Beyond Equality: A Contextual Re-Interpretation of Muslim Women's Right to Divorce within the Pakistani Legal Framework

Maryam Shahid Khan[ϕ]

CONTENTS

ϕ The author is a Barrister by occupation and is currently engaged in free-lance consultancy on legislation adversely affecting women in Pakistan.

I.
INTRODUCTION

Amongst the different forms of divorce available to Muslim women in Pakistan, the most commonly accessed is the *khula*. *Khula* is generally recognized by jurists as a woman's right to divorce, albeit through Court intervention, without assigning fault on the part of the husband. As such, it is often described as the mirror-image of the right of *talaq* available to men under Islamic Law. In present day practice in Pakistan, such a description of *khula* is misleading at best. Pakistani law has made several consequential distinctions between *talaq* and *khula* in terms of both substance and procedure that have resulted in glaring inequalities between men and women with respect to the right to divorce. To begin with, there can be no valid *khula* without Court intervention, while the *talaq*, in practice, is largely extra-judicial. Further, a woman seeking divorce through *khula* may not be granted one, depending on the discretion of the Court. Hence, *khula* does not provide Muslim women with a *carte blanche* to dissolve their marriage, as is the case with men. The unilateral right to divorce is, therefore, a right which has exclusively been granted to Muslim men through the instrument of *talaq*.

Undoubtedly, *khula* provides most women with a greater chance of obtaining divorce than the various grounds available under the Dissolution of Muslim Marriages Act, 1939 ("DMMA"), which require a more formal degree of evidence. However, unlike divorce via DMMA, divorce through *khula* is invariably attached with a price-tag, sometimes a heavy one for many women who can ill-afford to forego their dower or make additional "compensation" payments to their former husbands in lieu of their demand for a divorce.

The inequalities that exist between Muslim men and women in Pakistan with respect to their right to divorce are claimed, by some, to be a result of the triumph of classical Islamic Law over the liberatory forces of fundamental rights of women guaranteed in the Constitution of Pakistan, 1973 ("Constitution"). This article, however, postulates that, the content and application of the *Shariat* Law on divorce, in general, and *khula*, in particular, is essentially flawed in Pakistan. The article asserts that, in its original form, Islamic Law on divorce is no less liberatory than the Constitutional guarantees of equal rights for women. Both enable women to access divorce on much the same platform as men. In fact, it may well be the case that the Holy Quran, with its emphasis on the principle of "equity", goes beyond "equality" by requiring men to provide their divorced wives with maintenance (apart from the dower), while at the same time granting women equal rights to divorce. In this way, the heavier responsibility or liability for divorce generally falls on men under the Islamic Law. Thus, principally the rights and protections afforded to women in matters of

divorce by Islamic Law find expression in the modern day Constitutional guarantees upholding the equality of women before the law as well as simultaneously granting them special protection. The interplay of "equality" in terms of the right to divorce, and "equity" in terms of the special financial protection of women, has been reversed in the prevailing Pakistani legal framework so as to place a greater onus on women in matters of divorce. The article, therefore, argues that there is a need, both legal and moral, for *khula* to be re-visited and re-interpreted in its proper Quranic context.

Part II of the article examines the Quranic injunctions on divorce. Part III provides an analysis of the different forms of divorce as recognized by the *fiqh*, including *khula*, and critically analyzes their normative basis in light of the Holy Quran in terms of their impact on the equality between men and women in matters of divorce. Part IV is devoted to a brief discussion of the prevailing divorce laws in Pakistan, and how these affect Muslim women's right to divorce vis-à-vis Muslim men. Finally, Part V presents the main conclusions arising from the analysis and makes recommendations for law reform in the realm of divorce with particular emphasis on *khula*.

II.
QURANIC BASIS FOR DIVORCE

This Part presents an overview of the Quranic basis for and the general rules pertaining to divorce. In doing so, it first discusses the different sources of Islamic Law on divorce in general. Next, it examines the concepts of equality and equity contained in the Holy Quran in matters of divorce. These concepts provide the overall conceptual basis within which Quranic injunctions on *khula* and other forms of divorce must be read. This Part then proceeds to analyze the requirement and role of arbiters and conciliation, as well as witnesses, in all forms of divorce.

A. *Sources of Islamic Law on Divorce*

Islamic Law is derived from multiple sources, which mainly consist of: (i) the Holy Quran; (ii) Sunnah and *Hadith*, that is, the practical traditions and oral sayings, respectively, of the Prophet Muhammad (PBUH); (iii) *Fiqh* or Jurisprudence; (iv) *Madahib* or Schools of Law; and (v) *Shariat* or code of law which regulates the diverse aspects of the lives of Muslims.[1]

---

[1] Dr. Riffat Hassan, *Are Human Rights Compatible with Islam? The Issue of the Rights of Women in Muslim Communities* at http://www.religiousconsultation.org/hassan2.htm (last visited on 25th Aug, 2005).

These sources are commonly referred to, collectively, as the "Islamic Law", though they are not identical or considered to be of equal weight. The most important source of Islamic Law is the Holy Quran, which is regarded as the "primary, and most authoritative, source of normative Islam."[2] This article will, therefore, focus primarily on deriving principles directly from the Holy Quran. Juristic interpretations will not be considered as binding where the Holy Quran expressly and clearly lays down a rule.

Several different forms of divorce, as well as the different grounds on which they may be permissible, have been discussed at length in the *fiqh*. The two sects of Islam, *Sunni* and *Shia*, as well as the different *Madahib*, have set down varying interpretations of the Holy Quran and Sunnah on the subject of divorce. The main categories of forms of divorce in Islamic Law include divorce at the initiative of the husband, the wife, by mutual agreement, or by judicial process. According to the *fiqh*, it appears that, in general, divorce at the instance of the husband is prominent and rather simple. On the other hand, divorce at the initiative of the wife is often portrayed as difficult and restrictive.[3] As is discussed below, the express injunctions of the Holy Quran have been grossly misinterpreted to achieve this result.

B. *Concepts of Equality and Equity in Islam*

As background to examining divorce in light of the Islamic Law, it is necessary to briefly mention two concepts that have been emphasized by the Holy Quran in the context of justice, *"adl"* and *"ihsan"*, both of which concern the idea of achieving "balance." The concept of *"adl"* is defined by Fyzee (a well-known scholar of Islam) as "to be equal, neither more nor less." Fyzee further elaborates on this as follows: "...in a Court of Justice the claims of the two parties must be considered evenly, without undue stress being laid upon one side or the other. Justice introduces the balance in the form of scales that are evenly balanced."[4] *"Adl"* is, therefore, akin to the modern day concept of equality.

The Holy Quran also goes beyond *"adl"* to the concept of *"ihsan"*, which literally means, "restoring the balance by making up a loss or deficiency." This is a concept which shows Allah's sympathy for the disadvantaged segments of human society, such as women, orphans, slaves, the poor, the infirm, and the minorities.[5] In modern day parlance, *"ihsan"* is

---

[2] Ibid.

[3] See DAVID PEARL AND WERNER MENSKI, MUSLIM FAMILY LAW 279, Brite Books, (Lahore, 1998).

[4] See Hassan, supra note 1.

[5] Ibid.

akin to equity. According to the Oxford dictionary, "equity" means "fairness". Similarly, "equitable" means "fair; just."[6]

The injunctions on divorce in the Holy Quran readily manifest the principles of *"adl"* and *"ihsan"*, and, as such, should be read in the context of these two principles. The following extracts from relevant verses in the Holy Quran are especially relevant:

> "A divorce is only permissible twice: after that, the parties should *either hold together on equitable terms, or separate with kindness*" (2:229).[7]
> "When ye divorce women, and they fulfill the term of their (*Iddat*), *either take them back on equitable terms or set them free on equitable terms*" (2:231).
>
> "Thus when they fulfill their term appointed, *either take them back on equitable terms or part with them on equitable terms*" (65:2).

C. *Intervention by Arbiters and Requirement of Witnesses*

The Holy Quran prescribes an obligatory conciliation procedure to be followed in cases where a breach is anticipated between spouses. Verse 4:35 of *Surah Al-Nisa* provides thus:

> وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَماً مِّنْ أَهْلِهِ وَحَكَماً مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلاَحاً يُوَفِّقِ اللّهُ بَيْنَهُمَا إِنَّ اللّهَ كَانَ عَلِيماً خَبِيراً
> "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation: For God hath full knowledge, and is acquainted with all things."

