, this change would not justify annulling the marriage. The focus is on evaluating competence at the time of establishing the contract, not on the condition of maintaining that situation continuously after the contract is made. To stipulate otherwise would risk disrupting the family system and jeopardizing the future of children born during happier times.<sup>201</sup>

#### Activity 4.

*Fatima is a mature and wealthy young woman. Ahmed has proposed marriage to her. It is worth noting that Ahmed's father used to work as a driver for Fatima's father in one of his companies. However, Fatima's father has declined this marriage proposal on the grounds of Ahmed's perceived lack of competence. What are your thoughts on this situation, and how would you approach discussing it with your colleagues?*

## SUMMARY

Gurdianship refers to the person who is responsible for overseeing and consenting to the marriage of a female relative. A marriage cannot take place without the presence of a gurdian. Muslim jurists classified Wilaya related to marriage into three categories (i) Wilayat al-Ijbar (ii) Wilayat al-Ikhtiyar (iii) Wilayat al-Musharaka. Certain conditions must be met by a guardian to be eligible to carry out matters of guardianship such as (i) Puberty (ii) Mind (iii) Freedom (iv) Islam. Another issue is that a marriage not solemnized in the presence of at least two witnesses (i) They must be accountable, i.e., adult and of sound mind (ii) there must be two witnesses (iii) Islam (iv) Hearing the wording of the contract. Finally, to ensure sustainability, we must consider the qualities of competence of the parties, which include lineage, religiosity, wealth, profession, freedom, and freedom from defects.

## QUESTIONS

**One:** please provide answers to the following questions.

1. Write a comprehensive note on the compatibility of parties
2. What are the useful matters considered in competence according to jurists?
3. Examine the standpoint of Muslim jurists regarding the testimony of mute and blind individuals.
4. Demonstrate the qualities of compatibility of the parties
5. Discuss the requirements for a Legal Guardian in a concise manner.

**Two:** Fill in the gaps in the following sentences.

6. There is no marriage without.....

7. The ruler is the guardian .....
8. *Wilayāt al-Ijbar* is .....
9. *Kafā* is.....
10. Muawiyah and Abul-Jahm sent me a proposal of marriage." The Messenger of Allah (SAW) said, "Muawiyah.....

**Three:** Please indicate whether the following sentences are correct (✓) or incorrect (×).

11. A marriage cannot take place without the presence of a guardian.
12. Malikis, Shafi'is, and Hanbalis hold the view that the guardianship lies in the virginity of females.
13. It is permissible for a non-Muslim to testify against a Muslim woman.
14. It is allowed for a minor to enter into marriage without the guardian's permission.
15. *Wilayāt al-Ikhtiyar* refers to the authority granted to a legal guardian over the marriage of a woman without her consent.

**Four:** Read the following cases and analyse based on the Shari'ah point of view.

16. The session opened with (...) holding the nationality according to a valid residence permit No. (...), (...) holding the nationality according to a valid residence permit No. (...), and (...) holding citizenship according to a valid residence permit number (...). (...) concluded her statement, saying, "My father passed away in Sudan almost forty years ago, and my only brother, named (...), has been in Canada for over ten years. I have had no news of him, and I don't know whether

he is alive or deceased. I have no other relatives inside or outside Sudan. At thirty years old, I am still a virgin, never having been married before. (...) has proposed to me; he holds citizenship under a valid residence permit number (...), and he is a suitable match for me. I wish to marry him, and I request that you perform the marriage in your jurisdiction, specifically the Nairobi Qadis court." When asked if she had any evidence to support her statements, she responded, "I do not have any evidence, and I request that you facilitate the marriage in your jurisdiction. I have grown old without marriage, and I seek what is permissible while avoiding what is forbidden.

17. Ms. Saima had married without the approval and consent of her parents. Her father strongly disapproved: she returned the *nikahnama* to her husband's family and purported to cancel it. Eventually Ms. Saima in complete defiance of her family's wishes disappeared from her parent's home, only to surface again in a women's refuge managed by a non-governmental organization. The father of Saima filed criminal charges against the hostel, alleging that his daughter had been abducted. The Chief Justice of the Lahore High Court referred the case to a larger bench of the Lahore High Court, consisting of Judge so and so and they delivered a judgment barely two pages long, in which he relied on the decision of the Federal Shari'ah Court in which it was held that girl may marry without *wali's* consent.

## **Textbooks/Articles for Further Reading**

1. Sayid Sabiq, *Fiqh Al-Sunnah Islamic jurisprudence according to the Sunnah*. (Sharif Ansari, Beirut, 2009)
2. Wahba Al-Zuhaili, *Fiqhul Islam Waadilatuhu*, (Maarif Fikri center, Damascus, 1997)
3. Arthur Phillips & Henry F. Morris, *Marriage Laws in Africa*, (Law Africa Publishing Ltd. N.C: N.P. 2011)
4. Eugene Cotran *The Law of Marriage and Divorce*, (Great Britain: Publisher Sweet & Maxwell. 1968)
5. M. M. Muhammad Khalil Abdul Karim Al-Abbasi Dr. Khalil Ibrahim Muhammad, Custom and its role in the qualities considered in competence in marriage (a comparative study), *Majalat Kuliyah al-Kanun lilulum al-Kaunuyah wa al-Siyasiyah* Vol (12) 42 (2023).

## CHAPTER FIVE



# MUTUAL RIGHTS AND RESPONSIBILITIES OF SPOUSES

### **Introduction of the Chapter:**

Harmony and happiness within a family can be attained when each member understands their rights and responsibilities. In Islam, each spouse is endowed with specific rights and responsibilities, which they must have a profound understanding of to fulfill them effectively and seek their own rights in a respectful manner. When both husband and wife are aware of their respective rights and obligations, they hold the key to finding reassurance and tranquility in their married life. These rights serve as guidelines for marital harmony and emphasize the importance of treating each other well. It is commendable for both partners to give willingly before they receive and to willingly fulfill their partner's rights. This voluntary reciprocity should be motivated by kindness and not coercion, with each partner striving to outdo the other in acts of kindness, ensuring that they promptly and fully meet each other's rights without any shortcomings. In this unit, you will learn about mutual rights and responsibility of spouse. Finally, I have included a variety of activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions at the end of the unit to help reinforce and assess your understanding of the material.



## Objectives of the Chapter

Upon completing your study of this unit, you should be able to:

- i. Clarify the mutual rights and responsibilities of spouses.
- ii. Elucidate the consequences of not fulfilling these responsibilities.
- iii. Solve cases related to the mutual rights and responsibilities of spouses.

### 1. Mutual rights and responsibilities of spouses:

Since the marriage contract is a covenant between a man and a woman, it is intended to endure. Therefore, the law has established rights for the spouses concerning each other and between them. If each spouse fulfills their obligations towards the other, the family will be content, serving as a solid foundation in the construction of society.

#### (i) Mutual rights between spouses:

There are several rights associated with spouses as follows:

(a) Sexual relations: Sexual intercourse within a marital relationship is guided by Islamic principles. Both spouses have the right to engage in lawful intimacy. This is in accordance with Allah's command as mentioned in *Suratul Ma'arij*: 30, 'and those who guard their private parts, except with their spouses and the women (slaves and captives) whom their right hands possess, for then they are not to be blamed.' It is the duty of the wife to respond to her husband's invitation to their bed, as emphasized in various Hadiths. The Messenger of Allah (SAW) said, 'If a man invites his wife to be with him and she refuses, causing him to be upset, the angels continue to supplicate against her until morning.'<sup>1202</sup> Another Hadith states, 'When a man calls his wife to fulfill his desires, she should respond, even if she is occupied with her daily chores.'<sup>1203</sup> Marriage is intended for

the mutual benefit and protection of both spouses. It is equally important to safeguard the desires and needs of both partners. However, it is prohibited to engage in sexual relations with a wife during menstruation or through anal intercourse. This is highlighted in the Qur'an, 'And they ask you about menstruation. Say, "It is harm, so keep away from wives during menstruation. And do not approach them until they are pure. And when they have purified themselves, then come to them from where Allah has ordained for you. Indeed, Allah loves those who are constantly repentant and loves those who purify themselves" (QS 2: 222). Jalalidin commented on the above verse, stating that it is a command from God to refrain from having intercourse with women during menstruation, both in terms of timing and location. This prohibition should continue until they are cleansed of blood. After they have been cleansed, it is then appropriate to engage in sexual activity with them in the right manner.<sup>204</sup>

As for the prohibition in the anus, it has been proven in the following Hadiths, "If anyone has intercourse with a woman who is menstruating, or uses preposterous venery with a woman, or visits a *kahin*, he has disbelieved in what has been sent down to Muhammad."<sup>205</sup>

There is no doubt that engaging in sexual activity with a woman anally or during menstruation can pose health and psychological risks. Muslim jurists have varying opinions regarding the permissibility of engaging in sexual relations with a wife during her menstruation period. The Shafi'is, Malikis, and Abu Hanifa schools of thought hold the belief that it is prohibited to have sexual relationship with a menstruating woman between the navel and the knee, even in the absence of desire and even if there is a barrier. They substantiate their position with the following Hadith: "If one of us was menstruating, the Messenger of Allah (SAW) would tell her to put on an *Izar* (waist wrap) then he would fondle her."<sup>206</sup> If the sole concern was the presence of menstrual blood, then the act of tightening the garment would hold no significance. Another Hadith Narrated by Mu'adh Ibn Jabal (RAA): He asked the Prophet (Peace be

upon him), "What is lawful for a man regarding his wife when she is menstruating?" and he replied, "What is above the waist wrapper (*Izar*)."<sup>207</sup> The scholars argue that engaging in sexual intercourse below the waist wrapper (*Izar*) may lead to actions considered *haram* (forbidden), and they cite the following Hadith to support their stance: "And whoever indulges in these suspicious things is like a shepherd who grazes (his animals) near the *Hima* (private pasture) of someone else and at any moment he is liable to get in it."<sup>208</sup> Hanbali jurist and Ibn Hassan student of Abu Hanafi states that the Hanafi school of thought maintains that it is permissible to have a sexual relationship with a woman between the navel and the knee, and they substantiate their opinion with the following evidence: "Engage in everything else except sexual intercourse (with your wives)." (QS 2: 222)

### Activity 1.

*Discuss the health risks associated with engaging in sexual activity with a woman anally or during menstruation with medical doctors.*

(b) Sociability: Cohabitation with kindness is one of the mutual rights between spouses, so each one of them is obligated to cohabit with the other in kindness, and the origin is the saying of God Almighty. "And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them" (QS 2: 228). Another verse, "And live with them in kindness" (QS 4: 19). Sociability involves exhibiting good conduct with one's spouse, abstaining from causing them harm, and even enduring any harm from them. It also entails refraining from their recklessness and anger. In emulation of the Messenger of God, may God bless him and grant him peace, he used to delight the hearts of his wives through affectionate gestures, humor, and intimate interactions. The Prophet Muhammad (SAW) said, "He who believes in Allah and the Hereafter, if he witnesses any matter, he should

talk in good terms about it or keep quiet. Act kindly towards women, for woman is created from a rib, and the most crooked part of the rib is its top. If you attempt to straighten it, you will break it, and if you leave it, its crookedness will remain there. So, act kindly towards women."<sup>209</sup>

(c) Prohibition by *Muswāhara* (affinity): occur between individuals related through marriage.

(d) Right of Inheritance: Inheritance can be defined as the transfer of the deceased person's property to the living person.<sup>210</sup> When there are no offspring, a husband takes half (1/2) of his wife's estate, as stated in the Holy Qur'an: "And for you is half of whatever your spouses have left, in case they have no children" (QS 4: 12). However, if there are offspring, the husband's share is a quarter (1/4), as the Qur'an mentions: "In case they have children, then for you is the fourth of whatever they have left" (QS 4: 12). Furthermore, if the husband dies and has offspring, whether the heir is from that wife or from someone else, the wife's share of the inheritance is one-eighth (1/8). In addition, if the husband dies and has no offspring, whether male or female, the wife's share of the inheritance is a quarter (1/4). Allah (SWT) says, "And for them is a fourth of whatever you have left, in case you have no children; yet in case you have children, then they have an eighth of whatever you have left" (QS 4: 12).

€ Child's lineage: The lineage of the child is one of the most important rights that children acquire as soon as they are born. The Shari'ah guaranteed it to them, in addition to maintenance, custody, and inheritance. Muslim jurists have stated that lineage is affirmed if the two spouses entered into marriage in the correct manner and have engaged in sexual intercourse. In addition, Muslim jurists agreed that the lineage of out-of-wedlock child belongs to the mother. This opinion was mentioned in their books. The following scholars have these contributions to make: Ibn Najim said, "The lineage of the adulterous child belongs to the mother, so that she inherits him and he inherits from her because he is certain of his lineage on her part."<sup>211</sup> Ibn Abdulbarī said, "A mother is never excluded from her child,

and he is associated with her in any case because of her birth."<sup>212</sup> *Al-Bakrī* said, "The child of adultery is not attributed to a father but rather to his mother." The following evidence will be used to infer that the illegitimate child's genealogy attached to his mother: It was narrated that Ibn 'Umar said: "The Messenger of Allah conducted the procedure of Li'an (Oath of condemnation or sworn allegation of adultery committed by one's spouse) between a man and his wife, and he separated them and attributed the child to his mother."<sup>213</sup>

## ii. Rights of the wife:

(a) Dowry: *Mahr*, an Arabic term, refers to the dower in Islamic marriages. In addition to *mahr*, the Qur'an and Hadiths use several other Arabic words like *Sadaq*, *Nahlah*, *Ajr*, and *Faridah* to denote the concept of dower.<sup>214</sup> Muslim jurists have varying definitions for the term *Mahr*. According to the Hanafi School, it is the money specified in the marriage contract that the husband must provide in return for the marital benefits, whether explicitly named or implied in the contract.<sup>215</sup> In the Malik School, *Mahr* is seen as the money paid to the fiancée to exercise control over and protect her.<sup>216</sup> The Shafi interpretation characterizes *Mahr* as money given due to the marriage,<sup>217</sup> and the Hanbali School defines it as compensation provided as a result of the marriage.<sup>218</sup>

Ruling on the dowry: Muslim jurists unanimously agreed that the dower is an obligatory element to safeguard the woman's rights, ensuring that her dignity remains respected. Islamic law has established it as a symbol of the marriage contract with her, rather than being treated as payment for her, her beauty, or any form of enjoyment from her. This consensus was substantiated as the following evidence: Allah (SWT) says, "And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. So, for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation" (QS 4: 24). Another verse, "And give the women (on marriage) their dower as a

free gift" (*Suratul Nisaa*: 4). The two verses indicate that the dower must be paid willingly and that it is an obligation. The Prophet Muhammad (SAW) said, "What's this for?" He said: "I have married a woman." He said: "What dower did you give?" He said: "The weight of a *Nawah* (five Dirhams) of gold." He said: "Give a *Walimah* (wedding feast) even if it is with one sheep."<sup>219</sup> Muslims, from the time of the Companions to the present day, have unanimously concurred that the dower is obligatory, and there has been no dissent on this matter.<sup>220</sup> It is compulsory to pay the full dower if the marriage has followed legal procedures, and the two spouses have engaged in sexual intercourse. If they are unable to engage in sexual intercourse or divorce before consummation, the husband must pay half of the dowry. In the event of the husband passing away before consummation, he is also required to pay the full dowry.<sup>221</sup>

The wisdom of the obligation of dowry: The rationale behind the requirement of a dower is evident in that it serves as a symbol of the woman's honor and the man's genuine commitment to building a respectable marital life with her. Its purpose is to underscore the significance of the solemn contract and elevate its status as the foundation of a Muslim family, which forms the core of society, and to demonstrate respect, admiration, and reverence for the woman. The dower represents her entitlement, and the husband offers it as proof of his earnest desire for her, as well as an expression of affection and compassion between them. With the dowry, the woman can prepare for their married life together. The responsibility for the dower lies with the man, not the woman, because he is accountable for supporting his wife, while the woman's role is to care for and nurture their children and give birth to the next generation. If she were forced to provide the dowry, she might be subjected to significant hardships, and her dignity could be compromised. The Holy Qur'an established the principle of dividing financial responsibilities between men and women, as articulated in the following verse, "Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means" (QS 4: 34).

The amount of dowry: In the Qur'an and Hadith, there is no specific mention of the amount of dowry. Muslim jurists have generally agreed that there is no maximum or minimum amount for the dowry. In this context, Umar (RA) attempted to establish a maximum limit for dowry, suggesting it should not exceed 400 *dirhams*. He proposed that any amount exceeding this limit should be directed to the national treasury (*Bait Mal*). However, this proposal faced opposition from a woman in the mosque who recited a verse from the Qur'an: "But if you want to replace one wife with another and you have given one of them a great amount [in gifts], do not take [back] from it anything. Would you still take it unjustly and very sinfully?" (QS 4: 20). In response to the woman's citation, Umar (RA) acknowledged her argument and admitted his error.<sup>222</sup> However, Islam encourages us not to exaggerate the dowry. A'isha reported the Prophet as saying, "The marriage which produces most blessing is that which involves least burden."<sup>223</sup>

Muslim jurists also differ on the minimum amount of dowry. In this regard, the Shafi and Hanbali schools of thought maintain that there is no specific minimum amount for dowry. They support their opinion with the following Hadith: "Try (to find something), even if it were an iron ring."<sup>224</sup> Malik, on the other hand, states that the minimum amount of dower is a quarter of a dinar in gold. He justifies this based on the perspective of Shari'ah law, as theft is not punishable by hand-cutting if the stolen amount is less than a quarter of a dinar in gold. In contrast, the Hanafi School asserts that the minimum amount of dower is ten *Dirhams* and supports this opinion with the following Hadith: "The dower should not be less than ten *Dirhams*."<sup>225</sup>

Types of Dowry: there are two types of dower known as "*Mahr al-Musamā*" (specified dowry) and "*Mahr al-Mithlī*" (standard dowry).

(i) *Mahr al-Musamā*: The spouses have agreed upon certain terms and have specified them in the contract. There is no set limit to what can be included, as long as both parties agree. The dower can take various

forms, including cash, jewelry, real estate, animals, trade goods, and other valuable items. It is essential that the dower is clearly defined, either in detail, such as a specific amount of money like a thousand KSH, or in general terms, like a particular piece of gold or a quantity of wheat. If the dower remains unspecified from all angles to the extent that it cannot be determined, the contract is considered valid, but the dower is considered invalid for majority of Muslim scholars except the Malikis. The scenarios for a husband to pay the full specified dower are affirmed in the following:<sup>226</sup> (a) if the two spouses have engaged in sexual intercourse. (b) If the husband passes away before engaging in sexual intercourse. (c) This pertains to situations in which the couple meets alone in a place, and there are no obstacles preventing them from engaging in sexual intercourse. In the following situation, the husband must pay half of the specified dower if he divorces before consummation. Allah (SWT) say, "And if you divorce them before you have touched (had a sexual relation with) them, and you have appointed unto them the Mahr then pay half of that (*Mahr*)" (QS 2: 237).

(ii) *Mahr al-Mithlī*: The spouses have not specified particular terms in the contract, and the standard dower is applied in the following scenarios:<sup>227</sup> (a) if the spouses have not stipulated specific terms in the contract. (b) If the dower is explicitly denied in the contract, for instance, by stating, "I married you on the condition that you have no dowry." (c) If the dower is given an invalid name in the contract, such as when the dower is something not recognized in Islamic law, like wine and pork. An example of an unknown dower would be one that is ambiguously described, such as saying, "I married you with three animals."

## Activity 2.

Discuss with your lecturer the situation involving the loss of either the entire dower or half of it.

(b) Maintenance: is known as “*Nafaqah*” which means what a man spends on his wife which includes food clothing, housing, services, medical treatment, and all other necessities. Maintenance is the obligation of the husband regardless of the wife’s economic status. Maintenance is affirmed in the Qur'an, *Sunnah*, and the consensus of Muslim jurists. Allah (SWT) says, “The mothers shall give such to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms” (QS 2: 233). The Prophet Muhammad (SAW) said, "Treat women kindly, they are like captives in your hands; you do not owe anything else from them. In case they are guilty of open indecency, then do not share their beds and beat them lightly but if they return to obedience, do not have recourse to anything else against them. You have rights over your wives, and they have their rights over you. Your right is that they shall not permit anyone you dislike entering your home, and their right is that you should treat them well in the matter of food and clothing".<sup>228</sup> In another Hadith, Hind (bint `Utba) said to the Prophet (SAW) "Abu Sufyan is a miserly man and I need to take some money of his wealth." The Prophet (SAW) said, "Take reasonably what is sufficient for you and your children."<sup>229</sup> Muslim scholars have concluded that it is obligatory for a husband to provide maintenance for his wife.

Muslim jurists provide different reasons for the obligation of providing maintenance for a wife. According to the Hanafi school, the reason is *Ihtibas* (complete submission), where the wife is confined and unable to seek employment because of her husband. Therefore, the husband is obligated to cover all her expenses. On the other hand, Shafi'i jurists argue that a woman is entitled to maintenance due to *Tamkin*, which means the wife takes full responsibility to serve her husband. It is important to note that maintenance is not contingent on the formulation of the marriage contract, as exemplified by the marriage of the Prophet Muhammad (SAW) to A'isha when she was six years old and consummated the marriage at nine. There is no record of maintenance being provided before the consummation.

The result of this disagreement between the Hanafi and Shafi'i schools is that, according to the Hanafi School, a woman is entitled to maintenance simply by confining herself to her husband's house, even if she does not provide services such as sexual intercourse. On the other hand, the Shafi'i School asserts that she is only entitled to maintenance if she provides services to her husband, even if she confines herself to his house. In the Shafi'i perspective, if a wife does not provide these services, she is considered *Nashiz*, indicating disobedience by refusing to engage in sexual relations.<sup>230</sup>

Conditions of maintenance: For a wife to qualify for maintenance, the following prerequisites must be met:<sup>231</sup> (a) the marriage must be legally valid. If the marriage contract is invalid, the wife is not entitled to maintenance due to the contractual voidance. In such cases, separation is required, and the marital relationship comes to an end. (b) The woman must be physically capable of engaging in marital intercourse. If she is elderly and capable of intercourse, she qualifies for maintenance. However, if she is young and incapable of engaging in intercourse, she is not entitled to maintenance. (c) The wife must not be considered disobedient, defined as a woman who does not comply with her husband in matters required by law. For instance, if she fails to move into his house after a valid contract, she forfeits her entitlement to maintenance.

