

A Comparative Study of Dissolution of Marriage on Account of the Missing Husband (Mafqūd-ul-Khaber) and Women Problems

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Abstract

It is not only a husband who has been given a right to divorce his wife in case of any discord but the wife has also been given a right to ask for separation in Islam. Islam commands the husband to retain the wife in kindness and to take every possible measure for maximization of marital success. This paper provides an analytical study of the right of women in Islamic and Pakistani laws to get separation when her husband remains missing. It also analyzes the status of the missing of the husband and the problems faced by the wife while getting separation through court in case of a missing husband. A survey in the form of interviews was conducted to highlight the reasons of not filing the missing husband cases in the courts.

Key Words

Marriage (Nikah),
Dissolution of Marriage
act 1939, Missing of
Husband (*Mafqūd-ul-
Khaber*), Fasakh

Introduction

Marriage is the basic unit of the society which is observed through the institution of *Nikāh* in Islam. The relationship between man and woman in marriage is sacred and based on love, cooperation, and affection. A Muslim Marriage is a civil contract which can be dissolved like any other contract. It was the general perception that the right of divorce belongs only to the husband and women had no rights to obtain a divorce through the court. But in Islam husband and wife doth have given the right to dissolve the marriage when they observed that they cannot live within the limits prescribed by the Allah Almighty.

A missing person is one whose whereabouts are not known and there is uncertainty about him whether he is alive or not (Al-Marghinānī, 1416). A wife, whose husband has been missing for a long period, suffers from a great hardship regarding protection, companionship, enjoying the happy married life and financial support. It is, therefore, necessary for her interest as well as for the interest of the society to dissolve the marriage if she desires so.

Jurists differ over this issue whether a woman can seek divorce on her husband's missing or not.

According to Imām Abū Ḥanīfah (Al-Zuḥaylī, Wahbah, 1989, Ibn 'Ābidīn, 1407, Ibn Humām, sn, Dr. Muḥammad' Aqlah, 1989, Farangī, sn, Dr. Aḥmad Yūsuf, 1994) and Imām Shāfi'ī (Al-Ramlī, 1386) a woman whose husband's whereabouts are not known, is not entitled to seek separation until the death of the husband is not made conform to certainty. They have fixed the time on the expiry of which the missing person shall be considered to be dead surely. There are many traditions about the period fixed by the Abū Ḥanīfah. Al-Ḥussan ibn Ziyād has stated a report of Abū Ḥanīfah that a person shall be deemed to be dead on the age of one hundred and twenty years from his birth (Al-Marghinānī, 1416). According to Zāhir al-Riwāyah (A collection of consists of 6 books: Jāma' Kabir, Jāma' Ṣaghīr, Siyar Kabīr and Siyar Ṣaghīr, 5. Mabsūṭ (Also called the Asl), 6. Ziyadat on the rulings of the Hanafī imams namely Abū Hanīfah, Abū Yūsuf, and Muḥammad) Ḥanafī School of law hold the opinion that the missing person shall be deemed to be dead when none of coevals of the missing person remain alive. They hold this view because it is rarely possible that man lives after the death of his coevals. Imām Abū Yusuf has reported the time of a hundred years, and in another report, it is stated ninety years (Al-Marghinānī, 1416, Al-Sarakhsī, 1398, Maḥṣalī al-Buldajī, 1426. So according to Ḥanafī's a missing person would be declared to be dead when he would have attained an age at which he would die in the ordinary course of nature.

However, there are some exceptional certain circumstances in which a missing person can be strongly assumed to be dead earlier than the time reported by the jurists. Therefore, a person took part in a war and gets missing and there is no news whether his is alive or dead, or he has left

home in condition of serious death-illness and becomes untraceable. Or he had gone on a sea voyage and there is no news of his reaching at any port. In all these circumstances, a Qāḍī can declare a missing person to be dead and dissolve the marriage (Thānawī, 1987, Al-Shāfi‘ī, 1400.). The wife then observes ‘*Iddah*’ of a dead person (of four months and ten days) and shall have the right to contract another marriage (Thānawī, 1987, Al-Shāfi‘ī, 1400).

