

AN APPRAISAL OF THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939 IN THE LIGHT OF HUMAN RIGHTS LAW

A thesis submitted in partial fulfillment of the requirement for the award of the degree
of MS in Human Rights Law



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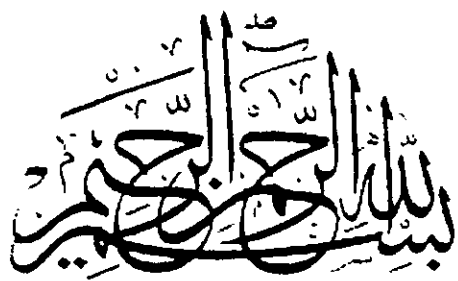
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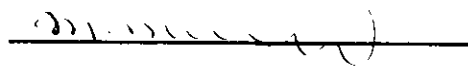
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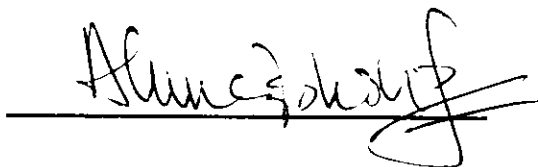


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DEDICATION


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DECLARATION

Yasar Arafat, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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I am thankful to ALLAH, the Almighty, who blessed me the courage, strength and resource to accomplish this task. I am immensely grateful to my parents who prayed for me all the time and other family members for helping and encouraging me to complete this work successfully. I am also grateful to my brother and sister, who cared and supported me in every best possible way.

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Abstract

The Dissolution of Muslim Marriage Act, (DMMA) 1939, is assumed to be based on the *Māliki* School of *Islāmic* jurisprudence. It is therefore essential to critically evaluate if DMMA represents the *Māliki* School or is against, moreover, it should be examined that whether the Dissolution of Muslim Marriages Act, 1939 provided the due rights to women or it failed in doing so.

The study will begin with the history of Dissolution of Muslim Marriages Act, 1939. The circumstances and situation of early part of twentieth century will be discussed, which forced women to leave Islam. The first *fatwā* of Maulana Ashraf Ali Thanavi, which led women to renounce Islam and then his revised *fatwā* will also be analyzed in the first chapter. It will also be highlighted how unanimously all the *Hānāfi* jurists took the initiative to derive *fatwā* from *Māliki* School, on the matter of dissolution of marriage. We will also discuss three opinions of *Hānāfi* jurists regarding the dissolution of marriage in case of apostasy.

In the second chapter, those sections of the Dissolution of Muslim Marriages Act, 1939 will be examined, which do not represent *Māliki* School. *Hānāfi* and *Māliki* opinions regarding the dissolution of marriage will also be examined in this chapter.

In the last chapter it will be proved that after adopting the DMMA, 1939, the *Hānāfi* jurists gave the *fatwā* totally based on the *Māliki* School of *Islāmic* jurisprudence. *Hānāfi* and even the non- *Hānāfi* jurists (*Ahle-Hadess*) of the Subcontinent never diverted from the real intention of *Māliki* School of thought. Some suggestions regarding amending the Dissolution of Muslim Marriages Act, 1939 will also be given in the last to make the Act according to the intention of *Māliki* School of thought.

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CHAPTER-1

BACKGROUND OF THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

1.1 INTRODUCTION

Women rights have been at stake in the world since time immemorial and the situation further worsens when these are violated under the umbrella of religious norms. As a matter of fact, men are dominant while women are treated as their subordinates. Throughout the history, women have been looking for a status and basic rights. While all social myths and values, and religious interpretation always favor men. Men are always considered the bread winners and women are restricted to home to do unpaid domestic work. All important positions belong to men whether in politics, law, administration or religion. Normally religion or religious interpretation is considered responsible for women's subordination. Women of almost all religions are yet to struggle for the right of genuine equality¹. In the Subcontinent, the situation of Muslim women is the worst, where they are being suppressed not only by the social values but also by religious values and laws. In the early part of the twentieth century, when women of the United States of America (USA) and other countries were having the right of vote, the Muslim women of the Subcontinent were still struggling for their basic rights. These rights were guaranteed by religion, Muslim women do not need any new law for their rights, and it is just needed to interpret these laws².

Marriage is an important stage in the life of every individual as it brings with itself responsibilities, rights and duties for both the parties. Human life is very complex with many ups and downs, which sometimes create a situation where the bondage of marriage needs to be dissolved, either by the consent of both or one of them. The dissolution of this marriage bondage is not as simple as it seems to be because it brings a

¹ Zakia-A-Siddiqui, *Muslim Women* (New Delhi: Md Publications, 1993), 21.

² Abu'l a'la Mowdoudi, *Haqooq Ul-Zojain* (Lahore: Idara Tarajuman al *Qur'an*, 1965), 14.

lot of troubles and problems side by side providing solutions to the already existing ones. Different religions, societies, constitutions and judicial systems have set different laws for the dissolution of marriage between a husband and a wife at different times. Islam, which is a complete code of life, has also not ignored this important dimension of human life and has prescribed a definite way to dissolve the marriage bondage.³

The early part of the twentieth century was tough for the Muslim women of the Subcontinent as regards the marriage issues. The *Ulama* (*Islāmic* religious scholars) of that time were too strict to their *fiqh*. Regarding Muslim family law, most of the scholars of the Subcontinent were strict followers of the opinions, sayings and doctrines of Imam *Abu-Hanifa*⁴.

These *Islāmic* scholars considered the statements of their respective *Imams* as unalterable; they never initiated to consult any other *Islāmic* school of thought. They did not allow even minor changes in the *fiqhi* opinions to make them conforming to changing circumstances. As far as our topic is concerned it is important to understand the *Islāmic* law about separation (*faskh*) and especially the opinion of *Hānāfi* School of thought.

1.2 HISTORY OF DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939.

In 1913, a Muslim husband applied to a British court in India for the restitution of conjugal rights, but his in-laws refused to let his wife join him.⁵ His in-laws claimed that

³ Ibid,93

⁴ A school of law or a school of thought in the *Islāmic* legal system is usually associated with the name of its founder. This is true, at least of the *Sunnī* schools. A school of law, besides being an internally consistent system of interpretation lends uniformity to the law. It is generally known that there are multiplicity of opinions within the *Islāmic* legal system. By following a school of law the follower accepts a uniform version within this rich variety. (see, Imran Ahsan Khan Nyazee, *Theories of Islāmic law*, 2nd reprint (Islamabad: *Islāmic* Research institute, 2005),8), (hereinafter referred to as Nyazee, *Theories of Islāmic Law*).

⁵ Muhammad Khalid Masoud, *Apostasy and Judicial Separation in British India*, available online at :< globalwebpost.com/farooqm/study_res/islam/.../masud_apostasy.doc> last accessed:20-04-2012

the woman had become an apostate and thus, according to *Islāmic* law, was no longer the claimant's wife. The judge asked the claimant to obtain a *fatwā*, (legal suggestion from certified *Islāmic* scholar) to clarify the position of *Islāmic* law on the status of his marriage. The claimant, therefore, approached Maulana Ashraf Ali Thanavi (d.1943) for *fatwā*, who ruled that due to apostasy the marriage was annulled. Translation of the question and answer is given below.⁶

Question: What do the scholars of religion and the jurisconsults of law say in the matter of Zayd [a fictitious name], who married a woman and brought her to his home? A few months after the consummation of the marriage, his wife's guardians came to take her back. Zayd sent her with them. Several days later, when Zayd asked her to return, her guardians declined, offering various excuses. After a few days, they flatly refused and demanded khul [that is, divorce on payment of consideration by the wife]. Zayd had no alternative but to apply to the government [court] for his wife's return. When the guardians learned [about Zayd's application to the court] they immediately taught the woman words of unbelief. The woman uttered those words of unbelief. Now, the guardians have submitted to the court that the woman, as a sane and adult person, had uttered those words of unbelief, hence her marriage contract with Zayd was no longer valid. Thus the plaintiff's request [for his wife's return to him] was not justified. Since the marriage was annulled, they could not return her. After this declaration, the judge asked Zayd to seek a *fatwā*. The judgment is withheld pending receipt of the *fatwā*. Now, the question is, [with regard to] this woman, who uttered the words of unbelief, whether as instructed by her guardians or on her own [initiative], with the intention to annul her marriage, is her marriage contract annulled according to God's [law] or not?

Response: Annulled. Uttering words of unbelief, intentionally or knowingly, whether one actually believes in those words or not and whether it is one's own view or

⁶ Khalid Masoud, *Apostasy and Judicial Separation*, 4

someone else's instructions, necessarily constitutes unbelief in all cases. Since unbelief causes annulment of the marriage contract, the marriage [in question] is dissolved. At the same time the marriage contracts of those, who instructed her words of unbelief, are also annulled. The marriage contracts of all those, who consented to such instructions, are also annulled. The only difference [between the status of the marriage contract of Zayd's wife and that of the wives of those, who taught her words of unbelief] is that according to the Shari'a, Zayd's wife should be forced to embrace Islam and to marry the same first husband. She is not allowed to marry any other person. The wives of those, who taught words of unbelief and of those who supported them, however, are allowed to marry whomever they wish after completing the 'iddat [Arabic: 'idda, the specified waiting period after the annulment of marriage]⁷.

Before discussing this *fatwā*, it will be better to know about the three opinions of *Hānāfi* School of *Islāmic* jurisprudence about the apostasy of a woman.

1.3 SEPARATION THROUGH APOSTASY OF WOMAN (*HANAFI* OPINION)

The first opinion of *Hānāfi* jurist (*Zahīul Raviā*) says that after the renunciation of Islam by the wife, the marriage bond is finished, but she will be forced to return to Islam and remarry her first husband, and until she does not accept Islam, she will be kept in prison.⁸

The second opinion is of a *Hānāfi* jurist (Ismaeel Zahid, Abu al Nasar al Dabohee, and Abu al Qasim Safar) from Samarqand and Bukhara that says that in the matter of renunciation of Islam by the wife, the marriage bond will remain valid, there will be no breach in the marriage bond and the renunciation of women will never make any effect on the marriage bond.⁹

⁷ Annex i

⁸ Tanzeel al Rahman , *Majmoo'a i Qawaneen i islam* (Islamabad: Islamic Research Institute, 1965), 721

⁹ Ibid

The third opinion of another *Hānāfi* jurist is that the renounced women will be treated like a slave and her husband will remain her custodian¹⁰.

It is evident that Ashraf Ali Thanavi gave his *fatwā* according to the first opinion of *Hānāfi* School of *Islāmic* jurisprudence, according to which the marriage is dissolved after the renunciation of Islam by the wife. The first opinion also includes that a woman will be forced to remarry her first husband. But for courts, it was enough that Ashraf Ali Thanavi annulled the marriage. Second thing is that forcing a woman to again accept Islam and to remarry her first husband was not possible in British India¹¹.

The court dissolved the marriage on the basis of this *fatwā* of Maulana Thanavi. The court verdict opened the doors for the Indian Muslim women to get separation from husbands. Before this decision, as earlier stated there was no remedy for the Muslim women of India to get rid of the marriage tie. So, the rate of apostasy surprisingly increased after this *fatwā* of Maulana Thanavi. On the other hand, the Christian missionaries also contributed to it. They started to motivate the Muslim women to convert to Christianity and to get rid of their husbands. A missionary by the name of Reverend Paul in Lyallpur baptized several new converts and issued certificates of baptism¹². There were a number of Christian missionaries all over the India, who were working to convert Muslim women from Islam to Christianity¹³.

¹⁰ Ibid

¹¹ Sabiha Hussain, *Muslim Womens Rights discourse in the Pre-Independence Period*, available online at :<www.cwds.ac.in/OCPaper/sabihaOccasionalPaper.pdf> last accessed: 20-04-2012

¹² Khalid Masoud, *Apostasy and Judicial Separation*, 6

¹³ Ibid.

The religious political party of India, Jamiat'Ulama i Hind, were too much shocked by these conversions. They started demanding reforms in the *Islāmic* law about the dissolution of marriage¹⁴.

1.4 APOSTASY AND BRITISH INDIAN COURTS

By going through these cases of conversion, it is observed that most of the lower courts were too concerned to know whether the conversion was genuine or a method to dissolve the marriage. On the other hand, the higher courts clearly declared that there was no need to know the motives and objectives of the conversion. For higher courts the conversion was enough reason to dissolve the marriage.

In many cases, husband requested the court not to dissolve the marriage because the conversion of the wife was not genuine and was just a tool to get rid of the marriage bond¹⁵. The Additional District Judge, Lyallpur, dismissed the case of *Mst Rahmate*, observing that her conversion was just a trick to dissolve the marriage, thus the court could not dissolve the marriage. The judge also called the conversion a "trick".¹⁶ The Higher Court, however, dismissed this argument and observed:

So long as the defendant has formally renounced her faith in Islam and has gone through the rite of baptism, the formal recognition of her admission into Christianity, the marriage must be held to have been dissolved according to law, and it is immaterial whether her motive is a genuine conversion or a device to have the marriage dissolved.¹⁷

In another decision the High Court clearly mentioned:

¹⁴ Sabiha Hussain, *Muslim Womens Rights*, 34

¹⁵ Muhammad Khalid Masoud, *Iqbal Reconstruction of Ijtihad* (Islamabad: *Islāmic* Research Institute, 1995), 156

¹⁶ All-India Law Report 1928, Lahore, 954

¹⁷ Ibid

“Apostasy of either husband or wife brings the dissolution of Muslim marriage It is immaterial to know whether the conversion is genuine or method to dissolve the marriage.”¹⁸

In 1937 *Saeedan vs Sharf*, a similar situation developed, when the district judge doubted the conversion and did not dissolve the marriage. The high court dissolved the marriage and declared that the marriage is dissolved whatever is the reason.¹⁹

In 1938, a complicated thing happened during the case of *Reshman vs Khuda Bakhsh*. *Khuda Bakhsh* asked the court for restitution of conjugal rights, while *Reshman* declared her conversion to Christianity. The lower court dissolved the marriage. On the appeal, the district judge started investigation about the conversion. *Reshman* was offered pork to eat, to judge her conversion. *Reshman* refused to eat. On the basis of this, the judge assumed that she had not abandoned Islam and her marriage was not dissolved. *Reshman* appealed to the High Court, which dissolved the marriage and further ruled that

“There was no need to investigate the genuineness of conversion”.²⁰

Even in some cases, some people cited the opinion of the *Hānāfi* jurists of Samarkand and Bukhara to courts. However the courts were strict that after the conversion of a woman the marriage was dissolved. In the case of *Sardar Muhammad vs Mst Maryam Bibi*, Amir Ali cited the views of the *Hānāfi* jurists of Samarkand and Bukhara that a Muslim man could marry a Christian woman, but the court annulled the marriage.²¹ In another judgment the court declared:

“Apostasy by either husband or wife means that marriage is dissolved. The real question in such cases is not whether she adopted Christianity or not, the real question is the wife has renounced Islam.”²²

¹⁸ All-India Law Report (Mst Rahmate vs Nikka and others) 1928, Lahore 954(1) .

¹⁹ All-India Law Report 1937, Lahore, 277

²⁰ All-India Law Report 1938, Lahore, 482-85.

²¹ All-India Law Report 1936, Lahore, 661.

²² All-India Law Report 1936, Lahore, 661

Interestingly, mostly these cases were filed in Punjab. The ratio of apostasy surprisingly increased in Punjab. Another interesting thing was that the renounced women were fully aware of the *Hānāfi* law regarding apostasy, because most suits were filed by the husbands for restitution of conjugal rights. The renounced women did not consider it necessary to confirm the dissolution of marriage from the courts. They took full advantage of this *Hānāfi* law.

Maulana Thanavi criticized those women, who were renouncing Islam. According to Maulana Thanavi, it was ignorance of the law on the basis of which those women were using apostasy as a weapon to get rid of their husbands.²³ Maulana further ruled that *Hānāfi* opinion never allowed an apostate woman to contract second marriage, so it was total ignorance of the *Hānāfi* law. All the three opinions of *Hānāfi* School of *Islāmic* jurisprudence, never allowed an apostate woman to contract second marriage. Maulana Thanavi was worried about the conversions. Some *Hānāfi* jurists cited the view of the *Hānāfi* jurists of Samarkand and Bukhara. This view was also cited in the British Indian courts, which, however, did not accept it and continued to dissolve marriages on the basis of the apostasy of Muslim women.

