

the Muslim spouse, his (and her) family or their offspring with the spirit and ways of shirk. Most probably, as a result of such a un-Islam will be bred in such a family.

A non-Muslim might approve of this, but a Muslim cannot afford to do so as monotheist. One who sincerely believes in Islam can never take such a risk merely for the sake of the gratification of his lust. He would rather suppress his passions than do anything that might mislead him to disbelief, blasphemy and shirk or, at least mislead his progeny.

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extends into future realities by virtue of off-spring and relatives.

The Qur'an says in Surah Al-Furqan :

And He it is Who out of this (very) water has created man, and has endowed him with (the consciousness of descent and marriage-tie: for thy Sustainer is ever infinite in His power.<sup>1</sup>

Furthermore, Allah has called upon us to protect your families from unbelief. The Qur'an states in Surah At-Tahrim,<sup>2</sup> the following: In this Ayat the term "ahl" denotes one's family and dependents in the most comprehensive sense of this word.

A general statement should be made about divorce as it is a destructive evil. Allah has made divorce legal, but He hates divorce and therefore, we, as Muslims, must hate what Allah hates. We must strive to maintain our marriage and families which come as blessing from Allah.

Lastly, here is a Hadith that every Muslim should consider before embarking upon divorce: "The Prophet (peace be upon him) declared that 'condemned are the men and women who relish the frequent change of marital partners, that is, the "tasters" who enjoy one partner for a while, then shift to another, then to a third, and so on." We seek the mercy of Allah and turn to Allah in repentance.

If a Muslim woman subsequently renounces Islam, she does not remain any more a legally married wife. Her marriage with a Muslim husband becomes null and void automatically. The reason given in the verse 2:221 as to why the believers have been prohibited from marrying mushrik spouses is that, they invite you to the Fire.

This means that such marriage might mislead the Muslims spouses to the ways of shirk, for the relations between the husband and the wife are not merely sexual but spiritual and cultural as well. It is possible that the Muslim spouse may influence the mushrik spouse and his and her family and their offspring in favour of the Islamic way of life.

But it is equally possible that the mushrik spouse may imbrue

1. Al-Qur'an : 25:54

2. Q. 66:6

And among his wonders is this: He creates for you mates out of your own kind, so that you might incline towards them, and engenders love and tenderness between you; in this, behold, there are message indeed for people who think.<sup>1</sup>

This is a very important Ayat concerning marriage. This Ayat states emphatically that marriage in Islam is not just a secular contract concerning tangible things. As this ayat points out, an Islamic marriage has intangible aspects and ennobling qualities. These qualities come as a blessing from Allah. Thus, marriage in Islam is something sacred and solemn.

The wife in an Islamic marriage must be devoutly obedient to her husband. However, there is no obedience to the creature in disobedience to the Creator. Here again, both partners are obliged to follow the Qur'an and Sunnah and to have a mutually agreeable understanding of Islamic practices.

This will come about only as the result of joint study and application of what has been learned. As regards the wife's obedience the Qur'an says in Surah An-Nisa:

"And the righteous women are the truly devout ones, who guard the intimacy which Allah has (ordained to be) guarded."<sup>2</sup>

The Prophet Muhammad (peace be upon him) said:

"The best out your oath she trust in of women is the one who is pleasing to look at, who carries instructions when you ask her, with the solemnity of an responds favourably and in your absence, she protects your trust in her self and your property."

### **Extension of Self:**

Marriage in Islam is an extension of yourself. Marriage is not just an observable occurrence of the present, but in Islam it

1. Al-Qur'an 30:21.
2. Al-Qur'an : 4:34

### **Companionship:**

However, there is no "Jihad of staying together inspite of difficulties that violate the Shari'ah. There is no patience in the face of what is Haram (forbidden by Qur'an).

The Qur'an says in Surah-An-Nur:

And as for those who accuse their own wives (of adultery), but have no witnesses except themselves, let each of these (accusers) call Allah four times to witness that he is indeed telling the truth, and the fifth time, that Allah's curse be upon him, if he is telling a lie.<sup>1</sup>

But (as for the wife, all) chastisement shall be averted from her by her calling Allah four times to witness that he is indeed telling a lie, and the fifth (time), that Allah's curse be upon her if he is telling the truth.<sup>2</sup>

An Islamic marriage is a marriage in which the *spouses* accord noble respect and kindness to each other. They try to find alternatives to each other's personal dislikes for the betterment of the marriage.

