

MARRIAGE, DIVORCE AND RE-MARRIGE (*HALALA*) IN ISLAM

by

Zafar Iqbal Kalanauri

Marriage in Islam

The primary source of Muhammadan Law is the Holy Quran which represents the God's Will communicated to the Prophet through the Angel Gabriel. Section 34, Chapter IV in Mulla's Principles of Muhammadan Law by Hidayatullah, Nineteenth Edition, (for short, "Mulla's Muhammadan Law") deals with Interpretation of the Quran. It states that the Courts, in administering Muhammadan law, should not, as a rule, attempt to put their own construction on the Quran in opposition to the express ruling of Muhammadan commentators of great antiquity and high authority.

In Islam, marriage is a legal contract "matrimony contract"; (*Nikāh-Nāmah*)¹ between two people. The bride is to consent to the marriage of her own free will. A formal, binding contract is considered integral to a religiously valid Islamic marriage, and outlines the rights and responsibilities of the groom and bride. There must be two Muslim witnesses of the marriage contract. Marriage, according to Muslim Law, is a civil contract, Marriage is highly revered and extolled in Islam and accorded a detailed treatment both in the Holy Qur'an and the Sunnah of the Prophet Muhammad (PBUH). It is, for instance, called the sign of God, a way of prophets and the Sunnah of Muhammad (PBUH). The Quran uses the simile of a garment to describe the mutually protective and beautifying relationship between spouses, and requires them to be very kind and considerate to each other. It also assigns different roles to each spouse to ensure smooth functioning of the family that emerges as a result of the marriage contract between husband and wife in a prescribed way.

Islam treats marriage as an everlasting institution with specific rights and responsibilities assigned to each partner. A Muslim marriage is a social contract between two independent persons who have attained puberty. Islam introduces checks and balances to protect and secure the rights of all stakeholders in this matter—the husband, the wife, the children, and society at large. It prohibits all forms of extramarital relations, both before and after marriage, treating them as a transgression. Thus, Islam, with its provisions for establishing and maintaining the integrity of the family, is diametrically opposed to the viewpoint that stands for sexual laxity in the garb of "freedom of choice."

In spite of its emphasis on marriage and its preservation, however, Islam does not rule out dissolution of marriage as a last resort for estranged couples. Describing divorce as the most detestable among the permissible acts. Islam gives both the partners the right to terminate their marriage contract if they fail to fulfill the primary objectives of marriage.

¹ An Islamic marriage contract (Arabic Katb el-Kitab, Hebrew Ketubah, Urdu Nikah-Nama) is an Islamic prenuptial agreement. It is a formal, binding contract considered an integral part of an Islamic marriage, and outlines the rights and responsibilities of the groom and bride or other parties involved in marriage proceedings.

Divorce is another name of dissolution of marriage under three distinct modes in which a Muslim marriage can be dissolved and the relationship of the husband and the wife terminated. The existence of conjugal relations in the case of Muslims has to be determined by reference to the provisions of the Muhammadan Law and not by considerations of equity and good conscience as understood in any other system of law.

Legal and Judicial Framework for Dissolution of Marriage in Pakistan

In Pakistan, the establishment and dissolution of marriage takes place under different laws and ordinances. Lack of awareness regarding the legal framework often creates problems for couples entangled in disputes, forcing them to struggle for their rights. With reference to dissolution of marriage, the following family laws are in practice in the country:

- Guardian-Wards Act (GWA) 1890;
- Child Marriage Restraint Act (CMRA) 1929;
- Dissolution of Muslim Marriage Act (DMMA) 1939;
- Muslim Family Laws Ordinance (MFLO) 1961;
- Muslim Family Law Rules (MFLR) 1961;
- Reconciliation Courts Ordinance (RCO) 1961;
- The West Pakistan Muslim Personal Law, *Shariah* Application Act (WPMPLSAA) 1962;
- West Pakistan Family Courts Act (WPFCA) 1964;
- West Pakistan Family Courts Rules (WPFCA) 1965; and
- *Hadd-e-Qazaf* Ordinance (HQO) 1979.

Although most of the sections, articles and clauses of these laws are in conformity with the teachings of Islam, there are certain areas where conflict between them creates difficult situations, particularly for women.

Under Section 5 of the West Pakistan Family Courts Act 1964², the Family Courts have been empowered to deal with cases of dissolution of marriage, including *khula* (divorce on the wife's demand), and the allied issues of dower, maintenance, restitution of conjugal rights, custody of children, guardianship, dowry, personal property and belongings of the wife.

Although separate Family Courts have been established, the existing Civil Courts are given additional powers of the Family Courts. Amendment 2002 provides the facility of seeking relief through combining different sections, clauses and articles taken from related laws in a single suit.

Rule 6 of the West Pakistan Family Courts Rules 1965³ provides that suits for dissolution of marriage or recovery of dower may be filed in a court that has jurisdiction in the area where the

² 5. Jurisdiction: Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule.

³ 6. The Court which shall have jurisdiction to try a suit will be that within the local limits of which-

- (a) the cause of action wholly or in part has arisen, or
- (b) where the parties reside or last resided together:

litigant wife ordinarily resides. Moreover, according to Section 19 of WPCR, the court fee for any plaint or appeal is only Rs.15/-, as opposed to Rs.15,000/- for ordinary civil suits. These provisions are intended to facilitate plaintiff women.

Marriage Dissolution: A Comparison of Practices, Laws and Islam

Dissolution of marriage in Pakistan takes different forms, including separation without divorce pronouncement; *talaq* (divorce by the husband); *khula*; *talaq-e-mubarat* (mutually negotiated divorce as part of the *khula* process); *talaq* by the wife through delegated right of divorce; and dissolution of marriage through court.

Three other forms, which are permissible in Islam but not common in Pakistan, include *eila*, an oath of abstinence from conjugal relations by the husband; *liaan*, in which permanent separation is awarded by a court after a man accuses his wife of adultery; and *khiyar-al-buloogh*, in which either spouse, in a child marriage contracted through the respective guardians, is given the right to repudiate the marriage upon attaining puberty.

