CHAPTER - 9
DEVELOPMENT OF MUSLIM PERSONAL LAW AND IMARAT

"साहित्य संगीत कला विहीनः
साक्षात पशु पुच्छ विषाण हीनः"
कालीदास
donahue

"One who is not aware with Instrument, Arts and Literature, he is animal although not having the tails and horns"
Figure Showing the Opinion About the Satisfaction with the Working of Imarate Sharia

Opinion of the Persons Associated with Imarate Sharia
Opinion of the Advocates/Jurists
Opinion of the Disputants
Opinion of the General Public
Opinion of the Ulema
Graph Showing the Opinion as to How Much Cooperation Imarate Sharia is Getting

from the following

Opinion of the Persons Associated with Imarate Sharia

Opinion of the Advocates/Jurists

Opinion of the Disputants

Opinion of the General Public

Opinion of the Ulema
Graph Showing the Opinion About the Effectiveness of Executing Measures of Imarate Sharia

Opinion of the Persons Associated with Imarate Sharia

Opinion of the Advocates/Jurists

Opinion of the Disputants

Opinion of the General Public

Opinion of the Ulema
CH-9: ROLE OF IMARATE SHARIA IN DEVELOPMENT OF MUSLIM PERSONAL LAW

1. INTRODUCTION:

Development of Muslim Personal Law means to give Islamic colour to any rule, regulation, by law or legislation, which may have connection with personal law. To give Islamic colour means the rule and regulation of the Holy Quran and the Tradition of the Prophet should prevail. Muslims believe that Quran is revealed knowledge and wordings of Allah (SWT). It is the first and foremost sources of Islamic Law. In the Holy Quran the Almighty Allah has revealed to follow Him and His messenger. He commands

$\text{"Say: "Obey Allah} \text{,} $

\begin{align*}
\text{قُلُ أَطِيعُواَ اللَّهَ وَآلِيَتَينُ وَأَلِمُ الْحَرَامَاتِ فَإِنَّ اللَّهَ لَا يَغْفِرُ لِلْمُشْرِكِينَ.}
\end{align*}

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$\text{وَأَطِيعُواَ اللَّهَ وَآلِيَتَينَ لَمْ يُكْسِرْنَ شَنْعُونَ}

بِشَاءِ اللَّهِ وَمَا خَلَقْنَاكُمْ إِلَّا لِيَشْعُرُواَ
And His Messenger"

Thus it is clear that in Islam one is to follow the commandments of Allah (SWT) and His messenger.

Apart from this there is provision of following Ameer (head) also.

Allah (SWT) has commanded -

"Oye who believe! Obey Allah, and Obey the Messenger, And those charged With authority among you."\(^2\)

The word ‘charged’ also includes ‘faqih’ or ‘jurists’ but where there is difference amongst the persons. Allah commands -

"If ye differ in any thing Among yourselves, refer it To Allah and His Messenger, If ye do believe in Allah And the Last Day: That is best, and most suitable For final determination."\(^3\)

\(^2\) Ibid S.4 A59

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Maulana Mohammed of Juna Garh is of the view that the commandment of Ameer or Faqih is to be followed only when that is in consonance with the commandment of Allah and the Prophet. If the incharge is following the different view the subjects are under obligation to correct him and he is also commanded in the above verse (ayat) to submit him before the commandment of Allah and the Prophet (SAW).

2. MODES OF SUBMISSION:

Once a delegation of the companions of the Prophet was sent. Prophet (SAW) reminded the delegation to follow their Ameer. The Ameer at one place ordered to collect the wood and torch, which was done. He further ordered the mamurin (Companions of the Prophet upon whom he was Ameer) to jump in that fire one by one. Some persons agreed to follow while another group defied the order. On return, the story was reported to the Prophet who appreciated the defiance saying that no instruction is to be followed, which is made against the commandment of Allah (SWT), and what Prophet says that is the commandment of Allah.

Ibid


Abdul Matin Maimin ‘Hadith Khair wa Shar’ (Bangalore : Darul Hadithia).

*Nor does he say (aught)
Of his own Desire*
If there was any order or practice of the Ameer against Quran or Tradition in the time of companions, the Ameer was informed about the correct thing e.g.

1. Caliph Abu Baker (Raz) had ordered not to include the grand mother in the list of inheritors who later withdrew his order when he heard the Tradition by Mughera bin Shoba and Mohammad bin Muslina.  

2. Caliph Umar (Raz) ordered the fixation of dower. When an old woman objected citing S.4 A20. Upon which Caliph Umar (Raz) did not fix the dower.

Thus it is clear that Ameer or jurist is to uphold the commandment of Allah and the Prophet. Where there is deviation from this, the order of the Ameer would be temporary and worth rejection.

