

(1): In Islam, the contract of marriage has a spiritual and moral aspect, it cannot be ruled out. Legally it is a civil contract subject to dissolution for certain good reasons. Islam being a Deen Fitrat conforms the dictate of human nature and does not prescribe the binding of man and woman together even in a state of extreme discord and complete incompatibility of temperament, but gives right to a man to divorce his wife, likewise right has been given to a woman to dissolve marriage through the Qazi or the Court of competent jurisdiction. Allah almighty says, that "The women have been given rights similar to the right given to men against them"

In Islam the marriage contract between man and woman has been declared as a source of mutual love and affection—

بما يحبون ويكرهون بما يحبون ويكرهون. If this love or affection due to some reasons start diminishing and develop hatred, disliking and disobedience, in such circumstances, the Holy Quran enjoins to appoint arbiter from the side of man and woman. They will try their best for reconciliation and restore love and affection between them. If they succeeded in doing so, that is well and good and if failed and the tense matrimonial life between the spouses continued, the Holy Quran ordains that اسات بالمعروف والنهي بالاجل Either

she should be kept in accordance with well known and established custom or release with grace and better way. In the light of Quranic commandments, it is not allowed to keep her for causing hurt and torture or for the sake of undue advantage. (—

ولا تضلوا من اجل ان تتخافوا) It must be kept in mind that, in Islam, though the divorce has been declared permissible but it has been declared the most abhorred and detestable among the permissible things, in the sight of Allah. Likewise the woman who seeks dissolution of marriage without cogent reasons, in the light of sayings of the Holy Prophet, shall be deprived of from the fragrance of paradise.

(2): Regarding family issues there are two important laws enforced at present in Pakistan. The first one is the dissolution of

Muslim marriage act 1939 and the second one is the Muslim family law ordinance 1961. The validity of these both laws have always been controversial between religious circles and the law makers. The British India constitutional assembly enacted the dissolution of Muslim marriage act 1939 in March 1939. Before its enactment, there used to govern the Islamic personal law for the settlement of family matters between the Muslims. As you know, the British India is dominated by the followers of Hanafi school of thought and under the Hanafi code of law, there is no provision under which the woman can dissolve her marriage through Qazi or the Court of law in a state of extreme rift and differences. On the other hand, under Fiqh Maliki, there are verities of grounds under which a woman can dissolve her marriage through the Court of law. Being suffocated by this embargo, the Muslim women of British India started to convert to other religion to get rid of their disliked husband. The Ulema established principles that the converted woman shall be imprisoned till they reconvert to their original religion. The principle was however not implemented. At the same time the Superior Courts of British India delivered a judgment by applying another principle of Islamic law wherein if one of the Muslim spouses converts to other religion, or becomes apostate, that will result in separation between them.. After this judgment, the rate of conversion to other religion by the women folk increased considerably. The Ulema and the Muslim organizations feeling the gravity of the situation, tried their best, to avert this trend. The Jamiatul Ulema Hind, under the leadership of Maulana Ashraf Ali Thanvi compiled a book entitled Hila-i-Najiza with the consultation of Arab Scholars, wherein it was mentioned that: If the followers of Hanafi Fiqh, faced hardship in applying Hanafi principles, they can apply the principles of other Imams like Imam Malik, Shafi and Imam Ahmad. When the Dissolution of Muslim marriage act 1939 was drafted, the Jamiatul Ulema-i-Hind showed its concern and strong reservations against it specifically, regarding the powers

granted to the non-Muslim judges to dissolve the marriage of Muslim spouses. They wanted to include some amendments in it and in this respect they met the Quid Azam and other high-ranking officials of Muslim league but they paid no heed to their demands and this law was passed by constituent assembly and enforced in British India.

