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"UNTYING THE KNOT"-MUSLIM WOMEN'S RIGHT OF DIVORCE AND OTHER INCIDENTAL RIGHTS IN BANGLADESH

by

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Personal laws govern important aspects of family life in Bangladesh such as marriage, divorce, inheritance, guardianship etc. Like many other countries, civil laws have reformed laws relating to the matters mentioned above. In other cases, civil laws have completely replaced personal laws e.g those relating to criminal justice, evidence. Bangladesh therefore falls within that category of country, which has accepted reform or changes only with regard to certain aspects of human conduct as being governed by an uniform law, applicable irrespective of religious affiliation; while retaining the application of religious laws in personal matters. Bangladesh thus differs from countries which have totally replaced religious laws by adopting a secular law (like Turkey or Albania) or countries which have retained Islamic or religious laws (like Saudi Arabia) in all matters.

The *Sharia* laws govern matters relating to marriage and divorce for the Muslims in Bangladesh. However, even in such cases, *Sharia* laws have not been retained in their totality; reforms have been made in family laws all over the Muslim world and Bangladesh is no exception.

CONTRACT OF MARRIAGE :

Marriage is considered to be of utmost importance and the very basis of Muslim society. Muslim jurists regard the institution of marriage as being partly an act of religious significance and partly a contractual transaction. It is considered to be a religious obligation for all capable Muslims to enter into the marital state. Bangladesh society places a great deal of emphasis on the institution of marriage; and for the woman it is perceived to be the only feasible option in life. Disregarding the fact that marriage of a daughter, in most cases, causes financial pressures on the family; what with the social necessity of having to pay dowry, arrange for wedding feasts etc; it is unthinkable that a woman remain unmarried. Due to the special

significance therefore attached to this institution, it is necessary to understand the nature of marriage under Muslim Law; since when we speak of protection of women's rights, to a large extent, we refer to the protection of women's rights within marriage.

Legally marriage under Muslim law takes the form of a contract. Therefore :

> "from a purely juristic point, marriage among Muslims is not a sacrament but a civil contract and though it is solemnized generally with recitations from the Quran, yet Muslim Law does not prescribe any service peculiar to the occasion : [1]

In a court of law, a Muslim marriage is treated like a contract. Having said that however, it is necessary to qualify the above statement by adding that since marriage is an union between two human beings, is it impossible to treat it in the same manner as, for example, a contract of sale. It has sometimes distastefully been called that i.e a contract of sale with the wife being the object of the transaction and the dower the consideration. This might have been true when the wife's family had been paid an amount as brideprice (which was, at that time, referred to as *mehr*) as consideration or compensation for their daughter; while another amount was paid to the bride (known as *sadaq*). However, when the right of *mehr* was recognized as being specifically the right of the wife (not her family) it became bridewealth instead of brideprice.

In practical terms, it may safely be said that contemporary Bangladeshi marriages, with its emphasis on the payment of dowry, have in fact become the contract where the bridegroom is sold. Dowry or *joutuk/dabi* (as it is know in bengali) is the sum of money or other property (this may include such diverse items as jewellery, land, cattle, bicycle, radio) which the bride's family pays to the groom or his family. Dowry payments have become the most significant financial transaction attached to marriages in Bangladesh, so much so that whereas the promise of payment of *mehr* or dower has become a

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1. Verma, B. R. (1975). *Muslim Marriage and Dissolution :* Law Book Company, Allahabad, p-14.

mere formality, the payment of dowry has become immediate and essential. Thus although the wife's right to dower or *mehr* is a right which is emphasized both by the *Quran* and the *Hadith,* in *reality* it affords little protection to her.

Fyzee[2] defines the marriage contract as one that has for its purpose the legalization of intercourse and the procreation of children. Ameer Ali[3] calls it

> "a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union".

Although considered to be a civil contract, marriage by it very nature, cannot purport to be like other civil contracts\ and religious and moral overtones play a significant role in a Muslim marriage. Therein lies the problem i.e whether or not to treat Muslim marriages purely as a civil contract like other contracts but also to take its inherent nature into consideration. Tanzil-ur-Rahman[4] refers to Muslim marriage as a *religious legal* contract' (italics mine) which has for its purpose the regularization of sexual relationship, the establishment of lineage of the progeny and the creation of civil rights and obligations between husband and wife. Marriage aims therefore at the legalization of the relationship between the couple and the legitimization of offsprings.

If treated as a purely secular or social institution, the parties would have to be given the opportunity to stipulate conditions upon which they have agreed. Muslim marriages, however, must conform to the religious laws and rules that exist e.g relating to divorce. Akram J in **IFTIKHAR NAZIR AHMED vs. GHULAM KIBRIA PLD 1968 587** opined :

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2. Fyzee, Asaf A.A (1964). *Outlines of Muhammadan Law :* Oxford University Press, Oxford et al, p. 90.