3. MUSLIM SCHOLARS AND DEVELOPMENT OF MUSLIM PERSONAL LAW:

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It is not less than Inspiration sent down to him.” (S.53 A.3,4)

7 Memon, p. 141.

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وإِنَّ أَرْدُنْ مِمَّا بَدَّلْتُ مَعْلُوْمَتِ الزَّوْجَ مَعْلُوْمًا مَكَّانَ زَوْجًا وَعَلَّطِيْسَمُ إِحْدَاهُمُ

قَنْطُرًا فَلَا تَأَخْدُوْا مَنْهُ شَيْئًا أَتَأَخْدُوْنَهُ بِهِتْنَا وَإِنَّمَا مُرْسِيًا

"But if ye decide to take
One wife in place of another,
Even if ye had given the latter
A whole treasure for dower

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A group of Ulema say that this is the time of Taqlid (only to follow). They give the following arguments as S.M.A. Habibi writes\(^9\):

1. Biasedness of the persons.
2. Quzat's Taqlid is preferred by intellectuals.
3. Codification of law on the basis of Schools.
4. Lack of depth of knowledge in the later scholars.
5. Vast knowledge of early Islamic scholars.

But the same author has collected the opinion of Dr. Sir Mohd. Allama Iqbal, Dr. Mustafa Ahmad Zarqa, and Shia view for continuation of ijtehad and has suggested the practicality of ijtehad. Any way the establishment of four schools is a fact. Although the scholars criticise its establishment but the majority of the persons follow it i.e. Hanafi school, Maliki school, Shafeyee school and Hambali school. In India mostly persons are descendants of followers of Hanafi school. But the question arises from amongst the important faqih or Mujbahid in Hanafi school, who is to be given more weightage. It is advisable to begin by explain the rules for the determination of the relative weight to be attached to the opinion of the learned Mujtahids. The word Mujtahid is defined in Talvih, which is a recognized book on the Muslim Law.

"A Muslim, wise, adult, intelligent by nature, well acquainted with the meaning of Arabic words and mandatory passages in the Quran, learned in the Traditions of the Prophet found in text-books or orally reported, as well as those which have been abrogated."

\(^9\) Syed Ahmad Mein Habibi. 'Islam ka Nizame Qanoon' (Aligarh: A.M. University), 1964, pp. 115-123.

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In Kahastani it is written

"Where the learned say that a Qazi has power to give an opinion in respect of a particular thing, the word Qazi means a Qazi who is a Mujtahid, and a Mujtahid is defined to mean a person who knows the Holy Quran and the Hadis well, and is competent to draw inferences from the words of God and the sayings of the prophet.'

There is no distinction between a Mufti and a Qazi according to the opinions of the learned. The following passage in Tahtavi also supports this view.

"The purport of the saying alluded to by Sheikh Kasim in his book named Tashih is that there is no distinction between ‘Kazi’ and ‘Mufti’.”

He further says, “Imam Abu Yusuf has said, that giving a fatwa is not permissible to any one but a Mujtahid. It is said on the authority of Fathul Qadir that all the jurists are strongly of opinion that Mufti and ‘Mujtahid’ are one and the same. One who is not a Mujtahid but only recollects the sayings of Mujtahids cannot be a Mufti.

Imam Abu Hanifa, styled the Great Imam, was the acknowledged founder (master) of the Hanafi school. Out of his numerous pupils only forty were looked upon as Mujtahids; but four alone among them were preeminent. They have been arranged as follows by some of the writers according to the degree of their preeminence:

1. Abu Yusuf
2. Mohammad
3. Zafar
4. Hasan Ibne Ziad
"A mufti should give his final *fatwa* in accordance with the above *Ulema* if they agree; but if they differ the learned are not agreed as to the course which is to be followed by the *Mufti*. The most approved doctrine is that a *fatwa* should generally be given in accordance with the opinion of Imam Abu Hanifa. This opinion is also supported by the *Sirajia* and other books. The opinion of Abu Yusuf should be next acted upon, and then that of Mohammad then of Zafar and Hasan Ibn Ziad."

In *Kitabul Kaza* it is said:

"A Qazi like a *Mufti* should generally rely on that of Abu Yusuf, then Muhammad, then on that of Zafar and Hasan Ibn Ziad. This is the most correct view; and has been held to be correct in *Sirajia* and *Munnia*. *Havikudsi* (which is a famous book) says, that the weight of argument should be considered when there is a difference of opinion. The former should be adopted as a general rule; and no one should adopt a different course unless he is a *Mujtahid*."

_Durrul-Mukhtar_ with reference to *Bahrurraik* declares it to be a weak point, and says that the correct view is that the opinion of Abu Hanifa should be acted upon. Even in case of a difference of opinion it is written, that only when the Qazi or the *Mufti* is a *Mujtahid* he can choose one opinion out of conflicting ones, otherwise there is no authority to do so.

