

An Analytical Study of Case Law of Diseases and Defects in the Spouses as a Valid Ground for Separation

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Abstract

In Islam, family has a great importance, and it is a basic unit in Islamic social structure for the lawful satisfaction of the passion based on love and cooperation. Marriage contract is considered a civil contract which can be dissolved like all the other contracts. Although a husband is given the right to divorce, but the wife is also given the right to ask for separation. This Article provides an analytical study about the right of the spouses according to Islamic perspective to get separation on the ground of disease or defect, as well as practices in the courts regarding divorce. The method of case study about diseases and defects is adopted in order to know the practice in the court, and 05 decided cases of Pakistani courts have been taken to analyze the issue. The Quantitative research method is also adopted to know the causes of having no case law on the said issue. A survey in the form of interviews consisting of 4 Questions (in the form of Questionnaire) was conducted on the issues to highlight the difficulties as to why most of the cases under the said issues are not filed. For the survey, samples were taken from 4 most senior Practicing Lawyers of Rawalpindi High court and 1 senior lawyer of Supreme Court Islamabad.

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

Introduction:

Islamic law provides several grounds to the spouses to get separation from each other in which one of the ground is defects in the spouse. When both of the spouses or one of the spouses is suffering from mental or physical diseases or defects then the basic objects of the marriage cannot be achieved. In such circumstances, it is desirable to dissolve the marriage¹. A wife's right to divorce either occurs as a delegated divorce, or is secured by a compromise with the husband, or can be exercised by filing a suit for dissolution of marriage before the Qāḍī or court.

Marriage/ *Nikāḥ* (the root word *nakaḥa*² meaning to be gathered³) is the essential element and basic idea in Muslim family law which is used for sexual intercourse⁴.

The preservation of the marriage contract is emphasized a lot in Islamic law but the spouses are also given the right of separation when they cannot live together. *Talāq* is

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¹ Al-Marghinānī, *Al-Hidāyah Sharah Bidāyah al-Mubtadī*, vol. 2, 27; Al-Shirbīnī, *Mughnī al-Muḥtāj ilā M'rifat Alfāz al-Minhāj* vol. 3, 203; Ibn Qudāmah, *Al-Muqāna'*, vol. 7, 581; Dr. 'Abd Allāh Yūsuf Muṣṭafā 'Azām, *Inḥilāl al-Zawāj fi 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'rifah, 1924), 192.

permissible as a remedy to be resorted only when there is no alternative solution to the dispute⁵.

The word ‘Ayb (العيب) is used for defect which means deficiency, imperfection and weakness⁶. In its meaning regarding the marriage, it means the defect that prevents from sexual intercourse⁷.

Legal Basis and Juristic Opinions about the Separation due to Defects/Diseases:

Two kinds of opinions are found about the right of a wife to seek separation due to defects/ diseases. The *Jamhūr Fuqahā’* (*Hanafī, Shāfi’ī, Mālikī, and Hanbalī*) unanimously hold the opinion to dissolve the marriage when the spouses or one of them is suffering from diseases or defects. They rely on the following *Aḥādīth* in support of their arguments:

"عن زَيْدِ بْنِ كَعْبٍ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ تَزَوَّجَ امْرَأَةً مِنْ بَنِي غِفَارٍ ، فَلَمَّا دَخَلَ عَلَيْهَا فَوَضَعَ نَوْبَهُ ، وَقَعَدَ عَلَى الْفِرَاشِ ، أَبْصَرَ بِكَشْحِهَا بَيَاضًا ، فَأَخْبَرَ عَنِ الْفِرَاشِ ، ثُمَّ قَالَ : خُذِي عَلَيْكَ ثِيَابَكَ ، وَلَمْ يَأْخُذْ بِمَا أَتَاهَا شَيْئًا"⁸

“It is reported that the Holy Prophet (P.B.U.H) married with a woman of Banī Ghifār tribe. He (Prophet) notice while intending to have intercourse with her that she had marks of leucocythaemia on her sides. He then moved away from her and asked her, “put on your clothes” and took back nothing from her whatever the He (P.B.U.H) had given to her”.