### Activity 3.

*Amina traveled to South Africa after receiving a scholarship without her husband's permission. Is she entitled to maintenance?*

Quantum of maintenance: Muslim jurists differ on the amount of maintenance and can be categorized into three groups: (a) Shafi'i<sup>232</sup> and some Hanafi<sup>233</sup> jurists argue that it should be based on the husband's

status, and they rely on the following verse, "Let the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him" (QS 65: 7). Allah (SWT) differentiated between the affluent and the insolvent, and made it dependent on the husband's condition. The Malikis opted for alimony, considering both the husband's financial situation and the level of marital sufficiency. (b) Some Hanafi jurists argue that it should be based on the wife's status and economic situation,<sup>234</sup> and they rely on the following verse, "Take reasonably what is sufficient for you and your children."<sup>235</sup> It is obligatory to provide maintenance to meet her needs. Therefore, the consideration is based on ensuring her needs are met. Because it is a husband's obligation as per Islamic marriage, the Shari'ah does not place a specific value on it. It is regarded similarly to the dower and her clothing. It is recommended for a wealthy husband to share meals with her as a display of good moral conduct and kindness. (c) Hanbali<sup>236</sup> and some Hanafi jurists argue that maintenance should be based on the situation of both spouses. They rely on the legal maxim: "Implementing both verses is better than neglecting one of them."<sup>237</sup>

If the husband is insolvent and unable to provide maintenance to his wife, the majority of jurists are of the opinion that the wife has the right to either annul the marriage or to be patient with him. They support their opinion based on the following: Allah (SWT) says, "Then either retain them gracefully or release them generously" (QS 2: 233). It is not a good thing to leave her without maintenance, so it is necessary to release her with kindness. Narrated Sa'id bin al-Musaiyab regarding a man who finds nothing to spend on his wife: "They are to be separated."<sup>238</sup> According to the Hanafi School, a woman does not have the right to request an annulment of the marriage due to her husband's insolvency with alimony. Instead, she is ordered to borrow if she is poor; otherwise, she should spend her own money and later be reimbursed by the husband. The Hanafis provide evidence to support their view.<sup>239</sup> "If your debtor be in straitened circumstances, give him time till his monetary condition becomes better"

(QS 2: 280). This is a general rule that applies to every insolvent person, including a husband's insolvency with maintenance.

Maintenance for a professional wife: If a wife has a profession, such as being a doctor, engineer, or teacher, and her husband allows her to pursue her career, it is necessary for the husband to provide maintenance. However, if the husband does not permit her to work and disobeys this command, she may not be entitled to maintenance. Some scholars argue that it is not within the husband's rights to prevent his wife from engaging in domestic work or fulfilling her marital duties, such as sewing and other household tasks. In such cases, she is entitled to maintenance unless her profession brings disgrace or diminishes her beauty. The husband does have the right to prevent her in such circumstances. On the other hand, some scholars hold that the husband does not have the right to prevent his wife from pursuing a profession that serves the needs of society, such as being a doctor, nurse, or other roles essential for the community. In this case, he does not have the right to prevent her, and she is entitled to maintenance unless her absence results in harm to the family or corruption, in which case he has the right to prevent her.<sup>240</sup>

Impediments to Maintenance: Muslim jurists list several impediments to maintenance as follows: (i) *Nashiz*: refers to the wife's disobedience to her husband regarding a right that she is obligated to fulfill by virtue of the marriage contract. When a wife is disobedient, her right to maintenance can be deprived. Disobedience can take various forms, including refusing to accompany her husband, leaving the house without the husband's permission, declining to travel with him, or working without his permission, among others. Allah (SWT) mentioned how to treat disobedience in a wife, "And the ones whom you fear their non-compliance, then admonish them and forsake them in their beds" (QS 4: 34). (ii) Imprisonment of a woman: If a woman is imprisoned, even unjustly, she is not entitled to maintenance for the time of her imprisonment due to the fact that the husband will not be able to have sexual relation

with his wife. (iii) If a wife chooses to engage in recommended fasting, such as fasting on days like Monday and Thursday, the third day of the lunar month in Muharram, the first ten days of Dhul-Hijjah, the Day of Arafah, and the six days after *Shawwal*, without seeking permission from her husband, she is not entitled to maintenance.<sup>241</sup>

#### Activity 4.

*Amina married Othman and they had three children. After some time, they had a quarrel. Amina decided to convert to Christianity. According to the schools of fiqh, is she entitled to maintenance as an apostate wife?*

(c) Fair treatment of co-wives: It is permissible to marry more than one wife with the condition of treating them equally in terms of maintenance, spending the night with them, and other material aspects under your control. If you cannot do so, it is not appropriate to engage in polygamy. Love, however, is not something you can be held accountable for because it is beyond your control. 'A'isha narrated that the Prophet used to divide his time among his wives equally and would say, "O God, this is my division concerning what I possess, so do not blame me concerning what Thou possess, and I do not."<sup>242</sup> Justice is a desirable and obligatory quality in all aspects of life, while injustice is a major sin that God Almighty does not approve of for any of His servants. Therefore, God Almighty commands husbands to be just and fair to the best of their ability. If one knows they cannot maintain such fairness, it is recommended to be satisfied with one wife to avoid oppressing them. Allah (SWT) has threatened those who are not fair between their wives with severe consequences on the Day of Resurrection, as mentioned in the Hadith of the Messenger of God, may God bless him and grant him peace. The Prophet (SAW) said, "Anyone who has two wives and inclines to one of them will come on the Day of Resurrection with a side (of his body) inclining."<sup>243</sup> This honorable Hadith serves as a warning and admonishment for those who commit this sin.

God Almighty threatens those who show favoritism, and they will be held accountable for their actions on the Day of Judgment. The recompense will match their deeds, and they will be inclined in a similar manner to their actions in this world. Not being fair between wives is considered one of the major sins.

### **iii. Rights of the Husband:**

The husband has several rights, including the right to be obeyed, the role of being the head of the marital home, the authority for disciplinary actions, and the responsibility of being a decision maker. We will elaborate on these four rights below:

(a) The obligation of obedience: Allah has made the man a *Qawwaam* (protector and maintainer) of the woman by commanding, directing and taking care of her, just as guardians take care of their charges, by virtue of the physical and mental faculties that Allah has given only to men and the financial obligations that He has enjoined upon them. Allah says (interpretation of the meaning): “Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their mean.” (QS 4:34). ‘Ali ibn Abi Talhah said, narrating from Ibn ‘Abbas: “Men are the protectors and maintainers of women”<sup>244</sup> means, they are in charge of them, i.e., she should obey him in matters of obedience that Allah has enjoined upon her, and obey him by treating his family well and taking care of his wealth.

The wife should willingly enter into a relationship of mutual respect and cooperation with her husband in the home they have built together. She should also be considerate of his family and respect reasonable requests, except for actions prohibited by God and His Messenger. Obedience to any being should not supersede obedience to the Creator. Furthermore, it is essential for her to uphold her dignity and protect her husband's reputation and assets, seeking his consent before sharing his wealth.

In essence, the core principle is for the wife to cooperate and work in harmony with her husband, as stated in the teachings of God Almighty, "And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And Allah is exalted in Power, Wise" (QS 2: 228). The noble verse states that wives have rights commensurate with their responsibilities, while husbands are granted a position of authority over them. This authority represents a leadership role where the wife is responsible for managing the family's affairs, providing for the household's needs, caring for the children, raising them, and offering guidance. This hierarchical position is elucidated in the Qur'anic verse, which states: "Men are the protectors and maintainers of women" (QS 4: 34). The responsibility and assignment of this degree, given to both men and women, are inherent in human nature and moral development. Divine nature has prepared men to earn a livelihood, work outside the home with their physical strength, and persist in their efforts. Women, on the other hand, are naturally equipped for tasks like childbirth, caring for their children, and managing household affairs, accompanied by the moral qualities that align with these responsibilities. In the context of the family, which is a social institution, there needs to be a leader who oversees its affairs, provides for its needs, and safeguards it from potential risks. The leadership of a man in the family is not about dominance; rather, it is a compassionate leadership based on love and the exchange of ideas, guided by what God and His Messenger have prescribed. If a husband strays from these principles, the wife is not obliged to obey him. Furthermore, a wife's obedience to her husband in accordance with God's and His Messenger's directives is considered a significant act of drawing closer to God, and God will reward her on the Day of Resurrection. The Prophet Muhammad (SAW) said, "Any woman who dies when her husband is pleased with her will enter paradise."<sup>245</sup> Another Hadith, "When a woman observes the five times of prayer, fasts during Ramadan, preserves her chastity and obeys her husband, she may enter by any of the gates of paradise she wishes."<sup>246</sup>

## Activity 5.

*What are your thoughts on discussing gender equality and women advocating for equal rights? Consider having this discussion with your colleagues.*

(b) Residing in the marital home: A woman should live in the marital home, and this should be her permanent residence as long as the legal housing requirements are met, and her husband fulfills her rights. She should not leave the home without her husband's permission and consent, this will enable her to fulfill her marital responsibilities, such as giving birth to and caring for their children. Her husband is responsible for providing suitable housing for her. From a psychological perspective, this arrangement is beneficial as it fosters family harmony and helps avoid exposure to potentially tempting environments. If she leaves the home without permission and puts herself in situations that may lead to harm, it can disrupt the family's structure, and in such cases, her expulsion may be considered valid, and restricting her from going out can be justified. This applies to visits to her parents as well, but her husband should avoid causing estrangement as it can be detrimental. The importance of maintaining family connections, as commanded by God, should be kept in mind in all these considerations.<sup>247</sup> The above is supported by the Hadith of Prophet Muhammad (SAW): A man traveled and prevented his wife from going out. Her father fell ill, so she asked permission from the Messenger of God (SAW), to visit her father. The Messenger of God (SAW) said to her: "Fear God and do not disagree with your husband." Her father died, so she asked the Messenger of God, may God bless him and grant him peace, for permission to attend his funeral. He replied, "Fear God and do not disagree with your husband." So, God revealed to the Prophet (SAW), that He had forgiven her for obeying her husband.

(c) Discipline: The husband has the right to discipline his wife if she

disobeys him in something good, not if she disobeys him in something sinful. In cases of marital discord caused by the wife, the husband can address it through the following three steps:

(i) Verbal counseling and guidance: Providing advice and guidance is the primary responsibility of the husband, who serves as the leader and provider for the family. It is the husband's duty to advise his wife regarding the importance of fulfilling her marital responsibilities towards him. In this regard, Allah (SWT) says, "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For Allah is Most High, great (above you all)" (*Suratul al-Nisa*: 34). This means if you fear discord, on their part, then advise them, boycott them in their beds and strike them in a way which is not injurious.

(ii) Boycotting: At times, verbal admonition might prove ineffective in resolving the wife's state of detachment and disobedience. This could be due to her emotional turmoil or a defiant response. The subsequent action to address her disobedience is to abstain from engaging with her intimately. Shafi'i<sup>248</sup> and Hanbali<sup>249</sup> jurists have stated that boycotting may involve avoiding someone in speech, but this should not persist for more than three days, in accordance with the Hadith which says, "It is not permissible for a Muslim to boycott his fellow for more than three nights."<sup>250</sup> Regarding boycotting the wife in bed, Malik has mentioned that the boycott can continue for up to a month but should not exceed four months. This practice is known as *īlā*, which involves taking an oath in the name of Allah or one of His attributes to abstain from sexual intercourse with one's wife for a minimum of four months. Meanwhile, Hanbali<sup>251</sup>

and Shafi'ī<sup>252</sup> scholars believe that boycotting in bed can be done at one's discretion since the boycott was not limited to a specific period. However, some Hanbali scholars argue that boycotting in bed should not extend beyond three days.

(iii) Discipline of wife: in some cases, the solution to the problem may require some harshness and toughness. The third measure is to discipline the wife by symbolic beating without inflicting any physical harm or injury on the wife. Allah (SWT) says, "(And last) beat them (lightly)". Al-Imām Qur'ubī, in his commentary, commented that: "Beat them lightly, a beating that leaves no mark on them and does not break the bone"<sup>253</sup>. Atā said "I asked Ibn Abass "beat them lightly" means Ibn Abass said "to beat with a light object like a toothbrush."<sup>254</sup> Mu'awiyah bin Haidah (May Allah be pleased with him) reported: I asked the Messenger of Allah (SAW): "What right can any wife demand of her husband?" He replied, "You should give her food when you eat, clothe her when you clothe yourself, not strike her on the face, and do not revile her or separate from her except in the house".<sup>255</sup> If the husband surpasses the prescribed limits and inflicts painful physical harm, this constitutes harm to the wife, justifying disciplinary action against him, and granting her the right to bring her case before a judge, seeking retribution. Finally, the last step in resolving marital disputes, if the previously mentioned methods prove ineffective, is to appoint an arbitrator from both the wife's and husband's families to facilitate reconciliation and safeguard the marital bond. These two arbitrators must meet the following criteria: They should be adults of sound mind, trustworthy, fair, and upright individuals. Additionally, they should possess expertise in marital relations and come with recommendations from the spouses' relatives.<sup>256</sup>

## QUESTIONS

**One:** please provide answers to the following questions.

1. Write a comprehensive note on mutual rights between spouses
2. Clarify the opinions of Muslim jurists regarding the permissibility of engaging in sexual relations with a wife during her menstruation period.
3. What are the conditions for a wife's entitlement to maintenance?
4. Discuss the steps for disciplining a wife and providing support with legal evidence.
5. Differentiate between *Mahr al-Musamā* and *Mahr al-Mithlī*

**Two:** Fill in the gaps in the following sentences.

6. A woman deserves financial rights from her husband which is.....  
.....and non-financial rights which  
are.....
7. Mutual rights between spouses are.....
8. A wife is entitled to inherit from her husband the following  
shares.....
9. When a woman observes the five times of prayer, fasts during Ramadan,  
preserves her chastity and obeys.....
10. The husband must pay half of the specified dower if.....

**Three:** Please indicate whether the following sentences are correct (✓) or incorrect (✗).

11. Hanbali and Shafi scholars assert that boycotting in bed was not confined to a specific period.
12. In the case of an invalid marriage contract, the wife is not eligible for maintenance.
13. The Hanafi School asserts that the minimum amount of dower is ten Dirhams.
14. The professional wife is not eligible for maintenance.
15. It is advisable to treat co-wives fairly.

**Four:** Read the following cases and analyse based on a Shari'ah point of view.

16. Salim filed a lawsuit against Zeinab's father, whom he identifies as the father of his ex-wife. In his lawsuit, he states, "I got engaged to the defendant's daughter. He agreed to the marriage and assured me that she was a virgin. Subsequently, we traveled to Tanzania to seek approval for the marriage, given my non-Tanzanian status and her Tanzanian nationality. After completing the application process, we returned, and the defendant informed me that we would proceed with a marriage contract for Zeinab while awaiting approval. She consented to this arrangement, and the marriage contract was finalized in the presence of her father, who is her legal guardian. I paid a dower of five thousand USD. Unfortunately, after my wife and I returned home, she revealed that she had been previously married, divorced, and was not a virgin. Realizing this, I am seeking a ruling from the woman's guardian to recover the dower amount and the costs incurred, totaling seven thousand USD.

## **Textbooks/Articles for Further Reading**

1. Engineer, A.A. *The Rights of Women in Islam*, (London: C. Hurst and Co. 1992)
2. El-Saadawi, N. *The Hidden Face of Eve: Women in the Arab World*, (London: Zed 1980)
3. Al-Faruqi, L., *Women, Muslim Society and Islam*, (Indiana: American Trust Publications, 1994)
4. Moosa, N., *Unveiling the Mind: A History of the Historical Evolution of the Legal Position of Women in Islam*, (University of Western Cape: Community Law Centre 2004)
5. Strasser, B.F. *Women in the Qur'ān, Traditions and Interpretation*, (New York: OUP, 1994)

## CHAPTER SIX



# PERIOD OF WAITING AND MATRIMONIAL PROPERTY

### **Introduction of the Chapter:**

The marital relationship does not always bring permanent satisfaction to both spouses. Human life is such that simple disagreements may arise and persist, which is quite common among couples. In some cases, these disagreements may become unbearable, turning life into a torment, especially if the conflicts expand. In such situations, individuals of goodwill and righteousness may intervene. They can appoint an arbitrator from the wife's side and another from the husband's family in an effort to reconcile their differences. If all attempts at correction fail, it may become necessary to resolve the issue through separation or, as it is known, divorce. Even though divorce is among the least favored options permitted by God, it is allowed to ensure that the rights of both parties are not violated. As Allah Almighty says, 'But if they separate [by divorce], Allah will enrich each [of them] from His abundance. And ever is Allah Encompassing and Wise.' One of the significant consequences of separation between spouses is the waiting period for the woman. The waiting period is established to allow any remaining connections of the marriage to naturally expire. Islam mandates that women observe this waiting period because it serves the interests of the people and helps maintain the purity of lineage. In this unit, you will learn about *Idda* (period of waiting and matrimonial property). Finally, I have included a variety of activities, essay questions, true/false questions, fill-in-the-blank questions, and case study questions

at the end of the unit to help reinforce and assess your understanding of the material.



### **Objective of the Chapter:**

After reading this chapter the student should be able to:

- (i) Differentiate types of *Iddah* and the general guidelines associated with the waiting period.
- (ii) Clarify the significant role that the waiting period plays in preventing both men and women from transgressing the limits set by Allah (*SWT*).
- (iii) Explain the rights and obligation of spouses concerning matrimonial property.

### ***Iddah* (Period of waiting):**

1. Definition of *Iddah*: *Iddah* is Arabic word which means is to keep count.<sup>257</sup> In Islamic legal terminology, it is the period a woman must observe after the death of her husband or after a divorce, during which she may not marry another man and the main purposes is to remove any doubt as to the paternity of a child born after the divorce or death of the prior husband.<sup>258</sup> Based on the definition provided above, I draw the following conclusions:<sup>259</sup>

- (i) The waiting period pertains to the woman, not the man. This means that the woman is not allowed to marry anyone other than her first husband until her waiting period has concluded.
- (ii) As for the man, he is not required to wait for a waiting period. He has the right to marry any woman he chooses after divorcing his wife, unless there are specific impediments preventing him from marrying a particular woman.
- (iii) A woman must observe the waiting period if her husband has had sexual intercourse with her. This also applies to a woman who has had sexual intercourse based on suspicion.
- (iv) The waiting period is mandated

to allow for the expiration of the remaining effects of the marriage. It is related to the proof of lineage and inheritance in cases of revocable divorce. During this period, the waiting woman is not permitted to marry another man, and she must observe mourning if the waiting period is due to the death of her husband. Additionally, she is entitled to maintenance and must mourn.

## **2. Wisdom of Waiting period:**

The waiting period, as specified by Almighty Allah in the Holy Qur'an, occurs after the separation of spouses. During this time, a woman is required to wait without entering into a new marriage until the designated period has elapsed. It is a consensus among jurists that there is no waiting period for a woman if the marriage was not consummated. This is based on the verse: "O you who believe! When you marry believing women, and then divorce them before you have sexual intercourse with them, no *'Iddah* have you to count in respect of them" (QS 33: 49). Jurists unanimously agree that a woman with whom the marriage has been consummated is obligated to observe the waiting period. This holds true regardless of the reason for the separation, be it due to death, divorce, or annulment, and regardless of the validity of the marriage contract. The legislation regarding the waiting period includes various rulings. (i) Worshiping God Almighty entails a woman observing the legally imposed waiting period in obedience to the command of God, the Almighty. She does this while seeking His pleasure, acknowledging that this act is solely dedicated to God, the Almighty. Whether or not the woman understands the wisdom behind the legislation of the waiting period is irrelevant; the essence of this act of worship lies in its devotion to God.<sup>260</sup> (ii) The waiting period is a manifestation of a wife's commitment to her husband. When a woman's husband passes away, she observes the waiting period in the same marital home. During this time, she reflects on their shared experiences, shows mercy toward him, forgives any mistakes or missteps, and seeks his forgiveness. Therefore, the waiting period symbolizes a wife's loyalty to her husband. This loyalty extends even to the waiting

period after divorce, as she refrains from marrying someone else until this period has concluded.<sup>261</sup> (iii) One of the key regulations concerning the waiting period is to confirm the purity of the uterus and safeguard family lineages. A woman is obligated to observe the waiting period until she is certain about whether she is pregnant or not. If she is indeed pregnant, her waiting period does not conclude, and she cannot enter into a new marriage until after giving birth. This is done to maintain the integrity of the unborn child's lineage and to ensure that the intimate relations with a second husband do not overlap with those from the previous marriage. The Prophet Muhammad (SAW) said, "Whoever believes in Allah and the Last Day, then he does not levy his water on someone else's child."<sup>262</sup> This implies that a man should not marry a woman who is pregnant from another man. The reason for this caution is that a pregnant woman might attribute her unborn child to the man who marries her, denying that the child is from her previous husband. This could lead to the child being attributed to someone who is not their biological father, causing a mix-up in lineages. It is not permissible for a woman to hide her pregnancy until she gets married. As mentioned in the Qur'an: "and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the Last Day." Therefore, a woman does not have the right to conceal her pregnancy; she must disclose this information. (iv) The waiting period of a divorced woman serves as an opportunity for the husband to consider reconciling with his wife, especially if the divorce is revocable, whether it is a first or second divorce. This waiting period typically spans three menstrual cycles for a divorced woman who is menstruating, during which the husband can choose to reconcile. It is a period for the husband to reflect on his decision. This concept is underscored by God Almighty's words: "And their husbands have the better right to take them back in that period if they wish for reconciliation." However, it is important to note that this wisdom does not apply to the waiting period of a woman whose husband has passed away. In this case, her waiting period is a period of mourning and grief for her late husband, as he has passed away and cannot return to reconcile with her.<sup>263</sup>

## Activity 1.

*Fatima got married and was subsequently divorced through a revocable divorce. However, during the waiting period, her husband passed away. What is the status of her waiting period now? Discuss with your colleagues*

3. The legislation of the waiting period: Muslim jurists who have affirmed its legitimacy and obligatory nature for women have provided reasons for this stance, supported by evidence from the Qur'an, the Sunnah (Prophet's traditions), and consensus within the Islamic scholarly community. Allah (SWT) says, "And those of you who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days" (QS 2: 234). Another verse from Qur'an states, "Divorced women shall wait concerning themselves for three monthly periods" (Suratul Al-Baqarah: 228) and, "The waiting period of those of your women who have lost all expectation of menstruation shall be three months in case you entertain any doubt; and the same shall apply to those who have not yet menstruated. As for pregnant women, their waiting period shall be until the delivery of their burden. Allah will create ease for him who fears Allah" (Suratul At-Talāq: 4).