Some of the Ḥanafī jurists hold the view that the matter should be left with Qāḍī and he shall decide the case according to the particular circumstances (Ibn ‘Ābiddīn, 1407).

Ḥanafī and Shāfi‘ī jurists’ argument in support of their opinion is the sayings of the Holy Prophet Muḥammad (P.B.U.H) about the wife of the missing person. Dār al-Qutnī (1316) stated the tradition as:

"قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ امْرَأَةُ الْمَفْقُودِ امْرَأَتُهُ حَتَّى يَأْتِيَهَا الْخَبْرُ"

“Wife of the missing person will remain his wife until any news arrives”.

Another argument is the ruling of the Ḥaḍrat ‘Alī (R.A) that the wife of the missing person is on trial. She has to be patient until she does learn of her husband’s death or of his pronouncing divorce to her (Al-Bayḥiqī, sn).

Another tradition is narrated by the Ḥakam Ibn ‘Utibah that if the husband of a woman is missing, he cannot remarry until he arrives or dies (Al-Bayḥiqī, sn).

Moreover, they hold the view that there is uncertainty about the husband’s death and the marriage contract cannot be dissolved based on doubt (Al-Marghinānī, 1416, Al-Kāsānī, 1406, Mawṣalī al-Buldajī, 1426). The Mālikī viewpoint on the issue of a missing person is opposite to Ḥanafī and Shāfi‘ī juristic. According to Imām Mālik, a wife of a missing person can remarry after waiting four years from the time when she brings her case to the court and after seeking the court’s decree of dissolution of marriage and observing the ‘*Iddah*’ period (Ibn Rushd, 1379, Al-Qurṭabī, sn, Al-Kalbī, 1404). Imām Ḥanbal (Buhūtī, 1403, Ibn Qudāma, 1401) has the same view on the issue of missing person as the Mālikīs.

According to Imām Mālik there are four kinds of missing persons whose whereabouts are not known:

- 1- Persons missing in an Islamic State.
- 2- Persons who get missing in an infidel’s country.
- 3- Persons missing in war between the Muslim themselves.
- 4- Persons missing in war with infidels (Ibn Rushd, 1379).

The waiting period for the wife whose husband’s whereabouts are unknown in an Islamic State, is four years. This period of four years is that if a person is alive then it is not possible to be unknown for such a long time. Moreover, the basic purpose is to remove the damage (darar) from the wife. They have the view that in case of ‘*Īlā’*’ and impotency a wife gets deprived of sexual relationship, but when the husband is missing then she is depriving of maintenance too along with the relationship (Ibn Rushd, 1379).

As for the person, whose whereabouts becomes unknown in an infidel’s country has have the same rule as for the prisoner, neither his wife can marry nor divide his wealth until the news of his death is received.

As for the matter of a wife whose whereabouts are unknown in the battle amongst Muslims themselves, there are two opinions:

- 1- The wife shall be free for remarriage after observing ‘*Iddah*’ period without any wait.
- 2- The wife shall have to wait for one year.

The persons, missing in the battle of the infidels is subject to the doctrine of four sayings:

- 1- There will be rule as same of prisoner.
- 2- It will be considered that the person has been killed and after one year, waiting the wife can do another marriage. However, when the wife is at a place from where she can have correct news about the husband then the waiting of one year is not necessary.
- 3- The third view is that the wife can remarry without any wait.
- 4- The fourth rule is that the person shall be deemed to be killed in case of wife, and in case of property it has the rule same as of missing person in an Islamic state (Ibn Rushd, 1379, Al-Kalbī, 1404).

Imām Mālik and Imām Aḥmad bin Ḥanbal hold this view on the base of order of Ḥaḍrat ‘Umar (R.A) which is passed him about the wife of a missing person.

