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Non-Maintenance creates a right of separation: a Comparative study of court's Practices and Shariah Law

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ABSTRACT

Islamic law enjoins the husband to maintain his wife and also gives the right to wife for separation when her husband fails or neglects to provide her maintenance. The right of separation on ground of non-maintenance is also acknowledged in Section 2 of Dissolution of Muslim Marriages Act 1939. The paper focuses to analyze the Islamic law regarding separation due to non-Maintenance and courts practices in Pakistan. The paper intends to know: what are the reasons on which Islamic Law allows a wife to ask for separation? What are the Jurists opinions regarding separation due to non-maintenance? what is the procedure that is followed in the court to dissolve the marriage on ground of non-maintenance? What are the difficulties faced by the woman in demanding the separation through the court on ground of non-Maintenance? The research follows the qualitative research method to identify the difference between theoretical framework and practical application of laws. The paper concludes that although the grounds of separation in Islamic law are incorporated in various Pakistani law but the application of these laws in courts is different.

Keywords: *Ṭalāq, Non-Maintenance, Dissolution of Muslim Marriage Act 1939. MFLO 1961.*



MAINTENANCE AND ITS LEGAL BASIS

The word “*Nafaqah*” root from al-nafaq is used for the term of maintenance, which literally means taking out. *Nafaqah* signifies what a husband spends for his family¹ and it includes all those things such as food, clothes, loading², and all the other things which are necessary for the support and comfort of a wife³. In the Islamic law, a man is bound to maintain his wife⁴.

The Holy Quran has laid down principles regarding the maintenance of the wife:

لِيُنْفِقَ ذُو سَعَةٍ مِنْ سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ⁵

“Let him who hath Abundance spend of his Abundance, and he whose provision is measured, let him spend of that which Allāh hath given”⁶

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ⁷

“Lodge them where ye dwell, according to your wealth, and harass them not so as to straighten life for them”⁸

The Prophet Muhammad (P.B.U.H) emphasized on the maintenance of wives in his address by saying:

أَطْعَمُوهُنَّ مِمَّا تَأْكُلُونَ وَأَكْسُوهُنَّ مِمَّا تَلْبَسُونَ وَلَا تَضْرِبُوهُنَّ وَلَا تَفْتَحُوهُنَّ⁹

“Give them food what you have for yourself, and clothe them by which you clothe yourself, and do not beat them, and do not revile them.

CONDITIONS FOR THE OBLIGATION OF MAINTENANCE

Although, Islam puts the duty of maintenance of the wife on the husband and he is responsible to provide his wife maintenance and all the necessary things however, certain conditions also put on for that liability. When a wife is capable to bear the strain of consummation and surrenders herself to her husband in a valid marriage, her maintenance is incumbent on her husband¹⁰. However, in case of irregular marriage and minority of the wife, the husband shall not be liable to maintain her¹¹. But if a wife is ill after the marriage and is not able to come to her husband's

¹Zayn al-‘Ābiddīn ibn Ibrāhīm Ibn Nujaym, *Al-Behr al-Raqā‘iq Sharḥ Kanz al-Daqā‘iq*, vol.4 (Cairo: Al-Maṭba‘at al-‘Imiyah), 188.

²Ibn Nujaym, *Ibid*, 188; ‘Ālī Hasb Allāh, *Al-Zawāj fī al-Shari‘a al-Islāmiyyah*, 178.

³Dhakī al-Dīn Sh’bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakhṣīyah*, 311.

⁴Al-Marghinānī, *Al-Hidāyah Sharah Bidāyat al-Mubtadī*, vol. 3, 39.

⁵Qur’ān 65:7.

⁶Muḥammad Marmaduke Pickthal, 552.

⁷Qur’ān 65:6.

⁸Muḥammad Marmaduke Pickthal, *Ibid*, 552.

⁹Abū Dāwūd, *Sunan Abī Dāwūd*, vol. 2, 210.

¹⁰ Ibn Nujaym, *al-Behr al-Rāq‘iq*, vol. 4, 188; Dhakī al-Dīn Sh’bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakhṣīyah*, 311-314.

¹¹ Ibn Nujaym, *al-Behr al-Rāq‘iq*, vol. 4, 188; Dhakī al-Dīn Sh’bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakhṣīyah*, 314.

home and the marriage has not been consummated yet then she will not be entitled for maintenance. However, when a marriage is consummated then her right of maintenance shall not be affected irrespective of the fact that the wife is ill having residence with her husband or with her parents¹.

The basis of the husband's liability for maintenance of his wife is created when a wife surrenders herself to him but when a wife engages herself in some employment without permission of her husband² or if she becomes disobedient (*nāshizah*),³ she shall not be entitled to maintenance. The right of maintenance is also lapses in case of wife's imprisonment⁴, apostasy or committing some sinful etc⁵.

Therefore, when a husband is liable for the maintenance of the wife then the wife is demanded to be obedient to her husband. When the wife surrenders to her husband and capable for sexual intercourse and living with her husband then the maintenance is incumbent upon the husband. But there are some conditions such as disobedience, minority, illness, imprisonment, employment, committing sinful act of the wife, the maintenance of the wife is not incumbent on the husband. It is a justice and balance right that when the husband is made liable for the maintenance then in return the wife is made to be obedient to her husband so that they lead a happy life.

MAINTENANCE LIABILITY OF RICH AND POOR PERSON

There are three opinions about the liability of a person in fixing the amount of maintenance. First opinion is the accepted view of Ḥanafī Jurists that when the husband and wife both are well-off, the *Qāḍī* should take in consideration the status of both and maintenance should be as per their standard of living. However, when both the spouses are poor then the maintenance should be as per their status⁶.