3: In case of serious rift and discord if the man and woman are not position to lead a harmonious life as envisaged by Islam, the woman may ask her husband to release her in restoration of what he had received from him as consideration of marriage, and the husband if accepting this offer, released her from the marriage bond, technically it will be given the name of "Mubarat" then there is no need of reference to the court of competent judge. In circumstances, where the husband refuses the offer of the woman, then there is unanimity of views between the jurists that there must be a third party to decide the matter between them. Ultimately the case will be placed before the court of Qazi for adjudication. In case the husband refused the decision of the Court, whether the Qazi or a judge is empowered to dissolve the marriage without consent of the husband? In this respect the superior Courts have given divergent views. In Umar bibi vs State it was held by the Lahore High Court that for the dissolution by way of khula, the consent of the husband is necessary, the Qazi or a judge is not empowered to dissolve the marriage on the grounds of dislike and hatred without consent of the husband .(AIR1945 LHR51). In Saeeda khoum vs Muhammad Sami ,it was held that "Incompatibility of temperament, dislike or even hatred on the part of the wife for the husband is not valid grounds for divorce under Muslim law unless the husband agrees to it".(PLD 1952LHR 113). In Fatima vs Najmul Ikram a divergent view came forth and it was held that: "Wife entitled to dissolution of marriage on restoration of what she has received from husband in consideration of marriage if judge apprehends that the parties will not observe the limit of God" 'In this judgment the consent of the husband was

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declared not necessary. PLD 1959LHR566. Then comes the scholarly written judgment, wherein it was held that in case of incompatibility of temperament between man and woman, the judge or a man in authority apprehends that they will not be able to observe the limits prescribed by Allah, he can dissolve the marriage without consent of the husband. (PLD 1967 SC page 97)

4: The jurists, Ulema and the judges have derived arguments from the following Quranic verses and traditions of the Holy Prophet P.B.U.H. It is appeared in the Holy Quran that "It is not permissible for you to take back what you have given to them unless there is a fear that they both will not observe the limit prescribed by Allah and if you fear that they both will not observe the limit of Allah, the there is no sin for both of them if she releases herself against what she has given to him". In the tradition of the Holy Prophet we have the case of Jamila the wife of Sabit bin Qais who approached to the court of the Holy Prophet and complained against Qais for his being ugly and short stature man and said that if I did not fear Allah I would have spat at his face. The Holy Prophet asked whether she is ready to return back the garden which he had given to you. She agreed and thus the Sabit bin Qais was ordered to divorce his wife. The second case is of Habiba, another wife of sabit she also complained against Sabit before the Holy Prophet and the Holy Prophet on hearing her arguments asked Sabit to release her. The case Mughis and his wife Barirah is also worth mentioning here. He had married to a slave girl and she left her due to incompatibility of temperament and inharmonious matrimonial life. Mughis used to walk through the streets of Medina crying and weeping. When it came into the kind notice of the Holy prophet, he asked her to go back along with her husband. She enquired the Holy prophet whether it is an order on his behalf? The Holy prophet said: no it was mere

recommendation. She declined to accompany him and the Holy Prophet ordered to divorce her. During the era of Hazrat Umar when a woman refused to live with her husband, Hazrat Umar confined her in a dirty place which was not fit for human dwelling. After some days when Hazrat Umar asked about the life she has passed in confinement, she said that these were the days that she has ever enjoyed throughout her life. On this, Hazrat Umar ordered her husband to release her even against nominal thing.

5: The differences between the Superior Courts and Ulema can be summarized as under:

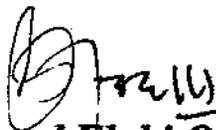
According to Superior court, in the relevant Quranic verse (If you fear) is addressed to the Head of the state or a Qazi that if they fear that the man and woman cannot live together within the limit prescribed by Allah, and then they can dissolve the marriage even if the husband was not agreed to it. According to Ulema, in this Quranic verse, the man and woman have been addressed. According to them, the subsequent verse (Unless they both fear) supports their contention. According to them, even if this Quranic verse is addressed to Ulil Umr, even then he cannot dissolve the marriage without consent of the husband .he can only ask or persuade them to dissolve the marriage with mutual consent.

