



**UNTRACEABILITY AS GROUND OF DISSOLUTION OF MARRIAGE IN
MUSLIM PERSONAL LAW**

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1. INTRODUCTION¹

Marriage is an important aspect of human life. It gets the sorrow, uneasiness and unpleasant things changed into happiness. It may be said that to get easiness and pleasure it is a must. Quran says² -

**“He created for you
Mates from among yourselves
That you may dwell in
Tranquility with them,
And he has put love
And mercy between your (hearts);
Verily in that are signs
For those who know”**

Thus, the creator, in order to keep the person in tranquility and love, the institution of marriage has introduced. That is why Allah has guided the men in the following verse.

**“On the contrary live with them
On a footing of kindness and equality”³**

Abu Bakar Jasad Razi has, while commenting the above verse, said “Don’t talk with them in rough manner, do not ignore them in the home affairs⁴”.

Thus, talking in good manner, showing the love and affection so that they may feel happy, is necessary, as Allah has revealed in the above-mentioned verse. Allah further guides⁵

**“They are your garments
And ye are their garments”**

Meaning there by that like garments one is the need of the other at every time and not for temporary period or only sexual passion.

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¹ I have written several papers on the grounds of dissolution of Muslim Marriage in which the introductory part and grounds of dissolution are common.

² Sura (Chapter denoted as S) 30 : Ayat (Verse or sentence denoted as A) 21

³ Holy Quran S 4:A 19

⁴ Jasad 'Ahkamul Quran' –Vol . II p. 109

⁵ Holy Quran S 2 :A 187

Since man is free in his acts, he can do the good work as well as bad work. Sometimes it happens that a man keeps his wife in complete misery. She is subjected to the excess of her husband. She has nothing to do except tolerating. But sometimes it becomes intolerable for her. In that extreme circumstances woman has right to get this pious tie broken. If a husband is feeling aggrieved, he can use the right of divorce. Where woman is aggrieved, she can get the marriage dissolved. But women are also cautioned in the use of their rights. Prophet (PBUH) has said⁶ –

“Every woman who ask her husband to divorce her without cause, the smell of paradise is forbidden to her.”

But when she is feeling that the continuance of tie will lead her in a life which is unfavourable for her in this world as well as hereafter she can use her right to reach the Qazi to get the marriage dissolved. Before using the right, a woman is guided to choose the other solutions. Allah commands⁷-

**“If a wife fear
Cruelty or desertion
On her husband’s part
There is no blame on them
If they arrange
An amicable settlement
Between themselves;
And such settlement is best”**

And further if they are unable to reach on any amicable solution, they can appoint the arbitrators.

**“If ye fear a breach between them twain,
Appoint (two) arbiters
One from his family,
And one other from hers
If they wish for peace
Allah will cause
There is reconciliation
For Allah hath full knowledge
And is acquainted
With all things”⁸**

Not only women but also men are guided to use the right of divorce in extreme circumstances. Prophet (PBUH) has said –

“The most detestable among all permitted things in the sight of Allah is divorce”⁹
Dare Qutni reports that Prophet (PBUH) has said to Muadh (Raz) –

“Nothing has been created by Allah on the earth which is more detestable than divorce”¹⁰

⁶ Fatwa Qazi Khan Vol. I p. 123

⁷ Holy Quran S 4 : A 128

⁸ Id S 4 : A 35

⁹ “Ibne Umar says that the thing which is lawful, but disliked by Allah is divorce.” Abu Daud Vol. I p. 123

But when it is the extreme need and the parties, instead of getting satisfaction from each other passing the life in jealousy and hatred and the family becomes the open scene of the hell, in such circumstances this detestable thing becomes a boon.

2. GROUNDS OF DISSOLUTION

The Hanafi jurists describe twelve¹¹ grounds of dissolution of marital tie but in India there are more grounds than that which are based on primary sources, other schools and legislations i.e.

