



## **Study of Marriage and Divorce in Islam and Challenges it Faces Due to Human Distortion**

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### **ABSTRACT**

Every faith, besides Divinity, touched upon social aspects of life; guidelines & framework for its followers to influence way of life too, besides the core faith and worship part. Islam was no different and hence touched upon a wide spectrum of social guidance for its followers. Marriage, family, procreation of children, property, succession, charity, adoption to name a few. Islam along with, also touched upon a social phenomenon of Dissolution of marriage, concept which was not addressed in those times. Dissolution of marriage became an integral part of Islam's social doctrine with specific procedures and rights set for both Man and Woman. However, in name of traditions and customs much was adulterated with rights of woman in such circumstances being curtailed. The paper explores the procedures of dissolution of marriage in Islam which were twisted over times, curtailing rights of woman especially during the unfortunate process of divorce.

**Keywords:** *Marriage, Dissolution, Talaq, Ahsan, Hasan, Khul, Iddat, Halala, Rights, Distortion, Shariat, Criminal Justice.*

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## 1. INTRODUCTION

MARRIAGE; Primary source of law in the Islamic jurisprudence is the 'revelation' (wahi; consisting of communication which were made by FARISHTA ZABRIEL, under command of ALMIGHTY, to the chosen Prophet MUHAMMAD ibn ABDULLAH pbuh), compiled to form THE HOLY QURAN.

The social institution of marriage in Islam is well embodied in the HOLY QURAN itself with much Ayats devoted to the issue.

The first Ayat embodying HOLY QURAN, Surah 5 Ayat 5 delivers about marriage. Besides marriage, it also reveals about whom a believer is permitted to marry and which food is permitted on a Muslim (HALAL).

"This day are (all) things good and pure made lawful unto you. The food of the people of book\* is lawful unto you and yours unto them. Lawful unto you is marriage, are (not only) chaste women who are believers, chaste women among the people of the books\*, revealed before your time- when you give them their due dower, and desire chastity, not lewdness, taking them as lovers. If anyone rejects faith, fruitless is his work, and in the hereafter, he will be in rank of those who have lost (all spiritual good)"- THE HOLY QURAN translated by ABDULLAH YUSUF ALI.

- People of Books refers to Jews (Revealed book- TAURAT/TORAH) & Christians (Revealed book (INJEEL/GOSPEL))

Mentioned in Surah 4 Ayat 23 are women prohibited on a Muslim male.

"Prohibited to you (for marriage) are ---your mothers, daughters, sisters, fathers sister, mothers sister, brothers daughter, sisters daughters, foster mothers (who gave you suck), foster sister, your wives mothers, your step daughters under your guardianship born of your wives to whom you have gone in, two sisters in wedlock at one and the same time..."

### **THE HOLY QURAN translated by ABDULLAH YUSUF ALI.**

Besides this prohibited are woman already married (Surah 4 Ayat 24), also women of non-believer\* (Surah 2 Ayat 221). Women whom your father married; Step Mothers (Surah 4 Ayat 22) \*

\*Women of non-believers refers to any other faith except Jews & Christians.

\*This was pre-Islamic social norm of Arabia, where eldest son was permitted to marry his step-mother after his fathers death.

The HOLY QURAN further in Surah 24 Ayat 32, Surah 25 Ayat 74, Surah 30 Ayat 21, Surah 40 Ayat 8 delivers about marriage.

Prophet Muhammad (pbuh) too, championed the institution of marriage and innumerable Hadiths tell about matrimony, family, children, well putting marriage in ambit of 'Wajib' (mandatory).

## DISSOLUTION

The same Islamic theology which speaks at length about ‘marriage’, also does not leave the dissolution of marriage, unattended or unaddressed.

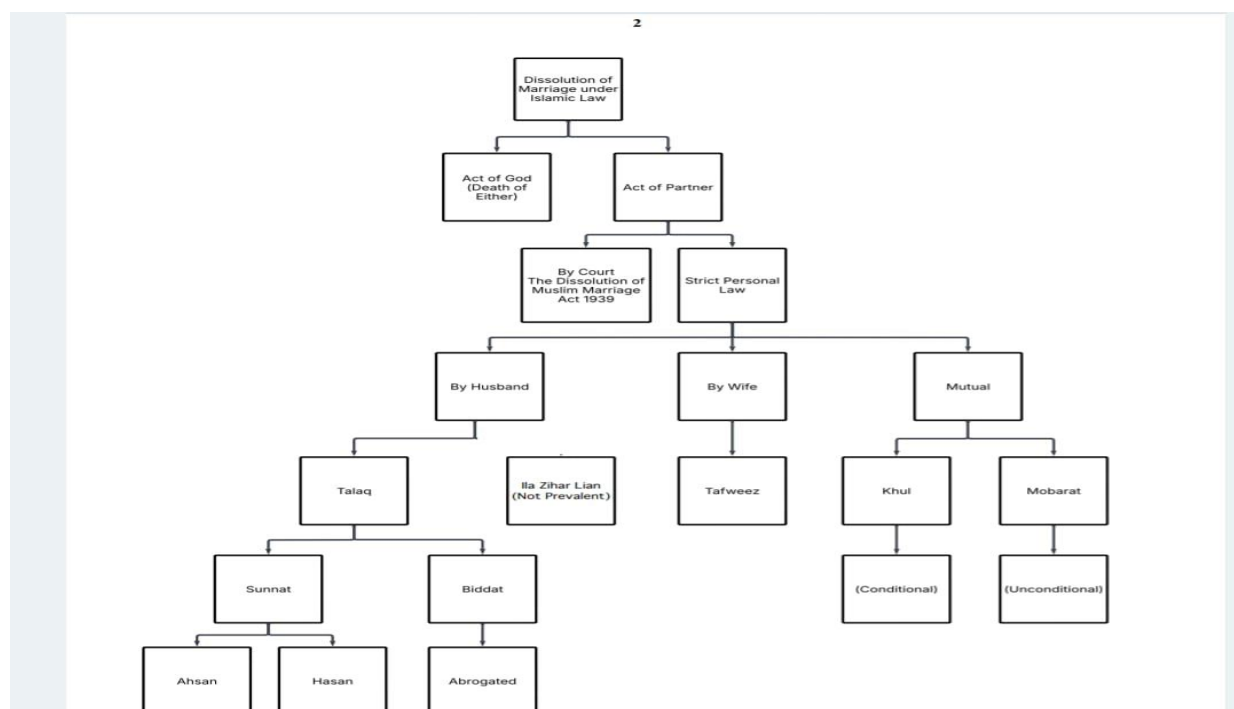
In this paper, we take up the aspect of dissolution of marriage at length, ways of dissolution of marriage, rights of husband, rights of wife, ways how to protect institution of marriage and solution to address issues of dissolution which still infest the Muslim society at large with much less transformation visible from within.

