

## Permanent Marriage

In Islam the word most commonly employed for marriage is *nikah*, which means literally 'sexual intercourse'. As a legal term it denotes the situation resulting from a particular contract, entered into by a man and a woman, by which sexual intercourse between them becomes legitimate in the eyes of God and society. The only other mode of legitimizing this sexual relationship is by a man's purchasing a female slave, but this is a complicated discussion that cannot concern us here.

Marriage as a legal institution is defined and described in terms of a number of 'pillars' (*arkan*) and 'statutes' (*ahkam*), which are discussed in what follows. The pillars are those elements of the marriage contract whose absence nullifies the contract. The statutes are the rules and regulations that govern the contract. A brief account will also be given of certain other legal points relating to marriage, namely divorce, the waiting period, forswearing, sworn allegation, *zihar*, and inheritance.

### I. The Pillars of the Marriage Contract

Marriage has a set number of pillars, two according to the Shi'a, three according to the Malikis and Hanafis, and four according to the Hanbalis and Shafi'is. All schools agree on the first two pillars, 'formula' and 'persons'.

#### A. The Formula (*sigha*)

Marriage is legalized by a contract (*aqd*), which, like all other contracts in Islam, consists of a declaration (*ijab*) and an acceptance (*qabul*). The woman declares that she is entering into a relationship of marriage with the man, and he accepts her as his wife.

The schools differ as to the exact words that may be employed in the woman's declaration. The Shafi'is and Hanbalis hold that a formula derived from the words 'I have married you' (*ankahtu-ka*) or 'I have espoused you' (*zawwajtu-ka*) are valid. The Malikis maintain that if the amount of the dower to be paid to the wife (see II A below) has been specified, the woman may also say 'I give myself to you' (*wahabtu-ka*)<sup>1</sup>.

The Shi'a do not include the verb 'to give', but they add the formula, 'I surrender myself to your pleasure' (*matta'tu-ka*).<sup>2</sup> The Hanafi School is the freest in respect of the formula, allowing any number of expressions to be employed, and even certain indirect formulas.

All schools agree that the man may show his acceptance by employing any word which denotes his satisfaction with the contract.

The Hanbali, Maliki, and Shi'i schools hold that the verbs for both declaration and acceptance must be in the perfect tense. According to the Hanafis, the present tense may be employed as long as what is meant is directed toward the future, i.e., does not denote the seeking of a promise of marriage;<sup>3</sup> according to the Shafi'is, the present tense may be used if it excludes the possibility of being interpreted as a promise of marriage, e.g., by adding the word 'right now' (*al-an*).<sup>4</sup>

All agree that both declaration and acceptance must be uttered at a single session. It is not necessary for the declaration to precede the acceptance, except according to the Hanbalis.<sup>5</sup> A person who knows Arabic must pronounce the formula in that language, but those who do not know Arabic may employ equivalent terms in their own language. A mute may employ sign language.

## **B. The Persons (mahall)**

The man and woman must be free of all *shar'i* hindrances to their marriage, as explained below. The identity of the spouses must be clearly specified. Thus, for example, if the guardian (below, C) should say: 'I give one of my two daughters to you in marriage', and the man should accept, the contract is invalid.

A woman may not marry a husband who is not 'equal' (*kafa*) to her. According to the Shi'a, this means only that the woman's husband must be a Muslim.<sup>6</sup> The Sunni schools add equality in terms of various social considerations. Not only must the man be a Muslim, he must also have a social standing at least equal to the woman's.

In other words, she may not marry anyone below her rank in society, though a man may do so. 'Equality' here is defined in terms of a number of factors which differ slightly among the four schools. The Hanafis mention Islam, lineage, profession, liberty (as opposed to slavery), piety, and property. The Shafi'is list lineage, religion, and profession, differing only slightly in the words employed from the Hanbalis. The Malikis mention piety and freedom from physical defects detrimental to marriage.<sup>7</sup>

A man and woman may be forbidden from marrying for several reasons:

1. Blood relationship (*qaraba*). A man may not marry the following women: (a) His mother or any of his grandmothers; (b) His daughter or granddaughters, no matter how far removed; (c) His sister; (d) His nieces, his aunts, or his great aunts.

2. Relationship by marriage (*musahara*). A man may not marry: (a) The mother or grandmothers of his wife; (b) The daughter, granddaughter, etc., of a wife with whom his marriage has been consummated; (c) The ex-wife of his son, grandson, etc.; (d) The ex-wife of his father, grandfather, etc.

3. There are certain women whom a man may marry singly, but not at the same time. These are (a) two sisters, and (b) a woman and the sister of her mother or father. In the second case, the Shi'a take exception to the four Sunni schools by saying that if the aunt agrees to share her husband with her niece, the contract is valid.<sup>8</sup>

Except for the daughter of his wife, in the three other instances of relationship by marriage, the women become forbidden to the man as soon as the marriage contract is concluded; consummation of the marriage is not necessary. But if a man wants to marry the daughter of a wife with whom he has not consummated his marriage, he can do so if he first divorces the wife.