- 1) Migration – when a woman comes in Islamic territory after embracing Islam immigrating from non-Muslim state while her husband remains in that state (non-Muslim state).
- 2) Improper marriage;
- 3) Marriage in contravention of status or Inequality of the husband (Kufu);
- 4) Dower if not in accordance with status;
- 5) Musahirat;
- 6) Acceptance of Islam by wife (barring the husband);
- 7) Acceptance of Islam by husband (barring the wife);
- 8) Fosterage (if the wife has fed her husband during childhood);
- 9) Option of slavery (Khayare Ataq);
- 10) Option of puberty (Khayare Balugh);
- 11) If one of the parties becomes non-Muslim;
- 12) Relation of master and slave;
- 13) Untraceability of the husband;
- 14) Inability to maintain the wife;
- 15) Neglect of the husband;
- 16) Impotence of the husband;
- 17) Insanity of the husband;
- 18) Virulent or Venereal disease of the husband;
- 19) Cruelty of the Husband;
- 20) Enmity between the spouses¹².

Amongst these I shall discuss untraceability of the husband as ground of dissolution.

3. DISSOLUTION OF MUSLIM MARRIAGE DUE TO UNTRACEABILITY

When the husband's whereabouts¹³ have not been known, the wife is entitled to obtain a decree from Qazi for the dissolution of her marriage. After the application of the wife the Qazi shall direct her to wait for a further period of one year. In the event of the husband's whereabouts remaining unknown during that period as well, the Qazi shall pass a decree

¹⁰Abdul Samad Rahmani "Kitabul Fashkh waltafriq" (Patna: Imarate Sharia, 1400 AH) 2nd ed. p. 35 citing Dare Qutni

¹¹Id pp 37-38

¹²Dr Badre Alam Khan, 'ADR for Muslim Personal Law' (Jaipur:UBH, 2018) ISBN 978-81-8198-952-4//

Dr Badre Alam Khan, 'Economic Rights of Women' (Delhi:APD, 1999) ISBN 81-7435-173-6 p 86

¹³Ashraf Ali Thanvi, 'HilatunNajiza' (Deoband: MRazi 2005) pp.106-128

dissolving the marriage. The wife, then, after observing her Iddat, shall be entitled to contract a second marriage.

The directive for waiting for a year shall be given only when necessary maintenance allowance for a year is available for her out of the properties of her husband or that she gets a loan in the name and on behalf of her husband. In the event of the provision for maintenance allowance for that period not being available and there being an apprehension of adultery, the Qazi shall, be empowered to dissolve the marriage forthwith.

The dissolution of marriage, on this ground, shall be deemed to be a revocable divorce.

There is difference of opinion with respect to the contracting of second marriage by the wife of the person whose whereabouts are not known. According to Imam Abu Hanifa (Rah) the wife of the person cannot be considered to have been released from the marriage-tie till her husband's death is known. In other words, the marriage contract of the wife is not valid as long as other men of the age of the person are alive¹⁴.

According to Imam Malik(Rah), there are four kinds of persons of unknown whereabouts, whose whereabouts become unknown¹⁵.

1. In an Islamic State.
2. In war with infidels.
3. After their going in an infidel country.
4. In war between the Muslim themselves.

Persons whose whereabouts become unknown in an Islamic State the waiting, is four years. Concerning the persons whose whereabouts become unknown in war with infidels there are several views of Maliki jurists. Some scholars say he shall be deemed to be a prisoner, till it is not known with certainty that he is dead, his wife shall remain in his marriage. The other view is that he shall be considered to have been killed and his wife after waiting for a year may enter into another marriage contract except when she is at such a place where it is easy to get correct information about her husband. It is, then, not necessary for her to wait for a year. Some are of the opinion that the wife, without waiting for the husband may contract another marriage. Some others are of the view that the husband so far as his wife is concerned, be deemed to have been killed. One more view is that the husband becomes untraceable after a battle amongst Muslims themselves shall become free from her marriage contract only after observing her Iddat without further waiting. According to some others, however, she shall have to wait for a year.¹⁶

Ibn Rushd is of the view that the reason for fixing the period of waiting for four years is based on the analogy of some opinion that the period of pregnancy, according to Malik(Rah), is four years. But it cannot be correct basis, as the period of waiting, in case of a slave girl's husband's whereabouts being not known is two years. According to Maliki's the provision with

¹⁴ Another report providing the basis of the rule of conduct among the Hanafis is that the death of the people of the age (of the husband) is no condition; rather it depends upon the Ameer

¹⁰ The jurists who fixed the period of four years' waiting regarding the wife of the husband whose whereabouts have been unknown base their rule of conduct on the decision of Caliph Umar(Raz) Imam Abu Muhammad Ibn Hazm has reported in his famous book, Al- Muhalla several rulings from Umar(Raz).

