UNTYING THE MARITAL BOND

Naima Huq*

There has been a simmering debate amongst Muslim scholars regarding 'inequality' of rights granted to men and women in Islam. The modernists have argued against the conventional interpretation of the *Quranic* text which seem to suggest inequality. They have reassessed the position of women as envisaged by the *Quran* and *Sunna* and have begun to examine why women have been denied the rights granted to them by Islam. The modernists have contended that cultural perceptions of women in pre-Islamic days have influenced the interpretation of the *Quran*. The 'women question' had been interpreted through male perspectives and desires. The modernists have also argued that fundamental principles of social justice, freedom and equality were buried under the growing power of patriarchal class relations.[1] The common prejudices and patriarchal attitudes among men towards women affect women's social standing as well as their legal rights.

Despite the *Quranic* flexibility to accommodate innumerable cultural situations, the orthodox jurists preferred a single interpretation based on the cultural context of that time. They believed that Islam is inimical to change. The modernists are now countering this exegesis of the law. They are arguing that the orthodox jurists failed to differentiate between the revealed, immutable and historically conditioned laws that were the product of the early jurists' fallible human reasoning and the assimilation of cultural practices.[2] The present paper examines the orthodox interpretation of the law of divorce and shows how the modernists have argued against such understanding of the law. However, the orthodox law alone can no longer be blamed for limiting women's rights to divorce. Modern reforms have been carried out in Bangladesh as elsewhere to counter these orthodox laws.

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* Naima Huq, LL.B.(Hons) and LL.M. Dhaka University, Ph.D. East London University, is an Assistant Professor of Law at the Dhaka Univeristy.
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1 El-Saadawi, N. , "Women and Islam" in Al-Harabi, A. (ed), Women and Islam, Oxford et all, 1982, pp. 193-205, at p. 197.

2 Esposito, J. J., Islam: The Straight Path, 2nd edition, Oxford, 1994, at p 214.

This paper focuses on the Hanafi law of *talaq-e-tafweez*, *khula* and *mubara'at*. It also analyses the judicial precedents and dicta of the non-statutory and statutory laws of divorce, from the British Colonial period to present day Bangladesh. The case law of the courts of the sub-continent up to 1947, of Pakistan until 1971, and of the courts in Bangladesh to date is examined. Judicial activism is focused upon with the intention of addressing a specific question: to what extent have the courts been upholding and protecting women's rights to divorce? While critically appraising the British Indian courts' judgements the paper maintains that British judges patronized the orthodox rigidity that `Islam is inimical to change'. This attitude of the judges left the Muslim personal law more or less untouched, and as a consequence women's rights to divorce have been adversely affected. However, the recent judicial activism tends to deal with the women question liberally, in the light of the changed circumstances of the society and within the framework of the *Quran* and *Sunna*. Examples can be drawn from the *Aklima Khatun*[3] and the *Khurshid Bibi's*[4] cases.

Further, this paper examines the various relevant legislative reforms carried out in Bangladesh as well as those enacted during British India (upto 1947) and the Pakistan period (1947-1971). These reforms were aimed at ameliorating women's divorce rights and removing the rigidity of the orthodox law.

Before examining the law on divorce, four charts in the next two pages, followed by a series of notes (1 to 19 in pages 3 to 5 of the main text after the charts), depicting divorce under the traditional law (law under the *Quran* and *Sunna*, including orthodox law) as well as after statutory reform are given for a clearer understanding of the development of the law and the present frameworks for regulating divorce.

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3 *Aklima Khatun vs Mohirur Rahman* 14 (1962) DLR (HCD) 476.

4 *Khurshid Bibi vs Baboo Mudh Amin* 19 (1967) DLR (SC) 61.

Notes to charts at pp. 2a to 2c

1. `*Khula* without husband's consent' is a well established precedent but not enacted by statutory reform. Before the *Khushid Bibi*'s case [19 (1967) DLR (SC) 61], a woman was not allowed to obtain a *khula* without husband's consent.
2. DMMA, 1939: The Dissolution of Muslim Marriages Act, 1939.
3. Traditional law: Divorce under *Quran* and *Sunna* including orthodox law. The orthodox law are those law where the orthodox jurists failed to distinguished between the revealed, immutable and historically conditioned law. In that process the orthodox jurists ignored the liberal aspects of the divorce law.
4. Judicial: *Qadi* (arbitrator/court)
5. *Talaq-ul-sunna't*: It is the *talaq* according to the rules laid down in the tradition of the Prophet.
6. *Talaq-ul-bidat*: It is an irregular *talaq*. It consists of three pronouncements during a single *tuhr* either in one sentence e.g. `I divorce thee triply or thrice', or a single pronouncement made during a *tuhr* e.g. `I divorce thee, I divorce thee, I divorce thee'.
7. *Talaq-e-rajee* (revocable divorce): It is a revocable pronouncement of *talaq*. It does not dissolve the marriage until the period of *iddat* has expired and may, at any time during the said period, be revoked. After the expiry of the *iddat* period the performance of *hila*[18] is not required for the wife remarrying the same husband.
8. *Talaq-ul-bain* (Irrevocable): It is a irrevocable *talaq* and becomes effective immediately after the pronouncements of *talaq*. *Talaq-ul-bidat* and occasionally *talaq hasan*[10] operate as *talaq-ul-bain*. In this form of divorce the procedure of *hila*[18] is essential for the wife remarrying the same husband.
9. *Ashan*: Most approved form of *talaq*. It consists of a single pronouncement of divorce made during a *tuhr* (period between menstruation) followed by abstinence from sexual intercourse for the period of *iddat*. In this form the divorce becomes effective only after the *iddat* and the parties can remarry without the formality of the woman marrying another man and being divorced from him.
10. *Hasan*: Approved form of *talaq*. It consists of three pronouncements during successive *tuhrs*. The first pronouncement should be made during a *tuhr*, the second during the next and third during the succeeding. If no intercourse has taken place during any of these three *tuhrs*, the *talaq* is effective after the third pronouncement. This *talaq* operates as *talaq-e-rajee*. *Hasan* form of *talaq* is treated as *talaq-ul-bain* when the husband

pronounces *talaq* on his wife for the time during a period when wife is free from her menstrual courses. The husband and wife have not come together during this period of purity. This is the first *talaq*. The husband resumes cohabitation or revokes this first *talaq* in this period of purity. Thereafter, in the following period of purity, at a time when no intercourse having taken place. The husband pronounces the second *talaq*. This is again revoked by express words or by conduct, and the third period of purity is entered into. In this period, no intercourse having taken place, husband for the third time pronounces the formula of divorce. This third pronouncement operates in law as a final and *talaq-ul-bain* (irrevocable).

11. *Lian*: When a husband accuses his wife of adultery, she has a right to apply to the *Qadi* to order the husband either to support his accusation by taking the special prescribed oaths or to admit the falsity of his charge. She also acquires the right to dissolve the marriage. This ground has been included in section 2(ix) the Dissolution of Muslim Marriages Act, 1939.
12. Ill-assorted marriage: is often known as unequal marriage. A marriage is unequal where the status of the husband is inferior to that of the wife's family, or he is inferior to the wife in respect of certain personal status.
13. Impotency: the wife's right to dissolve marriage on the ground of impotency has now being included in section 2(v) of the Dissolution of Muslim Marriages Act, 1939.
14. Missing husband: a missing person shall be considered under *Hanafi* law to have died at the time he would have attained an age of ninety and his wife shall than be entitled to the dissolution of her marriage. This clause is adopted in a modified form in section 2(i) of the Dissolution of Muslim Marriages Act, 1939. In this section a wife will be entitled to obtain divorce if the husband is missing for four years.
15. Apostasy: According to the traditional law, apostasy on the part of the wife operated as an immediate and absolute dissolution of marriage. Section 4 of the Dissolution of Muslim Marriages Act, 1939 provides that apostasy by itself does not dissolve the marriage, unless it be that a women re-embraces her former faith.
16. Option of puberty: Under orthodox law a girl could repudiate the marriage on attaining puberty only when she was given in marriage before puberty by any person other than her father. After statutory reforms (as DMMA 1939 amended from time to time) a girl can repudiate the marriage before attaining the age of 19 years, if she is given in marriage by her father or other grandfather before she attained the age of eighteen years. Provided that marriage has not been consummated.

17. *Ila*: A vow made by the husband not to have sexual intercourse for four months or longer. Under the *Hanafi law*, after the expiry of four months the wife is automatically divorced. *Zihar* and *ila* have no practical application in Bangladesh.
18. *Zihar*: the wife is entitled to obtain a divorce when the husband compares her with his mother i.e., you are to me like my mother.
19. *Hila* (intervening marriage): When the wife is divorced by the husband by way of *talaq-ul-bain*, then remarriage to the same husband is not possible without the formality of the woman marrying another man. She has to be divorced by her intermediate husband after consummation of the intermediate marriage.

THE NON-STATUTORY LAW OF DIVORCE

Divorce under the *Quran* and *Sunna* is referred to as the non-statutory law of divorce. This section focuses on the *talaq-e-tafweez*, *khula* and *mubara'at* forms of divorce. The purpose of this section is to review the non-statutory law of divorce and to consider how the modernists have reassessed the orthodox jurists' views.

TALAQ-E-TAFWEEZ

The right to divorce is considered by some orthodox jurists as an absolute right of the husband. He can either exercise the right by himself or appoint an agent to exercise this power on his behalf. The power to divorce delegated to the wife by her husband is known as *talaq-e-tafweez*. A wife under Muslim law can divorce her husband extra-judicially by invoking this delegated right to divorce. The basis of the law is evident in the *Quranic* verse: XXXIII:28

> O Prophet say to thy consorts, if it be that they ye desire, the life of this world, and its glitter, then come I will provide for you.[5]

However, this verse, on the face of it, is not a general command, but a revelation purely personal to the Prophet, and is only cited incidentally to introduce a tradition as to the effect of the particular expression used in exercising this option.[6]

Agreement for future separation

This is an important provision of the Muslim law of marriage which enables a wife to safeguard her future married life. She can make it a condition of her marriage that her husband delegate his power of divorce to her so that she can exercise it whenever she is not satisfied with his behaviour; for example, if

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5 Ali, A. Y., The Holy Quran, 5th edition, Vol. 1 & 11, New Delhi, 1979, at p. 1113.