Second opinion is that the status of wife should be considered irrespective of the fact that the husband is rich or poor⁷.

Third opinion is as stated in *Zahr al-Riwāyah* that the position of the husband should be considered alone. And this opinion is also hold by Abū al-Ḥasan al-Karkhī and Imām Shāfi'ī⁸.

The amount of the maintenance can be changed according the financial status of the husband. When a husband is poor and *Qāḍī* can fixed the amount of maintenance according to his financial status but if he becomes rich after that then *Qāḍī* can increase the amount of maintenance on the

¹Dhakī al-Dīn Sh'bān, Ibid, 315-16.

²Ibn Nujaym, Ibid, 193-96; Dhakī al-Dīn Sh'bān, Ibid, 319-20.

³Ibn Nujaym, Ibid, 194; Ibn, 'Ābiddīn, *Radd Al-Muḥtār 'Alā Durr Al-Mukhtār*, vol. 13, 85; Dhakī al-Dīn Sh'bān, Ibid.

⁴Ibn Nujaym, Ibid, 196; Dhakī al-Dīn Sh'bān, Ibid, 317.

⁵Ibn, 'Ābiddīn, Ibid, 664; Al- Qadūrī, *Mukhtaṣr al-Qadūī*, vol. 1, 109.

⁶Ibn 'Ābiddīn, Ibid, 83; Dhakī al-Dīn Sh'bān, *Al-Aḥkām al-Sharī'ah li-Aḥwāl al-Shakhṣīyah*, 325, 'Ālī Ḥasb Allāh, *Al-Zawāj fī Al-Sharī'ah Al-Islāmiyyah*, 188-89.

⁷ Dhakī al-Dīn Sh'bān, Ibid, 326; Ali, Hasb Allah, Ibid.

⁸ Dhakī al-Dīn Sh'bān, Ibid; 'Ālī Ḥasb Allāh, Ibid.

request of wife. In the same way, *Qāḍī* can decrease the amount of maintenance when the husband becomes poor¹.

However, if the husband is incapable, neglect, or refuse to maintain his wife, the Jurists have different opinions about the right of the wife for demanding the separation through the court.

JURISTIC VIEWS ABOUT THE SEPARATION DUE TO NON-MAINTENANCE

There are different opinions amongst the Muslim jurists as to whether a woman can demand separation or not when her husband fails to provide maintenance.

Ḥanafī Jurists hold that a woman is not allowed to demand separation because of husband's failure to maintain her whether this failure is due to the husband's poverty or simply he refuses to provide the maintenance². They opined that wife should arrange from her own property or the *Qāḍī* shall authorize her to raise loan on her husband's credit as her maintenance³. The incapability of providing the maintenance cannot make a base for demanding separation and *Qāḍī* shall not separate the spouses in this regard⁴. The wife can use a portion of her husband's property for her support without the *Qāḍī*'s order⁵. If the husband is rich and capable to maintain his wife but refuses to maintain her inflicting injustice upon her then, according to Ḥanafī's jurists, this injustice can be removed without dissolving the marriage. They suggest that *Qāḍī* shall provide a support to wife either by putting the husband into the jail until he pays the maintenance or by selling the husband's property⁶. Ḥanafī jurists in their support rely on the Qur'ānic verses:

لِيُنْفِقْ ذُو سَعَةٍ مِنْ سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ. لَا يَكْلَفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا
سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا⁷

“Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allāh hath given. Allāh asketh naught of any soul save that which He hath given it. Allāh will vouchsafe, after hardship, ease.”⁸

Ḥanafī jurists argue that this verse covers the husband who is insolvent and unable to provide maintenance to her wife. They also give a reference to verse of Surah al-Baqarah:

¹Al-Qadūrī, *Mukhtaṣr al-Qadūi*, vol. 1, 10; Dhakī al-Dīn Sh'bān, *Ibid*, 327.

²Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, vol.2, 512; Dr. ‘Abdul Karīm Zaydān, *Al-Mufaṣṣal fī Ahkām al-Mar’āh wa al-Bayt al-Muslim fī Sharī‘ah al-Islāmiyyah* vol. 8, 472; Dr. Muṣṭafā Ṣabā‘ī, *Al-Mar’āh Bayn al-Fiqh wa al-Qānūn*, 2nd ed, 96.

³Muḥammad Amīn ibn ‘Usmān ibn ‘Abdul ‘Azīz Ibn ‘Abbiddīn, *Hāshīyah Radd al-Muḥtār ‘Alā Durr al-Mukhtār* (Cairo: Makhtabah wa Maṭba‘ah Muṣṭafā al-Bābī al-Ḥalabī, 1386), 80.

⁴Wahbah al-Zuhaylī, *Ibid*; ‘Ālī Ḥasb Allāh, *Al-Furqah Bayn al-Zawjayn wa mā yata’laq min ‘Iddah wa Nasb*, 133-34.

⁵Syed al-Sābiq, *Fiqh al-Sunnah*, vol. 2, 259.

⁶Syed al-Sābiq, *Ibid*; Dr. Muṣṭafā Ṣabā‘ī, *Ibid*, 87.

⁷Qur’ān, 7:65.

⁸Muḥammad Marmaduke Pickthal, 552.

وَأِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ¹

"And if the debtor is in straitened circumstances, then (let there be) postponement to (the time of) ease"²

Moreover, during the time of Prophet Muhammad (P.B.U.H) there were poor and rich amongst the Ṣaḥābah but there is not a single example of separation effected due to the poverty or incapability of providing the maintenance³.

The Mālikī,⁴ Shāfi‘ī,⁵ and Ḥanbalī⁶ hold the view that a marriage can be dissolved by the judge or Qāḍī when the husband is poor and cannot provide maintenance to his wife.

They rely on the following injunctions of the Quran:

فَأَمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٍ بِإِحْسَانٍ⁷

"And then (a woman) must be retained in honor or released in kindness"⁸

They argued that under this Qur’ānic injunction if a husband has no means to maintain his wife, then, he cannot be said that he is keeping his wife with kindness therefore, and in this case, he must dissolve the marriage. They further describe the Qur’ānic verse:

وَلَا تُمَسِّكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا⁹

"Retain them not to their hurt so that ye transgress (the limits)"¹⁰

Further, they support their views with the authentic tradition of Prophet Muhammad (P.B.U.H) when it was asked about the person who is not capable to maintain his wife, he answered that they should separate.

عَنْ سَعِيدِ بْنِ الْمُسَيَّبِ فِي الرَّجُلِ لَا يَجِدُ مَا يَنْفِقُ عَلَىٰ امْرَأَتِهِ قَالَ يَقْرَأُ بَيْنَهُمَا¹¹

Narrated by Said ibn al-Musayyab, "If a man does not find the means to spend on his wife, they are to be separated"

Another tradition of Ḥaḍrat ‘Umar (R.A) when he ordered about the person who could not maintain his wife. They argued that the disorders in the husband’s such as impotency allows the wife to demand separation then the injury caused by the husband failure to maintain his wife is

¹ Qur’ān2:280

² Muḥammad Marmaduke Pickthal, Ibid, 51.

³ Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū* vol. 2, 513; Syed al-Sābiq, *Fiqh al-Sunnah*, vol. 2, 259; Dr. Muḥammad ‘Aqlah, *Nazām Al-Usrah fī al-Islām*, vol. 2, 213; Dr. ‘Abd Allāh Yūsuf Mustafā ‘Azām, *Inhlāl al-Zawāj fī al-Fiqh wa al-Qānūn*, 199-200.

⁴ Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, vol. 2, 51; Abū Barakāt Aḥmad ibn Muḥammad ibn Aḥmad al-Dardīr al- Mālikī al-‘Aḍawī al-Azharī al-Khalwatī, *Al-Sharḥ al-Kabīr*, vol. 2 (Cairo: Muṭb‘ah Būlāq), 247.

⁵ Al-Shirbīnī, *Mughnī al-Muhtāj ilā M’rifat Alfāz al-Minhāj* vol. 3, 442.

⁶ Ibn Qudāmah, *Al-Mughnī*, vol. 7, 573.

⁷ Qur’ān 2:229.

⁸ Muḥammad Marmaduke Pickthal, 39.

⁹ Qur’ān 2:231.

¹⁰ Muḥammad Marmaduke Pickthal, Ibid, 40.

¹¹ Abū Bakr ‘Abdul Razāq ibn Humām al-Ṣana‘ī, *Al-Muṣaṇaf*, 2nd ed., vol.7 (Bairut: Al-Maktabah Al-Islāmiyyah, 96.

far greater than the first case¹. They hold that a wife suffers an injury when the husband is incapable to provide her maintenance and in this case, she should be relieved from this injury by the *Qāḍī*².

The point of *Jamhūr* is more near to the Islāmic rule of justice as when the husband is incapable to maintain the wife then for the removal of this injustice is necessary.

CONDITIONS AND ISSUES REGARDING THE HUSBAND CAPABILITY AND INCAPABILITY OF MAINTENANCE

There are two conditions of the husband regarding the maintenance of wife, which lead a wife to ask for separation through *Qāḍī*.

1. Incapability of the husband to maintain his wife due to his poverty
2. Capability of the husband to main his wife but he does not maintain her³.

JURISTIC VIEWS ABOUT THE INCAPABILITY OF THE HUSBAND TO MAINTAIN HIS WIFE

The wife has right to ask for dissolution of marriage when financial position of the husband establishes through authentic course that he cannot pay maintenance for his wife⁴. There are different opinions of the jurists on the issue whether the *Qāḍī* dissolve the marriage immediately or after giving him some time.

According to *Mālikī* Jurists, when the husband's incapability to maintain his wife establishes and the wife asks for separation then in this condition, the *Qāḍī* may give him some time to provide maintenance. So, if the husband becomes capable to provide maintenance to his wife in this period then no separation will take place but if the husband remains incapable to provide maintenance within the said period then the *Qāḍī* will dissolve the marriage. However, in the case when the incapability of the husband does not establish then the *Qāḍī* will order him either to divorce his wife or to pay her maintenance. And if he refuses to comply with this order then the *Qāḍī* shall give him a period for providing the maintenance, failing on which the *Qāḍī* shall dissolve the marriage⁵.

*Shāfi'ī*⁶ jurists hold the opinion that a wife can ask for separation when the husband is incapable to provide maintenance and the *Qāḍī* will give the husband a time of three days for providing the

¹Ibn Qudāmah, *Al-Mughnī*, vol. 7, 574; 'Ālī Ḥasb Allāh, *Al-Furqah Bayn al-Zawjayn wa mā yata 'laq min 'Iddah wa Nasb*, 178.