3. Ali, Syed Ameer (1929). *Mahommdan Law :* Thacker, Spink and Co., Calcutta, p 269.

4. Rahman, Tanzil-ur-Rahman (1978). *A Code of Muslim Personal Law,* Vol. 1, Hamdard Academy, Karachi, p 17.

> "In Islam marriage is a legal notion (Amr-i-Sharayee). It is an act of piety (Abadat)." "The Nikah (contract of marriage) is a 'Sunnat-e-muakkada'-- a rule of conduct, laid down by the Holy Prophet, the observance with which is considered meritorious and a deviation from which is regarded as a sin. It is a contract 'uberima fides', requiring utmost good faith. It originated a legal relation or consortium, a partnership in life, securing harmony, happiness, peace of mind, good fellowship and connubial relations between the couple. The marriage is solemnized by nikah."

There are no special ceremonies or rites which are essentially attached to Muslim marriages and the procedure by which the marital relation may be contracted is relatively uncomplicated. Fyzee[5] says that the legal incidents of marriage in Islam are remarkable for their extreme simplicity. The major requirements which need to be fulfilled, for a valid marriage under *Sunni* law to take place, are the capacity and consent of the parties, the presence of witnesses, the offer by one party and the acceptance of the offer by the other party. Muslim law does not require that the marriage should be solemnized by the priest, *Kazi* or *Mullah,* nor that the marriage should be in writing or be registered. According to Ameer All[6] even the presence of witnesses is not essential for its legality :

> "For, though among the Sunnis the presence of witnesses is considered necessary to the validity of a marriage, their absence only renders it invalid which is cured by consummation."[7]

A marriage in Bangladesh however, is required to be registered under the Muslim Marriages and Divorces Registration Act of 1974. As far as capacity is concerned, only a person who has attained majority can herself enter into a marriage contract— Muslim law however recognizes the right of guardian to contract marriage on

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5. Fyzee (1964). Op. cit., p 91.
6. Ali Ameer (1965). *Mohammahan Law;* All Pakistan Legal Decisions, Lahore, p 243.
7. Ibid p. 243.

behalf of a minor. A woman is deemed to have reached majority upon attainment of puberty and as a major, she alone has the right to consent to her marriage; her guardian cannot do so on her behalf. In 1929 the effort was first made to enact a minimum age of marriage which would be uniform, and would apply to all communities of the then undivided India. Due to the fear of backlash from these communities, the Child Marriage Restraint Act, 1929 only dealt with punitive measures and could not declare marriages, where the parties were below a certain age, void. In 1929 the minimum age was set at 14 for girls. In 1961 by virtue of the Muslim Family Laws Ordinance, 1961 the age was raised from 14 to 16 and by the Child Marriage Restraint (Amendment) Ordinance to 18 in 1984.

DISSOLUTION OF MARRIAGE UNDER MUSLIM LAW :

Muslim marriages may be dissolved by the death of either of the parties. A Muslim husband has the right to dissolve the marriage by divorce at any time he wishes. This is the well know right of the husband called the right of *TALAQ.* Legally, the right of *talaq* gives the husband the license to dissolve the marriage at any time he pleases. Although divorce is considered by Islam to be distasteful, nevertheless it is recognized as a necessary evil. And it places the tools of this necessary evil primarily in the hands of the male. Undeniably Muslim law allows the husband wide powers to pronounce devorce and he may do so without sufficient cause and at his will or whim.

In the case of *talaq* :

> "No consent is required by the wife; and the pronouncement or declaration of talak is extra-judicial, in no way subject to any external check".[8]

Pronouncement of *talaq* may be revocable or irrevocable. A revocable pronouncement of *talaq* only takes effect after the period of *iddat* has expired and may at any time during that period be

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8. Pearl, David (1987). *A Textbook on Muslim Personal Law;* Croom Helm, London et al., p. 100.

revoked. On the other hand an irrevocable divorce takes effect immediately on its utterance, according to religious law. The revocable divorce is considered to be the approved from and called *talaq al-Sunna.* Under *talaq al-Sunna,* divorce may be in the *Ahsan* form which is the more approved ; or in the *Hasan form, which* is also approved but less so. The other form of divorce is called *talaq al-Bida* and is recognized by the *Hanafi* school as the disapproved form because it becomes effective immediately and becomes irrevocable.

By virtue of Section 7(1) of the Muslim Family Laws Ordinance, 1961 however :

> 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 give a copy thereof to his wife.

The object of Section 7 of the MFLO was to prevent impetuous and rash dissolution of marriage by the husband unilaterally using his power of divorce. The aim was to stop the repressive use of *Talaq-al-Bida* or irrevocable divorce by the husband.

The Muslim Family Laws Ordinance of 1961, therefore, attempted to freeze the *talaq* for 90 days during which time representatives of both parties are meant to attempt to bring about a reconciliation.[9] After this period of 90 days is over, the *talaq* becomes effective.

As far as the woman is concerned, her rights regarding divorce are much more confined and depends to a large degree upon her husband. The wife may dissolve the marital tie either by the mutual consent of the parties or at her won behest. The Quran deals with the right of the woman to end her marriage in several verses.[10]

> "It is not lawful for you to forcefully keep women treating them as your property,
>
> and do not harass them with a view to getting back part of the dower. [IV:19].