As narrated earlier, the focus of this paper would be to understand the issue of dissolution of marriage, procedure, rights of parties, distortion of such procedures and remedy of modern law, harmonizing Personal law with Criminal Justice System of India.

That most sincere efforts have been put in to harmonize Muslim Personal Law with Matrimonial Justice System of India in light of Constitutional values, dignity of woman, dignity of Institution of Marriage, wrapped into prudence and natural Justice.

That Relevant Ayats from multiple Quranic Translations have been referred to along with authentic Hadiths and works of Jurists and experts in field of Socio-Religious-Legal Islam.

### Dissolution of Marriage Under Islamic Law (Flow Chart)



The Holy Quran forms the most potent source of ISLAMIC LAWS. Ayats of The Holy Quran which expressly lay down dissolution of marriage provisions under Islam have been taken up in the write up. The rights of husband, the rights of Wife and the procedure to follow have been covered which are available in The Holy Quran. Of all the provisions available for dissolution of marriage, TALAQ-E-TAFWEEZ is not available in authentic text of The Holy Quran.

## **2. REVIEW OF LITERATURE**

### **Surah 02 Ayat 228**

(The Ayat gives authority to TALAK –E –AHSAN and TALAK – E – HASAN which in detail are discussed later in the write up)

#### **1) The Holy Quran Translated by ABDULLAH YUSUF ALI**

‘Divorced women shall wait concerning themselves for three monthly periods.

And it is not lawful for them to hide what Allah had created in their wombs, if have faith in ALLAH

And the Last Day. And their husbands have the better right to take them back in that period, if they

wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree over them and Allah is Exalted in Power, Wise.”

#### **2) AL-QURAN Rendered into English by Dr. SYED ABDUL LATIF**

“The divorced women shall not feel themselves free (to enter into marriage with others) until they have had their courses thrice, and it is not proper for them to conceal the knowledge of what God hath created in their wombs, if they believe in God and the Last Day; and their husbands have the right to claim back their wives within this period, if they desire to improve to improve relations. It is but fair that women should have rights over men, even as men have rights over women, albeit men rank a degree above them.: and God is Mighty, Wise”

#### **3) The Noble Quran ( Tafseer-e- Usmani ) by ALLAMA SHABBIR AHMED USMANI**

“The women under divorce shall wait by themselves for three periods. And it is not lawful for them to hide what God has created in their wombs, if they have faith (Iman) in Allah and the Last Day. And their husbands have a right to revoke them in that period if they want to live with good behavior. And the women have rights as obligations according to usage and the men have superiority over the women. And God is Mighty, Planner.

**4) The Meaning of The Glorious Koran Translation by MOHAMMAD MARMADUKE PICKTHALL**

“Women who are divorced shall wait, keeping themselves apart, three (monthly) courses. And it is not lawful for them that they should conceal that which Allah hath created in their wombs if they are believers in Allah and Last Day. And their husbands would do better to take them back in that case if they desire reconciliation. And they (women) have rights similar to those (of men) over them in kindness, and men are a degree above them. Allah is Mighty, Wise”

**5) The Koran translated by N. J. DAWOOD**

“Divorced women must wait keeping themselves from men, three menstrual courses. It is unlawful for them, if they believe in God and the Last Day, to hide what God has created in their wombs, in which case their husbands would do well to take them back should they desire reconciliation. Women shall with justice have rights similar to those exercised against them, although men have a status above women. God is Mighty and Wise”

**Surah 02 Ayat 229**

(The Ayat gives authority to TALAK-E-AHSAN, TALAK-E-HASAN and KHUL which in detail are discussed later in the write up)

**1) The Holy Quran Translated by ABDULAH YOUSUF ALI**

“A divorce is only permissible twice ,after that, the parties should either hold together on equitable terms or separate with kindness, it is not lawful for you, (men) to take back any of your gifts ( from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah if ye ( judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom, these are the limits ordained by Allah, so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong themselves as well as others”