²Al-Shirbīnī, *Mughnī al-Muhtāj ilā M'rifat Alfāz al-Minhāj* vol. 3, 442; Ibn Qudāmah, *Ibid*; Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, vol. 2, 51; 'Abd al-Reḥmān al-Sābūnī, *Nizām al-Ushrah wa Ḥal Mushkilātihā fī ḍū' al-Islām*, 1st ed., 125.

³'Ālī Ḥasb Allāh, *Ibid*; Muftī Muḥammad Zāhid, *'Addāltī Tafrīq*, 8.

⁴Dr. Abdul Karīm Zaydān, *Al-Mufaṣṣal fī Ahkām al-Mar'āah wa al-Bayt al-Muslim fī Sharī'ah al-Islāmiyyah*, vol. 8, 470.

⁵Al-Dardīr, *Al-Sharḥ al-Kabīr*, vol. 2, 519.

⁶Abū Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf Al-Fīrūzābādī al-Shīrāzī, *Al-Muhadhdhab fī Fiqh al-Imām Shāfi'ī*, vol. 2 (Beirut: Dār al-Fikr), 173; Al-Shirbīnī, *Mughnī al-Muhtāj ilā M'rifat Alfāz al-Minhāj* vol. 3, 442.

maintenance¹, but if the husband fails to provide the maintenance the *Qāḍī* will dissolve the marriage². This opinion is also hold by Ḥanbalī jurists. They contend that separation due to non-maintenance is just like the separation on ground of husband's impotency³.

If the wife knows about the financial position of the husband at the time of marriage then according to Mālikī Jurists, she has no right to ask for dissolution. However, according to Shāfi'ī and Ḥanbalī jurists, the right of wife to ask for dissolution remains intact in this situation.

CAPABILITY OF THE HUSBAND TO PROVIDE MAINTANANCE BUT HE DOES NOT MAINTAIN THE WIFE

Mālikīah Jurists allow the wife to ask for separation when her husband does not maintain her in spite of his capability. The *Qāḍī* may pass an order to put the husband into the jail but if, in spite of that, he does not pay maintenance then, the *Qāḍī* will dissolve the marriage. However, if he has known property then he will provide the maintenance from his property in spite of dissolving the marriage⁴. Ḥanbalī Jurists also hold the same opinion⁵.

According to first opinion of Shāfi'ī jurists a wife cannot ask for separation on account of her husband not to pay the maintenance when he is rich⁶ because there is possibility for her to take maintenance from his property otherwise the *Qāḍī* shall order to put the husband into the jail until he pays the maintenance⁷.

There are different views of Jurists regarding absence of the husband who has not known property owned by him nor does he leave any maintenance for his wife.

Mālikī⁸ and Ḥanblī⁹ jurists allow the wife a right to ask for separation. However, if the whereabouts of the husband is known then the *Qāḍī* shall send him order to come back and maintain his wife or send maintenance to his wife failing which, the *Qāḍī* will dissolve the marriage. But Shāfi'ī¹⁰ jurists do not allow the wife to ask for dissolution until the whereabouts of the husband becomes known.

In case of husband's insolvency, the *Qāḍī* shall give him a time to arrange maintenance for the wife and on his failure to do so, he shall pass a decree of dissolution of marriage¹¹.

The point of the Malikīah and Ḥanabalāh is seems more preferable when the husband is capable but not pays to wife her maintenance. As they provide a right to the woman for separation to

¹Al-Shīrāzī, *Al-Muḥadhdhab fī Fiqh Al-Imām Shāfi'ī*, vol. 2 173; Al-Shirbīnī, Ibid.

²Al-Shīrāzī, Ibid, 173; Al-Shirbīnī, Ibid.

³Ibn Qudāmah, *Al-Mughnī*, vol. 7, 577.

⁴Al-Dardīr, *Al-Sharḥ al-Kabīr*, vol. 2, 478-79.

⁵Ibn Qudāmah, *Al-Mughnī*, 575.

⁶Al-Shīrāzī, *Al-Muḥadhdhab fī Fiqh al-Imām Shāfi'ī*, vol. 2 173; Al-Shirbīnī, Ibid.

⁷Al-Shīrāzī, Ibid,173; Al-Shirbīnī, Ibid.

⁸Al-Dardīr, *Al-Sharḥ al-Kabīr*, vol. 2, 479.

⁹Ibn Qudāmah, *Al-Mughnī*, vol. 7, 575.

¹⁰Al-Shīrāzī, Ibid; Al-Shirbīnī, Ibid

¹¹Dr. 'Abd Allāh Yūsuf Mustafā Azām, *Inḥlāl al-Zawāj fī al-Fiqh wa al-Qānūn*, 202.

remove harm from her.

JURISTS OPINIONS ABOUT THE NON-PAYMENT OF DOWER

The jurists are agreed upon the issue that when the husband does not pay the dower amount to the wife and the marriage is consummated then the wife has no right to ask for separation on ground of non-payment of dower¹. But if the marriage is not consummated then according to Mālikī Jurists, the *Qāḍī* may put the husband into the jail until he pays the dower or may give him a specific time to pay the same². Shāfi'ī Jurists hold the view that if the dower is remained unpaid and the marriage is not consummated then the wife has right to ask for separation. They hold the view that it is better that *Qāḍī* shall give the husband a time of three days to pay the maintenance³.

NATURE OF SEPARATION DUE TO NON-MAINTENANCE

According to Mālikī jurists a separation due to failure to provide maintenance would be a *ṭalāq-i-raj'ī* so the husband can recourse to his wife in her *'Iddah* if he prove his capability provide maintenance⁴.

