

Some Aspects of Marriage and Divorce in Muslim Family Law

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Introduction

The social order of every society, evolves around several instincts and out of those two are not only powerful rather make a lot of influence on the society: the natural appetite or hunger and the sexual desire. The former signals for the preservation of individual itself, whereas the later deals with the preservation of descent, especially the lineage of mankind. For this object, almost every society on the earth has made certain rules in order to secure itself. But the divine way of life ---the *Shari'ah*--- has developed a unique system for the preservation of its subjects, its values, the society and mankind at large.

In the following line it shall be tried to elaborate the salient feature of marriage and divorce in the Muslim family law which are the focal symbols of the Islamic society. A slight discussion shall be made regarding the contemporary law in vogue and at the end of this paper the findings of the study shall be presented.

The family is the basic unit of Islamic society. It has its beginning by the coming into existence of the relationship of a husband and a wife. Then this chain extends to their further generation and thus the human society comes into existence.

Objectives of *Nikah*

There are certain objectives behind the introduction of marriage (*nikah*) for the attainment of which Allah Almighty has commanded man to lead his life under a system. A study of the Holy *Qur'an* and the *Sunnah* of the Prophet, peace be upon him, shows that the significant objectives of marriage (*nikah*) are as under:

1. Protection of Human morals

Allah Almighty has created this universe for man in which he declared man as the crown creation. It is the man who being subject to the divine law administers the affairs of the worldly system. By joining of human beings come into existence the families, the tribes, the classes

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and the races. But in the very beginning of them they are constructed by one social unit which starts by the wedlock of a man and a woman. Then this chain spreads by way of their children. This is possible only when their relationship is maintained within natural limits and to maintain the natural limits is possible through the institution of marriage (*nikah*).

Marriage (*nikah*) is the means of fulfilling the natural need of human beings. Only by means of it is possible to construct and protect human morals and culture. For this reason marriage has been termed as *Ihsan* in the Holy *Qur'an*. *Ihsan* means to construct a fort. Thus *nikah* is such strong fort that protects the morals of a man and a woman. The Holy *Qur'an* after describing certain prohibited degrees of women says:

Except for those, all others are lawful, provided ye seek (them in marriage) with gift from your property, desiring chastity not fornication.¹

It is necessary for obtaining natural and mutual benefit by a man and woman that human morals are protected by means of *nikah*. Without the *Ihsan* free mixing of opposite sexes is unnatural. This is a cause of mischief for not only human morals but also for human culture. If such bad conduct becomes common in any society it cannot maintain its very survival for a long time nor can human life remain balanced in such society.

2. Establishment of Islamic society

It is necessary for the accomplishment of the ends of Islamic *Shari`ah* that such means be available that may fulfill such ends. This would be possible only after the Islamic society comes before other nations as an ideal example and they be convinced that Islam alone is the true religion in which human relations are established in the best manner. To achieve this end Islam adopts many means. Out of those means *nikah* is also one such mean.

By means of marriage (*nikah*) on the one side the generation is protected and on the other human beings fulfill their natural need in the natural way. Resultantly they perform their social responsibilities in a valid manner. There are certain responsibilities which are on man and there are also certain rights established for him. A woman after coming into his *Ihsan* (fort of *nikah*) becomes the protector and supervisor of

1. *Al-Quran* 4:24, translated by Abdullah Yusuf Ali, Kitab Bhavan, New Delhi.

his house. The man struggles for earning the livelihood and she assists him in some fields. Thus both of them perform their respective responsibilities and leave all that they had accumulated during their life time as an estate for their future progeny. This chain is continuous since the first human couple or spouses. By this process good element gets development in the Islamic society and there remains no possibility of mischief. Islamic State plays its other functions for the evolution of human civilization. Thus instead of attending to minor issues that relate to peace and order and family life the State pays its attention to the national and international affairs.

3. Love and affection among the spouses

One of the objectives of *nikah* is to create mutual love and affection among both sexes. This objective can be accomplished only when the spouses get happiness and satisfaction. Rather, it would be better to say that the very object of creation of two opposite sexes of human beings was that they may be cause of peace and satisfaction to each other. The Holy *Qur'an* says:

It is He who created you from a single person, and made mate of like nature in order that he might dwell with her (in love).²

There is a saying of the Messenger of Allah that *Iblis* deputed his troops to create mischief and disorder in the world. Each one of the devils returns with a story of his performance and narrates the same to him but *Iblis* is not satisfied with their respective performances. The moment a devil informs that he has created misunderstanding between the spouses, *Iblis* embraces him and his joy knows no bounds.³

This *hadith* shows that lack of love and affection among the spouses is the worst of all Satanic mischief. This mischief generates many other mischief whereby other individuals of society are adversely affected. A dispute of two persons becomes the dispute of two families and if the solution is not found and separation takes place between the spouses the families is disconnected. Thus a domestic quarrel upsets the whole social order. Where such incidents multiply it weakens the strength of the State. This is the reason that *Iblis* feels extremely happy when love and affection among the spouses is rooted out from their hearts.

2. Al-Quran 7:189.

3. *Mishkat, Kitab al-Iman, Bab fi al-Waswasah*, Lahore, Nashran Quran Ltd., p.46.

Definition of *nikah*

Literally, the word *nikah* means "to collect things". The word *nikah* is used to connote the piercing or absorbing of a thing into another thing. When the water of rainfall absorbs into the earth the Arabs say: *nakaha'l-matru'l-'ard*. Likewise when the trees are intermingled it is said: *tanakahat'il-ashjar*. Technically, the word *nikah* refers to cohabitation (*mubasharat*). In *Shari`ah nikah* refers to a contract. A contract means a knot or a tie. As a woman and a man are tied together by a knot (of wedding called the wedlock), hence *nikah* is also called *`aqd* (a contract)⁴. Betrothing or asking for marriage (*nikah*) or engagement is a ceremony that takes place prior to the ceremony of *nikah*. it is like a preface of the *nikah*.

