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DISSOLUTION OF MARRIAGES ON TEST : A STUDY OF ISLAMIC FAMILY LAW AND WOMEN

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Introduction

The central theme of this article is to assess comprehensively to what extent the legislative enactments in family law, especially on dissolution of marriages have contributed to giving women in Bangladesh better protection from economic deprivation and violence. This study also focuses on the question whether women in Bangladesh stand to benefit from judicial activism. Along with the trend for more modern legislation in Bangladesh, this indicates a clear manifestation of a new sensitivity in issues involving the welfare of women, particularly protecting them from abuse.[1]

There are, generally speaking, three types of dissolution under Muslim law, dissolution by the death of either party, dissolution by act of the parties and dissolution by judicial process or *faskh*.[2] The dissolution of marriage by judicial process or *faskh* will be discussed by analysing the *Dissolution of Muslim Marriages Act* of 1939. The dissolution of marriage by an act of the parties will be discussed by showing the later developments in the Pakistani period under the *Muslim Family Laws Ordinance* of 1961 and finally the judicial developments in Bangladesh regarding dissolution by act of the parties will also be projected.

In *Sharia* law, the unilateral right of the husband to divorce his wife without the intervention of the court is often exercised

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1. Malik, Shahdeen: 'Saga of divorce women: Once again Shah Banu, maintenance and scope for marriage contracts'. In 42 DLR (1990) Journal, pp.34-40, at p.39.

2. Fyzee, Asaf A.A.: *Outlines of Muhammadan law*. 1st ed. Bombay 1949, 2nd ed. 1955, 3rd ed. 1964, 4th ed. New Delhi 1974, p.154.

arbitrarily and irrationally, making the lives of women miserable. Muslim law places the right in the husband in the expectation that he will take recourse to it rationally and with justice.[3] However, a Muslim husband of sound mind may divorce his wife without any cause whenever he desires.[4] This right of the husband has been described by authors as unfettered and unilateral.[5] In its extreme, this has led to the *talaq-al-bidah* pattern of divorce, where a husband pronounces triple divorce at one sitting. This has been regarded as a serious problem affecting women's lives as it is treated as irrevocable and final.[6] The right of dissolution of marriage at the instance of the Muslim wife was not recognised in South Asia and that this led to the reforms of the *Dissolution of Muslim Marriages Act* of 1939. This Act provided grounds under which Muslim women of South Asia could dissolve their marriage. Under this Act, the case of a wife seeking redress needs to be judicially scrutinised, which is a lengthy procedure, whereas for Muslim men there is no need to assign any reason for divorce.[7] Thus, divorce is easier for Muslim husbands than wives.[8]

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3. Mahmood, Tahir: *The Muslim law of India.* 1st ed. Allahabad 1980. 2nd ed. 1982, p.113.

4. Fyzee (1974), p.150; Mullah, Farduji Dinshad: *Principles of Mahomedan law.* 10th ed. Calcutta 1933, 17th ed. (1972), p.293.

5. Coulson, Noel J.: *Conflicts and tensions in Islamic jurisprudence.* Chicago and London 1969, p 75; Esposito, John L.: 'Perspectives on Islamic law reform: The case of Pakistan'. *In International Law and Politics.* Vol.13, No.2, 1980, p.229.

6. See, Fyzee (1974); Rahman, Tanzil-ur: *A code of Muslim personal law.* Vol.i, Karachi 1978.

7. Puri, Balraj: 'Muslim personal law: Questions of reform and uniformity be delinked'. In *Economic and Political Weekly.* 8th June 1985, pp.987-990, at p.989; Mahmood, Tahir: 'Progressive codification of Muslim personal law'. *In Islamic law in modern India.* Delhi 1972, p.90; Carroll, Lucy: 'Talaq-i-Tafwid and stipulation in a Muslim marriage contract: Important means of protecting the position of South-Asian Muslim wife'. *In Modern Asian Studies.* Vol.16, No.2, 1982, pp.277-309, at p.278.

8. Pearl, David: *A textbook on Muslim law.* London 1979. 2nd ed. 1987, p.100; Hodkinson, Keith: *Muslim family law-a source book.* London and Canberra 1984, p.246.

The Dissolution of Muslim Marriages Act, 1939

The Act provided women in British India, married under Muslim law, the right to apply to a court for a judicial divorce, which was not recognised before, although all schools of Islamic law recognise that a Muslim wife has a right to approach the *Qadi* or court for *Faskh* or judicial dissolution of her marriage.

The basis of the law can be traced in the fourth chapter of the Quran, which deals with wives.[9] Syed Ameer Ali reported that according to *Shahih al Bukhari*, the power of the *kazi* to pronounce a divorce is also founded in the express words of the Prophet that if a woman be prejudiced by a marriage, let it be broken off.[10] The various schools of Islamic law accepted the basic principles of dissolution of marriage but differed on the circumstances in which it should be applied.[11] Syed Ameer Ali stated the differences among schools to dissolve the status of marriage by a *Qadi* or judge.[12] For example, under the Hanafi doctrine, inability to provide maintenance is not sufficient ground for asking for a divorce when the husband does not have sufficient means. Whereas under the Shafi law, inability to provide maintenance, wilful or otherwise, is a cause for the *Qadi* to dissolve the marriage.[13] Thus to secure dissolution, a Hanafi woman, might be tried by a Shafi Kazi, whose pronouncement is also binding on her. This device to select and combine various elements of different schools of law is known as *Takhayyur* or an eclectic choice between parallel rules of the various schools of Islamic law.[14] This selective process of

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9. *Holy Quran.* iv: 34-35 as cited by Mahmood, Tahir: *Muslim personal law-role of the state in the Indian subcontinent.* 2nd ed. Nagpur 1983, p.45; Fyzee (1974), p.168.
10. See Ali, Syed Ameer: *Mahommedan law.* Vol.ii, 5th ed. New Delhi 1985, p.519.
11. Mahmood (1983), p.45.
12. See Ali (1985), pp.519-533.
13. *Ibid.*, pp.520-521.
14. Layish, Aharon: 'Shariah, custom and statute law in a non-Muslim state'. In Cuomo, I.E. (ed.): *Law in multicultural societies.* Jerusalem 1985, p.102; Coulson N.J.: *A history of Islamic law.* Edinburgh 1964, p.185.

overcoming divergences was hardly followed. Even though the courts in British India were given powers before 1939 to apply the law of one of the schools of Muslim law in a case in which the parties were followers of different schools, on grounds of justice, equity and good conscience, the courts were reluctant to apply the more liberal rules of Maliki law to parties following other schools.[15] This led to the passing of the *Dissolution of Muslim Marriages Act* of 1939.

Thus, there are differences among the schools of Islamic law concerning the precise grounds which would entitle a Muslim wife to judicial dissolution of her marriage. The Shafi school allows the wife's right to judicial divorce on the grounds of her husband's inability to maintain her, as well as his imprisonment, insanity, or affliction with serious disease. The Malikis, in addition, would allow a wife a judicial divorce if her husband failed or refused to maintain her, had been missing for four years, had abandoned or deserted her, or ill-treated her.[16] The Hanafi school only allowed a wife to apply for judicial dissolution of her marriage for the husband's impotency, insanity and leprosy.[17] However, she could also obtain dissolution of her marriage on the grounds of putative widowhood if her husband had become a missing husband.[18]

Not only are there divergences between the schools with regard to the grounds for the dissolution of marriage, but also differences of opinion within any one ground. For example, the Maliki, Hanbali

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15. Hussain, Syed Jaffer: 'Legal modernism in Islam: Polygamy and repudiation'. In *Journal of the Indian Law Institute*. Vol.7, 1965, pp.384-398, at p.396. See chapter 3.1.2 for details of the application of this maxim.

16. See for details Carroll, Lucy: 'Muslim women and judicial divorce: An apparently misunderstood aspect of Muslim law'. In *Islamic and Comparative Law Quarterly*. Vol.V, No.3-4, 1985, pp.226-245, at p.230; Mahmood (1983), p.45.