Once the marriage has been consummated, the wife's daughter is forbidden to him forever, whether or not the marriage contract is valid. If a man should marry both a woman and her daughter or two sisters in a single contract, both marriages are invalid. In both cases, should he first marry one and then the other, the first contract is valid and the second void.

The schools of law differ as to what exactly establishes the unmarriageability of a woman as the result of a relationship by marriage. For the Hanafis, unmarriageability is established by a valid marriage contract, sexual intercourse in whatever context (i.e. whether as the result of a valid contract, an invalid one, or fornication), love play, or looking at the private parts of a person of the opposite sex.<sup>9</sup>

The Shafi'is hold that unmarriageability is established only by a valid marriage contract or by the consummation of an invalid marriage contract. They do not consider any other factors, such as fornication or love play, as sufficient to establish unmarriageability.<sup>10</sup>

The Maliki position is the same as the Hanafi, except in the case of fornication; like the Shafi'is, the Malikis hold that no honor or respect can be paid to fornication.<sup>11</sup> In the Hanbali view an invalid contract, like a valid one, results in unmarriageability, as does sexual intercourse.<sup>12</sup> The Shi'a hold the same position as the Shafi'is except that the opinion of the *'ulama's* split on fornication; one group says that it results in unmarriageability, another group says it does not.<sup>13</sup>

4. Foster relationships because of suckling (*rida'*). In establishing unmarriageability, a foster mother who suckles an infant is considered exactly as the infant's real mother, provided that all the *shari* conditions for this relationship are fulfilled, as detailed below. In other words, the children of the foster mother are considered as the child's siblings and all of her other relatives are considered exactly as if they were truly the child's relatives by blood or marriage.

The Shi'a and Hanbalis hold that the mother's milk must have been the result of pregnancy from marriage.<sup>14</sup> The Shafi'is hold that the mere physical possibility of pregnancy is sufficient. Thus, for

example, if a married nine year old girl should have begun menstruation and her breasts produce milk, and if she should provide milk for a foster child, the *shar'i* foster relationship is established. 15

The Malikis and the Hanafis maintain that it is only necessary for the woman to have given milk for the relationship to be established; it makes no difference if she should also be an unmarried virgin, or if she is too young to marry or too old to bear children. 16

According to the Hanbali and Shafi'i schools, if the foster mother should have become pregnant through fornication, the relationship of unmarriageability is established only with the mother's blood relatives, not with the father's, since he has no legitimate relationship with the mother. The Hanafi and Maliki schools say that unmarriageability is established also with the father's relatives. 17 The Shi'a hold that in the case of fornication no relationship of unmarriageability is established whatsoever, since fornication deserves no respect. 18

According to four of the schools, the foster child must have been suckled before it reaches two years of age for unmarriageability to be established. The Malikis set the age at two years and two months. 19

According to all the schools, the milk must have entered the infant's stomach.

The Shi'a hold that the infant must have suckled at the breast of the foster mother. Hence, if the milk is placed in a container and fed to the child, the foster relationship is not established. 20 The Sunni schools hold that the means of drinking the milk is irrelevant.

The schools differ as to how many times milk must be drunk. The Shafi'i and Hanbali schools hold that the infant must suckle at least five times. 21 The Shi'a hold that it must suckle over a period of twenty-four hours or at least fifteen times, and each time it must drink a quantity of milk that would customarily be called a 'feeding'. 22 According to the Hanafis and Malikis, a single act of suckling, even if the infant drinks only one drop of milk, is sufficient to establish the relationship. 23

The Shafi'is and the Shi'a add that the foster mother must be alive when the milk is drunk. 24 The other schools hold that even if for some reason an infant should suckle at the breast of a corpse, the foster relationship will be established. 25

5. Religious difference. A woman may not marry a non-Muslim. In Sunnism, a man may marry a woman who is one of the 'People of the Book' (*ahl al-kitab*, i.e., Christians, Jews, and other religions with revealed scriptures). But in Shi'a a man may not contract a permanent marriage with a non-Muslim, though he may marry one of the People of the Book temporarily. 26 If either of the spouses should become an apostate, the marriage is automatically annulled.

6. Maximum number of wives. A man may not have more than four wives at one time. If a man should divorce one of his wives, he cannot remarry until her waiting period (below, IV) is completed, unless the divorce should be of the irrevocable type (*ba'in*, see below under III).

7. Divorce. If a man should have divorced his wife irrevocably, she is forbidden to him forever, unless she should marry another man and obtain a divorce from him. Once the woman's waiting period has expired, she may remarry her first husband. The woman's husband is known as the *muhallil*, 'he who makes [marriage to her first husband] lawful'. The marriage with the *muJ:tallil* must be consummated.<sup>27</sup>

8. Sworn allegation. Having annulled his marriage through 'sworn allegation' (*li'an*, below, VII), a man may never remarry the woman.