The following discussion presents a comparison of prevalent practices, Islamic teachings and laws concerning marriage dissolution in Pakistan.

Separation through Divorce

Divorce is the breaking of the spousal relationship with express or implied words, directly or through representation, by the husband, effective instantaneously or consequentially. As far its effects are concerned, it is of three kinds:

- 1) Revocable divorce (*talaq-i-rajaae*), in which the husband pronounces divorce once and at some later stage realizes that he made a mistake and decides to rescind the pronouncement unconditionally and resumes the normal spousal relationship;
- 2) Irrevocable divorce of minor degree (*talaq-i-bain sughra*), in which the parties, if they both agree, can re-enter into the marriage contract;
- 3) Irrevocable divorce of major degree (*talaq-i-bain kubra*) in which the husband cannot re-enter the marriage contract with his divorced wife unless she, after having married and establishing

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction.

Court Decisions: Jurisdiction. Proviso to R. 6, West Pakistan Family Courts Rules, 1965, enables estranged wife to file suit for dissolution of marriage within local limits of which she ordinarily resides. Words "ordinarily resides" must be construed in context of estranged wife who had left her husband's abode and had sought residence at any other place of her own choice; such place of her choice would answer to concept "ordinarily resides". Petitioner ordinarily residing at a place other choice, after separation from her husband, was, thus, competent to bring suit for dissolution of marriage in the Court of that place. High Court ordinarily would not go into question of fact in Constitutional Jurisdiction but where findings of Courts below on the face of record appeared to be perverse or based on no evidence, High Court even in Constitutional Jurisdiction could take different view. Both Courts below having unlawfully refused to exercise their Jurisdiction on wrong assumption that they did not have such Jurisdiction, their Judgments were set aside. P.L.J.1997 Lahore 1631 = 1997 CLC 742.

Expression ordinary resides "does not necessarily mean that residence should belong in point of time, residence for a few days is enough. Court has to see place where female has chosen to stay regardless of whether she is a permanent resident of place, whether she has property over there or length of time she has resided there. P.L.J.1996 Lahore 1071 = 1996 CLC 1820.

conjugal relations with her new husband, is divorced for some reason and is willing to re-enter into a marriage contract with her former husband.

Separation without Divorce

There are cases when couples who are separated but not divorced live separately with their respective families, while the formal termination of marriage is withheld. This practice basically stems from the desire to avoid the stigma of divorce or seek escape from spousal torture. It is also considered a symptomatic remedy until better sense prevails and the differences are resolved amicably.

However, in such situations, the woman often has to undergo considerable mental stress and humiliation. Although she is deprived of spousal companionship, she cannot legally enter into a new marriage prior to the termination of the first one. The husband, however, can avail this option. Children in such situations usually suffer unnecessarily, especially if they are residing with the mothers who cannot afford to maintain them adequately or are so distressed that they cannot perform the dual-parent role effectively.

This practice goes against the teachings of Islam, which does not permit the husband to be unjust or selfish. Instead, he is required to either reconcile affably, or divorce her without compromising her honor, dignity and security, or withholding her personal property and belongings. Islam gives concrete rights to women in this regard, unlike the pre-Islamic practices. It even allows a woman to remarry if her husband has gone missing.

The prevalent family laws in Pakistan also do not approve of the unfair nature of separation occurring under any process whether *eila* or *zihar*. For instance, Section 2 of the Dissolution of Muslim Marriage Act 1939 facilitates a woman to annul her marriage through providing detailed subtle grounds of contemporary nature in addition to the grounds formally recognized by the Shari'ah. The intent of existing laws clearly favors women towards the annulment of marriage in case they cannot get along with their husbands. Section 8 of the Muslim Family Laws Ordinance 1961 addresses divorce and allied issues unambiguously.⁴ Section 6⁵ declares that contracting a

⁴ 7. Talaq:

- (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
- (2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.
- (3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from day on which notice under sub-section (1) is delivered to the Chairman.
- (4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.
- (5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in Sub-section (3) or the pregnancy, whichever later, ends.
- (6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under his section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

8. Dissolution of marriage otherwise than by talaq.

second marriage without the prior permission of the first wife (or earlier wives, if there is more than one) is a crime punishable with imprisonment or fine or both. The same section implies the payment of the entire dower, whether prompt or deferred, to the first wife immediately. The first wife can also claim her maintenance if the husband falls short of fulfilling his responsibilities. In case the wife herself opts to leave her husband's house without any solid reason, such as cruelty or irresponsible behavior on her husband's part, she is not entitled to seek maintenance.

It has to be concluded that, notwithstanding the clear provisions of family laws and Islamic teachings, the prevalent practice in the country is unfair and, in some cases, abusive towards women. For most women in such cases, the options are quite limited and they are generally forced to live in very unfavorable conditions, hoping that things may eventually take a positive turn.

Divorce by the Husband – Talaq

Unfortunately, divorce seldom proceeds smoothly. It usually results from an aggressive behavior, mostly caused by a moment of rage, against the manner prescribed by the Qur'an and Sunnah. The pronouncement of three divorces in one breath is a common practice, in addition to abuse and character assassination. Women are generally denied their Islamic right to accommodation

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

⁵ 6. Polygamy:(1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under Sub-section (3), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall,

(a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(b) on conviction upon complaint be punishable with the simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

and maintenance during the *iddah*, i.e. the prescribed waiting period before a woman may remarry after divorce.

During the *iddah* of a revocable divorce, the parents of the divorced wife usually do not let her remain in her husband's house, ignoring the Qur'anic teachings according to which the couple should remain under the same roof so that there is maximum likelihood of resumption of the marital relationship.