**2) AL QURAN Rendered into English by Dr. SYED ABDUL LATIF**

“A return to each other is permissible after even after divorce has been pronounced twice or in two successive months; then an honourable retention or a grateful parting (may be effected). And it shall not be proper for you to take away aught what you have given to them, unless both fear they cannot keep within the bounds set by God. Then no blame shall attach to either for what the women shall herself give away for her redemption. These are the bounds of God: therefore overstep them not, for they who overstep the bounds of God are indeed transgressors”

**3) The Noble Quran (Tafseer-e-Usmani) by ALLAMA SHABBIR AHMED USMANI**

“The revocable divorce (Talaq-e-Rajae) is two times, after that its either retention according to usage or release in a good manner (in kindness). And it is not

worthy of you to take back what of what you have given them but when the husband and wife both fear that they shall not be able to keep the limits of God, then if ye people fear that they cannot keep the limits of God, so there is no sin on the two in that the women obtains release by giving ransom. These limits are set by Allah, so do not transgress them and those who transgress the limits set by Allah they are the evildoers”

**4) The meaning of THE Holy Quran Translation by MOHAMMAD MARMADUKE PICKTHALL**

“Divorce must be pronounced twice and then (a women) must be retained in honour released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in a case) when both fear that they may not be able to keep within limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them, if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whose transgresseth Allah limits: such are wrongdoers”

**5) The Koran Translated by N.J. DAWOOD**

“Divorce may be pronounced twice, and then a woman must be retained in honour or allowed to go in kindness. It is unlawful for husbands to take from them anything they have given them, unless both fear that they may not be able to keep within bounds set by God, in which case it shall be no offence for either of them if the wife ransoms herself. These are the bounds set by God: do not transgress them. Those that transgress the bounds of God are wrongdoers”

**Surah 02 Ayat 230**

(The Ayat used out of context with pervert interpretation gives authority to illegitimate practice of HALALA)

**1) The Holy Quran Translation by ABDULLAH YUSUF ALI**

“So, if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them to re-unite, provided they feel that they can keep the limits ordained by Allah. Such are the limits ordained by Allah, which he makes plain to those who knew”

**2) AL-QURAN Rendered into English by Dr. SYED ABDUL LATIF**

“But if he divorce her (finally), it is not lawful to take her again until she shall have married another, and this another also has divorced her: then there shall be no blame (on the first husband and the woman), if they return to each other trusting that they will keep within the bounds set by God. And these are the bounds of God clearly explained for a people who understand.”



**3) THE Noble Quran (Tafseer –e-Usmani) by ALLAMA SHABBIR AHMED USMANI**

“Now if the woman is divorced-third time-then she is not lawful (halal) for him after that (pronouncement) unless she marries another man beside him. Then, if the second husband divorces her, so there is no sin upon the two if they restore reunion (through re- marriage), provided they think that they will keep the order of God. And these are limits set by Allah, He describes them for who know”

**4) The meaning of The Glorious Quran Translation by MUHAMMAD MARMADUKE PICKTHALL**

“And if hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorces her it is no sin for both of them that they come together again if they consider that they are able to observe the limits of Allah. These are the limits of Allah. He manifested them for people who have knowledge”

**5) The Koran Translated by N.J. DAWOOD**

“If a man divorces (for third time) his wife, he shall not remarry her until she wedded another man and been divorced by him, in which case it shall be no offence for either of them to return to the other, if they think that they can keep within the bounds set by God. Such are the bounds of God. He makes them plain to men of understanding”

**Surah 04 Ayat 35**

(Ayat which expressly advocates reconciliation effort as a pre-condition before final irrevocable divorce)

**1) The Holy Quran Translated by ABDULLAH YUSUF ALI**

“If you fear a breach between twain, appoint (two) arbiters, one from his family and the other from hers. If they seek to set things alright, Allah will cause their reconciliation for Allah hath full knowledge and is acquainted with all things”

**2) AL – QURAN Rendered into English by Dr. SYED ABDUL LATIF**

“If you fear a breach between the couple, then appoint an arbiter from the man family and an arbiter from the woman family. If the two (man and wife) desire to reach a settlement, God will affect a reconciliation between them. And assuredly God is the knowing the Apprised of all”

**3) The Noble Quran (Tafseer-e-Usmani) by ALLAMA SHABBIR AHMED USMANI**

“If you fear a breach between them (wife and husband) bring forth an arbiter from his people and an arbiter from her people; if they will intend to compose, God shall create harmony between the two. No doubt, God is all knowing All aware”

**4) The Meaning of The Glorious Quran Translation by MOHAMMAD MARMADUKE PICKTHALL**

“And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk, if they desire amendment Allah will make them one mind. Lo! Allah is ever knower, Aware”

**5) THE KORAN Translated by N.J. DAWOOD**

“If you fear a breach between a man and his wife, appoint an arbiter from his people and another from hers. If they wish to be reconciled God will bring them together again. God is all knowing and wise”

**Surah 04 Ayat 128**

(The Ayat gives authority to mutual consent divorce called MUBARAT. But few Jurists have interpreted it as advisory for domestic matrimonial relationship)

**1) THE HOLY QURAN Translation by ABDULLAH YUSUF ALI**

“If a wife fears cruelty or desertion on her husbands part, there is no blame on them if they arrange an amicable settlement between themselves, and such settlement is best, even though men souls are swayed by greed. But if ye do good and practice self-restraint, Allah is well acquainted with all that ye do”

**2) AL- QURAN Rendered into English by Dr. Syed Abdul Latif**

“If a woman fears from her husband ill – treatment or estrangement, then, it shall be no fault in them if they settle things between them amicably: an amicable settlement is always good. The human mind is prone to emphasis self – interest. But if you act with an eye on the interest of others and be mindful of God, then your actions will certainly not go un-noticed by God”

