

CRUELTY A GROUND FOR DISSOLUTION OF MARRIAGE: A COMPARATIVE STUDY OF SHARIAH LAW AND COURT'S PRACTICES

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Abstract:

Islām being a religion of peace directs the Muslims in all the sphere of life by enjoining kindness and warns any hasty judgment. In Family matters dissolution of marriage is allowed when the differences and aversion arises between the spouses and the relation becomes unbearable and unendurable. Cruelty no matter mentally or physically provides a ground of separation to a Muslim wife. In Pakistan, the case law shows that in court a wife is demanded to provide satisfactory evidence to prove the claim of cruelty, failure of which the suit for dissolution of marriage will be set aside. This has caused difficulty to the wife, as it is practically hard to fulfill this requirement. The research also argues that the view prescribed in the Qur'ānic verses “retain them honorable or set them free kindly” (Al-Baqarah-231) is a general and absolute principle, within that framework and rule the rights of woman can be read and should be observed. This research answered several crucial questions such as what is the concept of cruelty in Islamic law and what is the court's ruling to address it? Does a Muslim woman is given a right of dissolution on ground of Cruelty or can a court grant such dissolution on the request of wife? The descriptive as well as analytical research methods have been utilized to explore different areas and to analyze the Islamic law and the legal rulings in Pakistan regarding the cruelty. The methodology of case study is applied and 15 decided cases have been selected to analyze the cruelty as a ground of separation.

Keywords: Nikāḥ, Ṭalāq, Discord, Injury, Ill-treatment, Cruelty, Dissolution of Muslim Marriage Act 1939.

Introduction

Islām commands the spouses to consort with each other in kindness and calls upon them to do every possible measure within their power to maximize the possibility of marital success and to minimize the inconvenience of marriage dissolution.

In Islamic law marriage/ Nikāḥ is considered a civil contract which (like all other contracts) can be executed and dissolved. The general observation about divorce is that it only belongs to the husband and women had no rights to obtain a divorce through the court. Ṭalāq in Muslim Family law

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is prescribed as a last remedy to be routed out only when there is no alternative solution for a dispute¹. Ṭalāq is absolute right and can be used by simply saying to the wife “I divorce you”, without the intervention of a judge and approval by the wife². Therefore, a husband can pronounce divorce to his wife by a simple pronouncement even without having any reason. However, when the husband makes the life of his miserable by cruelty, discord or by any other inhuman act, it will create a great hardship for a wife to live in. In this situation a woman is allowed to ask for dissolution from a relationship where there is hatred and ill-treatment instead of love and passion. The separation on the demand of the wife is established through several different grounds approved by Fuqahā'. However, they differ amongst themselves on the issue of cruelty as a ground for dissolution of marriage and procedure to be followed³. When the wife is maltreated by the husband and she wishes to seek separation then she has to move towards court/Judge and this kind of separation is named as Judicial separation.

SHIQAQ IN ISLAM LAW

The Arabic words Shiqāq (enmity or disagreement)⁴ and Darrar (Harm, Transgress) are used for cruelty in Islamic law. The word shiqāq derived from shaqq meaning break into two pieces. Therefore shiqāq refers to have conflict and differences between the spouses in such a severe condition that they do not want to live together⁵. Shiqāq or Darar includes all the harming acts of the husband towards his wife which are unendurable to her such as abusing, beating, forcing to do or say something which is wrong, living apart from her without any valid reason etc.⁶

Islam directs to appoint the arbiters in case of Shiqāq between the spouses in the following words:

وَأِنْ امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا
وَالصُّلْحُ خَيْرٌ⁷

“If a wife fears 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”.

Another place it says;

وَأِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ
بَيْنَهُمَا⁸

“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 Allāh will make them of one mind”⁹.

Cruelty a ground for Separation and Jurists Opinions

Jurists have different opinions regarding the dissolution of marriage due to cruelty (Shiqaq, Darar). Imām Abū Ḥanīfa and Imām Shāfi‘ī hold the views that injury, discord or ill-treatment are not valid grounds for demanding divorce as these reasons can be remedied by admonishing the husband.¹⁰ However, Imām Malik allows a woman asks the Qāḍī for separation on any conduct of injury, discord, or ill-treatment by the husband. The Qāḍī will then investigate the wife’s claim either by relying on her evidence or on the admission of the husband.¹¹ If the complain of the wife is found to be correct, the Qāḍī shall strictly give a warning to the husband. However, when the Qāḍī observe that the relationship between the spouses becomes unbearable and the effort of reconciliation fails, then he shall pass order for an irrevocable divorce.¹² But if the wife cannot proof her claim and the husband remains salient on this claim, the case will be dismissed by the Qāḍī.¹³