The withholding of dowry and other belongings of the divorcee is also a common practice in society. Custody and maintenance of children are the two most contentious issues between separating couples. Commonly, such matters are taken to the courts. The common practices are quite contrary to the Islamic teachings. The Qur'anic injunctions related to *talaq* clearly and forcefully forbid the exploitation of women. They do not allow men to keep women in a constant fix or coercion on the face of obvious incompatibility. The essence of the Qur'anic commandments in this regard can be summed up as follows:

- Men are generally vested with the responsibility of taking care of important matters pertaining to the family, including the dissolution of marriage.
- Divorce should always be a thoroughly deliberated decision and delivered in a period of *tohar* (i.e. when the menstrual cycle is completely over).
- It should be pronounced in such a way that the *iddah* is not compromised, as happens through the pronouncement of three verbal divorces in one go, so that the possibility of reconciliation and the provision of rejoining can be utilized.
- The husband has the right to pronounce *talaq* twice only, with *iddah* in between, and then either the couple is reunited or separated amicably.
- In the case of revocable divorce, the wife should spend the *iddah* at her husband's home, because it might help them reconcile with each other.
- It is obligatory upon the husband to provide maintenance and accommodation for his wife during the *iddah*.
- It is obligatory upon the husband to provide maintenance for a pregnant or breastfeeding divorcee, until the pregnancy or breastfeeding is over, both in the case of revocable and irrevocable divorces.

Based on the Qur'anic teachings, the Prophet Muhammad (PBUH) explained the procedure and mode of divorce clearly. In the light of these guidelines, Muslim jurists set out the detailed rules for all matters related to divorce. The key points relevant to this discussion are outlined below:

- Any *talaq* given for the period during which the husband can revert back to his wife is called *talaq-e-rujaee* (revocable divorce). After the first or second pronouncement of divorce, even if the *iddah* period is completed, the husband, prior to the pronouncement of the third divorce, has the option of taking his wife back by re-solemnization, with her consent. This type of divorce is called *talaq-e-bain sughra*. The third pronouncement makes divorce final and irrevocable — it is then called *talaq-e-bain kubra or mughallaza* (the third, irrevocable divorce). The third divorce means that the couple can never rejoin, unless the extraordinary condition of *halala* is fulfilled.

- *Halala* is the situation where a divorced woman marries another man in a regular manner with the solemn intention of living with him, but again unfortunately separates from him due to his death or divorce. She is then allowed under Islamic law to remarry her former husband, if she so wishes. Notably, the ugly custom of preplanned *halala*, in which the former husband manipulates someone to marry his former wife and then divorce her immediately without even consummation for enabling him to remarry the woman, is a mockery of the divine law and is cursed by the Prophet Muhammad (PBUH). The Caliph Omar and Abdullah bin Omar regarded such marriages as adultery.
- According to the Sunnah, the best procedure for divorce is *talaq-e-ahsan* (most approved form of divorce) in which divorce is pronounced once in *tohar*, with no conjugal relations in that period, and then the couple wait for the entire *iddah*, completing the divorce. During the *iddah*, the husband has the absolute right of *ruju* (i.e. reversal of the divorce process by the husband and maintenance of matrimonial relations as in the past) either verbally or practically.

The Sunnah also permits a second form of divorce, which jurists call *talaq-e-hasan* (proper form of divorce). In this, divorce is pronounced three times, with a gap of one *tohar* period of the wife between each pronouncement, so that each party has ample time for reviewing its standpoint regarding the dispute. Again, the husband has the absolute right of *ruju* until the divorce becomes final.

The practice of pronouncing three divorces at the same time is against the Sunnah and has been termed as *talaq-e-bidah* (the innovated divorce) by Muslim jurists. However, two opinions prevail among Muslim jurists regarding the effect of this practice. One group considers such a pronouncement as one divorce, while the other takes it as three divorces and declares the outcome to be the final *talaq-e-mughallaza*. Notably, it is unanimously agreed that such divorce is against Sunnah and highly disliked. Once the Prophet Muhammad (PBUH) was informed that a man had pronounced a ‘triple divorce’ to his wife. The Prophet rose in anger and exclaimed, “*Is the book of Allah being played with while I am still present among you?*”

Mahr (dower) has to be paid to the divorcee if it is not already paid. She has a right to her full dower if it was fixed and the couple has had conjugal relations. If there has been a conjugal act but the dower was not fixed, its amount is to be equivalent of dower fixed for other married sisters of her family, his family or based on the sisters-in-law of the families. She is paid half the dower if it was fixed but there was no conjugal act. Finally, if there was neither a fixed dower nor any conjugal relationship, some gifts are given to the divorcee.

The wife has the right to take all her belongings with her, including the things given to her by her husband. God-fearing men are asked to give *muta-e-talaq* (a monetary parting gift) to their ex-wives on such occasions, which is in keeping with their own financial status.

The *iddah* is different for women who are pregnant, not pregnant and above the reproductive age. For women in the last two categories, it is three months. However, for pregnant women, the *iddah* continues until the birth of the child. There is no waiting period for a woman who had no conjugal relations with her husband. The *iddah* after *khula* is one menstrual cycle, as described by the Prophet Muhammad (PBUH) and practiced by his companions.

In case of separation based on any type of dissolution of marriage, the mother has the right to custody of the children while the father is obliged to provide financial support for the children. Mudslinging and character assassination is strictly forbidden for the parting couples.