The Prophet Muhammad (SAW) said, 'No woman should mourn for anyone who dies for more than three days, except for a husband, for whom she should mourn for four months and ten days.'<sup>264</sup> Another Hadith states, "I visited Fatima bint Qais and asked her about the verdict of Allah's Messenger (SAW) about (board and lodging during the 'Idda) and she said that her husband divorced her with an irrevocable divorce. She (further said): I contended with him before Allah's Messenger (SAW) about lodging and maintenance allowance, and she said: He did not provide me with any lodging or maintenance allowance, and he commanded me to spend the 'Idda in the house of Ibn Umm Maktum"<sup>265</sup>. Ultimately,

Muslim jurists have reached a unanimous agreement on the necessity and legitimacy of the waiting period since the time of the Prophet's life. No one has contradicted this legal requirement.<sup>266</sup> Based on the unanimous agreement regarding the legitimacy of the waiting period, Muslim jurists have different opinions concerning the waiting period for non-Muslims, categorizing it into two groups as follows: (i) Hanafi jurists contend that if the waiting period is not applied in their religion, then it is not necessary for non-Muslims because they are not subject to the *Furu* (branches) of Shari'ah. (ii) On the other hand, Maliki and Shafi'i jurists assert that the waiting period is obligatory for non-Muslims as well, based on the verses, and there is no distinction between non-Muslims and Muslims in this regard.<sup>267</sup> The verse from the Qur'an and the Hadith confirms that the waiting period is required for a woman in the following cases.

*Divorced women who are menstruating.*

*Divorced women who are pregnant.*

*Women who have passed the age of monthly courses.*

*Women who have not yet menstruated.*

*Women whose husbands have passed away*

#### 4. Types of waiting period:

(i) Waiting for three menstrual periods: Muslim jurists have different interpretations regarding the waiting period for divorced women who are menstruating and have had a consummated marriage. This waiting period is mentioned in the Qur'an, specifically in *Suratul Al-Baqarah*: 228, which states, "Divorced women shall keep themselves in waiting for three *Qurū*." The term "*Qurū*" has various interpretations, leading to differences among Muslim jurists. Two main interpretations are as follows:

(a) Malik<sup>268</sup> and Al-Shafi'i<sup>269</sup> argue that "*Qurū*" signifies purity from menstrual periods. This interpretation is supported by narrations from A'isha, Ibn Umar, and Zaid bin Thabit (RA). They support their opinion with the following evidence: Allah (SWT) says, "O Prophet (SAW)! When

you divorce women, divorce them at their 'Iddah (prescribed periods), and count (accurately) their 'Iddah (periods)" (QS 65: 1). This means that the Qur'an instructs divorcing women during their 'Iddah period. Furthermore, Allah (SWT) commands that when someone wants to divorce a woman, it should be done during a period of purity and not during her menstrual period because divorcing during the menstrual period is considered *Haram* (forbidden). Therefore, the correct interpretation of verse 228 is "*Tuhri*" (purity). Another piece of evidence comes from the saying of the Prophet Muhammad (SAW) who advised, "Command him to take her back until she is in a state of purity, then she undergoes her second menses and again attains purity. At this point, either finalize the divorce or keep her."<sup>270</sup> This saying by the Prophet Muhammad (SAW) emphasizes the importance of purity and further establishes that 'Iddah is the period during which the right to divorce the woman is exercised. Therefore, the meaning of "*Qurū*" can be understood as purity.<sup>271</sup>

(b) Hanafi and Hanbali scholars contend that "*Qurū*" refers to menstrual periods. This interpretation finds backing in the teachings of Umar, Ali, and Ibn Masoud (RA).<sup>272</sup> They support their opinion with the following evidence: Allah (SWT) says, "If you are in doubt, the waiting period will be three months for those women who have ceased menstruating and for those who have not [yet] menstruated" (QS 65: 4). It is clear that for women who have ceased menstruating, the waiting period is three months. This suggests that the meaning of "*Qurū*" in this context refers to menstrual periods.<sup>273</sup> Also, they support their opinion with the following Hadith, Fatima bint Abi Hubaish used to have bleeding in between the periods, so she asked the Prophet (SAW) about it. He replied, "The bleeding is from a blood vessel and not the menses. So give up the prayers when the (real) menses begins and when it has finished, take a bath and start praying."<sup>274</sup> The Prophet Muhammad (SAW) commanded Fatimah to stop praying when her menstrual period began, and when it ended, she was required to resume her prayers. Furthermore, they explained that the waiting period was legislated to determine if the woman is not pregnant, and this

is indicated by menstruation, not purity. After considering two opinions, the weight of the statement leans towards the majority of Muslim jurists, such as Umar, Ali, and Ibn Masoud (RA), as the senior companions relied on it, and contemporary Muslim scholars also support this view like Sheikh Al-Uthaymeen.<sup>275</sup>

## Activity 2.

Polyandry is a type of polygamy where a woman has multiple husbands simultaneously. If polyandry is allowed, how can individuals with advanced knowledge ensure the legitimacy of the lineage and protect family heritage?

(ii) Waiting period for three months: This applies to women who have not yet menstruated, either because they have not reached the age of menstrual periods or because their menstrual periods have stopped, and this is known as *Yaisā*. Allah (SWT) says, “And those who no longer expect menstruation among your women – if you doubt, then their period is three months, and [also for] those who have not menstruated” (QS 65:

4). The waiting period applied for the following:

(a) *Yaisa*: Muslim jurists have differing opinions on the age of *Yaisā* as follows: The Hanafi school of thought asserts that there is no specific age for *Yaisā*, and it varies from one woman to another. When a woman’s menstruation stops, they consider it as *Yaisā*. In contrast, the Shafi’i School and some jurists from the Hanafi and Hanbali schools stipulate that the age of *Yaisā* is fifty years.<sup>276</sup> However, Mohammed bin Hassan, a student of Hanafi, suggests that the age of *Yaisā* is fifty-five years.<sup>277</sup> Another viewpoint presented by jurists is that there are minimum and maximum ages for *Yaisā*. Malikis’ and Hanbalis’ opinions are that the minimum age is fifty years, while Hanbali differs, suggesting that the maximum age is sixty years and Malik suggested a maximum age of seventy years.<sup>278</sup>

(b) *Saghīr* (Minor): Muslim jurists generally agree that the waiting period (*iddah*) for women who have not yet menstruated because they have not reached the age of menstrual periods is three months. Allah (SWT) says, “and [also for] those who have not menstruated” (*Suratul Talāq*: 4). Muslim jurists have reached a consensus that the waiting period for a minor who has not yet experienced menstruation is three months.<sup>279</sup>

(iii) Waiting period for four months and ten days: This applies for women whose husbands have passed away, so the waiting period is four months and ten days. Allah (SWT) says, “The wives of men who have died must observe a waiting period of four months and ten days” (QS 2: 234). This rule applies to all women whose husbands have passed away, whether they have had sexual intercourse or not, and whether they are of puberty age or minors. This is because death ends the marital relationship. In addition, Muslim jurist also agreed to follow the crescent of the moon. The Prophet Muhammad (SAW) said, as narrated by Ibn `Umar: The Prophet (holding out his ten fingers thrice), said, “The month is thus and thus and thus,” namely thirty days. Then (holding out his ten fingers twice and then nine fingers), he said, “It may be thus and thus and thus,” namely twenty-nine days.<sup>280</sup> He meant once thirty days and once twenty-nine days. In this context, Muslim jurists have varying opinions regarding the commencement of the waiting period. (a) According to Al-Shafi’i and Ibn Hanbal, the waiting period begins after the husband has passed away.<sup>281</sup> (b) Malik's view is that if the husband passes away after the fajr time, it will not be counted as the start of the waiting period.<sup>282</sup> The majority of Muslim scholars assert that the waiting period for a woman begins at the time when her husband passes away because any variation in the period could impact the specific months stipulated in the Qur'an.

If a divorced woman who has undergone a revocable divorce is in her waiting period and her husband dies, she must begin a new waiting period due to her husband's death. This is the consensus among the majority of jurists from the Hanafi, Maliki, Shafi'i, and Hanbali schools.

Therefore, the Hanafi school states that if a man divorces his wife with a revocable divorce and then he dies after the waiting period for divorce, that waiting period is invalidated, and she is required to begin the waiting period for the deceased, because the marriage still exists between them after the revocable divorce and ends only with the death. Consequently, she is obliged to observe the waiting period for a deceased person, which is a requirement associated with the marriage.<sup>283</sup>

(iv) Waiting period for twelve months: In the case of a divorced woman who experiences menstruation after reaching puberty, even if it occurs for just three days and then ceases, and a year or more passes without any further menstruation, her divorce takes place before she reaches the age of *Al-Yaisā*. Such a woman is referred to as the *Mu'tada al-Tuhrī*. According to Imam Malik, her waiting period is one year, while according to Imam Abu Hanifa, it continues until she reaches the age of *Al-Yaisā*, and then she observes a waiting period of three months.<sup>284</sup>

(v) Waiting Period for a Widow: Muslim jurists unanimously agree that if a pregnant woman has been divorced or her husband dies, her waiting period ends when she gives birth. Allah (SWT) says, "And for those who are pregnant, their term is until they give birth" (QS 65: 4). If a pregnant woman has been divorced her waiting period ends after she gives birth, but Muslim jurists differ on the status of a pregnant woman whose husband has passed away, categorizing it into two groups:

(a) The majority of Muslim jurists say that the waiting period ends immediately after she gives birth when her husband passes away. They support this opinion based on the following proofs: Allah (SWT) says, "And for those who are pregnant, their term is until they give birth" (QS 65: 4). This verse is general and includes a divorced pregnant woman whose husband has died, as God has set her waiting period to be the birth of a child. The corrected paragraph is: "Additionally, they referred to the Hadith of Subia' Al-Aslamī, who was married to Said bin Khawla and passed away after *Hija al-Wada'*. One day, Abu Sanabili noticed

that Subia'looked more beautiful and asked her why she had made herself beautiful, suggesting that she might be seeking a new husband. He reminded her that she was not entitled to remarry until she had completed a waiting period of four months and ten days. Following this, Subia'approached Prophet Muhammad (SAW) the next day and inquired about the waiting period. The Prophet Muhammad (SAW) replied, 'It is permissible for you to marry once you have given birth.'<sup>285</sup> Furthermore, they said the majority of Muslim jurists agree that the waiting period for a pregnant woman whose husband has passed away is the act of giving birth. Finally, the act of delivering is a sufficient sign of the purity of the uterus.

(b) Ali ibn Twalib and Ibn Abbas said that the waiting period for pregnancy is a long duration of time between giving birth and four months and ten days.<sup>286</sup> They support this opinion based on the following proofs: Allah (SWT) says, "The wives of men who have died must observe a waiting period of four months and ten days" (Suratul al-Baqarah: 234). The verse above indicates that if a woman whose husband has died is pregnant and gives birth before the end of the period of months, she should remain until the end of that period. However, if the months end and she does not give birth, she must wait until she gives birth. If she is accustomed to the latter of the two terms, then she has acted in accordance with the two verses. Merging two verses is better than preferring one.<sup>287</sup>

5. General directive of waiting period: There are several different rulings, some of which pertain to women's rights, and some of which involve duties that are obligatory for them. This unit provides a detailed explanation of the following:

(1) Staying in the marital home without departing from it: The majority of scholars hold the opinion, which is considered authoritative, that the location for the waiting period, whether due to divorce, annulment, or death, is the marital home where the woman resided before separating from her husband, before his demise, or upon receiving news of his death.

During this period, she should remain concealed from anyone who is not her *Mahram*. If the husband passes away while she is not in his home, it becomes obligatory for her to return to her former marital home to observe the waiting period. This requirement is rooted in acts of worship and is not exempted or altered without valid reasons. The basis for this ruling can be traced to the words of God Almighty: "O Prophet! Instruct the believers: When you intend to divorce women, then divorce them with concern for their waiting period, and count it accurately. And fear Allah, your Lord. Do not force them out of their homes, nor should they leave – unless they commit a blatant misconduct" (*Suratul Talāq*: 1). An exception to this rule applies to a woman who is in the waiting period for a death. In this case, it is permissible for her to go out during the day, return in the evening, and spend the night in the marital home. This is because she has no maintenance during the waiting period for a death, and she may be compelled to go out to earn her livelihood. It is important to note that a waiting woman can go out if she is forced to do so for any reason, whether it is during the waiting period for death or divorce. This is because necessities render unlawful acts. Additionally, a woman observing the waiting period after death or divorce should continue to reside in the same house they lived in before the separation. She should only move to another residence if there is a valid excuse, such as fearing for her safety or believing that living in the previous house would harm her in some way. The wisdom behind requiring her to stay in the marital home is to allow the husband time to reflect on his decisions following a divorce. It is possible that God may change his heart, leading him to reconsider the divorce and reconcile with his wife.<sup>288</sup> In the case of a husband's passing, showing regret for the loss of the husband, especially in the event of his death, is a sign of respect for his rights and a consideration of the feelings of his family and relatives.

### Activity 3.

*Fatuma is employed as a doctor. After her husband's passing, during her waiting period, she refrains from leaving her house except for work. However, her role as a doctor occasionally necessitates spending nights at the hospital. What is your perspective on how Fatuma should manage this situation? Please, let's discuss it.*

(2) *Hidād*: The Arabic word "*Hidād*" means abstaining from adornment after the death of one's husband in Islamic legal terminology. This entails refraining from using perfume, wearing jewelry, applying oil and kohl, dyeing oneself, or combing oneself, and avoiding being seen.<sup>289</sup> In pre-Islamic times, when a woman's husband passed away, she would abstain from most pleasures and lead an austere life. She refrained from using perfume, washing her body, or trimming her nails. She would dress in the plainest attire available and seclude herself in a small, aged dwelling for an entire year. After this period, she would emerge appearing disheveled and unadorned. To cleanse herself, she often used a certain type of plant, and it was rare for her to employ anything else for bathing purposes. This was mentioned in the following Hadith. "I heard my mother, Um Salama saying that a woman came to Allah's Messenger (SAW) and said, "O Allah's Messenger (SAW)! The husband of my daughter has died, and she is suffering from an eye disease, can she apply kohl to her eye?" Allah's Messenger (SAW) replied, "No," twice or thrice. (Every time she repeated her question) he said, "No." Then Allah's Messenger (SAW) added, "It is just a matter of four months and ten days. In the Pre-Islamic Period of ignorance, a widow among you should throw a globe of dung when one year has elapsed." Humaid said to Zainab, "What does 'throwing a globe of dung when one year had elapsed' mean?" Zainab said, "When a lady was bereaved of her husband, she would live in a wretched small room and put on the worst clothes she had and would not touch any scent till one year had elapsed. Then she would bring an animal, e.g. a donkey, a

sheep or a bird and rub her body against it. The animal against which she would rub her body would scarcely survive. Only then she would come out of her room, whereupon she would be given a globe of dung which she would throw away and then she would use the scent she liked or the like.<sup>1290</sup>

Since Islamic law is founded on principles of justice, fairness, and the welfare of individuals within the Islamic community, as long as neither party is harmed by taking on the responsibility for the other, it does not tolerate injustice and ensures that rights are not lost. It abolished the hardships that women faced due to the death of their husbands and replaced them with rulings that protect the rights of both parties, meaning the husband and the wife alike, as ordained by God Almighty. "The wives of men who have died must observe a waiting period of four months and ten days" (QS 2: 234). The Sunnah mentioned in the previous verse was superseded by the period indicated in this verse. The legislator, in Islam, established guidelines for women who have lost their husbands, placing certain restrictions on them. This, in turn, replaced the limitations they endured in pre-Islamic times.

The majority of Muslim jurists believe that it is necessary for a woman whose husband has passed away to abstain from adornment. They support their opinion with the following verse: "A woman must not observe mourning for one who had died for more than three (days) except for four months and ten days in the case of her husband. And she must not wear a dyed garment except one of the types made of dyed yarn, or apply collyrium, or touch perfume except a little perfume or incense, when she has been purified after her courses."<sup>291</sup> This applies to women who are not pregnant when their husbands die. If pregnant, the mourning period for her deceased husband ends upon giving birth. A woman who has undergone a revocable divorce should beautify herself, apply perfume, and refrain from going out of her home. Instead, she should take pride in her home, as stated in the words of God Almighty: "Do not force them out of their homes" (QS 65: 1).

#### Activity 4.

*Present a paper on the mourning practices among women in your tribe, addressing this topic from a jurisprudential perspective, as well as considering the customs and traditions involved.*

(3) The maintenance of the waiting woman: There is a unanimous consensus among jurists that a divorced woman who has not consummated her marriage is not entitled to maintenance. This is because there is no waiting period prescribed for her in this case. However, there is also a unanimous consensus among jurists that a divorced woman who has consummated her marriage is entitled to maintenance and housing during the waiting period. This is because marriage still exists, and the possibility of conjugal relations remains. Furthermore, there is a unanimous consensus among jurists, whether a woman is divorced by minor irrevocable divorce, regular divorce, or annulled marriage, that she is entitled to maintenance during the waiting period. This is in accordance with the verse from the Qur'an (QS 65: 6), which states: "Let them live where you live 'during their waiting period', according to your means. And do not harass them to make their stay unbearable. If they are pregnant, then maintain them until they deliver." In some narrations of the Hadith of Fatima bint Qais, whose husband divorced her three times, it is mentioned that "The woman who is absolutely divorced does not leave her house until she is free to remarry. She has no maintenance unless she is pregnant. In that circumstance, the husband must provide for her until she gives birth."<sup>292</sup> In that circumstance, the husband is obligated to provide for her until she gives birth because the pregnancy concerns his child, and he is responsible for the expenses related to the child, which can only be fulfilled by supporting the mother.

Muslim jurists have held differing opinions on the matter of a major and irrevocable divorce when the woman is not pregnant and whether she is entitled to maintenance. Two distinct schools of thought exist on this issue:

(a) The Hanafi School and a group of jurists who maintain that she is entitled to maintenance. They substantiate their stance with reference to the words of God Almighty. "O Prophet! Instruct the believers: When you intend to divorce women, then divorce them with concern for their waiting period, and count it accurately. And fear Allah, your Lord. Do not force them out of their homes, nor should they leave – unless they commit a blatant misconduct. These are the limits set by Allah. And whoever transgresses Allah's limits has truly wronged his own soul" (QS 65: 1). Allah (SWT) made it obligatory for a husband to provide maintenance for the wife by His Almighty saying, "Let them live where you live during their waiting period" (QS 65: 6). These rules apply generally to both revocable and irrevocable divorce. Maintenance is required for remaining in the marital house. If she were not obligated to pay maintenance, it could have resulted in harm to her and Almighty Allah (SWT) says, "And do not harm them in order to oppress them" (QS 65: 6).

(b) Malik, Al-Shafi, Ibn Hanbal, and others have stated that there is no maintenance for a major irrevocably divorced woman who is not pregnant. They support their opinion with the following proof. Fatima bint Qais (Allah be pleased with her) reported from Allah's Messenger (SAW) that there is no lodging and maintenance allowance for a woman who has been given irrevocable divorce.<sup>293</sup>

### **Matrimonial Property**

(1) "Matrimonial property" is defined as all the assets belonging to the parties (whether jointly or solely) which were acquired during the marriage. Matrimonial property will also include any property acquired before the date of the marriage such as furniture, bedding, tools, and other things that make the marital home suitable for living. There are differences among Muslim jurists regarding who is entitled to provide matrimonial property.

Malik stated that providing matrimonial property is the wife's obligation,

as long as she has received a dowry. If she did not receive a dowry, it is not compulsory for her. Moreover, if the husband specifies this requirement or if it is a customary practice for the wife to prepare the marital home, then the responsibility falls on her.<sup>294</sup>

The Hanafi school of thought asserts that providing matrimonial property is the husband's obligation, as it falls under the broader responsibility of providing maintenance, which includes food, clothing, housing, and medical treatment. Matrimonial property is considered an integral part of this maintenance.<sup>295</sup> Consequently, the house belongs to the husband, and the dower provided is regarded as a gift, as indicated in the Qur'an: "And give the women (on marriage) their dower as a free gift" (QS 4: 4).

(2) Division of Matrimonial Property: If spouses are in disagreement regarding the ownership of household goods, whether all or some of them, and each spouse claims ownership with supporting evidence or with equally valid evidence, the one who provides sufficient evidence for their claim will be granted a ruling in their favor. However, if they do not have sufficient evidence, Muslim jurists hold three different opinions on this matter as follows:

(a) If they fail to provide sufficient evidence, the property will be divided equally between them after both parties take an oath. This division is based on the apparent meaning, which implies equality between spouses with no preference for one over the other. This rule applies irrespective of whether the disputed property is intended for men, women, or both. This principle is supported by Imam Al-Shafi'i and those who share his viewpoint, who provide several pieces of evidence to justify this stance. The Prophet Muhammad (SAW) said, "Proof lies on the plaintiff and the oath is to be sworn by the defendant."<sup>296</sup> Adhering to the apparent meaning of the Hadith underscores the principle of equality in claims between spouses, with neither spouse being given precedence over the other unless a clear and justifiable reason exists. It is not appropriate for the man to claim precedence over his spouse's possessions solely on the

basis of being the head of the family, nor is it acceptable for the woman to assert priority over the man regarding household goods just because her hand is on the property in the house. Similarly, neither spouse should be favored over the property is more suitable for one of them.<sup>297</sup>

(b) The Hanafi,<sup>298</sup> Maliki,<sup>299</sup> and Hanbali<sup>300</sup> schools of thought assert that the distribution of property should be based on its suitability for both men and women. If spouses have a dispute over the ownership of property and lack sufficient evidence during their marriage or after separation, a specific procedure is followed. The husband's statement will be considered, and if the property is deemed suitable for him, such as plowing tools, and he takes an oath, he will prevail in the case. If he refuses to take an oath, he will lose the claim. A similar procedure is applied to women for property items that are deemed suitable for them. Muslim jurists maintain that if the property is suitable for both spouses, such as a fridge, radio, computer, or a car, among other items, the property will be granted to the party who can provide evidence of ownership. If neither spouse can provide sufficient evidence, the husband is given priority in the absence of evidence because he bears the responsibility of providing maintenance and may be required to take an oath to claim ownership.

#### Activity 5.

*Discuss the complications and issues that society encounters when turning to common laws regarding matrimonial property.*

## SUMMARY

Iddah refers to the period a woman must observe after the death of her husband or after a divorce, during which she may not marry another man. The main purpose is to remove any doubt as to the paternity of the child born after divorce or death of the prior husband. Furthermore, there are different types of Iddah (i) Waiting for three menstrual periods: this applies to divorced women who are menstruating and have had a consummated marriage. (ii) Waiting period for three months: This applies to women who have not menstruated. (iii) Waiting period for four months and ten days: This applies to women whose husbands have passed away. (iv) Waiting period for twelve months: In the case of a divorced woman who experiences menstruation after reaching puberty, even if it occurs for three days and then ceases. (v) Waiting period for a widow: This applies to a pregnant woman who has been divorced or whose husband dies. Some rules associated with iddah are (i) Staying in the marital home without departing from it (ii) *Hidad* (iii) Maintenance of the waiting woman. Another issue Muslim jurists emphasize is matrimonial property, which are assets belonging to parties. The distribution is based on sufficient evidence or the suitability of the property.