Shafi and Ḥanbalī hold the opinion that separation due to non-maintenance affects through the *Qāḍī* and will be regarded as *Faskh* (invalidation of the marriage). Therefore, the husband cannot revoke during the *'Iddah* and it shall amount to an irrevocable separation⁵.

Discussion:

Islamic Law provides a right of maintenance to a woman when she surrenders herself for her husband and provides her services to him and the then husband is liable to maintain her. Ḥanafī Jurists hold a strict approach, as they do not give a right for separation to a woman on non-maintenance ground no matter whether due to poverty or simply refusal to provide the maintenance. They ruled that wife should arrange from her own property or the *Qāḍī* shall authorize her to raise loan on her husband's credit. But this point does not seem to near to justice, when it is advised to a husband to keep the wife with kindness. Several difficulties lie in this way as arranging the loan or raising the loan on behalf of husband itself engaged the wife with many more hardships.

Besides the Ḥanafī Jurists, Jamhūr Fuqahā' Mālikī, Shāfi'ī, and Ḥanbalī augment that a woman must be retained in honor or released in kindness, is more preferable relying on which, they give the right of separation on ground of non-maintenance. And in case of incapability of the husband, the *Qāḍī* may give him some time to provide maintenance according to Mālikī, Shāfi'ī and Ḥanbalī

¹Al-Marghinānī, *Al-Hidāyah Sharah Bidāyat al-Mubtadī*, vol.3, 3334; Al-Shirbīnī, *Ibid*, 444; Ibn Qudāmah, *Ibid*; Al-Dardīr, *Ibid*, 299-300.

²Al-Dardīr, *Ibid*, 299.

³Al-Nawawī, *Kitāb al-Majmū' Sharḥ al-Muhdhdhab*, vol. 17, 88; Al-Shirbīnī, *Mughnī al-Muḥtāj ilā M'rifat Alfāz al-Minhāj* vol. 3, 444.

⁴Al-Dasūqī, *Ḥāshiyah Al-Dasūqī 'Alā al-Sharḥ al-Kabīr*, vol. 2, 418

⁵Al-Shirbīnī, *Ibid*, 343; Ibn Qudāmah, *Al-Mughnī*, vol. 7, 77

Jurists. Their argument in this regard is more justified as they opined that separation due to non-maintenance is far greater than in case of impotency.

Mālikī and Ḥanbalī Jurists allow the wife to ask for separation when the husband in spite of his capability does not maintain the wife even after the court's order but according to one opinion of Shāfi'ī jurists a wife cannot ask for separation when is rich but do not pay the maintenance.

Here, the point of the Malikiyah and Ḥanabalah seems more preferable when the husband is capable but not pays to wife her maintenance. As they provide a right to the woman for separation to remove harm from her.

The jurists do not give a right of separation to a woman upon the issue of non-payment of the dower amount and in case of marriage consummation. However, she has such a right in case when the marriage is not consummated. One considerable opinion of the Imām Shāfi'ī that the *Qāḍī* shall give the husband a time of three days to pay the same

According to Mālikī non-maintenance constitute a *ṭalāq-i-raj'ī* so the husband can recourse to his wife in her the *'Iddah* by proving his capability to provide maintenance. But Shafi and Ḥanbalī regarded the such separation as *Faskh* (invalidation of the marriage) giving no the chance to a husband to revoke during the *'Iddah*.

The Muslim Family Law Ordinance 1961 deals with the matters of marriage and divorce. However, besides the MFLO 1961, Dissolution of Muslim Marriage Act 1939 also provides certain grounds on which a woman can demand a separation from the court. The chapter argues that although the grounds of separation in Islamic law are incorporated in various Pakistani law but the application of these laws in courts is different. The chapter highlights the case law regarding the ground falls under the category of *Faskh* and courts attitude in dissolving the marriage under the said act. The question that have been raised in this chapter are; what is the procedure that is followed in the court to dissolve the marriage on different grounds under *faskh*? What are the difficulties faced by the woman in demanding the separation through the court? Through an analytical study, the difference between theoretical framework and practical application of laws have been highlighted.

CASE LAW OF MAINTENANCE

In Islamic law, it is duty of the husband to pay maintenance to his wife as long as she is in matrimonial tie. When a wife puts herself under her husband's control and obeys him then her maintenance is incumbent upon her husband. This portion presents the case law regarding the separation on ground of non-maintenance and highlights the courts interaction while granting the decree of dissolution on ground of non-maintenance.

In *Mst. Ashgari Sultana v. Chaudhary Shamim Ahmad*¹, the wife filed a suit for dissolution of marriage on ground of cruelty and non-maintenance alleging that her husband had not paid her dower and turned out her from his house after one month of the marriage after snatching her belongings. Moreover, she also claimed for previous maintenance at the rate of Rs.1000 per

¹ 2002 CLC 123 Lahore

month, as her husband had not paid her maintenance whiles her stay with her parents. In the written statement, the respondent husband denied all these allegations, however he stated that if all the ornaments, marriage expenses, clothes and all the other things given to her, are turned back to him then he would be ready to divorce her. The family court decided the issue of cruelty, maintenance against the wife and dissolved the marriage on ground of *khul'* by holding the view the wife would not be entitled to claim dower and maintenance as these could be fixed as consideration for the decree of *Khul'*. On appeal the learned additional district judge set aside the findings of the family court on the issue of maintenance and held that as the failure of the husband to pay the prompt dower, the wife had right to live separately. However, the district judge in spite of that view uphold the findings of the family court that the maintenance and dower could be a consideration of *khul'*. In this writ petition before the learned high court it was argued by the wife that non-payment of the prompt dower would be a valid reason for a wife to refuse her husband from her company and claim for maintenance. The learned counsel for the wife also argued that failure to pay maintenance for the period of 2 years was a valid ground for separation then there would be no reason to dissolve the marriage on ground of *khul'*.

