"Hens face no problems how to bring up their babies. But children take a long time to understand the things. If any thing is found without endeavour nothing is achieved. The thing which is found after struggle is an achievement. To obtain the led is not difficult that is why it is lying everywhere. But to obtain Lal (a special diamond) is difficult so it is important"
5. DISSOLUTION ON ACCOUNT OF INSANITY OF THE HUSBAND:

Insanity is another ground of dissolution of marriage\(^1\).

1). JURIST'S VIEWS:

According to Imam Muhammad (Rah), a wife is entitled to demand dissolution of her marriage provided the madness of the husband is of such a degree that her living with him be impossible. However according to Imam Abu Hanifa (Rah) and Imam Abu Yusuf (Rah) the wife is not entitled to demand dissolution from her husband on this ground. According to the three Imams. Viz. Imam Malik (Rah), Shafeyee(Rah) and Ahmad b. Hambal(Rah) the wife, in the event of her husband being mad, is entitled to demand dissolution.

In case of continuous madness of the husband the Qazi ought to pass a decree for dissolution without giving any time to the husband. In case of periodic madness, time for a year may be given, as is mentioned in some books of \textit{fiqh}\(^2\). The difference between continuous and periodic madness can only be said that the madness which is temporary and

\(^{1}\) AIMPL.B has proposed some measures to implement it by consensus of \textit{Ulema}. Also see supra note 61 chapter 3. Maulana Ashraf Ali Thanvi has discussed it in detail in his book \textit{HilatunNajiza op.cit.} pp.80-82

\(^{2}\) Rahman 'Tafriq' p. 80
recovery occurs at intervals is a periodic madness. As against the continuous madness is that, which remains constant without any recovery.

The wife has been empowered to demand dissolution under Section 2(vi) of the Dissolution of Muslim Marriages Act, 1939, in cases where the husband suffers from madness for two years. There is no mention of time for treatment being granted to the husband nor any discrimination or distinction has been maintained in the suits regarding continuous and periodic madness. A study of the books of *fiqh* shows that in case of discontinuous madness, the jurists are in favour of granting one year's time to the husband for treatment. It shall thus be advisable that the minimum period of madness in the above law instead of two years be reduced to one year, and it should also be provided that one-year time be granted for treatment, in case of discontinuous madness.

In this connection it is necessary to differentiate here that the impotence of the husband becomes the basis of the right of demanding dissolution by the wife only when the defect be in the husband at the time of the marriage contract. If the husband becomes impotent afterwards, the wife has no right to demand dissolution. There is no such restriction in case of madness. Whenever the madness appears and it persists for more than the prescribed period the wife has the right of demanding dissolution.

2). PAYMENT OF DOWER & OBSERVANCE OF IDDAT:

If the dissolution of marriage is brought about before valid retirement the dower due on the husband shall lapse and in the circumstance, the observance of the *Iddat* shall not be necessary in the same way as in case of dissolution before consummation of marriage. If

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3 Ibid p. 82
4 Rehman p. 584.
the knowledge of madness is acquired after valid retirement and the
dissolution of marriages brought thereafter, full dower shall become due
on the husband and the observance of Iddat shall also become incumbent
upon the wife. There is no necessity to dissolve a marriage in every case
merely on the presence of one of lunatic grounds. But if the madness
takes such a shape as to influence the attitude of wife toward the husband
to such an extent as to think it dangerous and impossible for her to live in
peace with him the marriage will be dissolved on this account.

3). IMARATE SHARIA'S VIEW:

As per Imarate Sharia a wife is entitled to get her marriage dissolved on
the ground of insanity. However, the opinions of Imam Abu Hanifa
(Rah) and Imam Abu Yusuf (Rah) are different. According to
Imam Mohammad (Rah) she is entitled to an option in order that
she may remove an evil from herself. In similar circumstances the
husband has power to divorce. The argument of both the scholars
(ABu Hanifa & Yusuf) (Rah) is that in marriage no such type of
right exists. If this is allowed, it would operate to the destruction of
the husband's right who is still capable of intercourse and to
continue the generation. Imam Mohammad's (Rah) view is
prevalent and accepted by Hanafi scholars. He says that diseases
like leprosy and white spot are grounds of dissolution due to
natural hatred and insanity should be treated at par. The views of
Shaikhain are not sustainable, as it will be creating great problems.
And in this way those are to be treated as an impediment in taking
once right. Sexual passion is not the only thing to be obtained by

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6 Rehman p. 583
7 Hedayap. 128
8 Hedaya p. 128
9 Ibid
the husband but procreation of children and life partnership is also important things to which she would be denied. If in case of impotence or person without penis, she would have right to opt either her husband or dissolution why not she has option here?\textsuperscript{10}

Imarate Sharia has issued the following guidelines for its implementation\textsuperscript{11}.

1. Wife has to prove the complete insanity on the part of husband.
2. After due investigation and inquiries the Qazi should give one-year time for medication.
3. After one year, if wife demands the dissolution due to his insanity, which could not be cured, the Qazi will provide her the opportunity to opt.
4. If wife opts dissolution the Qazi will dissolve the marriage
5. The dissolution will be caused due to marriage being void, in this case.

The dissolution is to be made on fulfillment of following conditions also:

1- Wife must not have known the insanity before marriage.
2- She must not have accepted him when she came to know about his insanity.
3- After knowing the insanity she must not have allowed him to have intercourse.
4- She must opt the dissolution immediately and before standing up from her seat when Qazi provides her the opportunity and not afterwards.

Imarate Sharia further explains that where the insanity is occasional the above rule will be applied. But in case of permanent

\textsuperscript{10} Rehmani ‘Tafriq’ pp 79-81
\textsuperscript{11} Ibid pp. 82 - 83
insanity the Qazi will make dissolution of the marriage without seeking the wife’s option.\textsuperscript{12}

The above-mentioned rules were not followed in case No 10 of 1494 AH\textsuperscript{13}. However it seems from the above para that the rules are favourable to the husband.

In \textit{Anjum Ara V. Mohd. Haider Ali}\textsuperscript{14} the plaintiff said that defendant, her husband, had turned mad. He was unable to provide her the marital right. She was also denied the maintenance from the defendant side so her marriage should be dissolved.

The Qazi heard the parties. The father of the defendant accepted the madness of the defendant. The defendant was unable to say any thing due to his mental disorder.

Keeping in view the prayer of the petitioner and acceptance of the defendant side, the Qazi dissolved the marriage without assigning any time to the defendant for medication.

In \textit{Rabeya Khatoon V. Mohd Tasleem}\textsuperscript{15} the plaintiff said that she was married three years before the petition of dissolution. For one year she went usually to her marital home despite the excesses of the defendant. After one year the defendant turned mad and had gone anywhere. In that period he neither maintained her nor provided the marital rights. So her marriage should be dissolved.

The notices were issued and were published in the newspaper fixing the time for hearing and judgment. But the defendant did not turn.

\textsuperscript{12} Ibid
\textsuperscript{13} See Appendix A
\textsuperscript{14} Case No. 392-16075-1416 AH
\textsuperscript{15} Case No. 229-15612-1416 AH
The allegations of the plaintiff that she was unable to have her rights and madness of the defendant were proved. The Qazi, considering the prayer of the plaintiff dissolved her marriage.

In *Shah Jahan Begum V. Mohd. Murtaza*\(^{16}\) the plaintiff said that she was married 8 years before filing the petition for dissolution with defendant. She begot two children in which one male child was alive. After two years of marriage the defendant turned mad. She lived with him for two years but there was maintenance problem. So she came her parental home. The defendant came twice for *rukhsati* but the plaintiff told him to come with his father. In the mean time the defendant in the madness killed his brother and was arrested by the police. There was no body to pursue his case. So her marriage should be dissolved with the defendant.

The witnesses proved the allegations of the plaintiff. The father of the defendant himself accepted the madness of the defendant. The plaintiff was deprived of all types of rights for the last four years. Under these circumstances the Qazi considered the prayer of the plaintiff reasonable and ordered for the dissolution of the marriage.

### 6. DISSOLUTION ON ACCOUNT OF VIRULENT OR VENEREAL DISEASE:

The virulent or venereal diseases are also the ground of dissolution of marriage\(^{17}\).

1). HANAFI VIEW:

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\(^{16}\) *Case No. 150-15834-1416 AH*

\(^{17}\) AIMPL.B has proposed some measures to implement it by consensus of *Ulema*. Also see see supra note 61 chapter 3.
The Hanafis say that if the wife finds in her husband such a physical defect or disease that prevents him from having sexual intercourse with her she shall be entitled to get the marriage dissolved. Such diseases are also contagious and they affect the health of the wife also.

