

- (1) the sexual intercourse between the spouses becomes unlawful.
- (2) the wife can contract another marriage with another person upon completion of the Iddat period,
- (3) the husband is to pay the dower debt and
- (4) the Parties cease to inherit each other.<sup>1</sup>

### Iddat or 'The 'waiting Period

An Iddat has been provided to confusion of paternity and to make sure about the pregnancy of the woman at the time of the contract of marriage and also for the health and hygienic of the woman.

The basis of the Law is in the Quran<sup>2</sup> and other passages. It is for a definite period and is made obligatory by consummation of the marriage.<sup>3</sup> The period of Iddat upon death of the husband, is four months and ten days, and if the woman is pregnant it runs till delivery.<sup>4</sup>

If the marriage is dissolved by divorce, the period is three monthly courses according to the Hanfi, Maliki and the Hambli schools, and 3 Tuhrs (a period between two monthly courses) according to the Shia and Shafi schools.

The husband is bound to provide for the maintenance of the wife during the period of waiting with an exception of her pregnancy according to the Shafi school which holds so, only in cases of pregnancy.<sup>5</sup>

<p>خواتین کے مسائل</p> <p>مؤلفہ : شازیہ قادریہ</p> <p>ناشر : مکتبہ نعوشیہ سبزی منڈی کراچی</p>	<p>خواتین کے فقہی مسائل پر ایک مفید کتاب</p>
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immoral life, the wife can seek judicial divorce.<sup>1</sup> The husband cannot interfere with the freedom of conscience of the wife, and if he has more wives than one, he has to treat all with justice, otherwise they can seek divorce judicially.<sup>2</sup> A marriage can also be dissolved if the person was not of equal in status of the wife, to avoid social disgrace, though the Shia Schools do not recognize it.<sup>3</sup>

### Automatic Dissolution Or Dissolution By Operation of Law

#### 1. Change of Religion-

Apostasy, or change of religion from Islam to infidelity, places the person outside the protection of the law. The ultimate effect of apostasy is the dissolution of the marriage even without a court decree.<sup>4</sup>

#### 2. Supervening Illegality

It may happen that the wife or the husband, by accruing a relationship through a third party, by fosterage or affinity may illegalize themselves to each other.

For example, if A, the husband, has a grown up wife B, he then marries C, who is below 2 years in age, and the wife feeds her breast to the young wife, her marriage with the husband becomes void. So also is the case of sucking the milk of the wife by the husband.<sup>5</sup>

Similarly if the husband commits fornication with the daughter of his wife by her previous husband, the marriage becomes void according to the Hanafi and Shaffi schools though not by Maliki school.<sup>6</sup>

#### Effects of Divorce

Upon a legal dissolution of marriage:

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1. Mohd. Yusuf I. 27,116
  2. Ham. Hedaya, 30; Amir Ali II. 23,459
  3. Abdur Rahim 332
  4. Durrul-Mukhtar 216
  5. See Nooral- Hedaya-Kitabu-Rada; Muatta of Imam Mohammad, 241
  6. Ham. Hedaya, 29

Such conferment of the power is called Tafwiz when the husband says to the wife:

- (1) 'Chose thyself' or 'divorce thyself';
- (2) 'Thy business is in thy hand' and
- (3) 'If thou wishest, divorce thyself.'<sup>1</sup>

### (7) Cruelty and Other Grounds

Upon a contract of marriage, a woman expects a particular behaviour from the husband, as ordained by the Quran and the Sharia. As her rights are well-defined, and upon their violation, the life becomes miserable and unhappy. To such unjustified acts and omissions of the husband, by acts or conducts, the wife is entitled to a decree for the dissolution of marriage contract by the court.

The basis of the law is the Quran for a separation on the breach of matrimonial rights and duties. There is a similarity of the Anglo-American law on the point of cruelty, as a ground to dissolve the marriage from the Islamic provisions.<sup>2</sup>

A legal cruelty includes any conduct of such a character as to have caused danger to life, limb or health or to give a reasonable apprehension of such a danger and, it much depends in each case upon its circumstances, and in particular, upon the victims capacity for endurance.<sup>3</sup>

The concept of cruelty is not clearly defined and the law is to take into consideration the rules of conduct of human relationships and its social engineering interpretations. The conception changes from time to time in the light of the growing social progress; and the courts, in administering the law have to take into account, the circumstances of actual life and the changes in the people's habits and modes of living.<sup>4</sup>

The Sharia strongly condemn adultery and fornication and the Quran explicitly provides punishment for such conducts. If a husband indulges into such conducts or forces his wife to lead an

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1. Abdur Rahim, 338. Ham Hedaya 67-92; Baillie I, 242-24  
 2. Compare Russel V. Russel (1897) A.C. 395  
 3. Ibid., Machenzie V. Mackenize (1895) A.C. 384-405  
 4. Abdur Rahim, 44, note the view of Dentrig L.J. in kaslefsky V. Kals..