Since the foregoing verse refers to a "breach" in the context of a married couple, it obviously includes breach in the form of divorce. It is evident, therefore, that for any form of divorce to achieve legal finality and become irrevocable, whether initiated by the husband or wife, the Holy Quran requires intervention by arbiters. No distinction, whatsoever, has been made in this regard between the genders, and, in fact, both men and women have been granted equal rights to appoint their own arbiters in order to attempt

---

[6] R.E. ALLEN, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH, Clarendon Press, Oxford (8th Edition, 1990).

[7] ABDULLAH YUSUF ALI, THE HOLY QURAN: TEXT, TRANSLATION AND COMMENTARY, Sh. Muhammad Ashraf Publishers & Booksellers, (Lahore, 1988). The translation and explanation of the verses of the Holy Quran appearing in this article have, unless otherwise indicated, been taken from Abdullah Yusuf Ali. Emphasis added.

reconciliation. Furthermore, the Quranic injunction for appointing arbiters and attempting conciliation cannot be sidelined as merely directory; it has a specific purpose, namely, to keep the door open for an amicable settlement between the spouses in order to maintain, as much as possible, the sanctity of the institution of marriage. The need for attempting reconciliation before a divorce acquires finality, must also be viewed in light of the extreme undesirability of divorce in Islamic Law. In this regard, an oft-quoted *Hadith* provides:

> "Of all things permitted by law, divorce is the most hateful in the sight of God."[8]

Verse 4:35 of *Surah Al-Nisa*, therefore, is an imperative pre-requisite for a legal divorce. It clearly envisages some form of judicial intervention in all cases of divorce and effectively outlaws all forms of unilateral and extra-judicial divorce.

In Shafi, Hanbali and Hanafi schools of law, the arbiters' role is no more than conciliatory. In contrast, in the Maliki school, the arbiters are representatives of the Court, and if they fail to bring about a reconciliation between the two parties, they can decide that the marriage should be terminated, which they can do only by way of ordering the husband to divorce his wife by *talaq*.[9] Though the various *madahib* may differ as to the precise role of the arbiters in the reconciliation process, it appears that there is consensus insofar as the ultimate outcome is concerned, that is, the question of granting divorce. In other words, whether the arbiters act as mere conciliators or representatives of the Court, it is not part of their function to deny the grant of divorce where reconciliation attempts between the spouses have failed. The added stipulation by the Maliki school that the final divorce must be pronounced by the husband by way of *talaq* only, does not find resonance in the Quranic verse quoted above. Indeed, as will become apparent later in this article, it does not find support anywhere in the Holy Quran.

In addition to the requirement of intervention by arbiters, the Holy Quran lays down the need for witnesses in matters of divorce in verse 65:2 of *Surah Al-Talaq*, which states:

> فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِّنكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكُمْ يُوعَظُ بِهِ مَن كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الآخِرِ وَمَن يَتَّقِ اللَّهَ يَجْعَل لَّهُ مَخْرَجاً
>
> "Thus when they fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms; *and take for witness two persons from among you, endued with justice, and establish the evidence (as) before God.* Such is the admonition

[8] ABU DAUD, SUNAN ABU DAUD, xiii. 3.

[9] See Pearl & Menski, supra note 3 at 286.

given to him who believes in God and the Last Day. And for those who fear God, He (ever) prepares a way out."[10]

The main object of the requirement of two witnesses for divorce is the establishment of proper evidence to ensure that no one will act unjustly or selfishly. The legal validity of any form of unilateral divorce that bypasses the above injunction must be doubted.

III.
ANALYSIS OF DIFFERENT FORMS OF DIVORCE

Having laid the groundwork for the general rules pertaining to divorce under Islamic Law in Part II, this Part presents a brief analysis of the main forms of divorce recognized by the *fiqh*, whether initiated by the wife or husband. The purpose of this analysis is to determine whether the different forms of divorce are in line with the general Quranic injunctions on divorce examined in Part II, with particular emphasis on *khula*, and their likely impact on the respective rights of men and women. Where applicable, this Part also analyzes whether other forms of divorce available to women according to the *fiqh* are necessary in the presence of *khula*.

A. *Khula*

1. *Quranic Injunctions on Khula*

Khula is recognized in Islamic Law as the wife's right to divorce, through Court intervention, without assigning any reason or fault on the part of the husband. The Quranic injunctions from which a Muslim woman's right to *khula* is derived, appear in verse 2:229 of *Surah Al-Baqarah*:

الطَّلاَقُ مَرَّتَانِ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ وَلاَ يَحِلُّ لَكُمْ أَن تَأْخُذُواْ مِمَّا آتَيْتُمُوهُنَّ شَيْئاً إِلاَّ أَن يَخَافَا أَلاَّ يُقِيمَا حُدُودَ اللّهِ فَإِنْ خِفْتُمْ أَلاَّ يُقِيمَا حُدُودَ اللّهِ فَلاَ جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللّهِ فَلاَ تَعْتَدُوهَا وَمَن يَتَعَدَّ حُدُودَ اللّهِ فَأُوْلَـئِكَ هُمُ الظَّالِمُونَ

"A divorce is only permissible twice: after that, the parties should either hold Together on equitable terms, or separate with kindness. *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 God. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God,*

[10] Emphasis added.

> *there is no blame on either of them if she gives something for her freedom.* These are the limits ordained by God; so do not transgress them if any do transgress the limits ordained by God, such persons wrong (Themselves as well as others)."[11]

The foregoing verse sets down the general rules regarding divorce. While doing so, however, it makes no distinction between men and women insofar as their right to obtain divorce is concerned. This is reinforced by the part of the verse which states, "the parties should either hold together on equitable terms, or separate with kindness." A logical, and perhaps the only possible interpretation, of this phrase is that the husband and wife are equally enabled to seek divorce and dissolve their marriage, without the necessity of the other spouse's approval or consent.

Various jurists insist, nevertheless, that men have an advantage over women insofar as divorce is concerned, and that men are exclusively entitled to unilateral and extra-judicial divorce. They claim support for this argument in verse 2:228 of *Surah Al-Baqarah*, which provides:

> وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنفُسِهِنَّ ثَلاثَةَ قُرُوَءٍ وَلاَ يَحِلُّ لَهُنَّ أَن يَكْتُمْنَ مَا خَلَقَ اللّهُ فِي أَرْحَامِهِنَّ إِن كُنَّ يُؤْمِنَّ بِاللّهِ وَالْيَوْمِ الآخِرِ وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ فِي ذَلِكَ إِنْ أَرَادُواْ إِصْلاَحاً وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ وَاللّهُ عَزِيزٌ حَكِيمٌ
>
> "Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. *And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them.* And Allah is Exalted in Power, Wise."[12]

First and foremost, it is obvious from the foregoing verse that, as a general rule, women have the same rights against men in matters of divorce. This is qualified by "according to what is equitable," which refers to the special financial protection provided to women. The following phrase, "degree (of advantage)", however, has been interpreted by many jurists as referring to greater rights available to men in accessing divorce. This rendition, however, is much too simplistic. For instance, Barlas[13] presents

---

[11] Emphasis added.

[12] Emphasis added.