According to the majority of the Hanafis, if the wife finds that her husband suffers from a venereal disease that hinders him in having sexual intercourse with her, she is entitled to seek dissolution from him through the Qazi.

Imam Muhammad (Rah) has added leprosy and leucocythaemia in the list of virulent diseases. Imam Kasani quoting the ruling of Imam Muhammad has, therefore, written that his being free of each of such defects i.e. leprosy and leucocythaemia is an essential condition of the marriage contract, otherwise the marriage contract on that ground shall stand vitiated.

It is said that according to Shaykhayn i.e. Imam Abu Hanifah and Imam Abu Yusuf(Rah), the wife is not entitled to obtain decree of dissolution on the ground of her husband suffering from leprosy or leucocythaemia. However, Qohistani is quoted as reporting from Imam Muhammad(Rah) that the wife has an option (of getting a dissolution) in the case of leprosy of her husband. She has also an option on account of every such defect, which makes her union with the husband, without receiving harm or injury to her, impossible.

The basis of difference between Imam Abu Hanifah(Rah) and Imam Abu Yusuf(Rah) on one side and Imam Muhammad(Rah), on the

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18 Bahur Raiq, Vol. III, p. 137
20 Damad Afandi, vol. I, p. 463:
21 Al-Muhit, Vol. II p 133
other is that the formers are convinced of the option of dissolution only in such a venereal disease that hinders one in having sexual intercourse. According to formers, the wife on the ground of the defects such as leucocythaemia cannot be entitled to secure dissolution. The reason being that these defects or diseases are not basic impediments to sexual intercourse. The Prophet(SAW) has said, ‘You marry each other and procreate children’. The main purpose of marriage contract obviously is to procreate children and satisfy the carnal appetite. Hence if the sexual intercourse is not possible the purpose fails and if the wife demands dissolution it becomes incumbent upon the husband to grant her divorce. If the husband refuses to effect divorce, the wife under the Shariah is entitled to get the marriage dissolved through the Qazi.

2). MALIKI VIEW:

According to Maliki school, as against the Hanafi view, each of the married woman is entitled to get the marriage dissolved due to diseases and physical defects discussed above.\(^{22}\)

Imam Malik (Rah) is convinced of the optional right of dissolution of each of the married women because of defects viz. Leprosy, leucocythaemia. Ibn Rushd in his book, Bidayatul Mujtahid writes that Malikis have differed about the rationale on account of which they have limited the right of dissolution to only these defects.\(^{23}\) According to them, limiting the defects to only four types of diseases is in effect a directive based on no particular cause (illat). In other words, those who are convinced of the right of repudiating the marriage contract on account of only those defects and are opposed to the right of dissolution on any other ground, consider the same to be based on the revealed guidance. Whereas

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\(^{22}\) Rehmani ‘Tafriq’ p. 85.

\(^{23}\) Ibid.
the others advance arguments limiting the defects to the number because they consider that these defects are inconspicuous while other defects are visible. No right of dissolution can accrue, in their view, on the ground of visible defects. According to some, the defects that are hereditary are to be held to give good ground for dissolution.

3). SHAFEYEE VIEW:

Dissolution may be made on account of leprosy and leucocythaemia. According to Shaykh Muhammad al-Sharbini al-Khatib, the author of *Mughni al-Muhtaj*, the learned men and experienced physicians are of the view that leprosy and leucocythaemia are largely infectious and are impediments for sexual intercourse. No sensible person shall be inclined to have sexual intercourse with one who suffers from these diseases.

It is said that in the event of leucocythaemia, leprosy being found in any one of the married husband the wife will have the right of annulling her marriage.

4). HAMBALI VIEW:

Ibn Qudamah al-Maqdisi in his noted work (on Hambli *Fiqh*) *Al-Mughni* and Abdullah Ibn Miftah in his book, *Almunzi al-Mukhtar* too have described such diseases and have spoken of the wife’s right of dissolution.

Maqdisi has written that dissolution of the marriage contract has been restricted to these defects because they stand in the way of achieving the purpose of marriage. Leprosy and leucocythaemia are extremely
obnoxious. They appear injurious to the wife’s mind. Amputation prevents sexual intercourse while hydrosile diminishes pleasure from it.²⁹

The following points are in favour of dissolution of marriage with the person suffering from virulent and venereal disease.

1. One of the principles of the law of shariah is To give or suffer no harm. Hence the husband’s retaining the wife, inspite of his having no power to give the wife her lawful rights (sexual intercourse), tantamount to inflicting injury on her. The Sharia is for the purpose of fully realising human potential. Hence, the attainment of the wife’s happiness demands that she, in such circumstances, be given the right of dissolution.

2. The Prophet (SAW) is reported to have contracted marriage with a woman of Bani Ghifar tribe. When he noticed leucocythaemia on the body of the woman he sent her back to her family. Leucocythaemia obviously is a defect that is obnoxious to the people.³⁰ On the other hand, marriage is contracted for the purpose of creating love and affection between the married couple. Another argument may as well be advanced on the basis of this narrative. As the marriage contract was annulled by the Prophet (SAW) on the ground of leucocythaemia, so the marriage contract may be annulled on the ground of each of such defects that create detestation and extreme abhorrence in the mind. The basis of the annulment of the marriage contract by the Prophet (SAW) was abhorrence caused by leucocythaemia which is as well found in other defects, such as leprosy, madness, AIDS, etc. they may too validly form the basis of the dissolution of marriage.

³⁰ Rahman p. 585
3. The Prophet, (SAW) said, “Flee from a leper as you do from tiger”. The dissolution of marriage on the ground of leprosy, in practice, is fleeing. If wife has no right to dissolve the marriage on account of leprosy, application of the principle laid down by the Tradition is not possible which Imam Bukhari has narrated.

5). SUBMISSION:

After a thorough study of the various view-points as discussed above one comes to the conclusion that the view that there is no option of dissolution on the ground of defect cannot be held to be correct. One is to agree with the view-point of Imam Abu Hanifah(Rah) and Imam Abu Yusuf(Rah) that the wife has the right of demanding dissolution only in case of the husband’s male organ being imputed and of his being impotent. In this respect, one finds the opinions of Imam Muhammad (Rah) and Imam Ibn Taymiyah(Rah) and of Hafiz Ibne Qayyim(Rah) based on beneficial ground, sound logic and juristic analogy as quite preferable.

6). MODERN LEGISLATIONS:

In various Muslim countries specific laws have been enacted giving right to the wife of seeking dissolution through Qazi on the ground of husband’s suffering from disease as detailed below:

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31 It is stated of the Caliph "Umar(Raz) that he saw a leper woman making the circuit (Tawaf) of the House of Allah(SWT) (Kabah). He said to her "O, slave of Allah(SWT)! Had you remained in your house, you would not have caused trouble to the people". Ibn Taymiyah has recorded in his "Fatawa" that he (Hadrat Umar) forbade a leper, with whom he had business dealings, to enter Madina and sent him the article sold outside Madina.

32 This is to the effect that any defect that makes the sexual intercourse impossible and becomes the cause of defeating the very purpose of marriage thus it to provide the good ground of demanding dissolution by the wife.
I). LEBANON:

Section 122. When the wife, after her marriage contract, becomes aware of her husband suffering from such a disease as leprosy, leucocythaemia or syphilis so that her staying with him shall prove harmful to her, it would be lawful for her to approach the proper authority and claim dissolution. The authority if it sees the prospect of the disease being cured he would postpone the dissolution for the period of one year. If the disease does not abate during that period and the husband does not consent to the pronouncement of divorce and the wife insists on dissolution that shall be duly effected. Such dissolution, however, cannot be effected on the ground of the husband being blind or lame.

Section 123. When the husband becomes insane the wife will have right to approach the proper authority for dissolution. The authority will provide one year time for medication. If the insanity is not cured the marriage will be dissolved.

II). JORDAN:

Jordan’s law on the subject of dissolution on the grounds of defects and diseases is not different from that of Lebanon. Hence Section 83 to 88 of Jordan’s “Qanun al-Ahwal al-Shakhsiyah” are in accordance with Lebanon’s law.

III). MOROCCO:

Section 54. (1) When the wife finds her husband suffering from diseases and defects like madness, leucocythaemia, consumption of permanent nature getting riddance from which is not possible or it is possible in more than a year’s time but the staying of the wife with him (in that period) be not possible without her being harmed, she is entitled to demand divorce from him through the Qazi though the diseases or defect
in him be unknown to the wife from before or after the marriage contract and to which the wife is not agreeable. The Qazi shall allow the husband one year's time. If he gets rid of the disease during that time well and good, otherwise the Qazi shall make the husband pronounce divorce to the wife.

