"The mirror of love should be cautiously handled. If it is scratched, the image will not be (fair and clearer) fairer and clearer"
1- INTRODUCTION:

Islam has prescribed five things as essential for life and marriage is one of them. It is necessary to get the human desire, fulfilled. Every one whether male or female literate or illiterate, urban or rural, rich or poor, fat or thin, is in need of a life partner to get the sorrow, uneasiness and unpleasant things changed into happiness. It may be said that to get easiness and pleasant it is a must. So Allah has revealed in sura 30 verse 21-

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\text{وَمِنَ الْخَيْبَةِ أَنَّ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أُرُوجًا لَّيْسَ كُتْبُوهَا إِلَيْهَا وَجَعَلَ بَينَكُمْ مُوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَا يَسْتِبِئُ لَقَوْمٌ يَتَفَكَّرُونَ}
\]

"He created for you
Mates from among yourselves
That you may dwell in
Tranquility with them,
And he has put love
And mercy between your (hearts);
Verily in that are signs
For those who know"

Thus, it is clear that the creator, in order to keep the person in tranquility and love, the institution of marriage has introduced. That is why Allah has guided the men in the following verse.
On the contrary live with them
On a footing of kindness and equality

Abu Bakar Jasas Razi has, while commenting the above verse, said “Don’t talk with them in rough manner, do not ignore them in the home affairs”.

Thus talking in good manner, showing the love and affection so that they may feel happy, is necessary, as Allah has revealed in the above-mentioned verse. Allah further guides

“They are your garments
And ye are their garments”

Meaning there by that like garments one is the need of the other at every time and not for temporary period or only sexual passion.

Since man is free in his acts he can do the good work as well as bad work. Some times it happens that a man keeps his life partner in complete misery. She is subjected to the excess of the man. She has nothing to do except tolerating. But some times it becomes intolerable for her. In that extreme circumstances woman has right to get this pious tie broken. If the man is feeling aggrieved he can use the right of

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1 Jasas 'Ahkamul Quran' - Vol. II p. 109
2 Holy Quran S 2 A 187
divorce and where woman is aggrieved she can get the marriage dissolved. But women are also cautioned in the use of their rights. Prophet (SAW) has said3 –

“Every woman who ask her husband to divorced her without cause, the smell of paradise is forbidden to her.”

But when she is feeling that the continuance of tie will lead her in a life which is unfavourable for her in this world as well as hereafter she can use her right to reach the Qazi to get the marriage dissolved. Before using the right a woman is guided to choose the other solutions. Allah commands4-

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\text{"If a wife fears Cruelty or desertion On her husband’s part There is no blame on them If they arrange An amicable settlement Between themselves; And such settlement is best"}
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And further if they are unable to reach on any amicable solution they can appoint the arbitrators.

\[
\text{"If ye fear a breach between them twain, Appoint (two) arbiters One from his family,}
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3. Fatwa Qazi Khan Vol. I p. 123
4. Holy Quran S 4 A 35
And one other from hers
If they wish for peace
Allah will cause
There are reconciliation
For Allah hath full knowledge
And is acquainted
With all things”.

Not only women but also men are guided to use the right of
divorce in extreme circumstances. Prophet (SAW) has said –

“The most detestable among all permitted things in the sight
of Allah is divorce”5

Dare Qumni reports that Prophet (SAW) has said to Muadh
(Raz)–

“Nothing has been created by Allah on the earth which is
more detestable than divorce”6

But when it is the extreme need and the parties, instead of
getting satisfaction from each other passing the life in jealousy and
hatred and the family becomes the open scene of the hell. In such
circumstances the detestable thing becomes the boon.

The Hanafi jurists describe twelve7 grounds of dissolution
of marital tie i.e.

1) Migration – when a woman comes in Islamic territory
after embracing Islam immigrating from non-Muslim state while her
husband remains in that state (non-Muslim state).

2) Improper marriage.

3) Marriage in contravention of status (other than Kufw).

4) Dower if not in accordance with status.

5) Musahirat.

6) Acceptance of Islam by wife (barring the husband).

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5 "Ibne Umar says that the thing which is lawful, but disliked by Allah is divorce." Abu Daud Vol. 1 p. 123
6 Dare Qumni cited by Abdul Samad Rahmani 'Kitabul Fashkh waltafriq' (Patna: Imarate Sharia. 1400 AH)
2nd ed. p. 35

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7) Acceptance of Islam by husband (barring the wife).
8) Fosterage (if the wife has fed her husband during childhood)
9) Option of slavery (Khayare Ataq)
10) Option of puberty (Khayare Balugh)
11) If one of the parties becomes non-Muslim.
12) Relation of master and slave.

Imarat Sharia follows the Hanafi law. But the rule of (Talifque & Takhayyur) picks and choose of any rule of other schools or transformation of Hanafi rule from any other school is applied. For dissolution of marriage it applies the following grounds:

Dissolution on account of-
(1) Untraceability of the husband.
(2) Inability to maintain the wife.
(3) Neglect of the husband.
(4) Impotence of the husband.
(5) Insanity of the husband.
(6) Virulent or Venereal disease of the husband.
(7) Inequality of the husband.
(8) Option of puberty.
(9) Physical contacts (Hurmate Musaherat).
(10) Cruelty of the husband and / or enmity between the spouses.

*Rahmani 'Tafriq' pp 37-38*
2(1). DISSOLUTION ON ACCOUNT OF UNTRACEABILITY:

When the husband's whereabouts have not been known, the wife is entitled to obtain a decree from Qazi for the dissolution of her marriage. After the application of the wife the Qazi shall direct her to wait for a further period of one year. In the event of the husband's whereabouts remaining unknown during that period as well, the Qazi shall pass a decree dissolving the marriage. The wife, then, after observing her Iddat, shall be entitled to contract a second marriage.

The directive for waiting for a year shall be given only when necessary maintenance allowance for a year is available for her out of the funds or properties of her husband or that she gets a loan in the name and on behalf of her husband. In the event of the provision for maintenance allowance for that period not being available and there being an apprehension of adultery, the Qazi shall be empowered to dissolve the marriage forthwith.

The dissolution of marriage, on this ground, shall be deemed to be a revocable divorce.

i). HANAFI VIEW:

There is difference of opinion with respect to the contracting of second marriage by the wife of the person whose whereabouts are not known. According to Imam Abu Hanifa (Rah) the wife of the person cannot be considered to have been released from the marriage tie till her husband's death is known. In other words, the marriage contract of the wife is not valid as long as other men of the age of the person are alive.\(^8\)

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\(^8\) AIMPI.B has proposed some measures to implement it by consensus of ulema. The period, however, is further reduced to two years. For detail see supra note 61 chapter 3. Maulana Ashraf Ali Thanvi has discussed it in detail in his book Hilatun Najiza pp 68-79

\(^9\) Another report providing the basis of the rule of conduct among the Hanafis is that the death of the people of the age (of the husband) is no condition; rather it depends upon the Ameer

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In some cases, according to later Hanafis the Qazi may permit the wife of the person, to contract marriage with another person. Even before the death of the contemporaries of her husband on the basis of apparent circumstances in which the husband's death may strongly be presumed, e.g. the husband goes on war and later there is no news about his life. In such circumstances, a Qazi, after the lapse of such time in which a strong presumption of his death may be accepted, may give a decree dissolving the marriage. Under such circumstances the husband shall be deemed to be legally dead and the wife, after observing her Iddat (of four months and ten days) shall have the right of entering into another marriage.

The view of the Hanafis is opposed to Maliki view, wherein, according to Imam Malik (Rah) the wife of a person whose whereabouts are not known, shall have the right of contracting another marriage after waiting for four years from the time of having recourse to the Qazi and after confirmation of decree of dissolution of marriage from the Qazi on termination of Iddat.\(^{10}\)

ii). MALIKI VIEW:

According to Imam Malik(Rah), there are four kinds of persons of unknown whereabouts, whose whereabouts become unknown\(^{11}\).

\(^{10}\) Ibn Rushd 'Bidayatul Mujtahid'. (Cairo 1369 A.H.) Vol. II p. 40

\(^{11}\) The jurists who fixed the period of four years' waiting regarding the wife of the husband whose whereabouts have been unknown base their rule of conduct on the decision of Caliph Umar(Ra7) Imam Abu Muhammad Ibn Hazm has reported in his famous book, Al- Muhalla several rulings from Umar(Ra7). They are as follows:-

1. Ibn Abi Layla says that he saw Caliph Umar(Ra7) giving the husband, whose whereabouts had become unknown and whose wife has contracted another marriage, the right of choice between the wife and the dower that he had given to the wife (i. e. he could take back either the wife or the dower paid to her).

2. Ibn Hazm has, on four other chains of authorities reported the above mentioned decision of Umar(Ra7) as narrated by Ibn Abi Layla. The difference versions are:-
(a) "A husband's whereabouts became unknown. His wife appeared before Caliph Umar(Raz). He enquired of it from her relatives. They supported her statement. Umar(Raz), therefore, ordered her to wait for four years from the time of the statement made. She (thereafter) entered into another marriage contract. Later, the former husband appeared. He spoke of it (to Caliph Umar(Raz)). According to Ibn Abi Layla, "Umar gave him the choice of either taking back the dower or accepting back the wife. He chose to take back the dower (i.e "Umar told the former husband that he could accept back his wife or take back the dower that he had given to the wife). The husband chose to take back the dower.

(b) "Ibn Abi Layla said that the whereabouts of a husband became unknown. His wife waited for him for four years. Thereafter, she placed her case before Caliph Umar(Raz). Caliph Umar(Raz) asked her to wait for four years from the time she placed her case before him. If her husband did come back so much the better, otherwise, he said she could enter into another marriage contract. The four years (of waiting) passed away. She heard nothing of her husband during that period. She entered into another marriage contract. The former husband, thereafter, appeared. He learnt of it and went before Caliph Umar(Raz). Caliph Umar(Raz) told him: if you want I shall get your wife back to you: or if you wish I may get you contracted into marriage with another woman. The husband replied, you get me contracted into marriage with another woman."

