

An Empirical Analysis of Case Law Regarding Spouses' Illnesses and Defects as Legitimate Grounds for Divorce

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Abstract

The family is a fundamental unit in the Islamic social system and is highly valued in Islam. It allows for the legitimate gratification of passions based on respect and collaboration. A marriage contract is regarded as a civil agreement that can be terminated just like any other. While a husband has the authority to file for divorce, a woman has the right to request a separation as well. This article offers an analytical analysis of court procedures surrounding divorce as well as the Islamic perspective on a spouse's right to separate due to illness or deformity. Five resolved cases from Pakistani courts were recently taken into consideration to examine the issue. The approach of case study concerning illnesses and defects is employed in order to comprehend the procedure of the court. In order to understand why there isn't any case law on the subject, the quantitative research approach is also used. In order to shed insight on the challenges associated with the reasons why the majority of cases pertaining to the aforementioned concerns are not filed, a questionnaire including four interview questions was administered. Four of the most senior practicing attorneys from the Rawalpindi judiciary and one senior attorney from the Supreme Court of Islamabad provided samples for the survey.

Keywords: *Impotency, Janūn, Disease and Defects, Marriage, Separation, and 'Ayb*

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Introduction

Islamic law gives couples a number of reasons to separate from one another, one of which being a spouse's shortcomings. The fundamental goals of a marriage cannot be fulfilled if one or both partners suffer from physical or mental illnesses or faults. Under these conditions, it is preferable to end the marriage¹. A woman can exercise her right to divorce by a delegated divorce, a compromise with her husband, or by suing the Qāḍī or the court in an action for dissolution of marriage.

In Muslim family law, marriage, or Nikāḥ (derived from the root word nakaḥ², which means to be gathered³), is the fundamental concept and factor that governs sexual relations⁴.

Islamic law places a strong emphasis on the maintenance of the marital contract, but it also grants the spouses the freedom to separate if they are unable to coexist. If there is no other way to resolve the conflict, then talāq may be used as a remedy⁵.

Defect is defined by the term "Ayb," which implies weakness, deficiency, and imperfection⁶. When used to a marriage, it refers to the condition that forbids having sex⁷.

Legal Foundation and Jurisprudential Views on Separation Owing to Illnesses or Defects:

There are two schools of thought on a wife's ability to request a divorce because of her illness or deformity. All the members of Jamhūr Fuqahā' (Ḥanafī, Shāfi'ī, Mālikī, as well as Ḥanbalī) agree that marriages should be

¹ Al-Marghinānī, *Al-Hidāyah Sharah Bidāyah al-Mubtadī*, vol. 2, 27; Al-Shirbīnī, *Mughnī al-Muhtāj ilā M'rifat Alfāz al-Minhāj* vol. 3, 203; Ibn Qudāmah, *Al-Muqana'*, vol. 7, 581; Dr. 'Abd Allāh Yūsuf Muṣṭafā, „Azām, Inḥilāl al-Zawāj fī al-Fiqh wa al-Qānūn, 232.

² Majd-al-Dīn ibn Y'qūb al-Fīroz Ābādī, *al-Qāmūs al-Muḥīṭ*, vol. 1, (Dār al-Kitāb al-'Arabī n.d), 502.

³ Waḥid-al-Zamān, *Lughāt al-Qur'ān* (Karachi: Kārkhāna Tijārat Kutub, s.n), 142.

⁴ Al-Sarakhsī, *Kitāb al-Mabṣūṭ*, vol. 3 (Beirut: Dār al-Ma'rifāh, 1924), 192.

⁵ Dr. J'afir 'Abd-al-Salām, *Ḥal 'Uqdah al-Nikāḥ fī al-Zaw' al-Sharī'ah al-Islāmīyah*, 1st ed., 43.

⁶ Ibn Manzūr, *Lisān al-'Arab*, vol. 1, 528, Ibn Humām, *Sharah Fath al-Qadīr*, vol. 5, 15

⁷ Shahāb al-Dīn Aḥmad ibn Aḥmad Qalyūbī, *Hāshīyah Qalyūbī 'Alā Sharḥ Jilāl al-Dīn al-Muḥallī 'Alā Minhāj al-Ṭālibīn*, vol. 2 (Bairut: Dār al-Fikr), 197.

dissolved when one or both spouses suffer from illnesses or deformities. They base their arguments on the observance of Aḥādīth:

*According to reports, the Holy Prophet (P.B.U.H) wed a woman from the Banī Ghifār tribe. While planning to have sex with her, Prophecy saw that she had leucocythaemia markings on her sides. Then, stepping back from her, he said, "Put on your clothes," taking nothing away from her that He (P.B.U.H.) had given her.*⁸

When a person has leucocythaemia, the Ḥadīth offers evidence for separation. The main goal of marriage is to foster love and affection between the partners, and leucocythaemia is an illness that many find insufferable or unbearable.

