

A comparative study of Dissolution of Marriage on Account of Missing of the husband (*Mafqūd- al-Khabar*) and Problems Faced by the Women

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Abstract

This article analyzes the status of the missing of the husband and right of the wife to get separation. In Islam it is not only a husband who has been given a right to divorce her wife in case of any discord but the wife has also given a right to ask for separation. The article highlights the problems faced by the wife when her husband gets missing. The article also provides a survey on the cases where no case law about the said issue is available and highlights the reason and difficulties, why the cases about missing of the husband are not filed in the courts.

Key words: Marriage (*Nikāh*), Dissolution of Marriage act 1939, Missing of Husband (*Mafqūd al-Khabar*), *Faskh*,

Introductions

Marriage in Islam is the basic unit of the society which is observed through the institution of *Nikāh*. The relationship between man and woman in marriage is sacred and based on love, cooperation, and affection. A Muslim Marriage is a civil contract which can be dissolved like any other contract. It was the general perception that the right of

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divorce belongs only to the husband and women had no rights to obtain a divorce through the court. But in Islam husband and wife doth have given the right to dissolve the marriage when they observed that they cannot live within the limits prescribed by the Allah Almighty.

A missing person is one whose whereabouts are not known and there is uncertainty about him whether he is alive or not¹. A wife, whose husband has been missing for a long period, suffers from a great hardship regarding protection, companionship, enjoying the happy married life and financial support. It is therefore, necessary for her interest as well as for the interest of the society to dissolve the marriage if she desires so.

Jurists differ over this issue whether a woman can seek divorce on her husband's missing or not.

According to *Imām Abū Ḥanīfah*² and *Imām Shāf'ī*³ a woman whose husband's whereabouts are not known, is not entitle to seek separation until the death of the husband is not make conform to certainty. They have fixed the time on the expiry of which the missing person shall be considered to dead surely. There are many traditions about the period fixed by the *Abū Ḥanīfah*. *Al-Ḥussan Ibn Ziyād* has stated a report of *Abū Ḥanīfah* that a person shall be deemed to dead on the age of one hundred and twenty years from his birth⁴. According to *Zāhir al-Riwāyah*⁵ *Hanafi*

¹ Al-Marghīnānī, *Al-Hidāyah Sharah Bidāyat al-Mubtadī*, vol.1,544.

² Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, vol. 2, 532-533; Ibn, 'Ābiddīn, *Radd al-Muhtār 'Alā Durr al-Mukhtār*, vol. 2, 903; Ibn Hammām, *Sharḥ Fath al-Qadīr*, vol. 3, 430; Dr. Muḥammad 'Aqlah, *Nazām Al-Ussrah fī al-Islām*, vol. 3, 223-24; 'Abdul Ḥayy Firangī Mahallī, *Majmū'ah Fatāwā*, vol. 2 (Lahore: Shehzad Publishers Jān Muḥamad Road Anār Kalī), 92-93; Dr. Aḥmad Yūsuf, *Aḥkām al-Zawāj wa al-Furqah*, 260.

³ Al-Ramlī, *Nihāyat al-Muhtāj li-Sharḥ al-Minhāj*, vol. 3, 442,

⁴ Al-Marghīnānī, *Al-Hidāyah*, vol. 1, 602

⁵ Zāhir Al-Riwāyah is the collection of the rulings of the Hanafī imāms namely Abū Hanīfah, Abū Yūsuf, and Muhammad. It consists of 6 books: a1-Jām' al-

School of law hold the opinion that the missing person shall be deemed to be dead when none of coevals of the missing person remains alive. They hold this view because it is rarely possible that man lives after the death of his coevals. *Imām Abū Yūsuf* has reported the time of hundred years, and in another report, it is stated ninety years⁶. So according to *Hanafī's* a missing person would be declared to be dead when he would have attained an age at which he would die in the ordinary course of nature.

However, there are some exceptional certain circumstances in which a missing person can be strongly assumed to be dead earlier than the time reported by the jurists. Therefore, a person took part in a war and gets missing and there is no news whether he is alive or dead, or he has left home in condition of serious death-illness and becomes untraceable. Or he had gone on a sea voyage and there is no news of his reaching at any port. In all these circumstances, a *Qāḍī* can declare a missing person to be dead and dissolve the marriage⁷. The wife then observes *'Iddah* of a dead person (of four months and ten days) and shall have the right to contract another marriage⁸.

Some of the *Hanafī* jurists hold the view that the matter should be left with *Qāḍī* and he shall decide the case according to the particular circumstances⁹.