Engagement (*khitbah*) and its rules

In Arabic language betrothing or engagement is called: *khitbah*. It is a promise of a man with the intention that he will marry a certain woman. It is a sort of agreement that serves as a preliminary to the contract of marriage (*nikah*). Engagement (*khitbah*) is permissible legally. Rather, it is commendable (*mustahsan*).

The legal wisdom behind the permissibility of engagement (*khitbah*) is to make the other members of the society known that such and such woman is attributed to such and such man. Hence sending message for asking her hand in marriage (*nikah*) by another man is not correct. According to the generality of the *`ulama*, engagement (*khitbah*) is a permissible act (*mubah*).⁵

It is better to have a glance over the woman before formal engagement (*khitbah*). There is a saying of the Messenger of Allah:

When any one of you makes an engagement, if it is possible for him, he should see such woman to know what incites him to marry her.⁶

4 . Isfahani, Raghib, *Mufridat al-Quran*, see *Nakaha*, Lahore, Ahl Hadith Academy, 1971, p.1077.

5. Ibn Rushd, Muhammad bin Ahmad bin Muhammad bin Ahmad, *Bidayah al-Mujtahid fi Nihayah al-Muqtasid*, Lahore, Maktabah al-`Ilmiyyah, 1984, vol.2, p.2 See also Al-Jaziri, Abd al-Rahman, *Kitab al-fiqh `ala al-mazahib al-Arba`ah*, Beirut, Dar al-Fikr, vol. 4, p.1-4.

6 . Al-Jama', *Abwab al-Nikah*, al-Tirmadhi, Muhammad bin Isha, . ?

The words of the *hadith* show that to see the woman by a man is subject to possibility. It is he to create possible permissible means. It is his responsibility to create such circumstances whereby he could be successful to see the woman without any unpleasantness. The situations that we observe daily in our atmosphere that a boy makes a regular demand to see the girl and the girl is groomed and well dressed and both are made to sit together in a ceremony to see each other. In some families, before contract of marriage (*nikah*), even knowingly chances of free mixing are provided to the boy and the girl on the plea that they may understand each other. All this was not in view of the *Shari`ah*. According to Islamic *Shari`ah* for good and pure life marriage (*nikah*) is definitely a significant element, but it is not an objective of life (*maqsad hayat*) nor the Islamic *Shari`ah* constructs such disposition of a human being that he may wander to find out the element of idealism in the woman. Such a behaviour is available in those societies who believe that all that is to be done is to be done in this world. In a Muslim society certainly the marriage (*nikah*) is a significant function but this function alone is not significant.

To contract marriage (*nikah*) is necessary for a man for the survival of human race but its being necessary for every individual depends upon the circumstances of each person. Islam has made *nikah* a duty (*fard*) for the Muslim society as a whole that the society must provide such means for its individuals that are necessary for the achievement of this objective but the command to enter into a contract of marriage (*nikah*) is not alike for every individual. Despite all the efforts of an Islamic society the social inequality remains there and to remove it is the responsibility of the Islamic State but is not in full control of it. Due to the presence of this social inequality the jurists have not kept the issue of marriage (*nikah*) for every individual alike and they have distributed it with regard to *hukm taklifi* in various categories. In the matter of conducting a marriage (*nikah*) a person can be in five kinds of circumstances. The same circumstances are in the view of the *Shari`ah* and termed as classes.

Classes of marriage (*maratib nikah*)

"*Maratib*" is a noun plural in the Arabic language. Its singular form is "martabah" which means a rank, a class, a category. According to the jurists (*fuqaha*) marriage (*nikah*) is of five classes. The jurists (*fuqaha*) have made these five categories to bring in conformity with the diversity of juristic rules⁷. Their understanding and grasping needs deep insight and juristic skill otherwise the fact is that in the Holy

7. Ibn Rushd, vol.2, p.2, *ibid*

Qur'an and the *Sunnah* of the Prophet peace be upon him, every person has been made to incline to contract a marriage (*nikah*). In *Surah al-Nur* the Holy *Qur'an* says:

Marry those among you who are single, and the virtuous ones among your slaves, male or female, if they are in poverty, Allah will give them means out of His grace.⁸

In many *ahadith* there is persuasion for *nikah*, e.g., in one *hadith* mentioned in al-Nisa'i there is prohibition to lead an unmarried life (*tajarrud*). 'Umm al-Mu'minin Hadrat `A'ishah Siddiqah (Allah's Pleasure be on her) said: "that the Messenger of Allah forbade to lead an unmarried life".⁹

These five classes of *nikah* described by the jurists (*fuqaha*) are the following:

1. Compulsory (*Fard*)

Where a person has all such resources that are generally necessary for a family life, such as adulthood, earning livelihood, health, having a house to live and is certain that along with the possession of these resources if he remains unmarried he will indulge in major sin (of commission of *Zina*), then it is, *fard* (compulsory) for him to contract a marriage (*nikah*). If he does not contract marriage (*nikah*) he will be sinful.

2. Obligatory (*Wajib*)

In the presence of the aforesaid circumstance if such a person instead of having a certainty (*yaqin*) he has a probability (*zann*) that it is possible that he may commit a major sin, then to contract a marriage (*nikah*) is obligatory (*wajib*) for him.