Divorce cases taken to the courts are settled under Section 7 of MFLO 1961. The detail of this procedure is as follows:

- The original divorce deed is required to be filed along with the suit.
- The notices of divorce along with photocopies of the divorce deed are to be submitted by the husband to the Chairman Arbitration Council (CAC)/Nazim Union Council (NUC) soon after the pronouncement of the divorce.
- Within 30 days of receiving the divorce notice, the CAC constitutes an Arbitration Council (AC) to facilitate reconciliation between the parties, taking all necessary steps in this regard. Section 2 (a) of MFLO specifies that the CAC and a representative each of the husband and wife constitute the AC.
- Ninety days after the divorce notice is delivered to the CAC, the *talaq* becomes effective if it has not been revoked during the period.
- If at the time divorce is pronounced, the wife is pregnant, the divorce does not become effective until the baby is born or the 90-day period ends, whichever occurs later.
- Upon the expiry of 90 days, a copy of the decision of the AC, i.e. reconciliation or divorce, duly attested by the CAC, is furnished to each party.
- Failure to provide a notice of divorce to the CAC is punishable by imprisonment for a maximum period of one year or with a fine of up to Rs. 5,000.
- In most parts of the country, a complaint against the husband's failure to provide the divorce notice can only be filed by the CAC. However, in the province of Punjab, the law has been amended to enable the wife to also file such a complaint.
- Many clauses of Section 7 of MFLO are contrary to the teachings of Islam, which creates confusions and exacerbates problems. The following are among the most significant issues:
 - After an irrevocable divorce is pronounced, there is no room for reconciliation in Islam; divorce becomes effective forthwith. However, MFLO makes no distinction between revocable and irrevocable divorces.

MFLO accepts the validity of a divorce only if the concerned CAC is properly notified of the occurrence of divorce, following which he issues divorce certificates to the divorcees. On the contrary, the some jurists under the Islamic law hold that the divorce is effective the moment it is pronounced, whether it revocable or irrevocable. The Shari'ah Appellate Bench of the Supreme Court (SABSC) of Pakistan, in one of its decisions, has upheld this Islamic principle, and it is being used as a precedent.

Furthermore, the Ordinance does not accept the divorce as effective until the stipulated 90-day period following notification to the CAC has expired. However, in the Islamic law, the *iddah* is not same in all situations. For instance, as mentioned above, there is no *iddah* for a divorced woman who has had no conjugal relations with her husband. The Ordinance, however, debars her from a second marriage until the expiry of 90 days. Furthermore, it allows and advises reconciliation through the Arbitration Council and allows the husband to take her back without

nikah (formal marital contract), whereas there is difference of opinion among jurists, whether Islamic law requires re-solemnization through a fresh *nikah*. Likewise, for an expecting mother, the delivery of the child ends the *iddah* period, be it a few days or many months. According to the Ordinance, however, she must observe a waiting period of 90 days, even if the child is delivered earlier.

According to MFLO, the *iddah* commences from the day the CAC receives notice of divorce. Yet, ironically, there is no time limit set for the husband to give this notice to the CAC. The words used in the relevant section are “as soon as possible,” and this loophole enables the divorcing person to play tricks and prolong the *iddah*, and thereby the agony of the divorcee, if he so wishes.

Prevalent practices are frequently in blatant violation of Islamic teachings, especially where the laws are weak or ineffective. Thus, the abhorrent practice of triple divorce pronouncements is common. Husbands fail to notify the CAC about their divorces leaving their wives in limbo, with no option of remarriage unless they are ready to face possible charges of adultery. As discussed later in this section, dissolution of marriage, including divorce, is frequently burdened with issues of maintenance rights and custody of children, creating a host of problems for the concerned parties and leading to acrimony, mudslinging and sometimes even blood feuds.

Divorce at the Wife’s Demand – Khula and Talaq-e-Mubarat

Khula is a process through which a woman can dissolve the marriage by surrendering certain rights given to her, such as dower (jewelry, ornaments and any fixed amount given or to be given by the husband), dowry (gifts brought by the bride at the time of marriage) and *bari* (the gift given by the groom to the bride on the occasion of marriage), etc. In no event is she required to pay from her own pocket to secure her freedom from a non-functional marriage. It is also widely believed that it can be obtained only through court since out-of-court *khula* settlements are not so common.

With not much to her name legally, the average Pakistani woman normally has to surrender jewelry gifted to her by her husband in cases of *khula*. There are also cases when she is pressurized to surrender the rights to the tangible items or property given to her by her own parents.

There is a widespread misconception that, in Islam, men alone are empowered with the right to dissolve their marriages. In reality, Islam also gives the woman the right to dissolve her marriage, through an agreement between herself and her husband, which may take the form of either *khula* or *talaq-e-mubarat*. In *khula*, the wife dissolves the marriage by paying for dissolution or surrendering certain rights. In *talaq-e-mubarat*, both spouses are desirous of separation and reach a mutual settlement that makes this possible. This divinely granted right of *khula* is stated in the Qur’an as follows:

“If you (the judge) do indeed fear that they would be unable to keep the limit ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by Allah, so do not transgress them”

There is a consensus among jurists that it is unjust for a husband to receive some kind of payment from his wife if he has been the oppressor. However, if a woman is the guilty party and seeks divorce, the husband can receive something from her the worth of which should not be more than what he had given to her or was supposed to give her as the dower.

The effect of dissolution of marriage through *khula* is similar to *talaq-e-bain*: the two cannot rejoin each other without a remarriage through a new matrimonial contract. Jurists of all four major schools in the Muslim world hold that *khula* can be decided at bilateral level; however, some hold that it can only be obtained through a competent court.

Using the right of *khula* without reasonable grounds is disapproved of in Islam: according to a saying of the Prophet Muhammad (PBUH), such women will not be able to get even the fragrance of *Jannah* (paradise).

The family laws of Pakistan are very clear about *khula*, and it is dealt with under Section 8 of the MFLO. *Khula* comes into effect by an offer from the wife to compensate the husband to release her from marital responsibilities. With mutual consent, she can be released through *talaq-e-mubarat*. In the light of a judgment of the courts, the production of evidence by a woman is not necessary to establish that she cannot live with her husband anymore. The right of *khula* is also exercised under the newly added proviso to Section 10 of the West Pakistan Family Courts, 1964⁶, whereby the Family Court in a suit for dissolution of marriage, if reconciliation falls, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage. Due to this amendment dissolution of marriage on the basis of *khula* has become very easy and quick, which has increased the rate of divorce at a very alarming rate in Pakistan.

