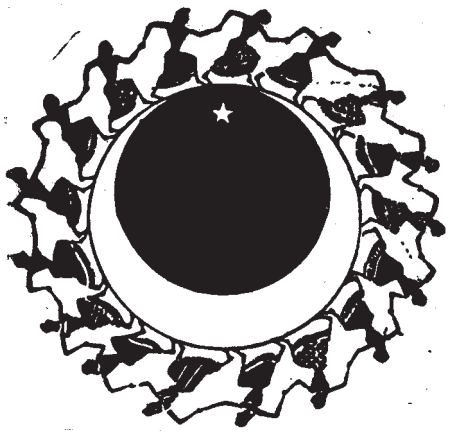

LAW

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The Muslim Woman's Right To Divorce

This is an analysis of the interpretation in Pakistani law of the Quranic provision for a woman's right to divorce a man with whom she does not wish to live. We do not, however, know how the law generally works in practice, and would like readers in Pakistan to send reports on this.

THE Dissolution Of Muslim Marriages Act, 1939— a law which, it may be noted, has been on the statute books of the territory now com-prising the states of India, Pakistan, and Bangladesh for nearly half a century—entitles a Muslim woman to divorce on several specified grounds, including :

that the husband has neglected or has failed to provide for her maintenance for a period of two years;

that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years

that the husband—habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment.

The grounds available under the Dissolution Of Muslim Marriages Act may be placed in some historical perspective by remembering that until 1938 divorce was available to an English wife only on grounds of adultery, rape, or an unnatural offence. The (English) Matrimonial Causes Act of 1937 extended these grounds by adding cruelty, desertion for three years, and incurable insanity. Even today, the law of divorce applicable to a Muslim woman in South Asia does not compare unfavourably with that applicable to an English wife. The Muslim wife in South Asia can obtain a divorce by mutual consent extrajudicially and without the two; years separation required under the (English) Matrimonial Causes Act, 1937.

On the other hand, the ground most commonly relied upon to establish irretrievable breakdown of marriage under the English Act is "unreasonable behaviour." The import of the English expression "has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent" is much the same as the comparable clause in the Dissolution Of Muslim Marriages Act, "makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment."

In Pakistan and Bangladesh, the Muslim wife's right to divorce has been considerably expanded by judicial interpretation of certain Quranic provisions and enunciation of the principle that it is not the policy of Islam to force a woman to remain bound in a union which she finds "hateful" : "Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation." (Balqis Fatima vs Najm-ullkram Qureshi, PLD 1959, Lahore HC 56b).

Despite the fact that many of these rights are not fully realised in practice as yet, the Quran conferred on women rights that were, in their time and for many centuries afterwards, quite revolutionary. In the course of a leading decision on judicial *khul*, the supreme court of Pakistan quoted the Quranic verse which states : "Women have rights against men, similar to those that the men have against them, according to the well known rules of equity." (Khurshid Bibi vs Muhammad Amin, PLD 1967, Pakistan SC 97). "It does not seem reasonable that while to one of the two contracting parties (i.e., the husband) has been granted a plenary power to put an end to the contract, there should be no power given to the other party and the wife must, in order to get a release, prove some misconduct on the part of the husband as will disentitle him to the continuance of the marriage. The wife ought, in reason, to have a right similar to that of the husband subject only to the order of the court. The rights of the contracting parties should, as far as the circumstances permit, be at par." (Balqis Fatima).

The Pakistani courts have concluded that "the letter and the spirit of the Quran" conferred on the wife the right which reason dictated should be hers. The most recent case is Abdul Rahim vs Mst Shahida Khan, PLD 1984 Pakistan SC 329. These precedents are followed by courts in Bangladesh.

In effect, a judicial *khul* is a judicial divorce granted in the face of the husband's opposition in circumstances where the wife cannot establish any one of the specific fault based grounds available to her under the Dissolution Of Muslim Marriages Act, 1939, and pleads only incompatibility of temperament or aversion. She need only establish that

serious disharmony exists between the spouses; she need not establish any grounds as such : "The judge will consider whether the rift between the parties is a serious one, though he may not consider the reasons for the rift." (Balqis Fatima).