### **C. Guardianship (wilaya)**

The legal guardian in the marriage contract may be the father, the father's father (Hanafi, Shafi'i, Shi'i), the executor of the father's will concerning the marriage (*wasi*), the governor of the town (*hakim*) in case of the nonexistence of the others (Hanbali), and the owner of a slave (Maliki). The mother has no guardianship except in the Hanafi School, which holds that if there is no close male relative, close female relatives may assume the guardianship and conclude the marriage contract. <sup>28</sup>

In the Maliki and Shafi'i schools, the participation of the legal guardian is one of the pillars of the marriage; in the Hanbali School it is a condition (*shart*) of the contract, which means that if the contract is concluded without the guardian, it will be valid only on condition that the guardian gives permission afterwards.<sup>29</sup> Hence in these three schools the woman does not have the right to conclude a marriage contract without the participation of her guardian.<sup>30</sup>

In the Shi'i and Hanafi schools the presence of the guardian is required only at the marriage contract of a girl not of age, that is, one who has not yet reached puberty (*saghira*), or of an incompetent or insane girl or woman of age.

In both these schools a girl who is physically mature may marry whomsoever she wishes, and the validity of the contract is not conditional upon the presence of the guardian.<sup>31</sup> However, the Hanafis add that since social equality (*kafa'*) is a condition for a valid contract, a guardian may annul a contract concluded by a woman on her own behalf with an unequal man.<sup>32</sup>

In the Maliki, Hanbali, and Shafi'i schools, the guardian may give a virgin in marriage without her consent, whether or not she is of age. But a woman or girl who has been married before may not be given in marriage without her permission.<sup>33</sup> The Hanafis and Shi'a hold that only a girl not of age may be given in marriage without her consent.<sup>34</sup> The Shafi'is add here that if an underage girl has already been married, she may not be given in marriage again until she comes of age.<sup>35</sup>

The regulations of guardianship also apply to boys not of age (*saghir*) and mentally incompetent men.<sup>36</sup>

### **D. Witnesses (Shahid)**

The Shafi'i, Hanbali, and Hanafi schools hold that the presence of two witnesses is a pillar of marriage

and that without their presence, the contract is invalid.<sup>37</sup> The Malikis hold that the presence of two witnesses is necessary at the time of the marriage's consummation (*dukhu*), but not during the contract, when their presence is merely recommended.<sup>38</sup> The Shi'a maintain that the presence of one or more witnesses is not a pillar of the contract, so a man and woman may conclude a contract secretly if they so wish.<sup>39</sup>

## II. The Statutes Of Marriage

### A. The Dower (*mahr*)

Whenever a man marries a woman, he must give her a dower in return for the sexual gratification he is to receive. The dower must consist of a specified amount of property, cash, or profit. It must be ritually pure and owned by the husband. All schools agree that the dower does not have to be mentioned in the contract. If it is mentioned and does not fulfill the conditions required for dowers, the contract is valid but the dower must be corrected.

There are two kinds of dower. The 'specified dower' (*al-mahr al-musamma*) is one upon which the man and the woman agree. The 'normal dower' (*al-mahr al-mathal*) is what the woman receives if she cannot come to an agreement with her husband over the specified dower, or if for some reason the specified dower should be invalid. The normal dower is the amount of property, in cash or kind, which other women of the same social status, age, beauty, etc., are receiving in the society of the time.

According to four of the schools, as soon as the marriage contract is concluded, the woman becomes the owner of the whole dower; the Malikis maintain that only one-half of the dower belongs to her at this point.<sup>40</sup> Should the wife demand the dower from her husband immediately, he must pay it to her; but if he should divorce her before consummation and she has not yet taken the dower, he only has to pay her one-half.

In all schools, consummation of the marriage or the death of one of the spouses necessitates payment of the full dower. The Malikis add that if the wife should live with her husband at least one year, there being no hindrance to consummation of the marriage, he must pay the full dower.<sup>41</sup> The Hanafis maintain that it is sufficient for the man to be alone with his wife on one occasion when there is no hindrance to consummation.<sup>42</sup> According to the Hanbalis, being alone with the wife, love play, and seeing her private parts are all sufficient cause for the payment of the whole dower.<sup>43</sup>

Before consummation of the marriage, payment of all or part of the dower may be nullified for the following reasons:

1. One-half is nullified through divorce.
2. If the woman should become an apostate, she loses the whole dower.

3. If the man should become an apostate, the marriage is void, but he still must pay one-half the dower.
4. If the man or woman should annul the marriage because of physical disability or deception by the partner, she forfeits the whole dower; however, the Shi'a hold that if the woman should annul the marriage by reason of the man's impotence, she will be entitled to one-half the dower.<sup>44</sup>
5. If a man and woman should suddenly become forbidden to each other through the establishment of some relationship, e.g. a foster relationship, where the woman is not at fault, she receives one-half the dower; if she is at fault she loses all of it.

