

## **Divorce Right Of A Muslim Wife In Bangladesh: An Overview On Shariah And Statutory Laws**

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### **Abstract:**

*The present study aims to point out the scope of divorce right given to a Muslim wife under Statutory and Shariah Laws and remove the misconception about the unlimited and unrestricted power of divorce of a Muslim husband. In Islam, divorce is among the worst things permissible by law, but even then, it is only legal to avoid loathsome consequences in families as well as society. Among the pre-Islamic Arabs, the power of divorce possessed by the husband was unlimited. They could divorce their wife at any time, for any reason or without any reason. They could revoke their divorce according to their own will and gave divorce once again as many times as they liked. But after the advent of Islam, the Prophet permitted to divorced parties three distinct and separate periods within which they might endeavor to become reconciled; but should all attempt at reconciliation prove unsuccessful, then in the third period the final separation became effective. He restrained the unlimited power of divorce by the husband and gave to the woman the right of obtaining the separation on reasonable grounds.*

**Keywords:** Muslim Wife, Divorce power, Modes of divorce, Restriction, Statutory Law, Shariah Law

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### **I. Introduction:**

Muslim husbands are presented with unfettered power in this regard over their female counterparts. Divorce at the instance of the husband is relatively easy, arbitrary, without fault and extrajudicial. On the other hand, divorce at the instance of a wife is complicated, fault-based or brought for consideration or under delegated right from the husband, involving either judicial or extrajudicial procedure. A woman's honour and dignity, from a marital standpoint, is recognized and valued under Islamic ordinances. The Quran treats both the husband and wife as partners and neither of the couple enjoys superiority over the other in marital life. Nonetheless, when it comes to the renouncement of marriage, certain embargos are imposed on wife in the light of traditional interpretations of Shariah law.

### **II. Concept of Divorce:**

The Arabic word for divorce is *talaq* which means "freeing or undoing the knot" (Imam Raghbi). In the terminology of the jurists, *Talaq* signifies the dissolution of marriage, or the annulment of its legality by the pronouncement of certain words<sup>1</sup>. In general, Dissolution of marriage or divorce can be regarded as a legal process that terminates a marriage or civil union between a husband and wife, people who are in need of such requires an expert to proceed with their intention of giving divorce. Divorce entails the cancelation or reorganization of the legal responsibilities of marriage by dissolving the bonds of marriage between a married couple under the rule of law of a particular state or country.<sup>2</sup> The Islamic law of divorce is a logical sequence of the status of marriage. It regards marriage as a civil contract, which confers on the parties to the contract, power of dissolving their relationship under certain specified circumstances.<sup>3</sup>

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<sup>1</sup> [https://www.iium.edu.my/deed/hadith/muslim/009\\_smt.html](https://www.iium.edu.my/deed/hadith/muslim/009_smt.html), accessed on 16/10/2024

<sup>2</sup> <https://www.fmassociatesbd.com/divorce-laws-and-procedures-in-bangladesh>, accessed on 17/10/2024

<sup>3</sup> Ameer Ali, *Mohammedan Law*(1985), p. 471

### **III. Divorce Right Of Wife Under Shariah Law:**

Although a husband possesses ultimate power of divorce under Islamic law, however, a wife has also numerous scopes to dissolve the marriage tie with her husband under Shariah law which can be illustrated under the following heads:

**Ila (vow of continence):** Ila is when a person swears that he will not have sexual intercourse with his wife and abstains from it for four months, the divorce is effected. The Hanafi jurists argue that since the husband acted unjustly towards his wife, it is equitable that on the expiration of four months he should be deprived of the benefit of marriage. Shafiis and Shias consider that such a vow does not amount to divorce, but gives the wife a ground to seek judicial divorce<sup>4</sup>. Although Ila is done by the husband, here Shariah law recognized the wife's scope of getting divorce on this ground.<sup>5</sup>

**Zihar (injurious comparison):** Zihar signifies a husband's comparison of his wife with his mother or any female relation with the prohibited degrees. In Zihar, the usual phrase is "thou art to me as the back of my mother". The uttering of Zihar does not by itself dissolve the marriage; its effects are that sexual intercourse between them becomes unlawful till he has expiated himself by performing penance, and two, the wife can claim judicial separation or even a regular divorce if he continues to behave irresponsibly in his fashion.<sup>6</sup> Although Ila and Zihar are taken place at the instance of the husband, however, Shariah gives the wife right to seek divorce on these grounds.