The Indian Muslims were concerned on the growing rate of conversions and wanted some solution to stop the same. For this purpose, it was necessary to provide some way out to the women regarding dissolution of marriage in *Islāmic* law.

1.5 WHY DID WOMEN CHOOSE APOSTASY FOR SEPARATION?

Islam has given great importance to the sanctity of marriage and desires to strengthen this relation. But if the relations between the spouses reach a point where it

²³ *Maulana Ashraf Ali Thanavi, Al-Heela al-Najiza li'l-Hilat Al-'Ajiza* (Lahore: Al-Faisal Publisher, 1996), 192

becomes necessary to untie them, then such relations may be abandoned. Although, separation is the most detestable thing in Islam, but at the same time it does not favor that the husband and the wife remain united in a hate full union. Though Islam does not appreciate separation of the spouses, but when the objectives of marriage are not being fulfilled then it is better to untie such a relation. The objectives of marriage include:²⁴

- a. Protection against unchastity.
- b. Peace and tranquility of spirit.
- c. Love and respect.
- d. Continuation of human race and religious upbringing of children under the patronage of husband.

Islam asks the believers to strengthen the relationship of marriage and make it successful. But the circumstances may arise when it becomes impossible for the husband and the wife to remain united. Then separation is allowed. The separation can be achieved in many ways in the *Islāmic* law²⁵.

The *Islāmic* law has given the right of *talaq* (divorce) to men. The literal meaning of *talaq* is “to leave” or to “snap off” or “to separate”. Divorce is right of the husband. He may use this right with reason or without reason²⁶. Islam has bounded men not to give divorce but legally no restriction is imposed on them. It has repeatedly said that divorce is only an evil. It is most detestable one among the lawful things, but whenever a husband wants to get rid of his wife, legally he can do.

Similarly Islam has given the right of separation to women. In pre-*Islāmic* Arabia, women had no right to claim dissolution of marriage on any grounds. Islam, however,

²⁴ Jamal j. Nasir, *The Islamic Law of Personal Status* (London: Graham and Trotman, 1986), 38

²⁵ Ibid.

²⁶ Asaf A.A. Fyzee, *Out Lines of Muhammadan Law* (Oxford University press, 1999), 150

allowed women the privilege of seeking divorce denied to them by the primitive society of the Arabs. *Khula* is sought by the wife; the husband is given the compensation to release her from the marriage tie.²⁷

Women have the right of *khul* and *faskh* to untie relation with their husbands. *Khul* is when wife has a dislike for her husband and ask him to be released her in exchange of a sum, or all parts of her *Mehar*. If the divorce is affected by the mutual consent of husband and wife then it is known as *mubarat*²⁸. In the case of *khul* the wife requests for release from the marriage bond and the husband agrees for certain consideration, which is usually a part or the whole of the *mehar* (dower). In *mubarat* apparently both are happy at the prospect of being rid of each other²⁹.

In the case of *khul* when both husband and wife agree to untie the marriage bond then there is no problem. The real problem starts when wife wants separation and husband does not agree.³⁰ Majority of Muslim scholars are of the opinion that the consent or approval of the husband is necessary in case of *khul*.³¹ It cannot be granted by the court on the request of wife if husband does not agree. It is also a fact that all the four *Sunnī* schools of *Islāmic* jurisprudence do not allow *khul* without the consent of husband. According to them, *khul* can only happen if husband agrees and without his consent the court does not have any jurisdiction to separate the spouses. So in the early part of twentieth century, the women started renouncing Islam because they were not having the right of *khul*, both *Hānāfi* jurists and courts were having the same opinion that the *khul* can only happen if husband agrees.

²⁷ Zakia-A-Siddiqui, *Muslim Women*, 34

²⁸ Fyzee, *Muhammadan Law*, 63

²⁹ Ibid, 64

³⁰ Tahir Mansoori, *Muslim Family Law in Islam* (Islamabad: *Shari'ah* Academy), 134

³¹ Zakia-A-Siddiqui, *Muslim Women*, 35

The word *faskh* means annulment or abrogation. In *faksh*, power lies with the Muslim judges to annul a marriage on the application of the wife. Majority of Muslims in the Subcontinent are follower of the *Hānāfi* School of thought, which in this regard is considered to be quite strict.³² *Hānāfi* jurists admit that only the wife of an impotent husband can apply for *faskh* (dissolution of marriage).³³ In the matter of *faskh*, *Maliki* School of *Islāmic* jurisprudence is considered to be more liberal for women. It requires ruling by the court in the following instance³⁴.

1. Illness or any defect in male.
2. Impotency of male
3. Cruelty or immoral treatment by husband
4. Missing of husband
5. Imprisonment of husband
6. Non-performing Maintenance

So from the above discussion it is clear that in *Hānāfi* law, women do not have the right of *khul* without the consent of husbands. So in 1913, the Indian Muslim women were not having the option of *khul*. Similarly in case of *faskh* (dissolution of marriage) only the wife of an impotent husband could apply for *faskh* (dissolution of marriage). So if an Indian Muslim woman wanted to get rid of her cruel husband, she was not having any option. The *Hānāfi* School never recognizes the dissolution of marriage on the basis of non-maintenance, cruelty, imprisonment of the husband, missing husband, or on the basis of any defect in the husband. The most miserable condition was in the case of missing husband. According to the *Hānāfi* School of *Islāmic* jurisprudence, the wife of

³² Fyzee, *Muhammadan Law*, 169

³³ Ibid,

³⁴ Mansoori, *Family Law in Islam*, 154

the missing husband cannot get separation until the people of the same age of her husband are living alive³⁵. So, according to *Ahnaf*, the period is approximately eighty to one twenty years.³⁶ Therefore in practical, she can never contract a second marriage. So these things forced the Muslim women of India to renounce Islam just to get rid of their cruel husbands. The *Hānāfi* law regarding dissolution of marriage was greatly blamed for these conversions.³⁷

1.6 MAULANA MOWDOUDI AND THE *HANAFI* OPINION

Maulana Mowdoudi criticized the *Hānāfi* opinion regarding the dissolution of marriage.³⁸ According to him, the purpose of *Islāmic* Law regarding marriage is to protect the chastity of the spouses.³⁹ The *Hānāfi* law failed to protect the basic objective of the marriage that is chastity. The Qur'an has called the marriage as "*Hisan*" or "*Mohsanat*", which means both men and women, enter in the fort of chastity. Quran says:

"Wed them with the permission of their owners and give them their dowers, according to what is reasonable: they should be chaste, not fornicators, nor taking paramours" (*Al Nisa* 25)

"(it is lawful for you) to have the virtuous women of the believers and virtuous women of those were given scripture before you, when you give them in wedlock, with honours, not in debauchery, or free love" (*Al-Maidah* 5)

So if we look in depth of the meaning of these verses of the Holy Qur'an, we understand that the most important objective of the marriage is chastity and to keep the men and women away from adultery. Chastity is the purpose of marriage, for which we

³⁵ Hamilton's *Hedaya*, English translation, 213

³⁶ Mowdoudi, *Haqooq Ul-Zojain*, 140

³⁷ Sabiha Hussain, *Muslim Womens Rights*

³⁸ Mowdoudi, *Haqooq Ul-Zojain*, 110

³⁹ Ibid,

can sacrifice other objectives of marriage, but for any other objective we can never sacrifice the objective of chastity⁴⁰. If in a marriage relation a stage reaches, where it is felt that the limits of God (chastity) can be violated then it will seem better to finish such a relation of the spouses instead of violating the limits of God.

The Holy Prophet (P.B.U.H) also confirmed this purpose of marriage by saying:

“O, you young men, whoever is able to marry, should marry for that will help him to lower his gage and guard his modesty”

In another Hadith, the Holy Prophet (P.B.U.H) said:

“Modesty is part of faith (Iman), that part is achieved when a person enters a marriage contract”.⁴¹

In Maulana Mowdoudi's view, the chastity is the most basic purpose of marriage but the *Hānāfi* law gives all the powers to the husband in the matter of the dissolution of marriage and it gives just misery to a woman. Maulana Mowdoudi was also of the view that *ijtihad* was the only way to provide solution of the problems of Muslim women.⁴²

The second basic objective of marriage is love and affection between the husband and the wife. The holy Qur'an explains as follows:

“And one of His signs is that He made wives of your genoas so that you may seek comfort in them and He inspired love and sympathy between them” (*Surah Room 21*)

The Qur'an further says:

“It was Allah, Who created mankind out of one living soul, and created of that soul a spouse so that he might find comfort and rest in her”(Surah Al Iraf 189)

⁴⁰ Mowdoudi, *Haqooq Ul-Zojain*, 17

⁴¹ Sahih al-Bukhari, *Kitab Ul Nikkah* 2: 5066.

⁴² Mowdoudi, *Haqooq Ul-Zojain*, 110

In another verse, the Qur'an says:

"The wives are like garments to you and you (husbands) are like garments to them" (*Surah Al Bakkara* 187)

In another verse, the Qur'an says:

"Either to retain in the recognized manner or to release in fairness" (*Surah Al Bakkarah* 229)

So from the above verses of the Holy Qur'an, it is clear that Islam does not require just a symbolic relation between the husband and the wife but it wants a true relation based on love, likeness, mercy and kindness. By using words "*garments of each other*" Islam makes it a more solid relation. Dress not only covers the parts of the body, but also makes a person more protected.

If there is no love and affection between the husband and the wife, then this relation is like a dead body. Maulana Mowdoudi criticized the *Hānāfi* Law because if a wife does not love her husband then this law gives her no opportunity to finish such marriage, while a man, if he does not like his wife, has the option of divorce. In *Hānāfi* law, the woman does not have the option of *khul* without the consent of the husband and similarly she does not have any option to untie such relation in the matter of non-maintenance, cruelty, missing husband, or on the basis of hatred.

1.7 REVISED *FATWA* OF MAULANA THANAVI

Maulana Thanavi realized the alarming situation and took the initiative to find a solution. He was greatly supported by Maulana Muhammad Shafi and Maulana Abdul Kareem Gumtoulvey.⁴³ He wrote a large number of letters to the scholars of *Maliki* School of *Islāmic* jurisprudence. Maulana Sayyed Hussain Ahmad Madni also helped

⁴³ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 15

Maulana Thanavi in this purpose. After several years of extensive consultation with *mufītīs* (religious scholars) in India and abroad, Maulana Thanavi published a *fatwā* entitled "*Al-Heela al-Najiza li'l-Hilat Al-'Ajiza*".

Maulana Thanavi gave the *fatwā* from *Maliki* School of *Islāmic* jurisprudence, with the help of many *Hānāfi Mufītīs*. He involved all great *Hānāfi Mufītīs* in this process and got the *fatwā* endorsed by them.⁴⁴ The Maulana first consulted the books of *Maliki* School of *Islāmic* jurisprudence, containing opinion about the dissolution of marriage. Then he got the information from *Maliki* jurists through letters⁴⁵. He expressed very sensitivity and care about the issue and consulted four groups of *Mufītīs*, three in India and one in *Madina*. Maulana Hussain Ahmad, the leading *Mufītī* of Dar-al-Uloom Deoband, extended him great support in getting *fatwā* from *Maliki* scholars. In fact, except the issue of *Maḥkūḍ al Khabar*, on all other issues, he conducted in-depth research in *Madina*⁴⁶. Maulana Hussain Ahmad also helped Maulana Thanavi in correspondence with *Maliki Mufītīs*. All the well known *Hānāfi Mufītīs* not only helped the Maulana but they also endorsed the new *fatwā* based on *Maliki* School of *Islāmic* jurisprudence.⁴⁷ Eleven great *Mufītīs* of Dar-al-Uloom Deoband helped *Maulana* Thanavi and also verified the *fatwā*. Similarly four *Mufītīs* from *Darul Aloom Saharanpur* also verified the new *fatwā*. Maulana Zakria (the leading scholar of *Tableeghy Jamat*) is also included in this list.⁴⁸

In the new *fatwā*, Maulana Thanavi further ruled that apostasy does not annul a Muslim marriage; therefore a wife may obtain a judicial divorce based on *Maliki* School of *Islāmic* jurisprudence. He advised the wives that if they wanted to get rid of their

⁴⁴ Annex ii

⁴⁵ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 34

⁴⁶ Ibid

⁴⁷ Annex iii

⁴⁸ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 34

husbands then first of all they should seek for *khul* from them. If the husbands do not agree, then the women can apply for dissolution of marriage on the basis of *Maliki* School of *Islāmic* jurisprudence.

In 1935, in the case of *Sardar vs Msmt Maryam Bibi*, this new *fatwā* was cited but the court refused to deviate from the *Hānāfi* law.⁴⁹ So the need was felt to amend the law through the legislation. The *Jamiat-Ulema-e-Hind*, one of the political parties of *Ulema* of India, strongly supported the revised *fatwā* of Maulana Thanavi. Qazi Muhammad Ahmad Kazmi, a lawyer and member of the Indian Parliament from Meerut, presented a bill in the parliament for this reform. While presenting the bill in the Assembly, he said:

The reason for proceeding with the bill is the great trouble in which I find women in India today. Their condition is really heartrending, and to stay any longer without the provisions of the bill and allow the males to continue to exercise their rights and to deprive women of their rights given to them by religion would not be justifiable— the rights of women should not be jeopardized simply because they are not represented in this house. I know, sir that the demand from educated Muslim women is becoming more and more insistent, that their rights be conceded to them according to *Islāmic* law. I think a Muslim woman must be given full liberty, full right to exercise her choice in matrimonial matters⁵⁰.

After long debates and several rounds of discussion, the bill was finally passed with the title of “Dissolution of Muslim Marriages Act, 1939”.⁵¹ The Act provided that the apostasy of a Muslim wife did not annul the marriage contract, and it allowed all grounds admitted in *Maliki* School of *Islāmic* jurisprudence for the dissolution of

⁴⁹ *Sardar vs Msmt Maryam Bibi*, 1935 Jullandhar, vide AIR 1936, 666.

⁵⁰ Legislative Assembly debate 1939:616

⁵¹ Annex iv

marriage. The Act also provided that the women can take decree from the court for dissolving marriage on the following grounds:

1. If the husband is missing
2. If the husband is not providing maintenance.
3. If the husband is sentenced to imprisonment.
4. The husband fails to perform marital obligation
5. If the husband is impotent or having other physical defects
6. If the husband treats the wife with cruelty

The Dissolution of Muslim Marriages Act, 1939 provided the Muslim women a chance to get decree of dissolution from the court, without renunciation of Islam. However, some religious scholars showed their dissatisfaction over the bill. The *Ulama* felt that the Dissolution of Muslim Marriages Act, 1939 was not representing the original recommendation.⁵² Secondly this Act was valid for all the Muslims of India, including *Sunnīs* and *Shias*. The *Jamiat-Ulema-e-Hind* blamed the member of Muslim League legislature for modifying such un-*Islāmic* modification⁵³. Maulana Thanavi also showed his displeasure over such un-*Islāmic* tempering⁵⁴. The Maulana Thanavi further ruled that if there was no Muslim judge or Muslim court, then according to *Hānāfi* law there would be no dissolution of marriage (*faskh*). Some of the members of legislature reacted to the objection. Mr J.A Throne (a nominated member of the Government of India) pointed out that

⁵² Sabiha Hussain, *Muslim Womens Rights*, 37

⁵³ Ibid,

⁵⁴ Ibid,

“The difficulty of implementation of this clause will arise in those provinces where the number of Muslim judges in particular and Muslims in general was small”.⁵⁵

1.8 TWO BASIC REASONS FOR THE REVISED *FATWA*

Maulana Ashraf Ali Thanavi mentioned two reasons in the beginning of the *fatwā* that why the need was felt to consult *Maliki* School of *Islāmic* jurisprudence.

The first reason was to provide women some kind of remedy regarding the dissolution of marriage through court, without renouncing Islam and at the same time to show that *Islāmic* law has all the solutions regarding woman’s right of separation.⁵⁶

Another reason, which forced the *Hānāfi* jurists to take *fatwā* from *Maliki* school, that there was illiteracy and ignorance of *Islāmic* knowledge among the general public. Most of the common people adopted those laws regarding the dissolution, which were even not present in the *Maliki* School of *Islāmic* jurisprudence. It was necessary to show the people the real picture of *Maliki* School of *Islāmic* jurisprudence⁵⁷.

