1. INTRODUCTION:

Dower is the English translation of the Arabic word 'Mahr\(^1\). Instead of using this term, the Holy Quran has used the words 'Saduqa\(^2\); "Fariza\(^3\) and 'Ujir\(^4\) due etc. for the same. The English term is a somewhat misleading as it has narrow and now taken into wider sense\(^5\). It is the development of evolutionary process of history. This term is development of equal act of bride price and also morning gift in Germany. Any way Dower, the French douaire Latin doarum, which again is a distorted form

\(^1\) Which means consideration paid by the husband to the wife

\(^2\) Holy Quran S. 4 A 4.

\(^3\) Holy Quran S. 2 A 236, 237.

\(^4\) Holy Quran S. 5 A 5.

\(^5\) Wilson - Digest on Mohommadan Law 1916, p. 52.
of *dotarum*, is evidently a derivative of *dos*, a gift. The Lexicon Webster dictionary defines it, 'that part of real estate, of which her husband possessed, at the time of death which is allowed the widow for as long as she lives'.

Tayabji says, that *mahr* is mentioned as being consideration for marriage but probably this is derived from English maxim that marriage is highest consideration. According to Islamic text in Pre-Islamic Arabia women were sold in marriage by their parents or guardians. At that time it was real consideration. But Prophet has prohibited such sales ordering that money should be given to the bride. Odium connected with price or consideration for sale of bride ought not to be attached to dower which not only prevented sale but provided for the woman who had before been treated as chattel. Grote, speaking of pre-historic Greece, says, "we find the wife occupying a station of great dignity of influence, though it was a practice for the husband to purchase her by valuable presents to her parents, a practice extensively prevalent among early communities and treated by Aristotle as an evidence of barbarism."

Amongst Teutonic races *Bitro* that seems to have been equivalent to sale of woman by her guardian payable after marriage to guardian and later on, to girl herself.

---

8 Ibid (Citing Holland, Jurispru.) (7th Ed. p. 257).
2. DOWER AND THE HOLY QURAN:

The Islamic law enjoins that on the occasion of marriage, some amount must be paid by the husband to the wife as dower. The Holy Quran says\(^9\) -

\[
\text{وَعَلَىٰ أَلْسِنَتْهُمْ صَدْقَتٌ بِنَبَتَةَ}
\]

"And give the woman (on marriage) their dower as gift".

Further\(^10\) -

\[
\text{لَا جُنَاحَ عَلَيْكُمْ إِن طَلَّقُتمُنَّ أَلْسِنَتَّهُمْ مَا لَمْ تُفِقُوهُنَّ أَوْ تَفْرَضُوا}
\]

"There is no blame on you
If ye divorce women
Before consummation
'Or the fixation of their dower;
But bestow on them
(A suitable gift)."

Further\(^11\) -

---

\(^9\) Holy Quran IV - 4.
\(^{10}\) 'The Holy Quran' S. 2A 236. Mostly Yusuf Ali's translation is cited so wherever there is no name of the translator it is to be assumed that Abdullah Yusuf Ali's translation is cited.
\(^{11}\) Ibid A 237.
And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower is due to them unless they remit it.

"O ye who believe! You are forbidden to inherit women against their will. Nor should ye treat them with harshness that ye may take away part of the dower ye have given them, except where they have been guilty of open lewdness;..."

12 The Holy Quran' S 4 A 19 & 20.
"But if ye decide to take
One wife in place of another,
Even if ye had given the latter
A whole treasure for dower
Take not the least bit of it back”.

Further13 —

".....Except for these, all others
Are lawful provided
Ye seek (them in marriage)
With gift from, your/property,
Desiring chastity, not fornication
Give them their dowry
For the enjoyment you have
Of them as a duty;......"
"Ye are one from another:
Wed them with the leave
Of their owners, and give them
Their dowers, according to what
Is reasonable: they should be
Chaste, not fornicators, nor taking
Adulterous: when they
Are taken in wedlock,..."

Further\textsuperscript{14} -

\begin{quote}
"O Prophet! We have
Made lawful to the
Thy wives to whom thou
Hast paid their dowers".
\end{quote}

Thus we see that the Almighty Allah has prescribed the system as gift to wife from husband; though marriage is not consummated and before the fixation of dower marriage is dissolved. It is prohibited to appropriate the dower money by any means except where the women themselves allow.

\textsuperscript{14} Yusuf Ali 'The Holy Quran' S. 33 A. 50, also see S. 5 A6, S. 40 A.10 V: 6, LX : 10.
In short the Holy Quran considers the dower as necessary incident of the institution of marriage.

(3) DOWER (HADITH) AND THE TRADITIONS:

Ali S/o Abdullah Quotes from Sufyan (Raz), who heard from Hazira's father saying that he heard from Sahl (Raz) that, "While he was (sitting) among the people in the company of Allah's messenger (SAW) a woman stood up and said. "O Allah's messenger (SAW)! I have given myself in marriage to you; Please give your opinion about me". The Prophet (SAW) did not give her any reply. She again stood up and said, "O Allah's Messenger! I have given myself (in marriage) to you, so please give your opinion about me" (woman). The Prophet (SAW) did not give her any reply. She again stood up for the third time and said, "I have given myself in marriage to you, so give your opinion about me". So a man stood up and said, "O Allah's Messenger! Marry her to me". The Prophet (SAW) asked him," Have you got any thing?" He said, "No". The Prophet (SAW) said, "Go and search for something, even if it were and iron ring". The man went and searched and then returned saying, " I could not find any thing not even an iron ring". Then the Prophet (SAW) said, "Do you know something of the Quran (by heart)?" He replied "I know (by heart) such and such sura." The Prophet (SAW) said. "Go. I have married her to you for what you know the Quran (by heart)". Thus, this Tradition (Hadith) shows that dower is necessary in the marriage. Moreover the fixation of dower is not

16 Ibid.
necessary that is why the companion (Raz) was asked to bring any thing including iron ring. Thus where the husband has nothing, the intangible thing (of thawab, recitation of verses of the Holy Quran) may be fixed as dower.

4. NATURE OF THE DOWER:

Holy Quran considers the dower as a free gift

'And give the dower to the women with happiness'.

Further it is termed as reward in chapter IV verses 25.

