

The Judicial Divorce, Grounds and Impacts: A Study from Islamic and Contemporary Legal Perspective

Dr. Muḥammad Zubairⁱ

Dr. Muḥammad Na‘īmⁱⁱ

Mian Muhammad Saleemⁱⁱⁱ

Abstract

According to Islam, the term Nikāḥ refers to definite words and conditions which make both male and female legitimate for each other. It is a deed of trust and a lifetime bond. The Holy Prophet (Peace Be Upon Him) has termed Nikāḥ as “sacred Sunnah (clear path, normative)”. Nikāḥ helps in achieving rationale of human life. It is a permissible and natural process of reproduction. Nevertheless, Nikāḥ is more than a social contract which ensures the mutual rights and brings the two unknown families closed to each other. It is also a form of worship, a unit of a righteous society and an integral part of social system. But sometimes the family life situations extend to a level which demands the practice of divorce. This research paper is inductive and analytical in nature which deals with the judicial divorce. Firstly, the difference between a simple divorce and judicial divorce or the dissolution of marriage has been stated qualitatively. Secondly, the various grounds of judicial divorce have been investigated and discussed. Furthermore, the evidences from both the Islamic and existing laws are incorporated comparatively. The verses from the Holy Qurān have been cited with Qurānic Text.

Key Words: Judicial Divorce, Dissolution, existing law, Social contract

Introduction

As per the Holy Qurān, the first ever relation in Heaven and on the Earth was that of a husband and wife. The Adam and His spouse Eve were settled on the Erath and from them the rest generation got produced. In Chapter No. 04 Verse No.01, it is discussed as:

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً¹

Marital life is encouraged and considered worth than of being a single. Except a few numbers, all the prophets of Allah had joined in marriage. The Holy Qurān has mentioned it in Chapter No.

i Assistant Professor, Department of Islamic studies, Abdul Wali Khan University, Mardan

ii Assistant Professor, Department of Islamic studies, Abdul Wali Khan University, Mardan

iii Associate Professor of Law, Abdul Wali Khan University, Mardan

وَلَقَدْ أَرْسَلْنَا رُسُلًا مِنْ قَبْلِكَ وَجَعَلْنَا لَهُمْ أَزْوَاجًا وَذُرِّيَّةً²

The Holy Prophet of Islam (saw) himself practiced polygamy and advised the singles to enjoy the marital life.

The divorce, although permissible, is considered a non-recommended action. Allah almighty shows His abhorrence on using this word. The Holy Prophet (SAW) has mentioned this in an authentic Hadīth.³ Besides, sometimes the separation becomes indispensable. At such circumstances, Islam advises to follow the best way of implementing the divorce, if someone deems it necessary. The Holy Qurān guides us:

وَإِنْ يَتَفَرَّقَا يُغْنِ اللَّهُ كُلًّا مِنْ سَعَتِهِ وَكَانَ اللَّهُ وَاسِعًا حَكِيمًا⁴

The male is empowered with the application of divorce which is a divine authorization almost well-matched to the intellectual capacity. This authority is endorsed to male in view of long-listed liabilities of which he is bound to meet. The payment of dower, the provision of maintenance, the accommodation and other domestic's needs are all on the shoulders of male. The female is no way legally responsible. This would be a tough assignment for a female if she is demanded of doing so and hence the authority of divorce has been handed over to male.

Moreover, a female can also demand for divorce which is known as dissolution or judicial divorce. For dissolution the word Faskh is used in Arabic. Faskh means to put off something or divide it into pieces. Imām Abū bakar Kāsānī (r.a) says that Fasakh is the cancellation of a contract from the gross root level⁵. Ibne Nujaīm Ḥanaḥī is of the opinion that this term refers to the disbanding of a contract. Faskh Nikāḥ has been defined as:

The divorce that is endorsed by the court after the wife has appealed for dissolution based on solid ground is called Faskh Nikāḥ.⁶

Authenticity of Dissolution of Marriage

In Chapter No.04 Verse No. 59 Allah almighty Allah has directed the believers to follow the instructions of rulers. The verse is as under:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ⁷

Imam Qurṭabī while explaining this verse says:

"The word (اولوالامر) refers to the ruling authority whose order become obligatory to be followed if it is relevant to the instructions of Allah and His messenger"⁸.

According to the Islamic Jurists, this authority is called (Walāyat) supremacy.