Since the Prophet (PBUH) dissolved the marriage due to a leucocythaemia defect, this establishes a foundation for the dissolution of the marriage contract due to other illnesses and defects like insanity⁹, leprosy¹⁰, riotq¹¹, Qarn¹², and others that could incite hatred in the subconscious and make it impossible for both partners to enjoy their married life¹³.

⁸ 8Aḥmad ibn Ḥanbal al-Shaybānī, *Musnad*, 2nd ed., (Al-Maktab al-Islāmī, 1398), 493; ‘Abū ‘Abd Allāh Muḥammad ibn Ismā‘īl Bukhārī, *al-Tārīkh al-Ṣaghīr* (Lāhore: Idārah Tarjumān al-Sunnah, 1982), 166; Muḥammad ibn ‘Alī Shawkānī, *Nal-ul-Awṭār Sharah Muntaqā al-Akḥbār*, vol. 2, 157, (The Ḥadīth is very weak due to Jamīl ibn Zaid because of His d‘af as he narrated sometime from Ka‘ab ibn Zaid, sometime from Ibn ‘Umar and sometime from Ka‘ab ibn ‘Ujrah whom Imām Bukhārī said that his Ḥadīth is not ṣaṣīḥ. Bahiqī also narrated the Ḥadīth with the authority of Ka‘ab ibn ‘Ujrah, see Nayl al-awṭār, 156.

⁹ A person is physically fit but have not sound mind and suffers from mental disorder condition in madness; ‘Ala’ al-Dīn ‘Abdul ‘Azīz ibn Aḥmad al-Bukhārī, *Kashf al-Isrār ‘an Uṣūl Fakhr al-Islām al-Bazdawī*, vol. 2 (Beriut: Dār al-Kitāb al-‘Arabī), 263, for detail see, 88.

¹⁰ Leprosy is a common and constant disease in which the skin, nerve or tissue gets effected: *Al-Mwsū‘ah* al-Ṭibbiyah al-Ḥadīthiyah, vol. 3, 448; Al-Ramlī, *Nidayat Al-Muḥtāj li-Sharḥ Al-Minhāj*, vol. 3, 202.

¹¹ Al-Ritq is described as bone in vagina and the sexual relationship is not possible due to the intensity of Join Vulva: Ibn Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 4, 133; Al-Shīrāzī, *Al fī Fiqh Al-Imām Shāfi‘ī*, vol. 2, 47; Ibn ‘Ābidīn, *Ḥāshiyah Radd al-Muḥtār ‘Alā Durr al-Mukhtār*, vol. 3, 501; Al-Dasūqī, *Ḥāshiyah al-Dasūqī ‘lā al-Sharḥ al-Kabīr*, vol. 2, 278; Al-Buhūtī, *Kashf al-Qinā’ ‘an Matn al-Iqnā’*, vol. 5, 109.

¹² Al-Qarn is a defect like al-Ritq, which prevents to have intercourse as due to having a bone or meat in the vagina: Ibn Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 4, 133; Ibn ‘Ābidīn, *Ḥāshiyah Radd al-Muḥtār ‘Alā Durr al-Mukhtār*, vol. 3, 501; Al-Khirshī, *Al-Khirshī ‘Alā*

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The Ḥadīth that the Prophet (P.B.U.H.) states, is another argument. According to the statement made by Allah's Messenger (P.B.U.H), there isn't any 'Adwa (no infectious disease is spread without Allah's consent), no Hamah, no adverse sign for the duration of the month of Safar by a and a person should flee from a leper just as one would from a lion¹⁴

This hadith offers evidence that leprosy is a valid reason to break a marriage. One approach to escape the suffering partner is to get the marriage contract annulled. The condition that prohibited the partner from being in a relationship is leprosy¹⁵.

As ḥaḍrat Ōmar (R.A.) puts it:

"In the event that a man marries a woman and discovers later on that she has leucocythaemia, insanity, or leprosy, he is obligated to pay her dower and to hold the person who deceived accountable for paying it."¹⁶

The Zāhiriyyah jurists hold the second position, which states that regardless of how contagious, unbearable, or venomous the illness or defect may be, the spouses have no legal authority to end the marriage for such reasons. According to Ibn Ḥazam, the qāḍī or anybody else does not have the authority to end the marriage or arrange for the couples to live apart if the husband fails to have sex with her even once¹⁷.