17. Nasir, Jamal J.: *The Islamic law of personal status*. London 1986, p.114; Carroll (1985), pp.230-231.

18. Coulson, N.J.: *A history of Islamic law*. Edinburgh 1964, p.185.

and Shia schools agree that a woman is entitled to re-marry after four years of her husband's absence, provided permission of the kazi or an order of a court has been obtained before the second marriage. The Shafi school requires that the woman should wait for her husband's return for seven years, after which she can re-marry with the prior permission of the kazi. Within the same school the jurists differ from each other. According to Abu Hanifa, a woman has to wait 120 years for the return of her husband before remarriage. But Muhammed reduced the period to 110 years and Abu Yusuf further reduced it to 100 years.[19] According to *Hedaya* and *Fatwa-i-Alamgiri* under the Hanafi law, the wife of a missing husband had to wait for at least 90 years before contracting a second marriage.[20] Thus the Hanafi wife had impossible grounds for the judicial dissolution of her marriage.[21]

In British India, as Hanafi law was dominant, this caused immense hardship to women as the courts denied Muslim women the rights of dissolution available to them under the *Sharia*. The situation became so alarming that women only for the purpose of dissolution of their marriage renounced their faith.[22] Thus there was a growing demand to reform the laws to ameliorate the status of women; the emerging debate was also influenced by the reforms in other countries.[23] The Muslim community repeatedly expressed dissatisfaction with the view held by the courts.[24] The *Ulemas*

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19. For details see Ahmad, K.N.: *The Muslim law of divorce.* New Delhi 1984, p.502; Ali (1917), p.118.

20. Ahmad (1984), p.502.

21. Anderson, Norman: *Law reform in the Muslim world.* London 1976, p.39.

22. Mullah, Farduji Dinshad: *Principles of Mahomedan law.* 10th ed. Calcutta 1933, p.209; Baillie, B.E. Neil: *A right of Muhammadan law.* 2nd ed. London 1887, p.29; Malik, Vijay: *Muslim law of marriage, divorce and maintenance.* 2nd ed. Lucknow 1988, p.4; Mahmood (1983), p.48; Qadri, Anwar Ahmad: *Commentaries on the Dissolution of Muslim Marriages Act, 1939.* Lucknow 1961, p.87.

23. Schacht, Joseph: *An introduction to Islamic law.* Oxford 1964, p.104.

24. Mahmood (1983), p.46; Fyzee, A.A. Asaf: 'Muslim wife's right of dissolving her marriage'. In *Bombay Law Journal.* Vol.xxxviii, 1936, pp.113-123; Khambafta, K.J.: 'Dissolution of Muslim marriage at the instance of the wife'. In *Bombay Law Journal.* Vol.xi, 1934, pp.290-291.

issued *Fatwas* supporting non-dissolution of marriage by reasons of the wife's apostasy. The debate only reached its height when cases of apostasy by Muslim women to get rid of their husband began to be reported from different parts of the country.[25] Thus the main reason for the support of the religious scholars and functionaries to the issue was to protect the Islamic *ummah* rather than to ameliorate the position of women.[26] The *Ulema* found that there was no way out but to secure legislation empowering judges in India to dissolve Muslim women's marriages in specified circumstances.[27] This reasoning of the *Ulema* was based on a book[28] which enumerated in detail the Maliki principles which can be applied to dissolve Muslim women's marriage under specified circumstances.[29] It was also suggested in the book that some Muslim members of the Central Legislative Council should introduce a Bill based on these recommendations.[30] Accordingly the leaders of Jamiat ul-Ulema prepared a Bill.

On 17th April 1936 the Bill was introduced by Qazi Md. Ahmad Kazmi, a member of the working committee of the Jamiat ul-Ulema. While the main purpose of the legislation was to protect Islam, in the Legislative Assembly the women's cause was shown as the main issue. While considering the Bill, Mr. Abdul Qaiyum said that the enlightened sections of the community believe that the time has come when a serious attempt should be made to restore all rights which were granted by the Quran to Muslim women.[31] He further said that owing to the attitude of Muslim

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25. Mahmood, Tahir: 'Indian legislation on Muslim marriage and divorce'. In Gangrade, K.D. (ed.): *Social legislation in India.* Delhi 1978, pp.16-29, at p.20.
26. Carroll (1985), p.233.
27. Mahmood (1983), p.46.
28. Thanvi, Ashraf Ali: *Al- Hilat Al-Najija Lil Halilal Al-Ajiza*, published in Arabic and Urdu in Delhi 1932.
29. Mahmood (1983), p.47.
30. *Id.*
31. *Legislative Assembly Debate.* Vol.i, 1939, p.621.

males and the highhanded manner in which Muslim women are treated, they have been forced in innumerable instances to resort to conversions which were not genuine conversions, but only in order to escape the marital tie.[32]

On the merit of the Bill, the Honourable Sir Md. Zafrullah Khan said that it puts down, in the space of one printed page, the various grounds on which divorce may be obtained by a woman married under Muslim law. The lack of such provision had caused a great deal of distress, misery and suffering in India.[33] He stated further that *khula* or divorce obtained at the instance of the wife was practically unknown in British-India and, if granted, was confined to the narrowest possible limits. In other Muslim countries, however, the various grounds of *khula* were freely recognized.[34]

Mrs. K. Radhabai Subbrayan, the only female member of the Assembly, expressed her support for the Bill and ventured to say that this Act would be the beginning for all progressive measures with regard to women.[35] The statement of the reasons and objects of the Bill indicates the circumstances for which the Bill was passed,

There is no provision in the Hanafi Code of Muslim law enabling married Muslim women to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafi or Hanbali Law. Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3,

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32. *Ibid.*, p.622.
33. *Ibid.*, p.877.
34. *Ibid.*, p.878.
35. *Ibid.*, p.878.

Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called 'Heelat-un-Najeza' published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki Law and highlighted that under the circumstances prevailing in India it may be applied to such cases. This has been approved by a large number of Ulemas who put their seals of approval on the book.

As the courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above-mentioned principle is called for in order to relieve the sufferings of countless Muslim women.[36]

The Bill became law on 17th March 1939 as the *Dissolution of Muslim Marriages Act*, 1939 (Act VIII of 1939). The new Act was an attempt to reinstate liberal Muslim provisions which were not contrary to Muslim law. Under sec. 2 (ii) of the Act a wife is entitled to the dissolution of her marriage when her husband has failed to provide for her maintenance for a period of two years. The entitlement of the wife to maintenance depends on the principles of Muslim law. Under section 2(iv) of the Act, a wife is entitled to the dissolution of her marriage when her husband has failed to perform, without reasonable cause, his marital obligations for a period of three years. Whether the husband is impotent or not has to be decided in accordance with Muslim law. Finally, under section 2(ix) of the Act, a marriage can be dissolved by the wife on any ground recognised as valid under Muslim law. This illustrates the application of Muslim law.

However, there are provisions of the Act which effect substantive changes and in some ways, as claimed by some scholars, contravene the principles of Muslim law. Tahir Mahmood has explicitly described the circumstances in which the husband might have withheld maintenance.[37] In particular, if the wife is *nashizah*

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36. *Gazette of India*. Part v, 1938, p.36.

37. Mahmood, Tahir: *The Muslim law of India*. 1st ed. Allahabad 1980. 2nd ed. 1982. 3rd ed. 1987, pp.97-101.

(disobedient) or refractory, under Muslim law she is not entitled to maintenance and so her marriage cannot be dissolved on the ground of the husband's failure to provide maintenance for a period of two years.[38] Further on, it has been held by the courts that a wife who refuses to return to her husband without sufficient cause is not entitled to maintenance.[39] The rulings of the courts are mutually contradictory as they are based on the "fault" theory and contrarily the modern "breakdown" theory.[40] The view that judicial dissolution or *faskh* can be granted irrespective of the wife's faulty conduct has been criticised by some scholars as it is not in consonance with the principle of *Nushuzah* under Islamic law.[41]

As we saw under the Hanafi law inability to maintain was not by itself considered a ground for divorce,[42] whereas under the Act failure to maintain, even on account of poverty, ill-health or imprisonment, is a good ground for the dissolution of the marriage.[43]

On the question whether the wife has a right of dissolution on the ground that the husband is missing, the right of dissolution arises after the expiry of the waiting period. As we saw under Hanafi law, the wife of a missing husband had to wait for an impossibly long time before contracting a second marriage. Under Maliki law, however, the period of waiting was only 4 years. The first change regarding this issue was made by the *Evidence Act* of 1872. Section 108 of the Act provides for a presumption that a person shall be considered to have died if he has not been heard of for a period of 7 years.[44] The Act of 1939 has further reduced the period to 4 years, adopting the Maliki law.