**3) THE Noble QURAN (Tafseer – e- Usmani) by ALLAMA SHABBIR AHMED USMANI**

“If a woman fears aggression or aversion of her husband there is no sin on the two that they make peace between them somehow or other; and peace is a very good thing. And before the hearts is present the avarice. And if you do good and practice restraint, then Allah is aware of all your actions”

**4) THE Meaning Of The Glorious Koran Translation by MOHAMMAD MARMADUKE PICKTHALL**

“If a woman feareth ill-treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better. But greed hath been present in the minds (of men). If ye do good and keep from evil, lo! Allah is ever informed of what ye do”

**5) THE KORAN Translated by N. J. DAWOOD**

“If a woman fears ill – treatment or desertion on the part of her husband, it shall be no offence for them to seek a mutual agreement, for agreement is best. But men is prone to avarice. But if you do what is right and guard yourself against evil, know then that God is cognizant of all actions”



### **Surah 65 Ayat 01**

(Ayat which expressly advices about prescribed periods for pronouncement of Talak and also rights of wife during Iddat)

#### **1) THE Holy Quran Translated by ABDULLAH YUSUF ALI**

“O Prophet! When ye do divorce woman, divorce them at their prescribed periods and count accurately their prescribed periods and fear Allah your Lord; and turn them not out of their houses, nor shall they (themselves) leave, except in cases they are guilty of some open lewdness, these are limits set by Allah and any who transgresses the limits of Allah does verily wrong (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation”

#### **2) AL-QURAN Rendered into English by Dr. SYED ABDUL LATIF**

“O Prophet! (announce to thy following): When ye have to divorce women, divorce them when they are in a free state for free of menses or are not pregnant and calculate the period of respite exactly and fear God, your Lord. Turn them not out of their houses, (during this period) and they on their part should not themselves depart, unless they have committed an open indecency. These are the directions of God; and whoever violates them, has indeed has wronged himself. Thou knowest not that God may perchance bring about a situation (which may result in reconciliation between you).

#### **3) THE Noble Quran (Tafseer-e-Usmani) translated by ALLAMA SHABBIR AHMED USMANI**

“O Prophet! When you divorce the woman, divorce them on their term, and count the term, and fear you God who is your Lord. Do not expel them from their houses and they should also not go forth, but that they commit a flagrant indecency. And these are God bounds tied by God and whoever trespasses the bounds of God has done wrong to himself. He knows not, yet per chance after that (divorce), God may create a new situation”

#### **4) The Meaning of The Glorious Koran Translated by MOHAMMAD MARMADUKE PICKTHALL**

“O Prophet! When ye (men) put away women, put them away for their (legal) period and reckon the period, and keep your duty to Allah, your Lord. Expel them not from their houses nor let them go forth unless they commit open immorality. Such are the limits (imposed by) Allah: and whoso transgresseth Allah limits, he verily wrongeth his soul. Thou know est not: it may be that Allah will afterwards bring some new things to pass”

#### **5) THE Koran Translated by N. J. DAWOOD**

“Prophet (and you believers), if you divorce your wives, divorce them at the end of their waiting period. Compute their waiting period and fear of God, your Lord. You shall not expel them from their homes, nor shall they go away, unless they have committed a proven sinful act. Such are the bounds set by God; he that

transgresses God bounds wrongs his own soul. You never know, after that, God may bring about some new event”.

### **Surah 65 Ayat 02**

(The Holy Quran yet again emphasizes on reconciliation and about mandatory provision of two witnesses at the time of divorce or reconciliation.

#### **1) The Holy Quran Translation by ABDULLAH YOUSUF ALI**

“Thus when they fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witnesses two persons from among you, endued with justice and establish the evidence for sake of Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, he (ever) prepares a way out”

#### **2) THE Noble Quran (Tafseer-e- Usmani) by ALLAMA SHABBIR AHMED USMANI**

“Then, when they reach their terms, retain them according to law or leave them according to law, and take witnesses, two men of equity (two men reliable) from among yourselves, and perform straight the witnessing for God sake. This thing- from it will understand he who believes in God and the Last Day. And whosoever fears God, he will create for him a way”

#### **3) AL – QURAN Rendered into English by Dr. SYED ABDUL LATIF**

“And when they have reached their prescribed time, either keep them in a gentle manner, and take two upright witnesses from among you that they may bear witness in name of God. This is a caution for him who believes in God and the day to come. And whoso feareth God, to him will he show a way out for reconciliation or a honourable parting.”

#### **4) The Meaning Of The Glorious Koran Translation by MOHAMMAD MARMADUKE PICKTHALL**

“And when they have reached their term, take them back in kindness or part from them in kindness, and call to witnesses two just men among you, and keep your testimony upright for Allah. Whoso believeth in Allah and the Last Day is exhorted to act thus, and whosoever keepeth his duty to Allah, Allah will appoint a way out for him”

#### **5) THE KORAN Translated by N.J. DAWOOD**

“When their waiting term is ended, either keep them honourable or part with them in honour. Call to witness two honest men among you and give your testimony before God. Whoever believes in God and the Last Day is exhorted to do this. He that fear God, God will give him a means of salvation and will provide for him whence he does not reckon”

### **Surah 65 Ayat 06**

(The Holy Quran here emphasizes about rights of woman during her Iddat period)

#### **1) The Holy Quran Translation by ABDULLAH YOUSUF ALI**

“Let the woman live (in Iddat) in the same style as ye live, according to your means: annoy them not, so as to restrict them. And if they are pregnant, then spend your substance on them until they deliver their burden...”