If a woman is aware of the disease (other than the above mentioned diseases) in a man and inspite of it she contracts marriage with him, or the disease overtakes him after the marriage is contracted and the wife expressly or impliedly consents to it, she shall not be entitled to demand divorces on account of that disease.

IV). IRAQ :

(1) When the wife finds her husband to be impotent or finds him suffering from such a disease that impedes him in having sexual intercourse, she is entitled to file a petition in the department concerned for dissolution.

(2) When the wife after the marriage contract finds that her husband suffers from such diseases as leprosy, leucocythaemia, consumption, syphilis, madness on account of which her living with him without harm is not possible or that any one of the diseases has overtaken him afterwards, she is entitled to have recourse to the department concerned.

(3) When the department concerned, after getting the medical examination made, expects the abatement of the diseases mentioned in sub-sections 1 and 2 of this section, it shall postpone the dissolution till the disease abates and the wife shall be entitled not to associate with the husband during that period.

\[\text{Section 44. Qanun al Ahwalal Shakhsiyyah}\]
(4) If the department concerned does not expect any abatement in the
diseases, and the husband refuse to effect divorce and the wife
insists on demanding dissolution, the Qazi in the circumstance shall
pass a decree of dissolution.

V). SYRIA:

Section 105. The wife is entitled to demand dissolution in the
following circumstances: -

(1) The husband suffers from such disease that hinders him in having
penetration; Provided that the wife does not suffer from such a
disease.

(2) The husband gets mad after the marriage contract.

Section 106 (1) The wife's right of demanding judicial dissolution
on the ground of diseases mentioned in the aforesaid section shall
lapse if the wife know of those diseases contended with them after
her contracting the marriage.

(3) It is however, established that the wife's right of demanding
separation on the ground of her husband being important shall in no
event lapse.

Section 107. If the diseases mentioned in the aforesaid section are
incurable the Qadi shall, in accordance with the demand, grant
dissolution between the couple to be effected forthwith. If the
disease is curable the Qazi shall postpone the demand for a suitable
period, which shall not be for more than a year. If the disease does
not abate within that period, the Qazi shall get dissolution effected
between them.
VI). INDIAN LAW:

The wife is entitled to get the marriage dissolved by virtue of section 2 of D.M.M. Act 1939.

VII). IMARATE SHARIA'S VIEW:

In *Raisa Khatoon V. Mohd. Mumtaz*\(^{35}\) the plaintiff said that she was married with the defendant 4 years before the petition of the dissolution of marriage. Soon after the marriage it was revealed that defendant was suffering from leprosy. After four years of marriage the defendant had not fulfilled any marital obligations. There were no symptoms of recovery and the disease was aggravating day by day. So her marriage should be dissolved.

The allegations of the plaintiff were proved by the witnesses and the Qazi quoting the views of Hanafis in case of leprosy dissolved the marriage.

In *Sayeeda Bano V. Mohd. Nizamuddin*\(^{36}\) the plaintiff said that the defendant was suffering from leprosy. He was also unable to have marital intercourse. She was at her parental home for three and half years. In that period the defendant neither demanded rukhsati nor sent her maintenance. So her marriage should be dissolved with him.

On the other hand the defendant said in the written statement that the allegations were false. She had indulged in immoral activities and was about to be divorced that is why she was making such type of allegations. The defendant never came in person to peruse the case. He took the plea of poverty but had also denied the offer of travelling expenses of to and fro.

\(^{34}\) Section 105 – 107 Qanun al Ahwal al Shakhsiyyah
\(^{35}\) Case No. 216-11962-1406 AH
\(^{36}\) Case No. 281-7139-1391 AH
\(^{36}\) This definition is based on the Hanafi point of view which, for its effects has a wider scope than
The allegations of the plaintiff could not be proved in toto. However, the leprosy was proved by the witnesses. The wife had been assigned the right to get the marriage dissolve to which she opted. So her marriage was dissolved.

7. DISSOLUTION DUE TO INEQUALITY OF THE HUSBAND:

Literally the word *kafat* means equality. Generally two persons are called (kufw) equal of each other who are Muslims, have the same lineage, are free and are equal in profession, wealth and character\textsuperscript{37}. In kafat age is not the criteria.

Malik, Karkhi, Hasan Basri and Sufyan Sauri do not accept the rule of inequality as a ground of dissolution\textsuperscript{38}. They cite the following precedents in support of their opinion:

(a) Bilal (Raz) a liberated slave was married to an Arab woman.
(b) The Prophet (SAW) has said that an Arab has no precedence over a non-Arab.
(c) The Prophet (SAW) and his Companions (Raz) did not follow the rule.

Truly speaking it is difficult to follow strictly some of the rules laid down by Muslim jurists on this subject, because some of the grounds on which a marriage was considered unequal in the past have now lost their significance. For example, now not much importance is attached to lineage and one comes across a case in which a girl belonging to a Pathan family has been married to a man belonging to a non-Khan family. Perhaps by evolutionary process of human society, an equality in intellectual level i.e. knowledge has gained more importance, probably


226
due to advancement in education. The Punjab Chief Court, however, held in a case that the inferiority in the social status of the husband does not justify the court to dissolve a marriage.39

7(1). ELEMENTS OF KAFAT:

i). HANAFI VIEW:

According to Hanafis the elements of kafat are:

1. Islam
2. Lineage (Nasab)
3. Professional class / Social status (Freedom from slavery)
4. Financial status
5. Moral standard

ii). MALIKI VIEW:

According to Malikis, it is enough for a man to be equal to a woman only in two elements: one is religiousness or piety and the other is freedom from those defects on account of which woman gets the right of dissolution of the marriage, such as leucocythaemia, insanity, leprosy etc. According to Imam Malik (Rah) lineage, freedom, profession and financial position are not so relevant.40

Under the Maliki law an unequal marriage contracted by the father of a girl shall be binding on her even if it is for an inadequate

40 According to them the only conditions to constitute equality are Islam, piety and means to maintain the wife. They do not attach any importance to the question of lineage, and profession. But there is a difference of opinion whether Imam Malik (Rah) made freedom also a condition of equality in marriage. According to another report, Imam Malik (Rah) made the following conditions as essential for equality in marriage:
(a) Islam or religion
(b) The husband being free of the following defects:
   (i) Leprosy,
   (ii) Leucoderma, and
   (iii) Insanity.
dower. She shall have no right to object the marriage. But she can get a marriage dissolved when the husband is impotent, eunuch or castrated or suffers from leprosy, leucoderma or insanity or is a slave.\textsuperscript{41}

Thus, the Malikis differ from the Hanafis in the conception of inequality.

iii). SHAFEYEE VIEW:

According to Imam Shafeyee in kafat, the following three elements are necessary.

1. Lineage
2. Religion
3. Profession\textsuperscript{42}

iv). ANALYSIS:

(a). ISLAM:

A husband whose father has embraced Islam and a wife whose father and grandfather both are Muslims, are not regarded as equal (kaf\textit{w}). A person who has had only one Muslim ancestor is not the equal of a person who has two or more Muslim ancestors.\textsuperscript{43}

After the advent of Islam a person was considered under this rule, to be superior to another whose grandfather had embraced Islam later than the grandfather of the other. This rule must have been based on the fact that people who adopted Islam in the beginning were persecuted and it required great courage and very firm belief to have embraced Islam in its early days. Such people were therefore, considered superior to those

\textsuperscript{41} Ibid.
\textsuperscript{42} Al Jazari, Vol IV, pp. 64, 58-59.
\textsuperscript{43} Fataw Alamgiri, Vol. II, p. 13;
who adopted Islam in later period, when professing of Islam involved no hardships. It is stated in Fatawa Alamgiri that this rule did not apply to Arab, but only to the non-Arabs for they felt proud of themselves in this distinction, (i.e. freedom and Islam). To make such distinction, in the present day, is impossible and improper too. Every Muslim after accepting the faith of Islam becomes a brother in religion and he is, according to Islam a kufw of a woman who is even born Muslim. Thus in Islam, as regards kafat it is just sufficient that the husband and wife are Muslims, though their forefathers may or may not be Muslims.

(b). LINEAGAE OR NASAB:

According to some jurist equality in lineage is also essential condition for equality in marriage. This concept, however, is alien to Islam that stands itself for removal of all distinctions of caste, creed and colour. The Muslims believe in equality of mankind and there can be no claim of superiority in Islam on the basis of tribe, nation or country.