The Schools of Muslim jurisprudence consider the dower as essential part of the marriage.

The jurists in India consider it as gift; mark of respect and consideration. In Abdul Qadir V. Salima Justice Mehmood held, 'Dower can be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. It is not the exchange or consideration, as understood in the technical sense in the Contract Act given by the man to the woman for entering into the contract but an effect of the contract imposed by the law on the husband as token of respect for the woman. If dower were treated as the bride-price a post-nuptial agreement, to pay dower would be void for want of consideration, but such an agreement is alid and enforceable.

Justice Sulaiman observed. "It is quite obvious that the analogy of sale cannot be carried too far. The marriage can not be regarded as

purely a sale of the person by the wife in consideration for the payment of dower”.

But Justice Mitter while reviewing the judgment19 of justice Mukharji who did not allow the plaintiff Saburunnessa to retain the property given in dower to her by her husband, upheld the judgment and appeal was rejected. The division bench comprising justice Mitter and McNair J. held," It appears from the plaintiff's own statement in the plaint, that her husband made a gift of immovable property in exchange for the dower. The character of such transaction has been regarded as a kind of sale in a decision of that Court which is governed by S. 54, Transfer of property Act and the consideration money being admittedly over one hundred could not be made except by a registered instrument".

It has been contended on behalf of the appellant that a dower is not really a consideration for the marriage and it is in the nature of a gift and therefore the deed did not require registration. It appears clear from the statement which has been quoted that it is not a gift pure and simple, but a hibabelewaz20 as understood by the Mohammedan Law, It is in reality a sale, and has all the incidents of a contract of sale, the court held.

Justice Mitter further held that the marriage under Mohammedan Law is a Civil contract and is like a contract of sale. Sale is a transaction of property for a price. In the contract of marriage the wife is the property and the dower is the price.

But this decision is only observations as it has no legal sanctity that is why it is neither followed by the courts nor the jurists took this

---

19 Suburunnessa V. Subdu Shaikh AIR 1934 Cal. 693.
20 'Hiba' means gift and 'Ewaz' means consideration.
decision for their comments. Even the Wilson's 'Digest of Mohammadan Law'. S. Amir Ali, Prof. Tahir Mehmood etc. do not have reference of this case in their books. Tayyabi has vehemently criticized this observation.

The Patna High Court has held that the dower money is not a charge upon the husband's property. It is an interest restricted in its enjoyment to her personality with in the meaning of section 6(d) of T.P.A^{21}. The Allahabad High Court considers the dower as a mark of respect. In Nasra Begam V. Rijwan Ali^{22} it was held that under the Mohammadan Law dower means money or property, which the wife is entitled to receive from the husband in consideration of the marriage. However, the expression, consideration is not to be understood in the sense in which it is used in the Indian Contract Act. In effect dower is an obligation imposed upon the husband as a mark of respect for the wife. Thus the dower is neither the Sale price nor consideration in the commercial sense but is a necessary incident in the form of gift.

5. QUANTUM OF DOWER:

There is no fixed scale of dower in the Holy Quran, which says -

"... Even if you have given her a whole treasure for dower, take not the least bit of it back^{23}. Caliph Umar once consulted his consultant's (Shura) and in a general gathering tried to announce the same addressed i.e., not to be considered for preceding as it is contrary to the Muslim law

^{21} Zobair Ahmad V. Jainandan Prasad AIR 1960, Pat. 147
^{22} AIR 1980, All. 119
^{23} The Holy Quran S 4 A 20
them and proposed the fixed scale, an old woman stood up and said that how Caliph Umar (Raz) dared to do which is not done by the Prophet. She further told, quoting the ayat 20 of sura 4 that what Allah grants them (i.e. women as dower) they (Caliph Umar Raz. & others) are trying to check. In this way Caliph Umar (Raz) became shy and said, "Every body has better knowledge than Umar even if that is an old and infirm woman."

(1). HANFI VIEW:

As has already been mentioned that no fixation of dower has been made in the Holy Quran and Tradition. However the minimum amount, fixed by Hanafis, is ten Dirham. They quote the Tradition where the Prophet of Allah told that there is no marriage except between equals. The woman can not be given in marriage but by guardians, there can not be dower which is less than ten Dirhams.

(2). MALIKI VIEW:

Imam Malik is of the view that the lesser amount of dower must not be less than three Dirhams or one-fourth Dinar.

(3). SHAFEEYEE VIEW:

To Shafeyees the quantum of dower is not fixed. It depends upon the parties concerned. To them any goods capable of being sold may be the dower. The Shawafey quotes the Tradition of the Prophet. Where a person of Banu Fuzara tribe had agreed to marry a woman by giving a pair

---

24 Darse Tirmizi, Vol. III, p. 391, but this tradition is weak.
26 Mughni Vol. VI, p. 680
of shoe to which Prophet (SAW) permitted\textsuperscript{27}. So the quantum of dower is not fixed and there is no minimum limit of it.

(4). HAMBALI VIEW:

The Hambalis also have similar view like Shafeyees. But the writer of  \textit{Balughul Maran}, Ibnul Hajar Asqalani (Rah) says that Imam Hamabi's view is quite different from Shafeyee's view\textsuperscript{28}.

In  \textit{Haleema V. Moin}\textsuperscript{29} it was observed that,"A Mohammadan husband may settle any amount that he likes by way of dower debt upon his wife though it may be beyond his means and though nothing may be left for his heirs after the payment of the amount; but he cannot in any case settle less than ten dirhams."

6. NATURE OF THE DOWER AMOUNT:

The widow's unpaid dower is unsecured debt. She is also to be kept in the list of other unsecured creditors. The right of widow is actionable claim. In  \textit{Maina Bibi V. Wasi Ali}, it was held that the woman's right of dower has no priority over other creditors. In  \textit{Sayed Ahmad V. Mst. Bunvadi}\textsuperscript{30} it was held that dower is a debt within the terms of the succession certificate Act 1889. Where the property is transferred in

\textsuperscript{27} Darse Tirmizi, Vol. III, p. 390. However this tradition is considered as weak but the following two Traditions of the Prophet which are not weak may be quoted here. (i) Abdur Rehman bin Auf (Raz) told the Prophet (SAW) that he had been married Prophet (SAW) asked how much sudaq (dower) he had given. He told a piece of gold equal to the seed of date. (ii) Another Tradition is that when Prophet (SAW) married his daughter to Ali (Raz), he was told not to approach to Fatima (Raz). D/o the Prophet (SAW) unless he gives the dower. He told that he had nothing to give. He was suggested to give his iron chain which is he used in war time. When he gifted the chain, he was allowed to approach. Thus any thing may be fixed as dower.

