An Overview of Mawlānā Ashraf ʻAlī al-Thānawīʼs:

Al-Hīlat al-Nājizah li l-Halīlat al-ʻĀjizah

On Legal Options in Sharīʻah for Women to Secure their Rights in Marriage and Divorce

Zameelur Rahman

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Foreword

Al-Hīlat al-Nājiẓah li l-Halīlat al-ʻĀjiẓah (The Effective Stratagem for the Helpless Wife) is a collaborative work on Islāmic law authored by leading Subcontinent 'ulamā' from the early 20th century under the supervision of Mawlānā Ashraf 'Alī al-Thānawī (1863 – 1943 CE).

The book was written in the context of Muslim women in British India who were trapped in unjust marriages. If a husband refuses to issue divorce either on altruistic grounds (*talāq*) or in exchange for a sum of money (*khulʻ*), the woman has no recourse besides the Islāmic law courts to dissolve the marriage. Unlike her husband, she does not have the intrinsic autonomy to enact a divorce. However, most of the Subcontinent had come under British rule and one of the palpable consequences, at least for the Muslim community, was the loss of Islāmic law courts where matters of personal law could be decided in accordance with the dictates of Sharīʻah. Hence, for many, it seemed there was no solution for these oppressed and helpless women. In desperation, many women in British India committed apostasy – may Allāh protect us – as a ploy to dissolve the marriage.[1]

Al-Hīlat al-Nājiẓah aims at redressing this dangerous phenomenon. It does so by outlining legal mechanisms in the Sharīʻah designed to empower women with respect to marriage and divorce. The relevance of the work in today's time could not have been greater. Muslims have spread throughout the known world, with large communities in Europe, America and Africa. The need, therefore, for legally viable channels in the Sharīʻah for women to dissolve their marriages in unjust situations has increased exponentially.

In the following paper, we will summarise the contents of *al-Hīlat al-Nājiẓah*, with an aim to familiarise an English-speaking audience with the basic themes discussed in this important work. The summary is not intended to be exhaustive. Many of the finer points and supporting statements from the classical jurists have not been included. Hence, 'ulamā' who are interested in greater detail are advised to refer to the original work. The Dārul Ishāʻat Edition, dated 1987, was used, which includes an introduction by Muftī Muhammad Taqī al-'Uthmānī and a separate discussion on the subject of *khulʻ*. The Arabic references mentioned as supporting evidence have been incorporated into the footnotes.

For the Hanafī madhhab, *Radd al-Muhtār* of Ibn 'Ābidīn al-Shāmī and *al-Fatāwā al-ʻĀlamgiriyyah* (or *al-Fatāwā al-Hindiyyah*) are the most frequently cited references. Where needed, other books were also cited, including *al-Mabsūt* of al-Sarakhsī, *Fatāwā Qādī Khān* and *Badāʻiʻ al-Sanāʻiʻ* of al-Kāsānī. At least one manuscript/hand-written work was consulted, *Khizānat al-Muftīn*. For the Mālikī madhhab, the primary sources that were consulted are *Mukhtasar al-Khalīl* and its commentaries by al-Dardīr; *al-Muntaqā* by al-Bājī and *al-Mudawwanah* of Sahnūn.

[1] The last section of *al-Hīlat al-Nājiẓah* is a detailed discussion on why this strategy would not in fact dissolve the marriage.

Arabic passages from these classical texts of fiqh are interspersed throughout the Urdū fatwās.

Appended to the end of the treatise is a collection of fatwās from leading Mālikī scholars of Madīnah who were asked to provide detailed explanations on the Mālikī rulings on certain key issues. The Mālikī scholars who answered the questions and whose fatwās were heavily relied upon in the treatise are as follows:

1. ʻAllāmah Saʻīd ibn Siddīq al-Fulānī
2. ʻAllāmah Alfāhāshim
3. ʻAllāmah Muhammad Tayyib ibn Ishāq al-Ansārī
4. ʻAllāmah Sālih al-Tūnisī
5. ʻAllāmah Muhammad ibn ʻAlī al-Baydāwī

References are frequently made to these fatwās.

Al-Hīlat al-Nājizah consists of:

- An introduction
- Two general sections:
    - The first on handing over the powers of divorce to the wife (*tafwīd al-talāq*) based exclusively on Hanafī jurisprudence
    - The second on the situations where women have recourse to an Islāmic Qādī or his replacement to dissolve the marriage based on a synthesis of Hanafī and Mālikī juristic rulings
- An addendum on three further situations
- An appendix on the Shar'ī ruling of a marriage in which the spouses adhere to different religions

Introduction to *al-Hīlat al-Nājizah*

In the introduction, dated and signed by Mawlānā Thānawī in Dhu l-Qa'dah of 1351 H (1933 CE), he starts with an explanation of the contents of the book and a rationale for its compilation.

There are two primary reasons for the compilation. The first is to discount criticisms against the Sharī'ah and its treatment of women that are trapped in marriages with husbands who are missing, insane, impotent, miserly and so on. The concern is that since there are no autonomous Islāmic Qādīs in India, Muslim women have no means to release themselves from such oppressive marriages.

In answer to this criticism, Mawlānā Thānawī contends that Islām has provided the solution, and failure to implement it is a fault in the Muslim community not Islāmic law. The solution is to appoint an Islāmic Qādī who can enforce his judicial decrees by authority of the government; or to request the government to appoint such a Qādī who possesses all the requisite qualities of a Qādī, like being Muslim, accountable, of sound body and mind and well-versed in religion; or at minimum, request the government to appoint a Muslim judge in each locality who enjoys autonomy in issuing decrees on these issues – of marriage and divorce – so that he may consult with the 'ulamā' and give rulings according to Sharī'ah. If Muslims do not make such arrangements, then the blame lies with them, not Islām.

Although this answer is adequate to rebuff the objections made against Islāmic law, Mawlānā Thānawī concedes that the pressing question still remains: Do women have any legal recourse in Sharī'ah in such desperate circumstances to dissolve their marriages? In answer to this question, it is submitted that women who are not yet married have an option in Hanafī jurisprudence to prevent potential injustices in marriage. The procedure and relevant rulings for this are discussed in "Section One".

Subsequent to a marriage, however, the legal options available to a woman are extremely limited in the Hanafī madhhab. This is why the rulings in this case were extracted mostly from the Mālikī madhhab, both from the classical texts of the school and fatwās that were solicited from its living scholars. Rulings pertaining to these issues were collected in "Section Two."

[On Taking Dispensations from another Madhhab and the Issue of Talfīq]

Mawlānā Thānawī then addresses the question of leaving the established rulings of the Hanafī school for dispensations found in the Mālikī madhhab. One may object that doing so entails that Hanafī jurisprudence is inadequate. In response, he argues the fatwās of Section Two were drafted while keeping the conditions of the Hanafī madhhab for taking dispensations from another madhhab in mind. Hence, the steps taken cannot be regarded as an attack on the integrity of the Hanafī school.

There are two conditions in particular which, if fulfilled, permit one to take from another madhhab:

1. The first condition is that it is done for dire need (*darūrah*) and not in following one's whims. There is consensus on this condition. Hence, permission to act on the Mālikī madhhab has only been granted in this treatise where there is clear necessity. Wherever there was no dire need, dispensations of the Mālikī madhhab were not adopted.

   'Allāmah Ibn 'Ābidīn al-Shāmī has explained in his *Sharh 'Uqūd Rasm al-Muftī* that in cases of dire need, there is scope to act on another madhhab. He writes:

   علم أن المضطر له العمل بذلك لنفسه كما قلنا، وأن المفتي له الإفتاء به للمضطر، فما مر من أنه ليس له العمل بالضعيف ولا الإفتاء به محمول على غير موضع الضرورة كما علمته من مجموع ما قررناه

   "It is known that the one who is compelled may act on this [i.e. a weak view] for himself, as we mentioned, and that the muftī may issue fatwā on it for the one who is compelled. Thus, what has passed, that it is not permissible for one to act on a weak view, nor to issue fatwā on it, is premised on a circumstance besides dire need, as you have learnt from all that we have established."

   And in *Radd al-Muhtār*, he said:

   إن الحكم والفتيا بالقول المرجوح جهل...قلت: لكن هذا في غير موضع الضرورة

   "A judicial decree and a fatwā on a weak view is ignorance…I say: But this is in a situation besides dire need."

2. The second condition for taking dispensations from another madhhab is that it does not result in combining between the opinions of the two madhhabs that are followed in such a way that the resultant action is invalid or impermissible according to both madhhabs. This is known as "*talfīq*." Ibn 'Ābidīn writes in *Radd al-Muhtār*:

   الحكم الملفق باطل بالإجماع

   "The ruling made-up [of the opinions of two madhhabs such that the resultant action is invalid according to both] is rejected by consensus."

   Mawlānā Thānawī submits that in his judgement, the most balanced view is that in taking dispensations from another madhhab on the basis of dire need, *talfīq* must not be made in the same set of rulings. For example, *talfīq* must not be made in rulings pertaining only to the actions of salāh or only to the rules of fasting. If, however, *talfīq* is made in different sets of rulings, it would not be the

kind of *talfīq* that is rejected by consensus. However, favouring the side of caution, this latter kind of *talfīq* will not be employed in this book.[2]

The second reason for compiling the book was to dispel ignorance. Some people, under the pretext of following the Mālikī madhhab, create such liberties that would at once be denounced by the Mālikī madhhab and the Hanafī madhhab. Some, due to not having proper acquaintance with the Mālikī madhhab, make mistakes in implementing its rulings. As a consequence, some annulments are unacceptable in Sharī'ah. Hence, this serves as a second reason to collect these rulings in full detail, presented clearly and with the necessary supporting evidence.

The work was critically reviewed and endorsed by leading 'ulamā' from Dārul 'Ulūm Deoband and Mazāhir al-'Ulūm Sahāranpūr, 11 from the first institution and 4 from the second. Their endorsements have also been included in the book. Mawlānā Thānawī warns readers that the book is not to be treated as a self-use manual. One who is working in the field must, firstly, consult with a learned 'ālim in every step of the process. Moreover, the 'ālim must also operate carefully, diligently and with full caution. He advises the 'ālim to consult the reliable books of fatwā in the Mālikī school, in particular *Mukhtasar al-Khalil* and its commentaries by 'Allāmah al-Dardīr, *al-Muntaqā Sharh al-Muwatta'* of al-Bājī, *al-Mudawwanah* and *Hāshiyah Aqrab al-Masālik*.

In the rare case that the solution is not satisfactorily found in these and other reliable Mālikī texts, the 'ālim is to consult the Mālikī scholars residing in Makkah and Madīnah who may be contacted via the chancellor of Madrasah Sawlatiyyah in Makkah and Madrasah 'Ulūm al-Sharī'ah in Madīnah. Secondly, one working in the field must also consult with secular lawyers to ensure the proceedings do not violate state law. This book was written purely on the basis of Shar'ī rulings. If, however, there is ever any conflict with state law, Mawlānā Thānawī advises Muslims who wield influence to advocate for its acceptance within the law.

In closing, Mawlānā Thānawī thanks key figures who were instrumental in the research and write-up of the treatise:

1. Mawlānā Husayn Ahmad al-Madanī, the then head teacher of Dārul 'Ulūm Deoband, who helped greatly in soliciting fatwās from the Mālikī scholars
2. Mawlānā Sayyid Ahmad Sāhib of Madrasah 'Ulūm al-Sharī'ah who also helped in acquiring answers from the Mālikī 'ulamā'
3. Mawlānā Zafar Ahmad al-'Uthmānī who prepared an initial draft of the treatise
4. Muftī Muhammad Shafī'
5. And Mawlānā 'Abd al-Karīm al-Gumtalī who then worked on a detailed write-up.

In humility, Mawlānā Thānawī writes that they should be given credit for authorship of the book, which he only took part in nominally.

[2] *Talfīq* in two different kinds of actions was employed only once in the book, in the context of "hurmat al-musāharah". The authors clarify that this was the first and only ruling in the book in which *talfīq* occurs.

Section One: On *Tafwīd al-Talāq* (Transferring the Right of Divorce to the Wife)

A woman or her guardian may secure an undertaking from her potential husband to transfer the autonomy of divorce to her in the event that he fails to comply with any one of a list of stipulated conditions. This would serve to curb any injustices that he may inflict on the woman subsequent to the marriage. A marriage certificate which transfers autonomy of divorce to the wife in this manner is valid and binding in Sharī'ah. It is known as "*tafwīd al-talāq*."

There are three common procedures of *tafwīd al-talāq*:

1. The conditions are put in writing before the marriage
2. The conditions are stated orally at the time of the marriage contract
3. The conditions are put in writing after the marriage.

These specific procedures will be discussed because they are the most common.