According to the Maliki, Hanbali, and Shi'i schools, if the marriage contract should be invalid but copulation takes place, the woman is entitled to the specified dower.<sup>45</sup> The Shafi'is hold that in such a case, she receives the normal dower.<sup>46</sup> The Hanafis rule that she will receive whichever of the two dowers is less.<sup>47</sup> In a case of 'mistaken intercourse' (*waty a!-shubha*), where copulation takes place because the man and woman mistakenly believe themselves to be husband and wife, the woman is entitled to the normal dower.

The woman may refrain from sexual intercourse as long as she has not received the dower. In such a case the man may not claim conjugal rights unless it was explicitly stated in the marriage contract that the dower would be paid at some later date.

But if the woman should accept intercourse before receiving the dower, from then on she may not refuse her husband, unless it is proven that he has no ability to pay the dower; here the Shi'a take exception, holding that once the marriage is consummated, the wife may not refuse intercourse because of the husband's inability to pay the dower.<sup>48</sup>

The Hanbalis, Shafi'is, and Malikis say that if the husband's inability to pay is proven before consummation, the woman may annul the marriage; with the exception of the Hanbalis, they hold that she may not do so after consummation, since her willingness to engage in sexual intercourse proves that she accepted the marriage's validity; the Hanbalis say the woman may annul the marriage even after consummation.<sup>49</sup> The Hanafis and Shi'a hold that the woman may not annul the marriage, but she may refuse to engage in intercourse.<sup>50</sup>

If the woman should decide to return part or all of her dower to her husband, he is then free from the obligation to pay it to her.

## **B. Support (nafaqa)**

Once the woman has taken up residence with her husband, he must support her in a mode corresponding to the support received by her equals. Support includes such things as food, clothing, shelter, and other necessities. Payment of the dower becomes incumbent on the husband as a result of the marriage contract, but payment of support only becomes incumbent as a result of the contract *and*

the wife's obedience to her husband. If the wife does not obey her husband, he is not obliged to support her.

Here it should be kept in mind that in Islamic society a wife must 'obey' her husband only within the *shar'i limits*, which is to say that the woman obeys the man on condition that he is obeying God. Should he tell her to do something not sanctioned by the *sharia* her duty is to follow God, not her husband.

A woman who is in the 'waiting period' (below, IV) after having been divorced, but not irrevocably, by her husband, is entitled to support, since she is still his wife. A woman who is in the waiting period of irrevocable divorce must be supported only if she is pregnant.

According to the Hanbalis, Malikis, and Shafi'is, if it is proven that the man does not have the ability to support his wife with the necessities of life, she has the right to seek to annul the marriage through a *qadi* (*shar'i* judge). The Hanafis and Shi'a maintain that a woman not adequately supported by her husband may complain to a *qadi*, who must then take whatever action he thinks necessary to rectify the situation, e.g., persuading the husband to take employment.<sup>51</sup>

### **C. Annulment (faskh)**

Any time a spouse has certain specified physical or mental disabilities which make continuation of the marriage difficult, the other spouse may annul the marriage. These disabilities vary according to the different schools.

All schools except the Hanafi list insanity, emasculation, and impotence for the men, and insanity, leprosy, and a blocked vagina for the wife; each of them except the Hanafi then adds various other disabilities of the same sort. In the Hanafi school the wife has the right to annul the marriage only for the three grounds listed, while the husband has no grounds for annulment on the basis of disabilities.<sup>52</sup>

The spouse who discovers a disability in the other spouse must exercise the right of annulment immediately or lose the right. Similarly, if there was knowledge of the disability before the marriage, the marriage is in effect an expression of satisfaction with the disability, so there is no grounds for annulment; however, the Shafi'is and Malikis hold that a woman's knowledge of the man's impotence before marriage does not effect her right to annul the marriage.<sup>53</sup> If the annulment takes place before consummation, the wife receives no dower; if the marriage has been consummated, she receives the full dower.

All schools agree that disabilities which existed before the marriage are grounds for annulment, but there is a difference of opinion about disabilities which appear after the marriage. The Malikis hold that in the case of such later disabilities, the wife—but not the husband—has the right to annulment before consummation, so long as the husband was healthy before the marriage; however, in the case of insanity and leprosy, the husband has one year in which to undergo treatment, If he is not cured in one year, the annulment takes place,<sup>54</sup>



All schools agree that a full year is needed before the man can be judged impotent; after a year, the annulment takes place. The Shafi'is and Hanbalis maintain that both spouses retain the right to annulment, whether before or after consummation. The Sunni schools agree that the annulment should be declared by a *qadi*.

The Shi'a say that disabilities occurring after marriage do not establish grounds for annulment, with the exception of the husband's insanity, which is grounds for annulment even after consummation; as for impotence, the wife should seek the *qadis* pronouncement of the one year period, but then she herself annuls the marriage.<sup>55</sup>

### III. Divorce (Talaq)

The pillars of divorce differ according to the schools. The Hanafis and Hanbalis hold that there is only one pillar, i.e., the formula through which it takes place. In the view of the Shafi'is and Malikis, the pillars are (1) the existence of the husband and the wife, (2) the formula of divorce, and (3) the intention.<sup>56</sup>

The Shi'a maintain that the pillars are (1) the husband and wife, (2) the formula, and (3) two witnesses.<sup>57</sup> The husband may divorce the wife, but not the reverse. In contrast to marriage, the wife's consent is not necessary.

