(1): In Islam, though a contract of marriage is a civil contract, subject to dissolution for certain good reasons, but its spiritual as well as moral aspect cannot be ruled out. 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 temperiment, 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---وجعل بينكم مودة ورحمة---*.If this love or affection due to some reasons start diminishing and develop hatred, disliking and dis –obedience, 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-(امساك بالمعروف او تسريح باحسان) 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 تمسكوهن ضرارا لتعتدوا ----------)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 r 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 she reconverts to her original religion. The principle was however not implemented. At the same time the Superior Courts of British India delivered a judgment by applying another princincple of Islamic law wherein if one of the Muslim spouses converts to other religion, or apostasy

of one of the spouses will result in separation between them.. After this judgment, the rate of conversion 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 she 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 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(ولا يحل لكم ان تاخذوا مما اتيتموهن شيئا الا ان يخافا ان لا يقيما حدود الله فان خفتم ان لا يقيما حدود الله فلا جناح عليهما فيما افتدت به تلك حدود الله فلا تعتدوها - (٢:٢٢٩) "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, then there is no blame on either of them if she gives something for her freedom.(2:229)". 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 agees 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.

It is pertinent to mention here that under the Dissolution of Marriage Act 1939,twelve grounds have been provided for women, on the basis of which the women can approach the family Court

seeking the dissolution of marriage. Under this law, if the ground for dissolution of marriage on the part of women is that: "I simply hate him" the judge is empowered to dissolve the marriage on this ground.

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