From the judgment of Mahmood, J. in _Abdul Kadir V. Salima_ it would appear that there is some passage in the *Durrul-Mukhtar* in support of the opinion, that in case of disagreement between Abu Hanifa and his pupils, the opinion of the latter should prevail; but there is no such passage in the *Durrul Mukhtar* as Dr. Jung observes.
In commenting on the term *Ikhtiar*, *Raddul Mukhtar* says-

“If one of the two opinions be that of the Imam and the other of some one else, there is no power to give preference to such other opinion over that of the Imam, because when the two dicta conflict they cancel each other; consequently we must revert to the original opinion, that is, give preference to the opinion of the Imam.” In *Raddul-Mukhtar* a reference is made to the *Fatawa Khairia* and *Bahrurraik*. *Fatawa Khairia* says-

“In the opinion of the Hanafi jurists it is a settled principle, that no *fatwa* should be given, and no opinion acted upon, except that of the great Imam. One should not act contrary to his opinion and in conformity with the opinion of Imam Abu Yusuf and Imam Muhammad or one of them or that of any other person except when it is compulsory, as in questions of cultivation. Although it may have been explained by the learned in religion that the *fatwa* is in accordance with the opinions of Imam Abu Yusuf and Muhammad; because the great Imam is the founder of the principles and the first Imam. It is written in *Bahrurraik*, that it is not only allowable but also incumbent that a *fatwa* be given according to the opinion of the great Imam, although it may not be certain upon what authority his saying was based.

Syed Muhammad Amin has referred to the passage in *Fatawa Sirajia* are as follows-

“The *fatwa* should generally be according to the opinion of Imam Abu Hanifa, then according to the opinion of Abu Yusuf, then Muhammad, then Zafar and Hasan Ibn Ziad. Some say that when Abu Hanifa is on one side and Abu Yusuf and Muhammad on the other, the Mufti has the option; but the first opinion is more preferable when the Mufti is not a Mujtahid.”
Consequently when the opinion of Abu Hanifa is on one side and the concurrent or dissenting opinion of his pupils on the other, then if the Mufti or the Qazi is not a Mujtahid, he should pass an order or give his fatwa according to the opinion of Abu Hanifa. He alone is recognized as the supreme master and not his pupils. In the books on Muslim Law there are sayings of Abu Yusuf, Mohammad, Zafar and Hasan Ibn Ziad wherein they themselves acknowledge that they have not originated any principle, that whatever they have said was derived from the sayings of Abu Hanifa, and they say with a solemn oath.¹⁰

There are however a certain number of principles, which are governed by the opinion of the two disciplines, in some eve by the opinion of Imam Muhammad or that of some other disciple of Imam Abu Hanifa. But these are well known cases, and upon which a large number of the learned Ulema and Mujtahids are agreed, and these are specially mentioned in the law books.

There is another mode of determining which opinion is preferable. The learned in fiqh have remarked that texts themselves have preference over their commentaries, and that the commentaries are preferable to the fatwas.

¹⁰ Dr. Jung p. As per Durru-Mukhtar Every one of them used to quote his authority and give it precedence. The saying of no disciple is outside the sayings of the Imam. In Kitabul Zina and the Walwalajiah. It is stated that Abu Yusuf said, that he had not expressed any views differing from Abu Hanifa, except when the latter himself had held them. It is said of Imam Zafar, that he said that he had not expressed any views differing from Abu Hanifa, in any matter except when the latter himself had held them formerly, and then abandoned them. Consequently it indicates that none of the pupils differed from the opinion of Abu Hanifa, but their opinions and sayings were in conformity with the sayings of their teacher Abu Hanifa. At the end of the Havi-i-Kudsi it has been stated of all the principal companions, such as Abu Yusuf, Muhammad, Zafar and Hasan, that they remarked that they had not said anything concerning any principle but that which was in conformity with the sayings of Abu Hanifa, and for this they have taken a solemn oath. Consequently under
There are however a certain number of principles, which are governed by the opinion of the two disciplines, in some even by the opinion of Imam Muhammad or that of some other disciple of Imam Abu Hanifa. But these are well known cases, and upon which a large number of the learned Ulema and Mujtahids are agreed, and these are specially mentioned in the law books.

There is another mode of determining which opinion is preferable. The learned in fiqh have remarked that texts themselves have preference over their commentaries, and that the commentaries are preferable to the fatawa. When two correct sayings conflict, the Qazi or Mufli has power to pass an order according to one of them, and it is not permissible to use this power, when one saying is contained in the text or the commentaries and the other in the books of fatawa, in which case it is incumbent to give preference to the saying in the text and commentaries over that of the fatawa.

When there are two correct sayings on one point, it is lawful to order or give the fatawa according to either of them.

It is expedient that the power be limited to the case where neither of the sayings is contained in the text, as we have said above on the authority of Alberi. And from the argument used in Kaza-ul-Fawait with reference to Bahrurraik it is clear, that when there is a conflict between a text and a fatwa, it is better to conform to the text; and such is the case if the commentaries. The learned in fiqh have said that, which is in the commentaries; and that commentaries are preferable to the fatawa. This is so, when it is specified that both of them are correct or where there is no such specification. But if one doctrine is to be found in the text, and the learned in Fiqh have made no
specification as to its correctness; or on the contrary explained the correct purport of its converse then Allama Kasim is of opinion that the corrected fatwa, should have preference, because the correctness of the one is explained, and the explanation of the other is to be verified and that express correctness is preferable to the implied one.

Again with reference to Anfaul Vasail it is said:

"Saying should be acted upon, which is in the text, because when there is conflict between the text and fatwa, the reliable one is the saying in the text. In the same way, the principles in the commentaries are preferable to those in the fatwa."