The *Ḥadīth* provides a proof for separation when one is suffering from leucocythaemia. Leucocythaemia is a defect that is intolerable or unbearable to the people and the basic purpose of the marriage is to create love and affections between the spouses.

As the marriage, due to defect of leucocythaemia was dissolved by the Prophet (P.B.U.H) so it provides a base that the marriage contract can be dissolved on ground of other diseases and defects such as madness⁹, leprosy¹⁰, *Rīq*¹¹, *Qarn*¹² ect that may create

⁵ Dr. J’afri ‘Abd-al-Salām, *Ḥal ‘Uqdah al-Nikāh fī al-Zaw’ al-Sharī’ah al-Islāmīyah*, 1st ed., 43.

⁶ Ibn Manẓūr, *Lisān al-‘Arab*, vol. 1, 528, Ibn Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 5, 15

⁷ Shāhāb 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.

⁸ Aḥmad 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 Sharḥ Muntaqā al-Akḥbār*, vol. 2, 157, (The Ḥadīth is very weak due to Jamāl ibn Zaīd because of His ḍ‘af as he narrated sometime from Ka‘ab ibn Zaīd, sometime from Ibn ‘Umar and sometime from Ka‘ab ibn ‘Ujrah whom Imām Bukhārī said that his Ḥadīth is not ṣaṣīḥ. Bahīqī 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 ‘Azīz ibn Aḥmad al-Bukhārī, *Kashf al-Isrār ‘an Uṣūl Fakhr al-Islām al-Bazdawī*, vol. 2 (Beruit: 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-Ḥadīthīyah*, 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-*

hatred in the mind and prevent the spouses to enjoy the married life¹³. Another argument is the Ḥadīth in which the Prophet (P.B.U.H) said,

"عن أبي هريرة يُقول قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَا عَدْوَى وَلَا طَيْرَةَ وَلَا هَامَةَ وَلَا صَفَرَ وَفِرٌّ مِنَ الْمُجْدُومِ كَمَا تَفِرُّ مِنَ الْأَسَدِ"¹⁴

"Allāh's Messenger (P.B.U.H) said, there is no 'Adwa (no contagious disease is conveyed without Allāh's permission) nor is there any bad sign from birds, nor is there any Hamah, nor is there any bad sign for the month of Safar, and one should run away from the leper as one runs away from a lion".

This Ḥadīth provides a proof that a marriage can be dissolve on ground of leprosy. The annulment of the marriage contract is the way of fleeing from the sufferer partner. Leprosy is the defect, which forbade the partner to have relationship¹⁵.

It is stated by Ḥadrat Ūmar (R.A):

"عَنْ عُمَرَ بْنِ الْخَطَّابِ قَالَ أَيُّمَا امْرَأَةٍ غَرَّ بِهَا رَجُلٌ بِمَا جُنُونٌ أَوْ جُدَامٌ أَوْ بَرَصٌ فَلَهَا مَهْرُهَا بِمَا أَصَابَ مِنْهَا وَصَدَاقُ الرَّجُلِ عَلَى وَلِيِّهَا الَّذِي غَرَّ"¹⁶

"If a person marries a woman and finds his wife suffering from leucocythaemia, madness, leprosy, in case of penetration he must pay the dower of the wife, and the responsibility to pay the dower on the person who deceive".

The second opinion is hold by the Zāhiriyyah jurists that the spouses have no right to dissolve the marriage due to diseases or defects even if the disease or defect is venereal, infectious, or intolerable. Ibn Ḥazam holds the view that if the husband is incapable having intercourse with his wife even once, the *qāḍī* or any other has no right to dissolve the marriage or make separation between the spouses¹⁷.