## QUESTIONS

**One:** please provide answers to the following questions.

1. Write a brief explanation of the significance of the Waiting Period.
2. Muslim jurists have varying interpretations of the term "*Qurū*." Explore their viewpoints and present the most accurate interpretation.
3. Discuss the waiting period for women whose husbands have passed away.

4. Elucidate similarities and differences between Islamic law and common law on matrimonial property.
5. What is the waiting period status for a woman divorced through a revocable divorce whose husband passed away during the waiting period?

**Two:** Fill in the gaps in the following sentences.

6. Maintenance is obligatory for a woman during the waiting period following a..... divorce. In the case of a woman observing the waiting period following the death of her spouse
7. During the waiting period it is forbidden the following
8. Waiting period is necessary for the following women's
9. The rationale for the waiting period in the event of death is
10. The Prophet Muhammad (SAW) replied, 'It is permissible for you to marry once

**Three:** Please indicate whether the following sentences are correct (✓) or incorrect (✗).

11. A woman is required to observe the waiting period if she has had sexual intercourse with her husband. (.....)
12. The period of Hidad in pre-Islamic times was four months and ten days (.....)
13. Malik, Shafi, Hanbali, and others have stated that there is no maintenance for major irrevocably divorced woman who is not pregnant (.....)

14. The Hanafi school of thought asserts that providing matrimonial property is the husband's obligation (.....)
15. If a divorced woman who has undergone a revocable divorce is in her waiting period and her husband dies, she must begin a new waiting period (.....)

**Four:** Read the following cases and analyse based on the Shari'ah point of view.

16. The facts of this appeal are that the appellant and the respondent are Muslims. They got married under Islamic law on 18<sup>th</sup> March 2005. The marriage was blessed with three sons. The sons are AIK. (now aged 14), SIK. (now aged 14), SIK. (now aged 12) and AIK. (now aged 10). On 1<sup>st</sup> March 2018 the respondent left the matrimonial home with the children and without the appellant's knowledge or permission. She removed the children from school. These acts aggrieved the appellant who filed a cause at the Qadi's Court (**Civil Case No. 68 of 2018**) at Nairobi seeking full custody of the children and their equal maintenance on a 50/50 basis. With the cause was a notice of motion seeking the custody of the children and their return to the home and school. The Qadi's Court on 3<sup>rd</sup> September 2018 delivered a ruling, following oral hearing, in which it granted actual custody of the children to the respondent, legal custody to the appellant and granted access to the appellant and his parents. The court ordered that the appellant provides school fees and related expenses, food, utility bills and medical expenses, and the respondent provides shelter and clothing.

### **Textbooks/Articles for Further Reading**

1. Ainiyah, Qurrotul, and Julianne Kamelia Riza. "Khulu'as Evidence of Women Equality Right in Islam." In 2nd Southeast Asian Academic Forum on Sustainable Development (SEA-AFSID 2018), pp. 111-114. Atlantis Press, 2021.

2. Daud, Fathonah K. "KHULU' AND TALAK, IS IT SAME? Philosophical-Comparative Study of Women's Divorce Rights in Fiqh and Positive Law." *Al Hakam: The Indonesian Journal of Islamic Family Law and Gender Issues* 1, no. 1 (2021): 16-31.
3. Md Habibur, Rahman, and Osmani Noor Mohammad. "Key Money (Badl Al-Khulu): An Islamic Perspective." *Ar-Raniry, International Journal of Islamic Studies* 5, no. 1 (2018): 59-87.
4. Ma'mun, Sukron, and Ibnu Akbar Maliki. "A Socio-Historical Study of Women's Rights Advocacy in Islamic Legal Construction." *JSEHR* 7 (2023): 1.

## CHAPTER SEVEN



### DISSOLUTION OF MARRIAGE

#### *(Talāq and Khul')*

##### **Introduction of the Chapter:**

Separation of spouses under Islamic law can take various forms. Some are initiated by the husband, known as *Talāq*, while others are initiated by the wife, referred to as *Khulu*. Separation can also be initiated by a *Qadi*, which is called *faskhi* (termination of the marital relationship due to a breach of the pillars or conditions) and *Tafriq* (termination of the marital relationship due to the husband's negligence or harm to the wife). Additionally, death can also lead to the separation of spouses. Historically, these rules were governed by the Shari'ah, interpreted through traditional Islamic jurisprudence. However, they varied depending on the legal school, and historical practices sometimes deviated from legal theory. Some religions, such as Christianity, do not allow divorce for any reason. However, it is allowed for the husband to separate from his wife, known as physical separation. This is because marriage is considered a sacred sacrament of the Church that cannot be dissolved, as the spouses are joined in a holy union. They base this on what is outlined in the Gospel of Luke. "And if a woman shall put away her husband, and be married to another, she commits adultery." The Gospel of Luke adds that those who marry divorced persons also commit adultery, as recorded in Luke 16:18. 1 Corinthians 6:9-10 states that adulterers "shall not inherit the kingdom of God", while Protestants permit remarriage under certain circumstances, such as if one of the spouses committed adultery or converted to another religion. This unit will focus on *Talāq* and *Khulu*. At the end of the unit,

you will find various activities and assessment questions to reinforce your understanding of the material.



### Objective of the Chapter:

After reading this chapter the student should be able to:

- (i) Define the meaning, types, and conditions of *Talāq*.
- (ii) Clarify the meaning, reasons, conditions, modes, and effects of *Khulu'*
- (iii) Solve cases related to *Talāq* and *Khulu'*.

### Talāq (Divorce):

1. Definition of *Talāq*: Divorce (*Talāq*) is among the detested of legal actions permitted by Islam. Moreover, Islam considers divorce as evil. Any means must prevent it, but marital relations become bitter in some situations, and two spouses cannot stay together in an atmosphere of hatred and disaffection. Under Islamic *Shari'ah*, the divorce may occur by the act of the spouses themselves or by a decree of the Qadi's court. Therefore, it is essential to understand the meaning of *Talāq*. The word *Talāq* is an Arabic name which means to untie or to set free.<sup>301</sup> Technically, there are different variations in statements from Muslim jurists on using the term *Talāq*. Hanafi jurists explain *Talāq* as breaking the marital relation immediately or eventually with a specific word.<sup>302</sup> While the school of Malik defines *Talāq* as a kind of act that will prevent husband enjoyment to his wife, and if it occurs twice, it will forbid him to have sexual intercourse unless he formulates marriage again.<sup>303</sup> Al-Shafi'i interprets *Talāq* as the dissolution of a spousal relationship by pronouncing *Talāq* or similar to it.<sup>304</sup> Lastly, Hanbali Jurists illustrate that *Talāq* is breaking marital relations.<sup>305</sup> Allah (SWT) has allowed divorce, yet He considers it one of the most disliked permissible actions in His sight. Divorce results in the fragmentation of the family and the undermining of its fundamental bonds. It entails

parting ways after being united and separation after coming together.

2. Legality of Divorce: The majority of jurists agree on the permissibility of divorce, citing verses from the Qur'an and Hadith. Allah (SWT) says, "Divorce them at their prescribed periods" (*Suratul At-Talāq*: 1). In another verse, Allah (SWT) says, "It is no sin if you divorce your wives" (QS 2: 236). In this regard, Prophet Muhammad (SAW) said, "The lawful thing which God hates most is divorce."<sup>306</sup> Muslim jurists have reached a consensus that divorce is permissible.<sup>307</sup> In terms of logic, the benefits of marriage can turn into adverse outcomes when spouses face disagreements, anger, discord, and disputes. These conflicts may erode their initial agreement, leading to disharmony. Continuing the marriage during such difficult times can lead to detrimental consequences, including animosity, enmity, infidelity, and other unfavorable circumstances. Therefore, divorce is endorsed as a measure to prevent the exacerbation of these adversities.<sup>308</sup>

3. Divorce ruling: The legal ruling on divorce is governed by the *Hukmu Shari'a* (command of Shari'ah) categories, which include obligatory, recommended, forbidden, disliked, and permissible rulings.<sup>309</sup> Divorce may be deemed obligatory if the husband causes harm to his wife due to strained relations, a debilitating illness that impedes their relationship, or if he has knowledge that his wife is not chaste.

It can also be considered when the husband feels disgraced and humiliated due to his wife's perceived poor character, making it impossible for him to continue living with her. Divorce is forbidden when it leads to adultery due to his attachment to her or inability to marry someone else. It is considered disliked, for instance, when divorcing a wife of good character and strong religious faith. Lastly, divorce is permissible if the husband does not admire his wife in high regard. Additionally, Muslim jurists have posed some restriction for divorce as follows: (i) it must be for a genuine

*Wajib/Fard*  
(obligatory), *Mustahab/Mandub* (recommended), *Mubah* (neutral), *Makruh* (disapproved), *Haram* (forbidden).

reason that is acceptable under Islamic law, such as the wife's negligence in worship or the use of obscene language. (ii) Must be in a state of ritual purity or pregnant. Ibn 'Umar (Allah be pleased with him) reported that he divorced his wife while she was in the state of menses. 'Umar (Allah be pleased with him) made mention of it to Allah's Apostle (SAW) and he said: Command him to take her back, then divorce her when she is pure, or she is pregnant.<sup>310</sup> (iii) It must be issued at one session. Hence, Muslim jurists had differing opinions regarding the issue of triple divorces in one pronouncement.

(a) The supporters of this viewpoint argue that the triple divorce occurs three times. It is not permissible for her husband, who initiated this form of divorce, to remarry her until she marries another man. This opinion is associated with the four *Imams Hanafi, Malik, Al-Shafi, and Ibn Hanbal* and is followed by the majority of the Companions and their successors.<sup>311</sup> They supported their opinion with the following evidence: Allah (SWT) says, "Divorced women remain in waiting for three periods" (QS 2: 228). One verse states, "You will not be blamed if you divorce women when you have not yet consummated the marriage or fixed a bride-gift for them" (QS 2: 236), while another verse says, "for divorced women Maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous" (QS 2: 241). The generality found in the noble verses encompasses both revocable and irrevocable divorces. This applies whether the divorce was pronounced with a single word or with two or three, whether separated or not, and it is only restricted by specific conditions. The waiting period mentioned in the text, which marks the start of the waiting period, maintains the generality of the rule. Also, they support their opinion with the following Hadith, a man divorced his wife thrice (by expressing his decision to divorce her thrice), then she married another man who also divorced her. The Prophet (SAW) was asked if she could legally marry the first husband (or not). The Prophet (SAW) replied, "No, she cannot marry the first husband unless the second husband consummates his marriage with her, just as the first husband had done."<sup>312</sup>

The preceding Hadiths establish that a triple divorce indeed occurs three times, and a woman is not permitted to return to her former husband unless she marries another person. These hadiths collectively complement one another, providing mutual clarification and confirmation. The Prophet (SAW) himself put this into practice three times. If it were not the case, he would have disavowed it and declared its invalidity.

(b) Those who support this viewpoint contend that three divorces occur as a single, revocable divorce. This opinion is associated with Ibn Taymiyyah and Ibn al-Qayyim.<sup>313</sup> They support their opinion with the following evidence. Allah (SWT) says, "A divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness" (QS 2: 229). The noble verse pertains to lawful divorce. God Almighty has ordained divorce to be carried out one after another, allowing one divorce at a time, rather than permitting three divorces all at once. If a husband pronounces three divorces simultaneously, only one of them is considered valid. Also, they relied on the following Hadith, Abu al-Sahba' said to Ibn 'Abbas: Enlighten us with your information whether the three divorces (pronounced at one and the same time) were not treated as one during the lifetime of Allah's Messenger (SAW) and Abu Bakr. He said: It was in fact so, but when during the caliphate of 'Umar (Allah be pleased with him) people began to pronounce divorce frequently, he allowed them to do so (to treat pronouncements of three divorces in a single breath as one).<sup>314</sup> The Hadith clearly indicates that a single-word divorce was valid during the time of the Prophet Muhammad (SAW) and Abu Bakr. However, Umar, may God be pleased with him, noticed that people were not taking the matter of divorce seriously and were issuing it too casually in one statement. He felt it necessary to impose stricter rules as a deterrent. The basis for this stricter stance was to protect the greater interest of the community. It is important to note that the concept of "interest" can vary and evolve, so it is essential to revert to the fundamental principle that divorce does not occur as three divorces in one statement but rather as one divorce.

(c) Those who support this viewpoint argue that pronouncing three divorces in a single session is an innovation and holds no legal validity; it is as if it never occurred in a legal context. This perspective is attributed to certain *Tabi'een* and some *Zāhiri* scholars,<sup>315</sup> and they substantiate their claim as follows: “He who does an act which we have not commanded, will have it rejected (by Allah).”<sup>316</sup>

#### Activity 1.

*Engage in a discussion with your lecturer about the weighted opinion concerning the issue of triple divorces pronounced in a single session.*

4. Wisdom of legislation of divorce: The wisdom of divorce legislation emphasizes that it encompasses various measures to address issues that may arise within a marriage. These measures include promoting good cohabitation and providing a framework for dealing with disputes. The process typically involves stages such as admonition, guidance, possible separation in the bedroom, and, in more severe cases, the option of involving two arbitrators appointed by a judge—one from the wife's family and one from the husband's family—to mediate and reconcile their differences. If these efforts fail to resolve the issues, divorce is considered a final recourse to address challenges that prove insurmountable for the spouses and those seeking wise and fair solutions. This recourse to divorce becomes necessary due to differences in morals, discordant characters, and complexities in the love relationship between the spouses, or in cases of incurable diseases or infertility, which can lead to the deterioration of the relationship between the two spouses. In such situations, the continuation of love and affection can transform into hatred and resentment. Divorce, in these circumstances, is regarded as a legitimate means to resolve family problems and is only sought when there is a genuine need for it. Prophet Muhammad (SAW) says, 'Any woman who asks her husband for

a divorce when it is not absolutely necessary, the fragrance of Paradise will be forbidden to her."<sup>317</sup> The wisdom behind the legality of divorce can be understood as follows: (a) Allah Almighty has sanctioned marriage as a means to attain tranquility, affection, and mercy. The fundamental principle is that each spouse fulfills their responsibilities toward one another. However, due to various factors, be they moral, material, or social, conflicts and discord may arise, leading to a mutual repulsion and the severing of the bond of affection between them, making their lives exceedingly challenging. In such cases, divorce serves as a solution to escape from these difficult situations and discord. (b) In some instances, wives may deviate from the righteous path, engage in immoral behavior, and dishonor their husbands. In these situations, divorce provides a way to safeguard the husband's honor and find a path to salvation. (c) Sometimes, individuals may make errors in their choice of a spouse or discover hidden congenital traits or diseases in their partner that render life with them unbearable and miserable. In these cases, divorce offers a means of relief and salvation from an intolerable situation.<sup>318</sup>

5. Condition of divorce: To be considered a valid divorce, the husband must be an adult and of sound mind. A minor, despite being of sound mind, is not eligible for divorce because he lacks the understanding of the repercussion.. Similarly, individuals who are mentally incapacitated are also ineligible for divorce as they lack the capacity to comprehend the implications of divorce <sup>319</sup>. In this regard, Muslim jurists have differing opinions regarding the divorce of a person who is intoxicated, the divorce pronounced in a jesting manner, and the divorce declared under coercion.

(i) Divorce of Intoxicated person: Intoxicated person means having lost some control of actions or behavior under influence of alcohol or another drug.<sup>320</sup> The majority of Muslim jurists have stated that the divorce of an intoxicated person does not occur if they used alcohol in a permissible way. This consensus has been quoted by scholars such as Ibn Qudama, when he said, "...Whether a person's mental capacity is compromised

due to insanity, fainting, sleep, taking medication, being coerced into consuming alcohol, drinking a substance that impairs their judgment, or unknowingly ingesting such a substance, all of these factors prevent divorce from occurring, as per the consensus among Muslim scholars. We are not aware of any disagreement on this matter.”<sup>321</sup> Also, Al-Inī stated that using anesthesia and consuming medicine do not constitute divorce by mutual agreement.”<sup>322</sup>

Additionally, Muslim jurists differ on whether a person's divorce will be counted if they choose to drink alcohol voluntarily as follows:

(a) The majority of Muslim jurists, such as Al-Shafi,<sup>323</sup> Hanbali,<sup>324</sup> and Dawood Zahiri<sup>325</sup> have expressed the opinion that divorce does not occur when an individual is intoxicated. This view is also supported by scholars like Ibn Taymiyyah, Ibn Qaim, Ibn Baz, and Utheymein. They support their opinion with the following evidence. Allah (SWT) said, “O you who have believed, do not approach prayer while you are intoxicated until you know what you are saying” (QS 4: 43). Allah (SWT) forbade a drunkard from offering prayers because they do not know what they are saying. Therefore, their prayer is not valid until they are aware of it and intend it. If their prayer is not valid, their divorce will not take place.<sup>326</sup> Furthermore, they support their stance with the following Hadith, "(The value of) an action depends on the intention behind it. A man will be rewarded only for what he intended."<sup>327</sup> Actions are contingent upon intention, so if someone utters something without the intention, whether it is due to oversight, premeditation, or a lack of sound judgment, it does not carry a legal ruling. Drunkenness, as is commonly known, impairs one's reasoning, so if something is uttered in a state of drunkenness, it does not result in a divorce.

(b) Abu Hanfia<sup>328</sup> and Malik<sup>329</sup> have expressed the opinion that divorce does occur when an individual is intoxicated. They support their opinion with the same verse from the Qur'an. Allah (SWT) said, “O you who have believed, do not approach prayer while you are intoxicated until you

know what you are saying" (QS 4: 43). Allah (SWT) forbade believers from offering prayers while intoxicated. This means that the obligation does not vanish, and only someone who is of sound mind and accountable can fulfill it. If it is an obligation, it remains in place, including the matter of his divorce.<sup>330</sup> Additionally, Umar and Muawiyah accepted divorce for an intoxicated person.<sup>331</sup> They also said that a drunkard may be divorced if his intoxication was due to an unlawful act, as his mental faculties have been impaired as a result of a sin. This is considered a form of punishment for him and a deterrent from committing the sin.<sup>332</sup>

## Activity 2.

*Search for more evidence presented by two groups and engage in discussions with your lecturer about the weighted opinion regarding the divorce of an intoxicated person.*

(ii) Divorce pronounced in a jesting manner: by a person who frequently tells jokes. Muslim jurists have different opinions regarding a divorce pronounced in a jesting manner, as follows: (a) the majority of Muslim jurists assert that a joking divorce occurs when someone intentionally utters an explicit word of their own choice and will. Therefore, regardless of whether the individual was serious or joking, the divorce is considered valid.<sup>333</sup> They used the following proofs: Prophet Muhammad said: "There are three things which, whether undertaken seriously or in jest, are treated as serious: marriage, divorce and taking back a wife after a divorce which is not final."<sup>334</sup> Additionally, it was reported that Umar ibn Khattab mentioned a man who used to divorce his wife and then remarry until Allah (SWT) revealed "Do not play with Allah's Commandment." The Prophet Muhammad (SAW) said, "Whoever divorces, emancipates, or remarries and says, 'I was a player,' is to be considered serious."<sup>335</sup> Finally, they said the consequence follows the reason; therefore, if a person pronounces a divorce, the effect will take place because the legislature arranges that it is

valid whether the individual intended to divorce or not.<sup>336</sup> (b) Malik and Dāwūd al-Zāhirī stated that the divorce of a joke is not considered valid.<sup>337</sup> They justified their stance by asserting that a joker lacks the resolve or intention for divorce to take place, and divorce necessitates intention, which is absent in this scenario. Prophet Muhammad (SAW) said, “(The value of) an action depends on the intention behind it. A man will be rewarded only for what he intended.”<sup>338</sup>

(iii) Divorce declared under coercion: The coerced person is the one who does not wish to initiate a divorce but is compelled to do so and pronounces it. (a) The majority of Muslim jurists argue that a divorce under coercion does not occur, based on the following evidence. Allah (SWT) said, “Whoever disbelieves in Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith” (QS 16: 106). The verse signifies that Allah (SWT) does not consider people disbelievers if they utter disbelief with their tongues while their hearts are reluctant due to external pressure. This verse implies a lesser ruling than disbelief in the first place. Prophet Muhammad (SAW) said, Verily Allah has pardoned [or been lenient with] for me my *Ummah*: their mistakes, their forgetfulness, and that which they have been forced to do under duress.<sup>339</sup> The Hadith indicates that a divorce performed under coercion is invalid. ‘A’isha told of hearing God’s Messenger say, “There is no divorce or emancipation in case of *ighlaq*.” It is said that the meaning of *ighlaq* is “compulsion”. Therefore, the Hadith suggests that a divorce carried out under duress is considered void. (b) Abu Hanifa said the divorced of a forced person is valid.<sup>340</sup> Allah (SWT) said, “And if the husband divorces his wife (for the third time), she shall not remain his lawful wife after this (absolute) divorce, unless she marries another husband, and the second husband divorces her” (QS 2: 230). Allah (SWT) does not differentiate between someone who divorces his wife voluntarily or under coercion. Moreover, the Hanafis, who asserted that a forced divorce takes place, drew a parallel between this and the divorce of someone jesting. They argued that just as the divorce of a joker is recognized, similarly, a forced divorce is recognized by analogy.<sup>341</sup>

6. Classification of Divorce: Divorce is categorized based on its pronouncement into explicit and metaphorical forms. In terms of its effectiveness, it is classified as revocable and irrevocable divorce.

(a) *Pronunciation*

(b) *Effectiveness*

(c) *Conformity*

(d) *Modes*

Concerning its conformity with Shari'ah law, it is categorized as *Sunni* and *Bid'a* divorce. In terms of its modes, there are the accomplished, future tense, and the suspended forms.

(i) Pronunciation: Muslim jurists have classified *Talāq* in terms of its pronouncement, namely explicitly and ambiguous. Explicitly means that there is an explicit declaration of divorce that may be performed orally or written, e.g., the husband says to his wife: “you are divorced.” This statement is known as explicit because the listener understands its meaning. The ruling on this type of divorce occurs immediately after uttering it.<sup>342</sup> Meanwhile, the metaphorical means unclear or indirect statement of divorce using phrases that are not exclusively prescribed for issuing divorce but alludes and hints to it, e.g., “You are a free woman”. This kind does not count if he did not intend to give *Talāq*. This opinion is the most popular of most jurists.<sup>343</sup>

(ii) Effectiveness: In terms of effectiveness, there is revocable (*raji'*) and irrevocable divorce (*Baynuna*). (a) Revocable divorce is the kind of divorce where the husband has a right to return to his wife when she is in her waiting period without a new contract, dowry, and consent after divorcing her twice.<sup>344</sup> Allah said, “and the husband has more right to take them back (in this period) if they court reconciliation” (QS 2: 228). In this verse, there is clear evidence that the husband has a right to return to his wife for those who have not depleted three *Talāqs*.<sup>345</sup> There are several rules associated with revocable divorce as follows: the husband has the

right to return to his wife without a new contract and dowry as long as she is in the waiting period. They are entitled to inherit each other if one spouse dies during the waiting period. Finally, it is not permissible to remove her from the marital home without legal justification.