SUBMISSION:

It is submitted that the above authorities conclusively show, that the master and founder of the Hanafi school was the great Imam and his sayings are preferable to those of his pupils; none of whom have a right to be termed masters or founders nor the commentaries of the original texts have preference over those of original texts like wise fatwa have no preference over the texts and commentaries. So the Judges who have laid down or followed others in contravening the above principles should now be corrected by the High Courts themselves or by the Judicial Committee. It is dangerous to perpetuate bad Law. The Imarat Sharia, if follows the Hanafi school is also to follow the similar way.

4. ESTABLISHMENT OF IMARAT AND IMARATE SHARIA:

The establishment of Imarat is itself an Islamic act but it must be expanded at all India level. The qualification of Ameer and the role of Imarat have also been discussed in detail in chapters two and eight respectively. The
differences of the Imarats must be met out. There is another Imarat at Sadiqpur, Patna, Bihar; which had been established long before Imarate Sharia. There is one more Imarat known as Idarae Sharia, Sultan Ganj, Patna, Bihar; which was established in early sixties of 20th century. There is need of coordination and co-operation amongst them. It may be like the opinion of the Sahaba\textsuperscript{11} that one Ameer should have been from Ansar\textsuperscript{12} and another from Muhajirin\textsuperscript{13}. But this view was not accepted by the companions (Raz) of the Prophet and Abu Bakar (Raz) was chosen as Caliph. So there is need to establish one Imarat. If it is not done the followers of one institution will criticise the functioning of other (and it happens also). Imarate Sharia says that it is ready to accept any body as Ameer provided Ahul Hil Wal Aqd are agreed over him. But Imarate Ahle Hadith doubts over this. There is also allegation against Imarate Sharia that it follows the secondary sources rather than primary one. Idarae Sharia says that Imarate Sharia is running with weaknesses. There is weakness in the faith of its workers. So they have established another Imarat. But the true Imarat is one, which makes unity. Despite the seniority, Imarate Ahle Hadith has no popularity as Imarate Sharia has. The Idarae Sharia is also not having mass level support in Bihar. So it is the duty of the Imarate Sharia to unite the persons by convincing the other institutions or / and by mass contact.

\textsuperscript{11} Sahaba plural of Sahabi i.e. companions of the Prophet (SAW).
\textsuperscript{12} People of Medina who helped the Prophet and his companions.
\textsuperscript{13} Companions of the Prophet (SAW) who migrated from Mecca to Medina in 620AD.
Marriage is one of the basic needs of human society. Islam considers it as an essential incident. But it never meant that it should be an occasion of extra vagancy or it be treated as burden upon the society. In this field Imarate Sharia has done enormous works. It has published several booklets to get the unIslamic practices uprooted. A mass campaign by Imarate is made against the dowry and its demand. It wants to make this institution very simple which is inconsonance with the Islamic law. It has condemned the campaign of the persons who want to defame the Islamic institution of marriage alleging it as an incidnet of sale. Imarate Sharia sends its own men to look after the fulfilhment of formalities of marriage in his presence provided the parties or at least one of the parties has sent the application for the same.\(^{14}\)

There is variation in the decisions (of Imarat) of the cases having similar issues.\(^{15}\) It might be the cause of not following the case law of its own. However it gives a bad signal on the Imarat’s part. We see that there is legislation\(^{16}\) all over the world extending the age of majority but Imarat has not charged its view. About witnesses in the marriage, the Imarat has developed a good trend of witnesses of locality of weaker sex. However in India under certain circumstances the witnesses of non-Muslims may have

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\(^{14}\) As Justice Mitter had held in \textit{Subrun Nisa V. Subdu Shaikh AIR 1934 Cal.}

\(^{15}\) Please see chapter 3 supra.

\(^{16}\) Please see chapter 3 supra.
been accepted. Because marriage is an essential incident of the social life. It should not be avoided due to lack of proper witnesses. In *Hurmat Musahirat* prohibition is accepted even where there is no marriage. However the Safeyee view seems good as it considers prohibition (* hurmat*) only after marriage and not on touching. The opinion of Hanafi school is really hard and Imarate Sharia has adopted this view, which may be looked afresh. As a whole the campaign of the Imarat to get the marriage solemnized in accordance with Islamic principles is very effective and worth appreciation.

6. DEVELOPMENT OF DOWER AND IMARATE SHARIA:

Dower is a necessary gift from the husband to the wife. In the Holy Quran and Traditions there is no fixed scale of it. It is the right of the wife and she can demand it any time from her husband. But in India the concept of dower debt is prevailing which is afro to Islam. Imarate Sharia seems failed in providing it the Islamic colour. Rather it has flown with the wind of the tradition in such manner that it has held that dower cannot be demanded unless there is dissolution of marriage.