Notwithstanding these rights and laws, the right of *khula* is seldom exercised by a woman out of court and in many cases she has to surrender, not only the dower given to her by her husband, but also the belongings and property gifted to her by her own parents to avoid lengthy litigation and character assassination, even where her husband has been an oppressor.

⁶ [* Words added by Family Courts (Amendment) Ordinance 2002]

*[10. Pre-trial proceeding.--(1) When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.]

* Sub. by West Pakistan Family Courts (Amendment) Act, 1969, S. 6.

(2) On the date so fixed the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their Counsel.

(3) At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties if this be possible,

(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix date for the * [recording] of evidence.--

"Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation falls, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage.

* Inst. by W.P. Act 1 of 1969 S. 6 (b).

Dissolution of Marriage through Court

In Pakistani society, a woman normally does not seek separation from her husband and goes to every possible extent to resolve her differences with her husband within the family. In extreme cases, she may seek to terminate her marriage through the intervention of elders or close relatives. She approaches a court for dissolution of marriage only when her matrimonial life is filled with unbearable troubles but the husband is not willing to free her from wedlock. Recently, however, there has been a noticeable increase in the number of cases reaching courts, which is attributed to the enforcement of the decision by courts to resolve each family case within a period of six months.

Muslim jurists believe that, under certain circumstances, a judge can terminate a marriage even without the consent of a husband, for instance, if the husband has gone missing, lost his sanity, or is impotent, or even if he fails to provide maintenance. Similarly, if the husband is unwilling to fulfill marital obligations, the court can intervene and, despite his unwillingness, separate him from his wife. The effect of dissolution of marriage through court is similar to *talaq-e-bain*, i.e. the two may rejoin through remarriage.

Section 2 of the Dissolution of Muslim Marriage Act 1939 provides a woman the right to terminate her marriage if her husband:

- is missing,
- has failed to provide maintenance,
- is sentenced to imprisonment for seven years,
- has failed to perform marital obligations,
- is impotent,
- is insane,
- is suffering from leprosy or venereal disease,
- is cruel,
- is associated with women of evil repute,
- attempts to force her to lead an immoral life,
- dispossesses her of her property, or
- obstructs her from practicing religion.

She can also dissolve her marriage if it was arranged before she reached the age of puberty, whether with consent or without her consent, solely by declaring that she has now become an adult and does not recognize the marriage. (This right is discussed further below in the discussion of *khiyar-al-buloogh*.)

Delegation of the Right of Divorce to Women – *Haq-e-Tafweez-e-Talaq*

Haq-e-Tafweez-e-Talaq is another option for dissolution of marriage under which a woman is granted the right to annul her marriage. A broad consensus exists among Muslim jurists that Islam gives a woman the right to seek this power from her husband, and it can be delegated by him to her both verbally as well as in writing, at the occasion of marriage solemnization or

afterwards, with different forms and conditions. If she has this right, she can divorce herself and dissolve the marriage. Once this right is delegated, it cannot be repudiated. The husband's right of divorce remains intact even after he delegates it to his wife.

MFLO also acknowledges this right. Accordingly, in Column 18 of the current *nikahnama* (standard marriage contract form), the husband may delegate the power of divorce to his wife with conditions arrived at by the parties. In the event that the wife subsequently exercises this right, she is required to send the divorce notice to the Chairman of the Arbitration Council, who issues a divorce certificate if reconciliation efforts from the platform of the Arbitration Council fail.

This option is rarely availed by women in Pakistani society, mostly because of ignorance about this provision in the *nikahnama*. The parents of a bride also do not seek this right for their daughter considering it a bad omen for the beginning of her marital life. Although the option is there on the official *nikahnama*, people normally cross it out, often without even consulting the bride. Notably, however, in the literate class in urban areas in general and in the aristocracy in particular, an increasing number of women are seeking this right, especially on the occasion of marriage.

In sum, though there is no religious or legal dispute on this issue, owing to lack of awareness and superstitious thinking, few women avail this option while men normally do not support it.

Dissolution of Marriage after Charges of Adultery – Liaan

Liaan, though rare, is another procedure of dissolving marriage. When a husband levels adultery charges against his wife but is unable to produce four witnesses to prove his claim. In such cases, he may either accept that his allegation was false and face the punishment for committing *qazaf*—in which 80 stripes are inflicted on him for a false allegation of *zina* (adultery).

Concept of Halala

حلالہ

Halala

.....

حلالہ لفظ قرآن میں تو استعمال نہیں ہوا البتہ یہ لفظ حلال سے بنا ہوا لگتا ہے۔

The word "Halala" has not been used in Quran. However, it seems to have been derived from the ward "halal"(Lawful)

اس سے مراد وہ عمل ہے جس سے ایک عورت جو ایک مرد سے طلاق لے چکی ہو

It means, a process in which a **definitely** divorced lady

دوبارہ اس (مرد) کے لیے کیے حلال ہو سکتی ہے

can again become halal (lawful) for her Husband

بیوی جو شرعی طور پر خاوند کے لئے حلال ہوتی ہے مندرجہ ذیل وجوہات کی بنا پر حرام ہو جاتی ہے

Wife who, as per Sharia Law is halal (lawful) for her husband becomes haram (unlawful), due to one of the following reasons:

(1) خاوند نے بیوی کو دو دفعہ میں سے ایک دفعہ طلاق دی ہو مگر اس (بیوی) کی عدت گزر گئی ہو

(1) Husband may have exercised his one of the Two Rights of Divorce, but the legal period (Eddat) of his wife expired; and

اور خاوند نے عدت کے ختم ہونے تک بیوی سے رجوع (صلح منگائی) نہ کیا ہو
husband did not reconcile with her during or on the expiry of her legal period (Eddat)

(2) خاوند نے بیوی کو ایک دفعہ طلاق دی اور عدت کی مدت میں رجوع کر لیا

(2) Husband exercised his one of the Two rights of divorce, but reconciled with her during or on the expiry of legal period

مگر کچھ عرصے کے بعد پھر کسی وجہ سے دوسری دفعہ طلاق دے دی مگر عدت

But after some time, due to any reason, again (Second and last Time) divorced her; and

کے ختم ہونے تک بیوی سے رجوع (صلح منگائی) نہ کیا ہو

did NOT reconcile with her during or on the expiry of legal period.