#### **2) AL – QURAN Rendered into english by Dr. SYED ABDUL LATIF**

“Lodge them (the divorced woman) where ye yourself lodge and let them live in a style that you yourselves live in, and harass them not in any manner. And if they are pregnant, meet their incidental expenses till they are delivered of their burden...”

#### **3) The Noble Quran (Tafseer-e-USmani) by ALLAMA SHABBIR AHMED USMANI**

“Give them lodging to live where you yourself are living, according to your means, and do not desire to tease them, so as to bring straitened circumstances upon them and if they bear a child, expend upon them until they deliver their burden...”

#### **4) The Meaning Of The Glorious Quran Translation by MOHAMMAD MARMADUKE PICKTHALL**

“Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them. And if they are with child, then spend upon them till they bring forth their burden...”

#### **5) The Koran Translation by N. J DAWOOD**

“Lodge them in your own homes, according to your means. You shall not harass them so as to make life intolerable for them. If they are with child, maintain them until the end of their confinement...”

### **AUTHENTIC HADITH**

(WHICH FORMS THE SECOND MOST POTENT SOURCE OF ISLAMIC LAWS) RELEVANT TO THE ISSUE UNDER CONSIDERATION.

**SAHIH AI – BUKHARI; Volume 07 Translated by Muhammad Muhsin Khan; THE BOOK OF DIVORCE Chapter 68 Page 117:**

The divorce according to As- Sunna (the Prophet legal way is that one should divorce his wife when she is clean from her periods and he has not had sexual intercourse with her (after her period) and there should be two witnesses for the divorce.

**SAHIH AL- BUKHARI; Volume 07; THE BOOK of DIVORCE Chapter 68 Page 125. No. 5266.**

Narrated Sa-Id bin Jubair that he heard Ibn Abbas saying, “If a man makes his wife unlawful for him, it does not mean she is divorced”

**SAHIH AL- BUKHARI; Volume 07; THE BOOK of DIVORCE Chapter 68 Page 133 No. 5273.**

The wife of Thabit bin Qais came to the Prophet and said, “O Allah Messenger! I do not blame Thabit for defects at his character or his religion, but I, being a Muslim, dislike to behave in an un-Islamic manner (if I remain with him). On that Allah Messenger said to her, “will you give back the garden which your husband has given you (as Mehr)” She said, “Yes” Then the Prophet said to Thabit, “O Thabit Accept your Garden, and divorce her once”

**VIEWS OF JURISTS AND EXPERTS IN FIELD OF SOCIO RELIGIOUS- LEGAL ISLAM**

That in this part of Write-Up I take up to explain various forms or procedures of dissolution of marriage, primarily in Hanfi Islamic laws. Within the Shia Sect, the dissolution of marriage on a broader look is quite simlier, if not same to the Sunni Hanfi school, with few striking differences.

**1) By MAN; TALAQ –E – AHSAN (read under TALAQ-E-SUNNA)**

- s written as f
- (a) The Talak Ahfan, or moft laudable divorce, is where the husband repudiates his wife by a fingle fentence, within a Tuhr, (or term purity) during which he has not had carnal connexion with her, and then leaves her to the obfervance of her Edit, or prefcribed term of probation. This mode of divorce is termed the moft laudable, for two refons – FIRST, becaufe the companions of the Prophet chiefly efteemed thofe who gave no more than one divorce until the expiration of the Edit, as holding this as the moft excellent method than that of giving three divorces, by repeating the fentence on each of the two fucceeding Tuhrs---SECONDLY , becaufe in purifuing this method the hufband leaves it fill in hif power, without any fhame, to recover his wife, if he be fo inclined, by a reverfal of the divorce during her Edit: thif method is, moreover, the leaft injurious to the woman, as fhe remains a lawful fubject of marriage to her hufband, evenafter the expiration pf her Edit ,which leaves a latitude in her favour unreportable by any of the learned.

**SOURCE: THE HEDAYA or GUIDE, Vol 01, CHAP 1 Page 201  
BURHAN AL-DIN AL- MARGHINANI TRANSLATED BY CHARLES  
HAMILTON.**

- (b) Talak ahsan—This consists of a single pronouncement of divorce made during a Tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat.

Talak-al-sunnat is of two kinds, namely, (1) ahsan, that is most proper. In the case of talak –ae ahsan and talak hasan, the husband has an opportunity of reconsidering the decision, for the talak in both cases does not become absolute until a certain period has elapsed and the husband has the option to revoke it before then.

**SOURCE: Principles of MAHOMEDAN LAW by SIR DINSHAW FARDUNJI MULLA 20<sup>th</sup> Edition, CHAPTER 16 Article 311 Page 393/394**

- (c) Talak al – sunna ( i.e, in conformity with the dictates of the Prophet) –

(1) Ahsan (most approved) (2) hasan (approved)

The talak al – sunna, ( quoting Tyabji 136, Mulla 311, most approved form, consists of one pronouncement in the period of Tuhr ( purity, i.e, when the woman is free from her menstrual courses) , followed by abstinence from sexual intercourse during that period of sexual purity (Tuhr) as well as during the whole of the iddat....it is this mode or procedure, which seems to have been approved by the Prophet at the beginning of his ministry, and is consequently regarded as the regular or proper and orthodox form of divorce ( Sheik Fazlur Rehman v Aisha ( 1929) 8 pat 690 citing Ameer ALI 11, 474)...Announcement made in the ahsan form is revocable during iddat.