In the Holy Quran it is stated that the believers are brethren. It is further laid down in the same surah of the Holy Quran, “Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you.” Here, precedence is given to a human being solely on account of piety, (taqwa), so that there should be no discrimination between an Arab and a non-Arab. The Prophet (SAW) has also stressed on it in his sermon on the occasion of his last Haj that no one has superiority over other by reason of his nationality or country. Thus he stated. “The Arabs have no precedence over the non-Arabs, nor the non-Arabs over the Arabs, nor the white one over a black except by excelling

44 Fatawa 'Alamgiri, Vol. II. p. 13;
45 Holy Quran S 14 A 10
He has thus declared in unequivocal terms that all human beings are equal, regardless of their individual or racial status, and that no one can claim any preference or superiority over others, except by reason of his piety. Moreover, equality in lineage was not a condition of equality in marriage in the early period of Islam. Abdur Raman b. Awf(Raz), a prominent companion, gave his sister in marriage to Bilal(Raz) who was a Negro emancipated slave. Imam Zainul Abidin, the cognatic great grandson of the Prophet (SAW) and a very learned Scholar gave his daughter in marriage to a liberated non-Arab slave. The ruler wrote to him that he had brought disgrace on all the Arabs. In reply the Imam referred to the Ruler the precedents set up by the Prophet (SAW), who had given his own cousin in marriage to Zayd bin Haresa(Raz), a liberated non-Arba slave.

It appears from a historical analysis that the concept of the superiority of the Arabs over non-Arabs developed later and it may be the result of their victories over the Persian and Byzantine empires. Besides this, the Arabs were very particular about maintaining racial purity and considered themselves superior to the non-Arabs on this account. Thus, it is stated in Sharah Wiqayah that superiority of the Arabs in respect of marriage is due to the fact that non-Arabs have lost their pedigree (racial purity) by inter-tribal marriages. It also seems likely that non-Arab jurists of later period adopted this view on account of their great reverence for the Prophet (SAW) and attached great importance to everything connected with him. Hence they considered the Arabs to be superior to the non-Arabs, and amongst Arabs they considered the Quraysh tribe, to which the Prophet (SAW) belonged, to be superior to other Arabs. 

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Hedaya Vol. II p. 300
Ubydullah b. Masud; Shara al-Wiqaya (Delhi, 1345 A.H.) Vol. II p117.

230
has, however, stated that there is no basis or Tradition for making equality in lineage a condition of marriage. This view seems to be correct.

(b) i. HANAFI VIEW:

The Hanafi jurists lay great stress that there should be equality in lineage in marriage. For this purpose they hold that people belonging to the Quraysh are superior to other Arabs while all the other Arabs are superior to the non-Arabs. Arabs excepting Quraysh are considered to be equal to each other, as they were considered notorious throughout the Arabia. This shows that character not only of an individual, but even of a group to which he belonged was taken into consideration in the matter of equality in nasab.

(b) ii. VIEWS OF OTHER SCHOOLS:

Maliki, Shafi and Hambali view do not considered equality in lineage a condition of equality in marriage.

According to Hanafi jurists, lineage is an important part of kafat. It seems to be based on class distinction which is not permissible in Islam. The conception arose due to prevalent social conditions of the Arabs. Besides Arabia and Indo-Pakistan sub-continent where it is due to the influence of Hindu culture and civilization on Muslims, in no other Muslim country any importance is attached to the equality in lineage relating to the doctrine of kafat.

(c). PROFESSION (HIRFAH):

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50 Hedaya Vol II p 300.
51 Fatwa Alamgiri Vol II p. 12.
52 Ibid.
53 The Arabs were supposed to be superior to the non-Arabs to such an extent that the marriage of an Arab girl to a non-Arab was considered to be derogatory to the girl's family, however, high the worldly position of the husband might be. Thus, even a non-Arab Ruler is not deemed to be the equal in marriage with in Arab woman (Rehman p. 202).
Another essential condition of equality in marriage, according to the Hanafis, is that the husband should not be carrying on a profession, which is inferior to the profession carried on by the members of the wife’s family. Abu Yusuf and Muhammad(Rah) hold equality in profession to be a necessary condition of marriage. Fatawa Qazi Khan too has held the principle of these two companions (Sahabayn) to be correct. Some jurists hold that there can be no condition of equality in profession as a man can change it at any time. The material time when a man’s profession is to be seen is the time of marriage and a subsequent change in his position is of no consequence. The condition of equality in profession according to Abu Hanifah, did not and does not apply to the Arabs, as reported by al-Karkhi, who were and are considered equal irrespective of their professions. But in countries other than Arabia there was a marked difference in social status and standard living among various classes of society, and they did not encourage inter-marriages between them. Profession, social status and respectability were considered to be so closely associated as to be one and the same thing. This condition was generally attached to certain professions while a degree of inferiority was attached to certain other professions on account of their being considered low, so that respectability or importance differed with different

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54 Ibn Hummam, Damand Afandi, the author of Fathul Qadir and Majmaul Anhur respectively have written that learning has precedence over lineage (Aljazri Vol. IV p. 55)
56 Hedaya Vol. II p. 301
57 A number of reports are attributed to Abu Hanifah. According to Azhir al-riwayat, (kitab ul-Asl) he does not make equality in profession an essential condition of equality for marriage, while, according to the other report, he considers it as an essential condition. According to another report, both Abu Yusuf and Muhammad (Rah) hold that profession is not to be taken into consideration, unless it is so contemptuous, mean and degrading as to bring disgrace to the woman’s family in which case the marriage can be dissolved on this grond as it would be unequal. (Al-Marghinani: Vol. II, p. 301)
59 Ibid, p. 330

232
The marriage of a girl whose family carried on a more respectable profession to a person whose family carried on a low profession was considered to bring discredit to the girl's family and thus lowered its prestige. There was also a risk that the girl being used to a certain way of living might find it hard to live with people whose standard of living was comparatively very low. Thus, the marriage of the daughter of a merchant to a barber or washerman was looked down upon and was considered to be a disgrace to the girl's family. The distinction of profession was more relevant in old times when families carried on and confined themselves to the same business or profession from generation to generation. They were considered to have a particular trait of character. The importance attached to a particular profession rested on the general opinion of the public, and sometimes differed in different localities. The profession of a sweeper, shoemaker, barber or washerman was considered low while that of a teacher, doctor and government servant considered as respectable. It is stated in al-Durr al-Mukhtar that unscrupulous officials are lower to the lowest professionals even if they are wealthy because their wealth has been earned by corrupt and unlawful means.

But this adherence to one profession by a particular family is no longer a good rule. The result is that persons carrying on a certain profession can no longer be deemed to possess certain traits of character. Hence, the status attached to various professions has undergone a radical change during recent times and the nature of profession cannot be a safe guide to determine the equality of a marriage unless the difference is so glaring as to have no doubt in the matter. But there can be no doubt that a

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60 Hedaya Vol. II, p. 301.
62 A sweeper, cobbler, washerman, or barber was considered lower in respectability than a tailor or a draper. (Ibnul Abidin p. 330-31).
marriage may be dissolved when the difference in respect of the professions carried on by the husband and the wife's family members generally is very marked and the wife's family is looked with disgrace on account of the husband's low profession. Thus a marriage between the daughter of a person and his servant, engaged for menial work, can be considered unequal. Such a marriage will obviously be mismatched and is probable to lead to misery and unhappiness for the girl and so may be annulled on the ground of inequality. It is stated in Raddul Mukhtar that the status of profession changes from time to time and so must be decided according to the special conditions of the times. Any way this ground is to be used very cautiously. The business has taken such a shape that the one time mean profession has taken the shape of industry with the help of advanced machines.

(d). PROPERTY:

Another condition of equality in marriage, according to the Hanafi relates to the financial condition of the husband. They say equality must exist in respect of financial position and property also. It is considered that a mismatched marriage with respect to financial conditions of the spouses, results in unhappiness. A girl brought up in comfort or luxury may find it hard to live with a husband whose means are very limited so that she shall have to live in a way which she is not accustomed to, and may have to experience great hardships on that account. Such a marriage may end in misery and unhappiness. The Hanafi jurists, therefore, explain that wealth contributes to the prestige of a family while poverty lowers its esteem.

According to a report, both Abu Hanifah, (Rah) and Muhammad (Rah) hold that the financial soundness of a man is to be

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64 Ibid. p. 331.
considered in general because a man may be capable of paying both the dower and the maintenance of the wife and yet may not be the equal to a wife possessing a large property. They consider wealth confers superiority and poverty causes loss of prestige. Imam Yusuf (Rah) on the other hand says that wealth is not to be taken into consideration, as it is an unstable thing that may be acquired in the morning and lost before night.

