

# **DISSOLUTION OF MARRIAGE BY MUSLIM WIFE: AN ANALYSIS OF SOME CLASSICAL PRINCIPLES**

Dr. M.Afzal Wani\*

## **I. Introduction**

Dissolution of marriage under Islamic law has attained very contentious dimensions inviting discussions on many perspectives of the subject. Most important issue is the power of a wife in the process of marriage-dissolution. In this paper we have an analysis of some principles in the classical Islamic Law regarding the subject.

## **II. Islamic Policy of Marriage Dissolution**

Islam discourages marriage dissolution but does not deny it. Dissolution of marriage becomes evidently desirable when the spouses can no longer live in harmony, having lost regard for each other and also the mutual trust and confidence. Taking a realistic view of human affairs, Islam requires that every attempt be made to stabilize and continue a marriage. But, when it is established that the marriage has proved a failure or broken down it does not hesitate to allow the parties to separate from each other. In other words, ordinarily the marriage in Islam is to last till one of the spouses dies, but, if the husband and wife cannot live together happily the very object of the marriage gets defeated. In such a situation

the dissolution of marriage is not to be denied. Denial in such a situation has nothing to offer but hardship and foulness. Islam, therefore, discourages marriage-dissolution but allows for the purpose of preventing other evils. The following classical texts reflect the basic policy of the Islamic law:

“Of all the permitted things divorce is the most abominable with Allah.”<sup>1</sup>

“Best amongst ye is the one who is best for his wife and children.”<sup>2</sup>

“The most perfect amongst the faithful in respect of faith is he who is best in disposition towards them (life-partners) and better among you are those who are better towards their wives.”<sup>3</sup>

“Let not a faithful man hate a faithful woman, if he dislikes some of her habits, he may like others.”<sup>4</sup>

“Get married, do not divorce; Allah does not like men and women who relish variety in sex matters.”<sup>5</sup>

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\* Associate Research Professor, ILL, New Delhi – 110001.

<sup>1</sup> Abu Dawud, *Sunan*, Part I:296. (Kanpur, n.d.).

<sup>2</sup> Wali-al-Din-al-Khatib, *Mishkat al-Masabih*, 181 (Delhi, 1350 AH).

<sup>3</sup> *Id.* at p.282.

<sup>4</sup> *Id.* at 280.

<sup>5</sup> Ali al-Muttaqi, *Kanz-at-Ummat*, Part : 159 (Hyderabad-Deccan, 1313 AH)

“And live with them (the wives) with kindness and equity; if ye take a dislike to them; it may be that ye dislike a thing, but Allah brings about through it a great deal of good.”<sup>6</sup>

Muslims have, therefore, been enjoined not to divorce their wives except in the case of their being unfaithful. Divorce is permitted as a matter of necessity for the avoidance of greater evil which may result from continuance of a marriage after its break down. Even in cases of necessity an attempt is to be made for reconciliation before its dissolution by referring the matter to arbitration. It is laid down by the Quran:

And if you fear a breach between the two (husband and wife), then appoint one arbiter from his (husband's) people and one arbiter from her (wife's) people. If they desire agreement, *Allah* will effect harmony between them.<sup>7</sup>

The requirement of reference of matters relating to divorce to arbitration strengthens the view that Islam discourages marriage dissolution. *Allah* says:

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<sup>6</sup> *The Quran*, Surah Al-Nisa (IV): 19.

“So if they (your wives) co-operate with you then seek not a way against them.”<sup>8</sup>

It can, therefore, be reiterated that basically Islam endeavours at a harmonious and stable relationship between the spouses to ensure order in society with happy homes and healthy generations. Islam, under its policy of “*no divorce but only in cases of necessity*”, entrusts the task of judgment about dissolution of marriage to the parties themselves, being the best judges to understand whether the relationship will go harmoniously or not. Pursuant to this philosophy various modes of marriage-dissolution have been recognized which are suitably adaptable in different situations. These are : *dissolution of marriage by mutual consent, dissolution of marriage by husband and dissolution of marriage by wife*. Here we focus on dissolution of marriage by wife.