(c) "There is in a narrative a short description of a husband being taken away by some jins (genii). The report then proceeds thus: the wife intimated Umar(Raz) of this. He instructed her to wait for four years. The wife waited for four years. Thereafter she took her case again before Umar(Raz). He, then, passed order to the effect that she might enter into another contract of marriage. The wife got herself contracted into another marriage. The former husband, thereafter, appeared. Umar(Raz) gave him the choice between the wife and the dower. He chooses to take back his wife. The Caliph Umar(Raz) got dissolution effected between the wife and her second husband and made the wife return to her former husband."

Although Ibn Hazm, besides the above, has mentioned other reports from Umar(Raz) but labels them incorrect. It is, therefore, not necessary to state them all. Of the tradition of Umar(Raz) the opinions of 'Uthman, 'Abdullah Ibn Umar(Raz) and Abdullah b. Abbas. These three of the companions of the Prophet(SAW) are noted jurists. From amongst the Successors of the Companions of the Prophet(SAW) the names of Hasan al-Basri, Nakhi, Zuhri, Umar b. 'Abdul 'Aziz. Sa'd b. Musayyib, Qatada, Abu-Zanad, Rabi'ah, Awz'I, Layth b. Sa'd and Malik b Anas are concur with the decisions of Umar. Among the Companions, Abdullah Ibn Masud appears to concur with the decision of 'Ali. From amongst the successors of the Companions who concur with 'Ali's decision are sha'bi. Ibn Abi Layla, Shabrauma. 'Uthman al-Batti, Sufyin Thawri Abu Hanifa, Abu Sulayman and other.

So far as the tradition of the Prophet(SAW) is concerned the jurist, who concur with 'Ali, themselves admit that the same is a weak one. Further, there is difference of opinion on the point whether that tradition can be used validity in support of the assertion of Ali and whether on this basis the assertion of 'Ali can be held to be preferable to that of Umar(Raz). Imam Nawawi writes in his "Sharhul Masud that if it is not preserved, it can however, be cited in support of the other traditions (of the Prophet(SAW) or of his Companions). Ibn Humam in his book, "Fath al-Qadiri" describing the practice of the Hanafis, in adopting the assertion of 'Ali in preference to other assertion, has held that the said tradition is a weak one.

It is said of the ruling of Umar(Raz) that the resided later from his view regarding the wife whose husband's whereabouts have been unknown and adopted the ruling of 'Ali. But, justice Tanzilur Rehman says inspite of his utmost search, it has not been possible to find any report that would prove that Caliph Umar(Raz) had resided from his ruling and had recourse to the ruling of 'Ali. Hafiz Ibn Hajar al 'Asqalani, too, has said in his book, 'Al-diryah Fi Takhrij al-Ahadith al-Hidayah that he has not been able to find any report about Umar(Raz)'s adopting the ruling of 'Ali:

Ibn Humam names Ibn Abi Layla in connection with Umar(Raz)'s adoption of this ruling, but scholars have not been able to find directly any assertion of Ibn Abi Layla in this connection. Even if any such report for Ibn Abi Layla be supposed to exist, merely his assertion is not worth-y of becoming treated as proof.

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1. In an Islamic State.
2. In war with infidels.
3. After their going in an infidel country.
4. In war between the Muslim themselves.

Persons whose whereabouts become unknown in an Islamic State the waiting, is four years. Concerning the persons whose whereabouts become unknown in war with infidels there are several views of Maliki jurists, as given below:

1. That he shall be deemed to be a prisoner, till it is not known with certainty that he is dead, his wife shall remain in his marriage.

2. That he shall be considered to have been killed and his wife after waiting for a year may enter into another marriage contract except when she is at such a place where it is easy to get correct information about her husband. It is, then, not necessary for her to wait for a year.

3. That the wife, without waiting for the husband may contract another marriage.

4. That the husband so far as his wife is concerned, be deemed to have been killed.

5. That the husband becomes untraceable after a battle amongst Muslims themselves shall become free from her marriage

However from the report about the view of the companions stated above, it becomes altogether established that according to Umar(Ra7) the wife of the husband whose whereabouts are unknown should place her case before the Authority concerned and thereafter wait for four years. She should then observe her Iddat after which she shall become entitled to enter into another marriage. This runs clearly against the assertion of ‘Ali which lays down that the wife of the husband whose whereabouts are unknown must wait till the death of her husband or of his pronouncing divorce does become known with certainty. The dictums, in other cases decided by Umar(Ra7), based on the fact of return of the first husband as well, disprove Ibn Abi Layla’s assertion of Umar(Ra7)’s having accepted the ruling of ‘Ali.
contract only after observing her *Iddat* without further waiting. According to some others, however, she shall have to wait for a year.\(^\text{12}\)

Ibn Rushd is of the view that the reason for fixing the period of waiting for four years is based on the analogy of some opinion that the period of pregnancy, according to Malik(Rah), is four years. But it cannot be correct basis, as the period of waiting; in case of a slave girl’s husband’s whereabouts being not known is two years. According to Malikis the provision with respect to the period of pregnancy of a free or slave woman is one and the same. Therefore, strictly speaking, the period of pregnancy cannot be held to be its basis.

Amongst the Malikis, on this question, there are several points of view as to when counting of the period of four years shall begin. According to one statement when the Qazi certifies the missing of the husband, the wife should wait for the period of four years from such date. The marriage, thereafter, shall be deemed as dissolved. The woman shall then observe the *Iddat* for a period of four months and ten days. According to some other Maliki jurists, the period of four years shall be reckoned from the time fixed by the Qazi. According to a majority of them the period expired before the filing to Qazi the application to that effect shall not be counted. According to other view, more preferable is that the counting of the period of whereabouts not being known shall begin from the time that is settled by the Qazi. She shall then have the right of contracting a fresh marriage at her will.

It is said that Imam Malik (Rah) was asked if a wife waited for four years her missing husband but without the decree of a Qazi, whether that period would be relied upon for her eligibility for remarriage. Imam Malik replied, “if she waited (even) for twenty years

\(^\text{12}\) Ibn Rushd *Bidayatul Mujtahid* Vol. II, p. 44.
in that manner. (without the Qazi's decree) it would not be so relied upon: but her waiting for four years from the time she filed her case in the Court of a Qazi would be acceptable 13.

Mawlana Ashraf Ali Thanwi in his book, *Hilatun Najizah* 14, on the basis of the Maliki verdicts (*fatawa*) has ruled that the Qazi shall pass a decree for four years' waiting for the wife, in case she has with her the provision of maintenance (for that period) supplied by her husband. (In other words, if there is no provision for her maintenance she shall not be ordered to wait for a further period of four years). He thus writes, "the direction for the observance of further four years' waiting by the wife (of a person whose whereabouts are unknown) is essential for the one who can pass that period with patience, forbearance and with chastity. In case it is not possible for a woman, due to fear of indulging in adultery, the Qazi has the power of getting the marriage dissolved after waiting for four years.

It is submitted that there should be awareness campaign so that the woman should inform the Qazi about her husband's missing. If she is unable, her case should be considered positively. Marriage is a necessity and if the husband is missing the wife may involve in varieties of immoral acts. So the period of four years should be counted from the date of missing.

iii). **MODERN LEGISLATIONS:**

The law on this subject in force in various Muslim countries are as follows -
(I). EGYPT:

Section 12. When the husband, without any reasonable cause, is absent for a year or more than a year and the wife inspite of her having the provision for maintenance is put to injury because of her husband’s absentee it shall be legal for her to apply to a Qazi demanding irrevocable divorce.

Section 13. When it is possible to have correspondence with the absent husband, the Qazi shall grant time and issue a notice in his name stating that if he does not appear before the Qazi with purpose of living with his wife or taking her wife with him or pronouncing divorce to her, the Qazi shall pass a decree effecting divorce to the wife. When the time expires and the husband takes no action or his objections are not accepted the Qazi shall get dissolution effected between them through an irrevocable divorce. When it is not possible to correspond with the husband, the Qazi shall without giving notice and granting time, pass a decree effecting divorce to the wife.

(II). IRAQ:

Section 43. When the husband, without lawful causes, is absent for two or more than two years and his place of residence is unknown, inspite of the husband’s property being in the wife’s use, it shall be lawful for the wife to apply to Qazi for dissolution on the ground of injury.

(III). TUNISIA:

When the husband is absent from his wife leaving none of his property with her, making no arrangement for her maintenance and appointing no one to provide her expenses, the Qazi shall order the

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Footnote: Act No 25 of 1929.
husband to appear before it within a month. In case of his non-appearance, the Qazi, after taking evidence and putting the wife on oath shall pass a decree effecting divorce.

(IV). MOROCCO:

The provisions of law as stated under the Moroccan law on the subject are in accordance with the Egyptian laws under section 12 and 13 stated above.

(V). JORDAN:

The provision of law that enunciated under section 89 and 90 of Jordan’s laws are in accordance with Egyptian law under section 12 and 13.

(VI). SYRIA:

Under section 109(1) and (2) of the Syrian law the same laws are enunciated in connection with the right of dissolution on account of husband’s absence.

There are appreciable differences in the laws in Islamic countries relating to this subject. In Iraq the period of absence of the husband is at least two years, whereas in Egypt, Morocco and Jordan the period of one year is held sufficient for the right of demanding a decree of dissolution.

The second kind of difference, in this connection, is that in Tunisia in the event of the husband’s whereabouts becoming unknown the right of demanding dissolution occurs only when the husband neither leaves sufficient property nor makes arrangement for the maintenance of the wife during his absence. Contrary to this, in several other Muslim countries the existence or non-existence of property for
meeting maintenance expenses cannot impede the right of the wife of demanding dissolution.

Under Syrian law it has been made clear that on demand dissolution in the event of husband’s absence, such dissolution as shall be effected will be equivalent to revocable divorce; whereas in other Muslim countries such dissolution has been made equivalent to the effecting of an irrevocable divorce.