In *Mehrun Nisa’s case*\(^\text{17}\) the defendant’s pronouncement of divorce was proved. But that was *bidai* form of divorce. Meanwhile the amicable solution ordained by the Almighty Allah\(^\text{18}\) was bypassed. It must have been condemned by the Qazi. The defendant went to the plaintiff’s house to bring her with him to her marital home. She refused to go with him, upon which the defendant pronounced the divorce twice in the same sitting. When she

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\(^{17}\) 73-13226-1410 AH

\(^{18}\) See Supra notes 55-63 c h. 41
demanded her dowry property along with dower, the defendant refused saying that his gift should be returned first, after wards he will give her dowry and dower. Upon this the Qazi has cited an Arabic text of *Fatwa Khania*, without the translation and held that what husband gives to his wife is her property and the husband has no claim over that. With due respect it is submitted that the Qazi should have cited verse 229 of sura 2. Thus in this way the opinion of advocates\(^2\) and *Ulema*\(^3\) is corroborated that the Shariat Court is not specific in applying or citing the primary sources of Islamic law.

In the case of *Naseem Haider*\(^4\) the defendant’s divorce was made on 14th of September 1998 by way of trip-\-le divorce. After the waiting period the dower Rs. 21 thousands were paid through the Imarate Sharia. In *Nuzhat Jahan V. Tufail Ahmad, Fahimul Haq V. Maryam Khatoon, Sohrab Qureshi V. Noshaba Khatoon, Sebun Nisa V. Md. Shahadat Husain, Zinal Ara V. Nisar Ali, Mahrun Nisa V. Md. Akhtar and Zeenat Parveen V. Md. Irfan*, the similar orders were made by Imarate Sharia.

Thus we see that there is a general trend of payment of dower after divorce, dissolution which is not appreciable in Islam.

In *Kariman’s case*,\(^5\) the marriage was dissolved by the Qazi due to assault of the defendant. The Qazi had ordered the payment of dower debt after dissolution. Here also the book *Hedaya, Moinul Hukkam* and *Fiqah Maliki* were referred instead of primary sources. It is submitted that the dower

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\(^{19}\) See note 56 chapter 4 supra

\(^{20}\) See Appendix

\(^{21}\) See Appendix

\(^{22}\) 113 - 16788-14119 AH.

\(^{23}\) 248-15931-1416 AH

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is not a debt as has also been held in the cases of Nuzhat Jahan, Sibun Nisa, Zinat Ara, Mahrun Nisa, Syed Hyder Rizvi v. Shahidi Nikhat (16-10295-1402AH) and Bibi Mahjubur v. Ehsan Ahmad (104-16534-1418 AH) but that is right of the wife. Imarat Sharia is a charitable institute and there is no provision of salary and there is lack of adequate staff to help Qazi. It might be the cause of certain difficulties and deviations.

In Zarina Khatoon v. Mohd. Siddique the plaintiff had demanded her dower money. She also alleged that her divorce was completed by her husband. Rejecting her witnesses as being her off springs, the Qazi had held that the order of the payment of dower may be made only after the dissolution of marriage. He had also referred two books Bahrur Raiq and Durre Mukhtar but not the original sources. With humble submission it may be said that dower is the property of the wife and she can demand that any time and the Qazi's decision was erroneous. In a case where there were no proper witnesses about quantum of dower the Qazi had held that the statement of husband will be accepted. Even where the quantum of proper dower was known, husband's saying was relied. Thus it is clear that the nature of dower as considered by Imrate Sharia is in accordance with Islamic law. However the quantum of dower is in consonance with Hanafi view. The term dower debt is the result of the local tradition and accepted by the Imarat in such a way that at one place the Qazi had held that the dower may be demanded only on dissolution of marriage, which seems enormous and has gained notoriety of customary law.

24 Also see Fahmida Khatoon v. Nayarul Haque, 148-11894-1406 AH.
7. DEVELOPMENT OF PROVISIONS OF DIVORCE AND IMARATE SHARIA:

In *Rasulan V. Abdus Subhan*\(^{25}\) the plaintiff was married 14 years before the petition of divorce. She alleged the cruelty on the part of the husband but she could not prove. Again she alleged in the revision petition that the plaintiff had divorced her, so he had lost the right of cohabitation. Seeing the defiance of the plaintiff the Qazi allowed the defendant to go to the Regular Court and issued a decree in the name of the Muslims not to marry with the plaintiff. In the present case the plaintiff should have been given the right to use *Khula* instead of compelling her to join the husband who was already having the 2nd wife. In the plaint she told that she would commit suicide if she was forced to join the husband. In the similar circumstance Caliph Umar (Raz) ordered a husband to divorce his wife. Moreover the Qazi has hinted to go to the Traditional Courts, which is not in accordance with the Islamic principles. The Qazi has also not used the original sources to decide the issues.

In *Saleeman v. Shaikh Shafar*\(^{26}\) the plaintiff married with defendant in the age of 7 years. When she was of 11 or 12 years of age she got a religious divorce (*fatwa*) from a mufti for her 2nd marriage when her husband was unknown for four years and she got a letter also about his death. After second marriage a girl child was born to her. In the mean time the defendant appeared but did not demand her wife and after few months again disappeared for 16 years. When she asked the *fatwa* from the Imarat, the

\(^{25}\) 30-334-1349 AH.

