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DIVORCE AND WOMEN'S RIGHTS:

SOME MUSLIM INTERPRETATIONS OF S. 2:228*

The traditional Islamic law of divorce has undergone considerable change in almost all Muslim countries during the twentieth century. These reforms have generally pursued two main objectives. One is to prevent the husband from abusing his power to effect a unilateral divorce (*ṭalāq*), and the other is to enhance the wife's rights especially in cases where the husband exercise of ṭalāq causes her substantial harm. Under classical sharīʿa law, the husband is authorized to divorce his wife without assigning any cause and he is not required to resort to any court proceedings in order to effect a ṭalāq. The wife, on the other hand, has no effective legal recourse either to challenge the husband's abuse of his power of ṭalāq, or to demand financial compensation. She is only entitled to rnaintenance during her waiting period of ʿidda following a final divorce. This period usually lasts three months, or in the event of a pregnancy, until the delivery of the child.

The traditional Mālikī law, being the most liberal of all the sharīʿa schools of law on the subject, permits the wife to demand a judicial separation in the event of the husband's affliction with a serious disease, his failure to maintain his wife, injurious treatment (*ḍarar*), and prolonged desertion.[1] The Ḥanafi law which commands the largest following of all the sharīʿa schools, however, only recognizes the husband's sexual impotence as a valid pound for judicial separation. But in normal circumstances, none of the recognised schools of Islamic law pants the wife any right to dispute the propriety or fairness of the husband's exercise of ṭalāq. This imbalance in the rights of the spouses concerning divorce has been the focus of attention in modern law reform. Questions have been raised as to whether the Muslim jurists of the past have failed to give adequate attention to the objectives of equality and justice which are founded in the original sources of the sharīʿa, especially the Qur'an.

The Syrian Law of Personal Status 1953[2] was the first in a series of Middle Eastern legal codes which introduced important reforms in the sharīʿa personal law. In its preamble to the section on divorce, this law stated that "the true purposes and conditions of divorce in Islam have sadly been misconstrued and perverted by the jurists of the past whose doctrine has led to a lack of security in married life" and that their exercise of excessive care to avoid any possible danger of breaking the law had often produced the opposite results. In this situation, the proper policy was to "open the door of mercy" from the provisions of the

I wish to thank the British Council for a scholarship it extended to me during my doctoral research at the University of London (1971-1975), form which much of the material presented here has been gained.

[1] The minimum period of desertion to justify judicial separation is one year according to one Mālikī view, and three years according to another.

[2] *Qānūn ḥuquq al-ʿā'ila*, Decree Law No. 59, 1953.

sharīʿa itself, to "return to the origins of the law of divorce in Islam and adopt from outside the four [Sunnī] schools provisions which will be conducive to public welfare."[3]

The need to reconstruct the Law of divorce in Islam, as acknowledged by the Syrian legislator, raises the question of a fresh approach to the interpretation of the Qur'anic verses on the subject, Classical sharīʿa law, on the whole, fails to give due prominence to some of the Qur'anic principles which could provide the basis of beneficial change in the rights and obligations of the spouses concerning divorce. One Qur'anic verse which can be given a fresh interpretation is S. 2:228:

> *wa lahunna mithl al-ladhī ʿalayhinna bi ʿl-maʿrūf* (and they—that is, the women—have rights similar to those which men have over them in a just manner, or according to approved custom).

This Qur'anic principle has not been given proper implementation in the classical jurisprudence. One question which has exercised the minds of jurists and exegetes is whether the similarity of rights in this verse should be confined to specific issues, or should apply, as a general rule, to all aspects of matrimonial relations. The early jurists and commentators have, on the whole, attempted to restrict the implications of this verse, which is of an evidently general nature, to particular subjects. In doing so, they have relied on the authority of Ibn ʿAbbas[4] who is reported to have commented that "I wish to be pleasing in appearance in the same way as I would wish my wife to be. For God has entitled the spouses to similar rights over each other . . (S. 2:228 cited)."[5] 'The majority of commentators thus adopt pleasant appearance and dress as the principal theme for similarity of rights between the spouses. A notable exception to this view is al-Jaṣṣāṣ (d. 370/980) who considers that similarity of right in S. 2:228 applies to the subject of dower, It is accordingly "the husband's obligation to give a proper dower (*mahr al-mithl*) to his wife whenever no dower is specified in the contract of marriage. For marriage establishes the husband's conjugal rights to his spouse and, in return, entitles her to a similar right, which is mahr al-mithl."[6] Modern jurists and commentators, on the other hand, maintain that S. 2:228 lays down a general rule which encompasses the whole range of relations between the spouses during their married life and its termination by divorce.

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[3] Ibid. For further information on the Syrian law of divorce see J. N. D. Anderson, "The Syrian Law of Personal Status," *BSOAS*, vol XVII (1955), 39ff; N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago and London: University of Chicago Press, 1969), pp.46ff.