(3) خاوند دو دفعہ طلاق دینے کا حق استعمال کر کے عدت کے ختم ہونے تک

(3) Husband had exercised his TWO rights of Divorce and during or before the expiry of legal period

بیوی سے دو دفعہ رجوع بھی کر چکا ہو مگر اس نے اب پھر طلاق دے ڈالی

had reconciled twice with wife, BUT AGAIN DIVORCES HER.

کیوں کہ

BECAUSE

(1) عدت واپی و دفعہ طلاق میں خاوند کے پاس صرف دو راستے ہی ہیں

(1) In two times Divorce with legal period, Husband has only two choices:

بیوی کو دستور کے مطابق رکھ لے یا دستور کے مطابق فارغ کر دے

Retain wife honourably OR Release her honourably

(طلاق دو ہیں (یعنی مرد صرف دو بار ہی زندگی میں ایک عورت کو طلاق دے سکتا ہے تیسری کی کوئی گنجائش ہی نہیں ہے))

2)

Divorce is (permissible) Twice (i.e. Husband can only divorce a wife twice, there is no provision of the Third one)

اوپر بیان کردہ تینوں میں سے کسی ایک صورت میں بھی طلاق موثر اور بیوی خاوند پر حرام ہو جاتی ہے

In any of the above mentioned three conditions, the divorce becomes effective and wife become haram (unlawful) for Husband

اب دوبارہ اگر وہ (خاوند) اس عورت سے شادی اسی صورت میں کر سکتا ہے کہ یہ کسی اور مرد سے شادی کرے

Now again Husband can only marry this lady, if she marries someone else

اور دوسرا مرد اس عورت کو طلاق دے اور اس خلاق کے موثر ہونے کے بعد یہ بیوی اس پہلے والے خاوند کو حلال ہو سکتی ہے

and the other husband divorces her, and after divorce becomes effective
this lady can become lawful (halal) to her First Husband

اس عمل کو حلال کہا جاتا ہے

This process is called "Halala".

حلالہ کی شادی میں پابندی

RESTRICTION IN HALALA MARRIAGE

پہلے والے خاوند اور نئے وائی دوبارہ بیوی کو یقین ہو کہ اب وہ شادی کر کے اللہ کی حدود قائم رکھ سکیں گے

...that they are able to observe the limits of Allah...

The Holy Quran recites on the issue of Halala, as under: Sura 230 (i.e. Verse 230).

“And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorces her, it is no sin for both of them that they come together again if they consider that they are able to observe the limits of Allah. These are the limits of Allah. He manifesteth them for people who have knowledge”.

What it means is that if the *Talak* was “the third time”, such a *Talak* was pronounced, then they cannot re-marry unless the wife were to have, in the intervening period, married someone else and her marriage had been dissolved either through divorce or death of that person and the *iddat* of divorce or death has expired. This is considered as *halala*”.

To prevent making a mockery of the sacred institution of marriage and of the rights of women, where the man divorces his wife and marries her again and again, Islam imposed the two-strike rule whereby a man is allowed to divorce and remarry the same woman again only twice. If the man divorces his wife for the third time, it would constitute an irrevocable divorce and it would be impermissible for the man to marry the same woman again unless and until she (perchance) marries another man, consummates the marriage, and the man dies or of his own will divorces her.

The term *halala* is when a man has irrevocably divorced his wife, and they (or some people) intentionally plan and arrange for another person to temporarily marry the (divorced) wife, so that the wife can again become legal again for the first husband. This intentional plotting and planning for arranging the temporary marriage of the divorced wife with another person to intentionally circumvent the Laws of Allah and make her legal for her first husband is what is known as *halala*.

It is absolutely impermissible and a grave sin in the sight of Allah for the believers to plan such a

halala to intentionally circumvent and make a mockery of the Laws of Allah Subhanah. The Messenger of Allah (PBUH) invoked the curse of Allah on the people who practiced *halala* and on those for whom it was practiced.

There is no concept as *halala* in Islam. This is something that has been made by some Muslims and unfortunately is now seen as part of the *Shari'ah* by some Muslims. The rule of the Qur'an is that if a man divorces his wife for the third time in one marriage contract then that wife cannot get back to the man unless she (genuinely) marries another man and then (genuinely) is divorced by that man. In other words, this rule should not be dealt with by a pre-planned marriage and divorce.

It is preferable not to give any title to marriages that are done with specific conditions as this will result in generalising conclusions. The main thing that makes the religious *nikah* (marriage) different from *zina* (adultery) is the fact that it is a permanent contract, by the consent of the two parties, to stay together (unless cancelling the contract by divorce) and that it is openly announced. Any conditions that do not negate the above conditions (and other religious laws) can be imposed to this contract, although in principle it is always better to keep it without any further conditions.

Islamic *sharia* disallows a couple remarrying after having been through three divorces. Some Sunni schools view a triple *talaq*, when the husband saying "I divorce you" three times in a row, as equivalent to three single *talaq*. Other Sunnis and Shia treat that as a single divorce, arguing that the Islamic prophet Muhammad did so and Umar having no authority to change that⁷.

Couples cannot remarry until the ex-wife marries another man, to ensure that divorce is not taken lightly. She cannot go back to this husband who has divorced her three times, unless she marries another person who out of his own free will divorces her. This rule is given by the *Shari'ah* to reduce the occurrence of three divorces and to protect the honor of the woman. *Nikah halala* cannot be done as a condition or intention to make her lawful to her ex-husband. After *iddah* is observed, the original couple may remarry. *nikah halala* is used mainly in countries that recognize the triple *talaq*.