6 Wilson, R.K., Anglo-Muhammadan Law, London et al., 1930, at p. 143.

he commits a breach of the terms of the marriage agreement. Such a divorce, by her will, takes effect as if a divorce had been pronounced by the husband himself.[7] This legal fiction is based on the phrase `all power of divorce is vested in the husband'. Tyabji argues:

> the fact is no doubt responsible for it being overlooked that a stipulation in the marriage contract for divorce is not a delegation of the husband's power to the wife. At the time when the agreement is made the man is not the husband of the woman -- but about to become her husband. The stipulation consequently takes effect as a part of an independent contract to which the persons who subsequently become husband and wife are both parties.[8]

Tyabji's argument is applicable to ante-nuptial agreements, but Muslim law also recognizes post-nuptial agreements between the parties. The delegation of the power to divorce is an integral part of the Muslim law of marriage and divorce, and the Muslims are governed by their own personal laws in these matters. As Ahmed comments on post-nuptial agreements

> there is no reasons why an agreement executed subsequent to a marriage should not be allowed to govern the rights and liabilities of the parties. Even under the Contract Act, it may be considered as a gift of his power to the wife on account of love and affection.[9]

There is, however, a difference of opinion as to whether marriage is merely a civil contract. Justice Qadir al-Din Ahmed, in a Karachi case, discussing the characteristics of the marriage contract, has observed that

> if religious ritual is not an essential part of the transaction it does not mean that it has no sacred and no higher religious purpose enjoying the sanctity of religion and pleasure of God. There is a sanctity attached to it from the beginning to the end by conceptions of rights and obligations which, if treated without the holiness which they possess in their nature, would be profane and cease to be Islamic in character.[10]

According to Justice Qadir al-Din's view marriage is not merely a civil contract, it has attached to it a religious sanctity as well. Marriage under Muslim law is a solemn agreement, yet one which allows spouses to enter into any agreement to define their rights and obligation at any time as long as it is not against the principles of public policy of Muslim law.[11]

To formulate an exact definition of `public policy' under Muslim law is a difficult undertaking.[12] Repelling a `contrary to public policy' argument in 1929,

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7 *Mohammad Amin vs Amina Bibi* AIR 1931 Lah 134.

8 Tyabji, F.B., Muhammadan Law, 3rd edition, Bombay, 1940, at p. 215.

9 Ahmed, K.N., Muslim law Divorce, New Delhi, 1978, at p. 210.

10 *Muhd. Yasin vs Khushnuma Khatoon* 1960 W.L.R. 2 Kar 29.

11 Supra note 9, at pp. 200-201.

12 *Ibid.*, at p. 200.

the Lahore High Court quoted Lord Davey's remarks in *Janson vs Drienfontein Consolidated Mines, Ltd,*[13]

> public policy is always an unsafe and treacherous ground for legal decisions and therefore must be kept within reasonable bounds.[14]

The British-Indian courts were much influenced by the English matrimonial regime. In English law an agreement regarding the terms of a future separation between the spouses would have been void. Batchelor J, proceeded to apply the English law to Muslim litigants through the `public policy' provisions of the Contract Act, 1872

> it is, as I understood it, as much the policy of the Muhammadan Law as of the English law that people who are married should live together and not apart; and if that is so, it seems to me that there should be no difficulty in applying to Muhammadans the English Rule that any agreement such as this, which provides for, and therefore encourages, future separation between the spouses, must be pronounced void as being against public policy.[15]

The Lahore High Court followed the *Mst Bai Fatima*'s case and held that an agreement by a Muslim husband with his wife that she would live in her parent's house was invalid as against public policy and cannot be invoked by the wife to defeat the husband's claim for restitution of conjugal rights.[16]

The ratio of the cases of the *Mst Bai Fatima* and the *Mst Bibi Fatima* was considered by the Lahore High Court in the case of *Muhammad Zaman vs Mst Irshad Begum.*[17] Ghani J, held

> with utmost respect to the learned Judges, who decided the two cases of Bombay and Lahore High Courts, I am unable to accept the proposition that an agreement made by the husband with his wife allowing her to live away from him in case of disagreement or when he takes a second wife can in any way be termed as opposed to public policy either under the Muslim law or within the meaning of section 23 of the Contract Act. A marriage between Muslim male and female is purely of a nature of civil contract and the wife is entitled to protect herself at the hands of her husband in case of their future differences. In the present case the agreement is to the effect that the wife is entitled to receive alimony in the house of her parents or anywhere else where she chooses to reside in case the husband takes a second wife and there is nothing in such an agreement which may be considered to offend against the term `public policy.'

In *Shamsun Nessa vs Md Yakub Mia*[18] the learned Judge dissented from the Calcutta High Court[19] and dissolved the marriage on breach of the condition that

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13 1902 Appeal Cases 484.

14 *Muhammad Ali Akbar vs Fatima Begum* 1929 AIR Lah 660.

15 *Mst Bai Fatima vs Ali Muhammad Aiyeb* 1913 ILR 37 Bom 280.

16 *Mst Bibi Fatima vs Nur Muhammad* (1921) 60 IC 88; *Imam Ali Patwari vs Arfatunnessa* 1914 AIR Cal 369.

17 1967 PLD Lah 1104.

18 8 (1956) DLR Dac 601.

the husband would live with his wife in her parent's house. It was further held that the term was neither unreasonable nor unconscionable nor against public policy. Moreover, so far as the personal law of the Muslims was concerned, it was stated that they should be governed not only by their personal law but also by their own customs and usages. Even if such a term as, for example, a husband living with his wife in her parent's house during the whole of their married life, is not reasonable according to Western ideas, it is quite reasonable and is in consonance with the usage and custom of the Muslim community in this country.[20]

The present tendency of the courts has been to give more latitude to the spouses to settle the terms governing their future marital relations and they have given effect to the conditions freely agreed upon between the parties as far as possible. The wife's desire to dissolve the marriage whenever she wishes to[21] or even her unconditional right to divorce her husband[22] were held to be valid grounds for exercising the power of delegated right. Carroll comments on the *Aklima Khatun*'s[23] case that

> there is no reason in Muslim law why the delegation to the wife of the right to pronounce *talaq* should not be unconditional, but the courts of British-India period, staffed by judges obviously influenced by the English ideas of marriage, were uncomfortable with such a concept and reiterated that the delegation was valid if the specified conditions under which the wife was authorized to pronounce *talaq* were `reasonable' and not contrary to `public policy' thereby implying that an unconditional delegation would be void.[24]

An ante-nuptial agreement by a Mahommaden husband not to contract a second marriage is legal and is not invalid as being immoral or opposed to public policy or in restraint of marriage. Therefore, a wife is permitted to dissolve the marriage on breach of such a condition.[25]

When the right to dissolve the marriage is delegated by an agreement made at the time of marriage or subsequent to the marriage, the usual practice in Bangladesh is to insert conditions in the *kabinnama* (marriage contract deed) at the time of registration of the marriage. *Talaq-e-tafweez* is a popular form of divorce and is considered as the most potent weapon in the hands of a wife.

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19 *Imam Ali Patwari vs Arfatunnessa* 1914 AIR Cal 369.

20 *Shamsun Nessa vs Md Yakub Mia* 8 (1956) DLR Dac 601.

21 *Sainnuddin vs Latifannessa Bibi* 1918 ILR 46 Cal 145.

22 Supra note 3.

23 *Ibid.*

24 Carroll, L., "Talaq-i-tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife", 16 (1986) Modern Asian Studies, pp. 277-309, at p. 279.

25 *Khalal Rahaman vs Marian Bibi* 1920 AIR Lower Burma 59; *Mst Sadiqa Begam vs Ata Ullah* 1933 AIR Lah 885.

Moreover, the grounds for the exercise of this power of divorce are not restricted to the statutory grounds contained in the Dissolution of Muslim Marriages Act, 1939. However, this form of divorce is not known in the rural areas by the terminology of *talaq-e-tafweez* but as *ek tarfa charan*[26] — divorce at the instance of the wife. The most common conditions that are endorsed in the *kabinnama*[27] are, for example, not to take a second wife during the subsistence of the marriage (which is more effective than the provision relating to polygamy in Muslim Family Laws Ordinance 1961), cruelty, non-maintenance and the wife's desire to exercise her delegated right whenever she wishes. The condition of 'the wife's desire to exercise her delegated right whenever she wishes' does not need evidence or proof of breach of any particular condition mentioned in the *kabinnama*. Such delegated right is a powerful weapon in the hands of women in order to bargain for a favourable position *vis-a-vis* the husband.

Talaq-e-tafweez takes effect as *talaq* and once it is delegated it cannot be revoked. The wife can revoke the *talaq* under the Muslim Family Laws Ordinance, 1961 within the period of reconciliation, that is, within 90 days from the date of serving of the notice to the Chairman of *Union Parishad;* after that the divorce becomes final and irrevocable.

The *talaq-e-tafweez* form of divorce does not take away the wife's right of obtaining unpaid dower from the husband.[28] On most occasions the wife does not receive her dower from the husband voluntarily as required by Muslim law. The wife is forced to seek the assistance of the courts of law in order to obtain the dower. In the rural areas, it is customary that in the case of a wife exercising her delegated right of divorce she must waive all claims against her husband. The waiver of claims include the unpaid dower as well as maintenance during the *iddat* period. Occasionally, a wife may also acknowledge the responsibility to maintain those children who live with her after the divorce, thereby releasing the father from his obligation to maintain his children.