[4] ʿAbd Allāh b. ʿAbbās (d.68/687) is recognized as a leading authority on tafsīr, for which he has acquired the appellations "Tarjumān al-Qur'an (interpreter of the Qur'an), and the "Father of Tafsīr". For more information see Mujāhid M. Al-Ṣawwāf, "Early Tafsīr- A survey of Qur'anic Contemporary up to 150 A.H., in Khurdish Ahmad and Ẓafar Isḥāq Anṣāri, eds., *Islamic Perspective: Studies in Honor of Mawlānā Sayyid Abul Aʿlā Mawdūdi* (Leicester, United Kingdom :The Islamic Foundation and J. M.Dent & Sons, 1979), pp.139ff.

[5] ʿImād al-ḍin Abu'l-Fidā' Ismāʿīl b. Kathir (d. 744/1372), *Tafsīr al-Qur'an al-ʿAẓim,* 3rd ed. (Cairo: Maṭbaʿat al-Istiqāma, 1956), vol I, p.271; Abū ʿAbd Allah Muḥammad b. Aḥmad al-Anṣarī al-Qurṭubi, *Tafsīr al-Qurṭubī* (Cairo: Dār al-Kit,1967), vol III, p. 123; Fakhr al-Dīn, *al-Tafsīr al-Kabīr* (Cairo: al-Maṭba'a al-Bahiyya, n.d.) vol V, p.101.

[6] Abū Bakr Aḥmad b. ʿAlī al-Jaṣṣāṣ, *Aḥkām al-Qur'an* (Beirut: Dār al-Kitab alʿArabī, 1335 A.H.) vol I, p. 375).

Ibn Jarīr ai-Ṭabarī (d. 310/922)[7] is the leading figure among classical commentators, while Rashīd Riḍā features prominently among the modernists. Al-Ṭabarī discusses the whole of S. 2228, which reads;

> And the divorced women shall await three courses (clause l—[clause supplied for the sake of convenience]):
> and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the Last Day (clause 2):
> and their husbands have a greater right to take them back during that period provided they intend reconciliation (clause 3).
> And they have rights similar to those which men have over them in a just manner- or according to approved custom (clause 4);
> but men have a rank above them (clause 5);
>
> and Allah is mighty, wise (clause 6).

While relying on a report attributed to al-Ḍaḥḥak, al-Ṭabarī comments that the wife is obligated to be pleasant in manner and speech; the husband too must avoid prejudice to her and provide her with maintenance. According to another report, attributed to Ibn Zayd, both the spouses are enjoined to fear God in observing each other's rights. Others have held the view that the spouses are equally entitled to each other's pleasant appearance and good companionship. Al-Ṭabarī then gives the following interpretation which he considers to be preferable:

> The divorced woman—divorced once or twice—-has the right over her husband that he must not revoke the ṭalāq during her three courses unless he intends mutual benefit thereby and avoids causing her harm. Similarly, the husband has a right over her in that when he intends to revoke the ṭalāq, she must not cause him prejudice by concealing her pregnancy. For God Almighty has forbidden her front doing so if she believes in God and the Last Day. God has thus granted each one of them a right over the other.[8]

Only toward the end of his commentary does al-Ṭabarī add a brief remark which seems to point at the right approach to the interpretation of clause 4:

> It is probable that this verse embraces all the rights which the spouses have over each other, despite the foregoing analysis. For God has granted each of the spouses similar rights over the other. If this interpretation is adopted, then all the commentaries of Ibn ʻAbbās, Ḍaḥḥāk and others would fall within the scope of this verse.[9]

Other commentators add but little to al-Ṭabarī's interpretation, which seems typical of the classical works. However, al-Zamakhsharī (d. 528/1133) briefly points out that 'men and

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[7] Muḥammad al-Bahī comments that "Tafsīr al-Tabarī is considered to be the most authoritative as it is based on approved precedents and it interprets the Qur'an by the Qur'an itself, the valid *sunnah*, and transmission from Companions and Successors" (see his Foreward in Maḥmūd Shaltūt, *Tafsīr al-Qur'an al-Karim: al-Ajzāʻ al-Uwal,* 2nd ed. (Cairo: Dār al-Maʻārif, 1374 A.H.), vol VI, p.532.

[8] Abū Ja'far Muḥammad b. Jarīr al-Tabarī, *Tafsīr al-Ṭabari: Jāmiʻal-Bayān ʻan Ta'wīl Ayi*

[9] Ibid., p.533.

women have been granted similar rights over each other in so far as the sharīʿa or approved customs are not violated" Al-Zamakhsharī then goes on to exclude the trivialities of everyday life from the scope of this verse by saying that "the verse implies similarities in positive obligations rather than similarity in all activities. For example, when [the wife] washes [the husband's] clothes or cooks for him, it does not create a similar obligation on his part."[10]

Al-Qurṭubī's commentary on clause 4 is largely a rehash of al-Ṭabarī, both of whom give prominence to the reports attributed to Ibn ʿAbbās on the subject of pleasant appearance. Al-Qurtubi (d. 671/1272), however, elaborates on this theme. His description of pleasant appearance includes cleanliness, washing of teeth, clipping of nails, and wearing a ring. The elderly man may dye his beard, and