For each of the first and second procedures, there are some conditions that must be observed for the transfer of divorce to be valid.

Conditions for the First Procedure

If the marriage certificate is recorded and signed before the actual marriage contract, there must be an attribution to the marriage (nikāh) itself. For example, the marriage certificate will say: "If I marry X, the daughter of Y, and thereafter violate any of the conditions stated below, then the above named will have the autonomy from that time on, without any time limit, to dissolve the marriage by enacting one irrevocable divorce (talāq bā'in)." If there is no attribution to the marriage, the transfer of divorce mentioned in the marriage certificate is void. A woman will not acquire autonomy of divorce thereby.[3]

Often the marriage certificate is prepared before the marriage but signed and witnessed after the marriage. In this case, it is not necessary to make an attribution to the marriage as this, in reality, falls under the third procedure and not the first.

Conditions for the Second Procedure

In the second procedure, in which the transfer of divorce is mentioned orally at the time of the marriage contract, it is a condition that the offer of marriage is made from the woman's party, meaning, from the woman herself, her proxy (wakīl) or her guardian (walī). Thus, the woman, her proxy or guardian will say: "I give myself," or, "I give X, the daughter of Y, to you in marriage on condition that if you do A, B or C, then I" or "she is at liberty to decide about my" or "her affair. That is, if any condition is violated, I" or "she will have autonomy to enact one irrevocable divorce from then on, without any time limit, in order to release myself" or "herself from the

[3] شرطه الملك كقوله لمنكوحته إن ذهبت فأنت طالق أو الإضافة إليه كإن نكحتك فأنت طالق فلغا قوله لأجنبية إن زرت زيدا فأنت طالق فنكحها فزارت (تنوير الأبصار)

marriage." In response, the man says: "I have accepted." If this is done, the woman will have the autonomy to issue one irrevocable divorce if the husband fails to comply with any one of the stated conditions. She merely has to say: "I have issued one irrevocable divorce upon myself."

If this procedure is not followed, but the offer and transfer of divorce are made from the side of the husband, the marriage will be concluded but the transfer of divorce will be void.[4]

The Third Procedure

A marriage certificate transferring the autonomy of divorce to the wife written or signed by the husband after the marriage is unconditionally valid. However, acceptance of it is entirely at the discretion of the husband. He cannot be compelled to enter into an agreement of *tafwīd al-talāq* after the marriage. Hence, the first two procedures are ideal for a woman who wishes to positively secure her rights in marriage.

Consultation

Giving women complete autonomy of divorce is not without its complications, considering the general nature of women to allow their emotions to cloud their judgement. Hence, the transferral of divorce should be made conditional on consultation from some responsible members of her family. For example, it will be said: "I give myself to you in marriage in exchange for X amount of dowry on condition that if I face severe hardship from you or you violate any one of the following conditions as attested to by two men from the following list, I will have the autonomy from that time forth, without any time limit, to enact one irrevocable divorce." If the marriage certificate or oral proposal is made by the woman's proxy or guardian, the wording would be changed accordingly.

However, even after two men from the list have attested to one or more of the conditions having being violated, the woman should not act in haste. The Messenger of Allāh (peace and blessings be upon him) said:

أبغض الحلال إلى الله الطلاق

"**The most detested of halāl [actions] to Allāh is divorce**."[5]

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[4] نكحها على أن أمرها بيدها صح (الدر المختار)

(قوله صح) مقيد بما إذا ابتدأت المرأة فقالت زوجت نفسي منك على أن أمري بيدي أطلق نفسي كلما أريد أو على أني طالق فقال الزوج قبلت، أما لو بدأ الزوج لا تطلق ولا يصح الأمر بيدها كما في البحر عن الخلاصة والبزازية (رد المحتار)

وفي تعليل الحكم قال الفقيه أبو الليث رحمه الله: لأن البداءة إذا كانت من الزوج كان الطلاق والتفويض قبل النكاح فلا يصح. أما إذا كانت من المرأة يصير التفويض بعد النكاح لأن الزوج لما قال بعد كلام المرأة قبلت، والجواب يتضمن إعادة ما في السؤال صار كأنه قال: قبلت على أنك طالق أو على أن يكون الأمر بيدك فيصير مفوضا بعد النكاح (رد المحتار)

[5] *Sunan Abī Dāwūd*, Mu'assasat al-Rayyān, 3:64; *Sunan Ibn Mājah*, Mu'assasat al-Risālah al-'Alamiyyah, 3:180

Thus, she should make a decision calmly and rationally, being mindful of the following:

1. Once the right of divorce has been transferred to her, she should not act in haste while in a state of anger. Rather, she should fix a period of time, no less than a week, for deliberation
2. She should consult with well-wishers
3. She should perform Salāt al-Istikhārah

Only after having done so should she act on what she feels to be correct. In doing so, the danger inherent in transferring the autonomy of divorce will be diminished.

A Note about Wording

When writing or stating the conditional transfer of divorce, it is necessary to be precise with the wording. One must not use the words "**if** she pleases" as this will limit her autonomy to the short period in which the condition/s was/were violated. Nor should the words "**every time** she pleases" be used as this will extend her autonomy to any future marriage that the couple may enter into. Instead, it should be worded in such a way that the transfer of divorce is neither limited to the short period in which the condition was violated nor is it extended to any future marriage.

Hence, the wording should be something like: "At the time the stated condition/s was/were violated until one month of such time, she will have the autonomy of enacting one irrevocable divorce in order to dissolve the marriage, and every time a condition is thereafter violated, she will regain the autonomy of enacting one irrevocable divorce up to one month from the time of violation. However, this is limited to this marriage. Hence, if after separation, the couple was to remarry, the conditions of transferral are no longer applicable."[6]

Finally, it is necessary for the husband to think carefully about the conditions on which the transfer of divorce is premised before he accepts the *tafwīd al-talāq*. He should take advice from the people of knowledge, insight and experience. He may not take back the transfer of divorce once it has been issued.[7] In order to secure his

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[6] إذا قال لها طلقي نفسك سواء قال لها إن شئت أو لا فلها أن تطلق نفسها في ذلك المجلس خاصة (الفتاوى الهندية)

إن قال لها طلقي نفسك متى شئت فلها أن تطلق في المجلس وبعده ولها المشيئة مرة واحدة وكذا قوله: متى ما شئت وإذا ما شئت ولو قال: كلما شئت كان ذلك لها أبدا حتى يقع ثلاثا كذا في السراج الوهاج (الفتاوى الهندية)

وأطلق الأمر باليد فشمل المنجز، والمعلق إذا وجد شرطه ومنه ما في المحيط لو قال: إن دخلت الدار فأمرك بيدك فإن طلقت نفسها كما وضعت القدم فيها طلقت لأن الأمر في يدها، وإن طلقت بعد ما مشت خطوتين لم تطلق لأنها طلقت بعد ما خرج الأمر من يدها (البحر الرائق)

[7] ليس للزوج أن يرجع في ذلك ولا ينهاها عما جعل إليها ولا يفسخ كذا في الجوهرة (الفتاوى الهندية)

ولا يملك الزوج الرجوع عنه أي عن التفويض بأنواعه الثلاثة لما فيه من معنى التعليق (الدر المختار)

interests, he may make the return, or forfeiting, of the dowry, or a percentage of it, a condition on his part for the transferral of divorce.

قوله الثلاثة: أي التخيير والأمر باليد والمشية (رد المحتار)

Section Two: On *Faskh al-Nikāh* (Dissolution of Marriage through the Law Courts)

This section deals with the options a woman has subsequent to a marriage in the following five situations:

1. The husband is impotent
2. The husband is insane
3. The husband is missing
4. The husband is miserly
5. The husband is truanting

The rulings for the first situation have been derived by and large from Hanafī jurisprudence while the rulings in the remaining four situations have been derived mostly from Mālikī jurisprudence.

Introduction

In all rulings of this section, a Qādī's judicial decree is a condition for the dissolution of marriage. In other words, neither can the woman nor her guardians unilaterally initiate a divorce. The woman must make an application to the court and after making investigations, the Qādī will issue a ruling.

A non-Muslim's decree will have no effect in Sharīʿah. If the case is handled by a Muslim but executed by a non-Muslim judge or vice versa, the decision is invalid, because witness testimonies must also be presented to a competent Qādī. The Qādī himself must hear the testimony or he must receive a written record from another Qādī. Otherwise, the Qādī may not issue a decree.[8]

However, this applies only to the situation that a Muslim judge is present. If there is no Muslim judge, or there is no option to take the case to a Muslim ruler, or the Muslim judge does not observe Sharʿī principles in formulating his ruling, the woman has no recourse in the Hanafī madhhab to dissolve the marriage in the abovementioned situations besides asking her husband for divorce. Hence, an earnest effort must first be made to ask the husband to issue divorce or at least accept *khul'* in order to remain faithful to the principle that dispensations from other madhhabs will only be sought in situations of dire need.

The Tribunal

If the husband does not comply, or divorce/*khul'* is not possible because the husband is missing or insane, and the woman does not have the patience to remain married to

[8] ولو جاء المدعي من القاضي برسول ثقة مأمون عدل إلى قاض آخر لا يقبل لأنه لا يزيد على أن يأتي القاضي بنفسه ويخبر وهو في غير ولايته كواحد من الرعايا بخلاف كتابه لأنه كالخطاب من مجلس قضائه (البحر الرائق)

ولو شهد شهود بحق ثم مات القاضي المشهود عنده وولي قاض آخر لم ينفذ تلك الشهادة حتى تعاد (البحر الرائق)

him, only then will there be scope to adopt the following dispensation from the Mālikī madhhab on the basis of dire need. In the Mālikī view, a tribunal consisting of a minimum of three upright Muslim men (*jamā'at al-muslimīn al-'udūl*) can take the place of a legitimate Shar'ī Qādī in his absence.

The most important condition for taking dispensations from another madhhab is the presence of dire need, and this should be assessed by erudite and practising scholars. Hence, the author of this work did not suffice with his personal opinion but solicited the views of the 'ulamā' of Deoband and Sahāranpūr before proceeding to give fatwā on the Mālikī madhhab.

Three Important Rulings Regarding the Tribunal

1. With respect to the Tribunal, the condition of "uprightness" (*'adālah*) means the individuals selected for the Tribunal must not be guilty of *fisq* (sinfulness). *Fisq* is to commit one major sin or persist on a minor sin. Hence, if a man accepts interest or bribery, cuts his beard short or is not regular in his salāh or fasting, he cannot be a member of this Tribunal. If no influential person that fits this description can be found in an area, they should elect some religious persons who do fit this description to pass verdicts in such cases.

2. The Tribunal should consist entirely of 'ulamā'. If this is difficult, there should be at least one 'ālim on the Tribunal, and if this too is difficult, an 'ālim must be made to supervise the entire process from beginning to end. If this is not done, any ruling issued by the Tribunal is invalid even if Shar'ī principles were observed.[9]

3. The Tribunal functions as a single body. Hence, if there is any disagreement over the final verdict, the decree of some members of the Tribunal to the exclusion of others will have no effect. Only a unanimous judicial ruling from all members of the Tribunal will have effect in Sharī'ah.[10]

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[9] ونبذ حكم جائر وجاهل لم يشاور وإلا تعقب ومضى غير الجور (مختصر الخليل)

العلماء ولو وافق الحق... وإنما تعقب مع المشاورة؛ لأنه، وإن عرف الحكم فقد لا يعرف إيقاعه؛ لأنه يحتاج لزيادة نظر في البينة وغيرها من أحوال المتداعيين إذ القضاء صناعة دقيقة لا يهتدي إليها كل الناس (شرح مختصر الخليل)

[10] قلت: فلو أنهما اختلفا فطلق أحدهما ولم يطلق الآخر، قال: إذا لا يكون هناك فراق لأن إلى كل واحد منهما ما إلى صاحبه باجتماعهما عليه (المدونة)

ولو حكم المتخاصمان رجلين فحكم أحدهما ولم يحكم الآخر فإن ذلك لا يجوز له قاله سحنون (المنتقى للباجي)

The Ruling of an Impotent Husband

In the terminology of Islāmic jurisprudence, an impotent man is one who despite possessing the male organ, is unable to perform intercourse with a woman, whether due to illness, weakness, old age, magic or some other reason. If a man is able to perform intercourse with some women but not others, he will be regarded as impotent with respect to those he is not able to perform intercourse.[11]

The wife of an impotent man has legitimate grounds of separation with the conditions discussed further below. The procedure is as follows:

1. The woman presents her case to the Qādī or the Tribunal
2. The Qādī or the Tribunal then investigates her claim by summoning the husband to court and asking him if he is indeed impotent
3. If he confesses, he will be given one year respite for treatment
4. If he does not confess and claims that he did perform intercourse with her, then:
    a. If she does not claim to be a virgin, the husband will be made to take an oath. If he takes an oath that he is not impotent and he has performed intercourse with her, the wife will not have any grounds for separation. On the other hand, if he refuses to take the oath, he will be given respite of one year for treatment.