[13] ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QURAN 196, Sama Editorial & Publishing Services (Karachi, 2004).

the varied meanings that may be attributed to the phrase, "degree (of advantage)", as follows:

> "There are then four themes in this Ayah in its various renditions: the waiting period in a divorce, the possibility of reconciliation between an estranged couple, the theme of kindness, and, the equality of spousal rights except that the husband has a degree or advantage over the wife whose nature the Quran does not specify. Given this fact, exegetes interpret the Ayah differently. Wadud (1999, 68) reads it as giving husbands the advantage of being able to "pronounce divorce against their wives without arbitration or assistance"; wives, on the other hand, need arbitration in order to get divorced. However, as she points out, this stipulation does not derive from the Quran, which does not say that women *should* have no powers of repudiation; they *did not* have such powers at the time of its revelation. Asad, on the other hand, reads the Ayah as giving husbands the advantage of being able to *rescind* a divorce; as he says (Asad 1980, 50 n. 216), "since it is the husband who is responsible for the maintenance of the family, the first option to rescind a provisional divorce rests with him." Since the Quran also mentions kindness and the possibility of a reconciliation, this may be a more appropriate reading than Wadud's. Hassan (1999, 357), however, reads the Ayah as giving husbands the advantage of being able to remarry without having to wait for a three-month period. Whichever reading one prefers, however, it is clear that the "degree" does not refer to the ontological status of men as males, or even to their rights over women; rather, it is a specific reference to a husband's right in a divorce and, from all indications, is meant to encourage more, not less, kindness towards women."[14]

Barlas convincingly asserts that the nature of the "degree (of advantage)" available to men has not been specified in the Holy Quran. The most logical and contextual interpretation of the "degree (of advantage)" is that the husband has the "better right" to take back his wife during the waiting period of *iddat*, meaning that the husband has a right to rescind or revoke the divorce before it has acquired finality. This is the most accurate interpretation since, in verse 2:228 of *Surah Al-Baqarah,*[15] mention of rescission of divorce by men immediately precedes the injunction concerning "degree (of advantage)." This rescission or revocation of *talaq* is only permitted during the period of *iddat*. Support for this proposition is taken from verse 2:231 of *Surah Al-Baqarah,* which states:

> وَإِذَا طَلَّقْتُمُ النِّسَاء فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ وَلاَ تُمْسِكُوهُنَّ ضِرَاراً لِّتَعْتَدُوا وَمَن يَفْعَلْ ذَلِكَ فَقَدْ ظَلَمَ نَفْسَهُ وَلاَ تَتَّخِذُوَاْ آيَاتِ اللّهِ هُزُواً وَاذْكُرُوا نِعْمَتَ اللّهِ عَلَيْكُمْ وَمَا أَنزَلَ عَلَيْكُم مِّنَ الْكِتَابِ وَالْحِكْمَةِ يَعِظُكُم بِهِ وَاتَّقُوا اللّهَ وَاعْلَمُوا أَنَّ اللّهَ بِكُلِّ شَيْءٍ عَلِيمٌ

[14] Ibid.
[15] See at p. 7.

> "*When ye divorce women, and they fulfill the term of their (Iddat), either take them back on equitable terms or set them free on equitable terms*; but do not take them back to injure them, (or) to take undue advantage; if any one does that; He wrongs his own soul. Do not treat God's Signs as a jest, but solemnly rehearse God's favors on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear God, and know that God is well acquainted with all things."[16]

According to verse 2:228 of *Surah Al-Baqarah* above ("Divorced women shall wait concerning themselves for three monthly periods"), a period of waiting for three monthly courses is prescribed for women before any divorce becomes final in order to see if the marriage conditionally dissolved is likely to result in issue. In other words, a divorce remains "revocable" by the husband till the end of the waiting period or "*iddat.*" The object of this is twofold: (i) to attempt reconciliation between the spouses, and (ii) to determine if the wife may be pregnant. Importantly, pregnancy prolongs the *iddat* till after the delivery of the child. In this regard, verse 65:4 of *Surah Al-Talaq* states:

> وَاللاَّئِي يَئِسْنَ مِنَ المَحِيضِ مِن نِّسَائِكُمْ إِنِ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلاَثَةُ أَشْهُرٍ وَاللاَّئِي لَمْ يَحِضْنَ وَأُوْلاَتُ الأَحْمَالِ أَجَلُهُنَّ أَن يَضَعْنَ حَمْلَهُنَّ وَمَن يَتَّقِ اللَّهَ يَجْعَل لَّهُ مِنْ أَمْرِهِ يُسْراً

> "Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses (it is the same): *for those who carry (life within their wombs), their period is until they deliver their burdens*: and for those who fear God, He will make their path easy."

2. *Financial Compensation by the Wife*

With respect to financial settlements at the time of *khula*, men are generally prohibited from demanding the return of any gifts or property they may have given their wives at the time of marriage. Obviously, this has been ordained for the economic protection of women, given that it is the obligation of men to financially maintain their wives. Support for this proposition is taken from verse 4:34 of *Surah Al-Nisa*, which states:

---

[16] Emphasis added.

> "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means..."

However, in certain circumstances, where *both* parties would be "unable to keep the limits ordained by God" (see verse 2:229 of *Surah Al-Baqarah* above), an exception is allowed whereby the wife may have to make some form of financial sacrifice in favor of her husband in order to obtain the divorce. Yusuf Ali interprets the phrase "unable to keep the limits ordained by God" as referring to situations where safeguarding the woman's economic rights compromises her very freedom of person. The case law in Pakistan appears to interpret this phrase mainly as alluding to fear of extra-marital relations on the part of the wife in view of marital breakdown. In such exceptional circumstances, it is permissible for the wife to give some material consideration to her husband in order to expedite the divorce. Nevertheless, the need and equity of such compensation by the woman is required to be submitted to the judgment of impartial judges. It is clear, therefore, that women need not compensate their husbands for seeking *khula* in all circumstances.

In practice, the dower (or *Haq Mehr*) that is given by the husband to his wife as a gift at the time of marriage, is often considered to be the yardstick for ascertaining the value of compensation that may become payable by a wife to the husband at the time of *khula*. For instance, some *madahib* suggest that a husband can demand a sum larger than the dower given by him at the time of marriage to the wife who demands *khula*. Other jurists forbid the taking by the husband of more than the dower amount.[17] However, judicial discretion must primarily focus on whether or not the compensation is payable by the wife in the first place on the particular factual basis of each case. Such compensation, as expressed in verse 2:229 of *Surah Al-Baqarah*, is not an automatic entitlement of the husband. This is further supported by verses of the Holy Quran relating to the dower and the importance attached to the wife's ownership of it.

The dower is mentioned in several verses in the Holy Quran. For example, verse 4:4 of *Surah Al-Nisa* provides:

> وَآتُوا النِّسَاء صَدُقَاتِهِنَّ نِحْلَةً فَإِن طِبْنَ لَكُمْ عَن شَيْءٍ مِّنْهُ نَفْساً فَكُلُوهُ هَنِيئاً مَّرِيئاً
>
> "And *give the women (on marriage) their dower as a free gift*; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer."[18]

---

[17] M. Fazlul Haq, *Dissolution of Muslim Marriages Act, 1939 (Act VIII SC 1939): Need for Amendment*, (1973) 1 SCC (JOUR) 28 available at http://www.ebc-india.com/lawyer/articles/73v1a10.htm (last visited on).

[18] Emphasis added.

It is, therefore, the duty of the husband to provide a dower for his wife. A pre-nuptial agreement releasing the husband from his obligation to provide his wife with a dower is a void contract in Islamic Law.[19] The wife may remit all or part of the dower after marriage. Such a remission is equivalent to a gift, which confirms that the wife is the absolute owner of the dower.[20] It is important to note that though the dower is an integral element of Muslim matrimonial law, it is not a consideration for the contract of marriage. Essentially, it is an *effect* of the contract of marriage rather than the price paid by the husband for acquiring the various rights which accrue to him on marriage.[21] There is no fixed minimum or maximum amount of dower and anything lawful may be stipulated as dower. According to the *fiqh*, the dower may consist of anything that can be valued in money, is useful, and ritually clean.[22]

Verse 4:19 of *Surah Al-Nisa* forbids inequitable withholding of the dower from the wife by her husband:

> يَا أَيُّهَا الَّذِينَ آمَنُوا لاَ يَحِلُّ لَكُمْ أَن تَرِثُوا النِّسَاء كَرْهاً وَلاَ تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا آتَيْتُمُوهُنَّ إِلاَّ أَن يَأْتِينَ بِفَاحِشَةٍ مُّبَيِّنَةٍ وَعَاشِرُوهُنَّ بِالمَعْرُوفِ فَإِن كَرِهْتُمُوهُنَّ فَعَسَى أَن تَكْرَهُوا شَيْئاً وَيَجْعَلَ اللّهُ فِيهِ خَيْراً كَثِيراً
>
> "O ye who believe! Ye are forbidden to inherit women against their will. *Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them, except where they have been guilty of open lewdness*; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and God brings about through it a great deal of good."[23]

According to Yusuf Ali, in pre-Islamic practice, a trick to detract from the freedom of a married woman was to treat her badly and force her to sue for a divorce when the dower could be claimed back. This harsh practice, which has acquired a certain amount of legal veracity in Pakistan today, has been strictly forbidden in the above verse. Where the wife has been "guilty of open lewdness", however, the husband is entitled to withhold the dower. Such "guilt" of "open lewdness" would, of course, require some form of proof.