There is a difference of opinion as to whether a husband will be considered to be wife’s equal if he is able either to pay the wife’s dower or to maintain her, or that he should able to meet both the liabilities. Abu Yusuf holds that the ability to pay the wife’s dower is not necessary condition of equality. He will, therefore, be considered wife’s equal, if he is able to maintain her. His reasoning is that payment of dower can be delay, but the payment of maintenance cannot. Abu Hanifah and Muhammad (Rah) do not agree with the view expressed by Abu Yusuf. They contend that the husband should be able to meet the liabilities so as to be the wife’s equal in wealth.\textsuperscript{65}

The Prophet (SAW) is reported to have said, “A woman is contracted into marriage for four consideration, namely, (i) wealth, (ii) position of her family, (iii) beauty and (iv) virtue, but you must give preference to virtue.”\textsuperscript{66}

(e). COMMENT:

From the above discussion the fact becomes clear that the Hanafis have led great emphasis on the elements of Kafat whereas the Malikis look at it with less strictness. The later hold, only being non-

\textsuperscript{65} Hedaya Vol. II p. 320
\textsuperscript{66} Wali al-Sin al-Khtib: Mishkat al-Masbih, Delhi, 1350 A.H., vo. ii, p. 267.
Muslim and suffering from particular physical defects to be the causes of inequality. The element necessary that is Islam is common among the entire jurist. Imam Shafeyee does not hold lineage and wealth to be the factors of kafat. It so appears that he prefers Islam with its total religious demands as essential and rejects wealth form being included in kafat because of its constant fluctuating nature.

The kafat, in fact aims at creating love and harmony in the lives of the spouses. The harmony cannot be achieved unless the husband is equal to the wife in most of the things. Hence, limiting the elements of social equality (kafat) shall be inexpedient. The Hanafis point of view in principle, appears to be more appropriate, but its practical application in modern times is proving somewhat difficult.

Here it is, necessary to mention that social equality is not a legal condition for the lawfulness or validity of marriage. Consequently Caliph Umar(Raz) Abdullah b Masud, (Raz), Umar b Abdul Aziz (Rah) Ubayd Ibn Umayr. Hammad Ibn Abi Sulayman, Ibn Awn, Imam Malik (Rah) Imam Shafeyee(Rah) and others are not convinced that social equality is an absolute condition in a marriage. Abu Hasan Karkhi and Abu Bakr Jassas of the Hanafis too do not give importance to kafat in the matter of marriage.67

v). MODERN LEGISLATION:

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67 The traditions in respect of kafat that have been quoted by Bayhaqi in his book, " Al-Sunan al-Kubra" excepting one narrated from 'Ali, have been held by Bayhaqi himself to be weak and not worth citing in proof (Raddul Mukhtar Vol. II p. 136).
Modern Legislation on the subject in several Muslim countries is given below:-

I). EGYPT:

In some Muslim countries equality in marriage in certain respects is still considered of great importance. In Egypt spouses should be equal in lineage religion property, piety and profession or social status.

II). TUNISIA:

The rule has however, been abrogated in Tunisia.

III). JORDAN:

Under the Jordanian Law, two person cannot become husband and wife if the difference in their age exceeds twenty years, except with the permission of the Court, which can be obtained only if:

(i) The consent of the party who is younger in age has not been procured by compulsion, and

(ii) The proposed marriage should not be prejudicial to the interest of the younger party.\(^{68}\)

(iii) It is essential for the validity of a marriage that the husband should be equal to his wife in financial status and this means that he should be able to pay her dower and to provide maintenance.\(^ {69}\)

(iv) Equality is to be considered at the time of marriage and subsequent imbalance thereof has no effect on marriage.

(v) If the husband is not equal to his wife the Qazi may dissolve the marriage before the discovery of pregnancy.\(^ {70}\)

IV). SYRIA:

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\(^{68}\) Article 21 Qanunal Ahwal al Shaksiya of Jordan

\(^{69}\) Ibid Art 22

\(^{70}\) Ibid Art. 27
Equality in Marriage: It is essential for the enforceability of a marriage contract that the man should be equal to the woman.\(^1\)

Where a girl contract herself into marriage without her guardian’s consent, the marriage shall be valid if the husband is equal to her; if he is not, the guardians can demand dissolution of the marriage.\(^2\)

Only a woman and her guardian can object to her marriage on the ground of inequality of the husband.\(^3\)

If the wife has become pregnant the right to annul the marriage on the ground of inequality shall be extinguished.\(^4\)

Equality shall be ascertained at the time of marriage: its subsequent disappearance shall have no effect.\(^5\)

V). MORACCO:

(a) Only the woman herself or her guardian can seek annulment of her marriage on the basis of inequality of the husband.\(^6\)

(b) ‘Equality’ is to be assessed at the time of marriage and shall be ascertained in accordance with custom.\(^7\)

It is only the woman herself who can object to any disparity of age beyond the customary limits between her and her husband.\(^8\)

After examining the Quranic verses and the words and acts of the Prophet (SAW) one may come to the conclusion that Kafat in marriage contract is in itself no condition for the lawfulness or validity of the marriage contract, though it may be advantageous. Its application in the present times is very rare.

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1 Art 26 Qanunal Ahwalal Shaksiya of Syria
2 Ibid Art 27.
3 Ibid Art. 29
4 Ibid Art. 30
5 Ibid Art 31.
6 Art. 14. (a) Qanunal Ahwalal Shakhsiya
7 Ibid Art. 14 (b)
8 Ibid Art. 15
vi). IMARATE SHARIA VIEW:

In Rafea Khatoon V. Abdus Sami the plaintiff said that she was married with the defendant. There was normal relation after marriage but after some times it was revealed that the defendant belongs to Kalal Caste while she was Syed. So, her marriage should be dissolved. In the proof, the hear say evidence had been brought which was not enough to prove the case.

On the other hand the defendant never misguided the plaintiff. What he told her earlier was saying again that he was Shaikh Siddiqi.

The Qazi took one by one the entire points & discussed in detail. The Qazi held that the lineage is not relevant in the non-Arab territory. So it is immaterial that to which caste the parties belong. The allegation of the plaintiff that the defendant acted in a drama club, which lowered her prestige, was also rejected mainly due to the reason that she was also an expectator in such drama.

In the last the Qazi held that the real matter of demand of dissolution was dowry. Before the marriage the defendant was student of Engineering. It was settled between the parties that the expenses of the studies of the defendant will be met by the plaintiff's father. But the amount offered, was less, due to which the defendant discontinued his studies and he could not take the degree of Engineering. To escape from the real cause the matter of lineage was raised.

The Qazi had condemned the greed of the dowry and rejected the petition of dissolution. Here the Qazi has used his inherent power and solved the matter in the light of true Islamic provisions, leaving the boundaries of Schools. Although at every point he quoted the Fiqah book.

In Alima Khatoon V. Mohd. Idrees the plaintiff said that her marriage was held during her minority by her father. Later on it was
revealed that the defendant was not of the lineage, which was told by the father of the defendant. Since the marriage was held during her minority, and consummated also during such period she was exercising the option of puberty.

The Qazi rejected the petition of the plaintiff saying that the marriage made by the father could not be dissolved by the wife. For this he quoted Shami as the source. The lineage of the defendant was not disproved by the plaintiff. So the petition of dissolution was rejected and the Qazi made order of rukhsati.

Here the lineage was decided according to the Islamic provision but the plea of the option of puberty was rejected on the weak sources i.e. other than the primary sources of Islamic law.

8. DISSOLUTION ON ACCOUNT OF OPTION OF PUBERTY

The right of a minor boy or girl, on attaining puberty, of repudiating their marriage got contracted by their guardians during their minority, is called the option of puberty.

The minor girls on attaining puberty have the right of exercising their ‘option of puberty’ and repudiate their marriage got contracted during their minority by their guardians, including their fathers and grandfathers.

(1). HANAFI VIEW:

According to Hanafi school except Imam Yusuf(Rah) there is consensus of opinion that the marriage of minor boys or girls, got

79 Nazim Sunni Dinyat, A.M.U., Aligarh
80 Maulana Ashraf Ali Thanvi has discussed it in detail in his book Hilatun Najiza pp. 98-104
81 According to Abu Yusuf a minor boy or girl has not got the option of puberty whether the marriage has been contracted by her father or grandfather or any other guardian. If, however, the marriage has been contracted with an unequal or the dower that has been settled upon is less than the proper dower, then, according to Abu Yusuf and Muhammad the minor girl, on attaining her age of majority can exercise her right of the option of puberty.
contracted during their minority by their guardians, other than their fathers or grandfathers, may, on their attainment of majority, be repudiated by them.\textsuperscript{82}

(2). MALIKI VIEW:

According to Malikis, father is only has the right of guardianship in marriage of their minor children, the question of exercising the option of puberty in the marriage got contracted by any guardian other than the father does not arise. Marriage got contracted by the other guardians are invalid.