Imām Shāfi'ī, vol. 2, 47; Ibn, 'Ābidīn, *Hāshiyah Radd al-Muhtār 'Alā Durr al-Mukhtār*, vol. 3, 501; Al-Dasūqī, *Hashiyah al-Dasūqī 'lā al-Sharāḥ 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, *Sharāḥ Fatḥ al-Qadīr*, vol. 4, 133; Ibn 'Ābidīn, *Hāshiyah Radd al-Muhtār 'Alā Durr al-Mukhtār*, vol. 3, 501; Al-Khirshī, *Al-Khirshī 'Alā 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 ashal 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 Sharāḥ Bidāyat al-Mubtadī*, vol. 2, 27; Shams al-Dīn Muḥammad ibn Muḥammad bin Aḥmad al-Shirbīnī al-Qāhirī al-Khattīb, *Al-Iqnā' fī ḥall Alfāz Abī Shujā'*, vol. 2 (Beirut: Dār al-M'rifah), 83; Al-Shirbīnī, *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-Ussrah fī al-Islām*, vol. 3, 235.

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

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

¹⁶ Anas ibn Imām Mālik, *al-Mawḥḍā*, 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-Ādilah 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 support his view with the tradition respecting Rafā‘ah al-Qarzī, narrated by Imām Zuhrī from Ḥadrat ‘Ā’iysha (R.A):

"عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا جَاءَتْ امْرَأَةً رِفَاعَةَ الْمُرْطَبِيِّ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ كُنْتُ عِنْدَ رِفَاعَةَ فَطَلَّفَنِي فَأَبَتْ طَلَاقِي فَتَزَوَّجْتُ عَبْدَ الرَّحْمَنِ بْنَ الزُّبَيْرِ إِيمًا مَعَهُ مِثْلُ هُدْيَةِ الثَّوْبِ فَقَالَ أَتُرِيدِينَ أَنْ تُرْجِعِي إِلَى رِفَاعَةَ لَا حَتَّى تَذُوقِي عُسَيْلَتَهُ وَيَذُوقَ عُسَيْلَتِكَ"¹⁸

“That Rafā‘ah al-Qarzī divorced his wife after whom she contracted marriage with ‘Abdal Reḥmān bin Zubair. She came to the Prophet (P.B.U.H) and said “he has nothing except like frill (of linen), the Prophet said to her, “probably you desire to get back to Rafā‘ah, this is not possible until you do not taste his honey and he that of yours”, that is, they cannot get separated until they do sexual intercourse”.

According to Ibn Ḥazam this tradition makes it clear that the marriage cannot dissolve on the ground of defects in the spouses¹⁹. But it seems that the relevant Ḥadīth is more about the condition of having sexual intercourse with the second husband is compulsory for the sake of remarrying the first husband.

Therefore, the arguments of the jamhūr Fuqahā’ are based on just as the main objective of the married life is to have a peaceful happy life but if one of the spouse is suffering from any disease or defect which makes the other feeling hatred then they can dissolve the marriage.

Who has Right to Seek Separation due to defects/diseases?

The Ḥanafī jurists allow a wife to demand separation when her husband has been suffering from such physical defects/diseases, but no such kind of right has been acknowledged for the husband by these jurists. Because, the husband has a right to divorce his wife when he finds defects in her that prevents him from establishing sexual relationship²⁰.

However contrary to Ḥanafī, Shāfi‘ī²¹ Mālikī²², and Ḥanbalī²³ jurists allow the both spouses to seek separation because of every defect or disease which prevents to enjoy the sexual relationship.

Kinds of Defects that may cause to dissolve the marriage:

The jurist are agreed upon the view that al-jab (if the male organ is missing) and al-‘ineen or impotency are the kinds that may lead to separation²⁴. However, they differ upon all the other defects/diseases that may lead to separation.

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

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

²⁰ Al-Kāsānī, *Kitāb Badā’i’ al-Ṣanā’i’ fi Tartīb al-Sharā’i’*, vol. 2, 322-27; Al-Mawṣilī al-Buldaḡī, *Al-Ikhtiyār li-Ta’līl al-Mukhtār*, 115; Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, vol. 2, 516; Dhakī al-Dīn Sh’bān, *Al-Aḥkām al-Sharī‘ah li-Aḥwāl al-Shakṣīyah*, 326.