"The emotions of love and hatred may not invariably have a rational basis...If... the court comes to the conclusion that the marriage has irretrievably broken down and there is no hope of the parties ever living together to perform their marital obligations, a case for the invocation of the doc-trine of *khul is* made out." (Shahida Khan, 1984).

It must be stressed that "irretrievable breakdown" in the context of a judicial *khul—in* contrast to the terms of the (English) Matrimonial Causes Act, 1937, and to proceedings under the Dissolution Of Muslim Marriages Act, 1939— need not be based on specified grounds alleged and established. It is enough that the wife strongly feels that continuation of the marriage is impossible for her. In a recent case the wife stated in her testimony that she would rather be shot than live with her husband. The high court judge, presently the chief justice of the Punjab, Pakistan, observed : "If a woman has stated that she would rather prefer to be shot dead than to go and live with her husband, it obviously means that she is determined not to live with her husband and the hatred was so deep that not to dissolve such a marriage would amount to compelling her or rather pushing her in a hateful union with the husband which certainly is not contemplated by the law applicable to the present case, i.e. dissolution of marriage on the basis of *khul."* (Rashida Bibi vs Bashir Ahmad, PLD 1983, Lahore 549)

The learned judge further ex-pounded the principle of judicial *khul* as follows: "The principle *of khul is* based on the fact that if a woman has decided not to live with her husband for any reason and this decision is firm, then the court, after satisfying its conscience that not to dissolve the marriage would mean forcing the woman to a hateful union with the man, (will dissolve the marriage) and it is not necessary on the part of the woman to

— *Balvinder*

produce evidence of facts and circumstances to show the extent of hatred..."

It should be reiterated that there is, of course, no necessity for the husband's consent or his pronouncement of *talaq* in order that a divorce obtained by the wife under the Dissolution Of Muslim Marriages Act or on the basis of judicial *khul* be valid and effective. The extrajudicial *khul* is a divorce by mutual consent, one of the incidents of which is that the wife agrees to make some financial restitution to the husband, usually repaying any *mahr* she has received and/ or renouncing her claim to any unpaid *mahr.*

Islam does not force a woman to remain bound in a union which she finds hateful

In practical terms, the difference between a divorce obtained under the Dissolution Of Muslim Marri-ages Act on one of the specified fault based grounds and a judicial *khul* is in regard to the wife's right to her *mahr.*

Mahr is an amount settled on the wife by the husband and is an essential component of a Muslim marriage contract. Although all of the *mahr* may be payable at or immediately after the marriage ("prompt" *mahr),* some portion is often deferred, becoming payable on dissolution of the marriage by the death of either spouse or by divorce. If the deferred *mahr* is set at a sufficiently high amount, it may be of real benefit to the wife, should she be divorced or widowed. *Mahr* is, however, frequently set at a nominal amount.

A divorce obtained by the wife under the Dissolution Of Muslim Marriages Act on any of the fault based grounds does not affect her right to claim any *mahr* that has not yet been paid to her.

However, if the wife obtains a judicial *khul*, she may be ordered by the court to repay any *mahr* already paid to her and/or to forgo any *mahr* owed her. Basically, this would seem to reflect an assumption that since the wife could not prove grounds for divorce under the Dissolution Of Muslim Marriages Act, the husband is an 'innocent' party : "If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife and ordinarily it will be of the whole of the property, but the judge may take into consideration reciprocal benefits received by the husband and continuous living together may be a benefit." (Balqis Fatima).

It must be emphasised that recourse to judicial *khul* is only necessary when the wife cannot establish any of the specific grounds available under the Dissolution Of Muslim Marriages Act.

While the Muslim husband in South Asia has the right unilaterally to dissolve the marriage extra judicially for any reason or for no reason at all, the Pakistani or Bangladeshi Muslim wife has a very extensive right to judical divorce, either on grounds specified in the Dissolution Of Muslim Marriages Act or, without establising any particular matrimonial fault on the parl of the husband or any ground as such, simply on the basis of incompatibility, discord, or aversion, sufficiently strongly felt to render the "harmonious married state as envisaged by Islam" impossible. The Indian Muslim wife has a right to judicial divorce on any one or more of the grounds set out in the Dissolution Of Muslim Marriages Act, 1939. ❐