The Holy Quran also lays down that where a man divorces his wife in place of another, he is forbidden to take back any of the dower he paid to his former wife. These injunctions appear in verses 4:20 and 4:21 of *Surah Al-Nisa*:

---

[19] See Pearl & Menski, supra note 3 at 181.
[20] Ibid.
[21] Id.
[22] See Pearl & Menski, supra note 3 at 179.
[23] Emphasis added.

وَإِنْ أَرَدتُّمُ اسْتِبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَآتَيْتُمْ إِحْدَاهُنَّ قِنطَاراً فَلاَ تَأْخُذُواْ مِنْهُ شَيْئاً أَتَأْخُذُونَهُ بُهْتَاناً وَإِثْماً مُّبِيناً

"But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back: Would ye take it by slander and manifest wrong?" (4:20).

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَى بَعْضُكُمْ إِلَى بَعْضٍ وَأَخَذْنَ مِنكُم مِّيثَاقاً غَلِيظاً

"And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant?" (4:21).

According to the *fiqh*, the whole dower generally becomes due to the wife either on the actual consummation of the marriage or the death of either spouse before consummation. If the wife dies before consummation, her heirs can sue for recovery of the dower-debt.[24] Also, in the event that a divorce takes place before the consummation of marriage, the woman is entitled to half the dower where the dower has been fixed (verse 2:237 of *Surah Al-Baqarah*), or a present where the dower has not been fixed (verse 2:236 of *Surah Al-Baqarah*).

In light of the above Quranic injunctions concerning the wife's entitlement to the dower, the question of whether or not a wife is required to return all or part of her dower to the husband in exchange for *khula* should not be taken lightly. Moreover, if it is ascertained that no compensation is payable by the wife in the particular circumstances of a case, the husband cannot be taken to be absolved of his duty to pay maintenance to the wife after the dissolution of marriage either. In this regard, verse 2:241 of *Surah Al-Baqarah* provides:

وَلِلْمُطَلَّقَاتِ مَتَاعٌ بِالْمَعْرُوفِ حَقّاً عَلَى الْمُتَّقِينَ

"For divorced women Maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous."

On the other hand, if it is adjudged that the husband is entitled to some form of compensation, the value of such compensation should logically be restricted to the value of the dower in the case. There appears to be no evidence in the Holy Quran that would suggest otherwise. In fact, verse 2:229 of *Surah Al-Baqarah* ("there is no blame on either of them if she give something for her freedom"), combined with verse 4:19 of *Surah Al-Nisa* ("Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them, except where they have been guilty of open lewdness"), indicates that anything given as compensation to the husband in excess of the dower at the time of *khula* would be considered extortionate.

---

[24] Ibid.

3. *Rules derived from Hadith on Khula*

Instances of *khula* are also mentioned in the *Hadith*. The first *khula* in Islam is reported in the commentary of Imam Razi on the Holy Qur'an, entitled "*Tafsir-ul-Kabir*", Vol. II, as follows:[25]

> "It has been reported that this verse (i.e. verse 35 of Chapter IV) was revealed respecting the case of Jamila, daughter of Abdullah, son of Ubayy and her husband Sabet, son of Qais, son of Shemas. The facts were that she hated him with intense hatred and he loved her with intense love. She came up to the Holy Prophet and, said: 'Effect separation between me and him as I hate him. I saw him from the side of my veil, coming amongst people. He was of the shortest stature, the ugliest in face and blackest in complexion. I do not prefer infidelity (Kufr) after having accepted Islam.' Sabet addressed the Prophet as follows: 'O Prophet of Allah, order her that she should return the garden I gave her.' The Holy Prophet said to her: 'What have you to say?' She replied: 'I agree and I will give more.' Then the Holy Prophet said: 'No, only the garden.' Then the Holy Prophet said to Sabet: 'Take from her what you gave and clear her way.' Sabet did this and it was the first Khula in Islam."

While this *Hadith* is an example of the exercise of *khula* by a Muslim woman within the context of a particular set of facts, it is of course derived from the primary Quranic injunctions contained in verse 2:229 of *Surah Al-Baqarah*. Nevertheless, it appears that certain jurists have established different rules directly from this particular *Hadith* itself, thus undermining the express provisions of the Holy Quran. For instance, in classical Hanafi law, the Hadith has been interpreted to mean that the wife cannot insist on divorce by *khula* without the husband's consent and the husband must pronounce the *talaq* before the divorce can take effect.[26]

Further, as was discussed above, strict adherence to the Hadith without recourse to the express injunctions of the Holy Quran has led many jurists to conclude that compensation to the husband by the wife is a necessary condition for *khula*. This is certainly not the case. If any specific rule can be derived from the Hadith, it is that in the event that the wife is adjudged liable to pay compensation, its value should not exceed the value of the dower.

B. *Talaq and Talaq-i-Tafwid*

The husband's right to divorce is known as "*talaq*", which may take different forms according to the *fiqh*. Simply, *talaq* is the "unilateral

---

[25] See generally Haq, supra note 17.

[26] See Pearl & Menski, supra note 3 at 283.

repudiation or cutting off of the marital tie" by the husband, and the consent of the wife is not required. Also, in classical Islamic Law, the pronouncement or declaration of the *talaq* is generally extra-judicial and is not subject to any external check. The different types of *talaq* include: (i) *talaq-i-bidat*, (ii) *talaq-i-ahsan*, (iii) *talaq-i-hasan*, and (iv) *talaq-i-tafwid*.

It is important to mention here that there are a number of consequential differences between *Sunni* and *Shia* law of divorce.[27] Firstly, Sunni law recognizes all three types of *talaq*, while Shia law does not accept the validity of the *talaq-i-bidat*. Secondly, in Sunni law there are no fixed formalities for the pronouncement of the *talaq*, which may either be oral or in writing, and which may be pronounced in the absence of the wife or any other witnesses. On the other hand, *Shia* law requires that the *talaq* must be pronounced orally in the presence of two witnesses with the exact term itself being used, and that there must be a definite intention to repudiate. In contrast, the classical Hanafi school of law accepts a divorce pronounced by way of jest, including a *talaq* pronounced when drunk, by mistake, or even under duress, on the principle that the law looks to the act rather than the intent.[28]

1. *Talaq-i-Bidat*

The *talaq-i-bidat* or "triple *talaq*" involves a series of three pronouncements of *talaq* consecutively at one time. The consequences of this are that since the divorce is final and effective at once, there is no scope for reconciliation and it is not possible for the parties to remarry each other unless and until the wife has gone through an intervening marriage with another man, which itself has been consummated and dissolved.[29] Generally, the *iddat* period following the *talaq-i-bidat* enables the wife to obtain maintenance from her former husband, though she neither has inheritance rights after the pronouncement of the *talaq* nor does she have the capacity to contract herself in marriage to another man during *iddat*.[30]

It is evident that *talaq-i-bidat* is in direct contravention of verse 4:35 of *Surah Al-Nisa* and verse 65:2 of *Surah Al-Talaq* (discussed above), which set down the requirement of reconciliation by arbiters before any form of divorce becomes irrevocable, and the requirement of witnesses for divorce, respectively. The so-called "unilateral" right that the *talaq-i-bidat* bestows upon Muslim men also grossly violates the equal rights provided by the Holy Quran to men and women in respect of access to divorce. As such, the *talaq-i-bidat* has no legal validity in Islamic law and should be outlawed.

---

[27] Ibid at 282.
[28] Id.
[29] See Pearl & Menski, supra note 3 at 281.
[30] Ibid at 282.