> It suits the elderly to trim his moustache, but it makes the youths look ugly to do the same. It is reported from the Apostle of God who has said my Lord has ordered me to grow my beard and trim my moustache." Similarly with regard to clothe which is the subject of these rights, the husband must act in harmony with his conditions so that his appearance pleases his wife and deters her from other men.[11]

Somewhat similar to al-Ṭabari's peripheral remark on the general nature of clause 4, al-Qurṭubī too acknowledges that his interpretation of this clause amounts to an approximation (*maʿnā mutaqārib*) "whereas the verse itself is broad enough to embrace all matrimonial rights."[12] The lingering doubt on this point has also been expressed by Fakhr al-Dīn al-Rāzī (d. 606/1210) who adopts the majority view in restricting the implications of clause 4 to particular issues, but adds that:

> Each of the spouses has rights over the other. Know that the purpose of marriage cannot be fulfilled unless they observe their respective rights, which are numerous although we only refer to some. One of these is that the husband is like the leader and custodian (*ka 'l-amīr wa'l-rāʿi*) . . . . [13]

Al-Rāzi then quotes Ibn ʿAbbās and others on the requirements of pleasant appearance and good companionship which, on the whole, amounts to a diversion of the theme from juristic to essentially non-juristic matters.

With regard to clause 5, the majority of classical commentators consider the rank given to men over women therein to imply man's superiority on account of "strength, wisdom, ability to provide maintenance, blood-money (*diyya*), inheritance and *jihād*."[14] To this list, al-Rāzī adds man's

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[10] Jār Allah Muḥammad b. ʿUmar al-Zamakhsarī, *al-Kashshāf ʿan Haqāʿīq Ghawāmiḍ al-Tanzil waʿUyūn al-Aqāwīl fi Wujūh al-Ta'wīl* (Beirut: Dār al-Kitāb, 1967) vol. III, p. 124.
[11] *Tafsīr al-Qurṭubī*, vol III, p. 124.
[12] Ibid.
[13] Fakhr al-Dīn al-Razī, *al-Tafsir al-Kabīr*, vol V, p.101.
[14] *Tafsīr al-Qurṭubī*, vol III, p. 125. That is only men are qualified to participate in jihād; they take double the female share in inheritance; and their blood-money (diyya) is twice that of the female.

> eligiblity for leadership (imāma) and judicial function . . . his right to ṭalāq and revocation (*raj'a*). For a woman is unable to divorce her husband, to revoke a ṭalāq, or to prevent her husband from revoking it. Similarly, man's share in the booty is greater than that of the woman. Since the superiority of man is established on these grounds, it becomes evident that the woman is like a helpless captive (*ka 'l-asīr, al-ʿājiz*) under the man's control.[15]

In an attempt to explain the meaning of clause 5, al-Ṭabarī quotes a number of traditions on such subjects as the husband's right to the obedience of his wife and the requirement that he give her a dower, including one that states that "men have a rank above women because men possess a beard of which the women are deprived."[16] Al-Ṭabarī then offers a variant interpretation which he considers to be preferable. He quotes a tradition, attributed to lbn ʿAbbās, that "the rank which God has bestowed upon man implies that he should pardon his wife from fulfilling some of her obligations towards him." In other words, the husband should show latitude and magnanimity because of his superior status.

Rashīd Riḍā (d. 1353/1935) is atypical of previous commentators on S. 2:228 insofar as he broaches the idea of a general equality of rights between the spouses. Referring to clause 4, Riḍā comments:

> This is a truly significant verse, a full interpretation of which would require a lengthy discussion, This verse incorporates a maxim (*qāʿida kulliyya*) to the effect that women are equal to men in all rights except in one matter which is referred to in the succeeding clause to this verse which is that "men have a rank above that of women." This last clause, in turn, refers to another verse (4:34) which describes the rank given to men in that men are responsible for providing maintenance for women. Mutual rights of men and women in transactions and in marriage are dependant, as is implied by the word "*bi 'l-maʿrūf*"on current customs among people which are in harmony with their laws, mores and beliefs. This maxim provides man with a standard on which to evaluate the treatment he accords his wife.[17]

Riḍā's commentary is particularly interesting in that it delineates clause 4 as a general principle by which the spouses should measure their conduct towards each other. Despite the fact that Riḍā's interpretation of S. 2:228 as a whole generally concurs with the mainstream of traditional opinion, his distinctively egalitarian views have had a visible impact on the thinking of subsequent scholars. At least, three prominent Egyptian Qur'ān commentators, namely Muṣṭafā al-Marāghī, Sayyid Quṭb, and Maḥmūd Shaltūt, have endorsed Riḍā's interpretation of clause 4. The following passage appears in Riḍā, and with no significant alteration, also in al-Marāghī:

> Similarity in this verse implies that their rights are equal and reciprocal. Whatever treatment a wife accords her husband, the husband should reciprocate in a like

[15] Fakhr al-Dīn al-Razī, *al-Tafsir al-Kabīr*, vol V, p.101.
[16] *Tafsīr al-Ṭabarī*, vol IV, p.535.
[17] Muḥammad Rashīd Riḍā, *Tafsir al-Qur'ān al-Hakīm*, 4th ed. (Cairo: Dār al-Manār, 1373 A.H.), vol II, p.375.