(VII). INDIAN LAW:

In India under section 2(1) of the Dissolution of Muslim Marriages Act, 1939, says “A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage in the event of her husband’s whereabouts being unknown for four years”. She has been given the right of demanding dissolution from her husband through the Court. The Court’s order has, however, been made to remain suspended for period of six months. If the husband returns during this period of six months and is prepared to fulfill his obligations arising out of the marriage contract, the decree of the Qazi shall not take effect.

According to this clause the period of four years does not commence from the time of the Court’s order, but begins from the time when the husband is proved to have disappeared. A wife can file suit under this provision of law at any time after the expiry of four years from the time of the husband’s disappearance. Moreover, the Qazi shall not ask her to wait any longer but shall decree her suit if the period of four years is proved. The decree shall be held in abeyance for six months. If the husband returns within the said period of six months, the decree shall be a nullity, provided that he satisfies the Qazi about his readiness to perform his marital obligations.
a). JUDICIAL TREND:

Under Islamic law, there are two kinds of directives with respect to persons whose whereabouts have not been known. The first kind of directives relates to:

(i) The rule of acquiring property from others by missing person

(ii) The rule with respect to the division and distribution of the property among heirs of such person.

The second kind of the directives relate to the right of contracting re-marriage with another person by the wife of the person whose whereabouts are not known. There is difference of opinion with respect to the directive relating to second kind vis. contracting of re-marriage with another person by the wife of the person whose whereabouts are not known. According to Imam Abu Hanifah and Imam Shafeyee, the wife of a person whose whereabouts are not known cannot be considered to have been released from the marriage-tie till her husband’s death is known with certainty, or the persons of his age die. Another version as well is found in the rule of conduct of the Hanafis that the death of the people of the age of the missing husband is no condition. In some cases according to Hanafis, the Qazi may permit the wife of a person, even before the death of the persons of the age of her husband on the basis of apparent circumstances in which the husband’s death may strongly be presumed. Such as the husband joins a war and there is no trace of him or he goes on a sea voyage and no news of his disembarking is received. In such circumstances, a Qazi, after the lapse of reasonable time in which the strong possibility of his death may be presumed may give a decree dissolving the marriage.
of reasonable time in which the strong possibility of his death may be presumed may give a decree dissolving the marriage.

According to Imam Malik, however, the wife of a person whose whereabouts are not known shall have the right of contracting another marriage after waiting for four years from the time of her going to Qazi, obtaining decree of dissolution of her marriage and observing her Iddat.

In case of Mozher V. Budh Singh (I.L.R 7 All 297) it was held that the matter of a missing person pertains to the laws of Evidence and the Muslim Law of Evidence having been superseded, the case of such person shall be governed by the provisions of the Evidence Act. A wife therefore, shall have to wait for 7 years for her missing husband after that he could be presumed to be dead. The period of 7 years commences from the time since when such person has not been heard of (See Sec. 108 Evidence Act, 1872).

But this is not in accordance with the provisions of Muslim law. However, considering the provisions of Muslim law. The Dissolution of Muslim Marriage Act, 1939 has fixed period for 4 years, being in effect, the period of the presumptive death of missing person whose wife may then be entitled to obtain dissolution of her marriage with her missing husband.

iv). ANALYSIS:

The reason under-lying the fixing of two separate periods for presumptive death is that in case of the dissolution of marriage of the wife of a missing husband the purpose is to save the wife from hardship, whereas in case of property the fear of hardship or injury is not so imminent. It may further, be stated that the rule of Istishab is available to avert the injury and not to achieve gain. Thus, a missing person shall
be deemed to be alive in respect of his own property till such time that the other persons of his age are expected to be alive. In respect of his inheriting others property, his share shall be set apart as *amanat* till such time the person of his age remain alive.

The law laid down under Section 108 of the Evidence Act, 1872 fixes a period of 7 years for presumptive death without making a distinction between:

(i) the presumption of death for purpose of dissolution of marriage of the wife of a missing person, and

(ii) the right to hold and acquire property of the missing person,

is not in accordance with the accepted view of the schools of Muslim law or the prevalent view in the laws in force in various Muslim countries.

As has been rightly observed by Ibn Rushd, the rule of Maliki *fiqh* is based on the principle of *ijtihad*. The period of waiting may be fixed according to the circumstances of each case. In this age means of communication have grown so rapidly and comprehensively as could not be imagined by the people of old time. Today the news of one’s disappearance can be spread within one day throughout the country by means of radio, television, newspapers and internet. Even his picture can be published throughout the world.

As per one of the Malikis rulings there is no need of 4 years waiting. Under extreme necessity one year waiting will be sufficient. It can be said that this ruling is more appropriate for the modern age and the law regarding the wife of one whose whereabouts become unknown should be based on this particular ruling. Consequently, the law may be as under -
When the wife institutes a suit for dissolution of marriage on the ground of disappearance of her husband for reasons unknown to her and the Qazi after investigation finds that her husband's whereabouts have actually been unknown, it shall order the wife to wait for a further period of one year. If the husband does not turn up during that period of one year the Qazi shall, at the expiry of that period, dissolve the marriage and the wife shall be entitled, after observing her Iddat, to enter into another contract of marriage.

Provided, that the Qazi may order the wife to wait for a further period of one year only in case the arrangement of her maintenance for that period has been made by her husband for her and there is no apprehension on her part of her involvement in sexual incontinence and falling in sin. In the event of non-provision of maintenance and the existence of apprehension, as aforesaid, the Qazi may still have the power of dissolving the contract of marriage forthwith, the duration of suit being counted towards the period of waiting of one year.

v). RETURN OF THE HUSBAND:

A question arises as to what order shall be passed if the husband whose whereabouts have been unknown turns up after four years and after the decree of the Qazi has been passed; and what shall happen if the wife, after observing her Iddat contracts marriage with another persons. So far as the first question is concerned, if the husband returns at a time when the wife is observing her Iddat he may have recourse to her as the marriage has not been terminated absolutely. If, however, the wife after observing her Iddat has contracted marriage with another person, what shall then happen? According to a report, in
the light of the decision of the Caliph Umar (Raz), if the husband returns before the wife contracts another marriage he shall have her as his wife (whatever time may have passed). If the wife has already contracted her marriage with another person the right of her former husband lapses and he cannot have that woman as his wife, although she may not have had valid retirement with the second husband. The second perfect pact of marriage makes the right of the second husband perfect over her. Imam Malik (Rah) has in his book, ‘Muwatta’, followed the decision of Umar (Raz).\footnote{Sunanul Kubra: Vol. V, p. 133.}

The decision of Caliph Ali (Raz) is at variance with the aforesaid decision of Umar (Raz). According to him the wife, in all events, shall be made to the former husband inspite of her having children from the second husband\footnote{Wid.}.

The ruling of Caliph Usman (Raz), in this respect, is stated to be that where the wife has contracted her marriage with another person and her former husband thereafter appears he shall be asked whether he wanted the return of his wife or the reimbursement of his paid dower. Action shall be then taken according to his choice. If he wanted the dower back the same will be returned to him.

The wife of a husband whose whereabouts are unknown, inspite of being subjected to extreme misery, must keep on waiting for the rest of her life. It is really hard and difficult for a married woman to keep on waiting for her husband during her entire life. In such circumstance urging unlimited patience is against Allah’s commandment,

\footnote{This Tradition is having the weak authorities.}
“On no soul doth Allah place a burden greater than it can bear.” For a wife waiting patiently till receiving the news of her husband’s death may become a real cause of her involvement in sexual sin. Hence, the Maliki view, compared to that of Hanafi’s and Shafi’s appears to be more sound.

The adoption of Maliki view, on this question, by the later Hanafi ‘Ulema themselves is also established. The salient points of Maliki doctrine that have been stated in *Hilatun-Najizah* are as follows:

1. A woman unknown without waiting sufficiently long time applies to Court and the Qazi, after taking evidence in a regular proceeding of the matters of proof of marriage and the husband’s missing and after notifying the same through newspapers and other sources, arrives at the conclusion that any hope of her husband being found is extinct. It shall then order the wife to wait for a further period of four years. If the husband does not appear even during these four years, the Qazi shall then at the end of that period dissolve the marriage. Such wife, after observing her *Iddat*, shall have the right of entering into another contract of marriage.

2. However, if the wife after waiting for a sufficiently long period, applies to a Court and the Qazi in view of the real risk of the wife taking to sinful way, takes steps by means of publication etc. for the appearance or attendance of the husband, then it may order that the wife should wait for a further period of one year. On the expiry of that period the Qazi shall dissolve the marriage and the wife after
observing *iddat* shall have the right of entering into another contract of marriage.

In both circumstances, it is essential that the order for waiting either for four years, or if the wife has waited sufficiently for the return of the husband for a period of one year, be issued. Indeed, according to Malikis, an order may as well be passed by the Qazi that the period of four years or the period of one year be counted from the date of the institution of suit.

**vi). IMARATE SHARIA'S VIEW:**

Imarat Sharia after brief discussion over Hanafi & Maliki schools concludes that it follows Maliki law in the aforesaid matter.

Imam Abu Hanifa is of the view that the dissolution of marriage, where the defendant is not known, is possible when the other fellows of the area having the similar age group are dead. After the death, the husband will also be presumed to be dead and the religious decree will be issued for the death of the husband. After the waiting period, the wife will be free to marry. For this, *Tahvi* reports that Prophet (SAW) has said.

“This woman is wife of her husband till the fact is clear (of his death)”. Ali (Raz) has said that when a woman is subjected to the hardships, she should not have remarried till the appearance of her husband or news of death or divorce from her husband. Because there is evidence of marriage and death is to be presumed. So the marriage will not be dissolved due to assumption of death.

Imam Malik is of the view that a woman whose husband is not known for 4 years has right to get the marriage dissolved. *Jame rumuz* reports-
‘The period to wait in the case of husband’s disappearance is 4 years as described by Imam Malik and Auzayee (Rah). So after 4 years she will be allowed to marry with another man.’