Mukhtaṣar al-Khalīl, vol. 3, 237; Al-Shīrāzī, *al-Muḥadhdhab fī Fiqh al-Imām Shāfi'ī*, vol. 2, 48; Al-J.,ī, *Sirāj al-Sālik aṣḥal al-Masālik*, vol. 2, 56; Al-Sharbīnī, *Mughnī al-Muhtāj*, vol. 3, 202; Al-Buhūtī, *Kashf al-Qinā' 'an Matn al-Iqnā'*, vol. 6, 651, for detail see, 113

¹³ Al-Marghinānī, *Al-Hidāyah Sharah Bidāyat al-Mubtadī*, vol. 2, 27; Shams al-Dīn Muḥammad ibn Muḥammad bin Aḥmad al-Shīrbīnī al-Qāhirī al-Khatṭīb, *Al-Iqnā' fī ḥall Alfāz Abī Shujā'*, vol. 2 (Beirut: Dār al-M.,rifah), 83 ; Al-Shīrbīnī, *Mughnī al-Muhtāj ilā M'rifat Alfāz al-Minhāj* vol. 3, 203, Ibn Qudāmah, *Al-Mughnī*, vol.7, 318-319; Dr. Muḥammad „Aqlah, *Nazām al-Uṣrah fī al-Islām*, vol. 3, 235.

¹⁴ Aḥmad ibn 'Alī Ḥajar Asqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 10, Kitāb al-Tibb, Bāb al-Jazam, 158.

¹⁵ Al-Shāfi'ī, *Al-Umm*, vol. 3, 92; Al-Shīrbīnī, *Ibid*, 203.

¹⁶ Anas ibn Imām Mālik, *al-Mawṭi'a*, vol. 2, ed. Muḥammad 'Abd al-Baqī, Kitāb al-Nikāḥ, bab ma jā' fī al-Ṣadaq wa al-Ḥiba, 526; Muḥammad ibn Ismā'īl Ṣan.,ānī, *Subal al-Salām Sharḥ Balūgh Al-Marām min Jam' al-Āḍilah al-Aḥkām*, 3rd ed., vol. 3. (Beirut: Dār al-Kitāb al-'Arabī, 1307). Narrators of the Ḥadīth are authentic (Thiqāt), al-Ṣn.,ānī, *Subul Salaam*, vol.2, 287.

¹⁷ Abū Muḥammad 'Abū 'Abd Allāh ibn Sa'īd Ibn Ḥazam, *Al-Muḥallā* (Beirut: Dār al-Afāq al-Jadīdah), 109-113.

Ibn Ḥazam provides evidence for his position from the following tradition about Rafāʿ, al-Qarẓī, as related by Imām Zuhri via Ḥaḍrat ʿĀṣiysha (R.A.):

*Rafāʿ, al-Qarẓī divorced his wife, who then got married to ʿAbdul Reḥmān bin Zubair. "He has absolutely nothing excluding like frill (of linen)," she said to the Prophet (P.B.U.H.). He responded, "Probably you want to get return to Rafāʿ, al-Qarẓī, this wouldn't be possible unless you have no taste for his honey alongside that of yours," meaning that they cannot be separated until they engage in sexual activity.*¹⁸

Ibn Ḥazam believes that this precedent makes it abundantly evident that a marriage cannot end due to flaws in either spouse¹⁹. However, it appears that the pertinent Ḥadīth focuses more on the requirement that sexual relations with the second spouse be had in order to remarry the first husband.

Consequently, the jamhūr Fuqahāʾ bases its reasoning on the idea that although a peaceful, happy existence is the primary goal of marriage, it can be dissolved if one partner has a condition or flaw that causes the other to feel hate.

Because of flaws or illnesses, who has the right to demand separation?

The Ḥanafī jurists recognize that a husband who suffers from physical flaws or illnesses is entitled to a divorce, but they do not recognize the husband's right to the same. Considering that the husband is entitled to file for divorce from his wife if he discovers flaws in her that prohibit him from having a sexual connection with her²⁰.

¹⁸ Ibn Ḥajar Asqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, Kitāb al-Ṭalāq Bāb min Jawaz al-Ṭalāq, vol. 9, 361; Abū Zakariyāʾ ibn Mūrī ibn Ḥasan ibn Ḥusayn ibn Jumuʿah ibn Ḥizāmī Al-Ḥawrānī Muḥiy al-Dīn al-Nawawī, *Ṣaḥīḥ Muslim bi-Sharḥ Al-Nawawī*, vol. 2 (Beirut: Dār al-Fikar li-ṭibʿah wa al-Nashr, 140), 1055-56.

¹⁹ Ibn Ḥazam, *Al-Muḥallā*, vol. 10, 62.

²⁰ Al-Kāsānī, *Kitāb Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, vol. 2, 322-27; Al-Mawṣilī al-Buldajī, *Al-Ikhtiyār li-Taʾlīl al-Mukhtār*, 115; Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, vol. 2, 516; Dhakī al-Dīn Shʿbān, *Al-Aḥkām al-Sharʿiyyah li-Aḥwāl al-Shakhṣiyyah*, 326.