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Imarat considered it a fit case to refer to the Qazi and Qazi held that the 2nd marriage was legal as that was made on the death report of one person which is enough to prove the same as per rule of *Raddul Mukhtar* Vol. II, p. 616 and the Holy Quran S 28 A 22, 125; S 4 A 94. But the appearance of the 1st husband had annulled the 2nd marriage. Since the 1st husband was disappeared for 16 years the marriage with the plaintiff was dissolved. So she would pass the *Iddat* simultaneously. However the Qazi held that the offspring of the plaintiff is legitimate.

It is submitted that the marriage of the plaintiff was made in the age of 7 years when she obtained the religious decree of death of her husband that was the time of her majority. There may be implied option of puberty. The most amazing thing is that the marriage is one of the basic needs of the human. The woman who lived with her 2nd husband for 18 years is not allowed to live with him due to the appearance of the 1st husband who even did not demand the wife and again disappeared for 16 years. For a disappeared person a family is being separated which seems hard. Moreover the plea of the wife that Umar (Raz) ordered for return to the first husband, who was disappeared either wife or dower. But there is no demand from (disappeared) first husband. The Qazi should have considered the view of Caliph Umar. The plea of the plaintiff that Ahle Hadith consider the 2nd marriage legal was not accepted. The Qazi rejected the plea saying that Caliph Umar had taken back his view and Ahle Hadith are not amongst righteous. The *fatwa* of Mufti Kifayatullah was also rejected by the Qazi. Thus we see that the decision of the Qazi is neither having consideration of

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26 7-270-1348 AH.

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public policy nor equity and justice especially when there is provision of continuation of marriage in other schools of thought. The Qazi is not supposed to be prejudice to any school to such an extent that the justice be affected. The consideration of circumstances and a sense to the peculiar situations is must. The rules of pick and choose or patch work (talfique and takhayyeer) should have been adopted in this case. In Bibi Safina V. Mohd. Israel27 the Qazi has decided the matter very logically. Although there was no reference of original source but the decision is worth appreciation. In the Holy Quran in the similar matter, the decision of the Prophet Daud (AS) has been appreciated. In this case parties were not in favour of divorce but the householders of the plaintiff forced the defendant to pronounce the divorce. The matter was so analysed and issues were decided in such a manner that no rule of schools were broken and the Islamic principle was implemented.

In Mohammad Qamruddin V. Majida Khatoon28 the Qazi adopted the Islamic method of arbitration and negotiation to continue the marital tie but in the last the parties decided to be separated to which Qazi said a matter of piety.

In Fatima and Zohra V. Khuda Bakhsh the Qazi started the proceeding itself saying that it is matter of haququUah and Qazi is under duty to protect this. In this case the statement of the defendant that he accepted before panchayat that he had divorced only one of his wives, was considered as confession and accepted by Qazi in such a way that the matter could not be refused by the defendant. The witnesses were also improperly accepted who did not see the defendant pronouncing the divorce but they heard from behind

27 For detail please see Appendix 1.
the wall. However as it has been discussed with reference of the *Fatawa Qazi Khan* that the statement of the husband will be relied upon if he divorced the wives and later says that he wanted to divorce any particular wife. The acceptance of improper witnesses is also not praise worthy. If any thing is prejudiced then the corroboration of that thing is very easy. But the decision must be just and also appeared to be just. The confession is not made before the Qazi. Qazi must accept the statement only when that is made before him and not anywhere else. In *Parveen V. Mirza Tahir Baig* the defendant told the plaintiff that if she would not leave the marital home, he would leave her (*Jawab Dedega*). On her non compliances he told that okay he had left her; one; two and three. But the Qazi has taken two grounds to continue the marital knot. First, there was only one male witness and one female. The other male witness is little bit deviating from the two witnesses so there is lack of proper witnesses to establish the case. Second, the defendant was in the abnormal condition and his statement was not to be relied due to mental conditions. However it could have been held *bidai*. Moreover being in one sitting its effect would have been of one divorce. Muslim personal law board has also taken this matter at its agenda and in near future it is going to be debated for consensus.  

But in *Fahimul Haque V. Maryam Khatoon* the plea of the plaintiff that he was abnormal at the time of divorcing the defendant thrice, was rejected and the marriage was found broken. All this was due to the acceptance of *bidai* form of divorce. If the true Islamic system of divorce

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29 Case No. 272/10203/1401 A.H.
29 The Hindustan Times 13 September p.1, 2000
were applied this type of problem would not have arisen.\textsuperscript{31} In Mohammad Saleem V. Hasina the Qazi rejected the plea of the defendant that the plaintiff had pronounced triple divorce to her. The acceptance of single pronouncement was considered single \textit{rajai talaque}. The Qazi held that the continuance of marriage is a basic thing. To break it, there is need of proper witnesses, which was not found in the present case.

In this case the real spirit of the institution of marriage is described. There is also a basic principle of the Islamic jurisprudence that any established thing can not be discredited without the proper witnesses and proof.

In \textit{Sibun Nisa's} case the plaintiff was considered divorced thrice only due to the acceptance of the defendant that plaintiff's mother told him that he had divorced three to the plaintiff and he reacted affirmatively. The wording of the defendant was "if you say like this then okay you should bring your dowry from my home". The Qazi considers this statement as acceptance of \textit{talaque}. He (defendant) says that he reacted in this way to show his anger and not acceptance of divorce but Qazi rejected his plea and marriage was held broken, which seems hard as it is in contravention with the true Islamic spirit.