\textsuperscript{28} Darse Tirmizi Vol. III, p. 398

\textsuperscript{29} AIR 1971 Pat. 389

\textsuperscript{30} (1919) 41 All. 538
consideration of dower, it is not gift but sale\textsuperscript{31} that is to be covered by T.P.A\textsuperscript{32}. It appears to be founded on power of the widow as a creditor for her dower to hold property of her husband of which she has lawfully and without force or fraud obtained possession until her debt is satisfied with the liability to account to those entitled to property subject to claim for profit received\textsuperscript{33}. The dower ranks as a debt and the wife is entitled along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully with express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and incomes issues accruing there from, she is entitled to retain such possession until it is satisfied. This is called the widow’s lien for dower, and this is the only creditors lien under the Muslim law, which has received recognition in the British Indian courts\textsuperscript{34}. \textit{Ameer} Ali is of the view that "under Mohammadan law, there is hypothecation without reason, and therefore a widow has no absolute heir over any specific property of her deceased husband so as to enable her to follow it, as in the case of a mortgage, into the hands of a bonafide purchaser for value\textsuperscript{35}.

The opinion of the courts regarding property in lieu of dower is different. The Allahabad and Andhra Pardesh H.C.s are of the view that it is both transferable and heritable\textsuperscript{36}.

\begin{footnotes}
\item[31] Bibi Janbi V. H. Sahib (1910) 21 Mad. L.J. 958
\item[32] Saburun Nisa V. Sabdu Shaikh AIR 1934, Cal.
\item[33] 14 MOO I.A. 377
\item[34] Hamaira Bibi V. Zubaida Bibi 43 I.A. 294
\item[35] Syed Amir Ali “Mohammadan Law”, 1976, p. 408
\end{footnotes}
A Muslim widow is entitled to transfer her husband's property of which she is in possession, in lieu of dower, without transferring her dower debt. And thus this will be absolute transfer without any encumbrance. Patna and Bombay H.C.s are of the view that the property is heritable. It is submitted that the views of Allahabad and Andhra Pradesh High Courts seems good provided the reasonable time would have passed.

7. DOWER AND THE VIEW OF IMARATE SHARIA:

Dower is a money given to the wife by the husband. It is so important that if it is not fixed at the time of marriage the law will assume its fixation and proper dower will be given to the wife. It is not consideration like in sale of property. Because in marriage nothing is sold or purchased. In Pre-Islamic Arabia, women were sold by their guardians. But Islam has reformed the law and the money is still due on husband but that is to be given to the wife and not to her guardians. That is why the system of 'shighar' in which the dower is not paid is prohibited. The Holy Quran also specifically makes

---

37 Abdullah V. Shams ul Haq and Others A.I.R. 1921, All. p. 262
38 Patna H.C. is of the view that "when a Muslim lady is in possession of her husband's property and she still claims dower debt then her right to retain property exists till dower debt is discharged. Such right to retain possession can also be exercised by her heirs after her death.
39 The Bombay H.C. is of the view that where a Muslim widow who is in possession of her husband's property, still claims her dower debt her right to retain possession of the property till the dower debt is discharged exists and it is immaterial in what character whether as a creditor for dower debt or otherwise she came into possession of the property, provided possession is lawfully and without force or fraud. Such right to retain possession can also be exercised by her heirs after her death.
39A In Maina Bibi V. Chaudhri Vakil the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Although there is conflict of opinion, yet in view of the Supreme Court observations in Kapoor Chand case, it seems more probable that this right is not transferable.
40 B.A.Khan. 'Economic Rights of women under Islamic Law & Hindu Law' (Delhi: Adam Publishers 1999) p. 244
41 Ibid.
provision for it. In Traditions (Ahadis) it has been declared a necessary incident of marriage. Those, who say that it is the sale price of the bride are not having the correct views. Islam never treats the dower as the sale price. Even the Almighty Allah has forbidden using the property of women without their consent. The Tradition where the Prophet (SAW) married a woman to a companion, fixing the verses of Holy Quran as dower is repealed by the verse No. 24 of sura IV where the Almighty Allah has made it mandatory to give the property. The minimum dower is 10 Dirham. If less than 10 Dirham is fixed as dower it will be increased up to 10 Dirham. Where there is no fixation of dower at the time of marriage the proper dower is to be given. Which will be equal to the bride’s sister’s dower. However due consideration would be given to the beauty in its fixation. So far as the transferability and inheritability of dower is concern, it is very much there.

In Noor Mohd. V. Amanat Hussain the Qazi court held that a son has right to inherit the property secured by dower debt of his dead mother from his step-father. Thus where the dower money is not paid by the husband of the deceased wife, her offsprings and other heirs have right to take the dower amount from the said husband.

The case of Mahrun Nisa V. Md Akhtar, Nasim Haider V. Shadabia Jabin, Bibi Kariman V. Md Mahfooz Ali, Mahjabin V. Ehsan Ahmad & Fahima Khatoon V. Nyazul Haque etc. are also related to the

---

42 Supra Notes 1, 2, 3 & 4.
43 Holy Quran IV: 19 & 20 for detail see Supra note 1.
44 For case Nos. please see the Appendix.
dower but the Qazi Court has made the order of payment of dower only. There is no discussion on the topic in the cases mentioned above.

The question arises as to what will happen where the property of deceased husband which is possessed by the widow in lieu of dower. The Imarat Sharia is of the view that she has no right to transfer that property. She will be entitled to that amount which is fixed at the time of marriage⁴⁵.