Kabir, 2. *Jāmi' Ṣaghīr* 3. *Siyar al-Kabīr*, 4. *Siyar al-Ṣaghīr*, 5. *Al-Mabṣūṭ* (Also named *Aṣl*), 6. *Ziyādāt*.

⁶ *Al-Marghinānī, Al-Hidāyah Sharah Bidāyat al-Mubtadī*, vol. 1, 547; *Al-Sarakhsī, Kitāb al-Mabṣūṭ*, vol.13, 86-88; *Al-Mawṣilī al-Buldajī, Al-Ikhtiyār li-Ta'līl al-Mukhtār*, vol.3, 42.

⁷ *Thānawī, Al-Hīlah al-'Ājizah li-Hīlah al-Nājjizah*, 1st ed., 59; *Al-Shāfi'ī, Al-Umm*, vol. 5, 255-56.

⁸ *Thānawī, Al-Hīlah al-'Ājizah li-Hīlah al-Nājjizah*, 1st ed., 59; *Al-Shāfi'ī, Al-Umm*, vol. 5, 255-56.

⁹ *Ibn, 'Ābidīn, Radd al-Muhtār 'Alā Durr al-Mukhtār*, vol. 4, 341.

Hanafī and *Shāfi'ī* jurists' argument in support of their opinion is the sayings of the Holy Prophet Muhammad (P.B.U.H) about the wife of the missing person. He (P.B.U.H) said:

"قَالَ رَسُولُ اللَّهِ ﷺ امْرَأَةُ الْمَفْقُودِ امْرَأَتُهُ حَتَّى يَأْتِيَهَا الْخَبَرُ"¹⁰

"Wife of the missing person will remain his wife until any news arrives".

Another argument is the ruling of the *Ḥaḍrat 'Alī* (R.A) that the wife of the missing person is on trial. She has to be patient until she does learn of her husband's death or of his pronouncing divorce to her¹¹.

Another tradition is narrated by the *Hakam Ibn 'Utibah* that if the husband of a woman is missing he cannot remarry until he arrives or dies¹².

Moreover, they hold the view that there is uncertainty about the husband's death and the marriage contract cannot be dissolve based on doubt¹³.

The *Mālikī* viewpoint on the issue of a missing person is opposite to *Hanafī* and *Shāfi'ī* juristic. According to *Imām Mālik*, a wife of a missing person can remarry after waiting of four years from the time when she brings her case to the court and after seeking the court's decree of dissolution of marriage and observing the *'Iddah* period¹⁴.

¹⁰ Al-Dār Quṭnī, *Sunan al-DārQuṭnī*, edited by 'Abd Allāh Hāshim Yamīnī, vol. 9,122.

¹¹ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 446.

¹² Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 446.

¹³ Al-Marghinānī, *Al-HidāyahSharahBidāyat al-Muḥtadī*, vol. 1, 547; Al-Kāsānī, *KitābBadā'i' al-Ṣanā'i'fiTartīb al-Sharā'i'*, vol. 14, 59; Al-Mawṣilī al-Buldajī, *Al-Ikhtiyār li-Ta'līl al-Mukhtār*, vol. 3, 41; *Thānawī*, *Ibid*, 60.

¹⁴Ibn Rushd, *Bidāyat al-Muḥtadīwa-Nihāyat al-Muḥtadī*, vol. 2, 42; Abū 'Umar Yūsufibn Abd Allāh Ibn Abdul Bar Al-Qurṭabī, *Al-Istazkār*, vol. 6 (Beirut: Dār al-Kutub al-'Ilmiyyah), 130; Abū' Abd Allāh Muḥammad Ibn Aḥmad Kalbī, *Al-Qawānīn al-Fiḥāh*, vol. 1 (Beirut: Dār al-Kitāb al-'Arabī, 1404), 240.

*Imām Hanbal*¹⁵ has the same view on the issue of missing person as the *Mālikīs*.

According to *Imām Mālik* there are four kinds of missing persons whose whereabouts are not known:

- 1- Persons missing in an Islamic State.
- 2- Persons who get missing in an infidel's country.
- 3- Persons missing in war between the Muslim themselves.
- 4- Persons missing in war with infidels¹⁶.

The waiting period for the wife whose husband's whereabouts are unknown in an Islamic State, is four years. This period of four years is that if a person is alive then it is not possible to be unknown for such a long time. Moreover, the basic purpose is to remove the damage (*darer*) from the wife. They have the view that in case of '*Īlā'*' and impotency a wife gets deprived of sexual relationship, but when the husband is missing then she is deprived of maintenance too along with the relationship¹⁷.