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In contrast to Ḥanafī, Shāfi‘²¹, Mālikī²², and Ḥanbalī²³ jurists, however, permit both spouses to request separation for any illness or defect that keeps them from enjoying a sexual connection.

Types of Inherits that might lead to a divorce:

There is consensus among jurists about the types of situations that might result in separation: impotence (al-ineen) and al-jab (in the event that the male reproductive organ is absent). They are not the same as all the other flaws and illnesses that might cause separation, though²⁴.

Imām Abū Ḥanīfah as well Imām Abū Yūsuf granted the right to divorce only in cases of sexually transmitted diseases that prohibit a person from engaging in sexual activity, such as impotency, amputated male organs, and testicular anosity, as these conditions make it impossible to fulfill the fundamental goal of marriage—having sex²⁵.

They state that none of the other flaws or illnesses, such as al-janūn, al-jazām, and al-baras, give rise to the right to request a separation²⁶. Nonetheless, Imām Muḥammad added other flaws such as al-janūn

²¹ Al-Shirbīnī, *Mughnī al-Muhtāj Ilā M’rifat Alāz al-Minhāj* vol. 3, 202; Al-Nawawī, *Kitāb Al-Majmū’ Sharḥ al-Muhdhdhab*, vol. 17, 268.

²² Al-Ḥaṭṭāb al-Mālikī, *Mawāhib Al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, vol. 3, 483; Anas ibn Mālik, *Al-Madawnah al-Kubrā*, 1st ed., vol.2, 167.

²³ Ibn Qudāmāh, *Al-Mughnī*, vol. 7, 650.

²⁴ Ibn, ‘Ābiddīn, *Ḥāshīyah Radd al-Muhtār ‘Alā Durr al-Mukhtār*, vol. 3, 494-96; Al-Kāsānī, *Ibid*; Dhakī al-Dīn Sh“bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakhṣīyah*, 526; Al-J., I, *Sirāj al-Sālik Ashal al-Masālik*, 56; Aḥmad ibn Ghanīm ibn Sālam al-Nafrāwī, *Al-Fawākah Al-Dawānī*, vol. 2 (Cairo: Muṣṭafā Al-Bābī al-Ḥalabī, 1374), 65; Al-Nawawī, *Kitāb al-Majmū’ Sharḥ al-Muhdhdhab*, vol. 16, 268; Ibn Qudāmāh, *Ibid*; Maṣṣūr ibn Yūnus ibn Ṣalāḥ al-Dīn al-Buhūtī, *Kashf al-Qinā’ ‘an Matn al-Iqnā’*, 105-06.

²⁵ Al-Mawṣilī al-Buldajī, *Al-Ikhtiyār li-Ta’līl al-Mukhtār*, vol.2, 115; Al-Kāsānī, *Kitāb Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’*, vol. 2, p.327; Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, vol. 2, 516-17; Dhakī al-Dīn Sh“bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakhṣīyah*, 526.

²⁶ Al-Mawṣilī al-Buldajī, *Ibid*; Al-Kāsānī, *Ibid*; Wahbah al-Zuhaylī, *Ibid*; Abū Zahrah, *Al-Aḥwāl al-Shakhṣīyah*, 356; Ibn Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 4, 134.

(insanity), al-jazām (leprosy), and al-baras (leucocythemia), along with any other flaws that cause a wife to avoid her husband²⁷.

The 13 flaws that cause people to want separation, according to the Mālikī Jurists, fall into three categories²⁸:

1. Only-in-the-husband defects such as impotence (al-‘Inīn), severed male organs (al-jab), testicular absence (al-khaṣāṣ), and genital allergy or aversion (al-‘Ī, tarād)
2. The woman alone possesses the following defects: al-Rītq, al-Qarn, al-‘Afl, al-‘Ifāṣ, and al-bakhr.
3. Al-junūn (insanity), al-jazām (leprosy), al-barap (leucocythaemia), and al-‘ūyītah (passing of stool during sexual activity) are defects that are frequent in both the husband and the wife²⁹.

Shāfi‘īyah states that there are seven flaws, which may be further classified into three groups, that cause people to desire separation³⁰:

1. Impotency and severed male organs, or al-‘Inīn and al-jab, are defects only seen in husbands.
2. The woman alone possesses the al-Ratq and al-Qaran defects.
3. Common flaws in both spouses include al-janūn (insanity), al-jazām (leprosy), and al-baras (leucocythemia).

As the hanbalī, there are eight *goushi* faults that cause people to desire separation, which may be further classified into three categories³¹:

1. Only a husband can have certain defects, such impotence (al-‘Inīn) and severed male organs (al-jab).
2. Only the woman has the following defects: al-Fataq, al-Qarn, and al-Afl

²⁷ Al-Mawṣilī al-Buldajī, *Al-Ikhtiyār li-Ta‘līl Al-Mukhtār*, vol. 2, 115; Al-Kāsānī, *Ibid*; Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, vol. 2, 516-17; Dhakī al-Dīn Sh‘bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakhṣīyah*, 526.