> manner. Although the spouses are of different sexes, they are of the same genus and they are similar (*mutamāthilān*) in their conduct and in their rights, just as they are similar in their human identity, perception, feeling, and intellect (*ʿaql*). Hence, it is neither just nor advisable for either of them to subjugate or humiliate the other. For their union in matrimony could not be a happy one except through mutual respect and observance of their respective rights.[18]

Having said this, however, Riḍā too defers to traditional opinion by quoting lbn ʿAbbās on the requirement of pleasant appearance and dress and by saying that 'the majority of jurists of the well-known schools are agreed that man has a right over his wife not to be denied sexual intercourse unless there is a lawful cause, and she has the right to be provided with maintenance."[19]

Commenting on clauses, both Riḍā and al-Marāghī (d. 1364/1945) point out that the rank which the Qur'an confers upon men signifies the leadership of the household and takes into account the common interest of the family and society for order and discipline. They are both of the view that this leadership belongs to the husband. It is thus his duty to protect his wife, and the latter is required to obey him. "If she becomes disobedient, he has the right to discipline her by admonishing her, separating from her, or beating her without causing her injury."[20] To this, al-Marāghī adds the proviso that obedience cannot mean rendering permissible into impermissible and vice versa.[21]

Sayyid Quṭb (d. 1966) on the other hand, holds the view that clauses 4 and 5 are both exclusively concerned with divorce, which is the principal theme of S. 2:228, and that neither of these clauses contains any reference to the subject of leadership or maintenance, Quṭb continues:

> I believe that the verse (clause 5 quoted) refers exclusively to the husband's right of revoking the ṭalāq which only he can incur in the first place, This is the rank which the Qur'an has granted the husband and it refers to his right of revocation alone. Contrary to what many have asserted, it is not a rank of absolute superiority.[22]

Remarks of this nature are rare in the classical Qur'an commentaries. Even modernists, for example Riḍā and al-Marāghī, avoid contradicting other commentators. However, Maḥmūd Shaltūt is openly critical of all those who invoke S. 2:228 in support of sexual discrimination:

> The verse makes evident the rank God has given to men above women after establishing an order of equality in their rights and obligations, It does not imply a power of custody or supervision for the husband either because of his natural strength or because of his labour and exertion in supporting his wife and family. Nor is this a

[18] Ibid., p.375; Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Maraghī,* 2nd ed, (Cairo: Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1953), vol II, p.378.
[19] Riḍā, *Tafsīr,* vol II, p.378.
[20] Ibid., p.380.
[21] *Tafsīr al-Marāghī,* vol. II, p.167.
[22] Sayyid Quṭb, *Fi Ẓilāl al-Qurʿān,* 2nd ed. (Cairo: Dār al-Qalam, 1960), p.182.

rank which implies slavery and subjugation as imposters and prejudiced people (*al-mukhādīʿūn al-mughriḍūn*) have portrayed. Look at the words of God Almighty (clause 4 quoted, which is then followed by a quotation of S. 4:34 on maintenance).[23]

Shaltūt is thus suggesting that the rank which men are given above women takes into account the subject of maintenance alone. He observes that he Qur'an affirms equality between men and women in all of the most important areas of human life."[24] To substantiate this, he refers to S. 4:32 which grants both sexes the right to work and to earn, and to S. 4:124 which renders them individually accountable for their own acts and deeds. He then discusses two additional issues in conjunction with S. 2:228, namely the husband's right to discipline his wife, and his obligation to give his wife a dower. Both of these are enjoined in the Qur'an and both are frequently invoked in support of sexual discrimination in the Qur'anic law of matrimony.

The husband's disciplinary power is the subject of S. 4:34 which draws a distinction between upright women (*ṣāliḥāt*) and "those on whose part you fear desertion. Admonish them and leave them alone in the bed and chastise hem. Women in this second category alone, Shaltūt observes, "are to be accorded one or more of the prescribed treatments as circumstances may necessitate."[25] As for the ṣāliḥāt who are mindful of their obligations, they themselves partake in the leadership of the household, but also allow the husband to lead in matters for which he is more competent. "Wives of this category," Shaltūt observes, "are in no way under the disciplinary power of their husbands."[26]

Turning to the subject of dower, Shaltūt refutes the often-quoted analogy between marriage and the contract of sale emphasizing that "contrary to what many have asserted, dower in Islam is not a price for a commodity, nor is it given in exchange for anything that a man can posses in a woman."[27] He adds that this is evident from the wording of S. 4:4 where dower is described as "*niḥla*" implying that which is granted at one's pleasure without any exchange of values.

We have seen that despite cursory references to similarity between the rights and obligations of the spouses in the classical commentaries, on the whole the early exegetes have ignored the central point of clause 4. In their defense of the equality of rights of the spouses, they have addressed themselves chiefly to subjects such as pleasant dress, good companionship and manners, which seem too vague and trivial to sustain the case for legal equality. It should be further noted that S. 2:228 is of a distinctly legal nature; it is couched in juristic language and it occurs in the context of matrimonial law, a subject which has received great attention in the Qur'an as well as the developed law of the major school.