As for the person, whose whereabouts becomes unknown in an infidel's country has the same rule as for the prisoner, neither his wife can marry nor divide his wealth until the news of his death is received.

As for the matter of a wife whose whereabouts are unknown in the battle amongst Muslims themselves, there are two opinions:

- 1- The wife shall be free for remarriage after observing '*Iddah*' period without any wait.
- 2- The wife shall have to wait for one year.

The persons, missing in the battle of the in fields is subject to the doctrine of our sayings:

- 1- There will be rule as same of prisoner.
- 2- It will consider that the person has been killed and after one year, waiting the wife can do another marriage. However, when the wife is at a

¹⁵ Al-Buhūti, *Kashf al-Qinā' 'an Matn al-Iqnā'*, vol. 5, 124; Ibn Qudāmah, *Al-Mughnī*, vol. 7, 588-89.

¹⁶ Ibn Rushd, *Bidāyat al-Mujtahidwa-Nihāyat al-Muqtaṣid*, vol. 2, 42.

¹⁷ Ibn Rushd, *Bidāyat al-Mujtahidwa-Nihāyat al-Muqtaṣid*, vol. 2, 42

place from where she can have correct news about the husband then the waiting of one year is not necessary.

3- The third view is that the wife can remarry without any wait.

4- The fourth rule is that the person shall be deemed to be killed in case of wife, and in case of property it has the rule same as of missing person in an Islamic state¹⁸.

Imām Mālik and *Imām Aḥmad bin Ḥanbal* hold this view on the base of order of *Ḥaḍrat 'Umar* which is passed him about the wife of a missing person.

It is reported by *Ibn Abīlaylā* that a wife appeared before *Ḥaḍrat 'Umar* (R.A) whose husband become unknown, He, therefore ordered her to wait for four years from the time she brought her case before him. She, then remarry after that period. Later the first husband appeared, *Ḥaḍrat 'Umar* gave him a choice between the wife and the Maher and he chose to take back the Maher¹⁹.

There are several versions of the tradition in which *Ḥaḍrat 'Umar* fixed the time of four years for the wife whose husband becomes unknown²⁰.

Calculation of the period

There are several views as to when the time of four years would be calculated. According to *Imām Mālik*, the period of four years commences from the time when the wife brings the case to the court and when the *Qāḍī* passes his decree. After the four years wait, divorce shall take effect and the wife shall be free for marital-tie after observing the *'Iddah* period. *Imām Mālik* does not consider the time waited by the wife whose husband becomes unknown before she brings her case in the court²¹.

¹⁸Ibn Rushd, *Ibid*, 43; Al-Kalbī, *Al-Qawānīn al-Fiqhiyah*, vol. 1, 241.

¹⁹ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 446; Anas Ibn Mālik, *Al-Mawṭa'*, vol. 4, 180.

²⁰ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. , 443.

²¹Anas Ibn Mālik, *Al-Mawṭa'*, vol. 4, 178; *Thānawī*, *Al-Ḥilah al-'Ājizah li-Ḥilah al-Nājizah*, 1st ed., 59.

However, the period of four years can be reduced to one year when the wife has already waited a lot for the husband before she brings the case in the court and if there is fear of indulging the wife in adultery²².

Return of the missing person

If a missing person reappear after the *Qāḍī* has dissolved the marriage and the wife is observing the 'Iddah period or has observed the 'Iddah period but still not contract a second marriage, then in these conditions the husband would be entitled to recourse her wife²³. The right of the first husband shall not be lapse over his wife when he returns before the expiry of the 'Iddah period, or in the condition that she has not contracted another marriage. It is reported that *Ḥaḍrat 'Umar* gave a choice to the husband between the wife and *mahr*²⁴.

However, there are different opinions about the condition when the husband returns after the expiry of 'Iddah period and the wife has contracted second marriage. According to the opinion of *Imām Mālik* if the wife has contracted second marriage after observing the 'Iddah period the first husband lapses his right to take her beck²⁵.

According to decision of *Ḥaḍrat 'Alī*, the wife shall be entitled to the first husband irrespective to the fact that the second husband has consummated the marriage. If the second husband consummated the marriage, then he shall be entitled to pay the dower. And this view is hold by the *Hanafi* jurists²⁶.

²²*Thānawī, Al-Ḥīlah al-'Ājjizah li-Ḥīlah al-Nājjizah*, 1st ed., 59.

²³ Al- Kalbī, *Al-Qawānīn al-Fiqhiyah*, vol. 1, 241.