8. SUBMISSION:

Since the amount of dower belongs exclusively to the wife that must be given to her when she demands it. It is immaterial that dower is prompt or deferred. In the Holy Quran there is no mention of deferred dower. On the other hand the commandment of Almighty Allah makes it clear that one is to give the dower with happiness. Again the verse where Allah forbids making excesses against the wife to force her to return the dower amount hints that dower is to be given in the continuance of marriage. The tradition, where the Prophet (SAW) asked Ali (Raz) to pay dower before approaching Fatima(Raz) also corroborates the prompt dower. In short nowhere it has been mentioned that the dower may be paid at the time of dissolution or after death of the husband. Moreover the wife should be given the amount, which is equal to the purchasing value of the dower amount. So there should be consensus of opinion of jurists that the amount is to be assumed in terms of gold at the time of marriage. If it is not done, it may amount injustice to widow/wife.

⁴⁵ Izatun Nisa V. Syed Abu Talib held by Md. Nurul Hasan and Md. Qamruddin JJ (Quzat) of Imarat Sharia
It is submitted that the deferred dower is not proved by the express provisions of Islamic source books. If it is followed in India the amount of dower to be paid at the death of the husband or at divorce/dissolution should be commensurate or at par with the purchasing value of the dower amount at the time when it was fixed i.e. at the time of celebration of marriage. As has been observed some persons deliberately delay the payment of the dower so that the purchasing value of the currency be lessen. But there is problem of interest (riba), in reevaluating the dower amount in purchasing value and in this way it will not be allowed in Islam. But the *Nazine Sunni Dinyat* of Aligarh Muslim University has suggested a good technique that there should be *ijma* on this point so that the weaker sex may not sustain the loss. Where she keeps any property in her possession in lieu of the dower that must be considered her own property. The right to eliminate and other rights of a full owner should be given to her. It is further submitted that *ijma* may also be made regarding the property possessed by the widow in lieu of dower that only within a reasonable time that property possessed by the widow in lieu of dower that only within a reasonable time that property may be taken back from the widow after the payment of her dower. If it is not done she should be treated absolute owner of that property with full rights of alienation. But right must be proportionate to the dower amount. If she exceeds that should be treated void.
PART-'B'
DIVORCE AND VIEW OF IMARATE SHARIA

1. INTRODUCTION:

Divorce is the translation of Arabic word Talaq which means 'to abandon'. In matrimonial matters it means breakage of marital tie.

In the Jewish religion, there was no restriction upon divorce. The husband was permitted to make divorce only in writing but that never came into practice. In the initial stage the husband was free to divorce in whatever manner he wanted but subsequently the Jews put a lot of restrictions over this. In Christianity divorce is not only abominable but also it is treated as a great sin so it is fully prohibited. Only the adulterous woman was to be given the divorce. The Mark contains the wordings of Christ as -

And he saith unto them, whosoever shall put away his wife, and marry another, committeth adultery against her (ii) And if a woman shall put away her husband and she married to another, she committeth adultery.'

Luke contains - 'who so ever putteth away his wife and marrieth another. committeeth adultery : and whosoever marrieth her that is put away from her husband committed the adultery'.

Polygamy was also allowed in Christianity. Consequently if there was mismatch in the relation, the life was full of misery and there was no

46 Fathul Mulhim, vol. I, p. 130, cited by Darse Termizi P.459
solution. Later on the Pope allowed the divorce but the grounds were limited. The courts of churches were empowered to grant divorce but, ordinarily; the courts did not grant the same as it was in contravention of the rule of Bible\(^4^9\).

After the renaissance the restrictions over the divorce was taken away. The duty of the church was limited and the power of divorce was conferred to the ordinary courts. At present both the parties are free to take divorce. Consequently the ratio of divorce in the western countries has increased.

In Hindu religion, divorce was prohibited. The marriage was treated as sacrament once the marital knot was tied it was permanent. Even after the death of the husband the wife was not allowed to marry with others. That is why, the tradition of sati started were the widows were forced to burn themselves on the funeral pyre of their husbands. The woman was considered ardhāngini\(^5^0\) and marriage was considered the union of flesh to flesh and bone to bone\(^5^1\). But when the hardship was realised, the provision for divorce was developed with the help of religious heads. In Northern India, till 1955-60, the system of divorce was considered abominable except in few castes of backward classes\(^5^2\).

Now in Hinduism, the law is enacted for divorce. The Act of 1955\(^5^3\) had provided several grounds for divorce and a few others have been added by the amendment in the Act in 1976\(^5^4\).

\(^4^9\) Ibid at Luke 16 : 18
\(^4^6\) Darse Tirmizi p. 459
\(^5^0\) Other half of the man
\(^5^1\) And also soul to soul
\(^5^2\) Darse Tirmizi p. 461
\(^5^3\) S.13. Hindu Marriage Act. 1955
2. ISLAM AND DIVORCE:

Islam provides the system of divorce but with great care and caution. The following study will make it clear.

2(1). BETTER TREATMENT WITH WIFE:

Islam dislikes the divorce. So it nips the evil in the buds. So to avoid the evil of divorce, Islam commands to treat the wives in a better way. So it is said that Islamic system of divorce provides a scientific treatment. It is based on Quranic revelations by Almighty Allah. Quran says -

"O ye who believe. Ye are forbidden to inherit Women against their will. Nor should ye treat them With harshness, that ye may Live with them. On a footing of kindness and equity"

\[ ^{54} \text{Amendment in Hindu Marriage Act, 1976} \]

129
Further

The parties should either hold
Together on equitable terms
Or separate with kindness

Again -

" 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,"

Thus the Almighty has commanded such things which would
avoid the incident of divorce.

55 The Holy Quran S 4 A.19
56 4- Ibid. S 2 A. 229
57 5- Ibid S 2 A 231
Not only the Holy Quran but the interpretation of the Quran[^58] i.e. Traditions says—

1- 'Follow my wordings in relations to the women who are made from crooked rib and if you try to bend it straight, it will break, therefore treat your wives kindly'^[^59].

2- 'Muavia Qashiri (Raz) says that he asked the Prophet (SAW), "What are the rights of a woman over us," He replied, "when you bring anything provide them also. When you dress yourself do not forget them. Don't slap them over their face and cheek. Don't abuse them. Don't leave them alone except at your homes'^[^60].

3- Abu Huraira (Raz) reports the sayings of the Prophet (SAW) that the believer husband will never have hatred with the believing wife....'^[^61]

4- 'Ayesha (Raz) reports the sayings of the Prophet that amongst believers the best is one who has the good behaviour and is kind over his family'^[^62].