3. Unlawful (*haram*)

In the following two circumstances the contract of marriage (*nikah*) is unlawful (*haram*): Firstly, the necessary requirement of marital life are not existing. Secondly, Where an individual is certain that after marriage (*nikah*) he shall commit major sin. In such a circumstance to contract a marriage (*nikah*) becomes unlawful. For example, a person is inclined (has deep secret interest) in a particular woman but he cannot marry her and if he contracts the marriage

8 . Al-Quran 24:32

9 . Al-Nisa'i, Ahmed bin Shua'ib, *Al-Sunan*, *Kitab al-Nikah*, Istanbul, Dar al-Dawa'h, 1401H.

(*nikah*) with some one else his inclination in the former remains in tact and he is certain that he would commit major sin. In such a circumstance his contracting a marriage (*nikah*) with this second woman is unlawful.

4. Disliked (*Makruh*)

Where a person has a probability (*zann*) that after his marriage (*nikah*) he instead of doing justice with his wife shall do injustice or he has the probability (*zann*) that he would commit major sin after such *nikah*, then in such a circumstance the *nikah* is disliked (*makruh*).

5. *Sunnat* (acting according to the practice of the Messenger of Allah)

When all the requirements of a marital life are available, viz. a man is adult, of sound mind, and there is no *zann* or *yaqin* of any injustice with the wife, *nikah* is *Sunnat*. There is a saying of the Messenger of Allah: “To contract a marriage (*nikah*) is my *Sunnah* (way)”¹⁰.

Equality (*al-Kafa'at*) among spouses (*zaujayn*)

It is necessary that in certain matters, which are next mentioned, there must be Equality (*al-Kafa'at*) among the spouses (*zaujayn*). The reason for the existence of such likeness is that individuals living in a like environment become acquainted with each other within no time. Their problems are common. Their needs and difficulties are similar. If there is difference of way of living and of the belief there is apprehension of dislike and detachment as against love and attachment. In such a situation the engagements of the husband are often totally different than the wives. Requirements of a wife may be beyond the capacity of the husband. Hence, to hope to lead a good and pure life in such a non-resembling wedlock is the most difficult thing. This non existence of likeness even adversely affects the children born of such a wedlock. Hence, the jurists (*fuqaha*) are of the view that there must exist likeness among the spouses (*zaujayn*) in certain matters. This likeness is to exist in five matters¹¹.

1. Equality in the matter of descent (*nasab*) :

Where the husband and the wife both belong to the same tribe (*qabilah*) it is called equality in the matter of descent (*nasab*). Where

10. Ibn Majah, Muhammad bin Yazid, *Al-Sunan, Kitab al-Nikah*, Istanbul, Dar al-Dawa'h, 1401H

11. Al-Jaziri, Abd al-Rahman, *Kitab al-fiqh `ala al-mazahib al-Arba`ah*, Beirut, Dar al-Fikr, vol. 4, p.54-60, *ibid*.

the spouses belong to two different families but of equal status it is also termed equality in descent (*nasab*). However, where one of the spouses (*zaujain*) belongs to a high and noble family while the other belongs to a low or a commoner family then may be the spouses (*zaujain*) carry on their life with each other without any inferior or superior complex but this joint would perhaps not be acceptable to the remaining members of the two families. The adverse effect of such complex subsists not only on the spouses but also on both the families throughout the marital life.

2. Equality in the matter of faith (*din*) and piety (*taqwa*):

It is also necessary that the spouses (*zaujain*) must have belief in one and the same faith (*din*). By equality in the matter of belief is meant that such difference might not be a bone of contention between them in their daily life. Fellowship in belief does not mean that the spouses (*zaujain*) must also have the same belief in the matter of details (*furu`*). Likewise it is also necessary that they both must be alike in the matter of observance of piety (*taqwa*). Where one partner of life is pious, faithful and observer of the limit of Allah Almighty while the other is impious, faithless and transgressor of the limits of Allah Almighty, it is impossible to conceive a peaceful life for them.

3. Equality in the matter of social status

It is also necessary that the spouses (*zaujain*) must be equal in the matter of their social status. They and their families should have adopted the same profession. This is essential for the reason that any one of the two or his or her family may become the victim of superiority complex and become a constant cause of torture for the other. For example the husband is a small shopkeeper in a town while the wife is holding a high office in a big city. This would not be equality in social status.

According to Imam Abu Hanifah, social status or inequality of professions have no significance in the matter of marital life. His argument is that the profession has no concern with the human attribute. Rather it is an external state that goes on changing in life. Hence the great Imam has not attached this condition to the marital life of the spouses (*zaujain*). In his view peaceful marital life is possible even where the professions adopted by the spouses (*zaujain*) are contrasting.

4. Equality in the matter of wealth and property

For leading a successful marital life equality in the matter of wealth and property among the spouses (*zaujain*) is commendable (*mustahsan*). Equality in wealth and property means that the spouses

(*zaujain*) must at least belong to like classes of society. It is true that marriage (*nikah*) of the Messenger of Allah with *Hadrat Khadijah* (Allah's Pleasure be on her) negates the concept of equality in wealth and property, but this was possible for a Prophet to make his way through the social inequalities. The welfare of the generality of Muslims lies in it that they should establish relationships with like families. This is also established on the strength of experience.

5. Equality in the matter of health

According to the *Maliki* and *Shafi'i* *Ulama* none of the spouses (*zaujain*) should be having the bodily defects like leprosy that is seriously disliked by human beings. Some *Maliki* *Ulama* add madness and say that a contract of marriage (*nikah*) between a person of sound mind with a mad person is not valid. However the generality of the *Ulama* are of the view that there is no harm in a contract of marriage (*nikah*) between such persons.

Essential Elements of Marriage (*Arkan Nikah*)¹²

There is conflict of opinion among different schools of thought in the matter of the essential elements of marriage (*Arkan Nikah*).