Apart from its obvious contravention of Quranic injunctions, the *talaq-i-bidat* has also been disapproved by *Hadith*. It is reported that the Prophet (PBUH) was told of a Muslim who pronounced three divorces against his wife at the same time whereupon the Prophet (PBUH) stood up in anger and exclaimed that the man was making a plaything of the Book of Allah.[31]

2. *Talaq-i-Hasan and Talaq-i-Ahsan*

The *talaq-i-hasan* is an approved method of *talaq* accepted by all *madahib*. The procedure for the *talaq-i-hasan* is that the husband repudiates his wife three times during the period of *iddat* or three menstrual cycles. The first statement of *talaq* is made during a *tuhr*, followed by a further single statement of *talaq* during the subsequent *tuhr*, followed by a final statement of *talaq* during the third successive *tuhr*. As soon as the husband pronounces the third *talaq*, *talaq-i-hasan* becomes irrevocable. Until the third pronouncement of the *talaq*, therefore, this form of *talaq* is also revocable by words or conduct. After the divorce has become irrevocable at the third pronouncement, the wife is required to observe *iddat*, during which the husband cannot revoke his decision to repudiate his wife.[32]

The most approved method of *talaq* is the *talaq-i-ahsan* which offers an opportunity of revocation and is, therefore, not instantly effective. It involves a single statement of *talaq* by the husband at a point between two menstruations (known as "*tuhr*"). If the husband wishes the divorce to be final, he must refrain from sexual intercourse with the wife that he has divorced during the *iddat* period of three menstrual cycles.[33]

Although both *talaq-i-hasan* and *talaq-i-ahsan* offer opportunities for reconciliation, *talaq-i-ahsan* finds more support in the Holy Quran. This is because in *talaq-i-ahsan*, the *iddat* period is treated as both the waiting period for the wife as well as a period for possible reconciliation between the spouses, in accordance with verse 2:231 of *Surah Al-Baqarah* quoted above ("When ye divorce women, and they fulfill the term of their (*Iddat*), either take them back on equitable terms or set them free on equitable terms").

3. *Talaq-i-Tafwid*

The husband may delegate his power to pronounce the *talaq* to some other person, including the wife. This delegated divorce is known as "*talaq-*

---

[31] AHMED B. ALI AL NASA, 1 SUNAN 98.
[32] See Pearl & Menski, supra note 3 at 281.
[33] Ibid at 280.

i-tafwid."[34] According to all *madahib*, a husband may delegate his unilateral right to *talaq* to his wife, permitting her to pronounce *talaq* upon herself. This delegation of the right to divorce to the wife, known as *talaq-i-tafwid*, may be made either at the time of marriage or negotiated subsequently with or without conditions. In an unconditional *talaq-i-tafwid*, the wife may exercise the power of *talaq* whenever she wishes and without any stipulations. On the other hand, where the *talaq-i-tafwid* is conditional or suspended, the wife may only exercise her right to divorce when a particular event happens, for example, the husband takes a second wife, or on the breach of a promise, for example, non-payment of the dower within a specified period of time. In the conditional or suspended *talaq-i-tafwid*, the repudiation occurs automatically after the stipulated event.[35]

The "delegation" of a husband's right of *talaq* to his wife effectively emasculates the right of the wife to obtain divorce through *khula* in her capacity as an independent juristic personality. Given the Holy Quran's emphasis on equality between men and women in respect of the right to divorce, the instrument of *talaq-i-tafwid* is based on false interpretations which necessitate active handing over of authority for divorce by the husband to the wife. Though it may be argued that *talaq-i-tafwid* protects women's rights to divorce while at the same time ensuring that they retain their dower and receive maintenance from their husbands, in reality *khula* provides women with the same safeguards without the need for a delegation of the right to divorce. As has already been discussed, financial sacrifice on the part of women in cases of *khula* is an exception rather than the norm. Not only is *khula* directly derived from the express injunctions of the Holy Quran, it also recognizes a Muslim woman as an independent juristic personality in matters of divorce and allows her to obtain divorce without the need to prove any grounds and without the consent of the husband. As such, the use of *talaq-i-tafwid* is un-Islamic as well as redundant.

C. *Faskh*

The *fiqh* also allows for fault-based divorce or *faskh*, though most of the grounds, by virtue of their nature, are only available to women. *Faskh* can only be acquired through Court intervention, since the dissolution of marriage is claimed on one or more of specified grounds that require formal adjudication. In general, *faskh* results from an irregularity in the marriage contract (for example, a physical condition which impairs sexual relations in the marriage), or upon the violation of a contractual clause, or upon failure

---

[34] Id.

[35] WLUML. KNOWING OUR RIGHTS: WOMEN, FAMILY, LAWS AND CUSTOMS IN THE MUSLIM WORLD 267, Creative Design, (Lahore, 2003).

of one spouse to fulfill certain marital responsibilities (also known as "*tafriq*").[36]

In classical Hanafi law, the only ground available to a woman for divorce through *faskh* is the incapacity of the husband to consummate the marriage. Other m*adahib*, however, provide additional grounds for *faskh*. For instance, *Shia* law allows dissolution if the husband is suffering from insanity, leprosy or venereal disease. The Shafi school of law goes further and recognizes willful refusal to maintain as a sufficient reason for *faskh*. The Hanbali school recognizes various physical and mental defects, as well as desertion for more than six months without just cause and failure to comply with a condition in the marriage contract. The Maliki school appears to be the most liberal in the context of *faskh* and allows the following grounds: physical and mental defects, failure to maintain, desertion, absence for more than one year for whatever reason, and cruelty or ill-treatment by the husband.[37]

Lian is also a form of *faskh* which arises where a husband challenges the legitimacy of a child of the wife by an affirmation that the wife was adulterous. The wife may or may not respond to this allegation, and the husband may even be unable to prove it.[38]

Like *talaq-i-tafwid*, *faskh* is also a redundant creation by jurists, not least because it creates artificial grounds when none are required for divorce.

D. *Mubarat*

Mubarat is divorce by mutual consent of both parties without intervention of a court or *qazi*. In other words, it is generally known to be an "extra-judicial" form of divorce. It should be mentioned at the outset that the terminology of *mubarat* and *khula* has, on various occasions, been used interchangeably. For instance, in classical Hanafi law, the wife cannot insist on divorce by *khula* without the husband's consent and the husband must pronounce the *talaq* before the divorce can take effect. This, however, essentially becomes a *mubarat*, but is commonly known as a *khula*.[39] The same confusion arises in the context of case law generated on the subject in Pakistan. This article will endeavor to use the terms of *mubarat* and *khula* in the proper context, regardless of how they have been used in the relevant case law.

If the husband is the one who makes the initial offer of a *mubarat*, his offer may not be retracted. It is up to the wife, then, to either accept or reject

---

[36] Ibid at 281.
[37] See Pearl & Menski, supra note 3 at 285.
[38] Ibid.
[39] Id at 283.

this offer. This is primarily because the offer by the husband is deemed equivalent to an oath of repudiation, which becomes effective immediately when the wife signifies her acceptance of the offer. On the other hand, if the wife makes the initial offer of a *mubarat*, she may retract her offer at any time before acceptance by the husband. Since *mubarat* requires consent of both parties to the marriage contract, the agreement to divorce may be voidable if it can be shown that either or both of the parties lacked the necessary intent or was induced into acceptance by fraud or duress.[40]

Mubarat is very well-grounded as a legal form of divorce in the Holy Quran. All the Quranic injunctions emphasizing equitable terms in matters of divorce logically refer to divorce by mutual consent. *Mubarat* should, therefore, be retained as a viable, amicable and consensual form of divorce providing spouses with the option of dissolving their marriage on mutually agreed terms and conditions.

IV.
WOMEN'S RIGHTS TO DIVORCE WITHIN THE FRAMEWORK OF CONSTITUTIONAL GUARANTEES & FAMILY LAWS IN PAKISTAN

Part IV begins by describing the existing conflict between Constitutional guarantees and the *Shariat* Law in Pakistan, with particular reference to the impact of this conflict on Muslim women's rights. It then goes on to examine the status of women's right to divorce in Pakistan, as well as how different forms of divorce, as institutionalized by Pakistani laws, impact upon the equality and equity established by the Holy Quran in this respect.