**SOURCE: ASAF A.A. FYAZEE OUTLINES OF MUHAMMADAN LAW**

**5<sup>th</sup> Edition, Page 121 Edited and Revised by TAHIR MAHMOOD.**

- (d) If a man, determined to divorce his wife and efforts to reconcile the parties have failed, he can pronounce a divorce (when the wife is not in her menses) but must try his best to revoke it, by words or conduct, within the permissible time limit as stated above. If he fails to do so, at the expiry of the said period the marriage will be dissolved. Since pronouncing a divorce this way leaves room for a remarriage between the parties by mutual consent whenever they so desire, it is described as “AHSAN”.

**SOURCE: Muslim Law in India and Abroad by TAHIR MAHMOOD & SAIF MAHMOOD Chapter 5, Page 180**

Talak-us-sunnat: the Ahsan form—The talak-us-sunnat is either ahsan or hasan—very proper or simply proper. In the Talak-us- sunnat pronounced in the ahsan form, the husband is required to submit to the following conditions. Viz: (a) he must pronounce the formula of divorce once, in a single sentence, (b) he must do so when the woman is in state of purity (tuhr) and there is no bar to connubial intercourse nor has there been any during the state and (c)he must

abstain from the exercise of conjugal rights after pronouncing the formula, for a space of three tuhrs. The later clause is intended to demonstrate that the resolve on the husbands part to separate from the wife, is not a passing whim, but is a result of settled determination. On the lapse of the term of three tahirs, the separation effects as an irrevocable divorce.

**SOURCE: AMEER ALI Commentaries on MOHOMMEDAN LAW Edition 05 Revised, Enlarged and Updated by JUSTICE S.H.A RAZA CHAPTER 13 SECTION 02 Page 1556**

(2) BY MAN; TALAK –E-HOOFN, (HASAN) (read under TALAQ-E- SUNNA)

a) The TALAK HOOFN or LAUDABLE Divorce, is where a husband repudiates an enjoyed wife by three sentences of divorce, in three Tuhurs.

**SOURCE: THE HEDAYA or GUIDE Volume 1 BURHAN AL-DIN AL MARGHINANI TRANSLATED BY CHARLES HAMILTON BOOK 04 CHAP. 01 Page 202.**

(b) TALAK HASAN---This consists of three pronouncement made during successive tuhrs, no intercourse taking place during any of the three tuhrs.

The first pronouncement should be made during a tuhr, the second during the next tuhr and the third during the succeeding tuhr.

**SOURCE: Principles of MOHOMEDAN LAW by Sir DINSHAW FARDUNJI MULLA Edition 20<sup>th</sup> CHAPTER 16 Article 311 Page 394**

(c) The hasan form of talaq, also an approved form but less approved than the first (ahsan) consists of three successive pronouncements during three consecutive periods of purity (tuhr). Each of these pronouncement should have been made at a time when no intercourse has taken place during that particular period of purity.

**SOURCE: ASAF A.A. FYZEE OUTLINES OF MUHAMMADAN LAW**

**Edition 05, Edited and Revised by TAHIR MAHMOOD CHAPTER 04 DISSOLUTION OF MARRIAGE Page 121**

(d) If ever in life he pronounces divorce for a third time, that will be the dead end leaving no room for revocation or remarriage. If before taking recourse to such a terminal step he has endeavored to save his marriage by pronouncing but revoking a divorce twice, his conduct in the eyes of law has been “Hasan” (good)

**SOURCE: Muslim Law in India and Abroad by TAHIR MAHMOOD & SAIF MAHMOOD CHAPTER 5 Page 180**

(e) Hasan Form –In the hasan form, the husband is required to pronounce the formula three times during three successive tahirs, namely, three periods of purity of the wife. When the last formula is pronounced, the talak or divorce becomes irrevocable (quoting Fatawai Alamgiri Vol 1 Page 492)



**SOURCE: AMEER ALI Commentaries on MAHOMMEDAN LAW, Revised, Enlarged and Updated by Justice S.H.A. RAZA CHAPTER 13 SECTION 2 Page 1556**

**BY WIFE: TALAQ-E-TAFWEEZ (The Delegated Power to Pronounce TALAQ)**

This form of dissolution of marriage does not find authority in the Holy Quran. It evolved later through tradition or custom.

- (a) TAFWEEZ AL TALAK, or delegation of divorce, is where the husband delegates or commits the pronouncing of divorce to his wife, deferring her to give the effective sentence, and it is comprehended under three heads, termed OPTION (IKHTIYAR), LIBERTY (AMIR-BA-YED) and WILL (MASHEEAT).

**SOURCE: THE HEDAYA OR GUIDE BURHAN AL-DIN AL-MARGHINANI TRANSLATED BY CHARLES HAMILTON VOL 1 CHAPTER 3 BOOK 4 Page 244**

(b) Delegation of power to divorce, Although the power to give divorce belongs primarily to the husband, he may delegate the power to the wife or to a third person, either absolutely or conditionally, and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly. A temporary delegation of the power is irrevocable, but permanent delegation may be revoked.

SOURCE : Principles of MAHOMEDAN LAW by SIR DINSHAW FARDAUJI MULLA 20TH Edition CHAPTER 16 Article 314 Page 399

STIPULATION BY WIFE FOR RIGHT OF DIVORCE ---An agreement made, whether before or after marriage, by which it is provided that the wife should at liberty to divorce herself in specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of Mahomedan law .

