



Email: editorijless@gmail.com

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## **DISSOLUTION OF MARRIAGE BY MUSLIM WIFE IN INDIA; JUDICIAL AND EXTRA - JUDICIAL REMEDIES**

**Mohd. Arif**

Sr. Assistant Professor, Department of Law, University of Jammu

Email: profarif123@gmail.com

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### **ABSTRACT**

Marriage under Islam is regulated by Quranic verses and Prophet (PBUH) claimed it as his Sunna and thereby considered as a devotional act. On the other hand, it is contractual in nature and hence, allows both the parties to divorce though on different conditions. But there is always a misconception that the husband only can dissolve the marriage by pronouncing talaq and the wife has no right to get rid from him when she dislikes his company for any reason which cannot be compromised. In fact, she also enjoys some extra-judicial remedies for dissolution of marriage like husband and in addition to those in India judicial remedy has also been granted to her under Dissolution of Muslim Marriage Act, 1939. In this paper an attempt has been made to analyze such judicial and extra judicial remedies available to Muslim wife in sub-continent generally and India particularly.

Key words: Divorce, Islam, Marriage, Muslim, remedies, Spouse, women,

The concept of marriage under Islam is well defined. The primary object behind the Islamic marriage is to control the sexual relations between opposite sexes with a view to safeguarding of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in earning a livelihood<sup>1</sup>. In Islam marriage is considered as a legal process by which the sexual relationship and procreation of children between man and woman is perfectly lawful and valid<sup>2</sup>. Marriage among Muslims though contractual in nature is also considered as a devotional act as its objects kept by the Almighty God are also rights of enjoyments and procreation of children and regulation of social life in interest of society. The Holy Quran says;

And one of His signs is that He created mates for you from yourselves, that you may find quiet of mind in them, and he put between you love and compassion. Surely there are signs in this for people who reflect<sup>3</sup>.

The Prophet Mohammad (P.B.U.H.) is also reported to have said;

<sup>1</sup> . Abdur Rahim, *The Principles of Mohammadan Jurisprudence* 327 (Lahore Edition 1958)

<sup>2</sup> . Sheikh Burhanuddin Abi Al Hasan Ali Marghinani, *The Hedaya; Commentary on Islamic Laws, Translated by Charles Hamilton* 25 (Kitab Bhawan New Delhi, 3<sup>rd</sup> Edition, Reprint 2014)

<sup>3</sup> . The Quran; Chapter 30, verse 21

Marriage is my *Sunna* and those who do not follow this way of life are not my followers<sup>4</sup>.

The institution of marriage in human world was developed with an intention to regulate the social system and to promote the natural growth of the human society. It was one of the most effective tools to bind the human being in a system, and it was an institution which always contributed to integrate and organize the human groups. But with the growth of the human society and other social structures, this institution suffered a lot. The element of tolerance is losing its significance in social behaviour and whole philosophy of human living is confined to the individuals' needs and rights without any obligations to the group of the people or society. Everyone is conscious of rights against others and hardly careful of duties owed to him against the others<sup>5</sup>. Such state of affair makes the marital relations a hell for the parties. Hence, Islam allowed its follower to dissolve the marriage if the sustenance of the same is not possible. However, the right to dissolution was granted to both the husband as well as wife. But in patriarchal societies the husband remains dominant and the wife's rights become the points of debates and research.

### RATIONAL OF THE STUDY

India is a land of diversities with several religions. The oldest part of the Indian legal system is the personal laws governing the Hindus and the Muslims. The institution of marriage in India is governed by the personal Laws. Among Hindus these laws have been codified whereas Muslims are still governed by *sharia* in case of their marriage. Islam insists upon the subsistence of a marriage and prescribes that the breach of the marriage contract should be avoided. Initially no marriage is contracted to be dissolved in future, but in unfortunate cases the dissolution takes place and the matrimonial contract is broken down. However, under Islamic law marriage is dissolved either by the death of the husband or wife or by the act of the parties. Muslim husband considered some unfettered rights vested in him to pronounce *talaq* to his wife to dissolve the marriage without seeking any intervention from the court. Such unfettered powers were some time misused by pronouncing triple *talaq*. Now the Supreme Court of India has declared Triple *Talaq* as unconstitutional, as such he can pronounce *talaq* in the form of *Ahsan* or *Hasan* only (the most approved form of *Talaq-ul- Sunna*). However, there is generally a misconception that a Muslim wife has no right to dissolve her marriage. This is basically just because of unawareness, backwardness and illiteracy of Muslim women. In fact, she has the double power as compared to husband. She has Judicial as well as extra judicial remedies to dissolve the marriage if there are impossibility in continuing the marital tie. Moreover, in order to provide safeguard to the Muslim women in India Statutory law is also there which deal with the matters arising out of the conjugal relation.