The man must be in possession of his rational faculties, have reached physical maturity (except in the Hanbali view), and be acting of his own free will (except according to the Hanafis). The Hanbalis maintain that a youth who has not reached puberty but who understands the meaning of divorce and its consequences may divorce his wife of his own accord; the Hanafis say that even if the formula is pronounced under duress, it is still valid.<sup>58</sup> To the views shared with the other schools, the Shi'a add that the husband must pronounce the formula with the intent of divorcing his wife, although unlike the Shafi'is and Malikis, they do not make this a pillar of divorce.<sup>59</sup>

The wife must be a free woman, a permanent wife, and faithful, since there is no divorce in the case of a slave woman, a temporary wife (in Shi'a m), or an adulteress.

The man must employ words in the formula that denote divorce directly or indirectly, though the Shi'a hold that the word 'divorce' itself must be employed. A dumb man may divorce his wife through gestures. The Malikis and Hanafis hold that a man may divorce his wife in writing.

The formula must be pronounced three times in the manner described below.

Divorce has two general categories depending on the time the man chooses to pronounce the formula: 'traditional' (*sunni*) divorce, which is permitted, and 'non-traditional' (*bid'i*) divorce, which is prohibited.

Whether divorce is traditional or non-traditional depends upon the woman's state of ritual purity when the man pronounces the formula and his manner of reciting the formula. During menstruation and

confinement after childbirth a woman is ritually impure, and she does not become pure again until her situation changes and she performs the major ablution (*ghusl*).

For the traditional divorce to take place, she must be in a state of ritual purity and her husband must not have had sexual intercourse with her during her last menstrual period (this condition is added for reasons of precision, even though sexual intercourse during that time is forbidden) or from the time she performed the major ablution after her period or confinement.

According to the Shi'a , if the woman is in the state known as *mustaraba* (i.e., she is approaching menopause, her menstrual period is delayed, and she may or may not be pregnant), the husband must wait three months in order to determine her condition, and only then can he divorce her.<sup>60</sup> The man must pronounce the formula on three separate occasions separated by a specific period of time, as explained below.

Although non-traditional divorce is forbidden with certain exceptions in the view of some schools, it may still take place. It is divided into several kinds: A divorce given while the woman is in (1) her menstrual period or (2) confinement, (3) A divorce given by pronouncing the formula three times on a single occasion; here the Shafi'is maintain that this form of divorce is permissible.<sup>61</sup> (4) Divorce when the woman is ritually pure after menstruation, but sexual intercourse has taken place; the Malikis hold that this form of divorce is not forbidden, only reprehensible (*makruh* ).

In spite of the fact that non-traditional divorce is forbidden, the Sunnis hold that the formula pronounced under any of the above conditions is still valid. However, the Hanafis and Malikis say that the man must return to his wife and consider himself as her husband; if he still desires to divorce her; he must wait until she has purified herself after her second menstrual period from the time he originally pronounced the formula and then pronounce it once more. If the man does not return to his wife, the divorce is valid, but the man has then definitely sinned against the *shari'a*; however, no punishment is to be inflicted in this world before the Day of Judgment,<sup>62</sup>

The Shi'a maintain that non-traditional divorce is invalid, with the exception of the form in which a man pronounces the formula three times at once; such a divorce is then irrevocable.<sup>63</sup>

In certain cases, the temporal categories delineated by 'traditional' and 'non-traditional' do not apply. Thus a man may divorce at any time a woman with whom he has not consummated the marriage, a girl who has not reached puberty, a woman who has reached menopause, and a pregnant wife. In three of the schools, these types of divorce are considered traditional, while the Shafi'is and Hanbalis hold that they are outside the classification.<sup>64</sup>

According to three of the schools, divorce initiated by the wife (*khul'* and *mubarat*, discussed below), divorce as a result of 'forswearing' (*I'la*, below V), and divorce ordered by a *qadi* have no temporal conditions. The Malikis and Shi'a hold that these are types of traditional divorce with the same temporal conditions.<sup>65</sup>

For a divorce to become final, in most cases the man must pronounce the formula on three different occasions, as described below. Technically, his first and second pronouncements are also divorces, but they are 'revocable' (*rij'i*). Hence, divorce may be divided into the revocable and irrevocable (*ba'in*) forms. In the following cases, divorce is irrevocable:

1. The divorce of a wife with whom marriage has not been consummated.
2. The divorce of a wife who has not yet reached puberty.
3. The divorce of a wife who has reached menopause.
4. Divorce initiated by the wife (*khul'* and *mubarat* ).
5. The third divorce after two revocable divorces.

Once an irrevocable divorce has taken place, a man may not remarry his wife unless she first marries another man and consummates the marriage; having been divorced irrevocably from her second husband, she may then remarry her first.