1.9 CONDITIONS FOR CONSULTING OTHER SCHOOL OF *ISLAMIC* JURISPRUDENCE

Maulana Thanavi also debated the point that the follower of one school of *Islāmic* jurisprudence could follow the saying of other school of *Islāmic* jurisprudence.

CONDITION NO.01

Maulana Thanavi was of the opinion that, when the follower of one school of *Islāmic* jurisprudence could follow the law and saying of the other school of *Islāmic*

⁵⁵ Ibid,38

⁵⁶ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*,28

⁵⁷ Ibid,30

jurisprudence, as it was the need of the time. But some of the religious scholars rejected the idea on the plea that *ijtihad* could not be done as it was valid up to the fourth century *Hijry* only.⁵⁸ Some *Hānāfi* Ulema claimed that the follower of one school of thought can never follow the other school of thought. According to them, the victim wives have not any solution except *Talaq Tafvid* (In the *Hānāfi* law, a man can stipulate his right of divorce to his wife at the time of Nikkah). These jurists argued that the *Hānāfi* law gives the woman an advantage to have the right of *Talaq Tafvid* at the time of Nikah.

However, Maulana Thanavi insisted that in case of need the law of other schools of *Islāmic* jurisprudence could be followed.⁵⁹ According to the *Hānāfi* School of *Islāmic* jurisprudence, only in the utmost necessity a *fatwā* can be taken from the other school of *Islāmic* jurisprudence⁶⁰. But this utmost necessity does not mean the necessity of single person but it should be the necessity of the whole Umma (nation).

Secondly, the way the Muslim women were renouncing Islam and Christian missionaries were working in this regard; there was a threat that if this law is not modified then a time will come when most of the Muslim women will convert to Christianity.

CONDITION NO.02

The second condition is that the common person cannot take the *fatwā* from other school of *Islāmic* jurisprudence, only the *Mufītīs* (qualified religious scholars) can do this work.

⁵⁸ Ibid,68

⁵⁹ Ibid,69

⁶⁰ Ibid,37

CONDITION NO.03

The third condition, which is necessary according to *Ulema* for acting on the other school *Islāmic* Jurisprudence, is *Tālfeeq*⁶¹. According to *Ulema*, instead taking different things from different schools of *Islāmic* jurisprudence, one has to be restricted to one school on a single issue⁶². For example if we are taking the opinion of Imam *Malik* then we must have to follow him fully on that particular issue. For example in case of a lost or missing person, if we solve this issue according to the *Maliki* School then all its parts regarding the missing person should be applied. We cannot apply the one part and leave the other. So these were some conditions which are necessary for taking the opinion from other schools of *Islāmic* jurisprudence.

1.11 CONCLUSION

Looking at the DMMA, 1939, it is observed that it was a remarkable achievement by the *Hānāfi* jurists. That legislation was necessary to protect the women from the existing social and customary practices due to which their life had become miserable. This document also showed that all the rights of women are present in the *Islāmic* law. The main credit goes to *Maulana* Ashraf Ali Thanavi, who did great work for providing relief to women. We should not forget those *Muftīs* and religious scholars, who helped Ashraf Ali Thanavi in this work. This document also finished the myths that the follower of one school of *Islāmic* jurisprudence must have to follow that particular school of thought in every issue. It showed that when needed then the *Islāmic* law-makers can take *fatwā* from other schools of *Islāmic* jurisprudence. The other advantage of DMMA, 1939 was that it stopped many Muslim women to renounce Islam and in this way saved their

⁶¹ Ibid

⁶² Ibid,38

faith (*iman*). The DMMA, 1939 also discouraged the Christian missionaries, who were working for Christianity and for the purpose were motivating the Muslim women to adopt Christianity just to dissolve their marriage.

CHAPTER-2

ANALYSIS OF DISSOLUTION

OF

MUSLIM MARRIAGES ACT, 1939

2.1 INTRODUCTION

The Dissolution of Muslim Marriages Act (DMMA) was adopted in 1939, in order to grant Muslim women the right of separation according to the *Māliki* School of thought. In this chapter we will closely examine all the articles of DMMA, 1939 and will compare it with the *Maliki* School of *Islāmic* jurisprudence. We will finally come up with the conclusion whether the DMMA, 1939 represents the *Māliki* School of *Islāmic* jurisprudence or it is diverged from the real intention of *Māliki* School of *Islāmic* jurisprudence.

Those articles of DMMA, 1939, will be examined which do not represent the real intention of *Māliki* School of *Islāmic* jurisprudence.

2.2 MISSING HUSBAND (MAFQOOD AL-KHABAR)

The word “*Māfqood*” in it’s literally sense means lost and sought after. In the language of law it signifies a person, who disappears and of whom it is not known whether he is living or dead or where he resides⁶³.

Section 2(i) of DMMA, 1939, states that a married Muslim woman shall be entitled to obtain a decree from the court if the whereabouts of her husband have not been known for a period of four years.

The period of four years is based on the doctrine of the *Maliki* School of *Islāmic* jurisprudence relating to the missing husband. When a wife asks the court for judicial separation for the reason that her husband is missing, the court will issue a notice of her

⁶³ Hamilton’s *Hedaya*, English translation, 213

suit to all the heirs of the husband, including his brothers and paternal uncles. Each of these persons will be heard by the court.⁶⁴

If the court passes the decree of *faskh* (dissolution of marriage), it will not be effective for a period of six months and if during this period, the husband comes back and he satisfies the court about performing his conjugal duties, the court shall set aside the decree.⁶⁵

(i) If the husband is not found during the period of six months, then marriage will stand dissolved from the date of the decree.

(ii) If the husband is traced but does not come back at the expiry of said six months, the decree will take effect. Unless, it is submitted, the wife applies to the court for its cancellation.

(iii) If the husband returns but fails to satisfy the court of his willingness to perform conjugal duties, effect may still be given to the decree on the application of the wife.⁶⁶

According the *Hānāfi* School of thought, the wife of the "*Māfquod*" (missing husband) cannot get separation until the people of the same age of her husband are live⁶⁷. So, according to *Ahnaf*, the period is approximately eighty to twenty one years.⁶⁸ Therefore in reality, she can never contract a second marriage. But in some situation, the judge or *qādi* can issue the decree of dissolution without any delay. For example, if somebody goes to battle and does not come back. Similarly, if somebody goes on a sea

⁶⁴ Tahir Mahmood, *The Muslim Law of India* (Allahbad: The Law Book Company, 1982), 99

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Hamilton's *Hedaya*, English translation, 213

⁶⁸ Mowdoudi, *Haqooq Ul-Zojain*, 140

voyage and never returns to the beach⁶⁹. Other than these conditions, the *Hānāfi law* does not give any ground for separation till the period of same age group persons are alive.

According to Imam *Mālik*, in case of *Māfquod al Khabar* or a missing person, the wife has to wait for four years, after which she may approach the court to get the decree of dissolution of marriage and can go for second marriage⁷⁰.

Ashraf Ali Thanavi in his *fātwā* "*Al-Helal-Najiza lil-Helatil Ajiza*" highlighted the *Māliki* point of view about the missing person. He says, "It is a unanimous decision that the wife of a missing husband can only be restricted for four years if she can lead or observe that time with chastity and can observe the limits of God (*Hudood of Allah*)".⁷¹ According to *Māliki* School of *Islāmic* jurisprudence, the period of four years can be reduced to one year if there is fear that she may involve in illicit relations or cannot observe the limits of God⁷². In most of the *fātwā*, the *Hānāfi* jurists mentioned that if a husband is missing and the woman does not have maintenance then only one month is enough. The top *Hānāfi* jurist held the same opinion, in their *fātwā* by saying that this limit could be reduce to one year.

ANALYSIS

The Dissolution of Muslim Marriages Act, 1939 says that the women will have to wait for four years for the decree of separation so it does not fully represent the *Maliki* School of thought. It also shows that only one part of the *Maliki* law has been

⁶⁹ Tanzeel ur rahman, *Majmoua Qawaneen Islam*, 677

⁷⁰ Ibid

⁷¹ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 290

⁷² Ibid

picked up and the second one is not included. Maulana Thanavi when discussed *tālfeeq*, he clearly mentioned that when we are taking the opinion of any school of *Islāmic* jurisprudence, it is necessary to implement all parts of that opinion on the particular issue.

We can see this point of view of reducing period to one year based on *Maliki* School, is also considered by great *Hānāfi Muftīs* in their *fatwās* about the missing husband. For example in *Fatwā Usmani*, Maulana Taqi Usmani also gave the following verdict:⁷³

“Period of four years can be reduced to one year if there is a fear that the woman cannot lead that period with chastity or cannot observe the limits of God”.⁷⁴

In *Fatwā Usmany* it is clearly mentioned that

If the husband is missing for minimum one year, and it is threat that the woman cannot observe that period with chastity then without any delay *qādī* could dissolve such marriage.⁷⁵

Similarly in *Ahsan ul Fatwā*, *Muftī* Rasheed Ahmad has the same opinion about the missing husband⁷⁶. It is clear that the *Hānāfi Muftīs* based their *fatwās* on the true doctrine of *Maliki* School of *Islāmic* jurisprudence. So the DMMA, 1939 should be amended on the true doctrine of *Maliki* thought.

⁷³ Annex v

⁷⁴ *Fatwā Usmani*, *fatwā* number 1043/2:448

⁷⁵ *Ibid*

⁷⁶ *Ahsan al fatwā*, Baab Khiyar al *fāskh*, 5: 422

2.3 NON MAINTENANCE

The maintenance in the language of *Islāmic* law means 'provision of all those things which are necessary to support life, like food, clothing and lodging'. When a woman surrenders herself to her husband then she has right of receiving maintenance from her husband. Now it is obligation of her husband to provide her maintenance.⁷⁷

According to the *Hānāfi* jurists, there cannot be separation on the basis of non-maintenance. The wife will bear expenditure from her own resources or will borrow on behalf of her husband, unless her husband is able to give her maintenance. According to *Ahnaḥ*, non-maintenance can never become a reason for the dissolution of marriage⁷⁸. They say that there is not a single incident in the period of Holy Prophet Muhammad (P.B.U.H) about the dissolution of marriage based on non-maintenance. Some companions of the Prophet were rich and some were very poor. We do not have a single example, where there is separation among the spouses on the basis of non-maintenance. According to *Ahnaḥ*, if a husband is rich and does not provide maintenance to his wife then instead of dissolving the marriage the judge can send the husband to prison or sell his assets to provide the maintenance to the wife. If the husband is poor, then also there cannot be separation among the spouses. The wife should wait for good days.⁷⁹

Maliki jurists agree that if the husband is poor and does not provide maintenance to his wife and if she cannot live in such a situation, then she has the right to ask the judge or *qāḍī* for maintenance or can request the court to allow separation from her spouse. So when a man cannot maintain a wife then it will be better to

⁷⁷ Hamilton's *Hedaya*, 140

⁷⁸ Tanzeel ur rahman, *Majmoua Qawaneen Islam*, 706

⁷⁹ Ibid.

separate her⁸⁰. The followers of Maliki School of *Islāmic* jurisprudence base their opinion on the Qur'anic verse:

"Either to retain in the recognized manner or to release in fairness" (Surah Al Bakarah 229).

So if the husband is not providing maintenance to his wife then it means he is not keeping her in a recognized manner. In such situation, the woman has the right to ask the court for the dissolution of her marriage as there is no other solution. The judge has the entire jurisdiction to untie such marriage.⁸¹

ANALYSIS

Section 2(ii) of DMMA, 1939, states that a married Muslim woman shall be entitled to obtain a decree from the court if the husband ignores or fails to provide her maintenance for a period of two years.

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But if we study the *Maliki* School of *Islāmic* jurisprudence, we find that the two-year period is not a hard and fast rule. According to *Maliki* School of *Islāmic* jurisprudence, if a husband is rich and in spite of this he does not provide maintenance to his wife, the court can grant a decree in the favour of the woman without any delay⁸². Similarly if a husband is poor and does not have maintenance and the court concludes that he has no financial resources, such marriage can also be ended without any delay⁸³. So from this point, we can conclude that it should be added to the law that if a husband is not poor and has sufficient financial resources the court should not allow delay in the dissolution of marriage.⁸⁴

⁸⁰ Ibid, 714

⁸¹ Ibid.

⁸² Ibid

⁸³ Ibid

⁸⁴ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 130

Ashraf Ali Thanavi, in his book “*Al-Helal-Najiza lil-Helatil Ajiza*”, clearly mentioned the point of view of *Maliki* School of *Islāmic* jurisprudence that if a husband does not provide maintenance to his wife then the court can dissolve the marriage without any delay.⁸⁵

By explaining *Maliki* point of view about non-maintenance, *Muftī* Muhammad Taqi Usmani clearly mentioned that in case non-maintenance, there is no need of waiting period⁸⁶. He said that only two conditions are necessary in the matter of non-maintenance.⁸⁷ The first condition is that if a husband does not agree for *khul* and secondly, a woman has not any alternate arrangement of maintenance⁸⁸.

So, we finally conclude that the Article 2(ii) does not represent the complete intention of the *Maliki* School of *Islāmic* jurisprudence. Further according to the rule of *tālfeeq*, when we are taking the opinion of other school of *Islāmic* jurisprudence then all portions of that rule should be included. It should be added in clause 2(ii) that if a husband is not poor and not providing the maintenance the court may dissolve the marriage without any delay and the restriction of two years is not necessary. Similarly if a husband is so poor that he will never be able to provide the maintenance in future, the court should also dissolve such marriage without any delay.

By observing the opinions of Indo-Pak courts, it is found that their decisions are inconsistent and not representing the motives of DMMA, 1939. For example the Sindh High court gave the ruling that:

⁸⁵ Ibid, 293

⁸⁶ *Fatwā Usmani*, fatwā number 1043/2:473

⁸⁷ Annex vi

⁸⁸ *Fatwā Usmani*, fatwā number 1043/2:478

(i) The husband's failure or neglect must have lasted for full two years immediately preceding the wife's suit. Failure for broken periods aggregating to two years will not satisfy the legal requirement.⁸⁹

(ii) The husband's failure for two years or more followed by a period during which maintenance was resumed, will also not satisfy the legal requirement.⁹⁰

So, it means that if a husband does not provide maintenance for one year to his wife, then gives maintenance for one or two months and again stops the maintenance, then the wife will not be entitled to dissolution of marriage on the basis of non-maintenance. The court should also keep in mind the intention of the husband; he may do this just to tease his wife. The objectives of marriage can also be violated with such a decision.

Some of the courts held that the wife, who refuses to live with her husband, cannot claim a *faskh* on account of non-maintenance.⁹¹ In another decision it was held that on living separate from their husbands then the court cannot grant *faskh* on the basis of non-maintenance because she has failed to perform her conjugal duties.⁹² In 1943, the court also decided that if a wife was unfaithful then the court could not grant decree on the basis of non-maintenance.⁹³ This court decision was based on the Muslim legal principle under which disobedience of the wife (*nushuz*) disentitles her to claim maintenance.⁹⁴

On the other hand some court decisions are contradictory to the above mentioned decision. A division bench of the Peshawar High Court in two different

⁸⁹ Satgunj vs Rehmat Ali Murad, AIR 1946 Sind 48.

⁹⁰ Ibid.

⁹¹ Mst Umat-ul-Hafiz vs Talib Hussain, AIR 1945 Lahore. 56 ; Zafar vs Akbari, AIR 1944 Lahore. 336,337

⁹² Umatul Hafiz vs Talib Hussain, AIR 1945 Lahore. 56

⁹³ Khatijian vs Abdullah, AIR 1943 Sind. 65

⁹⁴ Tahir Mahmood, *The Muslim Law of India*, 100

cases held that if the wife applies for the dissolution of marriage on the basis of non-maintenance then her conduct will be irrelevant in granting *faskh* under section 2(ii) of the DMMA, 1939.⁹⁵

The Kerala high court of India also held the decision that a wife can get the decree of *faskh* under section 2(ii) of the Act "on the score that she has not as a fact been maintained, even if there is cause for it".