KHULA

The concept of `mutual consent' in Muslim law is found in the *khula* and *mubara'at* forms of divorce. Though the `mutual aversion' on the part of the

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26 In the fieldwork it was gathered that women of Shohonpur were not acquainted with the terminology of *talaq-e-tafweez*. They termed *talaq-e-tafweez* as *ek tarfa charan*. According to the villagers of Shohonpur the Government had very recently introduced a law to ensure that this right of divorce in incorporated in the *kabinnama*. For details see Huq, N., Women's Right to Divorce in Rural Bangladesh, unpublished Ph..D. dissertation, Univeristy of East London, 1995; at pp. 161-166 and pp. 228-230.

27 *Ibid.*

28 *Sultan Khatun vs Safra Khatun* 1918 AIR Cal 204.

husband and wife is more appropriate for the *mubara'at* form of divorce, it is popularly identified with the *khula* form of divorce. In *khula* it is an aversion at the instance of the wife and in the *mubara'at*, divorce is by mutual understanding of the husband and wife.

Khula means the parting of a wife from her husband by giving him a certain compensation. If the husband agrees to the compensation, that constitutes a *khula*.[29] However, if he refuses and tries to uphold the marriage bond against the wife's wishes, she is entitled to go to the court for a decree of *khula*.[30]

The institution of *khula* was not unknown to pre-Islamic Arabia. Engineer claims that in that period a woman of high social status could free herself from the marriage if she so desired. She could ask for *khula* for lack of maintenance, maltreatment by her husband, or if he disappeared for a long period.[31] However, this should be considered as exceptional. Generally, a woman of pre-Islamic Arabia had no right to divorce her husband and was totally subjugated to her husband or her father. Islamic law grants this right without any distinction of caste, class or creed. The *Quranic* injunction of *khula* confers upon women the right to obtain a dissolution

> it is not lawful for you (men) to take back any of your gifts (from your wives) except when both parties fear that they would be unable to keep the limits ordained by *Allah*. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by *Allah*, there is no blame on either of them if she gives something for her freedom.[32]

Khula is granted to the wife when the husband and wife cannot fulfill the obligations imposed on them by marriage so that the harmonious married life, as envisaged by Islam, is no longer possible between them.[33] The first reported *khula* case in Islam is quoted by Bukhari in the following words

> the wife of Thabit bin Qais came to the Prophet and said, 'O *Allah*'s Apostle! I do not blame Thabit for defects in his character or his religion but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him)'. On that *Allah*'s Apostle said 'Will you give back the garden which your husband has given you (as

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29 Mahmood, T., Personal Law in Crises, New Delhi, 1986, at p. 77; Nasir, J. J., The Status of Women Under Islamic Law and Under Modern Islamic Legislation, London, 1990, at p. 36.

30 Maududi, M. A. A., The Laws of Marriage and Divorce in Islam, Lahore, 1983, at p. 36.

31 Engineer, A.A., The Right of Women in Islam, New Dehli, 1992, at p. 28.

32 Supra note 5, Verse 2:229.

33 Firdous, R., Discussion of Polygamy and Divorce by Muslim Moderists in South Asia with Applied Reference to their Treatment of Quran and Sunna, unpublished Ph.D. dissertation, School of Oriental and African Studies, London, 1990, at p. 205.

mahr)'. She said 'Yes'. Then the Prophet said to Thabit 'O Thabit! Accept your garden and divorce her at once'.[34]

This tradition shows that Thabit was blameless, and that the proposal for separation emanated from the wife who feared she would not be able to observe the bounds set by God, namely, to perform her functions as a wife.[35] The *Quranic* verse (2:229) gives a clear indication of the procedure of *khula*. It is not for the husband to put away his wife, it is the business of the judge to decide the case.[36] Similarly in Thabit's case, though the Prophet directed the husband to divorce his wife, the husband was bound by the decision of the judge, as is the wife.[37]

It is a controversial issue among Muslim scholars as to whether the *qadi*, now the court, has the power to dissolve the marriage when the husband does not give his consent to *khula*. There are differing juristic opinions on this point. The orthodox scholars maintain that the court has no power to dissolve the marriage because it is the absolute right of the husband,[38] he can either delegate his right to the wife (*talaq-e-tafweez*) or give his consent to the wife's request to be released from the marriage by *khula*. Whereas, some modern jurists hold that women are not forced to tolerate what seems to be intolerable for her; *khula* is given to the wife as a matter of right.[39]

Some Muslim scholars following the orthodox law, argued that the court had no power to dissolve the marriage or to order the husband to divorce his wife without his consent and in doing so they stuck to the doctrine of *Taqlid*, (the unquestionable following of the previous established authority of the orthodox jurists). Through this, i.e., by closing of the door of *Ijtihad* (independent judgement), they have restricted the development of Muslim society. Thara al Alwani contends that Muslim society only entered its current crisis after *Ijtihad* fell into disuse to be gradually replaced by *Taqlid*.[40]

The courts have tended to follow the views of the orthodox jurists. Three issues have been repeatedly laid before the judges for their consideration. First, whether *khula* can be granted by the court without the consent of the husband; second, on what grounds *khula* may be granted; and third, whether *khula*

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34 Khan, Md. M. (Tr), Shahih Al-Bukhari, undated, at p. 150.

35 Bhatnagar, J. P., Commentaries on the Muslim Women, 2nd edition, Allahadad, 1992, at p. 102.

36 Ali, Maulana M., The Religion of Islam, Lahore, 1940, at p. 678; see also Iyer, V. R. K., "Reform of the Muslim Personal Law" in Mahmood, T. (ed), Islamic Law in Modern India, Bombay, 1972, at p. 28.

37 Ali, M.M., *ibid.,* 1940, at p. 678.

38 Supra note 9, at pp. 227-231.

39 Supra note 33, at p. 212; supra note 30, at p.43.

40 Alwani, T.J., "Taqlid and Ijtihad", 8 (1991) The American Journal of Islamic Social Science, pp. 129-142, at p. 130.

amounts to *talaq* or whether it is a separate and distinct form of the dissolution of marriage.

Khula without the consent of the husband

When the question of whether *khula* could be granted by the court without the consent of the husband was placed before the learned Judge in *Mst Umar Bibi vs Muhammad Din*,[41] the court refused to grant *khula* without the consent of the husband and held

> the act of divorce in *khula* is an act of the husband (whether directly by dissolving the marriage himself or indirectly by conferring the power on the wife so to do) as it would be in *mubara'at* (i.e., mutual release) and in an ordinary divorce effected at his sweet will or pleasure without even necessarily a knowledge on the part of the wife that the marriage was terminated. The difference in these divorces merely lies in the fact that while the desire to separate and for emancipation emanates in the case of *khula* from the wife only, it is a result of mutual agreement between the parties in *mubara'at* and in execution of his one-sided desire to bring the matrimonial bond to an end in the third case ... that in cases of *khula, mubara'at* and ordinary *talaq* it is a husband or a person (including the wife herself) who has been authorized by the husband who can effect a *khula* divorce and it is not possible for a *qazi* or a court to do so (*khula*) in virtue of the powers vested in either of them.[45a]

Later, the judges endorsed the *Umar Bibi*'s view in the case of *Mst Sayeeda Khanam vs Muhammad Sami*.[42]

When the question of women's right to *khula* again fell for determination before the Full Bench of the Lahore High Court in the *Balquis Fatima*'s[43] case, the learned court dissented from the judgement in the *Umar Bibi*'s[44] case. They reinterpreted *khula* within the framework of the *Quran* and *Sunna*

> the wife is entitled to dissolution of marriage on the subject of what she has received from her husband in consideration of marriage if the judge apprehends that the parties will not observe limits of God. The husband's assent is not necessary.[45]

The *Balquis Fatima's* case was the first attempt on the part of the court to uphold the original spirit of *khula*. The Supreme Court of Pakistan in the *Khurshid Bibi's*[46] case was concerned with a slightly different question than the one raised in the *Balquis Fatima*'s case. In the *Khurshid Bibi*'s case the issue was whether a wife, under Muslim law was entitled as of right, to claim *khula* despite

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41 1945 AIR Lah 51.
41a *Ibid.,* at p. 53.
42 4 (1952) DLR Lah 134.
43 *Balquis Fatima vs Najmul Ikram Queshi* 11 (1959) DLR Lah 93.
44 Supra note 41.
45 Supra note 43.
46 Supra note 4.

the unwillingness of the husband to release her from the matrimonial tie if she satisfies the court that there is no possibility of their living together consistently with their conjugal duties and obligations. The learned Judges, after an exhaustive study of juristic opinions and relevant authorities, concurred in their opinion and endorsed the view of Kaikaus J, in the *Balquis Fatima's* case. He had stated that under Muslim law, the wife was entitled to *khula*, as of right, if she satisfies the conscience of the court that it would otherwise mean forcing her into a hateful union.[47]

Although it is popularly understood that the *Khurshid Bibi's* case is an innovation in *khula* form of divorce, in fact it did not create any new law. This case restored the original law of *khula* as envisaged by the *Quran* and *Sunna* (as discussed earlier). Nevertheless, through such `judicial activism'[48] the courts have asserted two rights: (a) their right to differ from the interpretation of traditionally authoritative legal texts which are not based on any specific rule of the *Quran* or the *Sunna*; and (b) their right to make an independent interpretation of the *Quran*. The decision solved the long running controversy among Muslim jurists. Pearl says that the case has gone a long way towards making the position of the spouses equal in relation to their right to divorce.[49] Similarly, Mahmood comments that the wife's right to *khula* is legally analogous to a man's right to *talaq*.[50]

The right conferred upon a wife by way of *khula* can be more appropriately identified as a procedural right to seek dissolution of the marriage through courts when the husband does not consent to it. *Khula* is a right which cannot be termed an absolute right when compared with the husband's right of *talaq*. It is a `controlled right' in that in the absence of the husband's consent, the decision

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47 Supra note 4.

