Dissolution of Muslim Marriage: Analytical Essay

Islamically, the termination of a marriage is regarded as the most loathed of permissible acts. It is the last resort when all attempts of saving the marriage have failed, remaining married is leading to discord and enmity, and there is no hope for reconciliation even after appointing arbiters.

Both parties are instructed to uphold the values of justice and kindness when parting ways. (Ch2 V229)

The procedure of dissolution depends on who it was initiated by. Although a Muslim husband holds unilateral authority in the pronouncement of divorce, a Muslim wife has the right to initiate separation. Hence, there are several ways a Muslim marriage can be dissolved.

- (i) by actual divorce (talaq)
- (ii) financial settlement in return for a divorce (khul'a)
- (iii) annulment in a court (faskh)

Apart from the above three, there are other ways a marriage can be dissolved, these modes are rarely used in modern times.

- (iv) the vow of abstention (ila')
- (v) maternal comparison (zihar)
- (vi) mutual oath swearing (li'an)

Talaq

When a husband initiates dissolution by the pronouncement of repudiation, it is known as talaq.

- (A) There are three conditions that must be present
    - (i) He must be sane
    - (ii) He must be mature
    - (iii) The divorce must not be issued under duress (the Hanafi School of Jurisprudence does not concur with this)

According to Sunni law divorce can be expressed as predominantly orally and written formats however any other method which clearly indicates the husbands desire to break the marriage is acceptable. Furthermore, there is no condition of a witness being present. Shia believe that precedence is always given to oral and they include the condition of the presence of witnesses.

- (B) There are two types of words used to effect a talaq.
    - i) Clear and Explicit (Sareeh) -expressly pronouncing the word 'divorce' or words derived from it e.g. you are divorced, indicating a clear intention to divorce.
    - ii) Ambiguous (Kinaya) - using words that are not solely used for issuing a divorce but allude to it. Divorce will only be effected if one intends it or the circumstances indicate it. This constitutes an irrevocable divorce (Talaq Baain) in

the Hanafi School of Jurisprudence.

- (C) There are three modes of repudiation if the marriage was consummated.
    - (i) The Ahsan (most preferred) divorce is to make one pronouncement of divorce to the wife, in an interval between menstruations (Tuhr), in which no sexual intercourse with the wife has taken place. After which she is left until her waiting period (Iddah) is over.
    - (ii) The Sunnah (preferred) divorce is to pronounce three divorces in three consecutive intervals of Tuhr, in which no sexual intercourse with the wife has taken place. The last pronouncement renders the marriage irrevocable.
    - (iii) The Bid’a (sinful and unlawful innovation) divorce consists of either making a pronouncement of divorce during the woman’s menstruation period or to pronounce two or three divorces at once or to issue a divorce in a Tuhr (purity) in which sexual intercourse with the wife took place.

Once a husband issues talaq, verbally or written, it comes into effect immediately and the wife would observe a waiting period (iddah).

The husband is financially responsible for maintaining the wife during her waiting period (iddah). Furthermore, since the husband is the contract-breaker, any unpaid dowry owed to the wife must be paid. The wife is not required to return any dowry paid to her. She is also not required to return anything that was gifted to her during the course of their marriage.

It is also recommended for the husband to gift his wife a small gift (known as mut'a) at the time of divorce, to avoid hard feelings.

Once the post marital waiting period comes to an end, the husband is no longer obliged to provide for her.

Talaq Tafweedh is when the husband delegates his power of divorce to his wife or a third party, this may be temporarily or even permanently, with or without stipulating conditions. Once this power is delegated, it cannot be revoked or withdrawn. The wife can therefore possess an unrestricted and permanent access to divorce and therefore gives talaq to herself on behalf of the husband.

Talaq instigated by the wife

- (i) Khula

Khula is the ending of the marriage (Nikah) whereby the husband consents to the request of the wife to release her from the marriage contract in return for the dowry or some other remuneration to be given to the husband. A khula once issued, counts as one irrevocable divorce (Talaq Ba’in).

- (ii) Faskh (annulment in a court)

If the husband refuses to release his wife, then the wife can seek dissolution of her marriage contract by the decree of a Muslim Judge (Qadhi). This annulment can only be decreed if the Islamically defined ground for faskh are present.

Some of the reasons for include:

- Constant ill treatment
- Negligence of her rights
- impotency
- insanity
- lack of financial support
- Any other reason the qadhi may deem justifiable.

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As for divorce in the gulf states in the United Arab Emirates and Bahrain as stated by “decree no. 45 of 2007” that has either registered or formally pronounced in court. However, Kuwait law does not stipulate this. This does not have any effect on the man’s power to divorce.

As for the women’s right in the gulf states a woman can either ask for khulah from the court or make a claim for mistreatment. Khulah can be granted even when there is no fault on her husband’s part Both Oman and Kuwait have recognised khulah as consensual so the husband cannot be coerced in to giving the divorce however if the husband continues to refuses and there is no reconciliation then a an appropriate consideration is owed to the husband

Bahrain, Qatar, and the United Arab Emirates believe that if the wife is willing to pay financial contribution (mahr) then the court is obliged to grant the divorce in same manor Qatar and Bahrain the court establishes the amount of contribution to be paid with the absolute limit being the dower. The gulf states also allow the wife to claim for divorce on the grounds of mistreatment

The effect of divorce

If a husband decides to dissolve the marriage although the court finds that the women is not at fault the wife is due some compensation in the form of mutat al talaq even though the marriage has been consummated. This is contrary to classical Islamic law. This indicates a more egalitarian approach to divorce as women as both women and men have access to initiate the divorce if they are willing to reimburse the other part financially.

Pakistan:

Initially under the Dissolution of Muslim Marriages Act of 1939 women had no right to divorce and the only way she could attain was for one was for either impotency or Lian. However due to reforms a woman is now able to get judicial divorce for various other reasons. “Under the Dissolution of Muslim Marriages Act Section 2”:

- Absence for 4 years
- Lack of financial support for two years
- Lack of physical intimacy for three years
- All forms of abuse

Marries a second time without the wife’s consent this could also carry a sentence of a year

imprisonment and a fine

The introduction of talaq tafweedh as an option on the Pakistani marriage registration forms as clause number 18 gives women further authority in their divorce

The wife is expected to return the dowry in most cases whether the husband Initiates the divorce or in certain cases when she initiates it. . As for khulah it will take place as long as she can prove she can no longer live with husband under the laws prescribed by God and she is willing to forgo her mahr then the court will provide her with her separation.

For a divorce to be valid the husband must provide a written notice to the chairman for up to 90 days and provide a copy to the wife. After which they either provide a mediator or authorise the divorce. Furthermore, talq ul bidah has been converted in to revocable talaq.