The 4 years period is subject to the condition where she is getting the maintenance. If not the Qazi can make order of dissolution before expiration of 4 years. Apart from this when there is apprehensions on the part of wife to indulge in the sexual crime the Qazi will grant her the decree of divorce after one year\(^{19}\), is said that it is better to give the option to the wife. If she wants to remain in the marriage of the husband, she may do and where she wants to be separate she is having the option. This is also corroborated by the tradition where the Prophet (SAW) has said to Barida (Raz) that she was free to choose whether she will be in the marriage or she wants dissolution.

Where the woman is not suffering from maintenance problem and also there is no demand of fulfillment of marital obligations there will be four types of cases.

1. Where the husband has disappeared from the Islamic territory or from the country with which the relations of the nations are good and to make a search of the husband is easy the woman will wait for four years.

2. Where the husband has disappeared from the battlefield, after the possible search the wife will be ordered to wait for one year.

3. When the husband has disappeared in the riots, after the possible search within a few months wife will be ordered to perform *Iddat*.

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\(^{19}\) Allama Mohammad Tayyab Bin Ishaque Ansari Maliki ‘Fatwa’ cited by Rehmani p. 50
4. When the husband has disappeared from the territory where ordinary human being can’t go due to fear of life and there is no possibility of search, there will be no waiting except waiting of death. Any way there are certain conditions before decree of dissolution.

1. She must present the witness for confirmation of marriage
2. She must prove the disappearance of her husband by witnesses.
3. Qazi himself will try to search the disappeared husband.
4. When the Qazi is satisfied he will make an order to wait till 4 years.
5. After 4 years she should obtain the decree of death of disappeared husband.

2(2). DISSOLUTION ON ACCOUNT OF INABILITY OF HUSBAND TO MAINTAIN THE WIFE:

The different schools have the different opinion regarding the husbands inability to maintain the wife. Those who support the dissolution inspire from the verse of the HolyQuran. The Hadith of Dare Qutni also corroborates the above verse that dissolution will be made. The views of Caliph Umar (Raz), Caliph Ali (Raz), Abu Huraira (Raz), Ibnul Musayyib (Rah) and Caliph Umar bin Abdul Aziz (Rah) are also in consonance with the above views.

The other group relies upon the verse of Surah Talaq where Allah has revealed— "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. They quote the above verse in their defense against dissolution of marriage.

i). HANAFI VIEW:

According to Hanafis a Qazi shall not get dissolution effected between the couple merely because of husband's incapability of providing maintenance. The wife shall arrange for maintenance either from her own property or by borrowing in the name of her husband till her husband has easier time.

If the husband is incapable of providing maintenance to his wife no dissolution can be effected between them though the incapacity may arise due to poverty. In support of their contention they rely on the Quranic verse: “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. After a difficulty, Allah will soon grant relief.”

The second argument of Hanfis is that amongst the Companions of the Prophet (SAW) there were some who were in

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20 The Holy Quran S 65 A 7

لينفق من سعيته ومن فندر عليه رزقه فلينفق بما أعانه الله إلا ما عانته سيجعل الله بعد عصر يسمرا

21 Holy Quran S 65A7

لينفق من سعيته ومن فندر عليه رزقه فلينفق بما أعانه الله إلا ما عانته سيجعل الله بعد عصر يسمرا
affluence and some who were in poverty but there is not a single instance during the period of the Prophet (SAW) where dissolution was effected due to poverty or non-providing of maintenance.

Where the husband is unable to maintain the wife, she will not be separated from him on any ground i.e., lodging, footing or clothing. The Qazi will decide the quantum of maintenance and will make an order that she should take money from any body as a debt saying him that when the husband will be having the means the debt will be returned. It is submitted that it may be a good law in the time of Caliphs but it is not possible now a days. Considering the present time situation the later Hanafis were deciding the matters through the Shafeyee Qazi. They also issued the religious decree that where the Qazi is Mujtahid he can dissolve the marriage in the above case. Maulana Abdul Hai in the book 'Umdatur Reayd' has quoted the saying of Imam Abu Hanifa(Rah) that the Mujtahid Qazi may make the dissolution on the above ground.

ii). MALIKI VIEW:

Sayeed bin Siddique Falati has written that Imam Malik(Rah) was asked that what will happen when the husband is unable to maintain his wife. The Imam replied that she will be separated and the marriage will be dissolved. In the corroboration of the above, Falati further quotes that in the city of Medina Umar Bin Abdul Aziz (Rah) was approached in the similar matter. He held that one month and maximum two months time will be given to the husband and if he fails to provide the maintenance, the marriage will be dissolved.

Falati also quotes the religious decree of sayeed Ibnul Musayib (Rah) that there will be dissolution of marriage. However he
accepts that where the woman is provided for that may be an even substandard thing she will not be freed. But where she is denied the marriage she will be dissolved.

The Explanation of Balughul Maram also corroborates this view quoting the practice of Caliph Umar(Raz) and Abu Hurairah(Raz).

iii). SHAFYEEM VIEW:

Nehayatul Muhtaj, 23 a famous book on Shafeyee School, contains that where the husband is unable to maintain, the wife will have right to get the marriage dissolved. Not only this but where the maintenance is being given by the husband’s ascendants, the wife is not bound to accept the same. She may approach to the Qazi for dissolution. But for this the institution of Qazi will be via media other wise this ground can’t be applied. Only Qazi can make an order of dissolution. The husband will be called and three days will be given to him to provide the maintenance. If he fails to provide within stipulated time she will be separated and the marriage will be dissolved.24

iv). HAMBAALI VIEW:

The view of Hanbalis is similar to shafeyees and Malikis.

v). COMMENT UPON THE ABOVE VIEWS:

Since Imarate Sharia adopts the rules of Talfique and Takhyur. It has described the view of other schools esp. Maliki School. The views of Imams-Malik, Shafi’ee and Ahmad b. Hambal (Rah) are that the husband, if he avoids providing maintenance to his wife, dissolution shall be effected between them. Keeping the woman in wedlock amounts cruelty on her in perpetuity. Allah has prohibited

22 Samad Rehmani ‘Tafrique’ P. 56.
23 Ibid.

176
retaining them (the wives) for persecuting them.\(^25\) It is cruelty to compel a wife to remain in the wedlock of such a husband and to do away with it is the duty of the Qazi. Hence, when the husband is not agreeable to dissolve the marriage, the Qazi shall be empowered to dissolve the marriage between them.

The view of the Hanafis that the Qazi shall at first order for meeting expenses of wife's maintenance by her borrowing in the name of her husband carries practical difficulties with it. Ordinarily, no permanent provisions for maintenance can be made in such way. Therefore, the duty of the Qazi is to see whether in the near future there is any possibility of the husband acquiring capability of providing maintenance to her. If there is no such possibility and there is an apprehension of the going astray from the right due to husband’s poverty, the Qazi will not make any delay in dissolution. The view of Imam Shafeyee (Rah) that dissolution should be effected on the ground of husband's poverty and his non-capacity of providing maintenance to his wife appears to be proper. But in such cases it will be appropriate to give some time to the husband before dissolution.

The grounds given by the Hanafi jurists in support of their view that a marriage cannot be dissolved on the husband’s inability or failure to maintain the wife do not appear in the present conditions of the society to take the realities of life into consideration. If a husband fails to support his wife then there seems to be no reason why relief should not be given to her. It is necessary in such a case to adopt the law of another Sunni School and to release the wife from hardship by dissolving the marriage tie. It may however be said that a wife who was

\(^{24}\) Huququl Zauzan – S.A.A. Maududi –(Delhi: M.M. Islami, 1989) p. 112  
\(^{25}\) The Holy Quran S 2 A 23
not being supported by her husband could, in early period of Islam, receive financial help from the *Baitulmal* or public treasury and so did not experience such hard ships as we see in present times. There is a possibility that wife a deprived of financial support may succumb to immorality rather than face starvation. Wives did generally not face these circumstances in old times.

The Shafeyee, Maliki and Hambali views provide for the dissolution of marriage when the husband is so poor as to be unable to maintain the wife seems proper and practicable. The dissolution effected on the ground of inability to provide maintenance is kept in the category of a revocable divorce. If the husband proves to be capable and prepared to provide maintenance to her, he will have the right to have recourse to his wife, provided her *Iddat* has not expired.

**vi). MODERN LEGISLATION:**

Laws in connection with effecting dissolution on the ground of non-providing of maintenance to wife have been enacted in several Muslim countries.

(1). IRAQ:

The wife has been given the right of presenting a petition for dissolution to Qazi in the event of husband's not-providing maintenance to her without any legal cause. The Qazi shall order the husband to provide maintenance to his wife within a period of sixty days.

(2). EGYPT:

Under the current Egyptian law, if the husband is unable to provide maintenance to his wife within a period of one month, the Qazi

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26 Under section 45 of the Qantum al-Ahwal al-Shakhsiya of Iraq
shall pass order for dissolution, provided the husband apparently has no property from which the wife may meet her maintenance expenditure. Under Section 91 of *Huququllahul Urduni*, in the event of non-providing maintenance for a year, the Qazi shall pass order for dissolution.

(III). SYRIA:

The wife has been given the right of dissolution in the event of the husband being available and his avoiding to provide maintenance without any cause to her. If, however, he satisfies the Qazi of his inability to do so, the Qazi shall grant him three month’s time during which it shall be necessary for him to provide the maintenance. In case of his default, dissolution shall be effected. It has been explained under the said law that such dissolution shall be in the category of a revocable divorce. If the husband is able to arrange for the maintenance during her *Iddat* and provide maintenance to her, he shall have the right of having recourse to his wife.

(IV). SUDAN:

If the husband has no known property out of which a maintenance order can be executed, the wife can demand dissolution of her marriage, which shall be granted forthwith. But if the husband is destitute, the Qazi a period of respite shall first give him. If a husband, who has no known property from which a maintenance order can be executed, goes away leaving his wife without maintenance, she may demand dissolution of her marriage. In such a case, if the husband can be contacted, he shall be asked by the Qazi to arrange for her maintenance within a specified period; if he fails to do so without any

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27 Under section 110. Of the Qanun-al-Ahwal al-Shakhsiyah of Syria  
28 Under Circular No. 17 of 1916, articles 1 to 9 of Sudan
excuse, the Qazi may dissolve the marriage. On the other hand, if he cannot be contacted or has disappeared completely or is of unknown whereabouts (Mafqudul khabar), the marriage may be dissolved without delay. The Qazi’s order under these provisions dissolving a marriage shall effect a revocable divorce. The husband can revoke it during the period of Iddat if he is prepared to provide maintenance.