²⁸ Anas bin Mālik, *Al-Madawnah Al-Kubrā*, vol. 2, 211-214; Al-Dasūqī, *Hāshiyah al-Dasūqī ‘Alā al-Sharḥ al-Kabīr*, vol. 2, 277; Al-Ḥaṭṭāb al-Mālikī, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, vol. 3, 483.

²⁹ Anas ibn Mālik, *Al-Madawnah al-Kubrā*, vol. 2, 211-214; Al-Dasūqī, *Hāshiyah al-Dasūqī ‘Alā al-Sharḥ al-Kabīr*, vol. 2, 277; Al-Ḥaṭṭāb al-Mālikī, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, vol. 3, 483-85.

³⁰ Al-Shāfi‘ī, *Al-Umm*, vol. 5, 90-95; Al-Nawawī, *Kitāb al-Majmū‘ Sharḥ al-Muḥdhdhab*, vol. 16, 268

³¹ Ibn Qudāmah, *Al-Muqannā’*, vol. 3, 55-57; Ibn Qudāmah, *Ibid*, vol.6, 561; Majad-ul-Dīn Abī Barakāt, *Al-Muḥarah fī Fiqh*, vol. 2, 24.

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3. The three defects that are similar to both the husband as well as the woman are leprosy (jayām), lunacy (janūn), and leucocythemia (baras).

Categories of Defects:

Three categories may be used to group all of the defects:

1. Common flaws shared by the wife and husband.
2. Issues those are unique to the spouse.
3. Flaws those are unique to the woman.

A husband may request a divorce because of certain illnesses, in accordance with Mālikī and a statement of the Shāfi'āh as well as Ḥanabli³². However, according to further sayings of the Ḥanablah and Shāfi'īah, he is not entitled to request separation because of these illnesses.³³

Review of the Jurists' Opinions:

The Jamhūr Fuqahā' (Ḥanafī, Shāfi'ī Mālikī, as well as Ḥanbalī) are in agreement that when one or both partners suffer from illnesses or other deformities, the marriage should be dissolved since the marriage's fundamental goal cannot be fulfilled. However, they disagree on the flaws and illnesses that cause a couple to split up. The Ḥanafī jurists granted the woman the right to divorce her husband if she discovered any physical flaws or illnesses in him, but the husband was not granted this right because he was entitled to Ṭalāq.

Imām Abū Ḥanīfah along with Imām Abū Yūsuf claim that the sole reasons for separation are al-jab and al-ineen (impotence) and al-khue (no testicles), as these conditions prevent one from engaging in sexual activity. They hold that the reasons of al-janūn, al-jazām, and al-baras are inadmissible; on the other hand, if Imām Muḥammad has committed any other faults that warrant the wife's separation from her husband, then those grounds are admissible. Legal scholars Shāfi'ī Mālikī and Ḥanbalī permit both spouses to file for divorce due to any illness or defect that keeps them from enjoying a sexual connection.

³² Al-Ḥaṭṭāb al-Mālikī, Ibid; Al-Shirbīnī, Ibid; Ibn Qudāmah, Ibid.

³³ Al-Ḥaṭṭāb Al-Mālikī, Ibid; Al-Shirbīnī, Ibid, 108; Ibn Qudāmah, Ibid

Three categories of defects can be distinguished: the first includes common defects that both the husband and the wife experience, such as madness (al-Janūn), leprosy (al-Jazaam), cholera, leucoderma (al-Baras), herpes, syphilis (al-Zuhrī), tuberculosis (al-sull), cancer (al-Sartān), and aid. The second category consists of problems that are exclusive to the husband, such as impotence (al-‘inīn), severed male organs (al-Jab), and testicle absence (al-Khuṣāṣ). Thirdly, there are faults such as al-Ratq, al-Qarn, al-„Afl, al-Fataq, and al-‘Ifḍāp, Bakhr al-Farj, that are exclusive to the woman.

When it comes to impotency, a woman must go to the qāḍī. After an inquiry, the qāḍī will give her husband a year to get over his impotence. However, if the husband disputes the woman's claims made under oath, the ladies will question the wife to ascertain the truth. The judge will make an order to obtain the medical examination.

When the qāḍī issues an order for that, the husband's one-year grant to cure his impotence will begin to count. It won't consider the time that has transpired since then.

Case Law on Impotency:

Although a happy marriage is the primary goal of matrimony, women have the right to file for divorce if their husband has impotence or any other illness or defect. Section (v) of the DMMA 1939 grants a woman in Pakistan the right to request dissolution of marriage if her spouse is experiencing impotence³⁴.