SOURCE: Principles of MAHOMEDAN LAW by SIR DINSHAW FARDAUJI MULLA 20TH Edition CHAPTER 16/314 Page 400

- (c) Draft of agreement for talaq-e-tafwiz is hereby annexed for convenience.

SOURCE: ASAF A.A. FYZEE OUTLINES OF MUHAMMADAN LAW Edition 05 CHAPTER 04 Page 126 Edited and Revised by TAHIR MAHMOOD

(d) Divorce by TALAQ-E-TAFWEEZ

1. One of the most important and useful institution of the Muslim matrimonial law is what is known as Talaq-e-Tafweez. It is a legal device by which a woman can protect herself

against misuse of some liberal rules of Muslim law by the husband in future. The parties to an intended marriage may agree and stipulate in marriage agreement that the wife shall have the right to dissolve the marriage by her own action and without initiating judicial proceedings.

In SAIFUDDIN vs SONEKA BIBI AIR 1955 Ass 153, it was held, “both the Courts below have concurrently found that the kabinnama (Nikahnama) was a genuine document and by virtue of it the defendant had delegated to the plaintiff the right to divorce the defendant in the circumstances mentioned there in”. In BUFFATAN BIBI vs SHEIKH ABDUL SALIM AIR 1950 Cal 304, it was held, that the basis of TALAQ-E-TAFWEEZ was the kabinnama.

**SOURCE : Muslim Law in India and Abroad by Tahir Mahmood & Saif Mahmood CHAPTER 5 Page 189.**  
**MUTUAL Dissolution of Marriage:**

(1) MOBARAT

- (a) A MOBARAT, or mutual discharge, (signified by a man saying to his wife, “I am discharged from the marriage between you and me” and her consenting to it) is the same as Khula—That if to say, in consequence of the declaration of both, every claim which each had upon the other drops, so far those claims are connected with their marriage.

**SOURCE : THE HEDAYA OR GUIDE BURHAN AL-BIN AL-MARGHINANI Translated by CHARLES HAMILTON CHAPTER 8 BOOK 04 Page 323**

- (b) A mubarat divorce like khula, is a dissolution of marriage, by agreement, but there is a difference between the origin of the two. When the aversion is on side of wife, and she desires a separation, the transaction is called khula. When the aversion is mutual and both the sides desire a separation, the transaction is called mobarat...Unless it is otherwise provided by the contract, a divorce effected by khula or mobarat operates as a release by his wife of her dower, but it does not effect the liability of the husband to maintain her iddat or to maintain his children by her.

**SOURCE: Principles of MAHOMEDAN LAW by SIR DINSHAW FARDUNJI MULLA Edition 20<sup>th</sup> ARTICLE 319 & 320 Page 402/403**

- (c) If the divorce is effected by mutual aversion (consent) it is known as mubarat...word mubarat denotes the act of “freeing one another mutually... In mubarat apparently both are happy at the prospect of being rid of each other .

**SOURCE : ASAF A.A. FYZEE OUTLINES OF MUHAMMADAN LAW Edition 5<sup>th</sup> Edited and revised by Tahir Mahmood Chapter 04 Page 129**

(d) Mubarat – Mubarat ( in law ) signifies mutual discharge from the marriage tie:

Under the Sunni law, when both the parties enter into a mubarat, all matrimonial rights which they possess against each other fall to the ground( Quoting Hedaya Vol 1 page 323 Fatawai Alamgiri Vol 1 Page 669.

**SOURCE: AMEER ALI Commentaries on MAHOMMEDAN LAW Edition 5<sup>th</sup> Revised, Chapter 16, Page 1599 Enlarged and Updated by Justice S.H.A. RAZA.**

## (2) CONDITIONAL MUTUAL DISSOLUTION of MARRIAGE (KHUL)

(a) Khoola, in its primitive sense, means the “draw off or dig up”. In law it signifies an agreement entered into for the purpose of dissolution of a conjugal connexion, in lieu of a compensation paid by the wife to her husband out of her property...what ever is capable of being accepted as a dower, is also capable of being accepted as a compensation for Khoola, since whatever is capable of being a proper return for that which is appreciable.

**SOURCE: THE HEDAYA OR GUIDE BURHAN AL- DIN AL-MARGHINANI Translated by CHARLES HAMILTON BOOK 04 CHAPTER 8 Page 314**

(b) A marriage may be dissolved not only by talak, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of “ khula or “ mubarat”...A mubarat divorce like khula, is a dissolution of marriage by the agreement, but there is a difference between the origin of two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called Khula. When the aversion is mutual, and both sides desire a separation, the transaction is called mubarat.

**SOURCE: Principles of MAHOMEDAN LAW By SIR DINSHAW FARDUNJI MULLA Edition 20<sup>th</sup> CHAPTER 16 ARTICLE 319 Page 402/403.**

(c) The Fatawa Alimigiri lays down, when married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine law, that is cannot perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return in consideration of which the husband is to give her a khula, and when they have done this a talaq-e-bain would take place (cited by Ameer Ali 2, 506.