A. *Battle of the Laws: Constitution versus Shariat*

Article 25 of the Constitution provides equal protection of law to both men and women in Pakistan, and prohibits discrimination on the basis of sex alone. It also acknowledges the right of the State to make special provisions for women and children. Articles 25 reads thus:

> **"25.** (1) All citizens are equal before law and are entitled to equal protection of law.
> (2) There shall be no discrimination on the basis of sex alone.
> (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

---

[40] Id at 284.

Similarly, Article 35, while protecting the institution of marriage, makes special mention of the protection of the mother and the child:

> **"35.** The State shall protect the marriage, the family, the mother and the child."

Articles 25 and 35 of the Constitution must be read in the context of the "Islamization" of laws in Pakistan. There is a clear trend in Pakistan towards greater explicit incorporation of Islamic values as part of the overall legal system. Article 1 of the Constitution of Pakistan, 1973 (the "Constitution") declares that Pakistan shall be known as "the Islamic Republic of Pakistan", and Article 2 declares Islam the state religion. The most prominent *madhab* in Pakistan is the Hanafi school, with sizeable *Shia* and *Isma'ili* minorities. Family laws in Pakistan largely reflect the principles of the Hanafi school, though efforts have been made in recent years by various interest groups to re-visit the basis of these laws.

In 1985, the Objectives Resolution of 1949, then contained in the preamble of the Constitution, was made a substantive provision thereof by the insertion of Article 2A by Presidential Order No. 14 of 1985. The oft-quoted part of the Objectives Resolution which forms the basis of *shariat* law in Pakistan is as follows:

> "Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah..."

In addition, Article 227 of the Constitution provides:

> **"227.** (1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.
>
> [**Explanation:** In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.]..."

The significance of the insertion of the Objectives Resolution as a substantive part of the Constitution, read with Article 227 above, is that all laws in Pakistan are, effectively, to be brought into consonance with the Holy Quran and Sunnah. Despite the strong language of Article 277, however, the superior Courts in Pakistan have held that the said Article is not meant to provide any ground for judicial review of legislation. Rather, it merely contains a direction which is addressed to the Parliament, and it is for Parliament alone to determine whether the injunctions of Islam are violated by any particular legislation. In the case of *Hakim Khan vs. The*

State[41] the Supreme Court held that despite the adoption of the Objectives Resolution as a substantive part of the Constitution, no part of the Constitution could be subjected to judicial review on the basis of repugnance or inconsistency with the injunctions of Islam. The following year, in 1993, the Supreme Court further held in the case of *Kaneez Fatima vs. Wali Mohammed*[42] that the Objectives Resolution could not be employed even for the purpose of striking down ordinary legislation. The combined effect of these judgments is that Article 2A of the Constitution and the Objectives Resolution cannot be relied upon by the Courts to provide tests of validity either for the Constitution or for ordinary legislation. The Courts may, however, rely on the Objectives Resolution and the injunctions of Islam in order to examine the validity of executive action. Further, the Courts can import the principles of Islam to cater for situations left untended by express legislation.[43]

In addition to Articles 2A and 227 of the Constitution, the application of *shariat* law has been laid down in various Muslim Personal Law matters by two main statutes: (i) West Pakistan Muslim Personal Law (Shariat) Application Act, 1962; and (ii) Enforcement of Sharia Act, 1991.

The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 directs the application of Muslim Personal Law, notwithstanding any custom or usage, to all questions of personal status where the parties are Muslims. Section 2 of the said Act provides:

> **"2. Application of the Muslim Personal Law.—** Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, *marriage, divorce, dower*, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, *subject to the provisions of any enactment for the time being in force*, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims."

Note the phrase "subject to the provisions of any enactment for the time being in force". This clearly suggests that the application of Muslim personal law even in the stipulated subject areas is subject to other specific legislation in the field.

The Enforcement of Sharia Act, 1991 states that all legislation is to be interpreted in light of *shariat* and that all Muslim citizens of Pakistan shall

---

[41] PLD 1992 SC 595.

[42] PLD 1993 SC 901.

[43] Salman Akram Raja, *Islamisation of Laws in Pakistan*, SOUTH ASIAN JOURNAL. (October-December) 2003 available at http://www.southasianmedia.net/Magazine/Journal/islamisation_laws.htm (last visited on 2nd Feb, 2006).

observe the *shariat* and act accordingly. However, even in this enactment, Section 20 states that:

> "...notwithstanding anything contained in this Act, the *rights of women as guaranteed by the Constitution shall not be affected.*"

It is indisputable, according to the above provision, that the rights of women enshrined in the Constitution are not subservient to any other law. In cases of conflict between *shariat* law, and the constitutional guarantees and other legislation in Pakistan, the latter should clearly prevail. However, the status of traditional *shariat* law vis-à-vis other statutory laws in Pakistan remains contested due to the powers available to the Federal Shariat Court (the "FSC") which runs as a parallel judiciary.

Insertion of chapter 3A into the Constitution by Presidential Order in May 1980 established the FSC. Article 203A of Chapter 3A stipulates that the "provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution", as such making the FSC a supra-constitutional body. Article 203D sets out the primary function of the FSC as follows:

> **"203D** (1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, *examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet*, hereinafter referred to as the Injunctions of Islam."

If a law or provision is determined by the FSC to be "repugnant" to the injunctions of Islamic Law, the State is required to take steps to amend the law so as to bring it into conformity thereof. The law which is declared "repugnant" shall cease to have effect on the day on which the decision of the FSC takes effect. Appeals from the FSC lie to the Supreme Court Shariat Appellate Bench. Subject to the appellate jurisdiction of the Supreme Court, decisions of the FSC are binding on the High Court and all Courts subordinate to the High Court.

The uncertainty created in the law by the tug-of-war between constitutional guarantees and *shariat* law (including the jurisdiction of the FSC), has undeniably shifted the balance of divorce rights in favour of men, many a times at the cost of the rights of women. This is explored below.

B. *Recognized Forms of Divorce*

The main statutes regulating divorce laws and related matters in Pakistan are the Muslim Family Laws Ordinance, 1961 ("MFLO"), the West Pakistan Family Law Courts Act, 1964 ("FCA"), and the Dissolution of Muslim Marriages Act, 1939 ("DMMA"). The MFLO recognizes all the

forms of divorce contained in the *fiqh*, including *khula, talaq* and *talaq-i-tafwid,* and *mubarat,* while the DMMA lays down the grounds for *faskh.* The MFLO, along with FCA, also lays down procedural rules concerning divorce and related matters.

C. *Erosion of Judicial Intervention in Talaq*

With the enactment of the MFLO, procedures for reconciliation before divorce were incorporated to a certain extent through the establishment of an "Arbitration Council". Under Section 7 of the MFLO, any man who wishes to divorce his wife is required, as soon as may be after the pronouncement of *talaq* in any form whatsoever, to give the Chairman of the concerned Union Council a notice in writing of his having done so, and to supply a copy thereof to the wife. Within thirty (30) days of the receipt of this notice by the Chairman, the Chairman is required to constitute an Arbitration Council, consisting of the Chairman and a representative of each of the parties, for the purpose of bringing about reconciliation between the parties. Section 7(3) further lays down that the *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety (90) days from the day on which notice is delivered to the Chairman. However, Section 7(5) states that if the wife is pregnant at the time the *talaq* is pronounced, the *talaq* shall not be effective until the period mentioned in Section 7(3) or the pregnancy ends, whichever is later. During the waiting period, the *talaq* pronouncement remains revocable and, if revoked, does not take effect as a divorce. In effect, the MFLO has attempted to institutionalize the *talaq-i-ahsan* formula for divorce by men, which is the most approved form of *talaq* according to the *fiqh*, and also finds support in Quranic injunctions.

However, the case law arising from Section 7 of the MFLO, has consistently undermined the importance of conciliation in the process of *talaq*. For instance, it was held in *Mst. Farida Parwin v. Qadeeruddin Ahmad Siddiqi*[44] that reconciliation proceedings under the MFLO were merely directory in nature, thus leaving a husband's unilateral right to divorce more or less intact.