48 The present courts with that of modern jurists re-defined and re-interpreted the orthodox Muslim law with changing social milieu, specially for the protection of the women's right. Justice Haleem of Pakistan maintains that equality and other liberal concepts are preserved through the intervention of court of law and by resorting to the adjudicatory process [see Haleem, M., "Law, Justice and Society", 38 (1986) Journal of PLD, pp. 205-212, at p. 206]. Judicial Activism involves the role of a judge, in given system as an instrument of developing the law to make it useful and relevant in an ever changing society because the process of judging about change is a part of the role of a judge as a creator. Judicial Activism, therefore, implies judicial creativity [see Anand, A.S., "Key Note Address" in Bhatia, K.L. and Jagmohan, S. (eds), Judicial Activism and Social Change, New Delhi, 1990, at p. 11].

49 Pearl, D., "Within the Limits Prescribed by Allah", 3 (1970) South Asian Review, pp. 313-319, at p.320.

50 Mahmood, T., "Womenhood in Islam" in Mahmood, T. (ed), Studies in Islamic law, Religion and Society, New Delhi, 1989 pp. 350-365, at p. 360

depends upon the court. The success of her right depends upon the judge and whether the judge appreciates that the couple cannot live a harmonious life as envisaged by Islam. This may present problems for a woman. For instance, a confusing judgement was given in *Siddiq vs Mst Sharfan*,[51] where the learned court refused to dissolve the marriage because the wife was found to be at fault.

> In the *Siddiq*'s case the court of first instance (lower Civil Judge Court) held that a wife by living an adulterous life could not make that a basis for the dissolution of marriage on the doctrine of *khula*. The learned District Judge (lower appellate court) on appeal did not disturb the finding of the learned trial Judge court on the allegations which were made in the plaint, but dissolved the marriage on the basis of *khula*. This court of appeal further observed to expect that after such prolonged agony of litigation she can be brought round to a reunion with her husband resulting in peaceful and harmonious life will be a sheer impossibility.[52]

However, in a second appeal the Lahore High Court reversed the decision of the District Judge Court and held

> she (the wife) is living in adultery and it is argued on her behalf that in the circumstances if she returns to her husband he would not treat her justly and for that reason there would not be a harmonious married life. Under Islamic law she has rendered herself to a penalty, and the *kazi* (here it means court) was competent to inflict the punishment on her. It will be anomalous, in such circumstances, to dissolve the marriage on the basis of her self-confessed adultery, and thus to invoke in her aid the Islamic law. I am, therefore, of the opinion that if the allegation made by the wife on the basis of which she claims dissolution on the principle of *khula* is such as exposes her to a criminal liability under the Islamic law, but it is not possible for the courts to impose it because there is no provision for doing so, it cannot furnish the basis for the court to dissolve the marriage on the principle of *khula*.[53]

The *Khurshid Bibi*'s case has given the wife a right to obtain *khula* without her husband's consent, but her success depends upon the court and whether the court appreciates that the husband and wife cannot live a harmonious life as required by Islam. Therefore it could be concluded that *khula* is not an absolute right but a 'controlled right'.

Grounds for *khula* divorce

Incompatibility in temperament, meaning a total lack of sympathy between husband and wife, aversion and marital breakdown are recognised as valid grounds for *khula* through judicial intervention.[54] The recent tendency of the

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51 20 (1968) DLR (WP) 117.

52 *Ibid.*

53 *Ibid.*

54 Anderson, J.N.D., Law Reforms in the Muslim World, London, 1978, at p. 80, see also Carroll, L., "A Note on Muslim Wife's Right to Divorce in Pakistan and Bangladesh", 13 (1986) New Community, pp. 94-98.

courts has been to interpret the law in the context of the changing circumstances of society and at the same time to provide protection for women. The Karachi High Court observed that the wife, under a *khula*, need not prove each and every allegation made by her against her husband. She only has to prove that the marriage has broken down and that there is no hope of reconciliation.[55] The philosophy behind this is that the judge need not inquire into the detailed reasons of the antipathy, because a woman may dislike her husband for many reasons, some of which she may not like to state in public or some of which might embarrass her.

Khula equated with *talaq*

The third point that fell for consideration before the High Court in the *Khurshid Bibi's* case is whether *khula* can be equated with *talaq*. After considering juristic opinion and the relevant authorities, the learned Supreme Court of Pakistan in the *Khurshid Bibi's* case came to the conclusion that *khula* is in fact a judicial dissolution or *Faskh* and not a *talaq*. This is also shown by the fact that after *khula* the right of the husband to take back the wife does not exist, as it does in the case of *talaq-e-rajee*. In addition, the period of *iddat* is different in either case.[56] It can be contended that when the wife gets a *khula* divorce she cannot go back to the husband even within the *iddat* period. This contention comes into direct conflict with sections 7 and 8 of Muslim Family Laws Ordinance, 1961 under which the divorce will be effective only after the expiry of ninety days from the receipt of the certified copy of the court decree. By virtue of sections 7 and 8 of the said Ordinance the wife can, if she desires to go back on her own volition or after successful reconciliation, return to her husband within the *iddat* period or ninety days. However, Pearl, after considering exhaustively judicial opinion on the relevant matter, concludes that the consensual divorce or *khula* operates within the framework of sections 7 and 8 of Ordinance.[57]

Minattur says *khula* is a poor substitute for *talaq*.[58] *Khula* is a right given to women and *talaq* is a right given to the husband. *Khula* and *talaq* are both revocable by virtue of sections 7 and 8 of the Ordinance. In *talaq* the husband has to compensate the wife by paying her the dower money, if not paid at the time of marriage or subsequently. Similarly in *khula* the wife has to forfeit the dower and/or return the benefits which were conferred on her as a marriage

55 *Hakimzadi vs Nawaz Ali* 1972 PLD Kar 540.

56 Supra note 4.

57 Pearl, D., A Textbook on the Muslim Personal Law, 2nd edititon, London, 1987, at p. 130.

58 Minattur, J., "On the Magic of Monogamy and Similar Illusions" in Mahmood, T. (ed.), Islamic Law in Modern India, Bombay, 1977, pp. 157-166, at p. 164.

consideration. The only difference that lies between *khula* and *talaq* is that, *khula* without the consent of the husband requires an application to the court whereas the *talaq* is purely extra-judicial.

Amount and nature of compensation

In *khula* the amount and nature of consideration to be paid to the husband has not been fixed by Muslim law. From a tradition of the Prophet, it appeared that he did not approve of, or even allow, payment of consideration greater than dower.[59] However, the jurists have stated that a higher consideration fixed in contravention of this rule would amount to a moral offence only and the consideration would be valid.[60] *Khula* without the consent of the husband is now held to be a judicial divorce. It is in the discretion of the court to fix the amount of compensation to be paid to the husband. The court in ascertaining the compensation of *khula*, will keep in view what benefits have been conferred on the wife by the husband as a consideration of the marriage.[61] The return of benefit or compensation is not a condition precedent to the dissolution of the marriage and a civil suit or action can be filed by the husband to restore the compensation from the wife.[62]

The 'return of benefit' includes not only the dower money but also includes clothes, jewelry and so on which the wife received at the time of marriage. The question of `return of benefit', (in kind and not unpaid dower money), could be viewed against the `restoration of the undue benefit' which the husband received as dowry from the wife or the wife's family. Complications may arise for the party, the wife or her family, who actually paid the dowry after the complaint is lodged against the husband. The wife, or her parent, will face an action for paying dowry to the husband and in turn the husband will face an action for taking the dowry under the Dowry Prohibition Act, 1980. The Dowry Prohibition Act, 1980 provides that whoever gives, takes or abets in the giving or taking of dowry commits an offence under the Act. In the social context, the effect of this law prevents the wife or her family from complaining against the husband for taking dowry. In fact the wife, in the case of *khula*, has to bear a significant economic burden. She has to forgo the dower as well as return the benefit which she received from the husband. In the rural areas it is, at a practical level, impossible for the bride or her family to lodge a complaint against the husband when the demand for dowry is made.

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59 Ahangar, Md. A. H., "Compensation in *Khul* — An Appraisal of Judicial Interpretation in Pakistan", 13 (1993) Islamic and Comparative Law Review, pp.113-143, at p. 118.

60 Supra note 9, at pp. 256-265.

61 Supra note 4.

62 *Samia Akbar vs Muhammad Zubair* 1990 PLD Lah 71.

MUBARA'AT

Mubara'at like *khula*, is a dissolution by agreement but on a formal level there is a clear distinction between the *khula* and *mubara'at* forms of divorce.[63] In *khula*, as stated earlier, it is a divorce at the instance of the wife and she has to compensate her husband for her release, whereas *mubara'at* is a divorce based on mutual aversion.[64] *Mubara'at*, in other words, is an agreement in private between the husband and wife and there is no question of compensation by the wife to the husband. In this form the intervention of court is not necessary and it is effective after either of the parties, or both, to such a divorce have complied with the required procedure under sections 7 and 8 of the Muslim Family Laws Ordinance, 1961.

However, terminology of `*mubara'at*' is not known to most Muslims, or even by the persons in authority dealing with the dissolution of marriage extra-judicially. Any divorce obtained by mutual agreement is erroneously termed as *khula*. Section 24 of the Muslim Marriages and Divorces (Registration) Rules, 1975 does not refer to the *mubara`at* form of divorce. All consensual divorces, if registered under the Marriages and Divorces Registration Act, 1974, are endorsed under the *khula* format even though the dissolution of marriage is obtained through the mutual consent of husband and wife. Yet the *Shariat* Act of 1937 mentioned both *khula* and *mubara'at* separately and therefore both forms have statutory recognition in Bangladesh. The independent existence of the *mubara'at* form must not be lost sight of. The distinct entity of *mubara'at* is important for the wife because in this form she does not necessarily have to pay compensation to the husband as in case of *khula*. In the *mubara'at* form of divorce the parties are free to enter into any agreement for their separation.