    b. If she claims to be a virgin, the Qādī or Tribunal will arrange for an examination to be conducted on her by reliable and competent women. In the Hanafī madhhab, the examination of one trustworthy woman is sufficient, but caution dictates that at least 2 women should examine her. However, if the case is not being handled by a Qādī but a Tribunal, the conditions of the Mālikī madhhab must be observed. According to the Mālikī madhhab, the examination of no less than two women will be accepted.[12]

        i. If after examination, it is found that she is not a virgin, the husband will be made to take an oath that he is not impotent and he has performed intercourse with his wife. If he takes the oath, his word will be accepted, and the woman will have no

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[11] هو الذي لا يصل إلى النساء مع قيام الآلة، فإن كان يصل إلى الثيب دون الأبكار أو إلى بعض النساء دون البعض، وذلك لمرض به أو لضعف في خلقه أو لكبر سنه أو سحر فهو عنين في حق من لا يصل إليها كذا في النهاية (الفتاوى الهندية)
أي مع وجود الآلة سواء كانت تقوم أو لا (رد المحتار)

[12] قلت: أرأيت ما لا يراه الرجال هل يجوز فيه شهادة امرأة واحدة؟ قال مالك: لا يجوز في شيء من الشهادات أقل من شهادة امرأتين، لا يجوز شهادة امرأة واحدة في شيء من الأشياء (المدونة)
وإن أتى بامرأتين تشهدان له قبلتا (مختصر الخليل)

grounds of separation. If he refuses to take an oath, he will be given one year respite for treatment.

ii. If, on the other hand, the examination reveals that she is indeed a virgin, the Qādī or Tribunal will issue a ruling for the husband to be given one year respite for treatment without asking him to take an oath.[13]

In short, if it is established by some form of evidence that the woman is not a virgin, whether because of a previous marriage, her own confession or the report of the female examiners, the man's oath that he has performed intercourse with her will be accepted and she will have no grounds for separation. If, however, the man refuses to take an oath, the woman's complaint will be considered valid, and he will be given one year's respite for treatment. On the other hand, if the female examiners report that she is indeed a virgin, he will immediately be given one year's respite for treatment without being asked to take an oath.

There is disagreement whether this "one year" refers to a solar year or a lunar year. The narration of "Zāhir al-Riwāyah" (manifest transmission)[14] is that it is a lunar year.

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[13] إذا رفعت المرأة زوجها إلى القاضي وادعت أنه عنين وطلبت الفرقة فإن القاضي يسأله هل وصل إليها أو لم يصل فإن أقر أنه لم يصل أجله سنة سواء كانت المرأة بكرا أم ثيبا، وإن أنكر وادعى الوصول إليها فإن كانت المرأة ثيبا فالقول قوله مع يمينه أنه وصل إليها كذا في البدائع.

فإن حلف بطل حقها، وإن نكل يؤجل سنة كذا في الكافي، وإن قالت: أنا بكر نظر إليها النساء وامرأة تجزئ والاثنتان أحوط وأوثق فإن قلن: إنها ثيب فالقول قول الزوج مع يمينه كذا في السراج الوهاج.

فإن حلف لا حق لها، وإن نكل يؤجله سنة كذا في الهداية، وإن قلن: هي بكر فالقول قولها من غير يمين (الفتاوى الهندية)

فإن قالت امرأة ثقة والثنتان أحوط هي بكر خيرت (الدر المختار)

التأجيل تعتبر السنة القمرية في ظاهر الرواية كذا في التبيين وهو الصحيح كذا في الهداية روى الحسن عن أبي حنيفة – رحمه الله تعالى – أنه تعتبر سنة شمسية وهي لا تزيد على القمرية بأيام وذهب شمس الأئمة السرخسي في شرح الكافي إلى رواية الحسن أخذا بالاحتياط، وكذلك صاحب التحفة، وهذا هو المختار عندي كذا في غاية البيان وهو اختيار شمس الأئمة في المبسوط، واختيار الإمام قاضي خان والإمام ظهير الدين في التأجيل أنه يقدر بسنة شمسية أخذا بالاحتياط كذا في الكفاية وعليه الفتوى كذا في الخلاصة (الفتاوى الهندية)

ولو أجل في أثناء الشهر فبالأيام إجماعا (الدر المختار)

جاءت المرأة إلى القاضي بعد مضي الأجل وادعت أنه لم يصل إليها وادعى الزوج الوصول، فإن كانت ثيبا في الأصل كان القول قوله مع اليمين، فإن حلف بطل حقها، وإن نكل خيرها القاضي، وإن قالت المرأة: أنا بكر نظر إليها النساء، والواحدة تكفي والثنتان أحوط فإن قلن هي ثيب كان القول قوله مع اليمين، وإن قلن هي بكر أو أقر الزوج أنه لم يصل إليها خيرها القاضي في الفرقة كذا في شرح الجامع الصغير لقاضي خان (الفتاوى الهندية)

إن اختارت الفرقة أمر القاضي أن يطلقها طلقة بائنة فإن أبى فرق بينهما هكذا ذكر محمد – رحمه الله تعالى – في الأصل كذا في التبيين والفرقة تطليقة بائنة كذا في الكافي (الفتاوى الهندية)

[14] That is, the five famous books authored by Imām Muhammad ibn al-Hasan al-Shaybānī in which he transmits the reliable positions of Imām Abū Hanīfah, Imām Abū Yūsuf and himself, and occasionally, the opinions of Imām Zufar and Imām al-Hasan ibn Ziyād. Namely, *al-Asl* (also called: *al-Mabsūt*), *al-Jāmi' al-Kabīr*, *al-Jāmi' al-Saghīr*, *al-Ziyādāt* and *al-Siyar al-Kabīr*. Generally, the fatwā position of the Hanafī madhhab is on one of the transmitted positions in the Zāhir al-Riwāyah.

However, in the transmission of al-Hasan ibn Ziyād, it is a solar year, and this has been preferred for fatwā by the later jurists on the basis of caution. This time period will commence from the Qādī's or Tribunal's decision to give respite, regardless of the time that has elapsed before the case was taken to court.[15]

5. If after a year, the husband's treatment was successful and he was able to perform intercourse with his wife even once, she will not have a right of separation.
6. If, however, his treatment was unsuccessful and he was unable to perform intercourse even once with his wife, the Qādī/Tribunal will investigate further. If the husband confesses, the Qādī/Tribunal will ask the woman in that very session whether she wishes to remain in the marriage or not. If she asks for a separation, the Qādī/Tribunal will ask the husband to issue a divorce. If he refuses, the Qādī/Tribunal will issue a separation. Whether the husband issues a divorce or the Qādī/Tribunal annuls the marriage, the separation amounts to one "irrevocable divorce" (talāq bā'in). If, however, she does not demand a separation in the very session that this offer is made, or she remains quiet until the session terminates, or she does any other act that suggests she does not wish for a separation, her right of separation will be revoked.[16]
7. If the husband does not confess but claims to have performed intercourse with her, then:
    a. If it was proven that she was not a virgin or she now claims that her virginity was lost some other way, the man will be asked to take an oath. If he takes an oath that he did indeed perform intercourse with her, his oath will be considered, and she will have no grounds of separation. If however, he refuses to take an oath, the woman will be given the option of separation in the manner explained above.[17]
    b. If it was proven that she was a virgin on the first occasion and again it is revealed upon examination that she remains a virgin, the Qādī or Tribunal will immediately give her the option of separation without taking an oath from the husband.

<u>Conditions of Separation</u>

Separation on the grounds of the husband's impotence is only valid when the following conditions are met:

1. The woman had no prior knowledge of his impotence. Hence, if she married him despite knowing of his impotence, she has no right of separation.[18]

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[15] ابتداء التأجيل من وقت المخاصمة كذا فى المحيط (الفتاوى الهندية)

[16] فإن اختارت زوجها أو قامت عن مجلسها أو أقامها أعوان القاضي أو قام القاضي قبل أن تختار شيئا بطل خيارها كذا في المحيط (الفتاوى الهندية)

[17] فإن نكل فى الإبتداء أجل وفى الإنتهاء خيرت (الدر المختار)

[18] إن علمت المرأة وقت النكاح أنه عنين لا يصل إلى النساء لا يكون لها حق الخصومة (الفتاوى الهندية)

2. The husband and wife did not perform intercourse even once subsequent to the marriage. Hence, if the husband performed intercourse with her even once, she will not have a right of separation.[19]
3. After coming to know of his impotence, she does not say: "I am happy to stay with him" or something to that effect, clearly expressing her consent to remain with him. If she merely remains silent or even allows him to touch, kiss or sleep in the same bed with her, this does not amount to a clear consent, and thus she will still have legitimate grounds for separation.[20]

If after marriage, a legitimate Shar'ī seclusion (khalwa sahīhah)[21] took place between the husband and wife, the husband will be liable to pay the full dowry after dissolution of the marriage and the woman must observe 'iddah.[22]

Note: The above discussion is regarding one who possesses the male organ but is unable to perform intercourse. If it is found that the husband does not possess the male organ or it is extremely small, he will not be given respite after following the above mentioned procedure. Instead, she will immediately be given a choice to separate.[23]

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[19] فلو جب بعد وصوله إليها مرة أو صار عنينا بعده أي الوصول لا يفرق لحصول حقها بالوطي مرة (الدر المختار)

وما زاد عليها فهو مستحق ديانة لا قضاء...ويأثم إذا ترك الديانة متعنتا مع القدرة على الوطي (رد المحتار)

[20] فلو وجدته عنينا أو مجبوبا ولم تخاصم زمانا لم تبطل حقها (الدر المختار)

أي ما لم تقل رضيت بالمقام معه كذا قيده في التتارخانية عن المحيط (رد المحتار)

[21] This refers to the man and wife being in solitude with each other in such a way that the husband is in no way hindered from performing intercourse with her. That is, neither of them are unwell or fasting an obligatory fast, and she is not experiencing hayd (menstruation) or nifās (post-natal bleeding), nor is she in the state of ihrām.

[22] وإلا بانت بالتفريق من القاضي (الدر المختار) ولها كمال المهر وعليها العدة لوجود الخلوة الصحيحة (رد المحتار)

[23] ولو وجدت المرأة زوجها مجبوبا خيرها القاضي للحال ولا يؤجل كذا في فتاوى قاضي خان، ويلحق بالمجبوب من كان ذكره صغيرا جدا كالزر (الفتاوى الهندية)

The Ruling of an Insane Husband

According to the view of Imāms Abū Hanīfah and Abū Yūsuf, the wife does not have the right of separation on the grounds of insanity. If the onset of insanity was before consummating the marriage, and as a result of his mental state, the husband is unable to perform intercourse with her thereafter, the same rules of an impotent husband will apply according to Imām Abū Hanīfah. In the view of Imām Muhammad, if the insanity is such that she is unable to remain with him because, for example, she fears that he may kill her, she has legitimate grounds to ask for a separation.[24] The imāms of the other three madhhabs agree with the view of Imām Muhammad. According to *al-Hāwī al-Qudsī*, fatwā is on the view of Imām Muhammad, and this seems to be the most correct view.[25]

Imām Muhammad made a distinction between two kinds of insanity, one which is more complete and severe than the other. The first is known as *mutbaq* and the second *ghayr mutbaq*. However, it is difficult to identify the exact difference between these two types in Imām Muhammad's usage. The Mālikī school makes no distinction between them.[26] Hence, all situations will be dealt with according to the procedure Imām Muhammad has given for the less severe form of insanity. That is, the husband will be given one year respite for treatment in much the same way as an impotent husband.