The benefit to women of Section 7 of the MFLO was further eroded when men deliberately failed to follow the prescribed notification procedures. This led to abuse of women in cases where they remarried believing that they had been validly divorced and were then prosecuted for bigamy under Section 494 of the Pakistan Penal Code, or for *zina* or adultery under the Zina (Enforcement of Hadd) Ordinance, 1979 (the "Zina Ordinance"), by their former husbands. Taking advantage of procedural

[44] PLD 1971 Kar. 118.

loopholes in the MFLO, men therefore sought to continue to control their former wives, resulting in severe penalties for women.[45]

Judicial trends show that prior to the enactment of the Zina Ordinance, the Courts tended to follow the landmark decision of *Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf*,[46] which held that failure to follow Section 7 of the MFLO, requiring notification of the *talaq* with the Union Council by the husband, would render a *talaq* invalid. However, after the promulgation of the Zina Ordinance, some Courts began to accept the validity of a *talaq* that had not followed the required procedure under the MFLO, in order to protect women from the severe penalties arising from the statutory laws concerning bigamy and zina. This led to a large amount of conflicting case law. The position was finally clarified by the Supreme Court in *Kaneez Fatima v. Wali Muhammad*,[47] where the Court confirmed that there can be no crystal-clear position as regards the interpretation of the notice requirements in Section 7 of the MFLO because of the co-existence of the classical and modern law. In subsequent cases, such as *Federation of Pakistan v. Tahira Begum*,[48] the Courts held that the application of Section 7 of the MFLO was not mandatory.

Finally, in a recent judgment given by the FSC, *Allah Rakha and another v. Federation of Pakistan and others*,[49] the procedures for talaq under Sections 7(3) and (5) of the MFLO have been declared "un-Islamic" in Pakistan. The FSC stated in this case that:

> "It may also be of benefit to express our firm view that the period of iddat is to commence from the date of pronouncement of talaq and not from the day of delivery of notice to the Chairman as the talaq takes effect from the date of pronouncement of talaq by the husband..."

The FSC went further and held that:

> "...*the provisions contained in subsection 3 and subsection 5 of the said section 7 cannot be maintained. Resultantly we declare that subsection 3 and subsection 5 of section 7 of the Muslim Family Laws Ordinance 1961 are repugnant to the injunctions of Islam* and it is directed that the President of the Islamic Republic of Pakistan shall take steps to amend the law so as to bring the above provisions into conformity with the injunctions of Islam. The above provisions of subsection 3 and subsection 5 which have been held to be repugnant to the injunctions of Islam shall cease to have effect on the 31st day of March 2000."

---

[45] See WLUML, supra note 35 at 257.
[46] PLD 1963 SC 51.
[47] PLD 1993 SC 901.
[48] 1994 SCMR 1740.
[49] PLD 2000 FSC 1.

The above judgment of the FSC has been challenged by various activists as being "contradictory, without jurisdiction and destructive of the protection afforded in the Ordinance"[50] and is currently in appeal at the Supreme Court Shariat Appellate Bench.[51] If the FSC decision is upheld by the Supreme Court, it will have the effect of re-approving and institutionalizing the *talaq-i-bidat* form of divorce, which was intended to be eliminated by Section 7 of the MFLO for the protection of the rights of women.

D. *Legal Sculpting of Muslim Women's Rights to Divorce*

Section 8 of the MFLO provides that all recognized forms of divorce, in addition to the *talaq*, are required to follow the procedure in Section 7 (as discussed above). Section 8 of the MFLO reads thus:

> "Where the right to divorce has been duly delegated to the wife and she wishes to exercise that 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 and so far as applicable, apply.*"

Therefore, the wife has to follow the same procedure set out in Section 7 in order to obtain a divorce. Following is a brief discussion of each of these forms of divorce available to women, as institutionalized in Pakistan. Though *mubarat* is also recognized as a legal form of divorce, there is no significant deviation in its practice from the Quranic injunctions. Therefore, the following discussion is limited to *khula, talaq-i-tafwid* and *faskh.*

1. *Khula*

In Pakistan, *khula* is the most commonly accessed form of divorce by women. The procedure for the *khula* is regulated by Section 8 of the MFLO, which means that, as a first step, she must file suit for *khula* in the Family Court under the FCA. Once the Family Court issues the *khula* decree, it sends notification thereof to the Union Council. The Union Council then proceeds as if it has received notice of *talaq* under Section 7 of the MFLO.

---

[50] See *Pakistan: Insufficient Protection of Women*, Amnesty International, London, UK available at http://web.amnesty.org/802568F7005C4453/0/B681F17BF82BE7BE80256B8100631267?Open (last visited on 2nd Feb, 2006).

[51] See *SC Adjourns Family Laws Petition Hearing*, The Dawn, October 24, 2004 available at http://www.dawn.com/2004/10/25/nat10.htm (last visited on 5th Feb, 2006).

Interestingly, even after obtaining the *khula* decree, the wife retains the right to revoke a *khula* during the waiting period.

The current position is that *khula* does not require the consent of the husband, though it cannot be decreed without Court intervention. In the landmark case of *Khurshid Bibi v. Babu Mohammed Amin*[52] the Supreme Court, while deciding that *khula* could be affected without the consent of the husband, made the following observation:

> "There are no basic ideological reasons militating against the view that the Holy Quran in conferring a right on woman to seek dissolution of marriage and providing the forum and rule of decision, authorized the Qazi to dissolve a marriage by khula. In Islam, marriage is a contract and not a sacrament, and whatever sanctity attaches to it, it remains basically a contractual relationship between the parties. Islam, recognizing the weaknesses of human nature, has permitted the dissolution of marriage, and does not make it an unseverable tie, condemning the spouses to a life of helpless despair. *The Quranic legislation makes it clear that it has raised the status of women. The Holy Quran declares in Verse 2:228 that women have rights against men similar to those that men have against them. It conferred the right of khula on women as against the right of talaq in men.*"53

The Supreme Court made several other important observations in this case, one of which was that Courts cannot be bound by juristic interpretations where the Holy Quran expressly provides a rule.

The principle that *khula* does not require the consent of the husband has been consistently upheld in subsequent cases in favor of women. For example, in *Abdul Rahim v. Shahida Khan,*[54] the Supreme Court held that Islam concedes the right to the wife to seek dissolution of marriage on the ground of *khula* when the wife's dislike or aversion to the husband is such that, whether it is justified or not, "the husband and wife cannot live together in harmony and in conformity with their obligations."

However, there continues to be disagreement as to whether or not a plea for *khula*, in itself, constitutes sufficient evidence of hatred to warrant granting a divorce. It was held in *Sayeeda Khanam v. Muhammad Sami*[55] by the High Court that:

> "...when this verse [4:130] is read in conjunction with the repeated injunctions in verses [4:35] and [4:128], that reconciliation and

---

[52] PLD 1967 SC 97.
[53] Ibid. Emphasis added.
[54] PLD (1984) SC 329.
[55] PLD 1952 (WP) Lah. 113.

> agreement is the better course, its effect may be appropriately understood to be that, having made every effort at restoring normal relations between themselves, *then if still the spouses cannot agree, and they separate, their action will not merit disapproval.*"[56]

This suggests that a woman's plea for *khula* should not be rejected on the grounds of lack of formal "proof" for the breakdown in marital relations.

Courts, nevertheless, usually tend to use the test of whether, on the basis of the circumstances presented before the Court, the wife feels she can no longer live with her husband "within the limits prescribed by Allah", that is, an irretrievable breakdown of the marriage has occurred. In the case of *Akhlaq Ahmad v. Kishwar Sultana,*[57] the Supreme Court also pointed out that when determining whether or not to issue a decree for *khula*, the Court is entitled to take into consideration the conduct of the parties subsequent to the institution of the proceedings, especially their behavior during reconciliation proceedings.