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9. Ibid, p 109.

10. Mahmood, Tahir (1987). "Law in the Quran : A Draft Code" in *VII Islamic CLQ (1987),* 13 (1-17).

Verses IV:128 lays down :

> "If a woman is scared of cruelty or desertion by the husband, there is nothing wrong if they arrange an amicable mutual settlement; such settlement is best,
>
> though one looks to one's own benefit;
>
> be kind and fear God, God knows all that you do."

KHULA

> "A husband under the Muhammedan Law alone wishing to dissolve the marriage may, after fulfilling all the conditions of the marriage contract, by his unilateral act dissolve it by means of Talaq. If both the husband and the wife wish to dissolve it, the dissolution may take the form of Khula or Mubaraat" **(SAYEEDA KHANUM VS. SAMIR 1952 4 DLR 134).**

In the case of a *khula* form of divorce, the desire to separate or sever the marriage knot comes from the wife's side, and the husband agrees to release her in exchange of some consideration, usually the dower. On the other hand, when both husband and wife wishes to end the marriage, dissolution takes the form of *mubaraat.* Therefore :

> "if the desire to separate emanates from the wife, it is called *khul';* but if the divorce is effected by mutual aversion (and consent), it is known as *mubara'at".*[11]

The *Maliki* Jurists refer to the *khula* form of divorce as *al-talaq bil iwad* or 'a divorce by giving something in return' while to the *Hanafi* jurists the *khula* form of divorce means :

> "the end of a marital relationship with consent either with the utterance of the word khul 'or something that mean the same".[12]

The two essential conditions are common consent and some sort of return or *iwad* (Fyzee 1964:163). *Khul* is therefore a consensual

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11. Fyzee (1964) Op. cit., p. 162.

12. Doi, Abdur Rahman I. (1984). *Shariah : The Islamic Law;* Ta Ha Publishers, London, p. 192.

divorce.[13] According to David Pearl[14] before the introduction of judicial modes of dissolution of marriage, *khul* may have been the only effective method in the classical *Hanafi* law for a wife to obtain divorce.

The reason for this is that the husband agreed to the dissolution because he could get something in return.

> "A *Khula* divorce is affected by an offer from the wife to compensate the husband if he releases her from his marital rights and acceptance by the husband of the offer" **(1952 4 DLR 134).**

Tahir Muahmood expresses the opinion that 'the wife's right to *Khul'* is legally analogous to the man's right of *talaq.* [15]

> "In *talaq* the man must pay the *mahr* if not yet paid and cannot demand its return if already paid. In *Khul* the wife is to forego it in favour of the husband. If a husband refuses to recognize the wife's action in effecting *Khul* she can seek a court order for that purpose; just as a man can do so to give proper effect to *talaq.*"

The true position of the woman's right of *Khula* seems to be confusing. Most authors call it a dissolution where the desire to put an end to the marital relationship emanates from the wife and the husband consents, in exchange of some return. According to an earlier definition by Tahir Mahmood *Khula* is divorce at the instance of the wife to which the husband consents or agrees.[16] He noted that there is a recent trend in certain countries to effect *Khula* by 'judicial intervention even where the husband does not agree to it'. The unilateral and equal right of divorce that the wife possesses is

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13. Pearl, David (1987). Op. cit. p 121.
14. Pearl, D. (1987). Op. cit., p 162.
15. Mahmood, Tahir (1986 "The Grandeur of Womanhood in Islam" in *VI Islamic CLQ (1986),* pp. 1-26.
16. Mahmood, Tahir (1980). *The Muslim Law of India;* Law Book Co. Allahabad, pp. 110-111.

the right under *talaq-e-tafwid* which the wife derives from the husband while he 'derives his power of unilateral *talaq* from the law itself'[17]

In the case of **KHURSHID BIBI vs. MUHAMMAD AMIN PLD 1967 SC 97** the question for consideration was whether a wife under Muslim law is entitled, as of right, to claim *Khula,* despite 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 Supreme Court upheld the decision of **MST. BILQUIS FATIMA vs. NAJMUL IKRAM QURESHI PLD 1959 Lah. 566** that under Muslim Law, the wife is entitled to *Khula,* as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union. The Court categorically laid down that there is a clear distinction between *Khula* and *talaq. Talaq* is pronounced by the husband on his own, but *Khula* signifies reference to some authority or third party (e.g the Court). When there is dissolution by mutual agreement it is technically called *mubaraat* and no reference to the Court is required. In the strict sense therefore *Khula* takes place when dissolution is sought by the wife and is effected by the Court for a consideration to be paid by her.

In later cases, Courts have followed the decision laid down in Bilquis Fatima and Khurshid Bibi's cases. In **SIDDIQ vs. SHARFAN (1968 20 DLR WP 117)** it was held that :

> "The wife is entitled to the dissolution of marriage on the restoration of what she received in consideration of marriage if the Judge apprehends that the parties will not observe the limits of God."