With respect to the procedure, after the wife makes an application to the Qādī or the Tribunal, they will first verify the husband's insanity. If it is confirmed that he is insane, his guardian or representative will be informed that he has one year respite for treatment. If after the one year period has elapsed, the woman reapplies for

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[24](ولا يتخير أحدهما) أي الزوجين (بعيب الآخر) فاحشا كجنون وجذام وبرص ورتق وقرن (الدر المختار)

وخالف الأئمة الثلاثة في الخمسة مطلقا ومحمد في الثلاثة الأول لو بالزوج كما يفهم من البحر وغيره (رد المحتار)

ولو قضى بالرد صح (الدر المختار)

وإذا كان بالزوج جنون أو برص أو جذام فلا خيار لها كذا في الكافي

قال محمد – رحمه الله تعالى – إن كان الجنون حادثا يؤجله سنة كالعنة، ثم يخير المرأة بعد الحول إذا لم يبرأ، وإن كان مطبقا فهو كالجب وبه نأخذ كذا في الحاوي القدسي (الفتاوى الهندية)

على قول محمد لها الخيار إذا كان على حال لا تطيق المقام معه، وفي كتاب الآثار للإمام محمد: وكذلك إذا وجدته مجنونا موسوسا يخاف عليها قتله (الفتاوى الهندية)

قال محمد: إن كان بالزوج عيب لا يمكنه الوصول إلى زوجته فالمرأة مخيرة بعد ذلك ينظر إن كان العيب كالجنون الحادث والبرص ونحوهما، فهو والعنة سواء، فينظر حولا، وإن كان الجنون أصليا أو به مرض ولا يرجى برئه فهو والجب سواء وهي بالخيار إن شاءت رضيت بالمقام معه وإن شاءت رفعت الأمر إلى الحاكم حتى يفرق بينهما (الفتاوى الحمادية)

[25] وفى البناية عن المرغيناني لا يكون المجنون كفؤا للعاقلة (منحة الخالق)

[26] وروى عبد الملك بن الحسن فى المجنون سواء كان جنون إفاقة أو مطبق إن كان يؤذيها ويخاف عليها منه حيل بينهما وأجل سنة...فإن برئ وإلا فهي بالخيار

annulment and it is confirmed the husband is still insane, she will be given the option of separation. If she exercises her right of separation, the Qādī or Tribunal will issue a separation.

If the onset of insanity was before the marriage, the separation will not be considered an "irrevocable divorce" but a true annulment, the legal outcome being that the man and woman were never married. If the onset of insanity was after the marriage, there is some ambiguity on what kind of divorce the separation amounts to. Precaution dictates that in this case the separation will be counted as one irrevocable divorce.

The conditions for her application to be valid are as follows:

1. She was not aware of his insanity before marriage
2. She did not express explicit approval of the marriage after knowledge of his condition
3. Once given the option of separation, she exercises her right of separation in the very same session
4. After the woman comes to know that insanity is a legitimate grounds for separation, she does **not** allow her husband to perform intercourse with her, in that she avoids being alone with him. If he performs intercourse with her by force, the right of separation remains.

If the annulment took place before a legitimate Shar'ī seclusion, the dowry will be waived and there will be no 'iddah. If legitimate Shar'ī seclusion occurred (before knowledge of his condition), then full dowry and 'iddah will be necessary after separation.[27]

Note: If any one of the conditions mentioned above are not met, there may still be grounds for separation on the basis of not receiving maintenance from the husband. However, in such a case all conditions of this situation must be observed. One such condition is that the woman did not know before marriage that the husband was poor.[28]

[27] وفسخ العقد رفعه فى الأصل وجعله كأن لم يكن ولو لم يكن حقيقته لم يكن لها مهر، فكذا إذا التحق بالعدم من الأصل...وإن كان قد دخل بها لا يسقط المهر لأن المهر قد تأكد بالدخول فلا يحتمل السقوط بالفرقة (البدائع الصنائع)

[28] لا إن علمت عند العقد فقره فليس لها الفسخ ولو أيسر بعد ثم أعسر

The Ruling of a Missing Husband

The majority of the jurists hold that a missing man will be legally considered alive with respect to his wealth until the men of his age pass away. Thereafter, his wealth be distributed amongst his heirs. This is the view of Abū Hanīfah, Mālik and al-Shāfi'ī. Imāms Abū Hanīfah and al-Shāfi'ī also maintain this rule with regards to the wife of a missing man. That is, she will remain married to him until men of his age pass away. However, the Hanafī jurists have allowed the Qādī in some situations to give her permission to marry another man, that is, when based on circumstantial evidence, the most likely reason for being missing is death. For example, one who was missing in battle would most likely have been killed.[29] In situations besides these, the wife of a missing man has no other option in the Hanafī madhhab besides waiting until all men of equal age pass away.

However, in the Mālikī madhhab, observing certain conditions, a marriage can be annulled by the Qādī following a four year period from the time a woman applies for separation. The woman will subsequently observe 'iddah and may thereafter marry another man. The Hanbalī madhhab has also stipulated a four year period in some situations as mentioned in *al-Mughnī*.

Some of the later Hanafī jurists gave fatwā on the Mālikī school in this issue because of the difficulty inherent in the Hanafī position.[30] The 'ulamā' of India have agreed on shifting to the Mālikī position, resulting in the ruling effectively becoming part of the Hanafī school. Nonetheless, as far as possible, it is still necessary for a woman to try to adhere to the original ruling of the Hanafī madhhab. If she has no arrangements for maintenance or she is fearful of falling into sin, there will be leeway to act on the Māikī dispensation based on dire need. While adopting the Mālikī view it is necessary to observe all the conditions of the Mālikī madhhab as stated by Ibn 'Ābidīn.[31]

Ibn 'Ābidīn al-Shāmī discussed the Māikī madhhab very briefly, which is why there was a need to study the position of the Mālikī school more thoroughly. Hence,

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[29] واختار الزيلعي تفويضه إلى الإمام (الدر المختار)

قال في الفتح: فأي وقت رأى المصلحة حكم بموته... ومقتضاه أنه يجتهد ويحكم القرائن الظاهرة الدالة على موته وعلى هذا يبتنى على ما في جامع الفتاوى حيث قال: وإذا فقد في المهلكة فموته غالب فيحكم به، كما إذا فقد في وقت الملاقاة مع العدو أو مع قطاع الطريق، أو سافر على المرض الغالب هلاكه، أو كان سفره في البحر وما أشبه ذلك حكم بموته؛ لأنه الغالب في هذه الحالات وإن كان بين احتمالين، واحتمال موته ناشئ عن دليل لا احتمال حياته؛ لأن هذا الاحتمال كاحتمال ما إذا بلغ المفقود مقدار ما لا يعيش على حسب ما اختلفوا في المقدار نقل من الغنية اهـ ما في جامع الفتاوى.

وأفتى به بعض مشايخ مشايخنا وقال إنه أفتى به قاضي زاده صاحب بحر الفتاوى، لكن لا يخفى أنه لا بد من مضي مدة طويلة حتى يغلب على الظن موته لا بمجرد فقده عند ملاقاة العدو أو سفره البحر ونحوه (رد المحتار)

[30] لو أفتي به في موضع الضرورة لا بأس به على ما أظن (رد المحتار عن القهستاني)

[31] مستجمعا شروطه (رد المحتار)

questions were sent to the Mālikī jurists of Madīnah and after receiving answers, some follow-up questions were sent. This occurred a third time. All of these correspondences have been appended to the book *al-Hīlat al-Nājizah*.

The procedure for a woman who wishes to apply for separation on the grounds of her husband being missing in a "Dārul Islām," that is a land governed by laws of Sharī'ah, is to first take the case to a Qādī and prove by means of testimony that she was married to the man in question. If people who witnessed the marriage itself are not available, the testimony of those who are aware of their marriage is sufficient.[32] Next, it will be proven through testimony that the husband is indeed missing.

Furthermore, it is necessary for the Qādī to conduct his own investigations to search for him. This may be done by questioning people who would be expected to know his whereabouts.[33] If there is hope in finding him by placing a notice in newspapers or other media outlets, this should also be done. In short, all available means and resources should be exploited to find him. There is disagreement over who should bear the expenses of this investigation. Some say it should be the woman herself and others, the treasury. In Dārul Harb, a group of men may bear the expenses or, if possible, the government.

When his missing status is confirmed, the Qādī will issue a decree to the woman to wait for four years. The period of four years will commence from the time the Qādī, having conducted his own investigations, has confirmed the missing status of the husband. No consideration is given to the time that elapsed before this.

If within this period, no information is received about him, he will be considered dead. The woman will be told to observe 'iddah for 4 months and 10 days, and thereafter she may marry another man. After the four year period, the woman does not have to reapply for separation. The initial application is adequate.[34] However, in order to act on the Hanafī madhhab as far as possible, after the four year period, the woman should return to the Qādī, and acquire a ruling from him that her husband is legally dead.[35]

In a Dārul Harb where the land is governed by non-Shar'ī laws, the majority of Mālikīs agree with the Hanafī stance. That is, a woman may not separate from her missing husband until all men of his age pass away. However, al-Ashhab from the

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[32] أما النكاح ففى العتبية عن سحنون قال جل أصحابنا يقولون فى النكاح اذا استنشر خبره فى الجيران أن فلانا تزوج فلانة وسمع الزفاف فله أن يشهد أن فلانة زوجته فلان إلخ (المنتقى للباجي)

[33] من حين العجز عن خبره بالبحث عنه فى الأماكن التي يظن ذهابه إليها من البلدان بأن يرسل الحاكم رسولا بكتاب لحاكم تلك الأماكن مشتمل على صفة الرجل وحرفته ونسبه ليفتش عنه فيها (شرح الدردير)

[34] فيؤجل الحر أربع سنين...ثم اعتدت عدة الوفاة وسقطت بها النفقة ولا يحتاج فيها لأذن (مختصر الخليل) لإذن من الحاكم لأن إذنه حصل بضرب الأجل أولا (شرح الدردير)

[35] فما لم ينضم إليه قضاء لا يكون حجة (الدر عن القنية)

senior jurists of the Mālikī school held that the ruling in Dārul Harb is the same as the ruling in Dārul Islām.[36]

If it is possible in a Dārul Harb to exploit all necessary means and resources to search for a missing husband, according to the contemporary Mālikī jurists who were consulted, it will share the ruling of Dārul Islām in this issue. Due to the absence of Islāmic rule, a Muslim judge who is appointed by the government to issue rulings in accordance with the Sharī'ah is sufficient. If a Muslim judge of this description is not available, a Tribunal may replace him as explained earlier.

Note: In the case of a missing husband, if the woman takes her case to a place where a Shar'ī Qādī is available, his ruling will be valid. However, in the case of an impotent or insane husband, it is necessary for her husband to be present in order for the ruling to be legitimate.

<u>If the Missing Husband Returns</u>

If the husband returns before a second marriage, or before a legitimate Shar'ī solitude with a second husband, the woman will remain married to the first husband.

If, however, the husband returns after a legitimate Shar'ī solitude has taken place with a second husband, the Mālikī madhhab makes a distinction between the situation that the second husband was aware of the missing husband and the situation that he was not aware, stating that in the first she will return to the first husband and in the second she will remain with the second.[37] However, the Hanafī madhhab makes no distinction between the two situations, stating that in all cases the woman will return to the first husband and the marriage to the second husband will dissolve upon his return.[38] Since there is no need to act on the Mālikī madhhab in this case, it is necessary to adopt the Hanafī stance.

There is no need to renew the marriage and no new dowry must be stipulated. She must observe 'iddah from the second husband for either three menstrual periods or the delivery of a child and this will be observed in the residence of the first husband.[39] After a legitimate Shar'ī solitude with the second husband, the full amount of dowry is payable. Before a legitimate Shar'ī solitude, the second husband does not

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[36] أما المفقود في بلاد الحرب فحكمه حكم الأسير لا تتزوج امرأته ولا يقسم ماله حتى يعلم موته أو يأتي عليه من الزمان ما لا يحيى إلى مثله في قول أصحابنا كلهم حاشا أشهب فإنه حكم له بحكم المفقود دى المال والزوجة معا (المقدمات لابن رشد)

[37] فتكون للمفقود فيما إذا جاء أو تبين حياته أو موته فى العدة أو بعدها وقبل عقد الثاني أو بعده وقبل تلذذه بها أو بعده عالما بما ذكر وتفوت عليه وتكون للثاني إن تلذذ بها غير عالم (شرح الدردير)

[38] وقد صح رجوعه عنه إلى قول علي – رضي الله عنه –، فإنه كان يقول ترد إلى زوجها الأول، ويفرق بينها وبين الآخر، ولها المهر بما استحل من فرجها، ولا يقربها الأول حتى تنقضي عدتها من الآخر وبهذا كان يأخذ إبراهيم – رحمه الله – فيقول: قول علي – رضي الله عنه – أحب إلي من قول عمر – رضي الله عنه –، وبه نأخذ أيضا (المبسوط)

[39] وللموطوئة بشبهة أن تقيم مع زوجها الأول وتخرج بإذنه فى العدة لقيام النكاح بينهما، إنما حرم الوطي (الدر المختار)

pay any amount of dowry. Any children from the second marriage will belong to the second husband.

The Ruling of a Miserly Husband

A miserly man in the terminology of Sharī'ah is one who despite having the means does not maintain his wife according to the requirements of Sharī'ah. Based on dire need, the rulings in this situation have also been extracted from the Mālikī school. In such a situation, it is necessary for the wife to first try to dissolve the marriage by means of *khul'*. If despite her best efforts, the husband does not comply, then in cases of extreme need, she may take recourse to the Mālikī position that the miserly character of the husband is a grounds of separation. There are two cases of extreme need:

- Firstly, no arrangements have been made for the wife's expenses neither by the husband nor by anyone else and the wife is unable to work.
- Secondly, because of the miserly character of the husband, the woman is forced to live separately from him, and she fears falling into sin because of this.