So, we see that some courts gave more consideration to the act of wife and some gave their decision only on the basis of section 2 (ii) of the Dissolution of Muslim Marriage Act 1939.

Instead of calculating two full years of non-maintenance, the courts should see the intention of the husband. For example in case a husband does not give any maintenance to his wife or does not treat her in a good manner, she leaves her matrimonial home just for survival and start living in her parents home. After some months, when she approaches the court for the dissolution of marriage on the basis of non-maintenance, the husband may take the plea that since she is not living with him so how could he maintain her. So the courts should always consider the intention of the husband instead of considering the absence of the wife from her matrimonial home. Almost all the great religious scholars of the Subcontinent while issuing the *fatwā* clearly mentioned that without any delaying period the court could dissolve the marriage in the case of non-maintenance.⁹⁶

⁹⁵ Said Ahmed vs Sultan Bibi, AIR 1943 pesh. 73, 75

⁹⁶ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 131

2.4 IMPRISONMENT

The Hānāfi jurists do not recognize the dissolution of marriage on the basis of husband's imprisonment⁹⁷.

In the view of Maliki School of *Islāmic* jurisprudence, the wife can ask for the dissolution of marriage if her husband has been imprisoned for three years and for some Maliki jurists if the husband is imprisoned for one year.⁹⁸

ANALYSIS

Section 2(iii) of DMMA, 1939, states that a married Muslim woman shall be entitled to obtain a decree from the court if the husband has been sentenced to imprisonment for a period of seven years or more.

The decree shall only be passed if the sentence has become final. If in the meantime the husband does not provide the maintenance to his wife for a period of two years, she will be entitled to take advantage of clause 2(ii).⁹⁹

As we have seen that in the *Maliki* School of *Islāmic* jurisprudence only a period of three years is a maximum period or one year, if her husband has been sentenced to imprisonment. But in the Dissolution of Muslim Marriages Act, 1939, a woman is bound to wait for minimum seven years for separation. This shows that the 2(iii) is also against the *Maliki* School of *Islāmic* jurisprudence. In the case of missing husband, the *Maliki* School of *Islāmic* jurisprudence has a clear stance that if a woman cannot wait and a threat to the limits of God is there then the period of four years can be

⁹⁷ Jamal, J.Nasir, *The Islāmic Law Of Personal Status* (London: Graham and Trotman), 126.

⁹⁸ Tanzeel ur rahman, *Majmoua Qawaneen*, 702

⁹⁹ C.M.Shafqat, *The Muslim Marriage, Dower and Divorce* (Lahore: The Law Book Company 1955), 117

reduced to one year. On the analogy of this point, we conclude that it should be added that if the woman cannot wait then maximum period should be one year.

2.5 HUSBAND'S FAILURE TO PERFORM MARITAL OBLIGATIONS

Section 2(iv) of DMMA, 1939, states that a married Muslim woman shall be entitled to obtain a decree from the court if the husband has failed to perform, without any reasonable cause, his marital obligation for a period of three years;

The Act does not specify "marital obligation" of the husband. It seems that a wife can file a suit for *faskh* under this provision, if her husband has deserted her for three years, though he has been providing maintenance to her.¹⁰⁰ If desertion for three years is coupled with non-payment of maintenance, a suit may be filed jointly under clauses (ii) and (iv) of section 2. An obligation to live in amity would be a marital obligation, thereby excluding cruelty. Refusal to consummate also falls within the phrase, and that will include an insistence by one spouse, without the consent of the other.¹⁰¹

Maulana Thanavi, by citing the *Maliki* law, clearly mentioned that even if a woman can arrange her maintenance by herself but if there is a threat that she will not be able to observe the chastity or it is threat that the limits of God can be violated then she can approach the court for the dissolution of marriage.¹⁰² The court will force the husband to perform his duties and if he does not act upon it, it can grant *faskh* without any delay and there is no need to ask her to wait for three years.¹⁰³

¹⁰⁰ Tahir Mahmood, *Muslim Law*, 101

¹⁰¹ Shafqat, *Muslim Marriage*, 117

¹⁰² Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 293

¹⁰³ Ibid.

We also examine that in case of *ilaa* the limit of four months is fixed.¹⁰⁴ If the husband does not rejoin his marital relations with his wife, she will be allowed to go for *faskh* (dissolution of marriage). If this is the case, then the question arises that why women are restricted for three years in the DMMA, 1939?

Mowdoudi, the great scholar, debated this topic that if a husband without any reasonable cause abstains from his wife and his purpose is just to punish or tease his wife then the maximum period, which Islam fixes, is four months. For *ilaa*, the oath or swear of a husband is necessary. Without oath or swear the *ilaa* would not be establish. Let's suppose that just to tease the wife, the husband abstains from her for whole life and he does it without swearing. What should be the solution then? For this we will have to see the objectives of marriage which include chastity. We will have to see how long this purpose of marriage can be achieved.¹⁰⁵ So it will be better to lemmatize this period for four months. According to the *Maliki* School of *Islāmic* jurisprudence, irrespective of swearing or not swearing if a man abstains from his wife or abstains from intercourse on the purpose of teasing her, then *ilaa* is established.¹⁰⁶

2.6 HUSBAND HAS BEEN ISNANE, SUFFERING FROM LEPROSY OR VENEREALL DISEASE

According to *Ahnaf*, only the wife of an impotent man can have the decree of dissolution from the court¹⁰⁷. But Imam Muhammad, another great *Hānāfi* jurist, also included an insane husband and a husband suffering from a venereal disease. According

¹⁰⁴ In *illa* the husband swears not to have physical relation with the wife and abstains for four months or more. The husband revokes the oath by resumption of marital life. After the expiry of the period of four months, in *Hānāfi* law the marriage is dissolved without legal law.

¹⁰⁵ Mowdoudi, *Haqooq al Zojain*, 37

¹⁰⁶ Ibid

¹⁰⁷ J.j nasir, *Muslim law*, 114.

to Imam Muhammad, these problems can create hatred between the spouses, which can ultimately be a hurdle in their physical relations¹⁰⁸. But according to Imam Abu Hānāfi, insanity or venereal disease does not lead to the dissolution of marriage¹⁰⁹.

The Maliki jurists hold the opinion that a woman can have the decree from the court for the dissolution of marriage on the basis of leprosy, insanity, impotency, and venereal disease¹¹⁰. Imam *Malik* included four problems in a husband, which grants her the right of dissolution of marriage. This list includes impotency, leprosy and virulent venereal disease.

ANALYSIS

Section 2(vi) of DMMA, 1939 states that married Muslim women will be entitled to obtain a decree from the court if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

It should also be added that if any defect in husband which is curable, then court should give one year period for the treatment and if the defect in husband is incurable then the marriage should be finished without any delay.

The DMMA, 1939 does not define insanity. The insanity is also known as *junoon* in Arabic. There are two kinds of insanity.¹¹¹ One is called incurable insanity (*junoon Mutabbaq*) and the second is curable insanity (*junoon Hadis*). *Junoon Mutabbaq* is such kind of insanity or *junoon* in which insanity is not curable, means the person suffering from it remains in this condition permanently and no chance of improvement is there. On the other hand *junoon Hadis* is such kind of *junoon* which is

¹⁰⁸ Ibid

¹⁰⁹ Tanzeel ur rahman, *Majmoua Qawaneen*, 702

¹¹⁰ Jj nasir, *Muslim law*, 120.

¹¹¹ Ibid, 123

curable¹¹². For the two categories of *junoon*, there are different rules in *Maliki* law. If a husband is suffering with such kind of *junoon* which is *Mutabbaq* and he might harm the wife during this situation then there is no need to give any time for the dissolution of marriage, the court can dissolve the marriage without delay. But if there is *junoon Hadis* then the court should allow one year period for treatment.¹¹³ But in DMMA, 1939 the condition of two years is kept, which is against the *Maliki* School of *Islāmic* jurisprudence as well as against the spirit of the *Sharī'ah*. Because in *Maliki* law there are only two conditions, if there is *junoon Hadis* then one year time is fixed for treatment and for *junoon Mutabak* there is no need of waiting period, so clearly DMMA, 1939 is deviated from the *Maliki* school of thought.

2.7 DECREE WILL BE VALID AFTER SIX MONTH

Section 2(ix) of DMMA, 1939, states that a decree passed on ground mentioned earlier shall not take effect before a period of six months, from the date of court verdict, and if the husband either in person or through his authorized agent satisfies the court within this period that he is prepared to perform his conjugal duties, the court shall set aside the decree.

Literally, the word *iddah* means counting or enumeration. *Iddah* technically means a waiting period which has to be observed by the woman after the dissolution of marriage. After dissolution of marriage she must have to observe this period¹¹⁴. According to Imam Abu *Hanifa*, a menstruating woman, whose marriage has been dissolved, after the consummation must have to observe *iddah*, which is three menstruation periods¹¹⁵. According to Imam *Shafie* and Imam *Malik*, the waiting period

¹¹² Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 95

¹¹³ Ibid, 96

¹¹⁴ Mansory, *Family Law*, 95

¹¹⁵ Ibid, 183

for such woman is three cleaning periods.¹¹⁶ In the case of non-menstruation, the waiting period or *iddah* is three months. In the case of a widow, the waiting period of *iddah* is prescribed as four months and ten days. Similarly, the *iddah* for a pregnant woman will be terminated with the delivery of the baby.

Muftī Muhammad Taqi Usmani in all *fatwās* regarding the dissolution of marriage, in his book *Fatwā Usmani*, clearly mentioned that after the decree of dissolution or after divorce, the woman needs to perform *iddah* which is stated in *Islāmic* law. So, it is needed to make this section of DMMA, 1939 more according to *Islāmic* law.

2.8 CONCLUSION

We come to the conclusion that it was a great effort by the *Hānāfi* jurists. The basic relief assured to the Muslim women of India was that they could untie the marital relation without renunciation of Islam. However, on a close examination we find a number of lapses in the DMMA, 1939, which are against the *Maliki* School of *Islāmic* jurisprudence. If we amend the DMMA, 1939 according to the doctrine and intention of *Maliki* School of thought, it will provide more reliefs to the women. We should also congratulate the *Hānāfi* jurist, who gave the *fatwā* keeping in view the true doctrine of *Maliki* School of *Islāmic* jurisprudence after the adaptation of Dissolution of Marriage Act, 1939.

¹¹⁶ Ibid, 183

Chapter-3

IMPROVING ABOUT DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

3.1 INTRODUCTION

In the last chapter, we will examine those articles of the Dissolution of Muslim Marriages Act, 1939, which are against the *Maliki* School of *Islāmic* jurisprudence. We will analyze the *fatwās* of *Hānāfi* and non-*Hānāfi* jurists of the Subcontinent that whether they represent the real intention of the *Mailki* School of *Islāmic* jurisprudence or not. We will also see whether the *fatwās* have given more rights to the women or the Dissolution of Muslim marriage Act, 1939.

3.2 TAQLEED AND HANAFI JURISTS

We should keep in mind that the *Hānāfi* jurists have always stressed on following the single school of *Islāmic* jurisprudence on each and every issue. They also stressed that the follower of one school of *Islāmic* jurisprudence can never follow the other one. They also stressed that the follower of Imam Abu *Hanifa* can never take the *fatwā* from the other school of *Islāmic* jurisprudence.

We should also keep in mind that both the *Barelawi* and *Deobandi* schools of thought were strict to follow the *Hānāfi* School of *Islāmic* jurisprudence.¹¹⁷ Maulana Qasim Nanotway, one of the great scholars of *Deoband*, justified the necessity to follow only one school of *Islāmic* jurisprudence as follows:

Now coming to the question of Taqlid, no doubt Islam is one religion and all the four schools of Islam are one religion and all the four schools of law are on the right path. Nevertheless, as the art of medicine in Greek tradition or in modern allopathic medicine is one and all the doctors have the capability and authority to treat, yet at times when there is a difference of opinion among the doctors in diagnosis, one follows only one doctor who is treating the patient at that time. Only his advice is followed and no

¹¹⁷ Masoud, *Iqbal reconstruction of ijtiḥad*, 156

attention is paid to other doctors. Similarly in case of difference of opinion among the various jurists or Mujtahids, it is necessary that only one Imam or Mujtahid be followed in all cases¹¹⁸

So it was clear that the *Hānāfi* jurists were never ready to leave *Taqlid* of *Hānāfi* School of *Islāmic* jurisprudence on a single issue. On the other hand, Sir Sayyed Ahmad Khan and Allama Muhammad Iqbal, were in favour of considering other schools of *Islāmic* jurisprudence. They also criticized the *Ulema* and *muftīs* for following the one specific school of *Islāmic* law.

Sir Sayyed Ahmad Khan (Non-*Hānāfi* Scholar), in one of his letters to Mahdi Ali Khan, says:

I say it very clearly that if people do not abandon *Taqlid*, do not follow the only light in Quran and Sunnah, and do not face the challenges of modern science to religion, Islam will disappear from the Subcontinent.¹¹⁹

This statement almost came true when the Muslim women started renouncing Islam just because of the *Hānāfi* opinion regarding the dissolution of marriage.

Here we should congratulate those *Hānāfi* scholars, especially *Maulana* Ashraf Ali Thanavi, who had taken great steps in this regard by not only providing the Muslim women a right to separate but also showing the light to other Muslim jurists that *taqlid* can be abandoned at the time of utmost necessity.

3.3 DECISION OF THE SUPERIOR COURTS

Normally it has been observed that in India and Pakistan, legislative assembly and higher courts adopted those laws regarding the women, which did not represent the

¹¹⁸ Ibid,62

¹¹⁹ Ibid,63

intention of *Shari'ah* but were too liberal in favour of the women. The best example is 1961 Muslim Family Law Ordinance, which insured more rights to woman though the *Ulema* rejected that law. Maulana Ahtashm ul Haq Thanavi, the only religious scholar in the committee, which framed the Muslim Family Law Ordinance 1961, disagreed to almost all the proposed sections of the law. Similarly in 1959, the Lahore High Court of Pakistan provided the women the right of *khul* without the consent of the husbands¹²⁰. The right of *khul* was further strengthened by the Supreme Court of Pakistan in 1967¹²¹. It is noticeable that these were historic decisions, which gave true and real right to the women of Pakistan regarding the dissolution of marriage. In both the cases, the wives were demanding *khul* while the husbands were asking for the restitution of conjugal right. The real issue was that whether the courts have jurisdiction to separate the spouses without the consent of the husband. It is also a fact that all the four *Sunni* Schools of *Islāmic* jurisprudence do not allow *khul* without the consent of husband. According to them, *khul* can only happen if the husband agrees to do so and without his consent, the courts do not have any jurisdiction to separate the spouses. The courts gave the following decision in both the cases:¹²²

That the wife may go wrong if dissolution is not ordered, is rather a reason for grant of dissolution for Islam prefers divorce to adultery.

The answer to the question referred is that the wife is entitled to dissolution of marriage on restoration of what she received in consideration of marriage if the judge apprehends that parties will not observe the limits of God.

¹²⁰ Balqis Fatima vs Najmul Ikram PLD 1959 Lahore-566

¹²¹ Khurshid Bibi vs Muhammad Amin PLD 1967 SC-92

¹²² Balqis Fatima vs Najmul Ikram PLD 1959 Lahore-566

Though *Ulema* also opposed the decision and even today leading scholars do not agree with this judgment of the Supreme Court of Pakistan. Maulana Muhammad Taqi Usmany, a leading *Hānāfi* jurist, strongly criticized these decisions of the superior courts in his article '*Reality of khul in Islam*'. He was of the opinion that without the consent of the husband, *khul* can never be granted by the court. He opined that *khul* is divorce not *faskh*.

If we look at the history of the courts before these two decisions, we find that the courts in the Subcontinent never allowed *khul* on the basis of hatred. The courts strictly followed the *Hānāfi* School, according to which *khul* cannot be granted without the consent of the husband. In the case of *Umer Bibi vs Muhammad Din*, Justice Abdul Rahman and Justice Honse said that it is not acceptable for the court to allow *khul* without the consent of the husband. The court also said that only on the basis of hatred and dislikeness, it cannot dissolve the marriage¹²³. Similarly in the case of *Saeeda Khanim vs Muhammad Sami*, the Lahore High Court said that incompatibility of temperament disliking and wife's hatred toward her husband can never lead to the dissolution of marriage in the *Islāmic* law. The court also concluded that for *khul* the consent of the husband is necessary¹²⁴.