(V). MOROCCO:

Under the law of Morocco⁴⁹, for want of maintenance it has been provided that the wife may demand from the Qazi, the dissolution of marriage when her husband is present but unable to maintain her. In such cases, where there is no known property and the husband, who is not destitute, persists in not maintaining his wife, dissolution of marriage shall be granted forthwith. If the husband establishes that he is unable to provide maintenance to the wife, the Qazi shall give him a period of respite not exceeding three months, and after the expiry of that period, if the husband still cannot provide maintenance, he shall dissolve the marriage. It has been further provided that dissolution of marriage granted under this article shall constitute a divorce revocable by the husband during the period of Iddat if he expresses his willingness for, and is capable of, providing maintenance to the wife.

(VI). IRAN:

The Iranian Law, dealing with the wife’s right to maintenance, provides that if an order of the Qazi directing the husband
to provide maintenance to the wife, issued on her application, cannot be executed, she may demand dissolution of marriage by the Qazi.

(VII). INDIA:

A Muslim wife has been given the right of claiming the maintenance, when the husband refuses or neglects to provide maintenance to her for the period of two years. The application of the clause is, however, subject to the general provisions of the Muslim law. Thus, a wife is not entitled to invoke this clause when she herself is at fault. A wife who is nashizah or refractory under the Muslim law is not entitled to maintenance and so her marriage cannot be dissolved on the ground that the husband has failed to maintain her for the prescribed period.

Section 2 (ii) of 1939, reads “(the marriage may be dissolved on the ground) that the husband ... has failed to provide for her maintenance for a period of two years;” The Court while explaining the clause held that period of 2 years must be continuous and not in part. When the period is proved the Court will award the decree of divorce. However when she leaves the marital home, she is not entitled to the benefits of the clause.

vii). IMARATE SHARIA’S VIEW:

In Mst. Zahira Khatoon V. Md. Shibli the plaintiff had mentioned in the plaint that she was given in the marriage of defendant Md. Shibli by her mother’s uncle when she was a minor. When she became major, she did not ratify the marriage and hence it should be

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30 Under Section 2(ii) of the Dissolution of Muslim Marriage Act, 1939
31 Has neglected
32 A.I.R. 1946 Sind. p. 48
33 AIR 1983 Ker 283
34 24/8395/1396 AH.
dissolved. She pleaded some other grounds also for the dissolution of marriage. She said that she went two times to the husband’s home. There was no any room except a corridor. She was sent to the house of near by inhabitants which she did not like. When she rejected to go, she was beaten and was forced to leave the marital home. Apart from this, she was not provided the food. Some times the father in law was serving her with food and some time he was denying saying that his son was jobless. She was being habitually assaulted in the marital home. So she applied for dissolution of marriage with the defendant.

The 1st witness of the plaintiff said that the defendant had no home and property. He had only one corridor and no room was there in his home. The defendant forced the plaintiff to sleep in the house of near by inhabitants. The food was also not provided to the plaintiff. The householders of her father provided her. She was beaten severely and severally. At last she was forced to leave the home of the defendant. Since that 2 years have passed the defendant has provided no maintenance

The 2nd witness of the plaintiff also said the same thing. He was in relation of both the persons.

On the other hand the defendant denied the charges but accepted that her householders provided the food to the plaintiff. He said further that there was no problem of lodging

The other witnesses said that there was problem of fooding in the house of the defendant but no problem of lodging was there.

The Qazi held that the plaintiff has used the option of puberty after one year of her majority so she had lost the option. Moreover the marriage was consummated so there was no question of option. The
other allegation of the plaintiff was proved by the witnesses. The allegation of fooding problem was accepted by the defendant himself.

Thus, the inability of maintenance in which fooding is included was proved. The plaintiff wife was having reasonable cause to get the marriage dissolved. So the marriage of the plaintiff with the defendant was dissolved.

ORDER:

"Due to non maintenance and non fulfillment of marital obligation and non provision of fooding & lodging and to protect the modesty I am dissolving the marriage of Mst Zahera Khatoon plaintiff with Md Shibli, the defendant. The plaintiff is no more wife of the defendant and after waiting period she is free to marry with another person."

2(3). DISSOLUTION ON ACCOUNT OF NEGLIGE OF THE HUSBAND TO THE WIFE:

SECTION-A: FROM THE MAINTENANCE POINT OF VIEW:

The next ground of the dissolution of the marriage is denial of maintenance. Allah has revealed "Give the Kinsman (her) due". Further "Men are incharge of women, because Allah has made one of them to excel the other, and because they spend of their property (for the support of women)."

Prophet (SAW) has said –

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35 AIMPLB has proposed some measures to implement it by consensus of ulama. The period, however, is further reduced to one year. For detail see supra note 61 chapter 3. Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza* pp. 83-88

36 Holy Quran S 18, 26.
“Your wives are having the rights upon you, so provide them lodging and fooding in a better way.\textsuperscript{37}

The 2\textsuperscript{nd} Caliph Umar (Raz) when received the complaint about soldiers for non maintenance of their wives he ordered the commanders to tell the soldiers to send the maintenance to their wives.\textsuperscript{38}

i). HANAFIS VIEW:

If the husband, inspite of his being in affluent circumstances, avoids providing maintenance to his wife, the Qazi instead of passing an order of dissolution may compel the husband to provide maintenance to the wife by getting the property of the husband sold. If the non-providing maintenance is due to the husband’s poverty, the Qazi will pass the order for waiting till improvement in the circumstances of the husband, as God has revealed “After a difficulty Allah will soon grant relief”. Therefore, if such a case is brought before a Qazi, he should pass an order that the wife should meet her maintenance expenses by borrowing in the name of her husband. According to some scholars, the wife being an heir to the husband must, when the husband is incapable for providing maintenance, arrange for his maintenance too, provided the wife be capable of it.

ii). MALIKI VIEW:

Allama Sayeed bin Siddique Falati says that the Maliki view upon the denial of maintenance to the wife, despite the means, will lead the marriage dissolved. The Qazi will compel the husband to maintain

\textsuperscript{37} Ahmad Asqalani ‘BalughulMaram’ (Deoband: Maktaba Thanvi, No Date) p. 333
\textsuperscript{38} Ibid p. 335
his wife. For this he will be given 10 days time and if he fails the Qazi will get the marriage dissolved.

iii). SHAFEYEE VIEW:

When the wife submits herself to her husband she is entitled to maintenance. In the case of denial she has right to get the marriage dissolved. Her right is absolute when she does not choose to dissolve the marriage, the rights remain effective and she can claim her due when the husband gets the means.

iv). HAMBALI VIEW:

When the wife submits her self to husband, she is entitled to take maintenance and in case of denial she can go to the Qazi to get her marriage dissolve. But the fact that she has submitted herself is to be proved by the wife.

Malikis, Shafeyees and Hambalis are unanimous on the point that if the husband has enough means and does not provide maintenance to the wife and the wife can no longer wait, she has the right of taking her case to the Qazi. The Qazi shall either compel the husband to provide maintenance to the wife or shall dissolve the marriage contract.

The three Imams argue that Allah (SWT) by saying “The parties should either hold together on equitable terms or separate with kindness” has ordered the husbands either to retain their wives on equitable terms (i.e. in proper comfort) or to divorce them with kindness. Hence the husband who has no intention to retain his wife in the proper comfort must put the wife divorcing her.

The rule of conduct of the Hanafis that the Qazi at the first instance ought to pass an order for the provision of maintenance of the

39 Rehmani ‘Tafriq’ p. 63
wife by borrowing in the husband’s name is beset with several practical difficulties. Ordinarily, borrowing can make no permanent arrangement for maintenance. The primary duty of Qazi, in such cases, is to see whether in near future, there is any possibility of borrowing or of the husband arrangement maintenance or because of poverty there is apprehension of the wife indulging in sin. It shall then in the latter case be incumbent upon the Qazi to get dissolution effected between them.

The point of view of the other three Imams that on the ground of husband’s poverty and his incapability of providing maintenance, dissolution ought to be effected seems to be correct indeed it shall be better, in such circumstances, to give at the first: some time to the husband enabling him to make necessary provision for maintenance.

A decree passed on husband’s neglect to provide maintenance to his wife shall be in the nature of revocable divorce. If the husband during her Iddat applies to the Qazi that he is ready to provide maintenance to his wife he should have the right to have recourse to the wife.

It is submitted that the Hanafi view is not correct and the latter views of the three Imams appears more correct. The proper course shall be that if a husband, inspite of his capability, neglects to provide maintenance to the wife, the Qazi at the 1st instance ought to order him to provide such maintenance. If inspite of this order the husband refuses to provide the maintenance, the Qazi, with the view of removing the harm and injury to the wife, will get dissolution effected between the couple.

vi). MODERN LEGISLATION:

40 Holy Quran S. 2.A.229
Relevant laws as in force in the above Muslim countries are reproduced as under:-

(I). EGYPT:

Section 4. When the husband refuses to provide his wife with maintenance inspite of his being possessed of property, order shall be given for providing maintenance to her out of his property. If he is not possessed of property and it is not clear whether he is in poverty or in affluence but he insists on not providing maintenance, the Qazi shall order effecting a divorce. If the husband's inability of providing maintenance is not proved, the Qazi shall dissolve the marriage immediately pronouncing the divorce. If his inability is proved the Qazi shall grant him time not exceeding one month. Inspite of the time granted, if maintenance is not provided the Qazi shall pass decree of dissolution.

Section 6. Dissolution got effected by Qazi on the ground of non-providing of maintenance by the husband shall take effect as a revocable divorce. The husband has the right of having recourse to his wife on his providing, during his wife's observance of her *Iddat* that he is affluent and is prepared to provide maintenance to her. If his being affluent is not proved and his agreeing to provide maintenance is not implemented, having recourse by him to his wife shall not be continued.