The woman must first present her case to the Qādī or Tribunal (in his absence) who will then investigate the matter based on Shar'ī testimony. If the woman's claims are confirmed and it is proven that despite having the means, the husband is not providing for her, the husband will be issued the following ultimatum: He must either fulfil the right of his wife or issue her a divorce, and if he refuses to do either, the Qādī or Tribunal will annul the marriage. If the husband does not respond, the Qādī or Tribunal will proceed to annul the marriage. There is no period of respite. Once the application has been made and the wife's claims have been confirmed, the husband will immediately be given this ultimatum.

If the husband mends his ways following separation and promises to provide for her after the 'iddah has completed, he has no unilateral right to take her back. He may only do so with her consent by renewing the marriage. If he does so before the 'iddah, there is some ambiguity as it is not clear whether the separation in this case is counted as a "revocable divorce" (talāq raj'ī) or an "irrevocable divorce". Because the first is more likely as stated by 'Allāmah Sa'īd ibn Siddīq, the woman must return to him if he makes a solemn promise to provide for her during the 'iddah. However, the marriage must also be renewed out of precaution.

The Ruling of a Truanting Husband

If a husband is absent and known to be alive, but he does not visit his wife nor does he make arrangements for her to come to live with him, nor does he make arrangements for her expenses, nor does he issue her a divorce, leaving her distraught and helpless, he is known as a "truanting husband". The wife must first attempt to obtain *khul'* from him. If he does not comply, it is better for her to be patient. If she cannot endure because of lack of maintenance, she may act on the Mālikī dispensation as follows.

She presents her case to the Qādī or Tribunal and proves by means of testimony that the truanting man is indeed her husband, and thereafter proves by means of an oath that he did not make arrangements for her provision nor did she forfeit her rights of maintenance. If someone takes responsibility for her maintenance thereafter, she will lose her right of separation. But if that person does not follow through with this undertaking, she may reapply for separation. In such a case, or in the case that no one takes responsibility for her maintenance, the Qādī or Tribunal will send a written decree to the husband, stating that he must either bring his wife to live with him or make arrangements for her expenses or issue her a divorce, and if he does not comply, the court will issue a separation. The written decree must be sent via two reliable persons who will demand a response, and any written or verbal response will be recorded so that they can be brought as evidence to the Qādī or Tribunal.[40] However, if the husband stays in a remote place where it will be difficult to send two people to him, it will be sufficient to send the written decree to him by post. If the husband does not respond, the Qādī or Tribunal will wait a further month. If within the month, the wife's complaints are still not redressed, she will reapply for a separation and the Qādī or Tribunal will annul the marriage.

If the husband returns after the separation but during the 'iddah, he has the right to take her back as the separation only amounts to a "revocable divorce." If he returns after the 'iddah and proves that his wife's claims were false, in that he did make arrangements for her maintenance or he invited her to stay with him or she forfeited her rights, she will be returned to him. This will be the case even if she remarried and had children with a second husband. In such a case, the second marriage will immediately terminate, and she will have to observe 'iddah if a legitimate Shar'ī solitude occurred. The ruling of the amount of dowry payable by the second husband is the same as for the missing husband.

If, however, the husband is unable to provide any proof against her claims, she will not be returned to him.

[40] ولم يفد كتاب وحده (مختصر الخليل) من غير شهادة على الحاكم...فلا بد من شاهدين يشهدان على أن هذا كتاب القاضي الفلاني وأنه أشهدهما على ما فيه (شرح الدردير)

Closing Remarks

Concluding the treatise, Mawlānā Ashraf ʻAlī al-Thānawī writes:

"Here ends the treatise, and all praise belongs to Allāh, the Guide in every statement. The lowliest, Ashraf ʻAlī, may his hidden and open sins be pardoned, wrote it, in participation with the two virtuous ones who have combined upright knowledge with right practice, Mawlawī Muhammad Shafīʻ and Mawlawī ʻAbd al-Karīm, may Allāh, Exalted is He, ennoble them with great reward, at the start of the month of Dhu l-Qaʻdah, 1351 from the migration of the Prophet, the Noble Intercessor, upon him a million blessings and salutations."[41]

Endorsements

Thereafter, endorsements are presented from the following scholars:

Imdādul ʻUloom

1. Mawlānā Zafar Ahmad (Imdād al-ʻUlūm)
2. Mawlānā Abd al-Karim (Khanqah Imdādiyyah)
3. Mawlānā Sirāj Ahmad (Khanqah Imdādiyyah)

Dārul ʻUloom Deobamd

4. Mawlānā Husayn Ahmad (Deoband, principal)
5. Mawlānā ʻAbd al-Samīʻ
6. Mawlānā Muhammad Rasūl Khān
7. Mawlānā Muhammad Ibrāhīm
8. Mawlānā Muhammad Tayyib
9. Mawlānā Sayyid Muhammad Mubārak
10. Mawlānā Riyād al-Dīn
11. Mawlānā Asghar Husayn
12. Mawlānā Masʻūd Ahmad
13. Mawlānā Muhammad Shafīʻ
14. Mawlānā Muhammad Iʻzāz ʻAlī

Mazāhir al-ʻUlūm

15. Mawlānā ʻAbdul Latīf
16. Mawlānā ʻAbdur Rahmān
17. Mawlānā Muhammad Zakariyyā Kāndhlewī
18. Mawlānā Muhammad Asʻadullāh

[41] وههنا تمت الرسالة، والحمد لله الهادي في كل مقالة، كتبها الأحقر أشرف علي، عفي عنه ذنبه الخفي والجلي، بمشاركة الفاضلين الجامعين للعلم القويم والعمل المستقيم، المولوي محمد شفيع والمولوي عبد الكريم شرفهما الله تعالى بالأجر العظيم في أوائل شهر ذى القعدة سنة ١٣٥١ من هجرة النبي الشفيع الكريم عليه ألف ألف صلوة وتسليم (الحيلة الناجزة، دار الإشاعة، ص٧٩)

Addendum

After writing the above treatise, there was a need to address three further situations which also require the decree of a Qādī for the annulment of marriage. The rulings of these three situations are all derived from the Hanafī madhhab, with the exception of the specific issue of substituting the Qādī with a Tribunal.

The three situations are as follows:

1. Hurmat al-Musāharah (Permanent Unmarriagibility based on Relationships Established Through Marriage or Sexual Intimacy)
2. Khiyār al-Bulūgh (Post-Maturity Autonomy)
3. Khiyār al-Kafā'ah (Autonomy based on Incompatibility)

This addendum has been titled *al-Mukhtārāt fī Muhimmāt al-Tafrīq wa l-Khiyārāt* (Selections on Important Aspects of Separation and Autonomies), and was completed in Ramadān of the year 1352 H.

Hurmat al-Musāharah:

Permanent Unmarriagibility based on Relationships Established through Marriage or Sexual Intimacy

If a man has illicit relations with a woman, or touches her bare skin or kisses her, resulting in either one of them experiencing lust, without any barrier between them that prevents heat transfer, or he looks inside her private parts with lust, "hurmat al-musāharah" will be established. Meaning, all female ancestors and female descendants of the woman, whether by blood or breastfeeding, will be permanently impermissible for him to marry. Similarly, if a woman touches the bare skin of a man or kisses him resulting in either one of them experiencing lust, or looks at his private parts with lust, then too hurmat al-musāharah will be established, making the male ancestors and male descendants of the man permanently impermissible for her to marry.

Intention is not a condition for hurmat al-musāharah. Hence, if this happens by mistake or accident, hurmat al-musāharah will be established. For example, if a man touches his mother-in-law with lust, believing her to be his wife, his wife will become permanently impermissible for him. This is why it is necessary for the husband to be extremely careful with respect to the female ancestors and descendants of his wife, and likewise the wife must be extremely careful with respect to his male ancestors and descendants.

If anything of this nature occurs between the husband and the wife's female ancestors/descendants or the wife and the husband's male ancestors/descendants, it is necessary for the woman to avoid intimacy with her husband and the man must separate from the woman, saying, for example, "I have left you," or, "I have divorced you." In such a case, the woman will observe 'iddah and she may thereafter marry another man.

If, however, the husband refuses to do this, the woman must try her utmost to avoid intimacy with him because intimacy with him is now harām. However, until the husband does not pronounce separation from her or the Qādī does not issue a separation, she may not marry another man.[42]

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[42] (و) حرم أيضا بالصهرية (أصل مزنيته) أراد بالزنا في الوطء الحرام (و) أصل (ممسوسته بشهوة) ولو لشعر على الرأس بحائل لا يمنع الحرارة (وأصل ماسته وناظرة إلى ذكره والمنظور إلى فرجها) المدور (الداخل) ولو نظره من زجاج أو ماء هي فيه (وفروعهن) مطلقا (الدر المختار)

قال في البحر: أراد بحرمة المصاهرة الحرمات الأربع حرمة المرأة على أصول الزاني وفروعه نسبا ورضاعا وحرمة أصولها وفروعها على الزاني نسبا ورضاعا كما في الوطء الحلال (رد المحتار)

وتكفي الشهوة من أحدهما (الدر المختار)

هذا إنما يظهر في المس أما في النظر فتعتبر الشهوة من الناظر (رد المحتار)

وبحرمة المصاهرة لا يرتفع النكاح حتى لا يحل لها التزوج بآخر إلا بعد المتاركة وانقضاء العدة (رد المحتار)

(قوله: إلا بعد المتاركة) أي، وإن مضى عليها سنون كما في البزازية، وعبارة الحاوي إلا بعد تفريق القاضي أو بعد المتاركة. اهـ.

If the woman wants a separation in order that she may marry another man, she must apply for an annulment from the Qādī or, in his absence, a Muslim judge authorised by the government to issue rulings in this regard, and in his absence, a legal Tribunal as described earlier. This is the only situation in which "talfīq" arises albeit in two different areas, as the ruling of "hurmat al-musāharah" is based on the Hanafī school and the substitution of a Qādī for a Tribunal is based on the Mālikī school.

The procedure for separation is as follows: The wife explains to the Qādī or Tribunal why she believes hurmat al-musāharah has taken place, based on either some incident between herself and the man's male ancestors/descendants or an incident between her husband and her female ancestors/descendants. If actual copulation took place, the woman should not mention this explicitly, but state that his private part touched her private part without a barrier or words to that effect. The Qādī or Tribunal will ask for confirmation from the husband. If the husband confirms her account, he will issue a separation. If the husband does not confirm her account, the woman will be asked to present witnesses. If she does not present witnesses or the witnesses are not competent to give testimony in court, the husband will be made to take an oath that hurmat al-musāharah did not take place. If he takes the oath, the Qādī or Tribunal will not issue a separation, nor will they decree that the woman must remain with her husband.

Whether the incident which the woman describes involved herself or her husband, the procedure will remain same. In the case where the incident involved the husband, the man will be made to swear an oath that the incident did not take place or if it did there was no lust. And in the case where the incident involved the woman, he will be made to take an oath that his overwhelming belief is that she is not being truthful in her claim and the incident did not take place or even if it did, it did not occur with lust.

As far as testimony is concerned, if the witnesses state that they saw the individuals in question kissing each other on the lips or on the face or touching the private parts or breasts, this is sufficient to establish hurmat al-musāharah. The claim from either the witnesses or the individuals involved that there was no lust will not be accepted. If the witnesses state they saw the man or woman in question kissing one another on the head or touching each other elsewhere and assert that this was with lust based on circumstantial evidence, hurmat al-musāharah will be established. If they do not state that this was with lust, hurmat al-musāharah will not be established. Instead, the man will be asked to take an oath that this occurred without lust. If he takes the oath, the

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وقد علمت أن النكاح لا يرتفع بل يفسد وقد صرحوا في النكاح الفاسد بأن المتاركة لا تتحقق إلا بالقول، إن كانت مدخولا بها كتركتك أو خليت سبيلك، وأما غير المدخول بها فقيل تكون بالقول وبالترك على قصد عدم العود إليها.

وقيل: لا تكون إلا بالقول فيهما (رد المحتار)

Qādī or Tribunal will not issue a separation. If he does not take the oath, the Qādī or Tribunal will issue a separation.[43]

Note: It is obvious that the incident that caused hurmat al-musāharah would involve two individuals, either the husband or the wife and one of their close relations. No clear explanation could be found from the jurists on the position of the testimony of the second individual. However, based on general principles, this individual may be counted as a witness. His/her testimony will be accepted if the incident he/she is confessing to does not amount to *fisq*. For example, if a father-in-law touched his daughter-in-law with lust believing her to be his wife, and he is otherwise an upright individual, his testimony will be accepted. If his/her testimony does amount to *fisq*, there is uncertainty whether the testimony will be accepted.