Thus *Khula* form of divorce can now be obtained through Court—'women now enjoy higher social right with the change of time' **(HASINA AHMED vs. SYED ABUL FAZAL 1980 32 DLR 294).** If the husband can divorce the wife by way of *talaq* without her consent, the court was of the opinion, that the wife ought to have the

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17. Ibid, p. 123.

right of divorcing the husband by *Khul,* without his consent.[18] Although the right of *Khul* and the right of *talaq* cannot be equated (since the wife has to go to court and forego her right to dower), it was a bold decision which attempted reforms in the position of women.

Judicial interpretation of religious texts have provided relief in the above case. Bold decisions by the judiciary can be means of reform and reforms must be made which keep view of the changing times. Again as regards legislative developments which effect the right of *Khula,* Section 8 of the Muslim Family Laws Ordinance (1961) has introduced the arbitral provisions of section 7 into the *Khul* procedure.[19]

TALAQ-E TAFWID.

As discussed earlier the husband has the right to terminate the marriage by the use of his right of *talaq.* This right may be delegated, if the husband wishes, to the wife at the time of the marriage or by way of prenuptial or post nuptial agreement between the parties. This is the right of *Talaq-e tafwid* or *tafweez al talak.* The terminology used to refer to the right of delegated divorce has differed from author to author. Fyzee,[20] has used the term *tafwid* while the Hedaya speaks of divorce or *Talak/talaq* by *Tafweez*[21]

The Hedaya[22] (1870:87) defines this right as :

> 'where the husband delegates or commits the pronouncement of divorce to his wife, desiring her to give the effective sentence....."

The right of delegated divorce is an important safeguard for the woman and certain grounds may be specified upon which she may

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18. Pearl, David (1970). "Within the Limits Prescribed by Allah" in *South Asian Review;* Vol. 3 No. 4 July 1970, 320 (313-322).
19. Pearl, David (1987). Op. cit., p. 123.
20. Fyzee (1964). Op. cit., p. 159.
21. *Hedaya* (1870). Translated by Hamilton, Charles; H. Allen and Co., London, p. 87.
22. Ibid., p. 87.

take advantage of the delegated authority. Fyzee[23] calls it the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of the Court. The delegation of authority may be either conditional or unconditional. The conditions however must not be opposed to public policy or the principles of Muslim law.

In the case of **AKLIMA KHATUN vs. MOHIBUR RAHMAN and others (PLD 1963 DAC 602)** the kabinnama gave the wife the right to pronounce divorce if prompt dower was not paid. The wife pronounced divorce after her demand was not met. It was held that such pronouncement was not against public policy and the principles of Muhammadan law. Therefore the wife can use her delegated power of divorce on the failure of her husband to pay prompt dower if it is so stipulated **(ABDUS SUKUR vs. MACHUMA KHATUN 1955 7 DLR 451).**

> "Where there is an express stipulation as to the wife's right to divorce the husband on the basis of delegated power given to her by her husband in the event of not living with her in her parents house, the wife is entitled by virtue of the delegated power to dissolve the marriage tie" **(SHAMSUN NESSA vs. YAKUB MIA 1956 8 DLR).**

The wife can resort to *talaq-i-tafwid* to separate herself on husband's failure to pay maintenance in terms of kabinnama **(SAFURA KHATUN vs. OSMAN GANI MULLA 1957 9 DLR 455).**

The right of divorce delegated to a woman by her husband depends entirely on the wishes of her husband. Therefore, the right of *talaq* of husband and wife cannot be equal.

> "Talak is the power given by Islam to the husband. The wife is not vested with such a power except in the case of tawfeez, i.e. delegation by the husband" **(MST. RESHAM BIBI vs. MUHAMMAD SHAFI 1967 DLR 104).**

Certain conditions may need to be fulfilled before the woman can exercise the right of *talaq* delegated to her. The conditions which

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23. Fyzee (1964) Op. cit., p. 159.

may legally entitle the wife to use her right of delegated divorce may include the second marriage of the husband, non-payment of dower, non-payment of maintenance, ill-treatment of wife etc. The problem arises when the wife exercises her right on the ground that the specified contingency has arisen but the husband disputes her claim. The conditions attached to the delegation needs to be fulfilled stringently. In all cases where a power to grant *talaq* has been given conditionally :

> ".... The condition ought to be fulfilled, literally and fully, before the power can be exercised. In other word, it has to be tested whether the condition exercised in the circumstance of the case is one which is reasonable and not opposed to the policy of the Muhammadan Law" **(AHMED ALI vs. SABHA KHATUN PLD 1952 DAC 385).**

Moreover, if the woman's power of divorce is made contingent on several conditions, then the power can only be exercised upon the fulfillment of all the conditions or contingencies. This means that if the power of pronouncing *talaq* is made to depend on the doing of more things than one, *talaq* would not take effect till all was done[24]. The fact that this right depends solely on the wishes of the husband ensures that it is in no way equal to the right of the husband to pronounce divorce. The pronouncement of *talaq* by the wife in the exercise of her *tafwid* may be challenged by the husband on the ground that the conditions required have not been fulfilled. In several cases for example, where the right of *talaq* by *tafwid* was sought to be used by the wife on the ground that maintenance was not paid, the courts held that the right to get maintenance is dependant primarily on the wife's performing her marital duties or upon her conduct **(11 DLR 17 1959 ; PLD 1952 385).** Therefore in order to take advantage of the right of delegated divorce, the conditions attached to the delegation must, as a pre-requisite, be fulfilled.