(II). SYRIA:

Section 110. (1) The wife has the right of making an application for the demand of dissolution when her husband is present, but his property has not been disclosed and it is not proved that he is incapable of providing maintenance.

(2) If the husband's incapability is proved or he is not traceable the Qazi shall allow him appropriate time not exceeding three
months for providing maintenance. If the husband does not provide maintenance during this period too, the Qazi shall get dissolution effected between the couple.

Section 111. Dissolution got effected by Qazi on the ground of non-providing of maintenance shall be equivalent to a revocable divorce. The husband shall have the right of having recourse to his wife during the observance of her Iddat, provided he proves his affluence and shows his readiness to provide maintenance.

(III). JORDAN:

Section 91. When the husband has gone in hiding or has gone somewhere on a journey and remains untraceable for a year and it becomes impossible for the wife to get any maintenance, she may demand dissolution of her marriage and the Qazi, after necessary investigation shall order dissolution of marriage between the spouse.

(IV). INDIA:

In India under section 2(ii) of the Dissolution of Muslim Marriages Act, 1939, the wife, in the event of her husband having refused or neglected to provide maintenance to her for a period of two years the wife has right of demanding dissolution.

a). JUDICIAL TREND:

Non – providing maintenance due to wife’s fault. The Lahor High Court in case of Manak Khan V. Mal Khan (AIR 1941 Lah. 16) has held that provision of Section 2(ii) of the Dissolution of Muslim Marriage Act, 1939 superseded the Islamic law. The same Court in another case Akbari Begum V. Zaffar Hussain (AIR 1942 Lah 92) held that under the said section 2(iv) the wife, in the event of the husband fulfilling without reasonable cause the conjugal obligations for a period
of three years, becomes entitled to have her marriage dissolved. Without reasonable cause the conjugal obligations for a period of three years, becomes entitled to have her marriage dissolved. The term without reasonable cause; in connection with maintenance, however do not find place in the said Section 2(ii). Hence it would be taken to mean that inspite the wife herself being held responsible for the non-providing of the maintenance (e.g. due to nushuz) she shall have the right to get the marriage dissolved for such non-maintenance. But Justice Lobo of Sind Chief Court, in the case of Mst. Khadijan V. Abdulcin (All Sindh 65), differing from the said decision (AIR 1942 p. 92), held that if the husband was not bound under the Islamic laws to provide maintenance to the wife it could not be said that non providing her with maintenance will lead to dissolution. The Allahabad High Court in the case of Badrunnisa V. Muhammad Yusuf (AIR 1944 All, 23) followed the said decision of the Sind Chief Court. The same year, however, the Lahor High Court in another case reported in AIR 1944, Lahor, 336 over-ruled the earlier two decisions of its own and held that before establishing the neglect of the husband it ought to be seen whether he was liable under Anglo Mohammadan law, under the circumstances, to provide maintenance. The Court has held that this clause does not caste upon husband an absolute duty to maintain.41 Although the husband is under legal obligation to maintain his wife regularly. An occasional visit or a half hearted offer of some clothes or some money at long intervals would not amount to maintenance of the wife for the purpose of section 2 (ii).

41 AIR. 1983 J & K 78
42 1985 Ker 1J 27.
In the light of the above decisions the view of the Courts is that refraction (nushuz) is a fit ground, not to provide maintenance to the wife. The court of the country should respect the rule by not over riding it. It is therefore submitted that it is a very sound view and should be followed in future decisions.

Nuzhat Jahan V. Tufail Ahmad alias Lalu

The plaintiff said that she was married with the defendant five years before. After 6 months of the marriage the defendant started cruel treatment. Once the sister of the plaintiff reached her marital home. She was (the plaintiff) cruelly treated in her presence, when her sister intervened, the defendant said that unless & until he is provided the cow & bicycle she will remain under cruel treatment. Once the mother of the plaintiff reached the marital home for her rukhsati but the defendant refused. When the mother tried to convince the defendant, he became angry and thrown out the belongings of the plaintiff saying that the plaintiff along with the belongings must be departed with plaintiff's mother. Despite the thousands request of the mother of the plaintiff, the defendant did not cool down and finally her mother left the marital home along with the plaintiff. After that, urchins were sent two times to bring her back but she refused. After that, the panchayat was held but the defendant refused either to divorce or bring her back. She is denied the maintenance and also denied the marital rights for long time so her marriage be dissolved.

Two witnesses corroborated the sayings of the plaintiff.

On the other hand the defendant said that she was habitual of meeting her sister's husband upon which she was warned. When she was not in the mood to comply she was given some blows. She went to her sister's home without the permission of the defendant. Even she left the
marital when the mother of the plaintiff had come. When the defendant sent his cousins and uncles, she did not come back, so she was left out but defendant was ready to accept her. However, the dower and the dowry were ready, if she wanted the defendant would hand that over.

The witness of the defendant had denied the allegation made by the plaintiff but they accepted the denial of maintenance and not fulfillment of the marital obligations. It was not possible to carry the life jointly, one of the witnesses of the defendant said.

The Qazi reached upon conclusion that the marriage between the plaintiff and the defendant was held nearly 6 years back. After Six months of the marriage the relations were strained. The plaintiff was habitually beaten, harassed and threatened and she was neglected for 3 years. In this period she was denied the maintenance and the marital rights. So the demand of dissolution was reasonable. The allegations were proved, which are enough for dissolution. So the marriage was dissolved.

ORDER:

"I am pleased to make an order to dissolve the marriage of the plaintiff Nuzhat Jahan with the defendant Tufail Ahamd alias Lalu on the ground of non-maintenance, cruel treatment and non-fulfillments of marital obligations".

Md Serajuddin V. Nikhat Sultanan

This petition was against the judgement of the vice Qazi who had dissolved the marriage of appellant with the defendant.

The petition was filed on 3.3.17. The parties were called on 25.4.17. The defendant represented her by her advocate while the appellant was absent. The parties were again called to be present in the Court of the Qazi on 11.5.17. The appellant was present with his
counsel, a practising advocate while the defendant was represented by her father.

The appellant said that the defendant was not against in the proceeding. It was another lady who was introduced as the defendant. The appellant says that he raised the question of the identification but no attention was paid.

The fact of the previous judgement says that the defendant was present on 5.5.16 and her wordings were recorded. While the appellant was not present despite that he was having the notice of proceedings.

The appellant was given one more chance to disprove the allegations of the wife on 8.6.1416. But the appellant was out of the Court and sent an application. While the defendant who was then plaintiff came with some additional witnesses. Due to the applications of the appellant the date of hearing was fixed on 1.8.1416. On which he came in the last hours. He took the plea of threatening of life and again applied for further time and his sayings were recorded on 22.8.1416.

The appellant has said that he had sent the persons several times for the *rukhsati* of the defendant.

The council of the appellant referring Mullah's book has said that the consent of the husband was necessary. The commentary of justice Hedaytullah was also referred by the counsel that the consent was necessary.

The allegations made by the defendant (plaintiff in the Vice Qazi's Court) were proved by the defendant. Upon whom the Vice Qazi was pleased to pass the order of dissolution of marriage. The appellant has raised the said ground in appeal.
The appellants plea of identity was too late. The fact as per the file of the proceeding the appellant escaped most of the times from the hearing when the hearing was made in his absence who will identify that the defendant was not present in the hearing and the lady present in the hearing was anyone else. The plea of the applicant that he raised the question of identity was not traceable. Since he was not present at the time of hearing how can he raise the objection and question of identity. The later submitted written statement did not contain the plea of identity. Thus the plea at that time was late and not acceptable. Moreover the identity was proved by the witnesses. Thus this ground was rejected.

The 2nd ground of the appellant that he had sent several times for the departure of the defendant was not proved. Amongst two witnesses of the appellant, one said that he had gone to ease the tension between the guardians of the parties. He did not say that he had gone for the departure of the defendant. The another witness also say that the mother of the appellant had gone to the defendant but the witness was unaware with the sayings of the appellant about departure. Thus the 2nd ground of the appeal was also not proved and hence rejected.

The 3rd ground raised by the counsel of the appellant, who was a practicing lawyer, that the consent necessary for dissolution. The fact that the consent is necessary but only in the case of 'Khula' and the reference, which the advocate had made, was also corroborating about Khula and not the dissolution. It is strange that the advocate was not with the Dissolution of Muslim Marriage Act- 1939, in which the consent of the husband is not necessary, provided, the grounds are proved, said the Qazi. Thus the 3rd ground was also not accepted.
Thus the lack of maintenance and non-fulfillment of marital obligations were proved. The appellant had brought no irregularity in the decision of the vice Qazi and hence the appeal was not sustainable. The Qazi was to make the following order.

**ORDER:**

The grounds upon which the vice Qazi had ordered for dissolution could not be vitiated & the grounds stand still good and he was pleased to order to maintain the status quo of the order of the vice Qazi, dismissing the appeal.

**SECTION-B: NEGLECT FROM MARITAL OBLIGATION POINT OF VIEW:**

There may be a situation that a woman has no problem of fooding lodging, or clothing but she is denied of conjugal rights. In this situation the Holy Quran has given the guidelines for four months.

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لَنْ يُؤْتُوْنَ مِنْ نَسَآءِهِمْ تَرْبُضَ أَربَعَةَ أَشْهُرٍ فَإِنْ فَآَءَوْ فَإِنَّ اللَّهَ عَفَوٌّ رَحِيمٌ
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“For those who take oath for abstention from their wives. A waiting for four month is ordered; If then they return Allah is oft forgiving Most merciful.

Thus the guideline provided to the Qazis and heads (Umara) that the females should not be denied their conjugal rights for more than four months. Although it is for the person who swear not to

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43 A1MPI.B has proposed some measures to implement it by consensus of ulema. The period, however, is further reduced to one year. Also see supra note 61 chapter 3.

44 Holy Quran S 2 A 226
approach the wives, but it may be the guiding principles for separating those women who are victim of implied ila i.e. desertion in the case of conjugal rights.