Final Points: It is harām for the husband to give false oath if he knows that something which caused hurmat al-musāharah has occurred. If he did take a false oath, while the claim of the woman is true, it is impermissible for her thenceforth to allow the man to be intimate with her. She must try by all means to separate from him, by asking for *khul'* and so on. If nothing works, she must live separately from him.

[43] (وإن ادعت الشهوة) في تقبيله أو تقبيلها ابنه (وأنكرها الرجل فهو مصدق) لا هي (إلا أن يقوم إليها منتشرا) آلته (فيعانقها) لقرينة كذبه أو يأخذ ثديها (أو يركب معها) أو يمسها على الفرج أو يقبلها على الفم قاله الحدادي وفي الفتح يتراءى إلحاق الخدين بالفم، وفي الخلاصة قيل له ما فعلت بأم امرأتك فقال: جامعتها تثبت الحرمة؛ ولا يصدق أنه كذب ولو هازلا. (وتقبل الشهادة على الإقرار باللمس والتقبيل عن شهوة وكذا) تقبل (على نفس اللمس والتقبيل) والنظر إلى ذكره أو فرجها (عن شهوة في المختار) تجنيس لأن الشهوة مما يوقف عليها في الجملة بانتشار أو آثار (الدر المختار)

(قوله: وإن ادعت الشهوة في تقبيله) أي ادعت الزوجة أنه قبل أحد أصولها أو فروعها بشهوة أو أن أحد أصولها أو فروعها قبله بشهوة، فهو مصدر مضاف إلى فاعله أو مفعوله وكذا قوله: أو تقبيلها ابنه، فإن كانت إضافته إلى المفعول فابنه فاعل والأنسب لنظم الكلام إضافة الأول لفاعله والثاني لمفعوله ليكون فاعل يقوم الرجل أو ابنه كما أفاده ح (قوله: فهو مضاف) لأنه ينكر ثبوت الحرمة والقول للمنكر (رد المحتار)

Khiyār al-Bulūgh (Post-Maturity Autonomy)

The highest guardian (walī) of a minor, whether male or female, is the father. If the father weds a minor, the marriage is absolutely binding. Meaning, after maturity, the boy or girl will have no autonomy to revoke the marriage. This is regardless of whether the marriage of a minor girl was to a compatible partner or not[44] and whether the dowry was to standard or not.[45] However, for the marriage of a minor girl to be accepted to a non-compatible partner or with a dowry below standard there are two conditions:

1. The father is in his right senses when conducting the marriage

2. He is not known for making bad decisions. That is, it is not expected of him that he would disregard the interests of the child for other worldly interests like money and so on.

If a man known for making bad decisions weds his daughter to a non-compatible partner or with dowry below standard, the marriage will not be concluded. The same applies to a father who is a shameless *fāsiq* as stated in *Radd al-Muhtār*.

In the absence of the father, the father's father holds the same authority and guardianship as the father.

In the absence of both the father and the grandfather, other close relatives will receive the status of guardianship, like the brother, uncle and so on. However, they are not equal to the father and grandfather. If they were to wed a minor to a non-compatible partner or with a dowry below standard, the marriage will not be concluded. And if they were to wed the minor to a compatible partner with the correct amount of dowry, the marriage will be concluded but not absolutely binding. Upon reaching maturity, the boy or girl will have the choice to annul the marriage. This is known as "khiyār al-bulūgh."

In order to exercise the right of khiyār al-bulūgh, a virgin girl must declare her disapproval of the marriage immediately upon reaching maturity[46] in the presence of two male witnesses. Upon reaching this age, she must verbally express her rejection of the marriage regardless of whether someone is present or not. More details on this are given below. She will only be excused for not expressing her disapproval of the marriage immediately if there is something preventing her from speaking at this point, like a cough, sneeze or someone putting their hand over her mouth. If there is

[44] A brief description of compatibility in terms of Sharīʿah will be given in the next section

[45] A "standard dowry" (mahr al-mithl) is the sum of money received as dowry by the girl's female relatives on her father's side. Hence, if a father weds his minor daughter in exchange for a sum of money below the "standard dowry," the marriage is concluded and binding, with the conditions mentioned above.

[46] Maturity is established by the first time she experiences *hayd*, experiences nocturnal emission or becomes pregnant. If none of these occur by the time she is 15 years of age in terms of lunar years, she will be regarded as mature from this point

an inexcusable delay, her right of exercising khiyār al-bulūgh will be revoked. If no one was present at the time she reached maturity and she was to tell a lie to the Qādī or the Tribunal that she did express her disapproval of the marriage immediately upon reaching maturity, although sinful, the decree of the Qādī in such an instance to dissolve the marriage will be binding in Sharī'ah.

If the girl is not a virgin at the time of reaching maturity, it is not necessary for her to express her disapproval of the marriage immediately. She will maintain the right of khiyār al-bulūgh right until the time that she does not show approval of the marriage. Hence, if after maturity, she declares acceptance of the marriage or she is physically intimate with her husband, her right of khiyār al-bulūgh will be revoked.

A minor boy shares the ruling of a girl that is not a virgin.

The abovementioned rulings apply to the situation that the minor boy or girl were aware of the marriage at the time of reaching maturity. If they are not aware of the marriage, then these rules apply once the news of the marriage reaches them.[47]

There are two ways a girl who is not a virgin may make witnesses:

1. If at the moment she reaches maturity there are people present, she declares: "I have now become mature and I wish to annul the marriage."

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47 (ولزم النكاح ولو بغبن فاحش) بنقص مهرها وزيادة مهره (أو) زوجها (بغير كفء إن كان الولي) المزوج بنفسه بغبن (أبا أو جدا) وكذا المولى وابن المجنونة (لم يعرف منهما سوء الاختيار) مجانة وفسقا (وإن عرف لا) يصح النكاح اتفاقا وكذا لو كان سكران إلخ (الدر المختار)
(قوله ولو بغبن فاحش) هو ما لا يتغابن الناس فيه أي لا يتحملون الغبن فيه احترازا عن الغبن اليسير، وهو ما يتغابنون فيه أي يتحملونه. قال في الجوهرة: والذي يتغابن فيه الناس ما دون نصف المهر كذا قاله شيخنا موفق الدين، وقيل ما دون العشر...(قوله أو زوجها بغير كفء) بأن زوج ابنه أمة أو عبدا ...(قوله المزوج بنفسه) احترز به عما إذا وكل وكيلا بتزويجها وسيأتي بيانه قريبا...(قوله بغبن) كان عليه أن يقول أو بغير كفء، ولو قال المزوج بنفسه على الوجه المذكور كما قال في المنح لسلم من هذا...(قوله وابن المجنونة) ومثلها المجنون قال في البحر: المجنون والمجنونة إذا زوجهما الابن ثم أفاقا لا خيار لهما (قوله لم يعرف منها إلخ) أي من الأب والجد، وينبغي أن يكون الابن كذلك...وفي شرح المجمع حتى لو عرف من الأب سوء الاختيار لسفهه أو لطمعه لا يجوز عقده إجماعا (رد المحتار)
(وإن كان المزوج غيرهما) أي غير الأب وأبيه ولو الأم أو القاضي أو وكيل الأب، لكن في النهر بحثا لو عين لوكيله القدر صح (لا يصح) النكاح (من غير كفء أو بغبن فاحش أصلا) وما في صدر الشريعة صح ولهما فسخه وهم (وإن كان من كفء وبمهر المثل صح و) لكن (لهما) أي لصغير وصغيرة وملحق بهما (خيار الفسخ) ولو بعد الدخول (بالبلوغ أو العلم بالنكاح بعده)... (بشرط القضاء) للفسخ (الدر المختار)

قوله أي غير الأب وأبيه) الأولى أن يزيد والابن والمولى لما مر...(قوله لو عين لوكيله القدر) أي الذي هو غبن فاحش نهر وكذا لو عين له رجلا غير كفء كما بحثه العلامة المقدسي...قوله أصلا أي لا لازما ولا موقوفا على الرضا بعد البلوغ...(قوله وملحق بهما) كالمجنون والمجنونة إذا كان المزوج لهما غير الأب والجد والابن بأن كان أخا أو عما مثلا...(قوله بالبلوغ) أي إذا علما قبله أو عنده قهستاني (قوله أو العلم بالنكاح بعده) أي بعد البلوغ بأن بلغا ولم يعلما به ثم علما بعده...(قوله للفسخ) أي هذا الشرط إنما هو لفسخ لا لثبوت الاختيار. وحاصله أنه إذا كان المزوج للصغير والصغيرة غير الأب والجد، فلهما الخيار بالبلوغ أو العلم به فإن اختار الفسخ لا يثبت الفسخ إلا بشرط القضاء...أما لو بلغها الخبر فأخذها العطاس أو السعال فلما ذهب عنها قالت لا أرضى جاز الرد إذا قالته متصلا (رد المحتار)

2. If no one is present, she will declare her disapproval of the marriage to herself and then immediately call witnesses or attend to them herself and declare: "I have now become mature and I wish to annul the marriage." She should not say: "I became mature a short while ago…"

Then she must take the case to the Qādī or in his absence, the Tribunal. There are three possible scenarios:

1. If she made witnesses, she will declare to the Qādī or the Tribunal: "I reached maturity on X day and I rejected my marriage and made Y and Z witnesses to this." Subsequently, the Qādī or the Tribunal will dissolve the marriage. However, after making witnesses, it is necessary to take the case to the Qādī within one month. If she does not do so within the period of one month, her right of khiyār al-bulūgh will be revoked.

2. In the situation that no reliable witnesses were available or she said to the witnesses: "I became mature a short while ago…", she must attend the court of the Qādī or Tribunal as soon as possible, within a maximum period of a few days, and declare: "I have reached maturity and reject my marriage, so issue a separation." If the Qādī or Tribunal asks when she reached maturity she should not answer. If she does not answer, the Qādī or Tribunal may issue a separation and otherwise may not.

3. A final scenario is that she states in the presence of the Qādī or the Tribunal, "I have just now reached maturity and wish to annul the marriage." Without any witnesses or oath, the Qādī or Tribunal may issue a separation.[48]

[48] قلت: وتحصل من مجموع ذلك أنها لو قالت بلغت الآن وفسخت تصدق بلا بينة ولا يمين ولو قالت فسخت حين بلغت تصدق بالبينة أو اليمين ولو قالت بلغت أمس وفسخت فلا بد من البينة (رد المحتار)

Khiyār al-Kafā'ah (Autonomy based on Incompatibility)

In some situations a woman's marriage to an incompatible partner[49] is completely invalid, in others it is valid but not binding and in yet others it is valid and binding. Six situations are discussed below.

First Situation: If a woman (one who has passed the age of maturity) was to marry a non-compatible partner without the permission of her guardian amongst her primary male heirs ('asabah)[50], the marriage is invalid and will not be concluded. This is the case even if she receives approval from the guardian thereafter. Hence, a woman must ensure that she avoids this.[51] If after marriage, she learns the man is incompatible with her, she should immediately accept that the marriage is not valid and separate from him.

Second Situation: If a guardian besides the father or grandfather weds a minor girl to an incompatible partner, or the father or grandfather wed her to an incompatible partner but he is known for making bad decisions or is a shameless *fāsiq* or did so while intoxicated and not in the right mind, the marriage in this case will also not be valid.

Third Situation: If the father or grandfather who is not known for making bad decisions and is not a shameless *fāsiq* was to wed a minor girl to an incompatible partner while in the right state of mind, the marriage is valid and binding. This is regardless of whether the father or grandfather knew at the time that the man was incompatible.

Fourth Situation: If a woman marries an incompatible partner with the permission of her guardian, while he is aware of his incompatibility with her, or if the guardian weds the woman to an incompatible partner with her consent, the marriage is valid and

[49] Compatibility is determined based on a number of different factors. For example, if the woman is from a pious family and the man is irreligious and commits open sins, he is not compatible with her. Similarly, if she is of a high ancestry and he comes from a family of lower caste, putting her family to shame if she was to marry him, he will be incompatible with her. Compatibility is only considered from the side of the woman. Hence, if a man was pious and the woman came from an irreligious family, they would not be described as incompatible.

[50] Guardianship rests in the primary male heirs ('asabah), that is: the male ancestors, male descendants, male descendants of the father and male descendants of the father's father. If no guardian amongst the 'asabah are present, the guardianship will move to others, like the mother. In such a case, a woman's marriage to a non-compatible partner is valid.