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24. Verma, B. R (1975). Op. cit., p. 171.

The right may legally be given unconditionally, although in Bangladesh the conditional *talaq-i-tafwid* is more common. Unconditional delegation of the right of divorce is valid according to Muhammadan law **(AKLIMA KHATUN vs. MAHIBUR RAHMAN 1962 14 DLR 476).** It is only when the right of delegated divorce is given unconditionally that the right of the husband and wife become equal. Otherwise, in practical cases the exercise by the wife of her right may involve her in costly and time consuming legal battles. Although the husband may not contest the divorce given by the wife, it often happens that he institutes a suit against the wife for restitution of conjugal rights.

It must be remembered that it is in the *Khula* form of divorce that the women may be required to give up her dower demand as *iwad* for the husbands consent. There exists some confusion as to the woman's right to dower when the dissolution is by way of her using her right of *talaq-e-tafwid.* The woman is actually entitled to *mehr* or dower in the same manner as if the divorce had been pronounced by the husband. Therefore when the woman possesses the right of *talaq-i-tafwid* and uses it, she is in a more secure position, at least in theory, than if her husband had consented to the dissolution (i.e *Khula* form of divorce).

In 1961 the Muslim Family laws Ordinance by section 8 laid down that where the right of divorce has been duly delegated to the wife and she wishes to exercise it; or where the wife dissolves the marriage by any manner (including dissolution by a decree of the Court) the wife is required to give notice in writing to the relevant authority and supply a copy to the husband in the same manner as the husband is required to do if he is the one pronouncing divorce.

The right of *talaq-i-tafwid may* be an important safeguard for women although it can in no way be called equal to the right of the husband as regards *talaq.* Nevertheless a woman whose contract of marriage contains this right will definitely find it easier to escape from an undesirable union. The husband should be asked to delegate this right at the time of the marriage. There have been cases where the

groom's side has refused to include this right on the ground that it is inauspicious to think of the marriage coming to an end. If the husbands right of *talaq* is considered to be inherent, the woman should not be deprived from the protection that this right affords.

STIPULATIONS IN THE MARRIAGE CONTRACT :

The insertion of conditions or stipulations in the marriage contract, whereby the wife lays down certain conditions which have to be fulfilled, may afford another protection for the married woman. The wife may reserve the right to seek divorce on the payment of some sort of compensation on conditions or stipulations being broken.

On the face of it, the 'stipulations in the marriage contract', which usually entitles the wife to divorce herself on the happening or omission of certain events seems to be the same as the power of delegated divorce. However, the non-performance of a stipulation inserted in the marriage contract may grant the wife rights other than divorce e.g compensation or maintenance. Tyabji[25]. says that a stipulation in the marriage contract for divorce, is not delegation of the husband's power. According to him.

> "At the time the agreement is made the man is not the husband of the woman - but about to become the husband. the stipulation consequently takes effect as part of an independent contract to which the persons who subsequently become husband and wife are both parties"[26]

The various schools of Muslim law hold differing views as to the legality of inserting such conditions. For although the Courts have reiterated time and again that marriage under Muslim law is a contract whether like other contracts stipulations or conditions can be attached to the contract is unclear.

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25. Tyabji, Faiz Badruddin (1968) *Muslim Law* -The personal laws of the Muslims in India and Pakistan; N.M Tripathi pvt. Ltd., Bombay, p 156.
26. Ibid p. 156.

According to Engineer[27]

> "Since marriage is contractual in Islam either side can validly lay down certain conditions. It is technically known as khayar al-shart (choice to put conditions)".

The *Hanafi* school does not recognize the validity of stipulations inserted in the marriage contract. Neither do the *Malikis* and the *Shafiis.*According to the above schools, such stipulations are void unless they are supported by some express authority or merely reinforce the normal effects of marriage.[28]

According to them:

> ".....the divine Lawgiver had prescribed the legal effects of a contract of marriage and that these were not subject to variation at the whim of the parties"[29].

The Hanbalis on the other hand, though generally the more orthodox school of thought, support the inclusion of stipulations in the contract as valid and enforceable. The Hanbali school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city or will not take her along on a journey or that he will not take another wife, the conditions and the contact are both valid and must be fulfilled.

> "According to the Hanbalis all stipulations which are not themselves prohibited and not manifestly inconsistent with the nature of marriage are valid and enforceable".[30]

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27. Engineer, Asghar Ali (1992). *The Rights of Women in Islam.*, IBS BUKU SDN. BHD, Selangor Darul Ehsan, p 113.