(3). SHAFEYEE VIEW:

The view of Shafeyees are similar to that of Malikis. However, grandfather has also got the right like father provided father is absent.

Although the scholars of Hanafi School are unanimous on the point that the option of puberty as a matter of pure right cannot be exercised in case of marriage got contracted by the father or grandfather, Imam Yusuf (Rah) and Imam Muhammad (Rah), are of the view that a girl, after attaining her puberty, can exercise her option of puberty in case she has been married on an insufficient dower, or with a socially unequal person inspite of the fact that her marriage was got contracted by her father or grandfather. Imam Abu Hanifa (Rah) is against the right to exercise the option of puberty for the purpose of invalidating such marriage on the ground of mere non-equality or insufficiency of dower.

In this connection Abu Hanifah and other Hanafi jurists rely on two contentions. One is based on the tradition of the Prophet (SAW) and the other on the rule of \textit{istihsan}. The contention based on the tradition is

\footnote{\textit{Fatawa Qazi Khan ;}, Vol. I, p. 166}
that the Prophet (SAW) married with Ayeshah(Raz) on five hundred dirhams as dower. The marriage was got contracted by her father during her minority. Likewise, Prophet (SAW) himself got his daughter Fatimah (Raz) married with Ali (Raz) on four hundred Dirhams as dower. In both these cases the dower was less than the proper dower. Inspite of it none of them exercised the right of option of puberty.

It is submitted that the argument of these jurists, based on the facts that Prophet, (SAW) married with Ayeshah, and Ali married with Fatimah on less than the proper dower and inspite of that none of them (i.e. Ayeshah or Fatimah) exercised the right of the option of puberty, is not sound. The option of puberty is an optional right; it may or may not be exercised. The non-exercise of the right does not negate its existence at all. It cannot be concluded from the Tradition that Ayeshah or Fatimah (Raz) wanted to exercise the right of the option of puberty but could not do so as the marriages were contracted at the instance of their fathers.

The second argument of the jurists that is based on istihasan is that a father has perfect affection for his children. His guardianship, therefore, is also perfect. He is better suited to guard and take of the rights and interests of his children than the children themselves or any one else. As a father understands the interest and benefits of the children better than the children themselves because of his abundant and solicitude for his children and on the basis of his exercising perfect guardianship over them, it will, as a result, follow that a father or grand father gets the children married keeping all their privileges interests and rights in view. Therefore, the marriages got contracted by them (father or grandfather) ought to be made binding and so effective that it cannot be repudiated by the exercise of the option of puberty.\(^4\)
The above argument that the marriage got contracted by the father or grandfather has been made irrevocable due to their absolute regard for their children and the marriage contracted by other guardians has been made liable to repudiation because of their lesser love is, to mind, unsound due to two reasons: Firstly there is not religious basis of such discrimination, and secondly father and grandfather have as complete a love for their major daughter as they have for minors. If they on their own account get their daughters contracted into marriage why should it be held, as ineffective?

In fact, the argument of the jurists that the father (or grandfather at his place) has greater love than the other guardians for the minor, and their guardianship is perfect hence the minor cannot be given the option of puberty, has no religious basis. The argument depends on pure rationalisation and presumption based on human nature and experience of the time. It is possible that Abu Hanifah and his contemporaries in the light of their experiences were of the view that a father would never act against the interest of his minor children. But due to prevailing conditions the legislature of a country comes to the conclusion that honesty and trust have become a rarity and people are using their discretion wrongly and improperly, its thinking shall then be different from Imam Abu Hanifa (Rah). In England till 1883 a father could freely sell his children. Legal restraints were therefore imposed.

(4). JUDICIAL TREND:

In India till, 1939 the marriages contracted by the father or the grandfather, as guardian could not be got annulled by the exercise of option of puberty. But under the Dissolution of Muslim Marriages Act (VIII of 1939) provisions of Muslim Law relating to suit for dissolution of
marriages by women married under Muslim Law were consolidated and clarified. The wives got contracted into marriages by their fathers and grandfathers or other guardians were treated at par and declared entitled under section 2 sub-section 7 to obtain decrees for dissolution of marriages from Courts through their exercise of option of puberty. In the result, whatever distinction in connection with the right of option of puberty in marriages got contracted by fathers, grandfathers and other guardians and been recognised in the earlier decisions of the Indian Courts disappeared by virtue of this Act which is being fully implemented since then.

(5). **IMARATE SHARIA VIEW:**

The view of Imarate Sharia regarding the option of puberty is in accordance with the view of Imam Abu Hanifa (Rah.). The marriage made by the father and grand father can not be dissolved by the option of puberty by the wife. If the marriage was made by mother, grand mother or other than father and grand father the marriage would be dissolved on the option of the wife. In the case of *Alima Khatoon V. Mohd. Idris*, the Qazi held that the marriage made by the father couldn't be dissolved on the option of puberty of the wife.

9. **DISSOLUTION ON ACCOUNT OF ENIMITY CRUELTY OF THE HUSBAND:**

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83 Rehman p. 469  
84 For details see supra notes  
85 Fatawa Imarat p. 171  

244
Allah in the Holy Quran says, "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.

At another place, He says, "If ye fear a breach, between them twain, appoint (two) arbitrators, one from his family and the other from hers. If they wish for place. Allah will cause their reconciliation."

The question arises as to who are the addressees in these verses? -

The first verse asks the couple to act in reconciliation. In the second verse addressing the officials of the State, Allah says, "If you find disagreement between the couple it is incumbent upon you to appoint one arbitrator from the families of each of the couple, with a view to bring about reconciliation in them." It is written in Tafsir Tabri, through the narrative of Sayeed b. Jubayr (Raz) that the verses are addressed to Amer. Imam Jassas has, as narrated by Suddi, written that the verses are addressed to husband and wives. But, to be more correct, it is the leaders of the community or the officials of the State that are addressed by the words, In khiftum i.e. if ye fear. This (second) Quranic verse has in the background that social order of the Arabs wherein no regular media for dispensing justice was established by a sovereign less society; rather the tribal heads themselves settled disputes arising between the individuals of their tribes. Hence the word, Khiftum in this (second) verse firstly means Officials of the State appointed for the purpose i.e. Qazis.

On a study of the above Quranic verse it appears that in this (second) verse the apprehension that requires the appointment of arbitrators is that of disagreement (Shiqaq) between the spouses. The literal meaning of the word, Shiqaq is discord. It has been derived from the word, Shiq that means direction. As the husband and the wife due to
discord between them stand oriented in two directions, the Holy Quran describes the situation by the word, *Shiqaq*.

From the words, “*in urida islaha*” in the above verse, the intention of both the arbitrators is meant; this is according to Ibn Abbas and Mujahid (Rah). That is to say, if both the arbitrators intend reconciliation, Allah would bring about harmony in the couple. Some people assert that by these words the intention of the couple is meant. If they (husband and wife) intend to remedy the situation and tell the arbitrators the truth. God shall bring about reconciliation between them.³

(1). THE MEANING OF *HAKAM*:

The term *Hakam* that has been used in the above verse stands for several meanings. In general, it means Official or a Judge or an Arbitrator. Its literal meaning is to forbid as stated by Ibn Abbas.⁵ Imam Raghib in his famous work, *Al-Mufradat Fi Gharib al-Qur’an* has said that the real meaning of *hakam* is to restrain something with a view to reform it.⁷

(2). SHAFEYEE VIEW:

Imam Shafeyee has said, “If the husband and wife be apprehensive of dissension amongst them and take their case to the official, it is incumbent upon him to depute wise and patient arbitrators, one from husband’s family and the other from wife’s family, to enquire into the real cause of dissension and bring about a settlement between them. It will not be valid for them, even if they consider it proper, to pass order of separation between them except when the husband empowers them to do so. Nor can they give way on the wife’s property (i.e. nor can
they get *Khula* effected between them). If the husband and wife are reconciled it is incumbent upon the official to pass such order that should emphasise the spiritual, pecuniary and ethical rights of each against the other.