[51] فنفذ نكاح حرة مكلفة بلا ولي وله إذا كان عصبة ولو غير محرم كابن عم في الأصح خانية وخرج ذوو الأرحام والأم والقاضي الإعتراض في غير الكفء ما لم تلد، ويفتى بعدم جوازه أصلا (تنوير الأبصار)

وهو المختار للفتوى (الدر المختار)

binding. All guardians are equal in this respect, with the difference being that a virgin woman's silence will be regarded as consent only when the father or father's father informs her of the marriage. When any other guardian informs her of the marriage, silent consent is not adequate.[52]

Fifth Situation: If a woman marries a partner whose compatibility is unknown with the approval of her guardian, and at the time of marriage, the woman made it a condition that the partner is compatible, or they were made to believe that he is, and it is later discovered that he is not compatible, both the woman and the guardian will have the option of annulling the marriage.[53] However, if the woman is a virgin, her right will be revoked if she remains silent upon receiving the news that he is incompatible. If she expresses her disapproval of the marriage immediately upon receiving news of his incompatibility, the Qādī or the Tribunal will issue a separation. If she is not a virgin, her right will remain until she explicitly or implicitly shows her approval of the marriage as discussed in the section on khiyār al-bulūgh. The guardian shares the same ruling as a woman who is not a virgin. That is, until he explicitly or implicitly (e.g. by accepting the dowry) approves of the marriage after knowing of his incompatibility, he will maintain the right to annul the marriage.[54]

Sixth Situation: If the father or grandfather weds a minor to a person they were made to believe is compatible, but it turns out he is not compatible, only the father or grandfather in this case will have the right to annul the marriage. Their right will remain until they show explicit or implicit approval of the marriage after learning of his incompatibility.[55]

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[52] زوج ابنته البكر البالغة من غير كفوء فعلمت بذلك فسكتت فسكوتها يكون رضا، والجد كالأب عند عدمه، وغير الأب والجد ليس بولي في النكاح بغير كفوء فلم يكن سكوتها رضا (خزانة المفتين، مخطوط)

[53] ولو زوجها برضاها ولم ويعلموا بعدم الكفاءة ثم علموا لا خيار لأحد إلا إذا شرطوا الكفاءة أو أخبرهم بها وقت العقد فزوجوها على ذلك ثم ظهر أنه غير كفؤ كان لهم الخيار – ولوالجية

[54] وقبضه أي ولي له حق الإعتراض المهر ونحوه مما يدل على الرضى رضا دلالة...ولا يكون سكوته رضا (الدر المختار)

[55] رجل زوج ابنته الصغيرة من رجل ذكر على أنه لا يشرب المسكر فوجده شريبا مدمنا فبلغت الصغيرة وقالت لا أرضى قال الفقيه أبو جعفر: إن لم يكن أب البنت يشرب المسكر وغالب أهل بيته الصلاح فالنكاح باطل لأن والد الصغيرة لم يرض بعدم الكفاءة وإنما زوجها منه على ظن أنه كفؤ (فتاوى قاضيخان)

فإنه قال الأب إذا زوج ابنته الصغيرة من رجل وظن أنه يقدر على إيفاء المعجل والنفقة ثم ظهر عجزه عن ذلك كان للأب أن يفسخ لأنه يخل بالكفاءة ولم يسقط حقه لأنه زوج على أنه قادر (خزانة المفتين)

Appendix:

The Status of a Marriage in which the Spouses Belong to Different Religions

Some Muslim women, out of desperation, committed apostasy as a ploy to escape an oppressive marriage. Hence, this appendix was added to explain the ruling of a marriage in which the spouses adhere to different religions. The outcome is that such a ploy, as dastardly and dangerous as it is, is ineffective since even after re-entering Islām, the woman will not be permitted in Sharī'ah to marry another man. This appendix is called *Hukm al-Izdiwāj ma'a Ikhtilāf Din al-Azwāj* (The Ruling of a Marriage with a Difference in the Religion of the Spouses), and was authored by Muftī Muhammad Shafī'. He completed it in Rabī' al-Awwal of the year 1352 H.

Differences in the religions of spouses may occur before a marriage or after. With regards to differences in religion before a marriage, a Muslim woman can in no situation marry a non-Muslim man, regardless of what religion he belongs to. Similarly, a Muslim man may not marry a non-Muslim woman with the exception of one who belongs to the "People of the Book", Jews and Christians, with two conditions:

1. She must believe in the fundamentals of the religion she subscribes to whether Judaism or Christianity

2. She is not an apostate from Islām who apostatized to the religion of Judaism or Christianity

If these two conditions are met, the marriage will be valid, but without dire need, such a marriage is regarded as extremely detestable (makrūh tahrīmī) because of the many harmful consequences it entails. Hence, 'Umar (may Allāh be pleased with him) forbade Muslim men from marrying women from the Jews and Christians (*Kitāb al-Āthār*).

If, on the other hand, the spouses belong to the same religion but a difference in their religions only arose after marriage, there are four possible scenarios:

Firstly, both were non-Muslims and both became Muslims together.

Secondly, both were Muslims and both became apostates together. In both these situations, the marriage remains intact.

Thirdly, both were non-Muslims and one of them enters Islām while the other remains a non-Muslim. If it is the man that becomes a Muslim while the woman remains a disbeliever, if she subscribes to a religion of the People of the Book with the two conditions described earlier, the marriage will remain unaffected. If however she belongs to another religion, and this occurred in a Dārul Islām, the Qādī will offer Islām to her, and if she accepts, the marriage will remain intact. If she refuses or remains silent, the Qādī will immediately issue a separation. In Dārul Harb, if she does not accept Islām within a period of three menstrual cycles, the marriage will dissolve. If she does accept Islām within this period, the marriage will remain intact.

If it is the woman that accepts Islām while the husband remains a non-Muslim, and this occurred in a Dārul Islām, the Qādī will offer him Islām, and if he accepts, the marriage will remain intact, but if he rejects or is silent the Qādī will issue a separation. In Dārul

Harb, if the husband does not accept Islām within a period of three menstrual cycles, the marriage will dissolve. If he accepts Islām in this period, the marriage will remain intact.

In the above scenario, if the separation was a result of the Qādī's decree, the woman must observe 'iddah. If the separation was after three menstrual cycles, and it was the husband that accepted Islām, 'iddah does not have to be observed. Hence, for example, he may marry the woman's sister immediately after the separation if her sister is a Muslim or from the People of the Book. If it was the woman who became Muslim, according to Imām Abū Yūsuf and Imām Muhammad, after the separation following three menstrual cycles, she must observe 'iddah for another three menstrual cycles. This is the more cautious view. According to Imām Abū Hanīfah she need not observe a period of 'iddah after the separation. However, if she is pregnant, according to Imām Abū Hanīfah too she cannot remarry until delivery of the baby.

Fourthly, if both were Muslims and then one of them left Islām. If it was the husband that apostatized, the marriage will immediately dissolve. There is no need for the intervention of a Qādī. If this occurred before a legitimate Shar'ī solitude, he will be liable for half the stipulated dowry and the woman need not observe 'iddah. If it was after a legitimate Shar'ī solitude, the full dowry will be payable and the woman will observe 'iddah.[56]

If the woman commits apostasy, there are three views in the Hanafī madhhab:

1. According to the Zāhir al-Riwāyah (apparent transmission), the marriage immediately dissolves with her apostasy, but she will be forced to re-enter Islām and to return to her husband

2. The jurists of Balkh and Samarqand and some of the jurists of Bukhārā like Abu l-Nasr al-Dābūsī and Abu l-Qāsim al-Saffār held that the marriage does not dissolve but remains intact

3. According to a report from the Nawādir[57], she will be put into slavery and given into the possession of her husband after authorisation from the ruler of the Muslims.[58]

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[56] إرتداد أحدهما أي الزوجين فسخ فلا ينقض عددا عاجل بلا قضاء فللموطوءة ولو حكما كل مهرها لتأكده به ولغيرها نصفه ولو سمى أو المتعة لو ارتد وعليه نفقة العدة (الدر المختار)

قوله بلا قضاء أي بلا توقف على قضاء القاضي وكذا بلا توقف على مضي عدة فى المدخول بها كما فى البحر (رد المحتار)

إذا ارتد أحد الزوجين عن الإسلام وقعت الفرقة بغير طلاق فى الحال قبل الدخول وبعده (الفتاوى الهندية)

[57] Nawādir are works besides the Zāhir al-Riwāyah authored by Imām Muhammad, Imām Abū Yūsuf or other students of Imām Abū Hanīfah.

[58] إذا ارتد أحد الزوجين وقعت الفرقة بغير طلاق (الهداي)

هذا جواب ظاهر المذهب. وبعض مشايخ بلخ وسمرقند أفتوا في ردتها بعدم الفرقة حسما لاحتيالها على الخلاص بأكبر الكبائر، وعامة مشايخ بخارى أفتوا بالفرقة وجبرها على الإسلام وعلى النكاح مع زوجها الأول؛ لأن الحسم بذلك يحصل، ولكل قاض أن يجدد النكاح

All three opinions agree that the woman does not have the right to leave the first husband and marry another man. Hence, on this point there is agreement. In order to maintain this unanimous principle, fatwā on the view of the jurists of Balkh and Samarqand is necessary as the other two views require state power (which Muslims do not have) to enforce discretionary punishments and slavery.

Important Points

Although the marriage remains intact according to this view, the jurists of Balkh agree that it is not permissible for the man to be intimate with the woman while she remains an apostate. Once she re-enters Islām, according to the jurists of Balkh, there is no need for renewal of the marriage, but according to the Zāhir al-Riwāyah, this is necessary. Since on this point, there is no need to move away from the Zāhir al-Riwāyah, it will be necessary to renew the marriage. Hence, a new amount of dowry will also need to be stipulated, no less than 10 dirhams.

Endorsements

The following scholars endorsed this treatise of Muftī Muhammad Shafī':

بينهما بمهر يسير ولو بدينار رضيت أم لا، وتعزر خمسة وسبعين، ولا تسترق المعتدة ما دامت في دار الإسلام في ظاهر الرواية، وفي رواية النوادر عن أبي حنيفة تسترق (فتح القدير)

منكوحة ارتدت والعياذ بالله تعالى، حكي عن أبي النصر وأبي القاسم الصفار أنهما قالا لا يقع الفرقة بينهما حتى لا تصل إلى مقصودها إن كان مقصودها الفرقة وفي الروايات الظاهرة يقع الفرقة وتحبس المرأة حتى تسلم ويجدد النكاح سدا لهذا الباب عليها (فتاوى قاضيخان)

تحرم على زوجها فتجبر على الإسلام ولكل قاض أن يجدد النكاح بأدنى شيء ولو بدينار سخطت أو رضيت وليس لها أن تتزوج إلا بزوجها قال الهندواني: آخذ بهذا. قال أبو الليث وبه نأخذ كذا في التمرتاشي (الفتاوى الهندية)

وتجبر على الإسلام وعلى تجديد النكاح زجرا لها بمهر يسير كدينار وعليه الفتوى ولوالجية.

وأفتى مشايخ بلخ بعدم الفرقة بردتها... قال في النهر: والإفتاء بهذا أولى من الإفتاء بما في النوادر... وحاصلها أنها بالردة تسترق وتكون فيئا للمسلمين عند أبي حنيفة (الدر المتار)

ولا يخفى أن الإفتاء بما اختاره بعض أئمة بلخ أولى من الإفتاء بما في النوادر، ولقد شاهدنا من المشاق في تجديدها فضلا عن جبره بالضرب ونحوه ما لا يعد ولا يحد... ومن القواعد: المشقة تجلب التيسير... قلت: المشقة في التجديد لا تقتضي أن يكون قول أئمة بلخ أولى مما في النوادر، بل أولى مما مر أن عليه الفتوى، وهو قول البخاريين (رد المحتار)

ارتدت لتفارق زوجها تجبر على الإسلام، وتعزر خمسة وسبعين سوطا، ولا تتزوج بغيره به يفتى ملتقط (الدر المختار)

(قوله ولا تتزوج بغيره) بل تقدم أنها تجبر على تجديد النكاح بمهر يسير وهذه إحدى روايات ثلاث تقدمت في الطلاق. الثانية أنها لا تبين ردا لقصدها السيئ. الثالثة ما في النوادر من أنه يتملكها رقيقة إن كان مصرفا (رد المحتار)

وفي المضمرات: لو أفتى لامرأة بالكفر لتبين من زوجتها فقد كفر قبلها، وتجبر المرأة على الإسلام وتضرب خمسة وسبعين سوطا ليس لها أن تتزوج إلا بزوجها الأول هكذا قال أبو بكر، وكان أبو جعفر يفتي بها ويأخذ بهذا انتهى. وقال بعضهم: أن ردتها لا تؤثر في إفساد النكاح ولا يؤمر بتجديد النكاح حسما لهذا الباب عليهن، وعامة علماء بخارى يقولون كفرها يعمل في إفساد النكاح لكنها تجبر على النكاح مع زوجها قطعا، وهذا فرقة بغير طلاق بالإجماع، وعليها الفتوى كذا في منهاج الصالحين (شرح الفقه الأكبر)