Such kind of decisions caused severe problems for the women of Subcontinent, regarding their rights. Most of the feminists started to say that in the *Islāmic* law, the women are subordinated and do not have the right of separation. So the Lahore high court in 1959 provided the women the real right of *khul*. After these two decisions of the higher courts, the lower courts also started granting *khul* to the wives without the

¹²³ *Umer Bibi vs Muhammad Din* AIR 1945 Lahore 51

¹²⁴ *Saeeda Khanim vs Muhammad Sami* PLD 1952, Lahore 113

consent of husbands. So, since 1959 the lower courts of Pakistan have been providing the rights of *khul* to the Muslim women without the consent of the husband.

The same situation is in India. The best example from the Indian judicial history is the Shah Bano case, in which the appellant was a lawyer, who married to Shah Bano in 1932. In 1975, the appellant drove the wife out of the matrimonial home. Shah Bano filed a petition against her husband for maintenance under Section 125 of the Code of Criminal Procedure. The magistrate asked the husband for the maintenance at the rate of Rs 500 per month. On November 6, 1978, the appellant divorced his wife. Since the husband was a lawyer he knew that according to the *Islāmic* law he would be responsible for maintenance till the period of *iddah*. He took the defence that he had divorced his wife and according to the *Islāmic* law, he had not further obligation to provide maintenance to her. Before citing the decision of the Supreme Court of India, it would be better to know about Section 125 of the Code of Criminal Procedure.

Section 125 says that if any person, having sufficient means, neglects or refuses to maintain his wife, unable to maintain herself, a Magistrate of the first class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife at such monthly rate not exceeding five hundred rupees in the whole. Under explanation word “wife” Article 125 says that a woman, who has been divorced by, or has obtained a divorce from her husband and has not remarried.

The husband took the plea that the Section 125 could not be implemented on the Muslim man because the *Islāmic* Law did not recognize the maintenance after the divorce. The Supreme Court of India held the decision that Section 125 is truly secular in character and is implemented on all the citizens of India, whether they are Muslim,

Christian or Hindu. This decision of the Supreme Court was strongly criticized by the Muslim jurists of India¹²⁵.

So we find that Pakistan's legislature and the Supreme Court gave more liberal decision and on the other hand all the great religious scholars opposed these decisions on the basis of *sharī'ah*. But in the DMMA, 1939, we find a reverse situation. The *fatwās* of the religious jurists regarding *faskh* were not only providing woman more rights but also were representing the real intention of *Maliki* School of *Islāmic* jurisprudence. On the other hand, the courts restricted themselves just to the wording of the Dissolution of Muslim Marriage Act, 1939.

3.4 MALIKI OPINION AND *HANAFI* JURISTS

The Dissolution of Muslim Marriage Act, 1939 was a great achievement of the great *Mufīīs* of *Hānāfi* School of *Islāmic* jurisprudence. Though, it was modified from the original recommendation of the *Mufīīs* of India. We also notice that after the implementation of Dissolution of Muslim Marriages Act, 1939, not only the *Hānāfi* scholars but also the non-*Hānāfi* jurists also gave their *fatwās* on the true doctrine of *Maliki* School of *Islāmic* jurisprudence. Before this *fatwā*, the *Hānāfi* jurists always gave *fatwās* on the basis of the *Hānāfi* School of *Islāmic* jurisprudence. In *Fatwā Darul Aloom Deoband*, it is clearly mentioned that on the basis of non-maintenance, there cannot be any separation among the spouses¹²⁶. The *fatwā* further narrates that if a husband does not provide maintenance to his wife then the husband should divorce her, but she does not have any right of separation.

¹²⁵ Ahmed Khan v Shah Bano RD-SC 99 1985

¹²⁶ *Fatwā Darul Aloom Deo Bund* kitab ul talaq9:35

After the revised *fatwā* of Maulana Thanavi, all the great scholars of the Subcontinent gave their *fatwās* on the true intention of *Maliki* School of *Islāmic* jurisprudence. If we go through *Imdad Ul Fatwā*, *Ahsan Ul Ffatwā* or *Fatwā Usmany*, we find that all the *fatwās* were based on the real intention of *Maliki* School. On the other hand, the Dissolution of Muslim Marriages Act, 1939 does not represent the real intention of *Maliki* School.

Another great thing is that it is the only document in the history of Subcontinent, which was taken from an *Islāmic* School other than that of *Hānāfi* School. But unluckily after this document, the *Hānāfi* jurists never considered other matters to solve in the light of other schools of *Islāmic* jurisprudence.

When we observe the *fatwā* of *Hānāfi* jurists after adopting the Dissolution of Muslim Marriages Act, 1939, we find that all the great *Hānāfi* jurists strictly followed the *Maliki* law regarding the dissolution of marriage, not only they followed *Maliki* opinion but they also strictly followed its clear intention.

For example in the case of missing husband (*Maḥkūḍ ul khabar*), the *Fatwā Usmany* clearly described the intention of the *Maliki* School. It clearly described that the four-year limit can only be applied if it is sure that the woman can observe this period with chastity. If the woman cannot observe the limit of four years with chastity then it should be relaxed to one year. Similarly if the woman can observe the limit with chastity but she does not have any maintenance, then the judge can terminate the marriage even after one month. Following are some *fatawas* of *Hānāfi* jurists :

Question: A woman has lost her husband for four years. The family migrated from Bangladesh to Karachi. The Government kept the family in a camp. During their stay in camp, she lost her husband.

Whole family tried to find the missing husband but in vain. The wife is living in miserable condition. Can she do second marriage?

Answer: The wife has the right to consult the court of a Muslim judge. In the court, firstly she will have to prove her marriage with the missing husband. Then through witness, she will have to prove that her husband has lost. Then the court will also search and investigate about the missing husband. After the search if the court did not find the missing husband then court will ask the woman to wait for further four years. During these four years, if the husband is not found then the wife will have to again consult the court for dissolution of marriage. The court will dissolve the marriage by considering the missing husband as dead. The wife then has to observe iddah of four months and ten days. This all detail will be valid only if woman can observe this period with chastity. But if there is threat that the limits of God can be violated or woman cannot observe this period with chastity then the limits of four years could be reduced to one year¹²⁷.

In another *fatwā* it is further elaborated.

Question: My daughter was married with a person named Muhammad Payaray Jan, on Aug 31, 1976 in Rawalpindi. Muhammad Payaray Jan was working in Dubai. After two months of the marriage Muhammad Pyaray Jan went to Dubai. For the last ten years, the whereabouts of Muhammad Pyaray Jan are not known. For the last ten years, he did not make any contact with anybody. We also contacted to his family, but they also do not know about Muhammad Payaray Jan. He never wrote a single letter and did not send any maintenance to his wife. I am a widow woman. My daughter is young. I am worried about my daughter. Please guide me the solution of this problem. Can I make the second marriage of my daughter?

Answer: It is better for the wife to continue the search for her husband. But if she thinks that she cannot bear or she cannot live without the husband, or she does not have maintenance or she is afraid that the she could not be able to observe the chastity, then she is allowed to consult the court. The court then dissolves the marriage on the basis of non-maintenance. After consulting the court the wife first will have to prove her marriage with Muhammad Payaray Jan. After this she will have to prove that her husband is

¹²⁷ *Fatwā Usmany*, Kitab al-talaq, 2: 448

lost. Then court will investigate about the missing husband. After this the court will ask the woman to wait for four years. If the missing person is not found during these four years then the court will consider the missing person as dead. After this the wife will have to observe iddah of four months and ten days. After the iddah the woman is free to do second marriage with any one. If the wife thinks that she cannot wait for four years, because she has already waited for ten years, or if there is a threat that the woman is young and cannot wait for four years and the limits of God can be violated then this limit of four years can be reduced to one year. After one year she will have to observe iddah, after which she has the opportunity to do the second marriage.

In another *fatwā*

Question: Mumtaz Bibi married to a person eleven years ago. In these eleven years, she hardly spent one year in her matrimonial home. Mumtaz Bibi's husband was requested to give maintenance to her or divorce her. But he is not willing to make any solution. Neither he is maintaining her nor willing to divorce her. Mumtaz Bibi is very worried about this situation. What is the solution of this issue in the *Islāmic* law?

Answer: First of all Mumtaz Bibi should try to have divorce from her husband. If the husband does not agree then she should seek for khul. If he does not agree for khul then she has all the options to take the matter to the Muslim judge for the dissolution of her marriage. The judge will ask the husband to maintain his wife or to divorce her. If he does not accept any option then the court has the entire jurisdiction to dissolve such marriage. After the dissolution of marriage she will have to observe iddah, after which she can make her second marriage.

In *Fatwā Usmany*, when one of the *Maulana* of Kashmir asked about the waiting period of non-maintenance, Maulana Taqi Usmany replied:

The woman has been given the right of the separation on the basis of non-maintenance. This right is given in the Maliki School of *Islāmic* jurisprudence. There are two conditions only: One is that the husband does not agree for khul and the other is that the woman has not any other arrangement regarding

maintenance. According to the Maliki School, on the basis of non-maintenance there is no need for any specific period.¹²⁸

Similarly in *Ahsan ul Fatwā*, it is clearly mentioned that if the husband does not provide maintenance and the woman also does not have any other source of maintenance then she can get separation based on the *Maliki* School of *Islāmic* jurisprudence. The wife should consult the court, which if thinks that the wife is saying truth then it should give one-month period to the husband for maintenance, if he does not provide maintenance in one month then the court should dissolve the marriage without any delay¹²⁹

Question: If a man does not provide maintenance to her wife, has driven her out of the matrimonial home and is also not willing to divorce her, then what is the solution in the *Islāmic* law regarding such situation.

Answer: In such situation, the wife should seek for khul. She should request the husband for khul. If the husband does not agree for khul and the wife does not have any source of income or maintenance then in such situation the wife has been given the relaxation to act upon the Maliki School of *Islāmic* jurisprudence. She should consult the court on the basis that her husband does not provide her maintenance. Then the Muslim Judge will investigate her claim. If the court finds that the wife is right and her claim is true then it will ask the husband to perform his conjugal duties and to provide maintenance. If the husband does not agree then the court has to ask him for divorce. If the husband neither agree for divorce nor for maintenance, then the court should dissolve such marriage without any delay.

Fatwā Usmany also holds the same opinion that such marriage should be dissolved without any delay. Similarly we closely look at *Fatwā of AHal-e-Hades*, we

¹²⁸ Ibid, 473

¹²⁹ *Ahsan- Ul-fatwā*, Babe khayar-e-*fāskh*, 2: 413

find the same situation. In *Fatwā Sanya*, same opinion is found in the case of missing husband or no maintenance.¹³⁰ In the *Fatwā Sanya* it is clearly mentioned that:

There are a number of cases in which the women cannot lead the four years with chastity. So it is requested to Ulema and *Muftīs* that they should reconsider this matter of four years. As far as the wives are concerned there are only two situations, to live with them with love and care or leave them in a good manner. A husband can never harm the wife. So if a husband is missing then her situation is like a suspended thing. So in such situation, she receives two harms, one economically and secondly physical because of her physical needs. So in such situation she does not need any specific period to wait.¹³¹

So it is clear that not only the *Hānāfi* jurists but also the non *Hānāfi* jurists also based their *fatwās* on the true doctrine of *Maliki* School of *Islāmic* jurisprudence. They criticized the fixing of specific period, when the husband is missing or is not giving maintenance or is abstaining from her wife just to tease or harm her.¹³²

Similarly in the *Majmoua Fatwā* , on describing the dissolution of marriage on the basis of the insanity of husband, it is clearly mentioned that:¹³³

In case of insanity we should see whether it is curable or incurable. In the case of non-curable insanity (*junoon muttabakk*), there is no need to give any time. In such situation, the court should dissolve the marriage without any delay.¹³⁴

So it is clear that many top *Hānāfi* and non-*Hānāfi* jurists of subcontinent followed the ruling of Imam *Maliki* after the revised *fatwā* of Maulana Ashraf Ali Thanavi, which was based on the *Maliki* School of *Islāmic* jurisprudence.

¹³⁰ Annex vii

¹³¹ *Fatwā Sania*, Kitub Un Nikkah, 2:266

¹³² Ibid

¹³³ Annex viii

¹³⁴ *Majmoua-Ul-fatwā*, Babul fareeq, 2:88

But on the other side, the courts just followed the wording of the Dissolution of Muslim Marriages Act, 1939.¹³⁵ The courts never tried to understand the intention of the *Maliki* School of *Islāmic* jurisprudence. They just assumed that the DMMA, 1939 was the real representation of the *Maliki* School of *Islāmic* jurisprudence.

So we finally come up that it was a great effort of the *Hānāfi* jurists but now the time has come that the DMMA, 1939 should be modified and made according to the real intention of the *Maliki* school of *Islāmic* jurisprudence.

Finally we come to the conclusion that in the matter of family laws, every decision should be based on one philosophy that the limits of God should not be violated. Secondly, we should take opinion from those schools of *Islāmic* jurisprudence which provide more rights to the women. Maulana Ashraf Ali Thanavi debated this issue in his book "*Al-Hilat Al-Najiza li'l-Halilat Al-'Ajiza*". He made it clear that at the time of utmost necessity *fatwā* can be taken from other schools of *Islāmic* jurisprudence. Maulana Thanavi also rejected the opinion that, *ijtihad* was only valid till the end of fourth century.¹³⁶

So from the above discussion, we reach a point that we should always follow the purpose of law instead of blindly following the one school of *Islāmic* jurisprudence.

3.5 SUGGESTED AMMENDMENT IN 2(i) OF DMMA, 1939

As 2(i) says a woman would have to wait for four years for decree of the dissolution on the basis of missing husbands. But on the basis of *Maliki* School it should also be added that if the woman is young then this period should be reduced to

¹³⁵ *Satgunj vs Rehmat Ali Murad*, AIR 1946 Sind 48

¹³⁶ Ashraf Ali Thanavi, *Al-Heela al-Najiza li'l-Hilat*, 73

one year. It should also be added that if the woman is not young but does not have the maintenance then due to financial burden her waiting period should be reduced to one year. All the *Hānāfi muftīs* held the same opinion in their *fatwās*. Even some *Hānāfi Muftīs* held the view that if the husband is missing, the woman is young, and no maintenance is there then this period can be reduced to one month.

3.6 SUGGESTED AMMENDMENT IN 2(ii) OF DMMA, 1939

2(ii) of DMMA, 1939 states that a married Muslim woman can take the decree of dissolution of marriage if she is not being maintained for two years.

It should be added if the husband is rich then without any delay the court should separate the spouses. It should also be added that if the husband is so poor that in future he will not be able to arrange maintenance then the court should also give no time to husband. Similarly instead of continuous two-year period the court should keep the intention of husband in mind.

3.7 SUGGESTED AMMENDMENT IN 2(iii) OF DMMA, 1939

Section 2(iii) of DMMA, 1939 states that a married Muslim woman shall be entitled to obtain a decree from the court if the husband has been sentenced to imprisonment for a period of seven years or upwards.

So this article should be amended that if a woman file a suit for a decree on the basis of imprisonment of her husband then it should be settling down to maximum one year. Because the *Maliki* jurists hold the opinion that it can be relaxed to one year.

3.8 SUGGESTED AMMENDMENT IN 2(iv) OF DMMA, 1939

Section 2(iv) of DMMA, 1939 states that a married Muslim woman shall be entitled to obtain a decree from the court if the husband has failed to perform, without reasonable cause , his marital obligation for a period of three years;

In marital relations it should be added that even if a husband is maintaining a wife but not fulfilling her conjugal rights and due to which she might violate the limits of God, then the court should separate it without delay.

3.9 SUGGESTED AMENDMENT IN 2(v) OF DMMA, 1939

A Section 2(vi) of DMMA, 1939 states that a married Muslim woman shall be entitled to obtain a decree from the court if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal diseases.

This article should be amended that if a husband is having incurable insanity and it is feared that he might harm the wife then the court should give a decree without any delay. If insanity of the husband is curable then the court should give maximum limit of one year for his treatment.

3.10 SUGGESTED AMENDMENT IN 2(ix) OF DMMA, 1939

Section 2(ix) of DMMA, 1939 states that a decree passed on ground 2 of DMMA,1939 shall not take effect for a period of six months from the date of such decree.