Irrevocable is divided into two kinds: minor and major irrevocable divorce.

(b) Minor irrevocable (*Baynuna Al-Sughra*) is that the husband does not have the right to return to his divorced wife except with a new contract, dowry, and consent. Minor irrevocable occurs where the waiting period has lapsed, but the husband has not exhausted the divorce in his possession concerning his wife.<sup>346</sup> Furthermore, divorcing women before consummation was included as a minor irrevocable divorce because there is no waiting period for it. Allah (SWT) says, “O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period of *‘Iddat* have ye to count in respect of them” (QS 33: 49). The right to return to his wife takes place during the waiting period, and when there is no waiting period, the divorce is not revocable. In the context of minor irrevocable divorce, there are specific rules to consider. One of the key rules is that the husband does not have the right to return to his wife without a new contract and dowry. Additionally, in this type of divorce, the couple does not inherit from each other.

(c) Major irrevocable (*Baynuna Al-Kubra*) divorce is that the husband does not have a right to return to his wife when the waiting period has lapsed or not lapsed unless she is married by another person and divorced or dies, as mentioned in the Qur’an, “And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him” (QS 2: 230). In the context of major irrevocable divorce, there are specific rules to consider. One of the key rules is that the husband does not have the right to return to his wife without a new contract and dowry. Additionally, in this type of divorce, the couple does not inherit from each other. Furthermore, the husband does not have the

right to return to his wife unless she is married to another person.

### Activity 3

Is this type of separation, where the wife has made a payment to the husband by mutual consent or by an order of the court and they have separated, considered revocable, minor irrevocable, or major irrevocable according to Islamic jurisprudence?

(iii) Conformity: there are two kinds of divorce in terms of conformity: (a) *Sunni*: is one pronouncement of *Talāq* made when a wife is pregnant or during a period of *Taharah* (ritual purity) in which no sexual intercourse has taken place.<sup>347</sup> This type of divorce occurs without dispute. (b) *Bida`i*: One pronouncement or more made while the wife is menstruating, in her postpartum period, or in a period of *Taharah* during which sexual intercourse has occurred. The classification of these categories is based on the following Hadith. Narrated Ibn 'Umar (RA): In the time of Allah's Messenger (SAW), he divorced his wife while she was menstruating, so 'Umar asked Allah's Messenger (SAW) about that and he replied, "Command him to take her back and keep her till she is purified (from menses), has another period, and is then purified. If he then wishes he may keep her and if he wishes he may divorce her before having intercourse with her. That is the 'Iddah (period of waiting) which Allah commanded for the divorce of women."<sup>348</sup> The majority of scholars are of the opinion that divorce occurs, according to the aforementioned Hadith of Ibn Umar. Furthermore, all Muslim jurists unanimously agree that it is forbidden and referred to as "*bida`i*" because the divorced person violated the *Sunnah*.<sup>349</sup>

(iv) Modes: Divorce can be (a) *Munjiz* (certain) when one intends to divorce his wife at present, using a phrase such as "I divorce you." This type of divorce occurs immediately upon its issuance, and its effects are upon him as soon as it is issued. There is no disagreement among jurists

regarding its occurrence as long as the husband is qualified to issue the divorce.<sup>350</sup> (b) *Mudhaf*: This is what is added to its occurrence at a time in the future, such as when a man says to his wife, "I will divorce you tomorrow," or "at the beginning of such-and-such a month," or "on the first of such-and-such a year." The ruling is that the divorce occurs when the first part of the time to which it is added has arrived.<sup>351</sup>

(c) *Mualaq*: This is what causes its occurrence to happen in the future with a conditional device, such as a comment using words like "if," "when," or "even," such as a man saying to his wife, "If you enter so-and-so's house, you are divorced," or "If you travel to your country, you are divorced," or "If you leave the house without my permission, you are divorced," or "Whenever you speak to so-and-so, you are divorced."

*I divorce you*  
*I will divorce you tomorrow*  
*If you leave the house without my permission, you are divorced*

The majority of jurists from the Hanafi, Maliki, Shafi, and Hanbali jurisprudences are of the opinion that a pending divorce takes place whenever the condition is fulfilled,<sup>352</sup> while Dāwūd al-Zāhirī scholars said that pending divorce will not occur whether the condition is fulfilled or not.<sup>353</sup>

Activity 4.

Why is divorce primarily controlled by men?

## 2. *Khulu'* (Redemption):

The fundamental principle in divorce is that it is initiated by the unilateral will of the husband. However, in special cases, it is permissible for the wife to initiate divorce with the husband's authorization. Similarly, a judge may, at the request of one of the spouses, order a separation or annul the marriage contract. It is also possible for the spouses to mutually agree to end their marital relationship through *khul'*.

(i) Meaning of *Khulu'*: *Khulu'* is derived from the word *Khala'*, which means "taking off something" or "removing," because a husband and wife are like garments for each other, as mentioned in the *Qur'an*. "Your spouses are a garment<sup>1</sup> for you as you are for them" (QS 2: 187). If a woman redeems herself by offering money to her husband for him to release her, and he agrees to this arrangement, then she has withdrawn from the marriage, and both have separated their roles as partners in the union. The term for this process is "*khula*."<sup>354</sup> There are various definitions of *khulu'* proposed by scholars within the jurists schools defining it as the "dissolution of the marital bond, subject to the husband's consent, through the pronouncement of *khulu'* or similar expressions."<sup>355</sup> In this type of contract, it only becomes valid when the wife offers compensation to her husband in exchange for his agreement to divorce her, thus allowing her to end the marital relationship.

(ii) Essentials of *Khul'* include the following: (i) spouses (ii) Modes: Muslim jurists have mentioned some of the terms used in this field, which are (*khul'*, *Fidya* (ransom), *Sulh* (reconciliation), *Al-Mubarat* (mutual agreement), *Talāq* (divorce), *Mufaraqa* (separation), and *Faskh* (annulment). For example, the wife states, "I will pay you 1000 USD in exchange for your *Mahr* (dowry)," and the husband replies, "I accept." (iii) Subject matter, which is marital relations: if the wife was irrevocably divorced at the time of *khul'*, then the *khul'* does not occur because it lacks a valid reason. However, if she was divorced with a revocable divorce, and this *khul'* happened during her waiting period, then it is considered valid according to the consensus

of the majority of the four schools of thought. (iv) Compensation is what the wife is required to pay to the husband in order to terminate the marital relationship. Scholars have disagreed regarding the validity of *Khula* without compensation. The Hanbalis and Shafi'is assert that it is not valid without compensation,<sup>356</sup> while the Hanafi and Maliki schools of thought maintain that it is indeed valid without compensation.<sup>357</sup> *Khul'* must be tradable in (*Mal Mutaqawwim*). Thus, the subject matter should not include items that are prohibited by the Shari'ah, such as pork, wine, and blood, among others. Almighty Allah said: "He has only forbidden you to eat carrion, blood, swine, and what is slaughtered in the name of any other than Allah" (QS 2: 173).

The first case of *Khul'* was reported by Ibn 'Abbas who mentioned that the wife of Thabit b. Qais came to the Prophet and said, "Messenger of God, I do not reproach Thabit b. Qais in respect of character or religion, but I do not want to be guilty of infidelity regarding Islam." God's Messenger asked her if she would give him back his garden, and when she replied that she would, he told him to accept the garden and make one declaration of divorce. \* Meaning she did not like him and so was afraid she might not show him the respect due to a husband. *Kufrān*, translated 'infidelity', can also mean 'ingratitude'.<sup>358</sup>

(ii) Wisdom of permissibility of *Khulu*: *Khula* is considered permissible because it serves as a solution when there is discord, conflict, or a lack of harmony between spouses. A woman may have legitimate reasons to dislike her husband and wish to separate from him, whether for moral, ethical, religious, or health concerns, such as old age or infirmity. In such cases, where she fears failing in her religious obligations, Islam has provided a way for her to seek separation through the husband's consent. This involves offering some compensation to secure her release from the marriage, relieve her of embarrassment, and reimburse the husband for his expenses incurred during the marriage process. Regarding the husband, it is also allowed for him to seek divorce from his wife if he experiences disobedience that disrupts marital harmony. However, it

is not permissible for him to coerce her into requesting a divorce and relinquishing her rights, as stated in the words of God Almighty: "But if you intend to replace a wife by another and you have given one of them a Cantar (of gold i.e. a great amount) as *Mahr*, take not the least bit of it back; would you take it wrongfully without a right and (with) a manifest sin? (QS 4: 20)

If the wife requests a *khulu*, and the husband wishes to continue their marital life, this issue should be resolved through dialogue and mutual understanding. This aligns with the noble verse that advises to "live with them in kindness." If the dispute remains unresolved, it is recommended, according to the consensus of most jurists, for the husband to grant the *khul'* request. This is based on the Hadith of the Prophet in which he asked a woman if she would return his garden, and upon her agreement, he instructed the husband to accept the garden and issue a single divorce pronouncement. Some jurists even consider responding to the *khul'* request in this situation as obligatory.

(iii) Effects of *Khulu*: If the *khul'* meets all the requirements mentioned above, it entails the following provisions: (a) the type of separation described is considered a significant and irrevocable divorce because it involves the wife paying money to free herself. This only occurs when the divorce is irrevocable. If it is not irrevocable, the man has the right to take her back, and she remains under his authority. The purpose behind this practice is to protect the woman from harm, so if it were permissible to take her back, the potential harm could return. However, Dāwūd al-Zāhirī stated that *Khul'* is a revocable divorce,<sup>359</sup> and Ibn Hanbal maintained that *Khul'* is a form of *Faskh* (annulment). This view was supported by Ibn Taymiyyah and Ibn Qayyim.

(b) The wife must provide compensation, her dower or another form, because the marital relationship will end after paying the dowry. (c) According to Abu Hanifa, *khul'* nullifies all rights and debts that each spouse owes to the other within the context of the marriage from which

the *khul'* originates. This includes matters like the dower and previously unpaid maintenance. The purpose is to resolve any conflicts and disputes between the spouses. However, debts or rights unrelated to the marriage, such as loans, deposits, mortgages, sale prices, and the like, are not waived through this agreement. Similarly, the maintenance during the waiting period is not waived unless specifically stipulated as such, as it is an obligatory component of the process.<sup>360</sup> (d) The waiting period for *khul'* is one menstrual period. This is because it is considered irreversible, and one menstrual period is deemed sufficient to establish the woman's innocence, similar to the concept of *istibra'*.<sup>361</sup> However, it is important to note that other jurists propose a waiting period of three menstrual periods, akin to the waiting period for a revocable divorce.<sup>362</sup>

## SUMMARY

Talaq refers to the act of breaking the marital relation immediately or eventually with a specific word. The legal rulings on divorce are governed by the categories of Hukmu Shari'a (command of Shari'ah) which include obligatory, recommended, forbidden, disliked, and permissible rulings. To be considered a valid divorce, the husband must be an adult of sound mind. In this regard, Muslim jurists have differing opinions regarding the divorce of a person who is intoxicated, the divorce pronounced in a jesting manner and the divorce declared under coercion. Divorce is categorised based on its pronouncements into explicit and metaphorical forms. In terms of effectiveness, there is revocable (*raji'*) and irrevocable divorce (*Baynuna*). In terms of conformity, it is classified into sunni and *bidai'*. In terms of modes, it is classified into *Munjiz*, *Mudhaf*, and *Mualaq*. Additionally, spouses can separate through *Khulu'*, which means the dissolution of marriage where the wife has made payment to the husband by mutual consent or by an order of the court. This type of separation is considered a significant and irrevocable divorce because it involves the wife paying money to free herself.

## QUESTION

**One:** please provide answers to the following questions.

1. Write a brief explanation of the consequences of *Khulu*.
2. Differentiate between revocable and irrevocable divorce
3. Define the term "*Talāq*" and provide an explanation of its legality.
4. Discuss the opinion of Muslim jurists regarding the divorce of an intoxicated person.
5. Write a comprehensive explanation of the concept of triple divorces in one pronouncement.

**Two:** Fill in the gaps in the following.

6. The lawful thing which God hates.....
7. *Khul'* is dissolution of the marital bond.....
8. *Mudhaf* is .....
9. There are three things which, whether undertaken seriously or in jest, aus:
10. *Talāq Bida`i* is .....

**Three:** Please indicate whether the following sentences are correct (✓) or incorrect (✗).

11. In irrevocable divorce the couple does not inherit from each other. (.....)
12. *Khul'* nullifies all rights and debts that each spouse owes to the other

within the context of the marriage. ( )

13. The example of *Mualaq* is "I will divorce you tomorrow." (.....)

14. The majority of Muslim jurists argue that a divorce under coercion does not occur (.....)

15. Revocable divorce is the kind of divorce where the husband has a right to return to his wife when she is in her waiting period without a new contract, dowry, and consent after divorcing her twice (.....)

**Four:** Read the following cases and analyse based on a Shari'ah point of view.

16. In one of the cases, it was noted that a woman filed a lawsuit against her husband, stating in her claim, "The defendant is my husband. He married me approximately in the year 1990, and he consummated a legal marriage with me. I bore him two daughters and a son, born on 9/21/2005, 4/21/2010, and 7/1/2015AH, respectively. In the month of July 2022, he divorced me, and the divorce incident was submitted to the Mombasa Qadi court. His Eminence issued a fatwa stating that the divorce was not valid. However, two months later in the same year, in the month of September, he divorced me, saying, 'I divorced you three times.' Subsequently, he expelled me and my children from the house, and I went to live in my brother's house. From that date until now, I have had three menstrual periods, and my husband has not proven his divorce from me, nor has he spent money on me or his children. I request proof of this divorce.

17. In one of the cases, it was stated that a woman filed a lawsuit against her husband, seeking the court's confirmation of her divorce. In her lawsuit, she stated, "The defendant, identified by the civil registry number (...), married me in the year 1998, entering into legal matrimony. We have children together, namely (...), (...), (...), and (...). I lived with him until

2015 when a dispute arose, resulting in physical harm. I called my family for assistance, and he declared, 'If you leave the house, you are divorced three times, irrevocably,' repeating it more than five times. Consequently, I left the house with my family, and he has not communicated with me since. This marks the first time a divorce has occurred between us, and I am seeking proof of my irrevocable divorce from him. This is my claim.

### **Text Books/Articles for Further Reading**

1. Zubairu Dalhatu Malami, *Marriage and Divorce in Islam*, ( Independently published, 2018)
2. Nik Noriani Nik Badli Shah, *Marriage and Divorce Under Islamic Law*, (Malaysia: Jalan Dutamas 1, Solaris Dutamas)
3. Abdulrahman, Manswab M. "An Analysis of the Causes of Divorce Among Muslims in Mombasa County in the Sharia Law Perspective." *International Journal of Islamic Studies and Humanities*, vol. 3, no. 2, 2020, pp. 90-97, doi:10.26555/ijish.v3i2.2363.
4. Omoro, Priscilla M. "*Investigating the Causes and Possible Solutions of Divorce in Nairobi City County, Kenya.*" PhD diss., university of nairobi, 2018.
5. Cotran, Eugene. "Marriage, divorce and succession laws in Kenya: Is integration or unification possible?." *Journal of African Law* 40, no. 2 (1996): 194-204.

## CHAPTER EIGHT



### DISSOLUTION OF MARRIAGE

#### *(Faskh and Tafriq)*

##### **Introduction of the Chapter:**

In Islam, the marriage contract is a sacred covenant that unites a man and a woman, providing the legal framework for their marital relationship. To ensure the stability and fulfillment of this relationship, it must be established with clarity and the mutual consent of both parties. Consequently, if one party possesses a physical or mental defect of which the other party is unaware and has not indicated acceptance, this lack of consent implies a problem. The uninformed party may lose interest or find the purpose of the marriage compromised. Thus, in Islam, both parties have the right to dissolve the marriage contract if it is discovered, after the marriage is solemnized, that one partner has a defect. Islam also establishes rules and conditions for such dissolution to occur. Therefore, this course is significant as it sheds light on the termination of a marital relationship through judicial divorce known as *Tafriq* or by judicial annulment (*faskh*). At the end of the unit, you will find various activities and assessment questions to reinforce your understanding of the material.



##### **Objective of the Chapter:**

After reading this chapter the student should be able to:

- (i) Define the concept of *Faskh* and understand its underlying reasons and rules.

(ii) Explain the meaning of *Tafriq* and comprehend its legal implications.

(iii) Proficiently resolve cases involving *Faskh* and *Tafriq*.

### 1. *Faskh* (Judicial Annulment)

I. *Faskh* literally means to annul or to rescind an agreement or a bargain.<sup>363</sup> In the context of Muslim matrimonial law, *fasakh* refers to the dissolution of the marriage contract, rendering it as if it had never existed.<sup>364</sup> *Faskh* and *Tafriq* share certain similarities, as both result in the termination of a marital relationship through a judicial decree. However, they differ in the following ways: *Faskh* is the dissolution of the marital relationship through the judicial process when there has been a violation of the contractual requirements, such as a marriage to forbidden women or the apostasy of one of the spouses.

On the other hand, *Tafriq* is the termination of the marital relationship through the judiciary due to negligence in fulfilling marital duties and the wife's promptness in asserting her rights. The process of *faskh* typically involves a court hearing, where evidence is presented to demonstrate that the marriage is no longer viable or that one spouse is at fault for violating the terms of the marriage contract. If the court finds that the grounds for *faskh* are valid, it may grant the divorce and dissolve the marriage.

II. Reasons for *Faskh*: The reasons for annulment arise from defects in the provisions of the contract, such as an invalid marriage contract, the occurrence of a defect like apostasy, and the inclusion of choice in the contract due to deception.

(a) Apostasy of one of the spouses: *Riddah* or apostasy, is defined as turning away from Islam.<sup>365</sup> It can be in many ways, such as rejection of Almighty Allah, denying one of his proven attributes, stating that he has a son, insulting the noble Prophet or the Qur'an, among others. If a Muslim apostatizes without compulsion and is a sane adult, the punishment for

apostasy from Islam imposed on him. The Prophet (SAW) said, “He who changes his religion kill him.”<sup>366</sup> Furthermore, his guardianship will be revoked, and therefore he will not have the authority to marry off his daughter. Also, his marriage contract will be dissolved, and he is not entitled to inherit. Finally, if he dies in apostasy, he shall not be washed, shrouded, or buried in Muslim cemeteries. Islam prohibits a Muslim from marrying a woman who does not follow a heavenly religion. This refers to a woman who does not acknowledge a prophet and does not believe in a revealed book, similar to a polytheist. This woman worships entities other than God, such as idols, fetishes, or celestial bodies, resembling the practices of polytheistic Arabs in pre-Islamic times. The fundamental difference between them is substantial: the husband in this context believes in God and accepts prophet hood, while the polytheist woman denies both God and prophet hood.<sup>367</sup> There is a consensus among scholars on the prohibition of a Muslim marrying someone who does not belong to a faith with a revealed book, based on the following evidence: Allah (SWT) says, “Do not marry polytheistic women until they believe; for a believing slave-woman is better than a free polytheist, even though she may look pleasant to you.” (QS 2: 221) Anyone who does not adhere to a revealed book or does not follow a prophet is considered to be outside of the Abrahamic faiths, and it is not permissible for a Muslim to marry such a person. Therefore, it is not allowed to marry a pagan or a Buddhist, for example.<sup>368</sup>

There are two scenarios for apostasy by a husband: (i) he renounces Islam before consummation of the marriage, and (ii) he renounces Islam after consummation of the marriage. In each of these scenarios, there are corresponding consequences as follows:

(i) Muslim jurists agree that if a Muslim renounces Islam before consummating the marriage, in this scenario, they will be separated, and this kind of separation is considered as *Faskh*. Imam Sarakhsī stated that if a Muslim converts to another religion, it will result in a major irrevocable

divorce with his wife, whether she is a Muslim or a person of the book (Christians and Jews).<sup>369</sup> Another scholar, Qadhi Abdulwahab, similarly expressed that if one of the spouses apostatizes before consummation, the separation takes place without dispute.<sup>370</sup> Additionally, Imam Shafi stated that if a Muslim converts to another religion, he will be separated from his wife in a major irrevocable divorce.<sup>371</sup> The impact of *Faskh* (annulment) before consummation in the event of the husband's apostasy can be discerned from the statements of Muslim jurists, as follows:<sup>372</sup>

*The marriage contract is dissolved, and the wife becomes a foreigner to him.*

*The wife is entitled to half the dower or Muta'.*

*There is no waiting period for the wife.*

*There is no inheritance between the two of them if the apostate dies.*

If a Muslim converts to another religion after the consummation of marriage, the following repercussions will follow:<sup>373</sup>

*The marriage contract is dissolved, and the wife becomes a foreigner to him.*

*The wife is entitled to remarry after completing the waiting period.*

*There are different opinions regarding inheritance.*

*The child's lineage will be associated with the husband.*

*The wife is entitled to the full dowry.*

*The type of separation is a major irrevocable divorce.*

Religions can be categorized into two main groups: (a) Revealed religions, which are those that originated from divine revelation to one of the prophets. Notable examples include Islam, Christianity, and Judaism. (b) Non-revealed religions, which are human-created belief systems. This category includes paganism, Magianism, Sabianism, and others.<sup>374</sup>

## Activity 1.

Is it allowed for people of the Book, such as Christians and Jews, to marry a Muslim lady? Discuss this with your colleagues.

(b) It is impermissible for a Muslim to marry certain women, and one type of prohibition is the permanent one, which remains forever forbidden for the individual to whom it applies. This prohibition is based on inherent characteristics of women that do not change throughout their lives. There are three main reasons for the permanent prohibition of marriage: consanguinity, affinity, and fosterage. If a man knowingly marries one of them, despite the prohibition, he should be subject to a severe punishment, as stated in the Hadith of Al-Baraa. In this Hadith, the Messenger of God, may God's prayers and peace be upon him, ordered the execution of a man who married his father's wife after learning of the prohibition. The marriage contract is automatically dissolved if one of them gets married.