The Qur'an says in Surah An-Nisa :

And consort with your wives in a goodly manner; for if you dislike them, it may well be that you dislike something which Allah might yet make a source of abundant good.<sup>3</sup>

### **Compatibility:**

As this Ayat points out, the goal in an Islamic marriage is finding avenues of compatibility, peace and harmony. A pattern of such living develops a dynamic personality in the spouses and serves as models for the children.

An Islamic marriage is one of love., peace, compassion and serenity, comfort and hope. These qualities should permeate throughout marriage. Otherwise living together becomes virtually impossible.

1. Al Qur'an surah-a-Al-Nur,6-9.

2. Qur'an 24:7,6-9.

3. Q.4:19.

of his blood-relations other than lineal descendants, or lineal ascendants.<sup>1</sup>

Marriage in Islam is more than marriage.<sup>2</sup> It is fifty percent of the fulfillment<sup>3</sup> of the Islamic way of life.

The Prophet (peace be upon him) had said:

"He whom Allah grants a pious wife, has been helped to preserve half of his Deen (Islamic way of life). Let him fear Allah so that he may preserve the remaining half." The key to marriage is submission to Allah.<sup>4</sup>

The Qur'an says:

Verily, for all men and women who have surrendered themselves unto Allah, and all believing men and believing women and all truly devout men and truly devout women, and all men and women who are true to their word, and all men and women who are 'patient in adversity, and all men and women who humble themselves (before Allah), and all men and self-denying women, and all men and women who are mindful of their chastity and all men and women who remember Allah unceasingly: for (all of) them has Allah rendered forgiveness of sins and a mighty reward.<sup>5</sup>

It is from the submission to Allah, that a marriage blossoms and becomes like a light shining ever so brightly. In Islam, marriage is obeying Allah and obeying the Prophet (peace be upon him) of Allah.

### Shared Experience:

Marriage in Islam, is fulfilling the material needs of our spouses and children to the best of our abilities. While one is spending upon his wife and children it should be realized that this is an act of sharing. Marriage in Islam is an act of sharing. It is a shared experience and there is no room for selfishness. It is also a "Jihad" (struggle) of staying together inspite of internal or external difficulties.<sup>5</sup>

1. Ham. Hedaya 148; Compare Baillie I, 563
2. Al-Hakim Ash Sharif Institution of marriage in islam: Muslims world league Journal Vol. 10 No.12 sep-oct (1983) P.36.
3. Rep.Ibid. 4. Q:33:35
5. Al-Qur'an: Surah At-Tatghabun Ayahs 14-15.

The husband has a duty to maintain his divorced wife undergoing Iddat or waiting period, according to the Hanafi views, while the Shaafi and the Shia schools make pregnancy as a condition precedent to it.<sup>1</sup>

But if the separation of the parties has originated from an act of the wife herself she is not so entitled for maintenance during the Iddat, and similar is the case of dissolution of a marriage upon the death of the husband for a widow is not entitled for maintenance on the basis of the Quran.<sup>2</sup> It is of interest to note the difference of interpretation of the Quranic text upon the maintenance of the widow during an Iddat, among the schools.<sup>3</sup>

During the pre-Islamic Arabia, there was no obligation on the part of either of the parents to maintain their children or relatives.<sup>4</sup> The Islamic reformation abolished such practices and provided for proper maintenance of these people, and even in the eyes of the law, a difference of faith makes no difference upon an obligation to maintain.<sup>5</sup>

The father and the mother both are liable to maintain their children,<sup>6</sup> and though the duty lies primarily upon the father, it is the duty of both of the parents even in cases of divorce to maintain their infant children.<sup>7</sup>

A Person of either sex who is in easy circumstances is bound to maintain every poor relative within the prohibited degrees of relationships of persons if male, is either; if female, is husbandless or married to a husband who cannot or will not support her.<sup>8</sup>

If the children are in easy circumstances they are bound to maintain their parents (but not step-parents) who are poor.<sup>9</sup> But a Person in uneasy circumstances is not bound to maintain any

Ham Hedaya, 45; Baillie I, 454

Ham. Hedaya 145; Agha Mohamed Jaffar

Bindaneen V. Koolsum Bee

M.L.J. 115 P.C.