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38. Rahman, Tanzil-ur: *A code of Muslim personal law*. Vol.i, Karachi 1978, p.288.
39. Majida Khatoon v Paghalo Mohammad PLD 1963 Dhaka 583; Sardar Muhammad v Nasima Bibi PLD 1966 Lahore 7.
40. Mahmood (1980), p.101.
41. Fyzee (1974), p.172.
42. *Asmat Bibi* v *Samiuddin*, 79 IC 1925 Cal 991; See also Manchanda, S.C: *The law and practice of divorce*. Allahabad, 4th ed. 1973, p.727.
43. *Zafar Hussain* v *Mst. Akhbari Begum* AIR 1944 Lahore 336.
44. *Mazhar Ali* v *Budh Singh* 1884 ILR All 297 (FB).

On the ground of cruelty of the husband, there was no dissolution of marriage under the traditional Hanafi law.[45] On the ground that the husband had more wives than one and did not treat them equitably in accordance with the injunctions of the Quran, under section 2 (viii)(f) of the Act, it has been held that if the wife is herself at fault so that the husband finds it impossible to maintain equal treatment between her and his other wives, she cannot be entitled to dissolve the marriage.[46] But when the husband did not provide any money to one wife while maintaining his other wives, it was held that he had not treated the wives equally.[47]

With regard to the provisions of Muslim law concerning impotency it is for the wife to establish the allegation that her husband is suffering from incapability and that she was ignorant of it at the time of marriage.[48] Under section 2(v)(c) of the Act the burden of proof has been shifted to the husband to prove that he has been cured of his defect.

The Act also made substantial changes to the Islamic doctrine of *Khiyar al-bulugh* or "option of puberty". Before the Act, a minor could repudiate her marriage, which was contracted by her guardian, when she attained puberty. After the 1939 Act, the age of puberty is fixed at the completion of 15 years, irrespective of the actual time of attainment of puberty.[49] This clause eliminates the fight over proof of puberty.[50] Moreover under the traditional Islamic law, a girl could not exercise this option against the decision of marriage made by her father or paternal grandfather, but only against other guardians. This assumption of the jurists was based on the reasoning that as they were so closely related to the girl, it could be presumed that they must have acted in her best interests.[51]

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45. Ahmad (1984), p.11.
46. Badrunnisa Bibi v Muhammad Yusuf AIR 1944 All 23.
47. Mst. Zubaida Begum v Sardar Shah AIR 1943 Lah 310.
48. Ahmad (1984), p.421.
49. Mahmood (1980), p.103.
50. For an example see *Mst. Daulon* v *Dosa* PLD 1956 Lahore 712.
51. Ahmad (1984), p.10; Hamilton, Charles (trans.): *The Hedaya*. 2nd ed. London 1957, p.37.

However, this reasoning is not based upon any Quranic prescription or *sunnah* of the prophet.[52] Moreover the courts have held that the consummation of marriage before the girl attained the age of 15 years did not destroy the option of puberty.[53] Tahir Mahmood points out that it is doubtful whether this is in conformity with Muslim law.[54]

The central question of apostacy has not been elaborated on by the Act. It only states in the fourth section that a Muslim woman's apostacy of Islam shall not dissolve her marriage. The fact is that if the women apostates to become a *kitabia* (who follow religious books), the marriage remains valid, as Muslim men are entitled to marry a *kitabia.* But if she apostates to a religion which does not follow a holy book, the marriage is considered void *ab initio.* However, in the Act the position of a woman who was originally a convert to Islam from some other faith remained intact in the sense that any later conversion dissolved her marriage automatically.[55] Thus, the Act has abolished apostacy as a ground for dissolution of marriage by a Muslim woman, taking away a right she already had. Now she must obtain a decree of the court before she considers her marriage dissolved.[56] This shows the conflict of Muslim interests and women's rights.

Thus, the Act was passed with many modifications, which was against the wishes of the Ulemas who drafted the original Bill[57] and made them disappointed. Their main grievance was that the

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52. Siddique, Muhammed Mazheruddin: Women in Islam. Lahore 1952, pp.83-84; Esposito, John L.: Muslim family law in Egypt and Pakistan: A critical analysis of legal reform, its sources and methodological problems. Ph.D. Thesis, Temple University, Ann Arbour, Michigan 1974, p.45.

53. For an example see *Ghulam Sakina* v *Falak Sher Allah Bakhsh* AIR 1950 Lahore, p.45.

54. Mahmood, Tahir: Muslim personal law-role of the state in the Indian subcontinent. 2nd ed. Nagpur 1983, p.49.

55. Mannan, A.M.: 'The development of the Islamic law of divorce in Pakistan'. In *Journal of Islamic and Comparative law.* Vol.5, 1974, pp.89-98, at p.92.

56. Malik (1988), p.72.

57. Mahmood (1983), p.49.

jurisdiction under the Act was not reserved for Muslim judges to extend the application of the Act to a couple who later become Muslims, to adopt the provisions relating to "option of puberty" to the traditional Hanafi principles and to make the provisions of sec. 4, dealing with the effect of apostacy to confirm the classical Muslim law.[58] In July 1942, Md. Ahmed Kazmi pressed for amendments, but was not successful as the amendments were not acceptable to the Government. Moreover, necessary support for them could not be secured in the legislature. The Ulemas blamed the leaders of the Muslim League in the legislature for giving the Bill a progressive outlook and for not keeping it within the Islamic framework.[59] Perhaps the leaders of the Muslim League in the legislature were successful in their effort for the passage of the Act as it was a progressive law reform. In this tug of war of Islamisation and modernisation, women, almost by chance-gained some rights which could have been hard to achieve otherwise.

The Act has a very limited scope in the sense that it did not restrict the arbitrary power of the Muslim husband to pronounce *talaq* or restrict polygamy.[60] Moreover, it has to be asked whether transferring the power of dissolving marriages from the husband to the judges (who are usually men) would improve the situation. Some scholars think that the delicate matters of family life will create a scandal if they come to open court.[61]

The *Dissolution of Muslim Marriages Act* of 1939 could not provide equal rights to the spouses with regard to the dissolution of marriage as the wife who could not fulfil the requirements of the specific grounds recognized in the Act did not have any redress.[62]

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58. Mainul, Md.: *Jamaiat-al-ulama kya Hay.* Delhi 1946.

59. *Id.*

60. Singh, Sukhdev: 'Development of the concept of divorce in Muslim law'. In *Allahabad Law Review.* Vol.5, 1973, pp.117-127, at p.126; Hussain (1965), pp.384-398.

61. El Arousi, M.: 'Judicial dissolution of marriage'. In *Journal of Islamic and Comparative Law.* Vol.7, 1977, pp.13-20.

62. Esposito, John L.: *Women in Muslim family law.* New York 1982, p.81.

For example, incompatibility of temperament was not considered a valid ground for the wife asking for *khula* divorce, although she foregoes her dower.[63] However the situation changed in 1959 when judicial *khul* was allowed if the wife was unable to keep the limits ordained by God as envisaged in the Quran, i.e. if in their relations to one another the spouses will not obey God and a harmonious married state as envisaged by Islam will not be possible.[64] This judicial *khul* without the husband's consent was reaffirmed in 1967 by the Supreme Court of Pakistan by granting a unilateral judicial *khul* to the wife for incompatibility of temperaments.[65] Thus although the legislative enactments in Muslim law had limitations, the judiciary was trying to be the gap filler for enhancing the rights of women.

The dissolution of marriage in the Pakistani period

Due to immense pressure from the women's organisations and their sympathisers,[ii] the government established a Commission on Marriage and Family Laws on 4th August 1955 to review the situation and suggest necessary changes. The Commission was to decide whether,

The existing laws governing marriage, divorce, maintenance, and other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam.[66]

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63. For an example see *Sayeeda Khanam* v *Muhammad Sami* PLD 1952 (W.P.) Lahore 113 (F.B.).

64. See *Balquis Fatimah* v *Nazm-ul-Qureshi* PLD 1959 (W.P.) Lahore 566 (para 42).

65. *Khurshid Bibi* v *Mohammed Amin* PLD 1967 SC 97. For a discussion of judicial *khul* see, Hinchcliffe, Doreen: 'Divorce in Pakistan: Judicial reform'. In *Journal of Islamic and Comparative Law*. Vol.ii, 1968, pp.13-25; Carroll, Lucy: 'The Muslim Family Laws Ordinance, 1961: Provisions and procedures'. A reference paper for current research'. In *Contributions to Indian Sociology*. (NS), Vol.13, 1979, pp.117-143.

66. The Marriage and Family Laws Commission Report was published in *The Gazette of Pakistan*. 20th June, 1956, pp.1197-1232, at p.1197 and is here after referred to as The Report.