Secondly, from the case of Jamila, Habiba and others, as cited above, the Superior Courts have derived arguments that, the Holy prophet as a judge had ordered the Sabit to divorce his wife, and he complied the orders, it is, according to them, is a proof that the consent of the husband is not necessary. According to others, the Holy prophet had asked sabit and others to divorce his wife and had not dissolve the marriage himself as a judge or Hakim. In Saeeda Khanum vs Muhammad Sami, the Lahore High Court had held that the Separation between Sabit and Jamila had taken place with the consent of the husband.

Regarding the view point of Lahore High Court, the august judge of Supreme Court in Khurshid bibi case held that: In Saeeda khanum case, the relevant Quranic verse regarding Khula was not taken into consideration.

Thirdly the superior Courts consider the separation by way of Khula as Fasakh not Talaq while according to Ulema it is Talaq not Fasakh. The Courts have preferred the view point of Imam Shafi, Ahmad Dawood Zahiri and others, According to them, the separation by way of Khula is Fasakh not Talaq while the Ulema have preferred the view point of Hazrat Umar, Hazrat Ali, Abdullah Ibn Masood, Hassan Basri, Qazi Shuriah, Imam Abu Hanifa and Imam Malik, According to them, a separation by way of Khula is Talaq not Fasakh.

At present the situation is that the last Judgment delivered by the august Supreme Court holds the field and the lower courts decide the cases following the precedent set by the Supreme Court in similar cases. The juridical opinion and view point of Ulema is still that for the separation by way of Khula the consent of the husband is necessary and the court is not empowered to dissolve the marriage on the basis of hatred and dislike unless he agrees to it. In this respect, a prominent scholar, the ex-judge of Supreme Court, Allama Taqi Usmani has compiled a book basing strong arguments and relying on strong references and has tried to prove that without consent of the husband, the court or a judge is not empowered to dissolve the marriage. This is also the viewpoint of other leading Ulema of the country.


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When Britisher captured India and established their rule, they promulgated their own laws like civil procedure and criminal procedure code. Evidence Act and other but they did not encroach upon the family laws of the inhabitants irrespective of the fact that whether they were Muslims, Hindus or Sikhs. They were allowed to be governed by their own rules, custom and usages. In 1937, Muslim personal law (shariat) application act was passed and it was decided that the rule of decision will be the Muslim personal law (Shariat) 1937 where the parties are Muslims and the issue relates to Marriage, dissolution of marriage, Talaq, Ila, Khula, Mubarat, Lian, Maintenance, Dower, guardianship and Waqf. In 1939, Muslim married women's dissolution of marriage act was passed whereby Muslim married woman was given the right of seeking dissolution of marriage through the court of law on various grounds like cruelty, impotence, hatred and extreme discord etc and continued to be enforced in the territories of Pakistan even after partition. In 1961, Muslim family law ordinance was promulgated. The most striking feature of this ordinance was that its provisions could not be tested on the touchstone of Shariah and could not be declared void being repugnant to the fundamental rights. The constitutions of 1962 and 1973 also excluded it from the jurisdiction of the courts of Pakistan. In 1980, when the Federal Shariat Court constituted, Muslim personal law was also excluded from its jurisdiction. In 1994, the situation changed when the apex Supreme Court, while disposing of Shariat petition on Zakat and Ushr ordinance, held that: All statutes and codified laws which apply to the Muslims in general, cannot be excluded from the jurisdiction of the Federal Shariat Court. (P.L.D 1994 S.C 607) As a result of this dictum, the Federal Shariat Court examined this controversial law for the first time and declared section 4 and 7 as repugnant to the Islamic injunctions.

By this petition, ostensibly, the provisions of Khula as contained in section 8 of the Muslim Family law ordinance 1961 and also 2(x) of dissolution of Muslim marriage act viii of 1939

have been challenged being inconsistent to Islamic injunctions, as appeared in the Holy Quran and Sunna of the Holy Prophet peace be upon him. Shariat Petition on the same subject, titled as S.P.NO 9/k of 1992, Masood Ahmad Ansari Vs state was dismissed in limine due to jurisdictional bar. At that time, the apex Supreme Court had not given any such verdict and constitutionally the Muslim personal law was beyond the ambit of our jurisdiction. So, the present petition cannot be dismissed on the same grounds.