It is reported by Ibn Abī laylā that a wife appeared before Ḥaḍrat ‘Umar (R.A) whose husband become unknown. He, therefore ordered her to wait for four years from the time she brought her case before him. She, then remarry after that period. Later the first husband appeared, Ḥaḍrat ‘Umar gave him a choice between the wife and the Mehr and he chose to take back the mehr (Al-Buldajī, 1426, Anas bin Mālik, sn).

There are several versions of the tradition in which Ḥaḍrat 'Umar fixed the time of four years for the wife whose husband becomes unknown (Al-Buldajī, 1426).

Calculation of the Period

There are several views as to when the time of four years would be calculated. According to ImāmMālik, the period of four years commences from the time when the wife brings the case to the court and when the *Qāḍī* passes his decree. After the four years wait, divorce shall take effect and the wife shall be free for marital-tie after observing the '*Iddah*' period. ImāmMālik does not consider the time waited by the wife whose husband becomes unknown before she brings her case in the court (Anas bin Mālik, sn, *Thānawī*, 1987).

However, the period of four years can be reduced to one year when the wife has already waited a lot for the husband before she brings the case in the court and if there is fear of indulging the wife in adultery (*Thānawī*, 1987).

Return of the Missing Person

If a missing person reappear after the *Qāḍī* has dissolved the marriage and the wife is observing the '*Iddah*' period or has observed the '*Iddah*' period but still not contract a second marriage, then in these conditions the husband would be entitled to recourse her wife (Al-Kalbī, 1404). The right of the first husband shall not be lapse over his wife when he returns before the expiry of the '*Iddah*' period, or in the condition that she has not contracted another marriage. It is reported that Ḥaḍrat 'Umar gave a choice to the husband between the wife and mehr (Al-Bayḥiqī, sn, Anas bin Mālik, sn, Anas bin Mālik, 1994).

However, there are different opinions about the condition when the husband returns after the expiry of '*Iddah*' period and the wife has contracted second marriage. According to the opinion of Imām Mālik if the wife has contracted second marriage after observing the '*Iddah*' period the first husband lapses his right to take her beck (Al-Bayḥiqī, sn, Al-Kalbī, 1404).

According to decision of Ḥaḍrat 'Alī, the wife shall be entitled to the first husband irrespective to the fact that the second husband has consummated the marriage. If the second husband consummated the marriage, then he shall be entitled to pay the dower. And this view is hold by the Ḥanafī jurists (Al-Bayḥiqī, sn, Al-Sarakhsī, 1398, Ibn Humām, sn, *Thānawī*, 1987).

Ḥaḍrat 'Usman gave a choice the husband between the wife and the dower. If he wants to take back the dowery, then it shall have made to be return to him but if he wanted the wife then she shall be separated from the second husband and she shall be return to the first husband after she has observed the '*Iddah*'. The second husband shall be liable to pay the dower in case of cohabitation with her (Al-Bayḥiqī, sn, Ibn Qudāma, 1401, Buhūtī, 1403).

Basis of the Differences between the Jurists

There are two jurisprudential principles on which basis the jurists differ between themselves on the issue of a missing person, that are, *Istiṣḥāb* (in this rule a thing remains on its original state and subject to the shari'h accordingly until clear proof of material change of its original state does become available) and *Qiyās* (analogical reasoning, through this process, the ruling of the sunnah and the Qurān may be used as a means to solve or provide a response to a new problem that may arise). The jurists who do not entitle the wife to seek separation when the husband's whereabouts becomes unknown rely on the rule of *Istiṣḥāb* (Mawṣalī al-Buldajī, 1426). However, the jurists who gave the right to a wife whose husband becomes unknown, to remarry after waiting a reasonable period rely on the fiqh rule of *Qiyās*. They have the view that the wife whose husband becomes unknown is equivalent to Illa or the imprisonment of the husband because the wife will suffer from great difficulty under all these conditions (Ibn Rushd, 1379).

Therefore, the basic propose in this matter is to save the wife from damage or misery. It is difficult for a woman to wait for her husband whose whereabouts are unknown in whole of her life and to save herself from committing sin. Under the Islamic law, it is the rule that the wife is not to be subjected to injury or damage.