The primary object of setting up the Commission was to examine whether the existing family law needed any alterations and modifications to enhance the position of women. Professor Coulson has argued that to some degree the Commission was set up to ensure that the existing laws conformed with Islamic principles.[67] But that was not the sole purpose of its formation. According to the Marriage Commission itself,

The primary object of the Commission was to revive in a slightly modified form the rights, granted to women by Islam.[68]

The Commission recommended the abolition of *talaq-al-bidah* and in addition suggested that *talaq-al-hasan*[69] should be made obligatory. They emphasised that this is not against the divine revelation or the teachings and the practice of the Prophet.[70]

Maulana Ehteshamul Haq in his dissenting note agreed that the *talaq-al-hasan* form of divorce was favored by the Prophet and therefore ought to be encouraged:

> We do not propose to give any encouragement to the practice of indiscriminate *talaqs* either For this we suggest that *talaq*, whether pronounced at one sitting or three sittings, should not be permitted without compelling reasons because to keep the way to unrestricted *talaq* open and to bar its enforcement and execution would be a premium on vice and adultery.[71]

The Maulana seemed to be in favour of *talaq* with compelling reasons, although he did not emphasise this. The *Ulema* was advocating to check *talaq-al-bidah* by education and awareness

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67. Coulson, N.J.: 'Reform of family law in Pakistan'. In *Studia Islamica*. Vol.7, Sept. 1957, pp.135-155, at p.136.

68. The Report, p.1203.

69. This is the repudiation of marriage by the husband by three pronouncements made during three *tuhrs* or period of purity. This has been regarded as the most approved form of divorce by the husband. See, Ali (1917); Fyzee (1974).

70. The Report, pp.1211-1213.

71 The Dissenting Note, p.1585.

of the law, not by legislation. However, he was not proposing to declare three pronouncement of *talaq* in one sitting to be ineffective or invalid.[72]

On the matter of divorce at the instance of the wife, the Commission expressed the view that no modification of the *Dissolution of Muslim Marriages Act* of 1939 was necessary. The Commission emphasised that *talaq-e-tahweed* and *khula* should be made more certain and precise.

On *talaq-e-tahweed* the Commission was of the opinion that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce as the man, if the right to do so had been delegated to her in the marriage contract by the man.[73] It was pointed out by an author, while reporting on the Dissenting Note, that Maulana Ehtishamul Huq emphasised that the delegation of the right of divorce by the husband to the wife should not be considered as an absolute right of the wife as described by the Commission.[74] The traditional critics were of the view that when the husband transferred his right of repudiation of marriage, he was left with no power and authority to repudiate it.[75]

The correct exposition of the law has been given by Tanzil-ur-Rahman who noted that if the husband delegates to his wife the right to divorce, his own right of effecting divorce does not lapse, but subsists so long as the wife does not exercise the right.[76]

On *khula* the Commission recommended that incompatibility of temperament should give the wife a right to demand a divorce.[77] The member critic, however, was of the opinion that the declaration

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72. *Ibid.*, pp.1581-1589.

73. The Report, p.1210.

74. Feroze, Muhammad Rashid: 'The reforms in family laws in the Muslim world'. In *Islamic Studies*. Vol.i, No.1, 1962, pp.109-130, at p.114.

75. Islahi, Amin Ahsan: 'Marriage Commission Report X'rayed'. In Ahmad, Khurshid (ed.): *Marriage Commission report X'rayed*. Karachi 1959, p.187, (2nd ed. Karachi 1961, under the title *Studies in the family law of Islam*).

76. Rahman (1978), pp.341-343; Carroll (1982), pp.277-300.

77. The Report, p.1215.

of incompatibility of temperament as a valid ground for dissolution of marriage by *khula* would throw open the floodgates of *talaq* and spell moral and social ruin for the society.[78] What he meant to say, presumably, was that women should not be given a say in decisions about divorce.

Section 7 of the Muslim Family Laws Ordinance (MFLO) requires the intervention of the Arbitration Council and seeks to curb unilateral divorces by Muslim men. It states in section 7 (1) that as soon as any man has given *talaq*, he should send the Chairman[79] notice in writing of his so doing and send a copy to the wife. The stipulated effect of such notice is to freeze the *talaq* for 90 days, during which limit the Chairman together with representatives of both parties, tries to reconcile them under section 7(4) of the MFLO. Section 7(3) of the Ordinance seems to indicate that after 90 days the *talaq* becomes effective unless the parties were reconciled. Any person who does not comply with these provisions is punishable by fine or imprisonment under section 7(2) of the MFLO. Section 7(3) of the MFLO has only purported to convert *talaq-al-bidah* from an irrevocable and final divorce to a revocable one.[80]

Talaq

One of the first cases on divorce was the much noted Supreme Court decision in *Ali Nawaz Gardezi* v *Muhammad Yusuf*,[81] where the purpose of section 7 of the Ordinance was re-stated,

> The object of section 7 is to prevent hasty dissolution of marriages by *talaq*, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status. If the husband himself thinks better of

78. The Dissenting Note, p.1590.

79. Chairman under section 2(b) means the Chairman of the Union Council or a person appointed by the central or provincial government or by officer authorised by the government. This provision has been changed in Bangladesh.

80. Coulson, N.J.: 'Islamic family law: Progress in Pakistan'. In Anderson, J.N.D. (ed.): *Changing law in developing countries*. London 1963, p.251.

81. PLD 1963 SC 51.

> the pronouncement of *talaq* and abstains from giving a notice to the Chairman, he should perhaps be deemed, in view of section 7, to have revoked the pronouncement and that should be to the advantage of the wife.[82]

The debate was, *inter alia*, on the issue whether notice to the Chairman of the Union Council was mandatory. While it has more recently been pointed out by an author that it is argued by some that the introduction of the notice requirement is contrary to the Quran and the *sunnah*, [83] in the 1960s the courts assumed that notice was mandatory.

On the question whether *talaq* given without complying with the provisions of the Ordinance is valid, there are now two contrary trends of cases. One trend suggests that the notice to the Chairman of the Union Council is mandatory.[84] A whole line of cases follows this leading case.[85] However, the opposite position is also reflected in the case-law and a number of cases have held that notice is not an essential criterion.[86]

The right of the wife to be notified under section 7(1) seems clearly enforceable by the penal sanctions contained in section

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82. *Ibid.*, p.75.

83. Pearl, David: 'Executive and legislative amendments to Islamic family law in India and Pakistan'. In Heer, Nicholas (ed.) *Islamic Law and jurisprudence*. Washington 1990, p.207.

84. Ali Nawaz Gardezi v Muhammad Yusuf PLD 1963 SC 51.

85. *State* v *Tauqir Fatima*, PLD 1964 Kar 306; *Abdul Aziz* v *Rezia Khatun*, 21 DLR (1969) 733. *Abdul Mannan* v *Sufuran Nessa*, 1970 SCMR 854; *Muhammad Salahuddin Khan* v *Muhammed Nazir Siddique*, 1984 SCMR 583. For details of the issue see, Carroll, Lucy: 'Talaq in Pakistan: Notification, revocation and the Muslim Family Laws Ordinance'. In *Islamic and Comparative Law Quarterly*. No.4, 1984, pp.238-247; Carroll, Lucy: 'Talaq in Pakistan: The question of notification again'. In *Islamic and Comparative Law Quarterly*. No.5, 1985, pp.287-297.

86. *Chuhar* v *Gulam Fatima* PLD 1984 Lah 234; *Noor Khan* v *Haq Nawaz* PLD 1982 FSC 265; *Md. Rafique* v *Ahmad Yar* PLD 1982 Lahore 825; *Marina Jatoi* v *Nuruddin K. Jatoi* PLD 1967 SC 580.

7(2).[87] The early cases in Pakistan made it mandatory to supply a copy of the notice of *talaq* to the wife.[88] However, several later cases arrived at a contrary decision.[89] If the primary object of the Ordinance was to enhance the position of women priority has more recently been given to Islamisation rather than concerns of women.[90] We shall see in below that Bangladeshi law now differs significantly from the law of Pakistan in this area.