5- 'Jabir (Raz) reports the sayings of the Prophet (SAW) that his directives about good treatment with wives be followed'^[^63] and

[^58]: Once Ayesha (Raz) was asked about the life of the Prophet (SAW) she replied, 'have you not read the Quran "It means what is in the Holy Quran that is explained by the Prophet.' Bukhari. *In Mohd. Ahmad Khan V Shah Bano Begum* the S.C. has cited it negatively. But my humble submission is that it never be treated as negatively. If a person, introducing some persons says - 'These persons are urban persons, if they get angry they will shake the havens; so treat them equitably. It means there is guidance for special treatment. The word 'so treat them equitably, meant condition that where they are not equitably treated. Like this women are not crooked by nature except where they are ill treated.

[^59]: Masnad Ahmad

[^60]: Sahih Muslim Sharif

[^61]: Tirmizi

[^62]: Shahih Muslim Sharif

131
6- 'Reports Abu Masood Ansari from the Prophet (SAW) that the expenditure made over the family is a good charity ...'. The best expenditure is that which is made over own family.'

Thus by good treatment the apprehension of divorce is fully erased.

2.(2). ALTERNATIVE MEASURES TO AVOID DIVORCE :

Where the good treatment is not effective to wipe out the differences between the spouses, the alternative measures are provided instead of divorce. So where there is excess from wife's part, the Almighty Allah commands-

If there is excess from wife's part then Quran says -

وَالَّذِينَ تَحَاقُونَ فَمَعْطُوْهُنَّ وَأَهْجُرُوهُنَّ فِي
المَسَافِعَ وَأَضْرَبُوهُنَّ فَإِنَّ أَطْعَمْكُمْ فَلَا تَبْغُوا عَلَيْهِمْ سَبِيلًا إِنَّ
اللَّهَ كَانَ عَلَيْهِمَا كَبِيرًا

"As to those women on whose part ye fear Disloyalty and all-conduct
Admonish them ( first ),
(Next), refuse to share their beds,
(And last) beat them ( lightly )\(^{64}\);
but if they return to obedience,
seek not against them

\(^{64}\) Beating does not mean that woman is made for being beaten like Tulsi's saying 'Dhol Ganwar Shudra Pashi Nari, Ye sah Taran ke Adhikar' here it means what Luqman the renowned scholar has said that a person's beating to his son is equal to a good charity.
Means of annoyance:
For Allah is Most High
Great (above you all)\(^{65}\).

Where the excess is not from wife side the Holy Quran guides-

\[\text{وَإِنْ خَفَفَتْهُمُ الْقَرْحَةُ بَيْنَهُمَا فَأَطْلَعَهُمَّ حَكَمَانِ بَيْنَ أَهْلِهِم}.
\[\text{وُحِكَّمَ مَنْ أَهْلِهَا إِنْ يَرَبْدَا إِلَّا إِنْ يَعْفَ أَلْلَهُ بَيْنَهُمَا إِنَّ}.

"If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family.
And another from hers;
If they seek to set things aright,
Allah will cause
Their reconciliation:
For Allah hath full knowledge,
And is acquainted
With all things"\(^{66}\).

The above discussion shows that the Islamic way of divorce is not instant and must not be a result of provocation. The Islamic concept of carrying of marital knot with happiness is appreciable. But where there is no way of normal relation, then this rule may be considered golden rule. But in fact it is rule of necessity that is why the seeing of the girl with whom marriage is proposed and permitted so that there may not be any

---

\(^{64}\) The Holy Quran. S. 4. A. 34

133
apparent disliking. Where there is any disliking in the wife and the husband is said to think about the virtues of his wife instead of her weaknesses. Allah commands-

وَعَلَىٰ هُمَا مِنْ نَيْبٍ وَيَجْعَلِ اللَّهُ فِيهِ حَيَرًا كَحَيْرًا

"Live with them^68
On a footing of kindness and equity
If ye take a dislike to them
It may be that ye dislike
A thing and Allah brings about
Through it a great deal of good"^69.

And where the things are intolerable the husband should try to mold her steadily^70.

2(3). DIVORCE IS ABOMINABLE IN ISLAM:

It is reported from the Prophet that the most detestable things, before Allah, amongst all the permitted things is divorce^71. It is also reported from the Prophet (SAW) that Iblis^72 sits, over his throne and the

^66 The Holy Quran. S. 4 : A. 35
^67 Although it is not allowed for a righteous to see any woman other than the wife and prohibited degrees women.
^68 i.e., Wives
^69 Holy Quran S 4 A 19
^70 Holy Quran S 4 A 134
^71 Abu Daud
^72 The head of devil forces whose name is Azazil. In Fatwaae Rahimia it is said that (shaitan) devil puts his throne on the surface of the sea and then sends his armies to instead people devil applauds such of his soldiers who cause estrangement between husband and wife, embraces them and says : "Bravo! Well done!" Abdur Rahim 'Fatwaae Rahimia'. Trans. Murtaza Husain F. Quraishi (Delhi : Kutub Khana Azizia) 1978 II p. 120
agents of devil forces approach with their achievements, who ever amongst them has prevented a student from his studies and one who has created the difference between the spouses; are rewarded by the throne. Such agents become nearer and dearer to the throne.

2(4). PERMISSIBLE NUMBER OF DIVORCE (TALAQUE RAJAYEE):

In pre-Islamic Arabia the divorce was allowed but no procedure was there. The persons were allowed to make divorce at any time and the number was also not fixed. The taking back was also not restricted. Even after hundred divorce, one was allowed to take his wife back. So the persons were habitual of divorcing their wives.

But after advent of Islam, it is not allowed to divorce the wife more than twice in revocable divorces.

The Holy Quran says -

A divorce is only Permissible twice."

"So if a husband

73 The Holy Quran S. 2 A. 229. Rahimia it is said that devil (shaitan) puts his throne on the surface of the sea and then sends his armies to instead people devil applauds such of his soldiers who cause estrangement between husband and wife, embraces them and says: "Bravo! Well done!" Abdur Rahim 'Fatawae Rahimia'. Trans. Murtaza Husain F. Quraishi (Delhi: Kutub Khana Azizia) 1978 II p. 120
Divorce his wife (irrevocably)
He can not, after that
May Marry her"74.