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[23] Maḥmud Shaltūt, *Tafsīr al-Qurʿān al-Karām: al-Ajzāʿ al-ʿAshrat al-Uwal*, 2nd ed. (Cairo: Dār al-Qalam, 1960), p.182.
[24] Ibid., p.178.
[25] Ibid., p.183
[26] Ibid.
[27] Ibid., p.181.

Al-Ṭabarī's commentary is obviously an attempt to confine the implications of clause 4 to the two preceding clauses. This is the main feature of his preferred version, which seeks to interpret the Qur'an by the Qur'an itself. In the following passage, al-Ṭabarī summarizes his preferred interpretation of S. 2:228 where he once again indicates the existence of mutual rights for the spouses:

> God Almighty ordered the husband to avoid harming his wife in revoking (the ṭalāq) during her three courses, and to observe the same conduct concerning her other rights (*huqūqihā*) and affairs. The husband too is entitled to be told the truth regarding any foetus that God may have created in her womb, she must avoid harm to him and observe all his rights. [28]

However, a closer look at al-Ṭabarī's interpretation would reveal that he makes no provision either for similarity of rights between husband and wife or for mutual rights between the spouses. A consideration of the grammatical structure and logical implications of S. 2:228 provides justification for this. I should also draw attention to the position of clause 4, its semantic content, and its relationship with the other clauses in S. 2:228.

In the first instance, clause 4 is a grammatically complete sentence which need not be associated with any other part of S. 2:228, and it retains its full meaning even if taken out of context. Clause 4 is not complementary to either the preceding or the succeeding clause, as it introduces a different theme. The two preceding clauses, 2 and 3, are complementary to clause 1 in the sense that they deal with the subject of ʿidda, which is introduced in clause 1.[29] Clause 4 introduces a new theme (similarity of rights); clause 5 is complementary to clause 4 and, in fact, embodies an exception to the general rule of equality in clause 4. Moreover, clause 4 consists of a general provision (*ʿāmm*) as opposed to a specific one (*khāṣṣ*). This means that clause 4 is open to interpretation. And it appears that differences of opinion among scholars and commentators concerning the precise import of clause 4 makes it impossible for an *ijmāʿ* (consensus) to be arrived at.

My contention is that al-Ṭabarī's assertion notwithstanding, the reference to the rights of the spouses in clause 4 need not be confined to the themes of its two preceding clauses. Al-Ṭabarī tends to assume that the pronoun *lahunna* (rights for women) refers to clause 3, and that *ʿalayhinna* (rights of men over women) refers go clause 2. In this way, the wife's right over the husband, according to al-Ṭabarī, is that he must avoid prejudice to her and not revoke the ṭalāq unless he intends reconciliation; and the husband's right over her is that she must reveal the truth in respect to her pregnancy.

There are certain inaccuracies in this interpretation. Al-Ṭabarī tends to suggest that clauses 2 and 3 incorporate mutual rights for the spouses. A fresh look at S. 2:228 however would indicate that neither of the rights to which al-Ṭabarī alludes are rights per se. Rather,

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[28] *Tafsīr al-Ṭabarī,* vol. VI, p.536.

[29] Clauses 2 and 3 explain the purpose of clause 1. The latter obligated the wife to observe the ʿidda. The purpose of this is to facilitate knowledge of a possible pregnancy (clause 2); and also to allow for the possibility of reconciliation (clause 3). Clause 4 introduces a new theme which is neither directly related nor should be logically confined to the subject of ʿidda.

they are obligations. The confusion is further aggravated when al-Ṭabarī assumes an order of mutuality between these "rights." He implies that the right of one spouse simultaneously embodies the obligation of the other. It is further contended that the two obligations in clauses 2 and 3 respectively are not mutually related as such. The basic confusion in al-Ṭabarī's approach thus lies in the attempt to confine exclusively the implications of clause 4 to the two preceding clauses. As a consequence of this restrictive interpretation, clause 4 has been reduced to a mere reference to specific issues rather than seen as a general guide and principle of matrimonial law.

Clause 4 clearly begins with a reference to the rights of divorced women, as the word *lahunna* implies. This is followed by an allusion to the rights of the husband, as the word *ʿalayhinna* indicates. It is thus evident that both should have rights if the verse is to be correctly understood. A look al-Ṭabarī's interpretation, however, reveals that the wife has no rights whatsoever. Were al-Ṭabarī's construction accepted, it would mean that the husband has rights but the wife has obligations only, which would not be in agreement with the obvious meaning of the verse. A perusal of S. 2:228 indicates the following:

Clause 1 creates an obligation on the part of divorced women to observe a waiting period (ʿidda) lasting three menstrual cycles. Clause 2 further obligates them not to conceal the truth in respect to their pregnancy. Clause 3 confers right on the husband enabling him to revoke a ṭalāq while intending a genuine reconciliation. Clause 4 is a general declaration that the spouses have similar rights. Clause 5 elevates men by a rank above women.