Other types of dissolution of marriage

Section 8 of the MFLO required the same procedure to be followed in other cases of dissolution of marriage than *talaq*. In the suit of *Mst. Mumtaz Mai* v *Gulam Nabi*,[91] the procedure required in the Ordinance could not be availed of as the suit was filed before promulgation of the Ordinance; the case implies that in *khula* cases also the same procedure as in section 7 should be followed. In the case of *Muhammed Amin* v *Mst. Surraya Begum*,[92] it was held that the expression "wished to dissolve marriage otherwise than by *talaq*" includes dissolution sought on the ground of *khiyar al-bulugh* or option of puberty, as it is in full accord with the phraseology employed in section 2 of the *Dissolution of Muslim Marriages Act* of 1939.[93] Recently there has been a surge of cases under section 8, which will be discussed below.[94]

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87. For details see Carroll, Lucy: 'Wife's right to notification of *talaq* under Muslim Family Laws Ordinance, 1961'. In PLD Journal 1985, pp.272-276.
88. *Inamul Islam* v *Mst. Hussain Banu* PLD 1976 Lah 1466.
89. See for example *M. Zikria Khan* v *Aftab Ali Khan* PLD 1985 Lah 319.
90. Mahmood (1983), p.164.
91. PLD 1969 HC 5.
92. PLD 1969 Lah 512.
93. *Muhammad Amin* v *Mst. Surayya Begum* PLD 1969 Lah 512, at p.518.
94. See for details on Pakistani period, Carroll, Lucy: 'Consensual divorces and the Muslim Family Laws Ordinance, 1961'. In PLD Journal 1987, pp.121-127.

The judicial developments in Bangladesh

The judicial developments in Bangladesh regarding dissolution by act of the parties, for example *talaq* by the husband, show that there are some instances where the statutory enactments, by strictly adhering to the procedural technicalities, are favouring women to continue their marriage. On the other hand, this is putting women in a dilemma, as in the eyes of the official law their marriage subsists but according to Islamic law and the society they are divorced when the husband has pronounced *talaq* three times in one sitting. The problem arises because of the continuation of the irregular form of *talaq* known as *talaq-al-bidah*, which has been referred to as a deviation from the divine principles.[95] The concern of the Commission of Marriage and Family Laws and later the enactment of section 7 of the *Muslim Family Laws Ordinance* 1961 was to change this instantly effective form of *talaq*, but this was not entirely successful.

Cases of *talaq*, *khula* and *talaq-e-tahweed* are all dissolution by the act of the parties. While the former is the unilateral right of the husband, the latter is the complementary right of the wife where she has to make some sacrifice or depends on the desire of the husband to delegate. The cases of *talaq*, *khula* and *talaq-e-tahweed* in Bangladesh are important to consider whether women are actually deprived of rights granted under Islamic law.

Talaq

In the *talaq* cases, by rigorously following the procedural technicalities and the precedent of *Ali Nawaz Gardezi* v *Mohammad Yusuf*,[96] non-judicial dissolution of marriage by *talaq-al-bidah* was being disregarded. Without notice to the Union Council or *Upazila* Chairman, a divorce would not be effective. It was also argued by Western authors that the requirement of notice is

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95. Mir-Hosseini, Ziba: Marriage on triala study of Islamic family law, Iran and Morocco compared. London and New York 1993, p.37.

96. PLD 1963 SC 51.

mandatory as without it the *talaq* itself is invalidated.[97] The Family Court decisions in Bangladesh confirm the position that without notice to the Arbitration Council, the *talaq* will not be effective. This remained the official law of Bangladesh[98] till the recent decision of the High Court Division of the Supreme Court of Bangladesh in *Sirajul Islam* v *Helana Begum*[99] where it was held that non-sevice of notice to the Chairman of the Union *Parishad* under section 7 of the Ordinance could not render the divorce ineffective when sworn in before the Magistrate, the Court relied on the decisions of the Pakistani Courts.

In Pakistan, more recently the Supreme Court has ruled that notice of divorce to a Union Council Chairman under section 7 of the *Muslim Family Laws Ordinance*, 1961 is against the *sharia* and the Constitution of Pakistan.[100] Still more recently, further cases have supported this position. This seems not to be the position in Bangladesh possibly because there is no express trend of Islamisation in family law but the abrupt decision of the High Court Division of the Supreme Court of Bangladesh in *Sirajul Islam* v *Helana Begum*[101] that even without notice to the Chairman divorce will be legally effective is not the general trend of the cases. However, it appears to protect women better by following the reforms enunciated by the statutory enactments.

In *Mst. Fatima Begum* v *Muhammad Golam Hossain*,[102] the Family Court ascertained that the marriage between the parties

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97. Pearl, David: *A textbook on Muslim personal law*. 2nd ed. London 1987, p.111; Anderson, J.N.D.: 'Reforms in the law of divorce in the Muslim world'. In *Studia Islamica*. Vol.xxxi, 1970, pp.41-52, at p.51; Hodkinson (1984), p.223.

98. Choudhury, Obaidul Huq: *Hand book of Muslim family laws*. Dhaka 1993, p.63; Haq, Md. Nurul: *Paribarik Adalot ain o alochona*. Dhaka 1990, p.136.

99. 48 DLR 1996, 51.

100. Carroll, Lucy: 'Talaq and polygamy: Some recent decisions from England and Pakistan'. In *Islamic and Comparative Law Quarterly*. Vol. V, No.3-4, 1985, pp. 226-245.

101. 48 DLR 1996 51.

102. Family Suit No.61 of 1991 (unreported).

subsisted as the *talaq* given by the husband was not in accordance with section 7(1) of the MFLO.

In *Anjuman Ara* v *Md. Abdur Rashid*,[103] the Family Court also held that the *talaq* of the husband did not affect the marriage as it was not given as required under section 7(1) of the *Muslim Family Laws Ordinance*, 1961. Thus, the strict interpretation of section 7 of the *Muslim Family Laws Ordinance*, 1961 protects women officially. But it is not taken into consideration what will happen to such women if in society they are regarded as divorced but in accordance with official law their marriage persists.

In *Mst. Roksana Begum* v *Md. Abdul Khair*,[104] the defendant could not prove that he had given *talaq* to the wife and was liable to pay maintenance. The court did not accept the social fact that he had given *talaq* in the traditional way, gave more preference to the statutory enactment and regarded it as an incomplete *talaq*. This has protected the woman, as otherwise she would have been worse off financially. On the other hand, there are a large number of occasions where the women are simply deserted or thrown out of their homes. How is the judiciary or the society protecting them? Even when the courts are arguing that these *talaqs* are incomplete and invalid, the Muslim women in Bangladesh are in a difficult situation as remain unsure about their marital status. In the eyes of the society they are divorced by *talaq*, but in the official legal system they are not divorced.[105] Thus, the statutory impediment of giving notice to the Arbitration Council sometimes works against women as they may be legally married under the official law but the society does not accept that and considers them as divorced by *talaq*.

In *Mst. Meherunnahar* v. *Rahman Khondakar*,[106] the Family Court squarely applied the classical Muslim law when the marriage

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103. Family Suit No.97 of 1990 (unreported).

104. Family Suit No.96 of 1991 (unreported).

105. Ahmad, Husna: Divorced yet married: The position of Bangladeshi women between English and Bangladeshi law. LL.M. Essay (unpublished) London SOAS 1991, p.5.

106. Family Suit No.24 of 1987 (unreported).

is not consummated, the wife is not entitled to any maintenance.[107] The facts of the case were that the parties were married under the Islamic *sharia* on 07–03–85 but after a few months, in September 1985, the wife was sent back to her father's house and on 25–05–87 the marriage was dissolved by *talaq*. The court rejected the allegation of the defendant that the wife had venereal disease but decided that the *talaq* was effectively given.

In *Mst. Fatema Begum* v. *Md. Golam Hossain*,[108] Justice Monjurul Basith did not allow the plaintiff to restore her conjugal rights on the ground that one cannot be forced to continue one's conjugal life. The court, however, ascertained that the marriage between the parties subsisted. The *talaq* purported to have been given by the husband was not in accordance with the provisions of section 7(1) of the *Muslim Family Laws Ordinance* 1961. The notice of *talaq* was given, in the above case, to an unauthorised person and not to the *persona designata*, i.e. the Chairman of the Union.

In *Anjumanara* v. *Md. Abdur Rashid*,[109] the Family Court also held that the *talaq* of the husband did not affect the marriage as it was not given as required under section 7(1) of the *Muslim Family Laws Ordinance*, 1961. Thus, the strict interpretation of section 7 of the *Muslim Family Laws Ordinance*, 1961 protects women officially. But it is not taken into consideration what will happen to such women if in society they are regarded as divorced but in accordance with official law their marriage persists.

In *Mst. Hafeza Bibi* v. *Md. Shafiqul Alam*,[110] the plaintiff and defendant were married under a registered *Kabinnama* on 09–07–86 with the dower money fixed at Tk. 50,001/–. The defendant gave *talaq* to the plaintiff on 18–11–91. The court did not grant maintenance to the wife during the subsistence of the marriage, as she was not obedient to her husband. One of the main criteria's of her disobedience was that she was staying away from her husband.