The effect of Zihar is to illegalize matrimonial intercourse till an expiation has been made, otherwise in the case of his refusal to do so, the court will grant a decree dissolving the marriage according to the Hanafi view. The Shia views are that the judge cannot grant a decree on non-expiation.<sup>1</sup>

### (3) Lian or imprecation

By lian the wife is entitled to bring a suit for divorce, for the husband's false charge of adultery on her. The Quran prescribes the mode of settlement clearly, and if the husband is unable to prove his allegation, the wife can sue for a judicial divorce. The paternity of the child is also decided by the procedure before the court.<sup>2</sup>

### (4) Eela Or Swearing

Eela means swearing; and, it signifies a husband's prohibition of himself from approaching his wife for 4 months by means of Vow of abstention, and upon the completion of the time, the divorce is complete and the marriage ends according to the Hanafi school, while the Ashari Shia and the Shafi schools require a judicial proceeding of it.<sup>3</sup> The basis of the law is the Quran.<sup>4</sup> The husband is bound to expiate on breaking his vow.

### (5) Failure To Maintain

The Sharia prescribes as a duty of the husband to maintain his wife. However, the wife in order to be entitled for maintenance must perform her duties prescribed by the law.<sup>5</sup>

### (6) Power of Delegation

At the contract, the parties may enter into a condition to vest the wife with a right to sue for a divorce judicially upon failure of the conditions. Once the power is conferred it becomes irrevocable.<sup>6</sup>

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1. Ham Hedaya 119
  2. Baillie I, 338. Ham. Hedaya, 124
  3. Baillie I, 297 Ham. Hedaya. 109
  4. Q: II, 226-27
  5. Baillie I, 438. Ham Hedaya, 141
  6. Ameer Ali, II, 321. Fitzgerald, 77

The Imam Azam or Abu Hanifa holds that in the absence of any agreement, the dower is released in both the cases, while Abu Yusuf says that the dower is not relinquished in Khula and in Mubarat both. Mohammad holds that the dower is not released in any way,<sup>1</sup> Similarly the jurists further disagree upon the jurisdiction of a court of law to grant a divorce by mutual consent.

## (D) Judicial Dissolution

### (1) Impotency

In the Sharia, an impotent person is one who cannot have connexion with a woman, though he has the natural organs, and a person who is able to have connection with an enjoyed woman; but not with virgin or with some women but not with others, whether the disability he by reason of disease, or weakness of original constitution, or advanced age or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection.<sup>2</sup>

In such cases, the wife should bring the matter to the judge demanding separation on that ground. The judge is to ask the husband about the intercourse and if he admits the case is to be adjourned for a year, but if he denies, the judge is to swear him and upon it the right of the wife will be held void. But if he refuses to swear, an inspection has to be made by 2 women and the relief is to be granted or refused accordingly.<sup>3</sup>

If after the year, the infirmity continues the husband has to be separated.<sup>4</sup> Similarly is the case of a man whose male organ has been cut off.<sup>5</sup> If the wife also suffers from absence of passage, the law permits no separation.<sup>6</sup>

### (2) Zihar Or Comparing

When the husband said to his wife that "Thou are to me as the back of my mother, it is zihar. The basis of it in the Quran."<sup>7</sup>

1. Ham Hedaya 116; Baillie II, 305-8, Tayabji S. 167
2. Baillie I, 347
3. Raddul-Muhtar II, 979
4. Ham. Hedaya, 126-7
5. Amir Ali, II, 532
6. Mohd. Yusuf, II. 232
7. Q: LVIII:2

methods approved by the Sharia. It may be Ahsan or best and Husun or good.

The Second is called Budes or irregular form of divorce which is held valid but sinful. It is also divided into the kinds with reference to number of pronouncements in time. The Shia schools do not recognize a Budes form of divorce, but only recognize the Ahsan form.

A divorce may be pronounced either in a revocable form called Rajai, or, in an irrevocable form, called Bain which is a complete divorce. The reason of difference of revocability is the possibility of reconciliation of the spouses.

As the law requires 3 pronouncements of a divorce, upon its happening, the husband cannot marry the wife again until She marries an other man who having consummated the marriage divorces her or dies and her "Iddat expires, for the Quran says that, "if he divorced her, she is not after that \_ lawful to him (that is after a third divorce) until she marry another husband.<sup>1</sup>

### (C) Dissolution By Mutual Consent.

The basis of the law is the Quran which says, 'And if ye fear that they cannot observe the ordinance of God, it shall be no crime, in either of (the) them, on account of that for which the wife shall redeem herself.

Such a divorce may be of two kinds. The first is called Khula which means the laying down by a husband of his right over his wife, for an exchange from her as a form of compensation for giving her the release.<sup>2</sup> The second is called Mubarat which is a mutual release of the parties without any claim upon each other.<sup>3</sup>

The jurists differ upon the doctrine of consideration in a mutual divorce. The Egyptian Code of the Hanafi Law holds in a Khula, that this is no requirement of payment by the wife.<sup>4</sup>

1. Ham. Hedaya 108; Bailie L 205

2. Amir Ali II. 506

3. Ibid

4. Abdur Rahman, Institutes of Mussalman Law, 159

refusal of Islam or due to imprecation or lian. The latter are separations under the option of emancipation, for Bela, apostasy or difference of Dar, by reason of property or a marriage remaining invalid.<sup>1</sup>

Every separation of a wife from her husband for a cause not originating from the husband, as for example, the option of puberty is a cancellation of the marriage contract i while if the cause originates in the husband as for example on impotency or upon his will it is called Talak.<sup>2</sup>

- (1) The dissolution upon the exercise of the option of puberty.
- (2) The dissolution upon the unilateral act of the husband.
- (3) The dissolution by the mutual consent or agreement of the parties to the marriage.
- (4) Judicial dissolution at the instance of the wife herself.
- (5) Automatic dissolution or dissolution by operation of law.