However, when the wife makes this claim again and ask for separation and the court could not establish the validity of her claim, then the Qāḍī or judge shall appoint two adult and well-acquainted arbiters who have the ability of effecting reconciliation. It is preferable that arbiters shall be relatives of the couple but in case of unavailability of relative, strangers can be appointed. It is duty of the arbiters that they investigate the causes of the discord or injury and do their best to attempt reconciliation. When the arbiter’s attempt of reconciliation fails, and the spouses or the husband is blamed for the discord or injury, or if the arbiters fail to establish the facts, they shall pass an irrevocable divorce. However, if the blame of injury or discord is found on behalf of wife then they shall be separated through the mode of Khul‘.¹⁴ Imām Aḥmad bin Ḥanbal agrees with Imām Mālik on this issue.

Arbiters (Hākam) and differences of Jurists

The meaning of the word Ḥākam is official, Qāḍī /Judge or an arbitrator. The word Qāḍī has been derived from the word Qaḍā which means a definite and final decision of a thing.¹⁵ In Islāmic law, it is the Qāḍī’s duty to stop people from transgressing the injunctions laid down by Shariah

Imam Malik and Shāfi'ī hold the opinion that it is compulsory to appoint arbiters (Ḥākam) to remove darar from the spouses.¹⁶

The jurists differ regarding the issue of, power of arbiters (Ḥākam), whether they have power to dissolve marriage or not? Imām Abū Ḥanīfah and Imām Shāfi'ī opined that in Qur'ānic verse “if they both want to set things right, God may bring about their reconciliation”¹⁷ the purpose of appointed the ḥākam is to attempt reconciliation only, they have no power to dissolve the marriage. Moreover, if the arbiters have the right to separate the couple then it will be either by the pronouncement of ṭalāq or by using the mode of khul'. In the case of ṭalāq then only the husband can pronounce it or the person to whom he authorizes as the ṭalāq is only right of the husband. And in case of khul' wife should have to pay compensation, Therefore, this is not allowed without her permission.¹⁸

Imām Mālik opined that the arbiters (Hakam) have both the powers firstly: to reconciliation and secondly to separate the couple. He has the view that Hakam is the representative of the authorities and as the authorities has the right to separate the husband and wife in case of cruelty, so Hakam has this power.¹⁹ He relied on the Direction of Hazrat Usman to Ibn Abbas and Mawiyah, if you think that dissolution is necessary then decides it, in case of Aqeel Bin Abu Talib and his wife. Moreover, Ali R.A said that the arbiters have right to reunite spouses or separate them.²⁰ None of Sahabah opposed the instructions of Hazrat Usman and Ali RA therefore, the opinion of Imam Shafi and malik is more worthy and preferable.

The Separation due to discord, injury or ill-treatment should amount to an irrevocable divorce. The husband shall has no right to take back her. The main object is to remove the injury and if it would be revocable divorce then this purpose cannot be achieved.²¹

Cruelty: ground for separation and Pakistani Law

Prior to passing the DMMA 1939, Ḥanafī School of law was followed in cases of divorce in the sub-continent in the early 20th century in the matters of divorce which had a restrictive approach regarding the dissolution of marriage through a Qāḍī or court. Under the said School of law, when a woman was maltreated and being abused by her husband, she had no other way to dissolve her marriage.

In this situation, Qāzī Muḥammad Aḥmad Kāzmī introduced a bill on 17 April which was passed after suitable modifications and got enforced on

17th march 1939, as the Dissolution of Muslim Marriage Act, VIII OF 1939.

The Dissolution of Muslim Marriage Act of 1939 brought sweeping changes in the law and the section 2 of the said act provides a number of grounds on which a woman can dissolve her marriage. DMMA 1939 sec 2 provides several grounds for dissolution. The separation in case of Shiqaq is not prescribed in the law however, section 2 (viii) of the said act prescribed the separation on account of cruelty as following:

that the husband treats her with cruelty, that is to say,

- (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
- (b) Associates with women of evil repute or leads an infamous life, or
- (c) Attempts to force her to lead an immoral life, or
- (d) Disposes of her property or prevents her exercising her legal rights over it, or
- (e) Obstructs her in the observance of her religious profession or practice, or
- (f) If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.²²