28. Coulson, N. J (1957). "Reforms of Family Law in Islam" *in Studies Islamica;* Vol VII, 1957, 139-140 (135-155).

29. Anderson, Norman (1976). *Law Reform in the Muslim World*; The Athlone Press. p 49

30. Coulson 1957 op cit., pp 135-155.

Therefore the *Hanbalis* recognize the validity of any stipulation in a marriage contract by which a husband undertakes not to do something which the *Sharia* normally permits but does not require as part of the essence of marriage[31]

Normally the conditions which are sought to be inserted are those which are likely to alleviate the position of woman. It is necessary therefore to find out whether or not the insertion of these conditions are really disallowed or whether like other aspects, it is merely another way to stop granting the women rights while go against the rights of the man.

The *Hadith* clearly states that the Prophet was in favour of such condition.

The *Sahih Al-Bukhari* states that:

> 'Umar said: The rights are decided by the conditions (stipulated during the wedding). And Al-Miswar bin Makhrama said: The Prophet mentioned his son-in-law and praised him highly as a son-in-law. He said, "whenever he talked to me he told me the truth and whenever he promised me, he kept his promise"[32].

Eminent jurists and authors have expressed differing views on the inclusion of enforceable stipulations in the marriage contract.

According to the Hedaya[33] if a man marries a woman for a thousand dirhams on the condition that he is not to marry during his subsisting marriage and he fulfills this condition, the woman is allowed only the promised dower. On the other hand, if the husband 'should infringe the condition' by marrying another wife she shall be entitled to her proper dower (proper dower is the dower which the wife is entitled to receive according to what is usual with reference to her paternal family and relatives). Therefore the principle is that she is entitled to

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31. Anderson, N. (1976). op. cit., p. 115.

32. *Bukhari* (1986). The Translation of meanings of Sahih-Al-Bukhari; by Muhammad Muhsin Khan; Islamic University, p. 61.

33. Hedaya (1870). Op cit p 49

more than the promised dower, if the husband fails to fulfill the condition agreed 'because he has acceded to a condition on behalf of the woman which was advantageous to her.'[34]

Other jurists however opine that such a condition would be void although the contract of marriage itself shall remain valid and not be affected by the illegality (in their opinion) of the condition attached. For example according to Shama Charan Sircar[35], conditions such as the husband shall not take another wife, that he shall not make her a participator of his inheritance or supply her with maintenance shall be held void.

Tahir Mahmood comes to the defence of the legitimacy of stipulations in the marriage contract by saying that it is only at the formative stage that the contractual element is attached to the marriage contract. Once the marriage comes into existence it takes the form of a sacred covenant and the man and the woman may:

> "mutually settle their own terms for the entire duration of the partnership and in respect of all its aspects and phases"[36]

Wilson[37] has mentioned several stipulations 'which may not be embodied in a contract o marriage' and these include conditions such as those stipulating that the wife need not live with her husband; or those declaring the marriage to be temporary only. Again any condition that one party shall be at liberty to cancel the marriage on discovery or certain defects in the other party is also void.[38]

Most countries have had to settle for a liberal interpretation of what is permitted in a contract of marriage. The principles of the Hanbali school have been liberally borrowed and assimilated so that Courts

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34. Ibid p. 49.

35. Sircar, Shama Charan (1874). *The Muhammadan Law-- Tagore Law Lectures;* Thacker, Spink and Co. Calcutta. p. 363.

36. Mahmood, T (1986). Op. cit., 10 (1-26).

37. Wilson, R.K (1895). *Digest of Anglo-Muhammadan Law;* W. Thacher and Co., London et al, p. 56.

38. Ibidp. 56.

have repeatedly upheld the stipulating of conditions in the *kabinnama.*

In the case of **JAMAIT ALI SHAH VS. MIR MUHAMMAD (38 IC 1916 10)** it was held that:

> "When a marriage contract is entered into subject to an essential condition of a reasonable nature, not opposed to the policy of the Muhammadan Law, the Court may set aside the marriage on the breach of that condition, unless the condition has been waived or the breach thereof acquiesced in by or on behalf on the wife".

In the case of **MUHAMMAD AMIN vs. MT. AIMNA BIBI and OTHERS (A.I.R. 1931 Lah 134)** the plaintiff had entered into an agreement whose terms were as follows: "I shall not marry another woman in the presence of Aimna Bibi, and if I do so she is to be held to have been divorced by me, on account of the second marriage; simultaneously with that second marriage she will be qatai haram (absolutely fobidden) to my person and this very divorce by me in her favour would be valid and legal". Addison J. opined that an agreement by the husband allowing the wife to divorce herself under certain specified contingencies amounts to a delegation of his powers by the husband and the pronouncing of the divorce by the wife amounts to the husband pronouncing it. Addison J. went on to add that he saw no difference between the husband agreeing that he shall be held to have divorced his wife, where a certain contingency arises and a condition allowing a wife to divorce herself upon a certain contingency arising. It was held that :

> "the agreement was valid and amounted to a divorce and was a complete answer to a suit for restitution of conjugal rights by the husband."

In other similar cases the Court has leaned heavily in favour of the wife.