It is clear from the foregoing that the first three clauses incorporate the obligations on the part of the divorced woman, as well as a right for the husband. Al-Ṭabarī's interpretation to the effect that the first three clauses create mutual rights for both spouses, which are then alluded to in clause 4 is not borne out by the contents of the verse and is, therefore, an incorrect t interpretation. In other words, if al-Ṭabarī's assumption were accepted that the "rights" of the divorced women, as understood from the word *lahunna*, refers to clause 2, the verse as a whole would not make any sense. For it would follow that the wives' "right" is that "it is not permissible for them to conceal the truth regarding their pregnancy." Obviously, the wives' obligation in this respect cannot simultaneously embody their "right," and aforitiori cannot be the correct implication of *lahunna*.

It will be further noted that there are two aspects to the meaning of clause one being the existence of rights for both spouses. This we have already discussed and concluded that S. 2:228, as per al-Ṭabarī, grants no rights to the wife. The other aspect of clause 4 which has received al-Ṭabarī's attention the spouses have mutual rights. A reconsideration of S. 2228 shows, however that no order of mutuality can be established in these rights:

Clause 2 which obligates the wife not to conceal the truth regarding pregnancy during her ʿidda is an objective obligation of the wife to tell the truth. This is borne out by the second part of the same clause. "if they believe in God and the Last Day." It is therefore the wife's responsibility to God, and it does not represent any particular right of the husband. Her responsibility to tell the truth is unaffected by whether or not the husband intends

reconciliation (at the instance of revoking the ṭalāq). Nor is the husband's right to revocation, which is the subject of clause 3, mutually related to the wife's obligation with respect to revealing the truth. Even if the wife were to reveal the truth, this would not necessarily create an obligation on the husband's part to revoke the ṭalāq. Conversely, even if she were to conceal the truth, it would in no way affect the husband's right to revocation.[30]

The only alternative that remains to be explored in order to discover the implications of the "rights of the divorced women" in S. 2:228 is to say that these rights are incorporated in the second part of clause 3. This would mean that the wife has a right which is that her husband should only revoke the ṭalāq when he genuinely intends reconciliation. However, a look at the wording of S. 2:228 indicates a further difficulty. For *lahunna* cannot be rightly said to be alluding to "*in arādu iṣlāḥa*" (if they intend reconciliation), since the latter is a condition of the statement immediately preceding it, that is the first part of clause 3. The condition does not make any sense separated from its predicate; hence it cannot establish any right by itself. This is in addition to the fact that intent is an abstract; the intention of one person cannot constitute the subject of a right for another.[31] Nor can it be said that *lahunna* alludes to the whole of clause 3. For the latter spells out the exclusive right of the husband with respect to revocation rather than conferring any right on the wife. Consequently the word *lahunna* does not refer to any right for the wife in S. 2:228 as a whole. In the absence of any right for the wife, neither the concept of similarity nor that of mutuality of rights has any place in S. 2:228. And this cannot be said to represent the correct meaning of clause 4 which clearly states that the spouses have similar rights. The use of the term "bi'l-ma'rūf" (in a just manner, or according to approved custom) at the end of clause 4 confirms the above analysis, which is to say that clause 4 is a general principle and not a mere reference to its preceding clauses. This is also borne out by the fact that clauses 2 and 3 incorporate subjects which are not amenable to the implications of custom or of just behavior. Al-Ṭabarī is silent as to the bearing of bi'l-marūf on the contents of S. 2:228. However, if al-Ṭabarī's assumption that clause 4 refers to the two preceding clauses were to be accepted, the term "bi'l-ma'rūf" would have to be attributed to the same clauses. This would mean that the wife must reveal the truth in accordance with the custom, or just behavior; or that the husband has the right to revoke the ṭalāq in accordance with the custom or just behavior. It is obvious that revealing the truth need not be made subject to such conditions. Similarly, the requirements of custom do not necessarily relate to the husband's right to revocation.[32]

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[30] According to al-Qurṭubī, "if the husband intends to harm his wife by lengthening her ʿidda, or by refusing to release her from the bond of nikāh, his revocation is still valid although he would have committed a sin" (*Tafsīr*, vol. III, p.123); see also Fakhr al-Dīn al Rāzī, *al-Tafsīr*, vol. V, p.100.

[31] Fakhr al-Dīn al-Razī notes that "intent is an internal quality that is not known to us; hence the sharīʿa does not make the validity of revocation dependent thereon. But every person is responsible for his intention before God" (*al-Tafsīr,* vol V, p.100).

[32] Commenting on S. 2:228, Yaḥyā b. ʿAli al-Shawkānī holds the view that the husband must seek the well-being of his wife in accordance to what is customary among other men and the way they treat their wives. Similarly, she must strive for the well-being of her husband in accordance to what is known of other women concerning such matters as obedience, adornment, companionship and the like (*Fatḥ al-Qadīr*[Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1350 A.H.], vol I, p.210. According to the majority of jurists, the wife may not be compelled to do the household chores such as cleaning and cooking. However, Ibn Taymiyya observes that these matters should be determined in the light of current custom. While recording Ibn Taymiyya's opinion, Rashid Riḍā

If, on the other hand, it is admitted that clause 4 incorporates a general principle, the phrase "bi'l-ma'rūf" would have a positive meaning. Either or both of the two meanings of this phrase would endow clause 4 with the characteristics of a general principle. In other words, clause 4 lays down a norm whose details can be elaborated in the light of either approved custom or just behavior, or both.