Nature of Separation due to Missing

Mālikī jurists do not differentiate between the person either missing due to a valid reason for example is missing for seeking the knowledge or for the propose of earning or missing without any reason (Al-Ṣābūnī, 1322). They hold the views that a person will be considered missing when his whereabouts becomes unknown more than one year. However, when the husband's whereabouts becomes known then *Qāḍī* shall pass him order either to come back and take his wife with him or to divorce her. And if the husband is at unknown place and does not comply with the *Qāḍī*'s order, then on the expiry of the time which court has given him to come back, the *Qāḍī* shall pass

the decree of divorce on demand of the wife (Dr. Muḥammad'Aqlah, 1989, Dr. Aḥmad Yūsuf, 1994). The separation through the court will be an irrevocable divorce.

According to Ḥanblī jurists, a wife cannot seek separation when the husband is missing due to a valid reason (Buhūtī, 1403). They fix the time of six months in which a person will be considered missing and the nature of the separation will be *Faskh* (Al-Ṣābūnī, Dr. Muḥammad'Aqlah, 1989, Dr. Aḥmad Yūsuf, 1994).

Prevalent Pakistani Law about Missing of the Husband

Under the Dissolution of Muslim Marriage Act 1939 the time for the waiting has reduced to four years regarding the wife of the missing husband to contract a second marriage. Section 2 of the said act provides a woman to ask for separation on ground of missing of the husband (That the whereabouts of the husband have not been known for the period of four years. Provided that the decree passed on ground shall not take affect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court set aside the said decree)

This section of the said act is based on the Mālikī School of law but the time of six months for the effect of the decree is not prescribed in Muslim law. The Mālikī view is based on the principle of Ijtihad as to save the wife from harm. Therefore, the time for waiting can be reduced by the court according to the circumstances of the case. In this age of communication when there is not difficult to find any news rather, then the rules can be modified by the way of Ijtihad. Moreover, in under the Muslim law when a husband returns before the wife has contracted second marriage then the husband can take his wife back but under the DMMA 1939 section 2 provides no such option to the husband. Once the marriage gets terminated after the six months from the court's decree the husband shall not have right to ask for the return of his wife.

Survey

To know about the implementation of the clause of the DMMA1939 about the missing of the husband a survey has been conducted.

Q. Is There any Case File Under the Missing of the Husband?

Number of Lawyers to whom the interview was taken	1. Yes	2. No
5	1 20%	4 80%

Missing of the husband is the issue on which no case is found in spite of searching a lot. Therefore, having unable to find a single case an interview was conducted from the lawyers to know the reasons for not filing a single case. As the above figure shows that only one lawyer told about the issue that there were some cases filed and decided on lower level but not reported nor had any proof of that as they gave the decision to the parties.

Q. What is the Main Reason that a Single Case is not Filed Under Missing of the Husband?

Number of Lawyers whom the interview was taken	1.To avoid the court's procedure	2.Ignorance about the law regarding the issue	3. To avoid the law period of 4 years for waiting	4. The law absolute about the issue of missing of the husband.
5	5 100%	2 40%	3 60%	5 100%

The figures show that court's long procedure to prove the issue and the time of four years to wait are the major reasons for not filing the suits under the said ground. Most of the women are directed to ask just for *khul'* to avoid the long procedure. Two of the lawyers have the opinion that most of the women are unaware of the laws about the separation through the missing of the husband and they are obeyed as they were asked to do according to the customs. On the question about the prevailed laws in the Pakistan only one opinion is found that having no authority on the issue means a positive aspect of the law. He further explained that there is no ambiguity in the law, as the law about the missing of the husband is very clear.

Q. Is there a Need for Amendment in the Law Regarding the Separation on Ground of Missing of the Husband?

1. Yes
2. No

Number of Lawyers to whom the interview was taken	1. Yes	2.No
5	4 80%	1 20%

One opinion is found that there is no need for the amendment in law as law is clear about the issue but the others have the opinion that there is a need of the amendments the law regarding the missing of the husband.