In another verse of the Holy Qurān it is explained as:

If you fear that both the husband and wife shall not maintain the orders of Allah, then there is no sin on them if the wife gives something (out of dower) to her husband as to relieve herself from the marriage bond.⁹

While explaining this verse, the prominent scholar Imam Quratabi says:

Here, the argument finds of those who opine that the ruling authority can arbitrate the case of divorce by Khul‘a.¹⁰

Another Verse in the same context, clarifies the authority of ruler in the domestic grievance as lawful.¹¹ From this verse it is obvious that at a time, holding the wife with kindness as well as violence is impossible. Where there is no gentleness, the violence will occur of course. If so, appeal to judge can be the option to eliminate the violence and help the wife getting rid of husband’s rudeness.

The reconciliation between husband and wife in time of misunderstanding is the Qurānic instruction which make the elders of both the parties responsible to tackle the case. The Holy Qurān discusses this matter in Sūrah Nisā’ Chapter No. 04 Verse No. 35.

In the time of the Holy Prophet (s.a.w), a woman came and told that she wanted separation from her husband for some reasons. The Holy Prophet (s.a.w) asked her about the returning of dower (husband’s property). The women showed agreement of giving back the property of husband. Then the Holy Prophet (s.a.w) told her husband to relieve his wife at the cost of that property.¹²

Similarly, the Holy Prophet (s.a.w) judged the case of lia’n and notified the decision.¹³

From this detail, the authenticity of dissolution of marriage elaborates and it became clear that the matter of dissolution is a known problem in the sources of Islamic rulings.

Difference between Divorce and Dissolution

Divorce and Dissolution vary from each other in view of the following points.

1. Dissolution dismisses the Nikāḥ at once from the root level while in divorce; the Nikāḥ terminates after the third divorce.
2. The Divorce is specific whereas the Dissolution is common. It means that unlike the divorce, Dissolution is sometimes simple separation but divorce in other occasions.

3. The quantity of divorce maximum of which is 3, is effective in form of clear divorce but in case of dissolution, the quantity of divorce does not disturb.
4. The divorce is not depending on court decision but, in contrast, the dissolution requires the judicial procedure.
5. Unlike divorce, the wife can also appeal for dissolution.

Grounds of Dissolution

In Islamic and contemporary legal sources there exist several grounds for dissolution briefly discussed below:

Khul‘a

If a wife demands divorce from her husband and pays back the whole dower or a part of it and, in response, the husband agreed to do so, the Khul‘a takes place. But the decision of dissolution by a third person being authorized is necessary to finalize the case.

In Islamic point of view, the consent by the husband is essential to proceed the Khul‘a. In case, the husband was not summoned appropriately and, in his absence, the decree for dissolution issued then it shall not be dealt as valid. However, if the procedure of summon service adopted properly then the decree passed Expetrel, is lawful.

Khul‘a is a terminology that implies specific procedure and conditions. A legal flea can be observed in our contemporary law which creates misconception and that is the ambiguity between the Khul‘a and dissolution. The Council of Islamic Ideology in its recommendation has resolved it as:

“If the court issued the decree after the husband is agreed upon, it is called Khula’. But if the husband repudiates to do so and the court issues the decree it will be dissolution.”¹⁴

In times of husband’s repudiation, the dissolution shall be valid or not? In our contemporary system, this type of decree is considered legal and the wife after passing the I’daat period is, free to enjoy another marriage. In Sharia’a point of view, the mere decree of Khul‘a does not allow a wife until it is processed in times of husband’s consent. Such decree is known as dissolution which also should be based on a genuine ground.

The judge can exercise the power of a husband if:

The husband remains absent to appear before the judge and to defend his position even though he has been summoned frequently.

The husband after appearance before the judge failed to defend his stance and denies divorcing his wife.

Besides this, if the wife is nāshiza meant disobedient to her husband though the husband meets all her rights appropriately, then there is no justification of dissolution. More over such wife does not deserve provision of maintenance. IbneRushd says that this is the unanimous decision of Jurists that Nāshiza is not deserving of maintenance provision.¹⁵

Mubārāt

Unlike the Khul'a, Mubārāt is the mutual agreement of the spouses to dissolve the marriage tie. The other rules of each are similar.