The normative character of clause 4 is further endorsed by clause 5 in the sense that the latter embodies an exception to the norm: men are given a rank above women as the providers of maintenance. Notwithstanding the importance of divorce and its profound consequences to the spouses, their offspring, and the society at large, the established sharīʿa law of divorce is characterized by an order of inequality in the rights of the spouses. This imbalance can be rectified through direct resort to the original sources of the sharīʿa and a reconstruction of its principles in the light of the Qur'anic criterion of bi'l-ma'rūf so as to satisfy the ideals of justice and the respected values of the community.

Despite its call for a reconstruction of the principles of divorce law in Islam the actual reforms that the Syrian Law of 1953 introduced was not as ambitious as might have been expected. This law basically reformed two aspects of the sharīʿa law of ṭalāq. One was concerned with the triple ṭalāq, which was no longer to operate as an immediate and final rupture of the marital tie. It was to count as a single repudiation which could be revoked by the husband. The other reform under the Syrian law related to compensation against prejudicial divorce, Article 117 of this law states that where the court considers that the husband has repudiated his wife without reasonable cause and the wife has suffered material damage thereby, it may order the husband to pay the wife compensation not exceeding one year's maintenance. This reform represented the implementation of the spirit of those Qur'anic verses which enjoined husbands to make a provision for repudiated wives (S. 2:236) and to "retain wives with kindness or release them with consideration" (S. 2:229). But these verses, as Noel Coulson commented, "had been largely regarded by traditional jurisprudence as moral rather than legally enforceable injunctions."[33] The Syrian legislation, nevertheless, marked a significant development in that "for the first time, independent assessment of the Qur'anic precepts had resulted in a departure from Interpretations hallowed by thirteen centuries of legal tradition."[34]

A reconstruction of the Qur'anic tenets on divorce has also been attempted by the judicial authorities of Pakistan. In *Balqis Fatima v. Najm-ul-Ikram Qureshi*,[35] the High Court of Lahore gave a novel interpretation to S. 4:35. This verse provides the authority for a form of divorce known in Islamic law as *khulʿ* in which the wife agrees to give her husband some financial consideration for her freedom. But khulʿ in sharīʿa law is a contract which could never be effected by the wife unilaterally. By reinterpreting S. 4:35, the High Court of Lahore concluded that khulʿ is a right of the wife which can be effected even without the consent of

himself comments that clause 4 "implies that custom should be observed by the spouses on condition that this does not amount to interference with the law itself" (*Tafsīr,* vol II, p.379)

[33] Neol J. Coulson, *A History of Islamic Law*, (Edinburg: Edinburg University Press, 1964), p.209.

[34] Ibid., p.210.

[35] All-Pakistan Legal Decision (P.L.D.) 1959, Lah, 566.

the husband. This conclusion is based on the argument that by authorizing arbitration in matrimonial discord, the Qur'an has, in effect, rendered khulʿ into a judicial divorce: S. 4:35 provided that "if you fear discord between the spouses, appoint an arbitrator (*ḥakam*) from his side, and one from others". After examining the various interpretations of this verse, the court observed that "the only reasonable inference from the use of the word 'ḥakam' in this verse is that the ḥakam has the power to separate the spouses."[36] The court held the opinion that since the husband has full power to repudiate his wife at will, it would be unreasonable if the wife were not given a comparable right. Although this must, in her case, remain subject to a decree of the court which might require her to repay all the benefits she has received from the marriage.[37]

The law concerning khul' in Pakistan, however, remained very much in doubt, despite the introduction of the Family Laws Ordinance in 1961. A further step was taken in 1967 when the Supreme Court, in the case of *Khurshid Bibi v. Muhammad Amin*,[38] upheld the decision of the High Court of Lahore and elaborated it further in the light of another Qur'anic verse which was quoted in support of judicial intervention to enforce a khulʿ "in cases of incompatibility, aversion, or marriage breakdown."[39] This verse (2:229) provided "if you fear that they [the spouses] cannot observe the limits prescribed by God, then it shall be no sin for either of them in what she gives to get her freedom." It wits held that this verse gave the court authority to enforce a khulʿ, even against the will of the husband, on the ground that the word "you" refers to judges whose duty it is to determine whether the spouses can keep within the bounds set by God, in other words, where the judge apprehends that "a harmonious married state, as envisaged by Islam, will not be possible."[40]

These same Qur'anic verses (2:229, 4:35) have formed the juristic basis of a much more radical reform of the law of divorce in the Tunisian Law of Personal Status 1957. Article 30 of this law abolished all forms of extra-judicial divorce, whether by ṭalāq or by the mutual agreement of the spouses, by enacting that "any divorce outside the court of law is devoid of legal effect." In support of this major innovation, the Tunisian jurists reasoned that in the very nature of things, some degree of discord must always precede a divorce, yet in most cases no opportunity had been provided for arbitrators to be appointed to attempt to salvage the marriage. The obvious solution then was to provide that no divorce would be effective except by consent of court.[41] Since the court was the most appropriate organ to

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[36] Cited in Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, 4th ed. (New Delhi: Oxford University Press, 1974), p.177. Fyzee observes that the court decision in this case is based on Malikī opinion concerning the powers of the arbitrators.