A man is entitled to take his wife back twice after two respective *talaqs* and for a third time also before the expiry of her *iddat* after he gives her a *talaq* for the third time. But after that the separation is irrevocable. She is then free to be married to any other person of her choice. If then in the normal course of life a dispute between them develops leading to first *talaq* by the second husband, she is again free to be married to any person of her choice including the second husband (by whom she has got the first divorce) and also including the first husband as well. The relevant point here is that a *halala* cannot be planned in advance, as a *nikah* between her and the second husband with an understanding of a divorce afterwards will not be valid. If she does so, it will be an illegitimate relationship with the second husband and with the first husband also with whom she comes to live after a pre-planned *halala*. Muhammad (PBUH) has cursed both such men who perform *halala* and for whom *halala* is performed. The second Caliph Hazrat Umar ruled during his reign that he will punish with stoning to death those who perform a pre-planned *halala*. Imam Sufian Sauri says: "If someone marries a woman to make her *halala* (for her ex-

⁷ Muslim 3491, 3492

husband) and then wants to keep her as wife, he is not permitted to do so unless he solemnises a nikah afresh, as the previous nikah was unlawful.” (Trimizi)

The widespread understanding of *fiqhi halala* is greatly unlike from the Quranic idea of *halala*. Regrettably, because of our prejudice tendency, existing deficiency in having a bond with Quran and dearth of research, the Quranic idea of *halala* has been outshined by *fiqhi halala*. Indeed in the legal and Quranic idea of *halala* neither prerequisite nor plan of divorce is there at the occasion of marriage. If a new marriage is performed with the objective of living together eternally and it turns into disastrous naturally and divorce occurs or the new husband expires, simply then the marriage with the ex-husband happens to be permitted. So, there should be no undisclosed method used in the ending of the new marriage to render remarriage with former husband viable i.e. it is completely incidental and effortless.

In this regards, we need to deliberate on a few points as below:

(1) According to Quran, marriage is never temporary. It is always permanent and that is why the law of divorce is there to dissolve the marriage in case the relations are completely spoiled between the couple. What is then the difference between precondition and intention of divorce from the results perspective? It is therefore quite astonishing that some of our religious jurists have not only allowed the marriage with the intention of divorce but have declared it blessed⁸.

If the spirit of *nikah ehsaan* is not there then it will difficult to call it a marriage. The word *ehsaan* is extracted from *hisn'* meaning fort, i.e. the place that serves as a place of protection. That is why a married man is called *mohsin* and married woman is called *mohsina* because they protect each other i.e. they get sheltered in a fort. The traditional *nikah* brings the woman in its fold of security. This protects the honour and dignity of woman as well as tames the unrestrained sexual desires of man, hence he also gets secured in the form of marriage. This is what Quran has pointed out by calling man a *muhsin* and woman a *muhsina*.

Addition of with *muhsineen'* is to show that extra marital relations are disallowed in open or in secret.

Just review the words of and honestly decide after pondering whether prevalent form of *halala* comes under the definition of *muhsineen* or not, i.e. if this form of *halala* makes man the protector of the honour and dignity of woman or a looter of her chastity usually lasting a few nights.

(2) Secondly, the agreement of man and woman plays a vital role in the marriage and no one denies the importance rather requirement of this covenant. Hence the question arises if the free will of partners is taken care of in the prevalent form of *halala*?

(3) Thirdly, in the case of pregnancy due to *halala*, is there any legal plan in the minds of man and woman? Also, is the issue of inheritance there in the minds of partners, in case of death

⁸ Durr-e-Mukhtar chapter, Al Raja, Published Mujtaba-i-Delhi, 1\241, as referred try Fatawa-e- Razwiya, vol.12, p.409, Raza Foundation, Jamia Nizaniia Razwiya, Andurun-e-Lahori Darwaza, Lahore No.8, Pakistan (54000).

during the period of *halala*. You may not find answer to these questions because the prevalent form of *halala* is only temporary and is only there to cater to the urgency of situation. Prevalent form of *halala* does not have any basis like a 'permanent marriage' i.e. this sowing is not to get the crop.

(4) Fourthly, man and woman tend to find out about each other's social, financial, moral and religious status before entering the matrimonial relation. It is only after satisfactory investigation that the relation comes into being. Does- *halala* also require this kind of scrutiny? Hand on heart, do we really think that this kind, *halala* is the Quranic objective of marriage. If not, then we should indeed not consider the prevalent form of *halala* as the legitimate dissolution of marriage.

It shows that where Quran has termed the marriage as *ehsaan* it has actually completely explained its meanings by this word i.e. a marriage which is opposite of *musafihat* and that is only possible when there is an intention of *ehsaan*. The marriage which is absent with the essence of *ehsaan* is not the opposite of *musafihat* - it is actually *musafihat*. The people, who take sex as the main objective of marriage, should ponder a little more on this verse of Quran. Does the prevalent *halala* not just comprise of sex only and don't we have the possibility of clandestine sex in, this kind of marriage during *halala* or afterwards. Is there anyone who thinks about this aspect?

Sexual immorality is possible in women just like men. In case of *halala* if a woman gets exposed to this kind of relation, will it not open the possibilities of extra marital relations for her later on? The reason is that like the words have come for men, similarly the words *Al Nisa 25* have come for women. That is, the women should also come under the bound of marriage to be *muhsina* rather than having overt and covert sexual relations. We believe that *halala* on one hand provides a blatant way for sexual desires, whereas on the other hand opens up the possibilities of clandestine illicit relations after divorce.

Our understanding is that this Quranic statement contains a universe of meanings within. This statement has provided such a description of marriage due to which not only *mutaa* but the prevalent *halala* also becomes illegal because both of them are devoid of *ehsaan* and full of *musafihat*.