Eīla'

It is another ground of dissolution mentioned in the Holy Qurān. It is a form of oath in which a husband speaks out to his wife that he would not approach her. By this statement the conjugal affairs on spouses are banned. Before Islam, this type of oath was a part of the Arab customs and by doing so a wife would become non permissible for her husband throughout her life. Islam brought positive reforms this custom and introduced proper criteria for Eīla'. In Chapter No.02 Verses 226 and 227 the Eīla' has been mentioned with these words:

لِّلَّذِينَ يُؤْلُونَ مِن نِّسَائِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ فَإِنْ فَاءُوا فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ¹⁶

For those who take an oath for abstention from their wives, a waiting for four months is ordained, if then they return, Allah is oft-forgiving, most merciful.

In these verses the duration of four months was fixed. So, a person who took such oath has the permission to return to his wife and perform the penance of oath but, after the completion of four months the Ṭalāk Bāi'n shall take place. The Islamic Jurists except Imām Abū Ḥanīfa are of the opinion that the divorce in light of Eilarequires to be notified by the judicial process.¹⁷

Zihār

Zihār is an Arabic word means back opposite of front. In Sarī'ah, it is the comparison of wife to the mother or any other woman prohibited for the husband. In the result, such husband cannot entertained his marital obligations until he pay the penalty of Zihār. The detail of Zihār is mentioned in the Holy Qurān with following words.

وَالَّذِينَ يُظَاهِرُونَ مِن نِّسَائِهِمْ ثُمَّ يَعُودُونَ لِمَا قَالُوا فَتَحْرِيرُ رَقَبَةٍ مِنْ قَبْلِ أَنْ يَتَمَاسَا ذَٰلِكُمْ تُوعَظُونَ بِهِ وَاللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ فَمَنْ لَّمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ مِنْ قَبْلِ أَنْ يَتَمَاسَا فَمَنْ لَّمْ يَسْتَطِعْ فِإِطْعَامُ سِتِّينَ مِسْكِينًا

If the husband fails to perform the penance of *Zihār* then the wife reserves the rights to ask the authority to command the husband to pay it and re-establish the domestic affairs or otherwise issue the decree of judicial divorce.

Li'ān

It is a form of oath containing on specific words that a husband and his wife undertake. This oath is taken at time when the husband alleges the charge of adultery on his wife without witness. Li'ān is processed by the judge and the husband takes oath four times of his truthfulness. On fifth time, he says, "The wrath of Allah be on me if I am liar." The wife afterwards, takes oath four times stating that her husband is a liar. Fifth time, she will say: Allah's curse be on her if her husband is truthful. Due to this procedure of Li'ān, the husband sets himself free from the punishment of *Qadhf* and the wife from *Ḥad Zinā*. As known above the Li'ān is a form of dissolution including the statements from both sides and consequently separates the spouses from each other. The Islamic jurists opine that the Li'ān comes in forth after the decision of a judge. In Chapter No.24 from Verse No. 04 to 09 the matter of Li'ān has been discussed in detail.¹⁸

In Pakistani Laws the Li'ān is lacking which is required to be incorporated.

Breach between the spouses

Sometimes the difference between the husband and wife takes place. A plan is advised by Allah almighty of appointment of arbiters to bridge the difference. The Holy Qurān has mentioned it in Chapter No. 04 verse No.35.

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا¹⁹

"If you fear a breach between them twain, appoint two arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation, for Allah has full knowledge, and is acquainted with all things"

In the existing law though the appointment of arbiters does not find but the judge on chair is supposed to plan for settling the dispute before it results in the separation of spouses.

The Council of Arbitration constituted under the Muslim Family Laws Ordinance 1961, can take effective step to resolve the matter. The Chairman of the Council and the body in his subordination shall look into the issue by receiving the findings from each side. Then they shall either succeed in their attempt or otherwise report it to the judge of the court. Here it is essential to note that the authority of dissolution refers to the Judge of the court only.

Disability of Husband

If the husband is disable to tackle the conjugal affairs profoundly then the wife has the right to ask the court for dissolution of marriage. In Islamic sources and the contemporary laws the reasons are mentioned which declare the husband disable. They are physical or mental diseases such as impotency, male with cut penis, insanity, Leprosy, Vitiligo and the other dangerous epidemic diseases.

In such cases the wife shall file the writ and the court shall process it. The husband shall be given in time of his impotency a period of one year for his treatment. After that period if the disease could not be cured then the court shall decide the dissolution. The said detail is mentioned in the sources of both laws.

Imam Marghinani describes:

وإذا كان الزوج عتينا أحله الحاكم سنة فإن وصل إليها فبها وإلا فرق بينهما إذا طلبت المرأة ذلك هكذا روي عن
عمر وعلي وابن مسعود رضي الله تعالى عنهم²⁰

"When a husband was impotent, the judge shall give the husband period of one year for treatment. If he was unable to rehabilitate the marital duties then the judge dissolves the marriage on the request of wife so has been reported by Umar, Ali and IbneMasud (May Allah be pleased with them)".