See Abdur Rahim, 45 112

Ameer Ali II, 426

Fatwa-e-Alamgiri I. 750

Ibid., 750

Ham. Hedaya 146; Baillie I, 459

Baillie I, 463; Wilson, 205 4. Ham. Hedaya 148; Wilson, 205

The theory behind the law is that it is a recompensation for the matrimonial restraint of the wife by the control of the husband.<sup>1</sup> A minor unable for sexual relations is not entitled to maintenance according to the Hanafi school, but not according to the Shafi school.

If the woman leaves the custody of her husband without his consent and becomes rebellious, the husband is under no duty to maintain her, unless, she surrenders herself to him, but if she refuses, due to the non-payment of her prompt dower, the case is otherwise.<sup>2</sup>

The husband is bound to provide the wife with a separate residence for her living, and the judge, even upon a proper complaint of the wife order the husband to arrange for her house in a neighbourhood of independent and trust-worthy people.<sup>3</sup> If the wife has servants, according to Abu Yusuf, the husband is bound to provide maintenance for than, while Abu Hanifa holds it unnecessary for a poor man, but the Shafi school holds the duty where the wife is of good social standing.<sup>4</sup>

In cases of sickness of the wife, she is entitled to maintenance, but it is not the duty of the husband to provide medical expenses, according to Hanafi view but otherwise according to the Shafi law where he is liable to the medical expenses too.<sup>5</sup>

The wife can take judicial remedies for maintenance and also can borrow for it upon the credit of the husband.<sup>6</sup> The Hanafi school rejects the rights of the wife for past maintenance unless it was fixed at the marriage contract or judicially determined, but the Shafi and the Shia schools allow it.<sup>7</sup>

The legal effects of failure of the husband to maintain the wife give rise to the right of the wife to sue for a judicial divorce, according to the Shafi Law, but not so according to the Hanafi jurists.<sup>8</sup>

1. Ham. hedaya, 140

2. Ibid. Baillie, I, 453

3. Baillie I, 453

4. Ham. Hedaya. 142

5. Baillie I, 446, Minhaj., 384

6. Baillie, I, 445; Ham Hedaya, 147

7. Ham Hedaya 421; Baillie I, 447, II., 100

8. Ham. Hedaya. 142

The custody of a boy, below 7 years and a girl till the age of puberty, belongs exclusively to the mother and on her default to the mother's mother, and after that Period, according to the Hanfi law the child must be given back to the father or after him to the paternal relations.<sup>1</sup>

The Shafi school says that if the mother is living, the child has the choice to be with her even after the prescribed limit of time, while the Shia schools hold that the mother's rights end, when male child becomes of 2 years and a female becomes of 7 years in age.<sup>2</sup> The traditions of the Prophet too mention accordingly with a prime consideration for the welfare of the minor.<sup>3</sup>

The right of mother to custody of the child is lost if she marries a person not related to the child within the prohibited degree, so long as the marriage subsist, by going to reside at a distant place from the residence of the father (except in case of a divorced wife who can take her child to her own place of birth, which was also a place of contract of the marriage) otherwise by failing to take proper care of the child, and by gross and open act of immorality she forfeits the right.<sup>4</sup>

### The law of Maintenance

Nafqah or maintenance, in the language of the Sharia Signifies all those things, which are essential to the support of life, such as food, clothes lodging, toilet requisites, but it excludes luxuries.<sup>5</sup> It is established by reasons of marriage relationship and property by which a person becomes incumbent to maintain another, and there is, more or less, much similarity with the law of the Anglo-American or other civilized systems of the world.<sup>6</sup> The Islamic law is derived from Quran for the maintenance of persons in a family.