### STATEMENT OF PROBLEM

Islam has given the spouses equal right to repudiate their union when marital relations have poisoned to a degree which makes their peaceful and harmonious life impossible and their exist an apprehension of limits of Allah being violated and all the means fail to bring them together, then the divine law does not insist that such strained relation should continue indefinitely and spouses are, therefore, allowed to separate from each other with kindness and human dignity. In the present study the remedy available to the wife in this regard under Muslim law applicable in India shall be analyzed. Hence, present research problem conceived has been titled as "Dissolution of Marriage by Muslim Wife in India; Judicial and Extra -Judicial Remedies"

### OBJECTIVES

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<sup>4</sup> . Aqil Ahmed, *Mohammadan Law* 107, (Central law Agency, 22<sup>nd</sup> Edition, 2007)

<sup>5</sup> . Akhileswar Prasad Mishra, "The Matrimonial Offences and Mediation: Protecting the Institution of Marriage, and Justice" 33 *JTRI, Journal* 113,. (Dec. 2012)

The objectives of the present study are;

- i. To highlight the exclusive rights of Muslim women to dissolve the marriage under Muslim Personal law.
- ii. To evaluate the remedies available to Muslim wife under Dissolution of Muslim Marriage Act, 1939
- iii. To negate the general concept of some sections of society that Muslim wife has no right to dissolve the marriage.

#### LIMITATIONS OF STUDY

The study is only a conceptual work derived from the literature available in different books, journals or research articles, whereas, in order to know the practicability of these remedies an empirical study is require.

#### METHODOLOGY

The present research is analytical in nature based on the literature available from different sources. The primary sources for the purpose of present study are Quran and the legislations whereas books, journals and other published material have been used as secondary source. The study has been confined only to the judicial and extra judicial remedies available to the Muslim wife for dissolution of marriage, hence the relevant literature pertaining to research has been studied.

#### MATRIMONIAL REMEDIES AVAILABLE TO WIFE

Islam has given the spouses equal right to repudiate their union when marital relations have poisoned to a degree which makes their peaceful and harmonious life impossible and their exist an apprehension of limits of Allah being violated and all the means fail to bring them together, then the divine law does not insist that such strained relation should continue indefinitely and spouses are, then allowed to separate from each other with kindness and human dignity. The classical Muslim Law provides extra Judicial remedies to both the spouses and in Indian Sub-continent Under Shariat Act, of 1937 a due recognition has been given to them. To make Muslim woman more secure from the situations where the husband neglects to maintain her, makes her life miserable by deserting or persistently ill treating her or certain other circumstances, in India statutory law provides the remedy of judicial divorce to her.

#### Extra-Judicial Remedies:

Under Muslim Law there are various non-statutory mode to dissolve the marriage. These are affected without the intervention of courts and that is why known as extra judicial remedies. Apart from the powers of Muslim husband to divorce his wife without the intervention of courts, wife has also powered to get rid from the husband where she is not satisfied with the marital bond. The mode of extra judicial divorce available to a Muslim wife are;

##### 1. *Khula*:

The word *Khula* has been derived from the Arabic term *khal'un*, which literally means extracting out one thing from another. The Quran has given a wife the right to release herself from the fortress of marriage by giving back some portion or whole of her dower amount received from her husband. This instant right of wife is popularly known as *Khula* and is expressly enshrined in the Quran which ordained;

“It is not lawful for you (men) to take any of your gift from your wives except when both parties fear that they would be unable to keep limits ordained by God. If you

(Judges) do indeed fear that they would be unable to keep limits ordained by God. There is no blame on either of them if she gives something for her freedom”<sup>6</sup>.

Hence, in *sharia* the *Khula* is used where the husband after accepting compensation from the wife renounces his rights and authority under marriage contract. Therefore, in *Sharia* it signifies the relinquishment of rights and authority over his wife by a husband dissolving the marital relationship at the desire of wife in lieu of compensation paid by her to husband out of her property.