In Pakistani Laws, it is mentioned as:

The wife is entitled to obtain a decree for the dissolution of her marriage if the husband was impotent at the time of the marriage and continues to be so.²¹

As per law it is necessary that before working on the application, the judge shall make an order requiring the husband to satisfy the court within a period of one year for the purpose of treatment. If the husband so satisfies the court within such period, no decree can be passed on the ground of his impotence

Similarly on the grounds of disability, the court can pass the decree of dissolution.

The wife may obtain a decree for the dissolution of her marriage if the husband has been insane for a period of two years or is suffering from Leprosy or a virulent venereal disease²².

From Islamic point of view, the chronic type of insanity can be a ground of dissolution. But in case of acute disease, the judge may provide a reasonable respite for treatment.

Non-Provision of maintenance

In the list of the other grounds of dissolution, one is the Non Provision of maintenance to wife. It holds the legal duty of husband to fulfill the basic needs of his wife such as food, cloth, and accommodation and treatment facility. In Islamic Sharia, it is known as "Nafaqa

With reference to the Holy Qurān, Chapter No. 02, verse No. 223, the husband is bound to provide the food and cloth to her wife.

On another occasion the shelter is included in the maintenance. In chapter No.65 Verse No 07 Allah directs the husband to provide his wife with food and shelter.

As the wife determines to have the rest of her life with husband and leave off her family. With this sacrifice she becomes deserving to be exempted from liabilities. If a husband ignores to facilitate his wife for a reasonable period then, the wife can ask the court for this right. The judge shall commands the husband either to resolve the matter and ensure the wife demand or otherwise make her wife free from the bond of marriage Here it shall be noted that the immediate judge is expected to provide a respite to husband for the maintenance.

According to Imām Abū Ḥanīfa, the non-provision of maintenance cannot be a ground for dissolution because the poverty is a natural phenomenon in which the man is compelled. In the Islamic history many examples exist that show the poverty of the believers.

‘Allōma Marghināni states:

The person who is unable to support his wife, the marriage shall not be dissolved and the wife shall be advised to meet her needs out of debt which the husband shall recover it later.²³

In the Holy Qurān Allah says the debited shall be given an interval for sometimes when he is able to pay the debt.²⁴

Violence

The other ground for dissolution is sever domestic violence. It is of two types, mental and physical. The mental violence is related to immoral attitude and continuously abusing behaviour of husband. In physical violence, the husband used to punish his wife severely or damage her body organ. Both are prohibited in Islam and in the contemporary laws as well. Particularly, the entire record of Islamic system lacks of the violence with all its forms. The domestic life is like an institution where the wife plays her role as an assistant

to her husband. The husband is dependant to her in running of a sound domestic life. She maintains numerous duties within the house which the man should realize. In times of wife's disobedience and misconduct, the husband gives her advice which shall help resolve the observation. If giving advice did not yield its impact then the husband shall segregate himself from her. This is a moral punishment and a source of awakening. The ineffectiveness of advice gives permission limited corporal punishment to the husband. This cannot be identified as violence because it is done for the sake of an inevitable purpose i.e. the far long-lasting and sound domestic life.

In contemporary Law the detail about the issue aforesaid, is as under:

The wife is entitled to a decree for the dissolution of her marriage if the husband treats her with cruelty that is to say:

- : Habitually assaults her to makes to her life miserable by cruelty or conduct even if such conduct does not amount to physical ill-treatment.
- : associates with women of evil repute or leads an infamous life; or
- : Attempts to force her to lead an immoral life; or
- : Dispose of her property or prevents her exercising her legal rights over it; or
- : Obstructs her in observance of her religious profession or practice; or
- : If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qurān.²⁵

The judge on chair, before issuing the decree, takes the measures to resolve the matter by obstructing the husband from violence; but when it is sensed that the remedy is impossible then there is no option except to dissolve the marriage.