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107. See Ali, Ameer Syed: Mohammedan law. Vol.II, Calcutta 1917, p.463.
108. Family Suit No.61 of 1991 (unreported).
109. Family Suit No.97 of 1990 (unreported).
110. Family Suit No.28 of 1992 (unreported).

However, the court allowed her maintenance for the *iddat* period.

In *Md. Kutubuddin Jaigirdar* v *Nurjahan Begum*,[111] as notice had not been served to the relevant Chairman, the *talaq* was held invalid. The plaintiff-respondent Nurjahan Begum brought this suit against her husband for a declaration that the marriage between her and her husband had been dissolved as a result of the exercise of the delegated power of divorce by her. She also used an alternative prayer that if the court found that the marriage tie between them had not been legally dissolved, then the court should grant a decree for dissolution of their marriage. This is a heavily contested suit which shows the trouble women have to face to free themselves from the marital bond. The facts of the case were that the plaintiff Nurjahan Begum was married to the defendant Kutubuddin Jaigirdar on 27th July 1965 according to Muslim law. The defendant executed a *kabinnama* in which the dower amount was fixed at Rs.10,00,000 of which Rs.5,000 was prompt dower; the delegated power of divorce was given to the plaintiff. The defendant's father was against this marriage and drove the couple out of his house and they stayed for some time in the plaintiff's father's house. During this period it was found that the husband was ill-tempered, arrogant and cruel by nature and the life of the wife became miserable due to his assaults and cruel conduct. Their relationship became very strained and finally the husband agreed to divorce her by writing. The *talaqnama* was registered on 17.6.66. Subsequently, the husband instituted a suit for restitution of conjugal rights and for a permanent injunction purporting to restrain the wife from taking another husband. The court decreed that although the marriage had been dissolved by *talaq* by the husband, as no notice had been given under sections 7 or 8 of the *Muslim Family Laws Ordinance* 1961, the marriage bond was still subsisting and the *talaq* was invalid. An appeal was made by the wife to the Court of District Judge who dismissed the appeal with the modification that the wife should be restrained from marrying for the second time till a valid divorce was obtained. On 21.7.67 the wife exercised her delegated power of

111. 25 DLR (1973) 21.

divorce and instituted a suit with the prayer to declare that by the exercise of the delegated divorce their marriage had been dissolved. But the trial court dismissed the suit on the ground that there was no exercise of delegated divorce by the plaintiff and no notice. On appeal, three years later the appellate court terminated the marriage on a new ground, that of *khula*. On second appeal by the husband, the court dismissed the appeal with the modification that the decree for dissolution of marriage was substituted by a decree declaring the marriage dissolved by the exercise of the delegated power of divorce by the wife.

This case not only projects the long procedure a woman may have to go through to have her marriage terminated and the confusions existing because of the various forms of divorce in Islamic law, but also the problem of the official law not being accepted by the society. Justice D.C. Bhattacharya himself stated:

> Whatever might have been the circumstances under which the defendant pronounced *talaq*, it does not appear, on an examination of the said circumstances, that either the plaintiff or her father had ever any doubt as to the effectiveness of the said divorce, as will appear from the fact that the father admittedly arranged a second marriage for his daughter to be solemnised on 30.4.67 and also from the fact that the plaintiff made a statement before the Subdivisional Magistrate of *Sadar*, Sylhet in a proceeding under the Code of Criminal Procedure, on 25.9.67 that she was unwilling to go with her former husband as she had already been divorced by him. In this context, it is most improbable that a Muslim girl would desire to live with a person who was no longer her husband because of the *talaq* given by him.[112]

This part of the judgement proves that whatever are the procedural technicalities of the enactments, the attitude of the people still centres on the *talaq-al-bidah* concept, i.e. whenever a *talaq* has been pronounced, it is valid per se and is considered final.

The same situation arose in *Abdus Sobhan Sarkar* v *Md. Abdul Ghani*,[113] where the absence of notice invalidated the delegated

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112. *Ibid.*, pp.36-37.

113. 25 DLR (1973) 227.

divorce but the decision explained the role of the Arbitration Council in *talaq* cases. The case was filed under sections 6, 7 and 9 of the *Muslim Family Laws Ordinance* 1961. The facts of the case were that an application was brought by Abdus Sobhan Sarkar under section 561A of the *Criminal Procedure Code*, 1898 for the quashing of proceedings in a case pending in the Court of Magistrate at Shirajgonj brought by Md. Abdul Ghani against him and a woman named Shakitannessa. In that case Md. Abdul Ghani complained that Shakitannessa is his legally wedded wife and claimed that Abdus Sobhan Sarkar had married her during the subsistence of their marriage. Abdus Sobhan Sarkar and Shakitannessa filed a petition before the learned Magistrate for dropping the case alleging that Shakitannessa had married Abdus Sobhan Sarkar after she had divorced herself in exercise of the delegated power of divorce in the *kabinnama*. They alleged that the delegated divorce was approved by the Arbitration Council which also gave permission to Shakitannessa to marry again. But the Magistrate Court rejected the petition and hence reference was made to the Appellate Court. In appeal the petition was dismissed on the ground that the Arbitration Council had no power to approve the divorce or to permit her to marry again. Justice Sayem stated:

> It will also appear that although sub-section (4) of section 7 provides that within thirty days of the receipt of written notice of pronouncement of a talaq the Chairman is required to constitute an Arbitration Council which is to take all steps necessary for reconciliation, nothing has been said in the section or anywhere else in the Act providing as to what will happen if under receipt of such a written notice of the talaq the Chairman does not constitute an Arbitration Council or if the Arbitration Council so constituted does not take any steps to bring about reconciliation between parties. Failure of the Chairman to constitute an Arbitration Council or that of a duly constituted Arbitration Council to take necessary steps to bring about reconciliation is thus inconsequential.[114]

The court thus, held that as far as *talaqs* were concerned the Arbitration Council had no function except to take steps to bring

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114. *Ibid.*, p.229.

about reconciliation between the parties and nothing more. The functions of the Arbitration Council in *talaq* cases have already been discussed. It appears that the only required criterion is to give notice of *talaq* to the Arbitration Council. This procedural impediment is generally working to protect women when they do not desire to have their marriage dissolved. But sometimes it acts negatively, prolonging an unwanted marriage and preventing the woman from marrying again, which has become the cause of untold misery, the consequence of which might be alarming with accusations of *zina* against the wife.

It appears that there is a brighter side of *talaq* than other forms of divorce, as the wife is entitled to her dower and sometimes the liability to pay dower may restrain the husband to give divorce. However, the husband may persuade the wife to a *khula* divorce to evade the payment of dower. Moreover, usually, even if a husband gives notice to the Chairman, he does not pay the dower or maintenance for the *iddat*. It was suggested by a lawyer in Bangladesh that the notice of *talaq* under section 7 of the *Muslim Family Laws Ordinance*, 1961 should compulsorily accompany a bank draft payable to the wife for the dower and the maintenance for the *iddat*.[115] Thus, Chairmen would not accept notices of divorce without dower and *iddat* money. The suggestion, if achieved, would solve many problems of Muslim women in Bangladesh. On the other hand, men would simply avoid to give notice of the divorce to the Chairman and rely on *sharia*, or even simple desertion. At present, this area of the law is quite confused as the High Court Division of the Supreme Court of Bangladesh in *Sirajul Islam* v *Helana Begum*[116] has decided that there are other ways to give talaq than giving a notice to the Chairman as an affidavit before the Magistrate was equally acceptable. The new trend in the higher judiciary are taking away the best possible protection offered to women for reconciliation.

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115. Rahman, Sheikh Shamsur: 'Family Court and Muslim Family Laws Ordinance'. In 40 DLR Journal (1988) pp.24-26.

116. 48 DLR 1996, 51.

Khula

Dissolution of marriage by *khula* is defined as an agreement between the parties to dissolve the marriage by the wife's foregoing of dower.[117] The 'judicial *khul'* has abolished the husband's consent criteria. But the compensation paid by the wife, usually by restoration of her dower, has remained intact.

In *khula* cases in Bangladesh, the courts are only reiterating the position in Pakistan that the consent of the husband is not a required criterion, as has been done in the celebrated case of *Khurshid Bibi* v *Mohammad Amin*.[118] But the judges are using a social argument rather than saying that *Khurshid Bibi* is a precedent. Perhaps on the basis of *Khurshid Bibi*, the judges wanted to create a new principle.