According to the *Ahnaf* like other matters the *nikah* has only one essential element that is called "*Sighah*", which means an offer (*Ijab*) and an acceptance (*Qubul*). *Ijab* is used for such word or phrase that is expressed by the guardian (*wali*) of the girl or a person acting on his behalf. For example, where A's daughter B is to be married C, the expression by A in the following words is called an offer (*ijab*): "I married my daughter B for a dower consideration of a hundred *dinars* with C".

It is a condition that the offer must be in the past tense. In the above quoted sentence the offer is in the past tense (*fi'l madi*). Hence, this is valid offer.

The second part of the "*Sighah*" is called acceptance (*qubul*). It is the word or the sentence which is uttered in response to the offer by the man or a person acting on his behalf. For example, the man, namely C, says: "I accepted B the daughter of A for a dower consideration of a hundred *dinars*". This whole sentence is called acceptance (*qubul*).

12. For details see Al-Jaziri, p.12, *ibid*

All jurists (*fuqaha*) agree that the offer and acceptance must be in the same sitting or session of assembly. In case the sitting or session had dispersed and thereafter the acceptance occurred then such an acceptance would be void automatically. The acceptance must also be in the past tense.

The *Maliki* school also mentions five essential elements of *nikah*. Those are:

(1) **Wording (*Sighah*):** These are the offer and acceptance. Their conditions have already been mentioned above.

(2) **Guardian (*Wali*);** He is a person from the side of the female who performs the function of offer on behalf of the female. For example, the father of the female or any other male within prohibited degrees to her. According to *Maliki* jurists (*fuqaha*) there can be no *nikah* without a guardian (*wali*). Their argument is based on the *hadith*: "a female who enters into a contract of Marriage (*nikah*) without guardian (*wali*) her *nikah* is void, is void,¹³ is void.

(3) **Dower (*Mahr*):** It is also one of the essential elements of *nikah* in the absence of which there cannot be *nikah*. However, the mention of the dower at the time of *nikah* is not essential.

(4) **Man:** A male person who intends to marry the female person.

(5) **Woman:** A female who is going to be married with the male person. It is essential for a woman to be free from all impediments like *`iddat* (observance of waiting period in cases of death of or divorce by the previous husband) and *hamal* (in case of pregnancy had delivered the child).

According to the *Shafi`i`Ulama* the essential elements of *nikah* are five though a little different in concept as compared to the concept of the *Maliki`Ulama*. These essential elements are: "*Sighah*"; Male; Female; Guardian; and Two witnesses.

The *Shafi`i`Ulama* have declared that the presence of two witnesses is essential element of *nikah*. Their argument has the support of a *hadith* according to which the Messenger of *Allah* said: "A marriage (*nikah*) contract without two witnesses is not permissible".¹⁴

13 . *Sunan al-Tirmidhi, Abwab al-Nikah, ibid.*

14 . Al-Jama', *Abwab al-Nikah, al-Tirmidhi, Muhammad bin `Isa, vol.I, p.405, ibid.*

Rules of Dower (*Ahkam mahr*)

Dower means the amount of consideration that is paid by the husband to the wife after Marriage (*nikah*) with her. Dower is one of the conditions of validity of *nikah*. This is the view of the *Ahnaaf*. Non payment of dower is against the *Qur'anic* verses. Its *wajib* is proved by the Holy *Qur'an* and *Sunnah*. Allah Almighty says: "And give the women (on marriage) their dower as an obligation".¹⁵

1. Kinds of Dower according to quantity

(1) Agreed upon Dower (*Mahr Musamma*)

Mahr Musamma is that dower on which both the parties have agreed upon as fixed between them. If it is cash then it will be the local coin and if it is ornament or property then it must be specified. The payment of dower becomes obligatory at the time of *nikah* or after the *nikah*¹⁶.

2. The Minimum Dower (*Mahr Adna*)

In this kind of dower no quantity is fixed. If man is rich he may give piles of wealth. However many *ahadith* are available giving the minimum limit of dower amount.

According to a report of *Imam* Bukhari the Messenger of *Allah* said to a person: enter into a marriage (*nikah*), contract even if for a consideration of a dower of an iron finger ring¹⁷.

According to a report of *Imam* Muslim, the dower of the wives of the Messenger of *Allah* had been 12.5 *Auqiyah*. *Abu Hurayrah* reported that during the period of the Messenger of *Allah* the quantity of dower fixed was 10 *Auqiyah*. In the modern period the market value of ten *auqiya* can be known very conveniently.

(3) The like dower (*Mahr Mithl*)

Mahr Mithl is that quantity which is fixed for other females as their dower in the family of the woman. Need to do so is felt where at the time of contract of marriage (*nikah*) nothing was settled between the parties about the dower or the payment of dower was settled but amount of dower was not fixed or determined by the parties for any reason whatsoever.

15 . *Al-Quran* 4:4.

16. For details, see Ibn Rushd, p.14-22, *ibid*.

17. Al Bukhari, Muhammad *bin* Isma'il, *Al-Jama' Al-Sahih, Istambul, Dar al Taba' al 'Amarah*

2. Kinds of Dower (*Mahr*) with regard to the period

With regard to the period when the dower is to be paid by the husband to the wife there are two kinds of dower.

- (1) Prompt dower (*mahr mu`ajjal*): It is that dower regarding the payment of which parties have agreed that it shall be paid promptly.
- (2) Deferred dower (*mahr mu'ajjal*): It is that dower regarding which there had been agreement between the parties that it shall be paid after some period¹⁸.

3. Addition or reduction in the quantity of settled dower

Both the husband and the wife have the right to add or reduce the settled amount or quantity of dower by mutual consent. Where a husband intends to increase the amount agreed to by him to be paid as dower amount, he has the right to do so. Likewise, where a wife intends to reduce the amount payable to him as dower amount she has the right to do so. She has the right even to forego the whole quantity of her dower.