¹⁶ Ibn Rushd 'Bidayatul Mujtahid' Vol. II, p. 44.

respect to the period of pregnancy of a free or slave woman is one and the same. Therefore, strictly speaking, the period of pregnancy cannot be held to be its basis.

4. MODERN LEGISLATION¹⁷

The law on this subject in force in various Muslim and non-Muslim countries are not uniform. In Egypt¹⁸ when the husband, without any reasonable cause, is absent for a year or more than a year and the wife in spite of her having the provision for maintenance is put to injury because of her husband's absence it shall be legal for her to apply to a Qazi demanding irrevocable divorce.

Section 13. When it is possible to have correspondence with the absent husband, the Qazi shall grant time and issue a notice in his name stating that if he does not appear before the Qazi with purpose of living with his wife or taking her wife with him or pronouncing divorce to her, the Qazi shall pass a decree effecting divorce to the wife. When the time expires and the husband takes no action or his objections are not accepted the Qazi shall get dissolution effected between them through an irrevocable divorce. When it is not possible to correspond with the husband, the Qazi shall without giving notice and granting time, pass a decree effecting divorce to the wife. In Iraq when the husband, without lawful causes, is absent for two or more than two years and his place of residence is unknown, in spite of the husband's property being in the wife's use, it shall be lawful for the wife to apply to Qazi for dissolution on the ground of injury. In Tunisia when the husband is absent from his wife leaving none of his property with her, making no arrangement for her maintenance and appointing no one to provide her expenses, the Qazi shall order the husband to appear before it within a month. In case of his non-appearance, the Qazi, after taking evidence and putting the wife on oath shall pass a decree effecting divorce. In Morocco the provisions of law as stated under the Moroccan law on the subject are in accordance with the Egyptian laws under section 12 and 13 stated above. In Jordan the provision of law that enunciated under section 89 and 90 of Jordan's laws are in accordance with Egyptian law under section 12 and 13. In Syria under section 109(1) and (2) of the Syrian law the same laws are enunciated in connection with the right of dissolution on account of husband's absence

There are many differences in the laws in Islamic countries relating to this subject. In Iraq the period of absence of the husband is at least two years, whereas in Egypt, Morocco and Jordan the period of one year is held sufficient for the right of demanding a decree of dissolution. The second kind of difference, in this connection, is that in Tunisia in the event of the husband's whereabouts becoming unknown the right of demanding dissolution occurs only when the husband neither leaves sufficient property nor makes arrangement for the maintenance of the wife during his absence. Contrary to this, in several other Muslim countries the existence or non-existence of property for meeting maintenance expenses cannot impede the right of the wife of demanding dissolution. Under Syrian law it has been made clear that on demand dissolution in the event of husband's absence, such dissolution as shall be effected will

¹⁷ Tahir Mahmood, 'Statute of Personal Law in Islamic Countries' (NDelhi:India and IslamicResearch Council1995) 2nd ed.

¹⁸Section 12 Act No. 25 Qanun al Ahwalal Shakhsiya of 1929.

be equivalent to revocable divorce; whereas in other Muslim countries such dissolution has been made equivalent to the effecting of an irrevocable divorce.

5. INDIAN LEGISLATION

In Indiasection 2(1) of the Dissolution of Muslim Marriages Act, 1939, says “A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage in the event of her husband’s whereabouts being unknown for four years”. She has been given the right of demanding dissolution from her husband through the Court. The Court’s order has, however, been made to remain suspended for period of six months. If the husband returns during this period of six months and is prepared to fulfill his obligations arising out of the marriage contract, the decree of the Qazi shall not take effect.

According to this clause the period of four years does not commence from the time of the Court’s order, but begins from the time when the husband is proved to have disappeared. A wife can file suit under this provision of law at any time after the expiry of four years from the time of the husband’s disappearance. Moreover, the Qazi shall not ask her to wait any longer but shall decree her suit if the period of four years is proved. The decree shall be held in abeyance for six months. If the husbands return within the said period of six months, the decree shall be a nullity, provided that he satisfies the Qazi about his readiness to perform his material obligations.