2. *Tafriq* (Judicial Divorce): The distinction between the separation by a judge's ruling and divorce lies in the fact that divorce is initiated by the husband's choice, while separation through judicial dissolution allows the wife to terminate her marital relationship on the husband's behalf if the remedial methods of divorce or *khul'* prove ineffective. The instances where the judge draws this distinction are derived from the jurists' jurisprudence, as they are not explicitly mentioned in a clear, authentic text. The grounds for *Tafriq* can be summarized as follows: (i) The fear of temptation, wherein a woman is concerned about committing adultery while being married. (ii) Concerns related to harm, such as the risk of mental instability or providing maintenance. (iii) The breakdown of trust between spouses, which can include instances of cursing. (iv) Failure to offer expiation to the husband in cases of *zihaar* and *ilaa'*. This approach

has been adopted to facilitate people in avoiding discomfort and aligns with the tolerant spirit of Islam. These cases include:

### Dissolution of marriage

Failure to provide maintenance	Separation because of defects of spouses	Separation due to discord	Separation due to Harm	Separation due to a husband's absence or imprisonment
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(a) Failure to provide maintenance: If a man with apparent wealth refrains from spending on his wife, and she requests a divorce from the judge, her request may not be granted. This is because maintenance can be obtained whether he is present or absent, making a divorce request unnecessary in such cases.<sup>375</sup> If the husband does not have apparent wealth, can his wife request separation? Muslim jurists have two different opinions on this matter.

(i) The Hanafi and Dāwūd al-Zāhirī schools of thought assert that whether a husband's wife is rich or poor, and whether he is present or absent, she is not entitled to demand separation. In this situation, she can apply to the judge to impose maintenance or be allowed to borrow money. They support this opinion with the following evidence. Allah (SWT) says, “Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief” (QS 65: 7). The companions of Prophet Muhammad (SAW) included both the poor and the rich, and there are no reports of the Prophet separating women from their husbands due to insolvency. Also, they quoted the following Hadith: “Abu Bakr (Allah be pleased with him) came and sought permission to see Allah's Messenger (SAW). He found people sitting at his door and none amongst them had been granted permission, but it was granted to Abu Bakr, and he went in. Then came 'Umar and he sought permission, and it was granted

to him, and he found Allah's Apostle (SAW) sitting sad and silent with his wives around him. He (Hadrat 'Umar) said: I would say something which would make the Prophet (SAW) laugh, so he said: Messenger of Allah, I wish you had seen (the treatment meted out to) the daughter of Khadija when you asked me some money, and I got up and slapped her on her neck. Allah's Messenger (may peace be upon him) laughed and said: They are around me as you see, asking for extra money. Abu Bakr (Allah be pleased with him) then got up went to 'A'isha (Allah be pleased with her) and slapped her on the neck, and 'Umar stood up before Hafsa and slapped her saying: You ask Allah's Messenger (SAW) which he does not possess. They said: By Allah, we do not ask Allah's Messenger (SAW) for anything he does not possess. Then he withdrew from them for a month or for twenty-nine days. Then this verse was revealed to him:" Prophet: Say to thy wives... for a mighty reward" He then went first to 'A'isha (Allah be pleased with her) and said: I want to propound something to you, 'A'isha, but wish no hasty reply before you consult your parents. She said: Messenger of Allah, what is that? He (the Holy Prophet) recited to her the verse, whereupon she said: Is it about you that I should consult my parents, Messenger of Allah? Nay, I choose Allah, His Messenger, and the Last Abode; but I ask you not to tell any of your wives what I have said He replied: Not one of them will ask me without my informing her. God did not send me to be harsh, or cause harm, but He has sent me to teach and make things easy."<sup>376</sup> Based on the aforementioned Hadith, if separation due to the failure to provide maintenance is permitted, it is not allowed for Abu Bakr and Umar (RA) to beat their daughters in front of the Prophet Muhammad (SAW) for being unable to provide.<sup>377</sup> Finally, they stated: "If refraining from spending when one has the means to do so is considered unjust, the remedy to rectify this injustice is to either sell one's possessions to facilitate the expenditure or put in jail until the expenditure can be made. There is no necessity to resort to separation to rectify this injustice, as long as there are other viable means. In such a situation, a judge should not distinguish between individuals for this reason, as separation is highly undesirable in the eyes of God. If the

individual lacks the financial means, no injustice can be attributed to him, for God does not impose burdens beyond one's capacity.<sup>378</sup>

(ii) Malik, Shafi, and Hanbali concur that a wife has the right to seek separation if a man, who possesses apparent wealth, refrains from providing financial support. They substantiate this view with the following evidence: Allah (SWT) states, "Then, either maintain [her] in an appropriate manner or release [her] with kindness" (QS 2: 229). Not maintaining one's wife while withholding financial support does not align with "maintaining [her] in an appropriate manner." Therefore, the preferable course of action is to release [her] with kindness.<sup>379</sup> The Prophet (SAW) said, 'The best alms is that which is given when one is rich, and a giving hand is better than a taking one, and you should start first to support your dependents.' A wife says, 'You should either provide me with food or divorce me.'<sup>380</sup> The above Hadith presents two options: either providing financial support and continuing to live with one's wife or separating if unable to provide maintenance. Finally, Allah (SWT) has mandated that husbands provide financial support, and they do not have the right to restrict their wives, deny them their freedom, or prevent them from seeking maintenance from others. In this regard, Prophet Muhammad (SAW) said, "no harm to oneself and not harmful to others."<sup>381</sup>

After a close observation of both opinions, the correct stance is the one supported by the majority of Muslim jurists. This is based on the following reasons: The statement asserting that a woman has the right to seek a divorce due to lack of financial support aligns with the fundamental principles and rules established by Islamic law. These principles emphasize the preservation of the human soul, protection from harm, and the removal of harm, in accordance with the saying of the Prophet, peace and blessings of God be upon him: "No harm to oneself and no harm to others." In addition, the Prophet did not reject his wives' requests for increased financial support. Instead, God commanded him to offer them the choice between continuing with insufficient maintenance or seeking

divorce. This is evident in the Almighty's words: "O Prophet, say to your wives, "If you should desire the worldly life and its adornment, then come, I will provide for you and give you a gracious release" (QS 33: 28).

## Activity 2.

Salim married Fatima and was financially prosperous. Initially, he generously supported her, but over time, he became more frugal with his spending, eventually ceasing to provide any financial support. He refused to contribute, claiming that Fatima had her wealth. Fatima took the matter to court and sought a separation from her husband, citing his failure to provide maintenance as the primary reason. Discuss this case with your instructor, as it raises questions about financial responsibilities and the reasons for seeking a separation in a marriage.

(b) Defects of spouses: There are two types of defects that can lead to the separation of spouses, as follows: (i) Defects that prevent someone from engaging in sexual intercourse. (ii) Defects that do not necessarily prevent someone from engaging in sexual intercourse but are repulsive or harmful, such as leprosy. Based on the information provided, there are different opinions among Muslim jurists regarding separation based on defects.

(i) The Malik, Shafi'i, and Hanbali schools of thought permit the separation of spouses based on defects, and they substantiate their opinion with the following evidence. 'Allah's Messenger (SAW) married *al-'Aaliyah* of *Banu Ghifar*. When she entered in his presence and he removed her clothes, he saw whiteness (of leprosy) around her waist area and the Prophet (SAW) said: "Put on your clothes and return to your family."<sup>382</sup> Based on this Hadith, it is allowed to separate if someone is found to have leprosy or

another disease that prevents them from engaging in sexual intercourse. Another Hadith, "There is no infection, no evil omen, no harm, and no serpent in a hungry belly; but flee from one who has tubercular leprosy as you would from a lion."<sup>383</sup> The Hadith provides advice and guidance for a healthy person to avoid contact with a leper in order to prevent harm. If one of the spouses is a leper, their harm is inevitable, and the only way to avoid this harm is through separation. Finally, the jurists unanimously agree that if a husband has a reproductive defect, such as impotence, sterility, or castration, she has the option to annul the marriage contract. She can do so by bringing her case before the judiciary and requesting a separation from her husband. Even if the judiciary concurs with her claim, the judge will rule in favor of separation based on her request. This is because the primary purposes of marriage are procreation and reproduction, and these defects prevent the fulfillment of these purposes. Moreover, these defects are permanent, and the harm resulting from them can only be avoided through the separation of the spouses. Therefore, she has the right to seek legal intervention to protect herself and terminate the marital relationship.<sup>384</sup>

(ii) Dāwūd al-Zāhirī and Shawkānī<sup>385</sup> stated that it is not considered separate based on defects, and they justify their position with the following Hadith. The wife of Rifa`a Al-Qurazi came to the Prophet (SAW) and said, "I was Rifa`a's wife, but he divorced me and it was a final irrevocable divorce. Then I married `Abdur-Rahman bin Az-Zubair but he is impotent." The Prophet (SAW) asked her "Do you want to remarry Rifa`a? You cannot unless you had a complete sexual relation with your present husband."<sup>386</sup> According to the preceding Hadith, this woman complained to the Prophet Muhammad that her husband was unable to engage in sexual intercourse, and she wished to separate from him. However, the Prophet Muhammad chose not to separate them.

(iii) The Hanafi school of thought has stated that requesting separation is a woman's right, not a man's. Their rationale is that separation is the

prerogative of the woman, as the husband can safeguard himself from harm through divorce.<sup>387</sup>

Muslim jurists argue about the type of separation that occurs due to defects as follows: (i) Hanafi and Malik assert that the type of divorce in this case is irrevocable divorce. They continue to explain that if it were not an irrevocable divorce, the husband would have the chance to remarry his wife, which could potentially harm her in the future.<sup>388</sup>

(ii) On the other hand, the Shafi and Hanbali schools of thought contend that the type of divorce is *faskh* (judicial dissolution), and it does reduce the number of divorces that the husband possesses.<sup>389</sup>

After presenting the statements and evidence in the previous discussion, I can give preference to the first statement, which asserts that it is absolutely permissible to request a separation due to defects. This preference arises from the lack of a valid basis for restricting the request for separation due to a defect to women rather than men. This preference is supported by the following justifications: It is permissible to annul a marriage between spouses due to a defect because the presence of a defect violates the will and contracts based on the will. In the case of the marriage contract, this is even more specific due to the inherent risks involved in marriage. Furthermore, there is no valid reason to discriminate between men and women in this matter. The annulment is meant to prevent harm to the affected party, and in this regard, both men and women should be treated equally.

### Activity 3.

*A wife approached you, alleging that her husband has not engaged in sexual intercourse with her due to his inability to achieve or sustain an erection (penile hardness). However, the husband asserted that he had, in fact, engaged in sexual activity with her. As a result of this dispute, the wife is seeking a separation. How would you address and handle this situation? Please discuss it further.*

(c) Separating spouses due to discord: Marriage is a social partnership between a man and a woman with the goal of cooperating in shouldering the burdens of life and having children. The distribution of rights and duties between them is parallel and equal. Therefore, Islamic law established these rights and duties, along with limits and controls to prevent tyranny by one party over the other and to ensure the continuity of familiarity, affection, happiness, and balance. When this balance is disrupted, marital life becomes unsustainable, causing harm to one of the spouses. As a result, separation may be fairer to the spouses than an outright divorce, as it allows them to present their issues before a judge and two arbitrators who can mediate to resolve the dispute and address its root causes. Is it possible for the aggrieved party to take the matter to the judge and request separation due to discord and harm? Muslim jurists have two opinions regarding the permissibility of separation due to discord.

(i) Malik and Hanbali said it is permissible to separate between the spouses because of discord if reconciliation has not succeeded. Allah (SWT) says, “And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought”. (QS 30: 21) The two verses state that marital relations are not valid unless there is tranquility between the spouses,<sup>390</sup> which is considered one of the

purposes obtained from marriage due to the presence of affection and love between them. If it is not possible to adhere to what is fair, it is necessary to release them with kindness to eliminate harm, and this should ideally be done by mutual consent. Otherwise, the alternative is separation. In addition, the Prophet Muhammad (SAW) said, "The best of you is he who is best to his family, and I am the best among you to my family. When one of you dies speak no ill of him."<sup>391</sup> This Hadith was reported from the Prophet Muhammad when many women complained to the Prophet about their strained relationships with their husbands. According to this hadith, it is necessary for spouses to seek good relations. However, if discord arises, the proper solution is separation. This concept is reflected in the following verse where Allah (SWT) says, "When ye divorce women, and they fulfil the term of their (*Iddat*), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage; if any one does that; He wrongs his own soul" (QS 2: 231). If the discord continues, it is then permissible to file a petition with the *Qadi's* court seeking separation. This can be done after reconciliation attempts have not succeeded.

(ii) Al Shafi and Dāwūd al-Zāhirī said it is not allowed to separate between the spouses on the grounds of discord. If the case is filed in the *Qadi's* court, the role of the *Qadi* is to command the husband to treat his wife with good character. They defend their stance with the following evidence. Allah (SWT) says, "If ye fear a breach between them, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things" (QS 4: 35). According to the previous verse, the role of arbitrators is to reconcile the discord that arises between spouses. Additionally, the verse does not mention separation, so the arbitrators do not have the authority to separate the spouses. In this regard, if the discord continues, the proper solution is to command the wife to obey her husband, and in turn, the husband can be given *Taazir* (discretionary punishment).

The most valid viewpoint is that supported by Malik and Ibn Hanbal, which permits the separation of spouses in cases of discord. This stance is grounded in the robust evidence they have cited, and it aligns with the practices of our ancestors. Moreover, if it becomes evident that the discord between spouses persists, the preferable course of action is to facilitate their separation. In such cases, enduring an unresolvable marital discord, which disrupts the stability of life between spouses, should take precedence over the mere continuation of a marriage bound only by name and contract.

(d) Separation due to Harm: Sheikh Abdulkarim Zaidan defines "harm" as anything that inflicts pain or injury upon the wife's body or soul, or places her at risk of death.<sup>392</sup> The jurist Malik stated that it is permissible for a wife to seek separation due to harm, such as physical abuse and verbal insults, whether the harm is recurring or not. If the harm is proven, the Qadi (judge) has the authority to grant the irrevocable divorce.<sup>393</sup> They support their opinion with the following evidence. The Prophet Muhammad (SAW) said, "There should be neither harming nor reciprocating harm."<sup>394</sup> The right of a wife includes the ability to request separation in cases of harm. If the husband is admonished and subsequently returns to fair treatment, it is a praiseworthy outcome. However, if he continues in his unjust and harmful behavior towards his wife, and she can demonstrate this, then the judge has no alternative but to intervene using the available legal measures. If all else fails and separation is still necessary, it becomes the last resort. Harm can manifest in various forms, including the following:<sup>395</sup>

- (i) Verbal abuse towards the wife, such as using derogatory language like calling her “a cursed daughter” or “an infidel daughter”.
- (ii) Physical violence without just cause.
- (iii) Neglecting her by refusing to communicate with her for more than three days.
- (iv) Engaging in sexual activity without her consent or in an inappropriate manner.
- (v) Compelling her to consume alcohol or food during the month of Ramadan against her will.
- (vi) Engaging in criminal activities that harm her reputation.
- (vii) Consuming alcohol or drugs that disrupt marital harmony.

Before issuing a separation between spouses, the judge (*Qadi*) must establish the occurrence of the alleged wrongdoing through various methods. These may include documentary evidence, testimonial evidence, physical evidence, photographic and video evidence, digital forensics, expert testimony, audio recordings, surveillance footage, eyewitness testimony, social media and online content, GPS and location data, medical records, email and electronic communication, satellite imagery, among other means. If it proves to be impossible to substantiate the alleged wrongdoing, the judge may opt to appoint two arbitrators to mediate the situation.

(e) Separation due to absence of husband: One form of marital separation arises from the husband's extended absence. This separation occurs when the husband is away from his wife for an extended period, which she may find difficult to endure. Some schools of thought permit the wife to seek separation due to the husband's prolonged absence, out of concern that the wife might be tempted to act disobediently during this time.

(i) Al Shafi<sup>396</sup> and Abu Hanaf<sup>397</sup> assert that seeking separation is not permitted when the husband is absent, as long as the marital relationship still exists. Any uncertainty should be resolved by eliminating doubt, and the only way to do so is if the husband either passes away or reaches an age at which his peers typically do. In such cases, he would be deemed a missing person, and his wife must observe the waiting period and inherit her rights.

(ii) In Hanbali jurisprudence, it is stated that if the husband is absent from his wife without a valid excuse for a duration that would harm the wife, she has the right to seek separation through a judicial process. Imam Ahmad, a prominent figure in the Hanbali School, approximated this period to be nine months. However, if the husband's absence is due to a legitimate excuse, the wife does not have the right to request separation.<sup>398</sup>

(iii) Malik's perspective allows for seeking separation due to the absence of the husband, whether there is a genuine reason for the absence or not, as long as the wife is suffering from his absence. However, there are differences among Malik jurists regarding the duration of the husband's absence. Some suggest that the wife must wait for three years, while others propose a waiting period of one year.<sup>399</sup>

(f) Separation due to the imprisonment: In response to the circumstances where a wife faces challenges due to her husband's absence and incarceration, as well as the potential negative consequences that may arise, and to protect herself from temptation and wrongdoing, she is allowed to pursue a formal separation through the legal system. For this reason, several observations have been made concerning the permissibility of separation.

(i) The Hanafi,<sup>400</sup> Shafi,<sup>401</sup> and Dāwūd al-Zāhirī schools of thought<sup>402</sup> hold the view that it is not permissible to separate spouses due to imprisonment, regardless of its duration. The Hanafi and Shafi'i schools deduced that it is impermissible for a woman to seek separation due to her husband's

imprisonment, citing the following reasons: There is no clear directive from the Qur'an, *Sunnah*, the actions of the Companions, or their statements that endorse separation for reasons of imprisonment or absence. Therefore, there is no valid basis for such a separation.<sup>403</sup> Additionally, the husband has the authority to initiate divorce, as indicated by the Hadith, "Divorce belongs to the one who takes hold of the calf,"<sup>404</sup> and according to the saying of the Prophet Muhammad (SAW), "The wife of a missing husband remains his spouse until she receives definite news of his death."

(ii) In contrast, the Maliki<sup>405</sup> and Hanbali<sup>406</sup> schools argue that there is a necessity for separation in cases of imprisonment. They argue that a woman may be at risk of committing adultery when living alone with no one to satisfy her needs. This situation can be harmful to her, and in Islam, harm should be prevented or alleviated.

Muslim jurists have varying opinions on the permissibility of separation due to imprisonment, with three distinct viewpoints regarding the allowable period for a wife seeking separation.

*Imprisonment*

*One Year*

*Six Month*

*Four Years*

(i) Malik asserted that if the husband is imprisoned for more than one year, the wife has the right to seek separation. In this context, Sheikh Dirdir further specified that the imprisonment must last for a year or longer.<sup>407</sup>

(ii) Ibn Hanbal stated that if the husband is imprisoned for longer than six months, the wife has the right to pursue a separation. He said, "If he is not absent due to a legitimate reason preventing his return, then the time period is six months."<sup>408</sup> Ibn Hanbal then replied with six months because when Umar (RA) was doing *Tawaf*, he heard a woman sing the following poems:

*"This night has grown long, and I've lost my sleep; I'm insomniac because I don't*

*have a boyfriend to spend time with. Were it not for God's protection, nothing like*

*it, the sides of this bed would have shaken."*

After this occasion, Umar ibn Khattab (R.A.) asked Hafsa, "How long can a wife wait for her husband?" She can't wait more than five or six months. Based on this information, Umar did not accept that a *Mujahid* should stay away from his wife for more than six months.<sup>409</sup>

(iii) Imam Ibn Taymiyyah said that a wife has the right to seek separation if her husband is imprisoned for four years, drawing an analogy with the case of a missing person. In such a situation, she observes the waiting period until death, and after that period, it is permissible for her to marry someone else. Therefore, according to Ibn Taymiyyah's view, the wife of the prisoner waits for four years, and if the prisoner does not get released, the judge will grant her separation from her husband.<sup>410</sup>

Based on the reasoning they provided, the permissibility of separation due to absence is justified by the harm caused to the wife when her husband is absent from her, even if his absence is for a legitimate excuse. This reason is undeniably present and realized in the case of imprisonment for more than a year, from the outset of its implementation. During the husband's imprisonment, he is considered equivalent to being away due to travel, and separation can only be requested after one year of imprisonment. Therefore, what the Malikis and Hanbalis assert regarding the permissibility of separation in this scenario can be attributed to one of the following two reasons: (a) Because it becomes impossible for the wife to be financially supported by her husband during his imprisonment, she has the right to request annulment for this reason, which relates to the circumstances of captivity, imprisonment, or absence. (b) If the woman

is harmed by the lack of intimacy in the relationship, and she fears the temptation of engaging in adultery due to this absence.

#### Activity 4.

Hadi was imprisoned on drug possession charges and received a four-year prison sentence. Subsequently, Khadija brought her case before the judge, and it was determined that the harm she experienced was due to a lack of financial support and sexual intercourse from her husband. As a result, she was granted a separation. In this case, the separation granted might be an irrevocable divorce or *Faskh*, and it's recommended to discuss this further with your lecturer to confirm the specific type of separation and its legal implications.

### SUMMARY

The marital relationship can end through *Faskh* or *Tafriq*. *Faskh* is the dissolution of the marital state relationship through the judicial process when there has been a violation of the contractual requirements, such as a marriage to a forbidden woman or the apostasy of one of the spouses. On the other hand *Tafriq* is the termination of the marital relationship through the judiciary due to negligence in fulfilling marital duties and the wife's promptness in asserting her rights.

### QUESTIONS

**One:** please provide answers to the following questions:

1. Clarify the perspective of Muslim jurists on separation due to the failure to provide maintenance.
2. Distinguish between judicial divorce (*Tafriq*) and judicial dissolution (*faskh*).

3. Explore the conditions that need to be fulfilled for separation due to defects or illness between spouses.
4. Provide a brief explanation of separation due to imprisonment.
5. Define the term 'harm,' list its various forms, and provide evidence of the permissibility of separation due to harm.

**Two:** Please indicate whether the following sentences are correct (✓) or incorrect (✗).

6. *Tafriq* is the dissolution of the marital relationship through the judicial process when there has been a violation of the contractual requirements, such as a marriage to forbidden women or the apostasy of one of the spouses. (.....)
7. If a Muslim renounces Islam, the marriage will automatically be dissolved. (.....)
8. Malik said that the type of separation due to imprisonment and absence is an irrevocable divorce. (.....)
9. Imam Ibn Taymiyyah said that a wife has the right to seek separation if her husband is imprisoned for one year. (.....)
10. A wife has the right to seek separation if a man, who possesses apparent wealth, refrains from providing financial support. (.....)

**Three:** Fill in the gaps in the following sentences:

11. The grounds for *Tafriq* can be summarized as follows:.....
12. The reason of *Faskh* are.....
13. How long can a wife wait for her husband? She replied.....
14. 'Do you want to remarry Rifa`a? You cannot unless.....
15. *Faskh* is.....