STATUTORY DEVELOPMENT OF THE LAW

This section deals with various enactments relating to women's divorce rights in Bangladesh. In considering the development of the law, the paper critically analyses the changing position of women under the law.

During the British administration there was very little legislative activity in the field of Muslim law. Most of the statutes were passed to restore, rather than to reform, the orthodox doctrines.[65] Four central statutes were passed during the British period: the Wakf Act of 1913 (which is beyond the scope of this paper); the Child Marriage Restraint Act of 1929; the Muslim Personal Law (*Shariat*)

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63 Mulla, D.F., Principles of Mahomedan Law, Hidayatullah et al (ed), 19th edittion, Bombay, 1990, at p. 265.

64 See Hinchcliffe, D., "Divorce in Pakistan: Judicial Reform", 2 (1968) Journal of Islamic and Comparative Law, pp. 13-37, at p. 21.

65 Jain, M.P., Outline of Indian Legal History, 2nd edition, Bombay, 1966, at p. 719.

Application Act of 1937; and the Dissolution of Muslim Marriages Act of 1939. The Act of 1939 is considered to be one of the most important enactments of the British Indian legislature for safeguarding the rights of Muslim women in the sub-continent. Although the Act gives more options to women to exercise judicial divorce, it does not protect women from the threat or abuse of *talaq* by their husbands.

After independence from colonialism the reformers of the new nation of Pakistan sought to improve women's position. As a result, the Muslim Family Laws Ordinance, 1961 was passed and subsequently inherited by Bangladesh. After the independence of Bangladesh two more enactments were made, the Muslim Marriages and Divorces Registration Act of 1974 and the Family Courts Ordinance of 1985. These are examined below. In this section the Muslim Personal (Shariat) Application Act of 1947, the Dissolution of Muslim Marriages Act of 1939, the Muslim Family Laws Ordinance of 1961, the Muslim Marriages and Divorces Registration Act of 1974 and the Family Courts Ordinance of 1985 are dealt with.

BRITISH-INDIA TILL 1947

The Muslim Personal Law (Shariat) Application Act, 1937

Before the passing of the Shariat Act of 1937, in British India custom had been given a place of honour in the administration of justice. It became an important source of law and a large volume of case law grew around the various customs.[66] Custom (e.g., tribal, communal, sectarian and local family) was given preference over the religious (Muslim and Hindu) law of the parties. Jain states that the British Indian courts showed a tolerance towards the customary law of the people and did not adopt a scrutinising attitude with the result that in the formative stages most of the customary law of the people could be preserved. However, new customs were not recognised by the courts, and the legal system tended to become rigid.[67]

The courts' acceptance of prevailing customary law amongst Muslims led to a whole variety of reactions by Muslim leaders at the beginning of this century.[68] Mahmood argues that the *Ulema* spear headed efforts

> for a complete suppercession, among the Muslims of all groups and regions of the non-Islamic customary law and for the compulsory enforcement of the Islamic legal system. They explained to people that their religion did not permit them to follow any non-Islamic customs. At the same time they demanded for the Government statutory enforcement of the *Sharia* law. These efforts of the *Ulema*

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66 *Ibid.*, at p.68; Ahmed, M.B., Administration of Justice in Medieval India, Karachi, 1951.

67 Supra note 65, at p. 715.

68 Baxi, U., Towards a Socialogy of Indian Law, New Delhi, 1986, at p. 18.

brought to the Indian statute book central enactments, abrogation of the non-Islamic customs followed by the Muslim and replacing them by the laws of Islam.[69]

The movement culminated in the Muslim Personal Law (*Shariat*) Application Act, 1937. The *Shariat* Act, 1937 did not bring about any changes in the *Sharia* law; it simply restored its application to all Muslim communities and did away with any custom which was contrary to it.[70] Section 2 of the Act provides

> Notwithstanding any custom or usage to contrary, in all question (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under the contract or gift or any other property of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula* and *mubara'at*, maintenance, *dower*, guardianship, gift, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*) .

Any person who desires to avail themselves of the benefit of this section requires a declaration that he is a Muslim, competent to contract (within the meaning of section 11 of the Contract Act 1872) and that he is a resident of Bangladesh (section 3 of the Muslim Personal (*Shariat*) Act of 1937).

The *Shariat* Act mentions all forms of divorce both judicial and under the orthodox law (section 6 of the Act). Section 6 of the *Shariat* Act was later repealed by the Dissolution of Muslim Marriages Act, 1939 (Act VII of 1939). It should be noted that the Act of 1937 mentions both the *khula* and *mubara'at* separately but due to the non existence of the *mubara'at* provisions in the Muslim Marriages and Divorces (Registration) Rules, 1975 (section 24) the *mubara'at* form is of little practical significance. The divorces by mutual aversion or even at the instance of the husband, are endorsed in the format of the *khula* in the Registration Book III of Form G. The explanation, for the omission of the *mubara'at* format in the Rules 1975, is that according to orthodox law the *khula* cannot be granted without the consent of the husband and therefore it is synonymous to the term *mubara'at*. Although the present position regarding the *khula* has been changed by the *Khurshid Bibi*'s case, the changed position has not been given a place in any statutory enactments. However, this misnomer of *mubara'at* leads to the deprivation of dower to which women are entitled in all types of divorces except that of *khula*.

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69 Mahmood, T., Muslim Personal Law: Rule of State in the Subcontinent, Delhi, 1977, at p. 21

70 Serajuddin, A. M., "Muslim Family Law and the Legal Rights of Muslim Women in South Asia", 32 (1978) Journal of Asiatic Society Bangladesh, pp. 129-147, at p. 132.

The Dissolution of Muslim Marriages Act, 1939

The principles of Muslim law concerning a married woman's right to dissolution of marriage through the courts were reformed during British India and an Act was passed titled The Dissolution of Muslim Marriages Act of 1939. Dissolution by the judicial process is not an unknown phenomenon in Islam; it is known as *Faskh* (annulment or abrogation).[71] The basis of the law is the *Quranic* injunction and tradition of the Prophet. The classical jurists, however, differed in their opinions and in the course of centuries the different schools of Islamic Law held widely divergent views regarding the interpretation of the basic texts.[72] In comparison with the other schools, namely, *Maliki*, *Shafii* and *Hanbali,* the *Hanafi* school to which the majority of the population of Muslim nations belong, is restrictive regarding women's rights to dissolve their marriage through the courts. The *Hanafi* law did not recognise any right on the part of women to obtain divorce, except for the husband's impotence, adultery and the exercise of the option of puberty.[73] If a husband neglects to maintain his wife, or makes her life miserable by deserting or persistently maltreating her, this does not give her the right to divorce him judicially.[74] On the other hand, the traditional *Maliki* law, being the most liberal of all the *Shariat* schools of law on the subject, permits the wife to demand a judicial separation in the event of the husband's affliction with a serious disease, his failure to maintain his wife, injurious treatment and prolonged desertion.[75]

As the overwhelming majority of Muslim women in British India were *Hanafis* the restrictive attitude of the *Hanafi* school created great hardship for those women who desired the dissolution of their marriages[76] but were not endowed with the delegated right to divorce or whose husband did not consent to *khula*. However, the *Hanafi* jurists had clearly laid down that in cases where the application of *Hanafi* law caused hardship, it was permissible to apply the provision of *Maliki*, *Shafii* or *Hanbali* law. However, British courts in India still hesitated to apply the *Maliki* law in relation to *Hanafi* women.[77] Recognizing the

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71 For details see Carroll, L., "Muslim Women and Judicial Divorce: An Apparently Misunderstood Aspect of Muslim Law", 5 (1985) Islamic and Comparative Law Quarterly, pp. 226-245.

72 Fyzee, A.A.A, Outlines of Muhammadan Law, Delhi, 1993, at pp. 168-69.

73 See Esposito, J.L., "Perpectives on Islamic Law Reform: The case of Pakistan", 13 (1980) International Law and Politics, pp.217-245, at pp.229-30.

74 The Gazette of India 1938, Part V, 36; see also Anderson, J.N.D., Islamic Law in the Modern World, Westport et al., 1959, at pp. 52-58.

75 Kamali, M. H., "Divorce and Women Rights: Some Muslim Interepretation of S-2:228", 74 (1984) The Muslim World, pp.85-99, at p. 85.

76 Mahmood, T., Family Law Reform in the Muslim World, Bombay, 1972, at p. 171.

77 Supra note 74.

above principle and following the *Maliki* doctrine, the Dissolution of Muslim Marriages Act, 1939 was passed empowering all Muslim women to dissolve their marriages through the court on certain grounds.[78]

The Act consists of two main provisions. First it abolishes the traditional principle under which apostasy by a Muslim woman would *ipso facto* dissolve her marriage. Secondly, it specifies and illustrates a large number of grounds, basically derived from the *Maliki* School of Islamic Law, on which a Muslim wife can seek dissolution of marriage through the court.[79] Section 2 of the Act gives a Muslim wife the right to obtain a decree for the dissolution of her marriage on any one or more grounds specified in the Act:

i) That the whereabouts of the husband have not been known for a period of four years;
ii) that the husband neglected or has failed to provide for her maintenance for a period of two years;
iii) that the husband has been sentenced to imprisonment for a period of seven years or upward;
iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
v) that the husband was impotent at the time of marriage and continues to be so;
vi) that the husband had been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
vii) that she, having been given in marriage by her father or other guardian before she attained the age of eighteen years, repudiated the marriage before attaining the age of nineteen years, provided the marriage has not been consummated;
viii) that the husband treats her with cruelty;
   (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
   (b) associates with women of evil repute or leads an infamous life, or
   (c) attempts to force her to lead an immoral life, or
   (d) disposes of her property or prevents her exercising her legal rights over it, or
   (e) obstructs her in the observance of her religious profession or practice, or
   (f) if he has more wives than one, does not treat her equitably in accordance with the injunction of the *Quran*;

78 Supra note 72, at p. 169.
79 Supra note 71, at p. 233.

ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim Law.