²⁴ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 446; Anas Ibn Mālik, *Al-Mawṭi'a*, vol. 4,180; Anas Ibn Mālik, *Al-Madwnah al-Kubrā*, vol. 5,133.

²⁵ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 443; Al-Kalbī, *Al-Qawanīn al-Fiqhiyah*, vol. 1, 241.

²⁶ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 444; Al-Sarakhsī, *Kitāb al-Mabṣūṭ*, vol. 13, 89; Ibn Hammām, *Sharḥ Fath al-Qadīr*, vol. 4, 444; *Thānawī, Al-Ḥīlah al-'Ājjizah li-Ḥīlah al-Nājjizah*, 1st ed., 88-89.

Ḥaḍrat 'Usman gave a choice the husband between the wife and the dower. If he wants to take back the dower, then it shall have made to be return to him but if he wanted the wife then she shall be separated from the second husband and she shall be return to the first husband after she has observed the *'Iddah*. The second husband shall be liable to pay the dower in case of cohabitation with her²⁷.

Basis of the differences between the jurists

There are two jurisprudential principles on which basis the jurists differ between themselves on the issue of a missing person, that are, *Istiṣḥāb*²⁸ and *Qiyās*²⁹. The jurists who do not entitle the wife to seek separation when the husband's whereabouts becomes unknown rely on the rule of *Istiṣḥāb*³⁰. However, the jurists who gave the right to a wife whose husband becomes unknown, to remarry after waiting a reasonable period rely on the *fiqh* rule of *Qiyās*. They have the view that the wife whose husband becomes unknown is equivalent to Illa or the imprisonment of the husband because the wife will suffer from great difficulty under all these conditions³¹.

Therefore, the basic propose in this matter is to save the wife from damage or misery. It is difficult for a woman to wait for her husband whose whereabouts are unknown in whole of her life and to save herself from committing sin. Under the Islamic law, it is the rule that the wife is not to be subjected to injury or damage.

²⁷ Al-Bayhiqī, *Al-Sunnan al-Kubrā*, vol. 7, 444; Ibn Qudāmah, *Al-Mughnī*, vol.17, 478-80; Al-Buhūti, *Kashf al-Qinā' 'an Matn al-Iqnā'*, vol. 19,168.

²⁸ The rule of *Istiṣḥāb* means that a thing remains on its original state and subject to the *Sharī'ah* accordingly until clear proof of material change of its original state does become available.

²⁹ Qiyas is the process of analogical reasoning, through this process, the ruling of the Sunnah and the Quran may be used as a means to solve or provide a response to a new problem that may arise

³⁰ Al-Mawṣilī al-Buldajī, *al-Ikhtiyār li-Ta'līl al-Mukhtār*, vol. 3, 41.

³¹ Ibn Rushd, *Bidāyat al-Mujtahidwa-Nihāyat al-Muqtaṣid*, vol. 2, 43.

Nature of separation due to missing

Mālikī jurists do not differentiate between the person either missing due to a valid reason for example is missing for seeking the knowledge or for the propose of earning or missing without any reason³². They hold the views that a person will be considered missing when his whereabouts becomes unknown more than one year. However, when the husband's whereabouts becomes known then *Qāḍī* shall pass him order either to come back and take his wife with him or to divorce her. And if the husband is at unknown place and does not comply with the *Qāḍī*'s order, then on the expiry of the time which court has given him to come back, the *Qāḍī* shall pass the decree of divorce on demand of the wife³³. The separation through the court will be an irrevocable divorce.

According to *Ḥanblī* jurists, a wife cannot seek separation when the husband is missing due to a valid reason³⁴. They fix the time of six months in which a person will be considered missing and the nature of the separation will be *Faskh*³⁵.

Prevalent Pakistani law about missing of the husband

Under the Dissolution of Muslim Marriage Act 1939 the time for the waiting has reduced to four years regarding the wife of the missing husband to contract a second marriage. Section 2 of the said act provides a woman to ask for separation on ground of missing of the husband³⁶

³² Al-Ṣābūnī, *Nizām al-Uṣrah wa Ḥal Mushkilātihā fī daw' al-Islām*, 158.

³³ Dr. Muḥammad 'Aqlah, *Nizām al-Uṣrah fī al-Islām*, vol. 3, 224-25; Dr. Aḥmad Yūsuf, *Aḥkām al-Zawāj wa al-Furqah*, 260.

³⁴ Al-Buhūṭī, *Kashf al-Qinā' 'an Matn al-Iqnā'*, vol. 19, 478.