Allah has said that if they have the intention of improving their relations, Alah shall bring about agreement between them. Allah has not said that separation shall be effected between them. The official concerned, however, has been authorised to enquire of the husband and wife whether they agree to the decision of the arbitrators and whether they give them the right of effecting separation. If the husband gives them that right and both the arbitrators consider it advisable they may, effect separation between the couple. The couple, however, shall not be compelled to give that right to the arbitrators.\(^\text{11}\)

• In another book of Shafeyee *fiqh*, *Al-Mughni al-Muhtaj* it is written that apparently arbitrators (*hakams*) are representatives.\(^\text{12}\)

(3). HAMBALI VIEW:

In a book of Hambali *fiqh*, *Al-Insaf* it is said that the correct view of Hambali school is to the effect that arbitrators are the representatives of the couple. They are not deputed without their (husband and wife's) consent and without being made their representatives.\(^\text{13}\)

Imam Ibn Hazam, accordingly, writes in his book, *'Al-Muhalla'*, the two arbitrators have no right of getting separation effected between the couple, neither by *khula* nor by any other means”.\(^\text{86}\)

(4). THE OTHER VIEW:

The second group of jurists is convinced of the authority of the arbitrators to get the separation effected the couple in the event of their
failure in bringing about reconciliation between them. The names of Said b. Musayyib, Said b. Jubayr, Shabi, Imam Malik and Imam Awzai (Rah) are stated to be included in this group. An assertion of Imam Shafeyee is in consonance with the same and one of the two assertions of Imam Ahmad b. Hambal is also said to be in agreement with it. But the final opinions of Imam Shafeyee and Imam Ahmad b. Hambal are that the arbitrators have no power of getting dissolution effected without receiving such authority.

Ibn Rushd stating the rule of conduct of Imam Malik writes that arbitrators have the authority for both the things i.e. either bring about reconciliation or dissolution.

(5). MODERN LEGISLATION:

The view in other Islamic countries in this respect is as under:

I). IRAQ:

Section 40 (1) When one of the couple has complaint of receiving injury from the other on account of which leading life together is impossible, or one of the two has complaint of mutual altercation, that one shall have the right of claiming separation through Qadi (court).

(2) Before the Qadi passes some order it is necessary for him to appoint, if available, an arbitrator on behalf of the wife and another on behalf of the husband with a view to bring about reconciliation between them. If the arbitrators are not available, the Qadi shall instead of these two hakams, authorise the spouses to choose the two arbitrators. If the spouses fail to choose them, the Qadi himself shall appoint the arbitrators.

II). EGYPT:

\textsuperscript{86} The same is written in a book on Ja'fari fiqh “Mukhtulif al-Shi'ah” that the arbitrators have no right to get separation effected without the permission of the couple.

\textsuperscript{87} Qanun al Ahwal al Shakhshiyah, 1959

248
Section 6. When the wife complains of such cruelty of her husband that it is impossible for her to have permanent matrimonial relationship with him, she shall have the right of applying to the Qadi for getting her separated from the husband. On an application made if the Qadi finds the cruelty proved and no possibility of the rectification of the same, he shall get effected an irrevocable divorce to the wife. If the said application is rejected and the wife files the complaint again and the husband’s cruelty is not proved, the Qadi shall, under sections 7, 8, 9, 10, 11, appoint two arbitrators.

Section 7. It is essential that the arbitrator be males, be just and be as far as possible, from the couple’s family. If they be not from the couple’s family they must be well aware of the couple’s circumstances and have the power of belonging about re-conciliation between them.

Section 8. It is essential for the arbitrators to find out the cause of difference between the couple and try to ameliorate the situation. If the amelioration, in ordinary course, be possible they should come to a decision in accordance, with the requirements of the case.

Section 9. When the two arbitrators fail in their attempt to bring about amelioration because of the excesses of the husband or because of the excesses from both sides or because of their not being able to know the correct situation, they shall have the power of getting a separation effected between them (the couple) through an irrevocable divorce.

Section 10. It is incumbent upon the arbitrators that whatever decision they give they must place the same before the Qadi and it is incumbent upon the Qadi to deliver judgment in conformity with the requirements of that decision.

III). TUNISIA:

*Qanun al-Ahwak al-Shakhsiyya (No. 25 of 1929)*

249
Section 25. When one of the spouses complains of the cruelty perpetrated by the other but has no witness for the same and the official by himself finds it difficult to establish cruelty with either of them, he shall appoint two hakams (arbitrators). It shall be incumbent upon the two arbitrators so appointed to make investigation in the case. If they find that they can bring about conciliation between the couple they would do so, but in other cases they shall have to place the matter before the Qadi.

IV). MORCCO :

Section 56. (1) When the wife ascribes to her husband such cruelty that makes intrinsically the leading of life permanently with that husband by a woman of her type impossible, and whatever she ascribes gets proved and the Qadi remains unable to bring about reconciliation between them, he shall pass an order effecting divorce.

(2) When the wife's complaint is rejected and she for the second time files the complaint before the Qadi and fails to prove the same, the Qadi shall appoint two arbitrators with the purpose of bringing about reconciliation between them.

(3) It shall be incumbent upon the arbitrators to find out the cause of difference between the spouses and try to bring about reconciliation between them. If the two arbitrators are unable to bring about reconciliation they shall place the matter before the Qadi who, in the light of their report, shall decide the matter

(Thus under the law of Morocco, the Hakams do not have authority separate the couple.)

V). JORDAN :

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89 Mujkallatul Ahwal al-Shakhshiyah
90 Mudawwanatul Ahwal al Shakhsilya
Section 96. When the wife has complaints of such cruelty of her husband which make the passing married life with him by a woman of her type impossible, she shall have the right of applying to the Qadi demanding separation. The Qadi, after such complaints are proved before him and he fails in his attempt to bring about reconciliation between them, shall appoint two arbitrators, having in view as regards the following matters:–

(a) It is incumbent that the arbitrators be males, just, capable of bringing about conciliation and be, as far as possible, from the family of the spouses, if it is not possible they may be taken from other families.

(b) It is incumbent upon the arbitrators to find out the cause of difference between the couple and to make an attempt at bringing about conciliation between them and settle the matter, if possible, in best manner.

(c) If the arbitrators fail in bringing about conciliation and in that the husband be at fault they shall pass order for separation effected through irrevocable divorce without compensation. If the wife be at fault or the correct situation does not become known, separation shall be got effected between them with payment of a portion of dower that be in conformity with the fault of each of the couple. If the fault be of the wife alone separation shall be got effected on appropriate compensation paid by her. It shall also be incumbent upon the arbitrators to have the compensatory allowance deposited with themselves prior to such divorce (separation).

91 Qunun al-Huquq al-A’ilah
(d) If the arbitrators differ between themselves the Qadi shall appoint other arbitrators in place of them or shall, besides the two, appoint from a third family another person as an umpire.

(e) It is incumbent upon the arbitrators; whatever the conclusion they arrive at, that they must submit it to the Qadi. The Qadi in the light of that conclusion, provided the same be based on the principles of Shari-ah, shall pass appropriate orders.

Section 97. The order passed for separation shall tantamount to an irrevocable divorce.

(Under the law of Islam, the Hakams may decide about separation, but their decision is to be given\ effect to by the order of the Qadi.)

VI. SYRIA:

Section 112.\(^2\) (1) When any one of the couple has complaints of cruelty against the other on account of which their passing of married life together permanently becomes impossible, they shall have the right of demanding separation through the Qadi.

(2) When such cruelty is proved and Qadi is unable to bring about conciliation he shall get separation effected between them and the same shall have the force of an irrevocable divorce.

(3) When cruelty is not proved or on the complaint of cruelty by the husband the Qadi grants time for conciliation, which shall not be less than a month, and inspite of that the husband insists on his complaint and conciliation is not brought about, the Qadi shall appoint two arbitrators from the family of the couple possessing ability on oath that they shall carry out the purpose set before justly and honestly.

\(^2\) Qanun al-Ahwal al-Shakhsiyah, 1953

252
Section 113. (1) It shall be incumbent upon the arbitrators that they find out the cause of difference between the couple and hold their sitting in camera under the supervision of the Qadi, wherein no one shall be present except the couple and the persons summoned by the arbitrators.

(2) The non-appearance of any one of the couple before the arbitrators, inspite of their having notice of it, shall not in any manner affect the orders passed by them.

Section 114. (1) The arbitrators shall attempt to bring about reconciliation between the couple. When the two arbitrators fail in this and find fault either mainly or completely with the husband, they shall pass orders for separation by way of an irrevocable divorce.

(2) If the fault be mainly for completely of the wife, the arbitrators shall pass orders for separation between the couple in lieu of full or part of the dower (if not paid). In case the dower is to be returned it shall be returned to the husband before the Qadi passes the order of separation.