The Act effected substantial change in orthodox law and in some ways, as claimed by some scholars, it contravened the principle of orthodox law namely, the dissolution of marriage on the ground of non-maintenance, option of puberty and apostasy.[80] These three grounds which departed from the orthodox law are discussed below.

Dissolution of marriage on the ground of non-maintenance

There is a divergence of opinion as to whether a wife has a right to dissolve her marriage on the ground of the husband's neglect or failure to provide maintenance, even if she is not entitled to maintenance under the principles of orthodox law. One set of judges declined to dissolve a marriage on the ground of the failure to maintain when the wife was at fault.[81]

Another set of judges held that where a husband failed to maintain his wife for two years preceding the suit, the wife was entitled to the dissolution of the marriage, irrespective of whether the woman was entitled to maintenance under orthodox law.[82] The same court further observed that the Act did not expressly lay down that its provision shall be subject to the principles of Muslim law. The Act is complete in itself and crystallizes a portion of Muslim law which, before it came into force, was not codified and consisted only of principles.[83] The learned court of Sind in *Noor Bibi vs Pir Bux*, gave an authentic judgement on the above question, partly dissenting from the view expressed in the *Main Said Ahmad Jan* case: no abrogation of the Muhammadan Law relating to maintenance of wives or otherwise is involved in dissolving a marriage, on proof of a husband's failure to maintain his wife, even when the wife had by her conduct disentitled herself from claiming maintenance. The principles upon which maintenance is enforced during the subsistence of marriage, and those upon which a dissolution is allowed are entirely different. A dissolution of a marriage is allowed when a cessation of the state of marriage has in reality taken place or the continuance of the marriage has become injurious upon the wife. The continuance of a state of affairs in which a marriage had ceased to be a reality, when the husband and the wife no longer lived "within the limits of *Allah*" is abhorred in Islam and the Prophet enjoined that such a state of affairs should be ended.[84]

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80 Mahmood, T., Muslim Law of India, 2nd edition, Allahabad, 1982, at pp. 97-101; Mannan, M.A. "The Development of the Islamic Law of Divorce in Pakistan", 5 (1975) Journal of Islamic and Comparative Law, pp. 82-93.

81 *Badrunnisa vs Mohd Yusuf* 1944 AIR All 23; *Mst Resham Bibi vs Muhammad Shafi* 19 (1967) DLR (WP) 104; *Ainuddin Karikar vs Salamatunessa Bibi* 5 (1953) DLR Dac 36.

82 *Main Said Ahmad Jan vs Mt Sultan Bibi* 1943 AIR 30 Pesh 73.

83 *Ibid.*

84 *Noor Bibi vs Pir Bux* 1950 PLD Sind 36.

In the *Noor Bibi*'s case, the Sind court emphasised the objectives of the marriage. When the marriage has broken down, Islam prefers that such a marriage should be put to an end and it leaves no chance of judging which party is at fault. This case widened the scope of sub-section (ii) of section 2 of the said Act, reflecting a liberal attitude on the part of the courts to protect women. According to the court's view the clause has been deliberately couched in very wide terms so that a woman should be protected, and there was no intention whatsoever that the courts assess whether the woman was entitled to maintenance when they considered her claim to the dissolution of the marriage on the ground of failure to pay maintenance.

Option of puberty

The Act of 1939 has broadened one of the traditional grounds for divorce; the option of puberty. This was also held by jurists to be a departure from the principles of orthodox law.

Section 2, sub-section (vii) of the Act refers to, what is known in the orthodox law as the `option of puberty' (*Khiyar-ul-bulugh*). Under the orthodox law a girl can repudiate the marriage on attaining puberty only when she was given in marriage before puberty by any person other than her father or grandfather.[85] After the passing of the Act the law was changed. The contract of marriage by the father or the grandfather stands on no higher footing than that of any other guardian. Any minor can repudiate such a marriage after the attainment of puberty.

This sub-section also relieved the woman from proving before the court that she has attained puberty to avail herself if this option. Under the orthodox law there is a presumption of attainment of puberty at the age of fifteen years, but this presumption is rebuttable. The section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 has adopted fifteen as the fixed age of puberty without an opportunity of rebuttal. This ground does not speak of puberty at all but only of the specific age. The only way it can reasonably be interpreted is that a women who has before the age of fifteen years been given away in marriage by her guardian is allowed to repudiate her marriage within a period of three years before she attains the age of eighteen years,[86] provided the marriage has not been consummated. The condition `fifteen' was raised to sixteen by section 13 (b) of Muslim Family Laws, 1961. Now by the section of 2(a) of the Ordinance 38 of 1984, the age of marriage has been raised from sixteen to eighteen years. The repudiation before eighteen years of age is raised to nineteen years by

85 *Mst Ghulam Fatima vs Rahman* AIR 1919 Lah 262; *Mst Ghulam Fatima vs Khaira* 1923 ILR 674.

86 *Mst Daulan vs Dosa* 8 (1956) DLR (WP) 77.

section 2 of Ordinance 25 of 1986. Therefore, the present of position of section 2 (vii) is that

> she, having been given in marriage by her father or other guardian before she attained the age of eighteen years, repudiated the marriage before attaining the age of 19 years. Provided that marriage has not been consummated.

The court has interpreted consummation widely. The cohabitation of a minor girl would not put an end to the option to repudiate the marriage. The expression 'consummation of marriage' means consummation with the free will and consent of both the parties. If the girl has not attained the age of fifteen years (at present eighteen years by virtue of the Ordinance 38 of 1984), her consent to the consummation of the marriage will not amount to consent in the eyes of the law.[87]

This juristic conflict has been put to an end by the Act of 1939 (as amended by amendment Ordinance 38 of 1984). Under the Act a woman can exercise her right of repudiation of marriage within one year after attaining the age of eighteen. The Act does not clearly provide for cases where the woman is ignorant of her age or her right of option.

The option of puberty has to be considered in the light of the Child Marriage Restraint Act, 1929 and the Muslim Marriages and Divorces Registration Act, 1974. The Child Marriage Restraint Act, 1929 imposed a penalty for persons who contract a child marriage, under the age of eighteen years in the case of a female and twenty one years in the case of a male [section 4 of the Child Marriage Restraint Act, 1929 as amended by section 2(a) of Ordinance 38 of 1984]. The 'penalty' provision under the Act is oppressive to women and discriminatory. By virtue of the Child Marriage Restraint Act, 1929, a girl is liable to criminal action immediately upon attaining eighteen years if she marries a boy under twenty one years of age. Whereas a boy will not be subjected to action until he attains the age of twenty-one years. It is worth mentioning that this Act comes into conflict with section 3 of the Majority Act of 1875 where the age of majority is 18 years for both male and female. Under criminal law any one above eighteen is liable for his/her action.

When a girl exercises her 'option', the guardian of the girl who has given her in marriage will be exposed to an action under the Child Marriage Restraint Act, 1929. Under the Muslim Marriages and Divorces Registration Act, 1974 the registration of marriages has been made compulsory. Any marriages registered where at least one party to the marriage is below the statutory age of marriage means that the Registrar endorsing such a marriage will be hit by the penal provision of the Child Marriage Restraint Act, 1929.

At present the parallel existence of the Child Marriage Restraint Act of 1929 and Muslim Marriages and Divorces Registration Act of 1974 have

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87 *Allah Diwaya vs Mst Kammon Mai* 1957 PLD (WP) Lah 45.

rendered the `option of repudiation' an insignificant ground for the dissolution of marriage because any person who violates the provisions of the Act of 1929 will be exposed to criminal action.

Apostasy

It has been mentioned earlier that the conversion of a Muslim woman to another religion was one reason that led to the enactment of the Act of 1939. This provision of the Act is often criticised as being in contravention with the principles of Muslim law. Before the Dissolution of Muslim Marriages Act, 1939 apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of marriage.[88] Apostasy from Islam as a ground for the dissolution of the marriage has been the subject of some controversy.[89] As the *Hanafi* school was too restrictive in respect of the dissolution of marriage many *Hanafi* Muslim women, finding no other way to get rid of undesired marital bonds, felt compelled by the circumstances to renounce their faith.[90]

Section 4 of the Act has saved a Muslim woman from renouncing Islam simply in order to obtain the dissolution of her marriage. Under the Act, the renunciation of Islam by a Muslim wife will not dissolve the marriage merely on account of a change of faith.[91] A marriage can only be terminated through the court by the wife on the basis of the grounds mentioned in section 2 of this Act.

The Dissolution of Muslim Marriages Act of 1939 is intended to provide women with the opportunity of terminating her marriage where she been adversely affected by the marriage. These rights are, of course, not equivalent to the rights available to a Muslim husband; as Carroll points out

> obviously, in order to take advantage of this statute the wife not only has to be able to prove one of the recognized grounds but also has to institute litigation which might not be concluded for several years.[92]

Nevertheless, the Act does not affect the rights which she enjoys under the Muslim law in respect of dower and maintenance during the *iddat* period.

Sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 are equally applicable to the decree of dissolution obtained through the court which is taken up later in this paper. The invocation of this law (Dissolution of Muslim Marriages Act, 1939) by Muslim women has been minimised by the provision

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88 *Sardar Mohammad vs Mt Maryam Bibi* 1936 AIR Lah 666; *Mst Bakho vs Lal* 1924 AIR Lah 397; *Mst Saidan vs Sharaf* 1937 AIR Lah 759; *Ghaus vs Fajji* 1915 AIR Lah 14; *Karan Sing vs Emperor* 1933 AIR All 433.

89 Malik, V., Muslim Law of Marriage, Divorce and Maintenance, Luchnow, 1961, at p. 70.

90 Supra note 76, at p. 171.

91 *Mst Fazal Begum vs Hakim Ali* 1941 AIR Lah 22.