8. DEVELOPMENT OF PROVISIONS OF DISSOLUTION AND IMARATE SHARIA:

\textsuperscript{30} Case No. 55 - 16185 - 1417 AH.
\textsuperscript{31} Also see \textit{Sohrat Qureshi v. Naushaba Khatoon}, 51, 16181, 1417 AH.

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In dissolution of marriage the true Islamic spirit is adopted by Imrate Sharia. In case of a husband missing, his wife is granted decree of dissolution on the complaint of non-provision of maintenance. On this ground there is requirement of two months period for dissolution. In this way 4 years waiting is not needed. In Bibi Ruqayya V. Mujib Alam\textsuperscript{32}, Shahina Perveen V. Javed Nehal\textsuperscript{33} and Bibi Mumtaz V. Mohammad Naushad\textsuperscript{34}, the marriage was dissolved without giving further time because there was maintenance problem also. Not only maintenance but also where there is apprehension of immoral act, the marriage will be dissolved without any period of waiting. Thus it is in consonance with the true Islamic spirit. Even in the presence of the husband the inability to maintain his wife will enable her to obtain decree of dissolution. In Zahera Khtoon V. Md. Shibli the Qazi dissolved the marriage on this ground. This thing is also in accordance with the principle of Islamic law although Hanafi law does not permit it but Imarate Sharia has taken a bold step in this regard which is appreciable.\textsuperscript{35}

In the case of impotence of the husband the Imarat has rightly taken the view that the right to have marital intercourse is a basic right of the wife and in case of impotence she is denied of her basic right. So she will have right to obtain decree of dissolution.

In Khairun Nisa's case the time given to the husband by the arbiters was treated enough and no more time was given for treatment. Thus in this way Imarate Sharia has impliedly accepted the authority. The marriage

\textsuperscript{32} 391 - 15159 - 1414 AH.
\textsuperscript{33} 340 - 15609 - 1415 AH.
\textsuperscript{34} 101 - 15370 - 1415 AH.
\textsuperscript{35} Bibi Fatima case see Appendix and Shahin Fatima V. Abdul Majid Ifickhari.
is dissolved although Hanafi law does not permit it. Where the husband is neglecting without financial problem the marriage is dissolved at once. Really it is appreciable thing is Islam. The Holy Quran commands that the wives must not be kept in marriage to make excesses. In case the wife is neglected from marital intercourse, she has right to obtain decree of divorce. Although Hanafi law does not permit it but Imarate Sharia has again upheld the Quranic dicta of arbiters. In other words if arbiters decide to dissolve the marriage that is also possible. It is really a good sign. Whenever there is no Imarat, Muslims are under duty to opt this way. It will help in providing easy justice to the weaker sex living in the remote areas or in odd circumstances.

9. SERVICES OF IMARATE SHARIA:

Imarate Sharia does not charge any thing from the litigants. There is also provision of soli hearing of the cases i.e. if any of the parties is unable to reach to the Qazi the Ameer will on request of the parties, order to make hearing of the parties and the witnesses at their residence or in their locality. This is very good thing and it is of course in consonance with the Islamic rule. The time is also taken less. This is another rule of Islam. Once the Prophet told his companions that in the previous books Allah commanded the rules of moral values like, “O egoist king! I have not assigned you the throne to collect the wealth. But your duty was to provide the solution of the pains of the suppressed (and sufferers). Because their voice is very dear to He and that reaches He within no time.” Thus the voice of the sufferers must be heard within a reasonable time, which is done by Imarate Sharia. The

36 Also see Md. Sarfuddin v. Nikhat Sultana, Nuchat Jahan v. Tufail Ahmad infra Appendix.
satisfaction is also provided to the persons. So there is no trend of appeal against the decision of the Qazi either before the Ameer or before the Civil Courts.

Great thinker Allama Iqbal syas - “Juda Ho Din Siyasat Se to Rah Jati Hai Changezi” (If there is no religion in politics there is nothing but barbarism). However it is not seen that Imarat is taking part in politics as it was doing previously. Any way it is not taking part in the politics due to its own limitations.

Thus we reach at the conclusion that to some extent the Imarat is successful in developing the personal law. But it has also adopted the same old rule of *taqlid* (following only). Although at some places it has taken bold steps to prevail the Islamic ideology.

Imarat Sharia has done enormous works in riot-affected areas, in tide affected areas and earth quake affected areas. It has also been helping widows and patients. It has provided certain other services to the Muslims. It has established several educational institutions. The technical institutions set up by it are not truly Islamic in their contents. There is no moral or religious instruction in effective way in them. Maulana Ashraf Ali Thanvi in his book *Islahie Maashra*, written that any knowledge at the cost of the religious values is prohibited (*haram*). In the board of *Wifaqul Madaris* the syllabi do not contain enough of the Quran and Hadith as it covers the *fiqh*. When there was inauguration of an educational institution of Imarat Sharia it was made by recitation of *Tanvirul Absar* a book of Hanafi School. However it has been

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37 It is negligible as it is less than one percent.
has been the tradition of the Muslims to inaugurate any thing by recitation of the Holy Quran.