The second husband is known as the *muhallil*, as mentioned above. In such a situation, it would be normal practice for some sort of agreement to be made between the wife and her second husband. However, it is not permissible for a condition of subsequent divorce to be entered into the marriage contract. Outwardly the contract must be the same as for any permanent marriage.<sup>66</sup>

A woman who has been revocably divorced keeps the status of wife, and the husband may return to her and have sexual intercourse with her if he so wishes. But according to the Malikis, he must make the mental intention of returning to her before doing so; and according to the Shafi'is, he must express the intention verbally to his wife.<sup>67</sup>

It is permissible to include a condition of divorce in the marriage contract in certain cases. Hence, for example, a wife may stipulate that if her husband should marry a second wife, she will have the right to be divorced.

Although only the man has the right to pronounce the formula of divorce, the woman may take the initiative in *khul'* and *mubarat*. These two terms are almost synonymous, but in the case of *khul'*, the wife must have an aversion to her husband; in *muharat*, there should be mutual aversion. In each case the wife agrees to pay her husband a certain amount of property in cash or kind if he divorces her.

According to the Shi'a , the amount in *muharat* must not exceed the amount of the dower, while in *khul'* there are no conditions on the amount, These divorces are irrevocable, except according to the Shi'a , who hold that during her waiting period the woman may take back her property from her husband, in which case he has the right to conjugal relations.<sup>68</sup> The Hanbalis maintain that *khul'* is a form of annulment, not divorce.<sup>69</sup>

Since these types of divorces are in reality a kind of contract, they require a declaration (*ijab*) and an acceptance (*qabul*). The woman must say something like: 'Divorce me in exchange for such and such', while the man must answer something like: 'I accept' or 'I divorce you'. The Sunnis hold that the husband may employ any number of words in the formula, such as 'divorce' or words derived from the same roots as *khul'* and *muharat*. The Shi'a say that the word 'divorce' itself must be employed.<sup>70</sup>

According to the Sunni schools, a third party may initiate a *khul'* divorce. In other words, he may offer the husband a sum in exchange for which the husband will divorce his wife. The Shi'a maintain that this is forbidden.<sup>71</sup>

The schools discuss in detail the nature of the property which may be exchanged in *khul'* and *mubarat*, differing on many minor points. In general it must be lawful and intrinsically valuable, like the property which constitutes the dower. If not, the divorce will be valid, but there is then a difference of opinion as to whether it is revocable or irrevocable.

#### **IV. The Waiting Period ('Idda)**

When a woman is divorced or her husband dies, she must wait for a prescribed period of time before she can remarry.

If the woman's husband has died, the waiting period differs according to whether or not she is pregnant; if she is not, she must wait four months and ten days. Such things as her physical maturity, whether or not she has reached menopause, and whether or not the marriage has been consummated are irrelevant.

If the woman is pregnant, according to the Sunnis her waiting period terminates when she gives birth to the child; according to the Shi'a, she must wait either four months and ten days or the term of her pregnancy, whichever is longer.<sup>72</sup>

If a woman's husband should be away on a journey when she hears of his death, according to the Sunni schools her waiting period begins on the date of his death; the Shi'a hold that it begins on the day she receives the news.<sup>73</sup>

The waiting period for divorce differs according to circumstances and the views of the different schools. A woman with whom the marriage has not been consummated has no waiting period. A girl less than nine years old has no waiting period according to the Hanbalis and the Shi'a; but the Malikis and Shafi'is hold that if she was mature enough to participate in sexual relations, she must wait three months; the Hanafis hold that in any case her waiting period is three months.

A woman who has gone through menopause must wait three months in the view of the Sunni schools, but the Shi'a say that she has no waiting period. A woman who menstruates and who is not pregnant must wait either three *tuhrs* (periods of purification after menstruation) according to the Shi'a, Malikis,

and Shafi'is, or three menstrual periods according to the Hanafis and Hanbalis. A woman who is old enough to menstruate but who does not or who is in the state of *mustaraha* must wait three months. A woman who is pregnant must wait until she has delivered her child.<sup>74</sup>

## V. Forswearing (Ila')

'Forswearing' means to swear an oath in God's name not to have sexual relations with one's wife, either absolutely, or for a period of more than four months. Since the *sharia* forbids a husband from refraining from sexual intercourse with his wife for more than four months, once the four months have passed, the wife has a valid reason to have recourse to a *qadhi*.

If the husband should break the oath, he must pay the expiation (*kaffara*) set by the law for the breaking of an oath. If he holds to his oath and the four months pass, the wife may go before a *qadi* and request that he clarify her marital situation. According to the wife's wishes, the *qadi* will either order the husband to return to his wife or to divorce her.

If the husband is ordered to return to her but refuses, the *qadi* will then order him to divorce her. If he also refuses that, the *qadi* will grant her a revocable divorce.