²¹ Al-Shirbīnī, *Mughnī al-Muḥtāj Ilā M’rifat Alāz al-Minhāj* vol. 3, 202; Al-Nawawī, *Kitāb Al-Majmū’ Sharḥ al-Muḥdhab*, 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 Qudāmah, *Al-Mughnī*, vol. 7, 650.

Imām Abū Ḥanīfah and Imām Abū Yūsuf gave the right to separation only in case of venereal diseases that prevents one to have sexual intercourse such as al-jab (amputated male organ) and al-‘Inīn (impotency) and al-khuse (having no testicle) because having these defects the basic objective of marriage as to have sexual intercourse cannot be achieved²⁵. All the other defects/diseases such as al- janūn, al-jazām and al-baras does not constitute a right to ask for separation according to them²⁶. However, Imām Muḥammad added more defects to as al-janūn (madness), al-jazām (leprosy) and al-baras (leucocythaemia) and any other defects, which makes the wife to stay away from her husband²⁷.

According to the Mālikī²⁸ Jurists the defects that lead to seek separation are 13 and could be divided into three categories, which is:

- 1- Defects that are found only in the husband such as al-‘Inīn (impotency), al-jab (amputated male organ), al-khaṣā’ (having no testicle) and al-‘Ītarād (sexual allergy or aversion)
- 2- Defects that are found only in the wife that are al-Rīṭq, al-Qarn, al-‘Afl, al-‘Ifḍā’ and al-bakhr
- 3- Defects common in the husband and the wife are al-junūn (madness), al-jazām (leprosy), al-baraṣ (leucocythaemia) and al-‘ūzīṭah (passing of stool at the time of intercourse)²⁹.

According to Shāfi‘īyah³⁰ the defects that lead to seek separation are seven and they also divided into three categories:

- 1- Defects that are found only in the husband are al-‘Inīn (impotency), al-jab (amputated male organ)
- 2- Defects that are found only in the wife are al-Ratq, al-Qaran
- 3- Defects that are common in the husband and the wife are al-janūn (madness), al-jazām (leprosy), al-baraṣ (leucocythaemia)

According to Ḥanbalī³¹ second of goushi the defects that lead to seek separation are eight and they also divided into three categories:

²⁴ Ibn‘Ābidīn, *Ḥāshiyah 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’ī, *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-Muḥdhab*, vol. 16, 268; Ibn Qudāmah, *Ibid*; Maṣṣūr ibn Yūnus ibn Ṣalāḥ al-Dīn al-Buhūī, *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 Fatḥ al-Qadīr*, vol. 4, 134.

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, *Ḥāshiyah 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, *Ḥāshiyah 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-Muḥdhab*, vol. 16, 268.

- 1- Defects that are found only in the husband such as al-‘Inīn (impotency), al-jab (amputated male organ)
- 2- Defects found only in the wife are al-Fataq, al-Qarn, al-‘Afl
- 3- Defects common in the husband and the wife are al-janūn (madness), al-jazām (leprosy), al-baraş (leucocythaemia)

Kinds of Defects:

All the defects may be divided into three categories:

- 1-Defects that is common in the husband and the wife.
- 2- Defects that are found only in the husband.
- 3- Defects that are found only in the wife.

According to Mālikī and one saying of the Shāfi‘āh and Ḥanablī a husband can seek separation due to these diseases³². But another sayings of the Shāfi‘īah and Ḥanablāh he has no right to seek separation due to these diseases³³.

Analysis of the Opinions of the Jurists:

The Jamhūr Fuqahā’ (Ḥanafī and Shāfi‘ī Mālikī, and Ḥanbalī) unanimous hold the opinion to dissolve the marriage when the spouses or one of them is suffering from diseases or defects because the basic objective of the marriage cannot be achieved. But they differ on the defects and diseases which lead the spouses to separation. The Ḥanafī jurists gave the wife a right of separation if she finds such physical defects or diseases in her husband, but no such has been given for the husband because he has right of Ṭalāq.