In *Hasina Ahmed* v. *Syed Abul Fazal* [119] the husband falsely charged the wife for adultery under Section 2(a) of Dissolution of Muslim Marriages Act (VIII of 1939). The wife, in order to obtain divorce against her husband, made her husband suspect her of having an illicit connection with her cousin and this suspicion caused a mental agony on the part of the wife which compelled her to institute this suit for the dissolution of her marriage with the defendant. Not only did the defendant husband dispute this allegation of the plaintiff but he also admitted the same position by alleging and reiterating the same allegation in his written statement and also in his deposition. The wife is entitled to a decree of dissolution of marriage. Under the Muslim Personal Law in the principle of '*lian*' or imprecation, the wife is entitled to sue for a divorce on the ground that her husband falsely charged her with adultery.

It has been found in this case that to have made consistent allegation about his wife's involvement with another person and

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117. Jung, Mahomed Ullah Ibn S.: *A dissertation on the Muslim law of marriage*. Allahabad 1926, p.52; Rahman (1978), p.513.

118. PLD 1967 SC 97.

119. 32 DLR 1980 (HCD) 294

the same allegation being repeated by the husband definitely is a "cruelty" within the meaning or sub–clause (a) of clause VIII of section 2 of the Dissolution of Muslim Marriage Act No. VIII of 1939. It provides that a women married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage if the husband treats her with "cruelty", that is to say, makes her life miserable by "cruelty" of conduct, even if such conduct does not amount to physical ill–treatment.

In *Hasina Ahmed* v *Syed Abul Fazal*,[120] a potent pronouncement has been made by Justice S.M. Hussain that by this *khula* form of divorce, women now enjoy higher social rights with the change of time. The court stated:

> This divorce by way of *khula* if not obtained with the consent and agreement between the parties, can, by analogy, be obtained from a Court of law before whom the case of dissolution of marriage is pending.[121]

The above case clearly indicates the trend of the judiciary to initiate new egalitarian principles in Muslim family law on the ground of changing situations of the society. The court stated:

> It must be observed that the courts while adjucating on family dispute and administering personal law shall take into account not only the factual and the legal position and questions involved in a particular case but also consider the social dynamics when the concept of law is changing in a changing society. Previously decades before where a wife's claim for a divorce could be resisted for well-established reasons it cannot be resisted for the self-same reason because of the very basic fact that with the changing society women are coming of their own and their independence of mind and will must be respected while considering the legal and contractual obligation in marriage between man and woman as such.[122]

This decision shows that the judge is accepting the new social environment which has brought a change in the attitudes of

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120. 32 DLR (1980) 294.

121. *Ibid.*, p.297.

122. *Id.*

women in Bangladesh. He wants to see this applied in family law cases. The court held that as the husband had falsely charged the wife with adultery, the wife was entitled to a decree for dissolution of marriage. Moreover, the court held that as the wife had explicitly expressed her willingness to part with her dower in consideration of a divorce, this should be accepted.

In *Mst. Amena Begum* v. *Ali Hossain*,[123] the plaintiff was married to the defendant on 09–08–85 by a registered Kabinnama. The plaintiff alleged that her husband was of ill temperament and was habituated to alcohol (*neshakhor*). The plaintiff also alleged that on 20–02–90, the defendant was drunk when he came home and beat her and turned her out of the matrimonial home. A further allegation against the defendant was that he was impotent, as they did not have any children during their marital life. This was confirmed by a doctor. The plaintiff divorced the defendant by her delegated power of divorce on 6–05–90 and sent a notice of the divorce to the defendant. The plaintiff, thus, was praying for a declaration that their marriage was dissolved. The Family Court held that the plaintiff was entitled to a declaration that the marriage was dissolved as her own allegations showed that she was not inclined to continue her marital life with the defendant and one cannot force another to do something against his wishes. This case, without saying so, follows the principle and precedent of Khurshid Bibi.

The type of attitude the courts should have to decide cases was also commented on by the Appellate Division of the Supreme Court. The court reasoned that it would be beneficial in a changing society if the courts concerned took a modernist and egalitarian view as has been done in the celebrated case of *Khurshid Bibi* v *Mohammad Amin*.[124] This projects that Bangladeshi jurisprudence is building on *Khurshid Bibi*'s case and reflecting a new outlook of the judiciary through it. However, by blindly following *Khurshid Bibi*'s case, courts are sometimes abandoning the plaintiff's case and making out a new case instead.

123. Family Suit No.41 of 1990 (unreported).

124. PLD 1967 SC 97

In *Md. Kutubuddin Jaigirdar* v *Nurjahan Begum*,[125] the facts of the case, in a nutshell, were that first the husband gave *talaq* to the wife but because of the procedural difficulties the court of first instance did not accept that . Then the wife exercised the right of delegated divorce and instituted a suit for a declaration that the marriage was dissolved, with an alternative prayer of dissolution on the ground of cruelty, which was also rejected. On appeal, the appeal court abandoned the plaintiff's own case of cruelty [under section 2(viii)] of the *Dissolution of Muslim Marriages Act* of 1939) and made out a new case of *khula*, being carried away by the decision of the Supreme Court of Pakistan in *Khurshid Bibi*'s case. On second appeal in the Supreme Court Appellate Division, the Appellate Division of the Supreme Court did not grant *khula*, as the evidence on record did not support the claim, and the wife did not forego her dower. The plaintiff wife herself had asserted in the course of her testimony, 'I retain my right of dower' (*'amar moharanar dabi akhono ache'*). This statement is completely inconsistent with the right of *khula* obtained by the decree. The Supreme Court held that the suit as framed and the evidence as led did not entitle the plaintiff to have a decree dissolving the marriage in *khula* form. Moreover, in the plaint, the wife was claiming the right of divorce in her alternative prayer on the ground of cruelty of conduct under section 2(viii) of the *Dissolution of Muslim Marriages Act* of 1939. No case of *khula* divorce was made out in the pleading of the wife. Justice D.C. Bhattacharya of the Supreme Court stated:

> In the said circumstances it was the clear duty of the said court not to abandon the plaintiff's own case and make out a new case for her in its stead.[126]

This questions the attitude of the judges. Why are they interested to deviate in a clear case of cruelty and turn it into a case of *khula*? Is it for the benefit of women or to deprive women of their rights of dower? The determined position of the plaintiff that she would

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125. 25 DLR (1973) 21.

126. *Ibid.*, p.28.

not forego her right of dower should have denied the judiciary the mandate to turn her case into a case of *khula*.

In *Muhammad Siddiq* v *Mst. Ghafuran Bibi*,[127] a prayer for converting the suit for dissolution of marriage, originally based on habitual cruelty, into a suit for divorce by way of *khula* at an appellate stage before the Supreme Court was not permitted. The facts of the case were that the wife's suit for dissolution of marriage on the ground of habitual cruelty and non-maintenance had been dismissed by the trial court. On appeal, the dismissal order was confirmed by the Appellate Court. On second appeal, the High Court took the view that even if the wife's appeal failed, the husband would not be in a position to take back the wife forcibly since the relationship between the spouses was very strained. In these circumstances the High Court felt justified in allowing the appeal and granting a dissolution of marriage by way of *khula*. Against this the husband appealed before the Supreme Court. It was decided that as there was no prayer made in the plaint for dissolution of marriage by way of *khula*, the High Court had acted illegally, as the husband was not given any opportunity to rebut the evidence. This shows that the High Court was transforming a case of cruelty into a case of *khula*. It is not clear whether this attitude is to sympathise with the women's cause, to give women their rights or to take away their rights. However, the Supreme Court sent the case back on remand to amend the plaint and to decide whether the wife was entitled to such form of dissolution.

In *Sheerin Alam Chowdhury* v. *Captain Shamsul Alam Chowdhury*[128] the family court held that if it so appears that the husband and wife cannot live together in peace and amity and the wife offers consideration for the dissolution of the marriage, she is entitled to dissolve the marriage by way of "Khula".

A *khula* divorce, perhaps, as the court reflects, is the key to freedom for many Muslim women. But the case law reveals that

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127. 25 DLR (1973) SC 1.