The Holy *Qur'an* says:

But if they, of their own good pleasure, remit any part of it to you take it and enjoy it with right good cheer.¹⁹

There are three circumstances which make the payment of dower obligatory:

- (1) When after entering into the contract of marriage (*nikah*) the spouses (*zaujain*) had cohabited it becomes obligatory upon the husband to make full payment of the dower amount.
- (2) When after entering into contract of marriage (*nikah*) the husband died. The widow shall get her dower amount before the distribution of the estate left behind by the deceased husband. It is not necessary that the spouses had cohabited before the death of the husband. To distribute the estate of the deceased husband before making payment of the dower debt to the widow is not permissible.
- (3) According to *Imam* Abu Hanifa and *Imam* Ahmad bin Hanbal, payment of dower become certain where the spouses (*zaujain*) had full privacy and isolation without any apprehension of arrival in their apartment of anyone

18. Ibn Rushd, p.14-22, *ibid*.

19 . Al-Quran 4:4.

else. It is called valid retirement (*Khalwat Sahihah*). In such a circumstance other persons do not know about cohabitation. However, if the door is closed in such a manner that coming or going in the private room is possible then such a situation is not called Valid retirement (*Khalwat Sahihah*)²⁰.

On valid retirement (*Khalwat Sahihah*), the payment of dower becomes obligatory upon the husband.

3. Dropping of Dower (*Suqut Mahr*)

Dropping of dower means the appearance of such circumstances due to which the dower does not remain the right of the woman. Those are five situations, namely,-

- (1) Renunciation of faith of Islam by the woman.
- (2) Both the spouses (*zaujain*) become apostates.
- (3) Both the spouses (*zaujain*) were non Muslims. The husband embraced Islam. The wife did not do so. She shall lose her right to receive the dower.
- (4) Where a guardian (*wali*) had contracted the marriage (*nikah*) of a minor or mad male person and he on attainment of his age of puberty or becoming of sound mind person denounces the contract of marriage (*nikah*).
- (5) Where a guardian (*wali*) had contracted the marriage (*nikah*) of a minor or mad female person and she on attainment of her age of puberty or becoming of sound mind person denounces the contract of marriage (*nikah*)²¹.

5. Dropping of half of the amount of Dower (*Suqut Nisf mahr*)

Where a wife is immediately after the contract of marriage (*nikah*) and without cohabitation is divorced, she becomes entitled to half of the settled dower.

In case the dower was not settled at the time of contract of marriage (*nikah*) and she was divorced without cohabitation, she becomes entitled to receive some benefit of graceful departure (*mut`ah*) which means a few garments, and a few articles of adornment according to the local custom and usage.

An over view of the family law in force

20 . Tanzil al Rahman, p.291-92 *ibid*.

21. Al Jaziri, p. 146-52, *ibid*.

The Muslim Family Laws Ordinance 1961²². ---the current law enforced in the country--- has deep impact on the Pakistani social order. This law remains under constant criticism in the religious circles. However, if some partial amendments are made in this law, all circles may be satisfied. In section 2 of the Ordinance, an attempt has been made to infuse the spirit of verse 35 of the *Surah al-Nisa*. The object of the said verse is that where there is apprehension of any disorder between the relations of the spouses (*zaujain*) an arbiter from each side be appointed to consider reconciliation between the spouses (*zaujain*). In this provision of the Ordinance an arbitration council has been constituted to achieve this objective. The council consists of a representative each of the parties and a Chairman who is the Chairman of the union council or such person whom the Federal or the Provincial Government or any officer of such Government may delegate the powers of Chairman.

It has also been stated in this section that if any of the parties does not nominate its representatives within the prescribed period the council shall stand constituted. The important thing to be noted is that the addition of a Chairman in the constitution of the arbitration council is an addition over and above the *Qur'anic* injunction. Hence it is better if the arbitration council consists of only on a representative of each party to be appointed by the parties themselves. The Chairman should not be included in the constitution of the council. Rather, he should perform his function as that of a supervisor and shall not interfere in the function of the council.

Section 5 of the Ordinance relates to the *nikah* solemnized by a person other than the *nikah* Registrar. In this section it has been stated that the person who solemnizes the *nikah* shall be responsible to inform the *nikah* registrar of the particulars of the *nikah* and in case of violation he shall be liable to undergo three months simple imprisonment or pay a fine of one thousand rupees or both.

A basic fact about the *nikah* is that it takes place in presence of the witnesses after an offer and acceptance. After it, the descent (*nasab*) of the children and the inheritance in the estate stand proved. In Islamic family law system there is no concept of any such person who is to act as a professional *Nikah Khawan*. This function can be performed by the relatives and friends of the parties who abides by the law of *Shari`ah*. Thereafter it is the responsibility of the state to keep vigilance over the state of affairs of the citizens. Who contracted

22 . Muslim Family Laws Ordinance (VIII of 1961) of July 15, 1961.

marriage (*nikah*)? In which family dissolution of marriage (*nikah*) took place? Where a child was born? To perform such functions the state may adopt different means.

Divorce and its related issues

In case of disunity and dissent between the spouses (*zaujain*) the *Shari`ah* has prescribed a reasonable way for the separation between them so that the spouses (*zaujain*) may determine for themselves new ways on the changed circumstances. This way is called "divorce" (*talaq*).

Definition of "divorce" (*talaq*)

Literally, the word "divorce" (*talaq*) means to abandon a thing or get rid of a thing. When an animal tied with a string is untied it is called *talaq*. If the tied with a string she camel is untied, the Arabs mention this state as: "*talaqa al-naqata talaqan*"²³ (The she-camel has been released).