³⁵ Al-Ṣābūnī, *Nazām al-Uṣrah wa Ḥal Mushkilātihā fī daw' al-Islām*, 158; 'Aqlah, *Nizām al-Uṣrah fī al-Islām*, vol. 3, 223; Aḥmad Yūsuf, *Aḥkām al-Zawāj wa al-Furqah*, 260.

³⁶ (a) That the whereabouts of the husband have not been known for the period of four years. Provided that (b) the decree passed on ground (a) shall not take affect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and

This section of the said act is based on the *Mālikī* School of law but the time of six months for the effect of the decree is not prescribed in Muslim law. The *Mālikī* view is based on the principle of Ijtihad as to save the wife from harm. Therefore, the time for waiting can be reduced by the court according to the circumstances of the case. In this age of communication when there is not difficult to find any news rather, then the rules can be modifies by the way of Ijtihad. Moreover, in under the Muslim law when a husband returns before the wife has contracted second marriage then the husband can take his wife back but under the DMMA 1939 section 2 provides no such option to the husband. Once the marriage gets terminated after the six month from the court's decree the husband shall not have right to ask for the return of his wife.

Survey

To know about the implementation of the clause of the DMMA1939 about the missing of the husband a survey has been conducted.

Q. Is there any case file under the Missing of the Husband?

Number of Lawyers to whom the interview was taken	1. Yes	2. No
5	1	4
	20%	80%

Missing of the husband is the issue on which no case is found in spite of searching a lot. Therefore, having unable to find a single case an interview was conducted from the lawyers to know the reasons for not filing a single case. As the above figure shows that only one lawyer told about the issue that there were some cases filed and decided on lower level but not reported nor had any proof of that as they gave the decision to the parties.

Q. What is the main reason that a single case is not filed under missing of the husband?

satisfies the court that he is prepared to perform his conjugal duties, the court set aside the said decree.

Number of Lawyers to whom the interview was taken	1. To avoid the court's procedure	2. Ignorance about the law regarding the issue	3. To avoid the period of 4 years for waiting	3. The law absolute about the issue of missing of the husband.
5	5	2	3	5
	100%	40%	60%	100%

The figures shows that court's long procedure to prove the issue and the time of four years for wait are the major reasons for not filing the suits under the said ground. Most of the women are directed to ask just for *khul'* to avoid the long procedure. Two of the lawyers have the opinion that most of the women are unaware of the laws about the separation through the missing of the husband and they are obeyed as they were asked to do according to the customs. On the question about the prevailed laws in the Pakistan only one opinion is found that having no authority on the issue means a positive aspect of the law. He further explained that there is no ambiguity in the law, as the law about the missing of the husband is very clear.

Q. Is there a need for amendment in the law regarding the separation on ground of missing of the husband?

1. Yes
2. No

Number of Lawyers to whom the interview was taken	1. Yes	2.No
5	4	1
	80%	20%

One opinion is found that there is no need for the amendment in law as law is clear about the issue but the others have the opinion that there is a need of the amendments the law regarding the missing of the husband.

Conclusion

To conclude it is clear from the injunctions of Islam that a husband is advised to retain his wife in every best possible way and to save her from any kind of harm.

The *Hanafi* Jurists have strict rule of waiting about 90-100 years then the wife can contract second marriage however, the *Mālikī* Jurists give a right of second marriage after the 4 years wait and observing the *'iddah*. Under the DMMA1939 the time for the waiting has been reduced to four years regarding the wife of the missing husband to contract a second marriage which is based on *Mālikī* School of law. Section 2 of the said act provides a woman the right to ask for separation on this ground when the whereabouts of the husband have not been known for the period of four years. Although the section of the said act is relied on the *Mālikī* School of law but the time of six months for the effect of the decree is not prescribed in the Muslim law. This *Mālikī* view is based on Ijtihad therefore, the time of four years can be reduced by the court according to the circumstances and the rules also can be modified by the way of Ijtihad. There is a dissimilarity between both the laws as Islamic law provides a right to the husband that he can recourse to his wife when he returns before the wife has contracted second marriage but the prevalent law DMMA 1939 provides no such right to the husband. Once the marriage gets terminated after the six month from the court's decree, the husband shall not have the right to ask for the return of his wife. There is not even a single case is found on issue related to missing of the husband. Section 2 of the said act also provides a ground to the wife to seek separation when the husband fails to maintain her for the period of 2 years. Most of the wives take the advantage of the clause of non-maintenance and *Khul'*.