According to Imām Abū Ḥanīfah and Imām Abū Yūsuf make only al-jab and al-‘Ineen (impotency) and al-khue (having no testicle) grounds for separation because having these defects the sexual intercourse is not possible. Al- janūn, al-jazām and al-baras are not a valid ground for asking separation according to them however, Imām Muḥammad has made any other defects, which makes the wife to stay away from her husband, valid grounds for separation. Shāfi‘ī Mālikī, and Ḥanbalī jurists allow the both spouses to seek separation because of every defect or disease which prevents to enjoy the sexual relationship.

Defects can be divided into 3 categories which are; first category falls under common defects in the husband and the wife including al-Janūn (madness), al-Jazaam (leprosy), Cholera, al-Baraş (leucoderma), al-‘Izīṭah, al-Bāsūr and al-Nāsūr, Herpes, al-Zuhrī (syphilis), Tuberculos (al-sull), Cancer (al-Sartān), aid. Second Category is defects that are found only in the husband like Impotency (al-‘inīn), al-Jab (amputated male organ), al-Khuşā’ (having no testicle). And third category is defects that are found only in the wife like al-Ratq, al-Qarn, al-‘Afl, *al-Fataq and al-‘Ifḍā’*, Bakhr al-Farj

On the issue of impotency a wife has to move to the *qāḍī* then *qāḍī* after investigation shall allow the husband the time of one year for the cure of his impotency. But in case of husband denial the wife’s assertion on oath, then the *qāḍī* shall examined the wife by the women to find out the truth. An order for the medical examination shall be passed by the Judge.

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

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*.

The period of one-year grant to the husband for cure of his impotency will count when the *qāḍī* passes an order for that. The time passed before it shall not take into account.

Case Law of Impotency:

The prime object of marriage is achieved only when the spouses leads a happy union but a woman is given a right to seek separation when the husband is suffering from impotency or any other disease or defects. In Pakistan DMMA 1939 section (v) provides a right to a woman for seeking the dissolution hen her husband was suffering from Impotency³⁴.

In *Zulfiqar Ahmad v. Judge Family Court*³⁵ case it was held that no degree can be granted on the ground of impotency of the husband unless it is not medically proved. The court rejected the right of the wife to seek separation on ground of husband's physically weakness. In this case Mst. Nasim Akhtar filed a suit for dissolution of marriage against her husband on the ground of cruelty, physical weakness of the husband, non-maintenance and *Khul'*. She alleged that she lived with her husband for two years in spite of his cruel behavior but her husband had turned her out of the house and had not paid her maintenance. She also alleged that her husband was physically weak and this defect had not been told her earlier which amount to fraud so she had developed hatred against him and not ready to live with him. The husband denying all these allegations filed a suit for restitution of conjugal rights and he also offered that the court might get him medically examined.

On the issue of impotency, the learned Judge with reference to section 2 of the Dissolution of Muslim Marriage Act 1939 held:

“That Impotency means that the husband is unable to have sexual intercourse with his wife but the physical weakness does not reflect on impotency³⁶.”

Moreover, it was held that in Islamic culture and society there is no tradition that a woman speaks about the physical weakness of the husband and any such ground may reflection the character of the woman because it is not possible to know about the physical weakness of the husband before performance of marriage.

On the ground of *Khul'* although the wife had stated that she had developed hatred against her husband but she failed to prove the same. However, the learned family court granted the wife dissolution on ground of *khul'* subject to the payment of Rs 10,000 as consideration, therefore, the decree pass by the learned Family court was maintained.

This view is also held in *Abdur Rehman Siddiqi v. Mst. Naseem Bibi*³⁷ case that in the society a woman does not speaks about the impotency or inability of her husband towards sexual relationship unless she becomes sure that her husband's impotency is incurable or of eternal nature. In this case the wife filed a suit for dissolution on grounds

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.

³⁶ Ibid; 1959.