But the said provision is not clear in case when she cannot proof her claim. Therefore, many contradictory decisions of the courts are found before and after the partition of Pakistan. Since the Balqis Fatima and Khurshid Bibi case women were not given the right of separation. In 1944 Lahore High Court refused to give a separation on account of cruelty, incompatibility of temperament in 'Umar Bibi²³ case. The same view was adopted after the partition of Pakistan in another case.²⁴ However, contrary to these decisions in 1959,²⁵ the court departed from the traditional Hanafi thoughts and held that the wife may ask for separation without the consent of husband when the court is satisfied that the marriage between the spouses had broken down. This view was adhered again in Khurshid Bibi vs. Muhammad Amin.²⁶

Case law

In Begum Zohra v. Maj.Gernal Muhammad Ishfaqul Majid²⁷ case, the wife filed a suit for dissolution on ground of cruelty and disposed of her property, made her life miserable by conduct of beating and deprived her from her jewelry and other ornaments.

Here the learned Judge rightly observed that DMMA 1939 leaves no space for the decisions of the Privy Council²⁸ when it reads as:

“habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment”. The learned court after observing the facts held that the wife had made habitually assaulted and decreed the suit on ground of cruelty.

In *Abdul Aziz v. Mst Bashiran Bibi*²⁹ the grounds of dissolution were cruelty, non-maintenance, failure to perform marital obligations and charge of wife’s adultery by the husband. In this case Mst Bashiran Bibi was living with her parents from where the appellant Abdul Aziz abducted her claiming that she had been engaged with him. She was recovered by the police on report of abduction by her parents and she used to live with her parents. After that the appellant file a suit for restitution of conjugal right which was passed in his favor.

In 2nd appeal the learned Judge after an exhausting judgment held that although the actual habitual cruelty be not proved but in these circumstance it would be cruel to ask the wife to live in marriage wedlock. In one mark able judgment³⁰ the court observed the facts very carefully it observed that the spouses had been suffered from criminal proceedings and the husband had taken a second wife therefore, the court passed the decree of dissolution and held that:

“If she is forced to go back there is likelihood that her husband may endanger her life.”³¹

Surprisingly in *Mst Hakimzadi v. Nawaz Ali*³² case, evidence of cruelty of the husband was present but trial court dismissed the suit and granted Khul‘. The woman in the case alleged ill-treatment, tortured by her husband, made her life miserable by conducting cruelty and administered opium to her with the result that she had suffered from treatment. The wife’s suit for divorce was dismissed by Civil Judge and District Court.

On appeal the learned high court after observing the facts held the view that the false accusation of adultery is true which shows that the marriage between the spouses has been totally failed and it is enough ground for seeking khul‘ and the appellant is not required to prove every allegation. But in spite of proving all the allegations to be true the learned high court granted the wife a decree of khul‘ and not dissolve the marriage under the ground available in DDMA1939.

In *Dr. Akhlaq Ahmad v. Mst. Kishwar Sultana*³³ case, although the other grounds were present but the court granted Khul‘ in which the wife has to return the dower.

In *Mst. Shahida Khan v. Abdul Rahim*³⁴ case, leaned Family Judge and Additional District Judge dismissed the appeals of the wife on the basis

that the wife had failed to prove her allegations against her husband and passed the decree of restitution of conjugal rights. In a writ petition before the learned high, the learned high court held that both the lower courts ignored the statement of the wife as she clearly stated that she had developed a sever hatred against her husband. The contention of the learned Additional District Judge was that the spouses had three children but the learned high court observed that extreme hated of parents will damage the personality of the children.

Supreme court in another case³⁵ was held that: Of course, the Qur'ānic condition must be satisfied for the husband and the wife cannot live together in harmony and infirmity with their obligations".

In *Bashiran Bibi v. Bashir Ahmad*³⁶ case, the wife alleged that her husband forced her to transfer her inherited property on his name and on refused the husband started to beat her and finally drove her out of the house. She further alleged that he forcibly abducted her and gave physical beatings to prevent them from selling the property. The learned judge, Family court dismissed her suit by holding the view that she had failed to prove her allegations regarding ill-treatment, abduction, and illegal confinement by the husband. In a writ petition the learned high court admitted that there was no requirements of law to prove the allegations of hatred and aversion by the wife to seek khul'. It was further stated that the when the parties are not agreed to live together and then the court after satisfying its conscience would order separation between the parties. The learned high court granted her the khul' in writ petition and did not dissolve the marriage under DMMA1939.