The practice of *khula* can be more easily understood by the decisions of the holy Prophet (P.B.U.H.) in the cases brought to him by the women where women were not willing to continue their marital tie. Such decisions specified the circumstances which would establish the fear of a breach of Allah’s limits, viz-a-viz the exact amount to be paid by wife to husband as compensation and how the husband is made agree to accept the compensation to be paid by the wife. In this regard the most famous case of *khula* considered as precedent for Muslim world was that which was brought by the wife of Sabit ibn Qais, to the Prophet (P.B.U.H.). As reported by Imam Bukhari with reference of Ibn Abbas that one day Jameela (wife of Sabit) appeared before the holy Prophet (P.B.U.H) and asked that she could not remain in the company of Sabit. She said that when she saw him coming in the company of some men, he was looking very ugly because of his blackest face and shortest height among them all. She said to the Prophet (P.B.U.H) that there was no other defect of faith or morality in Sabit and she just hate him because of his ugly appearance. She further said that if she had not fear of Almighty God she would have spit on his face when he came near her. She said that she was most beautiful and she feared that the company of Sabit may led her guilty of transgression of injunctions of Islam. After hearing the lady, the Prophet (P.B.U.H) asked her that she would have to return the garden which Sabit had given her in consideration of marriage. She replied that she would return even more than the garden if Sabit demanded. However, Prophet (P.B.U.H) said that the garden is sufficient and ordered Sabit to take garden back and divorce her which he did<sup>7</sup>.

It is pertinent to mention here that the provision of *Khula* is always at the instance of wife. As under Mohammaden law when husband is not willing to continue the marital tie he is authorized to divorce the wife on the payment of dower. But where the husband is willing but the wife is not willing to remain in the marital tie with the husband, she can pay either compensation or leave the dower to husband and get her released from the marital relations. Even, she need not to specify any specific reason to initiate *Khula*. It is sufficient that she is not satisfied in the company of the man in the marital tie. Some authors of the textbooks on Muslim law have categorized *Khula* in to the divorce by mutual consent but in actual here the consent is unilateral. If both the parties agree and desire a separation affecting a divorce, it is called as *Mubarat*. With regard to the orthodox belief of some Muslims that without the consent of husband divorce is incapable of being enforce, it is submitted that under this mode he pronounces divorce in lieu of the *khula* same as he makes the payment of dower when wife is not willing. The only thing the wife must have to do before the pronouncement of *Khula* is to undertake the efforts for reconciliation, just like a man is obliged to, before pronouncing husband-initiated talaq<sup>8</sup>. Despite its inclusion in *Shariat Act, 1937*, *Khula* is always initiated out of court. A controversy was raised by the decision of single judge of Kerala High Court that the Muslim women had lost their right to invoke extra-judicial divorce, after the coming into force of the Dissolution of Muslim Marriages Act, 1939<sup>9</sup>. Consequently, A number of women had approached the Court for seeking to validate their extra-judicial divorce by obtaining a declaration to that affect. However, this decision has been recently over ruled by the Division Bench of the Court observing that compelling the wife to go to court for *Khula*

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<sup>6</sup> . The Quran; Chapter: II; verse: 229

<sup>7</sup> . Muhammad Muhsin Khan (Translator), *Sahih al Bukhari (Arabic-English)*, 533 (Darussalam Publishers and Distributers Riyadh - Saudi Arabia, Vol.3, 1997)

<sup>8</sup> . *Shamim Ara Versus State of UP and another* (2002)7 SCC.518

<sup>9</sup> . *K.C. Moyin Versus Nafeesa and Others* (AIR 1973 . Ker 176)



frustrates the right granted to her under personal law, which is largely based on two primary sources, Quran and Hadith. The Court draw an analogy from the right of the husband to pronounce unilateral talaq to say that both are of similar nature and approval of husband as a condition precedent is not correct.

## 2. *Talaq-e-Tafwiz*

Under Islamic Law, like the unilateral powers of husband to dissolve the marriage, wife too can put an end to the marriage by unilateral declaration of her action. Every Muslim wife can at the time of their marriage reserve in the marriage deed a right of herself to dissolve the marriage under specific circumstances. This is delegation of divorce and technically known as *Talaq-e-tafwiz*. It is affected only at the instance of wife. This is one of the most important and useful concepts of the Islamic matrimonial law. Indeed, it is a legal measure by which a Muslim wife can protect herself against every misuse and harassment in the hands of husband<sup>10</sup>. In India the application *talaq-e-tafwiz* under Muslim law is fully recognised and the authors of different English textbooks designate it as 'delegated', 'stipulated' or 'contractual' divorced<sup>11</sup>.