**Talak-e-Tafweez (delegated divorce):** The husband may delegate the power of divorce to his wife. The delegation must be made in clear terms and the circumstances in which the wife is to exercise the choice must be spelt clearly. The conditions must not be opposed to public policy. The power so delegated can not be revoked by the husband. In the case of *Aklima Khatun vs. Mahibur Rahman*<sup>7</sup>, it was held that the right to divorce may be delegated absolutely or conditionally and it may be for once only for permanently. Again, in the case of *Tahazzad Hossain Sikdar vs. Hosseara Begum*<sup>8</sup>, it was observed that once the right to divorce has been delegated, the wife can exercise her right of talaq-i-tafweez and the pronouncement does not need to be in presence of the husband or witnesses.

The option of delegation-tafweez by the husband to the wife, confers woman the power to divorce herself<sup>9</sup>. The right to divorce so delegated refers to the notion of dissolution of the marriage contract in the form of talaq by husband to the wife<sup>10</sup>.

Tafweez may be in following three forms:

- i) Ikhtiar, giving her the authority to divorce herself.
- ii) Amr-ba-yed, leaving the matter in her own hand.
- iii) Mashiat, giving her the option to do what she likes.<sup>11</sup>

**Khula (redemption):** If the mutual relationship between the husband and wife is not good, the wife, if she so desires, may seek a khula divorce, e.g. by relinquishing her claim to the dower. It, entirely depends upon the husband to accept the consideration of dower and to grant the divorce. A husband may similarly propose a Khula divorce; the wife may accept or refuse it.<sup>12</sup>

**Mubara'at (mutual freeing):** When the divorce is effected by the consent of the husband and wife, it is known as mubarat'at (i.e. freeing one another mutually). The word mubarat'at or mubara'at indicates the freeing of each other (from the marriage tie) by mutual agreement. As Fyze puts it, while in Khula the request proceeds from the wife to be released and the husband agrees for certain consideration, usually the mahr, in mubarat 'at apparently both are happy at the prospects of being rid of each other.<sup>13</sup>

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<sup>4</sup> Syed Khalid Rashid, *Muslim Law*, 5<sup>th</sup> Edition(2009), p. 111

<sup>5</sup> *Bibi Rehana v. Iqtidaruddin* (1943) All 29.

<sup>6</sup> *Supra* Note 5, p. 112

<sup>7</sup> 1963 PLD 602

<sup>8</sup> 1967 PLD 421

<sup>9</sup> Shagufta Omar, *Dissolution of Marriage: Practices, Laws and Islamic Teachings*(2007),pp. 91-117

<sup>10</sup> Neil Baillie, *Digest of Mahomedan Law*,(1980), p.19

<sup>11</sup> <https://www.studocu.com/my/document/universiti-teknologi-mara/islamic-family-law/talaq-e-tafweez-article/91487368>, accessed on 27-10-2024

<sup>12</sup> *Supra* Note 5, p. 114

<sup>13</sup> *Ibid*, p. 116

Lian (mutual imprecation): The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. At the hearing of the suit, the husband had two alternatives: (a) he may withdraw the charge before the end of the trial, in which case the wife could not get a divorce, or (b) to persist in his attitude, whereby he will be required to accuse his wife on oath. This is followed by oaths of innocence made by the wife.<sup>14</sup>

Faskh (judicial annulment): Faskh means annulment. It refers to the power of court to annul a marriage on the application of the wife. The law of faskh is founded upon Koran and Traditions, "If a woman be prejudiced by a marriage, let it be broken off". Such judicial annulments are governed by Section 2 of the Dissolution of Muslim Marriages Act, 1939. Prior to the Act, the Muslim woman could apply for dissolution of marriage under the doctrine of faskh on 4 grounds: (i) The marriage was irregular, (ii) in exercise of the right of option - Khyar-ul-Bulugh, (iii) the marriage was within the prohibited degrees of relationship, (iv) post-marriage conversion of the parties to Islam.<sup>15</sup> 52 Two more grounds could be added: Impotency of the husband and han. In K. C. Moyin v. Nafeesa<sup>16</sup> the court had held that under no circumstances could a Muslim 'woman unilaterally repudiate a marriage by faskh, it had no legal sanction without seeking the intervention of the court.