**STORY OF CALIPH UMAR(RAZ):**

Once a woman came to Caliph Umar(Raz) and said, 'O commander of the believers, my husband is habitual of fasting in the day and prays the whole night. I consider it bad to complain against my husband.

Caliph Umar (Raz) replied, 'Your husband is very gentleman.'

Again the woman said the same thing. The Caliph again replied in the same manner. Kab (Raz) who was accompanying the Caliph said, 'O commander of the believers, this woman is complaining her husband's non fulfilment of marital obligation'. The Caliph replied. 'If the matter is so, get the matter resolved.'

Kab called the husband of that woman. When he came Kab(Raz) asked the woman to report the matter. She told the following:

"O gentleman Qazi, my partner has been kidnapped from my bed by the mosque. You guide him. The prayers have compelled him not to sleep with me. He is unable to sleep in the day and at night. In the matter of woman's right his action is not praise worthy." Kab asked the alleged husband who replied in this way –

"The Prayers have compelled me to be out of the bed of my wife. Now I am the person who has got addicted due to verses of chapter Namal and Saba Tawal of the Holy Quran".

After that the decision was also pronounced in the following way.
“O man! verily your wife has got some rights against you. You must pass one night out of four with her. O gentleman! give her the rights due upon you, Be away from pretending.

When Caliph Umar (Raz) heard that one night and a day out of four is ordered by Kab(Raz) he asked the source of this decision. Kab (Raz) replied that Allah has permitted the maximum four wives. If one marries four wives, one will take one day out of four days. So upon this the decision is made.

The Caliph became happy and appreciated the judgment of Kab(Raz). He also appointed him the Qazi of Basra. Thus wherever there is complaint like this, the husband will be forced to fulfill the obligation otherwise, there will be separation between the spouses.

i. HANAFI VIEW:

When the husband neglects performance of conjugal obligations, she will not be having right to go to the Qazi provided the 1st marriage has already been consummated. One who has made the marital intercourse at least once will not be subjected to the judicial proceedings for the same. Durre Mukhtar explains that it is the duty of the husband to make the marital intercourse but no one can compel him to do so. Tahavi reports, that a person who has made the 1st intercourse, is liable to make it again but it is only a moral duty and not legal one. If he doesn’t do so he will not be compelled.

Bahru Raiq contains, ‘there is consensus that the 1st marital intercourse is obligatory upon the male. If he does not do this he will be compelled by law to do the same but where he is not doing it after 1st intercourse he cannot be compelled.

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45 Tahavi Vol II p. 98.
46 Ibid. p. 88
It is said that there is a list of Ulema following the Hanafi school who say that the husband will be compelled to make the marital intercourse again & again. To them the marital intercourse is not only a moral obligation but the legal obligation is also there. If the wife is suffering from this problem she may approach to the Qazi and he will compell the husband to make marital intercourse to save the woman from cruelty. Where the husband is not ready the Qazi has the power to dissolve the marriage. Allamam Jassas Razi writes.

‘We know that Allah has commanded us to give the rights of those who are having upon us. In the matter of the Ila, Allah has revealed that retain the women in honour or release them in kindness.’

Shami also writes

“It is the duty of the Qazi in the matter of the Zihar to compell the wearer to expiate or bind him for divorce. The view of the Ulema who say that the Qazi will be having the power to compel the person to make the marital intercourse are of later Hanafis”. Thus it seems that this matter has not got only the moral force but the legal force also.

ii). MALIKI VIEW:

Malikis are of the view that when there is provision of dissolution in the absence of maintenance, the ground of non fulfillment of marital obligation is more sacred than that. In the case of maintenance other kiths & Kins may provide, while the conjugal obligation fulfilled exclusively by the husband. If there is no maintenance there may be some ailment to the wife. But in case of non-fulfillment of marital obligation there is chance of adultery. So when the

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*Ahkame Quran – Vol. 1. P. 362
Rehamani, ‘Tafrique’ p. 71
woman want to get her marriage dissolved on this ground, the Qazi after satisfactory proof against the allegation will dissolve the marriage. The Qazi will make haste in dissolving the marital knot where adultery is apprehended on the part of the wife. In the course of the dissolution the wife will get full dower from the husband.

iii). SHAFEYEE & HAMBLI VIEW:

It is said that Shafayee and Hambali views are similar to Maliki view.

iv). IMARATE SAHRIA'S VIEW:

Imarate Sharia follows the Maliki view in this regard. The Shafeyee view is also like Maliki view so it may be said that both schools are followed by Imarate Sharia.

In Bibi Fatima v. Salamath Mian Mansoori, the plaintiff said that she was married 8 years before with the defendant Salamat Mian Mansoori. After one year of marriage the defendant started cruel treatment with her. Not only the defendant was unable to fulfill the marital obligation, she was also beaten, abused, kept hungry and handed over to the nephew of the defendant to entertain her. She was subjected to immoral act by the nephew of the defendant at knifepoint. Although she served the defendant when he was hospitalized at Patna. The defendant had beaten her and thrown her out in the street after return from Patna. So her marriage should be dissolved, as the defendant was unable to fulfill the marital obligations. The witnesses of the plaintiff said that the plaintiff’s age was nearly 20 to 22 years and defendant was of 55 to 60 years and he was unable to fulfill his marital obligations.

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49 ibid.
One of the witnesses said that once he asked the defendant about his excesses. The defendant resolved not to beat the plaintiff any more. Once the plaintiff was set at the fire but she survived. At last the plaintiff was beaten and was forced to leave the home of the defendant. Before going home, the plaintiff stayed to one of the witnesses, where the brother of the plaintiff came and took her back. After the departure of the plaintiff the defendant did not give the maintenance & the marital obligations were also not fulfilled.

On the other hand the defendant said that he has never ill-treated her. When the thigh of the defendant was broken, the plaintiff served her at Patna. They returned to their home and the defendant again went to the Patna. In his absence, the plaintiff took her ornaments and money and ran away. However, he said that after operation he was unable to fulfill the marital obligations.

The witnesses corroborated the statement of the defendant. Although they say that they have not seen the plaintiff to go out of the house of the defendant with the ornaments and seven thousand rupees. However they agree that the defendant has not given her any maintenance and has failed to fulfill his marital obligations. One of the witnesses said that the continuance of the marriage was not possible as there was hatred.

FINDINGS OF THE QAZI:

After going through the statement of the parties and of the witnesses it was clear that the marriage between the plaintiff and the defendant was held 8 years before. Till seven years of the marriage the plaintiff was residing his marital home but from last 8 months she was

50 Rahmani, Tafriqu. p. 42
residing in her parental home. In this period the defendant had failed to provide her maintenance and fulfill the marital obligations.

The 1st allegation of the beating was proved by the witnesses although they have not seen with their own eyes but one of the witnesses said that once he warned the defendant and the defended took oath not to commit that sin again. One of the witnesses of the defendant also was said the possibility of the defendant to beat the plaintiff.

The 2nd allegation of the plaintiff was not proved that she was kept hunger.

Thus the Qazi Court had held that point of the plaintiff was that the nephew of the defendant had tried to have illicit relations with the plaintiff and several times he compelled the plaintiff to have illicit relations. The witnesses of the plaintiff said that the fact was known to the entire village.

The 4th point of the plaintiff was not proved that the plaintiff was set at fire.

The 5th point of the plaintiff that the defendant has no capacity to fulfill the marital obligations is proved as the defendant has accepted this point saying that after operation, the defendant was too weak to have the marital intercourse.

The sixth point of the plaintiff that she was compelled to leave the house of the defendant was also proved. The plaintiff’s witnesses have seen by their eyes for one day the plaintiff stayed in the house of the one of the witnesses. On the other hand the witnesses do not corroborate the plea of the defendant that the plaintiff has left the house of the defendant with ornaments and rupees. The witnesses said the hearsay story.
Thus the plaintiff had enough ground to get the marriage dissolved as she was subjected to immoral act and more over there was problems of the non fulfillment of the marital obligations. Keeping in the view of the above things the marriage of the plaintiff was dissolved by the Qazi.

**Order**

"I am pleased to pass the order of dissolution of marriage of the Plaintiff Bibi Fatima with the defendant Salamat Ali Mansoori due to non fulfillment of the marital obligations The plaintiff is no more wife of the defendant. After iddat period she is free to marry".

**4. DISSOLUTION ON ACCOUNT OF BEING IMPOTENCE OF THE HUSBAND:**

The case of impotence may arise when the husband has no male organ or that may be a non-entity or he is unable to perform marital intercourse.

**I. EUNUCH:**

Eunuch means a castrated male employed in a harem or the person who does not have penis or whose penis is almost a non-entity. To be a eunuch of the husband is also a ground of dissolution of marriage.

Where the wife wants to get her marriage dissolved on this ground, the Qazi after due inquiry and evidence may dissolve her marriage. Qazi Khan has also given a religious decree (fatwa) for the dissolution. Hedaya says that the Qazi should dissolve the marriage according to the rules of the Islam.

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51 Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza* pp.53-59
52 Lexicon Webster Dictionary
53 Rehamani p. 73
without delay. But the Qazi will see whether she has consented to the marriage despite the knowledge or she has accepted her husband when she came to know after the marriage. If she has done so she would not be allowed to get the marriage dissolved on this ground.

II. IMPOTENCE:

Impotent means the man who, inspite of having his male organ, is not capable of having sexual intercourse with his wife. A person may be impotent by birth or on account of some disease, weakness, old age or other reasons. The man, who is capable of having sexual intercourse with some women and is not capable of having it with some other women, shall be considered to be impotent in respect of those women with whom he is not capable of having sexual intercourse. The man who suffers from emission before contact with the woman, he too shall be considered to be impotent.

It is also ground of dissolution of marriage as has been told in the matter of impotence. a person does not have the capability of marital intercourse. So the Qazi after due enquiry will assign her the right to opt either her husband or dissolution. Hedaya also advocates for her right of dissolution.