The delegation to the power of pronouncement a talaq may be given by the husband to the wife either before the marriage or at the time of marriage or even at any time thereafter. In view of Tayabji pre-marital delegation is just a stipulation in the marital contract authorizing the wife to pronounce a talaq, in a specified contingency and is enforceable on a contractual basis<sup>12</sup>. According to him, how a man who is yet to become a husband delegate powers of talaq to his wife which he himself does not have. Differing from the views of Tyabji, prof. Tahir Mahmood says that jurisprudentially in each case the foremost basis of *talaq-e-tafwiz* is the authority delegated to the wife by the husband, and not the marriage contract. In his view the law of Islam does recognize the validity of an anticipatory delegation of the powers of talaq which the husband would automatically derive from the contemplated marriage<sup>13</sup>. Hence, A Muslim Man can at the time of marriage or at any time thereafter delegate to his wife;

- i. Authority to talaq herself i.e., *ikhhtiyar*;
- ii. Leave the matter in her own hands i.e., *amr-bi-yad*, or
- iii. Give her option to do what she likes i.e., *mashie*.

All these when analysed, resolved that the *talaq-e-tafwiz* is to leave in her or in someone else the option to do what he or she likes<sup>14</sup>. However, the delegation of powers of talaq to the wife is subject to the following limitations;

- i. The delegation must not be absolute;
- ii. The wife should be authorised to pronounce talaq only when any of the conditions specified in the agreement is violated by the husband; and
- iii. Those conditions must be reasonable and must not opposed the policy of the Islamic Law.

Thus, where under an agreement it has been stipulated that on the failure of husband to pay maintenance, or if the husband marries another wife, she will have a right to pronounce divorce on herself, such an agreement is valid and such conditions are reasonable and not against the public

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<sup>10</sup> . Tahir Mahmood, *The Muslim Law of India* (third edition; lexis Nexis Butterworths at p 99 (2002)

<sup>11</sup> . *Ibid*.

<sup>12</sup> . Naseem Akhter, *Family Law on Divorce and Judicial Separation*; Deep and Deep Publications Pvt. Ltd (2003) p.119

<sup>13</sup> . *Ibid*.

<sup>14</sup> . Furqan Ahmed; "Understanding the Islamic Law of Divorce" *Journal of Indian Law Institute*, July-December 2003. Vol. 45, issue 3 p 495

policy<sup>15</sup>. It should be noted that the mere happening of stipulation of contingency does not result in automatic breakdown of marriage. It depends upon the wife whether she choose to exercise the delegated powers or not. However, it does not curtail the unilateral powers of husband to pronounce divorce. By delegating the powers, he just empowers the wife to exercise such powers which he himself can exercise too.

### **Judicial Remedies**

According to Muslim legal theory the Judicial divorce is called fasikh which is pressed into service exclusively at the instance of wife<sup>16</sup>. Earlier there was no uniformity among all the Schools of Muslim Law on this point. Though Islam does not appreciate the interference of courts in the holy alliance of husband and wife but in certain unavoidable circumstance Qazi or Court could law fully dissolve the marriage<sup>17</sup> (Furqan Ahmed, 2003). In this context the Maliki School was most liberal and favourable to women whereas, Hanafi and Ithna Ishari which were prevalent among Indian Muslims were most rigid. Because of such rigidity a Muslim woman facing situation like disappearance of her husband, his lunacy, impotency or refusal to provide maintenance to her was left with virtually no remedy for the dissolution of marriage. Consequently, various Muslim Women sought refuge in conversion to other faith and during the first half of the twentieth century in British India there were numerous such cases<sup>18</sup>. This grave situation attracted attention of some Muslim Organisations and Scholars in India and they began thinking of ways and means to arrest a tendency among the Muslim women to renounce Islam just because the religious law did not allow them to get rid of their husband. It was opined that only the legislation empowering the courts to dissolve marriage at the instance of wife in specified circumstances could prevent the conversion and provide them a sought of relief<sup>19</sup>. In this back drop, in 1937 The Muslim personal law (*Shariat*) Application Act was enacted and immediately thereafter, in the year 1939 the Dissolution of Muslim Marriage Act was enacted in order to consolidate and clarify the provisions of Muslim Law, and to remove doubts as to effect of the renunciation of Islam by a married Muslim Women on her marital tie<sup>20</sup>. It was preceded by similar enactments in the princely States and after independence in 1959 it was extended to whole of the India except the State of Jammu and Kashmir. Now by virtue of Jammu and Kashmir reorganisation Act, 2019 it has also been extended to Jammu and Kashmir.