Imam Sarakhsi has used the words "*Izlatu'l-qayd*" (release from confinement) to convey the meaning of the word "divorce" (*talaq*)²⁴.

If by keeping in view the definitions given by different schools an exhaustive definition of the word "divorce" (*talaq*) which may also be harmonious with the modern legal language is given then it would be like this: "Divorce means the dissolution of marital relationship between the spouses (*zaujain*) personally or through an agent or a deputy or a delegatee, with specific words or allegorically, immediately or consequently."²⁵

When there remains no love and affection and unity among the spouses (*zaujain*) and there is no alternative except "divorce" (*talaq*) then separation in the manner prescribed by *Shari`ah* is better. However, separation among the spouses (*zaujain*) is not act liked by Allah. It is mentioned in the saying of the Messenger of Allah that: "Among the lawful matters the most disliked in the sight of Allah is the divorce"²⁶.

Number of pronouncements of "divorce" (*talaq*)

23 . Isfahani, see *Talaqa*, *ibid*.

24 . *Al-Sarakhsi, Kitab al-Mabsut*, vol.6, p.2. ?

25 . *Tanzil al Rahman*, Dr, vol.2, p. 357.

26 . *Abu-Daud, Sulayman bin Asha'th, Al-Sunan*, Lahore, Islamic Academy, 1983, vol.2, p.169.

An adult, of sound mind, married person has the right to pronounce "divorce" (*talaq*) to his wife during the marital life three times. For two times the husband has the right to revoke the pronouncement and can continue the usual marital relationship. But when he gives the *talaq* exercising his third time right, then the spouses (*zaujain*) do not remain husband and wife. The Holy *Qur'an* says:

A divorce is permissible twice, after that the parties should either hold together on equitable terms, or separate with kindness²⁷.

Kinds of Divorce (*talaq*)

There are two significant divisions of divorce which have been further sub-divided.

1. With regard to its construction

Kinds of Divorce (*talaq*) with regard to its construction refers to it that we can judge them by the standard of *Shari'ah*. And after such examining we can declare it as to whether it is in accordance with the method prescribed by the Messenger of Allah or is deviating from such method. Such a divorce is further sub-divided into *Talaq al-Sunnah* and *Talaq al-Bid'ah*.

(1) *Talaq al-Sunnah*

The *talaq* methodology of which has been taught by the Messenger of Allah himself. There are two modes of pronouncing this kind of *talaq*, namely, *talaq ahsan* and *talaq hasan*.

(a) *Talaq Ahan*: The most correct way of giving divorce to the wife is called *talaq ahsan*. The way of giving *talaq ahsan* is that when the state of menstruation of the wife comes to an end and the husband has not cohabited with her, he may pronounce one revocable divorce (*talaq raj'i* i.e. a *talaq* after which the husband has the right to revoke it) and thus the period of *'iddat* of the woman passes and if she was pregnant the delivery takes place.

The advantage of such divorce is that after the expiry of the *'iddat* period the same man can remarry the same woman without any impediment.

(b) *Talaq Hasan* : This mode of giving *talaq* is also according to the *Sunnah*. But it is of lesser rank. A *talaq hasan* is that a husband does not cohabit with his wife after she is clear from her menses and gives her *talaq*. When she is again clear from her next menses period he pronounces second *talaq* and when she is clear from her next menses he pronounces the third *talaq*.

27 . Al-Quran 2:229.

In this way of giving *talaq* the right to remarry by the same man to the same woman comes to an end as he has given the *talaq* thrice.

(2) *Talaq al-Bid`ah*

Talaq is the actual separation between the spouses (*zaujain*). As the Messenger of Allah has prescribed the manner of performance of a contract of marriage (*nikah*) so he has prescribed the manner of giving *talaq*. However there is a difference between the *nikah* and the *talaq*. The *nikah* can be entered into by the consent of both the parties while the right to divorce lies with the husband alone and this right he has in every circumstance irrespective of his exercising it in accordance with the *Sunnah* or otherwise.

A *talaq* given in a manner not prescribed by the *Sunnah* is called *bid`iyy*. One who adopts such manner is sinful. However, the *talaq* becomes effective.

Talaq bid`iyy is also of two kinds.

First kind of *Talaq Bid`iyy* is that which is given at an improper time. An improper time is the time when a women is undergoing her menses. There is a *hadith* concerning such a *talaq*. *Hadrat `Abdullah bin `Umar* (Allah's Pleasure be on them) gave *talaq* to his wife while she was under going her menses. The Messenger of Allah on the asking of *Hadrat `Umar* (Allah's Pleasure be on him) directed to revoke it and said: "Keep her till she is clean. Then when she again undergoes her menses and becomes clean, then if you want you may give her *talaq* or to keep her."²⁸

The second kind of *talaq bid`iyy* is that where the husband gives or pronounces the *talaq* in a single sitting or a single sentence thrice and ends the marital relation. For example he says: To you are three divorces or you are divorced, you are divorced or you are divorced."

2. With regard to effectiveness

With regard to effectiveness the divorce is of three kinds and each such kind has different rules. These kinds are: *talaq raj`i*, *talaq ba'in sughra*, and *talaq ba'in kubra*

28 . *Al-Bukhari, Kitab al-Talaq, ibid.*

(1). *Talaq raj`i*,

A *talaq raj`i* refers to a *talaq* where after giving the *talaq* the husband has the right to return to the marital life as before. he has the right to revoke the divorce pronounced by him. The process is accomplished by cohabiting with the woman during the period of `iddat after the first or the second pronouncement without any remarrying ceremony (*tajdid nikah*). However if he used the word *ba'in* (irrevocable) then the right to revoke (*haqq ruju`*) ends. In the process of *ruju`* in the case of a *talaq raj`i* there is no need of consent of the woman. It is the act of the man who brings the revocation to an effect.