92 Supra note 24, at p. 278.

of delegated right of divorce. Most women, if they have the power, in urban as well as rural areas, take advantage of the right of *talaq-e-tafweez* and most of the vital grounds namely cruelty, non-maintenance and taking an additional wife are endorsed as conditions of *talaq-e-tafweez*.

PAKISTAN FROM 1947-1971

The Muslim Family Laws Ordinance, 1961

It was fourteen years after the partition of India and Pakistan that the family law was reformed in 1961 in Pakistan. The modern reformers came to a consensus that the complexity of the procedural laws prevented a large number of people, especially women, from claiming their legitimate rights. Islam had given women the right to own property, contract marriage and to divorce. But in this society, due to poverty, illiteracy and socio-religious pressures the women are not in a position to seek legal assistance for their rights.[93] The reformers further added that it was a vital function of the legal and judicial system to adopt measures that minimised injustice. The reformers concluded that the *Sharia't* Act of 1937 and the Dissolution of Muslim Marriages Act of 1939 had become ineffective due to the complexity of the procedure of the courts. As a result, the Muslim Family Laws Ordinance, 1961 was passed to restrict polygamy and to control the use of a husband's unscrupulous resort to the right of *talaq*.

Here only the relevant provisions, 7 and 8, are considered. These sections lay down the procedure to be followed when the husband and the wife wish to divorce each other without the intervention of the court.

Section 7 of the Muslim Family Laws Ordinance, 1961 provides

(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka or with both.

(3) Save as provided in sub-section (5), a *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purposes of bringing about a reconciliation between the parties, and the Arbitration

93 The Gazette of Pakistan, 1956.

Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in sub-section (3) or pregnancy, whichever be later, end.

(6) Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from re-marry the same husband without an intervening marriage with a third person, unless such termination is for the third time so effective.

Section 8,

Where the right to divorce has been duly delegated to the wife and she wishes to exercise the right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of section 7 shall, *mutatis mutandis* (as near as possible), and so far as applicable, apply.

The procedure makes it incumbent upon the husband to send notice of *talaq* to the Chairman of the *Union Parishad* (Section 7 of the Muslim Family Laws Ordinance, 1961) irrespective of the methods adopted by the husband, that is, whether it be *talaq ahsan, talaq hasan* or *talaq-ul-bidat*. Failure to give such a notice will be an offence punishable under the Ordinance. The *Union Parishad* must take all steps necessary to bring about a reconciliation between the spouses. The divorce will, if not revoked earlier expressly or by conduct (as a result of reconciliation brought about by the *Union Parishad* or otherwise), be effective only after the expiry of ninety days from the date of the notice, or if the wife is pregnant after the pregnancy ends, whichever period is longer. If and when a divorce becomes effective, the parties may remarry each other, except in the case of a third divorce.

Section 7 of the said Ordinance has made all forms of *talaq: ashan, hasan* and *talaq-ul-bidat* into a single revocable *talaq*. The Ordinance further made provision for reconciliation at the initiation of the Chairman. The *talaq* will not be effective until the expiry of ninety days from the receipt of the notice of *talaq* by the Chairman. The object of this section is to prevent the hasty dissolution of the marriage by way of *talaq* pronounced by the husband unilaterally, without any attempt being made to prevent the ending of the matrimonial tie.[94] This Ordinance was intended to draw upon the original spirit of the *Quran* and *Sunna* in respect of reconciliation.

Sub-section 3 of section 7 of the 1961 Ordinance provided that the *talaq* will not be effective until the expiry of ninety days from the receipt of the notice by the Chairman of the *Union Parishad* in the rural areas, or the Chairman of a

94 *Syed Ali Newaz Gardezi vs Lt Col Md Yusuf* 15 (1963) DLR (SC) 9.

Ward within a municipality. Failure on the part of the husband to give notice or his abstention from giving notice to the Chairman concerned should perhaps be deemed, in view of section 7, as if he has revoked the pronouncement of *talaq* and that would be to the advantage of the wife.[95] However, in 1982 the High Court of Lahore in Pakistan in *Muhammad Rafique vs Ahmad Yar*[96] made redundant the provisions of section 7(3) of the Family Laws Ordinance, 1961 by declaring that failure to notify the appropriate Chairman did not invalidate the divorce,[97] contrary to the 1963 decision of the Pakistan Supreme Court.

Similarly, High Court Division of the Supreme Court of Bangladesh in *Sirajul Islam vs Helana Begum and others*[97a] held that non service of notice to the Chairman of the Union Parishad under the provision of this section can not render ineffective the divorce disclosed in an affidavit. This case has watered down the implication and importance of the provision by holding that *talaq* would be effective without notice to the Chairman. The significance of notice ought not to be lost sight of. Otherwise it will deprive the opportunity of reconciliation between the parties and moreover will go against the spirit of Islam. If this recent decision is considered as a correct interpretation of the provision of section 7 of the MFLO, 1961 then it is definitely a retrograde step.

Whether giving notice to the wife is a necessary condition is not very clear. In *Zikria Khan vs Altaf Ali Khan*,[98] the court held that the non supply of a copy of the divorce notice to the wife did not prevent the divorce from becoming effective after ninety days. The whole emphasis is on the date of receipt of the notice by the Chairman of the *Union Parishad* or Ward. However in *Inamul Islam vs Mst Hussain Bano*,[99] it was held that service of the copy on the wife was as important as service of the notice on the Chairman. Carroll suggests that the interpretation of section 7(3) in the earlier case (*Inamul Islam*) is preferable to that in the later case (*Zikria Khan*). The former gives an opportunity to the wife to try to save marriage within the *iddat* period.[100]

In Bangladesh *talaq* or any extra-judicial divorce obtained by a wife is not effective without notice being served upon the Chairman. In spite of such

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95 *Ibid.*

96 1982 PLD 825.

97 See also *Chulam vs Ghulam Fatima* 1984 PLD Lah 234; *Dr. Ashique Hussain vs Ist Additional District Judge and Family Appellate Court Karachi East,* 1991 PLD Kar 174; *Mirza Qaman Raza vs Mst Tahira Begum* 1988 PLD Kar 169; *Shaukat Hussain vs Mst Rubina* 1989 PLD Kar 513.

97a 48 (1996) DLR (HCD) 48.

98 1985 PLD Lah 319.

99 1976 PLD Lah 1466.

100 Carroll, L., "Wife's Right to Notification of Talaq under Muslim Family Laws Ordinance", 37 (1985) Journal of PLD, pp.272-276, at p.276. See also Mehdi, R., The Islamization of the Law in Pakistan, Surrey, 1994, at pp. 166-172.

provisions, divorces are occasionally obtained only by following the traditional method of registering with *kazis* as revealed from a village study.[101] The legislation provides that a *kazi* (Nikah Registrar) may register divorces.[102] The registration of divorce has not been made compulsory. On the other hand, the divorce is not effective until the expiry of ninety days from the receipt of the notice by the Chairman.[103] A question may arise as to whether such divorces are valid according to section 7(1)&(3) of the Ordinance. According to the orthodox law the divorce is effective after the expiry of the *iddat* period, that is after ninety days, but the Ordinance makes it clear that its provisions override other laws, custom and usages.[104] The Ordinance and the Muslim Marriages and Divorces Registration Act of 1974 did not reconcile this apparent conflict. The two statutes are also silent about the effectiveness or consequences of divorces if no notice is sent to the Chairman while, the divorce, nevertheless, is registered at the Marriages and Divorces Registration office. It is presumed that all the divorces registered in the Marriages and Divorces Registration office have no effect in the eye of the law, but in practice such divorces are considered effective by the *kazis.*[105] Pearl comments on the Ordinance

> a large number of marriages in these areas are not registered and there are still a proportion of marriages where the bride is under 16. Many divorces are not communicated to the Chairman, thus at least in strict legal theory that marriage would still be in existence. Where the matter is communicated to the Chairman and he establishes an Arbitration Council, the Council, more often than not, will follow prevailing social norms in making decision regarding polygamy and divorce. Contrariwise amongst the upper-middle class in the large towns such as Karachi, Lahore or perhaps Dacca, the Ordinance has done no more than continue a trend already apparent.[106]

This observation of Pearl was made in 1976 i,e, "fifteen years after the promulgation of the Ordinance and we have seen that the situation is not very different today."[107]

One of the objects of the said Ordinance is to give effect to the sanction of the *Quranic* verse.[108] It made provision for reconciliation within a period of 30 days from the receipt of the notice [Muslim Family Laws Ordinance, 1961, section 7(4)]. Nothing has been said in the section, or anywhere else in the

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101 Huq, N., supra note 26.

102 The Muslim Marriages and Divorces Registration Act, 1974.

103 *Abdul Aziz vs Rezia Khatoon* 21 (1969) DLR Dac 733.

104 Section 3 of the Muslim Family Laws Ordinance, 1961.

105 Supra note 101, at p. 89.

106 Pearl, D., "The Legal Rights of Muslim Women in India, Pakistan and Bangladesh", 5 (1976) New Community, pp.68-74, at p. 73.

107 Mehdi, supra note 100, p. at 198.

108 Supra note 5, Verse IV:35.

Ordinance, as to what will happen if upon receipt of such written notice of *talaq* the Chairman does not constitute an Arbitration Council and does not take any steps to facilitate a reconciliation between the parties.[109]

This loophole in the law to some extent frustrates the object of the said Ordinance. The purpose of the reconciliation is that before making a hasty decision the husband and wife get an opportunity to reconsider. It has been seen that during the long period of *iddat*, much of the intensity of the disputes providing the grounds for divorce dies down.

Section 7 of the Muslim Family Laws Ordinance, 1961 also applies to the wife who wishes to dissolve the marriage.[110] Section 8 of the said Ordinance has made it incumbent upon the wife who wishes to dissolve the marriage to follow the procedure laid down in section 7 of the Ordinance with necessary changes. Where the wife wishes to exercise her delegated right, that is *talaq-e-tafweez*, she must send notice to the Chairman after actually exercising the right of divorcing herself.