It should be added that if a husband is missing then the waiting period should be four months and ten days and on other grounds it should be three months and ten days.

3.11 CONCLUSION

We conclude that the top religious scholars of the Subcontinent gave the *fatwās* on the true intention of *Maliki* School of *Islāmic* jurisprudence. On the other hand, the courts did not know the real sayings of the *Maliki* School of *Islāmic* jurisprudence. They just followed the wording of the Dissolution of Muslim Marriages act, 1939, which was tempered by the lawyers. So the DMMA, 1939 should be amended and should represent the *Maliki* School of *Islāmic* jurisprudence.

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Annex i

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

امداد الفتاوی

جلد دوم

حکیم الامت مولانا اشرف علی تھانوی قدس سرہ

بترتیب جدید

مولانا مفتی محمد شفیع صاحب رحمہ اللہ

ناشر

مکتبہ دارالعلوم دہلی

عن حماد بن ذکوان عن غير كفو كان لهما الخيار ولو اجمعه فليحفظ ج ۲ ص ۵۲۱
 آن روایات سے معلوم ہوا کہ صورت مسئلہ میں ولی منکوحہ کو بھی اور اسید طرح بعد بلوغ
 کے خود منکوحہ کو بھی اس نکاح کے فسخ کرنے کا اختیار حاصل ہے اور یہ فسخ بحکم حاکم ہوگا جو کہ
 علامہ حیدر آبادی میں آسان ہے۔ و قوله قالت لا ارضى ليس للاحتراز في صورة الاشترا
 في الاخبار ليتوقف التفسير على بلوغها لان المسئلة الثانية التي رخصت الكبيرة
 بعد تحقق الاختيار فيها لا ولياء والله اعلم۔ ۹ ربيع الاول ۱۳۳۵ھ
 سوال (۲۳۵) کیا فرماتے ہیں علماء دین و مفتیان شرع متین اس مسئلہ میں
 کہ زید نے شادی کی اور بی بی کو گھر میں اپنے لایا اور خلوت کے چند ماہ کے بعد اس
 کے اولیاء رخصتی کے لئے آئے زید نے بی بی کو رخصت کر دیا۔ چند روز کے بعد زید نے عور رخصتی
 کی تو اس عورت کے اولیاء چلے خوالے کرنے لگے چند روز کے بعد رخصتی سے صاف انکار
 کیا اور چلے جانے لگے تو زید نے مجبور ہو کر گورنمنٹ میں رخصتی کے لیے درخواست کی جب
 اہل اہ کو یہ معلوم ہوا تو ان لوگوں نے جھٹ سے اس عورت کو کلمات کفر سکھلا دیئے اس
 حالت نے کلمات کفر زبان سے کہے اب اولیاء عدالت میں آکر یہ کہتے ہیں کہ لڑکی عاقلہ
 تھی جو کہ اس قسم کے کلمات کفر زبان پر لائی ہے اب زید سے اس کا نکاح ہی کتب باقی رہا
 یہ رخصتی جائز ہے نکاح ٹوٹ گیا اس وجہ سے ہم لوگ رخصتی نہیں کر سکتے اس اظہار
 حکم نے زید سے فتویٰ طلب کیا ہے اور اپنے فیصلہ کو فتویٰ پر موقوف رکھا ہے اب سوال
 ہے کہ اس عورت نے اولیاء کے سکھلائے سے یا خود اپنی طبیعت سے بغرض فسخ نکاح
 کلمات کفر کہے ہوں تو عند اللہ نکاح فسخ ہو گیا یا نہیں۔
 الجواب۔ فسخ ہو گیا عند اللہ سمجھ کر تلفظ کلمات کفر خواہ اعتقاد سے ہو یا بلا اعتقاد
 ایسا رائے سے یا کسی کی تعلیم سے سب موجب کفر ہے اور کفر موجب فسخ نکاح اس لئے
 ٹوٹ گیا اور ساتھ ہی ساتھ تعلیم کرنے والوں کا نکاح بھی ٹوٹ گیا اور جو شخص اس
 عدولی سے راضی ہیں سب کا نکاح ٹوٹ گیا لیکن اتنا فرق ہے کہ زید کی بی بی کو تو شرعاً
 نکاح مایہ کا کہ وہ اسلام لائے اور اسی شوہر اول سے نکاح کرے اور دوسرے شخص سے
 نکاح جائز نہ ہوگا۔ اور تعلیم کرنے والوں اور راضی ہونے والوں کی بی بیوں کو اختیار
 عدالت جن سے جائز نکاح کر لیں۔ فی الذل المختار اخبارت بارتداد زینحما



احکام طلاق و نظام شرعی ملت

یعنی

الحیلة الناجزة جدید

خواتین کو طلاق کے حقوق، لاپتہ شوہروں و مجنون سے فسخ
نکاح، نابالغہ کے فسخ نکاح، حرمت نکاح کے رشتے
یورپین اقوام سے نکاح اور مسلم پرنسپل لاپرجامع تحقیقات

مصنف: مولانا اشرف علی تھانوی

ترتیب جدید: مولانا خورشید حسن قاسمی

ناشران مہاجران کتب
عزیز سب ٹرنیٹ اردو بازار لاہور

الفصل

”العیلۃ الناجزہ“ کے تصدیق کرنے والے اکابرین کے اسماء گرامی

شیخ الاسلام حضرت مولانا سید حسین احمد

شیخ الحدیث حضرت مولانا محمد ذکریا صاحب نور اللہ مرقدہ

فقیر ملت حضرت مولانا مفتی محمد شفیع صاحب مفتی اعظم پاکستان و سابق صد مفتی دارالعلوم دیوبند

حضرت مولانا سید اصغر حسین میاں صاحب نور اللہ مرقدہ

شیخ الادب والفقہ حضرت مولانا محمد اعجاز علی صاحب

حضرت مولانا عبد الطیف صاحب ناظم مدرسہ مظاہر علوم سہارنپور

حضرت مولانا محمد اسعد اللہ صاحب ناظم مدرسہ مظاہر علوم سہارنپور

حکیم الاسلام حضرت مولانا قاری محمد طیب صاحب

حضرت مولانا عبد الرحمن صاحب استاذ مدرسہ مظاہر العلوم دیوبند

حضرت مولانا عبد السمیع صاحب دیوبندی استاذ دارالعلوم دیوبند

حضرت مولانا محمد رسول خان صاحب استاذ دارالعلوم دیوبند

حضرت مولانا سید محمد مبارک علی صاحب نائب مہتمم دارالعلوم دیوبند

حضرت مولانا مفتی محمد مسعود احمد صاحب نائب مفتی دارالعلوم دیوبند

حضرت مولانا محمد ریاض الدین صاحب استاذ دارالعلوم دیوبند

حضرت مولانا سراج احمد صاحب استاذ مدرسہ خانقاہ امدادیہ تھانہ بھون

حضرت مولانا عبد الکریم صاحب مکتھلوی

حضرت مولانا ظفر احمد عثمانی صاحب خانقاہ امدادیہ تھانہ بھون

و دیگر اکابرین و مفتیان ہند

جز

مولانا سلف
مولانا محمد
مولانا سجاد
مولانا محمد
مولانا اشفاق
حضرت مولانا
مولانا محمود
مولانا رشید
مولانا کفیل
مولانا عبد الرحمن
مولانا سید
مولانا اختر
مولانا مشید
مولانا عامر
مولانا
مولانا خلیل
مولانا محمد

Annex ii

جن حضرات نے "الجملة الناجزة" کی تصدیق و تائید فرمائی ان کے اسماء گرامی

- مولانا سلطان محمود صاحب
 مولانا محمد شریف اللہ صاحب
 مولانا سجاد حسین صاحب استاد مدرسہ فتح پوری دہلی
 مولانا محمد عبدالقادر صاحب استاد مدرسہ فتح پوری دہلی
 مولانا اشفاق الرحمن صاحب کاندھلوی استاد مدرسہ فتح پوری دہلی
 حضرت مولانا محمد شفیع دیوبندی
 مولانا محبوب الہی دیوبندی استاد مدرسہ عبدالرب دہلی
 مولانا رشید احمد استاد درجہ علیا مدرسہ حنیفہ دہلی
 مولانا کفیل احمد صاحب سند یافتہ دارالعلوم دیوبند استاد عربک ہائی اسکول دہلی
 مولانا عبد الرحمن صاحب صدر المدرسین مدرسہ امداد الاسلام میرٹھ
 مولانا سید طاہر حسین صاحب استاد مدرسہ امداد الاسلام میرٹھ
 مولانا اختر شاہ صاحب استاد مدرسہ امداد الاسلام میرٹھ
 مولانا مشیت اللہ صاحب استاد مدرسہ عالیہ میرٹھ
 مولانا عاشق الہی صاحب میرٹھ
 مولانا شاہ صاحب صدر مفتی مدرسہ عالیہ امدادیہ مراد آباد
 مولانا خلیل احمد صاحب مفتی مدرسہ عالیہ امدادیہ
 مولانا محمد سید حسن صاحب

مولانا محمد انور صاحب

مولانا محمد فاضل صاحب

مولانا عبدالحق صاحب مدرسہ شاہی مراد آباد

مولانا خیر محمد صاحب مدرسہ مدرس خیر المدارس جالندھر

مولانا محمد رمضان صاحب مدرسہ عربی خیر المدارس جالندھر

مولانا محمد علی مدرسہ خیر المدارس جالندھر شہر

مولانا محمد عبداللہ رائے پوری مدرسہ خیر المدارس جالندھر

مولانا عبد الکریم صاحب

مولانا محمد فقیر اللہ صاحب استاذ مدرسہ رشیدیہ ہمت پور جالندھر

مولانا فضل احمد صاحب مہتمم مدرسہ رائے پور گوجران پنجاب

مولانا محمد ابراہیم صاحب مہتمم مدرسہ عربیہ بکراون ضلع لدھیانہ پنجاب

مولانا عبد العزیز صاحب استاذ مدرسہ رائے پور جالندھر پنجاب

مولانا محمود حسن بہروی

مولانا عبد الکریم صاحب ہمت پور جالندھر

مولانا مفتی سید مہدی حسن صاحب مفتی مدرسہ رائے ضلع سورت گجرات

مولانا محمد حسن صاحب مدرسہ مدرس مدرسہ نعمانیہ امرتسر پنجاب

مولانا عبد الرحمن صاحب مدرسہ مدرسہ نعمانیہ امرتسر پنجاب

مولانا عبد الکریم صاحب استاذ مدرسہ نصرۃ الحق امرتسر

مولانا محمد بہاء الحق قاسمی بن حضرت مولانا مفتی پیر غلام مصطفیٰ صاحب قاسمی امرتسر

مولانا غلام محمد صاحب امام جامع مسجد خیر الدین امرتسر

مولانا اصحاب الدین استاذ مدرسہ تقویۃ الاسلام امرتسر

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ملاحظہ

مولانا محمد نور عالم استاذ عربی مسلم ہائی اسکول امرتسر
 مولانا حکیم عبدالخالق صاحب چوک فرید امرتسر
 مولانا عمر الدین شیخ مولوی فاضل قادیان ضلع گورداس پور پنجاب
 مولانا واحد بخش استاذ مدرسہ عربیہ احمد پور شرقیہ بہاول پور
 مولانا محمد صدیق صاحب
 مولانا افضل احمد صاحب

مولانا چراغ محمد صاحب استاذ مدرسہ انوار العلوم گوجرانوالہ
 مولانا عبد الواحد صاحب جامع مسجد مدرسہ انوار العلوم گوجرانوالہ
 مولانا عبد الجبار صاحب مفتی و امام جامع مسجد سوپور کشمیر
 مفتی محمد یسین دارالافتاوی سوپور کشمیر
 مولانا محمد اسحق بردوانی مدرسہ عالیہ ڈھاکہ
 مولانا محمد شمس الدین صاحب مدرسہ عالیہ ڈھاکہ

نوٹ : الحیلۃ الناجزۃ للحیلۃ العاجزۃ پر مذکورہ بالا حضرات
 کی تفصیلی تصدیق و رائے گرامی کتاب کے آخر میں بعنوان "تصدیقات علماء ہند"
 ملاحظہ فرمائیں۔ قدیم نسخے میں یہ تصدیق آغاز کتاب میں درج تھی۔

خورشید حسن قاسمی
 رفیق دارالافتا و رکن رونت ہلال کمیٹی
 دارالعلوم دیوبند یوپی انڈیا
 ۴ شعبان ۱۴۱۳ھ

Annex iii

کرفوتو سے کے وقت تمام شراکہ کو بخوبی ملحوظ رکھا ضروری آفتور فرمایا میں دھواں دھواں

الخطبات

سراج احمد غفرلہ کسبین خدا اکبر ترمین تمام اتھویر الکریم غفرلہ

مدرسہ خانقاہ امدادیہ ارشاد شاہ امدادیہ خوارزمیہ خوارزمیہ

۲۶ برہنہ خانہ بنارکریہ ۲۶ برہنہ خانہ بنارکریہ

مدرسہ نظامیہ علوم
سہا پور

از منظر علم سہا پور

بیشہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ

آیت اللہ العظمیٰ علیہ السلام نے ہمارے سامان نظر فرمائی تمام اس فتویٰ البیضاء الاستاجہ برقعہ

سنا ماہ بہ سبب ترقی بعد قریب کمالا اور سنا ہم یقین کرتے ہیں کہ اس زمانہ میں

حضرت سید محمد اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ اللہ

دعا میں علم کی ہمارت تا سر کی احوال زامہ و شکلات حاکم سے بخوبی واقف ہیں

یقیناً یہ حق حاصل ہے کہ فتوے کے لیے کسی دوسرے کام کے مذہب کو اختیار فرما

لیں کیونکہ بوقت شہیدہ دوسرے اصول کے مذہب کو اختیار کرنا بھی فقہ حق کا

ایک حکم ہے بناء علیہ کہ اگر اشتیاق ہے کہ حضرت اقدس کا فتویٰ ہم جیسوں کی رائے

تخصیص کا احکام مستخرج نہیں لیکن تحصیل الخیر والثناء اب ان مسائل کی تائید دیکھ سے

انتظار حاصل کرتے ہیں۔

حضرت اقدس دام ظلہ العالی نے اس فتوے میں جس میں تحقیق و تدریق و احوال
سے کام لیا ہے وہ دست کش نہ بیان نہیں ہم ہم قلمب سے جناب باہی ہوا سر میں
دست پر عاقل کردہ حضرت اقدس کو باریہ یوسف و برکات تادیر شریک کی پیش
پر سائنس رکھے اس میں ہم یقین کرتے ہیں کہ حضرت اقدس کی ساری عملیاتی سائنس
اس سے ہرگز میں شکور رہیں گی۔
فیصلہ احمد شاہ احمد الجبر و خوارزمیہ سائنس اسلامیہ

عبد اللہ اللہ اللہ اللہ اللہ	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم
مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم
مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم
مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم	مدرسہ نظامیہ علوم

مدرسہ نظامیہ علوم
سہا پور

از منظر علم سہا پور

مدرسہ نظامیہ علوم نے سائنس الاحیاء الانسانیہ اللہ اللہ اللہ اللہ اللہ

سائنس ہمارے دے ہمارے دے میں کو جو حاکمات کے سائنس ہمارے دے میں کو جو حاکمات کے

ہمیں معلوم ہو گا کہ جتنا دیر ہے سائنس ہمارے دے میں کو جو حاکمات کے

دیں اور اس میں ہر قسم کے اصول و قواعد ہیں سائنس ہمارے دے میں کو جو حاکمات کے

میں ضروریات و قسم کے سائنس ہمارے دے میں کو جو حاکمات کے

حضرت مولانا صاحب برکات اقدس کے سائنس ہمارے دے میں کو جو حاکمات کے

از بند رسیده امداد التماسه خوانده بخون

طاعت عندہ الصبر علیہ التعلیہ والتبریہ بتوسعہ ہذا اللہ اعلم فصل دوم فی استخراج الفوائد الانیسیۃ فی استخراج ما فیہ من العیق فی خانہ صوفی الخیریم ساقی الباب دوم در بیان تفصیل حاصل الکیاۃ واللہ اعلم بالصواب جہدہ یقل الخیر اللہ من فضلہ علیہ	عورت کے شوہر پر نہ سے شیخ کا نام نہ بر نہ ہو کہ جو خدا سے متنازع ہو کہ تجوہر فرمائے کہ وہ یا کمال و درستی ہے اس تحقیق میں کی ناس یا نیست اور طوریت کو کہ جو کہ یہاں نہیں ملے کہ کلامی اللہ اللہ صحت بحث ایک اور نام نہ
۲۶ رر رمضان ۵۶ھ	۲۶ رر رمضان ۵۶ھ