In the case of *Zulfiqar Ahmad v. Judge Family Court*³⁵, it was decided that until the husband's impotence was not medically proven, no degree could be awarded on that basis. The wife's request for a divorce due to her husband's physical infirmity was denied by the court. In this instance, Ms. Nasim Akhtar filed a petition to dissolve their marriage against her husband, citing Khul', cruelty, and the husband's physical infirmity as

³⁴ “That the husband was impotent at the time of the marriage and continues to be so”(b) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground DMMA 1939 section 2(v).

³⁵ 2003 CLC 1954 Lahore.

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reasons. Despite his harsh actions, she claimed to have lived with him for two years; nonetheless, he had kicked her away from the residence and neglected to pay her maintenance.

In addition, she claimed that the man she married was physically incapacitated and that she had not been informed of this flaw earlier, which amounted to fraud. As a result, she became hostile to him and was not prepared to live together with him. In addition to suing for the restoration of their marital rights, the husband, who refuted all of the accusations, also suggested that the court consider having him evaluated medically.

The learned Judge rendered the following ruling about impotency, citing the second section from *The dissolution for Muslim Marriage Act 1939*:

*The inability of a husband to engage in sexual activity with his spouse is known as impotency, but physical weakness is not a sign of impotency*³⁶.

Furthermore, it was stated that there is no custom in Islamic social and cultural contexts for a woman to discuss her husband's physical weakness, and any such discussion could be interpreted as a reflection of the woman's character given that it is impossible to be aware of a husband's physical weakness prior to marriage.

In Khul, the woman claimed to have grown hostile toward her husband, but she was unable to provide evidence to support her claims. Nonetheless, the wife was granted a divorce on the grounds of khulʾ by the learned family tribunal, provided that she paid Rs 10,000 as consideration. As a result, the decision made by the learned family tribunal was upheld.

This opinion was also expressed in the Abdul Rahman Siddiqi vs. Mst. Naseem Bibi³⁷ case, which states that in society, a woman should wait to discuss her husband's impotence or incapacity for a sexual engagement until she is certain that the impotence is permanent or incurable. In this instance, the wife initiated a lawsuit seeking a divorce on the grounds of brutality, neglect, the husband's inability to fulfill his responsibilities as a spouse, and khulʾ. The wife received a decree of khulʾ, after the family court determined all of the accusations against her to be true. In an appeal, the husband contested this ruling, arguing that since the wife had not provided evidence of any of the accusations—including those of cruelty,

³⁶ Ibid; 1959.

³⁷ 1994 MLD 2188 Lahore

lack of maintenance, and impotence—there was no basis for granting her a separation. He produced a medical certificate attesting to his physical, mental, and sexual fitness, but the document appeared to have been falsified due to several spelling errors. Furthermore, the physician had not disclosed the process or tests he used to come at this conclusion. The wife also underwent a medical examination, and the female doctor limited her conclusions to the fact that the wife was neither pregnant nor had an abortion. Additionally, additional signs including the uterus' normalcy demonstrated that she hadn't taken part in sexual activity. The court determined that the couple are cousins and that the wife's physical incapacity to carry out her husband's duties was the only explanation for her unwillingness to move in with him. The wife also claimed in her testimony that her husband had told her mother that she couldn't fulfill her share of the responsibilities of marriage. In addition, he declared his infirmity in front of a "Panchayat." In each of these cases, the learned judge decided as follows:

*"The young girl's forced return to live with her husband for the sole purpose of providing company in the home, without any physical connection between them and without the hope of bearing children—the ultimate goal of marriage—would be an inequitable, unfair, and cruel act on the part of the court"*³⁸

Despite the fact that the basis of impotency was previously proven, the court upheld the decision for the dissolution of the marriage on the grounds of Khul' rather than impotency, which was a legitimate reason for divorce. In the case of Mawlvi Mir Qalam Khan vs. Mst. Shamim Bibi³⁹, it was decided that if a wife is disabled from procreating and her husband has a legitimate basis for taking a second wife, the wife should be entitled to seek dissolution if the husband shares the impairment. In this instance, the woman was granted the decree of separation of marriage due to the impotence of her husband. After reviewing the facts, the learned Family tribunal declared that the couple could not cohabit within the boundaries set by Allah Ta'ala and granted the action for divorce based on impotency as well as the sum of dower.

³⁸ Ibid; 2193

³⁹ 1995 CLC 731 Peshawar

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In an appeal, the husband contested the learned Family court's decision, arguing that neither the medical certificate of impotence nor any other record demonstrated that the couple's relationship had deteriorated to the point where they could no longer coexist. However, the court dismissed this challenge, ruling that the accusation was plausible given the husband's lack of involvement in the delivery of any children. As the learned Judge noted, the couple cohabited for nine years, and following this extended amount of time, the wife inquired about her husband's impotence, indicating the tense dynamics between them.

