

**PROOF OF IDRAR IN MARRIAGE AND DIVOCE
UNDER ISLAMIC LAW**

PRESENTED BY:

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PREFACE

I am highly delighted and honoured by this invitation to present a paper on the Supra Topic under the platform of your noble Association of International Federation of Women Lawyers (FIDA) under the stewardship of Barrister Bilkisu Sulaiman. It is an opportunity to offer the little I have and employ a participatory approach with a view to achieving the best result by way of cross-fertilizing our ideas to the topic.

INTRODUCTION

This paper will revolve on examining conjugal right that exists between Spouses who entered into solemn covenant to live together as Husband and Wife for the rest of their lives.

Sharia designs certain guiding principles between spouses for the purpose of providing comfort and peaceful conjugation between them in their marital lives, devoid of which their togetherness cannot stand. Consequently it will result in dissolution either from the Husband side by pronouncing Divorce or from the wife's side by invoking her right of litigation.

If it is established that a Husband and Wife can no longer live together in peace and harmony, then the only alternative is separation. Divorce is also permitted when husband feels that his wife becomes undesirable in her matrimonial duties or she is not chaste, divorce is also obligatory on Husband when he is incapable of matrimonial intimacy or cannot maintain his wife, this is based on the Qur'anic text:-

Baqara verse 231

"فَامْسَاكَ بِمَعْرُوفٍ أَوْ تَصْرِيحٍ بِإِحْسَانٍ"

"The Husband is enjoined to keep his wives with kindness or separate from them in good terms"

MARITAL OBLIGATIONS

It is pertinent to outline marital obligations which guard against maltreatment and maintains peaceful coexistence between couples, some of these obligations are intertwined between the spouses while each party has his own peculiar obligation which binds him. Qur'ana'-

"وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ"

Knowing these rights will definitely assist us in determining whether one is in breach of any for an interested party to have cause of action against the defaulter.

OBLIGATION OF A HUSBAND

- To protect the wife
- To maintain her
- To pay her dower
- To make himself interactive
- To be sexually fit so that the wife should not feel completely neglected or be dissatisfied with the marriage on that ground.
- To treat the wife with affection and kindness this include permission to visit her parents and relatives
- Not to abstract her in performing her religious duties.
- To grand her freedom from the bondage of marriage when he has no inclination towards her.

MARITAL OBLIGATION OF THE WIFE

- To look after the domestic comfort of her Husband
- To be respectful, obedient and faithful to him
- To make herself available to him at all reasonable time
- To make herself attractive to him
- To suckle the children during the prescribed or usual period of time if so desired by the Husband and to bring up the children properly.

CONCEPT OF DARAR (HARM)

For us to know defaulter of Darar we need to highlight the word **DARAR**.

DARAR is an Arabic word which denotes abuse, it literally means ‘Harm’ the definition given by Jurists on the terminology of Darar clearly elucidates the types of Darar in question to include physical, psychological, emotional as well as financial. Darar can simply be described as anything that can cause injury or hurt one’s physical, emotional or psychological stability, under Islamic law it is established that the Husband has the power to divorce unilaterally and the wife has no such power but she can by mutual agreement with her Husband obtain divorce on payment to him of some considerations and that is called” Khul’I” if she doesn’t succeed in getting a divorce by Khul’I and some harm or injury is befalling her then she can apply to the Court for divorce on the following grounds:-

1. Divorce for lack of maintenance
2. Divorce for absence of Husband and fear of illicit relations
3. Divorce for bodily defects
4. Divorce for harm and bad relations
5. Divorce for Ila'I (الإيلاء)
6. Divorce for Li'an (لعان)
7. Divorce for ZIHAR

All these circumstances have direct bearing with Darar in one way or the other and Sharia provides equitable exit and remedies for any aggrieved wife.

Let me by way of quick analysis mention them one by one.

1. DIVORCE FOR LACK OF MAINTAINANCE

It is the view of all Jurists that the wife however rich might be, is entitled to maintenance from her Husband, so if he neglected her without lawful cause she has the right to sue him for maintenance and she will be given Judgment and that Judgment will be executed against his property and his income, and if he has nothing at all then the wife will apply for divorce and that divorce will be revocable so that if he regains ability to maintain her he can return her provided her Idda did not expire.

ولا يلزم الرجل النفقة الا على زوجته كانت غنية او فقيرة الخ، ثمر الداني 493

إذا أوقع الحاكم على الزوج الطلاق لأجل عسره بالنفقة فهي طلاق رجعية، فإذا اراد الزوج أن يراجعها فإنه لا يمكن من ذلك بل ولا يصح الابتعاد أن يوجد معه اليسر، شرح الخرشي

2 DIVORCE FOR ABSENCE OF HUSBAND

If the Husband absents himself from his wife to unknown destination his wife can raise claim for her divorce on account of his absence on conditions that:-

- a. He is the only person that sustains her maintenance.
- b. That she fears illicit relations, the absence is estimated at one year but to some Jurists not less than three years (3)

لا يطلق على من ترك الوطء إلا إذا طالت المدة، وذلك كسنة فأكثر عند ابن الحسن وهو المعتمد وقال الفرباني وابن عرفة السنتان والثلاثة ليست بطول بل الزيادة عليها ولا بد أن تخشى الزنا

حاشية الدسوقي 471

If his whereabouts is known then the court can summon him to appear, if he did not come within a reasonable time the case will proceed and the wife will bring witnesses to establish that there is a valid marriage contract between them and that she is under his control and he sustains her maintenance after that she takes the Oath that she is fearing commission of illicit appear.