It is pertinent to mention here the various conflicting judgments of superior courts on the issue of Khula. Earlier; it was held that: For the dissolution of marriage by way of Khula, the consent of the husband is necessary. Qazi or the court of law was not empowered to dissolve the marriage. (Umar bibi Vs Muhammad Din A.I.R 1945 LHR 51)

In Saeeda Khanum Vs Muhammad it was held that incompatibility of temperament, dislike or even hatred on the part of the wife for the husband is not valid grounds for divorce under Muslim law unless the husband agrees to it. (P.L.D 1952 LHR-113) In Fatima Vs Najmul Ikram, divergent viewpoint came forth and the court declared that: Wife entitled to dissolution of marriage on restoration of what she has received from husband in consideration of marriage if Judge apprehends that parties will not observe the limit of God i.e. harmonious married state as envisaged by Islam. In this Judgment the consent of the husband was considered not essential. (P.L.D 1959 LHR-566) Then comes the scholarly written and most elaborative judgment, delivered by the Supreme Court in the light of Islamic injunctions, on the issue of Khula. Though some leading Ulema have opposed and criticized the said judgment but the views taken by the Hon Judges, are also supported by Quranic verses and authentic Ahadith apart from the endorsement by some ancient Jurists. This judgment, at present holds the field. The superior as well as the subordinate court have been deciding matter pertaining to dissolution of marriage, basing the said judgment reported as Khurshid Bagum Vs Muhammad Ameen. (P.L.d 1967 SC-page 97) In Abdul Raheem Vs Mst

(3) (9)

Shahida Khan case, the august Supreme Court held that: Person in authority, including Qazi, can order separation by Khula even if husband was not agreeable to that course. (P.L.D 1984 SC-329)

The petitioner has criticized this judgment basing the booklet written by the learned scholar and adhoc Judge of the august Supreme Court, Hon. Justice Taqi Usmani. Obviously the judgments of the Supreme Court are not appealable before the Federal shariat Court. Review petition before the same court cannot be filed due to time limit, fixed for the said purpose.

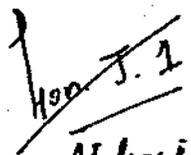
The petitioner has assailed neither provisions of Dissolution of Muslim marriage act 1939 nor Muslim Family law ordinance 1961. According to him, the way the superior as well as the subordinate courts are deciding the cases of dissolution of marriage by way of Khula, without taking into consideration the consent of the husband, basing the judgment of Supreme Court, P.L.D 1967 SC-97, is not in line with the Islamic injunctions, as appeared in the Holy Quran and Sunnah of the Holy Prophet.

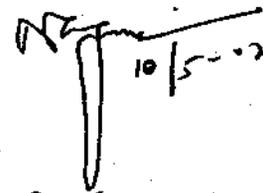
The parameter of our jurisdiction is to examine any law or provision of law on the touchstone of Islamic injunctions. We may examine section 2(x) of the dissolution of Muslim marriage act 1939 and section 8 of Muslim Family law ordinance 1961 and deliver an authoritative judgment on the issue of Khula. Other petitions on the same subject are also pending for hearing.

Submitted for further orders please.


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Registrar

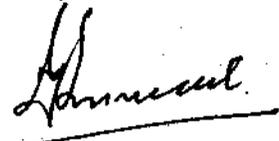

Hon. J. 1


10/5/02

At least three copies of this research note be made for each Hon Judge. May be placed before the Full Bench whenever it is constituted to hear the instant petition.

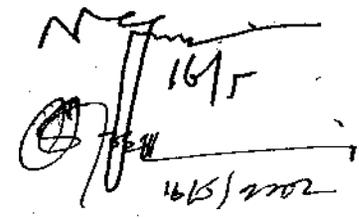
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Pl. comply.


16.5.2002

S.A.

DR-J


16/5/2002