از مدرسه دارالعلوم دیوبند

[illegible]

از فردا رسد مطلبی که سر علو هم بهای آن بود

الجناب محمد
الجناب محمد
الجناب محمد

[illegible]

مساعی بلیغہ اور انتہائی مجہد و جدوجہد کے شکست و ناکستہ خفاہی جزا را جزا را انکار و تحقیر میں
الذین انما لی ان ان کہ جزو جو ان میں ہوتا ہے غیر عطا فرمائے۔ آمین۔

[illegible]

تصديقات متعلقہ الحقائق

نظروا في التهمة فوجدناها صحيحة

الغيد الغديفة
العبد الجعف

محمد شفيق غفرل خادما لالا سائو ولي محمد
سراج احمد غفرل مدرس خانقاہ امدادیہ

بقية التسوس برطامان هذه الانتمة فوجدناها رقيقة وجسدا رقيقا في تلك سر
من اخذ حمارا واستخدمها في زرعها وجعلها خيرا الله تعالى عبيدنا محمد بن
خير اليك ولحسنه ورزقي واياك عيشة مستغنية وعاقبة حسنة

Annex iv

سوال: ایک شخص اپنی بیوی کو خراج اکل نہیں دیتا، نہ ہی اپنے پاس رکھتا ہے، اور طلاق بھی نہیں دیتا، اس کے بارے میں شریعت مطہرہ کا کیا حکم ہے؟
 الجواب: ومنہ الصدق والصواب
 اولاً اس عورت پر لازم ہے کہ شوہر کو کسی نہ کسی طریق سے علاج پر راضی کرے، اگر وہ کسی

۱۱۱۱۱۱۱۱

صورت میں کسی علاج پر راضی نہ ہو اور عورت کو سخت مجبوری ہو، یعنی کوئی شخص اس کے معیاروں کا قیاس نہیں لیتا، اور خود اپنی عورت کو محتوطہ حکم کرنی ضرورت سمجھتا ہے، اس کا اختیار اس کے ہاں ہے۔
 تو ایسی مجبوری میں مذہب مالک کے مطابق عورت حاکم مسلمہ کے پاس دعویٰ میں کرے کہ اس کا شوہر سخت کے باوجود خراج نہیں دیتا، حاکم شرعی شہادت سے پوری تحقیق کرنے کا، اگر عورت کا دعویٰ صحیح ثابت ہو گیا تو حاکم شوہر کو حکم دے گا کہ بیوی کے حقوق ادا کر دے یا طلاق دے، ورنہ نکاح فسخ کر دیں گا، اگر شوہر کوئی صورت قبول نہ کرے تو عورت کو طلاق دینا چاہیے، لیکن اس بارے میں مذہب مالکی میں یہ حکم نہیں ہے کہ یہ طلاق بائن ہے یا رجعی، قاضی مالکی میں رجعی ہونے کو ترجیح دی گئی ہے، لہذا انصاف کے بعد عورت گذرنے سے قبل اگر شوہر نفقہ دینے پر تیار ہو گیا تو اسے رجوع کا اختیار ہے، البتہ تجدید نکاح بہتر ہے، اگر عورت بعد نکاح پر راضی ہو تو لا تجدید جرحا بھی اسے دیکھ سکتا ہے، البتہ

فی العیلة الناجزة للعیلة العاجزة

تسہلات

نان و نفقہ نہ دینے کی بناء پر فسخ نکاح کا حکم

سوال :- ممتاز بی بی کی گیارہ سال ہو گئے شادی ہو چکی ہے، ان گیارہ سالوں میں سے ایک سال بمشکل ممتاز بی بی نے سسرال میں گزارا ہوگا، کئی طرح کی باتیں ہوئیں، ممتاز بی بی کے شوہر بے کئی بار اپیل کی گئی کہ یا تو طلاق دے دیں یا خرچ دے دیا کریں، کیا آپ ہمارے پاس آتے رہا کریں یا آپ ہمیں بلا لیں، تاکہ کوئی فیصلہ ہو جائے، مگر سوائے پریشانی کے عبدالقیوم نے کوئی فیصلہ اس میں نہیں کیا، اور نہ وہ بیوی کو پاس بلاتا ہے اور نہ خرچ دیتا ہے، اس صورت میں شریعت کیا حکم دیتی ہے؟

جواب :- صورت مسئلہ میں ممتاز بی بی کو چاہئے کہ اپنے شوہر کو سمجھا بھجا کر طلاق حاصل کر لے، اگر وہ اس پر راضی نہ ہو تو خلع کر لیں، مثلاً اگر اپنا مہر معاف کر کے اس سے طلاق حاصل کرنے کی کوشش کرنے، اگر وہ کسی طرح اس پر آمادہ نہ ہو تو کسی مسلمان حاکم کی عدالت میں نان و نفقہ نہ دینے کی بنیاد پر دعویٰ دائر کیا جائے، عدالت شوہر کو بلا کر یہ کہے گی کہ یا طلاق دو یا نان و نفقہ ادا کرو، اور اگر شوہر ان میں سے کچھ مانگے پر تیار نہ ہو تو شوہر کے قائم مقام کی حیثیت سے عدالت کو طلاق دینے کا اختیار ہوگا۔^(۲)

واللہ اعلم
۱۳۸۸ھ

An Act to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married woman on her marriage tie.

Whereas it is expedient to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage; it is hereby enacted as follows:

1. Short title and extent.

(1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to all the provinces and the Capital of the Federation.

2. Grounds for decree for dissolution of marriage.

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, namely:

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- (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;
- (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;

(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;

(viii) that the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the Injunctions of the Quran,

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law,

Provided that:

(a) no decree passed on ground (i) shall 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 authorised agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and

(b) before passing a decree on ground (v) 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 satisfied the Court within such period, no decree shall be passed on the said ground.

3. Notice to be served on heirs of the husband when the husband's whereabouts are not known.

In a suit to which clause (i) of section 2 applies:

(a) the names and addresses of the persons who would have been heirs of the husband under Muslim Law if he had died on the date of the filing of the plaint shall be stated in the plaint.

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit:

Provided that paternal-uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. Effect of conversion to another faith.

The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2;

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. Right to dower not be affected.

Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage

6. (Repeal of section 5 of Act, XXVI of 1937)

Rep. by the Repealing and Amending Act, 1942 (XXV of 1942), section 2 and First Sch.

Annex v

پینتالیس سالہ خودنوشتہ فتاویٰ کا مجموعہ

فتاویٰ عثمانی

جلد اول

کتاب الایمان والعقائد، کتاب السنۃ والبدعۃ، کتاب العلم والتاریخ،
کتاب التفسیر، کتاب الحدیث، کتاب الدعویۃ والتبلیغ، کتاب التصوف،
کتاب الذکر والدعاء، کتاب حقوق المعاشرة، کتاب الشیخ والمناقب،
کتاب الطہارات، کتاب الصلوة، کتاب الجنائز

حضرت مولانا مفتی محمد تقی عثمانی صاحب امتیاز

ترتیب و تخریج
مولانا محمد زبیر حق نواز
استاذ جامعۃ دارالعلوم کراچی

مکتبہ مہجرات اہل القرآن کراچی

فتاویٰ عثمانی جلد اول

پیش لفظ

عرض مرتب

جملہ حقوق ملکیت بحق مکتبہ اشاعت القرآن کراچی محفوظ ہیں

حضور صلی اللہ علیہ وسلم
احرام کا حکم
کفار کے نابالغ بچوں
سوشلزم کی حمایت کر
اسماء حسنیٰ میں سے
حضور صلی اللہ علیہ وسلم
اگر کسی کو چھ کلمے یاد
کلمہ طیبہ کے ساتھ
شعراء کا اپنے کلام
کپڑے میں انبیاء
شعر میں غیر اللہ کو
قادیانیوں کی عبادت
حیات انبیاء علیہم السلام
”اسلامی سوشلزم“

کیا جنت میں کفار
وحدت الوجود کا
مسئلہ عصمت انبیاء

باہتمام : مکتبہ اشاعت القرآن کراچی
طبع جدید : شوال ۱۴۲۷ھ - نومبر ۲۰۰۶ء
مطبع : زمزم پرنٹنگ پریس کراچی
ناشر : مکتبہ اشاعت القرآن کراچی
فون : 5031565 - 5031566
ای میل : i_maarif@cyber.net.pk

ملنے کے پتے:

* مکتبہ اشاعت القرآن کراچی

فون: 5031565 - 5031566

* اڈا المعمار و پرنٹنگ کراچی

فون: 5049733 - 5032020

﴿فصل فی فسخ النکاح عند کون الزوج مفقوداً

أو عَنِینًا أو متعنّتًا أو مجنونًا﴾

(شوہر کے مفقود، نامرد، متعنت اور مجنون ہونے کی بناء

پر فسخ نکاح کے احکام)

زوجہ مفقود کا حکم

سوال :- مسماۃ ہندہ کا شوہر تقریباً چار سال ہوئے کہ لاپتہ ہو چکا ہے، والدین اور بیوی کے ساتھ بنگلہ دیش سے کراچی آیا، حکومت نے ان کو کسی اور جگہ بھیج دیا اور بیوی کو کیمپ میں رکھا، اس کے بعد سے لاپتہ ہے، ہر چند تلاش بسیار کے بعد بھی کوئی سراغ نہ مل سکا، اب تک ہندہ انتہائی کسمپرسی کی زندگی گزار رہی ہے، ایسی صورت میں ہندہ کیا عقیدہ ثانی کر سکتی ہے یا نہیں؟

جواب :- صورت مسئلہ میں مسماۃ ہندہ کو یہ حق ہے کہ وہ مسلمان حاکم کی عدالت میں دعویٰ دائر کر کے پہلے یہ ثابت کرے کہ میرا نکاح فلاں شخص سے ہوا تھا، پھر اُس کے بعد گواہوں سے اس کا مفقود اور لاپتہ ہونا ثابت کرے، بعد ازاں عدالت خود بھی مفقود کی تفتیش اور تلاش کرے اور جب پتہ ملنے سے مایوسی ہو جائے تو عورت کو چار سال تک مزید انتظام کا حکم دے، پھر اگر ان چار سال کے اندر بھی مفقود کا پتہ نہ چلے تو مفقود کو چار سال کی مدت ختم ہونے پر مردہ تصور کیا جائے گا، اس وقت حاکم کے پاس دوبارہ درخواست دے کر عدالت سے اُس کے مردہ ہونے کا حکم حاصل کرے، اور پھر چار مہینے دس دن عدت و نفات گزار کر وہ دوسری جگہ نکاح کر سکتی ہے۔ اور یہ ساری تفصیل اُس وقت ہے کہ جب کہ عورت مزید چار سال مہر و محل اور عفت کے ساتھ گزار سکتی ہو، لیکن اگر عورت کے لئے اتنا عرصہ صبر کرنا مشکل ہو اور گناہ میں مبتلا ہونے کا قوی اندیشہ ہو تو صورت مسئلہ میں حاکم کو یہ بھی اختیار ہے کہ وہ چار سال کے بجائے صرف ایک سال انتظار کرنے کا حکم دے، اور ایک سال کے بعد شوہر مذکور

کی طرف سے اس کو طلاق رجسی یعنی تین مرتبہ ایام ماہواری گزار کر وہ دوسری جگہ نکاح کر سکے گی۔^(۱)
واللہ سبحانہ و تعالیٰ اعلم

۱۱/۱۰/۱۳۹ھ

(فتویٰ نمبر ۱۰۴۳/۲۸ ج)

(۱) "زوجہ مفقودہ کے حکم سے متعلق تفصیل و تحقیق کے لئے حضرت والا دامت برکاتہم کا مصدقہ درج ذیل فتویٰ ملاحظہ فرمائیں:-

سوال:- مفقودہ کی بیوی کے لئے شرعی حکم کیا ہے؟ تفصیل سے وضاحت فرمائیں۔

جواب:- مفقودہ کی بیوی کے لئے اصل حکم تو یہ ہے کہ وہ عفت و عصب کے ساتھ اپنی زندگی گزارے، لیکن اگر وہ مفقودہ شوہر کے نکاح سے رہائی حاصل کرنا چاہے تو درج ذیل صورت اختیار کر کے حاصل کرنے کی کوشش ہے:-

مفقودہ کی بیوی اپنا یہ مقدمہ مسلمان قاضی کی عدالت میں پیش کرے اور گواہوں سے ثابت کرے کہ میرا نکاح فلاں شخص کے ساتھ ہوا تھا، پھر گواہوں سے اس کا مفقودہ اور لاپتہ ہونا ثابت کرے، اس کے بعد قاضی خود اپنے طور پر اس کی تفتیش و تلاش کرے، جہاں اس کے جانے کا غالب گمان ہو وہاں آدمی بھیجا جائے، اور جس جس جگہ جانے کا غالب گمان نہ ہو صرف احتمال ہو وہاں اگر خطہ ارسال کرنے کو کافی سمجھے تو خطہ ارسال کر کے تحقیق کرے، اور اگر اخبارات میں شائع کر دینے سے خبر پڑنے کی امید ہو تو یہ بھی کرے۔

الغرض تفتیش و تلاش میں پوری کوشش کرے اور جب پتہ چلے سے ماہی ہو جائے تو قاضی، عورت کو چار سال تک حریز انتظار کا حکم دے، پھر ان چار سالوں کے اندر بھی اگر مفقودہ کا پتہ نہ چلے تو عورت قاضی کے پاس دوبارہ درخواست کرے، جس پر قاضی اس کے مردہ ہونے کا فیصلہ سنا دے، اس کے بعد چار ماہ و دن عزت و قات گزار کر عورت کو دوسری جگہ نکاح کرنے کا اختیار ہوگا۔

اور اگر عورت زمانہ کا شدید خطرہ ظاہر کرے تو ایسی صورت میں چار سال کے انتظار کا حکم ضروری نہیں بلکہ یہ دیکھا جائے گا کہ شوہر کے غائب ہونے کے وقت سے اب تک کم از کم ایک سال کا عرصہ گزر چکا ہے یا نہیں؟ اگر گزر چکا ہو تو قاضی حریز ہمت دینے بغیر اس وقت بھی نکاح ختم کر سکتا ہے، اسی طرح اگر زمانہ میں جلا ہونے کا خطرہ تو نہیں لیکن مفقودہ کا اتنا مالی موجود نہیں جو ان چار سالوں میں اس کی بیوی کے نان و نفقہ کے لئے کافی ہو، یا بیوی کے لئے مفقودہ کے مال سے نان و نفقہ حاصل کرنا مشکل ہو تو اس صورت میں اگر نان و نفقہ دینے کے بغیر کم از کم ایک ماہ گزرنا ہو تو قاضی نکاح ختم کر سکتا ہے۔

واضح رہے کہ آخری ان دونوں صورتوں میں عورت عزت و قات کے بجائے عزت طلاق گزارے گی، جو قاضی کے فیصلے کے وقت سے شمار ہوگی۔

لی البحر: (قولہ: ولا یفرق بینہ و بینہا: ای بین زوجہ، لقولہ علیہ السلام لی امرأۃ المفقودہ: انہا امرأۃ حتی یأتیہا البیان، ولول علی رضی اللہ عنہ لیہا: ہی امرأۃ ابتلیت للتصبر حتی یتبین موت أو طلاق اہ۔ (ج: ۵ ص: ۱۶۳)۔^(۱)
لی شرح الجلیل علی مختصر الخلیل: لیزجل أربع سنین ان دامت لفقتها.... فان لم تدم لفقتها من ماله فلہا التطلق لعدم النفقة بلا تأجيل، وكذا ان خشيت علی نفسها الزنا لیزاد علی دوام لفقتها عدم خشيتها الزنا۔ (ج: ۲ ص: ۳۸۵)۔