- 16. Four:** Read the following cases and analyse based on a Shari'ah point of view.
17. The core and well-established facts in this matter indicate that the two disputing parties solemnized their marriage in 1996. They subsequently cohabited in Saudi Arabia for nearly a decade, leading a typical marital life. Regrettably, despite their shared hopes, they were not blessed with the children. To assert the veracity of these circumstances, the wife initiated lawsuit No. 350 BC 2006 before the Lamu qadis court, bringing her grievances against the husband. She sought a divorce on the grounds of infertility, contending that the absence of children posed a detriment to their marital harmony.
18. The plaintiff initiated legal proceedings against her husband, seeking the annulment of their marriage. This request was based on his mental illness, coupled with instances of physical assault, battery, and verbal abuse. Despite being served with the case, the defendant contested its validity and subsequently avoided attending court sessions. A statement from a mental health hospital confirmed the defendant's diagnosis of schizophrenia. Considering the defendant's refusal to divorce or engage in marital relations, as documented in medical reports, the judge decided to annul the marriage without any compensation awarded to the plaintiff. The judge also informed the plaintiff about the necessity to observe the legal waiting period. The decision was later upheld by the court of appeals.
19. The plaintiff filed a lawsuit against her husband, seeking the annulment of their marriage due to his prolonged absence and abandonment without providing financial support. Since the defendant couldn't be located to be served with the lawsuit, a public announcement was made in a local newspaper. The case proceeded in absentia, and during the hearing, the plaintiff presented two legally qualified witnesses who attested to the validity of her claims. Subsequently, the judge, in absentia, decided to annul the plaintiff's marriage to her husband without awarding any compensation. The judge clarified to the plaintiff

that she was considered divorced from her husband in a minor way, and emphasized the requirement of observing the legal waiting period before considering remarriage. The ruling was declared final, and the court of appeals later affirmed the decision.

### **Textbooks/Articles for Further Reading**

1. Mehrajuddin, Mir. "Divorce under Islamic law." *Cochin University Law Review* 9 (1985): 315-349.
2. Moosa, Najma. "Faskh (divorce) and intestate succession in Islamic and South African law: impact of the watershed judgment in *Hassam v Jacobs* and the Muslim Marriages Bill." *Acta Juridica* 2014, no. 1 (2014): 160-191.
3. Abubeker, Muna. "The Description of the Divorce Cases of the Court Documents of 19th century Harar." In *Annales d'Éthiopie*, vol. 34, no. 1, pp. 99-120. Persée-Portail des revues scientifiques en SHS, 2022.
4. Mir-Hosseini, Ziba. "WHEN A WOMAN'S HURT BECOMES AN INJURY:'HARDSHIP'AS GROUNDS FOR DIVORCE IN IRAN." *Hawwa* 5, no. 1 (2007): 111-126.
5. Salim Mahmoudi, *The Ruling of marriage contracts' dissolution in Islamic Fiqh and its consequences*, University of Algiers Ben Youssef Ben Khadda, PhD diss., Islamic Jurisprudence 2018.

## CHAPTER NINE



# SEPARATION OF SPOUSES BASED ON ĪLĀ (VOW OF CONTINENCE), ZIHĀR (INJURIOUS COMPARISON) AND LI'AN (OATH OF CONDEMNATION)

### **Introduction of the Chapter:**

Since the family is one of the main pillars upon which Muslim society is based, Islam was keen to legislate what would guarantee its performance of its function in building.. The Muslim individual and the good citizen; where the relationship between the spouses is based on complementarity, compassion, affection, and good relations, however, sometimes disagreements may arise between the spouses as a result of misunderstanding and the lack of understanding of each other, which may lead the spouses to resort to divorce, which is the most hated permissible to God, and it takes various means, including social, economic, and family, and it may be done. Divorce, in all its forms, resorts to other divisions of marriage, such as judicial separation, which occurs through the intervention of the judiciary in its arrangement. Separation based on *Īlā* (Vow of continence), *Zihār* (Injurious Comparison) and *Li'an* (oath of condemnation) are among the types of judicial dissolution, the ruling of which was stated in the Qur'an, and the period specified for it, which was regulated by Muslim Family Law. There are clear conditions and procedures for *Īlā* (Vow of continence), *Zihār* (Injurious Assimilation) and

*Li'an* (oath of condemnation). At the end of the unit, you will find various activities and assessment questions to reinforce your understanding of the material.



### Objective of the Chapter:

After reading this chapter the student should be able to:

- (i) Define the concepts of *Īlā*, *Zihār*, and *Li'an* in Islam, along with their associated conditions and rules.
- (ii) Solve cases associated with *Īlā*, *Zihār*, and *Li'an*.

#### 1. *Īlā* (Vow of continence)

(a). Meaning of *Īlā*: "*Īlā*" is an Arabic term that refers to abstaining from a particular action by swearing an oath, and it is named so because the husband refrains from sexual relations with his wife, affirming this abstinence through an oath.<sup>411</sup> Technically, it is an oath in which the husband commits to refraining from intimate relations with his wife for a minimum of four months. If he keeps his oath, the marriage is dissolved; if he violates it, the marriage persists.<sup>412</sup> Allah (SWT) says, "And let not those who possess dignity and ease among you swear not to give to the near of kin and to the needy, and to fugitives for the cause of Allah" (QS 24: 22).

*For instance, if the husband says to wife 'I swear by Allah that I shall not approach you'.*

During the era of *Jahiliya*, it was a prevalent practice for Arab men to ensnare women in enduring marriages by taking a lifelong vow to abstain from intimate relations with them. This left women in a state of ambiguity, as they were denied their marital rights and yet unable to terminate the relationship. However, when Islam emerged, it brought fairness to

women's rights and status.<sup>413</sup>The *ilā* (Vow of continence) may be revoked in one of the two ways: (i) if a husband resumes sexual intercourse with the wife before the expiry of the four months or (ii) if the husband expressly remarks that he has revoked *ilā* before the expiry of the four months' time.

If a man refuses to have sexual intercourse with his wife without swearing an oath, then that action is not valid. Even if the period of abstinence lasts for four months or more, and some jurists consider it bad for ten days, it is permissible for his wife to request separation if there is no valid reason to prevent the sexual intercourse. Similarly, if the husband swears by someone other than God Almighty, such as the father or idol, not to make the sexual intercourse for his wife, then that oath is not binding. Swearing by anyone other than Almighty Allah is not considered a valid oath according to Islamic law, as stated by the Prophet (SAW) said, "God forbids you to swear by your fathers. If anyone swears, he must swear by God, or keep silent."<sup>414</sup>

(b) Wisdom of legislation of *Ilā* (Vow of continence):

"*Ilā*, a vow of continence, was a form of separation used in pre-Islamic times. It involved the separation of spouses in three ways: *Talāq* (Divorce), *Zihār* (Injurious Assimilation), and *Ilā* (Vow of continence). Islam has sanctioned divorce and established regulations for *Zihār* and *Ilā*. In pre-Islamic society, a man could take an oath not to engage in sexual intercourse for one year or even indefinitely with the intention of causing harm and preventing his wife from marrying someone else. This left the woman in a state of suspension, as she neither had a husband nor had been divorced. However, when Islam emerged, it provided regulations governing the relationships between spouses.<sup>415</sup> Allah (SWT) revealed the following verse, "For those who swear not to have sexual relations with their wives is a waiting time of four months, but if they return [to normal relations] – then indeed, Allah is Forgiving and Merciful. And if they decide on divorce – then indeed, Allah is Hearing and Knowing" (QS 2: 226-227). This verse clearly states that a separation will occur between

the spouses if the husband fails to fulfill his duties for a period of four months. The purpose of this separation is to prevent the woman from being oppressed and to avoid leaving her in a state of suspension, where she is neither a wife with rights nor a divorced woman. Instead, God will provide for her from His abundance.

In pre-Islamic times, Arabs engaged in a harmful practice where they made an oath to abandon their wives, causing great injustice to women. Islam, in its wisdom, put an end to this practice to protect women. God Almighty revealed a ruling specifying a waiting period of four months, which allows for the fulfillment of the husband's rights and his eventual return to his senses.<sup>416</sup>

#### Activity 1.

*Is it permissible to give your wife an (ila) (Vow of continence) with the motive of promoting the adherence to God's limits?*

(c) Rule of *ilā* (Vow of continence): If a husband makes an oath not to engage in sexual intercourse with his wife and then touches her within the four-month period, it triggers the requirement of *Īlā* as an expiation for swearing such an oath. If the four-month period elapses without him having intercourse with her, the majority of scholars hold that the wife has the right to demand either sexual intercourse or divorce. According to Imam Malik, in such a case, the judge may separate them to protect the wife from harm.<sup>417</sup> On the other hand, Imam Ahmad,<sup>418</sup> Al-Shafi'i,<sup>419</sup> and the scholars of Al-Zahir<sup>420</sup> do not advocate for the judge's direct involvement in divorce; instead, they suggest pressuring the husband and even imprisoning him until he chooses to divorce his wife. The Hanafis view the situation as follows: if the four-month period passes without intercourse, an irrevocable divorce is automatically issued, and

the husband cannot retract it. This is because he has abused his right by abstaining from sexual intercourse without a valid excuse, thereby unjustly depriving his wife of her rights.<sup>421</sup>

(d) Type of separation due to *īlā* (Vow of continence):

Muslim jurists have different opinions regarding the type of separation that occurs due to *īlā* (Vow of continence), which can be divided into two main opinions:

(i) The Hanafi school states that a separation resulting from *īlā* constitutes an irrevocable divorce. This view is based on the reasoning that if it were considered revocable, the husband could forcibly reconcile and take her back, which would not serve the wife's best interests and remove the harm from her.<sup>422</sup> They cited the following statement, which was reported by Othman and Ibn Abdillah ibn Abbas (RA): "If four months have passed, it is an irrevocable divorce."<sup>423</sup> Furthermore, they asserted that the separation resulting from *īlā* is irrevocable once the four-month period has elapsed, and this irrevocability is implemented to rectify an injustice. This injustice can only be rectified through an irrevocable divorce. Additionally, they argued that considering it as revocable would lead to an absurd outcome. For instance, if the husband refused to reconcile with his wife during the vow of continence or after giving a divorce, and the judge separates them with a revocable divorce, it could potentially allow the husband to remarry his wife in the future. Such a situation would be regarded as absurd.

(ii) Majority of Muslim jurist state that a separation resulting from *īlā* constitutes a revocable divorce.<sup>424</sup>

*īlā* constitutes an irrevocable divorce.  
*īlā* constitutes revocable divorce.

They quoted the following proofs. Allah (SWT) said, “Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day. And their husbands have more right to take them back in this [period] if they want reconciliation. And due to the wives is similar to what is expected of them, according to what is reasonable. But the men have a degree over them [in responsibility and authority]. And Allah is exalted in Might and Wise” (QS 2: 228). According to the previous verse, the husband has the right to remarry his wife as long as she is in the waiting period, whether it is due to divorce or *ilā* (Vow of continence).<sup>425</sup> However, it is worth noting that there is no clear and unequivocal evidence that the separation resulting from *Īlā* constitutes an irrevocable divorce.<sup>426</sup>

After considering the two opinions, the correct view aligns with the majority, who assert that the type of separation is a revocable divorce. This stance is taken because there is no clear and unambiguous evidence indicating that the separation resulting from *Īlā* constitutes an irrevocable divorce. Furthermore, allowing the husband a period of time to reconsider his decision and rectify any mistakes is seen as beneficial. The potential harm may increase if a divorce is irrevocable, so a revocable divorce is more practical.

(e) Consequence of the *Īlā* (Vow of continence): Various consequences arise from its rulings:

(i) paying *kaffara* (atonement” or “expiation”): If a husband of sound mind swears in the name of Allah or one of His attributes not to have sexual intercourse with his wife for a period of four months or more, and then engages in sexual intercourse before the specified period has ended, he is obligated to pay the *Kaffara* (expiation) for breaking his oath. Therefore, for redemption of a broken oath, you must ask Allah for forgiveness, and pay the amount equivalent to feeding 10 people or clothing them or the freeing of a slave. Allah (SWT) says, “Allah will not impose blame upon you for what is meaningless in your oaths, but He will impose blame upon

you for [breaking] what you intended of oaths. So, its expiation is the feeding of ten needy people from the average of that which you feed your [own] families or clothing them or the freeing of a slave. But whoever cannot find [or afford it] – then a fast of three days [is required]. That is the expiation for oaths when you have sworn. But guard your oaths. Thus does Allah make clear to you His verses that you may be grateful?” (QS 5: 89). In the case where there is no sexual intercourse, he will not be required to pay an expiation.

(ii) The divorce takes place after the conclusion of the *ilā* period, following the wife's submission of her case to the judge. The divorce, according to the consensus of the majority of Muslim scholars, is revocable.<sup>427</sup>

(iii) Waiting period: The wife must observe the waiting period at the end of the *ilā* period.

(iv) If the *ilā* period ends, the husband will have two options: he can choose to either divorce or have sexual intercourse with his wife. If he opts for sexual intercourse, he will be required to pay the expiation. However, if he refuses to divorce, the judge (*Qadi*) will intervene to separate them.<sup>428</sup>

(v) Reconciliation after or before the end of *ilā* can take place when the husband acknowledges his mistake, expresses remorse, commits not to repeat it, and when affection and love between the spouses are restored.<sup>429</sup>

## Activity 2.

Ahmed swore not to have intercourse with his wife for three months, and after two months, Ahmed revoked his oath. What is the ruling on this?

## 2. *Zihār* (Injurious Comparison)

(a) Meaning of *Zihār*: *Zihār* signifies a husband's comparison of his wife with his mother or any female relation within the prohibited degree.<sup>430</sup> Before the advent of Islam, it was a common practice for people to use the phrase "You are to me like the back of my mother" when expressing anger or displeasure with their spouse. This phrase would result in the woman being permanently forbidden to the man, making it impermissible for them to have intercourse. The woman would be in a state of limbo, neither married nor divorced. This custom continued during the early days of Islam until a man named Aws ibn al-Samit became angry with his wife Khawla and used the same phrase. Khawla, distressed by her husband's actions, decided to seek help from the Prophet. She told the Prophet about her husband's declaration, saying, "Awsa married me when I was a desirable young woman. When I was young and well-fed, he likened me to his mother and abandoned me for others." The Prophet, in response, told her that he had forbidden Aws from this practice. Khawla expressed her concern about her children, fearing they would be lost if they held them to him, or they would go hungry if they held them to me. In response to her plea, the Prophet said: "I do not see you except that I have made it forbidden to him." However, Khawla still felt the need to complain to God. In response to her plea, God revealed the following verse.<sup>431</sup>

“Allah has indeed heard (and accepted) the statement of the woman who pleads with thee concerning her husband and carries her complaint (in prayer) to Allah: and Allah (always) hears the arguments between both sides among you: for Allah hears and sees (all things). Those of you who sinfully divorce their wives by comparing them to their mothers should know that their wives are in no way their mothers. None can be their mothers except those who gave birth to them. What they say is certainly detestable and false. Yet Allah is truly Ever-Pardoning, All-Forgiving. Those who divorce their

wives in this manner, then wish to retract what they said, must free a slave before they touch each other. This penalty is meant to deter you. And Allah is All-Aware of what you do. But if the husband cannot afford this, let him then fast two consecutive months before the couple touch each other. But if he is unable to fast, then let him feed sixty poor people. This is to re-affirm your faith in Allah and His Messenger. These are the limits set by Allah. And the disbelievers will suffer a painful punishment (QS 58: 1-4).

(b) Illegality of *Zihār*: The term "*Zihār*" is forbidden, and it was regarded as a major sin, as indicated by the following Qur'anic verse: "Those of you who sinfully divorce their wives by comparing them to their mothers should know that their wives are in no way their mothers. None can be their mothers except those who gave birth to them. What they say is certainly detestable and false. Yet Allah is truly Ever-Pardoning, All-Forgiving" (QS 58: 1-4). 2) The verse clearly underscores the prohibition of "*Zihār*" when someone unjustly compares their wife to their mother. In response, God Almighty rebukes this reprehensible and false statement, emphasizing that forgiveness is granted only to those who have committed a prohibited act. Muslim jurists unanimously concur on the prohibition of intercourse before the husband pays the expiation. In this regard, Allah (SWT) says, "Those who divorce their wives in this manner, then wish to retract what they said, must free a slave before they touch each other... But if the husband cannot afford this, let him then fast two consecutive months before the couple touch each other. But if he is unable to fast, then let him feed sixty poor people" (QS 58: 3-4).

If he engages in sexual intercourse before completing the expiation, he has indeed committed a sin and disobeyed his Lord by not following His command. It is incumbent upon him to seek forgiveness. There is a narration about a man who had intercourse with his wife, and then did so again before paying expiation. He went to the Prophet Muhammad (SAW)

and informed him. The Prophet asked, "What led you to this action?" The man replied, "I saw the whiteness of her shins in the moonlight." The Prophet advised him, "Refrain from her until you expiate for your deed."<sup>432</sup>

There is a difference of opinion among Muslim jurists regarding various forms of intimate physical contact, such as kissing and touching, and whether they are prohibited. There are two main opinions among them:

(i) The majority of Muslim jurists maintain that activities like kissing, touching, and romantic gestures are prohibited, and they see no distinction between these acts and sexual intercourse. They base their argument on the following justification: Allah (SWT) says, "Those who divorce their wives in this manner, then wish to retract what they said, must free a slave before they touch each other" (QS 58: 3). The noble verse signifies the prohibition of physical contact before completing the expiation, and the term "touching" mentioned in the verse encompasses all forms of physical intimacy, including sexual intercourse, hand-to-hand contact, kissing, and romantic gestures, among others. Furthermore, they continue to assert that *Zihār* is a declaration that necessitates the prohibition of intercourse before expiation, and it extends to anything less than sexual intercourse, such as touching, among other acts that are also forbidden. These prohibitions are rooted in the concept of "*Sadd adh-Dharai*," which means leaving permissible things that lead to evil.<sup>433</sup> Finally, they argued that as long as the resemblance that is the reason for prohibition (for example, resembling one's mother) is considered forbidden, being intimate with the wife and enjoying all aspects of the relationship is also prohibited. The entire prohibition is based on the concept of similitude or likeness.<sup>434</sup>

(ii) Al Shafi<sup>435</sup> and other jurists, including those from the Maliki<sup>436</sup> and Hanbali schools,<sup>437</sup> maintain that kissing and engaging in romantic gestures, among other forms of physical intimacy, are permissible before fulfilling the expiation requirement.

After observing the two opinions, the first opinion serves as an incentive for him to hasten to declare *takfir* and to protect himself from falling into the forbidden. This view is supported by what was narrated by Abu Dawud and others. Furthermore, this perspective aligns with the statement of the Prophet, "Keep away from her until you expiate for your deed."

(c) Elements of *Zihār* (Injurious Comparison): In Hanafi jurisprudence, the element of *Zihār* is indicated solely by a statement. It is an expression that likens the wife to a woman forever forbidden to the husband, as if she were "... like the back of my mother." As for the pillars of *Zihar* according to the Malikis and Shafi'is, there are four: husband, wife, the *Mushabbah bihi* (is the object or entity to which the resemblance is being made) and modes.<sup>438</sup>

(d) Conditions of *Zihār* (Injurious Comparison): There are several conditions associated with *Zihār* (Injurious Comparison) as follows:

(i) The resemblance must be directed towards the wife, for instance, saying, "You are to me like the back of my mother." Additionally, *Zihār* will be valid if someone resembles a part of the body, for example, saying, "Your leg is like my mother." However, Hanafi jurists argue that if someone resembles a part of the body, it would not be valid if the organ is something not allowed to be seen such as the leg, stomach,<sup>439</sup> while the majority of Muslim jurists hold that if someone resembles a part of the body, it is valid.<sup>440</sup>

(ii) The comparison should be made to a woman who is forbidden by her husband, specifically a woman who is permanently forbidden to him. Islamic jurists have held different opinions when it comes to comparing a woman to one who is temporarily forbidden. For instance, some jurists, such as the Hanafi, Shafi, and certain Hanbali scholars, consider such a comparison to be idle talk with no legal consequences.<sup>441</sup> However, Maliki jurists argue that if the intention behind the comparison is to imply an injurious statement, then it is valid. But if the intention is not to suggest

*Zihār* (comparing a wife to a forbidden relative), there are no legal repercussions.

(iii) The comparison must include the concept of prohibition. If someone says, 'You are to me like the back of my mother,' the intended meaning is the prohibition of engaging in sexual relations with one's wife, just as it is forbidden to have sexual relations with one's mother. It also implies the prohibition of deriving pleasure or enjoyment from one's wife, as this would be considered *Zihār*. If the comparison does not include the element of prohibition, it will not be considered *Zihār*. For instance, if someone says, 'You are to me like the back of my other wife,' it lacks the prohibition aspect. Furthermore, if someone compares his wife to something prohibited other than another woman, such as saying, 'You are to me like alcohol or a pig,' Hanafi jurists argue that this may not be automatically classified as *Zihār*. Instead, their intention is taken into account, and *Zihār* will occur if that was their intent; otherwise, it will not be considered *Zihār*.<sup>442</sup> Hanbali jurists have differing opinions when it comes to comparing one's wife to something prohibited. There are two narrations - one considers it as *Zihār*, and the other does not. Similarly, some jurists argue that one should pay an expiation in such cases, while others believe it is not compulsory.<sup>443</sup>

(iv) The formula of *Zihār* must manifest the individual's intent. There are several types of formulas:

- o *Sarih* indicates *Zihār* explicitly, with a clear and unambiguous meaning that does not imply anything else. For example, when someone says, 'You are to me like the back of my mother,' *Zihār* is clearly understood without the need for additional intention. This type of *Zihār* takes effect immediately upon utterance, and its consequences are immediate.
- o *Kinayah* (Metonymy) refers to the act of referring to something by one of its attributes or using a related word. For instance, when someone says, 'You are like my mother in dignity,' this constitutes a

metonymy of *Zihār*. According to the majority of Muslim jurists, if the intention is to convey *Zihār*, it will be considered as such. However, if the comparison is made between the wife's dignity and that of the mother without the intention of *Zihār*, it will not be regarded as such.

- o *Taliq* is a form of *Zihār* that indicates its occurrence in the future through a conditional statement, often using words like 'if,' 'when,' or 'even.' For instance, a man might say to his wife, 'You are on me like my mother's back when I travel to your family's country.' In this case, if the wife does indeed travel, the legal repercussions of *Zihār* will come into effect.
- o *Mudhaf* is a form of *Zihār* where its occurrence is tied to a specific point in the future. For instance, when a man says to his wife, 'You're on me like my mother's back after the next month,' if the next month arrives, the legal repercussions of *Zihār* will come into effect.