³⁷ 1994 MLD 2188 Lahore.

of cruelty, non-maintenance, incapability of the husband to perform marital obligations and *khul'*. The family court found all the allegations against the wife and granted her the decree of *khul'*. On appeal the husband challenged this judgment with the contention that all the allegations such as cruelty, non-maintenance and impotency were not proved by the wife then there was no justification to grant her separation. He presented the medical certificate, which showed that he is physically, mentally, and sexually fit but the certificate seemed to be faked as it had many spelling mistakes. Moreover, the doctor had not indicated the manner and the tests on which he arrived at this result. The wife had also been medically examined and the lady doctor confined her findings that the wife had neither being pregnant nor having undergone any abortion. Moreover, others indications and normality of the uterus showed that she had not been subjected to sexual intercourse. The court held that the spouses are cousins and there was no other reason for the refusal of the wife to live with her husband except the physical inability to perform marital obligations. The wife also alleged her statement that her husband acknowledged before her mother about her inability to performed his marital obligations. Moreover, he also acknowledged his disability before a "Panchayat". The learned Judge in all these circumstances held:

"it would be an inequitable, unfair and unkind act on the part of the court, if the young girl is forced to resume living with her husband, for the sake of only giving company in the house, with no physical relationship between the couple and no hope of begetting progeny, the purpose for which marriage is performed"³⁸

The court maintained the decree for dissolution of marriage on the ground of *Khul'* although the ground of impotency had been proved but the court dissolved the marriage on *Khul'* not on the ground of impotency which was a valid reason for dissolution.

In *Mawlvi Mir Qalam Khan v. Mst. Shamim Bibi*³⁹ case it was held that in case of disability of the wife towards the procreation, the husband has a valid reason for having second wife, therefore, if the same disability lies with the husband the wife should have right to claim dissolution. In this case, the wife obtained the decree of dissolution of marriage under the ground of husband's impotency. The learned Family court after observing the evidence concluded that the spouses could not live together with the limits prescribed by the Allāh Almighty and decreed the suit for dissolution on ground of impotency and the amount of dower. On appeal, the husband assailed the judgment passed by the learned Family court on the ground that the medical certificate about the impotency was not proved through appearance in witness-box nor there was any other record which showed that the relationship between the spouses became so strain that they cannot live together. But this court rejected this objection and held in the circumstances that the husband had failed to contribute towards the birth of any child, the allegation seemed to be true.

It was observed by the learned Judge that the spouses lived together for the period of nine years and after this long companionship the wife asked for the impotency of the husband it showed the strained circumstances between the spouses. The medical certificate showed that the husband is suffering from the abnormality of the spermatozoa and his sperms are not capable for fertilization. It was held by the learned court that

³⁸ Ibid; 2193.

³⁹ 1995 CLC 731 Peshawar.

generally the impotency of the husband is taken when the husband is unable to satisfy her wife but in this case having no child during the last nine years is a strong reason for hatred between the spouses and ground for separation.

Under the section 2 of DDMA 1939 the decree of dissolution of marriage would become effective after the expiry of 90 days from the decision of the court. Therefore, the husband had failed to take the time of 1 year for cure of his impotency as he had filed his application after the 6 months and 18 days after the passing of the decree.

In *Abd Allah v. Mst. Shaheen*⁴⁰ case provides the rules and procedure followed by the court in the cases of impotency. The wife was entitled to dissolution of marriage on ground of impotency by the learned Family court. The husband challenged this decree in writ petition that the decree pass by the learned Family court was without lawful authority, as he was not given the time as prescribed in the section 2 of DDMA 1939. The learned court after observing the case facts held that the learned Family court had acted without authority and had failed to apply the law in its true manner. It was held that the Family court cannot pass a decree for dissolution on the ground of husband's impotency unless a time of one year is not provide to the husband for the cure of impotency. And if the husband after one year proved that he is no more impotent then the decree on such ground cannot be passed. In this case the husband had rightly submitted his application for the providence of time for the cure of impotency but the learned Family court did not provide him the said time. Moreover, the prove of husband's impotency was based on only evidence of a lady doctor that the hymen⁴¹ of the wife was intact and it proved that she had not been consummated. However, the learned Judge rejected this contention that according to medical science mare intact of the hymen is not sufficient proof that the wife was virgin because the hymen may be different or be so flexible in certain conditions that it gets ruptured on the time of first delivery. In addition to this the parties were produced their own medical certificates which indicates somehow personal involvements. The learned Judge held that court should refer the parties to be examined by the medical board. This case highlights the procedure for the medical examination.