Section 8 says "where any of the parties to marriage wishes to dissolve the marriage otherwise than by *talaq*", which apparently means dissolution of marriage through court, *khula* and *mubara'at* equally fall within the section. These forms of dissolution of marriage, particularly judicial dissolution, need careful examination in the light of section 23(2) of the Family Courts Ordinance, 1985.

Section 23(2) of the Family Courts Ordinance 1985 has made it incumbent upon the court to send a certified copy of the decree within 7 days of the passing of the decree. The Chairman after receipt of the same shall consider this as intimation of divorce and section 7 of the Ordinance will come into operation. A question may be raised in view of section 23 of Family Courts Ordinance, 1985 and sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 as to the time when the dissolution of marriage will be effective. is it after the expiry of ninety days from the receipt of the notice from the wife when she initiates the suit for dissolution or is it after the expiry of ninety days from the receipt of the certified copy from the court?

In one case it was held that it is not necessary to inform the Chairman after the court has granted a decree under section 2(ii) of the Act of 1939 on the basis of the option of puberty.[111] But in another case the Lahore Court of Pakistan had dealt with the question extensively and held that after the decree for dissolution has been made by the family court, that court must send a copy of the decree to the Chairman. At the same time it is necessary for the wife, in whose favour the decree is passed, to independently inform the Chairman about the decree, and

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109 *Abdus Sobhan Sarker vs Md Abdul Ghani*, 25 (1973) DLR HCD 227.
110 Section 8 of Muslim Family Laws Ordinance, 1961.
111 *Muhammad Amin vs Surraya Begum* 21 (1969) DLR (WP) 253.

also to send a notice thereof to the husband. An issue raised before the learned court was the effectiveness of the decree of the dissolution of the marriage after a successful reconciliation. The court held that in an instance of total success of the conciliation, the decree shall be deemed to have been abandoned by the wife. The conciliation will have the effect of compromise and thus avoidance of the decree. In other words the decree shall have no effect if within the specified period the reconciliation has been effected between the parties in accordance with the provisions of the Family Laws Ordinance and rules made thereunder.[112]

In the *khula* form of divorce there is no problem when the husband gives consent to the divorce and the wife may then obtain the divorce extra-judicially by serving the notice upon the Chairman. If husband refuses to give his consent, the wife has to seek *khula* through court and then the same question arises with regard to the applicability of sections 7 and 8 of the Ordinance. The court of Pakistan held that as a result of the promulgation of the Ordinance, reference to an Arbitration Council has become a pre-condition for applying to a Family Court for dissolution of marriage by *khula*. It further held that *khula* is operative in cases where the wife has a `fixed aversion' for the husband, in which case any amount of reconciliation would be of no use.[113] The court in this case only gave the probable consequences of `reconciliation'. It is impractical for the wife after going though the trauma of court procedure to wish to reconcile the marriage. Nonetheless, whatever be chances of successful reconciliation, the court did not specifically render that sections 7 and 8 inapplicable to *khula*.

In case of the *mubara'at* form of divorce which is based on the mutual aversion of the parties there is no question of going to the court. The marriage can be dissolved by serving the notice by either party upon the Chairman of *Union Parishad* or Ward. The method of reconciliation is of no effect as the parties have mutually consented to the divorce.

BANGLADESH FROM 1971

Bangladesh has inherited all laws that were enacted in British-India and in Pakistan.

The Muslim Marriages and Divorces (Registration) Act, 1974

The Muslim Family Laws Ordinance, 1961 incorporated the provisions for registration of marriages and divorces from Bengal Muhammadan Marriages and Divorces Registration Act of 1876 and made registration of marriages compulsory.

Later a separate statute was passed for the registration of marriages and divorces, titled Muslim Marriages and Divorces Registration Act, 1974 (Act LII

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112 *Muhammad Ishaque vs Ahsan Ahmed* 1975 PLD Lah 1118.
113 *Mustaz Mai vs Ghulam Nabi* 1969 PLD Baghad-ul-Jahid 5.

of 1974). Section 16 of the Act of 1974 has now repealed the Bengal Muhammadan Marriages and Divorces Registration Act, 1876. The Act reenacted the provisions of the 1876 Act for the voluntary registration of divorces.

Section 6 of the 1974 Act states that the Nikah Registrar or *kazi* may register the divorce on the application by the parties or person or persons who has or have effected the divorce. It is not incumbent upon the parties to register or inform the Registrar about the divorce as it is compulsory in cases of solemnisation of marriage. This section does not clearly specify that the registration of divorces will be effected only after the parties have made an effective divorce by complying with the procedure of the sections 7 and 8 of the Muslim Family Laws Ordinance, 1961.

In cases of *talaq-e-tafweez* the *kazi* (Nikah Registrar) will not register such divorces unless accompanied by a registered marriage document, or an attested copy of a such document, showing that the power of divorce has been duly delegated to the wife by the husband (Section 6(3) of the Muslim Marriages and Divorces Registration Act 1974). The non registration of the divorce in no way affects the validity of such divorces as it does in the case of non compliance with the provisions of the Muslim Family Laws Ordinance, 1961.

Apart from the evidential value, the registration of divorces under this Act has a marginal effect on the law of divorce but in practice, especially in the rural areas,[114] registration of divorces has come to occupy a significant place in the context of extra-judicial methods of divorce.

The Family Courts Ordinance, 1985

A separate court under the Family Courts Ordinance, 1985 has been established for dealing with disputes arising out of marriage, namely, dissolution of marriage, restitution of conjugal rights, dower, maintenance, and guardianship and custody of children (section 5). The object of the Ordinance is to provide a cheaper and more expeditious remedy and render the court accessible to all sections of society. It empowers the Assistant Judge in every District Court to deal with marital disputes. It has fixed a small court fee, taka thirty, for filing the suit with the aim of reducing costs and rendering the benefits of the family court to all social classes, whether rich or poor.

Section 3 of the Ordinance, 1985 states that it overrides all other laws except sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 which have been declared inviolable. The jurisdiction in section 5 of the 1985 Ordinance is subject to the provisions of the Ordinance of 1961. Section 23 of the Ordinance of 1985 requires the family court to send the certified copy of the decree of dissolution of marriage to the Chairman within seven days after the passing of

114 Supra note 100.

the decree. After receipt of such a certified copy of the decree the procedure of section 7 of the Muslim Family Laws Ordinance, 1961 will be set in motion. So the decree will not be effective until the expiry of ninety days from the receipt of the notice by the Chairman.[115]

The Ordinance of 1985 allows for an appeal in very limited circumstances (section 17). No appeal shall lie against a decree for dissolution of marriage except on the ground stated in section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939 i.e., that the husband disposes of his wife's property or prevents her exercising her legal rights over it and on the ground of non payment of dower exceeding five thousand taka.

The confusion in the Ordinance of 1985 is explained here using a hypothetical case. Suppose a decree for dissolution of marriage is passed by the family court on the ground of section 2 (viii)(d) of the Dissolution of Muslim Marriages Act, 1939. The mechanism of sections 7 and 8 of the Ordinance of 1961 will be set in motion and the dissolution will be effective after the prescribed period of ninety days from the date of the receipt of the decree. Section 17 of Family Courts Ordinance, 1985 does not clearly specify the position and effect of the decree if any appeal is filed against such a decree. The decree of the court at first instance will take effect after the expiry of ninety days irrespective of the decision of the Appellate Court. This is the case even if the husband's appeal is successful. The decree will have a premature end. However, it is unlikely that the Appellate Court will dispose of an appeal within three months.

The short comings of the family court have in fact adversely affected the legal status of women, particularly on the question of implementation of the law. The family courts set up to adjudicate on personal matters were supposed to be separate courts to ensure the privacy and security of women as well as to expedite results. Instead, ordinary civil courts have been functioning as family courts, thereby defeating their very purpose. Lengthy proceedings and even lengthier execution of decrees causes acute mental and financial strain on women. This is a particular problem in cases where women are claiming maintenance and *mehr*. Further, the family courts do not possess any mechanism to enforce judgement, or any instrument to assess maintenance and dower, and enforce compensation to be paid to the husband in case of *khula* or any other benefit the party is entitled to under the decree. As a result, women are left with no alternative but to approach the civil courts. This places greater financial strain on them since they have to pay substantial court fees in order to claim their

115 The matter has been dealt with in the section on the Muslim Family Laws Ordinance, 1961 of this paper.

rights. Since most women are barely in a position to support themselves this acts as a strong deterrent.

It may be **concluded** that women's rights to divorce have been enlarged by modern reforms and through judicial activism. Women have the right to separate themselves from an ill-founded marriage tie. The choices women have are not absolute as are those of their male counterparts; women's rights depend upon the presence of conditions, breach of a condition or evidence to prove that their marriage has broken down. On the other hand, the husband is not subjected to any condition. He still retains the power of absolute right to dissolve the marriage extra-judicially.

The courts of the present age have redefined *khula*, and hold that `it is a right given to the women'. In the process the judiciary have defined *khula* in a narrow sense and not in absolute terms. In judicial *khula* the woman has to seek relief through the courts and the court have to consider that there is a total failure of marriage between the husband and the wife. The delegated right by which the women can seek divorce on the breach of a condition causes less hardship. The extra-judicial forms of divorce , the *talaq-e-tafweez* and mutual consent which is popularly known as *khula* form of divorce, are less tedious, involve lower costs and less harassment than under judicial forms of dissolution. Furthermore, in the extra-judicial form of divorce the wife only has to follow the procedure of section 7 of Muslim Family Laws Ordinance, 1961. Although the rights of the wife are not equal to those of the husband, the husband and the wife have to use the same procedural law in the extra-judicial form of divorce namely, *talaq*, *talaq-e-tafweez* and *khula* with the consent of the husband. In addition, three aspects of social conditions:— poverty, illiteracy and vulnerability — force women to choose extra-judicial forms of divorce when the marriage has broken down.