In this way Islam puts restrictions75 in divorce as well as in taking back76.

3. CLASSIFICATION OF DIVORCE:

There are three situations in which material tie may be broken

(1) BY THE DEATH OF THE PARTIES
(2) BY THE ACT OF THE PARTIES
(3) BY THE JUDICIAL PROCESS (IT HAS BEEN DISCUSSED IN CHAPTERS 5& 6)

(1). BY THE DEATH OF THE PARTIES:

In the life time of the spouses the woman is prohibited to marry with another man and a man is prohibited to marry more than four77 women. But where the death occurs the woman is allowed to marry with another man after expiry of ʿiddat78.

(2). BY THE ACT OF THE PARTIES:

1. BY HUSBAND
(1). DIVORCE ( TALAQ )
   i). TALAQUUS SUNNAT ( AHSAN & HASAN )
   ii). TALAQLUL BIDDAT

---

74 The Holy Quran S. 2 A. 230.
75 The Holy Quran S. 2 A. 229
76 The Holy Quran S. 2 A 230
77 It is not rule but exception
(II) ILA (IT PROVIDES THE OCCASION TO THE WIFE TO DEMAND DIVORCE)

(III) ZIHAR (IT ALSO PROVIDES THE OCCASION TO THE WIFE TO DEMAND DIVORCE)

(I). DIVORCE (TALAQ):

When the husband divorces his wife, it is called talaq or divorce. In sunni law there is no form prescribed for divorce. The husband has full power to divorce his wife either by assigning reasons or without assigning it. In Shia law the form provided by the Prophet is strictly followed. A part from this two Muslim male witnesses are also necessary. The conditional or qualified divorce is permitted in the Hanafi law but not in Shia law.

i). TALAQUS SUNNAT:

Talaqus sunnat means divorce made in accordance with the Traditions of the Prophet. It is divided in two forms: (i) Ahsan, (ii) Hasan.

(a) TALAQUL AHSAN:

Talaqul Ahsan defining this divorce, Hedaya says that talaqul ahsan, or the most laudable divorce is that divorce where the husband repudiates his wife by a single sentence within a tohr, during which he has not had carnal connection with her and then leaves her to the observance of waiting period (iddat) or prescribed term of probation. After

---

78 Normally 4 months and 10 days but it may be after delivery where woman is pregnant which ever is longer.
79 Moonshi Bulzar Raheem V. Latifun Nisa (1861) 8 MIA
80 Tayabji 'Muslim Law' (1968) VII p.143 to 150.
81 AIMPLB has proposed some measures to implement it. For detail see supra note chapter 3.
82 Charles Hamilton 'The Hedya' book IV. Ch.1.
83 Period from one menstrual course to next course

137
the expiry of *iddat* the wife will be separated. But the benefit of this divorce is that the parties may marry again.

(b). **TALAQLUL HASAN** :

It is also approved form of divorce. Mentioning this the *Hedaya* says that *talake hasan* or laudable divorce, is that where a husband repudiates his wife in three sentences of divorce, in three *tohrs*. Imam Sadi, the teacher of Sarkhusi, has mentioned two kinds of *sunnah* divorce. One is laudable and other is abominable. The laudable is what jurists say *ahsan* and abominable is that to which the jurists say *hasan*. In this way, the traditions, which says the *talaq-e-hasan* as *sunnah* way, is only permissible thing.

ii). **TALAQLUL BIDDAT**

A divorce given in contravention of the injunction of the Holy Quran and Prophet's Tradition is known as *talaqul biddat*. *Hedaya* says "*Talaqul Biddat*, or irregular divorce is that divorce where a husband repudiates his wife by three pronouncements at once, or where he repeats the sentence separately, thrice within one *tohr*. Apart from this the divorce made within the menstrual courses is also considered *bidai* form of divorce. The divorce made within the pregnancy period is also *bidai*.

---

84 Period from one menstrual course to next course
85 As the marriage becomes irrevocable
86 Darse Termizi Vol.III p. 464
87 'Hemiton Hedaya' p. 73. AIMPLB has proposed some measures to avoid it. For detail see supra note chapter 3.
88 But where unconsummated marriage is repudiated it is not *bidai*.
89 Divorce is to be given in the *ruhr* period without having the carnal conjunction. When a woman becomes pregnant, no menstrual course comes, when husband is to divorce after menstrual course it means she is not pregnant other wise menstrual comes could not have come.
Where divorce is made without witnesses, it is also bidat\textsuperscript{89}. Almighty Allah has revealed-

\begin{quote}
فإذا بلغن أجلهن فأئسكونهم بمغروفي أو فارفوهن بمغروفي و أشهدوا
ذوئ عدل منكم وأقيموا الشهادة لله ذاكم يوعظ به من كان يؤمن
بالله واليوم الآخر
\end{quote}

"Thus when they fulfill Their terms appointed Either take them back On equitable terms Or part with them On equitable terms; And take for witness Two persons from among you, Endued with justice, And establish the evidence For the sake of Allah .Such Is the admonition given To him who believes In Allah & the last day\textsuperscript{90}."

Where the divorce is made in hasan\textsuperscript{5A} form\textsuperscript{91} it is not good before any of the scholars of different schools Imam Malik considers this form as

\textsuperscript{89} But only Shia law recognizes it. The shia law does not consider the divorce without witnesses. But in Sunni law divorce is effective without witnesses. No school of Sunni law is exception. Although in sura XV : V.2 it is mentioned, it is interpreted by Sunni's in a different way.
Thus it is clear that *bidai* form of divorce is not good. But the question is that if it is made what will be the after effect.\(^92\)

As we know that Quran says for divorce -

\[
\text{"A divorce is only Permissible twice:"}
\]