In *Leemon v. Mst. Kazbano*⁴² case, the court held that if the husband not applied for the time to cure his impotency then he would not be given the same. In this case, wife sought the dissolution on grounds of impotency of the husband and non-maintenance. The wife was married in her minor age on attaining the puberty she had discovered that her husband was impotent and incapable to perform his marital obligations. When the husband knew about his defect he started maltreated her wife and drove her out of his house. On being fed up, the wife filed suit for dissolution, which was denied by the family court but on appeal the Additional District court, decreed her dissolution. The husband then challenged this judgment in appeal contented that if the allegation and the data placed in the court about the impotency was proved then the court cannot have dissolved the marriage unless providing the husband a time of one year. But his contention was rejected by the court that he had not been asked for the time so he cannot avail the same.

⁴⁰ 1998 MLD 1216 Peshwar

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

Analysis of the Cases of Impotency:

In *Zulfiqar Ahmad v. Judge Family Court*⁴³ the ground for separation was that the husband was physically weak. But the court held with reference to section 2 of the DDMA 1939 held that impotency means that the husband is unable to have sexual intercourse with his wife but the physical weakness does not reflect on impotency. Although other grounds such as cruelty, non-maintenance are also claimed but the main problem was to prove these allegations. Alternatively, the wife prays for *Khul'* that she had developed hatred against her husband but she failed to prove the same. However, the learned family court granted the wife dissolution on ground of *khul'* subject to the payment of Rs 10,000 as consideration.

This view is also held in *Abdur Rehman Siddiqi v. Mst. Naseem Bibi*⁴⁴ case, a different attitude of the court is found when it ruled that in the society a woman does not speak about the impotency or inability of her husband towards sexual relationship unless she becomes sure that her husband's impotency is incurable or of eternal nature. Other grounds are also claimed but family court granted her the decree of *khul'*. On appeal the wife prove from many evidence that her husband is incapable to perform marital duties, the court rightly ruled after hearing that;

“it would be an inequitable, unfair and unkind act on the part of the court, if the young girl is forced to resume living with her husband, for the sake of only giving company in the house, with no physical relationship between the couple and no hope of begetting progeny, the purpose for which marriage is performed”⁴⁵

Unfortunately, the court maintained the decree for dissolution of marriage on the ground of *Khul'* although the ground of impotency had been proved but the court dissolved the marriage on *Khul'* not on the ground of impotency which was a valid reason for dissolution.

In *Mawlvi Mir Qalam Khan v. Mst. Shamim Bibi*⁴⁶ case is rightly decided on ground of impotency that the husband had failed to contribute towards the birth of any child in nine years and after this long companionship the wife demand separation due to impotency of the husband it showed the strained circumstances between the spouses. This decision is the exemplary decision by the court to remove the harm from the wife. The case is *Abdullah v. Mst Shaheen*⁴⁷ which provides the rules and procedure followed by the court in the cases of impotency and highlights the procedure for the medical examination. In *Leemon v. Mst. Kazbano*⁴⁸ case, the court also decided the case of ground of impotency.

Zulfiqar Ahmad v. Judge Family Court and *Abdur Rehman Siddiqi v. Mst. Naseem Bibi* cases, are decided by the court on the ground of *Khul'* although the ground of impotency was present but the court gave different decision. *Mawlvi Mir Qalam Khan v. Mst. Shamim Bibi*, *Abdullah v. Mst Shaheen* and *Leemon v. Mst. Kazbano*, are decided under the DDMA 1939 sec 2 ground of impotency

⁴³ 2003 CLC 1954 Lahore.