Conclusion

To conclude it is clear from the injunctions of Islam that a husband is advised to retain his wife in every best possible way and to save her from any kind of harm.

The Ḥanafī Jurists have strict rule of waiting about 90-100 years then the wife can contract second marriage however, the Mālikī Jurists give a right of second marriage after the 4 years wait and observing the *'Iddah*. Under the DMMA1939 the time for the waiting has been reduced to four years regarding the wife of the missing husband to contract a second marriage which is based on Mālikī School of law. Section 2 of the said act provides a woman the right to ask for separation on this ground when the whereabouts of the husband have not been known for the period of four years. Although the section of the said act is relied on the Mālikī School of law but the time of six months for the effect of the decree is not prescribed in the Muslim law. This Mālikī view is based on Ijtihad therefore, the time of four years can be reduced by the court according to the circumstances and the rules also can be modified by the way of Ijtihad. There is a dissimilarity between both the laws as Islamic law provides a right to the husband that he can recourse to his wife when he returns before the wife has contracted second marriage but the prevalent law DMMA 1939 provides no such right to the husband. Once the marriage gets terminated after the six months from the court's decree, the husband shall not have the right to ask for the return of his wife. There is not even a single case is found on issue related to missing of the husband. Section 2 of the said act also provides a ground to the wife to seek separation when the husband fails to maintain her for the period of 2 years. Most of the wives take the advantage of the clause of non-maintenance and *Khul'*.