Imprisonment

If the husband was sentenced for imprisonment of seven years or more, the wife is entitled to obtain a decree of dissolution as mentioned in Pakistani laws. In Islamic sources, there is no provision of such rulings. As known above, the marriage can be dissolved only on account of husband's missing for a reasonable period or his death is otherwise confirmed. As long the matter of imprisonment is concerned, it goes in against of the basic criterion of Islamic jurisprudence. But the latest scholars have permitted the effected wife to ask for dissolution of marriage if her honour is in threat. The grand Muftī of Hind Kifayatullah (r.a) has mentioned as:

If the husband is sentenced with lifetime imprisonment and has not left behind anything to maintain his spouse, the wife can dissolve her marriage

through court decision. After the decision, she has right to manage her marriage somewhere else after observance of the Iddah Period.²⁶

In Pakistani Laws the matter is described as:

A woman married under a Muslim law shall be entitled to obtain a decree for the dissolution of marriage of her marriage...the husband has been sentenced to imprisonment for a period of seven years or upwards.²⁷

Apostasy

Apostasy or conversion of a Muslim to other religion is also a ground of cancellation of marriage. The act of apostasy is prohibited in Islam and committing so, leaves behind the drawbacks one among is the cancellation of marriage. In Islamic sources it is clear that the act of apostasy breaks off the tie of marriage. In the Holy Qurān it is mentioned that on account of apostasy all the good deeds of believer destroy wherein the tie of marriage also includes. This cancellation of marriage is a unanimous opinion of all the old Muslim scholars. But besides this, the decree of apostasy shall be notified by authority. In existing law, the impacts of apostasy on marriage are mentioned as:

The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage.²⁸

Furthermore it is discussed as:

After such renunciation or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any grounds mentioned in section 2.²⁹

Conclusions

From the above discussion it becomes clear that there are more than a dozen grounds which are applicable for dissolution of Muslim Marriage. They are mentioned in the sources of Islamic Law i.e. Qurān, Sunnah, The books of Islamic Jurists and Fatwa of Muslims Scholars. These grounds include Khul‘a, Zihār, Eīla‘, Mubārāt, Li‘ān, Breech between the spouse, Non Provision of maintenance, Domestic Violence, Apostasy and disability of husband and Imprisonment of husband. In our existing law these grounds are mentioned in form of a specific Act known as Dissolution of Muslim Marriage Act 1939. Nearly all these grounds require to be trailed through judicial procedure. These grounds have there legal impacts as well i.e. the payment of dower, maintenance and observance of Idda period.

References

- 1 Sūrah Al Nisā, 4:01
- 2 Sūrah Al Ra'd13: 38
- 3 Imām Abū Dāūd, Sunan Abī Dāūd Hadīth No. 2180, Maktabtul 'Aşriya, Bīriūt
- 4 Sūrah Al Nisā, 4:130
- 5 Imām Abūkar Kāsānī, Badāi, us Şanāi, Dārukutubul'Ilmia' Bīriūt (1406 H) 6: 180
- 6 Ibn Nujaīm Ḥanafī, Alashbah wa Naẓā'r, Dārukutubul'Ilmia' Bīriūt (1400 H) 1: 338
- 7 Ibid 04: 59
- 8 Imām Qurṭabī, Tafsīr Qurṭabī, Dār ulkutubul M'şriya(1384 H) 5: 258
- 9 AlNisa 4:19
- 10 Tafsīr Qurṭabī 5: 258
- 11 Sūrah Al Nisā, 4: 59
- 12 Imām BuKhārī, Şaḥīḥ BuKhārī Kitābul Ṭalāq Hadīth No: 5273, Dār Ṭawq al Najāh
- 13 Ibid Hadīth No: 2256
- 14 Recommendations of CII annual Report 2008-09 p.27.
- 15 Ibn Rushd, Bidāyatul Mujtahid, Muşṭafa al bābī Publisher Egypt (1395 H)2: 55
- 16 Sūrah Al Baqra 02: 226,227
- 17 Ibn Qudāma, Almughnī, Dār ul Fikr Bīriūt ,1405 H, 8: 543
- 18 Sūrah Al Nūr 24: 4-9
- 19 Sūrah Al Nisā, 4: 35
- 20 Marghīnānī, Hidāya, Almaiktabat ul Islāmīa 2: 26
- 21 Dōnish Fardunjī Deep Mullah Principles of Muhammadan Law Mansor Book Depot Lahore p.410
- 22 Ibid 411
- 23 Hidaya 2: 41
- 24 Sūrah Al Baqra 2: 280
- 25 Muhammadan Law 411
- 26 Muftī Kifāyatullah,Kifāyat ul Muftī, Dār ul Isha't, Karachi,05-06:110
- 27 Muhammadan Law 470
- 28 Ibid 472
- 29 Muhammadan Law 472