

## **DELEGATION OF THE RIGHT OF DIVORCE AND ITS REVOCATION IN ISLAMIC AND PAKISTANI LAW: A COMPARATIVE STUDY**

Dr. Ihsanullah Chishti\*

Dr. Ayesha Snober\*\*

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### **Abstract**

Delegation of divorce and its revocation is an important issue in the discipline of Muslim family law, which especially highlighted by Muslim scholars in Pakistan after the legislation of Muslim Family Law Ordinance 1961 in this regard. Actually, the legality of the issue in the classical Muslim jurisprudence is not questionable due to its institution by the legal texts of the Holy Quran and Sunnah. But the Muslim scholars distinguish between pre- and post-contract delegation of right of divorce to the wife. As for as concerned the Pakistani Muslim family Law ordinance 1961, which legalized that right to divorce may be delegated to wife at all. We have tried to study in this article the real status of the issue in the light of Quran and Sunnah and opinions of the early Muslim Jurists in this regard. This study is based on the comparison between the practically applied law in Pakistan and legitimate position of the said case in Islamic Law.

**Keywords:** Delegation, Divorce, Family Law, Revocation

### **Introduction**

The delegation of power of divorce is also one of the prominent type of divorce instituted by Islamic law, while its legality in Islamic law has proved to be an exception to the general rules of divorce, because, according to the Islam divorce is the right of husband. It is a vital issue in the present world, although, it was introduced by the Islamic legal system from the very beginning. The Muslim jurists differentiate between the mandate before and after the contract. As for as in the Pakistani family law, it is permissible to delegate the right of divorce to the wife at all without distinguishing between above-mentioned situations, i.e. before and after the contract, furthermore, the Pakistani law does not discuss the case in which a husband delegates this right after the marriage contract. Likewise, another important aspect of the issue is revocation of delegation,

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\* Lecturer, Islamic Research institute, International Islamic University, Islamabad – Pakistan [ihsanullah.chishti@iiu.edu.pk](mailto:ihsanullah.chishti@iiu.edu.pk)

\*\* Assistant Professor, Department of Islamic Studies, Sardar Bahadur Khan University Quetta – Pakistan [snober\\_84@hotmail.com](mailto:snober_84@hotmail.com)

which has ignored by the legal text of Muslim family law ordinance 1961. We will explain in this article the Islamic provisions concerning the delegation of power of divorce before and after the marriage. Divorce according to the legal contract, is an original right of the husband, which establishes certain rights for the husband and some for the wife, but is it permissible for the husband to delegate his right to his wife or not? In addition, what is the opinion of *fuqaha'a*, because, we note in the laws of many Muslim and non-Muslim countries that the right to divorce may be delegated to the wife at the time of the contract. This issue need to be clarified, and its Islamic ruling should be illuminated in the light of the Qur'an, Sunnah and the opinions of jurists.

This research has been divided into three sections:

- 1: The concept of divorce, mandate and legitimacy
- 2: Delegation of Divorce right before and after the contract
- 3: Delegation of Divorce right in Pakistani law

### **Section 1: 1: The concept of divorce, mandate and legitimacy**

#### **I: The concept of divorce and delegation:**

As a term of the Islamic jurisprudence, Muslim jurists defined it from different characteristics, as the author of *Al-āiKhtīār* stated that:

”إِزَالَةُ النِّكَاحِ الَّذِي هُوَ قَيْدٌ مَعْنَى“<sup>1</sup> this is to end the marriage contract which binds the couple together, and other Jurists also similarly defined it. The conclusion is that divorce is the removal of the restriction acquired by the marriage contract after the consent of the contractors, whether or not the witnesses are present, because the certificate is not a condition for divorce to occur legally in Islamic law, so, divorce happens without a certificate, if one of the spouses acknowledges it.

As for the delegation of divorce right in the term, it is the transformation of the right of husband's to any other person to divorce her wife, or to his wife to divorce herself. Moreover, the doctrinal guidance of the delegation of this right is as stated in the *Al-muḥīṭ Al-burhānī*:

”والأصل في هذا أن الزوج يملك إيقاع الطلاق بنفسه فيملك التفويض إلى غيره فيتوقف عمله على العلم، لأن تفويض طلاقها إليها يتضمن معنى التملك، لأنها فيما فوض إليها من طلاقها عاملة لنفسها دون الزوج“<sup>2</sup>

“The basic principle of this is that, the husband has the privileges of divorce himself. So, the delegation of this right to another individual or authority depends on the knowledge, because, the authorization of wife to divorce herself includes the sense of transferring the ownership to her, because, in the case of her carrying out of the power, she is functioning for herself without the husband.” Its mean that *al-tafwīḍ* is technically in the field of Islamic Law is passing on right of divorce to wife or any other with consent.