وليس للمرتدة التزوج بغير زوجها به يفتى (الدر المختار)

وقد أفتى الدبوسي والصفار وبعض أهل سمرقند بعدم وقوع الفرقة بالردة ردا عليها، وغيرهم مشوا على الظاهر، ولكن حكموا بجبرها على تجديد النكاح مع الزوج وتضرب خمسة وسبعين سوطا واختاره قاضيخان للفتوى (رد المحتار)

From Imdādul ʻUlūm

1. Mawlānā Ashraf Ali
2. Mawlānā Abdul Karim Gumthali
3. Mawlānā Zafar Ahmad

From Deoband:

4. Mawlānā Asghar Husayn
5. Mawlānā Husayn Ahmad
6. Sayyid Muhammad Mubārak ʻAlī
7. Mawlānā Muhammad Ibrahīm
8. Mawlānā Muhammad RasūlKhān
9. Mawlānā ʻAbdus Samīʻ
10. Mawlānā Maʻsūm Ahmad
11. Mawlānā Riyād al Dīn
12. Mawlānā Muhammad Tayyib

From Mazāhirul ʻUlum

13. Mawlānā ʻAbdul Latīf
14. Mawlānā ʻAbdul Rahmān
15. Mawlānā Muhammad Zakariyyā Kāndhlewī
16. Mawlānā Muhamad Asʻad

Procedure of Faskh al-Nikāh at the Jam'iyyat al-'Ulamā' KZN

When a woman initially comes to the Jam'iyyat al-'Ulamā' wishing to apply for a *faskh*, she will be directed to the marriage counselling department. Here, she will be interviewed by a marriage counsellor, ideally a well-educated elderly female with an Islāmic ethos. The counsellor will find what issues the woman is facing in her marriage. She will exhaust all avenues to try to resolve the marriage. If deemed necessary, the husband will be called in to try to mediate a solution. All of this must be done under the supervision of an 'ālim to ensure the mediation is fair and unbiased. Despite sympathy for the applicant, the marriage counsellor must not submit to her pressures or in any way bend the rules.

If the husband co-operates, the counsellor will try to counsel them in their marriage. If the applicant is still apprehensive after being given assurances by the husband to make the marriage work, the marriage counsellor may suggest a **tafwīd al-talāq** (sample attached) to pacify her. The woman will put certain conditions – that is, those things she would like to see changed in her husband – and the husband will sign an agreement declaring that if he violates any of these conditions and his wife complains to the Jam'iyyat, two named members of the Judicial Committee will, after conducting their own investigations, have the permanent irrevocable autonomy to dissolve the marriage thereafter by enacting one talāq bā'in. This undertaking should not be imposed on the husband but negotiated with him, including the terms. They must agree amicably on the terms and conditions of tafwīd al-talāq.

If the counsellor discovers that there is no scope for reconciliation, or the husband does not cooperate, she will assess if there is grounds for faskh al-nikāh by sharing her case details with an 'āim from the judiciary. If there are grounds, the applicant will be advised to make an application to the judicial committee. She will be directed to a representative of the judicial committee who will help her fill out the **application form** (sample attached). A letter will be sent to the husband asking him to contact the Jam'iyyat with a deadline of fourteen days. If he does not reply, a second letter will be sent to him, attaching an "**acknowledgement of talāq**" (sample attached) form for him to sign if he believes the marriage has irretrievably broken down. If he still does not cooperate, a third letter will be sent with the date of a judicial sitting. He will be asked to attend and defend himself. It should be ensured the letter reaches him by a reliable method.

In the judicial sitting, three members of the judicial committee will be present who will function as the Tribunal (jamā'at al-muslimīn al-'udūl). The presiding officer will recite a khutbah and counsel the attendants to fear Allāh. He will then take an oath from both the plaintiff (the wife) and the defendant (the husband) if present to speak the truth. The presiding officer, who is already familiar with the case, will interrogate the wife first and then the husband. He must be strict to ensure that there are no interruptions from either side. After listening to both parties, as well as any accompanying witnesses and reports, the presiding officer will inform them

that the judicial committee will deliberate the case and notify them of their judgement in writing. If a decree of faskh is made, a faskh al-nikāh certificate will be sent to both the husband and wife declaring the marriage dissolved by authority of the judicial committee.

While the above description provides a basic outline of the procedure for *faskh al-nikāh*, it is obvious that there are additional aspects that must be considered depending on the grounds of *faskh* (e.g. miserliness, *hurmat al-musāharah*, insanity etc.) and the particular case at hand.

Note:

- It is necessary for the judicial committee to look over the books of fiqh, including *al-Hīlat al-Nājiẓah*, on the issue that is being presented as a grounds for divorce e.g. miserliness, impotence etc.

- If there are no grounds of faskh and the husband refuses to issue talāq despite an obvious failure of the marriage, the presiding officer may query the woman, asking if there were occasions when the couple had arguments with each other resulting in the husband issuing ambiguous statements of divorce like, "Leave," "Get out," "You are free to go." If these were said in the context of divorce, it would constitute one talāq bā'in. Hence, while observing the necessary conditions, this can be used to declare the marriage broken.

Sample Tafwīd al-Talāq Form[59]

Affirmation of Tafweedhut Talaaq

1434

To Whom It May Concern

I, ..., holder of South African I.D. No....., hereby agree to abide by the terms and conditions directed by the Jamiatul Ulama (KZN) regarding my marriage, which are set out below:

1.

2.

3.

4.

5.

6.

In the event of the matter with my wife not being resolved, and my wife further requests that she be released from the marriage, I, in the sane state of mind, willingly, without coercion hereby declares and affirm that I hereby grant, any two members of the Judicial Committee of the Jamiatul Ulama (KZN) the irrevocable autonomy (power) to terminate my *Nikah* with my wife, ..., holder of South African I.D. No. .....at their discretion.

_____

.....(Husband)

I take this decision on my own free will without any coercion and I have signed the above mentioned in the presence of:

_____ _____

Jamiatul Ulama (KZN) - Social Committee

1

[59] Note, there is a need to add the word "permanently" before the phrase "irrevocable autonomy". Without this addition, the tafwīd will be limited to the sitting (majlis) in which the conditions of the tafwīd were realised.

Sample Acknowledgement of Talāq Form

Acknowledgement of Talaaq

(Divorce)

****

I, _____

hereby acknowledge and confirm that I have willingly, in a sane state of mind and without coercion, issued my wife, _____(Full Name)

Talaaq (Divorce) on _____(Date).

_____

Signature (Husband)

Husband's Full name:_____

Address: _____

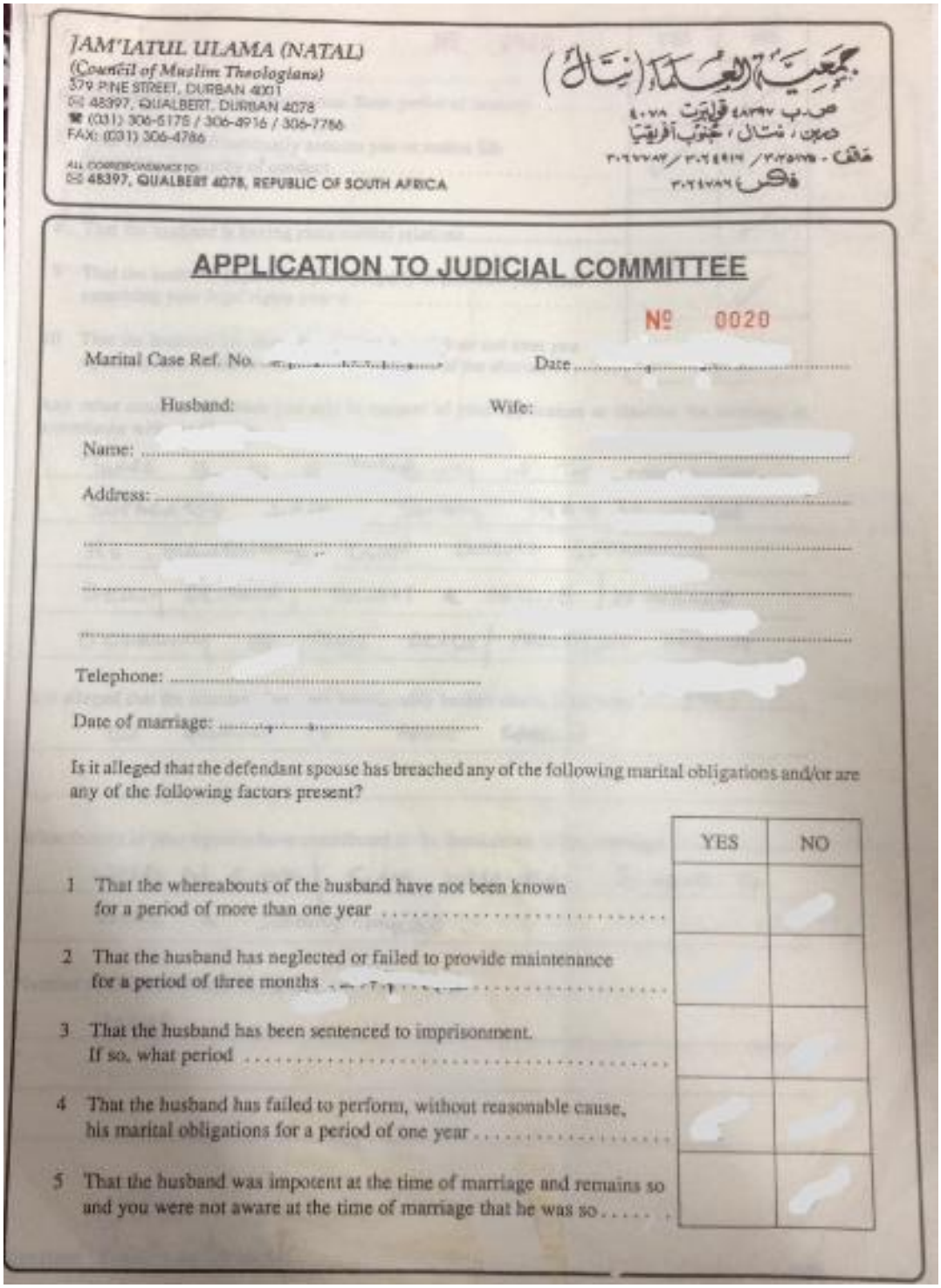
Tel: (H)_____ Cell: _____

Witnesses:

1. _____ _____
   Name Signature

2. _____ _____
   Name Signature

Sample Application of Faskh Form



JAM'IATUL ULAMA (NATAL)
(Council of Muslim Theologians)
379 PINE STREET, DURBAN 4001
PO 48397, QUALBERT, DURBAN 4078
(031) 306-5175 / 306-4916 / 305-7786
FAX: (031) 306-4786
ALL CORRESPONDENCE TO:
PO 48397, QUALBERT 4078, REPUBLIC OF SOUTH AFRICA

جمعية العلماء (نتال)
ص.ب ٤٨٣٩٧ قوالبرت ٤٠٧٨
دربن، نتال، جنوب أفريقيا
هاتف - ٣٠٦٢٧٧٨٢ / ٣٠٦٤٤١٩ / ٣٠٦٢٥١٧٥
فاكس ٣٠٦٢٧٨٦

APPLICATION TO JUDICIAL COMMITTEE

№ 0020

Marital Case Ref. No. ..... Date .....

Husband: Wife:

Name: .....

Address: .....

.....

.....

.....

Telephone: .....

Date of marriage: .....

Is it alleged that the defendant spouse has breached any of the following marital obligations and/or are any of the following factors present?

	YES	NO
1 That the whereabouts of the husband have not been known for a period of more than one year		
2 That the husband has neglected or failed to provide maintenance for a period of three months		
3 That the husband has been sentenced to imprisonment. If so, what period		
4 That the husband has failed to perform, without reasonable cause, his marital obligations for a period of one year		
5 That the husband was impotent at the time of marriage and remains so and you were not aware at the time of marriage that he was so		

№ 0020

	YES	NO
hat the husband has been insane. State period of insanity		
That the husband habitually assaults you or makes life miserable by cruelty of conduct.....		
8 That the husband is having extra marital relations.....		
9 That the husband disposes of your property or prevents you from exercising your legal rights over it		
10 That the husband has more than one wife, and does not treat you equitably in accordance with the requirements of the shariah		

Any other conduct on which you rely in support of your application to dissolve the marriage in accordance with the Shariah.

Is it alleged that the marriage has been irretrievably broken down, if so, why .....

.....

.....

What factors in your opinion have contributed to the breakdown of the marriage.....

.....

.....

Number of children (Name & Ages)

.....

.....

.....

Signature: .....