According to the medical document, the husband's sperm are incapable of fertilization due to spermatozoa abnormality. The erudite court decided that while a husband's inability to please his wife is often the cause of his impotence, in this instance, not having had a child for a period of nine years prior is a major source of animosity between the couple and grounds for divorce.

The dissolution of marriage decree would take effect, in accordance with section 2 of the DDMA 1939, ninety days following the court's judgment. Because he submitted his application six months and eighteen days after the decree was passed, the husband was unable to use the one-year period allotted for the treatment of his impotence.

The guidelines and process that the court follows in situations of impotency are provided in the Abd Allah vs. Mst. Shaheen⁴⁰ case. The erudite Family court granted the woman the right to dissolution of matrimony on the grounds of impotence. In a writ petition, the husband contested this order, arguing that the learned Family court's decision lacked legal standing since he had not been granted the time as required by DDMA 1939's section 2. Upon reviewing the case circumstances, the learned court concluded with the learned Family jurisdiction had not followed the law correctly and had acted without power. It was decided that the husband must be given a year to cure his impotence before the family court could issue a decision for divorce based on his inability to conceive. Additionally, the order on this basis cannot be approved if the spouse demonstrates after a year that the individual is no longer impotent. In this instance, the spouse properly requested a period of time to cure his impotence; however the learned

⁴⁰ 1998 MLD 1216 Peshwar

Family tribunal refused to provide him the requested time. Furthermore, the husband's impotence was demonstrated only by a female doctor's testimony, which indicated that the wife's hymen⁴¹ was unbroken and that she hadn't been consummated. The experienced Judge, however, dismissed this argument, stating that the hymen's intact state does not prove the wife was a virgin because hymens can vary or be so adaptable under certain circumstances that they rupture at the moment of birth. Furthermore, the parties presented their own medical certifications, which suggest a personal connection in some way. The learned judge ruled that the parties should be sent to the medical board for examination. This story illustrates how the medical examination process works.

The court decided in *Leemon vs. Mst. Kazbano*⁴² that the husband would not receive the same if he had not requested the time to treat his impotence. In this instance, the wife requested the dissolution of the marriage due to the husband's impotence and lack of support. When the young woman reached puberty, she learned that her partner was infertile and unable to fulfill his marital duties. The couple was married when the woman was still a juvenile. Upon discovering his flaw, the husband began abusing her and evicted her from his home. After growing frustrated, the wife moved for divorce. The Additional District Court, with the judge hearing an appeal, ordered the wife's dissolution after the family court had rejected her request. The husband subsequently appealed this decision, arguing that the court could not have ended the marriage without giving the husband a year's notice if the claim and the evidence of impotence were found to be true. However, the court dismissed his argument that he was not granted the time and so could not use it.

Examination of the Impotency Cases:

The husband's physical weakness served as the basis for the separation in *Zulfiqar Ahmad vs. Judge Family Court*⁴³. However, the court determined

⁴¹ The hymen is a membrane that covers fully or partially the external vaginal opening. Emans, S. Jean, *Physical Examination of the Child and Adolescent* (2000) in *Evaluation of the Sexually Abused Child: A Medical Textbook and Photographic Atlas*, ed.2 (Oxford: University Press n), 61-65.

⁴² PLD 1982 Karachi 449

⁴³ 2003 CLC 1954 Lahore.

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that weakness in the body does not equate to impotence, using section 2 from DDMA 1939 as support. Impotency is defined as the husband's inability to engage in sexual activity with his wife. While there are other grounds as well, such abuse and neglect, the major challenge was substantiating these claims. As an alternative, the woman begs Khul that she has become resentful of her husband but is unable to demonstrate it. Nonetheless, the wife was granted a divorce on the grounds of khul by the learned family court, provided that she paid Rs 10,000 as compensation. This opinion is also expressed in the *Abdur Rehman Siddiqi vs. Mst. Naseem Bibi*⁴⁴ case, where the court took a different stance, ruling that a woman in society should not discuss her husband's impotence or incapacity for a sexual relationship as long as she is certain that the impotence is permanent or incurable. Although she also claims other causes, the family court gave her the Khul, decree. The woman used several pieces of evidence to support her appeal, and the court correctly concluded that the man she married is unable to carry out his marital responsibilities.

*"The young girl's forced return to live with her husband for the sole purpose of providing company in the home, without any physical connection between them and without the hope of bearing children—the ultimate goal of marriage—would be an inequitable, unfair, and cruel act on the part of the court"*⁴⁵

Unfortunately, despite the fact that the tribunal severed the marriage on Khul' rather than impotency, which was a legitimate cause for divorce, the decision for dissolution of wedding on that basis was upheld.