[37] J. N. D. Anderson, *Law Reforms in the Muslim World* (London: Athlone Press, 1976), p.80.

[38] P. L. D. 1967 S. C. 97.

[39] Anderson, *Law Reform*, p.81.

[40] D. Hinchcliffe, "Islamic Law of Marriage and Divorce in India and Pakistan" (Ph.D. diss. London University, School of Oriental and African Studies, 1971), p.387.

[41] This Qur'anic provision had, in fact, already been utilized by the Egyptian reformers (Law No. 25 of 1929) which entitled the wife to demand a judicial dissolution of her marriage because of cruelty on the part of her husband which she could not prove. In this case, however, the argument had turned on whether the arbitrators, or the court on their recommendation, could terminate the marriage, if reconciliation proved impossible. The Egyptian law was , on the whole, restrictive regarding the power of the court, as it provided for judicial intervention only under specified circumstances (see Anderson, *Law Reform*, p.60)

fulfill the duty of arbitration, the Tunisian jurists concluded that the Qur'an , in effect, authorized judicial intervention in all cases of divorce.[42]

Modern reforms that have been introduced in various Muslim countries following the Syrian legislation of 1953 clearly acknowledge the need for a reconstruction of the law of divorce in Islam. The modernists have, in the meantime, shown the desire to retain their Islamic heritage by not wishing to depart from the basic principles of the sharīʿa. They have thus retained the sharīʿa doctrines and have sought juristic justification from its sources, founding their arguments largely on the Qur'an.

These reforms are, however eclectic and "piecemeal," and they suffer from a lack of consensus on general principles. The diversity of the actual measures adopted by various Muslim countries concerning divorce leads one to question the objectives that are being pursued in this field. Should the law aim at a basic equality between the rights of the spouses, or a fundamental inequality which is then modified by ad hoc and circumstantial measures? The disadvantages of this latter approach, apart from its questionable ends, are inconsistency and lack of cohesion in judicial decision-making.

Recent changes in the sharīʿa law of divorce, nevertheless, indicate a desire on the part of their initiators to translate the realities of modern life into legal rules in harmony with the letter or spirit of the Qur'an. When one reflects on the diverging interpretations of the Qur'an by commentators belonging to different periods of history, one realizes that their formulations have taken into account the changing needs of the community in its various social and historical settings.

As a distinctive discipline of Islamic learning, tafsīr must reflect the need for continuity and change in the understanding of the Qur'an. This must surely be a concomitant of the Muslim belief in the timeless validity of Qur'anic teachings. However, the compromise between continuity and change must have its limits. When a point of obvious imbalance between conflicting values arises, the need for change may command a higher priority. With regard to S. 2:228, differences of opinion between the classical and modern exegetes are not only due to a more egalitarian attitude on the part of the modernists, but more significantly to an attempt to rectify an obvious fallacy in the original interpretation of this verse.

The early commentators have not stressed the egalitarian aspect of the Qur'anic enactments on divorce. This omission has occurred chiefly because they regarded many of these enactments as being of purely moral significance. They ignored the rationale of translating these dispensations into positive law. When reading Nawwāb's critique, we are reminded that "Islamic scholars frequently failed to make use of their right to question earlier authorities and went on repeating what had been said by the ancient."[43] Today, Muslim society is faced with the challenge of ascertaining the relevance of long-established traditions to contemporary problems. In this momentous task, society must surely be prepared to abandon

[42] For further details see Coulson, *A History*, pp.210ff.
[43] Ismaʿil I. NAwwāb, "Reflections on the Roles and Educational Desiderata of the Islamist," in Khurshid Aḥmad and Zafar I. Anṣāri, eds., *Islamic Perspectives,* p.50.

the path of tradition and search for ways in which Islam can provide alternative solutions to these problems.

With regard to the rights of the spouses in divorce, there is no convincing evidence to justify the traditional interpretations of the Qur'an in the form they have been handed down from the past. It appears that the ulama have relied heavily on the accumulated weight of tradition. The neo-*ijtihād*[44] of Muslim Jurists and legislators in recent times has revealed exciting possibilities for fundamental changes in the sharīʿa law of matrimony. Most of these innovations have been realized through resorting directly to the original sources of the law. One sees on the horizon potential reforms in the legal heritage of Islam encompassing an order of equality between the spouses in divorce. Family law has always represented the core of the sharīʿa and the bastion of social relations in Islam. Reform activities in the present century have focused on family law, which seems to be a testing ground for the capacity of the sharīʿa to accommodate social change. Islamic law must grow abreast of the needs of Muslim society and be responsive to its problems. To achieve this is far more meaningful than conformity to the traditional demand for unquestioning loyalty to the authorities of the past.

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[44] The terms is from Neol J. Coulson whose *An History of Islamic Law,* Chap. 14, bears the title "Neo-Ijtihād".