6. RETURN OF THE MISSING HUSBAND

A question arises as to what order shall be passed if the husband whose whereabouts have been unknown turns up after four years and after the decree of the Qazi has been passed; and what shall happen if the wife, after observing her Iddat contracts marriage with another persons. So far as the first: question is concerned, if the husband returns at a time when the wife is observing her Iddat he may have recourse to her as the marriage has not been terminated absolutely.¹⁹ If, however, the wife after observing her Iddat has contracted marriage with another person, what shall then happen? According to a report, in the light of the decision of the Caliph Umar (Raz), if the husband returns before the wife contracts another marriage he shall have her as his wife (whatever time may have passed). If the wife has already contracted her marriage with another person the right of her former husband lapses and he cannot have that woman as his wife, although she may not have had valid retirement with the second husband. The second perfect pact of marriage makes the right of the second husband perfect over her. Imam Malik (Rah) has in his book, ‘Muwatta’, followed the decision of Umar (Raz).²⁰

The decision of Caliph Ali (Raz) is at variance with the aforesaid decision of Umar (Raz). According to him the wife, in all events, shall be made to the former husband inspite of her having children from the second husband²¹.

¹⁹ Sunanul Kubra: Vol. V, p. 133.

²⁰ Sunanul Kubra Vol. V p. 133.

²¹ This Tradition is having the weak authorities.

The ruling of Caliph Usman (Raz), in this respect, is stated to be that where the wife has contracted her marriage with another person and her former husband thereafter appears he shall be asked whether he wanted the return of his wife or the reimbursement of his paid dower. Action shall be then taken according to his choice. If he wanted the dower back the same will be returned to him.

7. JUDICIAL TREND

Under Islamic law, there are two kinds of directives with respect to persons whose whereabouts have not been known. The first kind of directives relate to:

- (i) The rule of acquiring property from others by missing person
- (ii) The rule with respect to the division and distribution of the property among heirs of such person.

The second kind of the directives relate to the right of contracting re-marriage with another person by the wife of the person whose whereabouts are not known. There is difference of opinion with respect to the directive relating to second kind vis. contracting of re-marriage with another person by the wife of the person whose whereabouts are not known. In India after Hilatun Najiza, D M M Act is rule to decide the matter.

In case of *Mozher V. Budh Singh*²² it was held that the matter of a missing person pertains to the laws of Evidence and the Muslim Law of Evidence having been superseded, the case of such person shall be governed by the provisions of the Evidence Act. A wife, therefore, shall have to wait for 7 years for her missing husband after that he could be presumed to be dead. The period of 7 years commences from the time since when such person has not been heard of.²³

But this is not in accordance with the provisions of Muslim law. However, the considering the provisions of Muslim law. The Dissolution of Muslim Marriage Act, 1939 has fixed period for 4 years, being in effect, the period of the presumptive death of missing person whose wife may then be entitled to obtain dissolution of her marriage with her missing husband.

The reason under-lying the fixing of two separate periods for presumptive death is that in case of the dissolution of marriage of the wife of a missing husband the purpose is to save the wife from hardship.

The law laid down under Section 108 of the Evidence Act, 1872 fixes a period of 7 years for presumptive death without making a distinction between –

- (i) the presumption of death for purpose of dissolution of marriage of the wife of a missing person, and
 - (ii) the right to hold and acquire property of the missing person,
- is not in accordance with the accepted view of the schools of Muslim law or the prevalent view in the laws in force in various Muslim countries.

²² I.L.R 7 All 297

²³ Sec. 108 Indian Evidence Act, 1872.

8. CONCLUSION

The wife of a husband whose whereabouts are unknown, inspite of being subjected to extreme misery, must keep on waiting for the rest of her life. It is really hard and difficult for a married woman to keep on waiting for her husband during her entire life. In such circumstance urging unlimited patience is against Allah's commandment,

“On no soul doth Allah place a burden greater than it can bear.” For a wife waiting patiently till receiving the news of her husband's death may become a real cause of her involvement in sexual sin. Hence, the Maliki view, compared to that of Hanafi's and Shafi's appears to be more sound.

The adoption of Maliki view, on this question, by the later Hanafi 'Ulema themselves is also established. The salient points of Maliki doctrine that have been stated in Hilatun-Najizah are accepted by Hanafi scholars followed by DMM Act 1939 in India.