If the man is not capable of having sexual intercourse, his wife has been given under law the right of demanding dissolution through Qazi. This right of the wife does not lapse even with the passage of time.
When the wife takes her case before a Qazi it is incumbent upon the Qazi to find out the truth from the husband. If the husband admits that he is not capable of having sexual intercourse with the wife the Qazi shall grant him a year’s time for treatment.

If the husband claims of his having sexual intercourse with the wife and the wife does not claim to be virgin the husband shall be made to take oath to support his claim. If he does take oath that he has had sexual intercourse with the wife, the Qazi shall reject the petition of the wife. If he refuses to take such oath the Qazi shall grant the above-mentioned time to him for treatment.

If the wife claims that she is still a virgin the Qazi shall order her to be examined. If the wife, on examination, is not found to be virgin the husband shall be made as above to take oath. If he takes oath that he has had sexual intercourse with the wife, the Qazi shall not pass an order for dissolution. If the husband refuses to take oath the Qazi shall grant him time.

In case the wife pleads about her being not a virgin and that her husband has spoiled her virginity by his fingers or by some other method and not by having sexual intercourse with her and the husband maintains that he has had sexual intercourse with her, according to Hanafis the result of the examination of the wife as to how her virginity came to be spoiled shall be relied upon. Preferably the number of examining persons should be two.

The time of one year shall be counted from the day the Qazi grants it. Prior to it whatever the time lapses it shall not be taken into account.

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60 Ibid. p. 613
If the husband, on treatment, gets well within one year and succeeds in having sexual intercourse with the wife even once, the right of the wife to the dissolution of marriage on this ground will lapse.

If the husband does not succeed in having sexual intercourse with the wife even once within the given period of one year the Qazi, on the desire of the wife, shall direct the husband to pronounce divorce to the wife. Upon his refusal, the Qazi himself shall effect dissolution.  

III. INDIAN LEGISLATION:

The wife has been authorised by virtue of section 2 (V) of the Dissolution of Muslim Marriages Act, 1939 to demand dissolution on the ground of her husband being impotent and the Court, on the application of the husband, is bound to grant him time for the period of one year.

Granting one year’s time to an impotent husband is a settled rule of Sharia. The current law by the addition of the words, ‘On the application of the husband’, has been brought closer to the real spirit of the law.

The time that is allowed to the husband for the cure of his impotence is one year. It cannot be less or more than that period of time. It is stated in Hedayah that the year of probation fixed by the Qazi in the case of impotence is to be counted by the lunar calendar, whereas Fatawa Alamgiri recommends the use of solar year by way of precaution, which is usually followed now.

IV. JUDICIAL TREND:

63 Hedaya Vol. II p 421
A marriage was annulled on the ground of impotence although, the evidence showed that it was restricted to the wife and was not a general condition of the husband. A husband was held by the Madras High Court under the Indian Christian Marriage Act to be impotent when intimacy with the wife was not possible on account of the abnormal size of the male organ as a result of which ordinary and complete intercourse was physically impossible. It was held that the husband was impotent as far as the wife was concerned. The view was based on the reasoning that impotence includes impracticability of coition.

Under Muslim law, the husband's impotence has to be proved as a fact. But under certain conditions Courts draw a legal presumption that the husband is impotent. Thus if the husband and the wife have lived together for a long time in the same house under conditions when the sexual intimacy was possible and it be established that the wife is still a virgin, though a fit subject for sexual intimacy, the Court may presume that the husband is incapable for coition at least with regard to the wife.

If the Court is satisfied that marriage has not been consummated although no impediment to consummation be apparent. The Court will be justified in dissolving the marriage.

The decision of a case involving impotence becomes difficult when it is contested and a spouse denies the allegation made by the

64 G. V. M. (1885) 10 App. Cas. 171.

65 KanthyBalavendram V. Harry, A.I.R. 1954, Mad. 316

66 Ibrahım V. Altagen A.I.R. 1925, All 24; Altafan V Ibrahim A.I.R. 1924 All. 116

67 Ranga Swami V. Arravind Ammal A.I.R. 1937, Mad 237

68 Brinda Kumar Viswa V. Hemlata Biswa, I.L.R. 48 Cal. 280:
other. In such a case medical examination of the spouse becomes very important. A Court has got full power to order the examination of the spouse or of one of them. In case of refusal to allow such examination, by any one the Court will be perfectly justified in drawing an inference against the party refusing the medical examination. The Courts in India have wide discretion in ordering medical examination of the parties subject to such conditions as may be necessary in a particular case. On the refusal of a party to attend for medical examination, the Court may draw an unfavourable inference against the party guilty of refusal.

A doctor's certificate to prove the capacity or incapacity of the other must be strictly proved by examining doctor, who issued it so that it may satisfactorily be ascertained as to what test he has carried out and how has he arrived at his conclusion. It may however, be stated that opinions of doctors are relevant but not conclusive. When the experts differ, the value and sufficiency of their value may legitimately form the subject of consideration and scrutiny despite their acceptance by one Court or another.

Ordinarily, the Court is to pass an order, if the husband so wished, giving one year's time to him for treatment, and adjourn the cases for one year. If on the expiry of one year the disease is found not curable the Court will pass a decree dissolving the marriage.

Allahabad High Court in the case of Mohd. Ibrahim V. Altafan, observed that the decree passed in the first instance is not to be executed. It is a conditional decree, which becomes operative only on the failure of the prescribed conditions. It does not change the status of

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65 Conselfes V. Iswariah, A.I.R. 1953, Mad. 858
66 Altafan V. Ibrahim, AIR 1924, All, 116
67 ibid
68 ibid
69 ibid
70 ibid
71 ibid
parties who continue to be liable for the maintenance of the wife while a spouse can on the death of the other, inherit from the deceased.

Muslim jurist do not recognise a waiver by the husband, that is time shall be given to him even when he does not want it or refuses to have it. The Lahore High Court has, however, held in a case that the condition as to adjournment is imposed for the benefit of the husband and if he does not want to avail himself of it he can certainly waive the right and in such a case the condition of suspension of the Court’s order will not be necessary and the marriage shall be dissolved forthwith. The principle of law laid down in this ruling is against the rule of Muslim Law mentioned above, but it appears to be more in accord with justice, equity and good conscience. It would be hard on the wife to make her wait for one year when the husband, for whose advantage the period of one year is granted, does not want it. If he considers that a grant of time is not necessary there is no reason why he should not waive this right. This difficulty is not experienced in India as time is granted to a husband under the provisions of the dissolution of Muslim Marriage Act, 1939, only when he applies for it.

V. IMARATE SHARIA VIEW:

Impotent is the person, who, despite having the penis, unable to make intercourse. It may be of two kind.

1. General Impotence

2. Particular Impotence

In general Impotence, a person is unable to intercourse while in particular impotence a person is capable of intercourse with one wife and at the same time unable to intercourse.
with another. *Hedaya* says that where a husband is impotent, the Qazi is to appoint the term of four year from the period of litigation, within which if the accused have made intercourse with his wife it is well otherwise the Qazi will pronounce a separation provided the wife so desires. Referring Caliph Umar, Caliph Ali and Abu Masood (Raz) *Hedaya* says that wife has right of casual enjoyment. The Imarat published book on dissolution contains the following points:

1. The woman should file the case before Qazi.

2. The Qazi should enquire it with the alleged husband. If he accepts then the Qazi will provide him a term of one year.

3. Where the husband denies the allegation -
   i. He will have a swear provided the wife is not virgin.
   ii. In case the husband is not ready to say on oath, he will be given a term of one year for medication.
   iii. If the wife claims her virginity the Qazi will ask two expert women to check her. If the report of women is contrary to her claim, the husband will have to say on oath that he has done the intercourse and his statement will be considered as true. Where the husband does not say on oath, he will be given a term of one year for treatment.

4. The term will be counted for the date of order of the Qazi.

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77 Ibid
5. If the husband is capable of intercourse in the provided term, the wife will not have the right to be separated.

6. Where the husband is unable to make intercourse in the said term, the wife will be given the option either to remain in his marriage or to choose separation.

7. Where the wife fails to choose separation in the same sitting, she will not have option to the separated in future. But Imarate Sharia has eased the condition of dissolution on this ground. Mr. Abdus Samad Rahmani, the former deputy Ameer of Imarate Sharia has written that Maliki view may be applied in this regard. In this regard the writer has quoted Ibne Wahban (Rah), Tahqul Anwar, Quhastam, Hasbul Mufin, Caliph Umar (Raz) and Shami etc. and established that where there is need the view of other Schools may be applied. In Khairun Nisa V. Asghar Ali, the acceptance of alleged impotence led the marriage dissolved although husband wanted last chance.

In Khairun Nisa V. Asghar Ali the plaintiff said that she was married with the defendant and went her marital home. But the husband was found impotent. When this matter was reported to the guardians, the arbiters were appointed. In the mean time the plaintiff returned to her parental home. The arbiters decided for rukhsati of the

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74 Rehmani 'Tafiq' pp. 74-75
75 Maulana Abdus Samad Rehmani 'Quza ke Chand Aham Masayal Fatva'. Imarate Sharia Iind ed. 15 pp. 34-37.
76 Ibid 32
77 Ibid 33
78 Ibid 34
79 Ibid 35
80 Ibid
81 156-14007-1412 AH. For details please see appendix.
82 Case No. 156-14007-1412 AH
In Khairun Nisa V. Asghar Ali 82 the plaintiff said that she was married with the defendant and went her marital home. But the husband was found impotent. When this matter was reported to the guardians, the arbiters were appointed. In the mean time the plaintiff returned to her parental home. The arbiters decided for rukhsati of the plaintiff and she went two times to her marital home but no improvement was found in the husband.

The defendant husband on the other hand, accepted his impotence but requested once more for rukhsati.

Keeping in the view to the above things the Qazi did not accept the request of defendant. The Qazi held that the defendant was allowed by the arbiters to have the rukhsati of the plaintiff and despite his medication no improvement was made. So that request would have made the matter more complicated. The right of the marital intercourse is a basic right of the wife and she was denied of this right. Thus her request of dissolution was reasonable. Finally her marriage was dissolved.

82 Case No. 156-14007-1412 AH