**SOURCE: ASAF A. A. FYZEE OUTLINES of MUHAMMADAN LAW Edition 5<sup>th</sup> CHAPTER 04 Page 128/129**

(d) Neither a form of divorce by husband nor divorce by the parties mutual consent, khula is divorce at the instance of wife—just as Talaq is divorce at the instance of husband. As in Talaq, reconciliation attempts must be made, in case of khula too but just as in talaq the last word is of the husband, in Khula the last word is of the wife. Veteran religious scholar of the subcontinent Abul Ala Maududi has observed: “ Wife

right in khula is parallel to man right of Talaq, like the latter the former too is unconditional. It is indeed a mockery of the Shariat that we regard khula as something depending either on the consent of the husband or on the verdict of the kazi. The law of Islam is not responsible for the way Muslim women are being denied their right in this aspect

**SOURCE: Muslim Law in India and Abroad Tahir Mahmood & Saif Mahmood CHAPTER 5 Page 187 .**

That at this junction it is pertinent to define IDDAT and its significance; a term widely used in most forms of dissolution of marriage.

- (a) A divorce declaration by the husband is an inchoate action which does not break the marriage forthwith. The law gives him a fairly long time to repeatedly reconsider the decision and encourage him to withdraw his declaration. However, since he cannot be allowed to keep the wife in a prolonged state of uncertainty, the law set a time limit for it, This is called Iddat. Iddat means in case of a pregnant wife the period till she is free from confinement and in respect of all other wives approximately three months during which two or three menses free periods for the wife would be intervened ---the idea being to afford to the man a fair chance or several chances, to get emotionally closer to the wife and reconsider the decision.

**SOURCE: CHAPTER 5 Page 178/179 Muslim Law in India and Abroad Tahir Mahmood & Saif Mahmood.**

- (b) When there have been one or two declarations in the approved forms a reconciliation can take place during Iddat, without a regular remarriage. The reconciliation may be a formal revocation of Talaq or by resumption of marital life.
- (c) Where there have been one or two declarations in the approved forms and the period of iddat has expired, a mere reconciliation is not enough . A regular remarriage is necessary and possible.

Where there have been three declaration amounting to an irrevocable talaq, the remarriage of the couple is only possible if the following course is adopted; otherwise the second marriage is irregular. In case no second marriage takes place, the union is void and the offspring of such union are illegitimate.

- (1) The wife should observe iddat.
- (2) After observing iddat the wife should be lawfully married to another husband.
- (3) Such intervening marriage must be actually consummated.
- (4) The second husband must pronounce divorce.
- (5) The wife should observe iddat after this divorce.
- (6) After the expiry of iddat remarriage can lawfully take place between the couple.

**SOURCE: ASAF A. A. FYZEE OUTLINES OF MUHAMMADAN LAW Edition 5<sup>th</sup> CHAPTER 04 Page 124.**

Such provisions were in place to discourage husbands who were adamant to dissolve

marriage, to still proceed with a “one” or at the most “two” pronouncement divorce, realising the consequence of the “third” pronouncement, in a situation where they would prefer to accept the divorced wife. Unfortunately, this gave birth to perverted, DOCTRINE OF HALALA. Law is very clear on occasion of clash of fundamental rights, whereby, ARTICLE 21 prevailing over rest. That the fulfilment of following conditions must make for a valid divorce.

- (1) The pronouncement of Talaq must be Express. Efforts must be made by the husband to pronounce Talaq in – person, and reasons for not doing so must be cited in the Talaq notices, but pronouncement of Talaq has been an informal & casual affair for men, thus remained unaccountable and shall continue to be the same.

Pronouncement can be made a more law and accountable friendly process within the privilege and ambit of Personal Law, by evolving a process to involve Family Courts, be it in – person or through Notice, in light of Holy Quran.

- (2) That the bedroom, living room, drawing room casual and remorseless WhatsApp E mail Talaq pronouncement should be held invalid, in light of Holy Quran.
- (3) That pronouncements must be made in presence of two witnesses, in light of Holy Quran.
- (4) That after the first Talaq pronouncement and commencement of Iddat, the divorced wife if residing with estranged Husband, must have right to continue residing in the same house but under “separation” from husband, until final culmination of iddat period, without reconciliation, in light of Holy Quran.
- (5) That after the first Talaq pronouncement and commencement of Iddat, in a situation where the divorced wife was away from house of estranged Husband, she be bestowed with all legal rights to be permitted in house of husband, under “separation” if she wishes so, until culmination of final divorce, in light of Holy Quran.
- (6) That the due process of mediation & reconciliation must be followed, at least twice in two periods of first & second and second & third pronouncement outcome of which must be recorded, in light of Holy Quran. If need be, Family Courts must be involved for recorded mediation under ambit of Personal Laws, in light of Holy Quran.
- (7) Right of woman to seek divorce through KHULA must be at equitable level as Talaq, in light of Holy Quran.
- (8) That TALAQ-E-TAFWEEZ or the delegated Talaq, finds no mention in the Holy Quran, even remotely. It developed later in Jurisprudence through human interference but could not develop as an accepted form of dissolution of marriage. Most jurists mention about delegation by husband being executed in favour of wife during Nikah in presence of witnesses and such delegation finding mention in the Nikahnama, becoming part of the contract. Thereby, making it a written understanding in presence of witnesses. Hence, such a delegation should be formally documented, even if to wife.



## Conclusion

We see that immense rights to women were bestowed in Islam vis-a-vis marriage or dissolution of marriage but later on as society progressed, the clergy by its vested intervention erased the letter and spirit of such social conduct in order to make the procedures more 'male' centric, with 'females' left with not much options.

The sanctity of Shariat was lost and thus rose few women to challenge such distortions, leading to judicial interventions. Privileges in form of Personal Laws are at 'peril' if such gross violations continue. Checks must be put in place from 'within' in order to keep alive the 'letter & Spirit' of Shariat or else Judicial indulgence is on the cards.

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