In *Bibi Anwar Khatoon v. Gulab Shah*³⁷ case, marriage took place in minor and had been consummated and the wife for about three years lived with her husband. The husband after six months of the marriage began maltreating and beating her and due to old age, he also became impotent. She filed the suit for dissolution of marriage on the grounds of non-maintenance, cruelty, and misappropriation of her property. The wife alleged that the hatred between them reached to such an extent that she could not live with her husband in the limits prescribed by Allāh so she also prayed for dissolution of marriage on ground of Khul'.

The wife's claims were remained unchallenged and were not refused but despite this fact, the family court dismissed her suit. In a writ petition, the learned Judge stated that the allegations were gone unchallenged and each one of them was a good reason for the dissolution of marriage under the DMMA 1939. The wife was married in her minor age by her father, an

additional ground for her to seek separation was “option of puberty”. Although all the other allegations were be the valid reasons for seeking separation under DMMA1939, the court dissolve the marriage on ground of khul’.

Sahibzada Sheheryar Abbasi v. Saima Abbasi³⁸ case raises the question was what has to prove for the allegation of cruelty? In this case, the wife filed a suit for dissolution alleging that she had been suffered from cruel attitude of her husband, alternatively she prayed for khul’. The court granted the decree of dissolution on ground of cruelty and khul’.

On the issue of cruelty it was held that:

“Although the cruelty can be physical, mental, or even by conduct, but it has to be proved as a matter of fact before the court.”³⁹

In Abdul Kalam Azad v. Mst. Shaheena⁴⁰ case, the learned family court decreed the suit of dissolution to the wife on grounds of cruelty, non-maintenance, deprivation of dowry articles and misappropriation. On appeal, the petitioner argued that the period of non-maintenance was 1-1/2 years, so it could not be reason for dissolution of the marriage because the period for demanding the separation on ground of non-maintenance is 2 years. The learned judge held that this argument is correct but it does not advance the case because the marriage has also dissolved on the other grounds such as cruelty, misappropriation of the dowry articles. It was a mark able judgment in which the family court held that in the present of all the other grounds, it is not correct to ask the wife to forgo her dower.

Mst Razia v. Abdul Hammed⁴¹ case the learned Family Judge dismissed the suit for dissolution of marriage on ground of cruelty and non-maintenance. In appeal, the learned court held that parties are living separately since 4 or 5 years then in these circumstances the court duty is to observe the facts of the case carefully. The court admitted that:

“Settled principle of law is that a court has the powers to mold a relief and grant the same, in the interest of justice, even if not asked.”⁴²

In Sarwar Jan v. Abdul Rehman⁴³ case the wife filed a suit for dissolution on ground of cruelty and inhuman attitude of the husband, spiritual torture was dismissed by trail court as she could not prove her allegations. On appeal she prayed for Khul’ in which the learned appellant court held that hatred, disliking, cruel attitude are enough grounds for a decree of Khul’. The learned Judge ruled about the issue, what a wife has to be proved in case of Khul’:

“It does not requires any evidence or proof, as it is the statement of the wife alone, which is the determinate factor in the case of Khul’.”⁴⁴

The learned Judge held that when the wife had an extreme hatred against her husband then in this case forcing her into a hateful union should not be a justice.

In another case⁴⁵, the wife filed a suit for dissolution alleging the cruel attitude of her husband as he was involved in homosexuality. In these circumstances, she prefers to dissolve her marriage instead of leading an infamous life. On the other hand, the husband alleged that her to be disobedient and characterless. The learned trail court decreed the suit for dissolution. On appeal the district court held the same findings. The learned court dismissed the petition after observing the facts statements of the parties and discussing the importance to the sanctity of marriage held:

“The cruelty need not only be of a physical torture or beating etc. But it can be mental conduct and reputation as well”⁴⁶

It was observed by the learned court that incompatibility of temperament, mental, moral and emotional outlooks, disliking and hatred between the spouses could be a valid ground for demanding the dissolution.

In Mst. Naseem Akhtar v. Muhammad Rafique⁴⁷ case the trail court rejected the wife’s suit for dissolution of marriage on ground of cruelty and non-maintenance because having five children.

In another⁴⁸ case, the court granted the decree of dissolution to the wife on the ground of cruelty. The wife had been clearly stated that she had developed hatred towards her husband. Another mark able judgment⁴⁹, the learned Judge held that:

“It is not necessary that, there must be physical mishandling or manhandling beating or cruel treatment. A single slap with dislike can create hatred”⁵⁰.