### III Forms of Marriage Dissolution by the Wife

*Talaq-e-safweed*. A man and woman entering into a contract of marriage may choose certain mutually agreed conditions upon which their marriage is to take place. The imposed conditions would define their future marital rights and obligations in addition to the ordinary ones following from a valid marriage contract. The spouses may, for example, agree that the wife shall have power to

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<sup>7</sup> *The Quran*, Surah Al-Nisa (IV): 35.

divorce herself on behalf of the husband. Such an agreement amounts to a delegation (*tafweed*) of his power by the husband to the wife. The pronouncement of divorce by the wife amounts to husband's pronouncing it. Such delegation of power may be either conditional or unconditional. When it is conditional the wife would be at liberty to declare divorce on behalf of the husband whenever he committed a breach of the conditions agreed upon resulting into dissolution of her marriage tie with the husband. If it is unconditional the wife has an absolute power as per the terms of agreement to dissolve the marriage.

Doctrine of *Tafweed* is based on a verse revealed about an incident mentioned in the Quran wherein it is provided: O'Prophet ! say to thy consorts, if it be that ye desire the life of this world and its glitter, - then come --, I will provide for your enjoyment and set you free in a handsome manner.<sup>9</sup>

In obedience to this Quranic injunction the Prophet (S.A.W.) had empowered his wives to choose either him or a separation, that is, they might either get the marriage dissolved or prefer its continuation. His (S.A.W.) wives however, chose the continuation of marriage. Thus a husband can lawfully delegate to his

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<sup>8</sup> *The Quran*, Surah Al-Nisa (IV): 34.

<sup>9</sup> *The Quran*, Surah Ahzab (XXI): 28.

wife power to dissolve the marriage if she so wants. This doctrine has enjoyed judicial recognition also.<sup>10</sup>

In *Talaq-e-tafweed* the husband retains his power of divorce as the same has not been transferred to the wife but she becomes an agent to effectuate divorce. This doctrine, therefore, brings the spouses at par about the exercise of divorce-power though the right actually vests with the husband.

The doctrine has proved useful in restraining husbands from contracting second marriage and securing some other benefits to the wives as demanded by circumstances of a certain case. Here are given, for the sake of interest, some conditions that are valid and on whose breach the wife can be made entitled to divorce herself:

- (i) The husband shall not absent himself from their place of residence for a specified period of time.
- (ii) The wife shall not be forced to cook food or wash clothes.
- (iii) The husband shall not keep the wife in the same house with his other wife.
- (iv) The husband shall not stop the wife from going to her parents once a week and other near relations.
- (v) The husband shall not indulge in gambling.
- (vi) The husband shall not maltreat the wife.

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<sup>10</sup> *Mohd Amin v. Amina Bibi*, AIR 1931 Lah 134.

(vii) The husband shall pay to the wife maintenance every month by a specified date or given her a specified sum of money by a certain date.

(viii) The husband shall not be guilty of immorality.

Therefore, if the conduct of the husband is against any of the agreed conditions the wife can *talaq* herself on behalf of the husband by virtue of the doctrine of *Talaq-e-tafweed*.

### Option of Puberty (*Khyar-ul-Bulugh*)

A minor suffers from a legal disability to enter into a binding contract and also enjoys a privilege from being always bound by a contract entered into by a guardian on his or her behalf. The minor can, on attaining majority, ratify such a contract if he or she so chooses. Under Muslim law a minor's marriage is governed by the same principle. When a marriage is contracted for minor by a guardian he or she on attaining majority has a right under certain conditions to choose whether he or she wishes to submit to the marriage or wants it to be dissolved. This right of dissolution of marriage on attaining majority is called *Khyar-ul-Bulugh* (option of puberty). Since a Muslim adult husband can dissolve marriage by *talaq* also, the doctrine of *Khar-ul-Bulugh*, gains more importance for women. Thus the doctrine is one of the safeguards against an undesirable marriage and a protection for minors

(especially females) from any unscrupulous or undesirable exercise of authority by his or her marriage guardian.

The doctrine of *Khar-ul-Bulugh* enjoys sanction under *Halith* as well. Hazrat Ibn Abbas narrates that a virgin girl came to the Prophet (S.A.W.) and said that her father had given her in marriage which was not to her liking. The Messenger of Allah (S.A.W.) then gave her option for and against the relationship.<sup>11</sup> After that this option became available to all. Capacity to exercise the option, however, occurs only when a minor attains puberty or majority. The minimum age of majority in case of boys and girls is twelve and nine respectively. However, fifteen is the maximum age of majority. Thus a minor is deemed to have attained majority when he or she has attained the age of fifteen years. Then the option may be exercised expressly or by conduct, that is, consummation with consent.