This is also worth remembering that once Prophet Muhammed (PBUH) told sahaba,

"Should not I warn you about the rented bull? The companions asked the Prophet who are they? He replied that those are the mohallil. Curse of Allah be upon the mohallil and mohallil lahu."

The interpretation of by Pir Karam Shah Alazhari is as follows:

"From here onwards it is the discussion about 3rd divorce (4) i.e. if he has given the 3rd divorce as well, then until she marries someone in the same way as she married the first husband and then the second husband after consummating the marriage does not divorce per his free will, she can marry the first husband again. This is a clear order from Quran

which is not subject to any interpretation. Now-a-days a solution has been sought in terms of halala for which Prophet Muhammed (PBUH) has ordered "Allah's curse on the person doing halala and the one for whom it is being done."⁹

This is quite clear now that Prophet Muhammed (PBUH) declared *halala*¹⁰ profane, Hazrat Umar (RA) called it worth stoning and Hazrat Uthman (RA) considered it devoid of the trait of *nikah*. In the presence of such clear verdicts, the emphasis for *Halala* is quite un-understandable.

Legal position of Halala in Pakistan

Muslim Family Laws Ordinance (MFLO) requires a man to give notice & go through a mediation/reconciliation process before divorce. However, it is often not followed, and the divorce is still enforced. A man is required to pay the *meher* (dower) at the time of divorce, if he has not paid it earlier. If the woman has the right of divorce in the Nikahnama, she can give a divorce and she does not have to give up her right to *meher*. Under MFLO a divorcing husband shall, as soon as possible after *talaq* has been pronounced, in whatever form, give a notice in writing to the chairman of the Union Council. Failure to notify, in the above stated manner, invalidated *talaq* until the late 1970s and early 1980s, but introduction of the *zina* Ordinance allowed scope for abuse as repudiated wives were left open to charges of *zina* if their husbands had not followed the MFLO's notification procedure. Since early 1980s, the practice of the Courts in Pakistan is that they validate a *talaq* despite a failure to notify as provided under the MFLO. In all other three types of divorces i.e. khula, mubara'at and judicial divorce, divorce is effective according to the law of the land and possibility of remarriage is there. The limitation of two *talaqs* is applicable only in case of divorce through "*talaq*". In all other dissolutions this limitation is not applicable.¹¹

The separated husband and wife through finalization of *talaq* can resume the marital relationship by means of re-marriage *nikah* as there is no legal impediment including that of an intervening

⁹ Zia-ul-Quran, vol. I, marginal note of verse #230 Sura — to-al Baqara, Zia-ul-Quran Publicationes, Ganj Bakhsh Road, Lahore, N/A.

¹⁰ Here regarding halala we want to point out that most of the scholars of filth rather all of them believes that the legitimate halala will be the only way for women who have received *talaq-e-Mugallaza* (i.e. three divorces at a time). However, Allama Tamanna Imadi and Allama Jaafar Shah Phulwari believes that this legitimate Halala will be valid for only those woman who have taken Divorce on her own will as a substitute for wealth, not for that woman who have been divorced by her husband on his own will. As per Jaffer Shah Phulwari, "After second Marriage if the later husband also divorced her accidentally, then she will be entitled for her former husband, this law was only for women who have taken Khula from their husband but it was considered for the woman who have been divorced thrice." (Qurani Qanun-e-Talaq, p.35, Dar-ul-Tazkeer, Rahman.Market, Ghazni Street, Urdu Bazaar, 2003.) Details could be found in the above mentioned two scholars' books. At-Talaq Marratan is a well-known book of Allama Tamanna Immaadi comprises of 167 pages, I have the issue of 2004, which was published from Dost Associates Urdu Bazaar Lahore. And The book of Jaffer Shah of 88 pages.

¹¹ PLD 2003 Peshawar 169

marriage or *hillala*. Section 7(6)¹² of MFLO also allows such a re-union without an intervening marriage. The other Islamic countries have also enacted similar laws. Therefore a man can remarry his divorced wife, twice even after two effective *talaqs*. But he is prohibited to marry her for the third time. Doctors of Islamic Shariah declare that after two complete effective divorces the woman loses subject (status) of legality for the previous husband but not before that. The eminent Islamic scholar Maulna Abul Ala Maududi in *Tafheem-ul-Quran*, Volume I at page 176 has subscribed to this view that there is no moral or legal obstacle in doing so.

The purpose of this allowance and the restriction according to Abul Ala Maududi in 'Meaning of Quran'¹³ is,

"This verse was meant to reform a serious social evil common in Arabia before the advent of Islam. A husband was allowed to pronounce divorce as often as he pleased. Whenever his relations were strained with his wife, he would pronounce divorce and then reunite as and when it suited him. As there was no limit to this, it was repeated over and over again....."

The misuse of this method was to disgrace the woman by restraining her from doing a lawful act.

*"...thus the wife could neither have conjugal relations with him nor was free to marry anyone else".....*¹⁴

And restraining anybody from doing anything what law allows him is cruelty.....*"This verse of Quran shuts this door of cruelty".....*¹⁵

This view has also been fortified by superior courts of the country by their authoritative pronouncements.¹⁶

¹² Section 7(6) : "Nothing shall debar a wife whose marriage has been terminated by talaq effective under the section from re marrying the same husband, without an intervening marriage with the third person, unless such termination is for the third time so effective."

¹³ The Meaning of the Qur'an; 10th edition, pg167

¹⁴ The Meaning of the Quran; 10th edition, p.167

¹⁵ The Meaning of the Quran; 10th edition, p.167

¹⁶ Gulzar Ahmed V Mst. Maryum Naz (2000 MLD 477), Fazal-Subhan v Mst. Sabreen and others (PLD 2003 Peshawar 169), Muhammad Ayub Khan v Mst. Shehla Rasheed and others (PLD 2010 Karach 131), Zulfiqar Ali v Mst. Yasmeen Mukaram and another (PLD 2011 Lahore 458), Danish v Mst. Fauzia Danish (PLD 2013 Karachi 209)