128. 48 DLR 1996 (HCD) pg. 79

the higher courts are turning other cases of dissolution into a case of *khula* to deprive women of their right to dower and to protect the financial interest of men. Moreover, from the practical point of view, a woman may be pressurised by her husband to give *khula* to avoid the payment of dower which he has to give when using *talaq*.[129] Some Muslim men are now refusing to give *talaq* to their wives contemplating that their wives will give *khula* when they can not bear any more and will thus free them of their liability to pay dower. There is no attempt made to mitigate this unfairness. Thus, judicial *khul* could actually be taking away an important right of the Muslim women. It is yet to be clarified why the courts are encouraging 'judicial *khul*' more than any other grounds of dissolution. Is it another game to deprive women of their rights, or giving freedom to men from their duty to pay dower? However, the judicial device of *khula* is also hard to achieve and proceedings could drag on for 6 to 10 years, as was indicated by a court of Pakistan in *Tahera Begum* v *Saleem Ahmed Siddiqui*.[130]

The situation in Bangladesh has changed after the enactment of the *Family Courts Ordinance* of 1985, as the special proceedings of the Family Courts are supposed to lead to an expeditious judgement. Still it usually takes a year or more to get a decree, as was evident in the case of *Mst. Roksana Begum* v *Md. Abul Khair*,[131] where the maintenance case needed nearly one year and ten months to come to a decision (filed in May 1991, judgement in March 1993). Execution of the decree is yet another matter.

Thus, the dissolution of marriage by *khula* potentially operates against women as it deprives them of their right of dower for their freedom from an undesirable marriage. Why women should always make concessions and compensations for their freedom, and not their partners, is yet to be understood.

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129. Carroll, Lucy: 'Mahr and Muslim divorcees right to maintenance'. In *Journal of the Indian Law Institute*. Vol.27, No.3, July-September 1985, pp.487-495, at p.494; Carroll (1982), p.277.

130. PLD 1970 Karachi 619, at p.620.

131. Family Suit No. 96 of 1991 (unreported).

Talaq-e-tahweed

One of the most potent legal weapons in Muslim women's possession is the right of delegated divorce or t*alaq-e-tahweed*.[132] This is a conscious effort of the female spouse or her guardian to balance the male matrimonial power.[133] This right has been regarded by the judges of British India as conditional and not an absolute option, depending on being reasonable and not opposed to public policy.[134] However, conditional delegation was always recognised to be perfectly valid if the condition or contingency specified in the *kabinnama* was fulfilled.[135] The *Muslim Family Laws Ordinance* of 1961 has provided the option to delegate the right of divorce in the form of the *kabinnama* itself. But it would have been beneficial to the women of Bangladesh if the stipulations of the delegated divorce had been expressly written into the *kabinnama*, giving women a broader choice at the time of need. However, sometimes the stipulations are handwritten in the *kabinnama* by the guardians of the parties.

The case law in Bangladesh suggests that women are benefiting from this device of delegated divorce. In *Nasima Bilkis* v *Md. Abdus Samad Khan*,[136] the plaintiff alleged that on the ground of cruelty, negligence to observe marital obligation and demand of dowry she had given divorce to the defendant by the delegated power of *talaq-e-tahweed* on 2.6.91 and the *talaqnama* had been registered. The Family Court held that the right was exercised in accordance with strict compliance of the terms and conditions of the delegation. Examining the conditions of this delegated power, which stated that it could be exercised 'if there is maladjustment at any time' (*'moner omil hoile jokhon ichcha'*), the court arrived

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132. On the new study of the subject see Shaham, Ron: 'Judicial divorce at the wife's initiative: The Sharia Courts of Egypt, 1920-1955'. In *Islamic Law and Society*. Vol.1, No.2, August 1994, pp.217-257.

133. Carroll (1982), p.278.

134. *Ibid.*, p.279.

135. Ali, Syed Ameer: *Mahommedan law*. Vol.ii, 4th ed. Calcutta 1917, p.556.

136. Family Suit No.12 of 1992 (unreported).

at the conclusion that there existed maladjustment between the parties.

In *Mrs. Sherin Akhter* v.*Alhaj Md. Ismail* [137] it was held that the *"Talaq"* pronounced by the wife must be communicated to the husband. When the communication is over and the husband admits to have received the same, the requirement of section 7(1) of the Muslim Family Law Ordinance (VIII of 1961) is complete and the talaq–e–tafweed becomes effective.

In *Monowara Begum* v *Md. Hannan Hawlader*,[138] the facts of the case state that the wife divorced the husband by *talaq-e-tahweed* and registered the divorce to make the dissolution more confirmed.

In *Khondakar Shafiqul Huq Masud* v *Farida Begum and others*,[139] the Family Court did not allow the husband to restore his conjugal rights as the marriage itself had been effectively dissolved by the exercise of *talaq-e-tahweed* by the wife.

In *Md. Kutubuddin Jaigirdar* v *Nurjahan Begum*,[140] the Appellate Division of the Supreme Court held that although the lower Appellate Court had found that the marriage tie between the plaintiff and the defendant had been dissolved as a result of the exercise of the delegated power of divorce by the wife, it did not make the necessary declaration that the marital tie had already been dissolved. The Supreme Court not only rectified the decree of the lower appellate court but substituted the decree for dissolution of the marriage on other grounds by a decree declaring that the marriage had been dissolved by the exercise of the delegated power of divorce by the wife.

In the renowned case of *Nelly Zaman* v *Giasuddin Khan*,[141] too, the court ascertained that the wife had exercised her delegated right of divorce or *talaq-e-tahweed* legally. The court held that it

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137. 51 DLR 1999 (HCD) pg. 159

138. Family Suit No.15 of 1989 (unreported).

139. Family Suit No.18 of 1990 (unreported).

140. 25 DLR (1973) 21.

141. 34 DLR (1982) 223.

had been stipulated in the *kabinnama* that the wife could exercise this right if there was mutual recrimination between the parties. As there was sufficient recrimination between the parties it granted the right to the wife.

The device of *talaq-e-tahweed* is more beneficial to women as it does not come into effect immediately if the contingency arises, as a *talaq* would, but allows the wife to consider her options. When she has the situation under control and then decides to effect a divorce, she may exercise the right at her discretion. Thus, she is not automatically divorced without her will as is done by *talaq*.[142] Moreover, by this method of inserting stipulations in the marriage contract, the wife could be provided separate maintenance and residence if the contingencies of polygamy or cruelty arise.[143] This would resolve many of the problems for deserted women when the husband marries again or she is to suffer the agony or difficulties of living with a co-wife.

Dissolution by the judicial process/faskh

In a recent decision by the High Court division of the Supreme Court in *Hosne Ara Begum* v. *Alhaj Md. Rezaul Karim*,[144] it is rightly observed that the appellate court below is guided by the archaic concept of absolute dominion of the husband over the wife, treating her as a chattel, forgetting that under the Muslim law several rights were granted to the wife, including the right to refuse the conjugal domain of the husband if treated by him with cruelty or the failure to pay prompt dower.[145] The Supreme Court also extended the meaning of cruelty as defined under sec. 2(viii) of the Dissolution of Muslim Marriages Act of 1939 not only to include physical assault and cruelty of conduct but conduct which does not amount to physical assault or cruelty in the literal meaning. As the Supreme Court held, in a well–to–do family

142. For details see Carroll (1982), pp.284-285.

143. For details see Malik (1990), pp.35-40.

144. 43 DLR (1991) 543.

145. Ibid., p.545.

compelling the wife to do domestic work can be seen as physical and mental torture. However, the Supreme Court ascertained, on considering the evidence found by the trial court (Family Court), that the wife was also subject to physical and mental torture and was under apprehension that she might be killed if she returned to her husband's house. Thus, physical and mental torture of the wife is not only held to be an offence punishable with imprisonment and fine but it also gives a valid ground to the woman to refuse restitution of conjugal rights to the husband.

In *Safiqul Islam* v. *State* [146] it was held that a divorce under the Ordinance is not unilateral act; rather it involves a public authority in the matter. It precludes a divorce or talaq from being effective for a period of ninety days from the date of the receipt of the notice by the Chairman. Consequently, the marital status of the parties will not in any way change during that period. The parties will continue to remain husband and wife till the divorce is confirmed. It was also held the ninety days reconciliation period is to start from the date of the receipt of the notice by the Chairman and not from the date when it was written.

The case law indicates that progress has been made especially in the cases of delegated divorce where by the device of *talaq-e-tahweed* women are entitled to dissolve their marriage easily. As we saw, in *khula* cases women are sacrificing their right of dower in exchange for a divorce. In *talaq* cases, although men are legally obliged to give women dower and *iddat* money, this is rarely observed. Thus, Bangladeshi divorce law, overall, does not protect women well from economic deprivation and violence and the way forward, it appears, is more widespread and creative use of stipulations in the marriage contract.

146. 46 DLR 1994 (HCD) pg. 700