A minor can waive the right of option of puberty or grant formal assent to the marriage only on attaining puberty. Cohabitation during the period of minority with or without the girls consent does not destroy her right because a minor is not capable of giving her consent to any act as long as she is a minor. Since the right to exercise option arises only when she has become a major and so is not lost by anything done or a happening before that time. The right shall be considered to have been waived only by allowing the marriage to be consummated freely after

attaining puberty. Abu Daud reported that the father of *Khansa* gave her in marriage while she was not a virgin. She did not like the match and so she came to the Prophet (S.A.W.). He (S.A.W.) annulled her marriage.<sup>12</sup> The repudiation of marriage if so chosen must be made within reasonable period of time. Any unreasonable delay shall vitiate the right. The time period may, however, be extended if the wife was ignorant of her marriage or of her right to cancel the same. Under the precedent a period of three years after puberty is deemed as sufficient and reasonable within which the option must be exercised, otherwise the right is lost.

When separation takes place by exercise of the option and the marriage has not been consummated the wife has no title to *Mahr*. But if the marriage had been consummated, she is entitled to her full *Mahr*, irrespective of the fact whether separation has taken place by her own option or by the option of her husband.<sup>13</sup>

Some of the jurists are of the view that marriage contracted for a minor by father or paternal grandfather is binding on minor and can be repudiated only if the father or grandfather has ignored the interests of the minor, or has acted fraudulently or negligently and the marriage is to the manifest disadvantage of the minor.<sup>14</sup> There is no such requirement about the marriage contracted by a guardian

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<sup>11</sup> Walial-Din al Khatib, *Mishkat al-Masabih* Vol II, 271 (Delhi, 1932); Abu Daud, *Sunan* Vol. I, 285-286 (Kanpur, n.d.)

<sup>12</sup> *Ibid.*

<sup>13</sup> *Al-Fatawa al-Hindiyah*, Vol II, 11 (Kanpur, 1349 AH)

<sup>14</sup> *Id* at 10; Jafar b al-Hasan, *Kitab Sharai al-Islam*, 173 (Tehran, 1377 AH).

other than father or grandfather. It may be noted here that the Dissolution of Muslim Marriage Act, 1939 knows no such distinction.

### *Ila'*

Literally *Ila* means 'vow' and the maker of vow is called *Muli*. At law it implies "cessation of sexual relations between the husband and the wife." In pre-Islamic days the husbands used to harass their wives by depriving them of their sexual intimacy without proper dissolution of marriage so that she could not contract another marriage. Islam has provided a check for evil effects of such practices.

If a man makes a vow saying to his wife, "By Allah! I will not have sexual intercourse with you" and the period exceeds four months then two consequences are possible. One, the man commits the breach of vow and has sexual intercourse with the wife. He does not lose the wife but shall be liable to penalty (*Kafara*). Second, if the husband does not resume sexual contact within four months, the wife has right to seek dissolution of marriage and get rid of the cruel situation.

### *Zihar*

The word *Zihar* is a derivative from word "*Zahr*"(back). *Zihar* means "to oppose back to back". In the language of law it signifies a man comparing his wife to any of his female relations within such prohibited degrees of relationship, whether by blood, fosterage or by marriage, as render marriage with her invariably unlawful. *Zihar*, therefore, is also used to deprive wife of sexual enjoyment and to

tie her to a miserable life. For instance when husband says to his wife "you are to me like my mother's back." Islam gives a right to the wife to seek marriage-dissolution.

The husband can re-establish the matrimonial connection only on paying the prescribed penalty (making expiation). He must free a captive before they touch one another. But he who has not the means, should fast for two months successively; and he who is unable to do so should feed sixty needy ones.<sup>15</sup>

In Zihar unlike *Ila* no time limit is prescribed to go back to what has been said. The wife can seek dissolution immediately after husband's making of such comparison.

### ***Lian***

*Lian* literally means to 'drive away'. Here it means to drive away from the mercy of Allah on account of imprecations involving the curse and wrath of Allah. When a husband accuses his lawfully wedded wife of adultery, she has a right to apply to the *Qadhi* to order the husband either to support his accusation by taking the specially prescribed oaths or to admit the falsity of his charge. Where the husband has made a false charge of adultery against the wife it will be valid ground for the dissolution of marriage by *Qadhi*. The law will be clear by the following Quaranic Verse :

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<sup>15</sup> *The Quran*, Surah Ahazab (XXXIII):4 and Surah Mujadila (LVIII): 2-4

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation), flog them with eighty stripes; and reject their evidence even after; for such men are wicked transgressors:

And those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling, the truth; and the fifth (oath) should be that they solemnly invoked the curse of Allah on themselves if they tell a lie. But it could avert the punishment from the wife, if she bears witness four times (with an oath). By Allah her husband is telling lie; and the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.<sup>16</sup>

One Hilal bin Umayyah accused his wife of having committed adultery. This verse was revealed when the Prophet (S.A.W.) was deciding their case. Hilal and his wife then took the prescribed oaths and the Prophet (S.A.W.) then separated them.<sup>17</sup>

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<sup>16</sup> *The Quran*, Sura Nur, (XXIV): 4,6-9

<sup>17</sup> *Supra* note 11 at 286; Al-Nasai, *Sunan* Vol. II,108 (Delhi, 1355 AH)

Ibn Umar reported that “the Prophet (S.A.W.) allowed imprecation between a man and his’ wife. He first admonished the husband and told him that the chastisement of this world is easier than the chastisement of the hereafter. Then he (S.A.W.) called her (the wife) and gave her similar admonition and warning. After the spouses had taken the prescribed oaths, he (S.A.W.) separated them”.<sup>18</sup>

Attempt of the Qadhi must be to discourage imprecations, which leads to the dissolution of marriage. The Qadhi first asks the husband either to take the prescribed oaths or to admit the falsity of his charge against his wife. If the husband persists in his accusation, the Qadhi shall first administer the oath to him four separate times by repeating each time, “ I call Allah to witness to the truth of my testimony concerning the adultery with which I charge this woman,” pointing to his wife. After that the husband will be required to pronounce the imprecation by saying, “May the curse of Allah fall upon me if I have spoken falsely concerning the adultery with which I charge this woman.” After this Qadhi admonishes the wife and advises her to give up her demand; but if she persists, he would ask her either to take the prescribed oaths or to admit her guilt. If she should admit her guilt of adultery, the marriage shall not be dissolved. Should she persist that her husband’s accusation is false the Qadhi must administer to her the prescribed oaths. She must repeat four separate times saying, “I call Allah to witness that my husband’s words respecting this adultery with which he charges me are altogether

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<sup>18</sup> Al Nasai, *id* at 109.

false,” and then pronounce the imprecations saying a fifth time, “May the wrath of Allah light upon me if my husband is just in bringing a charge of adultery against me.”

When both the parties have taken the imprecations and invoked the curse and wrath of Allah, the judge is to order the husband to divorce his wife and on his refusal or failure to do so the Qadhi shall himself dissolve the marriage if wife so desires. It is to be noted that the accusation does not automatically lead to dissolution of marriage but only gives to the wife right to the dissolution of marriage.

### *Khul'*

The contract of marriage is ordinarily supposed to last for the whole lifetime of the husband and wife. But when the relations between the spouses become so strained that the continuation of their union becomes undesirable, the spouses are, thereupon, allowed to terminate it. We know now that it can be terminated either by husband on his own initiative or at the instance of the wife or by mutual agreement. In the first two cases there is a breach of implied agreement that the marriage will subsist during the life time of the parties. If it is the husband who is guilty of this breach, he is penalized by becoming liable for the immediate payment of his wife's deferred dower (*mahr al-Mawwajjal*), and mahr. While if it is the wife who wants the termination of the marriage, she has, as a rule, to

compensate the husband. This termination of the marriage at the instance of wife is called *Khul'*.

The word *Khul'* literally means "to put off", as a man is said to *Khala'a* his garments when puts them off. In law it is the husband's parting with his right over his wife at her instance on acceptance of consideration.<sup>19</sup> Thus *Khul'* is a divorce with the consent and at the instance of the wife and in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. The Quran says:

Then if you fear that they (the spouses) cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby.<sup>20</sup>

Also the Prophet (S.A.W.) educated the people and enforced what had been revealed upon him. One day Jamila, daughter of Abd Allah b. Ubyyb. Salul and wife of Thabit Ibn Qays appeared before the Prophet (S.A.W.) and said, "O Messenger of Allah I and Thabit can never live together. I saw him coming from the other side with some men. I found that he had the smallest stature, was the blackest and ugliest among them; I swear by Allah that I do not dislike him on account of any religious or moral trupitude..... O Messenger of Allah! You can

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<sup>19</sup> Supra note 13 at 118; Ibn Abidin, *Radd al-Muhtar*, Vol.II, 571-572 (Cairo, 1318 AH).