2. *Talaq Ba'in Sughra*

When the period of *talaq raj`i* comes to an end, the man has no right to recall the marital life and the *talaq* turns into *talaq raj`i ba'in*. In such circumstance the spouses (*zaujayn*) can remarry by mutual consent.

If while giving *talaq* the man adds the word "*ba'in*", then for the first pronouncement and the second pronouncement it is called "*talaq ba'in sughra*". In such *talaq (talaq ba'in sughra)* the man and the woman can remarry by mutual consent during the `iddat or at the end of the *iddat* period. However when the *talaq* is given for the third time the right to remarry also comes to an end in the ordinary circumstances.

(3) *Talaq ba'in kubra*

This *talaq* is also called "*talaq mughallaz*". The manner of such *talaq* is that the husband gives three *talaqs* to his wife at one and the same time. After such *talaq* the man has no right to revoke it nor can he remarry the same woman till she marries another person and then that new husband dies or he divorces that woman.

The wording of divorce (*talaq*).

1. Explicit Wording

In Islamic law the wording used for pronouncement of divorce are also significant. Some words are such which explicitly give the meaning of *talaq* as the words: "I have given *talaq*." or " Now you have become a divorcee (*mutallaqah*)." After utterance of such words there remains no doubt at all that there has occurred divorce. Likewise in the words of other languages that are used for conveying the sense of divorce, if uttered the divorce will take place. The divorcer cannot later on take the plea that he intended by such words something else than divorce.

2. Allegorical Wording

The words other than the explicit words of divorce are the allegorical words. Such words are not used to clearly state the divorce but they are taken to mean divorce. As where a person says to his wife: "You are released." In such circumstance the intention of the speaker is relied upon. If the speaker says that his intention was to give divorce, the divorce will take place and if he explains otherwise then that explanation will be accepted.

Until a divorce (*talaq*) becomes irrevocable the husband has the option to revoke it within the period of *`iddat*. However, if the *`iddat* period expires this option is no more available to the man.

Right to revoke a divorce is vested in the man. He may declare such revocation by words of mouth. It is commendable to revoke a divorce in the presence of two witnesses. It is not necessary to give any compensation or to pay the dower (*mahr*) afresh nor is the consent of the woman necessary in the matter of revocation.

According to the *Hanafi* jurists (*fuqaha*) where a man who has given the divorce to his wife cohabits with her during the currency of the *`iddat* period, the revocation takes place automatically. There is no need of any oral declaration by the husband that he has revoked the divorce (*talaq*). Their argument is that there did not occur the disconnection of *nikah* between the spouses (*zaujain*) and the right to revoke vesting in the man is proved on the authority of the *Sunnah* of the Messenger of Allah as he had divorced *Hadrat* Hafsah (Allah's Pleasure be on her) and the same mode was adopted for revocation of divorce (*talaq*).²⁹

As against this, *Imam* Shafi'i is of the view that for the revocation of divorce oral declaration in the presence of two witnesses is necessary. He does not consider revocation of divorce (*talaq*) permissible by means of cohabitation.

After three pronouncements of divorce (*talaq*) have taken place the right to revoke comes to an end. The spouses (*zaujain*) become of prohibited degrees for each other and they cannot remarry. Rather, their reunion is possible only after the divorced woman marries some other person and that other person thereafter dies or he of his own free will divorces her. There is no other way for (the divorcer and the divorcee) for their marrying each other again.

29. *Sunan Ibn Majah*, *Kitab al-Talaq*, *ibid.*

***Khula'* and issues relating to it.**

There are many ways of separation between the spouses (*zaujain*). One of these ways is *Khula'*. Where the husband considers that it is impossible for him to continue the wedlock, he has the right to give divorce. Likewise where the wife considers that it is extremely difficult for her to pull on with the marital tie with her husband, she has the right to get *Khula'*. However, this is not the only distinction between divorce (*talaq*) and *Khula'* that one is the right of the man and the other is the right of the woman. Rather, there is a basic difference between the two. The divorce (*talaq*) takes place the moment a man utters some specific words. However the *Khula'* does not take place by mere statement of the woman or her demand for *Khula'*. Rather there is a method for its taking place.

Literal Meaning of *Khula'*

Literally, the word "*Khula'* " means to bring out a thing from another thing. The definition of *nikah* is to intermingle a thing into the other, to pierce a thing into another, to absorb a thing into another. The *Khula'* is opposite to it. Its meaning is otherwise. This word has been made to convey the sense of separation and parting.³⁰

Khil`at is that dress or garment which is put of by an emperor from his own person and bestowed upon any one among his subjects or taxpayer. Thus *khil`at* is that clothing which is put of by a person from his body. As a separation takes place on account of *Khula'* the same has been so termed.

Legality of *Khula'*

The validity of *Khula'* is proved on the authority of both the Holy *Qur'an* and *Sunnah*. The Holy *Qur'an* says:

It is not lawful for you (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah if ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, There is no blame on either of them if she gives something for her freedom.³¹

30. Sa`di, Abu Habib, *Al-Qamus al-Fiqhi lughatan wa istilahan*, Karachi, Idarah al-Qur'an wa al-Ulum al-Islamiyyah, p.120.

31. Al Quran 2:229.

From this verse, two kinds of *Khula'* are known. Firstly, any of the spouses (*zaujayn*) may apprehend that it is difficult to keep the limit of Allah during the wedlock and consequently they part from each other. Secondly, the person vested with authority among the Muslims like a judge (*qadi*) who considers that the limits of Allah will be broken if separation is not ordered. In such an apprehension the judge may order dissolution of marriage (*nikah*) on payment of some compensation by the woman to the husband.