Reference

- Al-Bayḥiqī, Abū Bakr Aḥmad ibn al- Ḥussayn ibn ‘Alī. (sn). *Al-Sunnan al- Kubrā*. (1st ed., 7th vol). (p. 224, 443, 446). Ḥaydar Ābād: Majlis Dā‘irat al-M‘ārif al-Naẓāmiyah al-Kāinah fī al-Hind.
- Al-Kalbī, Abū ‘Abd Allāh Muḥammad ibn Aḥmad. (1404.). *Al-Qawānīn al-Fiḥḥah*. (1st vol). (p. 241). Beirut: Dār al-Kitāb al-‘Arabī.
- Al-Kāsānī, Abū Bakr ibn Mas‘ūd, (1406). Kitāb *Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’*. (7th vol). (p.59). Beirut: Labnān, Dār al-Maktabah al-‘Ilmiyyah.
- Al-Marghinānī, Burhān al-Dīn, ‘Alī ibn Abū Bakr ibn ‘Abd al-Jalīl. (1416). *Al-Hidāyah Sharḥ Bidāyat al-Mubtadī*. (1st vol). (pp. 544, 547, 602)Pakistan: Idārah al-Qur‘ān wa al-‘Ulūm al-Islāmiyyah.
- Al-Qurṭabī, Abū ‘Umar Yūsuf ibn ‘Abd Allāh ibn ‘Abd al-Bar. (sn).*Al-Istidhkā*. (6th vol). (p. 130) Beirut: Dār al-Kutub al-‘Ilmiyyah.
- Al-Ramlī, Shams al-Dīn Muḥammad ibn Abū al-‘Abbās Shahāb al-Dīn Aḥmad ibn Aḥmad ibn Ḥamzah. (1386). *Nihāyat al-Muḥtāj li-Sharḥ al-Minhāj*. (7th vol). (p.442). Cairo: al-Maktabah al-Islāmiyyah.
- Al-Ṣābūnī, ‘Abd al-Reḥmān. (1322). *Naẓām al-Ussrah wa Ḥal Mushkalātihā fī ḍaw’ al-Islām* (1st ed). (p. 158). Damascus: Dār al-Fikr.
- Al-Sarakhsī, Imām Shams al-A‘immah Abū Bakr Muḥammad ibn Abī Sahl Aḥmad. (1398).*Kitābal-Mabṣūṭ*. (13th vol). (pp.86-89). Beirut: Dār al-Ma‘rifat.
- Al-Shāfi‘ī, Abū Abd Allāh Muḥammad ibn Idrīs. (1400). *Al-Umm*. (5th vol). (pp. 255-56) Beirut: Dār al-Fikr.
- Al-Zuhaylī, Wahbah, (1989). *Al-Fiḥḥ al-Islāmī wa Adillatuhū*. (3rd ed). (pp.532-533). Damascus: Dār al-Fikr.
- Anas bin Mālik, Abū ‘Āmir al-Asbahī, Abū ‘Abd Allāh. (1994). *Al-Mudawwanah*. (5th vol). (p. 133). Beirut: Dār al-Kutub al-‘Ilmiyyah,.
- Anas bin Mālik, Abū ‘Āmir al-Asbahī, Abū ‘Abd Allāh. (sn). *Al-Muwaṭṭā’*. (4th vol). (p. 180). Beirut: Dār al-Iḥyā’ al-Turāth al- ‘Arabī.
- Buhūtī, Mansūr ibn Yūnus ibn Ṣalāḥ al-Dīn. (1403). *Kashf al-Qina’ ‘an Matn al-Iqna’*. (5th & 19th vol). (p. 124, 478). Beirut: ‘Ālam Kutub.
- Dār al-Qurṭnī, ‘Alī ibn ‘Umar. *Sunan Dār al-Qurṭnī*. (1316). (eds) Yamīnī, ‘Abd Allāh Hāshim, (3rd vol). Cario: Dār al-Muḥṣan lil-Ṭabā‘at.
- Dr. Aḥmad Yūsuf, (1994). *Aḥkām al-Zawāj wa al-Furqah*. (p. 260-699). Cairo: Maktabah al-Naṣr.
- Farangī, ‘Abd al-Ḥa‘ī. *Majmū‘ah Fatāwā*. (2nd vol). (p. 92-93) Lahore: Shehzad Publishers Jaan Muḥamad Road Anār Kalī.
- Ibn ‘Ābiddīn, Muḥammad Amīn ibn ‘Usmān ibn ‘Abd al-‘Azīz. (1407). *Radd al-Muḥtār ‘alā Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār*. (2nd & 4th vols). Beirut: Dār al-Iḥyā’ al-Turāth al-‘Arabī,
- Ibn Humām, al-Siwasī al-Iskandarī, Kamāl-ul-Dīn Muḥammad ibn Hamām al-Dīn ‘Abd al-Wāḥid. *Sharḥ Faṭḥ al-Qadīr*. (3rd vol). (p. 430, 444) Cairo: Maṭba‘at al-Kubrā al-‘Āmīriyah,
- Ibn Qudāma, al-Maqdisī, Muwaffaq al Dīn Abū Muḥammad ‘Abd Allāh ibn Aḥma ibn Muḥammad). (1401). *Al-Mughnī*. (7th vol). (pp. 588-89, 478-80) Riyāḍ: Maktabah al-Riyāḍ al- Ḥadīthiyah.
- Ibn Rushd, Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad. (1379). *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*. (2nd & 3rd vols). (p. 42-43). Cairo: Dār al-Salām li-Tabā‘at wa al-Nashr wa al-Tawzi’ wa al-Tarjumah.
- Mawṣalī al-Buldajī, Abū al-Faḍl Majd al-Dīn ‘Abd Allāh ibn Muḥamūd ibn Mawdūd. (1426). *Al-Ikhtiyār li-Ta‘īl al-Mukhtār*: (3rd vol). (p.41- 42). Beirut: Dār Al-Kutub al-‘Ilmiyyah
- Muḥammad‘Aqlah. (1989). *Naẓām al-‘Ussrah fī al-Islām*. (3rd vol). (pp.223-25). ‘Aamān: Maktabah al-Riysālah.
- Ṭhānawī, Mawlānā Ashraf ‘Alī. (1987). *Al-Ḥīlat al-‘Ājizah li-Ḥīlat al-Nājizah*. (1st ed). (p. 59, 88-89). Karachi: Dār al-Ashā‘at Urdū Bazār.