3. DIVORCE ON ACCOUNT OF BODILY DEFECT

Whenever one of the spouse happens to know that his partner has some bodily defects which will make the marriage unbearable, that partner may apply to court for separation, the application should come forward the moment that partner begins to have the knowledge either before consummation or immediately thereafter.

وإذا علم السليم بعيب قبل العقد فلا خيار له بعد ذلك، وكذلك إذا رضي به بعد الإطلاع عليه وكذلك إذا رضي به بعد العلم به فلا خيار له بعد ذلك

حاشية الدسوقي 471

Conditions to such applications are:-

1. The party applying had no previous knowledge of his defect
2. That the objection was not waived
3. And that no conjugal relations took place between them

Bodily defects that constitute ground for such applications are as follows:-

- Insanity (الجنون)
- Leprosy (البرص)
- Leprosy (الجذام)
- Impotence (الإعتراض)

فالتفق مالك والشافعي على أن الرد يكون من أربعة عيوب "الجنون، والذام، والبرص، وداء الفرج الذي يمنع الوطء

بداية المجتهد 51:2

These are the common diseases between both parties with exception of impotence which in case of female partner there are about five diseases which cause inability of sexual intercourse viz:-

- a. Something like a bone of a ship in the female organ and prevents sexual intercourse is called :- **القرن**
- b. The closure of the way where Male organ penetrates into the female organ called :- **الرتق**
- c. Bad smell comes from the female organ called:- **البخر**
- d. Something on the lips of the female organ sometimes during intercourse brings out some liquids called:- **العفل**
- e. The removal of a partition between the place of urine and that of where the male organ penetrates called:- **الإفضاء**

All these are defects that give right to divorce but susceptible to the choice of the healthy partner.

Now coming back to our subject matter we made mention insanity, leprosy and impotence on the Husband side, all these defects according to Jurists will not give right for instant divorce but rather a reasonable time must be given for medication and thus is subject to medical authorities recommendations that is to say if a Medical Doctor confirmed that the affected person will be cured then a complete one year should be given in all three cases, if after the expiration of one year the victim still suffers from that defect then the partner can apply for divorce but all these are subject to the supra condition of waiving her interest, that means that if she choose to live with him after discovering the disease then she waived her right of divorce.

أجل في الجنون وفي الجزام والبرص حيث رجي براء من ذكر سنة

شرح الخرشي 76

المعترض فإنه يؤجل سنة لعلاجه سواء كان قديماً أو حادثاً، والسنة من يوم الحكم لامن يوم الرفع فإذا مضت سنة فإنه يطلق عليه حينئذ وإنما كان أجله سنة لتمر عليه الفصول الأربعة

4. DIVORCE FOR DARAR (HARM)

This topic is like the bedrock of this presentation in that most of the women's attention revolve on proving DARAR of either biting abusing the wife or her parents or any sort of maltreatment to her reputation. But divorce generally affects all sets of Darar (Harm) whether it is the absence of a Husband that

result in fear of committing illicit relation or bodily defect or desertion from the wife or refusing to provide her maintenance, all these are harmful and injurious to women and they must be jettisoned.

It is emphasized that relations between the spouses should always prevail and prosper, many verses and prophetic traditions were quoted. It should further be known that the Almighty Allah has made it clear that each one of the spouse has a right and obligations towards the other.

Verse 228 Baqra:

ولهن مثل الذي عليهن بالمعروف

Also Nisa'I Verse 19

وعاشروهن بالمعروف فإن كرهتموهن فعسى أن تكرهوا شيئا ويجعل الله فيه خيرا كثيرا.

Live with them on a pouting of kindness and equality if you take a dislike to them it may be that you dislike thing and Allah brings about through it great deal of good.

These and other Verses showed the spouses clearly the way they should behave and treat each other. If all that failed then Allah SWT has ordained how they get rid of each other.

Talaq which is the must hatful of the lawful things in the eyes of the Almighty Allah. There is also the general principle by the prophet Muhammad SAW

لا ضرر ولا ضرارا

You should not harm other and other should not harm you

Therefore going by those authorities of Malik Jurists the wife has the right of dissolution of marriage if the Husband ill-treats her to the extent that her equals cannot tolerate and the custom in her locality does not permit, also if he refrains from talking to her, turns his face away from her when they are in bed leers unjustifiably to the other co-wife or treat her with cruelty on conduct even if such conduct does not amount to physical ill-treatment.