It is sanctioned by the law that a husband is bound to maintain his wife, irrespective of her being a muslim, non-muslim, poor or rich, young or old, if not too young to be unfit for matrimonial intercourse.<sup>7</sup>

1. Ibid., 439, Ham. Hedaya 1393
2. ameer Ali II 542,
3. Mohd. Yusuf I. 141
4. Baillie I. 438
5. Ham. Hedaya, 140
6. Baillie I. 44, Durrul-Mukhtar, 283
7. Baillie I, 44



marriage is considered as legitimate. As adoption is prohibited by the Quran a paternity is not established by it, but an acknowledgment by a man establishes it.<sup>1</sup>

#### **(6) The Law of Guardianship:**

Guardianship or Wilayat is a right to control the movements and actions of a person who, owing to mental defect, is incapable to take care of himself in managing his own affairs, as for example an infant, idiot, and a lunatic.<sup>2</sup> The law protects the interests of such persons by taking cares of their person, property, and other related interests.

It is not an absolute right of anyone individual to become a guardian of minor but it is the fundamental principle of the law to promote the welfare of the minor. It comprehends firstly in the care of the person of the minor arising by Hizanat or custody, secondly, though the supervisory direction over his persons, and, thirdly, in the administration and care of his property.<sup>3</sup>

The pre-Islamic Arabia had no settled sovereign state, the Islamic law regulated the matters and interest of the weaker Person, and the Quran explicitly laid down rules for the laws relating to the guardianships of such weak Persons. The Quran is the basis of the law relating to guardianship.

#### **Al-Hizanat or Custody of Minors**

Hizanat is right of rearing up the child by the mother, and the father must provide for it, and the mother is, of all Persons, the best entitled to the custody of her infant child, during marriage, and after separation from her husband, unless she becomes an apostate, or wicked, or unworthy to be trusted.

The wickedness is injurious to the child as zina, theft, or being a professional singer, for a person who leaves out the child by going out is not to be trusted.<sup>4</sup>

1. Baillie I, 415

2. Abdur Rahi, 394

3. Ameer Ali II, 539

4. Baillie I, 435 citing Durrul-Mukhtar., 280

Egypt, Syria, Morocco and Pakistan has provided ample safeguards in the interest of the wife against the power of divorce of the husband.

Even some of them have provided on the traditionary basis that a triple divorce, in a single form, should be counted as one in order to provide an opportunity of revocation and reconciliation of the parties to the marriage.

Further, the countries have provided more widely for the wife to secure divorce judicially.<sup>1</sup> In India the Act of 1939 gives some powers to the wife, yet the enactment has no provision to regulate the husband's power of divorce, the time is ripe that the scholars will further amend the legal provisions and bring the law, as it is applied, by the major muslim countries.

#### 4. The Law of Parentage:

The word parentage is commonly restricted to the descent of a child from its father, but it is some times applied to descent from the mother, and is occasionally employed in larger sense to embrace other relationships.<sup>2</sup> The birth of a child establishes maternity irrespective of marriage, but the Shia schools want a wedlock for it.

The law of Islam is analogous to the Anglo-American law on the subject of legitimacy, as the laws of each civilized system presume in favour of legitimacy of the children, though rebuttable by clear and conclusive evidence.

The paternity of a child is not established, as it is a secret matter and positive proof is required for it, but when a child takes' birth to a woman, duly married after six months from the date of the marriage, and within two lunar years of termination of the marriage, (provided the mother remains unmarried) the paternity is established with the husband. But if the child is born within a period of six months and if the husband admits it as his, the paternity is established to him, otherwise it is not so.

The Sharia favours legitimacy and even a child of an irregular

1. See Anderson, Islamic Law in the Modern World (1959)
2. Baillie I, 391 Mohd. Yusuf, II (1894)
- \* Baillie, I Fatwai-Hindi II, 576

## Modern Challenges in the law of divorce

By Dr. Nazeer Akhter

☆☆☆

A contract of marriage is a civil contract , and if it becomes impossible for the parties to abide by it, the Shariah says that it be broken off. Though it is the intention of the parties that the contract must be, for the life time of the parties yet it remains dissolvable in cases of needs, when it becomes impossible and unbearable to lead a life of harmony, and peace, according to the law, it is lawful to terminate it.

Upon the basis of the democratic social patterns of modern societies, many Islamic countries have provided restrictions upon the arbitrary power of the husband to divorce his wife.

The modern doctrines of equality before the law demands more protection of the wife. The Shariah, as applied in Sudan, Jordan,

1. Baillie. I. 292. Ham Hedaya 128
2. Q: II, 228, 235
3. Baillie, I., 352. Ham Hedaya 128
4. Ibid
5. Ibid., 3 Minhaj 88