see how beautiful I am while Thabit is an ugly person.... I fear that I may be guilty of transgression of the injunctions of Islam.” The Prophet (S.A.W.) asked her if she would return the orchard given by Thabit to her as *Mahr*. She replied, “yes and if he demands more then I am ready to give him more than that.” The messenger of Allah (S.A.W.) said, “No: Not more than what he had given you.” He then asked Thabi to take back the orchard and release her from the marriage tie by divorcing her which he did.<sup>21</sup>

The object of *Khul'* is to enable the wife to get released from her husband when she finds that it is not possible for her to live with her husband in harmony and peace. It is to be noted that in the relevant Quranic provision cited above there is nothing to indicate husband's power to refuse dissolution of marriage when the wife offers a release by *Khul'*.<sup>22</sup>

### *Faskh*

Muslim women are also allowed to seek marriage dissolution on certain grounds dictated by reason and rationality. This aspect of the Islamic law has been statutorily granted recognition in the sub-continent and shaped in the form of Dissolution of Muslim Marriage Act, 1939. These grounds are given below:

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<sup>20</sup> *The Quran*, Surah Baqara (II): 229.

<sup>21</sup> Al-Bayhaqi, *Al-sunan al-Kubra*, Vol. VII, 313-14 (Hyderabad-Deccan, 1353 AH).

<sup>22</sup> *Supra* note 20.

- (a) *Missing husband.* Where the husband has disappeared and his whereabouts are not known for a period of four years or more, the wife can apply for *faskh*.
  
- (b) *Non-maintenance.* Where the husband fails or neglects to provide maintenance to the wife for a period of two years or more, she can apply for *faskh*.
  
- (c) *Imprisonment.* If the husband has been sentenced to imprisonment for a period of seven years or more, the wife can apply for *faskh*.
  
- (d) *Non-performance of martial obligations.* Wife can apply for *faskh* if the husband has failed to perform his martial obligations for a period of three years or more. Marital obligations are to be ascertained with reference to Islamic Law.
  
- (e) *Impotency.* Object of marriage is lawful satisfaction of their natural urges and a chaste and happy companionship of two members of the opposite sex. When the husband is incapable of consummating the marriage on account of some defect, physical or otherwise, the said

object of marriage is defeated. Islam lays great stress on the performance by the husband of the obligations to satisfy the natural desires of his wife, to be intimate with her at reasonable intervals and not to neglect this important obligation. Islam, therefore, gives the wife of an impotent person the right of getting her marriage dissolved.

- (f) *Mental or bodily disease.* If the husband is suffering from insanity for two years or more, the wife can sue for *faskh*. She can claim dissolution of marriage with a husband suffering from leprosy or a virulent venereal disease irrespective of the duration of the disease in either case. However, dissolution of marriage may be refused where the wife has herself infected the husband with the disease.
- (g) *Option of puberty.* Where a wife was given in marriage by her father or guardian, before she attained the age of puberty, she can seek a dissolution of such marriage on attaining the puberty by repudiating the marriage.<sup>23</sup>

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23 *Uloom-e-Khayr-ul-Balugh* (Option of puberty)

(h) *Cruelty.* A wife can claim the dissolution of marriage in Islamic law if the husband treats her with “cruelty”. No precise definition of ‘cruelty’ is possible, however, it can be explained by illustrations. For instance it can constitute—

- (i) A habitual assault or making the wife’s life miserable by physical ill-treatment or by a conduct short of that;
- (ii) Association with women of evil repute or otherwise leading an infamous life;
- (iii) Attempt to force the wife to live an immoral life;
- (iv) Disposing of her property or preventing her from exercising her rights therein;
- (v) Obstructing her in the observance of religious profession or practice;
- (vi) Inequitable treatment by a polygamous husband contrary to the Quranic injunction in this behalf; and so on.

(i) *Husband’s apostasy.* On the husband’s apostasy, the relationship of husband and wife is severed and the man ceases to be the husband of his Muslim

wife from the time of his renunciation of Islam.<sup>24</sup> It is immaterial what new religion he has adopted, because a Muslim woman is not allowed to marry a non-Muslim to whatever religion or creed he may belong.

#### IV Conclusion

The above account of the classical principles of Islamic law providing certain opportunities to women to get their undesirable marital unions dissolved need to be drafted into a comprehensive legislation. These are described, in one way or the other, in all the books of *fiqh* but are not commonly known to women who could take genuine benefit out of them. Legislations are easily accessible than the traditional textual readings in the form of various religious books. Lawyering is also facilitated by legislations. Thus, it is hightime that legislation be got through on the subject.

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<sup>24</sup> Followed in *Abdul Gani v. Azizul-Haq*, IL R 37 Cal 409.