## II: Legitimacy:

The legitimacy of the *al-tafwīd* ordained by the text of Holy Qur'an and prophetic traditions, as well as, the Muslim jurists has unanimously accepted the validity of *al-tafwīd* in Islamic law. One of the precedent in the life of holy prophet (peace be upon him) is the choice given by the Prophet (peace be upon him) to his wives, which is mentioned in holy book of Allah almighty as stated:

"يَا أَيُّهَا النَّبِيُّ قُلْ لِأَزْوَاجِكَ إِنْ كُنْتُمْ تُرِيدْنَ الْحَيَاةَ الدُّنْيَا وَزَيَّنَّتْهَا فَتَعَالَيْنَ أَمَتِعَنَّ وَأَسْرَحَنَّ سَرَاحًا جَمِيلًا"<sup>3</sup>

The verse mentioned is called the verse of choice, because, the Prophet gave the choice to his wives between the world, i.e. divorce and between God and his Messenger, i.e. to maintain the marital relationship with the Prophet (peace be upon him), it was rectified by prominent jurists as stated in *Aḥkām al-Qur'ān*:

أَنَّهُ خَيْرٌ هُنَّ بِإِذْنِ اللَّهِ تَعَالَى فِي الْبَقَاءِ عَلَى الزَّوْجِيَّةِ أَوْ الطَّلَاقِ، فَاخْتَرْنَ الْبَقَاءَ، قَالَتْهُ عَائِشَةُ وَمُجَاهِدٌ وَعَكْرَمَةُ وَالشَّعْبِيُّ وَابْنُ شَهَابٍ وَرَبِيعَةُ"<sup>4</sup>

He gave them the option based on permission of Allah Almighty, to stay married or get divorce, so they were chosen to stay with him, it was opined by *Aisha, Mujahid, Akrama, Al-Shaabi, Ibn Shihab and Rabia*".

As it was narrated by *Hazrat Aisha*:

"After revelation of this specific verse, I was the first women who were asked by Prophet in this regard, and he said: I'm reminding you of something, and you don't have to hurry until you ask your parents. *Hazrat Aisha* Said: I know my parents will never permit me to disintegrating with you. After that the prophet recited the said verse. *Hazrat Aisha* Asked: Is this is the matter of consultation with my parents, so I select Allah and his Messenger and the afterlife. Then he gave his other wives the choice, so they said like *Aisha* said:<sup>5</sup>

It is understood from the said narration that the choice is about divorce, because the word "parting" indicates divorce.

*Imam malik* has narrated that: *Abdullah bin Omar* used to say: if a man gives choice to his wife, the judiciary will follow the rules of divorce, but if the man claim that, I have intentioned from this option one time divorce, his statement will be accepted.<sup>6</sup>

Its mean that the holy Qur'an and Prophetic traditions legitimized the transformation of right of divorce, and Companion of Prophet has also rectified it in the light of Qur'an and Sunnah. In the next section we will elaborate the opinions of the jurists on the authorization and their legal forms: in terms of delegation at the time of the contract and after the contract.

## Section 2: Delegation of Right before and after the contract

Delegation of right is divided into two type, and both of them have different legal affects, therefore, it will be discussed distinctly along with the opinions of Muslim jurist in this regard.

### **1: Delegation of Right After the contract**

#### **I: Opinion of Hanfi Jurists**

The *hanfi* scholars argued that giving the choice is in fact, a kind of delegation of right, as if the husband would say, “choose” The wife says, "I chose myself, or he says, "Choose" and she says, "I choose". It is necessary to mention the word yourself or herself in one of the two words, because of the occurrence of divorce. because, it is not a word of divorce, but it is a metaphor, So, the three do not fall into it, but if he says to her, “choose a divorce” he does not need to mention the word himself for the sake of specification.<sup>7</sup>

And also if the husband says to his wife “your matter is in your hand" she will be considered owner of the right, If she answered "I divorced myself," the divorce occurred, And if the husband intended three, it will be three, because in the case of antonomasia the intention of the husband to be considered<sup>8</sup>.

The duration of the authorization is based on words, if it is delegated at all, the current session of discussion will be considered, if it is bound by a certain restriction, that predetermined time will be the limitation of choice, and if he uses the word "whenever" the authorization will be for an unspecified time<sup>9</sup>.

So, according to *hanfi* jurists the delegation of divorce is permissible, because, the husband is an owner of this right, who is entitled to dispose of his property, where he wishes, whether he acts in it himself or by power of attorney or by delegation to his wife, he is free to do so.