The learned judge after going through the record held that the wife's suit for dissolution of the marriage on ground of non-maintenance for a period of more than 2 years is valid under the section 2(ii) of the Dissolution of Muslim Marriage Act 1939. It was also held by the learned judge that the lower courts calling upon the wife to foregone the dower and maintenance was utterly without lawful authority. The court decrees the suit for dissolution on ground of non-maintenance and order to provide the maintenance at the rate of Rs 1000 per month from the period of last 6 years.

In another case¹, the wife filed a suit for separation on grounds of cruelty, non-maintenance, deprivation of dowry articles and misappropriation. The learned family court after examining the fact decreed the suit of dissolution to the wife on the said grounds. 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 according to the section 2(ii) provision of the DMMA 1939. 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.

In *Raja Muhammad Maqsood v. Mst. Kausar Nisar*² case, the wife suit for dissolution of the marriage before the family court kotli on 29th September 1998, on ground of false allegations of bad character, non-maintenance and cruelty. She alternatively prayed for *khul'*. She in her suit stated that her dower was fixed at Rs 5000 but her husband denied this statement as he said that the dower was fixed at one lac twenty thousand rupees and this was paid to her in shape of gold

¹*Abdul Kalam Azad v. Mst. Shaheena*, 1993 CLC 619 Lahore

²2000 YKR 956 Shariat Court (AJ&K)

ornaments. The husband filed a suit for restitution of conjugal rights contenting that her wife forcibly took the possession of his house and other households worth ten lac rupees and threw him out of the house. The trail court after recording the evidence passed a decree for dissolution of marriage on the basis that the wife should have to restore the 20 tolas of gold ornaments to her husband. The suit of husband for restitution of conjugal rights was dismissed. Both the parties challenge this judgment. The wife prayed in an appeal that the marriage may be dissolved on the ground of non-maintenance, cruelty and false allegation of bad character. She further prayed that if the marriage was dissolve on the base of khul' then the amount of dower may be fixed at Rs.5000. On the other hand, the husband prayed for the decree of restitution of conjugal rights and in-alternative the amount of khul' may be fixed as 8 lac. The learned counsel for the wife argued that her client has proved the other ground for separation but there was no need to grant the decree on the basis of khul' and moreover, in case of khul' the dower money may be fixed at Rs.5000 as stated by her client. He further argued that the husband did not mention his demand for 8 lac as consideration of khul' before the trail court therefore he is not entitled to any relief in this matter. After hearing the facts and observing the evidence, the learned court held that the wife failed to prove her allegations of non-maintenance and cruelty against her husband through her witnesses. The court held that the sole statement of the wife is insufficient to prove her case. On the issue of dower, the learned court held that it was stated by the wife that she had received gold ornaments apart from the dower amount of Rs. 5000, which was in her possession. In Islamic jurisprudence there is principle that when a wife seek khul' she has to restore the dower money, property and gifts taken at the time of marriage. The learned court in these circumstances dismissed the appeal and held that the trail court rightly fixed the amount of khul' as 20 tolas of gold ornaments on granting the separation to the parties on basis of khul'.

ISSUES OF WIFE'S REFUSAL TO LIVE WITH HUSBAND

However, when the wife is on fault and living apart from her husband without any valid reason then she cannot be entitled for the dissolution of marriage on ground d of non-maintenance. This view is hold in *Mst. Sherinzadgi v. Gul Muhammad*¹ case, where the wife was decreed the dissolution of marriage on ground of non-maintenance by the trail court but on appeal the district court dismissed the decree. In a writ petition she alleged that her husband had failed to provide her maintenance since last three years while she was living with her parents but her allegation was denied by the husband as he proved that she was living with her parents without any valid reason. The learned court agreeing with the findings of the first appellat court dismissed the appeal that there was no fault lies on behalf of the husband. It was held by the learned court that when the blame lies with the wife and she was living apart from her husband without any valid reason then she would not be entitled to dissolution of marriage and the husband was under no duty to maintain her wife while staying with her parents without any valid reason.

¹ PLD 1961 (W.P) Peshawar 66.

This view is also adhered in *Mst. Aishan Bi v. Sain*¹ case, that if the fault lies with the wife and living apart from her husband without any valid reason then she cannot ask for separation on ground of non-maintenance. In this case, the wife filed a suit for dissolution of marriage alleging that her husband at the time of marriage till filing this suit was impotent and he not also maintain her for the period of two years nor perform his marital obligations. Although the issue of impotency held unproved by the evidence but the other issues got proved and the court granted the decree of dissolution of marriage. However, this decision was reversed by the District Judge on appeal and dismissed the decree of dissolution of marriage. On the second appeal, the learned high court also held findings of District court to be correct. The main question was before the court whether a wife can be entitled to dissolution of marriage under the ground of non-maintenance when she was residing apart from her husband. The learned court gave many reference from the cases where there was held that the husband in all cases was not liable to pay the maintenance to his wife especially when the wife was living from him without a valid reason. The learned Judge after discussing the sections 2 (ii) of DDMA 1939 and the importance of happy life in the society dismissed the appeal by holding the view that the husband is not responsible to maintain his wife when the fault relied from wife and the wife in this case would not be entitled to seek dissolution of marriage.