#### (A) Dissolution By Option of Puberty

#### (B) Dissolution by Unilateral Act of Husband

A Muslim husband of understanding may repudiate his marriage contract with his wife at any time. This is called Talaq which means the removal of all the restraints of marriage contract. Its pillars are the expressions, such as 'Thou art repudiated' and it requires two conditions for validity.

A divorce may be pronounced orally or by writing. Even a divorce can be pronounced in the absence of the wife or witnesses, and the paver to divorce can be delegated.<sup>3</sup> An insane and minor cannot pronounce an effective divorce, though a person suffering from 'Marzulinaut' can effectively divorce his wife.<sup>4</sup>

The jurists differ on a divorce under compulsion. The Hanafi school holds it effective, the shias hold even a divorce under intoxication as invalid, while the Maliki and Shafi schools do not recognize it.<sup>5</sup>

There are two modes of a Talaq.<sup>6</sup> The first is called Talaq-soona or a divorce in the approved form in conformity with the

1. Baillie I. 203
2. Schacht, Origins 195 etsq.
3. Ibid: I: 242
4. Amir Ali II, 478.
5. Ham Hedaya 75
6. Ham. Hedaya 72; Baillie I. 205

Further, in addition to the interests of the parties, on the question of possible reconciliation between them, there also remains the interest of the community, which maintains a balance between the sanctity of marriage and the social welfare for public policy.<sup>1</sup>

The Sharia takes into consideration, by balancing the interests of the individual and society, and regulates the institution with a unique method which though possessed of qualities, may have some drawbacks and difficulties also.

A Talaq or divorce, according to dictionary meanings, is the taking off any tie or restraints, while the legal theory of Islam explains it, as the taking off the marriage tie by the prescribed and fixed formulas and methods.<sup>2</sup> The term used in two senses, the one is that which comprehends the other.

That is to say, in the more comprehensive sense, it is the title of a Kitab or book which comprises all the separations of a wife from her husband for causes originating in him.

### Classifications

According to ancient authorities and early jurists of the west, a contract of marriage was dissolved either by the authority of the husband himself or by mutual consent, or by the order of the court upon approach of either of the parties.<sup>3</sup>

The religion of Islam reformed the pre-Islam Arabian customs of divorces by the males and so it raised the status of the females. It created a balance for the proper social and family justice of the time.

In the Sharia there are 13 different kinds of divorce or separation called Firkut of married Parties. Seven of such kinds require a judicial decree while the rest do not so require.

The former are separations for impotency and separations under the option of puberty, for inequality, insufficient dower, husband's

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1. Paton, 134
  2. Inayah II. 211, Baillie I. 203, citing Ashbaho wal Nazairi Encyl. of Islam S.V. Talak sect. IV.
  3. See, E. Neufelf, Ancient Hebrew Marriage Law, 180 (1944)



## The Law of Divorce.

By: Dr. Nazeer Akhter

### Theory & Definition

A contract of marriage is a civil contract, and if it becomes impossible for the parties to abide by it, the Sharia says that it be broken off. Though it is the intention of the parties that the contract must be, for the life-time of the parties yet it 'remains dissolvable in cases of needs, when it becomes impossible and unbearable to lead a life of harmony, and peace, according to the law, it is lawful to terminate it.

The dissolution of a marriage, except by death, was strongly condemned by the Prophet as it is a worst thing being abominable, yet is valid in the eyes of the law in the interest of the wife, husband and the children.<sup>1</sup>

This power of termination of the marriage contract is called Talaq, divorce or separation. The basis of the law is in Quran.<sup>2</sup> The modern civilized society recognizes the institution of divorce, though the countries such as Spain, Brazil, Bolivia, Argentina, Italy and others do not recognize it.

The Sharia bases the institution upon the doctrine of nature, and, it is said that when the spouses develop a strong aversion to each other, and no love exists among them, the law gives them three choices.

- (1) The first, is if the marriage is continued with the mutual aversion, with ill-will and rancor, it would harm the interest of the family.
- (2) Secondly, the physical separation of the parties by preserving the married status will give rise to the offence against morality and the parties may be derived to vices, and
- (3) Thirdly, the divorce, which breaks the family and makes an act of ill will out of what had originally been and act of blessing, will be the most sound choice even though it may destroy the family life.<sup>3</sup>

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1. Raddul-Muhtar II. 628; Fath-ul-Qadri II, 326, Ameer Ali, II, 472.  
2. Q: II: 229, 231  
3. Prof. Abu Zahra in law in the Middle East. 146