ولی حاشیہ الدرر: لیزجل ای المفقودہ الحر أربع سنین ان دامت لفقتها من ماله والا طلق علیہ لعدم النفقة اہ۔ (ج: ۲ ص: ۳۷۹)۔^(۲)

ولی الشرح الصغير: والا للہا التطلق علیہ لعدم النفقة.... ای ولم تخش العنت والا لتطلق علیہ لضرر لہی اولی من معدومة النفقة۔ (ج: ۲ ص: ۶۹۳)۔^(۳)

ولی الفقہ الاسلامی وأدلہ للشیخ الزحلی: وراى المالکۃ والحنبلة جواز التفريق للفقۃ اذا طالت وتضررت الزوجة بقاء، ولو ترک لها الزوج مالا تنفق منه أثناء الغياب، لان الزوجة تتضرر من الغیبة ضرراً بالغاً، والضرر بدلیع بقدر الاسکان لقولہ صلی اللہ علیہ وسلم: "لا ضرر ولا ضرار".... وجعلوا احد الغیبة الطويلة منه لاکثر علی المعتمد، ولی قول ثلاث منوات اہ۔ (ج: ۷ ص: ۵۳۳)۔^(۴)

(۲) (طبع دار الفکر بیروت)۔

(۳) (دار الفکر بیروت)۔

(۱) (طبع ماجدہ کوئٹہ)۔

(۳) (طبع دار المعارف بمصر)۔

زوجہ مفقود کے لئے فسخ نکاح کا طریقہ کار

سوال :- میری بیٹی عمار بیگم کا نکاح مورخہ ۳۱ اگست ۱۹۷۶ء کو بمقام راولپنڈی ہوا تھا، لڑکا (محمد پیارے جان) ذہنی میں ملازم تھا، نکاح کے تقریباً دو ماہ بعد وہ واپس اپنی ملازمت پر ذہنی چلا گیا، اس دوران لڑکی کو وہ کراچی تک ساتھ لے گیا اور سانا زینور عاصب کر دیا، لڑکے نے کہا کہ تم ہو گیا ہے، اس پر ہم سے اور ہماری لڑکی سے کوئی جھگڑا نہیں ہوا، اس تاریخ سے آج تک تقریباً دس سال گزر چکے ہیں، ہم نے ان کے تمام رشتہ داروں سے دریافت کر لیا، اس کا کوئی پتہ نہیں، نہ خط ہے، نہ خرچہ ہے، یہ وہ ہوں میرا کوئی نہارا نہیں، لڑکی جوان ہے میں پریشان ہوں کیا میں اس کا دوسری جگہ نکاح کر سکتی ہوں؟ (انودی بیگم)

جواب :- صورت مسئلہ میں عمار بیگم کے لئے زیادہ بہتر تو یہ ہے کہ وہ اپنے شوہر کی تلاش جاری رکھے اور فسخ نکاح نہ کروائے، لیکن اگر وہ شوہر کے بغیر صبر نہ کر سکتی ہو یعنی یا تو اس کے نقص کا انتظام نہ ہو یا اسے اپنی عفت کے بارے میں خطرہ ہو تو وہ یہ کر سکتی ہے کہ وہ کسی مسلمان حاکم کی عدالت میں دعویٰ دائر کر کے پہلے یہ ثابت کرے کہ میرا نکاح محمد پیارے جان سے ہوا تھا، اس کے بعد گواہوں کے ذریعہ اس کا مفقود اور لاپتہ ہونا ثابت کرے، اس پر حاکم خود بھی اس کی تفتیش اور تلاش کرے، اور جب پتہ نہ ملے یا یوں ہو جائے تو عورت کو چار سال تک مزید انتظار کا حکم دے، اگر ان چار سال کے اندر بھی مفقود کا پتہ نہ چلے تو اس عدت کے اختتام پر شوہر کو مردہ تصور کیا جائے گا، اس کے

(۲، ا)۔ زوجہ مفقود کے مسئلے سے متعلق مزید تفصیل اور دلائل کے لئے حضرت دالادایت برکات علی کا مکتبہ نوری پبلیکیشنز کے حاشیہ میں ملاحظہ فرمائیں۔ (محمد زبیر)

بعد چار ماہ دس دن عدتِ وفات گزار کر مختار بیگم دوسری جگہ نکاح کر سکیں گی، لیکن اگر مختار بیگم کے لئے چار سال کی مدت گزارنا بھی ممکن نہ ہو، اور چونکہ اس نے دس سال تک پہلے ہی صبر کیا ہے اور عاجز ہو کر درخواست دی ہے، اس لئے معصیت میں مبتلا ہونے کا قوی خطرہ ہو تو اس صورت میں اس بات کی بھی گنجائش ہے کہ حاکم چار سال کے بجائے صرف ایک سال کے انتظار کا حکم دے اور ایک سال گزارنے کے بعد عورت کے طلب کرنے پر اس کا نکاح فتح کر دے، اس صورت میں فتح نکاح کے بعد تین ماہواری عدت گزار کر وہ جہاں چاہے نکاح کر سکتی ہے۔^(۱)

واللہ سبحانہ و تعالیٰ اعلم

۱۲/۶/۱۳۹۷ھ

(فتویٰ نمبر ۵۸۳/۲۸ ب)

Annex vi

(جواب سؤالات)

الجواب حاملہ و مصلیٰ

۱۔ اگر کوئی شوہر ایسا ہو جو باوجود استطاعت کے اپنی بیوی کو بان وقتہ نہیں دیتا اور عورت کے پاس بان وقتہ کا کوئی انتظام نہ ہو اور شوہر طلاق یا طلع کے لئے بھی تیار نہ ہو تو ایسی صورت میں وہ بالکل مذہب کے مطابق اس شوہر سے عدالت کے ذریعہ خلاصی حاصل کر سکتی ہے۔

۲۔ خلاصی حاصل کرنے کے لئے عورت اپنا مقدمہ کسی مسلمان جج کی عدالت میں پیش کرے اور یہ ثابت کرے کہ وہ طلاق کی بیوی ہے اور وہ باوجود استطاعت کے اس کو بان وقتہ نہیں دیتا اور نہ اس کے پاس بان وقتہ کا کوئی انتظام ہے، جس سے

اس کو سخت "ضرر" لاحق ہے اور وہ اس وجہ سے اپنی زوجیت سے لٹکتا چاہتی ہے۔

۳۔ عورت "طلاق" کے ساتھ نکاح اور اس کا ذکر وہ ذیہ کواہل سے ثابت کرے، اور اگر اس کے پاس گواہ نہ ہوں، یا گواہ ہوں لیکن اس نے پیش نہ کئے تو اگر شوہر عدالت میں حاضر ہو تو اس سے قسم لی جائے گی، اگر اس نے قسم کھانے سے انکار کیا تو یہ سمجھا جائے گا کہ عورت کا دعویٰ درست ہے، اب جج شوہر سے کہے کہ اپنی بیوی کے حقوق ادا کرو، یا طلاق یا طلع دو، ورنہ تم تفریق کر دیں گے، اس کے بعد بھی اگر وہ ظالم کسی صورت پر عمل نہ کرے تو جج کوئی حکم دے گا جو اس کے لئے بہتر ہوگا۔

۴۔ لیکن شوہر یا اس کا ذکیل عدالت میں حاضر نہ ہو جیسا کہ آج کل عموماً ایسا ہی ہے، اور عدالت کے بار بار نوٹس اور سمن جاری کرنے اور شوہر نوٹس اور سمن کے بارے میں مطلع ہونے کے باوجود حاضر عدالت نہ ہوتا ہو، تو اگر بیوی کے پاس گواہ موجود ہوں اور وہ پیش بھی کرے تو جج ان کی گواہی کی بنیاد پر بیوی کے حق میں نکاح کا فیصلہ جاری کرے، اور اگر عورت کے پاس گواہ موجود نہ ہوں، یا گواہ لیکن وہ پیش نہ کرے تو شوہر کا بار بار بلائے کے باوجود عدالت میں حاضر نہ ہوتا اس کی طرف سے قسم لے کر انکار (نکول) سمجھا جائے گا، اور اس انکار کی بنیاد پر عدالت شوہر عاقب کے خلاف اور بیوی کے حق میں نکاح کا فیصلہ جاری کرے گی۔

اب یہاں یہ سوال پیدا ہوتا ہے کہ شوہر اگر عاقب ہو اور عورت کے پاس گواہ موجود نہ ہوں، یا موجود ہوں لیکن عورت نے پیش نہ کئے تو اس صورت میں اس عاقب شوہر کے خلاف اور عورت کے حق میں فیصلہ کس طرح کیا جائے گا تو اس کے بارے میں عرض یہ ہے کہ یہ "نقص علی الغائب" کا مسئلہ ہے، جو مذہب حنبلیہ سے لیا گیا، یعنی ان کے پاس عاقب کے خلاف فیصلہ جاتا ہے، اور یہی موقف حضرات شافعیہ کا بھی ہے، اور ان کے پاس مدعی کے پاس گواہ ہوتے ہوئے بھی اگر مدعی گواہ پیش نہ کرے تو مذہب حنبلیہ سے قسم لینا اور اس کی بنیاد پر فیصلہ کرنا درست ہے، یہی موقف حضرات شافعیہ کا بھی ہے، اور حضرات حنفیہ میں سے حضرت امام ابو یوسف اور امام محمد رحمہما اللہ بھی اس کے قائل ہیں۔ لیکن اگر مدعا علیہ عاقب ہو تو اس پر قسم پیش کرنا چونکہ مستند ہوتا ہے اس لئے بار بار بلائے کے باوجود اس کا عدالت میں حاضر نہ ہونا اس کی طرف سے قسم لینے کا انکار (نکول) سمجھا جائے گا، اور اب اس انکار کی بنیاد پر مدعی کے حق میں فیصلہ جاری کرنے کے لئے مدعی سے قسم لینا ضروری نہیں، جیسا کہ حنفیہ کا بھی مذہب ہے۔

۵۔ بیوی کے لئے ضروری ہے کہ وہ درخواست برائے نکاح، بان وقتہ دینے کی بنیاد پر دے، اور جج اپنے فیصلے میں بھی اسی کو بنیاد بنائے۔ "طلیق" کا طریقہ کار ہرگز اختیار نہ کرنے، اس لئے کہ یک طرفہ طلع شرعاً کسی کے نزدیک بھی جائز اور صحیح نہیں۔ تاہم اگر کسی فیصلے میں بنیاد فیصلہ کی جگہ ہو، یعنی شوہر کا "تہت" ثابت ہو رہا ہو، تاہم عدالت نے طلع کے بجائے طلع کا راستہ اختیار کیا ہو، اور طلع کا انتظام استعمال کیا ہو۔

عقبات

تالیف

فقیر العزیز اعظم حضرت شیخ محمد رفیع صاحب رحمۃ اللہ علیہ



واحد تقسیم کتب خانہ

ایچ ایم اے بی بی

ادب منزل : پاکستان کرچی

Annex vii

مَسْئَلَةُ أَهْلِ الدِّينِ أَنَّ كِتَابَهُ لَا تَقْلَمُونَ
 پس اہل دین سے پوچھ لو اگر تمہیں علم نہ ہو (الانبیاء ۵۱)



فتاویٰ ثنائیہ

جس سے میرے

شیخ الاسلام حضرت علامہ ابوالوفاء رشید اللہ امرتسری کے
 ۴۴ سالہ فتاویٰ کو فقہی ترتیب کے ساتھ اس طرح مرتب کیا گیا ہے
 کہ بار بار ترمیم و معاملات کا کوئی مسئلہ علما باقی نہیں رہا

مفت محمد امجد علی شاہ صاحب دہلی دارالعلوم دیوبند

جلد ثانی

۱۶۷۷۲

ACCESSION NO. 3۵-۹۶
 DATE ۳۵-۹۶

حضرت مولانا محمد زاہد صاحب دہلی دارالعلوم دیوبند



اسلامک پبلیکیشنز

پیشین عمل روڈ رزفورد ٹاؤن - لاہور

قیمت ۱۰ روپے

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
مَا شَاءَ اللَّهُ لَا قُوَّةَ إِلَّا بِاللَّهِ الْعَلِيِّ الْعَظِيمِ

جلد دوم

ترجمہ اردو

مجموع الفتاویٰ

حضرت مولانا محمد عبدالحی فرنگی علی کنوی
نور اللہ مرقدہ

شہزاد پبلشرز
جان محمد روڈ لاہور
انارکلی

کے گھر سے نکلی ایک آنکھ پر دوا لگا کر دیکھا کہ وہ بالکل صحت مند ہو گیا۔
ابو الحسنات محمد علی دہلوی

باب التفرقة بالاضطرار

سوال اگر حاکم نے کسی کو قید کر کے جس دام یا چودہ برس کے لئے فصلی سے خارج کر دیا تو کیا اسمیل اور اسکی زوجہ میں تفریق کر دینا چاہیے جواب نہیں۔ درختار میں ہو ولا یفرق بینہما بعضہما ولا العدم ایقلہ و غائبہا حقہا ولو موسر و حوزہ الشافعی باحساناً و زوجہ و تضرع و حاجتہ و لو قطع بہ حنفی لو یفقد لعمرو لو اصابہا فلفظہ بہ نقد اذ المرءة تثل الہام و یعنی شوہر اگر بی بی سے ملنے سے عاجز ہو یا غائب ہوئے کیوجہ سے ایفائے حق نہ کر سکتا ہو پس اگر خوشحال ہو تو تفریق بھرائی جائیگی اور امام شافعی رحمہ اللہ علیہ نے اسے ہاتھ لگھاؤ زوجہ کی تنگدستی اور زوجہ کو غیبت نزع کی بدولت غصہ ہو چکے کیوجہ سے اگر حنفی اسکا حکم دے تو اسکا حکم نافذ نہ ہوگا اور شافعی اگر حکم دے تو اسکا حکم نافذ ہوگا اگر مرد و امور نے رشوت نہ لی ہو سوال اگر نزع کو جنون ہوا تو زوجہ کی وضاحت پر تفریق کر دیا جائیگی یا نہیں جواب اگر جنون حادث ہو جیسے عین تو ایک برس کی مہلت دیکھا جائے پھر بھی اگر اچھا نہ ہو اور وجہ کو اختیار کیا اور اگر جنون مطلق ہو تو فوراً تفریق کرنا چاہیے مہلت دینے کی ضرورت نہیں ہو مجموعہ الہیات میں ہوا ان کان بالزوج جنون او حذام او حص فلا یخارطھا وقال محمد لھا الخیار فاعل الضرر حنفی لھا جب العتہ کذا فی الکافی قال محمد ان کان الجنون حادثاً یوما یو جلد سنہ کا عتہ نہ ہو فی الزاۃ بعد الحول ذال عبدالرحمن کان مطبقاً فہو واجب بہ لکن کذا فی فتاویٰ عالمگیری نے ناقلاً من اماما گینئی اگر شوہر کو جنون یا حذام یا حص ہو تو بی بی کو خیار نہیں ہے اور امام محمد رحمہ اللہ کے نزدیک بغير فرض نزع ضرر یا ہر جیسا کہ الزوج مطبوع الذکر یا بی بی امو یا سیاہا کافی میں یہ امام محمد رحمہ اللہ ہیں اگر جنون حادث ہو تو ایک سال کی مہلت دیا جائیگی جیسا کہ عین کے معاملہ میں ہو چکا ایک سال بعد عورت کو خیار ہے اگر شوہر اچھا نہ ہو اور اگر جنون مطلق ہو تو اسکا حکم مجہوب کی طرح ہم اسی طرح کر لے ہیں یا سیاہی عالمگیری میں حاوی سے نقل کیا ہے و اشد علم حر و المراسی عفودہ القوی او احسانات عمر علیہ کی بخاؤ اشد عن عبد الجلی و اخی الو احسانات محمد علیہ

مجلد دوم

سوال
پرو کی غا
امام الک
عوض خود
حضرت
ترجمہ مع
محرمی ای
نے پہر کی
خود دیکھ
حضرت عمر
اور وہ چاہے
محمد بن عبد
علیا اور
علی رضی اللہ
عنہما میں
لیکے ایک
ایں نہ ہے
ما تقدم فی
واق علیہا
الشیطان
کاف زبیر