By inserting stipulations in the contract of marriage the evils of polygamy may be circumvented, for although the law requires the first wife's permission to be taken if the husband wishes to marry again, in

practice such permission is seldom taken. In 1933 in the case of **(Mt. SADIQA BEGUM vs. ATA ULLAH A.I.R 1933 Lah. 885)** it was again held that in an agreement between a husband and wife the latter is entitled to divorce on the ground that her husband has married and such an agreement in not opposed to Mahommedan law or public policy.

What seems to be the essence of the laws relating to conditions in the marriage contract is that *Hanafi* law does not permit conditional marriage contracts i.e. any condition upon which the marriage itself is contingent is unlawful; however reasonable, lawful stipulations may be inserted in the contract of marriage.

In 1956 the Pakistan government with the view to reform certain aspects of the Muslim law appointed the Commission on Marriage and Family Laws.The Commission posed various questions and gave recommendations. These recommendations faced severe criticisms from the orthodox clergy.

Surprisingly the two famous persons who had disagreed with the view of the other members of the Commission both agreed that conditions could be inserted in the marriage contract. The question posed by the Commission was put in the following way :

> "Do you agree that any condition may be inserted in the marriage contract which is not repugnant to the basic principles of Islam and morality, and that all such conditions shall be enforceable in a law court?"

In answer to the above, the Commission opined that:

> "There is consensus of opinion that marriage under Muslim law is a civil contract, and any conditions which are not repugnant to the basic principle of Islam and morality can be inserted in the Nikah-nama and that all such conditions can be made enforceable in a court of law"[39].

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39. Gazette of Pakistan, Extraordinary, (June 20, 1956). Ministry of law, Government of Pakistan, Karachi, p. 1210.

Maulana Ehtishamul-Huq in his note of dissent on the report of the Family Commission admitted that the insertion of conditions in the marriage contract is not prohibited by the Shariat and any person was anxious to have any condition inserted in the marriage contract should be allowed to do so. However he was of the opinion that the insertion of these conditions should not be encouraged because firstly restrictions placed on such a delicate relationship such as marriage may prove harmful in the end. "Secondly,

> such conditions should be avoided lest they may reduce the whole thing to a mere commercial transaction devoid of all the feelings of love and companionship, for if this practice becomes common, it is likely to give rise to many social and moral evils"[40].

The prescribed *nikahnama* form (under Section 5 of the MFLO 1961) contains the provision to insert special conditions (clause no.17). Stipulations which protect women and which may be inserted in the marriage contract affords women wide protection and has been widely accepted as being valid. Unfortunately ignorance of this right has ensured that very rarely are such protective stipulations inserted in the contract used.

DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939:

Under Muslim law dissolution of marriage through the Court, i.e. judicial divorce, is called *faskh. Faskh* means abrogation or termination and is the dissolution or rescission of the marriage contract by judicial decree[41]. The Act of 1939 provides for certain grounds under which a woman may obtain a dissolution of marriage. The passing of the Dissolution of Muslim Marriages Act of 1939

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40. The Gazette of Pakistan, Extraordinary (Aug. 30, 1956)., Ministry of Law, Government of Pakistan, Karachi, p. 1580.

41. Halim, M Abdul (1993). Social Welfare Legislation in Bangladesh; Oihik, Dhaka, p 31.

marked the first step towards reform in such laws in the Indo-Pak subcontinent.[42]

> "Prior to the passing of this the notion of judicial annulment of marriage at the instance of a Muslim wife was not recognized by the various schools of Law except for the Maiki school"[43].

Classical Hanafi law denied women the right to obtain dissolution of marriage by the decree of the court. According to Pearl[44] under *Hanafi* law the only ground on which a woman may obtain a judicial termination of marriage occurs when she can prove to the court that her husband is incapable of consummating the marriage. This means that the Courts, following the *Hanafi* interpretation, denied women the rights of dissolution available to them under the Sharia.[45]

The Act of 1939 went a long way towards granting women in the subcontinent the right of obtaining rescission of the marriage contract by judicial decree.

The grounds under which a woman may judicially seek to dissolve the marriage include:

1) The whereabouts of the husband are unknown for a period of four years.
2) Failure of the husband to provide for the maintenance of the wife for a period of two years.
3) Sentence of imprisonment on husband for a period of two years.
4) Failure without sufficient cause to perform marital obligations.
5) impotence to husband.
6) Insanity of husband.
7) Repudiation of husband by wife.

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42. Feroze, Muhammad Rashid (1962). "Reform in Familiy Laws in the Muslim World" in *Islamic Studies* Vol. 1. No 1962, 108 (107-130).
43. Ibid., 109 (107-130).
44. Pearl, D. (1987) Op. cit., p. 130
45. Fyzee (1964). Op. cit., p. 169.

8) Cruelty of husband and any other ground recognized by Muslim law.

The rights of women in Islam regarding the right to divorce are not equal. Whether the woman utilizes her right of *talaq-e-tafwid*, dissolves the marriage tie through *khula* or goes to Court for a judicial dissolution based on the Act of 1939, equality of rights regarding divorce does not exist. The man still has unrestricted right to repudiate his wife whereas the woman has: in the case of *talaq-e tafwid*, to depend on her husband's delegation of the right; in the case of *khul*, where the husband does not consent, to convince the Court that the marriage has transgressed the bounds prescribed by Allah; and in the case of *faskh* or judicial dissolution to involve oneself in costly legal procedures.