ولها التطلق على الزوج بالضرر وهو ما لا يجوز شرعا كهجرها بلا موجب شرعي وضربها كذلك
وسبها كما يقع كثيرا

حاشية الدسوقي ص 345.2

All these situations according to Imam Malik are constituting cause of action for wife. However, Imam Abu Hanifa. Shafi'I and Zahri together with Shi'a Imamiya refused altogether with the view of Imam Malik they say that however bad the relations might be between the spouses that should not amount to separation and the couples should be patients and reconcile.

But we must also know that for a wife to get Judgment in court for Darar she must establish her case, but if the dispute continuous and she fails to establish her application then the court has to appoint the arbiters preferably one from her side and the other one from the Husband's side. Those arbiters have to investigate through into the matters and try their best to reconcile but if that fails they have to make recommendation of divorce that may entail payment by her of consideration of divorce if the default was from her side, if both were faulty they may recommend divorce without any consideration. Whatever the Arbiters recommend has to be passed by the court whether the parties consent or not.

But according to some Jurists including Imam Abu Hanifa and Imam Shafi'I they are of the view that, Arbiters have no power whatsoever to dissolve the marriage and they are to reconcile only they are just Agents on behalf of the spouses and not Judges.

Let me summarily mention other circumstances that also constitute Darar on the side of a wife they are:-

Ila'I and zihar but I will leave these for us to go through Sharia authorities for the purpose of elaboration.

PROOF OF DARAR

1. Confessional statement by the Husband, this is the most strongest way of establishing Darar

يؤخذ المكلف بإقراره

An adult person is bound by his confession

So if the Defendant ie Husband admits the wife's claim of Darar then the court will pass judgment in favor of the plaintiff ie wife after Izar

2. **TWO WITNESSES:-** The witnesses may not compulsorily by eye witness, they may give hearsay evidence considering the marital situation, that they may not have access of knowing what is transpiring between the couples in their matrimonial House that is why Shari'a provides for hearsay evidence.

وعزل حاكم وفي تقديمه

وضرر الزوجين من تتميمه

احكام الإحكام p.40

But it is stipulated that the plaintiff must swear because of the weakness of hearsay evidence.

3. **CIRCUMSTANTIAL EVIDENCES:** this is where the witness cannot know thoroughly what transpired between the couples due to non-accessibility of their real situations but there are traces of maltreatment in the side of the plaintiff ie wife such as her physical appearance she looks very skinny after all she was fat and healthy before they got marriage, but she turn to be wearing tore clothes there are injuries on her body, people use to hear her shouting from the inner of the house etc. if this is established before the court, then the plaintiff will swear and the Judge will dissolve the marriage.

احكام الأحكام 35

و غالب الظن به الشهادة بحيث لا يصح قطع عادة

4. **LEGAL CONSTRUCTION:-** This will manifest where there has been established by legal implication that the husband maltreats his wife just like in the case of Hakamaini Mediators who reconcile between the couples and established that it is the husband that maltreats his wife, here

they can give their recommendation in the court that they should be separated or that both of them are in default will also give rise to dissolution of marriage.

CONCLUSION

From what we have disclosed so far it is evident that Shari'a system provides protection against all kinds of injustices and ill-treatments from the husband, it also detailed the provisions for judicial remedies for the wife in case of infringement of any rights she deserves.

From the light of the above we also disclosed extensively the situations where Idrar can be established not only in areas where most of people are thinking because majority of us think that Idrar is restricted only in case of biting or abusing wives rather it extends to so many cases where husbands take advantage of harming their wives either by deserting her on bed or even by travelling to unknown destination or by refusing to divorce her after all the husband knows fully that he cannot cater for her essential needs, either as a result of lack of maintenance or he is suffering from bodily defects that will prevent him from performing his intercourse with her, all these circumstances lead to a clear opportunity for the wife to have cause of action against the husband. Therefore, with this we understood that Islam treats women with respect and honour not like other religions. Of course respecting women in Islam is rooted to our beloved prophet Muhammad SAW who even at his last summon enjoined us to take care of women and respect them. When our mother Sayyida Aisha RA was asked about how the prophet SAW used to live in his house she said that he used to repair his own shoes, sew his clothes and carrying out all such household activities without complaint. Therefore we Muslim, this becomes a challenge on us to imitate him SAW not only in our matrimonial lives but in all our live endeavors.

RECOMMENDATIONS

1. We should always employ our talent to promote relevant mechanism through which the people and the system will be considered with a view to checking the problems affecting Family Law in our society such as providing special reforms on substantial legal issues like Khul'I and maintenance, I believe some Islam Countries do have civil reform on many areas including these ones.
2. There is a need to embark on sensitization for entire public for the purpose of educating them about the objectives of Sharia in relation to marriage. It is a duty of NGOs like this to use media for drawing the attention of intending men for marriage to know their responsibilities when they get marriage, this indeed will curtail a lot of misbehaviors in conjugation that leads to maltreating wives. And on the other hand will educate the wives how to live with their Husbands in peace and harmony.

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