When it will be minutely observed it will be seen that more than ones divorce can not be effective in a single sentence. It must be made one after another. Ibne Taimia says that Allah does not say that two divorce are in two times but in two prescribed times. So where a person says to his wife that he gives her two divorce or ten divorce or thousand divorce that will be considered as one.\(^93\) Hafiz Ibnul Qayyim says that twice means one after another. It never meant the digit two in any language. It is also clear from the verses of the Holy Quran -

\[^{90}\text{This is not rule for inception of repudiation. It is either for taking back after second divorce or make her away for the marital tie. So it is worth less to say things without witnesses divorce is bidai (mariful Quran).}
^{36}\text{Please see Supra note 36.}
^{91}\text{Only Hanafi scholars consider this form as Hasan. (Hedaya )}
^{92}\text{Even in the bidai form the most controversial question is that where man pronounces triple divorce in one and same setting what will happen or one sentence what will happen.}
^{93}\text{Fatawa Ibne Taimiyah Vol. III p. 47.}\]
"O ye who believe
Let those whom your right hands
Possess, and the (children) among you
Who have not come of age
Ask your permission (before
They come to your presence)
On three Occasions: before
Morning prayer, the while
Ye doth your clothes
For the noon day heat;
And after the late-night prayer④:"

Further -

"And decreed for
The children of Israel
In the book, that twice

④ The Holy Quran S 27 A 4.
Would they do mischief
On the earth and be elated
With mighty arrogance
(And twice would they be punished\textsuperscript{95})."

The above verses show the number of times where there is mention of twice and thrice. It is also clear that occasions are one after another.

This thing may be more clear from a tradition (Hadith) where it has been told that after \textit{Salat} anyone who recites thirty three times 'Subhanallah' and in the similar way 'Alhamdo-lillah' and again 'Allaho-Akbar' he will be rewarded in such and such way\textsuperscript{96}. Where A says \textit{Subhanallah} thirty three \textit{Alhamdolillah} thirty three and \textit{Allaho-Akbar} thirty three it will never be counted as ninety-nine. In the light of above it can be said that so why 'divorce three' or 'divorce irrevocable' would not be considered as three divorce.

The opinion that a woman becomes barred after three pronouncement in the single sentence. The question is where a person divorces his wife in separate sentence and three times in the same sitting, would it be considered as one. The answer as Ahle Hadith say is Yes, it would be considered as one, because the second divorce is to be made in

\textsuperscript{95} Ibid S 17 A 4.
\textsuperscript{96} As Holy Quran says (that unit of ten is complete unit)
the separate action. Moreover the Traditions of the Prophet clearly say that it will be considered as one.

The following traditions may be cited as example. Muslim reports, "To me Abdullah S/o Abbas that in the time of the Prophet (SAW) and in the Caliphate of Abu-Baker (Raz) and first two years in the Caliphate of Umar (Raz) the tripple divorce was considered as one time divorce. But Caliph Umar (Raz) said that the persons are making haste in a matter, which need delay. So it will be better to accept their haste."

He further says, "To me Taus, to him Sahba's father who asked Abdullah (Raz), the companions of the Prophet (SAW) and son of Abbas whether he knew the fact that in the time of the Prophet and in the Caliphate of Abu Bakar (Raz) and in the 1st three years of Caliphate of Umar (Raz), the tri-ple divorce was considered as one. Abdullah (Raz) affirmatively replied."

Again, "To me Taus, to him sahba's father who asked the Abdullah S/o Abbas to teach him the Traditions which were known to him. He asked whether the triple divorce was considered as on in the time of the Prophet and in the Caliphate of Abu Bakr. Abdullah replied affirmatively

---

98 Sahih Muslim Vol. 1 p. 477
99 Ibid
and told that when persons started divorcing the wives in the hasty ways, the Caliph ordered for the effectiveness of the same."

Further," Says Abdullah S/o Abbas that Rukana S/o Abde Yazid divorced his wife by way of triple divorce and fell in sorrow. The Prophet (SAW) asked him how had he divorced his wife. He replied that he divorced her by way of triple divorce. Prophet asked whether in the same gathering. He replied affirmatively then Prophet said that one divorce will be effective and he could take his wife back. So he took his wife back."

Thus the bidai way of divorce is considered as wrong and void by the jurists and scholars of the four schools except Imam Shafcyce who considers it as a valid way of divorce. However the effectiveness of three divorces, in one sitting, is recognized by the majority of the jurists. except Ibne Taimiya, Ibnul Qayyim and Ahle Hadith, who say that in such cases only one divorce will be effective.

4. IMARATE SHARIA'S VIEW ON DIVORCE:

Imarate Sharia also dislikes divorce. It is the most detestable thing according to Islam. So before divorce the parties were guided to opt the procedure, which would help to resolve the differences between them.

\[100\] Ibid
\[101\] Masnad Ahmad Vol. 1 p. 265
\[102\] Darse Tirmizi Vol. III p. 468; Fatawa Rahimia II p. 114
The right of divorce has been given to the husband. Where the husband is a minor, the legal guardian cannot divorce his wife. Where the husband is alleged to have divorced, there is need of witnesses. If divorce is not proved due to lack of witnesses, the husband will be under obligation to disprove the allegation of pronouncing divorce by oath. But in Zarina Khatoon V. Mohd. Siddique, the Qazi has held that although there was no proof of triple divorce, the lady, who believes that three pronouncements of divorce have been made, she must not marry him after completing the Iddat. With humble submission it is to say that there is difference between Qazi and Mufti. Before Qazi, if triple divorce is proved in accordance with the Islamic law of evidence, the wife will be prohibited (mughalliza) to her husband. Where upto two divorce is proved, she is free to remarry him. In this case the Qazi, despite the decision of two pronouncements had suggested the divorced wife not to marry her divorcing husband, which is against the injunctions of the Holy Quran. In Saliman V. Shaik Skafat the Qazi has taken a tough stand. The decision is neither in favour of husband nor wife. In this case Ms. Saliman was married with Shaikh Shafat at the age of 7 years. After two months husband went to Orissa and did not return. After a few months she received a letter from an unknown person of Orissa who informed about the death of her husband.

104 Ibid p. 470
105 Fatawa Imarat p.165
107 Ibid
108 supra Note 2
109 As iddat was completed & after iddat in marriage may be made between former spouses provided talaque is not pronounced more than two.
After a period of 4 years, she informed certain religious scholars about the death of her husband and wanted to know their opinion about remarrying with another person. She was replied to remarry and she was also religious decree for remarriage. Her previous marriage was annulled by the decree. She got married with Shaikh Mohsin and a girl child was born to her. In the mean time the former husband returned but did not seek the claim of conjugal rights. Again the former husband disappeared for a period of 16 years. The lady sought fatwa of Qazi about the validity of 2nd marriage after the lapse of 16 years.