With respect to the issue of compensation in cases of *khula*, earlier case law, such as *Razia Khatoon v. Muhammad Yousaf*[58] and *Samia Akbar v. Muhammad Zubair*[59], had held that it was not necessary for a wife to return the dower to obtain *khula* and that the wife's failure to pay compensation did not invalidate the divorce. In some cases, the Courts also considered which of the spouses was at "fault". For instance, in the case of *M. Saqlain Zaheer v. Zaibun Nisa,*[60] the Court took into account the benefits that had been received by the husband (such as housekeeping and childrearing) and subtracted a value for these from the compensation that was due to the husband. This position was in line with the Maliki jurists, who do not automatically impose reparations upon the woman, and do not automatically deprive her of her entire dower. In the Maliki school, much depends on the circumstances of the case.

However, an amendment to Section 10 of the FCA, which came into effect in October 2002, directly refers to *khula* and states that:

> "...provided that notwithstanding any decision or judgment of any court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and *shall also restore to the husband the Huq Mehar received by the wife in consideration of marriage at the time of marriage.*"[61]

---

[56] Ibid. Emphasis added.
[57] PLD 1983 SC 169.
[58] 1987 MLD 2486.
[59] PLD 1990 Lah. 71.
[60] 1988 MLD 427.
[61] Emphasis added.

The above amendment in the FCA has narrowed down the definition of benefits that the wife has to give up in consideration of *khula* to the husband. While this is likely to minimize delay and distress in cases of *khula*, it is disadvantageous to women who may be compelled to seek *khula* for no fault of their own but may not be financially secure. For such women, foregoing the full amount of the dower would be highly inequitable. Indeed, a recent study[62] shows that even when women presented evidence of cruelty and failure to provide maintenance, judges often granted *khula* and awarded the dower to the husband. In more than 80% of the cases that were examined as part of the study, women filed for divorce under "legally acceptable grounds", but accepted *khula*, thus losing the marriage settlements agreed upon in their marriage contracts. In other words, women bought their freedom by forfeiting their financial rights.

As regards the finality of the decree of *khula*, cases such as *Mst. Nahida Safdar v. Muneer Anwar*[63] and *Bushra Bibi v. Judge, Family Court, Bahawalpur,*[64] have confirmed that non-payment of the stipulated compensation for *khula* to the husband does not invalidate the dissolution of marriage. Recovery of compensation being a civil liability, the husband can institute a separate suit for this purpose.

2. *Talaq-i-Tafwid*

The wife's delegated right to divorce, namely *talaq-i-tafwid*, is expressly recognized by Clause 18 in the *nikahnama*, which asks "whether or not the husband has delegated the power of *talaq* to the wife and, if so, under what conditions."[65] Delegation through a written agreement after the marriage is also recognized. Under Section 8 of the MFLO, the wife may revoke a *talaq-i-tafwid* within the 90-day period after she has notified the local authorities.

3. *Faskh*

The DMMA governs fault-based judicial divorce or *faskh* in Pakistan. Section 2 of the DMMA lists the legal grounds, mainly derived from Maliki law, on which a woman married under Islamic law, is entitled to obtain a decree for the dissolution of her marriage. Briefly, the DMMA requires a wife to prove fault on the part of the husband on the basis of the following grounds: (a) desertion for four years; (b) failure to provide maintenance for

---

[62] SHAHEEN SARDAR ALI, SHAPING WOMEN'S LIVES: LAWS, PRACTICES & STRATEGIES IN PAKISTAN, (Shirkat Gah Publication, 2003).

[63] 2000, SD 560.

[64] PLD 2000, 95.

[65] RASHIDA PATEL, WOMAN VERSUS MAN: SOCIO-LEGAL GENDER INEQUALITY IN PAKISTAN 6, Oxford University Press, (Karachi, 2003).

two years; (c) husband has taken an additional wife without fulfilling prerequisites; (d) imprisonment for seven years; (e) failure to perform marital obligations for three years without reasonable cause; (f) husband was impotent at the time of marriage and continues to be so; (g) insanity for two years or leprosy or virulent venereal disease; (h) option of puberty; (i) cruelty; and (j) any other recognized ground for a valid divorce.

The fact that a woman has recourse to the DMMA to secure judicial divorce does not affect her financial claims against her husband. In this regard, Section 5 of the DMMA specifically provides as follows:

> "Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of the marriage."

Also, there is nothing in the DMMA to the effect that the husband's consent is required for the divorce to become final. Neither is there any provision imposing the requirement that the husband pronounce a *talaq* before the wife is free to remarry. Nevertheless, in Pakistan today, dissolution of marriage under the DMMA is the form of divorce that women access the least. This is mainly because evidence requirements are stringent, and a case may take many years to be decided, since the wife has to formally prove "fault" on part of her husband.66 For a start, the wife has to file suit for judicial divorce in the Family Court. Only once "fault" on the part of the husband has been proved does the Family Court issue a decree for dissolution of marriage, on the basis of which a notification is sent to the Union Council. The Union Council then proceeds as if it has received notice of *talaq* under Section 7 of the MFLO.

V.
CONCLUSIONS AND RECOMMENDATIONS

The first and foremost conclusion from the above analysis is that Islamic Law provides equal rights to men and women insofar as access to divorce is concerned. There is no support in the Holy Quran for providing men with rights to unilateral and extra-judicial divorce, and exclusively making women's rights to divorce subject to arbitration. Bringing all forms of divorce under judicial regulation, whether initiated by men or women, is in fact a requirement under Islamic Law. Verse 4:35 of *Surah Al-Nisa* ("If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers"), combined with the reference to "judges" in verse 2:229 of *Surah Al-Baqarah* ("If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on

---

[66] See WLUML, supra note 35 at 290.

either of them if she give something for her freedom"), clearly suggests that all forms of divorce, whether initiated by the husband or wife, are to be subjected to judicial intervention as a pre-condition to the grant of divorce. Hence, it is recommended that all forms of divorce, whether exercised by the husband or wife, should be made subject to judicial intervention in Pakistan. This will also effectively fulfill the Quranic requirement of two witnesses for the divorce to be valid.

The second conclusion that can be drawn from the analysis in this article is that a wife does not require the consent of or approval by her husband for obtaining *khula*. Nor is there any support in the Holy Quran for the proposition that a wife may claim divorce if it has been delegated to her by her husband. Islamic Law grants Muslim women a juristic personality in their own right, independent from their male counterparts. In this context, the concept and practice of *talaq-i-tawfid* is, therefore, unnecessary and un-Islamic. It is recommended that *talaq-i-tafwid* is outlawed in Pakistan.

The third conclusion is that "proof" of marital breakdown is not a requirement for *khula* to be granted. There continues to be disagreement in Pakistani law as to whether or not a plea for *khula*, in itself, constitutes sufficient evidence to warrant granting a divorce to women. In principle, this is a contextually flawed interpretation of *khula*. The Holy Quran does not contemplate that if the aggrieved party is the wife she should give proof of her grounds for divorce. The obvious reason for this is that marital breakdown may result from causes which the wife may not be able to prove before a Court. In spite of all possible efforts for reconciliation, if a wife does not give up her demand for *khula*, there is no reason why she should be directed to obtain a decree of dissolution on the basis of formal proof of her case. It is, therefore, recommended that the law should lay down that *khula* should be granted by the Court after making due efforts at reconciliation without having to provide proof of marital breakdown. Following from this, it is further recommended that since the Holy Quran does not refer to "fault-based" divorce or *faskh* for either men or women, divorce through grounds enumerated in the DMMA should be abolished.

The fourth conclusion is that men do not become automatically entitled to compensation by their wives in cases of *khula*. Compensation by the wife, according to the Holy Quran, is an exception rather than the rule. On the other hand, if it is adjudged that the husband is entitled to some form of compensation on the basis of the facts, the value of such compensation should be restricted to the value of the dower. Hence, it is recommended that in cases of *khula*, Pakistani law should clarify that the Muslim women are not automatically liable to compensate their husbands by repaying them the dower amount, and in the event that they are, the maximum ceiling of the compensation should not exceed the dower amount.

The final conclusion concerns the waiting or *iddat* period that women are required to observe before any divorce becomes final. According to Quranic injunctions, women are generally not required to wait beyond a

period of three menstrual cycles from the initial pronouncement of divorce, unless a *talaq* is revoked during *iddat* by the husband, in which case the divorce is rescinded. It is recommended in this regard that, in cases of *talaq* (divorce initiated by the husband), the formula provided by *talaq-i-ahsan* is retained as the only approved form of *talaq*.