(3) If difference arises between the arbitrators, the Qadi shall, in their place, appoint some other person as umpire, or shall appoint with them a third arbitrator after putting him an oath.

Section 115. It shall be incumbent upon the arbitrators to submit report of their findings before the Qadi, it shall not be necessary for them to give in the report the reasons for their finding. If the report is proved to be in order it shall be incumbent upon the Qadi to give his decision in accordance with the same.

(6). IMARATE SHARIA'S VIEW:

In Nuzhat Jahan V. Tufail Ahmad the plaintiff said that her marriage with the defendant was made eight years before the petition of
dissolution. The 1st three years of marriage were happy but after that the defendant started cruel treatment. She was beaten, unprovided for and threatened to be stabbed. She was forced to leave her marital home 3 years before and in that period no maintenance was provided to her. The defendant has 2nd wife also who was provided every thing, which was also a discrimination against her. So her marriage should be dissolved.

The defendant said in the written statement that she was not indulged in immoral activities but was also not allowed to meet her mahram relations. The allegations were wrongly implicated on him. However he beaten his wife sometimes in the way of entertainment.

The excesses of the defendant were corroborated by the witnesses. He (the defendant) himself accepted the beating.

Thus she was subjected to excesses of the defendant and kept unprovided and uncared which makes her pray reasonable. So the Qazi dissolved her marriage due to cruel treatment of the husband. The cases of Rashida v. Sulaiman, Khadija v. Habibur Rehman, Najma v. Saleem, Shahjahan v. Sharfuddin, Farzana v. Razi Ahmad and Bibi Kariman v. Mehboob Ali were also having similar nature and the marriages were dissolved by the Qazis of Imarate Sharia. In the last case the Qazi held that where the husband had beaten his wife only once or even abused her, she is entitled for dissolution. For this he had quoted the Maliki School.

10. DISSOLUTION ON THE GROUND OF TOUCHING, SEEING NAKED BODY WITH DESIRE (MUSAHIRAT):92

It is commanded by the Almighty Allah (SWT)

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92 Maulana Ashraf Ali Thanvi has discussed it in detail in his book HilatunNajiza pp. 91-97
"And marry not women
Whom your fathers married, —
Prohibited to you—
Your wives mothers;
Your step daughters under your
Guardianship, born of your wives.
To Whom ye have gone in, -
No prohibition if ye have not gone in ; -
Wives of your sons proceeding
From your loins; 93"

Thus the ascendants and descendents of the spouses are
prohibited for marriage except where marriage has not been
consummated. 94

93 Holy Quran S 4 A 22,23
The prohibition also observed where illicit relation is established.95

(1). HANAFI VIEW:

The prohibition of affinity is established by sexual intercourse, whether it be lawful or apparently so, or actually illicit. When a man has committed fornication with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grandfathers, how high soever, and to his sons, how low soever.

As this kind of prohibition is induced by sexual intercourse, so it is also occasioned by touching a woman with the hand, or kissing her or looking on her nakedness with desire, whether it be done by right of marriage or of property, or unlawfully, and whether she be a step-daughter or not, for there is no difference in this respect. And if a woman should look on the nakedness of a man, with desire, or touch him with desire, prohibition by affinity would, in like manner be incurred, and her mother and daughter would be rendered unlawful to him. Lying together with desire is equivalent to kissing, and so also is mutual embracing. Desire is necessary in all cases, and prohibition is not incurred by looking on, or touching all parts of the body, except when done with desire.

With regard to touching, the prohibition is equally established, whether it be intentional, or inadvertent, or compulsory, or even in sleep, and apparently whatever part of the person be touched. If a man has touch with his hand the hair of a woman, prohibition would be established without doubt. If he has touched her nail with desire prohibition is

94 Tyabji pp 116-159
95 Hedaya. Vol.II p113

256
established. It is assumed that there are no clothes between the parties, and if there be a cloth between them so thick that the person touching cannot feel the temperature of the other’s body, prohibition by affinity is not established, however much desire may be excited, but if the cloth be so fine that the warmth of her body can be felt by his hand it is established. So also if his hands were applied to the sole of her boot, unless it be so hard as to prevent his feeling the softness of her foot. And when a man kisses a woman with a cloth between them, but is sensible of the cold of her front teeth or of her lip, that is a kiss; and the case is the same with regard to touch. A prolongation of the touch is not necessary; hence it has been said that if a man touches a woman, with desire, and he touched the nose of her daughter, and his desire were increased, the mother would become unlawful to him, though he had withdrawn his hand on the instant. But it is a condition that the female touching be not old enough to have desire. And the fatwa is in favour of nine years as the age of desire, and nothing under it. Even actual connection with a female child so young as to have no desire does not occasion the prohibition of affinity. But though a woman has passed the age of desire, she may still give occasion for this prohibition. Desire in the male is also a necessary condition, so that actual connection by a boy of four years old would not induce the prohibition of affinity. While if a boy be of an age that usually admits of sexual intercourse, such intercourse by him is the same as by an adult person. Such a boy is described as one who desires and is desired of women. Desire must in all cases be simultaneous with the touch or sight. If these occur first without desire, and desire is afterwards excited, prohibition is not incurred.
The existence of desire in one of the parties is sufficient, but it is a condition that it shall not diminish at the time of touching or seeing, for if it do so the prohibition by affinity is not incurred.

If a man acknowledges that he has incurred the prohibition by affinity he is to be taken at his word, and the parties are to be separated. And the rule is the same though he should ascribed its occurrence to a time previous to his marriage, as, for instance, if he says to his wife, “I had connection with your mother before your marriage”, he is to be taken at his word, and they are to be separated; but he is not to be credited so far as regards the dower, and is accordingly liable for the whole amount specified or agreed upon. When a man kisses or touches a woman, or sees her nakedness, and then says it was not with desire, until it be proved that the act was done with desire; for desire is implied in kissing, but not in touching nor in seeing the nakedness. This, however, is only when the touch is on some other part of the person than the actual nakedness, for otherwise the assertion is not to be credited.

(2). IMARATE SHARIA'S VIEW:

Imarate Sharia follows the Hanafi rule regarding this. However difficulty arises when the wife fails to produce the witnesses. In this situation Qazi gets no authority to dissolve the marriage but the woman is advised not to have relation with the husband. She is also advised to take khula from him.

In *Mst. Hafizun V. Mohd. Farooque* the plaintiff made a petition for dissolution of her marriage on this ground. She told in the plant that her marriage was made with the defendant 8 years before the petition. After 5 years of the marriage she was subjected to the varieties of excesses. She was, often beaten by the defendant’s parents and sister.
Once the defendant's father, as he was trying earlier, cohabited with her. So her marriage was to be dissolved from the defendant as she was not lawful for the defendant due to *musaherat*. The witnesses corroborated her statement including the confession of the defendant in the *panchayat*. The witnesses also corroborated the fact of punishment of boycott of the defendant and his father by the *panchayat*. The defendant on the other hand denied the allegations and requested the soli hearing that was accepted and notified. But he could not come to negate the allegation before Qazi. The Qazi mentioning 'Bahrur Raiq' Vol. 2 p. 107, *Shami* p. 279 and *Durre Mukhtar* Vol. 2 p. 279, 283 held that if there was *musaherat*, the parties were not allowed to marry and if married they could not continue the same. Since the confession was proved by the witnesses the dissolution was ordered by the Qazi.

In *Bibi Jameela V. Jalaluddin* the plaintiff made a petition stating that the defendant's (her husband) father made intercourse with her so her marriage with the defendant was to be dissolved. She produced four witnesses who were unanimous in saying that the defendant had accepted the intercourse of his father with the plaintiff. The Qazi quoting Durre Mukhtar held that if husband acknowledge the intercourse of his father then the marriage will be dissolved. There the husband acknowledged with four witnesses and the condition was fulfilled. So the marriage was dissolved by the Qazi.

In *Hafizan V. Kamaluddin* the plaintiff made a petition for dissolution on the ground of *Musahirat*. She stated in the plaint that the defendant's father (i.e. her husband's father) had made illicit relation with her and in that way she was not lawful for the defendant. But in the oral statement at the time of hearing she told that the alleged person only slept
at her bed embraced her. There was no intercourse. The witnesses of the
plaintiff say that the defendant had accepted the sleeping of his father with
the plaintiff. But both the witnesses were considered insufficient to
establish *musahirat*. The allegations of the defendant that she wanted to
have relation with another person. It was that who suggested her to make
that allegation. But again the defendant failed to prove his allegations. So
the Qazi refused to dissolve the marriage and ordered for *rukhsati*.