The main object of this legislation was to consolidate and clarify the provisions of Muslim law and provide certain grounds to the Muslim women for getting release from the marital ties on which the *Sharia* was either silent or could not be practiced easily by the women under societal compulsions or their status in the then society.

The Dissolution of Muslim Marriage Act, 1939 is an important enactment which allows the courts intervention in the dissolution of Muslim marriage. The legislation contains certain grounds which a Muslim wife can avail for a decree of dissolution of marriage. A married Muslim woman is now entitled to obtain a decree for the dissolution of her marriage where her husband is missing for four years<sup>21</sup> or he fails to provide her maintenance for two years<sup>22</sup> or he has been sentenced to

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<sup>15</sup> . Lawal Mohammad Bani, "Dissolution of Marriage (Divorce) Under Islamic Law" *Journal of Law, Policy and Globalization*, vol 42 (2015) p.141 available at [www.iiste.org](http://www.iiste.org) last accessed on 24-4-2019.

<sup>16</sup> . *Supra* note 12 at p 89

<sup>17</sup> Furqan Ahmed; "Understanding the Islamic Law of Divorce" *Journal of Indian Law Institute*, July-December 2003. Vol. 45, issue 3 p 498

<sup>18</sup> . *Id.* at p. 499

<sup>19</sup> . Furqan Ahmed; "Understanding the Islamic Law of Divorce" *Journal of Indian Law Institute*, July-December 2003. Vol. 45, issue 3 p 498

<sup>20</sup> . Kusum, *Family Law Lectures; Family Law I*; 2n edition Lexis nexis Butterworths Wadhwa (2010) p.363

<sup>21</sup> . Dissolution of Muslim marriage Act, 1939; Clause i

<sup>22</sup> . *Id.* Clause ii

imprisonment minimum for seven years and it is confirmed by the highest court and become final<sup>23</sup> or he fails to perform marital obligations for three years<sup>24</sup> or he is impotent, or insane<sup>25</sup> or where she having been given in marriage by her father or other guardian before she attained the age of fifteen years<sup>26</sup> or where the husband treats her with cruelty<sup>27</sup> (DMMA, 1939). As per the conditions of Muslim women in 1939 in sub-continent, the provisions of this Act were most appropriate. They were needed an awareness with regard to their right provided by divine law which was totally ignored by the male dominancy. The most positive aspect of this Act was that it has created a sense of security among the Muslim women in India who were living at the mercy of their men. The right to obtain divorce under the Act is available only to the wife. Now a Muslim wife can obtain a decree of divorce from a court by filing a suit on any of the ground provided under the Act.

### Conclusion

The firm union of husband and wife is of paramount importance for a happy family life. Islam, therefore, always discourage any breach in the marital contract. Divorce is considered as most remain tie up in the marital relation then they are permitted to dissolve it either by mutual consent when both of them agreed to dissolve the marriage or unilaterally by the husband by pronouncing talaq or by wife in the form of *Khula* or *talaq-e Tafwiz*. *Khula* allows a Muslim wife to unilaterally divorce her husband by making certain payment or giving up or returning his dower whereas, *talaq-e-tafwiz* allows the wife to dissolve the marriage if her husband fails to keep his end of the marriage contract. Besides this in case of some eventualities which usually occur after the marriage and upon which sharia is silent (fasikh marriage) wife can approach to the court and avail the remedy provided under Dissolution of Muslim Marriage Act, 1939. Thus, with the passage of time Muslim women are getting more and more rights including their security in matrimonial relations and their position is becoming better day by day. Judicial activism has also been seen protecting the Muslim wives from the atrocities of their husbands and various pro-female judgments have been passed including the court verdict abolishing triple talaq. This all has improved the position of Muslim women in India and in any case, women are not deprived of any right where they can be harassed or made miserable by their counterpart. Only an awareness is required to be created among the women with regard to their rights and the men for their limitations. In this regard women organisations should come forward because in past such organisations have also done a tremendous job.

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<sup>23</sup>. *Id.* Clause iii

<sup>24</sup>. *Id.* Clause iv

<sup>25</sup>. *Id.* Clause v & vi

<sup>26</sup>. *Id.* Clause vii

<sup>27</sup>. *Id.* Clause viii