In this verse to obtain *Khula'* the mention of payment of compensation by the woman is absolute. For detailed injunctions (*ahkam*) the *Sunnah* provides guidance. The incident of Thabit *bin* Qays is mentioned in the *Sahih* of *Imam* Bukhari and *Sunan* of *Imam* Nisa'i.

The words of the *hadith* show that two of his wives did not like his countenance as his colour was black and his stature was short. One of his wives, namely, Jamilah *bint* Abi Salul brought her suit for dissolution of marriage (*nikah*) in the Court of the Messenger of Allah. After hearing the pleas put forth by her, the Messenger of Allah asked her: Was she prepared to return the garden that had been given to her by Thabit *bin* Qays. She replied in the affirmative. On that the Messenger of Allah directed her to return the said garden to her husband and directed her husband to accept it and give him a single divorce.³² Similar is the incident of the other wife of *Hadrat* Thabit *bin* Qays (Allah's Pleasure be on him).

Why the woman has not the right of *khula`* of the same nature as the man has the right of divorce?

To understand this thing it is essential that the basis of *nikah* is kept in mind which has been termed as *Ihsan* (a fort) and the man has been termed as *Muhsin* (One who builds the fort) and the woman has been termed as *Muhsinah* (the protected one in the fort). It is the man who lays the foundation of the family. It is he who is responsible to pay dower (*mahr*) to the woman. It is he who is responsible for the food, clothes and shelter and other social needs of the woman. It is he who is to bear the expenses of the maintenance and upbringing of his children. Thus for a family unit he alone is answerable in all manners. So, logically it becomes necessary that he should possess rights in relation to those duties. When he is the Master of the house, he has arranged and put in order everything according to his will and liking.

32. Al-Bukhari, *Kit b al-Talaq, Bab al-Khula`*, *ibid*

Those under his care and command must proceed subject to his will and desire. Among other grounds this is also one ground on the basis of which the man has been vested with the right to give divorce (*talaq*).

***Khula'* By Mutual Consent**

This is the reason that the process of *Khula'* does not become complete by the mere intention, desire or will of the woman. Rather, it has certain circumstances which are mentioned below.

Firstly, there may be a circumstance that a woman demands *Khula'* from her husband and the husband immediately gives his *Khula'* and makes no demand from her.³³

Secondly, there may be a circumstance that a woman demands *Khula'* from her husband and the husband also demands some compensation for the upsetting of his marital life and the woman agrees to pay it to her. This compensation cannot exceed the total value of the dower (*mahr*) of the woman. (see Al-Quran 2/229 and Bukhari and Muslim).

Thirdly, there may be a circumstance that the woman demand *Khula'* and the man accepts it willingly. If he demands the dower (*mahr*) paid by him to her to be returned to him and the woman is willing to do so, the *Khula'* may take place.

***Khula'* By the Decree of Court**

The aforesaid three forms of *Khula'* are dependent upon the mutual consent of the parties. Where the *Khula'* is not by any one of these three ways and the woman insists that she is to get separation and the man does not agree to it then the woman has a right to lodge a claim for dissolution of marriage (*nikah*) on the basis of *Khula'* before the Court.

At the trial the judge is responsible for two things. Firstly, to examine and consider as to whether there is apprehension of breaking of limits of Allah by any party. Secondly, the judge should hear the stand point of the woman and know the will of the woman. A judge is not expected of anything more. He cannot give a verdict against the stand of the woman.

Where any one of the above two situations are proved, the judge must order separation (*Khula'*). Where the woman is fulfilling

33. Al-Quran 2:229.

all the conditions of grant of *Khula`* the judge cannot give any other decision except that of separation (*Khula`*).

Here a question may arise that if the judge is bound to give a particular kind of decision in a suit for *Khula`* then what is the use of judicial proceedings?

The answer is that with regard to *Khula`* we have before us a clear question of law. There is no scope for any deviation from the injunctions (*ahkam*) of Allah and the Messenger of Allah. The only thing which a judge is responsible to see is the question of fact. May be the grievances of the woman be such as may be redressed after the hearing given to by the judge. In such a situation the judge may direct the other side to redress those grievances. The reason is that in the Islamic system of justice it is not the success or failure of either party at the trial. Rather, it is to keep all elements of the society at their proper place for the discharge of their respective functions. Where the judge can remove the grievances of the woman and she is also satisfied with such order there is no reason to cause separation between spouses (*zaujain*).

Where after all efforts, sermons, advices, and using all possible means to maintain the family life between the spouses (*zaujain*) the woman insists for separation (*Khula`*) the judge has the power to order the woman to pay back the dower which she had received at the time of *Nikah* to the husband and then order dissolution of marriage (*nikah*) on the basis of *Khula`*. Except this, the judge has no more power in such a case.

After *Khula`*

Khula` is equal to a single irrevocable divorce (*talaq ba'in*). A man has no right to revoke it. As the *Khula`* is according to the will of the woman. Hence the question of its revocation does not arise. Hence it is considered equal to an irrevocable divorce. However, if the woman agrees to remarry the same man she can with the consent of the man remarry with him.

Conclusion

It appears that Islamic law of marriage and divorce is not identical to the man made laws which are changed by man himself moment after moment. It is evident that the position of man and woman in the social set up of the community, is equal in every respect, but keeping in view the mindset of both the genders, Islam segregates the rights, duties and functions of both the gender and then declares their status with regard to family matters.

If it is asked that are man and woman equal in Islamic way of life? There would not be simple positive or negative way of answer rather, one must scrutinize, examine and inspect closely and thoroughly their respective rights, duties and functions. And then placing a complete picture in front, it may be possible to answer the above question. In other societies of the world, the state of affairs is not in concurrence to Islamic way of life. Those other societies always try to claim that man and woman are equal in every respect which is not a natural phenomenon.