It is said that in Islam there is no difference between religion and politics. It might be this reason, which had encouraged the Imarate Sharia to 
participate in the politics actively. But due to change of the circumstances its role is now passive in the politics.

10. IS IMARATE SHARIA REALLY AN IMARAT:

Discussion made in Chapter one makes it clear that there is need of an Ameer for Muslims. Now the question arises, is Imarate Sharia an Imarat. The ayat of the Holy Quran that follow Allah and His Prophet and those charged amongst you says that those who are charged and does not say to follow the vice of the charged. If it is accepted that to following the vice is also to be included in following the head (charged, Ameer, faqih) but one is to agree that the head must not be in obeyance. If he is out of reach and there is difference between incharge and wards they cannot resolve their differences according to the Quran and Hadith as ordained in the same verse of the Holy Quran. Moreover the person, who gets instruction from any source, which according to the instructed is included in the term Ameer. The instructed cannot be Ameer. However he may be vice (nayab). So if Imarate Sharia follows any body order it may not be Imarat. It may be called rather Neyabate Sharia. Where a particular person has been selected for Imarat, the Imarat will be named with him. So, as soon as Imarate Sharia follows any of the four schools of Sunnis, it will be called, Neyabate - Hanafia / Malikia / Shafeyeea / Hambalia but not Sharia. Because any of the four schools are not headed by the respective successors. If it is said that there are certain matters
in which the founders of the schools have held something which is in accordance with Islam. But many of the modern scholars, followers of primary sources, Ahle Hadith and Shias say that no generation can claim the monopoly of wisdom. An analogy may be suitable for any particular time but the same may be obsolete in future. The sayings of the Prophet contains the suitability for ever, as that is based upon revelations.

Let me discuss the practical aspect of Imarate Sharia. In the book 'Quza Ke Chand Ahsam Masayal' Maulana Abdus Samad Rahmani, replying the questions regarding:

1. Impotence of the Husband
2. Protection to the wife
3. Option of puberty
4. Procedure of evidence and litigation

Mostly questions were replied citing fiqh books instead of primary sources of Islamic Law. Some scholars are of the view that the persons, who were never Ameer, may not guide the Ameer or after his death his wordings may not be guidance for the Ameer. In the book of Rehmani 'Ketabul Faskh Wal Tafriq' it is written that Imarate Sharia's guidance for

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38 Ed. Mohd Shafi (Patna : Imarate Sharia. 1990) ibid Ed.
39 Ibid p. 8-12
40 Ibid p. 13-16
41 Ibid p. 17-41
42 Ibid. 25-29, 50-99
43 Only p. 13,14, 15, 23-27 contains the either verses of Holy Quran or story of companions of the Prophet (SAW) in which two verses in part instead of full and its explanation are quoted which is 0.5% of the discussion. However, the story of the companions cited in the Shami, a book of fiqh Hanafi and some story without reference is 6% only in the rest.
44 Maulana Abdul Moid's opinion who also represents Ahle Hadith opinion
dissolution of marriage is the guidance that is provided by the four schools of
the Sunni Law\textsuperscript{45}. In this way it may be said that Imarate Sharia is \textit{Neyabate}
Sharia rather than Imarate Sharia. However the response of the workers of the
\textit{Imarate Sharia}(that they have developed their own systems in the light of
\textit{Quran} \& \textit{Hadith} and \textit{Hyat} is the source of guidance) is rebutting the above
mentioned things and in this way its authenticity can not be doubted. But as
soon as it is guided by any source other than \textit{Quran} \& \textit{Hadith} the \textit{Neyabat}
(vice ship) rather than \textit{Imarat} will eclipse it.

However, the aims and objectives described by it are as follows\textsuperscript{46}:

1. To provide the Sharia Organisation (\textit{Imarat}) so that the Muslim may
lead the Islamic life.

2. To implement the Sharia especially in \textit{Ibadat} and personal Law
matters.

3. To make endeavour to develop the capability to implement the Sharia.

4. To protect the interest of Muslim.

5. To unite the Muslims on the basis of \textit{Tauhid} and \textit{Resalat} barring the
Schools of thoughts.

6. To provide the guidance to the Muslims in the field of education and
economy in the light of Sharia.

7. To establish the institute for betterment and services of humanity.

8. To protect the religious rights of Muslims and to develop the harmony
amongst the other religious communities, so that the real fraternity can
be establish.

\textsuperscript{45}It may also been seen at p. 44-51, 53, 57, 58, 63, 64, 73, 79, 80, 85-91, 94, 100 \& 105. Where it has been clearly

\textsuperscript{46}\textit{Imarate Sharia 'Imarate Sharia Bihar and Orissa' (Patna : Imarate Sharia, 1992) p. 7-8}
If it is established for the above mentioned objectives it is really Imarat. However, it may have incorporated the verses of the Holy Quran where Almighty Allah has guided the Ameer.

"(They are ) those who,
If We establish them
In the land, establish
Regular prayer and give
Zakat, enjoin
The right and forbid wrong:
With Allah rests the end
(And decision) of (all) affairs."