The case of *Mawlvi Mir Qalam Khan vs. Mst. Shamim Bibi*⁴⁶ was appropriately decided based on the husband's impotence, as he had not contributed to the birth of a child in nine years. The wife had demanded separation from the husband after a long period of companionship, which demonstrated the strained situations between the spouses. This ruling is the court's model judgment to relieve the wife of the injury. The case *Abdullah vs. Mst Shaheen*⁴⁷ outlines the guidelines and process the court uses when

⁴⁴ 1994 MLD 2188 Lahore.

⁴⁵ Ibid; 2193.

⁴⁶ 1995 CLC 731 Peshawar.

⁴⁷ 1998 MLD 1216 Peshawar.

deciding cases of impotence and emphasizes how the medical examination is conducted. The subject of impotency was also determined by the court in the Leemon vs. Mst. Kazbano case.⁴⁸

The cases of Abdur Rehman Siddiqi vs. Mst. Naseem Bibi and Zulfiqar Ahmad vs. Judge Family Court were determined by the court on the basis of Khul‘, even if the court made a different conclusion despite the existence of impotency. Under the DDMA 1939 sec. 2 basis of impotency, the cases of Mawlvi Mir Qalam Khan vs. Mst. Shamim Bibi, Abdullah vs. Mst. Shaheen, and Leemon v. Mst. Kazbano are determined.

Survey/interview sample:

In order to determine the causes for the lack of cases filed under the mentioned issue, the researcher conducted a survey at Rawalpindi High Court courts. A questionnaire with four questions was created for the survey. Four of the most senior practicing attorneys from the Rawalpindi judiciary and one senior attorney from the Supreme Court took a sample of the poll to find out why cases were not filed under this heading. To find out why there isn't only one source of information on the topics, a series of questions were posed.

1. *For what length of time have you been addressing the family issue?*

- I. Two years and older
- II. Five years and older
- III. Ten years and older

2. *The majority of separation lawsuits are submitted under*

- I. Khul‘
- II. Additional grounds permitted by DDMA 1939.

It has been noted that about 80 percent of separation lawsuits are brought under Khul‘. Furthermore, it has been noted that regardless of the existence of the other basis, women are instructed to request khul‘ in cases involving other grounds.

Q3. Is there a case based on the husband's many diagnoses, including leprosy, leucoderma, and other recent illnesses like cancer, HIV, etc.?

1. In agreement; 2. Disagreement

⁴⁸ PLD 1982 Karachi 449

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Despite having over a decade of expertise and serving as Supreme Court advocates, not a single lawyer has taken a case involving these matters.

Q 4. Why isn't there a single case filed under this ground? Why not?

1. A woman's shyness in disclosing illnesses or flaws
2. Protracted legal proceedings
3. To elude the time needed for the illness's recovery

It's odd to learn that social customs forbid women from requesting a divorce on the grounds of a husband's illnesses, which is one of the reasons why not a single lawsuit has been filed in this regard. Furthermore, the lack of a single occurrence on this basis might also be attributed to the woman's timidity. Above all, it is crucial to remember that the primary cause is the drawn-out legal process for testingify about the illness, which takes a year if it is curable. Therefore, the majority of women who file lawsuits under this pretext are instructed to want *khul'* in order to circumvent the judicial process.

Conclusion

Islam not only values marriage and opposes divorce, but it also gives couples the freedom to split if they find that they are unable to coexist for whatever reason. The term "*Ayb*" refers to a flaw that keeps a couple from engaging in sexual activity, which is the fundamental goal of marriage. The *Jamhūr Fuqahā'* (Ḥanafī, Shāfi'ī Mālikī, as well as Ḥanbalī) unanimously agree that when one or both partners have illnesses or other deformities, the marriage should be dissolved because the marriage's primary goal cannot be fulfilled.

Despite the fact that spouses often have a variety of illnesses, it is clear from the discussion above that the right to a separation will be granted in the event of several defects and illnesses:

1. Infirmities and illnesses that have no known cure.
2. Any infectious illnesses or birth abnormalities that cause injury to the woman, whether as a result of intimate contact with her spouse or through a sexual interaction.
3. Every illness or flaw that causes the wife to pass away, whether via intimate touch or a sexual connection.
4. Conditions and flaws that might be passed down to the kids.

5. Illnesses and flaws that might incite resentment and contempt⁴⁹ amongst partners

Despite the fact that the spouses have the option to end the marriage due to illnesses or other faults, the case law paints an inadequate image of how this article is really put into practice. It is evident from the courts that no cases have been filed under this heading; the only occasion on which a lawsuit is brought is on the grounds of impotency, which is likewise not common owing to legal procedure.