One must deal with the application of laws with regard to the social context of that particular country. Polygamy is an example of the misuse of power vested by the *Quran*, which allow men to have up to four wives, *but only on condition that the wives are treated equally.* The necessity of equality between the wives is impossible to fulfill (as the Quran in verse iv:128-129 agrees "and you will not be able to deal equally between your wives even though ye may wish"), Neither is the necessity for obtaining the consent of the former wife (required under the MFLO 1961) practicable where consent can easily be obtained from a wife financially and otherwise dependant on the husband. Various countries have construed Quranic injunctions regarding polygamy to prohibit polygamy (eg Tunisia).

Until such time when we have a political power bold enough to take the necessary drastic steps we need to take advantage of other methods e.g the insertion of stipulations in the marriage contract, judicial rather than legislative reforms etc. It is possible to mould or interpret religious law in such a manner that instead of strictly adhering to those which cause hardship and inversely effect the rights of women they will grant them greater rights. Khurshid Bidi's case is a case in point. David Pearl[46] refers to this case as the only

46. Pearl, David (1976). "The Legal Rights of Muslim Women in India, Pakistan and Bangladesh " in *New Community* 6,68(1976), 73(68-74).

major judicial reform that took place in Bangladesh and Pakistan in which the Supreme Court decided:

> "that a wife is entitled as of right to a khul being granted to her by the court if she shows that she is unable to live with her husband 'within the limits prescribed by Allah".

The form of reform need not be radical from the very beginning lest they cause more harm to the rights of women by giving rise to radical opposition. From a practical point of view what one wishes to achieve is the actual alleviation of the position of women in general in Bangladesh which means the vast majority of illiterate women living in the rural areas in whose lives religion and custom plays an intrinsic part. Reforms may take place in a variety of ways. Statutory reforms (e.g the Child Marriage Restraint Act of 1929, Muslim family Laws Ordinance of 1961)have made important changes. In India there is a statutory innovation which allows parties to opt out of the religious regime upon marriage in order to enable a common law to control the legal status arising out of marriage.[47]. This proves an option to parties in a marriage contract to choose to be governed by an uniform law applicable to all. Judicial interpretation and precedent may also be important modes of reform.

Reforms keeping within the confines of Muslim Law may easily be based on the principle that all things are permitted unless expressly prohibited.

This means that everything that is not specifically disallowed is deemed to be lawful based on the principle that 'lawfulness is the recognized principle in all things'.[48] Many countries have relied on the doctrine of *takhayur* (e.g Egypt, Sudan) to effect reforms.

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47. Ibid., 68(68-74).

48. Ali, Maulana Muhammad (1973). *The Religion of Islam;* The Ahmadiyya Anjuman Isha at Islam, Lahore, p. 495.

> "Takhayyur (selection) refers to the right of a Muslim to select and follow the teaching of a law school other than his own with regard to a particular legal transaction"[49]

By the use of this doctrine, validity has been afforded to the insertion of stipulations in the marriage contract. Use has been made of the rules of the Hanbali school which allows such insertion. According to Norman Anderson[50] this eclectic principle of *takahayyur*:

> "progressively expanded in its scope, has proved the major expedient in legislation introduced, in one country after another, to effect reforms in family law".

The right of the woman to go to the Court to obtain judicial termination of her marriage is also not recognized by the *Hanafi* school, and the doctrine of t*akhayyur* allowed this right, recognized by the *Maliki* school to be used for the benefit of women belonging to the Hanafi school.

Although substancial reforms were made facilitating Muslim women's right to divorce by the Dissolution of Muslim Marriages Act of 1939, the Muslim Family Laws Ordinance, 1961 and more recently, the Family Courts Ordinance of 1985, in reality little has changed. Women fail to take advantage of these laws, enacted for their benefit, due to lack of education, ignorance about their rights, poverty, lack of access (due to whatever reason) to judicial relief etc.

One of the major reforms required, in order that women may escape unhappy unions through the exercise of their right of divorce, is to the laws regarding custody and guardianship of children. Many women continue to suffer abuse because they are under the apprehension of losing their children for ever. Apart from that, stricter enforcement is necessary of laws relating to registration of marriage, age of marriage, dowry payments etc. A massive campaign to inform

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49. Esposito, John L. (1976) "Muslim Family Law Reform: Towards an Islamic Methodology" in Islamic Studies Vol. XV No. 1, 1976, 20(19-51).

50. Anderson, N (1976). Op. cit., p. 48.

women of their rights, both under religious as well as civil laws is essential.

Whatever the manner or methodology of reform required, wherever required, whatever opposition has to be faced; the fact that improvement of the condition of women is necessary is undeniable. The debate should be about how to, and not about whether to, change and improve conditions. It must to be remembered that Islam with its primary message of equality of all humankind; heralded as a religion which treats all believers as equal, must do just that-- treat all humankind which includes both men and women -- as equal. Equality must not only be between *all* men but also between men and women.