⁴⁴ 1994 MLD 2188 Lahore.

⁴⁵ Ibid; 2193.

⁴⁶ 1995 CLC 731 Peshawar.

⁴⁷ 1998 MLD 1216 Peshawar.

⁴⁸ PLD 1982 Karachi 449

Sampling of Survey/Interview:

To find out the reasons why there is no case filed under the said topic, the researcher conduct a survey in courts of Rawalpindi High Court. For survey a Questionnaire (consisting of 4 Questions) was formulated. Sample of the survey was taken by 4 most senior practicing lawyers of Rawalpindi High court and 1 senior lawyer of Supreme court to know the reasons for not filing the cases under such ground.

The following questions were asked to know the reasons for not having a single authority on the issues.

Q 1. How many years you are working on the family issue?

1. 2 years & above
2. 5years & above
3. 10 years & above

Number of Lawyers to whom the interview was taken	2 Years & above	5years & above	10 years & above
5		1	4
	0%	20%	80%

Q 2. Most of the cases of Separation are filed under

1. Khul‘
2. Other grounds available Under DDMA1939.

Number of Lawyers to whom the interview was taken	1. Khul‘	2. Other grounds available Under DDMA1939.
5	4	1
	80%	20%

It is observed that almost 80% cases of separation are filed under the ground of Khul‘. Moreover, it is also observed that if there is some case on other ground but the woman is directed to ask for khul‘ no matter whether the other ground is present or not.

Q 3 . Is there any case filed on the ground of different diseases found in the husband such as leprosy, leucoderma and other new diseases like Aids, cancer ect?

1. Yes
2. No

Number of Lawyers to whom the interview was taken	1. Yes	2. No.
5	5	0
	100%	0%

The figure shows that no case filed under the ground of diseases mentioned above. All the lawyers are well experienced and working as Advocate Supreme Court for more than 10 years but not a single one has proceed a case on these issues.

Q 4. What are the reasons why even not a single case is filed under that ground?

1. Shyness of a woman to disclose that diseases/Defects

2. Long court procedure
3. To avoid the period for the cure of that diseases

Number of Lawyers to whom the interview was taken	1. Shyness of a woman to disclose that diseases	2. Long court procedure	3. To avoid the period for the cure of that diseases
5	5	3	5
	100%	60%	100%

It is strange to know about the reasons for not filing a single suit on the issue of diseases found in the husband that the society traditions do not allow a woman to ask for separation on that ground. Moreover, shyness of the woman is also a reason for not have any one case on this ground. The most of all there is important to note that main reason lies in the long court procedure to testify the disease and then one years in case of curable. So most of the women even they file a suit under this ground she was directed to ask for khul' to avoid the procedure of the court.

Conclusion:

Islam besides emphasizes on the importance of marriage and disliking the divorce also provide the spouses a right to get separated when they observed that they cannot live together due to some reasons. The word 'Ayb (العيب) is used for defect that prevent the spouses of having the basic purpose of marriage, which is sexual intercourse. The Jamhūr Fuqahā' (Ḥanafī and Shāfi'ī Mālikī, and Ḥanbalī) Unanimous hold the opinion to dissolve the marriage when the spouses or one of them is suffering from diseases or defects because the basic objective of the marriage cannot be achieved. Although there are so many diseases found in the spouses but from the above discussion it can be concluded that the right of separation will be given on the several diseases and defects:

1. Diseases and defects that is not curable.
2. All the infectious diseases and defects which lead to the harm of the wife whether through the close contact with the husband or through the sexual relationship.
4. All the diseases and defects that lead to the death of the wife whether by close contact or by having sexual relationship.
5. Diseases and defects that may be transferred to the children.
6. Diseases and defects that may create hatred and disgust between the spouses

Although the spouses are given the right to dissolve the marriage on account of diseases or defects but the case law presents a poor picture of the implementation of this clause. In the courts it is seen that no cases are filed under this ground, only some rare cases are filed on the ground of impotency which is also not in practice due to court procedure.