Apostacy: When a Muslim renounces or leaves Islam it is called apostacy. Where a Muslim husband renounces Islam, his marriage with his wife is dissolved *ipso facto*, *on the other hand*, If a non-Muslim wife embraces Islam, her marriage tie stands intact, irrespective of the fact that the husband is non-Muslim.<sup>17</sup>

Option of Puberty (Khyar-ul-bulugh): When a minor girl or boy is married by his lawful guardian, other than father or paternal grandfather, such a marriage can be repudiated by the minor on attaining the age of puberty. Such an option vesting in a minor is called the "option of puberty".

#### **IV. Scope Of Divorce Under Statutory Law:**

A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds<sup>18</sup>, namely:

- (i) that the whereabouts of the husband have not been known for a period of four years; However, if a decree is passed on this ground shall not take effect 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 satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years. Under this clause, it is not necessary that such failure or neglect to maintain must be willful; a failure to maintain due to poverty, failing health, loss of work or for any other related cause, would still entitle the wife to seek divorce.<sup>19</sup>
- (ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards, such sentence should be final for availing this ground of divorce.<sup>20</sup>
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) that the husband was impotent at the time of the marriage and continues to be so. However, before passing a decree under this clause, the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated. She can do so by filing a suit and obtaining a decree of the dissolution of marriage.
- (viii) that the husband treats her with cruelty. As to what constitutes cruelty, examples have been given in that clause itself, and any of them would give her a cause to file for divorce, these are-

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<sup>14</sup> Ibid

<sup>15</sup> Tyabji, Muslim Law, p. 194.

<sup>16</sup> AIR 1973 Ker 176

<sup>17</sup> Supra Note 5, p. 130

<sup>18</sup> Section 2 of the Dissolution of Muslim Marriages Act, 1939

<sup>19</sup> Janak Raj Jai, Divorce law and procedure, 3<sup>rd</sup> edition(2004), p. 110

<sup>20</sup> Ibid, p.112

- a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, therefore, to come within the clause the cruelty, whether, physical or mental must be persistent one, a single act of cruelty will not suffice.<sup>21</sup>
- b) associate with woman of evil repute or leads an immoral life.
- c) attempts to force her to lead an immoral life. Mere attempt on the part of the husband compelling the wife to engage in an immoral act would suffice.
- d) disposes of her property or prevents her exercising her legal rights over it.
- e) obstructs her in the observance of her religious profession or practice.
- f) If he has more wives than one does not treat her equitably in accordance with the injunctions of the Quran. It is only very gross failure to treat the petitioner-wife equally.<sup>22</sup>
- (ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law. This clause empowers the court to dissolve a marriage on any ground other than those enumerated above, however, such a ground must be recognized as valid under the Muslim Law for dissolution of marriage. Merely because a wife has started to hate her husband is not a ground for divorce, it not being a ground recognized by Muslim Law.<sup>23</sup>

### **V. Husband's Power Of Divorce, Not An Unregulated One:**

There is a general feeling that divorce under Muslim Law is very easy and common. But the inclusive study of all Shariah provisions in this regard reveals a different notion than that is prevalent in the minds of the general public. Islam, in fact, with its realistic and practical outlook on all human affairs, does recognize divorce, but only as a last resort, or as necessary evil, inevitable under certain compelling circumstances. Quoting from Prophet's saying:

*'of all the permitted things, divorce is the most abominable with God'.*

The Prophet also discouraged and disapproved divorce except in extremely circumstances. The Prophet has said: *'Divorce shakes the throne of Allah.*

Mohammed Ali, in his book 'Religion of Islam' observed:

*'...it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce.'*

It is stated in Al-Radd Al-Mukhtar, that although divorce is forbidden, it becomes permissible for certain reasons. When there is no cause for separation, there is no necessity for release. Thus, if there is no legal ground for talaq, then it must be considered unlawful. This is based on the principles in the Quran that says to the effect that:

*'So it they (your woman) obey you, seek not a way against them'*<sup>24</sup>

It is also said in Surah An Nisa, Ayat 19:

*'O Believer, it is unlawful for you to inherit woman against their will, neither debar them that you may go off with part of what you have given them, except when they commit a manifest indecency. Consort with them honorably; or if you are averse to them, it is possible you may averse to a thing, and Allah set in it much good.'*

Mr. Justice Krishna Iyer pointed out:<sup>25</sup>

[T]he view that the Muslim husband enjoys an arbitrary unilateral power to inflict instant divorce does not accord with Islamic injunctions... it is a popular fallacy that a Muslim male enjoys under the Quranic law unbridled authority to liquidate the marriage.