The Shi'a differ here by holding that the *qadi* does not have the right to grant divorce in the husband's stead; however, he can force the husband—by imprisonment or other means at his disposal—to take one of the two courses open to him, i.e., to return to her or divorce her.<sup>75</sup> The Hanafis say that once the period of the husband's oath comes to an end, the woman is divorced irrevocably, without any need for the husband's pronouncement of the formula.<sup>76</sup> The Shi'a hold that forswearing may not take place in the case of a virgin.<sup>77</sup> The Sunni schools disagree and add that if her husband divorces her, the divorce is irrevocable.

## VI. Zihar

In pre-Islamic times the Arabs practiced a form of divorce which amounted to the husband's reciting the formula, 'You are to me as my mother's back (*zahr*)', a practice referred to as *zihar*. Although Islam forbids *zihar* (cf. Qur'an 33:4, 58:2), if a man should recite this formula to his wife—or an equivalent formula, by substituting a reference to any other female forbidden to him—sexual intercourse with his wife is forbidden to him. *Zihar's* conditions are the same as those of divorce; hence in Shi'a m two witnesses must hear the formula recited.

## VII. Sworn Allegation (Li'an)

'Sworn allegation' is a procedure whereby a man may take his wife before a *qadi* and either accuse her of infidelity or deny his fathering her child. The man then pronounces this formula four times: 'I testify before God that I speak the truth concerning what I say about this woman.' The *qadi* will then counsel

the man concerning the gravity of his accusation. If he should repent of his words, he will receive the punishment for false accusation (eighty lashes). If he maintains the truth of his accusation, he must repeat a second formula four times: 'God's curse be upon me if I am a liar'.

The judge then turns to the wife. She may either face the penalty for adultery (stoning to death) or repeat this formula four times: 'I testify before God that he is a liar'. The judge will counsel her concerning the gravity of falsely swearing before God. If she continues to maintain her innocence, she must pronounce a second formula four times: 'God's wrath be upon me if he is telling the truth'. If she refuses to pronounce the formula, she will suffer the penalty for adultery.

After sworn allegation, the man and woman are forbidden to each other forever, without divorce. If the husband denies the parentage of a child, the child is illegitimate. If the man should ever repent of his allegation, he must suffer the penalty for false accusation. In case a child is involved, its legitimacy will then be restored; according to the Sunnis, in such a case the father and the child inherit from each other, but according to the Shi'a, the father may not inherit from the child.<sup>78</sup> The woman continues to be forbidden to the man.

## VIII. Inheritance (Mirath)

Husband and wife inherit from each other according to set rules. The only condition for inheritance is a valid marriage contract, not consummation of the marriage.

If the wife should die childless, the husband inherits one-half of her property; if she had a child or children, he inherits one-fourth. If the husband should die childless, the wife inherits one-fourth of her property; if he had children, she inherits one-eighth.

If the deceased wife should have no other relatives, all property goes to the husband. If the deceased husband should have no other relatives, the wife will inherit one-half the property and the rest will go to the *bayt al-mal* (the community treasury), except according to one of two Shi'i opinions, which holds that she inherits all the property.<sup>79</sup> If the deceased husband had more than one wife, the wife's share is divided among them equally.

The husband inherits from everything left by the wife. According to the Sunni schools, the wife also inherits from everything left by the husband; in general the Shi'a hold that if she does not have any children from the husband, she inherits from all property except land, though she does inherit from the value of property situated upon the land, such as buildings, trees, implements, etc.<sup>80</sup>

If a woman should be in a period of revocable divorce when she or her husband dies, her situation is the same as that of an ordinary wife. But when irrevocable divorce has taken place, there is no inheritance, with the exception of divorce during illness.

If the husband should be ill and divorce his wife irrevocably, and if she should then die, he does not

inherit from her; but if the husband should die as a result of the illness, the schools differ as to the situation.

The Hanbalis hold that the wife inherits as long as she has not remarried. The Hanafis say that she inherits as long as she is still in her waiting period. The Malikis hold that she inherits in any case. The Shafi'is have two opinions, one that there is no inheritance, the other that the situation is as the Hanafis say. The Shi'a maintain that she may inherit within one year of the divorce provided she has not remarried.<sup>81</sup>