In this case the Qazi held that the 2nd marriage was legal. Because for death news, report of one person was enough (as per the ruling of Raddul Mukhar- Vol. II p.616 and the Holy Quran- Qasas- 22, 25 Nisa-94) but the marriage became void when the former husband returned to his home. The Qazi gave due importance to the decree of Mufti Kifayatullah but said that the decree is based upon the order of Caliph Umar (Raz) who had taken back his order. Regarding the daughter of the lady, Qazi said that the legitimacy would not be doubted. In this case it has also been held that where difficulty arises, any of the rules of four Sunni schools may be applied. At the last both the marriages were dissolved. 1st one due to absence of husband, while the 2nd due to his appearance. In this case a marriage was considered valid while later on that was treated void. The plea of the parties that Ahle Hadith do consider the 2nd marriage as valid the Qazi observed obiter dicta that they are not amongst the righteous. With humble submission it will be said that the Ahle hadith scholars are also in the list of ahlul hill wal aqdh of Imarat Sharia. So the observation is not sustainable and the decision seems erroneous. There was no meaning of
declaration of marriage void as the 2nd husband did not sought conjugal rights. It is amazing that the Qazi rejected the fatwas of Caliph Umar and Ahle Hadith Mufti without giving the sufficient reasons. Justice be not only made but it must appear to be done. A woman, married with man after taking proper religious decree is neither given to her ist husband nor to her second husband. Really the decision seems hard and the statement of Qazi is obiter dicta and his own view only.

In the case of Fatima and Zahra V. Khuda Bakhsh, the Qazi had accepted the evidence of witnesses who heard the utterances of the defendant but could not see the husband due to barrier of the wall and annulled both the marriages of the defendant. Due to public pressure the defendant accepted that he gave divorce to one of his two wives. Though he did not divorce any one of them. The Qazi observed that confession shows that the husband had divorced which was directly heard by one witness and indirectly by two witnesses.

In this case when there are no proper witnesses, the defendant's confession with regard to divorcing one wife only should have been accepted. In the light of following fatwa Qazi would have given the permission, the defendant to keep one wife. Fatawa Qazi Khan says:

"And if a man says," My wife is divorced," and he has two wives both being well known, it is competent to him to refer the divorce to which of the two wives he likes."109

---


147
In Shafat case evidence of one man is accepted but in this case Qazi did not rely upon those sources and one witness was not considered enough to prove the divorce. In Zahid Ali V. Shamshad Begam the witnesses gave different statements. Commenting upon this the Qazi has held that instead of following Imam Abu Hanifa (Rah), who says that in case of difference in the statements of the witnesses, none will be relied; the view of Imam Abu Yusuf and Imam Mohammad will be followed, who say in case of difference in the statements of the witnesses, the common minimum statement will be accepted and thus two pronouncements were accepted. But again in Perveen V. Mirza Tahir Baig, the statement was not unanimous and the common minimum formula was not applied. As in the case above. It is submitted that the Qazi should have followed either Imam Abu Hanifa (Rah) or his disciples as authority, in both the cases. Statements accepted by the pick & choose rule without giving sufficient reason for doing so is not proper.

In Sibun Nisa V. Mohd Shahadat Husain it was held that the statement alleging that the defendant has divorced his wife, if not denied is enough to prove the divorce. But Fatawa Qazi Khan says-

"A man says to another man," Have you divorced your wife" and the man addressed says," Yes". Spelling the word by its letters the divorce shall be caused.

Further," A woman says to her husband," Divorce me" and the husband says," I have done so." the woman shall become divorced.

---

110 Supra note 19 & 20. Also see Fatawa Imarte Sharia p. 138
111 73 - 9408 - 1399 AH
112 Fatawa Qazi Khan Vol. II p.3
"And if a woman says to her husband," Give me three divorces," and the husband says." I have done so." Or he says I have divorced three," she shall be thrice divorced. And if in answer his wife, he says," thou art divorced," or he says," thou art divorced," one divorce shall be caused because in this case, the answer does not embody or is not in terms of the question; whereas in previous paragraph or 1st case of the paragraph the answer was in consonance to the question."

Thus for divorce direct affirmative answer is needed like 'Yes' & divorce but not inference. In the case of inference it will be treated as single pronouncement provided the husband says something. Its amazing how saying of others will case the divorce when there is no delegation of authority. The better way of divorce is Ahsan\textsuperscript{113} or hasan\textsuperscript{114}. Bidai\textsuperscript{115} divorce is not appreciable and rather punishable in Islam. But in most of the cases the bidai form of divorces have been recognized by the Imarat Sharia. Even the Qazi himself writes to a single pronouncement as irrevocable. The single pronunciation 'I divorce thee' on 23 of Shawwal ( one of the Arabic Month ) is considered on 20 of the same month as irrevocable. In the decisions of the Qazi no where the system of bidai divorce is condemned. Moreover the Traditions of the Prophet to consider triple divorce in one sitting as one. has been ignored. However all over the world there is demand of its reconsideration to treat three divorces as one and that is why the enactment in several countries has been made.

\textsuperscript{113} The most loudabla divorce
\textsuperscript{114} Loudable divorce
\textsuperscript{115} Irregular divorce
A very prevalent way of divorce is coercion. We know that an act done against one's will is not his act. But where one is forced to divorce his wife there is no consideration of coercion. *Fatawa Qazi Khan* reports a Tradition of the Prophet (SAW)-

"Ayesha (Raz) said," I heard the Messenger of Allah says,'There is no divorce, and no emancipation by compulsion.'

_But Fatawa Imarat_ says that in coercion the written documents of divorce will not be executed but the pronouncement is to be accepted. But there is need to have a fresh look over it as there is Tradition of the Prophet (SAW) and also need of the hour.

The coercion may be caused in oral divorces so to say that in coercion the written divorces is not divorce and the oral is divorce seems erroneous. However there is proposal in All India Muslim Personal Law Board (AIMPLB) to develop the consensus to consider the divorce under coercion, undue influence, and sleeping etc as ineffective.¹¹⁶

¹¹⁶ The Hindustan Times 14.9.2000 Colmn 3-5pl.the meeting 1 scheduled to be held on 29 oct. 2000 in Banglone.