ISSUES OF NON-PAYMENT OF DOWER

In *Mst. Rahilan v. Sana Ullah*² case, a suit is filed by the wife for separation on ground of non-maintenance alleging that she had been beaten and turned out of the house by her husband. She further claimed that she had not been maintain by her husband for more than 2 years and not paid her dower yet nor perform his marital obligations. On the other hand, the husband stated that her wife was living with her parents without any valid reason and had not returned home. The learned trial court decreed the suit of dissolution in favor of wife on grounds that the husband had failed to maintain her wife for the period of 2 years and had made the life of his wife miserable. However, the learned district court dismissed the decree of dissolution and allowed the suit for restitution of conjugal rights by holding the view that there was no proof of cruelty and the wife is living from her husband without any valid reason. Both the lower courts on the issue of non-payment of the dower held that although it is proved that her dower is not paid yet but they ignore the issue as the marriage has been consummated. On appeal, the learned court held after discussing the issue of maintenance that the wife has to prove that she had not in some way, been guilty of conduct. The learned court held that the wife has failed on the point of maintenance but she can seek separation on the other ground, which she alleged that her dower amount of Rs700 had not paid by her husband yet. But the wife demanded her dower three years before in her written statement so the learned court held that the wife can demand her dower at

¹PLD 1952 Lahore 460

²PLD 1959 (W.P) Lahore 470

any time and when she demand her dower she has right to live apart from her husband without any valid reason until the dower is paid. And the husband becomes bound in this condition to maintain her wife in spite of the fact that she is living apart from him without any other reasonable cause.

In *Muslim Sher v. Mst. Qudrat Bibi*¹ case, the husband instituted a file for restitution of conjugal rights while the wife filed a suit for maintenance and recovery of dower. The trail court passed a decree of maintenance in favour of wife and her minor child and recovery of dower amount. The suit of the husband for conjugal rights is passed subject to the condition that the husband shall have to pay the past maintenance and dower amount. Husband's appeal against this decree passed by the trail court was dismissed by the district court however, he had paid the dower and maintenance amount but after that the wife filed a suit for the dissolution of marriage on grounds of non-maintenance, non-performance of the marital obligations, cruelty and alternatively prayed for *khul'*. The trail court found the issue of non-maintenance in favor of the wife while the other issues regarding the non-performance of marital obligations and cruelty were found against her. It was also held that the wife was additionally entitled to the degree on the ground of *khul'*. The trail court granted the decree of dissolution without proceeding the issue related to benefits as consideration. On appeal it was argued by the husband that the trail cannot pass the decree of dissolution as he has paid the amount of dower and maintenance and in case of *khul'* the court had not proceeded the issue of benefits as consideration of *khul'*. The learned Judge after observing the facts held that the husband had failed to maintain her wife although she was living apart from her because her dower had not been paid. And when the dower is not paid then the wife has right to live separate.

ISSUES WHEN THERE IS VALID REASON FOR WIFE TO LIVE SEPARATLY

In *Mst. Fazlan Bibi v. Muhammad Azam*² case, the wife had turned out from her house by her husband and she became to her parents. However, an agreement settled down between the parties in a punchayat to effect that the husband would not maltreat the wife and if the husband breached the agreement then the wife would live with her parents, and he would pay her maintenance. In pursuance of this agreement the wife went to live with her husband but met the same fate as she again turned out of the house by the husband. A suit for dissolution was file by the wife on grounds of non-maintenance for the period of more than two years, cruelty and desertion for over three years. The learned trail court decreed the dissolution of marriage held that the wife had turned out of her house by the husband and had not maintain for the period of more than two years but on appeal the learned district Judge dismissed the same.

On appeal, the learned high court set aside the decree given by the district court and allowed the appeal holding the opinion that if the wife proves that she was living apart from the husband with a valid reason then she would be entitled to seek separation on ground of non-maintenance.

¹PLD 1984 Peshawar 91.

²PLD 1952 Lahore 227

In *Zafar Iqbal v. Mst. Uzma Nosheen*¹ case, the wife had been treated cruelly and after the 8 months of marriage she had been thrown out by her husband and neglected to pay the maintenance on which she filed a suit of dissolution of marriage. The trial court decreed the suit for dissolution and recovery of dower and Rs. 2,000 per month as the maintenance amount. The amount of the maintenance was reduced to Rs. 1,000 per month by the District court. On appeal the learned high court held, on the issue that when the wife had been living apart from her husband because of husband's fault, she has to ask for separation of non-maintenance.²

ISSUES WHEN MAINTENANCE NOT ABSOLUTE RIGHT

In *Mst. Mumtaz v. Sher Ali*³ case, it was held that wife's right to maintenance is not absolute or unconditional. If the wife refuses to live with her husband or disobey her then she would not be entitled to maintenance. The wife files a suit for dissolution on grounds of non-maintenance for the period of 2 years, non-performance of the marital obligations for the period of last 3 years and cruelty. The lower courts found all these allegations against the wife and held that the wife had been living apart from her husband since for the last 3 years so in this condition the husband cannot be blamed not to maintain his wife or performing the marital obligations.

This issue was also discussed in *Mitha Khan v. Mst. Hidayat Bibi*⁴ case, where the court held that under the Muslim law, the wife is under an obligation to obey and carry out lawful and reasonable instructions of her husband, submit herself to him and live with him in his house. However, if she fails to do so then her right to maintenance is ceased. In this case, the wife got decree of dissolution on ground of non-maintenance by the lower court. On appeal the court discussed the question whether the non-maintenance is an absolute right of a wife to seek dissolution. The learned Judge gave a reference to various courts decisions in which it was held that when the fault is lies with the wife then she has no right to dissolution of marriage on ground of non-maintenance. The wife in this case had run away from the matrimonial house so she would not be entitling of dissolution.