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1. 'Abd al-Rahman al-Jaziri, *al-Fiqh 'ala al-madhahib al-arba'a* (hereafter cited as *Fiqh*), Cairo, 1969, IV, 24.
  2. Al-Shahid al Thani (Zayn al-Din Muhammad ibn 'Ali al-Jab'i al-'Amili [d. 965/1558]), *al-Rawdat al-bahiyya fi sharh al-lum'at al-Dimashqiyya* (hereafter cited as *Sharh al-luma*), Beirut, 1967, v, 108.
  3. *Fiqh*, IV, 13.
  4. *Ibid.*, 18.
  5. *Ibid.*, 25.
  6. *Sharh al-lum'a*, v. 234.
  7. *Fiqh*, IV, 54–60.
  8. *Sharh al-lum'a*, V, 181; Muhammad 'Ali al-Tabataba'i (d. 1231/1816), *Riyad al-masail* (also known as *al-Sharh al-Kabir*), Tabriz, 1308/1890–9 1,II, 94.
  9. *Fiqh*, IV, 63.
  10. *Ibid.*, 65.
  11. *Ibid.*, 66.
  12. *Ibid.*, 67–68.
  13. *Sharh al-lum'a*, v, 176–82; *Riyad*, II, 96–97.
  14. *Fiqh*, IV, 268; *Riyad*, II, 86.
  15. *Fiqh*, IV, 256.
  16. *Ibid.*, 253–55.
  17. *Ibid.*, 268–69.
  18. *Riyad*, II, 86.
  19. *Fiqh*, IV, 253.
  20. *Riyad*, II, 86.
  21. *Fiqh*, IV, 257.
  22. *Riyad*, II, 87.
  23. *Fiqh*, IV, 257.
  24. *Ibid.*, 256; *Sharh al-lum'a*, II, 63.
  25. *Fiqh*, IV, 254, 255, and 261.
  26. *Sharh al-lum'a*, v, 156; *Riyad*, II, 105–06.
  27. *Fiqh*, IV, 77–84; *Riyad*, II, 181; *Sharh al-lum'a*, VI, 46.
  28. *Fiqh*, IV, 27.
  29. *Ibid.*, 46–47.
  30. The major sources for this ruling are two hadith: 'If any of your women marry without the permission of her guardian, the marriage is invalid (*batil*)' (Abu Dawud, *Nikah* 19; al-Darimi, *Nikah* 11). 'A woman may not be given in marriage by a woman, nor may a woman give herself in marriage' (Ibn Maja, *Nikah* 15 Malik, *Nikah* 5).
  31. *Fiqh*, IV, 46–47; *Sharh al-lum'a*, V, 112; Muhammad b. al-Hasan al-Hurr al-'Amili (d. 1104–1693), *Wasa'il al-shi'a*, Tehran, 1385/1965–66, XIV, 220–221, hadith 1–3.

32. Fiqh, IV, 46.
33. Ibid.,51–52.
34. Ibid., Sharh al–lum'a, v, 116.
35. Fiqh, IV, 51–52.
36. Ibid.,51.
37. Ibid.,25.
38. Ibid.
39. Sharh al–lum'a, V, 112; Riyad, II, 70.
40. Fiqh, IV, 108.
41. Ibid., 109.
42. Ibid., III.
43. Ibid., 115.
44. Sharh al–lum'a, II, 101; Riyad, II, 135.
45. Fiqh, IV, 120–21; Sharh al–lum'a, II,101; Riyad, II, 135.
46. Fiqh, IV, 118.
47. Ibid., 116.
48. Sharh al–lum'a, v, 371–72; Riyad, II, 149
49. Fiqh, IV, 165.
50. Ibid., 163; Riyad, II, 109–10.
51. Fiqh, IV, 581; Sharh al–lum'a, v, 237–38; Riyad, II, 109–10.
52. Fiqh, IV, 189–92.
53. Ibid., 197.
54. Ibid., 181–98.
55. Sharh al–lum'a, v, 387; Riyad, II, 132–35.
56. Fiqh,IV, 280.
57. Sharh al–lum'a,vi, 11; Riyad,II, 168–75.
58. Fiqh, IV, 284
59. Sharh al–lum'a, VI, 14–21; Riyad, II, 172.
60. Riyad, II,171.
61. Fiqh,IV,297.
62. Ibid.,310.
63. Sharh al–lum'a, VI, 31–32; Riyad, II, 176.
64. Fiqh, IV, 305, and 307.
65. Ibid., 302; Sharh al–lum'a, VI, 36–37; Riyad, II. 176.
66. The necessity for the muhallil is established by Qur'an 2:230. And if he divorces her finally, she shall not be lawful to him after that, until she marries another husband. If he divorces her, then it is no fault in them to return to each other.'
67. Fiqh, IV, 435–41.
68. Sharh al–lum'a, VI, 104–07; Riyad, II, 196.
69. Fiqh, IV, 424.
70. Sharh al–lum'a, VI, 87–89, and 111–13; Riyad, II, 107.
71. Sharh al–lum'a, VI, 90–95.
72. Ibid., 62–63; Riyad, II, 187.
73. Sharh al–lum'a, VI, 65–66; Riyad, II, 188.
74. Fiqh, IV, 540–52; Sharh al–lum'a, VI, 57–65; Riyad, II, 183–86.
75. Sharh al–lum'a, VI, 160; Riyad, II, 123.
76. Fiqh, IV, 485.
77. Riyad, II, 122.
78. Sharh al–lum'a, VI, 210–12; Riyad, II, 217–18.



79. Sharh al-lum'a, VIII, 65-66; Riyad, II, 366.

80. Sharh al-lum'a, VIII, 172-74; Riyad, II, 367.

81. Sharh al-lum'a, VIII, 172; Riyad, II, 367, 369.

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