#### **II: Maliki jurists**

Maliki jurists also declared the delegation of Divorce right valid in Islamic law, so when a husband use the word *tamlīk* (transfer of ownership) she would be considered the owner to divorce herself, as stated in *irshād ul-sālik*:

“The woman is authorized to divorce herself is transfer of right, if she answers with acceptance or deny, it will be accepted, and to show pleasure is acceptance. If she divorce herself one time, the husband will no right to object, but in the case of more than one, the intention of husband will be prevailed”.<sup>10</sup>

And the Maliki doctrine is not revocable and striking off its right after the authorization in the form of ownership (*tamlīk*) and choice (*takhīr*), and in the power of attorney, he has to isolate her from him”.<sup>11</sup>

Because the *Malikis* not only considered it the transfer of ownership, but they say, that its rule is in accordance with the word that is indicated by him, therefore, Sometimes the mandate will be in the form of transferring the right, and sometimes it will be a choice, and sometimes it may be a power of attorney. So according to Islamic law, in all these cases the rules and commands will be different from each other.

### III: *Shāfiʿī jurists*

It is permissible to delegate divorce in the doctrine of *Shafi'i school of thought*, they say that the authorization is conditional with the intention of divorce from both sides, when using Canonical words, such as saying husband your matter is in your hand, or choose yourself, the intention of one of them separately has no value.

As for the withdrawal of endorsement and option, they may have before the divorce or the choosing herself as stated in the *Al-Majmū*:

“If a divorce is delegated to her, and then he revoked before her divorce or choose herself, both of the option will be *vide*”.<sup>12</sup>

So he has no right after the use of her right according the *Shafi'i* school of thought, and before that he may cancel this delegation.

### IV: *Hanbali opinion*

The husband may delegate to her the right to divorce explicitly or euphemistically herself, “if he says to her "your matter is in your hand" she has right to divorce herself as wishes, and whenever she desires, because, it is a kind of power of attorney for them, In the form of choice as a word of “choose yourself”. It is not for her to choose more than one, except to the husband enable her more than one by his word does or intention does. In addition, the wife has option to do so after delegation as soon as possible in the same place and discussion without any break up. So, if they started any other discussion or one of them left the session, the option will be considered *vide*”.<sup>13</sup>

The conclusion of the above discussion is that, the four *imam* agreed on the possibility of authorizing divorce, because, it is the right of the husband, and he may delegate his right to his wife, or to any other person power of attorney, whether absolutely or restricted by a specific period, or place, or with the time of Contract. So, the legitimacy of delegation of right of divorce after marriage contract proved by texts of the Qur'an and the Prophet's Sunnah.

As well as the revocation of the delegated power of divorce is concerned, *Hanbali* and *Shafi* consider the mandate to be a power of attorney only, so that he may revoke before her exercising of the right, furthermore, the husband may invalidate it before the she divorce herself. But according to *Hanfi* jurists it is transferring of ownership of right, which cannot be

revoked or invalidate after completion of transferring, likewise, imam Malik opined that it is not revocable except in the case, when the husband uses the word “*taūkīl*” (to make someone his agent or his wife), because the contract of agent can be revoked by principle.

*Imam ibn e Hazm* has adopted different point of view in this regard, according to him, delegation of right of divorce is illegal in Islam. Therefore, he said that, a woman has no choice to separate herself from her husband or stay with him except that Allah has allowed in the case of slave women, and the woman can never get ownership of the right of divorce.<sup>14</sup> After analysing the arguments and legal cause roots of the issue, it is clear that, the opinion of *ibn e hazm* is weak and not based on solid reason, because the texts and practices are going against his opinion.

## 2: **Delegation of Right of divorce before the contract**

We have discussed earlier the legality of delegation after the contract, but is conditional delegation permissible at the time of contract or not? We will look in for the answer to this important question, because legal practices based on authorization in the contract. The basic rule contained narrated about the Prophet (peace be upon him) in the *tirmḍī* in this regard is:

“That the messenger of Allah, peace be upon him said: reconciliation is permissible among Muslims, except which makes a legal thing illegal, or convert illegal to legal, And Muslims on their terms, except for a condition forbidden a legal provision, or a condition makes invalid valid”<sup>15</sup>.

This means that the fulfillment of the condition imposed with the consent is binding on Muslims in the contract or covenant between them, however, fulfillment is conditional on that, the contents of condition should not have conflict with the established legal texts and principles of Islamic law. And the other rule is that:

“Any condition which is in the interest of contract or is required by the nature of contract will be valid, because it is an appropriate condition for the contract”<sup>16</sup>

Therefore, according to Islamic law condition may be divided in to the following three types:

1: one kind is that which is permissible in Islamic law, and useful for the contract, but the parties did not require it, this needs to be taken into account.