In *Abdul Rehman v. Khalida Bi*⁵, a suit for dissolution of marriage is filed on the grounds of non-maintenance for the period of two years, non-performance of marital obligations and maltreatment. Alternatively, she also prayed for dissolution on the ground of khul'. On the other hand, the husband refusing the allegation stated that her wife was living apart from him without any valid reason and in spite of his efforts he has failed to bring her back to his house. The learned

¹2003 CLC 1213 Peshawar

²"a wife is entitled to claim maintenance for herself if she is forced to live apart from the husband on account of the acts of cruelty attributed to the husband. The maintenance is neither a nature of gift nor a benefit but is an undeniable legal obligation of the husband to provide maintenance to his wife who is not staying away from him without just cause"

³2000 CLC 558 Lahore.

⁴PLD 1958 Karachi 219.

⁵1980 CLC 1098 [S C (A.J&K)]

Sub-Judge found all the allegations against the wife and on the claim of *khul'* he held that there was a chance of compromise between the spouses and the circumstances between them could not be said so strained to allow separation. However, on appeal the learned District Judge discharged the decree of Sub-Judge and passed a decree of dissolution of marriage, which was also hold by the learned high court. In this appeal by leave, the husband contended that the husband is not bound to provide maintenance to his wife at his in-law's house especially when despite of the husband's efforts to bring her house. On the question of maltreatment, it was argued that this allegation had not supported by evidence and on the basis on sole statement of the wife and her mother, which could not be made ground for separation.

The learned judge held

"That it is not correct to say that section 2 (ii) of Act VIII of 1939 casts upon the husband an absolute duty to maintain his wife in all cases and that any failure in that duty would be a ground of divorce even if the wife herself was at fault"¹

So it was held that in Islamic law a husband is bound to provide maintenance to his wife but if the wife refuses to go to husband house to live with him then she would not have entitled to seek separation on ground of non-maintenance.

The learned judge held that in this as the evidence shows that the husband left his wife and ever (before instituted of his suit) he made any effort to bring his wife back. In addition, it was proved that the wife had made herself disentitled to demand maintenance at her mother's house as the husband had no legal excuse not to perform his marital duties at his in-law's house.

Discussion:

In *Mst. Ashgari Sultana* case the lower courts delivered the contracted decision as the other grounds for separation were present but the court passed the degree of *Khul'*. However, on appeal the high court correctly decided that the grounds of separation are present then the degree cannot be granted on the case of *khul'*.

The most critical situation is seen in the *Raja Muhammad Maqsood v. Mst. Kausar Nisar*² when the suit was filed on grounds of non-maintenance, cruelty and alternative prayed *khul'*. The main issue in these cases is to prove the allegation of cruelty which is another problem as the court hold that the sole statement of wife is not sufficient. And if the allegations are not proved then husband blamed a huge amount as consideration of *khul'*. In this case, wife cannot prove allegation of cruelty the court hold that she has to return a huge amount which the husband demand inspire of the fact that only Rs. 5000 is mentioned in the *Nikahnamah* as dower.

However, the court rightly decided the cases when the wife is living apart from the husband without any valid reason because as argued in Islāmic law that she has right to maintenance when she surrender herself and provide her services to the husband.

But when the wife living with valid reason or when the husband has not paid her dower then in

¹1980 CLC 1098 [S C (A.J&K)], At page 1102.

²2000 YKR 956 Shariat Court (AJ&K)

these cases the right to maintenance is not lapses. *Mst. Rahilan v. Sana Ullah*¹, *Muslim Sher v. Mst. Quadrat Bibi*², *Zafar Iqbal v. Mst. Uzma Nosheen*³ are the best examples of the court decisions in which the court held that on non-payment of the dower, wife has right to live apart from the husband. One contradicted point of the practice of court with Islāmic law is that in these cases the consummation and non-consummation of the marriage is not differentiated as the jurists do not give a right of separation to a woman upon the issue of non-payment of the dower amount and in case, when marriage is consummated.

Conclusion

On the issue of non-maintenance, all of the Juristic schools of law (except Ḥanafi) allow a wife to seek separation when the husband neglects or refuses to maintain her due to several reasons such as poverty, incapability to provide the maintenance. In Pakistan the privilege law DMMA 1939 Section 2 (ii) establishes the right of a woman to seek separation when her husband fails to maintain her for the period of two years. The said law neither deals with the responsibility of the husband to provide his wife the maintenance nor suggests the failure of the husband to maintain his wife an obstinate act. The act is also immaterial about the certain conditions due to which a husband fails to provide maintenance such as poverty of the husband, unemployment, imprisonment, or any other cause. The said law just provides a ground to a wife when the husband neglects or refuses to pay the maintenance for the period of two years then she can go to the court for separation. In analytical study of both laws, the case law highlights that in Pakistan the woman files suit for dissolution not on the certain conditions such as poverty, unemployment, or any other cause but in most of the cases the women were living apart from the husband after the relationships between them and their husbands became strained. Not even a single case was filed by a wife on the ground of non-maintenance due to poverty while living with the husband.

¹PLD 1959 (W.P) Lahore 470

²PLD 1984 Peshawar 91.

³2003 CLC 1213 Peshawar

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