In his commentary on the holy Quran, Mohammed Ali has said, "Divorce is one of the institutions in Islam regarding which misconceptions prevail so much so that even Islamic law, as administered in the courts is not free from their misconceptions".<sup>26</sup> Islam emphasizes that men and women are equal in several respects. While Islamic law vests the right of divorce in husband and wife, it also forcefully restrains the exercise of such right. To understand the complexities, it is necessary to have a tangible classification of the kinds and forms of divorce.<sup>27</sup>

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<sup>21</sup> Ibid

<sup>22</sup> Ibid, p.113

<sup>23</sup> Ibid

<sup>24</sup> Al Quran, Surah An Nisa: 34

<sup>25</sup> Yousuf v. Swaramma AIR 1971 Ker 26 1 at 264.

<sup>26</sup> Mohammad Ali, Commentary on the Holy Quran(1917), p.96

<sup>27</sup> Furqan Ahmad, Understanding the Islamic Law of Divorce, Journal of the Indian Law Institute(2003), Vol. 45, Issue ¾, p. 487

Both Shariah and Statutory Laws tried to limit husband's power of divorce in many ways. Shariah Law states that divorce has to be confirmed on three separate occasions and not, as is commonly believed, simply three times at once which is recognized as a sin. The first two instances the woman and the man are still in legal marriage. The third occasion of pronouncing divorce in the presence of the woman, the man is no longer legally the husband and therefore has to leave the house.<sup>28</sup> The purpose of this procedure of divorce in Islam is encourage reconciliation where possible. Even after divorce, the woman should wait three monthly circles during which her husband remains responsible for her and her children's welfare and maintenance.<sup>29</sup>

Again, Islamic law tried to safeguard the wife from husband's unfettered power requiring that payment of dower is compulsory as soon as divorce becomes effective which requires the husband thinks thrice before divorcing the wife.<sup>30</sup> The French legists Planiol and Ripert have explicitly emphasized Islam's point of view in regard to divorce in these words: "Divorce is a mischief. However, it is a measure that cannot be avoided for the welfare of the community, because it is the only remedy for another harm which may be more dangerous. The prohibition of divorce, whatever harm it may imply, is like the prohibition of surgery, because the surgeon is compelled to amputate some of the limbs of the patient's body. However, there is no danger whatsoever, in legislating for divorce (in accordance with the practice established by Islam) since it is not divorce that spoils married life and dissolves its sacred tie, but the misunderstanding that arises between the married couple and hinders the strengthening of this (union by marriage) and demolished it. Divorce alone puts an end to the hatred that may occur between the husband and his wife before it is aggravated and becomes an intolerable mischief to society."<sup>31</sup>

## **VI. Conclusion:**

According to Islam, marriage is a civil contract; yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity that a high degree of sanctity is attached to it. But, in spite of the sacredness of the character of the marriage tie, Islam recognizes the eternity of divorce in cases when marital relations are poisoned to a degree which makes a peaceful home life impossible. But Islam does not believe in unlimited opportunities for divorce on frivolous and flimsy grounds, because any undue increase in that facilities for divorce would destroy the stability of family life. Therefore, while allowing divorce even on genuine grounds, Islam has taken great care to introduce checks designed to limit the use of available facilities. The Islamic law did not take away the prevalent customary right of the husband to divorce his wife unilaterally, but imposed numerous restrictions on his right. A Muslim husband cannot divorce his wife and take her back as he pleases. Similarly, the Muslim law prescribes definite procedure and proper time for the divorce and further imposes obligations on the husband to pay dower and maintenance to the wife in case of divorce. In practice, these are sufficient and reasonable checks on the unilateral power of the husband to divorce his wife.

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<sup>28</sup> Baqir Sattar, *Divorce and Muslim Woman*, Random publications(New Delhi) p. 60

<sup>29</sup> Ibid

<sup>30</sup> Supra Note 5, p. 90

<sup>31</sup> Hassan Ibrahim Hassan, *Islam, Religious, Political, Social and Economic Study*, Beirut, 1967, p. 274