2: Second one is that which is not lawful, it is called voidable condition, sometime it could make void the contract, if it caused the breach of one of the main constituent (*Rukan*). Moreover, sometime the contract would remain lawful and the condition will be considered null and void, if it does not violate the intent and the purpose of the contract.

3: Third type is that which is not prohibited by law, but does not have to be taken into account, because it is useless or impossible, so, it will be considered invalid.

Imam *Ibne Taimia* stated in his prominent book:

"Every lawful condition will be imposed those things which are not obligatory"<sup>17</sup>.

As well as the conditions known in the custom with the condition that it will not convert prohibited things into lawful or vice versa, as he stated in the same book:

"The impacts of the contracts are either derived from the word occasionally, or it is depend upon the custom at other times, but both are bound by what Allah and His Messenger did not forbid"<sup>18</sup>.

And the authorization of divorce does not contradict the contract and is not opposed to the texts of *Shari'ah* and general principles of Islam, but proved by the texts of *Shari'ah* and all of the four juristic school of thoughts agreed on the legality of it, so it is valid to delegate the right at the time of contract.

*Hanfi* jurists have described the issue in more detail, and stated that in this case the offer should be from wife, as she said that the divorce will be in my hand etc., and the husband will accept her offer. If the husband offers her such right and she accepted, it will not be considered delegation of right, because:

"The beginning from the husband is a divorce, and the authorization before the marriage is not correct, but in case of the initiating from the woman it becomes authorization after the marriage, which is rectifying by the husband when he says: it is accepted"<sup>19</sup>.

The legal base of the above mentioned issue is that, delegation before ownership of the right of divorce is not valid, therefore, *hanfi* jurists restricted it with offer from wife.

Likewise, authorization in the form of the written covenant with the consent of the spouses is as valid, as it is in practice in the present era.

### **Section 3: Delegation of divorce in Pakistani laws:**

The husband is chosen between the authorization and the denying of it in the contract as stated in Pakistani law, where in the form of marriage the phrase question:

"Is the husband want to delegate the right of divorce to his wife or not? If he delegated, is it conditional or not?"

This means that the authorization may be absolute or restricted, if the husband wishes to restrict it with a restriction or condition, and may be restricted by a specific time or a certain time or by an accident and other things that are legitimately permissible.

Likewise, how a wife uses her right if she wants is stipulated in Article 8. 8: “Dissolution of marriage otherwise than by *talaq*, where the right to divorce has been duly delegated to wife, and she wishes to exercise that right or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq* the provision of section seven shall, mutatis mutandis and so far as applicable, apply”<sup>20</sup>

The Lahore high court has declared as under:

“He may delegated this power to his wife by way of a contract, as a man in person repudiate his wife, so he may commit the power of repudiation to his wife to repudiate herself, this power may be conferred on a third party as well”<sup>21</sup>

In another judgment it was observed that:

“Although the power to give divorce belongs 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 than pronounce the divorce accordingly. A temporary delegation of power is irrevocable but a permanent delegation may be revoked”<sup>22</sup>.

In another judgment of Peshawar high court, it was stated that:

“According to Muhammadan Law once a person to whom the power of divorce is delegated pronounces divorce, the power so delegated become irrevocable and this will operate as *Talaq* of the wife by husband”<sup>23</sup>

The conclusion of above discussion is that, according to Muslim family law of Pakistan, the delegation of power of divorce is valid absolutely and temporarily, and in case of permanent authorisation of the wife, the court has discussed that the husband may revoke the delegation whenever he wants but it is not mentioned explicitly in the text of law. As well as the decision of Peshawar High court is concerned, it is related to after the pronouncement of divorce and not before the divorce, likewise, the decision of Lahore High court<sup>24</sup> stated that when the person to whom the power has been delegated, pronounces divorce, the delegation will become irrevocable. Therefore, there is no contradiction and conflict among these decisions of Pakistani courts.

### **Conclusion**

As a result of this research effort, the following results have been derived:

- 1: The opinions of the jurists differ in the legitimacy of delegation before the contract.
- 2: The *fuqaha'a* agreed that divorce may be authorized at the time and after the contract.
- 3: Delegation of the right of divorce is absolutely valid in the Muslim family law of Pakistan.



4: As for as revocation of delegation is concerned, the *Hanfi* and Malik jurists considered it irrevocable, while *Hanbli* and *shafi* adopted the opinion that it may be revoked before the pronouncement of divorce.

5: In Muslim family Law of Pakistan, according to the court interpretation of said section, it may be revoked in the case of permanent delegation before her divorce herself.

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