(v) The existence of a marital relationship between spouses is essential. If a man marries a woman through legal procedures and then utters *Zihār* in this context, the *Zihār* will be valid. Therefore, if a man pronounces *Zihār* not to his wife, it will not be considered as *Zihār*, even if he marries after making such a statement. However, Hanafi jurists argue that if someone pronounces *Zihār* to foreign women and then engages in marriage, it is forbidden for him to have sexual intercourse before paying expiation.<sup>444</sup>

Muslim jurists differ on the consequences when someone pronounces *Zihār* to foreign women, saying, 'You are to me like the back of my mother if I marry you.' Hanafi, Maliki, and Hanbali scholars assert that this statement takes effect upon marriage, and the individual is not permitted to engage in sexual intercourse until expiation is paid. They support this view with a Hadith where someone declared a similar statement before marriage, and after marrying, Umar bin Khattab advised him to pay expiation.<sup>445</sup>

On the other hand, Shafi'i scholars argue that this pronouncement is not valid, and the person can engage in sexual intercourse immediately

because a marital relationship does not exist at the time of the statement. They base their stance on the evidence from Allah (SWT) stating, "Those of you who sinfully divorce their wives by comparing them to their mothers".

(vi) A person who pronounces *Zihār* (Injurious Comparison) must be an accountable person (*Mukallaf*), and this can be determined by the following criteria: (a) Puberty - if a child pronounces *Zihār*, it will not have any effects. This is because the rule of *Zihār* is based on prohibition, and the statement of prohibition is not applicable to a child until they reach puberty. The Prophet Mohammad (SAW) said, 'there are three whose actions are not recorded: a sleeper until he awakens, a boy until he reaches puberty, and an idiot until he is restored to reason.'<sup>446</sup> (b) Sound Mind - *Zihār* will not be effective if pronounced by a madman or a child because the mind is the tool of thinking and the source of discernment, which is not achieved in the case of a madman and a child.<sup>447</sup> (c) In Islam, if a person who is not a Muslim pronounces *Zihār*, his *Zihār* will not be accepted, whether he is from the people of the Book (Christians and Jews). This is the doctrine of the Hanafi, Maliki, and some Hanbali scholars. They support their stance with the following evidence: 'Those of you who sinfully divorce their wives by comparing them to their mothers.' This statement was directed to Muslims, indicating that *Zihār* is specific to them and not to other unbelievers.

On the other hand, Shafi'i and some Hanbali scholars argue that Islam is not a condition for *Zihār*. They interpret the verse as general and not specific to Muslims. They emphasize that further specification is only proven by evidence indicating it, and in this case, there is no such evidence.<sup>448</sup>

### Activity 3.

Hassan voluntarily drank alcohol, and upon returning to his wife, he uttered, 'You are like my mother's back.' Discuss with your colleagues the eligibility of Zihar occurring according to the doctrine of Muslim jurists.

(e) Expiation of *Zihār* (Injurious Comparison): The expiation of *Zihār* is done through one of the following ways in the sequence and order given in the verses above. The husband is not allowed to proceed to the next option unless he is unable to perform the first option. If the husband declines to expiate for his *Zihār* statement, the *Qadi* (judge) has the right to request the dissolution of the marriage.

- (i) Freeing a slave (this does not exist)
- (ii) Fasting for two months consecutively.
- (iii) Feeding sixty poor persons.

### 3. *Li'an* (Oath of Condemnation):

(a) The practice of *Li'an*, as a form of divorce, is infrequently employed within the Muslim community. It requires making a solemn oath to avoid facing *hudud* punishment related to the accusation of adultery (*zina*). *Li'an* is also employed to disclaim paternity of a child. The term *Al-Li'an* is derived from "*laān*," signifying expulsion and being distanced from the mercy of Allah.<sup>449</sup> *Li'an* exhibits slight variations in terminology based on the perspectives of jurists from different schools of law (*fuqaha' al-Madhahib*). According to the Hanafi school, *li'an* testimonies occur between spouses, confirmed by oath, with the husband invoking a curse, and the wife expressing anger.<sup>450</sup> The Maliki school describes *li'an* as an oath taken by a Muslim and accountable husband, asserting his wife's adultery or denying paternity, while the wife counters with a denial. Both spouses

then swear four times, pronouncing *Ashhadu bi Allah* in the presence of a judge.<sup>451</sup> In the Shafi'i school, these are specific words of information that provide an excuse for someone who was compelled to accuse the person who defiled his bed and brought disgrace upon him, or to disown the child.<sup>452</sup> In the Hanbali school, *li'an* consists of the spouses testifying under oath, followed by invoking the curse of Allah upon oneself and the wrath of Allah in the accused place for adultery.<sup>453</sup>

(b) Legal establishment of *Li'an*: *Li'an* is legislated based on the Qur'an, *Sunnah*, and the consensus of Muslim jurists. Allah (SWT) says, "And those who accuse their wives "of adultery" but have no witness except themselves, the accuser must testify, I swearing four times by Allah that he is telling the truth, and a fifth oath that Allah may condemn him if he is lying. For her to be spared the punishment, she must swear four times by Allah that he is telling a lie, and a fifth oath that Allah may be displeased with her if he is telling the truth" (QS 24: 6-9). It was narrated that Ibn 'Abbas said: "Mention of *Li'an* was made in the presence of the Messenger of Allah and 'Asim bin 'Adiyy said something about that, then he went away. A man from among his people came to him, complaining that he had found a man with his wife. 'Asim said: 'I was only put to this test because of what I said.' He took him to the Messenger of Allah and told him of the situation in which he found his wife. That man was pale and slim with straight hair, and the one whom he claimed to have found with his wife was dark and well-built. The Messenger of Allah said: 'O Allah, make it clear to me.' Then she gave birth to a child who resembled the one whom her husband said he had found with her. So, the Messenger of Allah conducted the procedure of *Li'an* between them." A man in the gathering said to Ibn 'Abbas: "Was she the one of whom the Messenger of Allah said: 'If I were to have stoned anyone without evidence I would have stoned this one?'" Ibn 'Abbas said: "No, that was a woman who used to do mischief even after becoming Muslim."<sup>454</sup> Ibn Al-Rushd said: *Li'an* is a ruling established by the Qur'an, *Sunnah*, analogy, and consensus.

*Li'an* is legislated for two reasons. First, when a husband accuses his wife of adultery without producing four witnesses to support his allegation. The accusation may be true, for example if he himself witnessed with his own eyes his wife in a compromising situation, but there are no four witnesses to corroborate his allegation or if the wife confesses to adultery and her confession is accepted and admitted based on clear and proven testimony. Thus in such a case, the husband shall as best as possible divorce his wife without *li'an*. But if her adultery is not proven with clear evidence, the husband may submit his allegation. The second reason for the occurrence of *li'an* is when a husband rejects the child conceived by his wife. For example, he admits that he has not consummated their marriage, or the wife has given birth to the child before six months from consummation.<sup>455</sup>

(c) Conditions of *Li'ān*: There are several conditions associated with *li'an* as follows.<sup>456</sup>

1. Inability to establish evidence.
2. The woman denies the existence of adultery. If she admits it, she should not be cursed.
3. The wife's chastity is attributed to adultery. If she is not chaste, then she should not be cursed. The spouses must be free, sane, adults, and Muslims.
4. No intercourse after ejaculation.
5. The prescribed pronouncement of *li'an* may not be altered; hence, both husband and wife must adhere to the truth of the words spoken. If one of them modifies the pronouncement, such as the oath (swearing in the name of Allah), or changes the pronouncement of wrath with curse, or vice versa, the *li'an* becomes invalid.
6. The pronouncements of *li'an* are narrated as clear evidence in the Book of Allah; therefore, it is obligatory to maintain an outwardly clear or definite statement in *li'an*.
7. It must be in the presence of the judge and four witnesses.

(d) The desirables of *Li'ān*: Before *Li'an* can be carried out, it is commendable (*sunnah*) to select a suitable time for the event.

- o The process of *Li'an* is recommended to be conducted after Asr prayers, based on the existence of the Hadith where Prophet Muhammad (SAW) said, "There are three to whom God will not speak and at whom He will not look on the day of resurrection: a man who swears falsely about some merchandise that he has previously received a larger offer than he has now been given; a man who swears a false oath after the afternoon prayer to deprive thereby a Muslim of his property; ..." <sup>457</sup> Some scholars continue to assert that the optimal time for *Li'an* is after Asr prayer on the day of Friday, specifically during the months of Rajab and Ramadan or on the days of *Eid*, *Arafah*, and *Ashura*, especially if the matter is of significant gravity.
- o *Li'an* is recommended to be conducted in the holy three mosques (*Masjid al-Haram* in Mecca, *Al-Masjid an-Nabawi* in Medina, and *Al-Masjid al-Aqsa* in Jerusalem), especially for those who reside nearby these mosques. <sup>458</sup> For those who do not reside nearby, it can be conducted in any mosque.
- o The *Qadi* must present a sermon and invoke the fear of God before pronouncing the curse, as mentioned in the Hadith.
- o It is commendable to conduct *Li'an* while the spouses are standing. <sup>459</sup>

(f) Implementation of *Li'ān*:

*Li'ān* between spouses takes place in the presence of the judge. The man steps forward and swears, saying, "I bear witness in the name of Allah that I am truthful in the accusation of adultery against my wife, and the child is a result of fornication and not mine." This statement is uttered four times. On the fifth oath, the husband must confirm with the statement, "I solemnly invoke Allah's curse upon me if I tell a lie." Then, the wife swears as follows: "I solemnly invoke Allah's wrath upon me if he (the husband) tells the truth." After the oaths are taken, the judge will pronounce an irrevocable divorce. If the husband refuses to take the oath,

he shall be punished for *Qazf* (slandering). According to the Maliki, Shafi'i, and Hanbali,<sup>460</sup> they base this on the following verse: "Those who accuse chaste women of adultery and fail to produce four witnesses, give them eighty lashes each. And do not ever accept any testimony from them – for they are indeed the rebellious." (QS 24: 4). Hanafi jurists state that if he denies taking the oath, he will face imprisonment until he complies or acknowledges that the information is incorrect, then the punishment of *Qazf* will be inflicted.<sup>461</sup>

If a curse is cast between spouses, some implications arise as follows: (i) the husband will not be subject to *hudud* punishment of *Qazaf*. (ii) The wife will be sentenced with *hudud* punishment for adultery unless she also swears in *li'ān*. (iii) their marriage is permanently dissolved. (iv) Where the husband's paternity for any child conceived or thereafter born is denied, the child shall not take the husband's name and will be surrendered to the wife. (v) It is forbidden for the man and woman to remarry forever as mentioned in two Hadiths of the Prophet (SAW). The first Hadith was narrated by Ibn Umar RA that: "The Prophet (SAW) carried out *li'an* between a man and his wife, resulting in denial of paternity for the woman's child (the child could not take the father's name). The Prophet (SAW) separated the couple and established the child's lineage only to the mother". (vi) The child does not inherit from the father and is not obligated to receive financial support from him. (vii) As a precautionary measure, the father should refrain from giving zakat to the child. If the father kills the child, there is no retribution against him due to suspicions arising from them. Additionally, it is impermissible for either of them to testify against the other, and the child is not considered of unknown lineage.<sup>462</sup>

#### Activity 4.

Perform a drama in your class under the guidance of your lecturer, focusing on the theme of *li'an* (the Oath of Condemnation).

### SUMMARY

Marital relationship can end through (i) *Ila* (Vow of continence): It is an oath in which the husband commits to refraining from intimate relationship with his wife for a minimum of four months. If he keeps his oath, the marriage is dissolved; if he violates it, the marriage persists (ii) *Zihār* (Injurious Comparison): This signifies a husband's comparison of his wife with his mother or any female relation. (iii) *Li'an* (oath of condemnation): It is a form of divorce which takes place under the following circumstances: "if a man accuses his wife of adultery, and does not prove it by four witnesses, he must swear before God that he is telling the truth four times and then add: If I am a liar, may God curse me."

### QUESTIONS

**One:** please provide answers to the following questions:

1. Discuss the various opinions concerning the type of separation resulting from *ilā* (Vow of continence).
2. Provide a brief overview of the methods of separation existing before Islam.
3. Outline the general rules associated with *Zihār* (Injurious Comparison).
4. Explain the legal repercussions when two spouses refuse to take the oath of *li'ān*.

5. Present a concise note on the commendable aspects of *li'ān*, supporting your answer with relevant Hadith.

**Two:** Please indicate whether the following sentences are correct (✓) or incorrect (×).

6. The minimum period of *ilā* is three months (.....).

7. *Li'an* is recommended to be conducted after Maghrib prayers (.....).

8. The expiation of *Zihār* are freeing a slave, fasting for two months and feeding sixty poor persons (.....).

9. The type of separation due to *li'anis* revocable (.....).

10. A person who pronounces *Zihār* must be *Mukallaf* (.....).

**Three:** Fill in the gaps in the following sentences:

11. *Li'an* is legislated for two reasons.....

12. The implications of *li'an* are .....

13. *Sarih Zihār* is .....

14. Conditions of *Zihār* are.....

15. Allah (SWT) says, "And those who accuse their wives of adultery.....telling the truth."

**Four:** Read the following cases and analyse based on a Shariḥah point of view

17. The case filed in the Garissa court involves Bakkar Juma, who, after consuming alcohol, allegedly told his wife, "You are on me like my

mother's back." In response, the wife has requested marital separation. Bakkar contends that he did not intentionally consume alcohol; instead, he claims that his friends mistakenly provided it to him at a wedding party, thinking it was juice. The ruling on this matter would depend on the specific legal and cultural context of the jurisdiction where the case is being heard. It may involve considerations of marital discord, the impact of alcohol consumption, and the circumstances surrounding the incident. The court would need to assess the evidence and arguments presented by both parties to make a fair and informed decision.

### **Textbooks/Articles for Further Reading**

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3. Shukri, Ahmed. *Muhammedan Law of Marriageand Divorce*. Columbia University Press, 1917.
4. Powers, Paul R. "Intent in Islamic Personal Status Law." In *Intent in Islamic Law*, pp. 123-167. Brill, 2006.
5. Merchant, Munira Jainuddin. *Indian Muslim women: Post-divorce problems, social support and psychological well-being*. University of Illinois at Chicago, 1992.
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## NOTES

### CHAPTER 1

- 1 Ahmad ibn Muhammad ibn Ali al-Fayumy, *Al-Misbah Al-Munir*, Vol 3, (n.d, n.p), p. 75
- 2 Wahbah al-Zuhayli, *Al-Fiqh al-Islam Waadilatuh*, Vol 9, (4th edn, Syria: Dar al-Fikr n.d), p. 6492-6494
- 3 Mohammad Fathi, *Buhuth Muqarat fi al-Fiqh al-Islami wa Usuluhu*, Vol 2, (1st edn, Beirut: Muasasat al-Risalah 1414), p. 510
- 4 Mohammad bin Abdallah Naisaburi, *al-Mustadrak alaa Sahihain* Vol 1, (1st edn, Beirut: Dar al-Kutub al-Ilmiyah, 1990) 197, Hadith no: 387
- 5 Hussein bin Masoud al-Baghawi, *Sharh Sunnah*, Vol 9, (2nd edn, Beirut: al-Maktab al-Islami, 1983), p.17, Hadith No: 2247
- 6 Abū Bakr Aḥmad ibn Ḥusayn al-Bayhaqī, *Sunan al-Kubra*, Vol 7, (1st edn, Pakistan: Majlis Dairatul Maarif 1344), p, 133, Hadith No: 14130
- 7 Mohammad ibn Isma'il al-Bukhari, *Sahih al-Bukhari* Vol 8, (1st edn, Beirut: Dar Tuq al-Najat,1987), p. 9, Hadith No: 5090
- 8 *Ibid.*, al-Baghawi, p.17, Hadith No: 2247
- 9 Muwafaq din ibn Qudamah, *Mughni wa Sharh al-Kabir*, Vol 6, (1st edn, Damascus: Dar al-Fikr 1984), p. 355
- 10 Mohammad Swaleh al-Uthaymin, *Al-Sharh Al-Mumti' Ala Zaad al-Mustaqni*, Vol 12, (1st edn, Saudia: Dar Ibn al-Jawzi, 1428), p. 20
- 11 Ali bin Suleiman Al-Mawardi, *Al-Insaf fi Ma'rifat al-Rajhi mina al-Khilaf*, Vol 8, (2nd edn, Beirut: Dar al-Ihya al-Turath al-Arabi 1400), p. 18
- 12 Sayyid Sabiq, *Fiqh As-Sunnah*, Vol 2, (n.p, n.d), p. 27
- 13 Ahmad bin Shuib an-Nasai, *al-Mujtaba Mina Sunan*, Vol 6, (2nd edn, Halab: Maktab al-Matbu'at al-Islamiyah 1986), p. 73
- 14 Ahmad bin Hassan Al-Bayhaqi, *Marifat Sunan wa Athar*, Vol 10, (1st edn, Damascus: Dar al-Qutaibah 1991) p, 131, Hadith No: 4414
- 15 Abu Bakar bin Masoud Al-Kasani, *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'*, Vol 7, (n.p, n.d), p. 430
- 16 Ibrahim Al-Aqib Ahmad Jalal Din, *Ahwal Shakhsiyah*, (1st edn, Sudan: Sudan Open University 2006), p. 11

- 17 Said bin Mansour, Sunan Said bin Mansour, Vol 1, (1<sup>st</sup> edn, Beirut: Dar al-Kutub al-Ilmiyyah, n.d), p. 162, Hadith No: 590
- 18 Ibid., Al-Bukhari, p. 9, Hadith No: 5090
- 19 Abū Bakr Aḥmad ibn Ḥusayn al-Bayhaqī, Sunan al-Kubra, Vol 7, (1<sup>st</sup> edn, Pakistan: Majlis Dairatul al-Maarif, 1344), p, 84, Hadith No: 13870
- 20 (Al-Bahuti, 2000)
- 21 Ahmad bin Amru Shaybani, Al-Ahad wa Al-Athar, Vol 4, (1<sup>st</sup> edn, Riyadh: Dar Rayah 1991), p. 7, Hadith No: 1947
- 22 Muslim bin Hajaj, Sahih Muslim, Vol 4, (1<sup>st</sup> edn, Beirut: Dar Al-Jeil, n.d), p. 176, Hadith No: 3713
- 23 Ibid., al-Bayhaqī, p. 10, Hadith No: 1816
- 24 Sandas Hamadi, 'Ahkam Khitbah An-Nisaa' (2021) 14 (2) Journal of education-university of Iraq 234
- 25 Opcit., Sandas
- 26 Ahmad bin Ali Muthana, Musnad ibn Yaala, Vol 7, (1<sup>st</sup> edn, Damascus: Dar al-Maamun 1984), p. 285, Hadith No: 4308
- 27 Ibid., Sandas
- 28 Ahmad bin Abdallah Asbahani, Al-Musnad Al-Mustakhraj ala Sahih Imam Muslim, Vol 4, (1<sup>st</sup> edn, Beirut: Dar al-Kutub al-Ilmiyyah 1996), p. 79, Hadith No: 3286
- 29 Ahmad bin Ali bin Hajar, Fath al-Bari, Vol 7, (1<sup>st</sup> edn, Beirut: Dar al-Marifa 1379), p. 86
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The present study is a university-level scholarly book titled “Muslim Family Law” explores various topics within personal status. The subjects covered include: The Marriage Proposal and its Provisions Construction of Marriage: Definition of Marriage and its Legal Provisions Conditions for Marriage Legality 1st Condition: No Temporary Marriage 2nd Condition: Permanent Marriage 3rd Condition: The Witness 4th Condition: Consent and Voluntariness 5th Condition: The Dowerto be Equal to the Dowerof Her Statue 6th Condition: The Husband to be Free from Any Defects of Castration and Sterility The Impediments Permanent Impediments Fitness in Marriage Dowerand its Provisions Rights and Duties of the Two Married Parties (Spouses) The Wife’s Rights to Maintenance Right to Justice in a Polygamous Marriage Marital Rights and Rights to Restriction Husband’s Obedience Obligation of the Wife to Obey the Husband and the Power of the Husband to Discipline if She Doesn’t Obey Him in What She is Obligated to Obey Him Dissolution of Marriage Marital conflict resolution Types of Divorce Divorce Procedure: Consequences of Divorce This comprehensive exploration aims to provide a scholarly and in-depth understanding of the various facets of Muslim personal law, offering insights into its legal provisions, conditions, and the rights and duties of individuals within the context of marriage and dissolution.

## AUTHOR PROFILE

Dr. Manswab obtained his PhD from the International Islamic University Malaysia in 2019 at Kulliyah of Islamic Revealed Knowledge and Heritage (Islamic jurisprudence) and his Master in Shari’ah and Law at the University of Dongola, Sudan in 2013. He holds a postgraduate diploma in international relations from Sudan Academic of Science in 2012. He received his Bachelor’s Degree from the School of Shari’ah and Islamic Studies at the International University of Africa, Khartoum, Sudan, in 2010. Dr. Manswab started his career as a tutorial fellow in 2013 at the College of Islamic Studies Mombasa, affiliated with the International University of Africa Khartoum-Sudan. Since then, he has taught various courses on Islamic studies and Islamic finance. Later, he wrote a text book about Islamic jurisprudence on bank transactions for the same college. He also taught various courses in Islamic law at Raf University between 2015 and 2016. He taught at the School of Humanities and Social Sciences, Department of Philosophy and Religious Studies, Pwani University from 2019-2020. From 2015 to 2023, he has taught various courses in B.A and M.A at Umma University’s School of Shari’ah and Islamic Studies, where he has also served as the department’s head for two terms, 2015-2016 and 2019-2020. He published twenty-two articles in peer-reviewed journals, some of which are indexed on SCOPUS and the Web of Science (WOS). He has also published four books: Islamic Inheritance, Islamic

Banking, Al-fiqh Al-Muyassar’s chapter on business transactions, and al-Manhaj al-Kamil [Full Curriculum]. He has presented around eight research papers at a number of national and international conferences. He has been involved in a number of refereed journals locally and internationally, either as a chief editor (Journal of Islamic Shari’ah E-ISSN: 2773-5915), a member of the editorial board, or an assessor of the articles. He has had the opportunity to evaluate more than 60 research papers in Arabic and English (Al-Hikmah Journal of Islamic Studies and Human Science, e-ISSN: 2637-0581), (Milkiyah Jurnal Hukum Ekonomi Syariah, e-ISSN 2549-8312), (Journal of Education in Muslim Societies- ISSN 2641-0052), (Sumait University Journal-ISSN 2507-7864). (International Journal of Islamic Studies and Humanities-ISSN 2614-3836) His research interests include Islamic Family Law, Islamic Finance, African CustUmary Law, and Islamic Theology. He has had the opportunity to supervise master’s students from Umma University and Mount Kenya UniversityKenya. He was named to the World Scientist and University Ranking for 2021. Finally, his research focuses generally on the promotion of social justice through practical engagement and research in solving contemporary issues in society.