Analysis of the case law

Mst Hakimzadi v. Nawaz Ali case shows the difference between the theoretical framework and practical application of the law when the trail courts refused the grounds of cruelty, ill-treatment whereas high court has admitted these grounds to be proved. The same difference has been found in this case Bibi Anwar Khatoon v. Gulab Shah, where the option of puberty was a valid ground but the learned court denied her right that the marriage had been consummated between the spouses, ignoring the fact that this consummation took place in the age of minority.

Bashiran bibi case, again presents the same view where the Family court dismissed suit by holding the view that the wife had failed to prove her. The more crucial decision was on the issue of hatred that there had no reason for developing hatred towards the husband, so the court also refused to grant khul'. But unfortunately here also learned judge granted the wife the khul' instead of dissolving the marriage under DMMA1939. And the same view is followed in Ahmad Nadeem v. Asia Bibi, Dr. Akhlaq Ahmad v. Mst.Kishwar Sultana, Sahibzada Sheheryar Abbasi v. Saima Abbasi where the other grounds were present but the court granted Khul' in which the wife has to return the dower.

Only in Mukhtar Ahmad v. Ansa Naheed, Sadia Sultan v. Additional District and Session Judge Hafizabad, Begum Zohra v. Maj.Gernal Muhammad Ishfaqul Majid and Dr. Anees Ahmad v. Mst.Uzma it was held that marriage has been dissolved on other grounds a wife would not be deprived from her right of dower.

Mst. Shahida Khan v. Abdul Rahim and Mst. Naseem Akhtar v. Muhammad Rafique both cases dismissed because the spouses have children in each case. Unfortunately the element of hatred is ignored in these cases. When the wife clearly stated that she would prefer to die rather than to live with her husband, and the husband expressed extreme doubts about the character of the wife then why the court ask to prove the allegations.

All these cases discussed above show the fact that courts have been still in a hesitation to dissolve the marriage under the grounds prescribed in DMMA 1939, even when there is a strong evidence for dissolution of marriage. Moreover, in all cases where there are grounds for dissolution under the DMMA are very clear and strong, but the Judges do not differentiate between faskh and khul' and mostly women are forced to seek separation on ground of khul'.

However, Malik Tanveer Khan v. Mst. Abber Liaqat and Muhammad Farooq v. Judge Family Court are Unique judgments and the best interpretation of the word cruelty that it does not include only physical torture or manhandling beating or cruel treatment etc. But it can be mental conduct and reputation as well, even a single slap with dislike can create hatred. And incompatibility of temperament, mental, moral and emotional outlooks, disliking and hatred between the spouses could be a valid ground for demanding the dissolution. Moreover, Mst Razia v. Abdul Hamed, Sarwar Jan v. Abdul Rehman, Malik Bashir Ahmad v. Additional District Judge, Bahawalpur, Abdul Aziz v. Mst Bashiran Bibi

and Mst. Feteḥ Begum v. Hakim Ali cases present a good example of the court duty to provide justice.

Conclusion

Relying on the ruling of Justice Islāmic law allows a woman to seek separation when there is hatred, ill-treatment cruelty, discord/Shiqāq between the spouses instead of love and passion.

The Jurists differ on the issue of cruelty as a ground of separation through the court. Imām Malik and Imām Aḥmad bin Ḥanbal give a right for separation to a wife when she was suffering injury, discord, or ill-treatment of the husband a woman can demand a separation through the court. The opinion and arguments of the Imām Malik and Imām Aḥmad bin Ḥanbal are acceptable and preferable as the main purpose of the court is to remove the harm from the wife.

From the above discussion it comes clear rights of women within marriage and divorce are established in Islamic law Law and are incorporated in various legislations of Pakistan but case law shows that many judges do not differentiate between the cases of faskh on ground of cruelty and Khul'. In Malik Tanver Khan v. Mst. Abber Liaqat⁵¹ case, the learned court stated a very remarkable word when it is said that the cruelty need not only be of a physical torture or beating etc. But it can be mental conduct and reputation as well. Incompatibility of temperament, mental, moral and emotional outlooks, disliking and hatred between the spouses could be a valid ground for demanding the separation as the basic object of the marriage is to lead a happy companionship. The matter creates many misapprehension and objections. The difference in the rulings of the Judges in court is due to abstractness and lack of accurate description of the modes of separation in the Pakistani Statutory laws, which infringe the principle of fair labeling and lead to inconsistent verdicts.

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